IN THE SUPREME COURT OF FLORIDA

DAVID S. FRANCES,	)	
	)	
Appellant,	)	
	)	
vs.	)	CASE NO. SC05-892
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	
_____	)	

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

INITIAL BRIEF OF APPELLANT

JAMES S. PURDY
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE

The State charged David S. Frances and his brother, Elvis Frances, by indictment with the first-degree murders of Helena Mills and JoAnna Charles, robbery of Mills' automobile, and two counts of petit theft of Charles' jewelry and Mills' son's Playstation video console. (V2, R 357-359)[1] The defense unsuccessfully contested the legality of Florida's death penalty under *Ring v. Arizona*,536 U.S. 584 (2002), contending among other things that it is unconstitutionally imposed by a judge rather than by jury, that it fails to require jury unanimity, and that the standard penalty phase jury instructions are unconstitutional as they minimize the role of the jury. (V3, R 404-406, 451-473; V4, R 634-654; V5, R 825-831, 866-870) The defendant also moved to bar victim impact evidence from the penalty phase of the trial, contending that under Florida's death penalty scheme, such evidence is irrelevant (and hence unconstitutional) to any statutory aggravating circumstances. (V1, T 40) The court denied the motions and permitted the victim impact evidence. (SR3, T 129-130, 149-150; V1, T 40)

A jury trial commenced before the Honorable John H. Adams, Judge of the

[1]The symbol "V" refers to volumes of the record on appeal (pleadings and penalty phase transcripts); the symbol "TT" to the volume numbers of the trial transcripts, numbered separately from the record of pleadings; while the symbol "SR" refers to volumes of the supplemental records.

Ninth Judicial Circuit of Florida, in and for Orange County on October 25, 2004. (V6, R 1129-1134) The court denied the defendant's motions for judgment of acquittal, in which defense had argued that there was a lack of premeditation shown. (TT9, T 1480-1487) The jury returned verdicts of guilty for two counts of first degree premeditated murder, one count of robbery, and two counts of petit theft as charged. (V6, R 1165-1169) The court adjudicated the defendant guilty of the charges. (V6, R 1162-1164)

Penalty phase of the trial commenced on November 1, 2004. The state produced the victim impact testimony of relatives of the two victims, along with additional testimony of the medical examiner. (V1, T 48-57, 58-66) Despite hearsay evidence being admissible at the penalty phase by statute [Fla. Stat. §921.141(1)], the trial court sustained multiple objections by the state to proposed hearsay testimony by the defendant, including testimony about the poor conditions of the house in which Frances grew up (V1, T 83-86), details of conversations a defense mitigation specialist had with folks in St. Thomas, U.S. Virgin Islands, and St. Kitts, where David and his brother Elvis grew up, regarding their childhood and young adulthood and the sharp contrast between the two brothers (V1, T 87-95), reports of domestic abuse (with cords and belts) on David as a child (V1, T 105-106), and a report of the defense mental health expert as to David's statements to

him as to why he could not leave Elvis despite Elvis's acts of prior violence. (V2, T 225-226) The court also sustained the state's objections to and precluded other defense testimony as irrelevant or improper, including reports of Elvis Frances's prior acts of violence (to show the relative character of David's brother, who was extensively involved in the instant case, and, in the defense view, the instigator of the violence, and to show the dynamics between the two brothers) (V1, T 135-136, 198-200), mental health expert opinion on whether the defendant possessed "street smarts" and how he would explain a person of normal intelligence not attempting to disguise the stolen vehicle (as the defendant had not done) (V1, T 178-181), and the mental health expert's opinion as to whether the in-court testimony of witnesses who knew the brothers contained anything inconsistent with the doctor's opinions about the pathologically dependent sibling relationship David had with his brother. (V2, T 212-213)

Following the presentation of the penalty phase testimony and argument of counsel, the jury recommended the death penalty for each of the two murders, voting 9-3 for death on Count I (Helena Mills murder) and 10-2 for death on Count II (JoAnna Charles murder). (V2, T 315; V6, R 1191, 1192) The defendant's motion for new trial was denied. (V7, R 1210-1204, 1226-1227)

After additional live and videotaped mitigating evidence was presented to

the court in the *Spencer* hearing (SR6, T 246-310), the court sentenced the defendant to death, finding that the state had proved two aggravating circumstances for Count I, and three aggravators for Count II, to-wit: a prior violent felony (the contemporaneous conviction for the murder of the other victim), the murders were committed during the course of a robbery, and, as to Count II (JoAnna Charles) only, the murder was heinous, atrocious, and cruel. (V7, R 1240-1245)

The court rejected the statutory mitigating factors of "no significant history of prior criminal activity," and "acting under duress or the substantial domination of another" (despite "the effect of Elvis's influence on Defendant"). (V7, R 1245-1246) The court did find and give unspecified weight to the defendant's "relative youth together with other factors" (not specifying what weight was given and what "other factors" were considered with regard to this mitigating circumstance) (V7, R 1246-1247); the relative personalities of the defendant and his brother (David being a model, quiet, gentle child, with Elvis being a bad, aggressive child, with a bad attitude); the fact that defendant would institutionalize well and was a model inmate with a good demeanor; the "pathologically dependent relationship from an early age" between the defendant and his brother, which caused David to be unable to leave his brother even after Elvis's prior criminal activity, and which "pulled

[David Frances] into Elvis' life style." (V7, R 1247-1248) The court also noted that the defendant's mother had "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;" that he lacked a positive male role model, never having known his real father, and "that Defendant had a pathological relationship with Elvis, who was dominant because he was stronger and more aggressive than Defendant," observing the defense contention "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." (V7, R 1248-1249) The trial court ruled that there was

> substantial evidence to support these non-statutory mitigating circumstances and finds that they are fairly descriptive of defendant's history, personality, and conduct.

(V7, R 1249) Despite giving them "serious weight," the court, however, concluded "that the circumstances are primarily descriptive and do little to counterbalance the egregious nature of the acts which constitute the crimes," ruling that the aggravating circumstances outweighed those in mitigation, and imposing death sentences for both killings. (V7, R 1249-1250) Further, the court sentenced the defendant to a consecutive fifteen year term of imprisonment on the robbery conviction and sixty days in jail on each of the petit thefts. (V7, R 1233-1236, 1250)

Notice of appeal was timely filed. (V7, R 1261) This appeal follows.

