IN THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT, IN AND FOR LEE COUNTY, FLORIDA **CRIMINAL ACTION**

STATE OF FLORIDA,
Plaintiff,

v. CASE NO. 16-CF-000455

JOSEPH ADAM ZIELER,
Defendant.
_____/

SENTENCING ORDER

THIS CAUSE comes before the Court on a sentencing hearing held on June 26, 2023, pursuant to §921.141(3) Fla. Stat. Assistant State Attorneys Stephanie Russell, Daniel Feinberg, and Abe Thornburg appeared on behalf of the State of Florida. The Defendant, Joseph Adam Zieler, was present with attorneys Kevin Shirley, Donna Murray, and Lee Hollander. This Court has jurisdiction.

A. PROCEDURAL BACKGROUND

1. A grand jury indictment was filed on November 3, 2016, charging Defendant with two counts of first-degree murder in connection with the 1990 killings of 11-year-old Robin Cornell and 32-year-old Lisa Story.

2. The State filed a notice of intent to seek the death penalty on November 28, 2016, and amended notice on November 30, 2016, listing five aggravating factors.

3. On August 20, 2018, this case was consolidated with Lee County case number 16-CF-18211, in which Defendant was charged with sexual battery on a person less than 12 years of age, sexual battery with a deadly weapon or great force, first-degree burglary with assault or battery, and two counts of second-degree murder.

4. On December 18, 2020, Defendant was charged by superseding indictment with two counts of first-degree murder. The State filed a superseding notice of intent to seek the death penalty on February 1, 2021, listing five aggravating factors.

5. On July 15, 2022, the State filed a notice of *nolle prosequi* on the charge of sexual battery on a child under 12 years of age and sexual battery with a deadly weapon or great force. On July 22, 2022, the State filed a notice of *nolle prosequi* on the charge of first-degree burglary.

6. Defendant was appointed attorneys Kevin Shirley and Lee Hollander to represent him in this case. Attorney Donna Murray represented Defendant in the mitigation argument.

7. Jury selection began on May 8, 2023, and the guilt phase of the trial began on May 16, 2023. On the evening of May 18, 2023, the jury found Defendant guilty as charged with both counts of first-degree murder.

8. The penalty phase began on May 23, 2023. On May 24, 2023, the jury found that all aggravating factors had been proven beyond a reasonable doubt on both counts of first-degree murder. The jury recommended a sentence of death for both counts by a vote of 10-2. The Court ordered a pre-sentence investigation.

9. A hearing pursuant to *Spencer v. State*, 615 So.2d 688 (Fla. 1993), was held on June 26, 2023. The State and Defendant presented the Court with a memorandum outlining their respective positions. During the *Spencer* hearing, Defendant presented additional evidence. After the *Spencer* hearing on June 26, 2023, final sentencing was held in the late afternoon of the same day after the Court had an opportunity to review and consider all additional evidence. This order is entered contemporaneously.

B. FACTS OF THE CASE

10. Jan Cornell testified that on the evening on May 9, 1990, her daughter Robin Cornell was 11 years old. They lived together in a condominium in Cape Coral near the Cape Coral Hospital, where Jan Cornell worked. On the previous day, one of Jan Cornell's friends, 32-year-old Lisa Story, moved into the condo's spare bedroom to allow the women to share living expenses. Lisa Story also worked at the hospital as part of the office responsible for charitable fundraising. Earlier in the evening, Lisa Story showed Jan and Robin a Seiko watch she had recently purchased for her fiancé for his birthday with a personalized message engraved on the back. She asked Jan for scissors and tape to wrap the watch in wrapping paper, still in its box. Between 10:30 and 11:00 p.m., Jan Cornell was considering going to her boyfriend Donny Batista's house to watch the end of a basketball game, but she felt it was too late in the evening to go out. Her daughter, Robin, and Lisa encouraged her to go. Robin told Jan to tell Donny not to be late to pick her up from school the next day. The mother and daughter said goodbye to each other, and Jan left to go to Donny's house, which was only a few minutes away.

11. Jan Cornell arrived at Donny Batista's house around 11:00 p.m. Although she only intended to stay a short while to watch the end of the basketball game, she accidentally fell asleep and woke up again around 4:00 a.m. on May 10, 1990. She rushed home because it was almost time for her to be at work at the hospital around 4:30 a.m. She discovered she was locked out of the house when she reached the front door. She testified that the front door had two locks, a deadbolt, and a lock for the door handle. The handle lock was broken and could not be unlocked outside, with or without a key. Jan Cornell testified that both her daughter and Lisa Story knew that the handle lock was broken and to lock the front door with the deadbolt only. Jan Cornell also testified that she heard footsteps inside while knocking at the front door. At this point, she did not think anything unusual was happening and believed Lisa may have forgotten about not using the handle lock. She walked around to the back sliding glass doors of the condo, hoping they may be unlocked and she could get inside that way. However, when she approached the sliding glass doors, she found they were open, and the vertical blinds were blowing out from the inside.

12. Jan Cornell testified that the home appeared in disarray upon entering her condominium from the open sliding doors. Many items were moved or out of place from where they had been when she left earlier that night. Notably, on an open ironing board, several photos of Robin Cornell and her older sister, Jeanie, were laid out in a row. These photos had been removed from a wall furniture unit, which appeared to be pulled away from the wall. Jan testified that she knew something was wrong then and ran up the stairs calling her daughter's name.

