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

REPLY BRIEF OF APPELLANT

JAMES S. PURDY
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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TABLE OF CONTENTS

TABLE OF CITATIONS

PAGE NO.

CASES CITED:

OTHER AUTHORITIES:

STATEMENT OF THE CASE AND FACTS

The Appellant relies on the statement of case and facts as set forth in the Initial Brief as a complete, accurate statement of the relevant facts. The state's version, while considerably longer (rehashing testimony witness by witness, with much irrelevant detail), is misleading in what it fails to mention:

The State notes, as did the Appellant, that the trial court excluded testimony from the defense mitigation specialist of whether there is "always documented evidence of child abuse or domestic violence." (State's Answer Brief, p. 7) What the state fails to note, however, is that the court permitted the state to elicit testimony that, despite reports of abuse of the defendant to her, there was no evidence of any arrests or police reports of abuse located. (V1, T 100-101) It was in an effort to rebut this damaging implication made by the state, that the defense sought to clarify that just because there was no police report of it, does not mean that it did not happen. (V1, T 101-106)

The appellee states that, according to the defendant's confession to police, victim Charles "still had life in her." (State's Answer Brief, p. 19) However, the state implies by this that the victim was conscious, when that is not the case: the defendant clearly stated that Charles "wasn't moving." (TT9, T 1460) Furthermore, the state is remarkably selective in its quotation, stopping it right

before the defendant's qualifying statement: "**IF** she still had life in her – not – not like she wasn't – she wasn't moving, but she looked – she looked she had life to me, still." (TT9, T 1460) (emphasis added) Thus there is absolutely no evidence in the record that Charles was conscious by the time the defendant had any interaction with her.

The appellee erroneously claims that the defendant "pulled Mills' car out of the garage." (State's Answer Brief, p. 19) Wrong again: the record indicates that co-defendant, Elvis Frances, took and drove Mills' car out of the garage, while David merely held the garage door open (as it would not stay open on its own). (TT9, T 1461-1462)

The state implies that no identification of the perpetrator would have been possible from any deposits left on the electrical cord (which caused or contributed to the strangulation death of Charles) by the perpetrator since "there was insufficient detail to lift a fingerprint from the cord." (State's Answer Brief, p. 21 n. 7) However, the point defense counsel tried to make below (and missing from the state's account here) was that the cord *could* have been subjected to serological testing to show the perpetrator, but that, despite the recognized poor quality of the cord for lifting prints from it, the investigator was instructed by the lead detective to make such a latent print attempt, without regard to the fact that such attempt

would ruin the cord for serological testing. (TT8, T 1251-1252)

The state asserts that the medical examiner indicated that it would take minutes for a person being strangled to lose consciousness (State's Answer Brief, p. 22) requires some major modification and clarification: Dr. Irrgang testified that it actually depended on the individual case and how well the blood supply is cut off; agreeing to such a time frame **only IF** the perpetrator was "not holding very tight and one side is not so tight." (TT8, T 1202-1203) (*See also* Initial Brief of Appellant, p. 31 n.10)

The state alleges that the 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." (State's Answer Brief, p. 22-23) While technically true,[1] the appellee again omits an important and highly relevant fact: the expert also recounted that she only had an extremely limited sample, containing only one area of DNA out of a possible thirteen areas, and that, as a result, she could tell that the sample "was consistent with a male individual" (hence, David and Elvis, both being males, could not be excluded). (TT8, T 1281-1282)

In discussing Dr. Irrgang's penalty phase testimony the state makes

[1] However, the state erroneously notes the wrong hand. The testing was done on the right hand fingernails, the left hand fingernails containing insufficient samples to test. (TT8, T 1281-

contradictory statements in an attempt to show that Charles was aware of Mills' struggle for life. The state urges that Charles "would have been able to hear screams" coming from Mills in another area of the apartment, but also admits later on the same page that there would have been no screams from Mills since a person being strangled would not be able to scream for help. (State's Answer Brief, p. 24) (*See* V1, T 61) Both statements logically cannot be true.

