IN THE SUPREME COURT OF FLORIDA

MICHAEL DUANE ZACK,

Appellant,

v. CASE NO. 92,089

STATE OF FLORIDA,

Appellee.

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

INITIAL BRIEF OF APPELLANT

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

DAVID A. DAVIS
ASSISTANT PUBLIC DEFENDER
LEON COUNTY COURTHOUSE
SUITE 401
301 SOUTH MONROE STREET
TALLAHASSEE, FLORIDA 32301
(904) 488-2458

ATTORNEY FOR APPELLANT
FLA. BAR NO. 0271543

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PRELIMINARY STATEMENT

The record on appeal in this case consists of 17 volumes, which were divided into two parts. The first consists of volumes one through six, and that includes the pleadings, motions, and the transcript of an examination of the defendant by a mental health expert. The second part, volumes seven through 17, contains the guilt and penalty phase trials of this capital case.

STATEMENT OF THE CASE

An indictment filed in the Circuit Court for Escambia County on June 25, 1996, charged Michael Duane Zack with the first degree murder of Ravonne Smith (1 R 1). It also charged him with robbery with a deadly weapon and sexual battery with a weapon (1 R 1-2). He apparently pled not guilty to those offenses because the case proceeded normally for matters of this sort.

Zack filed several motions dealing with the penalty phase aggravating factors (1 R 12-86), which the court denied (1 R 119-20), and which have little bearing on the issues raised on appeal.

The State filed several Notices of Intent to Offer Evidence of Other Crimes (2 R 230-47). It announced its intention to offer evidence that Zack had (1) stolen a red Honda in Tallahassee on June 5, 1996, (2) had murdered Laura Rosillo hours before he killed Ravonne Smith on June 13, 1996, (3) stole a car, TV and VCR from Smith, stole guns and money from a Bobby Chandler on June 12, 1996, and pawned them the next day, burglarized three houses on June 16, 1996, and (4) threatened a former girlfriend, Candice Fletcher, and tried to strangle her to have sex with him.

Zack filed a Motion in Limine to Preclude the introduction of similar fact evidence (2 R 273-75). The court denied that motion (3 R 357-60). As matters evolved, Zack challenges, on appeal,

only the trial court's order allowing the State to introduce the evidence of the Rosillo murder and Chandler thefts. Additionally, the State never introduced any evidence regarding crimes against Candice Fletcher, and it presented proof of only one of the June 16 burglaries.

Zack also filed a Notice and an Amended Notice of Intent to Rely on Mental Health Defense Other than Insanity, specifically intoxication, Fetal Alcohol Syndrome, and Post-traumatic Stress Disorder (2 R 248-55, 3 R 356). Additionally, he filed a Notice of Intent to Present Expert Testimony of Mental Mitigation (2 R 259-60). The State, in response, filed a Motion in Limine on Non-examining Expert (2 R 303-304), which the court denied (3 R 413-14).

Zack proceeded to trial before Judge Joseph Tarbuck, and after the State and Defense had presented their cases, the jury convicted him as charged on all the offenses (3 R 419-20). The court subsequently denied his motion for a new trial, and renewed motion for a Judgment of Acquittal (3 R 422-24, 447).

The Defendant proceeded to the penalty phase of the trial. Zack had filed a Motion to limit the Scope of Compelled Mental Evaluation and to Limit the use of any Information Gathered from Compelled Mental Health Evaluation (3 R 451-54). The court denied that request (3 R 441).

The State and Defense presented evidence in support or against imposition of a death sentence. The jury recommended death by a vote of 11-1 (6 R 792).

The court, following that verdict, sentenced Zack to death. In aggravation it found:

1. Zack was on felony probation at the time of the murder.
2. He committed the murder during the course of a robbery, sexual battery, or burglary.
3. He committed the murder to avoid or prevent a lawful arrest or detection.
4. He committed the murder for financial gain.
5. The murder was especially heinous, atrocious, or cruel.

6. The murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

(6 R 859-66)

In mitigation, the court arguably found the following statutory mitigation:

1. Zack was under the influence of an extreme mental or emotional disturbance. Little or no weight.

2. Extreme duress. Little or no weight.

3. Substantial impairment. Very little weight

4. As non statutory mitigation, the court arguably considered: all of the aspects concerning the Defendant's character, record, and childhood background.[1] Little weight.

(6 R 866-73)

As to the robbery and sexual battery convictions, the court imposed consecutive terms of life in prison (6 R 881-82).

This appeal follows.

STATEMENT OF THE FACTS

Edith Pope tended bar in Tallahassee. By June 4, 1996, Michael Zack had become a regular patron of the place, occasionally doing odd jobs in exchange for a beer (9 R 561). Over time, he had developed a friendship with Pope (9 R 556-58), and on that date, he asked to borrow her red Honda. She let him take it with the understanding he would return. He did not. (9 R 559).

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[1] Presumably this included the specific items Zack asked the court to consider: remorse, voluntary confession, good conduct while in jail, and Zack's childhood and family background.

Instead, he drove it to Panama City where he met Bobby Chandler at a local pub (9 R 576). Over the next several days, Chandler and Zack became friends, often drinking beer together (9 R 579). When Chandler learned the Defendant was living out of the Honda, he invited him to stay with him at his house until he could find a place to live (9 R 580).[2] He accepted the offer, and after four days Zack stole a handgun and a hunting rifle belong to Chandler (9 R 582). On the morning of June 12, he sold the weapons at a pawnshop in Niceville for $225 (10 R 606-609). [3]

Later that day, and also somewhere in Okaloosa County, Zack stopped at a bar to drink a beer. He wanted to be alone, but Laura Rosillo, a forty-year-old exotic dancer walked up to him wanting some cocaine (9 R 549, 11 R 886-87, 904, 907).[4] Eventually, the pair left in the Honda, apparently to smoke marijuana and use cocaine (11 R 825, 875). While Zack had plenty of the weed, he did not have "enough coke to satisfy her." (11 R 875) That made her mad, and she threw away the marijuana and opened the door to the car (11 R 876-77). Zack "stomped on the brake," and Rosillo hit her head on the door. She was yelling in his ear, threatening him. He stopped the car, grabbed her by the head, and slammed it into the side of the car (11 R 825). They then got out and continued to fight. She tried to hit him with a bottle and throw sand in his face. He kicked her four or five times (11 R 826). As she threatened him she also started taking off her clothes (11 R 880). The Defendant threw her to the ground a couple of times, and both of them acted crazy (11 R 880). Zack, however, eventually got the upper hand, and he strangled her to death (9 R 535-36).[5] He thought he had to bury her, so he kicked

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[2] One night Zack had such a bad nightmare that he woke Chandler up (9 R 592-96). He looked startled and was sweating when his host woke him up (9 R 596).

[3] When asked by the pawnbroker, he showed him his Florida driver's license (10 R 608).

[4] She also was proud of her breast "enhancements." (11 R 904)

[5] The beatings had also resulted in some brain injuries that would have caused her death (9 R 535).

some sand on her face (8 R 393, 11 R 899). There was also no evidence of any trauma to her vagina (9 R 547).

Zack drove the Honda to Dirty Jo's, a bar in Pensacola, arriving there somewhere between 2 and 5 p.m. on June 13 (8 R 206). He bought a beer, and after a while, Ravonne Smith, a 30-year-old waitress approached him (8 R 208). She got off work but stayed with Zack, leaving the bar with him and another friend, Russell Williams (8 R 217). Before leaving, she called her boyfriend and told him she would be late coming home (8 R 219, 298). She also asked Williams not to tell her boyfriend where she was, and when he called him later that evening, he said he did not know where she was (8 R 255, 304).

By this time, Zack had drunk two or three beers (8 R 249), and after the trio had finished drinking they got in Williams got and drove to the beach where they smoked some marijuana (8 R 250). Smith also gave him half of a hit of LSD, which he took (11 R 920).[6] After twenty minutes, they returned to the bar and Williams left Smith and Zack there (8 R 253).

Smith and Zack then left the bar in her car and drove around for an hour or so (11 R 921). Smith made some overt sexual advances (11 R 935), and it was evident to him that she "wanted to be with [him]." (11 R 900) They ended up at her house.

Based on his reconstruction of the evidence, the prosecutor theorized about what happened next. As soon as the couple came inside, Zack hit her with a beer bottle (8 R 275, 317). As shown by the blood found throughout the house, they struggled, during which he sexually battered her and finally stabbed her four times in the chest (8 R 317, 361-71, 9 R 505). Leaving her body in the master bedroom, he took a TV and VCR and the car she had driven (11 R 939, 943). He then drove to

[6] Smith had also provided some marijuana earlier that evening that she and some friends smoked (11 R 991).

Panama City where he attempted to pawn the electronic items (10 R 631). The pawn shop owner, however, was suspicious, and Zack fled, leaving his driver's license with the dealer (10 R 631). He abandoned the car a short time later (10 R 764).

The Defendant later broke into a house in Panama City and stole some of the owner's clothing (10 R 766). He was arrested two days later (10 R 747-49).

When initially questioned by the police, Zack voluntarily admitted killing Smith, stealing the Honda, and the guns (11 R 811-12). At another interrogation, he confessed to the Rosillo homicide (11 R 825-26).

As to the Smith homicide, he said that she had listened to him at the bar and liked him even though she knew of his disastrous childhood and the stolen car (11 R 898). Indeed, more than simply liking him, she was "all over" him (11 R 900), and once they had gone to her house they continued their sexual playing. She ripped his shirt, grabbed him, and pulled his hair. Obviously she liked rough sex (11 R 937-38).

After having sexual intercourse, Zack and Smith talked. As he headed to the bathroom she came up behind him and mentioned something about his sister and that she had murdered his mother (11 R 898). Zack, who had spent the past week using cocaine, marijuana, and LSD, and drinking beer became enraged (11 R 922, 932). He turned and hit her. She smacked him, and they began fighting throughout the house (11 R 922, 936). At some point, he thought she was going for a gun, so he got a small knife from kitchen and stabbed her four times (9 R 505, 11 R 938). Washing his hands of the blood, he also cleaned the weapon and put it back in the drawer he had taken it from (11 R 923-24). He then took the TV and VCR from the house, put them in her car and drove to Panama City where he tried to pawn the items (11 R 939, 943).

By June 1996, Michael Zack was chronologically 27 years old. He was born in 1968 to a woman who had made a habit of drinking 6-10 beers a night at least twice a week during the months she carried Zack (12 R 1036-37). His father divorced her shortly after he was born out of disgust that she would not stop drinking (6 R 1037).

Eventually, she married Anthony Midkiff, and this man made Zack's life a living hell. Apparently, by the time Zack was 8 or 9 years old, he wet his bed nightly. Midkiff punched him for doing that (12 R 1056-57). Besides the beatings, he used an electric blanket to electrocute him when he wet the bed (12 R 1059). To embarrass him, he had the boy wear the wet sheet around his neck (12 R 1059). But his abuse went further.

On occasion he heated a spoon until it was red hot then used it to burn Zack's penis. He also would pull on it hard (12 R 1057). An aunt said Midkiff "burned him all the time." (10 R 1058). If not that he threw him against the wall, and kicked him with boots that had spurs on them (10 R 1057, 15 R 1778).

But Midkiff did more. He tried to drown him, or run over him with a car (10 R 1058, 1061). Another time he tried to poison him (10 R 1064). When Zack was three, he drank 10 ounces of vodka, and he would have died had he not been resuscitated (12 R 1197, 16 R 1901-1902). He overdosed on drugs Midkiff had given him (15 R 1773). Midkiff threatened to shoot and stab him (10 R 1060). And he did more.

Zack had sisters, and Midkiff not only sexually abused him (15 R 1772), he regularly raped them. One of them, Theresa, hated Midkiff (12 R 1068). Another ran away to avoid being sexually battered (15 R 1780, 1783). To this day she still has nightmares about what Midkiff did to her (15 R 1780). Zack resorted to vandalism, setting fires, and beating other children (15 R 1746).

His mother also tried to stop her husband, and they fought over his abuse repeatedly (15 R 1731). But one could not reason with Tony, and he responded to her pleas by beating her (12 R 1098, 15 R 1756).

By the time Zack was in the third grade, his dysfunctional parents (16 R 1857) had given up on the boy (16 R 1857, 1882). When he was 11, they put him in a mental hospital in Louisiana (12 R 1100, 16 R 1856). He stayed there a year, and during that time, his sister, Theresa, murdered their mother using an ax (13 R 1300). She was eventually found not guilty of that offense because she was insane. Midkiff took Zack to his mother's funeral, but returned him to the hospital as soon as it was over (12 R 1101). He blamed the boy for his mother's death, and again threatened to kill him (12 R 1097, 15 R 1771, 1782).

At the end of the year, twelve-year-old Zack went to live with the Anglemeyers, who were friends of the family and had seen Midkiff's abuse (15 R 1764, 1677).[7] He stayed with them for a year or so, and then was sent to a series of foster homes for the next several years (15 R 1675). He was sexually abused at some of them (12 R 1104).

SUMMARY OF THE ARGUMENTS

ISSUE I: The most significant issue in this trial came from the trial court's rulings allowing the State to introduce evidence that Zack had murdered Laura Rosillo less than a day before the Smith homicide, and that he had stolen guns from Bobby Chandler and pawned them. The Rosillo murder had few similarities with Smith's death, and those that were shared were not

[7] The hospital expressed grave reservations about returning to the boy to Midkiff (16 R 1859).

sufficiently distinctive, either separately or taken together, to make the former crime have "fingerprint" similarities with the latter. On the other hand, the two offenses had many dissimilarities.

Additionally, the Rosillo murder and Chandler thefts were not inextricably connected with the Smith murder so that to have excluded those offenses would have confused the jury or prevented them from gaining a complete understanding of the Escambia County crimes. The crimes that occurred in the panhandle of Florida were not part of an unbroken chain of events.

The Rosillo murder also provided no explanation or motive for the Smith murder. That is, there is no evidence Zack killed Smith to avoid arrest for the Rosillo murder or the theft of Chandlers guns. The crimes have their own explanations independent of what this Defendant did earlier.

Finally, the State spent considerable time proving Zack committed the Rosillo murder and stole Chandler's guns. Indeed, the State's case amounted to a double murder trial with it presenting as much evidence and of the same type in the Rosillo homicide as it used in proving the Smith murder. The collateral crimes became such a feature of the Smith murder trial that whatever probative value those earlier offenses may have had was significantly outweighed by their prejudicial impact. There was no need for this evidence in light of the other proof the State presented to prove Zack committed a first degree murder when he killed Smith.

ISSUE II: The State charged Zack with sexual battery, and according to its reconstruction of the evidence, as soon as Zack entered Smith's house he hit her with a beer bottle, stabbed her, and then sexually battered her. The Defendant, on the other hand, said that when they came inside they had sexual intercourse, and after that they got in an argument that led to Smith's death. None of the circumstantial evidence refuted that explanation of what happened. Indeed, that there was an ashtray full of cigarettes in the living room supports Zack's hypothesis that he had consensual intercourse with a woman noted for her neatness. This hypothesis also bothered the trial court enough that he

announced he was sympathetic to it and delayed ruling on Zack's motion for a judgment of acquittal until much later in the trial.

ISSUE III: The State also argued Zack robbed Smith because after killing her he took a TV, VCR, and her car. The Defendant, on the other hand, contended the thefts were an afterthought to the murder. He killed her because she had made him angry with some comment about his mother and her murder. Only after she was dead did he realize he had a need for money, took the easily taken and pawned items from her house, put them in her car, and fled. No evidence suggested he planned to kill her before the murder, and even the trial court had problems finding the thefts were also part of a robbery.

ISSUE IV: The State never charged Zack with burglarizing Smith's house, but the trial court instructed the jury that it could use that crime in considering whether he had murdered the victim during the course of a felony murder. That was wrong as a very recent case from this court strongly suggests. That is, Smith invited Zack to come into her house, and just because a homicide occurred in there does not imply, without more evidence, she necessarily withdrew her consent that he could remain in it. Because the State provided no other evidence she had withdrawn her consent for Zack to stay in the building, it provided insufficient evidence to justify the jury finding him guilty of the murder during the course of a burglary. This also means that the court also erred in finding, as an aggravating factor, that he killed her during the course of a burglary.

ISSUE V: The court's never considered Zack's mitigation as mitigation. Instead, it turned much of it against the Defendant and refused to engage in a detailed consideration of the extraordinary proof of fetal alcohol syndrome, Post-traumatic Stress Disorder, incredible amounts of sexual, physical, and emotional abuse as a child, brain damage/atrophy, and drug and alcohol addiction. The court never expressly considered all the mitigation he presented in its sentencing order.

In fact, the order exhibits, at best, a thinly veiled contempt for the Defendant's mitigation case. "The Court feels that very little weight should be given to [Zack's mitigation] because frequently defendants facing punishment will do anything to mitigate their sentence." The court never engaged in the "thoughtful and comprehensive analysis" of the evidence mitigating against imposition of a death sentence.

ISSUE VI: The court justified sentencing Zack to death, in part, because he had committed the murder to avoid or prevent a lawful arrest. The State presented insufficient evidence to show that that motive provided the dominant reason for killing Smith. Rather than killing her as part of some methodical plan, the murder was the evidence of a frenzied, frazzled mind that saw life through distorted lenses. It was the result of a mind that functioned on a primitive level, and when Smith threatened that survival, he reacted impulsively, and in an emotional explosion. The circumstantial evidence does not exclude that explanation of this homicide.

ISSUE VII: The court found the murders to have been committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. The evidence it used to support that conclusion, such as the Rosillo murder, had no relevance to this aggravator, or was speculative. Additionally, Zack's damaged brain, childhood trauma, drug and alcohol addiction prevented him from properly perceiving reality. Consequently, he tended to misinterpret the situations he found himself in, and he would respond in a primitive, instinctive way to them. Hence, the Smith murder was the product of a brain damaged mind that exploded when Zack probably misinterpreted Smith's comments about his mother.

ISSUE VIII: The court admitted, during the sentencing phase, evidence from Smith's mother and brothers. While that was unobjectionable, the court was wrong 1. in mischaracterizing what the mother said, and then using it to justify finding the murder to have been especially heinous

atrocious, or cruel. It also erred in allowing the State to tell the jury that it could give whatever weight it wanted to give to the victim impact evidence. That was wrong because statements by the victim's family have no relevance to proving aggravating factors.

ISSUE IX: In rebuttal of Zack's penalty phase evidence, the State called Candice Fletcher, a former girlfriend of the Defendant. Over objection, she said that Zack had visited Tony Midkiff while she lived with Zack, their relationship seemed normal, that the stepfather cut off the visits when the boy stole from him, and that a mental health center refused to see Zack because he would not conform to a treatment plan. The court should have excluded that testimony because she was not an expert who could say what was a normal relationship, the evidence of the thefts was bad character evidence that had no relevance to this case, and what some Oklahoma health center may have said was hearsay that Zack had no fair opportunity to rebut.

ISSUE X: Zack wanted the court to instruct the jury that they could legitimately consider sympathy for him if it arose during the deliberations and consideration of the mitigating evidence presented. The court refused that request, accepting the State's argument that sympathy was foreign to jury deliberations. That, however, was not his argument, and the effect of the court's refusal and the State's argument about sympathy was to exclude any consideration of Zack's mitigation because it gave rise to sympathy for him.

ISSUE XI: The court found that Zack was on felony probation at the time he killed Smith, and he used that fact to justify sentencing him to death. The legislative authorization for him to do so, however, occurred after the date of the murder. Applying the "on felony probation" aggravator to him, thus, violated the constitutional prohibition against ex post facto laws.

ISSUE XII: Zack wanted to introduce a family photograph, but the court excluded it because he could develop the same point he wanted to make through the testimony of his witnesses. The picture was relevant, and the court should have admitted it.

ISSUE I

THE COURT ERRED IN ADMITTING EVIDENCE THAT ZACK HAD MURDERED LAURA ROSILLO AND STOLE GUNS FROM BOBBY CHANDLER AS SUCH EVIDENCE HAD NO RELEVANCE TO THE CHARGED OFFENSES, WHATEVER RELEVANCE THEY HAD WAS OUTWEIGHED BY THEIR PREJUDICIAL IMPACT, AND ONLY DEMONSTRATED ZACK'S CRIMINAL PROPENSITIES, IN VIOLATION OF HIS FIFTH AND FOURTEENTH AMENDMENT RIGHTS TO A FAIR TRIAL.

As required by Section 90.404(2)(b)1, Florida Statutes (1996), the State filed several notices that it intended to introduce evidence of other crimes Zack had allegedly committed before and after the murder of Ravonne Smith. Specifically it wanted to present evidence of the theft of the red Honda from Edith Pope in Tallahassee on June 5, 1996 (2 R 232), the murder of Laura Rosillo in Okaloosa County on June 12, 1996 (2 R 230), the theft of Bobby Chandler's guns and money in Panama City on June 12, 1996 (2 R 238), the theft of the TV and VCR from Ravonne Smith's residence in Pensacola on June 13, 1996 (2 R 236), the theft of Smith's car on June 13, 1996 (2 R 234), three burglaries of homes in Panama City on June 16, 1996 (2 R 240-244), and an assault on Candice Fletcher in Oklahoma in 1989 (2 R 246).