13. Once upstairs, she saw Lisa Story lying on her bed through the open door to the spare bedroom. However, she ran into the bedroom she shared with her daughter first and did not check on Lisa. She found Robin lying face down on the floor near the foot of the bed, with a bed pillow rolled up and placed under her body to prop up her pelvis. Her pajama shirt was pulled up to her neck, and her underwear was missing, rendering her nearly nude. Her legs were spread apart, exposing her genitals. A sex toy was on the floor between her legs. (The investigation later concluded that the item belonged to Lisa Story.) Jan Cornell testified that Robin felt cold and could tell she was dead, but she flipped her onto her back and attempted CPR while on the phone with 911. Jan Cornell testified that while performing CPR, she heard her daughter's lungs aspirate; it appeared to her that Robin had been crying heavily before her death.

14. Todd Everly, at the time employed by the Cape Coral Police Department, was the lead detective first assigned to this case in 1990 and was one of the detectives who responded to the scene on May 10, 1990. He testified that when he went upstairs, he found Lisa Story's body on her bed, lying on her right side in a fetal position, with a pillow over her head. She had injuries to her mouth and nose area, cuts and scrapes to her neck and back, and "extreme" injuries to her anus and anal cavity, causing "significant" bleeding. One of her fingernails was broken and bleeding, indicative of a defensive wound. There was a pornographic magazine left open on Lisa Story's bed near her body.

15. The empty box of the engraved Seiko watch Lisa Story purchased for her fiancé's birthday was found unwrapped and on her bed near her body. The watch was missing from the crime scene and has never been found. Items from Lisa Story's purse were strewn about; her wallet was lying open and contained no cash or credit cards. Several items of jewelry that Lisa Story wore daily were missing and have never been found.

16. Regarding Robin Cornell, Mr. Everly testified that he found her lying on her back, consistent with what Jan Cornell told them about flipping her over to perform CPR. Robin had severe injuries to her vaginal area that were apparent to investigators at the scene due to visible bleeding. Robin also had bruises and abrasions to her face, purplish lips, foaming at the mouth and nose, and an abrasion injury to her back on the right side of her spine. Robin's torn underwear was found nearby; abrasions on the front of her thigh were consistent with her underwear being forcibly torn off. Mr. Everly testified that the scene presented to law enforcement indicated some struggle and that Robin attempted to defend herself.

17. Mr. Everly testified that based on his career experience as a police officer and detective, it was clear that both Lisa and Robin were alive when they were sexually assaulted due to the amount of bleeding caused by their injuries.

18. Dr. Noelia A. Hernandez, the substitute medical examiner, testified to the full extent of the victims' injuries. Lisa Story had severe injuries to her anus, including several lacerations to the anal opening and internal bleeding. These injuries were caused by some foreign object being forced into her anus. Later testing of Lisa Story's rape kit revealed the presence of sperm cells in swabs from her anus. She also had blunt force injuries to her left shoulder and mid-back, a bruised right eyelid and hemorrhaging to the right eye, and an abrasion on her neck. She also had a laceration to her upper lip and bit down on her tongue so hard that it was almost severed. These injuries, when taken together with the fact that Lisa Story was found with a pillow over her head, indicate that she was killed by asphyxiation via smothering. Finally, Lisa Story had an injury to the fingernail on the third finger of her right hand.

19. As for Robin Cornell, Dr. Hernandez testified that she had bruising to her right shoulder, linear abrasions to her left eye, a linear abrasion to her left thigh, and abrasions to her mid-back. She also had bruises below her left eye, to her right cheek, at the left corner of her mouth, and to her chin. She had petechial hemorrhaging on her eyes, the inside of her scalp, heart, and lungs, which is consistent with death by asphyxiation. There were laceration injuries to Robin's inner vaginal walls, which caused internal bleeding, and lacerations to her posterior fornix, where the vaginal wall meets the cervix. These injuries were consistent with an object being inserted into her vagina. Samples of the bloody fluid inside Robin's vagina were taken, and her outer genitals and anus were swabbed; the samples and the swabs tested positive for sperm. The medical examiner testified that all of Robin's injuries were contemporaneous with her death, including the injuries to her vagina.

20. The medical examiner testified that when a person is smothered, he or she will lose consciousness after approximately 60 to 70 seconds, and death will result after about three to five minutes. She also testified that while the injuries to Robin's vagina and Lisa's anus were inflicted contemporaneous to their deaths, she could not definitively say whether they were incurred premortem or post-mortem.

21. Rape kits were administered to both victims. Numerous items of evidence were collected from the scene to obtain DNA samples. There was semen containing sufficient DNA for analysis on the bedsheet from Robin Cornell's bed, the pillow found beneath Robin's body, and the genital swabbing of Robin Cornell. The DNA within these samples was consistent with each other. Over the investigation in the decades that followed, over one hundred individuals' DNA was tested, but a match was not found. For twenty-six years after the crime, the case remained open but unsolved.

22. In 2016, Defendant was arrested for an unrelated crime, and a DNA sample was taken while booking him into jail. This sample was entered into CODIS (Combined DNA Index System) as a matter of standard procedure, and unexpectedly, it matched the 1990 rapes and murders of Robin Cornell and Lisa Story. Following this match, a second buccal swab was obtained from Defendant; this sample was also a match. When questioned by law enforcement, Defendant denied involvement in the crimes and claimed no memory of anything occurring in 1990 due to a motorcycle accident in 1998. However, his claimed lack of memory did not comport with his interview with police a few weeks earlier regarding the new offense for which he had been arrested, in which he appeared to have no cognitive or memory issues. Moreover, in letters and jail calls to his longtime girlfriend, Bonnie Kniceley, Defendant made incriminating statements indicating that

he was worried about being caught for past offenses. Bonnie Kniceley testified that one of Defendant's preferred sexual positions involved putting a pillow beneath her pelvis in the same manner that Robin Cornell's body was found. Jan Cornell testified that she had no idea whom Defendant was and had never heard of nor met him before or after the murders. He was also unknown to law enforcement during the entire twenty-six-year investigation of this case and was never considered a suspect before the CODIS hit.

