IN THE SUPREME COURT OF FLORIDA

DANA WILLIAMSON,

Appellant,

v.

STATE OF FLORIDA,

Appellee.
_____/

CASE NO.: 84,198

TRIAL COURT NO.: 92-15642CF10A

REPLY BRIEF OF APPELLANT

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PREFACE

In this Reply Brief, Appellant, DANA WILLIAMSON, shall be referred to as "Williamson or "Appellant." Appellee, STATE OF FLORIDA, shall be referred to as "State" or "Appellee." For ease of reference, the Record shall be identified by a parenthetical containing the volume number, followed by the letter "R.," followed by the page number upon which the cited material appears. The Supplemental Record shall be identified by a parenthetical containing the letters "1S.R.," and "2S.R.," followed by the page number upon which the cited material appears.

INTRODUCTION TO ARGUMENT

Florida Rule of Appellate Procedure 9.210(c) requires that a statement of case and facts section within an answer brief "shall be omitted unless there are areas of disagreement, which should clearly be specified." emphasis added. In its Brief, the State "rejects" the Appellant's factual summary,[1] yet fails to specify any falsehoods or inaccuracies. Answer Brief at 2.

The Appellant, by contrast, generally concurs with the State's lengthy statement of case and facts, with the exception of 1) the depiction of an EEG performed on Williamson in May 1994 as producing normal results where in fact, the Record reveals a finding of "mild abnormality." Compare Answer Brief at 17 with (19R.- 3521; 20R.- 3634-35; 21R.- 3822); and 2) the labeling of Appellant as being the perpetrator of the subject crimes at bar.

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[1] Williamson stands by the accuracy of the facts presented in the Initial Brief.

REPLY ARGUMENT

Williamson respectfully submits that the contentions of the State do not warrant affirmance in this case. The scope of this Reply will be confined to addressing the points raised in the argument section of the Answer Brief as they appear sequentially.

These include the following:

- That the trial court properly admitted the Appellant's 1975 manslaughter conviction during the guilt phase and/or that it was harmless error;
- That the trial court's failure to sever Count XVII - Extortion, was not preserved for appeal and/or that severance was not required;
- That the trial court properly admitted a quit claim deed and divorce papers prepared by Appellant and/or that it was harmless error;
- That the trial court properly denied Appellant's request for a judgment of acquittal;
- That the trial judge's findings regarding mitigation are supported by the Record; and
- Florida's death penalty statute is constitutional.

I. THE ADMISSION OF THE APPELLANT'S MANSLAUGHTER CONVICTION WAS OVERLY PREJUDICIAL AND VIOLATIVE OF THE "WILLIAM'S RULE."

Williamson's right to a fair trial was significantly prejudiced following the trial court's erroneous admission of his 1975 manslaughter conviction. The State contends that the admission does not mandate reversal, and in support thereof raises three issues: A) that the conviction's relevance to witness Charles Panoyan's state of mind and credibility outweighed any prejudicial impact; B) that the "William's Rule" was not at issue; and C) that alternatively, the introduction of the conviction was harmless error.

I.(A) THE RELEVANCE AND PREJUDICIAL IMPACT OF THE CONVICTION

The State primarily argues in its Brief that the admission was necessary to explain Panoyan's prolonged reluctance to identify Appellant to police due to his "state of mind," or more precisely, his fear of Williamson and the threatened reprisals allegedly made against his family.[2] Respectfully, the State's argument is not supported by the Record or Florida law.

A review of the Record illustrates that the prior conviction was clearly not required to establish Panoyan's fear of Appellant. It was Panoyan who testified that Williamson was the perpetrator responsible for stabbing to death Donna Decker, and shooting Carl, Clyde, Bob Decker. By virtue of his own testimony, (if it is to be believed) he was chillingly aware of Appellant's purported willingness to kill. Thus, the prior conviction was not probative or necessary to evidence an awareness of Appellant's murderous propensities as Panoyan himself testified to witnessing it first hand.

Additional information was elicited from Panoyan at trial which further minimized the need for the prior conviction evidence. Panoyan repeated in open court the frightening and extremely graphic threats to his family allegedly made by Williamson. (11R.-2124-25). He also testified that Appellant's brother Rodney[3] wanted to kill him right there on the spot the night of the crime. (11R.- 2128,2151). Finally, Panoyan stated repeatedly that he

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[2] The State claims that the prior conviction made the alleged threats more believable in the mind of Panoyan.

[3] Rodney allegedly was an accomplice to the crime.

believed that others were involved in the crime who were willing to carry out Appellant's threats if he went to the police. (11R.- 2126).

The Record establishes that Panoyan's testimony made the probative value [4] of introducing Appellant's prior conviction marginal at best, thus making its admission substantially outweighed by its prejudicial impact.

Florida law provides that the admission of such evidence may constitute reversible error. See Sampson v. State, 645 So. 2d 1005, 1008 (Fla. 2d DCA 1994) (evidence of prior cocaine offense overly prejudicial and reversible error); State v. Sawyer, 561 So. 2d 278, 284 (Fla. 2d DCA 1990) (exclusion of single hair matching murder defendant affirmed as overly prejudicial); Wilding v. State, 427 So. 2d 1069, 1070 (Fla. 2d DCA 1983) (mention of prior conviction overly prejudicial).

