IN THE SUPREME COURT OF FLORIDA

CASE NO. 75,049

STATE OF FLORIDA

Petitioner,

vs.

JOSEPH SAVINO,

Respondent,

****

PETITIONERS BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Joseph Savino, was the defendant in the trial court and the Appellant below, and will be referred to herein as "Savino" or "Respondent". The State of Florida, was the prosecution in the trial court and the Appellee below, and will be referred to herein as "Petitioner" or "the State". The record on appeal contains eighteen volumes and two supplemental volumes. The first eighteen volumes shall be referred to by the symbol "R" followed by the appropriate page number in parentheses. The supplemental volume will be referred to by the symbol "SR1" and "SR2" followed by the appropriate page number in parentheses. This case comes before this Court on a question certified to be of great public importance by the Fourth District Court of Appeal. Savino v. State, 14 F.L.W. 2567 (Fla. 4th DCA November 8, 1989).

STATEMENT OF THE CASE

Respondent was charged by a Grand Jury indictment with murder in the first degree by committing the felony of Aggravated Child Abuse. (R 2438). He was tried by jury. The jury returned a verdict of guilty of the lesser included offense of third degree murder. (R 2681). Respondent was adjudicated guilty in accordance with the verdict of the jury. (R 2681).

Notice of Appeal from the judgment and sentence was filed on April 2, 1987. Respondent's Brief was filed on October 7, 1988, Respondent raised four points on appeal. He contended he did not waive his presence, or acquiesce to or ratify counsel's waiver of his presence during a witness's testimony or during the court's response to a jury question. Next, he contended that the trial court erred when it failed to suppress the oral and recorded statements he gave to the police because he did not make a knowing and intelligent waiver of his Miranda rights. Respondent also contended that the trial court erred when it denied his request for a special instruction on insanity caused by the long and continued use of intoxicants. Finally, he contended that the court erred when it refused to admit the testimony of a third party who states that Respondent's wife had admitted to the third party that she had killed her daughter seven years earlier.

Petitioner's brief was filed on February 28, 1989. The Fourth District Court of Appeals held that the

trial court did not err in denying Respondent's motion to suppress his confession. However, the Fourth District Court reversed Respondent's conviction on the remainder of the points and remanded the case for a new trial. The Fourth District Court did certify the following question to the Supreme Court of Florida as a question of great public importance:

> MAY A DEFENDANT SHOW THAT SOMEONE OTHER THAN HIMSELF COMMITTED THE CRIME FOR WHICH HE IS CHARGED BY INTRODUCING EVIDENCE THAT ANOTHER PERSON WITH AN OPPORTUNITY TO COMMIT THE CRIME CHARGED, COMMITTED A SIMILAR CRIME BY SIMILAR METHODS. IF THE ANSWER TO THIS QUESTION IS IN THE AFFIRMATIVE, MAY THE TRIAL COURT APPLY A LESS STRICT STANDARD OF SIMILARITY TO THE ADMISSION OF SUCH EVIDENCE?

On November 16, 1989, Petitioner filed a timely notice to invoke discretionary jurisdiction of this Court.

Petitioner would point out to the Supreme Court of Florida that the certified question does not accurately encompass the fact of this case.

STATEMENT OF THE FACTS

Pretrial hearings were held on a defense motion to suppress the statements and on the question of Respondent's competency to stand trial. On competency, four hearings were held at which seven doctors and several relatives of Respondent testified. This testimony was incorporated for consideration on the motion to suppress. (R 408,425-524, 1044). The trial court denied the motion to suppress, specifically rejecting Respondent's claim that he was too intoxicated or mentally disturbed to knowingly and intelligently waive his rights. (R 2615). The trial court also ruled that the Respondent was competent to stand trial. (R 2526).

Pertinent to the issues before this Court is the testimony of Carolyn Savino, the Respondent's wife, at the motion to suppress. She was called as a witness for the Respondent. At the motion to suppress Carolyn Savino was warned by the trial court that anything she says could be used against her during her trial for third degree murder. (R 595). She was also advised that she had a right not to answer any questions until she had talked to her attorney. Carolyn Savino said she understood, that she had talked to her attorney, and that she desired to testify. (R 595-597).

Carolyn testified that on December 24, Christmas Eve, she did not get off work until 4:00 - 4:30 P.M. When she got home the Respondent, her husband, asked her to go to the

liquor store for a bottle a Jack Daniels. When Carolyn returned she had a drink and the Respondent had several. Then they had dinner. Later that evening the next door neighbor came over. The Respondent and his neighbors smoked three or four rocks of cocaine. This went on until about 10:00. When Carolyn went to bed, they left. Respondent then woke her at 2:30 A.M. Carolyn and Respondent took the dog for a walk for about an hour. When they got back to the trailer she had to get dressed for work. She left for work at 9:00 in the morning on Christmas day. She returned home at about 3:30 in the afternoon. When she came home she gave some money to the Respondent to buy some pot. This was Christmas evening. He came home. He smoked about six joints. This went on until 9:00 P.M. when the next-door neighbor came over and they went out. Respondent came home at about 3:30 A.M. on December 26th. Carolyn got up at 4:00 in the morning to get ready for work. She left for work at 6:00 in the morning. At 7:30 in the morning the phone rang. Respondent told Carolyn that she had to come home because Johnny, the victim, was sick and he was coming to pick her up. They were in an accident on the way home. After the accident on the way home, Carolyn arrived home an hour or an hour and a half after Respondent. She found Respondent at the door crying. He was saying "I'm sorry, I'm sorry. I didn't know, I'm sorry. Don't be mad at me." Carolyn went in the bedroom and then left to call the police. Carolyn testified that she was five and half months pregnant at this

time and working as a waitress. (R 601-607).

Respondent also took the stand for the motion to suppress. He did not deny Carolyn's rendition of the events of December 24th through the 26th. (R 833-865).

At the beginning of trial, the state moved in limine to prevent the defense from asking any witness to testify about statements made by Carolyn Savino concerning the 1978 death of Ahna LeMay Griffin, Carolyn's daughter. Any such statements would be out of court hearsay statements with no applicable exception for admissibility. (R 2633).

At the hearing just prior to the trial, defense counsel wanted to proffer the testimony of Dr. Appel who heard through collateral interviews with other people that Carolyn Savino had killed two other children plus her father. (R 1177, 1179). The trial court ruled that this was hearsay. (R 1179). The State argued that the trail court not get involved in hearsay after hearsay on collateral issues that are merely speculative. (R 1183).

Defense counsel sought to introduce the testimony of the medical examiner from Virginia who would testify that Ahna Griffin died of a blunt trauma. (R 1217). He also sought to have a detective from Virginia testify that he investigated the homicide up there and that Carolyn claimed that she was not there when Ahna Griffin died. (R 1224). Finally defense counsel wanted Cheri Dierringer to testify to the fact that Carolyn admitted to her that she killed Ahna. (R 1225).

