IN THE SUPREME COURT OF FLORIDA

MICHAEL GORDON REYNOLDS,
Appellant,

v. CASE NO. SC03-1919

STATE OF FLORIDA,
Appellee.
_____/

ON APPEAL FROM THE EIGHTEENTH JUDICIAL CIRCUIT
IN AND FOR SEMINOLE COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE

Appellant was indicted on three counts of First Degree murder and Burglary of a Dwelling with a Battery While Armed, arising from the murders of Danny Ray Privett, Robin Razor and Christina Razor on July 21-22, 1998 (R31-33). The Public Defender filed a motion for a *Nelson* hearing which was granted and private counsel appointed (R136, 137, 138). Co-counsel was also appointed (R167). The trial judge authorized fees for both a mitigation specialist and a confidential DNA expert (R169, 171). The trial court granted the defense motion for the State to preserve samples and provide them to the defense expert (R209). The trial court authorized fifty hours of DNA expert service to the defense (R210). The court granted costs for both Lab Corp and American Standard Testing Bureau to test DNA samples as a confidential DNA testing lab expert and confidential preservative testing lab and expert, respectively (R210, 211). The defense also received permission to retain a blood spatter expert (R210). The court appointed both a private investigator for the defense and a psychological expert (R393, 395).

Several pre-trial motions were heard, including a lengthy *Frye* hearing on the Motion(s) to Exclude DNA Testing (R75-76, 442-443; TT 3038.1-3065, 3066-3322, 3323-3383, 3384-3436, SR139-

177). The *Frye* hearing took place on July 18, August 2, September 19, and 27, and October 9, 2002. The motion to exclude DNA evidence was denied (R514-515). Appellant also filed a motion requesting the State be prevented from cross-examining the defense expert who conducted only chemical testing and no DNA testing (R494-496). The State had released evidence to the defense expert for testing and moved the court for the return of the evidence (R497).

The case proceeded to jury trial on April 23, 2003, the Honorable Kenneth Lester presiding (TT1786). On May 7, 2003, the jury found Reynolds guilty of:

(1) Second Degree Murder of Danny Ray Privett;

(2) First Degree Murder of Robin Razor;

(3) First Degree Murder of Christina Razor; and

(4) Burglary of a Dwelling With a Battery With a Weapon.

(R712-715, TT3030-31).

On May 8, 2003, Reynolds filed a Waiver of Right to Present Mitigation Evidence and Waiver of Right to an Advisory Sentencing Jury (R719-20, 721-22). The trial court followed the procedures outlined in *Koon v. Dugger*, 619 So. 2d 246 (Fla.

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1 The pleadings consist of pages 1-986. Cites to the pleadings will be "R". The trial transcript consists of pages 1-3720. Cites to the trial transcript will be "TT". The supplemental record consists of pages 1-178. Cites to the supplemental record will be "SR".

1993) (R946). Before evidence was presented, the trial judge had a discussion with the attorneys (TT3475). The court addressed Reynolds and verified he had instructed his attorneys he did not want to present a defense at the penalty phase (TT3476). Reynolds advised the judge he had been in prison all his life, and AMy mitigating is not nothing compared to the aggravators that the State is gonna bring in here against me.@ (TT3476-77). He was as tired of seeing the State of Florida and the people of Seminole County as they were tired of seeing him (TT3477). He said he knew he was going to death row. He had always conducted himself as a gentleman and did not want to present a mitigating case. Reynolds felt that because he had been locked up all his life, it would be a waste of time (TT3477). He felt the attorneys had done a great job, but if the case came back it would be because of the trial (TT3577). Therefore, Reynolds wanted to proceed to the *Spencer* hearing as quickly as possible (TT3477).

Judge Lester advised Reynolds it was necessary to follow certain procedures (TT3580). Defense counsel represented that Reynolds had been examined by a Adoctor or psychiatrist or psychologist.@ (TT3481). Reynolds said he did not want to see a psychiatrist (TT3582). Neither did he want to put his family through testifying. Family members were there, including two

sisters (TT3582). Reynolds said he had studied the law and knew what the aggravators and mitigators were. However, he was an innocent man (TT3485). He did not want to put the victims' family through more proceedings, either (TT3485). Reynolds signed a waiver of penalty phase and fully understood it (TT3486). He said he would rather be executed than spend his life in prison (TT3487).

The defense attorneys were prepared to go forward with the penalty phase and had witnesses available (T3488).

Defense counsel advised the court Reynolds wanted to waive the advisory sentencing jury (TT3494). The State had no objection (TT3494, 3498). The judge did not accept the waiver and said he wanted the jury advisory sentence (TT3498). Defense counsel objected (TT3499).

The State presented evidence that Reynolds had been convicted not only of the present crimes but also of aggravated robbery in Texas, aggravated assault in Arizona, and aggravated battery in Hillsborough County, Florida (TT3513, 3514, 3515; State Exhibits 1-5). Tonya Chapple, the victim in the Hillsborough County case, testified that Reynolds offered her $20.00 for a ride and, when she refused, pointed a gun at her and told her to get in the car (TT3522). Defense counsel objected because Reynolds had been charged with sexual battery,

armed kidnapping and aggravated battery but plead only to the aggravated battery (TT3522). The objection was overruled.

Chapple then testified that Reynolds told her to drive to a particular location (TT3524-25). When she stopped, Reynolds grabbed her hair and jerked her out of the car. He took her into a mobile home (TT3524). He told her to take her clothes off. He hit her over the head with the gun and beat her (TT3525). Chapple grabbed the gun out of Reynolds' pocket and got away (TT3526). Chapple identified a photograph depicting the injuries she received (TT3527). On cross-examination, Chapple admitted that she lived in a trailer with Fred Chapple (TT3530). After the alleged incident, she went back to Lenny's bar and grabbed and shook someone (TT3530). She then went home and was driven to the hospital by Fred Chapple (TT3531). Defense counsel asked whether it was Fred who actually beat her (TT3531).

Shirley Razor, Robin's mother and Christina's grandmother, established that Christina was 11 years old at the time of her death (TT3533).

Danny Razor, Robin's brother and Christina's uncle, gave a statement which the judge instructed the jury was a victim impact statement and not to be considered in aggravation (TT3535). Razor identified the victims (TT3539, 3540).

The defense presented no evidence (TT3541). Judge Lester questioned Reynolds as to whether he was certain he did not want to present mitigation. Reynolds said he did not (TT3542). After an overnight recess, the judge asked Reynolds whether he wanted to present any mitigation. Reynolds stated he would like to address the victims= family (TT3556). After further discussion, Reynolds= position was that he would address the judge at the *Spencer* hearing (TT3564-65).

The State argued for the aggravating circumstances of: (1) contemporaneous capital conviction and prior violent felony (TT3569-70); (2) during the course of a burglary (TT3570); (3) committed to avoid lawful arrest (TT3571); (4) heinous, atrocious and cruel (TT3571-73); and (5) as to Christina only **B** victim less than 12 years old (TT3573).

The jury returned advisory sentences of death by a unanimous vote of twelve to zero for the deaths of both Robin Razor and Christina Razor (R743-744, TT3468-3603, 3597).

A *Spencer* Hearing was conducted on June 6, 2003 (R833-34, TT3604-3704). Defendant had filed a Notice of Filing with documents attached (TT3607). The State did not object to the deposition of Stacia Adams but did object to the depositions of John Parker and Justin Pratt since they related to residual doubt (TT3607). Defense counsel did want to present residual

doubt Ain some fashion.@ (TT3608). The judge overruled the State=s objection but cautioned that residual doubt was not going to be the Amainstay@ of the *Spencer* hearing (TT3608).

Defendant addressed the court (TT3610). He disputed the prosecutor=s closing argument (TT3611-13) and the evidence (TT3614-3702).

At the sentencing hearing, defense counsel requested a new trial because Agent John Parker[2] misrepresented the reason for his suspension from the Seminole County Sheriff=s Office (TT3709).

On September 19, 2003, Judge Lester sentenced Reynolds to life imprisonment for both the second-degree murder of Privett and the burglary. The sentences were concurrent (TT3717). The trial judge imposed two sentences of death on Reynolds for the murders of Robin Razor and Christina Razor (R936-965, TT3717-3718). The Circuit Court found the following four aggravating circumstances as to Robin Razor:

> (1)The defendant was previously convicted of another capital felony or a felony involving the use or threat of violence to the person;

[2]The agent was first called AHarper@ but both defense counsel and the trial judge later called the agent AParker@ (TT3710, 3712).

(2) The capital felony was committed while the defendant was engaged in or was an accomplice in the commission of or in an attempt to commit any burglary;

(3) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest; and

(4) The capital felony was especially heinous, atrocious or cruel.

(R940-45).

The Circuit Court found the following five aggravating circumstances as to Christina Razor:

(1) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person;

(2) The capital felony was committed while the defendant was engaged or was an accomplice in the commission of or in an attempt to commit any burglary;

(3) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest;

(4) The capital felony was especially heinous, atrocious or cruel; and

(5) The victim of the capital felony was a person less than twelve years of age.

(R951-57).

The Circuit Court found the following non-statutory mitigating circumstances:

(1) The defendant was gainfully employed;

(2) The defendant manifested appropriate courtroom behavior throughout the pendency of the guilt and penalty phases of the trial and during the *Spencer* hearing;

(3) The defendant cooperated with law enforcement;

(4) Residual doubt;

(5) The defendant had a difficult childhood; and

(6) The defendant can easily adjust to prison life.

(R946-50).

STATEMENT OF THE FACTS

Robin Razor and Danny Ray Privett lived together as husband and wife for eleven years (TT852). They had two children: Christina, 11, and Danielle, 14 (at the time of the murders) (TT853, 2424). Privett and Danny Razor were renovating two trailers located on property where Privett, Robin, Danielle and Christina lived in a camper (TT855-56). Shirley Razor, Robin=s mother, had dinner with Robin, Christina, and Privett on July 21, 1998 (TT859). Danielle was spending the night at her friend, Tanya Pennington=s, house (TT859,891). Christina had previously spent the night at Tanya=s house and had a ARugrats@ sleeping bag (TT892-93). When Shirley returned to the trailer on July 22 and knocked on the door, she received no response (TT860-61). As she walked to her own trailer nearby, she saw Privett laying on the ground. This did not alarm her since he sometimes would get drunk and lay down to go to sleep (TT862). Shirley went to her own trailer for lunch. After she finished,

she walked back past Privett and just Aknew there was something wrong@ (TT862).

When Shirley saw Privett had a hole in his head, she ran to a neighbor=s house to call police (TT863). She then went to the camper and could see two people inside (TT864). A couch was blocking one of the camper=s doors, and the other door was locked from the inside (TT869-70).

The police arrived. Deputy Harrison examined Privett and saw that his face was Adeteriorated.@ (TT874). Harrison saw a piece of cinder block laying nearby. It appeared to have blood on it (TT874). Harrison then approached the camper and could see a woman and small child laying inside (TT875). He secured the area and did not enter the camper (TT876-77).

Terry Cresswell, evidence specialist for Seminole County Sheriff=s Office, collected between eighty and one hundred items for evidence (TT963-64). These items included footwear tracks, bath towel, pink pillow, underwear, blood samples inside and outside the camper, concrete block with bloodstains, beer cans, a tire iron, pruning shears, a hammer, screen door, paring knife, lady=s ring, and the doorknob of the front door (TT951-968). There was hair throughout the crime scene, and samples were collected (TT1028).

No latent prints were developed on the concrete block in the camper (TT1588). No latent prints of value were found on the pocket knife (TT1589). None of the footprints were made by the defendant's work boots (TT1598). Palm prints could not be matched to anyone (TT1599). There was human blood on the Rugrats blanket, pink pillow, switch plate, a pair of boots and panties(TT1621, 1626, 1631, 1634, 1704). There was no semen on the panties (TT1661). In fact, all swabbing tested negative for semen (TT1691). There was human blood, but no semen found on the oral and vaginal swabs taken from Robin and Christina Razor (TT1657).

