IN THE SUPREME COURT OF FLORIDA

WILLIAM FRANK DAVIS,

Appellant,

v. **CASE NO. SC06-1868**

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE **FOURTH** JUDICIAL CIRCUIT,
IN AND FOR **DUVAL** COUNTY, FLORIDA

REPLY BRIEF OF APPELLANT

NANCY DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

NADA M. CAREY
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NO. **0648825**
LEON COUNTY COURTHOUSE
301 SOUTH MONROE STREET, SUITE 401
TALLAHASSEE, FL 32301
(850) 606-8500

COUNSEL FOR APPELLANT

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STATEMENT OF FACTS

The state has included a Statement of Case and Facts in its Answer Brief at pages 1-60, which is identical in substance to the Statement of Facts in Appellant's Initial Brief, with the following exception: The state's version of the facts omits entirely the testimony of the mental health experts, Drs. Krop, Dudley, and Yates;

ARGUMENT

Point 1

THE TRIAL COURT ERRED BY INSTRUCTING THE JURY ON THE AGGRAVATING CIRCUMSTANCE OF COLD, CALCULATED, AND PREMEDITATED, BY ALLOWING THE PROSECUTOR TO ARGUE THIS AGGRAVATOR TO THE JURY, AND BY FINDING THIS AGGRAVATING CIRCUMSTANCE.

Appellant argued in the Initial Brief that the evidence does not show, as CCP requires, cool and calm reflection,

careful planning, and an intent to kill more contemplative, more methodical, and more controlled than that necessary to sustain conviction for first degree murder. Instead, the evidence shows that Davis was not thinking, that the killings resulted from a spur-of-the-moment impulse beyond Davis's own understanding and control, and that his conscious awareness was disconnected from reality during the murders. Appellant also argued that in finding the CCP aggravating factor, the trial court relied on factual inaccuracies and overlooked or misapprehended evidence critical to CCP.

The uncontested facts are that Davis arose from his bed/couch late one night, took a knife from his kitchen, walked several blocks to the home of two neighbors he barely knew, and killed them.[1] The entire episode from the moment he arose from his bed/couch to the final knife blow lasted about 15-20 minutes. There is no evidence at all he planned killing the victims before he arose from the couch. There is ample and consistent evidence that appellant had suffered from a variety of serious mental and emotional disorders since early childhood, and that immediately before, during, and after the attack appellant was in a state of dissociation.

In response, the state has focused on embellishing the facts with transparently manipulative adjectives and verbs rather than explaining how the facts fit this Court's

[1] Police testified Davis said he also took a bag and extra clothing to change into because he knew it would be bloody, but Davis later testified he did not say or do that.

definitions of CCP; ignored or misread unrefuted expert testimony; and misread, misinterpreted, or misstated important facts. Finally, the state did not cite a single case remotely similar to the present case in which this Court upheld CCP.

First, the state has sought to demonstrate the existence of CCP by dressing the limited facts with rhetorical embellishments, strained exaggerations, and unexplained conclusory statements: Davis didn't walk three blocks, he "navigated" or "negotiated turns and passed several other trailers," Answer Brief at 70; Davis didn't carry a knife that night, let alone a cheap kitchen knife, but carried a "deadly weapon" "in the cover of darkness," Id. at 69, 70; he "paused to reflect some more" before knocking on the women's door, Id. at 70; he "showed determination in overcoming the two women's resistance," Id. At 70; the "executions were laborious," Id. at 71; the victim's resistance "provided additional confirmation of Davis's determination to kill her," Id. at 72; Davis's following Wren into the kitchen after stabbing her at her doorstep "confirmed his cold, murderous premeditated calculation," Id. at 71; "executing" Albin when she walked into the kitchen is further evidence of Davis's "extremely heightened premeditation." Id. at 72. So, in the last two examples, Davis following Wren into the kitchen and stabbing her confirms his "cold, murderous premeditated calculation," but Albin walking into the kitchen toward Davis, the exact opposite scenario, also confirms his "extremely heightened

premeditation." How? The state doesn't seem to distinguish between premeditation and heightened premeditation, or explain how either scenario proves either premeditation or heightened premeditation, let alone how the two opposite scenarios prove whatever degree of premeditation.

More importantly, the state didn't define CCP, didn't detail the requirements necessary to meet CCP, and didn't show how the facts of this case satisfy those requirements. The state's sole stab at defining CCP was a brief excerpt from Lynch v. State, 841 So.2d 362, 371-372 (Fla. 2003), in which the Court noted that "[t]he facts supporting CCP must focus on the manner in which the crime was executed, e.g., advance procurement of weapon, lack of provocation, killing carried out as a matter of course." Unfortunately, this very broad outline of general considerations doesn't distinguish between the elements required for first-degree murder and the additional elements required for CCP -- the fundamental question here -- and thus the state never says what the minimum threshold for CCP is and how the facts of this case meet, or don´t meet, that threshold.

