IN THE SUPREME COURT OF FLORIDA

CARLTON FRANCIS	)	
	)	
Appellant,	)	
	)	CASE NO.: 94-385
vs.	)	
	)	
STATE OF FLORIDA	)	
	)	
Appellee.	)	
	)	
	)	

REPLY 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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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 CERTIFYING SIZE AND STYLE OF TYPE

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

STATEMENT OF THE CASE AND FACTS

Mr. Francis shall rely on his Statement of the Case and Statement of the Facts contained in his Initial Brief.

SUMMARY OF ARGUMENT

Appellant raised 14 issues on appeal. In this Reply Brief, he addresses three issues:

(1) The trial court erred in allowing the State to peremptory challenge a black juror because the challenge was racially motivated. The strike of the last black juror on the panel based upon the Prosecutor's allegation that she laughed at the mention of the murders was error since there's nothing in the record that supports the Prosecutor's stated reason for excusing the juror.

When a non-verbal response is offered as a racially neutral reason for the strike the response must be followed by questions of the juror making the response. It is incumbent upon the judge to acknowledge or describe the non-record behavior which could form the basis of the challenge. There is nothing in the Francis record to indicate that Ms. Bennett laughed and the judge neither questioned the prospective juror, nor made a finding of fact. The peremptory challenge should have been denied.

(2) The trial court also erred in denying the Motion for Judgment of Acquittal for lack of competent evidence in support of the armed burglary. The evidence in this case fails to establish that there was an uninvited entry into the residence. The evidence more properly supports that the Appellant gained entry to the house as a result of an invitation. This Court has recently construed the statute to eliminate the instances where an invitee gains entrance and then turns violent and commits a felony. The only exception to this is where the invitee surreptitiously remains in order to commit the felony. There is insufficient evidence to sustain Mr. Francis' conviction for armed burglary. This is particularly significant since the contemporaneous felonies were found to be an aggravator in this case, and the jury was instructed that armed burglary constituted a contemporaneous violent felony. The eight (8) to four (4) jury recommendation for death may well have been different if the jury had not been instructed in this

fashion.

(3) Mr. Francis' death sentences are not proportionate. There is unrebutted evidence of chronic mental illness to which the Court ascribed substantial weight. Therefore, these murders do not constitute murders of the type that are the least mitigated, and as such do not justify the imposition of a death sentence.

POINT I

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

In State v. Neil, 457 So.2d 481 (Fla. 1984), Florida first established its rule that the courts of this state would no longer allow minority members of the community to be excluded as jurors based on racial prejudice. "The striking of a single . . . juror for racial reasons violates the Equal Protection Clause." State v. Slappy, 522 So.2d 18, 21 (Fla. 1988). The most recent procedure for enforcing this rule was set forth in Melbourne v. State, 679 So.2d 759, 764 (Fla. 1996), as follows:

> A party objecting to the other side's use of a peremptory challenge on racial grounds must: a) make a timely objection on that basis, b) show that the venire person is a member of a distinct racial group, and c) request that the Court ask the striking party its reason for the strike. If these initial requirements are met (step 1), the Court must ask the proponent of the strike to explain the reason for the strike. At this point, the burden of production shifts to the proponent of the strike to come forward with a race-neutral explanation (step 2). If the explanation is facially 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 (step 3). The Court's focus in step 3 is not on the reasonableness of the explanation but rather its genuineness. Throughout this process, the burden of persuasion never leaves the opponent of the strike to prove purposeful racial discrimination.

In the instant case the State used a peremptory challenge to strike Ms. Bennett, a black member of the venire (T 812, 813). Appellant requested the Court require the State to give a race neutral reason for challenging Ms. Bennett, the State then said: "the reason the State has used the peremptory, when it was mentioned that two people were killed, it was noted that she laughed." (T 812).

The most recent procedure for enforcing the Slappy Rule was set forth in Melbourne in which Mr. Francis made the objection and the burden shifted to the State to come forward with a race neutral explanation to strike. If the Court evaluates the explanation and finds that it is facially race neutral 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 pretextural.

