

IN THE SUPREME COURT OF FLORIDA

CARLTON FRANCIS,

Appellant,

v.

CASE NO. 94,385

STATE OF FLORIDA,

Appellee.

\_\_\_\_\_ /

ON APPEAL FROM THE CIRCUIT COURT OF  
THE FIFTEENTH JUDICIAL CIRCUIT, IN AND  
FOR PALM BEACH COUNTY, FLORIDA  
(CRIMINAL DIVISION)

ANSWER BRIEF OF APPELLEE

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STATEMENT CERTIFYING SIZE AND STYLE OF TYPE

This brief has been prepared using 12 point Courier New, a font that is not proportionately spaced.

STATEMENT OF THE CASE

On August 3, 1997, Carlton Francis was arrested for the July 24, 1997 murder of 66-year-old twin sisters Bernice Flegel and Claire Brunt (2R 1-6). Three weeks later, a grand jury indicted Francis, charging him with two counts of murder, two counts of robbery with a deadly weapon, two counts of aggravated battery on a person aged 65 or older, one count of burglary with assault or battery and one count of grand theft (2R 10-14).

Following numerous pretrial proceedings, jury selection began on July 20, 1998 (12R 361). On July 28, 1998, the jury returned a verdict of guilty on all counts (21R 2011-13). The sentencing hearing before the jury occurred on September 8 and 9, 1998, and concluded with an 8-4 recommendation of death on each count of murder (23R 2303). On September 28, 1998, the trial court heard additional evidence as to sentence (23R 2313-35). The parties were given ten days to proffer written sentencing memoranda (23R 2337). After considering the memoranda submitted by the parties (6R 928 et seq, 6R 954 et seq), and the PSI (6R 917-27), the court on October 23, 1998 issued its sentencing order sentencing the defendant to death on each count of murder(8R 1316-20).

The court found four statutory aggravating factors as to each murder: (1) the defendant had been convicted of another capital felony or of a felony involving the use or threat of violence to the person; (2) the murders were committed while the defendant was engaged in the commission of robbery; (3) the murders were committed in an especially heinous, atrocious or cruel manner; and (4) the victims were particularly vulnerable due to advanced age.

The court found two statutory mitigators: (1) the defendant's age, which the court gave "very little weight," and (2) that the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance. The court noted that the second statutory mitigator had not been "raised by the defendant," and that "it has not been shown that the defendant was under any particular acute stress at the time of the killings." Nevertheless, because the defendant did suffer from "mental illness" which "may have been affecting the defendant at the time of the killings," the court gave this statutory mitigator "some weight" (8R 1318).

As to the nonstatutory mitigation urged by the defendant, the court: (1) agreed that the defendant's prior criminal history was limited to non-violent drug crimes, but gave this mitigator "little weight;" (2) agreed that the defendant is mentally ill and gave this mitigator "considerable weight;" (3, 4, 5) agreed that the evidence would generate sympathy for the defendant's family, that

he had family and friends who loved him, and that he has been a loving son, brother and father, but gave these mitigators "little weight;" and (8) agreed that the defendant's ability to conform his conduct to the requirements of law may have been impaired, giving this mitigator "some weight" (8R 1318-19). The court rejected the proffered mitigators of (6) the defendant's religious activities and (7) that society can be protected by a life sentence (8R 1319).

The court stated:

The Court has reviewed the aggravating circumstances, and all of the mitigating circumstances, both statutory and non-statutory. In weighing the totality of the evidence, the aggravating circumstances far outweigh the mitigating circumstances and tilt the scales of justice decidedly toward death.

(8R 1319).

#### STATEMENT OF THE FACTS--GUILT PHASE

Shortly before noon on July 24, 1997, Susan Wood talked by telephone to her 66 year old mother Claire Brunt (15R 877, 879). Mrs. Brunt lived at 2000 Ware Drive in West Palm Beach in a house belonging to her twin sister Bernice Flegel (15R 878-79). Both women were widowed, and had lived together since 1983 (15R 879). Susan Wood planned to stop by their home between 3 and 4 p.m. that afternoon (15R 879).

The defendant, Carlton Francis, lived with his mother Eleanor Goods, next door to the twins (15R 881, 883-84). Ms. Goods and the twins were good friends who went to garage sales together and

borrowed from each other (15R 881). The twins would let Francis change the oil in their car, and they would on occasion give him rides to school or to pay a bill (15R 884).

Also staying with Eleanor Goods at this time was her grandson (and the defendant's nephew), eight year old Rysean Goods (15R 918). Rysean was on good terms with his neighbors, whom he called Aunt Claire and Aunt Bee; he would play puzzles and make cookies with them (15R 926). On the morning of July 24, 1997, Rysean woke up in time to see his grandmother go to work; he had breakfast and then went to the pool (15R 927-28). He saw Aunt Claire they waved to each other (15R 929-30). Later, Rysean saw his uncle, the defendant Carlton Francis, exit his mother's house by the back sliding doors, carrying a green bag over his shoulder (15R 931, 933-34). A pipe of some sort was sticking out of the bag (15R 934). Francis told Rysean he was going to play basketball and then re-entered the house (15R 935). Some time thereafter, while Rysean was riding his bicycle in the front of the house, he saw Aunt Bee, getting her newspaper (15R 938). They waved to each other (15R 939). Still later, Rysean saw Francis leaving his house by the front door, still carrying the green bag; Francis was wearing a white T-shirt and blue shorts (15R 941-43). Rysean testified that he saw a dark red spot on the shoulder of Francis' T-shirt (15R 944). This time, Francis did not speak to Rysean (15R 948). He left, going in the direction of the Brunt/Flegel house (15R 947).

Rysean could not recall whether or not their car was in the carport at this time (15R 947). Later that afternoon, before dinner, Francis called Rysean and asked him if he had seen what was in the bag (15R 949-50).

Rysean testified that his grandmother was a nurse and that she kept "clear," tight-fitting gloves in a box in a kitchen cabinet (15R 979-79).

Susan Wood arrived at her mother's house between 3 and 4 that afternoon (15R 887). Her aunt's tan Grand Prix was not in the carport (15R 884, 887).<sup>1</sup> That was surprising to Wood, because she expected her mother and aunt to be home (15R 888). Then she discovered that the front door was ajar, when usually it was locked (15R 888). She entered the house. Her mother was seated in a chair, her back to the door and her arm extended (15R 889). Wood walked around the chair to face her mother; she notice that her mother's necklace was "really tight" and there was a "drip of blood" (15R 890). At first, Wood thought her mother had fallen asleep and her necklace was so tight it had cut her, but when she went to help her, she realized her mother was not breathing (15R 890-91). She went to the telephone to call 911 and then noticed her aunt lying face down in the kitchen "with an enormous amount of blood around her body" (15R 891). She called the police, who arrived at about 4:00 pm (15R 893, 901).

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<sup>1</sup> Bernice Flegel's daughter testified that the Grand Prix was a 1982 or 1983 model (17R 1430).

Police looked but found no signs of a forced entry (15R 910). Crime scene investigators found a fired .22 casing, but no bullet strikes anywhere in the house (17R 1319-20). Three knives were lying out, one on a table just inside the front door, one on a wicker stool, and one on the kitchen counter (17R 1320-21, 1325, 1329). The knife on the counter was broken; the hilt lay in a pool of blood on the floor near Bernice Flegel's head (17R 1330-31). A newspaper with a bloody shoe print on it lay on the floor near the front door (17R 1321, 1326). No usable fingerprints were found in the home or in the victims' car (17R 1331-43, 1354, 1356, 1360-61).

Forensics expert Deborah Glidewell conducted a DNA analysis of blood on two of the knife blades and determined that one knife had Claire Brunt's blood on it, while the other had Bernice Flegel's blood on it (18R 1457-58).

Dr. Charles Sibert conducted the autopsy. Claire Brunt had been stabbed 16 times, including one which cut her jugular vein and two in her back which punctured her lung (18R 1574). She had defensive wounds on her hands which indicated that she had struggled with her assailant (18R 1577). She would have died within minutes, and possibly within seconds, of being stabbed in the jugular vein (18R 1578). Bernice Flegel had been stabbed 23 times, the deepest of which went several inches into her liver (18R 1581). She also had been stabbed in her jugular vein (18R 1582). Dr. Sibert observed no defensive wounds on Ms. Flegel (18R 1583).

Charles Hicks, also known as CJ, testified that he was a drug dealer in 1997, and had sold heroin to Francis several times (16R 1129). CJ lived in a rented house at 814 9th Street (16R 1121). At about twenty minutes until 4:00 p.m. on the afternoon of July 24, 1997, CJ was looking out his window and saw Francis driving a brown or beige or beige and brown Grand Prix, probably an 1982 model; Francis parked it in an alley behind a church, between 8th and 9th Streets (16R 1131-33). Francis was carrying a green military-size duffel bag across his shoulder (16R 1135). Francis came to CJ's house and asked for a wheelbarrow and gasoline (16R 1139). Francis put "some stuff" in the wheelbarrow and tried to burn it (16R 1140).<sup>2</sup> One of the items CJ observed was a white pocketbook (16R 1140). There were also items of clothing in the wheelbarrow, but CJ couldn't tell exactly what they were (16R 1141). CJ left to get some drugs for a customer; when he returned, the wheelbarrow was "outside the road," covered with a piece of wire mesh (16R 1144-45). At some point, Francis dumped the contents of the wheelbarrow in a trash pile across the street, under a tree (16R 1147).

Sally Holloway, CJ's intimate companion, testified that when CJ left, Francis came in and watched television with her (16R 1054-

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<sup>2</sup> Jim LaGrotteria testified that he stopped by while this was going on and saw CJ and another man he did not know poking at the fire in the wheelbarrow. LaGrotteria got CJ's attention, and they walked away together, leaving the other man with the fire (18R 1536-38).

56). A "News flash" came on about the murder, sometime before 4:00 p.m., reporting that two women had been killed (16R 1056-57, 1085).

CJ testified that Francis asked him to move the Grand Prix, but CJ declined; Francis got in it and left (16R 1151-52).

Thirteen year old Jimmy Winn was watching television later that evening when news of the murder was broadcast and it was reported that the police were looking for the victims' car (17R 1367). Jimmy recognized the car; since about six p.m., the car had been in his back yard (17R 1368-69). He and his grandmother checked the tag; it matched, and they called the police (17R 1373, 1369-70).

Cab driver Solog Theramen testified that sometime between 5:30 and 7 p.m., Francis walked up to his taxi at the stand on Tamarind and 8th (17R 1398-99). Francis was carrying nothing (17R 1404). The driver testified that he was to take Francis to Ware drive, but when they got there, the driver dropped him off at the corner because of all the police cars and television trucks (17R 1404-05, 1408).

Detective Thomas Wills had arrived at the murder scene on Ware Drive at 4:21 p.m. (19R 1646). By the time he arrived, there were several marked police cars in front of the victims' residence, along with yellow crime scene tape surrounding the perimeter of the property (19R 1648). Wills remained for some time directing the investigation. At 7:25 p.m., Wills observed the defendant on Ware

Drive, walking towards him (19R 1650). The defendant walked "straight ahead" past all the police cars and then turned into his driveway and walked "directly" into his front door (19R 1650).<sup>3</sup> He was wearing a light blue tank top and blue denim shorts (19R 1652). Because Wills had information that Francis had been at his mother's house earlier that day, he wanted to talk to him (19R 1651). The defendant's mother invited Wills into her home and went to get the defendant (19R 1653). When Francis came into the living room, Wills reached out to shake hands. Francis looked startled and "swayed back," but eventually shook hands with Detective Wills (10R 1654-55). Wills told Francis he was investigating the murders next door and asked him if he knew anything about it. Francis stated he did; he had "seen it on TV" (19R 1655-56). Wills told Francis he understood that Francis had been home earlier that day (19R 1655-56). Francis asked, "How do you know that?" (19R 1656). After hearing Wills' answer, Francis turned to his mother and said, "Mama, why did you tell him that?" (19R 1656). Will's next question was whether Francis had seen or heard anything suspicious in the neighborhood that day; Francis replied that he had seen a black man and a white man riding bicycles on Ware Drive and they had looked suspicious to him. He could not, or would not, describe them, however (19R 1657). Francis denied being in the area when

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<sup>3</sup> David Wood, Susan Wood's husband, testified that Francis had walked by the crime scene and straight into his house "without looking over" (17R 1413).

the murders had occurred; he claimed to have been at his friend "Ghandi's" house (19R 1658). However, he could not provide any details about either Ghandi or where he lived (19R 1658). At this point, Francis told Wills he did not want to become involved, and left Wills standing in the living room (19R 1659).

