IN THE SUPREME COURT OF FLORIDA

CARLTON FRANCIS

Appellant,

vs.

STATE OF FLORIDA

Appellee.

CASE NO.: 94,385

Amended

INITIAL BRIEF OF APPELLANT

On Appeal from the Circuit Court
of the Fifteenth Judicial Circuit,
In and For Palm Beach County, Florida
[Criminal Division]

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TABLE OF CONTENTS

POINTS ON APPEAL
GUILT PHASE

PENALTY PHASE

AUTHORITIES CITED

CASES

CERTIFICATE OF COMPLIANCE WITH ADMINISTRATIVE RULE
CERTIFICATE OF SERVICE

In accordance with the Florida Supreme Court's Administrative Order issued on July 13, 1998 and modeled after rule 28.2(d) Rules of the United States Court of Appeals for the Eleventh Judicial Circuit, counsel for the Appellant hereby certifies that the instant brief has been prepared with the 12 point courier new type font a font that is not spaced proportionately.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to: Office of Attorney General, Assistant Attorney General, 1665 Palm Beach Lakes Boulevard, Suite 300, West Palm Beach, FL 33401-2299, this 27 day of August, 1999.

By: _____
Peter Grable, Esquire
Attorney for Appellant/Francis

PRELIMINARY STATEMENT

The parties will be referred to as FRANCIS and THE STATE. The following symbols

will be used:

The symbol "R" will denote the Record on Appeal.

The symbol "T" will denote the Transcript of Trial.

STATEMENT OF THE CASE

On August 25, 1997, Appellant, Francis, was charged by indictment with premeditated murder of Claire Brunt, premeditated murder of Bernice Flegel, robbery with a deadly weapon (Brunt), robbery with a deadly weapon (Flegel), burglary with assault or battery (Brunt and/or Flegel), aggravated battery on a person sixty-five (65) years or older (Brunt), aggravated battery on a person sixty-five (65) years or older (Flegel), and grand theft of a motor vehicle. (R 10-14).

Jury selection began on July 20, 1998. (R 361). At the close of the State's case, and at the close of all of the evidence, Appellant moved for judgements of acquittal (R 1747). Appellant's motions were denied (R 1753). Appellant rested without presenting evidence (R 1760). Appellant renewed his motions for acquittal(R 1761). The trial court denied renewed motions (R 1762). Appellant was found guilty as to all counts. (R 2012-2013). The juries' recommendation was 8/4 for the death penalty (T 2303).

On October 23, 1998, the trial court sentenced Appellant to

death for the murder convictions. (R 2351). Appellant was sentenced to five (5) years at the Department of Corrections, court costs of $261.00 and an assessment of $190.00 public defender fees for the grand theft auto. (T 2340) As to Counts V and VI, aggravated battery, the court vacated those judgements as covered by the murder convictions (T 2341) and the court withheld judgements as to counts VI and VII and imposed no sentence. (T 2341). As to Counts III, IV and V, to wit, burglary with an assault and two counts of robbery with a deadly weapon, the court sentenced Mr. Francis to an upward departure of life in the Department of Corrections.

On October 23, 1998 the trial court filed its sentencing order (R 1316-1320). A timely Notice of Appeal was filed. (R 1341).

STATEMENT OF THE FACTS - GUILT PHASE

This case involves an alleged murder of two sixty-six year old twin sisters, Claire Brunt and Bernice Flegel. Appellant allegedly stabbed both sisters to death during the robbery of their home located at 2000 Ware Drive, West Palm Beach, Florida. The incidents occurred on July 24, 1997. The defense contested the facts of the case as well as introducing evidence of mental illness and drug impairment.

Susan Wood testified that she was the daughter of Claire Brunt, and that Ms. Brunt was sixty-six years old at the time of her death. (T 877) Bernice Flegel was the twin sister of Claire

Brunt. Susan Woods spoke with her mother between 11:00 and 12:00 and had made plans to stop and see her between 3:00 and 4:00. The two women lived alone, and were friendly with Eleanor Goods, who lived in the home next door with two children and a grown son. (T 880-883). Mrs. Woods' mother and Eleanor Goods were good friends (T 881). Mrs. Wood testified that the two victims shared a Grand Prix automobile, tan with maroon interior. Although the car was titled in Mrs. Woods' aunt's name her mother would be the one who drove. (T 884). Both women were in basically good health and mentally alert (T 886-887). Mrs. Woods arrived in order to visit her mother between 3:00 and 4:00 in the afternoon. Upon approaching the house she noticed that the door was not closed completely. She pushed the door opened and discovered her mother laying back in her chair, her arm extended. She passed her and turned to speak with her mother and noticed that her necklace was tight around her neck and that there was blood on her neck. She realized that her mother was not breathing and went to call 911 for help. At that time, she noticed her aunt face down in the kitchen with an enormous amount of blood around her body. (T 889-891). She did not touch anything other than her mother's neck when she went to fix her necklace. (T 892).

Mrs. Woods could not give an accurate description of any items that were taken other than to say that no large items were taken (T 896).

Officer Paul Matthews testified that he arrived upon the scene at around 4:03 p.m. (T 901). When he arrived on the scene Officer Goya and members of the West Palm Beach Firemedics were there along with Mrs. Woods. (T 902). He checked the entire house for signs of forced entry and found none. (T 910). He was in the house for approximately 45 minutes and while he was there prevented any non-police personnel from entering the home. Matthews testified that all police officers were careful not to step in the blood and did not leave footprints to the best of his knowledge (T 915).

Rysean Goods was a nine year old grandson of Eleanor Goods, who lived with his grandmother, Francis, an elderly aunt, and a fifteen year old cousin. (T 919 - 925). Rysean considered himself to be Francis' good friend. On the morning of the murders Rysean and Guy had been playing in their swimming pool. Rysean stated that he saw his uncle with a tall green bag, which he was carrying by the strap. (T 933). Rysean saw what he thought was a pipe sticking out of the bag about a foot (T 934). His Uncle told him that he was leaving and going to play basketball. Rysean did not see Francis leave. (T 935). Rysean's grandmother came home to check on him at lunch time (T 936). Shortly before his grandmother come home he saw Beatrice Flegel exit her house and get a newspaper. (T 938). While he was in front of the house he saw his uncle Francis leave. His uncle was wearing a white t-shirt with blue shorts. He saw his uncle exit the front door of the

Goods house carrying the same green bag (T 943). Rysean noticed a dark red spot on the white t-shirt. He was not sure what it was. (T. 944). His uncle called him later that night, and asked him if he had seen what was inside the bag. Rysean responded "no" because he had not seen what was in the bag (T 952). Later that evening, Rysean saw his uncle arrive in a cab. When he got home he was wearing a black and blue Orlando Magic t-shirt. (T 958).

Upon cross examination Rysean testified that his grandmother kept pipes in the back yard for a shade tent. (T 965). Rysean was sure that he saw Ms. Flegel come out the front door to get a newspaper just two minutes before Francis left the second time. (T 967). When Rysean was interviewed by the detectives he never mentioned the spot on Francis' shirt. (T 969). The first time this was mentioned was to the State Attorney in New York a week before trial.(T 970).

Bruce Brown contacted the police department at the request of CJ (Charles Hicks). (T 986). Brown is a three or four time convicted felon. (T 988). He met Francis through CJ. (T 989). CJ had told Brown that Francis wanted to buy an assault weapon with ammunition for a negotiated price of $250.00 to $350.00. (T 991-992) He attempted to deliver the weapon to Francis, he saw Francis being arrested and left. (T 993-994). Brown did not give a statement to Detective Wills until eight months after the murders. (T 999)

Rashad Denson, a twenty-one year old native of West Palm Beach. (T 1007). Mr. Denson is the nephew of Charles Hicks. (T 1008). Although he was not sure of the time frame, Denson testified that he remembered Francis walking up to him two or three times in the area of Tenth and Douglass. (T 1010). On these occasions, Francis allegedly tried to purchase a fire arm from Mr. Denson. Mr. Denson admitted that it was his uncle, Charles Hicks, who got him to go to the police. Mr. Hicks had told him of the $1,000.00 reward (T 1012 - 1013).

Mr. George Dean testified that he knew Francis from the flea market over by North Shore Drive. (T 1016). Mr. Dean had seen Francis at a restaurant at Tamarind and Tenth called Folia's. That restaurant opened at 6:00 p.m. (T 1018). Prior to their meeting he had not seen Francis for approximately five years. He learned of Francis's arrest on TV. (T 1019-1020). The meeting at the restaurant was the day before the crime scene went up around Mr. Hick's home. (T 1021). He testified that the Francis asked him if he wanted to buy a necklace. Francis showed him an old fashion gold chain with a heart-shaped locket (T 1024). Dean further stated that he did not give this information to the police until approximately eight months after the incident. His statement was given at the same time as Mr. Browns'. Dean also admitted that during his deposition he had stated that Francis had attempted to sell him the necklace on the night that Francis was arrested.

Dean remembers this transaction occurred at around 7:30 p.m. (T 1037).

Sally Holloway is the common law wife of Charles Hicks. Holloway testified that she had seen Francis on one occasion before the murders. (T 1049). Sally first saw Francis and her husband together on July 24, when they walked into the house. (T 1050). When they came in Francis and Hicks went to the back of the house near the kitchen for approximately thirty (30) minutes. (T 1053). Charlie left the house leaving Francis and Sally behind. During that period, Sally said that the two of them saw a news report of the murder on the TV and that Francis did not react to the news of the murders in any way. (T 1055 - 1056). Later on that evening, Sally saw Francis and Hicks near a wheelbarrow. There was a fire in the wheelbarrow, although Sally was unable to identify what was being burned. (T 1059 - 1060). Sally does not know who started the fire or how it was put out. (T 1060 - 1061). Later Charlie showed her some coins and a couple of watches, and a necklace. (T 1062). Sally does not know where Charlie obtained these items. (T 1062). Over the next several days, Francis came back and reclaimed the items from Charlie. Charlie had given a necklace to Sally but took it away explaining that Francis insisted on getting the necklace back. Sally described the necklace as a gold necklace with a cross at the end. (T 1067). Francis began to stay in an abandoned shack next to Charlie and Sally's house, and he would

come over and beg for food from Sally. (T 1070). Upon cross examination Sally admitted that she didn't know that Charlie was a drug user or that he sold drugs, or that he owned any weapons or ammunition. (T 1074 -1075). Sally was unable to remember the day of the week or month when the murders occurred, or when Francis was at her house. All that she could remember was that it occurred during the summer time. (T 1080 - 1082). She was unable to give the location of the murders, and admitted that she had no conversation with Francis. (T 1082). Sally could not describe the clothes that Francis wore and she does not remember anything unusual about those clothes. (T 1083). Sally could not give the exact time of the news flash but remembers distinctly that it was during the time that she watched her favorite soap operas and that had to be between 1:00 and 4:00 in the afternoon. (T 1085).

In August of 1997, Sally gave a statement to Detective Key. During that statement she told Key that Francis left immediately after the news flash and that she didn't see him again that day.

When Sally gave her deposition in March of 1998, she indicated that after the fire Hicks and Francis re-entered the house after she had seen them at the fire, and went in the back room for several hours. (T 1100). Sally offered another version in her deposition in which she stated that Francis and Hicks left the house together and did not return. (T 1103). Sally's testimony established that Charlie wore size 8 ½ shoes and that he owned

Nikes. (T 1106-1107). Although, Sally testified in direct that she could establish that Charlie never left the house on the day of the murders she did not know Charlie's whereabouts in particular, but only that he was "in" the neighborhood and gone no longer than fifteen (15) or twenty (20) minutes as was his custom. (T 1108). In fact she is not sure whether Charlie had lunch at home or left the house in order to pick up a hamburger. (T 1109). Sally admitted that when she contacted the police she asked about a reward because she heard that they were "offering a thousand dollars." (T 1119 - 1120).

Charles Hicks is a thirty-nine (39) year old drug dealer. (T 1122 - 1127). He met Francis sometime in the summer of 1996 when he assisted Francis change a tire. He came to know him better over the next year during which he sold heroin to Francis approximately ten (10) times. (T 1129). He went on to testify that on July 24, 1997, he saw Francis drive a brown Grand Prix, beige and brown two-tone and park it in the alley between the church and the back of Charlie's home. (T 1133). He estimates that this was approximately 3:40 in the afternoon. He saw Francis exit the car with a duffel bag, wearing black and white tennis shoes and a maroon shirt. (T 1134). He states that Francis came to his house, knocked on the door and asked for gas and a wheelbarrow. (T 1135). Hicks remembers Francis coming in the house, but he does not testify that they went into the back room. (T 1138). Charlie testified that a

heroin customer by the name Jim Lagrottera came by and Charlie and Jim left to do an errand. (T 1138). Charlie testified that he had answered a call from Jim and came outside to discover that Francis had started a fire in a wheelbarrow. (T 1141). Charlie stirred the fire to see what was burning and discovered the charred remnants of a white pocketbook. (T 1141). He could not distinguish any other items but felt that perhaps a lot of things had been burned. (T 1142). He then testified that he left the house with Jim in order to get drugs (Percosets) for Jim. (T 1143). He was gone for approximately twenty (20) minutes and when he returned Francis was still there but the wheelbarrow had been moved. (T 1144). The contents had been dumped in a trash pile on Ninth Street, Hicks identified a photograph of that trash pile. (T 1148). Charlie remembered seeing Francis with a set of car keys which Francis left on the porch of the abandoned house. (T 1150). Charles also testified that Francis asked him to move the car, and he refused. (T 1151). He saw Francis move the car but he did not know. (T 1152). Francis stayed around the house that night and the next couple of days. He frequently asked Charlie for drugs. (T 1153 - 1154). Francis asked for permission to sleep in the abandoned shack. (T 1155). Charlie's landlord kept a lot of tools and miscellaneous furniture in that shack. Hicks testified that he kept clothes, a couple of old rifles, and tools in the shack. No lock was on the door. (T 1155 - 1156).

Hicks said that Francis gave him some old coins, two watches, one with engravement (sic). (T 1156). He testified that Francis asked him to pawn the watch for him but he refused (T 1156). Francis also attempted to trade the jewelry for Hicks' AK 47 assault rifle, which Hicks kept hidden under his home. (T 1157). Hicks kept possession of the watches and coins until he turned them over to the police. (T 1160 - 1161).

Hicks remembered seeing Mr. Francis with a black radio with grey tape around it. Francis asked Hicks to sell the radio but it was too old and damaged. (T 1163). Hicks testified that he saw Francis throw this radio under a house up on Eighth Street. (T 1164). He later showed the police where they could recover the radio. (T 1165). After a couple of weeks, Hicks decided to report this information to the police, and he turned over the coins and watches to them. (T 1172 - 1177). The police also recovered an old .22 caliber rifle that had belonged to Hicks for some time. The rifle had large rust spots in it. Hicks had only shot it once because he was scared that it was unsafe. (T 1182). He had kept the rifle along with some ammunition in the abandoned shack. The police recovered the rifle between the abandoned shack and a daycare center near Hicks' home where Hicks had said he had seen Francis bury the rifle. (T 1183). Before he went to the police he took his assault rifle from beneath his porch and moved it so that the police would not find it. (T 1187).

