IN THE SUPREME COURT OF FLORIDA

DAVID SYLVESTER FRANCES,

Appellant, **Case No. SC05-892**

v.

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE NINTH JUDICIAL CIRCUIT
IN AND FOR ORANGE COUNTY, STATE OF FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE

David and Elvis Frances were indicted on two counts of First-Degree Murder, Robbery, and two counts of Petit Theft for murdering JoAnna Charles, 17, and Helena Mills, 41, on November 6, 2000. (Vol. 1, R357). Elvis Frances, David's younger brother, moved to sever his case and was tried separately.[1] David Frances was tried by jury October 25-29, 2004.[2]

During the trial, the following occurred during the testimony of Gleneth Byron, Frances' mother:

> Q. (By defense counsel) By the way, back in the months before they moved into your house in Orlando, didn't you talk to Elvis on the phone about his living situation?
>
> Mr. Wixtrom (state): Judge, I'm going to object right now to continued questions as it pertains to Elvis as to relevance.
>
> Mr. Schmer: Well, it's directly relevant. If I may pursue this line of questioning briefly.
>
> The Court: I would allow it. Objection overruled.

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[1] The motion to sever appears in Elvis Frances' record in the Fifth District Court of Appeal. *Frances v. State*, 857 So. 2d 1002 (Fla. 5th DCA 2003). Elvis, 16 at the time of the murders, was convicted of two counts of first-degree murder and sentenced to life imprisonment. He was also convicted of robbery.

[2] The trial transcript was treated as a separate entity by the clerk. The pleadings and penalty phase transcripts are Volumes I to VII. The trial transcripts are Volumes I to X. Cites to the pleadings and penalty phase will be "Vol." followed by "R" and the page number. Cites to the trial transcript will be "Vol." followed by "TT" and the page number. Cites to the supplemental records will be "SRVol." followed by "SR" and the page numbers.

> By Mr. Schmer: Did you have a conversation with Elvis -- don't get into specifics, but just a conversation with Elvis about Elvis and David being evicted from their apartment in Tallahassee?
>
> A. Yes.
>
> Q. They told you they were evicted because --
>
> Mr. Wixtrom: objection, calls for hearsay.
>
> . . . . (discussion)
>
> The Court: Objection sustained.
>
> By Mr. Schmer: When David Frances and Elvis Frances were evicted from their apartment in Tallahassee, did you go up there to assist them in any way?
>
> A. No, sir.
>
> Mr. Schmer: Nothing further, Your Honor. Thank you.

(Vol. 6, TT819-22).

Frances was convicted as charged. (Vol. 6, R1165-69).

The penalty phase was November 1-2, 2004. Frances filed a pre-trial "motion *in limine*" to allow the defense to publish videotaped statements of nine witnesses at the penalty phase. In the alternative, Frances asked to perpetuate the testimony by deposition (Vol. 5, R945-46). The State objected to this procedure (SRVol. 3, SR16). Defense counsel indicated he had videotapes of 7-8 people for whom it would be difficult to travel (SRVol. 3, SR162). He argued that Section 921.141(1), Florida Statutes, provides that the defendant may admit hearsay evidence at the penalty phase and the State has no right to

cross-examine the witness because the statute says that only the "defendant" has the right to rebut hearsay statements (Vol. 5, R946; SRVol. 5, SR233). As defense counsel stated:

> The Sixth Amendment right to confrontation does not apply to the State here. It only applies to the defendant. And I would argue that, under existing case law, the State is only entitled to have the opportunity to cross-examine, if you will, the statements that are made from declarants, not declarants themselves. What I mean by that, they don't have the right to physically confront penalty phase witnesses; but they have the right to confront those statements that were -- are made by those witnesses by asking other people about those statements and have not had the opportunity to do so.

(SRVol. 5, SR233). Likewise, the motion *in limine* stated:

> FS921.141(1) only conditions the admissibility of hearsay statements on the defendant's opportunity to rebut and makes no such provision for the prosecution.

(Vol. 5, R946).

The State indicated they were setting depositions for all defense penalty phase witnesses (SRVol. 5, SR229). However the State objected to the use of videotapes (SRVol. 5, SR230). The trial judge ruled that if the State had the opportunity to depose and cross-examine the live witness, the videotape was admissible. If the State had not deposed the witness, the live witness would need to be presented at the penalty phase (SRVol. 5, SR229, 231, 236). The reason for the ruling was to avoid the expense of all the witnesses flying from St. Kitts to Florida (SRVol. 5, SR231).

The State objected to statements in two videotapes the defense wanted to present because the witnesses questioned the guilt of Frances and there was a viewing of religious artifacts behind the witness (Vol. 1, R18-19, 32). The trial judge viewed the videotapes (Vol. 1, R23-32). The judge ruled the tape admissible in its entirety except for the "panning of the rest of the room" after the witness statement (Vol. 1, R33). The State also objected to the last line of Mr. Richards' videotaped statement that "David is young, he is scared, he is about to lose his life." (Vol. 1, R34). The objection was overruled (Vol. 1, R34).

The State filed a motion *in limine* regarding whether the defense could present evidence that (1) Elvis received two life sentences; and (2) Elvis committed a murder in Tallahassee (Vol. 1, R6). The trial court ruled Elvis' life sentences were admissible (Vol. 1, R6). Defense counsel told the judge he did not intend to argue the events in Tallahassee made Frances less culpable in the Orlando murders (Vol. 1, R10). Defense counsel's purpose for admitting any testimony about the Tallahassee murder was to "give the jury a complete picture of the relationship and the sibling relationship that these brothers had." (Vol. 1, R10). Defense counsel agreed that any implication that David merely helped Elvis in the Orlando

murders the same as the Tallahassee murder, would be improper (Vol. 1, R11).

The State then advised the judge that in Dr. Mings' deposition, the doctor compared the Tallahassee murder to the Orlando murders "to make the point that these murders are more consistent with Elvis's personality than David's" and to show that Elvis was the prime mover; in other words, to show residual doubt (Vol. 1, R13). The defense had listed Tameka Jones, a witness to the Tallahassee murder (Vol. 1, R14). The trial judge denied the State's motion *in limine* on the Tallahassee murder because "Elvis's background and character is among the facts that the jury ought to have to consider in the assigning of the weight." (Vol. 1, R16).

During the testimony of Julie Norman, mitigation specialist, defense counsel asked:

> Q Okay. Now, Ms. Norman, you indicated that you did travel to St. Kitts. Did you visit the home where David lived for the first six to eight years of his life?
>
> A Yes, I did.
>
> Q Can you describe for us what you found?
>
> Mr. Ashton: Objection, Your Honor. Timewise. If I could approach I could explain more without making a speaking objection.

After discussion, the trial judge sustained the objection as to relevance. (Vol. 1, R83-84). The trial judge sustained a second

objection to a similar question regarding what the home looked like today (Vol. 1, R85). The trial judge also sustained an objection as to what “Sara” said about conditions fifteen years earlier (Vol. 1, R86). The witness then testified that she interviewed people about the conditions in which Frances grew up (Vol. 1, R86). She testified about his background and childhood. However, when she began testifying about hearsay statements the State objected, and clarified the objection as follows:

> Mr. Ashton: The first level of objection is the objection that these comments are out-of-court statements of the declarant. They are classically then defined as hearsay. Hearsay, of course, is admissible in penalty phases if the state has an opportunity to rebut those. The difficulty here is since none of the information that the witness is testifying to is the subject of records or documentation, there is no way to rebut. I didn't object when she testified about when the defendant started school because those things obviously are subject to records. The difficulty here is we have witnesses, I understand, that are going to be called to testify live, subject to cross-examination, as to many of these issues. I don't believe it is appropriate to allow this witness to give, in essence, her version of what these people said when these people are, in fact, available themselves or their statements are available to be directly quoted. The second level is Mr. Ruiz seems to want this witness to testify in some summary of "what they told you". Clearly, that's improper because the jury has no way of knowing who said what. This witness is not an expert so she is not permitted to give summary evidence or to give an opinion. If the court overrules my hearsay objection, then I would submit the best she can do is simply quote what people said, attributing it to who said it. And that's the second level of my objection.

After discussion, the court sustained the State's objection. (Vol. 1, R89-95).

The State also objected to Julie Norman giving an opinion on whether there is "always documented evidence of child abuse or domestic violence." (Vol. 1, R102). The basis of the objection was the witness was not qualified as an expert in the area of child abuse or family domestic abuse (Vol. 1, R104). The information was then proffered (Vol. 1, R105-06). The witness proffered that sometimes people keep domestic violence and child abuse a secret. She had information from both David and Elvis Frances that David had been physically abused (Vol. 1, R105). The trial judge sustained the objection to this testimony (Vol. 1, R106).

During the testimony of Tameka Jones, defense counsel asked the witness to describe incidents of **Elvis** Frances' physical violence. The State objected on grounds of relevance. The objection was sustained (Vol. 1, R134). The following took place:

> (The following proceedings were held at the bench)
>
> Mr. Hooper: Your Honor, the court had previously ruled, I believe, that the character of Elvis was relevant in this case so it could be juxtaposed with the character of David. Specific incidents of violence committed by Elvis Frances for violence. We heard from the other witnesses so far, Coach Bute and other witnesses, of Elvis being a physically violent person.

The Court: I previously ruled that evidence of the prior homicide would be admissible.

Mr. Hooper: Okay. So I'm not allowed to go into this area, then?

The Court: This is an improper introduction of character evidence. You haven't offered character evidence in a proper form, and I haven't heard whether the State will object to it, so I don't know what my ruling will be. But you can't show character evidence by prior bad acts.

Mr. Hooper: Okay. My intent was not to show character evidence, per se. It's just to amplify, illustrate the brothers and the difference in the brothers, their sibling relationship.

Mr. Ashton: Well, counsel argued and the court agreed the murder, the defendant's reaction to it, was relevant. There is no indication of any kind to tie it up with this. This is just an unrelated act of violence by Elvis, so far as I'm aware.

The Court: I'll sustain the objection.

(Vol. 1, R135-136). Jones then testified about how Elvis killed Washington (Vol. 1, R136-140).

During the testimony of Dr. Mings, defense counsel asked:

Q And how would, how would you explain someone of normal intelligence doing something that would seem sort of bizarre, not changing the tags, not switching off the car, just riding around, with capture almost inevitable?

Mr. Ashton: Objection, Your Honor. That calls for speculation that's not based upon psychology. That calls for rank speculation. I object to it.

The Court: I'll sustain the objection.

Q Is there any, other than IQ and intelligence, is there any other type of learned social skills, street

> smarts, if you will, that would factor into the way a person would respond in a given situation?
>
> A That's a common term that's used, street smarts, how smart they are out in real life, on the streets, doing things like, you know, criminals who are successful or fairly street smart, they know how to do things to avoid getting caught.
>
> Q In your opinion, did David possess these, what we call street smarts?
>
> Mr. Ashton: Objection. That's outside of the area of expertise. I don't believe there's a DSM criteria for street smarts.

After discussion, the court sustained the Stat's objection because "street smarts falls within the common experience of ordinary human beings." (Vol. 1, R178-181).

During the testimony of Jacqueline George, defense counsel was questioning the witness about **Elvis'** "problems" (Vol. 1, R197). The State objected:

> Mr. Ashton: Objection to the relevance of a "problem". If I can explain more at the bench.
>
> The Court: Yeah. Well, I'm going to sustain the objection to the form of the question. If you'd rephrase.
>
> Mr. Hooper: Okay.
>
> Q Did Elvis cause any problems on the trip to Mexico?
>
> A Yes, he did.
>
> Q And what did he do on that trip?
>
> Mr. Ashton: Objection. Relevance of a "problem". It's vague.

The Court: I'll sustain the objection.

Q Did Elvis want to fight some kid in Mexico?

A One of his team players.

Q And what led up to Elvis wanting to fight that kid?

A Because he stole his uniform.

Q Who stole whose uniform?

A Elvis.

Mr. Ashton: Objection to the relevance of this, Your Honor, to this case.

The Court: I'll sustain the objection.

After discussion, the trial judge sustained the objection as improper character evidence by showing specific bad acts. (Vol. 1, R197-200).

Defense counsel then elicited testimony that Elvis's reputation in the community was "bad." (Vol. 2, R202). Elvis "likes to fight. He gets in a lot of fights. And he didn't treat the other kids with respect." (Vol. 2, R202). David, on the other hand, was "kind and honest at the ball park." (Vol. 2, R202). When defense counsel asked whether David was afraid of Elvis, the State objected that there was no foundation laid for the question (Vol. 2, R202). The trial judge allowed defense counsel to lay the foundation outside the presence of the jury, after which the witness stated she didn't really know whether David was afraid of Elvis (Vol. 2, R204). Based on that answer,

defense counsel did not follow that line of questioning (Vol. 2, R205).

After Dr. Mings was qualified as an expert in psychology, defense counsel asked:

> Q You were present during the last three witnesses?
>
> A Yes, I was.
>
> Q Is anything any of the three said relative to David, Elvis, inconsistent with your other findings?
>
> Mr. Ashton: Objection. Objection to asking, commenting on the credibility of another.
>
> The Court: Objection sustained.

(Vol. 2, R213). Shortly thereafter, Dr. Mings testified:

> A . . . The story I had been told before that the grandma had told the mother she had to come get them—
>
> Mr. Ashton: Objection, Your Honor. The question was what the mother had said. We seem to be drifting into other witnesses.
>
> The Court: Objection sustained.

