IN THE SUPREME COURT OF FLORIDA

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| 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

# REPLY BRIEF OF APPELLANT

JAMES S. PURDY
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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## STATEMENT OF THE CASE AND FACTS

The Appellant stands by his Statement of Case and Facts contained in the Initial Brief of Appellant, as an accurate and complete statement of the facts, with one exception:

Counsel for Appellant mistakenly indicated in the initial brief that the defense psychologist had re-interviewed the defendant prior to indicating to defense counsel that he might be retarded. (Initial Brief, p. 2, 30) However, as correctly noted by the Appellee (Answer Brief, p. 42), Dr. Berland discovered the possible retardation issue upon re-reviewing his materials the night before the scheduled new penalty phase hearing in preparation therefor. Defense counsel had repeatedly been in contact with Dr. Berland long before the scheduled penalty

phase, inquiring whether any additional testing or materials were needed for his review of the defendant's mental status, but Dr. Berland failed to review his materials regarding the defendant until the night before the hearing, despite defense counsel's repeated inquiries. Having been advised of the possibility of the defendant's retardation only the night before the penalty phase hearing was to begin, defense counsel filed the motion for continuance immediately the next morning. (V 1, R 39-40; V 3, T 8-9)

Additionally, to clarify matters in the state's statement of facts:

The state indicates in its Answer Brief that Dr. Berland did not have any evidence to suggest Snelgrove's impairment "in his capacity to appreciate the criminality of his conduct." (Answer Brief, p. 29) However, as to the second disjunctive part of the statutory mitigator, Snelgrove's mental impairment *did* clearly affect his "capacity to conform his conduct to the requirements of the law." His mental disturbance impelled him to act even when he knew it was wrong. (V 15, T 1513-1514)

While the state correctly quotes Dr. Berland as saying he "did not put any causal relationship" between Snelgrove's mental illness and the charged offenses (Answer Brief, p. 30), Dr. Berland did indicate that he determined that Snelgrove did indeed suffer from his mental impairment *at the time of the crime* and that his

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) Further testimony indicated that the type of brain damage that Snelgrove suffers from 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)

Next, the state claims, based solely on speculation and inference, that merely because there was no indication of an I.Q. test in Snelgrove’s school records and due to the records’ notation of “EH” classes, that Snelgrove was not mentally retarded during his school years and only suffered from an emotional handicap. (Answer Brief, p. 32, 98) However, the state ignores the uncontradicted testimony of Dr. Bloomfield who testified that such an “EH” designation cannot be deemed to rule out that Snelgrove was mentally retarded prior to the age of eighteen. Often, he said, based on his extensive experience and personal knowledge, the moderately mentally retarded are placed by schools in emotionally handicapped classes simply because this can be done expeditiously; therefore the school records’ “EH” designation cannot, by itself, be used to negate possible mental retardation, a fact that the state’s Dr. Prichard ignores in merely assuming the

defendant was not considered mentally retarded by the school.[1] (V 15, T 1517-1518, 1562) (*see* Initial Brief, p. 26)

[1] But remember that Dr. Prichard also has some unique psychic talent to tell just by looking at a person whether or not they are mentally retarded, contrary to all accepted scientific thinking. (*see* Initial Brief, pp. 26, 35-36 and treatise cited there) As Prichard claimed, "when you have exposure to individuals who are mentally retarded, over time – you know, I have some kind of internal norms where I can recognize when somebody's probably intellectually delayed or very close to it." (V 20, T 108-109) *Contrast with* treatise cited in Initial Brief, pp. 35-36, indicating that this is impossible.

## SUMMARY OF ARGUMENTS

**I**. The trial court abused its discretion in unreasonably denying a continuance after the defense counsel had just learned from a mental health expert that his review of his notes in preparation for the new penalty phase caused him for the first time to suspect that defendant may be mentally retarded, an indication that he had initially (prior to the first trial) missed.