Zack filed a Motion in Limine to Preclude the Introduction of Similar Fact Evidence (2 R 273). The court considered the motion, but denied it, allowing introduction of the objected to evidence (3 R 357-60). Judge Tarbuck found it relevant for several reasons: 1. The similarities were pervasive and the dissimilarities "insubstantial." Specifically, the Okaloosa homicide refuted the defense of intoxication and existence of a mental condition. 2. "All of the crimes and acts of the Defendant constitute relevant evidence because the same are inextricably intertwined in the case at hand and are material to proving matters in controversy." 3. The homicides had a similar motive-robbery and forcible

rape. Alternatively, they established a pattern of conduct of wanting to get money to continue his lifestyle.[8] (3 R 358-60)

At trial the State introduced, over a continuing defense objection (7 R 152), the evidence it had given notice of except for two of the burglaries in Panama City and the Oklahoma assault. On appeal, Zack challenges only the Court's ruling allowing evidence of the thefts of Chandler's guns and the homicide of Laura Rosillo. The State showed that in early to mid June 1996 Bobby Chandler had befriended Zack (9 R 579). He got him a job, and let him stay at his house (near Panama City) for a few days while the latter found a place to live (9 R 580). On June 12, Zack stole a pistol and hunting rifle from him, and sold them at a pawnshop in Niceville the next day for $225 (10 R 606-609). Later that day he stopped at a bar in Okaloosa County to drink a beer. A forty year old exotic dancer, Laura Rosillo, approached him wanting to buy cocaine (9 R 549, 11 R 886-87, 904, 907). They left the place and drove to the beach. When she discovered that he had more marijuana than cocaine she became irate, throwing away his marijuana, screaming in his ear, scratching him, threatening to "tell her ex-husband to beat him," and "acting crazy." (11 R 869, 871, 876-77). Zack slammed on the brakes to the Honda[9] and the two began to fight (11 R 877). The struggle moved outside the car where he ultimately got the upper hand and strangled her to death (11 R 880-81). He drug her body about thirty feet, hid it behind a sand dune, and then partially buried it by kicking sand over her face (8 R 381-82,

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[8] The court also concluded that the crimes "cast light on the character" of the Pensacola offenses. (2 R 358). That was a redundant reason because this Court clarified that phrase in Ruffin v. State, 397 So. 2d 277, 279-80 (Fla. 1981) "Evidence of other crimes is relevant if it casts light on the character of the crime for which the accused is being prosecuted. For example, this evidence is relevant when it shows either motive, intent, absence of mistake, common scheme or plan, identity, or a system or general pattern of criminality."

[9] Which he had stolen in Tallahassee on June 5 (9 R 559).

393). Zack had neither sexually battered her (9 R 547), nor stolen anything. Within a day he would rape, rob, and kill Ravonne Smith in her home.

The theft of the guns and the Rosillo murder had no relevance to the Smith's death. They were not "inextricably" related to the Pensacola crimes, nor did the Okaloosa homicide share any significant, fingerprint type similarities with the Smith murder. They tended only to display the Defendant's criminal propensities, and the unfair prejudice from the earlier homicide and theft significantly outweighed whatever relevance they may have had. This Court should, therefore, reverse Zack's judgment and sentence and remand for a new trial.

A. THE LAW ON ADMITTING BAD ACTS EVIDENCE.

The legislature and the courts of this state have given special attention to the dangers of admitting evidence of uncharged bad acts or crimes the Defendant may have committed. For purposes of this argument, the pertinent statutes are sections 90.402, 90.403, and 90.404(2)(a). They provide:

90.402. Admissibility of relevant evidence

> All relevant evidence is admissible, except as provided by law.

90.403. Exclusion on grounds of prejudice or confusion

> Relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence. This section shall not be construed to mean that evidence of the existence of available third-party benefits is inadmissible.

90.404. Character evidence; when admissible

* * *

(2) Other crimes, wrongs, or acts.--

> (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.

The fundamental principle underlying any discussion of relevancy comes from this Court's decision in Ruffin v. State 397 So. 2d 277, 279 (Fla. 1981):

> In Williams v. State, [110 So. 2d 654 (Fla. 1959)] we announced a broad rule of admissibility based upon relevancy.... [W]e declared that any fact relevant to prove a fact in issue is admissible into evidence even though it points to a separate crime unless its admissibility is precluded by a specific rule of exclusion. We further held that evidence of collateral offenses is inadmissible if its sole relevancy is to establish bad character or propensity of the accused. We emphasized that the question of relevancy of this type of evidence should be cautiously scrutinized before it is determined to be admissible, but that nonetheless relevancy is the test. Evidence of other crimes is relevant if it casts light on the character of the crime for which the accused is being prosecuted. For example, this evidence is relevant when it shows either motive, intent, absence of mistake, common scheme or plan, identity, or a system or general pattern of criminality.

Ruffin, 279-280.

Relevancy, then, controls the admissibility of evidence. Of course, there are limits, some discretionary, and some absolute, that prevent the jury from hearing all relevant evidence. Section 90.403, for example, prohibits introducing pertinent proof of some fact where the prejudice it would create outweighs its probative value. While parties usually want evidence admitted because it prejudices its opponents, this court has held that "Only where the unfair prejudice substantially outweighs the probative value of the evidence should it be excluded." Amoros v. State, 531 So. 2d 1256, 1260 (Fla. 1988). This most often occurs when proving the collateral crimes become a feature of a trial instead of an incident to it. Heiney v. State, 447 So. 2d 210, 213 (Fla. 1984); State v. Richardson, 621 So. 2d 752, 758 (Fla. 5th DCA 1993). Such evidence tends to confuse the jury because it distracts them from the issues before them, the guilt or innocence of the Defendant for the crime charged, and trying him or her for some uncharged collateral offenses. Steverson v. State, 695

So. 2d 687 (Fla. 1997). Naturally inflammatory crimes such as murders, especially when the jury sees photographs of the slain victim tend, to be so prejudicial that trial courts should admit such evidence only with the greatest caution. Id. at 690; Henry v. State, 574 So. 2d 73, 75 (Fla. 1991). ("Indeed, it is likely that the photograph alone was so inflammatory that it could have unfairly prejudiced the jury against Henry.")

Evidence that only exhibits the Defendant's bad character or propensity to commit crimes likewise is inadmissible. Section 90.404(2)(a),Florida Statutes (1996). Such proof encourages the jury to disregard the presumption of innocence and vote for guilt because, well, once a crook always a crook. Straight v. State, 397 So. 2d 903, 908 (Fla. 1981); Holland v. State, 636 So. 2d 1289, 1293 (Fla. 1994); Bolden v. State, 543 So. 2d 423 (Fla. 5th DCA 1989) ("On appeal, the state argues that the testimony was admissible to show a 'pattern of conduct' by Bolden. That is exactly why the evidence was inadmissible.")

Finally, unless the collateral crimes evidence tends to prove a contested or material issue it is excluded. Though the State has the burden of proving every element of a crime, if one, such as identity, is uncontested the prosecution cannot introduce evidence of other offenses to establish that fact. Roberts v. State, 662 So. 2d 1308, 1310 (Fla. 4th DCA 1995)("Thus the statutory basis for the admission of collateral crimes evidence requires that such evidence relate to a disputed fact actually in issue.") ; Thomas v. State, 599 So. 2d 158, 162 (Fla. 1st DCA 1992).[10]

Hence, while relevancy remains the test of admissibility, this court and the legislature have placed significant restrictions on admitting all evidence that might bear on the defendant's guilt. Because of the extraordinary corrosive strength bad acts evidence has, this court has adopted a " strict

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[10] The Defendant's general plea of not guilty does not necessarily mean he necessarily contests all issues. Instead that is determined "from the particular facts and circumstances involved in each case." Thomas, at 162.

standard of relevancy." Huering v. State, 513 So. 2d 122, 124 (Fla. 1987); See, Ruffin, cited above. When the other crimes share some similarities with the charged offense, a significant risk exists that a jury will convict the defendant, not because he is guilty of the charged offense, but because of his propensity to lead a criminal life.

> To minimize the risk of a wrongful conviction, the similar fact evidence must meet a strict standard of relevance. The charged and collateral offenses must be only strikingly similar, but the must also share some unique characteristic or combination of characteristics which sets them apart from other offenses.

Huering at 124. See, also Drake v. State, 400 So. 2d 1217, 1219 (Fla. 1981)(Before evidence of a collateral offense can be legally admissible "the points of similarity must have some special character or be so unusual as to point to the defendant.")

Obviously, dissimilarities weaken the probative strength of the similar fact evidence, yet whether they become significant requires the trial court to consider the totality of the crimes. The uniqueness requirement is met where "the common points, when considered in conjunction with each other, establish a pattern of criminal activity which is sufficiently unique to be relevant to the issue of identity." Gore v. State, 599 So. 2d 978, 984 (Fla. 1992).[11]

Thus, section 90.404(2)(a) puts a special brake on admitting relevant evidence where the relevancy arises because of the similarities between the charged and collateral crimes. Not simply similarity, the Williams Rule offense must almost be a "fingerprint" of the charged offense. Drake, cited above.

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[11] Hence, the trial court gave too much emphasis to Gore when it found that this Court "has never required the collateral crimes or acts to be absolutely identical to the crime charged in this case." (2 R 358) As this Court indicated in that case, the two offenses must share enough common points that when taken together they exhibit a pattern of criminal activity "sufficiently unique" to unerringly point to the Defendant as the culprit in both instances.

B. THE LAW APPLIED TO THE FACTS OF THIS CASE

As mentioned above, the trial court in this case found the Rosillo murder and the theft of Bobby Chandler's guns relevant for three reasons. None of them withstand scrutiny.

1. The Williams Rule offenses had no pervasive similarities with the charged crimes.

In its order, the court said:

> The basic facts are not in dispute with the exception that Defendant contends that there is a difference between the two homicide victims warranting exclusion regarding evidence of the Okaloosa County homicide. This Court is of the opinion that while some distinction between the two victims. Has been proffered in the Defendant's memorandum, such distinctions are not material.
>
> * * *
>
> As alluded to above, the similarities in the two homicides are pervasive and the dissimilarities attempted to be established by the Defendant in his brief are insubstantial. The Florida Supreme Court has never required the collateral crimes or acts to be absolutely identical to the crime charged in this case. Gore v. State, 599 So. 2d 978 (Fla. Sup. Ct. 1992).

(2 R 358).

The court's order never listed or discussed the similarities, but the prosecutor provided them in his memorandum supporting admitting this evidence (2 R 290). None of them had the fingerprint quality this court has required, so the State had to rely on the combined effect of all the similarities to create the required uniqueness. Gore, cited above. Yet, it failed in that effort because only a few of the claimed likenesses were common to both murders.

1. Both victims are white females

2. Both victims are close in age. (Smith was 31, Rosillo 40 (9 R 549))

3. Both victims have similar physical characteristics. (That were never specified.)

4. Both victims are approached in a bar or tavern setting. (Rosillo approached Zack who wanted to be left alone (11 R 887). Smith also struck up a conversation with Zack and by the end of the afternoon had developed a rapport with with him (8 R 208, 222, 243)).

5. The defendant ingratiated himself with both victims. (With Rosillo, he wanted to be left alone (11 R 887)).

6. Both victims drink alcohol with the defendant. (There is no evidence he drank any beer with Rosillo. She apparently was interested only in getting cocaine that she thought Zack had (11 R 875)).

7. Both victims are invited to consume controlled substances with the defendant. (Smith smoked marijuana with Zack and Russell Williams and may have taken LSD. Rosillo only wanted cocaine, and she exploded when she realized he had only marijuana, not cocaine. (11 R 76-77)).

8. Both victims are convinced to leave the bar with the defendant. (Smith left with Zack and Williams after she called the latter. The trio drove around, smoking marijuana.)

9. Both victims are murdered, part of which consists of blunt trauma to the head.(Smith was stabbed four times, which was the cause of her death (9 R 509). The blunt trauma was caused by a "blunt -force instrument such as a two-by-four or something to [like that]," (9 R 514). Rosillo was strangled and beaten, which were the causes of her death (9 R 535, 537).

10. Both victims are found nude with their shoes on. (Rosillo was not nude (8 R 377). Her top was found around her waist (8 R 392-93)).

11. Both murders occur at a time when the defendant is nearly destitute. There is no evidence of that in either case, and particularly in Rosillo's murder Zack never took anything from her.)

12. Both murders occur at night.

13. Both murders occur within 25 miles of each other

14. Both murder occur within 24 hours of each other. (This and that the murder occurred within 25 miles of each other has no relevance for this issue, and would be more appropriate in considering a motion to consolidate offenses. See Rule 3.151, Fla.R.Crim.P.; Bundy v. State, 455 So. 2d 330, 344-45 (Fla. 1988).

(2 R 290)

Thus, the totality of the circumstances showed that Zack killed two white women at night who may have shared some non specified "physical characteristics." Such a broad comparison hardly justifies admitting the Okaloosa murder into Zack's Pensacola homicide trial. Drake, cited above ("The only similarity between the two [murders] . . . is the tying of the hands behind the victims' backs and that both had left a bar with the defendant."). The very few similarities between the Smith and Rosillo murders fails to satisfy the strict relevancy requirement this court has demanded of similar fact crimes.

If the two murders had few points in common there were numerous, significant dissimilarities:

1. Russell Williams drove Smith and Zack in his car when they initially left the bar. There was no third person with the Defendant and Rosillo, and they left in his vehicle.

2. Smith wanted to have sex with Zack (11 R 900, 935). Rosillo wanted only cocaine from him (11 R 875).

3. Smith triggered Zack's murderous rage with her comment about his mother. Rosillo apparently wanted cocaine and began screaming and tossing away his marijuana when he did not have what she wanted.

4. Smith was murdered at her house, Rosillo at a beach (8 R 377)

5. Smith was stabbed to death, Rosillo strangled.

6. In the Smith homicide, the victim was sexually battered and robbed. Zack committed none of those crimes against Rosillo.

7. Zack left Smith's body in her house in plain view. He partially buried Rosillo's on the beach (8 R 393, 11 R 899). That is, he made no effort to hide the former's body, but did so in the Okaloosa County killing.

8. The day after Smith's murder he tried to pawn the items he had stolen from Smith. He acted scared and panicked when the pawnbroker became suspicious of him. Zack had a hard time remembering killing Rosillo (11 R 873, 879).

Likewise, there are very few similarities between the theft of Smith's car, TV and VCR, and Chandler's guns. Indeed, the only common point between them is Zack's pattern of stealing, or

propensity, which is obviously an improper reason to admit the Chandler thefts. There are, moreover, significant dissimilarities:

1. Zack stole a TV, VCR, and car from Smith. He took only Chandler's guns (11 R 943).

2. He used force in committing his theft of Smith. There was none in the taking of the pistol and hunting rifle.

3. Zack also sexually battered Smith. He committed no other crime, violent or not, against Chandler.

4. Zack had known Smith for only hours before committing his theft of her property. He had known Chandler for several days, and had lived with him before taking his guns (9 R 580-81)

5. Smith was a female; Chandler a male.

Thus, if the court admitted the evidence of the Rosillo murder and the Chandler theft because the "similarities in the two homicides are pervasive and the dissimilarities. . . are insubstantial," it was wrong. The Williams Rule crimes did very little to show Zack's intent or motive in the Smith homicide. The similar fact evidence also had no relevancy to establish Zack's identity because the Defendant had conceded that element (2 R 261-62 3 R 348). Roberts v. State, 662 So. 2d 1308, 1310 (Fla. 4th DCA 1995). Significantly, Zack had filed a sworn motion to dismiss following Rule 3.190(c)(4), Fla.R.Crim.P., in which he had admitted killing Smith (2 R 261-62). By doing so, he had opened himself to a perjury charge should he later deny having anything to do with her death. State v. Rodriquez, 523 So. 2d 1141, 1142 (Fla. 1988).

Of course, the State claimed the evidence rebutted Zack "defense of intoxication and the existence of a mental condition referred to as post-traumatic syndrome disorder." (2 R 359) Yet, they do not because he never raised those issues in the Rosillo homicide, and indeed, it seems he killed her while trying to defend himself from Rosillo's attacks.

He claimed Smith perhaps unwittingly triggered his rage when she belittled his mother and her murder. Rosillo never pushed that button; instead she was screaming, threatening, and beating him because he had too little cocaine for her. On the other hand if Zack claimed he was drunk when he killed Rosillo he could also been inebriated when he murdered Smith barely 24 hours later. That similarity would not have weakened his intoxication or mental defect defense. Unlike those who claim a defense of accident or mistake, those who are intoxicated could very well remain so for hours, days, and weeks, as the legions of alcoholics can attest. Drunks can and do remain drunk or become drunk again. On the other hand, experience suggests that those who claim to have committed accidents that may raise suspicions rarely have histories of similar mishaps. In State v. Everette, 532 So. 2d 1124, 1125 (Fla. 3d DCA 1988), the Defendant claimed he had accidentally killed a child, yet that defense rang hollow when the State introduced evidence that he had abused children numerous times before. "The more frequently an act is done, the less likely it is that it is innocently done." Ehrhardt, Florida Evidence, 1998 edition section 404.12; Jensen v. State, 555 So. 2d 414, 415 (Fla. 1st DCA 1989). That logical conclusion has little significance for drunks and drug users, and it is especially weak here where only 12 hours separated the two killings, the Defendant said he had been drinking heavily, using marijuana and LSD, and others had seen him drinking.

In this case, the jury may well have concluded that simply because Zack killed Rosillo he murdered Smith. In other words, evidence of the Okaloosa County murder, when coupled with the Pensacola murder, only showed the Defendant had the propensity to murder women, or he had such a vile character that he likely committed a first degree murder of Smith.

The shared similarities were so scant and the dissimilarities so many and significant that the court could not have justified admitting the Rosillo murder and the Chandler theft because the crimes had a "fingerprint" similarity with the charged offenses.

Moreover, as argued later, the overwhelming prejudice the Rosillo murder created, particularly the photographs, substantially outweighed the slight relevancy the prior homicide had-particularly when the State introduced evidence from several witnesses who observed Zack shortly before he killed Smith to rebut his intoxication defense (8 R 217, 238, 249).

2. The Rosillo murder and Chandler thefts were not inextricably intertwined with the murder in Pensacola.

Crimes that have no obvious similarities or particular relevance to the charged offenses may nevertheless be admitted if the State needs them to present a complete and clear picture of what happened. Henry v. State, 649 so. 2d 1361, 1365 (Fla. 1994) ("[T]he facts of Suzanne Henry's murder were so inextricably intertwined with Christian's murder that to separate them would have resulted in disjointed testimony that would have led to confusion.") Such evidence can go to the jury if to omit it would leave them with "a materially incomplete account of the criminal episode." Williamson v. State, 681 So. 2d 688 (Fla. 1996). Nevertheless, because of the inherently strong, prejudicial effect evidence of other crimes, and particularly other murders, has on the jury, trial courts should closely, strictly scrutinize the relevance of those bad acts before admitting them at trial. Even if the judge allows the prosecution to present that evidence, it should carefully limit the extent or amount of its proof. Henry v. State, 574 So. 2d 73 (Fla. 1991).

Thus, if other crimes become admissible to establish the context out of which the charged offenses arose, the State must show there was at least some causal connection between the offenses. For example, in Bryan v. State, 533 So. 2d 744, 747 (Fla. 1988), Bryan committed a robbery in Alabama using a sawed off shotgun three months before he killed a night watchman for a seafood

wholesaler. He also stole a boat that was found near the murder scene. Evidence of the theft was relevant because it put him in the vicinity of the homicide about the time it occurred.[12]

In Foster v. State, 679 So. 2d 747, 753 (Fla. 1996), the State showed an unbroken chain of events that started with Booker's arrival at Foster's trailer and ended with Foster shooting the two victims. The latter defendant had used the same gun earlier in the day to rob a drug dealer. He had also stolen a truck, and had used it to ram the victim's car so he could kidnap them. The clear and direct link between the earlier crimes and the murders gave the jury a complete and comprehensible understanding of murders, and was admissible for that reason.[13]

In this case, no causal link connected the Okaloosa County homicide, the theft of the guns, and the Smith rape, robbery, and murder. The jury could very well have heard about the theft of the car in Tallahassee and then the Pensacola homicide without ever having been informed of the Rosillo murder and theft. The gaps in the story would never have confused the jury . Indeed, when Zack confessed to Officer Vetter about the Smith homicide he gave a chronology of what he had done since leaving Tallahassee, omitting the Rosillo killing. Vetter never scratched his head and said, "Wait a minute, something's missing." He accepted what Zack said, and it was not until the Okaloosa County police questioned him about the murder in their county that he admitted it and then told Vetter he had not mentioned it (10 R 768).

Thus, if this trained police officer never spotted an incomplete story, we should reasonably expect the jury to have understood what happened in Pensacola without becoming confused it they had

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[12] The robbery, though relevant to show that Bryan used the murder weapon in the robbery, should have been excluded because the prejudice created by it substantially outweighed its probative value. Also, there was no need for this proof because the State had other evidence placing the gun in the defendant's possession. Id. At 747.

