IN THE SUPREME COURT OF FLORIDA

THOMAS D. WOODEL,

Appellant,

v. CASE NO. SC05-1336

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE TENTH JUDICIAL CIRCUIT,
IN AND FOR POLK COUNTY, STATE OF FLORIDA

_____

ANSWER BRIEF OF APPELLEE

_____

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE NO.

Cases

Other Authorities

STATEMENT OF THE CASE AND FACTS

The appellant, Thomas Woodel, has been sentenced to death for the murder of Bernice Moody. In an opinion affirming the murder, robbery, and armed burglary convictions, this Court described the facts as follows:

> Clifford Moody, who was seventy-nine years old, and his seventy-four year old wife, Bernice, lived in a mobile home trailer on lot 533 at Outdoor Resorts of America in Polk County. The Moodys owned another trailer on adjoining lot 532, which they sometimes rented. Bernice was seen by the newspaper delivery man cleaning lot 532 about 4:30 to 4:45 a.m. on December 31, 1996. Clifford was last seen by a security person at the Outdoor Resorts Laundromat at about 5:30 a.m. The Moodys were preparing to show the mobile home for rental that day.
>
> The Moodys were found dead a little after 1 p.m. on December 31, 1996. Clifford was found lying on his back in the dining room area of the trailer on lot 532. His underwear and pants had been pulled down to below his knees. His eyeglasses lay approximately two feet from his head. Dr. Alexander Melamud, the medical examiner, testified that Clifford received a total of eight stab wounds, causing more internal than external bleeding, and that he died as a result of these stab wounds close in time to his wife's death.
>
> Bernice was found in the same trailer with multiple stab wounds. She lay dead on a bed in the back of the trailer and was nude except for one sock. A nightgown and female underwear with a knot tied in it lay on the floor next to the bed. Additionally, pieces of a porcelain toilet tank lid were found underneath her. Dr. Melamud testified that Bernice incurred a total of fifty-six cut or stab wounds, many of which on her right arm he opined to be defensive. Her jugular vein had been slit. Additionally, she had received significant blunt trauma injuries to her head, and her nasal bones were fractured. Dr. Melamud testified that Bernice died as a result of her

injuries sometime in the early morning hours of December 31, 1996. No semen was detected on Bernice.

With the permission and assistance of Outdoor Resorts, detectives searched the park's dumpsters the morning of January 3, 1997. The dumpsters had not been emptied since prior to December 31, 1996. During the search, detectives found three garbage bags containing pieces of a porcelain toilet tank lid, a wallet containing Clifford's identification and credit cards, keys with a tag stating "Cliff's keys," glasses, bloody socks, paperwork with the address of lot 301, and paperwork bearing the names of the defendant and his son, Christopher Woodel.

That afternoon, detectives went to lot 301. Woodel lived there with his long-time girlfriend, Christina Stogner, and his sister, Bobbi Woodel. Woodel and his sister signed consent forms to have their trailer searched. Stogner was out of town at that time. Also present that day at lot 301 was Gayle Woodel. Although not known at that time, it would later be discovered that Gayle married Woodel in 1989, and they had a son together, Christopher. Gayle and Woodel separated in 1992 but never divorced. In 1996, Gayle and Christopher lived in North Carolina while Woodel lived in Florida. However, Gayle had just come to Florida from North Carolina so that Christopher could spend some time with Woodel. Gayle, Christopher, and two of Gayle's friends were staying at Woodel's trailer.

While some detectives searched the premises, Woodel agreed to be questioned by other detectives. As Woodel left with the detectives, Woodel went over to Gayle and whispered for her to get rid of the knife Woodel had hidden. Gayle told Woodel's landlady and friend about the content of the communication. Gayle later told deputies as well.

The detectives gave Woodel *Miranda* warnings, and he consented to talk with them. He initially told the detectives that he had been home asleep at the time of the murders. After further questioning, Woodel began to write out a statement. He then stopped and confessed to killing the Moodys, whom he said he had never met. The detectives then tape-recorded Woodel's confession. In this taped confession played for the jury, Woodel admitted to drinking with others that

> evening after work in the lot next to the Pizza Hut where he worked. Afterwards, Woodel walked to Outdoor Resorts, a little over a mile from the Pizza Hut. Woodel admitted to entering the Moody's rental trailer early in the morning after seeing Bernice through the window. He said he went in to ask for the time. According to Woodel, Bernice was alone in the trailer. Upon seeing him, she came at him with a knife, over which Woodel soon gained control. He then proceeded to stab her many times and hit her over the head with a porcelain toilet tank lid one to three times. The toilet lid shattered.
>
> Clifford was last seen doing laundry at the Laundromat by security guard Elmer Schultz between 5:30 and 5:40 a.m. In his confession, Woodel said that he was leaving the trailer when Clifford came inside. Woodel then stabbed Clifford. As Clifford lay on the floor, Woodel picked up a bucket and placed pieces of the shattered toilet tank lid in it. He also placed the knife along with several other items in the bucket. Woodel said that after stabbing Clifford, he took Clifford's wallet.
>
> Woodel also said in his confession that he threw some items into a canal in the mobile home park, threw some items away in his garbage, and hid the knife behind a dresser. Deputies would later find pieces of the toilet tank lid and Bernice's eyeglasses in the canal, and a knife in Woodel's room wedged between a wall and the dresser.