STATEMENT OF THE FACTS

In the morning of November 6, 2000, Elvis and David Frances visited the apartment home of the victims, Helena Mills and JoAnna Charles, family friends of the Frances and their mother. (TT5, T668-671; TT6, T785)[2] They chatted briefly with Mills' son, Dwayne Rivers, before leaving. (TT5, T 674-675) Rivers left for school and upon returning home late from school that evening, he discovered the bodies of Helena Mills, and a houseguest, 17-year-old JoAnna Charles, dead in the master bathroom off of the mother's locked bedroom. (TT5, T 675-687) The bodies had been piled one on top of the other, with Charles' body on top of Mills', and an electrical cord (from a radio) wrapped around Charles' neck. (TT5, T 697-704, 737; TT6, T 903) Cause of death of both victims was asphyxiation due to strangulation, either by ligature alone or by a combination of ligature and manual. (TT8, T 1199, 1203-1204, 1222-1223) Mills had some abrasions on her forehead and nose (which could have been caused by the deceased body being dragged) and one to her neck caused by the ligature, while Charles also had an abrasion (caused by slippage of the ligature) and crescent-shaped marks (consistent with Charles' fingernails and an attempt by Charles to remove the

[2] David and Elvis would frequently visit the Mills' household and vice versa to play video games with Dwayne Rivers, Mills'son, and chat with Mills. (TT5, T 669-671)

ligature) on her neck. (TT8, T 1194-1198, 1209, 1217-1221, 1235) There was no additional evidence of any bruising or striking, the puffiness of their faces being caused solely by fluid buildup after death. (TT8, T 1236-1238)

Mills' 1996 green Mazda 626 car, several items of Charles' jewelry and Rivers' Playstation video game console were discovered missing. (TT5, T 708-709, 717-720) The house was not ransacked, but the teenagers' room was messy. (TT5, T 694, 727, 730; TT6, T836, 922; TT7, T 942-944, 954)

Neighbors of the victims neither heard nor saw anything unusual on the day of the killings and no suspects were developed in the month following the crime. (TT6, T 835; TT7, T1019-1020, 1033-1034) However, in the early morning hours of December 6, 2000, police in Dekalb County, Georgia, stopped the suspect vehicle for a traffic violation, discovering Elvis Frances driving the car, with four other passengers, including brother David in the rear passenger seat. (TT7, T997-1002) A check of the tag indicated that the vehicle was stolen and involved in a homicide, hence all occupants of the vehicle were taken into custody. (TT7, T 999-1000, 1004) David reported to the arresting officer that he had purchased the car from an unidentified male in Tallahassee, Florida. (TT7, T 1003-1004)

Detectives from Orlando flew to Atlanta to interview the occupants, dismissing all except Elvis and David Frances. (TT7, T 1021-1024; TT9, T 1353-

1356) Speaking to David, the detectives obtained a statement from him, eventually indicating that he had not purchased the car, but instead was aware that his brother had strangled Mills and Charles and had stolen the car. (TT9, T 1412-1433) The defendant admitted to being present, but merely assisted his brother in moving the bodies. (TT9, T 1417-1418)

After interviewing David, the detectives spoke with Elvis and played for him portions of David's interview, inculpating Elvis. (TT9, T 1447-1448) Following Elvis' interview, the detectives, the next day, returned to David and asked him for a further statement, indicating that they did not believe his earlier story. (TT7, T 1028; TT9, T 1453) This time, David confessed to his and Elvis' involvement in the killings, admitting that they went to Mills' home to steal a car for transportation as their mother had kicked them out of her home. (TT9, T 1458) There was no plan to kill the victims. (TT9, T 1464-1465) While there, Elvis went into Charles' room and started to strangle her and the defendant jumped on Mills, strangling her with his hands. (TT9, T 1459) While the defendant moved Mills' body into her bathroom, he noted that Elvis went and retrieved an electrical cord and strangled Charles again. (TT9, T 1459-1460) When David returned, Elvis had rendered Charles unconscious (but still alive), and they both moved her into the master bathroom, there strangling both victims again with the electrical cord. (TT9, T

1459-1461) The brothers found the jewelry in plain view and also took the Playstation and car keys. (TT9, T 1461-1462)[3] Elvis drove Mills' car home, where they packed, then went to a pawn shop where David pawned the items for approximately $200 before leaving town for Tallahassee. (TT9, T 1462-1463)[4] David recounted in the statement that he felt true remorse for the killings, stating he was confused and upset during the episode:

> Q: But you were – she told you to get out. You took the car. You needed a ride, and then two people got killed in the results of it; is that correct?
>
> A: Yes, sir.
>
> Q: What do you feel?
>
> A: I feel you – I feeling bad I did that. I really look bad. I didn't know – that didn't make no sense, what I did.
>
> Q: Well – and the reason you did this is why?
>
> A: I was like – I think it was – was just upset. I was just – I

[3] Many other items of value, including other jewelry items and money, were present in plain view in the apartment, but were not taken. (TT6, T 852, 855, 891-895; TT7, T 981-982)

[4] The police recovered the stolen items from the pawn shop, along with a pawn ticket in the defendant's name containing the defendant's fingerprint. (TT7, T 1044-1067, 1073-1085) A minor, such as Elvis, is precluded from making a pawn shop transaction. (TT7, T 1068-1069)

> didn't know what to do. I was confused. I did not know what to do cause I have to take care of my 16-year-old brother. I have to take care of me. I didn't know what to do. (Inaudible)
>
> Q: Is there anything else you want to tell us that you haven't already told us? This is your opportunity to say something.
>
> A: I just – I only – I didn't – I really didn't want – man, I didn't want the ending to be like that there with Helena and Joanna. I didn't.

(TT9, T 1463-1465) During the interview, the detective suggested to David that Elvis, who had a bad temper, was out of control (this being based on information the detective had received from the boys' mother and after speaking with Elvis himself). (TT9, T 1468-1469)

Testimony from anyone who knew the Frances brothers spoke unanimously as to how this crime was so out of character for David, "an angel," a mild, quiet, passive, gentle boy, who never got into any trouble and always respected everyone, and who refused to fight even when someone hit him; whereas that same testimony solidly portrayed the younger brother, Elvis, as a bad-tempered trouble-maker, who was always looking for a fight, was uncontrollable by his mother, and who did not respect his mother and others or their property. (TT6, T 810, 817; V1, T 23-32, 110-115, 117-119, 121; SR6, T 257-258, 261-262, 263-269, 270, 277-279, 287-

288, 303)[5] Abandoning both her sons, David and Elvis, as babies, Gleneth Byron left her native St. Kitts in the West Indies for work in Puerto Rico, leaving them in the care of their grandmother and aunt until David was seven or eight years old. (TT6, T 803; V1, T 23-26; SR6, T 262-263, 264-265, 274-275) Teachers and coaches recounted that David was a student on which a teacher or coach could depend, always lending a helping hand, assisting other students or players, loaning them his textbooks or computer time to others, necessitating David making up the time or assignment during leisure hours. (V1, T 182-184; SR6, T 250-253, 258, 281, 284-285) "Any violence?" "Not David!" was the universal reply. (V1, T 184; SR6, T 254-256) He tried to be the more caring, responsible "father-type" figure (one time bringing a needy little girl to class and asking his teacher if she could stay there while he studied so that he could keep an eye on her to protect her from some perceived harm). (V1, T 184; SR6, T 249-250, 257-258, 260, 280)

Upon moving to St. Thomas, U.S. Virgin Islands, Byron first retrieved David from his grandmother's to come live with her. (TT5, T 803-804; V1, T 87; V2, T 213-215) When Byron had ideas of later retrieving her four-year-old Elvis, seven-year-old David protested, being tremendously afraid of his much younger