Inside the trailer, DNA on the Rugrats blanket, pink pillow, white panties and switch plate matched the DNA of Reynolds (TT1776-1777, 1780, 1786, 1938, 1950). DNA on a piece of wood found over the air conditioner matched Reynolds DNA with Robin and Christina as minor contributors (TT1944-46). DNA from a smear of blood on the outside of the camper matched Appellant’s profile (TT1932). This could have been from a cut hand (TT 2314). There was a mixture of DNA from Appellant, Robin, and Christina on the white panties (TT1938, 1942, 1943). The Rugrats blanket had a mixture of Christina and Appellant’s DNA (TT1768, 1777). A partial DNA extraction from the pillow belonged to Christina (TT1963-1964). The pillow also had the DNA

of Appellant (TT1783). DNA extracted from a stain on a concrete block located on the sofa in the camper matched Robin Razor (TT1985-1986). Christina could not be excluded as a possible contributor (TT1987). A stain on second a piece of the concrete block matched Privett's DNA (TT1978). A pubic hair found on the pink pillow was similar to Reynolds' (TT1513-14). The DNA from the hair matched Appellant's DNA profile (TT1972). Reynolds was right-handed (TT1243), and the cut finger was on his right hand. The stab wounds to Robin's neck and ribs hit bone and could have caused the knife to slip (TT1353). The laceration to Reynolds' finger was very likely from a knife (TT1353).

Hairs from Christina Razor, Robin Razor, Danny Privett, and Michael Reynolds were compared to hairs seized at the crime scene(TT1514). Some of the hairs found included cat hairs, pubic hair, head hairs that belonged to the victims, limb hairs, and body hairs (TT1521). There was a dark brown Caucasian hair that did not match either the victims or Reynolds (TT1522). Hair found on Robin's hand was dissimilar to everyone in the case (TT1524).

Reynolds went to the emergency room at Central Florida Regional Hospital at 7:55 a.m. on July 22, 1998, for ankle and finger injuries (TT1060, 1068). Reynolds claimed he injured his finger when he tripped at home and caught his hand on a nail or

burr sticking out of a screened enclosure (TT1061-62, 1078, 1079). Reynolds asked the nurse whether it looked as if a nail could have caused the injury (TT1063) Reynolds claimed he got the abrasions on his hands while he was changing a tire on the way to the hospital (TT1063). There was no blood on Appellant=s clothing (TT1064) While Reynolds was in the treating room, he kept falling asleep (TT1065). He made no complaint of thorns in his hands (TT1063) Emergency room records described Reynolds as Acooperative and calm@ and oriented as to time and place (TT1072). Dr. Irrgang testified that the injury to appellant=s hand was very likely inflicted by a blade of a knife (TT1353). The cuts on Reynold=s hand were not consistent with his story of falling down and cutting his hand on the doorway because his hand would have to be upside down (TT1351, 1358). The rings Robin wore could have caused the injuries to the back of appellant=s hands (TT1352). There would have been blood dropping from the cut to appellant=s finger (TT1353).

Robin Razor had rings on her fingers and it is Avery, very possible@ that those rings made the scratches on Appellant=s right hand (TT1352,1359). It would take "quite a bit" of force for the little aluminum piece on the door to make the laceration on his finger (TT1353).

Reynolds was interviewed by the Seminole County Sheriff's Office (TT1159, 1241). He was not in custody at the time (TT1243). The videotape of the interview was played for the jury (TT1244). According to Reynolds, the dispute he had with Privett consisted of a few words they exchanged and not a major conflict (TT1251-1256). Reynolds first knowledge of the murders was when Richard told him Privett shot his wife and daughter, then shot himself (TT1259).

Reynolds had scratches and marks on the back of his hands (TT1163). He said the scratches came from vines around the oak tree (TT1245) Reynolds said he has never been in the Privett/Razor camper (TT1248). He also had a severely sprained ankle (TT1163). After the interview, Reynolds and the officers went to his trailer where Reynolds supposedly cut his hand on the door frame (TT1165). Where Reynolds said there was a burr on the door that cut his hand, there was a V-notch (TT1180, 1181). The officers did notice Reynolds' puppy that he allegedly tripped over when he cut his hand (TT1184). Reynolds admitted going to the hospital, and said he had a flat tire on the way but his jack broke (TT1184-86). Reynolds consented to a search of his trailer, and items were collected (TT1172, 1173, 1243).

There was a blue Dodge Aspen near Appellant's trailer (TT1167). Forty-one items were seized from the vehicle (TT1333).

Reynolds also gave hair and blood samples (TT1177, 1178). At one point, a search warrant was obtained (TT1989). Clothing on the clothesline that appeared to be Astrongly bleached@ was seized (TT1307). Clothes that had been washed would remove DNA; the fresher the stain, the easier to remove (TT1992). Bleach has an additional effect of washing away DNA (TT1993).

Reynolds lived on property owned by Gloria Laschance and had purchased a trailer from her (TT2217). Reynolds= trailer was near the victims' trailer and camper (TT2218). On the morning the bodies were discovered, Laschance saw Reynolds doing laundry at 5:30 a.m. (TT2218). Reynolds said he had done laundry the night before and was finishing up that morning (TT2223), but Laschance did not believe he had done any the night before because he borrowed laundry powder the next day (TT2224). Reynolds had a bandage on his foot (TT2222). Reynolds told Laschance he had slipped over a step in his trailer (TT2225). In fact, Laschance had slipped on the steps of the trailer when she owned it (TT2226).

Approximately one month after the murders, Reynolds was arrested in Hillsborough County (TT1168, 1198).

The medical examiner, Dr. Sara Irrgang, noted that the injuries to Privett were predominately on the head and face (TT1088). He had a large depressed skull fracture caused by

three or more blows to the head (TT1101, 1103). There were no significant defensive wounds (TT1106). Privett died within a matter of a few minutes (TT1109). Robin Razor had extensive contusions around her face and eyes (TT1111). She had multiple stab wounds, and her neck vertebra was broken (TT1112, 1119). It appeared there had been a violent struggle (TT1115). Robin had defensive wounds on her arm and hand (TT1116, 1121). She had hair mixed in with the blood on her hands (TT1143). The ultimate cause of death was a broken neck (TT1125). Christina Razor had a stab wound to the neck and sternum (TT1126, 1127). She had injuries to the mouth and a blow to the head (TT1128). The cause of death was Asignificant internal and external hemorrhage.@ (TT1128). All victims were murdered between 9:00 p.m. and 7:00 a.m. (TT1142).

The night of the murders, Jason Columbus, a neighbor of the Privett/Razor family, saw Privett sitting on a car with some other people (TT899-901). Columbus had seen Reynolds driving that type car and did not know of another dark-colored Dodge in the area (TT902). Reynolds lived on Columbus= grandparents= property a short distance from Columbus= house (TT902, 905). There were about seven families on the street and not much traffic (TT903). Columbus recognized a car at an impound lot

that was similar to the one he saw the night of the murders (TT909-911). The car belonged to Reynolds (TT916).

Prior to the murders, Ernie Rash, a family acquaintance, had seen Privett and Reynolds arguing violently (TT880). Privett and a friend were working on a boat trailer when Reynolds started cussing at everyone and arguing about the boat trailer (TT882). Reynolds got his truck to tow the trailer, but Privett took the tongue off the trailer (TT883). Reynolds was very upset, told Privett to just keep the trailer, and went spinning out of the area (TT884, 886).

Darrell Courtney was serving a ten-year sentence for bank robbery when he met Reynolds in jail (TT1427). Reynolds ultimately acknowledged responsibility for the murders, stating: ALook, with my record, I can=t leave any witnesses. But I do regret doing the little girl.@ (TT1429). Courtney made a deal with the government for substantial assistance and received 30 months off his federal sentence (TT1430, 1431). Courtney had shown a letter from Reynolds to prison officials (TT1431). The letter was read to the jury (TT1446-47). The officials asked whether Courtney knew about the murder (TT1444). Courtney had never testified against another inmate and said it could get a person killed (TT1437).

According to Christopher Zink, while Reynolds was in jail he had an argument with another inmate while going to court and said, Ahe=d kill the black guy like he did them people in Sanford@ (TT1567). The first time investigators went to see Zink, they did not mention the murders and did not offer him reduced time if he testified (TT1569). Zink never told anyone about what Reynolds said until he talked to an investigator five years later (TT1571).

At the close of the State=s evidence, Reynolds moved for judgment of acquittal (TT2331). The motion was denied (TT2332).

Reynolds presented testimony from seventeen witnesses, several of which involved the chain of custody or testing of evidence.

Danielle Privett, daughter of Privett and Robin and sister of Christina, spent the night at her friend=s house the night of the murder (TT2412-13). She was aware her parents were having problems with Alan Combs and Justin Pratt (TT2416). Privett and Robin had been living in the camper a few months when they missed a rent payment (TT2417). On Monday, Combs and Privett argued over the late rent payment (TT2420). Privett and Robin were murdered Tuesday night (TT2421). The family was receiving crank phone calls during this period (TT2423). Prior to moving into the camper, they had an argument with Combs over a

horseshoe game (TT2424). Combs returned to the scene with a gun (TT2418, 2419). Danielle did not recall telling anyone about seeing a gun (TT2431).

Privett's sister, Theresa Barcia, confirmed that Danielle said that Combs and Pratt were at the camper the Monday night before the family was killed (TT2432). Danielle told Barcia she saw guns (TT2432).

Ray Parker, major crimes unit investigator with Seminole County Sheriff's Office, also verified that Danielle told him her parents had argued with Pratt (TT2566). Parker spoke with Pratt after the homicides, and the interview was read into the record (TT2566, 2569-2580). The interview revealed that Pratt said he left Privett a note regarding the payment on the camper (TT2581). Pratt had no transportation except a bicycle, but his girlfriend had a car (TT2581, 2584). Pratt agreed to let law enforcement search his apartment (TT2582). There was nothing recovered to suggest Pratt had anything to do with the murders (TT2582).

Pratt's girlfriend, Nicole Edwards, was aware Pratt rented a camper to the Privett/Razors (TT2587). Since they were close friends, it was all right to miss a payment (TT2587). Pratt would generally pick up the payment/money in person (TT2587).

Edwards did not recall going to the camper right before the murders with Pratt and Combs (TT2588). Edwards was with some friends the night of the murders (TT2588). She previously told Investigator Parker she was spending the night at Pratt's house (TT2593). Pratt took the murders "very, very, very badly" (TT2594). Pratt had been arrested for domestic violence against her subsequent to the murders and the warrant was still outstanding (TT2595).

The defense investigator, Sandra Love, tried to locate Justin Pratt (TT2336-37). She found him in Oklahoma, but he became angry about the screening process at the airport and was escorted off the property by police (TT2344-45). Pratt had made a statement against his interests on July 23, 1998, which the defense sought to admit (TT2356-62). The court found that Pratt was unavailable to testify (TT2365), but ruled some portion of the statement inadmissible (TT2365-66).

Robert Scionti was friendly with Darrell Courtney, another inmate (TT2610). He did not know Reynolds (TT2611). Courtney told him that Reynolds and he had been incarcerated together and that Reynolds had not confessed to him (TT2612). Courtney told him he was in the Seminole County Jail awaiting trial on armed robbery charges and that he would not be testifying for the State (TT2622). Scionti was currently represented by same

defense attorney as Reynolds, but said he did not try to contact him regarding the Reynolds case (TT2613-14).

Norma Murrell worked at the Lil: Champ from 6 a.m. to 3 p.m. Reynolds borrowed a jack from her in the early morning hours (TT2434, 2435, 2436).

At the close of the defense case, Reynolds moved for judgment of acquittal (TT2732). The motion was denied (TT2733). The State recalled one witness, Charles Badger, to identify the summary sheet for DNA profiles (TT2735). Defendant then renewed the motion for judgment of acquittal (TT2761). The motion was denied (TT2762).

The jury returned verdicts of guilty to the charges of:

(1) Second Degree Murder of Danny Ray Privett (a lesser-included offense);

(2) First Degree Murder of Robin Razor;

(3) First Degree Murder of Christina Razor; and

(4) Burglary of a Dwelling With a Battery With a Weapon.

(R712-715,TT3030-31).

SUMMARY OF ARGUMENT

POINT I. THE TRIAL JUDGE DID NOT ABUSE HIS DISCRETION IN ADMITTING SOME BUT NOT ALL, OF JUSTIN PRATT'S STATEMENT. DEFENSE COUNSEL DID NOT POINT OUT ALL THE OBJECTIONS RAISED ON APPEAL. PRATT WAS NOT UNAVAILABLE; THE DEFENSE SIMPLY DID NOT SERVE HIM WITH A SUBPOENA. EVEN IF PRATT WERE UNAVAILABLE, NOT ALL OF THE STATEMENTS WERE RELEVANT, NOR WERE THEY AGAINST HIS PENAL INTERESTS. THERE WAS NO DUE PROCESS VIOLATION BECAUSE REYNOLDS PRESENTED THE MOST DAMAGING PORTIONS OF THE STATEMENT. ERROR, IF ANY, WAS HARMLESS.