(Vol. 2, R213-14).

During the testimony of Dr. Mings, defense counsel asked:

> Q So if David -- you mentioned pathologically dependent sibling relationship, which I am trying to understand. After the Tallahassee incident, why couldn't David just leave Elvis, say I'm out of that?
>
> A I've asked him that numerous times. I've asked him several questions which have been very difficult for him to answer for me. And his response to me at one point recently when I asked him, I said David, you know, everything I know about you during your early life, I don't understand this. I don't understand how

> you got from what people are saying about you through the period of time where you left for the military.
>
> Mr. Ashton: Objection to the hearsay response from a defendant.

The trial judge sustained the objection on the basis the State did not have the opportunity to cross-examine the defendant. (Vol. 2, R224-226). Dr. Mings went on to testify that David did not leave Elvis after the Tallahassee murder because "emotionally he sees Elvis as all he has." (Vol. 2, R226).

The jury recommended a sentence of death by a vote of nine (9) to three (3) for the murder of Helena Mills and ten (10) to two (2) for the murder of JoAnna Charles. (Vol. 6, R1191, 1192). The *Spencer* hearing was held January 13, 2005. (Vol. 7, R1226). Frances was sentenced to death on April 29, 2005 (Vol. 2, R323-346; Vol.7, R1239).

The trial court found three aggravating circumstances as to the murder of JoAnna Charles:

> (1) Prior violent felony (the contemporaneous murder of Helena Mills);
>
> (2) During a robbery;
>
> (3) Heinous, atrocious and cruel ("HAC").

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>
> (2) During a robbery;

(Vol. 7, R1241-1245). The trial judge rejected the statutory mitigating circumstances, except age of twenty (20) (Vol. 7, R1245-1247). The trial judge gave "serious" weight to the non-statutory mitigating circumstances that David Frances (hereinafter "Frances") exhibited a kind and gentle nature in school and on the baseball field, was a team player, had a clear sense of right and wrong, was a model inmate with a good demeanor, was polite and quiet in contrast to his brother Elvis, had a pathologically dependent relationship with Elvis, was abandoned by his mother shortly after he was born, was reared in poverty, and lacked a positive male role model (Vol. 7, R1247-1249).

STATEMENT OF THE FACTS

Dwayne Rivers was 13 years old on November 6, 2000, when he came home from Middle School and found his mother, Helena Mills, and a family friend, Joanna Charles, dead on the bathroom floor (Vol. 5, TT661-62,672, 695).

When Dwayne was getting ready to go to school that morning his mom was working at home, doing laundry and other household chores. (Vol. 5, TT667). Before he left for school, David and Elvis Frances rang the doorbell (Vol. 5, TT669). Dwayne knew the Frances brothers when they all lived in the Virgin Islands. (Vol. 5, TT669). The Frances brothers' mother, Gleneth Byron,

was a friend of Helena Mills and the families socialized (Vol. 5, TT670). Dwayne had been to the Frances household numerous times to play video games or watch TV (Vol. 5, TT671). The Frances family lived about five minutes from Rivers' and Mills' condominium (Vol. 5, TT676).

Dwayne engaged in brief conversation with the Frances brothers, which included informing them that Joanna Charles was staying home sick from school (Vol. 5, TT). The Frances brothers departed. Dwayne finished getting ready for school and left around 8:45 a.m. (Vol. 5, TT672 674).

Dwayne returned home around 6:00 p.m. that evening after a full day of school activities (Vol. 5, TT678, 687). Joanna's red Toyota was parked in front of the condo (Vol. 5, TT681). However, his mother's green Mazda 626 was not in the garage (Vol. 5, TT687).[3] Dwayne changed his clothing, and proceeded to fix a snack (Vol. 5, TT688). Dwayne answered a phone call, then went to find Joanna (Vol. 5, TT691). He banged on the door of the master bedroom and called for Joanna, but no one answered (Vol. 5, TT692). The door was closed and locked, so he went out the sliding glass door to the balcony that connected the living room to the master bedroom (Vol. 5, TT693). When he opened the

[3] Charles was 17 or 18 years old and attended Edgewater High School (Vol. 5, TT662). She drove a red Toyota Celica (Vol. 5, TT665). Mills was 41 years old and worked at a packing company. She drove a Mazda 626 (Vol. 5, TT663-64).

sliding glass door to the master bedroom, he discovered the bodies of Mills and Charles on the floor of the bathroom (Vol. 5, TT694-95). Dwayne called his mom's best friend, Gleneth Byron (David and Elvis Frances' mother), and then called 911 (Vol. 5, TT696).

When the paramedics arrived, rigor mortis had set in on both Charles' and Mills' bodies (Vol. 5, TT736). Charles' body was on top of Mills' body and there was a cord wrapped around her neck (Vol. 5, TT736-37).

Dwayne stayed with Byron for about a week or two after his mother's death. He never saw David or Elvis Frances in Byron's house during that time (Vol. 5, TT708). Dwayne had no idea at the time that David and Elvis murdered his mother and Joanna (Vol. 5, TT706).

Gleneth Byron, best friend of Helena Mills, and mother of David and Elvis Frances, was born in St. Kitts and had lived in Florida approximately 6 years at the time of trial (Vol. 6, TT781). She lived in Tallahassee for 2 years, then moved to Orlando (Vol. 6, TT781). She worked for the Department of Children and Families (Vol. 6, TT782).

Byron knew Mills when they both lived in St. Thomas. They had been friends for more than 17 years (Vol. 6, TT786). Mills and her son, Dwayne, came over to Byron's house "all the time" (Vol. 6, TT787). By November 6, 2000, David and Elvis had been

living with Byron for a month (Vol. 6, TT792). Neither son was employed, and Byron suggested they move out[4] (Vol. 6, TT794). Elvis had been in a fight in Tallahassee, and there was a warrant out for him (Vol. 6, TT818). Byron was going to give Elvis and David money for a bus to return to Tallahassee (Vol. 6, TT819).

At around noon on November 6, 2000, David called to tell Byron they had a ride back to Tallahassee (Vol. 6, TT795). When Byron went home from work around 5:00 p.m., her sons and all their belongings were gone (Vol. 6, TT797). Later that evening, she received a call from Dwayne Rivers, after which she drove the five minutes to Mills' house (Vol. 6, TT791, 797). She was informed Mills and Charles had been murdered. She had no idea her sons had anything to do with the murders (Vol. 6, TT801).

It was discovered that Mills' 1996 Mazda 626 had been stolen at the time of the murders. The tag and other information regarding the car were entered into the national law enforcement data base (Vol. 7, TT 1021).

Approximately one month after the murders on December 5, 2000, the Frances brothers were stopped at 1:27 a.m. in Ms.

[4] Byron had a history of problems with Elvis, whom she could not control and who hit her on one occasion when Elvis and Vernon, the younger brother, had an altercation (Vol. 6, TT817). David went into the Army when he was 17, but left the Army and moved back in with Byron when she lived in Tallahassee. (Vol. 6, TT807, 823).

Mills' stolen automobile in DeKalb County, Georgia (Vol. 7, TT997). There were five people in the car, which was still carrying Mills' license plate (Vol. 7, TT1001-02). Elvis was driving and David was sitting in the rear seat (Vol. 7, TT1005). David said the vehicle was his and that he bought it in Tallahassee (Vol. 7, TT1003). He could not provide the name of the seller (Vol. 7, TT1004).

Orlando Police Department Detectives Browning and Campbell immediately traveled to Dekalb County, Georgia, to interview the Frances brothers (Vol. 7, TT1021). David Frances gave a statement after being advised of his *Miranda*[5] rights (Vol. 7, TT1026; Vol. 8, 1356). The statement was tape-recorded (Vol. 7, TT1027). The December 5th statement was published to the jury (Vol. 9, TT1364-1445).

In his first statement, David said he bought Mills' car from a person named "Will" in Tallahassee (Vol. 9, TT1366). David admitted being in Orlando in early November, but said he and Elvis rode a Greyhound bus back to Tallahassee (Vol. 9, TT1368). David denied knowing anything about Mills' murder (Vol. 9, TT1386). He admitted going over to Mills' house and talking to Dwayne Rivers (Vol. 9, TT1406). David then said Elvis was "scrapping" with Mills and was on top of her (Vol. 9, TT1413, 1415). David went outside and moved the car. When he went back

[5] *Miranda v. Arizona*, 384 U.S. 436 (1966).

inside, Elvis was on top of JoAnna (Vol. 9, TT1415). David saw Elvis struggling with Joanna, who was a "big girl" (Vol. 9, TT1419). Elvis had no weapon. He was choking JoAnna with his bare hands (Vol. 9, TT1419). They pulled Joanna into Mills' bedroom (Vol. 9, TT1417). David denied stealing anything from Mill's apartment (Vol. 9, TT1426). David and Elvis took Mills' car and drove to Tallahassee (Vol. 9, TT1417, 1430).

The detectives then interviewed Elvis Frances at the juvenile detention facility and played the tape of David placing the blame on Elvis (Vol. 9, TT1448). Elvis and David were arrested for first-degree murder and transported back to Florida (Vol. 9, TT1451). Attempts were made to record the conversations in the transport van, but the equipment failed (Vol. 9, TT1452).

David Frances was interviewed a second time on December 6, 2000 (Vol. 9, TT1453). The tape recording was published to the jury (Vol. 9, TT 1456-65). David said his mother wanted them to leave the house, and "from Sunday night the tension started with my mom" (Vol. 9, TT1458). He and Elvis had no place to go, nothing to do, and no money. On Monday, they went to Mills' house and spoke to Dwayne. They went home and decided to steal Mills' car (Vol. 9, TT1458). An hour later, they met Helena outside in the garden. She said to go inside. When Helena came in, they both jumped her. David strangled Helena with his hands until she passed out (Vol. 9, TT1459). Elvis was having trouble

with Joanna. While David was moving Helena, Joanna passed out. David got Elvis to help him move Helena. Then they both went back to Joanna, who "still had life in her" (Vol. 9, TT1459). They moved Joanna over to where they had moved Helena. They both strangled Helena and Joanna by wrapping a cord around their necks. Joanna was still alive and you could "see her life in her" (Vol. 9, TT1460). They walked around the house and found gold jewelry, a PlayStation, a ring and a chain (Vol. 9, TT1461). They went downstairs. Elvis moved Joanna's car and David pulled Mills' car out of the garage (Vol. 9, TT1461).

Elvis and David went to a pawn shop and pawned the items for more than $200[6]. Then they left town (Vol. 9, TT1462-63). They drive to Tallahassee, then to Georgia (Vol. 9, TT1464).

Orlando Police Department processed the crime scene and took photographs (Vol. 6, TT850-55). There was no sign of forced entry (Vol. 6, TT888). One of the bodies was on top of the other in the master bathroom (Vol. 6, TT903). Fingerprints were found on the west nightstand in the master bedroom (Vol. 6, TT862, State Exhibit AQ), on the south end of the dresser on the west wall in the master bedroom (Vol. 6, TT864, State Exhibit AR),

[6] Dwayne Rivers identified a gold medallion chain with a teddy bear that Charles wore (Vol. 5, TT708, 709). He also identified Mills' car keys attached to a small blue flashlight bearing the initials "RPS" and a Sony PlayStation he kept underneath the TV (Vol. 5, TT715, 721).

and on the interior side of the door from the bedroom to the hallway (Vol. 6, TT865, State Exhibit AS). Fingerprints were found on a Sony PlayStation and sliding glass doors in both the living room and master bedroom (Vol. 6, TT883; Vol. 7, 947). Glasses in the refrigerator and a pitcher produced usable prints (Vol. 7, TT957). There were no usable prints on a green Cash America bag, a medallion, a pendant, or two gold chains (Vol. 6, TT884, 886). The prints from the house matched either Charles or Mills.

On December 7, 2000, Mills' 1996 Mazda 626 was returned to Orlando in a sealed car trailer (Vol. 6, TT913). The car was also sealed. Orlando police officers broke the seals on the car and processed it for fingerprints, took photographs and sweepings (Vol. 6, TT916). Prints were lifted from the left rear wheel and the exterior chrome molding on the left rear passenger door (Vol. 6, TT917-18). The second print matched a passenger in the car, Tarim Turnbull (Vol. 7, TT1118). Prints were also lifted from the right corner of the right rear window (Vol. 7, TT952). This last print matched David Frances (Vol. 7, TT1118).

Isam Abdalla, Manager of Cash America Pawn Shop, identified receipts for pawned items at 11:32 a.m. on November 6, 2000 (Vol. 7, TT 1054). David Frances presented his driver's license and pawned a PlayStation, a pendant and three chains (Vol. 7, TT1060). Frances received a total of $240.00 for the items (Vol.

7, TT1061). His thumb print was on the pawn ticket (Vol. 7, TT1118, State Exhibit #29).

Dr. Sara Irrgang, medical examiner for Orange/Osceola Counties, performed the autopsies on the two women (Vol. 8, TT1185). There was no evidence of sexual assault to either victim (Vol. 8, TT1190). Helena Mills had multiple abrasions on her face, injuries to the neck, and ruptured blood vessels in the face (Vol. 8, TT1194). She had a cut across the throat area (Vol. 8, TT1198). The cord[7] found around the neck of Charles was a flat cord typically used with a portable radio or TV (Vol. 8, TT1198). In Dr. Irrgang's opinion, the cut to Mills' neck was caused by the cord being wrapped around the neck and pulled at each end (Vol. 8, TT1198). The manner of death was homicidal. The cause of death was asphyxiation, also called strangulation by lay people (Vol. 8, TT1199).