Woodel v. State, 804 So. 2d 316, 319-320 (Fla. 2001).

Woodel was convicted on December 4, 1998, and originally sentenced to death for both victims on January 26, 1999 (V2/265-272). On appeal, this Court affirmed the convictions but remanded to the circuit court for entry of a new sentencing order.

Upon remand, the case was assigned to the Honorable Susan W. Roberts. It was determined that a new jury proceeding was necessary, as the original sentencing judge, the Honorable

Robert Pyle, was not available to conduct the new proceedings (V2/327). The resentencing proceeding was conducted July 6 - 20, 2005.

The Moodys' oldest daughter, Maryann Richard, testified that her father was 79 years old and her mother was 74 at the time of their murders (V10/1323). The Moodys lived in Illinois but wintered in Florida, living in one of two mobile home units they owned in Outdoor Resorts of America (V10/1321). In March or April of 1996, Bernice Moody had slipped and broken her arm, and as a result she had lost a lot of the strength in the arm (V10/1328-29).

The Moodys were killed on December 31, 1996 (V12/1781-82). Their bodies were discovered that day in the mobile home unit which they were preparing to rent out (V10/1326-27; V12/1726-27, 1730, 1781). Woodel spent the night before working at Pizza Hut, and drinking with friends after getting off work (V11/1531; V13/1846-48). Early in the morning he walked back to the trailer he rented at Outdoor Resorts and chanced upon the victims as he walked through the park (V13/1836, 1848-49).

The forensic evidence reveals that the attack on the Moodys was brutal and extended. Mrs. Moody was found lying on a bed, nude, having been stabbed 56 times and hit repeatedly over the head with a porcelain toilet tank lid (V12/1791, 1795; V13/1796-98, 1820-21, 1852-70). She suffered abrasions, fractures, and

damage to her internal organs from the deep stab wounds (V12/1795-V13/1798). Her panties had been cut off and tied in a knot (V13/1897-98). Mr. Moody was on the floor in the living room; of his eight stab wounds, several were deep enough to damage his internal organs (V13/1809-12, 1819).

Evidence from the crime scene recovered in a dumpster at Outdoor Resorts led the police to Woodel (V13/1826-27). Woodel's guilt was confirmed through substantial DNA evidence placing him at the scene, and placing items with the victims' DNA and other items from the scene in his possession (V11/1591-V12/1619, 1633-34). In addition, he provided a written statement and an extensive taped interview with Polk County detectives, acknowledging his involvement and describing his actions before, during, and after the murders (V13/1833-38, 1842-95). He recalled taking Mrs. Moody's robe off and cutting off her panties, although he could not remember why he had done these things, and did not think he had tied the panties in a knot (V13/1872-73).

In mitigation, Woodel presented several friends and co-workers (V14/2046-2100), his father (V14/2101-42), and his sister (V14/2143-V15/2215) to discuss his positive character traits and his childhood history. Woodel also testified about his life and his memory of the Moodys' murders (V15/2216-V16/2388).

Dr. Henry Dee, a clinical neuropsychologist, testified that Woodel has an IQ of 103 and no indications of brain damage, psychosis, or mental illness (V16/2389, 2412-13, 2426). Dee described Woodel's childhood as marked by extreme neglect and abandonment, and noted Woodel suffered chronic depression, low self-esteem, and emotional instability (V16/2402, 2413, 2415, 2444). Dee discussed the unique circumstances and hardships created by Woodel being a hearing child growing up in a home with deaf parents (V16/2390-2402). Dee was "bewildered" by the crimes, which he felt were out of character for Woodel, and could not offer a motive for the murders (V16/2421, 2426).

The jury recommended a life sentence for the murder of Mr. Moody, and recommended a death sentence by a vote of seven to five for the murder of Mrs. Moody (V3/363-64; V17/2648-49). A Spencer hearing was held on March 17, 2005 (V2/334-362), and a final sentencing hearing was held July 1, 2005 (V3/376-387).

The court followed the jury recommendations in both cases, sentencing Woodel to life for Mr. Moody's murder and to death for Mrs. Moody's murder (V3/393-403). As to Mrs. Moody's murder, the court found four aggravating circumstances: prior violent felony conviction (based on the contemporaneous murder of Mr. Moody) (great weight); committed during commission of a burglary (great weight); especially heinous, atrocious or cruel (great weight); and victim vulnerable due to age or disability

(moderate weight). In mitigation, the court found no significant criminal history (moderate weight); defendant's age (little weight); substantial impairment of capacity to appreciate actions or conform conduct (moderate weight, finding not substantially impaired through entire episode); extreme disturbance (little weight); physically abused as a child (moderate weight); neglected and rejected by mother and others (moderate weight); instability of homes as child (moderate weight); parents are deaf and mute (moderate weight); abuse of alcohol and drugs (little weight); willingness to meet with victims' daughter (little weight); willingness to be tested for bone marrow donation for his daughter (little weight); defendant's belief in God and belief he has been forgiven (little weight); voluntary confession (little weight); and defendant's compassion for others (little weight). The court concluded that the aggravating factors "far outweigh" the mitigation and imposed a sentence of death (V3/402). This appeal follows.