When collateral crime evidence is relevant to establishing the context[5] of a charged crime, Florida courts carefully scrutinize the prejudicial impact its admission will impart on the jury. In Cooper v. State, 659 So. 2d 442 (Fla. 2d DCA 1995), the attempted murder victim's statement that Cooper's daughter (whom victim dated) had told him that Cooper had molested her was introduced. The State argued the collateral crime established the context of how the incident with the victim had generated. Id. On appeal, the court reversed

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[4] See Cyprian v. State, 661 So. 2d 929 (Fla. 4th DCA 1995) (officer's testimony that it was common for victims to be initially unable to identify their attackers was improper attempt to bolster state witness testimony); Joseph F. Maimone Sec. and Investigations, Inc. v. American Exp. Travel Related Services Inc., 598 So. 2d 272, 273 (Fla. 3d DCA 1992) (testimony of two witnesses regarding origin of one clause in contract already breached inadmissible as cumulative).

[5] The State argues that the conviction helped establish the context of Panoyan's actions. Answer Brief at 25,29.

holding that "even were we to assume that the statement...was otherwise admissible, it would still be excludable under 90.403." Id. at 444. See also Denmark v. State, 646 So. 2d 754 (Fla. 2d DCA 1994) (evidence of prior criminal acts in neighborhood feud offered to prove context of drive by shooting excluded as too prejudicial).

The case of Unruh v. State, 560 So. 2d 266 (Fla. 1st DCA 1990) is also instructive in this regard. In Unruh, the appellant robbed and kidnaped one Mr. Turnipseed during a crime spree, until he was apprehended the same day following an armed confrontation. Id. at 267. The state introduced Turnipseed's account of the threats and other statements made by Unruh. The appellate court reversed, holding that the testimony was overly prejudicial and tended to only show propensity. Id. at 269.

The cases cited by the State on this issue shed little light on the case at bar. For example, Castro v. State, 547 So. 2d 111 (Fla. 1989), is cited as the "best illustration" of the reasoning behind the admission of the prior conviction. Answer Brief at 24-25. In Castro, this Court held the threat made by the defendant to a witness to be irrelevant because his state of mind was not at issue. Id. at 115. Nowhere does the Opinion state as Appellee implies, that the evidence would have otherwise been admissible per se if state of mind was at issue. Further, Castro did not involve a prior conviction, but only a threat. As mentioned above, the alleged threats made by Williamson were not excluded by the trial court. Similarly, Bryan v. State, 533 So. 2d 744 (Fla. 1988), does not support admission of Appellant's conviction. In Bryan, this Court affirmed the introduction of a prior crime to prove ownership of the murder weapon in the case charged. Id. Thus the prior crime in Bryan was highly relevant to a vital issue of the subject case - namely, the identity of the

perpetrator. The case at bar does not share such an important correlation.

The State's contention that the probative value of Appellant's prior conviction outweighed its prejudicial impact is not supported by the Record or applicable law, and should be rejected.

I.(B) THE "WILLIAM'S RULE"

Appellant takes issue with the State's claim that the "William's Rule" was not at issue in this case. The Record does indicate that the State provided a notice of intent to rely upon "William's Rule" evidence prior to trial. (25R.- 4573). Further the trial judge remarked, "I'll take it under advisement if you find its appropriate when the "William's Rule" evidence comes in.[6] (8R.- 1507).

At the heart of Appellant's position in this matter is that the real purpose,[7] and most importantly, the effect of admitting the prior conviction was to show propensity and bad character. The "William's Rule" dictates that failing to exclude such evidence may be reversible error. Williams v. State, 110 So. 2d 654 (Fla. 1959) (codified at F.S. section 90.404). The admission of irrelevant collateral crime evidence is presumed to be harmful. See Hayes v. State, 660 So. 2d 257 (Fla. 1995) (case reversed for failure to comply with the "William's Rule"); Griner v. State, 662 So. 2d 758, 759 (Fla. 4th DCA 1995) (same); Stevens v. State, 662 So. 2d 394, 395 (Fla. 5th DCA 1995) (evidence of prior robbery was introduced to show propensity not identity).

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[6] However, the judge did mention elsewhere that the prior conviction was not coming in as "William's Rule" evidence. (8R.- 1506).

[7] Appellant does not question the judge's impartiality, but rather the State's motives in seeking the conviction's introduction.

As noted in section I.(A), the probative value of Appellant's prior conviction was low considering Panoyan's testimony regarding the crime and threats made. Such a realization adds credence to Williamson's argument that on this issue, his character was the real target of the prosecution. The "William's Rule" was relevant in this case despite the State's claims to the contrary, and this Court should reverse and remand.

I.(C) THE ADMISSION OF THE CONVICTION WAS HARMFUL

There is little merit to the State's alternative argument that the introduction of the prior conviction during the guilt phase, if improper, nevertheless constitutes harmless error.

Florida law provides that evidence of collateral crimes that are admitted improperly are presumed to be harmful. See Czubak v. State, 570 So. 2d 925, 928 (Fla. 2d DCA 1995); Lawson v. State, 651 So. 2d 713, 715 (Fla. 2d DCA 1995) (court could not find beyond a reasonable doubt that the verdicts were not affected by the testimony regarding collateral crimes).

