IN THE SUPREME COURT OF FLORIDA

EDWARD J. ZAKRZEWSKI, II,

Appellant,

v. Case No: 88,367

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIRST JUDICIAL CIRCUIT,
IN AND FOR OKALOOSA COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE

The State accepts Zakrzewski's rendition of the Case as put forth in his brief.[1] It will provide legal arguments and rulings occurring in the lower tribunal as they specifically relate to Zakrezewki's issues on appeal. The State would only add that Zakrzewski, on the day he was sentenced to death for each of the murders of his wife, 8-year-old son, and 5-year-old daughter, pled guilty to an attempted voluntary escape which occurred prior to his penalty phase, for which he was sentenced to eighteen months in the Department of Corrections (II 366-68).

STATEMENT OF FACTS

The State generally accepts Zakrzewski's rendition of the facts as put forth in his initial brief, subject to the following additions and/or clarifications. The State would emphasize that Zakrezewski pled guilty to the capital murders of his wife Sylvia,

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'Appellant was the Defendant in the trial court below. Appellee, THE STATE OF FLORIDA, was the prosecution. Henceforth, Appellant will be identified as "Zakrzewski" or "Defendant". (Appellee spells his name Zakrezewski in his brief, while the record spells it the way it appears in the State's brief, which the State presumes is the correct spelling.) Appellee will be identified as the "State". The record and transcript of this case are contained in 10 volumes. Therefore, the reference "II 366-68" is to pages 366 to 368, located in volume II. "p" designates pages of Zakrzewski's brief. All emphasis is supplied unless otherwise indicated.

8-year-old son, Edward, and 5-year-old daughter, Anna (II 241-42). Therefore, there are no claims concerning guilt in his initial brief. He proceeded directly to a Penalty Phase, and the following facts are from that stage.

I. Aggravation

Deputy Baczek, Okaloosa County Sheriff's Office, was dispatched to provide a "welfare check" of Zakrzewski's home Monday, June 13, 1994 (V 365).[2] Zakrzewski's first Sergeant [Sgt.] had requested such a check because he had not shown up for work (V 365). Sgt. Mason and Sgt. Schmidt were in the driveway when Deputy Baczek arrived (V 365). They advised him they were concerned because there were bent screens and a broken window (V 366). Deputy Baczek observed the doors were locked, and entered through the broken window into the laundry room (V 367-68).

As Deputy Baczek approached the bathroom he observed "some blood on the door" (V 370). As he got closer, he saw blood spatter on the floor (V 370). He looked in the bathroom, saw the victims, backed out and called for backup (V 370). He was close enough to

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[2]Zakrzewski's brief does not differentiate between the record on appeal and the transcript of proceedings below, nor does he provide a volume number.

the victims to determine they weren't alive (V 370-71). He observed a machete lying on the bathroom floor near the right foot of one of the victims (V 371).

Deputy Nelson was the lead homicide investigator, and he arrived at the murder scene shortly after Deputy Baczek called for backup (V 387). The Zakrzewskis had only lived in the house for a month, and the family had not been seen since Thursday night (V 389-90). None of Zakrzewski's fellow workers had seen him since two p.m. Friday (V 389-90).

The family had two cars, a 1992 Geo Prism and a Plymouth Reliant (V 390). Zakrzewski had been seen in the Prism at a seafood market on Highway 98, Fort Walton Beach, Thursday night, June 9, 1994, at approximately 10:30 p.m. (V 390). Zakrzewski was "obviously intoxicated" and 'he had thrown up on himself" as reported by officers who discovered him at the market (V 391-92). These officers took Zakrzewski's keys so he would not be able to drive home (V 393). The next morning the Reliant was found in the place of the Prism (V 393). The Prism was still at the market at 5:30 a.m. Friday morning (V 394). At 7:45 a.m., employees at the market discovered the Reliant (V 394). Sometime between 5:30 a.m. and 7:45 a.m. the Prism and the Reliant were switched (V 394). Zakrzewski reported to work at 7:30 a.m. (V 394).

Zakrzewski left his job, never to return, at 2 p.m. Friday afternoon (V 395). He withdrew what he had left in his bank account from an ATM, $300.00, and at 2:48 p.m. procured a $5,000.00 advance on a credit card (V 395).

When Zakrzewski's whereabouts could not be determined, the case was aired on "America's Most Wanted" and on October 14, 1994, "Unsolved Mysteries." It was after the latter coverage that Deputy Nelson was advised that Zakrzewski had turned himself in to authorities in Hawaii, and he flew there to bring him back to Florida (V 396). Before departing, Deputy Nelson interviewed Officer Brown, who was present at the jail when Zakrzewski was visited by the Caparida family and George Schnackenburg (V 397). Officer Brown overhead Zakrzewski apologize to them for deceiving them, and stated 'his time on this earth was short; . . . he had to return to Florida to reap what he had sown" (V 397-398).

Deputy Nelson further testified that Zakrzewski sold the Geo Prism in Orlando for $3,500.00 on Saturday, June 11, 1994, two days before the bodies of his family members were discovered (V 398-99). The check he received for the Prism was never cashed (V 399). One of the agents from the dealership where he sold it drove him to the Orlando International Airport (V 399).

Under cross-examination, Deputy Nelson testified Zakrzewski

developed a relationship with the Caparida family, which allowed him to stay in a small cabin or shack on their church property (VI 406).[3] Zakrzewski "never mentioned ... to them that he was married or had any children" (VI 407). It was very easy to live off the land on Molokai (VI 409).

On redirect, Deputy Nelson explained why Zakrzewski chose to turn himself in 4 months after the murder (VI 411). The night "Unsolved Mysteries" aired, the Caparidas had guests for dinner, including Zakrzewski (VI 411). When Zakrzewski's image appeared numerous times, Cappy, the father, was going to confront him, but was dissuaded from pressing the matter by his wife, Judy, since there were other guests present (VI 412). The next morning Zakrzewski turned himself in to the Maui Police (VI 412). Zakrzewski had lied to the Caparidas that his mother died when he was 3-years-old, and he lived with his grandmother until she had recently died (VI 414).

Laura Rousseau, FDLE crime analyst, testified as to various evidence linking Zakrzewski to the murder scene, such as his fingerprints found in blood in the bathroom (VI 423). Blood stains and spatter were found "in the bathroom area on the walls, on the

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[3]The Caparidas were native Hawaiians who owned 12 acres on the island of Molokai, a very remote place (VI 403-04).

tub, and the toilet and the sink and on the floor and the door" (VI 425). Blood was found in the master bedroom on the floor and bedding (VI 425). Diluted blood was found swabbed around the sink area of the kitchen (VI 425). In the living room, there was blood on a large couch, pillows, wall, and carpet in the hallway (VI 425). Ms. Rousseau testified there were 21 areas where three or four cotton swabbings were taken (VI 426). A machete and crowbar were found on the floor of the bathroom (VI 428). A piece of rope was found in the tub (VI 428).

Suzanne Livingston, FDLE serologist, testified she tested over 100 blood swabbings, 80 of which came from the bathroom (VI 463). Sylvia's blood "was on the pillows and on the couch." Her blood was also in the hallway, master bedroom [bedspread, carpet, and a towel] and in the bathroom (VI 466-67). Edward's blood was "basically all over the bathroom," and just outside the bathroom in a footprint on the carpet (VI 467-68). Edward's blood was also found on the door knob of the master bedroom (VI 468). Anna's blood was only found on the east wall of the tub in the bathroom (VI 469). There were several locations in the bathroom where the blood of more than one person was mixed together (VI 470).

Janice Johnson, FDLE blood stain expert, testified one would expect blood spatter from machete blows (VI 481). The first blood

spatter she observed from the murder scene was "impact spatter on [the] front of the sofa" (VI 485). There were "very large . . . cast off spatters" in the north hallway (VI 486). There was a 'transfer stain" [footprint] on the hallway carpet (VI 486). There was "impact spatter" on the bedspread (VI 487). There was blood everywhere in the bathroom (VI 488-91).

In Ms. Johnson's opinion *forceful impacts were received by Sylvia while she was on the bed and she laid there for a period of time bleeding ... her blood soaking into the bedspread and also into the mattress and bedding beneath" (VI 502). Edward was struck near the bathroom door and near the toilet area (VI 505-507). Sylvia was struck with a machete while kneeling over the tub (VI 510-11). Anna was kneeling, as she was found, when she was struck with the machete (VI 513).

Ms. Johnson testified that Sylvia was first attacked in the living room while seated on the sofa (VI 522). She then traveled to the master bedroom where more forceful impacts were received and she lay bleeding for a period of time before the final blows were administered in the bathroom (VI 522). Sylvia was kneeling in the bathroom when the final blows occurred (VI 522). Edward 'received several forceful impacts in the bathroom area of the residence" (VI 523). Most of the blows "occurred when he was on the floor or in

the tub area of the bathroom" (VI 523). It is possible he may have been standing at some point, indicated by higher blood spatters on the wall (VI 523).

Anna was kneeling "when her forceful impacts occurred" (VI 523-24). Her blood was not found anywhere except on "the wall adjacent to where her body was found" (VI 524). Ms. Johnson explained that if Anna had been standing near the doorway, or in the center of the bathroom, when she was struck with the machete, there would have been blood spatters other than the limited area where her blood was found (VI 523-24).

Under cross-examination, Ms. Johnson testified Edward was murdered before his sister (VI 529). He was standing around the area of the toilet when he was first struck (VI 529). It was his blood in the footprint outside the bathroom (VI 530). She repeated her testimony as to Anna's position, when the defense attempted to portray Anna's first blow being administered while she was standing (VI 531-32). In her opinion, it was highly unlikely the victims were positioned in the kneeling postures they were found in, including Sylvia (VI 534). On redirect, Ms. Johnson testified that Anna was not standing when she was struck (VI 536). "There's just no spatter on her back consistent with her being in a upright position (VI 540)."

Julia Bates testified that she lived next door to the Zakrzewskis for 13 months in early 1993 to late 1994 (VI 549-50). In November of 1993 Mrs. Bates was handing out invitations to her daughter's birthday party when she engaged Zakrzewski in conversation regarding a neighbor who was getting divorced (VI 551-52). Zakrzewski told her 'he did not want to get a divorce, that he would kill them first" and spoke of the divorces he went through when he was a child (VI 551-52). Approximately a month later, during the Christmas season, Zakrzewski brought his two children to her house to play with her children (VI 553). Again, he talked about his childhood when his mother divorced (VI 553-54). 'He said again that he would not put his family through a divorce, that he would kill them first (VI 553-54)." Mrs. Bates told him if he killed his family he would go to jail and he would never be able to hold them again (VI 555). Zakrzewski merely nodded his head in agreement (VI 555).

John Poulighes, a classmate of Zakrzewski at the University of West Florida, testified the two of them had class on the day of the murder between 4:30 and 6:05 p.m. (VI 558-59). After class, they engaged in conversation in the parking lot (VI 561). John served during "Desert Storm", and Zakrzewski asked him what it was like to kill someone (VI 561-62). Defendant had two beers during this

conversation (VI 563).

Dr. Harvard performed autopsies on all three victims on June 14, 1994 (VI 569-70). The bodies were decomposing at the time he examined them (VI 573). His external examination of the mother, Sylvia, revealed multiple injuries (VI 573). She had a bruise/laceration to the left forehead area, and a blunt trauma injury behind her left ear (VI 573). There were ligature marks around her neck (VI 574).

His internal examination of Sylvia showed hemorrhages from the ligature, as well as skull fractures to the back of her head, left forehead, and jaw bone (VI 582). Sylvia died from "blunt force", as well as "sharp force" injuries (VI 582). She could have died from each of the blunt force injuries, or blood loss from the incision/laceration wounds on the back of her neck, upper back and head (VI 583). She was alive when the ligature was placed around her neck (VI 583). A crowbar could have caused the wounds to her skull, while a machete could have caused the laceration wounds (VI 583-84).

Dr. Harvard further testified that each of the fractures to the left forehead, head, and jaw could have produced unconsciousness (VI 587). So too would have the ligature (VI 587). However, he also testified that it is also possible that those

injuries would not produce unconsciousness (VI 588-89). People do sustain skull fractures and remain conscious (VI 589). It was also conceivable that Sylvia lost and regained consciousness (VI 589). The cutting wounds she received occurred while she was dying, "at or around the time of her death" (VI 590).

The external examination of 5-year-old Anna exhibited "multiple, somewhat diagonally oriented wounds of the back, the back of the neck and the back of the head. She had a wound of the lateral aspect of the right elbow area and a small wound of the right thumb (VI 591)." The internal examination comported with the external exam (VI 598). The 'chop" injuries which Anna sustained could have been caused by a machete (VI 599). It was conceivable that the wound to Anna's arm was caused by her raising it to protect herself (VI,VII 600-02). Her main wound was the laceration to the back of her head that resulted in skull fracture, which "could have rendered her unconscious quickly" (VII 603). If this wound did not come first, the other wounds inflicted upon her would have caused her pain and suffering (VII 604).

The external examination of 7-year-old Edward exhibited a head wound "that literally took off his left ear" (VII 605). There were multiple incision wounds to the back of his neck, head, and upper back (VII 605). Edward 'had almost a total amputation of his left

hand at the wrist" (VII 605). In Dr. Harvard's opinion, Edward was struck four times (VII 610). The wound to his left wrist was consistent with a defensive wound (VII 612).

The internal examination of Edward revealed that one of the wounds to the back of his neck "completely transected the spinal column and spinal cord and associated blood vessels" (VII 612). He died of either a skull fracture or the neck wound that severed his spinal column (VII 613). The severed spinal column would have meant instantaneous death (VII 621).

II. **Mitigation**

Zakrzewski's mother, Carla Ogden, testified that his lawyers asked her not to talk to him about the murders and she never did (VII 625,671). Under cross-examination she testified that she was advised to just be the mom, not an attorney (VII 671). She further testified: 'Sylvia loved her children." (VII 669)

Dr. Crown testified Zakrzewski suffered from "dysthymia" and "was under the influence of extreme mental and emotional disturbance" at the time he murdered his family (VII 685,687,697). He also opined that Ted Bundy was a psychopath, and Zakrzewski was not Bundy (VII 701-02).

Yong Suk Lansing, Hyo Chong Morris, and Scott Morris were called to portray Sylvia in an extremely negative light (VII 704-

63). At one point during Mrs. Morris' direct examination, after a State objection, the trial court admonished the defense as follows: "I am not going to allow a character assassination of the victim in this case (VII 751-52)."

Zakrzewski's co-worker, Sgt. Schmidt, testified he "was an outstanding worker" and that he was proud of his children (VII 774-776). She also testified that she would overhear Sylvia screaming at Zakrzewski over the telephone (VII 776). One time he commented to her "that he wished they'd just leave" (VII 781). Sgt. Schmidt further testified she did not know if that meant the children and Sylvia or just Sylvia (VII 781).

Roger Holley testified Zakrzewski loved his children and was very proud of them (VII 789-90). He overheard Sylvia screaming at Zakrzewski over the telephone and related an incident when he went to pick her up when she returned from Korea (VII 795-97). Under cross-examination he testified he did not see Zakrzewski "as having great difficulty in taking new information and solving problems" (VIII 804). In fact, Zakrzewski was just the opposite, "[h]e was able to evaluate things out" (VIII 804). There was nothing abnormal or unusual about his behavior on either the Thursday of the murders or the following Friday (VIII 805). On Friday, Zakrzewski told him he wanted to leave early so he could go home

and "spend some time with his kids" (VIII 805). Mr. Holley further testified that one of the folders Zakrzewski used at work and admitted as a defense exhibit, had "a skull and crossbones surrounded by two lightning bolts," which was not a unit insignia (VIII 807).

Dr. Larson testified Zakrzewski chose the machete because "it's the most merciful way for someone to die, that it's instantaneous and painless" (VIII 837). In his opinion he "was under extreme emotional duress at the time of the alleged incident" (VIII 838). This duress was caused by 'mild organic impairment . . . in combination with stress, in combination with depression" (VIII 839).

Under cross-examination, Dr. Larson testified he had reviewed documents downloaded from Zakrzewski's computer at work including his notes on Nietzsche's philosophy dealing with the "superman" (VIII 845). Dr. Larson opined Zakrzewski's views in this regard would be consistent with his narcissistic image of himself (VIII 845). He admitted 'anger, resentment, some form of revenge might have been a motivation in the murder of his wife" (VIII 846). Nietzsche's 'superman" philosophy may have been a factor in how Zakrzewski solved his problems (VIII 849). In his opinion Nietzsche's philosophy promoted an idealistic individual who is

powerful and who handles his problems in his own powerful way (VIII 849). If such a philosophy guided Zakrzewski's actions, then the murders of his wife and children would have had little to do with easing their alleged pain and suffering (VIII 849).

Dr. Larson further testified Zakrzewski was able to appreciate the criminality of his actions and to conform his conduct to the requirements of law (VIII 849). He was legally sane when he committed the murders (VIII 850). Dr. Larson further opined that if Zakrzewski idealized himself as the Nietzsche "superman" his feeling of worthlessness (characteristic of narcissistic personalities) might create some "rage or anger" (VIII 857).

As to the murders, Zakrzewski revealed to Dr. Larson that after he hit Sylvia with the crowbar and strangled her with the rope, he "realized [he] couldn't turn back then" (VIII 862, 872-73). Zakrzewski further divulged that his first feeling after murdering his family was "a momentary feeling *of elation as if it was a task well done, euphoria"* (VIII 863). Zakrzewski was "actually very positive about" Sylvia (VIII 869). He knew the consequences of his actions would either be death or life imprisonment, and he was ready to accept the consequences (VIII 869).