**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.

The state argues that the continuance motion was untimely because it was not based upon newly discovered evidence, but rather through an old witness who had previously testified in the first trial. However, the continuance motion was necessitated based upon the materially changed evidence from this witness, a new consideration discovered from further review of Snelgrove's case; evidence that the defense did not previously have available to it, through no fault of the defendant or his counsel. Immediately upon receiving this new evidence from the witness indicating further investigation was necessary, the defendant moved the court for the continuance. What more could the defendant have done any sooner?

The state cites *Doorbal v. State*, 983 So.2d 464 (Fla. 2008), as authority for the denial of the continuance here. However, *Doorbal* does not apply here as it is

limited to its extreme facts. The specific facts of *Doorbal* indicate that post-conviction counsel did absolutely nothing until the eve of the post-conviction hearing to investigate the mental health issues prior to the scheduled hearing, "assum[ing] that if she could delay the investigation of the mental helath claim, the trial court would eventually capitulate and grant a continuance." This dereliction of counsel's duty resulted in the ruling that "those timing factors were within the control of Doorbal's counsel" and that "the decision to wait until nearly two months after the Huff hearing to investigate the background or to involve mental health experts was the cause of the delays of counsel that required Doorbal to seek multiple continuances. Therefore, *under the facts as presented by the instant case*, we hold that it was not an abuse of discretion for the trial court to refuse to extend the date of the evidentiary hearing." *Doorbal*, *supra* at 486-489. Such extreme failures of defense counsel present in *Doorbal* are simply not present in the instant case.

Next, the state also claims that the continuance was tardy because of a failure to comply with the time requirements of Rule 3.203(d), Florida Rules of Criminal Procedure ("the motion for a determination of mental retardation as a bar to execution shall be filed not later than 90 days prior to trial"). However, initially it should be noted that this rule by its very terms applies to trials commencing after

October 1, 2004, whereas here the actual trial occurred here in 2002, before adoption of the rule. Fla. R. Crim. P. 3.203(d)(2), specifically provides that for earlier cases, the notice of mental retardation only must be filed "before a sentence is imposed." Additionally, this rule is intended only for the procedure of a post-penalty phase hearing before the judge to preclude a death sentence, and *not* for evidence to be presented to the jury during the penalty phase for their consideration in mitigation.

The state fantastically infers from the motion for continuance of the penalty phase and the later *Spencer* hearing some kind of improper defense motive, "choosing" to delay the proceedings and the imposition of the death sentence for some "tactical benefit." (Answer Brief, p. 47) This alleged "benefit" described by the state is somewhat fanciful because in reality there was no "benefit" – while the expert did report the defendant's new low intellectual scores to the jury, the state attorney hammered the expert repeatedly to elicit his testimony before the jury that he was not saying (at this time) that the defendant was retarded (since the intellectual scores are only a part of the determination of retardation and he had not had any opportunities to examine the case further for the other two prongs of the mental retardation test).

Further, the state's claims that because the judge ultimately, after the new

penalty phase and the *Spencer* and mental retardation hearing, found the defendant not to be mentally retarded, there is no harm in denying the continuance. That argument totally misses the point – that the defense had the right and the constitutional obligation to present complete and full evidence of the defendant's mental retardation to the jury in consideration of their advisory verdict, a matter the defense could not do because of the arbitrary and improper denial of the necessary continuance.

Prejudice is clear here as shown by *Sorge v. State*, 834 So.2d 268 (Fla. 1st DCA 2002), a case cited in a footnote by the state. (Answer Brief, p. 44) In *Sorge*, the defense had retained a mental health expert pre-trial to determine both the defendant's competency *and* sanity:

> The trial court granted a defense motion for the appointment of a medical expert to examine Appellant and *to determine his sanity at the time of the offense* and his competence at the commencement of trial. The forensic mental-health evaluation addressed current competence *but did not address Appellant's sanity at the time of the offense*.