The graphic nature of the prior conviction, and the testimony in relation thereto, surely had an overtly prejudicial impact on the jury.[8] See State v. Sawyer, 501 So. 2d at 284

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[8] In other contexts, this Court has observed that inquiries into the nature of prior convictions should be severely restricted to avoid undue prejudice to a defendant. See, e.g., Mead v. State, 86 So. 2d 773, 774 (Fla. 1956)(the proper procedural approach regarding the use of a prior conviction for impeachment requires an adversary to end their inquiry where the defendant admits that he has been convicted of a crime - the inquiry may not even be pursued to the point of naming the crime for which he was convicted). Here, the inquiry went far beyond introducing the record of the Appellant's prior conviction. Indeed, not only did the examination of the State's witnesses delve into the graphic nature of the prior conviction, but also highly prejudicial inaccurate and unreliable information about the conviction. For example, as described below, the trial court admitted testimony regarding the prior conviction that the Appellant purportedly beat the victim to death with a baseball bat, although the record reflects that a weapon

("the trial court should consider...the tendency of the evidence to resolve the matter, such as on an emotional basis."). Appellant was convicted of manslaughter at the age of fifteen in 1975 for kicking and punching to death a four year old child. Thus, the conviction itself conveyed the added prejudicial baggage that Williamson has a propensity to harm children.

Testimony regarding the conviction was elicited through Panoyan and Patrick O'Brian.[9] Although cited in the Initial Brief, their testimony repeated below serves as the best rebuttal to the State's harmless error position.

> Well, Mr. Panoyan knew about his (Williamson's) past. He knew that Williamson had killed before and he would have no problem killing again. He killed a four year old with a baseball bat. (8R.-1546-47) (testimony of O'Brian).
>
> He is a person that killed a baby. Stomped it to death and beat this other one so bad that it was brain dead. (11R.-2147) (testimony of Panoyan).

The statement concerning the "baseball bat" is completely inaccurate, thus adding to the conviction's prejudicial impact. The record of the prior conviction reflects that the Appellant struck the victim with his "hands and feet", and not with any weapon such as a baseball bat. (2S.R.-1); Ben Tenny, a police officer who worked on the case back in 1975, repeatedly stated that Appellant had punched and kicked the child. (19R.-3466,3476,3480,3484,3487); See also Dr. Appel's Report at (29R.- 5294). No mention of a bat or any other weapon is referenced. A weapon more closely equates with an intent to

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was not, in fact, used in that crime. (2S.R.-1).

[9] O'Brian was one of the jail house informants who testified. (8R.- 1552).

kill than kicking and punching. See Long v. State, 407 So. 2d 1018, 1019 (Fla. 2d DCA 1981) (characterizing the defendant as a "shoplifting suspect" without proof that he committed a previous offense was overly prejudicial and required reversal).

The claim that the evidence against Williamson was overwhelming is not supported by the Record. Answer Brief at 27. The State's case primarily hinged on the testimony of Panoyan, which was plagued with inconsistencies. Panoyan, originally the prime suspect, repeatedly told police that he did not know the gunman. (10R.- 1852; 11R.- 2146). He claimed to have been hog-tied but later showed no burns or abrasions. (6R.-1171; 12R.-2360). Panoyan claimed to fear Appellant, yet they apparently were seen in court numerous times talking and joking with one another. (7R.- 1232). The coincidence that he decided to go to the Decker house on the night of the crime when Bob Decker testified that he rarely would come to his house is suspicious. (6R.- 1044,1158). Panoyan and the gunman knew about the Decker's alarm system and floor safe. (6R.- 1023,1062,1064, 1167-68). Most unusual was the gunman's decision to let Panoyan go after attempting to kill everyone in the house.

Aside from Panoyan, the State's case relied upon jail house felons and limited circumstantial evidence. Much is made over the utility belt and cowboy hat found at the scene. The utility belt was not shown to belong to Appellant[10] as the State suggests, and in fact was found in Panoyan's truck. Answer Brief at 27, (7R.- 1300,1424,1467). The cowboy hat was not shown to be the Appellant's. When given a picture of the hat by police,

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[10] The prosecution did prove that Rodney Williamson had purchased two such belts. (8R.- 1465).

it is true that Williamson stated that it "Looks just like the hat I had." (1S.R.- 13). However, such a statement falls short of being conclusive. In fact, Cassandra Williamson testified that the hat did not belong to Appellant, but belonged to her. (8R.- 1481-82).

There were no fingerprints found, nor was any blood evidence, DNA or fiber evidence recovered. No confessions were made. Some evidence presented actually tended to show innocence and not guilt. Bob Decker saw a station wagon strangely parked nearby as he came home that night, yet neither Appellant or his brother Rodney owned such a car. (6R.- 1043; 8R.- 1483). Decker described the gunman as a large man but Williamson is diminutive in size. (4R.- 645). Decker also told the police that he thought he knew the perpetrator, but he had never met Appellant. (7R.- 1224).

The evidence was not overwhelming in the legal sense to render the admission of the prior conviction harmless error. The probative value of the conviction was certainly low compared to its prejudicial impact. Its purpose and effect was to destroy the character of Appellant and inflame the passions of the jury. This Court should reverse the convictions and remand for a new trial.