Second, the state diminishes the mental health experts' testimony by stating their "opinions rely substantially upon Davis's narratives and Davis's answers to psychological testing," Answer Brief at 74, and then almost immediately points to several cherry-picked comments by the experts that, standing alone, appear to support its position, while ignoring

everything else they said,[2] including testimony accepted by the trial judge. For example, the state notes that Dr. Krop testified he did not believe Davis had no control when he killed Wren and Albin. Answer Brief at 75. The state also notes that Dr. Krop said dissociation is a coping mechanism, not a diagnosis, that "[i]t was a way to divorce himself from what he was doing but it did not cause him to do it or impair his ability to conform." Answer Brief at 75.

But this summary of Dr. Krop's testimony about Davis's state of mind when he committed the murders is both incomplete and inaccurate, first because it falsely suggests that a dissociated state is intentional and irrelevant, inconsequential, or trivial to the issue of CCP, and second because it is wrong. In fact, Dr. Krop testified that dissociation separates the person from what he or she is experiencing, and is neither intentional nor conscious. Initial Brief at 73-75, XXI 2659-2660. This is relevant to CCP because it tends to negate the requirement of heightened premeditation. Second, Dr. Krop did not testify that Davis's dissociated state did not impair his ability to conform his behavior to the requirements of the law. Dr. Krop said the exact opposite: that because Davis was dissociated, his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was "certainly"

[2] This is like pointing to a pine seedling that's not on fire while the whole forest is burning.

impaired. Initial Brief at 33, XXI 2705. As Dr. Krop explained, Davis "wasn't fully cognizant or really thinking very much about what he was doing" during the attack but soon after recognized that what he had done was wrong. XXI 2669.

The state also claims that Davis was not consistent or truthful about not planning the murders and in describing them as an out-of-body experience (i.e., that he made this up after his first story failed, Answer Brief at 69, and later "thr[ew] a devil story at the experts," Id. at 75). But the state does not explain how initially blaming the murders on someone else proves cool and calm reflection, careful planning, and a cold-blooded intent to kill more contemplative, methodical, and controlled than that necessary to sustain first-degree murder. Nor does the state explain how initially blaming the story on someone else proves Davis's subsequent confession was a lie. Less than 24 hours after the attack, and less than three hours into initial police questioning, the feeble-minded Davis dropped his ludicrous story about the boyfriend attack. From that point on, in all police interviews, in all mental health interviews, in all guilt and penalty phase testimony, Davis undeviatingly described his mental state that night in terms mental health experts identify as dissociation.

The state also contends that appellant's reliance on Dr. Krop's testimony is misplaced because Dr. Krop did not believe Davis's possession story. Answer Brief at 75. Wrong. Dr. Krop's testimony on this issue bears quoting in full:

A Yes, yes, he has not tried to shirk – while he's been talking to me he hasn't tried to shirk criminal responsibility and probably has gotten to the point where he truly believes that what he – I presume again told the jury and told me about being possessed in a way. I mean, we hear this simple kind of thing about the devil made me do that, it's almost as if he had a need to contribute [sic] his actions to some demonic, Satanic kind of antichrist kind of thing.

Q When you said you initially saw him in September of – September 3rd, 2003, was that essentially what he told you about what happened then?

A Not to the same degree. He'd talk about that he wasn't fully in possession of his facilities, he talked about when this was happening that he almost felt like he was outside of his body, I think he used the term it was like a dream, he used the term that he was like watching himself in a movie. I think what he told me the first time was fairly accurate. What he described – what it is a well known phenomenon in psychiatry and psychology called disassociation. When somebody is engaged in something out of character, something that's awful, one of the ways that they – that the psychological or psych[e] deals with that is to sort of separate the person from what he or she is doing. So it doesn't make the person insane, it doesn't make the person have – considered to have a major psychiatric disorder.

Again it's a coping mechanism. It's not necessarily intentional or conscious but dissociative. Dissociative state is something that is well researched and well documented for individuals that are either having something terrible happen to them such as being sexually abused or doing something terrible to somebody else that is out of character or something truly in their conscious knowing is awful.

So I believe when he pretty much described what happened the first time, I think that was a relatively accurate presentation.

When I saw him the second time, again he had been in jail a lot longer, he – he had been in jail longer and he was at a point where he was having more and more difficulty coping. You could see by his physical health, he was not bathing, he was not taking care of himself. And I think psychologically he was getting to the point where he was starting to

> believe some of these things in terms of that have happened to him on the day in question and that's what he presented the second time.
>
> So again, I want to reiterate I don't think he was lying to me, I just think he had to have himself believe that.

XXI 2659-2660 (emphasis added).

Thus, Dr. Krop, clearly believed that Davis' description of himself experiencing the well-researched phenomenon of dissociation was truthful. So did the trial court.

However, as appellant noted in his Initial Brief at 75-76, the trial court conflated the unconscious, unintentional, and uncontrollable psychological coping mechanism of dissociation during the murder and Davis' later conscious, after-the-fact explanation of his bizarre, out-of-character violent experience that night as being "possessed." The state has done the same thing here. Though Dr. Krop, a scientist, understandably didn't believe Davis was "possessed" by the anti-Christ, he absolutely accepted that Davis experienced a state of dissociation that night, and also believed the uneducated, unsophisticated, and perhaps superstitious Davis's possession story an honest effort at explaining his dissociation.

The state also argued that Dr. Krop's opinion that Davis's judgment was compromised when he committed the murders should carry little weight because that opinion was based on the absence of a rational motive for the murders, which opinion in turn was based on Krop "simply accepting" Davis'

word that he was not upset about the break-up with Amy Ware, which acceptance should be discredited because "Krop conceded that Davis lied to him." Answer Brief at 76.