Charles' body was on top of Mills in the bathroom. There was a groove around Charles' neck accompanied by superficial lacerations (Vol. 8, TT1208-09). There were crescent-shaped marks on the right neck that "looked like fingernail marks." The fingernail marks were made near the time of the other marks (Vol. 8, TT1209). The electric cord was still around Charles' neck (Vol. 8, TT 1209). The fingernail marks appeared to be the

[7] There was insufficient detail to lift a fingerprint from the cord (Vol. 8, TT1247).

product of trying to remove hands or a ligature away from the neck (Vol. 8, TT1218). In many cases, the person's own skin is found under the fingernails, indicating they struggled to remove the ligature (Vol. 8, TT1218). The ligature still around Charles' neck had been tightened with such force it broke the skin. Charles also had a band across her neck and a red marks (Vol. 8, TT1221). Like Mills, she died of asphyxia (Vol. 8, TT1222).

When a person is strangled manually, it takes a few minutes to lose consciousness and the victim will most likely struggle. Strangulation requires constant pressure for approximately three to four minutes. Once the blood supply is cut off, the victim will lose consciousness within a minute or two (Vol. 8, TT 1203).

Dr. Irrgang found a hair and a fiber on Mills' right hand and a hair on her right breast (Vol. 8, TT1232). She found a hair on the anterior of Charles' gown and legs and a bobby pin on her body. The fingernails of both Charles and Mills were clipped (Vol. 8, TT 1233). The evidence was sent to FDLE for processing (Vol. 8, TT1232).

Yvette McNab, DNA expert, testified that neither David nor Elvis Frances could be excluded as a contributor of material found under the left-hand fingernails of Mills (Vol. 8, TT1283,

1285). The material under Charles' fingernails matched Charles' DNA (Vol. 8, TT1294).

When the State rested, Frances moved for judgment of acquittal (Vol. 9, TT 1470). The motion was denied (Vol. 9, TT1487).

Penalty Phase. The State called three witnesses: Dwayne Rivers, Joycelyn Crawford, and Dr. Irrgang. The defense called nine witnesses: Julie Norman, Michael Bute, Dwayne Bell, Tameka Jones, Dr. Eric Mings, Mario Turnbull, Ira Todman, and Jacqueline George.

Dwayne Rivers presented victim impact testimony regarding his mother, Helena Mills (Vol. 1, R49-52). Joycelyn Crawford presented victim impact testimony regarding her daughter, Joanna Charles (Vol. 1, R54-56).

Dr. Irrgang testified that there are pain receptors in the neck region that, if a person's hands or arm were wrapped around the neck, would cause pain and apprehension (Vol. 1, R58). Pulling a cord tightly against the next would trigger pain. Petechial hemorrhages in the eyes are caused by pressure building up in the head (Vol. 1, R59). Loss of blood supply causes the vision to become blurry. It also causes loss of consciousness which is stressful. Asphyxia causes distress to the brain (Vol. 1, R60). A person being asphyxiated will struggle to take breaths, but the oxygen-rich blood will not

reach the brain. The person will be able to make noises, but may not be able to scream for help (Vol. 1, R61). It takes a "couple of minutes" to cause a person to lose consciousness if the blood supply is completely blocked (Vol. 1, R61). If a person struggles, the blood supply is interrupted, which can prolong the time before unconsciousness. A person can move their extremities until unconsciousness takes place. They are able to perceive things, such as someone having their hands on them (Vol. 1, R62). Joanna Charles would have been able to hear screams coming from another part of the apartment if she were conscious. She would be able to feel hands around her neck (Vol. 1, R63). Strangulation requires enough pressure to compress the blood vessels. When blood is going to the brain but not coming out, it causes the petechial ruptures (Vol. 1, R65). It requires more pressure to shut off the arterial flow than the venal flow (Vol. 1, R65).

Julie Norman, psychotherapist and mitigation specialist, met with David, David's mother, David's brother, family members and extended family members, teachers, little league coaches, a pre-school teacher, a pastor, and an assistant pastor. She interviewed over forty people (Vol. 1, R82). Norman made a timeline of Frances' life by speaking with people (Vol. 1, R87). She also consulted with Dr. Mings, neuropsychologist, and gave him the information she gathered (Vol. 1, R96).

Norman spent two full weeks in St. Thomas and St. Kitts on her first visit. On her second visit, she spent four days there. (Vol. 1, R97). Obtaining records from the islands was difficult because they were destroyed in a hurricane. The police had no record of any arrests, either juvenile or domestic violence (Vol. 1, R97-98). Norman could not find many of Francis' friends even though she had a list of names (Vol. 1, R99). She interviewed Francis thirty times. She also interviewed Elvis three times. She traveled to Washington, D.C. to interview family members. She spent 300 hours on the case. (Vol. 1, R97).

Ben Richards, Frances' uncle, testified that one time Frances was going on a date when he was 16 or 17, and his mother went to the movie with them and bought the tickets (Vol. 1, R110). She also sat between Frances and his date. Frances was very good at baseball. His mother would come to the games and take him home immediately afterwards. The mother tried to control him and would not let him go any place. She threw Elvis out of the house when he was still a minor. Elvis went to live with David and Michelle, Richards' "big daughter." (Vol. 1, R111).

Frances' stepfather is a "lowly kind of person. Low, Low." Richards did not know anything about the relationship between the stepfather and Frances. He did know that Elvis thought he

was the natural child of the stepfather until his graduation (Vol. 1, R115). In Richards' opinion, "the mother is at fault for all of the events in their life." (Vol. 1, R112). According to Richards, the mother is "a fraud" because she "needs to understand that to value a friendship you value a friendship." The stepfather cheated on the mother and had a baby out of wedlock. "Nothing went well after that. It's spilled over on the kids." (Vol. 1, R113).

David and Elvis were different personalities. David was quiet and very respectful. "Everything was inside." (Vol. 1, R114). Richards could "vouch" for David, but did not know Elvis because he was so young when they left the islands (Vol. 1, R115). Frances' grandmother raised him until he was 7 or 8. She was a good person and raised Frances to respect her. The relationship waned over time, though, because they were apart. (Vol. 1, R114).

Sara Frances[8], Frances' aunt, lived with David Frances from the time he was born (Vol. 1, R23, 26). Frances' mother lived in the house with Sara, then went to Puerto Rico when Frances was a baby (Vol. 1, R23, 26). She would come back once in awhile. David was safe with Sara and his grandmother (Vol. 1, R26). David was a "bundle of joy." Elvis was "born big" and was

[8] The videotape was played for the jury at Vol. 1, R116; however, the videotape was transcribed during a pre-penalty phase hearing at Vol. 1, R23-32.

cute when he was little but started misbehaving when he grew up (Vol. 1, R24). David never misbehaved. Sara told him he should "be a preacher because he is so (inaudible) innocent." (Vol. 1, R24). When David went to school he would come home as clean as when he left home. Everybody loved David, he had a lot of friends at school, and he was active in sports. (Vol. 1, R25). If a fight broke out, David would run in to tell her. She would tell him to fight back, but he would say "No, no, no, I can't. They going to beat me up." (Vol. 1, R26). Elvis would fight in school and with other children in the neighborhood (Vol. 1, R27). David was "sometimes" afraid of Elvis (Vol. 1, R28).

David lived with Sara until he was 7 or 8. Her three children also lived in the house. They all played together (Vol. 1, R26). Shirley, another of Frances' aunts, also lived in the house with her children (Vol. 1, R27). David is like a son to Sara. She could not believe he committed murder (Vol. 1, R 30-31). David stammered when he first learned to talk (Vol. 1, R25).

Michael Bute, physical education teacher and baseball coach in the Virgin Islands, first met Frances in elementary school. Bute got to know Frances better on the baseball field when the latter was between 9 and 16 years old (Vol. 1, R118). David was a "good kid. Compared to Little Leaguers that took part, he was one of the better kids." Bute never had any problems with David

(Vol. 1, R118).

Elvis and David were like “night and day.” Elvis was “high tempered. Always getting in trouble.” (Vol. 1, R119). Elvis got into petty fights, fights that were unnecessary. He would run over younger children (Vol. 1, R119). During one fight when Elvis was 12, a parent saw him with a knife (Vol. 1, R120). The mother would punish Elvis, an all-star team member, from playing baseball (Vol. 1, R124). David would try to stop the Elvis from fighting, and would try to grab Elvis and take him home (Vol. 1, R120). David would carry Elvis’ bag. Most older children would make the younger sibling carry their bags (Vol. 1, R120). On cross-examination, Bute testified that Frances’ parents always attended the baseball games rooting for the kids (Vol. 1, R122).

Dwayne Bell, Orange County Corrections Department, supervised Frances from the time he came into Corrections: approximately 1½ years (Vol. 1, R126). Frances was a good inmate. He would ask for cleaning supplies to clean his cell. Frances is “one of the quiet ones” who stays in his room “either reading a book, or just standing around outside.” (Vol. 1, R127). Bell would describe Frances as a “model” inmate (Vol. 1, R128).

Tameka Jones, 24, was an inmate in the prison system at the time of the penalty phase (Vol. 1, R132). She was serving a sentence for the third-degree murder of Monique Washington who

was murdered in September 2000 (Vol. 1, R133). Monique had known both Elvis and David Frances a year before the she was murdered. She lived with them and their cousin, Michelle (Vol. 1, R133). David was calm and quiet. Elvis seemed to run the household. (Vol. 1, R134).

Jones testified that after Monique was murdered, she originally told police officers that David was involved (Vol. 1, R136). She subsequently testified at trial that David was not present and that Elvis killed Monique (Vol. 1, R137). Elvis was helping Monique move when he decided to strangle her with his hands and a VCR cord (Vol. 1, R138). He then stole Monique's car. Elvis asked David to help him move the body after the homicide (Vol. 1, R139). When Elvis told David he killed Monique, David's reaction was "What have you done? What have you got us into?" (Vol. 1, R139-140). Jones admitted on cross-examination that she never told police that David's first response to the killing was "What have you got us into." Jones told police that David's first response was "You know what we have to do," which was to dispose of the body (Vol. 1, R147-148).

Jones admitted telling the police numerous lies (Vol. 1, R141). She also told the police that David was being harassed by the military because he had "left it early." (Vol. 1, R143). David and Elvis had to leave Tallahassee because David was being

pursued by the military[6] (Vol. 1, R144). Jones overheard David and Elvis talking about taking Monique's car (Vol. 1, R144). She told police David and Elvis talked about "going to try to hurt her or tie her up." (Vol. 1, R145). She admitted David and Elvis talked about hurting Monique in order to get her car (Vol. 1, R145). The day Elvis and Jones left to help Monique move, Elvis said he was going to kill Monique (Vol. 1, R146).

After David and Elvis disposed of Monique's body, they stole her property from her house (Vol. 1, R149). A few days later, Jones and David drove Monique's car to Atlanta to party (Vol. 1, R150). They stayed in Atlanta a couple days then drove back to Tallahassee. (Vol. 1, R153).

Dr. Mings was qualified as an expert in psychology (Vol. 1, R170). He interviewed Gleneth Byron, Elvis Frances, David Frances, Tameka Jones, and a number of other people (Vol. 1, R174, 176). He reviewed police reports, witness statements, school records, Department of Corrections records of Elvis Frances, military records, statements of David and Elvis Frances, investigation records of the Monique Washington murder, medical examiner reports, and videotaped statements (Vol. 1, R175-176).

Mario Turnbull taught David in the 9th and 11th grades (Vol. 1, R182). Turnbull could always depend on David, who would always lend a helping hand and assist other students (Vol. 1,

R183). Turnbull never had any problems with David (Vol. 1, R183). David had fatherly inclinations. One time he brought a little girl to class so he could watch over her (Vol. 1, R184).

Ira Todman teaches art and coaches football and baseball. David Frances was one of his baseball players (Vol. 1, R186). David was a good player and would do whatever was needed (Vol. 1, R186). He was a team player. He would play whatever position was needed on a given day (Vol. 1, R187). Todman also taught Elvis Frances. Elvis would get angry and did not want to listen. Todman would ask David to talk to Elvis about his attitude (Vol. 1, R188). But Elvis might listen for a day then go right back to doing the same thing (Vol. 1, R189).

Todman knew David from age 16 to 18. David was a leader and would make sure other kids "do what was correct." He had a very clear sense of right and wrong. He was not easily influenced by others and would try not to break the rules (Vol. 1, R190).

Jacqueline George was a police officer in the Virgin Islands before she became a teacher (Vol. 1, R193). She knew Elvis and David Frances when they were in "Pee Wee League." (Vol. 1, R193). She knew them until they were 11 or 12 years old. Elvis was on her son's baseball team (Vol. 1, R194). David was quiet and "very manageable." Elvis was quiet when he was younger, but as the years progressed his attitude changed

"[f]or the bad." (Vol. 1, R195). Elvis would fight with team members and curse (Vol. 1, R195). One time he had a knife and was fighting with other team members (Vol. 1, R196). Elvis's reputation in the community was "bad." (Vol. 2, R202). Elvis "likes to fight. He gets in a lot of fights. And he didn't treat the other kids with respect." (Vol. 2, R202). David, on the other hand, was "kind and honest at the ball park." (Vol. 2, R202).