Hicks admitted that he was a twice convicted felon and that he used marijuana. (T 1200 - 1201). Hicks has been smoking marijuana since he was thirteen (13) years old, mainly on the weekends. (T 1201). Hicks sold heroin from the corner of Tenth and Douglas. During the previous year he had sold heroin to Francis between six or ten times. (T 1208 - 1211). Due to Sally's illness he had slowed up and had not seen Francis for perhaps six months before July 24, 1997. (T 1211). He had just moved into 814 9th Street in June of 1997, one month before the murders. (T 1211). Hicks testified that he had the rifle before he moved and that he had moved it with him to the new address. (T 1213). He also admits that it was therefore necessary for him have handled that rifle within four (4) months of the shooting. (T 1212).

Hicks contradicts himself concerning where he was when he saw Francis with the Grand Prix. In deposition he indicated that he was standing at the kitchen window and under direct testimony he testified that he was sitting in his living room looking out the back window. (T 1216). Charlie Hicks was adamant in his description of the color of the car as two toned, brown over beige. (T 1216).

Hicks could not remember whether Francis entered his home that first day, however he is absolutely positive that he did not enter the back room with Francis for any length of time, not twenty minutes, not two hours. (T 1223).

Hicks cannot recall where he was when Jim Lagrotteria arrived. At one point he says that he was in the house and at another point he says that he was watching TV. Mr. Hicks admits that he never told the police that Lagrotteria was a witness to the wheelbarrow fire. (T 1250 - 1252).

Hicks remembered that there was twenty-three dollars in the white pocket book and that Francis gave him ten dollars to purchase heroin. Francis kept the rest. Hicks was unable to pinpoint exactly when the watches and rings were shown to him. He cannot be sure if they were even shown on the same day. (T 1253). He also cannot remember when he acquired the coins. (T 1255).

Hicks contends that he did not know about the thousand dollar reward until "about the same day after the day I turned him in." (T 1267). He admitted that he knew about the thousand dollar reward when he gave his taped statement on August 4th. (T 1268). Hicks also admitted that due to his relationship with Jimbo as his drug dealer he could get him to do just about anything that he wanted. (T 1268 - 1269). Charles Hicks' foot size is size 8 and he has owned Nike tennis shoes. (T 1270 - 1271).

Officer Anthony Ellis located a rifle and .22 bullets and a baseball cap between Hicks' house and a daycare center. (T 1305). Charles Hicks never told Officer Ellis that he owned the rifle and ammunition. (T 1305).

Donald Guevremont, the crime scene investigator was assigned

to document, locate, package and photograph all evidence. (T 1311). On July 24, 1997, he arrived at the scene at 4:30 in the afternoon. (T 1311). Mr. Guevremont was unable to find any useful evidence in the front yard at the front door. (T 1316). When he entered he located a fired .22 casing from the floor to the left of the front door. (T 1319). There was no evidence that the .22 shell was fired in the home. (T 1320). A black handled knife was taken from a small table. (T 1320). Blood droplets led from that table to a wicker wood stool, where another knife similar to the first was found. (T 1321). A third knife was found on the kitchen counter. (T 1321). Several bloody footprints were found in the living room and kitchen area. (T 1321). One of the footprints was on a newspaper on the floor. (T 1326). The blood was swabbed and samples were sent to the local crime scene for testing. The footprints were sent to the FBI. (T 1329 - 1330). No fingerprints were found on any of the knives. (T 1331). A small box was found in the bedroom, which had been opened, it was tested for fingerprints and no fingerprints were recovered. (T 1333). Mr. Guevremont also photographed the automobile and processed the inside for fingerprints. No fingerprints were recovered. Inside the automobile a plum was recovered, and photographed and taken into evidence. The plum had no fingerprints. (T 1355). A small box was found inside the large metal box and inside that small box a small ring was recovered with an initial K engraved on it. (T

1340 - 1341). The shoes that Ms. Brunt and Ms. Flegel were wearing were submitted to the FBI. (T 1350 - 1351). Mr. Guevremont also measured Francis feet and found them to be a size 11. (T 1353). Mr. Guevremont confirmed that he could find no signs of forced entry. (T 1353). The windows and sliding doors were unlocked. (T 1354). No useful fingerprints or hair evidence was recovered from the crime scene. (T 1356). Cash was found in the house in a small ceramic bowl in the living room and one hundred dollars was found in a vase in spare bedroom. (T 1357 - 1358). A small purse containing thirty-two dollars was recovered from the kitchen floor. (T 1358).

Thirteen year old Jimmy Winn lived with his grandmother at 625 Eighth Street. (T 1366). On July 24, 1997, he and his grandmother were watching a news cast when photographs of the Grand Prix were shown. Both Jimmy and his grandmother recognized the car as being one they had seen parked near their apartment. (T 1367). Jimmy had first seen the car at approximately 2:30 p.m. and it was being driven by the apartment from Henrietta to Sapodilla.(T 1368). During that evening, at approximately 6:00, he saw the same care parked in his backyard. (T 1369). The grandmother called the police. (T 1370). When Jimmy saw the automobile he could not see who was driving, how many people were in the car, or who got out of the automobile. (T 1371). In his deposition, Jimmy had said that he had first seen the car at approximately 5:30. (T 1373 - 1374).

The State next called Rosie Manuel, the dispatcher for Gold Coast Jitney. (T 1380). Rosie worked in the office located at Eighth and Tamarind. (T 1382). On the evening of July 24, 1997, Rosie saw a gentleman seated in the back seat of cab number 5. The driver indicated that he was taking the fare to 2006 North Ware Drive. (T 1385 - 1386). During that night a call came from 2006 North Ware Drive for a pick up. This call came in at 8:20 p.m. (T1389). The fare was left off at Ninth and Division, which is located about five blocks from the cab stand. (T 1390).

The State next called the cab driver, Solog Theramen. He recalls taking a fare to the neighborhood of 2000 Ware Drive and dropping him off at the corner because of police cars and TV cameras. (T 1398). This fare walked up to his cab while it was parked at Eighth and Tamarind. The fare asked him to drive him to Ware Avenue. Theramen estimates the time to be between 5:30 and 7:00 p.m. (T 1399) No one was with him, and Theramen cannot describe his clothes. (T 1403). [Theramen identified a photo line up which he signed on the 28th of July, 1997. At that time he initialed a photograph on the line up of the person whom he took from the cab stand to the Ware address.] (T 1407). The passenger paid Theramen three dollars for a three dollar and fifty cent fare because that was all he had. (T 1408 - 1409).

The next witness for the State was David Wood, husband of Susan Wood. Mr. Wood testified that several days after the murder

he discovered a black back to a radio. He turned this into the police because he had been shown the radio found by the police which was missing a back. (T 1410 - 1411). The back was found in the spare bedroom among knickknacks which were on a shelf. When Mr. Wood was in the house he also saw some box cutting knives. These knives were smaller than the average knife and there was a package with three to a package with two remaining and one missing. These knives are very common. (T 1415).

The next witness called by the State was Kerry Cutting, Bernice Flegel's daughter. Mrs. Cutting entered the home four to five days after the murders. She tried to locate a storage box. The box was normally kept on a shelf in the hall closet just outside her mother's bedroom. That box was missing. Mrs. Cutting said that her mother kept two old pocket watches, some old jewelry and coins that had belonged to her grandfather in that box. Mrs. Cutting contacted the police and one of the detectives showed her a picture of the box which had been taken into evidence. At that time she asked if any watches had been recovered. (T 1420 - 1421). Mrs. Cutting remembered that one of the watches had elaborate scroll patterns and the face was white and was the type that you could see the gears move. (T 1421). Mrs. Cutting identified the State's exhibit 52 as being one of the watches because she recognized the inscription which read Seaside New Jersey. (T 1422) Cutting also identified State's's exhibit 2 as her mother's black

radio. Cutting was shown State's exhibit 51, the bag of coins, which she testified resembled the coins that were taken from the metal box. Cutting also described a long chain with a heart-shaped locket which was missing. She remembered this locket because it contained a picture of her grandfather. (T 1429). Cutting testified that both her mother and aunt's health was very good. The Senior Forensic Scientist for Palm Beach County, Deborah Glidewell, testified next. Her job is to examine blood and other bodily fluids for DNA analysis. (T 1449). She received blood samples of Claire Brunt and Bernice Flegel. She also received latex gloves, knife blades, swabs form the crime scene from the blood that was found on the floor, bar stool and walls, a belt, hair and fingernails from both Claire and Bernice. (T 1451). Blood was found under six of Claire Brunt's fingernails and under ten of Bernice Flegel's fingernails. (T 1453). The DNA profile obtained from one knife was consistent with Claire Brunt and a second knife contained DNA consistent with Bernice Flegel. (T 1458). No blood match was found for either Charles Hicks or Francis. (T 1459).

The next witness of the State was Jack McCall, a crime scene investigator. (T 1462). Mr. McCall recovered the 22 Winchester rifle: the rifle was loaded when it was recovered. (T 1469-1470). He recovered the black radio from underneath the house. He had received information that it was marked by a water jug that was left outside the home. He crawled under the house and recovered a

small square radio. (T 1472). He was not able to get fingerprints off the rifle or the radio. (T 1475).

Mr. McCall's next assignment was to go through a large pile of debris that was 25 feet long and three and a half feet high in some places. (T 1481). Mr. McCall found the following items in the pile; a gold band bracelet (T 1483), two car keys (T 1484), another set of keys (T 1485), a lady's pocket purse with a snap latch (T 1487), a button from a Pelle jeans (T 1489), a football-shaped button from Pelle jeans (T 1489), a Polaroid picture of a woman (T 1491), and a black knife handle (T 1493).

Mr. McCall also recovered a baseball cap with a plastic box of ammunition inside the hat. Along with the box of ammunition were fourteen live loose rounds. (T 1501). Mr. McCall also found hidden near the church near an air conditioning unit a pair of white latex rubber gloves. (T 1502). A pair of white latex gloves was recovered from inside the abandoned shed. (T 1504). Mr. McCall took photographs of the abandoned shack which showed a bible, mattress, and TV. (T 1506 -1507). State's exhibit 23 was identified as one of the bibles which were found in the abandoned shack. Mr. McCall identified fingerprints from that bible as belonging to Francis. (T 1510). Mr. McCall tested the sets of car keys on the 1982 Pontiac Grand Prix which were found and the keys fit the ignition and the doors to the victim's vehicle. (T 1518). Mr. McCall examined all of the latents fingerprints that

were found in the investigation. He was able to identify eight of the twenty- three fingerprints. Only those fingerprints taken from Francis' bible came from Francis. (T 1522).

It was pointed out in cross examination that there were Negroid hair samples collected from the watches. These hair samples were compared to those of Francis, and they were not his. They were not compared to hair samples from Mr. Hicks. (T 1527).

The State's next witness was Jim Lagrotteria. Mr. Lagrotteria knew Mr. Hicks approximately three years before the murders. Mr. Lagrotteria was in the contracting business and several of his employees worked in the neighborhood. (T 1533). Mr. Lagrotteria would purchase pain killers from Charles Hicks, and from time to time socialize with Mr. Hicks. (T 1534). Mr. Lagrotteria describes seeing a fire in a wheelbarrow approximately ten feet off Charles Hicks' front porch. He examined a photograph of the wheelbarrow but could not identify it as the one he saw. (T 1535). Mr. Lagrotteria estimates the time between 12:00 and 4:00 when he got to the house. He observed Charles and one individual poking at the fire. He saw mostly smoke, and not could identify what was burning. He saw Charles and the other man poking at the fire. Other than to describe the other man as a black individual, Mr. Lagrotteria could not describe Hicks' companion. (T 1536 - 1537). Lagrotteria does not recall leaving with Charles Hicks, and estimates that he stayed and talked with Charlie approximately five

to ten minutes. (T 1538). Lagrotteria estimated that he was contacted by the police officers three weeks after he had seen the fire. (T 1539).

Lagrotteria admitted that he was a four time convicted felon. (T 1541). Mr. Lagrotteria gave his deposition on March 21, 1998, and estimated that he had talked to Detective Wills for the first time about a month prior to his deposition. (T 1542). Lagrotteria also estimates that he had seen the two men by the burning wheelbarrow about two weeks before he talked to Detective Wills. (T 1543). Mr. Lagrotteria agrees that he must have seen the fire sometime in February of 1998. (T 1545 - 1546). Hicks had been Mr. Lagrotteria's drug source providing pain killers, Percocets and other drugs. Lagrotteria had engaged in purchases as large as six hundred dollars from Mr. Hicks an average of once a month. (T 1548). Mr. Lagrotteria contradicts Hicks' testimony and he denies that Mr. Hicks has ever taken him anywhere to buy pain killers. He specifically denies that on the day of the wheelbarrow fire that Hicks took him to meet Deborah to buy pills. (T 1549). When asked to describe the gentlemen standing next to Mr. Hicks at the wheelbarrow, Mr. Lagrotteria could not be at all specific with respect to facial hair, height, weight, or clothing. (T 1551). Lagrotteria admitted that Charles Hicks had given his name to the police and arranged for the meeting before he contacted the police. He had also confirmed that he had purchased heroin from

Mr. Hicks in addition to the pain killers. (T 1554).

Upon re-direct the prosecutor was able to get Mr. Lagrotteria to estimate the time of the fire as "certainly" earlier than February. . . the fall of 1997". (T 1557). The State Attorney also introduced a photo line-up which was shown to Mr. Lagrotteria on two occasions. The first time he could not identify anyone. Then somewhat later, Detective Wills showed the photo line-up again. At this time, he tentatively identified Mr. Francis' picture and indicated that he was ninety percent sure. Mr. Lagrotteria's reluctance to identify the photo was based upon his concern that he may have seen Francis some other time and was confusing the two occasions making the identification. (T 1559 - 1569).

The State next called Dr. Siebert, the associate medical examiner for Palm Beach County. (T 1570). Dr. Siebert performed the medical autopsies on both victims on June 25, 1997. (sic.) (T 1571). As to Ms. Blunt, she received sixteen stab wounds. (T 1575). She received two stab wounds to her back, she had various stab wounds to her neck and her jugular vein was cut. She also had what could be classified as a defensive wound to the back of her hand. (T 1577). Dr. Siebert estimated that the both women lost consciousness based upon the nature of their injury. It could have been as few as a few seconds or as long as a couple of minutes. (T 1578). Dr. Siebert determined based upon his examination of Ms.

Blunts' body that she was in a healthy condition consistent with a woman of sixty-six years of age. (T 1580).

Dr. Siebert next discussed Ms. Flegel's wounds. The largest deepest wound was to the midpoint of the chest, entered the liver that went in approximately three inches. She received many stab wounds to the neck, one of which struck the exterior jugular vein causing extensive bleeding. Ms. Flegel did not have any defensive wounds. (T 1582 - 1583). There were superficial wounds on the temple of both sides of her head. Siebert also considered Ms. Flegel to have been in good health consistent with a woman her age. (T 1584). As with Ms. Brunt, Ms. Flegel may have died within seconds or may have lingered several minutes. There is no way of telling exactly how long she lived. (T 1584). Cross examination of the doctor confirmed that both women may have lost consciousness within seconds. (T 1586). The lack of defensive wounds on Ms. Flegel indicate that she may have lost consciousness rapidly. (T 1586). With both women there is no way of determining what wounds they were conscious for or how may wounds were inflicted while the ladies were unconscious. (T 1586).

The State next introduced J.D. Thompson, a forensic scientist specializing in firearms and tool mark identification. (T 1592). In an effort to determine if the casing was fired from the firearm, He cleaned and repaired the firearm. (T 1595). He test fired the gun and based upon his analysis determined that the fired casing,

came from the rifle. (T 1603).

