IN THE SUPREME COURT OF FLORIDA

CASE NO. SC06-2090

TROY VICTORINO

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 Facts

On the morning of August 6, 2004, Christopher Carroll arrived at 3106 Telford Lane, Deltona, Volusia County, to pick up two of his workers, Anthony Vega and Roberto (Tito) Gonzales.[1] (V29, R1796-97, 1798). Other occupants of the home worked at Burger King with Carroll's girlfriend. Carroll's girlfriend told him her co-workers had not shown up for work that morning. (V29, R1797). After ringing the doorbell and knocking several times, the door "popped" open. The front door appeared to have been kicked in. Carroll entered and noticed the room to his right had a bed tipped up on its side. "There was blood all over it." Carroll called 911.[2] (V29, R1798).

Deputy Anthony Crane, Volusia County Sheriff's Office, responded to the 911 call. (V29, R1805). Crane and other law enforcement personnel found six victims: two males in the living room; a male victim, and a female victim located underneath the box spring, were found in the master bedroom; a male victim was found in the northwest bedroom; and a female victim was located

[1] Residents of the home were Erin Belanger, Francisco Roman, Jonathon Gleason, Roberto Gonzalez, Michelle Nathan, and Anthony Vega. (V9, R1558).

[2] An audiotape of the 911 call was published for the jury. (V29, R1801-1802, State Exh. 1).

in the southwest bedroom. (V29, R1806; 1815-16). A deceased Dachshund[3] was found in the master bedroom. (V29, R1868).

Stacy Colton, FDLE crime scene investigator, documented the scene. (V29, R1823-24; 1826). She sketched the location of each victim, placement of furniture, and items of evidence. (V29, R1832; 1840-41, State Exh. 5). She photographed the damage to the front door frame, area around the lock, and a screen door that had a tear along the frame. (V29, R1833, 1834-35, 1836). A heel mark, 36 inches up from the tiled floor, was located at the level of the front door handle. (V30, R1923). Colton photographed shoe track impressions, 13 inches in length, located by the front door. (V29, R1837). She collected a knife handle and knife blade. (V29, R1858, 1861, State Exh. 9). She photographed the victims and their injuries, as well as a deceased dog. (V29, R1861-1895, State Exh.10-21). A metal bat was located in the corner of the master bedroom. (V30, R1929-30).[4]

An examination of four baseball bats collected as evidence produced no latent prints on the external surfaces. (V35, R2655,

[3] The parties stipulated to the identification of the deceased Dachshund, ”George,” who died as a result of blunt force trauma. (V37, R2944, R2955, R2957).

[4] 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. (V30, R1919-20, State Exh. 22).

2658, 2662). The bat labeled Q2, wrapped in black tape, contained four unidentified latent prints underneath the tape. (V35, R2658-59, 2663).

Robert Anthony Cannon, ("Anthony") co-defendant, pled guilty to all charges[5] in exchange for a life sentence. (V30, R1936-37, 1939). Initially, Cannon refused to testify stating, "I'm not guilty, sir. I cannot say any more, sir." (V30, R1948). 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." (V30, R1951). Cannon said he and co-defendant Michael Salas were in fear for their lives. "We had no choice. We had to go with them." (V30, R1952). Cannon, Victorino, Hunter, and Salas[6] all entered the Telford home armed with baseball bats. (V30, R1954). Cannon refused to testify further and orally moved to withdraw his plea. (V30, R1957).

Brandon Graham, friend of Michael Salas and Robert Cannon, met Troy Victorino and Jerone Hunter on August 1, 2004. (V30, R1970-71, 1972, 1973, 2021, 2048). On that day, Graham,

[5] The charges included: 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. (V30, R1937-39).

[6] Hunter and Salas were eighteen years old. Victorino was twenty-seven years old. (V34, R2564, 2565).

Victorino, Hunter, Salas, Cannon, and other friends,[7] went to the Telford home to retrieve personal items belonging to Victorino. (V30, R1974, 1978; V31, R2050). Victorino "wanted us to fight some kids to get his stuff back." (V30, R1974). Cannon parked his vehicle[8] in the neighbor's yard. (V30, R1974). Some of the group went up to the house "cussing and yelling." The girls, armed with knives, entered the home. Salas, Hunter, Cannon, and Graham, all armed with bats, remained in the vehicle with Victorino. Hunter always carried a bat.[9] (V30, R1975; 2001). Victorino did not have a bat and did not go up to the house. (V30, R2004; 3392). Francisco Roman ("Flaco") was standing at the front door. The girls exited the house with Victorino's CD case. Hunter was yelling for the residents to come outside and fight. (V30, R1976, V31, R2056). Flaco said he was calling the police. Some of the group slashed tires before they left. (V30, R1977).

A few nights later, the group[10] met again at a local park.[11] Some of them were armed with bats; Cannon had a gun. They were

[7] Cannon references "Nicole, Crystal, Naomi, and Jonathan." The three girls are sisters. (V30, R1974; V31, R2049).

[8] Cannon owed a white Ford Expedition. (V30, R1989).

[9] Hunter testified that he did not carry a bat, and could not swing a bat due to a shoulder injury. (V40, R3356-57).

[10] The group included: Graham, Hunter, Victorino, Salas, Cannon, "Chad, Ricky, Chris, Mike Wilkins and Andrew." (V30, R1981).

going “to fight some kids” at the park. Graham knew some of the people they were going to fight. They did not live at the Telford Lane home. (V30, R2023; V31, R2065). The others never showed so Victorino’s group left. (V30, R1981-82, 2010, V31, R2067).

On August 5, Graham, Salas, and Cannon met at Victorino and Hunter’s home. (V30, R1984; V31, R2074). Victorino gave Cannon the gun. (V31, 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.” (V30, R1985; V31, R2076-77). Victorino said he would do that at “Flaco’s house.” (V30, 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. (V30, R1985, 1986). Graham said “yeah,” he was in. (V30, 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.” (V30, R1986). Victorino gave a “visual diagram” with his hands. Victorino wanted to kill Flaco, and

[11] The group first met at Little Caesar’s where Salas and Hunter called Victorino to help them fight. (V31, R2044).

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.” (V30, R1987, 2032). The group went looking for more bullets for the gun. (V30, R1988, 2009). They had more than seven bats between them. (V30, R1989). They discussed having a change of clothing. Hunter offered 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.” (V30, R1988). Graham did not want to go through with the plan. Salas said, “[Y]ou can’t bitch out on us.” (V30, R1990; V31, R2082). Graham was afraid of Victorino. (V31, R2042).

Graham had Cannon bring him to Kris Craddock’s house. The group told Graham they would return to pick him up at 7:00 p.m. Later that night, Cannon tried calling Graham repeatedly on Craddock’s phone. (V30, R1992; V31, R2202-03, State Exh. 25). Since Graham did not want to go with them, he told Craddock to tell Cannon he was visiting his sick brother in Deland. Graham told Craddock about the plan to murder the Telford Lane people. (V30, R2013; V31, R2085). Victorino told Graham they were going to kill the Telford Lane people at 10:00 p.m. that night. (V30, 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. (V30, R1994, 2016). Graham had not taken the plans to kill "seriously" and "was shocked" when he heard about the murders. He and Craddock drove to the Telford Lane home. (V30, R1994, 1996, 2015; V31, R2085).

Graham was afraid for himself and his friends. (V30, R1995; V31, R2043, 2089). He went to Salas' grandmother's house to retrieve clothing he had left. (V30, R1995). Victorino, Hunter, Salas and Cannon showed up. (V30, R1996). They did not mention the murders. (V30, R1996). Salas said he was not involved. (V30, R2017-18).

Graham saw Victorino's personal items in Cannon's truck. He knew Victorino wanted his items from the Telford Lane home. (V30, R1996-97, 2045, 2087). Graham and Craddock decided they would call police if the group was not caught. A friend talked to Graham about the murders and she called police. (V30, R1997, 2019). Graham was not charged with any crime. (V30, R2020).

Graham said Michael Salas had problems with the "Abi brothers." (V30, R2002). The Abi brothers were at the Telford Lane home on August 1. (V30, R2004). Salas told Graham he wanted to "beat up the Abiies" but Salas did not know the Abiies were at the Telford home on August 1. (V30, R2005-06).

Deputy John McDonald responded to a "suspicious activity" call[12] at 1590 Providence Boulevard, Deltona, on July 30, 2004. (V31, 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. (V31, R2099). Sheets said Joshua Spencer[13] gave him permission to be there. (V31, R2099). The deputies secured Francis and Sheets until they knew "exactly what was going on." (V31, 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. (V31, R2095-96). Reidy did not want to file charges against Francis and Sheets. McDonald advised Reidy that there was no evidence of a break-in. (V31, R2096). Deputy McDonald called Erin Belanger. He told her to inspect the home to ensure that nothing had been stolen and that no damage had been done. (V31, R2096-97). McDonald noticed bedding in the screened-in area of the home, and other items, as if someone had been living there. (V31, R2098, 2101). McDonald advised Belanger to find out who owned the property and return it, or get rid of it. (V31, R2103).

In the early morning hours of August 1, Deputy McDonald met Victorino at Sky Street, in Deltona. Victorino reported that his

[12] Erin Belanger had placed the call. (V31, R2097).

[13] Joshua Spencer was Norma Reidy's grandson (Erin Belanger's cousin). (V31, R2099, 2101, 2130).

personal belongings had been stolen from the Providence house. (V31, R2136, 2138, 2139). McDonald told Victorino to make a list of the stolen items. Victorino did not actually see the items that were missing or stolen. (V31, R2140). Victorino became angry, and told McDonald, "Don't worry about it, I'll take care of this myself." (V31, R2141). McDonald told Victorino to contact Belanger to report what had been taken from the Providence home. (V31, R2146).

Deputy Sierstorpff met Erin Belanger and Francisco Roman at the Providence Boulevard home on July 31, 2004. (V31, R2105). Belanger reported items stolen[14] from the residence. (V31, R2106). Sierstorpff observed a large amount of clothing and shoes strewn about the home. (V31, R2106). Papers bearing Victorino's name were found in a box. Sierstorpff was not aware 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. (V31, R2107). Belanger knew Victorino had been staying in her grandmother's home. (V31, R2109).

Kimberly Ann Jenkins, co-worker of five of the victims,[15] was Jonathan Gleason's girlfriend. (V31, R2114-15, 2116).

[14] Belanger reported a DVD/VCR player and CD player were stolen. (V31, R2106).

[15] According to Ms. Jenkins, Erin Belanger and Francisco Roman were dating. Michelle Nathan and Anthony Vega dated, as well. Although Jonathan Gleason had been living at the Telford Lane home for two weeks, he was in the process of getting an

Jenkins met Victorino at the Telford Lane home on July 31, 2004. (V31, R2118). Jenkins was visiting when Victorino, along with Amanda Francis, arrived to speak with Erin Belanger. (V31, 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 were at the Telford home. Belanger did not give them to him then "out of fear." (V31, R2124). Some of Victorino's other personal items had been dispersed,[16] as police told them to "take whatever we wanted from the Providence house." (V31, R2125-26). Jenkins, along with Belanger, Roman, and Rebecca Ortiz, took Victorino's belongings out of the Providence house. (V31, R2130). Belanger knew Victorino through her cousin, Joshua Spencer. (V31, R2130-31). Belanger did not like Spencer allowing people to live in their grandmother's house. (V31, R2133). Gleason told Belanger, "better to be safe than sorry" and to return Victorino's items to him. (V31, R2134). Belanger agreed to meet Victorino the next day at 6:00 p.m. at the Providence Boulevard home. (V31, R2120-21). Victorino failed to meet Belanger the next day. (V31, R2132).

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apartment. Roberto Gonzales did not live at the Telford Lane home. (V31, R2117, 2118).

[16] "Abi G" had personal items that belonged to Victorino. (V31, R2126).

Norma Reidy, Erin Belanger's grandmother, spent the winters in her Providence Boulevard home. (V31, R2153-54). No one had her permission to live in the home. Belanger looked after the home for her. (V31, 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. (V31, 2155). Reidy met Victorino through her grandson. (V31, R2157). After Reidy returned to Maine for the summer (in 2004), Spencer lived with Belanger for a short time. (V31, R2158). Reidy was not aware that Spencer had given Victorino permission to live in her Deltona home. (V31, R2161).

Kristopher Craddock met Victorino a few nights before the murders. (V31, R2163, 2164, 2203). Craddock, Brandon Graham, Michael Salas and Robert Cannon went to the park to fight some people who beat up Cannon and Salas.[17] (V31, 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. (V31, R2170-71, 2172, 2204). Victorino directed the others where to hide. The other group never showed. (V31, R2172-73). Craddock saw Victorino hand Cannon a gun. (V31, R2173, 2214). Victorino told Cannon, "If he shot it, make sure he picked up

[17] Earlier, Cannon and Salas had been accosted at a skating rink. (V31, R2212).

the shells." Craddock left the park shortly thereafter. (V31, R2174, 2204).

Brandon Graham went to Craddock's house on the night of August 5, 2004. (V31, 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. (V31, R2178, 2205-06). Later that night, Craddock and Graham went to Nate June's house. (V31, R2179). Cannon called Craddock's phone repeatedly to speak with Graham. (V31, R2202-03, State Exh. 25). Craddock told Cannon that Graham was not with him. (V31, R2180, 2209). Craddock and Graham spent the night at Craddock's house. Craddock's mother called the next morning and told them about the murders. Craddock, Graham and Brandon Newberry drove by the Telford Lane home. (V31, R2182, 2210). Graham went to Michael Salas' grandmother's house (where he had been living) to retrieve his clothes.[18] Victorino, Hunter, Salas, and Cannon were outside the house. Cannon asked Craddock if he had heard about the murders. (V31, R2183). Craddock did not see any of the defendants after that day. (V31, R2186).

