IN THE SUPREME COURT OF FLORIDA

ALFONSO GREEN,	:	
Appellant,	:	
vs.	:	Case No.SC02-2315
STATE OF FLORIDA,	:	
Appellee.	:	
_____	:	

APPEAL FROM THE CIRCUIT COURT
IN AND FOR HILLSBOROUGH COUNTY
STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

ROBERT F. MOELLER
Assistant Public Defender

FLORIDA BAR NUMBER 0234176

Public Defender's Office
Polk County Courthouse
P. O. Box 9000--Drawer PD
Bartow, FL 33831
(863) 534-4200

ATTORNEYS FOR APPELLANT

TOPICAL INDEX TO BRIEF

PRELIMINARY STATEMENT

The record on appeal herein consists of sixteen (16) volumes and two (2) supplemental volumes. References in this brief to the original record on appeal will be indicated by volume number(s) and page number(s). References to the first supplemental volume that was prepared will be indicated by the abbreviation "1Supp.," followed by the page number(s). References to the second supplemental volume that was prepared will be indicated by the abbreviation "2Supp.," followed by the page number(s).

Appellant, Alfonso Green,[1] was the defendant below. He will be referred to in this brief by name or as "Appellant."

[1] In most of the court documents below, Appellant's name is spelled "A-L-P-H-O-N-S-O." which appears to be the correct spelling. However, the spelling on the sentencing order and the Notice of Appeal is "A-L-F-O-N-S-O," and so this is the spelling that will be employed in this brief.

Appellee, the State, was the plaintiff below, and will be referred to in this brief as “the State” or as “Appellee.”

STATEMENT OF THE CASE

On October 29, 1986, an indictment was returned in Hillsborough County Circuit Court charging Appellant with two counts of first-degree murder. (Vol. 1, pp. 178-179) Count One charged that he killed Dora Virginia Nichols “by stabbing her with a knife or other sharp instrument[.]” (Vol. 1, p. 178) Count Two charged Appellant with killing Robert J. Nichols by the same method. (Vol. 1, p. 178) Both homicides allegedly occurred on October 10, 1986. (Vol. 1, p. 178)

Appellant was tried before a jury on August 25-27, and 31 and September 1-3, 8-11, and 15-16, 1987, with the Honorable Manuel

Menendez, Jr., presiding. (Vol. 2, pp. 261-264) On September 16, 1987, the jury found Appellant guilty of two counts of murder in the first degree, as charged in the indictment. (Vol. 2, pp. 390-391) After receiving evidence at a penalty phase held on the afternoon of September 16, 1987, the jury returned unanimous recommendations that he be sentenced to death for each of the two counts of murder. (Vol. 2, pp. 264, 391-392)

On October 23, 1987, written judgments and sentences signed by Judge Menendez were filed. (Vol. 3, pp. 400-406) They reflect that Appellant was given two death sentences, however, the court's written findings in aggravation and mitigation were not filed until January 13, 1988. (Vol. 3, pp. 426-431) The court found the following aggravating circumstances to have been proven (Vol. 3, pp. 427-429): (1) Appellant was previously convicted of another capital felony or a felony involving the use or threat of violence to the person; (2) the capital felony was committed while Appellant was engaged in committing or attempting to commit or flight after committing or attempting a robbery or burglary; (3) the crimes were committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody; (4) the crimes were committed for pecuniary gain; (5) the

homicides were especially heinous, atrocious, or cruel; and (6) the killings were committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. The court found nothing in mitigation. (Vol. 3, pp. 429-431)

On June 6, 1991, this Court affirmed Appellant's convictions and sentences of death. (Vol. 3, pp. 454-472)[2] The Court did, however, conclude that the trial judge erred in finding that the homicides were committed to avoid arrest and were cold, calculated and premeditated, and further found that the factors of committed during a robbery or burglary and for pecuniary gain were improperly doubled, and should have been considered as a single aggravating circumstance. (Vol. 3, pp. 465-468)

The Supreme Court of the United States denied certiorari on February 24, 1992. Green v. Florida, 502 U.S. 1102 (1992).

In 1993, Appellant, through post-conviction counsel, filed a Motion to Vacate Judgments of Conviction and Sentence with Special

[2] This Court's opinion is reported as Green v. State, 583 So. 2d 647 (Fla. 1991).

Request for Leave to Amend. (Vol. 1, p. 2)[3] The motion was subsequently amended several times. (Vol. 3, pp. 492-586; Vol. 4, pp. 595-766; Vol. 7, pp. 1304-1392)

Ultimately, on April 3, 2000, Appellant and the State entered into a joint stipulation which acknowledged that Appellant's trial counsel had rendered ineffective assistance at the penalty phase of his jury trial, and granted Appellant a new penalty trial. (Vol. 8, pp. 1492-1500) The stipulation provided for Appellant to waive his right to an evidentiary hearing on the guilt-phase claims raised in his motion for post-conviction relief. (Vol. 8, pp. 1492-1500)

On April 10, 2000, Judge Menendez accepted the stipulation. (Vol. 8, pp. 1501-1502)

Appellant's new penalty trial was held before a jury on February 11-14, 2002, with the Honorable William Fuente presiding. (Vol. 10, pp. 1-Vol. 14, p. 789) After receiving evidence from both the State and the defense, Appellant's jury returned recommendations by votes of 10-2 that he be sentenced to death. (Vol. 9, p. 761; Vol. 14, pp. 782-783)

[3] The date the motion was filed is unclear from the record. The "Case Progress" reflects that it was filed on June 2, 1993 (Vol. 1, p. 2), however, the second supplemental record shows the motion as being "undated," that is, without a filing date stamped on it. (2Supp., index and page 74) The certificate of service shows a date of April 5, 1993. (2Supp., p. 116)

A Spencer hearing[4] was held before Judge Fuente on April 4, 2002, at which the defense presented the testimony of two attorneys who had represented Appellant. (1Supp., pp. 42-62)

On June 3, 2002, defense counsel filed a motion to declare Florida Statutes 775.082 and 921.141 unconstitutional based on the case of Apprendi v. New Jersey, 530 U.S. 466 (2000). (Vol. 9, pp. 1776-1778) The motion requested as alternative relief, if these statutes were not invalidated, suspension of all further proceedings in this case subject to the decision of the Supreme Court of the United States in State v. Ring, 200 Ariz. 267, 25 P. 3d 1139 (2001), cert. granted, ____ U.S. ____, 112 S. Ct. 865 (2002). (Vol. 9, p. 1778) The motion was heard by Judge Fuente on June 10, 2002, and denied. (Vol. 9, pp. 1781-1782; Vol. 15, pp. 860-865)

Defense counsel subsequently made two more requests for the court to postpone sentencing of Appellant until this Court ruled on the applicability of Ring v. Arizona, 536 U.S. 584 (2002) to capital sentencing proceedings in Florida. (Vol. 9, pp. 1783-1785; Vol. 15, pp. 867-873, 878-879) However, the court refused to delay sentencing for this indefinite period, and the sentencing

[4] Spencer v. State, 615 So. 2d 688 (Fla. 1993).

hearing was held before Judge Fuente on October 3, 2002. (Vol. 15, pp. 575-909) The court sentenced Appellant to death for each of the two homicides. (Vol. 15, pp. 908-909) In aggravation, the court found as follows: (1) Appellant was previously convicted of another capital felony or a felony involving the use or threat of violence to the person, based upon "[t]he simultaneous conviction of multiple homicides. . ." and Appellant's "1993 conviction for an offense of assault with intent to commit rape[.]" The court accorded this factor "great weight." (Vol. 10, pp. 1791-1792; Vol. 15, pp. 884-885) (2) The pecuniary gain and burglary aggravating circumstances were established beyond a reasonable doubt. The court "accorded the pecuniary gain aggravating circumstance great weight," but "did not consider, apply or weight the burglary aggravating circumstance." (Vol. 10, pp. 1792-1793; Vol. 15, pp. 885-887) (3) The homicides were especially heinous, atrocious or cruel. The court gave this factor "great weight." (Vol. 10, pp. 1793-1796; Vol. 15, pp. 887-891) As for mitigation, the court found the two statutory "mental mitigators" (the crimes were committed while Appellant was under the influence of extreme mental or emotional disturbance and Appellant's capacity to appreciate the criminality of his conduct or to conform his

conduct to the requirements of the law was substantially impaired), which he gave "moderate weight." (Vol. 10, pp. 1805-1806; Vol. 15, pp. 902-903) The court also found several nonstatutory mitigators, which he accorded "moderate weight." (Vol. 10, pp. 1806-1809; Vol. 15, pp. 904-908) He gave "slight weight" to the mitigation testimony given at the Spencer hearing by two of Appellant's former lawyers. (Vol. 10, pp. 1808-1809; Vol. 15, pp. 905-908)

Appellant timely filed his notice of appeal to this Court on October 15, 2002. (Vol. 10, p. 1823-1824)

