IN THE SUPREME COURT OF FLORIDA

EDWARD J. ZAKREZEWSKI, 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

REPLY BRIEF OF APPELLANT

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

DAVID A. DAVIS
ASSISTANT PUBLIC DEFENDER
LEON COUNTY COURTHOUSE
SUITE 401
301 SOUTH MONROE STREET
TALLAHASSEE, FLORIDA 3230 1
(904) 488-2458

ATTORNEY FOR APPELLANT
FLA. BAR NO. 271543

TABLE OF CONTENTS

TABLE OF CONTENTS (Cont.)

TABLE OF AUTHORITIES

PAGE(S)

CASES

TABLE OF AUTHORITIES (Cont.)

PAGE(S)

TABLE OF AUTHORITIES (Cont.)

PAGE(S)

TABLE OF AUTHORITIES (Cont.)

PAGE(S)

STATUTES

RULES

CONSTITUTIONS

IN THE SUPREME COURT OF FLORIDA

EDWARD J. ZAKREZEWSKT, II,

Appellant,

v. CASE NO. 88,367

STATE OF FLORIDA,

Appellee.

_____/

REPLY BRIEF OF APPELLANT

ARGUMENT

ISSUE I

THE COURT ERRED IN FINDING THE THREE MURDERS TO HAVE BEEN COMMITTED IN AN ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL MANNER, IN VIOLATION OF THIS DEFENDANT'S EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

In his Initial Brief, Zakrezewski argued the murders of his wife and children were not especially heinous, atrocious, or cruel because none of the victims were aware for any substantial period that they were about to die. In Sylvia's case, she never knew.

> That each murder occurred quickly, as Zak intended (R 1024-26), without any of the victims being aware for any significant time of their impending deaths, is the most important point common to each victim. None of them knew (and Sylvia never did (R 583-84)) for more than a second or

> two that the Defendant intended to kill them (R 485, 587, 6 14-2 1, 1026-27, 1054). Those facts take these murders out of the especially heinous, atrocious, or cruel category.

(Initial Brief at p. 17. Case citations and footnote omitted.)

The State never refuted or answered that argument. Instead, it has contended that because Zak killed two children, that fact, i.e. that the victims were children, made the murders of his son and daughter especially heinous, atrocious, or cruel. (Answer Brief at p 33-34, 41).

A. The victims had no substantial awareness they were about to die.

As the quoted portion of the Initial Brief indicates, Zak's argument to the court's finding of the HAC aggravator rests exclusively on the absence of evidence showing his wife and children were aware of their impending deaths for a substantial period. Most victims in capital homicides know for at least a brief time that death is imminent. Such knowledge and the resulting fear makes those murders "heinous, atrocious, or cruel." See, State v. Dixon, 283 So. 2d 1, 9 (Fla. 1973). Bundy v. State, 471 So. 2d 9, 22 (Fla. 1985) To become esnecially heinous, atrocious, or cruel, however, "We have previously upheld the application of the heinous, atrocious, or cruel aggravating factor based, in part, upon the intentional infliction of substantial mental anguish upon the victim." Henyard, 22 Fla. L. Weekly S 14 (Fla. December 19, 1996). That heightened agony requires some time, though not necessarily very much, and normally does not occur at the instant of death. The exhausting, but undiscriminating, citation of cases by the State proves this point. (Answer Brief at p. 28-29, 33-34, 36.) None of the decisions by this court that the

State relied on involved the situation here, where the victims had no prolonged (if any) awareness of their impending deaths.

The State starts its barrage of irrelevant cases with King v. State, 436 So, 2d 50 (Fla. 1983), but it has no application because after King hit his victim with a heavy steel bar the latter remained conscious. The Defendant killed her by shooting her in the head twice, The initial injury coupled with the interval between the blow and the shooting made her murder especially heinous, atrocious, or cruel.

Similarly, in Muehleman v. State, 503 So. 2d 3 10 (Fla 1987), Muehleman brutally beat the victim, but he not only remained conscious, he begged for mercy, "muttering words to the effect of 'Jeff, oh, Jeff. . . .' No mercy was forthcoming." Id. at 3 11-12. The Defendant then suffocated the victim by stuffing plastic bags down his throat. That murder was HAC.

In Taylor v. State, 630 So. 2d 1038 (Fla. 1993), and Willacy v. State, 22 Fla. L. Weekly S2 19 (Fla. April 24, 1997), the Defendants were burglarizing homes when the victims evidently surprised their assailants and were beaten, strangled, stabbed, and/or burned. While this court may have said nothing about whether those assaulted were conscious when tortured, the situation, involving a home invasion, is almost per-se terror inducing. For some short, but significant period the victims must have been terrified by finding strangers in their homes and felt a doom of knowing they were about to die. Much as strangulations are almost per-se HAC, Orme v. State, 677 So. 2d 258 (Fla. 1996), so also are murders in which victims catch their killer inside their home and then

are brutally, viciously beaten, stabbed, strangled, and burned. Inherent in such situations is the substantial period of terror the victim must have had to know he or she is about to die. Davis v. State, 461 So. 2d 67 (Fla. 1984)‘; Geralds v. State, 674 So. 2d 96 (Fla. 1996).

Likewise this aggravator almost always applies in cases involving kidnappings, such as happened in Atkins v. State, 497 So. 2d 1200 (Fla, 1986) and Swafford v. State, 533 So. 2d 270 (Fla. 1988), where the victims were kidnaped and driven to either a wooded area or a remote location and then forced at knife point to walk across a field and disrobe before being killed. In such instances, terror and fear permeate, so that instantaneous deaths do not make the murders less cruel or atrocious or heinous. Phillips v. State, 476 So. 2d 194 (Fla. 1985).