On cross-examination, George admitted she only knew David and Elvis through baseball and had no involvement with their lives outside baseball (Vol. 2, R205-06). In the context of baseball, Elvis was very aggressive, like to win, and would fight with other players (Vol. 2, R206-07). Elvis was 11 or 12 years old when he fought with the Santo Domingo player (Vol. 2, R207). One time Elvis took George's son's glove and wanted to start a fight when that fact was discovered (Vol. 2, R210). One year Elvis was ineligible to play because of his behavior (Vol. 2, R212). The last contact George had with David was after he graduated from high school and left the island (Vol. 2, R208).

In Dr. Mings' opinion, Frances is not a psychopath or sociopath (Vol. 1, R177). He has an average IQ: 94 (Vol. 1, R177). Dr. Mings learned from the mother that both David and Elvis lived with the grandmother from the time they were born. Their aunts also lived in the house. The mother went to Puerto

Rico to work and would visit the children a couple times a year. At some point the children went to live with the mother (Vol. 2, R213). The mother sent for David first, then for Elvis. David begged her not to have Elvis come because he was afraid of him. David said Elvis beat him up. Dr. Mings considered it unusual for 7-year-old David to be afraid of 4-year-old Elvis (Vol. 2, R214). Part of the issue was sibling rivalry (Vol. 2, R215).

Notwithstanding, the brothers were "very close" and remained close during the course of their lives (Vol. 2, R220). From what Dr. Mings learned from others, Elvis was "aggressive and violent and involved in fights. David was "quiet, reserved, polite". . . "at least until up when he moved away from the island." (Vol. 2, R221). Once they left the island, David joined the Army, in part because he wanted to pursue an education. There was no evidence of disciplinary problems in the Army. Nonetheless, David went AWOL (Vol. 2, R221). David told Dr. Mings he "didn't like" the Army and he received information that Elvis was getting in trouble (Vol. 2, R219-222). So he left. Elvis was living with the mother when David left the Army. Elvis had two "youthful arrests for assault-related behavior." The mother said Elvis was "uncontrollable." There was a discussion of David adopting Elvis, but it was never pursued. The mother felt as though David should be responsible for Elvis. She kicked both brothers out of the house because

Elvis was a problem and David was rude to her (Vol. 2, R222). David and Elvis then had an apartment in Tallahassee (Vol. 2, R222).

In Dr. Mings' opinion, the brothers had a "pathologically dependent relationship," at least from David's point of view. David needed Elvis. He was trying to help his younger brother. David went into a "downward spiral" after he left the Army (Vol. 2, R223). Prior to deserting the Army, David had no criminal history except that he "smoked pot, like most of the people he knew did." (Vol. 2, R224). The murder of Monique Washington in Tallahassee probably brought the brothers closer together (Vol. 2, R223). David knew what Elvis did and was charged with accessory after the fact (Vol. 2, R224). David did not leave Elvis after the Tallahassee murder because "emotionally he sees Elvis as all he has." (Vol. 2, R226).

On cross-examination, Dr. Mings admitted that David has no psychological, personality, or mental disorder (Vol. 2, R227). The only unusual thing Mings discovered about David was the extent to which he loved Elvis and had bonded with him (Vol. 2, R227). Dr. Mings was not aware Tameka Jones originally stated that David was directly involved with the Washington murder. That fact could be important in assessing the relationship between David and Elvis (Vol. 2, R229).

***Spencer* hearing.** Frances presented additional testimony at the *Spencer* hearing. The first videotape was Michael Bute, baseball coach. Both Elvis and David were in the little league program, traveled with Bute, and were on the all-star team (SRVol. 6, SR247). They were both good players. David would do anything asked of him. Elvis was resistant. David and Elvis were like "night and day." (SRVol. 6, SR247). Elvis picked a fight one time in Santo Domingo with the entire opposing team. He had a knife with him. One of the parents took the knife away. Elvis had a bad temper at times. It upset him with he learned his stepfather was not his real father (SRVol. 6, SR248). David would always back up Elvis and try to stop him from fighting (SRVol. 6, SR249). David and Elvis' parents always came to watch the baseball games (SRVol. 6, SR249). David had a good rapport around the people in the baseball league (SRVol. 6, SR252). He was a positive influence on the team (SRVol. 6, SR253).

Mario Turnbull, by videotape, testified that he taught David computer applications. David was quiet and got along socially. David loved baseball. He was kind to everyone, and brought a young girl to class one time that he was watching for a relative (SRVol. 6, SR257). If the class was short on textbooks, David would give his to a student and come back later to complete his work. David did not fight (SRVol. 6, SR258).

One time David witnessed a traumatic event at school and later saw the body laid out in the gym before the funeral (SRVol. 6, SR259). When asked whether David was protective of Elvis, Turnbull said "not directly." (SRVol. 6, SR260). David was always respectful even if he felt he wasn't graded fairly (SRVol. 6, SR261). Turnbull last saw David when the latter was in the 11th grade (SRVol. 6, SR262).

Sara Frances videotape was played for the trial judge. It appears to be the same tape played for the jury during the penalty phase (SRVol. 6, SR262-269).

Andinna Conner testified by videotape. She is the principal of St. Paul's School and has known David since he was a baby (SRVol. 6, SR269). David was baptized and christened in St. Paul's Baptist Church. He was in Sunday school from childhood. His family was a Christian family. David was always "a very quiet, a bright, obedient little boy." In contrast, Elvis liked to fight and was more outgoing (SRVol. 6, SR270). It was a long time ago, but she remembered David as getting along with everybody (SRVol. 6, SR271). "Shirley" told her that David tried to get out of the Army early. Shirley was looking forward to David and Elvis "coming up and getting settled." (SRVol. 6, SR272).

Ben Richards videotape was played for the judge. It appears to be the same video played for the jury (SRVol. 6,

SR272-280). Ira Todman videotape was played for the judge. It relayed the same information relayed to the jury at the penalty phase (SRVol. 6, SR282-285).

Jacqueline George also testified by videotape. She had known the Frances family since her son was 7 years old. All the families whose children played baseball were very close. They would come to the park together. If it rained, they would stay and let the kids play together until around 10:00 p.m. (SRVol. 6, SR286). David was the quietest one of the bunch. George never heard another child complain that David played tricks on him. She never heard a coach or parent complain about David. George knew David through high school (SRVol. 6, SR287).

Elvis was also quiet. He was a very, very good baseball player and played "very aggressive." As the years went on, Elvis became "terrible." (SRVol. 6, SR288). At some point when Elvis was 10 years old, he did something and the coach took him out of the game (SRVol. 6, SR289). George repeated the Santo Domingo incident (SRVol. 6, SR290). The parents knew Elvis "was turning bad." (SRVol. 6, SR291). He stole a boy's uniform when the team when to Mexico, then wanted to fight the boy. Whenever they traveled, Elvis did not have money (SRVol. 6, SR291). She would pay for Elvis' meals. They traveled to Winter Haven, Florida and Disney World (SRVol. 6, SR292).

Elvis was “mean.” As the years went by, he got meaner (SRVol. 6, SR292). By the time Elvis was about 12 years old, they could not take him on trips anymore because he would play too rough or rile the umpire. Elvis was bad from the time he was in elementary school. One time he “bust a girl’s mouth for no reason.” (SRVol. 6, SR293). Another time, Elvis stole her son’s glove (SRVol. 6, SR297). David was always nice. He would walk away from a fight (SRVol. 6, SR294).

When George heard the news about the murders, her first thought was “how in the world David got in this with Elvis.” (SRVol. 6, SR294). David could not stop Elvis from doing what he wanted to do. Elvis was stronger and “bader.” (SRVol. 6, SR295). David had been afraid of Elvis since they were small (SRVol. 6, SR296). It did not shock George that Elvis was in trouble; but she felt David did not deserve the electric chair (SRVol. 6, SR296).

Both Gleneth Byron and Tameka Jones testified in person. Byron, Frances’ mother, read a statement:

> David was placed among the best set of kids growing up in his community. I did not send him to church and Sunday school, but instead, I took him with me every Sunday that we could worship together as a family. He accepted a lot at a young age and was able to be an example to his parents and others around him. He was very quiet, obedient and respectable. He was the kind of child anyone would like to have as a son. He was very big in sports, especially baseball. He made the all-star team every year and traveled to many places to represent the Virgin Islands. He was an honor

student from elementary school to high school. He was in both honor societies. His role in the honor society was to go to the public library on Saturdays to read to younger children who weren't able to read for themselves.

We relocated to Florida because he was determined to make it to the major leagues. He served in the United States Army after being recruited while he was still in high school. And while in Florida, he went out on his own and was able to find a job. The manager in the store found out the kind of young man he was and asked him if he had a brother that they could also hire to work. That is when his brother Elvis walked in and got the job because of David's recommendation. The other job -- they had a job, they had friends, they lived a good life, but little did David know that he should have picked his friends.

David was charged with the murder of my best friend, Helena, and JoAnna. This is not something parents wish to hear, especially when we know the way they were brought up. It pains me very, very much to see what was done and to whom it was done to. Based on the relationship between David and the victims, that is, he was not a stranger to them, and especially Helena was considered as family. Something leads me to believe that something impaired his judgment and influenced his decision during the time this took place.

We were all connected for many years, and it is unbelievable that David was even capable of doing something like this. Both my sons and my friends are very important to me. I have lost my sons and I have lost my friends. They are all equally important to me.

What David did was wrong. My friends did not deserve to die. I have suffered and I'm still suffering. Why do I have to suffer anymore? Is it not enough punishment for me? Not for what David did, but why do more people have to die because of this? How does giving David the death penalty resolve this? And I'm pleading on behalf of David for his life. I'm asking the Court for mercy. Please give him another chance to prove himself.

> I would like to apologize to Helena -- Dwayne and Helena's family and JoAnna's family on behalf of David and Elvis. I know that an apology would not bring them back to life, but I pray that the Lord will continue to give us the strength to carry on. Thank you.

(SRVol. 6, SR303-305).

Tameka[9] Jones recapped the details of Monique Washington's murder in Tallahassee. Elvis killed Monique when he "choked her out" with a VCR cord (SRVol. 6, SR307). Elvis also choked a puppy until it died because it was "just too simple" to take it to the pound (SRVol. 6, SR308). Elvis also beat up a "little kid" about 11 years old because the kid "poo-pooed" on himself. David was never violent. With Elvis, it was "his way or not way, pretty much." (SRVol. 6, SR309).

[9] Spelled "Tameka" at the penalty phase and "Tomeka" at the *Spencer* hearing.

SUMMARY OF ARGUMENT

POINT I: Frances argues that the trial court's rulings on State objections deprived him of a fair trial and the right to present a defense. Some of the evidentiary rulings were not preserved for appellate review. The trial judge ruled properly on those issues which were preserved. The trial judge did not abuse his discretion in his rulings. Although Frances claims he should be allowed to admit unlimited hearsay in the penalty phase and the State has no right to rebut the hearsay, this Court's case law is squarely to the contrary. Numerous witnesses testified in the penalty phase. There was no reason to repeat their testimony through an expert or mitigation specialist, and to do so would be bolstering and an attempt to comment on their credibility. Much of the complained-about testimony was cumulative to testimony of other witnesses. Some of the objections involved relevance, and the record shows the information was not relevant to any material issue. Frances was not deprived a fair trial or penalty phase. Error, if any, was harmless.

POINT II. The State proved two aggravating circumstances beyond a reasonable doubt as to both victims: prior violent felony and during a felony. Additionally, the State proved the murder of JoAnna Charles was heinous, atrocious and cruel. The trial court found and weighed mitigation based on the evidence

presented. Appellant's argument that the trial judge did not assign the proper weight to mitigation is not a valid consideration. The weight to be assigned that mitigation is within the trial judge's discretion. There was no abuse of discretion. This court does not re-weigh aggravating and mitigating circumstances. Frances' death sentence is proportional to other similarly-situated double homicides.

POINT III: Frances' R*ing* claim has been repeatedly rejected by this court. This case involved both contemporaneous murders and prior violent felonies. The murders were committed during a robbery.

ARGUMENT

POINT I

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN SUSTAINING THE STATE'S OBJECTIONS TO PENALTY PHASE TESTIMONY THAT WAS NOT RELEVANT, WAS HEARSAY, OR OTHERWISE INADMISSIBLE

Frances claims the trial court abused its discretion by excluding relevant evidence at the guilt and penalty phases; therefore, he was denied a fair trial. This issue is not adequately briefed to present a viable claim. *See Simmons v. State*, 31 Fla. L. Weekly S285, 294. n.12 (Fla. May 11, 2006) *citing Coolen v. State*, 696 So. 2d 738, 742 n.2 (Fla. 1997); *Duest v. Dugger,* 555 So. 2d 849, 852 (Fla. 1990). The State will attempt to address the individual cites to the record.

1. Why David and Elvis had to leave Tallahassee apartment. This bit of evidence would supposedly prove "why David in his confession tried to minimize his brother's role in these killings." (Initial Brief at 19). The record cite refers to the testimony of Gleneth Byron, Frances' mother during the guilt phase:

> Q. (By defense counsel) By the way, back in the months before they moved into your house in Orlando, didn't you talk to Elvis on the phone about his living situation?
>
> Mr. Wixtrom (State): Judge, I'm going to object right now to continued questions as it pertains to Elvis as to relevance.