Half an hour later, Wills observed Francis leaving the house, carrying three trash bags (19R 1659). Wills asked him where he was going. At first Francis claimed he was leaving for his safety, but then admitted his mother had thrown him out (19R 1660). Wills asked him if the clothes he was wearing were the same ones he had been wearing earlier that day when he had left the house. At first, Francis claimed they were. Hearing this, his mother told Francis: "Don't you lie. You weren't wearing those clothes earlier. You told me you got those from a friend" (19R 1660-61). In response to his mother's comment, Francis said, "Oh, yes," the clothes he had on came from "Ghandi" (19R 1661). Wills asked Francis where his clothes were; in response, Francis pulled out a pair of checkered shorts, which he claimed were the ones he had actually been wearing earlier (19R 1661). Again, however, he recanted when his mother refuted this statement and told Francis not to lie; in response, Francis "guess[ed]" he had not been wearing the checkered shorts earlier and said "maybe" all his clothes were at "Ghandi's" house, or actually, he now stated, Ghandi's mother's house (19R 1662). Again, Wills tried to find out

where Ghandi lived; Francis again insisted that he did not know the address (19R 1663). At this point, a taxi pulled up, and Francis left in it (19R 1664). Wills never did locate anyone named Ghandi (19R 1665-66).

A dispatcher at Gold Coast Jitney testified that, at 8:29 p.m., Francis called from 2006 Ware Drive, and rode from there to 9th and Division--some 4-5 blocks from the cab stand (17R 1389-90).

CJ testified that Francis returned to his house and bought more drugs (16R 1153).<sup>4</sup> At some point (he did not say when), CJ saw Francis throw some car keys "against the wall in the next building" (16R 1151). Francis had sought and obtained permission to stay in what CJ described as a "shack," or "storage room," which belonged to CJ's landlord, containing mostly tools and clothes (16R 1155-56). There was no lock on the door (16R 1156). A day or two after the murders, Francis showed CJ some old coins and two watches, one with engraving on it (16R 1156). Francis asked CJ to pawn these items for him; CJ declined, but gave them to his "wife" to hold, periodically returning them to Francis at the latter's insistence (16R 1156-58, 1160).<sup>5</sup> Francis wanted to trade these

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<sup>4</sup> Detective Wills testified that CJ's house on 9th Street was nearly four miles from 2006 Ware Drive (19R 1669).

<sup>5</sup> Sally Holloway corroborated CJ on this, testifying that the coins went "backwards and forwards," with Francis insisting on their return and then giving them back (16R 1065). She also testified that she held a gold necklace for a while, but that too was returned to Francis (16R 1066-67). It was stipulated that an expert from the FBI would testify that a Negroid hair found inside one of the watches did not match Francis (19R 1759).

items to CJ for an "AK" (16R 1157). CJ didn't think they were worth it and declined the trade; at Francis' continued insistence, however, he did introduce Francis to a gun dealer named Bruce (16R 1162).<sup>6</sup> Francis also had a black radio with gray tape on it he wanted to sell, but it wasn't worth anything (16R 1163). Eventually, Francis threw the radio under a house on Eighth Street (16R 1164). Francis also buried a .22 rifle which had belonged to CJ, who had kept it in the shack/storage shed behind his house (16R 1182-83). CJ testified that the gun was old; he wasn't sure if it would even fire, as it had "big rust spots" on it (16R 1182).

CJ testified that when he learned that the crime Francis had committed was possibly more serious than a burglary or theft, he decided to go to police. He first tried to wave down an officer driving down the street (16R 1173). That didn't work, so he contacted a police officer to whom he was somehow related (16R 1174). CJ showed them the coins and the watches, and showed them where to find the radio (16R 1177, 1179).

CJ testified that he had nothing whatever to do with the killing of Bernice Flegel or Claire Brunt. He had never been to their house, and had no idea where they even lived (16R 1199).

On August 3, 1997, Jack McCall, crime scene investigator, found the .22 rifle buried in the sand next to a former church at

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<sup>6</sup> Bruce Brown and Richard Denson each testified that Francis had tried to buy a gun from them not long before he was arrested (15R 990-93, 1011).

816 9th Street (18 R 1469-70).<sup>7</sup> He recovered a GE radio under a house at 800 9th Street (18R 1471-72, 1474). McCall and others searched a 20-25 foot long debris pile across from the church (18R 1476). At one end of this pile, McCall found a number of items, including two sets of car keys, a pocket purse with a snap latch (the cloth was burned away, leaving the metal frame), buttons, a black knife handle, some burnt clothing and an eyeglass arm (18R 1483-97). In the shack/storage shed, McCall found a hat with 14 loose rounds and an ammo box with 55 rounds of .22 caliber ammunition (18R 1501). He also found a bag containing ammunition for an AK 47 assault rifle, and a Bible with the defendant's fingerprint on it. (18R 1510, 1512). In an alleyway not far from the shack, McCall found screen covers and white latex rubber gloves (18R 1502, 1519). McCall testified that the keys in the trash pile worked the victims' 1982 Grand Prix (18R 1518).

Detective Wills talked to CJ on August 3, 1997. Thereafter, at police request, CJ walked Francis to a nearby alley, where police arrested him (19R 1668-71).<sup>8</sup> He and detective Key

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<sup>7</sup> As noted previously, CJ lived at 814 9th Street. Firearms expert J. D. Thompson testified that the spent casing found in the victims' home had been fired from this rifle (19R 1603). Thompson testified that he had to clean the gun, which was "extremely rusty," before he could test fire it; it would not fire when he received it (19R 1594).

<sup>8</sup> Detective Key testified that the time of the arrest was 4:25 p.m. (19R 1743).

interviewed him the evening of August 3.<sup>9</sup> Francis admitted touching two watches, some coins, a rifle, some bullets and a radio (19R 1710). Francis claimed the person who showed him this stuff was dark-skinned, short, and missing some teeth (19R 1714-15). Asked about some cuts on his hands and elbow, Francis claimed that he had gotten cut on glass in the abandoned house he was staying in (19R 1717-18). Francis insisted that he had left his house early on the afternoon of July 24 to visit "Ghandi" and to play basketball (19R 1726-27). Ghandi was not at home, so he went to a park by Westgate to play basketball (19R 1728). From there, he took a taxi home, because he "didn't feel like walking home from the park" (19R 1728, 1730). When he came home, he saw all the police (19R 1730). He insisted he went nowhere else (19R 1731). When confronted with the fact that police knew he had caught a cab at Tamarind and 8th, Francis stated: "I went around there" (19R 1732). When the police pointed out that he had just said that he had gone to his friend's house on Robbins and had played basketball at Westgate and nowhere else, Francis terminated the interview (19R 1732-33).

Detective Key testified that no one mentioned a rifle, bullets, gold watches, coins, or a radio until Francis himself brought the subject up by admitting that he had touched them (19R

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<sup>9</sup> The circumstances leading up to this interview will be detailed in the State's argument as to Issue III, wherein Francis contests the voluntariness of the statement.

1740). Key testified that Westgate is six miles from the taxi stand on Tamarind (19R 1742-43). Key identified the shoes Francis was wearing at the time of the arrest. They were size 9 ½ (19R 1736-37).

FBI expert Michael Smith testified telephonically; he stated that the bloody footprint on the newspaper in the victims' home most closely corresponded to a Nike Air Schreech, probably size 8-10 (19R 1619-20, 1623).

George Dean testified that, the day before Francis was arrested, Francis had tried to sell Dean a necklace for \$10. Dean did not buy it because it looked "like an old person's necklace" (15R 1024, 1032). Dean described it as being long, with a heart-shaped locket (15R 1024).

Kerry Cutting, Bernice Flegel's daughter, testified that her mother had a storage box in which she kept two pocket watches (one with an elaborate scroll pattern), jewelry and coins, which had belonged to Bernice Flegel's husband (17R 1419-21). She identified State's exhibit 52 as her mother's watches (17R 1422-23). She also identified State's exhibit 2 as her mother's radio (17R 1424). She testified that the coins in State's exhibit 51 appeared to be the same coins that were inside her mother's storage box, although she had not memorized the dates (17R 1425). Ms. Cutting testified that various additional pieces of jewelry her mother had kept on her dresser, "earrings and so forth," were missing, as well as gold

chain necklaces her mother had kept draped over some stuffed monkeys (17R 1426). The necklaces were old-fashioned in design and probably 18 or more inches long; one of them had a round heart locket (17R 1429). None of these items was ever recovered (17R 1426, 1429). Other small items were missing, but no large items, like televisions, etc. (17R 1437). Finally, she testified that state's exhibit 6, the burnt purse (18R 1487), looked like one her mother used (17R 1435-36).

STATEMENT OF THE FACTS--PENALTY PHASE

A number of Francis's family members testified on his behalf at the penalty phase. In essence, their testimony was that Francis was a loving person who was passive and nonviolent, who helped everyone, and who had always been a very religious person.

His mother, for example, testified that she never had any difficulty in getting her son to do things for her (22R 2060). There never had been even a "hint" of a problem between Francis and the two sisters living next door (22R 2075). On the contrary, Francis "loved those people" (22R 2076). Ms. Woods did acknowledge that her neighbors had to get someone else to cut their lawn because Francis would cut half the lawn and leave the other half (22R 2074).<sup>10</sup> She also acknowledged on cross-examination that she

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<sup>10</sup> Susan Wood had testified at the guilt phase that on one occasion Francis was supposed to help them put a new stove in, but she already had it installed by the time Francis arrived. She also testified that, when he got to the house, he peered into the window and studied them for a few minutes before going to the door (15R 895).

previously had complained that all he did was use her electricity.<sup>11</sup> Furthermore, although she testified on direct examination that her son was a kind, loving, and helpful person from the day he was born until "this happened" (22R 2077), she acknowledged on cross-examination that "recently" he "got slower," and sat around and moped more than usual (22R 2079). Ms. Woods could provide no explanation for this change in behavior. Yvonne Pitts testified, however, that the last time she saw Francis before the murders he looked like he might have been high on drugs (22R 2132, 2134).<sup>12</sup>

Outside the presence of the jury, defense counsel informed the court that they had discussed the results of an MRI administered to

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<sup>11</sup> In a letter attached to the PSI, which the jury did not see but the trial judge did, Bernice Flegel's daughter Kerry Cutting stated that her mother's relationship with the defendant had been misrepresented. According to Ms. Cutting, the only reason her mother had any contact with the defendant was her friendship with the defendant's mother, who "was always confiding in my mother about the trouble Carlton was in and how she was going to fix the situation." For the defendant's mother's sake, the victims' would give him jobs to help him get "squared away." Their generosity, however, had the unfortunate effect of causing the defendant view to the victims as an easy source of money and as easy targets. The defendant was always peering in their windows and knocking on their door, which concerned Ms. Flegel so much she became afraid to sleep at night. Ms. Cutting felt that it "is a sad shame that my mother's worst fears came true and she had to experience that as her last part of her mortal life." In Ms. Cutting's opinion, Francis "exudes evil and [I] have felt this from the first time I saw him." (6R 926-27).

<sup>12</sup> The PSI corroborates this explanation for Francis' change in personality in the two years before the murder: in March of 1995, he was convicted in Jamaica for possession of, dealing in, and attempt to export marijuana; in March of 1997, he was charged with possession and sale of cocaine. He served nine months on the marijuana charge, and pled guilty to the cocaine charges several months after being jailed for murder (6R 921).

Francis at their behest, and "there's nothing to go forward with" (23R 2165).<sup>13</sup>

Following this announcement, two mental health witnesses testified.

Dr. John Perry has a Ph.D. in clinical psychology from the Union Institute in Cincinnati, Ohio (23R 2168-69). His background includes being a coach for three years (23R 2168). Asked about "any type of acknowledgment or awards," Dr. Perry answered, "mainly in athletics." He was an All-American football player at the University of Tampa and is in the Hall of Fame there (23R 2170). He tried to administer a variety of tests to Francis, but, before he could finish, Francis refused to cooperate further (23R 2175). Francis did complete an IQ test, which showed that he was normally intelligent with a full scale IQ of 98, and also completed portions of a neuropsychological battery (23R 2197, 1299). None of the sub-tests Francis completed showed any evidence of any kind of brain dysfunction (23R 2197-98). Dr. Perry did not believe that Francis refused further testing out of mere stubbornness (23R 2176). Notwithstanding the incomplete testing, based on what Francis "was presenting at the time," Dr. Perry reached a diagnosis that Francis suffered from three personality disorders: schizotypal, schizoid

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<sup>13</sup> Although this fact was not presented to the jury, it was known to the trial court and, at the very least, is relevant to the issue of proportionality.

and obsessive-compulsive (23R 2178-81).<sup>14</sup> A schizotypal personality suffers from social anxiety and detachment from social relationships, and is considered a loner;<sup>15</sup> a schizoid personality reacts passively to adverse circumstances, and is considered cold and aloof; an obsessive-compulsive personality has obsessions such as (in Francis' case) contamination coupled with compulsive behavior such as hand-washing (23R 2181-84). Dr. Perry did state that under stress persons with schizoid personality can experience a brief psychotic episode; however, he did not suggest that Francis had experienced such an episode, and had not personally observed any such episode (23R 2185, 2195-97). Dr. Perry did opine that Francis' personality disorders contributed to the crime (23R 2192-93), but could not say that Francis was under the influence of extreme mental or emotional disturbance (23R 2201-02), or that Francis could not appreciate the criminality of his conduct or that his ability to conform his conduct to the law was substantially impaired (23R 2202). Furthermore, although he thought that Francis' mental condition had some effect on him at the time of the crime, Dr. Perry did not know and could not say "how" it was affecting him (23R 2205).