[5] The brothers were as different as "night and day." (V1, T 23-27, 113, 118, 133-134; SR6, T 247-250, 253-254, 268-269, 270, 282-283)

brother, who, despite their age difference, had beaten David. (V2, T 214-215; SR6, T 214-215, 296-297)[6] Still, as the brothers grew up together on St. Thomas, David would nonetheless try to look out for his younger, but stronger, brother, chastising, but taking care of Elvis when he got into trouble. (V1, T 120; SR6, T 249, 254-255, 258) Adults, recognizing that Elvis would not mind his mother, would often seek David's assistance in calming Elvis and counseling him to stay out of trouble. (V2, T 222; SR6, T 273, 283-284) David's efforts would only have a short-term impact, which would wear off in a day or two. (SR6, T 284, 295)

The pair of brothers were active in baseball, both being rather good and playing for the all-star teams. David was the consummate team player, always playing whatever position the team needed (playing mostly outfield, even though he preferred to catch), and always a good sport; while his polar opposite Elvis played dirty, got in fights (including one with a knife) with opponents, umpires, and even teammates, insisting on playing as he saw fit, rather than as the team needed. (V1, T 121; SR6, T 250-254, 281, 288-290) Elvis was suspended for a time from playing due to his behavior. (SR6, T 282, 288-290, 293)

Even after the family moved to the states, the testimony regarding the

[6] This "early on" event factors into the overall relationship between Elvis and David. (V2, T 214-215) Additional testimony indicated that David's fear of Elvis continued into his

brothers did not change: David continued to be calm and quiet, not liking all the "confusement, arguments going on," while Elvis, who ran the house even though younger, had a "don't care" violent attitude. (V1, T 133-135; SR6, T 306-310) Testimony was presented that David, who had gone AWOL from the army (which he joined immediately upon graduation from the St. Thomas high school) to take care of Elvis when he heard of Elvis getting in trouble. (V2, T221-222)

Elvis, in fact, with a roommate, Tomeka Jones, and with*out* David, engaged in a prior murder of an acquaintance in Tallahassee in September 2000, by strangling the victim with an electrical cord quite similar to the instant crimes, in order to steal the woman's car. (SR6, T 306) Learning of his brother's crime, David, who suffers from a "pathological dependent relationship" with his sibling, again made efforts to assist his brother out of his troubles by helping to dispose of the body, once again trying to protect Elvis, whom David desperately needed. (V2, T 223-226) Dr. Mings, a psychologist, testified that, despite Elvis' wrongdoings, David was unable to leave Elvis to his own devices because of his desire to protect him and because David sees Elvis as "all he has." (V2, T 223-227) David is neither a psychopath nor a sociopath, Dr. Mings relating that one cannot understand David without understanding Elvis and the brothers' sibling dynamics,

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young adulthood. (SR6, T 133-134, 296-297)

which would have made David's involvement in this crime occur. (V1, T 177-178; V2, T 213-215, 223-226) Others who knew the boys concurred; "Elvis is the type of person, he can put that faith in you to make you do things you don't want to do," and "He's that strong-willed child, that bad, strong-willed child." (SR6, T 296)

While David was remorseful for the crimes he committed,[7] Elvis "expressed no [such] remorse" and "during the PSI interview, the subject appeared to be bored and unconcerned.". (SR7, R 326) Instead, this "willing participant" in the murders "didn't care," had a violent, uncontrollable temper (causing even his own mother to be afraid of him),[8] ruled the household, and was unemployed, allowing himself to be cared for by his older brother, David. (SR7, R 325, 326; V1, T 133-134)

A jail guard testified on David's behalf, dubbing him a "model prisoner." (V1, T128) Dwayne Bell, of the Orange County Corrections Department, who had supervised the defendant on his cell block for about a year and a half, remarked that David was quiet and no trouble, staying mostly to himself, reading, and always asking (rather than being told) for cleaning supplies, volunteering to clean not only his own cell, but also the showers as well. (V1, T 125-128)

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[7] The trial judge expressed no doubt that David suffered remorse for his actions. (SR1, T 73)

[8] Hence, the reason she asked her sons to leave. (TT6, T 794, 810-818)

SUMMARY OF ARGUMENTS

Point I. The defendant's death sentences must be reversed and a new penalty phase trial ordered where the trial court improperly excluded relevant evidence at the penalty phase of the trial. Relevant evidence is admissible and at the penalty phase, evidentiary rules are relaxed and a defendant may present hearsay testimony. In a capital sentencing proceeding, any evidence which tends to show the character of the defendant, his role in the crime and the facts leading up to it, and anything in mitigation of the defendant's sentence must constitutionally be allowed.

Point II. The death sentences must be reversed where the trial court's findings were insufficient, where the court failed to consider appropriate mitigating factors, where the court erroneously found inappropriate aggravating circumstances, and where a comparison to other capital cases reveals that the only appropriate sentences in the instant case are life sentences.

Point III. Florida's death penalty procedure violates the Sixth and Fourteenth Amendments under *Ring v. Arizona.*

ARGUMENT

POINT I

THE DEATH SENTENCES MUST BE REVERSED, UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND ARTICLE I, SECTIONS 9, 16, 17, AND 22, FLORIDA CONSTITUTION, WHERE THE TRIAL COURT IMPROPERLY RESTRICTED THE DEFENDANT AT THE GUILT AND PENALTY PHASES OF HIS TRIAL FROM PRESENTING TO THE JURY EVIDENCE HIGHLY RELEVANT TO HIS RELATIVE CULPABILITY AND TO WHAT SENTENCE HE SHOULD RECEIVE.

A trial court's rulings on the admission or exclusion of evidence is ordinarily reviewed on an abuse-of-discretion basis. *See, e.g., Lamarca v. State*, 785 So.2d 1209 (Fla. 2001). *But see* Judge Farmer's dissenting opinion in *Eliakim v. State*, 884 So.2d 57, 63-68 (Fla. 4th DCA 2004), explaining why the standard of review for rulings on evidence ought to be primarily *de novo* or, under certain circumstances, a mixture of *de novo* and abuse of discretion.

Any evidence that tends to support the defendant's theory of defense is admissible, and it is error to exclude it. *Vannier v. State*, 714 So.2d 470, 472 (Fla. 4th DCA 1998). Where evidence tends in any way, even indirectly, to establish a the defendant's theory of the case, it is error to deny its admission. *Rivera v. State*, 561 So.2d 536, 539 (Fla. 1990). The Supreme Court said in *Chambers v.*

Mississippi, 410 U.S. 284, 302, 93 S.Ct. 1038, 1049, 35 L.Ed.2d 297 (1973), that "[f]ew rights are more fundamental than that of an accused to present witnesses in his own defense."