Deborah Newberry testified Brandon Graham stayed at her home for a few days in August 2004. (V32, R2244-45). On the

[18] After the murders, Graham stayed at the Newberrys' home. (V31, R2183).

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. (V32, R2248).

Deborah Newberry and Brandon 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. (V32, R2252, 2257, 2261). Newberry immediately called the police. (V32, R2249, 2253, 2260). Graham gave a statement to police. On the morning of August 9, Graham's school called Newberry and informed her Graham was giving a tape recorded interview at the Sheriff's office. (V32, R2250-51).

Jamie Richards, 911 operator, received a 911 call[19] at 1:15 a.m. on August 1, 2004, from Erin Belanger. (V32, 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 grandmother's home. (V32, R2273). People outside were yelling, "Come outside, come outside." (V32, R2275). Belanger said she did not have any weapons except for a baseball bat. (V32, R2279). Belanger did not want to meet Victorino the following night, "if there's going to be problems like this." (V32, R2281). Belanger said the people living in her

[19] The 911 call was published for the jury. (V32, R2270-2286).

grandmother's house without permission claimed her cousin had given them a key. (V32, R2283).

Thomas McDonnell, 911 Dispatcher, received a call[20] at 3:41 a.m. on August 1, 2004, from Erin Belanger. Belanger reported "the same people just came back ... banging on the door." A deputy was dispatched to the house. (V32, 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. (V32, R2309-10, 2311, 2323, State Exh. 28). William Macaluso, loss prevention specialist for 7-Eleven Corporation, verified that a maintenance check was performed on the security camera at the Providence Boulevard store, Deltona, on August 2, 2004. (V32, R2329-30). A CD of the tape for August 5, 2004, was published for the jury. (V32, 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. (V32, R2336-37, State Exh. 30).

Investigator Richard Graves, Volusia County Sheriff's Office, processed the crime scene. (V33, R2361-62). He, along

[20] The 911 call was published for the jury. (V32, R2296-2299; 2308).

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. (V32, 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. (V32, R2365, State Exh. 4).

Graves attended the autopsies of the six victims. (V33, R2368). Known hair and blood standards were collected from each victim.[21] Graves obtained a DNA sample from Victorino. (V33, R2384, State Exh. 37).

Graves processed a crime scene at 1001 Ft. Smith Boulevard, Deltona, Victorino's and Hunter's home, on August 8, 2004. (V33, R2391). Photographs of the residence were entered into evidence. (V33, R2396, State Exh. 39). Items of evidence collected at the residence included the following: Victorino's duffle bag; a pair of size 12 Lugz boots (V33, R2398-99, 2401-02, 2420, 2421 State Exh. 40); a pair of size 10 ½ Nike tennis shoes and shoelaces (V33, R2403-04, 2410, 2411, 2421, State Exh. 41; 42; 43).[22]

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[21] V33, R2370, 2375, State Exh. 31; V33, R2379, State Exh. 32; V33, R2380, State Exh. 33; V33, R2381, State Exh. 34; V33, R2383, State Exh. 35; V33, R2384, State Exh. 36.

[22] A poster board containing close-up photographs of the shoes and laces was admitted. (V33, R2413-14, State Exh. 44).

Investigator Charles Dowell, crime scene coordinator, Volusia County Sheriff's Office, videotaped the crime scene at Telford Lane and processed Cannon's Ford Expedition.[23] (V33, R2443, 2445, 2446, 2448). A Lugz boot box, located in the Expedition, contained papers belonging to Victorino. (V33, R2452-53). Victorino's prints were located on items found inside the box. (V235, R2642).

Lieutenant Albert Pagliari, Volusia County Sheriff's Office, processed various crime scenes in relation to the Telford Lane murders. (V33, R2467). He photographed, vacuumed, processed, and collected evidence from Cannon's Expedition. (V33, R2468). Pagliari processed sunglasses found in the Expedition. (V33, R2469, State Exh. 49). A latent fingerprint card containing Francisco Roman's prints was entered into evidence. (V33, R2473, State Exh. 50). Prints found on the sunglasses belonged to Francisco Roman. (V35, R2650-51). Pagliari assisted in processing Victorino's Fort Smith Boulevard home. (V38, R3124). Pagliari did not observe any blood stains on shoes located at Victorino's home. (V38, R3126). He did not get a close look at any of the shoes. (V38, R3127).

Investigator David Dewees, Volusia County Sheriff's Office, processed the crime scene at 1590 Providence Boulevard, Deltona.

[23] 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). (V33, R2456, 2463, 2469).

(V33, R2475). Dewees noted a forced entry to the broken front door, with a shoe print on the door. (V33, R2476). Dewees collected baseball bats located in a retention pond in Debary. (V33, R2481).

Investigator Lawrence Horzepa, lead investigator, interviewed several witnesses. Troy Victorino was developed as a suspect. (V34, R2510-11, 2512; 2515). Victorino and Jerone Hunter were found at home on August 7. (V34, R2516). Hunter voluntarily went with deputies and spoke with investigators. (V34, R2517). Initially, Hunter was not a suspect. (V34, R2518, 2556). Hunter gave inconsistent statements. He was "literally crying and shaking." Hunter was read his *Miranda* rights and he signed a waiver form. (V34, R2519, 2521, State Exh. 51). Hunter admitted his involvement and said, "[I]t wasn't supposed to happen like that." (V34, R2555, 2559).

Deputy Greg Yackel, Volusia County Sheriff's Office diver, searched a retention pond in Debary, Florida. Yackel and his dive team recovered four bats. (V34, R2570, 2571, 573).

Investigator James Day, Volusia County Sheriff's Office, secured Cannon's Ford Expedition and had it towed to the sheriff's evidence compound. (V34, R2584-85).

Kathleen Rebholtz, forensic technician, FDLE, recovers trace evidence from items of clothing or solid objects. (V34,

R2587). Rebholtz examined or "swept" items of clothing[24] recovered from Cannon's Expedition. (V34, R2592). Rebholtz prepared pharmaceutical folds from the debris scrapings from the clothing. ((V34, R2593, 2595, State Exh. 55). She examined the four baseball bats. (V34, R2596). Baseball bat number 1, item "Q1," contained hair, fibers, and solid material. (V34, R2601). State ID "OOO" contained trace material collected from bats "QI" and "Q2." (V34, R2602).

Ted Berman, crime laboratory analyst, FDLE, examined glass fragments (Q9) retrieved from State Exhibit 55. (V34, R2604, 2605, 2609, 2623). The Q9 fragments matched a broken lamp found in bedroom 2 of the Telford home. (V34, R2623).

Jennie Ahern, FDLE senior crime laboratory analyst, examined and compared footwear impressions with various sets of shoes.[25] A footwear impression, located on a pay stub belonging to Erin Belanger and found underneath her body (V27, R1869, State Exhibit 12) matched that of a Lugz left boot (State Exh. 40). (V35, R2670, 2677-78, 2679-80). The same Lugz left boot as well as a Lugz right boot, "most likely" made impressions on a

[24] 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. (V34, R2592, 2624).

[25] 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. (V35, R2678).

bed sheet (V27, R1887, State Exhibit 18) found in Belanger's bedroom. (V35, R2693). A shoe impression left on the front door of the Telford home, "could have" been made by the right Lugz boot (V33, R2399-2401, State Exhibit 40) (V35, R2705). All other footwear was eliminated as being responsible for the shoe impression on the front door. (V35, R2709). Footwear impressions found on playing cards located in the victims' home "could have" been made by the Lugz boots. (V35, R2710). **State Exhibit 30, poster board of still photos from 7-Eleven, showed Victorino wearing Lugz boots. (See, V32, R2347-48).** Ahern compared all of the boots collected with the shoe impressions. (V35, R2733).

Emily Booth Varan, FDLE crime laboratory analyst, prepared DNA profiles from known standards from all six victims.[26] Varan prepared a DNA profile from known standards from Victorino. (V36, R2777-78, State Exh. 72). Varan performed various types of DNA testing on the Lugz boots. (V36, R2784). Testing revealed Victorino was the wearer of the boots. (V36, R2786, 2790). Further DNA testing revealed Erin Belanger's, Anthony Vega's, Francisco Roman's, Roberto Gonzalez' blood on the boots. (V36, R2792, 2794, 2797, 2798, 2802, 2804). Varan examined four baseball bats.[27] (V36, R2807). Roberto Gonzalez "could be" a

[26] V36, 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.

[27] Two of the four bats contained blood. (V36, R2865).

contributor to the blood located on bat Q1. (V36, R2810, 2812). Erin Belanger, Francisco Roman and Roberto Gonzalez could not be excluded as contributors of the blood located on bat Q2[28] (V36, R2813, 2815, 2816-17). Bats Q3 and Q4, found in water, did not reveal any blood stains. (V36, R2, 2817-18, 2819, 2821, 2865). The water would have diluted any potential bloods stains. (V36, R2821). DNA testing on the blood located on a knife blade matched Jonathan Gleason. (V36, R2823, 2824). A mixture containing the blood of Anthony Vega and Roberto Gonzalez was found on the knife blade. (V36, R2824). A knife blade handle contained a mixture of DNA that belonged to Anthony Vega, Jonathan Gleason, and Roberto Gonzalez. (V36, R2824, 2826). Mitochondrial DNA was performed[29] on a hair sample, retrieved from one of the bats. (V36, R2838). The hair sample matched the DNA of Michelle Nathan. (V37, R2888).

Miranda Torres, a friend of Michael Salas and Robert Cannon, was a neighbor of Troy Victorino and Jerone Hunter. (V37, R2920). In the summer of 2004, Victorino told her he had moved into a friend's house on Providence Boulevard, "Josh's grandparents." (V37, R2923-24). Victorino and Hunter told her about their belongings being stolen by "Erin." "They were upset

[28] Bats Q1 and Q2 contained degraded DNA samples. (V36, R2822).

[29] LabCorp conducted the mitochondrial DNA analysis. (V36, R28380.

and mad." (V37, R2924). At midnight, August 5, 2004, Torres saw the defendants near her house. (V37, R2924-25). Cannon told her, "[W]e have to handle something real quick." (V37, R2929). A few minutes later, Torres noticed Cannon's vehicle was gone as were Victorino and his friends. (V37, R2930). The next afternoon, August 6, Salas, Hunter and Cannon came to her home to see her brother. (V37, R2931, 2937, 2938). Torres did not see the defendants again. (V37, R2932).

Dr. Thomas Beaver, medical examiner, performed the autopsies on the six victims. (V38, R2976, 2981). The first autopsy was performed on Anthony Vega. (V38, R2981). Vega's injuries consisted of blunt force trauma and sharp force injury. (V38, 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. (V38, R3000, 3002). A laceration on his scalp was caused by an unidentifiable blunt instrument. (V38, R3004, 3007). There were contusions on his shoulder and left knee, consistent with being dragged. (V38, R3004, 3013). Vega had defensive wounds on the back of his left hand. (V38, R3005-06). His skull was deformed and fragmented. (V38, R3007-08). A significant amount of blood located in the soft tissue areas of the head and skull indicated the injuries occurred before death. (V38, R3009). A forceful blow to the face caused Vega's skull to fracture. Bone fragments

lacerated his brain. (V38, R3010-11). There was a fracture at the base of the skull. (V38, R3011). The head injuries were consistent with being made by a baseball bat. (V38, R3012). The sharp force injuries to the neck were postmortem. (V38, R3000). Anthony Vega's death was caused by blunt force trauma to the head. (V38, R3011).

The next autopsy was performed on Jonathan Gleason. (V38, R3013). Gleason had fractures to his face. There were contusions down the left side of his head to his neck. His face was deformed. (V38, R3017, 3022). Contusions from the right side of his face stretched downward into his neck. (V38, R3017). There was a cylindrical contusion on his chest and another on his arm. (V38, R3018, 3020). The width of the contusions indicated the weapon was consistent with a baseball bat. (V38, R3018, 3028). There were two stab wounds to his chest. Three stab wounds to his abdomen were inflicted postmortem. (V38, R3020). Gleason's skull was fractured. (V38, R3021). There were defensive injuries on his hands and arms. (V38, R3023-24, 3025). There were numerous blows to Gleason's head, neck, and face. (V38, R3027-28). Gleason died as a result of a basilar skull fracture caused by blunt force trauma. (V38, R3026, 3028).

The third autopsy was performed on Roberto Gonzalez. (V38, R3039). There were large contusions on the right side of Gonzalez' face and chest. His skull was deformed and fractured.

(V38, R3042, 3044). There were a number of stab wounds in the chest area and abdomen. (V38, R3042). Some of the stab wounds were postmortem. (V38, R3043). There were lacerations and contusions on the scalp. Some of his teeth were missing and his jaw was fractured. (V38, R3043). His injuries were consistent with being hit by a baseball bat. There were multiple blows to Gonzalez' head. (V38, R3045). There were huge gaps between the pieces of bones in his skull. Fragments of bone penetrated his brain and cranial cavity. (V38, R3046). The whole front portion of Gonzalez' skull was caved in along with fractures to the base of the skull. (V38, R3047). It was not possible to remove Gonzalez' brain intact, as it was "so lacerated ... it's ... fragments of tissue." (V38, R3047). Gonzalez died as a result of blunt force trauma to the head. (V38, R3048).

The forth autopsy was performed on Michelle Nathan. (V38, R3048-49). 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 nor to the sides of her head. (V38, R3054). She had an abrasion on her knee. (V38, 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 being made by a baseball bat. (V38, R3055). There were defensive wounds on her hands and wrists. (V38, R3056). Incised and stab wounds on her neck were inflicted

postmortem. (V38, R3057). Nathan died as a result of blunt force trauma to her head. (V38, R3058).

