IN THE SUPREME COURT OF FLORIDA

DAVID SNELGROVE,	)	
	)	
Appellant,	)	
	)	
vs.	)	CASE NO. SC09-2245
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	
_____	)	

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

INITIAL BRIEF OF APPELLANT

JAMES S. PURDY
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SEVENTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE

This is a death penalty appeal following a remand from this Court for a new penalty phase trial before a new jury and the resultant resentencing to two death sentences.

On July 12, 2000, the State charged David Snelgrove by indictment with two counts of first- degree murder (premeditated and/or felony), armed robbery and burglary of a dwelling with an assault, stemming from the June 2000 death of Glyn and Vivian Fowler. (SV 1, R 13-15)[1] The jury found Snelgrove guilty of two

[1]The symbol "V" refers to the volume numbers, with the volumes of the transcripts being referenced according to the sequential numbers *assigned by the clerk's office for the entire record on appeal,* and not by the concurrent volume numbering of the court reporters' transcripts. "SV" refers to the volumes of the supplemental record.

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. 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." *Snelgrove v. State*, 921 So.2d 560, 565 (Fla. 2006). Because of the lack of a separate sentencing recommendation by the jury for *each* murder conviction, this Court reversed the death sentences and remanded for a new penalty phase proceeding before a new jury. *Snelgrove*, *supra*.[2]

Immediately prior to the new penalty phase, and in preparation therefor, the defense psychologist re-interviewed Snelgrove and, for the first time, reported to defense counsel that he suspected that Snelgrove may be mentally retarded. (V 3, T 8-9) As a result, the defense moved the court for a continuance to conduct new

[2] Certiorari review of the case was denied by the U.S. Supreme Court on October 2, 2006. *Snelgrove v. Florida*, 549 U.S. 836 (2006)(*mem.*). By this time, original defense trial counsel had left the employ of the public defender and new capital trial counsel hired, who had to familiarize himself with the case. Thus, the new penalty phase trial was to begin on January 22, 2008.

testing on the defendant and for the expert to analyze whether the defendant was indeed mentally retarded, matters he could complete within a couple of weeks. (V 3, T 9-10; V 4, T 56-57) Elected State Attorney John Tanner objected, assuring the court that a denial of the continuance would not be reversible error. (V 3, T 22) The court denied the continuance, ruling that the expert could do his testing while the case was proceeding, and further finding that, pursuant to the rule and statute, the issue of mental retardation was premature until after the jury had rendered its advisory verdict and the court itself was preparing for sentencing. (V 3, T 32; V 4, T 56-57, 68-69; V 8, T 605-606; V 10, T 833)

> But I think that issue, according to the general rules as they prescribe it, can pretty well be intelligently meted out and resolved ultimately prior to the -- any final sentencing that has to be imposed or that's appropriate. So I think we're on the right course on that, so I just wanted you to make sure you checked the rule.

(V 8, T 605-606)

The expert's testing (at night during the course of the new penalty phase trial, per the court's order) indicated that the defendant's full-scale I.Q. was a 70, within the range for mental retardation, and that further analysis of the other requirements for a diagnosis of mental retardation were necessary and would take some time. (V 3, T 32; V 4, T 56-57, 68-69; V 8, T 605-606; V 10, T 833. V 11, T 1004-1005) The court denied a further defense request for continuance for the

expert to complete his diagnosis, again ruling "we're not there, nor do we need to be," [indicating that they were not yet in the capital proceeding where mental retardation was an issue]. (V 11, T 1004-1005) But the defense was forced by denial of the continuance requests, to go forward without the completion of a mental retardation diagnosis.

The defense unsuccessfully objected to victim impact testimony and photographs ultimately entered into evidence (V 10, T 920-934; V 11, T 946-948, 958-962, 963, 964-968), and requested a newly-formulated jury instruction, then pending approval before the Supreme Court, which specifically told the jury that they could not consider the victim impact evidence as an aggravating circumstance, and that their consideration was limited solely to the aggravating and mitigating circumstances. (V 1, R 60-71; V 10, T 934; V 17, T 1793-1794; V 18, T 1839-1840) Instead, pursuant to the state's request and over defense objection, the jury was instructed that they could consider this evidence in making their decision (V 19, T 2010, 2017-2018, 2026).

The defense also unsuccessfully sought the newly-submitted jury instruction on a jury being permitted to dispense mercy even if the aggravating factors outweighed mitigation. Instead, the jury was instructed that they must follow the law and determine if the mitigation outweighed the aggravating factors in order to

recommend life. (V 1, R 60-71; Vol. 15, T 2004, 2005, 2010, 2018)

During testimony of a mental health expert, the court excluded testimony designed to show the drug's widely-recognized effect on the brain and conduct, illustrated by its effects in the laboratory on rats. (V 13, T 1243) The court agreed with the state that such testimony would first have to be *Frye* tested for general acceptance in the scientific community. (V 13, T 1243) Similarly, on the state's cross-examination when the expert attempted to answer a question by reference to established research and a report of the National Institute on Drug Abuse (NIDA), the court excluded the illustration, ruling such would require another long *Frye* hearing. (V 13, T 1287-1288)

On the afternoon of the sixth day of the new penalty phase trial, after the state had rested and the defense presented its case in mitigation regarding the defendant's mental deficiencies and drug addiction, the state presented a newly-prepared redacted version of Snelgrove's four-hour interrogation by police after the killings, ostensibly for the purpose of showing the defendant lacked any mental deficiencies. (V 16, T 1587-1596) The defense argued against its admission, first contending that the recording was totally irrelevant in rebuttal, since the only evidence presented to the jury (by the defense mental health expert) was uncontradicted that it was impossible to determine from such an interrogation

whether the defendant suffered from mental issues. (V 17, T 1662-1664, 1670, 1682-1683, 1729-1730, 1739) Additionally, the defense argued, the state's indication, for the first time six days into the new penalty phase trial, that it would present such a redacted tape completely surprised the defense and, as such, was a violation of the state's continuing duty to provide discovery. (V 16, T 1590; V 17, T 1667-1670) The defendant also objected to those portions of the new tape which showed a legally-inadmissible lie detector (voice stress analysis) test. (V 17, T 1663-1664) The court ruled the redacted tape would be admitted, ruling that it was relevant to the issue of the defendant's "competency." (V 17, T 1670-1671, 1740-1742) The defendant further moved for a continuance to review the state's newly-prepared redacted tape compared to the entire recording, to ascertain whether additional redacted matters should also be included in the presentation to the jury. (V 16, T 1664-1665, 1667-1670, 1682-1683; V 18, T 1806, 1810, 1831-1832) When technical glitches prevented the defense from completing its review of the two tapes during the night recess, the court refused any further delays for the defense to prepare its own video.[3] (V 18, T 1806, 1813-1815, 1852)

[3] The court insisted that the defense simply show the original unredacted tape to the jury, stopping and starting it at relevant places, which the defense declined to attempt, complaining that it would highlight to the jury deletions in the recording. (V 18, T 1820-1821, 1824-1825, 1828-1830, 1839-1845, 1852)

Following the argument and jury instructions telling them they must follow the law, the jury recommended death sentences for both killings by a vote of 8 to 4. (V 18, T 1950; V 19, T 2004, 2005, 2010, 2018).

The defendant moved to declare Section 921.137, Florida Statues, dealing with the procedure and burden of proof for a finding of mental retardation, unconstitutional, arguing that it placed an improper burden of proof on the defendant, and further that its limitation to an IQ of 70 or under failed to recognize the proper mental health range for retardation, up to an IQ of 75. (V1, R 132-133, 134-135) The trial court ruled that the statute was not unconstitutional (V 1, R 138-139, 142-143), and held a hearing on the defendant's mental retardation, concluding that he was not retarded. (V 1, R 166-170)

The court then imposed sentences of death for each of the murders, finding in aggravation for both: (a) a previous conviction of a felony of tampering with evidence, for which he had been placed on community control, assigning it "little to some weight" due to the non-violent nature of the offense (tampering with evidence by attempting to swallow his crack cocaine); (b) a previous conviction of another capital felony or of a felony involving the use or threat of violence to the person, to-wit: the contemporaneous murder of the other victim ("great weight"); (d) while engaged in the commission of a robbery or burglary and (f) for pecuniary

gain, which the court considered to be merged into a single aggravator (significant weight); (h) heinous, atrocious, or cruel, the court finding the knife and bludgeoning attack on the much older and smaller victims "viscous" (sic) and "deliberate" and that each victim was conscious during at least the beginning of the attack; and (m) the victims were particularly vulnerable due to their advanced ages and disparity in size. (V2, R 175-182)

The court rejected the statutory mitigating factors of (a) no significant history of prior criminal activity;[4] (f) the capacity of the defendant to appreciate the criminality of his or her conduct or to conform his or her conduct to the requirements of law was substantially impaired,[5] and the defendant's age of 26.[6] (V2, R 182-184)

The court found the statutory mitigating circumstance of "under the influence of extreme mental or emotional disturbance" and noted the presence of cocaine in Snelgrove's system at the time of the murder and his drug addiction and craving for cocaine "certainly had some impact on Mr. Snelgrove's thinking at the

[4] rejecting any argument that, since the offenses were relatively minor and all drug-related, the mitigating factor should still be found to apply and given some weight.

[5] not mentioning or disputing that the defense experts had presented unrefuted physical evidence and testimony specifically indicating that Snelgrove, although appreciating the criminality, was substantially impaired in conforming his conduct.

[6] noting that he was in ESE classes, but rejecting the mitigator because Snelgrove was able to "complete . . . adult tasks."

time of the murders, giving it "significant weight."[7] (V1, R 183) The court also found the following nonstatutory mitigating factors: 1) Snelgrove was a hard worker (some weight); 2) he was a loving and caring person who was loved by his family (some weight); 3) defendant had a long history of drug addiction and had unsuccessfully sought treatment (significant weight); 4) the death of his parents greatly affected the defendant (some weight); 5) defendant is a model inmate and has adjusted well to the structured environment of jail, giving it "little weight considering the difficulty of predicting future conduct;" 6) Snelgrove has abnormal brain function and limited intelligence (only affording it some weight due to fact he had good adult adaptive skills) (V2, R 184-186) The court totally rejected as non-statutory mitigation that Snelgrove had a very troubled childhood, indicating that there was no evidence which demonstrated that he suffered lifelong effects from brain injuries from his fall as an infant or his accidental ingestion of his uncle's Haldol, from which he almost died.[8] (V 2, R 184)

In conclusion, the court imposed two death sentences, finding that the

[7] but making no mention of the defendant's biological mental disturbance, the organic brain damage and malfunctions to the temporal lobes and subcortical areas of the defendant's brain (which cause problems with control of one's emotions, impulses, and aggression), nor without mention of Snelgrove's low intelligence level, his prenatal alcohol exposure and childhood ingestion of a large quantity of a relative's Haldol, and crack cocaine's inflammation of existing psychotic disturbances, and intensification of his ongoing manic symptoms.