> Mr. Schmer: Well, it's directly relevant. If I may pursue this line of questioning briefly.
>
> The Court: I would allow it. Objection overruled.
>
> By Mr. Schmer: Did you have a conversation with Elvis -- don't get into specifics, but just a conversation with Elvis about Elvis and David being evicted from their apartment in Tallahassee?
>
> A. Yes.
>
> Q. They told you they were evicted because --
>
> Mr. Wixtrom: objection, calls for hearsay.
>
> . . . . (discussion)
>
> The Court: Objection sustained.
>
> By Mr. Schmer: When David Frances and Elvis Frances were evicted from their apartment in Tallahassee, did you go up there to assist them in any way?
>
> A. No, sir.
>
> Mr. Schmer: Nothing further, Your Honor. Thank you.

(Vol. 6, TT819-22).

It is well settled that a trial judge's ruling on the admissibility of evidence will not be disturbed absent an abuse of discretion. *Johnston v. State*, 863 So. 2d 271, 278 (Fla. 2003); *Carpenter v. State*, 785 So. 2d 1182 (Fla. 2001). This colloquy occurred during the guilt phase. The trial judge allowed testimony regarding the fact David and Elvis were evicted and that Mrs. Byron did not go to help them. Although defense counsel “proffered” his testimony regarding his theory of what this evidence would show, he never proffered Mrs.

Byron's testimony. Therefore, this issue is not preserved. *Blackwood v. State*, 777 So. 2d 399, 408 (Fla. 2000). Even if it were preserved, it has no merit. The only objection sustained was to what Elvis told Mrs. Byron which is hearsay. The trial court correctly ruled that this was hearsay not within any exception. Defense counsel was able to present the fact the brothers were evicted and the mother did not help them get from Tallahassee to Orlando. Any further testimony would be cumulative. *Blackwood,* 777 So. 2d at 411.

2. Condition of house in which Frances grew up. This cite refers to a question asked Julie Norman, mitigation specialist:

> Q Okay. Now, Ms. Norman, you indicated that you did travel to St. Kitts. Did you visit the home where David lived for the first six to eight years of his life?
>
> A Yes, I did.
>
> Q Can you describe for us what you found?

(Vol. 1, R83). The prosecutor objected as to the relevance of how a house appeared fifteen years after Frances lived there. The trial judge sustained the objection (Vol. 1, R84). The trial judge sustained a second objection to a similar question regarding what the home looked like today (Vol. 1, R85). The trial judge also sustained an objection as to what "Sara" said about conditions fifteen years earlier (Vol. 1, R86). The objection as to relevance was properly sustained. The objection

as to hearsay was also properly sustained. Sara Frances' videotaped deposition was played at the penalty phase, and the State was able to cross-examine her.

Although the defense argues that Section 921.141(1),[10] Florida Statutes, allows a defendant to admit unlimited hearsay because the State has no right to confrontation, this argument has repeatedly been rejected by this Court. *Hitchcock v. State*, 578 So. 2d 685, 689-690 (Fla. 1990); *Blackwood v. State*, 777 So. 2d 399, 410-412 (Fla. 2000)[11] (three reports from mental health

[10] §921.141(1) provides in relevant part:

> In the proceeding, evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (5) and (6). Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements.

[11] In *Blackwood*, this Court noted:

> Additionally, we note that even though section 921.141(1) relaxes the evidentiary rules during the penalty phase of a capital trial, the statute clearly states that the defendant must have an opportunity to fairly rebut the hearsay evidence in order for it to be admissible. *See Wuornos v. State*, 644 So. 2d 1012, 1018 (Fla. 1994). **This rule applies to the State as well.** *Cf. Hitchcock v. State*, 578 So. 2d 685, 690 (Fla. 1990) (finding no merit to claim that state's ability to introduce hearsay in a penalty proceeding is limited while a defendant's ability to introduce hearsay is unlimited). (Emphasis supplied)

expert excluded); *Parker v. State*, 873 So. 2d 270, 283 (Fla. 2004).

The trial court did not abuse its discretion in sustaining the objection and, since Sara Frances testified, the issue is moot.

3. Conversations between defense mitigation specialist and others. This cite corresponds to testimony by Julie Norman that she interviewed witnesses about the Frances brothers' background and childhood. The State objected as to any hearsay statements because they could not rebut the statements (Vol. 1, R87). The information was never proffered and this issue is not preserved for review. *Blackwood, supra.* The trial judge properly sustained the objection because it was hearsay and the State did not have the opportunity to rebut.

Furthermore, even if this testimony had been allowed, it was cumulative to the testimony of the witnesses she interviewed because they testified at the penalty phase or their videotapes were admitted. *See Blackwood,* 777 So. 2d at 411. Uncle Ben Richards, Aunt Sara Frances, teacher and baseball coach Michael Bute, teacher Dwayne Bell, teacher Mario Turnbull, baseball coach Ira Todman, and baseball "mom" Jacqueline George all testified as to David and Elvis' childhood, the differences between the boys, and Elvis' violent temperament. This testimony was cumulative.

4. Reports of domestic abuse with cords and belts.

Frances raises this claim without explanation. The record cite is to the proffered testimony of Julie Norman that she found some (unspecified) information that indicated possible physical abuse of David. Her sources were David and Elvis Frances. (Vol. 1, R105). More specifically, there had been beatings with cords, belts and hands (Vol. 1, R106). The State objected to the question whether "there is always documented evidence of child abuse or domestic violence." (Vol. 1, R102). The basis of the objection was relevance because there had been no testimony regarding abuse (Vol. 1, R103). The trial judge stated that evidence of what is "usual" in domestic violence cases was inadmissible (Vol. 1, R103). Defense counsel then said he wanted to present testimony that through interviews, Ms. Norman learned that there were "possible instances of physical abuse." (Vol. 1, R104). The State objected as to hearsay (Vol. 1, R105). The trial judge sustained the objection to the questions and answers proffered, which was that David and Elvis told her about beatings by hands, belts and cords (Vol. 1, R106).

As outlined in section #2 above, the State had no opportunity to rebut these hearsay statements of the defendant and co-defendant. Apparently, the only information of physical abuse came from David and Elvis. No other family member, friend, or teacher had any information. This makes the

allegation particularly suspect. The trial court did not abuse its discretion in omitting this testimony which was based on the self-report of the defendant and his co-defendant brother, both of whom were unavailable to the State.

5. Defendant statements to mental health expert. This cites refers to the testimony of Dr. Mings when defense counsel asked:

> Q So if David -- you mentioned pathologically dependent sibling relationship, which I am trying to understand. After the Tallahassee incident, why couldn't David just leave Elvis, say I'm out of that?
>
> A I've asked him that numerous times. I've asked him several questions which have been very difficult for him to answer for me. And his response to me at one point recently when I asked him, I said David, you know, everything I know about you during your early life, I don't understand this. I don't understand how you got from what people are saying about you through the period of time where you left for the military.
>
> Mr. Ashton: Objection to the hearsay response from a defendant.

(Vol. 2, R224-226). Dr. Mings went on to testify that David did not leave Elvis after the Tallahassee murder because "emotionally he sees Elvis as all he has." (Vol. 2, R226). The trial court sustained the objection to the defendant's statement, but allowed testimony on Dr. Mings opinion why David did not leave Elvis after the Tallahassee murder. Again, this issue is not adequately briefed. *Simmons, Duest, supra.* Although the objection as to hearsay was sustained, the defense

was allowed to elicit the testimony they wanted to elicit. As argued in sections #2 and #4 above, the hearsay objection was not an abuse of discretion.

6. Reports of Elvis' acts of violence. The record cites refer to the testimony of Tameka Jones when defense counsel asked the witness to describe incidents of **Elvis** Frances' physical violence. The State objected on grounds of relevance. The objection was sustained (Vol. 1, R134). The following took place:

> (The following proceedings were had at the bench)
>
> Mr. Hooper: Your Honor, the court had previously ruled, I believe, that the character of Elvis was relevant in this case so it could be juxtaposed with the character of David. Specific incidents of violence committed by Elvis Frances for violence. We heard from the other witnesses so far, Coach Bute and other witnesses, of Elvis being a physically violent person.
>
> The Court: I previously ruled that evidence of the prior homicide would be admissible.
>
> Mr. Hooper: Okay. So I'm not allowed to go into this area, then?
>
> The Court: This is an improper introduction of character evidence. You haven't offered character evidence in a proper form, and I haven't heard whether the state will object to it, so I don't know what my ruling will be. But you can't show character evidence by prior bad acts.
>
> Mr. Hooper: Okay. My intent was not to show character evidence, per se. It's just to amplify, illustrate the brothers and the difference in the brothers, their sibling relationship.

> Mr. Ashton: Well, counsel argued and the court agreed the murder, the defendant's reaction to it, was relevant. There is no indication of any kind of tie it up with this. This is just an unrelated act of violence by Elvis, so far as I'm aware.
>
> The Court: I'll sustain the objection.

(Vol. 1, R135-136). Jones then testified about how Elvis killed Washington (Vol. 1, R136-140). The trial court allowed Jones to testify about Elvis killing Monique Washington and how David was only involved after the fact. The testimony about Elvis' other acts of violence were not proffered during the penalty phase, so this issue is not preserved. *Blackwood, supra.*

At the *Spencer* hearing, Jones testified about Elvis choking a puppy and beating a small boy who "poo pooed" on himself. If this was the testimony the defense wanted to present in David's penalty phase, the trial court was correct in excluding the evidence. Not only was it not relevant, it was improper character evidence of Elvis.

7. Mental health expert testimony on "street smarts." This cite refers to questioning of Dr. Mings when defense counsel asked:

> Q And how would, how would you explain someone of normal intelligence doing something that would seem sort of bizarre, not changing the tags, not switching off the car, just riding around, with capture almost inevitable?
>
> Mr. Ashton: Objection, Your Honor. That calls for speculation that's not based upon psychology. That calls for rank speculation. I object to it.

The court: I'll sustain the objection.

Q Is there any, other than IQ and intelligence, is there any other type of learned social skills, street smarts, if you will, that would factor into the way a person would respond in a given situation?

A That's a common term that's used, street smarts, how smart they are out in real life, on the streets, doing things like, you know, criminals who are successful or fairly street smart, they know how to do things to avoid getting caught.

Q In your opinion, did David possess these, what we call street smarts?

Mr. Ashton: Objection. That's outside of the area of expertise. I don't believe there's a DSM criteria for street smarts.

Mr. Hooper: May we approach, Your Honor?

The Court: Yes, sir. Would you take the jury out, please.

(Jury exited the courtroom)

The Court: Mr. Hooper?

Mr. Hooper: Yes, Your Honor. Dr. Mings has been qualified as an expert in the area of psychology, which I believe he quite clearly established is a study of human behavior. It's not just the study of abnormal behavior or psychiatric problems. It's in no way whatsoever limited to the four corners of the DSM. It goes far beyond the DSM and it deals with everyday behavior of everyday people. There is no allegation that there is anything, any particular DSM diagnosis on Mr. David Frances. And Dr. Mings is an expert in the field of general human behavior and should be allowed to give his opinion in that area.

Mr. Ashton: He is an expert in psychology, and if counsel can establish that "street smarts" is a subject that's studied or understood by psychologists better than the normal human being, he is right. At

> this point there has been no predicate to establish that "street smarts", whatever that means, is an area of psychological study. So at this point I would ask the court to sustain the objection.
>
> The Court: I think, if I followed your argument, a psychologist, once qualified, can testify about anything involved with any human being because everything falls within the general gamut of human behavior. I don't think I want to open any door quite that wide. There is a principle that precludes anyone, even an expert opinion, from invading the province of the jury, and testifying regarding things that are within the ordinary understanding and common knowledge of the jury, to do so invades the province of the jury, and when experts are qualified under 90.702 they are qualified to render opinions that are outside of the common experience of the jury, so in my view, street smarts falls within the common experience of ordinary human beings, and I'm going to sustain the objection. I like the argument, though.

(Vol. 1, R178-181).

The trial court correctly ruled the subject of "street smarts" was not one which required an expert opinion. A trial court has wide discretion concerning the admissibility of evidence and the range of subjects about which an expert can testify. *Jent v. State*, 408 So. 2d 1024 (Fla.1981); *Johnson v. State*, 393 So. 2d 1069 (Fla.1980), cert. denied, 454 U.S. 882, 102 S. Ct. 364, 70 L. Ed. 2d 191 (1981). Expert testimony should be excluded when the facts testified to are of such nature as not to require any special knowledge or experience in order for the jury to form its conclusions. *Johnson v. State*, 438 So. 2d 774, 777 (Fla. 1983); *See also Jordan v. State*, 694 So. 2d 708, 717 (Fla. 1997) (that elderly woman would be "terrified" if

confronted with a gun). The trial judge has broad discretion in determining the range of the subjects on which an expert can testify, and the trial judge's ruling will be upheld absent a clear error. *See Pagan v. State*, 830 So. 2d 792 (Fla. 2002). *Penalver v. State*, 31 Fla. L. Weekly S65 (Fla. Feb. 2, 2006).

