IN THE SUPREME COURT OF FLORIDA

EDWARD J. ZAKRZEWSKI,

Appellant,

vs. **Case No. SC 02-1734**

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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PRELIMINARY STATEMENT

Appellant, Edward J. Zakrzewski, appeals from the denial of his Rule 3.850 postconviction relief motion by the Circuit Court of the First Judicial Circuit, Okaloosa County, Florida, following an evidentiary hearing. References to appellant will be to "Zakrzewski" or "appellant," and references to appellee will be to "the State" or "appellee." The record on appeal consists of four volumes. Therefore, the reference "PCR II-320" refers to Volume II, page 320 of the postconviction record. In addition, based on the nature of appellant's claims for relief, Appellee relies upon the direct appeal record, which consisted of ten volumes. The State therefore respectfully requests that the Court take judicial notice of its file in appellant's direct appeal, cause number 88367. The reference "DA IX-1020" refers to Volume IX, page 1020 of the direct appeal record.

STATEMENT OF THE CASE AND OF THE FACTS

Original Trial Proceedings

Zakrzewski was charged by indictment on November 10, 1994, with the first-degree murders of his wife Sylvia, 8-year-old son Edward, and 5-year-old daughter Anna (DA I-15-16A), occurring on June 9, 1994. Following his arrest and return to the jurisdiction, having fled to Hawaii after the murders, Zakrzewski pled as charged on March 19, 1996 (DA II-241-242; DA III-442-446)[1]. The case then proceeded to the penalty phase (DA IV-X; see DA II-310).

As found by this Court,

> [t]he evidence presented during the penalty phase established the following facts. Zakrzewski and his wife had been experiencing marital problems for some time prior to the murders. Zakrzewski twice told a neighbor that he would kill his family rather than let them go through a divorce. On June 9, 1994, the morning of the murders, Edward called Zakrzewski at work and stated that Sylvia wanted a divorce. During his lunch break, Zakrzewski purchased a machete. He returned to work and completed his daily routine. That evening, Zakrzewski arrived home before his wife and children. He hid the machete in the bathroom.
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> After his family arrived home, Zakrzewski approached Sylvia, who was sitting alone in the living room. He hit her at least twice over the

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[1]Zakrzewski signed the "Written Plea" on March 15, 1996, which was filed in the circuit court on March 19, 1996 (DA II-241-242). Zakrzewski's guilty pleas were made on the record in open court on March 19, 1996 (DA III-427, 442-446), notwithstanding appellant's assertion that his guilty pleas were accepted at a March 25, 1996 hearing. Compare Initial Brief of Appellant (hereinafter "App.Br."), at 2.

head with a crowbar. The testimony established that Sylvia may have been rendered unconscious as a result of these blows, although not dead. Zakrzewski then dragged Sylvia into the bedroom, where he hit her again and strangled her with rope.

Zakrzewski then called Edward into the bathroom to come brush his teeth. As Edward entered the room, Zakrzewski struck the boy with the machete. Edward realized what his father was doing and tried to block the blow with his arm, causing a wound to his wrist. Further blows caused severe head, neck, and back injuries, and resulted in death.

Zakrzewski then called Anna into the bathroom to brush her teeth. Zakrzewski testified that he hit the girl with the machete as soon as she entered the bathroom. The State's expert testified that the blood spatters from Anna show that the girl was kneeling over the bathtub when she was struck by the machete. Cuts were found on Anna's right hand and elbow, consistent with defensive wounds. The blows from the machete resulted in Anna's death. The evidence was in conflict as to whether Anna was aware of her impending death.

Finally, Zakrzewski dragged his wife from the bedroom to the bathroom. He still was not sure if she was dead, so he hit her with the machete. Sylvia died from blunt force injuries as well as sharp force injuries.

Following the murders, Zakrzewski drove to Orlando and boarded a plane bound for Hawaii. While in Hawaii, Zakrzewski changed his name and lived with a family who ran a religious commune. After he had been there four months, the family happened to watch the television show "Unsolved Mysteries," which aired Zakrzewski's picture. Zakrzewski turned himself in to the local police the next day.

During the penalty phase, the State presented three aggravating factors: (1) the defendant was previously convicted of other capital offenses (the contemporaneous murders), (2) the murders were committed in a cold, calculated, and premeditated manner without pretense of legal or moral justification (CCP), and (3) the murders were

committed in an especially heinous, atrocious, or cruel manner (HAC). Zakrzewski presented two statutory mitigators: (1) no significant prior criminal history and (2) the murders were committed while the defendant was under the influence of extreme mental or emotional disturbance. Zakrzewski also presented twenty-four nonstatutory mitigators.[1]

The jury recommended the death penalty for the murders of Sylvia and Edward, both by a vote of seven to five. The jury recommended life imprisonment for the murder of Anna.

As to each of the murders, the trial court found that all three aggravating circumstances were proven beyond a reasonable doubt. The

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[1] Zakrzewski presented 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 severe 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 on ritalin; (16) the defendant has a long term adjustment disorder; (17) the defendant was suffering from a major depressive episode; (18) the defendant has 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; and (24) the defendant is

not a psychopath.

> trial court gave significant weight to both of Zakrzewski's statutory mitigators. The trial court also considered and weighed each of Zakrzewski's nonstatutory mitigators.[2] The trial court concluded that the aggravating circumstances outweighed the mitigating circumstances for all three of the murders. The trial court followed the jury's recommendation of death for the murders of Sylvia and Edward. The trial court overrode the jury's recommendation of life for the murder of Anna and imposed death sentences for all three murders.
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> [2] The trial court gave substantial weight to factors 6 and 7; significant weight to factors 3, 4, and 5; little weight to factors 1, 2, 8, 9, 10, 11, 13, and 14; and slight weight to factor 19. The remaining factors were given no weight.

Zakrzewski v. State, 717 So.2d 488, 490-491 (Fla. 1998), cert. denied, 525 U.S. 1126 (1999); see also DA II-310-320 (Sentencing Order); DA X-1274-1275 (jury recommendation).

Direct Appeal

Zakrzewski filed his notice of appeal on June 26, 1996 (DA II-333), and subsequently raised the following nine points on direct appeal:

> (1) the trial court erred by finding HAC; (2) the trial court erred by finding CCP; (3) the death sentence is not proportionately warranted in this case; (4) the trial court erred in overriding the jury's recommendation of life for Anna; (5) the trial court allowed prejudicial photographs of the victims to be admitted into evidence; (6) the trial court permitted State's mental health expert to testify about Nietzsche and his views on

> Christianity; (7) the trial court permitted the State's mental health expert to testify, when the testimony did not rebut the testimony of Zakrzewski's mental health expert; (8) the trial court failed to instruct the jury that Zakrzewski's ability to understand his conduct was substantially impaired; and (9) the trial court failed to instruct the jury on each of Zakrzewski's nonstatutory mitigating factors.

See Zakrzewski, 717 So.2d at 492.

This Court affirmed appellant's sentences on June 11, 1998. Zakrzewski, 717 So.2d at 495. Rehearing was denied on September 9, 1998, and the United States Supreme Court denied Zakrzewski's petition for writ of certiorari on January 25, 1999. Zakrzewski v. Florida, 525 U.S. 1126 (1999).

Rule 3.850 Proceedings

On January 24, 2000, Zakrzewski, through counsel, filed his "Defendant's Sworn Motion For Post-Conviction Relief" (PCR I-3), and "Defendant's Memorandum Of Law In Support Of Sworn Motion For Post-Conviction Relief." (PCR I-7). Appellant thereafter filed his "Complete, Amended Postconviction Motion To Vacate And Set Aside The Defendant's Guilty Pleas, Judgments And Death Sentences" on June 28, 2001 (PCR II-192). Therein, Zakrzewski raised the following issues: "Ineffectiveness Based Upon the Violation of the Defendant's Fourth Amendment Right to be Free From Unreasonable Searches and Seizures" (PCR II-

203-219); "The Defendant's Guilty Pleas Were Not Constitutionally Voluntary And Must Be Set Aside" (PCR II-219-223); " "The Right to a Fair Penalty Phase Jury Trial by a Panel of Impartial, Indifferent Jurors (The Venue Issue)" (PCR II-223-237); "The Prosecutor's Improper and Prejudicial Closing Argument and The Failure of Defense Counsel to Protect Their Client" (PCR II-238-247); and the cumulative effective of trial counsel's "errors and omissions." (PCR II-247). Upon issuance of the "Order To Show Cause" by the circuit court (PCR II-252), the State filed its "Response Opposing 'Complete, Amended Postconviction Motion To Vacate And Set Aside The Defendant's Guilty Pleas, Judgments And Death Sentences'" on November 27, 2001 (PCR II-253). On February 14, 2002, appellant filed a motion seeking judicial notice of his claim pursuant to Apprendi v. New Jersey, 530 U.S. 466 (2000), not previously raised, or, alternatively, to amend the amended postconviction motion to include the Apprendi claim (PCR II-293-299).

Following a Huff[2] hearing on March 14, 2002, the circuit court held an evidentiary hearing on May 23, 2002 upon claims one, two, and four raised by Zakrzewski's Rule 3.850 motion (PCR II-384, 386).[3] Appellant's third claim for relief,

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[2]Huff v. State, 622 So.2d 982, 983 (Fla. 1993).

[3]Both the Transcript Of Record Master Index and the Index for Volume III inaccurately reflect that page 384 of the record is located at the beginning of Volume III.

the venue issue, was withdrawn during the Huff hearing (see PCR III-386).

At the evidentiary hearing, evidence was adduced upon appellant's two claims of ineffective assistance of counsel and regarding the voluntariness of his guilty pleas:

1. Counsels' decision not to object to certain closing arguments

Upon his claim that trial counsel rendered ineffective assistance of counsel for failing to object to various statements made by the prosecutor in his penalty phase closing argument, Zakrzewski testified that he felt that counsel should have objected to comments about Zakrzewski's religious beliefs, and that he did not authorize counsel to not object to arguments referring to appellant's children as "babies" and about appellant going to "Disneyland"[4] (PCR III-401, 404, respectively).

Lead defense counsel, Chief Assistant Public Defender Issac Bruce Koran, testified in general that if he did not object to a closing argument, it was a matter of trial tactics or that he did not feel that it was objectionable (PCR III-428, 449). More specifically, Koran addressed each of the arguments that appellant contended an objection should have been made: (1) reference to the children as "babies" was not an appropriate objection, as it was not unusual vernacular in the area to refer to children

[4]While postconviction relief counsel questioned appellant about trial counsel's reference to "Disneyland," the prosecutor's argument at trial was actually to the fact that appellant traveled to Orlando after committing the murders and makes reference to "Disney World." (DA X-1224).

under the age of ten as "babies," and even if objectionable, counsel did not want to appear "obstreperous or argumentative" in front of the jury (PCR III-446); (2) defense counsel did not know that it would have been worthwhile to have objected to the prosecutor's reference to appellant as a "mass murderer" and believed that the state does have some latitude in the language it can use during closing argument (PCR III-447); (3) defense counsel did object to the prosecutor's argument asking the jury to imagine the pain the crow bar would have caused in killing appellant's wife (PCR III-447-448); (4) reference to "Disney World" did not warrant an objection as defense counsel "felt like it didn't really score with the jury, that it was - - to me was a little bit over the top, I didn't really think you were helping yourself with the jury and I didn't think it was worth objecting to." (PCR III-450-451); and (5) defense counsel did not object to remarks concerning appellant's religious beliefs because the prosecutor "had evidence of writings he [Zakrzewski] had made subsequent to being brought back here to this area and they seemed relevant to us that you'd be able to argue that." (PCR III-456).

Assistant Public Defender Elton William Killiam, co-counsel for the defense, also testified regarding the decision of the defense not to object to certain closing arguments by the prosecutor. Attorney Killiam testified that he did not hear anything during the argument for which he believed it necessary to make an objection (PCR III-

464), and stated that he "thought it [the argument] was a fair comment on the evidence." (PCR III-465). Killiam further testified that

> [m]y strategy is normally to kind of sit back and more or less let the prosecutor hang himself if he's becoming repetitive or obnoxious. If I see the jury reacting favorably to arguments or if I feel like my objection would not be sustained and it would only turn off the jury because I feel like these cases have to be won on the trial level and we're dealing with people and so I tend not to object as much as some others that I practice with simply because I feel like in dealing with juries sometimes it's not good practice to object unless it's a really strong objection.