C. TESTIMONY AND EVIDENCE

23. The following findings are based on the evidence presented by the State and Defendant at the *Spencer* hearing and their closing arguments supporting and opposing a death sentence. The Court also received, reviewed, and considered the sentencing memoranda from the State and the defense regarding the Court's consideration of all aggravating factors and mitigating circumstances as required by §921.141(3) Fla. Stat.

24. The State presented no evidence. The defense presented no testimony from additional witnesses or further evidence for the Court's consideration before sentencing. Defendant made a brief statement in which he asserted his innocence.

25. It should be noted that, at the outset of the *Spencer* hearing, Defendant asked to speak with Mr. Shirley. When Mr. Shirley approached Defendant, Defendant attempted to strike Mr. Shirley with his elbow before being restrained by the court bailiffs. The defendant was removed from the courtroom during a brief recess to allow the bailiffs to request additional assistance and fit him with restraints. Defendant returned to the courtroom, and the hearing was concluded. The Court notes this incident for the sole purpose of stating that it has had no bearing on the Court's sentencing decision.

26. Under §921.141(8) Fla. Stat. (2017), the Court finds that the State provided evidence of the existence of at least one (1) of the aggravating factors described in §921.141(6).

D. IMPOSITION OF A SENTENCE OF EITHER LIFE IMPRISONMENT WITH THE POSSIBILITY OF PAROLE AFTER 25 YEARS OR DEATH

27. The following analysis applies to the Court's consideration of all aggravating factors and mitigating circumstances presented in this case:

1. Has the aggravating factor(s) asserted by the State been found to exist and proven beyond a reasonable doubt?
2. Does the aggravating factor(s) sufficiently support the imposition of a sentence of death?
3. Does the aggravating factor(s) proven beyond a reasonable doubt outweigh the mitigating circumstances reasonably established by the evidence to warrant the imposition of a sentence of death?

28. The Court has reviewed the record, heard the evidence presented in both the guilt and penalty phases, reviewed the sentencing memoranda from the State and Defendant, the evidence presented at the Spencer hearing, and reviewed the pre-sentence investigation. After carefully considering the foregoing, the Court finds as follows.

E. JURY RECOMMENDATION

29. As noted *supra*, the jury's verdict was that the Defendant be sentenced to death. Accordingly, the Court assigns great weight to the jury's verdict.

F. AGGRAVATING FACTORS

30. The defendant was previously convicted of a felony involving the use or threat of violence to the person. Fla. Stat. § 921.141(6)(b). A felony "involving the use or threat of violence" refers to life-threatening crimes in which the defendant comes in direct contact with a victim. *Lewis v. State*, 398 So.2d 432 (Fla. 1981). Convictions that, on their face, constitute a crime involving violence can be used to establish this aggravating factor. *Mann v. State*, 420 So.2d 578 (Fla. 1982).

31. The jury found that this aggravating factor was proven beyond a reasonable doubt. The record shows that Defendant was convicted of resisting an officer with violence in 1990 and felony battery in 2016. Defendant stipulated that he was previously convicted of felony battery in violation of F.S. 784.041(1). Additionally, Defendant was convicted of two contemporaneous counts of first-degree murder in this case; contemporaneous violent felony convictions qualify for this aggravating factor. *LeCroy v. State*, 533 So.2d 750 (Fla. 1988); *King v. State*, 390 So.2d 315 (Fla. 1980).

32. The Court finds the elements of this aggravating factor were proven beyond a reasonable doubt for both murders. The Court assigns this aggravating factor great weight.

33. The capital felony was committed while the defendant was engaged in the commission of a burglary. Fla. Stat. § 921.131(6)(d). A prosecution for burglary is not required for this aggravating factor to apply as long as the burglary was proven beyond a reasonable doubt. *See, e.g.*, *Turner v. State*, 530 So.2d 45, 51 (Fla. 1987).

34. The jury found that this aggravating factor was proven beyond a reasonable doubt. The record shows that Defendant entered the home through an unlocked sliding glass door. The totality of the evidence indicates that Defendant did not know Jan Cornell or either of the victims before the murders, and he did not have permission to enter the home. The Seiko watch and jewelry items owned by Lisa Story were stolen from the crime scene and never recovered. Lisa Story's wallet was found lying open on her bed. The home was repeatedly described as "ransacked," with many items strewn about it, furniture moved out of place, and drawers left open. The evidence could not establish whether the disarray in the victims' home occurred pre- or post-killing; nevertheless, theft was evidenced by removing items from the residence. The totality of the evidence further indicates that the victims were sexually assaulted. The evidence proved Defendant was engaged in the commission of a burglary when both victims were murdered.

35. The Court finds the elements of this aggravating factor were proven beyond a reasonable doubt for both murders. The Court gives this aggravating factor great weight.

