IN THE SUPREME COURT OF FLORIDA

RICHARD TODD ROBARDS,

Appellant,

v.

CASE NO. SC11-425
L.T. No. CRC 06-18453 CFANO-K
DEATH PENALTY CASE

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE SIXTH JUDICIAL CIRCUIT,
IN AND FOR PINELLAS COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

On August 22, 2006, Appellant was indicted for the first degree murder of Linda Deluca (Count One) and Frank Deluca (Count Two). (V1:12-13). On April 9, 2007, Appellant's counsel, Assistant Public Defender Ronald Eide, filed a motion to determine Robards' competency to proceed. (V1:14-16). On August 10, 2007, the trial court conducted a competency hearing and heard testimony from two defense confidential mental health experts, Drs. Robert Berland and Michael Maher, and a court-appointed psychiatrist, Dr. Darren Rothschild.[1] (SV2:98-257). Subsequently, on September 11, 2007, the court issued an order finding Appellant incompetent to proceed and committing him for mental health treatment. (V1:93-95).

On February 14, 2008, while incarcerated at the Florida State Hospital in Chattahoochee, Appellant and another inmate attempted to escape. The two inmates fashioned dummies out of clothes and placed them in their beds, and having obtained a saw from hospital staff, sawed through the metal screens on the windows. Appellant crawled out of the window and climbed the plumbing fixtures outside and managed to get on the roof. When

[1] Another court-appointed expert, Dr. Susan Murray, did not testify, but submitted a report for the trial court's review. (V1:60-69, 93-96).

security discovered the escape attempt and located the two inmates hiding on the rooftop, they discovered that the inmates were wearing three sets of clothes in an attempt to protect themselves from the razorwire and had strips of torn sheets to utilize as a rope. (V32:1130-36).

A trifurcated competency hearing was conducted on April 10, May 8, and May 16, 2008, and the trial court heard testimony from mental health experts Kimberly McCollum, a psychological resident at Florida State Hospital, Dr. Jill Poorman, and Dr. Berland. (SV3:328-434; SV4:442-531; SV5:540-653). After hearing this testimony, the trial court found, beyond a reasonable doubt, that Appellant was competent to proceed and was simply being manipulative and malingering. (SV5:634-39). After Appellant was found competent, the trial court removed the Public Defender's Office because of a conflict and appointed regional counsel. (V1:104-05; SV5:639-45).

On June 4, 2008, regional counsel John Thor White noted to the court that he had been informed by the prosecutor and Appellant's prior counsel that he was going to be appointed, but he had not seen an official order appointing him. Mr. White informed the court that he had begun reviewing some of the material obtained from the Public Defender's Office. The court stated that the primary litigation since Appellant's arrest on

August 6, 2006, revolved around his mental health status, and because he had been found incompetent for a period of time, there had not been much work done in discovery on the guilt phase. The court further stated that defense counsel would "have to deal with his mental health issues for the potential of a penalty phase." (SV5:659-67).

On July 9, 2008, regional counsel White informed the court that he had reviewed all of the discovery and requested that a trial date be set. The court set the case for trial on December 9, 2008.[2] The State indicated that the guilt phase would take three days and defense counsel indicated that the penalty phase would take one day. (SV5:669-77).

At a status hearing on October 2, 2008, defense counsel John Thor White informed the court that he was prepared for the trial set to begin on December 1, 2008, but indicated that he was going to have a new penalty phase attorney assigned to the case from the regional counsel's office.[3] (SV5:709-12). Because

[2] In late August, 2008, the trial judge rescheduled the trial for December 1, 2008. (SV5:691-93).

[3] At a status conference on October 31, 2008, defense counsel requested a continuance of the trial date because his preparation was not progressing as well as he anticipated. Primarily, his concern was with the penalty phase and the fact that Appellant and his family members were not cooperating. The trial judge ultimately rescheduled the trial until March 3, 2009. (SV5:721-32).

Appellant complained that his counsel was "ineffective" for failing to recognize him in his "private capacity," the trial court conducted a hearing pursuant to Nelson v. State, 274 So. 2d 256 (Fla. 4th DCA 1973). (SV5:714-19). The court noted that Appellant's allegations were insufficient and found that defense counsel was providing competent representation. (SV5:714-19).

On November 26, 2008, defense counsel John Thor White filed a motion to withdraw due to Appellant's continued refusal to cooperate in his defense. Counsel indicated that Appellant's belief that he is a "sovereign man" and not subject to the court's jurisdiction constituted a "total barrier to productive attorney-client communications." (V3:305-05). On December 1, 2008, the court conducted a hearing on the motion and denied counsel's request to withdraw. (SV6:746-71).

On February 20, 2009, defense counsel again moved for a continuance of the trial to allow penalty phase counsel, Stephen Fisher, additional time to investigate mitigating evidence and requested a trial date in August, 2009. (V4:486-89). Counsel indicated that his co-counsel for the penalty phase had hired experts and social investigators, but he needed additional time. (V4:487). The State noted that the victims' family had been attending all the hearings and the State did not want the trial date scheduled so far off. The trial court agreed and

rescheduled the trial for June 23, 2009. (V4:486-89). Appellant then requested that defense counsel be dismissed and unequivocally requested self-representation. The court conducted a Nelson and Faretta inquiry, and on March 2, 2009, issued an order allowing Appellant to proceed *pro se* and appointing regional counsel John Thor White and Stephen Fisher as stand-by counsel. (V4:489-560, 569, 570-640).

Prior to the June 23, 2009, trial date, it became apparent that Appellant would not be prepared for trial because no depositions had been taken. Both the court and the prosecutor noted that Appellant was arrested and indicted in August, 2006, and now, almost three years later, not a single deposition had been conducted. (SV7:873-75). At a hearing on June 10, 2009, the trial court again continued the trial and set it for December 1, 2009. (SV7:945). Approximately a month before the scheduled trial, Appellant again asked for a continuance, and over the State's strenuous objection, the court granted a continuance and scheduled the trial for March 16, 2010. (SV8:1071-77).

On December 4, 2009, private attorney Larry Hoffman filed a notice of appearance and, shortly thereafter, filed a motion to appoint co-counsel Richard Watts for the penalty phase. (V7:1229, 1232). Mr. Hoffman noted that he was utilizing regional counsels' mitigation investigator, Rosalie Bolin, and

was obtaining the mitigation investigation from Appellant's prior stand-by counsel, Stephen Fisher. (SV8:1095, 1108). Defense counsel Hoffman informed the court that he was aware of the prior delays and he would be prepared for the March 1, 2010, trial date, but that he might need a small continuance. (SV8:1096-97). Counsel had spoken with Appellant and indicated that he was prepared to start the process of deposing the key witnesses and would expedite the case to the best of his abilities. (SV8:1096). Because Appellant's mother had retained private counsel Hoffman and there were no additional funds forthcoming, the trial court appointed regional counsel as penalty phase counsel. After regional counsel quickly moved to withdraw due to an ethical conflict, the court appointed Richard Watts as penalty phase counsel. (SV8:1145-59).

On February 5, 2010, defense counsel Hoffman moved for a two-month continuance of the trial due primarily to him losing a month of preparation after his wife passed away. The State noted that the victims' family who were attending all the hearings in this case would be disappointed with yet another continuance, but noted that this was one of the most valid requests made in this case. (SV9:1169-70). The court scheduled the trial for May 18, 2010. Defense counsel indicated that if the case proceeded to a penalty phase, they would only need three-quarters of a day

for the defense's presentation of mitigating evidence. (SV9:1173-76).

Prior to trial, Appellant filed a motion pursuant to Ring v. Arizona, 536 U.S. 584 (2002), challenging the constitutionality of Florida's death penalty statute. (V8:1360-66). Appellant also filed a motion to compel the State to provide notice of the aggravating factors. (V8:1367). At the hearing on the motion, the trial court indicated that if he granted the motion to compel, he would likewise require defense counsel to provide the State with a list of the potential statutory mitigating factors. (SV9:1204-17). Defense counsel requested that he be given time to consider the court's inclination and asked that the court defer ruling on the motion. On April 16, 2010, defense counsel indicated that he was still contemplating the court's position regarding his motion to compel and counsel further informed the court that he was having some reservations about being prepared for the penalty phase because he was still developing some of the mental mitigation. (SV9:1230-35).

On May 12, 2010, defense counsel renewed his motion to compel the State to disclose the aggravating factors. (V9:1478). Defense counsel filed his notice of mitigating circumstances and indicated that he did not intend to present any mental health

mitigation and would present evidence regarding Appellant's family background, employment, and good jail record. (V9:1480). At a hearing on his motion on Friday, May 14, 2010, defense counsel again indicated that he did not intend to present any mental health testimony at the penalty phase, although counsel noted that a PET/CAT scan had just been performed and the results had not been obtained. (V9:1492-93, 1496-97). The State orally informed the court and also filed a written response indicating that the State would rely on three aggravating factors: (1) the murders were committed while the Defendant was engaged in the commission of, or an attempt to commit, any robbery or burglary; (2) the murders were committed for pecuniary gain; and (3) the murders were especially heinous, atrocious, or cruel. (V9:1482, 1493-95). The trial judge inquired as to whether the State would also seek the aggravating factor that Appellant had a prior violent felony conviction based on the contemporaneous murder of the other person, and the prosecutor indicated that he was not sure if he would be seeking that aggravator, but he would let the court and counsel know if he did.[4] (V9:1498-99). On Monday, May 17, 2010, the State filed

[4] At a Faretta/Nelson hearing on February 26, 2009, the prosecutor indicated that he would be seeking the prior violent felony aggravator based on Appellant's prior record, and the fact that this was a "double homicide." (V4:593-97).

another notice of aggravating circumstances adding the aggravator that Appellant was previously convicted of another capital felony or a felony involving the use or threat of violence to another person. (V9:1508-09).

