IN THE SUPREME COURT OF FLORIDA

EDWARD J. ZAKREZEWSKI, II,

Appellant,

v.

CASE NO. 88,367

STATE OF FLORIDA,

Appellee.

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

INITIAL BRIEF OF APPELLANT

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

DAVID A. DAVIS
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NO. 27 1543
LEON COUNTY COURTHOUSE
SUITE 401
301 SOUTH MONROE STREET
TALLAHASSEE, FLORIDA 32301
(904) 488-2458

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF CONTENTS (Continued)

TABLE OF CONTENTS (Continued)

TABLE OF CITATIONS

TABLE OF CITATIONS

TABLE OF CITATIONS

TABLE OF CITATIONS

STATUTES

TABLE OF CITATIONS

PAGE(S)

OTHER AUTHORITIES

IN THE SUPREME COURT OF FLORIDA

EDWARD J. ZAKRZEWSKI, II,

Appellant,

v. CASE NO. 88,367

STATE OF FLORIDA,

Appellee.

INITIAL BRIEF OF APPELLANT

PRELIMINARY STATEMENT

Over the past eighteen years, Appellate counsel has defended more than 60 persons sentenced to death before this court. He thought that he had either represented or read about every type of murder possible. This case demonstrates the error of that conclusion. Zakrzewski pled guilty to killing his Korean born wife and their five and seven year old daughter and son. It presents some of the most difficult facts this court will have to consider because of the emotions that naturally arise in us as fathers. While other opinions this court has rendered share some similarities with the evidence presented here, there is a numbness that infects the mind and rational thinking that is almost unique. It will test the ability of this court to dispassionately review the facts, weigh the arguments made to save this Defendant's life, and reach a just decision as few other cases this court has reviewed has ever done.

The Statement of the Facts, while trying to present an unbiased, objective picture of the events leading up to the murders omits some important points. It makes no mention of the wife's partying in the months before her death, nor does it include any discussion of the mental problems Zakrzewski had. Those details will be presented in the various arguments raised on his behalf.

Appellate counsel will refer to the Appellant as either Zakrzewski, or "Zak," the more pronounceable nickname his associates called him.

STATEMENT OF THE CASE

An indictment filed in the Circuit Court for Okaloosa County on November 19, 1994 charged the Appellant, Edward Zakrzewski, with the first degree murder of his wife and two children (R 15-16). He pled not guilty, and the case proceeded in the normal manner. The following notices or motions, relevant to this appeal, were filed by the Defendant or the State:

1. Motion for appointment of confidential expert (R 20). Granted (R 22).

2. Motion to Limit Scope of Compelled Mental Evaluation (R 92, 246). Denied (R 437).

3. Motion for Change of Venue (R 99). Denied (R 431).

4. Motion. , . to Strike portions of "Florida Standard Jury Instructions in Criminal Cases" Re: Caldwell v. Mississippi (R 180). Denied (R 441).

5. Motion in Limine in Regard to Photographs and Videos (R 197). Denied (R 441).

6. Notice of Intent to Seek the Death Penalty (R 239).

7. Motion to Limit the Use of Any Information Gathered from Compelled Mental Health Evaluation (253). Denied (R 437).

Zakrzewski pled guilty to the three charges, and the court accepted the plea (R 451). It then proceeded to the penalty phase portion of the trial. A jury was selected, and after hearing the State's and Defendant's cases, it returned the following recommendations:

1. As to the wife and son-death by a vote of 7-5.

2. As to the daughter-life. (R 263-64).

The court followed the recommendation regarding the wife and son and imposed death in each instance. It disregarded the jury's verdict for the daughter and imposed death for her murder (R 298-304). In justifying those sentences, it found in aggravation as to each murder:

1. The Defendant had a prior conviction for two other murders, i.e. those of the children and the wife,

2. The murders were committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

3. The murders were especially heinous, atrocious, or cruel (R 3 10- 12).

In mitigation, it found the following statutory mitigators:

1. The Defendant has no significant prior criminal history.

2. The murders were committed while the Defendant was under the influence of an extreme mental or emotional disturbance.

(R 312-13).

It found, as nonstatutory mitigation:

1. The Defendant turned himself in and pled guilty. Little weight.

2. The Defendant was an "exceptionally hard worker, a good student, and an exemplary member of the United States Air Force." Significant weight.

3. The Defendant was a loving husband and father and was "truly remorseful for what he has done." Substantial weight.

4. The Defendant was under great stress due to work, college, child care, house work, and lack of sleep. Little weight.

5. The Defendant was a humble man. Little weight.

6. The Defendant was raised without his natural father and had a lack of prior domestic relationships. Little weight.

7. The Defendant had little religious training, but had embraced the Christian faith since the offense. Little weight.

8. The Defendant had a long term adjustment disorder and was suffering from a major depressive episode. Consider as part of the extreme emotional disturbance mitigator.

9. Good behavior after committing the murders. Slight weight.

(R 314-16). [1]

This appeal follows.

'The court rejected as mitigation 1) that the Defendant had been medicated for one month as a child with Ritalin. 2) his potential for rehabilitation, as speculative and not established. 3) that he had been a loving son, was intelligent, and was well thought of by friends, neighbors and co-workers. 4) The Defendant's use of alcohol immediately before the offense. 5) The Defendant is not a psychopath. (R 3 14-16).

STATEMENT OF THE FACTS

Edward Zakrzewski, a technical sergeant in the United States Air Force stationed at Eglin Air Force Base, got a telephone call from his seven year old son, Edward, on Thursday morning, June 9, 1994. He relayed a message from his mother, Sylvia Zakrzewski, that she wanted a divorce (R 716). Zak acted normally the rest of the day, but during lunch he bought a machete and sharpened it (R 805, 1024-25). He had determined to kill his wife and their two young children (R 858, 1023).

Zak finished the day at his office and went to a college class he had enrolled in (R 394). It was over about 6 p.m., and afterwards, as he and a classmate drank some beer, he ask the other student (who had fought in Desert Storm) what it was like to kill someone (R 562).

Mildly intoxicated (R 1025, 1143), he went home and waited for his wife and children to return, About 30 minutes later they showed up. Zak planned for his wife to come into their bedroom, but when she did not, he went to the living room where she had sat down on the couch, resting, with her eyes closed (R 1025, 1044, 1046). Wanting her to die quickly (R 1024-26), he hit her twice in the head with a crowbar (R 583-84). While not dead then, she probably died from those wounds, and she, in any event, became instantly unconscious (R 485, 587, 1026). He took her to the bedroom where he hit her again, and strangled her (R 487, 502, 574, 583, 1026).

Leaving her body there, he called his son, Edward to come to the bathroom to brush his teeth (R 1027). As he did so, Zak struck the boy with the machete (R 1027). At the last moment he saw what was happening, and he apparently raised his arm to fend off the blow (R 1027). Scared that his son might suffer, Zak hit him hard on the head, back of the neck and the back (R 605, 1052). Becoming instantly unconscious, the boy died from a skull fracture and blows to the neck (R 613).

Zak then called his five year old daughter, Anna, to brush her teeth, and as she came into the bathroom, he hit her although the evidence shows that he may have had her kneel over the bathtub before being struck first (R 1054, 524, 535, 595).[2]

Zak brought his wife's body into the bathroom, and hit it across the back and neck (R 583,590).

He returned to the living room, not believing what he had done (R 863, 1029). The momentary elation and feeling of a job well done (R 863) quickly passed and a numbness set in (R 1029). For his wife and children, it was over (R 1030).

He left his house, went to a bar, and spent the evening getting drunk (R 865, 1031). He sat in his car, threw up on himself, and passed out (R) When the police found him, they only took his car keys so he could not drive (R 391). On the morning of June 10, he walked home, broke into his house, changed uniforms, took his wife's keys, and drove to work in his other car (R 391, 1032). He acted normally (394, 805, 1033), but left his job early. He went to his bank, withdrew his savings ($300) and got a $5,000 loan on his credit card (R 395). All the while, he was polite (R 1124, 1132). He then drove to Orlando, and bought an airplane ticket to Hawaii. He stayed on a secluded island, but turned himself into the local police about four months later (R 396).

Zak had a normal, or apparently normal, childhood (R 632). His mother divorced his father when he was young, and remarried when he was 14. She divorced her latest husband several years later (R 627,632). Zak was somewhat rebellious as a teenager, and he used alcohol, marijuana, and LSD during his teen years (R 979-80). He tried college for a semester, but did poorly (R 634). He worked at a local factory in Michigan, but was

---

[2]The state's blood spatter expert believed Anna was killed while kneeling over the tub, but Zak said he hit her first as she came into the bathroom. This latter version has some support because several areas had blood that could not be identified because it could have come from several sources (R 470,532).

fired from it (R 634-35). He decided to join the Air Force, and after basic training he was assigned Nordstrom Air Force Base, Idaho. He seemed happy there (R 640).[3]

Pun Im, Zak's future wife, was born to a wealthy, "aristocratic" family in Korea (R 710, 988). She married an American despite her family's vigorous objections,[4] and he brought her to the United States, When the marriage failed, she had to work, and Zak first saw her as a waitress in a "dining room." (R 981-82).

To him, she looked like an angel, and shortly, Sylvia (her adopted American name) became pregnant. When Zak told her he was being transferred to Homestead Air Force Base in Florida, she said if he left her she would abort the child (R 982). They were married, and at first she tried hard to make the marriage work even though they had little money (R 983). She was active and pleasant (R 659).

In 1989 Zak was transferred to Korea, and for three years, the couple was happy (R 985). Even her family seemed to accept him, especially after Edward was born (R 990). Zak returned to the United States in 1992, and was assigned to Eglin Air Force Base as a supply sergeant (R 648,988).

Returning to America was a big blow to Sylvia. She had not wanted to leave Korea, and once here she became very homesick and unhappy (R 832, 1003). She slept a lot and called home almost daily, running up monthly telephone bills of $150-$600 (R 1000-1002). Even the children became too much for her (R 669), and she looked at them as "half-breeds." They were ugly, and she cried because Anna looked like an American (R 740, 765). At times she could be neglectful and cruel to them (R 709, 721) although she also loved them (R 669).

In her own way, Sylvia also loved Zak. She could be very nice to him when she wanted something, but mean when crossed (R 734). She had big plans for him. She wanted him to finish college, go to Harvard Law School, and become an ambassador to

---

[3]He stopped using drugs immediately before joining the Air Force (R 979-80).

[4]Family members beat her several times because she planned to wed an American (R 989-90).

Korea (R 766). And Zak, who originally wanted to teach, accepted that unrealistic goal, changed his major to business (R 652), and went to school three or four nights a week (R 998). He endured her belittling, screaming, bossing, pushing, and anger (R 719, 744, 751, 776) because she was the center of his life, a place she shared with his children and career in the Air Force (R 831, 851). By June 1994 he had almost finished his junior year of college and had made the Dean's list (R 650).

This determination also spread to his career. His supervisors uniformly rated him an outstanding airman (R 774), one everyone relied on (R 775), a "right hand man" (R 800), or one of the best workers one boss had seen in 30 years (R 803). This was more than puffery because the Air Force had promoted him ahead of his peers (R 785).

His children also were an important part of his life, and neighbors and relatives unanimously agreed that Zak was a loving, devoted father to his son and daughter (R 669, 708, 718, 733, 766-68, 769, 778, 794). He had their school drawings tacked to the walls of his office (R 493, 773), and he talked to them almost daily on the telephone (R 773). He was concerned about them (R 790), and was proud of his son (R 773-74). He talked about them all the time (R 666). He took care of them, made their lunches, and helped them get ready for school (R 666).

Predictably, Zak burned his "candle at both ends." (R 1143) A typical day for him would begin at 4 a.m. when he would wake up and study for an hour or so before he went to work. He left his Air Force job about 4 p.m. then went to school, getting home about 7 or 8 p.m. After playing with his children, helping them with their schoolwork, and getting them ready for bed, he would study until 1 or 2 a.m. (R 732, 996, 999). He was always working (R 782).

Although he wanted to make Sylvia happy, by the summer of 1993 she was becoming increasingly despondent. Unhappy in the United States, she became convinced that if she had a "100% Korean baby" she would find the peace she wanted. She believed she could talk a former boyfriend (who had lots of money (R 741)) into having sex with her to fulfill her dream (R 741). When she told her husband this plan, he went along with

it. He liked kids, and if it made her happy, it was OK with him (R 763, 834-35, 991). She even showed him a picture of the man, and told him things would work out (R 992).