STATEMENT OF THE FACTS

New Penalty Trial—State's Case-in-Chief

The State called four witnesses during its case-in-chief at the penalty trial held on February 11-14, 2002. (Vol. 11, pp. 199-356) Jack Nichols, a civil trial lawyer, was the son of R.J. and Virginia Nichols. (Vol. 11, pp. 199-200) The Nichols were renting one half of a duplex they owned to Appellant, who was behind in his rent. (Vol. 11, pp. 200-205) On the night before the instant homicides, his parents called Jack Nichols; they were very agitated. (Vol. 11, pp. 202-203) They related to him that they had gone to Appellant's apartment to collect the rent he owed, but

that Appellant had said something to the effect of, “Get her [Mrs. Nichols] out of here and don’t let her come back or I won’t be responsible for what I do.” (Vol. 11, pp. 202-203) That was the last time Jack Nichols talked to his parents. (Vol. 11, p. 203)

Appellant signed an agreement with his landlords to bring them his payroll check on October 10, and Appellant’s payroll check for $250 was found in the wallet of wallet of one of the Nichols after their death. (Vol. 11, pp. 205-210) Also found was a receipt signed by R.J. Nichols, made out to Appellant. (Vol. 11, pp. 208-209)

James S. Noblitt, who was retired at the time of Appellant’s penalty retrial, was involved in the investigation into the homicides of R.J. and Virginia Nichols when he was with the Tampa Police Department. (Vol. 11, p. 217)[5] He arrived at the scene of the homicides around 11:30 on the night of October 10 [1986]. (Vol. 11, pp. 217-218) Other officers were already there. (Vol. 11, p. 218) At the northwest corner of the residence, Noblitt observed what he characterized as “blood transfer” on a gate in a fence, and two impressions on the ground such that someone may

[5] Over defense objection, Noblitt was permitted to be in the courtroom even when he was not testifying, despite the invocation of the Rule. (Vol. 11, pp. 180-183)

have jumped over the gate, making the impressions when he landed. (Vol. 11, pp. 220-221) As Noblitt approached the doorway on the east side of the residence, he noticed “what appeared to be a blood transfer” on a wrought iron railing just outside the door. (Vol. 11, p. 223) The police did not find any evidence of forced entry into the residence. (Vol. 11, p. 228) Inside the residence not far from the door there were a few blood transfers and blood spatter, as well as a ladies’ cap, ladies’ prescription glasses (which were later determined to belong to Virginia Nichols), and two green buttons. (Vol. 11, pp. 223-224, 228, 235-236)

Virginia Nichols’ body was found about halfway down a hallway. (Vol. 11, pp. 226-227) Her lower dentures were found underneath her. (Vol. 11, p. 230)

R.J. Nichols’ body was found in a bedroom; he was “kind of in a fetal position,” with his feet against a door that had originally been the front door of the residence, but which had been blocked off, as there was another apartment on the other side of the door. (Vol. 11, pp. 227, 230-232, 234) He had part of a comforter from a bed stuffed in his mouth. (Vol. 11, pp. 227, 232, 242) Right inside the doorway of the room where Nichols was found

was a shirt that was later shown to belong to Appellant. (Vol. 11, pp. 231, 234, 240-241)

Warrants were issued for Appellant, and the police spoke with his family and friends in an effort to locate him. (Vol. 11, p. 244) On October 20, Noblitt's supervisor, Sergeant Price, received notification that Appellant had turned himself in to the Fort Lauderdale Police Department, and the two men flew to Fort Lauderdale that afternoon to conduct an interview. (Vol. 11, pp. 244-245) Noblitt asked Appellant to tell him what happened on the Friday in question. (Vol. 11, p. 245) Appellant said that, because of an eviction notice he received, he asked his employer, WesFlo, for a $250 advance on his pay, which he did receive, along with his regular paycheck. (Vol. 11, p. 245) When Appellant got off work that evening, he and his girlfriend, Cassandra Jones, with whom he was living, went to the Nichols' residence and paid the rent, and they were then not going to be evicted. (Vol. 11, pp. 245-246) After Appellant returned home, a friend or associate named Ernie wanted him to help move a refrigerator or other appliance, for which Appellant would be paid, and Appellant went with Ernie to do this. (Vol. 11, p. 246) He and Ernie purchased cocaine at two locations in Tampa, then went to an apartment and

smoked it with two girls they had met. (Vol. 11, p. 246) They took the girls back to Highland Pines, and Ernie left. (Vol. 11, p. 247) Appellant got a ride with a black male to the Boston Bar, where he met up with a man named "Bobby," with whom he had worked a couple of times at a temporary labor company called Tracy Labor. (Vol. 11, p. 247) The two men wanted to get another piece of cocaine, which they smoked behind a bar called the Rockin. (Vol. 11, pp. 247-248) They talked about getting more cocaine, and Appellant told Bobby he knew where they might be able to get a check for $250. (Vol. 11, p. 248) The two men went to Appellant's duplex apartment, and Bobby stayed outside while Appellant pushed in the door, entered his apartment, and changed his shirt. (Vol. 11, p. 248) His girlfriend, Cassandra, was angry that he broke the door frame. (Vol. 11, p. 248)

Appellant and Bobby then went to the Nichols' apartment, knocked on the door, and walked in. (Vol. 11, p. 248) Appellant asked Mr. Nichols if he could get the check back, and he thought Mr. Nichols was going to give it to him, but Mrs. Nichols then told her husband not to give it back. (Vol. 11, p. 248) Suddenly, Bobby pulled out a large butcher knife and began stabbing the Nichols, whereupon Mr. Nichols ran away to the back part of the

house. (Vol. 11, p. 249) Appellant tried to grab the knife from Bobby during the attack, and his hand was cut in the process. (Vol. 11, p. 253) [Noblitt observed that the cut was on Appellant's right hand. (Vol. 11, p. 307) Appellant was left-handed. (Vol. 11, p. 307)] Appellant and Bobby then left the residence without taking anything. (Vol. 11, p. 249) Appellant went back down the alley, and did not know where Bobby went. (Vol. 11, p. 249)

Detective Noblitt told Appellant that he did not believe there was a Bobby, but if there was, then Noblitt would work the rest of his career to find out if there was a Bobby and if he was responsible, because of the seriousness of the crimes. (Vol. 11, pp. 249-250) Noblitt basically was "bluffing or acting or whatever," because he did not believe there was a Bobby. (Vol. 11, p. 250) He began packing up his briefcase to leave and said to Sergeant Price, "Let's go, we're finished, I'll go find Bobby." (Vol. 11, p. 250) Appellant, who had lain his head down on his arm on the table while Noblitt was doing this, looked at the detective and said, "'Don't bother, you don't need to look for Bobby.'" (Vol. 11, p. 250) When Noblitt asked him what he meant, Appellant responded, "'There isn't a Bobby.'" (Vol. 11, p. 250)

Appellant went on to say that he could not believe what he had done, and he could not believe that cocaine was like it was. (Vol. 11, pp. 250-251) He explained to Noblitt that the parts of his story about buying cocaine were true, but he was alone when he returned to his apartment. (Vol. 11, p. 251) He pushed in the back door because the door frame was bad. (Vol. 11, p. 251) After arguing with Cassandra, he took the largest butcher knife (which was about 12-14 inches long) out of a butcher block in his residence and hid it in the back waistband of his pants under the clean work shirt he put on. (Vol. 11, pp. 251-253) He went to the Nichols' house and knocked on the door. (Vol. 11, p. 252) Mr. Nichols answered the door, and Appellant entered. (Vol. 11, p. 252) Appellant told Nichols that Cassandra had been arrested and he needed the check back in order to get her out of jail. (Vol. 11, p. 252) He thought Nichols was going to give him the check, until Mrs. Nichols entered and told her husband not to do so. (Vol. 11, p. 252) The next thing Appellant knew, "Mrs. Nichols was on the floor and bleeding and had been stabbed." (Vol. 11, p. 252) Appellant saw Mr. Nichols run to the back bedroom, followed, saw him at the door, and the next thing Appellant knew, "was that Mr. Nichols was on the floor and had been stabbed." (Vol. 11, p.