This argument has no basis in fact or logic. First, in reverse order, the only so-called "lie" Davis told Dr. Krop related to whether Davis had his shirt on or off in the shower that night. XXI 2676, 2712. It was a simple confusion about an irrelevant, trivial detail, no more. And, Dr. Krop did not merely accept Davis's word that the crime had no rational motive. Dr. Krop had reviewed all the materials related to the case, Initial Brief at 29, XXI 2641-2644, and said he found nothing in any of them to suggest the crime was related to Davis's break-up with Amy Ware or anything else. Initial Brief at 34, XXI 2671-2672. (Nor did any witness suggest revenge or any other motive for the murder.) Furthermore, Dr. Krop believed Davis incapable of telling him the motive due to Davis's "thought processes at the time." XXI 2713-2714. That is, his thought processes were too jumbled and confused to produce anything rational. Finally, the lack of a rational motive was not the basis for Dr. Krop's opinion that Davis was impaired. Lack of a rational motive was the reason Dr. Krop had no opinion on whether the impairment was substantial. Further, this wasn't the only reason Dr. Krop could not give an opinion on the extent of Davis's impairment. Krop said he couldn't ascertain the degree of impairment because he didn't have a full explanation for what was going through Davis's

head. Asked whether Davis was substantially impaired, Dr. Krop said,

> Because I really don't have a full explanation as to what was going through his head, I don't like to speculate on such an important issue. I think that certainly there was impairment there or else he would not have been dissociating, but to the degree is very difficult for me to provide at this time.

XXI 2705. Thus, dissociation is ipso facto evidence of some degree of impairment.

Third, the state misread, misinterpreted, or misstated a number of facts:

At page 71, footnote 11, the state asserts that the trial court could properly "accredit" Dr. Krop's testimony that Davis told him he sat 2-30 minutes on the victims' porch immediately before the murder. Wrong. The only evidence, from Davis himself, is that he sat there "about one minute" before initiating contact with the victims. Dr. Krop, after initially testifying, "I thought it was about a half hour," XXI 2679, later corrected himself and said he misread his notes.[3] Dr. Krop didn't know how long Davis sat there.

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[3] Q (By prosecutor) Did he state under line three when he sat on the stairs or outside it was for about an hour?
A No, I have the note that says it was in me for about an hour. So what he was referring to is this internal presence had been going for about an hour. I realize that I don't have there how long he actually sat down on the stairs before he went in there.
Q You're still thinking it's about half an hour that he told you?
A You know, I remembered this hour but now when I'm looking at it I see that wasn't

Also at page 71, footnote 11, the state says Davis "reflected" and "dared himself" to commit the murders on the porch during that same 2-30 minutes and that "it does not matter" whether he sat there for one second or thirty minutes. Wrong. The only evidence we have, from Davis, is that he didn't think or reflect about anything, and that a voice, like someone talking to him, dared him to do it. Appellant also disagrees with the state that the difference between a momentary, blank pause and an up to 30 minute reflection about impending murder "does not matter." The trial court mentioned the two to thirty minute time-frame three times in finding CCP, concluding that this "time for reflection" showed impulse control and heightened premeditation. III 492, 495.

The state incorrectly asserts Amy Ware moved away "several weeks" prior to the attack. Answer Brief at 70. It was actually several months. XIV 1288-1297.[4]

The state asserts that Davis's "rational" attempts to hide evidence after the crime provide additional support for CCP, Answer Brief at 69, 71, but fails to explain how Davis' feeble efforts at "covering his tracks" after the crime indicate cool and calm reflection, a careful plan, and a cold-

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necessarily referring – so I really don't know how long he stayed before he went inside.

XXI 2682-2683.

[4]The trial court's order also erroneously states that "less than a month after Amy Ware moved, defendant was arrested," III 472, whereas Ware testified she had lived with her sister and mother for only about a month in May 2003. Since Davis was arrested August 21, 2003, Ware had moved about 2.5 months before the arrest.

blooded, contemplative killing. If the state believes that Davis' efforts at hiding evidence after the crime indicate hyper-rationality, it should explain what was rational about leaving the bloody murder weapons on his own bedroom dresser? And what, exactly, was rational about Davis leading his roommate, and police, to the fresh murder scene? And what was rational about offering a story so implausible his average guy roommate, Armstrong, immediately asked the one obvious question exposing the absurdity of Davis's story: Why didn't you call police [for help, after being stabbed by an assailant and escaping, but leaving two defenseless women behind]?[5]

Fourth, the state argues that even if Davis's judgment was compromised or impaired, this doesn't negate CCP. Answer Brief at 76. Why not? The state never says why impaired capacity is not relevant to this aggravating factor, nor

[5]The trial court also made similar unsupported assumptions related to Davis's conduct after the attack. It stated that Davis wiped *fingerprints* off the door knob. III 512. In fact, he wiped the knob but there is no evidence he intended to wipe away fingerprints. The trial court also said Davis did what he could to cleanse the scene of anything that could connect him to the murders, including covering the bodies, trying to clean blood from the kitchen, putting utensils in the sink, cleaning himself in the bathroom, and locking the front door. III 518. The evidence shows, however, through Davis's repeated and consistent statements, which both experts accepted as accurate, that Davis covered the bodies because he felt bad (how would covering the bodies disconnect Davis from the murders, anyway?), and that he tried to clean the kitchen out of respect for the two women, and cleaned himself because he was bleeding profusely from two wounds. Davis also removed the knives from his cousin's house the following morning "out of respect" for her. See Initial Brief at 20.

distinguished the cases appellant cited in which CCP was negated due to compromised judgment. Id. at 74.