Accordingly, during the summer of 1993, she took her two children to Korea, and returned in August, pregnant (R 993, 1007).[5] Sometime later, she had a miscarriage, for which she blamed Zak (R 767, 1014-15). Still wanting to make her happy, Zak, at her insistence, bought a house he could not afford in the late spring of 1994 (R 389).

Increasingly, after the miscarriage, she talked of divorce.[6] She involved the children, and used them to pass messages to her husband about what she wanted to do (R 7 15, 1013, 1023). The seven year old son became so despondent that by June 1994, he was talking of suicide (R 748-49). Zak was against breaking up the family, and in November, December, or January he may have told a neighbor that if his wife divorced him, he would kill his children rather than putting them through that ordeal (R 551-56). Sylvia, undecided about separating from her husband, flip flopped several times on what she wanted to do (R 835).

On the evening of June 8, Sylvia said some "evil" things to her husband, and was very scared (R 746). The next morning, she began the cycle again. She had her son call his father and tell him that she wanted a divorce (R 7 16).

After the murders, Zak, as mentioned, flew to Hawaii. He did that because he had heard that a lot of drifters went there (R 1033). Within a few days, he was living in the jungle on the desolate island of Molokai (R 403, 405). A family that led a religious commune life took him, and let him stay in a shack at the back of their twelve acres. Calling himself Michael Green, he lived by himself, helped with the maintenance around the property, and regularly woke early so he could pray in the small chapel there (R 410,

[5]The trip was charged to their credit card (R 1009).

[6]She had first raised the possibility of divorce while he had been stationed in Korea (R 1003-1004). She also may have had sex with her Korean boyfriend before the 1993 vacation (R 99 1-93).

890, 922, 930). He was obviously troubled (R 893, 941, 959), but he was nice to the children (R 410, 892), never lost his temper (R 929, 947), and was humble (R 891).

About four months after he had been living there, the family happened to watch a TV program called "Unsolved Mysteries." It aired the murder of Sylvia and the two children, and showed a picture of Zak. He turned himself into the local police the following morning (R 405,900).

SUMMARY OF THE ARGUMENTS

Edward J. Zakrzewski did a great wrong. As punishment for this evil he will live out his days in prison, behind fence, and under scrutiny. This court will decide only how long his hell will last. Each day he will recall he ended the lives of those who meant the most to him, and that he will never hold his children. Despite their gruesome murders and that of his wife, this is not a death case, and the only sentence this court can affirm is one of life in prison.

The key issue is Issue III, the proportionality argument. Before it can decides that contention, this court should consider the first two points raised. The deceptive quality of this case begins with the trial court's conclusion that the murders were especially heinous, atrocious, or cruel. The State, as part of its closing arguments, claimed the jury could find this aggravating factor by simply looking at the gruesome pictures. None of the victims, however, had had any awareness for any significant time that they were about to die. Death, or at least unconsciousness, for all of them came quickly. Their murders, therefore, as gruesome and gory as the pictures showed them to be, were not especially heinous, atrocious, or cruel. (Issue I.)

Likewise, while Zak planned the homicides with calculation and premeditation, he exhibited none of the coldness this court has required for the "cold, calculated, and premeditated" aggravator to apply. His marriage was crumbling, and his damaged brain, chronic severe depression, and personality disorders provided him only one option, death. Moreover, and this is unusual, his love for his wife and children and his desire to end their pain, created within him a moral justification, or at least a pretense of it, for their deaths. (Issue II.)

With two aggravators strongly challenged, and a vast amount of evidence mitigating the death sentences, this court should find such punishment proportionately unwarranted. Zak committed "middle class" murders. That is, he was a decent, responsible citizen like most of middle class America. He had no criminal past, and he killed family members while under the influence of an extreme emotional disturbance.

This court has tended to reject death sentences in such instances, characterizing the homicides as the explosion of total criminality for which a death sentence is unjustified. (Issue III.)

One of the bizarre twists in this unusual case comes from the jury's death recommendations for Sylvia's and Edward's murders, but a life vote for Anna's homicide. The court, unable to distinguish the three murders, sentenced Zak to death in each case. That was error because the jury had several reasonable grounds on which to recommend a life sentence. Yet, the court was correct, the murders were indistinguishable, so rather than imposing death in each instance, the court should have sentenced Zak to life in prison for the three homicides. (Issue IV.)

That the jury recommended death at all arises in large part from the prosecutor's argument that the pictures were all they needed to establish the murders as especially heinous, atrocious, or cruel. Zak had asked the court to exclude them, but it not only refused to do so it did nothing to minimize their prejudicial impact. Because the photographs generally had only marginal relevancy to the sentencing phase of the trial, and they were very gruesome and gory, the trial judge should have kept the jury from seeing them. (Issue V.)

The State, also as part of its closing argument, harped on Zak's predilection for the philosophy of Frederick Nietzsche, a nineteenth century German philosopher. As Dr. Harry McClaren, its mental health expert, testified, this dead thinker "vigorously attacked Christianity." The court, however, erred in allowing this psychologist expert to give his opinion about Nietzsche because 1) He never permitted Zak to voir dire him on his expertise in that philosopher's writings. 2) The State never established his expertise in that area, and 3) The testimony of what he wrote had only a speculative relevance to this case. (Issue VI.)

Zak, however, had more fundamental problems with the State's expert witness. Dr. McClaren agreed with the defense experts that the Defendant was under an extreme emotional disturbance when he murdered his wife and children, the only mental

mitigation he offered. If so, the witness should not have testified because he rebutted none of the Defendant's proposed mental mitigators. By allowing him to give his unchallenged opinion, however, the court also let him tell the jury that he "absolutely" appreciated the consequences of his criminal conduct. That was error because Zak had specifically waived presenting any evidence of that statutory mitigator. The court also erred in allowing him to testify about Zak's motives and what Nietzsche advocated. The State should not have been able to present testimony through its expert that had no relevance to the mental mitigation Zak offered. (Issue VII.)

But, if Dr. McClaren could testify that Zak did not meet the criteria for the statutory mitigator that his "ability to appreciate the criminality of conduct was substantially impaired" the court should have instructed the jury on it. This conclusion becomes stronger because Zak pointed to other evidence supporting that mitigator. (Issue VIII.)

Zak had other mitigation, indeed, a "vast" amount of evidence, that he argued justified a life sentence. The court refused to give the jury any specific guidance that this wealth of proof could mitigate a death sentence other than the standard "catch-all" guidance. In light of recent United States Supreme Court opinions recognizing the co-sentencing authority of the jury, and this court's strict requirement that all mitigation be recognized, that was error. (Issue IX.)

ARGUMENT

ISSUE I

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

In justifying its death sentence for each of the murders, the court found Zakrzewski had committed them in an especially heinous, atrocious, or cruel manner (R 328-30). Because the homicides were committed similarly, its findings of facts supporting this aggravator in each count were alike. As to Sylvia, the wife, it found,

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

(R 328).

As to Edward Zakrzewski, the son, the court said:

> After beating Sylvia with a crowbar, the Defendant called his seven year old son into the bathroom and brutally hacked him to death with a machete. By the Defendant's own admission, Edward saw what his father was about to do to him and raised his hand in meager defense of his young life, at which time his hand was nearly severed at the wrist. Edward was undoubtedly aware for a period of time that he was about to be murdered by his own father. We will never know for what period of time Edward experienced this horror. We do know that the Defendant struck Edward over and over with the machete nearly decapitating him, shearing his right ear from his head, severing his spinal cord, and splashing *Edward's blood on the floor, walls, sink, toilet, tub and ceiling of the bathroom

(R 328).

As to Anna, the daughter, the court said:

> The Defendant testified that after bludgeoning Sylvia Zakrzewski and hacking Edward Zakrzewski to death wit the machete, he called Anna into the bathroom to"brush her teeth." He then testified that he struck Anna as she entered the doorway to the bathroom. The physical evidence in the case established by blood-stain patter analysis Jan Johnson is in direct contradiction of the Defendant s testimony as to where the murder of Anna Zakrzewski actually occurred. All of the physical evidence in the case establishes beyond a reasonable doubt that Anna was first struck with the machete and was murdered while she was in a kneeling position with her head bent over the edge of the tub just as her body was found. The physical evidence established beyond any reasonable doubt that Anna was still living when the Defendant knelt her down over the tub where her brother's mutilated, bloody, lifeless body had been placed by the Defendant and was thereupon murdered in execution-style fashion with the machete. The photos of Anna's body at autopsy as well as the medical examiner's testimony, indicate that Anna suffered cuts to her right hand and elbow, demonstrating that at some point she made a futile attempt toward off blows. Based upon the physical evidence and expert testimony relating thereto, the Court is convinced beyond any reasonable doubt that prior to Anna's death she not only experienced the horror of knowing that she was about to be murdered by her own father, but she also experienced the absolute horror of knowing that her brother had been murdered and that she was next. This Court could not imagine a more heinous and atrocious way to die.

(R 330).

While these essentially uncontested facts show three gruesome murders, they are insufficient to justify finding any of the murders especially heinous, atrocious, or cruel. Zak makes this claim because his son had no prolonged awareness of his impending death, and in the cases of Sylvia and Anna, they had none. This lack of any mental torture precludes application of this aggravator.

Any consideration of the HAC aggravator must begin with the definition this court provided in State v. Dixon, 283 So. 2d 1, 9 (Fla. 1973):

> It is our interpretation that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and, that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. What is intended to be included

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

As this court has applied that definition, it has required HAC murders to have been torturous to the victim. Not simply physically so, but crucial and necessary, the victims must have been mentally tortured as well. Wickham v. State, 593 So. 2d 191, 193 (Fla. 1991); Richardson v. State, 604 So. 2d 1109 (Fla. 1992). Thus, where the Defendant shot a victim, causing instant death, this aggravator may have applied because preceding the painless death was a prolonged or significant period where the victim was aware of his or her impending death, Cooper v. State, 492 So. 2d 1059 (Fla. 1986)(victim bound and helpless, gun misfired three times.); Preston v. State, 607 So. 2d 404 (Fla. 1992) (Fear and strain can justify a HAC finding,) On the other hand, quick deaths, in which the victim had no awareness they were about to be killed, or that they knew for only a short time, do not become especially heinous, atrocious, or cruel, even where he or she was stabbed. Wickham v. State, 593 So. 2d 191 (Fla. 1991)(Ambushing a "Good Samaritan" and shooting him twice was not HAC even though he pled briefly for his life); Scull v. State, 533 So, 2d 1137 (Fla. 1988) (Single blow to the head.); Wilson v. State, 436 So. 2d 908 (Fla. 1983)(Single stab wound is not HAC).

Awareness of death becomes an important factor, and murders committed when the victim is unconscious or even semi-conscious typically lack the gruesomeness to make them especially heinous, atrocious, or cruel. Herzog v. State, 439 So. 2d 1372, 1379-80 (Fla. 1983); Clark v. State, 443 So. 2d 973,977 (Fla. 1984).

From the definition, if the Defendant intended to torture the victim, or exhibited a morbid delight in the suffering of the victim, the resulting murder can be HAC. Multiple stabbings, brutal beatings, strangulations, and prolonged struggles exhibit this level of indifference to the pain the victim suffered. Pittman v. State, 646 So. 2d 167, 172-73 (Fla. 1994)(Victim strangled, stabbed, drowned in her blood.); Whitton v. State, 649 So. 2d 861, 866-67 (Fla. 1994)(30 minute attack); Hardwick v. State, 521 So. 2d 1071 (Fla.

1988)(5-6 minute attack during which victim was stabbed three times, shot in back and struck about the head.) If he did not, it does not apply. Kearse v. State, 662 So. 2d 677 (Fla. 1995) (No evidence the "defendant intended to cause officer unnecessary and prolonged suffering."); Williams v. State, 574 So. 2d 136 (Fla. 1991)(HAC "is permissible only in torturous murders. . . .as exemplified either by the desire to inflict a high degree of pain or utter indifference or enjoyment of the suffering of another.")

Applying this law to the facts of this case, shows that the murders here, as gruesome and tragic as they may have been, were not especially heinous, atrocious, or cruel, as this court has defined and applied that phrase.