The State next called Captain Bush-Ellis, a member of the West Palm Beach Police Department. She was initially contacted by Charles Hicks' wife in order to make arrangements for Mr. Hicks to file the initial report. (T 1609 - 1610). When she contacted Captain Bush-Ellis, she inquired about the reward. (T 1611).

The next witness called Michael Smith and FBI Forensic Examiner. (T 1614). Mr. Smith's position requires him to test and examine shoe prints. With respect to this case, he received five pieces of floor tile on a newspaper. He also received each of the victims shoes. (T 1617). From the six prints furnished to Mr. Smith, one came from Ms. Flegel's shoe. (T 1618). All the other prints came from a third person who was wearing a Nike Air Schreech Shoe. (T 1620). Mr. Smith was able to narrow the shoe size from a size eight to a ten, but probably closer to that of an eight. A size eleven shoe was definitely eliminated. (T 1623).

The next witness called by the State was Officer Tom Wills. Officer Wills arrived at the crime scene at 4:21 p.m. on July 24, 1997. (T 1646). Officer Wills had been on the crime scene for approximately three hours when he observed Mr. Francis walking toward 2006 Ware Street. The defendant did not look at the news cameras and police tape but walked straight ahead and went directly in his front door. (T 1650). Francis was wearing a light blue tank top, blue faded denim shorts and white low top Reebok

sneakers. (T 1652). After about ten minutes Officer Wills followed Mr. Francis into his house and asked to speak to him. His mother introduced the two, Wills observed that when Officer Wills stuck his hand out in order to shake his hand that Mr. Francis sort of looked startled and swayed back. (T 1654). Officer Wills was dressed in plain clothes and he wore a badge and a gun on his belt. He was not wearing a suite coat. (T 1655). Wills testified that he informed Francis that his mother had told them that Francis was present early in the day and Francis asked "Mama, why did you tell him that?". (T 1656). When he questioned Francis about his whereabouts, Francis replied that he was at a friend "Ghandi's house." He was unable to supply an address, phone number or an adequate description of where Ghandi lived. (T 1658). At that point Mr. Francis walked away from him. Approximately one half hour later, Wills saw Francis leave the house carrying three large trash bags. Wills approached him and asked him where he was going to which Francis replied that he was leaving the house, and that his mother had thrown him out. (19 R 1660). At this point Officer Wills asked him if he was wearing the same clothing he had worn earlier. He answered in the affirmative and which time his mother stated, "Don't you lie. You weren't wearing those clothes earlier, you told me got them from a friend." (19 R 1660 - 1661). At that point Mr. Francis agreed that he had gotten the clothes from his friend Ghandi. Wills continued to question him regarding

what he had on earlier and he began to dig around in the plastic bags. Francis pulled out a pair of checkered shorts which he said he had on earlier. Again, Francis's mother, "don't lie, I saw those shorts on the bathroom floor." At this point he said, "I guess I made a mistake, maybe my clothes are at my friend Ghandi's." (19 R 1662). Wills questioned Francis about the sneakers he was wearing. At first he indicated that they were his sneakers. His mother again corrected him and said "you told me that you got those from your friend too." He then said that Ghandi had given him the sneakers too. Wills again attempted to locate Ghandi and received no information from Francis other than the house was in the neighborhood and he doesn't know the address. Mr. Francis never gave a street name. (T 1662 - 1663). A Gold Coast Cab pulled up and Mr. Francis left. (T 1664). Afterwards Officer Wills contacted the cab company and obtained their log books. Officer Wills was unable to locate Ghandi. (T 1666).

On August 3, 1997, Officer Wills spoke to Charles Hicks on the phone and arranged to go to his home. (T 1668). Hicks, pursuant to police requests, walked Mr. Francis down an alley where he was arrested. (T 1671). Mr. Hicks provided Officer Wills with blood, hair and fingerprints without court order. (T 1671).

Wills detailed his involvement in showing the photo line up to Mr. Lagrotteria on the two separate occasions. Based upon his identification of the photo line up as the one in which Lagrotteria

identified Mr. Francis' picture with ninety-five percent certainty the total line up was admitted over defense objections. (T 1677 - 1679). Wills also testified that he was present during the Francis' interviews and that Detective Key read Francis his rights and that Francis appeared to understand them. (T 1680).

Wills stated that Francis did not have any cuts or blood on his hands at the time of arrest. (T 1682). Wills also admitted that Mrs. Goods denied making statements to Wills regarding Francis' clothing and shoes. (T 1683).

The State's final witness was Detective Gregg Key Detective Key became involved in the investigation when he met Charles Hicks at the police department. As a result of an earlier phone call, Officer Key indicated to Hicks that he was on his way to interview him when he showed up. (T. 1698 - 1699). After defense objection, Detective Key testified regarding his examination and interview of Francis on August 3, 1997. (T 1703).

Detective Wills testified that both he and Key were present when the rights were read to Mr. Francis. He appeared to understand everything that was explained to him. (T 1704). Officers spoke to Mr. Francis for about fifteen minutes before the tape began. (T 1706). Defense reiterated their objection to the introduction of the tape and renewed their Motion to Suppress. (R 1708). The tape was then played for the jury. In the course of the tape Francis admitted that he had touched a gold watch after it

was shown to him by the guy called CJ. (T 1709). He touched two watches and some gold coins and also a rifle and a black radio. (T 1710). All of these items where shown to him by Charles Hicks. (T 1712 - 1714). Mr. Francis admitted loading bullets into the rifle and touching the bullets and the rifle. (T 1716). Mr. Francis admitted sleeping in the abandoned house and explained a cut to his hand as occurring in that abandoned shack on the day of the tape. (T 1717). Detective Key falsely informed Francis that his fingerprints were all over the recovered property. In response to the accusation, Francis maintained that CJ fingerprints would also be on them since he was the one who showed him the material. (T 1719). During the tape Francis told the police officers that on the day of the murders he had taken a cab to Westgate in order to play basketball and had returned by cab to an address on Robbins near his home. The officers confronted him with the information that they had received from the cab company that transported him between a cab stand on North Tamarind and the Ware address and further that the cab stand was only a few blocks from Charles Hicks' home. (T 1730 - 1733).

Detective Key identified the shirt and shoes Mr. Francis was wearing on August 3rd and these were introduced into the evidence over defense objection. Wills also identified exhibit number 56, which was a box cutter type tool recovered from Mr. Francis pocket. This was admitted over defense objection. Detective Wills

testified that Francis mentioned the rifle, the watches, the coins and the radio before Wills had informed him that these items had been recovered. (T 1740). Officer Key admitted that he had lied to Mr. Francis regarding the fingerprints and other evidence. (T 1744).

The defense moved for a judgement of acquittal as to all counts which were summarily denied.

It was agreed that two stipulations would be entered into evidence as to part of the State's case. First it was stipulated that Negroid hair from one of the watches and clothing on the car seat were submitted to the FBI for analysis. That hairs from Francis were submitted for a comparison and that none of the Negroid hairs found in the submission to the laboratory were from Francis. (T 1759).

The second stipulation dealt with State's exhibit 64 and stated that a tool mark examiner from the FBI crime identified the broken piece in State's exhibit 64 as having been broken from the knife, also part of State's exhibit 64. (T 1704 - 1705).

STATEMENT OF FACTS - PENALTY PHASE

The State did not present evidence during Phase II. The defense first called Eleanor Goods, Francis' mother. Francis was born on July 2, 1975, and was 23 years old at the time of the murders. His mother described him as having always been a loving,

caring, helpful person, not only to his family but to other people and to animals; he has always shown a lot of concern and care. Francis was never violent and would avoid physical contact. He was always considered something of a coward. (T 2045). After his grandfather was diagnosed with prostate cancer, Francis cared for him until nursing services were obtained. He learned how to give his diabetic grandfather his insulin shots. Similarly, when his grandmother took sick, Francis lived with her and cared for her. He would sit and read the bible with her because she was a very religious person. In addition, Ms. Goods testified that she had an eighty-six year old aunt who lived with her. It was necessary for Ms. Goods to be out of the home working in order to support the many children. Francis was the one that stayed home and cared for elderly aunt and saw that she got her medicine and her food. The aunt was senile and Francis helped her feed herself and get around. (T 2047 - 2048). Francis is the father of a five year old child. (T 2059). Francis was around eighteen when the child was born. He did not marry the mother.

Prior to his arrest Francis saw his son frequently. Francis would play with him, take him shopping and be a normal loving parent. After the child's mother married Francis continued to enjoy a great relationship with his son. Since his arrest, Francis was not able to see his son because the boy's mother did not wish the child to see Francis in jail. (T 2064).

A letter that Mr. Francis wrote to his mom from jail was typical of his relationship with his mother.

"Dear Mommy,

> I just wanted to take the time to write you a letter thanking you for all support and love you have shown me throughout this ordeal and from my childhood on up. I know at times it may seem like I am ungrateful but I know that you have worked hard and suffered through the years trying to have the best for us and I want you to know that I promise a better future for us with the help of our heavenly father. He's been our helper throughout all our troubled times. Thanks a million. Carlton A. Francis, II." (T 2066 - 2067).

When asked to describe Francis and his religious beliefs his mother responded that Francis was always a very religious person. Francis reads the bible all of the time. When Francis' grandmother was ill he used to go over and see her, he would sit and read the bible, they would read the bible together. Francis did not develop his religion as a result of being in the jail house, he had been religious for many years. (T 2067). Francis would spend much time reading the bible, as much as three or four times a day. When he got up in the morning he read his bible, he read it during the day, and before he would go to bed. Ms. Goods said that she used to sit and read it with him sometimes. Once an evangelist came on the TV, he asked his mother to stand with him in front of the TV. The two of them stood in front of the TV that night, the Wednesday night before the murders. (T 2072). His mother said that these murders were inconsistent with the son that she knew. The murders were out

of character because Francis had never been violent. (T 2076). Francis was provided with everything he needed when he grew up. She gave him love, she spent time with him, gave him good schooling, good education, she even paid for tuition to a catholic school. Her only regret was that she spent so much time working. (T 2078).

When asked to explain the changes that had come over Francis before his arrest Ms. Goods replied that he walked slower, that his mind seemed to have changed, but she was unable to explain this change. (T 2081).

Francis' older sister, Michelle Goods, was the next to testify. Michelle was ten years older than Francis and the two were very close. When her mother would work, Michelle spent a lot of time raising the younger children. (T 2085). When the family moved to Florida from New York, Michelle would visit regularly and spoke to them on the phone. (T 2085). Michelle described Francis as a very gentle person, quiet, calm, loving, affectionate. From the time Francis was young he craved attention and soaked up affection and he always reciprocated. (T 2086). Michelle stated that Francis has never been violent, that he hardly ever had any confrontations with any kids or people on the street. Francis was something of a physical coward, and not at all violent. (T 2087).

Michelle told of one incident in which Francis's father came home after having left the family. The father became very angry and hit Francis and started to attack him, but Francis didn't protect

himself. Michelle asked him why he did not hit the father back. Francis simply explained that he's our father, he could not hit his father. (T 2088). Michelle suspected that this relationship had always affected Francis because he had hoped to be close to his father, but never was.

When Michelle was asked to comment upon Francis religious beliefs, she explained that he had became extremely religious over the past couple of years. Francis had always been a spiritual person with a deep respect for life. Both for the lives of humans and animals. Over the last couple of years, Francis became extremely concerned with his interpretations of the bible. Michelle noticed that he seemed have taken the bible very literally and sometimes they would differ because she did not interpret the bible in that matter. Michelle became concerned because every time they talked the conversations turned to religion. Michelle began to wonder why he had this sudden obsession and that he had become so focused on the bible. (T 2090 -2091). Michelle described the changes in Francis over the last few years as becoming more withdrawn and not as affectionate as he had previously been. He became quieter, more reserved, and more to himself. Michelle told of a time when Francis took the ground meat out of the refrigerator and submerged it into water so that the meat lost all of its color and turned white. When asked why he did this, Francis explained that you are not supposed to eat all of this blood. Michelle began

to see that Francis's interest in religion became excessive because all conversations began and ended on religion. The preoccupation and obsessiveness with religion became combined with an outward appearance of being withdrawn and less affectionate. He became very distant. (T 2094). Michelle began to notice that he would do strange things with his neck, he would act as if he had a tick and stretch his neck often. Francis would sit and stare off into space as if he were not aware of what going around him. She noted that these changes had been going on for two or three years. Francis never lost his gentleness and was never violent. He showed respect for all forms of life. He was particularly kind and loving to animals. (T 2097 - 2098).

Michelle found these murders inconsistent with the way Francis had lived his life. (T 2100). She ended her testimony with a plea for mercy, saying simply that Francis had always been a good and gentle person and Michelle explained to the jury that all of the family loved him and to please not put him to death. (T 2102).

The defense next presented two friends of the family, Joan Duquensy and Marian Boatwright, who both testified that Francis was a good and quiet person and that the murders were inconsistent with the Francis that they knew. (T 2105 - 2117).

Next the defense called Yvonne Pitts. Yvonne Pitts is Eleanor Goods' niece and Ms. Pitts was raised by Eleanor. Ms. Pitts described that Eleanor Goods not only raised six of her own children

but foster children and grandkids. Ms. Pitts considers Ms. Goods like a mother. (T 2125). From time to time Ms. Pitts would loose contact with Francis. She had known him since his birth and had seen him on a day to day basis during his early teenage years. She had seen him irregularly over the last three and four years and both lived in Palm Beach County. (T 2126 - 2127).

Ms. Pitts said that Francis was never disrespectful to her, even though she was a much older cousin. Francis was a loving person who was comical, and was never violent. (T 2129). Ms. Pitts said that Francis was the next door neighbor of the victims, that Bea and Claire trusted Francis and that they would want Francis spared so that he might find God and die saved. (T 2131). The State Attorney asked Ms. Pitts if Francis had not been strange the last time he visited her before the murders. Ms. Pitts replied that he had and confirmed that she suspected that he may have been high on drugs at the time. (T 2137). Ms. Pitts indicated that she did not know whether Francis was acting strange because of drugs or mental illness. (T 2138).

Francis' older brother Rashawn Goods was the next to testify. Rashawn is four years older and the two boys grew up together. (T 2140). Rashawn lived in his mother's house with Francis until Francis was about sixteen years old. Rashawn described that when the boys were growing up Francis would hang around him and be a pest. While the two of them would fight like brothers, Francis

would never fight anyone else. Francis would frequently be picked on outside the home and Rashawn would try to urge him to fight or to protect himself but Francis refused to do this. He was never violent. (T 2142- 2143). Rashawn described Francis as a loner, that he didn't hang with kids outside.

Rashawn explained how Francis became strange over the most recent two or three years. Although Francis was his brother he would come to his house and ask for cereal. Then he would ask for milk. He started to ask for everything; "can I use a paper towel, can I go to the bathroom." Francis knew that he was welcomed to what was in his brother's house but he would take nothing without asking. There was something different about Francis, he would sit there and twist his neck and stare off into space to such an extent that Rashawn started calling Francis "Space Man" because he would just sit there and stare and not respond to anybody. Francis began to associate everything and anything with religion, it didn't matter what they were talking about it would get back to the bible. (T 2146 - 2147). Even through these changes Francis remained nonviolent. (T 2148).

