IN THE SUPREME COURT OF FLORIDA

CASE NUMBER: 84, 256

WILLIAM GREGORY THOMAS,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

_____/

APPEAL FROM SENTENCE OF DEATH, CIRCUIT COURT
FOR THE FOURTH JUDICIAL CIRCUIT, DUVAL COUNTY, FLORIDA

BRIEF OF APPELLANT

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STATEMENT OF THE CASE

A. NATURE OF THE CASE AND JURISDICTION

This is a direct appeal from a sentence of death imposed by the trial court. This Court has jurisdiction pursuant to *Article V, Section 3(b)(1), Florida Constitution* and *Rule 9.030(1)(A)(I), Fl.R.App.P.*

B. COURSE OF PROCEEDINGS AND DISPOSITION IN THE LOWER TRIBUNAL

A Duval County Grand Jury returned an Indictment against Mr. Thomas for the first degree murder of RACHEL THOMAS; burglary of a dwelling; and kidnapping. (R-4) To these charges, Mr. Thomas entered a plea of not guilty.

Prior to trial, the State filed a motion to have Mr. Thomas evaluated to determine his competency to stand trial. (R-51) This motion was predicated on information the State said it had received from other inmates at the jail. In its pleading, the State specifically distanced itself from any belief that Mr. Thomas was not competent. (R-51) The trial court appointed two mental health experts to conduct an evaluation of Mr. Thomas. (R-53-56)

The State filed a notice to rely on similar fact evidence involving three separate instances of Thomas soliciting people to commit crimes. (R-63) The trial court granted the State the opportunity to use this evidence. (R-73)

In response to a defense motion for particulars, the State acknowledged that the crime in this case took place between September 12 and September 15, 1991 in Jacksonville. (R-77)

The case proceeded to trial. The jury found Mr. Thomas guilty of first degree murder (R-84); guilty of burglary of a dwelling where a battery was committed (R-

85); and guilty of kidnapping. (R-83)

After the first degree murder verdict, a penalty phase proceeding commenced. By a vote of 11-1, the jury recommended that the trial court sentence Mr. Thomas to death. (R-88) The trial court, following this recommendation, sentenced Mr. Thomas to death. (R-88) The trial court sentenced Mr. Thomas to death on the first degree murder conviction (R-130); life on Count 2 to run consecutive to the sentence imposed in Count 1 and life on Count 3, to run consecutive to the sentence imposed in Count 2. (R-132) The sentence of death was imposed by written judgment. (R-134-152) The sentences imposed in Counts 2 and 3 were guideline departure sentences. (R-153-154).

From these judgments and sentences, Mr. Thomas filed a timely notice of appeal. (R-161) This initial brief follows.

Case No. 93-5393-CF

There is a particular aspect to this case that needs to be addressed. Mr. Thomas was charged in a companion case - No. 93.5393-CF with the first degree murder of Elsie Thomas. On July 14, 1994, Mr. Thomas entered a plea of guilty to this charge; Elsie Thomas was his mother. (TR-1595)

The jury had made its recommendation on the case that is on direct appeal when the plea in the companion case was taken. The plea traded a first degree murder conviction for the State's promise not to seek the death penalty. (TR-1583)

After the trial judge accepted the plea, he set sentencing on both cases for the same time. (TR-1602-1603)

As part of the plea, Mr. Thomas purports to waive "any matter whatsoever arising out of Case No. 93-5394 (Rachael A. Thomas) - whether direct, collateral or appeals under Rule 3.850 F.R.C.P. However the defendant specifically reserves the right to appeal matters concerning the sentencing in 93-5394 on the count alleging first degree murder." (R-95)(TR-1581, 1584).

The style of this record indicates that the State of Florida is a "cross-appellant". There does not appear to be any notice of appeal filed by the State in the case. A telephone call to the Attorney General's office confirms that the State never filed a notice of appeal so that the record designation is incorrect.

STATEMENT OF THE FACTS

Rachel Thomas has not been reported seen since September 12, 1991. William Gregory Thomas and Rachel Aquino were married in 1985. From this marriage, one child was born - Bennie. The parties separated in January of 1991 and later divorced. At the time of Rachel's disappearance, the parties were already divorced and living separately.

