IN THE SUPREME COURT OF FLORIDA

ALPHONSO GREEN,

Appellant,

v. **Case No. SC02-2315**

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE THIRTEENTH JUDICIAL CIRCUIT,
IN AND FOR HILLSBOROUGH COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

Mr. Green was previously convicted in a 1987 trial of two counts of first degree murder, of Dora Virginia Nichols and Robert J. Nichols. On direct appeal this Court affirmed the judgments and sentences. Green v. State, 583 So. 2d 647 (Fla. 1991), cert. den., 502 U.S. 1102 (1992).

After appellant filed a series of motions for postconviction relief pursuant to Rule 3.850, Fla. R. Crim. P., and the trial court indicated an evidentiary hearing was appropriate on a claim of ineffective assistance of trial counsel, the state and Mr. Green entered into a Joint Stipulation, agreeing that trial counsel was ineffective in his representation in the penalty phase of the murder trial. Green and his collateral counsel agreed to waive the right to appeal the denial of his Third Amended Motion to Vacate in exchange for the state agreeing to a new penalty phase trial. The lower court entered its Order accepting the Joint Stipulation in lieu of an evidentiary hearing, denying relief as to guilt phase and granting a new penalty phase trial (R VIII, 1492-1500, 1501-1502).

Resentencing Proceeding:

The state's first witness Jack Nichols is a lawyer and son of homicide victims R. J. and Virginia Nichols. His parents called him for advice on how to evict appellant from an

apartment they had rented to him (R XI, 200). State Exhibit 32 was a handwritten agreement signed by Green, dated October 4, 1986. Nichols talked to his parents the night of October 9, the night before their murders (R XI, 202). They were agitated, Mrs. Nichols had been persistent about getting the rent money and they were concerned that Green may have called Mrs. Nichols a bitch and said "Get her out of here and don't let her come back or I won't be responsible for what I do." (R XI, 203). After the murders, the payroll check of Alphonso Green (State Exhibit 6) was discovered by brother-in-law Thomas Anderson (R XI, 206, 209).

Detective James Noblitt investigated the homicides of R. J. and Virginia Nichols; he went inside and observed the bodies (R XI, 217-218). He described the scene and identified photographic exhibits of the interior (R XI, 220-224). A video of the scene (State Exhibit 4) was played to the jury (R XI, 225-227). They did not find any evidence of forced entry (R XI, 228). Noblitt described the video display of Mrs. Nichols, blood on the door frame, and in the bedroom Mr. Nichols was found (R XI, 229-230).

A search warrant was executed at the residence of appellant in which slacks were seized and subsequently in October Noblitt returned to collect knives (R XI, 242). Noblitt came into

contact with appellant on October 20, 1986, ten days after the murder, at the Fort Lauderdale police department (R XI, 243). Noblitt interviewed him. Green explained that he needed to get an advance on his paycheck because of the eviction notice and his employer gave him the advance as well as his regular paycheck. He and his girlfriend Cassandra Jones went to the Nichols residence, paid the rent and they were not going to be evicted (R XI, 245-246). Appellant claimed he then helped a friend move a refrigerator to make a little money. He bought and smoked rock cocaine and bought more cocaine. He and his friend Ernie went to an apartment, met two girls and partied (smoked cocaine). Green stated he got a ride and met a guy named Bobby (R XI, 246-247). He only had $10 or $15 left, wanted to get more cocaine and he told Bobby he knew where he might be able to get a $250 check. He went to his apartment, changed shirts and then he and Bobby went to the Nichols' house and knocked on the door. They walked in, asked Mr. Nichols if he could get the check back and Mrs. Nichols said "Don't give it back to him." (R XI, 247-248). Green told Noblitt Bobby pulled out a butcher knife, stabbed the victims and they left. Nichols confronted him, said he didn't believe there was a Bobby since the blood at the scene went over the fences into his apartment (R XI, 248-249).

Noblitt repeated that he didn't believe there was a Bobby, but that he (Noblitt) was going to look for and find Bobby. Appellant responded "Don't bother, you don't need to look for Bobby" and "There isn't a Bobby" (R XI, 249-250). Then he related what actually happened (R XI, 251).

Appellant stated that after paying the rent he pushed in the back door of his apartment because the door frame was bad, and that he got into an argument with Cassandra. He took the largest butcher knife in the butcher block in his residence, stuck it under his clean shirt in the back waistband of his pants and went to the Nichols' house. He knocked on the door and entered when Mr. Nichols came to the door. He told Nichols that Cassandra was in jail and had been arrested, and he needed the money back to get her out of jail. He thought Nichols was about to return the check when Mrs. Nichols entered and told him not to give the check back. Green next became aware Mrs. Nichols was on the floor and bleeding, and had been stabbed. He saw Mr. Nichols run to the back bedroom. Green followed and was aware Mr. Nichols was on the floor and had been stabbed. He also noticed his own hand was bleeding. Noblitt noticed during the interview that he had a 3½ - 4 inch laceration on his right hand (R XI, 252). Green looked at a photo of a knife from his and Cassandra's apartment and saw one with the broken handle

with the rivet sticking out of it and didn't know if he cut his hand on the knife or the rivet (R XI, 253).

Green stated that while Mr. Nichols was moaning, he pulled the covers down and put them in his mouth to stop the moaning. He started to leave but the person renting the apartment within the house was standing outside (R XI, 254). Green went out a back door, over the fences into the alley and to his apartment. He thought he took the knife back to his apartment. Green said he went to St. Petersburg, Palmetto and Fort Myers, and spoke to Cassandra's cousin about killing these people. He went to cousins in Fort Lauderdale, told them of his involvement and they advised him to turn himself in (R XI, 255-256). Green's description matched the physical evidence Noblitt observed at the Nichols' house (R XI, 256).

From reviewing the prior trial transcripts, State Exhibit 6 was the check made out to Alphonso Green and endorsed over to the Nichols. On the back it recites deposit to the account of Dora Nichols. Mr. Anderson found the check in Mr. Nichols' trousers (R XI, 261). Noblitt reviewed and summarized the trial testimony of Doug Adkins and Cynthia Blanton who rented the little apartment off the main hallway (R XI, 262-271). Adkins stated he heard Mr. Nichols moan, the sounds stopped and then he heard doors and clothes in the closet being moved (R XI, 269).

Noblitt stated that Thomas Turner testified that on the night of the murders appellant came to his door, shirtless and sweating profusely, and bleeding heavily. Green claimed he had been in a bar fight (R XI, 273). He did not seem to be under the influence of drugs or alcohol (R XI, 274).

Noblitt related that Margaret Green testified she saw appellant after the murders. When she asked him about the glove on his right hand, he explained that he was a truck driver and wore the glove because he had trouble with his hands (R XI, 285-286). She saw news accounts that he was wanted for murder (R XI, 286). Noblitt also related the prior testimony of Jocelyn Green who gave appellant a ride and that Green related his car had been impounded by police because someone was arrested with drugs in his car (R XI, 286-288). Noblitt summarized the testimony of other witnesses (R XI, 288-294).

Dr. Lee Miller, Associate Medical Examiner, performed the autopsies on R. J. Nichols and his wife Virginia Nichols. The cause of death for both was multiple stab wounds (R XI, 325). Mrs. Nichols had a total of fourteen stab wounds, seven on the body and seven on the right hand (R XI, 327). One stab wound to the jaw would have been fatal because it severed the jugular vein; another lethal wound went five inches into the body and penetrated the heart (R XI, 328). Two wounds to the chest were

also fatal (R XI, 329). Mr. Nichols had twenty-eight stab wounds (R XI, 332). Defensive wounds were present (R XI, 335). Five of the twenty-eight wounds would have been fatal (R XI, 336).