II. THE FAILURE OF THE TRIAL COURT TO SEVER THE EXTORTION COUNT WAS ERROR.

The State next contends that severance of the extortion count was not preserved for review, and alternatively that it was otherwise not warranted. Appellee bases its first claim on Appellant's failure to seek severance before trial when the State's intention to use the prior conviction was made known.

Florida Rule of Criminal Procedure 3.152 (a) (2), provides that "the court upon a

proper motion before or during trial shall grant a severance...where it is necessary to achieve a fair determination of the defendant's guilt or innocence of each offense." See also Sosa v. State, 639 So. 2d 173, 174 (Fla. 3d DCA 1994) (even if consolidation is most practical way of processing a case, it does not outweigh a defendant's right to a fair trial). While it is true that notice was given before trial of the State's intention to introduce the conviction, Appellant was not aware that it would be admitted essentially to prove the extortion count. Rule 3.153 (a) states, " A defendant's motion for severance of multiple offenses...shall be made before trial unless opportunity therefore did not exist or the defendant was not aware of the grounds for such a motion." emphasis added. The Record reveals that Appellant's trial counsel was unaware that the conviction was being admitted by the judge to prove extortion:

> Had we known the state was going to bring it around for this count, which we were never put on notice for, we most likely would have filed a motion to sever that count based on the prejudicial impact it would have on the other 16 counts. Now we're at a significant disadvantage. Not only do we have to defend this extortion charge...that the court indicated would not otherwise have been allowed in for Counts 1 through 16. (8R.- 1505).
>
> We had no notice they were seeking to use this to apply to the extortion count. We would have been in a better position pretrial to sever the count and eliminate this whole thing from the trial. But by not being put on notice, we were never inclined to do that. (11R.-2095).

Indeed, the State's notice did not indicate the purpose of the conviction's introduction, and, therefore, was not meaningful. (25R.- 4573). In State v. Zenobia, 614 So. 2d 1139

(Fla. 4th DCA 1993), the state's notice failed to specify what aspect of its case the prior crime was sought to evidence. Id. at 1140. On appeal, the court held that such vagueness was grounds for exclusion of the evidence.[11] Id. The cases cited by the State on this issue involve circumstances very different from the case at bar. Rodriguez v. State, 609 So. 2d 493, 499 (Fla. 1992) (severance was not requested or mentioned at trial level thus waiving issue); Barbon-Zurita v. State, 415 So. 2d 824, 825 (Fla. 3d DCA 1982) (trial counsel was fully aware of issues prior to trial and consciously chose not to seek severance as part of trial strategy).

Alternatively, Appellee claims that the prior conviction was highly relevant and intertwined with the entire case making severance improper. The Record illustrates however, that the trial judge based his ruling predominantly[12] on the existence of the extortion count:

> You might be right if there was no charge of extortion...you're probably right the prejudice outweighs the probative value. It might outweigh the probative value on other counts. (8R.-1498)
>
> And so the State has filed an extortion count. Since each count has to be evaluated independently...and since this is relevant to the charge of extortion, since the state has to prove that the victim was actually in fear...

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[11] But see Quinn v. State, 662 So. 2d 947 (Fla. 5th DCA 1995) (notice need not show purpose of introduction).

[12] The trial judge also did state that the conviction was interrelated the case, but the Record is clear that Panoyan's state of mind as it related to the extortion count is what formed his opinion. (8R.- 1499).

(8R.- 1504).

> ...based on that they could find him guilty of extortion. Not guilty on the other counts. So it is relevant in light of the extortion charge. (Prosecutor Cavanaugh, (8R.-1501).

Appellant does not contest the relevance of the extortion count to the case,[13] but asserts severance was proper if its presence mandated the admission of his prior conviction. See Sosa v. State, 639 So. 2d at 174, (counts should have been severed where only one charge required proof of prior convictions); Orr v. State, 380 So. 2d 1185 (Fla. 5th DCA 1980).[14] Failing to sever counts when appropriate may have the effect of prejudicing the defendant's right to a fair trial. The court's reasoning in Chapman v. State, 639 So. 2d 682 (Fla. 5th DCA 1994), supports this proposition:

> In addition, the prejudice results not from the number of counts charged for each offense, but rather the danger that evidence from one charge will improperly bolster the state's case on the other charges.

Id. at 683.

The Record does not display a clear nexus between the prior conviction and the

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[13] Appellee's reliance upon Fotopoulos v. State, 608 So. 2d 784 (Fla. 1992), as "factually similar" to the case at bar is misplaced. Answer Brief at 29. There, the killings were connected in "an episodic sense" and a "temporal sense." Id. at 789. Williamson acknowledges the extortion count's relevance to the case, but argues that severance was proper to prevent the poisoning of the jury with an unrelated prior crime that occurred over 13 years before and when Williamson was a juvenile.

[14] Accord Ellis v. State, 622 So. 2d 991 (Fla. 1993) (even if joinder is proper, severance may be necessary to achieve a fair determination of each offense); Granville v. State, 625 So. 2d 1258, 1260 (Fla. 1st DCA 1993) (charges based on similar but separate episodes connected only by the accused guilt should be severed); May v. State, 600 So. 2d 1266, 1269 (Fla. 5th DCA 1992) (same).

murder charge. If the trial court was correct in its assessment of the conviction's relevance to the extortion count, then the court erred by refusing to order severance. The State's position on this issue should be rejected.