The fifth autopsy was performed on Francisco Roman. (V38, R3059). There was a contusion and deformity to the right side of his head. He had a fractured skull. (V38, R3062-63, 3064). These injuries were inflicted while he was still alive. (V38, R3064). There was a defensive wound to Roman's left hand. (V38, 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. (V38, R3063). An incised wound, inflicted postmortem, cut across Roman's neck, through the jugular vein and carotid arteries. (V38, R3063-64). Bone fragments penetrated his brain. Roman had a basilar skull fracture. Blunt force trauma to the head was the cause of death. (V38, R3066).

The final autopsy was performed on Erin Belanger.[30] (V38, 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. (V38, R3069). Blood seeped into her eyes as a result of the blows to her skull. (V38, R3070). There was a stab wound to her chest. (V38, R3070). An incised wound to her neck, inflicted postmortem, cut through

[30] Dr. Beaver testified, "We cleaned the body up considerably." (V38, R3068).

the jugular vein and trachea. (V38, 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. (V38, 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. (V38, R3073). All of Belanger’s injuries were consistent with being inflicted by a baseball bat. (V38, R3072, 3074). Dr. Beaver could only remove Belanger’s brain in pieces due to the severity of her injuries. (V38, R3074).

Dr. Beaver said it was possible the first blow to the head of each victim could have rendered them unconscious or caused death. (V38, R3076, 3077). He could not determine a time interval between the blunt force trauma wounds and the infliction of stab/incised wounds. (V38, R3078). Most, but not all, of the stab wounds were inflicted post mortem. (V38, 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. (V38, R3090-3093).

Deputy Gregory Roberts, School Resource Officer, took a harassment complaint made by Michelle Carter against Brandon Graham in September 2005. (V38, R3107; 3109). Roberts wrote a brief report and took no further action. (V38, R3110).

Michelle Carter and Brandon Graham worked together at Little Caesar's Pizza in 2005. (V38, R3111). Graham told her he had knowledge about the murders in this case. (V38, R3113, 3115). Carter testified, "It was like boasting, like bragging." (V38, R3113). Graham told Carter he would kill her if she told anybody. (V38, R3113). Graham told Carter to "watch her back." (V38, R3114). Deputy Roberts told Carter that Graham was told to stay away from her. (V38, R3114).

Brittany Labar was a friend of Kimberly Jenkins.[31] (V38, R3116). Labar was visiting the Telford home the day Victorino came by to talk to Belanger about his possessions. (V38, R3118). Labar saw Belanger and Victorino having a "normal conversation." (V38, R3119, 3120).

Yvonne Pizarro, a friend of Victorino's, saw Victorino on the night of August 5, 2004. (V38, R3127-28, 3129). Victorino picked up some clothes that belonged to him. (V38, R3131).

[31] Jenkins was Jonathan Gleason's girlfriend at the time of his murder. (V31, R2114-15).

Pizarro did not recall the exact time Victorino was at her home. (V38, R3132).

Arthur Otterson saw Victorino at Pizarro's house between 9:00 p.m. and 11:00 p.m. on August 5, 2004. (V38, R3135-36, 3138).

Philip Montosa employed Victorino. On the morning of August 5, 2004, Victorino cut lawns. (V38, R3140-41). Montosa could not recall the exact time Victorino finished. (V38, R3144). Montosa, who was dating Yvonne Pizarro's daughter, did not see Victorino at Pizarro's home later that evening. (V38, R3144, 3146). Montosa, who was living at Pizarro's home, waited up until 2:00 a.m., for his girlfriend Eunice to return home on the night of August 5, 2004. (V38, R3148).

Lillian Olmo saw Victorino at 11:00 p.m., at Papa Joe's bar on the night of August 5, 2004. (V39, R3154, 3156, 3163). Olmo and Victorino, along with Olmo's friends, left the bar together at closing time. (V39, R3157). Olmo was inebriated and could not remember how she got home that evening. (V39. R3163, 3166).

Eunice Vega, Victorino's friend, knew Victorino was staying at the Providence Boulevard home with Josh Spencer, in July and August 2004. Victorino had a key and his personal belongings were there. (V39, R3167-68, 3169). Vega visited Victorino at this home several times. (V39, R3169). After Victorino was removed from the Providence Boulevard home, he moved to the Fort

Smith Boulevard home. Henry and Ralph Melendez lived there. (V39, R3170). Vega and Victorino spoke daily. Victorino worked with Vega's boyfriend, Philip Montosa. (V39, R3171). During the first week of August 2004, Victorino told Vega that his property had been stolen from the Providence home. Victorino called police. (V39, R3171-72). On August 5, 2004, Vega saw Victorino at her mother's home. He arrived in a white Expedition. He picked up some of his personal belongings. (V39, R3175). They made plans to go to Papa Joe's bar. (V39, R3174). Vega went to the bar between 10:30 a.m. and 11:00 p.m. - - Victorino arrived a short time later. (V39, R3176-77). Vega, Lillian Olmo, John Pacheco, and Victorino left the bar at approximately 2:30 a.m. (V39, R3178). Victorino was picked up in the Expedition. (V39, R3178). Vega claimed she spoke with Victorino by cell phone[32] during the drive home from the bar. (V39, R3179, 3207). Vega saw Victorino the next day, sitting in a police car, after he was arrested. (V39, R3181). Vega was romantically interested in Victorino. (V39, R3203). She did not recall being with Victorino July 31, 2004 through August 4, 2004. (V39, R3211).

Troy Victorino testified on his own behalf. (V39, R3213). In July 2004, he was living at 1590 Providence Boulevard, Deltona, with Josh Spencer's permission. (V39, R3213). Spencer

[32] Vega's cell phone records did not show a phone call as being made after 11:06 p.m. (V39, R3209).

told Victorino that his grandmother, Norma Reidy, had given them permission to live in her home. (V39, R3213-14). On July 31, 2004, Victorino found his clothing missing and his car towed from Reidy's home. Victorino went to Belanger's home and told her that her grandmother, Norma Reidy, had given permission to live in her home. (V39, R3215-16, 3217, 3251-52). Victorino requested that either she or her boyfriend accompany him to her grandmother's house to retrieve the rest of his belongings. He described some of the items he wanted back. They arranged to meet the following evening. (V39, R3218-19). He returned to the Telford Lane home on August 1 at 8:00 p.m. Francisco Roman handed him two bags of clothing. The bags did not contain all of his missing items. (V39, R3219). Later that evening, Victorino attempted to file a complaint with police. (V39, R3220). He said, "I tried to explain the situation to him, and he just didn't want to hear what I had to say." He never threatened anybody. He was angry about his belongings being taken, but only called police to report the theft. (V39, R3235). He stayed at Yvonne Pizarro's house for the next few days and started living at the Fort Smith address on Tuesday, August 3, 2004. (V39, R3217).

Victorino worked with Philip Montosa. (V39, R3221). On August 5, he woke Jerone Hunter to tell him he was leaving for

work.[33] (V39, R3222-23). Later that day, Robert Cannon drove him to Yvonne Pizarro's home[34] to retrieve personal items. (V39, R3224-25). Victorino hardly knew Cannon, Salas or Graham. (V39, R3225-26). He "never" considered them his friends. (V39, R3226).

On the night of August 5, 2004, Victorino went to the 7-Eleven store to buy cigarettes and a drink. Shortly thereafter, he and Hunter went to Amanda Francis' house. Victorino told her he was going to Papa Joe's bar later that night. (V39, R3227). He returned to the Fort Smith house to change his boots so he could dance at the bar. He changed into a pair of K-Swiss boots, the same color as the Lugz boots. (V39, R3228). He arrived at the bar at 12:00 midnight and spent the next few hours with Lillian Olmo, Eunice Vega, and John Pacheco. (V39, R3228-29, 3290). Cannon and Hunter returned to give him a ride home at 1:00 a.m. (V39, R3229, 3239, 3295, 3301). On the way home, the three men picked up Michael Salas. (V39, R3302). The next morning, Victorino learned of the murders from friends and television news. (V39, R3230-31). He was arrested the following day. (V39, R3231).

Subsequent to his arrest, Victorino told police he informed Belanger that he needed his belongings back as well as "Xboxes" he bought for his son. (V39, R3252-54). At trial, Victorino said

[33] Victorino claimed he only knew Hunter for a few months. (V39, R3277).

[34] Ms. Pizarro lived on Sky Street, Deltona. (V39, R3224).

the “Xbox” belonged to Brandon Sheets. Belanger had returned most of his belongings with the exception of a box of legal paperwork. (V39, R3254). They agreed he would get his remaining items when her grandmother returned to Florida. (V39, R3261). Jerone Hunter did not accompany him to Belanger’s house on any occasion. (V39, R3262).

Victorino explained the incident at the park occurred because he and Jerone Hunter were looking for “Abi G.” (V39, R3271; 3393; 3405). Cannon brought a gun and some of the others had bats. (V39, R3274). Victorino left the park with Hunter, Salas and Cannon. There was no fight and nobody shot a gun. (V39, R3276).

Victorino was not home when Graham, Salas, and Cannon came over and watched the video Wonderland. (V39, R3279-80). Graham lied when he testified Victorino showed them the layout of the Telford home. (V39, R3281).

Victorino did not know who had been killed at the Telford home. He said, “I didn’t know it was that house. I mean, it looked familiar, but I didn’t put two and two together.” (V39, R3306). Investigators told him that Hunter had implicated him in the murders. (V39, R3312). Victorino said he had been wearing the K-Swiss boots the night of the murders. Whoever wore the Lugz boots was present at the crime scene, but it was not him. (V39, R3315).

Jerone Hunter testified that he and Michael Salas were friends. (V40, R3343). Hunter met Robert Cannon and Troy Victorino one month prior to the murders. (V40, R3344-45). Hunter was friends with the "Abi twins," Abi M and Abi G. (V40, R3346). After Hunter was forced to move out of his family's home, he moved in with Victorino. (V40, 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. (V40, R3351). Victorino, Hunter, Spencer, and Brandon Sheets stayed at the home for a week. (V40, R3351-52). Hunter, Victorino, and Nicole Kogut[35] discovered their personal items were missing. (V40, R3352). Victorino and Hunter stayed with friends for one night, and then moved to the Melendez' home on Fort Smith Boulevard. (V40, R3353).

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. (V40, R3356).

Hunter saw bats and Cannon's gun the night he and the others went to the park to fight. (V40, R3357; 3358). After the other group did not show at the park, Hunter and Victorino returned to the Fort Smith home. (V40, R3359). Soon after, the other group drove by, and a chase ensued. Cannon gave Victorino the gun. (V30, R3360-61). Victorino shot one bullet at the other

[35] Kogut was not living in the home. (V40, R3352).

car. (V40, R3361; 3407). Eventually, Hunter and Victorino returned to the Fort Smith home. (V40, R3361). Victorino was angry, playing with the gun. (V40, R3362-63; 3429). Hunter believed Victorino was angry at him and might harm his family. (V40, 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 Lane residents nor did he explain the layout of the Telford Lane home. (V40, 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 Lane home. They all agreed. (V40, R3367; 3405; 3409). They did not watch a movie called Wonderland. (V40, 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. (V40, R3373; 3432). Victorino said "he wanted to go up there and show his face." They waited for him for fifteen minutes. (V40, R3371). They returned to the Fort Smith home for Victorino to get a hooded sweater, (V40, R3372-73) and then 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. (V40, R3374). Victorino told Cannon to

park around the corner. Victorino peeked in the windows to see where the victims were located. (V40, R3412-13). With one kick, Victorino kicked the front door open. (V40, R,3375; 3388-89). Hunter entered, followed by Salas, Cannon, and Victorino. (V40, R3375; 3426). Victorino went into the master bedroom alone. (V40, R3377, 3389; 3433). Hunter saw Jonathan Gleason sitting in the recliner. He hit Gleason repeatedly with a baseball bat, "probably a dozen [or] less" times. (V40, R3376; 3390-91; 3396; 3414; 3426). Hunter thought Gleason was lying and knew where their personal items were. (V40, R3394). Gleason was trying to get up. (V40, R3398). Victorino, came out of the master bedroom,[36] and hit Gleason on the back of his head with a bat. (V40, 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 did not hit any of the victims in the head. (V40, R3378).

Michael Salas chased Roberto Gonzales into a back bedroom and hit him in the head. (V40, R3378; 3414). Gonzales was screaming he did not live there. (V40, R3415). Victorino told Hunter to "go help the others." (V40, R3399). Hunter found Robert Cannon in a back bedroom. Cannon and Anthony Vega were "swinging at each other." Hunter hit Anthony Vega on his

[36] Victorino was the only one of the four defendants that went into the master bedroom. (V40, R3377, 3378).

shoulder. Vega dropped a stick he had been using against Cannon. (V40, R3379; 3416). Victorino entered and he and Vega spoke in Spanish. (V40, R3416). Vega's "eyes just got kind of wide. Troy [Victorino] pushed me and Cannon out of the way and he started hitting the guy." (V40, R3417). Salas called for help from Gonzales' room. (V40, R3417-18). Cannon joined Salas and helped beat Gonzales with his bat. (V40, R3418). Hunter remained where he was, looking in the closet for his belongings. (V40, R3419). Hunter did not see Michelle Nathan in another bedroom hiding near a closet. (V40, R3419). Victorino "was going through the house." (V40, R3433). A short time later, Cannon, Salas, and Hunter exited the home. Hunter went back inside looking for Victorino. (V40, R3380). Victorino and Hunter exited the home. The four of them left. Victorino said he "needed to go back." (V40, R3381). After they returned, Victorino got out of the vehicle with a bat and Salas' switchblade knife. Victorino was in the house for a few minutes while the others remained outside. (V40, 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." (V40, R3383; 3440). Hunter did not use the knife at all. He did not stab or beat Michelle Nathan. (V40, R3422; 3434). He did not stab nor slit anyone's throat. (V40, R3435).

Hunter and Victorino returned to the Fort Smith home where Hunter washed his clothes and his blue and white Nike shoes.[37] (V40, R3403; 3436). He was arrested the next day.[38] (V40, R3383; 3394).