36. The capital felonies were especially heinous, atrocious, and cruel ("HAC"). Fla. Stat. § 921.141(6)(h). "Heinous" means extremely wicked or shockingly evil; "atrocious" means outrageously wicked and vile; and "cruel" means designed to inflict "a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others." *State v. Dixon*, 283 So.2d 1, 9 (Fla. 1973). The HAC aggravator applies to conscienceless or pitiless crimes which are unnecessarily torturous to the victim. *Baker v. State*, 71 So.3d 802, 820 (Fla. 2011). Fear, emotional strain, and terror inflicted on the victim prior to death qualifies a murder as heinous, atrocious, and cruel. *Id.* at 821. "[I]n order to support a finding of this aggravator, 'the evidence must show that the victim was conscious and aware of impending death.'" *Williams v. State*, 37 So.3d 187 (Fla. 2010) (quoting *Douglas v. State*, 878 So. 2d 1246 (Fla. 2004)). Evidence of defensive wounds indicates that the victim was conscious and aware of impending death. *Bright v. State*, 299 So. 3d 985, 1003 (Fla. 2020). "The victim's mental state may be evaluated in accordance with common-sense inferences from the circumstances." *Lynch v. State*, 841 So.2d 362, 369 (Fla. 2003). Strangulation creates a "prima facie case" for this aggravating factor. *Orme v. State*, 677 So.2d 258, 263 (Fla. 1996).

37. For count 1, the murder of Robin Cornell, the jury found that this aggravating factor was proven beyond a reasonable doubt. The record shows that Robin Cornell was conscious and aware she was being suffocated at the time of her death. She would have been conscious for at least 60 seconds while smothered in this case. The evidence showed that she had been crying heavily and experienced extreme emotional anguish before her death. Robin Cornell had defensive wounds and blunt force injuries to her face and parts of her body unrelated to being raped or smothered, indicating that a struggle occurred before she was murdered. Her underwear was torn from her body with such force that it left an abrasion injury on her thigh.

For count 2, the murder of Lisa Story, the jury found that this aggravating factor was proven beyond a reasonable doubt. The record shows that Lisa Story was conscious and aware she was being suffocated at the time of her death. She would have been conscious for at least 60 seconds while smothered in this case. She was attempting to force her tongue between her teeth to breathe, leading to her biting down on her tongue so hard that it was nearly severed. Furthermore, she attempted to fight off her attacker, as evidenced by the defensive injury to her finger and blunt force injuries to her face and parts of her body unrelated to being raped or smothered.

Although the medical examiner could not say with medical certainty whether the victims' vaginal/anal injuries were inflicted before death, the totality of the evidence indicates that both victims were alive at the time they were sexually assaulted, as evidenced by the amount of bleeding and bruising inflicted upon them contemporaneous to death. Moreover, there was no evidence of any injuries that may have caused the victims to be unconscious when smothered, such as significant blows to the head. The totality of the evidence shows that both victims were alive and conscious when they were raped and subsequently suffocated.

38. The Court finds the elements of this aggravating factor were proven beyond a reasonable doubt for both murders. The Court gives this aggravating factor great weight.

39. The capital felonies were homicides committed in a cold, calculated, and premeditated manner ("CCP") without any pretense of moral or legal justification. § Fla. Stat. 921.141(6)(i). In order to establish this aggravating factor, the evidence must show that:

1. The killing was the product of cool and calm reflection and not an act prompted by emotional frenzy, panic, or a fit of rage;
2. Defendant had a careful plan or prearranged design to commit murder before the killing;
3. Defendant exhibited heightened premeditation; and
4. Defendant had no pretense of moral or legal justification. *Franklin v. State*, 965 So.2d 79, 98 (Fla. 2007).

40. The jury found that this aggravating factor was proven beyond a reasonable doubt. The record shows that Defendant entered the home through an unlocked back door in the middle of the night when both occupants were asleep. Testimony established that it was well-known in 1990 that a person would not leave behind fingerprints if they wore gloves. No fingerprints were matched to Defendant in this case, despite the evidence conclusively proving his presence in the ransacked home. Defendant sexually assaulted both victims contemporaneously with killing them. Although the medical examiner could not say with certainty whether the victims' vaginal and anal injuries were inflicted before death, the evidence indicates that both victims were alive when they were sexually assaulted. However, even if the victims were dead when sexually assaulted, it would show the cold and premeditated nature of the killings to abuse the bodies for sexual gratification. Furthermore, Defendant spent significant time in the condo before or after the murders, as evidenced by its ransacked state. Concerning count 1, the murder of Robin Cornell, photographs of the 11-year-old victim were laid out on an open ironing board on the condo's ground floor. Concerning count 2, the murder of Lisa Story, a pornographic magazine was left open beside her body. A sex toy taken from Lisa Story's room was used to assault Robin Cornell sexually. These facts are inconsistent with a finding that either of the murders was committed following a moment of panic or rage or that Defendant did not reflect on his actions before the killings. How Defendant entered the home, the lack of fingerprints, and the fact that two different victims were killed similarly close in time to each other, show that Defendant had a carefully considered, premeditated plan to commit burglary, sexual assault, and murder. Finally, there was no evidence suggesting that the murders were committed with any pretense of moral or legal justification in the case of either victim; rather, the totality of the evidence indicates that the murders were sexually motivated and that both the victims were unknown to Defendant before the crime. The defendant had no moral or legal justification for wanting the victims killed. The defendant killed both Robin Cornell and Lisa Story coldly and methodically, resulting in the asphyxiation of both victims. Testimony indicated that asphyxiation requires 3-5 minutes of continuous pressure. After 3-5 minutes of choking one victim, regardless of which victim died first, Defendant chose to engage in the same manner of killing against the second victim. This was ample time to consider the act and consciously decide to continue.

41. The Court finds the elements of this aggravating factor were proven beyond a reasonable doubt. The Court gives this aggravating factor great weight.