8. Expert testimony about testimony of other witnesses.

This cite refers to a question by defense counsel to Dr. Mings:

> Q You were present during the last three witnesses?
>
> A Yes, I was.
>
> Q Is anything any of the three said relative to David, Elvis, inconsistent with your other findings?
>
> Mr. Ashton: Objection. Objection to asking, commenting on the credibility of another.
>
> The Court: Objection sustained.

(Vol. 2, R213). The trial court did not abuse its discretion in sustaining the objection. No testimony was proffered, and this issue is not preserved. *Blackwood, supra.* The ruling on admissibility was within the trial judge's discretion. *See Ibar v. State*, 31 Fla. L. Weekly S149 (Fla. March 29, 2006); *Johnston v. State*, 863 So. 2d 271 (Fla. 2003) (holding that a trial judge's ruling on the admissibility of evidence will not be disturbed on appeal absent an abuse of discretion). The question called for an expert to comment on the credibility of other witnesses. *See Feller v. State*, 637 So. 2d 911 (Fla.

1994)(reversible error to allow expert to vouch for credibility of witness).

Last, Frances argues the trial court's ruling precluded him from presenting his theory of defense. He does not identify that theory, and this claim is insufficiently pled. *See Duest, supra.* All but one of the record cites are to the penalty phase. Frances was afforded wide latitude in the penalty phase and witnesses testified by videotape over State objection. A huge amount of information was presented to the jury regarding Frances' life. Error, if any, was harmless. *State v. DiGuilio,* 491 So. 2d 1129 (Fla. 1986). Frances confessed to the murders and his involvement. Frances seems to argue that the theory of the penalty phase was that Elvis was responsible for both murders and David's relative culpability was minor. This "theory" is contradicted by his confession and the evidence. Frances received a fair trial and penalty phase.

ARGUMENT

POINT II

THE TRIAL COURT DID NOT ERR IN FINDING AND WEIGHING AGGRAVATING AND MITIGATING CIRCUMSTANCES; THE SENTENCE OF DEATH IS PROPORTIONAL.

Frances claims (1) the aggravating circumstance of heinous, atrocious and cruel ("HAC") was inappropriately applied to his case; (2) the trial court erred in weighing the contemporaneous murders; (3) the trial court erred in weighing the mitigating circumstances; and (4) the death sentences are disproportional.

1. Heinous, atrocious, and cruel. This Court's review of claims regarding whether an aggravating circumstance applies is limited to determining whether the trial judge applied the correct rule of law and, if so, whether competent, substantial evidence supports his finding. *Hutchinson v.* State, 882 So. 2d 943, 958 (Fla. 2004). The trial court order is supported by competent, substantial evidence. The trial court found:

> **III. THE CAPITAL FELONY WAS ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL.**[12]
>
> "Heinous," "atrocious," and "cruel" have been defined by the Florida Supreme Court as:
>
> > It is our interpretation that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and that cruel means designed to inflict a high

[12] (Trial court footnote) As stated previously, this aggravator applies to Joanna Charles only.

> degree of pain with utter indifference to, or even enjoyment of, the suffering of others. What is intended to be included are those capital crimes where the actual commission of the capital felony is accompanied by such additional acts as to set the crime apart from the norm or capital felonies — the conscienceless or pitiless crime which is unnecessarily torturous to the victim.

See State v. Dixon, 283 So. 2d 1, 9 (Fla. 1973).

In determining whether the heinous, atrocious, or cruel aggravating circumstances apply, the trial court must consider the circumstances of the murder from the "unique perspective of the victim," *see Banks v. State*, 700 So. 2d 363, 367 (Fla. 1997), as opposed to the perceptions of the perpetrator. *Farina v. State*, 801 So. 2d 44, 53 (Fla. 2001). The court may consider fear and emotional strain of the victim as contributing to the heinous nature of the murder. *See Preston v. State*, 607 So. 2d 404 (Fla. 1992), *cert denied*. 507 U. S. 999 (1993).

Dr. Sara Irrgang ("Dr. Irrgang"), the medical examiner who performed the autopsies on both victims, determined that Helena Mills and Joanna Charles died as a result of strangulation/ asphyxiation. Dr. Irrgang testified that each woman would have been conscious and aware of what was happening for a minimum of 1-2 minutes while continuous pressure was applied to their necks. During that time, they would feel the pain associated with hands and/or ligature around the neck. Dr. Irrgang further testified that both victims had cuts on their necks which were consistent with an electrical cord being pulled tight around the neck. A cord was recovered from around Joanna Charles' neck.

Dr. Irrgang testified that, along with the electrical cord marks, she also found crescent shaped fingernail marks or gouges on Joanna Charles' neck. It was Dr. Irrgang's professional opinion that these marks were consistent with defensive attempts to prevent strangulation. The DNA evidence subsequently found under Joanna Charles's fingernails was unique to her, which supported Dr. Irrgang's opinion that the marks

> were self-inflicted as Joanna Charles struggled to remove something from her neck.
>
> Due to her struggle for life, Joanna Charles' suffering was extensive and lasted a significant period of time. As Dr. Irrgang stated, Joanna Charles' death was not instantaneous, nor without her knowledge. Joanna Charles was attacked in her own home, a place where she was supposedly safe, by two people known to her. During the initial struggle with Elvis, she was clearly conscious and therefore suffered not only the physical pain caused by Elvis' hands around her neck and her own self-inflicted defense wounds, but also the anxiety and extreme terror caused by her knowledge of impending death. Her manifest terror and anxiety must have increased when Defendant arrived and Joanna Charles realized that he was there not to help her, but instead was helping Elvis kill her. Her physical pain further intensified while both Defendant and Elvis were strangling her and she was desperately fighting against two people who eventually overpowered her. Thus, the entire sequence of events leading to Joanna Charles' death demonstrates that she suffered both mental and physical torture at the hands of Defendant.
>
> Accordingly, this murder fits the Supreme Court's definition of "heinous, atrocious, or cruel." The Court finds that this aggravating factor is present.

(Vol. 7, R1243-1245). These findings are supported by substantial competent evidence.

Frances argues that JoAnna's murder happened quickly and he did not *intend* to inflict the high degree of pain that resulted. It is now well-settled that the intent of the murderer is not the operative question, rather the actual suffering of the victim. This Court recently stated in *Reynolds v. State*, 31 Fla. L. Weekly S318, 326 (Fla. May 18, 2006):

> Reynolds asserts that HAC is inapplicable because the evidence does not establish that he intended or desired to inflict a high degree of pain or that he was utterly indifferent to or enjoyed the suffering of his victims. However, we have specifically rejected Reynolds' contention. In *Lynch v. State*, 841 So. 2d 362 (Fla. 2003), we held that "[i]n determining whether the HAC factor was present, the focus should be upon the victim's perceptions of the circumstances as opposed to those of the perpetrator." *Id*. at 369 (emphasis supplied); *see also Farina v. State*, 801 So. 2d 44, 53 (Fla. 2001) ("[The HAC] aggravator pertains more to the victim's perception of the circumstances than to the perpetrator's."); *Guzman v. State*, 721 So. 2d 1155, 1160 (Fla. 1998) ("The intention of the killer to inflict pain on the victim is not a necessary element of the aggravator.")

Frances also argues that this strangulation does not warrant application of HAC because it was “no more likely than not that Charles lost consciousness upon her initial manual strangulation at Elvis’ hands.” (Initial Brief at 28). Not only does this Court review the facts in the light most favorable to the prevailing party, but also this allegation is not supported by the record. Frances argues that JoAnna lost consciousness immediately. Not so. David’s confession established that JoAnna struggled so much against Elvis that after David dispatched Mrs. Mills, he had to go help Elvis strangle her. David described JoAnna as a “big girl” whom Elvis had “trouble” with (Vol. 9, TT1419, 1459). David said Elvis was using his bare hands to choke JoAnna (Vol. 9, TT1419). David went and got Elvis to help him move Helena. Then they both went back to Joanna, who “still had life in her” (Vol. 9, TT1459). They moved Joanna over to

where they had moved Helena. Then, they both strangled Helena and Joanna by wrapping a cord around their necks. Joanna was still alive and you could "see her life in her" (Vol. 9, TT1460).

The medical examiner testified there were crescent-shaped marks on the right side of JoAnna's neck that "looked like fingernail marks." The fingernail marks were made near the time of the other marks (Vol. 8, TT1209). The fingernail marks appeared to be the product of trying to remove hands or a ligature away from the neck (Vol. 8, TT1218). In many cases, the person's own skin is found under the fingernails, indicating they struggled to remove the ligature (Vol. 8, TT1218). The ligature still around Charles' neck had been tightened with such force it broke the skin. Charles also had a band across her neck and a red marks (Vol. 8, TT1221).

When a person is strangled manually, it takes a few minutes to lose consciousness and the victim will most likely struggle. Strangulation requires constant pressure for approximately three to four minutes. Once the blood supply is cut off, the victim will lose consciousness within a minute or two (Vol. 8, TT 1203). Pain receptors in the neck region that, if a person's hands or arm were wrapped around the neck, would cause pain and apprehension (Vol. 1, R58). Pulling a cord tightly against the next would trigger pain. Petechial hemorrhages in the eyes are

caused by pressure building up in the head (Vol. 1, R59). Loss of blood supply causes the vision to become blurry. It also causes loss of consciousness which is stressful. Asphyxia causes distress to the brain (Vol. 1, R60). A person being asphyxiated will struggle to take breaths, but the oxygen-rich blood will not reach the brain. The person will be able to make noises, but may not be able to scream for help (Vol. 1, R61). It takes a "couple of minutes" to cause a person to lose consciousness if the blood supply is completely blocked (Vol. 1, R61). If a person struggles, the blood supply is interrupted, which can prolong the time before unconsciousness. A person can move their extremities until unconsciousness takes place. They are able to perceive things, such as someone having their hands on them (Vol. 1, R62). Joanna Charles would have been able to hear screams coming from another part of the apartment if she were conscious. She would be able to feel hands around her neck (Vol. 1, R63). Strangulation requires enough pressure to compress the blood vessels. When blood is going to the brain but not coming out, it causes the petechial ruptures (Vol. 1, R65). It requires more pressure to shut off the arterial flow than the venal flow (Vol. 1, R65).

Viewing this evidence in the light most favorable to the State, JoAnna was aware of the strangulation of Mrs. Mills who was in the next bedroom. She struggled with Elvis during the

time it took David to strangle Mills. Then David joined Elvis in strangling JoAnna who "still had life in her." This statement by David indicates JoAnna was still conscious and aware Mrs. Mills had succumbed and both murderers were now going to take care of her, too. Even after she was moved and dumped on top of Mrs. Mills, David described her as having life in her. To end that life, the brothers secured electrical cords and finished the job. The forensic evidence showed that JoAnna was struggling against the strangulation. The material under her fingernails matched her DNA (Vol. 8, TT1294). As the medical examiner indicated, the crescent-shaped marks on JoAnna's neck were from her fingernails digging into her own skin so she could breathe.

This Court has held that strangulation creates a prima facie case for HAC. *Ocha v. State,* 826 So. 2d 956, 963 (Fla. 2002); *Orme v. State*, 677 So. 2d 258 (Fla. 1996). Although this factor was not applied to Mrs. Mills, it does apply to JoAnna. The knowledge of Mrs. Mills being murdered in the next room added to the heightened fear. *See Francis v. State*, 808 So. 2d 110 (Fla. 2003). This Court recently discussed the unique circumstances associated with close proximity homicides:

This court recently summarized a similar circumstance:

> For a child to experience the fear, terror and emotional strain that accompanied Christina Razor as she fought for her life, knowing full well that she

> was fighting a losing battle, is unimaginable, heinous, atrocious and cruel. In a prior decision, the Florida Supreme Court has dealt with a similar situation. *Francis v. State*, 808 So. 2d 110 (Fla. 2003). The Francis decision discusses the unique circumstances associated with close proximity homicides:
>
> > Moreover, as we have previously noted, "the fear and emotional strain preceding the death of the victim may be considered as contributing to the heinous nature of a capital felony." See Walker, 707 So. 2d at 315; *see also James v. State*, 695 So. 2d 1229, 1235 (Fla. 1997) ("[F]ear, emotional strain, and terror of the victim during the events leading up to the murder may make an otherwise quick death especially heinous, atrocious, or cruel."). In this case, although the evidence did not establish which of the two victims was attacked first, the one who was first attacked undoubtedly experienced a tremendous amount of fear, not only for herself, but also for what would happen to her twin. In a similar manner, the victim who was attacked second must have experienced extreme anguish at witnessing her sister being brutally stabbed and in contemplating and attempting to escape her inevitable fate. We arrive at this logical inference based on the evidence, including photographs presented at the guilt phase, which clearly establishes that these two women were murdered in their home only a few feet apart from each other. As a result, we conclude that the trial court's HAC finding is further buttressed by the logical fear and emotional stress experienced by the two elderly sisters prior to their deaths as the events were unfolding in close proximity to one another.

Reynolds v. State, 31 Fla. L. Weekly S318, 326 (Fla. May 18, 2006).