On May 18, 2010, almost four years after the murders and after numerous continuances by the defense, Appellant's trial began before the Honorable Joseph A. Bulone. The State presented evidence that the two victims, husband and wife Frank and Linda Deluca, were found dead in their home on the morning of August 2, 2006. (V27:394-402). John Baird, a friend of the victims, went to their home around 10:30 a.m. and discovered that a fire had been set inside the home, but because a door or window was not open, the fire was eventually snuffed out for lack of oxygen.[5] (V27:395-96, 411-17). Mr. Baird observed the victims' bodies and went to a nearby school and alerted the school's resource officer. (V27:395-401).

After law enforcement and paramedics responded to the scene, paramedics entered the house with masks due to the high levels of carbon dioxide and performed a quick search of the residence. Once paramedics had sufficiently ventilated the home,

[5] Alice Demps testified that she was visiting her daughter who lived next door to the victims, on August 1, 2006, at around 5:30 in the afternoon and noticed smoke coming out of their chimney. (V28:513-15).

a more thorough crime scene investigation occurred and revealed that a red gas can was found inside the home, and burnt towels and newspapers dated August 1st, were found near the victims' bodies. (V15:2467-70; V27:397-98, 434-35, 468; V28:521-50; V29:641-44). In another room, heat-damaged newspapers dated July 31st were found, and these newspapers contained Appellant's fingerprints. (V27:483; V29:644-53, 661-67). Investigators determined that a flammable liquid had been utilized to start the fire and the accelerant was found on both of the victims' bodies. (V28:536-50). The inside of the victims' home appeared ransacked and a large safe was missing. Investigators noted two parallel scrape or gouge marks running down the driveway.[6] (V15:2479-83; V27:456). The August 2, 2006, newspaper was also found on the driveway. (V27:457).

The medical examiner determined that both victims died as a result of injuries sustained from a sharp instrument consistent with a knife.[7] (V29:607-25). Linda Deluca sustained multiple sharp wound injuries, including an "extremely severe" incised wound across her neck. (V28:560-68). Frank Deluca suffered more

[6] When investigators eventually located the safe Appellant took from the victims' home, the scrape marks in the driveway matched the width of the safe's wheels. (V32:1169).

[7] Although knives were found in the victims' home, none contained blood stains. (V28:501-04).

sharp force wounds than Linda Deluca and he also had several defensive wounds on his left hand. (V28:569-82; V29:607-25).

The victims' son, Chris Deluca, testified that his father was an entrepreneur who had previously owned a paint factory, a commercial fishing boat, and a restaurant. (V29:696). Frank Deluca also bought and "flipped" houses and had recently sold a neighboring home. (V29:696). Chris Deluca was aware that his father also sold marijuana. (V29:693-96). Frank Deluca owned an antique Wells Fargo safe containing over $88,000, which he kept in a spare bedroom in the house. (V29:697-98; V32:1170). Chris Deluca testified that he had recently bought a rifle with a scope on it and gave it to his father as a birthday present so they could go on a hunting trip together. His father kept the rifle in his bedroom next to a nightstand. (V29:698-703). Chris Deluca, who lived with his parents until May, 2006, testified that he met Appellant about a year before the murders. (V29:705). Chris Deluca was aware that Appellant had been a personal trainer for his parents, but testified that his parents had not worked out with Appellant within the last six months of their lives. (V29:705-07).

Clearwater Police Department Detective Christopher Precious testified that he obtained a search warrant for two storage units rented by Appellant. The storage facility's computerized

records indicated that Appellant entered the facility on August 2, August 4, and August 5, 2006.[8] (V29:672-79). Inside the storage unit, law enforcement discovered the scoped rifle given by Chris Deluca to his father for a birthday present. (V29:679-85). Detective Precious testified that on August 8, 2006, he was contacted by employees from the city's Department of Recycling regarding a purse found in a recycling dumpster. Linda Deluca's purse was found dumped in a cardboard recycling dumpster and officers found an extra-large "Dimmit" Cadillac auto-dealership t-shirt in the area near the purse.[9] (V29:725-37; V30:768-95).

Appellant's friend, Shane Harper, testified that he knew Appellant for about four to six months before August, 2006. (V30:806-12). Sometime in late April or early May of 2006, Appellant told Harper that he wanted to commit a robbery and wanted Harper to serve as the getaway driver. Appellant told Harper the victims had a safe and they drove to the victims' home and scouted the house out. (V30:812-16). Harper indicated

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[8] Prior to August, 2006, Appellant's last visit to the storage facility was on May 24, 2006. (V29:679).

[9] From May 27-June 23, 2006, Appellant worked at Dimmit Cadillac detailing cars. (V30:796-803). He was issued numerous white Dimmit t-shirts as his work uniform. After Appellant's arrest, officers discovered four white extra-large Dimmit t-shirts in the trunk of Appellant's car, and one in his hotel room, which were the same as the Dimmit shirt found in the recycling dumpster with the victim's purse. (V31:1032-34, 1039-43).

that he did not want to participate in the robbery, and Appellant got mad at him. (V30:817).

In early August, 2006, Appellant came to Shane Harper's apartment with marijuana and a scale. (V30:819-20). Appellant wanted Harper to sell the marijuana for him so he left the marijuana and scale with Harper. (V30:819-23). At the time Appellant left the marijuana and scale with Harper, Harper was unaware of the double homicide in Clearwater. However, after Harper spoke on the phone with his sister and told her about Appellant's plan to steal a safe, his sister broke down crying and Harper realized the house he had scouted with Appellant belonged to the homicide victims. (V30:823-25). On August 5, 2006, Harper called the Clearwater Police Department and turned over the marijuana and scale to them. (V30:852-54). Detectives from the drug unit worked with Harper and had him call Appellant and claim that he had sold some of the marijuana for $900. Appellant came over and picked up the money and some of the remaining marijuana, and when he left the apartment, officers arrested him.[10] (V30:825-28). Subsequently, Harper directed detectives to the house Appellant wanted to rob and identified the victims' house as the targeted home. (V30:852-53).

[10] When arrested, officers took photographs of the various cuts and scrapes on Appellant's hand and forearm. (V32:1161-67).

After law enforcement officers obtained the scale Appellant had given to Harper, Detective Anthony Monte recalled seeing an empty scale box and users' manual at the victims' home. (V30:836-45). Law enforcement officers returned to the victims' homes and matched the serial number on the scale to the serial number on the empty box. (V30:836-45).

Robert Kenney testified that he met Appellant while they were both incarcerated at the Pinellas County Jail in July, 2006. Kenney was in jail for violating a "no contact" condition of a domestic violence injunction with his live-in girlfriend, Jessica Ridpath. (V30:863-68; V31:960-63). Appellant was incarcerated with Kenny from approximately July 12-22, 2006. (V30:868). When incarcerated, Kenney would often speak on the phone with his attorney, Bora Kayan, and Appellant asked Kenney if he could speak to Kayan. (V30:868-71). On one occasion, Kenney overheard Appellant tell attorney Kayan that Appellant had funds that he could get from a safe once he was released, but Appellant had lost the combination to the safe.[11] (V30:870-

[11] Bora Kayan testified and confirmed Kenney's recollection of the conversation. Kayan testified that Appellant inquired about hiring him and told Kayan that he had money in a safe, but did not have the combination to the safe. (V32:1123-25).

Jessica Ridpath also testified that Appellant spoke of owning a safe with $50,000 in it, but it was at a friend's house and he did not have the combination. (V31:966. 972-73).

72). On July 22, 2006, Appellant also called bail bondsman John Brown and told him he could get bond money from a safe when he was released. (V32:1111-18).

After Kenney and Appellant were released from the jail, they began working out at the gym together. (V30:872-78). Upon his release, Kenney resumed living with Jessica Ridpath at her home in violation of his domestic violence injunction. Ms. Ridpath did not like Appellant because he was consistently calling the house and coming over unannounced. (V30:878; V31:964-66). At the time, Appellant was living in a motel. (V30:879).

On August 1, 2006, while Kenney was working at home, Appellant called in the mid-morning and asked if he could borrow Kenney's vehicle, a Ford Explorer SUV, to move some personal belongings. (V30:880-82). Appellant came over around 10:00 a.m. and was carrying a duffel bag with two pounds of marijuana that he wanted Kenney to hold for him. Kenney declined to keep the marijuana and Appellant went into the kitchen and began cleaning his sneakers. (V30:903, 907). Kenney gave Appellant a pair of his Nike Air Shox shoes, a red gas can, and also loaned Appellant his car. (V30:883, 903, 921). After a couple hours, Appellant returned to the house and asked Kenney to help him move some personal belongings. When Kenney got in the car, he

observed a red dolly in the backseat.[12] (V30:883). Appellant drove Kenney to a house in Clearwater and, after driving around the block, Appellant parked in the driveway and ran under a carport and pushed a large safe on casters down the driveway between two cars to the back of the SUV. (V30:884). When Kenney got out of the vehicle, he noted that it obvious the safe had been rolled down the driveway before as there were indentations in the driveway. Kenney testified that it was immediately obvious to him that the large and heavy safe was not going to fit in his SUV. (V30:884-85). Appellant told Kenney that he had previously lived with the people at the house and had personally trained them, but they had an argument and were not getting along anymore. (V30:885-86).