(PCR III-465).

2. Counsels' decision not to seek suppression of the evidence

Pertaining to appellant's claim that trial counsel rendered ineffective assistance upon failing to file a motion to suppress evidence seized from the residence, Zakrzewski testified that he did not authorize his attorneys not to challenge admission of the evidence (PCR III-404-405).

Co-counsel Koran testified on the issue that in a serious homicide case that he certainly would look very hard at attempting to suppress evidence that the state intended to admit (PCR III-429). Concerning Koran's decision not to seek suppression in Zakrzewski's case, the following colloquy occurred:

> Q [by the prosecutor] Now, concerning the allegation that you were ineffective for failing to file a motion to suppress. Would you agree

that based on the facts known to you at the time, not only the facts known from the discovery, from law enforcement, but from the statements made to you by your client that there were numerous theories under which the motion to suppress would be denied?

A [by Mr. Koran] I felt like -- that's what I felt. I just felt like a motion to suppress was probably, was not *probably, I felt it was certainly a futile exercise*. I could have filed a motion and the record is clear, I didn't, but *it just didn't feel like it had any possibility of being granted based on -- based on the discovery*. I didn't want to say that I had not made a decision on that until after we had taken discovery depositions and talked to the witnesses to see what they had to say. *After they testified, I just felt like there was simply zero chance in my opinion that the court would grant a motion to suppress and if the court didn't then an appeals court would see it differently*.

Q *Did you feel like it was likely that the court would find the trial court would find that there were exigent circumstances at the time of the entry by Deputy Baczek*?

A *I felt like it was certain that the court would*.

Q *Did you also feel that it was likely the court would find that Mr. Zakrzewski had abandoned that home*?

A *I felt like the court would come to that conclusion as well*.

Q *Did Mr. Zakrzewski tell you as he told us today in his earlier testimony that he had, in fact, no plans to return and that he had abandoned the home*?

A *Yes*.

Q *Did you also feel that it was inevitable that the bodies and the evidence within the home would be discovered*?

A *Yes*.

* * * * *

(PCR III-443-444) (emphasis added).

Co-counsel Killiam testified that he and Koran discussed the matter of suppression and Killiam "was convinced after talking to Mr. Koran that that was not going to be a fruitful avenue to spend our energy." (PCR III-462-463).

The State presented the testimony of Harold Edward Mason, a deputy with the Okaloosa Sheriff's Department at the time of the hearing but First Sergeant for the Air Warfare Center and Senior Master Sergeant in the Air Force on June 13, 1994, when the victims were found. Deputy Mason testified at the postconviction evidentiary hearing that appellant was one of Mason's troops and that appellant's supervisor Mr. Holley called at 11:30 a.m. or noon on June 13, 1994 to report that appellant was not at his class as scheduled (PCR III-482, 483). Because it was very unlike Zakrzewski to miss a class, Deputy Mason thereupon contacted the hospitals at Eglin and Fort Walton to inquire as to whether Zakrzewski had been involved in an accident (PCR III-483). Mason called both the sheriff and police departments but again was not able to learn anything regarding Zakrzewski's whereabouts (PCR III-483). Mason then went with another supervisor, Tech Sergeant Vicki Schmidt, to Zakrzewski's house (PCR III-483). At the house, there was no response to knocking on the door, and Mason observed that the air conditioner was on, found a broken window in the back of the

house with the screen replaced, and there was a great deal of mail in the mailbox (PCR III-484-485). Based upon that information, Mason recontacted the sheriff's department and requested that they come and check Zakrzewski's house (PCR III-485). Mason provided all of the above information to Deputy Baczek when he arrived at the house (PCR III-486).

The deposition of Deputy Robert Baczek, taken on May 1, 1995 on behalf of appellant, was admitted during the postconviction evidentiary hearing (PCR III-475-481; see PCR II-359-383).[5] Deputy Baczek had been a road deputy for approximately a year and a half in June, 1994 when he was dispatched to the Zakrzewski residence (PCR II-365-366). The call went out as a "welfare check," which is a check "on the health and well being of a person residing at that address." (PCR II-366). At the scene Deputy Baczek was contacted by Senior Master Sergeant Mason and Sergeant Schmit,

> saying that they were concerned that their sergeant that is employed at Eglin Air Force Base had not shown up for work that day, and they were concerned that something might have happened to him because this was unlike anything that they're used to with him. He was very punctual and aggressive with his military duties.

(PCR II-366). After being advised by Mason and Schmit as to their observations, Deputy Baczek inspected the outside of the residence (PCR II-367). He explained his

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[5]The deposition is bound separately from Volume II of the record, and is located within the Transcript Of Record, Exhibit Index.

decision to enter the house as follows:

> A. Yes, I was calling inside through the broken window. At that time I got no response. Based upon the evidence that I saw, the broken window and the screen being up, glass being inside and out and the screen being back up, *I felt that that was kind of curious and out of the ordinary* that somebody would break a window and put a screen back. *I feared for the welfare of whomever may have been in the house at that time, thinking that there may have been a burglary, the family may have been on vacation or something like that*. At that time I notified our dispatcher that based upon this I was going to enter the house through the broken window *to check on the welfare and see if there had been any kind of burglary inside*.
>
> * * * * *

(PCR II-368) (emphasis added). In addition, upon making his initial entry into the house, additional facts put Deputy Baczek on notice that something was not right (PCR II-369-370).

Finally, the parties stipulated that "[a] continuing investigation would have happened and eventually an entry would have been made." (PCR III-479). It was further stipulated that all evidence was seized pursuant to a search warrant, and that the victims' bodies were discovered upon the earlier entry (PCR III-489).

3. Voluntariness of appellant's guilty pleas

Although pled that counsel told him "he had no choice but to plead guilty since the state could introduce the evidence seized as a result of the illegal search of his

residence and, thereby, easily prove his guilt" (PCR II-219), Zakrzewski did *not* testify to those facts at the evidentiary hearing. Rather, appellant testified that he pled guilty in order to prevent the photographs of the murder scene from being shown to the jury during the penalty phase of trial (PCR III-395). According to appellant, "they [his attorneys] promised me that if I pled guilty and went to the penalty phase that they would stop -- suppress the photographs." (PCR III-395, 396). Appellant further testified that "Well, Mr. Killiam, Mr. Koran told me that if I went straight to penalty phase they would suppress the pictures. The pictures would not be shown. That was my big concern and I agreed to it." (PCR III-397). During cross-examination, Zakrzewski testified on the issue that counsel had told him they would get the pictures suppressed by filing a motion and promised that the judge would grant the motion (PCR III-412). Appellant did not remember whether his attorneys told him whether it was up to the judge or the lawyers as to who would decide if the pictures would be admitted into evidence (PCR III-425).

Co-counsel Koran testified at great length regarding Zakrzewski's contention that defense counsel promised that the photographs would be excluded if appellant pled guilty:

> Q [by postconviction counsel, Mr. Harrison] Okay. Let me ask you this. Mr. Zakrzewski claims that he was assured by you that those photographs would never be seen by the jury. Now, is he accurate

at all?

A [by Mr. Koran] No, sir, not as to that, that's not correct.

Q Okay. Is there any possibility that he may have misunderstood you in that regard?

A When we talk to a client -- I've been doing this -- I've been an attorney since 1972 and I do my very best to use the English language in such a way that it does not confuse my client and that it communicates in words that a client can understand based on their level of education and intelligence what we're trying to say. *I can tell you this much, that I believed based on the conversation I had with Mr. Zakrzewski and, of course, we had many conversations during the period of time we represented him that it was my belief that he understood exactly the situation and the situation was that we would try to limit the photographs. We told him that evidence would be presented in the penalty phase and we would try to limit those -- that evidence as best we could, but to say that we communicated to Mr. Zakrzewski or intimated or in any other way said anything that I felt could have given him the impression that the photographs would never come in, I can tell you categorically that's not correct.*

Q Would you agree at least that he expressed to you prior to the time that he signed the plea agreement that he was very concerned about those photographs?

A Yes, I would agree.

Q What did he tell you about that?

A That he was concerned that this -- that these photographs would come in and he felt that it was because of the nature of the photographs he felt that it was -- he just hated to see photographs of his children published in such a way or promulgated in such a way that people would see them and we agreed that it would be in everybody's best interest maybe not for the same reason that he felt, but I certainly felt

it would be in his best interest that those photographs not be promulgated and *so we indicated we would do everything we could to try to keep that from happening, but we never told him that it wouldn't happen. We simply said we would file a motion and see what the judge would do.*

* * * * *

Q [by Assistant State Attorney, Mr. Elmore] Okay. Now, concerning whether you would have -- and I realize you categorically deny that any statement was made to Mr. Zakrzewski that might have led him to believe that you were promising him exclusion of all photographs of his wife and children -- concerning that, do you recall specifically discussing that issue with him, the motion to exclude the photographs?

A [by Mr. Koran] I can't recall my actual conversations with Mr. Zakrzewski. I can recall his concern over the photographs. I remember his talking to me about that and I know we filed the motion, but I don't recall any specific conversations. I can't give any more detail than that really.

Q I gather that he was -- he would have been pained for other persons to see what he had done to his wife and children?

A I don't think that was the way he put it to us. I think he just felt so bad that they would be displayed in such a way. That -- to me that was as I recall -- that was certainly part of it.

Q Now, you've tried numerous homicides prior to Mr. Zakrzewski?

A Yes, sir.

Q Have you ever been successful in having a court throw out all pictures of homicide victims?

A No.

Q *So you wouldn't have been promising him on past experience?*

A *No, sir.*

THE COURT: Mr. Koran, did you ever tell Mr. Zakrzewski or did you ever assure Mr. Zakrzewski in any manner whatsoever that if he would plead guilty that you would guarantee that the jury would not see the photographs of the victims in this case?

MR. KORAN: No, Judge Barron, I never did.

THE COURT: Did you ever entice him or -- do you recall any conversations with Mr. Zakrzewski in which you tried to entice him to plead guilty in exchange for telling him anything about the photographs?

MR. KORAN: No, except -- no, the only -- the only thing I recall is that in the context of his trying to understand what would happen in a penalty phase, we had a conversation about what evidence would be presented and there would be less evidence presented than in a guilt phase, it would not be as graphic, but *it was never to my recollection and I'm certain about this -- it was never intimated to Mr. Zakrzewski that he would -- that this stuff would be excluded*.

(PCR III-432-434, 440-442) (emphasis added).

Co-counsel Killiam also testified that no such promise was made to Zakrzewski to induce his guilty pleas:

Q [by Mr. Elmore] Okay. A decision was made at some point by he and by your office that he would enter a plea of guilty in these cases, correct?

A [by Mr. Killiam] Correct.

Q Did Mr. Zakrzewski personally make and agree to make that decision to enter a plea of guilty?

A Yes, he did.

Q Did you make any kind of assertion or promise to him in order to influence him to make that decision concerning the admissibility of any evidence in the penalty phase hearing of the case?

A I recall that we told him we would try to minimize the photographic evidence, the physical evidence dealing with the crime scene.

Q Did you assure him that no photographs of his family as he had left them in the home beaten and blooded with a machete would be shown to the jury?

A No.

Q Did you say anything to him that he could mistake for such a promise?

A No.

Q Was it clear -- made clear to him that it would be up to the judge what photographs the jury saw?

A Yes.

* * * * *

Q [by Mr. Elmore] Was there ever any time that you stated to Mr. Zakrzewski I can tell you those photographs aren't coming in?

A [by Mr. Killiam] No.

Q I can promise you those photographs aren't coming in?

A No.

Q Did you ever tell him if you'd plead guilty and save me the trouble of defending you in the guilt phase I'll keep those photographs out?

A No, I didn't.

Q Did he ever obtain from you an affirmative promise? Did he say I'll only plead guilty if you promise me those photographs aren't coming in?

A No . . . .

* * * * *

(PCR III-460-461, 467-468) (emphasis added).