The Caparida clan testified as to what a great guy Michael

Green was during his four month stay on their island of Molokai (VIII 886-973). None of them knew him as Zakrzewski, or that he was a fugitive from justice until the airing of the 'Unsolved Mysteries" segment, and his surrender to Hawaii authorities the next morning (VIII 886-973).

Zakrzewski took the stand on his own behalf (VIII,IX 973-1101). He testified the first time he saw Sylvia "she looked like an angel" (VIII 981). He asked her out and pursued her (VIII 982). She got pregnant and he was being transferred to Homestead, Florida (VIII 982). He asked her to accompany him, but she would not go unless he married her; if he did not, she threatened to abort the child (VIII 982). He married her and he testified as to their relationship up to and including her murder (VIII,IX 983-1024). He claimed not to remember telling Mrs. Bates he would kill his children if Sylvia divorced him (IX 1017). He attempted to procure an additional $200,000.00 in life insurance (IX 1020). He figured "if [he] could get another $200,000 that would make $5[00,000], and if [he] killed [himself] they'd have what they needed" (IX 1020). He forgot about it because he figured he would not be able to slip the extra payment by Sylvia (IX 1020).

In his account of the murders, he admitted Edward knew he was going to be killed (IX 1027). Edward was brushing his teeth in the

bathroom, ***"the machete was behind the door, and at the last*** second ***he saw it in the mirror.*** That's ***when he put his hand up, . . . [t]hat's how he cut his hand*** (IX 1027)." However, he failed to acknowledge Anna's defensive wound when he related how she was murdered (IX 1027-28). As to Sylvia, he admitted hitting her twice with a crowbar as she sat on the couch in the living room, and once after dragging her to their bedroom (IX 1026). He strangled her because she was still breathing (IX 1026). After murdering his daughter, he moved Sylvia from the bedroom to the bathroom (IX 1028). He testified ***he still did not know she was dead,*** *but* ***he did not explain why*** (IX 1028). Because he **was** uncertain **as** to her death he struck her two or three times with the machete (IX 1028).

Under cross-examination Zakrzewski was questioned as to his failure to recall telling Mrs. Bates twice he would kill his whole family before he divorced (IX 1037). He admitted that when he decided to murder Sylvia he knew it **was** criminal (IX 1039). He also admitted **one** of his options **was** suicide, but he **was** ***"too much of a coward to take [his] own life"*** (IX 1039). He lied to Brother Cappy about his mother dying when he **was** three (IX 1040). Sylvia was not all bad; she loved her children (IX 1041). He considered killing the whole family, not just Sylvia, **as** evidenced by the machete behind the bathroom door (IX 1042-43). He did not know

Edward and Anna were in the TV room when he attacked his wife, he assumed that was so (IX 1047-48).

Zakrzewski acknowledged reading Nietzsche and placing quotes from his writings on his computer (IX 1074-78). His interest in Nietzsche continued subsequent to his being incarcerated (IX 1095-96).[4] He admitted both the computer download and his writings in jail were made by him (IX 1081,1095-96). He also admitted Nietzsche made an impression upon him (IX 1097).

III. **Rebuttal of Mitigation**

Maria Carlson testified she was a bank teller at Compass Bank on June 10, 1994, and served Zakrzewski when he obtained a $5,000.00 cash advance from a Visa card (IX 1122-23). He did not appear abnormal in any way (IX 1124). In fact, he was "cool and calm" (IX 1133).

Dr. McClaren testified as to Zakrzewski's mental and emotional state at the time of the murders:

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[4]These writings were concurrent with an attempted escape by Zakrzewski which came in late 1994 (IX 1080). He wrote: '...I made a final attempt at freedom. The gods frowned on me. I kept my peace in this house of morons only to prepare myself for a speedy departure. It was all for naught. There's no positive side to being in jail (IX 1083)." The jury never saw this portion of his writings because the prosecutor agreed to delete the reference to the escape attempt and Zakrzewski's disparaging remarks against Jews (IX 1083).

> He was a non-psychotic man of average intelligence under a significant stress at the time, financial and domestic difficulties. He also was burning the candle at both ends, going to school and working. (IX 1143)

Zakrzewski "had a fairly long-standing personality disorder with borderline features and perhaps some features of other personality disorders." Dr. McClaren could not rule out Dr. Crown's testimony as to 'brain dysfunction" (IX 1145).[5] In Dr. McClaren's opinion, Zakrzewski "was under extreme emotional disturbance at the time" [of the murders] (IX 1150). "...[T]he most important thing that was affecting him was an adjustment disorder that involved his financial and marital difficulties that was manifested by anxiety and depression" (IX 1151).

Dr. McClaren further testified as to Zakrzewski's underlying motivation for the murders: "...by killing his wife [he] ended a very large source of pain for *himself*" (IX 1154). Zakrzewski was angry (IX 1154). He appreciated the criminality of his conduct, and could have conformed that conduct to requirements of law (IX 1154-55). This was demonstrated by "the multitude of choices that this man made in the hours before these killings. . . . He revised his plan when things did not go as expected." (IX 1155) There was

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[5]Dr. McClaren later testified he was not sure that Zakrzewski had 'brain dysfunction" (IX 1159).

also Zakrzewski's flight to Molokai after the murders (IX 1156) .[6] Dr. McClaren's only testimony about Nietzsche was that Zakrzewski exhibited a "preoccupation with the philosophy of Frederick Nietzsche," and that Nietzsche "vigorously attacked Christianity" (IX 1156-57). Zakrzewski's extreme mental or emotional disturbance was caused by his 'long-standing personality disorder: and "an undue amount of stress" (IX 1159).

Under cross-examination, Dr. McClaren testified he was not an expert in neuropsychology.[7] As regards his testimony concerning Nietzsche he testified he had "read numerous selections! from his works (IX 1166).

George Schnackenberg, husband of one of the Caparida's daughters, who befriended Defendant during his stay on Molokai testified he spoke with Zakrzewski at the jail after he had turned himself in (IX 1170). Zakrzewski "mentioned that he must reap what he had sown" (IX 1170).

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[6]Zakrzewski testified he decided to go to Hawaii the day after the murders because he had heard there were 'a lot of drifters over there and that it's easy to live . . . there." (IX 1033)

[7]Of course neither was Dr. Larson, yet he testified that Zakrzewski's childhood "attention deficit or hyperactivity disorder" was a 'red flag that a person may have a compromised brain," and for that reason suggested to the defense they have a neuropsychologist examine him (VIII 826-27).

SUMMARY OF THE ARGUMENT

I.

Each of the three murders in this cause were heinous, atrocious or cruel. Zakrzewski's weapon of choice was a machete, and the bathroom where the majority of the killing took place was a scene of absolute carnage. Before he finished his wife, Sylvia, off with the machete, he bashed her in the head with a crowbar at least three times and strangled her with a rope. Besides being hacked to death with the machete, both his 7-year-old son, Edward, and his 5-year-old daughter, Anna, had defensive wounds indicative of fear or mental anguish. Error, if any, was harmless in light of two capital murders and CCP on each murder.

II.

All three murders demonstrate the heightened premeditation necessary for a finding of CCP. Months before the murders he spoke of killing his family before divorcing his wife. On the day of the murders, he bought a machete at noon and sharpened it. He strategically located his murder weapons prior to his family's returning home in the early evening. The crowbar and rope he placed in his bedroom where he hoped to lure his wife. The machete he placed behind the bathroom door, where he individually lured

both children on the pretext of their having to brush their teeth. Error, if any, was harmless in light of two capital murders and HAC applicable to each murder.

III,

When compared to other cases, death was the appropriate sentence for all three murders in this cause.

IV.

The jury override for Anna's murder was based upon facts so clear and convincing that virtually no reasonable person could differ that death was the appropriate sentence for each murder. Not only did the trial court find the same aggravating and mitigating circumstances for each murder, it found Anna's murder even more HAC and CCP than those of her mother and brother.

V.

The trial court correctly exercised its discretion regarding the admission of photographic evidence. It only allowed photographs which were relevant to depicting the factual conditions relating to the murders and in aiding the court and the jury in finding the truth. They also aided the medical examiner in his testimony concerning the injuries sustained by the victims, and in proving HAC.

VI.

Dr. McClaren's testimony regarding Friedrich Nietzsche's views on Christianity were relevant to refuting the defense portrayal of Zakrzewski as a contrite Christian. Both before and after the murders, Zakrzewski, by his own admission on the witness stand, was influenced by Nietzsche's writing. Any error is harmless in that it was cumulative to Zakrzewski's own comments on the matter.

VII.

Dr. McClaren's opinion as to Zakrzewski's underlying motivation for the murders was 'very, very different" from his experts. Therefore, his opinion was legitimate rebuttal to mitigation.

VIII.

The record contains competent evidence supporting the trial judge's refusal to instruct the jury on and his refusal to find the statutory mitigator of Zakrzewski's inability to appreciate the criminality of his conduct. Zakrzewski, himself, testified he knew at the time he committed the murders that he was engaged in criminal behavior.

IX.

"The trial court is required to give only the 'catch-all' instruction on mitigating evidence and nothing more."

ARGUMENT

ISSUE I

THE TRIAL COURT CORRECTLY EXERCISED ITS DISCRETION IN FINDING THE THREE MURDERS OF ZAKRZEWSKI'S WIFE, SON AND DAUGHTER WERE HEINOUS, ATROCIOUS OR CRUEL.

Zakrzewski smashed his wife, Sylvia, three (3) times in the head with a crowbar, strangled her with a rope, and ***"butchered"***[8] her to death with a machete. Before the machete attack on his wife, Zakrzewski ***"butchered"*** his 8-year-old son, Edward, and his 5-year-old daughter, Anna, to death with the machete. Both children exhibited defensive wounds indicative of their fear and or mental anguish, particularly in view of the fact that their father was their attacker. Each of these three murders was heinous, atrocious or cruel (henceforth HAC) beyond a reasonable doubt. There was "competent, substantial evidence to support the trial court's findings regarding" this factor for all three victims. ***See Bonifay v. State,*** 680 So. 2d 413, 417 (Fla. ***1996); Willacy v. State, 22*** Fla. L. Weekly S219, S220 n.7(Fla. April 24, 1997).

Zakrzewski concedes at p.15 of his brief that the trial court's "uncontested [findings of] fact show three gruesome murders," but they were "insufficient to justify any of the murders

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[8]Trial court's verbiage.

especially" HAC.[9] This Court has opined: "When there is a legal basis to support finding an aggravating factor, we will not substitute our judgment for that of the trial court . . . ." See ***Occhione v. State, 570 so.*** 2d 902, 905 (Fla. 1990); ***Willacy v. State, supxa,*** n.7. Further, this Court's "duty on appeal is to review the record in the light most favorable to the prevailing theory and to sustain that theory if it is supported by competent, substantial evidence." ***See Orme v. State, 677 So.*** 2d 258, 262 (Fla. 1996), cert. denied, 117 S.Ct. 742 (1997); ***Willacy,*** n.7.

Even if one or all of these murders were found not to be HAC, which the State does not concede, the outcome would not be different. Two capital murders, as well as the cold, calculated and premeditated factor would remain applicable to each murder. The State will address the heinous factor as it relates to each victim in keeping with the trial court's sentencing order attached in its entirety as an appendix hereto.[10]

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[9]Later, at p.38 of his brief, he stated: "Regarding HAC, though, the jury could have believed Zak's attack on his wife with a crowbar, then strangling her, and finally hitting her with the machete was sufficiently brutal for this aggravator to apply. Likewise, his savage attack on his son, which he admitted he did "hard" . . ., met the HAC definition. On the other hand, relatively little was said about Anna's death, and it came swiftly."

[10]Zakrzewski attached only portions of the sentencing order to his brief.

A. Sylvia (Wife)

The trial court found Sylvia's murder was HAC ♋♦ follows:

> The testimony of the medical examiner, along with the Defendant's own testimony, indicates that Sylvia Zakrzewski was first beaten with a crowbar, then strangled with a rope while still alive, and then literally ***butchered*** with a machete. The Defendant's own testimony indicates that he dragged Sylvia to the bathroom after he had murdered his two children and left them in the bathroom. Medical testimony was inconclusive as to whether Sylvia was dead when she was dragged into the bathroom and struck with the machete. We will never know. There is no possible way for us to know whether Sylvia was still conscious and able to perceive her two dead children in the bathroom prior to the final blows being struck to her head and neck with the machete. The brutal and atrocious nature of the Defendant's murder of his wife Sylvia was indeed a conscienceless, pitiless crime which was unnecessarily torturous to the victim. This aggravating circumstance was proved beyond a reasonable doubt. (II 323)

At p.17 of his initial brief, Zakrzewski argues: "Without dispute, Sylvia had no awareness of her impending death . . . she never regained consciousness after the first blows (with a crowbar), . . . and at most, was only 'semi-conscious immediately before her death."

In fact, Dr. Harvard, who performed autopsies on all three victims, testified that each of the fractures to Sylvia's left forehead, head, and jaw could have produced unconsciousness (VI 587). So, too, would have Zakrzewski's use of the ligature (VI

587). However, Dr. Harvard also testified that it was possible that those injuries would not produce unconsciousness (VI 588-89). Further, he testified that people do sustain skull fractures and remain conscious (VI 589). It was also conceivable that Sylvia lost and regained consciousness (VI 589). Of course, the only one who knows for sure whether Sylvia was conscious during any of his three separate attacks is Zakrzewski, and it would not be in his self-interest to say that she was.

Dr. Harvard testified Sylvia died from "blunt force" [the crowbar], as well as "sharp force" [the machete] injuries (VI 582). She could have died from each of the blunt force injuries, or blood loss from the incision/laceration wounds on the back of her neck, upper back and head (VI 583). Dr. Harvard was able to determine that she was alive when the ligature was placed around her neck in the bedroom (VI 583). The hacking wounds she received from the machete in the bathroom occurred while she was dying, 'at or around the time of her death" (VI 590).

However, a close review of Zakrzewski's testimony does provide some insight. He admitted hitting Sylvia twice with a crowbar as she sat on the couch in the living room, and once after dragging her to their bedroom (IX 1026). He took her to the bedroom, "and she was ***still breathing"*** (T.1026). So, he hit her a third time

with the crowbar and then he "strangled her" (IX 1026). He left Sylvia in the bedroom, and murdered his two children in the bathroom (IX 1027-28). He went back to get Sylvia, brought her to the bathroom where his children were already murdered or dying, and whacked her two or three times with the machete because he still ***didn't*** **know she was dead (IX** 1028).

This Court has upheld the heinous factor in a case in which the victim ***"was struck forcefully in the*** **face** ***by the Defendant with a heavy steel bar,*** not ***rendering the victim unconscious,"*** necessitating the Defendant to secure a pistol to finish her off with two shots to the head. ***King v. State, 436 So.*** 2d 50 (Fla. 1983), ***cert. denied, 466*** U.S. ***909 (1984); See also, Muehleman v. State,*** 503 so. 2d 310 (Fla.) (Victim lay sleeping in bedroom when Defendant snuck in, and repeatedly stuck him in the head with a frying pan with such force his dentures went flying, and the bed linens, walls, and curtains were spattered with his blood.) ***cert. denied, 108*** S.Ct. 39 (1987).

In Taylor v. ***State,*** 630 So. 2d 1038 (Fla. 1993), *cert. denied,* 115 S.Ct. 107 (1994), this Court found that the heinous factor was supported by the evidence despite the appellant's contention there was no evidence the victim was conscious or that she endured great pain or mental anguish during the murder. See ***also, Willacy v.***

State, supra, at S219 (Victim beaten, ***strangled*** and burned. ***"Each of these factors has been ruled diapositive of HAC."***); *Geralds v. State, 674 So.* 2d 96, 102 (Fla, 1996) (Victim severely beaten prior to death as evidenced by the bruises and cuts on various parts of her face and chest area, which indicated the blows were sufficient to knock her down and/or render her unconscious.); ***Atkins v. State, 497 so.*** 2d 1200, 1201 (Fla. 1986)(6-year-old victim knocked unconscious with a steel rod); ***Davis v. State, 461 So.*** 2d 67 (Fla. 1984) (Mother beaten over head with a pistol almost beyond recognition, one child tied up and shot twice, second child shot in back and then beaten, all of which occurred in mother's bedroom and short hallway to bedroom) ***cert. denied, 473*** U.S. 913 (1985).

The trial court correctly found Sylvia's death was HAC. However, if this Court should deem it was not, any error, without admitting such was the case, was harmless beyond a reasonable doubt given the remaining strong aggravators, including the capital murders of Zakrzewski's children, and the fact that the murders were cold, calculated and premeditated. ***State v. DiGuilio***, 491 So. 2d 1129 (Fla. 1986); Watts ***v. State, 593 So.*** 2d 198, 204 (Fla.) (eliminating HAC harmless where three aggravators remained to be weighed against one statutory and one nonstatutory mitigator) ***cert. denied, 112*** S.Ct. 3006 (1992). As further support for the

State's harmless error argument, it refers this Court to the trial court's finding regarding the cold, calculated and premeditated aggravator which shall be provided in its entirety in the State's argument on Zakrzewski's second issue.

