IN THE SUPREME COURT OF FLORIDA

CASE NO. SC06-1963

JERONE HUNTER
Appellant,

v.

STATE OF FLORIDA

Appellee.

ANSWER BRIEF OF APPELLEE

ON APPEAL FROM THE SEVENTH JUDICIAL CIRCUIT
IN AND FOR VOLUSIA COUNTY, FLORIDA

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Statement of the Case

On August 6, 2004, Erin Belanger, Francisco Roman, Gleason, Roberto Gonzalez, Michelle Nathan, and Anthony Vega were murdered in their Deltona, Florida home. (V9, R1579). On August 27, 2004, the Volusia County, Florida, grand jury returned indictments charging Troy Victorino, Jerone Hunter, Michael Salas, and Robert Cannon with the following offenses: Count I - Conspiracy to Commit Aggravated Battery, Murder, Armed Burglary of a Dwelling and Tampering with Physical Evidence; Counts II through VII - First Degree Premeditated Murder and First Degree Felony Murder (all six victims); Counts VIII through XII - Abuse of a Dead Human Body; Count XIII - Armed Burglary of a Dwelling; and Count XIV - Cruelty to Animals. (V1, R17-22). After a change of venue was granted, (V8, R1351-55), trial began in St. Johns County, Florida, on July 12, 2006, before Circuit Judge William Parsons. (V27, R1738). On July 25, 2006, Hunter was found guilty of Count I - Conspiracy to Commit Aggravated Battery, Murder, Armed Burglary of a Dwelling, and Tampering with Physical Evidence; Counts II through VII – First Degree Premeditated Murder and First Degree Felony Murder (all six victims); Count X – abuse of a dead human body (Roberto Gonzalez); Count XI - abuse of a dead human body (Gleason); Count XII - abuse of a dead human body (Anthony Vega); and Count XIII – Armed Burglary of a Dwelling with a Weapon. (V42, R4021-

22). The penalty phase began on July 27, 2006, and, on August 1, 2006, the jury returned its advisory verdict recommending that Hunter be sentenced to death for the murders of Gleason (vote of ten to two), Roberto Gonzalez (vote of nine to three), Michelle Nathan (vote of ten to two), and Anthony Vega (vote of nine to three), and to life without parole for the murders of Erin Belanger and Francisco Roman. (V49, R5059-61).[1] On September 21, 2006, the Court followed the jury's sentencing recommendation, and imposed four death sentences on Hunter. (V9, R1579-1610). This appeal follows.

Statement of the Facts[2]

On the morning of August 6, 2004, Christopher Carroll went to 3106 Telford Lane, Deltona, Volusia County, to pick up two of his workers, Anthony Vega and Roberto (Tito) Gonzales. (V27, R1796-97, 1798). Other occupants of the home worked at Burger King with Carroll's girlfriend. She told Carroll her co-workers had not shown up for work that morning. (V27, R1797). No one answered the doorbell. The front door appeared to have been

[1] The August 28, 2006, *Spencer* hearing is contained in Supplemental Record Volume 3.

[2] Co-defendant Michael Salas was not sentenced to death. His convictions were affirmed by the Fifth District Court of Appeal in a decision issued on December 14, 2007. *Salas v. State*, 32 Fla. L. Weekly D2942 (Fla. 5th DCA Dec. 14, 2007). The statement of the facts by the Fifth District provides a concise overview of the case.

kicked in. Carroll entered and noticed the room to his right had a bed tipped up on its side and "There was blood all over it." Carroll called 911.[3] (V27, R1798).

Deputy Anthony Crane and other law enforcement personnel were dispatched to the scene. (V27, R1805-06). They found six victims: two males in the living room; a male victim, and a female victim lying underneath the box spring, were located in the master bedroom (V27, R1806-07); a male victim was found in the northwest bedroom; and a female victim was located in the southwest bedroom. (V27, R1808). A deceased Dachshund[4] was found in the master bedroom. (V27, R1868).

Stacy Colton, FDLE crime scene investigator, documented the crime scene. (V27, R1823; R1826). She photographed the damage to the front door frame, area around the lock, and a screen door that had a tear along the frame. (V27, R1833, 1834-35, 1836). A heel mark, 36 inches up from the tile floor, was located at the level of the front door handle. (V28, R1923). Colton photographed shoe track impressions, 13 inches in length, located by the front door. (V27, R1837). She prepared a diagram of the house, detailing where each victim was located, and where

[3] An audiotape of the 911 call was published for the jury. (V27, R1801-1802, State Exh. 1).

[4] The parties stipulated to the identification of the dog, "George," who died as a result of a crushed skull. (V35, R2944; 2955).

items of evidence had been collected. (V27, R1840-41, State Exh. 5). She collected a knife handle and knife blade (V27, R1858, 1861, State Exh. 9) and photographed the victims. (V27, R1861-1895, State Exh.10-21). A metal bat was located in the corner of the master bedroom. (V28, R1929-30). A videotape of the crime scene depicting the actual positions of the victims, placement of the furniture, damage to the home, and lighting conditions was published for the jury. (V28, R1919-20, State Exh. 22).

An examination of four baseball bats submitted into evidence indicated no latent prints on the external surfaces. (V33, R2655, 2658, 1662). The bat labeled Q2, wrapped in black tape, contained four unidentified latent prints underneath the tape. (V33, R2658-59, 2663).

Robert Anthony Cannon, ("Anthony") co-defendant, pled guilty to all charges[5] in exchange for a life sentence without parole. (V28, R1936-37, 1939). Initially, Cannon refused to testify. (V28, R1948). Ultimately, Cannon testified it was Victorino's intention to kill everyone in the house. "That may have been in his mind, but that wasn't in my mind." (V28, R1951). Cannon and Salas were in fear for their lives. "We had no choice. We had to go with them." (V28, R1952). Cannon said

[5] Six counts of murder; abuse of a dead human body with a weapon; conspiracy to commit aggravated battery; armed burglary of a dwelling; cruelty to animals; and tampering with evidence. (V28, R1937-39).

Victorino would have killed Salas and him had they not gone along. (V28, R1952). Cannon, Victorino, Hunter, and Salas, all armed with baseball bats, went into the house the night of the murders. (V28, R1954). Cannon refused to testify further and orally moved to withdraw his plea. (V28, R1957).

Brandon Graham, friend of Salas and Cannon, met Victorino and Hunter on August 1, 2004. (V28, R1970-73; V29, R2021, 2048). Graham, Victorino, Hunter, Salas, Cannon, and other friends, went to Telford Lane to retrieve Victorino's personal items. (V28, R1974, 1978; V29, R2050). Victorino "wanted us to fight some kids to get his stuff back." (V28, R1974). Cannon parked the vehicle[6] in the neighbor's yard while some of the group went up to the house "cussing and yelling." The females, armed with knives, went into the house. (V28, R1974-75). Graham, Hunter, Cannon, and Salas, all armed with bats, remained in the vehicle with Victorino. (V28, R1975). Hunter always had a bat with him.[7] (V28, R2001). Victorino did not have a bat and did not go up to the house. (V28, R2004; V38, R3392). The girls exited the house with Victorino's CD case. (V28, R1976). Hunter was yelling for the residents to come outside and fight. (V28, R1976; V29,

[6] Cannon owed a white Ford Expedition. (V28, R1989).

[7] Hunter testified that he did not carry a bat, and could not swing a bat due to a shoulder injury. (V38, R3356-57).

R2056). Francisco "Flaco" Roman said he was calling the police. Some of the group slashed tires before they left. (V28, R1977).

On August 5, Graham, Salas, and Cannon met at Victorino and Hunter's home. (V28, R1984; V29, R2074). Victorino gave Cannon the gun. (V29, R2075). Victorino described a movie, Wonderland, where "[A] group of niggers had ran up on some more niggers' house and had beat them to death with lead pipes." Victorino said, "[I]f I had a group of niggers to do that shit, then I would do it." (V28, R1985; V29, R2076-77). Victorino said he would do that at "Flaco's house." (V28, R1985). Michael Salas said, "[Y]eah, I'm down for it." Robert Cannon said, "[I']m ready to kill me a bitch." Jerone Hunter agreed. (V28, R1985, 1986). Graham said "yeah," he was in. (V28, R1986, 2011, 2012).

Victorino, Hunter, Salas, Cannon, and Graham all agreed to kill the Telford Lane occupants. Victorino told them "[H]ow many people slept on ... what side of the room and how we would split up and kill them because it will be easier, and they had no weapons in the house." (V28, R1986). Victorino gave a "visual diagram" with his hands. Victorino wanted to kill Flaco, and told the group, "[T]o beat the bitches bad because all they do is talk shit." Hunter said they should wear masks; Victorino said they would not leave any evidence. "We're gonna kill them all." (V28, R1987, 2032). The group went looking for bullets for the gun. (V28, R1988, 2009). They had more than seven bats

between them. (V28, R1989). They discussed having a change of clothing. Hunter offered to give Graham some extra clothes "[B]ecause I guess we were probably gonna get blood on our clothes ... we needed a change of clothes to get rid of the evidence." (V28, R1988). Graham expressed doubt about the plan. Salas said, "[Y]ou can't bitch out on us." (V28, R1990; V29, R2082).

Graham had Cannon drop him off at Kris Craddock's house. The group told Graham they would return to pick him up at 7:00 p.m. (V28, R1991). Later that night, Cannon tried calling Graham repeatedly on Craddock's phone. (V28, R1992; V29, R2202-03, State Exh. 25). Graham did not take the calls and told Craddock about the plan to murder the Telford Lane people. (V28, R2013; V29, R2085). Victorino told Graham they were going to kill the Telford Lane people at 10:00 p.m. that night. (V28, R1993, 2013). Graham and Craddock went to another friend's house, Nate June, and played video games. Graham spent the night at Craddock's. The next morning, Craddock's mother called and told Graham and Craddock that six people were found dead in Deltona. (V28, R1994, 2016). Graham and Craddock drove to the Telford Lane home. (V28, R1994, 1996, 2015; V29, R2085).

After the murders, Graham was afraid for himself and his friends. (V28, R1995; V29, R2043, 2089). He went to Salas' grandmother's house to retrieve clothing he had left. (V28,

R1995). Victorino, Hunter, Salas and Cannon showed up but they did not discuss the murders. (V28, R1996). Graham noticed Victorino's personal items were in Cannon's truck. He knew Victorino wanted his items from the Telford home. (V28, R1996-97; V29, 2045, 2087). A friend talked to Graham about the murders and she called police. (V28, R1997, 2019).

Deputy John McDonald responded to a "suspicious activity" call[8] at 1590 Providence Boulevard, Deltona, on July 30, 2004. (V29, R2093-94). McDonald and Deputy Earney found Amanda Francis and Brandon Sheets at the property. Francis told McDonald that Troy Victorino had given her permission to be there. (V29, R2099). Sheets said Joshua Spencer[9] gave him permission to be there. (V29, R2099). The deputies secured Francis and Sheets until they knew "exactly what was going on." (V29, R2094-95). McDonald called the owner of the home, Norma Reidy, who lived in Maine. Reidy told McDonald that no one had permission to be inside the home, except her granddaughter, Erin Belanger. (V29, R2095-96). McDonald advised Reidy that there was no evidence of a break-in. (V29, R2096). Deputy McDonald called Belanger and advised her to inspect the home to ensure that nothing had been stolen or damaged. (V29, R2096-97). McDonald noticed bedding in

[8] Erin Belanger had placed the call. (V29, R2097).

[9] Joshua Spencer was Norma Reidy's grandson (Erin Belanger's cousin). (V29, R2099, 2101, 2130).

the screened-in area of the home, and other items, as if someone had been living there. (V29, R2098, 2101). McDonald advised Belanger to find out who owned the property and return it, or get rid of it. (V29, R2103).

Deputy Sierstorpff met Belanger and Roman at the Providence Boulevard home on July 31, 2004. (V29, R2105). Belanger reported items stolen[10] from the residence. (V29, R2106). Sierstorpff observed a large amount of clothing and shoes strewn about the home. (V29, R2106). Papers bearing Victorino's name were found in a box. Sierstorpff did not know if Victorino had permission to be inside the home. He was not aware of a complaint made by Victorino that his personal items had been stolen. (V29, R2107). Belanger knew Victorino had been staying in her grandmother's home. (V29, R2109).

In the early morning hours of August 1, Deputy McDonald met Victorino at Sky Street, in Deltona. Victorino reported that his personal belongings had been stolen from the Providence house. (V29, R2136, 2138, 2139). McDonald told Victorino to make a list of the stolen items. Victorino did not actually see the items missing or stolen. (V29, R2140). Victorino became angry, and told McDonald, "Don't worry about it, I'll take care of this myself." (V29, R2141). McDonald instructed Victorino to contact

[10] Belanger reported a DVD/VCR player and CD player were stolen. (V29, R2106).

Belanger in order for him to inventory what had been taken from the Providence home. (V29, R2146).

Kimberly Jenkins, co-worker of five of the victims,[11] was Gleason's girlfriend. (V29, R2114-15, 2116). Jenkins met Victorino at the Telford home on July 31, 2004. (V29, R2118). Jenkins was visiting when Victorino and Amanda Francis arrived to speak with Erin Belanger. (V29, R2119, 2123). Jenkins heard Victorino tell Belanger he wanted his property back. He was "sort of threatening if he didn't get his stuff back that he would do any means to get it back." At that time, only some of Victorino's belongings[12] were at the Telford home. Belanger did not give them to him then "out of fear." (V29, R2124). Some of Victorino's other personal items had been dispersed[13] as police told them, "take whatever we wanted from the Providence house." (V29, R2125-26). Jenkins, along with Belanger, Roman, and Rebecca Ortiz, took Victorino's belongings out of the Providence house. (V29, R2130). Belanger knew Victorino through her cousin, Joshua Spencer. (V29, R2130-31). Belanger did not like Spencer

[11] Jenkins said Belanger and Roman were a couple as were Nathan and Vega. Gleason was temporarily living at the Telford home until he moved into apartment. Gonzales did not live at the Telford home. (V29, R2117, 2118).

[12] Jenkins tried on some clothing. Roman and Gonzalez played with Victorino's "X Box" computer game. (V29, R2129-30).

[13] "Abi G" had personal items that belonged to Victorino. (V29, R2126).

allowing people to live in their grandmother's house. (V29, R2133). Gleason told Belanger, "better to be safe than sorry" and to return Victorino's items to him. (V29, R2134). Belanger agreed to meet Victorino the next day at 6:00 p.m. at the Providence Boulevard home. (V29, R2120-21). Victorino failed to meet Belanger the next day. (V29, R2132).

Norma Reidy, Erin Belanger's grandmother, spent the winters in her Providence Boulevard home. (V29, R2153-54). No one had her permission to live there, including Belanger and Joshua Spencer, her grandchildren. Belanger looked after the home for her. (V29, R2154-55). Reidy had previously given a house key to Spencer when he lived with her. She thought Spencer had returned the house keys to her. (V29, 2155). Reidy met Victorino through her grandson. (V29, R2157). After Reidy returned to Maine in the summer of 2004, Spencer moved in with Belanger for a short time. (V29, R2158). Reidy was not aware that Spencer had given Victorino permission to live in her Deltona home. (V29, R2161).

Kristopher Craddock met Victorino a few nights before the murders. (V29, R2163, 2164, 2203). Craddock, Graham, Salas and Cannon went to the park to fight some people who beat up Cannon and Salas. (V29, R2169-70, 2214). Craddock followed Cannon's vehicle to Victorino's house. Victorino got into Cannon's vehicle and the group went to the park. (V29, R2170-71, 2172, 2204). Victorino directed the others where to hide. The other

group never showed. (V29, R2172-73). Craddock saw Victorino hand Cannon a gun. (V29, R2173, 2214). Victorino told Cannon, "If he shot it, make sure he picked up the shells." Craddock left the park shortly thereafter. (V29, R2174, 2204).

Brandon Graham went to Craddock's house on the night of August 5, 2004. (V29, R2176, 2205). Cannon called Craddock's cell phone and asked for Graham. Craddock heard Cannon tell Graham, "Don't tell Craddock what we're gonna do." Graham told Craddock what was planned. (V29, R2178, 2205-06). Later that night, Craddock and Graham went to Nate June's house. (V29, R2179). Cannon called Craddock's phone repeatedly to speak with Graham. (V29, R2202-03, State Exh. 25). Craddock told Cannon that Graham was not with him. (V29, R2180, 2209). Craddock and Graham spent the night at Craddock's house. Craddock's mother called the next morning and informed them of the murders. Craddock, Graham and Brandon Newberry drove by the Telford home. (V29, R2182, 2210). Graham went to Salas' grandmother's house (where he had been living) to retrieve his clothes.[14] Victorino, Hunter, Salas, and Cannon were outside the house. Cannon asked Craddock if he had heard about the murders. (V29, R2183). Craddock did not see any of the defendants after that day. (V29, R2186).

[14] After the murders, Graham stayed at the Newberry's home. (V29, R2183).

Deborah Newberry testified Graham stayed at her home for a few days in August 2004. (V30, R2244-45). On the evening of August 5, Graham and her sons Chad and Brandon, returned home at 11:00 p.m. She heard about the murders the next day. (V30, R2248).

Newberry and Graham spoke about the murders on the morning of August 8. Graham told her he had lied to her and actually was with the defendants when they planned the murders. (V30, R2252, 2257, 2261). Newberry immediately called the police. (V30, R2249, 2253, 2260). Graham gave a statement to police. (V30, R2250-51).

Jamie Richards, 911 operator, received a 911 call[15] at 1:15 a.m. on August 1, 2004, from Belanger. (V30, R2263-64, 2266, State Exh. 26). Belanger told Richards "a bunch of girls" were inside her home yelling and would not leave. (V32, R2270-71). Belanger thought the girls were there because of an earlier problem at her grandmother's home. (V32, R2273). Belanger said she did not have any weapons except for a baseball bat. (V30, R2279). Belanger did not want to meet Victorino the following night, "if there's going to be problems like this." (V30, R2281). Belanger said the people living in her grandmother's

[15] The 911 call was published for the jury. (V30, R2270-2286).

house without permission claimed her cousin had given them a key. (V30, R2283).

