IN THE SUPREME COURT OF FLORIDA

EDWARD J. ZAKRZEWSKI,

Appellant,

vs. **Case No. SC 02-1734**

STATE OF FLORIDA,

Appellee.
_____/

ON DIRECT APPEAL FROM A FINAL ORDER OF THE CIRCUIT COURT OF THE FIRST JUDICIAL CIRCUIT, IN AND FOR OKALOOSA COUNTY, FLORIDA, DENYING APPELLANT'S FLORIDA RULE OF CRIMINAL PROCEDURE 3.850 MOTION FOR POST CONVICTION RELIEF IN A CAPITAL CASE.

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

Edward J. Zakrzewski, the appellant, was the defendant below. He will be referred to as "Zakrzewski" or the "defendant." The State of Florida, appellee, will be referred to as "the state." The record on appeal is in four volumes. References to the record on appeal will be by letter "R" followed by a page number located in the lower right hand corner of each page.

A. Nature of the Case:

This is a direct appeal to the Supreme Court of Florida of the June 17, 2002 final order (R. 576-584) of the lower tribunal, the Circuit Court of the First Judicial Circuit, in and for Okaloosa County, Florida, in Case No. 94-1283-CFA, denying Edward J. Zakrzewski's complete amended motion to vacate his guilty pleas, judgments and death sentences (R. 192-251) filed per the provisions of Florida Rules of Criminal Procedure 3.850 and 3.851. The Court denying the post conviction motion is the Hon. G. Robert Barron, Circuit Judge.

B. Course of Proceedings:

On November 19, 1994, the defendant was indicted by an Okaloosa County, Florida grand jury and charged with the following crimes:

1. Count I - first degree premeditated murder of Sylvia Zakrzewski, his wife.

2. Count II - first degree premeditated murder of Edward K. Zakrzewski, his son.

3. Count III - first degree premeditated murder of Anna Zakrzewski, his daughter.

(R. 193)

The offenses occurred on or about June 10, 1994, in Mary Esther, Florida. Assistant Public Defenders Isaac Bruce Koran and Elton W. Killam, of the Office of the Public Defender, First Judicial Circuit of Florida, represented the defendant at trial. (R. 193-94) On March 15, 1996, the defendant signed a written agreement in which he pled guilty as charged to all three counts in the indictment. (R. 310) On March 19, 1996, the plea agreement was filed with the Clerk of Circuit Court. Id. At a March 25, 1996 hearing, Judge Barron accepted the defendant's guilty pleas. Id.

On March 26, 1996, a jury was seated and a penalty phase capital proceeding per the provisions of Section 921.141, Florida Statutes (1992), commenced with Judge Barron presiding. (R. 193-94, 310) On March 30, 1996,

the jury returned the following advisory sentencing recommendations (R. 310):

1. As to Counts I (Sylvia) and II (Edward), death by a vote of 7-5. Id.

2. As to Count III (Anna), life in prison (by a 6-6 vote). Id.

On April 19, 1996, the Trial Court, in a written Order (R. 310-320), adopted the jurors' non-unanimous (a vote of 7-5) recommendations regarding Counts I and II, and imposed death sentences as to both counts. (R. 316, 318) As to Count III, the Trial Court declined to follow the jurors' advisory (a 6-6 split vote) sentence and recommendation of life, overrode it and imposed a death sentence as to this count as well. (R. 320) In justifying each of the death sentences, Judge Barron found that the state had proven the following statutory aggravating circumstances beyond a reasonable doubt:

1. As to Count III, the defendant now had prior convictions; that is, for the two other murders in this same case. Sec. 921.141(5)(b), Fla. Stat. (1992).

2. The homicides were especially heinous, atrocious, or cruel Sec. 921.141(5)(h), Fla. Stat. (1992).

3. The crimes were committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. Sec. 921.141(5)(i), Fla. Stat. (1992).

(R. 310-11, 316-19)

As statutory mitigating factors, the Trial Court found:

1. The defendant had no significant prior criminal history. Sec. 921.141(6)(a), Fla. Stat. (1992).

2. The murders were committed while the defendant was under the influence of extreme mental or emotional disturbance. Sec. 921.141(6)(b), Fla. Stat. (1992).

(R. 312-13, 317-20).

The Trial Court also found as non-statutory mitigating factors:

1. The defendant turned himself in and pled guilty.

2. The defendant was an exceptionally hard worker, a good student and an exemplary member of the United States Air Force.

3. The defendant had been a loving husband and father, and was truly remorseful for what he had done.

4. The defendant had been under great stress due to work, college, childcare and lack of sleep.

5. The defendant was a humble man.

6. The defendant was raised without his natural father.

7. The defendant had little religious training, but had embraced the Christian faith since the offense.

8. The defendant had a long-term emotional disorder and at the time of the crimes was suffering from a major depressive episode.

9. The defendant had again exhibited good behavior subsequent to the crimes.

(R. 313-16, 318-20)

On direct appeal, this Court affirmed the Trial Court's death sentences. Zakrzewski v. State, 717 So. 2d 488 (Fla. 1988). Justice Anstead, joined by two other members of the Court, dissented as to the death sentence imposed in Count III because the Court majority had not

> honored Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975), and our consistent case law in holding that, despite the unusual and unique circumstances involved herein, and the extensive amount of statutory and non-statutory mitigation established, no reasonable jury could vote for mercy, as the jury did here, and spare appellant's life for the killing of the child Anna, while voting for death in the killing of Edward.

Zakrzewski, 717 So. 2d at 496.

Zakrzewski filed a timely motion for rehearing which the Trial Court denied on September 9, 1998. He then filed a timely petition for writ of certiorari on December 3, 1998 in the Supreme Court of the United States. The petition was denied on January 25, 1999. Zakrzewski v. Florida, 525 U.S. 1126 (1999).

On January 24, 2000, the defendant filed a "shell" motion (R. 3-6) to vacate his guilty pleas, judgments and death sentences per the provisions of Florida Rules of Criminal Procedure 3.850 and 3.851 with an appendix (R. 30-191). The motion was prepared by Reed Ammon, Esq., who had been appointed to represent the

defendant per Sections 27.710 and 27.711, Florida Statutes (1998 as amended), known as Florida's "registry" statute. Id. On February 28, 2001, by order of the Trial Court, Ammon was permitted to withdraw as registry counsel and undersigned counsel, Baya Harrison, Esq., was appointed in his stead. On June 28, 2001, the undersigned filed Zakrzewski's complete 3.850 motion for post conviction relief. (R. 192-251) On July 30, 2001, the Trial Court issued an Order to Show Cause. (R. 252). On November 27, 2001, the state filed a response. (R. 253-90) A Huff hearing followed. (R. 300-02) On April 22, 2002, with the permission of the Trial Court, the defendant filed an amendment to the complete 3.850 motion raising an Apprendi/Ring claim. (R. 312-21) On May 6, 2002, the state filed a response to the Apprendi/Ring claim. (R. 322-333) On May 23, 2002, an evidentiary hearing was held before the Trial Court in Shalimar, Florida. (R. 334-35, 576)

C. Disposition in the Lower Tribunal:

On June 17, 2002, Judge Barron rendered a Final Order denying the 3.850 motion to vacate appellant's judgments and death sentences with regard to all claims. (R. 576-84) In so doing, the Trial Court determined that the Apprendi/Ring claim was procedurally barred. Id. On July 1, 2002, Zakrzewski filed a notice of appeal with the Clerk of the Circuit Court for Okaloosa County, Florida, to this honorable Court. (R. 590-91) On July 5, 2002, the defendant filed

an amended notice of appeal. (R. 593-94)

D. Statement of the Facts:

1.Some Of The Evidence Introduced During The Original Trial

On June 13, 1994, Zakrzewski's Air Force supervisor, Senior Master Sergeant Harold Mason, was advised that Zakrzewski did not come in to his work assignment that morning at Eglin Air Force Base. (R. 366) The sergeant was surprised since the defendant was always dependable and punctual. Concerned about the defendant's welfare, Sgt. Mason (now an Okaloosa County Deputy Sheriff) went to Zakrzewski's residence in Mary Ester, knocked at the front door and found it was locked. He observed a broken bedroom window and noticed that some window screens had been removed. (R. 367) No one came to the door. Worried that something might be amiss and concerned for the well being of the defendant and his family, Mason called the Sheriff's Office. (R. 366)

Okaloosa County Deputy Sheriff Robert A. Baczek was dispatched to the residence. When he arrived, Deputy Baczek was advised by Sergeant Mason of his concerns as referenced above. (R. 366)

Deputy Baczek walked around the perimeter of the residence and eventually removed a window screen in order to gain entry. At that time, he identified himself to anyone who might be in the house and announced that he was going to enter the house. (R. 367, 369)

At no time did Deputy Baczek obtain or initiate the procedure for obtaining a search warrant before entering the residence. (R. 369) Nor did he try to locate Zakrzewski to gain his permission for a search. (R. 377) Furthermore, he had no probable cause to believe that a criminal offense had been or was about to be committed at the residence and indeed stated so later in his deposition. (R. 365-81) After he entered the residence, Deputy Baczek found blood, a machete, and the dead bodies of Sylvia, Edward and Anna. (R. 372, 377)

It was only after Deputy Baczek's forced entry into the residence that law enforcement knew that crimes had been committed therein and formed the opinion that the defendant was implicated. (R. 199) Law enforcement authorities then attempted to locate the defendant to no avail since, as it was discovered later, he had fled to Hawaii. (R. 199)

Later that same day (June 13, 1994), after the initial entry and search described above, the Sheriff's Office sought and obtained a search warrant regarding the residence from the Okaloosa County Circuit Judge Ben Gordon. The items of evidence seized from the residence are listed on the inventory attached to said search warrant.

On or about October 14, 1994, the case was televised on "Unsolved Mysteries." (R. 199) After the broadcast, on or about October 15, 1994, the defendant turned himself in to the authorities in Hawaii. (R. 199) Okaloosa

County Deputy Sheriff Joe Nelson then flew to Hawaii to interview the defendant, arrest him and return him to Florida. (R. 199)

Deputy Nelson interviewed Officer Alan Brown of the Molokai Police Department. Officer Brown was present at the jail when the family Zakrzewski had been living with visited the defendant. Officer Brown told Deputy Nelson that he overheard Zakrzewski apologize to the family for having given them a false name, and tell them that his time on this earth was short and that he had to return to Florida to reap what he had sown. (R. 199)

These incriminating statements, as well as virtually all of the other evidence seized in this case, were the results of the initial warrantless search of Zakrzewski's residence.

On or about October 15, 1994, while in police custody, the defendant signed a document entitled, "Notification of Exercise of Rights." That document advised the authorities that he did not and would not consent to the search of his residence, automobile, person or property. (R. 200) Immediately upon his return to Okaloosa County, Zakrzewski executed virtually an identical document. These documents demonstrate Zakrzewski's intent, at the very first opportunity after his arrest, to exercise his rights under Article 1, Section 12 of the Florida Constitution, and the Fourth and Fourteenth Amendments to the United States Constitution, to be secure in his person, house, papers and effects, against unreasonable searches and

seizures.

In his closing argument to the jury, the prosecutor repeatedly belittled Zakrzewski regarding is conversion to Christianity and painted him instead as an anti-Christian zealot committed to the teaching of the German philosopher Frederick Nietzsche. (R. 238-47) The details of the prosecutor's comments are described in the argument section of this brief. Defense counsel did not object to hardly any of the prosecutor's prejudicial remarks in this regard.

2.Testimony Presented During The 3.850 Evidentiary Hearing

Zakrzewski was the first witness. He testified in support of his post conviction claim[1] that his guilty pleas were involuntary in the context of the introduction of the photographs of the slain victims. He stated that "(m)y desire was – when I made the decision to submit a guilty plea was to suppress the pictures and keep them from being flung around like some kind of side show." (R. 411) Zakrzewski said his attorneys promised him that if he pled guilty, they would keep the photographs of the slain victims from being shown to the jury during the penalty phase. (R. 395) He stated that the issue was so important to him that if he had known that the photographs were going to be introduced in evidence, he would not have pled guilty. (R. 396) However the photographs were introduced in evidence and were "waved around like a circus." (R. 397) Zakrzewski testified that he was not cognizant of any ruling the Trial Court had made regarding whether the photographs would be admitted, but had to rely upon what his attorneys told him. (R. 397) Mr. Elmore[2] asked him repeatedly on cross

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[1] Claim II in the complete 3.850 motion (R. 238-47), Issue III here on appeal.

[2] Assistant State Attorney Robert Elmore, the lead prosecuting attorney in the trial.

examination if he did not recall the hearing at which Mr. Killam moved to exclude the photographs, and Judge Barron said he would make that ruling at the hearing when the photographs were actually offered into evidence. (R. 414-16) Specifically, Elmore asked why Zakrzewski didn't discuss the judge's decision with his attorneys and back out of his plea at this time:

> Q. So your testimony is even though you knew that, even though you knew the judge refused to throw them out at that time you were going to rely on the promise from your attorneys that they'd win that later?
>
> A. I didn't fully understand – at that time, I don't recall fully feeling like it was over. I thought for sure that the judge would rule in my favor. That's the way I was led to believe. (R. 416)

Asked by Judge Barron to clarify whether his attorneys had told him that they would suppress those photographs in exchange for him pleading guilty, or if they told him they would file a motion to suppress, Zakrzewski testified that he was led to believe that, one way or another, the photographs would be suppressed:

> At that time, sir, I had no idea about the law – if they told me they were going to do it, all I could do is believe it. It's all I had. (R. 419)

Lead defense counsel, Mr. Koran, testified in this regard:

> . . . but to say that we communicated to Mr. Zakrzewski or intimated or in any other way said anything that I felt could have given him the impression that the photographs would never come in, I can tell you categorically that's not correct. (R. 433)

Koran acknowledged that Zakrzewski felt very strongly about the issue:

> . . . he just hated to see photographs of his children published in such a way or promulgated in such a way that people would see them and we agreed that it would be in everybody's best interest maybe not for the same reason that he felt, but I certainly felt it would be in his best interest that those photographs not be promulgated and so we indicated we would do everything we could to try to keep that from

happening, but we never told him that it wouldn't happen . . .