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<sup>14</sup> Dr. Perry stressed that these personality disorders should not be confused with schizophrenia (23R 2180).

<sup>15</sup> Dr. Perry testified that Francis' mother told him that Francis had "always" been a loner and had isolated himself (23R 2206).

Susan La Fehr Hession is a licensed mental health counselor in West Palm Beach. She had a B.S. in Psychology from Oakland University in Rochester, Michigan, a Master's in Psychology from the University of South Florida and has completed all but her dissertation for a Ph.D. in human sexuality from the Institute for Advanced Study of Human Sexuality in San Francisco (23R 2214-15). She administered psychometric testing to Francis, including the Bender Gestalt, the "protective drawing" test, an MMPI, and a word association test (23R 2219-20). She also interviewed the defendant and others. She concluded that, although Francis was not psychotic, he was "very disturbed" (23R 2221). Her diagnosis was the same as Dr. Perry's as to the three personality disorders (23R 2224). She, like Dr. Perry felt that these disorders, because they affected all areas of Francis' life, "was one of the many determining factors in his activity, and his crime" (23R 2242). She acknowledged that she was aware that Francis had been using drugs, including heroin (23R 2244), and that such drug usage could make Francis look "dazed and slow" in his movements (22R 2246). She also acknowledged that, despite his mental disorders, Francis could plan, could act intentionally, and could follow the law if he chose (22R 2246). She, like Dr. Perry, could not say that Francis was under the influence of "extreme" mental or emotional disturbance, or that his ability to appreciate the criminality of

his conduct or to conform his conduct to the requirements of the law was "substantially" impaired (23R 2247-48).

It should be noted that, despite all these witnesses' characterization of Francis as "passive," he aggressively made his own argument at his bond hearing, accusing his arresting officers of acting improperly and without probable cause (9R 29) argued for a speedy trial against the advice of his attorneys (9R 36-43), at one point insisted on representing himself (9R 102-123), and later filed pro se motions for speedy trial and for discharge (12R 346). Following the jury recommendation for death, Francis insisted on testifying at the Spencer<sup>16</sup> presentence hearing, again contrary to his attorney's advice (23R 2323). In his testimony, Francis claimed he did not get a fair trial, argued that he was innocent, criticized his attorneys' strategy in numerous respects, criticized the police and disparaged the credibility of state's witnesses (23R 2324-2330). He had written letters to the court, and planned to represent himself on appeal (23R 2330-34).<sup>17</sup>

Francis' sister and mother also testified at the presentence hearing before the judge. Both of them expressed their dissatisfaction with the fairness of the trial and their belief in Francis' innocence (23R 2315, 2316-23).

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<sup>16</sup> Spencer v. State, 615 So.2d 688, 691 (Fla. 1993).

<sup>17</sup> He later filed a written motion for self-representation on appeal (8R 1336).

### SUMMARY OF THE ARGUMENT

There are 14 issues on this appeal: (1) Where the State exercised a peremptory challenge against a black prospective juror because she laughed when informed that the defendant was accused of murdering two people, the trial court did not err in denying a defense objection to this peremptory. (2) The facts known to police at the time Francis was arrested were amply sufficient to give them probable cause to believe that Francis had committed a felony. (3) The trial court did not err in concluding that Francis had reinitiated contact with police after having earlier invoked his right to counsel. It is undisputed that Francis knocked on the door of the interview where he was being held and asked to speak to police about this case. Furthermore, police advised Francis that, because he had asked for an attorney, they couldn't talk to him; Francis told them he wanted to talk to them anyway. (4) The trial court did not err in admitting spontaneous statements made by the defendant's mother in the presence of the defendant, which the defendant immediately adopted. Further, the trial court admitted these statements on two separate grounds (spontaneous statements *and* adoptive admissions), and Francis only argues error as to one of these grounds on appeal. (5) Any issue as to the court's handling of the jury's request to rehear CJ's testimony is being raised for the first time on appeal and is therefore procedurally barred. Furthermore, the trial court was not out of line in trying

to discourage a read back of this testimony, which would have taken some three hours, especially where the court did so merely by telling the jury the truth (that it would take three hours) and where the defense explicitly agreed to this. (6) The motion for judgment of acquittal was denied properly. The evidence, even if circumstantial in many respects, when considered in the light most favorable to the state, paints a compelling picture identifying Francis as the person who entered the victim's home, stabbed them to death, stole their watches, radio, necklaces, coins and automobile, and fled to a location several miles away, where he burned incriminating evidence, disposed of the victim's car, and tried to sell the other items. Premeditation was established by evidence that Francis stabbed one victim 23 times and the other victim 16 times, finishing them off by cutting their jugular veins. (7) The HAC aggravator is not unconstitutional, and was properly found in this case in which two elderly women were brutally stabbed to death. (8) The trial court properly found that these murders had been committed during the course of a robbery. (9) The prior violent felony aggravator was properly applied to this double murder case. (10) The pecuniary gain aggravator is not unconstitutional and, moreover, was properly merged into the robbery aggravator. (11) Francis' complaint about the state's cross-examination of two defense mental health witnesses at the penalty phase is not preserved for appeal, as there was no

contemporaneous objection whatever to the state's cross-examination. Furthermore, these witnesses had been asked about Francis' sanity and competence on direct examination by defense counsel, and the state's cross-examination was not, as Francis contends for the first time on appeal, outside the scope of direct. The trial court was not confused about the law on this subject. It is not inappropriate for the trial court merely to note that a defendant is not insane or incompetent, and the fact that the trial court found a statutory mental mitigator not even contended for by the defense is a strong, even conclusive, indication that the court did not diminish the importance of mental health testimony to the defendant's detriment. (12) Under precedents from the United States Supreme Court, the aggravator that the victims were particularly vulnerable due to advanced age is not unconstitutionally vague, even if it requires a "subjective determination" and even though it might be incapable of "mathematical precision." This aggravator was properly found in this case. (13) Although some mental mitigation was shown to exist in this case, Francis is normally intelligent, has no brain damage, was capable of planning and acting intentionally, and was not under any acute distress at the time of the crime. Nor could any witness say how his personality disorders contributed to this crime. Furthermore, there is no evidence that Francis had a deprived, disadvantaged, or abusive childhood. There were four serious and

weighty aggravating circumstances in this case. In similar cases, this Court has repeatedly found death sentences proportionate even though mental mitigation was presented. The trial court properly found that the aggravators "far outweigh[ed]" the mitigating circumstances, and Francis' death sentences are not disproportionate. (25) Electrocution is not unconstitutional.

ARGUMENT

*ISSUE I*

THE TRIAL COURT COMMITTED NO REVERSIBLE ERROR  
IN REVIEWING THE STATE'S PEREMPTORY CHALLENGES

In his first enumerated error, Francis contends the trial court erred in determining that the state offered a race-neutral reason for its peremptory challenge of a black prospective juror, Ms. Bennett.

The record shows that the prosecutor asked prospective juror Bennett, *inter alia*: "How did you feel when you first came into this courtroom and you heard the judge tell you that a young man is accused of killing two people? What is the first thing you thought?" Ms. Bennett answered, "Nothing. . . . Nothing at all" (14R 713). Defense counsel asked one brief question of Ms. Bennett, concerning whether or not emotion is fact (she answered that it is) (14R 787).

Shortly thereafter, the parties began exercising peremptory challenges. The state peremptorily challenged Ms. Bennett (14R 812). Then the following transpired:

MR. BOUDREAU (for the defense): We object to Ms. Bennett. She's one of only two African-Americans. She said nothing that is even remotely prejudicial in this case, and we would ask for a race neutral reason for the striking of one of our rare African-American jurors.

THE COURT: Mr. Shiner.

MR. SHINER (for the state): The reason that the State has used the peremptory, when it was mentioned that two people were killed, it was noted that she laughed.

MR. BOUDREAU: Your Honor, that is something we never saw. And it certainly isn't noted on the record, and Mr. Shiner didn't ask for it to be noted on the record, and we object.

THE COURT: I will accept that as a race-neutral reason and the peremptory is granted as to Ms. Bennett.

(14R 812-13).<sup>18</sup>

In Melbourne v. State, 679 So.2d 759 (Fla. 1996), this Court refined its guidelines applicable to race-based objections to peremptory challenges, stating:

A party objecting to the other side's use of a peremptory challenge on racial grounds must: a) make a timely objection on that basis, b) show that the venireperson is a member of a distinct racial group, and c) request that the court ask the striking party its reason for the strike. If these initial requirements are met (step 1), the court must ask the proponent of the strike to explain the reason for the strike.

At this point, the burden of production shifts to the proponent of the strike to come forward with a race-neutral explanation (step 2). If the explanation is facially racially neutral and the court believes that, given all

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<sup>18</sup> As noted in Francis' brief, the state also peremptorily struck the other black prospective juror; however, Francis concedes that the record supports a conclusion that the state proffered a race-neutral reason as to this prospective juror. Initial Brief of Appellant at 55. It is well settled that opposition to the death penalty is a sufficiently race-neutral reason for exercising a peremptory challenge. Hartley v. State, 686 So.2d 1316, 1322 (Fla. 1996).

the circumstances surrounding the strike, the explanation is not a pretext, the strike will be sustained (step 3). The court's focus in step three is not on the reasonableness of the explanation, but rather its genuineness. Throughout this process, the burden of persuasion never leaves the opponent of the strike to prove purposeful racial discrimination.

Voir dire proceedings are extraordinarily rich in diversity and no rigid set of rules will work in every case. Accordingly, reviewing courts should keep in mind two principles when enforcing the above guidelines. First, peremptories are presumed to be exercised in a nondiscriminatory manner. Second, the trial court's decision turns primarily on an assessment of credibility and will be affirmed on appeal unless clearly erroneous. The right to an impartial jury guaranteed by article I, section 16, is best safeguarded not by an arcane maze of reversible error traps, but by reason and common sense.

Id. at 764-65 (footnotes omitted).

There is no issue in this case as to steps one or two. As to step three, it is the State's contention that the prosecutor's explanation clearly was, on its face, racially neutral, and that the trial court did not abuse its discretion in accepting it. Francis does not even argue that the explanation was not facially racially neutral, but argues that the record fails to support a conclusion that the reason was non-pretextual.

It is true that the transcript itself does not explicitly show that Ms. Bennett laughed. The record does explicitly show, however, that Ms. Bennett thought "nothing at all" about the

accusation that Francis had killed two people. It is not hard to imagine that she laughed when she gave such an answer. Furthermore, the answer itself suggests that Ms. Bennett had an overly casual attitude about a serious case. Whether or not she did, of course, only a mind reader would know. But surely the state was entitled to have doubts about her ability to fairly and impartially judge this case. See State v. Alen, 616 So.2d 452, 456 (Fla. 1993)(use of peremptory challenge to Hispanic juror found to be ethnically neutral "as her demeanor reflected a lack of interest in the judicial proceeding").

While the state obviously could have inquired further, the "focus is not on the reasonableness of the explanation but rather its genuineness, and the trial court's determination, which turns primarily on an assessment of credibility, will be affirmed on appeal unless clearly erroneous." Smith v. State, 699 So.2d 629, 637 (Fla. 1997)(affirming trial court despite defendant's claim that state failed to fully inquire into subject forming basis for peremptory). See also Georges v. State, 23 Fla. L. Weekly D2306 (Fla. 4th DCA October 14, 1999)("Although there is no on-the-record response from the juror on this issue, the record does show that the prosecutor questioned the panel about whether they would be able to fire someone, and that some of the jurors made non-verbal responses. Given the trial court's superior vantage point, there

is no reason to set aside the determination that the state's reason for the challenge was non-pretextual and genuine." ).

Peremptory challenges are presumptively exercised in a nondiscriminatory manner. Melbourne v. State, supra. The burden is on the opponent of the strike to prove purposeful discrimination. Ibid. In this case, the trial court did not clearly err in determining that the defendant had not met his burden of proving purposeful discrimination, and there is no merit to this claim.

### ***ISSUE II***

POLICE HAD PROBABLE CAUSE TO ARREST FRANCIS,  
AND THE TRIAL COURT PROPERLY DENIED FRANCIS'  
MOTION TO SUPPRESS

Here, Francis contends his custodial statements to police following his arrest should have been excluded as fruits of an illegal arrest. He contends that police lacked probable cause to arrest him on August 3, 1997. The trial court found otherwise, concluding that the police "did have probable cause to arrest Mr. Francis for a felony offense and that he was arrested based on probable cause on August the 3rd" (10R 300).