A. None of the victims had any lengthy awareness of their impending deaths.

That each murder occurred quickly, as Zak intended (R 1024-26), without any of the victims being aware for any significant time of their impending deaths, is the most important point common to each victim. None of them knew (and Sylvia never did (R 583-84)) for more than a second or two that the Defendant intended to kill them (R 485, 587, 614-21, 1026-27, 1054).[7] Those facts take these murders out of the especially heinous, atrocious, or cruel category. Wickham, Wilson, Herzog, cited above. Other evidence, or rather the lack of it, supports that conclusion.

B. Sylvia's death.

Without dispute, Sylvia had no awareness of her impending death. She was asleep, or at least her eyes were closed, when Zak struck her from the side (R 1025, 1044, 1046). He took her to their bedroom, and strangled her when she made some movement (R 487, 502, 574, 583, 1026). Yet, she never regained consciousness after the first blows (R 860, 1026), and at most, was only "semi-conscious" immediately before her death. Rhodes v. State, 547 So, 2d 1201 (Fla. 1989) (murder not HAC where victim was only semi-conscious when strangled.)

[7]Zak used a machete because death would be instantaneous and silent (R 859).

The court's order reflects the uncertainty of whether Sylvia was dead when taken into the bathroom ("Medical testimony was inconclusive as to whether Sylvia was dead when she was dragged into the bathroom and struck with the machete." (T 328)) This lack of conclusive proof undoes the court's conclusion on this aggravator. It must be proven beyond a reasonable doubt, State v. Dixon, 283 So. 2d 1 (Fla. 1973), and the circumstantial evidence regarding when she died points with an uncertain hand that she did so in the bathroom after seeing her two dead children. There is no evidence she was conscious after the first blows. Where the proof hesitates, this court has ruled that the Defendant must receive the benefit of the doubt. State v. Law, 559 So. 2d 187 (Fla. 1989). Hence, because Sylvia was probably either dead when taken to the bathroom or bedroom or unconscious, her death was not especially heinous atrocious, or cruel. Wilson, Herzog, cited above.

C. Anna and Edward.

In justifying a death sentence for the murders of Anna and Edward, the court found each had "defensive" wounds.' Such injuries, by themselves, are insufficient to make their deaths especially heinous, atrocious, or cruel. Those cases in which the victims tried to defend themselves and in which this aggravator was justified also had them being aware of their impending deaths for a significant period. In Campbell v. State, 571 So. 2d 415 (Fla. 1990) the murder victim was stabbed 23 times over the course of several minutes and had defensive wounds, Likewise, in Hansbrough v. State, 509 So. 2d 1081 (Fla. 1987) some of the victim's 30 or more stab wounds were defensive, indicating she was aware of her impending death. On the other hand, this court, in Brown v. State, 526 So. 2d 903 (Fla. 1988) refused to find the murder of a policeman especially heinous, atrocious, or cruel, even though the Defendant had taken the officer's gun from him during a struggle and shot him in the arm. Brown killed him despite his pleas not to do

'There is no evidence Anna had such injuries (R 619-20).

so. There, the time between the initial wounding and the murder was so short, that despite the evidence of a "defensive" wound, the HAC aggravator was inapplicable.

In this case, Anna was struck without any warning and was quickly killed. She could not have been aware of her death, if at all, for any length of time. Although Edward apparently saw his father about to hit him (R 1027), his death also came so swiftly that he did not suffer for any prolonged period. Unlike the victims in Campbell and Hansbrough, those in this case were killed almost instantly, and their suffering was mercifully short.

D. Zak' s intentions.

The evidence also shows with tragic clarity that the Defendant planned and carried out the murders of his wife and children with a swiftness to minimize their suffering and pain. "My understanding is when you sever the spine a person dies instantly without pain." (R 1024). Indeed, his entire motivation for killing his family, came from a bizarre desire to end or prevent their suffering (R 831, 836, 1030-31). Without any contradiction, witness after witness testified that Zak loved his wife and children (669, 708, 718, 733, 766-69, 778, 794, 83 1, 85 1). There is no evidence he wanted to torture them or that he, in any way, prolonged their deaths to delight in the agony he had inflicted. Williams, Kearse, cited above, To the contrary, he hit his son so hard because he did not want him to hurt and be alive (R 1052).

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

The facts of Santos come close to those here, and what the court did in that case, and the successor, Santos v. State, 629 So. 2d 838 (Fla. 1994) indicate what this court should do in this case for this issue and others.

In that case, Santos had fathered a child although he and the mother had had a stormy relationship. Heightening the tensions to a breaking point, she refused to give the child his last name, a threat to his misguided sense of masculinity. Sometime before the murders he threatened to kill the mother.

On the day of the murder, Santos saw his girlfriend strolling along a street carrying the baby, accompanied by her son from a former marriage. Santos quickly approached them, and as the mother fled carrying her child, he caught up with her and shot her twice and the baby once. He fled but was arrested a short time later. Although the trial judge found the murders to have been especially heinous, atrocious, or cruel, this court rejected that finding. "The present murders happened too quickly and with no substantial suggestion that Santos intended to inflict a high degree of pain or otherwise torture the victims. Id. at 163.

That holding applies to this case. Zak never killed the wife and children he loved with any indifference to their suffering. To the contrary, he wanted their deaths to be quick and painless (R 1024). He never enjoyed their deaths, and the victims here had no prolonged awareness they were about to die. Their deaths were not committed in an especially heinous, atrocious, or cruel manner.

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

ISSUE II

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

Justifying its death sentences, the court found that Zak committed each murder in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. The findings are long, and they are included as an appendix to this brief. They are also unchallenged.

The conclusion that the CCP aggravator applies, however, is contested. The court's sentencing order recounted the events surrounding the murders, but the analysis of the facts supporting the CCP aggravator omitted any discussion of the mental torment that Zak endured until the morning of the murders when he reached the "insane" (R 855) conclusion that his wife and children would be better off dead. This extreme loss of rational thinking created an emotional crisis of such magnitude that it precluded the calculated, premeditated murders from being either coldly done or without any pretense of moral justification.

As defined by this court in Jackson v. State, 648 So. 2d 85, 88-90 (Fla. 1994), the "cold" part of the cold, calculated, and premeditated aggravating factor requires the Defendant to have used a "calm and cool reflection," or said another way, "the murder was 'more cold-blooded, more ruthless, and more plotting than the ordinarily reprehensible crime of first-degree murder."' (cites omitted.)

As a necessary corollary to this limitation or definition of that term, murders committed in an "emotional frenzy" are not CCP because they were not "coldly" committed. Indeed, one could conclude that this aggravator automatically excluded the sentencing court from finding the mental mitigator that the Defendant committed the murder while under the influence of an extreme emotional disturbance. Section 921.141(6)() Fla. Stats. (1994) After all, how can one have lost emotional control of

himself, Walls v. State, 641 So. 2d 381 (Fla. 1994), and yet have also used a "calm and cool reflection" to have planned and carried out a murder?

Accordingly, this court has, except in a few distinguishable instances, recognized the logic of that conclusion and refused to find the CCP aggravator when the Defendant also had a significant loss of emotional control. In Maulden v State, 617 So. 2d 298 (Fla. 1993), the Defendant killed his former wife and her new boy friend. Maulden saw the latter as replacing him as the father figure with his children, and his untreated chronic schizophrenia only heightened the emotional stress he experienced, He decided one morning to kill his ex-wife and her new lover. He dug up a gun he had buried, went to the house where they stayed, and shot them as they slept. This court found the murders were not cold, calculated, and premeditated in light of Maulden's extreme emotional disturbance.

In White v. State, 616 So. 2d 25, 26 (Fla. 1993), White killed a former girlfriend after assaulting her and making threats to murder her. That murder failed to qualify as cold, calculated, and premeditated in part because this Defendant "was under the influence of extreme mental or emotional disturbance."[1]

In Penn v. State, 574 So. 2d 1079 (Fla. 1991), the Defendant brutally killed his mother with a hammer, After the homicide, he pawned several things he had stolen from her to buy cocaine. His estranged wife also told him that as long as his parent lived, they could not reconcile. The court found the murder to have been especially heinous, atrocious, or cruel, and committed in a cold, calculated, and premeditated manner. It also concluded he had acted under the influence of and extreme mental or emotional disturbance and had no significant history of prior criminal activity. This court rejected the CCP aggravator because it found no evidence "of the cold calculation prior to the murder necessary to establish this aggravating factor." Id. at 1083.

---

[1] This factor also did not apply because White was using cocaine at the time he killed her, and his capacity to appreciate the criminality of his conduct was substantially impaired. Id

In Farinas v. State, 569 So. 2d 425 (Fla. 1990), Farinas stalked a former girlfriend, forced her car to pull off a highway and then had her get in his vehicle. She jumped from it at a stop light, and he pursued her on foot. He shot her in the back then fired the gun two more times into her head although the weapon had misfired three times. This court rejected the lower court's finding of the CCP factor, concluding instead that it did not apply because he was "under the influence of extreme mental or emotional disturbance." Id. at 431.

In Richardson v. State, 604 So, 2d 1107 (Fla. 1992), the Defendant's long time girl friend kicked him out of the trailer they had shared. During the week before her death he made several threats to kill her. On the day of her murder he got a shotgun, hid it in coat he wore, and walked several miles to the trailer. Then, luring her outside, he shot her at what must have been point blank range. That murder, committed in the context of a domestic dispute, and Richardson's loss of emotional control, was not CCP.

In Cannady v. State, 620 So. 2d 165 (Fla. 1993), the Defendant killed his wife and then went after and murdered the man she claimed had raped her two months earlier. Rejecting the trial judge's conclusion that both murders were cold, calculated and premeditated, in particular, as to the alleged rapist's homicide, this court noted "The emotional distress apparent from this record' mounted over a two-month period, during which time Cannady continued to believe that Boisvert had raped his wife, causing her physical and emotional suffering." Id. at 170.

In Santos v. State, 591 So. 2d 160, 163 (Fla. 1991) (which this court had relied on in Richardson) the Defendant killed his wife and their two year old daughter. The trial court found the CCP aggravator and the emotional disturbance mitigator. This court, as it had done in other cases, rejected this aggravating factor because the testimony was "entirely consistent with a crime of irrational, heated passion brought on by a domestic frenzy.""

---

[10]This court has rejected the CCP aggravator for similar reasons in several other cases that arose in nondomestic situations, Windom v. State, 656 So, 2d 432 (Fla. 1995); Besaraba v State,

Thus, finding the Defendant under the influence of an extreme emotional disturbance tends to refute the notion that the he committed the murder with the coldness necessary for the murder to qualify for the CCP aggravator. Simmering emotions negate this aggravator. Cannadv.

The few instances this court has approved the CCP factor, even though the emotional disturbance mitigator had been found, have some distinguishing characteristics. Usually, the homicides occurred outside the domestic dispute scenario of the cases cited above. Hall v. State, 614 So. 2d 473 (Fla.1993) (Kidnaping, rape, and murder. Mitigators either "had not been established or were entitled to little weight."); Cruse v. State, 588 So. 2d 983 (Fla. 1991)(Six people, including two police officers, killed at a shopping center.)

Here, several precursors, some reaching back to Zak's youth, became focussed in the first half of 1994, so that Sylvia's playing the divorce cracked record on June 9 sparked an explosion of total criminality that almost defies understanding.

Undergirding any explanation of this Defendant's acts must be his mild brain damage, deep, chronic depression, and personality disorders (R 820, 826, 838-39, 1145). Unlike more serious injuries to the brains of other death row defendants, Zak's injury generally allowed him to meet and function in society, particularly the disciplined and structured world of the military. As a supply sergeant, he also had a low stress job (R 775), so the Air Force never pushed against those limits. Sylvia did.

Because of his brain injury, Zak missed the options presented by situations he faced (R 820). He compensated for his organic inability to concentrate (R 684) by developing rigid thinking. Although this discipline gave him the ability to focus on the task at hand, it came with a cost. By tuning out distractions, he failed to see alternatives, choices (R 855, 687). Particularly when stressed, he could not see the different solutions that any particular problem presented (R 682, 692-93, 855).

---

656 So. 2d 441 (Fla. 1995); Crump v. State, 622 So. 2d 963 (Fla. 1993); Padilla v. State, 618 So. 2d 165 (Fla. 1993).

Zak's chronic depression, dating at least from the time he returned from Korea, contributed to the emotional and mental straight jacket he found himself in by June 1994 (R 687, 823-24, 828-30). Indeed, his personality had changed (R 851). He entertained thoughts of suicide (R 867),[11] saw futility in living (R 831), became increasingly helpless, and believed himself worthless (R 687, 831). This long term, severe melancholy impaired his judgment and distorted his thinking, yet he apparently masked it from those he worked with, which the depressed can do with some skill (R 824, 1151).