None of the cases cited above, which the State relied on in its brief, have a remote similarity to this one. Here, there was no burglary, no robbery, no sexual battery. None of the victims were bludgeoned with a frying pan, Muehleman. None of them suffered a “blunt trauma” caused by a “heavy steel bar,” but remained conscious King. None of them were strangled or beaten or suffocated while awake, Davis. Geralds. None begged for mercy, Willacy, or were stalked. Phillips. The victims in this case had no prolonged awareness they were about to die, and their murders were, as Zak intended, swiftly and

---

‘In Davis, the Defendant never challenged the appropriateness of the HAC aggravator on appeal, so this court’s opinion never talked about why it was so. It simply, and appropriately, assumed the burglary/murder in which the mother was beaten and the children tied up and then executed was especially heinous, atrocious, or cruel.

painlessly done (9 R 1024) . As gruesome, as tragic as they were, they were not especially heinous, atrocious, or cruel.

B. Murders of children are especially heinous, atrocious, or cruel.

As to the deaths of Edward and Anna, Zak's children, the State argues "this Court has consistently upheld a trial court's finding of the heinous factor where a child was the victim." (Answer Brief at p. 33. See also p. 41) That is, these children's murders became especially heinous, atrocious, or cruel because they were children. Three responses.

First, this court in Santos v. State, 629 So. 2d 838 (Fla. 1994) rejected the trial court's conclusion that the murder of an infant was HAC. (See Initial Brief at pp. 19-20.) Likewise, in Bundy v. State, 47 1 So. 2d 9 (Fla. 1985) this aggravator was disapproved even though the victim was a 12-year-old girl.

Second, this court impliedly dismissed that argument in Henyard v. State, 22 Fla. L. Weekly S 14 (Fla. December 19, 1996):

> In this case, the trial court found the heinous, atrocious or cruel aggravating factor to be present based upon the entire sequence of events, including the fear and emotional trauma the children suffered during the episode culminating in their deaths and, contrary to Henyard's assertion, not merely because they were young children.

Third, in the cases cited by the State, this court would have found the child murders HAC without regard to the status of the victim. That the victim was a child was irrelevant.

1. Strangulations. James v. State, 22 Fla. L. Weekly S223 (Fla. April 24, 1997); Arbelaez v. State, 626 So. 169 (Fla. 1993); Adams v. State, 4 12 So. 2d 850 (Fla. 1982).

2. Beatings. Arbelaez; Mann v. State, 603 So. 2d 1141 (Fla. 1992); Atkins v. State, 497 So. 2d 1200 (Fla. 1986); Davis v. State, 461 So. 2d 67 (Fla. 1985); Morris v. State, 557 So. 2d 27 (Fla. 1990); Smalley v. State, 546 So. 2d 720 (Fla. 1989).

3. Prolonged or substantial period of time passed in which the victims knew of their impending deaths. Henvard v. State, 22 Fla. L. Weekly S14 (Fla December 19, 1996); Henry v. State, 649 So. 2d 1366 (Fla. 1994).

In two of the cited cases parents killed their children in an especially heinous, atrocious, or cruel manner, but those homicides involved months of severe abuse or neglect. Cardona v. State, 641 So. 2d 361 (Fla. 1994); Dobbert v, State, 375 So. 2d 1069 (Fla. 1979).

Obviously, none of the child slaying cases cited by the State have any relevance to this case. Zak's children were not strangled, neither were they beaten. Indeed, Zak chose a method of killing them to specifically prevent their needless suffering (9 R 1024, 1052). For the same reason, none of them had any prolonged suffering. Hence, the murders, as gruesome as the photographs may have made them appear, were not especially heinous, atrocious, or cruel.

C. Other arguments

The State, on pages 27-28 of its brief, seems to argue that if Sylvia was alive, her murder by strangulation or beating was IIAC. Not so. At best, the very best, Sylvia was

only "semi-conscious" when strangled. More likely she was unconscious. As such, her death could not have qualified for this aggravator. Herzog v. State, 439 So. 2d 1372, 1379-80 (Fla. 1983); Clark v. State, 443 So. 2d 973,977 (Fla. 1984).

The evidence shows more reasonably that she became unconscious after Zak struck her twice with the crow-bar, and remained so (6 R 587, 9 R 1026). No testimony or other proof even faintly suggests she regained enough of her senses to realize she was about to die. Thus, that she was "still alive," or "still breathing," or even that he "still didn't know she was dead" (Answer Brief at pp. 27-28) has no controlling relevance to this issue.

On page 3 1, the State says, "Edward's death was not a 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." Assuming that his death was not swift, his awareness of it was mercifully short. Moreover, the gruesomeness of the bathroom and the number of blows struck have little significance in this case because he knew for such a short time that he was about to die.

The State, on page 40 of its brief, quoting the court's sentencing order says, "It is noted the evidence also showed Anna suffered cuts to her right hand and elbow, demonstrating that at some point she made a **futile attempt toward off blows** (II 330)." (Emphasis supplied by the State.) The only evidence supporting that is less conclusive than the State's assertions. When asked if the wounds to the hand and elbow were "consistent with defensive wounds" the medical examiner said, "I couldn't be sure about

that. She had that small laceration of the lateral aspect of her right elbow areas. It's possible that could have been sustained when she raised her arm, but I'm not sure about that. It could also have been sustained if her arm was up at the same time that one of these wounds to the back was inflicted." (6 R 600,602) With such uncertainty, this Court cannot say Anna had any awareness for a significant period she was about to die.

Regarding Zak's argument that the Defendant intended for the murders to have been swift and painless, the State quotes a passage supposedly from Viking folklore that was found in his computer at work. Besides being silly, it has no relevance to his mind set when he murdered his family. First, no one ever proved he put it there, and if so, when, and if so, that it reflected what drove him to do these horrible acts. Moreover, the passage speaks of the welcome the valiant warrior, who has bravely died in battle, can expect in Valhal, the Viking heaven. It says nothing about prolonging the deaths of one's enemies or enjoying their suffering, or making their deaths in battle especially heinous, atrocious, or cruel.

The State, by way of a footnote on page 42 of its brief, cites Foster v. State, 654 So. 2d 112 (Fla. 1995), because the medical examiner in that case said the victim could have lived 3 or 5 minutes after his spinal cord was cut. It then concludes, "So much for Zakrzewski's belief that his family members died instantly without pain." Perhaps that would be true if Zak knew of Foster, but Appellate Counsel has checked the Bar Journal, and he does not find his client's name listed there. Moreover, even if he knew about

Foster, that is no evidence he was influenced by it, as the State argues he was by that quote about Valhal.