B. Edward (7-year-old Son)

The trial court's finding for the **heinous** factor as it pertained to Edward's murder was as follows:

> The murder of Edward Kim Zakrzewski was committed in an especially heinous, atrocious, or cruel manner. After beating Sylvia with a crowbar, the Defendant called his seven year old son into the bathroom and brutally hacked him to death with **a** machete. By the Defendant's own admission, Edward **saw** what his father was about to do to him and raised his hand in meager defense of his young life, at which time his hand **was** nearly severed at the wrist. Edward ***was*** undoubtedly aware for a period of time that he was about to be murdered by his own father. We will never know for what period of time Edward experienced this horror. We do know that the Defendant stuck Edward over and over with the machete nearly decapitating him, shearing his right ear from his head, severing his spinal cord, and splashing Edward's blood on the floor, walls, sink, toilet, tub and ceiling of the bathroom. This aggravating circumstance has been proven beyond a reasonable doubt. (II 328)

This Court has opined:

> ...It is not merely the specific **and** narrow method in which a victim is killed which makes **a** murder heinous, **atrocious,** or cruel; rather, it is the **entire *set of circumstances surrounding the killing.***

Magill v. State, 386 So. 2d *1188* (Fla. 1980), *cert. denied, 101* S.Ct. 1384 (1981), *(Magi11 I), appeal upon remand, 428 So.* 2d 649, 651 (Fla. 1989), *cert. denied,* 104 S.Ct. 198. It has further opined: "...In arriving at a determination of whether an aggravating circumstance has been proved the trial judge may apply a ***"common-sense inference fron the circumstances,"*** *Swafford v.* **State**, *533 So.* 2d 270, *277* (Fla. 1988), *cert. denied, 489* U.S. 1100, 109 **S.Ct. 1578, 103 L.Ed.2d 944 (1989)** ." *Gilliam* v. State, **582 So.** 2d 610, 612 (Fla. 1991).

At pp.18-19 of his brief, Zakrzewski acknowledges Edward's defensive wound, yet argues his death was not HAC because "the time between the initial wounding and the murder was so short." Zakrzewski's argument ignores the 'entire set of circumstances" surrounding Edward's murder, as well as the ***"common-sense inference"*** the trial judge could draw from those circumstances. The 'common-sense inference" to be drawn from the "entire set of circumstances" surrounding Edward's murder, is as the trial court found: ***"Edward was undoubtedly aware for a period of time that he*** **was *about to be murdered*** **by *his own father."*** **Edward's** death was not as swift as he alleges if one considers he was struck repeatedly with the machete, and his blood was literally all over the bathroom he ***was*** murdered in. Zakrzewski chooses to ignore the

sheer terror his son must have experienced when he saw his father's arm raised, machete in hand, ready to strike, and raising his arm "*in meager defense of his young life.*"

"The ***mindset*** or ***mental*** anguish of the victim is an important factor in determining whether this aggravating circumstance applies." *Phillips v. State, 476 So.* 2d 194, 196 (Fla. 1985). ***'Fear and emotional strain*** may be considered as contributing to the heinous nature of the murder, even where the victim's death was almost instantaneous." Preston *v. State, 607 So.* 2d 404, 409-10 (Fla.), *cert. denied, 113* S.Ct. 1619 (1992); See ***also, James*** v. State, 22 Fla. L. Weekly S223, (Fla. April *24, 1997); Hitchcock v. State, 578* So. 2d 685, 693 (Fla.), *cert. denied, 112* S.Ct. 311 (1990); *Rivera v. State, 561 So.* 2d 536, 540 (Fla. 1990); *Chandler v. State,* 534 So. 2d 701, 704 (Fla. 1988), *cert. denied, 490* U.S. 1075 (1989); *Phillips v. State, supra; Mason v. State, 438 So.* 2d *374* (Fla. 1983), *cert. denied* 104 S.Ct. 1330 (1984); *Adams v. State,* 412 So. 2d 850 (Fla.), *cert denied, 103* S.Ct. 182 (1982). "Moreover, the ***victim's mental state*** may be evaluated for purposes of such determination in accordance with a *common-sense inference* from the circumstances." *Swafford* v. State, supra, at 277; See *also Preston v. State, supra,* at 946 ("victim ***must*** have felt terror and fear as these events unfolded" [emphasis this court's]).

This Court has consistently upheld a trial court's finding of the heinous factor where a child was the victim. See e.g., ***James v. State, supxa*** (8-year-old victim picked up by her throat while she was asleep on couch, opened eyes and looked at defendant as he strangled her.); *Henyard* v. ***State,*** 22 Fl. Law Weekly S14, (Fla. December 19, 1996) (Mother raped by co-defendants on trunk of car, while her two daughters, 3 and 7-years-old were in back seat, mother shot several times and left for dead, children then executed by defendant with a handgun); ***Caxdona v. State, 641 So.*** 2d 361 (Fla. 1994) (Mother physically abused her son, 'Baby Lollipops", over months of time to the point of his having irreversible brain damage which eventually hastened his death, as well as neglected him resulting in malnutrition and anemia.) ***cert. denied,*** 115 S.Ct. 1122 (1995); Henry v. ***State,*** 649 So. 2d 1366 (Fla. 1994) (5-year-old boy kidnaped and stabbed in throat 9 hours after his mother murdered in similar fashion.), cert. denied, 132 L.Ed.2d 839 (1995) ; *(Arbelaez* v. State, 626 So. 2d 169 (Fla. 1993) (5-year-old boy beaten, strangled, and thrown off 70 foot bridge to drown.) ***cert. denied, 114*** S.Ct. 2123 (1994); *Mann* ***v. State,*** 603 So. 2d 1141 (Fla. 1992)(Kidnaping and murder of lo-year-old girl who died from skull fracture after being cut and beaten), ***cert. denied,*** 113 S.Ct. ***1063*** (1993); ***Atkins v. State,*** *supra*, (Fla. 1986) (6-year-old boy

abducted, forced to perform sexual acts, beaten about the head with a blunt instrument when child threatened to tell his parents.); ***Davis v. State,*** 461 So. 2d 67 (Fla. 1985) (Mother beaten over head with a pistol almost beyond recognition, one daughter tied up and shot twice, and second daughter shot once in back and beaten.) cert. denied, 473 U.S. 913 (1985); ***Adams v.*** State, 412 So. 2d 850 (Fla.) (8-year-old girl raped and strangled), ***cert. denied 459*** U.S. ***882 (1982);*** *Dobbert* ***v. State,*** 375 So. 2d 1069 (Fla. 1979) (Father physically abused his g-year-old daughter, and then killed her to prevent detection.) ***cert. denied, 447*** U.S. 912 (1980); ***Rutledge v.*** State, 374 So. 2d 975 (Fla. 1979) (Mother and oldest son, lo-years-old, literally butchered to death.) ***cert. denied, 446*** U.S. 913 (1980); ***Morris v. State,*** 557 So. 2d 27 (Fla. 1990) (18-month-old boy died of multiple injuries due to blunt trauma at hands of mother's boyfriend. HAC upheld but death sentence reversed owing to jury's life recommendation and extensive mitigation.); ***Smalley v.*** State, 546 So, 2d 720 (Fla. 1989) (Again, mother's boyfriend beat and dunked 28-month-old daughter's head in water, because she was ill and whining. HAC 'well supported by the record," but death sentence commuted to life in view of extensive mitigation.). Edward's murder should not be an exception.

Even if this Court were to determine the facts surrounding

Edward's death did not comport with the trial court's finding of HAC, any error would be harmless beyond a reasonable doubt. State v. *DiGuilio, supra.* Zakrzewski's sentence of death for the horrific murder of his son would remain in view of the two Capital murders of his mother and sister, and the fact that his death was cold, calculated and premeditated. ***See e.g., Watts v. State, supra.***

C. Anna (5-year-old Daughter)

The trial court found as follows regarding the murder of Anna:

> The murder was committed in an especially heinous, atrocious, or cruel manner. The Defendant testified that after bludgeoning Sylvia Zakrzewski and hacking Edward Zakrzewski to death with a machete, he called Anna into the bathroom to "brush her teeth." He then testified that he struck Anna as she entered the doorway to the bathroom. The physical evidence in the case established by blood-stain pattern analyst Jan Johnson is in direct contradiction of the Defendant's testimony as to where the murder of Anna Zakrzewski actually occurred. All of the physical evidence in the case establishes beyond a reasonable doubt that Anna was first struck with the machete and was murdered while she was in a kneeling position with her head bent over the edge of the tub where her brother's mutilated, bloody, lifeless body had been placed by the Defendant and was thereupon murdered in execution-style fashion with the machete. The photos of Anna's body at autopsy, as well as the Medical Examiner's testimony, indicate that Anna suffered cuts to her right hand and elbow, demonstrating that at some point she made a futile attempt to ward off blows. Based upon the physical evidence and expert testimony relating thereto, the

> Court is convinced beyond any reasonable doubt that prior to Anna's death she not only experienced the horror of knowing that her brother had been murdered and that she was next. This Court could not imagine a more heinous and atrocious way to die. This Aggravating circumstance has been proved beyond a reasonable doubt. (II 330)

The trial court's conclusions of fact come to this Court clothed with a presumption of correctness. *Shapiro v. State, 390 So. 2d 344* (Fla. **1980).** The trial court may make **a "*common-sense inference* from *the circumstances,"*** when determining the applicability of the heinous factor. *Swafford v. State, supxa,* at *277; Gilliam v. State, supra,* **at 612. 'The *mindset* ox *mental anguish*** of the victim is an important factor in determining whether this aggravating circumstance applies." *Phillips v. State, supra,* at 196. **"Fear *and emotional strain*** may **be** considered as contributing to the heinous nature of the murder, even where the victim's death **was** almost instantaneous." *Preston v. State, supxa, 409-10) ; See also, Hitchcock v. State, supra,* at *693; Rivera v. State, supra, 540; Chandler v. State, supxa,* **at** *704; Phillips v. State, supxa; Mason v. State, supra; Adams v. State, supxa.* "Moreover, the ***victim's* mental state** may be evaluated for purposes of such determination in accordance with a ***common-sense inference*** from the circumstances." **Swafford v. State, supra, at** 277; **See** *also Preston* v. State, *supxa,* at 946 ("victim ***must have*** felt terror

and fear as these events unfolded" [emphasis this court's]).

As the trial court found, the testimony of Janice Johnson, FDLE Blood Stain Expert, demonstrates the trial court's conclusions of fact were correct. The lower tribunal made a "*common-sense* inference from the circumstances" surrounding Anna's insidious and unconscionable murder. Ms. Johnson testified:

> A Above the top of the bathtub.
>
> Q All right. Was that the only place that Anna Zakrzewski's blood was identified?
>
> A Yes, it was.
>
> Q And what opinions or conclusions did you draw concerning the spatter depicted in photograph Z?
>
> A *Numerous samples* of *blood stains were collected from this bathroom, literally in excess of eighty samples, and the only blood* that *was identified as being from Anna was* area *number thirteen, and it's my opinion that's where she was when forceful impact occurred, and the spatter pattern* was *consistent with that* as *well.*
>
> Q Do you have any opinion or conclusion as to what position her body was in, standing, kneeling, lying down when the impact occurred?
>
> A It's consistent with her being in the *kneeling position in which her body was found.*
>
> Q What's the basis of your opinion concerning that?
>
> A The height of the spatter pattern itself.
>
> Q Explain.

A Okay. Normally when you're -- if you're in a kneeling position and someone strikes you and there's blood coming from your body, most of you wounds are from the shoulder area and that would have been directly -- the wall directly adjacent to the shoulder area in which the impacts were received to her body and this would have been a very low height. She would not have been in a standing position, and also the drops, if you look at them pretty close, they're pretty much 90 degree which is directly on, there's no angular spatters. They're pretty much 90 degree in shape.

Q Okay. *So that spatter wasn't occasioned to her as she was standing and then spattered down*?

A No, *it's not traveling domward, it's 90 degree.*

Q *Straight out from where?*

A *Straight out from hex wound* areas.

Q Basically from where hex body was found?

A Yes, sir. (VI 513-14)

Ms. Johnson's conclusions regarding Anna's murder were as follows:

Q All right. What opinions or conclusions have you reached concerning the attack of Anna Zakrzewski?

A My conclusions were that Anna was in the *kneeling position when her forceful impacts occurred.* Her blood was not identified as being on any other spatter patterns that were identified. Several samples were taken and none of those samples concluded that it was Anna's blood, only area number thirteen which was the wall adjacent to where her body was found.

. . .

Q In your opinion or conclusion if she **had** been standing near the doorway or in the center of the bathroom when struck with **a** machete, would you have expected impact spatters somewhere other than where you found them in this **case?**

A Not only would I expect impact spatters I would expect dropped blood because if -- due to the nature of the wounds she had received ***there should*** **have** ***been dropped blood*** **from** ***those wounds as well had she been standing in the center of the bathroom*** **floor.**

Q In your opinion or conclusion **was** her blood located only on the east wall of the tub near the same height as her body where you found spatters that were analyzed as her blood and perhaps in the pool of blood that was mixed in the bottom of that tub?

A That is correct? (VI 523-25)

On redirect examination, Ms. Johnson testified **as** follows:

Q You've testified that you believe it possible that she [Anna] could have been struck, apparently, one of those wounds near the doorway of the bathroom and then fell across the bathtub into that kneeling position without some blood of hers showing up somewhere besides on the east wall above the foot of the tub. In your professional opinion or conclusion, is that what happened?

A Well, it's been nearly two years since I've seen the photograph of Anna. I did not get it submitted to me for analysis, but upon examination of the photograph there are two things I do detect, one being is her left arm is under her head, and then you've got impact spatter spray on her forearm consistent with her being in that position when forceful impact occurred.

The second thing that I do observe right now is

> that she was struck on the back, she's not wearing a shirt, you've got no drip blood with her being in an upright position. There's just no spatter on her back consistent with her being in a upright position. Normally you see drips or some types of forceful spatters. Especially to these large lacerations on her back, you would expect that, but I don't -- if she were in an upright position -- but I don't see that. ***Again my opinion is that she was not in*** **an** ***upright position when all these injuries occurred.*** (VI 540)

The trial court correctly found that Ms. Johnson's testimony was 'in direct contradiction of the Defendant's testimony as to where the murder of Anna actually occurred (II. 330)." It found that all the physical evidence established beyond a reasonable doubt that she "was murdered while she **was** in a ***kneeling position*** with her head bent over the edge of the tub just as her body was found (II 330)." It made a common-sense inference from the circumstances, "that Anna was ***still living*** when the Defendant knelt her down over the tub ***where her brother's mutilated, bloody, lifeless body had been*** **placed** by the Defendant and **was** thereupon murdered in execution-style fashion with the machete (II 330) ." It noted the evidence also showed "Anna suffered cuts to her right hand and elbow, demonstrating that at some point she made a ***futile attempt to*** **ward off** ***blows*** (II 330)." From this evidence, the trial court drew **a** common-sense inference that prior to her death "she not only experienced the horror of knowing that she was about to be

murdered by her own father, but she also experienced the absolute horror of knowing that her brother had been murdered and that she **was** next (II 330)."

The trial court's conclusions of fact regarding the heinous murder of Anna were correct, carry the presumption of correctness, and should be affirmed. As previously argued for Edward's murder, this Court has consistently upheld a trial court's finding of the heinous factor where a child was the victim, and the State would rely upon the cases cited in the previous argument. However, if this Court should deem the trial court erred in finding this factor, the State respectfully submits, without conceding as much, any error was harmless beyond a reasonable doubt. State v. *DiGuilio, supra.* Zakrzewski's sentence of death for the heinous murder of Anna would remain in view of the two capital murders of his daughter's mother and brother, and the fact that her death was cold, calculated and premeditated. *See e.g., Watts v. State, supra.*

D. **Zakrzewski's Intentions**

On p.19 of his brief, Zakrzewski argued that he 'planned and carried out the murders of his wife and children with a swiftness to minimize their suffering and pain." At trial he testified his "understanding is when you sever the spine a person dies instantly

without pain" (IX 1024).[11] Thus, he used a machete as an alleged "merciful" method of ending their suffering.[12] It is the State's position that the following quote from Zakrzewski's computer notes, related to Viking folklore and written before the murders, provides a more insightful view of why he used a machete to kill his family:[13]

> A place in Valhal is promised to us for him who bravely dies with his ***blood-stained*** sword beside him and his heart unrent with fears, the All-fathers victory-watters [sic] will gently carry home. Even now, methinks, I sit in the banqueting hall of the heroes, and quaff the flowing mead.

E. ***Santos v. State, 591 So. 2d 160 (Fla. 1991)***

He then argues: 'The facts of Santos come close to those here, and what the court did in that **case,** and the successor (citation omitted) indicate what this court should do in this case

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[11]*See* ***Foster*** v. ***State,*** 654 So. 2d 112, (Fla.) (After severely beating victim and stabbing victim in throat, the defendant severed victim's spinal cord because one of girls accompanying him said victim was still breathing. The Medical Examiner indicated the ***victim could have lived 3 to 5 minutes*** **after** ***his*** **spinal** ***cord was severed. "***), cert. ***denied, 116*** S.Ct. ***314*** **(1995).** So much for Zakrzewski's belief that his family members died instantly without pain.

[12]Dr. Larson testified Zakrzewski told him he used the machete because "it's the most merciful way for someone to die (VIII 837)." One need only look at the photographs of the carnage inflicted in his bathroom to realize how mistaken this viewpoint was.

[13]These notes were introduced as State Exhibit 14 at trial and are currently on file with this Court.

for this issue and others." He provides a brief factual discussion which included the manner the victims died -- the mother was shot twice and the baby once. He argues this Court rejected the trial court's finding of HAC as follows: 'The present murders happened too quickly and with no substantial suggestion that Santos intended to inflict a high degree of pain or otherwise torture the victims. Id. at 163."

The State respectfully submits that Zakrzewski's use of a machete to hack his wife and children to death is clearly distinguishable from the use of a handgun as the murder weapon in *Santos,* and that case actually contravenes his argument. If Zakrzewski truly wanted to mercifully execute his family he could have done it with a handgun, He was in the Air Force, certainly one was accessible to him.