The state attempts to characterize the Frances' parents as supportive and involved with the children. Although there was evidence indicating that the parents would attend all the ball games with the boys (State's Answer Brief, p. 28) and there was some vague reference that the Frances' mother, Gleneth Byron, would discipline Elvis by prohibiting him from playing baseball (State's Answer Brief, p. 28), the specific testimony from the boys' coach, Ira Todman, was that it was he who prevented Elvis from playing on the team because of his "detrimental attitude." Other testimony indicated that the mother was unable or unwilling to discipline Elvis (*see* V1, T 111-112) and that the mother and step-father, although taking the boys to their ball games, were not the loving supportive parents the state would have us believe: they would refuse to stay after the games for socialization, "as soon as the game is over, 'Let's go home;'" the mother left her sons to be

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1282)

raised by their Aunt Sara and the mother would visit her sons only rarely (V1, T 23, 26), the mother was "a fraud" and the stepfather was "just a lowly kind of person." (R1, T 111-112):

> She is not – I don't think she is really for a mother good. The way she acted. Or maybe because of the stepfather too. there's a lot of pressure on her. Okay. And he was cheating on her. He got a baby out of the marriage. Nothing went well after that. It's spilled over on the kids.

(V1, T 113)

The state contends that Tameka Jones testified that the Frances brothers "had to leave Tallahassee because David was being pursued by the military." (State's Answer Brief, pp. 29-30) But Jones does not say that! Her exact quotes in response to the state's questioning are: "If they [the military] was, they was. I don't know if they was;" (V1, T 143) and "I didn't know they was looking for him." (V1, T 143). She further indicates that Elvis needed to leave because the police were looking for him because he had failed to appear. (V1, T 143)

The state notes that, after Jones and Elvis killed Monique, Elvis and David went back to her house and "stole her property" and that Jones and David drove to Atlanta "to party," intimating that David used the profits from the stolen items. (State's Answer Brief, p. 30) The state omits from its recitation of facts, however, that Jones testified that it was she, and not David, who pawned the items and

received the money, and that the money she used to party was not the money from the items taken from Monique. (V1, T 150)

In relaying Dr. Mings' testimony (the defense psychologist), the state contends that he testified that the brothers' relationship was a result of "sibling *rivalry*" (emphasis added). (State's Answer Brief, p. 33) No one ever testified that there was any sibling "rivalry" between the two; instead what the doctor stated was that he factored various events into consideration of the brothers' "sibling **relationship**" in order to form an opinion as to the dynamics of the sibling **relationship** between David and Elvis" and to explain why and how David was influenced by his brother. (V2, T 214-215)

The state contends that Dr. Mings' opinion in assessing the relationship between David and Elvis was flawed because "Dr. Mings was not aware Tameka Jones originally stated to police that David was directly involved with the Washington murder," which "*fact* could be important" in assessing that relationship. (State's Answer Brief, p. 34) However, this was NOT a "fact;" the state forgets to mention that, as Jones later admitted to authorities, David had nothing to do with the Washington's killing and was, as a result, not charged with that killing. (V1, T 136-137) Hence, this falsity is NOT important to Dr. Mings' assessment.

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.

The attorney for the state contends that counsel for the appellant has "not adequately briefed [this issue] to present a viable claim," citing *Simmons v. State*, 31 Fla. L. Weekly S285, 294 n. 12 (Fla. May 11, 2006); *Coolen v. State*, 696 So.2d 738, 742 n. 2 (Fla. 1997); and *Duest v. Dugger*, 555 So.2d 848, 852 (Fla. 1990); but that the state would still "attempt to address the individual cites to the record." (State's Answer Brief, p. 43) Counsel for appellant takes great exception to the assistant attorney general's claim. First, it should be noted that these cases are inapplicable here, for in those cases appellate counsel simply "adopted" or "made reference" to arguments below without any further explanation or argument, most often simply in a footnote. *See Id*. Secondly, by its answer brief, the state obviously was able to understand the claims presented here, including the

admissibility of hearsay at a penalty phase trial and the relevancy of the excluded testimony. The appellant's Initial Brief on this point, while not the drawn-out thirteen pages of the state's brief, argues the facts, giving specific record citations and summaries of the proposed error below, and specific case and statutory citations indicating that the court's exclusion of this relevant and admissible evidence was reversible error.

The state initially maintains that the excluded evidence was not adequately proffered by the defense. (State's Answer Brief, p. 44-45, 47) The state claims that the proffer by *defense counsel* was inadequate because the proffer was only through defense counsel and not proffered *testimony* of the witness herself. Such is not the case law. A proffer of excluded evidence by defense counsel *is* adequate to preserve the issue for appeal. "[A] summary of testimony by counsel can be considered a sufficient proffer if it adequately informs the appellate court of the scope and substance of the proposed testimony." *Asay v. State*, 769 So.2d 974, 983, n. 15 (Fla. 2000), citing Charles W. Ehrhardt, *Florida Evidence* § 104.3. *See also* Fla. Stat. §90.104(1)(b). *Blackwood v. State*, 777 So.2d 399 (Fla. 2000), cited by the state is in accord, rather than contrary as urged by the state.[2] *Blackwood*,