Kenney told Appellant that there was no way they were going to get the safe into the SUV, and convinced Appellant that they needed to rent a truck or something else to move the safe. They left the house and drove through a U-Haul parking lot and looked at trucks, but realized they lacked the lifting capacity. (V30:886-90). The two men eventually went to Nations Rent and

[12] Appellant had rented the dolly from U-Haul on August 1, 2006, at 11:23 a.m., and returned it August 2, 2006 at 1:50 p.m. (V31:992-1000).

Appellant rented a low-boy car hauler trailer.[13] They connected the trailer to Kenney's SUV and returned to the victims' house in Clearwater to get the safe. (V30:891-96). After returning and driving around the house again, Appellant eventually pulled into the victims' driveway and pushed the safe down the driveway. The safe gained momentum and slammed into the trailer and slid to the far right of the trailer. Before they could secure the safe, Appellant got into the SUV and drove around the corner and then got out and placed a tarp over the safe and secured it with chains. (V30:897-99). Kenney assumed Appellant was going to drive the safe to the hotel or to a townhouse he was attempting to secure, but Appellant said he could not take it there and they ended up taking the safe to Jessica Ridpath's home. (V30:899-901). Kenney put the safe in the garage next to some of his furniture and did not tell Ridpath about it because she would not have been happy storing Appellant's belongings at her house. (V30:901-02). After dropping off the safe, Appellant left with Kenney's SUV and Kenney assumed that he was returning the

[13] Appellant rented the trailer on August 1, 2006, at 2:28 p.m. (V31:1001-07). Appellant did not return the trailer and called Nations Rent and told them to pick it up at the Clearwater Inn motel. (V31:1003). When returned, the trailer was missing a chain and binder. (V31:1007-08). The chain and binder were subsequently located in Ms. Ridpath's garage along with the safe. (V31:955).

trailer. When Appellant returned Kenney's SUV around 6 p.m. on August 1, 2006, he had showered and cleaned up and came over wanting to take Kenney and Ridpath out to dinner. (V30:902). Ms. Ridpath did not want to go out to dinner with Appellant, so he eventually left by himself. (V30:902; V31:969-72). While Appellant was at Ms. Ridpath's residence on August 1, 2006, he borrowed some Febreeze cleaner from her to use on his car and went outside for a few minutes. (V31:969-71).

The next day, Appellant again came over and asked to borrow Kenney's SUV and told him he had not returned the trailer yet. (V30:908). The two friends worked out at the gym a couple more times that week, and then on Saturday, August 5, 2006, Robards came by the house and banged on the door for about twenty minutes, but Jessica Ridpath did not want Kenney to open the door. (V30:908). Kenney spoke with Appellant on the phone on Sunday and they agreed to go the gym the next day, but that was the last conversation Kenney ever had with Appellant due to Appellant's arrest. (V30:909).

A few weeks later, when Kenney and Ridpath returned from dinner, detectives from the Clearwater Police Department came to the house and Kenney fled out the back door because he was in violation of his domestic violence injunction. (V30:910-11; V31:975). Kenney ran to a nearby gas station and called Ridpath

and she informed him that the detectives were not there about the injunction, but were investigating a double homicide. (V31:976). Kenney returned to the residence and met with detectives Precious and Monte. The officers searched the residence and located the safe in the garage under a tarp. (V31:976-77). Kenney gave a detailed statement to detectives regarding his actions with Appellant and provided DNA and fingerprint samples to detectives. (V30:911-19). On or about August 26, 2006, Kenney was preparing for a trip to Dallas and was getting luggage out of the garage when he found a small handgun wrapped in a "cheap hotel type" white towel in the zippered pocket of his suitcase. (V30:919-21; V31:1008-10). Kenney knew Jessica Ridpath had not put the gun there and testified that Appellant was the only other person who had access to the garage.[14] (V30:919-21).

After Appellant's arrest, officers searched his motel room at the Clearwater Inn and noted that all of the hotel-issued towels were missing from the room. (V31:1011-13). Officers noted a blood stain on the door handle and seized the entire door handle for testing. (V31:1024-30). Subsequent DNA testing by

[14] According to Linda Deluca's daughter, her mother owned a small handgun that she usually carried in her purse. When Linda Deluca's purse was found in the recycling center, the firearm was not in the purse. (V32:1043-46).

FDLE analyst Darren Esposito indicated that the blood matched Appellant at 12 of 13 loci (the frequency of occurrence of that profile for unrelated individuals was astronomical -- approximately 1 in 100 trillion Caucasians, 1 in 490 trillion African Americans, and 1 in 180 trillion Southeastern Hispanics). (V31:1051-75). The DNA analyst also testified that he tested a DNA profile obtained from victim Frank Deluca's fingernail clippings and found a mixture which included possible contributors of Linda Deluca and Appellant at 9 of the 13 loci (the statistics on this mixture for unrelated individuals would be 1 in 860 Caucasians, 1 in 1900 African Americans, and 1 in 760 Southeastern Hispanics). (V31:1075-83).

The State also presented evidence from Detective Precious that after Appellant's arrest, on August 15, 2006, Appellant called Detective Precious and left a voice message telling the detective that if "you guys are ready to make a deal, come in and talk to me." (V32:1174). On cross examination, defense counsel questioned the detective on whether it was clear that Appellant was talking about a deal on his marijuana charge because his arrest on the double homicide did not occur until August 18, 2006, a few days after the phone call. (V32:1178-80). Detective Precious testified that he had only spoken with Appellant regarding the homicides and had never spoken to him

about the drug charges. Because Appellant was aware that Detective Precious was only involved in the homicide investigation, the detective believed the phone call was in reference to the homicides. (V32:1178-81). Detective Precious further noted that Appellant had stated that he was "involved" in the homicides, but it was bigger than him and involved a drug ring. (V32:1182-83).

The State also introduced evidence regarding Appellant's attempt to escape the Florida State Hospital on February 14, 2008. Appellant and another inmate placed dummies in their bed, sawed through metal screens after having obtained a saw from staff members, and then climbed out the window and made it to the rooftop before being caught hours later. Appellant was wearing three sets of clothes when caught in an apparent attempt to avoid injury from the hospital's razorwire. (V32:1126-37).

After the State rested its case in chief, Appellant moved for a judgment of acquittal which the trial court denied. (V32:1187-88). Defense counsel indicated they had no witnesses and Appellant would not testify. (V32:1188). The trial court conducted a colloquy with Appellant and he acknowledged that he had made the decision not to testify and he agreed with his attorneys not to call any witnesses. (V32:188-92). After closing arguments, the jury returned verdicts finding Appellant guilty

on both counts of first degree murder. (V33:1356).

The following Tuesday, May 25, 2010, the court conducted the penalty phase proceedings before the jury. The State presented brief victim impact evidence from Linda Deluca's sister, Caryl Dennis. (V20:3126-35). Appellant presented mitigating evidence via videos from out-of-state witnesses and also called a number of witnesses. The first video presented contained testimony from Lynn Whited-Triplett, who had attended the guilt phase, but had to return to Kentucky for work prior to the penalty phase. Ms. Triplett testified that she has known Appellant for over twenty-six years and they were high school sweethearts. She described Appellant as a warm, loving, wonderful person full of potential. (V20:3141-43). Defense counsel also presented a video containing testimony from a number of witnesses: Helen Miller (she had known Appellant when he was young and described him as quiet, shy, and very respectful), Gerry Robards (Appellant's mother), Richard Johnson (Appellant's grandfather), Lynn Triplett (high school girlfriend), Tonya Robards (Appellant's sister), and Mindy Bickey (one of Appellant's personal training clients). (V20:3146-51).

In addition to the videotaped testimony, defense counsel presented live testimony from Mindey Bickey, one of Appellant's

personal training clients. Ms. Bickey testified that Appellant was the only personal trainer she ever had that actually cared about his clients. She observed Appellant train another man with Parkinson's or MS, and Appellant carefully worked with him to make him physically better. Ms. Bickey testified that Appellant was welcome in her home with her family and had been there for Thanksgiving and on other occasions. When she was going through a particularly stressful period of her life when her mother was hospitalized for a broken hip, Appellant came to the hospital and visited her mother and brought pizzas for all the patients to cheer them up. (V20:3149-56).

Defense counsel called Mark Cognatti, a shift supervisor at the Pinellas County Jail and this witness detailed the two disciplinary infractions Appellant had while incarcerated for failing to respond to the prison count and for writing personal letters while utilizing the law library. (V20:3158-62). On cross-examination, the State noted that the witness was only referencing disciplinary infractions occurring since Appellant came in to the Pinellas County Jail on March 19, 2008, and was unaware of his history prior to that date. The witness was unaware of Appellant's attempted escape from the Florida State Hospital, or that bailiffs had indicated that Appellant had a razor blade during a court appearance. Mr. Cognatti indicated

that he was only aware of Appellant's disciplinary record for the time period requested; from March 19, 2008 to present. (V20:3162-64). After the witness was excused, the State requested that he return to the jail and search the records from the time of Appellant's arrest on August 7, 2006, and the State may recall him. (V20:3164-65).

Defense counsel called two inmates at the Pinellas County Jail to testify regarding Appellant's character. Henry Holiness testified that Appellant was a very humble guy, very disciplined, dedicated to his religion and workouts, and helping other people to mentally and emotionally relieve their stress and tension. Holiness testified that Appellant was a role model to other inmates and was a good person. (V20:3166-67). Another inmate, Carl Galbraith, testified that jail was very scary to him because he had never been in trouble before. Appellant opened his arms up to him and helped him through tough times. (V20:3171).

Appellant's mother, Gerry Robards, testified that she loved her only biological son and will always be there for him. They correspond while he is incarcerated and she testified that he is always helping people. She begged the jury to show mercy to Appellant because his life is worth something. (V20:3172-73).