252) With regard to the cut on his hand, Noblitt showed Appellant a photograph of a knife with a broken hand and a rivet sticking out of it that was recovered from the apartment Appellant shared with Cassandra. (Vol. 11, p. 253) Appellant said that he may have cut his hand on the rivet, but he was not sure if he cut it on the rivet or on the knife. (Vol. 11, p. 253-254)

When Mr. Nichols was lying down, Appellant heard him moaning and making noises, and so he pulled the covers down and put them in his mouth to stop the moaning. (Vol. 11, pp. 254, 257)

Appellant took off his shirt, wiped his hand with it, then put it in his back pocket. (Vol. 11, p. 254) When Noblitt questioned him, he was unaware that it had been left at the scene. (Vol. 11, p. 258) He began to leave out the same east door through which he had entered, but saw the white male who lived in the other half of the Nichols' duplex standing outside, and so ultimately exited out the back door. (Vol. 11, pp. 254-255) Appellant went over two fences and through the back alleyway to his apartment; he was not sure, but he thought he took the knife with him. (Vol. 11, pp. 255, 258) He could hear sirens, and helicopters flying overhead, and he realized he needed to get out of there. (Vol. 11, p. 255) He went to St. Petersburg the next

day, then to Palmetto, then to Fort Myers where he spoke to Cassandra's cousin; "that was the first time he told anyone he had killed these people and had a chance to cry about it." (Vol. 11, p. 255) Appellant then went to Fort Lauderdale where he had cousins, Ernie and Bessie Williams. (Vol. 11, p. 255) Appellant told his cousins what he was involved in, and they told him to turn himself in. (Vol. 11, pp. 255-256) His cousin drove Appellant to the Fort Lauderdale Police Department on Sunday night, and Appellant walked into the lobby, but did not want to turn himself in on Sunday, and argued with his cousin, who left. (Vol. 11, p. 256) Appellant spent the night under a big tree at a place for homeless people a few blocks from the police station, but realized he could not live like that forever with people looking for him, and decided on Monday morning to turn himself in. (Vol. 11, p. 256)

Although Noblitt had the opportunity to do so, he did not tape-record Appellant's statement, nor did he give Appellant the opportunity to write anything down. (Vol. 11, pp. 295-296, 298)

Appellant had testified at his first trial that Bobby did exist, and was the person who actually committed the crime, and

that Noblitt had fabricated the alleged confession. (Vol. 11, p. 299)

What Appellant told Noblitt during the interrogation session matched up with the physical evidence the detective observed at the Nichols' house. (Vol. 11, p. 256)

The police could not determine that anything had been taken from the Nichols' residence. (Vol. 11, pp. 299-300, 322) There was jewelry and other items of value, such as stereos, remaining in the residence after the episode of October 10. (Vol. 11, pp. 300-301)

Appellant's fingerprints were not found in the Nichols' residence. (Vol. 11, pp. 304-305) There were prints found that had been made by the Nichols, and there were other prints that could not be identified to either Appellant or the Nichols. (Vol. 11, pp. 304-305)[6]

According to Noblitt, Thomas Anderson, the Nichols' son-in-law, testified at Appellant's previous trial that the check made out to Appellant and endorsed over to the Nichols was found in Mr. Nichols' wallet, in his trousers, which he habitually hung on a

[6] Later testimony from Attorney Stuart Umbarger during the defense case indicated that the unidentified prints were taken from the hood of a Ford Tempo parked outside the Nichols' residence. (Vol. 13, pp. 560-561)

nail in his closet at night. (Vol. 11, pp. 261-262) There was a small amount of cash in the wallet as well. (Vol. 11, pp. 261, 300)

Noblitt also testified that Sergeant Price's testimony at Appellant's prior trial corroborated Noblitt's own testimony with regard to Appellant's confession. (Vol. 11, p. 262)

Noblitt went on to recount the testimony of Doug Adkins and Cynthia Blanton from Appellant's original trial. (Vol. 11, pp. 262-272) The two were renting the apartment that was on the other side of the door in the bedroom where Mr. Nichols was found. (Vol. 11, pp. 262-263) They were awakened on the night of October 10 [1986] by someone knocking on their window around 10:45 or so. (Vol. 11, pp. 263, 270) They were startled, got up, looked outside, and saw a black male, whom they could not identify. (Vol. 11, pp. 263-264, 270, 314-315) There was knocking on a door, followed a minute or two later by Mr. Nichols saying in a terrified voice something to the effect of, "'Don't, stop, please help.'" (Vol. 11, pp. 264, 269, 271) Adkins heard the sound of a slide bolt opening, as if someone was trying to open the door between his residence and the Nichols', and that caused him to arm

himself with a six-foot barbell. (Vol. 11, pp. 265-266) He and Blanton also heard Mr. Nichols moaning. (Vol. 11, pp. 269, 271)

Adkins went to the nearby residence of Oliver Black, another tenant of the Nichols', to get help. (Vol. 11, p. 265) On the way, he looked into the Nichols' residence, but could not see anything. (Vol. 11, p. 265) Upon returning to his residence, Adkins was informed by Blanton that she had been hearing sounds as if doors and closets were being opened and closed, and Adkins then heard similar sounds, which he described as "plundering." (Vol. 11, pp. 267, 271, 314) He obtained a .22 rifle in place of the barbell, and took Blanton to Oliver Black's house. (Vol. 11, pp. 266-267) On the way back to his house, Adkins heard the fence at the northwest corner of the house rattling twice, as if someone was going over it. (Vol. 11, pp. 267-268)

Oliver Black came over and the two men entered the Nichols' residence through the east door, which was ajar. (Vol. 11, p. 268) They found Mrs. Nichols' body in the hallway, left, and called the police. (Vol. 11, p. 268)

Blanton and Adkins heard what they believed to be the acts of only one person. (Vol. 11, pp. 271-272)

Noblitt went on to recount the testimony of another witness at Appellant's first trial, Thomas Turner, who had known Appellant since they were children. (Vol. 11, pp. 272-274) Turner had testified that Appellant came to his residence late at night on October 10 or early on the morning of October 11 [1986]. (Vol. 11, pp. 272-273) Appellant was shirtless, was sweating profusely, and bleeding heavily. (Vol. 11, p. 273)[7] He explained to Turner that he had been in a fight with three men at the Boston Bar over a woman. (Vol. 11, pp. 273-274) He asked to borrow a shirt, which Turner gave him. (Vol. 11, pp. 273-274) It did not appear to Turner that Appellant was on drugs or had been drinking. (Vol. 11, p. 274)

According to Noblitt, Margaret Green, who had been married to Appellant's uncle, had testified at the previous trial that Appellant came to her St Petersburg residence on foot on the morning of October 11 [1986]. (Vol. 11, pp. 284-285) He had a glove on his right hand, explaining that he wore it because he had trouble with his hands as a result of being a truck driver. (Vol. 11, pp. 285-286) Appellant stayed until that afternoon, then

[7] Turner himself later testified that, at Appellant's trial in 1987, his testimony had been that Appellant was breathing heavily, not bleeding. (Vol. 12, p. 415)

drove away with Margaret's daughter, Jocelyn Green, and a Mr. Wright in Jocelyn's car. (Vol. 11, p. 286) Mother and daughter later saw on the news that there were murder warrants out for Appellant. (Vol. 11, pp. 286, 288)

Noblitt testified that Jocelyn Green had testified at Appellant's previous trial that she drove Appellant to Palmetto and left him at the home of a woman named "Cat" on the Saturday in question (October 11). (Vol. 11, p. 288)

Noblitt was then asked about the testimony of Leon James at Appellant's prior trial. (Vol. 11, pp. 289-291) James was a cousin to Cassandra Jones, who was Appellant's girlfriend at the time of the events involved in this case. (Vol. 11, p. 289) Appellant had come to the house James shared with his father in Fort Myers about 9:30 p.m. (Vol. 11, p. 289) James had testified that Appellant admitted to killing both his landlords in Tampa when he was high on drugs. (Vol. 11, p. 290) Appellant wanted to stay at James's residence, and also wanted to borrow some money because he was trying to get to Miami. (Vol. 11, p. 290) James would not allow Appellant to stay there, nor did he give him any money. (Vol. 11, pp. 290-291) Appellant left, headed toward Miami. (Vol. 11, p. 290)

Noblitt went on to testify about what two other witnesses, Bessie Williams, who was Appellant's cousin, and Ernest Williams, her husband, had said at Appellant's first trial. (Vol. 11, pp. 291-293) They had indicated that Appellant came to their house in Fort Lauderdale about 4:00 on the afternoon of Sunday, October 19 [1986]. (Vol. 11, p. 291) Appellant confided in them that he had been involved in a murder of old people in Tampa. (Vol. 11, pp. 291-292) Ernest Williams advised him to turn himself in, and drove Appellant to the Fort Lauderdale Police Department that evening, where he left him. (Vol. 11, pp. 292-293)

Dr. Lee Miller was an associate medical examiner who performed the autopsies on R.J. and Virginia Nichols in 1986. (Vol. 11, pp. 324-325) The cause of death for both was multiple stab wounds. (Vol. 11, p. 325) Virginia Nichols had a total of 14 stab wounds, seven of which were to her right hand and which Dr. Miller characterized as "defense wounds." (Vol. 11, pp. 327, 330) There were three lethal wounds: one that shattered the lower jaw and entered the jugular vein, one that penetrated and nearly severed the heart, and one that penetrated the abdominal cavity below the chest and entered the liver. (Vol. 11, pp. 327-329) None of the wounds would necessarily have produced instant

incapacitation; Mrs. Nichols could have continued to “conduct meaningful physical activity for up to a minute. (Vol. 11, pp. 331-332) She would have been in severe pain. (Vol. 11, p. 332)

Mr. Nichols incurred a total of 28 stab wounds, some of which were defensive wounds. (Vol. 11, pp. 332, 335-336) Five of the wounds were potentially fatal: a stab wound of the right side of the neck which involved the jugular vein, a stab wound to the left chest involving the pulmonary artery and the heart, a stab wound of the right chest involving the right lung, a stab wound of the neck involving the larynx, and a wound that shattered the larynx and went into the floor of the mouth, but did not hit any large blood vessels. (Vol. 11, pp. 334-336) None of the wounds was instantly incapacitating; like his wife, Mr. Nichols might have been able to struggle for up to a minute after the fatal wounds were inflicted, until “the oxygen supply to his brain ran out and he passed out.” (Vol. 11, p. 337) His stab wounds would have been painful. (Vol. 11, p. 337)