Thomas McDonnell, 911 operator, received a call[16] at 3:41 a.m. on August 1, 2004, from Belanger. Belanger reported "the same people just came back ... banging on the door." A deputy was dispatched to the house. (V30, R2290, 2292, 2296, 2299, 2307, State Exh. 27).

Beverly Irving, assistant manager, 7-Eleven, Providence Boulevard store, Deltona, ensures that security store tapes are changed daily. Irving was working on August 5, 2004. The store's security videotape was entered into evidence. (V30, R2309-10, 2311, 2323, State Exh. 28).

William Macaluso, loss prevention specialist for 7-11 Corporation, verified that a maintenance check was performed on the security camera at the Providence Boulevard store, Deltona, on August 2, 2004. (V30, R2329-30). A CD of the tape for August 5, 2004, was published for the jury. (V30, R2334-35, State Exh. 29).

Jane Colalillo, video producer, created still photographs of customers' faces and footwear from the 7-Eleven surveillance tape dated August 5, 2004. (V30, R2336-37, State Exh. 30).

[16] The 911 call was published for the jury. (V30, R2296-2299; 2308).

Richard Graves, Sheriff's Office, processed the crime scene. (V31, R2361-62). He, along with Investigator Charles Dowell and FDLE technician Stacy Colton, obtained measurements, prepared a crime scene sketch, identified items of evidentiary value, took photographs and collected evidence. (V31, R2365). The front door had been forcibly entered. The dead bolt had been in the locked position. The door jamb was broken, and a shoe print was on the front door. (V31, R2365, State Exh. 4).

Graves attended the autopsies of the six victims. (V31, R2368). Known hair and blood standards were collected from each victim.[17] Graves obtained a DNA sample from Victorino. (V31, R2384, State Exh. 37).

Graves processed a crime scene at 1001 Ft. Smith Boulevard, Deltona, Victorino and Hunter's home, on August 8, 2004. (V31, R2391). Photographs of the residence were entered into evidence. (V31, R2396, State Exh. 39). Evidence collected at the residence included: Victorino's duffle bag; a pair of size 12 Lugz boots (V31, R2398-99, 2401-02, 2420, 2421 State Exh. 40); and a pair of size 10 ½ Nike tennis shoes and shoelaces (V31, R2403-04, 2410, 2411, 2421, State Exh. 41; 42; 43).[18]

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[17] V31, R2370, 2375, State Exh. 31; V31, R2379, State Exh. 32; V31, R2380, State Exh. 33; V31, R2381, State Exh. 34; V31, R2383, State Exh. 35; V31, R2384, State Exh. 36.

[18] A poster board containing close-up photographs of the shoes and laces was admitted. (V31, R2413-14, State Exh. 44).

Investigator Charles Dowell, crime scene coordinator, videotaped the crime scene at Telford Lane and processed Cannon's Ford Expedition.[19] (V31, R2443, 2445, 2446, 2448). A Lugz boot box, located in Cannon's Expedition, contained papers belonging to Victorino. (V31, R2452-53). Victorino's prints were located on items found inside the box. (V33, R2642).

Lieutenant Albert Pagliari, Sheriff's Office, processed various crime scenes in relation to the Telford Lane murders. (V31, R2467). He photographed, vacuumed, processed, and collected evidence from Cannon's Expedition. (V31, R2468). Pagliari processed sunglasses found in the Expedition. (V31, R2469, State Exh. 49). A latent fingerprint card containing Roman's prints was entered into evidence. (V31, R2473, State Exh. 50). Prints found on the sunglasses belonged to Roman. (V33, R2650-51). Pagliari assisted in processing Victorino's Fort Smith Boulevard home. (V36, R3124). Pagliari did not observe any blood stains on shoes located at Victorino's home. (V36, R3126). He did not get a close look at any of the shoes. (V36, R3127).

Investigator David Dewees, processed the crime scene at 1590 Providence Boulevard, Deltona. (V31, R2475). Dewees noted a

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[19] Items collected from the Expedition included a Lugz boot box (State Exh. 47); pants with Burger King label (State Exh. 48); sunglasses (State Exh. 49). (V31, R2456, 2463, 2469).

forced entry to the broken front door, with a shoe print on the door. (V31, R2476). Dewees collected baseball bats located in a retention pond in Debary. (V31, R2481).

Investigator Lawrence Horzepa, Sheriff's Office, was the lead investigator for this case. (V32, R2510-11, 2512). On August 6, after interviewing several witnesses, Victorino was developed as a suspect. (V32, R2515). Victorino was located at his home on August 7. (V32, R2516). Jerone Hunter, co-defendant, was found with Victorino. Hunter voluntarily went with deputies and spoke with investigators. (V32, R2517). Initially, Hunter was not a suspect. (V32, R2518, 2556). Hunter became nervous, "literally crying and shaking" and gave inconsistent answers. Hunter was read his *Miranda*[20] rights and he signed a waiver form. (V32, R2519, 2521, State Exh. 51). Hunter admitted his involvement and said, "[I]t wasn't supposed to happen like that." (V32, R2555, 2559).

Hunter told Horzepa he was living at 1001 Ft. Smith Boulevard, Deltona. (V32, R2523). He was involved in the incident that occurred on July 31 at the Telford home. He, along with three girls, entered the home, looking for personal belongings and a person named "Abi G." Hunter claimed his belongings had been removed from the Providence Boulevard home. (V32, R2523). Hunter returned to the Telford home the night of

[20] *Miranda v. Arizona*, 384 U.S. 436 (1966).

the murders “because they had his stuff, and that it had been stolen out of the Providence house. He was sick about his stuff and he ... wanted to get it back.” (V32, R2524). Hunter arrived in Cannon’s vehicle after midnight. (V32, R2524). He entered the home through the front door carrying a baseball bat. (V32, R2524-26). Hunter saw Gleason sitting in the recliner. (V32, R24526, 2529). He screamed at Gleason, “Where’s my stuff?” Gleason responded, “I don’t know.” Hunter thought Gleason was lying. He hit Gleason repeatedly with the bat. (V32, R2526-27; 3392). Roberto Gonzales ran to another room. (V32, R2529). Hunter found Gonzales in a back bedroom. Gonzalez swung a stick at him. (V32, R2530, 2556). He hit Gonzales repeatedly with the bat. (V32, R2530). Hunter could not recall how many times he hit Gonzales. “He was just swinging.” (V32, R2530). Hunter looked around the house for his personal items. He did not hit anyone else inside the home. Hunter left in Cannon’s vehicle. (V32, R2532).

There was blood everywhere at the Telford home. Hunter told Horzepa he had not gotten blood on himself but washed his clothes at the Fort Smith house. (V32, R2532-33). Hunter had been wearing a black shirt, black shorts, and blue and white Nike tennis shoes. (V32, R2533).

Horzepa interviewed co-defendant Salas in the early hours on August 8. (V32, R2534). Salas and Cannon had been stopped in

Cannon's vehicle at 10:30 p.m. on August 7. (V32, R2535). After reading Salas his *Miranda* rights, Salas told Horzepa he had been living with Cannon for a few weeks. (V32, R2535, 2539, 2558). Most of his clothing was still at his grandmother's house. (V32, R2540). Salas, armed with a baseball bat, went to the Telford home in Cannon's vehicle the night of August 6, 2004. (V32, R2541). Salas was wearing a blue shirt, Fat Albert jeans, FUBU boots, and a beanie. (V32, R3541). Salas entered the home armed with the bat. He hit "a black dude" (Roberto Gonzalez) located in a back bedroom. (V32, R2542). He repeatedly hit the victim in the legs, arms, back, and side. (V32, R2543). Salas said he did not hit anybody in the head. (V32, R2561). Gonzalez was the only person Salas admitted hitting. (V32, R2560). Salas told Horzepa where he had discarded his bat. (V32, R2544, 2566). Law enforcement located four bats in the area Salas described. (V32, R2545). Salas left the pants he was wearing the night of the murders at the scene where the bats were recovered. (V32, R2550).

Deputy Greg Yackel, Sheriff's Office diver,[21] along with his dive team, searched a retention pond in Debary, Florida, and recovered four baseball bats. (V32, R2570, 2571, 2573).

[21] Deputy Yackel's dive team included Officer Pat Casey, Captain Petersohn, and Detective Proctor. (V32, R2571).

Sergeant Brody Hughes, Sheriff's Office, executed a stop on Cannon's vehicle on August 7, 2004. (V32, R2580, 2581). Both Cannon and Salas were transported to the Sheriff's Operations Center. (V32, R2582).

Investigator James Day, Sheriff's Office, secured Cannon's Ford Expedition and had it towed to the sheriff's evidence compound. (V32, R2584-85).

Kathleen Rebholtz, forensic technician, FDLE, recovers trace evidence from items of clothing and solid objects. (V32, R2587). Rebholtz examined or "swept" items of clothing[22] recovered from Cannon's Expedition. (V32, R2592). She prepared pharmaceutical folds from the debris scrapings. ((V32, R2593, 2595, State Exh. 55). She examined the four baseball bats and found bat number 1, item "Q1," contained hair, fibers, and solid material. (V32, 2596, R2601). State ID "OOO" contained trace material collected from bats "QI" and "Q2." (V32, R2602).

Ted Berman, crime laboratory analyst, FDLE, examined glass fragments (Q9) retrieved from State Exhibit 55. (V32, R2604, 2605, 2609, 2623). The Q9 fragments matched a broken lamp found in bedroom 2 of the Telford home. (V32, R2623).

[22] The clothing consisted of two black T-shirts, a pair of shorts, a pair of jeans, a pair of boxer briefs, a stocking cap, one sock, and five shoes. (V32, R2592, 2624).

Jennie Ahern, FDLE senior crime laboratory analyst, examined and compared footwear impressions with various sets of shoes.[23] A footwear impression, located on a pay stub belonging to Erin Belanger and found underneath her body (V27, R1869, State Exhibit 12) matched[24] that of a Lugz left boot. (V33, R2670, 2677-78, 2679-80, State Exh. 40). The same Lugz left boot as well as a Lugz right boot, "most likely" made impressions on a bed sheet (V27, R1887, State Exhibit 18) found in Belanger's bedroom. (V33, R2693). A shoe impression left on the front door of the Telford home, "could have" been made by the right Lugz boot (V31, R2399-2401, State Exhibit 40; V33, R2705). All other footwear was eliminated as being responsible for the shoe impression on the front door. (V33, R2709). Footwear impressions found on playing cards located in the Telford home "could have" been made by the Lugz boots. (V33, R2710). In addition, State Exhibit 41, the Nike athletic shoes, (V31, R2403-05) "could have" left a shoe impression found on another playing card. (V33, R2712). State Exhibit 30, a poster board of still photos from 7-Eleven, showed Victorino wearing Lugz boots. (See, V30,

[23] Ahern received two pair of shoes plus one right and one left one, in submission 4; 37 pair, plus two right and three left shoes in submission 15; and 12 biofoam test impressions of 12 shoes in submission 33. (V33, R2678).

[24] Ahern explained the various levels of identifying/matching impressions: eliminate, similar, could have, most likely, and identification. (V33, R2725).

R2347). Ahern compared all of the boots collected with the shoe impressions. (V33, R2733).

Emily Booth Varan, FDLE crime laboratory analyst, prepared DNA profiles from known standards from all six victims and a DNA profile from known standards from Victorino.[25] (V34, R2777-78, State Exh. 72). Varan performed various types[26] of DNA testing on the Lugz boots. (V34, R2784). Testing revealed Victorino wore of the boots. (V34, R2786, 2790). Further DNA testing revealed Belanger's, Vega's, Roman's, and Gonzalez' blood on the boots. (V34, R2792, 2794, 2797, 2798, 2802, 2804). Varan examined four baseball bats.[27] (V34, R2807). Gonzalez "could be" a contributor to the blood located on bat Q1. (V34, R2810, 2812). Belanger, Roman and Gonzalez could not be excluded as contributors of the blood located on bat Q2.[28] (V34, R2813, 2815, 2816-17). Bats Q3 and Q4, found in water, did not reveal any blood stains. (V34, R2, 2817-18, 2819, 2821, 2865). The water would have diluted any potential bloods stains. (V34, R2821). DNA testing on the blood located on a knife blade matched Jonathon Gleason. (V34, R2823,

[25] V34, R2744, 2765-67, State Exh. 66; 2768-69, State Exh. 67; 2769-70, State Exh. 68; 2771-72, State Exh. 69; 2773-74, State. Exh. 70; 2775-76, State Exh. 71.

[26] DNA tests performed included wearer DNA testing. (V34, R2784).

[27] Two of the four bats contained blood. (V34, R2865).

[28] Bats Q1 and Q2 contained degraded DNA samples. (V34, R2822).

2824). A mixture containing the blood of Anthony Vega and Roberto Gonzalez was found on the knife blade. (V34, R2824). A knife blade handle contained a mixture of DNA that belonged to Anthony Vega, Jonathon Gleason, and Roberto Gonzalez. (V34, R2824, 2826). State Exhibit 4, blue and white Nike tennis shoes, "smelled really clean" as if "they had been through the wash," and contained no "wearer" DNA. (V34, R2826, 2828-29, 2861). However, the Nike shoes did contain DNA on the tongue[29] of the shoe that matched Anthony Vega. (V34, R2869, 2831). Michelle Nathan could not be excluded as a potential contributor. (V34, R2834, 2835-36). The bottom of one of the Nike shoes contained the DNA of Roberto Gonzalez. (V34, R2835-36). Mitochondrial DNA was performed[30] on a hair sample retrieved from one of the bats. (V34, R2838). The hair sample matched the DNA of Michelle Nathan. (V35, R2888).

Megan Clement, LabCorp employee, received known DNA samples from the victims and defendants. (V35, R2875, 2886). LabCorp tested a shoelace, State Exhibit 43, (V34, R2837-38) which contained a mixture of mitochondrial DNA of co-defendant Jerone Hunter and victim Roberto Gonzalez. (V35, R2891, 2892, 2902).

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[29] Ms. Varan opined that blood was on the tongue of the shoe, even though the shoes appeared to have been washed, because shoes "float" to the top in a washing machine, as the machine agitates. Therefore, the blood stains, although diluted, were not subjected to the soap in the water. (V34, R2862).

[30] LabCorp conducted the mitochondrial DNA analysis. (V34, R2838).

Miranda Torres, an acquaintance of Michael Salas and Robert Cannon, was a neighbor of Troy Victorino and Jerone Hunter for a short time. (V35, R2920). In the summer of 2004, Victorino told her he had moved into a friend's house, "Josh's grandparents," on Providence Boulevard. (V35, R2923-24). Victorino and Hunter told her about their belongings being stolen by "Erin." "They were upset and mad." (V35, R2924). At midnight, August 5, 2004, Torres saw the defendants near her house. (V35, R2924-25). Cannon told her, "[W]e have to handle something real quick." (V35, R2929). A few minutes later, Torres noticed that Cannon's vehicle was gone as were Victorino and his friends. (V35, R2930). The next afternoon, August 6, Salas, Hunter and Cannon came to her home to see her brother. (V35, R2931, 2937, 2938). Torres did not see the defendants again. (V35, R2932).

Dr. Thomas Beaver, medical examiner, performed the autopsies on the six victims. (V36, R2976, 2981).

The first autopsy was performed on Anthony Vega. (V36, R 2981). Vega's injuries consisted of blunt force trauma and sharp force injury. (V36, R2986). Vega's face was "all contusion" with an extensive amount of bruising. He had incised wounds on his neck. His face was deformed where the boney structure had been fractured. (V36, R3000, 3002). A laceration on his scalp was caused by an unidentifiable blunt instrument. (V36, R3004, 3007). There were contusions on his shoulder and left knee,

consistent with being dragged. (V36, R3004, 3013). Vega had defensive wounds on the back of his left hand. (V36, R3005-06). His skull was deformed and fragmented. (V36, R3007-08). A significant amount of blood located in the soft tissue areas of the head and skull indicated the injuries occurred before death. (V36, R3009). A forceful blow to the face caused Vega's skull to fracture - - bone fragments lacerated his brain, and there was a fracture at the base of the skull. (V36, R3010-11). The head injuries were consistent with being made by a baseball bat. (V36, R3012). The sharp force injuries to the neck were postmortem. (V36, R3000). Anthony Vega's death was caused by blunt force trauma to the head. (V36, R3011).

Jonathon Gleason had fractures to his face. There were contusions down the left side of his head to his neck. His face was deformed. (V36, R3017, 3022). Contusions from the right side of his face stretched downward into his neck. (V36, R3017). There was a cylindrical contusion on his chest and another on his arm. (V36, R3018, 3020). The width of the contusions indicated the weapon was consistent with a baseball bat. (V36, R3018, 3028). There were two stab wounds to his chest, and three stab wounds to his abdomen were inflicted postmortem. (V36, R3020). Gleason's skull was fractured. (V36, R3021). There were defensive injuries on his hands and arms. (V36, R3023-24, 3025). There were numerous blows to Gleason's head, neck, and face.

(V36, R3027-28). Gleason died as a result of a basilar skull fracture caused by blunt force trauma. (V36, R3026, 3028).