[8] despite testimony of ongoing brain damage and abnormalities, most likely caused by

aggravating circumstances outweighed the mitigating factors, particularly the "most weighty" contemporaneous conviction of the other murder and the heinousness of the crimes, and that the defendant had the ability to conform his conduct to the requirements of the law, but simply chose not to. (V 2, R 186-187).

This appeal follows.

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these incidents or pre-natal alcohol exposure.

STATEMENT OF THE FACTS

On June 2, 2000, the defendant, David Snelgrove, found himself alone, put out on the streets with no money, no clothes, no transportation, no orderly transition from the drug rehabilitation treatment he had been receiving, and no support to aid him in his quest to rid himself of his severe crack cocaine habit. (V 13, T 1273-1276, 1277-1278) His life had been spiraling downward since the sudden and unexpected death of his mother, his emotional and structural support, followed within weeks by the death of his father. (V 12, T 1093-1094, 1116-1117, 1158)

David also had mental issues prior to his fall into drugs; biological brain damage, resulting perhaps from prenatal alcohol exposure when Snelgrove's mother continued to drink and party when pregnant, particularly damaging to the central nervous system of the developing fetus. (V 12, T 1174; V13, T 1472, 1476, 1487, 1490) She also would give her infant son tranquilizers to make him sleep so she could leave the house to go partying. (V 12, T 1176)

David's fall from a shopping cart as a toddler (10-11 months old), wherein he had to be hospitalized with a soft "bashed-in head," could also have been responsible for the brain injury. (V 12, T 1103, 1143; V 14, T 1387; V 15, T 1489) He was often, during this time, left in the care of his mentally disturbed cousin. (V

12, T 1179-1180) While a young child of five years old, Snelgrove accidentally ingested this relative's Haldol and was rushed to the hospital after he quit breathing. This event could also have caused his biological brain damage. (V 12, T 1104, 1144; V 14, T 1387; V 15, T 1489)

Snelgrove's parents divorced when he was six and he bounced between his mom and dad, eventually ending up with his mother, to whom he had become quite close and also unusually dependent upon for structure and emotional sustenance. (V 12, T 1145) Snelgrove has a low I.Q. and was a slow learner. (V 12, T 1055-1056, 1105) Enrolled in special education classes, he dropped out of school before completing the tenth grade. (V 15, T 1505, 1562; SV 4, R 329-342) Because of a learning disability, Snelgrove was only able to do the most menial of jobs, but he had a history of gainful employment and was a dedicated and hard worker. (V 12, T 1085, 1118, 1127, 1147-1148, 1178)

But it was the deaths of his parents, so close together in the fall of 1998, that had caused David to become despondent and spiral downward into daily crack cocaine addiction, suffering intensely from the loss of the emotional support and structure his mother had provided. (V 12, T 1093-1094, 1116-1117, 1158) He had been arrested for multiple, non-violent offenses, all aimed at obtaining money to feed his habit, the uncontrollable chemical urges for more and more of the drug. (V

13, T 1197-1198, 1201-1203, 1301; V 15, T 1535) The last arrest had been for tampering with evidence, attempting to swallow his crack cocaine when confronted by police, which had placed him on probation. (V 10, T 912, 916)

David relocated away from the drug influences he had in Orlando and moved in with his aunt and cousin in Flagler County. (V 12, T 1153, 1168-1169)[9] The defendant willingly enrolled in and participated in an out-patient drug treatment program, but with little success. (V 13, T 1198, 1265) After discussions with his mental health and substance abuse counselor and his community control officer, David, realizing that if he wanted to free himself from the shackles of crack addiction he would need a more structured program, affirmatively sought placement into a residential drug treatment program. (V 13, T 1198, 1265)

Hence, he had found himself finally enrolled into the Salvation Army Residential Rehabilitation program in March 2000. And for three months he had been there, he had been quite successful. (V 13, T 1265-1268) With the help of the drug program, David was able to control his urges and, as shown by drug testing, was able to stay drug free for over three months, a highly impressive feat, according to expert witnesses. (V 13, T 1265-1268) He was an active participant

[9] David's sister, Ann Thomas, recalled an incident in Orlando wherein David was chased and stabbed by "the crack man." (V 12, T 1149)

in the counseling sessions. (V 13, T 1268) For the first time in recent memory, Snelgrove had high hopes for success in beating the bonds of drug addiction and making something of his life. (V 13, T 1275-1276)

But, David and a female co-resident had become attracted to each other,[10] and, in violation of the program's regulations on fraternization, kissed and fondled each other after attending church. (V 13, T 1268-1269) Realizing their error, and knowing that their rehabilitation was more important than a relationship, the two discussed their relationship and agreed to terminate it, since it was not worth pursuing and had to be avoided so that they could receive the help they needed to lick their drug habits. (V 13, T 1272-1273) When their indiscretion was discovered, though, the two patients were disciplined by demoting them to Level One for an additional two weeks, with greater restrictions. (V 13, T 1275)

Despite his learning disability, Snelgrove struggled to compose a letter to the drug program administrators, admitting his transgression and accepting his punishment, another great step in his recovery process, according to the experts, and begging for the center's continued help. (V 13, T 1272-1273, 1275-1276) Inexplicably, two weeks later when the restrictions were to be lifted, in an apparent

[10] a quite common occurrence in residential rehab programs, so much so that most drug rehabilitation programs are not co-ed. (V 13, T 1268-1269)

general crackdown on all of the residents, David and his co-resident's punishments were increased and David was immediately expelled from the residential drug treatment. (V 13, T 1201-1202, 1277-1278, 1280-1282)

So this was how Snelgrove found himself on June , 2000, outside of the Salvation Army, alone , put out on the street without his belongings, without any transition, and counseling for that transition, back into the real world, and without any means of getting home. Desperately wanting to remain drug free, he immediately telephoned his AA sponsor seeking his help in keeping off of drugs now that he was on his own. (V 13, T 1283-1284)[11] The AA sponsor declined or was unable to assist David and he was left with only his cousin, Jeff McRae (a crack user), for a ride home. (V 13, T 1283-1284, 1312-1314) Immediately upon picking up David, McRae purchased some beers and told Snelgrove that he was going to purchase some crack cocaine. (V 13, 1312-1314) David pleaded with Jeff not to, saying he wanted to remain off of drugs, and David successfully resisted his cousin's temptation, another huge attainment in his hopes at drug recovery. (V 13, 1312-1314)

Upon his ouster from the drug program at the beginning of June 2000,

[11] According to an expert witness, this was absolutely the right thing for David to attempt, showing that he had learned from the drug program and, now that that lifeline had been

David, who had tasted freedom from the drugs, felt utterly lost and fell into total despair, believing all was lost and there was no place else to turn for help. (V 12, T 1169-1170, 1179) Relatives spoke of this change in him, still noticing the caring and loving person, but also noticing an emptiness, an angst. (V 12, T 1169-1170, 1179) Despite having to rely solely on his own self-control and being back in the drug environment with his cousin, Snelgrove obtained employment and managed to refrain from drug usage for close to a week.[12] (V 13, T 1283-1284) But upon getting his first paycheck cashed on June 9, 2000, and while on his way to the Salvation Army to retrieve his belongings that they held in hock, his brain triggered an irresistible craving once again for crack, to which he tragically succumbed. (V 13, T 1283-1284) However, trying to be somewhat less irresponsible, Snelgrove purchased only a tiny quantity of the drug, but once experiencing the highly addictive drug again (which was even more intense due to his three-month abstinence), he was again hooked. (V 13, T 1283-1284)

It was then, under the effects of crack cocaine's irresistible craving state, coupled with his brain damage and mental abnormalities, that David found himself in the next two weeks leading up to the crimes. (V 13, T 1242-1243, 1298-1299,

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severed, he was still trying to keep clean. (V 13, T 1283-1284)

[12] Also quite an achievement, according to the expert. (V 13, T 1283-1284)

1301) Snelgrove was under the strong, dangerous, powerfully motivating, craving influence of crack cocaine on June 24, 2000. (V 13, T 1264, 1307-1308, 1315; V 15, T 1496)

The facts regarding the crimes which followed, established during the guilt phase of Snelgrove's trial are set forth in this Court's opinion in *Snelgrove v. State*, 921 So.2d 560 (Fla. 2006):

> 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. 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.

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.

* * *

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.

* * *

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.

Defense counsel first responded to Matthews' direct testimony by attempting to impeach him. He established that Matthews had pled guilty to all three charges for which he was being held (i.e.,

> burglary, petit theft, and assault). [FN6] He also confronted Matthews with inconsistent statements made at deposition in which Matthews claimed he did not remember anything Snelgrove told him. Matthews responded by acknowledging he had lied during deposition because he felt he "got messed around by the detectives and the State."
>
> > FN6. Matthews denied this, claiming the assault charge had been dropped, but the court file indicated otherwise. He also acknowledged that he initially raised this information in hopes of securing a deal, but he had not received one because the State "had thr[o]w[n] [him] to the dogs."
>
> Defense counsel also offered a defense to the State's case. It admitted to the burglary, but denied the murders. Specifically, the defense claimed that Snelgrove did, indeed, enter the Fowlers' home through the broken window, but only after the Fowlers had been killed by someone else. In the process of coming through the window, Snelgrove cut his hand. Defense counsel claimed that the State's failure to find the Fowlers' blood mixed with Snelgrove's affirmed this defense. Alternatively, defense counsel argued that if the jury were to find Snelgrove guilty of murder, the evidence did not support premeditation.

Snelgrove v. State, 921 So.2d at 562-565.

