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IN THE SUPREME COURT OF FLORIDA

LEO LOUIS KACZMAR, :

Appellant, :

v. : **CASE NO. SC13-2247**

STATE OF FLORIDA, :

Appellee. :

_____/

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

INITIAL BRIEF OF APPELLANT

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IN THE SUPREME COURT OF FLORIDA

LEO LOUIS KACZMAR, :

Appellant, :

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LT CASE NO. 09-CF-233

STATE OF FLORIDA, :

Appellee. :

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STATEMENT OF THE CASE[1]

On August 9-12, 2010, Leo Louis Kaczmar, III, was tried and convicted of first-degree murder in the death of Maria Ruiz. This Court affirmed the murder conviction, and on January 14, 2013, remanded the case for a new penalty phase. R1:1-37.

At the July 26, 2013, pretrial hearing, Kaczmar informed the trial court that he had turned down the state's plea offer because he was not willing to waive post-conviction and federal appeals of the guilt phase in exchange for a life sentence. R3:574-76.

On August 1, 2013, the defense filed a Notice of Renewal of All of "Defendant's Special Death Case" Motions, with a list of

1 The six-volume record on appeal will be designated as "R," followed by the volume number, followed by the page number. All proceedings were before Clay County Circuit Judge William A. Wilkes.

motions attached, including Defendant's "Apprendi-Type" Motion. R1:136-38. On October 11, 2013, the trial judge issued a written order renewing all prior rulings on these motions. R3:449.

On August 8, 2013, the trial court held a Koon2 hearing. Defense counsel informed the trial court that against counsel's advice, Kaczmar had decided not to present any mitigation witnesses or have the testimony of the mitigation witnesses from the first penalty phase read into the record. If permitted, counsel would have called all the mitigation witnesses who testified during the first penalty phase, including Martha Moody, defendant's maternal grandmother; Tammy Evans, defendant's biological mother; Dave Evans, defendant's stepfather; Silvia Williams, DOC Program Administrator; John Hough, defendant's good friend; Dr. Miguel Mandoki, child psychiatrist; Christopher Ryan Modlin, defendant's best friend and co-suspect; Kathy Casleton, defendant's maternal aunt; and Priscilla Kaczmar, defendant's wife. The defense also would have presented new mitigation evidence developed since the first penalty phase, including Sergeant Williams, a correctional officer at Florida State Prison, who would testify that Kaczmar has been a model inmate with no disciplinary referrals; Kaczmar's minister, Bill, who has a prison ministry at Florida State Prison; and Kaczmar's correspondence religious course, parenting course, and other

2 Koon v. Dugger, 618 So. 2d 246 (Fla. 1993).

correspondence courses he completed while in prison. R6:1113-15. Defense counsel further informed the court that part of Kaczmar's motivation for waiving mitigation was that he wanted guaranteed post-conviction counsel, which he would not have if given a life sentence. R6:1118. Under oath, Kaczmar told the trial court "my best position for myself is not to get a – a life sentence, sir. That's why I have to get a death sentence" because "I'm not a rich person so I can't afford to go hire a $150,000 lawyer and I cannot – my next round of appeals I can't file myself so I've got to be able to make sure I've got an appeal attorney." Kaczmar told the judge, "I've read the statutes... if I was a life sentence I'm not guaranteed a[n] attorney. On 3.851, I'm guaranteed an attorney all the way up through federal proceedings and all." R6:1121-22. Kaczmar further stated he lost his stepdad last month and his mother had a nervous breakdown the last time she came to court. He had 50 people to testify for him but it didn't do any good the last time and he was not putting his family through the heartache and pain. "It's not fair to them. It's an embarrassment to my family to have to come up here and talk about my childhood. . . . It's not going to do me no good. I know what I'm getting, death. I understand the county I'm in that's Republican. I understand this. So why do I put my family through all this heartache for no reason?" R6:1125.

The new penalty phase was held August 19-20, 2013. The

state presented the live testimony of Dr. Jesse Giles and the prior sworn testimony of nine other witnesses. No mitigation was presented. The jury recommended death by a vote of 12 to 0. R3:415, R6:482.

A Spencer[3] hearing was held immediately after the penalty phase trial. The state submitted transcripts of the prior mitigation testimony of John Hough, Katherine Casleton, Christopher Ryan Modlin, Tammy Evans, Martha Moody, and Dr. Miguel Mandoki. The defense presented no evidence or testimony. R2:298-400, R3:401-14.

The trial court received a Presentence Investigation Report. R3:416-25.

On October 11, 2013, the trial court, giving great weight to the jury's recommendation, sentenced Kaczmar to death. R3:587-94. On October 17, the defense filed a Motion for Rehearing/Clarification of the court's October 11 sentencing order. R3:480-82. On November 5, 2013, the court issued an Amended Sentencing Order, finding two aggravating factors: 1) prior violent felony, and 2) especially heinous, atrocious, or cruel. In mitigation, the court found: (1) Kaczmar was raised by an alcoholic father; (2) Kaczmar was physically and emotionally abused by his father; (3) as a child, Kaczmar was traumatized when he witnesses his grandfather drown and witnessed

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3 Spencer v. State, 615 So. 2d 688 (Fla. 1993).

his mother shoot his father; (4) Kaczmar was taught by his father to lie in court during his parents' divorce proceedings; (5) Kaczmar lacked a normal mother-son bond and relationship; (6) Kaczmar is kind to animals; (7) Kaczmar is a loyal friend; (7) Kaczmar was a good, reliable business partner; (8) Kaczmar has a loving relationship with his aunt; (9) Kaczmar was protective of younger family members; (10) Kaczmar suffers long-term effects of drug use; (11) Kaczmar was impaired by drugs on the evening of the murder; (12) Kaczmar did not receive mental health counseling and treatment; (13) Kaczmar was respectful in court; (14) Kaczmar is a loving father. R3:528-50; Appendix.

Notice of appeal was timely filed November 6, 2013. R3:521.

STATEMENT OF PENALTY PHASE FACTS

The trial judge read the parties' stipulation regarding Kaczmar's conviction of a prior violent felony, as follows:

> [O]ne, on February 7, 2002, the defendant, Leo Kaczmar, was convicted of the crime of robbery in Clay County, in case number 2001-716-CF.
>
> Number two, the crime of robbery is defined by Florida Statute 812.13 as follows: Quote, robbery means the taking of money or other property which may be the subject of larceny from the person or custody of another and with the intent to either permanently or temporarily deprive the person or the owner of the money or other property when in the course of taking there is the use of force, violence, assault or putting in fear.
>
> Number three, the robbery the defendant was convicted of involved the defendant and a co-defendant. The defendant and co-defendant struck and kicked the victim about the head and then forcefully took his jewelry and wallet for themselves against the victim's will. The defendant was 17 years of age at the time of the offense, which was committed on March 22, 2001, but was charged and sentenced as an adult.
>
> And, number four, the matters set forth in this stipulation alone are sufficient for the State of Florida to be deemed to have met its burden of proving and for the jury to find the existence of a prior violent felony aggravating circumstance of Florida Statute 921.141(5)(b).

R5:815-16.

The former testimony of the following witnesses was read to the jury: Julia Ferrell, Nathan Ferrell, Ryan Modlin, Priscilla Kaczmar, William Filancia, Richard Kuritz, Maria Lam, Deputy Monson, and Detective Sherman. Dr. Jesse Giles testified live.