Defense co-counsel Koran further testified concerning appellant's motivation for pleading guilty, based upon the overwhelming evidence of guilt and the defense tactical decision to not antagonize the jury in order to try to save appellant's life during the penalty phase:

> Q [by Mr. Elmore] What was the main motivating factor in the decision, not only your decision to advise your client, but also your client, Mr. Zakrzewski's, decision to enter a plea of guilty as related to the guilt phase issues in this case?
>
> A [by Mr. Koran] *Well, the evidence was -- was very, very strong. We talked about the case and talked about the issues and we just saw nothing that could be gained other than losing any sympathy that we might have with the jury by having a penalty -- by having a guilt phase and alleging to the jury it was not guilty. It seemed to me to be as they say counter productive and it would have hurt us much*

more I felt.

Q *Was that tactical theory discussed with Mr. Zakrzewski before he entered his plea?*

A *Oh, of course.*

Q Was he made fully aware that he was entitled to have a guilt phase defense and jury trial on whether he was guilty of the murders of his wife and children?

A We talked about it, Mr. Elmore, on a number of occasions. I believe we talked about it early on and we always made sure he understood what his rights were and what his options were. I've learned over the years that that's something you simply have to do and so he was always told what his choices were.

Q What were the -- if you recall what theories of defense was discussed with him concerning this case? You know, what defenses were discussed with him that could have been potentially raised in a guilt phase?

A Well, we -- I can't say it was really discussed in that type of context. We basically talked about it in terms of what the evidence was and what the state could present and what we had as choices. *The fact that he wasn't denying it certainly put us in a position where we were very limited in what we could do. The physical evidence was such that it was extremely incriminating. So in terms of presenting to him a viable option for an actual defense, I can't say -- I can't recall that we ever really talked about it in that context except to make sure he understood that he was certainly entitled to a trial on the case and if he wanted to contest his guilt, he could.*

Q Explain what you mean by the fact that because he was admitting to you and your staff and Mr. Killiam that he committed the offenses. Explain what you mean by the fact you were limited in what you could do from a defense standpoint.

A Well, of course, as you know and I think unlike what the public perceives, the fact that a client admits he committed an offense, we can't go into trial and say, okay, we're going to say we didn't do it and we're going to go ahead and plead you not guilty and put you on the stand and testify, I can't put a witness on the stand when I know he's going to perjure himself. Obviously, he could stay silent and not testify at all and not put himself in that position and we could put the state to the test of trying to make their burden of proof, but because of the physical evidence we were very limited in that so without him really getting on the stand and saying I didn't do it, especially when he was telling us he did, we didn't have very much -- very many options.

Q In other words in the guilt phase that left you with the option of proceeding to trial and trying a case on cross examination and attacking the state's evidence in the case?

A Go after evidence, yeah.

Q Hoping for reasonable doubt, perhaps suggesting that there was evidence that showed another person could have committed these crimes?

A That's correct.

Q The difficulty with that, of course, was you had a mental health defense to present in the penalty phase, correct?

A Yes, sir.

Q And the mental health professions that had seen him, Dr. Barry Crown and Dr. James Larson -- he had admitted to them that he committed these acts, correct?

A Yes.

Q So if you went to a guilt phase and argued to the jury that he did not commit the offense, that someone else likely committed the

offense upon conviction, if that was the outcome, then the jury was going to hear that that was, in fact, untrue. That he had admitted committing these offenses long before the trial, correct?

A That's correct.

Q And that was the -- that's basically the issue that you were presenting earlier, the tactical decision that you don't want to anger this jury when the evidence is so strong of guilt. You want to save this man's life.

A And that's why we had discussed it early on as a matter of fact. So this wasn't -- the fact we did this wasn't something that just sort of happened out of the blue.

* * * * *

MR. ELMORE (Cont'g): Mr. Koran, concerning Mr. Zakrzewski's attitude towards entry of the plea of guilty how would you describe that? Was he reluctant to plead guilty?

A No.

Q Was he very agreeable with your tactics and strategy to plead guilty in an attempt to save his life in a penalty phase hearing?

A He was -- we felt we had a good relationship. He was a cooperative, intelligent client who -- and we kept him abreast of what was going on during the course of the proceedings. We -- as I said, we had discussed early on a possibility and then we finalized it when we went ahead and entered a written plea. He had questions and they were questions that you would think would be appropriate for somebody in this situation, but was he difficult? Was he obstreperous? Was he slow to grasp the situation? No, he wasn't. If -- the question was he reluctant to enter the plea -- no, not in that sense at all. He understood -- it was our belief that he understood this was his best option.

* * * * *

(PCR III-436-440, 442-443) (emphasis added).

Co-counsel Killiam also testified regarding Zakrzewski's motivation for pleading guilty:

> A [by Mr. Killiam] *No, I -- the photographs weren't so much the motivation for the plea. The plea was to establish some mitigation by his cooperation and the fact that that's what he wanted to do. I mean he was a military man and believed in accountability. I knew that there were people who believe that if you're guilty of something you got to more or less fess up to it and we were of the opinion that that would be the best tactic to take in terms of trying to save his life which was the ultimate goal that I had as far as my part of the case.*
>
> Q [by Mr. Elmore] *Was that fully discussed with Mr. Zakrzewski, the strategy of him entering a plea of guilty to guilt or innocence?*
>
> A *Yes.*
>
> Q Okay. Was there any time when he was reluctant to do so?
>
> A No, I don't remember any -- any objections from him about the idea of entering a plea. In fact, I believe from the get go he was of the opinion that he ought to come in and fess up to what he's done and let the chips fall.

* * * * *

(PCR III-467-468) (emphasis added).

Following the evidentiary hearing, the parties each filed post-hearing memorandum (PCR III-494-526 (State's "Post 3.851 Evidentiary Hearing

Memorandum"); PCR III-527-575 (Zakrzewski's "Written Final Argument In Support Of The Amended Post Conviction Motion To Vacate And Set Aside The Defendant's Guilty Pleas, Judgments, And Death Sentences")). The circuit court denied appellant's Rule 3.850 amended motion on June 17, 2002 (PCR III-576-583). Zakrzewski filed his notice of appeal on July 1, 2002 (PCR IV-580). An "Amended Notice Of Appeal" was filed on July 8, 2002 (PCR IV-592).

SUMMARY OF THE ARGUMENT

I.

Zakrzewski contends that trial counsels' failure to object to various closing arguments during the penalty phase -- statements that referred to appellant's children as "babies," referred to appellant a "mass murderer," allegedly made an improper "golden rule" argument in reference to the murder of Zakrzewski's wife, and allegedly demeaned and demonized appellant -- constituted ineffective assistance of trial counsel. First, having failed to object to these closing arguments at trial, Zakrzewski is now seeking to avoid his procedural defaults by couching the issues as claims of ineffective assistance of counsel. The claims should be denied accordingly. Secondly, the motion court properly rejected Zakrzewski's claim for relief where trial counsel testified that they did not object as a matter of trial strategy. Appellant's disagreement with counsels' trial strategy does not establish that counsel performed ineffectively. Third, the arguments were not improper, and counsel will not be held to have provided ineffective assistance for failing to make nonmeritorious objections. And finally, even if objectionable, Zakrzewski failed to establish Strickland prejudice thereby warranting relief.

II.

Zakrzewski contends that trial counsel rendered ineffective assistance upon their failure to seek suppression of evidence seized from appellant's house. First, having failed to raise a Fourth Amendment challenge to the admission of evidence at trial, Zakrzewski is attempting to circumvent that procedural default by couching the claim in terms of ineffective assistance of counsel. The claim should be denied accordingly. Secondly, Zakrzewski fails to acknowledge that his valid guilty pleas waive any alleged constitutional error occurring prior to entry of the pleas. Third, to the extent the claim is reviewable, Zakrewski failed to establish that he had a reasonable expectation of privacy in the house, as appellant admitted that he had abandoned same. Fourth, even if Zakrzewski did possess a Fourth Amendment interest in the house, the initial entry was made pursuant to exigent circumstances and thus a warrant was not required. Finally, the bodies of Zakrzewski's wife and children would inevitably have been discovered, so that the seizure was constitutional. Here, based upon a thorough review of the facts surrounding the discovery of the bodies, trial counsel believed that a motion to suppress would have been futile.

III.

Zakrzewski contends that his guilty pleas were involuntarily induced, because trial counsel failed to challenge the admissibility of evidence seized from appellant's house, misadvised Zakrzewski in relation to a motion to suppress the evidence, and promised appellant that the crime scene photographs would not be admitted during the penalty phase of trial if he pled guilty. First, because the evidence seized from appellant's house was admissible, as discussed under Issue II, that portion of Zakrzewski's claim is without merit and should be denied. Second, regarding the alleged promise by trial counsel, the motion court credited trial counsels' testimony on the issue and Zakrzewski has provided no basis for this Court to ignore those credibility determinations. Counsel emphatically denied making any such promise, explicitly or implicitly, that could have induced Zakrzewski's guilty pleas. Further, counsel testified that appellant pled guilty based upon the strength of the State's case and to appear more sympathetic to the jury.

IV.

Before the motion court Zakrzewski contended that his sentences must be vacated because the Florida death penalty statute is unconstitutional under Ring v. Arizona, 536 U.S. 584 (2002) and Apprendi v. New Jersey, 530 U.S. 466 (2000). For the first time on appeal, Zakrzewski now contends that Florida's death penalty statute

is unconstitutional not only because the trial judge, rather than the jury, imposes the sentence, but also for a variety of reasons. To the extent that appellant failed to present those arguments to the Rule 3.850 court, they are not properly raised on appeal. In regard to the claim that was raised below, the motion court properly rejected appellant's claim as procedurally barred, as Zakrzewski failed to raise this Sixth Amendment claim at trial or on direct appeal. And even if appellant's claim is reviewable, relief is precluded by Bottoson v. Moore, 833 So.2d 693 (Fla.) (per curiam), cert. denied, 123 S.Ct. 662 (2002) and King v. Moore, 831 So.2d 143 (Fla.), cert. denied, 123 S.Ct. 657 (2002).

ARGUMENTS

I.

THE POSTCONVICTION MOTION COURT PROPERLY HELD THAT TRIAL COUNSELS' LACK OF OBJECTION TO PORTIONS OF THE PROSECUTOR'S CLOSING ARGUMENT DURING THE PENALTY PHASE OF TRIAL DID NOT CONSTITUTE INEFFECTIVE ASSISTANCE OF COUNSEL.

Zakrzewski contends that defense counsels' failure to object to various closing arguments by the prosecutor during the penalty phase of trial rose to the level of ineffective assistance of counsel.

A. Standard of Review

Following an evidentiary hearing, this Court has held that "the performance and prejudice prongs are mixed questions of law and fact subject to a de novo review standard but that the trial court's factual findings are to be given deference." Porter v. State, 788 So.2d 917, 923 (Fla.) (internal citation omitted), cert. denied, 122 S.Ct. 484 (2001); see also Stephens v. State, 748 So.2d 1028, 1033 (Fla.1999).

The standard governing appellant's claim of ineffective assistance of counsel is well-established:

> In order to prevail on a claim of ineffective assistance of counsel, however, a defendant must demonstrate that (1) counsel's performance was deficient and (2) there is a reasonable probability that the outcome

> of the proceeding would have been different. *See Strickland v. Washington*, 466 U.S. 668, 687, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). As to the first prong, the defendant must establish that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 687, 104 S.Ct. 2052; *see Cherry v. State*, 659 So.2d 1069, 1072 (Fla.1995). For the prejudice prong, the reviewing court must determine whether there is a reasonable probability that, but for the deficiency, the result of the proceeding would have been different. *See Strickland*, 466 U.S. at 695, 104 S.Ct. 2052; *see also Valle v. State*, 705 So.2d 1331, 1333 (Fla.1997). "Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable." *Strickland*, 466 U.S. at 687, 104 S.Ct. 2052.

Moore v. State, 820 So.2d 199, 207-208 (Fla. 2002); see also Lucas v. State, __ So.2d __, 28 Fla. L. Weekly S29, S30 (Fla. Jan. 9, 2003). Counsel's performance is presumed constitutionally adequate, Strickland v. Washington, 466 U.S. 668, 689 (1984), and "[r]easoned trial tactics do not amount to ineffective assistance of counsel." Gorby v. State, 819 So.2d 664, 678 (Fla. 2002).