III. THE TRIAL COURT ERRED IN ADMITTING THE QUIT CLAIM DEED AND DIVORCE PAPERS.

Appellee argues that the quit claim deed and divorce papers admitted were relevant to Williamson's knowledge of legal forms,[15] and alternatively minimizes any harmful error that could have resulted.

The admission of these papers was overly prejudicial and misleading to the trier of fact, as they had no legitimate bearing on the crime evidence. The quit claim deed Bob Decker was forced to sign never was recovered. Appellant's knowledge of simple land deeds makes him no different than any other homeowner. However, the deed allegedly prepared by Appellant[16] concerned his elderly father's property, which potentially could have led the jury to believe that he swindled or took advantage of his own father. (8R.- 1462, 1472). The divorce papers similarly have no relevance as half the population gets divorced, yet the fact that his wife was unaware of the divorce, also tends to show underhandedness. (8R.-1458-60).

Appellee proffers Miller v. State, 605 So. 2d 492 (Fla. 3d DCA 1992), for the

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[15] It is significant to note that Appellant did not "open the door," by claiming ignorance of legal forms, or mental incompetence. Williamson's brain dysfunction was raised in the penalty phase.

[16] Notably, Fran Shultz, the Appellant's mother in law, testified that Williamson did not even prepare the deed. (20R.- 3752).

proposition that evidence of legal acts are not prejudicial. Such a broad rule of thumb is too simplistic to apply in the case at bar. The case of Huhn v. State, 511 So. 2d 583 (Fla. 4th DCA 1987), illustrates this point.

In Huhn, the trial court admitted evidence that the defendant kept a pistol in his glove box and ATF records[17] of gun purchases, even though no evidence displayed that the pistol was used in the charged crime. Id. The appellate court reversed holding among other things, that there was nothing unlawful about owning the pistol, but it nevertheless conveyed a prejudicial message to the jury. Id. at 589. See also Westland v. State, 570 So. 2d 1133 (Fla. 4th DCA 1990) (improper to admit knife when there was no evidence tying knife with the charged crime).

Ideally, this issue should not be viewed in a vacuum when judging its prejudicial impact, but instead should be considered in conjunction with the introduction of Appellant's prior conviction. See Nowizke v. State, 572 So. 2d 1346, 1350 (Fla. 1990) (cumulative effect of errors required reversal of capital conviction); Hargrove v. State, 530 So. 2d 441 (Fla. 4th DCA 1988) (cumulative effect of improper admissions could have caused guilty verdicts) *rev. on other grounds* 552 So. 2d 281. The trial judge's erroneous admission of the quit claim deed and divorce papers was not harmless and this Court should reverse and remand.

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[17] The ATF records were deemed admissible as a writing sample, but only if the other available handwriting exemplars were found to be insufficient. Id. at 589.

IV. THE TRIAL COURT IMPROPERLY DENIED THE MOTION FOR A JUDGMENT OF ACQUITTAL.

Appellant is well aware of the difficult standard of review on this issue, but nevertheless asserts that an acquittal or the commutation of the death sentence to life imprisonment is warranted.

As demonstrated in section I.(C), the case against Williamson lacked substantial competent evidence to support a conviction. The testimony of Charles Panoyan was the linchpin of the State's case, yet was plagued with too many contradictions and irregularities to have been considered credible. Other than Panoyan, the only direct testimony[18] implicating Williamson was elicited through three jail house informants - Patrick O'Brian, Stephen Luchak, and Edward Aragones.

O'Brian is a six time felon who has acted as an informant on at least three other occasions in return for some sort of benefit. (8R.- 1552-53). During the time period that O'Brian testified against Williamson, he was being held for armed robbery which carries no bail. (8R.- 1554). In return for his cooperation, O'Brian was granted a bond hearing at which the prosecutor Cavanaugh appeared on his behalf. (8R.- 1554). He was discharged on "community release" and ultimately set free for time served.[19] (8R.- 1554,1582-86). At trial, O'Brian testified that Appellant approached him in jail for the first time and just started telling him about the details of the case. (8R.- 1556). O'Brian was aware of , and had access

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[18] Contrary to the State's argument, Bob and Clyde Decker's testimony does not implicate Williamson as they were unable to identify the gunman due to the mask he wore. Answer Brief at 33.

[19] This contradicts the claim by the State that no deals were made with O'Brian. Answer Brief at 14.

to a large case file Appellant kept in his cell. (8R.- 1558). Defense counsel also alluded to the widespread newspaper coverage[20]this case was attracting at the time. (8R.-1562). O'Brian confirmed[21] that the paper was readily available in jail. (8R.- 1562).

Stephen Luchak is a convicted felon serving a 35 year sentence as a habitual offender. (10R.- 1898). Prior to being sentenced, Luchak contacted the State regarding his alleged conversations with Williamson. (10R.- 1942). Mr. Cavanaugh offered his help if Luchak chose to enter a plea.[22] (10R.- 1942). Luchak was Appellant's cellmate and thus had daily access to the case file. (10R.- 1899).