Wendy Robinson planned to talk with Rachel at about 9:00 p.m. that evening. According to Robinson, Rachel's plan to meet Thomas between 5:00 - 5:30 at her house did not materialize because he never showed up. (TR-558) Rachel never called Robinson that night. (TR-559-560)

Rachel's roommate at the time, Arlean Colocar got home about 8:00 p.m. that night. (TR-587) Upon her arrival, she saw that the garage door was open and the lights on. Rachel's car was not in the garage but the door from the garage to the house was open. (TR-588) Colocar walked around the house but did not find Rachel. She did notice that Rachel's personal belongings were still in the apartment. (TR-596) Both Robinson and Colocar noticed that the hallway area had dirt on it and there were scuff marks on the wall. (TR-588)

Colocar then called Rachel's mother, who had not heard from her; then called Rachel's friends and finally the police. (TR-594) The initial police investigation included an examination of Rachel's house and a conversation with Thomas.

The following day, a homicide detective observed the rollers on the left side of the garage floor were off track; several footprints on the garage floor, with a tennis shoe type imprint; scuff marks on the wall; and dents in the air conditioning with blood on it. (TR-621-629) This detective also interviewed Thomas. Thomas told him that his last contact with his ex-wife was the day before when he had a message left on his answering machine. He returned the call to her about 5:00 p.m. (TR-635)

Thomas never told the detective that he called Rachel at work. (TR-637) A co-worker of Rachel, Cindy Halstead, said that Thomas had made such a call between 1-3 p.m. on September 12, 1991 because she answered the phone. (TR-549) In addition, Halstead said Rachel took the call. (TR-551)

Thomas told the detective that Rachel had invited him over. He waited to go until he found someone to go with him. Both his girlfriend and his son went with him about 5:45 p.m. in his red pickup truck. (TR-636) When he arrived at the house, the garage door was open and a car was parked in front of the house. He took two boxes to the front door and rang the doorbell. When no one answered, he left the boxes by the front door and went back to his truck. He then retrieved one of the boxes and left. (TR-640) Thomas said he neither went inside Rachel's house nor touched the car. (TR-643) Thomas then went home, where he got a call from his father about 6:15 p.m. He ate dinner at his parents with his girlfriend and son at about 7:15 p.m. (TR-647) Leaving his son with his parents, Thomas took his

girlfriend to her brother's house and then they both went back to his house to spend the night. (TR-647)

The detective interviewed Thomas' girlfriend Christina, who essentially confirmed his story. (TR-650)

The physical evidence obtained in the case consisted of a palm print from the trunk lid of Rachel's car, a 1987 gray Honda Civic. The print was identified as belonging to Thomas, (TR-701) although no one could say how long the print had been there. (TR-709) The car, when found three days after Rachel was last seen, (TR-669) appeared to have been freshly washed. (TR-679)

In addition, the detective observed black dirt in the bed of Thomas' truck which looked like the same type of soil outside Rachel's house and inside her house in the hallway. (TR-646) However, this soil was never analyzed to determine if it was in fact the same. (TR-653)

Finally, the blood that was found on the baseboard in Rachel's hallway and a small amount of blood discovered on the inside edge of the trunk lid were typed as "B". (TR-730). This was the same blood type as Rachel. (TR-731) No more discriminating comparisons of the blood were done. (TR-732)

Other people told different stories about Thomas's involvement with the disappearance of Rachel. In each instance, Thomas would say that he was adopted and that his true family name was Andrettti. The famous race car driver, Mario

Andretti, was his uncle. (TR-785) In addition, Thomas told people that his real family was part of organized crime or the Mafia. (TR-823) Although Thomas spun elaborate tales of his family and their enormous potential for physical harm, no one ever met any member of this family.