At the new penalty phase before a new jury, the state did not present all of the prior testimony from the guilt phase trial; instead only presenting during their case in chief crime scene photos and video, crime scene technician testimony, medical examiner testimony, evidence that Snelgrove was on community control at the time of the killings (for tampering with evidence by attempting to swallow his

crack cocaine), and victim impact testimony. Snelgrove's blood from the cut on his hand was found throughout the Fowler house, but was not found on their bodies, except one spot where it appeared that Mrs. Fowler's ankle had been grabbed by Snelgrove when moving her slightly from in front of a closet. (V 9, T 781-799, 804, 807-811) None of the victim's blood was found on the knife recovered from the woods nearby Snelgrove's residence. (V 10, T 838-840)

The state did not present to this new jury any evidence or testimony about the bloody clothes in the attic, testimony from his cousin, Jeff McCrae, nor the testimony of jail-house snitch Matthews. Yet, during cross-examination of a defense psychologist (who testified for the defense in support of mental mitigation), the state was permitted over objection to question the defense expert about the bloody clothes and the statement of Matthews implicating the defendant and allegedly showing a lack of remorse for the killings. (V 13, T 1309-1310)

Jail guards from Flagler County testified that the defendant was a model inmate, co-operative, respectful to all, and followed directions, keeping his cell clean. (V 12, T 1035-1036, 1048, 1059, 1066) One guard indicated that, based on her experience and interaction with David, he would do fine in a jail setting. (V 12, T 1068) On one occasion, Deputy Julie Martin related, Snelgrove had come between her and a combative inmate, defusing the situation and protecting her. (V

12, T 1055-1057)

Psychological testing and a PET-scan (which assesses brain function), showed to a reasonable degree of medical certainty *significant* brain damage to the temporal lobes and subcortical areas of Snelgrove's brain. (V33, T254-259) Prominent PET-Scan Doctor Joseph Wu, Clinical Director of the University of California Irvine College of Medicine, Brain Imaging Center, Associate Professor, Department of Psychiatry and Human Behavior, and well-published author on the topic of PET-Scans, (V 14, T 1329-1341)[13] reviewed Snelgrove's PET-Scan. (V 14, T 1365)

On the PET-Scan, Dr. Wu observed asymmetry in Snelgrove's temporal lobe area, with significantly much lower activity on the right side of the brain than the left side. (V 14, T 1376-1384, 1387-1388) Also indicative of brain damage is the asymmetry to the subcortical region, missing the normal inputs that would be coming from the right temporal area of the brain; "half [of Snelgrove's brain] is no

[13] http://www.bic.uci.edu/faculty/Wu.htm Dr. Wu has published multiple articles on PET scans of neuropsychiatric conditions such as traumatic brain injury, hypoxic brain injuries (such as carbon monoxide poisoning), and toxic encephalopathies. Dr. Wu's work has been described in Science magazine, ABC news, CNN, CourtTV, the LA times, and the Associated press. Dr. Wu has written over 50 peer reviewed articles on PET scans and neuropsychiatry. Dr. Wu has received over a million dollars worth of funding from the NIH. He has served as a reviewer for a number of journals including Nature magazine. He has written the chapter in functional brain imaging in the leading textbook of psychiatry, Kaplan and Sadock's *Comprehensive Textbook of Psychiatry*.

longer sending signals to the switchboard area." (V 14, T 1378-1380)[14] This damage to the right temporal lobe area shows an abnormality of the nervous system and is consistent with psychoses and paranoia and is consistent with his history of a head injury and the overdose of Halidol. (V 14, T 1397-1399) This type of brain damage (especially when coupled with the defendant's drug abuse) is a significant factor in impulse control and the regulation of aggression. (V 13, T 1238, 1241, 1298-1299; V 14, T 1389, 1403-1404, 1417; V 15, T 1535) In fact, where there is this type of brain damage, Dr. Wu likened cocaine abuse to "pouring gasoline on a fire." (V 14, T 1393)

Symptomatic of a biological disturbance to the brain is delusional, paranoid thinking, which was also considerably indicated by the MMPI testing. (V 13, T 1472, 1476, 1487) David showed indications (again well above the cutoff) of mood and perceptual disturbance, a thought disorder, a biological psychotic disturbance, and he suffered from elevated depression, also from the organic brain damage. In fact, Dr. Berland stated that Snelgrove's scores on the psychological tests were "clinically significant," to show a biological mental illness, something confirmed by the PET-Scan test. (V 15, T 1487-1488)

[14] Dr. Wu noted that a less experienced physician reading the scan may mistakenly believe that it looks perfectly normal, not having learned to recognize these kinds of differences.

The MMPI testing showed that this was not a newly-acquired psychotic symptom, nor was the defendant faking the results, but instead there was a long-standing, chronic disturbance, "a biological malfunction," which also indicated the presence of hallucinations and biological mood disturbance.[15] (V 15, T 1462) This biologically caused mental illness is "an important factor that allows people to cross the line and commit a crime like this." (V 15, T 1472)

Snelgrove's IQ shown on the Wechsler Adult Intelligence Scale (WAIS-III) was 70, within the retardation level. (V 15, T 1547-1548) At the hearing to determine mental retardation held before the trial court on June 3, 2009, the defense again presented the results of the new WAIS III testing indicating an IQ of 70, expert testimony showing a deficiency in at least two areas of adaptive functioning, and school records showing Snelgrove's placement in ESE (Exceptional Student Education) classes. (V 20, T 47, 65-67, 70-73) In fact, Dr. Bloomfield testified, the fact that Snelgrove was placed into ESE/EMO is indicative of deficiencies in some combination of five of areas of adaptive functioning. (V 20, T 68, 70-73)

Additionally, Dr. Bloomfield stated, the trial court's findings in the original

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(V 14, T 1380)

[15] In fact, if anything, the test results showed that David was trying to minimize or hide

sentencing order for Snelgrove in 2002, his education level, his abnormal brain functioning, his learning disability, and his low intelligence also provide support for a finding of deficiencies in adaptive functioning. (V 20, T 74; SV 1, R 32-50)

The defense expert realistically testified that, because Snelgrove's school records failed to show any IQ test results, he could not *definitively* state that the onset of mental retardation had occurred prior to age 18. (V 20, T 59, 75-77) However, Dr. Bloomfield did state that he could, *within a reasonable medical certainty* say that Snelgrove did have such deficiencies and was mentally retarded prior to age 18, despite the lack of any IQ test results prior to age 18. (V 20, T 80-81)

The State's usual expert on mental retardation, Dr. Pritchard, performed his own IQ test in jail on Snelgrove, spending at most four hours with the defendant and finding only borderline intelligence and not mental retardation, scoring the defendant's full-scale IQ at 75 (and ignoring the confidence range of the test which based on the score of 75 could actually be within the IQ range of between 68-80, which could include, within this result, a finding of mental retardation). (V 20, T 79, 117) Pritchard did admit that IQ was not a static number, but instead it is an approximate score, a range derived from the "confidence interval, with his testing

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the nature of his mental problems. (V 15, T 1472)

resulting in a range from 68-84. (V 20, T 130, 132)

Further, Pritchard speculated that, just because of the lack of any IQ test results in the defendant's school records and a single notation of "EH," Snelgrove's ESE school class placement was solely due to an emotional handicap, rather than an intellectual one. (V 20, T 110) However, Dr. Bloomfield had testified during the penalty phase, from his personal knowledge, that often the moderately mentally retarded are place in emotionally handicapped classes:

> It suggests then that the disturbance, the mental health disturbance was the preeminent factor at that time that they focused on, and they placed him based on that. And I don't know that it precludes low intellect. They just --
>
> My experience with kids who are crazy like that in school is that the schools are so disruptive by them, they want to do something with them as quickly as they can. And they focus on the cause of the problem, which is the disruption, which is the result of the mental illness.
>
> Q All right. And they came up with emotionally handicapped.

(Vol. 15, T 1517) Placement, then, in EH does not preclude low intellect and Dr. Bloomfield has found that many "moderately" mentally retarded children are placed in EH or EMH classes. (V 15, T 1517-1518, 1562)

Dr. Pritchard also opined that he had some unique power to tell, just by observing a person for a short period of time, whether they were retarded, and Snelgrove was not. (V 20, T 108-109) Pritchard admitted that Snelgrove's

learning disabilities “were across the board” and that even his testing and analysis included one score (fluid reasoning) within the mentally retarded range and one borderline. (V 20, T 144)

Further testimony at the retardation hearing indicated again that Snelgrove was exceptionally slow, especially after his accidental ingestion of his cousin’s Haldol. (V 20, 14-15, 19-20) He was able to work at only the most menial of jobs, having to be laid off when his cousin’s company went from just carpet cleaning (David could operate the wand, but only with full supervision) to building maintenance, a job he could not handle. (V 20, T 24-25, 30-32)

SUMMARY OF ARGUMENTS

I. The trial court abused its discretion in unreasonably denying a continuance after the defense had just learned from its mental health expert that his a new interview of the defendant in preparation for the new penalty phase indicated that defendant may be mentally retarded.

II. The trial court erred in allowing irrelevant and improper rebuttal evidence, which evidence was also a discovery violation, in the introduction of a newly-prepared redacted video of the police interrogation with the defendant. Such video did nothing to rebut the defense case in mitigation. It also included inadmissible evidence of a lie detector test.

III. The court's jury instruction, coupled with the improper argument of the state, impermissibly told the jury that they must follow the law and impose a sentence of death if the aggravating factors outweighed mitigation. This is not the law and the error rendered the advisory verdicts unconstitutional.

IV. The court improperly permitted the state to advance matters not in evidence through its questioning of defense expert witnesses, impermissilby suggesting to the jury that the state had additional evidence against the defendant's mitigation that it chose not to present to the jury.

V. Argument by the state attorney and the instruction given by the court

improperly and unconstitutionally told the jury that they could use the victim impact evidence in their consideration of whether the death penalty should be imposed, where in Florida the jury's determination of the appropriate sentence is limited to a consideration of aggravating and mitigating circumstances.

VI. The trial court erred in imposing the death sentence.

VII. Florida's scheme for determining mental retardation as a bar to capital punishment is unconstitutional on its face and as applied to this defendant. Under the proper standards, the defendant meets the criteria for mental retardation.

ARGUMENT

POINT I

THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING THE DEFENDANT'S MOTION FOR A CONTINUANCE OF THE NEW PENALTY PHASE TO CONDUCT FURTHER MENTAL HEALTH TESTING ON THE DEFENDANT AFTER ITS MENTAL HEALTH EXPERT'S NEW DETERMINATION THAT THE DEFENDANT MAY BE MENTALLY RETARDED, DEPRIVING SNELGROVE OF HIS RIGHT TO A FAIR TRIAL AND TO THE EFFECTIVE ASSISTANCE OF COUNSEL, AND RENDERING THE DEATH SENTENCES CRUEL AND UNUSUAL PUNISHMENT UNDER THE FEDERAL AND FLORIDA CONSTITUTIONS.