On pages 42 and 43 of its brief, it tries to diminish the influence Santos v. State, 629 so. 2d 838 (Fla. 1994) has on this case. "The State respectfully submits that Zarzewski'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." It then notes that he could have used a gun if he wanted to "mercifully execute" his family, and getting one should have been no problem because he was in the Air Force and "certainly one was accessible to him."

As to the latter point, the State obviously has no idea how difficult it is to get a weapon. Suffice it to say that appellate counsel would have an easier time sitting in this Court's conference of this case than he would in getting a gun from the arm's room of any military installation. Second, guns, when fired, make noise, and that would have alerted his children to their fate, something Zak did not want to do. That is part of the reason he used the machete-to keep them from knowing until the very last moment of their impending deaths.

Thus, Santos is relevant to this case because a murder is HAC, not because of the weapon used, but because of the manner it was committed. This aggravator can apply if a gun was used, and, as this case shows, not apply if a machete was the murder weapon. The key, as Santos declares, is that, "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, in its closing paragraph on this issue, persists in making the same mistake it made during closing arguments. "As the photographs of the victims demonstrate, his use of a machete to hack his family to death was most definitely HAC." "All you've got to do is take another look at these pictures and that will be confirmed to you. Wicked, evil, vile. You remember those words and you see if that's not what those photographs show." (12 R 12 14) Admittedly the murders were gruesome, but that fact by itself does not necessarily make the murders especially heinous, atrocious, or cruel.

Finally, the State claims that whatever errors the court made regarding the HAC aggravator would be harmless. If we strike that aggravator, however, there is considerable doubt the jury would have recommended death for Sylvia and Edward, and the court would have imposed that sentence for those two and the homicide of Anna. Without that aggravating factor, the only ones left would have been that Zak had a prior conviction for the other two murders, and they were cold, calculated, and premeditated. Balanced against those factors was a wealth of significant mitigation, including the two statutory mitigators that he had no significant prior criminal history, and he committed the murders while under the influence of an extreme mental or emotional disturbance (2 R 3 12-3 13). Additionally the jury recommended Zak be sentenced to life for the murder of Anna, and only by the narrowest of margins (7-5) did it vote for death as to Edward and Sylvia (2 R 263-64). Without the HAC aggravator, this court cannot say beyond a

reasonable doubt that the jury would have recommended, or the court imposed, a death sentence.

This court should reverse the trial court's sentence and remand for a new sentencing hearing.

ISSUE II

THE COURT ERRED IN FINDING THE MURDER TO HAVE COMMITTED IN A COLD, CALCULATED, AND PREMEDITATED MANNER WITHOUT ANY PRETENSE OF MORAL OR LEGAL JUSTIFICATION, A VIOLATION OF THIS DEFENDANT'S EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

In his Initial Brief, Zakrezewski focussed on only two of the four elements of the cold, calculated, and premeditated aggravating factor. "This extreme loss of rational thinking created an emotional crisis of such magnitude that it precluded the calculated, premeditated murders from being either coldly done or committed without any pretense of moral justification." (Initial Brief at p. 2 1.) The State spends its effort proving matters either admitted (the calculated and premeditated elements; Answer Brief at pp.47-48, 54-55), or unasserted (Zak's ability to appreciate the criminality of his conduct was substantially impaired. Answer Brief at p. 54). It ignored the significant weight given to the statutory mitigator that Zak was under the influence of an extreme emotional disturbance at the time of the murders (2 R 324)[2]. Consequently, it had nothing to say

[2]The court gave this mitigator "significant" weight rather than "great" consideration because it confused and mixed other statutory mitigator, this his ability to appreciate the criminality of his conduct was substantially impaired, with the extreme emotional disturbance mitigator. Not only was this confusing, it was unfair because Zak expressly waived presenting

regarding the several cases Zak presented in his brief that considered the interplay between the CCP aggravator and this statutory mitigator. That deficiency is important because this court has consistently refused to find murders coldly committed when the Defendant acts under the sway of some extreme emotional disturbance. See, pages 22-24 of the Initial Brief. Even though the murders of wives and girlfriends may have been done with calculation and premeditation, often they were not coldly so because of the extreme emotional turmoil the Defendant also experienced. Those cases form the crux of Zak's legal argument, and it remains unrebutted by the State's Answer Brief.

What it does bring to this issue has little pertinence to it. Zak had no history of violence towards his wife as the Defendants in Pope v. State, 564 So. 2d 1060 (Fla. 1990) and Cumming-El v. State, 684 So. 2d 729 (Fla. 1996) had towards the women they had lived with for only a short time. To the contrary, Zak was overly acquiescent to his wife's wishes. Porter and Cummings-El, on the other hand, killed their lovers because the believed that if "they could not have them, no one would." Cummings-El, at 730. Significantly, in Porter, the trial court found none of the Statutory mitigators, and in Cumming-El, it concluded the murder was not CCP.

Similarly, Thomas v. State, 22 Fla. L. Weekly S149 (Fla. March 20, 1997) has no relevance to this case. Besides the first degree murder charge, Thomas faced kidnaping and burglary charges arising out of the incident in which he brutally bound, gagged, and

---

evidence supporting it, and the court refused to instruct on it after the prosecutor raised the issue and argued it to the jury (See ISSUES VII and VIII).

beat his conscious wife, dragging her by the hair inside her home. Even more cold, Thomas killed his mother to prevent her from reporting the murder of his wife. That is cold. The court also found nothing to mitigate a death sentence.

Thus the State's cases have no compelling similarities to the facts this court now considers, and they provide no guidance about how this court should resolve this issue.