Jack Nichols and Patricia Anderson provided victim impact testimony regarding their parents (R XI, 346-356).

Defense witnesses Deputy Mark Weller, Deputy Steve Bryan, paralegal Elizabeth Mills and Frederick Sally described appellant as respectful, agreeable and nonviolent (R XI, 356-369). Sally had not seen appellant in the last fifteen years and then only to exchange hellos. He hadn't spent time with him since childhood (R XI, 368-369). Mills had not known Green outside of the jail environment (R XI, 364). Thomas Turner testified appellant was a respectful person and when Turner testified in Green's prior trial he stated that when he saw him October 10 he was breathing heavily; he hasn't seen him in fifteen years (R XII, 413-417). Appellant's cousin Dorothy Nelson and friend Cheryl Howard stated he had a good relationship with his family and was nonviolent. Howard is the mother of appellant's twenty-four year old child (R XII, 418-426). Beulah Battle described appellant as nice and nonviolent (R XII, 427-429). Wendall Adkins, a neighbor of Green's former mother-in-law, thought he was nice and nonviolent (R XII, 430-

432).

Psychologist Dr. Robert Berland testified that appellant was cooperative with him; a lot of witnesses were unavailable and documents were missing but he believed the two statutory mental mitigators were present. He also opined there was a brain injury, Green could form close, loving relationships, there was crack cocaine addiction during the last year leading up to the offense, he was cocaine-intoxicated at the time of the offense, he sought treatment for drug abuse and turned himself in to authorities after the murder (R XII, 432-440). Green's overall intelligence was average; he had a full scale IQ of 108 (R XII, 453). There was no clear evidence of brain injury from his PET scan (R XII, 459, 474). One possible source of the brain injury occurred two months prior to the murders when he was beaten by some drug dealers after he tried to steal drugs from them. Berland had no evidence to suggest that appellant's use of other drugs (marijuana, prescription drugs, amphetamines) had any adverse effects on him prior to the murders (R XII, 472). He stole from his employers and girlfriend; he was abusive and aggressive and violent toward people who loved him. Berland tested appellant in 1986 and more recently had recommended the PET scan (R XII, 473). Appellant reported to him he had used powder cocaine from 1976 to 1981 and stopped for approximately

one year after splitting up with his ex-wife because he had an adverse reaction to it (R XII, 474-475). Green also told Berland that during the time the children were living in the house he didn't use any cocaine and related that he had attempted to con the Nichols out of money by falsely claiming there was spoiled meat in a refrigerator that had gone bad (R XII, 476).

Cassandra Jones Davis, appellant's former girlfriend, testified that Green's behavior changed due to cocaine use. Before he was a responsible person who worked, paid bills and took care of her, but afterwards he became moody and she didn't want to be around him when he was on drugs. She was living with appellant when they rented from the Nichols. Appellant worked during the day but used cocaine on the weekend when he got paid (R XIII, 491-499). Appellant's cousin Lucille Richardson and school friend Alan Bell, Jr. testified Green was a good person (R XIII, 499-507).

Prior defense counsel Stuart Umbarger testified that at trial Green testified that he and Bobby had smoked rock cocaine together, put on a clean work shirt before going to the Nichols to receive payment for work he had done for them (R XIII, 510-511). He knocked on the door and was let in and Mr. Nichols agreed to pay him. Mrs. Nichols overheard this and objected to

giving him any money because he had been late with the rent money. Green claimed that Bobby burst through the door after apparently hearing the refusal of the money and stabbed Mrs. Nichols. Green claimed he grabbed Bobby and the knife and his hand was cut. His shirt was ripped in the struggle with Bobby. He stayed where he was because he felt Mr. Nichols was going back to get a gun. When he saw the two victims were dead, he panicked and left the scene. Green at the prior trial denied confessing to Detective Noblitt (R XIII, 512-515). Umbarger read the trial transcript and gave his summary of the testimony of Ms. Blanton, Mr. Adkins, and Oliver Black (R XIII, 519-522). Three of the prints found at the scene were not identified as either Green's or the victims'; Green's blood was found on his work shirt left at the scene (R XIII, 523). Umbarger testified that Dr. Feegel opined that the knife submitted to the lab for analysis was not the murder weapon (R XIII, 528). A blood trail led from the house into Green's duplex (R XIII, 536).

On cross-examination the witness admitted that he had not reviewed the testimony of Bessie Williams and Ernest Williams and could not say whether it was true that the defendant never told them that anyone else was involved in this murder (R XIII, 548-549). Umbarger did not read or review the trial testimony of Leon James that appellant told him he murdered his landlords.

Umbarger stated he discounted his testimony as being patently untruthful (R XIII, 550). Umbarger agreed that Noblitt had testified appellant had attempted to leave the Nichols' home after the murders by the front door but that a man with a rifle was outside, so he had to turn around and find another way out of the house; the front door is where there is blood on the railing (R XIII, 551). Umbarger admitted that Green testified at trial that it was his blood on the front steps of his own house (R XIII, 555) and on the fence that he had gone over (R XIII, 556). Umbarger stated that Green testified that the bloody paper towel was in the house because blood was pouring out of his hand. Umbarger conceded that Green testified he was only a little bit high on cocaine at the time of the murders; he was not consumed with it (R XIII, 556). Green had testified that he knew precisely what he was doing (R XIII, 557). Three of the fingerprints were smeared, four belonged to Mrs. Nichols and three were never identified as belonging to anybody. There were no unidentified fingerprints from inside the house (R XIII, 561). Green admitted in his testimony that he had been untruthful to many people (R XIII, 561-562). Dr. Miller testified there was nothing inconsistent with that knife causing all the victims' wounds (R XIII, 565).

Defense witness attorney Anthony Cunningham has known

appellant since Green was a child; Green's mother worked for him and his family. Green's father was a hard worker. Appellant was a polite, nice young man. Green was also a good worker at his law firm (R XIV, 647-652). David Bailey, cousin of appellant, testified he was hard-working and nonviolent (R XIV, 653-654).

Dr. Jonathan Sorensen, a professor of criminal justice, examined Green's inmate folder for his period of incarceration over the last fifteen years. His records indicated compliant, nonviolent behavior (R XIV, 664). He opined that appellant's likelihood of committing future acts of violence to be extremely low, as appellant is 51 years old (R XIV, 665). He acknowledged on cross-examination that people in their seventies and eighties still commit murder and he offered no guarantees (R XIV, 666).

Alma Fortson, appellant's sister who knew his as an adult but not as a child, has not seen him violent; he is warm and loving (R XIV, 694-698). Lee Green, appellant's brother, testified he was a good brother (R XIV, 699-700).

State rebuttal witness Dr. Walter Afield, a psychiatrist who evaluated appellant in 1987 for attorney Umbarger, did not find any evidence of psychiatric illness (R XIV, 672). There was no delusional paranoid thinking or serious emotional illness or

mood disturbance or chronic psychotic disturbances (R XIV, 673). He does not agree that an abnormal reading on a PET can always reveal brain injury; you can have false positives (R XIV, 674-675).

The jury returned death recommendations by a vote of ten-to-two (R XIV, 783). Thereafter, at a Spencer hearing on April 4, 2002, Jeff Hazen and Harry Brody, the CCR attorneys representing Green in 1998, testified that appellant was cordial, respectful and dignified. Brody acknowledged having also testified on behalf of Kenneth Stewart. (R Supp. I, 46-52).