(R. 433)

Koran acknowledged that the jury vote for the death penalty was very close; 7-5 for death regarding Counts I and II, and 6-6 regarding Count III. (R. 434) He concurred that under those circumstances the photographs acted as a very powerful prejudicial tool for the state. (R. 434) Koran was then asked by the judge:

> Q. Did you ever entice him or – do you recall any conversations with Mr. Zakrzewski in which you tried to entice him to plead guilty in exchange for telling him anything about the photographs?
>
> A. No, except – no, the only – the only thing I recall is that in the context of his trying to understand what would happen in a penalty phase, we had a conversation about what evidence would be presented and there would be less evidence presented than in a guilt phase, it would not be as graphic, but it was never to my recollection and I'm certain about this – it was never intimated to Mr. Zakrzewski that he would – that this stuff would be excluded. (R. 441-42)

Mr. Elton Killam, defense co-counsel, stated that he attempted to keep the photographs out of evidence, but only managed to keep out one. (R. 466) He testified:

> . . . the photographs weren't so much the motivation for the plea. The plea was to establish some mitigation by his cooperation and the fact that that's what he wanted to do. I mean he was a military man and believed in accountability . . . (R. 467-68)

Killam added that no promises were made to Zakrzewski about the photographs not being shown to the jury. (R. 460) He acknowledged that he did not expect the motion to suppress the photographs to be granted and stated that he has never

successfully prevented the introduction of all photographs of a homicide victim in a trial. (R. 461)

It was pointed out that Zakrzewski had already signed the plea agreement before the plea hearing. (R. 416) Zakrzewski signed the plea agreement on March 15, 1996 and the hearing on the plea agreement and the suppression of the photographs was ten days later, on the 25th. (R. 422) Killam agreed with this timeline. (R. 470)

The second issue raised during the evidentiary hearing (Claim IV in the complete 3.850 motion, Issue I on appeal here) was defense counsels' failure to object to the prosecutor's demonization of Zakrzewski during the state's closing argument. Zakrzewski recalled his counsel only "objecting maybe once or twice during the whole trial . . ." (R. 400) As to Elmore's argument that Zakrzewski's reading of Nietzsche was proof of his anti-Christian beliefs, the defendant vehemently believed this should have been objected to. (R. 401) He felt his attorneys should have objected to Elmore's other remarks about Disney World and his references to the children as "babies." (R. 404) He did not advise his attorneys of this during the closing arguments because he did not know better at the time and believed that they would do the right thing. (R. 407)

Asked why he did not object to the state's closing argument referencing Zakrzewski's writings about Nietzsche as being anti-Christian, Koran did not offer

a particular reason. (R. 428)

As to not objecting to the state's use of the term "babies" in referring to the child victims in its closing argument, Koran testified that he felt the jury would perceive an objection as obstreperous or argumentative. (R. 446) He agreed with Elmore that the term ("babies") is part of the vernacular for that geographical region. (R. 446)

As to the prosecutor's use of the term "mass murderer," Koran did not think that the term was applicable in this situation, but felt it was not worth making an objection to it. (R. 447) Koran felt the same way about objecting to the prosecutor's reference to Disney World. That statement was:

> You know it's ironic. He left here and he went to Orlando and all I can ever think of when I think of Orlando is Disney World. Those babies should have gone to Disney World, not him. Maybe they would have like to see paradise on earth in Hawaii. Maybe they would have liked to have seen it. (R. 450)

Koran explained:

> . . . my belief is I didn't object to it because I just felt like it didn't really score with the jury, that it was – to me was a little bit over the top, I didn't really think you were helping yourself with the jury and I didn't think it was worth objecting to. (R. 451)

Another of the statements at issue was:

> What happened then you and I don't really know because he's not telling the truth about it. We know that from the physical evidence – we know he executed her on the edge of the tub, not as she was standing in the hallway just going into the bathroom, not as she stood in the bathroom but over the edge of the tub. (R. 451)

Koran reiterated the same reason as described above for not objecting. (R. 452)

As to the comments about Zakrzewski's anti-Christian, Nietzschean writings, Mr. Koran did not object because he felt they were "relevant evidence." (R. 456)

Killiam acknowledged that they had received copies of the Nietzschean materials through discovery, and admitted that it would be a very unpopular opinion in this region of Florida. (R. 469-70) He was asked why he would then go forward with the religious mitigation argument when it would trigger the state to argue an anti-Christian factor. (R. 469-70) He responded:

> Well, we had five very good witnesses from Hawaii and we thought that those witnesses would overcome anything that Mr. Elmore would come at us with as far as religion and I felt comfortable being a north Floridian and having been brought up in Fundamentalist Christian philosophy that I could take him on on that issue with the jury. (R. 470)

Regarding the search and seizure issue, Zakrzewski testified that he and his wife bought the property and had been living there for a couple of months before the homicide. (R. 403) He did not authorize a search and seizure of evidence from his residence, but did not plan to return to it. (R. 403-04) He did not authorize his attorneys to not move to suppress the evidence taken from the residence. (R. 404)

Koran testified that attempting to suppress evidence is an important strategy in a homicide case (R. 429), but he did not file a motion to suppress the evidence gathered during the search and seizure. (R. 429) He acknowledged that the warrant was obtained after law enforcement had already entered and viewed the bodies (R. 429), but he did not recall that evidence was seized before a search warrant was issued. (R. 429)

Koran testified that he did not file a motion to suppress the evidence because he felt it would have been a futile exercise. (R. 443) He believed the court would have found that there were exigent circumstances which allowed the detective to enter the residence without a warrant. (R. 444) He also testified that he felt the court would determine that Zakrzewski had abandoned his residence. (R. 444)

Koran explained that they decided to go straight to a penalty phase trial because the evidence was very strong, and to demand a guilt phase trial would cause them to lose sympathy from the jury. (R. 436) He noted that they really had few options in that Zakrzewski told them that he committed the crimes. (R. 438) Also, to go to trial and attack the evidence would undermine the mental health mitigation they intended to use in the penalty phase. Furthermore, the jury would then hear that Zakrzewski had admitted his guilt to the mental health professionals. (R. 439)

According to Koran, Killam was to handle the penalty phase proceedings and Koran the guilt phase. (R. 461) Thus Killam was not involved in the decisions regarding efforts to suppress evidence. (R. 461) They discussed the issue, but,

> . . . I know that it came up in our discussions and it was not something that he felt very strongly about and I was not as concerned about that as I was about the other issues that I was going to be involved with. (R. 462)

Harold Mason was the first sergeant for the Air Warfare Center and a senior master sergeant at the time of the homicides. (R. 482) Zakrzewski was one of his troops. (R. 482) When he didn't show up for work, Mason went to the Zakrzewski residence on June 13, 1994, walked around the house and became very suspicious of a broken window. (R. 484) He found the doors locked and a quantity of mail in the mailbox. (R. 485) Feeling something was wrong, he called the sheriff's office and waited for the deputy (Baczek) to arrive. (R. 485) He told Baczek he was concerned because Zakrzewski was always dependable and on time, but had not shown up for class or work. (R. 486) After Baczek checked out the broken window and looked inside, Mason heard him report over his radio that there were signs of a struggle, and Baczek was told over the radio to go in and check. (R. 486)

Charles Richards works in the latent print section and the crime scene section for the Florida Department of Law Enforcement. (R. 487) He testified that a print left in blood in a protected, indoor environment would last for weeks or

even months. (R. 489)

E. Statement on Jurisdiction:

This Court has jurisdiction to review the lower court's final order denying Zakrzewski's Florida Rule of Criminal Procedure 3.850 in this capital case. Art. V, Sec. 3(b)(1), Fla. Const.; Fla. R. App. P. 9.030(a)(1)(A)(I); Fla. R. Crim. P. 3.850(g).

F. Standard for Appellate Review:

This appeal is a review of a post conviction capital proceeding involving mixed questions of law and fact. As such, the circuit court Order (R. 844-46) denying the Florida Rule of Criminal Procedure 3.850 motion is subject to plenary, *de novo* review except that deference is given to the Trial Court's findings of fact so long as there is competent and substantial evidence to support them. Johnson v. Moore, 789 So. 2d 262 (Fla. 2001); Rose v. State, 675 So. 2d 567 (Fla. 1996).

SUMMARY OF THE ARGUMENT

Zakrzewski submits four claims on appeal to this Court of the Trial Court's denial of his Florida Rule of Criminal Procedure 3.850 motion for post conviction relief. Three relate to ineffective assistance of trial counsel and the resulting prejudice to the defendant. The fourth claim concerns Zakrzewski's contention that since the trial judge, not the jury, made the ultimate determination that he be sentenced to death, his Sixth Amendment right to trial by jury was violated based upon principles set forth in Ring v. Arizona, ___ U.S. ___, 122 S.Ct. 2428 (2002).

In Claim I, Zakrzewski cites a host of instances during the prosecutor's closing argument at the original trial where, instead of making reasonable comments on the evidence, he repeatedly demonized the defendant for his alleged adherence to the anti-Christian philosophy of Frederick Nietzsche. The prosecutor took unfair advantage of the community's closely held conservative Christian beliefs to repeatedly hammer home his point. This deprived Zakrzewski of a fair

trial.

In Claim II, Zakrzewski substantiates his counsel's ineffectiveness in failing to move to suppress the evidence seized from his residence after the homicides. The defendant contends that the warantless search violated his Fourth Amendment right to be free from unlawful search and seizure. Had defense counsel protected Zakrzewski's Fourth Amendment rights, the evidence seized as a result of the unlawful search would have been suppressed and he could not have been convicted of any of the offenses of which he was charged.

In Claim III, Zakrzewski seeks to convince this Court that the Trial Court erred in not allowing him to withdraw his guilty pleas based upon the misrepresentations of his counsel to the effect that, if he did so, the state would not introduce photographs of the victims taken at the crime scene. In addition, had defense counsel successfully protected him against the aforementioned unlawful search of his residence, the state would not have been able to gather admissible evidence to convict him and he would not have pled guilty as charged.

The defendant claims that he suffered prejudice as a result of his counsel's ineffectiveness. As noted above, had his counsel protected him against the illegal seizure of evidence from his residence, he could not have been convicted and he would not have pled guilty. Furthermore, Zakrzewski almost overcame the imposition of the death penalty, the ineffectiveness notwithstanding. The jury

returned advisory recommendations of death as to Counts I and II by razor-thin votes of 7-5. The jury vote was split 6-6 as to Count III. Had defense counsel served the client properly, there is a distinct likelihood that the Trial Court would have had no basis for imposing the death penalty.

In Claim IV it is argued that the Trial Court had no legal authority to sentence Zakrzewski to death as a matter of law due to Florida's constitutionally flawed death penalty statute which allows the judge, not the jury, to make the ultimate decision whether to impose the death penalty at all.

ARGUMENT

Issue I: The trial court erred in not finding that Zakrzewski was denied effective assistance of counsel by not objecting to the prosecutor's improper closing argument which demonized the defendant.

Defense counsel had a solemn constitutional duty to protect Zakrzewski from prejudicial, improper and self-serving comments by the prosecutor during all stages of the proceedings, especially during closing arguments. Failure to protect the defendant in this regard constitutes ineffective assistance of counsel as a matter of state and federal law. See for example Miller v. State, 676 So. 2d (Fla. 1st DCA 1996). See also United States v. Morris, 568 F.2d 396 (5th Cir. 1978) and Connelly v. State, 744 So. 2d 531 (Fla. 2nd DCA 1999) where the courts held that improper, prejudicial comments made by the prosecutor in a state court criminal trial violate the federal constitution. In this case, Zakrzewski's counsel were deficient because they allowed the prosecutor, virtually without objection, to make a whole host of highly inflammatory, incorrect and prejudicial remarks to the jury during his closing argument.

In Stewart v. State, 51 So. 2d 494 (Fla. 1951), this Court referenced the duties of counsel and the trial court concerning closing argument:

> We have not only held that it is the duty of counsel to refrain from inflammatory and abusive argument but that it is the duty of the trial court on its own motion to restrain and rebuke counsel from indulging in such argument.

The Court further explained the special duty owed by a prosecutor:

> Under our system of jurisprudence, prosecuting officers are clothed with quasi judicial powers and it is consonant with the oath they take to conduct a fair and impartial trial. The trial of one charged with a crime is the last place to parade prejudicial emotions or exhibit punitive or vindictive exhibitions of temperament.

Id. at 495.

In Bertolotti v. State, 476 So. 2d 130, 133 (Fla. 1985), the Court condemned improper arguments by prosecutors in very clear terms, stating:

> The proper exercise of closing argument is to review the evidence and to explicate those inferences which may reasonably be drawn from the evidence. Conversely, it must not be used to inflame the minds and passions of the jurors so that their verdict reflects an emotional response to the crime or the defendant rather than the logical analysis of the evidence in light of the applicable law.

In Pacifico v. State, 642 So. 2d 1178, 1184 (Fla. 1st DCA 1994), the district court commented upon the impropriety of the prosecutor injecting his or her own personal views on the evidence into the proceedings, stating in part,

> (b)ecause a jury can be expected to attach considerable significance to a prosecutor's expressions of personal beliefs, it is inappropriate for a prosecutor to express his or her personal belief about any matter in issue.

Thus, it is reversible error for the prosecutor to "express a personal belief in the guilt of the accused." Riley v. State, 560 So. 2nd 279, 280-81 (Fla. 3d DCA 1990). It is also reversible error for the prosecutor to assert that "in his opinion the defense was a fabrication." Huff v. State, 544 So. 2d 1143 (Fla. 4 DCA 1989).

The prosecutor is also prohibited from making personal attacks on the defendant himself.

> It is improper for a prosecutor to refer to the accused in derogatory terms, in such a manner as to place the character of the accused in issue.

Pacifico v. State, 642 So. 2d at 1183.

In Pacifico, the First District Court of Appeal found fundamental error because the prosecutor attacked the character of the defendant by calling him a "sadistic, selfish bully," a "criminal," a "convicted felon," a "rapist," and a "chronic liar." Id. Similarly, the Fifth District Court of Appeal found fundamental error when the prosecutor called the defendant shrewd, cunning, and diabolical, in combination with other improper remarks. Fuller v. State, 540 So. 2d 182, 184 (Fla. 5th DCA 1989).

Zakrzewski acknowledges that under Section 921.141(1), Florida Statutes, the prosecutor in the penalty phase of a capital murder case is permitted reasonable latitude to comment, not only upon the nature of the crimes committed, but upon the "character" of the defendant himself. However, the operative word is

"reasonable," which does not authorize the prosecutor to engage in character assassination. That is exactly what the prosecutor did repeatedly in his closing argument during Zakrzewski's penalty phase trial.

Notwithstanding the aforementioned strict constitutional limitations on the state's conduct during closing argument, defense counsel, virtually without objection, permitted the prosecutor to relentlessly vilify and demonize their client. Specific instances of some of the highly inflammatory, prejudicial comments made by the prosecutor include the following:

In an obvious attempt to inflame the passions and emotions of the jury, the prosecutor referred to the young victims as "babies" on five occasions although the record clearly reflects the ages of the two children as seven and five respectively.[3]

> 1. "…he chose to murder his own babies." (p. 1219, R. 115)
>
> 2. "…Those babies should have gone to Disney World, not him." (p. 1224, R. 120)
>
> 3. "…He had already put it there, planning to call his babies in there." (p. 1227, R. 123)
>
> 4. "…It's time for you to tell me if a man can kill his wife and babies like this and not face the ultimate legal consequence for it." (p. 1234, R. 130)

[3] The following quotes are found in Exhibit D (R. 105-133), part of the Appendix attached to Zakrzewski's original 3.850 motion to vacate the defendant's death sentences (R. 3-6). The "p" cites are the original pagination, the "R." cites refer to the pagination of the record on appeal in this post conviction proceeding.

5. "…They'll write to him and he'll be living a life that he denied his babies." (p. 1235, R. 131)

These comments alone floridly contradict the law on the state's presentation that " . . . it must not be used to inflame the minds and passions of the jurors so that their verdict reflects an emotional response to the crime or the defendant rather than the logical analysis of the evidence in light of the applicable law." See Bertolotti, *supra*. Yet defense counsel did not object to these offensive, prejudicial comments by the prosecutor.

Asked at the evidentiary hearing why he did not object to that language, Koran testified that he felt the jury would perceive an objection as "obstreperous" or "argumentative" and agreed with Elmore that the term, "babies," is simply part of the vernacular for that region of Florida. (R. 446) However, it is obvious from its usage in the above quotes that the word "babies" was not simply an habitual, vernacular idiosyncrasy, but a strategic ploy, hammered into the jury's minds over and over again by the prosecutor to illicit hatred for Zakrzewski. It is hardly harmless error not to have objected.

The prosecutor also attempted to vilify the defendant by calling him a "mass murderer" on three different occasions in his closing argument. See the original 3.850 motion, Appendix, Exhibit D, pp. 1223, 1225, (R. 119, 121). Again, defense counsel failed to object to these improper comments. These kinds of personal invective are not permitted by this Court and the Florida District Courts of Appeal.

See for example Urbin v. State, 714 So. 2d 411 (Fla. 1998); Taylor v. State, 640 So. 2d 1127 (Fla. 1st DCA 1994); Brown v. State, 550 So. 2d 527 (Fla. 1st DCA 1989), and Spriggs v. State, 392 So. 2d 9 (Fla. 4th DCA 1980).

The prosecutor, again without objection, improperly utilized a "golden rule" argument regarding the death of Sylvia Zakrzewski, stating:

> Sylvia was beat (sic) in the face with a crowbar. She was beaten in the face with this. Now they want you to believe she went down like a sack of potatoes, she was unconscious instantly, didn't feel any pain. You pick this up and you imagine the pain that it will cause.

(Appendix to original 3.850 motion, Exhibit D, p. 1230, R. 126, emphasis supplied.) Earlier in his argument, using the "golden rule" strategy, the prosecutor stated, "I feel sorry for all the persons he has hurt and you should, too. But that's no reason to excuse him." (Appendix to original 3.850 motion, Exhibit D, p. 1218, R. 114) Defense counsel objected to these comments, but the objection was overruled.

