IN THE SUPREME COURT OF FLORIDA

DAVID BEASHER SNELGROVE,

Appellant,

v. **CASE NO. SC09-2245**
L.T. No. 00-00323 CFA

STATE OF FLORIDA,

Appellee.
_____/

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

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

STATEMENT OF THE CASE

This is the direct appeal from Snelgrove's resentencing for two counts of first degree murder, one count of armed robbery with a deadly weapon, and one count of burglary of a dwelling with a battery. The second penalty phase trial began on January 22, 2008 before the Honorable Kim C. Hammond. On January 31, 2008, the jury recommended death sentences for the murders of victims Glyn Fowler and Vivian Fowler, each by an 8-4 vote. Subsequently, the Defendant filed a Motion to Prohibit the Sentence of Death due to alleged mental retardation, pursuant to Fla. Stat. 921.137 and Fla. R. Crim. P. 3.203. As a result, final disposition of the case was continued so that necessary testing and mental retardation evaluations could be conducted. On June 3, 2009 a consolidated Spencer hearing and mental retardation hearing was conducted by the trial court. On July 2, 2009 the court entered an order finding David Snelgrove was not mentally retarded. The trial court filed an order imposing the death sentence on Snelgrove on October 28, 2009, for the murders of Glyn and Vivian Fowler.

This appeal follows.

RELEVANT FACTS

Appellant's statement of facts contains argument and therefore is not accepted by the State.

I. Guilt Phase

On Snelgrove's initial direct appeal, this Court provided the following recitation of facts:

> On Sunday, June 25, 2000, Glyn and Vivian Fowler were found dead in their home. The elderly couple had been brutally beaten and stabbed to death, as evidenced by multiple fractures and stab wounds spread throughout their bodies. Ultimately, Vivian died from a stab wound to the heart, and Glyn died of a brain injury caused by blunt force trauma to the head.
>
> Evidence at the crime scene and in the surrounding area linked David Snelgrove, the twenty-seven-year-old nephew of one of the Fowlers' neighbors, to the murder. Snelgrove had recently moved in with his aunt and his cousin, Jeff McCrae, after being expelled from a drug rehabilitation program. Blood droplets matching Snelgrove's DNA were found throughout the house, as were bloody fingerprints and footprints matching Snelgrove's. A trained bloodhound followed a scent from the blood on the Fowlers' broken window to Snelgrove, and the police recovered a knife in the woods next to the Snelgrove home with blood matching Snelgrove's DNA.
>
> Snelgrove denied any involvement with the murder. On the day the Fowlers' bodies were discovered, the Flagler County Sheriff's Office questioned Snelgrove about his activities that weekend and the cause of the cut on his hand. Snelgrove claimed he and Jeff McCrae had spent Friday evening at Don Silva's home. [FN2] Around 12:30 a.m., he and McCrae left Silva's together, and Snelgrove claimed he spent the rest of the night at home. He attributed the cut on his hand to an accident that occurred on Monday, June 19, the last day of his landscaping job.
>
> FN2. Don Silva is a friend of Jeff McCrae.
>
> At trial, Jeff McCrae presented a different version of events. He testified that he and Snelgrove arrived at Silva's separately on Friday, June 23, and they left together at approximately 12:30 a.m. On the way back to their house, they stopped to purchase crack cocaine. He did not notice any cuts or bandages on Snelgrove's hand at that time. During the middle of

the night, McCrae awoke to the sound of someone entering his house. He arose to find Snelgrove in the bathroom cleaning a cut on his hand and wiping what appeared to be blood from his leg and foot. Snelgrove stated that he had been in a fight, but he refused McCrae's offer to take him to the hospital. Instead, he wrapped his hand in what was possibly a shirt, [FN3] and told McCrae that he wanted to get more cocaine. The two went to purchase cocaine from a man named "Kimo" (Cornelius Murphy). McCrae testified that the money used to buy the cocaine had blood on it. Later that night, police stopped "Kimo" at a Jiffy Food Store after he attempted to make a purchase with blood-stained money. DNA tests on one of the bills showed that the blood matched Snelgrove's DNA.

FN3. In the attic of the Snelgrove home, the police discovered a bag with two bloody t-shirts. The bag smelled of ammonia. Blood samples from the t-shirts matched Snelgrove's DNA profile. Two pairs of blood-stained shorts were also found in the Snelgrove home. Blood samples from the shorts revealed a mixture of DNA: Snelgrove was determined to be the primary contributor; the testing was unable to exclude Jeff McCrae as a possible secondary contributor.

Two other witnesses also testified to the events of Friday night and the cause of the cut on Snelgrove's hand. Snelgrove's supervisor at the landscaping job testified that he did not notice any injury when he paid Snelgrove for his last day of work on Monday, June 19. [FN4] Snelgrove's neighbor, Hans Reinholz, testified that when he met Snelgrove and shook hands with him, around 11:15 p.m. on Friday, June 23, he did not notice any cuts or bandages.

FN4. There was a disagreement at trial regarding whether the supervisor paid Snelgrove in cash or by a check. Snelgrove first testified that he was paid in cash on Monday, June 19, but he later changed the story to claim he received a check that he cashed on Saturday, June 24. Snelgrove's supervisor claimed he paid Snelgrove in cash on his last day of work. Hans Rheinholz, Snelgrove's neighbor, testified that Snelgrove approached him around 11:15 p.m. on Friday, June 23, to ask him to cash a check for him, and Reinholz refused.

McCrae also testified that on Saturday, June 24, he and Snelgrove visited a number of pawn shops in an attempt to get cash. At one of the shops, McCrae waited in the car while Snelgrove allegedly went in to pawn an old fishing rod that a number of pawn shops had already rejected. Snelgrove returned with the fishing rod, but later a clerk at Value Pawn testified that Snelgrove pawned a necklace belonging to Vivian Fowler. Fingerprints on the necklace matched Snelgrove's.

Additional testimony came from Gary Matthews, an inmate at the Flagler County Jail, where Snelgrove was detained when he was arrested on June 25. Mathews alleged that Snelgrove made critical admissions to him. Hoping to secure a deal with the State on charges he faced, Matthews first wrote a letter to Irwin Connelly, the public defender representing him at the time Snelgrove was arrested. This letter informed Connelly that Matthews had information about a "certain case." [FN5] Connelly withdrew from representing Matthews on June 28, the day after receiving the letter. Matthews also wrote two letters to the state attorney's office. The first was written on June 28. The State did not disclose this letter to the defense until after the guilt phase was complete. However, this letter was substantively the same as a second letter written by Matthews on July 20, which the State did disclose to the defense before trial. The July 20 letter informed the State that Matthews might have information that could save them "some legwork" and aid in Snelgrove's prosecution.

> FN5. Matthews could not remember the date he sent this letter. He denied sending it on June 25, the day Snelgrove was arrested and first held, because he claims Snelgrove did not open up on the first day. He testified that "it had to be a couple days after [Snelgrove] entered the cell" before he wrote the letter. Connelly responded to the letter by filing a motion to withdraw on June 28, and an attorney outside the public defender's office was appointed to represent Matthews.

At trial, Matthews testified to his jailhouse conversations with Snelgrove. Specifically, Matthews testified that Snelgrove told him of a cooperative

effort between him and McCrae to break into the Fowlers' home and rob them of cash that the elderly couple kept in their bedroom. According to Matthews, Snelgrove claimed he knew of this money because he had borrowed money from the Fowlers in the past, and he was in need of money because another neighbor had refused his request for a loan. Snelgrove allegedly told Matthews that with McCrae acting as his lookout, Snelgrove broke a window with his hand and entered the house. He found his way to the master bedroom, but Glyn Fowler startled him before he could find the dresser where the money was kept. Glyn began to fight, and Snelgrove reported to Matthews that he beat and stabbed Glyn to death. In the commotion, Vivian awoke, and he beat and stabbed her as well. Matthews further testified that Snelgrove expressed remorse at his failure to look to the left when he entered the bedroom. If he had done this, he would have seen Vivian's purse, and he could have taken it without having to kill the victims.

* * *

The jury rejected both arguments. It found Snelgrove guilty of two counts of first-degree murder, one count of robbery with a deadly weapon, and one count of burglary of a dwelling with battery. On the two counts of first-degree murder, the jury found Snelgrove guilty of both premeditated and felony murder. In the penalty phase, the jury recommended the sentence of death by a vote of seven to five. [FN7] However, this recommendation did not individually address the two capital murder convictions for which Snelgrove was to be sentenced. Instead, the undifferentiated recommendation was: that "[a] majority of the jury, by a vote of 7/5, advise and recommend to the court that it impose the death penalty upon David B. Snelgrove."

FN7. In light of our holding that Snelgrove is entitled to a new penalty-phase proceeding, we will not recount the evidence and testimony that was presented at the penalty phase.

The circuit court sentenced Snelgrove to death on both capital murder convictions, and this appeal timely followed.

Snelgrove v. State, 921 So. 2d 560, 562-565 (Fla. 2005).

II. Resentencing Facts

A) *The State's Case*

Forensic Technical Manager Allen Miller testified that he was previously employed by the FDLE who testified that he arrived at the scene of a double homicide on Banbury Lane in Flagler County on June 25, 2000. (V9, 772). There was a broken window leading into the family room from the outside, with blood stains on the window sill, and the screen was cut. (V9, 779-780, 784). Blood was found on the inside door lock of a sliding glass door that went into the kitchen. (V9, 781). There were also blood stains on the wall and door frame part. (V9, 782). Another blood stain was found on a small wall, inside the foyer. (V9, 787). The closet inside a guest bedroom was found open and three dresser drawers were also open. (V9, 788). Bloody footprints were found in the hallway heading from the master bedroom, toward the kitchen area of the house, moving across the living room. (V9, 789). The footprints continued into the kitchen and drops of blood were also found in the kitchen up to the sliding glass door where blood was found on the door lock. (V9, 790).

Two bodies, identified as Mr. and Mrs. Fowler, were found in the master bedroom. (V9, 784). Blood droplets or spatter were found on the door looking across Mrs. Fowler's body. (V9, 792). The floor was bloody, doors were open, and blood stains

were on the door. A bloody hand print was found on the mirror in the master bedroom. (V9, 793). Laboratory examination identified the handprint as Snelgrove's. The blood on Snelgrove's handprint belonged to Vivian Fowler. (V9, 793). A jewelry box and other items were strewn about the floor of the master bedroom. (V9, 793). Blood spatter on the bedroom floor but not the open closet door suggested that the door was shut at the time of the attack and subsequently opened. (V9, 795). The upright dresser had blood smear on it. (V9, 795). There was also blood on the wall area where an indentation was found. (V9, 796). Blood was found throughout the bedroom on the carpet around the bed. (V9, 796). On the floor near the bathroom Miller found blood and a purse. Various items near the purse had blood on them and appeared to have been removed from the purse. (V9, 797). According to lab results, Snelgrove's blood was on the purse. (V9, 798).

Blood smear on the wall and dresser enabled Miller to surmise that Mrs. Fowler's head contacted with the wall and her right arm came into contact with the dresser. (V9, 798). Mrs. Fowler's body was apparently moved so that the closet door could be opened. Snelgrove's blood was found on Mrs. Fowler's right ankle. (V9, 799).

A lamp was knocked over near Mr. Fowler on the floor. (V9, 800). Blood cast off on the bedroom curtain across the room was

the result of blunt force trauma. There were “projected stains” on the curtain. (V9, 802). The spatter and distance “that it travels is directly related to the force that’s applied to that source.” (V9, 803). Blood stains were found on the drawer to the dresser in the master bedroom. (V9, 806-07). Blood was found on several items in the dresser drawers. (V9, 808). These items included a zip lock baggie and a gift certificate. (V9, 809). The nightstand was open and the drawers were open. (V9, 810).

Thomas Courter of the Flagler County Sheriff’s Office testified that he came into contact with David Snelgrove as part of his investigation of the homicides of Vivian and Glyn Fowler. (V10, 836). Courter identified photographs taken of Snelgrove and his home after the murders. (V10, 837-38). Photographs were also introduced of clothing taken from Snelgrove’s home. (V10, 838). Deputy Courter identified a photograph [10] of the area outside the Snelgrove home where a knife, the apparent murder weapon, was found. (V10, 838). The knife was seized by the Flagler County Sheriff’s Office and had a bent tip. That knife had blood on it when it was recovered. (V10, 839). Laboratory analysis determined that the knife had Snelgrove’s DNA on it. (V10, 839-40).

Dr. Thomas Beaver testified that he was currently director of forensic pathology for the Texas Tech University Medical

School and Chief Medical Examiner for Lubbock County Texas. (V10, 841). Previously, he was Chief Medical Examiner for Volusia County and in that capacity he came to be involved in the Snelgrove case. Dr. Beaver examined photographs of injuries to Snelgrove and testified Snelgrove had “dressed wounds” on his right hand. Snelgrove had a “jagged, incised wound along the tips of these fingers in kind of a line.” (V10, 845). These wounds were irregular and caused with something with an edge. (V10, 845). The back of Snelgrove’s hand revealed significant incised wounds, caused by a “sharp cutting edge” and also some lacerations, caused by “blunt trauma.” (V10, 846). Some injuries had characteristics of both sharp and blunt injury, characteristic of hitting a tooth with your hand. “So if you hit somebody with a fist and you hit their tooth it will produce an injury that looks like this.” (V10, 846). Dr. Beaver also noted bruising along the knuckles, and all of these injuries are what you see from “striking blows and particularly striking blows to the mouth area where you’ll get the tooth cutting on the skin.” (V10, 847).

The incised wounds to Snelgrove’s hand were likely caused by using a knife without a hand guard, and Snelgrove’s hand slipping down on the blade. People who use knives designed for cutting and “use them for stabbing and they end up with cuts of their fingers as their hand slips down onto the blade.” (V10,

854-55). Blood on a hand also makes slipping more likely; the momentum of the arm keeps moving and the hand will slip off the handle and onto the blade. (V10, 856). The knife recovered outside of Snelgrove's house had a bent tip which means it was driven into something "very hard." (V10, 857).

Dr. Beaver examined the injuries to victims Glyn and Vivian Fowler. (V10, 858). Vivian Fowler was 80 years old, 51 inches tall [4 foot 11], and weighed 91 pounds at the time of the autopsy. (V10, 870). Mrs. Fowler suffered multiple blunt force injuries and incised wounds which Dr. Beaver described for the jury.

Mrs. Fowler had multiple injuries to her face, abrasions on her left cheek above her lip, on her lip and along her nose. These were blunt impact injuries. She also suffered a contusion around her eye, with dark purplish coloration, indicating "blows had been struck here in the face." (V10, 861). Mrs. Fowler had "palpate fractures" of the "facial bones of her nose, the "bones underneath the skin were all fractured." (V10, 861). There were also lacerations to the right side of her head where "multiple blows" had been struck. (V10, 861). The face and skull were "deformed by fractures, around the central area of the face. (V10, 862).

Mrs. Fowler had a stab wound to the midline of her chest, it was curved, "so that means the knife, as it's - - it's moving

in relation to the body." (V10, 862). That wound went through the breast bone, the sternum, and into the heart." This wound was inflicted with a great deal of force to punch through the breast plate, through the sternum, and "that was the fatal wound in this case." (V10, 863). Her chest was filled with blood and there was blood around the heart as well. (V10, 871-72). While she certainly suffered "fairly massive injuries to the face, that's not what killed her, it was the stab wound to the chest." (V10, 872).

The facial bruises and trauma were inflicted when she was alive because there was bruising associated with those injuries, once the fatal wound to the heart was inflicted there would be no more blood pressure. "And once the stab wound to the chest occurs, there won't be any more blood pressure." (V10, 863).