G. MITIGATING CIRCUMSTANCES

42. "Whenever a reasonable quantum of competent, uncontroverted evidence of mitigation has been presented, the trial court must find that the mitigating circumstance has been proved." *Nelson v. State*, 850 So. 2d 514, 529 (Fla.2003). "The court must find as a mitigating circumstance each proposed factor that is mitigating in nature and has been reasonably established by the greater weight of the evidence." *Campbell v. State*, 571 So. 2d 415, 419 (Fla. 1990). A mitigating circumstance can be anything in the life of the Defendant that might indicate that the death penalty is not appropriate. It is not limited to the facts surrounding the crime and may include any aspect of the Defendant's character, background, or life or any circumstance of the offense that may reasonably indicate that the death penalty is not an appropriate sentence in the case.

43. Defendant submitted no statutory mitigating circumstances under Fla. Stat. 921.141(7). The jury found that no mitigating circumstances had been proven by a greater weight of the evidence. However, the Court has independently considered some statutory mitigating factors that may apply in this case. Moreover, the Court considered the possibility that other factors may exist in the Defendant's character, record, or background that would mitigate against the imposition of the death penalty. Specifically, the Court has considered the following mitigating factors, beginning with the statutory mitigating factors under Fla. Stat. § 921.141(7) that may be applicable.

H. STATUTORY MITIGATING FACTORS

44. The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance. Fla. Stat. § 921.141(7)(b). It is unknown if Defendant was under the influence of extreme mental or emotional disturbance, as this was never suggested during the trial or the penalty phase. The Court cannot find that Defendant was under the influence of extreme mental or emotional disturbance at the time of the murders because the evidence does not support this conclusion. Accordingly, the Court finds that the evidence does not support this mitigating factor. However, the Court considered Defendant's mental health issues a non-statutory mitigating factor (see below).

45. The capacity of the defendant to appreciate the criminality of their conduct or to conform their conduct to the requirements of law was substantially impaired. Fla. Stat. § 921.141(7)(f). Again, the Court finds that the evidence does not support this mitigating factor. While the evidence presented during the penalty phase indicated that Defendant has mental health issues and had suffered a closed-head injury years prior, it should be noted that the injury occurred after the date of the offense. Rather, regarding this specific statutory mitigating factor, the evidence established that Defendant fully appreciated that his conduct was criminal because he worked diligently to conceal his culpability. Notably, the lack of fingerprints at the scene indicates that Defendant was wearing gloves when he committed the offenses, showing his knowledge of the criminality of his actions. His only physical connection to the crime was the DNA samples from the crime scene. For nearly three decades, the defendant remained locally aware of the efforts to locate the perpetrator of this crime. Only through the combination of advancement in DNA processing and Defendant's actions did he unexpectedly become known as the perpetrator. After his arrest for a tangential crime, Defendant made several incriminating statements to Bonnie Knicely, his paramour of twenty-six years, instructing her on steps to take to secure his release and expressing his concern that something from his past had finally resurfaced. Additionally, he was evasive with

law enforcement when questioned about the crime and feigned a lack of memory of anything before a motorcycle accident in 1998. Defendant's attempts to hide from scrutiny indicate that he knew of the criminality of his actions and took steps to avoid detection.

46. As such, the Court cannot find that the defendant's capacity to appreciate the criminality of his conduct was substantially impaired. From the start, Defendant knew his actions were criminal and tried to evade the consequences of this same criminal conduct. The Court finds that the evidence does not support this mitigating factor.

47. The defendant's age at the time of the crime. Fla. Stat. 921.141(7)(g). At the time of the offense, the defendant was twenty-eight years old. He was not a teenager or young adult. The Court finds that the evidence does not support this mitigating factor.

I. NON-STATUTORY MITIGATING FACTORS

48. When weighing aggravating factors and mitigating circumstances, the trial court must "(1) expressly evaluate in his or her written order each mitigating circumstance proposed by the defendant to determine whether it is supported by the evidence and whether, in the case of nonstatutory factors, it is truly of a mitigating nature; (2) assign a weight to each aggravating factor and mitigating factor properly established; (3) weigh the established aggravating circumstances against the established mitigating circumstances; and (4) provide a detailed explanation of the result of the weighing process." *Orme v. State*, 25 So. 3d 536, 547-48 (Fla. 2009). In *Ford v. State,* 802 So.2d 1121, 1133-34 (Fla. 2001), the Florida Supreme Court summarized what a trial court must do in considering a factor that is proposed as mitigating in nature. The Court held that the trial court must determine the following:

1. Whether the evidence is mitigating in nature as a matter of law, and
2. Whether the factor is mitigating under the facts of the case.

49. If a proposed factor falls within a statutory category, it necessarily is mitigating in any case in which it is present. If a factor does not fall within a statutory category but nevertheless meets the definition of mitigating circumstances, it must be shown to be mitigating in each case, not merely present. If a non-statutory factor is present and found to be mitigating in nature, it must be accorded some weight; the weight is within the trial court's discretion. *Id.* at 1134-35.

50. Non-statutory mitigating factors raised in this case are as follows:

1. *The age of defendant: Joseph Zieler, is 61 years of age*. This fact is not in dispute. The Court concludes that this fact has been established, but its mitigating effect on the facts of this case has not. The defendant was twenty-eight years old when these crimes were committed and enjoyed over two decades of freedom while at large. The Court gives this mitigating circumstance minimal weight.

2. *Joseph Zieler suffers from anxiety.* Dr. Julie Harper and Dr. Keegan Culver testified that Defendant suffers from mild anxiety and depression, characterizing them as "adjustment disorders." While a greater weight of the evidence supports this mitigating circumstance, the Court finds that it does not substantially mitigate the

aggravating factors in this case. The evidence does not support a finding that Defendant has suffered from chronic anxiety or depression in the past. The Court gives this mitigating circumstance minimal weight.