SUMMARY OF THE ARGUMENT

I. No error occurred when the trial judge excused two potential jurors that could not speak English well enough to participate in deliberations without an interpreter. The record reflects that this issue has not been preserved for appellate review. Although Woodel asserts that his Sixth Amendment right to a fair cross section of his community was violated, he has not offered a sufficient challenge of systemic discrimination to support his claim. There has been no showing of a distinct class that was underrepresented in Woodel's venire. Florida law compelled that these prospective jurors be dismissed and Woodel has shown no impropriety with regard to the selection of his jury.

II. Woodel is not entitled to a new sentencing proceeding due to the unobjected-to testimony from Arthur White relating that Woodel admitted fondling Mrs. Moody. This testimony was relevant to describe the factual circumstances of the crime, and was not unduly prejudicial because other evidence established that Mrs. Moody had been undressed.

III. The trial court properly found and weighed as an aggravating circumstance that Bernice Moody was particularly vulnerable due to her advanced age and/or disability. Testimony offered at the resentencing established that Mrs. Moody was 74 years old and suffered from poor eyesight and a limited range of

motion in her left arm. The trial court applied the correct law and its factual findings are supported by the evidence.

IV. Woodel's death sentence is proportional. The murder of Bernice Moody is supported by four aggravating factors which heavily outweighed the minimal mitigating circumstances found. When compared with factually similar crimes, Mrs. Moody's murder compels the imposition of a death sentence.

V. This Court has repeatedly rejected Woodel's claim that Florida's death penalty statute violates the Sixth Amendment right to a jury trial because it permits a judge to determine eligibility for a capital sentence.

VI. This Court has repeatedly rejected Woodel's claim that Florida's death penalty statute violates the Eighth Amendment because execution by lethal injection is cruel and/or unusual.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT ERRED IN EXCUSING TWO JURORS FOR CAUSE.

Woodel's first issue challenges the trial court's ruling to excuse two prospective jurors for cause because they could not understand the English language and would have required an interpreter in order to participate in deliberations. According to Woodel, the dismissal of these jurors, Castillo and Casanova, resulted in a violation of his Sixth Amendment right to trial by a fair cross section of his community, and compels the granting of a new resentencing proceeding. Woodel presents this claim as a strictly legal issue to be reviewed *de novo*.

However, no issue has been preserved for appellate review. A review of the jury selection reflects that Woodel did not object when prospective juror Castillo was released, after the court was unable to secure an interpreter to assist with his voir dire (V5/320-25, 333-34). No one actually questioned Castillo; once he indicated that he did not understand English, the court indicated she would try to locate an interpreter, and Castillo was asked if he could return the next day, if an interpreter was available (V5/322-25). Castillo indicated a willingness to return, but shortly thereafter, the court determined that no interpreter would be available. Castillo was

called back in and told that they could not get an interpreter, so without objection, he was told that he was free to go home (V5/333-34).

Prospective juror Casanova also advised the jury management officials that he did not speak English well (V8/991). Defense counsel conversed with Casanova in Spanish, explaining that the court could provide an interpreter for the trial, but the interpreter would not be allowed to assist with deliberations (V8/992). Casanova indicated that would be a problem and asked to be excused (V8/992). The court asked if defense counsel wanted to inquire further, and counsel declined, but expressed concern that Woodel was "being deprived of a cross-section of his community ... but, what can I do?" (V8/993). Counsel lodged a "constitutional objection" but did not ask the judge to take any particular action.

At the end of jury selection, all parties expressly accepted the panel (V9/1158). Counsel for Woodel then offered the following comments:

> MR. COLON: I just wanted to renew one objection, and it had to do with the necessity of having to eliminate Hispanic jurors because of the -- I don't know -- even know what you call it. But the problem that we can have an interpreter for jury selection but we can't have them for jury deliberation, which makes no sense. But I understand that is not a Court ruling, that's just the way it is.

> THE COURT: Well, you told me -- it is a court ruling that you can't take them in the jury room, but not this Court.
>
> MR. COLON: Based on the law.
>
> THE COURT: I'm following the law.
>
> MR. COLON: That's what I'm saying. You're following the law. So it's really a constitutional issue. It's not like -- I don't think you're exercising discretion. You're doing what you're told to do.
>
> THE COURT: Right.
>
> MR. COLON: But I certainly think it's a violation of the Eighth Amendment because my client cannot have a full cross-section of the community because a person doesn't speak the language.
>
> THE COURT: And an interpreter. I don't know. Interesting.

(V9/1158-59).

From this discussion, it is clear that there is no ruling from the lower court for this Court to consider. Although defense counsel vaguely asserted a "constitutional issue," he did not secure any constitutional ruling from the judge, and he did not request that any particular relief be granted. It is not clear whether Woodel believes that the "accepted" jury panel should have been stricken, whether prospective jurors Castillo and Casanova should have been recalled and subjected to further questioning with an interpreter, or whether some other remedial action should have been taken. Even on appeal, the specific contours of his argument are not well-defined. Because no sufficient objection was offered to the court below, this claim must be specifically rejected as procedurally barred.