In December 2008, Julia Ferrell and her grandson, Nathan, 13, lived next door to Kaczmar and his uncle, Ed. On December 13, around 5:30 a.m., Julia was awakened by loud screams, angry

voices, and a sound like someone trying to kick a door down. Julia recognized Kaczmar's voice but couldn't make out the other voice. She assumed it was Leo and Ed in another fight. She went back to sleep and didn't get up until the fire truck was outside. R5:827-30. Nathan also heard loud screaming, which sounded like an argument, and, a few minutes later, loud pounding noises. Nathan thought both voices were deep but he wasn't sure. R5:822-25.

Ryan Modlin was currently in prison. Facing a maximum penalty of life, he had entered an open plea, agreeing to testify truthfully against Kaczmar, and was sentenced to 2 years in prison, followed by 2 years probation. R5:833-34. Modlin had known Leo since they were boys. In December 2008, Leo lived with his uncle, Ed Kaczmar, his father, big Leo Kaczmar, and Maria Ruiz, big Leo's girlfriend. Maria was quiet and didn't bother anyone. Modlin lived a few houses down the road. On December 12, 2008, Modlin went to Leo's house three times. Modlin first went to Leo's around noon or 1 p.m., they smoked weed, and Modlin went home. Modlin returned the second time around 5 p.m., and he and Leo went in Leo's truck to Jacksonville to get cocaine. They used powder cocaine in the truck on the drive back. When they got back to Leo's house, they used more cocaine. At some point, Leo's wife, Priscilla, came to the house, and Modlin went home shortly thereafter. Modlin came back the third time around 9

p.m. Leo and Modlin walked through the kitchen and down the hallway to Leo's room in the back. Maria was in the den, which had been converted into her bedroom. There was crack cocaine, powder cocaine, and marijuana on Leo's dresser. Leo was acting "real paranoid." There were holes in his bed sheets, and "he would stick his fingers in the holes like he was trying to find something, shaking socks out and pacing up and down the hallway looking out windows." He would pick the clean socks out of the laundry basket, turn the socks over and start shaking them. They both used more cocaine. Leo used four or five lines of cocaine as well as five or six rocks of crack. Leo said he wanted to get Maria back there to smoke some dope and wanted to have sex with her. At one point, Leo got down on his hands and knees in the closet and was wiping around with his hands saying that she overfilled the bathtub and let it run in the closet, and he hollered her name two or three times. But there was no water in the closet. Modlin went home sometime after 11 p.m., watched a movie, and went to sleep. The next morning, he went down to the Kaczmar residence, where he saw the police. He agreed to talk to the police and was driven to the station. He initially lied and said he was fishing the previous night because he figured the police would "put me in the middle of something I didn't do." Almost immediately after he lied, he told them the truth. R5:835-53, 858, 87-72.

At the time of the murder, Priscilla Kaczmar had been living at the Kaczmar residence for two months. She and Leo had been married five years and had two children, aged 3 and 1. Priscilla got home from work that day around 4 p.m. Maria was sitting on her bed making a necklace. Leo and Ryan were in the kitchen. Priscilla could tell Leo and Ryan were high because their faces were sweating, and Leo admitted he and Ryan had been using cocaine. Priscilla gave Leo $40 for gas, a hug, and left with the kids for her mom's, where she usually spent Fridays. The next morning, Leo called her mom's home number around 7:30. R5:887-97. The children are now 4 and 3, and Leo is close to them. R5:899.

William Filancia, 46, was Leo's cellmate at the Clay County Jail. Filancia is a three-time convicted felon, currently incarcerated on unrelated charges. He entered an open plea to the charges and was facing a maximum sentence of life in prison. The state agreed to ask for no more than 20 years in exchange for Filancia's truthful testimony in this case and any other cases he was asked about. Filancia testified that Leo told him that he and Ryan were doing pills and crack cocaine that day. Leo's father was incarcerated and his uncle was in the hospital. Leo was trying to get Maria to party but she did not want to party. Leo wanted to get lucky (get f-d). Maria and Leo's father were sleeping on a mattress in the living room. Maria was lying down

on the mattress when Ryan left for the evening. Leo said he made a pass at her, and they got into a shoving match. She ran into the bathroom and closed the door. He pounded on the door, then went outside and knocked on the bathroom window. She left the bathroom and went into the kitchen. Leo ran into the kitchen and they got into another shoving match. She had grabbed a knife, and he hit her in the head and knocked the knife out of her hand, cutting his thumb. He got really angry, hit her again, and started stabbing her with a fold-up fishing knife he always carried in his pocket. He stabbed her in the neck and side of the head. When he realized she was dead, he changed his clothes, put them and the knife in a garbage bag, and buried the bag in the woods behind the house. He drove to the gas station and bought $2 gas to burn the house down and destroy the evidence. He came back to the house on a road that ran behind the house, so the neighbors wouldn't see his truck. He poured the gas in the kitchen, made a line out the front door, and lit the gas from the front of the house. He left the gas can on the back porch and drove to the north side because he was going to say he was fishing that day. Later, when the police questioned him, they asked if he had any scratch marks. When he lifted up his shirt and pants to show them he didn't, the detective noticed blood on his socks and asked him to remove his socks. He panicked and scraped his thumb to make it bleed and rubbed the blood on the

socks. Filancia testified he overheard Leo talking to his wife on the phone. When he got off the phone, Leo said he should have done to her what he did to Ruiz. While Filancia and Leo were cellmates, a man accused of killing a child was brought into the jail and placed in confinement. The other inmates said the man was in confinement because he would get beaten up if they put him in custody. Leo said he would be the first to beat him, and when Filancia asked how he could say that, as he was accused of murder himself, Leo said, she had a chance to get away, children don't have a chance to get away. R5:900-917, 920.

On cross-examination, Filancia said Leo's paperwork was all over the jail cell. R5:922-23. Filancia hired Mr. Kuritz but never discussed Leo's case with him and never told Kuritz he would pay him extra if he got him a better sentence. R5:925-26.

Richard Kuritz had been representing Filancia for a year when he met with Kaczmar at the jail about a potential civil lawsuit for a foot injury. Kaczmar asked Kuritz if he would take the personal injury case and use the fee to represent him in the murder case. Kuritz declined. They did not discuss the charges and Kuritz knew no specifics of Kaczmar's case until Filancia notified Kuritz that he wanted to talk to the state about cooperating. Kuritz was present when Filancia spoke to a detective. Filancia's sentence was based on the guidelines. Filancia never offered Kuritz a reward for getting him a better

deal with the state. R5:928-33.

Maria Lam, FDLE crime analyst, testified DNA from the fingernail clippings of Ruiz matched Ruiz. R5:944. Lam also tested Kaczmar's socks for suspected blood, and found 18 areas on one sock and 11 areas on the other. She took 5 cuttings from each sock. She found a mixture of DNA. The major contributor was Maria Ruiz. She could not determine the minor contributor. R5:949-50. The DNA at one loci did not match Ruiz or Kaczmar, leading Lam to think there could be a third contributor. This also occurred at another loci, although that loci could also be an elevated stutter and due to the amplification process. R5:953-54. Lam did not test a hair found in Ruiz's hand. R5:956. The area where there was a third contributor was around the heel. R5:961. There were several stains in that area that Lam did not test. R5:962.