Aggravating this perpetual despondency, he also had a narcissistic personality in which he overvalued his opinion and importance (R 844-45).[12] The reality was, however, to the contrary, and underneath the veneer of self-confidence lived the feelings of worthlessness and inadequacy (R 856), which Sylvia constantly justified (e.g. 1015).

She, was, moreover, the center of Zak's life; and she controlled, perhaps unwittingly, to a significant extent, his well being (R 831). By June 9, he had repeatedly failed to make her happy, and that realization beat him into futility (R 832). Anyone would have had problems living with her, but Zak, with his own difficulties dealing with people, especially could not cope with his demanding wife (R 689, 846).

On returning to the United States in 1992, Sylvia obviously was unhappy (R 994-95, 1003). Having grown up in a rich Korean family, she was used to the good things in life, and she had much difficulty living on a sergeant's salary. She pestered Zak to ask his mother for money, and then complained when she sent so little (R 737-38, 1021). She blamed her church for not doing more to help her (R 736-37). Yet, the lack of money provided little impediment to what she wanted to do. When she returned to Korea in the summer of 1993, she put the entire vacation on a credit card (R 1009).

---

[11] "For a while he considered insuring himself for $200,000 and then committing suicide (R 867)

[12] Zak had read some of the writings of Frederick Nietzsche, who advocated a "superman" philosophy of life. See Issue VI. Such tenets supported Zak's narcissism (R 845).

Obviously, she was homesick (R 1002-1003). The $150-$600 monthly telephone bills she ran up testified to that (R 1002). More bizarre, she got the notion that she wanted a 100% Korean child (R 741, 763, 834-35, 991-92, 1007). Of course, she loved Edward and Anna, but they were "Honhyulah," half-breeds, and Anna looked American, not Korean (R 740). So, she convinced Zak to let her former boyfriend (who happened to be rich (R 741)) have sex with her so she could conceive the 100% Korean baby she wanted (R 763, 834-35, 991).

Such strange acceptance of the idea, and the subsequent pregnancy (R 993, 1007), exhibit Zak's desire to please his wife, He even redefined his college goals from teaching (R 65 1) to business, and he believed he could keep his wife if he could somehow improve his Korean language skills and get a job in Japan or Korea (R 995). Money, never very important to Zak (R 997), now became so.

This devotion tolerated the high telephone bills, the reckless use of the credit card, and led him to buy a house, at her insistence, they could not afford (R 1018-19). He tried to live up to her dreams, but as he studied at night, she played bingo, went to parties, danced, flirted, and possibly more (R 735-36 1008). Frequently she stayed out all night, and wandered about Florida and Alabama looking for fun (R 717, 736, 1008). If she happened to return and found that her husband had fallen asleep, she kicked him (R 1008). He accepted this treatment, craving almost her approval. Once, at a picnic, as she sat in a lounge chair, he brought her a plate of food, but he had to return to the food table two or three times until he got Sylvia exactly what she wanted (R 798). She could be very nice at times, or she could be mean (R 751, 753). To put it mildly, she was a hard woman to live with (R 743)

Obviously, as confirmed by Dr. McClaren, the State's mental health expert, he was "burning the candle at both ends," or, as he said, a "robot in overdrive." (R 1022, 1143). In addition to his regular Air Force job, he took three or four college courses every semester, and he was in class three or four nights a week (R 828). This pattern was even more difficult because his damaged brain had a hard time concentrating, and he spent

much longer studying that a normal person (R 684). Hence, he worked every night well past midnight and got up long before the sun (R 732, 996, 999). Tired from lack of sleep, he was always fatigued. He found no joy and little pleasure in life (R 855) Still, Sylvia belittled him, calling him a loser (R 1015).

His children provided a rare source of genuine happiness in this increasingly bleak life. All his neighbors and work associates agreed that he loved five year old Anna and seven year old Edward (R 669, 708, 718, 733, 766-69, 778). He tacked their grade school drawings on a wall at work (R 493, 773). They called him at the office almost daily, and he was both concerned with and proud of his son (R 773-74). Anna would ask him to comb her hair at night, and he obviously enjoyed doing it (R 733).[13] They, like his wife, were a central part of his life, and he talked about his children all the time (R 666).

Despite the happiness he had with his children, the marriage became increasing unhealthy and unstable (R 830), especially after the summer of 1993 and the subsequent miscarriage (R 834-355). Sylvia spoke more often of getting a divorce, and she involved her children in her sniping, using them to pass messages to her husband (R 836, 10213). Zak saw their helplessness and crying (R 748-49, 1013-15, 1023).

Winding the spring tighter, Zak read the philosophy of Frederick Nietzsche, a German philosopher, who advocated an "uberman" or superman approach to life. That is, idealistic men are "powerful and can handle their own problems in their own powerful way." (R 849) Such a view of life led this Defendant to rage, anger, and more depression because he obviously fell far short of reaching this German's world view (R 844).

Thus, by June 9, several stressors created an unbearable tension that exploded with the murders of those Zak held most dear:

1. The possibility of a divorce.
2. The resulting loss of his children
3. The full time job and full time college course load.
4. The shame of dropping a course and having to tell his wife.
5. Insufficient sleep.

---

[13]She would prefer Zak to comb her hair than Sylvia (R 733).

6. His involvement with the "superman" philosophy of Frederick Nietzsche. i.e. The idealistic man is powerful and can solve his problems in his own way.
7. The conflicts with his wife about money.
8. The large indebtedness
9. The recently purchased house that needed many repairs.
10. Zak's major role in child care.
11. Sylvia's unrealistic goals for her husband.
12. The unhealthy and unstable marriage.

(R 828-30, 848-49).

Zak became convinced that he had no options. When Sylvia vented her anger, life became futile, hopeless (R 831-32) It could not continue the way it had been because she and the children were obviously unhappy. She because of her dislike of the United States. The children because of the turmoil in the family.[14] Divorce, the only other choice likewise presented a dismal future. The children, half-breeds, would be pariahs in Korea. Sylvia, also, would live in shame there (R 836). And, if he had the children, they would miss their mother (R 836) "It was just a no win situation." (R 835) "He became so narrow in his focus that the only way out he could see was to take on the responsibility of her pain and his children's pain." (R 835-36)

Thus, by June 9, only slight pressure caused his explosion. The night before Sylvia had said some "very evil" things to Zak that frightened even her (R 746). He had only recently dropped one of his courses. He was ashamed of doing that, and afraid of Sylvia's wrath (R 831). Five days earlier, his son had talked of committing suicide, so when he called him on June 9, telling him that mother wanted a divorce, Zak saw the pattern beginning again (R 835). The cold rage boiled under a lid of Air Force calm, to erupt several hours later in an explosion of utter, absolute criminality. The anger, futility, depression that had built up, erupted (R 846, 867, 1 155), and once started, continued until

---

[14] "What would happen, she'd say who do you want to live with? They'd say I want to live with Dad, especially Anna, and she--she would come over to me and she would say I want to stay with Daddy. Daddy? Good. You don't love me, you don't look like me. You don't love me. I'm going back to Korea. You're never going to see me again. They'd run to her and say, no, I want to stay with you, I want to stay with you. And then, good, then you're not going to see your Dad anymore either because he's a Sonanonah [a bastard], and all this." (R 1013)

the tragic end (R 862). The resulting murders were not cold, calculated, and premeditated.

If Zak had an explosive rage, he also experienced a profound, soul shaking sense of sorrow, of failure. His children had suffered, and would suffer even more from the pain of a divorce he had felt as child. And if Sylvia took them to Korea they would become untouchables, half breeds in a culture that prized racial purity (R 761, 868, 1016). Even his wife, whose family called her a whore for marrying an American (R 990) would likely find a hard time there because she had married an American (R 835, 990).

Because of the pain his wife and children endured (R 837) his stressed and damaged mind increasingly focussed on one option to relieve their hurt. Death became the only release from their anguish. As is common for those suffering depression, he assumed the guilt for his perceived failure to make them happy (R 854-55). He took responsibility for their suffering, reasoning that they would suffer less if dead (R 868, 873).

Their deaths, therefore, achieved some moral justification to this man of limited vision, in much the same sense that Dr. Jack Kevorkian has justified assisting persons in pain end their lives of suffering. Michigan v. Kevorkian, Case No. 93-11482 (Mich. Cir. Ct. Wayne County, December 13, 1993). For this Defendant, death would end the suffering of his family, and he saw no other options, especially since he rejected divorce as a solution to the hurt his family had endured. Such a view, warped and severely limited as it may have been, provided a pretense of moral justification for these murders. It is sufficient to preclude application of the cold, calculated, and premeditated aggravator.

In giving meaning to the "without moral or legal justification" part of the cold, calculated, and premeditated aggravating factor, this court has focussed on the "legal justification" prong. Banda v. State, 536 So. 2d 221 (Fla. 1988); Christian v. State, 550 So. 2d 450 (Fla. 1989) (Pretense of self-defense.) To date, only this court's decision in

Hill v. State, 21 Fla. L. Weekly S5 15 (Fla. November 27, 1996) and particularly Justice Anstead's separate opinion has provided any explanation of what is a pretense of "moral justification," In that case, Hill argued he had at least a pretense of moral justification in killing two persons involved in performing abortions because he believed life began at conception Killing those who aborted or facilitated the abortion of the unborn, therefore, had some moral approval.

Zak's pretense of moral justification had a different focus. He wanted to end the obvious suffering of his wife and children. Unable to make her happy in either Korea or the United States, he saw death as the only choice he had. Likewise, his children had become increasingly despondent and suicidal at the thought of losing their mother or father (R 832-33). Zak, out of an illogical logic and love, decided to take their pain on himself, willing to accept a death sentence if necessary to end their suffering (R 858). Such a belief amounts to a pretense of moral justification because it expresses the fundamental desire of humanity to ease the suffering of others. Though not a legal defense, Zak's wish to spare his wife and children further pain presents at least a pretense of moral justification for what he did.

This court can only conclude that Zak never had the requisite coldness to have murdered his family, and that he had at least a pretense of moral justification in doing so. This court should reverse the trial court's sentence of death and remand for a new sentencing hearing.

ISSUE III

DEATH IS A DISPROPORTIONATE SENTENCE TO IMPOSE IN THIS CASE.

When this court reviews death sentences, it compares the case at hand with others involving similar facts.

> Because death is a unique punishment, it is necessary in each case to engage in a thoughtful, deliberate proportionality review to consider the totality of circumstances in a case, and to compare it with other capital cases. It is not a comparison between the number of aggravating and mitigating circumstances.

Porter v. State, 564 So. 2d 1060 (Fla. 1990). Later, in Kramer v. State, 619 So. 2d 274, 277 (Fla. 1993) the court expanded on the quality of proportionality review it conducts:

> While the existence and number of aggravating or mitigating factors do not in themselves prohibit or require a finding that death is nonproportional. . . we nevertheless are required to weigh the nature and quality of those factors as compared with other similar reported death appeals.

Defendants who commit similar crimes should receive similar punishment. Uniformity thus drives this unusual form of appellate scrutiny, Tilman v. State, 591 So. 2d 167, 169 (Fla. 1991). In this instance, the relevant cases involve defendants who have murdered members of their families. As will be seen, however, that relatively small class needs further refinement to catch the cases most like this one.[15]

At the outset, everyone must concede this case does not involve murders for gain, such as collecting on an insurance policy. Zeigler v. State, 580 So. 2d 127 (Fla. 1991); Buenoano v. State, 527 So. 2d 194 (Fla. 1988); Fotopoulos v. State, 608 So. 2d 784 (Fla. 1992); Bvrd v. State, 481 So. 2d 468 (Fla. 1985). No one ever suggested Zak murdered his family for that reason.

This Defendant also differs from others in that he lacks a history of violence. While this court has frequently reduced death sentences in cases involving the murders of spouses, lovers, and the like, it has drawn distinctions in situations where the defendant

[15]It is "incredibly rare" for a father to kill his children (R 874)

has prior convictions for committing violent crimes, particularly against women. See, Porter v. State, 564 So. 2d 1060 (Fla. 1990); Lemon v. State, 456 So. 2d 885 (Fla. 1984)(prior conviction for assault with intent to commit murder of a woman. Recently released from prison.); Duncan v. State, 619 So. 2d 279 (Fla. 1993)(Prior convictions for second degree murder and aggravated assault.)