To the extent that a facial attack on Florida's prohibition

against an interpreter's participation in jury deliberations[1] can be discerned from the comments below, no fair cross section violation appears. First of all, an asserted violation of the fair cross section requirement is a claim of systemic discrimination which Woodel has not demonstrated or even alleged in this case. In order to establish a prima facie violation of the Sixth Amendment fair-cross-section requirement, a defendant must show (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process. Duren v. Missouri, 439 U.S. 357, 363-364 (1979); United States v. Henderson, 409 F.3d 1293, 1305-1306 (11th Cir. 2005).

Woodel has failed to establish any one of these elements. He made no attempt below to offer any evidence relating to the identity of the particular class he felt was being underrepresented, and made no attempt to suggest the cause of any alleged underrepresentation. No Sixth Amendment claim is available on these facts. Gordon v. State, 863 So. 2d 1215,

[1] Other than that expressly authorized by Section 90.6063(2), Florida Statutes (1993).

1218 (Fla. 2003) (rejecting claim of ineffective assistance of counsel for failing to preserve fair cross section argument where defendant failed to make prima facie showing under Duren).

A fair cross section claim would fail initially in this case because individuals who don't speak English well are not a distinct class for purposes of needing representation on a jury. Duren requires that a group be of sufficient magnitude and distinctiveness in the community to warrant community representation. 439 U.S. at 370. While Hispanics or Latinos may be recognized as a distinct ethnic group, see State v. Alen, 616 So. 2d 452 (Fla. 1993), there is no independently recognized subgroup within this class defined only by individuals that are not fluent enough in English to participate as a juror without the help of an interpreter. Such a subgroup would not be limited to Hispanics but would encompass anyone who is not fluent in the English language. See Hernandez v. New York, 500 U.S. 352 (1991) (upholding acceptance of prosecutor's peremptory strikes motivated by concerns bilingual jurors would not accept official interpretations, finding such race-neutral concerns could be directed to both Latinos and non-Latinos).

Even if the subgroup of individuals not proficient in English could be considered a distinct class worthy of community representation under Duren, Woodel has offered no statistical

showing as to how large this class is within his community or the extent to which he believes the class was underrepresented in his venire. See United States v. Rodriguez, 776 F.2d 1509, 1511 (11th Cir. 1985) (assessing the fairness and reasonableness of a group's representation requires a comparison between the percentage of the "distinctive group" on the qualified jury wheel and the percentage of the group among the population eligible for jury service in the division; fair cross section violation generally requires at least ten percent disparity in underrepresentation). Such evidence is the heart of a fair cross section challenge, and no Sixth Amendment attack can be sustained without it. Woodel's failure to even suggest possible numbers to support his claim defeats this issue.

Furthermore, even if Woodel could establish that a distinct non-English group was disproportionately excluded from jury service in Florida due to the prohibition against any unauthorized person participating in jury deliberations, a fair-cross-section violation may be overcome by a sufficiently compelling state interest. Duren, 439 U.S. at 367-68 (violation rebutted if "a significant state interest is manifestly and primarily advanced by those aspects of the jury selection process" which result in the disproportionate exclusion). Surely protection of the recognized and time-honored sanctity of jury deliberations is a valid concern which justifies whatever

minimal impact it may have on proportional representation of potential jurors who are not fluent in English. See Henderson, 409 F.3d at 1305-1306 (finding exclusion for police officers and others with arrest powers to be legitimate state interest notwithstanding minimal impact on representation).

It is significant to note that, under federal law, fluency in the English language is in fact required in order for an individual to be qualified for jury service. See 28 U.S.C. §1865(b)(2),(3). This codification demonstrates other substantial state interests, over and above the sanctity of jury deliberations, to support any potential underrepresentation of non-English speaking jurors. Presumably, the federal recognition of dangers to the jury process created by participation of individuals that are not proficient in English reflects a sufficient interest to justify any minimal impact on the right to a fair cross section jury.

Duren recognizes that exemption from jury service "based on special hardship, incapacity, or community needs," is not likely to leave a remaining jury pool that is not representative of the community. 439 U.S. at 370. Hernandez and 28 U.S.C. §1865(b)(2) reflect that language and translation concerns can generate race-neutral justifications for exempting otherwise qualified individuals from jury service. On the facts of this case, Woodel's claim that his Sixth Amendment right to jury by a

fair cross section of his community was violated must be denied as both barred and meritless.

On appeal, Woodel's fair cross section claim has been expanded to incorporate other legal and constitutional arguments, including the assertion of an equal protection violation. Woodel recites several statutes, Sections 40.01, 40.013, and 913.03, Florida Statutes, relating to juror qualification and cause challenges. He claims that both his right to a jury comprised of people representing a fair cross section of the community and the right of the dismissed jurors to serve on a jury are implicated. Clearly, these arguments were not submitted below and no claim of equal protection violation or any other impropriety has been preserved for appellate review. Thus, the other aspects which he now raises must also be expressly denied as procedurally barred.

In addition, these arguments are similarly without merit. The reliance on Florida statutes is evidently to support a claim that, if a person is not disqualified as a matter of law, they cannot be "denied the opportunity of jury service arbitrarily or without sound basis," citing Porter v. State, 160 So. 2d 104, 109 (Fla. 1964) (Appellant's Initial Brief, p. 62). There can be no reasonable basis for concluding that Castillo and Casanova were excused from jury service "arbitrarily" or "without sound basis" on the facts of this case; as the record establishes,

they were excused because they could not participate in jury deliberations without the assistance of an interpreter, which is not authorized by law.