The back of Mrs. Fowler's hand had a large contusion "so that means that this has to happen" before the fatal wound to the heart. (V10, 864-65). This type of wound is typically seen "when a person is receiving blows and they put their hand up to defend and the blow strikes the hand instead of their face or whatever other part of their body and it produces - - the blunt impact produces a bruise." (V10, 865). Mrs. Fowler's hand also had an incised stab wound, which was curved, so the arm and the knife, or, both were moving in relation to one another when the wound was inflicted. (V10, 866). The knife wound went through

the fleshy portion of her arm through the blood vessels and would "bleed profusely." (V10, 866). This wound, however, itself, was not life threatening. (V10, 866).

Mrs. Fowler's right hand had a "typical defensive type injury" where she was "trying to ward off a knife." (V10, 867). The incised wound from a sharp instrument was to the "palmar aspect of the – thumb, that means the part you try to grab with." (V10, 867). Again, Dr. Beaver also noticed contusions to the back of the hand and blood pressure must have been present. The contusions and incised wound are characteristic of, and the "very classic location for a defensive injury where the person is trying to grab the knife or ward the knife off from being stabbed." (V10, 868). These defensive injuries were observed to both hands and reflected that Mrs. Fowler attempted to defend herself with both hands. (V10, 868).

Mrs. Fowler also suffered a fractured hyoid bone in her neck with associated haemorrhage, "so there's been choking of the neck, manual strangulation." (V10, 873). The injuries from manual strangulation occurred prior to the fatal stab wound. (V10, 873-74).

There was damage to the drywall portion of the bedroom, next to where Mrs. Fowler was found, with some blood on it. The irregular indentation associated with wipe off could be from a shoulder or a head. (V10, 876). Mrs. Fowler's body had been

moved based upon his analysis of the blood. (V10, 877).

All of the wounds, the contusions and abrasions on Mrs. Fowler's face and hands came before the stab wound to the chest, because once the stab wound to the chest occurs, there would not be enough blood pressure to "force blood out into the damaged tissues." (V10, 872). Dr. Beaver testified that the distribution of injuries and pattern of injuries to Mrs. Fowler "all suggest to me a prolonged struggle." (V10, 874). While he could not tell exactly when Mrs. Fowler lost consciousness, her defensive injuries indicate "she is aware that she's being attacked and she's defending, and then at some point she will lose consciousness and die." (V19, 874). Dr. Beaver testified that the injuries inflicted upon Mrs. Fowler, the multiple blows to her face, strangulation, and non-fatal stab wounds would cause significant pain and suffering. (V10, 877-79).

Glyn Fowler was 84 years old, 65 inches tall, and 159 pounds at the time of his death. (V10, 871). Mr. Fowler, like Mrs. Fowler suffered a number of injuries, from contusions, abrasions, strangulation, and stab wounds. Mr. Fowler suffered 21 separate injuries to his face and head. (V10, 886). Mr. Fowler had an incised wound to his scalp with associated brain haemorrhage. (V10, 882). Mr. Fowler also suffered blunt force trauma to his hands. (V10, 8883-84). Mr. Fowler's upper and lower jaws were fractured multiple times and fragments of bone

protruded into his mouth. (V10, 892-93).

Mr. Fowler's hyoid bone was fractured reflecting manual strangulation and extensive haemorrhaging in the neck muscles indicated that Mr. Fowler was alive when this injury was inflicted. (V10, 893). This indicates that he was alive and had blood pressure at the time he was strangled. (V10, 893-94). Blood was also found in Mr. Fowler's stomach which indicates that he swallowed after the infliction of injuries to his jaws and that he was conscious. (V10, 895). Dr. Beaver concluded that a stab wound to Mr. Fowler's chest was inflicted after his death because of the lack of haemorrhaging. (V10, 882).

Dr. Beaver testified that the Mr. Fowler's struggle with his attacker lasted from seconds to minutes but thought that the number and pattern of injuries reflected a "prolonged struggle." (V10, 895). "But this is a prolonged struggle. It involves manual strangulation, multiple blows to the head, defensive injuries on the arms and hands. So this is a prolonged struggle." (V10, 895). One of the blows to Mr. Fowler's head would render him unconscious and Dr. Beaver did not know whether it was the first blow or the last. (V10, 897). However, the 21 separate injuries suffered by Mr. Fowler suggested an "ongoing struggle." (V10, 898). Mr. Fowler was conscious and aware of the infliction of at least some of the injuries to the face and neck. (V10, 895). With strangulation, Mr. Fowler would have had

terror associated with the inability or restriction on his ability to breathe. (V10, 894).

Defensive wounds to both victims indicated that each was attempting to fend off blows and the knife and indicate that Mr. and Mrs. Fowler were aware they were being killed. (V10, 899).

Senior corrections probation officer Deborah Laso testified that David Snelgrove was on "community control" with the Department of Corrections on June 23 to 25 of 2000. (V10, 911-12). Community control was described as more onerous than probation and is considered more like jail, the person can go to work and back, substance abuse counselling, and home. They need permission to go anywhere else. (V10, 913). Snelgrove was placed on community control after a tampering with evidence charge based upon his attempt to swallow crack cocaine on January 24, 1999. (V10, 916).

Pam Fowler Norko, the daughter of victims Mr. and Mrs. Fowler, testified that she was a second grade teacher and literary specialist in California. Her mother Vivian, had just turned 80 at the time of her death. Her father was 84. Mrs. Norko testified that her daughter, Kaley, 12 years old, would speak to her grandparents by phone every single day. (V11, 942). Mrs. Norko read a letter from her daughter regarding the impact of learning of her grandparents' murder. Kaley described her grandparents as the most kind and caring people she had ever

met. (V11, 944). Kaley stated that her grandparents will be missed and that her life has been changed forever. (V11, 945).

Mrs. Norko said that she had a very close relationship to her mother and father. “They were my best friends.” (V11, 947). When she was growing up, Mrs. Norko said that her parents were “everybody’s parents” and that all of the children came to her house. (V11, 948). Her father served in the Army during World War II, returned home and went to school earning his Master’s Degree, before embarking on a career in education. When he retired, he had worked his way up to superintendant of the Nutley Public School System in New Jersey. (V11, 949). Her father always worked two jobs during the year. (V11, 950). Despite working two jobs, he always had time for his family, “we came first.” (V11, 950). Her father was an avid churchgoer and was an elder and deacon in the Trinity Presbyterian Church and was active in community organizations, raising money for charity, in the Elks, Kiwanis, and Town Clubs. (V11, 951).

Mrs. Norko testified her mother Vivian, was her best friend and they used to talk to one another “three times a day at least from California.” (V11, 951). Vivian was a full time mother until her youngest brother entered middle school, when she went to work full time. (V11, 952). Her mother kept a meticulous home and nothing was in disarray. (V11, 952-53). Mrs. Norko testified that her mother suffered from osteoporosis and had

just recovered from a vertebrae problem. (V11, 953-54). Her father had a recurring urinary tract problem that required hospitalization at times. (V11, 954).

Every year her parents came to California to celebrate Christmas with Kaley and Mrs. Norko. (V11, 961). Her brother Rusty came from California, but, was having trouble participating in these proceedings. (V11, 966). Mrs. Norko testified that her brother was also close to her parents and to her. (V11, 967). Her mother wore a silver herringbone necklace that Mrs. Norko's brother gave her. (V11, 970). The silver herringbone necklace was not among the personal effects Mrs. Norko viewed after the murder. (V11, 972-73). Mrs. Norko last spoke with her parents at 9:30 pm, on June 23, 2000. (V11, 955).

B. The Defense Case

Flagler County Jail personnel testified that Snelgrove was a cooperative inmate and was respectful to staff and other inmates. Snelgrove appeared to be helpful with another guard in her housekeeping duties. (V12, 1035-36). Snelgrove received two minor corrective consultations for disobeying orders from staff and also received a written reprimand for being in an "unauthorized" area of the jail. (V12, 1038). Snelgrove complained that he did not get enough peanut butter on his bread. One request noted it was his third request and in it, Snelgrove stated, in part: I would like to know if they are

going to start putting peanut butter on my bread at night. I have put in a request about this and have gotten no reply yet...” (V12, 1042). Snelgrove appeared to be able to read and comply with jail rules. (V12, 1049). Snelgrove was able to interact with and play games with other inmates, and, requested playing cards, pinochle cards. (V12, 1048).

Flagler Deputy Julie Martin testified that Snelgrove once came between her and a belligerent, verbally threatening inmate. (V12, 1056-57). Snelgrove filed a “formal grievance” complaining that his inmate account was not promptly credited and failing to handle his money properly. (V12, 1063-64). Snelgrove also filed a complaint regarding recreation, asserting that he should get “three hours” per week in the rec yard, and that “almost four months is enough time to fix the rec yard.” (V12, 1064). This complaint referenced a problem with the jail rec yard due to an escape and steps taken to “fix” it. (V12, 1064). Snelgrove appeared to be a reasonably intelligent fellow. (V12, 1065). Deputy Martin did not expect Snelgrove to be a problem if he served the rest of his life in prison. (V12, 1069).

Snelgrove presented a number of family members who generally testified that Snelgrove was kind, a hard worker, and not known to be violent or even lose his temper. (V12, 1148; V12, 1106). Two incidents related to possible brain injury;

Snelgrove falling out of a shopping cart as a toddler and hitting his head, and, an overdose of medication. When Snelgrove was maybe five, he got into an uncle's medication, "Haloperidol" and almost died.[1] (V12, 1104). Snelgrove had been close to his mother and he became depressed after her death in 1998. (V12, 1117). Snelgrove was a hyperactive child and had been treated with Ritalin. (V12, 1105).

Timothy Kaylor, Snelgrove's half-brother, provided the most extensive lay witness testimony on behalf of Snelgrove. He testified that he and Snelgrove lived together in Miami for some six or seven years before his father and Snelgrove's mother divorced. (V12, 1098). Snelgrove later moved in with Kaylor and his mother in the 1990's when they living in Orlando. (V12, 1102-03, 1107). During this time he became aware that Snelgrove had a cocaine problem. (V12, 1102-03). Snelgrove would act fidgety, wide-eyed and hyper when under the influence of cocaine. (V12, 1119). Kaylor talked to Snelgrove about his cocaine use and told him to stop using it. (V12, 1108). Kaylor was also using cocaine but did not want Snelgrove to know about it, because as a big brother he wanted to set a good example. (V12, 1120). Snelgrove did not drink alcohol. (V12, 1121).

[1] According to Kaylor, when Snelgrove got out of the hospital it seemed to have slowed him down and it took him "a while to bounce back." (V12, 1105). However, Snelgrove appeared to be "pretty much" normal after that. (V12, 1119).

Kaylor did not support his drug habit or use by stealing money from other people. (V12, 1121).

Kaylor never knew Snelgrove to be violent and seemed to want to help people if he could. (V12, 1106). Kaylor and Snelgrove worked together, "we painted together, painted apartments and houses, and cleaned carpets. Done everything from clean up yards to fixing roofs, you know, changing toilets, you know, any – almost anything." (V12, 1118). Snelgrove appeared quite capable of earning a living and had a driver's license and drove a car to and from work. (V12, 1127).

Kaylor did not think that Snelgrove was "all there" in that he did not do well in school, and that Snelgrove had a very limited attention span. (V12, 1122). However, in court, and in a prior deposition, Kaylor stated that his brother was not retarded. (V12, 1123). Kaylor also recalled stating that while his brother was not mentally ill, he was not "all together" in that normal people would show emotion in doing something wrong, but, he wouldn't show it, "[i]t had no effect on him." (V12, 1125). He agreed that Snelgrove didn't seem to "have much of a conscience." (V12, 1125).

Alice Snelgrove [Aunt] testified that Snelgrove lived with her from July of 98 or 99 until he was arrested for the instant offenses. (V12, 1191). During that entire time she claimed never to have seen Snelgrove under the influence of drugs. (V12,

1181-82). As far as she knew, Snelgrove was not using drugs when he stayed at her house. (V12, 1181). Snelgrove would babysit for her daughter and did not appear mentally ill or unstable. (V12, 1180).

Tom Breen testified he worked as an outpatient substance abuse counsellor when he came into contact with Snelgrove. Snelgrove was referred by his probation officer and began treatment for cocaine abuse. (V13, 1192-93). Snelgrove was not able to follow the rules of the counselling program and relapsed out in the community. (V13, 1198). Breen was able to get Snelgrove into the Salvation Army residential treatment program. (V13, 1199).

Breen thought that Snelgrove was depressed and introverted and did not believe Snelgrove was a violent person. Breen did not perceive any mental health problems other than substance abuse for Snelgrove nor did Snelgrove report any such problems. Breen was aware that Snelgrove's criminal record included two grand thefts, possession of cocaine in 1993, burglary of a structure in 1994, purchase of cocaine in 1995, a petit theft in 1996 and then "this tampering in 1999, and another possession in 1999." (V13, 1210). Breen considered this history of offenses related to Snelgrove's use of crack cocaine. (V13, 1210). Snelgrove's drug and alcohol abuse can be considered a voluntary act on his part. (V13, 1210-11). In his 25 years of experience

treating drug addicts, it has been Breen's experience that very few of his clients kill anyone. (V13, 1211).

The State and the defense stipulated that an "unquantifiable" amount of cocaine was present in the blood of Snelgrove which was collected in June 25, 2000. (V13, 1227-28).

Dr. Drew Edwards, Ph.D., a chemical or cocaine addiction expert, testified that addiction is "the inability to control substance abuse in spite of the evidence that this is harming you or things that you care about." (V13, 1233). Dr. Edwards testified that drug abuse, particularly cocaine abuse, causes changes to the brain and that some of those changes are long lasting or even permanent. (V12, 1239). Cocaine use, and, in particular crack, causes euphoria and neurotransmitters like dopamine fire at an accelerated rate. (V13, 1239). After drug use, however, the dopamine system is depleted and leads to depression and/or agitation. Id. It can take up to six months for an addict to feel normal again and not have an intense craving for cocaine. (V13, 1242).

Crack in particular can lead to "very impulsive, self-destructive types of behaviour." (V13, 1260). In his experience you see lots of abhorrent, immoral, and criminal behaviour associated with crack cocaine. (V13, 1261). Crack addicts have a very high relapse rate in his experience. Only 30 or 40 percent are able to maintain sobriety for six months after

treatment. (V13, 1263-64).

Dr. Edwards believed Snelgrove was under the influence of crack cocaine on June 24, 2000. (V13, 1264). Snelgrove relapsed after a period of apparently successful treatment at the Salvation Army residential program. (V123, 1265-66). After testing positive for cocaine upon admission, Snelgrove was apparently drug free for three months. (V13, 1268-69). Snelgrove was expelled for inappropriate (sexual) fraternization with another program participant. (V13, 1268-69). Snelgrove wrote a letter apologizing for his conduct and sought to remain in the program, but, was nonetheless expelled. (V13, 1278-79). When he was kicked out of the program, Snelgrove got a job and lived with Alice Snelgrove. (V13, 1293). However, Dr. Edwards found it disturbing that the Salvation Army summarily discharged Snelgrove from the program and did not allow for an orderly transition. (V13, 1280).

Snelgrove's criminal history was what Dr. Edwards would expect from a crack addict. Dr. Edwards acknowledged that Snelgrove had been arrested for or convicted of 4 or 5 offenses directly related to cocaine. Snelgrove had also been convicted of burglary, theft and grant theft. (V13, 1280-81). While Snelgrove was apparently sober for a few days after being expelled from the Salvation Army program, he used cocaine for 18 days straight leading up to, and including the day of the instant offenses [based upon his interview with Snelgrove]. (V13, 1283). Snelgrove was able to make choices and using cocaine was a choice, but, a choice clouded or influenced by addiction. (V13, 1296-97).