An order denying a continuance will be reversed upon a showing of an abuse of discretion. *Sliney v. State*, 699 So.2d 662 (Fla. 1997). Here, the denial of the defendant's request for a continuance to further explore and test new information that Snelgrove may be mentally retarded (and hence preclude the death penalty) was a "palpable abuse of discretion," unduly prejudicing the defendant. *Fennie v. State*, 648 So.2d 95 (Fla. 1994).

Just prior to the start of the new penalty phase, the defense mental health expert, Dr. Robert Berland, reinterviewed the defendant and reviewed his notes on Snelgrove's condition. As a result of this final preparation for his testimony, Berland became concerned that there was an indication that the defendant may be mentally retarded and additional testing and evaluation for this possibility was

necessary. As a result, defense counsel was forced to move for a continuance of the new penalty phase in order to develop this evidence for presentation at the new penalty phase trial.

The trial court denied the continuance, ruling that Dr. Berland could conduct his testing at night while the penalty phase trial was proceeding.

Although appellate courts typically defer to a trial court's ruling on a motion for continuance, deference is not absolute. *Smith v. State*, 525 So.2d 477, 480 (Fla. 1st DCA 1988). It appears the common link in those cases in which a palpable abuse of discretion has been found is that defendant must be afforded an adequate opportunity to investigate or prepare for presentation of any applicable defense. *Id*. at 479; *Beachum v. State*, 547 So.2d 288 (Fla. 1st DCA 1989).

Here, the defense was forced to proceed with the presentation of his case to the jury, without the benefit of information crucial to his case, which was yet to be developed. In denying the continuance, the trial court repeatedly mentioned that the issue of mental retardation was not yet ripe, coming, according to statute and rule, only after a jury's death recommendation. Yet, this evidence is also critical for the advisory and fact-finding functions of the jury; necessary for them to make an informed decision on whether Snelgrove should live or die. Without it, their death recommendations are invalid and unconstitutional, preventing the defense

from developing its statutory and non-statutory mitigating circumstances.

Without prior development of the retardation issue, counsel was forced to proceed to the penalty jury trial without knowledge of whether the issue would evolve. And when the testing was complete, indicating to the expert that the IQ portion of the requirements for a diagnosis of mental retardation was met, additional time to evaluate the other two prongs for mental retardation: a deficit in adaptive functioning and onset prior to age 18. While Dr. Berland was able to testify before the jury later in the penalty phase trial to his preliminary findings regarding IQ, he was wholly unable to complete the rest of his diagnosis by that time, needing to evaluate school records and conduct extensive interviews with family members. During its cross-examination of the doctor, the state attorney made much of the fact that Berland could not say that the defendant had deficits in his adaptive functioning and was mentally retarded, matters which he was as yet unable to complete.

Surely, this is unfair, clearly demonstrating the need for the continuance and rendering the death sentences constitutionally infirm. Not only has there been an abuse of discretion, but the denial of the continuance was so arbitrary and fundamentally unfair that it violates constitutional principles of due process. *See Gandy v. Alabama*, 569 F.2d 1318, 1323 (5th Cir. 1978); *Shirley v. North*

Carolina, 528 F.2d 819, 822 (4th Cir. 1975).

The United States Supreme Court addressed this subject in *Ungar v. Sarafite*, 376 U.S. 575, 589 (1964):

> The matter of continuance is traditionally within the discretion of the trial judge, and it is not every denial of a request for more time that violates due process even if the party fails to offer evidence or is compelled to defend without counsel. Contrariwise, a myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality. There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied. (Citations omitted.)

When a motion for a continuance for the purpose of securing defense witnesses is denied, caselaw has identified various factors in considering whether denial of the motion was an abuse of the trial court's discretion: prior due diligence to obtain the witness's presence; the degree to which such testimony is expected to be favorable to the accused; that the witness was available and willing to testify; and that the denial of the continuance caused material prejudice. *Geralds v. State*, 674 So.2d 96, 99 (Fla. 1996); *Hicks v. Wainwright* 633 F.2d 1146, 1148-1149 (5th Cir. 1981).

Here, the defendant cannot be faulted for requested delay; the defense expert, while preparing for his testimony prior to trial, only just discovered the possible mental retardation issue, indicating that more time was absolutely

necessary to fully test and develop this material issue. The expert did later complete work on the retardation issue and was able to opine that, with a degree of reasonable medical certainty, the defendant met the requirements for a diagnosis of mental retardation (although still not able to say beyond all doubt that onset occurred prior to age 18, due to the lack of adequate records). But this work was too late, because of the denial of the continuance, to be able to be presented to the sentencing jury.

A strong likelihood of prejudice is present. *See D.N. v. State*, 855 So.2d 258 (Fla. 4th DCA 2003). Without his completed interviews and record review, Dr. Berland's potential diagnosis of retardation was ridiculed by the state, highlighting that his diagnosis was missing several components. Yet, the trial court allowed this to occur by its "a myopic insistence upon expeditiousness in the face of a justifiable request for delay," rendering the right to defend "an empty formality." *Ungar v. Sarafite*, *supra*. The due process rights of the individual must triumph over these other considerations of haste and dispatch. *See also Hill v. State*, 535 So.2d 354, 355 (Fla. 5th DCA 1988). A palpable abuse of discretion having been shown, reversal for a new penalty phase is necessary.

POINT II.

THE TRIAL COURT ERRED IN ADMITTING IN REBUTTAL EVIDENCE WHICH WAS IRRELEVANT TO THE PENALTY PHASE OF A CAPITAL TRIAL AND WHICH WAS NOT PROVIDED TO THE DEFENSE UNTIL THE SIXTH DAY OF TRIAL, IN VIOLATION OF THE DEFENDANT'S RIGHT TO DUE PROCESS, TO COUNSEL, AND TO A FAIR TRIAL, RENDERING THE DEATH SENTENCES UNCONSTITUTIONAL.

On the sixth day of the new penalty phase trial, after the state had rested its case and the defendant had presented his case in mitigation, including testimony of mental health experts that the defendant suffered from brain damage and mental defects, the state presented a newly-prepared redacted video of the police interrogation of the defendant, purportedly to show that the defendant was not suffering from any mental deficiencies. This was the argument for its admission, despite the fact that it did not rebut any evidence presented by the defense. Specifically, the sole testimony before the court and jury was that it was impossible to determine a person's mental issues from a four-hour interrogation in a structured setting. (V 17, T 1662-1664, 1670, 1682-1683, 1729-1730, 1739) *See also* Felner, "Beyond Reason: Executing Person with Mental Retardation," American Bar Association: *Section of Individual Rights and Responsibilities - HumanRights*:

> "Most people with mental retardation are not so profoundly

> disabled that their condition is readily apparent; except in special cases such as Down's syndrome, they do not look different from anyone else. Many people who have cognitive impairments go to great lengths to mask them, wrapping themselves in a "cloak of competence." They may, for example, hide their inability to read or do basic math, working at menial jobs that do not require conceptual skills. As a result, defense lawyers often fail to realize their clients are retarded; when evidence of retardation is presented, prosecutors (and jurors, apparently) discount its significance. They see a defendant who is not manifestly "crazy," and they do not grasp the profound yet subtle ways a person with retardation is limited in his or her capacity to understand the world around him or her and to act appropriately."

Hence, such video presentation was totally irrelevant to the state's rebuttal case and its admission into evidence could only serve to prejudice the jury by showing that the defendant appeared to exhibit no remorse. Further, being provided to the defense so late into trial violated the state's continuing obligation for discovery and amounted to a trial by ambush. And, lastly, the lie detector test (CVSA) included in the recording is blatantly inadmissible.

The standard for review of admission or exclusion of evidence is an abuse of discretion standard. *San Martin v. State*, 717 So.2d 462 (Fla. 1998). The trial court abused its discretion here.

First, it is clear that only relevant evidence may be admitted. Section 90.402, Florida Statutes, provides that irrelevant evidence is admissible. *See also Moore v. State*, 701 So.2d 545, 549 (Fla. 1997). Section 90.401, Florida Statutes

defines "relevant evidence" as "evidence tending to prove or disprove a material fact." *See also Gibbs v. State*, 394 So.2d 231, 232 (Fla. 1st DCA 1981). Here, the video did not tend to prove any statutory aggravating factor, nor did it disprove any mitigating factor, especially in light of the sole evidence (and accepted scientific fact) that mental retardation or mental deficiencies cannot be ascertained, especially by non-experts, by viewing such an encounter. Thus, it must be excluded.

Secondly, being presented to the defense for the first time on the sixth day of trial violated the state's continuing discovery obligations and deprived the defendant of the opportunity to be prepared to address such evidence. The state was aware, since the first penalty phase trial in 2002 what mental health mitigation the defendant would present. Thus, there was no justifiable reason for the state to claim that it only became aware at this new penalty proceeding that such redacted tape would be necessary.

Florida's criminal discovery rules are designed to prevent surprise by either the prosecution or the defense. Their purpose is to facilitate a truthful fact-finding process. *Scipio v. State*, 928 So. 2d 1138, 1114 (Fla. 2006). Both sides are entitled to rely on full and fair compliance with the rule in preparing their cases for trial. *Id*. This Court has held that the chief purpose of our discovery rules is to assist the

truth-finding function of our justice system and to avoid trial by surprise or ambush. In *Scipio*, this Court specifically ruled:

> Because full and fair discovery is essential to these important goals, we have repeatedly emphasized not only compliance with the technical provisions of the discovery rules, but also adherence to the purpose and spirit of those rules in both the criminal and civil context. *See Binger v. King Pest Control*, 401 So.2d 1310, 1314 (Fla. 1981). This Court has explained that the rules of discovery are intended to avoid surprise and "trial by 'ambush.' " *Binger*, 401 So.2d at 1314. In *Binger*, we emphasized that the "search for truth and justice can be accomplished only when all relevant facts are before the judicial tribunal. Those relevant facts should be the determining factor rather than gamesmanship, surprise, or superior trial tactics." *Id*.

Scipio, *supra* at 1144.