This Court recently stated:

Probable cause for arrests exists where an officer "has reasonable grounds to believe that the suspect has committed a felony. The standard of conclusiveness and probability is less than that required to support a conviction." Blanco v. State, 452 So.2d 520, 523 (Fla. 1984). The question of probable cause is viewed from the perspective of a

police officer with specialized training and takes into account the "factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." Schmitt v. State, 563 So.2d 1095, 1098 (Fla. 4th DCA 1990).

Walker v. State, 707 So.2d 300, 312 (Fla. 1997).

Moreover, when "reviewing a trial court's determination of a motion to suppress, an appellate court will look to all of the surrounding facts and circumstances in the light most favorable to sustaining the lower court's ruling." Cole v. State, 701 So.2d 845, 855 (Fla. 1997).

The facts known to police at the time of Francis' arrest were described by detective Wills at the hearing on the motion to suppress. Will testified that he went to the crime scene the afternoon of July 24, 1997 (10R 140). Officers were present and crime scene tape had been placed around the entire residence and the yard around it (10R 141). He observed that the victims had been stabbed to death. The house had been ransacked; drawers had been pulled out, closets gone through, and a metal strongbox had been pried open (10R 141). Wills talked to Susan Wood, who informed him that various items were missing from the metal strongbox, including two gold pocket watches and old coins (10R 142-3). In addition, the victims' necklaces and car had been stolen (10R 143). Police put out a BOLO for the car and, in addition, informed the news media. It was located at a quarter till seven that evening, to the

rear of 625 8th Street (10R 144-5). This was at least three miles from the victims' home (10R 146).

At 7:25 p.m. that evening, Wills saw the defendant walking toward his house next door to the victims' home. Wills had already talked to Francis' mother, who had told him that Francis had been home earlier that day (10R 149). Francis walked past the crime scene and into his home without stopping to look (2R 3, 10R 148-9). With the mother's permission, Wills entered Francis' home to talk to him. Francis seemed startled and was reluctant to shake Wills' hand (10R 150). Wills told Francis he understood Francis had been home earlier that day. Francis wanted to know how he knew that. When Wills informed him his mother had told him, Francis said, "Mama, what did you tell him I was home for?" (10R 150-51). Wills asked him if he had seen anything suspicious in the neighborhood. Francis had seen "a white guy and a black guy on bicycles in the neighborhood," but could not give any description of them. Francis then walked out of the room, stating that he did not want to become the next victim (10R 151).

Half an hour later, Francis left his home, carrying three trash bags (10R 151-52). He told Wills he was leaving because of the murders, but then admitted he had been thrown out of the house. Wills asked him where he had been; Francis insisted he had been with a friend named Ghandi (10R 152). He could not say where Ghandi lived, however, except to say it was near (10R 152). Wills

asked him if he was wearing the same clothes as earlier. Francis first said they were, but then admitted they were not when his mother corrected him (10R 152-53). Next, Francis pulled a pair of shorts out of one of the garbage bags and told Wills these shorts were what he had been wearing earlier, but his mother again contradicted him (10R 154). Francis told Wills the clothes he had on came from Ghandi, as did his shoes (10R 153). Francis then left, in a Gold Coast Jitney van (10R 154).

Wills learned from Francis' nephew Rysean Goods that, after his mother had gone to work, Francis had left the house carrying a green bag with a pole sticking out of it and had walked towards the victims' house (10R 235).

Wills contacted Gold Coast Jitney and determined that Francis had returned to Ware drive in a cab he had picked up at the corner of 9th and Tamarind--about three blocks from where the victims' car had been recovered (10R 156). From his home on Ware drive, Francis had taken a cab to 9th and Division, about a block and a half or two blocks from where the victims' car had been found (10R 155).

At 2:00 p.m. on August 3, 1997, Charles Hicks, known as CJ, walked into the police department and told detective Key that a guy he knew as Anthony was hanging around his house and had given him a gold pocket watch to sell (10R 146, 215). CJ had further related that he had seen "Anthony" get out of a beige colored Pontiac Grand Prix on July 24, 1997, carrying a green colored duffel bag, and

shortly thereafter had burned clothing and a pocketbook (10R 147, 209). Between 2 and 4 p.m. on August 3, CJ turned over to the police department two gold pocket watches and some coins (10R 161, 215-16).<sup>19</sup>

Based on this information, police arrested Francis in an alley at 4:25 p.m. (10R 161, 170).

It can be seen from the foregoing that Francis seriously understates the information known to the police at the time of the arrest (Initial Brief of Appellant at 58). The police knew that two watches and some old coins had been stolen from the victims. They also knew that Francis had lived next door to the victims, had been at home shortly before they had been murdered, had left his house carrying a green duffel bag and had walked in the direction of the victim's home. They also knew that later that afternoon, and some three miles from the victims' home, Francis had exited the victims' car carrying a green duffel bag. They knew he had set fire to some clothing and a pocketbook. They knew he had thereafter caught a taxi three blocks away from where the victims' car had been found and had returned to Ware Drive. They knew that, upon his return to Ware Drive, he had acted suspiciously and had repeatedly lied to detective Wills concerning his whereabouts and his clothing, and had been unable to give a coherent explanation

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<sup>19</sup> In his probable cause affidavit, Wills stated that CJ positively identified Carlton Francis from a photograph lineup as being the person he knew as Anthony or Carlton Anthony (2R 4).

about where he had been and what he had been wearing. Police knew that Francis had thereafter caught another taxi at Ware Drive and had returned to a location only a block or two from where the victims' car had been found. Finally, police knew that Francis had subsequently shown Charles Hicks, who by coincidence lived on the same street on which the victims' car had been found, two gold watches and some old coins and had tried to sell them. These facts do more than create a "bare suspicion" of guilt as Francis argues (Initial Brief of Appellant at 59). These facts clearly establish reasonable grounds to believe that Francis had committed a felony.

The trial court properly found that the arrest was supported by probable cause.

### ***ISSUE III***

THE TRIAL COURT DID NOT ERR IN CONCLUDING THAT FRANCIS RE-INITIATED QUESTIONING AFTER HAVING INVOKED HIS RIGHT TO COUNSEL OR IN CONCLUDING THAT FRANCIS' STATEMENT WAS VOLUNTARY

Francis argues here that he did not re-initiate contact with police after having invoked his right to counsel, or at least he did not do so in a manner as would justify further interrogation. He also contends that the police conducted the functional equivalent of interrogation when they left him alone for several hours in the interrogation room and that this action amounted to coercion. These contentions must be analyzed in light of the evidence presented at the hearing on the motion to suppress.

Detective Wills testified that, following Francis' 4:25 p.m. arrest in the alleyway, he was brought to the police department and at 4:50 p.m. was read Miranda warnings by detective Key in Wills' presence (10R 162, 167). Although Francis refused to sign the card, he agreed to speak to the officers (10R 162-164). Francis was told that the police had a watch that had been turned over to them; Francis admitted having touched some old coins, one gold watch and some bullets (10R 164-65, 221). When police pressed for more information, Francis invoked his right to counsel (10R 165).<sup>20</sup> The interrogation immediately ceased, and the police left the room (10R 166-67). This occurred at 5:00 p.m. or possibly a little later (10R 232). Wills testified that he was doing paperwork on the case while other officers were sent to the shack behind CJ's house and the surrounding area (10R 168-69). As police found things, like the car keys, the radio, the rifle, the ammunition and so forth (10R 156-59), they relayed their findings to Wills (10R 168-69). At 6:00 p.m., Bernice Flegel's daughter Kerry Cutting came to the police department and identified a pocket watch (10R 217).

Although the investigators were finished talking to Francis (10R 234), they left Francis in the interview room as they worked

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<sup>20</sup> Francis testified he did not remember having been read his Miranda rights, but he acknowledged that if the police read him his rights, he already knew them; he also acknowledged having asserted his right to counsel and further acknowledged that the interrogation ended when he told police he wanted a lawyer (10R 240, 243, 255-57).

on the case (10R 169). Wills testified that the room was approximately eight feet by eight feet, with no windows except one on the door (10R 222). Francis was not handcuffed, but the door was locked and he could not get out; he was under arrest, and had been since taken into custody in the alleyway (10R 169-70, 221). Francis knew he was under arrest, having been so informed at the time he was taken into custody and also after he arrived at the police department (10R 204-05).<sup>21</sup> There was no other place to hold him but the interview room without pulling "someone off the road" to watch him, in which case he could have been put in a holding cell, or taken to jail (10R 225).

The next time police had contact with him was at approximately 8:30 p.m., when Francis knocked on the door (10R 170-71, 224). Wills opened the door and asked Francis what he wanted (10R 171). Francis told him he wanted to talk to Wills and Key again. Wills told him that, because he had asked for an attorney, "we" could not talk to him (10R 171). Francis replied that he wanted to talk about the case and that he did not want a lawyer now (10R 171, 227). Wills told Francis he would get back to him and re-locked the door (10R 171). He then discussed with detective Key what they

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<sup>21</sup> This last transcript citation is to the taped interview in which this was discussed and Francis acknowledged these facts. In addition, Francis testified at the motion to suppress hearing that, at 4:25 p.m., he had been arrested at gunpoint and put in handcuffs (10R 239). He did testify, however (somewhat inconsistently), that he knocked on the door only to find out if he was going to be arrested (10R 247).

should do. They decided to talk to Francis and to record the conversation (10R 171-72). There were no other conversations between Francis and the police between 8:30 p.m. and 9:07 when the taped conversation began (10R 226).

The tape was played at the hearing on the motion to suppress; it is about 25 minutes long (10R 173). The tape begins with Detective Key stating that it was 9:07 p.m. and asking Francis if he remembered knocking on the door at about 8:30. Francis did (10R 174). Then the following transpired:

DETECTIVE KEY: Why did you knock on the door?

CARLTON FRANCIS: Well, I wanted to talk and find out--

DETECTIVE KEY: What's going on?

CARLTON FRANCIS: Yes.

DETECTIVE KEY: So you initiated the contact with us?

CARLTON FRANCIS: Huh?

DETECTIVE KEY: You--what I mean is you initiated the contact with us?

CARLTON FRANCIS: Well, you see, I mean, from the way you made it seem earlier, it's like--I mean, I thought the reason why they--you were gonna arrest me or have me arrested was because you felt that I lied to you about something. You told me that I lied.

DETECTIVE KEY: Well, what we are doing is a police investigation, and we found out certain factors.

CARLTON FRANCIS: Yes.

DETECTIVE KEY: And the main thing I'm concerned with, did you contact us or we contacted you? You called us, right?

CARLTON FRANCIS: I knocked on the door.

DETECTIVE KEY: Okay. 'cause you had told us earlier you wanted to see a lawyer, right?

CARLTON FRANCIS: Yes.

DETECTIVE KEY: And we--and when you say that, I can't just come up here and start talking because I left you in the room and was over there minding my own business and you knocked on the door, and I came to the door and I says, well, you realize, Carlton, you asked to see a lawyer so I can't talk to you anymore, but you said I want to talk to you, is that right?

CARLTON FRANCIS: Yes.

DETECTIVE KEY: You said that, okay? When you said that--

CARLTON FRANCIS: 'cause I wanted to speak to you.

DETECTIVE KEY: When you said you wanted to speak to me, we came in here and we started talking--

CARLTON FRANCIS: Yes.

(10R 175-76).

It is of course well settled that when an accused in custody invokes his right to counsel the interrogation must cease. Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981). That is exactly what happened here. It is also well settled that, while the police may not thereafter reinitiate communication with the accused in the absence of counsel, the accused himself may

"initiate further communication, exchanges, or conversations with the police." Id. at 451 U.S. 484-85. And that is exactly what Francis did. Although Francis probably is correct when he states (Initial Brief at 61) that a simple "hello" by the defendant to a police officer would be an insufficient communication, exchange or conversation to justify further interrogation, see, e.g., Oregon v. Bradshaw, 462 U.S. 1039, 1045-46, 103 S.Ct. 2830, 77 L.Ed.2d 405 (1983) (plurality opinion)(communication initiated by the accused satisfies Edwards only if it relates to the investigation), when a defendant contacts a police officer and informs him he wants to talk about *this case*, the police are justified in doing just that. Jennings v. State, 718 So.2d 144, 147-50 (Fla. 1998)(affirming denial of motion to suppress where defendant who had invoked right to counsel initiated further contact with police and told them he wanted to talk to them); Stein v. State, 632 So.2d 1361, 1364 (Fla. 1994)(affirming denial of motion to suppress where defendant who had invoked his right to counsel had knocked on door and told police he wanted to talk "about part of it").

In this case, regardless of Francis' claimed motivation for reinitiating dialogue with the police, he clearly reinitiated that dialogue and insisted on talking about *this case* to Wills and Key even after expressly being informed by them that, because he had asked for an attorney, they could not talk to him. See, e.g., U.S. v. Conley, 156 F.3d 78, 83 (1st Cir. 1998)(no Edwards violation

occurred where, after the defendant had requested a lawyer, he had expressed the desire to reignite the dialogue--and persisted in his attempt to do so even after police explicitly reminded him of his right to an attorney. "In such a situation, the suspect, having himself initiated the resumed discussion, cannot later be heard to claim that the officers, by doing his bidding, abridged his rights."); United States v. Valdez, 880 F.2d 1230, 1232-34 (11th Cir.1989)(no Edwards violation where suspect who had previously invoked right to counsel asked in car on way to jail "Where are we going?" and officer's response led to incriminating statement).