After the defense rested, the State indicated that they might want to recall Mark Cognatti to testify regarding Appellant's disciplinary record for the entire time of his incarceration. Defense counsel indicated that he had not requested only a partial record from the jail and was unsure how to convey that information to the jury. After discussion, the State decided not to recall the witness, but simply argue that Appellant was not a model prisoner based on his escape attempt. (V20:3174-77). After the State's closing argument, the court inquired if Appellant wanted to testify before the jury. Appellant indicated that he would not testify before the jury, but he would reserve his statements until he could present them to the judge only. Appellant also indicated that he was not aware of any other witnesses that he wanted presented to the jury. (V20:3189-90). After defense counsel's closing argument, the jury returned a death recommendation on each count by a vote of seven to five. (V20:3243).

On July 13, 2010, the court conducted the first part of a trifurcated Spencer hearing. The State called Anna Cox, a Pinellas County Sheriff's Office forensic science specialist, who testified regarding the blood stain evidence at the victims' home. Due to the extensive heat damage from the fire, some of the blood evidence could not be collected. (V21:3272-76). Ms.

Cox's testimony regarding the blood stain evidence was intended to show the movement of the victims' bodies inside the home. On the bathroom doorway outside the bedroom where the incident began, the witness noted that there was aspirated blood stains between three and five feet up on the doorway, indicating that someone had a significant injury to their respiratory system (throat, nose, or mouth) and was standing upright and expelling blood while gasping or coughing. (V21:3280-85). Another area of blood stain spatter in the hallway was low to the ground and demonstrated that a victim had obtained an impact blow in that area and moved around. (V21:3285-88). The witness also documented a large blood stain near the bathroom which was consistent with a large pool of blood that someone had stepped in. The witness testified that most likely a victim had been laying there with a large blood pool nearby, but was moved into the nearby office. (V21:3288-92). The witness ultimately concluded that at least one victim had suffered injuries in the hallway and was moving around when they left the aspirated stains on the door, but the other stains she observed were likely caused by someone moving the victims or transferring the blood himself. (V21:3297-98). The State also called Tom Vankoughnett, a DNA analyst with the Pinellas County Forensic Laboratory. Mr. Vankoughnett testified that blood stains found

on the southeast bedroom door and on a blanket belonged to Linda Deluca. (V21:3317-25).

On August 24, 2010, the court conducted the second portion of the Spencer hearing and heard teleconferencing testimony from two defense mental health experts, Drs. Joseph Wu and Jonathan Lipman (V21:3343-92), and heard live testimony from another defense mental health expert, Dr. Robert Berland. (V22:3415-69). Dr. Wu, a psychiatrist from the University of California, testified that he reviewed a PET scan taken of Appellant in May, 2010. Dr. Wu compared PowerPoint slides of Appellant's PET scan results to an "age and gender match control subject" and noted that Appellant's scan showed abnormalities in the "parietal cortex" area of his brain, consistent with having been in multiple car accidents with traumatic brain injury. (V21:3347-50). Appellant also had abnormalities in the "emotional area of the brain" which are seen in people with toxic chemical brain exposure. (V21:3351-52). Lastly, Dr. Wu found a third type of brain abnormality usually associated with people suffering from schizophrenia. (V21:3352-53). According to Dr. Wu, people with brain abnormalities are at a greater risk of developing psychosis and behavioral problems. (V21:3353-54).

Dr. Jonathan Lipman, a neuropharmacologist from Tennessee, testified that he had reviewed some of Appellant's medical and

psychological records and had personally interviewed Appellant on July 28, 2010. (V21:3365). Dr. Lipman testified that elevated levels of anabolic steroids would be harmful to someone suffering from brain injury. (V21:3366-67). When examining Appellant at the jail, Dr. Lipman noted that Appellant displayed physical signs of anabolic steroid use, and when the doctor examined his breasts to determine if Appellant had gyncomastia (growth of breasts in males associated with steroid use), he discovered that Appellant had his breasts surgically removed and had the scars from the surgery. (V21:3368-69). Dr. Lipman testified that chronic high use of anabolic steroid results in irritability and low frustration tolerance and a predilection toward uncontrolled temper, rage, and paranoia. The psychotic symptoms associated with taking the drug can last for as long as four months after cessation of the use of steroids. When the usage stops, the effects are similar to cocaine withdrawal with depressed mood, sleeplessness, agitation, and despair. (V21:3371-72).

Dr. Lipman suspected that Appellant had anosognosia, a condition where Appellant was in denial as to the negative effects of the steroid use. Dr. Lipman spoke with another defense mental health expert, Dr. Berland, and found that Appellant's ex-girlfriends and other friends described him as a

violent and destructive person and they had to take out protection orders from him. (V21:3373-74). Appellant also described symptoms consistent with psychotic hallucinations and delusions which could be related to his steroid use. (V21:3374-75).

According to Appellant's self-reporting to Dr. Lipman, his steroid use began at age fifteen when he started using seven-week cycles of the drug prior to body-building competitions. Appellant moved into a middle phase at which time he began "stacking" several different drugs and supplements together in cycles, and eventually a latter phase in the 2000's when he simply used steroids continuously. In the latter stage, major personality changes were noted by Appellant's girlfriends. (V21:3375-77). Dr. Lipman testified that if Appellant had suffered brain injuries in 2001 and 2003, his steroid use would aggravate his brain injuries and have a permanent effect. (V21:3377-78). When Appellant was incarcerated shortly before the murders, he could have been undergoing withdrawal symptoms at the time of the instant murders if he did not have any steroids upon his release. (V21:3378). Dr. Lipman explained that the crime scene evidence was consistent with Appellant committing the murders during "roid rage" given the disorganized, chaotic, and excessively violent nature of the

crime. After his arrest for the two murders, Appellant reported symptoms consistent with withdrawal syndrome. (V21:3378-79).

Appellant testified at the Spencer hearing and claimed that he prayed for forgiveness and mercy every day. (V22:3400). He addressed the victims' family and stated that he prays for their suffering to stop and for their healing. Appellant noted that his parents did not raise him to be a bad person, but he had shamed himself and his family. (V22:3400-01). On cross-examination, Appellant declined to admit to the murders and claimed that he could not remember doing any of the events surrounding the murder. Appellant stated that he could not recall renting the dolly or the trailer, despite the fact that he was recorded on the jail phone giving his mother a different story as to why he was renting these items.[15] (V23:3492-94). The State also introduced voice messages left on a lady's phone, Frankie, one of Appellant's personal training clients. After hearing the voice messages, Appellant denied that it was his voice leaving the messages. (V22:3401-14).

Dr. Robert Berland, a forensic psychologist, testified that Appellant is psychotic and has delusional paranoid thinking.

[15] After the State played the recording of his phone conversation with his mother, Appellant testified that he recalled that conversation. (V23:3496).

(V22:3416). Dr. Berland summarized Appellant's scores on the Minnesota Multiphasic Personality Inventory (MMPI) and concluded that the results indicated substantial psychotic disturbance, including hallucinations and paranoid thought disorder. (V22:3416-24). Dr. Berland also interviewed seven people, five ex-girlfriends and two family members, and they observed Appellant having delusional paranoid beliefs and auditory hallucinations. (V22:3426). Dr. Berland also received information that Appellant had suffered two head injuries while involved in motorcycle accidents in 2001 and 2003, and other head injuries during his life. (V22:3426-29). Dr. Berland agreed with Dr. Wu's testimony regarding Appellant's PET scan results and opined that Appellant's steroid use or amphetamine use was the cause of the toxic brain injury. (V22:3430). Dr. Berland opined that Appellant suffered from extreme mental or emotional disturbance at the time of the murders and that his ability to conform his conduct to the requirements of the law was substantially impaired. (V22:3434-36).

On cross-examination, Dr. Berland acknowledged that Appellant had previously been diagnosed by mental health experts as malingering, but he did not agree with their opinions. (V22:3439-48, 3459). Dr. Berland also noted that the violent nature of these murders were not out of character for Appellant

as he was described as a violent person by his ex-girlfriends. A number of these women were so scared of Appellant they would not even talk to the doctor until they were reassured that he had been convicted and would never be released. (V22:3448-50).

At the conclusion of the second part of the Spencer hearing, defense counsel indicated that he had obtained the full stack of materials from the Pinellas County Jail regarding Appellant's disciplinary record and counsel again informed the court that he had not requested a partial report from the jail and would not have presented that information to the jury had he known the witness only had a partial portion of Appellant's record. Defense counsel indicated that the full report did not indicate any further disciplinary actions and he would present this material to the court, but he was nevertheless waiving any argument regarding Appellant's good behavior in jail.[16] (V22:3470-75).

