IN THE SUPREME COURT OF FLORIDA

RAYMOND MORRISON, JR.,

Appellant,

vs. CASE NO. 94,666

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT OF
THE FOURTH JUDICIAL CIRCUIT, IN AND
FOR DUVAL COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

CURTIS M. FRENCH
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 291692

OFFICE OF THE ATTORNEY GENERAL
PL-01 THE CAPITOL
TALLAHASSEE, FL 32399-1050

COUNSEL FOR APPELLEE

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE(S)

FEDERAL CASES

STATE CASES

OTHER

STATEMENT CERTIFYING SIZE AND STYLE OF TYPE

This brief has been prepared using 12 point Courier New, a font that is not proportionately spaced. For convenience to this Court, the State will cite to the record in the same manner as the Appellant.

STATEMENT OF THE CASE

The State accepts Morrison's Statement of the Case.

STATEMENT OF THE FACTS

I. Guilt Phase

The State accepts Morrison's statement of the facts relating to the guilt phase, except for the following which is offered to supplement/clarify Morrison's statement of facts.

The victim, Albert Dwelle, besides being 81 or 82 years old, had been disabled for many years, having suffered a stroke during a bout of typhoid fever at age 6 or 7 (V12T370). His left wrist was deformed and his left arm atrophied; the medical examiner described it as "small, almost like a club" (V14T789, V15T 804). Also, his right leg was shorter than his left, and also was deformed and atrophied (V14T 789, V15T804). According to his cousin, William Brinson, Dwelle could not use his left hand or arm, and he could hardly stand up and walk (V12T370). He also shook a lot, which made it difficult for him to write his name; with Brinson's assistance in holding his hand, Dwelle could make an "X" on his social security check (V12T370-72). Dwelle needed assistance to bathe, dress, and cook (V12T 370-71, V13T415-16). A woman from Urban Jax Home Health Care provided personal care for Dwelle (V13T413-15), while Meals on Wheels delivered his meals once a day (V13T421-23, 428).

Brinson testified that the victim habitually carried money in his shirt pocket (V12T376). The victim also had a collection of commemorative coins that were 99% pure silver (V12T372). Brinson had some similar coins that the victim had given Brinson (V12T373, 379). Brinson testified that State's Exhibit 26 (the knife recovered by police with Morrison's assistance) looked like a knife belonging to the victim that Brinson had handled the day before the murder (V12T378-79, V13T593-94). Brinson testified that, after the murder, there was no paper money and none of the commemorative coins in Dwelle's apartment (V12T383).

Sandra Brown, the mother of Morrison's five year old son, testified that, although Morrison did not live with her, he had spent January 8, 1997 with her (V12T390, 394). Morrison's sister had given Brown $20 to babysit her child (V12T394). She used that money to buy beer for Morrison and her uncle Johnny (V12T395-96).

Morrison gave a statement to police in which he admitted entering the victim's apartment without permission and taking money from the victim's shirt pocket. However, he contended the victim had stabbed himself while Morrison held him from behind (V13T586-89). Morrison stated that once he realized the victim was cut, he laid him down, took the knife, and left, hiding the knife under a brick (V13T589). Morrison took police to the knife, which he had hidden at the northwest corner of Apartment 15 at Ramona Park

Apartments, by a "little piece of concrete . . . . right next to the building amongst the leaves" (V14T743).

Morrison told police that he had used the victim's cash to buy crack cocaine and to pick up prostitutes (V13T530).

Harry Hills, father of several children by Morrison's mother, testified that Morrison had tried to sell him some silver coins (V13T491-92). He testified that Morrison's coins were darker, but similar in size and weight to the coins comprising State's Exhibit 19, which Brinson had identified earlier (V13495, 499).

Dr. Margarita Arruza, medical examiner, testified that she conducted the autopsy on the victim. There were minimal signs of a struggle (V15T817), but there was some bruising and abrasions on the victim's neck indicating he had been held from behind in a head lock (V15T805, 808-09). There was one major incised wound and one major stab wound on the victim's neck (V15R805-07). Although the jugular veins and carotid artery were not cut, the stab wound did puncture the victim's esophagus (V15R806-07). As a consequence, the victim aspirated the blood caused by the knife wounds to his neck (V15T807). Dr. Arruza testified that Dwelle died from a combination of bleeding to death and aspirating blood, similar to "drowning in your own blood" (V15T810).

II. Penalty Phase

The State also accepts Morrison's penalty-phase statement of the facts, except for the following supplementation/clarification.

Although Morrison's sister testified that she was the violent one, she has never been in prison, in contrast to Morrison, who had been sent to prison for 30 months after having broken an elderly man's jaw and breaking his teeth during a robbery attempt when his sister was fifteen or sixteen (V16T1118-20, 1131, 1134-35). The sister conceded that Morrison was not around to help during at least these 30 months (V16T1134).

Dr. Peter Lardizabal, retired chief medical examiner for Hillsborough County, testified for the defense (V16T1137). He agreed with Dr. Arruza that there was "no way" that Dwelle's wounds were self inflicted (V16T1154). He described one of Dwelle's neck wounds as "worse than a tracheotomy," because his vocal cords were rendered useless, he could not talk or breathe, and he inhaled a massive amount of his own blood from the "tremendous hemorrhage" produced by the many branches, even though the main arteries were not cut (V16T1146). Dr. Lardizabal agreed that Dwelle's injuries were consistent with someone having grabbed him from behind (V16T1159). Although Dr. Lardizabal thought death had occurred relatively quickly, he acknowledged that his estimate of the time it had taken Mr. Dwelle to die, based upon the loss of blood estimated from the length of a sardine can in the photographs he had looked at, was not "a hundred percent scientific" (V16T1147-48, 1161-62). He could not say what the rate of blood flow loss was (V16T1167-68). At any rate, Dwelle's death was not "immediate,"

because he had died from breathing in his own blood, as the blood in his nostrils demonstrated (V16T1162, 1167). Dr. Lardizabal acknowledged that before Mr. Dwelle lost consciousness, he could have felt pain and fear (V16T1168-69).

Morrison's father acknowledged that at some point, Morrison had decided he was going to make his own decisions rather than heed any advise that the father could give him ((V16T1182). Morrison's mother acknowledged that Morrison had people who loved him and cared for him and that he had the opportunity to build a family life for himself, had he chosen to do so (V17T1213). She also acknowledged that asthma was not the reason Morrison had missed "all" of the 83 days he had been absent his last year in school (V17T1215).

As for the evaluation by Dr. Krop, it should be noted that Dr. Krop found no significant neurological impairment and no indication of neurological disease of any sort (V17T1226-27).[1] Moreover, Morrison is not mentally retarded (V17T1229). Dr. Krop's primary diagnosis was substance abuse (V17T1223); however, he acknowledged that he had only Morrison's self-reported history to rely on because there are no treatment records of any kind (V17T1224).

Morrison reads well, but his math skills are relatively poor; nevertheless, he understands the value of property, and can do

[1] Testing showed some unspecified "deficits" not necessarily conclusive of brain damage; the results did not "reflect any significant neurological impairment" (V17T1226).

simple arithmetic such as addition and subtraction (V17T1228-29). Dr. Krop acknowledged that there are many people of borderline intellectual ability who work for a living; low intellectual ability, he conceded, "does not mean criminality" (V17T1230).

Dr. Krop acknowledged that Morrison had never sought treatment for his alleged substance abuse, even though there are treatment facilities available for persons like Morrison in Jacksonville (V17T1231). He also acknowledged that Morrison did not claim to have suffered a blackout during the murder of Mr. Dwelle, although, because Morrison had denied the crime, "that was sort of a moot point" (V17T1232). Morrison was mentally capable of understanding pain and suffering (V17T1232). Dr. Krop agreed it was antisocial behavior to rob someone and use the proceeds to buy sex (V17T1232).

In addition to the foregoing testimony, the trial court considered the report of licensed psychologist Dr. Sherry Risch, who had administered the psychological testing for Dr. Krop. This report was presented to the court by both Morrison and the State at the Spencer hearing following the 12-0 death recommendation by the jury (V10R1652-53, 1662-63). The report is set out at V6R180-83. According to this report, Morrison reported having received blows to the head, once from hitting his head on a rock, and other times while playing football. However, he has never been hospitalized for any head trauma. Testing showed that Morrison's reading ability was in the low average range, as was his attention,

concentration and memory, but that he was weak "in his ability to identify information typically acquired in the academic setting." On one test of verbal learning, Morrison showed "significant deficiencies," which may have "been associated with motivation," as Morrison approached the tasks required by this test in "a haphazard manner." He also did poorly on other tests after having approached tasks and/or replying in a "haphazard manner." Psychomotor output was normal, and no fine motor deficits were noted. Notwithstanding the haphazard effort put forth by Morrison, Dr. Risch felt that the test results are valid. The IQ testing showed a verbal IQ of 76, a performance IQ of 87, and a full scale IQ of 78.