The State objected to trying Carolyn Savino on a Virginia case in a Florida courtroom on inadmissible evidence. "If they want to try her, they can do that." (R 1225).

The defense counsel insisted on bringing in the testimony of Cheri Dierringer and a witness from Virginia that Carolyn had murdered Ahna in 1978 and to the continuing conduct on her part showing child abuse to Ahna. (R 1237-1244). The State argued that he did not want to turn this into a mud slinging contest on collateral issues and not whether or not Joseph Savino kill Johnny Griffin as he confessed to on the 26th of December, 1985. (R 1250).

In his opening statement to the jury the defense counsel stated that Carolyn Savino was eight months pregnant with Respondent's child at the time of this incident. Carolyn had six children which has since been taken from her by HRS. (R 1276). He mentioned that Carolyn Savino was charged with third degree murder in this case. (R 1285).

The first witness to testify was Dr. Wright, the medical examiner, who testified as to the cause of Johnny's death (R 1297, 1316, 1323-1324). He testified that the injury done to the six year old victim was caused by an extreme blunt force brought to bear against the abdomen (R 1324). To the doctor's knowledge he has never heard of a victim such as Johnny Griffin having a laceration of the intestine. As long as a person can move backwards a blow to the stomach will be absorbed by the soft abdomen. In order

to lacerate the intestines the blows that struck the victim would have had to compress the abdomen back against the spinal cord with such force that it tore the intestines apart. To do this the victim would have had to have been up against a wall or some immovable object when the blows were struck. (R 1325). This type of injury would have had to have been made by a very powerful or violent force to the abdomen. The doctor testified that it is pretty unlikely that an adult woman could inflict such injuries with her fist. She could have done it if the child was on its back and she stomped on its belly. It is possible that a woman could do it with her fist but it is unlikely. (R 1355). The victim was beaten repeatedly and severely. There are separated areas in the abdomen where there had been internal tearing. There is another area deep within the deep musculature of this child that was intensely bruised. There was another area in which there was hemorrhage around the spinal cord itself. All theses blows contributed to the death of the child. (R 1357-1357).

Police officers then testified that when they went to the trailer the victim did not have a heart beat (R 1382; that Respondent was pacing back and forth and said he "whoopped" the boy, he shouldn't have hit him so hard (R 1397); and that the victim was pronounced dead at the hospital (R 1430).

Virginia Griffin's testimony was taken in chambers to determine if she was capable of understanding the truth. She

did not testify at trial but her testimony is pertinent to the determination of the opportunity Carolyn Savino had in killing the victim.

Virginia told the trial judge that the Respondent beat Johnny Griffin up by hitting Johnny in the stomach. Johnny did nothing wrong. (R 1504-1506). She also said that her mother, Carolyn Savino, never hit her or hurt her. The Respondent has hit her and Johnny more than once. (R 1508-1509). Respondent hit Johnny Griffin lots of times in the stomach. She saw it. (R 1518-1519).

Deputy Charles Birt arrived at the scene about 9:24 in the morning. (R 1554). He heard the Respondent apologize to his wife. (R 1558) When Deputy Birt asked the Respondent what happened the Respondent said he was sorry that he had hit the victim. Birt then stopped the Respondent and read the Miranda rights to Respondent. Respondent voluntarily waived his Miranda rights. After Miranda, Respondent again stated that he had hit the kid because he would not stop crying. Respondent wanted his wife to forgive him. (R 1560-1563). Birt testified that the Respondent was not crying when the Miranda rights were being read to him. Birt felt that Respondent understood the Miranda rights and that he made a knowing and intelligent waiver. (R 1576,1580). Deputy Birt testified that Respondent's behavior was consistent with someone who was distraught and upset and concerned. (R 1592).

Detective Restive has been a police officer for more

that 23 years. (R 1594). He asked the Respondent what happened after he had talked to Deputy Birt. The Respondent said that he was drunk when it happened. Det. Restivo then placed the Respondent under arrest and told the Respondent that he would speak to the Respondent at the sheriff's office. (R 1598-1599). They left the trailer about 11 A.M. Respondent was quiet. He was not crying. (R 1601).

At the station Respondent was read his Miranda rights again. (R 1603). Respondent never refused to answer any questions. He appeared to understand what was being said to him. He responded coherently. He did not smell of alcohol. Once he started talking he would not shut up. (R 1608).

Respondent's taped confession was played for the jury. In the taped confession Respondent said that his wife went to work on December 24, 1985. Respondent then stated that he had seen his stepdaughter playing with the victim's private parts in the bathroom and he had smashed their heads together and slapped the victim twice in the face and hit his head on the bathroom counter. (R 1623). On the following day his wife went to work. He put Johnny and Virginia in the tub after they ate breakfast. He later saw the children playing in the bathtub and they got water all over the floor. Respondent stated he smacked the victim in the face and punched him in the stomach. The victim also hit the toilet bowl and a cabinet. (R 1624-1625). He punched the victim in the whole abdomen area. He could not remember how many times he punched the victim. He just knows he beat him

"really bad". (R 1625). Nothing happened on Christmas because he was too high. (R 1626). The next day (December 26th) the victim was in bad shape. Respondent noticed that the victim was bruised up on the side of his face and his chest. The victim kept calling for his mother. Respondent then called Carolyn up at work and told her she had to come home because "Johnny is in real bad shape." (R 1627). Respondent picked Carolyn up at work. On the way back they were in a car accident. The officer took Respondent home. Respondent tried to reassure the victim that his mother was on her way. The victim started fading out. The victim puked, he got sick. Finally the victim responded no more. (R 1628-1629). When Carolyn did get to the trailer she called the ambulance. (R 1629).

At the end of the tape, Det. Restivo testified that Respondent responded appropriately to all questions and did not appear to be fading in and out of reality. (R 1631).

The prosecutor called Margaret Cress to the stand in order to identify the decedent. On direct examination Cress identified herself as the decedent's baby-sitter and identified pictures of the deceased as that of Johnny Griffin whose birthday was August 31, 1979. On cross examination Cress stated that for all the times she had babysat for the deceased she had only been paid $50. All Cress testified to was age and identity. After the witness was excused and the jury had left the room the Respondent's counsel noted for the record that the Respondent had just come in the room and was

not present during the testimony of Margaret Cress. The prosecutor offered to question Margaret Cress over again. The Respondent's attorney elected to waive the Respondent's presence. Respondent did not object. (R 1723).

At trial, the defense asserted alternative defenses: that Respondent's wife, Carolyn, had committed this killing because she had allegedly killed two other children and her father died of blunt trauma (R 1229, 2338-2339); and that the Respondent was not guilty by reason of insanity and lacked the requisite specific intent because of brain damage from head injuries and chronic as well as recent drug and alcohol abuse. (R 1229, 2343-2349, Respondent's Brief page 2). To this end Respondent called several doctors to the stand to testify to Respondent's abuse of drugs and insanity. The defense called Drs. Ryan, Virsida, O'Brien, and Appel as trial witnesses. They testified that Respondent was insane at the time of the offense and did not knowingly waive his Miranda rights. (R 1830-1835, 1900-1906, 1963-1964, 2098-2105). In rebuttal the State called Dr. Schwartz and Dr. Zager to testify that the Respondent did not have brain damage and was sane at the time of the offense.