B. Failure to object to the prosecutor's closing arguments

> The trial court denied relief upon this claim as follows:
>
> . . . Mr. Koran and Mr. Killiam both testified that they made tactical decisions not to object to statements that may have been objectionable during the State's closing argument.[10] Although Mr. Koran could not

[10]Evidentiary hearing transcript, P.43-88.

> specifically remember why he did not object to some statements made by the prosecutor in closing argument, the Court finds that both Mr. Koran's and Mr. Killiam's vast experience in criminal defense is a relevant factor for this Court to consider and finds that during the course of the penalty phase and throughout closing arguments that they utilized a defense strategy and used their judgment to make a reasoned strategic decision on whether to object or not to the prosecutor's statements during closing argument.
>
> Moreover, the Court finds that even if trial counsel did render ineffective assistance of counsel by not objecting to the closing argument of the prosecutor, no prejudice resulted to the Defendant. There is no reasonable probability that the outcome of the proceeding would have been different absent the deficient performance.

(PCR III-581-582).

First, any challenge to the prosecutor's closing argument is procedurally defaulted, Moore, 820 So.2d at 210 n.10; Evans v. State, 808 So.2d 92, 107 (Fla. 2001), cert. denied, 123 S.Ct. 416 (2002), as appellant failed to raise such a challenge on direct appeal. Compare Zakrzewski, 717 So.2d at 492. To the extent that Zakrzewski is now attempting to circumvent the procedural bar by couching this issue as a claim of ineffective assistance of counsel, the claim should be denied. Brown v. State, 755 So.2d 616, 637 n.7 (Fla. 2000); Cherry v. State, 659 So.2d 1069, 1072 (Fla. 1995).

Secondly, Zakrzewski fails to establish that trial counsel performed deficiently. As the motion court stated (PCR III-581), defense counsel testified that, as a

matter of trial tactics, they did not object to the statements during the State's closing argument that appellant contends were objectionable (See PCR III-428, 449, 465). Accordingly, no relief is warranted. Gorby, 819 So.2d at 678; Muhammad v. State, 426 533, 538 (Fla. 1982) ("Whether to object is a matter of trial tactics which are left to the discretion of the attorney so long as his performance is within the range of what is expected of reasonably competent counsel."), cert. denied, 464 U.S. 865 (1983). That postconviction motion counsel may disagree with defense counsels' tactics does not negate that trial counsel acted as a matter of strategy or establish that such tactics were not reasonable. Rose v. State, 675 So.2d 567, 571 (Fla. 1996); Cherry, 659 So.2d at 1073.

Turning to the arguments at issue, appellant failed to demonstrate that they were improper. "The proper exercise of closing argument is to review the evidence and to explicate those inferences which may reasonably be drawn from the evidence." Bertolotti v. State, 476 So.2d 130, 134 (Fla. 1985). As this Court has repeatedly held, "the rule against inflammatory and abusive argument by a state's attorney is clear, each case must be considered upon its own merits and within the circumstances pertaining when the questionable statements were made." Muehleman v. State, 503 So.2d 310, 317 (Fla.) (internal citations and quotation marks omitted), cert. denied, 484 U.S. 882 (1987). Moreover, "[w]ide latitude is permitted in arguing to a jury . . . [and] logical

inferences may be drawn, and counsel is allowed to advance all legitimate arguments." Bonifay v. State, 680 So.2d 413, 418 (Fla. 1996) (internal citation and quotation marks omitted). Closing argument may not, however, "be used to inflame the minds and passions of the jurors so that their verdict reflects an emotional response to the crime or the defendant rather than the logical analysis of the evidence in light of the applicable law." Bertolotti, 476 So.2d at 134.

Zakrzewski argues that the prosecutor's reference to his children as "babies" was "an obvious attempt to inflame the passions and emotions of the jury . . . ." Appellant's Brief, at 25. To the contrary, the prosecutor's argument was a proper characterization of the evidence. Here, at the time of the murders, Zakrzewski's children were only five and seven years old, and were killed by their father after he called them to the bathroom under the guise of helping them brush their teeth (see DA IX-1027-1028, 1050-1055). There was nothing improper in the prosecutor reminding the jury of appellant's status as the children's father as well as the tender age of the victims. Further, trial counsel testified that based upon the vernacular of the region, that it was not unusual to refer to children under the age of ten as "babies" (PCR III-446). Compare United States v. Lean, 138 F.3d 1398, 1405 (11th Cir.) (reference to "crack addicted babies" held improper where the comment had nothing to do with the evidence that had been presented), cert. denied, 525 U.S. 896 (1998).

Zakrzewski also complains based upon the prosecutor's three references to him as a "mass murderer." App.Br. at 26. Appellant's contention that the prosecutor's argument amounted to "personal invective," App.Br., at 26, improper under Urbin v. State, 714 So.2d 411 (Fla. 1998), is without merit. Here, the prosecutor did not invite the jury to disregard the law, did not tell the jury that to vote for a life sentence would be irresponsible, did not argue to the jury what the victims were thinking, did not criticize appellant's defense witnesses, and did not urge the jury to show appellant the same mercy he showed his family. Compare Urbin, 714 So.2d at 420-422.

To the contrary, in light of appellant's triple murder of his family, Zakrzewski fails to explain how the limited references demonize him rather than constitute a proper characterization of the evidence. Further, the argument was made based upon the aggravating circumstances of the multiple murders (see DA X-1225). Muehleman, 503 So.2d at 317; compare Shurn v. Delo, 177 F.3d 662, 667 (8th Cir.) (prosecutor improperly attempted to link defendant with other mass murderers during penalty phase closing argument), cert. denied, 528 U.S. 1010 (1999). Finally, the limited reference to appellant as a mass murderer -- indeed, one of the three comments actually pertained to the testimony of a defense witness (compare DA X-1223 with DA X-1225) -- does not provide a basis for counsel to have objected. See Moore, 820 So.2d at 208 (two isolated references to the defendant as "the devil" were not so

prejudicial as to warrant relief).

Appellant also contends that the prosecutor "improperly utilized a 'golden rule' argument regarding the death of Sylvia Zakrzewski . . . ." App.Br. at 27.

Reviewed in context, see Muehleman, 503 So.2d at 317, the statement at issue arose as follows:

> These crimes were especially heinous, atrocious or cruel. They were. I mean, that's where we started out in voir dire and you remember it. We had some arguments about it because they were atrocious, heinous and cruel. All you have got to do is look at the photographs and you know it. But I'll tell you why the evidence shows that each murder was.
>
> Sylvia was beat in the face with a crowbar. She was beaten in the face with this. Now they want you to believe she went down like a sack of potatoes, she was unconscious instantly, didn't feel any pain. *You pick this up and you imagine the pain it will cause*. The medical evidence does not prove that she was rendered unconscious immediately because Dr. Havard told you, "Well, it's hard to say. It could have certainly rendered her unconscious, but it might not have. She might have regained consciousness after being beaten with that crowbar and suffering the injuries she did."
>
> She definitely was still alive and she was beat again on the bed with that crowbar, spattering blood all over the bedspread. I'm not going to drag it out here for you to see it. You can look at it if you want to. Ms. Johnson already showed it to you. He had her on the bed and he beat her again with it and blood spattered out. Then, she was still alive, so he got her down on the floor because it was making too much of a mess on the bed and he took that rope and he strangled her. Then he hacked her up with the machete.
>
> That's especially heinous, atrocious or cruel. It is a crime which

> is extremely wicked or shockingly evil, a crime which is outrageously wicked and vile.
>
> * * * * *

(DA X-1230-1231) (emphasis added).

The prosecutor did not argue that the jurors place themselves in the victim's shoes, but argued the circumstances of the crime to assist the jury to understand the "heinous, atrocious, or cruel" (HAC) aggravating circumstance. Muehleman, 503 So.2d at 317; see Hooper v. State, 476 So.2d 1253, 1257 (Fla. 1985) (comments that explain conduct and are not made to inflame the jury do not violate "Golden Rule."), cert. denied, 475 U.S. 1098 (1986). Clearly, the prosecutor, through the above argument, argued that the beating of appellant's wife with the crowbar was "unnecessarily torturous to the victim." See Zakrzewski, 717 So.2d at 492.

Further, even if the statement at issue was deemed an improper golden rule argument, such arguments are not per se reversible error, Sehnal v. State, 826 So.2d 498, 499 (Fla. 4th DCA 2002), and thus counsels' failure to object would not, in itself, constitute ineffective assistance of counsel. Zakrzewski fails to provide any basis for finding that he was prejudiced by the argument, see App.Br. at 27, and the issue is therefore not reviewable. Reaves v. Crosby, ___ So.2d ___, 28 Fla. L. Weekly S32, S33 (Fla. Jan. 9, 2003) ("[C]ounsel fails to provide any argument relative to this

ground, and accordingly, we find that it is not properly before this Court.") (citing Duest v. Dugger, 555 So.2d 849, 852 (Fla. 1990)). Nor can Zakrzewski demonstrate ineffectiveness, since the remark was isolated and thus did not become a feature of the trial. Sims v. State, 602 So.2d 1253, 1257 (Fla. 1992), cert. denied, 506 U.S. 1065 (1993).

Zakrzewski next plucks eight paragraphs out of the twenty-nine pages of transcript of the prosecutor's closing argument, contending that those paragraphs, taken out of context, amounted to a "sarcastic and emotionally charged attack upon the defendant, which could only be designed to further demean him in the minds of the jurors, instead of limiting himself to commenting on the evidence. . . ." App.Br. 27-28.

To the contrary, the arguments are based upon the evidence created by Zakrzewski's actions himself, as well as in response to appellant's purported account of the circumstances surrounding the murders.[6] No comment by the prosecutor could

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[6]The statements at issue, italicized below and set forth in context, see Muehleman, 503 So.2d at 317, are as follows:

> The children's photos, his family photos, all of that is intended to mitigate. All of these photos of Hawaii, of paradise on earth, are intended to mitigate. None of that excuses what he did and how he did it.
>
> *You know, it's ironic, he left here and went to Orlando and all*

(continued...)

[6](...continued)
I can ever think of when I think of Orlando is Disney World. Those babies should have gone to Disney World; not him. Maybe they would have liked to see paradise on earth in Hawaii. Maybe they would have liked to have seen it.

He says he's sorry they didn't get to. He says he's sorry he murdered them. He's sorry he murdered Sylvia. He's sorry that he's put you through this trial. He's sorry that you've got to see those photos. He's sorry for his mother and he's sorry for everybody he's hurt.

Well, that's a nice thing to say, but saying it doesn't take away what he did, ladies and gentlemen, and it doesn't excuse it. He's got to say he's sorry. He's free now. Even though he's in a jail cell, he's free.

Have you heard anything about him suffering since he put Sylvia to rest? Not one word. Not one word. He's not suffering any more. He's free. And that's what this murder was all about.

* * * * *

. . . . He could have killed them a whole lot easier in the den if he was driven by extreme disturbance.

No, he planned. He called Edward in there and he murdered him and he continued with his cold, calculated plan. Even as he stood in the gore of what he had done, he kept going, calm, cool, cold, calculated. "Anna, come brush your teeth, baby."

What happened then, you and I don't really know because he's not telling the truth about it. We know that from the physical evidence. We know he executed her on the edge of the tub, not as she was standing in the hallway just going into the bathroom, not as she stood

(continued...)

[6](...continued)
in the bathroom, but over the edge of the tub. Right there. Right there. That's where she was killed because her blood spattered in only one place, immediately to the right of her body on the wall.

He claims that he hit her as she was standing in the doorway and that he put this wound in her head when he first hit her. I know when I nick myself shaving I bleed a lot. That would bled and bled and bled. He says, "I hit her in the head and I caught her and I took her to the tub."

Now, you know, Mr. Killam tried to suggest through the experts that maybe she flew across the bathroom from the force of the blow. No way. *But, we know her blood would have fallen in that floor, would have spattered on that door, would have spattered on that sink and that toilet and those walls just like Edward's blood did if his story about her is true.* He's got to tell that story because if he doesn't, what it means is he put his little girl right down in the tub where her brother's body was mutilated and the blood was everywhere.