The prosecutor launched the following sarcastic and emotionally charged attack upon the defendant, which could only be designed to further demean him in the minds of the jurors, instead of limiting himself to commenting on the evidence:

> You know, it's ironic, he left here and went to Orlando and all I can ever think of when I think of Orlando is Disney World. Those babies should have gone to Disney World, not him. Maybe they would have like (sic) to see paradise on earth in

Hawaii. Maybe they would have liked to have seen it. (Appendix, Exhibit D, p. 1224, R. 124)

What happened then, you and I don't really know because he's not telling the truth about it. We know that from the physical evidence. We know he executed her on the edge of the tub, not as she was standing in the hallway just going into the bathroom, not as she stood in the bathroom, but over the edge of the tub. (Id. at p. 1228, R. 124)

But, we know her blood would have fallen in (sic) that floor, would have spattered on that door, would have spattered on that sink and that toilet and those walls just like Edward's blood did if his story about her is true. (Id. at p. 1229, R. 125)

It's time for me to be quiet and to listen to you. It's time for you to tell me if a man can kill his wife and babies like this and not face the ultimate lawful consequence for it. It's time for you each to tell me whether a crime this horrible deserves our law's ultimate penalty. I've prove (sic) to you it's the ultimate crime. I can't make it any worse than it is. I mean, there it is. It's not going to get any worse because it can't get any worse. (Id. at pp. 1234-1235, R. 130-131)

Or does he deserve to go to prison only for what he did? Remember, he hasn't said he's suffering in jail like he suffered in his previous life with Sylvia. They haven't tried to show you that. Does he deserve to go to prison where he can live a life? It might not be a life we all want, that he wants even but he can live a life there. (Id. at p. 1235, R. 131)

He can read his books. He can read his Nietzsche. He can see the sun and the moon and the stars. He can talk to his mother. He can love and be loved. He can write to his friends that all came here and told the truth about his life before these murders and his life after these murders. They will write to him and he'll be living a life that he denied his babies. (Id. at p. 1235, R. 131)

> No, no, no, no. His lawyer might try to convince you that living out his life with the guilt he feels is a worse punishment. That is a common argument that we hear on the street people. People say, "I'd rather he suffer forever in a jail than get a quick execution." No. If it would be a worse punishment, than (sic) we wouldn't be here. If it would be a worse punishment, he would have taken his own life if it was that bad. (Id. at p. 1235, R. 131)
>
> It doesn't hurt him bad (sic) enough for you to say, yeah, that's what we'll do, we'll let him suffer. It doesn't hurt like Edward hurt when he saw his own father murdering him. It doesn't hurt like Anna hurt when she was forced down into the murder of brother, knowing she was next. (Id., pp. 1235-236, R. 131-132.)

Perhaps most disturbing was the demonization of Zakrzewski based upon the prosecutor's self-serving spin on his alleged anti-Christian religious beliefs. Thus, at one point the prosecutor commented that it was,

> a factor of his disturbance that his own psychologist, Dr. Larson, admitted was that he was narcissistic. He had these narcissistic tendencies and his fascination with Nietzsche's superman, the ideal superman who despises Christianity. (Appendix to 3.850 motion, Exhibit D, p. 1216, R. 112, emphasis added.)

Later, the prosecutor makes it clear that he believed that the defendant himself hated Christianity, stating:

> (a)fter he came back from Molokai and before he went, he was fascinated with Nietzsche. Nietzsche denounces Christianity. In his own words in this writing here, he denounces Christianity. In his own writing, not the quotes, but this section here in cursive and he says, "That's my writing." He said, "Christianity is a primary culprit in propagating the belief that suicide is a ticket to eternal damnation. Ludicrous. All that's required are a couple of I believes and please forgive me. The Bible says it. This doctrine of eternal damnation is

> but another route of egress for spineless fools." (Id., p. 1223, R. 119, emphasis supplied.)

The prosecutor continued:

> That's surrounded by Nietzsche philosophy about the creative superman. So, you be sure to weigh his philosophy about Christianity with whether or not he should be forgiven for appearing to accept Christianity in Hawaii. (Id. at pp. 1223-224, R. 119, 120 emphasis supplied.)

The prosecutor added further:

> When you get these quotes, the one right on top as it came out of the computer, "A place in Valhal," that's Viking heaven, "is promised to us; for him who bravely dies with his blood-stained sword beside him and his heart unrent with tears." There's his blood-stained sword. (Id. at p. 1234, R. 130.)

It is important to note that the defendant never attempted to justify the murders of his family members based upon the philosophy of Friedrich Nietzsche. More importantly, who is the prosecutor to tell the jury what Christianity is or is not? Christianity encompasses many belief systems. Some denominations are tolerant, some not, of a person's right to question and explore metaphysical questions. The same is true of the Islamic and Jewish religions. No one can say that everyone within one religion will believe and practice their faith in exactly the same way. Zakrzewski should not have been attacked by the state for criticizing some elements of Christianity; there are many Christians who do not believe in "eternal damnation," and plenty who quote metaphorically from other belief systems. The state is not qualified to interpret the nuances of the defendant's

writings. For example, the state implies that the defendant's "sword" was the murder weapon, and that the phrase "unrent heart" must have meant that the defendant felt no remorse for what he did.

Thus, the aforementioned comments made by the prosecutor were not relevant, nor did they have any probative value whatsoever.[4] Instead, they constituted a prejudicial, highly charged card to play in this "bible belt" region, probably the most solidly Christian part of the State of Florida. The tactic was intended to convince and persuade the jury[5] that Zakrzewski was the "devil" incarnate who should be put to death, not just because he murdered his wife and children, but because he had insulted and threatened religious beliefs held sacred in the community. Thus, the prosecutor improperly injected religion[6] into the proceedings far beyond his right to do so and the defendant's counsel were duty bound to object to it.

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[4] Assuming for the sake of argument, that at the time of the homicides, the defendant held religious beliefs which were diametrically opposed to the tenets of Christianity, how was that relevant to whether he should be sentenced to death?

[5] In the event that the state argues that there is nothing in the record to suggest that those who sat on the jury held Christian religious beliefs, the defendant asks that the rule of common sense be applied.

[6] Appellant acknowledges that the sincerity of the defendant's Christian beliefs were fair game for the prosecutor during closing arguments since the defense, to a limited degree, used that during the penalty phase of the trial. But the prosecutor went far beyond that and instead, unfairly portrayed the defendant as the anti-Christ.

Asked at the evidentiary hearing why he did not object, Koran did not offer a particular reason:

> In light of the situation it was – I may have felt it would better not to enter an objection especially knowing we had a closing argument of our own that would conclude the proceedings. So to answer your question simply I can't tell you why I didn't object. (R. 428)

At any rate, defense counsel initially made no effort to object to these improper, inflammatory comments, tailor-made to cause the jury to react emotionally -- rather than to engage in a rational, logical analysis of the facts and circumstances. Trial counsel added that the reason they did not object was that (1) the statements were legitimate closing argument, and (2) as a strategic reason, they did not want to appear to be unreasonably interfering with that closing argument. For example, Koran stated:

> . . . my belief is I didn't object to it because I just felt like it didn't really score with the jury, that it was – to me was a little bit over the top, I didn't really think you were helping yourself with the jury and I didn't think it was worth objecting to. (R. 451)

Defense counsel were wrong. The arguments were improper and should have been objected to.

Killiam was questioned about his strategy in even pursuing a religious mitigation factor when they knew of the Nietzschean materials confiscated from the defendant while he awaited trial. Killiam admitted that he knew it would be a very unpopular viewpoint in this region of Florida (R. 469-470), but responded:

> Well, we had five very good witnesses from Hawaii and we thought that those witnesses would overcome anything that Mr. Elmore would come at us with as far as religion and I felt comfortable being a north Floridian and having been brought up in Fundamentalist Christian philosophy that I could take him on on that issue with the jury. (R. 470)

Apparently defense counsel were gambling that the jury, drawn from a conservative, Christian population, would separate and ignore the highly inflammatory, emotionally charged remarks from facts, would hold the improper remarks against the prosecutor and give him less credence. Thus, counsel stayed in their seats allowing the state to build a fire of religious prejudice against Zakrzewski and continually fan those flames.

Zakrzewski suffered severe prejudice as a result of his counsels' failure to protect him from the prosecutor's closing argument. It is important to note that the prosecutor's comments nothwithstanding, the jury death recommendations on Counts I and II were by a hair's breadth vote of only 7-5, and was split 6-6 on Count III. Had defense counsel objected contemporaneously the very first time an improper statement was made and each time thereafter, the Trial Court would have had no choice but to sustain the objections, strike the comments and order the jury to disregard them. Also, had defense counsel objected strongly enough and requested the prosecutor to refrain from making the improper comments again, it is likely that the prosecutor would not have repeated them. If the improper comments had not been made (or stricken if they were made), there is a distinct likelihood and

reasonable probability, given the close vote, that the jury would have returned life recommendations on all three counts. In that case, if three life recommendations had been returned, the Trial Court could not legally have overridden them.

Alternatively, if defense counsel had made contemporaneous objections each time the prosecutor made an improper remark, asked for them to be stricken and asked for a mistrial, and if the Trial Court had not sustained trial counsels' contemporaneous objections and granted the relief requested, at least the issue would have been preserved for appellate review. Upon appellate review, there is a distinct likelihood and reasonable probability that Zakrzewski would have been granted a new trial based upon the Trial Court's failure to grant the requested relief.

Issue II. The Trial Court erred in not finding that Zakrzewski was denied effective assistance of counsel when his trial lawyers failed to object to law enforcement illegal search of his residence and seizure of incriminating evidence therefrom.

As described above, Deputy Baczek entered and searched Zakrzewski's home without probable cause or a search warrant. (R. 368) Thereafter, the police seized and removed incriminating evidence from the residence, most significantly the bodies of persons he was alleged to have murdered, the weapon used to commit the crimes and his bloody fingerprints and palm prints. Every shred of incriminating evidence suggesting that Zakrzewski might have committed murder flowed from and was the fruit of that illegal entry, search and seizure.

The Fourth Amendment to the United States Constitution specifically

protects the right of the people to be secure in their homes.[7] In fact, the "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." United States v. United States District Court, 407 U.S. 297, 313, 92 S. Ct. 2125, 32 L. Ed. 2d 752 (1972). This right is so unequivocal that warrantless searches and seizures inside a home are deemed presumptively unreasonable. See Payton v. New York, 445 U.S. 573, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980). To implement this principle, the Supreme Court has held that warrantless searches "are per se unreasonable under the Fourth Amendment . . . subject only to a few specifically established and well-delineated exceptions." Katz v. United States, 389 U.S. 347, 357, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967). Accord, United States v. United States District Court, 407 U.S. 297, 317, 92 S. Ct. 2125, 32 L. Ed. 2d 752 (1972). These exceptions have been "jealously and carefully drawn" (Jones v. United States, 357 U.S. 493, 499, 78 S. Ct. 1253, 2 L. Ed. 2d 1514 [1958]), and the burden is upon the state to demonstrate that the procurement of a warrant was not feasible because "the exigencies of the situation

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[7] The Fourth Amendment to the United States Constitution, made applicable to the states by the Fourteenth, provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

made that course imperative." McDonald v. United States, 335 U.S. 451, 456, 69 S. Ct. 191, 93 L. Ed. 153 (1948).

Thus, even when a felony has been committed and officers have probable cause to believe that incriminating evidence will be found within a home, in the absence of exigent circumstances, a warrantless entry into the home to search for incriminating evidence is unconstitutional. Payton v. New York, 445 U.S. at 583; Hornblower v. State, 351 So. 2d 716, 718 (Fla. 1977) (holding that a warrantless search is presumed to be illegal unless there are exigent circumstances in addition to probable cause).

An "exigent circumstance" has been defined as "a situation where the inevitable delay incident to obtaining a warrant must give way to an urgent need for immediate action." United States v. Burgos, 720 F.2d 1520, 1526 (11th Cir. 1983). Circumstances that have been found to meet that requirement include danger of harm to police officers or the public and potential destruction of evidence. Vale v. Louisiana, 399 U.S. 30, 90 S. Ct. 1969, 26 L. Ed. 2d 409 (1970); United States v. Burgos, 720 F.2d at 1526. See also *United States v. Kreimes*, 649 F.2d 1185, 1192 (5th Cir. 1981) (entry without a warrant is also justified where there is hot pursuit, a fleeing suspect, danger to the arresting officers or danger to the public).

In Payton, the police, acting on probable cause after two days of

investigation, entered Payton's home without a warrant in order to arrest the defendant for murder. Though light and music emanated from the apartment, there was no response to their knock on the metal door. The officers broke into the apartment but found no one there. In plain view, however, was a .30-caliber shell casing that was seized and later admitted into evidence at Payton's murder trial. In due course, Payton surrendered to the police, was indicted for murder and moved to suppress the evidence taken from his apartment. In finding the entry in Payton illegal, the Court stated:

> The Fourth Amendment protects the individual's privacy in a variety of settings. In none is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home -- a zone that finds its roots in clear and specific constitutional terms: "The right of people to be secure in their . . . houses . . . shall not be violated." That language unequivocally establishes the proposition that "at the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." Silverman v. United States, 365 U.S. 505, 511, 5 L.Ed.2d 734, 81 S.Ct. 679, 97 A.L.R.2d 1277. In terms that apply equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant.

Payton v. New York, 445 U.S. at 589-90.

Additionally, an emergency situation can amount to an exigent circumstance, allowing an officer to enter a home without a warrant. The

emergency exception first received recognition in Florida in Webster v. State, 201 So. 2d 789 (Fla. 4th DCA 1967), and has been applied in various circumstances. See Guin v. City of Riviera Beach, 388 So. 2d 604 (Fla. 4th DCA 1980) (reasonable belief that a crime was in progress held sufficient to justify a warrantless entry); Grant v. State, 374 So. 2d 630 (Fla. 3d DCA 1979) (officers responding to reported shooting held to have properly entered apartment where they discovered certain evidence); Long v. State, 310 So. 2d 35 (Fla. 2d DCA 1975) (preservation of human life justified an emergency entry of a home and admissibility of contraband obtained).

However, this exception is not without limits or restrictions. To invoke the emergency rule to search a person's home, the exigencies of the situation must be so compelling as to make a warrantless search objectively reasonable. Mincey v. Arizona, 437 U.S. 385, 98 S.Ct. 2408, 57 L.Ed.2d 290 (1978) (the Fourth Amendment does not bar police officers from making warrantless entries and searches when they reasonably believe that the person within is in need of immediate aid).

In State v. Boyd, 615 So. 2d 786 (Fla. 2d DCA 1993), an officer was dispatched to a home to investigate a complaint that a man (Boyd) was in the backyard firing a shotgun. When the officer arrived at the residence, he observed Boyd standing in the yard aiming a shotgun at other homes in the vicinity. The

officer arrested Boyd for improper exhibition of a firearm. At that time, the officer observed that the door to the house was open and the name on the mailbox was "Beardon." For these reasons and because Boyd did not have any identification, the officer believed that an armed burglary had possibly occurred and that there might be a shooting victim inside the home. No one answered or came to the door when the officer called. At that point in time, the officer entered the home. While inside the home, he saw drug paraphernalia (contraband) and stolen goods. The trial court granted Boyd's motion to suppress, and the state appealed. On appeal, the Boyd court, quoting in part from Cross v. State, 469 So. 2d 226 (Fla. 2d DCA 1985) which relied on Mincey v. Arizona, 437 U.S. 385 (1978), held that,

> To invoke the emergency rule to search a person's home, the exigencies of the situation must be so compelling as to make a warrantless search objectively reasonable. (Emphasis supplied.) Thus we conclude that to allow a warrantless entry into a person's home in an emergency situation, there must be objectively reasonable circumstances that convey to the police officer an articulable, reasonable belief that an emergency exists. An emergency need not, in fact, exist so long as the officer reasonably believes it to exist because of objectively reasonable facts. The officer's conclusion then may be based on a combination of the "objective" nature of the circumstances and the officer's "subjective" perception of those circumstances.
>
> This court in Long relied on Webster for the rule that: The preservation of human life is paramount to the right of privacy protected by search and seizure laws and constitutional guaranties; it is an overriding justification for what otherwise may be an illegal entry. It follows that a search warrant is not required to legalize an entry by police for the purpose of bringing emergency aid to an injured person.

Id. at 789. (Italics original and underscoring supplied.)