Michael Salas, living with Robert Cannon in August 2004, met Troy Victorino for the first time on July 31. (V40, R3443, 3446). Salas knew Hunter in high school. (V40, R3446). On July 31, Salas, along with Cannon, Hunter, Victorino and some friends, drove to the Telford Lane home to retrieve personal items. (V40, R3449-50). Salas did not have any items stolen nor did he keep any at the Providence address. (V40, R3452). Salas did not enter the home on July 31. The girls stormed in and out of the house. (V40, R3454, 3455-56). Francisco Roman stepped outside with a baseball bat. (V40, R3456). Roman told the girls "to get out of my house, I don't want no problems." Roman called police. (V40, R3457, 3458). They all left in Cannon's Expedition. (V40, R3458). A few nights later, Salas and Cannon had an altercation at the local skating rink. (V40, R3462-65). Following that, Salas, Cannon, Hunter and Victorino went to the local park to fight the group that beat Cannon and Salas. (V40, R3477-78). The other group never showed. Salas and Cannon

[37] 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. (V40, R3385, 3404).

[38] At the time of his arrest, Hunter was wearing size 9 ½ shoes. (V40, R3384).

dropped Victorino and Hunter off at the Fort Smith home. (V40, R3482). Shortly thereafter, the other group drove by. Salas, Hunter, Victorino and Cannon chased them. Victorino fired a shot at the other car. (V40, R3482-83; 3595-96). The other group got away. Victorino and Hunter returned home. (V40, R3484). Victorino called Salas and Cannon to borrow Cannon's gun. They brought the gun to Hunter. (V40, R3485-86; 3606-07). The gun was returned to Cannon on August 5. (V41, 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. (V41, R3492-93; 3567). Victorino mentioned a movie where "people storm the house and beat the people inside the house with poles." (V41, R3493; 3567). Victorino said, "[I]f I have a group of niggas, I'll do that." (V41, R3568). Cannon and Salas agreed to help Victorino. Salas believed Victorino was threatening him. (V41, R3608). Graham "hesitated a little bit" but agreed. (V41, R3495).[39] The five men went looking for ammunition for Cannon's gun. (V41, R3498; 3572). When Victorino was not around, Brandon Graham told Salas he did not want to go with the others to the Telford home. (V41, R3498-99). Graham went to Kris Craddock's house. (V41, R3500; 3574).

[39] At this point, Victorino mentioned he had to go see his probation officer in the afternoon. (V41, R3497).

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." (V41, R3505). Prior to going to Papa Joe's bar, the four men proceeded to the Providence Boulevard home and broke in. (V41, R3560; 3577; 3579). Victorino said he wanted to retrieve some items. Victorino kicked the door in; Salas, Hunter, Cannon and Victorino entered. (V41, R3561-62). The four proceeded to Papa Joe's bar around midnight. "Troy said he had to make an appearance." (V41, 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. (V41, R3508-09; 3580). The four unsuccessfully tried to steal a car. (V41, R3509). They drove to the Telford home. (V41, R3511-12).

Victorino directed Cannon to park the vehicle around the corner. As the four exited the vehicle, Victorino gave them a baseball bat.[40] Victorino was "mad." He told the others, "When I come out, **nobody is going to be survivors.**" (V41, R3513; 3568; 3583). The four walked to the Telford house. Victorino went to the back of the house. (V41, R3585-87). He returned and told the others there were two people sitting in the living room.

[40] Salas said Cannon's friends, "Tito" and "Josh" put the bats in the back of the vehicle. (V41, R3628).

Victorino cut the screen on the locked door and propped it open. (V41, R3515). He directed where they all should go. (V41, 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. (V41, R3515; 3570). Victorino told them, "[I]f you leave you're just like these people." Salas believed Victorino was threatening him. (V41, R3516; 3570). Victorino counted to three and kicked the door in. (V41, R3517). Victorino was wearing the Lugz boots. (V41, 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. (V41, R3518-19). While Hunter was hitting Gleason with the baseball bat, Gonzales ran to the back bedroom. (V41, R3519-20). Salas went to the back bedroom. Gonzales came out of the dark and grabbed Salas around his waist. (V41, R3521). Gonzales was telling Salas he did not live there. Salas said, "[O]kay, I'm not going to do nothing, let me go." (V41, 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. (V41, R3522-23). Gonzales released Salas. Salas hit Gonzales on the arm and his side. (V41, 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. (V41, 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. (V41, 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.” (V41, 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.” (V41, 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.” (V41, R3526-27). Salas did not know if Belanger and Roman were dead or alive at that point. (V41, 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. (V41, R3528). Salas exited the house and got in the Expedition with Cannon. Salas did not know there were six people in the house. (V41, R3528). He wanted

to leave but Cannon said they had to wait for Victorino. (V41, R3530). Hunter joined them a few minutes later. He told them he found a girl in the closet. (V41, 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.” (V41, R352).[41] 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. (V41, 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. (V41, 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. (V41, R3554). Within a few seconds, Victorino said they needed to go back, he had left his fingerprints. (V41, R3533). Victorino entered the home, returning with a plastic bag covered in blood. Victorino had blood on his shirt and shoes. (V41, R3534). He directed Cannon to drive to an apartment complex in Debary. Hunter told them to take off their shirts and

[41] 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. (V41, R3617).

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 Hunter was wearing that night. (V41, R3535).[42] 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. (V41, 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. (V41, 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." (V41, 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." (V41, R3538; 3600-01). As the four left Wal-Mart, Hunter and Victorino joked about killing Belanger's dog. (V41, R3539). Cannon and Salas dropped off Victorino and Hunter before returning home. (V41, R3539).

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. (V41, R3543). The following day, August

[42] When Hunter got into the vehicle after the murders, he saw blood on the laces and tongue of his sneakers. (V41, R3621).

7, Salas and Cannon attempted to drive by Victorino's home. The street was blocked off, police tape surrounded the house. (V41, R3546). Later that night, Salas and Cannon were arrested. (V41, R3547).

On July 25, 2006, Victorino 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 VIII – Abuse of Dead Human Body with a Weapon (Erin Belanger); Count XIII – Armed Burglary of a Dwelling with a Weapon; and, Count XIV – Cruelty to Animals ("George," the Dachshund). (V44, R4018-19).

The penalty phase took place July 27-31, 2006. The State called ten witnesses. Family members and friends read statements to the jury. (V45, R4067-70; 4070-78, 4080-81; 4081-83; R4083-89; 4089-92; 4092-94; 4099-4105; 4108-09; 4110-12).

Dr. Joseph Wu, M.D., studies neuropsychological disorders through brain imaging. (V46, R4151-53). Wu examined PET scan images conducted on Victorino. (V46, R4204).[43] Dr. Wu did not conduct the test; he merely observed how the scan was performed. (V46, R4204). In his opinion, Victorino's PET scan was abnormal. (V46, R4211). The PET scan revealed a pattern of abnormality

[43] The PET scan was performed on March 22, 2006. An attempt was made to conduct a PET scan the day prior, but the machine was not working correctly. (V46, R4204, 4238).

that indicated either a traumatic brain injury, some form of bipolar or manic depressive illness, or a form of schizophrenia. It is possible the scan pattern was indicative of several disorders being present simultaneously. (V46, R4217).

Victorino suffered head traumas at age 4 and 14, respectively. At age 8, he was admitted to the hospital due to suicidal behavior. (V46, R4218). As a young child, Victorino had episodes of "hearing voices calling his name." (V46, R4219). A person experiencing a manic episode can have extreme rage. (V46, R4220). Dr. Wu concluded Victorino suffers from abnormalities of the frontal lobe, "the most common finding." (V46, R4230, 4236). This abnormality can be due to environment, genetics, disease, or injury. (V46, R4236).

Dr. Wu has never testified for the State in a capital case. (V46, R4234). The majority of cases referred to him have brain abnormalities as reflected on PET scans. (V46, R4234-35). Dr. Wu agreed the vast majority of cases containing an abnormality in the frontal lobe "do not go around killing people." (V46, R4241). However, "People with a frontal lobe impairment have an inability or difficulty in being able to stop themselves." (V46, R4241). Dr. Wu did not reach a mental diagnosis of Victorino using the DSM-IV.[44]

[44] American Psychiatric Association: *Diagnostic and Statistical Manual of Mental Disorders*, Fourth Edition, Text

Dr. Wu uses the "visual vigilance" protocol, a form of the activation protocol. He was present for the duration of Victorino's hour-long PET scan. (V46, R4235). Dr. Wu has no independent verification of Victorino's medical past. He relied on record review. (V46, R4236).

Dr. Charles Golden, Ph.D., conducted a neuropsychological evaluation of Victorino. (V47, R4266, 4270). He reviewed Victorino's medical records. (V47, R4270-71). Victorino has average intelligence and memory skills. (V47, R4273). The results of Victorino's executive functions test revealed a measure of impulsiveness. The results of the Rorschach Ink Blot Test revealed severe emotional problems. (V47, R4277; 4278). Victorino suffered physical and sexual abuse as a young child. After he developed aggressive tendencies, he was hospitalized. He heard voices in his head calling his name and cursing him. (V47, R4284-85). He slept with a baseball bat to protect himself. (V47, R4286). He did not receive proper medical treatment as a child, and, as a consequence, became dysfunctional. (V47, R4288).

Dr. Golden admitted he does not remember his clients and has a "horrible memory." (V47, R4309). Prior to starting his neuropsychology internship, it was suggested he might have a

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Revision. Washington, DC, American Psychiatric Association, 2000.

defect in the part of his brain where facial recognition takes place. (V47, R4310). He said, “I probably do have a defect there. And that is me, unfortunately.” (V47, R4312).

Victorino knows right from wrong. He has the ability to lie to himself and others. (V47, R4314). Dr. Wu was not aware of Dr. Golden’s finding before he evaluated the PET scan results. They worked “parallel” to each other. (V47, R4316). Dr. Golden said, “People who are victims become perpetrators later on.” (V47, R4318).

Dr. Jeffrey Danziger, M.D., conducted a psychiatric evaluation of Victorino. He reviewed Victorino’s medical and psychological records and interviewed Victorino’s mother. (V47, R4320; 4324-25). Records indicated Victorino was physically and sexually abused as a young child. (V47, R4332-33). At age nine, Victorino spent six weeks in a psychiatric hospital. (V47, R4334). He was diagnosed with early schizophrenia, bipolar disorder and atypical depression. (V47, R4336). He attempted suicide at age 14. (V47, R4340). At age 15, Victorino attended a private school for children who suffered from psychological problems. (V47, R4341). At age 16, he was sentenced to five years in prison. (V47, R4343). At age 20, he was sentenced to prison for 7 years for aggravated battery. (V47, R4345).

Victorino’s IQ measures 101, which is in the average range of intelligence. He is not mentally slow or mentally retarded.

(V47, R4338; 4367). He denied involvement in these crimes. (V47, R4364). He knows the difference between right and wrong. Victorino is not insane. (V47, R4369).

Antonio Victorino did not know his brother Troy, well. The family knew Troy was diagnosed as bipolar and was "given to rage." (V47, R4375-76).

Yvonne Pizarro, friend of Victorino for several years, never had problems with Victorino. He was helpful to her family and always welcome in her home. (V47, R4378-79; 4381). Pizarro was not aware of Victorino's criminal record. (V47, R4383).

John Pacheco, spoke with Victorino about his family. Pacheco did not know Victorino's father beat him. Victorino indicated he loved his family. (V47, R4384-85; 4387). Pacheco was not aware that Victorino was an eight-time convicted felon. (V47, R4391). Victorino was not impulsive. (V47, R4392).

Maritsa Victorino, Victorino's sister, testified the children were subject to corporal punishment while growing up. (V47, R4393, 4394).

Victorino's mother, Sharon Victorino, said he always took care of his younger siblings. (V47, R4395, 4397). As a young child, he was sexually abused at a babysitter's house. (V47, R4397). A few years later, Victorino's school notified Social Services that Victorino was being physically abused. (V47, R4398). Both of Victorino's parents were "strict

disciplinarians." (V47, R4399). Victorino was suicidal at age eight. (V47, R4401). His first felony charge was at age ten. (V47, R4405). He was in and out of the Juvenile Justice system, eventually landing in prison. (V47, R4419; 4422). Victorino's parents did everything they could to get him under control. (V47, R4421).

Dr. Lawrence Holder, M.D., has specialized in radiology and nuclear medicine for 38 years. (V50, R4887; 4899). After reviewing Victorino's PET scan, Dr. Holder observed normal distribution of glucose at the time of injection. (V50, R4909). Dr. Holder concluded Victorino's PET scan was normal.[45] (V50, R4900; 4909; 4918).

On August 1, 2006, the jury returned four recommended sentences of death by a vote of ten to two for the murder of Erin Belanger; a vote of ten to two for the murder of Francisco Roman; a vote of seven to five for the murder of Jonathan Gleason; and a vote of nine to three for the murder of Roberto Gonzalez. The jury recommended a life sentence each for the murders of Michelle Nathan and Anthony Vega. (V51, R5051-53).