POINT II. THE STATE PRESENTED A PRIMAFACIE CASE TO THE JURY. THE ARGUMENTS RAISED ON APPEAL WERE NOT RAISED AT THE TRIAL LEVEL. REYNOLDS' DNA WAS FOUND ON ITEMS IN THE CAMPER WHERE HE SAID HE HAD NEVER BEEN. SOME OF THE ITEMS CONTAINED MIXTURES OF THE DNA OF REYNOLDS AND THE VICTIMS. HE LIVED CLOSE BY AND HAD MOTIVE, OPPORTUNITY AND CAPACITY. HIS HYPOTHESIS OF INNOCENCE WAS NOT WELL-FOUNDED. FURTHERMORE, HE MADE INCRIMINATING STATEMENTS TO TWO PEOPLE.

POINT III. THE TRIAL JUDGE DID NOT ABUSE HIS DISCRETION IN REJECTING APPELLANT'S REQUEST TO WAIVE THE PENALTY PHASE JURY. THE TRIAL JUDGE FOLLOWED ESTABLISHED CASE LAW.

POINT IV THE TRIAL JUDGE DID NOT ABUSE HIS DISCRETION IN ALLOWING A WITNESS TO TESTIFY ABOUT DETAILS OF A PRIOR VIOLENT FELONY. IT IS ENTIRELY APPROPRIATE TO ALLOW DETAILS OF THE PRIOR FELONY. ERROR, IF ANY, WAS HARMLESS WHERE APPELLANT HAD TWO OTHER PRIOR VIOLENT FELONIES AND COMMITTED A TRIPLE MURDER.

POINT V THE CLAIM THAT THE STANDARD INSTRUCTIONS SHIFT THE BURDEN OF PROOF HAS BEEN REPEATEDLY REJECTED BY THIS COURT. DEFENSE COUNSEL DID NOT SPECIFICALLY RAISE THE OBJECTION TO THE JURY INSTRUCTIONS WHICH IS NOW RAISED ON APPEAL.

POINT VI THE TRIAL JUDGE DID NOT ABUSE HIS DISCRETION BY LIMITING CONSIDERATION OF RESIDUAL DOUBT. RESIDUAL DOUBT IS NOT A PROPER CONSIDERATION.

POINT VII THE STATE PROVED BEYOND A REASONABLE DOUBT THAT THE MURDERS OF ROBIN AND CHRISTINA RAZOR WERE HEINOUS, ATROCIOUS AND CRUEL, AND DONE TO ELIMINATE WITNESSES. BOTH VICTIMS HAD MULTIPLE INJURIES AND DEFENSE WOUNDS. THERE WAS NO REASON TO KILL THEM EXCEPT THAT HE HAD KILLED PRIVETT AND, AS HE STATED, WITH HIS RECORD HE HAD TO ELIMINATE ALL WITNESSES. APPELLANT'S ARGUMENT THAT THE TRIAL JUDGE DID NOT ASSIGN THE PROPER WEIGHT TO MITIGATION IS NOT A VALID CONSIDERATION. THE TRIAL JUDGE ACKNOWLEDGED ALL MITIGATION. THE WEIGHT TO BE ASSIGNED THAT MITIGATION IS WITHIN THE TRIAL JUDGE'SDISCRETION. THERE WAS NO ABUSE OF DISCRETION.

POINT VIII APPELLANT'S *RING* CLAIM HAS BEEN REPEATLY REJECTED BY THIS COURT. THIS CASE INVOLVED BOTH CONTEMPORANEOUS MURDERS AND PRIOR VIOLENT FELONIES. IT WAS COMMITTED DURING A BURGLARY.

POINT I.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING PORTIONS OF JUSTIN PRATT=S STATEMENT

Appellant claims the trial court abused its discretion in admitting some parts of Justin Pratt=s statement and excluding others. He first argues the redacted portions were not admitted to prove the truth of the matter asserted, i.e., not hearsay. Second, he claims the entire statement was an admission against penal interest and, thus, admissible. Last, Appellant argues that even if the statement was hearsay not within any hearsay exception, the trial court abused its discretion in redacting some portions because it denied due process.

Appellant sought to introduce the 46-page statement Justin Pratt made to Investigator Parker on July 23, 1998 (TT2332, 2356). Appellant argued Pratt's statement was a statement against interest (TT2333). The testimony of Sandra Love, defense investigator, was presented. She had been looking for Justin Pratt and learned he was living on the street in his van in Oklahoma (TT2337-2339). Pratt's stepmother went to Maysville to find him. As a result of her efforts, Pratt called Love and agreed to testify in this case (TT2340-2341).

Love flew to Oklahoma to meet Pratt and fly back to Florida with him. Pratt came to the airport and Love gave him a ticket; however, he did not get on the airplane. Pratt was searched

several times and became irate. They did not make their flight because Pratt said he left his van in short-term parking (TT2342). Love made arrangements for them to take a later flight (TT2342). Pratt became irate and was "cussing and screaming, walking away and, you know disappearing." (TT2344). When the airline employees told Love that she and Pratt could board, Pratt was still yelling and screaming. Love got on the plane thinking Pratt would follow. The police got on the plane and told Love they escorted Pratt from the property because he was not "acting right." The money for his ticket was refunded (TT2345). Before Love boarded the plane, Pratt had said "the only way I'm coming is if somebody forces me to come, but good luck finding me." (TT2345). Love spoke to Pratt's stepmother and Pratt had left town with another friend. Pratt had not contacted the defense since that time (TT2345). Pratt had an outstanding warrant in Seminole County (TT2347).

The defense did not attempt to secure Pratt's presence by the Uniform Foreign Depositions law (TT2348). The court had authorized use of an attorney and investigator in Oklahoma (TT2348). Love did not know whether any attorney was hired to help secure Pratt (TT2349). Love contacted an investigator who provided a report, but he could not produce a physical address for Pratt (TT2349). Love did not contact law enforcement in

Oklahoma even though there was an outstanding warrant for domestic violence (TT2350-2351).

The trial judge ruled Pratt was unavailable and that the defense made reasonable efforts to secure his presence (TT2355). The judge stated that the entire statement was not going to be admitted and that it should be pared down to the incident involving a threatening note (TT2365-66). Statements regarding payments on the trailer were also admissible (TT2366). The information regarding Privett being in the process of urinating was cumulative to police testimony (TT2366). The parties went through the statement page-by-page, and the trial judge determined the admissibility of each section (TT2367-70). The trial judge asked for corroborating circumstances (TT2373). Counsel was asked for research (TT2374-77). After reviewing the entire statement and taking a recess, defense counsel presented no research to the judge (TT2398).

The trial judge allowed pages 1 to 6. Defense counsel did not want page 7 to be admitted (TT2368). The parties disagreed about page 8 (TT2369-70). Defense counsel did not request pages 9, 10, or 11. He requested page 12 (TT2377). Counsel argued the statement that Privett cut Robin was not offered for the truth of the matter asserted (TT2378). When the trial judge said that "Debbie" should be the one to testify to certain facts, defense counsel stated: "Agreed." (TT2378). The parties

continued to the end of the statement, defense counsel posing objections to deleted parts (TT2379-85). Defense counsel agreed that pages 18, 19, 20, 21, 22, 27, 28, 29, 30, 31, 32, 33, 34, all except two lines on 35, 38, 39, 41, 42, 43, 44, 45, and 46 were not required (TT2380, 2393-96). The trial judge ruled that whether Pratt called the Razor trailer after the murders was inadmissible through Pratt's statement, but the question could be asked to Inv. Parker (TT2392).

Inv. Parker read the redacted statement into evidence (TT 2569-2580). The statement included that Privett made a deal to buy the camper from Pratt but was not paying (TT2573, 2575). Privett was paying about $25.00 a week which was really ridiculous, so it was pretty much understood that when Pratt came back from Oklahoma he would take the trailer back and the money Privett paid would be considered rent (TT2574). Privett was supposed to pay $150.00 per week and was "coming up with these measly little twenty-five a week." (TT2574). Pratt started complaining about the back payment, so Robin came by and left Pratt a note. Pratt went out to the Privett residence and left a note stating that there would be "war" with "conventional weapons." (T2576). Pratt denied being really upset with Privett (TT2576). Pratt admitted writing a "bunch of incriminating stuff" which made it look "like I was out to kill him or something" (TT2577). Pratt needed the money to straighten out

his driver's license situation (TT2578). He had already put up "For Sale" signs for the trailer (TT2578). He needed to get the trailer and fix it up to sell. It was worth about $2000.00, but the way it was with the "hicks" living in it, made it worth about $500.00 because they had goats and dogs in it (TT2579). Pratt was about to give Privett and Razor an ultimatum that they pay him $110.00 by Friday. It was "sticky because we're good friends and here we got in this deal where they owe me money." (TT2579). Pratt had been complaining to mutual friends about the money but he didn't have the backbone to stand up to Privett because they were friends (TT2580).

A. <u>Statement not hearsay</u>. Although the trial judge found Pratt unavailable, he was available. As noted by the State in cross-examination, there is a procedure for securing the presence of witnesses that was not utilized. Being unavailable requires (1) a privilege; (2) refusal to testify; (3) memory loss; (4) mental or physical illness or (5) absence from the hearing, and the proponent of the statement has been "unable to procure the declarant's attendance by process or other reasonable means." §90.804(1). Given the circumstances, it was unreasonable to believe that Pratt, who lived in a van and hop-scotched around among states, would appear at the trial. *See Jones v. State*, 709 So. 2d 512 (Fla. 1998); *Pittman v. State*, 646 So. 2d 167 (Fla. 1994). The burden of demonstrating

unavailability of a witness rests on the party that seeks to use the missing witness's previous testimony. *Jackson v. State*, 575 So. 2d 181, 187 (Fla. 1991). In *Lawrence v. State*, 691 So. 2d 1068, 1073 (Fla. 1997), this Court held that the State failed to show "unavailability" under almost identical circumstances. In *Lawrence*, the investigator made contact with the witness who agreed to appear, then didn't. This Court faulted the State for failing to obtain a subpoena. The witness had been camping in a state park. This Court held that the State's efforts were not sufficient to establish unavailability under section 90.804(1), Florida Statutes.

In any case, the only section that Appellant argued was not hearsay, and thus the only issue that is preserved on appeal was the statement that Privett cut Robin (TT2378). Appellant argues that Pratt's knowledge of the manner of death was not hearsay and not admitted to show the truth of the matter asserted. Instead, the statement showed Pratt knew the manner of death before it was released to the public. (Initial Brief at 26). Even if this statement was not hearsay, it was not relevant. §90.801.2 Fla. Stat. Pratt was a friend of Privett for five years. He was not interviewed until July 23, a day after the murders. Even though the newspaper did not publish the manner of death, it is certainly knowledge that people in the immediate community would know.

B. Statement against penal interest. The trial judge allowed the inculpatory portions of Pratt's statement. There were many sections defense counsel did not ask to be admitted. Now, appellate counsel argues the entire statement should have been admitted. This issue is not preserved except to the extent trial counsel objected. The only portions Reynolds now argues were pertinent are that Pratt knew the manner of death before the public and that Pratt tried to create an alibi. (Initial Brief at 29). Whether Pratt was with Nicole Edwards was subject to dispute (TT2593, 2598). Nicole told Inv. Parker that Pratt was with her from 2:00 a.m. to 7:00 a.m. Brenda Keck said she saw Nicole and Pratt at 7:00 a.m. So whether Pratt said he was with Nicole is not inculpatory unless there was some proof he was not with Nicole. The statement regarding manner of death is likewise not inculpatory because there is no proof everyone in the neighborhood didn't know how the victims were killed.