The court determined that the emergency exception was satisfied because,

> the officer here properly acted within these guidelines. First, he acted upon credible information. He had been dispatched to the scene based upon reports that there was a man in the yard discharging a firearm. Second, he observed a potentially life-threatening, out-of-control situation. When Deputy Gunnoe arrived he found appellee angry, red-faced, holding a shotgun shoulder high aimed in the direction of the residences yelling, "I'll shoot." Deputy Gunnoe had to point his own firearm at appellee, twice order him to put down the shotgun and threaten to shoot appellee before he finally put the shotgun down. Third, he observed evidence that the weapon had been fired and that another individual might be involved. After arresting appellee and placing him in the patrol vehicle, Deputy Gunnoe found three recently-fired shotgun shells in the yard near the front door, which was open. The deputy could not identify who resided in the house, could not get any response from the house and testified he entered through the open front door to see if there were injured persons inside. The name on the mailbox was not appellant's name, thus leading the officer to believe that appellant was shooting, not in his own yard, but in someone else's yard.

Id. at 789, 790. (Emphasis supplied.)

In the case at bar, there was no reasonable basis at the time to conclude that an emergency existed that was sufficient to justify a warrantless entry into Zakrzewski's residence. All the deputy knew when he arrived at Zakrzewski's house was that two of Zakrzewski's co-workers had reported that he had not shown up for work that day.

Upon arriving at Zakrzewski's property, Deputy Baczek looked around the outside of the house noting that a window was broken and that some of the window

screen frames seemed a little bent. Asked if he waited for his back-up to arrive, Deputy Baczek answered:

> No, I did not. I didn't feel that there was anything—I couldn't see anything of-what's the word I'm looking for-immediacy as far as backup at that time. I didn't think that-I didn't feel that there was anybody in the house because of just the appearance of the outside and no vehicles being there. (R. 368-69, Deputy Baczek's May 1, 1995 deposition)

As in Drumm v. State, 530 So. 2d 394 (Fla. 4th DCA 1988), law enforcement here could not justify the warrantless entry into Zakrzewski's residence by claiming that they feared for their safety (or the safety of others) because of "what they did not know about the case" or "who was in the house." Id. at 397.

It follows that at the time Deputy Bazcek arrived at Zakrzewski 's home, the various prongs of the "exigent circumstances" test could not be met. There was no indication that Zakrzewski or anyone else had committed a violent crime which would give rise to fear that the suspect was likely to attack the police or present a danger to the general public. Nor was there evidence to support a fear that a suspect might flee or that, if a suspect did leave the residence, the police would be unable to arrest him or her at that point. There was no suspicion that anyone was in need of medical assistance, which would meet the criteria of an emergency, justifying entry without a warrant. It is only in hindsight that one could suspect that someone inside the residence might have needed emergency treatment; Bazcek himself stated that he did not perceive any emergency. (R. 368-69) Finally, there

was no indication that evidence might be destroyed during the time it would take for a search warrant to be issued.

In the present case, the police proceeded to enter Zakrzewski's home without probable cause, without a warrant and in the absence of exigent circumstances. Deputy Baczek saw no evidence (a) of danger to the police or the public, (b) that medical intervention was necessary, (c) or of a homicide. He did not have even a suspicion that a crime had been committed prior to entering the residence. In fact, he testified that he became "extremely cautious" only after he had entered the residence and found a woman's purse lying open on the floor. (R. 371) He called the police dispatcher, declaring the residence to be a crime scene sometime later, only after he had found the bodies. (R. 372) Deputy Baczek added that upon his arrival at Zakrzewski's home:

> I walked around the house, did note that there were several screens down, but nothing significant. I didn't see any signs of forced entry or anything like that. I tried both exterior doors. They were both locked. I then came back to the front and again Sergeant Schmit or Sergeant Mason had informed me that there was a broken window, which I had previously seen, but the screen was back in place. I then looked into the broken window and I could see that there was glass outside on the ground, there was glass on the window seal (sic).
>
> . . . .
>
> Yes, I was calling inside through the broken window. At that time I got no response. Based upon the evidence that I saw, the broken window and the screen being up, glass being inside and out and the screens being back up, I felt that that was kind of curious and out of the ordinary that somebody would break a window and put a screen

> back. I feared for the welfare of whomever may have been in the house at that time, thinking that there may have been a burglary, the family may have been on vacation or something like that. At that time I notified our dispatcher that based upon this I was going to enter the house through the broken window to check on the welfare and see if there had been any kind of burglary inside.

(R. 367-68)

The Trial Court concluded that Zakrzewski was not entitled to relief because "the search of the home was justified under the exigent circumstances exception to the warrant requirement." (R. 578) The Trial Court's conclusion is incorrect because before exigent circumstances can be a valid exception to the warrant requirement probable cause must exist. The Trial Court was attempting to use exigent circumstances in a hindsight view of what might have been as the basis for establishing probable cause. The Trial Court added that "Deputy (Baczek) saw signs of a struggle and there was no response to knocks at the door or calls through the broken window." (R. 578) However, no one, including Deputy Baczek, ever said this.[8] Instead, Deputy Baczek said just the opposite. For example, as noted above, he stated, "I didn't see any signs of forced entry or anything like that." (R. 367, emphasis supplied.) Baczek added, "I didn't feel that there was anybody in the house because of just the appearance of the outside and no vehicles being there." (R. 368-69) Asked whether he thought anyone had entered the home

[8] As noted in the statement of the facts, Deputy Baczek did not testify at the evidentiary hearing. Rather, his deposition was entered into evidence.

through the broken window, he responded:

> No. My opinion was that no one had entered through that broken window because of the amount of glass that was still remaining on the top of the window seal (sic) immediately inside the window and all the glass shards still remaining on top of the seat, the wooden seat inside there.

(R. 379)

Thus, it is apparent that the officer had neither probable cause nor exigent circumstances when he entered Zakrzewski's home. The trial court's finding that he did was misplaced. Under these circumstances, the search of Zakrzewski's home and seizure of evidence therefrom were illegal -- and it would have been reversible error had the trial court denied a properly filed motion to suppress the illegally seized evidence. Drumm v. State, *supra.*

The state also argues that the evidence seized from Zakrzewski's home did not have to be suppressed because he abandoned his home and thus did not have a reasonable expectation of privacy therein. (R. 266-67) The Trial Court, however, did not deny Zakrzewski's claim on a theory of abandonment.

The state cites a host of cases in support of its contention that a person does not have a reasonable expectation of privacy in abandoned property. (R. 266-67) However, upon examining these cases, it is clear that they are not applicable. In these cases, the abandoned property was either located in a public place or, if found in a private place (such as a dwelling) rented and the true owner gave actual or

apparent consent to the search. Also, in the cases cited by the state, the property was not the defendant's homestead. See for example Abel v. State, 362 U.S. 217, 241 (1960) (the property seized was found in waste basket in the defendant's hotel room after he checked out of the room.); California v. Greenwood, 486 U.S. 35, 39-41 (1988) (trash abandoned by leaving it on roadside); Rakas v. Illinois, 439 U.S. 128 (1978) (this case concerned standing, rather than abandonment, in which property seized was found in a vehicle owned by someone other than the defendant.); U.S. v. Ramirez, 145 F.3d 345, 353 (5th Cir. 1998) (the property seized was found in defendant's vehicle after he had fled to another country); U.S. v. Winchester, 916 F.2d 601, 603-604 (11th Cir. 1990) (the law enforcement officers seized evidence from the defendant's rented cottage after he had left it and one of the cottage's other occupants gave consent to the search.); Gudema v. Nassau County, 163 F.3d 717, 722 (2d Cir. 1998) (a civil case in which the petitioner, a police officer, claimed the police department unlawfully seized his police shield and driver's license which he had lost); U.S. v. Poulson, 41 F.3d 1330, 1336-37 (9th Cir. 1994) (the defendant had no reasonable expectation of privacy in property that was left in a storage locker where the manager of the storage facility confiscated the property and turned it over to the police because the defendant failed to pay rent.); U.S. v. Thomas, 864 F.2d 843, 846 (D.C. Cir. 1989) (the property seized was found in defendant's gym bag which he left outside an

apartment door in a public hallway of an apartment building.); Jones v. State, 332 So.2d 615, 618 (Fla. 1976) (the property seized was found in defendant's vacated, rented shack [previously used as a chicken farm] and the landlord consented to the officers searching it.).

In sum, none of the cases cited by the state involve the seizure of property found in a defendant's home in which the defendant retained a property interest at the time of the search. In addition, in each of the cases sustaining the search of a dwelling, the officers received consent from someone who had actual authority or apparent authority to do so, and the officers actually knew (or at least reasonably believed) that the defendant had abandoned the property at the time of search. At the time Deputy Baczek entered Zakrzewski's home, Zakrzewski remained the legal owner. Additionally, it is undisputed that no one consented to Deputy Baczek entering Zakrzewski's home. It is equally clear that Deputy Baczek did not justify his entry of the home without a search warrant under the pretext that he believed the house was abandoned. Florida affords heightened protections for homestead property and Zakrzewski's home is no exception. Therefore, the state's argument -- that in hindsight (knowing only months later that Zakrzewski had moved to Hawaii) Deputy Baczek's warrantless entry into Zakrzewski's home was lawful because Zakrzewski had abandoned it -- must fail.

The state adds that even if the deputy entered and searched Zakrzewski's

home without exigent circumstances or probable cause, the evidence still should not be suppressed under the inevitable discovery doctrine, an exception to the exclusionary rule. (R. 269-72) Under this doctrine, evidence is admissible that otherwise could be excluded (because of an unlawful search or seizure) if it inevitably would have been discovered by lawful means had the illegal conduct not occurred. Nix v. Williams, 467 U.S. 431, 104 S. Ct. 2501, 81 L. Ed. 2d 377 (1984). However, in order for the evidence to be admissible under the inevitable discovery exception, the court must find that,

> (t)here must be a reasonable probability that the evidence in question would have been discovered by lawful means, and the prosecution must demonstrate that the lawful means which made discovery inevitable were possessed by the police and were being actively pursued *prior* to the occurrence of the illegal conduct.

U. S. v. Satterfield, 743 F.2d 827, 846 (11th Cir. 1984), emphasis supplied. In other words, the state cannot rely on the inevitable discovery exception merely by claiming that the evidence would have been found eventually. It must also show that

1. lawful means were being followed by the authorities, and

2. law enforcement was already seeking the evidence prior to the unlawful entry.

In very unambiguous terms, virtually mirroring the circumstances of the case at bar, the court in Satterfield held:

> The Government cannot later initiate a lawful avenue of obtaining the evidence and then claim that it should be admitted because its discovery was inevitable. This is a sound rule, especially when applied to a case in which a search warrant was constitutionally required. Because a valid search warrant nearly always can be obtained after the search has occurred, a contrary holding would practically destroy the requirement that a warrant for the search of a home be obtained *before* the search takes place. Our constitutionally-mandated preference for substituting the judgment of a detached and neutral magistrate for that of a searching officer, *United States v. Martinez-Fuerte*, 428 U.S. 543, 568, 96 S. Ct. 3074, 3087, 49 L. Ed. 2d 1116 (1976), would be greatly undermined.

Id. at 846, 847. This excerpt makes it clear that the inevitable discovery rule cannot be used as an after-the-fact justification for the unlawful entry and warrantless search of Zakrzewski's home. At the time Deputy Baczek unlawfully entered Zakrzewski's residence, law enforcement not only lacked the lawful means to discover the evidence inside the home, it was not even actively pursuing a lawful means to do so prior to the unlawful entry. Therefore, the discovery of the evidence by law enforcement, all of which led to the eventual conviction of Zakrzewski, certainly does not meet the criteria of the inevitable discovery exception to search and seizure laws.

As a consequence of the illegal entry, defense counsel was in a strong position to successfully move to have the physical evidence seized from Zakrzewski's private residence and all ancillary evidence flowing therefrom excluded. Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963); Norman v. State, 379 So. 2d 643 (Fla. 1980). Instead, defense counsel

encouraged Zakrzewski to plead guilty precisely because of the existence of the illegally seized evidence. This clearly constitutes ineffective assistance of counsel.

Zakrzewski certainly suffered prejudice because, but for his lawyers' ineffectiveness, the state would not have been able to convict the defendant of multiple counts of first degree murder and cause him to be sentenced accordingly.

Issue III. The Trial Court erred in not finding that the defendant's guilty pleas were not constitutionally voluntary and must be set aside.

The defendant contends that he proved during the evidentiary hearing that his guilty pleas were not constitutionally voluntary (R. 411) and, therefore, must be vacated and set aside by this Court because his counsel ineffectively:

1. Failed to test (move to suppress) the admissibility of the incriminating evidence seized from his residence as a result of the illegal search thereof;

2. Failed to advise Zakrzewski of his right to do so prior to tendering his plea of guilty to capital murder, as referenced above, and

3. Misadvised the defendant by telling him incorrectly that he had no choice but to plead guilty since the state could introduce the evidence seized as a result of the illegal search of his residence and, thereby, easily prove his guilt. Had Zakrzewski been properly informed that he could contest the legality of virtually all of the evidence the state amassed against him and that there was a reasonable

likelihood that this effort would be successful, the defendant most certainly would have insisted upon his right to a jury trial and would not have pled guilty. Furthermore, according to the defendant, his counsel advised and promised him that, if he would plead guilty as charged, the state would not introduce into evidence during the penalty phase of his trial photographs of the battered bodies of his dead wife and children. (R. 395)

Both of his counsel disagreed with his rendition of the facts concerning the photographs. Koran was asked by the Court:

> Q. Did you ever entice him or – do you recall any conversations with Mr. Zakrzewski in which you tried to entice him to plead guilty in exchange for telling him anything about the photographs?
>
> A. No, except – no, the only – the only thing I recall is that in the context of his trying to understand what would happen in a penalty phase, we had a conversation about what evidence would be presented and there would be less evidence presented than in a guilt phase, it would not be as graphic, but it was never to my recollection and I'm certain about this – it was never intimated to Mr. Zakrzewski that he would – that this stuff would be excluded. (R. 441-42)

Mr. Killam, co-counsel, stated that he attempted to keep the photographs out of evidence, but only managed to keep out one. (R. 466) He testified:

> . . . the photographs weren't so much the motivation for the plea. The plea was to establish some mitigation by his cooperation and the fact that that's what he wanted to do. I mean he was a military man and believed in accountability . . . (R. 467-68)

According to Zakrzewski's testimony during the evidentiary hearing, when

defense counsel first urged the defendant to plead guilty, he specifically told them that he would do so if and only if he could be assured that the state would not upset the jury and him by introducing the grisly photographs of his dead wife and children at the crime scene. (R. 396) Zakrzewski also did not want the photographs released to the general public. Counsel gave him this assurance unequivocally, according to the defendant. (R. 395, 419-20) However, several days later, at a hearing on the plea arrangement, the judge decided to withhold making a ruling on this critical issue until it came up in the penalty phase trial. (R. 414-416) Had Zakzrewski known that his defense counsel would not or could not keep their pledge, he would not have pled guilty. (R. 396)

At the evidentiary hearing, Zakrzewski was asked to clarify whether his attorneys told him they would suppress the photos in exchange for a guilty plea, or if they merely told him they would merely file a motion to suppress the photographs. He answered that he was led to believe that, one way or another, the photographs would not be shown to the jury:

> At that time, sir, I had no idea about the law – if they told me they were going to do it, all I could do is believe it. It's all I had. (R. 419)

In this regard, Zakrzewski was unaware that Section 921.141(1), Florida Statutes (1996) provides:

> If the jury trial has been waived, or if the defendant pleaded guilty, the

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

The above statute makes it clear that the photographs were indeed admissible at Zakrzewski's penalty phase jury trial. In Elledge v. State, 346 So. 2d 998, 1001 (Fla. 1977), this Court addressed the admissibility of evidence during the penalty phase of a death penalty jury trial and held that "the purpose of considering aggravating and mitigating circumstances is to engage in a character analysis of the defendant to ascertain whether the ultimate penalty is called for in his or her particular case." In this regard, the court concluded that evidence (such as photographs) that may not be admissible during a guilt phase proceeding would be admissible during the penalty phase to show the defendant's character. Id. at 1001.