Because there was no improper motive behind the excusal of these prospective jurors, any unpreserved equal protection claim must also fail. Woodel cannot succeed in showing a constitutional violation under the equal protection clause of the Fourteenth Amendment unless he can demonstrate that prospective jurors Castillo and Casanova were excused from jury service due to a discriminatory and invidious intent. Hernandez, 500 U.S. at 359-60 (proof of discriminatory intent or purpose required to show equal protection violation). Yet no finding of improper intent is available in this case. The record fully establishes that Castillo and Casanova were not excused in order to keep Hispanics from serving on Woodel's jury, but because they could not understand the English language sufficiently to participate in jury deliberations unassisted, as required by law.

As Woodel recognizes, excusal of these prospective jurors was compelled by Florida law. In DiLorenzo v. State, 711 So. 2d 1362 (Fla. 4th DCA 1998), a new trial was awarded after an official Spanish language interpreter was permitted to accompany a Spanish speaking juror into deliberations. It did not become clear until after the jury had been sworn that one of the jurors

had difficulty understanding the English language, and at that point an interpreter was provided to assist the juror in understanding the trial. The Fourth District held that the common law sanctity of the jury room requires a finding of fundamental error when an unauthorized person is permitted to intrude on deliberations.

In Morales v. State, 768 So. 2d 475 (Fla. 2d DCA 2000), the Second District rejected an attempt to secure a new trial based on the clerk having excused Hispanics from the venire that requested to be excused and indicated a difficulty with the English language. Noting the DiLorenzo decision, the court agreed that no individual had a right to "serve" as a juror, only the right not to be excluded from service due to racial, gender, or ethnic discrimination that is protected. Id., 768 So. 2d at 476; DiLorenzo, 711 So. 2d at 1363.

Morales clearly supports and authorizes the trial court's action below. To the extent Woodel attempts to distinguish it by suggesting that prospective jurors Castillo and Casanova were more willing to serve than the dismissed juror in Morales, this is a factual matter which is irrelevant to the *facial* challenge Woodel has presented. He has acknowledged that his argument relates a constitutional issue created by the trial court's blind application of the law, without regard to any discretionary acts. To now suggest the court had some

discretion or may have been justified in excusing these jurors on different facts is contrary to Woodel's position below and does not advance his claim on appeal.

Finally, this Court's opinion in Cook v. State, 542 So. 2d 964 (Fla. 1989), lends support for the cause dismissals entered by the court below on Castillo and Casanova. In Cook, the defendant challenged the trial court's refusal to strike, for cause, two Hispanic prospective jurors that indicated some difficulty with the English language. After extensive colloquy, the trial court determined that both individuals could understand the language sufficiently to participate in the trial, and the defendant was forced to use his peremptory challenges to exclude them from the panel. In upholding the court's discretion to deny the cause challenges, this Court commented:

> With the large influx of persons of Hispanic origin, it can now be expected that many jury venires in south Florida will contain persons who do not use textbook English grammar. However, it is the ability to understand English rather than to speak it perfectly which is important. *See United States v. Rouco*. After an extensive colloquy, the trial judge was satisfied that Mr. Sergio and Mr. Boan *had an adequate comprehension of English to serve fairly on the jury*. We are in no position to say that he was wrong.

542 So. 2d at 970 (emphasis added). This passage implicitly holds that, had the judge determined the potential jurors could

not adequately comprehend the English language, excusing them for cause would have been required.

No Sixth Amendment error occurred in the selection of Woodel's jury panel. His request for a new penalty phase proceeding on this issue must be denied.

ISSUE II

WHETHER A NEW PROCEEDING IS REQUIRED BY UNOBJECTED-TO TESTIMONY FROM STATE WITNESS ARTHUR WHITE.

Woodel next contends that the admission of irrelevant and prejudicial testimony from state witness Arthur White denied his right to a fair trial. As there was no objection to the challenged testimony below, any potential error has not been preserved for appellate review. Maharaj v. State, 597 So. 2d 786, 790 (Fla. 1992). This Court can only grant relief if any error is fundamental. Error can only be deemed "fundamental" when it "reaches down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error." Overton v. State, 801 So. 2d 877, 902 (Fla. 2001); Kilgore v. State, 688 So. 2d 895, 898 (Fla. 1996). A review of the record establishes that this standard cannot be met in this issue.

Arthur White met Woodel in 1997 when Woodel was arrested for these murders and White was incarcerated at the Polk County Jail; White and Woodel shared a cell (V12/1654). White saw a news story about the murders with Woodel's picture, and asked Woodel what had happened (V12/1656-57). Woodel told White that he had been coming home, drunk, and saw the female victim cleaning a window, and asked her the time; she had given it to

him and closed the curtain (V12/1657). He then went around to the other side of the patio and went in the home (V12/1657). The woman was coming through the hallway by the kitchen, and reached for a knife. They struggled over the knife and he pushed her down, getting cut a few times.