3. *Joseph Zieler suffers from symptoms of Parkinson's disease, including a neurocognitive disorder, tremors, memory loss, and head jerking.* Dr. Mark Rubino, a neurologist, testified that Defendant has symptoms of "Parkinson-ism" based on the results of brain scans and as evidenced by tremors and associated physical impacts. He testified that this indicates the presence of a mild neurological disorder with similarities to Parkinson's disease. However, the evidence showed that Defendant *does not* have Parkinson's disease. Dr. Rubino opined that "Parkinson-ism" may be early signs of the onset of Parkinson's disease or worse than Parkinson's disease because the condition may not respond to treatment. The greater weight of the evidence has established this mitigating circumstance. The Court gives this mitigating circumstance minimal weight.

4. *Joseph Zieler sustained a traumatic closed-head injury as a result of a severe motorcycle accident.* Dr. Mark Rubino testified that Defendant suffered a closed-head injury due to a motorcycle accident in 1998, further evidenced by his application and award of social security disability benefits. This injury occurred in 1998 after the crime was committed in May 1990. Additionally, Dr. Rubino noted that Defendant suffered another concussion due to a car crash in 2014. However, no evidence was presented that either of these accidents resulted in a *traumatic* brain injury causing significant brain damage or loss of function. This mitigating circumstance has been established to the extent that the "closed head injuries" did occur. However, the "traumatic" severity of these injuries was not established by the greater weight of the evidence. The Court gives this mitigating circumstance moderate weight.

5. *Joseph Zieler sustained a right leg fracture and a "degloving" injury to his foot.* This factor is not in dispute. The Court concludes that this mitigating factor has been established. However, these injuries occurred eight years after the crimes in this case. The evidence failed to establish that this circumstance is genuinely mitigating. The Court gives this mitigating circumstance no weight.

6. *Joseph Zieler has a neurodegenerative disorder, manifesting in mildly reduced uptake in the bilateral frontal lobes, which raises the possibility of frontotemporal dementia per FDG PET Scan.* Dr. Mark Rubino testified that Defendant may suffer from dementia. However, the totality of the evidence indicates that Defendant does not have severe deficiencies in intellectual ability or cognitive function. This mitigating circumstance has been established. The Court gives this mitigating circumstance minimal weight.

7. *Joseph Zieler suffers from vascular disease.* Although a preponderance of the evidence proved this, as Dr. Rubino testified that MRI scans indicated "vascular

disease" in the brain, his results were typical for a 61-year-old man. The Court gives this mitigating circumstance no weight.

8. *Joseph Zieler has a history of traumatic brain injury.* This factor was previously addressed under Circumstance No. 4, discussed above. As noted, there was no clear evidence that Defendant's prior head injuries were "traumatic," as that term is used medically. Additionally, Dr. Culver testified that Defendant admitted to her that he exaggerates his previous head injuries when it benefits him. The Court gives this mitigating circumstance minimal weight and notes that it is duplicative with other non-statutory mitigators.

9. *Joseph Zieler has been diagnosed with cognitive impairment, manifesting as a borderline score on processing speed.* Dr. Julie Harper and Dr. Karim Yamout performed cognitive tests on Defendant, and each determined that Defendant's processing speed was in the "low normal" range. While Defendant has a "mild neurological disorder," it was "subtle" and involved "very few deficiencies." The Court finds this mitigating circumstance has been established and gives it minimal weight.

10. *Joseph Zieler suffered from a heart attack and stent surgery.* While the greater weight of the evidence proved this, no evidence was presented about how it affected Defendant in the past or affects him presently. The evidence failed to establish that this circumstance is genuinely mitigating. The Court gives this mitigating circumstance no weight.

11. *Joseph Zieler has high blood pressure.* While the greater weight of the evidence proved this, no evidence was presented about how it affected him in the past or affects him presently. The evidence failed to establish that this circumstance is genuinely mitigating. The Court gives this mitigating circumstance no weight.

12. *Joseph Zieler was diagnosed with adjustment disorder with a depressed mood.* The greater weight of the evidence established this mitigating factor. However, the Court notes that Defendant has been in jail for over six years awaiting trial on a double rape and murder case. The evidence failed to establish that this circumstance is genuinely mitigating. The Court gives this mitigating circumstance minimal weight.

13. *Joseph Zieler was diagnosed with an amnestic disorder.* The only evidence establishing this fact came from Social Security Administration records from 1998 to 2001. The expert witnesses who testified during the penalty phase did not attest to the presence of an amnestic disorder. Moreover, there was evidence suggesting that the symptoms of this disorder were fabricated, in whole or in part, to obtain SSDI benefits. Dr. Culver testified that Defendant told her he "plays up" his head injuries "when it suits him." The Court finds this mitigating circumstance has been established and gives it minimal weight.

14. *Joseph Zieler has strengths in testing, with variable performance.* To the extent that this mitigating circumstance alleges that Defendant's cognitive testing is mostly normal, with some variations in performance, it has been established by the preponderance of the evidence. However, the mitigating effect of these facts is unclear. The evidence failed to establish that this circumstance is genuinely mitigating. The Court gives this mitigating circumstance minimal weight.

15. *Joseph Zieler exhibits significant weakness in conceptual shifting.* The evidence established that Defendant had some deficiencies in this area but did not establish that they rose to a "significant" weakness. The Court finds this mitigating circumstance has been established and gives it minimal weight.

16. *Joseph Zieler falls in the low average to the average range of intellectual ability.* This mitigating circumstance was established by the greater weight of the evidence. The Court notes that "low average to average" is still within the range of normal intellectual ability. The Court gives this mitigating circumstance minimal weight.