* * * * *

Ladies and gentlemen, I've laid it all out for you. I can't do any more. *It's time for me to tell me if a man can kill his wife and babies like this and not face the ultimate lawful consequence for it. It's time for you each to tell me whether a crime this horrible deserves our law's ultimate penalty. I've proved to you it's the ultimate crime. I can't make it any worse than it is. I mean, there it is. It's not going to get any worse because it can't get any worse.*

Or does he deserve to go to prison only for what he did? Remember, he hasn't said he's suffering in jail like he suffered in his previous life with Sylvia. They haven't tried to show you that. Does he deserve to go to prison where he can live a life? It might not be the life we all want, that he wants even, but he can live a life there.

(continued...)

have been more damning to appellant than what Zakrzewski admitted and what the evidence established he perpetrated upon his family. See Thomas v. State, 326 So.2d 413, 415 (Fla. 1975) (quoting Spencer v. State, 133 So.2d 729, 731 (Fla. 1961)), cert. denied, 369 U.S. 880 (1962)). Moreover, not only does appellant fail to demonstrate how the statements are improper, but he makes no attempt to establish that trial counsels' decision not to object was not reasoned trial strategy.

Zakrzewski also complains that the prosecutor demonized him with "self-serving

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[6](...continued)

> *He can read his books. He can read his Nietzsche. He can see the sun and the moon and the stars. He can talk to his mother. He can love and be loved. He can write to his friends that all came here and told the truth about his life before these murders and his life after these murders. They'll write to him and he'll be living a life that he denied his babies.*
>
> *No, no, no, no. His lawyer might try to convince you that living out his life with the guilt he feels is a worse punishment. That's a common argument that we hear on the street. People say, "I'd rather he suffer forever in a jail than get a quick execution." No. If it would be a worse punishment, then we wouldn't be here. If it would be a worse punishment, he would have taken his own life if it was that bad.*
>
> *It doesn't hurt him bad enough for you to say, yeah, that's what we'll do, we'll let him suffer. It doesn't hurt like Edward hurt when he saw his own father murdering him. It doesn't hurt like Anna hurt when she was forced down into the murder of her brother, knowing she was next.*

(DA X-1224-1225, 1228-1229, 1235-1236).

spin on his [Zakrzewski's] anti-Christian religious beliefs." App.Br. at 29. According to appellant, he

> should not have been attacked by the state for criticizing some elements of Christianity. . . . The tactic was intended to convince and persuade the jury[] that Zakrzewski was the 'devil' incarnate who should be put to death, not just because he murdered his wife and children, but because he had insulted and threatened religious beliefs held sacred in the community.

App.Br. at 30-31 (internal footnote omitted). While appellant admits that the defense injected "the sincerity of the defendant's Christian beliefs" during the penalty phase, App.Br. at 31 n.6, he further asserts that "the prosecutor went far beyond that and instead, unfairly portrayed the defendant as the anti-Christ." Id.

Zakrzewski claimed as a nonstatutory mitigating circumstance that he had "embraced the Christian Faith since the offense" (DA II-258), and presented testimony of his practice of Christianity, through open prayer and attendance at church services after the murders (DA VIII-892-893, 901 (Judy Caparida); 921, 930-931 (Cora Schnackenberg); 940, 941-942 (Stanford Lani Caparida); 944, 947-948 (George Schnackenberg); 952-953 (Cappy Caparida); DA IX-1034-1035 (Zakrzewski)). The State presented evidence to the contrary, based upon Zakrzewski's philosophical beliefs expressly evinced in his writings both prior to and after he murdered his family (See State's Exhibits 14 and 15, admitted at DA IX-1078, 1091).

Accordingly, and as appellant admits, "the sincerity of [his] Christian beliefs" were injected into the penalty phase of the case.[7] Thus contrary to the prosecutor improperly injecting religion into the proceedings, the State properly called to the jury's attention the credibility of the nonstatutory mitigating circumstance. Having placed his religious practices after the murder in evidence, there was no basis for defense counsel to have objected to the State's closing argument that reminded the jury of evidence calling into question the sincerity of Zakrzewski's beliefs underlying such practices.

Because the arguments cited by Zakrzewski -- reference to the child victims as "babies," referring to appellant as a "mass murderer, the alleged "Golden Rule" argument, and challenging the weight of the embracing Christianity nonstatutory mitigator -- were not improper, objections would have been without merit. Counsel will not be held ineffective for failing to raise nonmeritorious objections. See Jones v. State, ___ So.2d ___, 28 Fla. L. Weekly S140, S144 (Fla. Feb. 13, 2003).

Third, even if the arguments at issue were somehow deemed improper, appellant

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[7]To the extent that Zakrzewski questions the defense strategy in injecting his religious beliefs into the case, App.Br. at 32-33, appellant failed to present that issue in his Rule 3.850 motion and is precluded from raising the issue for the first time on appeal. Gudinas v. State, 816 So.2d 1095, 1111 n.4 (Fla. 2002); Doyle v. State, 526 So.2d 909, 911 (Fla. 1988).

cannot establish Strickland prejudice. Instead, Zakrzewski speculates that "given the close vote, that the jury would have returned life recommendations on all three counts." App.Br. at 34. Speculation cannot establish prejudice. Maharaj v. State, 778 So.2d 944, 951 (Fla. 2000), cert. denied, 533 U.S. 935 (2001); see also Rogers v. State, 511 So.2d 526, 531 (Fla. 1987) (speculation insufficient to establish actual prejudice upon claim for relief arising from delay of state in obtaining indictment), cert. denied, 484 U.S. 1020 (1988). Further, even if the arguments had been objected to, stricken, and the jury advised to disregard the comments, the fact that Zakrzewski committed multiple murders, and their brutality -- i.e., the basis for the aggravating circumstances -- obviously remained. Zakrzewski simply has not established that there is a reasonable probability that the result of the penalty phase would have been different had counsel objected to the prosecutor's arguments at issue. Moore, 820 So.2d at 208; see Occhicone v. State, 768 So.2d 1037, 1049 (Fla. 2000).

Finally, Zakrzewski contends in the alternative that had trial counsel contemporaneously objected to the prosecutor's argument and preserved the issue for appellate review, there is a reasonable probability that appellant would have received a new trial. App.Br. at 34.

While "[t]he failure to preserve issues for appellate review can constitute ineffective assistance of counsel," Rhue v. State, 603 So.2d 613, 615 (Fla. 2nd DCA

1992) (internal citations omitted), as the discussion of Strickland prejudice establishes, supra, at 43-44, Zakrzewski could not demonstrate that "counsel had no excuse for overlooking the objections and that the outcome of the case would likely have been different had the objections been made." Rhue, 603 So.2d at 615.

Based upon the foregoing discussion, the postconviction motion court properly rejected the claim of ineffective assistance of counsel, and Issue I should be denied.

II.

THE POSTCONVICTION MOTION COURT PROPERLY HELD THAT TRIAL COUNSEL DID NOT RENDER INEFFECTIVE ASSISTANCE OF COUNSEL PRIOR TO APPELLANT ENTERING HIS GUILTY PLEAS.

Appellant goes to great length to attempt to establish a Fourth Amendment violation, App.Br. at 34-48, upon which he eventually contends trial counsel was ineffective for not raising. App.Br. at 49.

A. Standard of Review

Following an evidentiary hearing, this Court has held that "the performance and prejudice prongs are mixed questions of law and fact subject to a de novo review standard but that the trial court's factual findings are to be given deference." Porter, 788 So.2d at 923 (internal citation omitted); see also Stephens, 748 So.2d at 1033.

The standard governing appellant's claim of ineffective assistance of counsel is well-established:

> In order to prevail on a claim of ineffective assistance of counsel, however, a defendant must demonstrate that (1) counsel's performance was deficient and (2) there is a reasonable probability that the outcome of the proceeding would have been different. *See Strickland v. Washington*, 466 U.S. 668, 687, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). As to the first prong, the defendant must establish that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466

> U.S. at 687, 104 S.Ct. 2052; *see Cherry v. State*, 659 So.2d 1069, 1072 (Fla.1995). For the prejudice prong, the reviewing court must determine whether there is a reasonable probability that, but for the deficiency, the result of the proceeding would have been different. *See Strickland*, 466 U.S. at 695, 104 S.Ct. 2052; *see also Valle v. State*, 705 So.2d 1331, 1333 (Fla.1997). "Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable." *Strickland*, 466 U.S. at 687, 104 S.Ct. 2052.

Moore, 820 So.2d at 207-208; see also Lucas, 28 Fla. L. Weekly at S30. Counsel's performance is presumed constitutionally adequate, Strickland, 466 U.S. at 689, and "[r]easoned trial tactics do not amount to ineffective assistance of counsel." Gorby, 819 So.2d at 678.

B. Failure to seek suppression pursuant to the Fourth Amendment

First, Zakrzewski is attempting "to raise a claim not cognizable on the merits, by casting it in the guise of an ineffective assistance of counsel claim," and thus is "precluded from raising this claim as an attempt to go behind the plea." Dean v. State, 580 So.2d 808, 809 (Fla. 3rd DCA 1991) (citing Stano v. State, 520 So.2d 278, 279-280 (Fla.1988)). Here, appellant was advised of the constitutional rights that he would be waiving by pleading guilty, and expressly admitted in open court that he understood that by entering his plea of guilty that he was giving up his right to a jury trial on the determination of guilt to the three counts of first degree murder (DA III-443), the right

to appeal all issues relating to the guilt phase of trial (DA II-444), and that he was pleading because he was guilty (DA II-446). Moreover, as stated by co-counsel Koran, "we've consulted with Mr. Zakrzewski and family, as well as other colleagues in our office. We are making this decision with Mr. Zakrzewski's full consent and to the best of our knowledge it was the decision that we felt was most appropriate under the circumstances." (DA II-446).

Secondly,

> a guilty plea represents a break in the chain of events which has preceded it in the criminal process. *When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea.* He may only attack the voluntary and intelligent character of the guilty plea by showing that the advice he received from counsel was not within the standards set forth in McMann [v. Richardson, 397 U.S. 759, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970)].

Tollett v. Henderson, 411 U.S. 258, 267 (1973) (emphasis added). And while "[a] trial attorney's failure to investigate a factual defense or a defense relying on the suppression of evidence, which results in the entry of an ill-advised plea of guilty, has long been held to constitute a facially sufficient attack upon the conviction," Williams v. State, 717 So.2d 1066 (Fla. 2nd DCA 1998),

> the two-part *Strickland v. Washington* test applies to challenges to guilty pleas based on ineffective assistance of counsel. In the context of guilty pleas, the first half of the *Strickland v. Washington* test is nothing more

> than a restatement of the standard of attorney competence already set forth in *Tollett v. Henderson*, supra, and *McMann v. Richardson*, supra. The second, or "prejudice," requirement, on the other hand, focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process. In other words, in order to satisfy the "prejudice" requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.

Hill v. Lockhart, 474 U.S. 52, 58-59 (1985).

Accordingly, if the Court were to determine that Zakrzewski's claim is reviewable, he is not entitled to relief unless he can establish that counsel erroneously determined that there was not a basis for challenging the admission of evidence and that appellant would not have pled guilty but for counsels' error.

While Zakrzewski asserts that counsel encouraged him to plead guilty "precisely because of the existence of the illegally seized evidence," App.Br. at 49, appellant does not contend that he would not have pled guilty but for counsels' advice. Rather, Zakrzewski argues that he "certainly suffered prejudice because, but for his lawyers' ineffectiveness, the state would not have been able to convict the defendant of multiple counts of first degree murder and cause him to be sentenced accordingly." App.Br. at 49. Accordingly, Zakrzewski's allegation of prejudice is insufficient.

Alternatively, assuming without conceding that it was sufficient for appellant to contend that the State would not have convicted him, "in order to establish a claim of

ineffective assistance in connection with a nolo contendere or guilty plea, a defendant must show he in fact had a viable defense." Maples v. State, 804 So.2d 599, 600 (Fla. 5th DCA 2002). Because the search and seizure was lawful, as demonstrated below, Zakrzewski did not have a viable defense and the claim is without merit.