The state next points to a bit of testimony that "doesn't negate CCP," that is, that Dr. Dudley's testimony that although Davis was vulnerable to brief periodic psychosis, he didn't have enough information to say whether or not Davis had experienced a "psychotic deterioration" at the time of the crime. Answer Brief at 77.

But the state must do more than point to testimony or evidence that doesn't negate the aggravating factor. The state has the burden of proving the aggravating factor beyond a reasonable doubt. This at least requires showing that the evidence is consistent with CCP (which the state failed to do); the evidence also must be inconsistent with the absence of CCP. Furthermore, the absence of psychosis does not prove CCP. See Initial Brief at 69-70, for definition of CCP.

The state cites two cases which it claims support its position that this murder was CCP, Sexton v. State, 775 So.2d 923 (Fla. 2000), and Connor v. State, 803 So.2d 598 (Fla. 2001). Neither case is remotely similar to the present case. After Sexton's grandchild died under mysterious circumstances, Sexton decided to kill the child's father, his son-in-law, because he feared his son-in-law would report him to the police. Sexton enlisted his mentally-disabled son, Willie, to do the killing and trained Willie over a three-week period on how to use a garrotte. Willie, with Sexton's help, took the

intended victim into the woods and strangled him. The murder was a classic execution-style murder: the victim was led into the woods on a pretext, overwhelmed and bound, then strangled with a rope. There are no similarities between Sexton´s training his mentally-disabled son over a three-week period to murder a son-in-law for a specific reason and Davis's sudden, impulsive grabbing of a knife and killing two people he barely knew. One event involved collaborative planning and consideration over weeks, while the other, from first impulse to kill to completion took 15-20 minutes.

Nor is Connor similar to the present case. Connor and Margaret had an affair. Margaret ended the affair and returned to her husband. Connor went to Margaret's house and killed Margaret's husband. Connor then kidnapped Margaret's thirteen-year-old daughter, Jessica, took her to his home, and hid her for a day. While Jessica was hidden in his house, police visited Connor, and he calmly answered their questions and denied knowing anything about Jessica's whereabouts or her father's murder. At some point, Connor bound and gagged Jessica. Hours later, he strangled her to death. Unlike the present case, Connor did not kill Jessica while under the influence of extreme mental or emotional disturbance. In upholding the CCP aggravator, the Court noted there was no evidence Connor killed her in a rage and concluded "the elapsed time of a full day between the kidnapping and the murder indicates a heightened premeditation." In Connor,

then, unlike the present case, the facts showed a "lengthy, methodic series of atrocious events" as well as a "substantial period of reflection and thought." See Nibert v. State, 508 So.2d 1 (Fla. 1987).

Last, the state contends that none of the cases appellant cited "apply." Answer Brief at 78. The state does not discuss why these cases do not apply for the propositions for which they are cited but instead embellishes the facts of both the cited cases and the instant case with various adjectives and verbs that intimate relevant distinctions between them. Suffice it to say, all of the cited cases include some combination of far greater reflection, careful planning, and cold-blooded intent to kill than the present case.

Here, Davis, with no discernible motive, suddenly rose from his couch, got a knife from his kitchen, walked several blocks to neighbors he barely knew, and stabbed them to death. There is no evidence he coolly and calmly reflected during that 15-20 minutes. There is no evidence of a well-developed or careful plan, since the evidence shows his "planning" was limited to his spontaneously grabbing a kitchen knife and a bag to carry bloody clothes. The evidence suggests the murders were not remotely contemplative (not with a borderline IQ; mental age of 15-16; frontal lobe damage; incapable of thinking through decisions even when not dissociating; committed while under the influence of extreme emotional

disturbance[6]), methodical (nothing methodical about the wild swinging and slashing of 34 haphazard blows, not one singly lethal, against women he outweighed by 100 pounds), or controlled (impaired capacity to conform conduct to the law during dissociated state, extreme emotional disturbance). CCP does not apply here, and the trial court erred in instructing the jury on and in finding this aggravating circumstance.

Point 2

THE TRIAL COURT ERRED IN FAILING TO CONSIDER AND WEIGH EVIDENCE OF DAVIS'S IMPAIRED CAPACITY.

Appellant argued in his Initial Brief that the trial court failed to address the competent, substantial evidence showing that Davis's capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of the law was impaired to some degree.