Appellant cites *Voorhees v. State,* 699 So. 2d 602 (Fla. 1997), for the proposition that Pratt's statements were admissible. In *Voorhees*, the codefendant admitted to killing the victim. This was certainly relevant, exculpated Voorhees, and met the test for corroboration because the evidence supported the statement. It was clearly a statement against interest. Pratt's statement was not. The other case cited by Reynolds, *Carpenter v. State*, 785 So. 2d 1182 (Fla. 2001), does

not support his argument. In *Carpenter*, this Court stated that: "Importantly, the State's theory in both *Voorhees* and *Sager,* as in the present case, included a charge that both defendants were involved in the murder." *Carpenter*, at 1203. In *Carpenter*, the co-defendant made inculpatory statements. These cases are distinguishable from the present case in which there is nothing to indicate Pratt was involved in the murders.

In *Sims v. State*, 754 So. 2d 657, 661 (Fla. 2000), this Court held there was no error in prohibiting a third-party statement where there was no indicia of trustworthiness. There must be other evidence to corroborate the statement. Here there was not. Furthermore, only the statements which are individually self-incriminatory should be admitted under the statement-against-interest exception. *Brooks v. State*, 787 So. 2d 765, 775 (Fla. 2001). The trial judge did not abuse his discretion in allowing the statements regarding late payments on the trailer and the threatening note. These statements incriminated Pratt. The portions the trial judge disallowed were not relevant to any issue, did not incriminate Pratt, and were not admissible.

C. Due Process. Reynolds did not argue a constitutional due process or fair trial violation at the trial level and this argument is not preserved. Neither did he argue the "rule of completeness." Appellant cites *Curtis v. State*, 876 So. 2d 13

(Fla. 1st DCA 2004) and *Neiner v. State*, 875 So. 2d 699 (Fla. 4th DCA 2004) as authority. In both cases, another person confessed to the crime. The courts held this evidence was admissible as a matter of due process. In *Curtis*, the declarant had been identified by the victim's husband, and he confessed; however, he was acquitted at trial. The jurors were told the declarant had been charged, but that he was acquitted. The jury was not told the declarant confessed to the crime. Under these circumstances, it was a due process violation not to admit the confession. However, this case is a far cry from the present case in which there is nothing to tie Pratt to the murders. *Neiner* is likewise distinguishable. In *Neiner*, the defendant in a drug possession case was precluded from admitting evidence that she could not obtain a copy of her prescription for the drug because the pharmacy destroyed its records. This is completely dissimilar to the present case. Reynolds was not denied a fair trial.

Error, if any, was harmless. *See State v. DiGuilio,* 491 So. 2d 1129, 1135 (Fla. 1986). The police searched Pratt's house and found nothing. He was investigated and eliminated as a suspect. Further, Reynolds' DNA was all over the crime scene, a place Reynolds denied ever visiting. Reynolds had a score to settle and lived nearby. Privett was seen sitting on Reynolds' car at 11:00 p.m. The murders occurred between 11:00 p.m. and

7:00 a.m. Reynolds was seen washing clothes at 5:30 a.m. and went to the hospital with suspicious injuries. Pointing the finger at Justin Pratt was simply a smokescreen to create reasonable doubt. The jury was aware of Pratt's motive and threat; however, the evidence all pointed to Reynolds.

POINT II.

THE TRIAL COURT DID NOT ERR IN DENYING THE MOTIONS FOR JUDGMENT OF ACQUITTAL

Appellant argues there was insufficient evidence to support any of the convictions. He argues there was insufficient evidence of burglary to support a felony murder conviction, and the circumstantial evidence which was presented was insufficient on all counts. Appellant claims the conviction was based solely on faulty DNA evidence and a Abotched@ investigation (Initial Brief at 39). Appellant argues that packaging the pink pillow together with a blue towel caused cross-contamination.

Several witnesses testified, and a photographs showed, that the pink pillow and blue towel were lying together at the crime scene where there was extensive blood, so there was no concern that the items were packaged together (TT1031, 1716). Reynolds argues that sweepings from the pillow and towel were contaminated due to the procedure. The procedure for sanitizing between sweepings was explained (TT1486-87). There was no showing of evidence tampering. The trial judge held a lengthy

Frye hearing on the Motion(s) to Exclude DNA Testing (R75-76, 442-443; TT 3038.1-3065, 3066-3322, 3323-3383, 3384-3436, SR139-177). The *Frye* hearing took place on July 18, August 2, September 19, and 27, and October 9, 2002. The motion to exclude DNA evidence was denied (R514-515). Appellant also filed a motion requesting the State be prevented from cross-examining the defense expert who conducted only chemical testing and no DNA testing (R494-496). The State had released evidence to the defense expert for testing (R497). Yet the defense presented no evidence to dispute the DNA testing done by FDLE. The portions cited as fact by Appellant are from cross-examination and were explained by the experts on direct and re-direct.

Appellant alleges that none of the DNA matched and that, even though he supposedly cut his hand at the crime scene, his blood was not found at the scene (Initial Brief at 40). Both David Baer and Charles Badger testified regarding DNA results. David Baer performed RFLP testing and Charles Badger performed STR testing. David Baer's test results were within the accepted margin of error (TT1806, 1870). If there was not concordance between the first and second sizer, the testers would re-examine the results. If they could not agree on the results, then the item was re-tested (TT1865). Before a result is released, there must be agreement (TT1865). Any second sizing done by John Fitzpatrick was re-done (TT2188). Harry Hopkins, the DNA unit

supervisor, was the third sizer (TT2194). Furthermore, Appellant claims he is innocent because none of the victims' blood was found on the defendant, on his clothing, or in his car; that there were no footprints, and hair in Robin Razor's hand did not match Appellant. Although Reynolds argues that hair was clutched in Robin's hand and could only be from the killer, the testimony was that the hair was stuck to her hand by the blood, not "clutched" (TT1033,1131). In any case, the identifiable hair was Robin's or from an animal (TT1532, 2046, 2054-65). In fact, all except four hairs examined matched one of the victims (TT1534). The only reason testing was not done on all items was because of limited resources (TT2033). Because there was so much evidence, the State had to prioritize which items to test (TT1028).

Appellant argues that since none of his blood was found on the victims, he couldn't be the killer. Reynolds' blood was all over the murder scene. Whether he happened to drip blood on the victims is immaterial when the State presented seven locations containing Reynolds' DNA, many of the locations including a mixture of Reynolds and victim's blood. The fact that none of the victim's blood was found on the defendant or his clothing is not remarkable. Reynolds lived nearby and did not need to drive his car to the murder scene. Further, he washed his clothing and removed any evidence.

In any case, Appellant did not make any of the above arguments at the trial level. The entire motion for judgment of acquittal was:

> Judge, at this time we, on behalf of Mr. Reynolds, the defendant, would ask the Court for a judgment of acquittal as to each of the counts and basically we're essentially alleging at this point in time that they have failed to prove that Michael Reynolds has committed any crime.

(TT2331). When the motion was renewed, the entire argument was:

> Your Honor, at this time, the Defense would renew its motion for judgment of acquittal on the same basis and the same grounds as previously stated.

(TT2732). The grounds now argued on appeal were not raised in the trial court; therefore, this issue is not properly preserved. As this Court stated in *Stephens v. State,* 787 So. 2d 747, 753 (Fla. 2001):

> This claim was not preserved for appeal because Stephens' counsel made a bare bones motion for judgment of acquittal, without any specific argument. In *Woods v. State,* 733 So. 2d 980 (Fla. 1999), this Court held the claim of improper denial of a motion for judgment of acquittal had not been preserved for appeal by a boilerplate motion without specific grounds.
> We said:
>
> > To preserve an argument for appeal, it must be asserted as the legal ground for the objection, exception, or motion below. *See Archer v. State,* 613 So. 2d 446, 448 (Fla. 1993); *Steinhorst v. State,* 412 So. 2d 332, 338 (Fla.

> 1982). Florida Rule of Criminal Procedure 3.380 requires that a motion for judgment of acquittal "*fully* set forth the grounds on which it is based." *See* Fla.R.Crim.Pro. 3.380(b) (emphasis added). Here, Woods submitted a boilerplate motion for acquittal without fully setting forth the specific grounds upon which the motion was based. 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 984. *See also Geralds v. State,* 674 So. 2d 96 (Fla. 1996) (holding two claims of unconstitutionality of jury instructions pertaining to death penalty proceedings procedurally barred because counsel failed to object with specificity); *Marquard v. State,* 641 So. 2d 54 (Fla. 1994) (finding a particular argument not preserved as to the trial court's denial of motion for judgment of acquittal on murder charge); *Patterson v. State,* 391 So. 2d 344 (Fla. 5th DCA 1980) (holding a bare bones motion for directed verdict will not permit a defendant to raise every possible claimed insufficiency in the evidence); *De La Cova v. State,* 355 So. 2d 1227 (Fla. 3d DCA 1978) (finding a bare bones motion for directed verdict does not raise every possible claimed insufficiency in the evidence).

There was sufficient evidence to support Reynolds' convictions. In *Woods,* this Court reaffirmed the general rule established in *Lynch v. State,* 293 So. 2d 44, 45 (Fla. 1974), that "courts should not grant a motion for judgment of acquittal unless the evidence is such that no view which the jury may lawfully take of it favorable to the opposite party can be

sustained under the law." *See also Gudinas v. State,* 693 So. 2d 953 (Fla. 1997); *Barwick v. State,* 660 So. 2d 685 (Fla. 1995); *DeAngelo v. State,* 616 So. 2d 440 (Fla. 1993); *Taylor v. State,* 583 So. 2d 323 (Fla. 1991).

There is sufficient evidence to sustain a conviction if, after viewing the evidence in the light most favorable to the State, a rational trier of fact could find the existence of the elements of the crime beyond a reasonable doubt. *See Banks v. State,* 732 So. 2d 1065 (Fla. 1999). The question of whether the evidence fails to exclude all reasonable hypotheses of innocence is for the jury to determine, and where there is substantial, competent evidence to support the jury verdict, the Court will not reverse. *Darling v. State,* 808 So. 2d 145 (Fla. 2002). The State is not required to "rebut conclusively, every possible variation of events" which could be inferred from the evidence, but must introduce competent evidence which is inconsistent with the defendant's theory of events. *Id.* Once the State meets this threshold burden, it becomes the jury's duty to determine whether the evidence is sufficient to exclude every reasonable hypothesis of innocence beyond a reasonable doubt. *Id.* The circumstantial evidence standard does not require the fact finder to believe to believe the defendant's version of the facts on which the State has presented conflicting evidence. *Conahan v. State,* 844 So. 2d 629 (Fla. 2003).

The first-degree murder verdicts in this case were general verdicts to first-degree murder (R713, 714). The jury was instructed on both premeditated murder and felony murder (R687, 688, TT2975-76). The jury also returned a guilty verdict on the burglary charge (R715). The evidence was sufficient for the second-degree murder of Privett, the first-degree murders of Christina and Robin Razor, and the burglary.

The trial judge made the following factual findings on the burglary as an aggravating circumstance:

> a. The jury found the Defendant guilty of this aggravator in Count IV, Burglary of a Dwelling with a Battery with a Weapon. The jury was justified in finding that the Defendant intended to commit a crime when he entered the gooseneck prowler camper and that crime was murder so as to eliminate witnesses that could inform the police as to a suspect for the murder of Danny Ray Privett.
>
> b. Substantial competent evidence was submitted at trial which proved the presence of the Defendant in the dwelling of the victims which was the gooseneck prowler camping trailer.
>
> c. The Defendant's DNA was located inside the victims' dwelling. Previously he had stated to the authorities that he had never been inside the subject gooseneck prowler camping trailer. The Defendant's position that he was never in the subject dwelling eliminates any possibility that he could be considered an invitee or that consent to enter was withdrawn. No direct evidence was presented that the Defendant was an invitee nor was there any circumstantial evidence to

> be relied upon to assert that the Defendant was an invitee.

(R941-942). These findings are supported by the record and there is no question Appellant was inside the trailer where DNA on the Rugrats blanket, pink pillow, white panties and switch plate matched Reynolds' DNA (TT1776-1777, 1780, 1786, 1938, 1950). A piece of wood over the air conditioner inside the camper had Reynolds' DNA (TT1945). DNA from a smear of blood on the outside of the camper matched Reynolds' profile (TT1932). This could have been from a cut hand (TT 2314). There was a mixture of DNA from Appellant, Robin and Christina on the white panties (TT1938, 1942, 1943). The Rugrats blanket had a mixture of Christina and Appellant's DNA (TT1768, 1777). A partial DNA extraction from the pillow belonged to Christina (TT1963-1964). The pillow also had the DNA of Appellant (TT1783). DNA extracted from a stain on a concrete block located on the sofa in the camper matched Robin Razor (TT1985-1986). Christina could not be excluded as a possible contributor (TT1987). A stain on second piece of the concrete block matched Privett's DNA (TT1978). A pubic hair found on the pink pillow was similar to Reynolds' (TT1513-14). The DNA from the hair matched Appellant's DNA profile (TT1972). Reynolds was right-handed (TT1243), and the cut finger was on his right hand. The stab wounds to Robin's neck and ribs hit bone and could have caused

the knife to slip (TT1353). The laceration to Reynolds' finger was very likely from a knife (TT1353).