1. Zakrzewski did not possess a reasonable expectation of privacy in his abandoned residence

Zakrzewski assumes for purposes of his Fourth Amendment analysis that he had a reasonable expectation of privacy in the abandoned residence. App.Br. at 34-44. Zakrzewski also defends his position on the basis that the motion court did not deny his claim on a theory of abandonment. App.Br. at 44. That the lower court's decision was correct for a different, additional reason does not preclude review upon another legal basis, as "the ruling will be upheld if there is any theory or principle of law in the record which would support the ruling." Dade County School Bd. v. Radio Station WQBA, 731 So.2d 638, 644 (Fla. 1999). That is,

> the theories or reasons assigned by the lower court as its basis for the order or judgment appealed from, although sometimes helpful, are not in any way controlling on appeal and *the Appellate Court will make its own determination as to the correctness of the decision of the lower court, regardless of the reasons or theories assigned therefor*.

In re Estate of Yohn, 238 So.2d 290, 295 (Fla. 1970) (emphasis added). This principle has been applied in the context of criminal appeals, see Cordova v. State, 675

So.2d 632, 636 (Fla. 3rd DCA 1996) (applying "right for the wrong reason" rule); see also Caso v. State, 524 So.2d 422, 424 (Fla.) ("A conclusion or decision of a trial court will generally be affirmed, even when based on erroneous reasoning, if the evidence or an alternative theory supports it."), cert. denied, 488 U.S. 870 (1988), as well as upon appellate review of Rule 3.850 proceedings. See Lowery v. State, 766 So.2d 417 (Fla. 4th DCA 2000) (applying "right for a different reason" rule).

Turning to the search of Zakrzewski's residence,

> [t]he touchstone of Fourth Amendment analysis is whether a person has a 'constitutionally protected reasonable expectation of privacy.' *Katz v. United States*, 389 U.S. 347, 360, 88 S.Ct. 507, 516, 19 L.Ed.2d 576 (1967) (Harlan, J., concurring). *Katz* posits a two-part inquiry: first, has the individual manifested a subjective expectation of privacy in the object of the challenged search? Second, is society willing to recognize that expectation as reasonable? See *Smith v. Maryland,* 442 U.S. 735, 740, 99 S.Ct. 2577, 2580, 61 L.Ed.2d 220 (1979).

California v. Ciraolo, 476 U.S. 207, 211 (1986). Further,

> [t]he courts have allowed the seizure of evidence "voluntarily abandoned" where no improper or unlawful act was committed by the law enforcement officers prior to such abandonment. . . . Police do not conduct a "search" within the meaning of the Fourth Amendment when they retrieve property which a defendant has voluntarily abandoned in an area where he has no reasonable expectation of privacy, ...

State v. Williams, 751 So.2d 170, 171 (Fla. 2nd DCA 2000) (internal citations and quotation marks omitted).

When Zakrzewski does address the abandonment issue, he relies upon the fact

that he "retained a property interest at the time of the search." App.Br. at 46. Notwithstanding Zakrzewski's suggestion, "[i]t should not be assumed that the property law concept of abandonment is controlling as to the reach of the Fourth Amendment." State v. Kennon, 652 So.2d 396, 397 (Fla. 2nd DCA 1995). Rather, mere ownership of property does not, in itself, establish a legitimate expectation of privacy. Rawlings v. Kentucky, 448 U.S. 98, 105 (1980).

Thus whether Zakrzewski had a "reasonable expectation of privacy" in the house does not turn upon his legal interest in the property, State v. Daniels, 576 So.2d 819, 823 (Fla. 4th DCA 1991); United States v. Hershenow, 680 F.2d 847, 856 (1st Cir. 1982), but upon whether he abandoned the property. "The test for abandonment is whether a defendant voluntarily discarded, left behind, or otherwise relinquished his interest in the property in question so that he could no longer retain a reasonable expectation of privacy with regard to it at the time of the search." State v. Lampley, 817 So.2d 989, 991 (Fla. 4th DCA 2002) (internal citations and quotation marks omitted).

Here, the record establishes that Zakrzewski abandoned the house; he left it behind without any intention of returning (PCR III-391, 444). The fact that appellant left the residence in noticeable disrepair and with his mail piling up (PCR III-484-485), in conjunction with the disappearance of Zakrzewski, his wife, and children and

without providing any word to family, friends, or co-workers as to their plans, further evinces a lack of an expectation in privacy, as those circumstances certainly would give rise -- as they did in this case -- to a check into the well-being of Zakrzewski and his family. Accordingly, because appellant did not have a reasonable expectation of privacy in the house, counsel reasonably decided not to seek suppression of the bodies recovered therein (see PCR III-444). Compare United States v. Wyler, 502 F.Supp. 959, 967-968 (S.D. N.Y. 1980) (defendant intended to continue occupancy of Florida home where there was no evidence of a hasty departure and house was left in orderly condition). Moreover, co-counsel Koran only decided not to file a suppression motion until after he made a complete review of the facts surrounding the discovery of the bodies (PCR III-443-444).

2. Exigent circumstances authorized the initial police entry

Zakrzewski contends that exigent circumstances cannot excuse the warrantless entry into his house. App.Br. at 40-42. Even if Zakrzewski did have a reasonable expectation of privacy in the house, which the State does not concede, relief is not warranted.

"The right of police to enter and investigate an emergency, without an accompanying intent either to seize or arrest, is inherent in the very nature of their

duties as peace officers and derives from the common law." Zeigler v. State, 402 So.2d 365, 371 (Fla. 1981). The emergency doctrine, under the exigency exception to the warrant requirement, has been defined generally as follows:

> Law enforcement officers may enter private premises without either an arrest or a search warrant to preserve life or property, to render first aid and assistance, or to conduct a general inquiry into an unsolved crime, provided they have reasonable grounds to believe that there is an urgent need for such assistance and protective action, or to promptly launch a criminal investigation involving a substantial threat of imminent danger to either life, health, or property, and provided, further, that they do not enter with an accompanying intent to either arrest or search.

Brinkley v. County of Flagler, 769 So.2d 468, 471 (Fla. 5th DCA 2000) (internal citation omitted).

In denying appellant's claim of ineffective assistance for failing to file a motion to suppress, the motion court stated the following:

> Specifically, the Defendant contends that the facts as they exist did not constitute sufficient exigent circumstances to enter the home without a warrant; thus, his counsel was ineffective for failing to move to suppress the evidence seized. During the evidentiary hearing, counsel for the Defendant stipulated to the admission of Deputy Baczek's May 1, 1995 deposition into evidence. Additionally, Harold Mason, Defendant's Sergeant at the time of the murders, testified during the evidentiary hearing. Mr. Mason testified that he became concerned when the Defendant failed to report to class at Hurlburt Field and called the police when he checked the Defendant's home and noticed a broken window, mail in the mailbox, and no response to phone calls and knocks on the door. The deposition testimony of Deputy Baczek reveals that he arrived at the Defendant's home and spoke with Harold Mason. Deputy Baczek was shown the broken window and informed by Mr. Mason that the

> Defendant had not been present at work that day. The Deputy saw signs of a struggle and there was no response to knocks at the door or calls through the broken window. There were several days of mail in the mailbox, the air conditioner was running, and discussions with the neighbors did not allay the fear of foul play. Further, the Deputy testified during the deposition that he feared for the welfare of whomever was in the home. The Court finds that the search of the home was justified under the exigent circumstances exception to the warrant requirement. Thus, the Defendant has failed to establish that counsel's failure to file a motion to suppress was an error so serious that he was not functioning as the counsel guaranteed by the Sixth Amendment and the Defendant failed to establish that counsel's errors were so serious as to result in prejudice to the Defendant. Trial counsel made a reasoned informed strategic decision not to file a motion to suppress the evidence seized from the Defendant's home;[2] and, the Defendant has failed to establish either prong of the *Strickland* test pursuant to *Strickland v. Washington*, 466 U.S. 668 (1984).
>
> * * * * *
>
> [2]Evidentiary hearing transcript, P. 60-61.

(PCR III-577-579).

Based upon the information known by Deputy Baczek before he entered the house -- including that it was highly uncharacteristic of Zakrzewski to not show up at work, that there was a broken exterior window with glass on the ground and remaining in the window sill, that no one answered knocks at the door or Deputy Baczek's calls through the broken window, and there were several days of mail accumulated in the mailbox -- Deputy Baczek "feared for the welfare of whomever may have been in the

house at that time, ..." (PCR III-368). Deputy Baczek therefore decided to enter the house "to check on the welfare and see if there had been any kind of burglary inside." (PCR III-368).

Accordingly, the facts known to Deputy Baczek were considerably more than Zakrzewski's assertion that "[a]ll the deputy knew when he arrived at Zakrzewski's house was that two of Zakrzewski's co-workers had reported that he had not shown up for work that day," App.Br. at 40, "and that some of the window screen frames seemed a little bent." App.Br. at 40-41. Further, appellant mischaracterizes Deputy Baczek's testimony: he did not state that he did not perceive a medical emergency, but that he entered the house without waiting for his back-up to arrive, which presumably would have been for the officer's safety, because he apparently did not perceive a threat to himself (Compare App.Br. 41 with PCR III-368-369).

Finally, Zakrzewski's reliance upon Drumm v. State, 530 So.2d 394 (Fla. 4th DCA 1988), is misplaced. Drumm did not involve a warrantless entry based upon facts giving rise to a perceived need to check on the welfare of the inhabitants. Compare id. at 397 ("All that the police knew at the time they arrived at Drumm's house was that a car which was registered in her name had been involved in the accident and that the car was, at that time, outside her home."). And despite appellant's attempt to distinguish the permissible warrantless entry in State v. Boyd,

615 So.2d 786, 789 (Fla. 2nd DCA 1993), see App.Br. at 39-40, the rule in Boyd, applied to the totality of the circumstances known by Deputy Baczek in this case, likewise support trial counsels' decision not to seek suppression:

> When the issue is narrowly that of the right of police to enter and investigate a constitutionally protected area in an emergency or because of exigent circumstances without the accompanying intent either to seize or arrest, *the standard becomes the reasonableness of the belief of the police as to the existence of emergency or exigent circumstances, and not the existence of the emergency or exigent circumstance in fact*.

Id. at 789 (emphasis added); see PCR III-444 (counsel testified he "felt like it was certain that the court would" find exigent circumstances to excuse the warrantless entry). Thus any suggestion that Deputy Baczek should not have made the warrantless entry is simply without merit. The subsequent discovery of the bodies, in plain view, and seized pursuant to a warrant, similarly provided no basis for trial counsel to seek suppression of the evidence.

3. The victims' bodies inevitably would have been discovered

Zakrzewski further contends that the discovery of his murdered family was not, for Fourth Amendment purposes, permissible under the "inevitable discovery" doctrine, and thus counsel was ineffective for failing to challenge the evidence. App.Br. 46-49.

Even if this Court were to determine that counsel did not provide effective assistance based upon attorney Koran's belief that Zakrzewski did not have a reasonable expectation of privacy in the house or that exigent circumstances supported the entry which led to the discovery of the victims, Zakrzewski was not prejudiced because the "inevitable discovery" doctrine would have defeated any motion to suppress. The "inevitable discovery" doctrine provides that "evidence obtained as the result of unconstitutional police procedure may still be admissible provided the evidence would ultimately have been discovered by legal means." Maulden v. State, 617 So.2d 298, 301 (Fla. 1993). That is, "[t]he independent source doctrine allows admission of evidence that has been discovered by means wholly independent of any constitutional violation." Nix v. Williams, 467 U.S. 431, 444 (1984). In Jeffries v. State, 797 So.2d 573 (Fla. 2001), this Court further discussed the doctrine:

> In *Craig v. State*, 510 So.2d 857, 862-63 (Fla.1987), this Court provided the following analysis of the inevitable discovery rule:
>
> > The evidence presented at the suppression hearing in this case was sufficient to establish by a preponderance of the evidence that, if appellant had not led police to the bodies, they would ultimately have been located very soon thereafter by means of ordinary and routine investigative procedures. There was testimony that the surrounding areas of all sinkholes in the region would have been closely examined as a matter of routine. Also, co-defendant Schmidt had given his lawyer a limited authorization to inform the police that the bodies had been disposed of in

> deep water. This routine examination of sinkholes would have revealed the drag marks, debris, clothing fibers, and other indicators that were present at Wall Sink where the bodies were found. Wall Sink was the largest and deepest sink in the general area. These indicators, the testimony showed, would inevitably have caused police to concentrate their deep-water searching capabilities at Wall Sink. We therefore conclude that the trial court was correct in admitting the bodies and related evidence, on the ground that although they were in fact found by means of appellant's statements, they would have been found independently even without the statements, by means of normal investigative measures that inevitably would have been set in motion as a matter of routine police procedure. *United States v. Satterfield*, 743 F.2d 827 (11th Cir.1984), *cert. denied*, 471 U.S. 1117, 105 S.Ct. 2362, 86 L.Ed.2d 262 (1985); *United States v. Brookins*, 614 F.2d 1037 (5th Cir.1980). The inevitable discovery doctrine is properly applied regardless of whether the ground of suppression of the statement is violation of the fourth amendment, fifth amendment, or sixth amendment. See *Nix v. Williams*, [467 U.S. 431, 104 S.Ct. 2501, 81 L.Ed.2d 377 (1984)].