Here, the court repeatedly sustained the state's objections and refused to admit highly relevant evidence to the question of the defendant's relative culpability and other substantial mitigating factors, including his childhood, his domination by and fear of his brother, and evidence of Elvis' prior acts of violence: testimony about why the brothers had to leave their apartment in Tallahassee (which defense argued was relevant to show why David in his confession tried to minimize his brother's role in these killings – because David is his brother's guardian and his brother is all he has, with nowhere else to go and no one else to go with) (TT6, T 819-820), testimony about the poor conditions of the house in which Frances grew up (V1, T 83-86), details of conversations a defense mitigation specialist had with folks in St. Thomas, U.S. Virgin Islands, and St. Kitts, where David and his brother Elvis grew up, regarding their childhood and young adulthood and the sharp contrast between the two brothers (V1, T 87-95), reports of domestic abuse (with cords and belts) on David as a child (V1, T 105-106), a report of the defense mental health expert as to David's statements to him as to why he could not leave Elvis despite Elvis's acts of prior violence (V2, T

225-226), reports of Elvis Frances's prior acts of violence (to show the relative character of David's brother, who was extensively involved in the instant case, and, in the defense view, the instigator of the violence, and to show the dynamics between the two brothers) (V1, T 135-136, 198-200), mental health expert opinion on whether the defendant possessed "street smarts" and how he would explain a person of normal intelligence not attempting to disguise the stolen vehicle (as the defendant had not done) (V1, T 178-181), and the mental health expert's opinion as to whether the in-court testimony of witnesses who knew the brothers contained anything inconsistent with the doctor's opinions about the pathologically dependent sibling relationship David had with his brother. (V2, T 212-213)

While some of these matters were excluded as hearsay, Florida Statutes clearly allows for hearsay testimony in the penalty phase of the trial. §921.141 (1), Fla. Stat. In fact, the United States Supreme Court has consistently held that preclusion of relevant evidence at a capital sentencing proceeding runs afoul of the Court's holdings that emphasize the importance of providing to the jury as much information as possible. *Lowenfield v. Phelps*, 484 U.S. 213 (1988); *Lockett v. State*, 438 U.S. 586 (1978) (finding unconstitutional any state-imposed restriction on the admissibility at sentencing of any perceived mitigation).

Each of these excluded matters were highly relevant to the jury's

consideration of whether the defendant should live or die for his crimes. *See Cooper v. Dugger*, 526 So.2d 900 (Fla. 1988); *Garcia v. State*, 816 So. 2d 554, 564-567 (Fla. 2002). Exclusion of them precluded the jury from making their reasoned determination of the sentencing issues. In *Warren v. State,* 577 So.2d 682 (Fla. 1st DCA 1991), the District Court reiterated that a homicide defendant is afforded wide latitude in the introduction of evidence in support of his theory of of the case, and said that where there is even the "slightest evidence" which may be reasonably regarded as bearing on the defense, "all doubts as to the admissibility . . . must be resolved in favor of the accused." *Id*. at 684. The trial court in this case erred by excluding from evidence testimony bearing on Appellant's defense of the death sentence, rendering such sentences unconstitutional. A new penalty phase is required. Art. I, §§9, 16 and 17, Fla. Const.; Amends. V, VIII, and XIV, U. S. Const.

POINT II

THE APPELLANT'S DEATH SENTENCE WAS IMPERMISSIBLY IMPOSED BECAUSE THE TRIAL COURT FOUND AN IMPROPER AGGRAVATING CIRCUMSTANCE, EXCLUDED EXISTING MITIGATING CIRCUMSTANCES, AND FAILED TO PROPERLY FIND THAT THE MITIGATING CIRCUMSTANCES OUTWEIGH THE AGGRAVATING CIRCUMSTANCES, RENDERING THE DEATH SENTENCES UNCONSTITUTIONAL UNDER THE UNITED STATES AND FLORIDA CONSTITUTIONS.

The sentences of death imposed upon David Frances, must be vacated. The the court found three aggravating circumstances, one of which is inappropriate, failed to consider highly relevant and appropriate mitigating circumstances, and improperly found that the aggravating circumstances outweighed the extensive mitigating factors. These errors render Frances' death sentences unconstitutional in violation of the Eighth and Fourteenth Amendments to the United States Constitution and Article I, Section 17 of the Florida Constitution. Aggravating circumstances must be proven beyond a reasonable doubt to exist and review of those factors is by the competent substantial evidence test. Where evidence exists to reasonably support a mitigating factor (either statutory or non-statutory), the court must find as mitigating that factor. Review of the weight given to mitigation is subject to the abuse-of-discretion standard. *See Cole v. State*, 701 So.2d 845, 852 (Fla. 1997). It is submitted that this Court's proportionality review, being a

question of law, is a *de novo* review.

The law of Florida reserves the death penalty for only the most aggravated and least mitigated of first-degree murders. *Urbin v. State*, 714 So.2d 411, 416 (Fla. 1998); *Cooper v. State*, 739 So.2d 82, 85 (Fla. 1999); *Almeida v. State*, 748 So.2d 922, 933 (Fla. 1999); *State v. Dixon*, 283 So.2d 1, 7 (Fla. 1973). "Thus, our inquiry when conducting proportionality review is two-pronged: We compare the case under review to others to determine if the crime falls within the category of *both* (1) the most aggravated and (2) the least mitigated of murders". *Cooper*, 739 So.2d at 82; *Almeida, supra*. (emphasis in original)

This is *not* the most aggravated, *nor* the least mitigated first-degree murders in the state of Florida. David Frances' involvement in the killings stemmed from the instigation of his influential, dominant, and violent brother. Evidence unanimously showed that this incident was so out of character for the gentle, passive, respectful, David, who until coming under the influence of his brother, was crime free until the age of 20, when, having a pathologically dependent relationship with Elvis and feeling the need to protect the only one he had, became involved in Elvis's actions. This is the situation that needs to be weighed against the minimal aggravation.

In *Campbell v. State*, 571 So.2d 415 (Fla. 1990), this Court reiterated the

correct standard and analysis which a trial court must apply in considering mitigating circumstances presented by the defendant. In *Campbell*, the Court quoted from prior federal and Florida decisions to remind courts that the sentencer may not refuse to consider, as a matter of law, any relevant mitigating evidence. *See Eddings v. Oklahoma*, 455 U.S. 104, 114-115 (1982); *Rogers v. State*, 511 So.2d 526 (Fla. 1987). *See also Lockett v. Ohio*, 438 U.S. 586 (1978). Where evidence exists to reasonably support a mitigating factor (either statutory or non-statutory), the court must find as mitigating that factor. This Court summarized the *Campbell* standards of review for mitigating circumstances:

> (1) Whether a particular circumstance is truly mitigating in nature is a question of law and subject to de novo review by this Court;
>
> (2) Whether a mitigating circumstance has been established by the evidence in a given case is a question of fact and subject to the competent substantial evidence standard;
>
> (3) The weight assigned to a mitigating circumstance is within the trial court's discretion and subject to the abuse of discretion standard.

Blanco v. State, 706 So.2d 7 (Fla. 1997); *See also, Cave v. State*, 727 So 2d 227 (Fla. 1998).

In *Nibert v. State*, 574 So.2d 1059 (Fla. 1990), the Court reiterated that a mitigating circumstance must be reasonably established by the greater weight of

the evidence. Where uncontroverted evidence of a mitigating circumstance has been presented, a reasonable quantum of competent proof is required before the circumstance can be said to have been established. Thus, when a *reasonable* quantum of competent, *uncontroverted* evidence of a mitigating circumstance is presented, the trial court *must* find that the mitigating circumstance has been proved. *Nibert*, at 1062. *See also Mahn v. State,* 714 So.2d 391, 400-1 (Fla. 1998)(quoting *Spencer v. State*, 645 So.2d 377, 385 (Fla. 1994); *see Eddings v. Oklahoma*, 455 U.S. at 114-15 (stating that trial courts may determine the weight to be given to relevant mitigating evidences, "[b]ut they may not give it no weight by excluding such evidence from their consideration").