Francis further argues, however, that keeping him in the interrogation room for three and one half hours was a ploy designed to induce him to contact police and is therefore the functional equivalent to interrogation pursuant to Rhode Island v. Innis, 446 U.S. 291, 100 S.Ct. 1682, 64 L.Ed. 2d 297 (1980). But Francis has no actual evidence that there was any ploy on the part of the police to induce him to talk further. Indeed, the police testified they were through talking to him. Francis remained in the interview room because the detectives were doing paperwork in a fast-breaking case in which new evidence was coming in by the minute. Francis, after all, was under arrest and was going to be in custody somewhere, and the interrogation room was as good a place as any. The police were obviously surprised, and unprepared, when Francis knocked on the door and told them he wanted to talk to

them. An almost identical argument to that Francis makes, involving very similar circumstances, was rejected in Craig v. State, 599 So.2d 170 (3d DCA 1992). In that case:

After the statement denying responsibility [and invoking his right to counsel], Craig was placed in a room in the police station awaiting transportation to the jail. While there, he overheard his co-defendant, who was being questioned in the next room, "throw him in" to the police. For that reason, he decided, for his own best interests, to confess his involvement. He then literally knocked on the door of the interview room, told Singer he wanted to confess and did so. There is no indication whatever that the confession arose out of a deliberate stratagem or any form of improper "interrogation" by the police. [cits., including Rhode Island v. Innis, supra]. Indeed, they were totally surprised by the confession.

Id. at 171 (fn. 2). This decision by the District Court was reviewed by the Eleventh Circuit Court of Appeals, *en banc*, which readily agreed that no Edwards violation occurred in these circumstances. Craig v. Singletary, 127 F.2d 1030, 1039 (11th Cir. 1997) ("We begin with the unassailable proposition that admission of Craig's second or addendum confession did not violate the Edwards rule).

After hearing all the evidence, the trial court found that Francis had voluntarily reinitiated conversation with police after having been advised of his rights (10R 301). This conclusion is presumptively correct, San Martin v. State, 705 So.2d 1337, 1345 (Fla. 1997), and the trial court's ruling "is accorded great

deference." Walker v. State, 707 So.2d 300, 311 (Fla. 1997). The record supports the trial court's conclusion, and this issue is meritless.

#### ***ISSUE IV***

THE TRIAL COURT DID NOT ERR IN ADMITTING  
STATEMENTS MADE BY FRANCIS' MOTHER WHICH  
FRANCIS IMMEDIATELY ADOPTED

As noted in the statement of facts, detective Wills talked to Francis the evening of July 24 at his home in the presence of his mother. Wills asked Francis if the clothes he had on were the same ones he had been wearing earlier that day. Francis said they were, but was immediately contradicted by his mother who stated that those were not the clothes he had on earlier and that Francis had told her he had obtained his present outfit from a friend. Francis immediately agreed, acknowledging that they were not the same clothes and stating that he had obtained them from his friend Ghandi. Shortly thereafter, Francis pulled out a pair of checkered shorts which he identified as the ones he had been wearing earlier. He again was contradicted by his mother, who told him not to lie and that she had seen those shorts earlier on the bathroom floor. Again, Francis immediately agreed with his mother, acknowledging that he did not have them on earlier and then stating that all his clothes must be at his friend's house. Finally, when asked about the clothes in the garbage bag, Francis' mother stated that he had

told her they had come from his friend, and Francis immediately agreed (19R 1660-63).

Before allowing this testimony to be presented to the jury, the trial court heard it outside the jury's presence and then listened to the arguments of counsel as to the admissibility of the mother's statements. The court then ruled that the mother's statements could come in both as spontaneous statements *and*, "*secondly*," to show that Francis had "changed his story prompted by her" (19R 1638).

Francis contends the trial court erred in admitting the mother's statements under the spontaneous-statement exception to the hearsay rule. Nowhere in his brief does he question the trial court's alternative basis for admitting the statements. Since he does not even challenge this alternative ground of admissibility, the trial court's ruling may be affirmed on that undisputed basis even if this Court disagrees with the spontaneous-statement rationale. Caso v. State, 524 So.2d 422 (Fla. 1988) ("A conclusion or decision of a trial court will generally be affirmed, even when based on erroneous reasoning, if the evidence or an alternative theory supports it.").

Should any further argument be necessary, the State would note that the mother's statements were admissible for a variety of reasons, probably the most important being under the adoptive admission rationale. According to Ehrhardt:

When an adverse party manifests a belief in or adopts the statement of another person as his or her own, the statement is treated as an adoptive admission under § 90.803(18)(b). An adoptive admission occurs when there is an express statement agreeing with the statement of another. The opposing party is treated as if the party had made the statement since the statement was affirmatively adopted.

Ehrhardt, *Florida Evidence*, § 803.18b, p. 742-43 (1999 Edition). In fact, the adverse party need not expressly agree with the out-of-court statement. Recently, this Court found that out-of-court statements were properly admitted under this rationale where the defendant merely failed to dispute the statement. Nelson v. State, 24 Fla. L. Weekly S250, S252 (Fla. May 27, 1999); Brennan v. State, 24 Fla. L. Weekly S365, S366-67 (Fla. July 8, 1999). Francis, by contrast, did not merely acquiesce to his mother's statements; he affirmatively adopted them.

Moreover, Francis affirmatively adopted his mother's statements after having previously made contrary statements. It is clearly proper to show that a defendant has "attempted to avoid detection by lying to the police," Smith v. State, 424 So.2d 726, 730 (Fla. 1983), and to show that the defendant has made inconsistent statements. Blair v. State, 406 So.2d 1103, 1106-07 (Fla. 1981). Francis's inconsistent statements were relevant to show consciousness of guilt, and the mother's statements are necessary to place these inconsistent statements in context.

Furthermore, although this is probably a closer question, the State would argue that the trial judge correctly determined that the mother's statements were spontaneous. Francis argues that the statements were not spontaneous because they referred to Francis' attire at lunchtime several hours earlier. However these statements were in immediate response to Francis' attempt to lie about what he had been wearing--an event the mother could not reasonably have anticipated. While not every disagreement about a past event would warrant the application of the spontaneous-statement exception to the hearsay rule, surely the circumstances of this case do. It seems obvious that the mother reacted to her son's lies with the kind of spontaneity which "negatives the likelihood of conscious misrepresentation by the declarant and provides the necessary circumstantial guarantee of trustworthiness to justify the introduction of the evidence." Ehrhardt, supra at 668-69.<sup>22</sup> Furthermore, in this case, the defendant himself ratified what the mother stated. Thus, any error in concluding that the mother's statements were admissible as spontaneous statements has to be harmless.

A trial judge's ruling on the admissibility of evidence will not be disturbed absent an abuse of discretion. Kearse v. State,

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<sup>22</sup> In fact, it appears that after Ms. Woods did have time for reflection she attempted to recant her spontaneous statements. See her testimony at the Spencer presentence hearing (23R 2321-22).

662 So.2d 677, 684 (Fla. 1995); Blanco v. State, 452 So.2d 520, 523 (Fla. 1984). There was no abuse of discretion in this case.

#### ***ISSUE V***

THE TRIAL COURT COMMITTED NO REVERSIBLE ERROR IN FAILING TO SPEND THREE HOURS READING BACK THE TESTIMONY OF CHARLES HICKS; NEITHER PARTY DESIRED SUCH A READ BACK, AND THE JURY DECIDED IT DID NOT NEED IT

Some time after the jury began deliberating, the court received a note from the jury requesting a written list of witnesses, the tape recording of Francis' statement to police and CJ Hicks' testimony. The court discussed the request with the parties. The first two items were not a problem for anyone. As to CJ's testimony, The court stated that the jury might be under the misapprehension that a transcript of CJ's testimony existed which the jurors could read themselves; the court would have to explain that there was no transcript, and the court reporter would have to do a read back. Defense counsel had no objection to so informing the jury (21R 1976).

The jury was brought into the courtroom. As to CJ's testimony, the court explained:

[Y]ou requested CJ's testimony. And I need to explain I am not quite sure what you mean. Let me explain that sometimes jurors think we can hand you a transcript; that's not possible. If you wish to hear all or part of Charles Hicks' testimony, it requires the Court Reporter to read it back from her notes, and that is certainly possible. I just need to know whether that's what you want, all of it or part of it. Do you understand that's

what it involved? It means that she'll set it up and read back the testimony with all of us present; if that's what you desire.

(21R 1979). The jury returned to the jury room for consideration of this matter, and by written note informed the court that it wished to hear CJ's direct testimony. Defense counsel objected to that, insisting that if the entire direct were read, the cross examination would have to be read also. The court agreed with defense counsel (21R 1982).<sup>23</sup> The following then transpired:

THE COURT: ... What I want to do ... is talk them out of it or tell them it's three hours long.

MR. BOUDREAU [for the defendant]: Tell them it's three hours long.

MR. SHINER [for the state]: I don't know if it's three.

THE COURT: It's at least three hours.

MR. BOUDREAU: I think it's 90 minutes. It was three or four hours live testimony.

THE COURT: My clerk and my Court Reporter estimate three hours. They're the ones that kept track; the Court report [sic] obviously was [sic].

MR. SHINER: The actual testimony was three hours.

THE COURT: More than that, so--

MR. SHINER: Tell them that if they hear the whole testimony, tell them how long it is,

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<sup>23</sup> The court explained to the prosecutor that, if the jury had only asked about a specific point, that part possibly could be isolated and read by itself, but "when they say only direct, they get the whole thing" (21R 1983-84).

and ask them if they're sure they want to hear it.

MR. BOUDREAU: *We agree with that procedure, to tell them it's going to last three hours, play the whole thing before them, and ask them if they still want to hear it, knowing the length.*

(21R 1982-83) (Emphasis supplied).

The jury was returned to the courtroom and the transcript of Francis' statement was replayed (21R 1985-2008). The court then told the jury:

The bailiff is ... going to send some menus now being lunchtime. You can order in some lunch. In view of your general question for the testimony of Mr. Hicks, it would be necessary for us to do an unfair read back. It is anticipated that the read back will take a little over three hours, so if you decide you still want it, let us know, we'll do it after lunch. If you don't want it, that's okay, it is up to you entirely.

(21R 2009). Outside the presence of the jury, the court asked defense counsel for comment. Defense counsel had no comment, and interposed no objection of any kind (21R 2009).<sup>24</sup> Counsel for both parties left the courthouse for lunch. When they returned, they learned that the jury had sent two notes. The first said, "We want to hear that testimony now, forget lunch." Shortly thereafter, a

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<sup>24</sup> The State questions whether the court really used the word "unfair," as it makes little sense in this context. In light of the discussion with counsel which had preceded this communication to the jury, the court likely said "entire" or something similar. In any event, Francis' trial counsel interposed no objection to this or any other portion of the court's response to the jury.

second note said, "Never mind the question. Hold the request, hold up for now" (21R 2010-11). No objections or motions were made by counsel for either side. The verdict was published immediately thereafter (21R 2011-13).

On appeal, Francis for the first time complains that the court tried to "discourage" a read back of CJ's testimony. He also contends that replaying Francis' taped statement, but not reading back CJ's testimony, deprived him of a fair trial. Initial Brief at 69-70.

It is obvious from the record, however, that defense counsel explicitly agreed that the trial court should discourage the read back by telling the jury that it would last three hours. Defense counsel's sole insistence was that, if the entire direct examination were read back, fairness dictated that the entire cross examination would also have to be read back, a point with which the trial court agreed. Defense counsel never contended that CJ's entire testimony should be read back because Francis' taped statement was replayed. Nor did defense counsel object to the court's instructions to the jury, or to anything else that occurred in connection with the request for read back. Thus, this issue is not preserved for review. J.B. v. State, 705 So.2d 176, 1378 (Fla. 1998)("to raise an error on appeal, a contemporaneous objection must be made at the trial level when the alleged error occurred.").

To the extent that any further argument is necessary, the State would note that the trial court merely told the jury the truth: a read back would take three hours. Furthermore, the court made it clear that a read back was up to the jury, and would be provided if the jury wanted one, knowing that it would take three hours. The jury decided that a read back would not be necessary. Thus, it is incorrect to say, as Francis does (Initial Brief at 70), that the "jury was sent to deliberate without having their [sic] request met." The jury got what it asked for; if it had asked for more, it would have got that, too.