SUMMARY OF THE ARGUMENT

There are ten issues raised on appeal: (1) Morrison's general complaints about trial counsel did not require a full Nelson inquiry; furthermore, after the trial court made inquiry of Morrison and his counsel on June 26, 1998, and gave Morrison the opportunity to ask any and all questions about his representation, Morrison made no further complaints about trial counsel until after the trial was over. In these circumstances, the trial judge was justified in concluding that Morrison's concerns had been addressed. (2) The trial court properly excused a prospective juror for cause on the ground that the juror was unsure if he would be able to vote for a death sentence, especially where defense counsel made no effort to rehabilitate the juror. (3) It is well settled that the prosecutor may properly exercise peremptory challenges against prospective jurors who are opposed to the death penalty but not excludable for cause. (4) The prosecutor did not mislead the jury about the State's burden of proof simply by stating that it did not require 100% certainty. Further, the Court's instructions defining reasonable doubt and were sufficient to correct any possible prejudice to the defendant. (5) The trial court was authorized to conclude from the totality of the circumstances that Morrison's confession was freely and voluntarily made, and that his will was not overborne by appeals to religious sentiment. Morrison clearly understood that he could cut off

interrogation at any time, but chose not to. (6) No reversible error has been shown regarding two evidentiary rulings by the trial court. (7) The trial court did not err in denying Morrison's motion for judgment of acquittal. The State presented evidence from which the jury could find beyond a reasonable doubt that Morrison committed first degree premeditated murder and, as well, first degree felony murder. Morrison's statement that the victim stabbed himself twice during a struggle with Morrison while trying to prevent a robbery is not credible, especially given the severity of the wounds and the victim's age and severe disabilities, but Morrison is still guilty of first degree felony murder even under his own statement. (8) The trial court properly instructed the jury as to the HAC aggravator, and properly found it to exist. (9) The victim in this case clearly was particularly vulnerable due to advanced age and severe disability, and the trial court did not err in finding this aggravator. (10) The death penalty is a proportionate sentence for a brutal murder of an elderly and disabled victim in his own home, committed during a robbery by a defendant who had a prior record of conviction for violent felonies, including a prior robbery of an elderly man whose jaw was broken by the defendant. There are four valid statutory aggravating circumstances in this case versus no statutory mitigators, and the defendant is neither brain damaged nor mentally retarded, and he did not have a disadvantaged childhood.

ARGUMENT

ISSUE I

MORRISON'S GENERALIZED COMPLAINTS ABOUT HIS APPOINTED COUNSEL WERE INSUFFICIENT TO TRIGGER A NELSON INQUIRY; THE INQUIRY THE COURT DID CONDUCT WAS SUFFICIENT

It is the State's contention here that Morrison made no more than generalized complaints about the communications between himself and his attorney. For this reason, the trial court was not required to conduct a Nelson inquiry. The inquiry the court did conduct on June 26, 1998 was sufficient, and the defendant made no further requests to replace his court-appointed attorney between then and his September trial, or afterwards. Clearly, the court was entitled to conclude that Morrison's concerns were addressed and alleviated by the inquiry that occurred and the explanations given to him. Furthermore, a second attorney was appointed to represent Morrison before trial. Morrison has failed to demonstrate any reversible error.

A discussion of the relevant events will clarify the State's position. Originally, Ronald Higbee and others from the office of public defender represented Morrison. That office filed two motions to suppress (V2R329, 336), which came on for evidentiary hearing on November 13, 1997 (V8R1258 et seq).

At that hearing, Morrison's mother testified, inter alia, that she had a brother-in-law, Fred Austin, who has a bad crack problem and a lengthy police record, and is in and out of jail (V8R1413-

14). She testified that Austin was with Morrison on the day he was arrested, and that she had told him many times he was supposed to come to the hearing on the motion to suppress (V8R1413-14). Following her testimony, Mr. Higbee stated to the court that the public defender's office had "subpoenaed Fred Austin numerous times to come to this hearing," which had been reset a couple of times, and that they had been looking for Austin since the latest hearing date had been set (V8R1414-15). Higbee had talked by telephone with Mr. Austin that day, but Austin was afraid to come to court for fear that he would be arrested (V8R1415). The hearing concluded without Austin's testimony.

On January 16, 1998, before the trial court had ruled on the motions to suppress, Higbee filed a certificate of conflict and a motion to withdraw (V9R1450). The court granted the motion and appointed Mr. Refik Eler to represent Morrison (V9R1451). On January 22, 1998, the court gave Mr. Eler the opportunity to "add anything to what was done on the motion [to suppress]," including presenting additional witnesses (V9R1457-58). On January 30, 1998, Mr. Eler announced that he would present the testimony of one additional witness (V9R1461-62). On February 13, 1998, Mr. Eler announced that the additional witness was Fred Austin and that his testimony would be presented by way of a written stipulation (V9R1467-68).

In the meantime, Morrison had been filing his own pro se pleadings calling for the suppression of evidence, beginning with a pre-hearing statement of facts he filed on October 16, 1997 (V2R360), and post-hearing memorandum he filed on December 18, 1997 (V5R780). Following the appointment of Mr. Eler to represent him, Morrison filed an additional pro se memorandum of law in support of motions to suppress on February 12, 1998 (V5R789). He filed still further pleadings after the court denied the motions to suppress on March 19, 1998 (V2R335, 341). These variously were styled as an "appeal" from the decision on the motion to suppress, or as a motion for rehearing; one appears to be an original motion to suppress raising the same grounds as raised previously, one is some sort of unidentified memo, one appears to be a summary of testimony, one is called a "Motion to Discharge Officers Statements," another a motion to "Dismiss Charges," and at least one is simply a letter to the court. The factual and legal allegations appear to be essentially cumulative and redundant to each other and to the motions filed and argued by Morrison's attorneys (V5R820, 837, 847, 851, 858, 866, 872, 877, 886, 889, 894, 900).

On April 2, 1998, Morrison wrote a letter to the court expressing his dissatisfaction with his court-appointed attorney, who, he claimed, would not visit with or talk to him; Morrison wanted to appeal the suppression ruling and he was concerned about

Fred Austin not having been "allowed" to testify. Morrison asked the court to appoint another attorney or let him be "court counsel" (V5R830). However, in a letter filed on April 17, 1998 (and dated both April 12 and April 13), Morrison withdrew his previous request, stating that he was now "satisfied with Mr. Eler," and "with how my case is doing," and "would like to keep Mr. Eler as my attorney" (V5R842).[2]

However, two pleadings filed on May 13, 1998, one styled a "Motion to Suppress Statement," and the other styled "Motion for Rehearing in Support of Motion to Suppress," each contain a request for new counsel, based on dissatisfaction with Mr. Eler. In the first, Morrison stated:

> And Mr. Morrison would like the courts to appoint another attorney to defendant, because Mr. Eler refuse to give me legal copys [sic] of my law work an [sic] refuse to come to se me about my case he hasn't been to see me but one time, since he had my case and I want the courts to appoint new counsel, because Mr. Eler is not doing his job to represent me proper, since I'm look [sic] at the Dealth [sic] sentence, and he don't even come to see me at all and I refuse to go to trial with Mr. Eler, how can he represent me if he don't know [sic] about my case, he won't even come to the jail to talk to me about it, so he can't represent me in trial.

(V5R856). In the second, Morrison stated:

---

[2] In his brief, Morrison states that this letter was written just one day later. Although Morrison refers to his previous letter as having been written on April 12, it was apparently executed on March 31, 1998 (V5R832) and filed on April 2 (V5R830).

> Said defendant is asking for the court to suppress all statements against defendant, and all charges be dropped charges against defendant [sic]. And defendant was [sic] like the courts to change my court appointed attorney because: Mr. Eler only came to see him once since he started on my case but only stayed 3 minutes, and hasn't come back since, I have asked for legal docouments [sic] from him (copys) [sic] but he refuse to give me copys [sic] or come let me no [sic] what's happen in my case, since I'm faced with the dealth [sic] penalty he should at least come more than once to talk about my case, and I feel that he not doing his job to the best of his ability to I'm asking the courts to appoint further counsel for said defendant, it only right for defendant to receive proper counsel, since he's facing the dealth [sic] penalty. In this case, the defendant respectfully request this Honorable Court to appoint another counsel since Mr. Refik Eler refuse to discuss the case with Mr. Morrison or refuse to come over to the jail to even go over the case with Mr. Morrison since, he was appointed to the case, and be[cause] Mr. Eler refuse to give Morrison legal copies of suppression transcripts or other legal docemounts [sic]

(V5R864-65). Finally, in a document which appears to have been executed on June 25, 1998, but filed on June 29, Morrison once again stated his complaints about Eler, stating:

> I would like for the record to show that Mr. Morrison feels that his lawyer Refik Eler is not doing his job to the best of his ability. Mr. Eler hasn't come over to the jail house to see me, but one time, since he had my case and the he stayed only less than three minutes he don't never counsel me about my case, we never go over my legal work. I have asked him for copys [sic] of my motion to suppress decision and I have asked Mr. Eler for the transcript of the motion to suppress decision, and ask him to let me listen to the tape of the court

> reporter, were [sic] they change the officers statement, I also asked him why wasn't my witness Fred Austin allowed to testify on my behalf at suppression hearing, and I gave my lawyers investigator my witness that I want to be called on my behalf at my trial and none has been contacted or either called. So I'm asking the court to appoint Mr. Morrison another court appointed attorney, because Mr. Refik Eler hasn't been doing his job to represent Mr. Morrison to the best of his ability thank you.

(V5R909).

On June 26, 1998, one day following the June 25 letter, the court heard various pending motions. The Court asked Mr. Eler if he was aware of the various handwritten motions filed by Mr. Morrison (SR3). Mr. Eler stated that he was; that most of them dealt with the court's denial of the motions to suppress. Eler stated that, as he had explained to Morrison, although Morrison had the right to bring them to the court's attention, Eler would not adopt them "because those issues have been, in my opinion, preserved in the record for purposes of appeal should a conviction occur and would be redundant" (SR3-4). Following discussion and ruling on numerous defense motions, the court returned to the subject of Morrison's pro se motions (SR33). The court explained to Morrison that it had ruled on the motions to suppress and would not change its mind on that ruling, but that its ruling would be reviewed by an appellate court if Morrison were convicted and would decide if its decision was legally correct or incorrect (SR35-6). However, although the court would not address the motion to

suppress again, the court would consider any other matter and any other questions Morrison might wish to present. Given this opportunity, the only matter raised by Morrison was:

> THE DEFENDANT: Yes. I want to know why my witness I was going to rely to testify?
>
> THE COURT: Fred Austin, that's a long story, but my understanding, Mr. Austin wasn't too interested to come down to the courthouse for his own reasons, but he did submit a statement and the attorneys did agree as to what he would have testified to had he been here, he was with you shortly before this incident took place and he knew something of your sobriety or your mental condition at the time you were arrested and the time you made the statement and perhaps the time this offense occurred also, but during that general time frame. I think Mr. Austin had a warrant or something, he didn't want to come down here is what it boiled down to.
>
> But they did find him and talk to him so your lawyer did, Mr. Higbee did - so the Public Defender's investigator called upon him and that was made part of this.
>
> So you have any other questions about anything?
>
> THE DEFENDANT: No, sir.
>
> THE COURT: Okay. Work with Mr. Eler.