Dr. Jesse Giles conducted the autopsy. Ruiz, 5'5" and 134 pounds, had on a blue jean jacket, V-neck blouse, capris, and panties. There were five cuts in the rear of the jacket and blouse and one cut in the front upper right chest area. The cuts matched wounds on her body. R5:976. There was no smoke in the oral cavity or lungs, meaning she was not breathing when smoke got to her. R5:980. The cause of death was hypovolemic shock due to sharp force injuries, including stab wounds to the neck, i.e., she bled to death. R5:982-83. Dr. Giles described each

wound from A to quadruple O from photographs. There were wounds to the upper right back, to the fronts and backs of the hands and wrists, to the face and neck, and to the chest. All the injuries appeared to have come from a single-edge slender blade. A group of eleven stabs and slashes of the neck were very serious, fatal. Major arteries were cut, which would cause heavy bleeding, and the larynx was completely severed. Five stab wounds to the back went into the right lung and also were potentially fatal. After receiving the major neck wound, Ruiz would have passed out in a few seconds and died shortly after. R5:984-95. The wound to the larynx would cause rapid blood loss and rapid unconsciousness. R5:997. The neck wounds that severed the major arteries would result in unconsciousness in a few seconds. R5:997. There was no aspirated blood, meaning she did not take many, if any, breaths after the neck was cut. R5:999. In Dr. Giles opinion, the neck wounds severing the arteries occurred towards the end of the attack. R5:1000. He couldn't give a sequence of how the wounds occurred but concluded "these came late in the course and the chest stabs came late and the hands came early." R6:1004. He could not say if Ruiz was conscious when the neck injuries occurred. R6:1006.

Deputy Monson testified there was blood on the wall in the hallway leading to the kitchen, on the stove, and on the legs of the dining room table. R6:1010.

Detective Sharman spoke to Kaczmar at the Sheriff's Office at 9:30 p.m. on December 13, 2008, after advising him of his rights. During the interview, Sharman saw what looked like blood on Kaczmar's sock and asked him what it was. Kaczmar said it was blood from a cut on his upper calf, which he got fishing. When asked about a small fresh cut on his left thumb and some scratch marks in the palm of his right hand, Kaczmar said he got these from fishing as well. He said he left to go fishing between 2 and 3 a.m. R6:1022-31.

The state read a victim impact statement from Alfredo Eugenio Ruiz, the brother of Maria Ruiz. R6:1037-39.

The following stipulation regarding Kaczmar's age was read to the jury:

> Number one, the defendant was born December 18, 1983. Number two, the victim, Maria Ruiz, was murdered and the house containing her dead body was burned in the morning of December 13, 2008. At the time the defendant was 24 years old and he was within five days of his 25th birthday.

R6:1050.

During its deliberations, the jury sent four questions to the judge: 1) "Was the knife that was used in the murder ever retrieved? 2) "Was Christopher Modlin a suspect in the victim's murder? If so, was he charged with any crime related to this case?" 3) "Was there any witnesses in the initial trial that testified to seeing or hearing the defendant speak or treat the victim derogatorily at any time while the victim was living in

the house? 4) "Was there any testimony in the initial trial that the defendant ever spoke of wanting to have sex with the victim before the 12th of December, 2008?" R6:1096, R2:297. Defense counsel and the prosecutor agreed that the judge couldn't give them the answers, that the jury had to rely on their memory and the evidence presented in this proceeding and the instructions given them. R6:1097. When the jurors were brought out, the judge instructed them as follows: "I read the four questions that you sent back and my answer is this: It's not relevant to what you're here to decide right now so I can't answer these questions, okay?" R6:1097.

Spencer Hearing Evidence

The state introduced transcripts of the testimony from the original penalty phase of John Hough, Katherine Casleton, Martha Moody, Christopher Ryan Modlin, Tammy Evans, and Dr. Miguel Mandoki. R6:1104, R2:298-399, R3:401-14.

Katherine Casleton is Leo Kaczmar's paternal aunt. When Leo was very young, Casleton was always with him, keeping him most weekends. They were very close, and he called her "Mom" before he called his own mother "Mom." Even after Casleton had her own children, Leo was much more than a nephew. When he was 15, 16 years old, he came to live with Casleton for about a year. Leo was always respectful and well-behaved. He would do anything for her children and was very generous with them. Leo defended

Casleton's soon-to-be nephew, who was getting bullied at school. Leo was so large for his age that he was not allowed to play Pee Wee football because they were afraid he would hurt the other children due to his size. R2:299-307. Leo developed issues after his parents were divorced. He was a pawn, both parents playing him against the other. Each gave him whatever he wanted. Leo was close to Ryan Modlin when they were children. They separated, and when they got back together, Leo changed. Leo wanted Ryan's lifestyle. A lot of things were handed to Ryan, and Leo wanted the same. R2:308-10. Leo's father was not a good father. Leo was not reprimanded when he needed to be but when he did something minor, his father would lose it. Leo's father expected things from Leo at age 3 and 4 that he shouldn't have, and it was like that throughout Leo's child life. Leo's father was an alcoholic, and when drunk, he beat his son undeservedly. One time, Casleton invited Leo to hold her new baby, and Leo's father started smacking Leo because he thought he shouldn't be near the baby. Casleton had to tell Leo's father to get out of her house. At her wedding, Leo's father wouldn't allow Leo to interact with the other kids. He was mad that he couldn't drink (because he was on probation) and he took it out on Leo. He also took it out on his wife, Tammy. Casleton saw her brother strike Leo multiple times throughout his childhood, probably more than a hundred times, even when he was 16, 17 years old. He punched Leo

with his fist in the head or anywhere else he could hit him. Even when Leo was a little child, his father constantly smacked him in the head. Leo felt like he never had his father's approval. He sent his father a copy of his G.E.D, and his father never bothered to open the letter. About 90 percent of her brother's interactions with Leo were negative. Casleton never heard Leo's mother encourage him either, tell him he'd done a good job or anything like that. Later, as a teenager, Leo was spoiled to a degree. Both parents competed to be the better parent so each gave him whatever he needed. R2:310-20.

Martha Moody is Leo's grandmother. Leo lived with Moody quite a bit, two or three different times. She never had any problem with him. He helped her around the house and with the lawn. He respected her. He didn't have a good relationship with his father. His father was a bully and was mean to him. His father also tried to get Leo to lie against his mother in court. Leo had a good relationship with Moody's husband, his grandfather. They went fishing together and spent a lot of time together. Leo sometimes stayed the weekend with them. Leo was 12 or 13 when her husband died. They were swimming in a lake, and her husband kept going under water, and Leo was saying to him, Poppy, don't do that, you're scaring me. Moody and Leo pulled him out and called 911, but he was dead before they got him to the hospital. Leo was good to their dogs and his own dog,

Chocolate. He was respectful of Moody's belongings, her property, and her home. Leo treated his friends well, too. He was spoiled to a certain extent by his parents because he was the only child. When his parents were separated, his father tried to get him to go against his mother and do things to his mother that he shouldn't have done. R2:324-32.

Dr. Miguel Mandoki is a child and adolescent psychiatrist. Dr. Mandoki reviewed the jail records, Kaczmar's school records, and other available information. He interviewed Kaczmar and his mother and reviewed Ryan Modlin's deposition. He did not see any evidence of insanity. Dr. Mandoki said overindulging a child is very confusing for a child when the good behavior and bad behavior are not enforced. The child has problems knowing what's good and what's bad or directing his behavior to some type of gain. It's confusing when no matter what the child does, good or bad, he is praised or given something. They were giving Leo "things" but not affection, stability, or protection, the things a kid needs to grow. Until the age of seven, Leo had to fend for himself and wasn't getting the emotional support and nourishment needed to grow up and become a productive adult. His parents were too worried about themselves. Leo's father was an alcoholic who beat his son and his wife. From age 7 on, there was a lot of physical violence from both parents. Leo witnessed his father beating his mother constantly, his mother constantly being scared

of his father. His father used him as an ally against his mother. His mother, feeling desperate on one occasion, shot his father in front of him. During most of his childhood, Leo was traumatized like that. Being exposed to this type of violence creates a state of confusion. The child is scared because he doesn't know what is going to happen. After the shooting, Leo's mother sent him to live with his father for a whole year. Leo never bonded with either parent. His mother was too traumatized, and he harbored anger at his father. The consequence of these parental relationships was an inability to internalize values, goals, morals. R2:334-349.