The State then complains on appeal that "Neither of Zakrzewski's experts was a neurologist," and no evidence shows that any of the tests the state on appeal thinks might be relevant were done. (Answer Brief at pp. 53-54). First, the State never noted that deficiency at the trial level, so it is precluded from doing so now. Cannady v. State, 620 So. 165 (Fla. 1993); State v. Dupree, 656 So. 2d 430 (Fla. 1995). (The State is bound by the same rules as the Defendant, and issues not raised at the trial level by the State cannot be raised on appeal.) Indeed, Dr. McClaren, its expert and not a neuropsychologist, never disagreed with Dr. Crown's finding (9 R 1145, 1159). Second, section 90.705(1) Fla. Stat. (1991) allows the Defense or State to present its expert testimony without first laying the foundation for it. The State in this case could then have cross-examined the Defense experts to bring out the basis of his or her conclusion, whether he administered CAT scans, MRIs, EEG, ECHOs, EMGs, and whatever other test the State on appeal believes the medical profession should have inflicted on Zak. It never did that here.

Third, Dr. Crown, one of Zak's experts, was a neuropsychologist, and the state at the trial level never suggested he was unqualified to conclude Zak was brain damaged. On appeal it complains merely that the expert was not a neurologist.

Finally, the State notes that Zak said he was not angry at the time of the murders (R 1042-43 Answer Brief at p. 5 1) He immediately clarified that response, though:

Q You weren't angry?

A No sir.

Q This wasn't done in the heat of passion?

A It was passionate, yes, sir.

Q Tell me about that. It was passionate. How was it passionate'?

'A I loved my family. I didn't want to lose them. It wasn't easy. Yeah, it was passionate.

(9 T 1043)

The extreme emotional disturbance Zak suffered prevented him from coldly considering what he did, for the same reasons the court's errors in finding the murder HAC mandates a new sentencing hearing (see the previous issue in the Reply Brief), the mistakes it made regarding the CCP aggravator are not harmless and mandate a new hearing. This court should reverse the trial court's sentence of death and remand for a new sentencing hearing.

ISSUE III

DEATH IS A DISPROPORTIONATE SENTENCE TO IMPOSE IN THIS CASE.

The State posits two primary reasons this court should find death a proportionately warranted sentence in this case. First, the type of weapon used or the method death was inflicted makes this a death worthy case (Answer Brief at pp. 59-60). Second, this court

has affirmed death sentences in other "domestic dispute" cases (Answer Brief at pp. 60-61).

A. The type of weapon used makes this case proportionately warranted.

Zak argued that the deaths of his wife and children, as horrible and gruesome as they may have been, were not especially heinous, atrocious, or cruel. See, ISSUE I. As discussed there, that Sylvia had no idea of her impending death made the HAC aggravator inapplicable even though she was "'beaten with a crowbar, strangled with a ligature, and finished off with a machete." (Answer Brief at p. 59)

In proportionality analysis, the manner of death bears little on whether death is warranted. More important are the aggravating and mitigating factors present. In the cases cited by the State on page 59 of its brief, the trial court in every instance, except Atkins v. State, 497 So. 2d 1200 (Fla 1986), found several aggravating circumstances and nothing; in mitigation. Bruno v. State, 574 So. 2d 76 (Fla. 1991) (during the course of a robbery, pecuniary gain, HAC, CCP; no mitigation); Colina v. State, 634 So. 2d 1077 (Fla. 1994) (prior murder conviction, pecuniary gain/robbery, HAC; no mitigation); King v. State, 436 So. 2d 50 (Fla. 1983) (prior conviction for a violent felony, HAC, CCP; no mitigation); Davis v. State, 461 So. 2d 67 (Fla. 1984) (during the course of a burglary, HAC, CCP, avoid lawful arrest-one victim only; no mitigation). In Atkins, the court found the Defendant had killed a child during a kidnapping to avoid lawful arrest and HAC. The only mitigation, his lack of a significant prior history criminal activity, carried little weight.

Thus, except for Atkins, death was the presumptively correct sentence because the court had found at least one aggravator and nothing in mitigation. State v. Dixon, 283 So. 2d 1 (Fla. 1973). In short, this court has had little trouble rejecting proportionality arguments when several aggravating factors apply without any or scant mitigation to balance it.

The next chunk of cases listed by the State similarly have no pertinence to this one beyond the fact that the victims were beaten and strangled. Yet, as discussed in ISSUE I, they have little relevance here. Zak's victims either were unconscious or only momentarily aware of their impending deaths while the victims in the cited decisions knew for much longer they were going to die. They also have no bearing because, like the other cases the State relied on, these involve situations where the trial court correctly found several aggravators, and the mitigation it concluded applied had "scant" weight. Additionally, they also uniformly involved a robbery/burglary scenario. Taylor v. State, 630 So.2d 1038 (Fla. 1993) (burglary/sexual battery, financial gain, HAC; weak evidence of mental retardation.); Gamble v. State, 659 So. 2d 242 (Fla. 1995) (pecuniary gain, CCP; in mitigation, age, co-Defendant's sentence given little weight.); Owen v. State, 596 So. 2d 985 (Fla. 1991) (prior conviction of an attempted first degree murder, during the course of a burglary/sexual battery, HAC, CCP; weak non statutory mitigation); Willacy v. State, 22 Fla. L. Weekly S 219 (Fla. April 24, 1997) (during the course of a robbery, arson, burglary, pecuniary gain, HAC, CCP; non-statutory mitigation given little weight)

B. Domestic disputes.

Contrary to the State's assertions on pp 60-62 of its brief, Zak does not argue that because the murders in this case somehow fit a "domestic dispute" mold, all further analysis ceases. Oh, if life or litigation were only that simple: to incant a magic phrase at which this court's collective eyes would glaze over, and the justices would chant in unison "reversed for a life sentence. Give Davis a raise." Classifying the murder here as "middle class" helped identify the relevant points this court should compare "with other similar reported death appeals." Kramer v. State, 619 So. 2d 274, 277 (Fla. 1993). So identifying them as "middle class" does not end the inquiry, as the State argued, it began the examination and comparison of relevant factors in this unique form of appellate review.

As to that examination, the State has done nothing to challenge it other than presenting a list of decisions from this court that have approved death sentences for murders that arguably arose in the context of a domestic situation. None of them, as will be shown, have much in common with this case. With equal ease, this Defendant could have presented decisions involving "'domestic disputes" that declared life in prison the proportionately appropriate punishment. See, Porter v, State, 564 So. 2d 1060, 1065 (Fla. 1990) (Barkett, concurring in part and dissenting in part.) They, like the State's accumulation, would have presented marginal help to this court because like the State's string citations they have little bearing to the proportionality analysis required by the facts of Zak's situation.