On October 3, 2002, the lower court entered its sentencing order and imposed sentences of death (R XV, 875-909; R X, 1788-1810). The court found in aggravation: (1) that appellant was previously convicted of another capital felony or a felony involving the use or threat of violence to another person (to wit, the conviction of the other homicide in this double homicide episode) and the prior conviction for assault with intent to commit rape; (2) homicide for pecuniary gain;[1] and (3) the homicides were especially heinous, atrocious or cruel -- Mrs. Nichols had been stabbed fourteen times and Mr. Nichols had been stabbed twenty-eight times (and bed clothing had been

[1] The court did not consider, apply or weigh the burglary aggravating circumstance (R X, 1793).

stuffed into his mouth to stop his moaning)(R X, 1791-1796). Specifically, the court found:

> AGGRAVATING CIRCUMSTANCES
>
> The State presented evidence of four (4) aggravating circumstances as set forth below, each of which was upheld by the Supreme Court in its opinion in Green, *supra*. The Court instructed the jury that it could only consider one of two aggravating circumstances dealing with committing a capital felony for pecuniary gain or during commission of a burglary.
>
> The Court now finds as follows.
>
> 1. The Defendant was previously convicted of another capital felony or a felony involving the use or threat of violence to the person. Section 921.141(5)(b), Fla. Stat.
>
> The evidence established that the Defendant committed and was convicted of the murders of Dora Nichols and Robert Nichols during one episode. The simultaneous conviction of multiple homicides constitutes a previous conviction of a capital offense. See King v. State, 390 So.2d 315 (Fla. 1980); Stein v. State, 632 So.2d 1361 (Fla. 1994); Pardo v. State, 563 So.2d 77 (Fla. 1990).
>
> Moreover, the State introduced a certified copy of Mr. Green's 1993 conviction for an offense of assault with intent to commit rape, a felony involving the use or threat of violence to a person.
>
> The evidence established this aggravating circumstance beyond a reasonable doubt. The Court accorded it great weight as to each count in determining the appropriate sentences.

2. The capital felony was committed during commission of a burglary or for pecuniary gain. Sections 921.141(5)(d) or (f), Fla. Stat.

The evidence established that the Defendant confessed to Detective J.S. Noblitt and Sergeant R. Price that he went to the victims' home at approximately 11:30 p.m. to get back a check he had given them earlier in the day to pay rent. A tenant of a small apartment the victims rented to that tenant next to their home testified that he heard the attacks on the victims and then heard someone ransacking the drawers and closets. The photographs introduced in evidence depicted the opened drawers, blood in the entrance area of the home, and the victims dressed in sleeping clothing. The Defendant was looking for the check.

The Defendant initially entered the front doorway area of the residence and spoke with the victims. He did not enter stealthily or surreptitiously. However, when Mrs. Nichols told him that they would not return the check, the Defendant attacked and killed them both. This rendered the Defendant's actions a burglary in that he remained in the structure with intent to commit an offense therein, even though he may not have had the intent to commit an offense when he initially entered the doorway area.

The murders were an integral step in the Defendant's efforts to obtain a specific sought after gain, specifically, the check he gave the victims earlier to pay his overdue rent. The murders were committed to facilitate getting that property. The motivation for the killings was pecuniary.

The evidence established the pecuniary gain and burglary aggravating circumstances beyond a reasonable doubt. The Court

accorded the pecuniary gain aggravating circumstance great weight as to each count in determining the appropriate sentences.

The Court did not consider, apply, or weigh the burglary aggravating circumstance.

3. The capital felony was especially heinous, atrocious, or cruel. Section 921.141(5)(f), Fla. Stat.

The evidence demonstrated that the Defendant stabbed Virginia Nichols a total of fourteen (14) times with a knife. The medical examiner testified that seven (7) of the wounds were defensive in nature, and that three (3) of the remaining seven (7) were lethal. He described one (1) lethal wound to be a stab to the face that entered the right side of her lower jaw and shattered her jaw bone and severed her left jugular vein. He described a second lethal wound to be a stab to her chest, which went completely through her heart, and nearly cut it in half. He described a third lethal wound as a stab to her liver which produced injury that would have been fatal without rapid medical intervention. The evidence further demonstrated that Mrs. Nichols sustained a deep laceration to her right leg near her knee and other stab wounds to her face and chest.

Dr. Miller opined that Mrs. Nichols could have struggled and fought for her life for approximately a minute after she received the lethal wounds, and longer if she received the non-fatal stab wounds first. He further opined that the stab injuries were extremely painful. The evidence demonstrated that the Defendant attacked Mrs. Nichols first. The law enforcement investigators found her glasses behind the front door along with her nightcap. Moreover, the Defendant admitted

that he attacked her first. The investigators found her body in the hallway and blood splattered in the living room, on the inside of the front door, on the television stand, and on the magazines under the television, and found a trail of blood leading to her body. Neighbors testified that they heard her scream.

The evidence further demonstrated that the investigators found Mr. Nichol's body in a back bedroom next to a door that was bolted and locked from the other side. Neighbors testified that they heard Mrs. Nichols scream and that they heard Mr. Nichols trying to open a door which led to their apartment. They heard the attack as it progressed and heard Mr. Nichols moaning on the other side of the door. It is obvious that Mr. Nichols saw the Defendant attack and stab Mrs. Nichols, and that he knew the Defendant was going to attack him also.

The Defendant stabbed Mr. Nichols twenty-eight (28) times. Five (5) wounds were lethal. One (1) stab broke his jaw. One (1) stab penetrated his neck and severed his larynx. One (1) stab entered his neck and lacerated a jugular vein. One (1) stab penetrated his chest cavity and entered his right lung. One (1) stab entered his left chest and penetrated his left pulmonary artery through and through.

He sustained defensive wounds on both arms, on the palms of both hands, and on the backs of both hands.

Dr. Miller opined that he could have struggled for about a minute after he received the lethal wounds, and longer if he received the non-lethal wounds first. He described his wounds as being very painful.

> Neighbors testified that they heard Mr. Nichols pleading and then moaning.
>
> The Defendant confessed that he stuffed bed clothing into Mr. Nichols' mouth to stop his moaning.
>
> It is obvious that Mr. Nichols endured great pain, suffered psychological fear, sustained lethal injuries to himself, and was aware of his wife's suffering.
>
> It is also obvious that Mr. Green deliberately intended to inflict a high degree of suffering or pain.
>
> The evidence established beyond a reasonable doubt that each homicide was especially heinous, atrocious, or cruel. The murders of Mr. Nichols and of Mrs. Nichols were conscienceless, pitiless, and unnecessarily torturous.
>
> A killing by multiple stab wounds where the victim is alive and conscious when the defendant inflicts the trauma is the type of murder to which this circumstance applies. See Davis v. State, 620 So.2d 152 (Fla. 1993); Pittman v. State, 646 So.2d 167 (Fla. 1994), and cases cited therein.
>
> The evidence established this aggravating circumstance beyond a reasonable doubt. The Court accorded it great weight as to each count in determining the appropriate sentences.
>
> (R X, 1791-1796)

The court found the two statutory mental mitigators but added that the supporting testimony was negated by other expert testimony, and some non-statutory mitigation (R X, 1805-1807).

This appeal follows.

SUMMARY OF THE ARGUMENT

I. The lower court did not abuse its discretion in answering the jury's question about eligibility for parole. The court correctly answered that there was no guarantee that appellant would be granted parole at or any time after twenty-five years and the court's response did not give an unfair advantage to either side.