[2] The specific page reference by the state to *Blackwood*, *supra* at **408**, (State's Answer Brief, p. 45), has nothing to do with offers of proof, but rather simply to a failure by the defense

supra at 410-411. *See also Orlando/Orange County Expressway Authority v. Latham*, 643 So.2d 10, 11 n. 3 (Fla. 5th DCA 1994). The proffers by defense counsel as to the substance of the excluded evidence as well as argument on the rationale for its relevance and admissibility was clearly presented to the court below and is quite adequate to provide specific sufficient detail to inform both the trial court and this Court as to the substance of the evidence and its relevancy to the defense and/or was obvious from the questions themselves. Fla. Stat. §90.401(1)(b); *Pacifico v. State*, 642 So. 2d 1178, 1185 (Fla. 1st DCA 1994).

The state admits that while, by statute, hearsay may be admissible at the penalty phase of a trial, it contends that *here* it had no opportunity to rebut or challenge this evidence since it could not have confronted these witnesses. (State's Answer Brief, p. 46-47) However, this argument is specious in that the state HAD the opportunity to confront these witnesses, but chose not to. The record clearly shows that the witnesses who provided these reports about David growing up were provided to the state long before trial and the state simply chose not to contact them or depose them in any way since they lived in the Carribean (where the Frances boys grew up). (V1, T 86-88, 89-90) Surely the state cannot be permitted to determine what defense evidence can be admitted and what cannot be admitted

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to enter any objection at all.

by simply deciding which witnesses it chooses to contact and which is chooses not to! The state's contention that they did not have the opportunity to confront these named, known witnesses was caused by their own failure to investigate and utilize pre-trial discovery, not by any action of the defendant. Additionally, the state's citation to *Blackwood v. State*, *supra*, regarding the lack of confrontation rights is inapposite. In *Blackwood*, the state could not confront the speaker of the hearsay because the speaker was the victim of the homicide, was thus deceased, and thus unavailable to the state. *Id*. at 412. Here, however, the witnesses were very much alive and available to the state to confront during pre-trial discovery, yet the state failed to avail itself of the opportunity to do so.

The state also contends that excluded testimony about the conditions of the defendant and his siblings while growing up was simply cumulative to the evidence that was presented from witnesses (both live and through video-taped testimony). (State's Answer Brief, p. 47) This is simply not true – no permitted testimony described the crowded poor conditions of the home where they were raised, with many occupants from a very extended family; many of the witnesses interviewed by the defense mitigation expert were not present to testify, including Shirley Richards (the boy's aunt), the boys' maternal grandmother, their kindergarten teacher, Mitchell Conner, the boys' stepfather, Melanie Richards, and

Liz Bruly, all of which were contacted by the mitigation specialist to obtain family and school records and gather information about David's upbringing, his childhood (that he was not far in terms of years from), his social history, family relationships and their economic status. (V1, T 85-90) Based upon her interviews with these folks and her review of records, the mitigation specialist, it was proffered, would have testified to her assessment of the risk factors found in a violent situation such as encountered here. (V1, T 95) But she was unconstitutionally precluded from doing so.

The state next claims that the issue of the excluded testimony regarding the domestic abuse of David as a child was presented here without explanation, claiming that there was some "*(unspecified)* information that indicate possible physical abuse of David." (State's Answer Brief, p. 48) (emphasis added). Despite the state's claim that it was "unspecified," the appellee immediately contradicts this claim by then proceeding to specify the information with cites to the record, that it came from the defendant and Elvis, and "*more specifically*, there had been beatings with cords, belts, and bare hands." (State's Answer Brief, p. 48) (emphasis added). As recounted in this reply brief's Statement of Case and Facts, *supra* at p. 1, the exclusion of testimony from the defense mitigation specialist of whether there is "always documented evidence of child abuse or domestic

violence," came only after the state was permitted to elicit testimony that there was no reports to authorities of any abuse. To allow the state to introduce this fact, yet exclude the proffered testimony of the defense on the same issue smacks of unfairness and a denial of due process of law, rendering the death sentences invalid. The mere fact that this evidence came from the defendant should not relate to its admissibility, but simply goes to the weight that the state could argue that the jury give it. *See Bender v. State*, 472 So.2d 1370, 1372 -1373 (Fla. 3rd DCA 1985).