Dr. Ryan testified at trial that the Respondent is more responsive and more coherent that he was at the beginning of the year (R 1334). He admitted to being part of the defense team and not a court appointed doctor (R 1839). Dr. Ryan's impression that the Respondent could not have formed the requisite intent to committed the crime was based

on communications he had with the Respondent three months after the incident (R 1851). One can have organic brain disorder and still be legally sane (R 1853). Ryan did not talk to the police officers who observed the Respondent's behavior and how he appeared that day because a lay man's opinion is irrelevant (R 1858). Dr. Ryan admitted that the only information that he had regarding the Respondent's alleged substance abuse were statements made by the Respondent himself. He did no independent testing or interviews. (R 1849-1851). Based only on what Respondent said to him, Dr. Ryan diagnosed the Respondent as being psychotic due to organic brain disorder and substance abuse. (R 1848,1849). Dr. Ryan admitted that the Respondent could have organic brain damage and still be sane. (R 1854).

Dr. Virsida testified that one can have organic brain disorder and still be legally sane (1910). The symptoms which Respondent displayed the day of the incident are all typical of one who is suffering from reactive psychosis including the hallucinating (R 1910-1911). Virsida noted that a number of comments he made in his taped confession indicated to him that the Respondent was psychotic (R 1916). One such statement he pointed out was on page three of the transcript where the Respondent says, "I don't know. I just wasn't aware what I was doing at that time." The State pointed out that that is a misprint and the transcript should read, "I wasn't aware of what I was doing at that time." (R 1917). So the conclusion that that was not an appropriate

response is now not valid (R 1917). Virsida stated that the only information he had on the behavior of the Respondent on December 24, 1985, when he beat the victim, was Respondent's report of his alleged substance abuse. Based on Respondent's statement alone the doctor determined that the Respondent was insane on the 24th of December, 1985 (R 1921). Thus, Dr. Virsida's opinion is based solely on Respondent's self serving statements.

Dr. O'Brien testified at trial that without substantiating evidence he would wonder about the truthfulness as to the amount of drugs the Respondent said he took from December 24 through December 26 (R 1986). The only person that O'Brien talked to about Respondent's substance abuse was the Respondent. (R 1955, 1975, 1980). O'Brien stated that the Respondent could form the intent to do tasks like fix a van, or to pick up his wife or to get help for his sick child but could not form the intent to commit a crime while under the influence of drugs (R 1987-1989). Dr. Virsida also testified that Respondent "knows the game". Thus, Dr. Virsida's opinion is based solely on Respondent's statements to him.

Dr. Appel's neuropsychological test revealed that the Respondent had organic brain damage in the left anterior hemisphere of the brain. (R 2141). She found out from Respondent's sister that the Respondent was hit on the head with a baseball bat when he was young and she learned from his mother and sister that Respondent was struck by lightning

when he was eight years old. (R 2146). She acquired her medical history from Respondent's mother. (R 2147). She had already turned in her report to the court when she talked to Rodney Moore, Bo Thurston and Gomez. (R 2147-2148). Dr. Appel does not remember if she read the police report and depositions or listened to the taped confession or read a transcript of the taped confession before she made her report. (R 2149-2151). In her report she states that all her information came from three interviews and testing sessions lasting 12 hours total and a general history of the Respondent given her by the defense attorney. (R 2479). The only person she talked to about the Respondent's alleged drug and alcohol abuse was the Respondent, himself. It was not confirmed by any outside source. Her conclusion was that the Respondent suffered from organic brain damage caused by the injuries to his head combined with the substance and drug abuse. (R 2151).

Dr. Appel testified that Respondent's problems with utilizing verbal information is due to his organic brain damage. His memory problems are due largely to his organic brain damage. (R 2158-2159). However in her report on page seven (R 2485) she says that the Respondent is "much more mentally clear during her interview than he was when he was first arrested and questioned." (R 2154).

After refusing to answer the question, Dr. Appel finally admitted that one can have a reactive psychosis (R 2120-2125). The associated features of reactive psychosis is

frequent perplexity and a feeling of confusion are present, which the individual may acknowledge which can be judged from the way he or she responds to the question or requests, behavior may be bizarre and include peculiar postures, outlandish dress, screaming or muteness. Aggressive behavior may also be present. Speech may be inarticulate gibberish or repetition or nonsensical phrases, effects often inappropriate, volatile, transient hallucinations or delusions are common. Obvious confabulated answers may be given to factual questions, disoriented. (R 2128-2129). All these symptoms were displayed by the Respondent. Dr. Appel admitted to charging the Respondent $10,000. worth of fees (R 2130).

Dr. Stillman's taped deposition was played for the jury. The transcript of the taped deposition is found in the first Supplemental Record (SR1). Aside from talking to the Respondent, Stillman talked to Respondent's sister, Stephanie, about the head injuries the Respondent sustained from his stepfather hitting him over the head with a baseball bat and being struck by lightning. (SR1 11). This caused the Respondent's organic brain damage. (SR1 11). Dr. Stillman diagnosed the Respondent as having an organic brain syndrome after a two hour interview with the Respondent. (SR1 33). That means the Respondent has damage to the brain which causes a structural defect. (SR1 34). This can come from damage that one is born with genetically in some form or caused by an outside agent. (SR1 35). In this case

Respondent's brain damage was caused by being struck on the head with a baseball bat and being struck by lightening and a combination of substance abuse. (SR1 37).

Dr. Stillman testified that the Respondent understood the charges against him and to some degree the consequences if he were found guilty. (SR1 39-41). Respondent knew the purpose of having an attorney. (SR1 41). Respondent told Dr. Stillman that he didn't remember what happened and that he did not want to remember. (SR1 44). Dr. Stillman specifically testified that the organic brain damage was there prior to the incident but that the abuse of drugs and alcohol during the days in question made what was there before worse. (SR1 53). Dr. Stillman admits that the Respondent has no history of any psychological problems or treatment by any institution. There is no corroboration from any hospital records or medical records that the Respondent suffered any injuries from a baseball bat or lightning or that the Respondent was ever hospitalized for drug treatments. (SR1 64). Dr. Stillman's evidence of drug abuse came from the Respondent's self serving statements. (SR1 64).

Dr. Schwartz testified that the EEG and the MR that were done were normal. He could not find any focal brain damage as suggested by Dr. Appel. (R 2204).