In *Scipio v. State*, *supra*, this Court reversed a conviction where the state failed to disclose a material change in the expected testimony of a listed witness. The court in *Scipio* cited Rule 3.220(b)(1)(B), Florida Rules of Criminal Procedure, which provides that the state must disclose "names and addresses of all persons known to the prosecutor to have information that may be relevant to any offense charged or any defense thereto." The Court's holding was that the discovery rules require not only compliance with the rules' technical provisions, "but also adherence to the purpose and spirit of those rules." 928 So. 2d at 1144. Ultimately, the *Scipio* court held, the rules impose "a continuing mandatory duty

on the prosecution to disclose certain specifics." *Id*. This Court should hold that one of those "specifics" is the presentation of the materially changed exhibit. The presentation of this video to the defense on the sixth day of trial was simply too late.

Further compounding this error was the court's refusal to grant a continuance for the defense to preview the redaction and determine if there was additional material on the complete interrogation that should be included above the state's determination on the redaction. Pursuant to the caselaw cited in Point I, *supra*, the court's denial of a continuance for this purpose also was reversible error.

And lastly, the law is quite clear that lie detector testing is not admissible in a criminal trial. *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923); *Kaminski v. State*, 63 So.2d 399 (Fla. 1952); *Crawford v. State*, 321 So.2d 559 (Fla. 4th DCA 1975) (holding that the mention at rial that a witness was asked to take a polygraph test raised an impermissible inference of witness credibility).

This video was thus inadmissible in rebuttal, served no relevant purpose, presented a discovery violation by the state, and presented the jury with highly prejudicial matters, outweighing any probative value. A new penalty phase trial is required.

POINT III.

THE TRIAL COURT ERRED IN PERMITTING THE STATE, OVER OBJECTION, TO INCORRECTLY INFORM THE JURY THAT DEATH RECOMMENDATIONS WERE REQUIRED BY LAW, COMPOUNDING THE ERROR BY REFUSING THE DEFENDANT'S REQUEST TO CORRECTLY INSTRUCT THE JURY ON THE MATTER, THEREBY RENDERING THE DEATH SENTENCES UNCONSTITUTIONAL.

This Court has "declared many times that 'a jury is neither compelled nor required to recommend death where aggravating factors outweigh mitigating factors.'"). *Cox v. State*, 819 So.2d 705, 717 (Fla. 2002) [quoting *Henyard v. State*, 689 So.2d 239, 249-50 (Fla. 1996)]; *see also Gregg v. Georgia*, 428 U.S. 153, 199, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976) (plurality) (explaining that a jury can constitutionally dispense mercy in cases deserving of the death penalty).

During closing argument, the highly-experienced elected State Attorney informed the jury, to the contrary: that the law actually required them to recommend death sentences if they found that the aggravating circumstances outweighed the mitigation:

> MR. TANNER [Prosecutor]: The ultimate weighing, again, do those justify, any of them or all of them, justify recommending a death sentence? Do these outweigh it?
>
> That's not an emotional decision. You're not left clueless out here. You're not left having to inflict or having to undergo the -- perhaps the heavy duty of, well, it's what I decide. No, it's the law that you have to -- have to consider. His Honor will include

> his instructions, I think, with instructions that will clarify that.
>
> And I want to touch on something the Defense lawyers have said two or three times, and that is that justice is always satisfied with a life sentence. Now, where is that written? Where did that –
>
> MR. VALERINO: I'm going to object to that, Your Honor. That may not be in the instructions, but that's the case law.
>
> THE COURT: Overrule the objection. I'll let you both argue your positions.
>
> MR. TANNER: Thank you.
>
> You know, who said so? What – what – let's – first let's – what's 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 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.

(V 18, T 1950)

"Follow the law, follow the law," the state attorney said, and the law is this, he informed them, incorrectly: the law requires that they must recommend death. And the trial court did not correct this error by sustaining the objection or with a correct instruction on the law.

Defense counsel had sought a correct instruction on the law, following Judge Eaton's proposed jury instructions, that the jury is not required to recommend death, regardless of their findings on the aggravating and mitigating circumstances. [since adopted with slightly modified language by this Court, *see In re Standard*

Jury Instructions in Criminal Cases-Report No. 2005-2, 22 So.3d 17, 22 (Fla. 2009)]. (V 17, T 1794-1796) But the court denied the legally correct requested instruction, confident, it initially said, that the state would never argue to the contrary, but then backing off that assertion, and tacitly approving the state's "required by law" argument:

> THE COURT: *I don't presume the State would ever argue that it was required.* They argue that maybe they think it's supported by the law and the facts.
>
> MR. NELSON [prosecutor]: We think the instructions supported by the Supreme Court and published in their most recent edition of the penalty phase jury instructions are equally as weighty as Judge Eaton's and tested.
>
> THE COURT: Well, *I think you may be able to argue reference to what you believe that – and maybe use the word "required."* But I'm going to stick with the Supreme Court's instruction.

(Vol, 15, T 1796)

The argument of the state coupled with the instructions given to the jury repeatedly told them that they must follow the law and determine if the mitigation outweighed the aggravating factors in order to recommend life. (V 19, T 2004, 2005, 2010, 2018)

The combination of these errors, telling the jury they are required to follow the law and yet denying the correct instruction that they are never required to vote

for death, results in reversible error, preserved at trial by the defense's objections and requests. It results in death sentences imposed in violation of the right to a fair trial by jury, due process, equal protection, and the prohibition against cruel and unusual punishment, as guaranteed by the federal and Florida Constitutions. This Court, in adopting revisions to the penalty phase jury instructions, recognized that an American Bar Association study[16] found significant confusion amongst Florida jurors believing there was a requirement under the law that they find for the death penalty under certain aggravating circumstances.

> **Significant Capital Juror Confusion** ... -Death sentences resulting from juror confusion or mistake are not tolerable, but research establishes that many Florida capital jurors do not understand their role and responsibilities when deciding whether to impose a death sentence. In one study, over 35 percent of interviewed Florida capital jurors did not understand that they could consider any evidence in mitigation and 48.7 percent believed that the defense had to prove mitigating factors beyond a reasonable doubt. *The same study also found that over 36 percent of interviewed Florida capital jurors incorrectly believed that they were required to sentence the defendant to death* if they found the defendant's conduct to be "heinous, vile, or depraved" beyond a reasonable doubt, *and 25.2 percent believed that if they found the defendant to be a future danger to society, they were required by law to sentence him/her to death*, despite the fact that future dangerousness is not a legitimate aggravating circumstance under Florida law.

In re Standard Jury Instructions in Criminal Cases-Report No. 2005-2, *supra* at 19

[16] American Bar Association, *Evaluating Fairness and Accuracy in State Death Penalty Systems: The Florida Death Penalty Assessment Report* (2006), at vi.

(emphasis added). In adopting the new jury instructions, this Court noted that the new instruction that "the jury is 'neither compelled nor required to recommend death,' even where the aggravating circumstances outweigh the mitigating circumstances" was "consistent with Florida and federal case law," citing *Cox v. State*; *Henyard v. State*; and *Gregg v. Georgia*, *supra*. *See also Franqui v. State*, 804 So.2d 1185, 1193 (Fla. 2001) (error for court to inform jury the law required jurors to recommend a death sentence if the aggravating circumstances outweighed the mitigating circumstances).

The correct legal instruction as requested by the defense and the court's sustaining of the objection to the state's improper closing argument would have prevented this error, and would have corrected the jury's misconception that death recommendations were required by law. Instead, the jury was certainly left with the mistaken belief that they *had* to recommend death sentences here. The argument of the state and the jury instructions given by the court specifically and erroneously told them this. Unlike in *Cox*, *Franqui*, and *Henyard*, *supra*, the defense here *did* preserve this issue for appeal, and, when coupled with the request for a correct legal instruction and the misleading instructions given here, results in harmful error.

A new penalty phase trial is therefore constitutionally and legally required.

POINT IV.

THE TRIAL COURT ERRED IN PERMITTING THE STATE TO QUESTION A DEFENSE EXPERT WITNESSES ABOUT FACTS NOT IN EVIDENCE, IN VIOLATION OF THE DEFENDANT'S RIGHT TO CONFRONTATION, DUE PROCESS, AND A FAIR JURY TRIAL, AND RENDERING THE DEATH SENTENCES CRUEL AND UNUSUAL PUNISHMENT.

At this new penalty phase trial, the state elected not to present testimony to new jury about bloody clothes found in the defendant's attic, which clothes contained the defendant's blood and possibly that of his cousin, Jeff McRae (but containing no blood of the victims). Also, the prosecution opted not to call a jail-house snitch, Gary Matthews regarding alleged admissions the defendant had made to him while in the Flagler County Jail (such testimony having been severely impeached at the defendant's original trial, *see Snelgrove v. State*, 921 So.2d at 564-565).

Despite these facts not being introduced into evidence before this new penalty phase trial, the state was permitted over defense objections to question defense expert witnesses about these facts, inquiring if the experts were aware of them and had taken them into consideration (which they had not). Dr. Edwards was asked by the prosecutor whether the defendant had told him about washing the blood off and hiding his clothes in the attic. (V 13, T 1309-1310) The state was

permitted to ask Dr. Berland whether he had reviewed the taped statement of Matthews regarding Snelgrove's admissions to him and Snelgrove's demeanor about the killings, "with regard to the psychosis and his affect when he murdered these people," and further, "So, so you, you would just choose to not even review the statement of a witness who claimed to know something about what motivated this man to kill these people?" (V 15, T 1525-1534)

These questions were highly improper, assuming facts not in evidence, and intimating that the state had additional unheard evidence which would corroborate their case. Prosecutor's are clearly prohibited from commenting on matters unsupported by the evidence produced to the jury at trial. *Huff v. State*, 437 So. 2d 1087 (Fla. 1983); *Garcia v. State*, 622 So. 2d 1325 (Fla. 1993) (while the state is free to argue to a jury any theory that is reasonably supported by evidence, it may not subvert the truth-seeking function of trial by obtaining a conviction or sentence based on obfuscation of relevant facts). *See also Garron v. State*, 528 So. 2d 353 (Fla. 1988); *Thornton v. State*, 852 So.2d 911, and 914 (Fla. 3rd DCA 2003) (references to matters not in evidence which intimated the prosecutors' extra-trial knowledge of facts adverse to the defendant); *Brooks v. Kemp*, 762 F. 2d 1383 (11th Cir. 1985).