This is not a case in which the trial court failed to determine what the jury wanted to hear, or in which the trial court refused to give the jury information which could have been readily supplied. Compare Rodriguez v. State, 559 So.2d 678, 679 (although trial court has great discretion in ruling on a request to determine what the jury wishes to have read back, such discretion cannot be properly exercised without knowing the nature of the request; because the information desired by the jury might have been readily supplied, the defense request should have been granted). On the contrary, the trial court in this case did determine what the jury sought. Furthermore, although it would be accurate to state that what the jury sought could *not* have been *readily* supplied, the court nevertheless was willing to give it to the jury if it insisted. The trial court did not abuse its

discretion in its response to the jury's request for a read back of testimony. Coleman v. State, 610 So.2d 1283, 1286 (Fla.1992) (trial court need only answer questions of law, not of fact, when asked by a jury and has wide discretion in deciding whether to have testimony re-read); see also Fla. R. Crim. P. 3.410.

#### ***ISSUE VI***

#### **THE TRIAL COURT PROPERLY DENIED THE MOTION FOR JUDGMENT OF ACQUITTAL AS TO THE COUNTS ALLEGING MURDER, ROBBERY AND MOTOR VEHICLE THEFT**

As noted in the Statement of the Case, Francis was indicted on two counts of first degree murder, two counts of robbery with a deadly weapon, two counts of aggravated battery on a person aged 65 or older, one count of burglary with assault or battery and one count of grand theft of an automobile (2R 10-14). At the close of the evidence, defense counsel moved for a judgment of acquittal on all counts. As to the murder counts, defense counsel argued there was "no" evidence of premeditation and "no" evidence that the killings were committed by Francis (19R 1747). In addition, he argued there was "no" evidence to show Francis had committed a burglary or robbery and therefore "no" evidence to support a finding of felony murder (19R 1748). As to the robbery counts, defense counsel argued there was "no" evidence that Francis used any "force, threat, violence, or assault" (19R 1749). He also argued that the evidence was insufficient to show that Francis had stolen anything from the victims (19R 1749). As to the burglary

count, defense counsel argued that there was "no" evidence that Francis entered or remained on the property of the victims with the intent to commit an assault or battery on them (19R 1749). And as to the grand theft count, defense counsel argued that the evidence failed to show that Francis had taken the victims' car (19R 1751). In addition, defense counsel suggested, as a reasonable hypothesis of innocence, that Charles Hicks (CJ) was the murderer (19R 1762). The trial court denied "all the motions for judgment of acquittal" 19R 1753, 1762).<sup>25</sup>

Francis contends here that the trial court erred in denying his motions for judgment of acquittal and also contends the evidence is insufficient to support the convictions.

In Gordon v. State, 704 So.2d 107 (Fla. 1997) this Court noted:

We have repeatedly reaffirmed the general rule established in Lynch v. State, 293 So.2d 44 (Fla. 1974) that:

[C]ourts should not grant a motion for judgment of acquittal unless the evidence is such that no view which the jury may lawfully take of it favorable to the opposite party can be sustained under the law.

Id. at 45; see Gudinas v. State, 693 So.2d 953 (Fla. 1997), cert. denied, \_\_\_ U.S. \_\_\_, 118

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<sup>25</sup> Defense counsel also made a motion for judgment of acquittal as to the two counts of aggravated battery upon a person aged 65 or older (19R 1750-51). Although the court initially denied this motion, the court on later reflection decided that these two counts were "covered by the murder convictions" (23R 2341). There is no issue as to these two counts on appeal.

S.Ct. 345, 139 L.Ed.2d 267 (1997); Barwick v. State, 660 So.2d 685 (Fla. 1995); DeAngelo v. State, 616 So.2d 440 (Fla. 1993); Taylor v. State, 583 So.2d 323 (Fla. 1991).

Gordon, supra at 112. Furthermore:

"A judgment of conviction comes to this Court with a presumption of correctness and a defendant's claim of insufficiency of the evidence cannot prevail where there is substantial and competent evidence to support the verdict and judgment." Terry v. State, 668 So.2d 954, 964 (Fla. 1996). The fact that the evidence is contradictory does not warrant a judgment of acquittal since the weight of the evidence and the witnesses' credibility are questions solely for the jury. Davis v. State, 425 So.2d 654, 655 (Fla. 5<sup>th</sup> DCA 1983); see generally Lynch v. State, 293 So.2d 44, 45 (Fla. 1974) (holding that where reasonable minds may differ as to proof of ultimate fact, courts should submit case to jury). It is not this Court's function to retry a case or reweigh conflicting evidence submitted to the trier of fact. Tibbs v. State, 397 So.2d 1120, 1123 (Fla. 1981), affirmed, 457 U.S. 31, 102 S.Ct. 2211, 72 L.Ed.2d 652 (1982).

Donaldson v. State, 723 So.2d 177, 182 (Fla. 1998).

Applying these principles to this case, it is clear that the trial court properly denied the motions for judgments of acquittal. Addressing premeditation first, the State would note that although trial defense counsel argued that there was "no" evidence of premeditation, in fact the evidence showed, at a minimum, that Bernice Flegel had been stabbed 23 times, including one stab wound four inches deep that penetrated her liver and another that severed her jugular vein, and that Claire Brunt had been stabbed 16 times,

including one which severed her jugular vein and two others which punctured her lung.

Premeditation involves a "prior intention to do the act in question" Lowe v. State, 107 So. 829, 831 (Fla. 1925). It is not necessary "that this intention should have been conceived for any particular period of time. . . . It is sufficient if the prisoner deliberately determined to kill before inflicting the mortal wound. If there was such a purpose deliberately formed, the interval, if only a moment before its execution, is immaterial." Ibid. It is certainly reasonable to conclude from the number and severity of stab wounds inflicted that the killer deliberately determined to kill. And this Court has held just that, stating: "The deliberate use of a knife to stab a victim multiple times in vital organs is evidence that can support a finding of premeditation." Jiminez v. State, 703 So.2d 437, 440 (Fla. 1997)(citing Preston v. State, 444 So.2d 939, 944 (Fla. 1984)). Jiminez only stabbed the victim eight times. The 39 stab wounds inflicted in this case, on two different victims, and with two different weapons, especially when one considers that *Francis burglarized and robbed his next-door neighbors, who knew him and therefore could identify him if they survived*, more than suffices to allow a reasonable trier of fact to find that the murder was premeditated.<sup>26</sup>

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<sup>26</sup> The State would note that Francis went into the victim's home armed with a .22 rifle that, as it turned out, did not work. Although Francis had to use the victim's own knives to murder them,

Furthermore, even if the evidence were deemed insufficient to support a finding of premeditation, the evidence, as will be demonstrated below, supports a conviction for felony murder, and Francis is not entitled to a reversal on the issue of his intent. Jones v. State, 24 Fla. L. Weekly S535, S538 Fla. November 12, 1999)

Francis in fact barely addresses premeditation. What he primarily argues is that the evidence fails to identify Francis as the person who entered the victims' home, murdered them and stole their car, their jewelry and their money. In arguing this, Francis summarizes the evidence. Not surprisingly, he omits significant incriminating evidence. Of course, any summary of the evidence presented at trial, by Francis or by the State, is just that: a summary. It should be noted, however, that the trial court and the jury based their decisions on *all* the evidence, not just a summary.

Besides giving short shrift to significant incriminating evidence presented by the state, Francis devotes a large portion of his argument to attacking the credibility of states' witness. However, the trial court and jury were able to see and hear, and to observe the demeanor of, the witnesses as they testified. For these reasons, "it is the province of the trier of fact to determine the credibility of witnesses and resolve factual conflicts." Guzman v. State, 721 So.2d 1155, 1159 (Fla. 1998).

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he did not enter their dwelling unarmed.

Therefore, in reviewing the evidence on appeal, this Court must view the evidence "in the light most favorable to the state." State v. Law, 559 So.2d 187, 189 (Fla. 1989).

When reviewed in that light, the evidence shows the following:

- 1) Francis wanted to buy an assault rifle.
- 2) Francis was seen shortly before the murders walking in the direction of the victims' home, carrying a green duffel bag with a pipe sticking out.
- 3) Later, Francis was seen exiting his home, still carrying the green duffel bag.
- 4) There was now a dark red spot on the shoulder of his shirt.
- 5) He walked away in the direction of the victims' home.
- 6) Soon thereafter, the victims were discovered murdered. A spent .22 casing lay on the floor. Many items were missing from their home, including a black radio, two pocket watches, some coins, and several necklaces, including one with a heart-shaped locket.
- 7) Also missing was the victims' 1982 tan Pontiac Grand Prix.
- 8) That same afternoon, Charles Hicks (CJ) saw Francis drive up in such a car and park it in an alley behind a church. Francis was carrying a green duffel bag. CJ lived on 9<sup>th</sup> Street.
- 9) Francis then burned "some stuff" in a wheelbarrow, including some clothes and also a white pocketbook similar to one the victims' had owned.
- 10) Police gave the news media a description of the victims' auto, including the tag number.
- 11) Francis saw a "news flash" about the murders.
- 12) Shortly thereafter, Francis got into the victims' car and drove off.
- 13) Francis also that afternoon called his nephew and asked

him if he had seen what was in the duffel bag. 14) The victims' car was recovered later that evening after Jimmy Winn saw the news bulletin describing the car and giving its tag number and he recognized it as the one in his backyard. Jimmy Winn lived on 8<sup>th</sup> Street. 15) Francis walked up to a taxi stand at Tamarind and 8<sup>th</sup> Street and caught a ride back to his home on Ware Drive, almost four miles away. 16) When Francis returned, there were numerous police cars at the victims' home, which was surrounded by crime scene tape. Francis walked by all this without even looking. 17) Francis acted wary when approached by detective Wills. 18) Francis was upset that his mother had told Wills that he had been home earlier that day. 19) Francis gave materially inconsistent statements about what he had been wearing earlier, first claiming that he had been wearing what he had on, then claiming that he had been wearing some checkered shorts, and finally claiming that his clothes were with a friend name Ghandi he could give no information about. He also claimed to have seen two suspicious persons in the area earlier, but could not describe them. 20) Police have never been able to find "Ghandi" or the clothes Francis had been wearing earlier. 21) Francis knew the victims and had been in their house before. 22) There was no sign of forced entry following the murders. 23) Francis took a taxi from his mother's house to 9<sup>th</sup> and Division--the same street CJ lived on, and some 4-5 blocks from the taxi stand. 24) Francis now had money and bought drugs from CJ.

25) Francis also had two pocket watches, a black radio, some old coins, and at least one necklace. He tried to get CJ to pawn these items for him, or to trade them for an assault rifle. 26) Not long before he was arrested, Francis tried to buy guns from two other persons. 27) The day before he was arrested, Francis tried to sell George Dean a necklace which Dean described as "an old person's necklace," with a heart-shaped locket. 28) Francis also buried a .22 rifle which had belonged to CJ, who had kept it in the shack Francis had been staying in. 29) After Francis was arrested, this rifle was dug up; a ballistics examination identified this rifle as the one which had fired an empty casing found in the victims' home. 30) A search of a nearby burn pile turned up the burnt remains of a pocket book and keys to the victims' Grand Prix. 31) Bernice Flegel's daughter identified the victim's watch and radio; she also stated that the coins and the burnt pocket book looked like her mother's. These items had been given to CJ to hold by Francis. 32) No fingerprints were found in the victims' house or car. 33) A pair of latex gloves found not far from Francis' shack were similar to ones his mother--a nurse--kept in her home. 34) After being arrested, Francis admitted touching various items which had belonged to the victims, before the police even identified these items to him. 35) Francis told police that when he had left his mother's house and gone to Ghandi's house and to Westgate to play basket ball and no where else. 36) He told police he had ridden a

taxi home from Westgate because he did not feel like walking home. 37) When informed that police knew he had caught a taxi at Tamarind and 8<sup>th</sup>, Francis admitted he had gone there--a distance of some six miles--a statement not only contradicting his earlier statement that he had gone only to Ghandi's and to Westgate but also inconsistent with his earlier insistence that he had taken a taxi from Westgate home because he did not feel like walking that shorter distance.

It can be seen from the foregoing that Francis had the motive and the opportunity to commit these murders. Furthermore, he was continually in the right place at the right time to have been the person who committed the murders and stole the victims' automobile and jewelry. He also possessed the proceeds from the crime (which, coincidentally, even he admitted having touched). Finally, he had acted suspiciously before and after the murders, telling his nephew he was going to play basketball when he was carrying an army duffel bag with a pipe sticking out of it, ignoring the nephew when he left later with a red spot on his shirt, calling his nephew about whether he had seen the contents of the bag, burning numerous items on his arrival at CJ's house, ignoring the crime scene upon his return to his mother's house, repeatedly lying about his whereabouts and the clothing he wore, and continually changing his story each time he was caught in a lie. Ultimately, as in Gordon, supra, the defendant "has no alibi." 704 So.2d at 113.

Not only do all these circumstances compellingly identify Francis as the killer, but his alleged reasonable hypothesis that CJ is the real killer has several problems. First, there is absolutely no evidence placing CJ anywhere near the victims' home on the day of the murder or any other time. Nor is there any evidence whatever that some stranger had been in the area at the relevant time (aside from Francis' own statement about two men on a bicycle, who Francis could not, and never has been able to, describe). Furthermore, the lack of forced entry into the victims' home is inconsistent with entry by one who was a stranger to the victims. Finally, CJ testified that he did not commit the murders (16R 1199), and that is direct evidence contradicting Francis' allegedly reasonable hypothesis of innocence.