While still married, Thomas began dating Jennifer Howe. In August of 1991, she met Thomas at a local shopping center. He got her to drive to Rachel's house; Thomas had a plan to get Rachel to sign some papers. (TR-790) Nothing occurred at this time because Rachel was not home. (TR-790)

Doug Schraud was Thomas' partner in the disappearance of Rachel. (TR-813) He met Thomas from working at Publix with him. They became friends and commiserated with each other about their marriages and divorces - both thought they were getting the shaft. (TR-818)

The first time Schraud went with Thomas to Rachel's house was to pick up his son, Bennie. Thomas had some things to give her but Rachel would not take them. Instead, Thomas left the items by her front door. (TR-824)

A couple of days later, Thomas approached Schraud with a plan to forcibly take Rachel from her house to Thomas' uncle's house to get her to sign some papers about their son and property. (TR-825) Thomas told him the plan would be carried out on September 12th. (TR-828)

On September 12, Schraud and Thomas met at Thomas' house. (TR-829)

They drove over to Rachel's house in Thomas' truck. (TR-835) After parking in the driveway, Thomas got out carrying a box containing some child's clothes, paperwork and duct tape. (TR-835) Rachel answered Thomas' knock and he forced his way in. (TR-853)

Rachel and Thomas got in a physical fight; while Thomas was holding her down, Schraud gave him the duct tape. Together, they taped her legs. (TR-836) When Rachel continued to struggle, Thomas hit her in the face. She started bleeding from her face and chin. (TR-868) Thomas then taped her arms behind her back and her mouth. (TR-837)

Thomas retrieved Rachel's car key. While Schraud propped the garage door open, Thomas drove Rachel's car into the garage. Schraud popped the trunk (TR-840) and Thomas put Rachel inside it. (TR-842) Schraud closed the garage door after Thomas drove Rachel's car out. They agreed to meet at Thomas' house. (TR-843)

Schraud drove Thomas' truck and when he arrived at the house, Thomas was already there. (TR-845) Thomas tells Schraud never to repeat what happened or Thomas' Mafia uncles would take care of him. (TR-853) Schraud then leaves the house. When he saw Thomas the next day, Thomas tells him Rachel's house has been thoroughly cleaned. (TR-854) Also that day, Schraud is questioned by the police. Schraud denies knowing anything. (TR-855)

Exactly one year later, Schraud is again questioned by the police. This time he confesses to his involvement and agrees to inform on Thomas. (TR-858)

After his divorce from Rachel, Thomas married Christina. She was also told about Thomas' Mafia family but never actually met them. (TR-892) She did meet his real family as every Thursday night she and Thomas would eat dinner at his parents house. (TR-897)

On September 12, 1991, she got home from work at about 5:30 p.m. Thomas got there about 15 minutes later. (TR-897) She remembered that he was wearing jeans, a tee shirt and white tennis shoes and was visibly hyper. He told her that his Mafia family had taken Rachel. (TR-898) She did not see Schraud at Thomas' house. (TR-925)

In response to a request from Thomas, she drove her car with Thomas' son to the Publix on Roosevelt. (TR-901) She waited to meet him there for almost an hour. When Thomas did not show, she tried to call him at home but could not reach him. (TR-901) Thomas finally arrived driving Rachel's gray Honda. (TR-903) She watched him wipe down the inside of the car and the side of the car by the door handle. (TR-904) Then they all drove in her car to his parents house. (TR-904)

During the drive, Thomas told her that he and his Mafia family went to Rachel's house. While there, they were attacked by two men. Thomas killed one of the attackers. Thomas explained that his family took Rachel to kill her because

Rachel had plotted to kill Thomas. (TR-905) Thomas told her that Rachel had been taken deep sea fishing and her body had been chopped up and fed to the sharks. (TR-918)

After eating dinner with his parents, they ended up back at his house. When Rachel's mother called later that night, Thomas told her that although he had gone to Rachel's house, she was not home. He denied seeing Rachel at all that day. (TR-908)

Thomas gave Christina a story to repeat for public consumption. The story was that Christina had accompanied him to Rachel's house but she was not there. This story would remove any danger Christina would be in from the Mafia. (TR-910) When the police questioned Christina the following day, she repeated that story. (TR-911) She repeated it again over a year later to the State Attorney's office. (TR-919) On Saturday morning, Thomas got Christina to throw away all of his tennis shoes. (TR-915)

The State offered the testimony of four persons who swore that Thomas had told them the story of Rachel's disappearance. Three of them occurred while Thomas was being held pretrial in the Duval County Jail.