II. The claim that the death sentences should be vacated because the trial court that initially sentenced appellant to death in 1987 allegedly failed to file a timely written order must be rejected. The instant claim is procedurally barred since Green failed to assert on direct appeal any argument that there had been a violation of Van Royal v. State, 497 So. 2d 625 (Fla. 1986) or Grossman v. State, 525 So. 2d 833 (Fla. 1988). The claim is also barred since he abandoned such a claim in the postconviction amended pleadings. The claim is also meritless, since Judge Menendez's written findings in January of 1988 would have been in compliance with the edict issued in Grossman, *supra*. Obviously, this Court was able to provide full appellate review in its decision affirming the judgment and sentence. Green v. State, 583 So. 2d 647 (Fla. 1991).

III. There was no evidentiary insufficiency in the lower court's determination in the sentencing finding that the

homicides were committed to facilitate obtaining property; the motivation for the killings was pecuniary. See Finney v. State, 660 So. 2d 674 (Fla. 1995); Williams v. State, 622 So. 2d 456 (Fla. 1993); Buenoano v. State, 527 So. 2d 194 (Fla. 1988); Larzelere v. State, 676 So. 2d 394 (Fla. 1996). Appellant is not entitled to relief pursuant to Delgado v. State, 776 So. 2d 233 (Fla. 2000) since relief under Delgado, *supra*, is not available to convictions that became final before Delgado was decided. See Jimenez v. State, 810 So. 2d 511 (Fla. 2001). Appellant's conviction became final with this Court's affirmance of the judgment and sentence and denial of rehearing on August 23, 1991. Green v. State, 583 So. 2d 647 (Fla. 1991).

IV. Appellant's request for relief pursuant to Apprendi v. New Jersey, 530 U.S. 466 (2000) and Ring v. Arizona, 536 U.S. 584 (2002) must be rejected. As appellant recognizes, this Court has consistently and persistently rejected appellant's claims and variants thereof. See King v. Moore, 831 So. 2d 143 (Fla. 2002) and Bottoson v. Moore, 833 So. 2d 693 (Fla. 2002). Unlike Arizona, the maximum penalty for first degree murder is death. Porter v. Crosby, 840 So. 2d 981 (Fla. 2003); Mills v. Moore, 786 So. 2d 532 (Fla. 2001); Shere v. Moore, 830 So. 2d 56 (Fla. 2002). 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. Kormondy v. State, 845 So. 2d 41 (Fla. 2003).

The state further notes that among the aggravators present in the instant case was the prior violent felony conviction aggravator, F.S. 921.141(5)(b), for the murder conviction of the other victim and a prior conviction of assault with intent to commit rape. Thus, reliance on Apprendi is unavailable. See Doorbal v. State, 837 So. 2d 940 (Fla. 2003); Lugo v. State, 845 So. 2d 74 (Fla. 2003).

Finally, Ring is not retroactive. See Turner v. Crosby, 339 F.3d 1247, 1282 (11th Cir. 2003); State v. Towery, 64 P.3d 828 (Ariz. 2003).

ARGUMENT

ISSUE I

WHETHER THE LOWER COURT ERRED AND ABUSED ITS DISCRETION IN ANSWERING THE JURY'S QUESTIONS ABOUT ELIGIBILITY FOR PAROLE.

The standard of review on the trial court's answering a question posed by the jury during its deliberations is abuse of discretion. Downs v. State, 572 So. 2d 895 (Fla. 1990). Discretion is abused only when the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable person would take the view adopted by the trial court. Trease v. State, 768 So. 2d 1050, 1053 n.2 (Fla. 2000); Huff v. State, 569 So. 2d 1247, 1249 (Fla. 1990); Overton v. State, 801 So. 2d 877, 896 (Fla. 2001); Banks v. State, 732 So. 2d 1065, 1068 (Fla. 1999); Quince v. State, 732 So. 2d 1059, 1062 (Fla. 1999); Hawk v. State, 718 So. 2d 159, 162 (Fla. 1998); White v. State, 817 So. 2d 799, 806 (Fla. 2002). The lower court did not abuse its discretion.

In closing argument defense counsel reminded the jury "we started this case with the understanding that Mr. Green was convicted of first degree murder" (R XIV, 728). He reiterated:

> And in the course of this hearing, obviously we're not in a position to argue that Mr. Green is not guilty because, again, as we're constantly aware that the defendant, Mr. Green, has been convicted by a previous jury of first degree murder. (R XIV,

732)

Defense counsel further argued that there had been testimony that Green has been "a very obedient, very respectful, very compliant prisoner. One who has required little maintenance during his incarceration, other than the normal maintenance that a prisoner has" (R XIV, 742). He added:

> And I ask you to give that serious consideration as to the fact that he has been incarcerated during this period of time. And that he has been for the most part or, well, I should say almost completely -- a completely model prisoner . . . (R XIV, 742)

In the instructions to the jury, the court instructed that its recommendation should be either death or life imprisonment without possibility of parole for twenty-five years (R XIV, 766-767).

Approximately an hour and a half into the jury deliberations, the court received the following question from the jurors:

> Judge, does a life sentence without the possibility of parole for 25 years start with the year 1987 or does it start with today? (R XIV, 771; R IX, 1759)

The prosecutor thought the jury should be told that appellant gets credit for all the time he's been in jail and defense counsel thought the question should not be answered and

that they should be instructed to rely on the given instructions (R XIV, 771). The prosecutor provided the court with Downs v. State, 572 So. 2d 895 (Fla. 1990). The defense maintained that the court should tell the jury nothing or that if the court answered, should state that it wasn't sure when he began eligibility for parole (R XIV, 777).

The court drafted an answer reciting:

> The defendant, if sentenced to life without possibility of parole for 25 years, would be entitled to credit for time served against a life sentence. However, there is no guarantee that he would be granted parole at or any time after 25 years.
>
> (R IX, 1759; see also R XIV, 781-782)

The defense objected and asked the court to add that there is no guarantee the court will not give consecutive life sentences making him eligible for parole after fifty years (R XIV, 781). The court noted the defendant's objection. The court had the bailiff return the note with the answer to the jury at 3:10 pm and the jury returned with its ten-to-two recommendation of death at 3:25 pm (R XIV, 782).

In Downs v. State, *supra*, during deliberations the jury asked the question "Would the life sentence with no chance of parole for 25 years begin right now, or would the 11 years he already spent in prison be subtracted from the 25 years?" After

consulting with counsel and over defense counsel's objection, the trial court instructed the jury that Downs "would receive credit for time served on this charge." This Court rejected Downs' contention that the court's answer improperly "invited" the jury to access future dangerousness, thereby adding a non-statutory aggravating circumstance to the jury instruction:

> Under the facts presented, we find that the trial court did not abuse its discretion. (572 So. 2d at 901)

Appellant's citation to Perriman v. State, 731 So. 2d 1243 (Fla. 1999) does not command reversal. The Court noted there that "Where appropriate, the court may also clarify a point of law with a brief, clear response." Id. at 1247. In a concurring opinion, Justice Anstead added that trial courts should be encouraged to give the jurors help without the threat of reversal for a slight deviation from pattern charges. Id. at 1248.

In Waterhouse v. State, 596 So. 2d 1008 (Fla. 1992), this Court held that the trial court did not abuse its discretion in refusing to answer questions propounded by the jury regarding when the defendant would be eligible for parole, whether time served previously counts toward parole time, and whether, if paroled, would the defendant be returned to finish his sentence. This Court explained that it could not reasonably be argued that

the jury would have been less likely to recommend the death penalty had it been informed Waterhouse would receive credit for time served and that the trial court could not know whether he would be extradited to New York once paroled. The Court pointed out that the defendant was not prohibited from presenting evidence that would cause the jury to decline to impose the death penalty. Id. at 1015.