In some of the cases cited by the State on pages 59-6 1, several aggravators were properly found while nothing mitigated the death sentences imposed and approved. Williams v. State, 437 So. 2d 133 (Fla. 1983); King v. State, 436 So. 2d 50 (Fla. 1983); Harvard v. State, 414 So. 2d 1032 (Fla. 1982); Henry v. State, 649 So. 2d 1366 (Fla. 1994) (at least two aggravators and nothing to mitigate the murders.)

Other cases cited by the State involved Defendants who had extensive records for committing violent crimes. Violence was a way of life for them. Duncan v. State, 619 So. 2d 279 (Fla. 1993); Porter v. State, 564 So. 1060 (Fla. 1990); Lemon v. State, 456 So. 2d 885 (Fla. 1984).

Still other cases involved "massive" amounts of aggravation balanced against "scant" mitigation. Thomas v. State, 22 Fla.L.Weekly S149 (Fla. March 20, 1997); Arbalaez v. State, 626 So. 2d 169 (Fla. 199).

Finally, the State cited Pope v. State, 679 So. 2d 710 (Fla. 1996), but this court said Pope killed his girlfriend for pecuniary gain, not for reasons that arose out of their domestic relationship.

More significant than the differences between the cases it cited and the facts developed here, the State made no effort to discredit Zak's "middle class" analysis, why the factors he identified had no significance, and why the facts of the cases he argued fell into that analytical category somehow differed from those here. Klokoc v. State, 589 So. 2d 2 19 (Fla. 1991); Kamnff v. State, 37 1 So. 2d 1007 (Fla. 1979). Instead, it ignored the analytical problems by summarily explaining that "all citizens are eaual before the

law." (Answer brief at p. 62. Emphasis provided by the State,) It should have done more.

Citing this court's opinion in Porter v. State, 564 So. 2d 1090 (Fla. 1990), it argues this murder was not done in a fit of sudden rage. (Answer Brief at p. 63.) If so, Kampff and Klokoc have special pertinence. In Kampff, the Defendant had brooded for three years over the divorce of his wife before he finally killed her. In Klokoc, the Defendant shot his daughter to spite his wife for leaving him.[3] In both instances, however, this court reduced the death sentences to life in prison. It should do the same thing here.

C. Other arguments.

The State wants this court to consider Edward's and Anna's ages as reasons to reject Zak's proportionality argument, and it cites the new "victim's age" aggravator to support it. (Answer Brief at pp. 63-64) It did not present that argument to the court below. Indeed, the prosecutor agreed that the new aggravating factor had no applicability to this case (3 R 433). As such, it cannot raise that factor now. Cannady v. State, 620 So. 2d 165 (Fla. 1993). While this court may have "repeatedly upheld death sentences for the murders of children under 12," (Answer Brief at p. 64), it has not always done so. Santos v. State, 629 So. 2d 838 (Fla. 1994); Knowles v. State, 632 So. 2d 62 (Fla. 1993). Moreover, as explained in the previous issue, that it has approved

---

[3] This Court also approved the finding the murder to have been cold, calculated, and premeditated.

such punishment has more to do with the totality of the circumstances rather than the single factor of the status of the victim.

The State on page 65 argues that Edward's death was not instantaneous because the boy was struck four times. It provides no record support for that conclusion, but apparently reasons that Zak would have stopped hitting his son if death had been immediate, Contrary to the Appellee's bald conclusion, the evidence shows death came swiftly, as the Defendant intended (6 R 6 14, 9 R 1024, 1027).

That a medical examiner in Foster v. State, 654 So. 2d 112 (Fla. 1995) said the victim in that case could have lived 3 to 5 minutes is irrelevant to this case since the one who testified in this case never said that. (Answer Brief at p. 65) This court will not take notice of opinions in other cases. See, Wuornos v. State, 644 So. 2d 1012, 1019 (Fla. 1994). More significantly, there is no evidence Edward lived that long (7 R 611,613). To the contrary, he died almost instantly (6 R 6 14, 6 16), as Zak intended. Moreover, Edward had only one defensive wound, not the twenty or thirty such injuries that would have given rise to a logical presumption the victim suffered excruciating mental and physical agony before dying. (See Initial Brief, Issue I.)

The state on pages 65 and 66 of its brief claims Anna suffered a defensive wound. As explained before, the medical examiner hestitated at classifying the wounds on her hand and elbow as such (6 R 600).

The State, however, has a more difficult problem than using ambiguous testimony to reach a dubious conclusion. The jury had recommended life for Anna's murder even

though she had, like her brother, been killed by a machete. In Irrizarv v. State, 496 So. 2d 825 (Fla. 1986), this court rejected the trial court's override of a jury verdict of life in prison even though the victim (his ex-wife) had been hacked to death with a machete, and her lover almost killed with the same weapon.

This court should do as it did in that case and and reverse the trial court's sentences of death and remand for imposition of a life sentence for each murder

ISSUE IV

THE COURT ERRED IN OVERRIDING THE JURY'S RECOMMENDATION OF LIFE FOR ANNA, AND IN DOING SO IT MADE NO VALID DISTINCTION BETWEEN HER MURDER AND THAT OF EDWARD AND SYLVIA ZAKREZEWSKI, A VIOLATION OF ZAKREZEWSKI'S EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

The problem presented by this issue involves reconciling the irreconcilable. How could the jury have recommended death for Edward Zakrezewski, yet have said it believed his father should live for the murder of Anna? The court, and the State on appeal, approached the issue by discussing first the deaths of Sylvia and Edward, and then, because Anna's situation had no distinctions imposing death for her murder. In his Initial Brief*, Zak reversed the order of analysis, and argued life for each homicide. In support of this approach, he noted that the death recommendations were by the narrowest of margins (7-5), and that the court overvalued the jury's death recommendation. More compelling, though, both the court and the jury may have given more weight to the photographs of the victims. The jury, in particular, may have believed Sylvia's murder

was especially heinous, atrocious, or cruel because Zak twice hit her with a crow bar, and later strangled and hit her with a machete. As pointed out in ISSUE I, because she had no awareness of her impending death, her death was not especially heinous, atrocious, or cruel. Similarly, the jury could have concluded that Edward's momentary knowledge he was about to die, coupled with the several blows inflicted, one of which almost severed his arm, made his death HAC.