Both the State and defense counsel orally presented argument to the judge regarding the appropriate sentence, and defense counsel urged the judge to override the jury's seven to five recommendation in light of the mental mitigation presented

[16] At the third part of the Spencer hearing, defense counsel indicated that he was changing his mind and was now reasserting this mitigating factor. (V23:3575-78).

at the Spencer hearing. (V23:3498-521). Defense counsel indicated "we knew when we came on to this case that we wouldn't be able to marshal the mental health materials in time to present to the jury and ask the Court to consider that factor that the jury didn't hear the mental health explanations of Mr. Robards' behavior when you are making your decision." (V23:3520-21). The following exchange then occurred:

> THE COURT: Well, at life over death conferences defense attorneys even go over the strategy of saving some evidence for the Spencer Hearing. And I don't know if that was part of your strategy at all, but that's an actual strategy that defense attorneys try to employ in order to give the Judge a reason to override the jury just in case the jury comes back with death. So was that part of your strategy to have evidence that would be presented at the Spencer Hearing that may not: be presented during the penalty phase?
>
> MR. WATTS: That's a fair comment, Judge. It's been my strategy from time to time. I can't -- and I have to say that I had trepidation at the time of the Spencer Hearing that I wished I had it all to lay out to the jury or to make the decision to lay out to the jury. I had heard from Dr. Wu. I knew there were brain abnormalities. And, yes, to be perfectly honest it was a potential strategy, but I didn't have the ability to make the complete decision at the time but –
>
> THE COURT: Right. You couldn't do it anyway, but even if you could have done it by then, you may have just done it the way you actually did it because the theory is, first of all, that many of the arguments that you're making about mental health issues may be more persuasive for a Judge than it would be for a jury. And then, as I said before, the thinking is that if the jury does come back with a death recommendation, that if there is additional evidence presented at a Spencer Hearing it in effect gives the

Judge a logical reason to override. And the only reason I'm bringing that up is I haven't made up my mind about this at all. I'm not going to make up my mind until I review everything, and that includes all the memorandums that haven't been presented yet. But, as you know, I could either impose the death penalty or life in prison. And if I do impose the death penalty, then every single thing that you do is going to be reviewed in the future. So I just want to make sure that the reason that you have presented these things at the Spencer Hearing was for a strategic reason and riot for a negligent reason. Do you understand what I'm getting at?

MR. WATTS: Yes, sir. We were mindful. First of all, I would say that when I agreed to get on the case with Mr. Hoffman, we knew the case was over. And out of respect to the system, we agreed and I agreed with Mr. Hoffman to move forward as fast as we could. In the past my strategy has been and in the very recent past to save mental health and take a high road approach in the - - so, yes, I'm addressing that for the record. Still in all when it came down to the day of I wished I had had a full scope of it. We still may have made the same decision. I trust that we would have, and I discussed that with Mr. Hoffman, and I discussed it with predecessor counsel. And, yes, we made a considered decision to go forward at that time if that answers your question.

THE COURT: Okay. It does.

MR. WATTS: Yes, it was strategic. But still I want to appeal to the Court to consider how the jurors may have taken this. I had no idea how good it would be, the PET Scan. I knew there were abnormalities. I didn't know how profound they were, et cetera. So still I would likely have made the same decision. It was more of a putting the jury into it rather than my not presenting to them that I made that comment that what impact might this have had on the jury in a positive way to make it six, six.

THE COURT: Well, that's part of the arguments that they promote at the life over death conference or seminar is to make that argument. So I just wanted to make sure that what you're doing is strategic which I

> think it is and isn't based out of negligence or carelessness or anything.
>
> MR. SCHAUB: Just from a State perspective when I attend State functions on the death penalty, we enjoy when the jurors get to hear about the violence that someone might show towards women which the jurors weren't allowed to hear during the case but would have been once the doctors testified considering all the interviews they conducted with the women.
>
> THE COURT: Right. And there is general agreement that the mental health issues are probably more persuasive in front of the Judge than they are in front of the jury. So that's the consensus belief. Obviously we don't know whether it's actually true, but that's the consensus belief. I think we can all agree on that, right?
>
> MR. WATTS: We hope it's true. Thank you, Judge.

(V23:3521-25).

On October 7, 2010, the trial court conducted the third and final part of the Spencer hearing. Defense counsel presented testimony from Appellant's younger sister, Tanya Robards. Ms. Robards testified that she and her siblings grew up in a blended family; her biological father had two sons and custody over another son from his first wife. Appellant did not share a biological connection with the other boys and was emotionally and physically picked on as a result. (V23:3555-60). The witness also testified that she heard about an incident from a letter Appellant wrote to his mother that he had performed oral sex on someone else at a young age after drinking or smoking marijuana. (V23:3562, 3586-87). When Appellant was about fifteen, things

changed for him because he began using steroids and playing high school football and working out at a gym. (V23:3563-64).

At the hearing, Appellant also addressed the court and discussed taking various medications prior to the murders, including painkillers. (V23:3597-99). Appellant apologized for his prior courtroom behavior and expressed remorse and took full responsibility for the two murders, but could not recall any details regarding the murders. (V23:3600-03, 3611-15). Appellant attributed his prior behavior to the withdrawal from medication. (V23:3600-03). On cross-examination, Appellant explained that he was not trying to escape from the Florida State Hospital, but was simply star-gazing on the roof and praying. Appellant testified that he brought cans of tuna with him because he was hungry, wore excessive clothing because he was cold, and brought newspapers with him to read. (V23:3608-10). Appellant also could not explain his selective memory as to how he could recall with great detail his process of obtaining steroids, but could not recall any of the details of the murders. (V23:3623-25).

On October 29, 2010, the trial court sentenced Appellant to death on both counts and found four aggravating circumstances: (1) Appellant was previously convicted of another capital felony; (2) the capital felony was committed for pecuniary gain; (3) the capital felony was committed while Appellant was engaged

in the commission of a robbery;[17] and (4) the murders were especially heinous, atrocious, or cruel. The court rejected the two statutory mental mitigators and found ten nonstatutory mitigators: (1) Appellant's family history; (2) the original plan to rob the victims did not include a plan to murder them; (3) good conduct while in custody; (4) capacity to form positive relationships; (5) remorse and potential for rehabilitation; (6) traumatic brain injury based on the PET scan results; (7) effects of steroids on brain injury and in general; (8) use of prescribed steroids, interactions with other prescribed drugs, and withdrawal; (9) Appellant's mental health; and (10) history of steady employment. The court concluded that the magnitude of the aggravating circumstances outweighed the mitigation and sentenced Appellant to death for the murders of Frank and Linda Deluca. (V13:2123-44).

[17] The court merged this factor with the pecuniary gain aggravator and did not consider it as an additional aggravating factor.

SUMMARY OF THE ARGUMENT

Appellant's claim that his penalty phase counsel was ineffective is not cognizable on direct appeal. Contrary to Appellant's assertions, this Court cannot make a finding based on the face of the record that penalty phase counsel performed deficiently and that Appellant was prejudiced as a result. This claim should be denied without prejudice to raise it in a postconviction motion pursuant to Florida Rule of Criminal Procedure 3.851.

Appellant failed to argue to the trial court that Florida's death sentencing scheme is unconstitutional because it allows a jury to recommend a death sentence by a bare majority. Accordingly, the issue is unpreserved and procedurally barred. Furthermore, this Court has consistently rejected this identical claim and Appellant has failed to offer any compelling reason to revisit this Court's prior precedent rejecting this claim.

Appellant asserts that the trial judge departed from his position of judicial neutrality prior to trial by giving a "tip" to the State to seek the aggravating circumstance of a prior violent felony conviction based on the contemporaneous murders. The instant claim is procedurally barred as defense counsel did not object when the State added the aggravating circumstance, nor did counsel file a motion to disqualify the judge based on

the alleged improper conduct. In addition to being procedurally barred, Appellant's claim is without merit. The State had previously indicated that it would seek this aggravating factor, and its failure to initially notice this aggravator did not preclude the State from seeking it in the future.

The trial court acted within its discretion in denying Appellant's motion for mistrial made after the prosecutor made allegedly improper comments during closing arguments. The prosecutor's argument was a permissible comment on the lack of evidence supporting the defense theory, and even if improper, the comments were not so prejudicial as to vitiate the entire trial. Additionally, unobjected-to comments by the prosecutor did not constitute fundamental error.

ARGUMENT

ISSUE I

APPELLANT'S CLAIM THAT HIS PENALTY PHASE COUNSEL PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL IS NOT PROPERLY RAISED IN THIS PROCEEDING AND IS WITHOUT MERIT.

In his first claim, Appellant asserts that his constitutional rights were violated because his penalty phase counsel provided ineffective assistance of counsel by failing to present mental mitigation evidence to the jury. As this Court has previously held in numerous cases, a claim of ineffective assistance of counsel is generally not cognizable on direct appeal. An exception to this general rule is recognized in the rare cases where the claimed ineffectiveness is apparent on the face of the record and it would be a waste of judicial resources to require the trial court to address the issue in a postconviction motion under Florida Rule of Criminal Procedure 3.851. See Smith v. State, 998 So. 2d 516, 522-23 (Fla. 2008) (declining to address numerous claims of ineffective assistance of counsel on direct appeal); Gore v. State, 784 So. 2d 418, 437 (Fla. 2001) ("Even assuming that an ineffective assistance of counsel claim could be properly asserted under these circumstances, with rare exception ineffective assistance of counsel claims are not cognizable on direct appeal."); Bruno v.

State, 807 So. 2d 55, 63 & n.14 (Fla. 2001); Mansfield v. State, 758 So. 2d 636, 642 (Fla. 2000); Martinez v. State, 761 So. 2d 1074, 1078 n.2 (Fla. 2000); Lawrence v. State, 691 So. 2d 1068, 1074 (Fla. 1997); Wuornos v. State, 676 So. 2d 972, 974 (Fla. 1996); Consalvo v. State, 697 So. 2d 805, 811-812 n4 (Fla. 1996); McKinney v. State, 579 So. 2d 80, 82 (Fla. 1991) ("The trial court is the more appropriate forum to present such claims where evidence might be necessary to explain why certain actions were taken or omitted by counsel."). Appellant's case does not qualify as one of the rare cases where both prongs of Strickland are apparent on the face of the record. See Strickland v. Washington, 466 U.S. 668 (1984) (setting forth the two requirements a defendant must establish in support of a claim of ineffective assistance of counsel: (1) deficient performance by counsel and (2) prejudice). Accordingly, this Court should deny the instant claim without prejudice for Appellant to raise it in an appropriate postconviction motion. See Smith, 998 So. 2d at 523.