(SR36-7).

On September 18, 1998, Eler asked the court to appoint co-counsel; his motion was granted and Christopher Anderson was appointed as second chair (V5R925, V9R1519).

Just before trial, the court stated that it had been reviewing the court file, including the numerous letters Morrison had filed,

some of which referred to alibi witnesses (V12T334).[3] The court asked Mr. Eler about these witnesses. Eler responded that he and his investigator had attempted to seek out and interview these witnesses, and based on that had made the decision who to call and not to call (V12T334-36). Further, Eler had discussed the case with Morrison (V12T337).

Finally, Morrison wrote one more letter after he was convicted, stating he was dissatisfied with Eler's performance during trial. He sought no remedy; "just wanted the court records to be aware of his misrepresentation" (V7R1163-64).

It should be noted, first, that Morrison never clearly sought to represent himself.[4] Thus, Morrison was "not entitled to an inquiry on the self-representation under Faretta." Davis v. State, 703 So.2d 1055 (Fla. 1997)(citing Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975).

Second, the gist of Morrison's complaints were that Mr. Eler did not communicate with him or discuss the motions which had been

---

[3] One such letter was filed April 9, 1997 (V1R31-36). In this letter, Morrison claimed he had not confessed, he had not shown police the knife and he was intoxicated at the time. He identified various alibi witnesses who, he claimed, could prove his innocence.

[4] The closest he came was in his April 2 letter when he sought either new counsel or permission "to let me be court counsel." Although the phraseology is confusing, this seems to be merely a request to allow Morrison "to be more active in assisting his lawyer rather than any potential assertions of a right to self-representation." Bell v. State, 699 So.2d 674, 677 (Fla. 1997). In any event, this request was effectively withdrawn by Morrison's letter filed April 17, 1998.

filed. A lack of communication is not a ground for an incompetency claim. Watts v. State, 593 So.2d 198, 203 (Fla. 1992); Parker v. State, 570 So.2d 1053 (Fla. 1st DCA 1990). Furthermore, the court did inquire of defense counsel concerning the pro se motions to suppress, at a hearing on June 26, 1998, and defense counsel explained in Morrison's presence that the motions to suppress which counsel had filed, along with the evidence presented on those motions, was sufficient to preserve all relevant issues for appeal. Thereafter, the court explained to Morrison that although the court had ruled and would not reconsider its ruling, his decision would be reviewed on appeal if Morrison were convicted. This apparently satisfied Morrison, as he asked no further questions about the motions to suppress, expressed no further dissatisfaction with counsel in this regard, and filed no further pro se motions. The one question Morrison did still have concerned his uncle Fred Austin not testifying, but this too was explained to Morrison. Given the opportunity to raise anything further, Morrison was silent. The court made sufficient inquiry to determine whether there was reasonable cause to believe that counsel was not rendering effective assistance. A court's "inquiry into a defendant's complaints can be only as specific and meaningful as the defendant's complaint." Lowe v. State, 650 So.2d 969, 975 (Fla. 1994). As in Lowe, Morrison "complaints were merely generalized grievances;" he could "point to no specific acts of

counsel's alleged incompetence." Ibid. In the circumstances of this case, no further inquiry was required. Watts v. State, supra; Howell v. State, 707 So.2d 674, 680 (Fla. 1998).[5]

Further, the court had every reason to assume that Morrison's concerns had been addressed and alleviated by the inquiry that occurred and the explanations given to him. Not only did Morrison not persist in his complaints about Eler when given the opportunity to do so at the June 26 hearing, but, following that hearing, which occurred almost three months before trial, Morrison made no further motions or complaints about Eler until after the trial was over. Davis v. State, supra ("Davis's silence after hearing what his attorney had been doing to ready the case for trial would lead one to believe that Davis felt his concerns had been heard by the judge and his lawyer and he was content to proceed.").

Finally, even if the court's inquiry was in any way technically insufficient, any error is harmless. Morrison was not entitled to different court-appointed counsel as of right; he was entitled to substitute counsel only if his trial counsel was incompetent. Hardwick v. State, 521 So.2d 1071, 1074-75 (Fla. 1988). The trial court made a sufficient inquiry into that issue.

---

[5] In fact further inquiry did occur, when, just before trial, the court inquired of defense counsel as to his investigation of alibi and intoxication witnesses mentioned in Morrison's letter of April 9, 1997 (this letter, it should be noted, made no claim of dissatisfaction with counsel, who, of course, at that time was not Mr. Eler anyway).

Morrison has not demonstrated reversible error here.

ISSUE II

PROSPECTIVE JUROR STAPLES WAS PROPERLY EXCUSED FOR CAUSE AS HE WAS UNSURE IF HE WOULD BE ABLE TO VOTE FOR A DEATH SENTENCE IF SELECTED AS A JUROR

The relevant portions of the record are set forth in Morrison's brief. The State will not repeat that in full, but would just note that, upon first being questioned about the death penalty, Staples said he would "prefer to see a person rehabilitated, even if they have murdered somebody." He did not "know if [he] could push for the death penalty" (V11T118-19). Later, when asked if he could recommend a death sentence if he were to find that the aggravating factors outweighed the mitigating factors, Staples answered that he was "not sure." After the trial court explained the law and stated that the question was whether Staples could follow that law, Staples answered that he "still [was] not sure" (V11T143-47).

Defense counsel asked Staples no questions about his feelings towards the death penalty or his ability to vote for it, and made no attempt to rehabilitate Staples.[6]

Over defense objection, the trial court granted the state's challenge for cause, finding that Staples had made "it clear that

[6] Defense counsel was not prevented from doing so, as was counsel in Sanders v. State, 707 So.2d 664 (Fla. 1998); he simply chose not to.

he was not sure he could follow the law regarding the imposition of the death penalty" (V12T293).

There is no "requirement that a juror may be excluded only if he would never vote for the death penalty." Wainwright v. Witt, 469 U.S. 412, 421, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985). Nor must a court find a juror qualified if he "*might* vote death under certain *personal* standards." Id. at 422 (emphasis in original). Instead, the standard the trial court must apply when a prospective juror is challenged for cause is whether the juror's views on capital punishment would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." Id. at 424. This impairment need not be proved with "unmistakable clarity," as determinations of juror bias "cannot be reduced to question-and-answer sessions which obtain results in the manner of a catechism." Ibid. For a variety of reasons, many prospective jurors "simply cannot be asked enough questions to reach the point where their bias has been made 'unmistakably clear.'" Id. at 425. Thus, "deference must be paid to the trial judge who sees and hears the juror." Id. at 426. Accord, Delgado v. State, 25 Fla. L. Weekly S79 at S83-84 (Fla. February 3, 2000)(citing the Witt standard, and then stating: "It is within the trial court's province to determine if a challenge for cause is proper, and the trial court's determination of juror competency will not be overturned absent manifest error.").

In this case, it is true that juror Staples expressed a belief in the death penalty for a person who "was in my home, killed my children" (V11T118). He might even be able to personally "kill" such a person "[i]f it was happening to me, in my home" (V11T118). It is clear, however, that while he might support a death sentence under this personal standard in these very limited circumstances, he was not sure that he could follow the law or ever vote for a death sentence as a juror. This equivocation is sufficient to support his excusal for cause, particularly in the absence of any attempted defense rebuttal. Fernandez v. State, 730 So.2d 277, 281 (Fla. 1999) (no manifest error shown in excusing four prospective jurors who "gave equivocal responses to questions from the prosecutor, defense counsel, and the court as to whether they could follow the law and set aside their beliefs concerning the death penalty"); Johnson v. State, 608 So.2d 4, 8 (Fla. 1992) (prospective jurors opposed to death penalty properly excused where defense counsel failed to ask jurors in question about their views concerning the death penalty and never tried to rehabilitate them, and neither juror ever indicated in any way that she could follow the law).

Farina v. State, 680 So.2d 392 (Fla. 1996), on which Morrison relies, is inapposite. First of all, the juror in question stated that she would try to be fair and that she would "fairly consider the imposition of the death penalty, depending on the evidence

[she] heard in the courtroom," and, in fact, *could* impose a death sentence in a murder case, depending on the circumstances presented. Thus, although she had "mixed feelings" about capital punishment, she never expressed uncertainty about her ability to vote for it in a proper case, according to the appropriate legal standards. Moreover, the prosecutor never stated the ground on which he was challenging this juror, and the court apparently had granted the state's challenge for the sole reason that the court had just granted a defense challenge. None of the bases supporting this Court's reversal in Farina apply here.

This Court has found no abuse of discretion in the excusal of a juror even where the defense attempted a rebuttal and obtained answers arguably supporting a conclusion that the juror could apply the law, where the juror had also "expressed uncertainty several times during the interview." Kimbrough v. State, 700 So.2d 634, 639 (Fla. 1997). Here, there was neither rebuttal nor attempt at rehabilitation, and the juror consistently stated that he preferred rehabilitation to the death penalty and was not "sure" if he could vote for a death sentence.[7] In these circumstances, the trial court did not abuse its "great discretion" in granting the state's challenge for cause. Kearse v. State, No. SC90310 (Fla. June 29, 2000).