Other than the standard jury instruction on the HAC aggravator, the jury had no special guidance that would have told them that acts done after the victim is dead, unconscious, or even partially aware, cannot make the resulting murder especially heinous, atrocious, or cruel. Thus, it could have wrongly found this aggravator for Edward and Sylvia, but because so little was said about Anna's death, have found it inapplicable to her. That is, the jury could have believed Zak's testimony that he hit his daughter as she came into the bathroom (9 R 1054). Because Dr. Harvard could not say she suffered "defensive" type wounds (6 R 600), the jury would have concluded she did not. She would, therefore, have been killed without any awareness of her mother's and brother's deaths, and not much understanding she was about to die.[4]

The analysis presented in the Initial Brief, thus, explained the jury's life recommendation for Anna, and provided a compelling argument why the court should have imposed life sentences for the deaths of Sylvia and Edward.

---

[4]The jury may have also questioned how much awareness of death a five year old could have had.

The State, responding to that argument, presented a list of cases involving multiple murders in which juries had recommended life, which the trial court overrode, and which this court affirmed. (Answer Brief at pp. 64-65.) Except for Garcia v. State, 644 So. 2d 59 (Fla. 1994), which Zak cited and discussed in his Initial Brief, none of the cases relied on by the State involved split sentencing recommendations. In Robinson v. State , 610 So. 2d 1288 (Fla. 1992); Williams v. State, 622 So. 2d 456 (Fla. 1993); and Coleman v. State, 610 So. 2d 1283 (Fla. 1992), the three Defendants were involved in the murders of four persons who had stolen some cocaine from them. Even though the juries had recommended life for every murder this court approved the trial court's override.

Similarly, in Zeigler v. State, 580 So. 2d 127 (Fla. 1991), this court again approved the trial court's override in the two first degree murders Zeigler had been found guilty of committing.[5] The trial court in Porter v. State, 429 So. 2d 293 (Fla. 1983) overrode the jury's life verdicts in each killing of a double homicide,

Those cases have no particular relevance here because none of them involved the split-verdict situation presented by this case. Garcia, does. The State also mentions that decision, and it relies on language from the opinion to support its argument: "the trial judge found the same aggravating and mitigating circumstances applied to the murders of both Julia and Mabel." Id. At 64. A closer reading of the opinion, however, reveals that the court found four aggravators and no mitigation. "The trial judge followed the jury's

---

"The jury found he had committed two other second degree murders.

unanimous recommendation. . . In the sentencing order, the trial judge found four aggravating factors and no mitigating factors." Id. at 6 1-62.

Zak's case stands in contrast to Garcia's. Here we not only have a list of mitigators that "would be as long as from you out the back of the courtroom," (9 R 1178) the court's sentencing order found much of what the Defendant presented as ameliorating a death sentence (2 R 3 14- 16). Sustaining the court's death sentences needs more help than Garcia can provide.

The State's first paragraph on page 74 of its brief mystifies Zak with its quote of the Court's sentencing order. Why the trial court would have imposed death if Anna's murder was not HAC has no relevance to explaining the jury's disparate verdicts.

The State misunderstands why the Defendant relied on this court's opinion in Ross v. State, 386 So. 2d 1191 (Fla. 1980). Although strongly guided by the jury's recommendation, the trial judge makes an independent evaluation of the aggravating and mitigating factors to reach a reasoned determination of the appropriate sentences to impose. The sentencing court in Ross incorrectly believed the jury's vote bound him. Apparently acting similarly to the judge in that case, the judge on this one simply accepted the jury's death recommendations, gave them more weight than the 7-5 votes deserve, and sentenced Zak to death for the murders of Sylvia and Edward. That Ross involved only a single elderly victim, as the State pointed out in its brief at p. 73, has no relevance to this analysis, and Zak would have cited the case regardless of the status of the victim.

Frankly, which murder the court analyzed first should not have mattered, the result should have been the same, Similar cases should receive similar sentences. Yet, the trial court said death was correct, and Zak claimed he should have gotten life. For the reasons presented here and in the Initial Brief, the court should have imposed three life sentences. This court should correct the lower court's mistake and reverse the trial judge's death sentences and remand with instructions that it impose life sentences for each murder.

ISSUE VI

THE COURT ERRED IN ALLOWING DR. HARRY MCCLAREN, AN EXPERT IN PSYCHOLOGY, TO INTERPRET THE WRITINGS OF THE NINETEENTH CENTURY GERMAN PHILOSOPHER FREDRICH NIETZSCHE, AND TO CHARACTERIZE THEM AS ANTI-CHRISTIAN, IN VIOLATION OF ZAKREZEWSKI'S EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

The State has two arguments regarding this issue: 1. Because Zakrezewski never objected to the State asking his expert about Nietzsche's "Uberman" philosophy he waived any objection to the State asking its expert, Dr. Harry McClaren, about this nineteenth century German's beliefs regarding Christianity. 2. In any event, McClaren testified as a lay witness, not as an expert.

A. The lack of objection.

After Zak had examined his mental health expert, Dr. James Larson, the State asked him some questions. Some of them focussed on Frederick Nietzsche's philosophy, specifically his "Uberman" doctrine. Consistent with his conclusions regarding Zak, the

psychologist said that the philosopher's "superman" approach to life was consistent with the Defendant's "narcissistic view of himself." (8 R 845-46). He said nothing about the German's attitude toward Christianity.

This latter point is significant because Zak may have been willing to let Dr. Larson talk about the "Uberman" whether he was an expert or not. Such a decision, however, does not mean he was therefore happy with Dr. McClaren talking about the philosopher's problems with Christianity. That he had arguably waived an objection earlier in the trial does not imply he had done so later, especially when he specifically complained about Dr. McClaren testifying about matters in which he was unqualified (R 1156-57). To accept the State's position would elevate procedural defaults to a level as bizarre as this issue. By specifically objecting to the State's expert testifying about a matter over which he had no demonstrated expertise, Zak has preserved it for this court's review.