In Whitfield v. State, 706 So. 2d 1 (Fla. 1997), when the jury inquired whether life in prison without parole meant no parole under any circumstances, the trial judge declined to give an affirmative response choosing instead to reread the appropriate instruction. This Court agreed there was no abuse of discretion in the lower court's refusal to answer the question affirmatively, based on the law. Id. at 5.

Appellant argues apparently the best option is not to answer the question at all or simply refer them back to the instructions previously given. While it may be correct to assert that a trial court probably does not abuse its discretion in declining to answer questions or referring back to the originally charged instruction, it is also correct that where, as here, the trial court gave a correct answer that also does not constitute an abuse of discretion. Here, the court's answer that Green would be entitled to credit for all jail time served

is correct and it is correct that there is no guarantee that he would be granted parole at or any time after twenty-five years. Appellant contends that the lower court, if answering the question, should have added that appellant could be given two consecutive life sentences, in which case he would not be eligible for parole for fifty years. While the lower court arguably might have given that instruction, that instruction carries the possible danger of implying that the trial court was amenable at that moment to imposing consecutive life sentences (when the judge was not yet prepared to make any sentencing decision -- whether life or death) whereas the answer given by the court only suggested the uncertainty of predicting in future the actions of a completely different actor, the Parole and Probation Commission. The lower court properly resolved the matter with an honest, correct answer that did not give an unfair advantage to either side.[2]

It cannot be said that no reasonable person would take the view adopted by the trial court. Trease, *supra*; Huff, *supra*, Overton, *supra*. Appellant's claim of an abuse of discretion must be denied.

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[2] A defense special requested instruction may be denied even though a correct statement of the law where it is misleading. Stephens v. State, 787 So. 2d 747, 756 and n.9 (Fla. 2001); United States v. Sans, 731 F.2d 1521, 1530 (11th Cir. 1984).

ISSUE II

WHETHER THE DEATH SENTENCES SHOULD BE VACATED BECAUSE THE TRIAL COURT THAT ORIGINALLY SENTENCED APPELLANT TO DEATH IN 1987 ALLEGEDLY FAILED TO FILE A TIMELY WRITTEN ORDER.

Appellant next argues that his death sentences should be vacated because Judge Menendez allegedly failed to timely file the written sentencing findings, for the original sentences of death imposed in 1987, as required by Van Royal v. State, 497 So. 2d 625 (Fla. 1986) and its progeny. Green contends that the court imposed two sentences of death on October 23, 1987 (R III, 400-406) but entered the written sentencing findings on January 11, 1988 *nunc pro tunc* October 23, 1987 (R III, 426-431).[3] [The original notice of appeal was filed on November 10, 1987 and an amended notice of appeal was filed November 30, 1987.[4]] The original record on appeal was sent to this Court on March 18, 1988.

(A) The instant claim is procedurally barred.

In Green's previous direct appeal he raised the following issues: (1) trial court error in failing to declare a mistrial

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[3] The order reads January 11, 1987, but this is an obvious typographical error and should be 1988.

[4] See initial direct appeal record, Florida Supreme Court case number 71,540, Vol. XVI, 2783, 2791. The record was certified to this Court on March 14, 1988.

after the state excluded three blacks as jurors; (2) allowing certain alleged hearsay statements introduced by the state; (3) allowing the state to commit fundamental error by insinuating that the defendant intended to rely on the intoxication defense; (4) trial court's finding that the murders were committed for the purpose of avoiding or preventing a lawful arrest was not supported by the record; (5) trial court unlawfully doubled the aggravating circumstances that the murders were committed in the commission of a robbery or burglary with their being committed for pecuniary gain; (6) the CCP finding was not justified; (7) that the HAC instructions were unconstitutionally vague; (8) the trial court improperly failed to submit for the jury's consideration whether Green had a significant history of prior criminal activity; (9) the prosecutor's comments in penalty phase argument deprived Green of a fair sentencing hearing; and (10) the function of the jury was denigrated in violation of Caldwell v. Mississippi, 472 U.S. 320 (1985). This Court found no reversible error and affirmed the judgment and sentence. Green v. State, 583 So. 2d 647 (Fla. 1991), cert. den., 502 U.S. 1102 (1992). Appellant lodged no complaint in that appeal or in his rehearing motion pertaining to any Van Royal/Grossman[5] violation. Thus, any such Van

[5] Grossman v. State, 525 So. 2d 833 (Fla. 1988).

Royal/Grossman complaint or argument has been abandoned by Green's failure to raise on appeal or assert in his rehearing motion. See Joel Dale Wright v. State/Crosby, 857 So. 2d 861, 878 (Fla. 2003)(claim that this Court failed to do reweighing required by Sochor v. Florida, 504 U.S. 527 (1992) deemed abandoned for failure to assert in rehearing motion). Lightbourne v. State, 841 So. 2d 431, 442 (Fla. 2003)(claim that could have been raised in a motion for rehearing but was not was abandoned and procedurally barred from consideration in a postconviction proceeding); Garcia v. State, 816 So. 2d 554, 569 (Fla. 2002)(defendant's failure to challenge decision with regard to jury override issue in a motion for rehearing).

The instant claim is procedurally barred for yet another reason. Appellant asserts at footnote 10, page 43 of his brief that he raised this issue below in his 1993 and 1994 motions for postconviction relief (R Supp. II, 83-88; R III 500-506). Appellant has neglected to mention that Green subsequently filed on July 31, 1998 a Second Amended Motion to Vacate urging fifteen claims (R IV, 595-680). The Van Royal/Grossman claim was omitted there and presumably abandoned. Green filed a Second Amended Motion again on August 14, 1998 (R IV, 682-766) and again Green failed to assert this claim. Contrary to appellant's footnote assertion, the lower court "never reached

the issue" because appellant had abandoned it in the Second Amended Motion to Vacate. The record reflects that the trial judge considered all of the issues presented in the final Motion to Vacate, denied most of the claims and ruled that some required an evidentiary hearing (R VIII, 1404-1440).[6] Thereafter, the parties entered into the Joint Stipulation and Green was given another penalty phase proceeding.

In addition to appellant's double default and abandonment of the instant claim in failing to urge it in his 1998 Second Amended Motions to Vacate, appellant is barred from urging the claim now by virtue of his agreement in the Joint Stipulation waiving the right to appeal the January 31, 2000 Order Denying in Part the Amended Motion to Vacate (R VIII, 1492-1502).

(B) The instant claim is meritless.

Quite apart from the procedural bar argued, *supra*, relief must be denied as meritless. A review of this jurisprudence is in order. In Van Royal, *supra*, the Court vacated the death sentences where more than a month elapsed between the time the jury recommended life sentences and the time the judge overrode

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[6] Judge Menendez's order disposed of the seventeen issues raised in Green's Third Amended Motion to Vacate which had been filed on April 9, 1999. That Third Amended Motion to Vacate has not been included in the instant record on appeal. Appellee can furnish a copy of that motion should the Court desire it.

the life recommendation by orally sentencing defendant to death. The judge did not recite the findings on which the death sentences were based into the record. Moreover, the findings were not made for an additional six months until after the record on appeal had been certified to the Court. Under these circumstances the Court vacated the sentences. Id. at 628.