The state further contends that no preserved error occurred where the court refused to allow Dr. Mings, the mental health expert, to testify that the facts relayed by three prior witnesses who knew the defendant and family growing up were consistent with his diagnosis. The state maintains that this precluded testimony was not proffered. (State's Answer Brief, p. 54) However, as previously noted herein, the statute itself, as well as caselaw, provide that where the answer was obvious from the question asked, a proffer is not required. Fla. Stat. §90.401(1)(b); *Pacifico v. State*, *supra*. Here, it is obvious that the answer was obvious! Further, the proposed question in no way called for the expert to comment on the witnesses credibility, on whether they were telling the truth or not – it simply asks if the facts that they provided in their testimony (true or not,

credible or not) was consistent with *his* expert opinion, or whether their testimony would change his diagnosis. (V2, T 213)

An expert witness may render an opinion that is based on hearsay. *See Michael David Ivey, Inc. v. Salazar*, 903 So.2d 329, 331 (Fla. 5th DCA 2005); *Houghton v. Bond*, 680 So.2d 514, 522 (Fla. 1st DCA 1996); *Bender v. State*, *supra*; *Sikes v. Seaboard Coast Line R.R. Co.*, 429 So.2d 1216, 1222 (Fla. 1st DCA 1983). This general principle is incorporated into the Florida Evidence Code in the following language:

> The facts or data upon which an expert bases an opinion or inference may be those perceived by, or made known to, the expert at or before the trial. If the facts or data are of a type reasonably relied upon by experts in the subject to support the opinion expressed, the facts or data need not be admissible in evidence.

§ 90.704, Fla. Stat. Further, as the death penalty statute [§921.141(1)] specifically provides, even the hearsay on which the expert based its opinion is admissible, just as it specifically is permitted by statute in the proceedings for *Jimmy Ryce* involuntary commitment of sexual predators. *See* Fla. Stat. §394.9155(5); *In re Commitment of Rodgers*, 875 So.2d 737, 740 (Fla. 2nd DCA 2004); *Lee v. State*, 854 So.2d 709, 713-714 (Fla. 2nd DCA 2003) (all holding hearsay evidence admissible by statute as long as there is no showing of unreliability).

Lastly on this issue, the appellee avers that the initial brief "argues the trial

court's ruling precluded him from presenting his theory of defense," yet "he does not identify that theory, and this claim is insufficiently pled." (State's brief, p. 55) It does not take a rocket scientist to ascertain from the initial brief, however, that the "theory of defense" at the penalty phase and in this appeal is that David Frances does not qualify for the death penalty – that matters in his life history, his makeup, his character (many of which were excluded as recounted here), his dependant relationship on his brother, are highly relevant mitigators which call for life sentences. While, as pointed out by the state, the defendant's statements to the police "contradicts" the theory of his relative minor culpability, the mental health expert sought to present evidence (excluded at TT6, T 819-820; V1, T 135-136, 198-200) which would demonstrate why David would have accepted more responsibility in his statement to police than actually occurred.

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.

Regarding the heinousness aggravator, the state points out that "it is **now** well-settled that the intent of the murderer is not the operative question" in determining this aggravating circumstance, citing to *Reynolds v. State*, 31 Fla. L. Weekly S318, 326 (Fla. May 18, 2006); *Lynch v. State*, 841 So.2d 362 (Fla. 2003); and *Guzman v. State*, 721 So.2d 1155, 1160 (Fla. 1998) (intention of defendant is not a necessary element of this aggravator). If true, then these cases are at odds with earlier pronouncements from this Court, upon which the constitutionality of Florida's death penalty was based. For in *State v. Dixon*, 283 So.2d 1, 9 (Fla. 1973), this Court previously defined this factor in terms all relating to the intent of the murderer: "wicked," "evil," "vile," "cruel," "conscienceless," "pitiless," and "designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others."

As recounted in the Initial Brief, p. 27, this Court has also previously stated

in *Santos v. State*, 591 So.2d 160, 163 (Fla. 1991), and *Cheshire v. State*, 568 So.2d 908, 912 (Fla. 1990), that 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). This Court's change of heart on the definition of this aggravator to "now" (as the state says) focus solely on the victim's perception (even where the crime was accomplished by a co-defendant with no intent on the part of the defendant to have the killing be cruel or torturous) represents a major change in the foundation for the acceptance of the death penalty as constitutional and "now" renders Florida's death penalty scheme violative of the proscription against cruel and unusual punishment and makes its imposition arbitrary, wanton, and capricious.