A new trial is necessary where the prosecutor mentions a witness who did

not testify or evidence not presented to the jury, suggesting there was evidence harmful to the accused and corroborative to the state's case that they did not hear. *Brown v. State*, 18 So.3d 1149 (Fla. 4th DCA 2009); *Hazelwood v. State*, 658 So.2d 1241, 1244 (Fla. 4th DCA 1995); *Stewart v. State*, 622 So.2d 51, 56 (Fla. 5th DCA 1993).

Similarly, assumptions of fact in a hypothetical question asked of an expert witness must be based solely upon facts that are supported by evidence which has been introduced during the trial. *Autrey v. Carroll*, 240 So.2d 474, 476 (Fla. 1970); *Atlantic Coast Line R. Co. v. Shouse*, 83 Fla. 156, 91 So. 90 (1922); *Chiles v. Beaudoin*, 384 So.2d 175, 178 (Fla. 2nd DCA 1980).

Here, the prosecutor represented outright to the jury that he had additional evidence supporting death sentences and negating the defendant's mental health mitigation. *See Ruiz v. State*, 743 So.2d 1, 4 (Fla. 1999) (state may not suggest that evidence which was not presented at trial provides additional grounds for finding defendant guilty [or, as here, for finding for the death penalty]; *Thompson v. State*, 318 So.2d 549, 551-552 (Fla. 4th DCA 1975) He also surely suggested to the jury that this testimony showed the defendant exhibited no remorse. *See McKenzie v. State*, 830 So.2d 234, 238 (Fla. 4th DCA 2002).

As this Court stated, "That which has gone before cannot be considered by

the jury except to the extent it can be properly presented at the trial and those things that cannot properly be presented must not be considered at all. *Ruiz v. State*, *supra* at 4, *quoting United States v. Garza*, 608 F.2d 659, 662-62 (5th Cir.1979).

The questions of the prosecutor here, intimating additional evidence in support of death sentences deprived the defendant of his right to confrontation of that evidence and denies due process and a fair trial. The resulting death sentences are rendered cruel and unusual punishment. A new penalty phase is required.

POINT V.

COUPLED WITH THE ARGUMENT OF THE PROSECUTOR, THE JURY INSTRUCTION GIVEN BY THE COURT OVER DEFENSE OBJECTION THAT THEY MAY CONSIDER THE VICTIM IMPACT EVIDENCE IN MAKING THEIR DECISION ON WHAT PENALTY TO RECOMMEND RENDERS THE DEATH SENTENCES UNCONSTITUTIONAL.

Whether Florida's death penalty jury instructions deny due process and fundamental fairness under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, §§ 2, 9, 16, 17 and 22 of the Florida Constitution is a pure question of law subject to *de novo* review.

In a capital case in Florida, the jury's recommendation of sentence must be based solely on the statutory aggravating circumstances and the mitigating circumstances upon which they have been instructed. Snelgrove moved in writing to have the trial court instruct the jury pursuant to a newly-formulated (then pending approval by this Court) jury instruction on victim impact testimony, to precisely that. (Vol. 1, R 60-71; Vol. 8, T 934; Vol. 15, T 1793-1794, 1839-1840) Instead, pursuant to the state's request and over defense objection, the jury was instructed that they could consider this evidence in making their decision. (Vol. 17, T 2010, 2017-2018, 2026):

> You have heard evidence that concerns the uniqueness of Glynder Fowler, a/k/a Glyn Fowler, as an individual human being

> and the result – 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.

The same instruction was read with regard to the second murder victim. (V 19, T 2017-2018)

While in *Payne v. Tennessee*, 501 U.S. 808 (1991), the United States Supreme Court held that the State could properly decide that a jury should hear victim impact at sentencing, the *Payne* decision also held that victim impact evidence was not a type of non-statutory aggravating circumstance. The instruction given here clearly tells the jury that, despite the limitations of their relevant consideration to the aggravating and mitigating circumstances, they may actually weigh the victim impact evidence in reaching their decision.

On the other hand, the instruction proposed by the defense was that which, at the time, was proposed for adoption by this Court, and which has now been approved by the Court:

> However, you may not consider this evidence as an aggravating circumstance. Your recommendation to the Court must be based on aggravating circumstances and the mitigating circumstances

upon which you have been instructed.

(V 135, T 1793) *In re Standard Jury Instructions in Criminal Cases-Report No. 2005-2*, 22 So.3d 17, 21 (Fla. 2009). This correct legal instruction clearly tells the jury that such evidence may not enter into their weighing of the aggravating and mitigating circumstances, upon which Florida's death penalty is exclusively based.

To further complicate matters, in addition to the flawed instruction, the prosecutor also argued the victim impact to the jury in his closing, beseeching them to remember the loss to our community of a World War II veteran and his wife of a lifetime, and that that evidence was relevant to their consideration of what sentence to impose. (V 18, T 1922, 1939)

The improper instruction coupled with the prosecutor's argument to the jury violates the Florida and federal constitution's rights to due process, a fair trial, and prohibition against cruel and unusual punishment. A new penalty phase trial is required.

POINT VI.

THE APPELLANT'S DEATH SENTENCE WAS IMPERMISSIBLY IMPOSED, RENDERING THE DEATH SENTENCE UNCONSTITUTIONAL.

The sentences of death must be vacated. The trial court found improper aggravating circumstances, failed to consider (or gave only little weight to) highly relevant and appropriate mitigating circumstances, and improperly found that the aggravating circumstances outweighed the mitigating factors. These errors render Snelgrove's death sentences unconstitutional in violation of the Eighth and Fourteenth Amendments to the United States Constitution and Art. I, §17 of the Florida Constitution. Aggravating circumstances must be proven beyond a reasonable doubt to exist and review of those factors is by the competent substantial evidence test. Where evidence exists to reasonably support a mitigating factor (either statutory or non-statutory), the court must find as mitigating that factor. Review of the weight given to mitigation is subject to the abuse-of-discretion standard. *See Cole v. State*, 701 So.2d 845, 852 (Fla. 1997). It is submitted that this Court's proportionality review, being a question of law, is a *de novo* review.

A. The Trial Judge Considered Inappropriate Aggravating Circumstances

Aggravating circumstances must be proven beyond a reasonable doubt by

competent, substantial evidence. *Martin v. State*, 420 So.2d 583 (Fla. 1982); *State v. Dixon*, 283 So.2d 1 (Fla. 1973). The state has failed in this burden with regard to the aggravating circumstances found by the trial court, and the court gave inappropriate weight to a relatively minor (under the facts of the case) aggravating factors, prior (contemporaneous) violent felony and on community control for a prior felony. Additionally, the court engaged in improper doubling of HAC and the vulnerability of victims due to advanced age aggravators. The court's findings of fact, based in part on matters not proven by substantial, competent evidence beyond a reasonable doubt, and on erroneous or speculative findings, do not support these circumstances and cannot provide the bases for the death sentences.

The capital felony was committed by a person under sentence of imprisonment or placed on community control or probation. §921.141(5)(a), Fla. Stat.

The evidence showed that Snelgrove was on community control when the homicides occurred. The underlying offense for community control was tampering with evidence, in that Snelgrove swallowed a piece of crack cocaine when being questioned by police in Orlando.

The trial court failed to consider the relatively minor weight this aggravator should legally be given inasmuch as it was community control rather than a prison sentence and given the relatively minor nature of the offense (a crack addict

attempting to destroy evidence by swallowing his stash when questioned by police). The fact that Snelgrove was on community control is intertwined with his long-term cocaine addiction. The letter written by David Snelgrove asking to stay in the drug treatment program, just two weeks prior to the homicides, reflects that he was trying hard to overcome his addiction and needed professional help in doing so. The expulsion from the drug treatment program, and the testimony of Drew Edwards showing that Snelgrove then did the right thing by calling his sponsor, who refused assistance, greatly diminishes the weight that should be given this factor. This is not a situation where an inmate kills another inmate or a guard, or a defendant who is on probation for a violent felony who is violent again. This aggravating circumstance does not compel a sentence of death and it does not make this the most aggravated of first-degree murders. It must be given little weight in the grand scheme of a life or death decision here.

<u>The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person</u>. §921.141(5)(b), Fla. Stat.

A contemporaneous conviction where the defendant had up to that time lived a violence-free life, *must* be given lesser weight. The aggravating nature of a "prior" violent or capital felony is most influential for people who have multiple violent felonies over a period of time. *See, e.g. Remeta v. State*, 710 So.2d 543

(Fla. 1998). The "prior violent felony" also weighs heavily in favor of the death penalty for serial killers, who carefully committed five first-degree murders, three sexual batteries, and three armed burglaries over a 72-hour period. *See Rolling v. State*, 695 So.2d 278 (Fla.1997).

Where as here, contemporaneous violent crimes are not preceded by *any* prior violence on the part of the defendant, the weight of this factor is substantially less than for those with a long history of prior violent crimes. *See Almeida v. State*, 748 So.2d 922, 933 (Fla.1999) (Life sentences appropriate in homicide case where, "In addition to the mental health mitigation . . . the defendant was twenty years old at the time of the crime, and the present crime and the [two] prior capital felonies all arose from a single brief period of marital crisis that spanned six weeks. We note that the jury vote was seven to five."); *Terry v. State*, 668 So.2d 954, 965 (Fla.1996) ("While this contemporaneous conviction qualifies as a prior violent felony and a separate aggravator, we cannot ignore the fact that it occurred at the same time, was committed by a co-defendant, and involved the threat of violence with an inoperable gun.")

While contemporaneous convictions for violent crimes do qualify as "prior" violent felonies, it is clear from the evidence that cocaine addiction, emotional distress and mental illness mitigate the application of this aggravating factor here.

The evidence conclusively shows that violence is totally out of character for David Snelgrove. His aunt testified that David does not have a violent bone in his body. There is no evidence in the record even suggesting that Snelgrove has ever before been violent (his prior offenses were all drug related and non-violent), and the testimony of the family members, friends and experts who knew him and reviewed the records all show this. The contemporaneous violent crime is not entitled to great weight in light of the mitigating evidence. This factor does not make this the most aggravated and least mitigated of first-degree murders. This factor must be given minimal weight.

Especially heinous, atrocious or cruel improperly doubled with Vulnerability of the Victims.