Neither Mr. nor Mrs. Nichols had any natural diseases that would potentially have shortened their lives. (Vol. 11, p. 337)

After having Jack Nichols and Patricia Anderson, the Nichols' children, read victim impact statements to the jury, the State rested. (Vol. 11, pp. 346-356)

New Penalty Trial—Defense Case

Hillsborough County Sheriff's Deputy Mark Weller became acquainted with Appellant when he was the "house man" at the jail, "in charge of cleaning up the pods[.]" (Vol. 11, pp. 356-357) Weller never had any trouble with Appellant and never observed any type of improper behavior by him; the two men had mutual respect for each other. (Vol. 11, p. 358)

Deputy Steven Bryan testified similarly that, in his experience with Appellant at the Orient Road Jail, Appellant was "respectful," did everything Bryan asked him to, and "never gave anybody any problems." (Vol. 11, pp. 358-360)

Elizabeth Mills met Appellant in her capacity as a paralegal with a Tampa law firm, and the two became friends, but she had never known him outside of the jail environment. (Vol. 11, pp. 361-362, 364) She described him as "an extremely pleasant, agreeable person," and someone who cooperated with her and with his attorney. (Vol. 11, pp. 362-363) Appellant had never

exhibited any type of disruptive or violent behavior, "[q]uite the opposite." (Vol. 11, p. 363)

Fredrick Sally had known Appellant since junior high school, but mostly spent time with him during their youth. (Vol. 11, pp. 364-369) Sally's mother, who kept him "straight" and did not allow him to be around "bad boys," approved of his friendship with Appellant. (Vol. 11, pp. 366-367) Sally had never known Appellant to be violent or disruptive. (Vol. 11, p. 367)

Thomas Turner had known Appellant for about 30 years, and found him to be "a very respectable young man." (Vol. 12, p. 414) He knew nothing of Appellant's cocaine addiction. (Vol. 12, p. 417)

Dorothy Norton was Appellant's older cousin. (Vol. 12, pp. 418-419) She said that Appellant had a good relationship with his "loving family," and his mother was "real supportive" of her children. (Vol. 12, p. 419) Norton never observed Appellant exhibit violent behavior. (Vol. 12, p. 419)

Cheryl Howard and Appellant had had a romantic relationship with each in 1976-1977 and had a child together, who was 24 at the time of the penalty retrial. (Vol. 12, pp. 423-424)[8] Howard

[8] Subsequent testimony showed that this child was a son. (Vol. 12, pp. 461-462)

described Appellant as “a very passionate person” when she knew him. (Vol. 12, p. 423) He was never violent or anything of that nature. (Vol. 12, p. 424) She was not aware of Appellant’s drug problems. (Vol. 12, p. 424)

Beulah Battle had known Appellant for close to 20 years. (Vol. 12, pp. 427-428) He described Appellant as a “nice, intelligent young man” who kept a job. (Vol. 12, p. 428) Battle never saw Appellant be disrespectful or violent toward anyone; that was not his character. (Vol. 12, p. 428)

Wendall Adkins had known Appellant for roughly 28 or 29 years. (Vol. 12, pp. 430-431) He found Appellant to be a very nice and considerate person. (Vol. 12, p. 431) Adkins never observed him acting in any type of disrespectful or disruptive or violent manner. (Vol. 12, pp. 431-432)

Dr. Robert Berland was a forensic psychologist who evaluated Appellant, whom he described as very cooperative. (Vol. 12, pp. 433, 436-437) Berland had done psychological testing on Appellant, including administering the MMPI, in 1986, and then evaluated him prior to the new penalty trial. (Vol. 12, pp. 443, 448) Berland found evidence of nine mitigating circumstances: (1) Appellant was under the influence of extreme mental or emotional

disturbance at the time of the offenses; (2) Appellant's capacity to conform his conduct to the requirements of law was substantially impaired; (3) brain injury; (4) Appellant was capable of forming warm, close, and loving relationships during his life; (5) Appellant had a substantial history of stable and successful employment experiences; a long and successful work history; (6) Appellant had gone through a "severe personal, social, economic and health decline as a result of a crack cocaine addiction" in the time period leading up to the offenses; (7) Appellant was intoxicated with cocaine at the time of the offenses; (8) approximately nine months before the offenses, Appellant initiated on his own an attempt to seek treatment for his crack cocaine addiction; and (9) after Appellant made a successful escape from the area after the crimes, he chose to turn himself in. (Vol. 12, pp. 438-440)

Berland noted the existence of a psychotic disturbance in Appellant, which included auditory hallucinations and delusional paranoid thinking, and which would have been exacerbated by the use of cocaine. (Vol. 12, pp. 443-450)

The brain injury was indicated by the results of the Wechsler Adult Intelligence Scale that was administered to Appellant, and

was supported by his history of at least two incidents of head trauma. (Vol. 12, pp. 451-455) At 17, Appellant was hit be a car broadside while riding a motorcycle. (Vol. 12, p. 455) He was pronounced dead at the scene but survived, and was hospitalized for an extended period. (Vol. 12, p. 455) And about two months before the instant homicides, Appellant was beaten up by six or seven men and hit in the head with a brick after he tried to steal drugs from a drug dealer. (Vol. 12, pp. 456-457, 471) Cassandra Davis perceived a change in him after this incident, especially when he was using cocaine; he became much more explosive and easily angered. (Vol. 12, p. 457) He showed more restlessness and difficulty sleeping. (Vol. 12, pp. 457-458) His drug use increased fairly substantially from that point on. (Vol. 12, p. 457)

A PET scan administered to Appellant did not show clear evidence of brain injury, but this was not sufficient to rule out brain injury, nor did it change Berland's opinion. (Vol. 12, pp. 458-460)

Cassandra Davis, who had had a long-term relationship with Appellant, had described to Berland how cocaine took over Appellant's life after he was introduced to crack sometime during

the year before his arrest and began using it on a daily basis. (Vol. 12, pp. 464-465) His personality changed, he became irritable, would snap at her, and had explosive outbursts or anger. (Vol. 12, p. 465) His work habits changed in that he no longer worked steadily and would steal from his employers; as a result money became a severe problem. (Vol. 12, p. 465) Appellant no longer cared for his hygiene and appearance as he had before. (Vol. 12, p. 465) His paranoia increased. (Vol. 12, p. 466) Appellant's behavior on drugs frightened Davis so that she had to leave the house frequently when he came home. (Vol. 12, p. 466)

Cassandra Davis herself testified that she and Appellant had a girlfriend-boyfriend relationship for about two or two and one-half years in the mid 1980's, around the time Appellant got arrested. (Vol. 13, p. 492) Appellant's behavior changed when he began using cocaine, which he did mostly on the weekends after he got paid. (Vol. 13, pp. 493-494, 496) When he was not on drugs, he was a nice person, "a very responsible guy," but when he got on drugs, "he was a different person." (Vol. 13, p. 493) Before drugs, Davis never saw any disruptive or violent behavior on Appellant's part, but that changed after he got on drugs. (Vol.

13, pp. 493-494) Appellant became very moody and was “like a Dr. Jekyll and Mr. Hyde.” (Vol. 13, p. 494)

Lucille Richardson, Appellant’s younger cousin, observed that Appellant’s behavior changed after he started using cocaine in the ‘80’s. (Vol. 13, p. 500) Before the cocaine, he was a nice and respectful person who had a good relationship with his family. (Vol. 13, p. 501) After he began using cocaine, Appellant was always in a hurry, “never stayed in one place like he used to[,]” and was “like nervous . . . always like looking behind him, expecting somebody to be there or something.” (Vol. 13, p. 502)

Alan Bell, Jr., had known Appellant since junior high school. (Vol. 13, p. 503) He knew him “to be a young man that grew up with values,” and never saw him act violently. (Vol. 13, p. 504)

Stuart Umbarger was an attorney who was court-appointed to represent Appellant in this case. (Vol. 13, pp, 508-509) He testified regarding some of the evidence that was presented at Appellant’s first trial. (Vol. 13, pp. 508-571) Appellant had testified at the trial that he smoked rock cocaine on the evening in question and met up with a man named Bobby, whose last name he did not know. (Vol. 13, p. 510) They smoked some rock cocaine together. (Vol. 13, pp. 510-511) When the money was gone,

Appellant decided to go to the Nichols to ask them to pay him for some chores he had done around the property. (Vol. 13, p. 511) He knocked on the door and was admitted by Mr. Nichols. (Vol. 13, p. 512) Mr. Nichols agreed to pay him, but Mrs. Nichols overheard this, and objected to Appellant being paid because he had been late in the rent. (Vol. 13, p. 512) Mr. Nichols "kind of winked at" Appellant and said, "I didn't tell her that you paid the rent today." (Vol. 13, p. 512) At that point Bobby, who had apparently heard Mrs. Nichols refusing to give the money, burst through the door with a knife in his hand and proceeded to stab Mrs. Nichols. (Vol. 13, p. 512) Appellant grabbed the knife and tried to take it away from Bobby and was cut on the right hand. (Vol. 13, pp. 512-513, 529) He ripped off his shirt and wrapped it around his hand. (Vol. 13, p. 513) When it grew quiet, he went to back bedroom, where Mr. Nichols had been headed, and found him there. (Vol. 13, pp. 513-514) Appellant, who was still high on cocaine,[9] "freaked out" and kept going from Mrs. Nichols to Mr. Nichols and back again; they appeared to be dead. (Vol. 13, pp. 513-514) Appellant panicked and went out the back door and left the scene.