This court has also rejected proportionality arguments where the trial judge found some mental mitigation but gave it scant weight, Spencer v. State, 21 Fla. L. Weekly S 366 (Fla. September 12, 1996). Spencer killed his wife, and in aggravation the court found he had murdered her in an especially heinous, atrocious, and cruel manner. It also found he had been previously convicted of aggravated assault, aggravated battery and attempted second degree murder. Although the Defendant had presented some evidence that the statutory mental mitigators applied, this court approved the trial judge's conclusion they were entitled to little weight.

This court has, however, recognized that family relations often create "intense emotions," Wright v. State, 586 So. 2d 1024 (Fla. 1991), and it has with consistent regularity refused to affirm death sentences where the Defendants killed their wives, girlfriends, and children when the former were intensely jealous or filled with an unmanageable anger. Douglas v. State, 575 So. 2d 165, 167 (Fla. 1991)(intense jealousy and hatred.); Farinas v. State, 569 So. 2d 425, 431-32 (Fla. 1990)(jealousy).

Douglas and cases like it provide some help here because Dr. Larson and Dr. McClaren agreed Zak had killed his wife, at least in part, out of anger (R 857, 1155). They fail, however, to capture the essence of this case because no one ever suggested the Defendant killed his children for that reason.

More on point, this court has also found death proportionally unwarranted in domestic killings when the Defendant had a damaged brain, alcohol or drug problems, a low IQ, or mental problems. De Angelo v. State, 616 So. 2d 440 (Fla. 1993)(Brain damage and other nonstatutory mental mitigation); Cannadv v. State, 620 So. 2d 165 (Fla. 1993)(alcoholism and atrophied brain); Richardson v. State, So. 2d (Fla. 199)(Low IQ);

Santos v. State, 591 So. 2d 160, 162 (Fla. 1991)(incompetent to stand trial and psychotic at times).

These cases provide greater guidance because Zak had organic mental problems. As Dr. Crown found, Zak had mild brain damage that allowed him to function "under limited stress." (R 695) Dr. Larson echoed that conclusion (R 826). Such a deficiency or inability to consider options became a fundamental explanation for the murder of the Defendant's wife and children. When his wife (through his son) told him he wanted a divorce, his distorted and rigid reasoning led him to only one conclusion: that they would be better dead than alive (R 835-36).

Yet there are other cases involving Defendants and facts more similar to those presented here. The underlying similarity and unifying theme that percolates through them is that they are "middle class" murders. That is, the Defendants in this small subset of the family murder class work at steady jobs, have a house with a mortgage, pay their bills and taxes, and are in every respect responsible citizens. They represent the great bedrock of middle class America: decent, responsible, and law-abiding. They lack the vicious, remorseless determination to kill their wives and anyone else that got in their way to satiate their greed that Zeigler, Fotopoulous, Buenoano, and Byrd demonstrated. They hide their mental problems behind a facade of normality. The murders they commit become the horrible explosion of total criminality this court recognized in State v. Dixon, 283 So. 2d 1 (1972) that sometimes overcomes fundamentally decent people. While they may be guilty of a first degree murder, they do not deserve a death sentence.

Within them the spring winds tighter, the band stretches longer, and the water boils higher, In Kampf v. State, 371 So. 2d (Fla. 1979), Kampf brooded for three years over the divorce from his wife of 17 years. He shot her once in the head, and when told she was dead, he said, "Good." In this early death penalty case, this court rejected the trial court's death sentence, particularly that the murder was especially heinous, atrocious, or cruel. Kampf had not planned the murder for three years, and his "expression of satisfaction at his former wife's death can be interpreted as an indication of concern over

whether she died quickly or lingered or suffered." Id. at 1010. This court also concluded that evidence tended to establish that Kampf had no significant criminal history, and he killed his wife while under the influence of an extreme mental or emotional disturbance. Id.

In Klokoc v. State, 589 So. 2d 219 (Fla. 1991), the Defendant abused his wife who eventually left him. Seeking to find some means to retaliate, he killed his 19 year old daughter as she slept. In finding his death sentence disproportionate, this court noted he had the same mitigators as Kampf: no significant criminal history, and under the influence of an extreme emotional disturbance. As to this last factor, Klokoc was "not in a heightened rage" at the time of the murder. Id. at 219. Indeed, the murder was, significantly, cold, calculated, and premeditated.

Nevertheless, this court, on conducting a proportionality review, reduced Klokoc's death sentence because he had mental problems and "it is unrefuted in this record that he was under extreme emotional distress." Id. at 222.

This case falls more closer into the Kampf and Klokoc line of decisions than others in this genre of murders. First, only one aggravator, the prior conviction for a capitol felony, clearly applies, and it carries little weight because the felonies, the other two murders, happened contemporaneously with the third homicide. As such, they were part of the "explosion of total criminality" this court concluded in Dixon, cited above, did not merit a death sentence.

Second, the trial court found the two statutory mitigators that typifies middle class murders: the Defendant had no history of significant criminal activity, and he committed the murder under extreme emotional distress. Specifically, Zak not only had no significant history of criminal activity, he had no criminal record, not even a speeding ticket. On the other hand, not only was the statutory mental mitigator present, other mental mitigation exposed the significant mental problems he had (R 3 14-16).

Despite this Defendant's significant and persistent mental problems (that even the State's expert agreed he demonstrated (R 1144-55)), he functioned extraordinarily well in

the Air Force. His supervisors unanimously declared him an outstanding airman (R 774), one of the most dependable (R 803), one that everyone relied on (R 775). He was their "right hand man" (R 800), and the best worker one supervisor had seen in 30 years (R 803). As proof that this was more than court room loyalty, the Air Force had promoted him ahead of his peers (R 785). He really was as good as those he worked with attested.

And there is more, indeed, a "vast" amount of other mitigation in this case. Besaraba v. State, 656 So. 2d 441 (Fla. 1995). There is so, much, in fact, that in opposing Zak's request for specific instructions on the mitigation, the Prosecutor claimed the list "would be as long as from you out the back of the courtroom." (R 1178). Some was presented as part of the argument against the cold, calculated, and premeditated aggravator (See Issue II) and will not be repeated here.

The recurrent theme coming from the testimony of the psychologists and Zak was his tremendous sense of guilt at the pain and suffering his wife and children endured at the end. He blamed himself for their unhappiness (R 854-55). Unlike Klokoc and Santos, this Defendant felt no jealousy towards his wife. He did not kill her out of spite or revenge (R 837). Indeed, despite all his efforts to satisfy his wife, from going to school to buying a house, he failed to please the one person who had become the center of his life (R 831, 851). Thus, this man who was described as a peace maker and never violent (R 652, 848), in a bizarre twist of logic, sought to relieve their pain by killing them. Their deaths were an act of mercy to relieve the hurt (R 858), and he took responsibility not only for them, but for a death sentence for himself (R 868-69), much as Klokoc did for the murder of his daughter.

There is, in this case, such a profound sorrow, sublimely distinct from even those cases most like this one. Even though the experts may have concluded he was angry with his wife, there is abundant, undeniable evidence he loved her, and especially his children. Words simply fail to capture loss he felt, we all experience at the great wrong he has done. Yet, his execution is not the conclusion this court should approve. His death sentence should be reduced to one of life in prison.

ISSUE IV

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

The jury made an unusual, and illogical, distinction when it recommended death sentences (by a vote of 7-5) for the murders of Sylvia and Edward Jr., yet decided that the Defendant should get a life sentence for the murder of Anna (R 259-64). The court, after concluding that he should die for the murders of Sylvia and Edward, found the same aggravating factors applied to Anna (R 320). Because it saw no distinction between the three murders, it ruled that the jury's life recommendation unreasonable and could be ignored (R 320). Accordingly, it sentenced the Defendant to death for Anna's murder. Not only did the jury have a reasonable basis for that latter recommendation, the court should have overridden the death recommendations for the other murders and imposed life in each other instance.

A trial court should impose a life sentence the when the jury has recommended that punishment and they had a reasonable basis for it. Tedder v. State, 322 So. 2d 908 (Fla. 1975). Accordingly, on appeal, if this court finds such a justification for the jury's verdict, it will reverse the imposition of the death and remand for a life sentence. E.g. Bovett v. State, 21 Fla. L. Weekly S535 (Fla. December 5, 1996).

In this case, the jury had abundant reasons to recommend a life sentence for Zak, and those have been examined in the issues dealing with two of the aggravating factors and the proportionality argument. (See Issues I, II, III) Briefly, the jury could have concluded that the murder was not especially heinous, atrocious, or cruel, and it was not committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. It could have reasoned that the vast amount of mitigation, including two statutory mitigators, outweighed the only aggravator remaining. This latter factor lacked significant weight because the prior felonies occurred contemporaneously with the

death of Anna. Thus, the jury had a reasonable basis for its life recommendation, and the court erred in overriding it.

The problem arises, though, of the trial judge's reason for imposing death. It found no difference between the murders of Anna and those of her brother and mother (R 320). Because it had already determined death was appropriate for them, it concluded death was the correct sentence for Anna's murder. But would it have reached the same conclusion had it considered Anna's homicide first? Using the analysis above, it could have imposed a life sentence for her death. Then, using the same logic, it could have concluded that because there was no legal difference between the murders of Anna, Edward, and Sylvia, life should be imposed.

This court has considered a few cases in which juries returned split recommendations in situations where a single defendant killed two or more persons. Garcia v. State, 644 So. 2d 59 (Fla. 1994); Craig v. State, 510 So. 2d 857 (Fla. 1987); Groover v. State, 458 So. 2d 226 (Fla. 1984). Usually, the facts surrounding the murders explained or justified the disparate verdicts. In Garcia, however, the homicides of two elderly sisters had no such distinctions, and this court approved the trial court's override of the jury's life recommendation for one of the killings. That result has no application here because the trial court found in Garcia four aggravators applicable and nothing to mitigate them. Since the other murder had nothing to distinguish it, and particularly because nothing mitigated either homicide, the jury's life recommendation lacked the credibility this court has presumed it had.

Garcia presents a distinguishable counterpoint to this case. The trial court found three aggravators, two of which Zak has strongly attacked. More significant, a vast amount of strong mitigation exists, and the one unchallenged aggravator, the prior convictions for a violent felony, could reasonably count for little because the murders arose out of the same explosive act of criminality. Garcia provides no guidance about how to resolve the dilemma presented by the split recommendations in this case.

If differences exist between the murders of Anna and her brother and mother, they must occur in the facts surrounding the especially heinous, atrocious or cruel aggravator. Zak's intentions sufficient to justify the CCP factor applied with equal force to Anna and Edward, so it provides no reason for the disparate recommendations. Regarding HAC, though, the jury could have believed Zak's attack on his wife with a crowbar, then strangling her, and finally hitting her with the machete was sufficiently brutal for this aggravator to apply. Likewise, his savage attack on his son, which he admitted he did "hard" (R 1027), met the HAC definition. On the other hand, relatively little was said about Anna's death, and it came swiftly.[16]

The State, in its closing argument, encouraged this reasoning, because a large part of its HAC argument focused on the pictures taken of the victims shortly after the police discovered their bodies. "Sylvia Zakrzewski's murder was especially heinous, atrocious and cruel. Edward's was and Ann's was. All you've got to do is take another look at these pictures and that will be confirmed to you. Wicked, evil, vile. You remember those words and you see if that's not what those photographs show." (R 1214) The photographs of Edward's body, particularly, have a horror, the jury must have responded to with a death recommendation.[17]

This reasoning, however, runs contrary to what this court has said regarding HAC. Acts that occur after death, after the person has lost consciousness, or even when he or she is semi-conscious do not make the resulting murder especially heinous, atrocious, or cruel. Herzog v. State, 439 So. 2d 1372, 1379-80 (Fla. 1983); Clark v. State, 443 So. 2d 973, 977 (Fla. 1984). Thus, the pictures the prosecutor said proved this factor do not because all the evidence showed that none of the victims in this case either knew of their

---

[16]The prosecutor said Anna's murder was "the most heinous murder of all, the worst of all." (R 1232)

[17]During voir dire, several prospective jurors said the killing of children and murders done with a machete would automatically be especially heinous, atrocious, or cruel (R 105, 134-35, 142-46,155, 177).

impending deaths or realized they were about to die for such a short time to be legally inconsequential. [18]

In Ross v. State, 386 So. 2d 1191 (Fla. 1980), the trial court, following the jury's recommendation, sentenced Ross to death for the beating death of an elderly woman. This court reduced that sentence to life because "It appears, however, that the trial court gave undue weight to the jury's recommendation of death and did not make an independent judgment of whether or not the death penalty should be imposed." Id. at 1197. As in Ross, the court here may have given too much weight to the jury's death recommendations. They were by the slimmest of margins: 7-5 in both cases, and those decisions become suspect in light of the State's closing argument that emphasized the gruesome and gory nature of the pictures as justification for finding the especially heinous, atrocious, or cruel aggravating factor.