[13] The robbery evidence also had relevance to show Booker's motive and intent because he had said he wanted to recoup some earlier gambling losses and was willing to kill to do so.

never heard about the earlier crimes Zack had committed. There was no link between the Rosillo murder or Chandler thefts and the Smith murders as there was between the theft of the car. He did not use the guns to kill her, nor did he commit the latter murder to hide what he had done earlier (10 R 761-62, 790-91). The Rosillo murder and Chandler thefts, in short, provided no missing link to a full explanation of what happened in Pensacola. They only distracted the jury from resolving Zack's guilt for the crimes against Smith. Steverson v. State, 695 So. 2d 687 (Fla. 1997)

Finally, as with the argument against the similar fact rationale for admitting this evidence, if we assume some relevancy, the court should have nevertheless excluded the murder in Okaloosa County. The extensive proof of those crimes went far beyond what was necessary to give the jury a complete picture, and its prejudicial impact far outweighed the slight relevancy it might have had.

3. The other crimes evidence had no relevancy to show Zack's motive in the Smith homicide, sexual battery, or robbery.

If relevancy is the key to admitting evidence, then proof of other crimes may become admissible if it shows the Defendant's motive or intent in committing the charged offenses. Finney v. State, 660 So. 2d 674 (Fla. 1995). For example in Craig v. State, 510 So. 2d 857 (Fla. 1987), Craig was stealing cattle from his employer. He later murdered him after the latter had discovered the theft, the motive for the homicide being to avoid being caught for cattle rustling. Admitting that evidence provided a clear reason for the murder.

In Finney, the defendant killed one woman and two weeks later raped and robbed another in a gift shop. This Court found no relevance between to two events, specifically holding that the latter crime provided no pecuniary gain motive for the robbery. In State v. Richardson, 621 So.2d 752, 757 (Fla. 5th DCA 1993), Richardson committed a robbery and murder so he could get some money to flee

because he had committed another murder. Evidence of the earlier crimes was properly admitted to explain the later homicide.[14]

In this case, the prosecutor told the jury in its closing argument that the Rosillo murder showed Zack's motive and intent when he killed Smith.

> Now, what do you use that evidence for? Well, what the evidence is to be used for is that the murder that occurred of Laurie Rosillo preceded the date of Ravonne smith's murder by less than 24 hours. Less than 24 hours. And that's where she was found out on the beach. Use your common sense. It takes five to seven minutes just to strangle somebody. Five to seven minutes. That doesn't have anything to do with all of the beating and the pounding that this woman took. Is there any way that for the next 23 ours the defendant wasn't thinking about that when he came in contact with Ravonne Smith, and he was not thinking about that when he talked to her at Dirty Joe's Bar, and he was not thinking about that when he got in her car, and he was not thinking about that when he went to her house, and he was not thinking about that when he assaulted her in her house.
>
> That's what this evidence here should be used for, this murder in Okaloosa County. It should be used for you to see what information does that give you concerning what the defendant's intent was at the time he murdered Ravonne Smith. That's the purpose of this evidence.

(14 R 1381-82)

Hardly. Only through sheer speculation can the State maintain that contention because there is no testimony, no exhibit, and no confession that Zack killed Smith for reasons arising out of the Okaloosa County homicide. When questioned, Zack had a hard time remembering it (11 R 844-46), so State's argument that it consumed his thinking when he killed Smith carries little weight. Moreover, had he thought about her murder, that fact provided no reason or intent in the latter homicide. The Rosillo murder provided no motive, it suggested no logical reason why Zack killed Smith. He did not do the latter homicide to avoid detection for the Rosillo murder. Craig, cited above. He took nothing from Rosillo, so her death provided no clear or reasonable evidence of his intention to kill Smith for

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[14] While relevant, this Court cautioned against transcending "the bounds of relevancy" and making the collateral offense a feature of the case against Richardson.

money. In this case, no evidence suggested Zack killed Smith and stole from her to get money so he could flee the Rosillo murder. Richardson.

The Rosillo murder and Chandler theft, in short, provided no explanation for the Smith murder. They did, however, demonstrate Zack's propensity to kill and steal, and exhibit his criminal character. It showed that if he killed once he was likely to do so again.

4. The unfair prejudicial impact of this evidence substantially outweighed what ever probative value it may have had.

If the evidence of the other crimes has some probative relevance, a court must nevertheless exclude it if its prejudicial impact substantially outweighs whatever relevance it may have. Section 90.403, Florida Statutes (1996); Steverson v. State, 695 So. 2d 687 (Fla. 1997). In Henry, cited above, this court found that the prejudice of admitting the relevant evidence of one murder outweighed its probative value in proving a second:

> Some reference to the boy's killing may have been necessary to place the events in context, to describe adequately the investigation leading up to Henry's arrest and subsequent statements, and to account for the boy's absence as a witness. However, it was totally unnecessary to admit the abundant testimony concerning the search for the boy's body, the details from the confession with respect to how he was killed, and the medical examiner's photograph of the body. Even if the state had been able to show some relevance, this evidence should have been excluded because the danger of unfair prejudice substantially outweighed its probative value. § 90.403, Fla. Stat. (1985). Indeed, it is likely that the photograph alone was so inflammatory that it could have unfairly prejudiced the jury against Henry.

Henry, at 75.

Similarly, in Steverson v. State, cited above, this Court agreed with Steverson that despite the limited relevancy of a second murder to show his motive in committing the first homicide, the prejudice in admitting that evidence substantially outweighed the limited probative value it presented:

> Steverson contends that this testimony simply had no place in his trial for the murder of Bobby Lucas, and this evidence served only to confuse the jury--distracting them from the case at hand--and essentially retry Steverson for the shooting of a police

> officer rather than focusing the jury's attention on this case. Just as we concluded in Henry, we conclude here that it is likely that the twelve photographs of Rall's injuries alone were so unnecessary and inflammatory that they could have unfairly prejudiced the jury against Steverson. See Henry v. State, 574 So.2d at 75. Further, as in Henry, while "some reference" to the police officer's shooting would have been permissible, there is absolutely no justification for admitting the extensive evidence received here.

Steverson at 691.

In this case, the State presented several witnesses and numerous exhibits about the Rosillo murder and the Chandler thefts. Two police officers testified about discovering Rosillo's body. A crime scene investigator recreated the crime. The medical examiner told about the beating and strangulation of Rosillo. Officer Griggs interrogated Zack about Rosillo's death. The jury heard his confession. Chandler testified about befriending Zack, cleaning his guns, and their theft. Several witnesses recounted the Defendant's pawning of them. Especially inflammatory were the 21 photographs of Rosillo and the crime scene. Indeed, the State put as much effort in presenting its case against Zack for the murder of Rosillo and theft of Chandler's weapons as it did in prosecuting him for the murder of Smith.

When the pictures of Rosillo's beaten and bloodied face and body were placed next to those of Smith's stabbed and bloodied face and body, the gruesome similarity became so emotionally explosive that the jury could have been unfairly prejudiced against him. It returned a guilty verdict to punish him as much for committing the Rosillo murder as for killing Smith. Sexton v. State, 697 So. 2d 833, 838 (Fla. 1997)("Yet the jury could only have been inflamed by this damaging testimony and might have been moved to punish Sexton for those collateral acts by finding him guilty of the murder in this case.")

What is more, the State repeatedly used the Rosillo murder and Chandler theft in its opening statement (7 R 163-68)[15] and closing argument (13 R 1377-85, 14 R 1445). Cf., Hartley v. State, 686 So. 2d 1316, 1320 (Fla. 1996)(What a party says in its opening statement can be used in measuring the harm of improperly admitted bad act evidence). It also presented several witnesses who worked at the bar where Zack met Smith, and they uniformly said he "didn't seem intoxicated," "was not intoxicated," and saw him drink only "two or three beers." (8 R 217, 238, 249). Russell Williams, probably the last person to see Smith alive, also testified that the defendant was not drunk when he left him and Smith (8 R 249).

The State also used bits and pieces of evidence to emphasize Zack's low rider life style. Over defense objection a hat with the words "Bad to the Bone" on it, as well as a skull and crossbones and a confederate flag found at the Smith murder scene was shown to the jury (8 R 281-83, 293, 466). It became part of the State's closing argument: "And in addition to his admitting that he was in the pawn shop, he's got a hat on, and this is how he considers himself in the day following -- the two days following having committed two murders." (13 R 1406)

When questioned about the Rosillo murder, Zack said that as he kicked sand over Rosillo's body a song by a group known as "Guns and Roses" went through his mind (11 R 827-28) with the lyrics "Something about she was nagging me, so I put her six feet under, had to bury her." (11 R 827-28).[16] The prosecutor emphasized, again over defense objection, those lyrics when he posed a hypothetical question to his Dr. McClaren, his mental health expert (13 R 1277).

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[15] He claimed Zack sexually battered Rosillo (7 R 167), but no evidence ever showed any sperm in her vagina or injury to that organ (9 R 547-48).

[16] Zack's lawyer objected to that testimony, but it was overruled (11 R 825-27).

The State introduced, over defense objection, photographs and a videotape of Rosillo's body and the scene where it was found (8 R 378, 386). While pictures of murder victims, even though gruesome, may be admitted, the relevancy of such evidence becomes much more attenuated, the prejudicial value more accentuated, and the tendency of it to become an inflammatory feature of the trial more likely when they are of murder victims. In Henry v. State, 574 So.2d 73, 75 (Fla. 1991), this Court found admitting photograph of a second person Henry had murdered irrelevant to proving the charged homicide. "Indeed, it is likely that the photograph alone was so inflammatory that it could have unfairly prejudiced the jury against Henry."[17]

These pieces of evidence became part of the larger picture the State deliberately painted of Zack. It became a portrait that only justified the State's bad character assessment of him and further inflamed the jurors against him (8 R 282).

Hence, while relevancy and not necessity is the criteria for admitting evidence, Ruffin, cited above, the need for bad acts proof becomes a consideration when measuring the prejudicial impact testimony has against its probative value. Henry, Steverson, cited above. In this case, assuming some relevancy of the Rosillo murder and Chandler thefts, there was little need for this other crimes evidence. They became a feature of the State's case that confused the jury by diverting its attention from the issue of Zack's guilt for the Smith murder, rape, and robbery.[18] That made their use unfair, particularly when the prosecutor went into extensive detail about the uncharged murder and theft as part of its opening statement, its case inc chief, and its closing argument. Bush v. State, 690 So. 2d

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[17] The prejudicial impact of this evidence became especially potent by the State's use of an overhead projector that presented huge pictures of the victims (e.g. 13 R 1280, 1406).

[18] Over repeated defense objection, the State also went into detail about Zack's numerous thefts and burglaries, particularly the theft of the Honda from Edith Pope in Tallahassee on June 5, and that he had just gotten out of jail for auto theft (12 R 1113-16, 1122-23).

670, 673 (Fla. 1st DCA 1997); Long v. State, 610 So. 2d 1276, 1280-81 (Fla. 1992); Randolph v. State, 463 So. 2d 186, 189 (Fla. 1988).

The Rosillo murder and the Chandler theft, thus, had no relevance to any of the legitimate issues tried in this case, and the court should have excluded any evidence of those crimes That it did not became error, and this court should reverse the trial court's judgment and sentence and remand for a new trial.

ISSUE II

THE COURT ERRED IN FAILING TO GRANT ZACK'S MOTION AND RENEWED MOTION FOR A JUDGMENT OF ACQUITTAL ON THE SEXUAL BATTERY CHARGE, A VIOLATION OF HIS FIFTH AND FOURTEENTH AMENDMENT RIGHTS.

In addition to charging Zack with first degree murder, the State alleged that he had sexually battered Ravonne Smith with force likely to cause serious personal injury (1 R 2). After presenting whatever evidence he thought would support a conviction for that offense, the prosecutor convinced the jury in its closing argument that the Defendant was guilty of that crime. Specifically, he used the following evidence or inferences from it:

1. Zack hit Smith with a bottle and broke it while she was near a couch in the living room. He did that to subdue her.

2. There was blood on her shirt "up around the collar," which was indicative of forceful bloodshed.

3. The badly ripped bra found in the bedroom supported the State's theory that Zack hit her in the living room.

4. 24 hours earlier the Defendant had ripped the clothes of Laura Rosillo. And that established a pattern.

5. Smith's underwear and other clothes were found in the bedroom next to the bed except that her shorts and shirt were found in a drawer. The shorts had blood on them, and the shirt was missing a button. She had her shoes on.

6. She was hit in the living room and dragged down the hall to the bedroom where she was sexually battered on the bed, as evidenced by the blood found on it.

7. Somehow she got loose from Zack and fled to another bedroom where he beat into unconsciousness.

(13 R 1396-99).[19]

At the close of the State's case, Zack moved for a judgment of acquittal on the sexual battery, arguing that "Certainly there's no evidence of any sexual battery that's been admitted. There's evidence of consensual sex but no evidence of any forced sex." (11 R 975)[20] The court, "looked with favor" on that argument, but delayed ruling on the motion until Zack had presented his case (11 R 977). It later denied the motion.

Responding to the State's argument on the sexual battery charge, Zack's lawyer argued that the evidence was "not clear that they didn't have sex, go back into the living room, partially redress, the fight started over the comment, and then she went back into the bedroom, fell on the bed, and that's the reason for the blood on the bedspread." (14 R 1435) Dismissing the bra, he noted that "You don't know what that bra looked like before this happened. . . . We don't even know that that was the bra she had

[19] The State's closing rebuttal argument presented no new arguments on this point (14 R 1446-47).

[20] Zack also contended that he was not guilty of felony murder if the underlying felonies were robbery and sexual battery. The court, wanting to shorten his argument, "look[ed] with favor on [his] argument with regard to the felony murder involving grand theft and involving sexual battery. There's no proof except that the theft of the VCR and the TV occurred as an afterthought after the murder took place. It was not the intent to murder to take those items." (11 R 975-77) Nevertheless, it took the motion under advisement (11 R 977).

on that night with her white outfit. There's no blood on the bra. No blood on the panties. The panties aren't torn." (14 R 1435-36)

Zack should not have had to argue he never sexually battered Smith, and the court erred in denying his motion for a judgment of acquittal because the evidence never established to a "subjective state of near certitude" that Zack sexually battered Smith. Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed. 2d 560 (1979).

The state's insurmountable problem of showing Zack raped Smith arises from the special rules of evidence and appellate review applied when the state relies solely on circumstantial evidence to prove the defendant's guilt. This Court has long held that

> One accuse of a crime is presumed innocent until proven guilty beyond and to the exclusion of a reasonable doubt. It is the responsibility of the State to carry this burden. When the State relies upon purely circumstantial evidence to convict an accused, we have always required that such evidence must not only be consistent with the defendant's guilt but it must also be inconsistent with any reasonable hypothesis of innocence.

Davis v. State, 90 So.2d 629, 631 (Fla. 1956); McArthur v. State, 351 So.2d 972 (Fla. 1977). State v. Law, 559 So. 2d 187 (Fla. 1990).

As applied to cases such as this where the key issue focuses on whether Smith consented to having sexual intercourse with Zack. As such the "Circumstantial evidence must lead 'to a reasonable and moral certainty" that she never did so. Kirkland v. State, 684 So.2d 732, 734 (Fla. 1996) ("We have stated that such a motion [for a judgment of acquittal] should be granted unless the State can 'present evidence from which the jury can exclude every reasonable hypothesis except that of guilt.'"); See, also Hall v. State, 90 Fla. 719, 729, 107 So. 246, 247 (1925)." Cox v. State, 555 So.2d 352, 353 (Fla. 1990). Suspicions, even strong suspicions of the defendant's guilt are

insufficient, as a matter of law, to support a conviction as long as the evidence supports a theory that she agreed to have sex with him. Id.

Thus, if we resolve whatever conflicts exist in the evidence in favor of the state, as we must, what proof did the state present showing the defendant's guilt? Not much.

First, and most significant, Zack presented a reasonable explanation for the events of June 13. He went to "Dirty Jo's" bar in Pensacola where Ravonne Smith worked. She was lonely, and struck up a friendship with him. During the next several hours, they smoked some marijuana, and he took a hit of LSD and drank beer (8 R 249). She became more interested in him, and they became sexually aroused (11 R 900, 935). They eventually went to her house where they had sexual intercourse (11 R 937-38). Afterwards, as Zack was in the hall, about to go into the bathroom, she made some remark about his mother, and he hit her (11 R 898). She struck him in return, and they then got into a fight that ranged throughout the house, eventually ending in the bedroom (11 R 922, 932).

None of the State's evidence contradicted or rebutted that scenario, and the prosecutor could only speculate that Zack delayed his attack on Smith until they got inside her house.
That he supplied hunches when he lacked proof becomes obvious in explaining that Zack took her from the living room where he hit her with the bottle back to the bedroom from where she then somehow got away from him and fled into another bedroom.

> She was hit with the bottle. She was dragged down this hall. Her bra was ripped off of her along with her clothing. There's a button off the shirt. Everything comes off of her except her shoes.
>
> * * *
>
> She was being sexually battered. And then somehow she gets loose from him and she flees to another part of the house, . . .

(13 R 1398). The State's argument that after being beaten, dragged down a hall, her clothing ripped off her, and then raped she had the strength to "somehow get loose" amounted to wishful speculation on the prosecutor's part. Zack, on the other hand, provided a more reasonable explanation, and one that also fits with the evidence. Moreover, he and Smith could have had consensual sex and come to the living room afterwards at which point she made the comment that led to her death. That scenario would fit with the State's reconstruction of the events leading up to the homicide.

Other evidence, or the lack of it, also supports Zack's consensual sex argument. First, Smith suffered no injuries to her vagina, strong evidence that she consented to having sex with Zack. Garcia v. State, 644 So. 2d 59, 60 (Fla. 1994)("[D]ue to injuries to [the victim's] vagina and anal canal, it was clear that a sexual battery had occurred. . . ") She also had invited Zack to her house. This is not a case where he broke into her home and raped an elderly woman. Garcia; Lightbourne v. State, 438 So. 2d 380 (Fla. 1983)(Defendant broke into house, surprising victim, and sexually battered her before ignoring her pleas and killing her.)

To the contrary, the evidence clearly shows that Smith was interested in Zack (5 R 931).[21] Several witnesses said she was friendly to him and thought he was a "hot date." (8 R 208, 222, 243, 350, 11 R 990). She willingly left the bar with him (8 R 217, 977), and the pair drove around for more than an hour smoking marijuana and engaging in sexual foreplay before going to her home (11 R 921, 935) to conclude what they had started at Dirty Jo's. That she liked "rough sex" (11 R 936-37) explains as well the torn bra and shirt.

If the pair did not have sex on their minds, why did Smith take Zack home? If he wanted to kill her he would have done as he had killed Smith in the car, as he had done with his other victim.

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[21] One witness said Smith was "all over" Zack. (11 R 900). Another said she told her boyfriend on the telephone that she was working late (8 R 298).

The evidence presented by the State never rebutted his consistent statement. Perhaps the most significant unexplained piece of evidence was the ashtray found in the living room of Smith's house that was "full of cigarettes." That was important because Smith kept the house clean (8 R 300) and would likely have disposed of the cigarettes. But they were there when the boy friend returned. The likely explanation is that after having sex, Smith and Zack smoked the cigarettes, and as he got ready to go, they got in the fight that resulted in her death. That version of what happened explains the cigarettes. The State's explanation did not, and indeed, it has to ignore the ashtray in order for Zack to immediately attack Smith as soon as they entered the house.

The State's evidence supported his version of what happened as much as its guess as to how the murder occurred (11 R 947-48). Indeed, the murder could well have happened as the State posited, except the couple had sexual intercourse before the fight. Because the prosecution never rebutted Zack's reasonable hypothesis of innocence of the sexual battery, the court should have granted the motion for a judgment of acquittal. This court should, therefore, reverse the trial court's judgment and sentence not only for that offence but for the murder as well and remand for a new trial. The Defendant makes that assertion because the jury could have found him guilty of murder on a felony murder theory with the only underlying felony being sexual battery.

This court should also remand for a new sentencing hearing because in imposing a death sentence the court found that Zack had committed the murder during the course of a robbery, sexual battery, and burglary (6 R 860-61). It gave "great weight" to that aggravator. If there was insufficient evidence of the sexual battery, the court may not have given this justification for death as much weight. This Court should, for that reason, also remand for a new sentencing hearing.

ISSUE III

THE COURT ERRED IN DENYING ZACK'S MOTION FOR A JUDGMENT OF ACQUITTAL ON THE ROBBERY CHARGE AND SUBMITTING IT TO THE JURY BECAUSE THE THEFT OF THE TV, VCR, AND CAR WERE AN AFTERTHOUGHT AND NOT PART OF THE EVENTS THAT CONSTITUTED THE MURDER, A VIOLATION OF HIS FOURTEENTH AMENDMENT RIGHT TO A FAIR TRIAL.

This issue focusses on the robbery charge the State leveled against Zack. He contends here that the taking of the TV, VCR, and car not only occurred after the homicide but were afterthoughts to that offense and not part of the acts surrounding it. Without argument, it proved that after killing Ravonne Smith Zack took a television set, a VCR, and the car she had driven him to her house. He tried to pawn the electronic equipment the next day in Panama City, and when that failed he left those items in the pawn shop, walked out, and quickly abandoned the car and walked away from it (10 R 764). The prosecutor elevated that taking to a robbery because it claimed the thefts were part of the events surrounding the murder (13 R 1403-1405). Zack, on the other hand, argues that the former crime amounted to an afterthought, so that it was not part of the acts or events surrounding the murder. Recent cases from this court support that position. Mahn v. State, 23 Fla. L. Weekly S219 (Fla. April 16, 1998); Jones v. State, 652 So. 2d 346 (Fla. 1995).