White did not believe that Woodel intended to kill the woman, but was drunk and startled by the knife (V12/1658). Woodel told White that the woman was wearing her night clothes, and at one point in time Woodel knocked her down, ripped her nightgown, and drug her into the bedroom (V12/1658). Woodel also told White that when they were in the bedroom, he fondled the woman, and then he left her in the bedroom and went into the bathroom to wash up (V12/1658-59). He heard the male victim enter the home and there was a confrontation and the man was stabbed (V12/1660). Woodel told White that he took the knife with him when he left and later got rid of it (V12/1661).

Woodel now claims that a new resentencing proceeding is necessary due to White's unobjected-to testimony about Woodel's admission to having fondled Bernice Moody. However, the admission of this testimony was not error, let alone fundamental error, and no new resentencing is warranted.

The admission of evidence at a penalty phase proceeding is governed by Section 921.141(1), Florida Statutes. That law provides, in pertinent part:

> In the proceeding, evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (5) and (6). Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements.

According to Woodel, testimony that he admitted fondling Mrs. Moody was irrelevant because he was not charged with any sexual offense and it did not relate to any aggravating factor. However, Woodel's actions toward Mrs. Moody were relevant to understanding the entire circumstances of the crime. In this case, one of the aggravating factors which the State submitted for consideration was the "especially heinous, atrocious or cruel" factor. Woodel's admission of fondling Mrs. Moody is properly considered as part of the terror, pain, and humiliation Mrs. Moody suffered at Woodel's hands.

In addition, Woodel's statement to White was relevant in order to assist the jury in determining the credibility of Woodel's post-arrest statement to Detectives Cloud and Cash as well as his own testimony. In all of his statements, Woodel attempted to minimize his actions, for example suggesting repeatedly that Mrs. Moody was getting "poked" because she was flinging her arms after she startled him with the knife. His admission to having fondled Mrs. Moody sheds light on his other

statements, indicating that he had ripped her nightgown and cut off her panties, although he couldn't remember why.

This evidence was also relevant to offer a possible motive for Woodel's behavior. Woodel's state of mind and motivation were both at issue in light of Woodel's testimony as well as that of Dr. Dee. Woodel's testimony that he was angry at being alone at the time he approached Bernice Moody (V15/2303-04) is clarified and explained by his admission that he fondled Mrs. Moody.

Woodel disputes any relevancy and suggests instead that admission of this testimony amounted to evidence of an improper non-statutory aggravating factor. There is no basis for any conclusion that the jury may have considered Woodel's admission of fondling to be a separate and distinct aggravating factor. The jury was properly instructed on its role in weighing the aggravating and mitigating factors as well as the need to limit consideration of aggravating factors to those identified and defined by the judge (V17/2637-39). Woodel's acts of fondling were not identified or argued to the jury as a separate aggravating factor; in fact, the prosecutor did not even mention the fondling at all in his closing argument (V16/2515-V17/2596).

Moreover, this evidence was not unduly prejudicial. The jury was aware that Mrs. Moody was undressed during the attack,

and knew that her panties had been cut off and tied. That Woodel may have taken further liberties with her body would not be surprising or lead the jury to any conclusion that it would not otherwise have reached based on the other evidence admitted.

The scant case law Woodel provides in this issue does not compel the granting of a new resentencing proceeding. Woodel has not offered any comparable case which finds fundamental error on similar facts. To the contrary, numerous cases uphold the admission of much more egregious collateral bad acts which were properly admitted at trial or in penalty phase. Anderson v. State, 841 So. 2d 390, 397-400 (Fla. 2003) (prior attempted capital sexual battery properly admitted to show motive and entire context of crime); LaMarca v. State, 785 So. 2d 1209, 1213 (Fla. 2001) (prior sexual battery properly admitted as inextricably intertwined with charged offense); Zack v. State, 753 So. 2d 9, 16 (Fla. 2000) (other crimes committed in two-week period prior to murder properly admitted to show entire context from which murder arose); Jorgenson v. State, 714 So. 2d 423, 428 (Fla. 1998) (fact that defendant was a drug dealer properly admitted to show motive); Suggs v. State, 644 So. 2d 64, 69-70 (Fla. 1994) (defendant's possession of book, "Deal the First Deadly Blow," not irrelevant or inflammatory so as to require exclusion).

Finally, Woodel's suggestion that ineffective assistance of trial counsel is apparent from the face of the record and provides an alternative basis for relief is not persuasive. Although the record reflects counsel did not object to this testimony, the reasons for counsel's failure to object are not apparent. As this Court has recognized, defense attorneys often decline to object for strategic reasons. Brown v. State, 846 So. 2d 1114, 1122 (Fla. 2003). The mere failure to object, even to facially improper testimony, does not automatically establish deficient performance for purposes of assessing the effectiveness of representation. In this case, as has been shown, the testimony was not improper, and therefore no objection could be constitutionally compelled. Even assuming some impropriety, however, there can be no prejudice where there is no reasonable probability that a timely objection would have altered the outcome of Woodel's penalty phase. Given the strength of the aggravating factors and the weakness of the mitigation offered in this case, this standard cannot be met on this issue. Therefore, this record does not demonstrate either deficient performance or prejudice, and no new resentencing is required due to ineffective assistance of counsel for failing to object to this evidence.