Joseph Stewart repeated the tale that Thomas and his Mafia family took Rachel from her house after killing a number of people defending her. Rachel was also killed, put in the trunk of her car and the family then got rid of her body. (TR-

945)

Ahmad Dixon said that Thomas told him that he and a friend took Rachel to get her to sign some papers. Thomas then took her to some woods and killed her in the presence of his friend. Dixon said that Thomas never told him what happened to the body. (TR-963)

The second jailhouse confession contained the information that Thomas and Schraud forced their way into Rachel's house and killed her. James Bonner was clear that Rachel was dead before her body was removed from her house. (TR-984) Bonner said that Thomas told him that he killed Rachel with his hands and that he alone disposed of the body. (TR-982-983)

Finally, Eddie Rhiles swore that Thomas stated that he and Schraud had severely beaten Rachel at her house but that she was still alive when she was taken out of her house. (TR-988)

Rachel's whereabouts are still unknown. No family member or friend has heard from her since the afternoon of September 12, 1991.

SUMMARY OF THE ARGUMENT

Mr. Thomas directly challenges his conviction for the first-degree murder of his ex-wife, Rachel Aquino Thomas. The undisputed fact was that her body was not found and therefore the State relied totally on circumstances to convince a jury that she is dead and that Thomas caused her death. The evidence in this respect falls short to establish these elements beyond a reasonable doubt.

The other issues raised by Mr. Thomas address the appropriateness of the death sentence. He challenges both the process by which the penalty was imposed as well as the factual basis for death.

The imposition of the death penalty was procedurally unfair because of an inaccurately informed and instructed jury, as well as prosecutorial misconduct in the penalty phase closing argument. Substantially, the Stated failed to prove the pecuniary gain aggravator.

Finally, the sentencing order is deficient because if fails to directly address the mitigation presented by Mr. Thomas.

THE STATE FAILED TO PROVE THE CORPUS DELICTI

> The corpus delicti of a homicide consists of three elements, i.e., 'first, the fact of death; second, the criminal agency of another person as the cause thereof; and third, the identity of the deceased person.'

Golden v. State, 629 So. 2d 109, 111 (Fla. 1993), citing *Jefferson v. State,* 128 So.2d 132, 135 (Fla. 1961). (footnote omitted). The issue in this case is "the fact of death".

> The corpus delicti must be proved beyond a reasonable doubt . . . Moreover, when circumstantial evidence is used to prove the corpus delicti, "it must be established by the most convincing, satisfactory and unequivocal proof compatible with the nature of the case, excluding all uncertainty of doubt."

Golden v. State, 629 So.2d at 111, citing *Lee v. State,* 117 So.2d 699, 702 (Fla. 1961)

Everyone agrees that the body of Rachel Aquino Thomas was not part of the case. Therefore, whether she is dead and how she died were facts that could only be shown circumstantially.

> By its very nature, circumstantial evidence is subject to varying interpretations. It must, therefore, be sufficient to negate all reasonable defense hypotheses as to cause of death and show beyond a reasonable doubt that the death was caused by the criminal agency of another person.

Golden, above at 111.

In *Davis v. State,* 582 So.2d 695, 697 (Fla. 1st DCA 1991), Darren Davis was convicted of killing Timothy Lowe. "Neither Timothy Lowe nor his remains have even been found."

Davis, a drug dealer, had been ripped off by unknown persons posing as police officers. He systematically determined that Lowe was the individual who planned the rip off. Davis got his friend, Jason Coates, to entice Lowe to Davis' house. Once the three were together, they smoked some marijuana. Davis then pulled out a gun, forced Lowe to put on some handcuffs and the three of them drove to a rural area of Escambia County.