It was improper for the Appellee to argue in its Answer Brief that the strike could have been based upon Ms. Bennett stating that she "felt nothing" when asked her thoughts about Francis being accused of killing two people (T 713). The explanation advanced by the State was that Ms. Bennett laughed at the mention of the two

murders. It is therefore this explanation alone that should be examined under step three of the Melbourne procedure. The Fourth District Court recently issued an opinion which set forth the procedures which should be followed by the trial judge when a non-verbal response is given as the race neutral reason, Georges v. State, 723 So.2d 399 (Fla. 4 DCA 1999).

In Georges the Prosecutor's reason for excusing the juror was that the juror had indicated he had been fired from a job without knowing the reason for the termination. The State analogized this situation to that of Georges, who was fired as a result of the circumstances in his case. The trial court denied the challenge. However, the trial court's recollection of what the juror said during voir dire was incorrect.

As in Georges, nothing in the record supports the Prosecutor's statement that Ms. Bennett laughed. Ms. Bennett was never asked if she had laughed. There is nothing in the record to indicate that Ms. Bennett laughed in response to the Prosecutor's question. The State Attorney made no contemporaneous reference to the laugh on the record. He did not ask Ms. Bennett any further questions. No reason was advanced, the trial judge did not question Ms. Bennett himself, nor did he acknowledge or describe the non-record behavior which confirmed the basis of the racially neutral reason for the challenge. Because the trial judge failed to do so, the peremptory challenge should have been denied. See Hill v. State, 547 So.2d

175 (Fla. 4th DCA, 1989). The record is void as to any verbal or non-verbal response supporting the Prosecutor's alleged observation that Ms. Bennett laughed. Neither the record nor the judge's observation are a basis for the racially neutral reason. Therefore, a new trial should be granted.

POINT VI

THE TRIAL COURT ERRED IN DENYING THE MOTION FOR SUMMARY JUDGMENT OF ACQUITTAL FOR LACK OF COMPETENT EVIDENCE/BURGLARY.

On February 3rd, 2000 this Court decided Delgado v. Florida, No. SC 88638, February 3rd, 2000. The Court in Delgado held that burglary is not intended to cover a situation where an invited guest turns criminal or violent once he has peaceably gained entry. Burglary is intended to criminalize the conduct of the suspect who terrorizes, shocks, or surprises the unknowing.

In the present case there is a substantial question as to whether the Appellant was invited to enter the victims' home. There was no eyewitness to the entry of the crime scene. The crime scene experts were unable to find any evidence of forced entry to the home. The Appellant knew the victims and had been in their home many times before. Ms. Brunt was found seated in a chair in the living room. Certainly no forced entry may be implied or argued from this fact. More likely, Ms. Brunt was seated in her chair at that time she was attacked because she was not alerted to any

danger. All the evidence of violence or assault occurs inside the home. The evidence is all consistent with the killer having gained entrance by invitation.

In his sentencing order, the trial judge alludes to "the threat with the rifle" (R 2344). However, there is no evidence that the .22 caliber rifle was used to threaten the ladies in order to gain entry. The State relies upon the testimony of Rysean Goods to establish that Mr. Francis walked towards the victims' home with some type of pipe sticking out of a bag (T 934). The crime scene investigators found a fired .22 caliber shell casing in the home, but no bullet strikes anywhere in the house (T 1319-20). The firearms inspector determined that the .22 caliber shell casing was fired from a .22 rifle owned by C. J. Hicks (T 1603). This rifle was recovered fully loaded in a location that was accessible to both Mr. Hicks and Mr. Francis. There is no evidence establishing how the casings got into the victims' home. Certainly, the trial judge inferred from the State's case that Mr. Francis used the rifle to threaten one of the women in order to gain entrance. Interestingly, the State Attorney never argued this to the jury. In fact, the State Attorney told the jury that ". . . whoever did this either had a way to get into the house without breaking the window or the door, or they were let in because the person who did this may have known the victims" (T 1787). The State concedes that the murderer may have been invited into the house, and then

proceeded to rob and murder the victims. By advancing this argument, the State acknowledges that the evidence fails to establish a burglary. Delgado, *supra*, establishes that an invitee cannot become a burglar simply because he commits a crime once he is inside the home. There is insufficient evidence to convict the Appellant of armed burglary.

POINT VIII

THE DEATH PENALTY IS NOT PROPORTIONATELY WARRANTED IN THIS CASE.