Zakrzewski's use of the machete was more in keeping with the "blood-stained sword" he wrote about, than it was a weapon of mercy. As the photographs of the victims demonstrate, his use of a machete to hack his family to death was most definitely HAC.

ISSUE II

THE TRIAL COURT CORRECTLY EXERCISED ITS DISCRETION IN FINDING THE MURDERS OF SYLVIA, EDWARD, AND ANNA WERE COLD, CALCULATED AND PREMEDITATED.

The trial court's findings for the cold, calculated and premeditated aggravator as regards Sylvia's murder, and which are equally applicable to that of Edward and **Anna,** besides being clothed in a presumption of correctness, illustrate why all three murders exhibit the four elements necessary to establish the cold, calculated, and premeditated aggravating circumstance (henceforth CCP). *See* Walls *v. State,* 641 So. 2d 381, 387 (Fla. 1994). All three murders exhibit they were the product of cool and calm reflection, careful planning, heightened premeditation, and without any pretense of **moral** or legal justification.

Zakrzewski concedes in his brief at p.21 that the trial court's findings which follow are "unchallenged", yet he argues the trial court's conclusion from these factual findings are 'contested". As with HAC, there was competent, **substantial** evidence to support the trial court's findings of CCP for all 3 murders. *Willacy v. State, supra,* n.7. These findings **clearly** demonstrate why the coldness factor applies to these murders. Even if one or all three murders were found not to be CCP, the outcome would not be different. Two capital murders, and HAC, would remain

applicable to each murder.

A. Sylvia's Murder

The trial court found as follows:

> 2. The murder of Sylvia Zakrzewski was committed in a cold, calculated, and premeditated manner without pretense of legal or moral justification.
>
> Unrebutted evidence was offered through the testimony of a neighbor, a friend of the Defendant's, that on two prior occasions several weeks and months before he allowed his wife to divorce him he would kill her and the children. On the morning of June 9, 1994, the Defendant's son, Edward Kim Zakrzewski, called the Defendant at work and told him that his mother, Sylvia Zakrzewski, was going to file divorce papers that day. During his lunch break that same day, the Defendant went to an Army Surplus Store and purchased a machete, took it home, sharpened it, and positioned it behind the bathroom door in the house. He also placed a crowbar in the bedroom, cut a piece of rope and also placed the rope in the bedroom. He then returned to work, completed his normal work day, and attended his college course that afternoon. Upon returning home that evening, the Defendant sent the children to watch television in the TV room, then called Sylvia to the bedroom where he had hidden the crowbar and the rope for the purpose of killing her. When she failed to respond, the Defendant walked to where she was sitting on the couch in the living room, and struck her at least twice in the head and face with the crowbar without any conversation or provocation. The Defendant then carried Sylvia to the bedroom where he placed her on the bed and struck additional blows with the crowbar. The Defendant then moved Sylvia to the floor because "she was bleeding too much" and placed her head on a plastic bag in an obvious attempt, at that point, to conceal the existence of as much blood as possible.

> proceeded to choke Sylvia with the rope. The Defendant then went to the bathroom, called his son, Edward Zakrzewski, to the bathroom to "brush his teeth" and when Edward entered the bathroom, the Defendant struck him several times with the machete. The Defendant then called Anna Zakrzewski into the bathroom, also to "brush her teeth" and proceeded to murder Anna with the machete. The Defendant then returned to the bedroom and moved Sylvia to the bathroom where he placed her in a kneeling position with her head over the edge of the tub next to Anna, and then struck her several times across the head and neck with the machete. The bodies of all three victims, Edward, lying in the bottom of the tub, and Sylvia and Anna draped over the tub would indicate an obvious pre-planned attempt to drain the blood of the victims into the tub in order to facilitate cleanup and body removal. The evidence in this case, along with the testimony of the Defendant, indicates that the murder of Sylvia Zakrzewski was the product of probably months and undeniably hours of cool, calm reflection, and careful planning without any pretense of legal or moral justification. Sylvia Zakrzewski's murder is clearly set apart from most domestic homicides in that it did not arise during the course of any domestic dispute or heated argument and was certainly not the result of any sudden provocation or heat of anger. This aggravating circumstance was proved beyond a reasonable doubt. (II 322-23)

These detailed findings clearly demonstrate the four elements necessary for a finding of CCP as concerns the murder of Sylvia. ***See Walls v. State, supra; Davis v. State, supra.***

First, the murder of Sylvia was the product of cool and calm reflection and not an act prompted by emotional frenzy, panic, or a fit of rage. ***Walls v. State, supra.*** The trial court found "the

murder of Sylvia . . . was the product of probably months and undeniably hours of cool, calm reflection" (II 323) .[14] Zakrzewski's neighbor, Julia Bates, testified that in November, 1993, and again around Christmas time, 1993-94, he told her he would "kill them first" before he would allow Sylvia to divorce him (VI 549-50). Zakrzewski, himself, testified how he decided on the day of the murders to kill his family (IX 1023,1042-43). He left work at noon to buy the machete, and then went home to sharpen it (IX 1024). He went about his normal day, including attending an early evening college course, and returned home after discussing with John Poulighes, a "Desert Storm" veteran, what it was like to kill someone (IX 1024-25). He testified he had 30 to 40 minutes when he returned home and readied the murder scene prior to his family's arrival from Edward's Tae Kwon Do class (1025). This preparation included placing the machete behind the bathroom door, and the crowbar and rope in the bedroom where he originally intended to lure Sylvia to kill her (IX 1025). When that didn't work he went to her and clobbered her while she sat on the couch (IX 1026).

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[14]At p.28 of Zakrzewski's brief he argues, contrary to the evidence and the trial court's finding: "The cold rage boiled under a lid of Air Force calm, to erupt several hours later in an explosion of utter, absolute criminality. The anger, futility, depression that had built up, erupted . . . . and once started, continued until the tragic end."

Under cross-examination Zakrzewski testified he was not angry (IX *1043).* The trial court found:

> Sylvia Zakrzewski's murder is clearly set apart from most domestic homicides in that it did **not arise during *the course of any domestic dispute or* heated *argument and was certainly not the result* of *any sudden* provocation or heat of anger.** (II 323)[15]

The trial court found the murder **was** the product of "careful planning", the second factor in determining CCP (II 323). ***Id.*** Certainly, the aforementioned facts demonstrate such **was** the **case.** Third, as regards the "heightened premeditation" element, the trial court found that Sylvia's murder "was the product of probably months and undeniably hours of cool, calm reflection." ***Id.*** Fourth, the trial court specifically found Sylvia's murder **was** "without any pretense of legal or moral justification" (II 323).[16] ***Id.***

The facts surrounding the murders of Sylvia, Edward, and Anna

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[15] Zakrzewski attempts to liken the murders to domestic homicides as evidenced by his cited authorities at pp.22-23.

[16] At p.29 of his brief Zakrzewski argues: 'Their deaths, therefore, achieved some moral justification to this man of limited vision, in much the same sense that Dr. Jack Kervorkian has justified assisting persons in pain end their lives of suffering." His analogy is not well taken. Kervorkian's medical assistance in the suicides of terminally ill patients can hardly be equated to Zakrzewski's heinous murders of his young wife, 7-year-old son, and 5-year-old daughter.

clearly demonstrate that this is not a case involving a sudden fit of rage, as the trial court correctly found. The factual circumstances in Porter v. State, 564 So. 2d 1060, 1064 (Fla. 1990), cert. denied, 498 U.S. 1110 (1991), provide guidance to this Court regarding CCP for not only Sylvia's murder but for her children's as well:

> This is not a case involving ***a*** sudden fit of rage. Porter previously had threatened to kill Williams and her daughter. He watched Williams' house for two days just before the murders. Apparently he stole a gun from a friend just to kill Williams. Then he told another friend that she would be reading about him in the newspaper. ***While Porter's motivation may have been grounded in passion, it*** **is clear that** ***he*** **contemplated** ***this murder well in*** **advance.**

See also, Thomas v. State, 22 Fla. L. Weekly S149 (Fla. March 20, 1997) (Husband kidnaped and murdered wife to avoid paying his part of settlement agreement in their pending divorce.); Pope v. State, 679 So. 2d 710, 716 (Fla. 1996)(Defendant beat, stabbed and kicked girlfriend in the head repeatedly with cowboy boots. Competent, substantial evidence supported trial court's finding that this was a "premeditated murder for pecuniary gain, not a heat of passion killing resulted from a lover's quarrel. "); ***Cummings-El*** v. State, 684 So. 2d 729 (Fla. 1996) (Defendant killed ex-girlfriend after relationship ended. Record replete with heightened premeditation

including armed assault several weeks before murder with threat to kill, aggravated battery with threat to kill two days later, and admission to another two weeks before murder that if he couldn't have her no one **would).**

Even if the trial court erred in finding Sylvia's murder **was** CCP, which the State does not concede, any error would be harmless beyond a reasonable doubt. *See Capehart v. State, 583 So.* 2d 1009, 1015 (Fla.), cert. denied, 112 S.Ct. 955 (1992). Zakrzewski's sentence of death for the murder of his wife would remain in view of the capital murders of his two children, and HAC.

B. 7-year-old Edward's Murder

The trial court found:

> 2. The murder of Edward Kim Zakrzewski was committed in a cold, calculated, and premeditated manner without pretense of legal or moral justification. The Court's previous discussion of the plans and preparations leading to Sylvia Zakrzewski's murder are reiterated herein. Edward's murder **was** the second in a carefully planned deliberate act after having bludgeoned Sylvia Zakrzewski but prior to killing Anna Zakrzewski. After bludgeoning Sylvia Zakrzewski with **a** crowbar, the Defendant called Edward into the bathroom and as Edward entered the bathroom struck him with a machete. Edward's murder was obviously planned in the same cold, calculated, and premeditated manner without pretense of legal or moral justification as described in the murder of Sylvia Zakrzewski. This aggravating factor has been proven beyond a reasonable doubt. (II 328)

The State would rely on the facts, authorities and reasoning contained in its argument for the trial court's finding of CCP for Sylvia's murder. It would only add the following testimony by Zakrzewski given under cross-examination:

> ***Q*** Well, let's get that straight now, Mr. Zakrzewski. Did you decide to kill Sylvia and kill her, and then decide, now I got to get rid of my children; or did you decide to kill the whole family and set it up to kill the whole family? You've told us both.
>
> A I think --
>
> Q Which was it?
>
> A ***I think I considered the whole family, too.***
>
> Q That's ***what the machete was for in the bathroom?***
>
> A Yes, ***sir.***
>
> **Q You *weren'* t angry.**
>
> A No, ***sir.*** (IX 1042-43)

Edward's murder was CCP. If it wasn't, any error was harmless beyond a reasonable doubt given the aforementioned remaining aggravators. See Davis v. ***State, supra; Capehart v. State, supra.***

C. **5-year-old Anna's Murder**

The lower tribunal found:

> 2. The murder was committed in a cold, calculated and premeditated manner without pretense of legal or moral justification.

> The Court's findings as to the facts tending to establish this **aggravating** factor were previously discussed under Count I. By the Defendant's own admission, Anna Zakrzewski was the third of the three execution-style murders committed by the Defendant. The heightened premeditation with which the Defendant carried out the murders of Sylvia Zakrzewski and Edward Zakrzewski clearly applies to Anna's murder, **as** she was the last to be killed. In fact, the Defendant had more time to consider and reflect on the murder of Anna Zakrzewski than either of the other two. This aggravating circumstance has been proved beyond a reasonable doubt. (IX 329)

Again, the State would rely upon its previous arguments made for the applicability of CCP to both Sylvia's and Edward's murders, **and** would note the trial court's finding that as the third to be murdered, Zakrzewski 'had more time to consider and reflect on the murder of Anna . . . than either of the other two." As with her mother and brother, error, if any, regarding the applicability of CCP to Anna's murder was harmless beyond a reasonable doubt. See ***Davis v.*** State, ***supra; Capehart v. State, supra.***

Zakrzewski lumps all three of his victims together when arguing that the trial court erred in concluding CCP applied to each of them. The State treated each victim as individuals, because the trial court made individual findings for each. His argument against CCP can be capsulized by the following statement he made on p.24 of his brief: "Ungirding any explanation of this

Defendant's acts must be his mild brain damage, deep, chronic depression, and personality disorders."

As regards Zakrzewski's alleged 'mild brain damage", Dr. Crown, neuropsychologist, testified he had "mild neurocognitive deficits" (VII 681-83,697). Dr. Larson, psychologist but not a neuropsychologist, testified Zakrzewski was diagnosed as a child as having *attention deficit disorder or deficit hyperactivity," which to him indicated "mild brain impairment" (VIII 820). It was he who suggested Zakrzewski be examined by a neuropsychologist (VIII 820).

Neither of Zakrzewski's experts was a neurologist,[17] and there is no indication that any of the following medical tests were performed upon him: Computerized Axial Tomography/Multi-Resonance Imaging (CAT scan/MRI), Brain scan (Nuclear medicine), Skull X-rays, Electroencephalogram (EEG), Echoencephalogram (ECHO), Electromyogram (EMG). The EMG tests nerve conductivity throughout the muscles of the body, and could have been relevant to Dr. Crown's diagnosis that Zakrzewski had "mild neurocognitive

[17]Dr. Crown distinguished between clinical psychologists and neuropsychologists drawing the following analogy: '[A] clinical psychologist is very similar in many ways to a psychiatrist in the medical field, whereas a neuropsychologist would have a greater similiarity with a neurologist. Logically, if one were trying to prove brain damage, it would seem one would seek the expertise of a neurologist.

deficits". Dr. McClaren, like Dr. Larson, not an expert in neuropsychology, testified he could not rule out Dr. Crown's testimony as to "brain dysfunction" (IX 1145). However, he also testified he was not sure that Zakrzewski had "brain dysfunction" (IX 1159).

Despite Zakrzewski's "mild brain damage, deep chronic depression, and personality disorders," his own expert, Dr. Larson, testified he was able to appreciate the criminality of his actions and to conform his conduct to the requirements of law (VIII 849-50). Zakrzewski, himself, while on the witness stand, admitted that when he decided to murder Sylvia he knew it was criminal (IX 1039).

The State's expert, Dr. McClaren testified Zakrzewski "...by killing his wife ended a very large source of pain for ***himself***" (IX 1154). Zakrzewski appreciated the criminality of his conduct, and could have conformed that conduct to the requirements of **law** (IX 1154). Dr. McClaren further testified such was demonstrated by "the multitude of choices that this man made in the hours before these killings. . . . He revised his plan when things did not go **as** expected." (IX 1155). There **was also** his flight to Molokai after the murders (IX 1156), which as this Court is well **aware** raises an inference of consciousness of guilt. *Ventura v. State, 560 So.*

2d 217, 221 (Fla. 1990) (Flight instruction upheld, where defendant arrested, posted bond, fled, re-arrested 5 years later, living under an assumed name.), *cert. denied, 111* S.Ct. *372 (1990); Fenelon* v. **State,** 594 So. 2d 292 (Fla. 1992) (Flight instruction no longer allowed, but inference of guilt may be argued by counsel.)

The State respectfully submits this Court affirm the trial court's findings of CCP **as** to each victim. Card **v. State, 453 So.** 2d 17, 23 (Fla.) ("[N]o merit to contention that the psychologist's testimony precluded a finding beyond a reasonable doubt in this issue [CCP]. It is the province of the court to determine the weight to be given to the testimony in the sentencing phase. *Smith v. State, 407 So.* 2d *894* (Fla. 1981), *cert. denied, 456* U.S. 984 *(1982).")* *cert. denied, 469* U.S. 989 (1984).

As further evidence the trial court assigned the correct weight to Zakrzewski's experts testimony regarding CCP, Dr. Crown testified Zakrzewski had "great difficulty in taking new information and then applying it in a problem solving situtation (VII 682)." Yet, Roger Holley, Zakrzewski's "supervisor for almost 2 years," whose desk **was** only 18-20 feet away from him, and who obviously came into daily contact with him, testified he did not see Zakrzewski 'as having great difficulty in taking new information and solving problems" (VII 788-89, 804). In fact, Mr.

Holley testified Zakrzewski was just the opposite: 'He was able to evaluate things out (VII 804)."[18] In the light most favorable to its findings regarding CCP, this Court should affirm because they are supported by competent, substantial evidence. *Orne* v. State, *supra,* at 262.

ISSUE III

DEATH IS A PROPORTIONATE SENTENCE GIVEN THREE CAPITAL MURDERS, WHICH WERE HAC AND CCP.

Proportionality review as delineated by this Court is as follows:

> ...In reviewing a death sentence, this Court must consider the particular circumstances of the case on review in comparison to other decisions we have

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[18]The District Court of Florida, Second District has opined:

> The determination of a defendant's mental condition at the time of the offense is a question of fact for the jury. Byrd v. State, 297 So. 2d 22, 24 (Fla. 1974); Collins v. State, 431 So. 2d 225 (Fla. 4th DCA 1983). Here, in seeking to sustain the trial court's ruling, the appellee emphasizes the state's failure to present any expert testimony on the issue of insanity. It is true the state presented only lay witness testimony regarding appellee's sanity. However, it was the jury's prerogative to rely solely on the lay testimony and disregard the testimony of appellee's expert witnesses.

State v. MCMahon, 485 So. 2d 884 (Fla. 2d DCA), *cert. denied, 492* so. 2d 1333 (Fla. 1986).

> made, and then decide if death is an appropriate penalty in comparison to those other decisions.

Hunter v. State, 660 So. 2d 244, 254 (Fla. 1995), *cert. denied, 116* S.Ct. 946 (1996). Such a review in this cause demonstrates death is a proportionate sentence for each of the three murders, when one considers each murder had three aggravating circumstances including two capital murders, HAC, and CCP.