17. *Joseph Zieler has experienced episodic depression throughout his life and suffers from a major depressive disorder.* The greater weight of the evidence did not establish this circumstance. Dr. Harper testified that while she believed Defendant suffered from "episodic depression" and "major depressive disorder," her actual diagnosis of "adjustment disorder" was made clear on cross-examination. Dr. Culver testified that adjustment disorder is different from major depressive disorder. The Court gives this mitigating circumstance no weight.

18. *Joseph Zieler suffers from adaptive functioning deficits.* This mitigating circumstance is supported by Defendant's SSDI records, referenced above. However, cognitive testing by the medical experts did not reveal any adaptive functioning deficits. The Court finds this mitigating circumstance has been established and gives it no weight.

19. *Joseph Zieler had symptoms of inattention during middle school, which resulted in poor grades.* There was no testimony presented to establish this mitigating circumstance. Defendant's school records are the only evidence submitted supporting this assertion. The Court finds that the greater weight of the evidence established this circumstance but gives it no weight.

20. *Joseph Zieler was never referred for remedial services, retained, or tested for services by the school system for academic assistance.* These facts were reflected in Defendant's partial school records. Still, aside from having poor grades before dropping out of high school, the evidence did not establish that Defendant was actually in need of remedial services or assistance to begin with. The Court gives this mitigating circumstance no weight.

21. *Joseph Zieler had good attendance at school.* This mitigating circumstance is partially reflected in Defendant's incomplete school records and has been proven

by the preponderance of the evidence for those periods reflected in the documents. The evidence failed to establish that this circumstance is genuinely mitigating. The Court gives this mitigating circumstance no weight.

22. *Joseph Zieler did not graduate high school and had a 10th-grade education.* While the greater weight of the evidence established this mitigating circumstance, there was no testimony regarding its impact on Defendant or the appropriate punishment in this case. The Court gives this mitigating circumstance no weight.

23. *Joseph Zieler was exposed to drugs at an early age and was smoking marijuana when he was nine years old.* Defendant relayed these facts to the psychologists who evaluated him and the investigator for the pre-sentencing investigation. The Court finds that the greater weight of the evidence has established this mitigating circumstance. The Court gives this mitigating circumstance no weight.

24. *Joseph Zieler sustained head trauma as a child when he slipped on ice, which resulted in a scar and permanent lump on the back of his head.* This anecdotal evidence was provided to the medical experts in connection with his evaluations. This mitigating circumstance has been established, but the evidence failed to establish that this circumstance is genuinely mitigating. The Court gives this circumstance minimal weight.

25. *Joseph Zieler has witnessed domestic violence between his father and mother.* This evidence is anecdotal and was provided to mental health experts in connection with his evaluations. This mitigating circumstance has been established. The Court gives this factor minimal weight.

26. *Joseph Zieler was physically and emotionally neglected by his parents as a child growing up.* This evidence is anecdotal and was provided to mental health experts in connection with his evaluation. This mitigating circumstance has been established. The Court gives this circumstance minimal weight.

27. *Joseph Zieler was physically and verbally abused by his father.* This evidence is anecdotal and was provided to mental health experts in connection with his evaluation. This mitigating circumstance has been established. The Court gives this circumstance minimal weight.

28. *Joseph Zieler witnessed his father's physical and verbal abuse of his brothers.* This evidence is anecdotal and was provided to mental health experts in connection with his evaluation. This mitigating circumstance has been established. The Court gives this circumstance minimal weight.

29. *Joseph Zieler often sought refuge at the home of his maternal grandmother after school to avoid his father's abuse.* This evidence is anecdotal and was provided to mental health experts in connection with his evaluation. This mitigating

circumstance has been established. The Court gives this circumstance minimal weight.

30. *Joseph Zieler's father relocated the family to the town of Palos Hills, which was farther away from his grandmother, preventing Joseph Zieler from going to her home and avoiding his abusive home environment.* This evidence is anecdotal and was provided to mental health experts in connection with his evaluation. This mitigating circumstance has been established. The Court gives this circumstance minimal weight.

31. *Joseph Zieler is uncertain of his paternity and believes his uncle may be his biological father.* This evidence is anecdotal and is speculation on behalf of Defendant. No objective evidence was presented to support Defendant's belief, although it can be acknowledged that this may be Defendant's subjective opinion. This mitigating factor has not been established.

32. *Joseph Zieler never received grief counseling or other services after the loss of his maternal grandmother, mother, and other close relatives.* This evidence is anecdotal and was provided to mental health experts in connection with his evaluation. This mitigating factor has been established. The Court gives this circumstance minimal weight.

33. *Joseph Zieler's father was fired from the Cape Coral Police Department for conduct unbecoming an officer after he admitted to burglarizing a restaurant.* This evidence is anecdotal. No objective evidence was presented to support these facts, nor was any evidence presented to establish why it has any mitigating effect in this case. This mitigating circumstance has not been established.

34. *Joseph Zieler married his first wife, Laurie, when he was 20 years old.* No evidence was presented to establish this factor. The Court gives this mitigating factor no weight.

35. *Joseph Zieler became a father at 21 years of age when his eldest son was born.* This factor is reflected in the pre-sentence investigation report and is not in dispute. The Court concludes that this mitigating factor has been established. The evidence failed to establish that this circumstance is genuinely mitigating. The Court gives this mitigating factor no weight.

36. *Joseph Zieler was divorced when he was 23 years old, and Laurie would not allow Joseph Zieler to see his son.* No evidence was presented to establish this factor. The Court gives this mitigating factor no weight.