In Thompson v. State, 351 So. 2d 701 (Fla. 1977) this Court held that "misrepresentations by counsel as to the length of a sentence or eligibility for gain time can be the basis for post-conviction relief in the form of leave to withdraw a **guilty plea." Counsels' misrepresentation of the law, which served as what**

the defendant believed was the basis for his bargain with the state, is analogous to the misrepresentation in the Thompson case. This is so because Zakrzewski **would never have tendered his guilty pleas had he been correctly advised and informed. (R. 396) In Roberti v. State, 26 Fla. L. Weekly D802 (Fla. 4th DCA March 23, 2001), the defendant alleged that he received ineffective assistance of counsel when his lawyer incorrectly advised him that, if he pled guilty, he would not be subject to the sexual offender commitment act. The defendant later sought to withdraw his plea on that basis and the court held:**

> The trial court denied this claim stating that commitment under the Act is a collateral consequence of a plea about which the defendant need not be warned. See Watrous v. State, 2001 Fla. App. LEXIS 2441, 26 Fla. L. Weekly D 686 (Fla. 2d DCA Mar. 7, 2001); Pearman v. State, 764 So. 2d 739 (Fla. 4th DCA 2000). While this is a correct statement of the law, it fails to address Roberti's actual claim. Roberti alleged not that counsel failed to advise him that his pleas could subject him to commitment under the Act, but rather that counsel affirmatively misadvised him that they could not. Affirmative misadvice about even a collateral consequence of a plea constitutes ineffective assistance of counsel and provides a basis on which to withdraw the plea. See Watrous, 2001 Fla. App. LEXIS 2441, 26 Fla. L. Weekly D 686 (Fla. 2d DCA March 7, 2001); Simmons v. State, 611 So. 2d 1250 (Fla. 2d DCA 1992); Montgomery v. State, 615 So. 2d 226 (Fla. 5th DCA 1993).

A "defendant invariably relies upon the expert advice of counsel concerning sentencing in agreeing to **plead guilty." See** State v. Leroux, 689 So. 2d 235, 237 (Fla. 1996). Even where trial counsel's advice was an honest mistake,

if the defendant pled guilty in reasonable reliance on that incorrect advice, (s)he is permitted to withdraw the plea. Costello v. State, 260 So. 2d 198 (Fla. 1972). As stated, Zakrzewski made the decision to plead guilty, he says, because counsel advised him that the jury would be prevented from viewing the highly inflammatory and emotionally charged photographs during the penalty phase. But for counsels' misadvice about the inadmissibility of the gory photos if he agreed to plead guilty, Zakrzewski would not have pled guilty but would have insisted on proceeding to trial. The assurances given misled Zakrzewski in his effort to make an intelligent choice between two alternatives and served to improperly induce his pleas. Tal-Mason v. State, 700 So. 2d 453 (Fla. 4th DCA 1997).

Because his guilty pleas were unintelligent and constitutionally involuntary, Zakrzewski must be accorded an opportunity to withdraw them. He is also entitled to have his pleas, judgments and sentences set aside and a trial before a jury regarding all aspects of the case.

In considering the merits of this issue, the defendant must address the fact that both Mr. Koran and Mr. Killam, as referenced above, emphatically denied Zakrzewski's contention that any promise was made regarding the subject photographs. According to both defense counsel, all Zakrzewski was told was that they would do their best to limit the introduction of some of the photographs, but that some would most assuredly be allowed in evidence to prove various matters

material to the penalty phase of the case. The Court is asked to credit Zakrzewski's testimony in this regard.

Whatever else might be said of the defendant, he had a solid reputation for honesty and forthrightness while a member of the United States Air Force, according to his superiors. And he was willing to plead guilty rather than put the state through the time, energy and expense of proving his guilt, which he always acknowledged. Obviously, he did not want to be reminded of the horror of his acts -- or perhaps selfishly, not have the jury made aware of them -- during the penalty phase of the trial. Thus, his request that the photographs not be admitted in exchange for his guilty pleas seems logical and natural. If he was not made this promise by counsel -- then what did he get from the state in exchange for his guilty pleas? Absolutely nothing. Without it, there was no other motivation for the defendant to plead guilty. The defendant hastens to add that he does not suggest in any way that his counsel knowingly misstated the facts in this regard during the post conviction evidentiary hearing before Judge Barron. He believes that they simply did not recall making this assurance in the complicated course of preparing his case for trial.

Issue IV. The Florida death penalty statute, as applied to Zakrzewski, violates the Sixth and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution because of the principals announced by the United States Supreme Court in Ring v. Arizona and Apprendi v.

New Jersey. The Trial Court erred in ruling that Zakrzewski was not entitled to relief on this issue because it was procedurally barred.

Zakrzewski alleged in his supplemental motion for post conviction relief (R. R. 303-20) that his death sentences must be set aside and vacated because Florida's death penalty statute is unconstitutional under the principles announced in Apprendi v. New Jersey, 530 U.S. 466 (2000) as applied to certain death penalty cases in Ring v. Arizona, ___ U.S. ___, 122 S.Ct. 2428 (2002).[9] Specifically, Florida's death penalty statute (a) does not require the jury to find the existence of each aggravating circumstances beyond a reasonable doubt, (b) does not require the jury to find that there are insufficient mitigating circumstances that outweigh the aggravating circumstances beyond a reasonable doubt, (c) provides that the jury's verdict is only advisory and not binding,[10] **(d) only requires a bare majority of the jurors to make a death recommendation to the court, and (e) allows the reviewing court**

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[9] Zakrzewski referenced the Ring v. Arizona case in his Supplemental 3.850 motion, which was pending in the United States Supreme Court at that time.

[10] This relates to what is commonly referred to as a "jury override," meaning that if the jury recommends that the defendant should be sentenced to life in prison, the trial judge has the authority to override the jury's recommendation and impose death. Of course, a jury override could also occur where the jury recommends death, but the judge imposes a life sentence. However, the latter type of jury override does not have constitutional implications, as it is generally recognized that a life sentence is less severe than a sentence of death. See Bottoson v. Moore, 27 Fla. L. Weekly S 891, 902 (Lewis, J., concurring in result only) (noting that it is "within constitutional parameters" for a trial judge to adjust a defendant's sentence downward from death to life).

to reweigh the aggravating and mitigating factors to determine whether the death sentence may stand after striking one of the aggravating factors on appeal. Id.

The Trial Court denied relief without addressing its merits ruling that it was procedurally barred. (R. 532) Subsequently, the U.S. Supreme Court decided Ring, declaring Arizona's death penalty statute unconstitutional (in violation of the Sixth Amendment guarantee to a trial by jury, because under Arizona law the trial judge, rather than the jury, makes the necessary findings of fact on aggravating factors required to subject the defendant to the death penalty.[11] **Because Florida trial judges make the same factual findings, aided by only non-binding, advisory recommendations of non-unanimous juries, Florida's death penalty statute must be struck down as well.**

A. The Ring issue was properly before the Trial Court and not procedurally barred.

As noted above, the trial court denied Zakrzewski's claim that the Florida death penalty statute is unconstitutional under the principles established in Apprendi/Ring, because the claim was procedurally barred. (R. 532) The trial court erred. Apprendi and Ring were not decided until after Zakrzewski was sentenced to death. Justice Shaw responded to a similar argument in Bottoson v.

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[11] Subsequent to the Ring decision, this Court decided Bottoson v. Moore, 27 Fla. L. Weekly S 891 (Fla. October 24, 2002) and King v. Moore, 27 Fla. L. Weekly S 906 (Fla. October 24, 2002). These cases are discussed herein.

Moore, 27 Fla. L. Weekly S 891 (Fla. October 24, 2002):

> The State contends that Bottoson cannot obtain relief under Ring because he failed to raise this issue at trial. I find this contention disingenuous in light of the fact that Bottoson was tried nearly twenty years before Apprendi was decided and thus had no basis for arguing that a "death qualifying" aggravator must be treated as an element of the offense. In point of fact, there is no indication that either the Arizona Supreme Court (footnote omitted) or the United States Supreme Court (footnote omitted) required that Ring himself raise the issue at trial, and yet both courts reviewed his claim and the United States Supreme Court granted relief.

Id. at 898. Thus, it is clear that in the case bar, Zakrzewski's claim is not procedurally barred.

B. Florida's death penalty statute violates the Sixth Amendment as Interpreted By the U.S. Supreme Court in Ring v. Arizona.

Ring v. Arizona, with issues similar to the case at bar, has its precedents in Walton v. Arizona, 497 U.S. 639 (1990), Jones v. United States, 526 U.S. 227 (1999) and Apprendi v. New Jersey, 530 U.S. 466 (2000).

In 1990, the U.S. Supreme Court was asked in Walton v. Arizona, 497 U.S. 639 (1990) to determine whether Arizona's death penalty statute violated the Sixth Amendment because in Arizona the penalty phase portion of the trial was conducted by the trial judge without a jury. The judge alone determined which aggravating factors were proven beyond a reasonable doubt. Because the Supreme Court in Hildwin v. Florida, 490 U.S. 638 (1989) held that such sentencing factors did not have to be made by a jury, Walton attempted to distinguish Arizona's death penalty laws from Florida's. Walton pointed out that Arizona's trial judge is not assisted by a jury at all in determining which aggravating factors existed, nor is the trial judge provided with an advisory verdict as to the ultimate sentence to be imposed. The U.S. Supreme Court disagreed and held that:

> It is true that in Florida the jury recommends a sentence, but it does not make specific factual findings with regard to the existence of mitigating or aggravating circumstances and its recommendation is not binding on the trial judge. A Florida trial court no more has the

> assistance of a jury's findings of fact with respect to sentencing issues than does a trial judge in Arizona.

Id. at 648.

Walton contended that in Arizona, aggravating factors were "elements of the offense," while in Florida such factors were merely "sentencing considerations." Id. Again the U.S. Supreme Court disagreed and held that aggravating factors were not "elements of the offense" but were instead "sentencing considerations" used to assist the trial court in determining whether to impose life or death. Id. Accordingly, the U.S. Supreme Court concluded, "the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury." Id. Justice Stevens disagreed with the majority in Walton, stating that the Sixth Amendment requires "a jury determination of facts that must be established before the death penalty may be imposed." Id. at 709 (Stevens, J., dissenting).[12]

In Jones v. United States, 526 U.S. 227 (1999), the U.S. Supreme Court considered whether the federal car-jacking statute, which contained three possible punishments (life imprisonment if death resulted, a maximum of 25 years imprisonment if serious bodily injury resulted, or 15 years imprisonment) "defined

[12] Justice Stevens pointed out that aggravating circumstances "operate as statutory 'elements' of capital murder under Arizona law, because in their absence, [the death] sentence is unavailable." Id. at 709, n. 1.

three distinct offenses or a single crime with a choice of three maximum penalties, two of them (death or serious bodily injury) dependent on sentencing factors exempt from the requirements of charge and jury verdict." Id. at 229. The Court, in Jones held that in order to avoid a potential violation of the Sixth Amendment (because a judge rather than a jury would be finding the facts necessary to raise the punishment beyond a 15 year prison sentence) the statute established three separate offenses, and thus required the jury to decide beyond a reasonable doubt whether serious bodily injury or death resulted. Id. at 251-52. The court in Jones distinguished Walton by pointing out that Walton "characterized the finding of aggravating facts falling within the traditional scope of capital sentencing as a choice between a greater and a lesser penalty, not as a process of raising the ceiling of the sentencing range available." Id. at 251. [13]

In 2000, one year after Jones, the U. S. Supreme Court decided Apprendi. Here the defendant was convicted of second-degree possession of a firearm punishable by up to ten years in prison. Id. at 469-70. However, the trial judge found that Apprendi's crime was racially motivated, which under New Jersey's

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[13] In Jones, Justice Kennedy disagreed with the majority's account of the Walton decision. He reasoned that the two cases could not be reconciled because "(I)f it is constitutionally impermissible to allow a judge's finding to increase the maximum punishment for car-jacking by 10 years, it is not clear why a judge's finding may increase the maximum punishment for murder from imprisonment to death. In fact, Walton would appear to have been a better candidate for the Court's new approach than is the instant case." Id. at 272 (Kennedy, J., dissenting).

"hate crime enhancement" statute authorized the judge to increase the penalty up to 20 years. On the authority of that statute, the judge sentenced Apprendi to 12 years in prison, exceeding the maximum allowed under the firearm offense by two years. The U. S. Supreme Court held that the New Jersey statute violated Apprendi's Sixth Amendment right to "a jury determination that (he) is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." Id. at 477. The crime for which Apprendi was charged included both the firearm offense and the hate crime aggravating factor. The court reasoned that "(m)erely using the label 'sentence enhancement' to describe the (second act) surely does not provide a principled basis for treating (the two acts) differently." Id. at 476. The court observed that the dispositive question "is one not of form, but of effect." Id. at 494. The court concluded "(o)ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Id. at 490. (The court also held that a defendant could not be "expose(d) . . . to a penalty exceeding the maximum he would receive if punished according to the facts reflected in the jury verdict alone." Id. at 483.)

The Court then had to insure that Apprendi reconciled with Walton. The Apprendi Court reasoned that the two cases did not conflict because in Walton the death sentence was not an enhanced sentence, but was merely the maximum

sentence that could be imposed for first-degree murder.[14] Id. at 407. Justice O'Connor dissented stating that the distinction was "baffling" because a "defendant convicted of first-degree murder in Arizona cannot receive a death sentence unless a judge makes the factual determination that a statutory aggravating factor exists. Without that critical finding, the maximum sentence to which the defendant is exposed is life imprisonment, and not the death penalty." Apprendi, 530 U.S. at 538 (O'Connor, J., dissenting). The Apprendi majority disagreed and specifically held that Apprendi did not apply to death penalty cases. Id. at 497.

Finally, in Ring, the U. S. Supreme Court considered whether the Court's previous holdings in Jones and Apprendi extended to Arizona's death penalty statute. The Court concluded notwithstanding its earlier attempts in Jones and Apprendi to distinguish capital cases, that "Apprendi's reasoning is irreconcilable with Walton's holding" and that "(c)apital defendants, no less than non-capital defendants . . . are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment." Ring, 122 S.Ct. at 2432.

In assessing the continued viability of Walton in light of Apprendi, the Court

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[14] Moreover, the court held, "Once a jury has found the defendant guilty of all the elements of an offense which carries as its maximum penalty the sentence of death, it may be left to the judge to decide whether that maximum penalty, rather than a lesser one, ought to be imposed." Id. at 407 [quoting Almendarez-Torres v. United States, 523 U.S. 224, 257, n. 2 (Scalia, J., dissenting)].

in Ring noted that the Walton Court had rejected the Arizona petitioner's attempt to distinguish the Florida death penalty, holding instead that neither state's statute violated the Sixth Amendment. It determined that the aggravating factors were not elements of the crime but "sentencing considerations guiding the choice between life and death." Ring, 122 S.Ct. at 2437, quoting Walton, 497 U.S. at 648. The Apprendi Court, however, rejected this analysis, when it held that "the relevant inquiry is not one of form, but of effect." Apprendi, 530 U.S. at 494. The effect of Arizona's statute, according to Ring, is that the defendant is only exposed to the death penalty if the trial court, and not the jury, makes a finding of an aggravating factor. Id. at 2440-41. Concluding that Walton was undermined by Apprendi, the Court struck down the Arizona death penalty statute as a violation of the Sixth Amendment. Id. at 2443.

In his concurrence in Ring, Justice Scalia sought to clarify the Court's decision:

> (T)oday's judgment has nothing to do with jury sentencing. What today's decision says is that the jury must find the existence of the fact that an aggravating factor existed. Those States that leave the ultimate life-or-death decision to the judge may continue to do so -- by requiring a prior jury finding of aggravating factors in the sentencing phase or, more simply, by placing the aggravating-factor determination (where it logically belongs anyway) in the guilt phase.

Ring, 122 S.Ct. 2428, 2445 (Scalia, J., concurring). Although reaffirming his belief that the Sixth Amendment does not require the finding of aggravating factors, Justice Scalia, nevertheless approved the outcome of Apprendi and Ring because of the "perilous decline" of the right to trial by jury. Id. Justice Scalia determined that:

> I believe that the fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment that the defendant receives--whether the statute calls them elements of the offense, sentencing factors, or Mary Jane--must be found by the jury beyond a reasonable doubt.

Id. at 2444.