The Court found that there are four statutory aggravating circumstances in this case. The first statutory aggravator found was that there exists prior violent felony convictions. These convictions are based on the contemporaneous murders (the double murder). It should also be considered that the Court used the armed burglary as a contemporaneous violent felony. As argued above, Delgado mandates that the conviction for armed burglary be reversed. Since the jury recommendation for death was eight (8) to four (4), this could be a very important factor in the jury's recommendation of the death penalty and cannot be viewed as harmless error. It also needs to be pointed out that the Court found as a statutory mitigating factor that the Defendant's prior criminal history involved only non-violent drug related crimes, but afforded it very little weight.

The Court also found as a statutory mitigator that the capital felony was committed while the Defendant was under the influence of extreme mental or emotional disturbance under Florida Statute 921.141 (7)(b). Considering this statutory mitigator the Court reviewed the evidence of two mental health experts who established clearly that the Defendant suffers from mental illness. Their diagnosis were classic paranoid disorders which may have been affecting the Defendant at the time of the killings. In affording this mitigator some weight, the Court reasoned that while it was shown that the Defendant suffers from this chronic mental illness it was not proved that the Defendant was under any particular acute distress at the time of the killings. The Court also found as a non-statutory mitigator that Carlton Francis is mentally ill or emotionally disturbed. In affording this factor considerable weight the Court recognized the testimony of the two mental health experts, the interviewing probation officer, family members, and the argument of the Prosecutor as all agreeing that something is wrong with Carlton Francis. Specifically, the diagnosis of schizoid personality disorder, schizotypal disorder and obsessive compulsive disorder were found to have been proven. As a further non-statutory mitigator the Court found that the Defendant's ability to conform his conduct to the requirements of law may have been impaired. The Court gave this factor some weight. There was no evidence presented by the State to rebut that Francis suffers

from a severe mental illness and that Francis has no prior history of violent acts. Simply stated, this tragic double murder must be viewed as the first violent act of a chronically mentally ill twenty-three year old man.

The Court also found that the capital felony was committed while the Defendant was engaged in a commission of a robbery. In view of his convictions of robbery in Counts III and IV, Mr. Francis must agree that this aggravating factor exists beyond any reasonable doubt.

The next aggravator which was found by the Court was that the capital felony was a homicide that was committed in a especially heinous, atrocious and cruel manner under Florida Statute 921.141 (5)(h). Mr. Francis has advanced arguments showing that the medical testimony failed to establish that either of the victims were alive after the initial blow. Therefore, under the case law, this aggravating factor should not be considered.

The trial court also found that the aggravating factor that the victims of the capital felony were particularly vulnerable due to advanced age or disability. The Court found that: the twin sisters were 66 years of age, they were in reasonable health for their age, and that no particular disability was shown. The trial court concluded that the legislature has clearly shown that it considers advanced age a special circumstance worthy of consideration in capital sentencing and the Court found that both

victims were in this protected class beyond a reasonable doubt. The Court found as a matter of law that no particular disability was shown. A common sense reading of the statute leads one to believe that a particular disability must be shown due to age. Therefore, this aggravator has not been proven and should not be considered. This is a case of first impression regarding this new aggravator and the aggravator should be disallowed as impermissively vague and overbroad.

The cases cited by the State may be distinguished. Bates v. State, 24 Fla. L. Weekly S471 (Fla. October 7, 1999). The Court in Bates failed to find a statutory mental mitigating factor. The trial court, while considering Mr. Francis' case, found as a matter of law that the capital felony was committed while the Defendant was under the influence of extreme mental or emotional disturbance. The sentencing judge gave this statutory mitigator some weight, while the trial judge in Bates specifically failed to find the evidence sufficient for this statutory mitigator. The issue was appealed and this Honorable Court found that the trial court did not abuse its discretion in failing to find a statutory mitigator. Clearly Francis' case is more mitigated than that of Mr. Bates.

Guzman v. State, 721 So.2d 1155 (Fla. 1988) is clearly less mitigated than Francis. The trial court in Guzman found five aggravating circumstances (more aggravation than Francis, and no statutory mitigation).

Zakrzewski v. State, 717 So.2d 488 (Fla. 1998) involved the brutal machete killing of Mr. Zakrzewski's wife and two small children. The Court found CCP based upon Zakrzewski's purchase of the machete during his lunch break, his early return to his home where he hid the machete, and the bludgeoning and hacking of his wife followed by the execution style killing of his own two small children. Zakrzewski's primary holdings are that there are no exceptions of the death penalty for domestic murders and "middle-class" murders.