[9] Appellant testified at his previous trial that he was a little bit high that night, but was not consumed with cocaine, and he knew precisely what he was doing. (Vol. 13, pp. 556-557)

(Vol. 13, p. 514) He made his way from Tampa to St. Petersburg to Palmetto to Fort Myers, eventually ending up in Fort Lauderdale, where he turned himself in at the police department 10 days after the homicides. (Vol. 13, pp. 514-515) Appellant "[a]solutely denied" confessing to Detective Noblitt. (Vol. 13, p. 515)

The testimony from Appellant's previous trial showed that Appellant's blood was found only on his work shirt; none of his blood was found inside the Nichols' residence, nor was blood from either of the Nichols found on Appellant's shirt, even though there was "blood everywhere" at the scene of the homicides. (Vol. 13, pp. 523-524)

A knife that was introduced into evidence at Appellant's trial as the proposed murder weapon had been submitted to lab for blood analysis, but no blood was found. (Vol. 13, pp. 525-527) Dr. John Feegel testified for the defense at the first trial that that knife was not the murder weapon. (Vol. 13, pp. 527-529) Feegel also characterized the wound to Appellant's hand as a defensive wound. (Vol. 13, pp. 529-530)

Detective Noblitt had testified at the first trial that there was blood smear on a railing about four feet outside the front door of the Nichols' residence that could have been left by

someone leaving by the front door and vaulting over it; this blood was not analyzed. (Vol. 13, pp. 534-536, 551) There was another blood trail out the back door, where Appellant had exited the residence, going over two fences and leading to Appellant's duplex. (Vol. 13, p. 536)

The testimony at trial showed that there was still jewelry on Mrs. Nichols' hands when she was found, as well as money in her purse, and money in Mr. Nichols' wallet. (Vol. 13, p. 537) There did not appear to be any TV sets, radios, or anything gone from the house. (Vol. 13, p. 537)

There was no testimony at trial that Appellant had confessed to killing two people to anyone other than the two police officers (Noblitt and Price). (Vol. 13, p. 539) He had told people that he had been involved in this, had been there and that something horrible had happened, but not that he killed Mr. And Mrs. Nichols. (Vol. 13, p. 539)

Eleven days after the homicides, six pages of photographs of Mr. and Mrs. Nichols were found at a location in Tampa some distance away from their home. (Vol. 13, pp. 540-542)

Anthony Cunningham, a Tampa attorney, had known Appellant for many years. (Vol. 14, pp. 647-649) Appellant's mother had taken

care of Cunningham's children, and Appellant's father had also worked for Cunningham, doing "some building repairs or things like that." (Vol. 14, p. 649) Appellant himself had also worked for Cunningham; he and his mother had cleaned Cunningham's law offices. (Vol. 14, p. 651) Appellant was a good worker; Cunningham "never had to complain about him showing up or doing the work. . ." (Vol. 14, p. 651)

Cunningham had represented Appellant when, at the age of about 14, he was struck by an automobile while riding a moped or other small vehicle. (Vol. 14, p. 650)

Cunningham described Appellant as polite and "a very nice, good young man always." (Vol. 14, p. 650) He never observed Appellant to act in any way violently or inappropriately. (Vol. 14, pp. 651-652) Appellant never raised his voice, and Cunningham thought him to be "absolutely . . . one of the most calm individuals" he had ever met. (Vol. 14, p. 652)

Appellant's cousin, David James Bailey, Jr., found him to be a hard worker who was always willing to work for whatever he wanted. (Vol. 14, p. 654) Bailey had never seen Appellant act in any violent or inappropriate fashion. (Vol. 14, p. 654)

Dr. Jonathan Sorenson was a professor at Fitchburg State College in Massachusetts who was an expert in the field of criminology and the analysis of predicting future dangerousness. (Vol. 14, pp. 655, 659) Studies in which Sorenson had participated or of which he was aware showed that capital murderers while incarcerated have very low rates of violence—about 10 to 20 per cent—and become involved in the act of homicide again less than one per cent of the time. (Vol. 14, pp. 660-661) People tend to "age out of violence," and "time served is also a strong predictor" of future dangerousness. (Vol. 14, p. 661) Sorenson described how he and his colleagues used "actuarial prediction" to assess the chances of an individual committing future acts of violence. (Vol. 14, pp. 661-662)

Sorenson examined Appellant's inmate folder for the period of his incarceration over the past 15 years and found it indicative of compliant, non-violent behavior, with only three minor disciplinary rule violations. (Vol. 14, pp. 664-665) In Sorenson's opinion, the likelihood of Appellant committing future acts of violence was very low, given his age (51) and the length of time he had been incarcerated without committing any violent act. (Vol. 14, p. 665) Alma Fortson, Appellant's sister,

testified that, in the mid-1980's Appellant drove trucks for various companies and was employed during part of that time by the Jim Walter Corporation. (Vol. 14, p. 697) Appellant had a warm and loving relationship with his family over the years. (Vol. 14, p. 698) He and Fortson had a normal brother/sister relationship, and she had never seen a violent side of him. (Vol. 14, pp. 697-698)

Lee Green was Appellant's younger brother by three years. (Vol. 14, p. 700) He described his brother as "a good person" who was changed by cocaine use. (Vol. 14, p. 700) Before cocaine, he was "a good brother," and "a positive-minded individual, had a good focus on life, had some things in life he was trying to do," but it "all went away." (Vol. 14, p. 700)

New Penalty Trial—State's Rebuttal

By agreement of the parties, the State's rebuttal witness, Dr. Walter Afield, a psychiatrist, testified out of turn at Appellant's penalty trial. (Vol. 14, pp. 667-694) In 1986 or1987, Afield evaluated Appellant at the request of his then defense counsel, Stuart Umbarger. (Vol. 14, pp. 671, 689) He met with Appellant on two occasions and administered the MMPI and the sentence completion questionnaire. (Vol. 14, pp. 671-672) Afield

did not find any evidence of psychiatric illness, “serious psychopathic [sic],” serious emotional illness, delusional paranoid thinking, mood disturbance, or chronic psychotic disturbances. (Vol. 14, pp. 672-673)

Afield stated that it is possible to get false positives with a PET (Positron Emission Tomography) scan; an abnormal reading does not necessarily mean there is brain damage. (Vol. 14, pp. 674-675) On the other hand, one could have brain injury with a completely normal PET scan. (Vol. 14, p. 692) And one may be mentally ill without having brain injury. (Vol. 14, p. 692)

Appellant gave Afield his explanation of the events of October 10, 1986. (Vol. 14, p. 690) Appellant told Afield that he had been using cocaine, and that he was a witness to the murders of Mr. And Mrs. Nichols, but that the actual stabbing was done by another individual. (Vol. 14, pp. 690-691) The psychological testing conducted by Afield indicated that Appellant was telling him the truth and was not attempting to deceive him in any way on the testing. (Vol. 14, pp. 691, 693-694)

Spencer Hearing

Jeff Hazen, counsel with CCR in Tallahassee, testified that he dealt with Appellant from October, 1998 until April, 2000.

(1Supp., pp. 46-48) Appellant was always very cordial and respectful, even though Hazen was just out of law school, and their interaction was always positive. (1Supp., pp. 47-49) Appellant was always concerned with his family, especially that his son stay on the right path. (1Supp., p. 49)

Harry Brody, assistant capital collateral counsel for the northern region, began representing Appellant in October, 1998. (1Supp., p. 50) Brody was always comfortable with Appellant, whom he found to be a person of "wide and varied" interests. (1Supp., p. 51) Appellant was always dignified, never abusive in any way, and straightforward. (1Supp., pp.51-52) Brody did not foresee any problems that Appellant might have in the prison system if given a life sentence. (1Supp., pp. 51-52)

SUMMARY OF THE ARGUMENT

The court below abused his discretion when he answered the question propounded by Appellant's penalty phase jury regarding when a life sentence without possibility of parole for 25 years would begin to run. The question showed that the jury was concerned with improper matters, and the court should have declined to answer. If he felt the need to respond, he should have given the jury more information, for example, letting them know that Appellant might be sentenced to consecutive life terms, and thus subject to back-to-back minimum mandatory sentences, rather than leaving them to think that credit for time served might enable Appellant to be released in the near future.

The judge who originally sentenced Appellant to death did not file his written findings with regard to aggravating and mitigating circumstances until more than two months after initially sentencing Appellant to death. Pursuant to section 921.141(3) of the Florida Statutes and decisions of this Court, the failure to file a timely written order supporting the sentences should cause them to be vacated.