Florida's death penalty practice, in giving the judge the power of determining the final sentence, is no different than the Arizona procedure found infirm in Ring. Under Arizona law, a defendant cannot be sentenced to death unless additional findings are made. It requires the judge who presided at trial to "conduct a separate sentencing hearing to determine the existence or nonexistence of (certain enumerated) circumstances . . . for the purpose of determining the sentence to be imposed." Ring, 122 S.Ct at 2434, quoting Ariz.Rev.Stat. Ann. § 13-703(C) (West Supp. 2001). The Arizona statute also provides that "(t)he court alone shall make all factual determinations required by this section or the constitution of the United States or this state." Id. Thus, after the sentencing

hearing, the judge determines which aggravating and mitigating circumstances exist. In that case, the judge can only sentence a defendant to death "if there is at least one aggravating circumstance and 'there are no mitigating circumstances sufficiently substantial to call for leniency.'" Id., quoting Ariz.Rev.Stat. Ann. § 13-703(F), West Supp. 2001).

Likewise, under Florida law the trial judge, not the jury, determines whether the aggravating factors necessary to authorize a death sentence have been "sufficiently proven"[15] and whether those aggravating factors outweigh the mitigating factors. Sec. 921.141(3), Fla. Stat. (1993). Thus it is the trial judge, not the jury, who makes the decision as to whether the defendant is sentenced to death. The jury's function is only to provide the trial court with an "advisory" recommendation regarding what sentence should be imposed. Sec. 921.141(3), Fla. Stat. (1993). The jury's recommendation is based on a simple majority vote. Sec. 921.141(3), Fla. Stat. (1993); Brown v. State, 565 So.2d 304, 308 (Fla. 1990) (a jury's advisory recommendation in a penalty phase death penalty proceeding does not have to be unanimous; a simple majority is all that the constitution requires). In Florida "the (trial) court is the final decision-maker and the sentencer -- not the jury." Combs v. State, 525 So. 2d 853, 857 (Fla. 1988). It follows that

[15] Although Section 921.141(3), Florida Statutes (2001) provides that the aggravating factors only have to be "sufficiently proven," the cases make it clear that this requires said factors to be proven beyond a reasonable doubt. See State v. Dixon, 238 So.2d 1 (Fla. 1978) and Johnson v. State, 660 So.2d 637 (Fla. 1995).

there is no difference in principle between the death penalty statutes of Arizona and Florida on the central issue of the jury's role in determining whether aggravating circumstances are sufficient to support a death sentence. Accordingly, Florida's death penalty statute conflicts with the principles declared in Apprendi and Ring, and must be found unconstitutional.

C. The Florida Supreme Court's Interpretation of Ring v. Arizona

This Court first addressed the applicability of the Ring issue to Florida's death penalty statute in Bottoson v. Moore, 27 Fla. L. Weekly S 891 (Fla. October 24, 2002) and King v. Moore, 27 Fla. L. Weekly S 906 (Fla. October 24, 2002). In Bottoson, this Court held that the petitioner was not entitled to relief under Ring, because had the U.S. Supreme Court intended to extend the Ring decision to Florida's death penalty scheme, it would have either granted Bottoson's petition for writ of certiorari or directed the Florida Supreme Court to reconsider Bottoson in light of Ring. Bottoson, 27 Fla. L. Weekly at S 891. Furthermore, this Court determined that the petitioner was not entitled to relief because Ring did not expressly overrule its prior decisions[16] upholding Florida's death penalty statute. Id. However, although all of the justices concurred that Bottoson was not entitled to relief under Ring, only a plurality of the justices believed Florida's death penalty

[16] See, e.g., Hildwin v. Florida, 490 U.S. 638 (1989); Spaziano v. Florida, 468 U.S. 447 (1984); Barclay v. Florida, 463 U.S. 939 (1983); Proffitt v. Florida, 428 U.S. 242 (1976).

statute remained unaffected by Ring.[17] In this regard, a majority of this Court, as set forth in the separately filed opinions, stated that Florida's death penalty scheme was inconsistent with (or at least affected by) Ring and concurred in the result only.

Zakrzewski respectfully contends that this Court misapplied the principles announced in Ring -- in that, although it is true that Ring did not explicitly overrule its earlier decisions upholding Florida's death penalty statute, by virtue of the Ring decision itself, any earlier decision that does not comport with or cannot be reconciled with the legal principles annunciated in Ring are implicitly overruled. Simply because the U. S. Supreme Court did not expressly overrule Hildwin, Spaziano and Proffitt in Ring is irrelevant. In Ring, the Court had no reason to overrule those decisions for the simple reason that the Court was applying its Apprendi decision to Arizona's statute, not Florida's.

In addition, the argument that Florida's death penalty statute should survive scrutiny because the U. S. Supreme Court did not grant certiorari in the Bottoson and King cases in light of Apprendi should be rejected. The U.S. Supreme Court has repeatedly cautioned that no significance whatsoever should be given to the

[17] In Bottoson, Senior Justice Harding and Justices Wells and Quince concurred with the *per curiam* opinion, believing that Florida's death penalty statute was not unconstitutional under Ring. However, Chief Justice Anstead and Justices Shaw, Pariente, and Lewis only concurred in the result, while although supporting the denial of relief to Bottoson, believed that the constitutionality of Florida's death penalty statute has been called into question by Ring.

denial of certiorari because that Court regularly denies certiorari for reasons completely unrelated to the merits of a particular case. See e.g., Knight v. Florida, 528 U.S. 990, 990 (1999) (opinion of Stevens, J., respecting denial of petitions for writs of certiorari noting that "it seems appropriate to emphasize that the denial of these petitions for certiorari does not constitute a ruling on the merits"). Moreover, when this court stated that Bottoson was not entitled to relief because one of his aggravating factors was based on a prior conviction, which Apprendi seemed to exclude from its jury trial requirement,[18] this court failed to appreciate the context in which that limitation was made. At the time Apprendi was decided, the U. S. Supreme Court was announcing what the Sixth Amendment required as to a non-capital offense. Apprendi's language was proper because it would be unnecessary and futile to require a jury to determine the existence of a prior conviction as to a non-capital offense. This is so because virtually all the non-capital statutes, that utilize the defendant's prior convictions to trigger the enhancement statute, do so automatically and no other additional findings are required. For example, if a particular non-capital state statute (i.e. a habitual offender statute) provides for increased penalties for repeat offenders, a trial judge is permitted to determine the

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[18] The Apprendi language was "other than a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt" Apprendi, 530 U.S. at 490. (Emphasis supplied.)

existence of the prior convictions under Apprendi. But when prior convictions are used as aggravating factors in a death penalty proceeding, the same analysis fails. This is so because the existence of a prior conviction (which is an aggravating factor in Florida) is not all that is required to subject a defendant to the death penalty. In addition, there must also be a finding that "there are insufficient mitigating circumstances to outweigh the aggravating circumstances." Sec. 921.141(3)(b), Fla. Stat. Thus, under the logic contained in the Bottoson decision, if a defendant had a prior violent felony conviction, it would automatically subject him to the death penalty, notwithstanding the statute's additional requirement that there are insufficient mitigating factors to outweigh the aggravating factors. This result surely is not what Apprendi intended. Thus, because Florida's death penalty statute requires the existence of at least one aggravating factor, which must outweigh the existence of any mitigating factors, when a prior conviction is used as an aggravating factor it must be proven beyond a reasonable doubt by a jury.[19]

Notwithstanding Zakrzewski's belief that this Court misapplied Ring in the Bottoson case, under the rationale of the separately filed opinions relief is warranted because in his case, the jury's advisory verdict was far from unanimous.

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[19] In Ring, the court held that "If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact--no matter how the State labels it--must be found by a jury beyond a reasonable doubt." Ring, 122 S.Ct. at 2439 (citing Apprendi, 530 U.S. at 482-83).

The jury recommended that Zakrzewski be sentenced to death for the murders of Sylvia and Edward by a narrow vote of 7-5. The jury recommended that Zakrzewsi be sentenced to life in prison for the murder of Anna by vote of 6-6. The trial judge overruled the jury's life recommendation as to Anna and instead sentenced him to death as to each count. "Apprendi and Ring also stand for the proposition that under the Sixth Amendment, a determination of the existence of aggravating sentencing factors, just like elements of a crime, must be found by a unanimous jury vote." Bottoson, 27 Fla. L. Weekly at S896 (Anstead, C.J., concurring in result only). Justice Shaw believes Ring and Apprendi require the jury's verdict to be unanimous as well. Id. at S896-98 (Shaw, J., concurring in result only) (stating that an aggravating factor "must be treated like any other element of the charged offense and, under longstanding Florida law, must be found unanimously by a jury").

For these reasons, the death sentences imposed against the defendant should have been vacated and set aside by the Trial Court.

CONCLUSION

WHEREFORE, the defendant requests the Court to grant the following relief:

1. Reverse the Final Order of the Trial Court (R. 576-583) which denied the defendant's Florida Rule of Criminal Procedure 3.850 motion for post conviction relief.

2. Find that the defendant was provided constitutionally ineffective assistance of counsel at trial for the reasons stated above.

3. Remand the cause to the lower tribunal.

4. Order that the defendant's guilty pleas, judgments and death sentences be set aside and that he be granted a new jury trial on all issues.

5. Order that the search of the defendant's residence was illegal and that the evidence seized as a result be suppressed.

6. Find that Zakrzewski's Apprendi/Ring claim was not procedurally barred and that his death sentences are vacated and set aside as a matter of law.

7. Grant such other and further relief to the defendant as the Court deems proper.

Respectfully submitted,

_____

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CERTIFICATE OF SERVICE

I hereby certify that a copy of foregoing has been provided to Robert Elmore, Esq., Assistant State Attorney, 151 Cedar Street, Post Office Box 517, Crestview, Florida 32536, and the Florida Department of Legal Affairs, Office of

the Attorney General of Florida, Capital Appeals Division, the Florida Capitol Building, Plaza Level One, Tallahassee, Florida 32399-1050, this 3d day of December, 2002, by United States mail delivery.

CERTIFICATION REGARDING FONT AND OTHER MATTERS

This brief was prepared using a Times New Roman 14 point font not proportionally spaced. The brief is also submitted on a disk that meets the Court's requierments and rules.

_____

Baya Harrison, III

ARGUMENT

Issue I: The Trial Court erred in denying Zakrzewski's claim that he was denied constitutionally effective assistance of counsel at trial and suffered prejudice as a result.

A. Ineffectivness and the resulting prejudice generally.

Zakrzewski was denied constitutionally effective assistance of counsel at trial as guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution, and Article I, Declaration of Rights, Sections 2, 9 and 16, Florida Constitution, and within the meaning of ineffective assistance of counsel in capital and other criminal cases as defined in Strickland v. Washington, 466 U.S. 668 (1984), Cherry v. State, 659 So. 2d 1069 (Fla. 1995), Roberts v. State, 568 So. 2d 1255 (Fla. 1990), and Williams v. State, 673 So. 2d 960 (Fla. 1st DCA 1996). The acts and omissions of trial counsel described herein were more than negligent acts. Instead, these acts, omissions, errors and deficiencies were so serious and significant that defense counsel was not functioning as "counsel" as guaranteed by the Sixth Amendment to the United States Constitution as applied to the states by virtue of the due process clause of the Fourteenth Amendment. These deficiencies, errors, acts and omissions were instead well outside and significantly and measurably below the broad range of reasonable professional standards of competence for attorneys in this circuit, this state and the United States of America.

Furthermore, the deficient performance of trial counsel was prejudicial and so affected the fairness and reliability of the proceedings that the confidence in the outcome of it was seriously undermined and eroded. Strickland v. Washington, 466 U.S. at _____.

B. Ineffectiveness Based Upon the Violation of the Defendant's Fourth Amendment Right to be Free From Unreasonable Searches and Seizures.

As described above, Deputy Baczek entered and searched Zakrzewski's home without probable cause or a search warrant. (R. _____) Thereafter, the police seized and removed incriminating evidence from the residence, most significantly the bodies of persons he was alleged to have murdered, the weapon used to commit the crimes and his bloody fingerprints and palm prints. Every shred of incriminating evidence suggesting that Zakrzewski might have committed murder flowed from and was the fruit of that illegal entry, search and seizure.

The Fourth Amendment to the United States Constitution specifically protects the right of the people to be secure in their homes.[20] In fact, the "physical

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[20] The Fourth Amendment to the United States Constitution, made applicable to the states by the Fourteenth, provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." United States v. United States District Court, 407 U.S. 297, 313, 92 S. Ct. 2125, 32 L. Ed. 2d 752 (1972). This right is so unequivocal that warrantless searches and seizures inside a home are deemed presumptively unreasonable. See Payton v. New York, 445 U.S. 573, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980). To implement this principle, the Supreme Court has held that warrantless searches "are per se unreasonable under the Fourth Amendment…subject only to a few specifically established and well-delineated exceptions." Katz v. United States, 389 U.S. 347, 357, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967). Accord, United States v. United States District Court, 407 U.S. 297, 317, 92 S. Ct. 2125, 32 L. Ed. 2d 752 (1972). These exceptions have been "jealously and carefully drawn" (Jones v. United States, 357 U.S. 493, 499, 78 S. Ct. 1253, 2 L. Ed. 2d 1514 [1958]), and the burden is upon the state to demonstrate that the procurement of a warrant was not feasible because "the exigencies of the situation made that course imperative." McDonald v. United States, 335 U.S. 451, 456, 69 S. Ct. 191, 93 L. Ed. 153 (1948).

Thus, even when a felony has been committed and officers have probable cause to believe that incriminating evidence will be found within a home, in the absence of exigent circumstances, a warrantless entry into the home to search for

incriminating evidence is unconstitutional. See Payton v. New York, 445 U.S. at 583; Hornblower v. State, 351 So. 2d 716, 718 (Fla. 1977) (holding that a warrantless search is presumed to be illegal unless there are exigent circumstances in addition to probable cause).

An "exigent circumstance" has been defined as "a situation where the inevitable delay incident to obtaining a warrant must give way to an urgent need for immediate action." United States v. Burgos, 720 F.2d 1520, 1526 (11th Cir. 1983). Circumstances that have been found to meet that requirement include danger of harm to police officers or the public and potential destruction of evidence. See Vale v. Louisiana, 399 U.S. 30, 90 S. Ct. 1969, 26 L. Ed. 2d 409 (1970); United States v. Burgos, 720 F.2d at 1526. See also *United States v. Kreimes*, 649 F.2d 1185, 1192 (5th Cir. 1981) (entry without a warrant is also justified where there is hot pursuit, a fleeing suspect, danger to the arresting officers or danger to the public).

In Payton, *supra*, the police, acting on probable cause after two days of investigation, entered Payton's home without a warrant in order to arrest the defendant for murder. Though light and music emanated from the apartment, there was no response to their knock on the metal door. The officers broke into the apartment but found no one there. In plain view, however, was a .30-caliber shell casing that was seized and later admitted into evidence at Payton's murder trial. In

due course, Payton surrendered to the police, was indicted for murder and moved to suppress the evidence taken from his apartment. In finding the entry in Payton illegal, the Court stated:

> The Fourth Amendment protects the individual's privacy in a variety of settings. In none is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home--a zone that finds its roots in clear and specific constitutional terms: "The right of people to be secure in their . . . houses . . . shall not be violated." That language unequivocally establishes the proposition that "at the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." Silverman v. United States, 365 U.S. 505, 511, 5 L.Ed.2d 734, 81 S.Ct. 679, 97 A.L.R.2d 1277. In terms that apply equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant.

Payton v. New York, 445 U.S. at 589-590

In the present case, the police proceeded to enter Zakrzewski's home without a warrant. Furthermore, they did so in the absence of exigent circumstances. Deputy Baczek saw no evidence (a) of danger to the police or the public, (b) that medical intervention was necessary, (c) or of murder. He did not have even a suspicion of same prior to entering the residence. In fact, he testified that he became "extremely cautious" only *after* he had entered the residence and found a woman's purse lying open on the floor. He called the police dispatcher, declaring

the residence to be a crime scene sometime later, only *after* he had found the bodies. Deputy Baczek added in his sworn deposition (which is a part of the court files in this case), that upon his arrival at Zakrzewski's home:

> I walked around the house, did note that there were several screens down, but nothing significant. I didn't see any signs of forced entry or anything like that. I tried both exterior doors. They were both locked. I then came back to the front and again Sergeant Schmit or Sergeant Mason had informed me that there was a broken window, which I had previously seen, but the screen was back in place. I then looked into the broken window and I could see that there was glass outside on the ground, there was glass on the window seal (sic).
>
> ….
>
> Yes, I was calling inside through the broken window. At that time I got no response. Based upon the evidence that I saw, the broken window and the screen being up, glass being inside and out and the screens being back up, I felt that that was kind of curious and out of the ordinary that somebody would break a window and put a screen back. I feared for the welfare of whomever may have been in the house at that time, thinking that there may have been a burglary, the family may have been on vacation or something like that. At that time I notified our dispatcher that based upon this I was going to enter the house through the broken window to check on the welfare and see if there had been any kind of burglary inside.