The defenses next witness was Doctor John A. Perry. Dr. Perry has a Ph.D. in clinical psychology with a Master's degree in specific learning disabilities. He is a licensed family expert who has been accepted as an expert witness for over fifteen years in Palm Beach County. Dr. Perry was called as a consultant for an

evaluation after other medical experts had observed odd and peculiar behaviors and signs and symptoms that indicated some form of brain dysfunction. As a result the defense asked Dr. Perry to perform some tests to rule out any kind of organicity. (T 2170). Dr. Perry had five actual face to face sessions with Francis. In addition, he reviewed batteries of tests that were administered by other professionals and he had case notes on behavioral observations and consultations from other experts. Dr. Perry interviewed one of the Correction Officers and also reviewed the depositions of family members, including a sister, a cousin, as well as the depositions of Charles Hicks and Sally Mae Holloway. (T 2172).

Dr. Perry observed that initially Francis was cooperative, but in a test situation Dr. Perry noticed that there were times when Francis became distracted and at other times he became suspicious and guarded throughout the entire test situation. At different times Francis would end the evaluation abruptly because he started to feel uncomfortable and nervous and complaining that he didn't feel well. The tests had to be rescheduled and the battery of tests took many additional hours to complete. When Dr. Perry returned to test him Francis refused to see him.

During the testing procedure Francis had difficulty handling items. He had to wear gloves before he would touch anything. He was afraid of dirt on the materials. Francis stated that it would be against his religious beliefs to handle anything so contaminated.

As the tests and evaluations continued, Francis became more and more uncomfortable and manifested anxiety which eventually led him to terminate the tests prematurely. (T 2174). On one occasion the guards refused to allow Francis to have gloves and Francis refused to take the tests and as a result the full battery of tests were never completed.

Dr. Perry said that Francis was not simply refusing to do the tests out of unwillingness or not being cooperative. The test was creating too much anxiety for him to proceed. The symptoms that he presented were obvious. Dr. Perry had discovered that Francis had committed minor infractions in the jail in order to be put in isolation. He did this because he was not comfortable with other people and this was characteristic of his personality. (T 2176 - 2177).

Dr. Perry indicated that Francis met the diagnostic criteria for a schizoid personality disorder and features of what is called schizotypal. Further testing would be needed to do further diagnosis to see if there is an underlying thought disorder that could be contributing to the behavior. Francis, however, is at the age, late adolescence and early adult life, where people who suffer from schizophrenia have their first episode. (T 2180).

Based upon this information Dr. Perry was able to diagnose Francis with schizotypal personality and obsessive compulsive.

Obsessive compulsive is where someone has obsessions that are

persistent ideas and thoughts or impulses or imaginations which are intrusive and cause anxiety and distress. Francis' obsession appeared to be repeated thoughts about contamination.

The compulsive part of it is the repetitive behaviors. In Francis's case it seemed to be cleaning. The goal of this compulsion is to reduce the anxiety or the distress of the individual. Francis exhibited an excessive social anxiety, which does not diminish. This is typical of the schizotypal personality. The anxiety did not diminish the more familiar Francis became with Dr. Perry. Francis's anxiety tends to be associated with some paranoid fears. (T 2180 - 2182). Dr. Perry noticed that these behaviors, complaints and symptoms began to manifest themselves more over a period of time.

The characteristics of a schizoid personality disorder involve an individual who detaches from social relationships where they have a restrictive range of expression and of emotions. This disorder was apparent from Dr. Perry's contact and observations with Francis as well as from what witnesses observed and commented on in their depositions. Schizoid personality disorder individuals are isolated and spend time by themselves. They tend to be indifferent to approval or criticism of others and not bothered by what others said. It became apparent when Dr. Perry tried to persuade Francis to see the consequences of his refusal to go through with the tests. The consequences didn't seem to bother Francis. There was no

reaction. Francis never reciprocated gestures or facial expressions. Francis refused to shake hands. If you would smile at Francis, he would not smile back. He showed no signs of facial expressions, the constricted affect is cold and aloof. This is symptomatic of schizoid personality. They have difficulty expressing anger, and all the time that Dr. Perry met with Francis, Dr. Perry never saw any signs of anger. Francis never expressed any kinds of anger with his conviction. People with schizoid personalities react passively to adverse circumstances. (T 2184).

Dr. Perry went on to say a schizoid personality may experience brief psychotic episodes which could last anywhere from a couple of minutes up to a few hours because they tend to decompensate under stress. Dr. Perry's opined that this is what would happen to Francis. As the testing became more and more stressful for him he clearly decompensated.

Various Correction Officers were interviewed who reported that Francis would stand in his isolation cell for up to four hours at a time naked and just staring off into space. When he was not doing that he would be obsessively cleaning his cell. (T 2185).

Dr. Perry noted that these odd behaviors were not just something noted by jailers and family members, but also lay witnesses around the time of the crime including Charles Hicks and his associates. (T 2188).

In order to do a complete evaluation of Francis's mental

disorders, Dr. Perry would have to observe him for a period of six months, or better. Nonetheless, Dr. Perry was able to say without reservation that Francis suffers from a mental illness. Francis is very anxious and paranoid in social conditions. He is preoccupied with religion and cleanliness. He presented a pervasive pattern of social and interpersonal deficits in a schizotypal personality marked by acute discomfort and a reduced capacity for close relationships. (T 2190) Francis mental illness effected his ability to act and react in social situations so that there is a reasonable probability that his mental illness contributed to the commission of the crime. Dr. Perry was unable to say definitely that Francis had experienced a psychotic episode during the commission of the murders, but given his mental illness it was a possibility. When a correction officer saw Mr. Francis stand naked for up to four hours at a time is indicative of the type of stress and disassociation associated with a psychotic episode. However, Dr. Perry did not observe any psychotic episodes in their five meetings. (T 2196 - 2197). Francis is of average intelligence. (T 2197). Francis had the ability to make a plan (T 2200) and the ability to cover up his wrong doings and misdeeds (T 2200). When asked if Francis committed the crimes under the influence of extreme mental or emotional disturbance Dr. Perry indicated that he could not answer that question. He could only comment that with Francis's personality if he were under a severe stress of some kind or another

that people with these personality can become psychotic for brief moments. However, without the extended observation, competency and sanity evaluations, Dr. Perry could not give an opinion with medical certainty. (T 2201). Dr. Perry went on to state that he could give an opinion that Francis had the mental illness for some time and that the murders occurred during a psychotic episode was certainly a possibility given the degree of his mental illness. (T 2202).

The defense next called Susan La Fehr Hession, a licensed mental health counselor in private practice in West Palm Beach, Florida. Ms. Hession has twenty-five years experience in the field of mental health, specifically forensic mental health. She has testified and been accepted in Florida Courts as an expert in these areas over one thousand times. (T 2216).

In preparation for her evaluation, Ms. Hession met with Francis on three separate occasions spending approximately five and one half hours in face to face meetings. She also reviewed various depositions from the case including family members. She met for an hour and a half with Francis's mother and for approximately two and a half hours with Francis's cousin, Yvonne Pitts. She reviewed information prepared by defense investigators and spent over two and a half hours discussing the case with defense attorneys. She consulted with Dr. Perry. Ms. Hession reviewed the police reports and school records. She administered the psychometric testing, Bender Gestalt, protective drawing test, Minnesota Multi phasic

Inventory. She talked with the psychiatric nurse from the jail named Sangena Rogers. (T 2219 - 2220).

Ms. Hession found Francis to be a very disturbed young man in several areas of his functioning. She found that he did have brief psychotic episodes for approximately five years or since age eighteen. (T 2221). She found examples of psychotic behavior from the descriptions of Francis's behavior from the Palm Beach County Correction staff, Charles Hicks, Michelle Goods and other family members. Ms. Hession's stated that these psychotic episodes do not pervade every aspect of his life but there are moments when he loses contact with reality. (T 2222). Hession's formal diagnosis of Francis is schizotypal disorder occurring together with a schizoid disorder and an obsessive-compulsive disorder. All of these disorders can occur together and do so with Francis. (T 2224).

The schizotypal disorder is a pervasive pattern of social and interpersonal deficits marked by acute discomfort, with a reduced capacity for relationships. This has been evidenced throughout the last three years of Francis's life. This type of illness, as with most mental illnesses, usually occur when the young adult becomes of age between seventeen and twenty-three. (T 2225). Francis's case seems to be one of these examples. (T 2226). This is a person who is considered odd and unusual or bizarre by others. He has eccentricities, odd behaviors, odd appearances, his ideas of reference are thoughts and beliefs that are incorrect

interpretations of social interactions or social events, odd beliefs or magical thinking, preoccupation with religion or the paranormal, inappropriate or constricted affect. It is accompanied by behavior or appearance that is odd and peculiar, excessive social anxiety that does not diminish with familiarity and tends to be associated with paranoid fears. (T 2227). Ms. Hession found evidence Francis meets this criteria from the jail staff and nurses, the statements by Charles Hicks to the Police Department, observations by neighbors that Francis appeared to be going crazy, Sally Mae Holloway's statements that he was dazed the whole time, slow and unusual. Observations by cousins and other family members that within the last three years he has entered a shell and that he is not the same person that he was earlier in life. Michelle Goods, his sister, says that he is removed from everyone, distant and strange. He is no longer affectionate, he's lost touch with reality. Ms. Hession found that uniformly across the board there was verification of the criteria for schizotypal disorder. His beliefs and preoccupation with marijuana, paranormal and religion are evidenced by the strange rituals he performs with washing and cleaning of meat, preoccupation with constantly talking about the bible, and grandiose ideas of becoming a prime minister of the world. (T 2233).

Ms. Hession also found that Francis met all criteria for a schizoid disorder which bears similar characteristics to a schizotypal disorder. With schizoid disorder, the first criteria

is detachment. Francis has been described by family members and professionals as being so detached it was almost as if he wasn't there. The second diagnostic criteria is preferring to spend time by himself and being socially isolated and a loner. The third criteria is schizoid disorder is indifference to approval or criticism. In Ms. Hession's observations of Francis, as well as in Dr. Perry's observations, Mr. Francis was completely passive. His family members also described him as indifferent to their encouragement or disapproval. The next criteria is difficulty in expressing anger or difficulty with angry situations. Family members told of many circumstances, but is perhaps best illustrated by Francis's inability to protect himself from his father's attacks or to respond when his father yelled at him. (T 2239). The next criteria is to react passively to adverse circumstances. That criteria is most clearly evidenced in his reaction to his arrest and the trial and he was completely passive the whole time. (T 2240). The final criteria is that under stress an individual may experience brief psychotic episodes lasting minutes to hours. Hession had no doubt that Francis met this criteria. (T 2240 - 2241).

Hession diagnosed Francis with a obsessive-compulsive disorder which is a very serious and debilitating anxiety disorder marked by obsessions which are persistent thoughts and ideas, impulses or imaginations that are bothersome and intrusive and cause anxiety and distress. Simply stated the compulsions are the behaviors and the

repetitive behaviors are compulsions which the individual must perform in order to reduce their anxiety. (T 2241). Francis manifests this mostly in his cleaning, his washing and his obsession with contamination and dirty things.

When asked if the mental illness contributed to the murders, Ms. Hession responded:

> ". . . this mental illness is very severe and very pervasive so it affects all areas of Carlton's life and I think it affects him almost all of the time, so that although he may have brief periods when he's not too stressed and he pulls it together with close family members, by and large, this illness which is very serious and very comprehensive and pervasive affects all areas of his life so, or course, it was one of the many determining factors in his activity, and his crime. I think there was no way it couldn't be because it affects every area of his life." (T 2242).

Ms. Hession was certain that the mental illness contributed to the crime because it had been with him for many years and it is not easily treated. (T 2243). The State Attorney inquired about the drug abuse problems Mr. Francis had. Ms. Hession indicated that she was aware of his marijuana and heroin use and she went on to say that when persons with this type of serious mental illness remain untreated, there is a strong tendency to self medicate and that heroin, cocaine, marijuana and alcohol are those drugs which these persons most often medicate themselves with. The use of heroin could exacerbate the symptoms, or it could give some relief from the kind of torturous thoughts and imaginations and behaviors he had. (T 2245). Ms. Hession went on to state that the dual

diagnosed substance abuser and mentally ill are now very prevalent and you see so much of this type of situation. (T 2246).

Ms. Hession clearly found that Francis suffered from schizotypal disorder, the obsessive-compulsive, and the schizoid disorder. These conditions are ever present, they do not go away. Francis has carried these mental illnesses and he will carry them for the rest of his life so they had to be present when these crimes were committed. (T 2247). Anyone who suffers from these serious mental illnesses has impaired judgement and impaired capacity in many areas of their lives. It is difficult to know how substantial it was for Francis at the time of the murders, but certainly these mental illnesses could and did interfere with his thinking, judgement, and his ability to control his actions. (T 2248).

The court found the following non-statutory mitigating factors:

1. Carlton Francis had no significant history of prior violent criminal activity. The fact was proven, but he court gave it no weight.

2. Carlton Francis is mentally ill or emotionally ill. It gave this factor considerable weight.

3. His family, the court gave this no weight.

4. Carlton Francis has family and friends who care for him, the court gave this no weight.

5. Carlton Francis has been a loving son, brother and father of five. The court gave this little weight.

6. The religious activities of the defendant. The court gave this no weight.

7. Society can be protected by a life sentence. The court gave this no weight.

8. The defendant's ability to control his conduct to the requirements of law may have been impaired. The court indicated that they gave this factor some weight. (R 1319)

After considering the above, the Court gave death sentences for the murders of Claire Brunt and Bernice Flegel. (R 1319-1320)

SUMMARY OF ARGUMENT

The Court was clearly erroneously when it denied Francis' objection to the State's peremptory challenge of the prospective Juror Bennett. During her examination, the State expressed no problems with Bennett. However, the defense challenged the peremptory exclusion, the State then replied that Bennett laughed during the time that the murders were described. There is no indication on the record that this occurred. The court did not question the juror nor was there a contemporaneous statement made to the record that she laughed. The record is completely silent and does not support the State's reason. Such error entitles Francis to a new trial.

The Court erred in finding that there was probable cause for

Francis' arrest on August 3, 1997, and thus it erred in denying denying Francis' motion to suppress all physical evidence and subsequent statements. Francis was arrested at about 4:25 P.M. The arrest was based primarily upon information received from Charles Hicks, a twice convicted felon and a known drug dealer. Hick's brought various items to the police department which he alleged that Francis had given him. These items were similar to items reported stolen at the time of the murders but no definite identification of the items had been made. These facts may have been sufficient to make Francis a suspect, but they did not constitute probable cause for his arrest.

After his arrest, Francis' was Mirandized and the police began interviewing. After ten to fifteen minutes he exercised his right to counsel. Francis was then left for three and one half hours in a closed interview room. There is no record that food or water was provided him, there is no record that he was allowed to go to the bathroom. After three and one-half hours he knocked on the door to find out if he was arrested and going to jail. At that time, the police reinitiated their interview. The court erred in deeming this inquiry regarding his status as a reinitiating of contact with the police. Consequently any statements made after his exercise of his right to counsel, should have been suppressed. The court erred in denying that motion to suppress.

During the trial, the arresting officer testified regarding

his initial contact with the appellant. The arresting officer asked Francis if he was wearing the same clothes that he had on at the time that the murders occurred. When Francis' replied that they were the same, the arresting officer was allowed to testify over objection, his mother indicated that Francis had been wearing different clothing and that his answers were untruthful. The mother was not called as a witness. The admission of this evidence constitutes reversible error.