[7] He expressed no similar uncertainty about his ability to vote to convict; his uncertainty was limited to being able to vote for a death sentence.

ISSUE III

THE STATE MAY PROPERLY EXERCISE ITS PEREMPTORY CHALLENGES TO STRIKE PROSPECTIVE JURORS WHO ARE OPPOSED TO THE DEATH PENALTY, BUT NOT EXCLUDABLE FOR CAUSE

Morrison argues here that the state may not peremptorily challenge a prospective juror whose feelings against the death penalty do not rise to the level sufficient to support a challenge for cause. He argues that allowing a prosecutor to peremptorily excuse such a juror is tantamount to allowing the state "through the back door" when it is not allowed "through the front door." Initial Brief of Appellant at 49.

This claim may be disposed of summarily. First of all, the issue raised here was not preserved below. Trial counsel did not object to any of the State's peremptory challenges on this basis. In fact, trial counsel, while arguing against the challenge for cause which was the subject of Issue II, above, conceded that the prosecutor "certainly" could use a peremptory to strike a prospective juror who was unsure about his ability to vote for a death sentence (V12T292). Having made this concession at trial, Morrison cannot now argue the contrary. San Martin v. State, 705 So.2d 1337, 1343 (Fla. 1997).

Second, the issue is without merit. See, e.g., San Martin v. State, 717 So.2d 462, 467-68 (Fla. 1998); San Martin v. State, supra at 1343 (both parties have the right to peremptorily strike persons thought to be inclined against their interests; thus, state

may properly exercise its peremptory challenges to strike prospective jurors who are opposed to the death penalty but not subject to challenges for cause). Morrison has presented no sufficient basis for overturning this recent precedent.

ISSUE IV

THE JURY WAS NOT MISLED ABOUT THE STATE'S BURDEN OF PROOF

During the voir dire examination, the prosecutor, after stating that the standard of proof was "beyond a reasonable doubt," asked the prospective jurors, "Do you all understand that you don't have to be 100 percent, absolutely convicted [sic] that this man committed the crime in order to return a verdict of guilty?" (V11T98). Defense counsel immediately objected to what he characterized a misstatement of the law, and moved to strike the panel. The prosecutor disagreed that he had misstated the law, but had no objection to the court reading and in fact encouraged the trial court to reading the standard jury instruction to the jury panel (V11T99). The court sustained the objection, denied the motion to strike the panel, and read the standard reasonable doubt instruction to the jury panel, telling the jurors to "disregard the statement made by Mr. Taylor regarding the 100 percent issue" (V11T100-102).

Morrison contends the trial "court reversibly erred by not striking the panel." Initial Brief of Appellant at 56. The State does not agree.

First, the State does not agree that the prosecutor misstated the law. All he said, in effect, was that beyond a reasonable doubt does not mean beyond all doubt, which is true.[8] Gilday v. Callahan, 59 F.3d 257, 261-62 (1st Cir. 1995) (not improper to explain that, while the requisite level of confidence was indeed substantial, it did not require proof beyond *all* doubt, or to say that the certainty required was less than a mathematical certainty). While the beyond-a-reasonable-doubt standard requires proof to a "high level of probability," it does not require proof beyond all doubt. Victor v. Nebraska, 511 U.S. 1, 114 S.Ct. 1239, 127 L.Ed.2d 583 (1994) (the reasonable doubt standard is "probabilistic;" where the facts are in dispute, "the factfinder cannot acquire unassailably accurate knowledge of what happened;" instead, "all the factfinder can acquire is a belief of what *probably* happened")(quoting In re Winship, 397 U.S. 358, 90 S.Ct.1068, 25 L.Ed.2d 368 (1970), Harlan, J., concurring). Nothing in the prosecutor's comments compared reasonable doubt to a "grave uncertainty," or indicated that a doubt must be not only "reasonable" but "substantial," phrases which, in a jury instruction, might be interpreted by a juror to allow a finding of guilt based on a degree of proof below that required by the Due

[8] To be 100% sure means that one has no doubt whatever. More than 100% certainty is not possible.

Process Clause. Cage v. Louisiana, 498 U.S. 39, 111 S.Ct. 328, 112 L.Ed.2d 229 (1990).

Nothing in State v. Wilson, 686 So.2d 569 (Fla. 1996), on which Morrison relies, holds to the contrary. Although the court's preliminary instruction there did distinguish beyond a reasonable doubt from absolute certainty, this Court in Wilson did not indicate that this portion of the instruction was problematic. It appears, rather, that this Court was more concerned with the trial judge's repeated emphasis on the limits to the state's burden.

Furthermore, and perhaps more importantly, the real distinction between this case is, first, that there is no issue in this case of any instruction by the court; the comment at issue was made by the prosecutor, not the judge. Second, the trial judge in effect sustained the objection and instructed the jury to disregard the comment. Third, the judge immediately read the standard reasonable doubt instruction to the jury, and repeated that standard instruction in its charge to the jury following the close of the evidence and argument of counsel. In Wilson itself, this Court found that any ambiguity in the *court's* comments was clarified satisfactorily by the standard reasonable doubt instruction that the court. It stands to reason that the court's immediate action in this case negated any possible error in the *prosecutor's* voir dire question.

Morrison argues that the error was not cured because a prospective juror later said that he would have to be "a hundred percent sure before I could put somebody's life on the line." To the extent this juror was confused about the proper standard of proof, the confusion was favorable to the defense, as this juror would have applied a higher standard of proof than that required by law. In any event, this prospective juror was peremptorily struck by the state and did not serve as a juror in this case, so no harm occurred.

Finally, Morrison contends the prosecutor misstated the law in his closing argument. There was no objection to this argument, however (V15T955-56). Furthermore, the defendant did claim in his statement to police that the disabled victim had attacked Morrison and in the process had stabbed himself twice. Therefore, it was not inaccurate for the prosecutor to state that the defendant "would have us believe" that the elderly, disabled victim had attacked Morrison, that Morrison had been forced to defend himself, and that during his attack the victim had twice cut his own throat. Furthermore, the comment that the prosecutor had not yet "heard the defense in this case" was true, as this comment occurred before defense counsel had argued. Morrison cites no authority to support his contention that this comment somehow shifted the burden of proof to him, or otherwise served to "minimize" the state's burden of proof. The State would contend that the prosecutor's argument

was not erroneous at all, but if there was any error, it was not fundamental. Absent any objection, no reversible error has been shown.

ISSUE V

MORRISON VOLUNTARILY CONFESSED AND THE TRIAL COURT PROPERLY DENIED THE MOTION TO SUPPRESS; THERE WAS NO MISCONDUCT BY POLICE SUFFICIENT TO OVERBEAR MORRISON'S WILL, AND THE FACT THAT MORRISON MAY HAVE BEEN MOTIVATED IN PART BY HIS OWN RELIGIOUS BELIEFS DOES NOT REQUIRE THE EXCLUSION OF HIS CONFESSION

Morrison filed pretrial motions to suppress his statements to police as well as evidence discovered as the result of the interrogation. Morrison contended that the interrogation was unconstitutional because it continued after Morrison invoked his right to silence and his right to counsel and because his statements were obtained as the result of coercion, including the State's improper use of religion. An evidentiary hearing was conducted on these motions and allegations.

Police patrol officer Antonio Richardson testified first. Besides being a police officer, he is an ordained minister (V8R1273). Richardson did not know Morrison, and had never seen him prior to his arrest (V8R1291-92). Morrison quickly became a suspect in the police investigation; Richardson was instructed to find Morrison and arrest him on an outstanding writ of attachment (V8R1266-67). With the help of a confidential informant, who told

Richardson that Morrison had been buying drinks and smoking crack the previous evening, Richardson went to the Marietta area, where he located Morrison in a trailer (V8R1267, 1292). Richardson arrested Morrison at 3:30 p.m. on January 10 (V8R1290). Richardson handcuffed Morrison, advised him of his Miranda rights and placed him in the back of his patrol car (V8R1267-68). Morrison did not appear at that time to be under the influence of drugs or alcohol (V8R1268-69). Morrison asked Richardson why he was being arrested; he wanted to know if it had anything to do with the "old man that was killed" (V8R1270). Richardson told him he was being arrested on child support charges (V8R1270). Richardson testified that he did not initiate the conversation; in fact, he did not want to talk about the crime because he did not want to be a witness (V8R1270). Morrison never invoked his right to counsel or to silence; in fact he seemed to want to talk (V8R1270-71). Richardson could not recall for sure how the subject of religion came up; he testified that he might have brought it up himself, but only after Morrison told Richardson that he had a problem with alcohol and crack cocaine and wanted to get his life straight (V8R1271-72). Morrison said he had been a Christian but had "backslid" and wanted to be restored back to God (V8R1272). Richardson told him if he wanted to be restored, he needed to "get back in the right relationship with Christ" (V8R1272). Richardson never told Morrison that if he did not confess that he was going to Hell or would suffer eternal

damnation; nor did he promise Morrison eternal paradise if he did confess (V8R1274). Richardson did not try to elicit a confession, and Morrison did not confess to Richardson (V8R1274). Nor did Richardson tell Morrison that could truly repent only if he confessed his guilt; in Richardson's belief, "only to God do you confess" (V8R1297). However, he did advise Morrison to tell the detectives the truth (V8R1297). When they arrived at the Police Memorial Building, Richardson waited for a while with Morrison. Richardson told him that when his situation was resolved, to give Richardson a call; that Richardson could take him to church or something (V8R1274-75). Richardson then left and went first to church and then home (V8R1276-77).

At the police station, Morrison was interrogated by detectives Therman Davis and Terry Short. Short was the lead detective and administered Miranda warnings (V8R1313). Morrison did not appear to be under the influence of drugs or alcohol (V8R1315-16).