In Mahn, Jason Mahn tried to re-establish a relationship with his father whom he had not seen since he was one year old. Apparently the effort failed and acting out of frustration with his parent he killed his long time girlfriend and her fourteen-year-old son by stabbing them with a knife he had obtained from the kitchen. He took her car and $400 found in a drawer next to her bed in "a desperate and frenzied effort to flee" to Oklahoma where he was arrested. The State subsequently charged him with the murders and robbery, and the jury convicted him of those offenses, but indicated he committed homicides with premeditation rather than in the course of the robbery. In

the penalty phase, the court considered the robbery an "afterthought," thus refusing to find the aggravator that the murder was committed during the course of a robbery.

On appeal this Court found insufficient evidence to sustain the robbery conviction. In reaching that conclusion, it relied on Jones v. State, 652 So. 2d 346 (Fla. 1995), which clarified that for a theft to become a robbery the threat or force element of robbery [must] be part of a continuous series of events with the taking of the property." Significantly for this case, it also noted

> Further, while the taking of property after the use of force can sometimes establish a robbery, id, we have held that taking of property after a murder, where the motive for the murder was not the taking of property is not robbery.

Mahn at. 221.

The taking, in short, becomes an afterthought to the homicide, and the force used in that offense does not convert the theft into a robbery.

Except for some minor distinctions the facts presented in this case are of the same type as those in Mahn, and this Court's holding in the latter instance should control how it decides this issue.

First, Zack stole the TV, VCR, and car after the murder, and he obviously took the vehicle so he could flee. He never told the police in any of the statements he made that he had killed Smith for her wealth. To the contrary, he consistently told them that she "provoked" his explosive rage when she made some comment about his mother (12 R 1095). That unknowing blunder sparked the fight between her and the Defendant, and never did he stab her because he wanted what she had.

Second, the TV and VCR were relatively high value, were easily taken, and were quickly pawned. The car provided a rapid escape, something he had thought little of since he had abandoned another car immediately before the murder. If robbery were part of his thinking in killing Smith, it made no sense to abandon one car just to steal another, particularly when he had no reason to believe the Pensacola police had any idea he drove a car stolen weeks before in Tallahassee. Indeed, if

robbery and escape were part of his plans in killing Smith he would have kept the red car because the pawn shopowner where he tried to unload the TV and VCR the morning after the murder testified that he "had received some kind of a warning of a vehicle being looked for from another pawn broker, and that it might have some stolen item. . . ." (10 R 630-31)

Additionally, the murder arose as much from Zack's disastrous past as it did from the events of June 13. Without question Zack was sexually, physically and emotionally abused by Tony Midkiff, his stepfather. He suffered years of being beaten and kicked daily, of being threatened with death, of seeing his mother repeatedly beaten, of being handcuffed to a bed, of being raped, and other depravities (15 R 1727, 1760, 1771, 16 R 1932, 17 R 2023). This torture revealed itself in bed wetting as a child and nightmares as an adult (16 R 1857, 15 R 1680).

Besides the abuse, he suffered from Fetal Alcohol Syndrome and Post Traumatic Stress Disorder (16 R 1830, 1892, 1930, 1937). He was also brain damaged from birth, a condition that was exacerbated when he drank ten ounces of vodka when he was three years old (16 R 1855, 1883, 1901-1902).

Consequently, and predictably, he was impulsive and given to fits of rage (16 R 1831, 1905-1906). He was hyper-alert, and considered what a normal person would treat as minor irritants as major threats (16 R 1934). He was always on edge, and tended to react to problems in primitive ways (16 R 1952, 1954). He had the intellectual capacity of a 15 year old, and more ominously the emotional development of a 10-year-old child (16 R 1870, 1925, 1872)

Additionally, on the day of the murder Zack had smoked some marijuana, drank some beer, and taken LSD.

Thus, the events of Zack's dark past coupled with the drugs he used immediately before the murder became a guaranteed formula for disaster (17 R 2042).

Thus, Smith's comment about Zack's mother's death triggered that primitive survival reaction, and he exploded in an uncontrolled rage. The murder had nothing to do with robbing his victim and everything about child abuse, drug abuse, and alcohol abuse.

In Mahn, the jury's guilty verdict rested solely on a premeditation theory, even though the jury also convicted him of robbery, and that became one of the reasons this Court found the evidence of robbery insufficient. Id. at 221. Here, Zack asked the court to give the jury a verdict form so they could indicate whether they convicted him of first degree premeditated murder or of felony murder. The court, however, refused that request, at the urging of the State (13 R 1331-32).

In Mahn, this Court also noted that although the jury had convicted Mahn of robbery the trial judge, in the sentencing phase, refused to find, as an aggravator, that he had committed it during the course of a robbery. In this case, while the judge found that Zack had committed the murder during the course of a sexual battery, robbery, and burglary, it justified that conclusion by relying only on facts surrounding the sexual battery (6 R 860-61). When Zack made his initial motion for a judgment of acquittal the court, even then, considered the robbery as nothing more than a petit theft (11 R 977). Hence, like the court in Mahn, it thought so little of the robbery conviction that it carried little, if any, weight in justifying Zack's death sentence.

In any event, even if the court had found the robbery as an aggravator this court could, as it has done in other cases, have rejected that conclusion. In Knowles v. State, 632 So. 2d 62 (Fla. 1993), this court refused to find that Knowles had committed the second of two murders during a robbery even though the jury had convicted him of that offense, and the trial court had decided it aggravated the murder. The evidence there showed that Randy Knowles had spent most of the day of the murder sniffing paint thinner. Intoxicated, he got a rifle and killed a ten year old girl who was visiting a friend in the trailer next to his. He then went home, argued with his father, shot him as he

sat in his truck, and pulled him out of it. He got in the vehicle and fled the scene. Although the State charged and the jury convicted Knowles of robbing his father of the truck, this Court found insufficient evidence of that crime to justify aggravating the murder as committed during the course of a robbery.

The same is true here. There is no evidence Zack intended to rob Smith before he killed her, or that he committed the homicide to take her TV, VCR, and car. It was, as this Court held in Mahn and Knowles, an afterthought, and not the motive for the murder.

This court should, therefore, reverse the trial court's judgment and sentence on the robbery charge and remand for a new trial. Because the court instructed the jury that it could convict Zack of first degree murder if it was committed during the course of the robbery(14 R 1457), this Court should also reverse the judgment and sentence for the former offense and remand for a new trial on it. If the murder conviction remains despite the lack of evidence supporting the robbery conviction, this court should none the less

ISSUE IV

THE COURT ERRED IN INSTRUCTING THE JURY IT COULD CONVICT ZACK OF FELONY MURDER IF THE UNDERLYING FELONY WAS BURGLARY, AN UNCHARGED AND UNPROVEN CRIME, AND A VIOLATION OF ZACK'S FIFTH, SIXTH, AND FOURTEENTH AMENDMENT RIGHTS.

In charging Zack with first degree murder, the State specifically alleged that he killed Ravonne Smith during the course of a sexual battery or robbery (1 R 1). At the charge conference during the guilt phase of the trial, the State wanted the court to instruct the jury that it could find him guilty of felony murder if he committed the homicide during the course of a burglary (13 R 1345).

Over objection (13 R 1344), the court agreed 13 R 1352). During the penalty phase of the trial, it also found that he had committed the murder during the course of a burglary as well as a robbery and sexual battery (6 R 860). In light of this Court's holding in Willie Miller v. State, Case No. 85, 744 (Fla. July 16, 1988), that was error.

In that case, Miller and a co-defendant entered a grocery store, ostensibly to rob those inside. Two people were shot, one of whom died, and some money taken. Miller was charged and found guilty of first degree murder, attempted first degree murder, armed robbery, burglary, and robbery. Miller was also sentenced to death following a unanimous jury recommendation of death.

On appeal this court reversed Miller's conviction for the burglary conviction. By entering a grocery store open to the public, he had gained a consensual entry. To convict him of burglary, therefore, the State had to show that that consent to "remain in" the store had been withdrawn. Significantly, this Court refused to conclude that the victim/owner had withdrawn his consent because some crime had been committed inside

> This is not sufficient. It is improbable that there would ever be a victim who gave an assailant permission to come in, pull guns on the victim, shoot the victim, and take the victim's money. To allow a conviction of burglary based on the facts in this case would erode the consent section of the [section 810.02(1)] Florida Statutes (1993)] to a point where it was surplusage: every time there was a crime in a structure open to the public committed with the requisite intent upon an aware victim, the perpetrator would automatically be guilty of burglary. This is not an appropriate construction of the statute.

Slip opinion at pp. 3-4.[22]

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[22] This holding is at odds with , and implicitly rejects, the holdings of cases such as Robertson v. State, 699 So.2d 1343, 1347 (Fla. 1997). "There was ample circumstantial evidence from which the jury could conclude that the victim of this brutal strangulation-suffocation murder withdrew whatever consent she may have given Robertson to be in her apartment."

That rationale applies with the same force to this case, where the alleged burglary was of a residence, not a grocery store open to the public. Smith had invited Zack inside, so the State had the same burden here that it had in Miller: to prove that the victim had withdrawn her consent to "remain[] in" her house. Merely because he committed other crimes inside is not sufficient to carry the load. All the State presented here, and argued in its closing argument, was that once he began his attack on Smith, her consent was "impliedly withdrawn." (13 R 1402). The court, confirming that contention, instructed the jury that "When the victim becomes aware of a commission of a crime, the victim impliedly with withdraws consent to the victim's remaining in the premises." (14 R 1463). Miller holds that is insufficient evidence.

This Court should, therefore reverse Zack's judgment and sentence and remand for a new trial.

ISSUE V

THE COURT'S SENTENCING ORDER IS DEFICIENT IN THAT IT FAILED TO CONSIDER ALL THE MITIGATION ZACK PRESENTED IN SUPPORT OF A LIFE SENTENCE, AND THE CONCLUSIONS IT REACHED WERE AT ODDS WITH THE EVIDENCE PRESENTED BY THE STATE AND DEFENSE, IN VIOLATION OF ZACK'S EIGHTH AND FOURTEENTH AMENDMENT RIGHTS

Zack has attacked several of the aggravating factors the court found in his case in other issues. The argument he presents here focuses exclusively on its discussion of the mitigation it found, failed to find, and the reasoning used by Judge Tarbuck in rejecting it.

What he said becomes an issue because of what this Court and the United States Supreme Court have said concerning mitigating evidence. In Lockett v. Ohio, 438 U.S. 586 (1978), and Eddings v. Oklahoma, 455 U.S. 104 (1982), the Court found "Just as the State may not by statute

preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, as a matter of law, any relevant mitigating evidence." Eddings, at 113-14 Relevant evidence, in turn, included "any aspect of a defendant's character or record and any of the circumstances of the offense." Lockett, at 110.

This court in Campbell v. State, 571 So. 2d 415 (Fla. 1990), provided guidance on implementing the Lockett/Eddings requirements.

> When addressing mitigating circumstances, the sentencing court must expressly evaluate in its written order each mitigating circumstance proposed by the defendant to determine whether it is supported by the evidence and whether, in the case of nonstatutory factors, it is truly of a mitigating nature. See, Rogers v. State, 511 So.2d 526 (1987), cert. denied, 484 U.S. 1020, 108 S.Ct. 733, 98 L.Ed.2d 681 (1988). The court must find as a mitigating circumstance each proposed factor that is mitigating in nature and has been reasonably established by the greater weight of the evidence: "A mitigating circumstance need not be proved beyond a reasonable doubt by the defendant. If you are reasonably convinced that a mitigating circumstance exists, you may consider it as established." Fla. Stand. Jury Instr. (Crim.) at 81. The court next must weigh the aggravating circumstances against the mitigating and, in order to facilitate appellate review, must expressly consider in its written order each established mitigating circumstance. Although the relative weight given each mitigating factor is within the province of the sentencing court, a mitigating factor once found cannot be dismissed as having no weight. To be sustained, the trial court's final decision in the weighing process must be supported by "sufficient competent evidence in the record." Brown v. Wainwright, 392 So.2d 1327, 1331 (Fla.1981).

571 So. 2d at 419 (Footnotes omitted.)

The trial court's sentencing order, therefore, must be a "thoughtful and comprehensive analysis of any evidence that mitigates against the imposition of the death penalty. . . . if the trial court does not conduct such a deliberate inquiry and then document its findings and conclusions, this court cannot be assured that it properly considered all mitigating evidence. In such a situation, we are precluded from meaningfully reviewing the sentencing order." Hudson v. State, 23 Fla. L. Weekly S71 (Fla. Feb. 5, 1998)

In this case, the trial court did not expressly evaluate each mitigating circumstance proposed by Zack. Instead, the sentencing order evidences an open contemp of Zack's mitigation, a refusal to recognize the evidence as such, and a determination to impose death. "The Court feels that very little weight should be given to the above [mitigation] because frequently defendants facing punishment will do anything to mitigate their sentence." (6 R 873) This Court can only conclude it failed to enter an order that measured up to the "thoughtful and comprehensive analysis" requirement this Court has imposed.

A. The Statutory Mitigation.

The court devoted seven pages of the sentencing order discussing the mitigation. It used four of those pages to dismissing the statutory mitigator, that the defendant was under the influence of an extreme mental or emotional disturbance at the time of the murder. After determining that mitigator was present but deserved little weight, it almost summarily and similarly dismissed the other statutory mitigator: that Zack's ability to conform his conduct to the requirement of the law was substantially impaired (6 R 871). In reaching those conclusions the court made nine statements that either had no evidence basis or were based on a faulty and incomplete reasoning.

1. Rejecting the significance of the evidence that Zack suffered from Fetal Alcohol Syndrome (FAS) and Post Traumatic Stress Disorder (PTSD), the court said, "Without exception, every expert testified that the vast majority of these people that have fetal alcohol syndrome and post-traumatic stress disorder do not commit criminal acts. (6 R 867, see also 6 R 871).[23] Dr. McClaren, the State's expert refuted the court's conclusion

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[23] 14% of the American population are diagnosed with PTSD (16 R 1879). "Although the majority of victims do not become perpetrators, clearly there is a minority who do. Trauma appears to amplify the common gender stereotypes: men with histories of childhood abuse are more likely to take out their aggressions on others. . . . a small minority of survivors, usually male, embrace the role of the

> Q: And the combination of [FAS, PTSD, alcohol] can produce this explosive behavior?
>
> A. Yes, people that have all these difficulties are more at risk for violence. Mentally ill people are somewhat more at risk for violence than the nonmentally ill. If you add substance abuse to that, the risk goes up dramatically. If you add personality disorder to it, it goes up even more. McArthur research studies show this. So the more that some of these problems stack up, the more likely people are to be violent.

(17 R 2042)

Dr. Crown, a defense expert, echoed Dr. McClaren's testimony: Persons suffering FAS drift into criminal behavior if they have no nurturing background. That tendency worsens a hopeless situation if he or she also has PTSD. Adding drugs and alcohol "exacerbates it to the extreme." (16 R 1923-24)

2. "[T]here was no evidence of heavy consumption of alcohol by the Defendant." (6 R 867, See also, 6 R 871). In support of this, the court relied on the testimony of persons who had seen the defendant days (Edith Pope, Bobby Chandler) or hours (Mary Bedard) before the murder.

First, no one saw Zack and the victim at the time of the homicide. Williams, the last to have seen them, dropped them off at the bar about 7:30 p.m. (8 R 253), and the murder occurred before 10:30 (8 R 273). Thus, the testimony of Pope and Chandler, who had not seen the Defendant for days or weeks had slight relevance to the court's conclusion on this point. Cf., Wickham v. State, 593 So. 2d 191 (Fla. 1991)(Mitigation weakened because Wickham, though an alcoholic, was not drinking on the day of the murder.)

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perpetrator and literally reenact their childhood experiences." Judith Herman, Trauma and Recovery: The aftermath of violence-from domestic abuse to political terror, (New York, Basic Books, 1992): p. 113.

Bedard's testimony also deserves little consideration. She saw Smith at Dirty Jo's and suggested that she had done no drinking (8 R 215), yet the medical examiner said she had a .26 blood alcohol content (9 R 515) She was very drunk (12 R 1178-79). Additionally, her friend, Russell Williams, said she had smoked marijuana with Zack and him (11 R 930-31). The Defendant and her may also have taken some LSD, a particularly nasty hallucinogen (10 R 790, 793, 11 R 920).

Williams also saw Zack drink two or three beers in the hour or two that he was with him (8 R 248-49).[24] He shared some marijuana with him (11 R 930-31). This latest use of beer and marijuana was merely a continuation of what Zack had been doing all week (11 R 932). Indeed, Zack was addicted to both alcohol and marijuana (17 R 2022).

Thus, if Smith was drunk at the time of her death, Zack, the alcoholic and drug addict, would also have drunk much more than those who had seen him hours earlier noticed (11 R-954).

3. "The Defendant was relaxed and sociable"on the day of the murder. (6 R 867) While arguably true that observation has slight significance here because no one saw him the crucial hours immediately before the murder. See, Wickham, cited above.

Zack has a severely damaged brain caused in part by his mother's drinking binges while pregnant with him (12 R 1036, 1193, 16 R 1937, 2036).[25] When he was three years old, he drank ten ounces of cherry vodka, not only almost killing him, but further injuring his already weakened intellect (16 R 1901). The years of vicious physical, sexual, and emotional (16 R 1898) abuse and neglect also caused his mental faculties to further deteriorate. In truth, his brain not simply was

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[24] Zack was drinking an "Icehouse" brand beer. It has a 5 percent alcohol content , which is higher than regular beer (8 R 349).

[25] Dr. McClaren never determined if Zack suffered FAS, and thought "it certainly is a possibility" if his mother "drank as much as she was described." (17 R 2036).

damaged, it never developed (16 R 1903). Such early, massive injury was permanent, irreversible (12 R 1193).

Hence, he suffered from Fetal Alcohol Syndrome, Post-traumatic Stress Disorder, Attention Deficit Disorder, and was hyperactive (16 R 1863, 1937).

With years of physical, sexual, and emotional abuse, Zack learned to survive, but that is about all he learned . He had only a primitive, survival way of perceiving his world (16 R 1952). Born with a defective brain that only deteriorated further with abuse, he reacted on an impulsive, emotional level (12 R 1192-93, 1195, 16 R 1829, 1898, 2036). He had memory problems (16 R 1904). Consequently, perceiving the world differently than normal people, he responded to the situations he found himself inappropriately (16 R 1903). Significantly, he handled stress irrationally, and was hyper vigilant when involved in relationships with others (16 R 1240)

Before returning to Smith's house, Zack had abandoned the red Honda. After getting to the house, she told him that he would have to leave because her boyfriend would be home soon (12 R 1145). That created a crisis in his life because he thought he had some sort of future with her (10 R 790, 11 R 900). She had, after all, accepted his revelation that he had stolen the Honda, and was willing to stay with him (11 R 898). The bubble broke, however, when she said he had to leave. The distorted reality warped some more under the stress of an uncertain future, drugs, and alcohol (16 R 1898). The survival thinking kicked in, the impulsive reactions took over. When she made what may have been an innocuous comment about the murder of his mother Smith lit the match to the gasoline (16 R 1959). The years of abuse desensitized him to what he then did, and he simply had no understanding or appreciation of his acts (16 R 2036).

Thus, when Dr. Maher said Zack was under the influence of an extreme emotional disturbance he was correct (16 R 1957). But it was a type different that what this court has routinely

encountered. Because of his mental deficiencies, some inherited, some forced on him, and some self induced, he constantly lived in a world of extreme emotional disturbance. He had some awareness of his problems because he used alcohol and drugs to medicate the mental and emotional pain he suffers (16 R 1957, 1898). Yet, the primitive, survival way of existing lurked close to the surface. The drugs and alcohol, which reduce inhibitions in normal people, did so quicker and more completely with Zack (12 R 1192). His damaged, inflexible brain misperceived Smith's statement, and it reacted instinctively, without any flexibility (16 R 1904), and without any sensitivity to what he was doing (16 R 1906)

Hence, while the court may have correctly noted that Zack appeared relaxed and sociable on the day of the murder, that was not the case the hour before he killed Smith.

4. "The evidence was susceptible to interpretation that the Defendant does not have emotional problems but rather was using his childhood treatment or mistreatment and the death of his mother as a manipulative tool to victimize people." (6 R 868)

In other words, the abuse Zack suffered no longer affects him. Not only is that factually wrong, this Court rejected that conclusion years ago. Nibert v. State, 574 So.2d 1059, 1062 (Fla. 1990) .

> The fact that a defendant had suffered through more than a decade of psychological and physical abuse during the defendant's formative childhood and adolescent years is in no way diminished by the fact that the abuse finally came to an end. To accept that analysis would mean that a defendant's history as a victim of child abuse would never be accepted as a mitigating circumstance, despite well-settled law to the contrary.

Id.