In response, the state has argued that the trial court's failure to find that Davis's impairment was not substantial should be affirmed, and that appellant "overlooked" Dr. Krop's testimony where he declined to speculate whether Davis was

[6] In discussing the extreme emotional disturbance mitigating factor, which the trial court found, the court erroneously stated that Dr. Dudley based the borderline personality disorder diagnosis on his belief that Davis had been severely abused and on Davis's dreams. In fact, Dr. Dudley based his diagnosis on the fact that Davis met eight of the nine criteria, when four to five criteria require a diagnosis. XXI 2779-2784. Also, the trial court wrote that Dudley testified that Davis has had BPD since childhood, when Dudley actually testified at length that Davis developed BPD during adolescence as a result of the confluence of his emotional problems and cognitive deficits, for which he received no treatment or interventions. XXI 2743, 2746-2747, 2751.

substantially impaired. Answer Brief at 88. The state did not read appellant's argument very carefully, and thus missed the point. Appellant did not argue that the trial court should have found substantial impairment but argued rather that the trial court should have considered the evidence of Davis' impaired capacity, even though the degree of his impairment was not specified. Furthermore, appellant specifically discussed Dr. Krop's testimony on this issue. Initial Brief at 82.

On page 88, the state again asserts (as it did in its response to Point 1) that Dr. Krop "did not say that [dissociation] ... impaired his ability to conform." Dr. Krop did say Davis was impaired, however, and did say that his dissociative state indicated he was impaired: "certainly there was impairment there or else he would not have been dissociating." XXI 2705.

At page 86, the state cites Pittman, Bryant, and Zack in support of the trial court's finding that there is nothing in the record to demonstrate that Davis could not conform his conduct to the requirements of law. Answer Brief at 87.

This argument is without merit. The state has cherry-picked a few quotations from the court's opinions in these cases without even discussing the facts. The facts of the murders, as well as the evidence of impaired capacity in those cases, are not comparable to the present case. In Pittman, the defendant learned his estranged wife's sister had tried to

press criminal charges against him for an alleged rape that occurred five years earlier. He made threats against his wife and her family. On the eve of the murders, he arranged a visit to his father's house, whom he had not visited in months, then walked the short distance to his wife's family's home, cut the phone lines, entered the house, and murdered his wife's sister and parents. He poured gasoline throughout the house and yard and burned the house down. He stole the sister's car, abandoned it, then later returned and burned it as well. Pittman denied that he committed the murders, and as the trial court noted, Pittman went about the killings and the destruction of evidence in such an efficient manner that but for a lady picking roses one morning who happened to see him running from the burning car, the case might not have been successfully prosecuted. The only evidence of impaired capacity mentioned was the expert's opinion. And, in upholding the trial court's rejection of the mental mitigators, all this Court said was that after reviewing the record, "we conclude that the trial court could have reasonably rejected the expert's testimony concerning Pittman's mental and emotional condition." This case is not helpful on this issue.

In Bryant, Bryant shot a store owner, Andre, during a robbery. Bryant and another man entered the store after Andre took the receipts to the back. Bryant went to the back, pretending to look for a bathroom. When Andre turned his

back, Bryant pulled his gun. Andre began to wrestle with Bryant over the gun, until Bryant got control and shot the owner. Bryant shot him two more times and ran out of the store. In the meantime, Bryant's co-defendant had ordered Andre's wife to open the cash register and demanded money. When Bryant got home, he asked his wife to dispose of the gun. At trial, Bryant denied any involvement in the robbery or killing. Bryant had committed numerous prior violent felonies and was of average or above average intelligence. Bryant argued the trial court failed to consider expert testimony that Bryant suffered from neurological defects that would cause a lack of impulse control and impaired judgment under stress. (Note: the mitigator proposed was neurological defects, not the impaired capacity mitigator). The trial court discounted this testimony, concluding that Bryant's actions demonstrated otherwise, to wit, in his taped confession, Bryant described the planning of the robbery, the selection of possible targets, the rejection of one target due to the number of people at the location, and the election of Bryant and Dexter Kirkwood to enter the second target's market because the victim didn't know them but knew the other accomplices.

In Zack, the defendant was convicted of the rape, robbery, and murder of Ravonne Smith. The trial court found all the statutory mental mitigators for which evidence was offered, and Zack's only argument on appeal was that the trial

court did not give them sufficient weight. This Court held the trial court was entitled to consider the testimony of witnesses regarding the weight to give this mitigator because the witnesses were interacting with Zack over a period of several days during which he had committed two murders, a rape, and several robberies.

Last, the state asserts that if the trial court's failure to consider Davis's impaired capacity is error, it is harmless "in light of all the ways the trial court did consider Davis' alleged mental condition and in light of the weighty, serious aggravation." But, Davis's mental state at the time he committed the murders is of paramount importance in determining the penalty he deserves. Because Davis's capacity to understand what he was doing and control his behavior was diminished, because he was not fully aware of what he was doing, his degree of culpability for the crime is lessened. This is critical to the weighing of aggravators and mitigators and to the determination of whether the death penalty is appropriate, and therefore the trial court should have considered the evidence of Davis' impaired capacity.

Point 3

THE TRIAL COURT ERRED IN ALLOWING THE PROSECUTOR TO ARGUE IN CLOSING THAT SCHOOL FIGHTS AND DAVIS'S BEHAVIOR IN JAIL AFTER THE HOMICIDE COULD BE USED TO REBUT OR REDUCE THE WEIGHT OF THE MITIGATING CIRCUMSTANCE OF NO SIGNIFICANT PRIOR CRIMINAL HISTORY AND IN USING SUCH INCIDENTS TO REDUCE THE WEIGHT OF THIS MITIGATOR.