On September 21, 2006, the court sentenced Victorino to death, finding the following aggravating and mitigating

[45] Dr. Holder did not review Victorino's prior medical records. (V50, R4919).

factors:[46]1) the capital felony was committed by a person previously convicted of a felony and under sentence of imprisonment or placed on community control or felony probation-moderate weight; 2) the defendant has been previously convicted of another capital felony or a felony involving the use or threat of violence to a person-very substantial weight; 3) the crime for which the defendant is to be sentenced was committed while he was engaged in the commission of the crime of burglary-moderate weight; 4) the crime for which the defendant is to be sentenced was committed for the purpose of avoiding or preventing a lawful arrest (Gleason and Gonzalez, only)-substantial weight; 5) the capital felony was especially heinous, atrocious or cruel-very substantial weight; 6) the capital felony was a homicide and was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification-great weight. The court did not find any statutory mitigating factors. The court found the following non-statutory mitigating factors: 1) the defendant has a history of mental illness, brain abnormality and hospitalizations-some weight; 2) the defendant was physically, sexually and emotionally abused as a child-moderate weight; 3) the defendant is a devoted son, brother, uncle and friend and has the support of family and friends-little weight; 4) the defendant took a

[46] The sentencing order is attached as Appendix 1.

homeless person in off the streets, fixed a friend's car and boat, and mediated a fight as acts of kindness-little weight; 5) the defendant exhibited good behavior during trial-little weight; 6) the defendant was a good inmate while incarcerated, completed life skill certificate and vital issues project-little weight; 7) the defendant was a good student and earned awards in recognition including the growth and orientation lab, a "Fins" program certificate, a "Good Kid" award, a "Good Apple" award, a "Forest Service" award and "Automobile Collision and Repair" honors award-little weight; 8) the defendant had an alcohol abuse problem-little weight; 9) the defendant had a useful occupation-little weight. The court found that the aggravation outweighed the mitigation, and imposed a sentence of death. (V9, R1559-1578).

SUMMARY OF THE ARGUMENT

The trial court did not abuse its discretion in denying the motion to suppress DNA evidence. The court's ruling came after an evidentiary hearing in which that court assessed the credibility of the various witnesses. The court's ruling is not clearly erroneous. Likewise, the court's denial of the motion to suppress physical evidence is not clearly erroneous.

The court did not abuse its discretion in denying the motion to sever. Consolidation of the defendant's cases for

trial was proper, and was conducted in a manner that did not infringe on the constitutional rights of any defendant.

The trial court did not abuse its discretion when it allowed the State to offer similar fact evidence.

The "circumstantial evidence standard" does not apply to this case because there was direct evidence of Victorino's guilt.

The heinousness aggravator and the coldness aggravator were properly found. Both aggravators are fully supported by the facts of this case.

The weight given the "mental mitigation" is in accord with Florida capital sentencing law. The court properly found under the facts that the statutory mental mitigators had not been established, and properly found that the non-statutory mental mitigation was entitled to no more than "some" weight. Victorino's death sentences are not "disparate" given that he was the driving force behind these murders.

Any error in the use of the "and/or" conjunction in the jury instructions is harmless in light of the individualized verdicts for the various offenses. Any such error is not "fundamental" under Florida law.

Assuming that the change of venue claim is sufficiently briefed, there was no abuse of discretion. Moreover, Victorino had no objection to venue being changed to St. Johns County, and

in fact endorsed that location. In any event, Victorino does not argue that the jury selected for trial was not fair and impartial.

The *Ring v. Arizona* claim, assuming it was preserved in the first place, is foreclosed by binding precedent. To the extent that the "due process" claim is preserved, and to the extent that it states a claim of some sort, the relief Victorino argues for (a mistrial) is effectively what he received when the motion to change venue was granted and the trial was delayed.

In addition to not being preserved, Victorino has advanced no argument to support the claim that the trial court abused its discretion in allowing the number of peremptory challenges provided for under the Rules of Criminal Procedure. this claim is not based on *Trotter*, but rather is based on the novel premise that the allocation of peremptories in multiple defendant cases is a basis for relief.

Victorino never moved for a mistrial based on the "refusal" of witness Cannon to testify. Likewise, the claim that a mistrial should have been granted because the co-defendants intended to "essentially prosecute" Victorino is insufficiently briefed, and presents no claim for review. The "irrelevant evidence" claim is also insufficiently briefed because the "improper evidence" cannot be identified from the brief. There

is no error to "cumulate," and therefore no basis for relief under a cumulative error theory.

While not directly addressed in the *Initial Brief*, Victorino's death sentences are not disproportionate.

I. THE MOTION TO SUPPRESS DNA EVIDENCE

On pages 42-45 of his brief, Victorino argues that the trial court should have suppressed the DNA samples taken from his person, which, according to Victorino, were taken without his consent. Whether a defendant gave his consent to search is a factual issue that is reviewed by the appellate courts for clear error. *Davis v. State*, 594 So. 2d 264, 266 (Fla. 1992) (whether a suspect voluntarily consents to a search is a question of fact for the trial judge and should not be disturbed on appeal unless the trial court's determination is clearly erroneous); *United States v. Zapata*, 180 F.3d 1237, 1240 (11th Cir. 1999) (district court's findings as to whether or not consent was voluntarily given are disturbed only if they are clearly erroneous). Victorino has not addressed that standard of review, and has ignored the factual findings of the circuit court, which, after hearing the witnesses testify about the taking of the DNA samples, rejected the version of events contained in Victorino's brief.

In relevant part, the trial court's order reads as follows:

According to Mr. Victorino, he was awakened by Inv.

Seymour along with two other people and asked for DNA samples. He insists that he refused the samples saying that they would not be surrendered without a warrant. He then asserts that there was a commotion and his mouth was forcefully opened in such a way that the sample was collected. Although he described it as being an unpleasant circumstance he concedes that there was no injury or damage. He claimed in his testimony that he had never been swabbed before. Essentially he told the investigators that they needed a warrant before they could take the samples.

It is interesting to note that Mr. Victorino also had his nails scraped with a device that is similar to a guitar pick and those shavings were collected for evidentiary purposes along with the clothing he was wearing. The motion does not seem to address those matters.

In contrast Investigator Horzepa who is the case agent had interviewed Mr. Hunter and then directed his attention to Mr. Victorino. He insists that Mr. Victorino never refused the DNA, that there was no commotion and that he received no information on a refusal. The department's normal practice is to ask for DNA sample and then if it is refused to obtain either a court order or search warrant. Investigator Graves was charged with the responsibility of actually collecting a DNA sample from both Mr. Hunter and Mr. Victorino. His memory of the episode was that he asked to collect the sample from Mr. Victorino who first indicated that it wasn't necessary because his DNA was on record. When the investigator indicated that was not adequate, Mr. Victorino opened his mouth and volunteered the DNA. According to Investigator Graves, Mr. Victorino opened his mouth, gave a sample and never told anybody that they needed a warrant. Investigator Graves insists no force was ever used and that Mr. Victorino acted as though he had given a sample before. In fact the testimony is that Mr. Victorino was actually quite cooperative. He had voluntarily given a statement, provided the DNA requested and stood up to facilitate the collection of material lodged beneath his fingernails. He was described as fully cooperative and fully compliant.

Investigator Dowell apparently was outside the room

but within several feet so that he could hear and have a sense about what was going on.

He verified the fact that Mr. Victorino did not resist, was never forced to give a sample, never required a warrant and was non-disruptive. There was a suggestion that Investigator Dowell could be impeached from an earlier statement which was rather imprecise but nevertheless explained by Investigator Dowell to the extent that Mr. Victorino first said the sample wasn't necessary because he had previously provided one. When the officers indicated they needed a separate sample, he remained compliant.

Sgt. Bob Kelly who was in charge of the crime scene unit indicated that he watched the DNA collected. He again claims there was no commotion or obstruction in any way. He indicates that Mr. Victorino fully cooperated, was polite, gave a voluntary statement and cooperated with the gathering of evidence from his fingernails. He reports that Investigator Graves was the one who had the gloves on and actually collected the sample.

Much was made at the hearing about the fact that the recorded statement apparently was turned off shortly before the collection of the DNA sample, the material under Mr. Victorino's fingernails and his clothing change. The defense could not understand why the camera had been turned off when these samples were collected. The last witness indicated that his understanding of the circumstance was that the machinery was turned off since the interview was complete and so that Mr. Victorino would have privacy when he took off his clothes and got into the jumpsuit. That explanation makes perfect sense to this court.

From a factual basis it appears that the overwhelming weight of the evidence clearly indicates that Mr. Victorino came to the Operations Center while in custody but with a spirit of cooperation. He was treated appropriately in that he was given food and water, was kept in an air conditioned facility and was allowed bathroom use when required. Mr. Victorino, a person with some experience in the court system, voluntarily agreed to give a statement which was

> preceded by his *Miranda* warnings. While in the spirit of cooperation the State collected his clothing, two DNA samples orally and gathered information by way of scrapings under his fingernails. Other than Mr. Victorino, all of the other people present indicated there was no resistance and, in fact, Mr. Victorino was cooperative. **The court finds the testimony of the officers who were present to be more credible than Mr. Victorino whose description of the incident does not square with his other acts and conduct and, therefore, the court finds him to lack credibility in this regard.** The court, therefore, finds that Mr. Victorino had freely and voluntarily provided not only a statement but the DNA samples and allowed the state to collect material that was lodged under his fingernails for their investigation.

(V4, R652-656). (emphasis added).

The trial court's order is not clearly erroneous, especially when Victorino has done no more than repeat the "factual" averments that he made in the trial court, and which that court rejected. This claim is not a basis for relief.[47]

II. THE DENIAL OF THE MOTION TO SUPPRESS EVIDENCE FROM VICTORINO'S RESIDENCE

On pages 46-50 of his brief, Victorino argues that the trial court should have suppressed evidence seized at his residence. Like Claim I, above, this claim is reviewed under the clearly erroneous standard.

[47] As the trial court noted, evidence of a person's own DNA is fundamentally different from most other types of evidence in that it, like a fingerprint, is an unchangeable characteristic of the individual. The cheek swab method is hardly invasive, and, assuming it is true that the state already had Victorino's DNA profile on file, it strains credulity to suggest that the State would not have inevitably discovered the information even without consent.

In denying Victorino's motion to suppress, the trial court stated:

> Apparently Mrs. Rafael Melendez had provided written consent to search which was provided before the issuance of the August 8 warrant and the two questioned items were recovered following a search ostensibly done pursuant to the search warrant and also after the consent of Mrs. Melendez. These facts were agreed to by the parties at the time of the hearing.
>
> **CONSENT TO SEARCH**
>
> 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 this case, there was no evidence that the brown 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. . . . He had drugs in his pocket. 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 consentual (sic) 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.
. . .

The court having conducted a factual and legal analysis concerning the issues raised by the motions described above filed by defendants, Victorino and Hunter, has concluded that despite the fact that both defendants appear to have had an expectation of privacy and, therefore, standing to challenge the search that the government did, nonetheless, the search of the Melendez residence in which they located and recovered the shoes and shoelaces is valid. The court has concluded that the search had two valid basis. First, it was done pursuant to a consent to search provided by Mrs. Rafael Melendez and, second, the search was conducted after the issuance of a search warrant and pursuant to the directives of that warrant. The court has analyzed the affidavit provided by the affiant and found that the warrant was properly issued by the magistrate, in this case Judge Foxman, and that there is no defect in regard to the precision of the warrant. In fact the warrant is quite precise as to the items challenged in these motions. Those conclusions having been reached, it is apparent that both motions should be denied.

(V7, R1239-54).[48] Those findings are not clearly erroneous, and should not be disturbed.

To the extent that Victorino cites various cases for the proposition that the State cannot fall back on a consent to search if the warrant is invalidated, the cases on which he relies are inapposite here. For example:

> "A consent to search is valid when the consent is freely and voluntarily given and the search is conducted within the scope of the consent." *Minter-Smith v. State*, 864 So. 2d 1141, 1143-44 (Fla. 1st DCA 2003). However, consent is not voluntary if it was the result of submission to authority. *See Reynolds v. State*, 592 So. 2d 1082, 1086 (Fla. 1992). Where officers represent they have a lawful authority to search, a suspect's resulting acquiescence is not an intentional and voluntary waiver of Fourth Amendment rights. *See Bumper v. North Carolina*, 391 U.S. 543, 548-50, 20 L. Ed. 2d 797, 88 S. Ct. 1788 (1968).

Smith v. State, 904 So. 2d 534, 538 (Fla. 1st DCA 2005). There is no claim in this case that the consent was not properly given, and, because that is so, there is no basis for relief.

III. THE DENIAL OF THE MOTION TO SEVER

On pages 51-60 of his brief, Victorino argues that the trial court erred in denying his motion to sever his trial from that of the co-defendants. The denial or granting of a motion to sever 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*

[48] The court's order is attached as Appendix 2.

v. State, 596 So. 2d 447, 450 (Fla. 1992) (noting that standard of review for cases involving 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 Victorino's motion, the trial court entered a lengthy order, stating in pertinent part:[49]

> The Motions to Sever allege that each defendant has made statements during custodial interrogations as well as written statements, intercepted letters, intercepted telephone conversations, and other statements or comments. The court has received and reviewed the transcripts of the custodial interrogations.
>
> The defendants seek to sever their cases and have requested separate and independent trials on all issues which would include separate trials in regard to any penalty phase that may be necessary should two or more of the defendants be found guilty of the capital murders. The severances are sought pursuant to Florida Rules of Criminal Procedure, Rule 3.152(b). There have been three separate grounds asserted by each defendant. First, each defendant asserts that an oral or written statement by a co-defendant makes reference to him but is not admissible in his case. Secondly, the defendants assert that one or more co-defendants have inconsistent defenses. Within this category, Mr. Victorino argues that he will be exposed to an organization of claims that he was the principal instigator of the activities that resulted in the deaths. The third concern expressed is that the trial of multiple defendants on multiple charges with a vast array of evidence is essentially so unwieldy both as to the guilt phase and, if necessary, as to the penalty phase, that a fair trial cannot be had even if properly managed by the court. Each of these areas of concern will be discussed below.

[49] The order denying severance is attached as Appendix 3.

. . .

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.Ed.2d 176 (1987), the court held "that the Confrontation Clause [was] not violated by the admission of the non-testifying 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.

. . .

Hostility among defendants or an attempt by one defendant to escape punishment by throwing blame on a codefendant is not sufficient reason, by itself, to require severance. *McCray v. State,* 416 So. 2d 804 (Fla. 1982).