The State and defense experts uniformly agreed Zack was not malingering when they examined him (16 R 1840, 17 R 1991, 2018). They also found he had suffered a tremendous amount

of abuse as a child (12 R 1086, 1286). Dr. McClaren, the State's expert, agreed with the defense expert's conclusion that the Defendant suffered PTSD (13 R 1302). He found his recent nightmares while staying at Bobby Chandler's home (9 R 593-96) particularly compelling evidence that he still suffered from the effects of his disastrous childhood (13 R 1302). The murder of his mother when he was less than 12 also was a terribly traumatizing event (13 R 1300). His drug and alcohol addictions (12 R 1105-1106, 17 R 2022) also evidenced the emotional scarring he suffered as an infant, child, and boy. It was and is something he, and perhaps any one, could never overcome (12 R 1204). He never "resolved" his abuse, and after his early teenage years, there was little chance to do so, even if anyone had cared enough to offer him help (16 R 1950).

Undenied and uncontroverted Zack suffered horribly at the hands of his step father, and continued to suffer from years of abuse, neglect, and sadism. The trial court had no basis to conclude Zack used his childhood mistreatment as "a manipulative tool to victimize people." There is no evidence he did that, and to so conclude ignores or misreads the wealth of evidence from defense and state experts that directly contradicts the trial court's conclusion.

5. "Therefore, the Court rejects the theory that the Defendant had a 'hot button,' that is, a mention of his mother's death, that if accidentally touched, the Defendant turns into a murderous human being." (6 R 868)

First, the State coined the "hot button" phrase not the Defense (11 R 949), and the implication behind it ignores the culmination of events in Zack's life that culminated in the murder of Ravonne Smith. That is, the events leading up to her death can be grouped into three phases. In the first phase, the preconditions for the tragedy emerged. Zack suffers from Fetal Alcohol Syndrome, he has a Post-traumatic Stress Disorder, and he is drug and alcohol addicted. Consequently, he was impulsive, and when drinking, hyper-impulsive.

In the second phase, on the day of the murder, the life long abuse began to come into tragic focus. He was drinking beer, and may have been drunk. He had smoked some marijuana, and may have ingested LSD. Smith was interested in Zack, and perhaps reading more into her sexual advances than she intended, he believed he might have some sort of future with her. That explains why he abandoned the Honda and left Dirty Jo's with her (12 R 1092, 1141).

The stage was thus set for the third phase. At some point, after having had sexual intercourse, she told him he had to leave. She had a boyfriend, and he would be home soon (12 R 1145). The bubble began to burst, and Zack worried about what he was to do without a car, without a future. "She was saying something about somebody being home or something, and then I was like, man, you know, I done got rid of that car, what are we going to do or something like that. And then we got into something about the acid. And then she said something abut ain't that how your--something about my mom." (12 R 1145) Zack, who had unresolved grief for his mother, and who had a warped perception of reality, impulsively hit her with the beer bottle. When he further misinterpreted her intentions to somehow get a gun, he went for a knife and then stabbed her four times.

Smith's murder, therefore, was not an accident. The events of the day and Zack's life pointed to their inevitability. The key, though, was the apparent promise of a new life that disappeared, leaving him stranded. That was unusual, perhaps unique for this Defendant, and it explains why someone else had not triggered it before. The combination of life long debilitations, immediate precursors, and triggers simply had not occurred for Zack to have impulsively lashed out.

6. "It is unreasonable to this Court for any expert to testify that such expert does not need to look at the behavior of the Defendant from 1988, when his mother was murdered,

until mid-1996 when the Defendant committed his first murder, to ascertain whether or not he was under extreme mental duress at the time of the crime." (6 R 868)

Four mental health experts examined Zack as part of his defense, either in connection with this case, or offenses that he allegedly had committed in Tallahassee some months earlier. Dr. William Spence, a forensic psychologist from Tallahassee, examined the Defendant in December 1995 to determine his competency to plead insanity (16 R 1824-25). He was diagnosed as "drug alcohol dependence, I call it addiction, and the other problem with the chronic problems of depression over the years." (16 R 1829) He also found he suffered from post-traumatic stress disorder (16 R 1830). Dr. James Larson, also a psychologist who had examined 2500 defendants over the past 15 years (16 R 1851), examined Zack. As part of that evaluation, he reviewed the available medical and psychiatric records, depositions, and talked to witnesses and family members or those who had had contact with him (16 R 1854). He administered several psychological tests, such as the Wechsler Adult Intelligence Scale, and the Wide Range Achievement Test. (16 R 1854). After reading the extensive records, including Zack's hospitalization when he was 11 years old, Dr. Larson corroborated those reports' findings by interviewing people involved with the Defendant as he grew up (16 R 1859). He also talked with persons who had recent contact with him, and read depositions of people who had seen Zack on the day of the murder (16 R 1860). Based on this information, he diagnosed Zack as suffering from Post-traumatic Stress Disorder (16 R 1862). He also concluded he had brain damage (16 R 1866), and at the time of the murder was under the influence of an extreme emotional disturbance (16 R 1873).

Dr. Barry Crown, a neuropsychologist, examined Zack and found him suffering from Fetal Alcohol Syndrome (16 R 1892). He administered at least nine psychological tests (16 R. 1911-13). He also found that when exposed to drugs and alcohol and stress, the Defendant's brain reacted

abnormally (16 R 1893). Zack had other problems that he traced from the time of his mother's pregnancy through his disastrous childhood and into the early teenage years. The numerous deficiencies Dr. Crown discovered were long term and permanent (e.g. 16 R 1902-1904). For him, as a specialist in the organic functioning of the brain, the critical period in Zack's life were the early, developmental years. Indeed, Dr. Crown concluded this defendant had never left his childhood, having a mental age of 11 years old (16 R 1915). Thus, he concluded the Defendant's ability to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired at the time of the homicide.

When asked, he told the prosecutor that he had not talked with the people who were with the Defendant prior to the murder (16 R 1917). For him, a neuropsychologist who looked to the organic functioning of the brain, such information would have only confirmed what he had already concluded.[26] (16 R 1917-18).

Dr. Michael Maher, a psychologist, besides evaluating Zack, interviewed or saw videotapes of several of Zack's family. He reviewed the two volume transcript of Dr. McClaren's examination of the Defendant between the guilt and penalty phase of the trial (16 R 1928-29). Based on that information, he concluded Zack suffered from Post-traumatic Stress Disorder, Fetal Alcohol Syndrome, Attention Deficit Disorder, and was hyperactive (16 R 1930, 1937). He also testified he suffers from a chronic extreme emotional disturbance (16 R 1924), and his ability to appreciate the criminality of his conduct was substantially impaired (16 R 1957).

None of the defense experts said they needed more information for their evaluations, and Dr. Crown specifically said he had "sufficient information to arrive at my conclusion." (16 R 1917).

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[26] Talking with people at the time of the murders may have been important to a clinical psychologist, as Dr. Crown admitted, but that was not his speciality (16 R 1917).

It is unreasonable and unfair to reject all of the defendant's expert's testimony because Dr. Crown, the neuropsychologist, purportedly said he did not "need to look at the behavior of the Defendant from 1988." Dr. Crown looked for brain damage, which, by its nature, often occurs during a child's formative years and is permanent. He should not be faulted because he found it without also know what Zack did on June 13, 1996. That information would only have been a manifestation of what he had already concluded.

The other defense experts, not being neuropsychologist, used current information, and Dr. Larson, in particular, found the depositions of those who had seen Zack on the day of the murder "very helpful." (16 R 1878).

That Dr. McClaren, the State's expert, talked with people who had seen Zack on the day of the murder is deceptive. None of them saw the Defendant immediately before Smith was killed. They could not confirm whether he was drunk then or under any stress then or was acting impulsively then. That is important because they said Smith had drunk nothing, yet she was very much intoxicated when killed (9 R 515, 12 R 1178-79). Either these witnesses lied to Dr. McClaren, or they simply did not know what she and Zack did after they left Dirty Jo's.

What is more, the evidence of Zack's impulsiveness was there. On impulse he took Pope's Honda. On impulse he abandoned it because Smith seemed interested in him. On impulse he decided he had a future with her (12 R 1145).

Other evidence, such as the nightmares and the drug and alcohol addiction confirmed the Defense experts' conclusions.

The trial court, thus, had no justifiable reason for rejecting Zack's experts.

7. "However, this Court does consider the testimony of family members concerning the Defendant's youth and his mistreatment by his stepfather but such does not establish that

the Defendant was under the influence of extreme mental or emotional disturbance at the time he committed this murder." (6 R 868-69)

That conclusion is only a variation of the theme used by the court to reject Zack's mitigation, and it was discussed in point four. Childhood traumas and their impact do not evaporate because Zack, like the rest of humanity, grew up. Nibert v. State, 574 So.2d 1059, 1062 (Fla. 1990). Unlike the vast majority of adults his adult body housed the mind and spirit of a mutilated youth:

1. His mother's alcoholic binges while she was pregnant caused irreparable brain damage, and he suffers from Fetal Alcohol Syndrome.

2. Tony Midkiff sexually, physically, and emotionally abused his stepson for years.

3. When he was three years old he drank 10 ounces of vodka (16 R 1901). He was resuscitated, but part of his low wattage brain may have further atrophied (12 R 1197). The lack of parental bonding contributed to his brain decay (16 R 1903). That lack of nurturing tends to lead to criminal behavior (16 R 1923)

4. He has permanent brain damage that cannot be overcome (12 R 1193)

5. Zack was committed to a mental hospital when he was eleven years old.

6. While there, his sister brutally murdered his mother with an ax. He was allowed to attend her funeral, but was immediately returned to the facility. (12 R 1100)

7. He has unresolved grief over his mother's murder. (12 R 1108, 16 R 1841). Drinking became a form of self medication (16 R 1954).

8. He suffers from Post-traumatic Stress Disorder that he cannot overcome (12 R 1200, 1204). He handles stress irrationally and is always hyper vigilant (12 R 1240). Hence, stress produces problem with maturation, and increased his vulnerability to drugs and alcohol (16 R 1897).

9. He had no chance to develop normally after his early teenage years (16 R 1950).

10. He has the mental age of an 11 year old and the emotional maturity of a 10-year-old (16 R 1870, 1872).

As a result, he left his "childhood" with several deficiencies that directly related to his lack of moral culpability:

1. He was impulsive and overly sensitive to alcohol. (12 R 1192-93). FAS makes one more dependent on the instinctive, impulsive and emotionally driven areas of the brain (16 R 1951)

2. He lives in a primitive world, focussing only on surviving (12 R 1145).

3. He suffers from a chronic extreme emotional disturbance (16 R 1924).

4. He is impaired in a very basic way.

Consequently, as a direct result of his childhood and the warped mind it gave him, the events of leading of to the Smith murder were predictable:

1. At the time of the murder, there was pressure on Zack. He had just gotten rid of the red car believing he had a future with Smith. She squelched that idea when she told him he was going to have to leave. When she made, what Zack thought was an insulting comment about his mother and her murder, he hit her, and the two got in a fight. Misperceiving that she was going for a gun, he retrieved a knife and stabbed her.

2. He had no understanding of the acts leading up to the murder. He did not understand the gravity of what he did and lost control of himself in any event. (12 R 1205).

Contrary to the court's findings, Zack's youth and "mistreatment" by his stepfather provides the crucial explanation for the events leading up to Smith's murder, and they support his argument that when he killed her he was acting under the influence of an extreme emotional disturbance.

8. "Several people testified in behalf of the Defendant as to childhood abuse of the Defendant by his stepfather, Anthony Midkiff. However, although these witnesses allegedly saw the abuse, they never did anything about it-never reported it to appropriate authorities." (6 R 869)

Besides being irrelevant, it is simply untrue.

The Defendant's aunt saw Midkiff burn, beat, and torture Zack "all the time," but she could do nothing because "there was no control of Tony." (15 R 1728) His children were "petrified" of him (15 R 1785). His mother also tried to stop her husband, and they fought over his abuse repeatedly (15 R 1731). But one could not reason with Tony, and he responded to her pleas by beating her (12 R 1098, 15 R 1756). At the time of her murder, Zack's mother had just told her husband she was leaving him (15 R 1759)

Midkiff was a sergeant in the army, and on several occasions the Military Police were called to stop his beatings, but they did nothing (15 R 1743, 1755). Relatives tried to see the base commander about the soldier's abuse, but could not (15 R 1756-61).

Zack spent at least a year in a mental hospital in Louisiana, which is very unusual for a child only 11 years old, and a further indication someone thought he needed help (12 R 1100, 16 R 1856). At the end of his stay, the staff expressed considerable concern about returning the child to the father (16 R 1859). They also recommended special education classes for Zack (16 R 1859). The Anglemeyers, who were friends of the family, had also seen Midkiff's abuse (15 R 1764)). They took custody of Zack after the hospital for a while (15 R 1677). There was also a documented need for counseling. His step father never got that help because the distance was too far (16 R 1855). So, the court simply was wrong in concluding that no one reported the abuse.

Moreover, Zack's parents, predictably, individually and as parents were dysfunctional (16 R 1857). By the third grade they had "given up" on the boy (16 R 1882). Midkiff had not, however, given up on Zack's sisters. He raped Theresa and her sisters then promised to kill her mother if she told anyone (12 R 1064). Scared, she remained silent (12 R 1064). Her hatred of him seethed below the surface until she mistakenly murdered her mother instead of Tony (15 R 17798-79). She was

eventually found insane and hospitalized (12 R 1067-68). Another sister still has nightmares of being raped, and she eventually ran away from home (15 R 1780, 1783).[27] Zack, too brain damaged to flee, resorted to vandalism, setting fires and beating other children (15 R 1746).

Thus, the signs of abuse were there for anyone to see, and many did. Zack should not, in any event, be blamed because those who should have looked out for him did not.

9. "The people that the Defendant encountered during the few days prior to this murder all testified that they did not observe anything wrong or abnormal with the Defendant's conduct. There is absolutely no evidence that the Defendant exhibited any stress or strain or duress prior to the homicide in question." (6 R 869)

First, as mentioned before, how Zack acted days before the murder has little relevance to the weight the mitigation he presented. See, Wickham v. State, 593 So. 2d 191 (Fla. 1991). Second, even the testimony of those who saw him on the day of the murder has little significance. Third, no witness saw him at the time of the homicide, and the best the State could do was produce Russell Williams, who last saw Zack and Smith at 7:30 p.m. (8 R 253).

What we do know about Zack indicates that this void was critical. That is, he is impulsive, and when he drank, as he clearly had done that evening, he became very impulsive (12 R 1192-93, 16 R 1897, 1951). What is more, he probably drank much more than the two or three beers Williams saw him swallow in the hour or two he was with him (8 R 249). Zack was, after all, drug and alcohol addicted (17 R 2022). No one, on the other hand, saw Smith drink anything, yet the medical examiner reported that her blood alcohol level was . 26 (5 R 515). She could have drunk enough beer to get to that level only after she and Zack left Dirty Jo's. For a confirmed alcoholic to sit

[27] Midkiff also threatened one of Zack's sisters if she testified at her brother's trial (15 R 1784-85). Midkiff apparently was available for trial to rebut the testimony of his children, but the State never called him (12 R 1048-53).

around and simply watch Smith became totally drunk without joining in defies belief. Zack drank much more than Williams and others saw, and that probably happened after he left Dirty Jo's.[28]

Then, once at Smith's house, she let him know that he was going to have to leave. But what was he to do? He had abandoned the Honda, believing he had some future with her that she now nixed. So, the stress built, and with marijuana, beer, and maybe LSD coursing through his blood, he overreacted, or reacted abnormally to this unexpected revelation (16 R 1898) With his life or survival threatened, reality warped (12 R 1180), he drastically misinterpreted her comment about his mother, and impulsively struck out and killed her (12 R 1145, 1192-93, 16 R 1903, 1952)

Thus, that no one saw Zack under any stress or strain that day or during the past several days becomes irrelevant. Until the very end, when Smith announced that he would have to leave, life was mellowing out for Zack. Only then did the future become more bleak, and the pressures of merely surviving sufficiently strong that they triggered the wild, impulsive reaction that led to her death.

B. Mitigation ignored by the court.

Zack submitted a sentencing memorandum in which he presented several statutory and nonstatutory mitigating factors for the court to consider (6 R 823-827). At the sentencing hearing, he offered evidence to support them. The court's sentencing order, contrary to the requirements of Campbell v. State, 571 So. 2d 415 (Fla. 1990), largely ignored the evidence he presented, or rejected it for bizarre reasons. While it acknowledged some of the mitigation Zack offered, the trial judge never considered the mitigation as mitigation. Instead, it used what the Defendant offered to further justify imposing death. That was improper.

[28] Indeed, the State's theory has Zack hitting Smith with a beer bottle (13 R 1396).

1. What the court ignored. From the Defendant's sentencing memorandum, or based on the evidence at trial, he proved the following mitigators. The court's sentencing order made no mention of them.

a. Zack has suffered brain damage (12 R 1193, 16 R 1864-72, 1883, 1903). Knowles v. State, 632 So. 2d 62, 67 (Fla. 1993)

b. He has skewed perception of reality (12 R 1180, 1205, 16 R 1864, 1898, 1950).

c. He was in a mental hospital for a year when he was 11 years old, and since then has had no home, but was bounced among foster homes and physically and sexually abused (12 R 1104). Stephens v. Kemp, 846 F.2d 642, 653 (11th Cir.1988); Wickham v. State, 593 So.2d 191, 194 (Fla. 1991)("Clearly, the evidence regarding Wickham'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.")

d. He came from a dysfunctional home with very dysfunctional parents. Wickham, Campbell, cited above, at 419, fn. 3.

e. He has a mental age of 15 and the emotional maturity of a 10 year old (16 R 1870, 1872). Jones v. State, 705 So. 2d 1366 (Fla. 1998) (mental age of 13-14); Corbett v. State, 602 So. 2d 1240 (Fla. 1992) (14); Woods v. State, 531 So. 2d 79 (Fla. 1988) (12. The dissent also believed it would be cruel and unusual to execute someone with the mental age of a child.)

f. He is an alcoholic and a marijuana addict (17 R 2022). Ross v. State, 474 So. 2d 1170, 1174(Fla. 1985) (The defendant's past drinking problem was mitigating, "even though the defendant himself testified he was 'cold sober' on the night of the murder."); Mahn v. State, 23 Fla. L. Weekly S219 (Fla. April 16, 1998).

g. Without any dispute, Zack suffered a tragic, horrible childhood. All the experts, state and defense, agreed with that. That is what the court had to say about that uncontroverted mitigation:

> The evidence was susceptible to interpretation that the Defendant does not have emotional problems but rather was using his childhood treatment or mistreatment and the death of his mother as a manipulative tool to victimize people.".. . One could readily conclude that the revelation of the circumstances surrounding his mother's demise was solely for the purpose of gaining sympathy and trust . . .Several people testified in behalf to the Defendant as to childhood abuse of the Defendant by his stepfather, Anthony Midkiff. However, although these witnesses allegedly saw the abuse, the never did anything about it-never reported it to appropriate authorities. . . . The court feels that very little weight should be give to [the Defendant's childhood and family background information] because frequently defendants facing punishment will do anything to mitigate their sentence.

(6 R 868, 873)

In other words, the years of unrelenting abuse Zack suffered not only were his fault, he encouraged it so he could use it to mitigate a death sentence for a murder that had its roots in that very abuse. The quoted portions of the court's order is absolute and utter nonsense. The last sentence particularly exhibited Judge Tarbuck's contempt not only for the mitigation Zack offered but for the fundamental law underlying death penalty sentencing. Throughout the sentencing order, he clearly never considered this Defendant's mitigation as mitigation. Instead, he used it to support his idea that Zack preys on unsuspecting women. That approach ignored the dictates of Campbell, and its demand of a "thoughtful and comprehensive analysis" of the mitigation.

This unwillingness to consider the mitigation the Defendant offered also exhibited itself in the way he treated the evidence Zack suffers from Post-traumatic Stress Disorder. The court simply dismissed it by noting that "Expert testimony suggests that four to eighteen percent of the population of this country suffer from post-traumatic stress disorder. . . . Without exception, every expert testified that the vast majority of these people that have fetal alcohol syndrome and post-traumatic

stress disorder do not commit criminal acts." (6 R 867) First, not every expert said that. Only Dr. Larson gave those figures, and he limited his testimony to PTSD. That percentage and conclusion did not include FAS. More significantly, the court never considered the legitimacy of that conclusion for persons who have both FAS and PTSD and their criminal proclivities. When asked about that, Dr. McClaren, the State's expert said, "[P]eople that have all these difficulties are more at risk for violence (17 R 2042).

The court never considered the combination of FAS, PTSD, and drugs and alcohol. When asked about that even Dr. McClaren, the State's expert, admitted that "the more that some of these problems stack up, the more likely people are to become violent." (17 R 2042) Dr. Crown was more pessimistic. Combining FAS, PTSD, with drugs and alcohol "exacerbates [the tendency to criminal behavior] to the extreme." (16 R 1923-24)

None of what he said, or what the defense experts said about the layered or synergistic effect of these individually debilitating defects, found its way into the court's order.

Nor did the court consider as mitigation the years of physical, sexual, and emotional abuse Zack endured. It could not dismiss the nightmares Bobby Chandler witnessed just days before the murder as "a manipulative tool to victimize people." It never considered the impact on a three year child of drinking 10 ounces of vodka (16 R 1901). It never considered as mitigation the ax murder of his mother on him when he was 11 years old by his sister when he was in a mental hospital.