In *Trease v. State*, 768 So.2d 1050 (Fla. 2000), though, this Court receded from its holding in *Campbell* to the extent that *Campbell* disallowed trial courts from according no weight to a mitigating factor. The Court recognized that there are circumstances where a mitigating circumstance may be found to be supported by the record, but given no weight. The Court concluded that while a proffered mitigating factor may be technically relevant and must be considered by the sentencer, the sentencer may determine in the particular case at hand that it is entitled to no weight for additional reasons or circumstances unique to that case. For a trial court's weighing process and its sentencing order to be sustained, that

weighing process *must be detailed in the findings of fact* and must be supported by the evidence. The court's sentencing order fails in that regard.

A. The Trial Judge Considered Inappropriate Aggravating Circumstances.

It is well established that aggravating circumstances must be proven beyond a reasonable doubt by competent, substantial evidence. *Martin v. State*, 420 So.2d 583 (Fla. 1982); *State v. Dixon*, 283 So.2d 1, 9 (Fla. 1973). The state has failed in this burden with regard to one of the aggravating circumstances found by the trial court, that of heinous, atrocious, or cruel with regard only to the killing of JoAnna Charles. V7, R 1240, 1243)[9] The court's finding of HAC for the Charles' murder, is based on matters not proven by substantial, competent evidence beyond a reasonable doubt, and on erroneous findings, and thus does not support this circumstance and cannot provide the basis for the sentence of death.

This Court has defined the aggravating circumstance of heinous, atrocious, or cruel in *State v. Dixon*, *supra* at 9:

[9] The trial court, finding no evidence of a struggle with victim Mills, found this aggravator inapplicable to that killing, but only to the Charles' murder.

> 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 degree of pain with utter indifference to, or even enjoyment of, the suffering of others.

Recognizing that all murders are heinous, *Tedder v. State*, 322 So.2d 980, 910 (Fla. 1975), this Court further defined its interpretation of the legislature's intent that the aggravating circumstance only apply to crime **especially** heinous, atrocious, or cruel.

> What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies -- the conscienceless or pitiless crime which is unnecessarily tortuous to the victim.

State v. Dixon, *supra* at 9.

As this Court has stated in *Santos v. State*, 591 So.2d 160, 163 (Fla. 1991), and *Cheshire v. State*, 568 So.2d 908, 912 (Fla. 1990), this factor is appropriate only in torturous murders which exhibit a *desire* to inflict a high degree of pain, or an utter indifference to or enjoyment of the suffering of another. *See, e.g.*, *Douglas v. State*, 575 So.2d 165, 166 (Fla. 1991) (torture-murder involving heinous acts extending over four hours). The present killing of Charles happened too quickly with no substantial suggestion that the defendant *intended* to inflict a high degree of pain or otherwise torture the victim; rather, David found himself in a situation

created by his more powerful, evil brother, Elvis, and, confused, had no idea why it happened as it did. Accordingly, the trial court erred in finding this factor to be present.

While this Court has upheld this factor numerous times in cases involving strangulation, this Court has not and cannot apply a *per se* HAC to strangulation cases. Each case must be examined on its own facts. Those cases in which it has been held to be HAC involved facts specifically showing that the victims were acutely aware of their impending deaths and all involved torture and suffering beyond the singular fact of the strangulation. *See, e.g.*, *Hildwin v. State*, 531 So.2d 124 (Fla. 1988); *Thompkins v. State*, 502 So.2d 415, 421 (Fla. 1986).

The State's evidence in this case made it no more likely than not that Charles lost consciousness upon her initial manual strangulation at Elvis' hands. *See DeAngelo v. State*, 616 So.2d 440, 442-43 (Fla.1993). The evidence indicated the struggle between Elvis and Charles was not excessively long, did not involve a great deal of fighting and torture, and that the onset of unconsciousness would have been relatively quick (in the same amount of time as that of the victim Mills who had showed absolutely no signs of resistance). The only evidence here of any type of resistance (and thus foreknowledge of death) was, as the trial court noted in its sentencing order, the crescent shape abrasion on Charles' neck, which the

medical examiner speculated *could* have been caused by Charles' attempt to prevent the strangling, something present in most cases of strangulation. (V7, T 1244)

In *Tompkins v. State*, 502 So.2d 415, 421 (Fla.1986), affirming the HAC finding, the medical examiner testified that death by strangulation was not instantaneous and the evidence supported a finding that the victim was not only conscious but engaged in a desperate, lengthy struggle for life, fighting violently to get away. Contrasting the evidence in the instant case with that of *Tompkins* and *Conde v. State*, 860 So.2d 930, 955 (Fla. 2003), shows that this factor is not applicable here.

In *Conde*, the medical examiner testified that the victim's *numerous* defensive wounds, which included bruised knees and elbows, a fractured tooth, torn fingernails, and a bruise around the sensitive ear area, indicated a violent struggle and that the victim was alive and conscious for some period of time while Conde was strangling her. The medical examiner also found brain swelling, indicating sustained pressure on the neck, and air hunger, which usually involves longer consciousness than those instances when the blood is completely cut off. Lastly, the examiner testified that the victim suffered a broken hyoid bone in her neck, which may have led to neck swelling even after Conde released his grip,

causing the victim to experience air hunger longer than the twenty to thirty seconds Conde stated it had taken him to strangle her. The totality of this evidence provided competent, substantial evidence that the victim was conscious for a period of time during which she struggled with Conde, sustained numerous bodily injuries, and likely knew her death was imminent. *Id*.

In contrast, the state failed to meet its burden in this case, however. The only evidence of any wounds to Charles was the minor abrasion on Charles neck and the speculation of the medical examiner that it *could* have been an attempt to prevent the strangulation. There was no bruising or evidence of a painful beating, no defensive wounds to Charles' hands or arms, and no signs in the apartment of any violent struggle. (TT8, T 1236) The statement of David, who consistently throughout his life has tried to protect his brother, indicates that, while Elvis was having some undisclosed problem with Charles, she was unconscious by the time David had moved Mills' body and joined his brother to move her also into the bathroom. (TT9, T 1459-1460) When David joined Elvis, Charles was already unconscious (although still apparently alive). (TT9, T 1460) There exists here only the trial court's speculation in its sentencing order that Charles was conscious

when David arrived (V7, R 1245),[10] while the sole evidence (David's statement) indicates otherwise and there is nothing in the medical examiner's testimony to support the court's supposition.