Roberto Gonzalez had large contusions on the right side of his face and chest. His skull was deformed and fractured. (V36, R3042, 3044). There were a number of stab wounds in the chest area and abdomen. (V36, R3042). Some of the stab wounds were postmortem. (V36, R3043). There were lacerations and contusions on the scalp. Some of his teeth were missing and his jaw was fractured. (V36, R3043). His injuries were consistent with being hit by a baseball bat. There were multiple blows to Gonzalez' head. (V36, R3045). There were huge gaps between the pieces of bones in his skull. Fragments of bone penetrated his brain and cranial cavity. (V36, R3046). The whole front portion of Gonzalez' skull was caved in along with fractures to the base of the skull. (V36, R3047). It was not possible to remove Gonzalez' brain intact, as it was "so lacerated ... it's ... fragments of tissue." (V36, R3047). Gonzalez died as a result of blunt force trauma to the head. (V36, R3048).

Michelle Nathan had two sharp force injuries to her neck. She had cylindrical contusions on her breast, right shoulder, and arm. There was no injury to her face or to the sides of her head. (V36, R3048-49, 3054). She had an abrasion on her knee. (V36, R3055). There were a number of lacerations to the back of her head, "gaping wounds." These injuries, made while she was

alive, were consistent with a baseball bat. (V36, R3055). There were defensive wounds on her hands and wrists. (V36, R3056). Incised and stab wounds on her neck were inflicted postmortem. (V36, R3057). Nathan died as a result of blunt force trauma to the head. (V36, R3058).

Francisco Roman had a contusion and deformity to the right side of his head. He had a fractured skull. (V36, R3059, 3062-63, 3064). These injuries were inflicted while he was still alive. (V36, R3064). There was a defensive wound to Roman's left hand. (V36, R3065). There were sharp force injuries which included incised wounds to his neck and a series of stab wounds to his chest. The stab wounds to his chest were inflicted postmortem. (V36, R3063). An incised wound, inflicted postmortem, cut across Roman's neck, through the jugular vein and carotid arteries. (V36, R3063-64). Bone fragments penetrated his brain. Roman had a basilar skull fracture. Blunt force trauma to the head was the cause of death. (V36, R3066).

The final autopsy was performed on Erin Belanger.[31] (V36, R3066). There were numerous injuries to her face and head. Her skull was deformed and her teeth were missing. Blunt force injuries were inflicted while she was alive. (V36, R3069). Blood seeped into her eyes as a result of the blows to her skull.

[31] Dr. Beaver testified, "We cleaned the body (Belanger's) up considerably." (V36, R3068).

(V36, R3070). There was a stab wound to her chest. (V36, R3070). An incised wound to her neck, inflicted postmortem, cut through the jugular vein and trachea. (V36, R3070-71). There was trauma to her genitalia. Belanger had lacerations in the wall of her vagina into the abdominal cavity. “All the way through the vagina and into the peritoneal cavity.” There were lacerations to the ligaments and tissues attached to the female organs. (V36, R3071-72). These injures were “like an impaled-type injury. It would be something inserted into the vagina, driven with force to tear through the wall of the vagina and into the peritoneal cavity.” Portions of Belanger’s brain protruded through the lacerations in her skull. There were some injuries to her hands. (V36, R3073). All of Belanger’s injuries were consistent with being inflicted by a baseball bat. (V36, R3072, 3074). Dr. Beaver could only remove Belanger’s brain in pieces due to the severity of her injuries. (V36, R3074).

Dr. Beaver could not determine a time interval between the blunt force trauma wounds and the infliction of stab/incised wounds. (V36, R3078). Most, but not all, of the stab wounds were inflicted post mortem. (V36, R3082). Dr. Beaver concluded all of the victims suffered pre-mortem, painful injuries consistent with being inflicted by a baseball bat. The injuries to their heads were the causes of death. (V36, R3090-3093).

Michelle Carter and Brandon Graham worked together at Little Caesar's Pizza in 2005. (V36, R3111). Graham told her he had knowledge about the murders in this case. (V36, R3113, 3115). Carter testified, "It was like boasting, like bragging." (V36, R3113). Graham told Carter he would kill her if she told anybody. (V36, R3113). Graham told Carter to "watch her back." (V36, R3114).

Troy Victorino testified on his own behalf and denied any involvement in the murders. (V37, R3315).

Jerone Hunter testified that he and Michael Salas were high school friends. (V38, R3343-44). Hunter met Robert Cannon and Troy Victorino one month prior to the murders. (V38, R3344-45). Hunter was friends with the "Abi twins," Abi M and Abi G. (V38, R3346). After Hunter was forced to move out of his family's home, he moved in with Victorino. (V38, R3347-48). After Victorino and Hunter were evicted, they moved into Norma Reidy's Providence Boulevard home. Josh Spencer assured them they had Reidy's permission. (V38, R3351). Victorino, Hunter, Spencer, and Brandon Sheets stayed at the home for a week. (V38, R3351-52). Hunter, Victorino, and Nicole Kogut[32] discovered their personal items were missing. (V38, R3352). Victorino and Hunter stayed with friends for one night, and then moved to the Melendez' home on Fort Smith Boulevard. (V38, R3353).

[32] Kogut was not living in the home. (V38, R3352).

Abi M informed Hunter that his brother, Abi G, and Francisco Roman were involved with Hunter and Victorino's missing items from the Providence home. (V38, R3356). Hunter assumed Josh Spencer had lied about having permission to stay at the Providence home. Hunter was angry about Abi G's involvement. (V38, R3405-06).

Hunter first saw bats the night he and the others went to the park to fight the other group. (V38, R3357). Salas showed Hunter Robert Cannon's gun when Hunter got into Cannon's vehicle. (V38, R3358). After the other group did not show at the park, Victorino returned to the Fort Smith home. (V38, R3359). Soon after, the other group drove by, and a chase ensued. Cannon gave Victorino the gun. (V38, R3360-61). Victorino shot one bullet at the other car. (V38, R3361; 3407). Shortly thereafter, Hunter and Victorino returned to the Fort Smith home. (V38, R3361). Victorino was angry, playing with the gun. (V38, R3362-63; 3429). Hunter believed Victorino was angry at him and might harm his family. (V38, R3408; 3429-30).

The next day, August 5, 2004, Cannon, Salas, and Graham came to the Fort Smith home and discussed getting Victorino's and Hunter's items returned. Victorino did not say anything about a plan to kill the Telford home residents nor did he explain the layout of the Telford home. (V38, R3365; 3408-09; 3308-09). Victorino asked them if they would help him get his

belongings, including two “Xboxes” and a “Gamecube” from the Telford home. They all agreed. (V38, R3367; 3405; 3409). They did not watch a movie called, Wonderland. (V38, R3365).

At approximately 11:00 p.m. on August 5, Victorino, Hunter, Cannon, and Salas stopped at a 7-Eleven and then proceeded to Papa Joe’s bar. (V38, R3373; 3432). Victorino said “he wanted to go up there and show his face.” They waited for him for fifteen minutes. (V38, R3371). They returned to the Fort Smith house for Victorino to get a hooded sweater. (V38, R3372-73). They drove to the Pennington Street area (where Victorino formerly lived) to steal a car. After an unsuccessful attempt, the four proceeded to the Telford Lane home. Hunter, Salas, and Cannon were all wearing masks. (V38, R3374). Victorino told Cannon to park around the corner. Victorino peeked in the windows to see where the victims were located. (V38, R3412-13). With one kick, Victorino kicked the front door open. (V38, R,3375; 3388-89). Hunter entered, followed by Salas, Cannon, and Victorino. (V38, R3375; 3426). Victorino went into the master bedroom alone. (V38, R3377, 3389; 3433). Hunter saw Jonathon Gleason sitting in the recliner. He hit Gleason repeatedly with a baseball bat, “probably a dozen [or] less” times. (V38, R3376; 3390-91; 3396; 3414; 3426). Hunter thought Gleason was lying and knew where their personal items were. (V38, R3394). Gleason was trying to get up. (V38, R3398). Victorino, came out of the master

bedroom,[33] and hit Gleason on the back of his head with a bat. (V38, R3376-77; 3394; 3433). Gleason did not move again. (V40, R3398). Hunter said, "[j]ust the expression on [Gleason's] face was like - - like he lost expression ..." Hunter knew Gleason and Nathan. (V38, R3377). Hunter did not hit any of the victims in the head. (V38, R3378).

Michael Salas chased Roberto Gonzalez into a back bedroom and hit him in the head. (V38, R3378; 3414). Gonzales was screaming he did not live there. (V38, R3415). Victorino told Hunter to "go help the others." (V38, R3399). Hunter found Robert Cannon in a back bedroom. Cannon and Anthony Vega were "swinging at each other." Hunter hit Anthony Vega on his shoulder. Vega dropped a stick he had been using against Cannon. (V38, R3379; 3416). Victorino entered and he and Vega spoke in Spanish. (V38, R3416). Vega's "eyes just got kind of wide. Troy pushed me and Cannon out of the way and he started hitting the guy." (V38, R3417). Salas called, "Yo, come help me" from Gonzales' room. (V38, R3417-18). Cannon joined Salas and helped beat Gonzales with his bat. (V38, R3418). Hunter remained where he was, looking in the closet for his belongings. (V38, R3419). Hunter did not see Michelle Nathan in another bedroom hiding near a closet. (V38, R3419). Victorino "was going through the

[33] Victorino was the only one of the four defendants that went into the master bedroom. (V38, R3377, 3378).

house." (V38, R3433). A short time later, Cannon, Salas, and Hunter exited the home. Hunter went back inside looking for Victorino. (V38, R3380). Victorino and Hunter exited the home. The four left. Victorino said he "needed to go back." (V38, R3381). They returned and Victorino got out of the vehicle. He had a bat and Salas' switchblade knife. Victorino was in the house for a few minutes while the others remained outside. (V38, R3382; 3419-20). Victorino exited, wiping blood off the knife with his sweatshirt. He gave the knife to Salas and told him, "[w]ipe it off real good, clean it real good." (V38, R3383; 3440). Hunter did not use the knife at all. He did not stab or beat Michelle Nathan. (V38, R3422; 3434). He did not stab or slit anyone's throat. (V38, R3435).

Hunter and Victorino returned to the Fort Smith home where Hunter washed his clothes and his blue and white Nike shoes.[34] (V38, R3403; 3436). He was arrested the next day.[35] (V38, R3383; 3394).

Michael Salas, living with Robert Cannon in August 2004, met Troy Victorino for the first time on July 31. (V38, R3443, 3446). Salas knew Hunter in high school. (V38, R3446). On July

[34] Hunter said the 10 ½ size Nike sneakers and shoelaces (State exhibits 41, 42, 43) collected at Hunter's and Victorino's home were not his. (V38, R3385, 3404).

[35] At the time of his arrest, Hunter was wearing size 9 ½ shoes. (V38, R3384).

31, Salas, along with Cannon, Hunter, Victorino and some friends, drove to the Telford Lane home to retrieve personal items. (V38, R3449-50). Salas did not have any items stolen nor did he keep any at the Providence address. (V38, R3452). Salas did not enter the home on July 31. The girls stormed in and out of the house. (V38, R3454, 3455-56). Francisco Roman stepped outside with a baseball bat. (V38, R3456). Roman told the girls "to get out of my house, I don't want no problems." Roman called police. (V38, R3457, 3458). They all left in Cannon's Expedition. (V38, R3458). A few nights later, Salas and Cannon had an altercation at the local skating rink. (V38, R3462-65). Following that, Salas, Cannon, Hunter and Victorino went to the local park to fight the group that beat Cannon and Salas. (V38, R3477-78). The other group never showed. Salas and Cannon dropped Victorino and Hunter off at the Fort Smith home. (V38, R3482). Shortly thereafter, the other group drove by. Salas, Hunter, Victorino and Cannon drove after them. Victorino fired a shot at the other car. (V38, R3482-83; 3595-96). As the other group got away, Victorino and Hunter returned home. (V38, R3484). Victorino called Salas and Cannon to borrow Cannon's gun. Over Salas' objection, Salas and Cannon brought the gun to Hunter. (V38, R3485-86; V39, 3606-07). The gun was returned to Cannon on August 5. (V39, R3492).

On the afternoon of August 5, Salas, Cannon, and Graham went to Victorino's and Hunter's home. Victorino told the others he wanted his items returned from the Providence house. (V39, R3492-93; 3567). Victorino mentioned a movie where "people storm the house and beat the people inside the house with poles." (V39, R3493; 3567). Victorino said, "[I]f I have a group of niggas, I'll do that." (V39, R3568). Cannon and Salas agreed to help Victorino. Salas believed Victorino was threatening him. (V39, R3608). Graham "hesitated a little bit" but agreed. (V39, R3495).[36] The five men went looking for bullets for Cannon's gun. (V39, R3498; 3572). When Victorino was not around, Brandon Graham told Salas he did not want to go with the others to the Telford home. (V39, R3498-99). Graham went to Kris Craddock's house. (V39, R3500; 3574).

On the evening of August 5, 2004, Salas and Cannon picked up Victorino and Hunter. Salas said, "Jerone, he was all excited. Mr. Victorino, he was a lot more angry, excited." (V39, R3505). Prior to going to Papa Joe's bar, the four men proceeded to the Providence Boulevard home and broke in. (V39, R3560; 3577; 3579). Victorino said he wanted to retrieve some items. Victorino kicked the door in; Salas, Hunter, Cannon and Victorino entered. (V39, R3561-62). The four proceeded to Papa

[36] At this point, Victorino mentioned he had to go see his probation officer in the afternoon. (V39, R3497).

Joe's bar around midnight. "Troy said he had to make an appearance." (V39, R3507-08; 3562).

After stopping by the bar, they returned to the Fort Smith home for Victorino to get a sweater. Victorino was wearing his Lugz boots. (V39, R3508-09; 3580). The four tried to steal a car where Victorino's former home was located. (V39, R3509). After an unsuccessful attempt, Salas, Victorino, Hunter, and Cannon drove to the Telford home. (V39, R3511-12).

Victorino directed Cannon to park the vehicle around the corner. As the four exited the vehicle, Victorino gave them a baseball bat.[37] Victorino was "mad." He told the others, "When I come out, **nobody is going to be survivors.**" (V39, R3513; 3568; 3583). The four walked to the Telford house. Victorino went to the back of the house. (V39, R3585-87). He returned and told the others there were two people sitting in the living room. Victorino cut the screen on the locked door and propped it open. (V39, R3515). He directed where they all should go. (V39, R3612). He told Hunter "to get the dude sitting in the recliner." Victorino was going into the first room on the right-hand side. He told Cannon to go to the back bedroom on the left-hand side. Salas and Cannon told Victorino they did not want to go through with this plan. (V39, R3515; 3570). Victorino told

[37] Salas said Cannon's friends, "Tito" and "Josh" put the bats in the back of the vehicle. (V39, R3628).

them, “[I]f you leave you’re just like these people.” Salas believed Victorino was threatening him. (V39, R3516; 3570). Victorino counted to three and kicked the door in. (V39, R3517). Victorino was wearing the Lugz boots. (V39, R3518). Victorino entered first and went directly into the master bedroom. Hunter, behind Victorino, was followed by Salas and Cannon. As Salas entered, “I see Jerone swinging.” Victorino told Salas to go to the back bedroom. (V39, R3518-19). While Hunter was hitting Gleason with the baseball bat, Gonzales ran to the back bedroom. (V39, R3519-20). Salas went to the back bedroom. Gonzales came out of the dark and grabbed Salas around his waist. (V39, R3521). Gonzales was telling Salas he did not live there. Salas said, “[O]kay, I’m not going to do nothing, let me go.” (V39, R3522). Salas swung the bat and hit Gonzales in the back. Cannon assisted Salas and also hit Gonzales in the back and shoulders with his bat. (V39, R3522-23). Gonzales released Salas. Salas hit Gonzales on the arm and his side. (V39, R3523-24). Gonzales “was basically trying to back up, putting his hands up ... ” Salas hit him in the leg. Gonzales ran to a corner and squatted down. (V39, R3524). Salas and Cannon left the bedroom. Victorino, walking toward them, told Cannon, “[G]o, leave ... go back to the car.” Salas saw Gleason “already knocked out.” Hunter asked Salas if he killed Gonzales. Salas told him, “I’m not killing anybody.” Hunter went back into the bedroom and

starting hitting Gonzales in the head. (V39, R3524-25). Hunter "started hitting him and hitting him, and he wouldn't stop." Salas told Hunter to stop. Hunter told him, "[H]e's not dead, I got to kill him." Salas said Hunter struck Gonzales "around 20 to 30" times, "more than I can count." (V39, R3525-26). Victorino called to Salas from the master bedroom. Salas saw Francisco Roman on the bed. "I didn't know if he was dead or knocked out, but he's on the bed." (V39, R3526). Victorino was holding Belanger by her left foot, "[h]olding the bat in his right hand. She's halfway off the bed. He tells me, watch what I do to this bitch. That's when I turn and leave the house." (V39, R35126-27). Salas did not know if Belanger and Roman were dead or alive at that point. (V39, R3527; 3628). He saw Hunter grab a knife off the counter and put it to Gleason's neck. Salas did not know if he slit Gleason's throat. (V39, R3528). Salas exited the house and got in the Expedition with Cannon. Salas did not know there were six people in the house. (V39, R3528). He wanted to leave but Cannon said they had to wait for Victorino. (V39, R3530). When Hunter joined them a few minutes later, Hunter told them he found a girl in the closet. (V39, R3531). Hunter said she (Michelle Nathan) cried, "please don't kill me, please don't kill me." Hunter told her, "too late, bitch." She screamed as he stabbed her in the chest. He hit her repeatedly in the head,

"again and again." (V39, R3532).[38] Hunter went back into the house. Shortly thereafter, Victorino and Hunter joined them. Victorino put a box full of items in the back of Cannon's vehicle. (V39, R3533). As they left the scene, Hunter told Victorino he saw him kick open a door, and saw Vega drop a stick. Hunter saw Victorino hit Vega. Victorino told the other three that he stuck his bat into both Belanger and Roman. (V39, R3533). Salas did not see anyone being stabbed or cut. After leaving the Telford home, Hunter said he stabbed Michelle Nathan and hit her. Victorino asked, "Did you do what I said?" Hunter said he did. (V39, R3554). Within a few seconds, Victorino said they needed to go back, he had left his fingerprints. (V39, R3533). Victorino entered the home, returning with a plastic bag covered in blood. Victorino had blood on his shirt and shoes. (V39, R3534). He directed Cannon to drive to an apartment complex in Debary. Hunter told them to take off their shirts and pants. Salas said he had no blood on his clothing. Hunter was wearing a bluish-black shirt, shorts, and blue and white Nikes sneakers. Salas identified State Exhibit 41 as the sneakers

[38] During his interview with police, Salas told detectives Nathan was hiding under blankets in the closet. Hunter had gotten a knife from the kitchen which he used to stab Nathan. (V39, R3617).