(See Appendix, Exhibit C, Deputy Baczek's May 1, 1995 deposition, R. 88-89, emphasis supplied.)

Baczek was then asked if he waited for "back up," to which he responded,

> No, I did not. I didn't feel that there was anything -- I couldn't see anything of -- what's the word I'm looking for -- immediacy as far as backup at that time. I didn't think that -- I didn't feel that there was anybody in the house because of just the appearance of the outside and no vehicles being there.

(R. 89)

Another exception to the exclusionary rule regarding an alleged Fourth Amendment violation is in the case of an emergency. The emergency exception first received recognition in Florida in Webster v. State, 201 So. 2d 789 (Fla. 4th DCA 1967), and has been applied in various circumstances. See Guin v. City of Riviera Beach, 388 So. 2d 604 (Fla. 4th DCA 1980) (reasonable belief that a crime was in progress held sufficient to justify a warrantless entry); Grant v. State, 374 So. 2d 630 (Fla. 3d DCA 1979) (officers responding to reported shooting held to have properly entered apartment where they discovered certain evidence); Long v. State, 310 So. 2d 35 (Fla. 2d DCA 1975) (preservation of human life justified an emergency entry of a home and admissibility of contraband obtained).

However, this exception is not without limits or restrictions. To invoke the emergency rule to search a person's home, the exigencies of the situation must be so compelling as to make a warrantless search objectively reasonable. See Mincey v. Arizona, 437 U.S. 385, 98 S.Ct. 2408, 57 L.Ed.2d 290 (1978) (holding that the Fourth Amendment does not bar police officers from making warrantless entries and searches when they reasonably believe that the person within is in need of immediate aid).

In State v. Boyd, 615 So. 2d 786 (Fla. 2d DCA 1993), the officer was dispatched to a home to investigate a complaint that a man (Boyd) was in the

backyard firing a shotgun. When the officer arrived at the residence, he observed Boyd standing in the yard aiming the shotgun at other homes in the vicinity. The officer arrested Boyd for improper exhibition of a firearm. At that time, the officer observed that the door to the house was open and the name on the mailbox was "Beardon." For these reasons and because Boyd did not have any identification, the officer believed that an armed burglary had possibly occurred and that there might be a shooting victim inside the home. No one answered or came to the door when the officer called. At that point in time, the officer entered the home. While inside the home, he saw drug paraphernalia (contraband) and stolen goods. The trial court granted Boyd's motion to suppress, and the state appealed. On appeal, the Boyd court, quoting in part from Cross v. State, 469 So. 2d 226 (Fla. 2d DCA 1985) which relied on Mincey v. Arizona, 437 U.S. 385 (1978), held that,

> To invoke the emergency rule to search a person's home, the exigencies of the situation must be so compelling as to make a warrantless search *objectively reasonable*. (Emphasis supplied.) Thus we conclude that to allow a warrantless entry into a person's home in an emergency situation, there must be objectively reasonable circumstances that convey to the police officer an articulable, reasonable belief that an emergency exists. An emergency need not, in fact, exist so long as the officer reasonably believes it to exist because of objectively reasonable facts. The officer's conclusion then may be based on a combination of the "objective" nature of the circumstances and the officer's "subjective" perception of those circumstances.
>
> This court in Long relied on Webster for the rule that: The preservation of human life is paramount to the right of privacy protected by search and seizure laws and constitutional guaranties; it is an overriding justification for what otherwise may be an illegal

> entry. It follows that a search warrant is not required to legalize an entry by police for the purpose of bringing emergency aid to an injured person.

Id. at 789. (Italics original and underscoring supplied.)

The court determined that the emergency exception was satisfied because,

> the officer here properly acted within these guidelines. First, he acted upon credible information. He had been dispatched to the scene based upon reports that there was a man in the yard discharging a firearm. Second, he observed a potentially life-threatening, out-of-control situation. When Deputy Gunnoe arrived he found appellee angry, red-faced, holding a shotgun shoulder high aimed in the direction of the residences yelling, "I'll shoot." Deputy Gunnoe had to point his own firearm at appellee, twice order him to put down the shotgun and threaten to shoot appellee before he finally put the shotgun down. Third, he observed evidence that the weapon had been fired and that another individual might be involved. After arresting appellee and placing him in the patrol vehicle, Deputy Gunnoe found three recently-fired shotgun shells in the yard near the front door, which was open. The deputy could not identify who resided in the house, could not get any response from the house and testified he entered through the open front door to see if there were injured persons inside. The name on the mailbox was not appellee name, thus leading the officer to believe that appellant was shooting, not in his own yard, but in someone else's yard.

Id. at 789, 790. (Emphasis supplied.)

In the case at bar, there was no reasonable basis to conclude that an emergency existed that was sufficient to justify a warrantless entry into Zakrzewski's residence. All the police knew at the time they arrived at Zakrzewski 's house was that two of Zakrzewski's co-workers had reported that he had not shown up for work that day. Upon arriving at Zakrzewski's property, Deputy

Baczek looked around the outside of the house noting that a window appeared to have been broken and that some of the window screen frames seemed a little bent. The police knew nothing more than this and had no knowledge of what, if anything was in the house. Notwithstanding the broken window, Deputy Baczek stated that he "couldn't see anything of... immediacy" and that he "didn't feel that there was anybody in the house because of just the appearance of the outside and no vehicles being there." (Appendix, Exhibit C, Deputy Baczek's May 1, 1995 deposition, page 6.) As in Drumm v. State, 530 So. 2d 394 (Fla. 4th DCA 1988), law enforcement could not justify the warrantless entry into Zakrzewski's residence by claiming that they feared for their safety (or the safety of others) because of "what they did not know about the case" or "who was in the house." Id. at 397.

In this regard, at the time the police arrived at Zakrzewski 's home, there was no indication that he or anyone else had committed a violent crime, much less *intentionally* committed a violent crime which would give rise to fear that the suspect was likely to attack the police or present a danger to the general public. Nor was there evidence to support a fear that a suspect might flee or that, if a suspect did leave the residence, the police would be unable to arrest him or her at that point. There was no suspicion that anyone was in need of medical assistance, which would convert the situation into an emergency justifying entry without a warrant. Finally, there was no indication that evidence might be destroyed during

the time it would take to determine whether a search warrant could be issued.

Thus, since the police had no knowledge or belief of exigent circumstances to justify their entry into Zakrzewski's home without a warrant, the search and seizure of evidence therefrom were illegal and it would have been reversible error were the trial court to deny a properly filed motion to suppress the illegally seized evidence. See Drumm v. State, *supra.*

Another exception to the exclusionary rule is the inevitable discovery rule. In this instance, evidence is admissible that otherwise could be excluded (because of an unlawful search or seizure) if it inevitably would have been discovered by lawful means had the illegal conduct not occurred.

1) Nix v. Williams

a) , 467 U.S. 431, 104 S. Ct. 2501, 81 L. Ed. 2d 377 (1984).

However, in order for the evidence to be admissible under the inevitable discovery exception, the court must find that,

> (t)here must be a reasonable probability that the evidence in question would have been discovered by lawful means, and the prosecution must demonstrate that the lawful means which made discovery inevitable were possessed by the police and **were being actively pursued *prior* to the occurrence of the illegal conduct**.

U. S. v. Satterfield, 743 F.2d 827, 846 (11th Cir. 1984), emphasis

supplied. In other words, the state cannot rely on the inevitable discovery exception by only claiming that the evidence would have been found eventually.

Instead, the state must also show that

a. lawful means were being followed by the authorities, and

b. law enforcement was already seeking the evidence prior to the unlawful entry.

The court in Satterfield held in this regard:

> The Government cannot later initiate a lawful avenue of obtaining the evidence and then claim that it should be admitted because its discovery was inevitable. This is a sound rule, especially when applied to a case in which a search warrant was constitutionally required. Because a valid search warrant nearly always can be obtained after the search has occurred, a contrary holding would practically destroy the requirement that a warrant for the search of a home be obtained *before* the search takes place. Our constitutionally-mandated preference for substituting the judgment of a detached and neutral magistrate for that of a searching officer, *United States v. Martinez-Fuerte*, 428 U.S. 543, 568, 96 S. Ct. 3074, 3087, 49 L. Ed. 2d 1116 (1976), would be greatly undermined.

Id. at 846, 847.

Thus, like the other exceptions to the exclusionary rule, the inevitable discovery rule could not be used to justify the unlawful entry and warrantless search of Zakrzewski's home. This is so because at the time Deputy Baczek unlawfully entered Zakrzewski's residence, law enforcement did not possess the lawful means to discover the evidence inside the home and certainly was not actively pursuing any lawful means to do so prior to the unlawful entry of his

home. Therefore, the discovery of the evidence, all of which led to the eventual conviction of Zakrzewski, by Deputy Baczek does not fall within the scope of the inevitable discovery exception to search and seizure laws.

The conclusion is inescapable, therefore, that had the issue been raised, the state could not have satisfied its burden of proving that Deputy Baczek had lawful grounds to believe exigent circumstances existed to justify his entrance into the defendant's residence without a warrant. The presumption that the warrantless search and seizure of evidence from Zakrzewski's residence was unconstitutional remains unrebutted. See Earmann v. State, 265 So. 2d 695 (Fla. 1972).

As a consequence of the illegal entry, defense counsel was in a position to successfully move to have excluded at trial the physical evidence seized from Zakrzewski's private residence and all ancillary evidence flowing therefrom. See Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963); Norman v. State, 379 So. 2d 643 (Fla. 1980).

The Trial Court would have committed reversible error under such circumstances had it denied a motion to suppress the subject evidence.

The observations of police, the blood samples, and the evidence of and from the bodies all flowed from law enforcement's initial illegal search and seizure. Had it not been for its illegal initial presence in the home, the state would not have obtained the evidence which was threatened to be used against Zakrzewski at his

trial at the time his appointed counsel incorrectly informed him that he had no defense to the charges and affirmatively counseled him to plead guilty.

Defense counsel were constitutionally ineffective in this regard because:

a. Defense counsel tendered Zakrzewski's plea of guilty as charged in the indictment, fully exposing him to the death penalty, without any concession from the State and without advising Zakrzewski of his right to challenge the warrantless search and seizure of evidence from his residence in the absence of probable cause;

b. Defense counsel failed to investigate Zakrzewski's grounds for a Fourth Amendment challenge to the search of his home and the seizure of evidence from its premises;

c. Counsel failed to file a motion under Fla. R. Crim. P. 3.190(h)(1) to suppress the evidence obtained in the course of that unlawful search;[21]

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[21] Fla. R. Crim. P. 3.190(h)(1), entitled "Motion to Suppress Evidence in Unlawful Search," reads in its entirety:

> (1)Grounds. A defendant aggrieved by an unlawful search and seizure may move to suppress anything so obtained for use as evidence because:
>
> (A) the property was illegally seized without a warrant;
> (B) the warrant is insufficient on its face;
> (C) the property seized is not that described in the warrant;
> (D) there was no probable cause for believing the existence of the grounds on which the warrant was issued;
> (E) the warrant was illegally executed. (Emphasis supplied).

d. Counsel failed to argue a motion to suppress the subject evidence before the trial court; and,

e. Counsel failed to preserve the issue for appellate review.

These acts and omissions fall squarely within the realm of ineffective representation as defined by the Supreme Court in Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). (Counsel is ineffective where counsel's performance is deficient, and, but for the deficiency, there is a reasonable probability that the outcome of the proceeding would have been different.) This is so in part because the failure of defense counsel to move to suppress illegally seized evidence can constitute ineffective assistance of counsel. See Devega v. State, 706 So. 2d 102 (Fla. 1st DCA 1998).

Defense counsel ignored the obvious need and lawful basis to challenge the search of Zakrzewski's residence as illegal and failed to seek suppression of the incriminating evidence discovered therein. Use of this illegally obtained evidence against Zakrzewski during the guilt/innocence phase of the criminal trial would clearly have violated his rights under Article I, Section 12 of the Florida Constitution and the Fourth and Fourteenth Amendments to the United States Constitution. Yet this (the planned use of the illegally seized evidence by the state at trial) was precisely what was wrongfully employed by defense counsel to

intimidate Zakrzewski into forfeiting his right to seek an acquittal and plead guilty as charged instead.

Defense counsel's failure to investigate the matter and failure to move to suppress the illegally obtained evidence was a serious deficiency which fell measurably below objective standards of reasonably effective representation by attorneys handling criminal cases and, *a fortiori*, death penalty cases. Allegations of ineffectiveness where defense counsel fails to seek the suppression of illegally obtained evidence are as legally valid in the context of a guilty plea as they are after a trial. See Simmons v. State, 485 So. 2d 475 (Fla. 2d DCA 1986) (holding counsel's failure to move to suppress evidence may have rendered guilty plea involuntary, and that the claim required record refutation or an evidentiary hearing to resolve it) and Williams v. State, 717 So. 2d 1066 (Fla. 2d DCA 1998) (same); Hanford v. State, 756 So. 2d 191 (Fla. 4^{tth} DCA 2000) (an allegation of ineffectiveness in failing to seek suppression of tainted identification was legally and factually sufficient under the standards of Strickland v. Washington, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 [1984]).

The defendant suffered significant prejudice because there is a distinct likelihood and a reasonable probability that, but for defense counsel's failure to challenge the admissibility of the illegally obtained evidence on Fourth

Amendment grounds, the evidence would have been suppressed and the prosecution against Zakrzewski effectively terminated.

Florida Rule of Criminal Procedure 3.850(d) provides that a 3.850 motion may only be denied without a hearing "(i)f the files and records in the case ***conclusively*** show that the prisoner is entitled to no relief." (Emphasis supplied). See Devega v. State, 706 So. 2d 102 (Fla. 1st DCA 1998) (allegations that counsel was ineffective in failing to investigate vehicle search or to move to suppress its fruits required an evidentiary hearing or record attachments showing conclusively that defendant was not entitled to relief); Cintron v. State, 504 So. 2d 795 (Fla. 2d DCA 1987) (reversing denial of motion alleging ineffective assistance of counsel for failing to move to suppress confession because affidavits and other matters *dehors* the record were insufficient to refute prisoner's claim), appeal after remand, Cintron v. State, 508 So. 2d 1315 (Fla. 2d DCA 1987)(same); Fordham v. State, 691 So. 2d 43 (Fla. 1st DCA 1997) (similar); Simmons, *supra* (in context of guilty plea)**;** Williams, *supra* (same).

As the record in this case does not conclusively refute this claim, an evidentiary hearing is required.

Issue II. The Defendant's Guilty Pleas Were Not Constitutionally Voluntary And Must Be Set Aside

The defendant realleges, reasserts and incorporates herein by reference

numbered paragraphs 1- 62 as set out above.

The defendant's guilty pleas were not constitutionally voluntary and must be vacated and set aside by this Court because his counsel:

a. Failed to test the admissibility of (moved to suppress) the incriminating evidence seized from his residence as a result of the illegal search thereof.

b. Failed to advise Zakrzewski of his right to do so prior to tendering his plea of guilty to capital murder, as referenced above, and

c. Misadvised the defendant by telling him incorrectly that he had no choice but to plead guilty since the state could introduce the evidence seized as a result of the illegal search of his residence and, thereby, easily prove his guilt.

Had Zakrzewski been properly informed that he could contest the legality of virtually all of the evidence the state amassed against him and that there was a reasonable likelihood that this effort would be successful, the defendant most certainly would have insisted upon his right to a jury trial and would not have pled guilty.

Furthermore, defense counsel advised and promised Zakrzewski that, if he would plead guilty as charged, the state would not introduce into evidence during the penalty phase of his trial photographs of the battered bodies of his dead wife

and children. That is, when defense counsel first urged the defendant to plead guilty, Mr. Zakzrewski specifically told them that he would do so ***only*** if he could be assured that the state would not upset the jury and him by introducing the grisly photographs of his dead wife and children at the crime scene. Defense counsel gave this assurance unequivocally. Nevertheless, apparently because defense counsel had reached no such agreement with the prosecutors, the state proceeded to introduce the subject photographs in evidence during the penalty phase of the trial anyway. Had Zakzrewski known that his defense counsel would not keep their word in this regard, he would not have pled guilty.