Dr. Mandoki explained that Kaczmar's long-term drug use would have affected his brain. With chronic use, the brain reacts quicker and stronger to exposure. With chronic drug use, a lower dose of the drug has a greater impact. Asked his conclusions about the effects of his drug use the night of the murder, Dr. Mandoki said, "I think he was – it's impossible that he knew what he was basically doing or could have tapered his behavior or modified it. I think he was like in a state of confusion that, you know, apparently he didn't know even what he was doing or if it was right or wrong." R2:350-51.

Leo was a bright kid but his parents didn't even know if he was going to school. They never took him to see a professional to find out why he was not going, why he wasn't performing or

interested. School personnel should have realized something was wrong and sought mental health assistance. He was raising himself basically. Nobody cared. He was the last one on the totem pole that anybody cared about. He would go to school in the summer and catch up for the whole year. He was a bright kid with potential. That the victim was his father's girlfriend was no accident. Tremendous anger against his father had accumulated over the years. Asked his opinion on the effects of the extremes of beating and spoiling, Dr. Mandoki replied, "He doesn't know what's right and wrong and, you know, the indulgence has to do more with the parent's guilt about not giving him what he needed which is affection and giving him material things, so it's more harming than helpful. It's better never giving him anything at any time than just that shift of overindulging to totally depriving him." R2:351-54.

On cross-examination, Dr. Mandoki said he spent two hours with Leo at the jail on May 28 of that year and spoke with his mother for an hour. He had not reviewed the recordings of Leo and an undercover cop regarding Leo's efforts to plant evidence and harass witnesses from March to April. He had not reviewed the medical examiner's report or Filancia's statement but was aware that Ruiz was stabbed repeatedly, which, in his opinion, indicated the degree of anger. He didn't do an I.Q. test but believed Leo had above average intelligence. R2:355-72.

John Hough has known Kaczmar for five years and considers him a good friend. Once, when they were fishing together, the flywheel cut Hough's thumb, and he passed out. When he woke up, Leo had pulled him out of the water. His hand was bleeding badly, and Leo pulled the boat for a mile, until they found a paramedic. R2:376-79.

A stipulation to the following facts was admitted: Kaczmar spent several years in a Florida prison serving sentences for former crimes; while in prison, he earned a G.E.D. and a basic Junior Achievement program certificate; inmates in Florida prisons receive disciplinary reports when charged with violating prison rules, and while Kaczmar was an inmate, he received only one disciplinary report, on August 12, 2010, for smoking tobacco in a non-smoking area. R2:379-80.

Ryan Modlin testified he and Leo were best friends growing up and lived a few blocks from each other. Leo's dad, an alcoholic, was "hateful" and real mean to Leo's mama. He was always hollering. Ryan saw Leo very upset at times about things his dad had said or done to him. Leo would be sitting out in the middle of the dirt road, and Ryan and his grandfather would stop and talk to him. Ryan lost contact with Leo for a while but he remembered being with him when his mother met her second husband, and it was bad for Leo. Leo's father called him fat, fatass, and worthless. Ryan heard about Leo's father holding a knife to Leo

and Ryan's cousin but wasn't present for that. Ryan and Leo were drug users. Ryan said he didn't see them as junkies--"I'm just a man that used dope"—but remembered saying previously that he and Leo were junkies and had used drugs on an almost daily basis. They used methamphetamines, marijuana, and cocaine, but mostly crystal meth. The night of the murder, Leo was extremely intoxicated on powder cocaine, crack cocaine, and marijuana. He was hallucinating, seeing water running across the floor when there was no water there. The last time Ryan saw Leo that night, about 11 p.m., Leo was acting paranoid, real bad. He was looking out the windows and pacing up and down the hallway from his bedroom to the kitchen. He was digging in the mattress in the holes in the sheets like he was looking for something. R2:383-91.

Tammy Evans is Leo's mother. She was married to Leo's father for 12-14 years. She was 15 years old when she got with him and 17 when they got married. During that time, he was an extreme alcoholic. When he drank, he was violent and mean. He was very abusive to anyone he was around. If he didn't like what you said, he'd want to beat you up. He had many DUI's and didn't have a driver's license for most of their marriage. He was unfaithful during the marriage. He didn't want the divorce and stalked her for months and got more violent during the divorce. He slapped and kicked her in front of Leo, even kicked her in the

face. Leo was right there and saw it every time. He also beat Leo for any little thing. If his dad had a bad day at work, he took it out on Tammy and Leo. He hit Leo like a man, punched him with his fist in the face. He pushed, punched, kicked. He called his son a "fatass motherfucker." Leo was mentally abused. During the divorce proceedings, Tammy had an injunction against her husband. Leo was staying with her, and when she left for the day, his dad came and picked him up and ransacked and flooded the house, cut everything up, ripped up the marriage certificate, and wrote "I hate you" on the mirror. He tried to get Leo to say he, Leo, did it because she had tried to beat him up, and they were going to arrest Leo for it, and then his dad admitted it was him and was put in jail. Two weeks later, he was back at her house. Leo came to the back door and said he came to get some stuff to go fishing. Tammy could tell something was wrong because Leo's eyes were big and he looked scared. Tammy looked out the side window, and Leo's dad threw a basketball through the bedroom window and threatened to kill her. At the time, she had a domestic violence injunction against him. He threw the bicycle and was acting like he was going to come inside. Tammy called 911 and told them they better come because she had been scared for her life for so long and she was going to kill him. About that time, he busted the window out in the living room and pushed the couch forward, as if he was coming in. He was throwing glass

at her and saying he was going to kill her, so she shot him with a .22 shotgun. Leo was trying to get his daddy to leave but he wouldn't. The police eventually found him and arrested him. Later, her ex-husband tried to get Leo to lie and say she tried to shoot her son. He fought her for custody and told Leo she was the problem and turned Leo against her for nine months. Leo was 12 at the time. Later she learned her ex-husband and her son were using illegal drugs together. After Leo came back to live with Tammy, his father would ask Leo to take him to buy drugs. Leo did well in school until the divorce. After that, school, his attitude, everything changed. The change was drastic. He didn't care anymore. He got in trouble. Even his dad pushed him aside. Tammy married Dave Evans and has been married to him 10 years. Leo thinks of Dave as more of a father than his own father. They've done everything together. They go on trips. They started a business together, Reliable Tree Service. Leo did a lot of the tree work and got the bids on jobs while Dave did the financial part and also went out on jobs. Leo was a good partner. While in prison, he called his mother on special occasions and made her cards. R2:395-400, R3:401-13.

SUMMARY OF ARGUMENT

Issue 1. The trial judge erred in giving great weight to the jury's death recommendation. Kaczmar refused to present any

evidence in mitigation, and the trial court provided no alternative means for the jury to be advised of the available mitigating evidence. Under these circumstances, the jury's recommendation was a nullity and entitled to no weight.