Davis testified that Morrison never asked for an attorney (V8R1317). Nor did he ever state that he did not want to talk to police "as a group," although at one point Morrison did state that he did not want to talk to Davis, when, after Davis got frustrated at all the different stories Morrison was giving, Davis pounded the table and shouted at Morrison (V8R1318-19). At that point, Morrison told Davis: "I don't like you. I ain't going to talk to you anymore" (V8R1319). Davis testified that when Morrison said

this, he was calm and did not appear frightened (V8R1319). Davis said, fine, I don't want to talk to you either, and he did not talk to Morrison after this incident (V8R1319-20).

Davis testified that he did not know that officer Richardson was minister until shortly before the hearing (V8R1329).

Detective Short testified that after developing Morrison as a suspect, he had discovered that there was an outstanding writ of attachment on Morrison. Short instructed officer Richardson to find Morrison and arrest him on that writ (V8R1333). Although Short was one of Richardson's training officers, Short did not know he was an ordained minister (V8R1334). He did not instruct Richardson to question Morrison or even talk to him (V8R1335). To Short's knowledge, Richardson did not talk to Morrison about the murder of Albert Dwelle (V8R1335). When Short first encountered Morrison, he was in an interview room alone, while Richardson was in the homicide office (V8R1335).

Short advised Morrison of his Miranda rights; Morrison appeared not to be under the influence of any intoxicant and was "totally coherent" (V8R1337-40). Morrison never at any point during the interview asked for an attorney (V8R1341-42).

At one point, after Morrison gave numerous conflicting accounts about his whereabouts and activities, Short told Morrison he wanted to establish a time line to clarify what his actions had been (V8R1368-69). Morrison said he did not understand why Short

wanted to go over that again, because Davis had it all in the notes he had been taking (V8R1369). Short explained that he could not repeat his stories, he kept changing them, and there were so many inconsistencies he wanted to do a time line (V8R1369-70). Morrison never said he wanted the interrogation to cease, or that he did not want to talk to police, although at one point he did say he did not want to talk to detective Davis, after Davis struck the table in frustration and told Morrison in a loud voice that he was a liar (V8R1343). Short was "shocked," and he thought Morrison probably was, too, but he did not think Morrison was "intimidated" (V8R1343). Morrison told Davis he was not going to talk to him anymore; Short took Davis out of the room, and Davis never again talked to Morrison (V8R1344).

Short continued the interrogation alone. He testified that during the course of the interrogation, they did not talk just about the homicide itself. Some of the conversation was small talk. At one point, Morrison asked Short if he was a religious person; Short told him he really was not "religious" but he did believe in God, and there was a 10-15 minute conversation about that. Short testified that he began to feel like he "owed" Morrison some consideration, and offered Morrison the opportunity to pray.[9] Because Morrison had express some concern about the two-

[9] At trial, Short testified that Morrison told him he was upset and wanted to pray (V13T570).

way mirror in the interrogation room, Short offered to take him down the hall to the chapel (V8R1349-50). Once there, they knelt, and, although Short had expected a silent prayer, Morrison prayed aloud, something to the effect that "he had done something terrible, it was the worse [sic] thing that he had ever done, and that he was going to leave it in God's hands at this point" (V8R1352). Afterwards, they sat there for a couple of minutes, and Morrison told Short that at this point he was not going to say that he did it or that he did not do it (V8R1353). Short assumed Morrison was finished, and they got up to return to the interrogation room. On the way back, Morrison told him, "I will eventually tell you the things you need to know, but right now I just need some time to think about this thing" (V8R1353). Short offered to have anyone Morrison wished brought to the station; Short expected Morrison might ask for a relative or friend (V8R1344). Instead, Morrison asked for officer Richardson, who he called the "preacher policeman" (V8R1344-45). Richardson was called to the station, and talked to Morrison "one-on-one" (V8R1346). Richardson did not tell Short what he and Morrison had talked about, and "to this day" had not told Short what had transpired (V8R1346).

Richardson testified that he was called back to the station shortly before midnight (V8R1301). Short told him that Morrison wanted to talk to him; Short did not know why, but did tell

Richardson that they had been in the chapel earlier for prayer (V8R1277-78). When Richardson walked into the interrogation room, Morrison was there alone. Morrison told Richardson he did not want to talk to the other officers anymore, just to arrest him on the child support charge, he was ready to go on to jail (V8R1278-79). Richardson said, fine, why am I here, and turned to go. Morrison stopped him and said, wait, I want to talk to you (V8R1278-79). Morrison told Richardson he wanted to tell him something, but he did not want it to hurt him; he requested a Bible (V8R1281). Richardson at first assumed that Morrison had wanted to talk to him because he thought he would feel more comfortable with a black officer, but when he asked for the Bible, he realized Morrison wanted spiritual counseling (V8R1303). Richardson told him their conversation would be between the two of them and asked him what was it he wanted to say (V8R1282). They prayed and then had a conversation, which Richardson divulged only when subpoenaed by defense counsel for deposition (V8R1282). Richardson has never told Short or Davis what was said (V8R1283). He testified he quoted to Morrison "the Scripture that says we reap what we sow" (V8R1304). Morrison told him that he had not killed Mr. Dwelle; Richardson responded that he assumed that he had not (V8R1305). Eventually, he told Richardson he wanted to talk to detective Short again and tell him the truth (V8R1283). After a bit, Morrison told Short the same thing he had told Richardson (V8R1285).

Short testified that he went in, sat down, and stated to Morrison that he understood Morrison wanted to talk now. Short reminded Morrison that he did not have to talk to him and was free not to. However, Morrison said he wanted to talk (V8R1347). In his statement to Short, Morrison admitted going into the victim's apartment and attempting to take money from the victim's shirt pocket; he stated that when he did, the victim had attacked him with a knife and that during the struggle the victim had accidentally cut his own throat twice (V8R1347-48).

Morrison testified on his own behalf at this hearing. He insisted that he had told detectives at the outset that he did not want to talk to them, and also had asked that he be allowed to call his father so he could get a lawyer (V8R1394-95). He testified that his requests were ignored. He also testified that it was Short's idea to call officer Richardson; Morrison did not want to talk to Richardson or anyone else (V8R1397). He acknowledged, however, that he was the one who had brought up the subject of religion (V8R1398). Although he testified that Richardson had told him he had to talk to the detectives, he also conceded that "he didn't really say I had to talk to them" (V8R1402). Morrison testified that, in any event, he knew he did not have to talk to anyone (V8R1406). In fact, he contended that he had not done so and had not confessed (V8R1407).

Although contending below that the confession should have been excluded because the interrogation continued after Morrison invoked his right to silence and to counsel, Morrison argues neither ground on appeal. As to these claims, the State would just note that the record supports the trial court's determination that Morrison never asked for an attorney and did not attempt to terminate Short's interrogation V5R801).[10] The only claim Morrison raises on appeal concerns the allegedly illicit appeals to his religious sympathies.

The State would note, first, that there is no issue in this case of the "Christian burial technique," which is "the practice of inducing a detainee to tell the location of a homicide victim's body so it can receive a proper burial service." Johnson v. State, 660 So.2d 637 (fn. 1) (Fla. 1995)(citing Roman v. State, 475 So.2d 1228(Fla. 1985)). Even use of a "Christian burial technique" does not require suppression per se; instead, the court considers the totality of the circumstances to determine whether a reference to the need to find the victim's body is sufficient to make an otherwise voluntary statement inadmissible. Lukehart v. State, No. SC90507 (Fla., decided June 22, 2000) (citing Hudson v. State, 538 So.2d 829, 830 (Fla. 1989)).[11] In this case, it is clear that

---

[10] The trial court did find that Morrison told Richardson that he, in effect, wanted to terminate the interrogation, but that when Richardson turned to go, Morrison reinitiated the interrogation (V5R800).

[11] The Seventh Circuit Court of Appeals does not agree that the Christian burial technique described in Brewer v. Williams, 430

Morrison was properly advised of his rights, including his right to remain silent and to counsel. In fact, Morrison successfully exercised his right to silence as to detective Davis, when Davis acted in a way that was offensive to Morrison. Furthermore, although Richardson advised Morrison to accept Jesus and to get right with God, he never suggested to Morrison that the only way to do that was to confess to murder; in Richardson's view, Morrison's only Christian obligation was to confess to God, not to the police. And it is worth noting that Morrison did not actually confess to having killed the victim himself. Nor is there evidence to show that either Richardson or Short planned to use religion to get Morrison to confess. Richardson never planned to obtain a confession, and had no desire to become involved in this case. As for Short, it was Morrison, not Short, who first brought up the subject of religion. Now, once he did so, Short may very well have attempted to create a favorable climate for confession by attempting to strike an emotional chord with him, but there is nothing inherently wrong with that. U.S. v. Barlow, 41 F.3d 935

U.S. 387, 97 S.Ct. 1232, 51 L.Ed.2d 424 (1977) is a coercive form of interrogation. See Barrera v. Young, 794 F.2d 1264 (7th Cir. 1986) ("[I]t is unimportant that Anderson played on Barrera's religious convictions. This is just a form of interrogation, and Barrera knew he would be interrogated. Brewer involved an appeal to religion, but the nature of the appeal was important to the conclusion that the officer's statement was a form of interrogation; it was the fact of interrogation, and not the method, that was objectionable in Brewer."). See also, Kamisar, Brewer v. Williams, Massiah, and Miranda: What is Interrogation? When Does it Matter?, 67 Geo. L. J. 1 (1978).