The trial court, thus, gave more weight to the death recommendations than they deserved, and rather than imposing death in all three murders, the court should have overridden the jury's recommendations for Edward and Sylvia and imposed life sentences for all three murders. This court should correct that fault and reduce all three sentences to life in prison.

---

[18] The State also improperly argued that mitigation must "excuse" the murders (R 1218, 1222). That is improper because as this court has said, mitigating factors, "may be considered as extenuating or reducing the degree of moral culpability for the crime committed" King v. State, 623 So.2d 486,489 King v. State, (Fla. 1993).

ISSUE V

THE COURT ERRED IN ADMITTING SEVERAL GRUESOME AND GORY PHOTOGRAPHS OF THE VICTIMS IN THIS CASE BECAUSE WHATEVER PROBATIVE VALUE THEY HAD IN THIS PENALTY PHASE HEARING WAS SIGNIFICANTLY OUTWEIGHED BY THEIR PREJUDICIAL VALUE, A VIOLATION OF ZAKRZEWSKI'S EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

The law on admitting gruesome and gory photographs is deceptively simple. "Generally, the admission of photographic evidence is within the trial judge's discretion and a trial judge's ruling on this issue will not be disturbed on appeal unless there is a clear showing of abuse. Pangburn v. State, 661 So, 2d 1182, 1187 (Fla. 1995). As with other forms of evidence, relevancy, generally, is the measure of admissibility. Accordingly, this court regularly rejects challenges to a lower court's ruling admitting pictures of the victims' body because the Appellants failed to show this necessary abuse of discretion. E.g. Peterka v. State, 640 So. 2d 59, 69 (Fla. 1994). Photographs often help the police show the location of the victims' bodies, the time of death, and the manner in which they were bound. Henderson v. State, 463 So. 2d 196 (Fla. 1985) They assist the medical examiner explain the external examination of the victim. Bush v. State, 461 So. 2d 936 (Fla. 1984).

Nevertheless, a small but significant body of cases has found error in several trial courts' rulings admitting horrible pictures under the facts of those cases. Duncan v. State, 619 So. 2d 279 (Fla 1993); State v. Smith, 573 So. 2d 306 (Fla. 1990); Czubak v. State, 570 So. 2d 925, 928-29 (Fla. 1990). In such instances, the prejudicial value of the pictures outweighed whatever limited probative significance they may have had. Czubak, Duncan. Judges should exclude pictures with little relevancy, particularly if they are pertinent to an uncontested issue. Smith. Even where the gruesome photographs have some relevance, if other evidence can make the State's point, the pictures should not be admitted. Czubak. at 928-29. In short, as this court has warned, "trial judges [should] carefully scrutinize photographic evidence for prejudicial effect, particularly when less

graphic evidence is available to illustrate the same point," Duncan (Kogan, concurring and dissenting in part); Marshall v. State, 604 So. 2d 799, 804 (Fla. 1992) Their shocking value may outweigh whatever limited relevancy they might otherwise have. Nixon v. State, 572 So. 2d 1336, 1342-43 (Fla. 1990).

In this case, the Court admitted some of the most gruesome pictures ever presented to a jury. Yet it refused to do anything to reduce their unfairly prejudicial impact (R 608) despite repeated requests by defense counsel to limit the number of photos (R 375, 474-76, 516, 537-39, 577, 606-609, 615), to exclude cumulative pictures (R 428), to crop certain ones (R 608), and to stop the prosecutor from "flaunting" them before the jury (R 443, 474-75).

The jury's life recommendation for Anna and death verdict for Edward presents a major conflict because, as the trial court recognized Anna's murder was more cold, calculated, and premeditated, and more heinous, atrocious, or cruel, than Edward's death (R 330-31). As the trial judge concluded, the jury could have had no reasonable basis to distinguish between the two homicides. Yet, the jury had a reason, some justification for making the distinction. The pictures. Those gruesome and gory photographs made these murders especially heinous, atrocious, or cruel in the eyes of the prosecutor and the jury, but not the law (R 1214).

Undoubtedly, the death stare of Edward naturally shocked those who were to recommend what sentence Zak should receive. See, Atkins v. State, 663 So. 2d 624 (Fla. 1995)(Gruesome photographs immaterial because they would have "likely inflamed jurors by showing the gruesome extent of the child-victim's injuries.") More prejudicial, the prosecutor in closing argument told the jurors "Sylvia Zakrzewski's murder was especially heinous, atrocious and cruel, Edward's was and Ann's was. All you've got to do is take another look a these pictures and that will be confirmed to vou Wicked, evil, vile. You remember those words and you see if that's not what those photographs show." (T 1214)(Emphasis supplied.) As argued in Issue I, neither Edward's nor Sylvia's death were especially heinous, atrocious, or cruel, and the pictures only misled the jury(and the

court) to conclude it applied. The inflammatory prejudicial impact these pictures had on the jury outweighed whatever limited relevance they had in this sentencing proceeding.

This court should remand for a new sentencing hearing.

ISSUE VI

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

This issue borders on the bizarre. The State called Dr. Harry McClaren to testify about Zak's mental condition. It was able to do this because this Court had recently added Rule 3.202 Fla. R. Crim. P. to the rules of criminal procedure. As the commentary to that addition noted, experts hired by the State could examine Defendant's solely to rebut whatever mental mitigation the Defendant had presented.

Accordingly, the court qualified him as an expert in forensic psychology (R 1138), and he told the jury about his interviews with Zak, and the conclusions he reached concerning his mental state. Rather than rebut Dr. Larson's or Dr. Crown's conclusions, he agreed with the Defendant's experts: Zak suffered from an extreme emotional disturbance (R 1150). At that point, the State should have concluded its examination of Dr. McClaren. It did not do so, however.

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

MR. KORAN: Judge --

THE COURT: At this point.

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

A: Yes,

Q: By -- how did you familiarize yourself with that?

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

Q: Okay.

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

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

THE COURT: No, sir. Request is denied. Go ahead and proceed, Mr. Elmore.

MR. ELMORE (Cont'g): Thank you, Your Honor. Based on your readings concerning Nietzsche, what is Nietzsche philosophy towards Christianity.

A: He vigorously attacked Christianity.

(R 1 156-57).[19]

The court made three errors in allowing Dr. McClaren' s testimony regarding Nietzsche's anti-Christian attitude. First, it refused any defense voir dire of the psychologist's expertise in the philosophy of Nietzsche. Second, the State never established he was so qualified, and third, his testimony had only a speculative relevance to this case.

Trial courts have considerable discretion in admitting or excluding the testimony of expert witnesses, and only if they have clearly abused it will this court find error. Way v. State, 496 So. 2d 126 (1986). Such freedom, however, has limits, and this court has

[19]The State also introduced a letter found in his cell fourteen months after the murders in which he said, among other things, "Christianity is a primary culprit in propagating the belief that suicide is a ticket to eternal damnation. Ludicrous, all that's required are a couple of 'I believe' and 'please forgive me,' the Bible says it." (State exhibit 15)

reversed convictions in capital cases where the trial court erred in excluding expert testimony that was relevant to the issues raised at trial. See, Hall v. State, 568 So. 2d 882 (Fla. 1990).

1. The court refused to allow Zak to voir dire Dr. McClaren regarding his expertise on Nietzsche.

The State, as evident from the testimony quoted above, made a feeble attempt to qualify Dr. McClaren as an expert in the philosophy of Frederic Nietzsche. Zak sought to question the psychologist about the depth of that "expertise," but the court refused to let him do that (R 1157). Section 90.705(1) Fla. Stats, (1993) allows an expert to give his opinion without first disclosing the facts or date on which he based his conclusions:

> (1) Unless otherwise required by the court, an expert may testify in terms of opinion or inferences and give his reasons without prior disclosure of the underlying facts or data. On cross-examination he shall be required to specify the facts or data.

Subsection 2 of that section, however, qualifies the witness's privilege to withhold the basis for his conclusions:

> (2) Prior to the witness giving his opinion, a party against whom the opinion or inference is offered may conduct a voir dire examination of the witness directed to the underlying factors or data for his opinion. If the party establishes prima facie evidence that the expert does not have a sufficient basis for his opinion, the opinions and inferences of the expert are inadmissible unless the party offering the testimony establishes the underlying facts or data.

That cross-examination of the expert might satisfy the requirements of the voir dire allowed by subsection (2) does not necessarily cure the court's failure to allow it. "This procedure raises the possibility that an expert might make an unsupported statement of opinion that is so prejudicial that cross-examination before the jury would not erase the resulting bias. See Cirack v. State, 201 So. 2d 706, 710 (Fla. 1967); see also Charles W. Ehrhardt, Florida Evidence, Sec. 705.1 (1993 ed.)" Estv v. State, 642 So. 2d 1074 (Fla. 1994). In Esty, this court found that the trial court had erred (though harmlessly) in refusing to allow the Defendant to voir an expert on DNA analysis about the data

underlying his conclusions. This court could also have reached the same conclusion by noting that the qualifications of an expert to testify on a particular subject is a factual matter, and without the necessary facts to reach an informed decision the court abused its discretion in admitting the challenged expert's testimony. Dedge v. State, 442 So. 2d 429, 430-31 (Fla. 5th DCA 1983).

Similarly, in this case, the court erred, but not harmlessly, in refusing to let Zak test the underlying facts on which Dr. McClaren based his conclusion that Nietzsche was "very anti-Christian." Although, as noted, the Defendant could have examined the expert on the basis of his conclusion, he asked only one brief question at the end of his examination, "You haven't read any books by Frederick Nietzsche, it that correct?" To which, the witness said, "Not from cover to cover. I've read numerous selections." (R 1166) Counsel wanted to attack Dr. McClaren's expertise, but rather than aggravating an already bad situation he let it lay. He should not have faced such a choice.

During the State's closing argument, the prosecutor relied on Dr. McClaren' s "anti-Christian" testimony to denigrate the evidence of Zak's intense remorse (R 1223-25).

> The real reason he pled guilty is in hope that you'll excuse him, so you wouldn't be angry by the State havmg to prove his guilt. It's one more, one more attem pt to ask you to excuse him. It doesn't mitigate his crime. They're going to tell you he became a Christian and he prayed for forgiveness. Well, that's good.. . . .
>
> After he came back from Molokai and before he went, he was fascinated with Nietzsche. Nietzsche denounces Christianity. In his own words in this writing here, he denounces Christianity. In his own writing, not the quotes, but this section here in cursive and he says, "That s my writing." He said, "Christianity is a primary culprit in propagating the belief that suicide is a ticket to eternal damnation. Ludicrous. All that's required are a couple of I believes and please forgive me. The Bible says it. This doctrine of eternal damnation is but another route of egress for spineless fools." That's surrounded by Nietzsche philosophy about the creative superman. So, you be sure to weigh his philosophy about Christianity with whether or not he should be forgiven for appearing to accept Christianity in Hawaii.

(R 1222-24).

This court cannot say such error was harmless beyond a reasonable doubt. If it is, however, other errors surrounding this issue make the mistake reversible.

2. The State never established Dr. McClaren's expertise in Nietzsche. For Dr. McClaren, a psychologist, to become an instant expert on a 19th century German philosopher because he had read an entry in an encyclopedia and some of his works defies belief. Of course, one may qualify as an expert on Nietzsche by virtue of "knowledge, skill, . . . or education." Section 90.702 Fla. Stat. (1993). There is, however, no evidence this witness had the extensive knowledge required to offer an opinion on what Nietzsche meant. There is, in short, no evidence this psychologist had any special knowledge about that philosopher that would have assisted the jury. Merely because the court recognized his expertise regarding the human mind, such acknowledgment did not become a roving commission for him to testify about any other subject the prosecutor might have inquired into. Hall v. State, 568 So, 2d 882, 884 (Fla. 1990)(Religion professor unqualified to testify about the Defendant's insanity.) Gilliam v. State, 514 So. 2d 1098 (Fla. 1987) (Medical examiner not qualified to testify about shoe pattern evidence.); Kelvin v. State, 610 So. 2d 1359 (Fla. 1st DCA 1992) (Evidence technician was not an expert to testify about the trajectory bullets may have taken.).