Issue 2. The trial judge improperly interfered with the jury's decision-making and usurped the jury's function when, in response to questions the jury asked during deliberations, the judge told the jurors the questions were "not relevant to what you're here to decide." A trial court may not make a comment that may be construed by the jury as a comment on the weight, character, or credibility of the evidence. Here, by instructing the jury that its questions weren't relevant, the judge essentially told the jury not to consider those questions in its deliberations. The instruction thus was an impermissible comment on the evidence.

Issue 3. The prosecutor engaged in impermissible closing argument when he characterized the mitigating evidence as "excuses." Labeling mitigating evidence as "excuses" is improper, particularly where, as here, the mitigating circumstances were unrefuted and the trial judge found and gave weight to them.

Issue 4. The trial court abused its discretion in failing to find and give weight to the mitigating circumstance that Kaczmar was emotionally torn by extremes of parental abuse and

parental overindulgence. This circumstance was proved by substantial, competent evidence.

Issue 5. The death sentence is disproportionate.

Issue 6. The death penalty was improperly imposed because Florida's death penalty statute violates the sixth amendment under Ring v. Arizona, 536 U.S. 584 (2002).

ARGUMENT

Issue 1

THE TRIAL COURT ERRED WHEN IT GAVE GREAT WEIGHT TO THE JURY'S RECOMMENDATION WHERE KACZMAR REFUSED TO PRESENT ANY EVIDENCE IN MITIGATION AND THE TRIAL COURT PROVIDED NO ALTERNATIVE MEANS FOR THE JURY TO BE ADVISED OF THE AVAILABLE MITIGATING EVIDENCE.

The trial court violated the Eighth Amendment and this Court's holding in Muhammad v. State, 782 So.2d 343 (Fla. 2001), when it gave great weight to the recommendation of Kaczmar's penalty phase jury despite the fact that no mitigating evidence was presented to the jury. This error requires reversal for resentencing.

In Muhammad, the Court held reversible error occurred when the trial court gave "great weight" to the jury's recommendation "in light of Muhammed's [sic] refusal to present mitigating evidence and the failure of the trial court to provide for an alternative means for the jury to be advised of available mitigating evidence." 782 So. 2d at 362-63. The Court reasoned:

> In determining whether the court erred in this case in giving the jury's recommendation great weight, we must consider the role of the advisory jury. Pursuant to section 921.141(2), Florida Statutes (1995), the jury's advisory sentence must be based on "whether sufficient aggravating circumstances exist as enumerated in subsection (5)" and "[w]hether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist." s. 921.141(2)(a)-(b), Fla. Stat. (1995). "The jury's responsibility in the process is to make recommendations based on the circumstances of the offense and the character and background of the

> defendant." Herring v. State , 446 So. 2d 1049, 1056 (Fla. 1984). The failure of Muhammad to present any evidence in mitigation hindered the jury's ability to fulfill its statutory role in sentencing in any meaningful way.

Id. at 362-63. Noting that the sentencing order specifically stated that the jury's recommendation was given great weight,[4] the Court vacated the death sentence and remanded for resentencing.

Here, too, the sentencing order specifically states that the jury's recommendation was given great weight:

> The jury was fully justified in its twelve to zero recommendation that the death penalty be imposed upon Defendant for Ms. Ruiz's murder. This Court is required to give great weight to the jury's recommendation and fully agrees with the jury's assessment of the aggravating circumstances presented. Defendant waived mitigation before the jury. The prior testimony of the former mitigation witnesses, however, was submitted to this Court. After considering the mitigating circumstances presented, this Court finds that the ultimate penalty that this Court can impose in this case should be imposed.

R3:549.

The record therefore establishes that the trial court in the present case, as in Mohammad, did not lessen its reliance on the jury's verdict and felt obligated to give the jury's

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[4] "The jury recommended that this Court impose the death penalty upon AKEEM MOHAMMAD by a majority of 10 to 2. *This Court must give great weight to the jury's sentencing recommendation.* The ultimate decision as to whether the death penalty should be imposed rests with the trial judge." Id. at 363-64 (emphasis added).

recommendation great weight. Kaczmar's jury, like Mohammad's, was not presented with any of the mitigating evidence, however. The jury's recommendation therefore is a nullity, and the trial judge erred in considering it in sentencing Kaczmar to death. This Court should vacate Kaczmar's sentence and remand for resentencing.

Issue 2

THE TRIAL JUDGE IMPROPERLY INTERFERED WITH THE JURY'S DECISION-MAKING AND USURPED THE JURY'S FUNCTION WHEN, IN RESPONSE TO FOUR QUESTIONS THE JURY POSED DURING ITS DELIBERATIONS, THE JUDGE TOLD THE JURY THE QUESTIONS WERE "NOT RELEVANT."

During deliberations, the jury sent four questions to the judge: 1) "Was the knife that was used in the murder ever retrieved? 2) "Was Christopher Modlin a suspect in the victim's murder? If so, was he charged with any crime related to this case?" 3) "Was there any witnesses in the initial trial that testified to seeing or hearing the defendant speak or treat the victim derogatorily at any time while the victim was living in the house? 4) "Was there any testimony in the initial trial that the defendant ever spoke of wanting to have sex with the victim before the 12th of December, 2008?" R6:1096, R2:297. Defense counsel and the prosecutor agreed the judge couldn't answer the questions and discussed the appropriate response:

> MR. SHEA: Your Honor, I don't know that we can answer those.
> MR. COLAW: Yeah, I don't think you can give them answers.
> THE COURT: What?
> MR. COLAW: I don't think you can give them answers to those questions.
> MR. SHEA: They have to rely on their memory.
> MR. COLAW: They have to rely on the evidence presented in this proceeding and the instructions you've given them.
> THE COURT: Everybody on board with that?
> MR. SHEA: Yes, sir.

R6:1096-97.

When the jurors were brought out, the judge did not instruct the jury as had been agreed upon by the parties but instead told the jury: "I read the four questions that you sent back and my answer is this: It's not relevant to what you're here to decide right now so I can't answer these questions, okay?" R6:1097.

By telling the jurors their questions were "not relevant," the judge improperly invaded the province of the jury and interfered with its decision-making.

Because defense counsel did not object to the improper comment, the fundamental error standard of review applies. Jones v. State, 612 So.2d 1370, 1373 (Fla. 1992)(Absent a contemporaneous objection, an appellate court reviews a judge's improper comment for fundamental error); Ross v. State, 386 So.2d 1191, 1195 (Fla. 1980)(same). Fundamental error is error that "reaches down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error." Rimmer v. State, 825 So. 2d 304, 323 (Fla. 2002).

"A judge may not sum up the evidence or comment to the jury upon the weight of the evidence, the credibility of the witnesses, or the guilt of the accused." § 90.106, Fla. Stat. (2011). As the Fourth District Court of Appeal explained:

> While a judge may clear up uncertainties in the issues in a case, it is error for the judge to make any remark in front of the jury that might be interpreted as conveying the judge's view of the case or an opinion on

> the weight, character, or credibility of the evidence.
>
> ....
>
> Regardless of the proper intention of the court in making such remarks, in determining their effect on the jury we must consider that the high position which a judge holds in the scheme of the trial magnifies, in the minds of the jurors, the meaning of comments by the judge, to which he himself may not attach particular importance.

Jacques v. State, 883 So. 2d 902, 905-06 (Fla. 4th DCA 2004)(citation omitted).