Appellant argues the only evidence was DNA evidence. Not so. There was also evidence of a violent argument between Privett and Appellant over a boat trailer (TT880). Appellant lived near the crime scene, and Privett was seen sitting on Appellant=s car the night of the murders (TT899-901). The cuts on Reynolds' hand were not consistent with his story of falling down and cutting his hand on the doorway because, according to the medical examiner, his hand would have to be upside down (TT1351). Robin Razor had rings on her fingers and it is Avery, very possible@ that those rings made the scratches on Appellant=s right hand (TT1352,1359). It would take "quite a bit" of force for the little aluminum piece on the door to make the laceration on Appellant's finger (TT1353). Clothing on the clothesline that appeared to be Astrongly bleached@ was seized at Reynold=s trailer (TT1307). Clothes that had been washed would remove DNA; the fresher the stain, the easier to remove (TT1992). Bleach has an additional effect of washing DNA away (TT1993). On the morning the bodies were discovered, Gloria Laschance saw Reynolds doing laundry at 5:30 a.m. (TT2218). Darrell Courtney testified that Reynolds acknowledged responsibility for the murders, stating: ALook, with my record, I can=t leave any witnesses. But I do regret doing the little girl.@ (TT1429). Christopher Zink

testified that while Reynolds was in jail he had an argument with another inmate and said, Ahe=d kill the black guy like he did them people in Sanford@ (TT1567).

Reynolds denied being in the camper, yet his DNA was all over the items in the camper and mixed with the DNA of Christina and Robin Razor. His statement to police and fabricated alibi did not hold up. There were no briars in the area of his trailer, and no thorns in his hand at the hospital. The burr on the aluminum door was not oxidized and could not have caused the finger injury unless great force was applied. Pratt was investigated as a suspect, as were any other persons who had a grievance with Privett or Razor. There was no evidence Pratt was involved. There was overwhelming evidence Appellant was.

There was ample evidence before the jury and the evidence did rebut Appellant=s hypothesis that he was not the murderer, that the cuts on his finger were innocent, and that he was not at the crime scene. Unfortunately for Reynolds, the evidence pointed to him and he made statements corroborating the evidence.

POINT III

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN REJECTING APPELLANTS REQUEST TO WAIVE THE PENALTY PHASE JURY

Appellant acknowledges that whether to allow a defendant to waive the penalty phase jury is within the trial court=s

discretion (Initial Brief at 43); *State v. Hernandez*, 645 So. 2d 432 (Fla. 1994); *Sireci v. State*, 587 So. 2d 450, 452 (Fla. 1991); *State v. Carr*, 336 So. 2d 358 (Fla. 1976), *Lamadline v. State*, 303 So. 2d 17 (Fla. 1974). Notwithstanding, Appellant argues that in his case there was an abuse of discretion because the jury heard no evidence of mitigation and their recommendation was improperly skewed and should not have formed any basis for the ultimate sentencing to death (Initial Brief at 44). Appellant recognizes that the trial judge made note of the fact the jury did not receive evidence in mitigation.

It is well-settled that the trial judge has the absolute discretion to accept or reject a defendant's waiver of jury recommendation. *Sireci v. State*, 587 So. 2d 450 (Fla. 1991); *State v. Carr*, 336 So. 2d 358 (Fla. 1976). Even if the State agrees to the waiver, the judge can require a jury recommendation. *Muhammad v. State*, 782 So. 2d 343 (Fla. 2001). Appellant has offered no compelling reason to reverse established law.

POINT IV

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ALLOWING A WITNESS TO TESTIFY TO DETAILS OF A PRIOR VIOLENT FELONY

Appellant complains that the victim of a prior violent felony was permitted to testify as to the facts surrounding the incident.

The State presented evidence that Reynolds had been convicted not only of the present triple homicide but also of aggravated robbery in Texas, aggravated assault in Arizona, and aggravated battery in Hillsborough County, Florida (TT3513, 3514, 3515; State Exhibits 1-5). Tonya Chapple, the victim in the Hillsborough County case, testified that Reynolds offered her $20.00 for a ride and, when she refused, pointed a gun at her and told her to get in the car (TT3522). Defense counsel objected because Reynolds had been charged with sexual battery, armed kidnapping and aggravated battery but plead only to the aggravated battery (TT3522). The objection was overruled.

Chapple then testified that Reynolds told her to drive to a particular location (TT3524-25). When she stopped, Reynolds grabbed her hair and jerked her out of the car. He took her into a mobile home (TT3524). He told her to take her clothes off. He hit her over the head with the gun and beat her (TT3525). Chapple grabbed the gun out of Reynolds' pocket and got away (TT3526). Chapple identified a photograph depicting the injuries she received (TT3527). On cross-examination, Chapple admitted that she lived in a trailer with Fred Chapple (TT3530). After the alleged incident, she went back to Lenny's bar and grabbed and shook someone (TT3530). She then went home and was driven to the hospital by Fred Chapple (TT3531).

Defense counsel asked whether it was Fred who actually beat her (TT3531).

Appellant claims this evidence so prejudiced the jury that it tainted the recommendation. Whether a previous conviction constitutes a felony involving violence under section 921.141(5)(b) depends on the facts of the previous crime. Those facts may be established by documentary evidence, including the charging or conviction documents, or by testimony, or by a combination of both. *Gore v. State,* 706 So. 2d 1328, 1333 (Fla. 1997). For example, in *Anderson v. State*, 841 So. 2d 390, 406 - 407 (Fla. 2003), a witness testified about a completed sexual battery. Anderson had pled to attempted sexual battery and argued it was error to allow details of a completed crime. This Court held that the trial court did not err in permitting the State to present evidence regarding the details of the attempted sexual batteries, even if that evidence included testimony about completed acts of sexual battery. *See also Morgan v. State,* 415 So. 2d 6, 12 (Fla. 1982); (jury aware that appellant's previous conviction of second-degree murder, for which he was serving a thirty-year sentence at the time of the instant murder, was obtained pursuant to an indictment for first-degree murder); *Power v. State*, 886 So. 2d 952, 964 (Fla. 2004)(four individuals testified as victims as to Power's prior violent felony convictions); *Spann v. State*, 857 So. 2d 845, 855 (Fla. 2003);

Rose v. State, 787 So. 2d 786, 800 (Fla. 2001); *Lockhart v. State*, 655 So. 2d 69, 72 (Fla. 1995). Appellant had the opportunity to cross-examine Chapple and made the point that it may have been her boyfriend who committed the crime.

It is only when a defendant has no opportunity to rebut hearsay testimony that a problem arises. *See Bowles v. State*, 804 So. 2d 1173, 1184 (Fla. 2001). For example, this Court recently reversed a case in which the State introduced hearsay testimony of an unavailable witness who was the victim of a prior felony. *Lebron v. State*, 894 So. 2d 849 (Fla. 2005). The case was reversed for various reasons regarding the evidence presented on the prior violent felony. None of these reasons apply in the present case. This Court stated:

> In general, it is proper to admit evidence regarding prior violent felony convictions to provide the sentencing jury the context of the crime. As this Court has recognized:
>
> > [I]t is appropriate in the penalty phase of a capital trial to introduce testimony concerning the details of any prior felony conviction involving the use or threat of violence to the person rather than the bare admission of the conviction. Testimony concerning the events which resulted in the conviction assists the jury in evaluating the character of the defendant and the circumstances of the crime so that the jury can make an informed recommendation as to the appropriate sentence.
>
> *Rhodes v. State,* 547 So. 2d 1201, 1204 (Fla. 1989); *see also Jones v. State,* 748 So. 2d 1012, 1026 (Fla. 1999) (permitting the admission of hearsay testimony

> from a police officer regarding defendant's past murder conviction). However, the State may not introduce testimony or evidence pertaining to prior violent felony convictions that is irrelevant, violates the defendant's confrontation rights, or where the probative value of the evidence is far outweighed by prejudicial effect. *See Rhodes,* 547 So. 2d at 1205; *see also* ' 90.403, Fla. Stat. (2002) ("Relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice....").

Id. at 853.

In *Lebron*, this court found that the probative value of the evidence pertaining to possession and use of a gun during the robbery and kidnapping was far outweighed by prejudicial effect. Lebron had been convicted of simple assault which is only a misdemeanor. This Court also found that Lebron had been acquitted of the possession or use of a gun during the commission of the prior felonies. Therefore, evidence of the firearm should not have been introduced for the purpose of establishing the prior violent felony aggravator because the jury found no firearm associated with the crimes. This Court held the “prejudice resulting from the erroneous admission of this evidence is only underscored by the strong, striking parallel between the offense described” and the present offense. *Id.* at 854.

In the present case, there were not only two other prior violent felonies, but also there were two contemporaneous murders. Further, the testimony of Tracy Chapple was relevant to

the prior violent felony of aggravated battery and was not unduly prejudicial. This case is more like *Gore, Anderson, Morgan, Power, Spann, Rose* and *Lockhart* and less like *Lebron*.

Even more recently, this Court has reaffirmed that details of a prior violent felony are admissible. In *Dufour v. State,* 30 Fla. L. Weekly S247, 253 (Fla. April 14, 2005), this Court held that:

> Moreover, the trial court did not err in allowing Mayfield to provide testimony regarding details of the Mississippi murder. This Court has held that "it is appropriate in the penalty phase of a capital trial to introduce testimony concerning the details of any prior felony conviction involving the use of threat of violence to the person rather than the bare admission of the conviction." *Rhodes v. State*, 547 So. 2d 1201, 1204 (Fla. 1989). Further, this Court explained that "[t]estimony concerning the events which resulted in the conviction assists the jury in evaluating the character of the defendant and the circumstances of the crime so that the jury can make an informed recommendation as to the appropriate sentence." *Id.*; *see also Jones v. State*, 748 So. 2d 1012, 1026 (Fla. 1999) (holding that a police officer may give hearsay testimony concerning a defendant's prior violent felonies during the penalty phase).

Error, if any, was harmless. *State v. DiGuilio*, 491 So. 2d 1129 (1986); *Mahn v. State*, 714 So. 2d 391, 399 (Fla. 1998) (concluding that although robbery conviction was improperly used as a prior violent felony conviction, contemporaneous convictions of two other homicides satisfied the aggravating circumstance). Appellant was convicted of two contemporaneous murders as prior violent felonies for each of the murders on which the death

penalty was imposed. Additionally, he had prior violent felonies in three states. The trial judge found in his sentencing order as to Robin Razor:

> 1. F.S. 921.141(5)(b) The Defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.
>
> a. It was proven during the penalty phase by the State of Florida that the Defendant had been convicted of prior felony convictions that involved the use or threat of violence to a person. Certified documentary proof was received by the Court which established the Defendant's prior convictions for aggravated robbery (Harris County, Texas, 1984); aggravated assault (Maricopa County, Arizona, 1993) and aggravated battery (Hillsborough County, Florida, 1999). The named victim in the Hillsborough County aggravated battery, Tanya Chapple, testified at the penalty phase hearing. Ms. Chapple identified the Defendant and advised that the Defendant did threaten her with a gun, physically attacked her and that she suffered physical injuries from the Defendant beating her. At the *Spencer* hearing, the Defendant overtly acknowledged his involvement in the Texas and Arizona cases. He directly related to the Court certain aspects of the Arizona case which had not been presented by the State during the penalty phase.
>
> b. The certified Judgment and Sentence of the Hillsborough County, Florida aggravated battery conviction coupled with the testimony of the victim, Tanya Chapple, proves beyond any doubt that the Defendant had previously been convicted of a felony involving the use or threat of violence to a person.
>
> c. In the case at bar, Case No. 98-3341-CFA, State of Florida vs. Michael Gordon Reynolds, it was proven at trial during the guilt phase that the Defendant committed the offenses of Count 1, Second Degree Murder of Danny Ray Privett and Count III, First Degree Murder of Christina Razor. The Court adjudicated the Defendant guilty of those offenses. Although these were contemporaneous qualifying prior violent or capital convictions, they may be considered

> as proof for the subject aggravating circumstance. *King v. State*, 390 So. 2d 315 (Fla. 1980); *Stein v. State*, 632 So. 2d 1361 (Fla. 1994); *Francis v. State*, 808 So. 2d 110 (Fla. 2003).
>
> This aggravating circumstance has been proven beyond all reasonable doubt. This aggravating circumstance is given great weight by the Court.