Such speculation cannot provide the basis for this aggravator. In *Rhodes v. State*, 547 So.2d 1201 (Fla. 1989), the decomposing body of an approximately forty-year-old female, missing her lower right leg, was found in debris being used to construct a berm in St. Petersburg. The medical examiner determined manual strangulation to be the cause of death because the hyoid bone in the victim's throat was broken. Rhodes was interviewed by detectives, and during that and subsequent interviews, Rhodes gave different and sometimes conflicting statements to his interviewers, always denying that he raped or killed the victim. He subsequently offered to tell how the victim had died if he could be guaranteed

[10] The trial court conjectures in its sentencing order that "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." (V7, R 1245) This guess is contrary to the evidence and without any support in the record, in antithesis of the defendant's statement that Elvis strangled her until she was unconscious (and only after that, and after Charles was moved to the other room, did David join in the strangulation with the ligature to make sure she was dead), and contrary to the M.E.'s testimony that unconsciousness was, for her, the same as that of Mills (TT8, T 1224), wherein the court rejected this factor. It must be remembered that the medical examiner could not determine whether the ligature strangulation, or the preceding manual strangulation solely at Elvis' hands, produced unconsciousness and death. (TT8, T 1223)

he would spend the rest of his life in a mental health facility. Rhodes then claimed the victim died accidentally when she fell three stories while in a hotel. At trial three of Rhodes' fellow inmates at the jail were called as witnesses for the state. Each inmate testified that Rhodes admitted killing the victim.

The trial court in *Rhodes* had found that HAC applied stating:

> That the murder of Karen Nieradka was especially heinous, atrocious and cruel in that the victim was manually strangled and the clumps of her own hair found in her clenched hands indicates the pain and mental anguish that she must have suffered in the process.

This Court, however, rejected the trial court's finding of the HAC aggravating circumstance finding that the victim may have been semiconscious at the time of her death according to the conflicting stories told by Rhodes. Further, the Court, quoting *State v. Dixon*, *supra*, found nothing about the commission of this capital felony "to set the crime apart from the norm of capital felonies."

In *DeAngelo v. State*, *supra*, the defendant struck the victim on the head, used manual strangulation, and then strangled the victim with a ligature. The trial court did not find the presence of this aggravator. In rejecting the state request for the HAC aggravating circumstance, this Court upheld the trial court, agreeing that the state had failed to prove that the victim was conscious during the ordeal,

relying on the medical examiner's testimony as to the possibility that at the time she was strangled with the ligature the victim was unconscious as a result of the pressure of the manual choking and the absence of a struggle or defensive wounds. This is *precisely* the situation here.

The facts of the instant case reveal that there was no intentional torture of the victim. There was no factual, non-speculative evidence to suggest that the infliction of this strangulation was so prolonged as to amount to lengthy, deliberate torture, as that term is rationally and legally understood.

This circumstance is proper only in "tortuous murders," such as that found in the contrasting case of *Brown v. State*, 721 So.2d 274 (Fla. 1998), where the victim was stabbed nine or ten times, and received additional blunt trauma injuries. Expert testimony showed there that the victim was alive and conscious during the attack. *Id*. at 278. By contrast, here, the medical examiner's testimony reveals that consciousness could have been lost within a relatively brief period of time during the *manual* strangulation (before the ligature was even applied). (TT8, T 1223) Dr. Irrgang's testimony was specifically that Charles' unconsciousness was within the same time frame as that of victim Mills. (TT8, T 1224) Thus there is no additional evidence to elevate the Charles' killing (at the hands of Elvis, at least until she lost consciousness) to heinous, atrocious, and cruel.

The contrast between those cases involving torture or depravity and the instant case should be clear. *Contrast, e.g.*, *Davis v. State*, 604 So.2d 794 (Fla. 1992), wherein the medical examiner testified that the 73-year-old victim likely was not rendered unconscious by a blow to the head and could have been conscious for thirty to sixty *minutes*, while slowly bleeding to death from the stab wounds. As such, in the instant case, the state has failed to prove this factor of torture or depravity beyond a reasonable doubt regarding the Charles' killing. The conclusion of the trial court should be rejected.[11]

Regarding the second aggravating factor found by the trial court, prior conviction for a violent felony, this Court has ruled that contemporaneous convictions can be considered. *Lucas v. State*, 376 So.2d 1149, 1152-1153 (Fla. 1979). However, a contemporaneous conviction where the defendant had up to that time lived a violence-free life, must be given lesser weight. The aggravating nature of a "prior" violent or capital felony is most influential for people who have multiple violent felonies over a period of time. *See, e.g. Remeta v. State*, 710 So.2d

[11] The trial court's finding of this factor also should fall because its conclusion of HAC was based in part on the irrelevant, non-statutory aggravating factor mentioned in its discussion of HAC, that "Charles was attacked in her own home, a place where she was supposedly safe, by two people known to her." (V7, R 1245) The place of the crime and the victim knowing the perpetrators are not proper statutory aggravators. This Court has repeatedly denounced such usage of nonstatutory aggravating circumstances. *See, e.g.*, *Lucas v. State*, 376 So.2d 1149 (Fla. 1979); *Elledge v. State*, 346 So.2d 998 (Fla. 1977). *See also Barclay v. Florida*, 463 U.S. 939,

543 (Fla. 1998). The "prior violent felony" also weighs heavily in favor of the death penalty for serial killers, who carefully committed five first-degree murders, three sexual batteries, and three armed burglaries over a 72-hour period. *See Rolling v. State*, 695 So.2d 278 (Fla.1997).

Where as here, contemporaneous violent crimes are not preceded by *any* prior violence on the part of the defendant, the weight of this factor is substantially less than for those with a long history of prior violent crimes. *See Terry v. State*, 668 So.2d 954, 965 (Fla.1996) ("While this contemporaneous conviction qualifies as a prior violent felony and a separate aggravator, we cannot ignore the fact that it occurred at the same time, was committed by a co-defendant, and involved the threat of violence with an inoperable gun."); *Almeida v. State*, 748 So.2d 922, 933 (Fla.1999) (Life sentences appropriate in homicide case where, "the defendant was twenty years old at the time of the crime, and the present crime and the [two] prior capital felonies all arose from a single brief period of marital crisis that spanned six weeks.").

While contemporaneous convictions for violent crimes do qualify as "prior" violent felonies, it is clear from the evidence that Elvis was the primary aggressor and cause of the crimes. The evidence conclusively shows that violence is totally

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956 (1983).

out of character for David Frances. All who knew him testified that David is a passive, gentle individual. There is no evidence in the record even suggesting that David Frances has ever before been violent. The contemporaneous violent crime is not entitled to great weight in light of the mitigating evidence. This factor does not make this the most aggravated and least mitigated of first-degree murders. This factor either must be, at the very least, given minimal weight.

B. Mitigating Factors, Both Statutory and Non-Statutory, Are Present Which Outweigh Any Appropriate Aggravating Factors.

Age. The defendant was twenty years old at the time of the crime. The trial court found this statutory mitigator, but, the court, ambiguously, stated it had "weighed his relative youth together with other factors," without any further elaboration. (V7, T 1246-1247) This finding is insufficient. As noted above, the *Campbell* line of cases indicate that, for a trial court's weighing process and its sentencing order to be sustained, that weighing process *must be detailed in the findings of fact* and must be supported by the evidence. The court's sentencing order fails in that regard, giving no insight into what "other factors" were considered in regard to this mitigator and the relative weight the trial court assigned.