*Id*. at 269 (emphasis added). Then, *just prior to trial*, the expert noted to defense counsel *for the first time* that the defendant may have been insane (even though the expert was ordered to determine the defendant's sanity long before that time). Despite the failure of the expert witness to make such determination earlier, the

*Sorge* court ruled that it was prejudicial error to deny the continuance, ruling, "Because the expert indicated that Appellant may have been legally insane at the time of the offense, the continuance was not sought as a means of delay, and the question of sanity at the time of the offense goes to the heart of the case against Appellant, we agree with Appellant that the motion for continuance should have been granted." Despite the failure of the defense witness to undertake the court-ordered insanity evaluation earlier in the process, the appeals court held that "Appellant's due process rights were violated by the trial court's denial of the motion for continuance." This was so even though Appellant was also faulted for not "fil[ing] a notice of intent to rely on an insanity defense." *Id*. "The denial of the motion for continuance prejudiced Appellant by foreclosing the possibility of his producing evidence that he was insane at the time of the offense. Therefore, the trial court abused its discretion in denying the motion for continuance." *Sorge v. State*, 834 So.2d at 269-270.

The same ruling must be applied here. The defense only just discovered the additional indication that the defendant may be retarded when they immediately sought the continuance. To paraphrase *Sorge*, "Because the expert indicated that Appellant may have been [mentally retarded], the continuance was not sought as a means of delay, and the question of [retardation] goes to the heart of the

[sentencing] case against Appellant, . . . the motion for continuance should have been granted." The denial of the continuance "prejudiced Appellant by foreclosing the possibility of his producing evidence that he was [retarded]." Therefore, the trial court abused its discretion here in denying the motion for continuance. *Sorge v. State, supra*. The defendant's rights to due process and equal protection, a fair jury trial, and effective assistance of counsel have been compromised, and the death sentences rendered cruel and unusual punishment. A new penalty phase hearing before a new jury is constitutionally mandated.

## **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.

In its argument on this point, the state first claims that "Appellant's brief is conspicuously devoid of any facts developed below" regarding this issue. This is simply not so – the state and this Court are referred to those detailed facts at pages 5-6 of the Initial Brief of Appellant, as well as a summation of those facts and additional record citations in the Point II argument at pages 35, 37, and 39 of the Initial Brief.

The state also argues that there was no discovery violation by the state's late announcement (on the sixth day of the penalty phase) that they had a new redacted tape of the defendant's interview with police since the entire taped interview had been provided to the defense prior to the first guilt phase trial. (Answer Brief, p. 52) However, this argument ignores the fact that the state had never before in Snelgrove's case attempted to introduce the new exhibit or most of its contents in the prior trial and thus defense was ambushed in the middle of the new proceeding with this newly created exhibit. The creative editing by the assistant state attorney

of the contents of the tape essentially, it is submitted, make it a brand new exhibit, for which Rule 3.220 would require its disclosure prior to trial. The defense, because of the tardy disclosure by the state was left in the middle of trial with a new, surprise exhibit, for which they did not have adequate time to prepare to rebut with their own, more complete, version of the interview tape. The state, too, had the complete interview tape in its possession since 2000, yet they incredibly and underhandedly did not prepare this edited version and disclose it to the defense until the sixth day of the new penalty phase. Surely, this is not what the rules of discovery contemplate – trial by ambush!

Further, the state attempts to justify the court's admission of the state's edited tape, claiming its contents were relevant. (Appellee's Brief, p. 53) There, the state quotes the trial court, "It may be that it doesn't go so far as to prove competency, but it may dispute the allegations of incompetency that have been asserted." (V 17, T 1741) However, this ruling does not show relevancy to the issue at hand, which was not the competency of the defendant. Rather, the issue was whether this new tape was relevant to show mental retardation – a fact that medical and scientific evidence shows cannot be ascertained, especially by lay viewers, by the mere viewing of a retarded individual (with only the notable exception of Downs Syndrome). (*see* Initial Brief, pp. 35-36)