(R940-941). The same findings were made as to Christina Razor. These findings are supported by competent, substantial evidence and show that, even if the jury heard details surrounding the aggravated battery, Appellant had so many prior convictions and two contemporaneous murders, it would not have changed the recommendation.

POINT V

THE STANDARD JURY INSTRUCTIONS DO NOT SHIFT THE BURDEN TO THE DEFENDANT

As Appellant acknowledges, this argument has been rejected repeatedly by this Court.

This claim is a recycled *Arango* claim and has been denied repeatedly by this Court. *Arango v. State,* 411 So. 2d 172 (Fla.), *cert. denied,* 457 U.S. 1140 (1982). *Stewart v. State,* 549 So. 2d 171 (Fla. 1989), *cert. denied,* 497 U.S. 1032 (1990); *See also Teffeteller v. Dugger*, 734 So. 2d 1009, 1024 (Fla. 1999) *San Martin v. State,* 705 So. 2d 1337, 1350 (Fla. 1997); *Lewis v. State*, 572 So. 2d 908, 912 (Fla. 1990) *Preston v.*

State, 531 So. 2d 154, 160 (Fla. 1988).In *Arango,* this Court held:

> Appellant next maintains that the instructions given to the jury impermissibly allocated the constitutionally prescribed burden of proof. At one point in the trial proceeding, the judge stated that if the jury found the existence of an aggravating circumstance, it had "the duty to determine whether or not sufficient mitigating circumstances exist to outweigh the aggravating circumstances." This instruction, appellant argues, violates the due process clause as interpreted in *Mullaney v. Wilbur*, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975), and *State v. Dixon*, 283 So. 2d 1 (Fla. 1973), *cert. denied*, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974).
>
> > In *Mullaney* the Supreme Court held that a Maine law requiring the defendant to negate the existence of malice aforethought in order to reduce his crime from homicide to manslaughter did not comport with due process. Such a rule, the Court wrote, is repugnant to the fourteenth amendment guarantee that the prosecution bear the burden of proving beyond a reasonable doubt every element of an offense. In *Dixon* we held that the aggravating circumstances of section 921.141(6), Florida Statutes (1973), were like elements of a capital felony in that the state must establish them.
> >
> > In the present case, the jury instruction, if given alone, may have conflicted with the principles of law enunciated in *Mullaney* and *Dixon*. A careful reading of the transcript, however, reveals that the burden of proof never shifted. The jury was first told that the state must establish the existence of one or more aggravating circumstances before the death penalty could be imposed. Then they were instructed that such a sentence could only be given if the state showed the aggravating circumstances outweighed the mitigating circumstances. These standard

> jury instructions taken as a whole show that no reversible error was committed.

Arango 411 So. 2d at 174 (Fla. 1982). Appellant has offered this Court no compelling reason to revisit established precedent.

Further, there was no contemporaneous objection to the jury instructions. Although counsel filed a litany of boilerplate pre-trial motions, at the time of the instructions, there was no objection on this basis. Therefore, this issue regarding the jury instruction was not preserved (TT3588, 3593).

Although defense counsel filed two proposed jury instructions and challenge the instructions on the individual aggravating circumstances, he did not specifically raise the issue now raised on appeal (R735-736).

Furthermore, the issue raised on the appeal was not raised at the trial level. The record cites provided by appellant are to the following motions:

1. Cite to R131-134. This is a motion to declare Section 921.141(2) unconstitutional because "the state must show the aggravating circumstances out weigh the mitigating circumstances. *Arango v. State*, 411 So. 2d 172 (Fla. 1982)." There is no argument or mention of the jury instructions or the statute shifting the burden.

2. Cite to R272-278. This motion alleges § 921.141 "contains no burden of proof as to mitigation," that the "reasonably convinced" standard is deficient and that the standard in *Campbell v. State*, 571 So. 2d 415 (Fla. 1990), violates principles of strict construction.

(Intial Brief at 52).

The argument raised on appeal is that the comparative burdens of the State on aggravating circumstances and the defense on mitigating circumstances violates due process and requires the mitigators outweigh aggravators (Initial Brief at 52). This was not the specific argument presented to the trial judge. Additionally, the pre-trail motions failed to raise any issue regarding jury instructions, an issue which is now raised on appeal.

POINT VI

THE TRIAL JUDGE DID NOT ABUSE ITS DISCRETION IN LIMITING THE CONSIDERATION OF RESIDUAL DOUBT

Appellant acknowledges that residual doubt is not an appropriate nonstatutory mitigation circumstance (Initial Brief at 70); *King v. State*, 514 So. 2d 354 (Fla. 1987). Nevertheless, he invites this Court to recede from established precedent and find the trial judge abused his discretion by following that precedent. Appellant has offered this Court no reason to revisit established precedent and this claim should be denied.

This Court has repeatedly held that lingering or residual doubt is not a valid nonstatutory mitigating circumstance, and that a defendant has no right to an instruction thereon. *See*

Darling v. State, 808 So. 2d 145, 162 (Fla.2002) (explaining that this Court has followed United States Supreme Court precedent holding that a defendant has no right to present evidence of lingering doubt); *Sims v. State,* 681 So. 2d 1112, 1117 (Fla. 1996) (concluding that the trial court did not err in declining to instruct the jury on imperfect self-defense as a mitigating circumstance); *see also Franklin v. Lynaugh,* 487 U.S. 164, 173-74 (1988) (rejecting the argument that the Eighth Amendment requires a capital sentencing jury to be instructed that it can consider lingering doubt evidence in mitigation). *Duest v. State*, 855 So. 2d 33, 40-41 (Fla. 2003).

POINT VII

THE TRIAL JUDGE PROPERLY CONSIDERED AND WEIGHED BOTH AGGRAVATING AND MITIGATING CIRCUMSTANCES

Appellant argues the trial judge improperly found the two aggravating circumstances of witness elimination and heinous, atrocious and cruel. '921.141(5)(e), Fla. Stat.; '921.151(5)(h) Fla. Stat.

A. Witness elimination aggravating circumstance. The trial court found:

> F.S. 921.141(5)(e) The capital felony was committed for the Purpose of avoiding or preventing a lawful arrest.
>
> a. The Defendant knew the victims; and the victims, Danny Ray Privett and Robin Razor, knew the Defendant. They lived in close proximity to each other on the same street.

b. It was proven at trial that victim, Danny Ray Privett, was surreptitiously murdered outside the trailer. This stealthy killing was committed while Danny Ray Privett was about to engage, in the act of, or having just finished urinating.

The Defendant approached the victim, unnoticed, then viciously and deliberately battered the victim's skull with a piece of concrete.

c. The victim was rendered unconscious almost immediately and died a short period thereafter without regaining consciousness according to the Medical Examiner.

d. The gooseneck prowler trailer, being located some distance away, would not necessarily afford its occupants the opportunity to either see or hear the murder of Danny Ray Privett.

e. Should the perpetrator be unknown to the victims located inside the gooseneck prowler trailer, there would be no need for him to proceed to the trailer and murder its occupants if he was not seen or heard by the remaining victims.

f. The victim, Robin Razor, did know the Defendant and had expressed her dislike and mistrust of the Defendant to several acquaintances. It was necessary for the Defendant to eliminate Robin Razor to avoid arrest because Robin Razor would advise the authorities that the Defendant would be a primary suspect.

g. Darrell Courtney testified at the guilt/innocence phase that the Defendant admitted that he had killed the victims. The Defendant expressed regret to Courtney over having to kill the child, Christina Razor, but advised that "with my record I couldn't afford to leave any witnesses".

h. The relationship that existed between the Defendant and Darrell Courtney was borne out of mutual respect due to their joint status of being convicted felons who had served time in prison. Darrell Courtney is logically the type of individual with whom the

> Defendant would share this information concerning the murders. The Defendant also had requested that Darrell Courtney perform an act on the Defendant's behalf concerning a jail guard. Said request was set forth in the Defendant's letter to Courtney and admitted into evidence.
>
> i. This aggravating circumstance has been proven beyond all reasonable doubt. This aggravating circumstance is given great weight by the Court.

(R942-944).

The trial court findings are supported by competent, substantial evidence. Appellant was friends with the Privett/Razor family and lived close by. After he killed Privett, he had to kill Robin and Christina. As he told Courtney: with his record he had to eliminate all witnesses.

This aggravating factor may be proven by circumstantial evidence from which the motive for the murder may be inferred without direct evidence of the offender's thought process. *Swafford v. State*, 533 So. 2d 270, 276 n.6 (Fla. 1988), *cert. denied,* 489 U.S. 1100 (1989). In *Willacy v. State*, 696 So. 2d 693,696 (Fla. 1997), this Court held:

> Willacy contends that the court erred in finding that the murder was committed to avoid arrest. We disagree. When Sather surprised Willacy burglarizing her house, he bludgeoned her and tied her hands and feet. At that point, Sather posed no immediate threat to Willacy: She was incapable of thwarting his purpose or of escaping and could not summon help. There was little reason to kill her except to eliminate her as a witness since she was his next door neighbor and could identify him easily and credibly both to police and in court. *See Thompson v. State*, 648 So. 2d 692, 695 (Fla. 1994), *cert. denied*, 515 U.S. 1125, 115 S.Ct.

> 2283, 132 L.Ed.2d 286 (1995). The court applied the right rule of law to these facts, and competent substantial evidence supports its finding. We find no error.

Another case involving the same issue is *Preston v. State*, 607 So. 2d 404, 409 (Fla. 1992), wherein this Court stated:

> We have long held that in order to establish this aggravating factor where the victim is not a law enforcement officer, the State must show that the sole or dominant motive for the murder was the elimination of the witness. *Perry v. State*, 522 So. 2d 817, 820 (Fla. 1988) *Bates v. State*, 465 So. 2d 490, 492 (Fla. 1985). However, this factor may be proved by circumstantial evidence from which the motive for the murder may be inferred, without direct evidence of the offender's thought processes. *Swafford v. State*, 533 So. 2d 270, 276 n. 6 (Fla. 1988), *cert. denied*, 489 U.S. 1100, 109 S. Ct. 1578, 103 L.Ed.2d 944 (1989).

See also Clark v. State, 443 So. 2d 973 (Fla. 1984) (victim could identify defendant, knew him from past employment); *Young v. State,* 579 So. 2d 721 (Fla. 1991) (victim told son to call police and defendant knew he would be arrested when they arrived). The trial court applied the right rule of law, and its determination is supported by competent substantial evidence.

B. <u>The heinous, atrocious aggravating circumstance</u>. The trial court found as to Robin Razor:

> F.S. 921.141(S)(h) <u>The capital felony was especially heinous atrocious or cruel.</u>
>
> a. Dr. Sarah Irrgang, the medical examiner, testified that victim, Robin Razor, suffered multiple stab wounds to the head and neck area and one to the torso. It was Dr. Irrgang's testimony that Robin Razor also

suffered a number of defensive wounds to the arms and hands.

b. The presence of defensive wounds allows the assumption to be made that the victim was alive unless shown otherwise by the evidence.

c. The existence of numerous defensive wounds demonstrates that the victim was aware of her plight and was resisting.

d. The medical examiner also testified that torment wounds were present. Wounds of this type are normally associated with the perpetrator taking a depraved, measured approach to the infliction of the injury and taking pleasure in his cruel activity.

e. The numerous stab and cutting wounds suffered by the victim, Robin Razor, are consistent with having been made by a weapon such as a knife and did produce copious amounts of blood. At the moment that the victim, Robin Razor, was being attacked, it is not known whether or not her daughter was still alive and conscious or unconscious or had been murdered. Regardless, in the close confines of that cramped camping trailer, a bloodied Robin Razor, in great pain as a result of numerous wounds to her body, was forced to fight a losing battle for her life knowing that either her daughter had already been killed and she was next or that if Reynolds prevailed, her daughter would suffer certain death. It is not difficult to imagine the fear, terror and emotional strain that accompanied Robin Razor as she fought for her life knowing full well the consequences of losing the battle. *Socher v. Florida*, 580 So. 2d 595, 603 (Fla. 1991), rev'd on other grounds. *Socher v. State*, 112 S.Ct. 2114 (1992).

f. In addition to the victim, Robin Razor, having suffered multiple stab and cut wounds, evidence was presented at trial that

> the victim was beaten about her head with a piece of concrete block The blood of Danny Ray Privett was mingled with that of the victim, Robin Razor, on the concrete block located within the camper.
>
> g. As a result of the above-mentioned factors, Robin Razor, while still conscious and alert suffered great physical pain, mental torment, fear arid emotional anguish.
>
> h. This aggravating circumstance has been proven beyond all reasonable doubt. This aggravating circumstance is given great weight by the Court.