The burglary and pecuniary gain aggravating circumstances were not supported by the evidence, and the burglary was

submitted to Appellant’s jury using an incorrect instruction. Nothing was shown to have been taken from the Nichols’ residence. Appellant’s entry into the residence was with the consent of the occupants; pursuant to this Court’s Delgado opinion, he could not have been guilty of burglary.

Pursuant to Ring v. Arizona, 122 S. Ct. 2428 (2002), Florida's scheme of capital punishment violates principles of due process of law and the right to trial by jury, and Appellant's sentence of death imposed under such a scheme cannot be permitted to stand.

ARGUMENT

ISSUE I

THE COURT BELOW ERRED IN ANSWERING THE JURY'S QUESTION REGARDING WHETHER A LIFE SENTENCE WITHOUT ELIGIBILITY FOR PAROLE FOR 25 YEARS WOULD RUN FROM 1987 OR FROM THE DATE OF THE SENTENCING RECOMMENDATION.

Appellant's penalty phase jury began deliberating at 12:40 p.m. on February 14, 2002. (Vol. 14, p. 771) At 2:14 p.m., the judge and counsel convened to address a question presented by the jury: "Judge, does a life sentence without the possibility of parole for 25 years start with the year 1987 or does it start with today?" (Vol. 9, p. 1759; Vol. 14, p. 771)

The defense position was that the court should not answer the question, but should tell the jury to rely on the instructions they had already been given. (Vol. 14, pp. 771-772) If the court was going to answer the question, defense counsel argued that the jury should be given additional information, such as that no one in the state of Florida had been released after 25 years, and that Appellant could received consecutive life sentences for the two murders, which would mean that he would not be eligible for parole for 50 years. (Vol. 14, pp. 773-774)

The court seemed persuaded by a case presented to it by the State, Downs v. State, 572 So. 2d 895 (Fla. 1990), and wrote the

following answer for the jury on the paper with their question: "The Defendant, if sentenced to life w/o possibility of parole for 25 years, would be entitled to credit for all jail time served against the life sentence. However, there is no guarantee that he would be granted parole at or any time after 25 years." (Vol. 9, p. 1759; Vol. 14, pp. 773-782)

It was 3:10 p.m. when the bailiff presented the jury with the court's answer to their question; 15 minutes later, the jury returned its 10-2 recommendations that Appellant be sentenced to death for each of the murders. (Vol. 14, p. 782)

During the course of his discussion with counsel for the State and the defense, prior to writing out his answer to the jury's question, the court observed (Vol. 14, p. 780):

> The one problem that I'm having with this whole thing is this—the very nature of this question tells me that they are concerning themselves with something that they're not supposed to be concerned with. They're supposed to be concerned with whether the aggravating, mitigating circumstances justify this sentence or justify that sentence.

The court was quite correct in making these remarks; Appellant's jury was considering something they should not have been. Significantly, the jury's question did not express any confusion over the law they were to apply, but only concern over the

consequences of their recommendations. One wonders, then, why the court felt compelled to answer the question. It certainly would have been a proper exercise of the court's discretion to adhere to the request of defense counsel and refer the jury to the instructions they had already received. In King v. Dugger, 555 So. 2d 355 (Fla. 1990), this Court fouhd no abuse of discretion in the trial court's refusal to admit testimony that a life sentence for first-degree murder includes a minimum mandatory sentence of 25 years' imprisonment. This Court noted that such testimony was irrelevant to King's character or prior record, or the circumstances of the crime, and so was not valid mitigation. The information the court below gave to Appellant's jury in the form of his answer to their question was sort of the "flip side" of this, but was equally irrelevant for the jury to consider in making its sentencing determination. In Waterhouse v. State, 596 So. 2d 1008 (Fla. 1992), this Court found no abuse of discretion in the trial court's refusal to answer questions the jury had about when the defendant would be eligible for parole if sentenced to life, whether time served counted toward the parole time, and whether the defendant would be returned to New York to finish his sentences there if he were paroled from Florida. The Court observed that the jury instructions that had

been given "adequately informed the jury that a life sentence carried a minimum mandatory sentence of twenty-five years. [Citing King v. Dugger.]" 596 So. 2d at 1015. Appellant's jury was similarly adequately informed (see jury instructions in Volume 14, pages 758-769), and for the court to go beyond the instructions given was fraught with hazards. In Perriman v. State, 731 So. 2d 1243 (Fla. 1999), this Court found no abuse of discretion in the trial court refusing to answer a jury question and instead directing the jurors to refer to the standard jury instructions they had been given. This Court noted the danger inherent in a trial court's attempt to come up with additional instructions not contained in the standards:

> The Florida Standard Jury Instructions in Criminal Cases were designed to eliminate—or minimize—juror confusion concerning the applicable law in criminal cases. The instructions were researched and formulated by a committee of experts and then reviewed by this Court in an effort to eliminate imprecision. [Footnote omitted.] The charges were designed above all to be accurate and clear—and thus to withstand appellate scrutiny. In contrast, an on-the-spot instruction formulated by a lone trial judge in the midst of a live proceeding has none of these safeguards and my prove lacking when placed under the microscope of appellate review. To compel trial courts to give such off-the-cuff responses upon request—as Perriman suggests—would invite a recurrence

> of the pre-1970 problems that gave rise to the standard instructions.

731 So. 2d at 1246. The Perriman Court went on to note that "the court must exercise sound discretion" when the "jury is confused concerning a point of law," 731 So. 2d at 1247, but in no way authorized a court to allay a jury's concerns regarding the consequences of its actions.

If the court below was not going to choose the best option, that is, not to answer the jury's question at all, other than to refer them back to the instructions already given, then he should have balanced the instructions by giving them a complete picture of the sentencing possibilities, especially, as defense counsel urged, that Appellant could be given two consecutive life sentences, in which his case he would not even be eligible for parole for 50 years. This might well have diminished the jurors' apparent concern that Appellant might be released from prison in the near future.

The reliance of the court below upon Downs was misplaced, as that case is distinguishable from that of Appellant. In Downs the jury asked, "Would the life sentence with no chance of parole for 25 years begin now, or would the 11 years he's already spent in prison be subtracted from the 25 years?" 572 So. 2d at 900. The trial court responded that Downs would receive credit for time served on the charge. On appeal, Downs argued that this answer improperly invited his jury to assess future dangerousness, while the State argued that the defense had created the issue by arguing to the jury that a life sentence would protect society from Downs for the next 25 years. With no analysis, this Court found no abuse of discretion by the trial court "[u]nder the facts presented[.]" 572 So. 2d at 901. In the instant case, Appellant's counsel did not make an argument to the jury like that made by Downs's counsel, and so there was no justification for the answer to the jury question given by the lower court. Downs was decided based on its unique fact situation, which is inapplicable in the present context.

The standard of review to be used with regard to this issue is abuse of discretion. Perriman; Downs; see also Florida Rule of Criminal Procedure 3.140 and the Committee Notes thereto. For the reasons expressed above, the lower court abused his discretion in answering the question posed by Appellant's penalty jury, and he must receive a new penalty trial as a result.

ISSUE II

APPELLANT SHOULD HAVE HIS DEATH SENTENCES VACATED IN FAVOR OF LIFE SENTENCES BECAUSE THE COURT THAT ORIGINALLY SENTENCED HIM TO DEATH FAILED TO FILE A TIMELY WRITTEN ORDER SETTING FORTH HIS FINDINGS IN SUPPORT OF THE DEATH SENTENCES IMPOSED.

Judge Manuel Menendez originally imposed two sentences of death upon Appellant on October 23, 1987. (Vol. 3, pp. 400-406) However, his written findings as to aggravating and mitigating circumstances were not filed until January 13, 1988. (Vol. 3, pp. 426-431) [Although the written sentencing order is dated the "11th day of January 1987, nunc pro tunc October 23, 1987[,]" this is obviously a typographical error. The year the order was signed had to have been 1988, not 1987.] Appellant's notice of appeal had been filed on October 15, 2002. (Vol. 10, pp. 1823-1824)

In Van Royal v. State, 497 So. 2d 625 (Fla. 1986), this Court vacated the death sentences where the trial court failed to make timely written findings to support the sentences, as required by section 921.141(3) of the Florida Statutes. Without such an order, this Court could not be certain that the sentences were based on a reasoned judgment, as required by law. {See also, Rhodes v. State, 547 So. 2d 1201 (Fla. 1989).] Subsequently, in

Grossman v. State, 525 So. 2d 833 (Fla. 1988), this court put into place, effective 30 days after Grossman became final, a procedural rule requiring written orders imposing death sentences to be prepared prior to oral pronouncement of sentence, for filing concurrent with the pronouncement. In Christoper v. State, 583 So. 2d 642 (Fla. 1991), this Court applied the Grossman rule to quash the appellant's death sentence in favor of a life sentence, noting that the holding in Grossman was not a mere technicality, and that the Court has consistently held that the weighing of aggravating and mitigating factors must take place at sentencing. "The preparation of written findings after the fact runs the risk that the "'sentence was not the result of a weighing process or the 'reasoned judgment' of the sentencing process that the statute and due process mandate.' Citing Justice Ehrlich's concurring opinion in Van Royal.]"