This Court has explained that "age is simply a fact, every murderer has one." *Echols v. State*, 484 So.2d 568, 575 (Fla. 1985)(defendant was fifty-eight years old at the time of the crime). However, where the age of the defendant is accompanied by other factors, such as a lack of significant history of criminal activity, or by a showing of some emotional or behavioral immaturity, the age of the defendant is a valid mitigating circumstance. *See Bradley v. State*, 787 So.2d 732 (Fla. 2001) (age of 36, coupled with lack of significant criminal activity); *Burns v. State*, 699 So.2d 646 (Fla. 1997) (age of 42; length of time defendant was a "law-abiding citizen" before committing the crimes is important for this mitigator); *Ramirez v. State*, 739 So.2d 568 (Fla. 1999)(finding that trial court abused its discretion in finding the defendant's age of seventeen to be entitled to only little weight where testimony that he was more immature emotionally and behaviorally than his chronological age); *Mahn v. State*, 714 So.2d 391, 400 (Fla. 1998)(finding that the trial court abused its discretion in refusing to consider defendant's age of twenty as a statutory mitigating factor in light of other factors, including an extensive history of drug and alcohol and emotional instability); *Urbin v. State*, 714 So.2d 411, 418 (Fla. 1998)(young age entitled to greater weight when there is extensive evidence of parental neglect and abuse that played a significant role in the child's lack of responsible judgment); *Scull v. State*, 533 So.2d 1137, 1143 (Fla. 1988)(although

Skull was twenty-four years old at the time of the killing, his age was found to be mitigating in light of other factors such as maturity level). *See also Ellis v. State*, 622 So.2d 991, 1001 (Fla. 1993)(the weight given to a young age can be diminished by other evidence showing unusual maturity); *LeCroy v. State*, 533 So.2d 750, 758 (Fla. 1988)(finding that the weight of the mitigating factor was diminished by LeCroy's unusual mental and emotional maturity). Based on these rulings, it is clear that the trial court abused its discretion by not assigning this mitigator great weight.[12] All the evidence showed that up until age 20 (and just shortly before the instant killings), the defendant was a law-abiding citizen, not having committed any crimes. Although a few years older than Elvis, all of the uncontradicted evidence showed the defendant to be unduly influenced by his younger, stronger brother, of whom he was afraid and upon whom he had a pathological dependence. These factors, coupled with his relative youth and resultant immaturity, render this mitigator very powerful, mandating a life sentence.

Extreme Duress or Under the Substantial Domination of Another. Once again the trial court's order is defective for what it does not say – indicating it was rejecting this mitigator based upon "other factors" (without elaboration), and

[12] Indeed, not expressly assigning it any weight. (V7, R 1246-1247)

rejecting as unpersuasive, without more, the uncontradicted evidence of just about every witness who testified that they knew him and Elvis' influence over him. (V7, R 1246)

A statutory mitigating factor is established where the defendant acted under duress or under substantial domination of anther person pursuant to Section 921.141(6)(e), Florida Statutes. *See Stokes v. State*, 403 So.2d 377 (Fla. 1981); *Kampff v. State*, 371 So.2d 1007 (Fla. 1979); *Jackson v. State*, 366 So.2d 752 (Fla. 1978). Where this mitigator is present, even where the jury has recommended death, a death sentence may be disproportionate. *See, e.g., Smalley v. State*, 546 So.2d 720 (Fla. 1989). Notwithstanding the unsubstantiated view of the trial court that "Defendant maintained a normal capacity of independent choice and freedom of action" (V7, R 1246), a review of the record establishes this to be undeniably false; the evidence was all to the contrary when it came to Elvis's influence. Uncontroverted evidence proves conclusively that Elvis, David's brother and violent co-defendant, was actually the leader and that David, as consistent with his personality trait of a pathological dependence upon and fear of his brother, acted under duress and the substantial domination of Elvis. (V1, T 133-134; V2, T 213-216, 223-227; SR6, T296-297) They unanimously attested to David's passivity and that this crime was totally out of character for David, as opposed to Elvis'

temper and aggression. (TT6, T 810, 817; V1, T 23-32, 110-115, 117-119, 121, 184; SR6, T 254-258, 261-262, 263-269, 270, 277-279, 287-288, 303) It is inconsistent with David's entire history to come to the conclusion that he was the one who pressed for violence rather than Elvis. The court's order, indicating without record support the bald assertion that he had "independent choice" is insufficient on which to base a rejection of this factor. *See Spivey v. State*, 529 So.2d 1088 (Fla. 1988) (codefendants were primary motivators in that they furnished money, planning, and wherewithal to commit the murder); *Neary v. State*, 384 So.2d 881 (Fla. 1980) (codefendant played a significant role in the crime); *Stokes v. State*, 403 So.2d 377 (Fla. 1981) (dominant member of motorcycle gang received immunity from prosecution). *See also Jackson v. State*, 575 So.2d 181 (Fla. 1991); *Cooper v. State*, 581 So.2d 49 (Fla. 1991); *Dolinsky v. State*, 576 So.2d 271 (Fla. 1991); *Douglas v. State*, 575 So.2d 165 (Fla. 1991); and *Pentecost v. State*, 545 So.2d 861 (Fla. 1989), in which cases this Court, in reversing the death sentences based in part on this mitigator, either questioned the credibility of a witness used to refute this mitigating factor, or found it unclear from the facts who was the dominant actor.

Based upon the undisputed testimony in the record, it is clear that David was the follower here, under duress and his brother's domination. This factor must be

found and considered in the capital sentencing equation.

Lack of Significant History of Prior Criminal Activity. The trial court erred in rejecting this powerful mitigating circumstance for the sole reason of his uncharged history of one time being an accessory after the fact "while AWOL from the U.S. Army." (V7, R 1245) Despite this history, David still has a lack of a "significant" history.

In *State v. Dixon*, 283 So.2d 1, 9 (Fla. 1973), this Court held that the key word is "significant," the less serious the prior history and the less criminal activity on the defendant's record, the more consideration should be afforded this mitigating circumstance. This factor has been found to exist where a twenty-year-old defendant had previously pled guilty to a burglary offense. *Combs v. State*, 403 So.2d 418 (Fla. 1981). The factor was also found to apply even where a defendant had one prior conviction for the illegal manufacture of amphetamines, *Trepal v. State*, 621 So.2d 1361 (Fla. 1993).

Similarly, David's one instance of criminal activity (in assisting his dominant brother as an accessory *after* the fact)[13] does not negate or lessen this

[13] Being AWOL from the Army does NOT constitute a criminal history. "Being absent without leave is clearly a breach of military discipline and regulations but that parallel activity in the state of Florida does not appear to constitute a crime. Rather, it appears analogous to a breach of employment contract or duty." *Frazier v. State*, 515 So.2d 1061, 1063 (Fla. 5th DCA 1987). As such the court's consideration of this factor (and the presentation of evidence of such AWOL

mitigator, especially in light of his 20 years of crime-free gentle, passive life.