(R944-945).

The trial court found as to Christina Razor:

> a. Dr. Sarah Irrgang, the medical examiner, testified that victim, Christina Razor, suffered two stab wounds to the neck and shoulder area, contusions to her face, and injuries to her mouth. It was Dr. Irrgang's testimony that Christina Razor also suffered an abrasion on the back of one of her hands which was characterized as being consistent with a defensive wound.
>
> b. The presence of a defensive wound allows the assumption to be made that the victim was alive unless shown otherwise by the evidence.
>
> c. The existence of a defensive wound demonstrates that the victim was aware of her plight and was resisting. The stab wounds suffered by the victim, Christina Razor, are consistent with having been made by a weapon such as a knife.
>
> d. At the moment that the victim, Christina Razor, was being attacked, it is not known whether or not her mother was still alive, conscious or unconscious or had been

murdered. Regardless, in the close confines of that cramped camping trailer, Christina Razor, in great pain and fear, was forced to fight a losing battle for her life knowing that either her mother had already been killed and she was next, or that after Reynolds killed her, he was sure to end her mother's life. For a child to experience the fear, terror and emotional strain that accompanied Christina Razor as she fought for her life, knowing full well that she was fighting a losing battle, is unimaginable, heinous, atrocious and cruel. 1n a prior decision, the Florida Supreme Court has dealt with a similar situation. *Francis v. State.*__808 So. 2d.110 (Fla. 2003). The *Francis* decision discusses the unique circumstances associated with close proximity homicides:

> Morever, as we have previously noted, "the fear and emotional strain preceding the death of the victim maybe considered as contributing to the heinous nature of a capital felony." See *Walker* 707 So. 2d at 315; see also *James v. State*, 695 So. 2d 1229, 1235 (Fla. 1997) ("[F]ear, emotional strain, and terror of the victim during the events leading up to the murder may make an otherwise quick death especially heinous, atrocious, or cruel.").

In this case, although the evidence did not establish which of the two victims was attacked first, the one who was first attacked undoubtedly experienced a tremendous amount of fear, not only for herself, but also for what would happen to her twin. In a similar manner, the victim who was attacked second must have experienced extreme anguish at witnessing her sister being brutally stabbed and in contemplating and attempting to escape her inevitable fate. We arrive at this logical

> inference based on the evidence, including photographs presented at the guilt phase, which clearly establishes that these two women were murdered in their home only a few feet apart from each other. As a result, we conclude that the trial court's HAC finding is further buttressed by the logical fear and emotional stress experienced by the two elderly sisters prior to their deaths as the events were unfolding in close proximity to one another.
>
> e. This aggravating circumstance has been proven beyond all reasonable doubt. This aggravating circumstance is given great weight by the Court.

(R955-957).

The trial court findings are supported by competent, substantial evidence. The findings summarize the evidence: Robin Razor had extensive contusions around her face and eyes (TT1111). She had multiple stab wounds and her neck vertebra was broken (TT1112, 1119). It appeared there had been a violent struggle (TT1115). Robin had scratch-like marks consistent with “torment wounds.” (TT1116). Robin had defensive wounds on her arm and hand (TT1116, 1121). Blood all over her hands indicated she defended herself (TT1362). Robin had a total of eleven stab wounds (TT1364). There was a violent struggle for a period of time (TT1123). Robin sustained very painful injuries (TT1125). She sustained a large depressed skull fracture and chest wound (TT 1115, 1120). One stab wound broke the spinous process of

the neck vertebra (TT1112). The ultimate cause of death was a broken neck (TT1125).

Christina Razor had contusions to her face and blunt force to the mouth (TT1126, 1127). She had a stab wound to the neck and sternum (TT1126, 1127). She had injuries to the mouth and a blow to the head (TT1128). The cause of death was Asignificant internal and external hemorrhage.@ (TT1128). There was a defensive wound which appeared to be a blow to the hand (TT1129).

This Court has upheld the heinous, atrocious aggravating circumstance in multiple stab wound cases. *Duest v. State*, 855 So. 2d 33 (Fla. 2003); *Francis v. State*, 808 So. 2d 110 (Fla. 2001); *Brown v. State*, 721 So. 2d 274 (Fla. 1998); *Mahn v. State*, 714 So. 2d 391 (Fla. 1998); *Nibert v. State*, 508 So. 2d 1 (Fla. 1987). Add to that the mental anguish of finding a knife-wielding man in the house in the night and having a child or mother brutally attacked in front of each victim.

Appellant argues that this Court should focus on the intent of the murderer, not on the actual suffering of the victim. In *Lynch v. State,* 841 So. 2d 362, 369 (Fla. 2003), this Court reiterated that, when analyzing the heinous, atrocious aggravator (“HAC”), the focus is not on the intent of the assailant, but on the actual suffering caused the victim. In determining whether the HAC factor was present, the focus should

be upon the victim's perceptions of the circumstances as opposed to those of the perpetrator. *See Farina v. State,* 801 So. 2d 44, 53 (Fla. 2001); *see also Hitchcock v. State,* 578 So. 2d 685, 692 (Fla. 1990). Further, "the victim's mental state may be evaluated for purposes of such determination in accordance with a common-sense inference from the circumstances." *Swafford v. State,* 533 So. 2d 270, 277 (Fla. 1988); *see also Chavez v. State,* 832 So. 2d 730, 765-66 (Fla. 2002). The HAC aggravating factor focuses on the means and manner in which the death is inflicted and the immediate circumstances surrounding the death, rather than the intent and motivation of a defendant, where a victim experiences the torturous anxiety and fear of impending death. *See Barnhill v. State,* 834 So. 2d 836, 849-850 (Fla. 2002); *Brown v. State,* 721 So. 2d 274, 277 (Fla. 1998).

Each murder was deliberately and extraordinarily painful, *Porter v. State*, 564 So. 2d 1060 (Fla. 1990), and was carried out with utter indifference to the suffering defendant caused his helpless victims. *Bates v. State*, 750 So. 2d 6 (Fla. 1999); *Mahn v. State*, 714 So. 2d 391 (Fla. 1998). The heinousness aggravator focuses on the ordeal of the victim -- the Aintent@ of the defendant does not matter. *Guzman v. State*, 721 So. 2d 1155 (Fla. 1998) (no Aintent element@ applies to this aggravator); *Gorby v. State*, 630 So. 2d 544 (Fla. 1993).

In a double murder case in which the victims were subjected to substantial mental anguish before being shot to death, the Supreme Court of Florida stated:

> We have previously upheld the application of the heinous, atrocious, or cruel aggravating factor based, in part, upon the intentional infliction of substantial mental anguish upon the victim. See, *e.g., Routly v. State,* 440 So. 2d 1257, 1265 (Fla. 1983), and cases cited therein. Moreover, "[f]ear and emotional strain may be considered as contributing to the heinous nature of the murder, even where the victim's death was almost instantaneous." *Preston v. State,* 607 So. 2d 404, 410 (Fla. 1992), *cert. denied,* 507 U.S. 999, 113 S.Ct. 1619, 123 L.Ed.2d 178 (1993).

Henyard v. State, 689 So. 2d 239, 254(Fla. 1996). *See also Nibert v. State,* 508 So. 2d 1, 4 (Fla. 1987) (victim stabbed seventeen times, defensive wounds, conscious stabbing); *Guzman v. State*, 721 So. 2d 1155, 1160 (Fla. 1998) (nineteen stab wounds, one defensive wound, blows by force); *Duest v. State*, 855 So. 2d 33, 46 (Fla. 2003); *Finney v. State*, 660 So. 2d 674 (Fla. 1995); *Pittman v. State*, 646 So. 2d 167 (Fla. 1994).

C. Weight given to mitigating circumstances.

The trial judge found:

STATUTORY MITIGATING CIRCUMSTANCES

> Defendant, Michael Gordon Reynolds, waived his right both in writing and orally on the record to present mitigating evidence. Outside the presence of the jury, the Defendant stated his reasons why he did not want to present any additional evidence tending to demonstrate the existence of either statutory or non-statutory mitigating circumstances at the penalty phase before the jury. Upon the Defendant declining to present mitigating evidence at the penalty phase, the

Court followed the procedures set forth by the Florida Supreme Court in *Koon v. Dugger*, 619 So. 2d 246 (Fla. 1993).

The Court acknowledges that even though the Defendant has formally waived presentation of mitigation, it must consider and weigh any mitigation that is uncontradicted in determining the appropriate sentence. Accordingly, the Court will consider any and all mitigation presented during the course of the guilt phase, penalty phase, the Pre-Sentence Investigation Report and appropriate mitigation presented during the *Spencer* hearing.

1. The Defendant was gainfully employed.

a. Defendant established this fact that he was employed through a labor force during the guilt phase of the trial byway of the Seminole County Sheriffs Office videotaped statement of the Defendant.

b. At the Spencer hearing the Defendant stated that his chosen occupation was a roofer and that he worked hard at his trade.

c. The Court is reasonably convinced that this mitigating circumstance has been proven and is entitled to little weight.

2. The Defendant manifested appropriate courtroom behavior throughout the pendency of the guilt and penalty phases of the trial. Additionally, the Defendant manifested appropriate courtroom behavior during the Spencer hearing.

a. The Court had an opportunity to view the Defendant on a consistent basis during the course of the guilt phase, penalty phase and during the Spencer hearing. The Court finds that Defendant's behavior was appropriate throughout all aspects of his trial. The Defendant was cooperative with his attorneys, court officials and the court proper.

b. The Court is reasonably convinced that this mitigating circumstance has been proven and is entitled to little weight.

3. The Defendant cooperated with law enforcement.

a. The Court finds that cooperation with law enforcement can be a mitigating circumstance; however, in the instant case, the Defendant's videotaped statement only partially assisted law enforcement.

b. The videotape statement made by the Defendant was done in a fashion so as to be considered deceptive.

c.The videotape statement of the Defendant contained false and misleading statements.
d. The Defendant did voluntarily submit hair, blood and DNA samples. The Defendant also allowed law enforcement to search his residence.

e. The Court is reasonably convinced that this mitigating circumstance has been proven and is entitled to little weight.

4. Residual doubt.

a. The deposition of John Parker taken on December 10, 1998 and the unredacted statement of Justin Pratt given to Ray Parker and Larry Herron on July 23, 1998 were submitted by the defense for purposes of residual or lingering doubt. The Court is aware that "residual" or "lingering" doubt is not an appropriate mitigating circumstance. The defense submitted the statements as a continuation of their general theory of the case that parties other than the Defendant committed the murders. The Court understands the spirit of the defense's offering of the two statements to be considered by the Court.

b. These statements taken in conjunction with the unsworn oral statement of the Defendant at the *Spencer* hearing are being considered as allegations and argument designed to establish residual or lingering doubt. *Way v. State*, 760 So. 2d 903 (Fla. 2000).

c. The two statements, and the oral statement of the Defendant at the *Spencer* hearing with respect to residual or lingering doubt will not be considered by the Court as a non-statutory mitigator for purposes of sentencing.

d. The Court gives no weight to the residual or lingering doubt claim made by the Defendant and will not consider this non-factor at all.

5. The Defendant had a difficult childhood.

The evidence presented by the Defendant regarding this mitigating factor has been submitted by way of the deposition of his sister, Stacia Adams, during the course of the *Spencer* hearing.