In his Initial Brief, appellant argued that under Hess v. State, 794 So.2d 1249 (Fla. 2001), the lack of prior criminal history mitigator can be rebutted only by criminal activity that took place before the murder. Therefore, because the jail incidents took place after the murder, and the school fights were not criminal activity, it was error for the trial court to consider, and for the prosecutor to argue, that this evidence could be used to impeach this mitigating factor.

At page 89, the state first asserts that appellant did not object to the evidence of Davis's jail behavior, and the issue thus was unpreserved, and therefore "the state was entitled to comment on it and the judge entitled to weigh it." The state is wrong. Although appellant did not object to the admission of evidence of Davis's jail behavior, noting that it was relevant to whether Davis could do well in a structured environment, appellant did object to its use to impeach the mitigator of no prior criminal activity. XXIV 3237-3241, 3275. This issue was preserved.

On the merits, as to jail incidents, the state argues that as long as the trial court finds that the mitigator exists, the court is in compliance with Hess, and post-crime

activity may be used to diminish the weight of the mitigator. Answer Brief at 91. Such a construction would eviscerate the ruling in Hess altogether. Furthermore, this interpretation is absurd. If a defendant has no prior criminal history, what is being reduced?

With regard to Davis's school behavior, the state notes one incident not mentioned by appellant (that Davis hit his cousin with a pine cone) and argues that Davis's "misbehaviors" were substantially more significant than the one incident in Ramirez v. State, 739 So.2d 568 (Fla. 1999), which involved stealing a $10 bill. Answer Brief at 90. The state has not addressed appellant's argument, which is that Davis's "misbehaviors" in school were exactly that—misbehaviors—and not criminal activity. The lack of prior criminal history mitigator explicitly refers to "criminal" history, not childhood misbehavior. The state has not cited authority or made any argument to suggest otherwise.

Point 4

THE DEATH PENALTY IS NOT WARRANTED IN THIS CASE, WHEN THE CRIME WAS COMMITTED DURING A DISSOCIATIVE EPISODE BY A SEVERELY EMOTIONALLY DISTURBED AND MENTALLY HANDICAPPED INDIVIDUAL WHO HAS THE MENTAL AGE OF A 16-YEAR-OLD AND NO PRIOR HISTORY OF VIOLENCE.

In his Initial Brief, appellant argued that the aggravating circumstances (HAC, committed during a burglary, and prior violent felony) should be given reduced weight given they all arose from a one-time, unplanned and inexplicable outburst of violence; that the extensive and weighty mitigating circumstances (lifelong mental and emotional handicaps, brain damage, low IQ, immaturity, severe psychiatric illness, extreme emotional disturbance, impaired capacity, lack of prior criminal history, remorse), place this case outside the category of "least mitigated;" and that in similar cases, this Court has found the death penalty disproportionate.

In response, at page 92, the state first takes issue with appellant's assertion that neither Davis nor the mental health experts could explain what possessed Davis to kill the two women, asserting that "even Dr. Krop opined that Davis' possession was Davis concoction." Wrong. Dr. Krop did not say that Davis "concocted" or "fabricated" that he had been possessed. Dr. Krop said Davis "truly believes" he was possessed because he was having so much difficulty coming to terms with what he had done. XXI 1659. Furthermore, the

trial judge accepted Krop's view: "It is clear to this Court that the Defendant may truly have convinced himself that his body was taken over by an evil spirit or the anti-Christ as his way of dealing with the murders he committed." IV 545.[7]

At page 93-96, the state cites Pittman v. State, 646 So.2d 167 (Fla. 1994); Lawrence v. State, 846 So.2d 440 (Fla. 2003); Robinson v. State, 761 So.2d 269 (Fla. 1999); Smithers v. State, 826 So.2d 916 (Fla. 2002); and Mann v. State, 603 So.2d 1141 (Fla. 1992), as comparable cases. These cases, however, are not remotely similar to the present case.

Pittman killed his wife's parents and sister because his wife was divorcing him and her sister had accused him of rape. Pittman had threatened all four. On the day of the murders, Pittman cut the phone lines, entered the family's home, stabbed to death the sister and her parents, and then burned down the house. He stole the sister's car and later burned it. At trial, Pittman denied having anything to do with the murders. Unlike the present case, these murders were

[7] Also, at page 98, n.18, the state misquotes the trial court's order with regard to Davis's physical and emotional abuse as a child. The state asserts that the court order says, "'While the Court does not find that Defendant was severely beaten by his parents, this Court does not totally discount Ms. Rodriguez's and Mr. Guy's testimony' concerning Defendant being called pejorative names." The order actually states: "While the Court does not find that the Defendant was severely abused by his parents, this Court does not totally discount Ms. Rodriguez's and Mr. Guy's testimony. There also was some indication that the Defendant was called pejorative names by his mother . . . and in school because of his race." The court did find and give some weight to the mitigator that Davis "suffered some physical and emotional abuse as a child."

committed in a cold, calculated, and premeditated manner ("had been contemplated for some time and were extensively covered up") and were not committed under the influence of extreme emotional disturbance or while the defendant's capacity was impaired. Furthermore, although an expert testified Pittman had brain damage, the trial court properly rejected that opinion as there was no evidence to corroborate it, unlike here, where Davis's brain damage, which the trial court found, was evident at an early age. Also, Pittman had committed a prior violent felony and there was no evidence he was immature, had a low IQ, or a history of mental and emotional handicaps since age 5. Pittman is not comparable to the present case.