Dr. Zager testified at trial that he reviewed all the reports done by the Respondent's doctors: Ryan, Appel, Virsida and Stillman (R 2226). He also listened to the taped

confession and talked to Dr. Jess Cohn, Prison Health Service Psychiatrist (R 2226-2228). Dr. Cohn, who cared for the Respondent in prison, felt that there was no present evidence of any bizarre behavior approximate in time to when Dr. Zager examined the Respondent, which was a contrast to how the Respondent presented himself to the doctor on May 3, 1986 (R 2228). In the taped statement the Respondent was clear and lucid and the Respondent was able to appropriately respond to the police officer, he was able to be aware of dates, circumstances and so forth (R 2231). The fact that the Respondent appeared so totally impaired after his arrest was suspicious since it should be reversed where the Respondent was impaired on December 26, 1985 and more coherent after detoxification and being on antipsychotic medication (R 2233-2234, 2238-2239). It is reasonable to believe that a normally functioning individual who is charged with a murder of a stepchild should be significantly emotionally distressed shortly after the event (R 2248). Dr. Zager did mention in his report to the Court that the Respondent may be feigning (R 2252).

The only independent source that testified to Respondent's use of drugs came from Wallace Thurston, Jr. (Bo Thurston). Thurston testified that the Respondent mainly drank beer. Respondent did not drink alcohol that much. In fact, Thurston has never seen Respondent totally drunk or intoxicated. (R 2017,2021). Thurston and Respondent would get high together by having a beer and smoking a little

marijuana. Thurston only saw Respondent do coke once. (R 2016,2021).

Joseph Gomez also testified that he knew the Respondent for three months prior to the incident. (R 1934). He and the Respondent would get high on marijuana on a daily basis. They would smoke 10-15 joints a day. Sometimes they would also consume a six pack or two a day. (R 1927). On December 24, 1985 he went with Respondent to look for cocaine rock. They bought six rocks of cocaine. Respondent smoked three of the rocks. (R 1928). Thurston could not testify to Respondent's long term use of drugs.

Among jury instructions requested by the defense and denied by the court was the following (R 2640):

> DEFENDANT'S REQUESTED JURY INSTRUCTION NO. 5
>
> The law recognizes insanity super induced by the long and continued use of intoxicants so as to produce a fixed and settled frenzy or insanity either permanent or intermittent. [Citations omitted.]

During the jury's deliberations, the jury submitted a question (2414):

> With regard to third degree murder, culpable negligence, course of conduct, the Defendant must have known or reasonably should have known, does this apply to any reasonable person or must reasonableness be attributed to this case regardless of the Defendant's condition in particular?

The court instructed the jury, "This is an objective standard of any reasonable person" (R 2416-2417). Defense counsel waived Respondent's presence for the reinstruction. (R 2415).

POINTS ON APPEAL

WHETHER THE TRIAL COURT ERRED IN TAKING THE TESTIMONY OF A WITNESS AS TO THE AGE AND IDENTITY OF "HE VICTIM AND IN RESPONDING TO A LEGAL QUESTION POSED BY THE JURY WHERE RESPONDENT WAS NOT PRESENT BUT WHERE RESPONDENT'S COUNSEL WAIVED RESPONDENT'S PRESENCE.

WHETHER THE TRIAL COURT CORRECTLY DENIED THE DEFENSE'S REQUEST TO INSTRUCT THE JURY THAT INSANITY MAY RESULT FROM THE LONG AND CONTINUED USE OF INTOXICANTS.

WHETHER THE TRIAL COURT CORRECTLY REFUSED TO ADMIT TESTIMONY FROM A WITNESS THAT RESPONDENT'S WIFE HAD ADMITTED TO HER THAT SHE HAD MURDERED ONE OF HER CHILDREN IN 1978

SUMMARY OF ARGUMENT

POINT I

Respondent's absence during the testimony of a State witness and during the instructing of the jury on a point of law was not reversible error as these were not crucial stages of the trial and Respondent's counsel waived his presence. Respondent has not shown that he was prejudiced by his absence.

POINT II

The trial court correctly instructed the jury on the insanity defense as well as on the use of intoxicants as effecting a defendant's ability to form the necessary intent to commit a crime. There was no independent evidence submitted by the defense that the Respondent was insane due to the long and continued use of intoxicants. Thus, the requested jury instruction was not warranted.

POINT III

Petitioner maintains that Respondent's use of the reverse Williams rule to inculpate Carolyn Savino in the crime charged is an aberration of the Williams rule. The fact that Carolyn Savino may have admitted to another person that she killed her one month old child in 1978 is not relevant to a material fact at issue in this case, as there is no clear and convincing evidence that the death of Carolyn

Savino's child, Ahna, is connected to the death of the victim in this case. Further, there are not unique or distinctive features common to the two incidents in question, as these two incidents are seven years, six children and 1/2 a pregnancy apart from each other, and the prejudicial impact outweighs its probative value. Furthermore, Carolyn Savino was never indicted, tried or convicted of the crime she is now accused of committing -the death of Ahna. Nor was there evidence that Carolyn Savino had the opportunity to committ the crime charged or that there was a conection between Carolyn Savino and the crime charged. All the evidence presented indicated that Carolyn Savino was at work when the victim was beaten. Finally, the testimony of Cheri Dierringer is rank hearsay.

ARGUMENT

POINT

WHETHER THE TRIAL COURT ERRED IN TAKING TESTIMONY OF A WITNESS AS TO THE AGE AND IDENTITY OF THE VICTIM AND IN RESPONDING TO A LEGAL QUESTION POSED BY THE JURY WHERE RESPONDENT WAS NOT PRESENT BUT WHERE THE RESPONDENT'S COUNSEL WAIVED RESPONDENT'S PRESENCE.

Florida Rules of Criminal Procedure 3.180(a) requires the presence of the defendant at crucial stages of the proceedings against him. Presence has been defined as meaning that the defendant is allowed to view and not merely hear the evidence against him. The primary purpose of the requirement that a defendant be present during trial is to allow the defendant to confront witnesses and the evidence against him. Waters v. State, 486 So.2d 614 (Fla. 5th DCA 1986). Constructive presence satisfies the constitutional requirement where a defendant is absent but is represented by his counsel who waives objection to the defendant's absence and upon the defendant's return the defendant acquiesces in or ratifies the actions taken by his counsel during his absence. Smith v. State, 453 So.2d 505 (Fla. 4th DCA 1984). Respondent's absence does not frustrate the fairness of the proceeding unless Respondent can show that he was prejudiced by his absence. Garcia v. State, 492 So.2d 360 (Fla. 1986); Lambrix v. Dugger, 529 So.2d (Fla. 1988).

In the instant case Respondent was absent during the testimony of the witness Margaret Cress and when the trial court answered a jury question which was a purely legal

query.

The prosecutor called Margaret Cress to the stand in order to identify the deceased. On direct examination Cress identified herself as the decedent's babysitter and identified pictures of the deceased as that of Johnny Griffin whose birthday was August 31, 1979. On cross examination Cress stated that for all the times she had babysat for the decease she had only been paid $50. All Cress testified to was age and identity. (R 1719-1722). This fact was not in dispute nor was it a mystery to the Respondent.