Grossman was decided on February 18, 1988, little more than a month after the original written sentencing order was filed in this case. Although the new rule established in Grossman was prospective only, and this Court has refused to apply it to sentences imposed prior to Grossman (see, for example, Holton v. State, 573 So. 2d 284 (Fla. 1990), Appellant urges that it

violates principles of due process and equal protection to deny him the protection set forth in Grossman.

In Hicks v. Oklahoma, the Court held that sentencing is not merely a matter of state procedural law. When a defendant is arbitrarily deprived of a clear statutory right as to his sentence must be imposed, he is deprived of due process of law. Art. I, § 9, Fla. Const.; Amend. XIV, U.S. Const. The right to due process protects against the arbitrary deprivation of life, liberty or property. Appellant has a protected interest in not being arbitrarily sentenced to death. Because section 921.141(3) of the Florida Statutes specifically requires a sentencing judge who does not issue written findings in conjunction with imposition of a death sentence to "impose sentence of life imprisonment," and the original sentencing judge here did not make the required findings prior to sentencing Appellant to death, due process mandates that Appellant receive life sentences.

To approve different consequences for a trial court's failure to file timely written findings regarding a death sentence based upon whether the defendants were sentenced before or after the Grossman rule took effect implicates the equal

protection clause. Amend. XIV, U.S. Const. Appellant belongs to a less favored class of defendants who remain subject a death sentence rather than those who will automatically have life sentences imposed. The only distinction is the date the sentence was pronounced.

This invalid distinction allows the State another chance to impose a death sentence on persons like Appellant while giving other defendants the protection afforded them by statute. The disparate treatment is arbitrary and inconsistent with the Eighth Amendment requirement that capital punishment "be imposed fairly and with reasonable consistency, or not at all." Eddings v. Oklahoma, 455 U.S. 104, 112 (1982). Accordingly, this Court should vacate Appellant's sentences of death and replace them with sentences of life imprisonment without possibility of parole for 25 years.

Appellant's issue involves purely matters of law, and should be reviewed using a de novo standard. State v. Glatzmayer, 789 So. 2d 297, 301 n, 7 (Fla. 2001); Butler v. State, 706 So. 2d 100, 101 (Fla. 1st DCA 1998).[10]

[10] Appellant's postconviction counsel raised the issue raised here in two of the motions they filed (Vol. 3, pp. 500-506; 2Supp., pp. 83-88) but the trial court never reached the issue, in light of the stipulation for a new penalty trial that was entered into.

ISSUE III

THE COURT BELOW ERRED IN FINDING THE BURGLARY AND PECUNIARY GAIN AGGRAVATING CIRCUMSTANCES AND SUBMITTING THEM TO THE JURY, AS THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THEM, AND THE JURY INSTRUCTION ON BURGLARY WAS INCOMPLETE AND INCORRECTLY STATED THE LAW.

The trial court instructed Appellant's jury on both committed for financial gain and committed during the course of a burglary as potential aggravating circumstances, but cautioned them not to use a single aspect of the offense as supporting two separate aggravating factors. (Vol. 14, pp. 760-762) The court defined "burglary" for Appellant's jury as follows (Vol. 14, p. 759): "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."

The court subsequently dealt with these aggravators in his written sentencing order as follows (Vol. 10, pp. 1792-1793):

> 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 I 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 the 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.

There are at least two problems with the way the trial court dealt with the aggravators in question: they were not supported by the evidence, and the burglary was submitted to the jury upon improper instructions. Appellant would first note that there was

no evidence anything was taken from the Nichols' residence. There were items left in the residence such as jewelry and stereos that could more readily have been converted into quick cash to purchase drugs than the rent check the State theorized Appellant went there to retrieve. Moreover, the circumstances here failed to show a burglary in light of Delgado v. State, 776 So. 2d 233 (Fla. 2000). In Delgado this Court receded from prior decisions interpreting the burglary statute and held that consensual entry is an affirmative defense to burglary. The statutory language "remaining in a structure" was limited to exclude situations where the defendant was originally allowed into an occupied structure but his or subsequent actions led to an implied withdrawal of permission to remain. Only where a defendant surreptitiously remains on the premises can he or she be properly convicted of burglary in addition to whatever offense the defendant commits in the structure. This Court recently effectively reaffirmed the principles of Delgado in Ruiz & Braggs v. State, Case No. SC02-389 and SC02-524 (Fla. December 18, 2003). There the Court rejected the State's arguments that it had receded from Delgado in Jiminez v. State, 810 So. 2d 511 (Fla. 2001) or, if not, that the Court should recede from Delgado. The Court further noted that,

consistent with its opinion in Floyd v. State, 850 So. 2d 383 (Fla. 2002), the Florida Legislature's attempt to nullify Delgado by enacting section 810.015(2) of the Florida Statutes does not apply to conduct occurring before February 1, 2000. In the instant case, of course, the conduct occurred long before that date, and Delgado would apply.

The evidence adduced below was consistent only with a consensual entry into the Nichols' residence. Appellant knew the Nichols—they were his landlords. The police observed no signs of forced entry. Appellant gained entry either by knocking on the door or ringing the doorbell. Even the trial court observed in his written sentencing order that Appellant "did not enter stealthily or surreptitiously." The court also noted that Appellant "may not have had the intent to commit an offense when he initially entered the doorway area." However, the court then erroneously applied the old, outdated interpretation of the burglary statute which this Court discredited in Delgado by stating that when Appellant attached the Nichols, this rendered his "actions a burglary in that he remained in the structure with intent to commit an offense therein."

The court made a similar error in submitting the burglary aggravator to Appellant's jury upon a barebones definition of

burglary that did not conform with the standard jury instruction on burglary, and did not take Delgado into account.

For these reasons, the burglary aggravating circumstance should not have been submitted to Appellant's jury nor found to exist in the trial court's sentencing order.

Appellant submits that his issue involves questions of law, and so a de novo standard of review should apply. State v. Glatzmayer, 789 So. 2d 297, 301 n, 7 (Fla. 2001); Butler v. State, 706 So. 2d 100, 101 (Fla. 1st DCA 1998). But see Willacy v. State, 596 So. 2d 693, 695 (Fla. 1997) {this Court's "task on appeal is review the record to determine whether the trial court applied the right rule of law for each aggravating circumstance and, if so, whether competent substantial evidence supports its finding. [Footnote omitted.])"

ISSUE IV

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

Appellant's issue presents a question of law, and so the standard of review is de novo. State v. Glatzmayer, 789 So. 2d 297, 301 n, 7 (Fla. 2001); Butler v. State, 706 So. 2d 100, 101 (Fla. 1st DCA 1998).

In Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 2355 (2000), and Jones v. United States, 526 U.S. 227, 243 n.6 (1999), the United States Supreme Court held that, any fact (other than prior conviction) that increases the maximum penalty for a crime

must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt. Apprendi, 120 S.Ct. at 2362-63; Jones, 526 U.S. at 231. Basing its decision both on the traditional role of the jury under the Sixth Amendment and principles of due process, the Apprendi Court made clear that:

> [i]f a defendant faces punishment beyond that provided by statute when an offense is committed under certain circumstances but not others . . . it necessarily follows that the defendant should not -— at the moment the state is put to proof of those circumstances -— be deprived of protections that have until that point unquestionably attached.

530 S.Ct. at 2359. The Apprendi Court held that the same rule applies to state proceedings under the Fourteenth Amendment. 530

S.Ct. at 2355. These essential protections include (1) notice of the State's intent to establish facts that will enhance the defendant's sentence; and (2) a jury's determination that the State has established these facts beyond a reasonable doubt.

In Jones, 526 U.S. at 250-51, the Court distinguished capital cases arising from Florida.[11] In Apprendi, 530 S.Ct at 2366, the Court observed that it had previously

> rejected the argument that the principles guiding our decision today render invalid state capital sentencing schemes requiring judges, after a jury verdict holding a defendant guilty of a capital crime, to find specific aggravating factors before imposing a sentence of death. Walton v. Arizona, 497 U.S. 639, 647-649 ... (1990)[.]

Thus, it appeared that the principles of Jones and Apprendi did not apply to state capital sentencing procedures. See Mills v.

[11] Those cases were Spaziano v. Florida, 468 U.S. 447 (1984), and Hildwin v. Florida, 490 U.S. 638 (1989).

Moore, 786 So. 2d 532, 536-38 (Fla.), cert. denied, 532 U.S. 1015 (2001). In Ring v. Arizona, 536 U.S. 584 (2002),[12] however, the United States Supreme Court overruled Walton v. Arizona and held that the Sixth and Fourteenth Amendments to the United States Constitution require the jury to decide whether a death qualifying aggravating factor has been proven beyond a reasonable doubt.