Hunter was wearing that night. (V39, R3535).[39] Victorino cleaned up at a water spigot. He gave Salas a blue bandana and told him to wipe the four bats clean and throw them into the woods. (V39, R3536-37; 3621; 3626). Victorino directed them to a local Wal-mart. He had credit cards he had taken from the Telford home. Victorino told Salas to go inside with him. Victorino went to an ATM machine while Salas went to the bathroom. (V39, R3537-38). Victorino and Salas went to the video game section. Victorino told Salas to "[W]atch Cannon - - I don't think he trusted him." (V39, R3538). After they left the Telford home, Victorino told Salas and Cannon, "You all two keep your mouth shut. You call the man on me and I'm going to take you out of the game." (V39, R3538; 3600-01). As the four left Wal-Mart, Hunter and Victorino joked about killing Belanger's dog. (V39, R3539). Cannon and Salas dropped off Victorino and Hunter before returning home. (V39, R3539).

Salas said he and Cannon did not kill anyone at the Telford home. (V39, R3553; 3628). Salas did not hit anybody in the head nor did he help the others kill anybody. (V39, R3555; 3599).

In the afternoon of August 6, Salas, Victorino, Hunter, and Cannon drove to Sanford for Victorino "to get rid of some stuff" from the Telford home. (V39, R3543). The following day, August

[39] When Hunter got into the vehicle after the murders, he commented on the blood he saw on the laces and tongue of his sneakers. (V39, R3621).

7, Salas and Cannon attempted to drive by Victorino's home. The street was blocked off, police tape surrounded the house. (V39, R3546). Later that night, Salas and Cannon were arrested. (V39, R3547).

At booking, Salas said he did not know how he got caught. (V39, R3549). He told the booking officer he was not responsible for what happened. (V39, R3551).

On July 25, 2006, Hunter was found guilty of: Count I - Conspiracy to Commit Aggravated Battery, Murder, Armed Burglary of a Dwelling, and Tampering with Physical Evidence; Counts II through VII – First Degree Premeditated Murder and First Degree Felony Murder (all six victims); [40] Count X – abuse of a dead human body (Roberto Gonzalez); Count XI - abuse of a dead human body (Gleason); Count XII - abuse of a dead human body (Anthony Vega); and Count XIII – Armed Burglary of a Dwelling with a Weapon. (V42, R4021-22).

The penalty phase took place July 27-31, 2006. The State called ten witnesses. Family members and friends read statements to the jury. (V43, R4067-70; 4070-78, 4080-81; 4081-83; R4083-89; 4089-92; 4092-94; 4099-4105; 4108-09; 4110-12).

Dr. Alan Berns, M.D., specializes in forensic psychiatry. (V46, R4597). Dr. Berns conducted an evaluation of Hunter. He

[40] The victims were: Erin Belanger; Francisco Roman; Jonathon Gleason; Roberto Gonzalez; Michelle Nathan, and Anthony Vega.

reviewed medical and school records, police records, and interviewed family members. (V46, R4601-02). Medical records of Hunter's father indicated a diagnosis of paranoid schizophrenia. Medical records for his mother indicated depression, suicidal and homicidal tendencies. Dr. Berns opined that Hunter's mother may have been a schizophrenic. (V46, R4604). There was a significant history of mental illness in Hunter's family. (V46, R4603-05).

Dr. Berns determined Hunter suffers from depression and has a history of substance and alcohol abuse. (V46, R4606). Hunter was "cooperative. His speech was goal-directed, relevant, and coherent. He denied experiencing any hallucinations and delusional thoughts." (V46, R4606). He was not depressed during the evaluation. (V46, R4607). His memory for recent events was intact although he had difficulty with immediate recall. (V46, R4607).

After evaluating Hunter for a second time on April 8, 2006, Dr. Berns concluded it was "very likely" Hunter suffers from schizophrenia. (V46, R4607-08). Schizophrenia can impair impulse control. It can cause frontal lobe damage. Dr. Berns believes schizophrenia runs in families. (V46, R4609-10). Not all schizophrenics are violent. (V46, R4611). Hunter told Dr. Mings he has been hearing voices throughout his life. (V46, R4612). Hunter is "happy when he hears the voice of his deceased twin

brother; it sort of gives him comfort." (V46, R4612). He is not provoked to violence from these voices. (V46, R4619). There was no indication Hunter was faking schizophrenia. (V46, R4613). Schizophrenia is treatable with medication, and, therapy. (V46, R4613). Dr. Berns concluded Hunter suffers from paranoid schizophrenia. (V46, R4614).

Hunter told Dr. Berns he smoked marijuana the night of the murders. He admitted hitting the victims with a baseball bat. (V46, R4620, 4622). He told Dr. Berns he saw a girl hiding in the closet and that he walked away. (V46, R4623). Hunter denied slashing Nathan's throat. R4623). Hunter is not insane and knows right from wrong. (V46, R4624).

Joshua Blanton, corrections officer, Volusia County jail, said Hunter had not presented any sort of disciplinary problem while incarcerated. (V46, R4625-26).

Annette Washington, Hunter's mother, testified she suffered physical and mental abuse from Hunter's father. Although Hunter was not subjected to abuse, he saw his mother being abused. He was very young at the time. (V47, R4632, 4633).

Washington noticed Hunter started talking to himself when he was four years old. (V47, R4637). He was not violent with anyone. (V47, R4639). Washington had rules that her children were to abide by. (V47, R4641). Hunter was involved in sports and art. (V47, R4642). The family was very involved in church.

(V47, R4645). Hunter was told to move out in July 2004 since "he wasn't going to abide by the rules." (V47, R4647).

Elisha Hunter, Jerone's older brother, recalled Jerone talking to his deceased twin when he was a teenager. (V47, R4649-50, 4651). Their step-father, Dan Washington was a strict disciplinarian. (V47, R4653).

Johnny Lee Bowles, Hunter's aunt, said Elisha Washington, Sr. (Hunter's father) was violent with Hunter's mother. (V47, R4658-59). He beat her all the time when Hunter was young. (V47, R4659). Hunter "communicated" with his deceased brother. (V47, R4663).

Oletha Dames, Hunter's godmother, said Hunter was "a very peculiar young man." (V47, R4669; 4671). Hunter was very protective of his mother. (V47, R4672). Although Hunter's mother was physically abused by his father, Hunter was not. (V47, R4673). Hunter was a sensitive young man. He was very musical. (V47, R4674).

Dr. Eric Mings, Ph.D., a neuropsychologist, conducted an evaluation of Jerone Hunter.[41] (V47, R4675; 4680). Hunter was cooperative, although he had difficulty organizing his responses. (V47, R4685). Hunter admitted to a history of depression as well as hearing voices. Mings, said, "He appeared

[41] Dr. Mings met with Hunter on nine separate occasions. (V47, R4682).

to be generally a relatively bright individual ...” (V47, R4685). Dr. Mings administered a variety of neuropsychological tests which included the WAIS III; Wechsler Memory Scale III; measures of dexterity; MMPI (Minnesota Multiphasic Personality Inventory); and a malingering test. Hunter’s full scale IQ was 91, the lower end of the average range. (V47, R4687-88). Hunter’s performance on the Test of Memory and Malingering was “flawless.” (V47, R4690). However, Dr. Mings concluded Hunter was in the early stages of schizophrenia. (V47, R4694-95). Although Hunter appeared to be of average intelligence, he had difficulty expressing himself and appeared confused. (V47, R4698).

Annette Washington told Dr. Mings that Hunter’s father was “extremely violent, abusive, and a very strange individual.” (V47, R4702). Hunter’s father had been diagnosed as a schizophrenic. (V47, R4705). Dr. Mings testified that when a parent is a schizophrenic, “it significantly increases the likelihood of a schizophrenic condition in an offspring.” (V47, R4704). Hunter’s mother used to tell him he was “strange.” (V47, R4709).

Dr. Mings said Hunter “rationally knows right from wrong.” (V47, R4714). Further, most schizophrenics who are adequately treated do not have problems with the law. (V47, R4715).

Initially, Dr. Mings believed Hunter was not competent to proceed with his trial. (V47, R4718). Although he was able to understand the legal concepts, he was unable to effectively communicate with his attorneys. (V47, R4718-19). However, the court deemed Hunter competent. (V47, R4718). Hunter did not tell Dr. Mings the details regarding the murders. (V47, R4722).

Dr. Ruben Gur, Ph.D., neuropsychologist, testified via video conference. (V48, R4826-27). Dr. Gur reviewed Hunter's medical, family, and educational history. In addition, he administered neuropsychological testing which generated a computer "behavioral image" of Hunter's brain. (V48, R4832-33, Def. Exh. 3). Dr. Gur concluded Hunter suffers from a "schizophreniform" disorder that is not yet "full blown." (V48, R4850). Hunter exhibits both negative symptoms and positive symptoms of schizophrenia. Schizophrenia has five major negative symptoms and four major positive symptoms. (V48, R4851-52). Of the negative symptoms, Hunter exhibits the following: emotions in an inappropriate fashion; lack of evolution, the ability to plan or have a purpose in life; and, a deficit in olfactory functioning, the ability to smell. (V48, R4852). Positive symptoms include: hallucinations, delusions, bizarre behavior, and thought disorder. Of these, Hunter exhibits hallucinations and delusions. (V48, R4852-53). As a results of the clinical interview and a consultation with Dr. Mings, Dr. Gur suggested

further testing which included structural and functional neuroimaging. (V48, R4853). An MRI and a PET scan were conducted on Hunter. (V48, R4856). Hunter's MRI results indicated a "smaller than normal" brain and "[a] brain that we see in individuals who suffer from schizophrenia." (V48, 4860; 4861). The PET scans results showed 23 of 35 regions of Hunter's brain had "abnormal metabolism." (V48, R4861-62). Dr. Gur concluded that Hunter suffers from brain damage in the area that controls impulses and actions. (V48, R4868; 4649).

Dr. Gur said schizophrenics, on average, do not act violently and are susceptible to the dominating influence of another. (V48, R4868; 4870).

With the exception of a few instances, Hunter followed the rules in high school. (V48, R4877-78). Hunter was vague about the details of the murders. (V48, R4880). Dr. Gur did not see any indications that Hunter did not know right from wrong. (V48, R4881).

Dr. Lawrence Holder, M.D., has specialized in radiology and nuclear medicine for 38 years. (V48, R4887; 4899). After reviewing Hunter's PET scan and MRI results, Dr. Holder

concluded the PET scan and MRI were normal. (V48, R4909-10; 4912).[42]

On August 1, 2006, the jury returned four recommended sentences of death by a vote of ten to two for the murder of Gleason; a vote of nine to three for the murder of Roberto Gonzalez; a vote of ten to two for the murder of Michelle Nathan; and a vote of nine to three for the murder of Anthony Vega. The jury recommended a life sentence for the murders of Erin Belanger and Francisco Roman. (V49, R5059-61).

SUMMARY OF THE ARGUMENT

The "primacy doctrine" does not supply a basis for this Court to disregard its' settled precedent. The denial of the motions to suppress are supported by the evidence, are not clearly erroneous, and should not be disturbed. Denial of the motion for mistrial was not an abuse of discretion. The ineffectiveness of counsel claim is not properly raised on direct appeal. However, since Hunter has chosen this forum to litigate this claim, he should be barred from relitigating the ineffectiveness of counsel issue in a collateral proceeding. The verdict is supported by competent substantial evidence, and the motion for judgment of acquittal was properly denied. The denial of the motion to sever was not an abuse of discretion. The use

[42] The PET scan cannot be used to detect of diagnose a psychiatric disease such as schizophrenia (V48, R4901, 4911-4925).

of the phrase "and/or" in the guilt stage jury instructions does not constitute reversible error. Competent substantial evidence supports the trial court's finding of aggravating circumstances. Hunter's claim that this Court's proportionality review is "unconstitutional" was not preserved for review, and, in any event, has no legal basis. Hunter's death sentence is not "disproportionate" to that of co-defendant Salas, who was less culpable than Hunter. The "lethal injection" claims are not preserved for review, and, in any event, are foreclosed by binding precedent. The *Ring v. Arizona* claim is foreclosed by settled precedent. The "cumulative error" claim is insufficiently briefed, and, in any event, there is no error to "cumulate."

ARGUMENT

I. THE "PRIMACY DOCTRINE" CLAIM

On pages 22-23 of his brief, Hunter argues that this Court should apply the "doctrine of primacy to this case." This claim does not present any ground for relief, but rather is an unsupported claim that this Court should ignore not only the various statutory provisions which require conformance with Federal constitutional law but also case law that has been settled for many years for Hunter's perceived benefit. There is no basis for disturbing this Court's death penalty

jurisprudence, nor is there any basis on which to ignore precedent in deciding this case. This Court should decide the claims raised in Hunter's brief in accord with settled precedent.

II. THE DENIAL OF THE MOTION TO SUPPRESS STATEMENTS CLAIM

On pages 24-27 of his brief, Hunter argues that his statements to law enforcement should have been suppressed. Whether a defendant is "in custody" for *Miranda* purposes is a mixed question of law and fact which is reviewed *de novo*. *United States v. Wyatt,* 179 F.3d 532, 535 (7th Cir. 1999); *United States v. Fernandez-Ventura*, 132 F.3d 844, 846 (1st Cir. 1998), *citing Thompson v. Keohane*, 516 U.S. 99, 100-102 (1995). A trial court's order on a motion to suppress comes to the appellate court clothed with a presumption of correctness, and a reviewing court must interpret the evidence and reasonable inferences and deductions derived therefrom in the manner most favorable to sustaining the trial court's ruling. *San Martin v. State*, 717 So. 2d 462 (Fla. 1998). The trial court's ruling on the voluntariness of a confession should not be disturbed unless it is clearly erroneous. *Escobar v. State*, 699 So. 2d 988, 993-994 (Fla. 1997); *Davis v. State*, 594 So. 2d 264, 266 (Fla. 1992).

While Hunter does not acknowledge it, the trial court entered a lengthy order denying the motion to suppress. The trial court held:

> The fundamental question presented in this case involves whether or not the defendant was in custody at the time of the statement or admissions. In order to make that determination, it is the court's responsibility to examine, weigh and consider the totality of the circumstances. *Connor v. State*, 803 So.2d 598 (2001) A determination of whether someone is in custody is a mixed question of law and fact. The test is whether a reasonable person would believe his freedom of action was curtailed to a degree associated with an arrest. *Ramirez v. State*, 739 So.2d 568 (1999) *Ramirez, Id*., outlines four factors for the court to consider in its evaluation of that question. Those factors are (1) the manner in which the police summoned the person for questioning, (2) the purpose, place and manner of interrogation, (3) the extent to which a person is confronted with evidence of his guilt, and (4) whether the person was informed that he was free to leave the place of questioning.
>
> Addressing the four factors it is without question that Mr. Hunter was invited to give a voluntary statement. The testimony of the case manager and the detectives coupled with the testimony of Eunice Vega clearly indicate there is no dispute that he was asked to voluntarily come to the police station for questioning. At the beginning of the statement, Investigators Seymour and Horzepa indicated they were with the major case unit and then advised Mr. Hunter as follows:
>
> First of all, I want to tell you I appreciate you coming in. It is a voluntary statement. Okay? Any time you want to stop talking to us, you want to get up, you want to leave, you've got the right to do so. You understand that? You're not here under arrest. You're not here - - you know, like I said it is all voluntary. Okay?
>
> On Page 2 Mr. Hunter acknowledged the voluntariness of the statement. When the interview got more complicated

at page 65, Investigator Seymour at line 21 told Mr. Hunter that he could go home and they would give him a ride. Based on the findings of fact that this court has made, it is clear that Mr. Hunter was asked to come to the Operations Center as a voluntary statement so that he could provide information as a witness and not as a suspect in the case.

The second consideration is the purpose, place and manner of interrogation. The purpose of the interrogation appeared from the words used by the investigators was to find out what Mr. Hunter knew about Mr. Victorino and his involvement rather than any involvement of Mr. Hunter. When they reviewed the timeline and Mr. Hunter's explanation corresponded closely to that of Mr. Victorino, the officers became suspicious. Nonetheless the purpose of the interview was information gathering rather than any effort to use a voluntary statement as a subterfuge to seek admissions. The place of the interview was the Operations Center. While the Operations Center is some distance from Deltona, it is apparent that the police wanted to take advantage of the audio and video recording equipment so that all of the information could be preserved. That appears to be a good practice and allows the court to see actually what happened and whether actual intimidation or coercion is used.

The third question is the manner of interrogation. In this case two officers in an interview room had a conversation with Mr. Hunter. The first hour or so seems benign although he was confronted with inconsistencies in his statement and warnings by the officers concerning consequences of not being forthright. There was concern that the defendant on page 92, was told that he was, "about the dumbest young man I have ever met." He reports that hurt his feelings but at that point in time most of the information had been given. There was only one other question asked before he was given his *Miranda* warnings so it would be hard to understand how that statement could have elicited involuntary information.