Even if this Court were to address the merits of Appellant's ineffective assistance of counsel claim at this time, it is clear that Appellant cannot establish both deficient performance and prejudice as required by Strickland. Appellant asserts that the face of the record establishes that defense

counsel was deficient in his investigation and presentation of mental mitigating evidence and further argues that he was prejudiced by counsel's failure to present mental health expert testimony to the jury at the penalty phase. Counsel relies on statements made by penalty phase counsel Richard Watts at the second portion of the Spencer hearing indicating that, at the time of the penalty phase, he did not know the full scope of Appellant's brain abnormalities. (V23:3521-25). Of course, defense counsel's statements on the record regarding his prior strategic choices were obviously limited given his current representation of Appellant and the context in which the comments were made. Furthermore, the current record on appeal clearly does not support any finding that penalty phase counsel performed diligently in representing Appellant or that he was prejudiced.

As set forth in the Statement of the Case and Facts, Appellant was arrested in August, 2006, and his case proceeded through numerous lengthy delays due to Appellant's alleged incompetence (the doctors and court found Appellant was malingering) and issues with his representation. Eventually, on December 4, 2009, private attorney Larry Hoffman began representing Appellant and indicated that he would be ready for the trial scheduled for March 1, 2010. Hoffman sought the

appointment of Richard Watts as penalty phase counsel, and on January 29, 2010, Watts was appointed by the court. The record establishes that when defense counsel Hoffman came onto the case, he obtained prior counsels' files, including the records and reports from the prior competency proceedings. On February 4, 2010, just a few days after his appointment, penalty phase counsel Watts filed motions to appoint mental health experts and a mitigation specialist. The next day, defense counsel sought, and was granted, a two month continuance and the trial was rescheduled for May 18, 2010. On April 21, 2010, penalty phase counsel filed a motion to approve PET scan testing and funds for Dr. Maher, which the trial court granted. On May 6, 2010, the court issued a transport order requiring Appellant to be transported for the PET scan testing.

At the time of the penalty phase on May 25, 2010, counsel was obviously aware of potential mitigation based on Appellant's mental health. Counsel possessed the numerous experts' reports stemming from the competency hearing, had been working with his own mental health experts for months, and had just recently received the results of Appellant's PET scan from Dr. Wu. As counsel noted on the record, he made a strategic decision not to present this information to the jury. Three months later at the Spencer hearing, counsel recognized, in hindsight, that he did

not realize the "full scope" of the mental mitigation at the time of the penalty phase, but this does not equate to a finding that he performed deficiently when he made the decision to forego presenting mental mitigation to the jury. See Strickland, 466 U.S. at 689 (stating that a fair assessment of an attorney's performance requires that every effort be made to eliminate the distorting effects of hindsight and to evaluate the conduct from counsel's perspective at the time).

Contrary to Appellant's assertions, the face of the record does not support a finding that penalty phase counsel performed deficiently by failing to investigate and present mental mitigation to the jury at the penalty phase. Counsel indicated that he was aware of the mental health issues, including the results of the PET scan showing brain abnormalities. Penalty phase counsel Watts stated that he discussed this decision with his co-counsel and with prior counsel. As Watts stated on the record, after discussing the mitigation evidence with others, he made a strategic decision not to present mental mitigating evidence to the jury. Although counsel was able to develop more detailed mental health information in the months following the penalty phase, this does not equate to a finding of deficient performance.

In addition to failing to establish deficient performance, the record also does not support a finding of prejudice. As this Court stated in Cherry v. State, 781 So. 2d 1040, 1048 (Fla. 2000), when addressing the prejudice prong of a claim directed at penalty phase counsel's performance, the defendant "must demonstrate that there is a reasonable probability that, absent trial counsel's error, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." In this case, Robards has failed to carry his burden of showing that, had trial counsel acted as alleged, there is a reasonable probability that he would have obtained a life sentence.

As the prosecutor noted when defense counsel indicated that he made the strategic decision not to present mental mitigation evidence to the jury, this was a sound strategic decision as the State would have elicited extremely damaging testimony from the mental health experts (as was done at the Spencer hearings). When Appellant presented Drs. Wu, Lipman, and Berland at the Spencer hearing, the prosecutor elicited testimony that Appellant's five ex-girlfriends were terrified of him and had obtained restraining orders against him. The State presented voice-mail phone messages Appellant left on a woman's phone that vividly represented his anger, rage, and "explosive discontrol."

In addition to this prejudicial information, the presentation of any mental mitigating evidence to the jury would have resulted in the State being able to elicit further damaging testimony about Appellant's behavior. The State would have undoubtedly presented more detailed information regarding Appellant's escape attempt from the Florida State Hospital and, like was done during the competency hearings, would have presented evidence from mental health experts that Appellant was malingering and had an antisocial personality disorder. The jury, like the trial judge, would have relied on this evidence, as well as the facts of the instant murders, to reject the two statutory mental mitigators. Thus, because Appellant has failed to meet his burden of establishing deficient performance and prejudice as required by Strickland, this Court should affirm the lower court's denial of the instant claim.

ISSUE II

APPELLANT'S CLAIM THAT FLORIDA'S CAPITAL SENTENCING SCHEME IS UNCONSTITUTIONAL FOR ALLOWING A NON-UNANIMOUS JURY RECOMMENDATION FOR DEATH IS PROCEDURALLY BARRED AND WITHOUT MERIT.

In his second issue on appeal, Appellant claims that Florida's capital sentencing scheme is unconstitutional because it allows a jury to recommend a death sentence by a bare majority. Appellant did not present this argument to the trial court below and has therefore failed to preserve this issue for appellate review. See Gore v. State, 964 So. 2d 1257, 1276 (Fla. 2007); Fotopoulous v. State, 608 So. 2d 784, 794 & n.7 (Fla. 1992). Even if this Court addresses this unpreserved issue, this Court should once again deny the instant claim.

As this is a purely legal issue, appellate review is *de novo*. Trotter v. State, 825 So. 2d 362, 365 (Fla. 2002). Appellant acknowledges that this Court has repeatedly rejected this exact claim, and Robards has not provided any reasonable basis for reconsideration of the issue. In James v. State, 453 So. 2d 786 (Fla. 1984), this Court denied relief on an identical claim by noting that "the United States Supreme Court has never held that jury unanimity is a requisite of due process, and in Alvord v. State, 322 So. 2d 533 (Fla. 1975), cert. denied, 428 U.S. 923, 96 S. Ct. 3234, 49 L. Ed. 2d 1226 (1976), this Court

held that the jury in a capital case could recommend an advisory sentence by a simple majority vote. We do not find that unanimity is necessary when the jury considers this issue." James, 453 So. 2d at 792 (footnote omitted); see also Parker v. State, 904 So. 2d 370, 383 (Fla. 2005) ("This Court has repeatedly held that it is not unconstitutional for a jury to recommend death on a simple majority vote."); Israel v. State, 837 So. 2d 381, 392 (Fla. 2002) (rejecting defendant's assertion that his death sentence was unconstitutional based on the jury's recommendation for death was by a split vote); Card v. State, 803 So. 2d 613, 629 n.13 (Fla. 2001); Sexton v. State, 775 So. 2d 923, 937 (Fla. 2000); Thompson v. State, 648 So. 2d 692, 698 (Fla. 1994); Brown v. State, 565 So. 2d 304, 308 (Fla. 1990). Because this Court has consistently rejected this claim and found Florida's capital sentencing scheme constitutional, no relief is warranted on this unpreserved issue.

ISSUE III

APPELLANT'S CLAIM THAT THE TRIAL JUDGE DEPARTED FROM JUDICIAL NEUTRALITY AND COMMITTED FUNDAMENTAL ERROR BY PROMPTING THE STATE TO ADD AN AGGRAVATING FACTOR IS PROCEDURALLY BARRED AND WITHOUT MERIT.

Appellant asserts that the trial judge departed from his position of judicial neutrality when he gave the prosecutor a "tip" to seek the aggravating factor that Appellant had a previous violent felony conviction based on the contemporaneous murders. On Friday, May 14, 2010, shortly before the trial, the trial court addressed Appellant's renewed motion to compel the State to disclose the aggravating factors. (V9:1489-99). Defense counsel filed his notice of mitigating circumstances and orally indicated that he did not intend to present any mental health mitigation and would present evidence regarding Appellant's family background and employment background. (V9:1480, 1496). The State orally informed the court and also filed a written response indicating that the State would rely on three aggravating factors: (1) the murders were committed while the Defendant was engaged in the commission of, or an attempt to commit, any robbery or burglary; (2) the murders were committed for pecuniary gain; and (3) the murders were especially heinous, atrocious, or cruel. (V9:1482, 1493-95). The trial court repeatedly stressed to both sides that they were not bound by

their responses, but urged each side to let the court and opposing counsel know as soon as possible if additional aggravators or mitigators were being sought. (V9:1495, 1496-97). The following exchange between the prosecutor and the court also occurred at the hearing:

> THE COURT: Okay. All right. And then the only other question that I had – I really don't want to give the State or defense or anyone any additional ideas. But after I went through the affidavit and the case law on that I thought that another prior aggravating factor may be previous conviction of capital or violent felony because of the alleged contemporaneous murder of the other person.
>
> Are you going to be asking for that one?
>
> MR. SCHAUB: I don't know yet.
>
> THE COURT: All right.
>
> MR. SCHAUB: I'll let you know on that.
>
> THE COURT: All right. And I'm not saying that you should. I'm just saying that, you know, I went through everything, and I was trying to think of what possible aggravating circumstances and mitigating circumstances would be.