Davis got out of the car with a gun and forced Lowe into some woods. Shortly thereafter, Coates heard one gunshot. He then saw Davis return from the woods, carrying the clothes Lowe had been wearing. Davis and Coates split the money from Lowe's wallet. On the drive back to Pensacola, Davis tossed Lowe's clothes into a body of water. Davis told Coates that Lowe "wouldn't never have to worry about ripping nobody else off." Coates also said that Davis threatened to kill him if Coates told anyone what had just happened.

A some unspecified later time, Davis told a friend of his the approximate location of Lowe's body. The friend then told police. The police then questioned Davis, who admitted to kidnapping Lowe and then tying him to a tree naked. Davis then covered Lowe's body with syrup; when he returned to the site, Lowe was still

alive. Davis said that a person who went with him, Steven Stokes, cut Lowe's throat. Both of them left the woods, never to return. Davis gave the police detailed directions to Lowe's body but the police never discovered it.

In addition, Davis apparently confessed to murdering Lowe to a prison inmate.

The State presented testimony from Lowe's family and employer that he was not the kind of person to disappear. No one had heard from him since January 3, 1986.

In this case, there was no witness to the killing. It is true that Schraud says Thomas kidnapped Rachel and placed her in the trunk of the car. Schraud knew that Rachel was alive when he left and unlike Davis, there was no person who heard or saw any activity that could fairly be characterized as causing Rachel's death. There was no gunshot; no walking out of the woods with the other person's clothes; no dividing up the proceeds of the other person's wallet.

Rachel's family and friends have not heard from her. It was established that she was not the kind of person who would walk away from her son and her job. Rachel did call Wendy Robinson to say that Thomas had not shown up by 5:30 p.m. According to Christina Thomas, Thomas got home on September 12, 1991 at about 5:45 p.m. Interestingly, neither Schraud nor Christina Thomas saw each other at Thomas' house that afternoon. Ninety minutes later, Thomas was eating dinner with his parents.

The statements made by Thomas about what happened to Rachel, as related by others, are ludicrous. None of these statements are consistent nor are they consistent with the limited physical evidence assembled in the case. The blood amounts seen by Schraud and discovered in Rachel's house and car were insubstantial. Nothing of Rachel's was found in Thomas' possession. Although Thomas' palm print was found on Rachel's car, there was no way to say when it was placed there.

Sochor v. State, 580 So.2d 595, 600 (Fla. 1991) is another illustration of sufficient evidence to support a finding that a death occurred by the criminal act of another when no body was found.

Like Thomas' case, there was evidence presented in Sochor that the victim disappeared on a particular day and had never been seen after that time. The victim's disappearance was inconsistent with her prior behavior; she had kept in touch on a regular basis with her family and friends. Nothing was missing from her apartment. What separates Sochor from Thomas is what Sochor's brother saw.

On New Year's Eve 1981, Sochor and his brother met the victim at a lounge in Broward County. All three left the lounge in Sochor's truck, ostensibly to get some breakfast. Instead, Sochor drove to a secluded spot and stopped the truck. Apparently, Sochor and the victim got out of the truck.

Sochor's brother heard the victim screaming with Sochor on top of her. The

brother tried to intervene but Sochor told him to get back in the truck. Sochor then continued his assault. Some time later, Sochor came back to the truck alone and he and his brother drove home.

The next morning, Sochor's brother found woman's clothes and a set of keys in the truck. In addition, Sochor gave a statement to law enforcement that he believed he killed the woman. Finally, Sochor fled from Broward County, to Tampa, on to New Orleans and finally to Atlanta.

On the continuum of determining when the State has adduced evidence to make a finding beyond a reasonable doubt that a person is indeed dead and that the death was due to a criminal act, the Thomas case is more closely aligned with Golden than with Davis or Sochor. As Golden informs:

> The finger of suspicion points heavily at [Thomas] A reasonable juror could conclude that he more likely than not caused his [ex-] wife's death. In criminal cases, however, circumstantial evidence must establish that death was caused by the criminal agency of another beyond a reasonable doubt, which is a more demanding finding than that it likely occurred.

Golden v. State, 629 So.2d at 111.