(fn. 26) (5th Cir. 1994) ("There is nothing inherently wrong with an officer attempting to create a favorable climate for confession by attempting to strike an emotional chord with a defendant."). Nor is it improper to appeal to a defendant's self interest, even if that self interest is based, in part, on a defendant's pre-existing religious beliefs. Barrera v. Young, 794 F.2d 1264, 1270 (7th Cir. 1994) ("Anderson's reminder to Barrera that if he believes in an afterlife he must consider the effect of his crimes and his failure to confess is again an appeal to Barrera's (very long run) self interest. It is difficult to describe an appeal to religious beliefs as unacceptable in our society; such appeals are common parts of life and need not cease at the door of the jail. Barrera could have cut Anderson short and said that he wanted to hear such appeals only from a priest or a friend, but he did not. He found the appeal compelling, and a rhetorical device does not become illegitimate just because it is effective."). The circumstances in this case are similar to those in Welch v. Butler, 835 F.2d 92 (5th Cir. 1988). There, a professed born-again Christian police officer listened to a tape of a conversation between the defendant and his wife in which the defendant had expressed the concern that God would never forgive him for murder. The police officer, concerned that the defendant misunderstood the nature of divine forgiveness, entered the room, identified himself as a police officer, and discussed forgiveness and salvation and

prayed with the defendant. During this three hour session, the defendant made incriminating statements. The Fifth Circuit found no coercion, stating:

> There can be no doubt that Welch's confession was not the product of will overborne by the police. One does not have to be devout to accept the fact that Welch was concerned about his salvation and about divine forgiveness. However, this concern existed before his conversations with Easley. At most, the police set up a situation that allowed Welch to focus for some time on those concerns with a fellow Christian in the hope that his desire to be saved would lead him to confess. What coercion that existed was sacred, not profane.

Id. at 95. The record in this case supports the trial court's conclusion that Morrison's confession was the product of reason and free will. According the trial court's conclusion the deference it deserves, Walker v. State, 707 So.2d 300, 311 (Fla. 1997), this issue clearly is meritless.[12]

---

[12] Morrison cites two California cases, an Arizona case and one Arkansas case. Although the State would suggest that federal cases are more persuasive precedent concerning constitutional issues than other state cases, these cases do not in any event support his position. In the Arkansas case, the court found that the confession was not involuntary. Noble v. State, 892 S.W.2d 477 (Arkansas 1995). As for the California cases, in one, the officers had continued the interrogation after no less than ten invocations by the defendant of his right to silence, People v. Montano, 277 Cal.Rptr. 327 (1991); in the other, one of the interrogating officers was a close friend of the defendant, having developed that friendship through church, and, among other things, told the defendant she would suffer divine retribution, including possibly severe mental illness, if she did not confess; he also told her she might serve only 4-7 years in prison if convicted. People v. Adams, 192 Cal.Rptr. 290 (1983). In the Arizona case, the court found that appeals to religious or moral sentiment are generally admissible, and that a detective's statement to a defendant of

ISSUE VI

THE TRIAL COURT DID NOT IMPROPERLY LIMIT DEFENSE CROSS-EXAMINATION, NOR ERR IN SUSTAINING THE STATE'S OBJECTION A DEFENSE ATTEMPT TO ESTABLISH BAD CHARACTER OF A STATE'S WITNESS BASED ON THE PERSONAL KNOWLEDGE OF DEFENSE WITNESS RATHER THAN ON REPUTATION IN THE COMMUNITY

Here, Morrison complains about two rulings by the trial court sustaining a state's objection to testimony.

In the first instance, Morrison contends the court erred in sustaining the state's objection to a defense question posed to Sandra Brown, who was the father of Morrison's child and who lived across the hall from the victim. Defense counsel had already established on cross-examination that police had talked to her at her apartment and then "downtown," and that upon being brought to the police station, detectives had advised her of her constitutional rights (V13T405-06, 411). The question to which the objection was sustained was: "Police ever tell you, ma'am, that when your were brought down and read your rights, detective ever tell you that he didn't believe you had nothing to do with this?" (V13T411). Morrison argues now that the purpose of this question was to attack Brown's credibility by implying that Brown herself had been a suspect and had in interest in deflecting suspicion away

---

below-average intelligence, to the effect that everybody has to answer to God for what they did and how did the defendant think he would answer to God for his acts, did not render subsequent confession inadmissible. State v. Adams, 703 P.2d 510 (Arizona Appeals 1985).

from herself. Initial Brief of Appellant at 83. If this was the purpose, however, it was not the question defense counsel asked; counsel did not ask Brown if she considered herself a suspect, or even if she considered herself a suspect based on what police had told her; instead, he asked a question which, on its face, attempted to elicit the hearsay statement of a third party. Morrison has not shown that he was in any way prevented from establishing properly that Brown considered herself a suspect for any reason. Moreover, Morrison had the opportunity to pursue this subject with Detective Morrison, so any possible error is harmless.[13]

In the second instance, Morrison complains of the exclusion of Delores Tims' testimony as to whether or not Sandra Brown was truthful. The trial court excluded such testimony because, in the court's view of her proffered testimony, she was basing her conclusion on her own personal experience of having caught Brown in a lie on one occasion rather than on Brown's reputation in the community. Morrison concedes that this Court has "made clear that specific acts of lying is [sic] inadmissible for impeachment while general reputation for lack of truthfulness is admissible." Initial Brief of Appellant at 88. However, he argues that the

[13] Detective Short testified on cross-examination that he had Mirandized Brown both at the apartment and at the police station; although he did not "really see her as a suspect," he did feel that she might have some knowledge of the crime or could "possibly have played a role in it.

trial court's finding is not supported by the record, which, he contends, shows that in fact Tims had two bases for her conclusion, her personal experience *and* her knowledge of Brown's reputation in the community.

It is true that Tims initially seemed to be saying that her testimony was based on her knowledge of Brown's reputation in the community. However, when questioned about her knowledge of Brown's reputation, Tims talked only about her own experience with Brown. From the proffer as a whole, the trial court was justified in concluding that Tims really did not know Brown's reputation in the community and was testifying only about a specific act of lying with which Tims was personally familiar. Furthermore, even if the court's ruling were error, any error was harmless because Tims' testimony would have been cumulative to that presented by Georgia Bell Morrison, who testified that she knew Brown's testimony in the community for truthfulness and that reputation was that she "is a big liar" (V15T912).[14]

Morrison has not shown any abuse of discretion in the trial court's evidentiary rulings at issue here. Asay v. State, No. SC90963 (Fla. June 29, 2000); Kearse v. State, 662 So.2d 677, 684 (Fla. 1995); Blanco v. State, 452 So.2d 523 (Fla. 1984).

[14] In addition, while Brown's testimony was not unimportant, it was hardly the most incriminating evidence presented by the State.

ISSUE VII

THE TRIAL COURT DID NOT ERR IN DENYING MORRISON'S MOTION FOR JUDGMENT OF ACQUITTAL AS TO FIRST DEGREE MURDER

At the close of the state's case, defense counsel moved for a judgment of acquittal on all counts. He argued that there was no evidence of a nonconsensual entry and no evidence that Morrison had taken anything (V15T822-23). As for premeditation, defense counsel stated only that the state had not "shown [a] prima facie case of any kind of premeditation" (V15T823). At the close of the evidence, defense counsel renewed the motion for judgment of acquittal, without adding anything to what he had already stated (V15T932). Morrison argues that the trial court erred in denying his motion for judgment of acquittal as to murder and burglary.

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

> We have repeatedly reaffirmed the general rule established in Lynch v. State, 293 So.2d 44 (Fla. 1974) that:
>
> > [C]ourts should not grant a motion for judgment of acquittal unless the evidence is such that no view which the jury may lawfully take of it favorable to the opposite party can be sustained under the law.
>
> Id. at 45; see Gudinas v. State, 693 So.2d 953 (Fla. 1997), cert. denied, ___ U.S. ___, 118 S.Ct. 345, 139 L.Ed.2d 267 (1997); Barwick v. State, 660 So.2d 685 (Fla. 1995); DeAngelo v. State, 616 So.2d 440 (Fla. 1993); Taylor v. State, 583 So.2d 323 (Fla. 1991).

Gordon, supra at 112. Furthermore:

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

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

Applying these principles to this case, it is clear that the trial court properly denied the motions for judgments of acquittal.

Morrison first contends the evidence is insufficient to show premeditation because the killing was "spontaneous," and because the most serious injury "was not even deep enough to sever major blood vessels. Initial Brief of Appellant at 89-90.

Premeditation of course involves "a prior intention to do the act in question." Lowe v. State, 105 So. 829, 831 (Fla. 1925). Without such prior intention on the part of the killer, the killing is not premeditated murder. It is well settled, however, that it is not necessary "that this intention should have been conceived

for any particular period of time. . . . It is sufficient if the prisoner deliberately determined to kill before inflicting the mortal wound. If there was such purpose deliberately formed, the interval, if only a moment before its execution, is immaterial." Ibid. "Premeditation need only exist for such time as will allow the accused to be conscious of the nature of the act the accused is about to commit and the probable result of the act." Buckner v. State, 714 So.2d 384 (Fla. 1998).

Inherently, premeditation cannot be proved by third-party direct evidence. A defendant's "mental conception lies beyond the scrutiny of exact observation" by others. Lowe, supra. The defendant is the only eyewitness to his own mental processes; therefore, only the defendant's own statements can provide direct evidence of premeditation. Thus, if the defendant does not confess, "circumstantial evidence [is] the only medium of proof available" to the State by which it can prove premeditation. Ryan v. State, 92 So. 571, 572 (Fla. 1922). It is well settled, however, that the "character of the homicide and the element of premeditation may by proved by circumstantial evidence; the jury being privilege to infer the existence of premeditation and the unlawful character of the homicide from the evidence submitted as they may infer the existence of any other material element in a criminal charge." Ibid. See also, Barnhill v. State, 48 So. 251, 257 (Fla. 1908) ("The human mind acts with celerity which it is

sometimes impossible to measure. Whether a premeditated design to kill was formed must be determined by the jury from all the circumstances of the case.").