As no basis for disturbing Woodel's death sentence has been offered in this issue, this Court must deny relief.

ISSUE III

WHETHER THE TRIAL COURT ERRED IN FINDING THE AGGRAVATING FACTOR OF "VULNERABILITY DUE TO ADVANCED AGE OR DISABILITY" WITH REGARD TO THE MURDER OF BERNICE MOODY.

Woodel also challenges the trial court's finding in aggravation that Bernice Moody was a particularly vulnerable victim due to advanced age or disability. Although Woodel urges this Court to apply a *de novo* standard of review to this issue (Appellant's Initial Brief, p. 73), this Court has made it clear that it will not reweigh the evidence to determine whether the State proved an aggravating circumstance beyond a reasonable doubt, that the task on appeal is to review the record to determine whether the trial court applied the right rule of law for the aggravating circumstance and, if so, whether competent substantial evidence supports its finding. Willacy v. State, 696 So. 2d 693, 695-96 (Fla. 1997).

In the instant case, the trial court's findings are supported by competent substantial evidence and the right rule of law was applied. Accordingly, this Court must decline Woodel's invitation to usurp the trial court's role, and affirm the lower court's application of this factor. Willacy, 696 So. 2d at 695-96 (division of labor between trial and appellate courts is essential to "promote the uniform application of aggravating circumstances in reaching the individualized

decision required by law"); see also Lawrence v. State, 691 So. 2d 1068, 1075 (Fla. 1997) (even if some evidence existed supporting defendant's theory that he shot the store clerk because she angered him, the trial judge was not required to reject aggravator where there was competent, substantial evidence to support it); Orme v. State, 677 So. 2d 258, 262 (Fla. 1996) (duty on appeal is to review the record in the light most favorable to the prevailing theory and to sustain that theory if it is supported by competent, substantial evidence); Occhicone v. State, 570 So. 2d 902, 905 (Fla. 1990) (court will not substitute its judgment for that of the trial court when there is a legal basis to support finding an aggravating factor).

The trial court made the following findings in support of this aggravating factor:

> Bernice Moody was 74 years of age when she died. She wore glasses, had limited range of motion of her left arm due to a shoulder injury in the spring of the year resulting in loss of arm strength. Dr. Steve Nelson, the Medical Examiner, testified that the toxicology screen indicated that the drugs she had ingested were not prescription drugs and may have been for arthritis, general pain and allergies.

(V3/396). The record reflects that the court's findings are supported by the testimony of Maryann Richard, Mrs. Moody's daughter (V10/1323, 1328-29), and Dr. Nelson (V13/1802).

In its prior consideration of this case, this Court upheld

the applicability of this factor as to both victims:

> Here, the victims were in their seventies and their attacker was twenty-six. The significant disparity in age between the victims and their attacker is a proper consideration for this aggravator. Contrary to Woodel's assertion, the finding of this aggravator is not dependent on the defendant targeting his or her victim on account of the victim's age or disability.
>
> Competent, substantial evidence exists to support this aggravator for the murders of both Clifford and Bernice. With regard to Clifford, there was evidence that Clifford led a sedentary lifestyle resulting from a triple bypass surgery. He previously had both knees replaced and walked with an uneven gait. With regard to Bernice, Dr. Melamud testified that Bernice had medicine in her system, probably for arthritis. Additionally, Bernice's eldest daughter testified that Bernice previously had broken her arm and completely severed the ball in its socket in her shoulder and was in excruciating pain. This resulted in a loss of mobility, partial loss of use, and loss of strength in her left arm. Notably, Dr. Melamud testified that the defensive wounds Bernice sustained were on her right arm. Thus, the trial court did not err in finding this aggravator for both victims.

Woodel, 804 So. 2d at 325-26. Although Woodel is correct in that this prior finding did not bind the lower court for resentencing purposes, his suggestion that there should be a different result this time because the evidence presented was different is not supported by the record. All of the evidence noted to support this factor initially - the ages of the victims, the disparity with Woodel's age, and Mrs. Moody's physical condition, including the prior damage to her arm and the nonprescription medicine in her system - was introduced at

the resentencing and noted again with regard to this factor.

Woodel's only argument on this issue merely offers his disagreement with the trial court's findings on the application of this factor. Woodel claims that, because some of the Moodys' friends indicated they were unaware of Mrs. Moody's physical limitations, this factor was not proven. Clearly the issue presented a question for the fact-finder, which was considered and resolved contrary to Woodel's position. As sufficient evidence was offered and accepted to support the trial court's findings, Woodel's request for a new resentencing in this issue must be denied.

ISSUE IV

WHETHER WOODEL'S DEATH SENTENCE IS PROPORTIONAL.

Woodel also challenges the proportionality of his death sentence. This Court's proportionality review does not turn on the existence and number of aggravating and mitigating factors, but this Court must weigh the nature and quality of the factors as compared with other death cases. Kramer v. State, 619 So. 2d 274, 277 (Fla. 1993). The purpose of a proportionality review is to compare the case to similar defendants, facts and sentences. Tillman v. State, 591 So. 2d 167, 169 (Fla. 1991). When factually similar cases are compared to the instant case, the proportionality of Woodel's sentence is evident.