Calling Mr. Thomas a murderer in closing argument (TR-1184) is no substitute for proof. Saying Rachel is dead repeatedly in closing argument is not a substitute for proof that she is in fact dead. The evidence is not sufficient to convict Mr. Thomas of murder.

THE TRIAL COURT VIOLATED THE DICTATES OF CAMPBELL V. STATE

Campbell v. State, 571 So. 2d 415, 419 (Fla. 1990) requires a trial court sentencing a defendant to death to "expressly evaluate in its written order each mitigating circumstance proposed by the defendant to determine whether it is supported by the evidence and whether, in the case of nonstatutory factors, it is truly of a mitigating nature."

The sentencing order in this case is 18 pages long. (R-134-152) (The last page simply indicates who was given a copy.) The following is the total devoted to evaluating the mitigating evidence.

> There are no other aspects of William Gregory Thomas' character or record, nor any other circumstances of the offense, which would mitigate in favor of William Gregory Thomas or his conduct in this matter.

(R-148)

This analysis violates the Campbell standard. See *Besaraba v. State,* 656 So.2d 441, 446 (Fla. 1995) In *Larkins v. State,* 655 So.2d 95, 100-101 (Fla. 1995), that sentencing court actually referred to some of the mental mitigation testimony offered by the defendant. The sentencing order was silent as to any other information offered by Larkins. It said only "Since no other mitigating circumstances can be gleaned from the record, the imposition of the death penalty is the appropriate sanction for the offense

of First Degree Murder." This Court decided that this effort was deficient.

At the sentencing proceeding before the jury, Mr. Thomas presented testimony from Ronald Haylett that Thomas was a good worker for Publix who showed up everyday and did not cause any trouble. (TR- 1347- 1348) In addition, he believed from his contact with Thomas that Thomas would not be violent. (TR- 1348) In response to a question from the prosecutor, Haylett agreed that Thomas was conscientious on the job and not involved in any illegal substance abuse, (TR- 1354- 1355)

Dorothy Locke has known Thomas most of his life. (TR- 1358) She described him as a "very delightful young man"; "very loving"; good with her children. (TR- 1359) Mrs. Locke believed Thomas to be thoughtful of other people and a "very loving husband and father" for Rachel and their son. (TR- 1360) She had the opportunity to see Thomas and his son together and thought that Thomas "treated him wonderfully. He was very proud . . . of Bennie and also of his daughter." (TR- 1361) She also believed it was not in Thomas' character to hurt someone else. (TR- 1361; 1507)

Thomas was adopted as an infant and raised by a good family. (TR-1362) He apparently had a good relationship with his parents and they helped him out financially, including loaning him the money for a down payment on a house.

Thomas' son Bennie, although a source of friction between Thomas and the Aquinos, still loves his father unconditionally. (TR- 1503) Thomas had a "great sense of humor and he wanted to make you laugh". (TR- 1507) In spite of his murder conviction,

Mrs. Locke observed that Thomas continued to be a "very loving" person. (TR- **1507)**

While in jail, Thomas met Nancy Cabase, who worked with a jail ministry program. (TR- 15 10) Her contact with other inmates in Thomas' area in the jail led her to conclude that Thomas had been a positive influence in their lives. (TR- 1510- 15 11) She believed that Thomas was "a good man. I have seen a lot of good in him. I have known a lot of good in him and very caring, very compassionate about the needs of other people. " (TR- **15 11)**

The sentencing order issued in this case addresses none of the potential mitigation. *Ferrrell v. State,* 653 So.2d 367, 371 (Fla. 1995) To this end, this Court should direct the trial court to "expressly evaluate . . , each statutory and non-statutory mitigating circumstance proposed by [Thomas]." This will require a resentencing hearing and the promulgation of a new sentencing order

THE CCP INSTRUCTION GIVEN DURING THE PENALTY PHASE WAS UNCONSTITUTIONAL

The trial judge gave the following instruction at trial.

> Four, the crime for which the defendant is to be sentenced was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification.