3. Dr. McClaren' s testimony was irrelevant because it had only speculative application to this case.

The fundamental question arises of what relevance Nietzsche's attitudes regarding Christianity had to this sentencing hearing? The logic of the State's position seems to be that because quotes from Nietzsche had been found in Zak's computer at work (R 1097), and Nietzsche was "anti-Christian," Zak was also. Thus, his four month sojourn in Hawaii with the Caparidas, who oversaw the Gospel Shoes of Christ Jesus Church and who uniformly testified about his deep religiosity, was a "pack of lies." (R 891-93, 413) The only evidence arguably supporting that argument came from a letter found in his jail cell fourteen months after the murders. In it he discusses the desirability of suicide to life in prison for "the truly creative man." (State exhibit 15) "Christianity," he wrote, "is a

primary culprit in propagating the belief that suicide is a ticket to eternal damnation. Ludicrous, all that's required are a couple of 'I believes' and 'please forgive me,' the Bible says it." Id. In short, because Nietzsche was anti-Christian, so was Zak.

Logically, a general proposition does not establish specific conclusion. "All brilliant lawyers have blue eyes. John has blue eyes. John is therefore a brilliant lawyer." In this case, the State's tautology went "Nietzsche was anti-Christian, Zak had his writings in his computer. He was therefore, anti-Christian." Not necessarily.

In Stano v. State, 473 So. 2d 1282 (Fla. 1985) this court held that the trial court correctly excluded evidence that mentally ill persons often confess to crimes which they had not committed because it had no relevance to whether Stano had so confessed. "[T]he proffered testimony of Dr. Stern, a psychiatrist, that people often confess to crimes which they did not commit constitutes mere speculation in connection with Gerald Stano." Stano v. Dugger, 883 F. 2d 900, 909 (C.A. 11 1989) (Footnote omitted.) See also, Flanagan v. State, 625 So. 2d 827, 829 (Fla. 1993)("Establishing that a defendant has a certain character trait in order to show he acted in conformity with that trait on a certain occasion is forbidden by the rules of evidence. Sec. 90.404(1), Fla. Stat. (1987); see generally Charles W. Ehrhardt, Florida Evidence Sec. 404.4 (1992).")

So, here, that Zak had quotes from Nietzsche in his computer has no relevance to the issues presented to the jury. First, none of them declare any "anti-Christian" attitude. They focussed, instead, on the "uberman" or superman philosophy. That we can overcome whatever problems we face. (State exhibit 14) Second, even if they did, the State never showed Zak put them there, believed, or followed them. Such testimony, from an untested witness about an irrelevant issue should have been excluded. This court should reverse the trial court's judgment and sentence and remand for a new sentencing hearing,

ISSUE VII

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

To comply with the provisions of Rule 3,202 Fla. R. Crim. P. Zakrzewski filed a "Notice of Intent to Present Expert Testimony of Mental Mitigation." (R 88-89).[20] Specifically, he alerted the Court and the State that he planned to call Dr. Barry Crown and Dr. James Larson to testify that 1) The murders were committed while Zak was under the influence of an extreme emotional disturbance, and 2) His capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law were substantially impaired. (R 88-89) At the same time he filed a "Motion to Limit Scope of Compelled Mental Evaluation" seeking to limit the State's expert's examination to rebutting only the mental mitigating factors he had identified in his notice (R 92-94).

The court heard argument on the motion after the State and Zak had presented their cases in chief, and immediately before the prosecutor offered its rebuttal. Specifically, HE intended to call his expert, Dr. Harry McClaren, to testify about the evaluation he had conducted of the Defendant. The latter objected to the psychologist testifying because Dr. McClaren had found the same mitigator as the Defense experts, so his testimony would have rebutted nothing (R 1106).[21] When the court asked why he objected, a logical question, counsel responded, "I think the state is going to try and explore the Nietzsche business further, Your Honor, and I don't see the relevance of that.

---

[20] Zak filed his notice because the State had notified him of its intent to seek death, as required by Rule 3.202(a) (R 239).

[21] Zak never asked his experts if he qualified for the other statutory mental mitigator, his "capacity to appreciate the criminality of his conduct was substantially impaired," (T 840) He did this to prevent Dr. McClaren from rebutting it (T 1183-84).

What they're trying to do is backdoor some inflammatory information even though they concede that the mental mitigator is present." (R 1108)

The State agreed that Dr. McClaren would find the extreme emotional disturbance mitigator, but it contended he should testify because "He has a very, very different opinion about the underlying reasons for that disturbance." (R 1119)

The court denied Zak's motion. "The state has an absolute right to call a psychological expert, a mental health expert, in the rebuttal portion of their case." (R 1111) The court also refused to determine whether Dr. McClaren's testimony rebutted the Defense expert's conclusions, and it placed no limits on the scope of his examination (R 437,439, 1111-12).

When called, Dr. McClaren testified,

> 1. Zak suffered an extreme emotional disturbance, as the Defense experts had earlier done.
>
> 2. The defendant "absolutely" appreciated the criminality of his conduct at the time of the murders (R 1155).
>
> 3. That the nineteenth century German philosopher Frederic Nietzsche "vigorously attacked Christianity." (R 1157)
> 4. His motive for killing his wife was to "end[] a very large source of pain for himself." (R 1154)

The court erred in allowing Dr. McClaren to testify because what he said rebutted no mental mitigator Zak presented, and introduced irrelevant issues for the sentencers to consider.

This issue focuses on Rule 3.202 Fla. R. Crim. P., the new rule of criminal procedure that allows a state hired mental health expert to examine a defendant facing a capital sentencing procedure who plans to use experts to establish one or more mental mitigating factors. The relevant parts provide

> (a) Notice of Intent to Seek Death Penalty. The provisions of this rule apply only in those capital cases in which the state gives written notice of its intent to seek the death penalty within 10 days from the date of arraignment, Failure to give timely written notice under this subdivision does not preclude the state from seeking the death penalty.

> (b) Notice of Intent to Present Expert Testimony of Mental Mitigation. When in any capital case, in which the state has given notice of intent to seek the death penalty under subdivision (a) of this rule, it shall be the intention of the defendant to present, during the penalty phase of the trial, expert testimony of a mental health professional, who has tested, evaluated, or examined the defendant, in order to establish statutory or nonstatutory mental mitigating circumstances, the defendant shall give written notice of intent to present such testimony.
>
> (c) Time for Filing Notice; Contents. The defendant shall give notice of intent to present expert testimony of mental mitigation within 45 days from the date of service of the states notice of intent to seek the death penalty. The notice shall contain a statement of particulars listing the statutory and nonstatutory mental mitigating circumstances the defendant expects to establish through expert testimony and the names and addresses of the mental health experts by whom the defendant expects to establish mental mitigation, insofar as is possible.

The rule grew out of a perceived need to "level the playing field" or to allow the State a fair opportunity to rebut whatever mental mitigation the Defense experts might develop for the penalty phase of a capital trial. Dilbeck v. State, 643 So. 2d 1027, 1030 (Fla. 1994). Rule 3.202 allows the State's mental health experts an opportunity to examine the Defendant with the sole objective of rebutting the mental mitigation he has announced he might present. This expert cannot examine the Defendant to establish any aggravator, and by implication, he or she cannot testify about non-mental mitigators. That is, this extraordinary rule allows the State access to the Defendant solely because it would be unfair for the Defendant's psychologists to testify without any meaningful opportunity for the prosecution to rebut their conclusions.

That the opposing side can examine the Defendant does not mean the expert's testimony is necessarily admissible. Although the rule provides no guidance regarding the procedure for admitting the State's rebuttal evidence, some suggestions can be gleaned from what this court adopted. Before the State can call its witness, the court must rule (if requested) on the admissibility of the evidence. Relevance, as always becomes the key, and in this instance the trial judge had to determine if what the prosecutor wanted the jury to hear rebutted the mental mitigators testified about during

the defendant's case. If it did not rebut, or if the expected testimony concerned matters other than mental mitigation, the court should have excluded the expected testimony.

In this case, Dr. McClaren, the State's mental health expert, agreed with the defense experts that this mitigator applied. Could Dr. McClaren testify? No. He could not because his conclusion that Zak suffered an extreme emotional disturbance was the same conclusion reach by the his witnesses. The rule allows state experts to testify only if their conclusions differ from those of the defendant's specialists.

Yet, what harm did this Defendant suffer? As Dr. McClaren' s testimony developed, the State's reason for calling him became clear, and as Zak' s lawyer noted, "I think the state is going to try and explore the Nietzsche business further, Your Honor, and I don't see the relevance of that. What they're trying to do is back door some inflammatory information even though they conceded the mental mitigator is present." (R 1108) Indeed, when Zak's lawyers objected to the State asking the Defendant about Nietzsche, the court admitted it had no idea what relevance Nietzsche had to the case:

> COURT: . . . If it' s--if it's material that's written by the defendant that is--that he admits is his writing in a letter or a memoir or whatever, it's probative in value. I don't know why we need to --
>
> KILLAM: To what? To what is it probative, Judge?
>
> COURT: The issues in the case.
>
> KILLAM: To what issue?
>
> COURT: I don't know what issue.
>
> KILLAM: Well, why are you going to admit it if you don't even know what it's probative of?
> COURT: Because I said I would.

(R 1078-79).

Zak agrees with the court: He does not know what issues the Nietzsche testimony had relevance. For the court to admit Dr. McClaren's testimony, the State had to first show that it was necessary to rebut specific mental mitigators. A desire to use the expert to

challenge the Defendant's case generally fails to meet the necessity requirement of 3.202. The state's witness can testify only on matters that rebut the mental mitigators.

Thus, in this case, the State never established the necessity for calling Dr. McClaren. This witness never disagreed with the Defense regarding the only mental mitigator his experts concluded applied to this case. What Dr. McClaren had to say as to the mental mitigation was irrelevant because it did not meet the threshold requirement of rebuttal.

The expert's testimony was important, however, when state began questioning its witness about Nietzsche (R 1156-57). But the "level playing field" justification for allowing him to examine the Defendant then tell the jury about his findings does not let him speak about matters not germane to the mental mitigators, such as Zak's conversion or rededication to Christianity or his motive to kill his wife. If such evidence had relevance, other witnesses who had not examined this Defendant could have testified. One who had questioned Zak and who could use his words against him cannot do so.

The court also erred in allowing Dr. McClaren to testify that Zak "absolutely" appreciated the criminality of his conduct (R 1155). Zak had deliberately waived presenting any evidence regarding that mitigator (R 840, 1155), so the State's expert had nothing to rebut. The court should have excluded his testimony on that statutory mitigating circumstance.

Finally, the State's expert told the judge and jury that Zak's motive in killing his wife was to end "a very large source of pain for himself." (R 1154). The Defendant had objected to that testimony, but the State said Dr. Larson (one of the Defense experts) also was asked to state whether he believed that was his motivation and I think they've put it in issue." (R 1153) The State had, however, opened the door regarding Zak's motivation. On cross-examination of Dr. Larson, the prosecutor asked him "Isn't it quite possible, Doctor Larson, that anger, resentment, some form of revenge might have been a motivation in the murder of his wife for this prolonged domineering conduct that everybody' s described?" To which he responded, "Yes, I think it was." (R 846) Zak

never inquired of his expert regarding the former's motives for committing the charged homicides.

The State, therefore, abused its limited privilege to examine Zak by having its expert testify about matters that had no pertinence to rebutting the mental mitigation Zak had specifically proven.

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

ISSUE VIII

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

At the outset, Zakrzewski must admit that at trial he limited the evidence he put on regarding the mitigator that his "ability to understand the criminality of his conduct was substantially impaired." He did this, as a tactical matter, to limit or eliminate the testimony of the State's expert witness, Dr. Harry McClaren (T 342-43). Additionally, Dr. Larson, Zak's mental health expert testified the Defendant did not meet the criteria for the mitigator to apply (R 353).

The basis for the argument that the court should have instructed the jury on this mitigator comes from the State's examination of Dr. McClaren, its mental health expert.