This court recognizes under *Schmeller v. U.S.*, 143 F.2d 544 (CA 6th Cir. 1944), "the gain in speed and economy of trial which results from the consolidation of criminal cases is often offset by the disadvantage at which the defendants are placed by the consolidation. The trial court has the obligation of safeguarding the rights of not only the Government, but also of the individual accused, and must see to it that such rights are not jeopardized by the consolidation for trial of numerous cases." Nonetheless, while severance is necessary to promote fair determination of guilt or innocence, fair determination of guilt is not foreclosed merely because co-defendants blame one another for what transpired. *Alfonso v. State*, 528 So. 2d 383, (Fla. 3rd DCA 1988). As a result the issue involving the possibility of inconsistent defenses will not, by itself, support a severance.

. . .

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.

. . .

The issuance of severance is usually one of judicial discretion. *Bateson v. State*, 761 So. 2d 1165 (Fla. 4th DCA 2000). The standard is whether the movants have shown any reliable reason the trial would not allow them to have a fair determination of guilt or innocence. A severance is not necessary when the evidence is "presented in such a manner that the jury can distinguish the evidence relating to each defendant's acts, conduct and statements and can then apply the law intelligently without confusion to determine the individual's guilt or innocence." *Johnson v. State*, 720 So. 2d 232 (Fla. 1998). There has been no showing that the issues can't be fully tried as pled. Since the case now involves one less defendant and two fewer attorneys, the case is more manageable than it was at the time of the hearing on the defendants' Motion to Sever.

. . .

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 defendants are found guilty of capital murder the sentencing jury should hear those matters

in a single hearing. Based on the findings set forth above, it is

ORDERED AND ADJUDGED as follows:

1. The Motion for Severance filed by Troy Victorino be and the same is hereby DENIED.

2. The Motion for Severance filed by Jerone Hunter be and the same is hereby DENIED.

3. The Motion for Severance filed by Michael Salas be and the same is hereby DENIED.

(V4, R721-28).[50]

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

IV. THE "PRIOR BAD ACTS" CLAIM

On pages 61-64 of his brief, Victorino argues that the trial court abused its discretion in allowing the introduction of certain *Williams* Rule evidence. The admissibility of evidence is within the sound discretion of the trial court, and the trial court's ruling will not be reversed unless there has been a clear abuse of that discretion. *Ray v. State*, 755 So. 2d 604, 610 (Fla. 2000); *Zack v. State*, 753 So. 2d 9, 25 (Fla. 2000); *Cole v. State*, 701 So. 2d 845 (Fla. 1997); *General Elec. Co. v. Joiner*, 522 U.S. 136, 118 S.Ct. 512, 517, 139 L.Ed.2d 508 (1997)

[50] Victorino complains that he "objected to relevancy" some 24 times, and provides a record citation on page 57 of his brief. No objection appears at V33, R2463, 2473, or V34, R2521 and 2537. The other references are to items of evidence that were clearly relevant as to all three defendants. No "limiting instruction" was necessary or appropriate.

(stating that all evidentiary rulings are reviewed for abuse of discretion.")

In granting the State's notice of similar fact evidence, the trial court entered a lengthy order, which, in pertinent part, reads as follows:

> Chronologically the State seeks to introduce acts, events and incidents that occurred prior to the murders. An analysis of the State's proffer is set forth below.
>
> **August 1, 2004: Telford Lane Incident**
>
> Brandon Graham, Michael Salas and Robert Anthony Cannon were first introduced to Troy Victorino and Jerone Hunter the week before the murders by three girls. Jonathan Veida, a friend of Brandon Graham, was also introduced the same day.
>
> At the first encounter, Troy Victorino reported that "his stuff," referring to his personal property, had been taken apparently along with some property of Jerone Hunter. Victorino had evidently lived in a house on Providence owned by Erin Belanger's grandmother in Deltona. Erin Belanger is one of the murder victims. Victorino was trying to assemble a large group of people to accompany him to the Telford Lane property to recover his personal property. The proffer suggests that Troy Victorino reports that the people who took his property and live at Telford Lane include a young man named "Flanko" as well as twin brothers referred to as "Abi G" and "Abi M". Cannon used his Ford Expedition and he drove the group to the Telford property following directions provided by Troy Victorino, the apparent sponsor of the trip. Also along as part of the group were Brandon Graham, Jonathan Veida, Michael Salas, Jerone Hunter and three girls named Nicole, Naomi and Crystal. Apparently Naomi was Mike Salas' girlfriend. The group arrived at the Telford property in the early morning hours of August 1, 2004.
>
> The vehicle driven by Cannon was parked in a

neighbor’s driveway so it could not easily be seen and all the occupants with the exception of Victorino went up to the Telford Lane house. It is reported that Hunter had a bat with him at the time. Victorino stayed behind fearing arrest if he was among the group, apparently because he was on probation. The girls took the lead and entered the house without permission. They were greeted by “Flanko” who opened the door backed up by both of the twins, “Abi G” and “Abi M”. It is reported that one of the twins also had a bat. When the occupants of Telford Lane declined to fight, the girls ran through the house and discovered a CD Pack belonging to Victorino. Apparently the girls were armed with knives.

During the confrontation, the occupants of the Telford home called the police and the entire group who arrived with Cannon retreated. Their goal was to have fought for the property that Victorino claims was stolen from him but that fight did not occur. As they retreated the girls slashed tires on vehicles purportedly belonging to the occupants of the house.

Troy Victorino remained in the Expedition during the entire episode. Nonetheless it appears he was the event sponsor. The raid on the house was actually an act of revenge for what he claimed was the theft of “his stuff’. He recruited Robert Anthony Cannon to drive his Expedition and the others to be part of the large number of people to challenge the Telford occupants to a fight for his property. He directed the group to the Telford property and stood by as they did his bidding, armed with a bat and knives. To avoid detection he remained in the shadows, in this case, the Expedition. It is apparent on these facts, if true, he was a sponsor of this event.

August 3, 2003: Attempted Revenge Fight

On August 3, 2004 in the early evening Mike Salas and Robert Anthony Cannon were “jumped” in a planned fight. Robert Anthony Cannon was confronted at the skating rink in Deltona by a person that confronted him and hit him through the window of his vehicle. Since the police were nearby, a planned meeting was arranged with the aggressor. A person named Ryan was to meet S alas and Cannon near the rink.

When they arrived around 7:00 p.m. it was clear there would be more than a one on one fight. They got out to get ready for the fight and they were both cold cocked from behind. Cannon reported a broken nose and bleeding and Salas some bruising as they left the fight. Cannon called Brandon Graham and assembled a group of about 12 to 15 people to help retaliate. Those included Troy Victorino, Jerone Hunter, and Michael Salas as well as Kristopher Craddock. At the time Cannon had a 38 caliber automatic pistol with a magazine and two rounds of ammunition. Arrangements for the fight between the groups was scheduled by phone at Manny Rodriguez Park in Deltona. When Cannon's group arrived, Mr. Victorino disbursed the group throughout the park apparently so the element of surprise could be used. Craddock, in learning that a gun was involved, retreated. The opposition never appeared and all but Cannon, Salas, Hunter, Victorino and Brandon Graham disbursed.

A short while later the group left and encountered the opposition group in a vehicle in Deltona. It should be noted that Graham reports that the opposition group involved the Abi twins who were at the Telford property earlier in the week and were thought to have participated in the theft of Victorino's personal property. He said along with the twins were boys named Phil, Robert and Ryan, all apparently unrelated to the Telford property. Cannon actually relates being "jumped" to a skirmish occurring several weeks earlier.

Nonetheless a vehicle pursuit of the opposing group at a high rate of speed took place through the Deltona streets. Victorino borrowed Cannon's pistol during the ride and fired a single shot at the opposing vehicle. It is unclear whether he hit or missed the yehicle, both outcomes having been reported.

After the shot was fired the chase ended and Victorino was taken home. Cannon kept the gun and the remaining shell. Later Victorino called Cannon and S alas and asked them to bring him the gun since he claimed he needed protection in light of the fact that his place of residence was known to the Telford Lane occupants. They honored his request and drove the gun back to his

house.

August 4, 2004: Midday planning of crime.

At midday on August 4, 2004 Brandon Graham, Robert Anthony Cannon, and Michael Salas were called by Jerone Hunter to come pick up the automatic pistol with its remaining shell from Victorino who had kept it overnight. At that meeting Victorino reportedly articulated a plan whereby a group including he, Graham, Hunter, Cannon and S alas would attack the Telford Lane home. One by one Victorino had each of the other young men commit to the plan. The plan involved a discussion of the layout of the house and the fact that by surprise all the occupants could be easily killed. Victorino insisted that the girls living in the home be beaten and made to suffer because they “talk so much” or words to that effect.

In conjunction with the plan the group left the Ft. Smith house where Victorino and Hunter were staying in an effort to get more bullets for the automatic pistol. They went to several locations but could not find any more ammunition. At that time the boys split up but planned to reassemble between 9:00 and 10:00 p.m. on the 5th to attack the Telford Lane house and kill its occupants.

During the meeting the plan evolved so that bats would be used since no ammunition could be found for the gun. Hunter suggested that masks be used. That suggestion was reportedly rejected since all occupants would be killed leaving no witnesses. It was reported that the gun had been buried 1000 paces from Robert Anthony Cannon’s home.

August 4 and 5,2004: The murders took place.

It appears the murders occurred shortly before midnight on August 4, 2004 and into the early morning hours of August 5.

LEGAL ANALYSIS

First the defense argues that the trial in this case has started with the attempted selection of a jury in Deland in May, 2006. Therefore, the door had not been

open for the State to be able to provide the defendant with the appropriate notice under Florida Statutes, Section 90.404(2)(b)(l). They assert that the fact that the jury selection has been postponed and the case will not again begin with jury selection until July *5,* 2006 does not change the fact that the State had not sought the use of the *Williams Rule Evidence* before trial.

While an interesting argument, the purpose of the rule was to give the defendants notice under Florida Statutes, Section 90.404(2) of its intent to use similar fact evidence and allow the defendants time to respond and resist in advance of trial. Although the State did not file a notice before the attempted jury selection, once the decision was made to move venue based on the request of all parties, the discovery was reopened and a new date was set. Keeping the State from having its request from being considered without any case authority for that proposition would merely advance procedure over substance with no showing of prejudice to the defendants. That argument is without merit.

The incidents that occurred between August 1, 2004 and the murders can be separated to some extent factually but should also be viewed as a whole.

. . .

Beginning on August 1, 2004, even though Salas and Cannon first met Victorino and Hunter for the first time on or about that date, the raid on the Telford property by a gang of young men under the direction of Victorino and Hunter appears to be the beginning of an extended confrontation that later resulted in the murders. These young men came together as a group to avenge a wrong claimed by Victorino by the theft of and retention of his personal property. There was a nexus in time and place to the murders since the raid on the Telford property occurred only several days before the murders. The group or some members were armed with bats which apparently the State will claim is the type of weapon used in the murders.

The second incident involving a fight where Cannon and Salas were jumped on August 4, 2004 is more

problematic in that Cannon ties being “jumped” or beaten to an earlier and unrelated event several weeks before. Nonetheless, by hearsay reports, some of the participants were living at the Telford address and the fight was motivated or in response to the August 1 raid. Regardless of the initial cause of Cannon and Salas being “jumped”, these men resorted to reliance on their new group, which included Victorino, Salas, Hunter and Cannon, as well as others, to avenge the insult. They, along with others, went to be a part of a scheduled fight. After the opposition group failed to show, Victorino, Hunter, Cannon and S alas retreated together. They had armed themselves for the fight with weapons including a semi-automatic pistol. On the way home the weapon was fired Once while the young men found and followed the group they had been scheduled to fight.

Obviously the facts show they had formed a gang of at least four, had armed themselves, had acted to protect and avenge each other’s interest and had acted on pledges to each other in that respect.

The events of mid-day on August 5 are even more clearly inextricably related. They met, pledged to join Victorino in killing the occupants of the Telford Lane home and spent time in what would be described as weapons selection. They had a 38 caliber automatic pistol with one bullet. They visited several residences in an effort to locate additional ammunition ostensibly for the attack on Telford. Having found none, they used bats that were reportedly kept in Hunter’s truck.

All of these facts appear to be relevant to the facts the State must prove for premeditated murder to connect the four originally charged defendants and Brandon Graham. They also appear both as to time and proximity to be inextricably intertwined. While the events are not “an unbroken chain of circumstances”, the events are clearly related and a consistent series of events that are relevant for purposes of establishing the elements of the crime, the fact of premeditation, the method of transportation, the method of weapon selection, the formation of the murder team and the purpose for the activity. Any effort to dissect these facts or delete portions would

likely create confusion and inability for the jury to understand the events that the State claims led to the murders.

These events, individually and taken as a whole, clearly represent facts that could be helpful in proving a material fact and issue, including, but not limited to, proof of motive, opportunity, intent, preparation, plan and are clearly helpful and instructive concerning the context of the murders. The *Williams Rule* allows relevant evidence to be introduced to prove these elements. The test is relevancy. *Bryan v. State*, 532 So. 2d 744 (Fla. 1988); *Taylor v. State*, 855 So. 2d 1 (Fla. 2003).

The cases allowed *Williams Rule* evidence relevant to understanding the case. *Conde v. State*, 860 So. 2d 930 (Fla. 2003); *Consalvo v. State*, 607 So. 2d 805 (Fla. 1996); *Ferrel v. State*, 686 So. 2d 1324 (Fla. 1996). In this case the State asserts by its proffer that the formation of the four person group on or about August 1, 2004 and involved the development of adhesion among the group members that culminated with the murders. The group committed what some might consider a trial run in the first incident with all four men as well as others. The four again came together the day before the murders to cement the group's function and character by agreeing to fight the perceived enemy to protect the honor of Cannon and Salas. Thereafter they attacked the opposing group, purported having members from Telford Lane, by a high speed chase and discharge of a weapon during the chase. The next day the group reportedly met and formed an agreement to commit the murders later the same day.