"Where any doubt is raised that an accused was prejudiced by a judge's remark, a new trial is warranted." Rutledge v. State, 1 So. 3d 1122, 1132 (Fla. 1st DCA 2009); see also Thomas v. State, 838 So. 2d 1192 (Fla. 2d DCA 2003).

In Jacques, the court found fundamental error occurred where, during defense counsel's closing argument, the judge commented, "That's not what she said and that's not what the record shows." 883 So. 2d at 905. The court likewise concluded fundamental error occurred in Walden v. State,123 SO 3d 1164 (Fla 4th DCA 2014) where the trial court made a comment that could have been construed by the jury as a comment on the evidence or defendant's guilt. Walden was charged, inter alia, with burglary of a structure while armed after the alleged victim reported that when she entered her massage business, she encountered Walden with two knives, one of which he put to her neck while demanding money. Walden testified, however, that he had permission to

enter the establishment, a "whorehouse." During deliberations, the jury submitted the following question to the trial court: "Does the State have to prove he was armed within the structure?" The trial court, after discussions with counsel, referred the jury to the burglary instruction and stated, "In the burglary, the last paragraph is if you find [appellant] guilty of burglary, you must also determine if the State has proved beyond a reasonable doubt whether in the course of committing the burglary, [appellant] was armed or armed himself within the structure with a dangerous weapon." A juror then asked in open court, "Is it fair to say that Ashley Walden was armed within a structure with a dangerous weapon?" The trial court responded, "He was armed or armed himself, yes." The jury found Walden guilty of burglary of a structure while armed.

In reversing, the court noted that the trial court correctly reread the burglary instruction after the jury asked whether the state had to prove appellant was armed within the structure. However, when the juror then orally asked, "Is it fair to say that [appellant] was armed within a structure with a dangerous weapon?", the juror appeared to be asking about the facts of the case, and the court's response therefore could have been construed by the jury as a comment on the evidence or Walden's guilt, thus warranting a new trial.

Here, the judge's response to the jury's questions similarly could have been construed as a comment on the evidence. By telling the jury its questions were not relevant, the judge in effect told the jury its consideration of those questions was not relevant. However, the questions, even if not answered by the evidence, may have been relevant to the jury's consideration of the appropriate punishment. The jury's consideration of the fact that these questions were not answered by the evidence could have been a relevant consideration in their verdict. Accordingly, the trial judge erred by deviating from the response agreed upon by counsel—that the jurors were to rely on their memory, the evidence, and the instructions--by telling them instead that their questions were not relevant. The Court's misdirection may well have been construed as a comment on the evidence or the credibility of the witnesses. A new trial is thus warranted.

Issue 3

THE PROSECUTOR ENGAGED IN IMPERMISSIBLE CLOSING ARGUMENT WHEN HE REFERRED TO THE MITIGATING EVIDENCE AS "EXCUSES."

During closing argument, the prosecutor told the jury what to expect from defense counsel's closing argument:

> Now they may make arguments and ask you to speculate about some other things, you know, create some excuses or mitigation as I would call them for his actions, but at the end of the day that's your call.

R6:1062.

In Urbin v. State, 714 So. 2d 411 (Fla. 1998), this Court condemned the labeling of defense mitigation evidence as excuses. "We conclude that this argument was improper, especially in view of the fact that the State presented no evidence to rebut the mitigation and the trial judge found and gave weight to all of the proffered mitigators." Id. at 422 n.14; see also Hawk v. State, 718 So. 2d 159, 165 (Fla. 1998)(Justice Pariente, concurring)("labeling uncontroverted mitigating evidence as 'pathetic excuses' was clearly improper").

In the present case, defense counsel argued a number of mitigating circumstances to the jury, including that Kaczmar was impaired by crack cocaine on the evening of the murder, that his behavior in court was respectful, and that he has been a loving father to his two little girls. R6:1076-78. The state did not offer any evidence to refute these mitigators, and the trial court found and gave weight to each of them. R3:547-48.

Accordingly, labeling the mitigating evidence as excuses was error. This error, along with the other errors raised herein, entitles Kaczmar to a new penalty phase proceeding.

Issue 4

THE TRIAL COURT ERRED IN FAILING TO FIND AND GIVE WEIGHT TO THE MITIGATING CIRCUMSTANCE THAT KACZMAR WAS EMOTIONALLY TORN BY EXTREMES OF PARENTAL ABUSE AND PARENTAL OVERINDULGENCE.

To insure the proper consideration of mitigating circumstances, the trial court must expressly evaluate each mitigating circumstance to determine whether it is supported by the evidence. Campbell v. State, 571 So. 2d 415, 419 (Fla. 1990), receded from in part in Trease v. State, 768 So. 2d 1050 (Fla. 2000). A mitigator is supported by the evidence "if it is mitigating in nature and reasonably established by the greater weight of the evidence." Ferrell v. State, 653 So. 2d 367 (Fla. 1995). The trial court must find a mitigating circumstance has been proved if it is supported by a reasonable quantum of competent, uncontroverted evidence. Nibert v. State, 574 So. 1059 (Fla. 1990). The trial court may reject a mitigating circumstance only if the record contains competent, substantial evidence to support that rejection. Mansfield v. State , 758 So. 2d 636, 646 (Fla. 2000).

This Court summarized its standards of review of the trial court's findings as follows:

> 1) Whether a particular circumstance is truly mitigating in nature is a question of law and subject to de novo review by this Court; 2) whether a mitigating circumstance has been established by the evidence in a given case is a question of fact and subject to the competent substantial evidence

> standard; and finally, 3) the weight assigned to a mitigating circumstance is within the trial court's discretion and subject to the abuse of discretion standard.

Blanco v. State, 706 So. 2d 7, 10 (Fla. 1997)(footnotes omitted).

In the present case, the trial court erred by rejecting as unproved the mitigating circumstance that Kaczmar was emotionally torn by extremes of parental abuse and parental overindulgence. This mitigator was supported by ample evidence.

In finding unproved the mitigating circumstance that Kaczmar was emotionally torn by extremes of parental abuse and parental overindulgence, the trial court wrote:

> Tammy Evans, Martha Moody and Katherine Casleton testified that Defendant's father would alternate between beating Defendant and overindulging him. Defendant, however, failed to present evidence of how this upbringing impacted his ability to know right from wrong or inhibited his ability to be a law-abiding member of society. This Court finds this mitigating circumstance was not proven and gives it no weight in determining the appropriate sentence for Defendant.

R3:544.