Subsequently, a number of defendants raised similar Van Royal challenges. In Grossman v. State, 525 So. 2d 833 (Fla. 1988) this Court rejected a defense argument that the sentence should be overturned because the trial judge did not enter his written findings until three months after orally sentencing Grossman to death. The Court noted that unlike Van Royal the judge's written findings were made prior to the certification of the record to this Court; it was not determinative that the written findings were made after the notice of appeal was filed seven days after the oral pronouncement of sentence, since direct appeal is automatic under the death penalty statute and the trial court retains concurrent jurisdiction for preparation of the trial record for appeal. Id. at 841.

The Grossman Court deemed it desirable -- since not everyone had had the benefit of Van Royal and other cases -- to establish a procedural rule that all written orders imposing a death sentence be prepared prior to the oral pronouncement of sentence

for filing concurrent with the pronouncement. This rule became effective thirty days after the Grossman decision became final. Id. at 841. Rehearing was denied in Grossman on May 25, 1988 and thirty days thereafter would have been June 24, 1988. Judge Menendez's written findings in Green's original sentencing in January of 1988 thus would have been in compliance with Grossman. In Stewart v. State, 549 So. 2d 171, 176 (Fla. 1989) the Court remanded for written findings where the sentencing occurred prior to Grossman and because the trial court followed the jury recommendation of death. And in Stewart v. State, 558 So. 2d 416, 421 (Fla. 1990) the Court again noted that the Grossman rule (failure to prepare written order concurrent with oral pronouncement requires vacation of death sentence) was inapplicable where the sentencing proceeding preceded Grossman. When Stewart returned to this Court following reimposition of a death sentence, this Court summarily dismissed a renewed claim that a life sentence should be imposed for the failure to prepare written findings at the first sentencing proceeding. Stewart v. State, 620 So. 2d 177, 180 n.2 (Fla. 1993). In contrast, relief was available to the defendant in Christopher v. State, 583 So. 2d 642 (Fla. 1991) where the trial court's error occurred after the Grossman decision.

Green is not entitled to relief on the authority of Grossman

and Stewart, *supra*.

Appellee would additionally note that the stated concern of the Court in Van Royal that the Court cannot assure itself that the judge based the oral sentence on a well-reasoned application of the factors set out in § 921.141(5) and (6) is not present in the instant case. Not only were Judge Menendez's written findings and analysis of aggravating and mitigating circumstances available to this Court for review but also the Court had no difficulty in its appellate review capacity of determining the validity of the trial court's result. After setting aside two aggravators, the Court found the remaining three valid aggravators weighty enough to support the sentence and "we find that there is no reasonable likelihood that the trial court would have concluded differently, given the circumstances of this case." Green v. State, 583 So. 2d 647, 653 (Fla. 1991).

ISSUE III

WHETHER THE LOWER COURT ERRED IN FINDING THE BURGLARY AND PECUNIARY GAIN AGGRAVATING CIRCUMSTANCES AND SUBMITTING THEM TO THE JURY AS THE EVIDENCE WAS ALLEGEDLY INSUFFICIENT AND THE INSTRUCTION ON BURGLARY WAS INCOMPLETE OR INCORRECT.

Preliminarily, appellee notes that on Green's direct appeal he raised the issue that the trial court had unlawfully doubled the aggravating circumstances that the murders were committed in the commission of a robbery or burglary with their being committed for pecuniary gain and this Court determined that "Because both aggravating factors arose out of the same episode, these aggravating circumstances must be considered as a single aggravating factor. [citation omitted] Accordingly, these two aggravating factors should be considered as one." Green v. State, 583 So. 2d 647, 652 (Fla. 1991). The Court concluded:

> As a result of these conclusions, three valid aggravating factors remain: (1) Green was previously convicted of another capital felony or a felony involving the use or threat of violence to another person; (2) the crime was committed for pecuniary gain and/or during the commission of a robbery or burglary; and (3) the capital felony was especially heinous, atrocious, or cruel. Because there are three valid aggravating factors and no mitigating factors, we conclude that the death sentence should be affirmed. We do so because we find that there is no reasonable likelihood that the trial court would have concluded differently, given the circumstances of this

case. Id. at 653.

Thus, it appears that this Court previously determined that the commission of a robbery or burglary and for pecuniary gain aggravators should be considered as one and constituted a valid aggravating circumstance on the evidence presented. There was no evidentiary insufficiency for the combined aggravator.

(A) Pecuniary gain.

In the resentencing proceeding, the victims' son Jack Nichols testified his parents called for advice on how to evict appellant from an apartment they had rented to him (R XI, 200). Exhibit 32 was a handwritten agreement written by his father and signed by Green dated October 4, 1986 (R XI, 202). The night before their murders they phoned the witness concerned and agitated about getting the rent and what Green had said (R XI, 203). State Exhibit 6 was Green's payroll check recovered after the murders (R XI, 209). Ten days after the murders Detective Noblitt met appellant at the Fort Lauderdale police department (R XI, 243). Appellant stated that he got an advance on his paycheck of $250 because of the eviction notice, as well as his regular paycheck (R XI, 245). Green and Cassandra Jones met with the Nichols and paid the rent (R XI, 246). After buying and smoking rock cocaine and partying and claimed to have met up with a guy named Bobby whom he knew from working at the

temporary labor company (R XI, 247). Appellant told Bobby he knew where he might be able to get a check for $250, for more cocaine (R XI, 248). Green told Noblitt he and Bobby went to the Nichols' home, knocked on the door, walked in and he was beginning to ask Mr. Nichols if he could get the check back. Mrs. Nichols said not to give it back (R XI, 248). Green claimed Bobby pulled a knife and started stabbing Mr. and Mrs. Nichols (R XI, 249). When Noblitt announced he did not believe there was a Bobby but that he would look for a Bobby if there was one, appellant looked at him and said "Don't bother" and "There isn't a Bobby" (R XI, 250). He admitted taking a large butcher knife and putting it in his waistband and knocked on the door of the Nichols' house. He told Mr. Nichols Cassandra had been arrested and he needed the money back to get her out of jail (in an attempt to have his check returned). Mrs. Nichols entered and told him not to return the check (R XI, 252). He "saw" Mrs. Nichols on the floor and bleeding and had been stabbed. Then he saw Mr. Nichols run to the back bedroom, he followed, and next knew that Mr. Nichols was on the floor and had been stabbed (R XI, 252). He left, spoke to Cassandra's cousin in Fort Myers where he mentioned he had killed these people (R XI, 255). He also told cousins in Fort Lauderdale what he was involved in (R XI, 255-256). The check, Exhibit 6,

was made out to Alphonso Green and on the back, deposit to the account of Dora Nichols. A son-in-law discovered the check in Mr. Nichols' trousers (R XI, 261).

Additionally, testimony was presented that Doug Adkins, who rented the adjacent apartment, and his girlfriend Cynthia Blanton were awakened on the night of October 10, saw a black man at the window, and heard Mr. Nichols yelling "Don't, stop, please help" (R XI, 262-265). After the voices or moans stopped, Adkins heard the doors and clothes in the closet being moved (R XI, 269). Blanton similarly had testified in the prior trial that she was awakened, and saw a black male at the door. Adkins and Blanton only heard what they believed to be the acts of one person involved in the attack (R XI, 270-271).