The next consideration is the extent to which a person is confronted with evidence of his guilt. There is no question in this case that Mr. Hunter was confronted with inconsistencies in his statement and suggestions

that he was involved in these murders. Those suggestions came about only after his explanation of where he had been which led investigators to believe he knew more about the case than he was sharing with them. While they were firm with him they didn't rant or rave, they didn't place themselves in close proximity to him, they didn't deprive him of sleep or a chance to take a break or have liquids and there is a complete absence of any other conduct that is any more substantial than firmness in the conservation.

The last factor is whether the person is informed whether that he was free to leave the place of questioning. That issue has been discussed thoroughly and there is no question that he had the right to leave. He never exercised the right and never declined to answer the voluntary statements. In fact he continued to answer questions after he was given his *Miranda* rights and advised that he had a right to counsel.

Applying the facts to the law in this case, it is clear that the defense team raises appropriate concerns in its motion. On its face the defendant was put into a patrol car and led into a secure compound where he spent several hours being interrogated by seasoned and experienced officers. The defense team originally thought that the investigators had information about Mr. Hunter that apparently they did not have. His defense team seemed to think that he was the focus of the investigation and should have been *Mirandized* at the beginning of the conversation rather than later. In point of fact many of those concerns have dissipated in that they are unsupported by the evidence that was presented to the court at the time of the hearing. In reviewing the four factors set forth in *Ramirez,* it is clear to the court that the defendant was asked to voluntarily come to the police station to answer some questions. He voluntarily went and further testified to his lawyers question that he would have gone with his own transportation had that been available. It is apparent it was intended to be a voluntary statement. It is apparent from the review of the tapes and the transcript as well as the information presented that the purpose of the interview was to learn about Mr. Victorino and not necessarily about Mr. Hunter. The place selected was

> the Sheriffs Office so that the interview could be recorded and taped. The interrogation was quite civil during the early stages when the investigators were in the information gathering phase. It became a firmer interview when it became apparent that Mr. Hunter was not being honest with the officers and may have information that he wasn't revealing or, for that matter, may have been involved. There is no question that he was confronted with some evidence but that was not a feature of the interview. The confrontation about him being the dumbest young man they had seen took place virtually at the same time he was *Mirandized.* Only one question preceded the *Miranda* warnings so it appears to the court that that feature is not a factor in this analysis and again there is no doubt on the facts of this case that it was a voluntary statement.
>
> The court finds the defendant's entire statement to be free and voluntary. The court having considered the facts in this case, having made appropriate findings based on the presentation and the weighing of the evidence and the credibility of the parties, having heard from the defendant, having weighed his credibility and being otherwise fully advised in the premises, the court has concluded that the facts applied to the appropriate law in this case require that the motion be denied.

(V7, R1259–1263).

Those findings are presumptively correct, and Hunter has done nothing to demonstrate that they are clearly erroneous. There is no basis for relief.

III. THE SUPPRESSION OF PHYSICAL EVIDENCE

On pages 27-29 of his brief, Hunter argues that physical evidence seized by law enforcement should have been suppressed. Like the previous claim, this issue is wholly fact-bound. Whether a search is by valid consent is a factual issue that is

reviewed by the appellate courts for clear error. *Davis v. State*, 594 So. 2d 264, 266 (Fla. 1992); *United States v. Zapata*, 180 F.3d 1237, 1240 (11th Cir. 1999).

What Hunter has omitted from his brief is that the search at issue was conducted pursuant to consent obtained from the homeowner.[43] The trial court, in denying the motion to suppress, made the following findings:

> On August 7, 2004, Rafael Melendez executed a voluntary consent to search giving the police permission to search the premises. The court's understanding is that Henry Melendez and Rafael Melendez were the owners or joint occupants of the property located at 1001 Fort Smith Boulevard in Deltona and that Mr. Hunter and Mr. Victorino were guests in their home, having stayed there between one day and one week by stipulation and at least several days by testimony. The next day an application for a search warrant was presented to Judge Foxman and a search warrant was issued. Thereafter a search of the premises was done which discovered the shoes and shoelaces. There is no evidence that the consent had ever been withdrawn.
>
> The parties suggest that because the search warrant superseded the consent that somehow the police did not have authority to perform the search pursuant to the consent. There is no evidence that indicates that the police could not and in fact did not search the premises pursuant to both the authority of the government warrant and the authority of the homeowner. In *Hicks v. State*, 852 So.2d 954 (Fla. 5th DCA 2003), the questioned search was done pursuant to the homeowner who gave his permission for the officer to enter and search the entire residence ...
>
> In this case, there was no evidence that the brown

[43] The search warrant was apparently obtained shortly thereafter.

> shoes acted as a container for any property located therein and according to the evidence the shoes were open and obvious to a casual examiner walking through the house with the permission of the homeowner who owned the house and which involved a search in a common areas available to anyone who lived in the house. The same is true of the shoelaces that had been placed in a laundry basket next to or in the vicinity of the washer and dryer. Following the logic of the *Hicks* case, discovery of that information seems to have been appropriately done pursuant to a search of the house pursuant to the consent and therefore would not be subject to being suppressed as any violation of an expectation of privacy, once the consent is given.
>
> There is no question that the homeowner has the right to consent to have his home searched ... This court, therefore, finds that while the parties argue that there was some defect in the consent that required a search warrant, it appears to the court that there is no evidence of any such defect. With or without the search warrant, it appears that the search was or could have been conducted pursuant to the consent and the defendant did not have standing to challenge the consensual search, especially involving the discovery of items that were open, obvious and in plain view while occupying a common area of the household available to all who lived and stayed there, that being the laundry room area.

(V7,R1290-91).

Hunter has not challenged those findings, and, because that is so, has conceded the validity of search pursuant to consent. Without conceding that there is any defect in the search warrant, the State suggests that Hunter has abandoned the consent issue, and that that component of the search is dispositive of the denial of the motion to suppress.

Without conceding that discussion of the warrant itself is necessary to disposition of this claim, the true facts are that

the trial court also entered lengthy findings regarding the sufficiency of the search warrant. While Hunter claims that the investigator who executed the search warrant affidavit misrepresented various matters, the true facts are that the trial court expressly rejected that claim. (V7, R1295). Likewise, there is no deficiency in the warrant for the reasons stated by the trial court. *See*, *supra*.

IV. THE MISTRIAL CLAIM

On pages 29-30 of his brief, Hunter claims that the trial court should have declared a mistrial when co-defendant Cannon (who had already entered a guilty plea) "refused to be cross-examined." A trial court's ruling on a motion for mistrial is subject to the abuse of discretion standard of review. *Goodwin v. State*, 751 So. 2d 537, 546 (Fla. 1999); *Thomas v. State*, 748 So. 2d 970, 980 (Fla. 1999); *Hamilton v. State*, 703 So. 2d 1038, 1041 (Fla. 1997). The trial court did not abuse its discretion when it denied Hunter's motion.

Cannon's testimony was extremely brief, and amounted to little more than the statement that Hunter, Cannon, Victorino and Salas entered the house where the murders took place and that all were armed with baseball bats. (V28, R1954). That testimony is entirely consistent with Hunter's confession, and is far less detailed than that confession. (V32, R2523-33; V38,

R3374-3441). Assuming for the sake of argument that there was some error, that error was harmless beyond a reasonable doubt. *State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986).

Further, **Hunter did not attempt to cross examine Cannon, and never moved for a mistrial based upon Cannon's claimed refusal to testify.** Whatever claim Hunter may have had, it is not preserved for review because there was no timely objection.

To the extent that Hunter claims that the State "knew" that Cannon would refuse to testify, that suggestion is rebutted by the findings of the trial court when that issue was addressed below in response to argument by one of the co-defendants. (V 30, R2240-41). Finally, to the extent that Hunter's suggests that the trial court should have granted a mistrial *sua sponte*, nothing that took place rose to the level of requiring a mistrial, and, had the trial court followed that course of action, double jeopardy might well have barred a retrial. Granting a mistrial is a drastic step, and the trial court did not abuse its discretion in not taking it. There is no basis for relief.

V. THE INEFFECTIVENESS OF COUNSEL CLAIM

On pages 30-34 of his brief, Hunter argues that his trial counsel were ineffective for not moving to strike the testimony of co-defendant Cannon. Ineffectiveness of counsel claims are normally cognizable only in post-conviction relief proceedings,

for the fundamental reason that the testimony of trial counsel is usually needed in order to reach a fair resolution of such claims. *Lawrence v. State/McDonough*, 32 Fla. L. Weekly S699 (Fla. Nov. 1, 2007); *Stewart v. Crosby*, 880 So. 2d 529, 532 (Fla. 2004); *Gore v. State*, 784 So. 2d 418, 437-438 (Fla. 2001); *McMullen v. State*, 876 So. 2d 589, 590 (Fla. 5th DCA 2004); *See also, United States v. Almaguer*, 2007 U.S. App. LEXIS 20105, 14-15 (5th Cir. 2007); *United States v. Greer*, 440 F.3d 1267, 1272 (11th Cir. 2006). Without knowing the thought processes of Hunter's attorneys, it is simply impossible to determine what strategic and tactical reasons were involved in the decision not to cross-examine Cannon. In any event, Hunter was not prejudiced by Cannon's testimony – the same matters that Cannon testified about came before the jury in far greater detail through Hunter's own confession.

To the extent that Hunter claims that there are other instances of ineffectiveness of counsel to be found in the other claims raised on appeal, for the reasons set out in the argument with respect to each claim, there is no basis for relief. Finally, Hunter has chosen to raise his ineffectiveness of counsel claims on direct appeal. While that is not the most efficient forum for such claims, it is the one Hunter has chosen. Because that is so, and because he has presumably raised such ineffectiveness claims as he deems appropriate, he is

procedurally barred from relitigating those ineffectiveness claims in a post-conviction relief motion. Likewise, he is procedurally barred from litigating additional specifications of ineffectiveness of counsel in a subsequent motion because those claims could have been but were not raised on direct appeal.

VI.THE DENIAL OF THE MOTION FOR JUDGMENT OF ACQUITTAL CLAIM

On page 35 of his brief, Hunter argues that his motion for judgment of acquittal should have been granted. The standard of review for the denial of a motion for judgment of acquittal is whether the verdict is supported by competent substantial evidence. *Crump v. State*, 622 So. 2d 963, 971 (Fla. 1993) (question of whether evidence fails to exclude any reasonable hypothesis of innocence is for jury to determine, and if there is substantial, competent evidence to support jury verdict, verdict will not be reversed on appeal); *Tibbs v. State*, 397 So. 2d 1120 (Fla. 1981), *aff'd*, 457 U.S. 31 (1982) (concern on appeal must be whether, after all conflicts in the evidence and all reasonable inferences therefrom have been resolved in favor of the verdict on appeal, there is competent, substantial evidence to support the verdict). Hunter cannot overcome the evidence supporting the verdict.

The evidence from trial is set out in detail in the statement of the facts, *supra,* and will not be repeated here.

For purposes of this claim, it is sufficient to emphasize that Hunter and his co-defendants discussed and planned the assault on the Telford Lane house; that they armed themselves with baseball bats and planned to obtain replacement clothing; that the front door to the Telford Lane house was kicked open, revealing a shoeprint consistent with shoes owned by Victorino; that Hunter entered the residence first, armed with a baseball bat; that blood from one of the victims was found on the lace of Hunter's shoe; that Hunter confessed to striking various victims with a baseball bat; and that all six victims died as a result of blunt force trauma to the head, inflicted with an object consistent with a baseball bat. That evidence is sufficient to present a question for the jury, and, in light of the direct evidence in the form of Hunter's confession, takes this case out of the more defense-friendly circumstantial evidence standard of review. The evidence is more than sufficient to overcome a motion for judgment of acquittal, and that motion was properly denied. There is no basis for relief.

VII. THE DENIAL OF THE MOTION TO SEVER

On pages 36-37 of his brief, Hunter argues that the trial court should have severed Hunter's case from the co-defendants cases. The denial or granting of a motion for severance is reviewed for an abuse of discretion. *Fotopoulos v. State*, 608 So. 2d 784, 790 (Fla. 1992) (granting a severance is largely a

matter within the trial court's discretion); *Crossley v. State*, 596 So. 2d 447, 450 (Fla. 1992) (noting that standard of review for cases involving the consolidation or severance of charges is one of abuse of discretion); *Bateson v. State*, 761 So. 2d 1165, 1169 (Fla. 4th DCA 2000) (noting that denial of a motion for severance is reviewed for abuse of discretion).

In denying the motion to sever, the trial court made detailed findings:

> Florida Rules of Criminal Procedure, Rule 3.152, provides for the severance of offenses and defendants. In particular, subsection (b) deals with severance of defendants and provides in subsection (1) that on motion of the State or defendant, the court shall order a severance of defendants and separate trials: (a) before trial on a showing that the order is necessary to protect the defendant's right to a speedy trial, or is appropriate to promote a fair determination of guilt or innocence of one or more defendants (emphasis added).
>
> For separate offenses to be tried together, they must be connected in a "significant way." *Stephens v. State*, 863 So.2d 436. This case clearly presents a casual link between the offenses as required by *Ellis v. State*, 622 So.2d 991 (Fla. 1993), and satisfies Florida Rules of Criminal Procedure, Rule 3.150(a). Clearly these offenses are "connected acts or transactions" since they allegedly occurred within a single episode. *Spencer v. State*, 645 So.2d 377 (Fla. 1994). Factors relevant to this finding involve (1) temporal and geographical association with crimes; (2) the nature of the crimes; (3) that the crimes involve the same victim; and (4) the manner in which the crimes were committed. See *Domis v. State*, 755 So.2d 683 (4th DCA 1999). This court finds these defendants and counts have been properly joined.
>
> In this particular case the State has recognized the defendant's right of confrontation in that the State's

Response to Defendant's Motion to Sever Trial indicates that it will not offer the written, video, audio, transcribed or telephonic intercepted versions of the statement specifically objected to by each of the defendants in their motions to sever. The State goes on to point out that it will offer direct testimony by the persons who received the statements in such a way that the witnesses will not offer any testimony directly or by inference in reference to any co-defendant. Attached to the State's Response was the detail of what essentially is a redactation of what the State intends to offer as to Mr. Cannon, Mr. Hunter, and Mr. Salas. There was no redactation as to any statements made by Mr. Victorino which the State asserts it could not do based on the fact that Mr. Victorino has denied any participation in the case.

The State's proposition is that it can accomplish the goal of redacting or editing any statements made by the defendants for purposes of admissions against interests at time of trial by presenting the evidence through the actual questioners that this court characterizes as an oral redactation that appears to allow the presentation of information in much more abbreviated form and, therefore, in the form much less likely to be confusing or harmful to any non-speaking defendant in the sense that the jury is not left to try to interpret the context of the much more lengthy statements. This court concludes that the presentation by the State allows the court to proceed with a joint trial at which evidence of the statements will be admitted after all references to the moving defendants have been deleted, provided the court determines that admission of the evidence with deletions will not prejudice the defendant. By this conclusion the court makes no evidentiary determination or determination as to foundation which would have to take place in the context of the trial. In other words the court is making no ruling that these statements are admissible, that the prerequisites for admission have been made or any indication as to how it will rule but merely concludes that the presentation made by the State allows the court to proceed as provided by Rule 3.152(b)(2)(B).

The State's Response with attachments appears to comply with Rule 3.152 which is designed to deal with

Bruton issues. As pointed out in *Richardson v. Marsh*, 481 U.S. 200, 107 S.Ct. 1702, 95 L.Bd.2d 176 (1987), the court held "that the Confrontation Clause [was] not violated by the admission of the non-testif5ting co-defendant's confession with a proper limiting instruction when, [as there] the confession is redacted to eliminate not only the defendant's name but any reference to his or her existence." As a result the Motions to Sever based on statements made by co-defendants' implication of other defendants is denied.

...

The issue framed above was not raised in those terms but was expressed during the course of the hearing as an additional ground or a ground incorporating the others which should be viewed in combination with the other reasons for the severance in regard to this court's determination. This particular ground incorporates the others in that the case could be complicated and lengthy in its duration. From a practical standpoint there is surely some number of defendants that might support this argument. However, since the hearing on the Motions to Sever, one of the defendants, Robert Canton, has pleaded guilty to all counts of the indictment and the trial now involves only three defendants. Cases with three defendants with multiple counts are matters that are regularly handled in Florida courts and do not seem to rise to the level of due process concerns standing alone or in combination with the other issues raised.

...

In *Gordon v. State*, 863 So.2d 1215, the court, dealing with post-judgment issue concluded that "where co-defendants are tried together on a capital charge, there being no ground for a severance of the guilt or innocence phase of the trial, it is proper for the court to proceed with a joint sentencing trial so that the same jury that heard all of the guilt phase evidence can consider and weigh the roles and culpability of the defendants. Citing *Maxwell v. Wainwright*, 490 So.2d 927, the language in that case indicates that if the case is appropriate for a single trial for multiple defendants on multiple charges, it is more appropriate that the same jury consider the relative culpability as one of the features of the

> penalty phase in a single trial rather than in multiple trials which appears to be the law governing that issue. The court has, therefore, concluded that without a severance of the guilt-innocence phase, the case should proceed to trial on all issues and if two or more of the defendant are found guilty of capital murder the sentencing jury should hear those matters in a single hearing.

(V4, R591-597).

Those findings demonstrate that there was no abuse of discretion, and there is no basis for relief.

To the extent that further discussion of this claim is necessary, Hunter's claim that he "could not cross-examine Salas on what he said about the bats" is not supported by the record, which indicates that no testimony in the form of a statement by Salas said anything about **Hunter's** bat. (V32, R2544). Any claim to the contrary is not borne out by the record. There is no basis for relief.

VIII. THE "AND/OR" JURY INSTRUCTION CLAIM

On page 38 of his brief, Hunter claims that it was error to use the phrase "and/or" between the names of the defendants in the guilt stage jury instructions. Co-defendant Salas raised this claim on appeal from his convictions, and the Fifth District Court of Appeal rejected that claim, and held that the "verdicts reflect individualized analysis by the jury of the charges against each defendant," and found harmless error. *Salas v. State*, 32 Fla. L. Weekly D2942 (Fla. 5th DCA Dec. 14, 2007).