Additionally, in *State v. Ruiz*, 502 So.2d 87, 87 (Fla. 4th DCA 1987), the district court stated:

> "If the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered ... then the evidence should be received." *Nix v. Williams*, 467 U.S. 431, 104 S.Ct. 2501, 81 L.Ed.2d 377 (1984). In order to apply this doctrine, there does not have to be an absolute certainty of discovery, but rather, just a reasonable probability. *United States v. Brookins*, 614 F.2d 1037 (5th Cir.1980).

Jeffries, 797 So.2d at 577-578.

Here, it is undisputed that concern over Zakrzewski's unexplained absence from work initiated a welfare check of his home (PCR II-366). A check of the outside of the residence indicated that the house appeared abandoned -- based upon the absence of parked vehicles, that the mail had piled up, and that no one answered the door or Deputy Baczek's calls from the broken window with the replaced screen (PCR II-367-368). And because Zakrzewski had already killed his wife and children, the victims would have been missed shortly when they failed to attend to their daily routine, including, for example that Edward would have missed his Tae Kwon Do class (see DA IX-1025). Moreover, it is undisputed that the lender of the mortgage on the house would have, as it did, foreclose and take possession of the house (PCR II-338, 354-358).[8] While "[s]peculation may not play a part in the inevitable discovery rule; the focus must be on demonstrated fact, capable of verification," Bowen v. State, 685 So.2d 942, 944 (Fla. 5th DCA 1996), the State has met its burden in this case. Based upon the foregoing facts, particularly where law enforcement had already begun a welfare check, it is not only reasonably probable that the police would have continued its investigation into the disappearance of the Zakrzewski family and inevitably would have discovered the victims' bodies independent of Deputy Baczek's initial entry into

[8]The foreclosure documents are bound separately from Volume II of the record, and are located within the Transcript Of Record, Exhibit Index.

the house, but so stipulated by appellant (PCR III-479).

As the foregoing demonstrates, counsel reasonably believed that any motion to suppress would have been futile (PCR III-443-444). The State would thus suggest that Zakrzewski's "claim of ineffective assistance of counsel is an expression of frustration concerning the result of his trial. Such frustration is not a viable basis for granting postconviction relief." Jones, 28 Fla. L. Weekly at S142. Accordingly, issue II should be denied.

III.

THE POSTCONVICTION MOTION COURT PROPERLY HELD THAT TRIAL COUNSEL DID NOT MISADVISE OR OTHERWISE MAKE ANY PROMISES TO APPELLANT TO INVOLUNTARILY INDUCE HIS GUILTY PLEAS.

Zakrzewski contends on appeal that his guilty pleas were involuntary on the basis that trial counsel

> 1. Failed to test (move to suppress) the admissibility of the incriminating evidence seized from his residence as a result of the illegal search thereof;
>
> 2. Failed to advise Zakrzewski of his right to do so prior to tendering his plea of guilty to capital murder, as referenced above, and
>
> 3. Misadvised the defendant by telling him incorrectly that he had no choice but to plead guilty since the state could introduce the evidence seized as a result of the illegal search of his residence and, thereby, easily prove his guilt. Had Zakrzewski been properly informed that he could contest the legality of virtually all of the evidence the state amassed against him and that there was a reasonable likelihood that this effort would be successful, the defendant most certainly would have insisted upon his right to a jury trial and would not have pled guilty. Furthermore, according to the defendant, his counsel advised and promised him, <u>if</u> he would plead guilty as charged, the state would not introduce into evidence during the penalty phase of his trial photographs of the battered bodies of his dead wife and children. (R. 395)

App.Br. at 49.

A. Standard of Review

> In reviewing a trial court's application of the above law to a rule 3.850 motion following an evidentiary hearing, this Court applies the following standard of review: As long as the trial court's findings are supported by competent, substantial evidence, "this Court will not substitute its judgment for that of the trial court on questions of fact, likewise of the credibility of the witnesses as well as the weight to be given to the evidence by the trial court."

Swafford v. State, 828 So.2d 966, 978 (Fla. 2002); see also Sweet v. State, 810 So.2d 854, 871 n.7 (Fla. 2002) ("[T]he trial court must evaluate the credibility of any witnesses, and we are obligated to give deference to the trial court's factual findings."); Porter, 788 So.2d at 923 ("We recognize and honor the trial court's superior vantage point in assessing the credibility of witnesses and in making findings of fact.").

B. Voluntariness of Zakrzewski's guilty pleas

Regarding Zakrzewski's claims that his pleas were involuntary in relation to counsels' advice and/or actions in respect to the seizure of evidence, the motion court denied relief as follows:

> The assertion that his plea was not voluntarily entered because his counsel failed to move to suppress incriminating evidence seized from the Defendant's home is without merit. As discussed above, the search was justified under the exigent circumstances exception and the Defendant has failed to establish *Strickland* prejudice as to this issue.

(PCR III-579).

Contrary to his Zakrzewski's contention in his postconviction motion, see PCR

II-219, appellant did *not* testify at the evidentiary hearing that counsel told him "he had no choice but to plead guilty since the state could introduce the evidence seized as a result of the illegal search of his residence and, thereby, easily prove his guilt." And as discussed under Issue II., supra, at 49-61, because the seizure of evidence did not violate the Fourth Amendment, counsel did not render ineffective assistance in not moving to suppress the evidence. Accordingly, Zakrzewski's contention that counsels' advice in respect to suppression or failure to file a motion to suppress rendered the plea involuntary is without merit.

In regard to Zakrzewski's argument that he would not have pled guilty but for counsels' promise that if he pled guilty that the State would not introduce the crime scene photographs during the penalty phase, the motion court denied relief as follows:

> As to the alleged misadvice of counsel that the crime scene photographs would be suppressed, which the Defendant contends motivated him to enter the pleas of guilty, the Court finds that the testimony of Mr. Koran and Mr. Killiam regarding their discussions with the Defendant regarding the introduction of the crime scene photographs of victims is credible. Both Mr. Koran and Mr. Killiam emphatically deny that they assured the Defendant that the photographs would [be] suppressed. The Defendant was told that he was "entitled to a trial on the case and if he wanted to contest his guilt, he could;"[5] however, he chose to plead guilty and counsel believed that "he understood this was

[5]Evidentiary hearing, P. 54.

his best option."[6] Counsel testified that they had discussions with the

> Defendant regarding the presentation of evidence during the penalty phase and a motion was filed to try to limit the crime scene photographs that were shown to the jury; however, at no time was the defendant ever told that the evidence would be excluded.
>
> Moreover, prior to the Defendant pleading guilty in open court, the Court made the decision to determine the admissibility of the crime-scene photographs when tendered for admission into evidence during the penalty phase proceeding.[7] The Defendant then entered his pleas of guilty and indicated that he had read and understood his written plea agreement, which contained no promise that the photographs would be excluded.[8] The Court has had the opportunity to observe the Defendant on the witness stand and believes that the Defendant is intelligent and fully understood the plea agreement and the discussions with his counsel concerning the admissibility of the crime-scene photographs.
>
> Accordingly, the Court rejects the Defendant's testimony and assertion in his motion that his pleas of guilty were unconstitutionally involuntary because his counsel assured him that the photographs would be "suppressed."
>
> ---
>
> [6]Evidentiary hearing P. 60.
>
> [7]Vol. III, P. 433-34; attached hereto as Exhibit "D." *See also*, Vol. II, P. 243-244; attached hereto as Exhibit "E."
>
> [8]*See* Exhibit "C."

(PCR III-579-581).

Without citing supporting authority, Zakrzewski urges this Court "to credit Zakrzewski's testimony in this regard" notwithstanding "the fact that both Mr. Koran and Mr. Killiam . . . emphatically denied Zakrzewski's contention that any promise was

made regarding the subject photographs." App.Br. at 54. While appellant acknowledges that both defense attorneys testified that "all Zakrzewski was told was that they would do their best to limit the introduction of some of the photographs, but that some would most assuredly be allowed in evidence to prove various matters material to the penalty phase of the case," id., he believes the Court should credit Zakrzewski's testimony over trial counsels' on the basis that he "had a solid reputation for honesty and forthrightness while a member of the United States Air Force," "was willing to plead guilty rather than put the state through the time, energy and expense of proving his guilt, which he always acknowledged," and if there was no such promise by counsel, "there was no other motivation for the defendant to plead guilty." Id. at 55.

Appellant's request of the Court ignores the credibility determinations of the motion court, which had a superior vantage point to judge the credibility of the witnesses and make relevant findings of fact. Moreover, Zakrzewski's suggestion that both defense lawyers "simply did not recall making this assurance in the complicated course of preparing his case for trial," App.Br. at 55, is just not reasonable. That characterization of defense counsel's testimony fails to address the absolute certainty with which counsel testified -- i.e., attorney Koran testified that he "categorically" did not promise Zakrzewski that the photographs would be excluded, and that "it was

never intimated to Mr. Zakrzewski that he would -- that this stuff would be excluded" (PCR III-433, 442; see supra, at 16-20). Further, Zakrzewski ignores the testimony of trial counsel concerning appellant's motivation for pleading guilty, App.Br. at 55, including the fact that Zakrzewski did not deny that he committed the murders, the strength of the State's case, and that appellant would appear more sympathetic at the penalty phase if he admitted guilt in light of the foregoing. Thus Zakrzewski's contention that "there was no other motivation" for him to plead guilty except for the purported promise of counsel to exclude from evidence the crime scene photographs is refuted by the evidence adduced at the hearing. See supra, at 20-25.

Finally, cases cited by Zakrzewski are inapposite, App.Br. at 52-54, as each involved either a determination that trial counsel had in fact misadvised the defendant and that erroneous advice was the basis for the entry of the guilty plea, or that a claim of affirmative misadvice was denied without the record addressing the issue. Compare, e.g., Thompson v. State, 351 So.2d 701 (Fla. 1977) (record established that defendant pled guilty upon an honest misunderstanding or belief as to a promise of the trial judge that was communicated through trial counsel), cert. denied, 435 U.S. 998 (1978); Costello v. State, 260 So.2d 198, 201 (Fla. 1972) (record established that counsel misadvised defendant that court would not sentence him to death if he pled guilty); Roberti v. State, 782 So.2d 919, 920 (Fla. 2nd DCA 2001) (cause remanded for

an evidentiary hearing, where "Roberti must demonstrate that counsel affirmatively misadvised him and that he would not have pleaded had he been properly advised."); Tal-Mason v. State, 700 So.2d 453, 456-457 (Fla. 4th DCA 1997) (remand warranted where record failed to demonstrate "the nature and extent of counsel's specific advice to defendant concerning gain time and its applicability to any sentence that might be imposed.").

Because the record here refutes Zakrzewski's claim that counsel misadvised him and that he pled guilty in reliance thereto, Issue III should be denied.

IV.

APPELLANT IS NOT ENTITLED TO RELIEF UNDER APPRENDI v. NEW JERSEY, 530 U.S. 466 (2000) OR RING v. ARIZONA, 536 U.S. 584 (2002).