The U.S. Supreme Court has held that, "If a State has determined that death should be an available penalty for certain crimes, then it must administer that penalty in a way that can rationally distinguish between those individuals for whom death is an appropriate sanction and those for whom it is not." *Spaziano v. Florida*, 468 U.S. 447, 460 (1984). The Constitution prohibits that arbitrary or irrational imposition of the death penalty. *Id*., 468 U.S. at 466-467. *Proffitt v. Florida*, 428 U.S. 242, 250-253 (1976), requires that in reviewing death sentences

similar results will be reached in similar cases and that this Court must assure that "the [aggravating and mitigating] reasons present in one case will reach a similar result to that reached under similar circumstances in another case." By changing the definition of heinous, atrocious and cruel from what it was in 1976 and even in 1991 (*Santos*, *supra*) to what it is "now" (according to the state), this Court has engaged in an inconsistent interpretation of aggravating and mitigating circumstances, which has prevented the evenhanded application of Florida's death penalty. Arbitrariness and capriciousness have returned in full force to Florida's capital punishment system. Hence the statute, under this Court's new interpretation of aggravators is now unconstitutional.

Further, the state contends that the defendant's confession establishes that Charles was conscious for an extended period of time, even after the initial strangulation at only Elvis's hands. (State's Answer Brief, p. 59) However, as noted in the Statement of Case and Facts herein, David's statements indicate only that he felt Charles may have still been alive, NOT that she had regained any consciousness. (TT9, T 1459-1460) The state's contention, then, that Charles felt pain later upon the defendant taking part in the strangulation with the cord is not accurate since she never regained consciousness. *See also* Statement of Case and Facts herein, p. 3, regarding the medical examiner's testimony regarding

consciousness (TT8, T 1223-1224) and footnote 10, p. 31of the Initial Brief.

With regard to Appellant's argument in support of the statutory mitigating circumstances of age, no significant history of criminal activity, and duress/substantial domination, the state declares that the defendant personally waived these statutory factors. (State's Answer Brief, p. 70-72) This is wholly false and a complete misinterpretation of the actions of defense counsel and the defendant. The defendant simply waived the standard jury instructions which, he felt, distinguished between statutory and nonstatutory mitigation and minimized the nonstatutory factors in the jury's mind. (R2, T239) (*See also* R5, R 884-886 regarding the defense motion in limine re: non-enumerated mitigating circumstance.) The trial judge plainly understood that Frances was merely waiving the jury instruction and that he would have to consider the applicable statutory mitigating circumstances in his determination of life or death, a quote that the state conveniently omits from its brief, stopping just before it. (R2, T 238-239) Thus, the defendant did not waive the court's consideration of his statutory mitigation and the judge considered them in its sentencing order (to which the defendant takes issue on the sufficiency of the findings, the evidence to support them, and the weight to be afforded them).

Contrary to the state's assertions, there was an abundance of evidence –

uncontroverted evidence – that Elvis was the leader, the dominant one, the one of whom David was afraid, the one who had influence over David, despite being the younger brother. (V1, T 133-134; V2, T 213-216, 223-227; SR6, T 296-297) This crime was totally out of character for David, as opposed to Elvis' temper, dominance, 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) *See* Initial Brief of Appellant, pp. 38-41)

With regard to Appellant's proportionality claim, the state contends that there was no evidence presented of child abuse or deprived childhood, nor any mental issues. (State's Answer Brief, p. 81) However, (while Appellant contends that there still was sufficient, unrebutted evidence that was presented to the court on these matters) this was precisely the additional evidence that was erroneously excluded by the trial court (*see* Point I of this brief and Initial Brief of Appellant), hence depriving the defendant of the opportunity to present additional evidence of these mitigators. As described by ALL the witnesses who know David Frances, these crimes are completely out of character for him such that he should be spared this state's ultimate sanction.

This is *not* the most aggravated, *nor* the least mitigated first-degree murders in the state of Florida, despite the two murders. 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. This Court must vacate the death sentences in light of this substantial mitigation.

CONCLUSION

Base on the cases, authorities, and policies cited herein and in the Initial Brief, the appellant requests that this Court reverse and remand for imposition of life sentence or for a new penalty phase.

Respectfully submitted,

JAMES S. PURDY
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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JAMES R. WULCHAK
ASSISTANT PUBLIC DEFENDER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been mailed to Hon. Charles J. Crist, Jr., Attorney General, 444 Seabreeze Blvd., Fifth Floor, Daytona Beach, FL 32118, this 4th day of August, 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