To the extent that appellant is complaining that the evidence does not support a determination that the homicides were committed for pecuniary gain, appellee disagrees and urges that the evidence shows Green returned to the victims' residence late at night armed with a butcher knife to take back the check he had furnished as rent money in order to buy more crack cocaine. That he may have been ultimately unsuccessful in retrieving the check does <u>not</u> negate the fact that the homicides were committed for the desired pecuniary gain. The lower court correctly concluded:

> The murders were an integral step in the Defendant's efforts to obtain a specific sought after gain, specifically the check he gave the victims earlier to pay his overdue rent. The murders were committed to facilitate getting that property. The motivation for the killings was pecuniary. (R X, 1793)

See Finney v. State, 660 So. 2d 674 (Fla. 1995)(to establish pecuniary gain aggravating factor state must prove murder was motivated at least in part by desire to obtain money, property or other financial gain); Williams v. State, 622 So. 2d 456 (Fla. 1993)(pecuniary gain factor upheld where victims were bound, tortured and interrogated in an effort to extract from them the location of stolen drugs and money); Buenoano v. State, 527 So. 2d 194 (Fla. 1988)(pecuniary gain factor upheld where defendant poisoned husband to become entitled to life insurance proceeds); Larzelere v. State, 676 So. 2d 394, 406 (Fla. 1996)(the aggravating circumstance of committed for pecuniary gain was based on the evidence that appellant killed her husband to collect life insurance); Floyd v. State, 569 So. 2d 1225 (Fla. 1990); see also Francis v. State, 808 So. 2d 110, 137 (Fla. 2001)(no error occurs where jury is instructed on pecuniary gain and felony murder aggravators so long as the judge ultimately merges the two into one, citing Gaskin v. State, 737 So. 2d 509, 516 n.13 (Fla. 1999)).

(B) Burglary.

Appellant next argues that the jury was erroneously instructed about a burglary. The record reflects that the jury was instructed without defense objection that "Burglary is defined as entering or remaining in a structure owned by another without the permission or consent of the owner with intent to commit an offense therein" (R XIV, 759). After explaining the aggravators including the pecuniary gain and during the commission of a burglary aggravators (R XIV, 761), the court further instructed that "if you find that the killing of the victims was done for financial gain, and you find that the killings were done during burglary -- excuse me, during a burglary committed solely to facilitate theft, you shall consider that as only one aggravating circumstance rather than two. These two circumstances are considered to be merged." (R XIV, 762). The defense had no objection to the given instructions and thus any complaint pertaining to a jury instruction is deemed barred. See Steinhorst v. State, 412 So. 2d 332 (Fla. 1982); Occhicone v. State, 570 So. 2d 902 (Fla. 1990); see also Woods v. State, 733 So. 2d 980, 984 (Fla. 1999)("To preserve an argument for appeal, it must be asserted as the legal ground for the objection, exception, or motion below. [citations omitted]"). The Woods Court added that "He

did not bring to the attention of the trial court any of the specific grounds he now urges this Court to consider." Id. at 985. See also Archer v. State, 613 So. 2d 446, 448 (Fla. 1993)("Archer did not make the instant argument in the trial court [pertaining to his JOA], and, therefore, this issue has not been preserved for appellate review.

Appellant's claim that he should obtain relief pursuant to Delgado v. State, 776 So. 2d 233 (Fla. 2000) and State v. Ruiz/Braggs, 863 So. 2d 1205 (Fla. 2003) is meritless. In Jimenez v. State, 810 So. 2d 511 (Fla. 2001) the Court addressed the question whether Delgado should apply retroactively. This Court denied relief explaining:

> His convictions were final prior to the release of our opinion in Delgado. Retroactivity is therefore determined by the criteria set forth in Witt v. State, 387 So. 2d 922 (Fla. 1980). In order for Delgado to have retroactive application, it must: (1) emanate either from this Court or the United States Supreme Court; (2) be constitutional in nature; and (3) have fundamental significance. Id. at 929-30. We have determined that Delgado does not meet the second or third prongs of the Witt test; hence it is not subject to retroactive application. See Delgado, 776 So. 2d at 241. Moreover, in its most recent session, the Legislature declared that Delgado was decided contrary to legislative intent and that this Court's interpretation of the burglary statute in Jimenez's direct appeal was in harmony with legislative intent. Ch. 2001-58, § 1, 2001 Fla. Sess. Law Serv. 282, 283 (West).

> Based on the foregoing, we affirm the decision of the circuit court denying Jimenez's rule 3.850 motion.
>
> It is so ordered. Id. at 513.

This Court has adhered to the view that Delgado relief is unavailable to convictions that became final prior to the release of Delgado. See State v. Ruiz/Braggs, 863 So. 2d 1205, 1211 n.8 (Fla. 2003)("This consequence of our decision that Delgado should not be applied retroactively cannot be used as a basis to alter Braggs' and Ruiz's rights under Smith, in which this Court made a clear distinction between cases on collateral review and those in the "pipeline." See 598 So. 2d at 1066 n.5.").

Regrettably, appellant's conviction became final with this Court's affirmance of the judgment and sentence on June 6, 1991 and denial of rehearing on August 23, 1991. Green v. State, 583 So. 2d 647 (Fla. 1991).[7]

Appellant armed himself with a butcher knife hidden in his pants and went to the victims' residence late at night -- to reobtain from them money so that he could purchase additional

[7] Additionally, the Joint Stipulation and Order Accepting Joint Stipulation wherein Green waived any challenge to the postconviction disposition of his claims in April, 2000 constitutes an additional basis for the denial of relief (R VIII, 1492-1502).

drugs. He brutally slayed them via multiple stab wounds, even pursuing Mr. Nichols into another room where the elderly man unsuccessfully sought refuge. Green even stuffed material into Mr. Nichols' mouth to stop his moaning as he ransacked the house, searching for the check. The jury appropriately recommended the penalty of death in this brutal double homicide perpetrated for pecuniary gain for a defendant who had a prior conviction of a violent felony. No relief is available to appellant on the assertion that there may have been an incorrect or incomplete instruction unobjected to at trial.

Consequently, appellant is not entitled to relief on this appeal from the sentence imposed; the pecuniary gain aggravator is fully supported by the evidence and the sentencing court did not consider, apply or weigh the burglary aggravating circumstance.

ISSUE IV

WHETHER APPELLANT IS ENTITLED TO A LIFE SENTENCE BECAUSE THE FLORIDA DEATH PENALTY STATUTE ALLEGEDLY VIOLATED HIS DUE PROCESS AND JURY TRIAL RIGHTS THAT AGGRAVATING CIRCUMSTANCES BE ALLEGED IN THE INDICTMENT AND FOUND BY THE JURY BEYOND A REASONABLE DOUBT.

Appellant next contends that following Apprendi v. New Jersey, 530 U.S. 466 (2000) and Ring v. Arizona, 536 U.S. 584 (2002), Florida Statute 921.141 must be deemed facially invalid since he received a death sentence where the jury did not make a specific finding of an aggravating circumstance and the indictment fails to allege an aggravating circumstance. Green argues that this constitutes fundamental error and can be raised for the first time on appeal. Appellant concedes that similar arguments have been presented and rejected in King v. Moore, 831 So. 2d 143 (Fla. 2002) and Bottoson v. Moore, 833 So. 2d 693 (Fla. 2002), but seeks to preserve them for possible review in another forum (Brief, p. 56). For the reasons that follow appellee submits that the request for relief must be denied.