In earlier decisions, the Fifth District Court of Appeal, as well as three other district courts, have held that fundamental error cannot be found in the absence of an examination of all of the facts and circumstances of the case. *See, Garzon v. State,* 939 So. 2d 278, 285 (Fla. 4th DCA 2006), *rev. pending*, *Garzon v. State,* Case No. SC06-2235 (a proper approach to fundamental error considers the jury instructions as a whole, in the context of the case that was tried; a proper approach does not nitpick at the instructions to manufacture a fundamental error that was overlooked by the participants at trial); *Zeno v. State,* 922 So. 2d 431 (Fla. 2d DCA 2006) (a determination of whether these instructions constituted fundamental error requires a full review of the record on appeal - new appeal granted so appellate counsel can present this issue); *compare, Harris v. State,* 937 So. 2d 211 (Fla. 3d DCA 2006) (we conclude that the use of the "and/or" conjunction in the instruction to the jury resulted in fundamental error *based on the totality of the circumstances*) (emphasis supplied).

The reasoning of the Fifth District in *Salas* is correct, and it follows the analysis that should be undertaken by this Court in resolving this claim. Under all of the facts and circumstances of this case, including the record, the instructions as a whole, the verdicts and the theory of prosecution, reversible error did not occur. *Salas v. State*, 32

Fla. L. Weekly D2942 (Fla. 5th DCA Dec. 14, 2007). To be fundamental error, an erroneous jury instruction "must 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." *Garzon,* 939 So.2d at 282, quoting *State v. Delva,* 575 So. 2d 643 (Fla. 1991). The purpose of the general rule prohibiting the use of the "and/or" language is to prevent one defendant from being improperly convicted for the criminal conduct of another; if the purpose for the rule is not served in a particular case, the rule may be inapplicable. *Tolbert v. State,* 922 So. 2d 1013 (Fla. 2006). Under the facts of this case, the evil sought to be avoided is simply not present, and, in light of the explicit instruction that the charges and evidence against each defendant must be separately considered, there is no error here.

The determination of whether fundamental error occurred requires that the and/or instructions be examined in the context of the other jury instructions, the attorneys' arguments and the evidence in the case to decide whether the verdict of guilty could not have been obtained without the assistance of the alleged error. *Garzon,* 939 So. 2d 278. The Third District has also recognized that where there is a material distinction between the cases of codefendants, a new trial need not be granted because the error in giving a jury instruction with the

"and/or" conjunction can be harmless error. *Lloyd v. Crosby,* 917 So. 2d 988 (Fla. 3d DCA 2005).

First, the State notes the differences in the verdicts for the three defendants. This case is similar to *Tolbert, supra,* where the Fifth District found that when the codefendant is acquitted of all charges, the jury cannot be misled into believing that the defendant can be held criminally responsible for the conduct of the codefendant. *Id.* The Court stated that "the illogic that emanates from application of the rule in such a situation is readily apparent and leads us to believe that the rule does not apply in cases where the codefendant was acquitted." *Id.* In this case, it is just as apparent that the jury was not misled and carefully considered each charge individually.

Salas, Hunter and Victorino were all found guilty of both first degree premeditated murder and first degree felony murder of all six victims. All three were convicted of conspiracy, and all three were convicted of armed burglary. All three were acquitted of abusing the dead body of Francisco Roman. Significantly, Victorino was found guilty of abusing the body of Erin Belanger; Salas and Hunter were acquitted. Hunter was convicted of the three counts of abusing the bodies of Roberto Gonzalez, Jonathon Gleason and Anthony Vega; Salas and Victorino were acquitted of those counts. Victorino was convicted of

cruelty to animals; Hunter and Salas were acquitted. Based on these individualized verdicts, one need not speculate that the jury may have improperly convicted one codefendant for the conduct of another. The verdicts leave no doubt that the jury was not misled in any way.

The same charge was given on all counts, and it is clear that the jury was able to distinguish between codefendants, just as it was instructed to do:

> Now, a separate crime is charged against each – Troy Victorino and/or Jerone Hunter and/or Michael Salas in each count of the indictment. Troy Victorino and/or Jerone Hunter and/or Michael Salas have been tried together. However, the charges against each, and the evidence applicable to that person, must be considered separately. A finding of guilty or not guilty as to one must not affect your verdict as to any other of the crimes charged.

(V41, R3966-67).[44]

In a case such as this, where individualized verdicts were indeed returned, it would defy logic to find that the jury did not follow this instruction, which it is presumed to have done, anyway. *Carter v. Brown and Williamson Tobacco Corp.*, 778 So. 2d 932, 942 (Fla. 2000). As the Fourth District has noted, "jurors are not potted plants." *Garzon, supra.* Nor are they so easily confused that they cannot follow this instruction, particularly

[44] The Third District has held that this instruction does not cure any defect. *See, Dorsett v. McCray,* 901 So. 2d 225 (Fla. 3d DCA 2005); *Harris v. State,* 937 So. 2d 211 (Fla. 3d DCA 2006).

when they received individual verdict forms for each of the defendants, and rendered the verdicts accordingly.

Further, the jury was instructed on the principal theory, which can and should also be considered in determining whether or not fundamental error occurred. *Garzon, supra. But see, Davis v. State,* 922 So. 2d 279 (Fla. 1st DCA 2006); *Zeno v. State,* 910 So. 2d 394 (Fla. 2005). The principal instruction given in this case utilized the "and/or" conjunction, but that is exactly what the theory of principals means -- a defendant is liable for the criminal acts of his codefendants. This was the State's theory when it argued in closing:

> If you follow the law of principal and apply it, and we believe it applies in this case, then it doesn't matter who did what in what room, so long as the intent was to commit the crimes and there was some participation. In other words, they're all charged with each and every crime, and, in fact, each crime of the other, and we believe the evidence – the evidence will show that it is supported.

(V21, R2137).

It is apparent that the jury did analyze what happened in what room in relation to each defendant's intent and level of participation, because it acquitted Salas of counts eight through twelve and count fourteen (abuse of the dead bodies of victims Belanger, Roman, Gonzalez, Gleason and Vega, and cruelty to animals), yet convicted Victorino of two of those counts and Hunter of four of those counts.

Under the circumstances of this case, the use of the "and/or" conjunction in the substantive jury instructions was not reversible error. Viewed in the context of the entire trial and theory of prosecution, with the giving of the principal and independent act instructions, and multiple defendants instruction, the individualized verdicts that were clearly consistent with the evidence, and the separate verdict forms, any alleged error simply did not go to the fairness or validity of the entire trial. Even if this Court should determine that the use of "and/or" was erroneous, any error was harmless because it did not affect Hunter's substantial rights.[45] *Salas, supra; Fla. Stat*, § 924.33 (2007); *Goodwin v. State*, 751 So. 2d 537, 539 (Fla. 1999). As was the case with *Salas*, Hunter was convicted based on his own actions, not those of his co-defendants.

IX. THE WEIGHING OF AGGRAVATION AND MITIGATION

On pages 39-42 of his brief, Hunter argues that the trial court committed error in concluding that the aggravating factors outweighed the mitigation. Whether an aggravating factor exists

[45] Hunter never suggested an alternative jury instruction. While not a bar to review, it is obvious from the charge conference that the trial court attempted to develop appropriate instructions for the jury. Hunter never argued fundamental error below, and never proposed an instruction that would remove the alleged error.

is a factual finding reviewed under the competent substantial evidence test. When reviewing aggravating factors on appeal, this Court reiterated the standard of review, noting that it "is not this Court's function to reweigh the evidence to determine whether the State proved each aggravating circumstance beyond a reasonable doubt –- that is the trial court's job. Rather, our task on appeal is to review the record to determine whether the trial court applied the right rule of law for each aggravating circumstance and, if so, whether competent substantial evidence supports its finding." *Alston v. State*, 723 So. 2d 148, 160 (Fla. 1998), *quoting Willacy v. State*, 696 So. 2d 693, 395 (Fla.), *cert. denied,* 522 U.S. 970 (1997). Finally, "'the weight assigned to a mitigating circumstance is within the trial court's discretion and subject to the abuse of discretion standard.' *Blanco v. State*, 706 So. 2d 7, 10 (Fla. 1997)." *Coday v. State*, 946 So. 2d 988, 1000 (Fla. 2006). Against that backdrop, there is no basis for relief in this case.

The Aggravating Circumstances.

In its sentencing order, the trial court found the following aggravating circumstances:

> **A. AGGRAVATING FACTORS**
>
> **1. Florida Statutes, Section 921.141(5)(b): The defendant has been previously convicted of another capital felony or a felony involving the use or threat of violence to a person.**

The defendant was convicted of six counts **of** first degree capital murder which supports this aggravator. The murders occurred over a relatively short period of time all within the home located on Telford Lane in Deltona, Florida. The exact time of death and the sequence of the deaths for each victim could not be determined with precision but the court finds that all six murders were contemporaneous murders, one with the others, from a single episode.

Because all six murders were committed in a single episode the aggravating factor is applied to all six victims. *King v. State*, 390 Sà.2d 315 (Fla. 1980), *cert. denied, 450* U.S. 989,67 L.Ed.2d 825, 101 S.Ct. 1529 (1981). This aggravating circumstance can be established by contemporaneous and subsequent convictions. *Ruffin v. State*, 397 So.2d 277 (Fla.) cert. denied, 454 U.S. 882, 70 L.Ed.2d 192, 102 S.Ct. 368 (1980); *King v. State*. *id*.; *Bidrich v. State*, 346 So.2d 998 (Fla. 1997).

This aggravator has been proved beyond and to the exclusion of a reasonable doubt. The court has given this aggravator very substantial weight.

2. **Florida Statutes, Section 932.141(5)(d); The crime for which the defendant is to be sentenced was committed while he was engaged in the commission of the crime of burglary.**

   In the verdict returned in this case, the jury found the defendant guilty of six counts of first degree murder as well as armed burglary of the property on Telford Lane which led to the death of all six victims. This aggravator has been established beyond and to the exclusion of a reasonable doubt. Since the defendant was convicted and sentenced to life in prison for the felony, this court assigns moderate weight to this aggravator

3. **Florida Statutes, Section 921.141(5)(e): The crime for which the defendant is to be sentenced was committed for the purpose of avoiding or preventing a lawful arrest.**

   The application of this aggravator divides victims into two categories, law enforcement officers and everyone else. An attempt to avoid arrest is not

present unless it is clearly shown that the dominate or only motive for the murder was the elimination of a witness. (emphasis supplied) *Urbin v. State*, 714 So.2d 411 (Ma. 1998); *Consalvo v. State*, 697 So.2d 805 (Fla. 1996); *Robertson v. State*, 611 So.2d 1228 (Fla. 1993). The avoid arrest aggravator focuses on the motivation for the crimes. *Stein v. State*, 632 So.2d 1361 (Fla. 1994). The court pointed out in *Consalvo v. State*, *id.*, that "the evidence must prove that the sole or dominate motive for the killing was to eliminate a witness", and "mere speculation on the part of the State that the witness elimination was the dominate motive behind a murder cannot support the avoid arrest aggravator." Proof of the intent to avoid arrest by eliminating a witness must be very strong. *Riley v. State*, 366 So.2d 19 (Fla. 1978).

The indicia of the avoid arrest aggravator begins with a discussion at the time of the agreement to commit the murders, earlier the same day, in which a discussion was had as to whether or not masks would be needed. At that time the intent to leave no survivors had been expressed and agreed to by all the participants. Mr. Hunter and his co-defendants had visited the Telford Lane house earlier in the week. along with others at which time he made it clear that he wanted the return of his personal property. He, along with the co-defendants, were known to the occupants of the house. After Mr. Victorino kicked in the front door, each of the defendants entered the house and methodically killed all of the occupants of the house. After leaving it is reported that Mr. Victorino went back into the house with a switchblade ostensibly to finish killing anybody that had survived and it is reported that the knife was bloody when he rejoined his co-conspirators in the Ford Expedition. There is no question that the State has established that one of the motives for the murders was the elimination of all witnesses in the house which was obvious from both the statements and conduct of all defendants.

The question as to Mr. Hunter then becomes whether the intent to avoid arrest was the dominate or only motivation for the murders of Michelle Ann Nathan, Anthony Vega, Gleason, and Roberto Gonzalez. The facts of the case clearly reveal that there had been

tension between Mr. Hunter and Mr. Victorino and Erin Belanger who was the granddaughter of the owner of the house that Hunter and Victorino had illegally occupied. She apparently had them removed from that structure and took possession of the items of personal property that were present at the time of their eviction. Mr. Hunter and Mr. Victorino along with Mr. Cannon, Mr. Salas, Mr. Graham and others conducted what would best be described as a raid on the Telford Lane property earlier during the week of the murders in an effort to recover that property. There was an additional incident where Mr. Victorino and Erin Belanger met and had a discussion about the recovery of that personal property at the Telford Lane house. As a result of these transactions, Mr. Victorino was well known to Erin Belanger and the other occupants of the house and by implication Mr. Hunter's identity could be easily discovered. Mr. Hunter actually knew Mr. Gleason from high school although there is some question as to whether he realized that at the time of the murders. He had seen Gleason earlier that week and presumably could be identified by Mr. Gleason. Mr. Hunter also indicated he knew Michelle Nathan from high school. Elimination of witnesses who know Mr. Hunter, Mr. Victorino, Mr. Cannon and Mr. Salas support the aggravator.

The analysis of this aggravator as to Gleason, Roberto Manuel Gonzalez, Michelle Ann Nathan and Anthony Vega is unlike the killing of Erin Belanger and Francisco Ayo Roman by Mr. Victorino which appeared driven by revenge, retaliation and retribution. The deaths of Gleason, Gonzalez, Nathan and Vega were part of an announced plan to avoid arrest and the motive of Mr. Hunter in regard to the deaths of Gleason, Gonzalez, Nathan and Vega was solely to avoid arrest which the State has proved beyond and to the exclusion of a reasonable doubt.

As a result the court has concluded that the intent to avoid arrest clearly was the motive and does fit into the very narrow category requiring strong woof of the "dominate" or "only" motive for the murders of the decedents, Gleason, Gonzalez, Nathan and Vega. The aggravator has been proved beyond and to the exclusion of a reasonable doubt as to the decedents, Gleason, Gonzalez, Nathan and Vega and will be given moderate

weight.

4. Florida Statutes, Section 921.141(5)(h): The capital felony was especially heinous, atrocious or cruel.

In order to find the heinous, atrocious or cruel aggravator, a two prong test must be met. Although cases involving instantaneous death are not generally considered to be heinous, atrocious or cruel, *Lewis v. State*, 398 So.2d 432 (Fla. 1981); *Kearse v. State*, 662 So.2d 677 (Fla. 1996); *Robertson v. State*, 611 So.2d 1228 (Fla. 1993); *Hart v. State*, 615 So.2d 412 (Fla. 1992), a conscienceless or pitiless and unnecessarily torturous killing does establish the heinous, atrocious or cruel aggravator. *Richardson v. State*, 604 So.2d 1107 (Fla. 1992); *Hartley v. State*. 686 So. 2d 1315 (Fla. 1996). Post mortem injuries must not be considered.

The attack on the occupants at the Telford Lane property occurred in the early morning hours at a time when the occupants were sleeping or there was otherwise very little activity. Erin Belanger and Francisco Roman, who were possessors of the property, were together in bedroom 3 as demonstrated in State's Exhibit *5* along with her dachshund, George. Gleason and Anthony Vega were in the living room. Michelle Nathan was in bedroom I and Roberto Gonzalez was in bedroom 2. The attack was obviously planned to take advantage of the early morning hours. The arrival of the defendants was announced by a kick to the front door which was strong enough to dislodge the front door which had its. deadbolt in place.

It is obvious that with that type of force, all of the occupants of the household would be able to hear the entry of the defendants. Of the ten people who were in the house at the time, six are dead. Mr. Victorino denies that he was present and Mr. Hunter, Mr. Salas and Mr. Cannon all admit to being present but obviously have self-interest in describing what actually took place. There appeared to be reliable reports that Mr. Gleason protested by saying that he didn't even live there. Michelle Nathan, discovered hiding in the bedroom closet of bedroom number 1, begged for her life.

The State presented a video record of the house showing the position of the bodies taken before the investigation began along with still photographs depicting the same information. To even a casual observer the crime scene was horrible. Throughout the house furniture was in disarray, lamps broken, televisions knocked down and pockets of blood had been splattered evidencing the mayhem that had occurred. In some cases the blood splatter completely darkened a wall or corner of the house and there is obviously blood splatter that ended up landing on the ceiling near some of the brutalization of the victims that took place during the attack. it is obvious to the court that all of the victims were alive and aware of the attack as they were systematically killed.

An individual analysis appears to be appropriate for each of the victims concerning the cause of death and an overall description of their injuries. While this analysis deals only with victims, Gleason, Gonzalez, Nathan and Vega, the information regarding Belanger and Roman is relevant since the injury and damages occurred in parallel to the other victims.

Anthony Vega: Exhibit 89 shows autopsy photographs that were explained to the jury by Dr. Beaver, the Medical Examiner, concerning Anthony Vega. The doctor described both blunt force injury and sharp force injury. Mr. Vega had a bruised face and eyes as a result of blunt force as well as a deformed face due to fractured skull. He had knife wounds in the neck as though he were slit which Dr. Beaver felt were post mortem. There is damage to the back of his skull and obvious defensive wounds on his hands. Dr. Beaver found bleeding into the brain. A fragment of the skull actually penetrated the brain indicating that he had been hit with great force, the injuries having been consistent with being struck by a metal baseball bat. Dr. Beaver concluded that he died from blunt force trauma with at least two blows to the head. Knife wounds to the neck and apparently left knee and upper extremity injuries were post mortem which the court cannot consider for an evaluation of this aggravator.