> Q. Doctor, in your opinion did he appreciate the criminality of his conduct?
>
> A. Absolutely.
>
> Q. In your opinion could he have conformed his conduct to the requirements of law rather than murdering his family?
>
> A. In my opinion he certainly could.
>
> Q. What factors are the bases of your opinion as to whether he could have appreciated the criminality of his conduct --
>
> MR. KILLAM: I'm going to object to this line of questioning. This goes to a mitigating circumstance which we have not introduced.
>
> COURT: Overruled.
>
> ELMORE(continuing): what factors are the basis of your opinions concerning those matters?
>
> A. I think the most important involve the multitude of choices that this man made in the hours before these killings. There were many choices that he made as far as his course of action, his choice of tactics. He revised his plan when things did not go as expected.
>
> KILLAM: Judge, he's testifying to facts we've already discussed.

COURT: Is that an objection? Overruled.

(R 1155-56).

At the charge conference, Zak requested the court instruct the jury on the statutory mitigator that the "capacity of the defendant to appreciate the criminality of his conductor to conform his conduct to the requirements of the law was substantially impaired." Section 921.141(6)(f) Fla. Stat. (1994) (R 1204-1205). "Based on the fact that Dr. Crown did indicate there was some cognitive dysfunction in the sense of his ability to make choices, on that basis we would ask that statutory mitigator actually be included in the jury instructions." (R 1204) "And we do have expert evidence there's neurological deficit and you also have the testimony of the alcohol usage. And the combination of those two, I think, is enough for the instruction." (R 1207) The court denied that request, reasoning that since none of the three experts found this mitigator, there was no need to instruct on it (R 1205). In light of the prosecutor's questioning of Dr. McClaren regarding it, however, that was error.

The law in this area is simple. A court should instruct the jury on the Defendant's theory of defense if there is any evidence to support it. Hooper v. State, 476 So. 2d 1253 (Fla. 1985). The Defendant need not present it, as long as evidence exists supporting it. Mellins v. State, 395 So. 2d 1207 (Fla. 4th DCA 1981). In Mellins, the Defendant denied she was drunk, but other witnesses contradicted her, Their testimony justified the defense request for an instruction on voluntary intoxication.

Even the prosecutor, in closing argument, can provide the necessary basis for giving a defense requested instruction. In Hooper, the prosecutor told the jury that he had killed two people in an intoxicated rage. Justice Overton, dissenting from this court's affirmance of Hooper's conviction, concluded that the lower court should have instructed on intoxication because "Although the defendant did not assert intoxication as his primary defense, it was clearly the principal theory of the prosecutor. . . ." Id. at 1261.

In this case, the State argued in its closing to the jury that "Dr. Crown did say he thought he--Dr Larson said he thought he suffered from a major depressive disorder. But

he was extremely clear that this Defendant was not psychotic, he did not suffer from any hallucinations of any kind, he appreciated the criminality of his conduct and he could conform his conduct to the requirements of the law," (T 1212) As Justice Overton contended in Hooper that allusion to the diminished capacity mitigator justified the jury instruction Zak requested.

In addition, evidence was presented supporting that request. Among the deficits created from his organic brain damage (R 695), he had "great difficulty in taking new information and then applying it in a problem solving situation." (R 682). He closed out options (R 684). Indeed, he thought he had no other options but murder (R 689). He had great difficulty making choices (R 693).

Now, does this evidence conclusively prove Zak could not appreciate the criminality of his conduct? No, but then this court need not decide that issue. As long as he has presented "any evidence" supporting giving the instruction he requested, the court should have read it to the jury. In this case, Zak has carried the mild burden this court placed on him in order to justify giving the instruction on the statutory mitigator he requested.[22]

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

---

[22]The State relied on this court's opinion in Jones v. State, 612 So. 2d 1370, 1375 (Fla. 1992). In that case, the defendant's mental health expert "specifically testified that Jones did not meet the criteria for the statutory mitigators. It reached that conclusion because he had presented no evidence to support a contrary result. Such is not the case here.

ISSUE IX

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

During the penalty phase conference, the court agreed to instruct the jury on the requested statutory mitigating factors (R 1178). Zakrzewski's counsel had filed a "Defendant's List of Nonstatutory Mitigators." (R 257-58) It contained 23 aspects of the Defendant's character and history that mitigated a death sentence, as the court noted (R 1182).[23] The State objected to the list of non-statutory mitigators being read to the jury because "It would be as long as from you out the back of the courtroom." (R 1178). The court, while letting Zak argue whatever he wanted in mitigation, refused to include the list as part of the penalty phase instructions (R 1 182).[24] Thus, the court instructed the jury on three of the statutory mitigators, and read them the "catch-all" instruction that "any other aspect of the Defendant's character or record, and any other circumstance of the offense" could mitigate a death sentence (R 1262). In light of recent developments in death penalty law, not providing guidance about the mitigators Zak had specifically identified, and which the court had acknowledged as mitigation, was error.

The law in this area is simple and traditionally against the argument Zak now makes. This court has consistently held that Defendants facing a death sentence are not entitled to instructions on specific non-statutory mitigators even though evidence supports finding them. Finney v. State, 660 So. 2d 674, 684 (Fla. 1995) ("This Court has repeatedly rejected Finney's next claim that the trial court must give specific instructions on the non-statutory mitigating circumstances urged.") The "catch-all" guidance covers any other ameliorating evidence not covered by the statutory mitigation. Johnson v. State,

---

[23]A twenty-fourth, that the Defendant was not a psychopath, was added during the charge conference. (R 1182).

[24]It did, however, let the State see the list (T 1183), and the prosecutor used it during his closing argument (E.g. T 12 17- 18, 1222)

660 So. 2d 637, 647 (Fla. 1995). Zak, therefore, acknowledges that he must carry a heavy load, walking uphill, in a driving rain, to convince this court to change this law. Yet, it is one he has cheerfully shouldered because he knows hills crest and rains stop.

In the important case of Campbell v. State, 571 So. 2d 415 (Fla. 1990) this Court recognized that "our state court continues to experience difficulty in uniformly addressing mitigating circumstances under section 921.141(3) Florida Statutes (1995), which requires 'specific written findings of fact based upon [aggravating and mitigating] circumstances."' Id. at 419. To remedy this problem it concluded that

> When addressing mitigating circumstances, the sentencing court must expressly evaluate in its written order each mitigating circumstance proposed by the defendant to determine whether it is support by the evidence and whether, in the case of nonstatutory factors, it is truly of a mitigating nature. . . .The court must find as a mitigatmg circumstance each proposed factor that is mitigating in nature and has been reasonably established by the greater weight of the evidence. . . ."

Id. (Footnote omitted)

A sentencing court, therefore, must consider every mitigating factor proposed by the Defendant, and if the evidence supports finding it, the sentencer must do so.

By way of a footnote this court made a nonexclusive list of such nonstatutory mitigation:

> 1. Abused or deprived childhood.
> 2. Contribution to community or society as evidence by an exemplary work, military, family, or other record.
> 3. Remorse and potential for rehabilitation; good prison record.
> 4. Disparate treatment of an equally culpable codefendant.
> 5. Charitable or humanitarian deeds.

Id. at 419.

This court has, accordingly, reversed several death sentences because the sentencer failed to follow the commands of Campbell to explicitly consider and find every mitigating factor supported by the evidence. Larkins v. State, 655 So. 2d 95 (Fla. 1995); Ferrell v. State, 653 So. 2d 367 (Fla. 1995).

In Espinsoa v. Florida, 505 U.S. ___, 120 L.Ed.2d 854 (1992), the United States Supreme Court rejected the jury instruction on the "especially heinous, atrocious, or cruel" aggravating factor. It did so because the guidance on that aggravator was "so vague as to leave the sentencer without sufficient guidance for determining the presence or absence of the factor." Id. at 120 L. Ed. 2d 858. It also rejected the State's argument (which echoed this court's sentiments) that because the trial judge is the sentencer, it could correct any mistakes made by the penalty phase jury. Relying on what this Court had said in other cases, the nation's high court concluded that Florida had decided "to place capital-sentencing authority in two actors rather than one." Id. at 120 L. Ed 2d 859.

In light of what the Court said regarding the especially heinous, atrocious, or cruel aggravating factor, it can not be seriously argued that the "catch-all" instruction somehow overcomes the vagueness problems identified in Espinosa.

While Zak has not challenged the facial constitutionality of that instruction, he does complain that the jury had inadequate guidance about what it could have considered to justify a life sentence. Specifically, from the 23 items presented as mitigation, the jury was never specifically told they could be considered as such, even though this court has recognized them as ameliorating.

> 1. The Defendant served in an exemplary manner in the United States Air Force. Campbell, cited above.
>
> 2. The Defendant is an exceptionally hard worker. Id.
>
> 3. The Defendant has a potential for rehabilitation. Nibert v. State, 574 So. 1059 (Fla. 1990).
>
> 4. The Defendant exhibited good behavior while hiding for an extended period of time under an assumed name. C.f. Skipper v. South Carolina, 476 U.S. 1 (1986).
>
> 5. The Defendant was a loving and good son. See, Thompson v. Dugger, 515 So. 2d 173 (Fla. 1987).
>
> 6. The Defendant was impaired by alcohol at the time of the offense. Campbell, cited above.
>
> 7. The Defendant turned himself in. Perry v. State, 522 So. 817 (Fla. 1988).

8. The Defendant showed sincere grief and remorse. Morris v. State, 557 So. 2d 27 (Fla. 1990).

9. The Defendant was a loving husband and father until the offense. Perry v. State, 522 So. 2d 817 (Fla. 1988).

With the jury left without any help about what "any other aspect" could possibly mean, the specific guidance Zak requested reasonably would have assisted the jury reach a just result. If a defendant is entitled to a jury instruction on his theory of defense if evidence in the record supports it, Hooper v. State, 476 So. 2d 1253 (Fla. 1985), the court should have told the jury it could consider the specific non-statutory mitigating factors in determining whether he should live or die. Granting that request would not have inflicted a major change in the administration of Florida's death penalty. It would, instead, have made the jury's recommendation and the resulting sentence more reliable. This court should reverse the trial courts sentence of death and remand for a new sentencing hearing.

CONCLUSION

This court must decide if the trial court's death sentences in the three murders are warranted. It will have a difficult time affirming it for the homicide of Sylvia because this court has tended to find life in prison is appropriate when a man kills his wife in an emotional rage

The murders of Edward Jr. and Anna were indistinguishable, yet the jury recommended death for the son's murder and life for the daughter. Those verdicts are irreconcilable. Not only did the jury have a reasonable basis for their life vote, the aggravators supporting a death sentence for Edward are either invalid (HAC and CCP) or of little weight, In light of the vast mitigation Zak presented, the court should have ignored the death vote and imposed life in the son's murder, and followed their recommendation for Anna' s homicide.

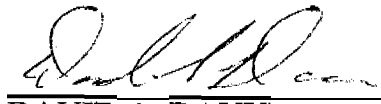
For Edward Zakrzewski, though, these arguments and this brief are minor distractions. His life is over. His wife and children are dead. His career in the Air Force has ended. His college aspirations are dashed. In an act of total moral insanity, he has eliminated that which gave him his greatest happiness and satisfaction. However long he may live, he must cope with that truth.

Florida has no interest in executing this most miserable of men. Defendants like Zak commit their horrible crimes, not as the product of some rationale analysis, but as the result of an extreme emotional crisis in their lives. Their crimes are explosions of total criminality, and their executions serve no valid purpose.

Based on the arguments presented here, the Appellant, Edward J. Zakrzewski, through his appellate counsel, respectfully asks this Honorable Court to reverse the trial court's sentence and remand with directions that the trial court sentence him to life in prison without the possibility of parole for twenty-five years or to conduct a new sentencing hearing.

Respectfully submitted,

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT



DAVID A. DAVIS
Assistant Public Defender
Fla. Bar No. 271543
Leon County Courthouse
Suite 401
301 South Monroe Street
Tallahassee, Florida 32301
(904) 488-2458

ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Richard B. Martell, Assistant Attorney General, by delivery to The Capitol, Plaza Level, Tallahassee, Florida, and a copy has been mailed to appellant, EDWARD J. ZAKRZEWSKI, II, #554000, Florida State Prison, Post Office Box 181, Starke, Florida 3209 1, on this 27th day of February, 1997.

DAVID A. DAVIS