Similarly, Mr. Aragones has been in and out of jail several times and is in the habit of living under false names. (3R.- 2488-89). At the time of his testimony, he was going by the name of Michael Colon and previously he was Benjamin Sosa. (13R.- 2493-94). He was also serving as an informant in another case at the time which may explain all the names. (13R.- 2494).

None of these individuals can be considered reliable. Each were shown to have clear potential biases and credibility shortcomings. With such demonstrably weak direct testimony and limited circumstantial evidence,[23] the case lacks substantial competent evidence to uphold the conviction. A death sentence under such circumstances risks the

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[20] In fact, a book entitled Until Proven Innocent has since been written on this case.
[21] Of course, he denied reading of this case in the paper. (8R.- 1562).
[22] Luchak refused to plea out and was convicted and sentenced as a violent habitual offender. (10R.- 1945).
[23] See Crump v. State, 622 So. 2d 963 (Fla. 1993) (where state's entire case rests upon circumstantial evidence, evidence must be inconsistent with any reasonable hypothesis of innocence).

execution of an innocent man, and is not in the interest of justice. See Tibbs v. State, 397 So. 2d 1120, 1337 (Fla. 1981) ("In capital cases, the Court...determine if the interest of justice requires a new trial..") (citing Florida Rule of Appeal 9.140(f)).

Florida law mandates that a conviction not secured by substantial competent evidence cannot be sustained. See Tibbs v. State, 397 So. 2d at 1125, (conviction reversed based on insufficiency of evidence); Firkey v. State, 557 So. 2d 582, 586 (Fla. 4th DCA 1989), *rev'd on other grounds,* Wilson v. State, 635 So. 2d 16, 17 (1994) (same); Florida Dept. of Transp. v. Raiche, 527 So. 2d 842, 845 (Fla. 2d DCA 1988) ("a jury's verdict cannot rest on a mere probability or guess...where there is no rational predicate for it in the evidence").

The trial judge erred in failing to grant Appellant's request for a judgment of acquittal.

V. THE TRIAL COURT'S FINDINGS WITH RESPECT TO APPELLANT'S MITIGATING EVIDENCE ARE NOT SUPPORTED BY THE RECORD.

The State next asserts that the trial judge's (A) failure to find statutory mental mitigation, and (B) his weight given to the non-statutory mitigation evidence; is supported by the Record. Williamson takes issue with this contention and maintains that the death penalty is not appropriate in the case at bar.

V.(A) APPELLANT'S BRAIN DAMAGE

During the penalty phase, uncontroverted evidence was presented by four medical experts establishing that Williamson suffers from brain damage. Despite this serious diagnosis, the trial judge allotted little weight to this evidence, and refused to find any statutory mitigation. The Record illustrates that the judge repeatedly demanded concrete

proof from each expert of a direct correlation between the brain damage and the circumstances of Williamson's behavior on the night of the crime. (19R.-3559,3570, 3571, 3571-74; 21R.- 3838-44). Such a high standard was erroneous and beyond the realm of the expertise of the experts who testified, with the exception of Dr. Appel.[24] See Mines v. State, 390 So. 2d 332, 337 (Fla. 1980).[25] The law provides that aggravating circumstances must be proven beyond a reasonable doubt, but mitigating circumstances do not share such a high burden. See Fla. Std. Jury Instr. (Crim.) at 81. Evidence is "mitigating" if, in fairness or in the totality of the defendant's life or character, it may be considered as extenuating or reducing the degree of moral culpability for the crime committed. Wickham v. State, 593 So.2d 191, 194 (Fla. 1991). In Wickham, this Court held that evidence concerning the defendant's "abusive childhood, his alcoholism, his extensive history of hospitalization for mental disorders including schizophrenia, and all related matters" should have been found and weighed by the trial court. Id. Similarly, it was error for the trial court in the instant case not to accord more weight to the significant statutory mitigating factors presented during the penalty phase of the trial. See Eddings v. Oklahoma, 455 U.S. 104 (1981)(vacated death sentence where trial court failed to give "individualized consideration

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[24] Dr. Appel did cite numerous studies showing a correlation between murder inmates and organic brain dysfunction. (20R.- 3794-95).

[25] The cases cited by the State on this issue do not support the propriety of the judge's ultimate findings. Johnson v. State, 660 So. 2d 637, 646 (Fla. 1995) (penalty phase evidence of mental disturbance presented by lay witness not medical experts); Lucas v. State, 568 So. 2d 18, 23 (Fla. 1990) (death sentence reversed for failure to make specific findings); Rogers v. State, 511 So. 2d 526 (Fla. 1987) (childhood trauma would have had mitigating effect but the issue was not raised during the penalty phase thus not preserved on appeal).

of mitigating factors" regarding the defendant's troubled youth and held that "state courts must consider all relevant mitigating evidence....").

This Court has traditionally looked carefully at evidence of mental infirmity in a defendant sentenced to death as a potential basis for commutation to life imprisonment. See Spencer v. State, 645 So. 2d 377, 384 (Fla. 1994) (death sentence vacated as trial court improperly rejected circumstances of defendant's personality disorder and biochemical intoxication); Morgan v. State, 639 So. 2d 614 (Fla. 1994) (death sentence reversed for brain damaged juvenile); Rhodes v. State, 547 So. 2d 1201, 1208 (Fla. 1989) (death sentence vacated as experts testified regarding defendant's organic brain damage).[26]

This Court's ruling in Carter v. State, 560 So. 2d 1166 (Fla. 1990), is instructive in this regard. In Carter, experts testified that the defendant suffered from organic brain damage resulting from abuse as a child and other severe head injuries. Id. at 1168. Further, it was learned that he experienced "somewhat delusional" schizoid episodes. Id. Consequently, the death sentence was subsequently vacated by this Court. Id.