Zakrzewski does not distinguish in his argument regarding proportionality that there were three separate murders and three separate death sentences. The trial court's "Sentencing Order" exhibits very careful weighing of both aggravation and mitigation for each murder, and demonstrates why death is proportionate for each murder.

A. **Sylvia**

Zakrzewski's wife was struck in the head twice with a crowbar, dragged to her bedroom and struck again with the crowbar, strangled with a rope, and ultimately hacked to death with a machete while she was dying. Before Zakrzewski finished Sylvia off with the machete, he murdered his two children with it. As previously argued, the trial court found three aggravating circumstances existed regarding her murder: the capital murders of her son and daughter, HAC, and CCP.

In mitigation, the trial court found two statutory mitigators, "[n]o significant prior criminal history," and "[t]he capital felony was committed while the Defendant **was** under the influence of extreme mental or emotional disturbance" (II 323-24). For the former the trial court found:

> 1. . . . This mitigating circumstance was established by the evidence **and** the Court has given significant weight to the consideration of the Defendant's lack of any prior criminal history. However, ***this*** **statutory** ***mitigator is over-shadowed by the fact that the Defendant committed three premeditated murders during the*** course ***of the evening in question.*** (II 323-24)

As regards the second statutory mitigator, the trial court found in pertinent part:

> ***2. . . .the*** Court finds that the evidence presented is sufficient to establish the existence of this mitigating factor, and. the Court has given significant weight to the existence of this statutory mitigator. However, testimony of two of the psychologists, Dr. Larson for the defense and Dr. McClaren for the State were in agreement that while the Defendant **was,** at the time of the murders, 'under the influence of extreme mental or emotional disturbance", ***the Defendant's mental or emotional distress did not prevent him from appreciating the criminality*** **of** ***his conduct or substantially impair his ability to conform his*** **conduct** ***to the requirements of*** law. Accordingly, while this mitigating circumstance does exist, the Court finds that it is entitled to "significant" rather than "great" weight. (II 324)

As regards nonstatutory mitigation, Zakrzewski requested the trial

court consider twenty-four factors, which it considered and weighed (II 325-26).[19]

Sylvia's murder was horrible. She was beaten with a crowbar, strangled with a ligature, and finished off with a machete. She was still alive when she was strangled as evidenced both by the medical examiner's testimony and Zakrzewski's himself. This Court has found a death sentence proportionate where a crowbar was used as one of the murder weapons. ***See Bruno v. State, 574 So.*** 2d 76, 82 (Fla.)(Defendant savagely beat the victim in the head and shoulders with crowbar in excess of 10 times, then finished him off by firing a .22 caliber handgun into his head twice.), ***cert. denied, 502*** U.S. ***834*** (1991); ***See also, Colina v. State, 634 So.*** 2d 1077 (Fla. 1994) (Husband and wife beaten to death in each other's presence with ***tire Iron); King v. State, supra*** (Same as ***Bruno, supra,*** except ***heavy steel bar*** used.); ***Atkins v. State, supra*** (6-year-old child beaten to death with ***steel rod.); Davis v. State, supra*** (Mother beaten over head with pistol, one child tied up and shot twice, second child shot in back and beaten.).

This Court has held death proportionate where the victim was

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[19]The trial court's findings regarding nonstatutory mitigators demonstrate its careful consideration, and the State will refer this Court to the "Sentencing Order," attached as an appendix hereto.

both beaten and strangled to death. *See e.g., Gamble v. State, 659* So. 2d 242 (Fla. 1995) (Defendant struck landlord in head with ***claw hammer,*** held him down as accomplice repeatedly administered more blows with the hammer, and ultimately strangled him with a cord.); *Owen v. State,* 596 So. 2d 985 (Fla.) (Victim was struck on head and face with ***hammer*** blows and strangled.), *cert. denied, 113* S.Ct. 338 (1991) . Death has also been held proportionate where three separate and distinct means were used to kill the victim as was the case with Sylvia. See e.g., *Taylor v.* State, supra (Victim stabbed, struck with metal bar and/or candlestick, as well as strangled with an electrical cord); ***Willacy v. State, supra*** (Victim beaten, strangled and burned).

Zakrzewski, at pp. 32-33, as he attempted in his argument against CCP, likens his 'murders to a domestic dispute. "However, this Court has never approved a ‘domestic dispute' exception to imposition of the death penalty." *Spencer v. State,* 21 Fla. L. Weekly S366, S367 (Fla. September 12, 1996). Further, there are true domestic cases where this Court has found the death sentence appropriate. *See e.g., Thomas* v. State, *supra* (Husband kidnaped and murdered wife to avoid paying his part of settlement agreement in their pending divorce.); Pope v. *State, supra* (Defendant beat, stabbed and kicked girlfriend in the head repeatedly with cowboy

boots.); *Cummings-El v. State,* supra (Defendant killed ex-girlfriend after relationship ended.); *Henry v. State, 649 So.* 2d 1366 (Fla. 1994) (Henry argued with his wife, ultimately leading to him stabbing her repeatedly in throat. He then kidnaped her 5-year-old son from a previous marriage, and murdered him 9 hours later by stabbing him in the throat.), *cert. denied,* 132 L.Ed.2d *839 (1995); Arbalaez v. State, supra* (5-year-old boy beaten, strangled and thrown off 70 foot bridge because his mother broke up with defendant.); *Duncan* v. *State,* 619 So. 2d 279 (Fla.) (Duncan waited until his fiancee woke up and coldly stabbed her repeatedly with a kitchen knife when she went outside to smoke a cigarette.), *cert. denied,* 114 S.Ct. *453* (1993); *Porter v. State, 564 So.* 2d 1060, *supra; Lemon v. State, 456 So.* 2d 885 (Fla. 1984) (Lemon killed ex-girlfriend after previous conviction for similar offense.), *cert. denied, 469* U.S. 1230 (1985); *Williams* v. State, 437 so. 2d 133 (Fla. *1983); King v. State, 436 So.* 2d 50 (Fla. 1983) (King killed wife who was seeking divorce, with the Court finding 2 aggravators and no mitigators.), *cert. denied, 466* U.S. *909* (1984); *Harvard v. State,* 414 So. 2d 1032 (Fla. 1982) (King killed former wife and Court found two aggravating and no mitigating factors), *cert. denied, 459* U.S. 1128 (1983).

Zakrzewski also appears to argue at pp.33-34 that there should

be an exception to the death penalty for what he calls ***'middle class murders."*** The State is not aware of any such special class of murderers, and if there was, such a categorization would violate the due process and equal protection clauses of both the Florida and United States Constitutions, the essence of which is that ***all citizens are equal before the law.*** [20] There are no exceptions, rich, middle **class,** or poor.

Zakrzewski further argues at p.33 that he represents "the great bedrock of middle class America: decent, responsible, and law-abiding." He lacks "the vicious, remorseless determination to kill their wives and anyone else that got in their way . . . ." Yet, the following comments were found on his computer, written some time around the murders:

> **'Obstacles** ***do not exist to be surrendered to, built only to be broken."***
>
> ***"He sought merely to free the strong men from the restrictions of a religion which*** fitted ***the needs of only the weaker members of society."*** (State Ex. 14)

These statements made by Zakrzewski, as well as the carnage depicted in the photographic evidence submitted at trial,

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[20] "Capital defendants are not a 'suspect class' for equal protection purposes." ***Thompson*** v. ***Lynaugh,*** 821 **F.2d** 1054, 1062 (5th Cir. 1987), ***cert. denied,*** 108 S.Ct. 5 (1987). Certainly **a** 'middle class" capital defendant is not a "suspect class" either.

demonstrate that he did in fact have "the vicious, remorseless determination to kill" his wife, 7-year-old son and 5-year-old daughter. They were "obstacles". "This is not a case involving a sudden fit of rage." Porter ***v. State, 564 So.*** 2d at 1064. The murders of his wife and children was not 'an explosion of total criminality," they were the product of cool, calm and calculated premeditation. "While [Zakrzewski's] motivation may have been grounded in passion, it is clear that he contemplated this murder well in advance." ***Id.*** Zakrzewski told Dr. Larson that his first feeling after murdering his family was ***"a momentary feeling of elation as if it was a task well done, euphoria"*** (VIII 863). Death is the appropriate sentence for the heinous murder of Sylvia, as it is for Edward, and Anna.

B. 7-year-old Edward

In aggravation for the murder of Zakrzewski's son, the trial court found the capital murders of his mother and sister, CCP and HAC applicable. The trial court found the same mitigation applicable to Sylvia, applied to Edward's murder. There are ***a*** number of factors to be considered regarding proportionality for Zakrzewski's death sentence for his son.

First, there is the matter of Edward's age. The State would note that the Florida legislature enacted a new aggravating

circumstance, effective October 1, 1995: *"(1) The victim of the capital felony was a person less than 12 years of age."* Section 921.141 Fla. Stat (1995). Although not applicable to Zakrzewski, since he murdered his family on June 9, 1994, the fact that Edward was only 7-years-old adds great weight to the already strong aggravation against Zakrzewski for his murder. Further, as delineated in the State's argument regarding HAC, this Court has repeatedly upheld death sentences for the murders of *children under 12.*

Second, Zakrzewski testified his son knew it was coming (IX 1027). Edward was called to the bathroom on the pretext of having to brush his teeth (IX 1027). As he brushed his teeth, Zakrzewski testified, *"the machete was behind the door, and at the last second he saw it in the mirror. That's when he put his hand up, . . . [t]hat's how he cut his hand* (IX 1027)." Dr. Harvard, who performed the autopsies of all three victims, testified there was 'almost a total amputation of [Edward's] left hand at the wrist" (VII 605). This wound was a *defensive* one (VII 612). Therefore, Edward experienced the *fear and emotional strain* argued by the State relative to HAC. *See James v. State, supra* (8-year-old victim picked up from a couch by her neck, defendant saw her eyes open and they looked at each other *as* he squeezed until her eyes

and tongue bulged out .); *Henyard v. State, supra;* (3-year-old and 7-year-old executed with handgun, while 3-year-old looked at gun pointed at her face.); ***See also, Huff*** v. State, 495 So. 2d 145 (1986) (Defendant's father had turned and **was** looking toward him seated in back seat when he fired fatal shots; father had placed his hand up in a futile attempt at self-defense, aware his own son was about to murder him.),

Edward was struck 4 ***times,*** which leads to another consideration (VII 610). Although there **was** no testimony **as** to how long it took young Edward to die, it was not instantaneous as Zakrzewski allegedly intended. Thus, the **very use** of the **machete,** as the chosen instrument of death, sets this apart from other murders. As previously delineated, the Medical Examiner in ***Foster v. State, supra,*** indicated the ***victim*** could ***have lived 3 to 5 minutes after his spinal cord was severed.*** Edward's death **was** not only horrific, it must have been excruciating **as** well. Death is the appropriate sentence for Edward's murder.

C. <u>5-year-old Anna</u>

The argument made for Edward's murder is equally applicable to Anna's.[21] She was ***under*** 12 when she was murdered. She had ***a***

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[21]The State will discuss the circumstances surrounding Anna's murder in more detail in its next argument concerning the jury

defensive wound. She was slaughtered by a machete. However, the trial court found Anna's murder to be the most horrible of all:

> Based upon the physical evidence and expert testimony relating thereto, the Court is convinced beyond any reasonable doubt that prior to Anna's death *she not only experienced the horror* of *knowing that her brother had* been *murdered and* that *she was next. This Court could not imagine* a *more heinous and atrocious* way to *die.*
>
> . . .
>
> Anna's murder was the product of an even more *heightened, cold, calculated premeditation and was beyond all reasonable doubt, even more heinous, atrocious, and cruel than the murder of* Sylvia *and Edward Zakrrewski.* (II 330)

Given those findings, death was the proportionate sentence for Anna's murder, which explains why the trial court overrode the jury's life recommendation, Zakrzewski's next point on appeal.

ISSUE IV

> THE TRIAL COURT CORRECTLY OVERRODE THE JURY'S LIFE RECOMMENDATION FOR ANNA'S MURDER WHERE THE FACTS SUGGESTING A SENTENCE OF DEATH WERE CLEAR AND CONVINCING.

Zakrzewski argues at p.36 of his brief: "The jury made an unusual, and illogical, distinction when it recommended death sentences . . . for the murders of Sylvia and Edward Jr., yet decided that the Defendant should get a life sentence for the murder of Anna." The State respectfully submits the converse is true. Given

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override.

the death recommendations for Sylvia and Edward, the jury made an unusual and illogical distinction when it recommended life for Anna's murder.

The standard of review for jury overrides was delineated by this Court in *Washington v. State, 653 So,* 2d 362, 366 (Fla.), ***cert. denied, 116*** S.Ct. 387 (1995), as follows:

> In Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975), we held that "[i]n order to sustain a sentence of death following *a* jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ." We have consistently interpreted ***Tedder*** as meaning that an override is improper if there exists a reasonable basis for a jury's recommendation of life imprisonment. (citations omitted) We have affirmed life overrides in cases similar to the instant one. . . . (citations omitted) On the other hand, we will not affirm a life override if the record contains mitigating circumstances which may provide a reasonable basis for the jury's life recommendation. . . . (citations omitted)

This Court has instructed trial judges as follows:

> We remind the judge that, even though a jury determination is entitled to great weight, "the judge is required to make an *independent determination,* based on the aggravating and mitigating factors." (citation omitted)

King v. State, 623 So. 2d 486 (Fla. 1993).

In this cause, the trial judge did as this Court instructed and made an *"independent determination"* regarding the appropriate

sentence for the murder of 5-year-old Anna. Zakrzewski also argues at p.36: 'Because it saw ***no distinction*** between the three murders, it ruled the jury's life recommendation unreasonable and could be ignored." In fact, the trial court found Anna's murder even more heinous and cold than the murders of her mother and brother:

> The Court has very carefully considered and weighed the aggravating and mitigating circumstances found to exist in the murder of Anna Zakrzewski, being ever mindful that human life is at stake and in the balance. The Court finds that the aggravating circumstances present in the murder of Anna Zakrzewski outweigh the mitigating circumstances present and the Court further finds that the facts suggesting **a** sentence of death are so **clear** and ***convincing*** **that no** ***reasonable person could differ.*** Anna's murder was the product of an even more ***heightened, cold, calculated premeditation and*** **was** ***beyond all reasonable doubt,*** **even** ***more heinous, atrocious, and*** cruel ***than the murder of Sylvia and Edward Zakrzewski.*** The Court can find no sound reason for recommending ***a*** life sentence for Anna's murder after having found sufficient reason to recommend a death sentence in the murders of Sylvia and Edward Zakrzewski. Even if the jury reached ***a*** conclusion in total contradiction of the physical and expert opinion evidence that the murder of Anna ***was*** not heinous, atrocious, or cruel, the Court finds that the two remaining aggravating circumstances established beyond a reasonable doubt would outweigh all mitigating circumstances. Accordingly, the Court will override the recommendation of the jury for a life sentence in the murder of Anna Zakrzewski. . ..(II 330-331)

The trial court determined, mindful of the standard espoused by this Court in *Tedder,* that "the facts suggesting **a** sentence of

death are *so clear and convincing that no reasonable person could differ"* (II 331). On that basis the trial court could find *"no sound reason"* why Anna's murder should receive a life recommendation where the murders of Sylvia and Edward received death recommendations. The facts supporting this determination follow.

Janice Johnson, FDLE blood spatter expert, testified that Anna was *kneeling* "when her forceful impacts occurred" (VI 523-24). Her blood was not found anywhere except on "the wall adjacent to where her body was found" (VI 524). Ms. Johnson explained that if Anna had been standing near the doorway, or in the center of the bathroom, when she was struck with the machete, there would have been blood spatters other than the limited area where her blood was found (VI 523-24).[22] On redirect examination Ms. Johnson testified:

> A Well, it's been nearly two years since I've seen the photograph of Anna, I did not get it submitted to me for analysis, but upon examination of the photograph there are two things I do detect, one being is her left arm is under her head, and then you've got impact spatter spray on her forearm consistent with her being in that position when forceful impact occurred.
>
> The second thing that I do observe right now is

[22]Zakrzewski testified he hit Anna once in the neck as "she turned the corner to go in [the bathroom], then he carried her to the bathtub where he "hit her all those other times" (IX 1028).

> that she **was** struck on the back, she's not wearing a shirt, you've got not drip blood with her being in an upright position. **There's just no spatter on *her back consistent with her being in a upright position.*** Normally you see drips or some types of forceful spatters. Especially to these large lacerations on her back, you would expect that, but I don't -- if she were in an upright position -- but I don't see that. **Again *my opinion is that she was not in an upright position when all these injuries occurred.*** (VI 540)

Dr. Harvard testified Anna 'had a wound of the lateral aspect of the right elbow area and a small wound of the right thumb" (VI ***591).*** He further testified it was conceivable that the wound to Anna's arm was caused by her raising it to protect herself **(VI,VIII 600-02).** The combination of this ***defensive wound*** and Ms. Johnson's testimony that Anna ***was "kneeling"*** when she was murdered, led the trial court to conclude in its finding of HAC for her murder as follows:

> All of the physical evidence in the case establishes beyond a reasonable doubt that Anna **was** first struck with the machete and was murdered while she was in a kneeling position with her head bent over the edge of the tub where her brother's mutilated, bloody, lifeless body had been placed by the Defendant and was thereupon murdered in execution-style fashion with the machete. The photos of Anna's body at autopsy, **as** well **as** the Medical Examiner's testimony, indicate that Anna suffered cuts to her right hand and elbow, demonstrating that at some point she made a futile attempt to ward off blows. Based upon the physical evidence and expert testimony relating thereto, ***the Court is*** **convinced beyond any *reasonable doubt that***

> ***prior to Anna's death she not only experienced the horror of knowing that her brother had been murdered and that she was next.*** This Court could not imagine a more heinous and atrocious way to die. This Aggravating circumstance has been proved beyond **a reasonable** doubt. (II 330)

As previously delineated, because Anna's murder was preceded by her mother's and brother's, the trial court found hers even more ***HAC and*** CCP than theirs (II 330-31).