At the conclusion of the trial the jury requested a read back of Charles Hicks' testimony at approximately 10:15 A.M. The court took care of other matters and did not provide a read back. The court issued a statement asking the jury for an exact indication of what portion of Mr. Hicks's testimony they wanted. The jury then replied that they needed the whole direct testimony. After discussion, the Judge and attorneys agreed that they would need to provide both direct and cross examination to the jury and that it would take over three hours. The attorneys were then dismissed for lunch and the jury was sent to the jury room and lunch ordered. Shortly thereafter, the jury sent a note to the Judge indicating that they wanted to forget lunch and begin the read back. The judge directed that they shoudl continue deliberating without the read back. Just as the attorney's returned, the Jury announced that they had reached a verdict. It was reversible error to allow the Jury to deliberate without first providing the requested read

back.

The court erred in failing to grant a judgment of acquittal. There is absolutely no physical evidence connecting Mr. Francis to the murders. No fingerprints, hair, blood, or eyewitnesses can place Mr. Francis at the Murder scene. Bloody shoe prints that were located at the murder scene more closely connect Mr. Hicks than the appellant. All the property recovered was provided by Mr. Hick. The remainder of the state's case was provided by a network of Charles Hick's friends and associates. As such all of the corroborating testimony was not credible and full of inconsistencies. The court should have granted a motion for acquittal and as such Mr. Francis' conviction should be reversed.

Appellant argues that the aggravating circumstances, heinous, atrocious and cruel; felony murder, prior violent felony; and pecuniary gain are unconstitutional both facially and as applied. Appellant also argues that it was error to instruct the jury on all three of these aggravators because they are all based upon the same conduct which occurred contemporaneous with the murders.

The court found that victims of capital felony were particularly vulnerable due to advanced age or disability based upon their age, 66 years old. No evidence was presented that these women were particularly vulnerable. They both were in reasonable good health, mobile and active. The aggravating factor is unconstitutional as vague and over broad.

The Court found that the defense clearly established that the defendant suffers from mental illness. The diagnosis of the appellant was classic paranoid disorders which may have been affecting the defendant at the time of the killings. The court also found as a non-statutory mitigating factor that Carlton Francis was mentally ill and emotionally disturbed. The State offered no rebuttal evidence to the appellant's mental illness. The court erred in allowing the prosecution to cross examine the expert witnesses with respect to the issues of the defendant's sanity and competency. Sanity and competency were not issues during the penalty phase and they had not been raised at any time in the case in chief. These questions were confusing to the jury and improperly diminished the importance of the mental illness mitigators. The court erred in its holding regarding the mental health mitigators in noting that "the defendant was capable of planning and executing crimes...that the defendant could establish right from wrong." Hence the case should be remanded for resentencing with proper weight given to the mitigating evidence.

The death penalty is not warranted in this case. The aggravating factors of prior violent felony, pecuniary gain, and in the course of a robbery and burglary all arise from the same criminal episode. The appellant had no prior violent felonies. There is clear and competent evidence of Mr. Francis' serious and chronic mental illness. These murders are not among the least

mitigated, and the case should be remanded for re-sentencing.

POINT I
TRIAL COURT ERRED IN DENYING APPELLANT'S OBJECTION TO STATE'S PEREMPTORY CHALLENGE ON RACIAL GROUNDS

The Court was clearly erroneous when it denied Francis's objection to State's peremptory challenge of a prospective juror on racial grounds. During jury selection the State used a peremptory challenge on juror Bennett, one of only two Afro-American in the panel. (T. 812). Francis objected and State gave the reason for the challenge that when it was mentioned that two people were killed, prospective juror Bennett laughed. (T. 813). Francis indicated that there was nothing in the record reflecting this assertion, however, the Court, with any discussion on comment, denied Francis's objection to the peremptory challenge. (T.813).

When a party objects to the other side's use of a peremptory challenge on racial grounds, three steps must be taken. The party must first make a timely objection on that basis, then they must show that the perspective juror is a member of a distinct racial group, and finally they must request the court to ask the striking party for it reasons for the strike. Once the party making the objection does this then the burden shifts to the proponent of the strike to come forward with a race-neutral explanation for the strike. If the court finds that the explanation is facially race-neutral and the court believes that, given all the circumstances

surrounding the strike the explanation is not a pretext, the strike will be sustained. Once a facially race-neutral explanation is given, the trial judge must then determine the genuineness of the explanation as to whether it is pretextual. State v. Neil, 457 So. 2d 481 (Fla. 1984); Melbourne v. State, 679 So. 2d 759 (Fla. 1996).

In evaluating the race-neutral reason, the court cannot accept the reason proffered at face value. Rather, the court must evaluate those reasons as they would weigh any disputed fact, and as in weighing any disputed fact, they must rely on the record. The trail court must evaluate the credibility of the person offering the explanation as well as the credibility of the asserted reason. In Slappy v. State, 522 So. 2d 18 at 22(Fla. 1998), the Supreme Court upheld a nonexclusive factors used to determine the legitimacy of a race-neutral explanation propounded by the district court. The Court found that the presence of one or more of these factors tended to show that the reasons given for the strike are not supported by the record or are an impermissible pretext. The factors cited were (1) alleged group bias not shown to be shared by the juror in question, (2) failure to examine the juror or perfunctory examination, assuming neither the trial court nor opposing counsel had questioned the juror, (3) singling the juror out for special questioning designed to evoke a certain response, (4) the prosecutor's reason is unrelated to the facts of the case,

and (5) a challenge based on reasons equally applicable to juror who were not challenged. The Court found that if any of the five factors was present during the questioning of the panel and the State failed to offer a convincing rebuttal, then the State's race-neutral explanation must be deemed a pretext. Id., at 23.

To sustain a objection to a peremptory challenge based on racial reasons, State must support its challenge with neutral reasons based on answers provided at voir dire or otherwise disclosed on the record itself. The reasonableness of the State's explanation is not enough, the State must demonstrate through the record the reasons given and the absence of pretext. Id. The Slappy Court found that this requirement helps ensure procedural regularity and racial neutrality. Id., at 23-24. Logically, to allow reasons for a strike, such as the one at hand, without a record to support it only opens the door to abuse.

In Francis' trial, there were two Afro-American perspective jurors. The one addressed in this argument was juror Bennett. However, juror Nixon, the other Afro-American juror, was also struck by the State. Francis objected and the State gave a race-neutral reason for the strike. Francis then attempted to show how the juror was rehabilitated and the Court denied Francis' objection. (T. 816-817). Though the race-neutral reason given by the State was questionable, the Court established a facially sufficient record to support its decision.

In the present case, the record does not exist. The State questioned perspective juror Bennett in a perfunctory manner. The State first asked Bennett about her employment and her future spouse's employment. The State then asked Bennett her thoughts on Francis being accused of killing two people, for which she answered "Nothing"; this was the only time that Bennett was asked bout the killing of two people, the time in which the State indicated that she laughed. The State the asked Bennett if she had any problem presuming Francis innocent and if there was anything about the nature of the case that prevented her from listening to all the evidence prior to making a decision, to which she answered "no" to both questions. (T. 713). Nothing else was asked of Bennett by the State, Francis, or the trail court. The State failed to examine Bennett on the grounds alleged for the bias, despite the fact the record shows that she indicated that she had no thought on the matter, completely contradictory to the State's allegation. The State never questioned Bennett about the alleged laughter even though the opportunity was there. Under the factors cited in Slappy, the State's strike of Bennett falls under factor number (2) and it's reason for the strike is at best suspect.

More importantly, the State must support its explanation with neutral reasons based on answers provided at voir dire or otherwise disclosed on the record itself. There is nothing in the record to support the State's allegations that Bennett laughed at the mention

of the killing of two people. The State though arguably concerned, never inquired of Bennett as to her alleged reaction. The trial court as a minimum should have questioned Bennett about the alleged laughter and made a record to prevent any misconception. For all anyone knows, Bennett may have had a nervous laugh, may have laughed at something completely different than what the State assumed she was laughing at, or she may not have laughed at all and the State was confused. The record as it stands in completely silent and therefore does not support the State's reason for the strike of Bennett. The denial of Francis's objection to the strike of Bennett was clearly erroneous. Such error is reversible error that entitles Francis to a new trial.

POINT II
TRIAL COURT ERRED BY DENYING FRANCIS' MOTION TO SUPPRESS STATEMENTS AND EVIDENCE

The trial court erred in finding that there was probable cause for Francis' arrest on August 3rd, 1997 and thus denying Francis' motion to suppress all physical evidence obtained from him at the time of his arrest and his subsequent statements to the police. The Supreme Court has held that probable cause is determined by whether a police officer has reasonable grounds to believe that a person has committed a felony. Cole v. State, 710 So. 2d 845 (Fla. 1997). If probable cause is lacking for an arrest then the arrest is deemed illegal. It then follows that all evidence, physical or otherwise, obtained subsequent to an illegal arrest is

inadmissible regardless of any Miranda waiver. Brown v. Illinois, 422 U.S. 590 (1975).

On August 3rd, 1997 at about 4:25 p.m. Francis was arrested. Prior to his arrest, at 2:00 p.m. on that same date, Charles Hicks came to the police department and brought a gold pocket watch and some old coins that he said Francis had given him. (T. 215). It was not until after Francis had invoked his right to counsel, at about 6:00 p.m., that the victim's daughter came to the police station and indicated that the pocket watch looked similar to one that her mother had, however, she had not seen it in years. Hicks also told the police that on the day of the murder he had seen Francis in a two-toned car similar to the victim's car; however, the victim's car was only one tone. (T. 229). At the time of Francis' arrest, the police also knew that Francis' nephew had seem him leave the house around the time of the murder walking towards the victim's house across the yard with a green duffle bag that seemed to have a pole coming out of it. (T. 234). The police knew that on the day of the murder Francis had taken a cab from the area where the victim's car was abandoned to his home. These were the only facts known to the police at the time of Francis' arrest.

On a motion to suppress the evidence adduced is to be taken in a light most favorable to the state's position. Phuagnong v. State, 714 So, 2d 527 (1st DCA 1998). On appeal, the standard of review for the trial judge's factual findings is whether competent

substantial evidence supports the judge's ruling. Caso v. State, 524 So.2d 422 (Fla.1988), cert. denied, 488 U.S. 870, 109 S.Ct. 178, 102 L.Ed.2d 147 (1988). The standard of review for the trial judge's application of the law to the factual findings is de novo. Ornelas v. U.S., 517 U.S. 690, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996). In the light most favorable to the State, all the facts known to the police, prior to Francis' arrest, only raised speculations as to his involvement, nothing more. Though these facts may have made Francis' seem very suspicious, that in itself was not enough to warrant his arrest. On August 3rd, 1997 the police lacked probable cause to arrest Francis. The police only had a bare suspicion of Francis' involvement that did not rise to reasonable grounds to believe that he had committed a felony.

After Francis' arrest he was read his Miranda rights and he gave a brief 10 to 15 minutes statement before invoking his right to counsel; three and one half ours later, Francis gave another statement. The Supreme Court has held that even if Miranda rights are invoked, any statement given after an illegal arrest are nevertheless inadmissible. Brown, 422 U.S. at 602-603. Since Francis' arrest lacked probable cause and thus was illegal, all statements given by him are therefore inadmissible. All evidence, physical or otherwise, stemming from the illegal arrest is in admissible. Wong Sun v. United State, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed. 2d 441 (1963).

POINT III
TRIAL COURT ERRED IN FINDING THAT FRANCIS RE-INITIATED CONTACT AFTER INVOKING HIS RIGHT TO COUNSEL AND THAT THE STATEMENT WAS VOLUNTARY

At the motion to suppress the facts, showed that after Francis was arrested he was placed in an 8' x 8' interrogation room, Miranda rights were read to him and he waived them. Francis gave a brief 10-15 minutes statement and then invoked his right to counsel. Francis was then left in the interrogation room by himself for about three and one half hours. For those three and one half hours, no one came in, no one said anything to him, the police testified that they proceeded to finish their paperwork while he remained in the room. Francis then knocked on the door to find out what was going on, the police came into the room proceeded to question Francis as they secretly taped the conversation. At the beginning of the taped conversation, Detective Key asked Francis why he knocked on the door. Francis responded "well, I wanted to ask and find out"; Key cuts him off and finishes his sentence, "what's going on?", to which Francis replied, "yes." The police interpret this as a re-initiation of contact and proceed to interrogate Francis about the murder and his involvement. The trial court, in error, found that Francis was the one that reinitiated contact with the police and denied Francis' motion to suppress all statements given after his invocation to right to counsel.

The Supreme Court has held that once an accused invokes their right to counsel, they are not subject to further interrogation by the authorities until counsel has been made available to them or unless the accused initiates further communication, exchanges or conversation with the police. Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880, L.Ed. 2d. 378 (1981). At the point the accused invokes his right to counsel all interrogation is to cease. If the accused initiates contact after his invocation, the contact initiated by the accused must be more than perfunctory or mundane interaction. The authorities cannot use a simple "hello" or other routine contact as an excuse to interrogate the accused once the right is asserted. Traylor v. State, 596 So. 2d 957, 985 n.62 (Fla. 1992)(Kogan J., concurring). Statements made when police initiate contact after an accused has invoked their right to counsel are invalid. Michigan v. United States, 475 U.S. 625, 106 S.Ct. 1404, 89 L.Ed. 2d. 631 (1986). If one looks at the testimony of Detective Key, in the beginning of his conversation with Francis he finishes his thought as to why he knocked on the door; i.e., "I wanted to ask and find out", "what's going on". Inquiries such as these are not to be construed as re-initiation of contact, rather Francis' contact with the police was completely perfunctory in nature.

In the case at hand, after Francis invoked his right to counsel he was left in a solitary room without windows for over

three and one half hours. Francis' contends that he was left there as a ploy whereby eventually Francis would have to make contact to find out his status and the status of the case; thus arguably reinitiating contact. The Supreme Court has held that where words or actions are designed to elicit an incriminating response it is the functional equivalent of interrogation. Rhode Island v. Innis, 446 U.S. 291, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980). Psychological ploys which are meant to create incriminating responses have been found to be the functional equivalent of interrogation, as well. Arizona v. Mauro, 481 U.S. 520, 107 S.Ct. 1931, 95 L.Ed.2d 458 (1987). Once Francis invoked his right to counsel, the police had to cease all forms of interrogation. However, the police action in Francis case were specifically designed to elicit an incriminating statement from him, and thus a continued form of interrogation that is impermissible. Francis was left in the room by himself in limbo, nothing to do but wonder what was going on, and anxiously awaiting what would happen next. The police knew that by sequestering Francis in such a way, and for such an extended period of time, it was just a matter of time before he would request to talk to them about his status. It was the police who initiated contact with Francis and therefore all statements made by him after his invocation of right to counsel were invalid and inadmissable.