In Lawrence, Lawrence and co-defendant, Rodgers, drove 18-year-old Jennifer Robinson to the woods, had sex with her, and then Rodgers shot her in the head. They cut out her calf muscle (which was later found in Lawrence's refrigerator), took pictures of her body, and buried her. Police found notes penned by Lawrence, saying, "get her very drunk," "rape many, many, many times," "slice and dice," "[d]isect completely." The state notes: "As here, Lawrence reasoned that 'Lawrence's mental impairments were diminished by other evidence in this case,'" Answer Brief at 95-96, but fails to explain how or what, for either case. Appellant will explain the differences. Unlike the present case, the murder in Lawrence was the result of calm, careful planning well in advance,

replete with self-exhorting motivational notes and consisted of a series of atrocious events. Furthermore, this was Lawrence and Rodgers's third murder. They previously stabbed to death Lawrence's cousin after driving him to a remote location and, eleven days before that, they shot an elderly man in the back while he was sitting in his living room, which Lawrence admitted he and Rodgers did after driving around looking for someone to kill. Lawrence involved a detailed, preconceived plan to murder and mutilate a woman by a man who had previously committed two other planned murders, not, as here, a one-time unplanned and inexplicable explosion of bizarre violence. Lawrence therefore is not similar to the present case or other cases this Court has found ineligible for death despite substantial mitigation.[8]

In Robinson, Robinson waited until his girlfriend was asleep, hit her in the head with a hammer, buried her, and stole the money he knew was in her shoes. He said he killed her because he didn't want to fight her for the money and did not want to return to prison. The trial court found three aggravators: pecuniary gain, avoid arrest, and CCP. With respect to mitigation, the trial court concluded that Robinson was a sociopath and that his extensive drug abuse/addiction was the primary problem and had led to his misconduct. Unlike the present case, the motive was robbery, and the defendant

[8] The mitigation in Lawrence included disturbed home life, brain damage, schizophrenia, emotional disturbance, impaired capacity, and that Lawrence was slow and a follower.

was a violent sociopath. The state argues that appellant's death sentence merits affirmance, because as the Court in Lawrence noted regarding Robinson, "This Court upheld Robinson's death sentence because the totality of the circumstances indicated that Robinson was capable of functioning in everyday society and that he 'acted according to a deliberate plan and was fully cognizant of his actions.'" Answer Brief at 95. But the state ignores that in the present case, there is strong evidence that Davis was not fully cognizant of his actions, that Davis's "plan" was about as minimally deliberate as a first-degree charge could sustain, and doesn´t distinguish between the respective capabilities of functioning in everyday society. Furthermore, unlike appellant, Robinson had previously been in prison.

In Smithers, the defendant killed two women, both prostitutes, a week or more apart, after picking them up at the same place, taking them to his same property, having sex, luring them into the same garage, killing them the same way, and dragging them into the same nearby pond. Although both mental mitigators were found, the evidence was conflicting as to whether Smithers suffered from a mental illness or had brain damage, and there was no evidence of longstanding severe mental and emotional handicaps. Additionally, unlike the present case, Smithers committed two separate murders a week apart, the second murder clearly CCP.

In Mann, the defendant kidnapped and murdered a 10-year-old girl, who died from a skull fracture after being cut and beaten. Mann, a pedophile, kidnapped the girl to molest her. The aggravators were prior violent felony, committed during a felony, and HAC. Neither mental mitigator was found. Mann is not similar to the present case in any respect, unless the state is merely comparing the number of aggravators and mitigators, which is not how this Court conducts proportionality review. See, e.g., Urbin v. State, 714 So.2d 411, 416 (Fla. 1998).

At page 95, footnote 16, the state also cites, without discussion, as similar with regard to proportionality review, numerous other cases[9] in which extensive aggravating circumstances outweighed substantial mitigating circumstances. These cases are dissimilar to the present case in ways too numerous to mention. Suffice it to say that most involved extensive planning (Zakrwewski, Rolling, Henyard, Provenzano, Spencer); most involved sadistic rapes, robbery, or both (Chavez, Guidinas, Rolling, Pope, Henyard, Branch); several involved the murder and/or rape of children (Chavez and Henyard); several involved defendants with prior violent criminal histories (Guidinas, Rolling, Spencer); and none

[9] Chavez v. State, 832 So.2d 730 (Fla. 2002); Zakrzewski v. State, 717 So.2d 488 (Fla. 1998); Guidinas v. State, 693 So.2d 953 (Fla. 1977); Rolling v. State, 695 So.2d 278 (Fla. 1997); Pope v. State, 679 So.2d 710 (Fla. 1996); Henyard v. State, 689 So.2d 239 (Fla. 1996); Branch v. State, 685 So.2d 1250 (Fla. 1996); Spencer v. State, 691 So.2d 1062 (Fla. 1996); Provenzano v. State, 497 So.2d 1177 (Fla. 1986).