In short, the sentencing court has exhibited a flagrant disregard and even contempt for the mitigation Zack presented. Its redundant order condemning him to death shows no reasoned analysis of the evidence supporting a life sentence. It ignores evidence and misconstrues other proof to justify a death sentence. This court's holdings in Campbell, and the United States Supreme Court's

ruling in Lockett and Eddings reject what the court did here. This Court should reverse the trial court's sentence of death and remand for a new sentencing hearing.

ISSUE VI

THE COURT ERRED IN FINDING THE MURDER TO HAVE BEEN COMMITTED "FOR THE PURPOSE OF AVOIDING OR PREVENTING A LAWFUL ARREST," AS THERE WAS INSUFFICIENT EVIDENCE SUPPORTING THAT AGGRAVATING FACTOR, A VIOLATION OF ZACK'S EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

In sentencing Zack to death, the court found that he had murdered Ravonne Smith "for the purpose of avoiding or preventing a lawful arrest or detection for the crimes for which Defendant was ultimately convicted." (6 R 861-62). Justifying that aggravator, the court concluded that Zack had attacked and incapacitated her. He then got a knife and stabbed Smith four times, killing her. "Having been incapacitated, there was no need to kill the victim and the evidence is clear and convincing that the victim was killed so that she could not identify her attacker." (6 R 861) The court also found that he had murdered Laura Rosillo and stolen Bobby Chandler's guns only hours earlier, and he knew he could be linked to her death and the theft through the red Honda. That explains why he took the license plate off that vehicle. Also, after killing Smith, he took her car and some of her property (6 R 862).

The court relied in part on the State's closing penalty phase argument in which the prosecutor had contended the avoid lawful arrest aggravator applied because "There was no need to kill her."

> She was unconscious. The medical examiner told you that. The murder did not have to occur except but for one reason, she was killed so she could not identify her attacker and the man who was robbing her. Because as she law unconscious on that floor, the defendant then left her and he walks back to the kitchen and he retrieves the knife, and he comes back and he stabs her four times.

(17 R 2066)

The court erred in finding the "avoid lawful arrest" because there was insufficient evidence that the dominant motive for killing Smith arose from Zack's desire to avoid prosecution for the sexual battery and robbery. Menendez v. State, 368 So.2d 1278 (Fla. 1979).

In enacting Section 921.141(5)(e), Fla. Stat. (1996),[29] the legislature intended to protect law enforcement officers by justifying imposing a death sentence on defendants who had murdered them to avoid arrest. White v. State, 403 So.2d 331 (Fla. 1981). This narrowly conceived aggravator can have wider application, but only if certain, strict conditions are met. First, the dominant or only motive for the killing must be to avoid arrest. Urbin v. State, 24 Fla. L. Weekly S257 (Fla. May 7, 1998); Bates v. State, 465 So. 2d 490, 493 (Fla. 1985). Second, the proof of this intent must be very strong. Riley v. State, 366 So.2d 19 (Fla. 1979). The state must show by positive proof that the defendant committed the murder exclusively to stay out of jail. It does not become a legal default reason for imposing death. Some cases will illustrate the difficulty the State has had in carrying this burden.

In Garron v. State, 528 So.2d 353 (Fla. 1988), Garron murdered his wife with a gun. As one of daughters called the police for help, the defendant killed her. Although the trial court said her murder was done to avoid lawful arrest, this Court disagreed: "Here, there is no proof as to the true motive for the shooting of Tina [the daughter]. Indeed, the motive appears unclear. The fact that Tina was on the telephone at the time of the shooting hardly infers any motive on the appellant's part." Id. at 360.

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[29] "The capital felony was committed for the purpose of avoiding or preventing a lawful arrest of effecting an escape from custody."

Similarly, in Livingston v. State, 565 So.2d 1288 (Fla. 1990), the defendant robbed a clerk at a convenience store. After killing her, he said he was going to get the other clerk who had hidden in the back of the store. He fired a shot through the door of the closet in which she was hiding but did not kill her. The murder was not committed to avoid lawful arrest.

In Menendez v. State, 368 So.2d 12787 (Fla. 1979), the victim was found lying on the floor of his jewelry store with his hands outstretched in a supplicating manner. Menendez had killed the victim with a gun which had a silencer on it. While these facts certainly suggested that the defendant had committed the murder to avoid lawful arrest, they failed to satisfy the "very strong evidence" standard this court has required to justify finding this aggravator.[30]

In Doyle v. State, 460 So. 2d 353, 358 (Fla. 1984), Doyle raped and murdered the victim who knew him and would have reported the sexual battery. The trial court, in finding the Defendant committed the murder to avoid lawful arrest, reasoned that because he had been given a suspended sentence in an unrelated case, he committed the murder to prevent the reporting of the rape. The sentence would have been imposed if the latter offense had been reported. This Court rejected that finding: "It is a tragic reality that the murder of a rape victim is all too frequently the culmination of the same hostile-aggressive impulses which triggered the initial attack and not a reasoned act motivated primarily by the desire to avoid detection." Id. at 358.

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[30] On the other hand, in Lopez v. State, 536 So.2d 226 (Fla. 1988), the defendant and an accomplice entered a house, and once inside they shot (but did not kill) one victim and murdered her son. Lopez used a silenced gun to do so, and what made this case different than Menendez was his unambiguous statement that he could not afford to leave any witnesses. This court found that he committed the murder to avoid lawful arrest.

The trial court in Doyle justified applying the avoid lawful arrest aggravator in part because the victim could identify the Defendant. This court has, however, rejected finding it for that reason alone. Caruthers v. State, 465 So. 2d 496 (Fla. 1985).

Finally, if the defendant committed a string of murders in which this aggravator applied to the earlier ones, it does not necessarily applied to the later homicides. Wyatt v. State, 641 So. 2d 355, 359 (Fla. 1994)

Of course, this Court has approved this aggravator in many instances, but the facts of this case distinguish it from those. Zack, for example, never bound and abducted Smith, took her to a remote location, or hid her body; nor is there any evidence she pled for her life. Davis v. State, 698 So. 2d 1182 (Fla. 1997); Cave v. State, 476 So. 2d 180, 188 (Fla. 1985); Routly v. State, 440 So. 2d 1257, 1264 (Fla. 1983). He never confessed that he killed her because he did not want any witnesses. Walls v. State, 641 So.2d 381 (Fla. 1993). He did not kill her to prevent her from testifying in other proceedings. Provenzano v. State, 497 So. 2d 1177, 1183-84 (Fla. 1986). The facts also show little advance planning, such as cutting the telephone wires to the victim's house. Correll v. State, 523 So.2d 562, 567 (Fla. 1988). Likewise, nothing exhibits that he murdered Smith to avoid his past and create a blemish free future. Peterka v. State, 640 So. 2d 59, 70-71 (Fla. 1994)(Victim killed so Peterka could assume his identity.).

Indeed, we know precious little about how Zack killed Smith or why. Of course, we have the State's blood splatter expert who tried to recreate a scenario the State created, but her testimony was only "consistent" with its theory; she never said that was the only explanation for the evidence (9 R 482). Zack's explanation makes as much sense as the prosecutor's: after having sex with Zack, she said something about his mother and her murder that tricked him, and he turned on her,

eventually killing her.[31] The State's evidence was consistent with that scenario. Thus, this ambivalence does not satisfy the "strong evidence" standard this court has established for this type of murder. Routly v. State, 440 So.2d 1257, 1264 (Fla.1983).

What this Court said in Doyle, however, explains the murder: that the passions which may have exploded in the sexual battery continued with the murder. It also rejects the trial court's justification for this aggravator: that it applied because there was no need to kill Smith (6 R 861). Emotions, almost by definition, run counter to rational, reflective thought. Thus, that there was no need to kill her ignores the failings humans so often have. Rage, once uncorked, proves a difficult genie to get back in its bottle, and we can only guess that Zack murdered Smith to avoid arrest based on the murky facts presented here."[32]

This observation resonates because when questioned Zack admitted to killing Smith and never varied from his story, and he never said he murdered her to avoid being arrested for sexually battering her. Instead, she "provoked" his explosion of total criminality by her comments about his mother and her death (11 R 898, 922, 932).

If preventing capture was his intention, on the other hand, we would have expected Zack to have had a weapon handy. [33] Instead, he relied on the fortuity of finding a knife (and a small one at

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[31] This overwhelming reaction becomes more plausible in light of Zack's use of alcohol, marijuana, LSD, and cocaine during the hours before the homicide (8 R 249, 250, 11 R 920); and his extraordinarily poor impulse control (16 R 1898, 1906, 1933).

[32] The avoid lawful arrest aggravator likewise does not automatically apply in the current murder if it was the motive in earlier murders. Wyatt v. State, 641 So. 2d 355, 359 (Fla. 1994).

[33] Of course, Zack did have a weapon handy: his hands. He had killed Rosillo by strangling her, and significantly he did not use the same method to kill Smith. Instead he fled to the kitchen to get a knife because he thought she may have had a gun. This ad hoc defense further weakens an already strained argument that the Defendant's only motive in killing Smith was to avoid arrest. It shows, instead, a panicked reaction to a perceived threat. Perry v. State, 522 So. 2d 817, 820 (Fla. 1988).

that) in Smith's kitchen (9 R 505, 11 R 938). See, Bates v. State, 465 So. 2d 490, 492 (Fla. 1985)(Murder weapon is a pair of scissors found in office where victim worked and was killed. Avoid lawful arrest aggravator not applicable.)

Showing a further lack of planned motive, Zack picked Smith up at the bar where she worked, and he knew that others could recognize him. Indeed, Russell Williams had driven the couple around and smoked some marijuana with him. If murder was in his heart he would never have had wandered about Pensacola with another man smoking dope.

After Williams left, Zack did not take Smith to a desolate location; instead the pair returned to the house she shared with her boyfriend. Attacking and killing her and then leaving her body there hardly shows any thought out plan to murder to avoid arrest. Davis v. State, 698 So. 2d 1182 (Fla. 1997); Cave v. State, 476 So. 2d 180, 188 (Fla. 1985); Routly v. State, 440 So. 2d 1257, 1264 (Fla. 1983)

Even that Smith could have identified Zack, which has slight relevance to this aggravator anyway, Caruthers v. State, 465 So. 2d 496 (Fla. 1985), has even less significance here. She had known him for only a few hours, he was drifting through Pensacola, and he likely could have quickly moved on before the police would have become alerted to be on the lookout for him.

In short, with no direct evidence that Zack killed Smith to avoid going to jail, the State had to rely on circumstantial evidence to prove that aggravator. Its evidence, however, failed to provide the strong proof that his only or dominant motive in killing her was to avoid arrest. Instead, we have only a murky pool of facts in which motives remain submerged and clouded with ambiguity. This Court has refused to find this aggravator in such instances, requiring instead proof that shows with crystal clarity that the only or dominant motive to murder was to avoid arrest. Such is not the case here.

This Court should, therefore, reverse the trial court's sentence of death and remand for a new sentencing hearing. It should do so because the trial judge instructed the jury on this aggravator, and it may have improperly used it in recommending the court impose a death sentence. The lower court also gave great to this aggravator (6 R 863), so this Court cannot reliably find the error to have been harmless beyond a reasonable doubt.[34]

ISSUE VII

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

In sentencing Zack to death, the trial court concluded that he had murdered Ravonne Smith in a cold, calculated, and premeditated manner without any pretense of moral or legal justification (6 R 865-66). It did so for the following reasons:

1. Zack need money and he looked for a victim to get it.

2. He had killed another woman less than 24 hours earlier.

3. He had a smooth manner of stalking an hunting his prey and trapping her and then raping and robbing her.

4. The Defendant's explanation was nothing more than an effort to manipulate the minds of the jurors to get a life recommendation.

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[34] The court, in its sentencing order, found both that the "evidence is clear and convincing that the victim was killed so that she could not identify her attacker," and that "All of the above facts establish beyond a reasonable doubt that the sole purpose for the murder of the victim was to eliminate her as a witness. . . ." (6 R 861-62). Aggravating facts must be proven beyond a reasonable doubt. State v. Dixon, 273 So. 2d 1 (Fla. 1972)? Sentencing orders must be of unmistakable clarity Mann v. State, 420 So. 2d 578 (Fla. 1982). Such is not the case here, and this Court should remand, if for no other reason than for the lower court to clarify what level of proof it used in finding this aggravator.

5. Smith did nothing to obtain a weapon.

6. The murders were viciously done.

7. Zack got a knife after knocking the victim unconscious and methodically stabbed her.

8. After the murder, he washed the knife and returned it to the kitchen drawer. He took Smith's property, loaded it in her car, and drove away.

9. He put the victim's clothing in a drawer in her bedroom.

The court erred in finding this aggravating factor because the facts and cases from this court belie the court's conclusion of a defendant seeking new victims to satisfy his needs for money and sex. It either relied on evidence irrelevant to this aggravator or made speculative conclusions that fail to withstand scrutiny.

A. Evidence irrelevant to the CCP aggravator.

The court, in justifying finding this reason for imposing death relied on several pieces of evidence that were irrelevant or of such slight significance that they added nothing to the weight on the side of the scale that would tip in favor of finding the murder to have been CCP. First, the court merely cited that Zack had killed a woman, Laura Rosillo, less than 24 hours before murdering Ravonne Smith. Zack has argued the irrelevancy of that "similar fact" evidence in ISSUE I. Its use here only emphasizes that contention because the lower court did nothing with it other than to include it in its findings. Obviously it had relevance only to show Zack's bad character and propensity to kill women.

In Wuornos v. State, 676 So. 2d 966, 971 (Fla. 1995), the Defendant had murdered at least five men over the course of a year's rampage through central Florida. In finding the CCP aggravator applicable in one of the later homicides, the trial judge included that "Charles Carskaddon was not the first of Miss Wuornos' murder victims. The evidence indicates that by the time Miss Wuornos

killed Mr. Carskaddon she had a well established pattern of selecting white, middle-aged male victims, luring them to a secluded area with promises of sec, shooting them multiple times in the torso, and stealing their money, car and all other personality [sic] in their possession." The theft of Mr. Carskaddon's property did not occur spontaneously following the killing. Miss Wuornos carefully and calculatingly selected this victim, stalked him and lured him to a secluded area with the intent of killing and robbing him. Id. at 971. This Court rejected the CCP for reasons that resonate on several levels with this case:

> A part from the improper use of collateral crimes evidence to prove bad character or propensity, nothing in the record supports the last two sentences of this quotation. There were no witnesses to the killing of Carskaddon, and Wuornos's confessions themselves do not support the existence of cold, calculated premeditation.

Id. at 971.

Merely citing the earlier homicide, without providing any relevant link to the Smith murder exhibited only Zack's bad character and propensity to kill. It showed only that murder was easy for Zack-quite a damning comment on his character. As this Court concluded in Wuornos, it must find that the evidence of the earlier homicide had no pertinence to establishing the CCP aggravator.

Likewise, justifying this aggravator because Zack's explanation was a "mere effort[] to manipulate the minds of the jurors and secure from them a recommendation of life imprisonment" twisted his legitimate efforts to defend himself into an aggravating factor.
This Court rejected that approach to capital sentencing in Pope v. State, 441 So.2d 1073 (Fla. 1983), where it said that the absence of a defendant's remorse cannot justify a death sentence.

Similarly, here, Zack's valid defense cannot be turned against him. That the trial judge construed his constitutional right to present a defense as nothing more than "mere efforts to

manipulate the minds of the jurors" insults our adversarial system and raises the question of Judge Tarbuck's impartiality in this case. Perhaps Zack should have said nothing, but had he done so then the trial court would have claimed the CCP aggravator was unchallenged. Damned if you do. Damned if you don't.

The court also justified the CCP aggravator by noting that the Defendant had put Smith's clothes in a drawer. This strange piece of evidence does nothing to show his supposed cunning and calculation, and it becomes little more than a curiosity of the case. It is ridiculous to believe that by putting the clothes in the drawer, Zack intended to somehow hide the homicide. After all, the house had blood splatters all over it, Smith's body laid on the floor, and several people had last seen the woman leaving the bar with him. What Zack intended by putting the clothes in the drawer is a mystery, and evinces more a frazzled mind than one coolly and calmly planning and executing a stabbing murder. Mahn v. State, 23 Fla. L. Weekly S219 (Fla April 16, 1998) ("There is no evidence that Mahn acted in the deliberate, professional, and coldly calculating manner that is required to establish this aggravator.)

B. The court's speculation on the evidence.

Wuornos, just cited, provides further guidance. As there, the court in this case had no basis for concluding that Zack was "stalking and hunting his prey and trapping the prey. . . ." As in Wuornos, there were no witnesses to the murder and Zack's confession included no mention of stalking, hunting, or otherwise deliberately seeking someone to kill." To the contrary, Laura Rosillo sought out the Defendant (9 R 549, 11 R 886-87, 904, 907), and from the evidence Smith was as interested in the Defendant as he was in her (11 R 990). If he was "hunting" for someone to rape and rob Ravonne Smith would have been a poor candidate. Zack would have lost interest in her and fled once her friend, Russell Williams showed up. If he wanted to commit crimes for his own sexual

gratification and financial needs, he would not have rode around with him smoking marijuana. He would not have gone back to her house, but as in the Rosillo murder, he would have taken her to the beach.

Moreover, if he was looking for money, he would have ransacked her house.[35] He did not, and the only things he took were the easily pawned TV and VCR (11 R 939, 943). The theft of those items, items of obvious, significant value, and which could be easily sold, evince a mind wanting to quickly flee, and he took only that which could be easily seized and almost as effortlessly sold.

Also, there is no evidence Smith had any money or anything else of value that Zack could have taken when he met her in the bar. If he wanted money, a more likely source would have to have robbed the tourists who frequented the Pensacola beaches, stores, and motels. Better yet, he could have broken into the beach houses, many of which probably were unoccupied. Indeed, when he fled to Panama City after the murder that is what he did, taking the food and clothing of those who lived there (10 R 766) To have "stalked" a bar maid in the dive where she worked made little sense, especially when several others, including friends such as Russell Williams, saw her talking to and leaving with Zack. Particularly when she lived with a boyfriend she and probably Zack knew would return sometime during the evening (8 R 219, 298).

What he did evinces hardly evinces the mind of a maniac coldly plotting the murder of an unsuspecting Bambi. Instead it showed a man who was surprised that she could be interested in him

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[35] He would also have taken Laura Rosillo's rings and money (9 R 470-71). Mahn v. State, 23 Fla. L. Weekly S 219 (Fla April 16, 1998), this Court said, "There is no evidence that Mahn acted in the deliberate, professional, and coldly calculating manner that is required to establish this aggravator. The evidence reflects that Mahn, using hastily obtained weapons of opportunity, carried out the attacks in a haphazard manner, striking out at Debra, for example, when she confronted him after the attack on Anthony, and then fled in panic." Id. at 222.

and was willing to go with her to find out how far she was willing to take their relationship (11 R 933-34).

Moreover, accepting that he "stalked" her does not mean he did so to murder her. As likely it was to steal. He had, after all, stolen Chandler's guns and Edith Pope's car when he needed money and transportation. There is no evidence his method of getting funds now included murder, especially because he took nothing from Laura Rosillo. Indeed, if he needed money, he would have taken the rings found on her body (9 R 470). Gorham v. State, 454 So. 2d 556 (Fla. 1984).

The court also had no basis to find that Smith did nothing to obtain a weapon. Zack said he thought she had gotten one after they started fighting, or she may have been trying to find one (9 R 938). Nothing refutes that conclusion, and nothing supports the court's belief she had done nothing to justify his perceived need to defend himself.

Likewise, nothing supported the trial judge's belief that Zack methodically stabbed her only after she had been knocked unconscious.

At most, Zack may have methodically planned to take Smith's property, as he had done with Chandler's guns (9 R 582). Such intentions, however, do not equate to a cold, calculated, and premeditated plan to murder. Hardwick v. State, 461 So. 2d 79 (Fla. 1985)(A premeditated intent to rob does not infer a premeditated intent to murder.)

C. The lack of other evidence showing heightened premeditation.

Zack can understand why the trial judge had to speculate about Zack's intentions: it had none of the evidence other cases have had that justified finding the CCP aggravator. For example, in Hartley v. State, 686 So. 2d 1316 (Fla. 1996), this Court concluded it applied because Hartley and his cohorts had obtained a gun and a getaway car in advance of the murder, he did not act out of a frenzy, he forced the victim to drive to a remote location, and the defendant shot him five times

execution style. He also told a witness that he had decided to "get the victim." None of that happened here. Zack found the murder weapon, a small oyster knife, at Smith's house (11 R 940). He abandoned the Honda he had been driving before leaving with Smith. He never told anyone before or after the murder that he had planned to kill her, and while he stabbed her four times, that fact hardly show "the murder is 'more cold-blooded, more ruthless, and more plotting than the ordinarily reprehensible crime of first-degree murder.'" Jackson v. State, 648 So. 2d 85, 88-90 (Fla. 1994)(The CCP aggravator applies to "those murder which are characterized as execution or contract murders or witness-elimination murders."); Herring v. State, 446 So. 2d 1049, 1057 (Fla. 1984). There is scant evidence Zack had any plan when he happened to stop at Dirty Joe's bar on June 13, much less one that he had carefully conceived and executed. See, Suggs v. State, 644 So. 2d 64, 70 (Fla. 1994)(Victim abducted and taken to a remote location where she was stabbed in a manner similar to that described in a book titled "The First Deadly Blow." Entire episode showed a careful plan to avoid detection. Suggs had also told cellmates he was not going to be stupid this time.) Thus what he did not do (such as not murdering Smith after raping and robbing her) cannot support finding the CCP aggravator. Thompson v. State, 456 So. 2d 444 (Fla. 1984). There is also no evidence Zack took any measures to hide the execution of the murder, such as using a gun with a silencer, or a pillow to muffle sounds, or take her to a remote location. Lightbourne v. State, 438 So. 2d 380 (Fla. 1983).