Proportionality Review. As this Court has stated time and again, death is a unique punishment. *See Urbin v. State,* 714 So.2d 411, 416 (Fla.1998) (quoting *Porter v. State,* 564 So.2d 1060 (1990)); *Terry v. State,* 668 So.2d 954, 965 (Fla.1996); *Tillman v. State,* 591 So.2d 167, 169 (Fla.1991); *State v. Dixon*, 283 So.2d 1, 7 (Fla.1973). Accordingly, the death penalty must be limited to the most aggravated and least mitigated of first-degree murders. *See Dixon*, 283 So.2d at 7. In deciding whether death is the appropriate penalty, this Court must consider the totality of the circumstances in the instant case in comparison to the facts of other capital cases and in light of those other decisions. *See Urbin*, 714 So.2d at 416 (quoting *Tillman*, 591 So.2d at 169). It is not merely a comparison between the number of aggravating and mitigating factors. *See Porter,* 564 So.2d at 1064.

After considering the aggravating and mitigating circumstances in this case in comparison with other capital cases, this Court must find that this case does not warrant imposition of the death penalty. *Cf. Hawk v. State,* 718 So.2d 159 (Fla.1998); *Kramer v. State,* 619 So.2d 274 (Fla.1993); *DeAngelo v. State,* 616 So.2d 440 (Fla.1993); *Livingston v. State,* 565 So.2d 1288 (Fla.1988); *Fitzpatrick*

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status to the jury) actually constitutes a non-statutory aggravating circumstance, resulting in unconstitutional death sentences.

v. State, 527 So.2d 809 (Fla.1988).

In *Livingston*, the defendant was convicted and sentenced to death for fatally shooting a gas station clerk. The trial court found three aggravating factors-prior violent felony, murder committed during a robbery, and murder committed to avoid arrest. The court balanced those factors against two mitigating circumstances-the defendant's age (seventeen) and the defendant's unfortunate upbringing and rearing-and found that death was warranted. On appeal, this Court vacated the sentence of death, finding that the record disclosed significant mitigation which effectively outweighed the remaining two aggravating factors: Livingston was severely beaten as a child by his mother's boyfriend; his mother neglected him; Livingston's youth, inexperience, and immaturity mitigated the offense; which counterbalanced the aggravating factors. *Id.* In *Kramer*, the defendant killed the victim during a fight. The trial court found two aggravating factors: prior violent felony and that the murder was especially heinous, atrocious, or cruel (HAC). On appeal from a sentence of death, this Court vacated the sentence due to the substantial mitigating evidence, including that the defendant was a model prisoner and was under stress at the time of the crime. In *Fitzpatrick*, the defendant fatally shot a police officer while holding several people hostage. 527 So.2d at 810. The trial court sentenced defendant to death after finding five

aggravating factors and three mitigating factors. Despite the five aggravating factors, this Court vacated the sentence of death because compared to other cases the killing in this case resulted more from the acts of an immature man-child than from a hard-blooded killer. *Id.* at 812. And, in *Hawk,* this Court reversed a sentence of death for the brutal beating of two elderly victims where the two aggravating circumstances failed to outweigh evidence presented in mitigation. 718 So.2d at 163. There, uncontroverted evidence established, among other things, including Hawk's age, nineteen, as a statutory mitigating factor and several nonstatutory mitigators, including a disadvantaged youth and an abusive childhood. *Id.*

See also Wright v. State, 688 So.2d 298 (Fla.1996) (reversing sentence of death where two aggravating circumstances did not outweigh evidence in mitigation, including cooperation with police, remorse and regular church attendance); *Proffitt v. State,* 510 So.2d 896 (Fla.1987) (vacating sentence of death on proportionality grounds despite trial court's finding of two aggravating circumstances – murder was committed during a burglary and murder was cold, calculated and premeditated where mitigating evidence included lack of history of prior criminal activity, fact that the defendant was described as nonviolent, and that defendant had not possessed a weapon when entering the victim's home; and

Crook v. State, 908 So.2d 350, 358 (Fla. 2005) (aggravating circumstances present here, though substantial, found not to outweigh the combination of unrefuted and overwhelming mitigation, that were determined in other cases requires a life sentence, including Crook's young age of twenty, his abusive childhood, diminished control over his actions, and a disadvantaged home life.

These are precisely the overwhelming kind of mitigation presented here, including the mitigation found to be present by the trial court, albeit giving them unspecified weight: the defendant's "relative youth together with other factors" (not specifying what weight was given and what "other factors" were considered with regard to this mitigating circumstance) (V7, R 1246-1247); the relative personalities of the defendant and his brother (David being a model, quiet, gentle child, with Elvis being a bad, aggressive child, with a bad attitude); the fact that defendant would institutionalize well and was a model inmate with a good demeanor; the "pathologically dependent relationship from an early age" between the defendant and his brother, which caused David to be unable to leave his brother even after Elvis's prior criminal activity, and which, the court found, "pulled [David Frances] into Elvis' life style." (V7, R 1247-1248) The court also noted that the defendant's mother had "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;"

that he lacked a positive male role model, never having known his real father, and "that Defendant had a pathological relationship with Elvis, who was dominant because he was stronger and more aggressive than Defendant," observing the defense contention "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." (V7, R 1248-1249) The trial court ruled that there was "substantial evidence to support these non-statutory mitigating circumstances and finds that they are fairly descriptive of defendant's history, personality, and conduct." (V7, R 1249)

Comparing these cases with the instant one reveals clearly that this case is ***not*** the most aggravated nor least mitigated of crimes, for which the death penalty is reserved. This Court must vacate the death sentences in light of the substantial mitigation.

POINT III.

FLORIDA'S DEATH PENALTY IS
UNCONSTITUTIONAL UNDER ***RING V. ARIZONA***.

In *Ring v. Arizona,*122 S.Ct. 2428 (2002), the Supreme Court held that Arizona's capital sentencing statute violated the Sixth Amendment, as construed in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), because the judge, rather than the jury, was given the responsibility of making the findings of fact necessary to impose a sentence of death. Florida law, like Arizona law, makes imposition of the death penalty contingent on a *judge's* factual findings regarding the existence of statutory aggravating circumstances, and is thus unconstitutional.[14] The trial court erred in denying defendant's motions to find Florida's sentencing scheme unconstitutional.

[14] This Court has nevertheless concluded that it must uphold the constitutionality of Florida's statute unless and until the United States Supreme Court overrules *Hildwin* and expressly applies *Ring* to Florida. See *Bottoson v. Moore*, 833 So. 2d 693 (Fla. 2002); *King v. Moore*, 831 So.2d 143 (Fla. 2002).

CONCLUSION

The appellant requests that this Court reverse and remand for imposition of life sentence or for a new penalty phase.

Respectfully submitted,

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PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

_____
JAMES R. WULCHAK
ASSISTANT PUBLIC DEFENDER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to Hon. Charles J. Crist, Jr., Attorney General, 444 Seabreeze Blvd., Fifth Floor, Daytona Beach, FL 32118, this 16th day of March, 2006.

CERTIFICATE OF FONT

I hereby certify that the size and style of type used in this brief is proportionally spaced Times New Roman, 14pt.

_____
JAMES R. WULCHAK