Zakrzewski's argument as to this claim completely ignores the capital murders of Sylvia and Edward ***as*** an aggravating circumstance for Anna's murder. There were ***three (3) capital murders*** in this cause, and this Court has affirmed overrides in numerous ***cases*** where a defendant murdered more than one victim. ***See e.g., Garcia v. State, 644 So.*** 2d 59 (Fla. 1994) (2 elderly sisters murdered in their home); ***Williams v. State, 622 So.*** 2d 456 (Fla.)(4 victims who stole drug ***money), cert. denied, 114 S*** .Ct. 570 (1993); ***Robinson v. State,*** 610 So. 2d 1288 (Fla. ***1992)*** (Same ***case*** as ***Williams), cert. denied,*** 114 S.Ct. 1205 (1994); ***Coleman v. State,*** 610 So. 2d 1283 (Fla. ***1992)*** (Same **case** as ***Williams), cert. denied*** 114 S.Ct. 321 (1993); ***Zeigler*** v. State, 580 So. 2d 127 (Fla.)(Wife killed for insurance proceeds and 3 other people murdered in elaborate cover up plan), ***cert. denied, 502*** U.S. ***946*** (1991); ***Porter v. State, 429*** So. 2d 293 (Fla.) (Defendant murdered elderly man and his wife in

their home for, among other things, their car.), *cert. denied, 464* **U.S. 865 (1983).** See also previously cited **cases** concerning child victims where parent **was** also killed.

Garcia v. State, supra, in fact, is analogous to the circumstances found in this cause. Garcia broke into the home of two elderly sisters (86-year-old Mabel and go-year-old Julia) and repeatedly stabbed both of them to death. The jury recommended life for Mabel's murder and death for Julia's. This Court noted "that the trial judge found the same aggravating and mitigating circumstances applied to the murders of both Julia and Mabel," and affirmed the override for **Mabel's** murder. Similarly, in this cause, the same aggravating and mitigating circumstances were found in each of the murders of Sylvia, Edward, and Anna.[23] "... [U]nder the circumstances of this **case** no reasonable person could differ **as** to the appropriateness of the death penalty for the murder of [Anna]." Id. at 64.

Zakrzewski, at p.38, tries to explain the death recommendation for Edward as deriving from the prosecutor's closing argument in which he argued the photographs taken of the crime scene

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[23]Zakrzewski concedes on p.38 of his brief that his 'intentions sufficient to justify the CCP factor ***apply with equal* force *to Anna and Edward."***

demonstrated that all three murders were HAC (X 1214). Zakrzewski argues: "The photographs of Edward's body, particularly, have a horror, the jury must have responded to with a death recommendation."[24] However, a review of the photographs of Sylvia and little Anna are no less horrific and no less indicative of a death recommendation, than those of Edward. His reliance on ***Ross v. State,*** 386 so. 2d 1191 (Fla. 1980) is misplaced because that case only involved a ***single*** elderly victim.[25]

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[24]In footnote 17 of his brief, Zakrzewski alleges that during voir dire "several prospective jurors said the killing of children and murders done with a machete would automatically be especially heinous, atrocious, or cruel." Besides his failure to provide the names of these prospective jurors, the State does not completely agree with his categorization of their responses to his questioning during voir dire. The State's review of his record cites (IV 105, 134-35, 142-146, 155, 177) identified the following jurors: Mr. Jensen, Ms. Allen, Mrs. Brunnworth, Mr. Garrity, Ms. Bacon, and Mr. Hindall. Mr. Jensen was excused for cause (IV 160), as were Ms. Bacon and Mr. Hindall (IV 179). Mr. Garrity was removed by Zakrzewski's peremptory challenge (IV 163). The trial court inquired whether he wanted to challenge either Ms. Allen or Mrs. Brunnworth for cause or exercise peremptory challenges and he chose not to (IV 163). He allowed those two to be seated on his jury, and he has waived any complaint such as he made in his footnote. Therefore, this gratuitous remark bears no relevancy to this issue and should be stricken.

[25]In footnote 18, p.39, Zakrzewski alleges two instances of prosecutorial misconduct during closing argument. Besides taking the comments out of context, he never objected to them and is procedurally barred from raising them now. His reliance on King v. ***State,*** ***supra,*** is misplaced in that, unlike this cause, the prosecutor in ***King*** gave a "dissertation on evil" which this Court felt was intended to inflame the passions of the minds and passions

Zakrzewski further argues at p.38 of his brief: "If differences exist between the murders of Anna and her brother and mother, they must occur in the facts surrounding the especially heinous, atrocious or cruel aggravator." However, the trial court reasoned:

> ***Even if the jury reached a conclusion in total contradiction of the physical and expert opinion evidence that the murder of Anna was not heinous, atrocious, or cruel, the Court finds that the two remaining aggravating circumstances established beyond a reasonable doubt would outweigh all mitigating circumstances.*** (II 331)

Thus, even if HAC were not applicable, the trial court still would have found the remaining two capital murders and CCP aggravators outweighed any mitigation presented.

The trial court properly adhered to the Tedder test, and correctly found that reasonable people could not differ concerning the propriety of the death sentence for 5-year-old Anna's murder. The same three strong aggravators apply to each of the three murders, and, in juxtaposition with the enormity of the massacre seen in this cause, the mitigators pale in comparison. Zakrzewski has failed to demonstrate that there exists a reasonable basis for the jury's recommendation of life imprisonment for Anna's murder.

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of the jurors.

The trial court's override should be affirmed.

ISSUE V

THE TRIAL COURT CORRECTLY EXERCISED ITS WIDE DISCRETION IN MATTERS PERTAINING TO THE ADMISSION OF EVIDENCE AS REGARDS PHOTOGRAPHS OF THE VICTIMS.

This Court has recently opined regarding the admission of photographic evidence:

> We have stated that we will not disturb the trial court's ruling on the admission of photographic evidence absent a clear showing of abuse of discretion. *Pangburn* ***v. State,*** 661 So. 2d 1182 (Fla. ***1995); Wilson v. State, 436 So.*** 2d 908 (Fla. 1989). We also have explained that the "test for admissibility of photographic evidence is relevancy rather than necessity." ***Pope v. State, 679 So.*** 2d 710, 713 (Fla. 1996), ***cert. denied, 117*** S.Ct. 975 (1997).

Gudinas v. ***State, 22*** Fla. L. Weekly S181, S184 (Fla. April 10, ***1997).*** In that same opinion, this Court found: "Furthermore, we agree with the State that during the penalty phase, the slides, already in evidence, were relevant to proving the heinous, atrocious, or cruel aggravating circumstance." In ***Booker v. State,*** 397 So. 2d 910, 914 (Fla.), ***cert. denied, 454*** U.S. 957 (1981), this Court provided the following parameters for relevant photographic evidence:

> Photographs are admissible if they properly depict the factual conditions relating to the crime and if they are relevant in that they aid the court and jury in finding the truth. (citation omitted)

> The photograph was used in connection with testimony regarding the causes of death (citation omitted); the nature and extent of the "force and violence" used to perpetrate the crimes (citation omitted); and the premeditated and cold blooded intent of the defendant (citation omitted). The photograph was used for any or all of these three purposes, so making it relevant and admissible.

Zakrzewski argues at p.41 of his brief "the Court admitted some of the most gruesome pictures ever presented to a jury." He never identifies specifically which photographs he found offensive below or whether he objected to their admission, and the State respectfully submits his fifth claim is insufficiently pled. The State further submits, having reviewed the photographic evidence presently in this Court's possession, that the trial court admitted photographs that properly depicted the factual conditions of the murders; the nature and extent of the force used to commit the murders; as well as the cold-bloodedness and heinousness of the murders.

Zakrzewski also incorrectly argues that the trial court refused to do anything to reduce their unfairly prejudicial impact and to exclude cumulative pictures. Again, the State's review of the photographic evidence revealed that the trial court did a commendable job in limiting the photographic evidence in both regards. State exhibits 5A, 5B, 5D, 6A, 7B, 7C and 7F were marked

for identification only and never admitted into evidence. 5A is a closeup profile of Sylvia; 5B was a facial closeup of Sylvia with a cross in her mouth; 5D was a closeup of Sylvia's neck wound. 6A was a closeup of Anna's face. 7B was a closeup of Edward's face; 7C was a closeup of Edward's back; and 7F was a closeup of Edward's neck. The remainder of the photographs depicted the factual conditions of the murder, demonstrated aggravating circumstances, and aided the medical examiner in his testimony as to the victims' wounds (V 379-84; VI 434-38, 449-50, 488-524, 537-38, 577-84, 592-98; VII 606-15).

The trial court correctly exercised its discretion in admitting photographs during the Penalty Phase which depicted the cold, calculated, shockingly evil, outrageously wicked and vile murders of Zakrzewski's wife, son and daughter. There was not a guilt phase to Zakrzewski's trial because he opted to plead guilty to the murders over a year after he committed them. All of the photographs admitted during the penalty phase would have been admissible during the guilt phase to prove his culpability for three capital murders, and the jury would have seen them if one had been conducted. *See Gudinas v. State, supra,* at S184. Even if some of the photographs were not admissible during the guilt phase, they would have been during the penalty phase given the different

standard for the admissibility of evidence during that stage as evidenced by the following opinion:

> At the outset, it must be remembered that there is a different standard for judging the admissibility and relevance of evidence in the penalty phase of a capital case, where the focus is substantially directed toward the defendant's character. See Sec. 921.141(1), Fla. Stat. (1987). In *Elledge* v. ***State, 346*** So.2d 998, 1001 (Fla. 1977), we pointed out that "the purpose of considering aggravating and mitigating circumstances is to engage in a character analysis of the defendant to ascertain whether the ultimate penalty is called for in his or her particular case." Thus, evidence that would not be admissible during the guilt phase could properly be considered in the penalty phase. (citation omitted)

Hildwin v. ***State, 531 So,*** 2d 124 (Fla. 1988), ***affirmed, 490*** U.S. 638 (19891, ***reh. denied, 492*** U.S. 927 (1989). Therefore, even if the trial court erred in admitting some of the photographs, which the State does not concede, it would have been harmless beyond a reasonable doubt. ***See Thompson v. State, 619 So.*** 2d 265, 266 (Fla.), ***cert. denied, 114*** S.Ct. 445 (1993).

ISSUE VI

> THE TRIAL COURT CORRECTLY EXERCISED ITS WIDE DISCRETION IN MATTERS PERTAINING TO THE ADMISSION OF EVIDENCE WHERE IT ALLOWED DR. MCCLAREN TO EXPRESS AN OPINION ON FRIEDRICH NIETZSCHE'S ATTITUDE TOWARD CHRISTIANITY.

Zakrzewski begins his sixth claim at p.43 as follows: "This issue borders on the bizarre." The State argues this claim crosses

the border into the bizarre, because it is based on the following simple exchange:

> MR. ELMORE: Thank you, Your Honor. Based on you readings concerning Nietzsche, what is Nietzsche['s] philosophy towards Christianity.[26]
>
> DR. McCLAREN: He vigorously attacked Christianity. (IX 1157)

From that exchange, he ultimately argues "[t]his court should reverse the trial court's judgment and sentence and remand for *a* new sentencing hearing." Dr. McClaren's testimony was not given as an expert on Nietzsche's view of Christianity, but as any lay person who read his works.[27] Error, if any, which the State does not concede, was most certainly harmless given Zakrzewski's own writings expressing an anti-Christian philosophy.

Before addressing Zakrzewski's individual subclaims, a rendition of the factual circumstances surrounding this matter is necessary. First, Dr. McClaren was called during the State's ***rebuttal*** to the mitigation presented by Zakrzewski. Said mitigation consisted primarily of a character assassination of

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[26]Zakrzewski describes Friedrich Nietzsche as a Nineteenth Century German [actually he was born in 1844 in what was then known as Prussia] Philosopher who professed an "'uberman' or superman philosophy, [t]hat we can overcome whatever problems we face."

[27]Anyone who read Nietzsche's works would come to the same conclusion.

Sylvia (VII 704-800; VIII 801-07);[28] what a great guy he was both as himself (VII 704-800; VIII 801-07), and as his assumed identity after the murders, 'Michael Green" (VIII 879-973); and two mental experts as to his mental state at the time of the murders (VII 674-704; 810-77). One of the experts, Dr. Larson, expressed his views about the writings of Friedrich Nietzsche.

Under cross-examination, Dr. Larson testified, with no objection, as follows:

> Q In reviewing this case, did you receive the documents downloaded from his office computer?
>
> A I did.
>
> Q Did you note some Nietzsche philosophy quoted in those documents?
>
> A I did.
>
> Q Doesn't Nietzsche have to do with -- doesn't he propound a philosophy dealing with the superman?
>
> A I believe he did.
>
> Q Would that be consistent with this narcissistic view of himself?
>
> A It would.
>
> Q Someone that was interested in that superman-type philosophy?

---

[28]During Mrs. Morris direct examination the trial court commented: "I am not going to allow a character assassination of the victim in this case (VII 751-52)."

A It would. (VIII 845-46)

Later, again with no objection, Dr. Larson testified:

> **Q** Doctor Larson, did you consider whether his involvement in this Nietzsche superman philosophy might have been a factor in how he acted out to solve the problems he had?
>
> A Yes.
>
> **Q** In fact, doesn't that philosophy promote an idealistic individual who is powerful and who handles their problems in their own powerful **way?**
>
> A Yes.
>
> Q And if that type of thinking guided his actions on Thursday, June 9, 1994, it wouldn't have very much to do with easing pain and suffering of anyone else but accomplishing his own aims, isn't that correct?
>
> A If, indeed, he wasn't under stress, and if, indeed, he wasn't depressed, then I think that would be the case. (VIII 848-49)

Finally, with no objection, Dr. Larson testified:

> Q And if you idealize yourself as the Nietzsche superman, that feeling of worthlessness might create some **rage** or anger in you, might it not?
>
> A I think it could create rage, anger and more depression because it's more out of -- more disparate with how you want to see yourself. (VIII 857)

At no time during this testimony was Dr. Larson qualified as an expert in the philosophy of Friedrich Nietzsche.

Under cross-examination, Zakrzewski admitted he read Friedrich Nietzsche's works and placed quotes related to Nietzsche's philosophy on his computer at work, which was State's Exhibit 14 (IX 1074-78). Zakrzewski objected as to relevancy and a sidebar transpired (IX 1076). The trial court ruled:

> If the defendant admits that these were matters placed on his computer by him, the court's going to admit them into evidence for any probative value that they might have. I do not anticipate a lengthy discussion on the philosophies of Nietzsche any more than I do the Bible. (IX 1077)

Zakrzewski identified State Exhibit 14 as his computer notes and they were admitted into evidence (IX 1078).

Another sidebar occurred in which the prosecutor announced his intention 'to ask the Defendant about some writings in the jail that are Nietzschen writings of his own, . . . in order to demonstrate that he still maintained interest in it (IX 1078). The defense asked the trial court to excuse the jury, which it did (IX 1078-80). The prosecutor conducted a proffered cross-examination, in which Zakrzewski admitted the handwritten notes taken from his cell in the Okaloosa County Jail were his (IX 1081).

The prosecutor argued the relevancy of these writings as follows:

> MR. ELMORE: Judge, as we -- as has been mentioned the defendant did attempt to escape from the county

> jail and that's when these materials were seized from his cell. Here, Judge, it refers to "I made a final attempt at freedom. The [g]ods frowned on me. I kept my peace in the house of morons only to prepare myself for a speedy departure. It was all for naught. There's no positive side to being in jail." I think, Judge, quite frankly that they've called into question his escape now by asking him if he's ever been arrested or ever had any criminal activity. I think that they may have made a mistake by doing that, Judge, and I don't think this is so prejudicial at this time, but I'm willing to delete that entire paragraph because I know they're going to object to it.
>
> THE COURT: So you're offering the document as --
>
> MR. ELMORE: Deleting the sentence about Jews[29] and the paragraph about escaping from the jail.

After hearing argument, the trial court ruled:

> THE COURT: Gentlemen, the court has reviewed this entire document. All I can really state for the record is that it appears to be to the court a hand-written compilation of the defendant's thoughts and attitudes and emotional state is obviously an issue in this case, the court finds that it is probative in value and I will admit it into evidence. Now, the portions that we have agreed to delete is the page that basically says Blitzkrieg, and that's been voluntarily deleted by Mr. Elmore. The best way I know to delete it is to simply remove it from the document. (IX 1088)

Zakrzewski's cross resumed, and he acknowledged that the handwritten notes made while he was incarcerated, State Exhibit 15,

---

[29]Zakrzewski made anti-Semitic remarks. The deleted portions were made State Exhibit 15A, while the admitted writings were State Exhibit 15.(IX 1089-91)

contained direct quotes from Nietzsche's writing in red, as well as his own comments influenced by the philosopher's writings (IX 1096-97) .