The state also criticizes Appellant's notation that Dr. Berland testified that viewing the taped interview of the defendant would be irrelevant to his determination of the defendant's mental deficiencies since it is impossible to ascertain from such an interview alone whether the subject was retarded, saying that "the State is unaware of any evidence code provision which requires rebuttal or impeachment evidence to be approved by the witness sought to be impeached." (Answer Brief, pp. 55-56) The state misses the point, though. The point Appellant is making is that there was absolutely no evidence presented below and absolutely no scientific support to show that this taped interview is relevant – that the jury's observation of this interview could prove to them that the defendant was not mentally retarded. In fact, the only evidence presented on the subject of its relevance was that of Dr. Berland, who indicated what medical research plainly shows, that observing an individual in the brief setting of an interrogation cannot reveal whether that individual is or is not retarded. As such, and unless the state could show scientific research or present expert testimony indicating that it could so show retardation (which they did not and cannot), this tape is simply irrelevant.[2]

[2] The state also cites to *Arizona v. Mauro*, 481 U.S. 520 (1987), for the proposition that the taped interview was relevant. However, that was not the issue in *Mauro* at all: the issue was a possible *Miranda* violation. Also, it must be noted that the interview in *Mauro* was introduced to disprove the defendant's *sanity*, a completely different issue than mental retardation or mental impairment to conform his conduct to the requirements of the law.

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 (including the giving of a lie detector test on the defendant, to which the defense did object [V 17, T 1664]),[3] outweighing any probative value. A new penalty phase trial is required.

[3] *See* Initial Brief and cases cited therein, p. 39.

## **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.

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. As seen above, the defense, contrary to the assertion of the state in its Answer Brief, pp. 66-67, *did* object. His objection was clearly that the prosecutor's comment was not the law and therefore improper. And the trial court did not correct this error by sustaining the objection or with the defense-requested correct instruction on the law.

The combination of these preserved errors, telling the jury they are required to follow the law and yet denying the correct instruction that the law is that the jury is never required to vote for death, results in reversible error. These improper rulings result 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. 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.

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.

As argued in the Initial Brief, the state was improperly permitted over objection to inform the jury through its questioning of a defense mental health expert that there was additional evidence the state had in its possession, that had not been presented to this jury. These questions were highly improper, assuming facts not in evidence, and intimating that the state had additional unheard evidence which would corroborate their case. (*See* Initial Brief, pp. 46-49)

The state attempts to minimize this damage by arguing in its brief that because the prosecutor did not go into the details of the non-introduced evidence, there is no foul. This state is incorrect. It matters not that the prosecutor did not present the details of this other evidence. He ultimately told the jury that the state had additional evidence not presented to them which would support death sentences. This is precisely what courts have condemned.

As argued in the Initial Brief, pp. 46-49, and supported by the case citations presented therein, prosecutors are clearly prohibited from commenting on matters

unsupported by the evidence produced to the jury at trial since such reference intimates the prosecutors' extra-trial knowledge of facts adverse to the defendant. 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. *Even 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. He also surely suggested to the jury that this testimony showed the defendant exhibited no remorse.

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.

In its Answer, the state contends that "Appellant's argument is somewhat difficult to decipher." (Answer Brief, p. 78) Appellant does not believe that the argument is that difficult. Snelgrove moved in writing to have the trial court instruct the jury pursuant to a newly-formulated (then pending approval, and since adopted) jury instruction on victim impact testimony, that 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. 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*:

> While such [victim impact] 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***.

(Vol. 17, T 2010, 2017-2018, 2026) (emphasis added). This instruction was harmful error; while a jury may under *Payne* hear victim impact evidence they may not consider it in weighing aggravating and mitigating circumstances. The

instruction given, on the other hand, told the jury that they may weigh the victim impact evidence.

The requested (and now Court-adopted) jury instruction correctly 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.