Furthermore, for the reasons cited in this argument, it must also be found that Francis' statement was involuntary. A statement

that is obtained by means of physical or psychological coercion will be deemed involuntary and inadmissible. Whether a statement is voluntary will depend on the totality of the circumstances surrounding the statement. Sliney v. State, 699 So. 2d 662, 667 (Fla. 1997). The totality of the circumstance show that Francis was kept locked in a room creating a form of "cabin fever" for the sole purpose of eliciting an incriminating statement from him. To render a statement voluntary and admissible as evidence, the mind of the accused should at the time be free to act uninfluenced by fear or hope. It is sufficient that the circumstances and declarations of those present be calculated to delude to prisoner of his true position, and exert an improper and undue influence over his mind. Traylor, 596 So. 2d at 964, 965. The totality of the circumstances show that the police action was purposefully designed to delude Francis and to create a state of anxiety. The police wanted, and did create, a sense of fear in Francis whereby all statement that he made after his three and on half hour sequestration were involuntary.

POINT IV
TRIAL COURT ERRED IN ADMITTING HEARSAY EVIDENCE IN THE FORM OF SPONTANEOUS STATEMENT OVER APPELLANT'S OBJECTION

Hearsay is defined as a statement made by someone, other than the declarant while testifying at trial or hearing, which is offered in evidence to prove the truth of the matter asserted.

§90.801 Fla. Stat. (1979). Hearsay is inadmissible except as provided by statute. § 90.802 Fla. Stat. (1979). Florida has codified specific exceptions to that general rule in § 90.803 (1)-(23) (1979). Over Francis' objection, the trial court allowed hearsay testimony of Francis' mother as a spontaneous statement exception. Such error greatly prejudiced Francis where it denied him his constitutional right to cross examine the witness, his Mother, about her opportunity to see and know the things about which her hearsay statement referred to, the accuracy of her memory , or any discrepancy in her statement.

The hearsay testimony at issue were statements made by Francis' mother in response to the Police questioning Francis the day of the incident. (T 1630 - 1666). Francis' mother never testified at trial. The first statement was made about three and one half hours after the police arrived at the crime scene and Francis arrived home. The police questioned Francis as to whether the clothes he was wearing were the same as the ones he was wearing earlier in the day to which Francis replied they were. At that time, Francis' mother made the statement. "No, you weren't. You weren't wearing those clothes earlier. When I came home I saw you in different clothes." About a half hour later Francis was leaving his home with some garbage bags. Francis reached in pulled some checkered shorts and told the Police that was what he was wearing earlier in the day. Again, his Mother made the statement

"no, you weren't, those were on the bathroom floor when I came home at lunchtime." Both of Francis' mother's statements were introduced at trial as spontaneous statements over Francis's objection.

A spontaneous statement is a statement describing or explaining an event or condition, or immediately thereafter, except when such statement is made under circumstances that indicate its lack of trustworthiness. § 90.803(1) (1979). The spontaneous statement exception is at times confused with the excited utterance exception; a statement or excited utterance relating to a starling event or condition made while the declarant was under the stress of excitement caused by the event or condition. § 90.803(2) (1989). The primary distinction between both exceptions in how much time has elapsed between the event or condition and the statement describing the event or condition. Ehrhardt, Florida Evidence § 803.2 at 617 (1995 Edition). A spontaneous statement is made while the declarant is perceiving the event or condition or immediately thereafter. Lyles v. State, 412 So. 2d 458 at 460 (Fla. 2nd DCA 1982).

The present evidence code under §90.803(1-3) arise from the general philosophies of the res gestae exception to the hearsay rule. Res gestae has been defined as the circumstances, fact and declarations which grow out of the main fact and serve to illustrate its character, and which are so spontaneous and

contemporaneous with the main fact as to exclude the idea of liberation or fabrication. State v. Snowden, 345 So. 2d 856 at 860 (Fla. 1st DCA), cert. denied, 353 So. 2d 679 (Fla. 1977). Under the present codification of spontaneous statement, the main fact refereed in res gestae exception has been found to be some occurrence startling enough to produce nervous excitement, and the statement must relate to it. Lyles, 412 So. 2d at 460.

The statement sought to be introduced must relate to a startling occurrence. In the case at hand, the hearsay statements sought to be introduced were the Mother's statement about what Francis was wearing earlier in the day, at lunch time, prior to the murder taking place. Therefore, the event the hearsay statement was referring to was Francis' attire at lunch time. In no way can it be said that what Francis was wearing earlier in the day was a starling event. The event in question was prior to any murder taking place and otherwise insignificant. Logically, it follows that if there is no starling event or occurrence then there does not exist a spontaneous statement exception to the hearsay rule.

Even if one were to argue that the starling occurrence was the murder of Francis' neighbors, by the time the police questioned Francis, whereby the Mother makes the statements introduced, at least three and one half hours had elapsed. These statement were no longer spontaneous statements made as the occurrence was taking place or immediately thereafter.

By allowing the statement to be admitted over Francis' objection the trial court denied Francis' this right to cross examine the witness, his mother, as to her ability and opportunity to see the thing she testified to. Francis' was not able to question her as to the fact that the murder took place around 2:00 p.m.; however, she left the home at 12:00 p.m. and Francis' remained giving him the opportunity to change clothes prior to the murder without her knowledge. The Court allowed the State to bootstrap and admit testimony that would otherwise be inadmissible. To allow the State to introduce statement that contradict a speaker's testimony as spontaneous statements would deny the ability to cross examine a person's accuser, a denial of the fundamental right of confrontation, If this court finds that the statement was not within any hearsay exception, then this court must consider whether is was harmless or harmful error. State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986). The admission of the hearsay statement denied Francis a viable area of defense and his right to confront his accuser. This especially in light of the fact Francis's case was entirely circumstantial and no direct evidence linked him to the murder. The Florida Supreme Court has pronounced that the test of whether the admission of evidence over Appellant's objection is harmless or harmful error will depend on whether after a close examination of the entire record on appeal, including permissible evidence which the jury could have

permissibly relied on, and even closer examination of the impermissible evidence, there is a reasonable possibility that the error affected the verdict.

In the case at hand, one must find that the admission of the hearsay statement affected the verdict. Francis' was denied the ability to argue that he had no blood stains despite a bloody crime scene. Rather, it the mind of the jury it portrayed him as a liar and destroyed his credibility, despite the fact that he did not testify. Francis' was denied the ability to show the jury that he did not lie and that his Mother did not have all the facts. The State had the last and only word on the subject.

The Supreme Court of Florida has stated, that when applying the test as to whether the admission of the evidence was harmful or harmless, it is not enough to show that the evidence against the defendant was overwhelming. Castro v. State, 547 So. 2d 111, 115 (Fla. 1989). In Lee v. State, 531 So. 2d 133 (Fla. 1988), quoting, People v. Ross, 67 Cal. 2d 64, 85 (Cal. 1967) (Traynor, C.J., dissenting), rev'd, 391 U.S. 470 (1968), the Court wrote,

> "Overwhelming evidence of guilt does not negate the fact than an error that constituted a substantial part of the prosecution's case may have played a substantial part in the jury's deliberation and thus contributed to the actual verdict reached, for the jury may have reached its verdict because of error without considering other reasons untainted by error that would have supported the same result. "

The appellate court is not to use this analysis as a way of becoming a fact finder, excluding impermissible evidence, weighing

permissible evidence, and determining whether the permissible evidence is sufficient, or even overwhelming, to support a guilty verdict. Lee, at 137. If this Court cannot say without a reasonable doubt that the error did not effect the verdict then the error is harmful. DiGuilio v. State, 491 So. 2d 1129, 1135, 1139 (Fla. 1986).

POINT V
THE TRIAL COURT ERRED IN FAILING TO PROVIDE A READ BACK OF THE TESTIMONY OF CHARLES HICKS

On July 28, 1998, the court instructed the jury with respect to deliberations in the quilt phase. (R 1935). At 9:55 a.m. the court recessed in order to deliberate. (R 1970). Sometime thereafter the court received a note from the jury requesting a list of witnesses, C. J. Hicks' testimony and the tape of the Defendant (R 1975). The jury was called back in and was provided with a list of witnesses and arrangements were made to play back Mr. Francis' entire statement, and the jury was asked what they need from Mr. Hick's testimony. They indicated that they required the direct testimony of Mr. Hick's (R1982) After deliberation the attorneys' and the court decided that it would be necessary for Mr. Hick's entire testimony to be read to the Jury and that it would take three hours. (R1982-1983) As fashioned to discourage the readback, the court explained to the jury:

> "In view of you 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

> over three hours so if you decide that you still want it let us know, we will do it after lunch, if you don't want it that's okay, it is up to you entirely. With that, please continue deliberating. We will get lunch in for you and keep moving." (R 2009).

The court's phrases "unfair read back", "so if decide you still want it, let us know, we will do it after lunch, if you don't want it that's okay" were designed to discourage the jury from the readback. The fact that the jury was provided with Francis' statement, but not Hick's statement was unfair. The Jury was sent to deliberate without having their request met. Hick's testimony was crucial and the failure to provide the readback denied Francis with his due process right to a fair trial.

Francis was denied due process and a fair trial under the fifth, sixth, eighth and fourteenth amendment to the United States Constitution and Article I, Sections 9, 12, and 16 of the Florida Constitution.

POINT VI
THE TRIAL COURT ERRED IN DENYING THE MOTION FOR JUDGMENT OF ACQUITTAL FOR LACK OF COMPETENT EVIDENCE

The trial court erred in denying Francis' Motion for Judgment of Acquittal as to all crimes. This denied Mr. Francis due process of law pursuant to the fifth, sixth, eighth and fourteenth amendment to the United States Constitution and Article I, Sections 2, 9, 16, and 17 of the Florida Constitution. Francis made motions for judgment of acquittal at the close of the State's case and at

the close of all of the evidence, specifically pointing out that there was no evidence of premeditation and no evidence in this case that the killings occurred at the hand of Francis.

With respect to the robbery and burglary counts there is no physical evidence that Francis entered or remained on the property Claire Brunt or Bernice Flegel, and there is no eyewitness that Francis was on the property. As such, there is a complete failure of evidence to show that there was an assault or battery committed at that place by Francis. With respect to the robbery and burglary counts there is no evidence that the property was recently stolen. There is no testimony absolutely identifying the jewelry or the coins.

None of the property was recovered from Mr. Francis. All of the property was recovered from Mr. Hicks. All of the property that was recovered was never positively identified and as such the judgment of acquittal should have been granted. It was error for the court to deny the motions for acquittal. (T 1753).

The defense presented no evidence, and renewed their motions for acquittal arguing a reasonable hypothesis of innocence, to wit, that Charlie Hicks was the killer. The .22 rifle and bullet casing had been found in Mr. Hicks' care and custody; all the recently stolen property was turned over to the police by Mr. Hicks. It was error for the court to deny these motions for the following reasons.

In cases where there is a complete lack of substantial competent evidence to support the jury verdict appellate courts must reversed. Welty v. State, 442 So.2d 1159 (Fla. 1981); Clark v. State, 379 So.2d 97 (Fla. 1979), cert. den'd 450 U.S. 936, 101 S.Ct. 1402, 67 L.Ed.2d 371 (1981).

There is no eyewitness testimony linking Francis to the murder scene. The only testimony regarding Francis' presence near the crime scene came from the Francis' nine year old nephew, Rysean Goods. Rysean did not see his uncle on the property of the decedents. He did not hear a disturbance, and he did not observe his uncle with any stolen property. Rysean merely stated that he saw his uncle with a tall green bag with a pipe sticking out of the back. (T 934). Rysean was unable to identify the nature of the pipe nor did he see what was in the bag. When he saw his uncle leave it was only moments after seeing one of the victims pick up her newspaper. Though he testified to a mysterious dark red spot being on Francis' t-shirt (T 952), he never mentioned this to anyone until shortly before trial. (T 970). Rysean's testimony that his uncle called and asked him what was in the bag is of no evidentiary value (T 952).

Rysean did testify that Francis returned home with different clothes than those he had on when he left. However, this does not constitute competent evidence on which to base a conviction.

No physical evidence collected at the crime scene connects

Francis to that crime scene. No fingerprints, hair samples, or fibers were recovered. The murder weapons were found to be two black handled knives. (T 1319 - 1320). Blood from Ms. Flegel was found on one knife and blood from Ms. Blunt was found on another. No one knife contained blood from both victims. This is circumstantial evidence indicating that more than one person was involved. Multiple footprints were recovered. One of the footprints came from Ms. Flegel's shoe (T 1618). The other bloody foot prints were made by a Nike Air Schreech, most likely made by a size eight foot. (T 1623-1624). Charles Hicks' foot size is a size eight and he has owned Nike tennis shoes. (T 1270-1271), and Francis' foot size is size eleven. (T 1353).

A .22 caliber casing was found on the floor near the front door of the murder scene. (T 1319). This shell was fired from a Winchester .22 pump rifle. (T 1596-1597). The rifle was recovered near Charles Hicks' home, where Charles Hicks' told the officers that it would be recovered. The rifle belonged to Charles Hicks, though he never revealed that information to the investigating officer. (T 1305). Hicks stated that he had not seen Francis for six months before the July 24, 1997 murders. (T 1211). However, Mr. Hicks was sure that he moved the rifle with him to his new address within a month of the shooting. (T 1213). Hicks does not place the rifle in the hands of Francis, and there were no fingerprints recovered from the rifle. Therefore, the shell casing

recovered at the murder scene serves to connect Charles Hicks to that murder scene much more convincingly that it connects Francis.

Susan Woods or Kerri Cutting couldn't positively identify any property as property that was taken from the scene. Ms. Cutting was able to generically describe two old pocket watches, an old necklace and coins as being items that were taken from a lock box. She was able to describe one of the watches as having elaborate scrolling on it and of the type that revealed the gear action. (T 1421). The items which Charlie Hicks turned over to the police most certainly match the descriptions given by Ms. Cutting. This is somewhat remarkable since she had not seen those items in quite a long time. It should be noted that all the items were in the possession of Mr. Hicks, not Mr. Francis. Hicks told the police that he received the items from Francis (T 1156), Francis told the police that he had been shown the items by Hicks, and it was only after Hicks showed him the items that Francis' fingerprints may have been found on them. (T 1709 - 1714).

All the other civilian witnesses at trial were under the control and domination of Charles Hicks. Mr. Brown contacted the police department at the request of C.J. Hicks. (T 986). Brown is a convicted felon who testified that Charles Hicks had introduced Francis to him in order that Francis could purchase a rifle. Mr. Brown testified that when he went to deliver the rifle, he saw Mr. Francis being arrested on August 3, 1997. (T 993 - 994). Brown

did not give a statement to the police until eight months after the murders. (T 999). Mr. Denson is a nephew of Charles Hicks. (T 1008). Mr. Denson testified that although he can't remember the exact time he recalled Francis allegedly trying to purchase a firearm. It was Charles Hicks that got Mr. Denson to testify. (T 1012). George Dean, an associate of Mr. Denson testified that Mr. Francis attempted to sell a long chain and locket to him on the night of the murders. However, Dean was not able to identify the night in question, and thought it was certain it was the night that Francis was arrested. He indicated that the transaction took place at 7:30 p.m. (T 1037). Mr. Francis was arrested at approximately 4:15 p.m. (T 1671). Sally Mae Halloway is the common law wife of Charles Hicks. (T 1049). Sally's testimony conflicts with Charlie's concerning when and how Francis appeared at the Hicks' home on July 24, 1997. She can only place the coins, watches and necklace in Charlie's possession and does not know where he obtained them. (T 1062). She only offers confirmation that Francis came to her house and asked for those items on several occasions. (T 1067). She confirms that it was Charles Hicks who controlled the stolen items. She tried to establish through her testimony that Charlie Hicks never left the house the day of the murders, but she cannot account for large portions of the day while she was watching TV. (T 1109). Charles Hicks was the State's chief witness. Mr. Hicks is a drug dealer. (T 1126). He owned the

wheelbarrow in which the victims purse, car keys and papers were burnt. (T 1148). It was only Hicks' common law wife and Hicks' heroin customer (Jim Lagrotteria) that confirmed that Francis had anything to do with the wheelbarrow and the items which were recovered from the burn pile. Lagrotteria was dependent on Mr. Hicks for his heroin and admitted that Mr. Hicks was a friend to whom he was indebted. (T 1541). Mr. Lagrotteria was a four time convicted felon who could not supply any accurate time frame as to when he observed this fire. Mr. Lagrotteria did not give a statement to the police until February of 1998. Mr. Lagrotteria was taken to the police by Mr. Hicks.