The trial court rejected this mitigating circumstance on the grounds that no evidence was presented linking the mitigator to Kaczmar's ability to know right from wrong or his ability to obey the law. This was error for two reasons. First, there is no requirement that mitigation have a nexus to the offense. Cox v. State, 819 So. 2d 795 (Fla. 2002). The definition of mitigating is extremely broad. A mitigating circumstance is anything "that, in fairness or in the totality of the defendant's life or

character, extenuates or reduces the degree of moral culpability for the crime committed or that reasonably serves as a basis for imposing a sentence less than death." Crook v. State, 813 So. 2d 68, 74 (Fla. 2002); see also Wickham v. State, 503 So. 2d 191, 194 (Fla. 1991); Jones v. State, 652 So. 2d 346, 351 (Fla. 1995). As Justice Sotomayor recently explained:

> In Lockett v. Ohio, 438 U.S. 586, 98 S. Ct. 2954, 57 L.Ed.2d 973 (1978), we held that the sentencer in a capital case must be given a full opportunity to consider, as a mitigating factor, "any aspect of a defendant's character or record," in addition to "any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Id. at 604, 98 S.Ct. 2954 (plurality opinion) (emphasis added). We emphasized the "need for treating each defendant in a capital case with that degree of respect due the uniqueness of the individual." Id. at 605, 98 S.Ct. 2954. This rule "recognizes that 'justice ... requires ... that there be taken into account the circumstances of the offense together with the character and propensities of the offender,'" as part of deciding whether the defendant is to live or die. Eddings v. Oklahoma, 455 U.S. 104, 112, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982) (quoting Pennsylvania ex rel. Sullivan v. Ashe, 302 U.S. 51, 55, 58 S.Ct. 59, 82 L.Ed. 43 (1937)). And it ensures that "'the sentence imposed at the penalty stage ... reflect[s] a reasoned moral response to the defendant's background, character, and crime.'" Abdul-Kabir v. Quarterman, 550 U.S. 233, 252, 127 S.Ct. 1654, 167 L.Ed.2d 585 (2007) (quoting California v. Brown, 479 U.S. 538, 545, 107 S.Ct. 837, 93 L.Ed.2d 934 (1987)(O'Connor, J., concurring)).
>
> Thus we have consistently rejected States' attempts to limit as irrelevant evidence of a defendant's background or character that he wishes to offer in mitigation. In Skipper v. South Carolina, 476 U.S. 1, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986), for example, we held that the exclusion of evidence regarding the defendant's good behavior in jail while

> awaiting trial deprived him of "his right to place before the sentencer relevant evidence in mitigation of punishment." Id. at 4, 106 S.Ct. 1669. We explained that the jury "could have drawn favorable inferences ... regarding [the defendant's] character and his probable future conduct." Id. Although "any such inferences would not relate specifically to [the defendant's] culpability for the crime he committed, ... such inferences would be 'mitigating' in the sense that they might serve 'as a basis for a sentence less than death.'" Id. at 4–5, 106 S.Ct. 1669 (quoting Lockett, 438 U.S., at 604, 98 S.Ct. 2954 (plurality opinion)).
>
> Particularly instructive is Smith v. Texas, 543 U.S. 37, 125 S.Ct. 400, 160 L.Ed.2d 303 (2004)(*per curiam*). In Smith, the Texas courts withheld a mitigation instruction concerning the defendant's background, on the ground that he had offered "no evidence of any link or nexus between his troubled childhood or his limited mental abilities and this capital murder." Ex parte Smith, 132 S.W.3d 407, 414 (Tex.Crim.App.2004). We rejected this "nexus" requirement as one we had "never countenanced," and we reiterated that the only relevant question is whether the proposed mitigation evidence would give a jury "a reason to impose a sentence more lenient than death." 543 U.S. at 44–45, 125 S.Ct. 400.

Hodge v. Kentucky, 133 S.Ct. 506 (2012)(dissenting to denial of certiorari).

The trial court's rejection of this aspect of Kaczmar's background on the basis that he did not demonstrate how this aspect of his upbringing affected his ability to know right from wrong or his ability to be law-abiding therefore is error.

Furthermore, although a nexus between a mitigating circumstance and the capital murder is not required, a nexus was, in fact, shown with regard to this aspect of Kaczmar's upbringing. Dr. Mandoki testified that overindulging a child is

confusing for the child and results in the child having problems knowing what's good and what's bad and in directing his behavior toward some type of gain. Dr. Mandoki further testified that although his parents gave him "things," Kaczmar did not receive the emotional support and nourishment needed to become a productive adult and never bonded with either parent. The consequence of these deficient parental relationships was an inability to internalize values, goals, morals. When asked his opinion on the effects of the extremes of beating and spoiling, Dr. Mandoki replied, "He doesn't know what's right and wrong . . . indulgence has to do more with the parent's guilt about not giving him what he needed, which is affection, . . . it's more harming than helpful. It's better never giving him anything at any time than [] that shift of overindulging to totally depriving him." R2:351-54.

The trial court's analysis of this mitigating circumstance is legally and factually erroneous. This circumstance is mitigating and was proved by unrefuted evidence. The trial court abused its discretion in failing to find and give weight to this mitigating circumstance. Resentencing is required.

Issue 5

THE DEATH SENTENCE IS DISPROPORTIONATE.

This murder occurred during a confrontation between Kaczmar and Ruiz after a night of heavy drug use. Kaczmar had been

consuming large quantities of drugs throughout the day, including crack cocaine. According to state witness Modlin, Kaczmar was paranoid and delusional, was seeing things that weren't there. The number and force of the blows indicate this was a frenzied attack, born of sudden emotional rage. This is consistent with state witness Filancia's testimony that Kaczmar said he became enraged after he got cut while attempting to disarm Ruiz. In short, something snapped. When compared to similar cases, the ultimate punishment is not warranted.

This Court has long recognized that the law of Florida reserves the death penalty for "only the most aggravated and least mitigated" of first-degree murders. State v. Dixon, 283 So. 2d 1, 7-8 (Fla. 1973)(finding a "legislative intent to extract the penalty of death for only the most aggravated, the most indefensible of crimes"), cert. denied, 416 U.S. 943 (1974); see also Williams v. State, 37 So. 3d 187 (Fla. 2010)("The Eighth Amendment to the United States and this Court's proportionality review require that the death penalty be reserved for those cases that are the most aggravated and least mitigated")(internal quotation omitted).

In deciding whether the death sentence is proportionate in a particular case, the Court has summarized the guiding principles as follows:

> "[W]e make a comprehensive analysis in order to determine whether the crime falls within the

> category of both the most aggravated and the least mitigated of murders, thereby assuring uniformity in the application of the sentence." We consider the totality of the circumstances of the case and compare the case to other capital cases. This entails "a qualitative review by this Court of the underlying basis for each aggravator and mitigator rather than a quantitative analysis." In other words, proportionality review "is not a comparison between the number of aggravating and mitigating circumstances."

Williams v. State, 37 So. 3d 187, 205 (Fla. 2010)(quoting Offord v. State, 959 So. 2d 187, 191 (Fla. 2007)).

Application of these considerations mandates a reduction of Leo Kaczmar's sentence to life imprisonment.

The present case involves only two aggravating factors, prior violent felony and especially heinous, atrocious, and cruel (EHAC).

The circumstances of the prior violent felony, a robbery, are not compelling. In March 2001, Kaczmar and a co-defendant struck and kicked the victim and took his wallet and jewelry. Kaczmar was 17 years old at the time.

The underlying basis of the EHAC aggravator also must be taken into account. While EHAC is a serious aggravator, see Larkins v. State, 739 So. 2d 90, 95 (Fla. 1999), "substantial mitigation may make the death penalty inappropriate even when the aggravating circumstance of heinous, atrocious, or cruel has been proved." Nibert v. State, 574 So. 2d 1059, 1063 (Fla. 1990).

Furthermore, the gravity of EHAC is diminished in the

present case for several reasons. While this Court has upheld EHAC in multiple stab wound homicides, see Reynolds v. State, 934 So. 2d 1128 (Fla. 2006), the EHAC aggravator is to be applied only to torturous murders. Torturous murders are "those that evince extreme and outrageous depravity as exemplified by the desire to inflict a high degree of pain or utter indifference to or enjoyment of the suffering of another." Simmons v. State, 934 So. 2d 1100, 1122 (Fla. 2006). Here, all indications are that the sharp-instrument murder of Ruiz occurred as the result of a sudden and impulsive, explosive outburst. There is nothing that suggests the murder was the product of a desire to inflict a high degree of pain or the enjoyment of Ruiz's suffering. In addition, Kaczmar had ingested a large quantity of drugs throughout the day and evening. He was acting paranoid, putting his hands in holes in the sheets, seeing water in the closet when no water was there, pacing up and down the hallway. A defendant's mental and emotional state is a factor in determining the gravity of EHAC. See Halliwell v. State, 323 So. 2d 557 (1975)(killing committed in an "emotional rage" was not EHAC); Holsworth v. State, 522 So. 2d 348 (Fla. 1988)(death sentence reversed where heinousness of murder resulted from drug and alcohol intoxication).