Dr. Edwards has been involved in treating a thousand addicts but very few of those individuals have committed homicide, probably less than 5. (V13, 1287). Dr. Edwards acknowledged that Snelgrove brought a knife with him to the victims' home, but, thought that the knife was to be utilized to cut the screen and gain entry. (V13, 1298). Snelgrove did have the intent to enter the victims' home with the intention of stealing from the victims. (V13, 1298). Shortly before breaking into the Fowlers' home, Snelgrove went to another neighbor's house, Mr. Reinholz, and attempted to borrow money from him. However, Mr. Reinholz would not lend Snelgrove any money. (V13, 1299). Dr. Edwards acknowledged that Snelgrove had also gone to

the Fowlers' home on two occasions prior to the murder and had borrowed money from them. (V13, 1300). Dr. Edwards acknowledged that Snelgrove washed up blood afterward from data he reviewed, but did not know if that was in the Fowler home or "afterwards" in his Aunt's house. Snelgrove pawned Mrs. Fowler's herringbone necklace the next day. (V13, 1310).

Dr. Joseph Wu, a psychiatrist who specializes in the area of PET scan imaging of the brain, was qualified without objection as an expert. (V14, 1330). Dr. Wu has testified in approximately 30 or so death penalty cases and in each case he was called by the defense. (V14, 1403). Dr. Wu admitted that in the great majority of capital cases where he has been asked to examine defendants, he has found a brain abnormality, 28 out of 30. (V14, 1416, 1427).

Dr. Wu observed a PET scan administered to Snelgrove by a Florida physician at an Orlando hospital. The PET scan revealed some differences between the normal control average pattern and Mr. Snelgrove's pattern. Snelgrove's right temporal lobe area is much less active than a normal right temporal lobe area. (V14, 1376). There was an asymmetry between the left and right side of Snelgrove's brain which extended beyond normal variability he would expect to see. (V14, 1379). The subcortical structure in Snelgrove's brain was also less active on the right side when compared to the left. (V14, 1381). The

PET scan showed that Mr. Snelgrove's brain, the right temporal area, did not pick up sugar as fast as, or was slower in processing sugar, than the other areas of the brain. (V14, 1404, 1407).

The significance of the imaging from the PET scan, according to Dr. Wu, was that "this is indicative of an abnormal brain which is damaged in some way. The brain damage is consistent with a history of possible trauma, it's for example, if someone fell out of a shopping cart and struck their head. It would be consistent with possible hypoxia, so, for example, if someone took an overdose of medication and was in shock, and so their blood circulation wasn't sufficient to profuse the brain." (V14, 1387-88). It could also possibly be consistent with psychoses or schizophrenia as conditions of traumatic brain injury may increase the likelihood a person could develop paranoia and psychoses. (V14, 1388).

Dr. Wu testified that ordinarily it is the frontal lobe area which is a control center for the brain and associated with acting out or anger. Snelgrove's frontal lobe did not exhibit any abnormality or injury. (V14, 1417). However, Dr. Wu thought that the frontal lobe was not the only part of the brain which regulates aggression. (V14, 1418).

When asked to explain the impact of the brain abnormality on Snelgrove, Dr. Wu testified:

> Well, I can say that this is the area of the brain that is associated with the regulation of reality testing, associated with mood regulation and aggression, so that abnormalities in this area will be more likely to result in impaired regulation of aggression, impaired control of mood, impaired ability to engage in proper reality testing.
>
> But I can't say 100 percent certainty that that's going to happen. I can just say that there's a medically significant increase in the probability of this happening."

(V14, 1391). Cocaine acts like gasoline on the fire of a damaged brain and can "significantly enhance an abnormal functioning of the brain." (V14, 1393). Dr. Wu agreed that a lot of people have impaired brain functioning but don't kill people and he was not testifying that the brain abnormality was "directly leading to the events." (V14, 1404). Dr. Wu did not talk to any of Snelgrove's family nor was he ware of any of the facts of the case. (V14, 1407).

Forensic psychologist Dr. Robert Berland testified that he examined Snelgrove and administered psychological and intelligence testing. Dr. Berland administered the MMPI-II and testified that several of the scales were elevated. The schizophrenic scale was well above cut off and the paranoia scale was above the line or cut off, as well as scale 4. (V15, 1470-73). Scale 8 measured different symptoms of psychosis and "it's a good measure of hallucinations." (V15, 1470). The elevated scale 4 is influenced by criminal thinking or character disturbance, "antisocial is what they call it" but Dr. Berland

did not know how much of this scale was influenced by “mental illness.” (V15, 1472). The depression scale was what Dr. Berland would expect from situational depression and the mania score was elevated, reflecting that his energy levels were “way above, so he has elevated depression and mania.” (V15, 1464).

Based upon the MMPI and his interview with Snelgrove, Dr. Berland thought that Snelgrove suffered from a psychotic disturbance of biological origin, “that did not control all of his behaviour but was an adverse background influence.” (V15, 1476). Snelgrove’s MMPI profile was described as “actively psychotic” by Dr. Berland. (V15, 1477). In the interview, Snelgrove admitted auditory and tactile hallucinations. And, he also admitted “reluctantly” some delusional paranoid beliefs. (V15, 1484).

Dr. Berland administered the original WAIS, or 1955 Weschler Adult Intelligence Scale to Snelgrove. He used the test as a measure of impairment for brain injury. Snelgrove obtained a 78 full scale IQ. (V15, 1485). Dr. Berland said that the differences among his highest and lowest sub test scores “can mean impairment from brain injury, and the bigger the difference the more likely the impairment.” (V15, 1487). Based upon the history of head injury and the WAIS test scores Dr. Berland suggested the defense obtain a PET scan of Snelgrove. (V15, 1488). Falling out of a shopping cart as a toddler and

ingestion of Haldol as a child were possible contributors to brain injury. (V15, 1490). Prenatal alcohol exposure was another possibility, but, Dr. Berland was not able to confirm it. (V15, 1490). The PET scan revealed a "dramatic asymmetry" which showed that one part is not working as well as it should and therefore was "indicative of damage." (V15, 1494).

Cocaine is "particularly bad for intensifying an existing psychotic disturbance." (V15, 1496). "It will dramatically increase the intensity of symptoms that are there." (V15, 1496). Dr. Berland had evidence that Snelgrove was a chronic cocaine abuser. (V15, 1498).

Dr. Berland thought that anyone who "is psychotic would qualify for" the "extreme mental or emotional disturbance" mitigator. (V15, 1512-13). Dr. Berland thought Snelgrove also qualified for part of the capacity to conform his conduct to the requirements of the law mitigator. (V15, 1513). He did not have any evidence to suggest that Snelgrove was impaired in "his capacity to appreciate the criminality of his conduct." (V15, 1513). But, Dr. Berland did believe that Snelgrove was "substantially impaired" in his capacity to conform his conduct to the requirements of the law based upon a psychotic disturbance, "exacerbated by drugs." (V15, 1514).

On cross-examination, Dr. Berland agreed that Snelgrove was not insane, that he borrowed money from the Fowlers earlier that

evening, then planned with a cousin to break in to the victims' home after they went to sleep. (V15, 1515). However, Dr. Berland did not discuss the facts of the offenses with Snelgrove. (V15, 1516). He chose not to ask Snelgrove about the murders, how he did it, or why he did it. (V15, 1534).

Dr. Berland thought that when Snelgrove used cocaine he became paranoid and became more "explosive, he acted on impulses, and he felt and acted more aggressively." (V15, 1535). Dr. Berland claimed that Snelgrove himself provided that information. (V15, 1535). When asked what other people provided similar information, Dr. Berland stated Beth Griffin, who described Snelgrove as "paranoid." (V15, 1535). She was the wife of one of Snelgrove's friends who knew him for 14 or 15 years. (V15, 1536). Dr. Berland testified that he did "not put any causal relationship" between Snelgrove's mental illness and the charged offenses. (V15, 1539). "I don't have any - - enough information to give a causal link between the mental illness and the crime." (V15, 1540).

Dr. Berland was cross-examined, without objection, about his failure to review Snelgrove's videotaped interview within 24 to 36 hours of the murders wherein Snelgrove provided various explanations for his conduct and his recent injuries. (V15, 1540-41). Dr. Berland did not view the videotape because even the most disturbed people can get it together and act normal for

an hour or two. (V15, 1543). Dr. Berland did not dispute the fact lay witness descriptions of Snelgrove asserted "well, but he wasn't crazy." (V15, 1519). But, Dr. Berland testified "I'm not looking to prove anything to them." (V15, 1519).

Dr. Berland admitted that plenty of low IQ people do not engage in criminal behaviour. (V15, 1519). And, even in people who are not mentally ill, alcohol and drugs can alter behaviour. (V15, 1520-21). The MMPI results indicate that Snelgrove has a character disorder, and, Dr. Berland "can't dispute that he does." (V15, 1523). "The antisocial character, someone who tends to try to get by - - around the rules and getting their own way without following rules." (V15, 1524).

Dr. Stephen Bloomfield testified that he was a clinical and forensic psychologist. He administered the WAIS-III [Weschler Adult Intelligence Scale, Third Edition] test to Snelgrove on January 23, 2008. Dr. Bloomfield obtained a verbal IQ of 69 and a performance IQ of 76, for a full scale IQ of 70. (V15, 1548). The DSM-IV defined mental retardation as a score of 70 or below. Depending on the circumstances, an IQ score of 70 to 74, or "70 or below is indicative of mild mental retardation." (V15, 1549). A diagnosis of mental retardation requires a qualifying IQ score, a measure of adaptive functioning, and, onset or diagnosis before the age of 18. (V15, 1549). Dr. Bloomfield was not yet able to determine if Snelgrove met the criteria for

mental retardation. (V15, 1549-50). Snelgrove's self-report indicated that he had been diagnosed with attention deficit disorder, and was in special education classes before dropping out in the ninth grade. However, Dr. Bloomfield had not examined any school records. (V15, 1550).

Dr. Bloomfield thought that a score of 70 warranted further evaluation and further information. (V15, 1551). This process can take time and in particular, locating records to establish onset before 18, with a defendant of Snelgrove's age, is difficult, "[v]ery difficult." (V15, 1562).

Dr. Bloomfield was aware that in school testing for children designated ESE, certain psychological testing is mandated and a plan implemented to ensure appropriate placement. Such testing is required by law. (V15, 1556). There are five categories of ESE, classifications used by the school.[2] While Dr. Bloomfield had not examined the school records, he agreed that EH by a record would lead him to assume Snelgrove was in emotionally handicapped classes. (V15, 1560).

[2] These were TMH, [Training Mentally Handicapped], EMH [Educationally Mentally Handicapped], . . . SLD [Slow Learning Disability], SED [Severely Emotionally Disturbed], and EH [Emotionally Handicapped]. (V15, 1557-58). Among those disorders, emotionally handicapped was different, in that it could be based upon psychological disorders rather than cognitive thinking processes. (V15, 1558).

C. State's Rebuttal Evidence

The State called Dr. Lawrence Holder in rebuttal on the issue of the PET scan and brain damage. Dr. Holder was licensed to practice medicine, and, was on staff at the University of Florida, Shands Hospital in Jacksonville, and also has been doing consulting work.[3] Dr. Holder is board certified in diagnostic radiology and nuclear medicine. (V16, 1619). Dr. Holder has seen or interpreted thousands of PET scans in his career. (V16, 1620).

Dr. Holder reviewed a disk prepared by Dr. Wu relating to a PET scan. (V16, 1631). In reviewing the PET scan of David Snelgrove, Dr. Holder did not find any abnormality in the PET scan. (V16, 1632). He found absolutely no abnormality in any area of the brain, the frontal area, cortex, or any other area. (V16, 1633). Dr. Holder explained that different areas of the brain process glucose differently and that there is a normal variation just as one foot can be slightly larger or smaller than another, within a normal variation. "So that – and so after looking at a lot of brains, people try to say this is the normal pattern with a normal range." (V16, 1635-36).

[3] Dr. Holder had previously been associate professor at Johns Hopkins and a full professor at the University of Maryland in the area of diagnostic radiology before becoming a full professor of diagnostic radiology in nuclear medicine at the University of Florida. (V16 1623-24).

Snelgrove's variation "[a]bsolutely." fell within the normal range. (V16, 1636).

Dr. Wu chose to add color variation to the normal PET scan digital presentation to accent the perceived difference. However, Dr. Holder again, testified that in Snelgrove all that is revealed is a normal variation. (V16, 1644). Dr. holder explained: "He [Dr. Wu] has chosen to present a color set of images that are in a color scale that is not linear. And the color scale is used to extenuate differences, and that's what he's done. Manipulation in itself is not a bad word." (V16, 1645-46).

The State next played a redacted tape to the jury of the videotaped interrogation of Snelgrove shortly after the murders. Tom Coulter of the Flagler County Sheriff's Department interviewed Snelgrove on June 25, 2000. (V18, 1859-61). He provided Snelgrove with his Miranda warnings orally and in writing. The tape was played for the jury.

When asked what he did over the weekend, Snelgrove said: "Pretty much nothing, sat home most of the weekend, except for Friday, when I walked over my cousin's friend's house. Other than that, I was home." (V18, 1863). In the tape, Snelgrove provided innocent explanations for the cuts on his hands and recalled his whereabouts during the time frame of the murders. Snelgrove claimed that last Monday when he was working for

Greenskeeper he was "doing some trimming some hedges and when I was cutting one of the hedges, one of the sheers ran by, I cut my finger and I had my hand kind of a little too close as I was trying to guide it." (V18, 1867). He said that his boss, Rich, was there when he cut himself. (V18, 1868). In fact, Snelgrove said that his boss wanted to call it a day after he was injured; however, Snelgrove said "no, man, I need to work the rest of the day. So I just took a rag and tied it around my fingers and I went back to work"[4] (V18, 1875-76). When asked if his boss could verify this information, Snelgrove said: "Oh, yeah." (V18, 1875). When asked about other cuts, specifically on his arm, he claimed: "Just from working, old cuts, all over my legs." Id.

Snelgrove admitted that he knew the Fowlers from across the street. He claimed the last time he saw them was Friday afternoon outside by their garage. Snelgrove said that he had been in the house a couple of times. One time, apparently when he was just visiting, a few months back Mr. Fowler asked "me to help him take and move some dressers from - - I don't remember which room it was, but it was one of them." It might have been one of the bedrooms, but Snelgrove claimed not to remember.

[4] Snelgrove was right handed and did not explain how he could cut his right hand and trigger the hedge cutter at the same time.

When told that they had his blood and fingerprints in the house, Snelgrove said "I know I've been in the house." However, he denied he was bleeding at the time he was in the Fowlers' home. When told that they had his blood in the house, Snelgrove said: "It's not mine." When the detectives told Snelgrove his print was on the mirror, he claimed "I don't remember there being a mirror." (V18, 1868-84).

D. Mental Retardation Facts

After the jury had recommended death for each murder, Snelgrove filed a motion to prohibit imposition of the death sentence on the basis of mental retardation, pursuant to Section 921.137 of the Florida Statutes and Fla. R. Crim. Proc. 3.203. A mental retardation hearing was ultimately conducted on June 3, 2009. (V21). The trial court entered an order rejecting Snelgrove's retardation claim finding that it was not even a "close call" on July 2, 2009. (V1, 170).

Any facts relevant to disposition of the retardation issues raised by appellant in this brief will be addressed under Argument VII, infra.

SUMMARY OF THE ARGUMENT

ISSUE I--The trial court did not abuse its discretion in denying a motion for continuance made on the first day of the penalty phase trial in order for defense counsel to investigate the 'possibility' that the defendant was retarded. This was hardly a compelling reason to justify a potentially open ended, lengthy delay, in a case which had already languished at the resentencing stage for several years. The motion was based solely upon a defense expert who had previously testified on behalf of Snelgrove and was not based upon newly discovered evidence.