The state cites to *Hernandez v. State*, 4 So.3d 642, 666 (Fla. 2009), contending that *Hernandez* specifically rejected any challenge "to the *exact* victim impact instruction provided by the trial court in this case." (Answer Brief, p. 80) This is not true. The instruction given in *Hernandez* was different in a material aspect from that given here: In *Hernandez* the trial court told the jury simply that "you may still consider it *as evidence* in this case." Here, however, the court told the jury that "you may still consider [it] *in making your decision*." A decision which, however, is legally supposed to be based *solely* on a weighing of the aggravating and mitigating factors. The addition of this last phrase critically differentiates the instant instruction from that of *Hernandez*, a distinction that makes a world of difference – wrongly telling the jury that victim impact evidence can be weighed in their decision-making process, a process which is supposed to be limited to a weighing of the aggravating and mitigating circumstances, which victim impact evidence under the law does not and may not impact.

Appellant's argument also referred to the increased harm of this improper instruction where 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 this 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 defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

The Appellant never argued, and is highly offended by the state's Answer Brief's callous allegations, that a prior first degree murder conviction is "minor," nor did Appellant ever contend that there should be a "two for one policy."

What the Appellant is urging, on the other hand, is that a contemporaneous violent conviction, *where the defendant had up to that time lived a violence-free life, must* be given lesser weight. As argued in the Initial Brief, case law indicates that 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).

Therefore, Appellant's argument is that where, as here, contemporaneous violent crimes are not preceded by *any* prior violence on the part of the defendant,

the weight of this factor must be 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."); *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, contrary to the state's assertion, 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.

The state's argument seems to be that an improper doubling issue is resolved by the strict and limited double jeopardy analysis of *Blockburger v. United States*, 284 U.S. 299, 304 (1932), whether each provision's elements requires proof of a fact which the other does not, regardless of the specific evidence adduced in the particular case. (*See* Answer Brief, pp. 84-85) However, Appellant is unaware of any law utilizing the strict *Blockburger* analysis for the issue of improper doubling of aggravating circumstances.

Here, the trial court found both the aggravators of HAC and the victims'

vulnerability due to their advanced age. Both aggravating factors here, as recounted by the trial court in its sentencing order, speak of the "same aspect" in recounting the *manner* of the victims' deaths, the vulnerability of the victims and their infirmities. This single aspect, then, of the victims' advanced age and vulnerability, gives rise to both of these circumstances. Thus, these two factors should have been considered as only a single aggravating circumstance.

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 tip the scales in favor of life imprisonment. Snelgroves sentences of death, when compared to others, are disproportional and constitute cruel or unusual punishment under the circumstances. They 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.

The state claims that the defendant has been proven not to be mentally retarded based upon the fact that he was placed in emotionally handicapped classes in school, rather than one specifically designed for the mentally retarded. As pointed out earlier in this Reply Brief and in the Initial Brief, this mere fact cannot be used to disprove his mental retardation as there is no evidence from the school records as to why he was placed in EH classes. Dr. Prichard's (and the trial court's) assumption that, merely because the school chose to assign him to EH classes somehow means, without any IQ tests given, that Snelgrove was not mentally retarded, is pure speculation. It flies in the face of unrebutted testimony from Dr. Bloomfield that he personally knows of many instances where the mentally retarded were placed in emotionally handicapped programs simply because it was more expeditious to do so and that schools often choose to treat the

symptoms of disruptive behavior, rather than the cause of that behavior, mental retardation. The mere placement of the defendant in EH classes cannot prove a negative, that the defendant is not mentally retarded – it is too great a leap, an unconstitutional one, especially in light of Dr. Bloomfield's revelations that schools often prefer not to consider a diagnosis of mental retardation.

Snelgrove's IQ testing, even by that of the state's expert, falls within this accepted medically and scientifically range of 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 herein and in the Initial Brief, 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

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## 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 1st day of July, 2011.

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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