This Court has stated:

[T]he question of whether the evidence fails to exclude all reasonable hypotheses of innocence is for the jury to determine, and where there is substantial, competent evidence to support the jury verdict, the verdict will not be reversed on appeal. [Cits.] The circumstantial evidence standard does not require the jury to believe the defense version of facts on which the state has produced conflicting evidence, and the state, as appellee, is entitled to a view of any conflicting evidence in the light most favorable to the jury's verdict. [Cit.]

Cochran v. State, 547 So.2d 928, 930 (Fla. 1989). Furthermore, when reviewing a motion for judgment of acquittal:

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. [Cit.] 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.

State v. Law, 559 So.2d 187, 189 (Fla. 1989). Furthermore,

If there is room for a difference of opinion between reasonable people as to the proof or facts from which an ultimate fact is to be established, or where there is room for such differences on the inferences to be drawn from conceded facts, the court should submit the case to the jury.

Taylor v. State, 583 So.2d 323, 328 (Fla. 1991).

The State clearly presented enough evidence to allow rational jurors to conclude beyond a reasonable doubt that Francis was the killer and CJ was not. The evidence also was sufficient to allow rational jurors to conclude that Francis was guilty beyond a reasonable doubt of the other crimes charged; i.e. that he had burglarized the victims' home, robbed them, and stolen their car. The trial court properly denied the motions for directed verdict. Furthermore, viewing the evidence in the light most favorable to the jury's verdict, Cochran v. State, supra, the evidence is sufficient to support a finding of guilt on all counts.<sup>27</sup>

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<sup>27</sup> In Miller v. State, case no. 93,792, pending in this Court, the State has argued that no special standard for review of circumstantial evidence is necessary and that this Court should adopt the rational-trier-of-fact standard of appellate review for sufficiency of the evidence announced in Jackson v. Virginia, 443

## **ISSUE VII**

### THE HAC AGGRAVATOR IS NOT UNCONSTITUTIONAL ON ITS FACE OR AS APPLIED IN THIS CASE

Francis contends that the HAC aggravator is unconstitutional in several respects. He does not cite to any portion of the record in which this issue was raised at trial. However, an examination of the record shows that Francis, through counsel, filed a pre-trial motion to declare this aggravator and the standard jury instruction unconstitutional on the ground that both the aggravator and the instruction are unconstitutionally vague and overbroad, do not provide an adequate narrowing of the class of persons to whom the aggravator can be applied, and do not give adequate guidance to the jury or to the judge (3R 327-41). Although filing this boilerplate motion, which was denied without further argument (11R 305), defense counsel never objected to the HAC jury instruction; on the contrary, in an exceptionally brief charge conference, the prosecutor and defense counsel announced that they had agreed to a set of penalty-phase jury instructions (23R 2252). Defense counsel acknowledged they "got everything" they wanted (23R 2252).<sup>28</sup> After the jury instructions were delivered by the court, the court asked

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U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), as all federal courts and the overwhelming majority of states have done. The State will not re-argue this issue here, but would contend that the evidence in this case meets the Jackson v. Virginia standard.

<sup>28</sup> It is also notable that every motion in limine filed by defense counsel as to prosecutorial argument was agreed to by the prosecutor (23R 2252).

defense counsel if there were "any additions, corrections or objections to the instructions as read" (23R 2300). Defense counsel answered, "No, sir" (23R 2301).

Because Francis agreed to the instructions actually given without providing any alternative instructions, he has waived any claims he might have concerning the HAC instruction. McDonald v. State, 24 Fla. L. Weekly S347, S348 (Fla. July 1, 1999). Furthermore, the standard HAC instruction given in this case is the same instruction this Court approved in Hall v. State, 614 So.2d 473, 478 (Fla. 1993) and found sufficient to overcome vagueness challenges to both the instruction and the aggravator. Since that time, this Court has consistently rejected claims that either the HAC aggravator or our present HAC jury instruction is constitutionally deficient. Nelson v. State, 24 Fla. L. Weekly S250, 252 (Fla. May 27, 1999); Walker v. State, 707 So.2d 300, 316 (Fla. 1997); Chandler v. State, 702 So.2d 186, 201 (Fla. 1997). Thus Francis' complaints about the HAC aggravator and the jury instructions are both procedurally barred and meritless.

Francis also argues that these murders were not heinous, atrocious or cruel. However, the "HAC aggravating circumstance has been consistently upheld where the victim was repeatedly stabbed." Guzman v. State, 721 So.2d 1155, 1159 (Fla. 1998). Accord, e.g., Brown v. State, 721 So.2d 274, 277 (Fla. 1998); Mahn v. State, 714 So.2d 391, 399 (Fla. 1998); Atwater v. State, 626 So.2d 1325, 1329

(Fla. 1993). Furthermore, Francis' argument that he may have lacked tortuous "intent" fails to help him. This Court consistently has held that: "Unlike the cold, calculated and premeditated aggravator, which pertains specifically to the state of mind, intent and motivation of the defendant, the HAC aggravator focuses on the means and manner in which the death is inflicted and the immediate circumstances surrounding the death." Brown, supra at 277. Accord, Guzman at 1160 ("The intention of the killer to inflict pain on the victim is not a necessary element of the aggravator"); Mahn at 399 (Mahn's contention that HAC did not apply because he did not deliberately inflict pain rejected).

Although Francis makes no argument on appeal relating to the consciousness of the victims, the State would note that, at the very minimum, the victims had to be alive for a few seconds--even if the most fatal of the wounds had been administered first. Although the lack of defensive wounds to Bernice Flegel do not necessarily mean that she was unconscious during her attack, Claire Brunt's defensive wounds do mean that she *had* to be conscious during her attack. Furthermore, Francis could not have killed both women instantaneously. Finally, stabbing killings by their nature heinous, atrocious and cruel. Thus, this Court affirmed HAC in Taylor v. State, 630 So.2d 1038, 1043 (Fla. 1993), where the victim had been stabbed 20 times and beaten, even though the medical

examiner could not say "whether the victim was conscious during all or any part of the attack." Id. at 1039.

The HAC aggravator was found properly in this case.

### ***ISSUE VIII***

THAT CONTEMPORANEOUSLY TO THE MURDERS FRANCIS  
COMMITTED ROBBERY IS A VALID STATUTORY  
AGGRAVATOR AND WAS PROPERLY FOUND IN THIS CASE

In his eighth enumerated error, Francis contends the trial court erred in finding as an aggravated circumstance that the murders of Bernice Flegel and Claire Brunt were committed while the defendant was engaged in the commission of robbery. Francis argues that this statutory aggravator is unconstitutional because it is an "automatic" aggravator. This claim has been repeatedly rejected by this Court. E.g., Hudson v. State, 708 So.2d 256, 262 (Fla. 1998); Blanco v. State, 706 So.2d 7, 11 (Fla. 1997). As noted in Blanco, the "list of enumerated felonies in the provision defining felony murder is larger than list of enumerated felonies in the provision defining the aggravating circumstance of commission during the course of an enumerated felony."

Moreover, this case is not, as Francis contends, a "felony murder." Francis premeditatedly murdered two elderly woman for the purpose of robbing them. By murdering these two women, who knew and could identify him, Francis eliminated them as witnesses and furthered the chances of a successful robbery. It was a cold blooded killing for monetary gain. The contemporaneous commission

of robbery is a strong aggravator in this case, not a "weak" one as Francis contends.

### ***ISSUE IX***

THE PRIOR VIOLENT FELONY AGGRAVATOR IS NOT  
UNCONSTITUTIONAL FOR ANY REASON ALLEGED, AND  
WAS PROPERLY FOUND IN THIS CASE

Although, as noted above, Francis interposed no objection at trial to the jury instruction as to the prior violent felony aggravator, he contends on appeal that this aggravator is unconstitutional, primarily because it may apply, as here, to a contemporaneously committed second murder for which there was no conviction at the time the first murder was committed. Francis concedes this Court has consistently upheld the use of this aggravator as to a contemporaneously committed crime committed against a different victim, so long as there has been a conviction for the "prior" crime at the time of the death sentencing. See, e.g., Banks v. State, 700 So.2d 363, 365 (fn. 3) (Fla. 1997); Correll v. State, 523 So.2d 562, 568 (Fla. 1988); King v. State, 390 So.2d 315, 320 (Fla. 1980); Elledge v. State, 346 So.2d 998 (Fla. 1977).

Francis' argument that this aggravator, so interpreted, fails to narrow the class of persons eligible for a death sentence and is "wholly unrelated to the blameworthiness of the particular defendant" approaches sheer nonsense. The aggravator applies in this case because Francis murdered two people. The aggravator

obviously narrows the class of persons eligible for a death sentence, because only a relative handful of murderers murder more than one person. Furthermore, common sense tells us that if murdering one person is bad, murdering two people is worse and merits a more severe sentence. There is no error here.

**ISSUE X**

THE PECUNIARY GAIN AGGRAVATOR IS NOT UNCONSTITUTIONAL FOR ANY REASON ALLEGED; MOREOVER, IN THIS CASE IT MERGED INTO THE CONTEMPORANEOUS ROBBERY AGGRAVATOR AND WAS NOT FOUND TO BE AN ADDITIONAL AGGRAVATOR

Here, Francis complains about the pecuniary gain aggravator and the jury instructions as to that aggravator. As noted above, Francis' trial counsel agreed to the jury instructions en toto. Therefore, his complaint about the jury instructions is not preserved. The complaint about the aggravator itself seems to be primarily that it "repeat[s]" other aggravators, presumably in this case the contemporaneous commission of robbery. In this case, however, any possible doubling was avoided (by agreement of the parties) by instructing the jury only on pecuniary gain and not the contemporaneous commission of robbery. Thus, these two factors could not have been erroneously "doubled" by the jury.

It is proper to find the pecuniary gain aggravator where the defendant has robbed the murder victim. Larkins v. State, 655 So.2d 95, 100 (Fla. 1995); Toole v. State, 479 So.2d 731 733 (Fla. 1985). Moreover, the trial court merged this aggravator into the

robbery aggravator, treating them as one aggravating factor, as required by Castro v. State, 597 So.2d 259 (Fla. 1992). There is no error here.

***ISSUE XI***

THERE WAS NO ERROR IN ALLOWING THE STATE TO CROSS-EXAMINE DEFENSE WITNESSES ABOUT SANITY AND COMPETENCE WHERE BOTH WITNESSES HAD BEEN QUESTIONED ABOUT THE SAME SUBJECT ON DIRECT AND THERE WAS NO OBJECTIONS TO FURTHER QUESTIONING ON THE SAME SUBJECT ON CROSS; SINCE THE TRIAL COURT FOUND A STATUTORY MENTAL MITIGATOR NOT EVEN URGED BY THE DEFENDANT, IT IS DIFFICULT TO SEE HOW THE TRIAL COURT COULD BE SAID TO HAVE DIMINISHED THE IMPORTANCE OF THE MENTAL HEALTH TESTIMONY

Francis argues here (without any citation to the transcript) that the state cross-examined Dr. Perry and Ms. Hession about "the insanity defense and the defendant's competency." Francis also contends that this cross-examination fell outside the scope of direct examination and was improper.

The State must disagree with the contention that it would be inappropriate to ask a defense mental health witness about the defendant's sanity and competence at the penalty phase even if the defendant had not first addressed these matters on direct. Although obviously a conclusion that the defendant is sane and competent does not preclude a finding of mental mitigation, nevertheless, where the defendant claims mental mitigation, the jury is entitled to know the nature and extent of the defendant's mental illnesses, if any, and the state should be allowed to

delineate the precise contours of the defendant's mental condition on cross-examination.

In general, cross-examination extends to the "entire subject matter" of the direct examination, including "all matters that may modify, supplement, contradict, rebut or make clearer the facts testified to" on direct. Embrey v. Southern Gas & Electric Corp., 63 So.2d 258, 262-63 (Fla. 1953). "[Q]uestions which are intended to fill up designed or accidental omissions of the witness, or to call out facts tending to contradict, explain or modify some inference which might otherwise be drawn from his testimony, are legitimate cross examination." McCrae v. State, 395 So.2d 1145, 1152 (Fla. 1980). Although sanity and competence are not controlling as to mitigation, neither are they irrelevant to any analysis of the defendant's mental condition. See, e.g., Shellito v. State, 701 So.2d 837, 844 (fn. 4) (Fla. 1997) (that defendant showed no signs of psychosis was relevant to evaluation of his mental condition).

Moreover, in this case, the question of Francis' competence and sanity were raised in the first instance by defense counsel, who asked both mental health witnesses on *direct examination* if Francis were sane and competent (23R 2192-93, 2242-43). Thus, the State's questions on this subject (which were almost as brief as defense counsel's), were quite plainly *not* outside the scope of direct examination. Furthermore, and most importantly, defense

counsel *did not object to the state's questioning.*<sup>29</sup> Therefore, any issue of the state's cross-examination in this regard is not preserved for appeal.