(V9:1498-99). On Monday, May 17, 2010, the State filed another notice of aggravating circumstances adding the aggravator that Robards was previously convicted of another capital felony or a felony involving the use or threat of violence to another person. (V9:1508-09).

Appellant now asserts that the court departed from its position of judicial neutrality by suggesting to the State to seek another aggravator. First, Appellant has not preserved this

issue as defense counsel never raised any objection to the State adding this aggravator, nor did counsel file a motion to disqualify the judge based on any alleged improper conduct. Thus, the instant issue is not preserved for appellate review. See McKenzie v. State, 29 So. 3d 272 (Fla. 2010) (holding that defendant's claim that trial judge departed from position of neutrality was unpreserved and procedurally barred for appellate consideration where defendant did not raise objection or file motion to disqualify); Jones v. State, 582 So. 2d 110, 111 (Fla. 3d DCA 1991) (stating that "in order to preserve for appellate review alleged improprieties of a trial judge, an objection must be made contemporaneously with the prejudicial conduct or comments").

Appellant's attempt to avoid the procedural bar by arguing that the trial judge committed fundamental error is unavailing and without merit. This Court has defined fundamental error "as error that 'reaches down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error.'" Rimmer v. State, 825 So. 2d 304, 323 (Fla. 2002) (quoting Kilgore v. State, 688 So. 2d 895, 898 (Fla. 1996)). As the Fourth District Court of Appeal stated in Mathew v. State, 837 So. 2d 1167, 1170 (Fla. 4th DCA 2003), "it is clear that not every act or comment

that might be interpreted as demonstrating less than neutrality on the part of the judge will be deemed fundamental error."

Appellant's assertion that the court committed fundamental error by giving a "tip" to the State is without merit. See generally Chastine v. Broome, 629 So. 2d 293, 295 (Fla. 4th DCA 1993) (stating that as a neutral arbiter in judicial proceedings, a trial judge "must not enter the fray by giving 'tips' to either side"). In this case, the trial judge did not "tip off" the prosecutor to an aggravating factor of which the prosecutor was unaware. Well over a year before the May 14, 2010, hearing, the prosecutor indicated that the State would likely be seeking the aggravating factor of a prior violent felony based on the contemporaneous murders. At a hearing on February 26, 2009, the prosecutor indicated that he probably would be seeking the prior violent felony aggravator based on the fact that this was a "double homicide." (V4:596-97). Certainly, Appellant's assertion that, without the trial judge's "tip," the State might have continued to overlook this aggravator is unfounded given the prosecutor's prior statements indicating the possibility of seeking this aggravator. Rather, a logical reason for the State to have not listed the aggravator was the fact that the jury had not convicted Appellant of the two murders at the time of the notice, and thus, it was

premature to list this aggravator. Regardless of the reasons for the State's failure to initially list the aggravator, Appellant was not prejudiced by the addition of the aggravator a few days later. Because the trial judge's comments were not a departure from impartiality and did not prejudice Appellant in any manner, he cannot prevail on his claim of fundamental error. Accordingly, this Court should deny the instant unpreserved claim.

ISSUE IV

THE TRIAL COURT ACTED WITHIN ITS SOUND DISCRETION IN DENYING APPELLANT'S MOTION FOR MISTRIAL BASED ON THE PROSECUTOR'S COMMENTS DURING CLOSING ARGUMENTS.

In his final issue, Appellant argues that the prosecutor's comments during the guilt phase closing arguments violated his right to a fair trial. After defense counsel argued to the jury that he had raised a reasonable doubt based on his theory that Appellant's fingerprints found on the newspaper in the victims' home were planted by someone else, the prosecutor responded:

> Now, they don't have to prove anything to you. What did they say they were going to do, raise reasonable doubt, raise reasonable doubt. Well, that newspaper, that newspaper dated the day before the crime, they're going to raise reasonable doubt. Don't you think if someone saw – someone gives him a newspaper to read the day before you would hear that testimony? You haven't heard that testimony because it doesn't exist.

(V33:1286-87, 1320). Defense counsel objected, asked for a curative instruction, and moved for a mistrial. Defense counsel asserted that the defense did not have a burden of proof and the prosecutor's comments were directed at Appellant's failure to take the stand. (V33:1329). The trial judge denied the motion for mistrial and gave a curative instruction because the comment "involved the Defendant's right to remain silent. . . . and perhaps an implication of burden shifting." (V33:1329-30). The court instructed the jury that only the State has the burden of

proof in this case, the State has to prove its case beyond and to the exclusion of every reasonable doubt, and the defense does not have any burden of proof. (V33:1321).

Following the judge's curative instruction, the prosecutor resumed his argument and stated:

> The defense wants you to believe that somebody planted that newspaper. There's no evidence of that. There's no evidence whatsoever that somebody gave him a newspaper the day before and said, Put your fingerprints on here so I can plant evidence on you.

(V33:1321-22). Defense counsel again raised the same objection, and the court sustained the objection and then explained that he sustained what he thought the prosecutor may say next and that the objection was actually overruled. (V33:1322-23). Appellant now asserts that the prosecutor's subsequent remarks reinforced his earlier comments which were fairly susceptible of being interpreted by the jury as a comment on Robards' failure to testify.

The State submits that the trial court acted within its sound discretion in denying Appellant's motion for mistrial based on the prosecutor's comments.[18] The law is well established

[18] As noted, Appellant objected to the prosecutor's initial comment and immediately moved for a mistrial. The trial court did not rule on the objection, but denied the motion for mistrial and gave a curative instruction. Accordingly, the appropriate standard of review for a ruling on a motion for

that a motion for mistrial is addressed to the sound discretion of the trial court and "the power to declare a mistrial and discharge the jury should be exercised with great care and should be done only in cases of absolute necessity." Ferguson v. State, 417 So. 2d 639, 641 (Fla. 1982); see also Goodwin v. State, 751 So. 2d 537, 546 (Fla. 1999). "Discretion is abused only 'when the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable [person] would take the view adopted by the trial court.'" Trease v. State, 768 So. 2d 1050, 1053 n.2 (Fla. 2000) (citing Huff v. State, 569 So. 2d 1247, 1249 (Fla. 1990)). Furthermore, this Court has stated that "a mistrial is appropriate only when the error committed was so prejudicial as to vitiate the entire trial." Duest v. State, 462 So. 2d 446, 448 (Fla. 1985).

Appellant's argument that the prosecutor improperly commented on his failure to testify is without merit. Although this Court has stated the "very liberal rule" that "any comment on, or which is fairly susceptible of being interpreted as referring to, a defendant's failure to testify is error and is strongly discouraged," this court has attempted to draw a

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mistrial is under an abuse of discretion standard. See Dessaure v. State, 891 So. 2d 455, 464-65 n.5 (Fla. 2004).

distinction between impermissible comments on silence and permissible comments on the evidence in the case. Rodriguez v. State, 753 So. 2d 29, 37 (Fla. 2000). The prosecutor's argument that the jury had not heard any evidence supporting the defense theory that someone planted evidence is a fair comment on the lack of evidentiary support for defense counsel's speculative argument. The prosecutor clearly stated to the jury that the State had the burden of proof and the defense did not "have to prove anything to you," and then argued that defense counsel's argument that he had raised a reasonable doubt was lacking because there was no evidence to support his theory that someone planted evidence. The prosecutor's comments were a permissible argument commenting on the lack of evidence supporting the defense theory.

Even if this Court finds that the prosecutor's comments were "fairly susceptible" of being interpreted as a comment on Appellant's failure to testify, the comments were not so prejudicial as to vitiate the entire trial. The State never argued that the defense had any burden of proof, nor did the prosecutor argue that Appellant failed to testify. Rather, the prosecutor simply informed the jury that they had not heard any evidence to support the defense theory that physical evidence was planted. See Serrano v. State, 64 So. 3d 99, 111 (Fla. 2011)

(finding that prosecutor's argument: "You can't come up with any other theory that fits that anybody else would have done it . . . He talks about this being a professional hit. There is no evidence. There is no evidence that these crimes are any kind of professional hit," was not so prejudicial as to constitute fundamental error). Additionally, after denying the motion for mistrial, the trial court gave a curative instruction to the jury. (V33:1320-21); see Jackson v. State, 702 So. 2d 607 (Fla. 5th DCA 1997) (ruling that prosecutor's comment during argument was improper, but the court's curative instruction cured any potential harm and the error was harmless). Because the trial court acted within its sound discretion in denying Appellant's motion for mistrial, this Court should affirm the court's ruling.

Appellant additionally argues that this Court should reverse his convictions and remand for a new trial based on the cumulative effect of the prosecutor's comments, including an unobjected-to comment by the prosecutor that the Clearwater Police Department did a great deal of work in investigating this case:

> Think about it, all the evidence, all the work that they did during this investigation. **And we didn't even show you all of it. We would have been here forever.** You know how hard they worked this case. And it was their hard work and their evidence and their

> efforts that found all of this evidence and put this case together.