Mr. Hicks and his circle of friends cannot offer the type of substantial and competent evidence upon which a murder conviction may be based.

The victims' automobile was recovered on the day of the murders a few blocks from Charles Hicks' home. A fourteen year old boy recognized the car from the news cast and notified the police that it was parked behind his apartment at approximately 6:00 p.m. (T 1369). He did not see who was driving the car. It was Charlie Hicks who said that he saw Francis exit the automobile. But when Mr. Hicks was questioned about where he was when he saw Francis exit the car he was inconsistent saying one time that he was in the kitchen, and another he was in his living room. (T 1216).

There is insufficient competent evidence to support Francis'

convictions. There is absolutely no physical evidence connecting him to the murders. The only physical evidence recovered at the crime scene closely connects Charles Hicks to the murder scene. All the property was recovered from Charles Hicks. A network of Charles Hicks' friends and associates offered corroborating testimony which was unbelievable and full of inconsistencies.

Because the court erred in denying the motion for acquittal, Mr. Francis' convictions should be reversed.

POINT VII
FLORIDA STATUTE 921.141 (5)(h), HEINOUS, ATROCIOUS OR CRUEL AGGRAVATING FACTOR IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED IN THIS CASE

Florida Statute 921.141 (5) (h) is unconstitutional because it fails to narrow the class of person eligible for the death penalty; fails to guide the discretion of the sentencers; or undermines the meaningfulness of appellate review. Maynard v. Cartwright, 108 S.Ct. 1853, 1857-58 (1988). This is particularly true in *weighing* states such as Florida. Stringer v. Black, 112 S.Ct. 1130 (1992). Like in the Oklahoma circumstance Florida's heinous, atrocious or cruel circumstance may be cited to almost any set of facts. No objective set of standards limit the sentencer in finding this circumstance. No one sitting down with the variety of standards that has been applied to Florida's circumstance can infer how the circumstance will be applied from one day to the next.

In the instant case, the court erred in finding the circumstance since it should not apply unless it is clear that the Appellant intended to cause unnecessary and prolonged suffering. Kearse v. State, 662 So.2d 677 (Fla. 1995) Bonfair v. State, 626 So.2d 1310 (Fla. 1993). There is no evidence Mr. Francis had any intent to cause prolonged suffering or intentional torture. The Medical Examiner found that each of victims may have been instantaneously killed. At the time of the murders Francis undoubtedly suffered from acute mental illness which negated his ability to form a torturous intent as defined in Proffitt.

POINT VIII
FLORIDA STATUTE 921.141 (5)(d) AND THE (5)(d) STANDARD AND INTERIM INSTRUCTIONS ARE FACIALLY UNCONSTITUTIONAL AND AS APPLIED UNDER THE FACTS OF THIS CASE

The felony murder circumstance automatically expands the class of persons eligible for the death penalty. The Eighth Circuit Court in Collins v. Lochhart, 754 F.2d 258 (8th Cir. 1985) stated: "We see no escape in the conclusion that an aggravating circumstance which merely repeats an element of the underlying crime cannot perform this narrowing function." The felony murder circumstance repeats an element of the offense of felony murder, and creates an unlawful presumption that death is an appropriate sentence. See, Jackson v. State, 502 So.2d 409 (Fla. 1986) and Jackson v. Dugger, 837 F.2d 1469 (11th Cir. 1988); which held that

such a presumption, if employed at the level of the sentencer, vitiates the individualized sentencing determination required by the Eighth Amendment.

Felony murder is the least aggravated form of first degree murder since it does not entail the premeditated design to kill another unlawfully. Hence, the felony murder aggravating circumstance creates a presumption of death for the least aggravated form of first degree murder. It does the opposite of what the Constitution requires of an aggravating circumstance. A killing during an enumerated felony will turn a manslaughter into a first degree murder and will then, through the aggravating circumstance, turn the first degree murder into a capital case. Thus the circumstance does not serve the constitutionally mandated channeling function.

The lack of premeditation may well be a mitigating circumstance. However, in a felony murder aggravating circumstance the unpremeditated murder turns a mitigating circumstance into an aggravating circumstance. See Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L. Ed 2d 973 (1978) where a death sentence was set aside where the state penalty statute did not provide for full consideration of the mitigating factor of lack of intent to cause death. Because the felony murder aggravator prevents consideration of lack of intent to kill as mitigation, the felony murder circumstance violates Hitchcock v. Dugger, 107 S.Ct. 1821 (1987).

In Lowenfield v. Phelps, 108 S.Ct. 546 (1988), the United State Supreme Court rejected a challenge to the portion of the Louisiana death penalty statute which called for the death penalty for a premeditated murder committed during the course of a violent felony, but in doing so distinguished Florida's statutory scheme. Louisiana's statute narrows the class of death eligible by narrowing the statutory definition of capital offenses, while Florida defines first degree murder broadly and uses only aggravating factors to narrow the class of death eligible. Further, Lowenfield did not involve a Lockett/Hitchcock argument as contained herein.

Section 921.141 (5)(d), and the standard instruction that the sentencing jury is required to follow do not meet the constitutional requirements of narrowing the class of persons eligible for the death penalty, and in fact have the opposite effect. See Barnard, Death Penalty, 13 Nova L.Rev. 907 (1989). The Florida felony murder circumstance, and the death sentencing scheme as a whole, are thus unconstitutional.

In the case at bar, the jury's decision to convict the appellant of aggravated battery and robbery were based on circumstantial evidence alone. Indeed, no items were recovered directly from Francis, there were no eye witnesses, and no physical evidence connecting the appellant directly to the crimes.

In addition, it was error to instruct the jury on felony

murder aggravator and pecuniary gain. The recommendation may have easily been based upon a impermissible doubling of the aggravators.

This court should declare the aggravator unconstitutional and reduce the death penalty to life imprisonment or at least remand for resentencing.

POINT IX
THE PRIOR VIOLENT FELONY AGGRAVATING FACTOR OF SECTION OF 921.141(5)(b) FLORIDA STATUTES AND THE STANDARD (5)(b) INSTRUCTION ARE UNCONSTITUTIONAL FACIALLY AND AS APPLIED

The prior violent felony aggravating factor and its corresponding standard instruction is unconstitutionally vague and overbroad, and has been applied in an overbroad fashion, and in an arbitrary and inconsistent manner. As such, the death penalty as applied in Florida violates the fifth, sixth, eighth and fourteenth amendments to the United States Constitution and Article I, Sections 9, 16, 17, 21 and 22 of the Florida Constitution.

Substantive due process and equal protection and principles require a provision of law, including, criminal statutes, be rationally related to its purpose. Reed v. Reed, 404 U.S. 71 (1971); Potts v. State, 526 So.2d 104 (Fla. 4th DCA 1987), aff'd., State v. Potts 526 So.2d 63 (Fla. 1988).

The Florida Supreme Court has interpreted the aggravator as applying to a conviction pending upon appeal. See Ruffin v. State, 397 So.2d 277 (Fla. 1981); Peek v. State, 395 So.2d 492 (Fla. 1981). Such an interpretation violates the due process and equal

protection rights to an appeal and the eighth amendment narrowing requirement and proscription that death sentences "cannot be predicated on mere 'caprice' or on 'factors that are constitutionally impermissible or totally irrelevant to the sentencing process," or on "materially inaccurate" information. Johnson v. Mississippi, 108 S.Ct. 1981, 1986, 1989 (1988) (reversing affirmance of death sentence where sentence based on prior violent felony which was later vacated).

The second problem is the expansion of the circumstances to permit contemporaneous violent felony convictions to be treated as a prior violent felony. In the case at bar, Francis had no other violent felony before the criminal episode which forms the basis of this conviction and appeal. However, because Florida permits any conviction prior to sentencing to be treated as a prior violent felony the trial court found this aggravator. Lucas v. State, 376 So.2d 1149 (Fla. 1979). The fact that the court has limited the contemporaneous conviction circumstances to preclude its use where there is a single victim, (Wasko v. State, 505 So.2d 1314 (Fla. 1987), does not save the circumstance. Use of a contemporaneous violent felonies is not related to the purpose of the circumstance - - to punish more severely those who have committed violent crimes in the past. "[T]he individualized assessment of the appropriateness of the death penalty is a moral inquiry into the culpability of the defendant." California v. Brown, 107 S.Ct. 837

(1987). Use of a contemporaneous conviction ignores the legitimate inquiry into whether a person convicted of a first degree murder has a history of violence, and exposes those who have no history of conviction for a violent felony to a greater likelihood of receiving death. The broad application of this circumstance thus fails to genuinely narrow the class of death eligible and is wholly unrelated to the blameworthiness of the particular defendant, and relies on conduct that is irrelevant to the sentencing process. Zant v. Stephens, 462 U.S. 862 (1983).

The standard instruction is unconstitutionally vague, and similarly misleads the jurors into considering unlawful and constitutionally irrelevant factors in deciding whether death is the appropriate sentence. In the case at bar, because the State offered proof of a contemporaneous murder and two counts of robbery the court was required to instruct that:

a.The crime of murder is a capital felony; and

b.The crime of robbery is a felony involving the use or treat of violence to another person.

As such, the trial court is required to direct the sentencing jurors to find a contemporaneous violent felony is actually prior. As such, this instruction is misleading and unconstitutional. The prior violent felony instruction is also unconstitutional for the same reason as is the circumstance, under Maynard.

Further, as applied to this case, the instructions on felony murder, pecuniary gain, and contemporaneous violent felony

(robbery) requires the jury to base three aggravators on the same act.

This Court should declare the aggravator unconstitutional as applied and reduce the death sentence to life imprisonment or at least remand for resentencing.

POINT X
SECTION 921.141 (5)(f) FLORIDA STATUTES AND THE (5)(f) STANDARD JURY INSTRUCTION IS UNCONSTITUTIONAL AS APPLIED

The pecuniary gain aggravating circumstance unlawfully expands the class of death eligible by repeating other aggravating factors as does its corresponding standard jury instruction. Further, because the instruction fails to inform the jury of the narrowing constructions on the circumstance made by the supreme court, the instruction improperly relieves the State of its burden of proving the elements of the circumstance. As such, the pecuniary gain aggravator and its corresponding jury instruction, as applied in Florida, violates the Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution and Article I, Sections 9, 16, 17, 21, and 22 of the Florida Constitution.

This factor is straightforward, and has generally been strictly construed by the Florida Supreme Court. See Simmons v. State, 419 So.2d 316 (Fla. 1982). The court has held that pecuniary motivation must be proven beyond a reasonable doubt and such proof cannot be supplied by inference from circumstances unless the evidence is inconsistent with any reasonable hypothesis

other than the existence of the aggravating circumstance. The ease with which jurors and the courts can decide whether this factor applies does not cure and in fact heightens its unconstitutional expansion of the class of the death eligible by repeating other circumstances.

In this case, the pecuniary gain circumstance doubles the robbery felony listed in the felony murder circumstance by referring to the same aspect of the defendant's case. Provence v. State, 337 So.2d 783 (Fla. 1976). As pointed out above, the prior violent felony circumstance was found as to the contemporaneous felony involving robbery creating another repetition.

Thus the tripling calls for a sentence of death and violates the eighth amendment requirement that death sentencing procedures must provide a meaningful basis for distinguishing the few cases in which death is appropriate from the many cases in which it is not. Furman v. Georgia, 408 U.S. 238, 313 (1972). "To avoid this constitutional flaw, an aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." Zant v. Stephens, 462 U.S. 862 (1983). The existence of several aggravating factors calling for a sentence of death based on the same conduct of the defendant thus violates the eighth amendment. See Lowenfield v. Phelps, 108 S.Ct. 546 (1988).

The standard jury instruction simply tracks the statute. Because it permits improper consideration of an improper aggravating circumstance, its use violates the cruel or unusual punishment clauses of the state and federal constitutions. Espinosa v. Florida, 112 S.Ct 2926 (1992). The reading of the pecuniary gain circumstance and the others listed above likewise violates the eighth amendment.

This court has made some effort in limiting the application of this circumstance by holding that it applies only where "the murder is an integral step in obtaining some sought-after specific gain." Hardwick v. State, 521 So.2d 1071, 1076 (Fla. 1988). But the standard jury instruction merely tracks the statute and does not inform the jury of this limitation. Hence, arbitrary and illegitimate application of the circumstance by juries is inevitable, in violation of the principles set out in Maynard and Espinosa. Further, by not informing the jury of the narrowing construction, the instruction unconstitutionally relieves the state of its burden of proving the integral element of the circumstance.

The court should declare the aggravator unconstitutional and reduce the death sentence to life imprisonment or, at least, remand for resentencing.

POINT XI
THE TRIAL COURT ERRED IN ALLOWING THE PROSECUTOR TO QUESTION THE DEFENSE WITNESSES REGARDING APPELLANT'S SANITY AND COMPETENCY WHERE INSANITY AND INCOMPETENCY WERE NOT PLEAD/THE COURT ERRED IN HOLDING THAT THE

APPELLANT'S SANITY AND COMPETENCY DIMINISHED THE MITIGATING FACTOR OF MENTAL ILLNESS

During the penalty phase, the state cross examined Dr. Perry and Susan Le Fehr Hession concerning the insanity defense and the defendant's competency. These matters were outside the scope of direct, were prejudicial and irrelevant. Insanity and competency do not have an evidentiary relationship to the mental illness mitigator, and the cross examination on these points improperly diminishes the mental mitigation.

The trial court confused the mental mitigating circumstance with insanity and incompetency in its sentencing order. Under State v. Dixon, 283 So.2d 10 (Fla. 1973) this error may not be held to be harmless. Judges have made the mistake of confusing these two standards and those mistakes have resulted in reversals. Morgan v. State, 639 So.2d 6, 13 (Fla. 1994) and Knowles v. State, 632 So.2d 62 (Fla. 1993). The fact that the court specifically included Francis' ability to distinguish between right and wrong, premeditate an action, and cover up his action within its consideration of the mitigator "substantial mental illness" indicated that the court used these factors to diminish the importance of the mitigator in its sentencing decision:

> "The two mental health experts established clearly that the defendant suffers from mental illness. Their diagnosis of the defendant were classic paranoid disorder, which may have been affecting the defendant at the time of the killings. While it has been shown that the defendant suffers from this chronic mental illness it has not been shown that the defendant was under any

> particular acute distress at the time of the killings. Indeed, both experts testified that the defendant was capable of planning and executing the crimes as well as his attempts at covering up his misdeeds afterwards. They both believed that the defendant could at all times distinguish between right and wrong.
>
> Nonetheless, the court gave this some weight." (T 2347 - 2348)

The Court should order resentencing pursuant to Article I, Sections 9, 16, 17, 21, and 22, the Florida Constitution and the fifth, sixth, eighth and fourteenth amendments to the United States Constitution.