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); Bruno v. Moore, 838 So. 2d 485 (Fla. 2002); Fotopoulos v. State, 838 So. 2d 1122 (Fla. 2002); Lucas v. State/Moore, 841 So. 2d 380 (Fla. 2003); Porter v. Crosby, 840 So. 2d 981 (Fla. 2003)("Contrary to Porter's claims, we have repeatedly held that the maximum penalty under the statute is death and have rejected the other Apprendi arguments."); Spencer v. State, 842 So. 2d 52 (Fla. 2003); Conahan v. State, 844 So. 2d 629 (Fla. 2003); Anderson v. State, 841 So. 2d 390 (Fla. 2003); Cole v. State, 841 So. 2d 409 (Fla. 2003); Doorbal v. State, 837 So. 2d 940 (Fla. 2003); 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."); R. S. Jones v. State/Crosby, 845 So. 2d 55 (Fla. 2003); Lugo v. State, 845 So. 2d 74 (Fla. 2003); Lawrence v. State, 846 So. 2d 440 (Fla. 2003); Banks v. State/Crosby, 842 So. 2d 788 (Fla. 2003); Grim v. State, 841 So. 2d 455 (Fla. 2003), Butler v. State, 842 So. 2d 817 (Fla. 2003) (relying on Bottoson v. Moore, 833 So. 2d 693 and King v. Moore, 831 So. 2d 143 to a Ring claim in a single aggravator (HAC) case); Chandler v. State, 848 So. 2d 1031, 1034 n.4 (Fla. 2003); Pace v. State/Crosby, 854 So. 2d 167 (Fla. 2003); Cooper v. State/Crosby, 856 So. 2d 969 (Fla. 2003); Duest v. State, 855

So. 2d 33 (Fla. 2003); Blackwelder v. State, 851 So. 2d 650 (Fla. 2003); Wright v. State/Crosby, 857 So. 2d 861 (Fla. 2003). See also Nelson v. State, 850 So. 2d 514 (Fla. 2003); Caballero v. State, 851 So. 2d 655 (Fla. 2003); Belcher v. State, 851 So. 2d 678 (Fla. 2003); Allen v. State/Crosby, 854 So. 2d 1255 (Fla. 2003); Fennie v. State/Crosby, 855 So. 2d 597 n.10 (Fla. 2003); Owen v. Crosby/State, 854 So. 2d 182 (Fla. 2003); McCoy v. State, 853 So. 2d 396 (Fla. 2003); Conde v. State, 860 So. 2d 930 (Fla. 2003); Stewart v. State, ___ So. 2d ___, 28 Fla. L. Weekly S700 (Fla., Sept. 11, 2003); Jones v. State/Crosby, 855 So. 2d 611 (Fla. 2003); Rivera v. State/Crosby, 859 So. 2d 495 (Fla. 2003); Davis v. State, 859 So. 2d 465 (Fla. 2003); Anderson v. State, 863 So. 2d 169 (Fla. 2003); Henry v. State, 862 So. 2d 679 (Fla. 2003); Cummings-El v. State, 863 So. 2d 246 (Fla. 2003); Johnston v. State, 863 So. 2d 271, 286 (Fla. 2003); Owen v. State, 862 So. 2d 687, 703-704 (Fla. 2003); Zakrzewski v. State, ___ So. 2d ___, 28 Fla. L. Weekly S826 (Fla., Nov. 13, 2003); Guzman v. State, ___ So. 2d ___, 28 Fla. L. Weekly S829 (Fla., Nov. 20, 2003); E. W. Davis v. State, ___ So. 2d ___, 28 Fla. L. Weekly S835 (Fla., Nov. 20, 2003).

Unlike the situation in Arizona, the maximum sentence for first degree murder in Florida is death. See Mills v. Moore, 786 So. 2d 532, 536-538 (Fla. 2001); Mann v. Moore, 794 So. 2d

595, 599 (Fla. 2001); Porter v. Crosby, *supra*; Shere v. Moore, 830 So. 2d 56, 61 (Fla. 2002)("This Court has defined a capital felony to be one where the maximum possible punishment is death. [citation omitted] The only such crime in the State of Florida is first-degree murder, premeditated or felony."). Ring v. Arizona is inapplicable.

Appellee further notes that among the aggravators present in the instant case was F.S. 921.141(5)(b), prior conviction of another capital felony or felony involving the use or threat of violence to the person, to wit: (1) the conviction of the murder of Dora Nichols (used in the Robert Nichols count);[8] (2) the conviction of the murder of Robert Nichols (used in the Dora Nichols count) by unanimous jury verdicts in the 1987 trial; and (3) a prior conviction for the offense of assault with intent to commit rape. See State's Exhibit 31. Thus, reliance on Apprendi is unavailable.

Since a jury previously unanimously decided appellant was guilty of first degree murder of both Dora and Robert Nichols, the presence of the prior violent conviction aggravator is proper and applicable with adequate jury participation. Green's claim must be denied. As stated in Doorbal v. State, 837 So. 2d

[8] See King v. State, 390 So. 2d 315 (Fla. 1980); Pardo v. State, 563 So. 2d 77 (Fla. 1990); Stein v. State, 632 So. 2d 1361 (Fla. 1994).

940, 963 (Fla. 2003):

> Of note, Doorbal argues that his death sentences were unconstitutionally imposed because Florida's capital sentencing scheme violates the United States and Florida Constitutions by failing to require that aggravating circumstances be enumerated and charged in the indictment and by further failing to require specific, unanimous jury findings of aggravating circumstances. 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. Because these felonies were charged by indictment, and a jury unanimously found Doorbal guilty of them, the prior violent felony aggravator alone clearly satisfies the mandates of the United States and Florida Constitutions, and therefore imposition of the death penalty was constitutional.

Accord, Lugo v. State, 845 So. 2d 74, 119 n.79 (Fla. 2003); Duest v. State, 855 So. 2d 33, 49 (Fla. 2003); Blackwelder v. State, 851 So. 2d 650, 653-654 (Fla. 2003).

Finally, appellant may not obtain relief pursuant to Ring v. Arizona, 536 U.S. 584 (2002) because Ring is not retroactive. Turner v. Crosby, 339 F.3d 1247, 1282 (11th Cir. 2003); State v. Towery, 64 P.3d 828 (Ariz. 2003).

PROPORTIONALITY

Additionally, although appellant has not addressed proportionality, it is incumbent upon this Court to consider

whether the imposed death sentence is proportionate. Appellee submits that it is. The lower court's findings on aggravating factors in the sentencing order included: (1) prior violent felony convictions, i.e., the simultaneous conviction of the other homicide victim and the 1975 conviction for assault with intent to commit rape; (2) the capital felony was committed for pecuniary gain is evidenced by the fact he returned to the victims' home to get back a check he had given them earlier to pay the rent; and (3) the capital felony was especially heinous, atrocious or cruel. Virginia Nichols had been stabbed fourteen times. Mr. Nichols had been stabbed twenty-eight times (R X, 1791-1796).

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).

The instant case is similar to Duest v. State, 855 So. 2d 33 (Fla. 2003)(aggravators included HAC/stabbing; prior violent felony conviction, robbery/pecuniary gain); Singleton v. State, 783 So. 2d 970 (Fla. 2001)(aggravators of prior violent felony conviction and stabbing/HAC); 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).[9] The death penalty imposed here is proportional in this horrendous, gruesome, double homicide.

[9] The Court also found some mitigation and gave it moderate weight but noted that the mental health testimony provided by Dr. Berland was negated to a degree by Dr. Afield (R X, 1806).

CONCLUSION

WHEREFORE, based on the foregoing facts, arguments and citations of authority the sentence of death should be affirmed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief of Appellee has been furnished by U.S. mail to Robert F. Moeller, Assistant Public Defender, P.O. Box 9000, Drawer PD, Bartow, Florida 33831, this _____ day of March, 2004.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this pleading is 12-point Courier New, in compliance with Fla. R. App. P. 9.100(*l*).

Respectfully submitted,

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