W. Gleason: Dr. Beaver used the State’s Exhibit 90 to describe the injuries to Gleason who was apparently

seated in the living room chair at the time of the attack. He had a marked contusion on the left side of his head down his neck and Dr. Beaver felt he had suffered a blunt force trauma while he was alive. Re had two stab wounds in the chest which were probably post mortem and an injury to his arm and a laceration to the left side. Dr. Beaver felt that he sustained blunt force trauma to the head and sharp force trauma to the chest. He found defensive injuries on his hands consistent with fending off an attack. Dr. Beaver felt he had been bit at least three times, maybe more. Cause of death was basil skull fracture which required severe force. Again, for purposes of analyzing this aggravator, the court has not considered the post mortem injuries.

Roberto Manuel Gonzalez: Dr. Beaver used State's Exhibit 91 which consisted of a series of autopsy photographs to explain the injuries to Roberto Gonzalez. He had a contusion on the left side and deformed head. Dr. Beaver described a contused chest and stab wounds on his chest which Dr. Beaver felt were post mortem and an extensive skull fracture with a huge piece of the skull missing as well as bruising to his hands, another sign of defensive wounds. Dr. Beaver described the cause of death as blunt force trauma to the head being consistent with being hit with a baseball bat. Dr. Beavers felt that the injury he found would take a minimum of three blows at least to the right side of the head because of the amount of force needed to cause the damage to the skull and injury to the brain. The cause of death was blunt force injury to the head. Again, for purposes of this aggravator, the court will not consider the post mortem injuries.

Michelle Ann Nathan: While Michelle Nathan had to sharp force injuries to the neck as well as some clear, cylindrical impressions on her body that were consistent with impressions of a baseball bat. She had a bruise to the arm and shoulder although her face was not damaged. At the back of the head there were a number of lacerations known as gaping wounds that were consistent with being hit by a baseball bat. There were three stab wounds that may have been post mortem. Dr. Beaver felt that the bat marks had been inflicted while she was alive. The injury to her head would have

taken three blows with the bat and he concluded that there was blunt force trauma to the head and brain.

Francisco Ayo Roman: Dr. Beaver used State's Exhibit 93 to describe the injuries to Francisco Roman. The injuries involved a large contusion on the right side of the head and a deformity. There were neck stab wounds and stab wounds to the left chest that Dr. Beaver felt were post mortem. The fracture of the skull was inflicted when he was alive. A fragment of the skull caused at the time of the fracture was depressed and projected into the brain. Dr. Beaver again concluded that the cause of death was blunt force trauma to the brain. Mr. Roman was also missing teeth.

Erin Belanger: Dr. Beaver described Erin Belanger's injuries by a series of autopsy photos labeled as State's Exhibit 94. She is described as having multiple contusions to the face and skull with deformity of the skull. Most of her teeth were absent. Apparently the blow to the skull also caused a perfusion of blood into the eye sockets which explains apparent bruising in that area. There were sharp force cuts on her neck and under her arm which appear to be post mortem injuries. The doctor also described forceful thrusting of a baseball bat into her vaginal area that caused penetrating injuries into her abdomen and other female organs. The court presumes that was done post mortem. Dr. Beavers described a gaping head wound that was so severe that her brain was seeping through the skull fracture. There was also bruising to her hands which is an indicator of defensive wounds.

It is apparent to the court that all of the victims were aware of the attack because of the loud and forceful entry made through the front door. It is hard to imagine the mayhem that followed. In the case of each of the victims there is evidence that they fought or were aware of the ongoing onslaught both because of defensive wounds that the medical examiner identified as well as the fact that the injuries were so severe that they could not have been accomplished by a single blow to the head. Many of the injuries required multiple blows to cause the force necessary to fracture the skull in the areas fractured. This attack took place in a rather small series of rooms and the

crime scene evidence tells even a much more difficult story. The victims were brutalized to the extent that their blood was all over the house. It was on the floor, it was on the walls, it was on the ceilings and the blood had been exacted by the avengers with great force and brutality. There were pleas from Gleason and Michele Nathan asking that their lives be spared. With the force exerted and the swinging of bats the victims, as long as they were conscious, were going through a living hell. Two of the victims, Erin Belanger and Francisco Roman, lost most of their teeth in the attack. It is abundantly clear and the State has established beyond and to the exclusion of reasonable doubt that the murders of all victims were heinous, atrocious or cruel. The conduct of Mr. Hunter was conscienceless and pitiless and clearly each of the victims, Gleason, Gonzalez, Nathan and Vega died as a result of an unnecessarily tortuous killing.

The State has established this aggravator by evidence beyond and to the exclusion of reasonable doubt that the capital murders of W. Gleason, Roberto Manuel Gonzalez, Michelle Ann Nathan and Anthony Vega were especially heinous, atrocious or cruel and very substantial weight has been assigned to this aggravator.

5. Florida Statutes, Section 921.141(5)(i): The capital felony was a homicide and was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification.

The law has established that in order to find cold, calculated and premeditated as an aggravator, it must be established that (1) the murder was the product of a cool and calm reflection and not an act prompted by emotional frenzy, panic or a fit of rage, (2) the defendant had a careful plan or prearranged design to commit murder before the killing, (3) the defendant exhibited heightened premeditation, and (4) the defendant had no pretense or legal or moral justification. *Jackson v. State*, 648 So.2d *85* (Fla. 1994); *Nelson v. State*. 748 So.2d 237 (Fla. 1998). The court finds that the murders of W. Gleason, Roberto Manuel Gonzalez, Michelle Ann Nathan and Anthony Vega were each committed in a cold, calculated and premeditated manner.

Mr. Hunter met with Mr. Victorino, Mr. Salas, Mr. Cannon and Mr. Graham at midday before the murders to formulate the murder plan. Each of the five young men agreed to participate in the murders when asked by Mr. Victorino in their group meeting. Apparently Mr. Victorino had seen a movie titled “Wonderland” in which a group of men went into a house and killed the occupants with sticks or metal rods. Mr. Victorino carefully described the process, outlined the layout of the home on Telford Lane in Deltona to the co-conspirators and assigned each of them tasks. They made arrangements to meet later in the day. Later that day, absent Graham, they assembled and tried to steal a car to avoid detection but failed. They tried to find ammunition for a handgun Mr. Cannon had acquired but failed. They arranged for each of the four actual participants, Hunter, Victorino, Salas and Cannon, to be transported in Mr. Cannon’s Ford Expedition and each selected a solid metal bat which they each in turn took with them to Telford Lane as planned. At one point there was a concern raised that there was an infant in the house which caused reluctance for all except Mr. Hunter who pledged to kill the child if necessary. The plan was actually executed as it had been planned.

Mr. Victorino kicked in the front door and the young men took their assigned positions throughout the house first disabling and then murdering the six victims by using the metal bats, killing the six victims, one by one. The plan required all occupants be killed so there would be no witnesses. The murders were performed in a cool, calm and reflective manner and were not acts prompted by emotional frenzy, panic or a fit of rage. The murders were also the result of a careful plan or prearranged design to commit murder and the murder of these individuals meets the test of a heightened level of premeditation demonstrated by the plan formulation hours before the crimes with substantial opportunity to reflect on the decision to kill.

This aggravator also requires that the conduct be without any pretense of moral or legal justification. The murders appear to be revenge killings by Mr. Hunter and Mr. Victorino for the loss of some

> relatively insignificant personal property, thrill killings or killings to eliminate witnesses as agreed in the overall plan. A pretense of legal or moral justification is "any colorable claim based at least partly on uncontroverted and believable factual evidence or testimony that but for its incompleteness, would constitute an excuse, justification, or defense as to homicide. *Walls v. State*, 641 So.2d 381 (Fla. 1994).
>
> Viewing this evidence in the light most favorable to Mr. Hunter, retention of property would not constitute an excuse, justification or defense to homicide. *Hill v. State*, 688 So.2d 901 (Fla.), *cert. denied*, 522 U.S. 907, 118 S.Ct. 265, 139 L.Ed. 191 (1997); *Dougan v. State*, 595 So.2d 1 (Fla. 1992). The court finds that there was no pretense of moral or legal justification for these murders and, therefore, the aggravator has been proven beyond and to the exclusion of reasonable doubt. The court assigns great weight to this aggravator.
>
> None of the other aggravating factors enumerated by the statute is applicable to this case and no other is considered by this court. Nothing except as indicated in Paragraph A 1-5 above was considered an aggravator. Victim impact evidence was received during the penalty phase but neither considered nor weighed in analyzing the aggravating or mitigating factors.

(R1580-1590).

The Mitigating Circumstances.

In its sentencing order, the trial court found the following in mitigation:

> **B. MITIGATING FACTORS**
>
> **1. Statutory Mitigating Factors.**
>
> **a. Florida Statutes, Section 921.141(6)(g): Age of the defendant at the time of the crime.**
>
> The defendant was 18 years of age at the time of the murders. In addition, the defendant presented

testimony of Dr. Eric Mings, Dr. Rubin Gur and Dr. Allen Berns which suggested that in addition to his age, Mr. Hunter was in the early stages of schizophrenia, perhaps even paranoid schizophrenia. Their diagnosis and conclusions were based on the core history of severe mental illness, perhaps schizophrenia, of Mr. Hunter's father and at least some treatment for mental problems on the part of his mother. These factors suggest that Mr. Hunter was much more likely than others to have a mental defect or disease. Historically he had lost a twin brother as an infant and apparently over his childhood had regularly spoken to his twin as though that person was present in his life which was reliably established. The doctors felt that he had impaired judgment and was described from time to time as a loner. This mitigator has been established and the court gives it some weight.

b. Florida Statutes, Section 921.141(6)(d): The defendant was an accomplice in the capital felony committed by another person and his or her participation was relatively minor.

The defendant was convicted of capital murder in regard to all six victims and a recommendation of death has been made in regard to four. The defendant actively participated in the conspiracy to commit the murders, actively broke into and burglarized the property and was convicted of abuse of a dead human body in regard to Gleason, Roberto Gonzalez, and Anthony Vega. All in all the defendant was found guilty of 11 crimes of the 14 crimes charged including the six first degree murders.

It should be noted that the stature of Mr. Hunter is relatively small compared to the stature of Mr. Victorino who is the person that formulated and orchestrated the crimes. Mr. Bunter stands 5 feet 6 inches tall and is described as having a weight of 136 pounds. Mr. Victorino stands six feet five inches and described as having a weight of 275 pounds. Mr. Victorino is at least twice as big as Mr. Hunter. Despite the obvious contrast, it nonetheless appears that Mr. Hunter was an active and enthusiastic participate in both the conspiracy to commit murder and the execution of the murders. He was convicted of

11 of the crimes charged by the State as compared to Mr. Victorino's conviction for 10 crimes charged. The jury recommended that the court impose a death sentence in regard to four victims. It is obvious to the court that Mr. Hunter was an active participant in the capital felonies and played a major, not a minor, role in the episode at Telford Lane in Deltona, Florida. As a result the court finds this mitigator has not been established.

c. Florida Statutes, Section 921.141(6)(e): The defendant acted under extreme duress or under the substantial domination of another person.

The evidence of this mitigator involves an expert analysis done by Dr. Allen Burns, Dr. Eric Mings, and Dr. Rubin Gut Bach of those experts relied upon a history that suggested that Mr. Hunter's father was a diagnosed schizophrenic who was described technically, as well as graphically by one of the lay witnesses, as having serious mental health issues. Mrs. Hunter also has been treated for mental illness although somewhat nondescript as to diagnosis.

The history presented during the course of the trial indicated that Mr. Hunter had lost a twin sibling as an infant and despite that fact regularly talked to his dead twin over most of his life. He was described as a loner and was diagnosed by Dr. Burns as very likely having schizophrenia based on what he found to be a thought disorder, hearing of voices by way of conversations with his twin, grandiose themes and his otherwise disorganized lifestyle. Dr. Burns described the onset of schizophrenia as occurring in most cases between the ages of 18 and 25 and further described the impairment of judgment and impulse control associated with schizophrenia, especially when alcohol or other chemical substances are abused.

Dr. Eric Mings spent a great deal of time with Mr. Hunter and gathered a much broader band of history and information. He agreed with that diagnosis and was the source of the referral to Dr. Rubin Our who is a nationally renown neuro-psychologist who is a professor at the University of Pennsylvania School of Medicine.

Dr. Gur's testing suggests a defect in the left frontal portion of the brain which effects verbal memory, emotional elements and the ability to evaluate threatening circumstances. In doing that analysis, he took into account the auditory hallucinations dealing with Mr. Hunter's long term conversations with his deceased twin and confirmed that he had a condition, which if not diagnosed as schizophrenia, was similar to the schizophrenia pattern. According to Dr. Our, Mr. Hunter suffers from a loss of range of affect, loss of ability to plan and set goals, and had an abnormally small brain found in as few as one in ten thousand people. All of these features were suggestive of a diagnosis of schizophrenia. His ultimate diagnosis was some type of brain damage that was consistent with schizophrenia and perhaps other problems that certainly could have been caused by a head injury although there was no reliable evidence on that issue. Dr. Our felt that the PET (Position Emission Tomography) scan done for Mr. Hunter demonstrated abnormalities and was of the opinion that the PET scan confirmed his diagnosis. Mr. Hunter was also diagnosed with a low average intelligence quotient of approximately 91.

Building on the diagnosis Dr. Our felt that Mr. Hunter suffered from impulse control and essentially the defective functioning of his frontal lobe which is the part of the brain that has to do with executive functions. His theory was that the difficulty associated with his own ability to perform executive functions was so diminished that he might attach to someone who has a stronger more dominant personality and essentially allow that person to supplant those functions he might normally perform on his own.

Dr. Gur was of the opinion that the PET scan that was performed on Mr. Hunter was confirmatory of the diagnosis of each of the experts regarding Mr. Hunter's condition. A counter expert was called by the State, that being Dr. Lawrence Holder. Dr. Holder is an extremely well qualified and board certified nuclear radiologist. He evaluated the brain scan of Mr. Hunter to be normal and explained that the science of brain scanning has not yet reached the point where it can be used to corroborate the otherwise subjective diagnosis involving mental health issues. The court

has concluded that the brain scan evaluated by Dr. Holder is normal and cannot, therefore, be used to verify, the evaluation and diagnosis of Dr. Bums, Dr. Mings and Dr. Gur. Nevertheless, these evaluations seem to be well-founded and carefully made and the court does not discount those evaluations other than its declination to conclude that the PET scan verifies these findings.

The court recognizes that the defendant acted under extreme duress or under the substantial domination of another person to the limited extent that he was a follower of Mr. Victorino in terms of the decision to burglarize the home and commit the murders. It is doubtful to this court that would have ever occurred without Mr. Victorino's influence. For that reason the mitigator has been established. The court does not find, however, that the defendant was a recalcitrant participant once he decided to be part of the murder team. The court further rejects the proposition that Mr. Hunter surrendered his mental functions to the extent that his executive function was taken over by Mr. Victorino. While an interesting theory, the evidence in this case does not support such a conclusion and that part of Dr. Gur's evaluation is rejected. The court does assign some weight to this, mitigator.

d. Florida Statutes, Section 921.141(6)(a): The defendant has no significant history of prior criminal activity.

The defendant did not have any significant history of prior criminal activity and this mitigator has been established. The court assigns little weight to this mitigator.

e. Florida Statutes, Section 921.141(6)(f): The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

As described in mitigator c the experts that evaluated Mr. Hunter have concluded that he may be in the. early stages of schizophrenia or suffer from schizophrenic like symptoms which correspond with frontal lobe difficulties and corresponding impulse control. This

is based on a history associated with hearing voices and actually carrying on conversations with his deceased twin and is made more likely by the fact that his father was a diagnosed schizophrenic and his mother had mental health issues. Both by stature and personality, Mr. Victorino was very influential on Mr. Hunter but the court finds the defendant has failed to show that he lacked the capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law and, as a result, this mitigator has not been established

f. Florida Statutes, Section 921.141(6)(h): The existence of other factors in the defendant's background that would mitigate against the imposition of the death penalty.

At the *Spencer* hearing Mr. Hunter's attorneys indicated there are no other factors to consider other than the listed statutory and non-statutory mitigators.

2. Non-Statutory Mitigating Factors.[FN3]

a. The level of maturity of the defendant at the time of the crime.

It is clear to the court that the defendant was not very mature at the time of the crime. He had only reached adulthood for a short period of time and had left the home *of* his mother and stepfather because he could not comply with the reasonable rules they had imposed for living with the *family.* He seemed to be functioning without guidance or direction and apparently was prepared to do just about anything to fit in with the group that would accept him. It appears to the court that the defendant has established that the defendant was very immature at the time of the crime, however, little weight is assigned to this mitigating factor.

> [FN3] The State raised a proposed mitigating factor of 'the defendant was physically and emotionally abused' as item l0 in its Sentencing Memorandum. A letter request was sent to attorneys for both parties who agree the mitigator has no application.

b. The defendant could not have foreseen that his conduct in the course of the commission of the offense would create a grave risk of death to one or more persons.

This mitigator suggests that the defendant didn't appreciate what was about to happen at the Telford Lane home. In fact, as the jury found, he had participated in a conspiracy to break into the house and commit the murders leaving no person living. Thereafter, some six or seven hours later, Mr. Hunter along with the murder team assembled and were transported by Mr. Cannon to the Telford Lane property, each team member having armed himself with a bat. Before they entered the house they knew and were aware there were a number of people in the home. The court finds a grave risk of death or substantial bodily injury to one or more of those persons was obvious to the defendant. The court finds that this mitigator has not been established.

c. The defendant exhibited good conduct during incarceration.

The court finds that the defendant has exhibited good conduct during incarceration and has complied with all of the appropriate rules and regulations during his stay at the various county jails where he has been a resident. This mitigator has been established although the court gives this mitigator very little weight.

d. The defendant exhibited good conduct during trial.