Defense counsel then asked for a moment to see if he had any witnesses present in the hall whereupon the jury was dismissed. (R 1723). Once the jury had left the room Respondent's counsel noted for the record that the Respondent had just come in the room and was not present during the testimony of Margaret Cress. The trial court asked if the Respondent's counsel wanted to waive the Respondent's presence or do the testimony over again. The prosecutor offered to question Margaret Cress over again. Respondent's counsel waived Respondent's presence. All this was done in the presence of the Respondent and within earshot.

Margaret Cress' testimony went to the age and identity of the deceased's it did not go to the guilt or innocence of the Respondent. Cress was cross examined by the Respondent's attorney even beyond the limited scope of direct examination. (R 1721). Therefore, Respondent was not denied his right to confront the witness and the evidence against him.

Furthermore, the prosecutor offered to re-do the testimony in the presence of the Respondent. Respondent's counsel waived Respondent's presence rather than have the testimony taken over again. Respondent did not object although he was present during this discussion. Consequently, it is reasonable to presume that Respondent ratified or acquiesced to his counsel's action.

The Fourth District Court held that even though the Cress's testimony was not crucial to the outcome of the case, the Respondent's absence during her testimony deprived him of his right to confront her and the error was not harmless. This is clearly an erroneous decision. The age and identity of the victim was not in question and Cress's testimony was a mere formality. This was not a crucial stage of the adversary proceedings and any error was truly harmless. There was no prejudice to the Respondent.

During the deliberations of the jury the jury asked this legal question of the court:

> "With regard to third degree murder, culpable negligence, course of conduct, the Defendant must have known or reasonably should have known, does this apply to any reasonable person or must reasonableness be attributed to this case regardless of the Defendant's condition in particular?'' (R 2414).

The Respondent's counsel responded to the question in astonishment: "God, that is heavy....How are you going to answer it?" (R 2414).

During conference on the matter of how to answer the

jury question, the prosecutor asked the Respondent's attorney if he wanted the Respondent present or was this the kind of question where he feels he can waive Respondent's presence. Respondent's attorney waived Respondent's presence. (R 2415).

After settling on the right way to answer the jury question the jury was called in and the court answered:

> Okay, ladies and gentlemen, I have received a question which reads: "Re third degree murder, culpable negligence, course of conduct that the Defendant must have known or reasonably should have known, does this apply to any reasonable person?" Yes. "Or must reasonableness be attributed to this case regardless of the Defendant's condition in particular?
> This is an objective standard of any reasonable person.
> (R 2416-2417).

It is a well settled point of law that the rules of criminal procedure do not require the presence of the defendant, in addition to counsel, when the trial judge, during jury deliberations, responds to a legal question in the presence of both defense counsel and the prosecutor and the judge does not give any additional instruction, retestimony or provide any additional evidence. Meek v. State, 487 So.2d 1058 (Fla. 1986). As in Meek the instructions were a correct statement of the law of reasonableness, with which defense counsel agreed, and Respondent's absence was harmless.

Meek at 1060. Chapman, id.; DiGuilio, id.

The Fourth District Court ruled that the Petitioner

misplaced its reliance on the Supreme Court's ruling in Meek. The Fourth District Court held that the record does not indicate that the Respondent acquiesced to or ratified waiver by defense counsel nor was this harmless error. Therefore, the District Court found that Respondent's absence was reversible error.

The State contends that Meek, supra, is clearly on all fours. The Fourth District Court's cavalier dismissal of Meek was inappropriate. Even in Respondent's motion for a new trial he does not object to the testimony of Margaret Cress or to the court's answer of a purely legal question to jury during deliberations.

Petitioner would request that the Supreme Court reverse the Fourth District Court's ruling in regard to the issues discussed above and affirm the judgment and sentence of the Respondent.

POINT II

WHETHER THE TRIAL COURT CORRECTLY DENIED THE DEFENSE'S REQUEST TO INSTRUCT THE JURY THAT INSANITY MAY RESULT FROM THE LONG AND CONTINUED USE OF INTOXICANTS.

In the instant case, the Fourth District Court of Appeal held that the Respondent had presented sufficient expert testimony to support a jury instruction on the fact that the law recognizes that insanity could be suprerinduced by the long and continued use of intoxicants. Citing to Cirack v. State, 201 So.2d 706 (Fla. 1967). Petitioner maintains that the bases for the experts' testimonies regarding the Respondent's alleged substance abuse problems were hearsay and self-serving statements of the Respondent himself. Plus, the Respondent's experts testified that it was not just the substance abuse but the organic brain damaged caused by being hit on the head by a baseball bat and being struck by lightning when the Respondent was young combined with the alleged substance abuse that caused the Respondent's problems. Petitioner contends that the trial court was correct in not confusing the issues by reading Defendant's Requested Jury Instruction No. 5.

In Cirack the accused attempted to introduce the opinion of an expert that the accused had been temporarily unable to distinguish right from wrong because of the effects of alcoholic intoxication on his unstable mind and emotionally immature personality. The expert's opinion was based entirely

on the accused's statements made to him during the private examination. The accused did not testify and there was no evidence put before the court that the accused had, in fact, consumed large quantities of alcohol and little food in the three-day period. The question before the court in Cirack was whether the expert could furnish the basis for his testimony and opinion by testifying to the self-serving declarations of the accused from which he concluded that Cirack had consumed about a fifth of whiskey per day for three days and eaten only "nick-nacks." This Court ruled that the accused could not introduce such hearsay statements.

> The rule that hearsay evidence, including self-serving declarations and statements, is not admissible is essential to the truth finding process of our adversary system of jurisprudence. The basic reason for its existence is that it prevents the fabrication of testimony and evidence. This is accomplished by requiring the maker of a statement to testify in person and be subject to cross-examination so that the trier of fact, be it judge or jury, will have the opportunity of judging the veracity of the statements. The cases holding such evidence inadmissible are legion.

Cirack, 201 So.2d at 709. Although Cirack holds that the law recognizes that a long and continued use of intoxicants can produce insanity in a person, it also holds that an expert cannot base his opinions only on the self-serving, hearsay declarations and statements of the defendant himself for the basic reason that fabrication is too easy. In the instant

case that is exactly what happened.

Dr. Ryan, and Dr. Stillman, who were not court appointed experts, and DR. Virsida, and Dr. Appel all testified that the only information they have regarding the alleged drug and alcohol abuse came from the Respondent himself. (R 1849-1851, 1921, 2151, SR1 64). In fact, Dr. Stillman admitted that the Respondent does not have a medical history of psychological problems or substance abuse. Respondent has never been institutionalized for any substance abuse problems. Finally there are no medical reports regarding any injuries caused by a baseball bat or lightning. (SR1 64). Dr. O'Brien testified that without substantiating evidence he would wonder about the truthfulness as to the amount of drugs the Respondent said he took from December 24 through December 26. (R 1986). Petitioner would maintain that without substantiating evidence of long term abuse of drugs and alcohol the truthfulness of Respondent's statements to the experts who testified would also be suspect.