The court below found four aggravating circumstances: (1) prior violent felony conviction (based on the contemporaneous first degree murder of Clifford Moody), (2) during the course of a burglary, (3) heinous, atrocious or cruel, and (4) advanced age of the victim (V3/394-96). The court provided little weight to three statutory mitigating circumstances: age of the defendant (26); substantial impairment of his capacity to appreciate the criminality of his crime or conform his conduct to the requirements of law (due to his ingestion of alcohol on the night and early morning of the murders); and under the influence of extreme mental or emotional disturbance (because he

liked to be around people, and there was no one at his home that evening) (V3/397-98). Moderate weight was given to the mitigating factor of no significant history of criminal activity (V3/397). Ten nonstatutory mitigating circumstances were found and given little to moderate weight (V3/398-402). The court characterized the aggravating circumstances as "appalling" and concluded that they "far outweigh" the mitigation presented (V3/402).

A review of factually similar cases supports the imposition of the death sentence herein. See Delgado v. State, 948 So. 2d 681 (Fla. 2006) (two victims repeatedly stabbed in their home); Lynch v. State, 841 So. 2d 362 (Fla. 2003) (two victims killed in their home); Smithers v. State, 826 So. 2d 916, 931 (Fla. 2002) (double homicide, HAC and prior conviction aggravators); Dennis v. State, 817 So. 2d 741 (Fla. 2002) (double murder during burglary); Jimenez v. State, 703 So. 2d 437 (Fla. 1997) (elderly woman beaten and stabbed during burglary, statutory mitigator of substantial impairment applied); Johnson v. State, 660 So. 2d 637 (Fla. 1995) (stabbing death of elderly woman during burglary); Jones v. State, 652 So. 2d 346 (Fla. 1995) (couple stabbed during robbery at their business); Freeman v. State, 563 So. 2d 73, at 75 (Fla. 1990), cert. denied, 501 U.S. 1259 (1991) (defendant beat a man that came in as he was trying to burglarize the man's house; Freeman had prior violent felony

convictions of a similar nature, and the trial court also found the murder was committed in the course of a burglary/pecuniary gain. In mitigation, the trial court found low intelligence, abuse as a child, artistic ability, and enjoyed playing with children -- mitigation which this Court characterized as not compelling); Brown v. State, 565 So. 2d 304 (Fla.) (death sentence for murder committed during the course of burglary was proportionate where there were two aggravating factors balanced against the mental mitigators), cert. denied, 498 U.S. 992 (1990); Cherry v. State, 544 So. 2d 184, 187-88 (Fla. 1989) (sentence proportionate where victim was heinously beaten to death during the course of a burglary for pecuniary gain), cert. denied, 494 U.S. 1090 (1990).

The evidence presented in the instant case established that Woodel repeatedly stabbed the Moodys during the course of a burglary. Balanced against this heinous crime was a laundry list of character traits and aspects of the crime which Woodel urged as mitigating evidence. This evidence was completely unremarkable and afforded minimal weight. Based on the foregoing, this Court must find that Woodel's sentence is proportional.

ISSUE V

WHETHER FLORIDA'S DEATH PENALTY STATUTE VIOLATES THE SIXTH AMENDMENT RIGHT TO A JURY TRIAL.

Woodel's next issue asserts that Florida's death penalty statute violates the Sixth Amendment to the United States Constitution as interpreted in Ring v. Arizona, 536 U.S. 584 (2002). This is a purely legal issue which is reviewed *de novo*.

This Court has repeatedly rejected Woodel's argument. Coday v. State, 946 So. 2d 988, 1005-1006 (Fla. 2006); State v. Steele, 921 So. 2d 538 (Fla. 2005). The argument is particularly meritless in light of the jury having convicted him of another first-degree murder, which was cited to support the aggravating factor of prior violent felony conviction. No relief is warranted.

ISSUE VI

WHETHER EXECUTION BY LETHAL INJECTION CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT.

Woodel's last claim challenges the constitutionality of lethal injection as a method of execution. This is a purely legal issue which is reviewed *de novo*. As Woodel acknowledges, this Court has rejected his argument many times. Rolling v. State, 944 So. 2d 176 (Fla. 2006); Rutherford v. State, 926 So. 2d 1100, 1113 (Fla.), cert. denied, 126 S. Ct. 1191 (2006); Hill v. State, 921 So. 2d 579, 582-83 (Fla.), cert. denied, 126 S. Ct. 1441 (2006). To the extent that he suggests the issue must be reconsidered in light of the execution of Angel Diaz in December, 2006, he has offered nothing for further consideration. As this Court is not a fact-finding body, Woodel's request for "further scrutiny" of the issue is not meaningful. Woodel will receive the benefit of whatever changes may ultimately be adopted to improve Florida's system. However, his sentence is not subject to reversal on this basis.

CONCLUSION

Based on the foregoing facts, arguments and citations of authority, this Court must affirm the death sentence imposed by the lower court for the murder of Bernice Moody.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Robert Moeller, Assistant Public Defender, Polk County Courthouse, P. O. Box 9000-PD, Bartow, Florida, 33831, this 6th day of April, 2007.

CERTIFICATE OF FONT COMPLIANCE

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

Respectfully submitted,

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