This court has concluded that the facts and circumstances are inextricably intertwined and will be necessary for the jury to consider to understand the context in which the murders occurred. The first and third events described above seem to fit that description without question. An argument has been made that the attempted fight in the park and later high speed chase are not inextricably intertwined and, therefore, would involve an effort to show bad character. Clearly, all of the events come within the *Williams Rule* definition so the court has concluded that the matters are either inextricably intertwined

> or are admissible as relevant under the *Williams Rule* unless some exclusionary rule applies.

(V8, R1402-09). (emphasis added).

Those detailed findings by the trial court are in accord with Florida law, and demonstrate no abuse of discretion. There is no basis for reversal.

To the extent that further discussion is necessary, the record is clear that discovery was reopened on April 21, 2006, after the initial attempt to seat a jury failed, resulting in venue being changed to St. Johns County. The motion to reopen discovery was filed by co-defendant Hunter, and was granted **without objection.** (V7, R1330-31). Victorino did argue, at the hearing on the State's motion, that even though the initial attempt to seat a jury had failed, and even though venue had been changed, the case was still "in trial" for purposes of the *Williams* Rule's 10-day notice requirement. (V15, R2505-7). Victorino cited no authority to support that novel argument, and has not done so in his brief, either. Because no case law supports Victorino's claim that "trial" commences for *Williams* Rule purposes when jury selection starts, even if venue is subsequently changed, and there is a substantial delay before jury selection begins in the new location, it makes no sense to put the trial court in error. In any event, Victorino's argument places form over substance (as the trial court found, *infra*)--

there is no possible prejudice (other than that attendant to all adverse evidence), and, because that is so, reversal is inappropriate. Victorino has not even suggested that his ability to respond to the *Williams* Rule evidence was impaired in any fashion, and, indeed, he cannot make such a claim, given that the notice was filed well before the St. Johns County trial began. This claim is not a basis for relief.

V. THE "CIRCUMSTANTIAL EVIDENCE STANDARD" CLAIM

On pages 65-67 of his brief, Victorino argues that he was entitled to a judgment of acquittal, and that the evidence against him was circumstantial. Under this theory, Victorino argues that he is entitled to relief because the State's case was "entirely circumstantial," and did not meet the standard for a circumstantial evidence case. Assuming *arguendo* that the circumstantial evidence standard is applicable, that standard is:

> In [*State v. Law*, 559 So. 2d 187, 188 (Fla. 1989)], this Court further elaborated on the standard in circumstantial evidence cases as follows:
>
> > It is the trial judge's proper task to review the evidence to determine the presence or absence of competent evidence from which the jury could infer guilt to the exclusion of all other inferences. That view of the evidence must be taken in the light most favorable to the state. The state is not required to "rebut conclusively every possible variation" of events which could be inferred from the evidence, but only to introduce competent evidence which is

> inconsistent with the defendant's theory of events. Once that threshold burden is met, it becomes the jury's duty to determine whether the evidence is sufficient to exclude every reasonable hypothesis of innocence beyond a reasonable doubt.

Id. at 189 (citations and footnote omitted).

Miller v. State, 770 So. 2d 1144, 1148 (Fla. 2000). However, Victorino's argument overlooks the fact that, rather than being a wholly circumstantial case, there was direct evidence of his guilt, including the testimony of Robert Cannon which described how Victorino and the co-defendants entered the victims' home armed with baseball bats with the intention of killing the occupants (V30, R1951, 1954); the testimony of Graham about how Victorino and the others agreed to kill the victims, and how Victorino briefed the conspirators on the assault plan (V30, R1986, 1987, 1993, 2013, 2032); the testimony matching Victorino's shoes to footprints found underneath one of the victim's bodies (V. 35, R2670, 2677-78, 2679-80); and the testimony of Hunter and Salas about Victorino's part in the murders. (RV40, 3375-77, 3394, 3433, 3382, 3419-20; V41, 3526-29, 3536-37). Under these facts, the circumstantial evidence standard is simply inapplicable because the case is not "wholly circumstantial." The motion for judgment of acquittal was properly denied. *Hertz v. State*, 803 So. 2d 629 (Fla. 2001);

Looney v. State, 803 So. 2d 656 (Fla. 2001); *Brown v. State*, 721 So. 2d 274 (Fla. 1998).

VI. THE HEINOUSNESS AGGRAVATOR

On pages 68-74 of his brief, Victorino argues that the heinous, atrocious, or cruel aggravator does not apply in this case. Whether an aggravating circumstance exists is a factual finding reviewed under the competent, substantial evidence test. When reviewing aggravating factors on appeal, this Court in A*lston v. State*, 723 So. 2d 148, 160 (Fla. 1998), 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," *quoting Willacy v. State*, 696 So. 2d 693, 695 (Fla.), *cert. denied*, 522 U.S. 970 (1997).

In finding that Victorino's murders of Erin Belanger, Francisco Ayo Roman, Jonathon W. Gleason and Roberto Manuel Gonzalez were especially heinous, atrocious or cruel, the trial court found:

> 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 13, 15 (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. Jonathon Gleason, and Anthony Vega were in the living room. Michelle Nathan was in bedroom 1 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 bad 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 a 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. While this analysis deals only with victims Belanger, Roman, Gleason and Gonzalez, the information regarding Nathan and Vega is relevant since the injury and damages occurred in parallel to the other victims. An individual analysis appears to be appropriate for each of the victims concerning the cause of death and an overall description of their injuries.

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.

Jonathon W. Gleason: Dr. Beaver used the State’s Exhibit 90 to describe the injuries to Jonathon 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. He 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 hit 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 (sic) 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 bead. Again, for purposes of this aggravator, the court will not consider the post mortem injuries.

Michelle Ann Nathan: Michelle Nathan had two 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. Beaver 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 bad been exacted by the avengers with great force and brutality. There were pleas from Jonathon 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. Victorino was conscienceless and pitiless and clearly each of the victims, Belanger, Roman, Gleason and Gonzalez, died as a result of an unnecessarily tortuous killing.
>
> The State has established this aggravator by evidence beyond and to the exclusion of a reasonable doubt that the capital murders of Erin Belanger, Francisco Ayo Roman, Jonathon W. Gleason and Roberto Manuel Gonzalez were especially heinous, atrocious or cruel and very substantial weight has been assigned to this aggravator.

(V9, R1563-1568).

Those findings are supported by competent substantial evidence, and, in the final analysis, Victorino's brief does little more than disagree with those findings. This aggravator was established beyond a reasonable doubt.

To the extent that Victorino argues that he had no "intent" to torture his victims, Florida law is settled that there is no "intent element" associated with the heinousness aggravator. *Guzman v. State,* 721 So. 2d 1155, 1160 (Fla. 1998). To the extent that Victorino claims that the heinousness aggravator is unconstitutional for various reasons, that aggravating factor has been repeatedly upheld both by this Court and the United States Supreme Court. *Mansfield v. State*, 758 So. 2d 636, 649

(Fla. 2000); *Power v. State*, 605 So. 2d 856, 864 (Fla. 1992); *Ponticelli v. State*, 593 So. 2d 483, 487 (Fla. 1991).[51]

VII. THE COLDNESS AGGRAVATOR

On pages 75-79 of his brief, Victorino argues that the cold, calculated ad premeditated aggravator is not supported by the evidence, in addition to an argument that this aggravator is "unconstitutional." Whether an aggravating circumstance exists is a factual finding reviewed under the competent, substantial evidence test. When reviewing aggravating factors on appeal, this Court in *Alston v. State*, 723 So. 2d 148, 160 (Fla. 1998), 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," *quoting Willacy v. State*, 696 So. 2d 693, 695 (Fla.), *cert. denied*, 522 U.S. 970 (1997). To the extent that Victorino argues that there is some constitutional deficiency with the coldness aggravator, that claim has been

[51] While Victorino raises various "constitutional" challenges, he does not explain where those claims were preserved below. Victorino's pre-trial motion appears at V6, R999-1024 of the record and does not preserve those claims.

rejected by this Court, assuming it was preserved below in the first place.[52] *Lynch v. State*, 841 So. 2d 362, 374 (Fla. 2003); *Fotopoulos v. State*, 608 So. 2d 784, 794 (Fla. 1992). In applying the coldness aggravator to this case, the sentencing court held:

> 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 bad 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 Erin Belanger, Francisco Ayo Roman, Jonathon W. Gleason, and Roberto Manuel Gonzalez were each committed in a cold, calculated and premeditated manner.
>
> Mr. Victorino met with Mr. Hunter, 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 he 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. He carefully described the process, outlined the layout of the home on Telford Lane in Deltona to the coconspirators 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

[52] A pre-trial motion to declare the CCP aggravator unconstitutional is found at V5, R975. That motion has nothing to do with the issue raised in Victorino’s brief.

four actual participants, Victorino, Hunter, 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. Victorino and Mr. Hunter 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. Victorino, 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.

(V9, R1568-69).

Those findings are supported by competent substantial evidence, and, in the final analysis, Victorino's brief does little more than disagree with those findings. This aggravator was established beyond a reasonable doubt.

VIII. THE MENTAL MITIGATION CLAIM

On pages 80-83 of his brief, Victorino argues that the sentencing court gave insufficient weight to the "mental mitigation" evidence. In *Campbell v. State*, 571 So. 2d 415 (Fla. 1990), this Court established the relevant standards of review for mitigating circumstances: 1) whether a particular circumstance is truly mitigating in nature is a question of law and is subject to *de novo* review by this Court; 2) whether a mitigating circumstance has been established by the evidence in a given case is a question of fact that is subject to the competent substantial evidence standard; and finally, 3) the weight assigned to a mitigating circumstance is within the trial court's discretion and subject to the abuse of discretion standard. *See also, Kearse v. State*, 770 So. 2d 1119, 1134 (Fla. 2000) (observing that whether a particular mitigating circumstance exists and the weight to be given to that mitigator

are matters within the discretion of the sentencing court); *Trease v. State*, 768 So. 2d 1050, 1055 (Fla. 2000) (receding in part from *Campbell* and holding that, though a court must consider all the mitigating circumstances, it may assign "little or no" weight to a mitigator); *Mansfield v. State*, 758 So. 2d 636 (Fla. 2000) (explaining that the trial court may reject a claim that a mitigating circumstance has been proven provided that the record contains competent substantial evidence to support the rejection).

In finding that the statutory mental mitigating circumstances did not apply to Victorino, the sentencing court held:

> **B. MITIGATING FACTORS**
>
> **1. Statutory Mitigating Factors. [footnote omitted]**
>
> **a. Florida Statutes, Section 921.141(6)(b): The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance**.
>
> At the trial it was established that Mr. Victorino had a very difficult childhood. A history of severe beatings as a child, claimed sexual abuse by a babysitter and at age 10 the claim that he, heard voices cursing him. Mr. Victorino was hospitalized in a mental facility in New York as a child where he was later discharged against medical advice. He was so troubled that he slept with a baseball bat as a child and there were no viable efforts to provide any treatment or counseling to address his concerns.
>
> Apparently Mr. Victorino moved to Florida at age 11 and had been taking medication with a report that he did better between the ages of 11 and 13 or so. His

history contains multiple reports of suicide attempts and he may have had what the doctors described as major depressive disorder. Mr. Victorino's mother testified and indicated that in hindsight she would describe the conduct of both she and her husband as abusive, both physically and emotionally, during the childhood of Troy Victorino as well as their other children.

With this background, there was testimony from Dr. Joseph Wu, a board certified psychiatrist and associate professor, Dr. Charles Golden, a well qualified neurologist, and Dr. Jeff Danziger, a well qualified psychiatrist board certified in general, forensic, geriatric and addictive psychiatry. Dr. Wu arranged for a PET (Position Emission Tomography) scan which was done in Jacksonville and ostensibly shows brain activity. Dr. Wu reports that Mr. Victorino's PET scan was abnormal by what he describes is a reversal of the normal gradient. By that he appears to mean that there is activity in portions of the brain where activity would not be expected and there is a lack of activity where activity would be expected. Testifying principally from the results of the PET scan he found these results consistent with traumatic brain injury, bi-polar disorder or schizophrenia and consistent with damage that occurred during childhood, either physical or psychic. There didn't appear to be any direct episode of skull injury that could account for his findings.

Dr. Charles Golden, the neuro-psychologist, testified that Mr. Victorino was of average intelligence but that the testing that was done indicated difficulty with frontal lobe function which is an area of the brain that is used for performing executive function decisions. Mr. Victorino reportedly suffers from impulsiveness and a severe problem with emotion.

Dr. Jeff Danziger, a psychiatrist, reported that childhood abuse of the nature and extent reported by Mr. Victorino can cause mental health, anti-social and criminal responses. He diagnosed a lifelong mental health disorder that began in childhood although his diagnosis was somewhat nonspecific.

The evidence presented on behalf of Mr. Victorino

clearly indicated that he suffered a mental health disorder of some dimension and that he had gone through periods of depression a number of times that would account for his numerous suicide attempts. The abnormality appears to be focused in the frontal lobe which research indicates is responsible for executive functions in such things as impulse control and, in many cases, moral decision making. His thinking was very immature which may be related to his earlier and lengthy incarceration.

During the course of the trial Dr. Wu evaluated the PET scan for Mr. Victorino, having found it to be abnormal and, therefore, having concluded that it was consistent with a traumatic brain injury, bi-polar disorder **or** schizophrenia and consistent with damage during childhood. A counter-expert was called by the State, Dr. Lawrence Holder.[53] **Dr. Holder was an extremely well qualified and board certified nuclear radiologist. He evaluated the brain scan of Mr. Victorino 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. Golden and Dr. Danziger. Nevertheless, those 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.**

While the defendant has established that he has a mental or emotional disease or defect, the nexus between his asserted condition and the murders is completely lacking. There is no reliable evidence that he was under the influence of extreme mental or emotional disturbance at the time of the murders.