In Spencer v. State, 691 So.2d 1062 (Fla. 1997) the death penalty was found proportionate based upon two aggravating circumstances (1) contemporaneous convictions for aggravated assault, aggravated battery and attempted second-degree murder, and (2) especially heinous, atrocious, cruel. The trial judge in Spencer also found three mitigating circumstances, that the murder was committed while Spencer was under the influence of extreme mental or emotional disturbance; that Spencer's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirement of the law was substantially impaired; and the Court also considered a number of non-statutory mitigating factors such as Spencer's drug and alcohol abuse, paranoid personality disorder, sexual abuse by his father and good employment record. In weighing the aggravating and mitigating factors the judge gave some weight to the statutory mental mitigators and very little

weight to the non-statutory mitigators and concluded that the aggravating circumstances outweigh the mitigating circumstances. The 1996 Supreme Court refused to participate in the reweighing of the aggravators and mitigators and found that the judge's decision to give little weight to the mitigators was not error. The weight given to the mitigators in Spencer was considerably less than the weight the trial judge gave to Francis' mental mitigators. In Spencer the trial judge found two mental mitigators but did not ascribe great weight to them based upon other evidence presented, including Spencer's ability to function in his job and his capacity to plan and carry out his wife's murder. In contrast, Mr. Francis was shown to be suffering from chronic mental illness which caused him to "zone out", appear crazy and out of it. Because of these factors, there is no evidence that Mr. Francis was able to work. In addition, the Francis trial judge gave considerable weight to the non-statutory mitigator of chronic mental illness.

Likewise, in Pope v. State, 679 So.2d 710 (Fla. 1996), the trial court failed to find mitigation based upon a psychiatrist's unrebutted testimony that Pope suffered from posttraumatic stress syndrome as a result of his combat experience in Viet Nam. That trial court wrote an extensive sentencing order discussing the evidence when giving the proposed mitigator serious consideration. The trial court in Pope found that no mental mitigators existed.

In Foster v. State, 654 So.2d 112 (Fla. 1995), the trial court

found as non-statutory mitigators (1) that Foster was under the influence of emotional or mental disturbance, but that disturbance was not extreme, and (2) Foster's capacity to appreciate the criminality of his conduct was impaired, though not substantially impaired. The trial court in Mr. Francis' case found both a statutory and non-statutory mental mitigator. The non-statutory non-mental mitigator was given considerable weight. The evidence in Francis' case was uncontroverted.

Davis v. State, 461 So.2d 67 (Fla. 1985), is a case involving a triple murder of a woman and her five and ten year old daughters in their home. The aggravating circumstances were heinous, atrocious and cruel, under sentence of imprisonment, previous convictions of a violent felony, and committed during the course of a burglary. Although some evidence of mental illness was presented the Court found that no such mitigators existed. Under the Cooper v. State, 739 So.2d 82 (Fla. 1999) analysis the Davis case is one of the least mitigated and Mr. Francis' case is one of the most mitigated.

In Lemon v. State, 456 So.2d 885 (Fla. 1984), the Florida Supreme Court affirmed the death sentence after a proportionality review. The aggravating factors were a prior violent felony conviction for the same type of crime and heinous, atrocious and cruel. The Court found one mitigating factor, that the Defendant was acutely emotionally disturbed at the time. However, the trial

court's sentencing order indicated that the trial court had some question as to the degree of the emotional disturbance at the time of the crime. In Mr. Francis' case there is no doubt that he suffered from chronic mental illness at the time of the murders. Mitigation in Mr. Francis' case exists without a doubt. And under the test developed by this Court in Cooper and Larkins v. State, 739 So.2d 90 (Fla. 1999) the death sentence is not warranted in Mr. Francis' case.