37. *Joseph Zieler had several jobs prior to his motorcycle accident, including working for a family-owned business, Goodwill Industries, Silco Industries, Marine Concepts, and working with boats.* No testimony was presented to establish this

factor, although the pre-sentence investigation report details some of Defendant's past work history. The Court gives this mitigating factor minimal weight.

38. *Joseph Zieler attempted to stop an armed gunman and called the police to protect his family.* No evidence was presented to establish this factor. The Court gives this mitigating factor no weight.

39. *Joseph Zieler has low self-esteem.* Dr. Harper testified to Defendant's low self-esteem. The Court finds that the existence of this mitigating circumstance was established. However, the reported reasons behind Defendant's low self-esteem were not established by the preponderance of the evidence. The evidence failed to establish that this circumstance is genuinely mitigating. The Court gives this mitigating factor no weight.

40. *Joseph Zieler told Bonnie not to worry about visitation to take the stress off of her.* This evidence was presented and is not in dispute. Defendant did make those statements to Ms. Kniceley on a recorded phone call from jail. This mitigating circumstance has been established, and the Court gives this circumstance moderate weight.

41. *Joseph Zieler cooperated with law enforcement and did not resist them.* The defendant cooperated with law enforcement to the extent that he did not resist arrest physically. However, it cannot be said that Defendant was candid and forthcoming with law enforcement when questioned about these circumstances, as seen by the disparities between his interviews with investigators and his discussion and instructions to Bonnie Kniceley. The defendant was not obligated to waive his Fifth Amendment or any rights under *Miranda v. Arizona*, 384 U.S. 436 (1966). Still, he minimized his mental acuity and misrepresented his functioning capability when choosing to speak. This mitigating factor has been established at the most basic level of what qualifies as "cooperation"; however, the Court gives it minimal weight.

42. *Joseph Zieler is capable of redemption.* No evidence was presented to establish this factor. This mitigating factor has not been proven, so the Court gives it no weight.

J. SENTENCING CIRCUMSTANCE AND PROPORTIONALITY

51. In evaluating the aggravating and mitigating factors, the Court does not engage in a mere counting procedure but instead makes a reasoned judgment based on the totality of the circumstances. *See Terry v. State*, 668 So. 2d 954 (Fla. 1996). In reaching this decision, the Court is mindful that because death is a unique punishment in its finality, its application is reserved only for those cases where the most aggravating and least mitigating circumstances exist. *Id.* The law never requires the imposition of a sentence of death.

52. In this case, the totality of the circumstances indicates that Defendant, with premeditation, gained entry into the home of Robin Cornell, an eleven-year-old girl, and Lisa Story, a thirty-two-

year-old woman. Upon entry, Defendant brutally raped, sodomized, and murdered both victims. The evidence showed that this crime was cold, calculated, premeditated, and inflicted serious physical and emotional pain on the victims. The jury and this Court found that all aggravating factors had been proven.

53. No statutory mitigating factors were raised or established, but the Court considered the non-statutory mitigating factors presented by Defendant. Out of 42 enumerated non-statutory mitigating factors, the Court found that 36 have been established. Out of those established, several were assigned no weight, as they were not indeed of a mitigating nature. The totality of the mitigating circumstances indicates that Defendant suffers from some medical symptoms indicative of "Parkinsons-ism" and mental health issues relating to past head injuries and difficulties in childhood, specifically relationship issues with his father. Moreover, Defendant did not resist law enforcement when arrested for these crimes.

54. The Court has further considered and given great weight to the advisory verdict of the jury, who, by a vote of ten to two, recommended that the death penalty be imposed.

55. The Court recognizes there is no mathematical formula for considering the aggravating and mitigating factors. It is not enough to weigh the number of aggravators against the number of mitigators. The Court carefully considered the nature and quality of each aggravator and mitigator. The aggravating factors, in this case, are horrific. These factors greatly outweigh the comparatively insignificant mitigating factors. Having reviewed all of the aggravating factors proven beyond a reasonable doubt and all of the mitigating circumstances reasonably established by the evidence, the Court finds that the mitigating circumstances do not outweigh the aggravating factors.

56. Given the facts of the case, nothing in Defendant's background or mental state would suggest that a death sentence is disproportionate. This Court's review of other reported capital cases has led the Court to conclude that the death penalty is not disproportionate in this case. Under the totality of the circumstances and evidence, the Court finds no basis to override the jury's verdict. The totality of the circumstances warrants that Defendant, Joseph Adam Zieler, be sentenced to death.

Accordingly, it is

ORDERED AND ADJUDGED that Defendant, Joseph Adam Zieler, is sentenced as follows:

Count 1: First-Degree Murder, Defendant is hereby sentenced to death.
Count 2: First-Degree Murder, Defendant is hereby sentenced to death.

The defendant is given credit for all time served in this case, concurrent as to all counts.

The defendant is committed to the custody of the Department of Corrections for the execution of this sentence as provided by law.

The defendant is hereby notified that these convictions and sentences are subject to automatic review by the Florida Supreme Court.

DONE AND ORDERED in chambers at Fort Myers, Lee County, Florida, this 26th day of June 2023.

eSigned by Robert Branning 06/26/2023 14:38:31 9ECeo7Xs

Robert J. Branning
Circuit Court Judge

Electronic Service List
Kevin Clifford Shirley <kcslaw8@gmail.com>
Lee Hollander <leehollander@hollanderandhanuka.com>, <clarabepa@aol.com>
Donna Murray <dmurraycpi@yahoo.com>
Daniel Feinberg <dfeinberg@sao20.org>
State Attorney 20th Circuit <eService@sao20.org>
Stephanie Russell <srussell@sao20.org>
Abraham Thornburg <athornburg@sao20.org>
Judicial Assistant <tanders@ca.cjis20.org>