D. Zack's mental deficiencies made it unlikely he could have coldly plotted anything.

Zack's brain is so defective that he lived life in a haze of distorted reality that led to primitive, instinctive and emotional overreactions. The destruction of his ability to rationally understand and react to his world began before his birth. His mother heavily drank beer and other

forms of alcohol while she carried Zack. He emerged into the world with a defective brain that never fully developed (16 R 1866, 1883, 1901-1902). The experts would diagnose him as suffering from Fetal Alcohol Syndrome, the chief characteristics being his low IQ, his erratic, impulsive behavior, and inability to handle stress (16 R 1892-93, 1939). He either could not change or had great difficulty adapting to changes, and was emotionally unstable (16 R 1947, 1949). This permanent affliction made Zack more dependent on the primitive parts of his brain. He tended to react instinctively, impulsively, and he ran more on emotion than intellect (16 R 1951). He lived a primitive existence, to survive first and only (16 R 1951)

Compounding this low wattage problem, he had a childhood of persistent, intolerable levels of child abuse. State and defense experts agreed he suffered from Post traumatic stress disorder-the same syndrome soldiers face after being exposed to sustained, heavy combat, and others experience who have endured overwhelmingly traumatic events (16 R 1930, 17 R 2022) Years of suffering abuse from his step father, having his sister ax murder his mother, and living in constant fear, no terror, altered his brain's chemistry.

Compounding those defects, Zack had ingested about 10 ounces of vodka as an infant, and that only exacerbated the problems he had because of the fetal alcoholism and child abuse.

Predictably, the Defendant turned to alcohol and drugs to medicate the pain he endured, and he became addicted to the them (17 R 2022).

Now, life would have been bad enough with only one of these defects, but when they were piled on top of each other, the criminal results were almost virtually assured (17 R 2042). As a result of the FAS, PTSD, alcohol and drug addiction, and hyperactivity and attention deficit disorder, Zack perceived and reacted to the world differently than ordinary people. He reacted to stress differently, inappropriately, and impulsively (16 R 1893). He behaved like a 11-12 year old child (16 R 1915,

1975). He behaved not simply differently but he became hyper excited (16 R 1893). He became not only impulsive and disruptive, but he could not be calmed (16 R 1898, 1900, 1905). No one could stop him (16 R 19095). Because of his defects he was explosive, he could not handle his emotions, and over responded in a primal, instinctive way to situations he had probably wrongly analyzed.

Hence, the court correctly concluded that at the time he murdered Smith he was acting under the influence of an extreme mental or emotional disturbance, and his ability to appreciate the criminality of his conduct to the requirements of the law was substantially impaired (6 R 873). Section 921.141(6)(b), (f), Florida Statutes (1996). Those deficiencies also precluded Zack from committing the murder in a cold, calculated, and premeditated manner, as this court has defined those terms. Misperceiving and misinterpreting what she said to him, he felt threatened by her. Unable to handle his emotions, he reacted on an instinctive, survival level. He exploded and attacked her, and could not stop until he had fled.

Hence, Smith's murder had none of the indicia this Court has required for the CCP aggravator to apply. Zack never used "calm and cool reflection." Jackson v. State, 648 So. 2d 85, 88-90 (Fla. 1994). It was not an "execution or contract murder." Mahn v. State, 23 Fla. L. Weekly S219 (Fla. April 16, 1998). Indeed, logically one cannot be under the influence of an extreme emotional disturbance or lack the ability to substantially appreciate the criminality of one's conduct and yet commit a murder in a cold, calculated, and premeditated manner. E.g., Maulden v. State, 617 So. 2d 298 (Fla. 1993)(Murder not CCP in light of Maulden's extreme emotional disturbance.); White v. State, 616 So. 2d 25, 26 (Fla. 1993); Walls v. State, 641 So. 2d 381 (Fla. 1994).

The trial court, therefore, erred in finding the CCP aggravator, and this Court should reverse its sentence and remand for a new sentencing hearing.

ISSUE VIII

THE COURT ERRED IN USING THE VICTIM IMPACT EVIDENCE PRESENTED BY THE STATE IN THE PENALTY PHASE PORTION OF ZACK'S TRIAL TO JUSTIFY FINDING THE MURDER TO HAVE BEEN ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL, AND IN ALLOWING THE PROSECUTION TO TELL THE JURY IT COULD GIVE WHATEVER WEIGHT IT WANTED TO THAT EVIDENCE, A VIOLATION OF ZACK'S EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

As part of its case during the sentencing phase portion of Zack's trial, the State presented (without objection), as victim impact witnesses, Ravonne Smith's mother and two of her brothers (15 R 1623-35). The mother was asked if he "ever [felt] like you were able to say goodbye to your daughter?" (15 R 1625) She said, no, and explaining that answer, she told the jury: "when we had Vonnie's viewing and I looked at her at the funeral home, I said I can't say goodby, this does not look like my daughter. And I held that thought because every time the phone rang for at least six or eight weeks after that, it was Vonnie calling me. Because that wasn't her. And she'd say Mama, I'm sorry that you've been worried, but that wasn't me in my house, I was on vacation and somebody else was there." (15 R 1625).[36]

Then, during the State's closing penalty phase argument, the prosecutor commented on the purpose of the victim impact evidence, generally following what the victim impact statute, Section 921.141(7), Fla. Statutes (1996), provided. It also provided a rationale, a justification for allowing them to hear this evidence. Significantly, however, it went further, and told it could give it whatever weight it felt was appropriate.

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[36] Ravonne Smith's two brothers also testified as victim impact witnesses (15 R 1629-35). At the sentencing hearing, Mrs Kennedy again spoke as did Ms Smith's sister in law (6 R 831-39).

> What that evidence was designed to show you and demonstrate to you, that this woman was unique, that she was loved, and that her loss is a loss is a loss to this community. That's what that evidence is. That this is just not some unnamed face. That there were people who loved and cared about her. And that the community is less now that we don't have her. You'll give weight whatever you feel is appropriate, but you are entitled to hear that.

(17 R 2077)

Using victim impact evidence to justify an aggravating factor and allowing the jury to give it whatever weight they believed was appropriate, without any judicial guidance on how to consider that proof, was such a serious error that it fundamentally tainted the reliability of the death sentence imposed on Zack.

In Payne v. Tennessee, 501 U.S. 808, 827, 111 S.Ct. 2597, 2609, 115 L.Ed.2d 720 (1991), the United States Supreme Court found no constitutional problem with allowing the jury to hear evidence about the impact the Defendant's murder had had on the victim's family.

> [I]f the State chooses to permit the admission of victim impact evidence and prosecutorial argument on that subject, the Eighth Amendment erects no per se bar. A State may legitimately conclude that evidence about the victim and about the impact of the murder on the victim's family is relevant to the jury's decision as to whether or not the death penalty should be imposed.

In response to this holding the Florida legislature enacted Section 921.141(7), Florida Statutes (1995), which permits victim impact evidence to be heard in capital sentencing proceedings. A victim's family members' characterizations and opinions about the crime, the defendant, and the appropriate sentence, however, remain inadmissible. Payne, 501 U.S. at 830 n. 2, 111 S.Ct. at 2611 n. 2.

This Court approved that section and the admissibility of victim impact evidence generally in Windom v. State, 656 So. 2d 432, 438-39 (Fla. 1995):

> Both the Florida Constitution in Article I, Section 16, and the Florida Legislature in section 921.141(7), Florida Statutes (1993), instruct that in our state, victim impact

> evidence is to be heard in considering capital felony sentences. We do not believe that the procedure for addressing victim impact evidence, as set forth in the statute, impermissibly affects the weighing of the aggravators and mitigators which we approved in State v. Dixon, 283 So.2d 1 (Fla.1973), cert. denied, > 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974), or otherwise interferes with the constitutional rights of the defendant. Therefore, we reject the argument which classifies victim impact evidence as a nonstatutory aggravator in an attempt to exclude it during the sentencing phase of a capital case. . . .The evidence is not admitted as an aggravator but, instead, as set forth in section 921.141(7), allows the jury to consider "the victim's uniqueness as an individual human being and the resultant loss to the community's members by the victim's death." Sec. 921.141(7), Fla. Stat. (1993).

(Emphasis supplied.)

Contrary to the limits this Court placed on the use of this proof, the trial court in this case used it to justify finding the HAC aggravator. Relying on the quoted portion of the mother's testimony, it justified finding it because

> The mother of the victim testified that for a long time after her daughter's death she did not believe her daughter was dead and when a knock came upon her door she rushed to the door thinking that it might be her daughter returning home. The reason for this disbelief was when she was taken to identify her daughter she was unable to do so by looking at her daughter's face.

(6 R 863-64)

There were several errors in using that evidence. First, Ms Kennedy did not say that. Second, she was unable to look at her daughter's face at the viewing at the funeral home, not at a morgue. She, like any parent grieving over the loss of a child, had a hard time saying goodbye to a daughter she loved. It was not, as the court implied, because Ms Smith's face and body were so badly damaged that she could not recognize her daughter. The court misconstrued what Ms. Kennedy said.

Finally, the court used the impact Smith's death had on her mother to aggravate the murder. While the HAC aggravator focusses on the impact on the victim, Banks v. State, 700 So. 2d 363, 367

(Fla. 1997), it is the murder victim, not her family that this court meant. The family's suffering, as real and poignant as it was here, has no relevance in determining whether a murder is especially heinous, atrocious, or cruel.

Compounding this error, the prosecutor told the jury they could give the victim impact evidence whatever weight they felt it deserved. In other words, they could consider it as aggravating evidence. Indeed, immediately before telling them that it had negated a large part of Zack's mitigation by telling the jury they should put sympathy aside, for Zack and the victim (17 R 2077). The jury, therefore, had the State telling them it could put the victim impact evidence on the scales in determining whether to recommend life or death. More than simply increasing the weight of the aggravators it reduced the consideration they gave Zack's compelling mitigation. Making matters worse the jury had no instructions from the court on how they should use that evidence (14 R 1575). Indeed, Zack asked the court to instruct the jury on the role of sympathy in determining what sentence to recommend, but the court refused to give it or any other guidance on the matter (14 R 1575-80). The prosecution's argument, and the trial judge's use of Ms. Kennedy's testimony to increase the significance of the HAC aggravator render the jury's recommendation and the resulting death sentence suspect and invalid.

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

ISSUE IX

THE COURT ERRED IN ADMITTING, AS THE STATE'S REBUTTAL CASE, THE TESTIMONY OF CANDICE FLETCHER, ZACK'S FORMER GIRLFRIEND, THAT MENTIONED ALLEGED, BUT UNCHARGED CRIMES, THAT MADE CONCLUSIONS ONLY A MENTAL HEALTH EXPERT COULD REACH, AND THAT CONTAINED HEARSAY ABOUT WHY A MENTAL HEALTH CENTER REFUSED TO TREAT HIM, ALL OF WHICH VIOLATED HIS FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS.

As its final witness in the rebuttal portion of the State's penalty phase testimony, the prosecutor presented the testimony of Candice Fletcher. She had lived with him for two years, during which time they had a child (17 R 2049). Zack also would visit Tony Midkiff, the stepfather who had physically, sexually, and emotionally beaten him during his childhood. According to Fletcher, the Defendant had lived with him when she first met him, and after she began living with him, he would "visit or socialize" with Midkiff. Zack objected to her characterization that the relationship was "one that you would expect between a stepfather and his son." (17 R 2051-52). The court overruled it. It similarly rejected the Defendant's complaint to Fletcher's testimony that Midkiff had cutoff the relationship because "Michael stole from him." (17 R 2052). Finally, Fletcher said that a mental health facility in Lawton, Oklahoma "wouldn't have anything to do with him because he wouldn't conform to any treatment program." (17 R 2054). Zack objected because that was hearsay. The court, as it had done with his other complaints, denied this one as well (17 R 2054). It erred, however, in each instance, and the result was that the jury's death recommendation, and the trial court's sentence were fatally tainted. This Court must reverse the trial court's sentence and remand for a new sentencing hearing.

1. The evidence that Zack had stolen from his stepfather was improper bad character evidence.

Section 90.404, Fla. Stat. (1996), provides the relevant portion of the evidence code that controls this argument:

> (2) Other crimes, wrongs, or acts.--
>
> (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.

Fletcher's testimony that Midkiff cut off his relationship with Zack because the latter stole from him introduced his bad character trait of not only stealing but taking things from his relatives. Such smearing of his character was improper. Zack has presented the law on this issue earlier (See ISSUE I). Several cases with facts very similar or less egregious to those here support this argument.

In Dibble v. State, 347 So. 2d 1096 (Fla. 2d DCA 1977), a Detective Herold arrested Dibble after she and a companion had tried to take money from him as the officer posed as a drunken derelict. While making the arrest, he told the defendant, "that this happens all the time on the street, people getting robbed, but this time I was a police officer, and 'You just all hit the wrong guy this time.'" Id. at 1097. Admitting that statement at trial, the Second District held, was error. It implied that Dibble had previously robbed someone, but there was no proof of such a crime, or that she had done it. Because the comment was "highly prejudicial," the court ordered a new trial.

In Jackson v. State, 451 So. 2d 458 (Fla. 1984), the defendant was charged with two counts of first degree murder, and during the state's case, one witness said that Jackson had told him that he was a '"thoroughbred killer' from Detroit." This court held that admitting that statement created

reversible error because "the boast neither proved that fact, nor was that fact relevant to the case sub judice." Id. at 461.

In Finklea v. State, 471 So. 2d 596 (Fla. 1st DCA 1985), the state charged Finklea and his co-defendant with two counts of robbery with a firearm. The key witness against the defendant, when cross-examined by the co-defendant, tried to clarify his testimony by claiming Finklea took him by a car lot on Friday, not Tuesday or Wednesday. Significantly, this later time referred to two uncharged robberies. Even though the court sustained Finklea's objection and gave a cautionary instruction, the "introduction of a prior unrelated criminal act is too prejudicial for the jury to disregard." Id. at 597.

Finally, although there are other cases supporting this point,[37] in Jackson v. State, 627 So. 2d 70 (Fla. 5th DCA 1993) , the detective investigating the robbery Jackson was eventually charged with committing testified that he had first learned of a possible suspect when another policeman told him "that an individual had been taken in on another charge and he fit the description that been issued . . . of the suspect of the case." Id. at 70. All this evidence did, the Fifth District held, was demonstrate the defendant's bad character or propensity to commit crime. Id. at 71. Thus, unsubstantiated allegations the defendant committed other crimes generally have no relevance to prove the charged crime. Admitting such claims not only is error, it is error requiring a new trial.

So, here, Fletcher's testimony that Zack had stolen things from his step father at some unspecified time in the past only established his bad character and evil propensity. These allegation

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[37] Malcolm v. State, 415 So. 2d 891 (Fla. 3d DCA 1982) (new trial for sale and possession of drugs required when the court admitted evidence of Malcolm's involvement in another unrelated sale); McClain v. State, 516 So. 2d 53 (Fla. 2d DCA 1987) (New trial in a sexual battery case required when the court admitted testimony of the victim/baby sitter who told the defendant that "You probably did that to [appellant's five-year old stepdaughter], too.")

of other crimes could only have fatally damaged the fairness of his sentencing hearing. Chapman v. State, 417 So. 2d 1028, 1031 (Fla. 3rd DCA 1982).

Because the accusation of the prior crimes was "highly prejudicial" or was "presumptively prejudicial" this court must reverse Zack's sentence and remand for a new sentencing hearing.

2. Candice Fletcher was unqualified to testify that the relationship between Midkiff and Zack was one "you would expect between a stepfather and his son."

Sections 90.701 and 90.702 ,Florida Statutes (1996), controls this portion of Zack's argument:

> 90.701. Opinion testimony of lay witnesses
>
> If a witness is not testifying as an expert, the witness's testimony about what he or she perceived may be in the form of inference and opinion when:
>
> * * *
>
> (2) The opinion and inferences do not require a special knowledge, skill, experience, or training.
>
> 90.702 Testimony by experts
>
> If scientific, technical, or other specialized knowledge will assist the trier of fact in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify about it in the form of an opinion; however, the opinion is admissible only if it can be applied to evidence at trial.

Fletcher's testimony, therefore, was admissible, if at all, only if what she said about what one would expect of a normal father/son relation did not require expert testimony.

Opinion testimony by lay witnesses is restricted to matters which they perceive, but which are hard to put into words. Eichelberger v. State, 662 So. 2d 1025, 1026 (Fla. 5th DCA 1995). In this case, we have a fundamental problem with the reliability of Fletcher's opinion that Midkiff and

his stepson had a normal father-son relationship. Hadden v. State, 690 So. 2d 573, 578 Fla. 1997) ("Reliability is fundamental to issues involved in the admissibility of evidence.")

First, we have no basis to believe she knew what such a relationship required. We know nothing of her background. Being a woman, she was not testifying from personal experience but what she observed. The State never explored her past to determine if she had seen "normal" male relationships. For all we know, she may have lived her life as the property of some member of "Hell's Angels."[38]

More significantly, the Midkiff -Zack interaction could hardly have been a normal one. Midkiff was not Zack's natural father. He was his stepfather. Also, by 1990 his wife/ Zack's natural mother had been dead for several years, having been murdered by one of the Defendant's half sisters with an ax, and subsequently declared insane. The complexities of "normal" father son relationships would need an expert to explain. In this case, sorting out the normal from the unusual demanded the knowledge, skill, and training of the expert. What she said may very well have misled the judge and jury. Stewart v. State, 622 So.2d 51, 54 (Fla. 5th DCA 1993)(Lay witness opinion testimony inadmissible if it misleads the jury.)

Moreover, Fletcher's own direct testimony belied her conclusion. Zack stole from his stepfather, and Midkiff retaliated by cutting off the relationship. What the Defendant did was abnormal, as was his stepfather's reaction.

Finally, unlike other opinion testimony, Fletcher was not speaking about a discreet event such as a stabbing, Kight v. State, 512 So. 2d 922 (Fla. 1987), or the speed of a car, Martinez v. State, 692

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[38]" [I] is not uncommon to find adult survivors who continue to minister to the wishes and needs of those who once abused them and who continue to permit major intrusions without boundaries or limit. Adult survivors may nurse their abusers in illness, defend them in adversity, and even, in extreme cases, continue to submit to their sexual demands." Herman, Trauma and Recovery, cited above, p. 112.

So. 2d 199 (Fla. 3d DCA 1997). Instead the State wanted her to reflect on events that had presumably taken place over a two year period (at least six years before trial), and synthesize some sort of generalized conclusion based on her overall impression of Midkiff's and Zack's relationship. There is absolutely no evidence it was reliable. Hadden, cited above.

Hence, the State needed an expert to testify about the normalcy of Zack's relationship with his father. Fletcher's testimony on that point was unreliable, and she never, in any event, established her qualifications to pass on it.

3. The mental health center would have nothing to do with Zack because he would not conform to any treatment program.

Clearly Fletcher's testimony about Zack's failure to follow a treatment program was hearsay. Section 90.80, Florida Statutes (1996). Because hearsay is admissible in the penalty phase part of a defendant's trial if the Defendant's constitutional rights are protected, this Court need only examine the unfair prejudice Zack received by the portion of Fletcher's testimony.

Section 921.141(1), Florida Statutes (1993), states that in the penalty proceeding

> evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (5) and (6). Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements.

Generally, if the defendant has an opportunity to cross-examine the persons who made the hearsay statements, his constitutional right to confront his accusers has been satisfied. Spencer v. State, 645 So. 2d 377, 383-84 (Fla. 1994). There are limits, however, to this general rule. If the State offers the tape statement of a victim of another crime the Defendant committed he will not have had a fair opportunity to rebut that testimony. Rhodes v. State, 547 So. 2d 1201, 1004-1205 (Fla.

1989). If witnesses in the penalty phase of a capital trial refer to reports made by other persons, the trial court will have erred in admitting such references. Rhodes v. State, 638 So. 2d 920, 924 (Fla. 1994); Gilliam v. State, 582 So. 2d 610, 612 (Fla. 1991). Similarly, co-defendants whose testimony would have been inadmissible under Bruton v. United States, 391 U.S. 123 (1968), remains so in the penalty phase even though a third party, subject to cross examination, presents it. Gardner v. State, 480 So. 2d 91 (Fla. 1985); Hall v. State, 381 So. 2d 683 (Fla. 1980).

In this case, we have, first of all, no idea what basis Fletcher had to conclude the Oklahoma mental health center would have nothing to do with Zack. Somerville v. State, 626 So. 2d 1070, 1073 (Fla. 1st DCA 1993)(lay witness required to present basis on which opinion is based.) Second, although he could have cross-examined her, he had no way to challenge the health center's conclusion that he was unwilling to continue with his treatment program. Rhodes, cited above.