In addition, none of the experts mentioned above stated that it was their opinion that the long term use of intoxicants caused any insanity in the Respondent. They all testified that the Respondent suffered from organic brain damaged caused by blows to the head from a baseball bat and being struck by lightning as well as substance abuse. (R 1848, 1849, 2151, SR1 37). Not one could testify that the substance abuse contributed more to the Respondent's alleged insanity than the physical damage done to the brain.

Furthermore, none of the tests done on the Respondent can verify that the Respondent suffered from a long time abuse of drugs and alcohol. All the tests could determine, at best, is that the Respondent had organic brain damage. Disregarding the Respondent's self-serving statements, all that remains is that the Respondent suffered from organic brain damage which caused him to be unable to determine right from wrong.

This would not warrant the requested jury instruction.

The only person to testify that could comment on the Respondent's long term substance abuse was Bo Thurston. He testified that he had never seen the Respondent totally drunk or intoxicated and had only seen Respondent do coke once. He testified that Respondent mainly drank beer and smoked marijuana. (R 2016, 2017, 2021).

Dr. Schwartz and Dr. Zager both testified that Respondent did not have organic brain damage and that Respondent was sane. (R 2204, 2252). The greatest evidence of Respondent's sanity at the time of the incident is his taped confession. In that taped confession he was clear and lucid, able to appropriately respond to the questions asked, aware of dates, circumstances, how much he had drank or smoked on each day, he knew he had hurt the victim badly by hitting him in the abdomen and he was aware of his surroundings.

Dr. Stillman testified that the Respondent understood the charges against him and to some degree the consequences

if he were found guilty. Respondent knew the purpose of having an attorney. Respondent stated to Dr. Stillman that he did not want to remember the incident. (SR1 39-41, 44).

In sum, an expert psychiatric opinion that a criminal defendant was voluntarily intoxicated to the point of insanity is inadmissible unless it is based upon more than the defendant's unconfrontable self-serving hearsay declarations to his doctor. Cirack, supra.: Johnson v. State, 478 So.2d 885, 886-887 (Fla. 3rd DCA 1985); Holsworth v. State, 522 So.2d 348, 352 (Fla. 1988). Their testimony was admissible only as to the effect of a given quantity of intoxicants on Respondent's mind. Cirack, supra.
The trial court specifically instructed the jury on insanity and impairment of the mental faculties by intoxication.

In the instant case the jury found the Respondent guilty of the lesser included offense of murder in the third degree. (R 2418). Implicit within that rendition was the jury's determination that the Respondent was mentally capable of forming the requisite specific intent required in child abuse. At the time that it made its decision, the jury had before it substantial evidence in regard to Respondent's long and continued substance abuse, the expert testimony on the Respondent's alleged brain damage, and the history of child abuse committed on the Respondent. The jury also heard the Respondent's taped confession and expert and non-expert testimony as to the sanity of the Respondent at the time of the offense. From the evidence produced at trial, the jury

could, as it did, rationally infer that Respondent possessed the requisite criminal intent necessary for his conviction. Because of this determination, the manner, i.e., by voluntary or involuntary intoxication, of Respondent's asserted insanity was not a necessary consideration for the jury. Consequently, assuming for the sake of argument that it was error for the trial court to fail to give the Respondent's instructions as requested, because of the jury's findings that Respondent did have the requisite criminal intent to commit the offenses with which he was charged, it was at most harmless error. See, Powers v. State, 369 So.2d 640 (Fla. 3rd DCA 1979).

In conclusion, there was not any independent evidence that the Respondent suffered from long term substance abuse, therefore, the trial court was correct in denying the Respondent's requested jury instruction. Furthermore, in light of the jury determination that the Respondent did have the requisite criminal intent to commit the offense of aggravated child abuse, it was at most harmless error. Petitioner would request that the Fourth District Court's ruling be reversed and the Respondent's conviction and sentence be affirmed.

POINT THREE

WHETHER THE TRIAL COURT CORRECTLY REFUSED TO ADMIT TESTIMONY FROM A WITNESS THAT RESPONDENT'S WIFE HAD ADMITTED TO HER THAT SHE HAD MURDERED ONE OF HER CHILDREN IN 1978 AS PROOF THAT SHE KILLED THE VICTIM IN THIS CASE

The Respondent maintains that the defense was prevented from presenting hearsay evidence inculpating Respondent's wife in the death of her little girl in 1978 and, thereby, exculpating the Respondent from the crime charged. Petitioner maintains that this is an aberration of the Williams Rule and the fact that Respondent's wife had a child that died from blunt trauma seven years earlier does not prove that she killed her son, Johnny Griffin.

Apparently Carolyn Savino had a child, Ahna LeMay Griffin, who died when she was one month old in 1978 from blunt trauma to the head. (R 2633). Carolyn was not indicted, or tried regarding this death. Defense counsel sought to introduce the testimony of the medical examiner from Virginia who would testify that Ahna Griffin died of a blunt trauma. (R 1217). He would also testify that Carolyn testified in a court proceeding as well as evidence from the police that this death was an accidental death. (SR2 6). All that the medical examiner could testify to is that Ahna died of blunt force trauma. (SR2 8). The medical examiner's opinion was that the death was a homicide and he reported it as such to the police. (SR2 9). The only similarity in Ahna's death and Johnny's death is that they were both abused

children. (SR2 lo).

Defense counsel also wanted to introduce testimony from the detective in Ahna's case who would testify that Carolyn claimed that she was not there when Ahna Griffin died, just as she claimed in the instant case. (R 1224). Defense counsel also wanted Cheri Dierringer to testify to the fact that Carolyn Savino had admitted to Dierringer that she had killed Ahna. (R 1225). The trial court ruled that this was hearsay. (R 1179). The State argued that this was not relevant or probative to any issue in this trial as to Johnny Griffin's death in 1985. The Court granted the State's motion in limine. (R 1244).

Carolyn Savino testified at the motion to suppress that on December 24 she was at work until 4:00 or 4:30 P.M. She was with her husband most of the evening. She went to bed at 10:00 P.M. On December 25th she went for a walk with her husband at 2:30 A.M. When she returned she got dressed and went to work. She returned home at 3:30 P.M. On December 26th she got up at 4:00 A.M. and got dressed to go to work. She left for work at 6:00 A.M. At 7:30 A.M. the Respondent called her about Johnny Griffin. Her husband picked her up from work. They were in an accident on the way home. When she got home she called the ambulance immediately upon seeing Johnny Griffin. (R 601-607).

Respondent took the stand for the motion to suppress. He did not deny Carolyn's rendition of the events of December 24th through the 26th. He did not state that Carolyn Savino

ever hit Johnny Griffin during that period or during any other period. (R 833-865).

Virginia Griffin's testimony was taken in chambers to determine if she was capable of testifying regarding the events. She stated to the trial judge that the Respondent hit the victim in the stomach repeatedly but that her mother, Carolyn Savino, never hit her or hurt her. (R 1518-1519).