Accordingly, while this murder meets the Court's definition of EHAC in that Ruiz experienced pain for at least a few seconds

before she lost consciousness, the aggravator should be afforded little weight given Kaczmar's emotional state, drug intoxication, and the absence of a desire to inflict a high degree of suffering.

The mitigation in this case is compelling. Kaczmar grew up in an unstable and abusive family. His father beat him from a very young age (3 or 4, according to his aunt) for, well, being a child, for doing things for which no child should be punished, much less beaten with fists. His father was mentally abusive as well, calling him demeaning names. Kaczmar also witnessed his father beating his mother, often and mercilessly. Neither parent was capable of giving Kaczmar what he needed to become a functioning adult. He raised himself essentially and bonded with neither parent. Kaczmar experienced other traumas as well: he witnessed his grandfather's death and witnessed his mother shoot his father. Not surprisingly, Kaczmar, like many others, used drugs in an attempt to alleviate the pain and confusion engendered by the abuse he suffered as a child. And yet, despite his abusive upbringing and chronic, long-term drug use, Kaczmar has positive traits. He loves his two young daughters. He ran a business with his step-father and was a hard, reliable worker in that business. He is kind to animals, is a loyal friend, has a loving relationship with his aunt, was protective of his cousins, and obtained his GED and other certificates while in prison.

The death sentence is disproportionate when compared with other cases in which the Court has reversed the death sentence on proportionality grounds. See Wilson v. State, 493 So. 2d 1019 (Fla. 1986); Farinas v. State, 569 So. 2d 425 (Fla. 1990); Ross v. State, 474 So. 2d 1170 (Fla. 1985); Kramer v. State, 619 So. 2d 274 (Fla. 1993); Penn v. State, 574 So. 2d 1079 (Fla. 1991).

In Wilson, this Court vacated the death sentence where the defendant was convicted of killing his father in a heated confrontation, where there were two aggravating circumstances, EHAC and prior violent felony, and no mitigating circumstances.

In Ross, this Court vacated the death sentence where the defendant killed his wife, where the killing was EHAC but was mitigated by the fact that the defendant had been drinking and the killing occurred during an angry dispute.

In Farinas, this Court vacated the death sentence where the defendant shot his former girlfriend three times, paralyzing her with the first shot and then shooting her twice more in the head. The murder was EHAC and committed during a kidnapping but there was mitigating evidence that the defendant was under the influence of extreme mental or emotional disturbance.

In Kramer, the defendant beat to death a drinking buddy. The killing was EHAC and the defendant had previously been convicted of attempted murder for a similar beating. In reducing the sentence to life, the Court found dispositive the defendant's

alcoholism, mental stress, severe loss of emotional control, and potential for productive functioning in the structured environment of prison.

Like the above-cited cases, the killing in the present case was the result of an emotional confrontation, occurred upon reflection of short duration, and involved a similar balance of aggravation and mitigation.

In Penn, the defendant beat his mother to death with a hammer and stole numerous items from her house. The killing was EHAC but this Court reduced the sentence to life, citing evidence that Penn had consumed six or seven pieces of crack cocaine that night, was under extreme emotional disturbance, and had no criminal history.

When the facts of the present case are compared to the preceding cases, it is clear that equally culpable defendants have received sentences of life imprisonment. The present murder resulted from sudden emotional rage after a night of heavy crack cocaine use. The defendant had a deficient and abusive upbringing. Among capital crimes, this is not one of the most aggravated and least mitigated. The death penalty is not the appropriate penalty for Leo Kaczmar, and this Court should vacate his death sentence and remand for imposition of a sentence of life imprisonment with no possibility of parole.

Issue 6

THE TRIAL COURT ERRED IN SENTENCING KACZMAR TO DEATH BECAUSE FLORIDA'S CAPITAL SENTENCING PROCEEDINGS ARE UNCONSTITUTIONAL UNDER THE SIXTH AMENDMENT PURSUANT TO RING V. ARIZONA.

This issue was preserved by Kaczmar's Renewal of All of "Defendant's Special Death Case" Motions, with a list of motions attached, including Defendant's "Apprendi-Type" Motion. R1:136-38. The standard of review is de novo.

The death penalty was improperly imposed in this case because Florida's death penalty statute is unconstitutional in violation of the Sixth Amendment under the principles announced in Ring v. Arizona, 536 U.S. 584 (2002). Ring extended to the capital sentencing context the requirement announced in Apprendi v. New Jersey, 530 U.S. 446 (2000), for a jury determination of facts relied upon to increase maximum sentences. Section 921.141, Florida Statutes (2009), does not provide for such jury determinations.

Kaczmar acknowledges that this Court has adhered to the position that it is without authority to declare section 921.141 unconstitutional under the Sixth Amendment, even though Ring presents some constitutional questions about the statute's continued validity, because the United States Supreme Court previously upheld Florida's statute on a sixth amendment challenge. See, e.g., Bottoson v. Moore, 833 So. 2d 693 (Fla.), cert. denied, 537 U.S. 1070 (2002); King v. Moore, 831 So. 2d 143

(Fla.), cert. denied, 537 U.S. 1067 (2002).

Additionally, Kaczmar is aware that this Court has held that it is without authority to correct constitutional flaws in the statute via judicial interpretation and that legislative action is required. See, e.g., State v. Steele, 921 So. 2d 538 (Fla. 2005). However, this Court continues to grapple with the problems of attempting to reconcile Florida's death penalty statute with the constitutional requirements of Ring. See e.g., Marshall v. Crosby, 911 So. 2d 1129, 1133-35 (Fla. 2005) (including footnotes 4 & 5, and cases cited therein); Steele. At this time, Kaczmar asks this Court to reconsider its position in Bottoson and King because Ring represents a major change in constitutional jurisprudence which would allow this Court to rule on the constitutionality of Florida's statute.

This Court should re-examine its holding in Bottoson and King, consider the impact Ring has on Florida's death penalty scheme, and declare section 921.141 unconstitutional. Kaczmar's death sentence should then be reversed and remanded for imposition of a life sentence.

CONCLUSION

Appellant respectfully asks this Honorable Court to reverse and remand this case for the following relief: Issues 1 & 4, vacate the death sentence and remand for resentencing by the judge; Issues 2 & 3, vacate the death sentence and remand for new penalty phase proceedings; Issue 5 & 6, vacate appellant's death sentence and remand for imposition of a life sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by electronic mail to Trisha Meggs Pate, Office of the Attorney General, at crimapptlh@myfloridalegal.com, and a true and correct copy has been sent via US Mail to Leo Louis Kaczmar, J20499, Florida State Prison, 7819 NW 228th St., Raiford, FL 32026-1000, on this date, August 25, 2014.

CERTIFICATE OF FONT SIZE

I HEREBY CERTIFY that, pursuant to Florida Rule of Appellate Procedure 9.210, this brief was typed in Courier New 12 Point.

Respectfully submitted,
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PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

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