ISSUE II--The trial court properly allowed the State to present a video tape of the defendant's police interrogation shortly after the murders in rebuttal. The tape was relevant to rebut defendant's claims of mental illness, possible retardation, and impaired capacity at the time of the offenses. The tape was nothing more than a redacted version of videotapes which had been in the defense counsel's possession prior to the 2002 trial.

ISSUE III--Appellant's objection to the prosecutor's argument was not preserved for review. In any case, neither the court's instructions nor the prosecutor's argument were improper.

ISSUE IV--The prosecutor had a good-faith basis for cross-examination questions of defense experts allowed by the trial court below. The questions were relevant to assess what information the experts relied upon, or, chose to ignore in forming their opinions.

ISSUE V--The prosecutor's brief unobjected to and factual reference to victim impact testimony did not misstate the law or mislead the jury. The trial court did not abuse its discretion in providing an approved victim impact instruction in lieu of the special instruction requested by the defense.

ISSUE VI--The death sentences recommended by the jury and imposed by the trial court complied with the law and are well supported by the evidence.

ISSUE VII--Snelgrove's challenges to Florida's procedure for determining mental retardation are without merit. Competent substantial evidence supports the trial court's ruling that Snelgrove was not retarded.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN REJECTING A DEFENSE REQUEST FOR CONTINUANCE ON THE FIRST DAY OF THE PENALTY PHASE TRIAL ON THE POSSIBILITY THAT AN EXPERT MIGHT, UPON TESTING AND INVESTIGATION, FIND SNELGROVE MENTALLY RETARDED? (Stated by Appellee)

Appellant first argues that his death sentences should be reversed for yet another penalty phase because the trial court failed to grant a continuance for the defense to explore and possibly present mental retardation as mitigation. The State disagrees.

A trial court's ruling on a motion for continuance is reviewed under the abuse of discretion standard. Kearse v. State, 770 So. 2d 1119 (Fla. 2000). In Kearse, this Court stated that the trial court's ruling on a motion for continuance will only be reversed when an abuse of discretion is shown and further noted:

> ...An abuse of discretion is generally not found unless the court's ruling on the continuance results in undue prejudice to defendant. See Fennie v. State, 648 So. 2d 95, 97 (Fla. 1994). This general rule is true even in death penalty cases. "While death penalty cases command [this Court's] closest scrutiny, it is still the obligation of an appellate court to review with caution the exercise of experienced discretion by a trial judge in matters such as a motion for a continuance."

Kearse, 770 So. 2d at 1127 (quoting Cooper v. State, 336 So. 2d 1133, 1138 (Fla. 1976)). As this Court has explained, an abuse

of discretion is not found "unless no reasonable person would take the view adopted by the trial court." Scott v. State, 717 So. 2d 908, 911 (Fla. 1998)(citing Huff v. State, 569 So. 2d 1247 (Fla. 1990)). See also Shands Teaching Hosp. and Clinics, Inc. v. Dunn, 977 So. 2d 594, 599 (Fla. 1st DCA 2007)(noting that given the highly deferential standard, "a reversal for failure to grant a motion for continuance would be justified only in very rare situations."). Further, assuming for a moment an abuse of discretion could be discerned on this record, a defendant "must also show that the trial court's denial was harmful; the harmless error doctrine is applicable in these situations." Barnhill v. State, 834 So. 2d 836, 847 (Fla. 2002)(citations omitted).

Snelgrove fails to establish an abuse of discretion or undue prejudice resulting from the court's ruling. First, this request for a continuance came on the first day of the penalty phase trial and was therefore, unquestionably, untimely.[5] (V3,

[5] Under the mental retardation statute and Rules of Criminal Procedure, the "oral" assertion of defense counsel that Snelgrove might be retarded, was untimely. Amendments to Florida Rules of Criminal Procedure and Florida Rules of Appellate Procedure, 875 So. 2d 563, 570 (Fla. 2004)(promulgating Rule 3.203 (d)(1) providing that "the motion for a determination of mental retardation as a bar to execution shall be filed not later than 90 days prior to trial..."); § 921.137 ("A defendant charged with a capital felony who intends to raise mental retardation as a bar to the death sentence must give notice of such intention in accordance with the rules of court governing notices of intent to offer expert testimony regarding mental

4). When confronted with the motion at this late date, the trial court understandably asked for an explanation, noting that Dr. Berland, upon whom the request was based, had testified in the previous penalty phase. Defense counsel explained that Dr. Berland called just prior to the start of the penalty phase, after reviewing the material, and "felt that Mr. Snelgrove may fall within the mental retardation level." (V3, 8). Defense counsel admitted that Dr. Berland told her Snelgrove scored a 78 on the WAIS, but told her a more recent test, the WAIS-III, needed to be administered to determine whether or not the individual is mentally retarded. (V3, 8-9). Defense counsel also indicated the other reason for the requested continuance was to secure the presence of a mitigation witness, Alice Snelgrove. (V3, 11). Defense counsel explained: "So - - and not only are we asking for a continuance so that we can have this WAIS-III test done which were just told about last night, we would like some additional time to see if we can locate, again, Miss Snelgrove." (V3, 14). The State, in response, stated:

> First of all, this psychologist did give an IQ test, the result of 78. If he had thought another test was necessary back in 2000, he could have asked for another test. He did not. He did not suggest one was necessary. He didn't suggest mental retardation. He

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health mitigation during the penalty phase of a capital trial.").

> testified voluminously and extensively in the trial. He never thought mental retardation.

(V3, 21).

Appellant's assertion that Dr. Berland discovered the possibility of retardation based upon an interview or contact with Snelgrove just prior to the second penalty phase is incorrect. Rather, it is clear that Dr. Berland "discovered" this issue while reviewing material long in his possession in preparation for the second penalty phase. (V1, 39). There was nothing new mentioned or relied upon by the defense in asking for a continuance. Nonetheless, the prosecutor stated he would not object to having another expert, retained by the defense, come in and test Snelgrove over the next few nights, as the penalty phase proceeded. However, the prosecutor did object to a continuance on the grounds of prejudice to the State if the case were continued at this late date. The prosecutor stated, in part:

> But to delay this trial, we too have witnesses. We have a witness coming from Texas. We have witnesses coming from upstate, and the family coming from out of state. This is ready to go. If I thought this was a built in reversal, I'd stand up here and say we better continue it. I don't believe it is. I believe they can run their test. As he's indicated, if the test is above 70, then issue is over with. If it's below 70, then we can determine what to do with it as the trial progresses. But we may have to delay the trial a couple of days, have additional testing or some other expert come in, or we may not...

(V3, 22). The trial court noted that this case had already been

delayed “for quite a while as it is, and we’ve had more than ample time to do what needs to be done and be prepared.” (V3, 32). The court allowed for testing to be conducted and facilitated in the courthouse and provided bailiffs to assist in finding a secure location for testing. “So I would say forge ahead on your efforts, and the sooner you get that in the better.” The court, however, declined to grant the continuance. (V3, 32).

The requested delay had nothing to do with the prosecutors or the State’s evidence. The subject matter sought to be “investigated” by the defense was a matter uniquely within the province of the defendant and his attorneys. It cannot be credibly argued that the defendant’s mental capabilities and background were matters unknown to, or unforeseen by defense counsel. See e.g. Fennie v. State, 648 So. 2d 95, 98 (Fla. 1994)(denying mid-trial request for continuance to retain an expert to counter state witness where the defendant had access to all the state witness’ prior statements, and the defense was able to depose the witness prior to the testimony). Indeed, the continuance was claimed based upon a defense expert, Dr. Berland, who long ago, having tested the defendant, and apparently, not suspected he was retarded, called defense counsel, and opined, it was “possible” the defendant could have a qualifying low IQ score to be considered retarded. This was

hardly a compelling reason to justify a potentially open ended, lengthy delay in a case which had already languished at the resentencing stage for several years. The case had been previously set for penalty phase trial on August 13, 2007, but, was continued at the request of defense counsel. (V1, 30). The defense did not request a continuance of the penalty phase, set a year and four months after the previous trial date, until the morning the trial was set to start, on the possibility that subsequent testing or investigation might reveal Snelgrove was retarded. A court "does not abuse its discretion in denying a continuance based upon an 'eleventh hour' request for an expert witness where such request could have been made earlier." Lawson v. State, 884 So. 2d 540, 545 (Fla. 4th DCA 2004)(citing, Davis v. State, 704 So. 2d 681, 683 (Fla. 1st DCA 1997))(no abuse of discretion in rejecting defense counsel's request for continuance at the "11th hour" in order to secure mental health expert to support an intoxication defense on commencement of final hearing for probation violation).[6]

[6] This case stands in stark contrast to Sorge v. State, 834 So. 2d 268, 270 (Fla. 1st DCA 2002), where the court found an abuse of discretion in failing to grant a continuance based upon the possibility of pursuing an insanity defense. The defendant's murder case had been pending less than a year from the time the defendant had been charged and the defense attorney's requested evaluation did not encompass, as requested, the issue of sanity. Just prior to trial, an expert indicated that the defendant "may have been legally insane at the time of the offense" and the court found "the continuance was not sought as a means of

This Court in Gorby v. State, 630 So. 2d 544, 546 (Fla. 1993) affirmed a similar day of trial denial of a requested continuance, based in part, upon a claim that the defense retained mental health expert needed more time to complete his evaluation of the defendant. This Court stated:

> The public defender's office originally represented Gorby, but, when it sought permission to withdraw, the court appointed a private attorney to represent him. The day after being appointed, that attorney asked for and received a continuance. Seven months later, on the day trial began, counsel moved for another continuance because one of his two penalty phase investigators had not had time to work on the case, two witnesses in Texas could not be located, and the neuropsychologist needed more time to "confirm" his findings. After hearing both sides on this motion, the court denied the continuance, and trial commenced. Gorby now argues that the court committed reversible error by denying the continuance. We disagree.
>
> Granting a continuance is within a trial court's discretion, and the court's ruling on a motion for continuance will be reversed only when an abuse of discretion is shown. Bouie v. State, 559 So.2d 1113 (Fla. 1990). As pointed out by the state, counsel had two investigators and also personally travelled to West Virginia to investigate Gorby's background, the mental health expert had more than adequate time to prepare for trial, and counsel did not allege that the Texas witnesses would ever be available. Gorby has not demonstrated that the court abused its discretion in refusing to continue the trial.

Gorby, 630 So. 2d at 546. See also People v. Jackson, 45 Cal. 4th 662, 678, 199 P.3d 1098, 1108 (Cal. 2009)(no abuse of

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delay." Here, unlike, Sorge, where the expert had just completed an evaluation of the defendant, the requested continuance was based upon the last minute "revelation" of a defense expert, who had previously testified in this case and who had been known to the defense since 2000.

discretion found in denying "a continuance to investigate "the adaptive functioning factors that are mentioned in the Atkins v. Virginia opinion" and to wait for the Legislature to define mental retardation.").

Rather than reject outright the defendant's attempt to test the defendant at the last minute and present an unlisted or undisclosed expert, the trial court allowed the defendant to pursue and present evidence of possible mental retardation. This was a reasonable accommodation given the untimely nature of the defense request for continuance, the inconvenience and expense to the State [out of state witnesses and family members], and, the orderly and efficient administration of justice for this long delayed penalty phase re-trial. Further, the record clearly refutes the notion that the defense suffered any "undue" harm from the failure to grant an open ended continuance in this case. If anything, the defense benefitted from the late testing and last minute addition of an expert to testify, Dr. Stephen Bloomfield. [in his brief, appellant mistakenly refers to Dr. Berland, who did testify during the penalty phase, but, did not administer the WAIS-III-R].

Dr. Stephen Bloomfield testified during the penalty phase that he administered the WAIS-III [Weschler Adult Intelligence Scale, Third Edition] test to Snelgrove on January 23, 2008. Dr. Bloomfield obtained a verbal IQ of 69 and a performance IQ

of 76, for a full scale IQ of 70. (V15, 1548). The DSM-IV defined mental retardation as a score of 70 or below. Depending on the circumstances, an IQ score of 70 to 74, or "70 or below is indicative of mild mental retardation." (V15, 1549). However, Dr. Bloomfield was not able to yet determine if Snelgrove met the criteria for mental retardation. (V15, 1549-50).

Notably, defense counsel did not even file a motion to prohibit the imposition of the death penalty by reason of mental retardation until September 5, 2008, well after the jury recommendation which was made on January 31, 2008. (V1, 114). This motion, and, the accompanying request for a delay in the Spencer hearing and ultimately sentencing, suggest the real reason for the retardation claim was simply to delay the proceedings and imposition of the death sentences. (V1, 169)(Defendant's motion to continue Spencer hearing, citing the need for "more time, up to six (6) months, needed to continue pursuing the issue of the defendant's possible mental retardation.").

Since the defense chose to investigate the possibility that Snelgrove was retarded on the first day of the scheduled trial, it ultimately received the tactical benefit of presenting an expert to opine that Snelgrove's intellectual scores placed him within the range of mild mental retardation, without any

rebuttal from a State expert. Ultimately, the State retained Dr. Pritchard who obtained a higher, or non qualifying IQ score of 75, and who testified that Snelgrove did not meet the criteria to be considered mentally retarded. See Issue VII, infra. Dr. Pritchard's testimony was found more credible by the trial court, which issued a detailed order, rejecting Snelgrove's mental retardation claim. Consequently, based upon this record, it cannot be said the defendant suffered any prejudice from the trial court's denial of a continuance in this case. The jury did hear from Dr. Berland and a just retained mental health expert, Dr. Bloomfield, that Snelgrove was possibly retarded, without any expert to rebutt that testimony from the State. See, Schriro v. Smith, 546 U.S. 6, 126 S. Ct. 7 (2005)(the Court reaffirmed that its decision in Atkins does not give a capital defendant a right to have a jury determine whether he or she is mentally retarded.). And, as ultimately found by the trial court, after the subsequent mental retardation hearing, Snelgrove was found not to be retarded by the trial court. Under the circumstances of this case, it cannot be said the trial court abused its broad discretion, or, that the defendant suffered any undue prejudice as a result of the continuance denial. See White v. Com., 178 S.W.3d 470, 489 (Ky. 2005)(no error to deny continuance to defendant considering defendant's own role in creating the need for a delay in order

to pursue mental retardation claim where claim was "quite speculative" and he was able to present his low IQ scores to the jury as mitigation).

In conclusion, the requested continuance was nothing more than a request to continue the mitigation investigation, to investigate the possibility of retardation, for a resentencing proceeding, years after the original trial based upon the last minute speculation of an expert long known [Dr. Berland] to the defense. Under the circumstances, the trial court was under no obligation to allow counsel additional time, and, disrupt the long scheduled, and, long delayed penalty phase, so that counsel could continue the mitigation investigation. See Doorbal v. State, 983 So. 2d 464, 489 (Fla. 2008)(no abuse of discretion in denying continuances for post-conviction hearing where preparation of such a claim "primarily entails an investigation of the background of the defendant" and the "timing factors" surrounding mental health evaluations of the defendant "were within control of Doorbal's counsel."). Moreover, since the defendant was not, in fact, retarded, he was not prejudiced by the denial of the continuance.

ISSUE II

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN ADMITTING A REDACTED TAPE OF SNELGRROVE'S EXCULPATORY STATEMENTS TO THE POLICE SHORTLY AFTER THE VICTIMS' MURDERS IN REBUTTAL? (Stated by Appellee)

Snelgrove next contends that the trial court erred in allowing the State to introduce a redacted portion of Snelgrove's exculpatory explanations and denial of committing the victims' murders in rebuttal. The State sought to introduce the tape to rebut mental health evidence which suggested that Snelgrove was chronically psychotic based upon his MMPI scores, that he was brain damaged and possibly retarded. The trial court did not abuse its discretion in admitting the videotape.