A. **Dr. McClaren's Testimony Was Given as a Non-Expert**

At p.45 of his brief, Zakrzewski alleges the State "made a feeble attempt to qualify Dr. McClaren as an expert in the philosophy of Frederic [sic] Nietzsche." The State respectfully submits no such attempt was made, **as** the following exchange, occurring prior to the complained of testimony, demonstrates:

> a Now Dr. McClaren, you've -- in forming your opinions about [Zakrzewski], have you considered his apparent preoccupation with the philosophy of Frederick [Friedrich] Nietzsche?
>
> A Yes.
>
> MR. KORAN: Your Honor, I'm going to object to any further testimony. There was no predicate laid that this witness has a knowledge of the philosophy of [Friedrich] Nietzsche. That would be --
>
> THE COURT: I'm assuming that's the next question. I'm assuming. So let's wait and see. I'll withhold your objection.
>
> MR. **KORAN:** Thank you, Judge.
>
> MR. ELMORE (Cont'g): Dr. McClaren, have you -- after learning of his preoccupation with Nietzsche, have you familiarized yourself with the basic tenets of Nietzsche's philosophy regarding Christianity?
>
> THE COURT: The objection -- previous objection is

overruled.

MR. KORAN: Judge --

THE COURT: At this point.

MR. ELMORE (Cont'g): Have you not?

A Yes.

Q BY -- how did you familiarize yourself with that?

A Well, starting with information readily available in encyclopedias, then reading various writings of Nietzsche.

Q Okay.

MR. KORAN: Before we get into that, may I voir dire the witness in this area?

MR. ELMORE: Judge, that one tenet of the philosophy is all I'm asking about is the attitude toward Christianity and I don't want to get into the entire Nietzsche philosophy, but just that one tenet which has been made an issue in this trial.

THE COURT: No, sir. Request is denied. Go ahead and proceed, Mr. Elmore. (IX 1156-57)

Dr. McClaren then testified that Nietzsche 'vigorously attacked Christianity."

The State first argues Zakrzewski never moved for a mistrial regarding this testimony and he is, therefore, procedurally barred from raising this claim before this Court. ***See Wuornos v. State,*** 644 So. 2d 1000, 1010 (Fla. 1994). Second, Dr. Larson had already

provided his unobjected non-expert opinion as to Nietzsche's philosophy. The door was opened. Third, Dr. McClaren did not profess to be an expert in Nietzsche philosophy, did not need to be, and, therefore, a voir dire was not necessary.

B. **The State Did** Not **Need to Establish Dr. McClaren as an Expert**.

Dr. McClaren's comment regarding Nietzsche's views on Christianity could have been **made by** anyone who read the philosopher's work, as demonstrated by the unobjected testimony of Dr. Larson. It does not take any special expertise to understand the plain meaning of Nietzsche's work. Dr. McClaren's testimony was akin to that of the police officer in Jones v. State, 440 So. 2d 570, 574 (Fla. 1983). The credence and weight to be given to his testimony, as with that of Dr. Larson's on the same subject, remained with the jury. Id.

C. **Dr. McClaren's Testimony** was Relevant.

Dr. McClaren was called in rebuttal to Zakrzewski's mitigation. Zakrzewski included the following nonstatutory mitigator on his list: '14. The Defendant has embraced the Christian Faith since the offense." The State sought to rebut this image, by showing that Zakrzewski, after his 4 month stay on Molokai, while in the county jail awaiting his trial, had returned

to his former self, was hand writing quotes from Nietzsche, and making the following derogatory comments about Christianity:[30]

> I find it comical the numerous exits people create for themselves rather than except their complete loss of self-respect and to in turn pursue the inevitable expeditiously. ***Christianity is*** a ***primary culprit in propalgating [sic] the belief that suicide is*** a ***ticket to eternal damnation. Ludicrous, all that is required are a couple*** of ***"I believes" and "please forgive me," the Bible*** says ***it. This doctrine of eternal damnation is but*** *another* ***route of egress for spineless fools.*** (State Exhibit 15)

Dr. McClaren's brief remark rebutted Zakrzewski's mitigation, and was both relevant and admissible. Even if it were not, which the State does not concede, it was merely cumulative to Zakrzewski's own derogatory comments regarding Christianity, which derived from Nietzsche's influence upon him, and were, therefore, harmless. ***Wuornos v. State, supxa.***

---

[30]In the State's memorandum for sentencing, the prosecutor addressed nonstatutory mitigator 14 as follows: "The defendant's professed newfound Christianity does not mitigate his crimes committed prior to his new faith. In fact, the evidence found in [his] jail cell brings into question the sincerity of his religious commitment versus the sincerity of his admiration of the anti-Christian philosophy of Nietzsche." (II 291)

ISSUE VII

THE TRIAL COURT CORRECTLY EXERCISED ITS WIDE DISCRETION IN ALLOWING DR. MCCLAREN TO TESTIFY.

Zakrzewski argues at p.50 of his brief: 'The court erred in allowing Dr. McClaren to testify because what he said rebutted no mental mitigator Zak presented, and introduced irrelevant issues for the sentencer to consider." His referral to "irrelevant issues" is a continuation of his argument concerning Nietzsche contained in Claim VI supra, and the State would rely on its argument thereto.

The first part of his argument concerns the codification of the *Dillbeck* rule, which he interprets at p. 51 as containing "the sole objective of rebutting the mental mitigation he has announced he might present."[31] The State respectfully submits his interpretation of the rule is incorrect. The State's reading of Fla. R. Crim P. 3.202(d), **which** pertains to appointment of the State's expert, and which Zakrzewski neglects to include in his extensive rendition of the rule, does not reveal any derivative of the word rebut:

> **(d)** Appointment of **State Expert; Time of Examination.** After the filing of such notice and on the motion of the state indicating its desire to

[31] *Dillbeck* ***v. State, 643 So.*** 2d 1027 (Fla. 1994).

> seek the death penalty, the court shall order that, within 48 hours after the defendant is convicted of capital murder, the defendant be examined *by* a mental health expert chosen by the state. Attorneys for the state' and defendant may be present at the examination. The examination shall be limited to those mitigating circumstances the defendant expects to establish through expert testimony.

The trial court found, when Zakrzewski's Motion to Limit Testimony of Dr. McClaren was argued:

> THE COURT: *Rebuttal sometimes -- sometimes is* a **matter** *of* opinion and for me to decide what he's going to say before he says it and what questions are going to be presented to him at this point in time is asking the court to reach a conclusion prior to the witness taking the witness stand. I'm saying this. He has a right to take the stand. He has a right to testify. If any question is posed to him during the course of this testimony that is subject to an objection, then you should raise that objection at that time and I'll be happy to rule on it. (IX 1111)

In fact, although Dr. McClaren did find the applicability of the extreme emotional disturbance mitigator, as the prosecutor observed: "He has a very, *very different opinion* **about** the *underlying reasons for that disturbance* (IX 1119)."

Zakrzewski's expert, Dr. Larson testified:

> A The best I can tell from everybody I've talked to and all the information I read in various reports is that he was a very dedicated father, and that he loved his children very much. That's the part that anybody has to struggle with. It's not uncommon for a man to kill a spouse. I mean it's

uncommon, but if we look at murders, about half of all murders, give or take, are domestic situations of one kind or another. What's very uncommon is when a father kills a child, and when a father kills a child, in my experience, it most likely has to do with child abuse when that child's quite young. For example, a father loses his temper and throws the child out of the bassinet. That's a very, very rare event, but for a father to plan to kill his children to relieve them of pain is a very atypical event and bizarre, frankly. Men oftentimes kill women, and women oftentimes attempt to kill men because of jealousy. Jealousy doesn't seem to be the issue here. I mean he allowed his wife to become pregnant by another man. So it doesn't seem to be a situation of jealousy. The motivation was that he perceived everything as so hopeless about his wife having happiness or his children having happiness, that he decided to end their misery by taking their lives and carry the pain. (VIII 836-37)

The State called Dr. McClaren to refute what Zakrzewski refers to in his brief as his "Kervorkian" act in killing his family. Dr. McClaren's perception as to Zakrzewski's motivation was quite different:

Q Have you formed any opinions or impressions about his motivation for killing his wife, Sylvia Zakrzewski?

A Yes.

Q Could you tell the jury what they are?

A I believe that by killing his wife he ended a

very large source of pain for himself.[32] (IX 1154)

The trial court properly exercised its wide discretion in allowing this testimony, which clearly refuted Dr. Larson's view of Zakrzewski's motivation. As Dr. McClaren further testified:

> **Q** Would it be fair to **say** that any man who murdered his family the way this man murdered his family is likely to be extremely disturbed in some **way?**
>
> MR. KORAN: I object to that question.
>
> THE COURT: Overruled.
>
> **A** I would think that the likelihood would be extremely high. (IX **1161)**

Zakrzewski also argues at p. 53 of his brief that the trial court erred in allowing Dr. McClaren to testify that he appreciated the criminality of his conduct when he murdered his family, where he had deliberately waived that mitigator. What Zakrzewski fails to mention is that Dr. Larson underwent cross-examination as to this matter, and he specifically waived any objection to that line of questioning (VIII 840-41, 849-50). He is, therefore, procedurally barred from arguing the **State's expert could not** testify as to the same matter, because he opened the door. ***Preston***

---

[32]Dr. McClaren's view comported with Zakrzewski's own computer notes in which he said "Obstacles [are] built only to be broken." (State exhibit 14)

v. State, *supra*.

On the merits, Dr. McClaren's testimony was relevant as to the weight to be given the extreme emotional disturbance mitigator (IX 1154-55). The trial court found this mitigator existed, but in light of both Dr. Larson's and Dr. McClaren's testimony as to Zakrzewski's ability to appreciate the criminality of his acts, which by the way he testified to himself (IX 1039), the Court found that it [was] entitled to "significant" rather than "great" weight (II 324). Alternatively, without conceding error, the fact that both Dr. Larson and Zakrzewski, himself, testified that he knew what he was doing was criminal when he murdered his family, renders Dr. McClaren's testimony cumulative, and therefore, harmless beyond a reasonable doubt. ***State v. DiGuilio, supxa.***

ISSUE VIII

THE TRIAL COURT CORRECTLY EXERCISED ITS DISCRETION IN NOT GIVING A JURY INSTRUCTION ON ZAKRZEWSKI'S ABILITY TO UNDERSTAND THE CRIMINALITY OF HIS CONDUCT, WHERE THE EVIDENCE CLEARLY DEMONSTRATED HE KNEW WHAT HE WAS DOING WAS CRIMINAL AT THE TIME OF THE MURDERS.

'It is within the trial court's discretion to decide whether a mitigator has been established, and the court's decision will not be reversed merely because an appellant reaches a different conclusion." ***Lucas v. State,*** 613 So. 2d 408, 410 (Fla. 1993),

cert. denied, 114 S.Ct. 136 (1993), *citing Sireci v. State, 587* So. 2d 450 (Fla. 1991), *cert. denied,* 112 S.Ct. 1500 (1992). "Moreover, whether a mitigator has been established is a question of fact, and a court's findings are presumed correct and will be upheld if supported by the record." *Id., citing Campbell v. State,* 571 so. 2d 415 (Fla. 1990). The trial court's finding regarding the extreme disturbance mitigator is pertinent to Zakrzewski's eighth claim:

> 2. The capital felony was committed while the Defendant was under the influence of extreme mental or emotional disturbance.
>
> Three doctors testified during this penalty phase proceeding. Two were called by the Defendant, and one was called by the State. While the ultimate findings and conclusions of these three doctors differ to some extent, the Court finds that the evidence presented is sufficient to establish the existence of this mitigating factor, and the Court has given significant weight to the existence of this statutory mitigator. However, ***testimony of two of the psychologists, Dr. Larson for the defense and Dr. McClaren fox the State were in agreement that while the Defendant was, at the time of the murders, "under the influence of extreme mental or emotional distress did not prevent him from appreciating the criminality of his conduct or substantially impair his ability to conform his conduct to the requirements of law.*** Accordingly, while this mitigating circumstance does exist, the Court finds that it is entitled to "significant" rather than "great" weight. (II 324)

As previously delineated in the State's argument to

Zakrzewski's seventh claim, not only did Zakrzewski's expert, Dr. Larson, testify he appreciated the criminality of his conduct, he did as well (VIII 840-41, 849-50; IX 1039). Couple that with Dr. McClaren's similar testimony (IX 1154-55), and "the record contains competent substantial evidence supporting the trial judge's refusal to instruct the jury on and his refusal to find the statutory mental mitigator[]." ***Jones v. State,*** 612 So. 2d 1370 (Fla. 1992), ***cert. denied,*** 114 S.Ct. 112 (1993).

ISSUE IX

THE TRIAL COURT CORRECTLY EXERCISED ITS DISCRETION IN NOT GIVING INSTRUCTIONS ON NONSTATUTORY MITIGATORS IN KEEPING WITH CLEAR PRECEDENT EMANATING FROM THIS COURT.

Recently, this Court opined as follows:

> The trial court is required to give only the 'catch-all" instruction on mitigating evidence and nothing more. We have previously rejected in other cases the identical claim James raises here [and in this cause]. ***See generally Johnson v. State, 660 so.*** 2d 637, 642 (Fla. 1995) (rejecting claim identical to James' claim here as well as his requested instruction on the weighing process), ***cert. denied,*** 116 S.Ct. 1550 (1996); ***Gamble v. State,*** 659 So. 2d 242, 246 (Fla. 1989) (finding that specific instruction as to nonstatutory mental impairment mitigation which fell short of statutory mitigator was not required), ***cert. denied*** 116 S.Ct. 933 (1996); *Armstrong* v. State, 642 So. 2d 730, 734 n.2 (Fla. 1994) (rejecting claim of error for failing to instruct that mitigating evidence need not be found unanimously); ***Walls v. State,*** 641 So. 2d 381, 389 (Fla. 1994)(finding no error in failing

> to give more detailed instructions on mitigation where the "instruction on mitigating factors has been repeatedly upheld both in this Court and in the federal courts, and we reaffirm its validity today") .

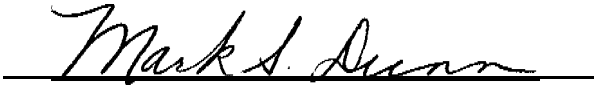
James v. State, *supra*, at S226. ***See also, Jones v. State, 612 So.*** 2d at 1375 ("...the standard jury instruction on nonstatutory mitigators is sufficient, and there is no need to give separate instructions on individual items of nonstatutory mitigation.").

Zakrzewski accepted the penalty phase instructions as given with no objection, and he is, therefore, procedurally barred from raising this claim on appeal. *Fotopolous* ***v. State, 608 So.*** 2d 791-***92*** (Fla. ***19920, cert. denied, 113*** S.Ct. 2377 (1993). As regards the merits of his ninth claim, ***James*** is dispositive, and this Court should affirm Zakrzewski's three sentences of death.

CONCLUSION

Based on the above cited legal authorities and arguments, the State respectfully requests this Honorable Court to affirm Edward J. Zakrzewski, II, convictions and sentences of death.

Respectfully submitted,
ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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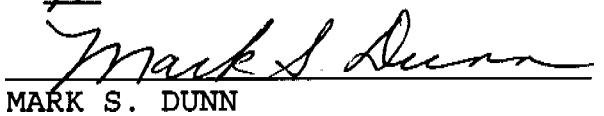
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing ANSWER BRIEF has been furnished by U.S. Mail to, DAVID A. DAVIS, Assistant Public Defender, Counsel for Appellant, Leon County Courthouse, Ste. 401, 301 South Monroe Street, Tallahassee, 32301, this 16th day of May, 1997.



MARK S. DUNN
Assistant Attorney General

IN THE SUPREME COURT OF FLORIDA

EDWARD J. ZAKRZEWSKI, II,

Appellant,

v. CASE NO. 96-822

STATE OF FLORIDA,

Appellee.

APPENDIX

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Trial Court's Sentencing Order . . . . . A

IN THE CIRCUIT COURT IN AND FOR OKALOOSA COUNTY, FLORIDA

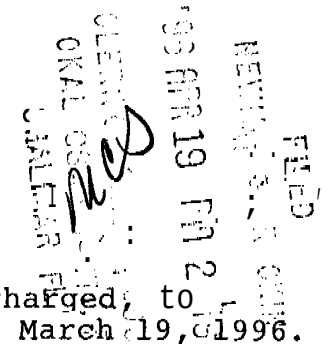
CRIMINAL DIVISION

CASE NO. 94-1283-CFA

STATE OF FLORIDA

VS

EDWARD J. ZAKRZEWSKI, II



SENTENCING ORDER

The Defendant entered a plea of guilty, as charged, to three counts of First Degree Premeditated Murder on March 19, 1996. The Court, upon having determined that the Defendant's plea was entered freely and voluntarily, scheduled the matter for a penalty phase proceeding before a jury. Following jury selection, the penalty phase jury began receiving evidence on March 25, 1996, and evidence in support of aggravating factors and mitigating factors was heard. On March 30, 1996, the jury returned a seven to five recommendation that the Defendant be sentenced to death in the electric chair on Counts I and II, the murder of Sylvia Zakrzewski, and the murder of Edward Kim Zakrzewski.. That same jury returned a recommendation of life in prison without the possibility of parole on Count III, the murder of Anna Kazrzewski. At that time, the Court requested memoranda from both counsel for the State and counsel for the Defendant. The defense memorandum was received on April 10, 1996, and the memorandum from the State was received on April 16, 1996. Both memoranda were reviewed in detail by the Court.

On April 18, 1996, the Court held a further sentencing hearing wherein the defense presented additional evidence consisting of the depositions of Dr. James Larson and Dr. Barry Crown, along with three letters written by the Defendant while incarcerated. Following legal argument from both sides, the Court recessed in order to allow final reflections upon final sentencing by the Court.