B. Dr. McClaren could testify as a lay witness.

The crux of the State's argument is that "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." By way of footnote, it continued, "Anyone who read Nietzsche's works would come to the same conclusion." (Answer Brief at p. 79) This last assertion has no basis in this record, other than Dr. McClaren's opinion, and amounts to speculation by the State.

Within the first assertion arises two questions: Is the philosophy of Nietzsche such that an expert is needed to explain it to the jury ? Second, if not, can any lay person give

an opinion regarding that dead German's approach to the various problems life presents? Section 90.701-702 provide the framework for answering these questions.

90.70 1. Opinion testimony of lay witnesses

> If a witness is not testifying as an expert, the witness's testimony about what he or she perceived may be in the form of inference and opinion when:
>
> * * *
>
> (2) The opinions and inferences do not require a special knowledge, skill, experience, or training.

90.702. Testimony by experts

> If scientific, technical, or other specialized knowledge will assist the trier of fact in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify about it in the form of an opinion; however, the opinion is admissible only if it can be applied to evidence at trial.

Dr. McClaren could testify about Nietzsche's attitudes towards Christianity, therefore, if his opinion did not require special knowledge about Christianity and Nietzsche.

As to Christianity, or, more broadly, religion, courts across the nation have regularly used experts to clarify, explain, or assist the jury in understanding its application to a particular case. Wisconsin v. Yoder, 406 U.S. 205 (U.S. 1972) (Religion and the Amish faith.); Small v. Lehman, 98 F.3d 762, 765 (CA.3 1996); Alvarado v. City of San Jose, 94 F.3d 1223, 1232 (CA.9 1996) (" The reasonable observer is not an expert on esoteric religions, nor can he or she be turned into one by any publicity generated by

plaintiffs' lawsuit. Furthermore, a reasonable observer cannot be expected to infer an endorsement of the religion practiced by a revolutionary group in southern Mexico); Mills v. Singletary, 63 F.3d 999, 1029 (C.A. 11 1995) (Expert on Muslim religious practices.); Wilson v. Block, 708 F.2d 735, 744-45 (C.A.D.C. 1983) (Hopi and Navajo religion); International Soc. for Krishna Consciousness. Inc. v. Barber, 650 F.2d 430, 442-43 (C.A.2 1981)(Krishnas.) They regularly admit the testimony of experts on religion because it will assist the jury understand esoteric beliefs and nuances. One cannot argue with a straight face that religion in general, or Christianity and all its variants, specifically, "does not require a special knowledge." Moreover, one would need the expert's assistance to understand the nineteenth century German Christianity Nietzsche presumably criticized. To assume, as the State has done, that any lay person would understand Nietzsche's views of that religious expression defies credulity.

Similarly, one would expect only an expert to testify about Nietzsche and his philosophy. That he and what he wrote are beyond the ken of the common man finds some support in that no Florida decision makes use of what that thinker had to say, and the federal system cites him only extraordinarily rarely. Hutto Stockyard. Inc. v. U.S. Denartment of Agriculture, 903 F. 2d 299 (CA 4 1990). If modern society has relegated him to academia, then only the services of an expert can remove him from its ivy towers

Finally the State claims the court's error was harmless "given Zakrzewski's own writings expressing an anti-Christian philosophy." (Answer Brief at p. 79). What the State refers to were his ramblings found in a jail cell fourteen months after the murders,

and after he had turned himself into the police. Whatever weight they may have had, McClaren's testimony had considerably more because the court relied on the psychologist's "very anti-Christian" testimony in rejecting Zak's "professed newfound Christianity" as mitigation. (2 R 291) Without that opinion, the jury may very well have given greater weight to the mitigation the Defendant presented, or at least one member of the jury may have done so. And that would have been enough since they recommended death in two of the murders by a 7-5 margin, and voted for life in the death of Anna. Dr. McClaren's testimony could not have been harmless beyond a reasonable doubt.

ISSUE VII

THE COURT ERRED IN ALLOWING THE STATE'S MENTAL HEALTH EXPERT, DR. HARRY MCCLAREN TO TESTIFY BECAUSE HIS TESTIMONY REBUTTED NONE OF THE MENTAL MITIGATION PRESENTED, A VIOLATION OF ZAKREZEWSKI'S FIFTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS.

Quoting from Zakrezewski's Initial Brief that the only use the State can make of evidence gained by virtue of Rule 3.202(d), Fla. R. Crim. P. is for rebuttal, the Appellee "respectfully submits his interpretation of the rule is incorrect." (Answer Brief at p. 88) That is, the State now claims it can use evidence obtained by a forced examination of the Defendant by State hired experts in its case in chief, even though such proof may have nothing to do with the reason for the examination: to allegedly "balance the playing field." Dilbeck v. State, 643 So. 2d 1027, 1030 (Fla. 1994). While the rule may not explicitly use the word "rebut" or "any derivative" of it (Answer Brief at p. 88), Dilbeck,

and this court's intention in fashioning the limited intrusion into the Defendant's right against self-incrimination, clearly indicated that the State could use the compelled examination only to rebut the accused's claim of-mental mitigation.

> At the time of sentencing in the present case, Nibert [v. State, 574 So. 2d 1059 (Fla. 1990)] had been decided, thus obligating the State to either rebut the defendant's mitigating evidence or run the risk of having the court accept that evidence establishing one or more mitigating circumstances....

Dilbeck, at 1030.

It then adopted a procedure it had created in a non-capital setting and applied the same limitations:

> When a defense expert [who has interviewed the defendant] will be used to demonstrate the presence of the [battered-spouse] syndrome, the state will then have the opportunity to have the defendant examined by its expert, who will be allowed to testify at trial to rebut a defense expert's testimony.

Hickson v. State, 630 So. 2d 172 (Fla. 1993), quoted in Dilbeck, at p. 1031. (Emphasis supplied.)

The State's witness, therefore, can testify only if what he has to say rebuts the Defendant's expert's testimony regarding the presence of mental mitigation. Rule 3.202 should only level the playing field, not add players to the State's team.