Furthermore, the jury is not required to completely accept the defendant's statements about the crime, even though those statements may provide the only direct evidence of his intent. It is within the jury's province to determine the credibility of witnesses, Fierstos v. Cullum, 351 So.2d 370, 371 (Fla. 2d DCA 1977), and the jury is no more required to believe a non-credible defense statement than it is required to believe any non-credible witness. Barnhill v. State, supra (the testimony was in conflict, but the jury did not believe the defendant's version of the events); Ryan v. State, supra (jury reasonably inferred that the defendant's account was "more or less a fabrication"); Woods v. State, 733 So.2d 980, 986 (Fla. 1999) ("circumstantial evidence rule does not require the jury to believe the defendant's version of the facts where the State has produced conflicting evidence"); Pietri v. State, 644 So.2d 1347 (Fla. 1994) (jury was not required to believe defendant's testimony that he accidentally shot the victim).

Here, the defendant stated to police that the victim had attacked him with a knife, that there was a struggle, and that while he held the victim from behind, the victim had stabbed himself *twice* in the neck, killing himself. Morrison's statement

that the victim had stabbed himself, however, defies common sense.[15] Morrison's further contention that the wounds were minor because the "most severe injury" was not even deep enough to sever major blood vessels (Initial Brief of Appellant at 90), is belied by the testimony. There were two major knife wounds to the victim's neck. One was an incised wound from left to right across the victim's neck. It is true that this wound, which looked "bad," did not go "deep" enough to sever the jugular veins or carotid artery (V15T806). But is hardly a minor wound. Furthermore, the other wound was a stab wound that was *four and three quarters of an inch long*; in inflicting this wound, Morrison not only cut the victim's esophagus, but also actually nicked the vertebrae in the victim's neck (V15T807, 812). This was a "deep, long wound" (V15T807) to a vital spot, sufficiently injurious to cause the victim to drown in his own blood (V15T810). The jury was amply justified in concluding that it demonstrated Morrison's intent to kill. Jiminez v. State, 703 So.2d 437, 440 (Fla. 1997) (deliberate use of a knife to stab a victim multiple times in vital organs, alone, is evidence that can support a finding of premeditation).

But, Morrison argues, the killing was not preplanned, but was the result of the victim's "spontaneous and unexpected" assault on Morrison. However, there were minimal signs of any struggle; the

[15] Morrison's own defense expert testified at the penalty phase that there was "no way" the victim's wounds were self inflicted (V16T1154).

few superficial abrasions that were present in addition to the two major knife wounds were consistent with the victim being held from behind in a head lock, stabbed twice in the neck, and the being dropped onto the floor.

In fact, Morrison's whole claim of having been attacked by the victim borders on the ridiculous. The victim was over 80 years old and severely disabled. His left arm was atrophied to the point that it was barely more than a club. He could not use this arm at all. His right leg was also deformed and atrophied. He could barely walk or even stand; he shook so much he could not even sign his own name. He could not even bathe or dress without assistance. Based on the evidence presented, the jury was entitled to reject Morrison's claim that he had acted in self defense and that the victim had stabbed himself.

Furthermore, even if Morrison had not intended to kill when he first entered the apartment, the jury was entitled to conclude that he "deliberately determined to kill before inflicting the mortal wound," Lowe v. State, supra, and that this intent existed for such time as to have allowed Morrison "to be conscious of the nature of the act [he] was about to commit and the probable result of the act." Buckner v. State, supra. As the trial court noted in its sentencing order, when the court rejected the proffered mitigator that the killing was unintentional, Morrison was a regular visitor to the apartment adjacent to the victim's; had the victim survived,

he could have identified Morrison (V7R1184) . This circumstance, coupled with the nature of the wounds inflicted plus the victim's inability to defend himself, belie any claim that the killing was unintentional or that Morrison was not conscious of the nature of his act or its probable result. Because reasonable jurors could reject Morrison's theory of non-premeditation and conclude that he committed premeditated murder, the trial court did not err in denying Morrison's motion for judgment of acquittal as to premeditated murder.

It must be noted that the State need not exclude *all possibility* of any reasonable conclusion save that of guilt. Such a standard would, in effect, require the State to prove a defendant's guilt beyond *all doubt* in a circumstantial-evidence case, and that is not the law of Florida. It is true that, under present law, when the State seeks to prove premeditation to the jury by circumstantial evidence, the evidence must be consistent with guilt and inconsistent with every other reasonable inference. Cochran v. State, 547 So.2d 928 (Fla. 1989). However, it is also true that:

> [T]he question of whether the evidence fails to exclude all reasonable hypotheses of innocence is for the jury to determine, and where there is substantial, competent evidence to support the jury verdict, the verdict will not be reversed on appeal. [Cits.] The circumstantial evidence standard does not require the jury to believe the defense version of facts on which the state has produced conflicting evidence, and the state,

> as appellee, is entitled to a view of any conflicting evidence in the light most favorable to the jury's verdict. [Cit.]

Cochran v. State, supra at 930. Furthermore, when reviewing a motion for judgment of acquittal:

> It is the trial judge's proper task to review the evidence to determine the presence or absence of competent evidence from which the jury could infer guilt to the exclusion of all other inferences. That view of the evidence must be taken in the light most favorable to the state. [Cit.] The state is not required to "rebut conclusively every possible variation" of events which could be inferred from the evidence, but only to introduce competent evidence which is inconsistent with the defendant's theory of events.

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

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

Taylor v. State, 583 So.2d 323, 328 (Fla. 1991). For all the foregoing reasons, the trial court did not err in concluding that the evidence of premeditation was sufficient to go to the jury.

Furthermore, any error in instructing the jury as to premeditated murder was harmless as a matter of law, because the evidence sufficed to support a conviction for first degree felony murder. Griffin v. United States, 502 U.S. 46, 112 S.Ct. 466, 116 L.Ed.2d 371 (1991); Jones v. State, 748 So.2d 1012, 1024 (Fla. 1999); Mungin v. State, 689 So.2d 1026 (Fla. 1995).

Morrison concedes that the evidence suffices to show that the murder was committed during a robbery, but argues that his conviction for first degree murder may not stand because the evidence does not support two of the State's theories of guilt, i.e., premeditation and committed during a burglary. The State addressed premeditation above. As for burglary, citing Delgado v. State, 25 Fla. L. Weekly S79 (Fla. Feb. 3, 2000), Morrison argues that he cannot be guilty of burglary because the victim allowed him to enter. Delgado is pending on the State's motion for rehearing, in which the State has asked this Court to withdraw its opinion and reinstate previous law on the subject. Under previous law, evidence of a struggle can supply the necessary evidence of an unlawful remaining following an invited entry. Ray v. State, 522 So.2d 963, 965 (Fla. 3d DCA 1988). The State would rely on Ray and its progeny. Should this Court deny the State's motion for rehearing in Delgado, however, the evidence still suffices to establish burglary in this case. According to the defendant's own statement, the victim told Morrison he could not come in (V13T587). Then, according to Morrison, when the victim went back into the apartment, Morrison "opened the door" and followed the victim to his bedroom (V13T580). This does *not* constitute an invited entry, and the mere fact that the victim failed to lock the door after closing it does not make Morrison's subsequent entry in any way consensual.

Even if this Court were to determine that felony murder robbery was the only State theory supported by the evidence, that would still suffice to support Morrison's conviction for first degree murder, under precedents from both this Court and the United States Supreme Court, and Morrison can cite no precedent to the contrary.

ISSUE VIII

THE TRIAL COURT PROPERLY INSTRUCTED THE JURY AS TO THE HAC AGGRAVATOR AND PROPERLY FOUND THAT THE STABBING MURDER OF A DISABLED ELDERLY VICTIM WAS HAC

Morrison argues here that the HAC aggravator and the instruction thereon is unconstitutionally vague. In addition, he contends this murder is not HAC.

The standard HAC instruction given in this case is the same instruction this Court approved in Hall v. State, 614 So.2d 473, 478 (Fla. 1993). Since that time, this Court has consistently rejected claims that either the HAC aggravator or our present HAC instruction is constitutionally deficient. Nelson v. State, 748 So.2d 237, 245-46 (Fla. 1999); Walker v. State, 707 So.2d 300, 316 (Fla. 1997); Chandler v. State, 702 So.2d 186, 201 (Fla. 1997). The trial court did not err by giving this instruction in this case.

Morrison concedes that the victim suffered "multiple injuries." Initial Brief of Appellant at 90. He argues, however, that this murder is not HAC because it was a "spontaneous theft

gone bad" and that "the stabbing occurred during a life-or-death struggle" that began when the victim attacked Morrison causing Morrison to defend himself. Initial Brief of Appellant at 95.

It is the State's position, first, this was not a theft that went "bad," but was from the very outset at least a burglary.[16] Burglary is a serious crime that is "bad" to *start with;* that's why a murder committed during a burglary is statutorily defined as an "aggravated" murder. Furthermore, Morrison's claim that he was engaged in a "life or death" struggle with the victim is belied by the evidence that the victim was incapable of putting up a fight, even if, as Morrison claimed, he did attempt to resist the theft of his money. The only signs of a "struggle" were bruises and abrasions on the victim's head indicating that he had been held from behind in a headlock, plus very minor abrasions on his arm indicating he had been dropped after having his throat cut. There is no evidence that Morrison was injured at all. Given the victim's advanced age and significant disabilities, it is obvious that the only person whose life was ever at stake was the victim's.

The "HAC aggravating circumstance has been consistently upheld where the victim was repeatedly stabbed." Guzman v. State, 721 So.2d 1155, 1159 (Fla. 1998). Accord, e.g., Brown v. State, 721 So.2d 274, 277 (Fla. 1998); Mahn v. State, 714 So.2d 391, 399 (Fla.