POINT XII
SECTION 921.141 (5)(m) FLORIDA STATUES THE VICTIMS OF THE CAPITAL FELONY WERE PARTICULARLY VULNERABLE DUE TO ADVANCED AGE OR DISABILITY IS UNCONSTITUTIONAL BOTH FACIALLY AND AS APPLIED

This aggravating circumstance is unconstitutional in that it is vague, ambiguous and does not narrow the types of cases that are subject to the death penalty. It violates Mr. Francis' constitutional rights under Article I, Sections 2, 9, 16, and 17 of the Florida Constitution and the fifth, sixth, eighth and fourteenth amendment to the United States Constitution. The defense moved to declare this aggravator unconstitutional. The Court denied the motion and the jury was instructed on the aggravator.

The Eighth Amendment requires great care in defining aggravating circumstances. Maynard v. Cartwright, 108 S.Ct. 1853,

1860 (1988), especially in weighing states such as Florida. Stinger v. Black, 112 S.Ct 1130 (1992). An aggravating circumstance is unconstitutional if it fails to narrow the class of persons eligible for the penalty; fails to guide the discretion of the sentencers; or undermines the meaningfulness of appellate review. Godfrey v. Georgia, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980).

The statute or instruction does not give any assistance to the jury in determining what is or is not advanced age.

It is the appellant's position that this aggravating circumstance was not proved beyond a reasonable doubt. There is no evidence of any disability for either victim. To the contrary the testimony was that both victims were approximately sixty-six years of age and in good health. The victim's daughter testified that both victims were particularly active and interested in maintaining their health in order to enjoy their grandchildren. The medical examiner found both to be in reasonably good health; except for the injuries received in the murder. Evidence introduced at trial showed that the women were active, drove an automobile, tended the "fish pond" in the backyard, went around to garage sales and were active in going to the front yard to retrieve the paper. There is no evidence in the record that either victim, due to advanced age, was more vulnerable than any other person facing an attacker armed with a knife and apparently a rifle.

This court should declare the aggravator unconstitutional and reduce the death sentence to life imprisonment, or at least remand for resentencing.

POINT XIII
THE DEATH PENALTY IS NOT PROPORTIONALLY WARRANTED IN THIS CASE

"Any review of the proportionality of the death penalty in a particular case must begin with the premise that death is different." Fitzpatrick v. State, 527 So.2d 809, 811 (Fla. 1988). Its application is reserved for the most aggravated, the most indefensible of crimes. State v. Dixon, 283 So.2d 10 (Fla. 1973). The sentences of death are not clothed with the presumption of correctness, regardless of the juries recommendations. Proportionality review is not a comparison between the number of aggravating and mitigating circumstances. Rather, it requires the court to consider a totality of circumstances in a case and to compare the case with other capital cases. This is necessary in each case to engage in the thoughtful, deliberate, proportionality review to consider the totality of circumstances in the case and to compare it with other capital cases. This requirement comes from a variety of sources in the Florida law, including the Florida Constitution's expressed prohibition against unusual punishments. Article I, Section 17, Florida Constitution. Death is a unique punishment in its finality and its total rejection of the possibility of rehabilitation, its application is reserved only for

those cases where the most aggravating and least mitigating circumstances exist. Perry v. State, 668 So.2d 954 (Fla. 1996).

Consider the analysis of this court in the case of Besarababd v. State, 665 So.2d 441 (Fla. 1995) The Defendant was convicted of two counts of first degree murder, attempted murder, robbery and possession of a firearm during the commission of a felony. The defendant had been ordered off a bus by the driver for allegedly drinking an alcoholic beverage. Besarabab rode another bus to a transfer site where he waited approximately one half an hour before Granger's bus pulled into the site. Besarbab walked to the front door of the bus and shot Granger in the neck, killing him. Besarabab then shot a passenger in the back, killing him. He then approached a vehicle waiting at a red light and order the driver out of the vehicle. Besarabab then shot the driver of the vehicle in the back three times. That driver survived. Besarabab then left the scene in the stolen car and was captured three days later following a struggle in which Besarabab tried to pull his gun on two officers. This court struck the aggravating circumstance that the murders were committed in a cold, calculated and premeditated matter, but retained as an aggravating circumstance the commission of another capital offense or felony involving the use or threat of violence (two first degree murder convictions, attempted murder conviction and a robbery conviction all arising from the same criminal episode). The court, in evaluating the mitigating

circumstances noted that they had ruled in Campbell v. State, 571 So.2d 415, 419 (Fla. 1990), that the court must find as a mitigating circumstance each proposed factor that is mitigating in nature and has been reasonably established by the greater weight of the evidence. The court also noted under Songer v. State, that the court addressed the issues of a single aggravating circumstance "long ago we stressed that the death penalty was to be reserved for the least mitigated and most aggravated of murders. To secure that goal and to protect against arbitrary imposition of the death penalty, we view each case in light of others to make sure that this ultimate punishment is appropriate. . . We have in the past affirmed death sentences supported by only one aggravating factor, but those cases involved either nothing or very little in mitigation". The court in Basarbab went on to find two statutory mitigating circumstances; that the defendant had no significant history of prior criminal activity and that the crimes were committed while the defendant was under the influence of great mental or emotional disturbance. Several non-statutory mitigating circumstances were also found including that defendant had a history of alcohol and drug abuse and physical and emotional problems. The court went on to find that the death sentence was disproportionate and therefore vacated the death sentences and remanded for imposition of life sentence without the possibility of parol, in spite of the two first degree murder conviction,

attempted murder conviction and a robbery conviction.

In Jergenson v. State, 714 So.2d 423 (Fla. 1998), the defendant drove Tammy Joe Ruzga to an isolated area where he shot her three times in the head. Jergenson was a drug dealer. Ruzga had been stealing drugs from him and threatening to turn Jergenson into the police if he cut off her drug supply. A state witness testified that Jergenson threatened to get rid of anyone who interfered in his drug business. The sole aggravating factor found in Jergenson's case was Jergenson's prior 1967 conviction for second degree murder in Colorado. The mitigating factors were; 1) that the murder was committed while Jergerson was under the influence of extreme mental or emotional disturbance and 2) Jergerson's capacity to perform his conduct to the requirements of the law was substantially impaired. Non-statutory mitigating factors were: 1) that the murder was committed while Jergerson was under the influence of drugs; 2) that the murder was a product of a disagreement stemming from a romantic relationship and 3) there was disparity of treatment between treatment and accomplice. The court held that in spite of the prior second degree murder conviction in 1967 the death penalty was disproportionate and therefore vacated the death sentence.

In Knowles v. State, 632 So.2d 62 (Fla. 1993), the defendant, after drinking beer and huffing Toluene, obtained a .22 calabur semi-automatic rifle and went next door where he shot a ten year

old girl three times, killing her. He then went outside where he went over to his father, who had just gotten into his truck. The two exchanged words and Knowles shot is father twice in the head, killing him. He then drove off in his father's truck. Witnesses testified during the trial that Knowles had told the witness six weeks prior to the incident that "he don't think I'm going to do it, but I am going to blow his shit away". Another witness testified that Knowles had said several months earlier that "the day might come that he just may loose it" and start shooting people in the trailer park. During the trial the state presented expert testimony that Knowles was both sane and able to premeditate at the time of the murders. The court noted, however, that there was extensive uncontroverted evidence of Knowles neurological deficiencies resulting from extended abuse of alcohol and solvents. There is also uncontroverted evidence that Knowles was intoxicated at the time of the murders. The court noted that the rejection of Knowles insanity and voluntary intoxication defenses does not preclude consideration of statutory and non-statutory mental mitigating circumstances. Campbell, Supra, and Mines v. State, 390 So.2d 332 (Fla. 1980), cert. den'd, 451 U.S. 916, 101 S.Ct. 1994, 68 L.Ed.2d 308 (1981). The court reversed, finding that in light of the bizarre circumstances surrounding the two murders and the substantial unrebutted mitigation established in this case that death is not proportionally warranted.

Knowles and Basarbab clearly establish that even in a double homicide, the imposition of the death sentence can be disproportionate. This is especially so where there is substantial unrebutted mitigation in a case. In the instant case there is substantial unrebutted evidence establishing that Francis suffers a severe mental illness and that Francis has no history of prior violent acts. It is unrebutted that the homicide convictions are totally out of character for the defendants. The circumstances surrounding the instant murders were just as bizarre of those surrounding the murder in the Knowles case. The imposition of the death penalty in the instant case would be a disproportionate sentence.

In Fitzpatrick v. State, 527 So.2d 809 (Fla. 1988) the defendant took a bus to a real estate office with the intent to carry out a plan. His plan called for him to take a hostage from the real estate office, march the hostage up the street to a bank, and then rob the bank using the hostage as a shield. The plan called for Fitzpatrick to escape into a crowd, get lost in the post robbery confusion, and then take a bus home. When Fitzpatrick entered into the office with the gun taped into his hand, held a secretary hostage in the office and announced his plan to use her as a shield to protect himself. At that point a delivery boy entered the office and Fitzpatrick held him hostage as well. Hearing the commotion from an adjoining office David Parks called

the sheriff's department. Parks went into the office and was also held hostage.

Two deputies arrived and a gun fight ensued in which one deputy was killed, the other one wounded as well as Mr. Parks.

Fitzpatrick was charged and convicted of first degree murder, attempted first degree murder and kidnaping. The trial court found the following aggravating factors: 1) previous violent felony; 2) great risk of death to many person; 3) committed while in the course of commission of an enumerated felony, kidnaping; 4) purpose of avoiding lawful arrest; 5) pecuniary gain.

The mitigating factors were: 1) under the influence of extreme mental or emotional disturbance; 2) the capacity of Fitzpatrick to appreciate the criminality of his conduct; and 3) the age of Fitzpatrick at the time of his crime. Following a jury recommendation against life imprisonment, the trial judge sentenced Fitzpatrick to death. Evidence presented at phase-two clearly showed Fitzpatrick to have a substantially impaired capacity, extreme emotional disturbance, and low emotional age. Witnesses present at the scene of the shooting testified that Fitzpatrick appeared "psychotic", "high", "spacey", "panicky", and "wild". Fitzpatrick family members and those who had known him throughout most of his life testified that he frequently talked to himself as if he was hearing other voices, that during conversations he would "phase out or just go off in left field". His landlord referred to

his as goofy.

These descriptions are consistent with the evidence presented by several experts testifying at the resentencing hearing. A unanimous opinion of these mental and physical health professionals was that Fitzpatrick suffered from extreme emotional and mental disturbance and that his capacity to conform his conduct to the requirements of law was substantially impaired. Each expert testified that Fitzpatrick's emotional age was between nine and twelve years old. One expert even declared that Fitzpatrick was in lay terms "crazy as a loon". These opinions were based on extensive examination. This court reversed the trial court's death penalty finding that the evidence of mental illness showed the mitigating circumstances clearly outweighed the aggravating circumstances and renders the death penalty inappropriate.

In its' sentencing order the court found statutory mitigator that Francis was under the influence of mental or emotion disturbance. In doing so, the court stated:

> "The two mental health experts established clearly that the defendant suffers from mental illness. The diagnosis of the defendant were classic paranoid disorders which may have been a effecting the defendant at the time of the killings. While it has been shown that the defendant suffers from this chronic mental illness, it has not been shown that the defendant was under any acute distress at the time of the killings . . .
>
> Also found is a non-statutory mitigating factor is that Carlton Francis was mentally ill and emotionally disturbed. The mental

> health experts, the interviewing probation officer, the prosecutor and family members all agree that "something is wrong" with Carlton Francis. The diagnosis of schizotypal personality disorder and obsessive compulsive disorders have been proved."

The State offered absolutely no rebuttal evidence to the mental illness evidence. Like the landlord in Fitzpatrick, C.J. Hicks referred referred to Francis as crazy. As this court has stated time and time again, death is a unique punishment Urvin v. State, 714 So.2d 411 (Fla. 1998). In considering cases with unrebutted substantial evidence of mental illness, this court has found that the murders did not warrant the imposition of the death penalty. Hawk v. State, 718 So.2d 159 (Fla. 1998) DiAngelo v. State, 616 So.2d 440 (Fla. 1993) Fitzpatrick v. State, 527 So.2d 809 (Fla. 1988)

This court recently reversed three cases in which the death penalty was applied under comparable circumstances. In doing so, the court recognized that the death penalty has been reversed in cases where multiple aggravators were posed against comparable mental health mitigation. In Cooper v. State, 1999 WL 459249 (Fla) evidence of a brutal childhood, brain damage, mental retardation and mental illness of paranoid schizophrenia mandated the reversal despite aggravating circumstance of a prior murder, commission during a robbery, pecuniary gain and capital CCPR. Not only must the sentencing court find that a murder is among most aggravated, it must find that it is also one of the least mitigated

murders. Just as the court refused to do that in Cooper, it should refuse to do so in this case. In the Larkin v. State, 24 Fla. L. Weekly S379 two aggravators were found, to wit: Larkins had previously been convicted of manslaughter and assault with intent to kill and the murder was committed for pecuniary gain. The mitigators were that the murders were committed while the defendant was under the influence of extreme emotional disturbance and the defendant's ability to conform his conduct to the requirements of the law was substantially impaired. In reversing the death sentence, the the court pronounced a standard requiring not only that the case constitute one of the most aggravated but one of the least mitigated of first degree murders. In Mr. Francis's case the State presented no evidence rebutting the severe and long standing mental illness from which Mr. Francis suffers.

In Armedia v. State, (Sup. Ct. 1999, Lexis 1177) (decided July 8, 1999) the court applied the test discussed above. Despite finding that the defendant satisfied the first prong his having committed a prior first degree murder, the court reversed finding that evidence of a brutal childhood and the vast mental health mitigation limited the court from concluding that crime was one of the least mitigated murders. Likewise, Mr. Francis' case is not one of the most aggravated and least mitigated murders in which the ultimate penalty should be reversed. Consequently the case should be remanded for resentencing.

POINT XIV
ELECTROCUTION VIOLATES THE FLORIDA AND UNITES STATES CONSTITUTION

This punishment violates the United States and Florida Constitution. Electrocution is unconstitutionally in light of the evolving standards of decency and the availability of the cruel equally effective methods of execution. Indeed, most states have abandoned electrocution. It violates the eighth and fourteenth Amendments to the United States Constitution and the Florida Constitution. Electrocution amounts to excruciating torture. Malfunctions in the electric chair cause unspeakable torture. Buenoano v. State, 565 So.2d 309 (Fla. 1990).

As such, appellant prays that the sentence of death be set aside and that he be properly sentenced to life imprisonment.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH ADMINISTRATIVE RULE
CERTIFICATE OF SERVICE

In accordance with the Florida Supreme Court's Administrative Order issued on July 13, 1998 and modeled after rule 28.2(d) Rules of the United States Court of Appeals for the Eleventh Judicial Circuit, counsel for the Appellant hereby certifies that the

instant brief has been prepared with the 12 point courier new type font a font that is not spaced proportionately.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to: Office of Attorney General, Assistant Attorney General, 1665 Palm Beach Lakes Boulevard, Suite 300, West Palm Beach, FL 33401-2299, this _____ day of August, 1999.

By:_____
Peter Grable, Esquire
Attorney for Appellant/Francis