On page 91 of its brief, the State argues that Zak waived any objection to the State asking its expert, Dr. Harry McClaren, about the Defendant's ability to appreciate the criminality of his conduct, and he is "procedurally barred . . . .because he opened the

door." As to the latter point, he never specifically waived his objection to the State's questioning of Dr. McClaren about that mitigator. The discussion of counsel and the court is a bit ambiguous, but apparently what Zak intended to "waive," as the State puts it, was an objection to an inquiry about whether Zak was suffering from an extreme emotional and mental disturbance, the other statutory mental mitigator (8 R 840-41). Moreover, that he may have "opened the door," not by his examination, but by allowing the State's cross-examination of Zak's expert, does not mean that it will remain forever open.

The State says 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 Zakrezewski'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)"

(Answer Brief at p. 92).

Reading the court's discussion of the extreme emotional disturbance mitigator, and why it gave '"significant" rather than "great" weight reveals that it used the other statutory mental mitigator, the one Zak had deliberately not pursued (9 R 1182-84) to reduce the weight given to the extreme emotional disturbance mitigating factor. In other words, because the court did not find Zak's ability to appreciate the criminality of his conduct was substantially impaired, it gave less weight to the one every one agreed was present:

that he was under the influence of an extreme emotional disturbance. That not only was unfair (because Zak specifically did not want to develop the former), it confused the analysis of the mitigators. One is not a variation of the other. The extreme emotional disturbance mitigator focuses on the Defendant's mental state, while the "appreciates the criminality of his conduct" narrows the inquiry to his knowledge of right and wrong. State v. Dixon, 283 So. 2d 1, 10 (Fla. 1973). To give less weight to the emotional disturbance factor because "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" (2 R 324), as the court did, confuses the analysis, and turns a mitigator into aggravation, something this court has said a sentencer cannot do. Maggard v. State, 399 So. 2d 973 (Fla. 1981). See, Orme v. State, 677 So. 2d 258 (Fla. 1996) (Evidence to show the Defendant could not "enjoy" the killing cannot be used to specifically refute the Heinous, atrocious, or cruel" aggravator, but must be considered as part of the general case for mitigation.")

Finally, the State's predictable harmless error analysis makes Zak's point. If Dr. McClaren's testimony was "cumulative," as the State alleges, then the Court should have excluded it for the reasons presented in the Initial Brief and above. On the other hand, if he went beyond the scope of what Rule 3.202(d) permitted, it was not so, and the court's error became fatally damning to Zak.

This court should reverse the trial court's sentence and remand for a new sentencing hearing.

ISSUE VIII

THE COURT ERRED IN REFUSING TO INSTRUCT THE JURY ON THE STATUTORY MENTAL MITIGATOR THAT ZAKREZEWSKI'S ABILITY TO UNDERSTAND THE CRIMINALITY OF HIS CONDUCT WAS SUBSTANTIALLY IMPAIRED, A VIOLATION OF HIS EIGHTH AND FOURTEENTH AMENDMENT RIGHTS

The State cites irrelevant law on this point. Of course, the trial court has discretion regarding what weight to give a mitigator. Lucas v. State, 613 So. 408 (Fla. 1993). This issue, however, focusses on another issue. Was there "any evidence" of the statutory mental mitigator that Zakrezewski's ability to understand the criminality of his conduct was substantially impaired? If so, the court had no discretion, but it erred as a matter of law if it failed to give the instruction on that mitigating factor. Regarding that issue, and the law Zak cited in his Initial Brief, the State remains silent.

Well, not exactly silent. It again raises an irrelevancy. It claims the trial court's "finding regarding the extreme disturbance mitigator is pertinent" to this issue. Not so. As Zak argued in his brief: Now, does this evidence conclusively prove Zak could not appreciate the criminality of his conduct? No, but then this court need not decide that issue. As long as he has presented "any evidence" supporting giving the instruction he requested, the court should have read it to the jury." (Initial Brief at p. 57). As further argued there, he easily carried that light burden, and the court should have instructed the jury on the requested mitigator.

ISSUE IX

THE COURT ERRED IN FAILING TO INSTRUCT THE JURY ON THE EXTENSIVE NONSTATUTORY MITIGATING FACTORS, AS REQUESTED, IN VIOLATION OF THE DEFENDANT'S EIGHTH AND FOURTEENTH AMENDMENT RIGHTS

The State says on page 95 of its brief that Zakrezewski failed to preserve this issue because he "accepted the penalty phase instructions as given without objection." Near the close of the charge conference, Defense Counsel said the following:

> MR. KORAN: Judge, for the record, I did want to ask your ruling on our list of nonstatutory mitigators, if I haven't already, I would ask that that be included in the section on mitigating circumstances, for the record, even though I know what you're going to do.
>
> THE COURT: It would so reflect. Let the record reflect that the Court has allowed them to argue each of those mitigators to the jury, but I will not include those in the instructions.

(9 R 1199)

Zak has preserved this issue for appeal.

CONCLUSION

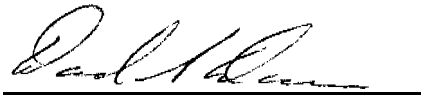
Based on the arguments presented here, and in Zakrezewski's Initial Brief, the Appellant respectfully asks this honorable Court to reverse the trial court's sentence of death and remand either for a new sentencing hearing or for imposition of life sentences.

CERTIFICATE OF SERVICE

1 HEREBY CERTIFY that a copy of the foregoing has been furnished to James W. Rogers, Assistant Attorney General, by delivery to The Capitol, Plaza Level, Tallahassee, FL; and a copy has been mailed to Mr. Edward J. Zakrezewski, DC #554000, Florida State Prison, Post Office Box 747, Starke, FL 32091, on this date, July 16, 1997.

Respectfully submitted,

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT



DAVID A, DAVIS
Assistant Public Defender
Fla. Bar No. 27 1543
Leon County Courthouse
Suite 40 1
301 South Monroe Street
Tallahassee, FL 32301
(904) 488-2458

ATTORNEY FOR APPELLANT