(TR-1451)

Thomas did not object to this instruction nor propose an alternative. This instruction is still unconstitutional. ***Jackson v. State,*** 648 So.2d 85, 90 (Fla. 1994) "The CCP instruction given in this case does not adequately explain the difference between the premeditation required to convict for first-degree murder and the heightened premeditation required to find the CCP aggravator." ***Foster v. State, 654*** So.2d 112, 115 (Fla. 199.5)

The Jackson case was decided three weeks after the penalty phase jury proceeding was held in this case. While this Court has been clear that this claim is "procedurally barred unless a specific objection is made at trial", it would be irrational to treat Thomas' case different from one that began one month later.

This is so because the erroneous instruction was not harmless. This Court's standard to review a claim for harmless error is whether the State can show beyond a

reasonable doubt that the error did not contribute to the verdict. *Hitchcock v. State,* 614 So.2d 483, 484 (Fla. 1993) The focus must be on the impact of the error on the jury. *Stringer v. Black, 112* S.Ct. 1130, 1336 (1992)

The harmless error concept in Florida is the consequence of a marriage of due process and judicial economy. *State v. DiGuilio,* 491 So.2d 1129, 1135 (Fla. 1986) Permitting constitutional errors to be harmless requires a strict adherence to focusing "on the effect of the error on the trier-of-fact."

> The test is not a sufficiency of the evidence, a correct result, a not clearly wrong, a substantial evidence, a more probable than not, or even an overwhelming evidence test. Harmless error is not a device for the appellate court to substitute itself for the trier-of-fact by simply weighing the evidence.

State v. DeGuilio, 49 1 So.2d at 1139.

Any analysis must take into account that a penalty phase determination includes the imprecise weighing component by the jury. "Florida's capital sentencing scheme does not require that the jury make express findings in aggravation , . ." *Ventura v. State, 560* So.2d 217,222 (Fla. 1990) While the jury's role is specifically delineated, in practice it is impossible to know how it went about reaching its decision. Moreover, determination of an appropriate penalty does not involve simply counting aggravators and mitigators. Accordingly, a jury's role in weighing aggravation against mitigation must involve accurate guidance with respect to these factors. *Floyd v. State, 497* So.2d 12 11, 12 15

(Fla. 1986) Otherwise, as this Court said in Floyd, the process is "incomplete." There is no contemporaneous recordation of (1) whether the jury found the existence of this aggravator at all and if it did, (2) how much weight it assigned to it in arriving at the recommendation of death.

The jury's understanding and consideration of aggravating factors may lead to a life recommendation because the aggravators themselves are insufficient to justify a sentence of death,

The United States Supreme Court recognized that the use of an improper aggravating factor in a weighing state (like Florida's) has the potential for great harm.

> Although our precedents do not require the use of aggravating factors, they have not permitted a State in which aggravating factors are decisive to use factors of vague or imprecise content. A vague aggravating factor employed for the purpose of determining whether a defendant is eligible for the death penalty fails to channel the sentencer's discretion. A vague aggravating factor employed for the purpose of determining whether a defendant is eligible for the death penalty fails to channel the aggravating factor used in the weighing process is in a sense worse, for it creates the risk that the jury will treat the defendant as more deserving of the death penalty than he might otherwise be by relying upon the existence of an illusory circumstance. Because the use of a vague aggravating factor in the weighing process creates the possibility not only of randomness but also of bias in favor of the death penalty, we cautioned in Zant that there might be a requirement that when the weighing process has been infected with a vague factor the death sentence must be invalidated.

Stringer, 112 S.Ct. At 1139.

In *Keen v.* State, 19 Fla. L. Weekly S243 (Fla. May 5, 1994), Keen was convicted of killing his wife and sentenced to death. During their deliberations, some jury members read a magazine article concerning the "tactics of defense attorneys who demeaned a victim's character and made personal attacks on the prosecutors." Parts of the article had been underlined and highlighted, Even though the record in Keen's case did not have in it comparable issues, this Court found that it could not "say beyond a reasonable doubt that the article did **not** influence jurors in some way."

The significance of this aggravator cannot be understated. It has been interpreted to apply to those cases involving execution-style murders.