involved emotionally disturbed, impaired, immature, brain-damaged defendants with no prior criminal history who killed persons they liked for no known reason while dissociating.[10]

Last, at page 97-99, the state argues that the cases cited by appellant do not apply, noting differences in each of

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[10] Chavez kidnapped, raped, and murdered a 9-year-old child. Zakrwewski killed his wife and two children when he got home from work (earlier that day, he had hidden the murder weapon, a machete, behind a sofa), then fled to Hawaii, where he lived for four months before being captured. Guidinas (who had prior convictions for auto burglary, assault, theft, assault with intent to rape, indecent assault and battery, and assault and battery) tried to rape Rachelle Smith outside a bar, then raped and murdered Michelle McGrath, stomping her to death and vaginally and anally penetrating her with sticks. Rolling, a serial killer, raped, murdered, and mutilated five college students over a period of several days, to avenge his brutal imprisonment in Louisiana. Pope beat, stabbed, and kicked Alice McHaffey, so that he could steal her car and money, saying afterwards, "I hope I killed the bitch" and "I hope I didn't go through all that for nothing. I hope she's dead as a doornail." Henyard decided to steal a car and kill the owner, then he and Smalls followed Ms. Lewis to her car, ordered her daughters, aged 3 and 7, into the backseat, and drove to a deserted location, where they raped and shot Lewis four times (Henyard later bragged about the rape), left her for dead, then killed both children. Branch accosted a college student, stole her car, and stomped, beat, raped, and strangled her, leaving a wooden stick in her vagina (no mental mitigation was found). Spencer killed his wife, after threatening to kill her several times, attempting to kill her two weeks before, and twice committing aggravated assault on his step-son. Provenzano went to the courthouse for his disorderly conduct trial with guns sewn into the liner of his jacket and a knapsack containing weapons. When told he couldn't bring his knapsack inside, he took it to his car and returned to the courthouse. Later, when a bailiff was instructed to search him, Provenzano opened fire, injuring two bailiffs and killing a third, while screaming that he was going to kill all of them. There were five aggravating factors (prior violent felony, avoid arrest, disrupt government function, great risk of harm to many, and CCP) and only one mitigator (no prior criminal history).

them from the present case. For example, the state notes that Hawk had meningitis as a child, and that although he bludgeoned two people, only one died; that Almeida had a brutal childhood and the killing was not HAC; and that Mauldin was overwhelmed by his emotions whereas Davis is "a conniving murderer."

It goes without saying that each factual scenario in a death penalty case is somewhat unique. Rarely do two cases involve identical sets of mitigating circumstances. Rarely do cases involve sets of aggravating circumstances that are identical both in quality and quantity. Appellant cited Hawk v. State, 718 So.2d 159 (Fla. 1998); Robertson v. State, 699 So.2d 1343 (Fla. 1997); Morgan v. State, 639 So.2d 6 (Fla. 1994); Penn v. State, 574 So.2d 1079 (Fla. 1991), and Mauldin v. State, 617 So.2d 298 (Fla. 1993)(also a double homicide), because all involved youthful or immature, brain-damaged, psychiatrically disturbed individuals with longstanding mental and emotional handicaps, abusive childhoods, and no prior criminal histories. Furthermore, in Robertson and Penn, as here, the defendants killed people they liked for inexplicable reasons. And, as here, Hawk, Morgan, and Robertson involved homicides in which the HAC aggravating circumstance applied. Finally, in Almeida v. State, 748 So.2d 922 (Fla. 1999), this Court reduced the death sentence to life in prison even though Almeida had committed two other first-degree murders in the weeks preceding the crime. The present case plainly fits

within this group of cases for which death has been found a disproportionate penalty.

In sum, the state has sought to portray Davis as a manipulative, conniving killer who coldly plotted, then carried out two execution-style murders, and then "went to extreme measures" to hide what he had done. This description is contrary to the facts. The evidence shows a bizarre, out-of-character explosion of violence committed by a seriously disturbed individual who feels tremendous remorse for his crimes. Under the circumstance, death is disproportionate.

CONCLUSION

Pursuant to the arguments in both this Reply Brief and the Initial Brief, appellant respectfully requests this Honorable Court to reverse his sentence of death and remand this case for the following relief: Points 1 and 3, reverse for a new penalty phase proceeding; Point 2, reverse for resentencing by the trial judge; Points 4 and 5, vacate appellant's death sentence and remand for imposition of a life sentence.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to **STEPHEN R. WHITE**, Assistant Attorney General, The Capitol, Tallahassee, FL 32399-1050, and **WILLIAM FRANK DAVIS**, #J31703, Florida State Prison, 7819 NW 228th Street, Raiford, Fl 32026, on this date, June 16, 2008.

CERTIFICATE OF FONT SIZE

I HEREBY CERTIFY that, pursuant to Florida Rule of Appellate Procedure 9.210(a)(2), this brief was typed in Courier New 12 point.

Respectfully submitted,

NANCY DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

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NADA M. CAREY
Assistant Public Defender
Florida Bar No. **0648825**
301 South Monroe Street, Suite 401
Tallahassee, FL 32301
(850) 606-8500
COUNSEL FOR APPELLANT