Of course, "a trial court has broad discretion to determine the relevancy of evidence." Wright v. State, 19 So. 3d 277, 291 (Fla. 2009). The abuse of discretion standard of review on appeal is highly deferential to the trial court's ruling. **"**Discretion is abused only when the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable person would take the view adopted by the trial court." White v. State, 817 So. 2d 799, 806-807 (Fla. 2002)(citing Trease v. State, 768 So. 2d 1050, 1053 n.2 (Fla. 2000)). Appellant's brief is conspicuously devoid of any facts developed below. Review of those facts establishes that the trial court made a

well reasoned, and, well supported decision to admit the tape.

While the defense complained about having to review the redacted version of Snelgrove's statement several days after the start of the penalty phase trial and raised a number of general concerns, counsel ultimately asserted that it opened up a "can of worms." (V17, 1670). The trial court noted that it did not recognize a "can of worms" objection and asked the defense for authority and specific reference to the rules of evidence on why the tape should be excluded. Id. The Court was not sure the defense was objecting on the ground of relevancy or hearsay or some other basis and asked counsel for clarification on what "exactly" counsel was asking for. (V17, 1672). The prosecutor noted that the State and defense had gone through a suppression hearing regarding the tape and that if there remained any objectionable material on the tape the defense would have moved to suppress it, but had not. (V17, 1672-73).

The State noted that the tape was relevant to intelligence, adaptive behavior, and that Snelgrove's discussion and responses, and emotion were depicted on the tape. (V17, 1673). The prosecutor observed that a defense expert had noted that communication skills and adaptive skills are important in making a mental retardation determination. (V17, 1674). The prosecutor noted that if the tape reflected a bumbling uncommunicative, apparently brain damaged Snelgrove, within a short period after

the crimes, the defense would certainly introduce the tape. (V17, 1675). The State also noted that the tape had previously been ruled admissible, with the exception of Mr. Snelgrove invoking his right to counsel, which occurred at the end of the tape, and which had been suppressed. (V17, 1675-76).

The defense argued that Dr. Berland provided undisputed testimony that you could look at and interact with people and never suspect that they are mentally ill or suffer from psychosis. "A determination of something of that nature is outside this realm of the capabilities of lay witnesses." (V17, 1682). The court noted that the jury can dispute or question the testimony of any witness, lay person and expert, and decide "what's credible." (V17, 1685). The trial court dismissed the jury early and allowed the defense over the evening break to view the redacted DVD, which was about an hour long, and, possibly make their own. (V17, 1688). The court also played the DVD outside of the jury's presence prior to the break to give defense counsel the ability to view and object to specific portions of the tape. (V17, 1690). After viewing the DVD in open court, defense counsel finally coalesced its argument down to relevancy, that it was "irrelevant, has no probative value." (V17, 1729).

The prosecutor noted that this tape reflects Snelgrove just a day after the murders, or within 48 hours of the murders, and,

how he spoke, communicated, and depicts his emotional state, and, in particular, whether or not he is under duress, or, the influence of a psychosis. (V17, 1734). And, as the prosecutor noted, Snelgrove, in an obviously stressful situation, comes across as "cool, calm, collected." (V17, 1735). "And during that process he still is able to relate well with them, laugh, know he's hungry, know he wants to have a smoke." (V17, 1735). The questions the defendant's experts raise or address, relating to stress and brain damage, ability to process information, intelligence and memory, are all addressed in the video, including memory and cognitive ability. (V17, 1736).

After viewing the tape, the trial court agreed that the tape was relevant and its relevance far outweighed the danger of unfair prejudice. The trial court stated, in part: ". . . It may be that it doesn't go so far as to prove competency, but it may dispute the allegations of incompetency that have been asserted." (V17 1741). The court noted that it was of particular value I that "it does show the demeanor, the character, the ability to understand, read, communicate, even write that was demonstrated at the time relatively close to the alleged murders." (V17, 1741).

As an initial matter, Snelgrove claims some sort of discovery violation based upon the apparent failure to disclose or list the DVD as an exhibit prior to the penalty phase. The

problem with this argument is that the full videotape(s) of the interrogation, from which the shortened and redacted DVD was compiled, was undeniably in the defense possession since the initial trial in 2000, and, indeed, part of the tape was actually introduced during the trial. See Snelgrove, 921 So. 2d at 562-65; See State v. Muhammad, 866 So. 2d 1195, 1202-1203 (Fla. 2003)(noting that defendant failed to show prejudice based upon written statements of prison personnel where "there has been no demonstration that the allegedly withheld documents contained any information not already disclosed to Muhammad by other means."); Frazier v. State, 761 So. 2d 337, 340 (Fla. 4th DCA 1999)("Frazier could not reasonably claim that the state's rebuttal evidence surprised him and thereby necessitated surrebuttal, as it was a verbatim recitation of the rebuttal witness's testimony from the 1993 trial."); Durrance v. State, 44 So. 3d 217, 221 (4th DCA 2010)("The state, having disclosed the existence of the prior trial testimony, was not required to provide the substance of the written or recorded testimony, nor was it required to do the defense's job by pointing out exactly which parts of the trial testimony that it intended to use."). The trial court dismissed any notion that the DVD constituted a discovery violation because "undisputedly," the tapes had been made and furnished to the defense. (V17, 1671). Indeed, defense counsel seemed to abandon his discovery objection, admitting the

defense had in its possession the full tape of Snelgrove's police interrogation and the earlier edited version which had been admitted during Snelgrove's trial. (V16, l608-09). Consequently, on this record, no discovery violation has been established.

"Generally, rebuttal testimony is permitted to refute a defense theory or to impeach a defense witness." Rimmer v. State, 825 So. 2d 304, 321 (Fla. 2002)(citing Charles W. Ehrhardt, *Florida Evidence* § 612.5 (1999)). Appellant focuses his argument on the rather interesting theory that because Dr. Berland did not think viewing a videotape of the defendant shortly after the murders would be helpful on the question of Snelgrove's mental functioning, possible psychosis, or other mental issues, the State was thereby precluded from introducing the tape in rebuttal. The State is unaware of any evidence code provision which requires rebuttal or impeachment evidence to be approved by the witness sought to be impeached. If there were such a requirement, experts would certainly want to avoid and therefore would probably veto [not find *helpful* in formulating their opinions] any potential rebuttal or impeachment which could reflect poorly upon or actually contradict their opinions.[7]

[7] As this Court noted in Easkold v. Rhodes, 614 So. 2d 495 (Fla. 1993):

> "even though the facts testified to by [the medical expert] were not within the ordinary experience of the

And, for that reason, appellant's argument against admission of the tape does not raise a serious legal question for this Court, much less demonstrate an abuse of the trial court's discretion.

It must be remembered too, that Dr. Bloomfield, Snelgrove's retardation expert, agreed that the ability to communicate is an important part of an intelligence review. (V15, 1565-66). The tape reflects Snelgrove's ability to communicate and follow directions. Certainly, if the tape had shown Snelgrove to be dissembling, uncommunicative, or otherwise acting unusually shortly after the murders, Dr. Berland and the defense would have viewed the tape as unquestionably relevant and would have sought its admission. A legitimate area of inquiry for any expert, and, in particular a mental health expert, is the background material they either chose to rely upon, or, chose to ignore or overlook.[8] The review of materials or failure to review materials which could shed light on Snelgrove's functioning was certainly a relevant area for impeachment and

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members of the jury, the jury was still free to determine their credibility and to decide the weight to be ascribed to them in the face of conflicting lay evidence." (quoting Shaw v. Puleo, 159 So. 2d 641 (Fla. 1964)).

[8] Dr. Berland was cross-examined, without objection, about his failure to review Snelgrove's videotaped interview within 24 to 36 hours of the murders wherein he provided various explanations for his conduct, and, his recent injuries and was generally evasive. (V15, 1540-41). Dr. Berland didn't view the videotape because in his experience even the most disturbed people can get it together and act normal for an hour or two. (V15, 1543).

rebuttal.

For example, Dr. Berland found that Snelgrove was substantially impaired in his capacity to conform his conduct to the requirements of the law by virtue of a chronic or continual psychosis, brain damage, or some combination. However, Dr. Berland admitted that he did not ask Snelgrove anything about the offenses and therefore had no idea what Snelgrove was thinking at the time of the crimes.[9] When Dr. Berland was asked the rather logical, and in the State's view, glaringly obvious question, on why he did not bother to ask Snelgrove about the charged murders, Dr. Berland explained simply that was not "what my job was." (V15, 1516).

Courts have found video tapes and confessions of defendants relevant on issues of mental capacity or competency.[10] See e.g.

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[9] In an apparent contradiction to finding the statutory mental mitigator of diminished capacity to conform, Dr. Berland claimed that he did "not put any causal relationship" between Snelgrove's mental illness and the charged offenses. (V15, 1539). "I don't have any - - enough information to give a causal link between the mental illness and the crime." (V15, 1540).

[10] In Arizona v. Mauro, 481 U.S. 520, 107 S. Ct. 1931 (1987), the Court concluded that allowing a suspect to talk to his wife after he had invoked his right to silence did not constitute a custodial interrogation. The tape recording was introduced at trial, over defendant's Miranda objection, in order to rebut the defendant's claim that he was insane at the time of the killing. Mauro suggests that as a matter of relevancy, a tape of the defendant pursuing a mental competency defense shortly after the charged crimes is so obviously relevant, that an objection on that ground [relevancy] is rarely lodged or discussed unless

Perri v. State, 441 So. 2d 606, 609 (Fla. 1983)("Although defendant objects to the admissibility of this video tape, it is relevant to show that he was, at that time, under the influence of some mental or emotional disturbance."); Lambert v. State, 888 P.2d 494, 499 (Okla. Cr. 1994)(court finding "the use of Appellant's confession, given prior to trial and available from the beginning of this entire procedure, is permissible in determining Appellant's competence to stand trial."); Glover v. Newton-Embry, 2009 WL 2413925, 8 (W.D. Okla. 2009) ("Specifically, given the State's evidence that Petitioner was faking incompetence and Petitioner's evidence of her mental retardation, the video provided an opportunity for the jury to compare her demeanor and ability to communicate at the time of her husband's death with the demeanor and communication skills she displayed during the competency trial.")(citations omitted); State v. Widenhouse, 582 So. 2d 1374, 1387 (La. App. 2 Cir. 1991)("the trial court did not abuse its discretion in allowing the state to rebut the expert testimony by replaying defendant's confession.").

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some other legal issue is addressed, such as invocation or waiver of Miranda. And, there is no Fifth or Sixth Amendment challenge here because Snelgrove validly waived Miranda and at the point in the questioning he subsequently invoked counsel, all questioning ceased. The invocation of counsel was not shown to the jury on the redacted DVD. (V16, 1597).

Snelgrove has cited no authority for the proposition that a video tape of a defendant, taken shortly after a murder, is inadmissible on the basis of relevancy when a question is raised surrounding the defendant's mental state or capacity. Consequently, it certainly cannot be said that the trial court abused its broad discretion in admitting the tape in rebuttal. See Brooks v. State, 918 So. 2d 181, 188 (Fla. 2005)(A trial court's admission of evidence will not be disturbed on appeal absent a clear abuse of discretion.").

Appellant next asserts that the trial court was somehow required to grant a continuance to the defense so that they could further examine and possibly counter the tape.[11] The trial court was under no such obligation where the tape was simply a shortened version of tapes the defense had possessed for years, since the first trial. The DVD was provided to the defense on the afternoon of January 29th, during an afternoon break. (V15, 1568). Under the circumstances, the trial court was quite accommodating to the defense, since the material reflected in the DVD or tape had long been in defense counsel's possession. The court provided a lengthy recess for the parties to review

[11] Defense counsel was provided a copy of the edited or shortened version of defendant's statement, which was just over 50 minutes long, at 2:00 on the afternoon of January 29th. (V16, 1587, 1603).

the tape in court.[12] (V16, 1655-56; V17, 1660). Further, the trial court gave the defense an overnight recess in order to view the original tapes and select additional portions, should they choose, to show the jury. (V17, 1742-43). "Well, that is afforded to you [time], so take advantage of that. If there's something you think needs to be presented from that evidence, feel free to do that." (V17, 1743). After briefly discussing jury instructions, the court recessed over night. (5:05 pm). (V17, 1802).

The record makes it clear that the court and State were more than willing to accommodate counsel in their efforts to prepare for and present any evidence they desired from the unedited version of the defendant's statement. (V18, 1817-20). As the court explained: "They say you can play any of it or all of it. You need to decide which portions that you want to play and be prepared to that to the jury." (V18, 1821). The prosecutor also noted that a VHS player was in the courtroom and the defense could play any portion of the tapes it wanted to for the jury. (V18, 18276). Rather than do so, counsel simply announced his objection on constitutional grounds. (V18, 1821).

[12] The record reflects the court recessed at 10:47 a.m. and reconvened at 1:40 p.m. (V17, 1660). However, when the court reconvened, defense counsel asserted he or his staff experienced technical problems viewing the original tapes and therefore were unprepared to present their own version or additional matters. (V18, 1815).

When defense counsel stated he did not know what he wanted to play, the trial court was unimpressed, noting that it had the tapes for years: ". . .I find it difficult to believe you don't know how much of it you did want to play and see if there's a better way that we can find that permits you to play it."[13] (V18, 1831). Under the circumstances, and, without defense counsel articulating any compelling need for a continuance, the trial court was under no objection to delay the penalty phase trial.

There was nothing unfair about the procedure employed by the trial court below. Defense counsel may have been inconvenienced by having to view the tape, but inconvenience is not grounds for excluding relevant evidence. As this Court observed in Cooper v. State, 336 So. 2d 1133, 1138 (Fla. 1976): "Our rules were not designed to eliminate the onerous burdens of trial practice. Their purpose was to avail the defense of evidence known to the state so that convictions would not be obtained by the suppression of evidence favorable to a defendant, or by surprise tactics in the courtroom."

While appellant, in passing, mentions the State introduced a "materially changed" exhibit (Appellant's Brief at 39), no such alteration evidence was introduced below. And, no

[13] Defense counsel mentioned some areas he wanted to cover, but, apparently decided against presenting any part of the unedited tapes, claiming that stopping and fast forwarding the VHS tape could irritate the jury. (V18, 1829).

supporting facts or argument accompany this allegation on appeal. Consequently, this argument has not been preserved on appeal. See Duest v. Dugger, 555 So. 2d 849, 852 (Fla. 1990).

Finally, appellant briefly mentions the reference to a voice stress test in the tape and observes that polygraph results are clearly inadmissible as a matter of law.[14] (Appellant's Brief at 39). However, the State submits that any objection to the tape on the basis of including reference to the stress test has been waived. While initially, perhaps, defense counsel raised a concern that the tape referenced a stress test or lie detector (V17, 1664), after viewing the redacted DVD defense counsel failed to mention this objection or request that this portion of the tape be excised. Defense counsel simply argued the tape was irrelevant and offered argument in support of his relevancy argument. (V17, 1729-30, 1739-40). Nor, when the tape was played for the jury, did defendant object to the tape on this specific basis. [counsel did renew his objection on grounds previously raised]. See McGirth v. State, 48 So. 3d 777, 791 (Fla. 2010)(counsel's failure to obtain a specific ruling on any specific item of victim impact evidence and

[14] The State does not disagree with this non-controversial statement of the law, but notes that no such polygraph or stress test results were admitted in this case. See Sochor v. State, 883 So. 2d 766, 787 (Fla. 2004)(polygraph results not admissible without consent of the parties).

failure to contemporaneously object to specific victim impact evidence operated to waive his claim even though counsel had filed an earlier motion to exclude victim impact evidence); Teffeteller v. State, 495 So. 2d 744, 747 (Fla. 1986)(stating that "[a]ppellant cannot bootstrap this concern over" [revealing the defendant's prior death sentence] in voir dire "to alleviate the requirement of a contemporaneous objection.")(citing Steinhorst v. State, 412 So. 2d 332 (Fla. 1982)); Blackwood v. State, 946 So. 2d 960, 967 (Fla. 2006)(defendant "failed to present the trial court with an opportunity to rule upon the specific arguments now raised and the claim is therefore procedurally barred.")(citing Steinhorst v. State, 412 So. 2d 332, 338 (Fla. 1982)).