The sentencing order also shows that the trial court counted the same aspects of the crime as two separate aggravating circumstances. (V 2, R 177-179, 181-182) This Court has held that aggravating circumstances cannot be doubled. A doubling occurs when one aspect of the case gives rise to two or more aggravating circumstances. In such an instance, only one aggravating circumstance can be found and considered. *E.g. Provence v. State*, 337 So.2d 783 (Fla. 1976) (pecuniary gain and during the course of a robbery); *Lukehart v. State*, 776 So.2d 906,925 (Fla. 2000) (improper doubling of committed in the course of aggravated

child abuse and victim under the age of 12); *Ray v. State*, 755 So.2d 604, 611 (Fla. 2000) (improper doubling of prior violent felony (contemporaneous robbery) and during the course of a robbery).

Here, the trial court found for both murders both aggravators of HAC, and the victims' vulnerability due to their advanced age. Both aggravating factors here speak of the vulnerability of the victims and their infirmities. This single aspect, then, of the victims' status of advanced age and vulnerability gives rise to both of these circumstances. Thus, these should have been considered as only a single aggravating circumstance. The sentences must be vacated and reduced to life or remanded for a new penalty phase.

B. Mitigating Factors, Both Statutory and Non-Statutory, Are Present Which Outweigh Any Appropriate Aggravating Factors.

The trial court's sentencing order glossed over the statutory and non-statutory mitigating factors and improperly rejected them or abused its discretion in giving them little weight, with no explanations why.

Mitigating considerations that have consistently and historically been deemed to be "significant" exist here. For instance, in *Mahn v. State*, 714 So.2d 391 (Fla. 1998) the Court reversed two death sentences and remanded where the trial judge applied the wrong legal standard in concluding that the defendant was

not under the influence of drugs or alcohol when murders were committed. Citing *Ross v. State*, 474 So.2d 1170, 1174 (Fla. 1985), the Court noted that a defendant's past drug and alcohol abuse problems are "collectively . . . a significant mitigating factor" even though the defendant testified he was "cold sober" on the night of the murder. *Mahn*, *supra* at 401. The evidence here shows that, rather than being cold sober, Snelgrove was in the acute stage of craving for crack cocaine, and that his actions were controlled solely by his addiction to that drug.

The court's sentencing order finds the statutory mitigating factor of "under the influence of extreme mental or emotional disturbance," but inappropriately minimizes it to a simple drug addiction and craving for cocaine. In glossing over this powerful mitigator, the trial court failed to consider the strong, irresistible impact Snelgrove's addiction had on him and the unrebutted expert testimony of his desperate struggles to break free of the addiction. There was testimony of biological brain damage; of Snelgrove's total dependence on his mother, who died suddenly (within a short time of his father's death), which left him decimated and caused his worsening spiral into depression and addiction. His discharge from a drug treatment program (in which he proudly stayed off drugs for three months) for the minor offense of fraternization caused him to lose all hope of recovery, supplanting that hope with pure despair. Having been drug-free for over three

months Snelgrove astoundingly remained off drugs for two weeks on his own after being ousted from the treatment program, but ultimately succumbed to the strong desire). Especially coupled with his biological impairments, the cocaine craving was irresistible and had total control of him on the night of the murders.

This mitigating circumstance has been called "the mitigating factor of the most weighty order." *Rose v. State*, 675 So.2d 567, 573 (Fla. 1996) and has been found to justify a life sentence. *See Kramer v. State*, 619 So.2d 274 (Fla. 1993) (death sentence disproportionate where suffered from alcoholism and under influence of mental or emotional stress – held to be substantial); *Nibert v. State*, 574 So.2d 1059 (Fla. 1990) (drinking heavily at time of murder part of basis for substantial mental mitigation).

Here, the trial court did not assess the additional evidence that the defendant suffers form and failed to place it into the necessary equation. While Dr. Lawrence Holder testified that he did not see any asymmetry on the defendant's PET-Scan, he simply did not have the qualifications to make such a finding. He was a mere radiologist without the experience required to make such a reading, whereas Dr. Wu is *the* expert on PET-Scan evidence, has written and taught extensively on the subject. Dr. Holder, it seems, is making a career of criticizing Dr. Wu and accusing him of "manipulation" of the data, admitting that he has testified critically

of Dr. Wu in the past. (V 16, T 1645-1646)

Furthermore, even the state's expert at the retardation hearing admitted that the defendant does suffer from mental deficiencies and abnormalities. (V 20, T 136-137, 139-140 This factor is present in the most weighty measure, compelling a life sentence.

Next, the trial court stunningly rejected "the substantial impairment of the defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirement of the law." The court found that the defendant *did* suffer from some abnormal brain function and had limited intelligence, but ruled that these factors did not substantially impair his capacity to conform his conduct to the requirements of the law, contrary to the evidence. The evidence shows specifically that the defendant suffered damage to the areas of the brain ("clinically significant") which "significantly" diminished his control over his behavior and contributed to the situation in which he appears to have become out of control or violent. Damages to these areas of the brain alone caused significant loss of emotional and impulse control and are involved with the regulation of aggression and the ability to integrate cognition and movement, making Snelgrove much more vulnerable. When coupled with a long-standing crack cocaine addiction, which has a profound impact on the right temporal lobe as well, the impairment is

amplified, causing severe mental disturbance and "substantial" impairment to Snelgrove's ability to control his actions. The cocaine ingestion further impaired David's already fragile brain, "significantly" explaining the aggressive behavior exhibited in this one instance due to its effect on an area of the brain responsible for the survival instinct, causing the person to be hyper-vigilant and very much more prone to act impulsively.

Moreover, the defendant also suffered from a long-standing, chronic disturbance, "a biological malfunction in his brain," the presence of hallucinations and biological mood disturbance. His IQ testing was at least between 70 and 75, below or only slightly above the retardation level, showing, again "significantly," that certain portions of his brain were not functioning properly, which "significantly" diminished his control over his behavior and contributed to the crime and violence on this one occasion.

The trial court's sentencing order, however, fails to mention or analyze or dispute any of the above-cited testimony, and thus, erroneously concluding that these factors did not substantially impair the defendant. As such, the court erred by not considering this weighty and unrefuted mitigating evidence.

Similar facts in other cases have resulted in a strong finding of this mitigating factor. *See Besaraba v. State*, 656 So.2d 441, 445-446 (Fla. 1995)

(defendant experiencing a psychotic episode in which he was unaware of his actions, evidence of past emotional disturbances, and situational stress of confrontation with victim which triggered episode, all establish this mitigator and justify a life sentence); *Morgan v. State*, 639 So.2d 6 (Fla. 1994) (rage and mental infirmity; Court applied this circumstance to reduce to life, *despite finding by trial court that it did not play a major role in the crime*); *Knowles v. State*, 632 So.2d 62, 67 (Fla. 1993) (organic brain damage, psychotic state, neurological deficiencies, coupled with intoxication caused this Court to reverse trial court's rejection of this factor and to reduce to life); *Rivera v. State*, 561 So.2d 536 (Fla. 1990) (borderline personality disorder, impulsiveness, lack of control of anger, affective instability); *Carter v. State*, 560 So.2d 1166 (Fla. 1990) (organic brain damage, increased impulsiveness, diminished ability to plan events, psychologist testified that defendant "probably" unable to appreciate criminality). For cases involving alcohol and drug usage that have found this factor, *see Stewart v. State*, 558 So.2d 416 (Fla. 1990) (defendant drunk most of the time and used drugs; his control over his behavior was reduced by alcohol abuse); *Heath v. State*, 648 So.2d 660 (Fla. 1994) (alcohol and marijuana consumption); *Morgan v. State*, 639 So.2d 6, 13-14 (Fla. 1994) (voluntary intoxication); *Carter v. State*, 560 So.2d 1166 (Fla. 1990) (extensive drug abuse and possibility of substantial intoxication at time of

the murder); *Campbell v. State*, 571 So.2d 415 (Fla. 1990) (chronic drug and alcohol abuse, among other things); *Songer v. State*, 544 So.2d 1010 (Fla. 1989); *Burch v. State*, 522 So.2d 810 (Fla. 1988) (PCP usage); *Amazon v. State*, 487 So.2d 8 (Fla. 1986) (long history of drug abuse and had taken drugs on night of offense). And for cases dealing with the low intelligence levels recorded by Snelgrove, *see Morgan v. State*, 639 So.2d 6 (Fla. 1994) (factor found where defendant had low I.Q., although still in normal range); *Campbell v. State*, 571 So.2d 415 (Fla. 1990) (retarded I.Q. level, poor reasoning skills, third grade reading ability); *Morris v. State*, 557 So.2d 27 (Fla. 1990) (I.Q. of 75, mental limitations obvious).

The above-cited cases cannot be reconciled with the evidence and sentencing order here. To fail to follow these precedents renders the defendant's death sentences constitutionally unsound. There exists strong, unrefuted evidence that the defendant's organic brain damage, cocaine addiction, and low intelligence directly and significantly contributed to these crimes. This statutory mitigating circumstance is present and is present solidly; it was error to reject it. The two death sentences must be vacated and reduced to life.

The letter David Snelgrove wrote just two weeks before the homicides is compelling mitigation. That letter shows insight into cocaine addiction and a will to overcome it. It shows timely recognition of the power of cocaine addiction and

ultimate realization that David Snelgrove was addicted to crack cocaine and needed help to kick it. The motivation for writing the letter, and its content, is critical in understanding the true character of David Snelgrove. It was not a defensive letter – it did not blame anyone for his pending expulsion from the program. He admitted responsibility and his shame for allowing other human emotions get in the way of "the single most important thing to him - his sobriety." It was a cry for help that, had it been heeded, would NOT have resulted in his freedom or the end of restriction, but instead to being subjected to yet more discipline, restriction and structure to help him face his addiction to crack cocaine. It shows deep human feeling and emotion that clearly led to a state of rejection, dark despair and depression just two weeks before his acts on June 24, 2000, when he lost all hope and was dismissed from the program.