JoAnna was 16 years old. She was in a bedroom right next to her aunt’s. She struggled for her life to the point that

even strong, aggressive Elvis could not handle her and David had to come to his aid. Strangulation of a conscious murder victim evinces that the victim suffered through the extreme anxiety of impending death as well as the perpetrator's utter indifference to such torture. Accordingly, this Court has consistently upheld the HAC aggravator in cases where a conscious victim was strangled. *See Mansfield v. State*, 758 So. 2d 636, 645 (Fla. 2000): *Hildwin v. State*, 727 So. 2d 193, 196 (Fla. 1998); *Orme v. State*, 677 So. 2d 258, 263 (Fla. 1996); *Hitchcock v. State*, 578 So. 2d 685, 692 (Fla. 1990). As in *Bowles v. State*, 804 So. 2d 1173, 1178-1179 (Fla. 2001), both the defendant's confession and the medical examiner's testimony provide competent, substantial evidence to support the trial court's finding that the victim was strangled while conscious for a time sufficient to suffer a physically and mentally cruel and torturous death. *See Mansfield*, 758 So. 2d at 645; *Belcher v. State*, 851 So. 2d 678, 683 (Fla. 2003); *Barnhill v. State*, 834 So. 2d 836 (Fla. 2002).

Furthermore, even if JoAnna had lost consciousness quickly, in *Francis v. State*, 808 So. 2d 110 (Fla. 2001), this Court noted that the application of HAC has been upheld even when the "medical examiner determined that the victim was conscious for merely seconds." Id. at 135. In *Rolling v. State*, 695 So. 2d 278 (Fla. 1997), this Court upheld the application of the HAC

aggravating circumstance even when the medical examiner testified that the "victim would have remained alive for a period of thirty to sixty seconds." Rolling, 695 So. 2d at 296. Moreover, in *Peavy* the Court determined that the application of HAC was not improper when the medical examiner testified the victim would have lost consciousness within seconds. *See Peavy* v. State, 442 So. 2d 200, 202-03.

2. Weight given the contemporaneous murders. Although Frances acknowledges that contemporaneous convictions are properly considered as a prior violent felony, he argues with the weight given this aggravating circumstance. (Initial Brief at 34). The trial judge found this aggravating circumstance for both victims.

The trial court did not abuse its discretion in the weight assigned to this aggravator. *Sexton v. State*, 775 So. 2d 923, 934 (Fla. 2000)(abuse of discretion standard applies to determination whether trial court afforded proper weight to aggravating factor). The trial court held:

> **I. DEFENDANT WAS PREVIOUSLY CONVICTED OF ANOTHER CAPITAL FELONY OR OF A FELONY INVOLVING THE USE OF THREAT OF VIOLENCE TO THE PERSON.**
>
> On December *5,* 2000, Defendant and Elvis were stopped in Helena Mills' automobile in DeKalb County, Georgia. During the interview with Orlando Police Department Detective Reginald Campbell, Defendant initially stated that Elvis killed both victims. Although Defendant admitted that he helped move the bodies and participated in stealing the car, he denied any role

> in the actual killings. When confronted with Elvis' version of the murders, however, Defendant confessed that he alone strangled Helena Mills until she was unconscious. He then went into the bedroom where Elvis was unsuccessfully trying to overcome Joanna Charles, and helped Elvis strangle her. Defendant and Elvis moved the bodies into the bathroom and further strangled Helena Mills with an electrical cord. Because Joanna Charles still had life in her, they wrapped the cord around her neck and each of them pulled on one end of it.
>
> The contemporaneous conviction of a violent felony may qualify as an aggravating circumstance, so long as the two crimes involved multiple victims or separate episodes. *See Pardo v. State*, 563 So. 2d 77, 80 (Fla. 1990). *See also Doorbal v. State*, 837 So. 2d 940, 963 (Fla. 2003), *cert. denied*, 539 U.S. 962 (2003) (one of the aggravating circumstances found by trial judge to support sentences of death was that Doorbal had been convicted of a prior violent felony, namely the contemporaneous murders of Griga and Furton).
>
> The jury verdict in the guilt phase finding Defendant guilty of two counts of premeditated murder clearly shows that the State proved beyond a reasonable doubt that Defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to a person. Accordingly, the Court finds this aggravating factor is present.

(Vol. 7, R1241). In conclusion, the trial court found the aggravating circumstances greatly outweigh the mitigating circumstances (Vol. 7, R1249). These findings are supported by competent substantial evidence.

3. Weight given mitigating circumstances. The trial court did not abuse its discretion in deciding the weight to be given to mitigating factors. As to mitigation, the trial court held:

> **I. THE DEFENDANT HAS NO SIGNIFICANT HISTORY OF PRIOR CRIMINAL ACTVITY.**

The Court finds that this mitigating circumstance is not present. Defendant's history of helping Elvis in disposing of Monique Washington's body while AWOL from the U. S. Army is significant and precludes this as a mitigating circumstance.

II. THE CRIME FOR WHICH THE DEFENDANT IS TO BE SENTENCED TODAY WAS COMMITTED WHILE HE WAS UNDER THE INFLUENCE OF EXTREME MENTAL OR EMOTIONAL DISTURBANCE.

The Court finds that this mitigating circumstance is not present. There was no evidence of this mitigating circumstance apart from the mental state inherent in a premeditated intent to kill.

III. THE VICTIM WAS A PARTICIPANT IN THE DEFENDANT'S CONDUCT OR CONSENTED TO THE ACT.

The Court finds that this mitigating circumstance is not present. There was no evidence of this mitigating circumstance.

IV. THE DEFENDANT WAS AN ACCOMPLICE IN THE OFFENSE FOR WHICH HE IS TO BE SENTENCED BUT THE OFFENSE WAS COMMITTED BY ANOTHER PERSON AND DEFENDANT'S PARTICIPATION WAS RELATIVELY MINOR

The Court finds that this mitigating circumstance is not present. Defendant was an active participant in the killing of both victims.

V. THE DEFENDANT ACTED UNDER EXTREME DURESS OR UNDER THE SUBSTANTIAL DOMINATION OF ANOTHER PERSON.

Defendant offered evidence that he was under the influence of his younger brother Elvis; however, such evidence was not persuasive. The Court has weighed the effect of Elvis's influence on Defendant together with other factors, but finds that since Defendant maintained a normal capacity of independent choice and freedom of action, such influence did not rise to the level of extreme duress or substantial domination.

VI. THE CAPACITY OF THE DEFENDANT TO APPRECIATE THE CRIMINALITY OF HIS CONDUCT OR TO CONFORM HIS CONDUCT TO THE REQUIREMENTS OF THE LAW WAS SUBSTANTIALLY

IMPAIRED.

The Court finds that this mitigating circumstance is not present.

VII. THE AGE OF THE DEFENDANT AT THE TIME OF THE CRIME.

Defendant was twenty (20) years of age at the time of the offense. The Court has weighed his relative youth together with other factors.

VIII. THE EXISTENCE OF ANY OTHER FACTORS IN THE DEFENDANT'S BACKGROUND THAT WOULD MITIGATE AGAINST IMPOSITION OF THE DEATH PENALTY.

Per defense counsel's request,[13] the jury was instructed on the mitigating circumstances of:

> (1) Among the mitigating circumstances that you may consider, if established by the evidence, are:
>
> > (a) Any aspect of the defendant's character, record, or background; and
> > (b) Any other circumstance of the offense that would mitigate against the imposition of the death penalty.

At the penalty phase evidentiary hearing, Defendant presented several witnesses, primarily school teachers and baseball coaches, who all testified that Defendant exhibited a kind and gentle nature both in school and on the baseball field, was a team player, and had a clear sense of right and wrong. Those witnesses, who also knew Elvis, stated that Elvis by contrast was very aggressive, liked to fight, and had a bad

[13] (Trial court footnote) Defense counsel stated that he did not want the mitigating circumstances listed in the jury instructions. Instead, he asked the Court to give only the general instructions, i.e., the jury could consider any aspect of Defendant's character, record, or background that it found to be mitigating. After the Court conducted a thorough colloquy with Defendant to make sure that he understood what counsel wanted, the jury received the general instructions on mitigating circumstances.

attitude.

Dwayne Bell, an Orange County Corrections Department employee who supervised Defendant in the Orange County Jail for a year and a half, testified that Defendant was a model inmate with a good demeanor.

Tameka Jones ("Jones") testified that she lived for one year with Defendant and Elvis and their cousin in Tallahassee. Defendant and Elvis wanted to leave Tallahassee because Defendant was being pursued by the military and Elvis had failed to appear for a court appearance. Elvis and Tameka Jones went to the apartment of Monique Washington where Elvis strangled Ms. Washington with his hands and a VCR cord in order to steal Ms. Washington's car. Defendant and Elvis then drove back to the apartment, removed the body, and dumped it. They also stole several items from the apartment and pawned some of them. Defendant and Tameka Jones then drove Ms. Washington's car to Atlanta where they "partied."

Dr. Eric Mings ("Dr. Mings"), a psychologist, testified that a neuropsychological examination of Defendant showed normal results. He further testified that, although Defendant and Elvis were very close, they were also very different. Dr. Mings stated that Elvis tended to be aggressive and violent, and was involved in a lot of fights, while Defendant was polite, quiet, and reserved. Defendant went A.W.O.L. because he didn't like the Army, and Elvis was continually getting into trouble at home. However, when Defendant arrived home, his mother kicked both Elvis and Defendant out of the house. It was Dr. Mings' professional opinion that Defendant and Elvis had a pathologically dependent relationship from an early age, and that Defendant didn't leave Elvis after the Tallahassee murder because he emotionally believed that Elvis was all he had. Dr. Mings further opined that, based on the extent of the bonding between the two of them, Defendant was pulled into Elvis' life style.

The defense asserted that Defendant had no prior criminal activity other than being A.W.O.L. from the military and aiding Elvis "after the fact" in an earlier homicide. The defense further asserted that

> the criminal activity in the instant case, while severe, was an isolated event. Defendant showed that his mother left him shortly after he was born, leaving him to be reared by his grandmother in poverty in a small home in the Virgin Islands. He also showed that he lacked a positive male role model because his father abandoned him. The defense argues that Defendant had a pathological relationship with Elvis, who was dominant because he was stronger and more aggressive than Defendant; accordingly, it would be a miscarriage of justice to sentence Defendant to death when his co-defendant brother received a life sentence.[14]
>
> The Court finds substantial evidence to support these non-statutory mitigating circumstances and finds that they are fairly descriptive of defendant's history, personality, and conduct. Since these circumstance are the primary matters upon which the defense has rested its argument for mitigation the Court has weighed them carefully and given serious weight to them. The Court finds, however, that the circumstances are primarily descriptive and do little to counterbalance the egregious nature of the acts which constitute the crimes.

(Vol. 7, R1239-1249). These findings are supported by competent substantial evidence.

Francis now argues the trial court erred in failing to give weight to the statutory mitigating circumstances of age, no significant criminal history, and duress/substantial domination.

The statutory mitigating circumstances were personally waived by the defendant. The arguments made on appeal were not

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[14] (Trial court footnote) Defendant concedes that Elvis was not eligible for the death penalty because he was two months shy of his seventeenth birthday when he was sentenced. However, he asserts that it is hard to dispute that Elvis was the dominant force in the murders given the fact that he was involved in a similar killing in Tallahassee.

presented to the trial judge. During the charge conference, the trial judge asked whether the defense was requesting instructions on specific mitigating circumstances (Vol. 2, R236). Defense counsel stated:

> Mr. Hooper: That's correct, Your Honor. The defense prefers not to have the mitigating circumstances listed out. The defense prefers just to have the – I'm looking for the number, which is just 8a and b[15], Your Honor. That you may consider any aspect of the defendant's character, background, and other circumstance in the defense – we just wish the general instructions.

(Vol. 2, R236). The prosecutor then requested:

> Mr. Ashton: I would suggest that, and you're probably thinking the same thing, it might be a good idea to get the defendant's specific waiver of some of these because there are some statutories that he is – based on the evidence, might arguably apply.

(Vol. 2, R236). The judge agreed, and asked Frances:

> The Court: Mr. Frances, have you --
>
> The Defendant: Yes, Your Honor.
>
> The Court: Have you discussed with your attorneys that you are entitled to have the jury instructed that they can consider certain mitigating circumstances, including whether or not you have, if you have no significant history of prior criminal activity, that you were under the influence of extreme mental or emotional disturbance, that they may have known that

[15] Instructions 8a. and 8b. of Standard Jury Instructions for Penalty Proceedings in Capital Cases for F.S.921.141(6) provide:

> 8. Any of the following circumstances that would mitigate against the imposition of the death penalty:
> a. Any [other]aspect of the defendant's character, record, or background.
> b. Any other circumstance of the offense.

you were an accomplice in the offense, that you were under extreme duress or substantial domination from another person, including Elvis, whether your capacity to appreciate the criminality of your act may have been substantially impaired, or your age. Have you discussed all of these circumstances with your attorneys?

The Defendant: Yes, Your Honor.

The Court: And have you discussed with them the possible existence of any non-statutory mitigating circumstances that they may have in mind?

The Defendant: Yes, Your Honor.

The Court: And they have asked that I just give a general instruction that the jury may consider any aspect of your character, record or background that they find to be mitigating. Just, do you understand the difference between listing them out and just saying them generally?

The Defendant: Yes, Your Honor.

The Court: And have you discussed with your attorneys whether it's a good idea or not a good idea to list them out or --

The Defendant: We discussed it was a good idea, as you say.

The Court: To do them generally?

The Defendant: Yes, Your Honor.

The Court: Is that what you wish?

The Defendant: Yes, Your Honor.