The court finds that the defendant exhibited good conduct during trial. The court has had an opportunity to observe Mr. Hunter during all parts of the trial of this cause and it is apparent that Mr. Hunter has exhibited good conduct, has been appropriately respectful to the court and counsel and has maintained his composure in difficult circumstances. This mitigator has been established but because this type of conduct is expected, very little weight is assigned to this mitigator.

The court has now discussed all of the aggravating circumstances and mitigating circumstances. The

> aggravating circumstances in this case far outweigh the mitigating circumstances. This court agrees with the jury's recommendation that in weighing the aggravating circumstances against the mitigating circumstances, the scales of life and death tilt unquestioningly to the side of death.

(V9, R1590-1597).

The Trial Court's Weighing is Proper.

In his brief, Hunter specifically complains that his age should have been given greater weight in mitigation, as should his lack of prior criminal activity. However, against the mitigation is the fact that Hunter was convicted of beating six people to death, and the jury recommended death for four of those murders. The fact that Hunter started his criminal record with six murders should not work in his favor -– he does not get a free killing merely because it happens to be his first offense. *Schoenwetter v. State*, 931 So. 2d 857, 875 (Fla. 2006); *Farina v. State*, 801 So. 2d 44, 48-49 (Fla. 2001). Likewise, age is a circumstance that everyone has -– despite Hunter's age, he was a full participant in the offenses, and, merely because he was 18 at the time is not sufficient to offset his death-worthiness.[46] *See, Henyard v. State*, 689 So. 2d 239 (Fla. 1996).

Finally, Hunter's claim that his mitigation is "unparalleled" strains credulity -- Hunter was convicted of **six**

[46] The constitution does not assign specific weights that must be given to various types of mitigation.

brutal murders, and the four murders for which he received a death sentence are extremely aggravated. Under the facts of this case, which, quite literally, stands by itself as the penultimate example of the "most aggravated" of first degree murders, there was no abuse of discretion in the trial court's sentencing process. Death is the proper sentence, and that sentence should be affirmed.

X. THE "UNCONSTITUTIONAL PROPORTIONALITY REVIEW" CLAIM

On pages 42-48 of his brief, Hunter argues that "this Court's comparative proportionality review of sentences of death is unconstitutional." Hunter's claim apparently is that this Court's proportionality review should include a comparison of death cases to cases in which the defendant received a sentence other than death, cases in which a death sentence was sought but not imposed, and cases in which the death penalty "could have been sought" but was not. And, Hunter seeks to expand the base of cases to include all cases falling into those categories anywhere in the country (but presumably limited to jurisdictions having a death penalty). According to Hunter, this claim was raised in a motion filed on January 5, 2006. However, the "proportionality" component of that motion, which is found at V

4, R.650-51 contains none of the arguments contained in Hunter's brief.[47]

Florida law is well-settled that claims that were not timely raised in the trial courts cannot be raised for the first time on appeal. *Johnson v. State*, 32 Fla. L. Weekly S445 (Fla. July 5, 2007); *Williams v. State*, 32 Fla. L. Weekly S347 (Fla. June 21, 2007); *Reynolds v. State*, 934 So. 2d 1128, 1140 (Fla. 2006); *Floyd v. State*, 913 So. 2d 564, 578 (Fla. 2005); *Steinhorst v. State*, 412 So. 2d 332, 338 (Fla. 1982). Despite the claims contained in Hunter's brief, this claim was not raised below, and, because that is so, this claim is not preserved.

Even if Hunter had properly raised this claim in the trial court, it is not a basis for relief. The proportionality review conducted in Florida death penalty cases has been repeatedly upheld, and nothing Hunter has argued to this Court supplies a basis for ignoring more than 30 years of precedent.

[47] The pages of this motion are out of order in the State's copy of the record. The section of the motion entitled "Proportionality Review" is sub-section "J" of the motion. In his brief, Hunter cites to R1995 and R2005-6 as record pages where this issue was "preserved." Those pages of the record contain no discussion of proportionality review, or anything resembling it. The hearing on Hunter's motion is found at V12, R1978-2024.

Further, Hunter's argument that "the Constitution does not stop at the state line" ignores the settled law holding that proportionality review is not constitutionally required in the first place.[48] *Pulley v. Harris*, 465 U.S. 37 (1984); *Barbour v. Haley*, 471 F. 3d 1222, 1231 (11th Cir. 2006); *Garcia v. State*, 492 So. 2d 360, 368 (Fla. 1986); *State v. Henry*, 456 So. 2d 466, 469 (Fla. 1984). And, to the extent that Hunter relies on the September 2006 "ABA Report," this Court has repeatedly rejected that report as a basis for relief. *Diaz v. State*, 945 So. 2d 1136, 1145-1146 (Fla. 2006); *Rolling v. State*, 944 So. 2d 176, 181 (Fla. 2006); *Rutherford v. State*, 940 So. 2d 1112, 1117 (Fla. 2006). Finally, Hunter's suggestion that *Pulley v. Harris* should be overruled is made in the wrong Court. This Court has repeatedly recognized the United States Supreme Court's statement that the prerogative of overruling that Court's decisions lies in Washington. *Marshall v. Crosby*, 911 So. 2d 1129, 1135 (Fla. 2005); *Mills v. Moore*, 786 So. 2d 532, 537 (Fla. 2001). Even if Hunter had preserved his "proportionality review" claim, it does not establish a basis for relief.

XI. HUNTER'S DEATH SENTENCE IS PROPER

[48] To the extent that Hunter relies on a Fourth DCA case and a California case on pages 46-47 of his brief, those cases are distinguishable from the extreme facts of this case, and deserve no further discussion.

On pages 48-55 of his brief, Hunter argues that his death sentence is "disproportionate." Hunter further claims that this Court should "increase the extent" of proportionality review as argued in Claim X. For the reasons set out above, there is no basis for altering this Court's settled precedent concerning proportionality review. And, despite Hunter's claims, his death sentence is entirely proper.

To the extent that Hunter claims that his death sentence is disproportionate to Salas' life without parole sentence, the trial court's sentencing order leaves no doubt that Hunter was more culpable than Salas, both in terms of his active and enthusiastic participation in the planning and execution of the murders, and as evaluated by the jury. (V9, R1580, 1589, 1591). The testimony indicates that Hunter and Victorino were the driving forces behind the murders, and that Salas was a less active participant in the events. Hunter was more culpable, and deserved the sentence he received.[49] *Brooks v. State*, 918 So. 2d 181, 209-210 (Fla. 2005); *Marquard v. State*, 850 So. 2d 417, 424 (Fla. 2002); *Rimmer v. State*, 825 So. 2d 304, 322 (Fla. 2002); *Chamberlain v. State*, 881 So. 2d 1087, 1108-09 (Fla. 2004); *Fotopoulos v. State*, 838 So. 2d 1122, 1133 (Fla. 2002).

[49] Hunter was actually convicted of 11 of the charged offenses, while Victorino was only convicted of 10. (V9, R1591). Salas was convicted of eight (8) of the charged offenses. (V9, R1579).

To the extent that Hunter claims that his death sentences are disproportionate to other death sentences imposed in Florida, he has cited only one case in his brief which had more than one victim, in comparison to Hunter's **six** victims and four death sentences. And, the only multiple victim case cited by Hunter is not a proportionality case, but rather was remanded for a life sentence based on an improper jury override. *Ferry v. State*, 507 So. 2d 1373 (Fla. 1987) (override improper because mitigation provided basis for jury's life recommendation).

In contrast to *Ferry,* the mitigation offered by Hunter is far less than "substantial" and, in fact, is minimal in comparison to the heavy aggravation present in this case. In fact, there are few cases which compare to the extreme circumstances of Hunter's crimes. *Coleman v. State*, 610 So. 2d 1283, 1287 (Fla. 1992) (four victims); *Bolender v. State*, 422 So. 2d 833, 837 (Fla. 1982) (defendants killed four drug dealers, but victims' livelihood did "not justify a night of robbery, torture, kidnapping, and murder"), *cert. denied*, 461 U.S. 939, 103 S. Ct. 2111, 77 L. Ed. 2d 315 (1983); *White v. State*, 403 So. 2d 331 (Fla. 1981) (execution-style killing of six victims during a residential robbery), *cert. denied*, 463 U.S. 1229, 77 L. Ed. 2d 1412, 103 S. Ct. 3571 (1983); *Correll v. State*, 523 So. 2d 562 (Fla.) (four victims), *cert. denied*, 488 U.S. 871, 102 L. Ed. 2d 152, 109 S. Ct. 183 (1988); *Ferguson v.*

State, 474 So. 2d 208 (Fla. 1985) (execution-style killing of six victims warrants death); *Francois v. State*, 407 So. 2d 885 (Fla. 1981) (same), *cert. denied*, 458 U.S. 1122, 73 L. Ed. 2d 1384, 102 S. Ct. 3511 (1982). Death is the proper sentence.

XII. & XIII. THE LETHAL INJECTION CLAIMS[50]

On pages 56-61 of his brief, Hunter argues that lethal injection is an unconstitutional method of execution, and that his sentence should therefore be reduced to life without parole. Hunter's claim for a life sentence is foreclosed by statute, which provides:

> (8) Notwithstanding § 775.082(2), § 775.15(1), or § 790.161(4), or any other provision to the contrary, no sentence of death shall be reduced as a result of a determination that a method of execution is declared unconstitutional under the State Constitution or the Constitution of the United States. In any case in which an execution method is declared unconstitutional, the death sentence shall remain in force until the sentence can be lawfully executed by any valid method of execution.

Fla. Stat. § 922.105. Hunter's argument is legally invalid, and deserves no further discussion.

To the extent that Hunter has raised a substantive lethal injection claim in his brief, he has provided no citation to the record to support the assertion that timely objection was made and nowhere in the record does it appear that such a claim was

[50] Claims XII and XIII in Hunter's brief are both "lethal injection" claims. Those claims are combined herein.

raised. Assuming *arguendo* that Hunter really did preserve this claim, it is foreclosed by this Court's decision in *Lightbourne v. McCollum,* 32 Fla. L. Weekly S687 (Nov. 1, 2007) and *Sims v. State,* 754 So. 2d 657 (Fla. 2000). To the extent that Hunter raises issues in his brief based on the December 2006 Diaz execution, *Lightbourne* disposed of those claims. To the extent that Hunter raises a *per se* challenge to lethal injection as a method of execution, *Sims* is dispositive assuming the claim was preserved at all.

To the extent that Hunter raises a "separation of powers" argument related to the lethal injection procedures on pages 62-63 of his brief, that claim does not appear to have been preserved by timely objection. While Hunter has provided no record citation, the true facts are that this claim has been rejected by this Court. *Diaz v. State*, 945 So. 2d 1136, 1143 (Fla. 2006); *Sims v. State*, 754 So. 2d 657, 670 (Fla. 2000). This claim is foreclosed by binding precedent.

XIV. THE *RING V. ARIZONA* CLAIM

On pages 64-69 of his brief, Hunter argues that the Florida death penalty act violates *Ring v. Arizona*, 536 U.S. 584 (2002). Assuming *arguendo* that this claim was preserved by timely objection below (V1, R47-67; V12, R2004) this claim is foreclosed by binding precedent. This Court has repeatedly rejected *Ring* claims in cases such as this one where there is an

underlying felony (or, in this case, multiple) conviction. The law is settled that:

> However, even if the claims were not barred, they would be without merit. This Court has recognized that a defendant is not entitled to relief under the "prior-conviction exception" to *Apprendi* [FN8] where the aggravating circumstances include a prior violent felony conviction. *See, e.g., Duest v. State,* 855 So. 2d 33, 49 (Fla. 2003) (noting rejection of *Ring* claims in a number of cases involving a prior-conviction aggravator); *Grim v. State*, 841 So. 2d 455, 465 (Fla. 2003) (explaining that defendant was not entitled to relief under *Ring* where aggravating circumstances of multiple convictions for prior violent felonies and contemporaneous felony of sexual battery were unanimously found by jury). . . . *See Kimbrough v. State*, 886 So. 2d 965, 984 (Fla. 2004); *Doorbal v. State*, 837 So. 2d 940, 963 (Fla. 2003).
>
> > [FN8] In *Apprendi v. New Jersey*, the Supreme Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to the jury, and proved beyond a reasonable doubt." 530 U.S. at 490 (emphasis added).
>
> Additionally, this Court has rejected claims that *Ring* requires the aggravating circumstances to be individually found by a unanimous jury verdict. [citations omitted] The Court has also repeatedly rejected objections to Florida's standard jury instructions based on *Caldwell v. Mississippi*, 472 U.S. 320, 105 S. Ct. 2633, 86 L. Ed. 2d 231 (1985). [citations omitted].

Evans v. State, 32 Fla. L. Weekly S719 (Fla. Nov. 15, 2007). Hunter has more than enough prior violent felony convictions (six for murder and one for armed burglary) to satisfy any

possible interpretation of *Ring*. This claim is not a basis for relief, even assuming that it is properly preserved.

To the extent that this claim contains additional claims beyond the *Ring* claim, those claims were not raised below and, in any event, are foreclosed by binding precedent. Subclaims A and B on page 65 of Hunter's brief are *Ring* claims which are meritless. Subclaim C on page 66 argues that "special verdict forms" are required. That claim has been expressly rejected. *State v. Steele,* 921 So. 2d 538 (Fla. 2005); *see, Huggins v. State*, 889 So. 2d 743, 772 (Fla. 2004). Subclaim D on page 66 is a *Ring* claim which is foreclosed by binding precedent. Subclaim E on page 66 is a burden shifting jury instruction claim which is foreclosed by binding precedent. *Boyde v. California,* 494 U.S. 370 (1990); *Blystone v. Pennsylvania,* 494 U.S. 299 (1990); *Freeman v. State*, 761 So. 2d 1055, 1067 (Fla. 2000); *San Martin v. State*, 705 So. 2d 1337, 1350 (Fla. 1997); *Shellito v. State*, 701 So. 2d 837, 842-843 (Fla. 1997). Subclaim F on pages 66-67 is foreclosed by binding precedent. *Hunter v. State*, 660 So. 2d 244 (Fla. 1995); *Stewart v. State,* 549 So. 2d 171 (Fla. 1989). Subclaim G is based on the false premise that "independent reweighing" of aggravation and mitigation is required. The Florida statute has been repeatedly upheld as constitutional. *Franklin v. State*, 965 So. 2d 79, 101 (Fla 2007); *Hildwin v. Florida*, 490 U.S. 638,(1989), *Spaziano v. Florida*, 468 U.S. 447

(1984), *Barclay v. Florida*, 463 U.S. 939,(1983); *Proffitt v. Florida*, 428 U.S. 242, (1976); *Bottoson v. Moore*, 833 So. 2d 693, 695 & n.4 (Fla. 2002); *See also, King v. Moore*, 831 So. 2d 143 (Fla. 2002) (denying relief under *Ring*). Likewise Subclaim I is foreclosed by settled, binding, precedent. Subclaim H is a pure *Ring* claim which is foreclosed for the same reason that all of Hunter's other such claims are not a basis for relief. Subclaim J, which claims that the jury instructions are invalid, is insufficiently briefed because it identifies no claimed deficiency. In any event, the jury instructions have been repeatedly upheld. *Williams v. State*, 32 Fla. L. Weekly S347 (Fla. June 21, 2007); *Taylor v. State*, 937 So. 2d 590, 599 (Fla. 2006); *Reynolds v. State*, 934 So. 2d 1128, 1151-1152 (Fla. 2006). With the exception of his citation to *Caldwell v. Mississippi*, 472 U.S. 320 (1985), the other cases relied on by Hunter are Texas cases which have no applicability to Florida's death sentencing scheme. *Caldwell* is not applicable in Florida, either. *Combs v. State*, 525 So. 2d 853, 856 (Fla. 1988); *Provenzano v. Singletary*, 148 F.3d 1327, 1334 (11th Cir. 1998); *Davis v. Singletary*, 119 F.3d 1471 (11th Cir. 1997). Subclaim K (assuming it was preserved below) argues, contrary to precedent, that Hunter was entitled to a jury instruction on residual

doubt. *Franklin v. Lynaugh*, 487 U.S. 164 (1988); *Downs v. State*, 572 So. 2d 895 (Fla. 1991).[51]

XV. THE CUMULATIVE ERROR CLAIM

On pages 70-72 of his brief, Hunter argues that the "cumulative effect of the deficient performance of trial counsel" entitles him to relief. Florida law is settled that ineffectiveness of counsel claims are not properly raised on direct appeal. However, since Hunter has chosen to raise those claims in this forum, he is bound by that choice. This Court should hold that Hunter is barred from subsequently raising any ineffectiveness of counsel claims that have not been raised on direct appeal.

In addition to being improper at this stage (but Hunter is bound by that choice), this claim is deficiently briefed. It is not possible to identify with any specificity which claims Hunter is referring to, which claims are "incorporated by reference", and which claims the State is supposed to identify by speculation or guesswork. The purpose of an appellate brief is to presents arguments and authorities to support those arguments –- this claim does neither.

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[51] *Oregon v. Guzek*, 546 U.S. 517 (2006) provides no support for Hunter's claim. Instead, to the extent that decision is relevant at all, it suggests that it is proper to refuse to consider or instruct on lingering doubt.

CONCLUSION

Wherefore, based upon the foregoing arguments and authorities, the State submits that Hunter's convictions and sentences of death should be affirmed in all respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was furnished by U.S. mail to **Ryan Truskoski**, Esquire, P. O. Box 568005, Orlando, Florida 32856-8005 on this ___ day of January, 2008.

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CERTIFICATE OF FONT

I hereby certify that a true and correct copy of the foregoing Answer Brief was generated in Courier New, 12 point font, pursuant to Fla. R. App. 9.210.

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