In Cannady v. State, 620 So. 2d 165 (Fla. 1993), this Court vacated the death sentence recommended by the jury following expert testimony, that the defendant, while sane under M'Naughten, nevertheless suffered from depression, an abnormal EEG, and abnormal brain cerebral atrophy for his age group. Id at 170.

Contrary to the State's argument, the statutory mitigating evidence in this case

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[26] Accord Cochran v. State, 547 So. 2d 928, 932 (Fla. 1989) (sentence reversed due to mental problems); Freeman v. State, 547 So. 2d 125, 127 (Fla. 1989) (life imprisonment appropriate where defendant had low IQ and could not deal with stressful situations).

similarly mandates a reversal of the death sentence. Four neurologic experts testified regarding the Appellant's brain dysfunction - Dr. Appel, Dr. Wand, Dr. Smutlovsky, and Dr. Dickens.

Dr. Appel opined that Williamson suffers from brain damage which occasionally manifests in mental seizures. The State implies that Dr. Appel was quick to reach a conclusion but the Record reflects that she did extensive research and prepared a detailed report chronicling Appellant's life history. (29R.- 5278-5302).

Her research uncovered that Appellant has led a troubled life marked by mental instability. Young Williamson was a hyperactive child and discipline problem in school. (29R.- 5281-82). His father abused him physically, but his mother Ella, did her best to shield him from the abuse. (29R.- 5282). On Christmas Day, 1969, Ella Williamson and ten year old Dana were involved in a car accident resulting in her death. (29R.- 5283). Appellant suffered sever head and internal injuries and only learned of his mother's death weeks later. (29R.- 5283-84). See Carter. Appellant was discharged and returned to his father's care which became more violent. (29R.- 5286). Appellant was often beaten and was once locked in a hot utility closet for three days and nights without food. (20R.- 3667-69; 29R.- 5286).

Williamson was removed from his home by the State and sent to South Florida Children's Hospital in 1971 after being diagnosed psychotic. (29R.- 5287). An EEG taken in 1971 revealed that Appellant's brain function was abnormal, and x-rays showed calcification of the Falx which is very unusual for a child. (29R.- 5299), See Cannady. He was put on Thorazine and Mellaril which likely exacerbated his brain condition. (20R.-

3790).

In 1973, Appellant was discharged to Boystown where the staff there noted his need for psychiatric treatment. (29R.- 5290). He was soon expelled from Boystown and then sent from shelter to shelter. (29R. 5290-91). At one shelter, Appellant allegedly tried to molest a five year old girl and he was placed in detention. (29R.- 5291-92). Later that year he was placed at the Nova Living and Learning Center. (29R.- 5293).

During these years the Record is replete with petty theft and misbehavior, which tragically culminated in his killing of the child in 1975 for which he was convicted of manslaughter. (29R.- 5295). Appellant was sent to adult prison at the age of fifteen and was released in 1980. (29R.- 5295). He apparently received no treatment for his medical condition during this time. (29R.- 5295).

Williamson was married soon after his release and held down a job. (29R.- 5296). He also reconciled with his father and began to care for him in 1987 following a stroke. (29R.- 5296). Appellant began experiencing marital difficulties as his wife was a drug user, neglectful mother, and had an extramarital affair with his brother Rodney which produced a child. (29R.- 5296). After his father's stroke, financial difficulties added to an already stressful environment. (29R.- 5296). He allegedly committed the crimes against the Decker's soon afterwards in 1988.

Dr. Appel requested an EEG and brain map be conducted on Appellant in 1994. The EEG revealed a mildly abnormal brain function, [27]and the brain map displayed that the

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[27] The State's contention that the 1994 EEG was normal is not supported by the Record. (19R.- 3521; 20R.- 3634-35; 21R.- 3822).

Appellant has brain damage. (20R.- 3776,3788-89; 29R.- 5299). Armed with all this data, Appel concluded that Williamson has long been brain damaged which interferes with his capacity to process information normally. (20R.- 3788; 29R.- 5300). Also she reported that he likely experienced uncontrollable seizures due to his condition. (20R.- 3777-78).

The judge's rejection of Dr. Appel's testimony is not reasonable as the State suggests. (30R.- 5384). The State's contends (and the judge[28]) that Appel's findings were not credible due to her focus on the seizure disorder and her inability to explain Williamson's actions at the crime scene in relation thereto. (21R.- 3837-38). Dr. Appel however, did not unequivocally state that Appellant committed the crimes during a seizure. (21R.- 3837-38). She stated that the underlying brain dysfunction was present even in the absence of a seizure, impairing his capacity to appreciate the criminality of his conduct. (21R.- 3838, 3842).