[16] The trial court found in its sentencing order that Morrison entered the victim's apartment without permission for the purpose of taking the victim's property (V7R1181).

1998); Atwater v. State, 626 So.2d 1325, 1329 (Fla. 1993). In this case, the victim was cut twice in the neck, one cut being deep enough actually to nick the spine. Furthermore, the injuries inflicted were massive; Morrison's own expert described the victim's injuries as "worse than a tracheotomy," because his vocal cords were rendered useless, he could not talk or breathe, and he inhaled a massive amount of his own blood from the "tremendous hemorrhage" (V16T1146, 1154). Although the two experts disagreed about how long the victim may have remained alive, death clearly was not immediate, as the blood in the victim's nostrils could only have been caused by the victim trying to breathe in his own blood (V16T1162, 1167). Clearly the victim suffered pain from his wounds and from being unable to breathe. Regardless of Morrison's intent to inflict pain on the victim, the means and manner in which death was inflicted in this case justify the HAC finding. Brown, supra at 277 ("Unlike the cold, calculated and premeditated aggravator, which pertains specifically to the state of mind, intent and motivation of the defendant, the HAC aggravator focuses on the means and manner in which the death is inflicted and the immediate circumstances surrounding the death."); Guzman, supra at 1160 ("The intention of the killer to inflict pain on the victim is not a necessary element of the aggravator."); Mahn, supra at 399 (Mahn's contention that HAC did not apply because he did not deliberately inflict pain rejected).

Stabbing murders are by their nature heinous, atrocious and cruel. The trial court did not err in finding the HAC aggravator in this case.

ISSUE IX

> THE VICTIM IN THIS CASE WAS OVER 80 YEARS OLD AND DISABLED; HE WAS CLEARLY "PARTICULARLY VULNERABLE" AS A CONSEQUENCE OF HIS AGE AND DISABILITY; BECAUSE THE AGGRAVATOR CLEARLY APPLIES IN THIS CASE, MORRISON MAY NOT CHALLENGE IT FOR VAGUENESS; FURTHERMORE, THE AGGRAVATOR GIVES SUFFICIENT GUIDANCE TO THE SENTENCER EVEN IF NOT SUSCEPTIBLE OF MATHEMATICAL PRECISION

The jury was instructed on, and the trial court found as a statutory aggravating circumstance, that the "victim of the capital felony was particularly vulnerable due to advanced age or disability." In its written sentencing order, the trial court found:

> The evidence established that the victim was eighty-one or eighty-two years old. The evidence also established that the victim had been totally disabled since childhood. The State has proved beyond any reasonable doubt that the victim was particularly vulnerable due to advanced age and disability. This aggravating circumstance was accorded great weight in determining the appropriate sentence in this case.

(V7T1183-84). Morrison contends this aggravator is unconstitutionally vague and overbroad. This claim is not preserved for appeal, as Morrison failed to object to it at trial. In fact, trial counsel conceded that the aggravator had been proved

and, indeed, suggested that it was "perhaps" the State's "strongest" aggravator (V10R1652).

Furthermore, even if Morrison had raised a constitutional vagueness complaint at trial, this Court would not need to address it. Regardless of any incremental nuance of decisional authority which may develop as cases involving this aggravator are presented to this Court in upcoming years, the aggravator clearly applies in this case. Given the victim's advanced age and near life-long serious disabilities, he clearly was "particularly vulnerable" to attack by Morrison. Therefore, Morrison's vagueness complaint need not be addressed, since "[o]ne to whose conduct a statute clearly applies may not successfully challenge it for vagueness." Parker v. Levy, 417 U.S. 733, 756, 94 S.Ct. 2547, 41 L.Ed.2d 439 (1974).

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

reasonable jurors would find this aggravator applicable in every case.[17] Second, the aggravating circumstance must not be unconstitutionally vague. Ibid. It is unconstitutionally vague, however, only if it fails to provide "any" guidance to the sentencer. Walton v. Arizona, 497 U.S. 639, 654, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990). An aggravator is not unconstitutionally vague simply because it "is not susceptible of mathematical precision," as that is often not possible. Tuilaepa, supra at 973. Therefore, review for vagueness is "quite deferential." Ibid. An aggravator is not unconstitutionally vague if it has "some 'common-sense core of meaning . . . that criminal juries should be capable of understanding.'" Ibid. (quoting Jurek v. Texas, 428 U.S. 262, 279, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976)(White, J., concurring in judgment)). If the aggravator provides the jury with "some guidance," the Eighth Amendment "requires no more." Sochor v. Florida, 504 U.S. 527, 112 S.Ct. 2114, 119 L.Ed.2d 326, 340 (1992).

It may be that the phrase "particularly vulnerable due to advanced age or disability" requires the sentencer to make a "subjective determination." Arave v. Creech, 507 U.S. 463, 472, 113 S.Ct. 1534, 123 L.Ed.2d 188 (1993). And this subjective

---

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

determination may be more difficult "than, for example, determining whether [the defendant] 'was previously convicted of another murder.'" However, that "does not mean that a State cannot, consistent with the Federal Constitution, authorize sentencing judges to make the inquiry and to take their findings into account when deciding whether capital punishment is warranted." Id. at 473.

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

Finally, Morrison also complains that the evidence does not show he chose this victim because of his age and disability. Although it seems highly likely that he did choose his victim for this reason, the statutory definition of this aggravator does not make the defendant's purpose an element of the aggravator. No matter why Morrison chose the victim, the fact remains that this victim was particularly vulnerable due to his age and disability. This fact justifies a more severe sentence, and the trial court properly found the aggravator.

ISSUE X

THE DEATH PENALTY IS A PROPORTIONATE SENTENCE FOR THE BRUTAL MURDER OF AN ELDERLY AND DISABLED VICTIM IN HIS OWN HOME, COMMITTED DURING A ROBBERY BY A DEFENDANT WHO HAD A CRIMINAL RECORD OF VIOLENT FELONIES

Morrison argues here that his death sentence is disproportionate. But there are four statutory aggravators in this case (prior violent felony, robbery/burglary/pecuniary gain, HAC, and victim particularly vulnerable due to advanced age and disability) and *no* statutory mitigators. Morrison is not brain damaged, and has no significant mental health problems except that he has abused alcohol and drugs. While is IQ is in the high borderline range, he is not mentally retarded. He did not have a deprived childhood. In cases similar to this one, this Court has upheld death sentences even though mental mitigation was presented. See, e.g., Bates v. State, 750 So.2d 6 (Fla. 1999) (victim stabbed; three aggravators, including murder committed during kidnapping and sexual battery, pecuniary gain and HAC, versus two statutory mitigators and several nonstatutory mitigators; testimony indicated some neurological impairment); Robinson v. State, 24 Fla. Weekly S393, S396-97 (Fla. August 19, 1999) (victim beaten and stabbed; three aggravators, avoid arrest, pecuniary gain and CCP, versus two statutory mental mitigators and evidence of abusive childhood, brain damage and heavy drug usage); Guzman v. State, 721 So.2d 1155 (Fla. 1998) (stabbing murder; after striking CCP on appeal, death

sentence affirmed based on four remaining aggravators of prior violent felony, avoid arrest, robbery and HAC, versus mitigation of alcohol and drug dependency); Zakrzewski v. State, 717 So.2d 488 (Fla. 1998) (victims killed with machete; three aggravators of CCP, HAC and prior capital felony versus two statutory mitigators including extreme mental or emotional disturbance and a number of nonstatutory mitigators); Cole v. State, 701 So.2d 845 (Fla. 1997) (victim beaten and stabbed; four aggravators - prior violent felony, murder committed during kidnaping, pecuniary gain and HAC - versus organic damage, mental illness and abused and deprived childhood); Spencer v. State, 691 So.2d 1062 (Fla. 1996) (victim beaten and stabbed; two aggravators of prior violent felony and HAC versus two statutory mental mitigators plus drug and alcohol abuse and paranoid personality); Henyard v. State, 689 So.2d 239 (Fla. 1996) (four aggravators, including prior violent felony, murder committed during the course of a felony, pecuniary gain and HAC, versus both statutory mental mitigators plus low intelligence, impoverished childhood and dysfunctional family); Pope v. State, 679 So.2d 710 (Fla. 1996) (stabbing murder; two aggravators of prior violent felony and pecuniary gain, vs. two mental mitigators); Foster v. State, 654 So.2d 112 (Fla. 1995) (victim beaten and stabbed; three aggravators, CCP, HAC and murder committed during robbery, vs. mental or emotional disturbance, impaired capacity, drug and alcohol addiction, learning

disabilities and abusive family background); Henry v. State, 649 So.2d 1366 (Fla. 1994) (victims stabbed; two aggravators of prior violent felony and HAC); Lemon v. State, 456 So.2d 885 (Fla. 1984) (victim stabbed; two aggravators of HAC and prior violent felony versus emotional disturbance).

Morrison's death sentence is amply justified under the facts and circumstances presented to the sentencer. Morrison's proportionality issue is meritless.

CONCLUSION

For all the foregoing reasons, Morrison's conviction and death sentence should be affirmed.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

_____
CURTIS M. FRENCH
Assistant Attorney General
Florida Bar No. 291692

OFFICE OF THE ATTORNEY GENERAL
The Capitol
Tallahassee, FL 32399-1050
(850) 414-3300
FAX (850) 487-0997

COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief has been furnished by U.S. Mail to Chet Kaufman, Assistant Public Defender, Office of the Public Defender, Leon County Courthouse, 301 South Monroe Street, Tallahassee, Florida 32301, this 10th day of July, 2000.

_____
CURTIS M. FRENCH
Assistant Attorney General