Assuming, however, this issue has been preserved, it is nonetheless without merit. This was a penalty phase and the defendant's guilt had therefore been established. Consequently the overriding credibility concerns surrounding admission of a lie detector test at trial are simply not present. See Lundy v. State, 51 So. 3d 1171, 1174 (Fla. 5th DCA 2010)("Cases finding harmful error when a polygraph is referred to involve testimony revealing the results of the examination or where the only inference to be drawn from the testimony would be that the testimony of a critical witness had been corroborated by the polygraph.")(citing Dean v. State, 325 So. 2d 14, 17 (Fla. 1st

DCA 1975)). Moreover, the stress test results were not admitted, only the relevant portion, showing Snelgrove following directions and communicating clearly and coherently with Officer Courter. The jury would not draw any adverse conclusion to Snelgrove's credibility from brief mention of the stress test.[15]

As noted, mention of the lie detector in a penalty phase, where guilt has been established, is much less likely to cause prejudice than a trial situation. Moreover, the prosecutor was careful to excise any results of that stress test from the tape shown to the jury. (V16, 1606) ("This had been - - any implication or statement of that - - of the result of the test has been excluded"). Even at trial, mention of a polygraph does not require reversal or even amount to error in situations similar to here, where there is no mention of the test results. For example, in White v. State, 17 So. 3d 822, 824 (Fla. 5th DCA 2009), the Fifth District found no error despite the fact that the jury learned that a state's witness was required to testify truthfully and take a polygraph examination as part of a plea bargain. The court observed: "The mere mention of a polygraph examination is not prejudicial when no inference is raised as to the result or any inference that could be raised is not

[15] Officer Courter explained: "What we have is a CVSA instrument, computerized voice stress analyzer, and it kind of works like a polygraph, but it recognizes deception, but it just works off of voice." (V17, 1713).

prejudicial. Neither [the witness's] testimony, nor the prosecutor's statements, indicated the results or raised an inference as to the results of the polygraph examination." (citing Hutchins v. State, 334 So. 2d 112, 113-14 (Fla. 3d DCA 1976)).

The stress test was admissible not on the question of Snelgrove's credibility, but his demonstrated cognitive ability. The tape reflects Snelgrove's ability to communicate, relate to the questioner in an appropriate manner, and follow directions. Thus, it was relevant to his mental state and capacity shortly after the murders, an issue raised by the defense in these penalty phase proceedings. Consequently, the trial court did not abuse its discretion by failing to redact or excise reference to the stress test. Moreover, since the reference to the test was just a small part of an otherwise admissible tape lasting nearly one hour, any error in referring to the stress test was clearly harmless.

In conclusion, the taped interview of Snelgrove, made shortly after the murders, was relevant on the issue of Snelgrove's mental state, an issue placed directly in question by defense testimony in this case. Consequently, the trial court did not abuse its broad discretion in allowing the State to introduce the tape in rebuttal. But, if any error can be discerned, it would be harmless under the facts of this case.

Officer Courter provided cumulative testimony to that depicted on the tape.[16] And, in this heavily aggravated case, it cannot be said admission of this tape constituted harmful error.

ISSUE III

WHETHER THE PROSECUTOR'S ARGUMENT ON WEIGHING AGGRAVATING AND MITIGATING FACTORS WAS INAPPRORPIATE IN CONJUNCTION WITH THE TRIAL COURT'S PROVISION OF THE STANDARD INSTRUCTION ON WEIGHING MITIGATING AND AGGRAVATING CIRCUMSTANCES? (Stated by Appellee)

Appellant initially asserts that the prosecutor argued that the "law" required a death recommendation in this case. Appellant also asserts an unrelated claim that the trial court failed to provide his specially requested instruction on a jury recommendation for life which is based upon mercy, and, not balancing the mitigating and aggravating factors. Neither argument has any merit.

As an initial matter, the question surrounding the prosecutor's comment Snelgrove pursues on appeal has been waived. Appellant argues that the prosecutor's argument amounted to telling the jury the law required a death

[16] Officer Courter testified without objection to his observations of Snelgrove over a three to four hour period and during that time he had the opportunity to observe Snelgrove's demeanor and ability to communicate. (V18, 1902). Snelgrove appeared sober and responsive, giving directions, spelling names, and understood the language and conversation. (V18, 1904). Snelgrove never gave an inappropriate or bizarre answer. (V18, 194-06).

recommendation. However, defense counsel's objection, in its entirety was as follows: "I'm going to object to that, Your Honor. That may not be in the instructions, but that's the case law." (V18, 1950). Defense counsel's objection preceded the prosecutor asking the jury to consider what the defense lawyers had said, "that justice is always satisfied with a life sentence. Now, where is that written? Where did that –-" [objection]. Id. Snelgrove's argument on appeal is that the prosecutor impermissibly told the jury to follow the law and that the law requires that they recommend death. (Appellant's Brief at 41). The specific argument now made on appeal bears no resemblance to the objection lodged below. Consequently, the argument has been waived on appeal. See Blackwood v. State, 946 So. 2d 960, 967 (Fla. 2006) (defendant "failed to present the trial court with an opportunity to rule upon the specific arguments now raised and the claim is therefore procedurally barred.")(citing Steinhorst v. State, 412 So. 2d 332, 338 (Fla. 1982)); Card v. State, 803 So. 2d 613, 622 (Fla. 2001)(a contemporaneous objection is required to preserve an issue surrounding a prosecutor's comments in closing argument.). This Court has stated that for an error to be so fundamental "that it can be raised for the first time on appeal, the error must be basic to the judicial decision under review and equivalent to a denial of due process." State v. Johnson, 616 So. 2d 1, 3 (Fla.

1993)(citing D'Oleo-Valdez v. State, 531 So. 2d 1347 (Fla. 1988); Ray v. State, 403 So. 2d 956 (Fla. 1981)).

In any case, assuming for a moment this Court examines the merits of appellant's unpreserved claim that the prosecutor argued the law requires a death recommendation, the error is without merit. While the prosecutor did ask jurors to follow the law, he did not state that the "law" required a death recommendation in this case. He did ask the jurors to follow the law as instructed by the trial court. The prosecutor stated, in discussing justice:

> What is justice? It's not -– it's not really a nebulous concept. We kind of know it when we see it.
> One, it's conformity to the law. And we're all going to urge you and His Honor is going to instruct you follow the law, follow the law. You're going to hear that several times.
> Justice, one definition is a merited punishment, merited recommendation. That would be justice, what is merited. A recommendation that reflects fairness. Weigh it. One that does equity. Isn't equity a sense of fairness and justice, balance?. . .[17]

The objection at trial, but not pursued on appeal, the mention of justice by the prosecutor was simply in response to defense counsel's assertion in voir dire that "the law is always satisfied if someone receives a life sentence without parole."

[17] In his closing, defense counsel made a much more blatant appeal for the jury to follow the law: "You all are here because during jury selection it was decided that you could follow the law. . .it was decided that you could follow the law. . .You took an oath to follow the law..." (V18, 1953).

(V7, 568). The prosecutor simply asked the jurors to consider whether or not justice would be satisfied with a life sentence. See Walls v. State, 926 So. 2d 1156, 1166 (Fla. 2006)(a prosecutor's comments are not improper where they fall into the category of an "invited response" by the preceding argument of defense counsel concerning the same subject). This was a proper comment, and, was made in direct response to the defense contention that the law is always satisfied with a life sentence.

The prosecutor's comments in this case on justice were even more innocuous than those in Conahan v. State, 844 So. 2d 629, 640 (Fla. 2003), which this court did not find improper. The prosecutor in Conahan asked the jury to balance justice for the victim with mercy for the defendant, stating: "Mercy for a defendant means nothing if we do not also honor justice for the victim. The statutory scheme in Florida attempts to strike a balance between the equally important values in our society of mercy to a defendant and justice to a victim. It attempts-" Here, the prosecutor made a similar reference to justice and asked the jury to weigh the aggravating and mitigating factors and consider what justice required. Nothing improper can be discerned in that argument.

Snelgrove next asserts the trial court erred in providing the standard instruction on balancing or weighing aggravating and mitigating factors rather than providing his specially requested instruction. Snelgrove's proposed instruction would have advised the jury its recommendation, regardless of, or, in spite of the mitigating or aggravating factors, the jury had the "option to recommend that a [life] sentence be imposed." (V17, 1795). The trial court did not abuse its broad discretion in refusing such an instruction. See James v. State, 695 So. 2d 1229, 1236 (Fla. 1997)(a trial court has wide discretion in instructing the jury and that the court's rulings on the instructions given to the jury are reviewed with a presumption of correctness). At the time of Snelgrove's trial, this Court had rejected similar mercy instruction claims. See Stephens v. State, 975 So. 2d 405, 421 (Fla. 2007)("A trial court does not err in failing to provide such a special mercy instruction.")(citing Mendyk v. State, 545 So. 2d 846, 850 (Fla. 1989)); Correll v. Dugger, 558 So. 2d 422, 425 (Fla. 1990)(appellate counsel not ineffective for failing to raise mercy instruction issue where "the court gave the standard jury instructions with respect to sentencing, including the advice that the jury could consider any other aspect of the defendant's character or record and any other circumstances of the offense."). Further, where the trial court has correctly

instructed the jury using standard instructions on weighing and balancing mitigating factors, as here, (V19, 2000, 2009-10), it will generally not find error in failing to provide specially requested mitigation instructions. See Booker v. State, 773 So. 2d 1079, 1091 (Fla. 2000)(noting trial court correctly provided the standard instructions and that "we have repeatedly held that clarifying instructions on mitigating circumstances are not required.")(citations omitted).

That, after this case was tried, a change in the instructions was made, does not establish any infirmity in the penalty phase instructions or jury recommendation in this case. See In re Standard Jury Instructions in Criminal Cases-Report No. 2005-2, 22 So. 3d 17, 35 (Fla. 2009). This Court did not change or alter the standard instruction based upon any perceived unconstitutionality in the standard instructions.[18] Accordingly, it cannot be said the trial court abused its broad discretion in providing the standard jury instruction on weighing mitigating and aggravating factors. San Martin v. State, 705 So. 2d 1337, 1350 (Fla. 1997)(concluding that weighing provisions and the standard jury instruction thereon

[18] If every time this Court refined jury instructions it thereby invalidated all prior or pending cases tried under the formerly valid instructions, the justice system would be seriously disrupted with unconscionable costs thereby imposed, borne by the State and the crime victims.

did not unconstitutionally shift the burden to the defendant to prove why he should not be given a death sentence.).

In conclusion, the jury was properly instructed during the penalty phase below. Appellant has failed in his burden to demonstrate reversible error, much less prejudicial error requiring reversal of his sentence based upon his proposed instructions.

ISSUE IV

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN ALLOWING THE PROSECUCTOR TO QUESTION DEFENSE EXPERTS ON THEIR KNOWLEDGE OF FACTS SURROUNDING THE MURDERS ON CROSS-EXAMINATION? (Stated by Appellee)

Appellant next argues that the prosecutor impermissibly questioned defense experts on facts not introduced during the penalty phase below. Appellant's argument is devoid of merit. The trial court made an appropriate discretionary ruling to admit this evidence. McCoy v. State, 853 So. 2d 396, 406 (Fla. 2003)(a trial court's ruling on the scope of cross-examination is subject to an abuse of discretion standard.).

The prosecutor's questions served to illuminate the matters which Dr. Berland chose to rely upon, or, those matters he chose to ignore in forming his opinions in this case. Appellant argues the State was impermissibly allowed to ask Dr. Berland whether or not he had viewed the statement of a cell mate regarding Snelgrove's description of the murders. (V15, 1525-

26). The defense objected on relevance, hearsay, and because the State had not presented this evidence in the second penalty phase. (V15, 1527). The State noted that Dr. Berland had already testified that he relied upon all kinds of hearsay and information concerning Snelgrove, and the prosecutor intended to ask Dr. Berland if he relied upon the statement, "what did he make of it," and if not "why didn't he consider it" in formulating his opinion. (V15, 1528). The trial court ultimately ruled that the State was entitled to learn what Dr. Berland relied upon or recalled in making his conclusions. (V15, 1531).

The prosecutor did not go into the details of Matthews' statement, but simply moved on after Dr. Berland explained he apparently made a conscious choice not to even review or consider the statement. The prosecutor asked the logical and relevant question of Dr. Berland, on why he would not want to hear from a witness who claimed to know something "about what motivated this man to kill these people?" (V15, 1533). Dr. Berland explained that he did not consider jailhouse snitches reliable. (V15, 1534). The prosecutor did not inject any details surrounding that statement into his inquiry of Dr. Berland, but, even if he had, it would have been perfectly appropriate to test Dr. Berland's opinion on the basis of this

information.[19] (V15, 1534). This line of inquiry was followed by questions, which brought out the fact Dr. Berland chose not to ask Snelgrove anything about the murders. (V15, 1534). The question was obviously relevant and no abuse of the trial court's discretion has been shown.

The other area of cross-examination mentioned in appellant's brief, was the question concerning Snelgrove hiding bloody clothes in the attic. The prosecutor's question was relevant, in that he was asking Edwards about the facts he relied upon in forming an opinion. The prosecutor asked: "Well, let's see if he told you in your conversations about washing off the blood in the Snelgrove house and hiding bloody

[19] As cogently noted by the First District, in AT & T Wireless Services, Inc. v. Castro, 896 So. 2d 828, 832-833 (Fla. App. 1 Dist. 2005) the party cross-examining an expert should be provided broad leeway to test the expert's opinion:

> Ordinarily, on direct examination, the expert testifies his or her conclusions are "within a reasonable degree of medical probability." The testing of these conclusions and the factors the expert considered in forming his or her opinion are explored in cross-examination. Such testing may lead the fact finder to conclude the expert's opinion is neither well-founded, nor persuasive because the expert failed to consider the many issues raised in cross-examination. For instance, here, if the expert had never considered whether it was possible Claimant was malingering, the JCC may have concluded the expert's opinion was not persuasive. If parties were required to ask questions in terms of medical probability or certainty, they would be unable to test whether the expert fully evaluated all possibilities when forming his or her opinion.

clothes in the attic. Did he talk to you about that?" (V13, 1309). The answer was interrupted by an objection, but, the prosecutor then asked Dr. Edwards if he had "reviewed any data that" which showed him that information. (V13, 1310). Dr. Edwards thought that Snelgrove did clean up at his Aunt's house, but could not remember him hiding bloody clothes.

Appellant's argument presupposes a requirement that cross-examination questions of an expert be based solely upon evidence admitted at trial. This is an absurd and plainly incorrect premise, as an expert may testify to his opinion and consider a myriad of facts or evidence. Indeed, the underlying facts used to formulate an expert's opinion are frequently not introduced into evidence.[20] See Jackson v. State, 648 So. 2d 85, 91 (Fla. 1994)("However, there is no requirement that the facts or data underlying an expert opinion be admitted into evidence in order to establish the basis of the opinion.")(citing §§ 90.704, .705, Fla. Stat. (1991)). If an expert may base his opinion on facts not in evidence, certainly the opposing party may cross-examine the expert about the facts which the expert chose to consider, and, perhaps more importantly, what facts they did not rely upon or chose to ignore in forming their opinions. See Parker v.