In Robinson v. State, 24 Fla. L. Weekly S393 (Fla. August 19, 1999), the trial court found three aggravating factors: (1) the murder was committed for pecuniary gain, (2) the murder was committed to avoid arrest, and (3) the murder was cold, calculated and premeditated. The trial court also found two statutory mitigating factors. Robinson suffered from extreme emotional disturbance (some weight) and Robinson's ability to conform his conduct to the requirement of the law was substantially impaired due to drug use (great weight). The Court found the following non-statutory mitigation: Robinson had suffered brain damage to his frontal lobe (little weight because of insufficient evidence that it affected Robinson's conduct) and Robinson suffered from personality disorder (given varying weight between some and great). Robinson argued in his appeal that insufficient weight was given to his brain injury. In weighing the mitigators this Court found that the evidence was unclear and controverted concerning the existence

of brain damage and if it did exist that there was no way of judging its effect on Robinson's behavior. The Court reasoned that Robinson's extensive drug abuse and addiction was the primary problem. The Court refused to find this evidence to be sufficient to make Mr. Robinson's case one of the most mitigated. On the other hand, Francis' mental illness was found to be both chronic and substantial and was uncontroverted.

In Henyard v. State, 689 So.2d 239 (1997), Henyard was convicted of the execution style slaying of two little girls. Before killing the girls Henyard raped their mother in front of her daughters and shot the woman four times, three wounds to her neck, mouth and between the eyes. Miraculously, she survived. After shooting the mother Henyard drove away with her two daughters where they were dispatched with a single shot to each of their heads. The primary proportionality argument on appeal was that Henyard's accomplice was given a life sentence. This argument was not considered because the accomplice was fourteen years old and it would have been unconstitutional to execute him. The Court found mitigating factors of age (18), and afforded that some weight, that the Defendant was acting under extreme emotional disturbance and his capacity to conform his conduct was impaired (very little weight), and that Henyard was of low intelligence and had the emotional level of a thirteen year old (very little weight). Mr. Francis' case can be distinguished on the basis that the Court

afforded substantial weight to his chronic mental illness.

In July of 1999 this Court developed a two-pronged test in order to determine proportionality. See Cooper v. State, 739 So.2d 82 (Fla. 1999) and Larkins v. State, 739 So.2d 90 (Fla. 1999):

> The Court in State v. Dixon, 283 So.2d 1 (Fla. 1973) held that the death penalty is reserved for only the most indefensible of crimes: Review of a sentence of death by this Court is the final step within the state judicial system. Again, the sole purpose of the step is to provide the convicted Defendant with one final hearing before death is imposed. Thus, it again prevents evidence of legislative intent to extract the death penalty for only the most aggravated, the most indefensible of crimes: Ibid. we later explained our law reserves the death penalty only for the most aggravated and least mitigated murders, Kramer v. State, 619 So.2d 274, 278 (Fla. 1993). Thus, our inquiry when conducting proportionality review is two-pronged: We compare the case under review to others to determine if the crime falls within the category of both (1) the most aggravated, and (2) the least mitigated of murders.

In Larkins v. State, 739 So.2d 90 (Fla. 1999), the Court again affirmed that proportionality is not merely a comparison between the number of aggravating and mitigating factors, but rather in deciding whether death is an appropriate penalty the Supreme Court must consider the proportionality of the circumstances in the instant case in comparison to the facts of other capital cases and find that the murder considered is not only one of the most aggravated, but also one of the least mitigated for first-degree murders. Larkins was convicted of first-degree murder of a store clerk which occurred during the robbery of a convenience store. The trial judge found two aggravating factors, a prior violent felony based upon a twenty year old manslaughter conviction, and

(2) that the murder was committed for pecuniary gain during a robbery. The trial court found no statutory or non-statutory mitigating factors. In review this Court found that the trial court had failed to evaluate each of the mitigating circumstances presented by the defense. On remand the trial court found the same two statutory mitigating circumstances and two statutory and eleven non-statutory mitigating factors. Larkins was shown to have an extended history of mental and emotional problems. Larkins suffered from organic brain damage which affected his mental and emotional condition so that it made it difficult for Larkins to control his behavior and caused him to have poor impulse control. The trial court again sentenced Larkins to death. This Court set aside the death sentence and remanded the case to the trial court with directions to impose a sentence of life in prison.

Under the two-prong test of Cooper and Larkins, Mr. Francis' case should be remanded to the sentencing court so that a life sentence without parole may be imposed.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to: Curtis M. French, Assistant Attorney General, Office of the Attorney General, PL-01 The Capitol, Tallahassee, FL 32399-1050, this _____ day of February, 2000.

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