The testing and testimony of Dr. Berland show major depression occurring in June 2000, after Snelgrove was expelled from the drug treatment program. For the first time in his life, David Snelgrove was admitting addiction and pleading for help, and had a glimmer of hope that he would succeed, but his efforts were crushed. His aunt and his cousin Melissa noticed a marked change in him when he returned from the program; David Snelgrove was a changed, lifeless and depressed person when he returned from the Salvation Army. He no longer cared; he had lost

all his hopes and dreams for freedom from the dreaded drug and for a better life. Even so, he obtained a job and worked for 10 days. He withstood the craving for crack cocaine for a full week before having a beer, which triggered the area of the brain associated with crack cocaine craving. (V35, T589-593)

When he was discharged from the drug program, his belongings were retained, so he wore Jeff McRae's clothes and had to rely on McRae for transportation and a place to stay. Jeff McRae was perhaps the worst influence David Snelgrove could be exposed to at that time. McRae was his older cousin who was using crack cocaine and offering it to David Snelgrove. On the drive home from the Salvation Army, McRae tried to get Snelgrove to stop and have a beer and get some crack, but David resisted. McRae contacted drug dealers and purchased the crack cocaine that was used by David multiple times on June 23 and June 24, 2000. It can safely be said that, but for the crack cocaine supplied by McRae and Snelgrove's expulsion from the program for "fraternizing" this tragic event would not have happened.

At one time, David Snelgrove certainly had a choice about using crack cocaine, but in light of the circumstances in June 2000, he could no longer withstand its sinister influence, and was powerless to resist its use on June 23, 2000. The addiction to and use of crack cocaine does not excuse or justify what

was done. However, it is a powerful explanation of what caused these crimes, and it is compelling mitigation that cries for a life sentence.

David Snelgrove did not have a choice about having a mother who drank heavily and partied while she was pregnant with David. He did not have a choice about being born with brain damage, being left either at home alone on tranquilizers or with his mentally ill cousin, nor did he have a choice about his mother and father divorcing. School records were introduced into evidence that show David Snelgrove was in ESE classes and that he did not complete the 10th grade. His printing reflects his low intelligence and mental problems. With an IQ lower than 78, he is yet trainable to do menial jobs, and everyone noted that he was a very hard worker. He cared about people, and squabbling upset him. He counseled Melissa McRae not to use drugs and to respect her elders. David was a great help to his aunt in caring for her elderly brother, Harry Snelgrove.

The fact that Snelgrove has never before been violent is significant – it is a comment on his character. The fact that a person with David's mental impairment and exposure to crack cocaine could remain absolutely non-violent for 26 years is a compelling mitigating consideration. It is apparent that he can be safely housed in a Florida prison and be productive. He can be trained to work in the prison system and will require little supervision. His prior criminal record is not significant, in

that virtually all of his offenses are related to his cocaine addiction.

Prior to June 2000, no violence had ever been displayed by Snelgrove. Even the arrest that led to his being placed on community control was accompanied by an opportunity to use force to resist, which he did not. David Snelgrove is a human being who is far from perfect. Yet, overall, the good in him outweighs the bad. Snelgrove is dependent on crack cocaine, and, unfortunately, he is not the only person who has experienced the ghastly addictive quality of that drug. He was incarcerated for 2 years in the Flagler County Inmate Facility, with no DR's, only two minor "corrective consultations" and one written reprimand.

The death of Snelgrove's parents, one month apart in 1998, is a mitigating consideration that caused emotional duress and pushed him into further cocaine usage. The unexpected loss of his mother was devastating to David, who was already mentally and emotionally handicapped. She was his emotional anchor, who understood him and was attempting to make up for her earlier deficiencies in caring for him. These mitigating considerations are factors that bear on what an appropriate punishment is for Snelgrove. As explained above, this is not the most aggravated of capital cases. There is no evidence whatsoever that Snelgrove intended to harm anyone prior to being surprised in the darkness by Glyn Fowler. Snelgrove is appropriately punished by life imprisonment.

In conclusion, the trial court improperly doubled HAC with vulnerability of the victims due to advanced age. The substantial statutory and nonstatutory mitigating circumstances, unrebutted by the evidence, clearly tips the scale in favor of life imprisonment. His sentences of death, when compared to others, is disproportional and constitutes cruel or unusual punishment under the circumstances. It must be vacated.

POINT VII.

FLORIDA'S SCHEME FOR DETERMINING MENTAL RETARDATION AS A BAR TO CAPITAL PUNISHMENT IS UNCONSTITUTIONAL AT LEAST AS APPLIED TO THIS CASE, FAILING TO ACCOUNT FOR THE ACCEPTED MEDICAL RANGE OF IQ FOR RETARDATION AND WHERE INADEQUATE SCHOOL RECORDS LACK THE REQUISITE EVIDENCE OF ONSET PRIOR TO AGE 18, RENDERING THE DEATH SENTENCES UNCONSTITUTIONAL; UNDER CORRECT STANDARDS THE DEFENDANT IS MENTALLY RETARDED.

Florida's scheme for determining mental retardation in capital cases is unconstitutional. It uses an incorrect standard to determine the cut-off for retardation, it uses an incorrect legal standard for the burden of proof on the defendant, and it denies equal protection of the law, allowing the rich (and better school districts who memorialize IQ testing) to be able to show onset prior to age 18 and adaptive functioning disabilities, whereas the poor (or poorer school districts) have no recourse to such testing or fail to maintain adequate records of such.

Florida Statute 921.137 establishes the procedure for the determination of whether or not a capital defendant is mentally retarded and therefore ineligible for the death penalty.

Florida Statute 921.137(4) provides in part that "If the court finds, by clear

and convincing evidence, that the defendant has mental retardation as defined in subsection (1), the court may not impose a sentence of death and shall enter a written order that sets forth with specificity the findings in support of the determination."

The "clear and convincing" standard established in Florida Statute 921.137(4) places such an onerous burden on the Defendant as to violate due process.

Florida Statute 921.137(4) places the burden on the Defendant to prove by "clear and convincing" evidence that he is mentally retarded and there ineligible for the death penalty. This is to onerous a burden to place on the defendant and therefore it violates the due process clause of the Federal Constitution.

The United States Supreme Court in *Medina vs. California*, 505 U.S. 437, 112 S.Ct. 2572, 120 L.Ed.2d 353 (1992) established the fact that a state may presume that a defendant is competent and require him to prove incompetence by a preponderance of the evidence. This presumption and burden placed upon a defendant to prove incompetence was found not to violate the due process clause.

In the case of *Cooper v. Oklahoma*, 517 U.S. 348, 116 S.Ct. 1373, 134 L.Ed. 2d 498(1996), Oklahoma had passed legislation wherein a defendant was presumed competent to stand trial unless he proved his incompetence by clear and

convincing evidence. The court found this law unconstitutional as it placed too onerous a burden on the defendant so as to violate the due process clause.

In 2004, the Florida Supreme Court adopted new Rule of Criminal Procedure 3.203, *Amendments to Florida Rules of Criminal Procedure* and *Florida Rules of Appellate Procedure*, 875 So.2d 563 (2004). When the new rule was proposed it appears that the Criminal Court Steering Committee recommended a preponderance standard, expressing concerns that the clear and convincing burden of proof of Section 921.137(4) was unconstitutional.

The new rule omitted a burden of proof. In a concurring opinion to the adoption of the Rule, Justice Pariente expressed concerns about the constitutionality of the clear and convincing standard of 921.137(4). She also suggested that the Legislature amend the burden of proof set forth in Florida Statute 921.137(4) to the preponderance of the evidence standard. To date, this Court has not addressed this impropriety in Florida's retardation determination. *Kilgore v. State*, 2010 WL 4643043 (Fla. November 18, 2010).

For the reasons stated, the Defendant requests this Court find Florida Statute 921.137 unconstitutional.

Further, Florida Statute 921.137(1) defines mental retardation as "significantly subaverage general intellectual functioning existing concurrently

with deficits in adaptive behavior and manifested during the period from conception to age 18.

The term "significantly subaverage general intellectual functioning" means "performance that is two or more standard deviations from the mean score on a standardized intelligence test specified in the rules of the Agency for Persons with Disabilities".

The Florida Supreme Court has interpreted this to mean an IQ of 70 or less.

Florida Statute 921.137 and this Court's interpretation of "significantly subaverage general intellectual functioning" violates the Due Process Clause of the Federal Constitution.

In *Atkins vs. Virginia,* 536 U.S. 304 (2002), the United States Supreme Court found that the execution of mentally retarded persons was unconstitutional. It constituted cruel and unusual punishment prohibited by the 8th Amendment.

In a footnote 5 in the *Atkins* case, the Supreme Court noted that the consensus in the scientific community recognized an IQ between 70-75 or lower to typically be considered the cutoff IQ score for the intellectual function prong of the mental retardation definition. Based on this footnote in *Atkins*, the defendant argues that Florida is only permitted to establish procedures to determine whether a capital defendant's IQ is 75 or below on a standardized intelligence test. The plain

meaning of §921.137 is a strict cutoff of 70 for IQ, which does not include a variance for a standard error of measurement that would raise the IQ limit up to 75. *Cherry v. State*, 959 So.2d 702, 711-714 (Fla. 2007). This is the standard in Florida despite the AAMR/AAID inclusion of a standard error of measurement, which would include those IQs that reach 75.

Snelgrove's IQ testing, even by that of the state's expert, falls within this accepted medically and scientifically range. He thus meets the test for mental retardation. His adaptive functioning is deficient in at least two, if not more areas, especially when considering his placement in ESE classes (for which the qualifications match the required adaptive functioning deficits).

For the reason stated, the defendant requests this Court find Florida Statute 921.137 and the Florida Supreme Court's interpretation of the Statute unconstitutional and to find the defendant suffers from mental retardation and thus is constitutionally precluded from receiving the death penalty. The death sentences must be vacated and the defendant sentenced to life imprisonment.

CONCLUSION

The appellant requests that this Court reverse his death sentences and, as to Points I-IV, remand for a new jury penalty phase trial; and as to Points V-VI, remand for imposition of life sentences.

Respectfully submitted,

JAMES S. PURDY
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

JAMES R. WULCHAK
ASSISTANT PUBLIC DEFENDER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been delivered via U.S. mail to Scott Browne, Esq., 3507 E. Frontage Rd., Suite 200, Tampa, FL 33607, and mailed to Mr. David Snelgrove, Inmate # 442564, Union Correctional Institution, 7819 N.W. 228th Street, Raiford, Florida 32026, this 14th day of December, 2010.

_____
JAMES R. WULCHAK
ASSISTANT PUBLIC DEFENDER

CERTIFICATE OF FONT

I hereby certify that the size and style of type used in this brief is proportionally spaced Times New Roman, 14pt.

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JAMES R. WULCHAK
ASSISTANT PUBLIC DEFENDER