(V32:1233) (emphasis added). As this Court has previously held, a timely objection puts the trial court and the prosecutor on notice that a line of argument is objectionable or is breaching the bounds of propriety. It also provides the trial court the opportunity to admonish the prosecutor or remedy the situation through a curative instruction. See Card v. State, 803 So. 2d 613, 622 (Fla. 2001). Regarding unobjected-to comments, this Court noted in Card, that a contemporaneous objection is required to preserve an issue surrounding a prosecutor's comments during closing argument. This Court stated:

> As a general rule, the failure to raise a contemporaneous objection when improper closing argument comments are made waives any claim concerning such comments for appellate review. See, e.g., Brooks v. State, 762 So. 2d 879, 898 (Fla. 2000); McDonald v. State, 743 So. 2d 501, 505 (Fla. 1999). A timely objection allows the trial court an opportunity to give a curative instruction or to admonish counsel for making an improper argument. See Nixon v. State, 572 So. 2d 1336, 1341 (Fla. 1990). The exception to the contemporaneous objection rule is where the unobjected-to comments rise to the level of fundamental error, which has been defined as error that reaches down into the validity of the trial itself to the extent that a verdict of guilty or jury recommendation of death could not have been obtained without the assistance of the alleged error. See McDonald, 743 So. 2d at 505 (quoting Urbin, 714 So. 2d at 418 n.8); Chandler v. State, 702 So. 2d 186, 191 n.5 (Fla. 1997) (holding that for an error to be raised for the first time on appeal, the error must be so prejudicial as to vitiate the entire trial).

In order for Appellant to obtain relief based on the unobjected-to comments, he must establish that the prosecutor's comments rise to the level of fundamental error. Here, the prosecutor's comments that he did not show the jury all the evidence obtained by the Clearwater Police Department was not so prejudicial as to constitute fundamental error. When viewed in context, the prosecutor's argument was addressing the substantial amount of work performed by the detectives and crime scene personnel in this case, all of which pointed to Appellant as the person responsible for the murders. Although inartfully stated, the prosecutor's comments did not "reach[ ] down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error." Archer v. State, 934 So. 2d 1187, 1205 (Fla. 2006) (quoting Kilgore v. State, 688 So. 2d 895, 898 (Fla. 1997)). Accordingly, because none of the comments mentioned in Appellant's brief, either alone or collectively, rise to the level of fundamental error, this Court should deny the instant claim.

SUPPLEMENTAL ISSUES

THE EVIDENCE IN THIS CASE IS SUFFICIENT TO SUPPORT APPELLANT'S CONVICTIONS FOR THE TWO MURDERS AND HIS DEATH SENTENCE IS PROPORTIONATE.

Although not raised on appeal by Robards' appellate counsel, the State will briefly address the sufficiency of the evidence in the instant case, as well as, the proportionality of Appellant's death sentences. As this Court recently stated in Baker v. State, 71 So. 3d 802, 824 (Fla. 2011):

> Finally, we address whether the evidence was sufficient to support Baker's conviction for first-degree murder. This issue has not been addressed by either party. In death penalty cases, however, regardless of whether the parties raise the issue, this Court is required to conduct an independent review to determine whether sufficient evidence exists to support the conviction. See Fla. R. App. P. 9.142(a)(6); Phillips v. State, 39 So. 3d 296, 308 (Fla.), cert. denied, --- U.S. ----, 131 S. Ct. 520, 178 L. Ed. 2d 384 (2010). The evidence in a capital case is judged to be sufficient when it is both competent and substantial. See Phillips, 39 So. 3d at 308. This Court must "view the evidence in the light most favorable to the State to determine whether 'a rational trier of fact could have found the existence of the elements of the crime beyond a reasonable doubt.'" Rodgers v. State, 948 So. 2d 655, 674 (Fla. 2006) (citing Bradley v. State, 787 So. 2d 732, 738 (Fla. 2001)).

In the instant case, there is substantial and competent evidence supporting Appellant's convictions for murdering Frank and Linda Deluca. The State introduced evidence that, well prior to the murders, Appellant told numerous people that he had a

safe with money, but he did not have the combination for the safe. Appellant took his friend Shane Harper to the victims' home and showed Harper the victims' house and told Harper he planned to steal their safe.[19] On the day of the murder, Appellant went to the victims' home and brutally murdered them with a sharp instrument, likely a knife, and then attempted to destroy any evidence by burning down the house. Appellant utilized newspaper and an accelerant (likely gasoline from the red gas can he took from Jessica Ridpath's garage) to start the fire, and left his fingerprints on newspapers in the house and his DNA under Frank Deluca's fingernails. Unfortunately for Appellant, there was not sufficient oxygen inside the house, and the fire was snuffed out before it could destroy the incriminating evidence. While at the victims' residence, Appellant took a rifle, Linda Deluca's purse and firearm, and a large amount of marijuana and a scale. The rifle was subsequently discovered in Appellant's leased storage facility, Linda Deluca's purse was found in a dumpster along with a shirt consistent with the work shirts owned by Appellant. A firearm, most likely Linda Deluca's firearm, was found hidden in Jessica

[19] The victims had been personal training clients of Appellant over six months before the murders and he had been inside their house.

Ridpath's garage along with the victims' stolen safe. Appellant gave the marijuana and victims' scale to Harper so he could sell the marijuana, and Harper turned it over to law enforcement officers.

Robert Kenney provided testimony establishing that Appellant came over to his house shortly after the murders and cleaned his shoes and then borrowed a red gas can and Kenney's SUV so he could return to the victims' home and set the fire and retrieve the safe. When it became obvious that Appellant could not transport the heavy safe in Kenney's SUV with the dolly he had rented from U-Haul, Appellant and Kenney went to another location and rented a large car trailer. Appellant and Kenney loaded the safe onto the trailer and took it to Jessica Ridpath's garage.

After Appellant's arrest, law enforcement officers discovered a blood stain on his hotel door handle and DNA analysis indicated it was Appellant's blood. At the time of his arrest approximately a week after the murders, law enforcement officers took photographs of the knicks and cuts on Appellant's hands and arms. The State also introduced evidence that Appellant called the lead homicide detective and asked the detective to come and speak to him so they could make a deal. Appellant also told the detective he was involved in the

murders. Finally, while incarcerated in the Florida State Hospital, Appellant attempted to escape. The State submits that this evidence clearly supports Appellant's convictions for the first degree murder convictions on victims Frank and Linda Deluca.

In addition to affirming Appellant's convictions for murder based on the sufficiency of the evidence, this Court should also affirm his two death sentences based on a finding that his sentences are proportionate. This Court has previously noted that it has an independent obligation to perform proportionality review in all death cases.

> Due to the uniqueness and finality of death, this Court addresses the propriety of all death sentences in a proportionality review. This review is a unique and highly serious function of this Court, the purpose of which is to foster uniformity in death-penalty law. It is not a comparison between the number of aggravating and mitigating circumstances; rather, it is a thoughtful, deliberate proportionality review to consider the totality of the circumstances in a case, and to compare it with other capital cases.

McCoy v. State, 853 So. 2d 396, 408 (Fla. 2003) (quotation marks and citations omitted). This Court compares the case under review to others to determine if the crime falls within the category of both (1) the most aggravated, and (2) the least mitigated of murders. Almeida v. State, 748 So. 2d 922, 933 (Fla. 1999).

A review of the aggravating and mitigating evidence established in the instant case demonstrates the proportionality of the death sentences imposed. In this case, the court found three aggravating factors applicable to each of the murders: (1) Appellant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person; (2) the murders were committed during the course of a robbery (merged with the pecuniary gain aggravating circumstance); and (3) the murders were especially heinous, atrocious, or cruel. The court found no statutory mitigating factors, but found ten nonstatutory mitigators: (1) Appellant's family history; (2) the original plan to rob the victims did not include a plan to murder them; (3) good conduct while in custody; (4) capacity to form positive relationships; (5) remorse and potential for rehabilitation; (6) traumatic brain injury based on the PET scan results; (7) effects of steroids on brain injury and in general; (8) use of prescribed steroids, interactions with other prescribed drugs, and withdrawal; (9) Appellant's mental health; and (10) history of steady employment.

This Court has previously held that the HAC aggravator is one of "the most serious aggravators set out in the statutory sentencing scheme." Larkins v. State, 739 So. 2d 90, 95 (Fla.

1999). Here, Appellant killed two victims in an especially heinous, atrocious or cruel manner while robbing them of their possessions in their home. The weighty aggravating factors far outweighed the nonstatutory mitigation presented in this case and establish that Appellant's death sentences are proportionate. See, e.g., Deparvine v. State, 995 So. 2d 351 (Fla. 2008) (upholding defendant's two death sentences where aggravating factors of CCP, prior violent felony for contemporaneous murder convictions, pecuniary gain, and under sentence of imprisonment outweighed mitigation that defendant suffered from serious emotional deprivation as a child because of familial dysfunction and suffered from an inability to form and maintain close relationships with others); Lynch v. State, 841 So. 2d 362 (Fla. 2003) (death sentence proportionate in double homicide where the trial court found three aggravators of HAC, prior violent felony, and commission in the course of a felony; statutory mitigation of no significant criminal history; and nonstatutory mitigation of mental or emotional disturbance, impaired capacity, mental illness, and alcohol abuse); Rose v. State, 787 So. 2d 786 (Fla. 2001) (death sentence proportionate where four aggravators, including HAC and prior violent felony, outweighed substantial mental mitigation and depraved childhood); Spencer v. State, 691 So. 2d 1062 (Fla. 1996) (death

sentence proportionate where two aggravating circumstances, prior conviction for a violent felony and HAC, outweighed two mental heath mitigators, and a number of nonstatutory mitigators including drug and alcohol abuse, paranoid personality disorder, sexual abuse by father, honorable military record, good employment record, and the ability to function in a structured environment). Because Appellant's death sentences are proportionate based on the significant aggravating factors and slight mitigation in this case, this Court should affirm Appellant's convictions and death sentences.

CONCLUSION

In conclusion, Appellee respectfully requests that this Honorable Court affirm Appellant's convictions and sentences.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Steven L. Bolotin, Assistant Public Defender, Public Defender's Office, P.O. Box 9000 – Drawer PD, Bartow, Florida 33831-9000, on this 7th day of May, 2012.

CERTIFICATE OF FONT COMPLIANCE

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

Respectfully submitted,

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