In summation, the Court sets forth the following mitigating circumstances that occurred during the Defendant's childhood.
a. The Defendant suffered from an upbringing marked by physical and psychological abuse.

b. The Defendant's father was a chronic alcoholic.

c. The Defendant's mother was chronically ill and was often hospitalized during the Defendant's childhood.

d. The Defendant was regularly hit, slapped and kicked by his drunken father, without warning.

e. During the school week, the Defendant would sometimes be kept awake all night by his father and would sometimes be awakened by having ice water poured on him.

f. The Defendant regularly cared for his disabled, wheelchair-bound sister because his mother was unable to do so.

g. The Defendant helped run household affairs around the home by cooking, cleaning and doing yard work.

h. The Defendant was very close to his mother, who died on Christmas day, 1975, when the Defendant was seventeen years old.

i. Despite the Defendant's father abusing him, the Defendant still showed his father respect and assisted him around the house.

j. The Defendant was a hard worker beginning his work history at an early age by working around the home and mowing lawns in the neighborhood.

k. The Defendant attended church as a child, even though his parents did not.

1. The Defendant's education was limited to the tenth grade.

m. The Defendant began using alcohol at an early age (14).

n. The Defendant had essentially no adult supervision as a child arising from his mother's chronic illness and his father's habitual drunkenness.

o. The Court is reasonably convinced that the mitigating circumstance of the Defendant having a difficult childhood has been proven. It is entitled to little weight.

6. The Defendant can easily adjust to prison life.

a. During the guilt phase of the trial, the State presented a letter from the Defendant to witness, Darrell Courtney, about the conditions within the Orange County Jail. He discussed such factors as the type of food served during meals, the ability to obtain seconds, the costs of goods at the commissary and the fact that his cell had a view of a lake.

b. The Defendant's written description of these factors demonstrates that the Defendant can and does adjust well to an institutional life.

c. Evidence was also presented during the *Spencer* hearing that the Defendant had been a member of prison gangs while serving time in Texas and Arizona prisons. The Defendant opined at the *Spencer* hearing that it was necessary for him to join a white supremist gang so as to protect himself inasmuch as he was not allowed 'just to serve his time". The Defendant was heavily tattooed during his prison sentences with white supremacy symbols related to the Ku Klux Klan, including, but not limited to letters, hooded figures, flames, and other racist symbols.

> d. The evidence demonstrates that while the Defendant is able to acclimate to prison life and becomes institutionalized rather quickly, it is not in an appropriate fashion nor does it lend itself to the smooth operation of a prison facility. The Court is reasonably convinced that this mitigating circumstance has not been proven.
>
> In the instant case, the Defendant presented no mitigation to the jury and the jury returned a recommendation of death by a vote of 12-0. The Court does not give the recommendation of the jury great weight. The advisory sentence of the jury is given less weight in accordance with *Muhammad v. State*, 782 So. 2d 343, (Fla. 2001).
>
> All aggravating circumstances and all mitigating circumstances have been discussed by the Court in this Order as they relate to Count II. Each of the individual aggravating circumstances proven by the State is given great weight and they far outweigh the mitigating circumstances. Each one of the aggravating circumstances in Count II[3], standing alone, would be sufficient to outweigh the minimal amount of mitigation that exists in Count II.

(R946-951, 958-963).

Appellant does not allege the trial judge refused to consider or find any specific mitigation, he merely argues with the weight assigned by the trial judge.

At the outset, it is important to note *Kearse v. State,* 770 So. 2d 1119 (Fla. 2000), wherein this Court held:

> Deciding the weight to be given a mitigating circumstance is within the trial court's discretion, and its decision is subject to the abuse-of-discretion standard.... [T]he trial judge is in the best position

[3]The trial court made the same findings for Count III.

> to judge ... and this Court will not second-guess the judge's decision ....

Id. at 1133. Additionally, "there are circumstances where a mitigating circumstance may be found to be supported by the record, but given no weight." *Trease v. State,* 768 So. 2d 1050, 1055 (Fla. 2000). A "mere disagreement with the force to be given [mitigating evidence] is an insufficient basis for challenging a sentence.@ *Porter v. State,* 429 So. 2d 293, 296 (Fla. 1983) (quoting *Quince v. State,* 414 So. 2d 185, 187 (Fla. 1982)). As the record "contains competent, substantial evidence to support the trial court's rejection of these mitigating circumstances," *Kight v. State,* 512 So. 2d 922, 933 (Fla. 1987), the trial court's refusal to grant any weight to certain mitigating evidence was not improper. *Cox v. State* 819 So. 2d 705, 722-723 (Fla. 2002).

Error, if any, was harmless. *See State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986). This case involved a triple homicide. The trial judge found four aggravating circumstances as to Robin Razor and five aggravating circumstances as to Christina Razor. Even the one aggravating circumstance of the contemporaneous murders would outweigh the mitigation.

POINT VIII.

FLORIDA=S DEATH PENALTY STATUTE IS NOT UNCONSTITUTIONAL UNDER *RING V. ARIZONA*

There are fundamental reasons why the *Apprendi/Ring* argument fails: Reynolds= death sentences are supported by aggravators that fall outside any interpretation of *Apprendi/Ring*;[4] and, the statute under which Reynolds was sentenced to death provides that, upon conviction for capital murder, the maximum possible sentence is death, unlike the statute at issue in *Ring. Ring* clarified that *Apprendi* applied to capital cases, and that *Apprendi* applied to Arizona's death penalty statute. However, *Ring* has no application to Florida=s death sentencing scheme because the United States Supreme Court, while misinterpreting Arizona's capital sentencing law, did not misinterpret Florida law. The basic difference between Arizona and Florida law is dispositive of Reynolds= claims.

***Apprendi/Ring* does not invalidate Florida=s death penalty statute.**

Reynolds= claim that *Apprendi/Ring* operates to invalidate Florida=s long-upheld capital sentencing statute has been repeatedly rejected by this Court and by the United States Supreme Court. *See Lugo v. State*, 845 So. 2d 74, 119 (Fla. 2003); *Kormondy v. State*, 845 So. 2d 41, 54 (Fla. 2003); *Conahan v. State*, 844 So. 2d 629 (Fla. 2003); *Butler v. State*, 842 So.

[4] The contemporaneous murders of Robin Razor and Christina Razor and murder during-the-course-of-a-burglary serve as aggravating circumstances in both death sentences.

2d 817 (Fla. 2003)(relying on *Bottoson v. Moore*, 833 So. 2d 693 (Fla. 2002) and *King v. Moore*, 831 So. 2d 143 (Fla. 2002) to a *Ring* claim in a single aggravator (HAC) case); *Banks v. State*, 842 So. 2d 788 (Fla. 2003); *Spencer v. State*, 842 So. 2d 52 (Fla. 2003); *Grim v. State*, 841 So. 2d 455 (Fla. 2003); *Cole v. State*, 841 So. 2d 409 (Fla. 2003); *Anderson v. State*, 841 So. 2d 390 (Fla. 2003); *Lucas v. State/Moore*, 841 So. 2d 380 (Fla. 2003); *Porter v. Crosby*, 840 So. 2d 981 (Fla. 2003).

Reynolds- death sentences are supported by aggravators that fall outside any interpretation of *Apprendi/Ring.*

Under the plain language of *Apprendi*, a prior violent felony conviction is a fact which may be a basis to impose a sentence higher than that authorized by the jury=s verdict without the need for additional jury findings. There is no constitutional violation (nor can there be) because the prior conviction constitutes a jury finding which the judge may rely upon, without additional jury findings, in imposing sentence. *See Almendarez-Torres v. United States*, 523 U.S. 224 (1998); *Apprendi v. New Jersey*, 530 U.S. 466 (2000). Under any view of the law, and even after *Ring*, the jury is not required to make a determination of the prior violent felony aggravator, and that aggravating circumstance can be found by the judge alone.

Under any interpretation of the facts, the prior violent felony convictions obviate any possible Sixth Amendment error.

Those aggravating circumstances are outside of the *Apprendi/Ring* holding,[5] and, because that is so, those decisions are of no help to Reynolds. In the absence of any legal support, Reynolds= claim collapses. *Apprendi* and *Ring* do not factor into the facts of this case, and no relief is justified. Additionally, this murder was committed during a felony and the jury returned a verdict of guilty on armed burglary.

Death is the maximum penalty for first-degree murder.

A[T]he legislature, and not the judiciary, determines maximum and minimum penalties for violations of the law.@ *State v. Benitez*, 395 So. 2d 514, 518 (Fla. 1981). The Court, long before *Apprendi*,[6] concluded that the maximum sentence to which a

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[5] The *Apprendi* Court cited to *Jones v. United States,* 526 U.S. 227, 243 n.6 (1999), for the proposition that under the Fifth and Sixth Amendments, Aany 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 v. New Jersey,* 530 U.S. 466, 476 (2000). [emphasis added]. The Court has already clearly said that death is the maximum penalty for first degree murder, so that component of the statement has no application to Florida law. In any event, Reynolds=s prior violent felony convictions establish an aggravator that is outside any possible (or reasonable) interpretation of *Apprendi/Ring.*

[6] The Florida Supreme Court=s interpretation of Florida law is consistent with the description of Florida=s capital sentencing scheme set out in *Proffitt v. Florida,* and echoed in *Barclay v. Florida,* 463 U.S. 939, 952 (1983) (A[I]f a defendant is found guilty of a capital offense, a separate evidentiary hearing is held before the trial judge and jury to determine his sentence.@). If the defendant were not eligible for a death sentence, there would be no second proceeding.

Florida capital defendant is subject following conviction for capital murder is death. *Apprendi* led to no change of any sort, by either the Legislature or the Florida Supreme Court.

In Florida, the determination of Adeath-eligibility@ is made at the guilt phase of a capital trial, not at the penalty phase, as was the Arizona practice. The Florida Supreme Court has unequivocally said what Florida=s law is, just as the Arizona Supreme Court did. The difference between the two states= capital murder statutes is clear, and controls the resolution of the claim. Because death is the maximum penalty for first-degree murder in Florida (and because it is not in Arizona), Reynolds= *Apprendi/Ring* claim collapses because nothing triggers the *Apprendi* protections in the first place. *See, Barnes v. State,* 794 So. 2d 590 (Fla. 2001) (*Apprendi* not applicable when judicial findings did not increase maximum allowable sentence).

Ring did not eliminate the trial judge from the sentencing equation or in any fashion imply that Florida should do so. Under the Arizona capital sentencing statute, the Astatutory maximum@ for practical purposes is life until such time as a judge has found an aggravating circumstance to be present. An Arizona jury played no role in Anarrowing@ the class of defendants eligible for the death penalty upon conviction of first degree murder. As the Arizona Supreme Court described Arizona law, the statutory maximum sentence permitted by the

jury=s conviction alone is life. *Ring v. State*, 25 P.3d 1139, 1150 (Ariz. 2001). Florida law is not like Arizona=s. *Mills v. State,* 786 So. 2d 532 (Fla. 2001).

The distinction between a Asentencing factor@ (*i.e.*: Aselection factor,@ under Florida=s statutory scheme) and an element is sharply made in *Apprendi,* where the Court stated: AOne need only look to the kind, degree, or range of punishment to which the prosecution is entitled for a given set of facts. Each fact necessary for that entitlement is an element.@ *Apprendi v. New Jersey,* 530 U.S. at 501. [emphasis added]. A Florida defendant is eligible for a death sentence on conviction for capital murder, and a death sentence, under Florida=s scheme, is not a Asentence enhancement,@ nor is it an Aelement@ of the underlying offense. *Almendarez-Torres v. United States,* 523 U.S. 224 (1998); *McMillan v. Pennsylvania,* 477 U.S. 79 (1986). *See, Hildwin v. Florida,* 490 U.S. 638, 640-41 (1989). [emphasis added].

CONCLUSION

WHEREFORE, based upon the foregoing arguments and authorities, the Appellee respectfully requests that all requested relief be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Answer Brief of the Appellee has been furnished by U. S. Mail, to James R. Wulchak, Office of the Public Defender, 112 Orange Avenue, Daytona Beach, Florida, 32114 on this_____day of April, 2005.

_____
Attorney for Appellee

CERTIFICATE OF COMPLIANCE

I hereby certify that a true copy of the foregoing Answer Brief of the Appellee was generated in a Courier New, 12 point font, pursuant to Florida Rule of Appellate Procedure 9.210.

_____
Attorney for Appellee