The Court: Okay. Very well.

(Vol. 2, R237-238).

Trial counsel did not argue statutory mitigating circumstances to the jury (Vol. 2, R296-300), and did not

address them in either of the two sentencing memorandum (Vol. 7, R1221-24, 1228-32). Trial counsel did not argue for statutory mitigating circumstances at the *Spencer* hearing (SRVol. 6, SR314-16). The issue now raised on appeal was not only never raised at the trial level, it was specifically waived by the defendant personally.

On the merits, age, in and of itself, does not require a finding of the age mitigator. *See Nelson v. State*, 850 So. 2d 514, 528 (Fla. 2003) (age 21); *Gudinas v. State*, 693 So. 2d 953 (Fla. 1997) (Age 20); *Garcia v. State*, 492 So. 2d 360, 367 (Fla. 1986) (age 20). In *Shellito v. State*, 701 So. 2d 837, 843 (Fla. 1997), this Court held that the trial judge is in the best position to judge a defendant's emotion and maturity level and the Court will not "second guess his decision." Frances was 20 years old at the time of the murders. As his teachers testified, he was an unusually bright and responsible young man through high school. He was recruited straight out of high school for the Army. The alleged reason he left the Army was to take care of his younger brother. There was even talk of him adopting Elvis. There was no evidence David was immature, either emotionally or physically.

There was no evidence David was under the substantial domination of Elvis. One witness said David was afraid of Elvis when they were younger. The other witnesses simply described

Elvis as a mean-spirited bully who fought and stole. Rather than cower in Elvis' presence, David would go in to break up fights Elvis started. There was no evidence Elvis dominated David. To the contrary, as Dr. Mings testified, there was a very strong bond between the brothers. When Elvis killed Monique, David quite cordially disposed of the body for him. Then David took Monique's car and went to Atlanta to party with Tameka. The fact that Elvis was four when he beat on David, 7, hardly established this mitigator.

The evidence in this case shows that both brothers went to Mrs. Mills' house in the early morning. A reasonable inference from this visit is they were checking out the situation. Once they learned Dwayne was leaving for school and JoAnna was sick, they waited until Dwayne left then went back while the two women were alone. David immediately jumped Mrs. Mills while Elvis went to take care of JoAnna. When JoAnna fought Elvis, David finished his business with Mrs. Mills then went to help Elvis. There is no evidence Davis was anything more than a willing participant in these exploits and probably planned the entire event. After they stole Mrs. Mills' car, they went back to Atlanta to party: the same pattern David followed after Monique's death.

Francis argues that being AWOL is not a "significant criminal history." (Initial Brief at 41). The trial judge

rejected the statutory mitigating circumstance because not only was David a deserter from the Army and being sought by authorities, but also he was involved in the murder of Monique Washington while he was a deserter. Although Frances may think his involvement in Monique's death was minimal, disposing of a body, failing to report a crime to authorities, and driving a known stolen car to Atlanta to party with friends is certainly criminal. This is not to mention the fact he admitted to Dr. Mings he smokes marijuana. Although Frances says that presenting evidence of his deserter status is a non-statutory aggravating circumstance, this is precisely the information the jury must have to assess the true character of a defendant. Furthermore, it was through Tameka, a defense witness, that this information came to light because military authorities were looking for David and they had to leave Tallahassee. It is not necessary for Frances to be convicted of the criminal activity for. *See Walton v. State*, 547 So. 2d 622, 625 (Fla. 1989); *Washington v. State*, 362 So. 2d 658, 666-667 (Fla. 1978).

A trial court's decision regarding the weight to be assigned to a mitigating circumstance that it determines has been established is "within the trial court's discretion, and its decision is subject to the abuse-of-discretion standard." *Kearse v. State*, 770 So. 2d 1119, 1133 (Fla. 2000); see also *Trease*, 768 So. 2d 1050, 1055 (Fla. 2000). *Cole v. State*, 701

So. 2d 845, 852 (Fla. 1997). Under the abuse of discretion standard, a trial court's ruling will be upheld unless the "judicial action is arbitrary, fanciful, or unreasonable, . . . [and] discretion is abused only where no reasonable [person] would take the view adopted by the trial court." *Trease*, 768 So. 2d at 1053 n.2 (quoting *Huff v. State*, 569 So. 2d 1247, 1249 (Fla. 1990)).

4. Proportionality. This case presents a murder which is among the most aggravated and least mitigated reviewed by this Court. This case is comparable to similarly situated double-homicide defendants who have been sentenced to death. *See, e.g., Lynch v. State,* 841 So. 2d 362 (Fla. 2003) (defendant shot two victims, aggravating circumstances of prior violent felony and committed during a felony as to both victims; CCP as to one victim, HAC as to other); *Smithers v. State*, 826 So. 2d 916 (Fla. 2002)(two victims strangled, aggravators of prior violent felony and HAC on both murders, CCP on one murder; statutory mitigators of extreme emotional disturbance and impaired capacity; numerous nonstatutory mitigators); *Francis v. State*, 808 So. 2d 110 (Fla. 2001)(defendant stabbed two people to death; aggravating circumstances of prior violent felony, committed during a felony, and HAC); *Blackwood v. State*, 777 So. 2d 399, 412-13 (Fla. 2000) (concluding that the death sentence was proportionate where the HAC aggravator outweighed one

statutory mitigator and multiple nonstatutory mitigators); *Bates v. State*, 750 So. 2d 6 (Fla. 1999)(murders committed during felony and for pecuniary gain; mitigation of not criminal history, age of 24, committed under emotional distress, ability to conform conduct impaired); *James v. State*, 695 So. 2d 1229 (Fla. 1997)(stabbed one victim, strangled the other; aggravators of prior violent felony for contemporaneous murder, HAC; one statutory and one nonstatutory mitigator); *Henyard v. State*, 689 So. 2d 239 (Fla. 1996) (two victims shot, aggravators of prior violent felony, during a felony and for pecuniary gain, and HAC; mitigators of age (18), extreme emotional disturbance and impaired ability to conform conduct; numerous nonstatutory mitigators) . *Lawrence v. State*, 698 So. 2d 1219 (Fla. 1997)(two murders, aggravators of prior violent felony, CCP; five statutory mitigators plus four nonstatutory factors; co-defendant was actual killer).

The circumstances of this case are similar to other cases in which this Court has upheld the death penalty. *See Butler v. State*, 842 So. 2d 817, 833 (Fla. 2003) (holding the death sentence proportional for the first-degree murder conviction where only the HAC aggravator was found); *Singleton v. State*, 783 So. 2d 970, 979 (Fla. 2001) (holding the death sentence proportional for the first-degree murder conviction where the aggravators included prior violent felony conviction and HAC);

Mansfield v. State, 758 So. 2d 636, 647 (Fla. 2000) (death sentence was proportionate where trial court found two aggravating factors, HAC and murder committed during the course of enumerated felony, measured against five nonstatutory factors that were given little weight); *Geralds v. State*, 674 So. 2d 96 (Fla. 1996) (death sentence was proportionate where trial court found only two aggravating circumstances, HAC and murder in course of felony, and some nonstatutory mitigation); *Branch v. State*, 685 So. 2d 1250, 1253 (Fla. 1996) (holding death sentence proportional in a case where the aggravators were murder committed during the course of enumerated felony, prior violent felony, and HAC, and the following nonstatutory mitigating factors were found: remorse, unstable childhood, positive personality traits, and acceptable conduct at trial).

Francis compares his case to *Hawk v. State,* 718 So. 2d 159 (Fla. 1998); *Wright v. State*, 688 So. 2d 298 (Fla. 1996); *Proffitt v. State*, 510 So. 2d 896 (Fla. 1987); *Kramer* v. *State*, 619 So. 2d 274 (Fla. 1993), *DeAngelo v. State*, 616 So. 2d 440 (Fla. 1993); *Fitzpatrick v. State*, 527 So. 2d 809 (Fla. 1988); and *Livingston v. State*, 565 So. 2d 1288 (Fla. 1988). These cases are distinguishable.

Wright involved a case in which the defendant became angry when his ex-wife refused to let him visit his children, so he killed her. The aggravating circumstances were that he had a

prior violent felony and committed the murder during a burglary. The statutory mitigating circumstance was extreme emotional disturbance. Nonstatutory mitigation included remorse, cooperation with police, mental health problems, heated domestic dispute, history of conflict with victim, good military and employment record, regularly attended church, mental abuse as a child, and good deeds. This Court held that the only history of violence had to do with the ongoing struggle between the defendant and the victim, there was "copious" mitigation, and the defendant was "extraordinarily overwrought" at the thought of losing his children. *Wright*, 688 So. 2d at 301.

In *Proffitt*, the murder was committed during a residential burglary. The State conceded CCP did not apply. The defendant was employed, was a good worker, made no attempt to inflict mortal injuries on the victim's wife, fled the scene, confessed, and surrendered to authorities. This Court found a death sentence disproportionate because to hold otherwise "would mean that every murder during the course of a burglary justifies the imposition of the death penalty." *Proffitt*, 510 So. 2d at 898.

Mr. DeAngelo killed a woman that lived with him and his wife. The only aggravating circumstance was CCP. There had been an ongoing quarrel between the victim and defendant. DeAngelo was a volunteer firefight, served in the Army, and confessed to the crime. He suffered from bilateral brain damage, and had

hallucinations, delusional paranoid beliefs and mood disturbance. *DeAngelo,* 616 So. 2d at 443.

Likewise, Mr. Kramer got into an argument with another man and killed him with a rock and/or knife. There were two aggravating factors: prior violent felony and HAC. Statutory mitigation included extreme emotional disturbance and inability to conform his conduct to requirements of law. Nonstatutory mitigation included model prisoner, good worker, alcoholism and drug abuse. This Court found that:

> The evidence in its worst light suggests nothing more than a spontaneous fight, occurring for no discernible reason, between a disturbed alcoholic and a man who was legally drunk.

Kramer, 619 So. 2d at 278.

The defendant in *Fitzpatrick* had the three statutory mitigating factors of age, extreme emotional disturbance, and inability to appreciate the criminality of their conduct. Mr. Fitzpatrick was, in lay terms, "crazy as a loon." *Fitzpatrick*, 527 So. 2d at 812.

The pattern that emerges from the cases Frances cites is that the murders occurred during a heated dispute or ongoing battle between the victim and the defendant. The defendants all had mental health problems and sometimes alcohol or drug abuse problems. *See Hawk v. State*, 718 So. 2d 159, 163-64 (Fla. 1998) (mental mitigation was substantial); *Larkins v. State*, 739 So.

2d 90, 95 (Fla. 1999) ("The killing here appears to be similar to the killing that occurred in *Livingston* and to have resulted from impulsive actions of a man with a history of mental illness who was easily disturbed by outside forces.") *Livingston v. State*, 565 So. 2d 1288, 1292 (Fla. 1988) (death disproportionate where aggravators, prior violent felony and murder committed during a robbery, offset by severe childhood abuse, youth and immaturity, and diminished intellectual functioning).

Francis relies on cases which are inapposite to his situation. Frances has no mental health problems. He has an average IQ. There is no evidence of alcohol or substance abuse. There was no evidence of child abuse or deprived childhood. Gleneth's Byron's letter at the *Spencer* hearing negates any implication of a deprived or abused childhood. There was no heated argument with Mrs. Mills or JoAnna. Frances simply needed a car to go to Atlanta and party. The jury in appellant=s case recommended death by a vote of 10 to 2 and 9 to 3, and that recommendation must be given great weight. *Grossman v. State*, 525 So. 2d 833 (Fla. 1988). The aggravating circumstances proven by the State clearly establish that the death penalty is appropriate and the State asks this Court to affirm the sentence of death.

POINT III

FRANCES' DEATH SENTENCE DOES NOT VIOLATE *RING v. ARIZONA*.

Frances next asserts that Florida's capital sentencing scheme violates his Sixth Amendment right and his right to due process under the holding of *Ring v. Arizona*, 536 U.S. 584 (2002). This Court has previously addressed this claim. *Bottoson v. Moore*, 833 So. 2d 693 (Fla. 2002), and *King v. Moore*, 831 So. 2d 143 (Fla. 2002), and denied relief. *See also Jones v. State*, 845 So. 2d 55, 74 (Fla. 2003). Frances is likewise not entitled to relief on this claim. Furthermore, two of the aggravating circumstances found by the trial court were prior conviction of a violent felony, and that the murders were committed during a robbery. *See Doorbal v. State*, 837 So. 2d 940, 963 (Fla.) (rejecting *Ring* claim where aggravating circumstances found by the trial judge were defendant's prior conviction for a violent felony and robbery), *cert. denied*, 539 U.S. 962, 123 S. Ct. 2647, 156 L. Ed. 2d 663 (2003).

CONCLUSION

Based on the foregoing arguments and authorities, Appellee respectfully requests this Honorable Court affirm the order of the trial court and deny all relief.

Respectfully submitted,

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_____
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was furnished by U.S. mail to **James Wulchak**, 444 Seabreeze Blvd., Suite 210, Daytona Beach, Florida 32118-3841, this _____ day of May, 2006.

_____
Assistant Attorney General

CERTIFICATE OF FONT

I hereby certify that a true and correct copy of the foregoing Answer Brief was generated in Courier New, 12 point font, pursuant to Fla. R. App. 9.210.

_____
Assistant Attorney General