Upon consideration by the Court, the Court having heard the evidence presented before the jury in the penalty phase, having had the benefit of legal memoranda from counsel, additional evidence and further argument both in favor and in opposition of the death penalty, finds as follows as to each count:

Count I - First Degree Murder of Sylvia Zakrzewski:

A. AGGRAVATING FACTORS

1. The Defendant was previously convicted of two other capital offenses, to-wit: the first degree murder of Edward Zakrzewski; and the first degree murder of Anna Zakrzewski. This aggravating factor is obviously uncontroverted and proved beyond a reasonable doubt.

2. The murder of Sylvia Zakrzewski was committed in a cold, calculated, and premeditated manner without pretense of legal or moral justification.

Unrebutted evidence was offered through the testimony of a neighbor, a friend of the Defendant's, that on two prior occasions several weeks and months before the murders, the Defendant had stated that before he allowed his wife to divorce him, he would kill her and the children. On the morning of June 9, 1994, the Defendant's son, Edward Kim Zakrzewski, called the Defendant at work and told him that his mother, Sylvia Zakrzewski, was going to file divorce papers that day. During his lunch break that same day, the Defendant went to an Army Surplus Store and purchased a machete, took it home, sharpened it, and positioned it behind the bathroom door in the house. He also placed a crowbar in the bedroom, cut a piece of rope and also placed the rope in the bedroom. He then returned to work, completed his normal work day, and attended his college course that afternoon. Upon returning home that evening, the Defendant sent the children to watch television in the TV room, then called Sylvia to the bedroom where he had hidden the crowbar and the rope for the purpose of killing her. When she failed to respond, the Defendant walked to where she was sitting on the couch in the living room, and struck her at least twice in the head and face with the crowbar without any conversation or provocation. The Defendant then carried Sylvia to the bedroom where he placed her on the bed and struck additional blows with the crowbar. The Defendant then moved Sylvia to the floor because "she was bleeding too much" and placed her head on a plastic bag in an obvious attempt, at that point, to conceal the existence of as much blood as possible. He then proceeded to choke Sylvia with the rope. The Defendant then went to the bathroom, called his son, Edward Zakrzewski, to the bathroom to "brush his teeth" and when Edward entered the bathroom , the Defendant struck him several times with the machete. The Defendant then called Anna Zakrzewski into the bathroom, also to "brush her teeth" and proceeded to murder Anna with the machete. The Defendant then returned to the bedroom and moved Sylvia to the bathroom where he placed her in a kneeling position with her head over the edge of the tub next to Anna, and then struck her several times across the head and neck with the machete. The bodies of all three victims, Edward, lying in the bottom of the tub, and Sylvia and Anna draped over the tub would indicate an obvious pre-planned attempt to drain the blood of the victims into the tub in order to facilitate cleanup and body removal.

The evidence in this case, along with the testimony of the Defendant, indicates that the murder of Sylvia Zakrzewski was the product of probably months and undeniably hours of cool, calm reflection, and careful planning without any pretense of legal or moral justification. Sylvia Zakrzewski's murder is clearly set apart from most domestic homicides in that it did not arise during the course of any domestic dispute or heated argument and was certainly not the result of any sudden provocation or heat of anger. This aggravating circumstance was proved beyond a reasonable doubt.

3. The murder was committed in an especially heinous, atrocious, or cruel manner.

The testimony of the medical examiner, along with the Defendant's own testimony, indicates that Sylvia Zakrzewski was first beaten with a crowbar, then strangled with a rope while still alive, and then literally butchered with a machete. The Defendant's own testimony indicates that he dragged Sylvia to the bathroom after he had murdered his two children and left them in the bathroom. Medical testimony was inconclusive as to whether Sylvia was dead when she was dragged into the bathroom and struck with the' machete. We will never know. There is no possible way for us to know whether Sylvia was still conscious and able to perceive her two dead children in the bathroom prior to the final blows being struck to her head and neck with the machete. The brutal and atrocious nature of the Defendant's murder of his wife Sylvia was indeed a conscienceless, pitiless crime which was unnecessarily torturous to. the victim. This aggravating circumstance was proved beyond a reasonable dcubt.

None of the other aggravating factors enumerated by statute are applicable to this Count and none other was considered by this Court,

Nothing except as previously indicated in paragraphs 1 through 3 above was considered in aggravation.

B. MITIGATING FACTORS

Statutory Mitigating Factors:

In its sentencing memorandum, the Defendant requested the Court to consider the following statutory mitigating circumstances:

1. No significant prior criminal history.

This mitigating circumstance was established by the evidence and the Court has given significant

weight to the consideration of the Defendant's lack of any prior criminal history. However, this statutory mitigator is over-shadowed by the fact that the Defendant committed three premeditated murders during the course of the evening in question.

2. The capital felony was committed while the Defendant was under the influence of extreme mental or emotional disturbance.

Three doctors testified during this penalty phase proceeding. Two were called by the Defendant, and one was called by the State. While the ultimate findings and conclusions of these three doctors differ to some extent, the Court finds that the evidence presented is sufficient to establish the existence of this mitigating factor, and the Court has given significant weight to the existence of this statutory mitigator. However, testimony of two of the psychologists, Dr. Larson for the defense and Dr. McClaren for the State were in agreement that while the Defendant was, at the time of the murders, "under the influence of extreme mental or emotional disturbance", the Defendant's mental or emotional distress did not prevent him from appreciating the criminality of his conduct or substantially impair his ability to conform his conduct to the requirements of law. Accordingly, while this mitigating circumstance does exist, the Court finds that it is entitled to "significant" rather than "great" weight.

Nonstatutory Mitigating Factors:

The Defendant has asked the Court to consider the following nonstatutory mitigating factors:

1. The Defendant turned himself in.

2. The Defendant pled guilty.

3. The Defendant is an exceptionally hard worker.

4. The Defendant was on the Dean's List in his-' third year of college.

5. The Defendant served in an exemplary manner in the United States Air Force.

6. The Defendant showed sincere grief and remorse.

7. The Defendant was a loving husband and father until the offense.

8. The Defendant was under great stress due to work, college, child care, housework and lack of sleep.

9. The Defendant is a patient and humble man.

10. The Defendant was raised without his natural father in his home.

11. The Defendant had a lack of prior domestic relationships.

12. The Defendant's role in his marriage was passive in a union dominated by his wife.

13. The Defendant received little religious upbringing.

14. The Defendant has embraced the Christian Faith since the offense.

15. The Defendant was a hyperactive child and was medicated with ritalin.

16. The Defendant has .a long term adjustment disorder.

17. The Defendant was suffering from a major depressive episode.

18. The Defendant has a potential for rehabilitation.

19. The Defendant exhibited good behavior while hiding for an extended period of time under an assumed name.

20. The Defendant was a loving and good son.

21. The Defendant is intelligent.

22. The Defendant is well thought of by friends, neighbors and co-workers.

23. The Defendant was impaired by alcohol at the time of the offense.

24. The Defendant is not a psychopath.

(1 and 2)- The Defendant turned himself in and thereafter pled guilty. The fact that the Defendant turned himself in after being identified by friends on the TV show "Unsolved Mysteries" has been established by the evidence but is given little

weight by the Court since the Defendant realized he had been identified at that point and had little option. The fact that the Defendant pled guilty has also been given little weight by the Court since the State had a varietal "mountain of evidence" including bloody fingerprints and footprints, obvious flight by the Defendant after evidence was undeniable that he would have known of the murder of his family, and an otherwise very strong, convincing case. After his arrest the Defendant waited a year and four months before pleading guilty, and the guilty plea was entered only approximately one week prior to the date set for trial. The plea of guilty in the face of overwhelming evidence would indicate a strategic attempt to gain sympathy from the jury rather than an overwhelming sense of grief and remorse.

(3, 4 and 5)- The fact that the Defendant was an exceptionally hard worker, a good student, and an exemplary member of the United States Air Force was established by the evidence and those mitigators have been given significant weight by the Court.

(6 and 7)- The evidence has established that the Defendant was a loving husband and father until the offense and his testimony indicates that he does appear to be truly remorseful for what he has done. Both of these mitigating circumstances are found to exist by the Court and have been given substantial weight by the Court.

(8)- The fact that the Defendant was under great stress due to work, college, child care, housework, and lack of sleep was established by the evidence but given little weight by the Court.

(9,10 and 11)- The Court finds that these mitigating factors have been established by the evidence but are entitled to little weight.

(12)- The Court finds that this mitigating factor was not established by the evidence.

(13 and 14)- The fact that the Defendant received little religious upbringing but has embraced the Christian Faith since the commission of the offenses has been established by the evidence but has been given little weight by the Court.

(15)- The fact that the Defendant was medicated for one month on ritalin as a child is not a mitigating circumstance.

(16 and 17)- The Defendant's "long term adjustment disorder" and "major depressive disorder" were established to somedegree by the evidence but were

considered by the Court in discussing the statutory mitigator of extreme mental disturbance and are not considered separately as nonstatutory mitigators.

(18) - Potential for rehabilitation was not established by the evidence, it is speculative at best, and has been given no weight by the Court.

(19) - The fact that the Defendant exhibited good behavior while hiding for an extended period of time following the commission of the offenses has been established by the evidence and given slight weight by the Court.

(20, 21, and 22) - These nonstatutory mitigators have been established by the evidence but are entitled to no weight in consideration of the Defendant's sentence.

(23) - The Defendant's use of alcohol immediately prior to the murders was slight and did not significantly impair him or his recollection of the events. This circumstance is entitled to no weight.

(24) - The fact that the Defendant is not a psychopath is not a nonstatutory mitigator.

The Court has very carefully considered and weighed the aggravating and mitigating circumstances found to exist in the murder of Sylvia Zakrzewski, being ever mindful that human life is at stake and in the balance. The Court finds, as did the jury, that the aggravating circumstances present in this Count outweigh the mitigating circumstances present.

Accordingly, it is

ORDERED AND ADJUDGED that the Defendant, Edward J. Zakrzewski, II, is hereby sentenced to death for the murder of the victim, Sylvia Zakrzewski. The Defendant is hereby committed to the custody of the Department of Corrections of the State of Florida for execution of this sentence as provided by law.

Count II - First Degree Murder of Edward Kim Zakrzewski:

A. AGGRAVATING FACTORS

1. The Defendant was previously convicted of two other capital offenses, to-wit: the first degree murder of Sylvia Zakrzewski; and the first degree murder of Anna Zakrzewski. This aggravating factor has been proved beyond a reasonable doubt.

2. The murder of Edward Kim Zakrzewski was committed in a cold, calculated, and premeditated manner without pretense of legal or moral justification. The Court's previous discussion of the plans and preparations leading to Sylvia Zakrzewski's murder are reiterated herein. Edward's murder was the second in a carefully planned deliberate act after having bludgeoned Sylvia Zakrzewski but prior to killing Anna Zakrzewski. After bludgeoning Sylvia Zakrzewski with a crowbar, the Defendant called Edward into the bathroom and as Edward entered the bathroom struck him with a machete. Edward's murder was obviously planned in the same cold, calculated, and premeditated manner without pretense of legal or moral justification as described in the murder of Sylvia Zakrzewski. This aggravating factor has been proven beyond a reasonable doubt.

3. The murder of Edward Kim Zakrzewski was committed in an especially heinous, atrocious, or cruel manner. After beating Sylvia with a crowbar, the Defendant called his seven year old son into the bathroom and brutally hacked him to death with a machete. By the Defendant's own admission, Edward saw what his father was about to do to him and raised his hand in meager defense of his young life, at which time his hand was nearly severed at the wrist. Edward was undoubtedly aware for a period of time that he was about to be murdered by his own father. We will never know for what period of time Edward experienced this horror. We do know that the Defendant struck Edward over and over with the machete nearly decapitating him, shearing his right. ear from his head, severing his spinal cord, and splashing Edward's blood on the floor, walls, sink, toilet, tub and ceiling of the bathroom. This agravating circumstance has been proven beyond a reasonable doubt.

None of the other aggravating factors enumerated by statute are applicable to this Count and none other was considered by this Court.

Nothing except as previously indicated in paragraphs 1 through 3 above was considered in aggravation.

B. MITGATING FACTORS

The Court has considered and weighed each of the statutory and nonstatutory mitigating factors as discussed under Count I and the Court finds the same mitigating factors and the weight to be given thereto are applicable to Count II.

The Court has very carefully considered and weighed the aggravating and mitigating circumstances found to exist in the murder of Edward Kim Zakrzewski, being ever mindful that human life is at stake and in the balance. The Court finds, as did the jury, that the aggravating circumstances present in Count Ii outweigh the mitigating circumstances present.

Accordingly, it is

ORDERED AND ADJUDGED that the Defendant, Edward J.Zakrzewski,II, is hereby sentenced to death for the murder of the victim, Edward Kim Zakrzewski. The Defendant is hereby committed to the custody of the Department of Corrections of the State of Florida for execution of this sentence as provided by law.

Count III - First Degree Murder of Anna Zakrzewski:

A. AGGRAVATING FACTORS

1. The Defendant was previously convicted of two other capital offenses, to-wit: the first degree murder of Sylvia Zakrzewski; the first degree murder of Edward Kim Zakrzewski. This aggravating circumstance has been proven beyond a reasonable doubt.

2. The murder was committed in a cold, calculated and premeditated manner without pretense of legal or moral justification.

The Court's findings as to the facts tending to establish this aggravating factor were previously discussed under Count I. By the Defendant's own admission, Anna Zakrzewski was the third of the three execution-style murders committed by the Defendant. The heightened premeditation with which the Defendant carried out the murders of Sylvia Zakrzewski and Edward Zakrzewski clearly applies to Anna's murder, as she was the last to be killed. In fact, the Defendant had more time to consider and reflect on the murder of Anna Zakrzewski than either of the other two. This aggravating circumstance has been proved beyond a reasonable doubt.

3. The murder was committed in an especially heinous, atrocious, or cruel manner. The Defendant testified that after bludgeoning Sylvia Zakrzewski and hacking Edward Zakrzewski to death with the machete, he called Anna into the bathroom to "brush her teeth." He then testified that he struck Anna as she entered the doorway to the bathroom. The physical evidence in the case established by blood-stain pattern

analyst Jan Johnson is in direct contradiction of the Defendant's testimony as to where the murder of Anna Zakrzewski actually occurred. All of the physical evidence in the case establishes beyond a reasonable doubt that Anna was first struck with the machete and was murdered while she was in a kneeling position with her head bent over the edge of the tub just as her body was found. The physical evidence establishes beyond any reasonable doubt that Anna was still living when the Defendant knelt her down over the tub where her brother's mutilated, bloody, lifeless body had been placed by the Defendant and was thereupon murdered in execution-style fashion with the machete. The photos of Anna's body at autopsy, as well as the Medical Examiner's testimony, indicate that Anna suffered cuts to her right hand and elbow, demonstrating that at some point she made a futile attempt to ward off blows,. Based upon the physical evidence and expert testimony relating thereto, the Court is convinced beyond any reasonable doubt that prior to Anna's death she not only experienced the horror of knowing that she was about to be murdered by her own father, but she also experienced the absolute horror of knowing that her brother had been murdered and that she was next. This Court could not imagine a more heinous and atrocious way to die. This aggravating circumstance has been proved beyond a reasonable doubt.

None of the other aggravating factors enumerated by statute are applicable to this Count and none other was considered by this Court.

Nothing except as previously indicated in paragraphs 1 through 3 above was, considered in aggravation.

B. MITIGATING FACTORS

The Court has considered and weighed each of the statutory and nonstatutory mitigating factors as discussed under Count I and the Court finds the same mitigting factors and the weight to be given thereto are applicable to Count III.

The Court has very carefully considered and weighed the aggravating and mitigating circumstances found to exist in the murder of Anna Zakrzewski, being ever mindful that human life is at stake and in the balance. The Court finds that the aggravating circumstances present in the murder of Anna Zakrzewski outweigh the mitigating circumstances present and the Court further finds that the facts suggesting a sentence of death are so clear and convincing that no reasonable person could differ. Anna's murder was the product of an

even more heightened, cold, calculated premeditation and was beyond all reasonable doubt, even more heinous, atrocious, and cruel than the murder of Sylvia and Edward Zakrzewski. The Court can find no sound reason for recommending a life sentence for Anna's murder after having found sufficient reason to recommend a death sentence in the murders of Sylvia and Edward Zakrzewski. Even if the jury reached a conclusion in total contradiction of the physical and expert opinion evidence that the murder of Anna was not heinous, atrocious, or cruel, the Court finds that the two remaining aggravating circumstances established beyond a reasonable doubt would outweigh all mitigating circumstances. Accordingly, the Court &ill override the recommendation of the jury for a life sentence in the murder of Anna Zakrzewski and,

Accordingly, it is

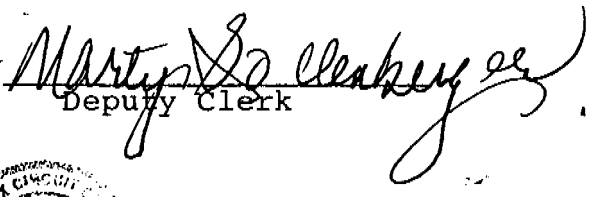
ORDERED AND ADJUDGED that the Defendant, Edward J. Zakrzewski, II, is hereby sentenced to death for the murder of the victim, Anna Zakrzewski. The Defendant is hereby committed to the custody of the Department of Corrections of the State of Florida for execution of this sentence as provided by law.

DONE AND ORDERED in Shalimar, Okaloosa County, Florida, this 19th day of April, 1996.

CIRCUIT JUDGE

Copies to:
State Attorney
Attorney of Record
Defendant

Newman C. Brackin
Clerk of Court

BY 
Deputy Clerk