Quite to the contrary, his conduct was clearly not an act prompted by emotional frenzy, panic or rage. Throughout the week of the murders it was obvious he

[53] Victorino erroneously says that the State's expert was unqualified, (Initial Brief at 81) and erroneously says that expert was not a medical doctor (Initial Brief at 81-82).

wanted his property back. When it became clear that was not about to happen, he calmly planned the murders, enlisted his friends, arranged for transportation and the arms, in this case baseball bats. The plans were made in such a way that Mr. Victorino did not expect that he would be apprehended. The murders were done by surprise at night. All victims were killed as planned. Along the way they attempted to steal a car to insulate their chances of detection, a task at which they failed. In addition they attempted to arm themselves with a firearm in the possession of Mr. Cannon but were unsuccessful in obtaining additional ammunition. After the murders the men retreated together. They washed and disposed of their clothes. The baseball bats were disposed of by depositing them in a pond where they would sink to the bottom so they could not be discovered. Thereafter Mr. Victorino threatened any of the co-defendants who confessed or shared information about the evening's events. Even after his arrest Mr. Victorino denied that he participated and tried to maintain an alibi that he had attempted to establish, all in the face of overwhelming proof by the State.

While his mental health experts did not anchor a diagnosis, the evidence is clearly to the contrary of any claim of Mr. Victorino being under the influence of extreme emotional disturbance at the time of the murders and, therefore, this aggravator has not been established.

b. 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.

The analysis of this mitigator appears also to be governed by the facts and circumstances outlined in statutory mitigator a and for purposes of evaluating this mitigator, the factual findings above are appropriate. While the defendant was neither insane at the time of the murders nor incompetent during the course of these proceedings, the mental health diagnosis and evaluation set forth above lead the court to conclude that the defendant had the capacity and ability to appreciate the criminality of his conduct or to conform his conduct to the requirements

> of the law. While he had a negative history, it is clear he had both the capacity and ability to comply with the law and the court finds this, mitigator has not been established.
>
> **c. The defendant has a history of mental illness, brain abnormality and hospitalizations.**
>
> The analysis in regard to statutory mitigator a describes a history of mental illness, brain abnormality by history and hospitalizations with the same qualifications that the court expressed concerning the value of the corroborative PET (Position Emission Tomography) scan. This mitigator has been established and is given some weight.

(V9, R1570-1575).

Victorino's argument is apparently that the trial court abused its discretion in finding that Victorino had not established that he was under the influence of an extreme mental or emotional disturbance at the time of the murders. However, as set out by the court in the sentencing order, there is no causal connection between any mental status and the murders for which Victorino was sentenced to death. The trial court found, and Victorino does not contest, that his actions in the week leading up to the murders were calm, planned, and goal-directed –- the murders were not prompted by "emotional frenzy, panic or rage," as the sentencing court found. (V9, R1573). The sentencing court properly found that, under these facts, the mental state evidence was not truly mitigating. That finding should not be disturbed.

IX. THE "DISPARATE SENTENCE" CLAIM

On pages 83-85 of his brief, Victorino argues that his sentence is "extremely disparate" in comparison to two of his co-defendants. One co-defendant, Cannon, entered a guilty plea, and was sentenced to life without parole on 6 murder counts. Salas was convicted after trial, but the jury recommended life without parole sentences for him. Based upon the evidence presented, it is clear that Victorino, and to a slightly lesser extent Hunter, were the driving forces behind these murders. And, given that the same jury heard all of the evidence as to the defendants, there can be no claim that the jury did not know the result in the co-defendants' cases. Based upon the evidence, it is clear that Victorino was the ringleader, and, therefore, the most culpable of all. His sentence is not disproportionate under the facts, and should not be disturbed. *Gonzalez v. State*, 33 Fla. L. Weekly S451, 456 (Fla. July 3, 2008).

X. THE "AND/OR" JURY INSTRUCTION CLAIM

On pages 85-89 of his brief, Victorino argues that the use of the "and/or" conjunction in certain guilt phase jury instructions entitle him to relief. This claim is preserved at V42, R3697. He does argue, on page 81 of his brief, that this "error" is "fundamental." That position has been squarely rejected by this Court. *Garzon v. State*, 980 So. 2d 1038, 1045

(Fla. 2008).[54] In this case, under the facts, any error was harmless for the reasons set out below.

To the extent that further discussion is necessary, 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*, 972 So. 2d 941 (Fla. 5th DCA 2007). Accord, *Zeno v. State,* 922 So. 2d 431 (Fla. 2d DCA 2006)

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. *See*, *Salas, supra*. 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

[54] *Garzon* was released after Victorino's brief was filed.

rule may be inapplicable. *Tolbert v. State,* 922 So. 2d 1013 (Fla. 2006).

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. 3rd DCA 2005).

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, there is 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).[55]

[55] The Third District has held that this instruction does not cure any defect. *See, Dorsett v. McCray,* 901 So. 2d 225

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 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.

(Fla. 3rd DCA 2005); *Harris v. State,* 937 So. 2d 211 (Fla. 3rd DCA 2006).

(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 Victorino's substantial rights.[56] *Salas, supra; Fla. Stat*, § 924.33 (2007);

[56] Victorino 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. Victorino never argued fundamental error below, and never proposed an instruction that would remove the alleged error.

Goodwin v. State, 751 So. 2d 537, 539 (Fla. 1999). As was the case with *Salas*, Victorino was convicted based on his own actions, not those of his co-defendants.

XI. THE CHANGE OF VENUE CLAIM

On pages 89-90 of his brief, Victorino cites to a Second District decision for the standard of review that applies to a motion for change of venue. No citation to the record of the hearing on this motion is provided, and no argument in support of this claim is contained in the brief.[57] In any event, Victorino had no objection to moving the case to St. Johns County. (V14, R2425; 2429-2432).

This Court has held that, to prevail on a claim that the trial court erred in denying a motion for change of venue, the Appellant must establish that the trial court "palpabl[y] abuse[d] . . . [its] discretion." *Davis v. State*, 461 So. 2d 67, 69 (Fla. 1984); *Rolling v. State*, 695 So. 2d 278 (Fla. 1997) (trial court did not abuse its discretion in denying the change of venue motions since the circumstances do not indicate that the community was so infected by the media coverage of this case that an impartial jury could not be impaneled, and an impartial jury appears to have been seated.) Victorino has not explained how error occurred.

[57] Victorino filed a pre-trial motion for change of venue to move the trial to South Florida. (V5, R924-926).

In the context of this case, venue was changed from Volusia County (where the crimes took place) to St. Johns County, roughly 100 miles away.[58] In any event, Victorino has not demonstrated how the trial court abused its discretion in trying this case in St. Johns County, nor has he presented argument to show how the jury was not fair and impartial, which is an essential component of this claim. This claim is insufficiently briefed, and is not a basis for reversal. *See*, *Reaves v. Crosby*, 837 So. 2d 396 (Fla. 2003), *Duest v. Dugger*, 555 So. 2d 849 (Fla. 1990).

XII. THE *RING V. ARIZONA* CLAIM

On pages 90-93 of his brief, Victorino argues that Florida's death penalty statute violates *Ring v. Arizona*. Assuming *arguendo* that this claim was preserved by timely objection below (V6, R1081-1089; 1090-1115) 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:

[58] Notably, when St. Johns County was originally discussed as a trial venue, co-counsel for Victorino indicated that he was aware that media coverage in that area had been "either nothing or extremely little." (V14, R2427). No defendant objected to moving the trial to St. Johns County. (V14, R2429-30). Likewise, there is no claim that an impartial jury could not be (and was not) selected in St. Johns County.

> 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). . . . *See Kimbrough v. State*, 886 So. 2d 965, 984 (Fla. 2004); *Doorbal v. State*, 837 So. 2d 940, 963 (Fla. 2003).
>
> 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, 975 So 2d 1035, 1052-1053 (Fla. 2007). (footnotes and parenthetical omitted). Victorino has more than enough prior violent felony convictions (five 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.

XIII. THE “DUE PROCESS” CLAIM

On pages 93-94 of his brief, Victorino argues that his “due process” rights were violated. This claim is apparently predicated on the fact that Victorino was served with an arrest warrant on April 13, 2006. That date is after the original attempt to seat a jury in Volusia County had begun, and **the same day that the motion to change venue was granted.** (V14, R2333). This issue consumes one page of the transcript. (V14, R2333).

The relief requested by Victorino was a mistrial, which is

effectively what he received when the motion for change of venue was granted, and trial did not resume until some three months later. Whatever Victorino's claim may be, he was not prejudiced –- error, if there was any, was harmless.[59]

XIV. THE "ADDITIONAL PEREMPTORIES" CLAIM

On pages 94-95 of his brief, Victorino argues that he should have been allowed more than 10 peremptory challenges. Victorino's claim is **not** a claim based on *Trotter.* Instead, his claim is apparently that the trial court abused its discretion in allowing him (and all the other parties) the number of peremptory challenges provided for in *Florida Rules of Criminal Procedure* 3.350(a)(1) and (b) and *Florida Statutes* § 913.08(2). Victorino asked for "as many [peremptories] as [the court would] possibly consider," which is insufficient under *Trotter* and does not demonstrate an abuse of discretion. (V28, R1687). Argument on this issue appears at pages 1826-1834 of the record, but that argument was made by counsel for co-defendant Salas, and Victorino did not join in the motion.

In any event, Victorino has advanced no argument to support the notion that the trial court abused its discretion, especially in light of the explicit language of Rule 3.350(e) which expressly states that the trial court may exercise its

[59] The trial court immediately conducted an initial appearance hearing. (V14, R2333). No complaint about the arrest warrant had been raised previously.

discretion to allow additional challenges "**when appropriate**." In the absence of any argument suggesting why additional challenges were appropriate, this claim is insufficiently briefed.[60] *Reaves, supra; Duest, supra.*

XV. THE MISTRIAL CLAIM

On pages 95-97 of his brief, Victorino claims that the trial court should have declared a mistrial when co-defendant Cannon (who had already entered a guilty plea) "refused to testify or answer questions." 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).

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. (V30, R1954).[61] That testimony is entirely consistent with Hunter's confession, and is far less detailed than that confession. (V34, R2523-33; V40, R3374-3441). Assuming for the sake of argument that there was

[60] The fact that Victorino was not as parsimonious with his challenges as was the State proves nothing at all.

[61] This testimony does, however, provide direct evidence of Victorino's guilt.

some error, that error was harmless beyond a reasonable doubt. *State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986).

Further, Victorino **did cross examine Cannon, (V30, R1954) and never moved for a mistrial based upon Cannon's claimed refusal to testify.**[62] Whatever claim Victorino may have had, it is not preserved for review because there was no timely objection.

XVI. THE DENIAL OF A "MISTRIAL"

On pages 97-98 of his brief, Victorino argues that the trial court should have granted a mistrial when counsel objected that the co-defendants intended to "essentially prosecute" Victorino. No record citation is provided, and this claim is insufficiently briefed. It is not incumbent on this Court or the state to review the record in an attempt to discern the basis of a claim raised on appeal. The motions found at V32, R2233[63] and V38, R3102[64] relate to Claim XV - - no motions raising the claim

[62] The motion for mistrial relied on by Victorino (V30, R1965) was made by counsel for another defendant during Victorino's cross-examination of Cannon. Victornio did not join that motion.

[63] To the extent that Victorino 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). No motion for mistrial was made during Cannon's testimony.

[64] This motion came at the end of the State's case and erroneously asserted that is was a "renewed" motion for mistrial.

in Victorino's brief have been located. This claim is insufficiently briefed. *Reaves, supra*; *Duest, supra*.

XVII. THE "IRRELEVANT EVIDENCE" CLAIM

On pages 98-99 of his brief, Victorino complains that "evidence that was admissible against the co-defendants and not against him was admitted into the trial Court in front of the Jury and estimated total of 23 times." This claim is insufficiently briefed.

Victorino has provided no record citations to the claimed "improper evidence," nor has he provided any legal argument to support his claim that admission of that evidence was error. This Court, and the State, are left to speculate about what "evidence" forms the basis of this claim. Victorino is the master of his own case -- it is not the responsibility of the State to identify and brief the basis of this claim, nor is it the responsibility of this Court to decide a claim that Victorino has not seen fit to brief adequately. This claim is insufficiently briefed, and relief should be denied for that reason.[65] *Reaves, supra*; *Duest, supra*.

XVIII. THE "CUMULATIVE ERROR" CLAIM

[65] Victorino should not be heard to complain that he did not have sufficient space to brief this claim and remain within the 100-page limit. By way of example only, parts of pages 50, 60 and 67 are left blank.

On page 99 of his brief, Victorino argues that the "cumulative errors" that occurred in his trial require reversal of his convictions and sentences. Presumably, this claim is based upon the "cumulative effect" of the other 17 claims raised in Victorino's brief. However, none of those other claims establish error, and, because that is so, there is no "error" to "cumulate" in first place. *Floyd v. State*, 850 So. 2d 383, 408 (Fla. 2002).

VICTORINO'S DEATH SENTENCE IS PROPORTIONATE

Victorino's brief does not directly address the proportionality of his death sentences. There are few cases which compare to the extreme circumstances of Victorino'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.

CONCLUSION

Wherefore, based upon the foregoing arguments and authorities, the State submits that Victorino'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 above has been furnished by U.S. Mail to: **J. Jeffery Dowdy**, Esq., 720 West State Road 434, Winter Springs, Florida 32708 on this _____day of August, 2008.

Of Counsel

CERTIFICATE OF COMPLIANCE

This brief is typed in Courier New 12 point.

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