Zakrzewski was unaware that Section 921.141(1), Florida Statutes (1996) provides,

> If the jury trial has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose, unless waived by the defendant. In the proceeding, **evidence** may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (5) and (6). Any such **evidence**, which the court deems to have probative value, may be received, regardless of its admissibility under the exclusionary rules of **evidence,** provided the defendant is accorded a fair opportunity to rebut any hearsay statements.

The above statute makes it clear that the photographs were indeed admissible at Zakrzewski's penalty phase jury trial. In Elledge v. State, 346 So. 2d 998, 1001 (Fla. 1977), the court addressed the admissibility of evidence during the

penalty phase of a death penalty jury trial and held that "the purpose of considering aggravating and mitigating circumstances is to engage in a character analysis of the defendant to ascertain whether the ultimate penalty is called for in his or her particular case." In this regard, the court concluded that evidence (such as photographs) that may not be admissible during the guilt phase would be admissible during the penalty phase to show the defendant's character. See id. at 1001.

Zakrzewski avers that his decision to plead guilty was predicated in part upon his trial counsel's wrong advice that the horrific and extremely prejudicial photographs would not be introduced as evidence during the penalty phase of his trial. In Thompson v. State, 351 So. 2d 701 (Fla. 1977) the court held that "misrepresentations by counsel as to the length of a sentence or eligibility for gain time can be the basis for post-conviction relief in the form of leave to withdraw a **guilty plea." Counsels' misrepresentation of the law, which served as what the defendant thought was the basis for his bargain with the state, is analogous to the misrepresentation in the Thompson case. This is so because** Zakrzewski **would never have tendered his guilty pleas had he been correctly advised and informed.**

In Roberti v. State, 26 Fla. L. Weekly D802 (Fla. 4th DCA March 23, 2001), the defendant alleged that he received ineffective assistance of counsel

when his lawyer incorrectly advised him that, if he pled guilty, he would not be subject to the sexual offender commitment act. The defendant later sought to withdraw his plea on that basis and the court held:

> The trial court denied this claim stating that commitment under the Act is a collateral consequence of a plea about which the defendant need not be warned. See Watrous v. State, 2001 Fla. App. LEXIS 2441, 26 Fla. L. Weekly D 686 (Fla. 2d DCA Mar. 7, 2001); Pearman v. State, 764 So. 2d 739 (Fla. 4th DCA 2000). While this is a correct statement of the law, it fails to address Roberti's actual claim. Roberti alleged not that counsel failed to advise him that his pleas could subject him to commitment under the Act, but rather that counsel affirmatively misadvised him that they could not. Affirmative misadvice about even a collateral consequence of a plea constitutes ineffective assistance of counsel and provides a basis on which to withdraw the plea. See Watrous, 2001 Fla. App. LEXIS 2441, 26 Fla. L. Weekly D 686 (Fla. 2d DCA March 7, 2001); Simmons v. State, 611 So. 2d 1250 (Fla. 2d DCA 1992); Montgomery v. State, 615 So. 2d 226 (Fla. 5th DCA 1993).

A "defendant invariably relies upon the expert advice of counsel concerning sentencing in agreeing to **plead guilty."** **See** State v. Leroux, 689 So. 2d 235, 237 (Fla. 1996). Even where trial counsel's advice was an honest mistake, if the defendant pled guilty in reasonable reliance on that incorrect advice, he is permitted to withdraw his plea. See Costello v. State, 260 So. 2d 198 (Fla. 1972). In this regard, Zakrzewski made the decision to plead guilty because counsel advised him that the jury would be prevented from viewing the highly inflammatory and emotionally charged photographs during the penalty phase. But for counsels' misadvice about the inadmissibility of the gory photos if he agreed to

plead guilty, Zakrzewski would not have pled guilty but would have insisted on proceeding to trial. The misadvice given misled Zakrzewski in his effort to make an intelligent choice between two alternatives and served to improperly induce his pleas. See, Tal-Mason v. State, 700 So. 2d 453 (Fla. 4th DCA 1997).

As his guilty pleas were therefore unintelligent and constitutionally involuntary, Zakrzewski must be accorded an opportunity to withdraw them. He is also entitled to have his pleas, judgments and sentences set aside and a hearing before a jury trial regarding all aspects of this case.

Cumulative Prejudice

Defense counsel committed a host of errors and omissions as described above, all of which constituted ineffective assistance of counsel. When the errors are considered in their entirety and the cumulative effect of all of them together, as well as individually, the relief sought by the defendant must be granted.

In the living room, he saw blood on the couch. Socks with blood on them were discovered in a hamper. (R. ____) In the master bedroom, the deputy found a clear plastic bag which covered a bloodstain. (R. ____)

CONCLUSION

WHEREFORE, the defendant requests the Court to grant the following relief:

1. Reverse the Final Order of the Trial Court (R. 576-583) which denied the defendant's Florida Rule of Criminal Procedure 3.850 motion for post conviction relief.

2. Find that the defendant was provided constitutionally ineffective assistance of counsel at trial for the reasons stated above.

3. Remand the cause to the lower tribunal.

4. Order that the defendant's guilty pleas, judgments and death sentences be set aside and that he be granted a jury trial on all issues.

5. Order that the search of the defendant's residence was illegal and that the evidence seized as a result be suppressed.

6. Find that Zakrzewski's Apprendi claim was not procedurally barred.

7. Grant such other and further relief to the defendant as the Court deems proper.

Respectfully submitted,

_____

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CERTIFICATE OF SERVICE

I hereby certify that a copy of foregoing has been provided to Robert Elmore, Esq., Assistant State Attorney, 151 Cedar Street, Post Office Box 517, Crestview, Florida 32536, and the Florida Department of Legal Affairs, Office of the Attorney General of Florida, Capital Appeals Division, the Florida Capitol Building, Plaza Level One, , Tallahassee, Florida 32399-1050, this 3d day of December, 2002, by United States mail delivery.

CERTIFICATION REGARDING FONT AND OTHER MATTERS

This brief was prepared using a Times New Roman 14 point font not proportionally spaced. The brief is also submitted on a disk that meets the Court's requierments and rules.

_____
Baya Harrison, III

D. A State-by-State Analysis

While it is acknowledged that each state is certainly free to develop its own laws and procedures in a manner it deems appropriate, it is certainly insightful to

consider how other states impose the death penalty. Comparing Florida's death penalty scheme to those in other states, it becomes clear that Florida's scheme is different from every other death penalty scheme in the country. Ring identified that of the 38 states that allow for capital punishment, "29 generally commit sentencing decisions to juries."[22] Ring, 122 S.Ct. at 2442, n. 6. Five states, Arizona, Colorado, Idaho, Montana, and Nebraska, have death penalty laws which require the judge, not the jury, to decide the existence of the facts needed in order to subject a defendant to the death penalty.[23] Id. Four states, Alabama, Delaware, Florida and Indiana, use a "hybrid system,"[24] in which the jury renders an advisory recommendation but the trial judge ultimately decides whether to accept or reject the jury's recommendation.[25] Categorizing the states in this manner illustrates that

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[22] The 29 states are: Arkansas, California, Conn. Georgia, Illinois, Kansas, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Nevada, New Hampshire, New Jersey, New Mexico, New York, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, and Wyoming.

[23] This was the procedure declared unconstitutional in Ring. As to the other states, because they, too, do not use a jury at all in the penalty phase portion of the trial, under Ring they must fail.

[24] States that utilize "hybrid systems" are frequently referred to as states allowing for "jury overrides," in that, the judge can "override" the jury verdict and impose a different sentence.

[25] It is noted that after Ring was decided, Delaware and Indiana have amended their death penalty laws and now require a jury to find the existence of aggravating factors.

Florida's death penalty scheme is only shared by a minority of the states. But upon further examination, Florida's scheme is shared by none.

Alabama

Alabama's death penalty scheme is very similar to Florida's, but differs in a few significant ways. At the conclusion of the penalty phase trial, the jury is instructed to determine whether any aggravating circumstances exist. The aggravating circumstances must be proven beyond a reasonable doubt.[26] If the jury finds that at least one or more aggravating circumstances exist, it must determine whether the aggravating circumstances outweigh the mitigating circumstances. If it does, it must recommend death. However, the jury can only recommend death if at least ten of the twelve jurors vote for death.[27] The jury's recommended sentence is to be considered, but is not binding upon the court. If the jury is unable to reach an advisory verdict, the court may declare a mistrial, requiring a new penalty phase trial. If the jury returns an advisory verdict, the court considers a pre-sentence report and allows counsel for both parties to present argument concerning the existence or non-existence of aggravating and mitigating factors and the proper

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[26] ALA. CODE § 13A-5-45(e) (2001). The statute also provides that " any aggravating circumstance which the verdict convicting the defendant establishes was proven beyond a reasonable doubt at trial shall be considered as proven beyond a reasonable doubt for purposes of the sentence hearing."

[27] ALA. CODE § 13A-5-46(f) (2001). However, the jury can recommend life in prison with a majority vote.

sentence to be imposed. Thereafter, the court is to "enter specific written findings concerning the existence or nonexistence of each aggravating circumstance and each mitigating circumstance. In determining the proper sentence to impose, the court shall determine "whether the aggravating circumstances it finds to exist outweigh the mitigating circumstances it finds to exist."[28]

Delaware

On July 22, 2002, the Delaware Legislature amended its death penalty laws in an effort to conform its laws in accordance with the Ring decision. In this regard, Delaware now requires that in order to sentence a defendant to death, the jury must unanimously find that the existence of at least one aggravating circumstance beyond a reasonable doubt. If the jury is unable to reach a unanimous decision as to the existence of an aggravating circumstance, it is required to report the same to the judge, identifying the number of affirmative and negative votes as to each circumstance. If the jury is able to reach a unanimous decision as to the existence of an aggravating circumstance, it then decides whether to recommend life in prison or death. In making its recommendation, the jury must "report to the court by the number of affirmative and negative votes its recommendation on the question as to whether, by a preponderance of the evidence, after weighing all relevant evidence in aggravation or mitigation which bear upon the particular

[28] ALA. CODE § 13A-5-46(f) (2001).

circumstances or details of the commission of the offense and the character and propensities of the offender, the aggravating circumstances found to exist outweigh the mitigating circumstances found to exist."[29] However, the jury's recommended sentence does not have be based on a unanimous vote. Once the jury renders its recommended verdict, the ultimate decision as to the whether to impose a life or death sentence is left to the court. In this regard, if the jury finds that at least one aggravating circumstance has been established beyond a reasonable doubt and the trial court finds by a preponderance of the evidence that aggravating circumstances outweigh the mitigating circumstances, the court "shall impose a sentence of death."[30]

Indiana

Like Delaware, subsequent to the Ring decision, on June 30, 2002, the Indiana Legislature amended its death penalty laws. Under the amended statute, a defendant who has been found guilty of (or pled guilty to) first-degree murder can only be sentenced to death if a penalty phase jury finds that the state has established at least one aggravating factor beyond a reasonable doubt and that "any mitigating circumstances that exist are outweighed by the aggravating

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[29] DEL. CODE ANN. tit. 11 § 4209(c)(3)b.1 (2002). (It is emphasized that the statute only requires that the weighing process be established by a preponderance of the evidence, not beyond a reasonable doubt.

[30] DEL. CODE ANN. tit. 11 § 4209(d)(1) (2002).

circumstance or circumstances."[31] In addition, this requires the jury to use a "special verdict form" identifying which aggravating factors were so established. The jury's verdict must be unanimous. The jury's recommendation is binding on the court and the defendant is to be sentenced according to the jury's recommendation. However, if the jury is unable to agree on a sentence recommendation, the court "shall discharge the jury and proceed as if the hearing had been to the court alone.

Florida

Comparing Florida's scheme to those referenced above, a few distinctions can be ascertained. First, and most importantly, Florida is the only state in the country that allows the jury to recommend death by a simple majority. See Susan F. Schaeffer, Circuit Judge, Sixth Judicial Circuit of Florida, Florida College of Advanced Judicial Studies p. 1 (2002). Every other state requires the jury's recommendation to be either unanimous or a substantial majority. Florida's procedure, in this regard, does not violate Ring in and of itself. This is so because Ring does not require jury sentencing at all. Ring only requires that the facts necessary to expose a defendant to the death penalty, that is the existence of aggravating factors, be submitted to and proven beyond a reasonable doubt by a jury. Although the jury in Florida sits through the penalty phase portion of the

[31] IND. CODE § 35-50-2-9(k) (2002). However, the statute does not require the weighing proviso to be established beyond a reasonable doubt.

trial, considers the evidence presented therein and renders an advisory verdict, it is not required to unanimously agree on which aggravating factors were found beyond a reasonable doubt. The constitutional concern this procedure raises is exemplified by considering that a Florida jury could hear evidence tending to support the existence of twelve aggravating factors. Then during deliberations, each juror could find the existence of a different aggravating factor (while rejecting the remaining 11). Once the jury recommended death, the trial judge is to determine which aggravating factors were established. Thus, in this hypothetical case, the judge could find that all twelve aggravating factors were proven beyond a reasonable doubt, while the jury, as a whole, did not find that any of the aggravating factors were proven beyond a reasonable doubt.

The second distinction is that in Florida a jury's recommendation is not binding, that is, a jury can recommend life and the judge has the authority, albeit limited,[32] to disregard the recommendation and impose death. Florida and Alabama are the only states in the country that allow for a jury override.

The state argues that Zakrzewski is not entitled to relief because not only does he have to show that "he is now technically correct in his Fourth Amendment

[32] See Tedder v. State, 322 So. 2d 908, 910 (Fla. 1976) (ruling that Florida's jury override is constitutional, but will only be upheld if "the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ").

argument, but also that any reasonable attorney in 1994 would have seen it the way he does now." (R. 271-72). In other words, the state contends that even though Satterfield, noted above, appears to make the inevitable discovery doctrine fail in Zakrzewski's case, his defense attorneys cannot be deemed ineffective if "any [other] reasonable construction" of the inevitable discovery doctrine exists. The state's argument is spurious at best. Surely, Zakrzewski was denied effective assistance of counsel when the law would support the suppression of the evidence that was seized from his home.

Had the issue been raised, the state could not have satisfied its burden of proving that Deputy Baczek had lawful grounds to believe exigent circumstances existed to justify his entrance into the defendant's residence without a warrant. The presumption that the warrantless search and seizure of evidence from Zakrzewski's residence was unconstitutional remains unrebutted. See Earmann v. State, 265 So. 2d 695 (Fla. 1972).

These acts and omissions fall squarely within the realm of ineffective representation as defined by the Supreme Court in Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). (Counsel is ineffective where counsel's performance is deficient, and, but for the deficiency, there is a reasonable probability that the outcome of the proceeding would have been

different.) The failure of defense counsel to move to suppress illegally seized evidence can constitute ineffective assistance of counsel. See Devega v. State, 706 So. 2d 102 (Fla. 1st DCA 1998).

Defense counsel's failure to investigate the matter and failure to move to suppress the illegally obtained evidence was a serious deficiency which fell measurably below objective standards of reasonably effective representation by attorneys handling criminal cases and, *a fortiori*, death penalty cases. Allegations of ineffectiveness where defense counsel fails to seek the suppression of illegally obtained evidence are as legally valid in the context of a guilty plea as they are after a trial. See Simmons v. State, 485 So. 2d 475 (Fla. 2d DCA 1986) (holding counsel's failure to move to suppress evidence may have rendered guilty plea involuntary, and that the claim required record refutation or an evidentiary hearing to resolve it) and Williams v. State, 717 So. 2d 1066 (Fla. 2d DCA 1998) (same); Hanford v. State, 756 So. 2d 191 (Fla. 4tth DCA 2000) (an allegation of ineffectiveness in failing to seek suppression of tainted identification was legally and factually sufficient under the standards of Strickland v. Washington, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 [1984]).

The defendant suffered significant prejudice because there is a distinct likelihood and a reasonable probability that, but for defense counsel's failure to challenge the admissibility of the illegally obtained evidence on Fourth

Amendment grounds, and the fact that the inevitable evidence rule would not hold, the evidence would have been suppressed and the prosecution against Zakrzewski effectively terminated.

For the reasons set forth above, this court should reverse the trial court's order denying relief as to this claim.