Respondent's taped confession confirms the fact that Carolyn Savino went to work every day. He also related how he beat Johnny Savino severely. He does not say that Carolyn Savino beat Johnny nor that she had the opportunity to beat Johnny. In fact it was Carolyn who called the ambulance. (R 1623-1629).

Defense counsel admitted that Carolyn Savino was not in the house during any of the beatings. (R 1224). The prosecuting attorney stated in his opening that Carolyn Savino was at work all day. This was never disputed by Respondent. There was not one shred of evidence submitted that Carolyn Savino beat Johnny Griffin during the days in question or that she had the opportunity to beat Johnny Griffin during the days in question. The only testimony or evidence submitted is that Carolyn Savino was at work from early morning to late afternoon. There was only some testimony by Bo Thurston that Carolyn Savino abused Johnny Griffin when he was a baby. (R 2008, 2011-2015).

Finally, a police investigation into the death of Ahna Griffin indicated that the death was accidental. There was a

court proceeding that reviewed the evidence found in Ahna's death. Since Carolyn was not indicted it is safe to say she was innocent of any charges related to the death of Ahna. (SR2 6). Johnny Griffin's death was not accidental. Even assuming that the trial court would have allowed the testimony of Cheri Dierringer, her testimony would only have been admissible if corroborating circumstances showed the trustworthiness of the statement. Dr. Beyer's testimony would not be sufficient to supply that corroboration since he could only testify that Ahna died of blunt trauma and that in his opinion it was homicide.

The Fourth District Court held that:

> Notwithstanding the seven-year separation between the death of appellant's wife's daughter and the death of her son, the circumstances surrounding the two deaths and the evidence that the deaths resulted from similar injuries and under similar circumstances make the evidence concerning the earlier death relevant to appellant's guilt or innocence. Both children incurred multiple injuries consistent with blunt force trauma, and the trauma in both cases was consistent with child abuse. The record shows that appellant's wife had physically abused her son on several occasions and that she was living in the home with appellant and the victim when the allegedly fatal blows were struck. Accordingly, we hold that the trial court erred when it excluded this evidence from the jury.

The holding of Williams v. State, 110 So.2d 654 (Fla. 1959), cert. denied, 361 U.S. 847, 80 S.Ct. 102, 4 L.Ed.2d 86 (1959) is now codified in the Florida Evidence Code as

Section 90.404(2), Florida Statutes (1979), and provides in subsection (a):

> Similar fact evidence of other crimes, wrongs or acts is admissible when relevant to prove a material fact in issue, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, but it is inadmissible when the evidence is relevant solely to prove bad character or propensity.

In order to introduce evidence of another crime, not only must the requirements of Section 90.404(2)(a) be met, but the similar fact evidence must meet a strict standard of relevance in order to minimize the risk of a wrongful conviction. Consequently, the similar fact crime, when compared with the present offense, must be so unique or particularly unusual as to provide a "finger-print type" characteristic tending to establish independently of an identification of the perpetrator by the collateral crime victim, that he committed the crime now in question. Heuring v. State, 513 So.2d 122, 124 (Fla. 1987); Nelson v. State, 450 So.2d 1223 (Fla. 4th DCA 1984). Courts look disfavorably when the evidence of similar fact crimes is "made a feature instead of an incident" of the trial on the charged offense. See e.g., Snowden v. State, 14 F.L.W. 257 (Fla. 3rd DCA, January 24, 1989).

A defendant's right to present witnesses and offer evidence is a fundamental element of due process of law. Washinuton v. Texas, 388 U.S. 14, 19, 87 S.Ct. 1920, 18 L.Ed.

2d 1019 (1967). This broad right has given rise to a rule allowing a defendant to introduce evidence that another person recently committed a similar crime by similar methods, since such evidence tends to show that someone other than the accused committed the particular crime. United States v. Armstrong, 621 F.2d 951, 953 (9th Cir. 1980); Pettijohn v. Hall, 599 F.2d 476, 480 (1st Cir.), cert. denied, 444 U.S. 946, 100 S.Ct. 308, 62 L.Ed.2d 315 (1979); United States v. Robinson, 544 F.2d 110, 113 (2nd Cir. 1976), cert. denied, 434 U.S. 1050, 98 S.Ct. 901, 54 L.Ed. 2d 803 (1978); Holt v. United States, 342 F.2d 163, 165-166 (5th Cir. 1965); People v. Flowers, 644 P.2d 916, 918 (Colo), appeal dismissed, 459 U.S. 803, 103 S.Ct. 25, 74 L.Ed.2d 41 (1982); Kucki v. State, 483 N.E. 2d 788, 791 (Ind.App. 1985); Commonwealth v. Jewett, 392 Mass. 558, 562, 467 N.E. 2d 155 (1984).

In State v. Echols, 524 A. 2d 1143 (Conn. 1987) the Supreme Court of Connecticut stated:

> The defendant, however, must show some evidence which directly connects a third party to the crime with which the defendant is charged. It is not enough to show that another had the motive to commit the crime; nor is it enough to raise a bare suspicion that some other person may have committed the crime of which the defendant is accused.
>
> The presentation and admissibility of such evidence is governed by the rules of relevancy. We have often stated that "[e]vidence is admissible when it tends to establish a fact in issue or to corroborate other direct evidence in the case. . . . 'one fact is relevant to another fact whenever, according to the common course of events, the existence of the one, taken alone or in connection with other facts, renders the existence

> of the other either certain or more probable. . . . Unless excluded by some rule or principle of law, any fact may be proved which logically tends to aid the trier in the determination of the issue. Evidence is admitted, not because it is shown to be competent, but because it is not shown to be incompetent. No precise and universal test of relevancy is furnished by the law, and the question must be determined in each case according to the teachings of reason and judicial experience.' (citations omitted)

Echols, 542 A.2d at 1147-1148. See also State v. Pruitt, 380 S.E. 2d 383 (N.C.App. 1989); State v. Cotton, 351 S.E. 2d 277 (N.C. 1987); Commonwealth v. Lawrence, 536 N.E. 2d 571 (Mass. 1989); United States v. Puckett, 692 F.2d 663, 671 (10th Cir.), cert. denied, 459 U.S. 1091, 103 S.Ct 579, 74 L.Ed.2d 939 (1982); Krown v. United States, 460 U.S. 1024, 103 S.Ct. 1276, 75 L.Ed. 2d 497 (1983).

The passage of time must play an integral part in the balancing process to determine admissibility of other crimes. The evidence must not be too remote in time or too weak in probative quality and it should be closely related to the facts of the case against the defendant. Thus, the proof of one act may reasonably prove a second. The passage of time necessarily leads to an eroding of the commonality between the two crimes. The probability of an ongoing plan or scheme then becomes tenuous. The admission of other crimes remote in time allows the jury to convict a third party because of the kind of person he is, rather than on the evidence disclosed, that the third party committed the crime charged. Commonwealth v. Lawrence, supra.; State v. Jones, supra..