Appel added that Williamson's presence of mind in attempting to escape detection is consistent for a person with his brain problem. (21R.- 3845). She reiterated that his processing of information or judgment was not normal, but not completely out of control. (21R.- 3842,3845). This contradicts much of the State's argument in this regard. Answer Brief at 41-42.

Dr. Appel's testimony that Williamson's capacity was impaired or at the very least that he was under the influence of a mental disturbance should not have been rejected by the trial judge.

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[28] See Judge's Sentence at (30R.- 5384).

Dr. Smutlovsky's and Dr. Wand's testimony supports Dr. Appel's diagnosis. Dr. Smutlovsky performed a "Brain Spec" on Williamson and found him to be "brain damaged." (19R.- 3582). The State implies that Smutlovsky holds brain mapping in low esteem yet he states "This (brain mapping) is used in to make definitive conclusions as to whether or not there was brain damage and is an accepted clinical modality that is used in most of the...world." Answer Brief at 18; (19R.- 3593). Dr. Wand performed the brain map on Williamson and found him to be severely brain damaged. (20R.- 3635). Dr. Wand acknowledged that there is some controversy surrounding brain mapping but little in his mind. Answer Brief at 39; (20R.- 3645). The State's contention that Dr. Wand was ignorant of the facts of the crime is not relevant as he was strictly hired to do the test and reveal its findings. Answer Brief at 40. The judge's rejection of these doctors' findings was erroneous. (30R.- 5382).

The testimony of Dr. Dickens was distorted by the State in its Brief. The State listed Dickens as finding no evidence of brain abnormality. Answer Brief at 39. He actually stated "Its not normal. Its not what we considered normal," and "it was clear that he had an abnormal EEG." (19R.- 3512,3545). The statement by Dickens that the 1971 EEG irregularity could have been caused by the natural development of Appellant was made in response to the State's claim that the 1994 EEG was normal.[29] The Record shows that the 1994 EEG produced abnormal results, though Dickens was not aware of this at the time. See footnote 27.

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[29] The trial judge also erroneously listed the 1994 EEG as coming out normal. (30R.- 5382).

The four experts proffered by the defense provided uncontroverted evidence that Appellant is brain damaged. The trial judge's failure to find both statutory mitigating factors was reversible error. See Nibert v. State, 574 So. 2d 1059, 1062 (Fla. 1990) ("when a reasonable quantum of competent uncontroverted evidence is presented, the trial court must find the mitigating circumstance has been proved").

V.(B) THE NON-STATUTORY MITIGATORS

The ten mitigating factors found by the judge to exist make the imposition of a death sentence improper. The childhood abuse and hardship experienced by Williamson was unusually severe. See section V.(A) and (20R.- 3667,3703,3725). Florida law provides that a death sentence may be inappropriate where such abuse is displayed. See Livingston v. State, 565 So. 2d 1288, 1292 (Fla. 1988) (death sentence vacated due to evidence of severe childhood beatings).

The death of Donna Decker, while horrific, was not "cruel," "heinous," or "atrocious" as the court found. (30R.- 5378-79). While Appellant acknowledges the severe pain experienced by Mrs. Decker detailed by the State, there is no proof of an intent by Appellant to torture or prolong her suffering. See Kearse v. State, 662 So. 2d 677, 686 (Fla. 1995) (aggravating factor of cruel, heinous and atrocious not proven where there was no showing of an intent to cause unnecessary or prolonged suffering); Bonifay v. State, 626 So. 2d 1313, 1313 (Fla. 1993) (same). Indeed, the evidence reflects a violent struggle where it is very possible that the knife was taken from Donna Decker and turned against her.[30] (5R.- 980-81;

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[30] Panoyan testified that Appellant fled the home out of control stating "that something had gone wrong." (20R.- 3684,3688).

19R.- 3432,3435).

The abuse and childhood trauma taken in conjunction with Appellant's brain dysfunction, make the death penalty disproportionate in this case. The trial judge erroneously failed to find statutory mitigators or give sufficient weight to the established non-statutory mitigators. Based on the arguments presented and in the interest of justice, this Court should vacate the death sentence and impose life imprisonment.

VI. FLORIDA'S DEATH PENALTY STATUTE IS UNCONSTITUTIONAL AS APPLIED TO THE FACTS OF THIS CASE.

Appellee's argument that this issue is waived or otherwise invalid is without merit. Appellant acknowledged in the Initial Brief that the constitutionality of §921.141 has been generally upheld. However, the facts of this case which form the basis of Appellant's arguments (i.e. the admission of the prior conviction and legal documents, the severance issue, the lack of competent evidence and brain damage displayed) make the sentence of death levied by the trial court unconstitutional under the Fifth, Eighth, and Fourteenth Amendments of the US Constitution and Article I, §9 and 17 of the Florida Constitution..

CONCLUSION

The Appellant respectfully urges this Court that taken individually and collectively, the arguments put forth herein cast serious doubt on the propriety of the convictions and resulting death sentence secured by the State. The Answer Brief does not support

affirmance in this cause. Therefore, Williamson respectfully requests this Court to order an acquittal or new trial, and a reversal of the death sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was sent by U.S. Mail to Celia A. Terenzio, Esquire, Department of Legal Affairs, 1655 Palm Beach Lakes Boulevard, Suite 300, West Palm Beach, Florida 33401-2299, this 5th day of February, 1996.

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