[20] For example, the sole person mentioned by Dr. Berland who could support his MMPI based conclusion that Snelgrove was psychotic and paranoid did not even testify during the penalty phase. (V15, 1535-36).

State, 476 So. 2d 134, 139 (Fla. 1985)("We find that it is proper for a party to fully inquire into the history utilized by the [defense mitigation] expert to determine whether the expert's opinion has a proper basis.")(citations omitted). Accord Muehleman v. State, 503 So. 2d 310, 315-16 (Fla. 1987); Coday v. State, 946 So. 2d 988, 1006 (Fla. 2006). See also, Wong v. Belmontes, 130 S. Ct. 383, 388 (2009)("What is more, expert testimony discussing Belmontes' mental state, seeking to explain his behavior, or putting it in some favorable context would have exposed Belmontes to the Howard [uncharged prior murder] evidence.").

It was entirely proper for the prosecutor in this case to cross-examine defense experts, who opined that Snelgrove's capacity was substantially impaired at the time of the offenses, by questions reflecting upon Snelgrove's goal directed and deliberate behavior at the time of the offenses. See Dempsey v. Shell Oil Co, 589 So. 2d 373, 379 (Fla. 4th DCA 1991). The prosecutor did not, as appellant contends, claim that he had facts or additional evidence supporting the death penalty or negating the defendant's mental health evidence. (Appellant's Brief at 48). The prosecutor simply asked the defense experts if they had reviewed readily available statements and reports in formulating their opinions. The prosecutor had a good faith basis for asking questions of the defense experts on cross-

examination. Rhodes v. State, 547 So. 2d 1201, 1205 (Fla. 1989)(An attorney must have a "good-faith factual basis" for asking questions of a witness on cross-examination.)(citations omitted). The prosecutor did not make up, or insinuate facts into his questions of Dr. Berland or Dr. Edwards. See Snelgrove, 921 So. 2d at 562-565 (discussing bloody clothing found in Snelgrove's aunt's home smelling of ammonia after the murders and Matthews' testimony surrounding Snelgrove's confession to, and, details of the murders). The prosecutor could certainly have asked the experts if they had read or considered the facts recited in this Court's opinion. Accordingly, Snelgrove has not demonstrated any error in the trial court's handling of cross-examination, much less a prejudicial abuse of the trial court's discretion.[21]

[21] If an error could be discerned, it would be harmless under the facts of this case.

ISSUE V

WHETHER THE PROSECUTOR'S BRIEF, AND, UNOBJECTED TO REFERENCE TO VICTIM IMPACT TESTIMONY, COUPLED WITH THE VICTIM IMPACT INSTRUCTION PROVIDED BY THE TRIAL COURT RENDERS APPELLANT'S DEATH SENTENCES UNCONSITUTIONAL? (Stated by Appellee)

Appellant's argument is somewhat difficult to decipher, but, he generally asserts that the prosecutor's victim impact argument, and, the trial court's victim impact instruction were improper. However, Snelgrove apparently does not argue that the victim impact testimony as presented, through the victims' daughter, was improper. No error has been demonstrated in this case.

As an initial matter, the State disagrees with appellant's statement that review is *de novo* in this case. The instruction and prosecutorial comments claims are both subject to an abuse of discretion review. See Card v. State, 803 So. 2d 613, 624 (Fla. 2001)(court has wide discretion in determining whether or not to provide a special instruction); Thomas v. State, 326 So. 2d 413, 415 (Fla. 1975)(comments are controllable in the trial court's "discretion."). As to the prosecutor's comments on the victim impact testimony, the defendant lodged no objection to these comments below. Consequently, this claim of error has been waived on appeal. See Sims v. State, 681 So. 2d 1112, 1116-17 (Fla. 1996)(improper prosecutorial comments claim not properly before the Court on appeal without an

objection)(citations omitted).

In any case, the prosecutor provided a very brief and respectful reference to the victim impact testimony. The prosecutor also advised the jury, it was "not an aggravator" and that "you don't list that as an aggravator." (V18, 1921-22, 1939). The prosecutor did not misstate the law or facts in describing the victim impact testimony. Accordingly, no error can be discerned, much a less the type of error required to be considered fundamental.

As for the proposed victim impact instruction, the trial court provided the appropriate, standard instruction on victim impact evidence.[22] This Court has not held that either the victim impact instruction or admission of victim impact evidence is inappropriate, much less unconstitutional. Snelgrove's proposed instruction was not necessary and the fact this Court,

[22] The trial court advised the jury:

> You have heard evidence that concerns the uniqueness of Glynder Fowler, a/k/a Glyn Fowler, as an individual human being and the resultant loss of the community members to his death. Family members are unique to each other by reason of the relationship and the role each has in the family. A loss of a family -- to the family is a loss to both the community of the family and to the larger community outside the family.
>
> While such evidence shall not be considered as establishing either an aggravating circumstance or rebuttal of a mitigating circumstance, you may still consider victim's impact evidence in making your decision in this matter.

(V19, 2010).

subsequent to Snelgrove's trial, amended the standard instruction, does not establish any constitutional infirmity in the instruction provided.[23] Indeed, this Court has recently rejected any challenge to the exact victim impact instruction provided by the trial court in this case. See Hernandez v. State, 4 So. 3d 642, 666 (Fla. 2009).

The trial court did not abuse its discretion where the trial court provided an approved instruction and the instruction provided was neither inadequate nor misleading. Further, this Court has consistently and repeatedly upheld the admission of victim impact evidence, as permitted by section 921.141(7) of the Florida Statutes and Payne v. Tennessee, 501 U.S. 808, 111 S. Ct. 2597 (1991). See, e.g., Windom v. State, 656 So. 2d 432, 438 (Fla. 1995); Bonifay v. State, 680 So. 2d 413, 419-420 (Fla. 1996); Farina v. State, 680 So. 2d 392, 399 (Fla. 1996); Chavez v. State, 832 So. 2d 730, 767 n.45 (Fla. 2002). Glyn and Vivian Fowler were entitled to be remembered during the sentencing of their killer.

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[23] As stated by this Court, "pursuant to section 921.141(7), Florida Statutes (2008), an instruction addressing 'victim impact evidence' has been added, and this instruction provides that although victim impact evidence was presented to the jury, the jurors 'may not consider this evidence as an aggravating circumstance' but rather must consider the aggravating and mitigating circumstances upon which they have been instructed. In re Standard Jury Instructions in Criminal Cases-Report No. 2005-2, 22 So. 3d 17, 21 (Fla. 2009).

ISSUE VI

WHETHER THE APPELLANT'S DEATH SENTENCE WAS IMPERMISSIBLY IMPOSED? (Stated by Appellee)

Appellant alleges numerous sentencing infirmities which, he asserts, render his death sentence unconstitutional. The State disagrees. Snelgrove provides few supporting facts and certainly no law which establishes any sentencing error, much less a prejudicial infirmity which mandates reversal for either reconsideration by the trial court or a third penalty phase trial.

A. The Trial Court Did Not Instruct The Jury On Or Consider Inappropriate Aggravating Factors

i) The Trial Court Properly Instructed The Jury Upon And Considered The Community Control Aggravator

Snelgrove contends that the trial court gave improper weight to the fact appellant was on community control at the time he committed the murders. Of course, the weight assigned to a mitigating circumstance is within the trial court's discretion and will not be reversed on appeal absent an abuse of that discretion. See Blanco v. State, 706 So. 2d 7, 10 (Fla. 1997). In this case, the trial court properly considered the fact that appellant was under community control when he chose to break into the Fowlers' home and murder them to obtain money. Neither the underlying offense nor the fact he was on community control at the time of the murders is contested by Snelgrove.

However, Snelgrove contends that since he was placed on community control for a drug offense, he should be given a pass and this aggravator should not have been given any weight by the trial court. The State is unaware of any statutory or legal provision which excuses criminal conduct simply because it is drug related. The fact that Snelgrove chose to tamper with drug evidence, and contrary to the directions of a police officer, in order to prevent his arrest, was not so insignificant as to render the resulting community control aggravator unworthy of any weight. This aggravator, does certainly pale in comparison to the other weighty aggravators in this case. The trial court did not err in giving it "little to some weight." (V2, 176).

Even assuming, argu*endo*, this Court finds any error with regard to this aggravator, the error is clearly harmless in this case. Appellant's sentence is supported by four other weighty aggravators.

(ii) Whether The Trial Court Properly Found That Appellant Had Previously Been Convicted Of Another Capital Felony Or Of A Felony Involving The Use Or Threat Of Violence To The Person.

Snelgrove contends that the trial court gave inappropriate weight to relatively minor (under the facts of this case) aggravating factors, prior (contemporaneous) violent felony..." (Appellant's Brief at 54). Snelgrove's attempt to classify a prior heinous and atrocious and cruel murder, as a "relatively

minor" aggravator, defies logic, the law, and the facts. This Court rejected such an argument in Frances v. State, 970 So. 2d 806, 816 (Fla. 2007).[24]

A prior first degree murder cannot, in the State's view, ever be considered a "relatively minor" aggravator. The fact that Snelgrove chose to murder two individuals in their own home, rather than one, is certainly entitled to great weight, particularly in this case, where neither victim was armed or otherwise posed any threat to the much larger and younger Snelgrove. Mr. and Mrs. Fowler did not die quick and painless deaths. They were brutally attacked in their own bedroom at night and their lives ended for Snelgrove's financial gain. The trial court gave appropriate weight to this severe aggravator. Contrary to Snelgrove's argument, there is no two for one policy in the State when it comes to murder. See Frances, 970 So. 2d at 816. The trial court was entitled to give this aggravator "great weight." (V2, 179-80). See Jones v. State, 998 So. 2d 573, 586 (Fla. 2008)(recognizing that the prior violent felony aggravator is one of "the most weighty in Florida's sentencing calculus" (quoting Sireci v. Moore, 825 So. 2d 882, 887-88 (Fla.

[24] In Frances, this Court distinguished both cases cited here by Snelgrove; Terry v. State, 668 So. 2d 954, 965 (Fla. 1996) and Almeida v. State, 748 So. 2d 922, 933 (Fla. 1999). Frances, 970 So. 2d at 817.

2002)).[25]

(iii) There Was No Improper Doubling Of The HAC And The Victims' Vulnerability Due To Age Aggravators

In Banks v. State, 700 So. 2d 363, 367 (Fla. 1997), this Court enunciated the proper analysis concerning the duplication of aggravating factors:

> Improper doubling occurs when both aggravators rely on the same essential feature or aspect of the crime. However, there is no reason why the facts in a given case may not support multiple aggravating factors so long as they are separate and distinct aggravators and not merely restatements of each other, as in murder committed during a burglary or robbery and murder for pecuniary gain, or murder committed to avoid arrest and murder committed to hinder law enforcement. (citation omitted).

"Hence, the focus in an examination of a claim of unconstitutional doubling is on the particular aggravators themselves, as opposed to whether different and independent underlying facts support each separate aggravating factor." Sireci v. Moore, 825 So. 2d 882, 885-86 (Fla. 2002).

The facts supporting one aggravating circumstance may also support another. "The consideration of two aggravating circumstances ("doubling") is improper when they refer to the same aspect of the crime." Griffin v. State, 820 So. 2d 906, 914, 915 (Fla. 2002)(citation omitted)(e.g. murder committed to

[25] Trial court's routinely provide contemporaneous murders and attempted murders great weight. See e.g. Welch v. State, 992 So. 2d 206, 210 .n.2 (Fla. 2008); McGirth v. State, 48 So. 3d 777, 792 (Fla. 2010).

avoid arrest and murder to hinder law enforcement efforts). Here, the HAC aggravator [Section 921.141(5)(h)] focuses on the manner of death and the pain and suffering inflicted by a defendant upon the victim. It clearly does not have an age or disability related vulnerability requirement. Section 921.141(5)(m), focuses upon the age or disability related vulnerability of the victim. Clearly, not every HAC murder will have a victim made more vulnerable by age or disability. Nor will every murder of a disabled or age vulnerable victim be HAC. The victims' vulnerability due to age or disability was clearly not intended by the legislature to be a subset or subcategory of HAC. See generally Capers v. State, 678 So. 2d 330 (Fla. 1996)(permitting sentencing guideline departure based upon age of the victim even when age is an element of the offense); Banks v. State 700 So. 2d 363, 367 (Fla. 1997)(rejecting improper doubling of enumerated felony and HAC noting that HAC "aggravator focuses on a different aspect of the capital felony-its impact on the victim.").

B. Appellant's Death Sentence Is Proportional

What Snelgrove is essentially asking this Court to do is reweigh the aggravating and mitigating circumstances and arrive at a different conclusion than that reached by the jury and trial court below. However, that is not the appropriate

function of this Court on proportionality review.[26] See Hudson v. State, 538 So. 2d 829, 831 (Fla. 1989)("It is not within this Court's province to reweigh or reevaluate the evidence presented as to aggravating or mitigating circumstances."). See also, Bates v. State, 750 So. 2d 6, 12 (Fla. 1999)("Our function in a proportionality review is not to reweigh the mitigating factors against the aggravating factors" but to "consider the totality of the circumstances in a case and compare it with other capital cases.").

Snelgrove's death sentences are supported by the following aggravators: 1) Snelgrove had previously been convicted of a felony and was on community control at the time he committed the murders (little to some weight); 2) at the time he committed each murder he had previously been convicted of another capital offense, a prior murder (great weight); 3) at the time Snelgrove committed the murders he was engaged in the commission of robbery and burglary; 4) murders were committed for pecuniary gain (merged with robbery/burglary and given significant weight); 5) the murders of Glyn and Vivian Fowler were especially heinous, atrocious or cruel (great weight); and, 6)

[26] The purpose of the proportionality review is to compare the case to similar defendants and facts "to determine if death is warranted in comparison to other cases where the sentence of death has been upheld." England v. State, 940 So. 2d 389, 408 (Fla. 2006).

the victims were particularly vulnerable due to age and infirmity (significant weight). Balanced against these aggravators was a single statutory mitigator of extreme emotional disturbance (significant weight) and a number of non-statutory mitigators relating to his low IQ, family relationships, drug abuse, and non-violent criminal record. (V2, 175-210). The court concluded that the aggravating circumstances as to each murder, far outweigh the mitigating circumstances." (V2, 189).

This Court has placed the HAC statutory aggravator at the apex in the pyramid of the capital aggravating jurisprudence. See Maxwell v. State, 603 So. 2d 490, 493 (Fla. 1992); Larkins v. State, 739 So. 2d 90, 95 (Fla. 1999). Indeed, the Court has approved death sentences supported only by an HAC aggravator. Butler v. State, 842 So. 2d 817 (Fla. 2003). Appellant brutally beat, strangled, and repeatedly stabbed the two elderly victims in their own home. Both Glyn and Vivian attempted to defend themselves, but were overwhelmed by the younger and much larger appellant. The medical examiner detailed the list of horrific injuries appellant inflicted, and the HAC finding is well supported, and, not contested by Snelgrove in this appeal.[27]

[27] Dr. Beaver testified that the distribution of injuries and pattern of injuries to Mrs. Fowler "all suggest to me a prolonged struggle." (V10, 874). Dr. Beaver testified that the injuries inflicted upon Mrs. Fowler, the multiple blows to her

Also, particularly weighty is the fact this was not one murder, but, two heinous, atrocious and cruel murders. The elderly victims were each attacked and brutally murdered, no doubt fearing for each others' safety in the process of struggling with Snelgrove. This Court has repeatedly recognized that the prior violent felony aggravator is among the most weighty in Florida's capital sentencing scheme. See Hayward v. State, 24 So. 3d 17, 39 (Fla. 2009)("prior violent felony aggravator has been regarded as one of the weightiest aggravators.")(citations omitted).[28]

Appellate counsel fails to cite a single comparable case in support of his claim that the death sentence is not proportional. A review of similar cases establishes that Snelgrove's death sentence is proportionate. See Merck v. State, 975 So. 2d 1054 (Fla. 2007)(finding death sentence proportionate where two aggravating factors of HAC and prior violent felony outweighed one statutory mitigator, the

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face, strangulation, and non-fatal stab wounds would cause significant pain and suffering. (V10, 877-79). Similar conclusions were made by Dr. Beaver as to the attack and injuries inflicted on Mr. Fowler. "But this is a prolonged struggle. It involves manual strangulation, multiple blows to the head, defensive injuries on the arms and hands. So this is a prolonged struggle." (V10, 895).