Commonwealth v. Brown, 534 N.E. 2d 806 (Mass App. 1989). Moreover, without such limiting conditions the jury would be exposed to a farrago of evidence which would only tend to confuse issues.

The Fourth District Court of Appeals quoted with favor State v. Garfole, 388 A.2d 587 (N.J. 1978). In that case the defendant was originally charged with six offenses. The State successfully had the sixth offense severed because it occurred some nine months after the fifth. The State then dismissed all charges arising from the first four offenses. The defendant had a strong alibi for four of the six incidents, namely, that he had been at work at the time of their occurrence. The defendant felt that if all of the six incidents were not presented at trial he would not be able to show he was innocent of the related crimes and, therefore, could not be guilty of the crime charged.

The court in Garfole noted the similarities in all the crimes.

> In addition to the close time sequence of the first five episodes, it is to be noted that all but one occurred within the vicinity of the Cranford Junior High School and the other a half mile away. All the incidents transpired between 9:45 P.M. and 11:00 P.M.. . .The sixth was the only temporally remote incident, yet that very incident was found similar enough to the fifth for Evid.R. 55 purposes. All victims of the assailant's sexual attacks were young girls between 12 and 16 years of age. In four of the six cases, including the one for which defendant was tried, the victim was with a companion. Yet, the victim in incident six was alone. Incident two was

> the only one in which no molestation occurred. In every incident except the sixth, the assailant brandished a handgun. All of the incidents except the third took place within a square mile of Cranford Junior High School, and in that case the attacker stalked his victim while she was within the area. In all six incidents, the attacker indicated that he did not wish to hurt anyone. While the exact details of every act of molestation are not the same, they are not significantly dissimilar. A feature common to all of the sex attacks was carnal touching, but an absence of vaginal penetration.

Garfole, 388 A.2d at 589,597. Initially, the State was so completely convinced that all of the crimes were committed by the same individual that defendant was indicted for all six offenses and the State opposed any severance filing a brief to that effect. Garfole, at 595.

In all the cases cited by the Petitioner in this brief strong showings of similarity of other offenses as to time, place and manner to the crime charged was required prior to admissability of the other crimes to identify a third party as the one who committed the crime charged. The similarities were not of a general nature but were specific in nature.

In the instant case there is no connection between the 1978 death of Ahna Griffin and the 1985 death of Johnny Griffin. Ahna was one month old when she died of blunt trauma to her head. Carolyn Savino testified in a court proceeding that the death was accidental and that she was not home when it happened. Apparently this explanation was accepted as there is no evidence presented that she was

charged in the crime. Johnny was six years old when he died. The blow that struck him was of such a force that it compressed his abdomen against the back bone with enough force that it tore his intestines. The only way a woman could have reasonably done this would be to stomp on the child's stomach while the child was on its back. This Carolyn would have had to have done in her eighth month of pregnancy. There is no evidence present that this event occurred. Further, there was no evidence present that indicated that Carolyn had, in the recent days or months preceding the incident, abused Johnny. There was some evidence that indicated that Carolyn abused Johnny when he was a baby. The only evidence presented regarding Carolyn's opportunity to abuse Johnny was that she was at work on the days in question. Consequently, the defense failed to establish an opportunity, and a direct connection between Carolyn and the charged offense.

The death of Ahna does not go to prove any fact in question. It seems incongruous that such testimony should be allowed into evidence when its probative impact has been so attenuated by time that it has become little more than character evidence illustrating a possible predisposition of someone other than the accused - in this case Carolyn Savino.

The concerns of Florida Statute 90.404(2) are equally valid when applied to evidence of other acts of third parties. When, as in a case such as this, a defendant seeks to introduce other acts evidence to show that a third party

committed the charged offense, the danger is just as great that the jury will conclude the third party committed the act because he is "likely" to do so or because he escaped prior punishment. The danger is also just as great that the jury will be confused by the introduction of other crimes evidence or that the third party will be unprepared to demonstrate fabrication. There is no valid reason for making a distinction between defendants and third parties in this area. The concerns of a statute such as Section 90.404(2) go beyond mere protection of a defendant from prejudice. Such statutes address concerns of relevancy and also questions of allowable methods of proof. United States v. Puckett, 692 F.2d 663, 671 (10th Cir.), cert. denied, 459 U.S. 1091, 103 S.Ct. 579, 74 L.Ed.2d 939 (1982); cert. denied sub nom.

Section 90.404(2) sets forth an analytical framework for examination of other acts evidence. The statute provides that such evidence is not relevant when used "to prove the character of a person in order to show that he acted in conformity therewith," but rather must be introduced for the purpose of proving an element listed within the statute. Then, the evidence must be shown to be more probative than prejudicial. Even if the evidence were relevant a trial court may exclude relevant evidence if "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Straight v. State, 397

So.2d 903 (Fla. 1981); Florida Statutes Section 90.403.

Use of the third party defense is based upon the premise that when the guilt of another person is inconsistent with the guilt of the defendant, it is relevant for the defendant to present evidence that such other person committed the crime charged. The third party defense should necessarily be difficult to establish. The defense should not be able to rest on the creation of a bare possibility that a third party might be the culprit. Rather the defense must first establish a motive, opportunity, and a direct connection between the third party and the charged offense. Once the necessary foundation is established, it is permissible to introduce evidence of a motive of a third party to commit the crime, threats by the third party, or other facts which are relevant to establish that the third person committed the act in question. The two acts must be so similar in time, place, and manner that a jury could infer that the acts bear the "imprint" of the third party, creating a discernible mode of operation from one act to the next. Heuring v. State, 513 So.2d 122, 124 (Fla. 1987); State v. Norris, 168 So.2d 541 (Fla. 1964); Dibble v. State, 347 So.2d 1096 (Fla. 2d DCA 1977).

The only real purpose for introducing such evidence regarding Ahna's death in this case would be to show the bad character of Carolyn Savino. This violates the clear intent of Florida Statute 90.404(2). The trial court was correct in denying the admission of such evidence. Petitioner would

request that the Fourth District Court's ruling be reversed and the conviction and sentence of the Respondent be affirmed. The Petitioner would request that the Supreme Court answer YES to the first certified question by the Fourth District Court of Appeals and NO to the second certified question by the Fourth District. The Petitioner would request that the Supreme Court answer NO to both restated certified questions submitted by the Petitioner.

CONCLUSIOW

Petitioner, based on the foregoing arguments and authorities cited herein, requests this Honorable Court to affirm the conviction and sentence of the Respondent and to answer the certified questions as requested in Point 111.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by mail/courier to ALLEN J. DEWEESE, Assistant Public Defender, Fifteenth Judicial Circuit, The Governmental Center/9th Floor, 301 N. Olive Avenue, West Palm Beach, Florida 33401, this 16th day of January, 1989.

Of Counsel