Moreover, that hearsay justified, in her mind, her conclusion that Zack refused any treatment, and for him to rebut that he would have had to have presented other witnesses showing that he was willing to "conform to any treatment program" in Oklahoma. In Dragovitch v. State, 492 So. 2d 350, 354-55 (Fla. 1986), this Court found that "hearsay reputation evidence employed here is not susceptible to the fair rebuttal contemplated by the statute." It reached that conclusion be "Were we to hold otherwise, penalty phase proceedings could well turn into 'mini-trial' on collateral matters."

Similarly, in this case, the court and jury would have been forced to wander among the collateral hills as Zack led them through his evidence showing that he wanted to be treated in Oklahoma. Requiring such a "mini-trial" diversion in order for him to have "fairly rebutted" Fletcher's conclusion expects more of him that Section 921.141(1) demands.

Thus, the court should have granted Zack's objection on this point. That it refused to do so was error. That mistake and the others become reversible error not only because of their inherent

prejudice but also because of the use the court and the prosecutor made of them to rebut not only the existence of the mitigation but to reduce the weight the given them.

As part of his closing argument, the prosecutor minimized Midkiff's abuse by mingling it with the behavior Fletcher supposedly observed:

> ... Anthony Midkiff cut him off because he was being victimized by the defendant. The death of the mother, the post-traumatic stress disorder has been used by the defendant. . . .but clearly he knew that he had a way of getting into a mental health center when he wanted to.
>
> So what do we know about that? You know, based upon the testimony of Candace Fletcher, that in 1990 the mental health center in Lawton, Oklahoma refused to have anything more to do with him because the only time he showed up was when he thought he was going to jail. . . .the only time he asked for help is when he is in trouble as a way to avoid sanctions like incarceration. He's using it to his own ends. It's a manipulative tool.

(T 2080-81).

> ... Don't let yourself be manipulated.

(T 2084).

The court also relied on Fletcher's testimony in rejecting the wealth of mitigating evidence Zack presented. In its sentencing order, it found:

> Several people testified in behalf of the Defendant as to childhood abuse of the Defendant by his stepfather, Anthony Midkiff. However, although these witnesses allegedly saw the abuse, they never did anything about it -- never reported it to appropriate authorities. The Defendant was living with his stepfather in 1988 as an adult and shortly thereafter he established a relationship with one Candice Fletcher and she bore a child by the Defendant and while this relationship existed, the Defendant continued to interact and socialize with his stepfather, Anthony Midkiff. Candice Fletcher testified that the relationship between the Defendant and his stepfather terminated because the Defendant had taken something from his stepfather.
>
> As to the Post Traumatic Stress Disorder and the Fetal Alcohol Syndrome, the Defendant claims that he sought help therefor but never could obtain the same. This is rebutted by the testimony of Candice Fletcher that in 1990 a mental health center in Lawton, Oklahoma, refused to have anything more to do with the Defendant because the only time he showed up for counseling was when he thought he was going to jail.

(6 R 689)

Candice Fletcher's testimony was more than a "very brief" comment that never surfaced again. Rhodes, 638 So.2d 920, 924 (Fla. 1994). It became, instead, a significant part of the State's and court's rationale they used to rebut Zack's mitigation that he was viciously abused by Tony Midkiff.[39]

Fletcher's testimony, therefore, could not have been harmless beyond a reasonable doubt, if for no other reason that this Court cannot know what effect it had on the jury. Dragovitch v. State, 492 So. 2d 350, 355 (Fla. 1986). It should reverse the trial court's sentence of death and remand for a new sentencing hearing.

ISSUE X

THE COURT ERRED WHEN IT REFUSED TO GIVE ZACK'S PROPOSED INSTRUCTION ON THE ROLE SYMPATHY PLAYED IN THE SENTENCING PHASE OF THIS CAPITAL CASE, A VIOLATION OF THE DEFENDANT'S EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

During the penalty phase charge conference, Zack requested the court instruct the jury on the limited and natural role sympathy played in determining whether they should recommend a life or death sentence.

> MR. KILLAM: Judge, I renew my request that the Court clear up with the jury the issue of sympathy. As you can see in these instructions, there's no anti-sympathy instruction in here, and in my voir dire I was restating what the United States supreme Court had said about sympathy, basically that if it is something that arises as a result of a moral reasoned response to mitigating evidence, then just because somebody might have feelings of sympathy doesn't mean that they should

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[39] Indeed, one popular book on the subject has the intriguing title, Men Who Hate Women and the Women Who Love Them. One who has not been abused would expect those who have to avoid those who have abused them. While a natural and logical assumption, the truth, as the battered women's syndrome attests, is much different. Like moths drawn to a flame, the abused often are attracted to those who have beaten them as children.

> disregard that mitigation evidence, because by implying that they would disregard that.

(15 R 1573)

> The State objected to such guidance, arguing, "for 200 years we have never let sympathy, bias and prejudice get into a jury room in a court of law, and unless Mr. Killam can produce a case with an approved instruction that says that the jury can be sympathetic based upon a reasoned moral response, then in essence what we're allowing sympathy, bias and prejudice to do is to creep into that jury room.

(14 R 1575)

> For the record the court read into the record the jury instruction, Zack wanted:
>
> During the guilt-innocence phase of this trial you were instructed that sympathy for one side or the other should not be considered. The mitigation evidence inevitably involves sympathy which should not cause you to disregard mitigation evidence that is reasonably established. Mere sympathy which is purely an emotional response to what you have hear should not influence your decision in any way. However, if sympathy arises as part of a reasoned, moral response to mitigation place before you, you may consider that in your decision about the appropriate penalty.

(14 R 1580)

The court then denied Zack's requested instruction (14 R 1580). That was error.

In Saffle v. Parks, 494 U.S. 108 (1990), the court considered whether a habeas petitioner was entitled to relief because the trial court had instructed the jury in the penalty phase of his capital trial to "avoid any influence of sympathy." It held that for it to rule in his favor, the nation's high court would have to create a new rule, something it refused to do for those seeking a writ of Habeas Corpus. Teague v. Lane, 489 U.S. 288 (1989).

This Court has, however, held that the Saffle court squarely passed on that issue, and it has consistently rejected arguments similar to the one Zack raises here. Hunter v. State, 660 So.2d 244, 253 (Fla. 1995); Hitchcock v. State, 578 So.2d 685, 694 (Fla. 1990). Because Saffle never squarely rejected the argument on the merits Zack now presents this Court should reconsider its holdings in

Hunter and Hitchcock. It should do so because the Court, at the State's urging, refused to let Zack voir dire the jury on "sympathy which is based upon a reasoned moral response to mitigating evidence that gives you a reason to find mitigation." (7 R 128-29, 131). Instead, it the guilt phase jury instruction on sympathy: "Feelings of prejudice, bias or sympathy are not legally reasonable doubts and they should not be discussed by any of you in any way in reaching your verdict." (7 R 131) Further minimizing the value of Zack's mitigating evidence, the State in its closing argument told the jury to "Put sympathy aside. I don't want sympathy in that jury room on my evidence, and don't let it in the jury room on what the Defense presented to you." (17 R 2077) Thus, the jury was told that by the court during voir dire and the State during its closing argument that they had to reject Zack's mitigation because it might have raised their sympathies. This is entirely different that basing a recommendation for life or death solely on sympathy without regard to the aggravating and mitigating circumstances. Zack simply wanted the jury to know that sympathy for the Defendant was legitimate if it was based on the evidence presented at his sentencing hearing. Contrary to what the State argued, they did not have to put that legitimate empathy aside. Nor did they have to put aside any mitigation they may have found because it created, as a collateral matter, feelings of sympathy within them.

With the State's argument misleading the jury into believing that they could not consider any of the evidence that created sympathy for or against Zack, the court should have given his requested instruction providing the guidance they needed. See, Hooper v. State, 476 So. 2d 1253 (Fla. 1985)(Overton, dissenting. The prosecutor's closing argument can justify giving a defense requested instruction.)

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

ISSUE XI

THE TRIAL COURT VIOLATED FLORIDA AND FEDERAL LAW BY RETROACTIVELY APPLYING THE NEW AGGRAVATING CIRCUMSTANCE OF MURDER COMMITTED WHILE ON FELONY PROBATION, THEREBY ERRONEOUSLY PERMITTING THE STATE TO INTRODUCE EVIDENCE TO PROVE IT, INSTRUCTING ON IT, AND FINDING IT PROVED.

Zack murdered Ravonne Smith in June 1996. On October 1, 1996 an amended Section 921.141(5)(a) became effective. It provided:

> (5) AGGRAVATING CIRCUMSTANCES.--Aggravating circumstances shall be limited to the following:
>
> (a) The capital felony was committed by a person previously convicted of a felony and under sentence of imprisonment or placed on community control or on felony probation.

Ch. 96-302, § 1, Laws of Fla. (underscore in original) (codified at § 921.141(5)(a), Fla. Stat. (Supp.. 1996); see also ch. 96-290, § 5, Laws of Fla.[40]

In sentencing Zack to death, Judge Tarbuck found that this changed aggravating factor applied to him.

> 1. The capital felony for which the Defendant is to be sentence was committed while he had been previously convicted of a felony and was under sentence of felony probation.
>
> The Defendant, MICHAEL DUANE ZACK, III, was placed on probation in Oklahoma on October 11, 1991, for a period of five years for a felony. This homicide occurred on June 13, 1996. Therefore, the Defendant was on felony probation from the State of Oklahoma when the instant murder was committed. There has been no evidence to the contrary. Therefore, this aggravating circumstance has been proved beyond a reasonable doubt and this aggravating factor will be given great weight.

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[40] The reviser's note to this amendment put its effective date as October 1, 1996. See also Chapter 96-302, Section 2. For ex post facto analysis, the crucial date is when a law becomes effective. See, State v. Hootman, 23 Fla. L. Weekly S164 (Fla. March 26, 1998); Livingston v. State, 510 So.2d 295, 296 (Fla. 1987).

(6 R 860)

In addition, the State to introduced evidence to prove Zack was on probation (16 R 1620-21), and it argued it to the jury (17 R 2062-23), and the court instructed the jury to consider the factor (17 R 2108). This was all error, however, because this amended section of the death sentencing statute should not have been retroactively applied to this defendant.

A. The statute was never intended to be retroactively applied

Initially, this factor has no application here because there is absolutely no indication in the language of the statute or its legislative history that the Legislature ever intended it to apply retroactively. The general rule of law strongly disfavors retroactive application of new statutes. See Landgraf v. USI Film Products, 511 U.S. 244 (1994); Lynce v. Mathis, 117 S. Ct. 891 (1997). Florida law presumes a new statute is intended to be prospective only, and that presumption may be overcome only when the Legislature has stated "expressly in clear and explicit language" its intent to apply the statute retroactively. See, e.g., State v. Lavazzoli, 434 So. 2d 321, 323 (Fla. 1983) ("It is a well-established rule of construction that in the absence of clear legislative expression to the contrary, a law is presumed to operate prospectively."); Gupton v. Village Key & Saw Shop, Inc., 656 So. 2d 475, 477 (Fla. 1995) ("We have held that a substantive law that interferes with vested rights--and thus creates or imposes a new obligation or duty--will not be applied retrospectively."); Alamo Rent-A-Car v. Mancusi, 632 So. 2d 1352, 1358 (Fla. 1994) (substantive statutes are prospective absent clear legislative intent to make them retroactive). No statute could be more substantive and unsuited to retroactive application than one newly defining or creating an aggravating circumstance.

Since 1980, this Court consistently has held that being on probation is not being under sentence of imprisonment and does not qualify as aggravating circumstance under section

941.141(5)(a). See Peek v. State, 395 So. 2d 492 (Fla. 1980) ("Persons who are under an order of probation and are not at the time of the commission of the capital offense incarcerated or escapees from incarceration do not fall within the phrase 'person under sentence of imprisonment' as set forth in section 921.141(5)(a)."); see also Pettit v. State, 591 So. 2d 618 (Fla. 1992); Trotter v. State, 576 So. 2d 691 (Fla. 1990) (Trotter I), receded from on other grounds, Trotter v. State, 690 So. 2d 1234 (Fla. 1996), cert. denied, 118 S. Ct. 197 (1997) (Trotter II); Bolender v. State, 422 So. 2d 833 (Fla. 1982); Ferguson v. State, 417 So. 2d 631 (Fla. 1982). This is consistent with the long-established tradition of Florida law distinguishing probation from substantially more harsh and severe custodial restraint measures including imprisonment and community control. See Ch. 948, Fla. Stat. (1995); Skeens v. State, 556 So. 2d 1113 (Fla. 1990); State v. Mestas, 507 So. 2d 587 (Fla. 1987).

The present case is not like Trotter II, where the Legislature acted specifically and promptly to correct a new and recent interpretation of legislative intent, effecting a minor refinement of existing law. When the Legislature changed 16 years of uniform precedent to create an aggravating circumstance for felony probation in 1996, it made "a substantive change in Florida's death penalty law." Trotter II, 690 So. 2d at 1237**.**

Moreover, due process requires penal statutes be strictly construed in favor of the accused. See U.S. Const. amend. XIV; art. I, § 9, Fla. Const.; Perkins v. State, 576 So. 2d 1310 (Fla. 1991). Judicially enlarging the statute under these circumstances violates due process. See Bouie v. Columbia, 378 U.S. 347 (1964); State v. Snyder, 673 So. 2d 9 (Fla. 1996).

B. The statute as applied is an *ex post facto* law

Even if the Legislature had intended this new aggravating circumstance to apply retroactively, doing so here violates the ex post facto prohibitions of the United States and Florida Constitutions.

See U.S. Const. art. I, § 10; Lynce v. Mathis, 117 S. Ct. 891 (1997); art. I, § 10, Fla. Const.; Dugger v. Williams, 593 So. 2d 180 (Fla. 1991).

Lynce did more than apply the ex post facto clause to a particular early release program. Rather, the United States Supreme Court unanimously corrected this Court's long-held general outlook on what kinds of law changes merit ex post facto protection. The Court made clear that any retroactively applied law that alters a determinant of a prisoner's punishment, produces a sufficient risk of increasing the measure of punishment attached to the covered crimes, or alters a prisoner's eligibility for lesser punishment, is an ex post facto law. Lynce expressly rejected this Court's artificially broad interpretation of what constitutes a "procedural" law not within the ex post facto prohibition. See 117 S. Ct. at 898 n.17.

An aggravating circumstance is the single major determinant of a capital sentence. It is an essential element of a death sentence, and it must be proved beyond a reasonable doubt. Its availability defines eligibility for the death sentence. Its existence certainly increases the risk that one convicted of capital murder will get a death sentence. It could be the difference between a life and death recommendation and a life and death sentence. No law could be more substantive. Accord Bowen v. Arkansas, 911 S.W. 2d 555, 562-64 (Ark. 1995) (holding an aggravating circumstance is "a substantive provision that cannot be applied retroactively" under federal ex post facto clause), cert. denied, 116 S. Ct. 1861 (1996).

Likewise, Florida's ex post facto standard provides that even the retroactive diminishment of access to a purely discretionary or conditional advantage constitutes a violation of the Florida Constitution. See Wickham, 593 So. 2d at 181. A life recommendation and a life sentence are advantages jeopardized by allowing co-sentencers to consider, find, and weigh an inapplicable aggravating circumstance.

This Court's prior ex post facto aggravator decisions hold that minor refinements of existing law or changes that merely reiterated an element already present in the crime of first-degree murder are not ex post facto laws. See, e.g., Trotter II; Valle v. State, 581 So. 2d 40 (Fla. 1991) (law enforcement victim aggravator); Combs v. State, 403 So. 2d 418 (Fla. 1981) (premeditation). Appellant strongly disagrees with these cases and asks this Court to overrule them in light of Lynce. In any event, they are easily distinguished because a complete abrogation of 16 years of settled law is no minor refinement, and being on felony probation is not a factor present in murder or any preexisting aggravating circumstance. See, State v. Hootman, 23 Fla. L. Weekly S164 (March 26, 1998)

Zack was constitutionally entitled to rely on the law of punishment that existed when his offense occurred. The State cannot prove beyond a reasonable doubt the error did not affect the jury's or the judge's determinations. The jury was exposed to penalty phase testimony, strong argument, and instructions on this factor. The judge and jury, co-sentencers in Florida's death penalty scheme, found and gave "great weight" (6 R 860) to this aggravator. This Court should reverse the trial court's sentence of death and remand for a new sentencing hearing.

ISSUE XII

THE COURT ERRED IN REFUSING TO ADMIT A PHOTOGRAPH OF ZACK'S FAMILY DURING THE PENALTY PHASE OF HIS TRIAL, A VIOLATION OF HIS EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

As part of Zack's defense in the penalty phase of his trial, he sought to introduce the picture of his extended family that included his niece.

> I intend to attempt to introduce this photograph of Theresa's daughter. It's mitigation evidence in that it shows that the defendant has family that's not here, that if he were to get a life sentence, he would be able to communicate with the child.

(16 R 1795)

The court noted that the child "is partially of black descent" and the State objected to introducing it because it was irrelevant and it was to seek the sympathy of the black jurors on the panel (16 R 1795-96). The court excluded the picture, concluding that he could elicit the evidence from the child's mother, who Zack planned would testify anyway (16 R 1796-97) Excluding that picture was error.

This Court has usually faced the issue of admitting photographs at a trial from the perspective of the defendant seeking to exclude "gruesome and gory" pictures the State wants admitted during the guilt phase of a trial. Almost every time, this court has rejected claims of error, reasoning that the pictures were relevant. For example, this Court most recently rejected the argument that pictures of the defendant's dead wife and two children, introduced only in the penalty phase of the trial, were irrelevant. Zakrzweski v. State, 23 Fla. L. Weekly S352 (Fla. June 11, 1998). What it said there has particular relevance here:

> In his next issue, Zakrzewski asserts that it was improper for the trial court to admit prejudicial photographs of the victims into evidence. We rejected a similar argument in Pope v. State, 679 So. 2d 710 (Fla. 1996), cert. denied, 117 S. Ct. 975 (1997). In Pope, we stated:
>
> > Pope next asserts that the trial court erred by admitting inflammatory photographs of the bloody bathroom where the stabbing occurred, autopsy photographs, and the victim's bloody clothes. We disagree. The test for admissibility of photographic evidence is relevancy rather than necessity. Nixon v. State, 572 So. 2d 1336, 1342 (Fla.1990), cert. denied, 502 U.S. 854, 112 S.Ct. 164, 116 L.Ed.2d 128 (1991). The photographs of the bathroom and the clothes were relevant to establish the manner in which the murder was committed and to assist the crime scene technician in explaining the condition of the crime scene when the police arrived. The autopsy photographs were relevant to illustrate the medical examiner's testimony and the injuries he noted on Alice. Relevant evidence which is not so shocking as to outweigh its probative value is admissible. Having viewed the

> photographs, we cannot say the trial court abused her discretion. See Jones v. State, 648 So. 2d 669, 679 (Fla. 1994), cert. denied, 115 S.Ct. 2588, 132 L.Ed.2d 836 (1995).

Id. at 713-14. Further, we note that the objection in Pope arose at the trial phase.

> In the present case, Zakrzewski objected to the photographs being admitted at the penalty phase. Section 921.142(2), Florida Statutes (1995), which describes the procedure for the penalty phase of a capital case, states "[a]ny such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence . . . ." For these reasons, we reject Zakrzewski's argument.

Zakrzewski, at 23 Fla. L. Weekly S 353

The reasoning used in that case applies to the facts presented here. The picture was relevant to show that Zack not only had a family, but could, even behind prison walls, contribute to it. Such was valid mitigating in that it revealed his character. Because the picture tended to support that factor, it was relevant. See, Burns v. State, 699 So.2d 646, 699 (Fla. 1997)(Family relationships and the support the defendant provided his family are admissible as nonstatutory mitigation regarding Burns' character.)

Without ever considering Zack's position, the trial court excluded the picture because it was unnecessary. "Well, I think--I think that same information can be conveyed to the jury orally rather than by this photograph." As Zakrzewski, and other cases have repeatedly held, however, relevancy, not necessity is the measure of admissibility. See, Ruffin v. State, 397 So. 2d 277 (Fla. 1981).

On the other hand, neither the State nor the court could find any evidence Zack wanted it introduced to elicit sympathy from any black jurors there may have been on his jury. That speculative suggestion came from the prosecutor, and without any evidence supporting his conclusion the trial court bought it (16 R 17696).

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

CONCLUSION

Based on the arguments presented here, Michael Zack respectfully asks this honorable Court to 1) reverse the trial court's judgment and sentence and remand for a new trial, 2) reverse the trial court's sentence of death and remand for a sentencing hearing before a jury, or 3) reverse the trial court's sentence of death and remand for resentencing.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Richard Martell, Assistant Attorney General, by delivery to The Capitol, Plaza Level, Tallahassee, FL 32399-1050; and a copy has been mailed to appellant, on this date, January 7, 2000.

Respectfully submitted,

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

_____
DAVID A. DAVIS
Assistant Public Defender
Fla. Bar No. 0217543
Leon County Courthouse
Suite 401
301 South Monroe Street
Tallahassee, FL 32301
(850) 488-2458