Seeking relief pursuant to Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428 (2002) and Apprendi v. New Jersey, 530 U.S. 466 (2000), Zakrzewski contends for the first time, now on appeal, that

> Florida's death penalty statute (a) does not require the jury to find the existence of each aggravating circumstances beyond a reasonable doubt, (b) does not require the jury to find that there are insufficient mitigating circumstances that outweigh the aggravating circumstances beyond a reasonable doubt, (c) provides that the jury's verdict is only advisory and not binding,[ ] (d) only requires a bare majority of the jurors to make a death recommendation to the court, and (e) allows the reviewing court to reweigh the aggravating and mitigating factors to determine whether the death sentence may stand after striking one of the aggravating factors on appeal.

App.Br. 56-57 (internal footnote omitted). Before the motion court, Zakrzewski filed a motion seeking judicial notice of his claim pursuant to Apprendi v. New Jersey, 530 U.S. 466 (2000), not previously raised, or, alternatively, to amend the amended postconviction motion to include the Apprendi claim (PCR II-293-299). Therein, appellant specifically limited his claim as follows:

> [a]n issue that must be addressed here, as I understand it, is the same as in Apprendi, Jones, and Ring: Are the Sixth and Fourteenth Amendments to the United States Constitution of the United States violated by Florida's death penalty statute that, by its very terms and conditions,

> does not cause and allow the jury to make all the findings necessary to expose the defendant to a death sentence?

(PCR II-295) (emphasis in original).

The motion court denied relief, stating "[a]s to the *Apprendi* claim, this claim is procedurally barred from consideration." (PCR III-582). "To uphold the trial court's summary denial of claims raised in a 3.850 motion, the claims must be either facially invalid or conclusively refuted by the record." Foster v. State, 810 So.2d 910, 914 (Fla.) (internal citation omitted), cert. denied, 123 S.Ct. 470 (2002).

Regarding appellant's claims that were ultimately raised before the motion court pertaining to Ring and Apprendi, they are procedurally barred: Zakrzewski did not contemporaneously assert before or at trial a Sixth Amendment jury sentencing claim challenging the procedure by which the aggravating factors were found (compare DA I-50-51 ("Motion To Prohibit Application Of Florida Statute 921.141(5)(1)," on basis of Ex Post Facto Clause); DA I-86 ("Amended "Motion To Prohibit Application Of Florida Statute 921.141(5)(1)" (same)); DA I-146-168 ("Motion To Declare Section 921.141, Florida Statutes Unconstitutional For Lack Of Adequate Appellate Review"); DA I-169-176 ("Motion To Declare Section 921.141, Florida Statutes Unconstitutional Because It Precludes Consideration Of Mitigation By Imposing Improper Burdens Of Proof Or Persuasion"); DA I-195-196 ("Motion To Declare Section 921.141, Florida

Statutes Unconstitutional Because Only A Bare Majority Of Jurors Is Sufficient To Recommend A Death Sentence"); DA IX-1181-1207 (charging conference), or on direct appeal (compare "Initial Brief Of Appellant, No. 88367, at i-iii). Having failed to raise these claims in a timely manner, they are now barred and the Court should deny relief on that basis. See McGregor v. State, 789 So.2d 976, 977 (Fla. 2001) (Apprendi claim procedurally barred for failure to raise in trial court); Barnes v. State, 794 So.2d 590 (Fla. 2001) (Apprendi error not preserved for appellate review).

To the extent that Zakrzewski now contends that Ring invalidates his death sentence on additional bases not raised before the postconviction relief court, he is precluded from raising these bases for the first time on appeal. Gudinas, 816 So.2d at 1111 n.4; Doyle, 526 So.2d at 911.[9] Moreover, these additional bases are unavailing, as the only issue before the United States Supreme Court in Ring was "whether that aggravating factor may be found by the judge, as Arizona law specifies, or whether the Sixth Amendment's jury trial guarantee,[ ] made applicable to the States by the Fourteenth Amendment, requires that the aggravating factor determination be

[9]Zakrzewski does not specifically address the procedural default issue other than to rely upon the sole concurring opinion of Justice Shaw in Bottoson, 27 Fla. L. Weekly at S896-S898. See App.Br. at 58-59.

entrusted to the jury.[ ]" Ring, 122 S.Ct. at 2437 (internal footnotes omitted).[10]

Even if the Court were to determine that Zakrzewski has not defaulted upon the claims raised under Issue IV, neither Ring nor Apprendi are subject to retroactive application.

On June 24, 2002, the United States Supreme Court issued its decision in Ring, holding that the Sixth Amendment requires that a jury make the finding of an aggravating circumstance necessary for imposition of the death penalty. Id., 122 S.Ct. at 2443. The Supreme Court decided Ring based upon Apprendi, previously decided on June 26, 2000, which held that a criminal defendant is entitled to a jury

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[10]To the extent that Zakrzewski is challenging the death sentence imposed for his murder of his daughter Anna based upon the trial court's override of the jury's recommendation of a life sentence, see App.Br. at 70, this Court decided that issue on direct appeal. Zakrzewski, 717 So.2d at 494. Accordingly, the claim is not subject to successive review. Compare Garcia v. State, 816 So.2d 554, 569 (Fla. 2002) (jury override issue not decided in former direct appeal and thus it did not constitute the law of the case to preclude sentencing defendant to death in a new penalty hearing). And even if the claim is reviewable in light of Ring, but see infra, at 71-75 (discussing nonretroactivity of Ring), the capital murder convictions of Zakrzewski's wife and son were aggravating circumstances found by the trial court in sentencing appellant to death for the murder of his daughter Anna (DA II-329). Thus relief is not warranted. See, e.g., Jones, 28 Fla. L. Weekly at S144; Doorbal v. State, ___ So.2d ___, 28 Fla. L. Weekly S108, S115 (Fla. Jan. 30, 2003); see also, Anderson v. State, ___ So.2d ___, 28 Fla. L. Weekly S51, S57 (Fla. Jan. 16, 2003) (Pariente, J., concurring in result); Cole v. State, ___ So.2d ___, 28 Fla. L. Weekly S58, S65 (Fla. Jan. 16, 2003) (Pariente, J., concurring in result).

determination of any fact that increases the penalty for a crime beyond the prescribed statutory maximum, other than the fact of a prior conviction. Id. 530 U.S. at 490. Appellant's conviction became final on January 25, 1999, when the United States Supreme Court denied Zakrzewski's petition for writ of certiorari. See Caspari v. Bohlen, 510 U.S. 383, 390 (1994) ("A state conviction and sentence become final for purposes of retroactivity analysis when the availability of direct appeal to the state courts has been exhausted and the time for filing a petition for a writ of certiorari has elapsed or a timely filed petition has been finally denied.").

Neither Ring nor Apprendi apply to Zakrzewski's case. In Griffith v. Kentucky, 479 U.S. 314 (1987), the United States Supreme Court held that "a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, *pending on direct review or not yet final* . . . ." Id. at 328 (emphasis added). Because Zakrzewski's appeal was not pending on direct review and was final in January, 1999 when certiorari was denied by the United States Supreme Court– before that court decided Ring or Apprendi -- neither decision applies to his case.

Moreover, Zakrzewski is not entitled to retroactive application under the principles of Witt v. State, 387 So.2d 922, 929-30 (Fla. 1980). Hughes v. State, 826

So.2d 1070, 1073-1075 (Fla. 1st DCA 2002), review granted (1/10/03)[11]. Pursuant to Witt, this Court must consider three factors: the purpose served by the new case; the extent of reliance on the old law; and the effect on the administration of justice from retroactive application. Ferguson v. State, 789 So.2d 306, 311 (Fla. 2001). When deciding whether to apply a decision retroactively, "the fundamental consideration is the balancing of the need for decisional finality against the concern for fairness and uniformity in individual cases." Johnston v. Moore, 789 So.2d 262, 267 (Fla. 2001). As the Court stated in Ferguson,

> For a new rule of law to warrant retroactive application it must satisfy three elements: "The new rule must (1) originate in either the United States Supreme Court or the Florida Supreme Court; (2) be constitutional in nature; and (3) have fundamental significance."
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> * * * * *
>
> As emphasized by this Court in *Witt*, "only major constitutional changes of law will be cognizable in capital cases under Rule 3.850. 387 So.2d at 929. These major constitutional changes in the law typically fall into one of two categories: "(1) those which place beyond the authority of the state the power to regulate certain conduct or to impose certain penalties, or (2) those changes which meet the three-prong test for retroactivity set forth in *Stovall v. Denno*." McCuiston v. State, 534 So.2d 1144, 1146 (Fla.1988) (citations omitted).
>
> The three factors considered under the test announced in *Stovall*

[11]Oral argument has been scheduled in Hughes for March 6, 2003 before the Court.

> *v. Denno*, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967), are: "(1) the purpose to be served by the new rule, (2) the extent of reliance on the old rule, and (3) the effect on the administration of justice of a retroactive application of the new rule." *McCuiston*, 534 So.2d at 1146 n. 1.

Ferguson, 789 So.2d at 309, 311.

Applying Stovall v. Denno, 388 U.S. 293 (1967), the United States Supreme Court has rejected retroactive application of its holding that a violation of the right to a jury trial is not subject to retroactive application:

> The values implemented by the right to jury trial would not measurably be served by requiring retrial of all persons convicted in the past by procedures not consistent with the Sixth Amendment right to jury trial. Second, States undoubtably relied in good faith upon the past opinions of this Court to the effect that the Sixth Amendment right to jury trial was not applicable to the States. . . . Several States denied requests for jury trial in cases where jury trial would have been mandatory had they fallen with the Sixth Amendment guarantee as it had been construed by this Court. . . . Third, the effect of a holding of general retroactivity on law enforcement and the administration of justice would be significant, because the denial of jury trial has occurred in a very great number of cases in those States not until now according the Sixth Amendment guarantee.

DeStefano v. Woods, 392 U.S. 631, 634 (1968) (internal citations omitted).

Similarly, there is no basis for application of Ring or Apprendi in this case. Hughes, 826 So.2d at 1073-1075; see also Colwell v. State, 59 P.3d 463, 473 (Nev. 2002) (Ring not afforded retroactive application on collateral review); Sanders v. State, 815 So.2d 590, 591-592 (Ala. 2001) (Apprendi held not to apply retroactively to cases

on collateral review under Teague v. Lane, 489 U.S. 288 (1989)), cert. denied, 534 U.S. 956 (2001); Whisler v. State, 36 P.3d 290, 300 (Kan. 2001) (same), cert. denied, 122 S.Ct. 1936 (2002); State ex rel. Nixon v. Sprick, 59 S.W.3d 515, 520 (Mo. 2001) (Apprendi not subject to retrospective application); State v. Sepulveda, 32 P.3d 1085, 1088 (Ariz. App. Div. 2 2001) (Teague precluded retroactive application of Apprendi); People v. Bradley, 2002 WL 31116769 *6 (Colo. App. Sept. 2, 2002) (same); People v. Montgomery, 763 N.E.2d 369, 378 (Ill.App. 1 Dist. 2001) (same)[12]; Teague v. Palmateer, 57 P.3d 176, 186 (Or. App. 2002) (same).

Finally, in the event this Court were to determine that appellant's claims under Ring and Apprendi are properly before the Court, relief should be denied. See, e.g., King, 831 So.2d at 144; Bottoson, 27 Fla. L. Weekly at S891; Spencer v. State, ___ So.2d ___, 28 Fla. L. Weekly S35, S41 (Fla. Jan. 9, 2003); Anderson, 28 Fla. L. Weekly at S57; Doorbal, 28 Fla. L. Weekly at S115; Kormondy v. State, ___ So.2d ___, 28 Fla. L. Weekly S135, S139 (Fla. Feb. 13, 2003).

Based upon the foregoing, Issue IV should be denied.

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[12]But see People v. Smith, 2003 WL 168382 *2 (Ill.App. 1 Dist. Jan. 24, 2003) (recognizing conflict among Illinois lower appellate courts as to whether Apprendi is subject to retroactive effect on collateral review).

CONCLUSION

Based on the foregoing arguments and authorities, the lower court's Order denying appellant's motion for post-conviction relief should be affirmed.

Respectfully submitted,

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CERTIFICATE OF TYPE SIZE AND STYLE

Undersigned counsel hereby certifies that this brief was typed using Times New Roman 14-point font, in conformity with Fla. R. App. P. 9.210(a).

CERTIFICATE OF SERVICE

Undersigned counsel hereby certifies that a true and correct copy of the foregoing was mailed, postage prepaid, on this ____ day of March, 2003, to:

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