> A defendant convicted of first-degree murder may not be sentenced to death without an additional finding. At least one aggravator must be found as a sentencing factor. Like the hate crimes statute in Apprendi, Florida's capital sentencing scheme exposes a defendant to enhanced punishment —- death rather than life in prison —- when a murder is committed "under certain circumstances but not others." Apprendi, at 2359. This Court has emphasized that "[t]he aggravating circumstances" in Florida law 'actually define those crimes . . . to which the death penalty is applicable . . . .'" State v. Dixon, 283 So. 2d 1, 8 (Fla. 1973), cert denied
>
> sub nom., 416 U.S. 943 (1974).

Green was Sentenced to Death Without a Specific Jury Finding of an Aggravating Circumstance

Appellant was sentenced to death pursuant to section 921.141, Florida Statutes (2002), which does not require a jury finding that any specific aggravating factor exists. Section 921.141(2) governs the advisory sentence rendered by the jury in this case and provides as follows:

[12] Ring was decided on June 24, 2002, which was after Appellant's new penalty trial, but before he was actually sentenced by the court.

(2) ADVISORY SENTENCE BY THE JURY. -- After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based on the following matters:

(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5);

(b) Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and

(c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

On its face, this statute does not require any express finding by the jury that a death qualifying aggravating circumstance has been proven. Moreover, this Court has never interpreted this statute to require the jury to make findings that specific aggravating circumstances have been proven. See Randolph v. State, 562 So. 2d 331, 339 (Fla.), cert. denied, 498 U.S. 992 (1990); Hildwin v. Florida, 490 U.S. 638, 639 (1989). Consequently, the statute plainly violates the Sixth and Fourteenth Amendment requirements of Jones, Apprendi, and Ring, and the requirement

ellant's case illustrates how section 921.141 is unconstitutional on its face.

that the jury must find a death qualifying aggravating circumstance. Pursuant to section 921.141, the jury was instructed to consider four aggravating circumstances: (10 Appellant had been previously convicted of another capital offense or a felony involving the use or threat of violence; (2) committed during the course of a burglary; (3) committed for financial gain; and (4) HAC. (Vol. 14, pp. 760-761)[13] The judge instructed the jury that it was their duty to render to the Court an advisory sentence based upon their determination as to whether sufficient aggravating circumstances existed to justify imposition of the death penalty, and whether sufficient mitigating circumstances

[13] The court gave the jury an instruction designed to prevent them from doubling the burglary and financial gain circumstances. (Vol. 14, pp. 761-762)

existed to outweigh any aggravating circumstances found to exist. (Vol. 14, pp. 762)

The jurors were instructed that it was not necessary that the advisory sentence of the jury be unanimous. (Vol. 14, p. 765)

They were never instructed that all must agree that at least one specific death qualifying aggravating circumstance existed -- and that it must be the same circumstance. Thus, the sentencing jury was not required to make any specific findings regarding the existence of particular aggravators, but only to make a recommendation as to the ultimate question of punishment.

The jury ultimately returned an advisory sentence recommending by a vote of ten to two that the court impose the death penalty. The advisory sentence did not contain a finding as to which specific aggravating circumstance(s) was (were) found to exist. (Vol. 9, p. 761; Vol. 14, pp. 782-782)

It is likely in any case that some of the jurors will find certain aggravators proven which other jurors reject. What this means is that a Florida judge is free to find and weigh aggravating circumstances that were rejected by a majority, or even all of the jurors. The sole limitation on the judge's ability to find and weigh aggravating circumstances is appellate

review under the standard that the finding must be supported by competent substantial evidence. Willacy v. State, 696 So. 2d 693, 695 (Fla. 1997).

An additional problem with the absence of any jury findings with respect to the aggravating circumstances is the potential for skewing this Court's proportionality analysis in favor of death. An integral part of this Court's review of all death sentences is proportionality review. Tillman v. State, 591 So. 2d 167 (Fla. 1991). This Court knows which aggravators were found by the judge, but does not know which aggravators and mitigators were found by the jury. Therefore, the Court could allow aggravating factors rejected by the jury to influence proportionality review. Such a possibility cannot be reconciled with the Eighth and Fourteenth Amendment requirement of reliability in capital sentencing.

The State Failed to Allege Aggravating

Circumstances in the Indictment

The Apprendi Court also found that an aggravating sentencing factor must be pled in the Indictment to support the death penalty. In Ring, at n.4, the United States Supreme Court pointed out that Ring did not contend that his indictment was constitutionally defective. As a result, the Supreme Court did not discuss that question in Ring. Because Ring overruled Walton, however, there is no valid reason why the Jones and Apprendi requirement that an aggravating factor must be pled in the

indictment should not apply to capital cases. No aggravating sentencing factors were charged in Appellant's indictment; the indictment simply charged him with two counts of murder in the first degree. (Vol. 1, pp. 178-179)

The Ring decision essentially makes the existence of a death qualifying aggravating circumstance an element which the State must prove to make an ordinary murder case into a capital murder case. Because the Court applied the Jones and Apprendi requirement that a jury find the aggravating sentencing factor beyond a reasonable doubt to capital cases in Ring, it would appear the Supreme Court should hold that the Jones and Apprendi requirement of alleging one or more aggravating sentencing factors in the indictment also applies to capital cases once that issue is before the Court. Thus, this Court should find that section 921.141 is unconstitutional on its face because it does not require a death qualifying aggravating factor to be alleged in a capital murder indictment. In the absence of an allegation of a death qualifying aggravating factor, an indictment does not charge a capital offense, and no death sentence can be constitutionally imposed.

The flaws in Florida's capital sentencing scheme discussed above constitute fundamental error which may be raised for the first time on appeal. In Trushin v. State, 425 So. 2d 1126, 1129-30 (Fla. 1983), this Court ruled that the facial constitutional validity of the statute under which the defendant was convicted can be raised for the first time on appeal because the arguments surrounding the statute's validity raised fundamental error. In State v. Johnson, 616 So. 2d 1, 3-4 (1993), this Court ruled that the facial constitutional validity of amendments to the habitual offender statute was a matter of fundamental error which could be raised for the first time on appeal because the amendments involved fundamental liberty due process.

In Maddox v. State, 760 So. 2d 89, 95-98 (Fla. 2000), this Court ruled that defendants who did not have the benefit of Florida Rule of Criminal Procedure 3.800(b), as amended in 1999 to allow defendants to raise sentencing errors in the trial court after their notices of appeal were filed, were entitled to argue fundamental sentencing errors for the first time on appeal. To qualify as fundamental error, the sentencing error must be apparent from the record, and the error must be serious; such as a sentencing error which affected the length of the sentence. Id., at 99-100. Defendants appealing death sentences do not have the

benefit of Rule 3.800(b) to correct sentencing errors because capital cases are excluded from the rule. Amendments to Florida Rules of Criminal Procedure 3.111(e) & 3.800 & Florida Rules of Appellate Procedure 9.020(h), 9.140, & 9.600, 761 So. 2d 1015, 1026 (1999).

The facial constitutional validity of the death penalty statute, section 921.141, Florida Statutes (2000), is a matter of fundamental error. The error is apparent from the record, and it is certainly serious because it concerns the due process and right to jury trial requirements for the imposition of the death penalty. Imposition of the death penalty goes far beyond the liberty interests involved in sentencing enhancement statutes.

Moreover, the use of a facially invalid death penalty statute to impose a death sentence could never be harmless error. A death sentence is always and necessarily adversely affected by reliance upon an unconstitutional death penalty statute, especially when the statute violates the defendant's right to have the jury decide essential facts. See Sullivan v. Louisiana, 508 U.S. 275, 279-282 (1993) (violation of right to jury trial on essential facts is always harmful structural error).

Thus, Florida's death penalty statute is unconstitutional on its face because it violates the due process and right to jury trial requirements that all facts necessary to enhance a sentence be found by the jury to have been proven beyond a reasonable doubt, as set forth in Jones, Apprendi, and Ring. This issue constitutes fundamental error, and can never be harmless. This Court must reverse Appellant's death sentence and remand for a life sentence.

Appellant is aware that in King v. Moore, 831 So. 2d 143 (Fla. 2002) and Bottoson v. Moore, 833 So. 2d 693 Fla. 2002) this Court rejected arguments similar to those contained herein, but asks the Court to revisit these important issues, and raises them here to preserve them for possible further review in another forum.

CONCLUSION

Based upon the foregoing facts, arguments, and citations of authority, your Appellant, Alfonso Green, prays this Honorable to vacate his sentences of death and remand for imposition of life sentences. In the alternative, Appellant asks the Court to reverse his death sentences and remand for a new penalty phase before a jury.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Charles J. Crist, Jr., Concourse Center #4, 3507 E. Frontage Rd. - Suite 200, Tampa, FL 33607, (813) 287-7900, on this 24th day of , .

CERTIFICATION OF FONT SIZE

I hereby certify that this document was generated by computer using Microsoft Word with Courier New 12-point font in compliance with Fla. R. App. P. 9.210 (a)(2).

Respectfully submitted,

JAMES MARION MOORMAN
Public Defender
Tenth Judicial Circuit
(863) 534-4200

ROBERT F. MOELLER
Assistant Public Defender
Florida Bar Number O234176
P. O. Box 9000 - Drawer PD
Bartow, FL 33831

rfm