Francis also argues that the trial court confused mitigation with insanity and incompetence in its sentencing order and, as a consequence, "diminished" the importance of the mental mitigation in its sentencing. It should be noted that the portion of the sentencing order on which Francis quotes here is the trial court's finding of a statutory mitigator which Francis' trial counsel did not even contend for. See 6R 928-53 (Defendant's sentencing memorandum). In addition, neither of his mental health witnesses testified that either statutory mental mitigator applied. Thus, the trial court found as a statutory mental mitigator that "The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance," (8R 1318), even though, as the court recognized, this mitigator was "not raised by the defendant" (8R 1318), and certainly not compelled by the defense testimony. That the court found a statutory mental mitigator not even raised by the defendant and gave it "some weight" certainly tends to refute Francis' claim on appeal that the trial court's confusion about sanity and competence caused the

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<sup>29</sup> Although Francis does not provide a record citation to the supposedly offending portion of the cross-examination, a review of the transcript shows that defense counsel interposed no objection whatever to any portion of the state's cross-examination of either Dr. Perry or Ms. Hession.

court to "diminish the importance" of mental health mitigation. Initial Brief of Appellant at 87.

Moreover, it was neither inappropriate nor a sign of confusion for the trial court to have noted in its sentencing order that the defense experts believed that Francis "could at all times distinguish between right and wrong," or to note that it "has not been shown that the defendant was under any particular acute distress at the time of the killings," or to note that he was "capable of planning and executing the crimes, as well as . . . covering up his misdeeds afterward" (8R 1318).

Francis fails to mention that the trial court also found Francis' proposed *nonstatutory* mitigator that he was mentally ill or emotionally disturbed and gave this factor *considerable* weight (8R 1318-19). The record simply does not support Francis' contention on appeal that the trial court diminished the weight of the proposed mental health mitigation due to a misunderstanding of the law. No error appears here.

#### ***ISSUE XII***

THE VICTIMS IN THIS CASE WERE 66 YEARS OLD AND CLEARLY WERE VULNERABLE DUE TO ADVANCED AGE; BECAUSE FRANCIS AGREED TO THE JURY INSTRUCTION AS TO THIS AGGRAVATOR AND BECAUSE THE AGGRAVATOR CLEARLY APPLIES TO HIM, HE MAY NOT CHALLENGE IT FOR VAGUENESS; FURTHERMORE, THE AGGRAVATOR GIVES SUFFICIENT GUIDANCE TO THE SENTENCER EVEN IF NOT SUSCEPTIBLE OF MATHEMATICAL PRECISION

The jury was instructed on, and the trial court found as a statutory aggravating circumstance, that the "victim[s] of the capital felonies in this case were particularly vulnerable due to advanced age or disability" (23R 2293, 8R 1317-18). See § 921.141 (5) (m) Fla. Stat. 1999. In its written order, the trial court explained:

The evidence established that the twin sisters were 66 years of age. They appeared to be in reasonable health for their age. No particular disability was shown. The legislature has clearly shown that it considers advanced age a special circumstance worthy of consideration in a capital sentencing. Both victims were clearly in this protected class and this factor was proved beyond a reasonable doubt.

(8R 1317-18).

Francis contends that this aggravator is unconstitutional. Although the basis of his claim is not entirely clear, he seems to be arguing that it is unconstitutionally vague.

The State would note, first, that Francis does not complain about the jury instruction as to this aggravator, nor could he, since, as noted above, his trial counsel agreed to the penalty-phase jury instructions. Thus, any issue of the necessity for any kind of limiting instruction has not been preserved for review.

Secondly, regardless of any incremental nuance of decisional authority which may develop as cases involving this aggravator are presented to this Court in upcoming years, the aggravator clearly applies in this case. The two victims were 66 year old women, who

lived together because they were both widowed. Although they were in good health for their age, they were both nevertheless, due to their age and the circumstances consequent to that age, "particularly vulnerable" to attack by this defendant. Indeed, it is hard to imagine coming to any other conclusion. Therefore, Francis' vagueness complaint need not be addressed, since "[o]ne to whose conduct a statute clearly applies may not successfully challenge it for vagueness." Parker v. Levy, 417 U.S. 733, 756, 94 S.Ct. 2547, 2562, 41 L.Ed.2d 439 (1974).

Should further argument be necessary, the State would note that an aggravating circumstance must meet two requirements. First it may not apply to every defendant convicted of murder; it must apply only to a subclass of murder defendants. Tuilaepa v. California, 512 U.S. 967, 972, 114 S.Ct. 2630, 129 L.Ed.2d 750 (1994). This aggravator clearly meets that requirement: it applies only to murders committed against victims who are particularly vulnerable due to advanced age. No matter how large this class may ultimately prove to be, obviously not all murder victims are of advanced age, and there is no danger whatever that reasonable jurors would find this aggravator applicable in every case.<sup>30</sup> Second, the aggravating circumstance must not be unconstitutionally

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<sup>30</sup> In this respect, this aggravator is distinguishable from those which, without some limiting instruction, could be interpreted by reasonable jurors to apply to every murder defendant. E.g., Espinosa v. Florida, 505 U.S. 1079, 112 S.Ct. 2926, 120 L.Ed.2d 854 (1992); Godfrey v. Georgia, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980).

vague. Ibid. It is unconstitutionally vague, however, only if it fails to provide "any" guidance to the sentencer. Walton v. Arizona, 497 U.S. 639, 654, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990). An aggravator is not unconstitutionally vague simply because it "is not susceptible of mathematical precision," as that is often not possible. Tuilaepa, supra at 973. Therefore review for vagueness is "quite deferential." Ibid. An aggravator is not unconstitutionally vague if it has "some 'common-sense core of meaning . . . that criminal juries should be capable of understanding.'" Ibid. (quoting Jurek v. Texas, 428 U.S. 262, 279, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976)(White, J., concurring in judgment)). If the aggravator provides the jury with "some guidance," the Eighth Amendment "requires no more." Sochor v. Florida, 504 U.S. 527, 112 S.Ct. 2114, 119 L.Ed.2d 326, 340 (1992).

It may well be true that the phrase "particularly vulnerable due to advanced age" requires the sentencer to make a "subjective determination." Arave v. Creech, 507 U.S. 463, 472, 113 S.Ct. 1534, 123 L.Ed.2d 188 (1993). And this subjective determination may be more difficult "than, for example, determining whether [the defendant] 'was previously convicted of another murder.'" However, that "does not mean that a State cannot, consistent with the Federal Constitution, authorize sentencing judges to make the inquiry and to take their findings into account when deciding whether capital punishment is warranted." Id. at 473.

The aggravating circumstance that the victims were "particularly vulnerable due to advanced aged" adequately guides sentencing discretion even though "the proper degree of definition of an aggravating factor of this nature is not susceptible of mathematical precision." Walton, supra at 655.

The trial court properly found this aggravator in this case.

**ISSUE XIII**

FRANCIS' DEATH SENTENCES ARE NOT  
DISPROPORTIONATE

Francis argues here that his death sentences are disproportionate, relying exclusively on the mental mitigation he presented in support of his argument. The State disagrees. This is a highly aggravated murder case. Francis murdered two elderly and defenseless women in their home so he could rob them. There are four statutory aggravators in this case: (1) prior violent felony conviction (in effect, the double murder); (2) in the course of a robbery; (3) heinous, atrocious or cruel; and (4) victims were especially vulnerable because of their age. Although it is not disputed that Francis has three personality disorders as described in the Diagnostic and Statistical Manual of Mental Disorders, 4<sup>th</sup> Edition, it should be noted that he is not brain damaged in any way.<sup>31</sup> He is also normally intelligent. Furthermore, neither

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<sup>31</sup> As noted in the Statement of Facts, an MRI administered for the purpose of determining if Francis might have brain damage showed nothing (23R 2165). In addition, none of the neuropsychological tests administered by Dr. Perry showed any brain

mental health expert could say how Francis' mental disorders (he was passive, a loner, and compulsive) contributed to his crimes, and there was, as the trial court found, no evidence that Francis was under any kind of acute distress at the time of the crimes.

The cases cited by Francis are significantly less aggravated than this one, and, as well, the defendants in those cases have more severe mental and other problems than does Francis.<sup>32</sup> Francis is not brain damaged, is normally intelligent, and did not have a disadvantaged or deprived or abusive childhood. His mother was a nurse who provided a good home for Francis, and his family provided a warm and loving environment as he grew up. In cases similar to this one, this Court has upheld death sentences even though mental mitigation was presented. See, e.g. Bates v. State, 24 Fla. L. Weekly S471 (Fla. October 7, 1999) (victim stabbed; three aggravators, including murder committed during kidnapping and sexual battery, pecuniary gain and HAC, versus two statutory

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damage.

<sup>32</sup> Besaraba v. State, 656 So.2d 441 (Fla. 1995); Jergenson v. State, 714 So.2d 423 (Fla. 1998); and Knowles v. State, 632 So.2d 62 (Fla. 1993) are all single aggravator cases. The defendants in Larkins v. State, 739 So.2d 90 (Fla. 1999) (two aggravators) and Cooper v. State, 739 So.2d 82 (Fla. 1999) (three aggravators), were both brain damaged and had low IQ's and abusive childhoods; in addition, neither murder was HAC. Of all the cases cited by Francis, only Fitzpatrick v. State, 527 So.2d 809 (Fla. 1988) involved a greater number of aggravating circumstances; in Fitzpatrick, however, the trial court had found three statutory mitigators. Fitzpatrick's emotional age was between 9 and 12 years, he suffered extensive brain damage, and possessed, at best, marginal intellectual functioning. In addition, this Court noted that HAC and CCP were "conspicuously" absent.

mitigators and several nonstatutory mitigators; testimony indicated some neurological impairment); Robinson v. State, 24 Fla. L. Weekly S393, S396-97 (Fla. August 19, 1999) (victim beaten and stabbed; three aggravators, avoid arrest, pecuniary gain and CCP, versus two statutory mental mitigators and evidence of abusive childhood, brain damage and heavy drug usage); Guzman v. State, 721 So.2d 1155 (Fla. 1998) (stabbing murder; after striking CCP on appeal, death sentence affirmed based on four remaining aggravators, prior violent felony, avoid arrest, robbery and HAC, versus mitigation of alcohol and drug dependency); Zakrzewski v. State, 717 So.2d 488 (Fla. 1998) (victims killed with machete; three aggravators, CCP, HAC and prior capital felony versus two statutory mitigators, including extreme mental or emotional disturbance, and a number of nonstatutory mitigators); Cole v. State, 701 So.2d 845 (Fla. 1997) (victim beaten and stabbed; four aggravators, prior violent felony, murder committed during kidnapping, pecuniary gain and HAC, versus organic brain damage and mental illness and abused and deprived childhood); Spencer v. State, 691 So.2d 1062 (Fla. 1996) (victim beaten and stabbed; two aggravators, prior violent felony and HAC versus two statutory mental mitigators, drug and alcohol abuse and paranoid personality); Henyard v. State, 689 So.2d 239 (Fla. 1996) (four aggravators, including prior violent felony, murder committed during the course of a felony, pecuniary gain and HAC, versus both statutory mental mitigators, low intelligence, impoverished

childhood and dysfunctional family); Pope v. State, 679 So.2d 710 (Fla. 1996) (stabbing murder; two aggravators, prior violent felony and pecuniary gain, versus two mental mitigators of extreme mental or emotional disturbance and substantial impairment); Foster v. State, 654 So.2d 112 (Fla. 1995) (victim beaten and stabbed; three aggravators, CCP, HAC and murder committed during robbery, versus mental or emotional disturbance, impaired capacity, drug and alcohol addiction, learning disabilities and abusive family background); Henry v. State, 649 So.2d 1366 (Fla. 1994) (victims stabbed; two aggravators, prior violent felony and HAC); Lemon v. State, 456 So.2d 885 (Fla. 1984) (victim stabbed; two aggravators of HAC and prior violent felony versus emotional disturbance); Davis v. State, 461 So.2d 67 (Fla. 1984) (defendant murdered three persons living next door to his parents; five aggravators, under sentence of imprisonment, prior violent felony, burglary, HAC and CCP).

The death penalty was amply justified in this case, and Francis' two death sentences are proportionality warranted.

#### ***ISSUE XIV***

##### **ELECTROCUTION IS CONSTITUTIONAL**

Assuming that Francis has standing to raise this issue at this juncture, since his execution is not imminent, he is nevertheless foreclosed by this Court's recent decision in Provenzano v. Moore, 24 Fla. L. Weekly S443 (Fla. September 24, 1999).

CONCLUSION

For all the foregoing reasons, Francis' convictions and death sentences should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Peter Grable, 804 N. Olive Avenue, 1st Floor, West Palm Beach, FL 33401, this 20th day of December, 1999.

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CURTIS M. FRENCH  
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