[28] See Rodgers v. State, 948 So. 2d 655, 669 (Fla. 2006) (Affirming on proportionality review a single aggravator case [prior murder] noting that the mitigation, including similar intelligence to Snelgrove, and family member testimony was given some or little weight.

defendant's age, and numerous nonstatutory mitigators including defendant's difficult family background, his alcoholism and alcohol use on the night of the murder, and his capacity to form and maintain positive relationships); Rose v. State, 787 So. 2d 786 (Fla. 2001)(death sentence proportionate where four aggravators, including HAC and prior violent felony, outweighed substantial mental mitigation and depraved childhood); Spencer v. State, 691 So. 2d 1062 (Fla. 1996)(death sentence proportionate where two aggravating circumstances, prior conviction for a violent felony and HAC, outweighed two mental heath mitigators, and a number of nonstatutory mitigators including drug and alcohol abuse, paranoid personality disorder, sexual abuse by father, honorable military record, good employment record, and the ability to function in a structured environment); Johnston v. State, 863 So. 2d 271, 286 (Fla. 2003)(affirming death sentence where two aggravators (prior violent felony conviction and HAC) outweighed one statutory mitigator (substantially impaired capacity) and twenty-six nonstatutory mitigators).

Rather than cite any comparable case on proportionality, Snelgrove asserts the trial court did not fully consider or improperly discounted appellant's addiction or alleged mental infirmities. Snelgrove does not directly or independently challenge the trial court's rejection of the substantially

impaired capacity mitigator. Rather, he attempts to insert this claim within a proportionality argument in the hope it will somehow persuade this Court his death sentence is disproportionate. However, as this Court made clear in Rodgers, 948 So. 2d at 669, the trial court is vested with considerable discretion in finding and weighing mitigating circumstances:

> Next, Rodgers claims generally that the court should have afforded more weight to the mitigation found. We review a trial court's assignment of weight to mitigation under an abuse of discretion standard. See Blanco, 706 So.2d at 10 (stating standard of review is abuse of discretion). Thus, we defer to the trial court's determination unless it is unreasonable or arbitrary-that is, unless no reasonable person would have assigned the weight the trial court did. Perez v. State, 919 So.2d 347, 372, 376 (Fla. 2005), cert. denied, 547 U.S. 1182, 126 S.Ct. 2359, 165 L.Ed.2d 285 (2006); Elledge v. State, 706 So.2d 1340, 1347 (Fla. 1997). We hold that Rodgers has not demonstrated that the trial court abused its discretion.

Even the addiction expert presented by the defense that Snelgrove could make his own choices, had free will, and was responsible for his acts. (V13, 1296-97). While drug addiction and cocaine craving had an influence on Snelgrove's behavior, he was capable of formulating a criminal plan, targeting the elderly victims who had previously loaned him money, stealthfully gaining entry into the victims' home, and, after viciously attacking and murdering the victims, carried through with his criminal plan, rummaging through the house for money. After obtaining money and some valuables, he fulfilled his plan

by going with his cousin McCrae, to purchase crack cocaine. See Davis v. State, 604 So. 2d 794, 798 (Fla. 1992)(statutory mitigating circumstances properly rejected, despite testimony of two defense experts, where defendant's methodical behavior was inconsistent with alleged drug use); Johnson v. State, 608 So. 2d 4, 12, 13 (Fla. 1992)(where defendant used drugs before the murder and claimed he was going to rob someone to get money for drugs where "[t]here was too much purposeful conduct for the court to have given any significant weight to Johnson's alleged drug intoxication, a self imposed disability that the facts show not to have been a mitigator in this case.")(citing Bruno v. State, 574 So. 2d 76 (Fla. 1991)).

Snelgrove essentially argues that his expert's opinion, presumably Dr. Berland, must be believed or credited by the trial court. However, in Durousseau v. State, 35 Fla. L. Weekly S723 (Fla. Dec. 9, 2010) this Court observed the following on such expert 'opinions':

> We have articulated a distinction between factual evidence and opinion testimony. "As a general rule, uncontroverted factual evidence cannot simply be rejected unless it is contrary to law, improbable, untrustworthy, unreasonable, or contradictory." Walls v. State, 641 So.2d 381, 390 (Fla. 1994)(citing Brannen v. State, 94 Fla. 656, 114 So. 429 (1927)). "This rule applies equally to the penalty phase of a capital trial." Walls, 641 So.2d at 390. We further stated that "[o]pinion testimony, on the other hand, is not subject to the same rule," and explained that "[c]ertain kinds of opinion testimony clearly are admissible-and especially qualified expert testimony-

> but they are not necessarily binding even if uncontroverted. Opinion testimony gains its greatest force to the degree it is supported by the facts at hand, and its weight diminishes to the degree such support is lacking." Walls, 641 So.2d at 390-91. Moreover, "[a] debatable link between fact and opinion relevant to a mitigating factor usually means, at most, that a question exists for judge and jury to resolve." Id. at 391.

Dr. Berland did testify that Snelgrove was "substantially impaired" in his capacity to conform his conduct to the requirements of the law based upon a psychotic disturbance, "exacerbated by drugs." (V15, 1514). But, notably, Dr. Berland did not ask Snelgrove anything about what he was thinking at the time of murders. (V15, 1516). In fact, Dr. Berland failed to ask Snelgrove anything about the murders at all. Id. Presumably, Dr. Berland found Snelgrove was substantially impaired based upon his MMPI, which reflected that Snelgrove was psychotic and paranoid. However, on cross-examination, Dr. Berland stated that he was not making a "causal link" between Snelgrove's mental illness and the crime. (V15, 1539). The problem with the testimony is that it was contradicted by almost every one of Snelgrove's lay witnesses who testified during the penalty phase. (V12, 1125; V12, 1180; V13, 1210). Dr. Berland's testimony was simply not credible. Durousseau v. State, 35 Fla. L. Weekly S723 (Fla. Dec. 9, 2010)(affirming rejection of mental health expert's conclusions where it was contradicted by lay witness testimony).

The more pertinent finding from Dr. Berland's MMPI, and, in the State's view, more relevant to explain these offenses, was the elevated scale 4, reflecting Snelgrove's "antisocial" tendencies. (V 15, 1523-24). And, this finding, unlike any assertion that Snelgrove was psychotic, had support in the lay witness testimony,[29] the facts of these offenses, and, Snelgrove's criminal history,[30] establishing a disregard for the rights of others [theft, grand theft, burglary, robbery and two murders]. The trial court's rejection of the substantially impaired mental mitigator was well supported by the evidence.

Similarly, on the issue of brain damage, the trial court could credit the testimony of Dr. Holder, a board certified diagnostic radiology and nuclear medicine physician, who found Snelgrove's PET scan to be within normal limits. (V16, 1619). Moreover, the point of Dr. Wu's testimony, and, its relevance, if any to the behavior of Snelgrove, was that brain damage made Snelgrove less likely to control his behavior and could lead to violent outbursts. However, Snelgrove apparently, had no such history of violent outbursts, casting doubt upon the existence

[29] Snelgrove's half brother testified that Snelgrove did not seem to "have much of a conscience." (V12, 1125).

[30]Contrary to appellant's contention that he led a relatively crime free life but for his drug addiction, as the court noted below, Snelgrove had "a significant history of prior criminal behavior." (V, 182).

of, or significance of any potential brain damage. Dr. Holder's conclusion in this regard was more credible than Dr. Wu's, who finds virtually every murderer he has examined in Florida to be brain damaged. [28 out of 30]. (V14, 1416, 1427). Nonetheless, the trial court charitably found that Snelgrove did suffer from some brain abnormality, but, properly rejected any assertion that Snelgrove had substantially impaired capacity at the time of the murders. (V2, 183).

In conclusion, the HAC aggravator alone, as to the two elderly victims would overcome the mitigation presented by Snelgrove. The victims were awakened in their own home, and, brutally, beaten, strangled and stabbed. The number and pattern of injuries suggested a prolonged struggle, as they fought for their lives before succumbing to the much larger, and armed, Snelgrove. See Belmontes, 130 S. Ct. at 390 (reversing the Ninth Circuit Court of Appeals on an ineffective assistance of counsel claim, noting as to prejudice, the victim needlessly suffered a painful death and that the jury heard "this savage murder was committed solely to prevent interference with a burglary that netted Belmontes $100 he used to buy beer and drugs for the night."). However, when coupled with four additional aggravating factors, including the weighty prior violent felony conviction (contemporaneous murder), it becomes clear that death was the only appropriate punishment in this

case. The death penalty imposed here is proportional.

ISSUE VII

WHETHER FLORIDA'S PROCEDURE FOR DETERMINING MENTAL RETARDATION IS UNCONSTITUTIONAL?

Snelgrove finally complains that Florida's procedures for assessing mental retardation are unconstitutional and that under the appropriate or ideal standards, he might be considered retarded. Snelgrove's argument lacks any merit.

First, as to Snelgrove's attack on the constitutionality of the statute, this Court has repeatedly and consistently rejected Snelgrove's challenges. Snelgrove's challenge to the clear and convincing burden of proof is not only without merit, it should not even be addressed in this case.[31] In cases such as this, where the trial court found it was not a close question, and that Snelgrove failed to establish retardation by even a "preponderance" of the evidence, this Court declines to even address the question. See Nixon v. State, 2 So. 3d 137, 145 (Fla. 2009)("We need not address this claim because the circuit court held that Nixon could not establish his mental retardation under either the clear and convincing evidence standard or the

[31] Florida is not the only state which places the burden on a defendant to prove retardation by more than a preponderance. See People v. Vasquez, 84 P.3d 1019 (Colo. 2004)("[i]mposing upon the defendant the burden of proving his retardation by clear and convincing evidence for that purpose offends no constitutional mandate.").

preponderance of the evidence standard.")(quotations omitted); Accord Jones v. State, 966 So. 2d 319, 330 (Fla. 2007); Trotter v. State, 932 So. 2d 1045, 1049 (Fla. 2006).

Snelgrove next challenges the definition of mental retardation and specifically, the requirement a defendant must establish an IQ of 70 or below, without regard for the standard error of measure. The 70 or below cut off is now well established as a matter of Florida law. See Fla. Statute § 921.137(4); Fla. R. Crim. P. 3.203. Cherry v. State, 959 So. 2d 702, 711 (Fla. 2007); see also Nixon v. State, 2 So. 3d 137, 142 (Fla. 2009); Phillips v. State, 984 So. 2d 503 (Fla. 2008); Jones v. State, 966 So. 2d 319, 325 (Fla. 2007). This Court has declined to recede from Cherry on the grounds argued by Snelgrove in this appeal. See Nixon, 2 So. 3d at 142; Dufour v. State, 36 Fla. L. Weekly S57 (Fla. February 3, 2011). Snelgrove has offered no compelling reasons to depart from this precedent, particularly where Snelgrove failed to establish the remaining two prongs of mental retardation.

Of course, this Court has "stated that diagnosis of mental retardation requires three findings: (1) significantly subaverage general intellectual functioning; (2) concurrent deficits in adaptive behavior; and (3) onset of the condition before age 18." Jones, 966 So. 2d at 325 (citing Burns v. State, 944 So. 2d 234, 245 (Fla. 2006)). As to the merits of the trial

court's finding that Snelgrove was not retarded, Snelgrove presents no argument, much less facts to suggest the trial court's finding was erroneous. (Appellant's Brief at 74). Snelgrove's failure to specify or assert any factual discrepancies in the trial court's order or set forth particular facts in support of his claim should serve to waive this issue on appeal. See Coolen v. State, 696 So. 2d 738, 742 n.2 (Fla. 1997) and Duest v. Dugger, 555 So. 2d 849, 852 (Fla. 1990)(stating that a failure to fully brief and argue points on appeal constitutes a waiver of these claims). In any case, it is clear the trial court's order was supported by competent, substantial evidence in this case. See Phillips v. State, 984 So. 2d 503, 509-513 (Fla. 2008)(This Court reviews the circuit court's mental retardation determination on appeal to "determine whether it is supported by competent substantial evidence.").

Defense expert Dr. Bloomfield, could not render an opinion that Snelgrove's onset was before the age of 18, due to the lack of information, records or testing. (V21, 75). Dr. Bloomfield stated it was "likely" he was retarded, but, did note that Snelgrove was classified emotionally handicapped, not intellectually handicapped by the school system. (V21. 73-74). Dr. Bloomfield admitted that with an IQ of 70 and the lack of information, it was a "close call situation." (V21, 76). In contrast, Dr. Gregory Pritchard testified that Snelgrove did not

meet any of the three prongs necessary to be considered mentally retarded and that it was not a "close call." (V21, 120, 144).

Dr. Pritchard testified that Snelgrove scored solidly in the borderline range of intellectual functioning on the Standford-Binet, with an overall IQ of 75. (V21, 117-18). The appropriate confidence interval provided a range between 72 and 80. (V21, 132).

In viewing the school records, Snelgrove's placement as an emotionally, not intellectually handicapped student was significant to Dr. Pritchard. The classifications are not arbitrary and we can infer, that "they placed him in emotional handicapped classes, he was determined not to be mentally retarded." (V21, 103-04). Specific criteria governed such classifications and had he been found mildly mentally retarded, Snelgrove would have been placed in educable mentally handicapped classes or with even lower IQ, trainable mentally handicapped classes. (V21, 104). Notably, in the stacks of records he reviewed on Snelgrove, from school records to DOC records Dr. Pritchard testified:

> . . .And when I review records on individuals who do truly have intellectual limitations, it tends to come up in the records. Just like somebody who has a substance abuse issue, if you review enough records about an individual, usually the key points or the key problems kind of are restated throughout the records.
>
> And I have, you know, eight, nine, ten inches of records here, and I didn't see any place in the records, not from the Department of Corrections, not

> from the jail, not from the school, any place that said Mr. Snelgrove had intellectual limitation.

(V21, 105-06).

The jail records showed that Snelgrove was more than capable of meeting his needs, making requests for medical services, requesting medication, indicating that "he was recognizing his own needs independently and taking the appropriate action to get those needs met." (V21, 107). See Jones, 966 So. 2d at 325 ("Jones recognized when he had medical problems and requested help.").

Dr. Pritchard testified that Snelgrove displayed a vocabulary and fluid communication style which did not suggest he was mentally retarded. (V21, 109-10). In carrying on a dialogue and conversation with Snelgrove Dr. Pritchard did not find any evidence of impairment. (V21, 112). Snelgrove also worked and was able to drive to job sites working in landscaping and the carpet cleaning business, something you would not expect from someone who was mentally retarded. (V21, 113). See Rodgers, 948 So. 2d at 667.

The State presented competent and substantial evidence to support the trial court's ruling below. Consequently, the instant appeal should be denied.

CONCLUSION

In conclusion, Appellee respectfully requests that this Honorable Court AFFIRM the sentences imposed below.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing ANSWER BRIEF OF APPELLEE has been furnished by U.S. Regular Mail, to James R. Wulchak, Chief, Appellate Division, Assistant Public Defender, 444 Seabreeze Blvd., Suite 210, Daytona Beach, Florida 32118-3941, on this 18th day of March, 2011.

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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