The trial court found that this crime met the standard announced in Andrea Jackson, essentially conducting its own harmless error review. (R-145-146) In doing so, the trial court acknowledges the instructional mistake. The factual basis for this aggravator essentially says **that** Thomas planned to kidnap ***and kill*** Rachel a month before September 12, 1991. (R-146) The problem with this factual predicate is that there is no evidence that Thomas planned to kill Rachel. The testimony of Doug Schraud, relied upon by the trial court to support this finding, clearly is limited to a plan to kidnap Rachel. He never understood that Rachel would be killed and the joint undertaking was to deliver Rachel alive in able to sign some post-dissolution papers. See ***Gerald v. State,*** 601 So.2d 1157, 1164 (Fla. 1992)

What Thomas did after September 12, 199 1 is not material to this aggravator. Power *v.* State, 605 So.2d 856, 864 (Fla. 1992) The CCP aggravator focuses on the consciousness of the defendant before the crime. *Rogers v. State, 5* 11 So.2d 526, 533 (Fla. 1987) Rogers and another man planned a robbery of a grocery store. To implement this plan, they rented a car, secured two .45 caliber semiautomatic handguns and cruised the area to find a suitable target. Prior to the robbery, the two men disguised their appearance by donning nylon-stocking masks; they also put on rubber gloves. Once inside the store, Rogers partner told the cashier to open her register. When the cashier could not, the two left the store, Rogers trailing behind. Rogers partner heard three shots and Rogers admitted he shot someone.

This Court reversed the trial court's finding that the killing was cold, calculated and premeditated. "There is an utter absence of any evidence that Rogers in this case had a careful plan or prearranged design to kill anyone during the robbery." *Rogers, 5 11* So. 2d at 533. A properly instructed jury could have come to the same conclusion in this case.

This abduction was committed in a populated residential neighborhood in broad daylight. No attempt was made to disguise Thomas' facial features. He used his own vehicle. These facts make it debatable whether the four factors of *Walls v. State,* 641 So.2d 381, 387 (Fla. 1994) were established.

First, "the killing was the product of cool and calm reflection and not an act

prompted by emotional frenzy, panic or a fit of rage." No one knows how the killing occurred but there is substantial record evidence that Thomas was angry with his ex-wife. It is consistent with the evidence that once having kidnapped Rachel, Thomas killed her in "a fit or rage."

Second, "the murder [must] be the product of a careful plan of prearranged design . . . before the fatal incident." It has already been said that Thomas carefully planned to abduct Rachel. This careful plan must be critically distinguished from a plan to commit murder; without this as a goal, this aggravator cannot apply.

Third, there is an element of "deliberate ruthlessness." The facts of Walls describe "the killing as a drawn-out affair." This could not have been the case for Thomas; there were way too many external time constraints. Rachel said Thomas did not meet her as planned at 5:30 p.m. Less than two hours later, Thomas was eating dinner with his parents. During this time, he had contact with a number of people, none of whom witnessed a murder,

Finally, there is a requirement that the killing have "no pretense of moral or legal justification." There is no evidence on this element at all.

A review of the record establishes that it is reasonably possible that the jury's recommendation was influenced by the unconstitutional aggravator. Therefore, it was not harmless.

THE STATE ATTORNEY REPEATEDLY GAVE UNCONSTITUTIONAL INFORMATION TO THE JURY ABOUT THE WEIGHTING PROCESS

In deciding the appropriate recommendation as to a sentence in a capital murder case, the jury is instructed to weigh the aggravating factors and mitigating factors. Explaining this process to the jury, the prosecutor repeatedly told the prospective panel that "the law required a death recommendation". (TR-357) To this, Mr. Thomas objected. "I don't know of any place anywhere where it says the law requires a death penalty." (TR-357) This is of course, the correct statement of the law.

The trial court then took over the questioning of the jury panel. The judge placed the jury's role in a proper perspective - weighing the aggravating and mitigating circumstances and reaching a recommendation. (TR-357-358)

In spite of this, the prosecutor remained true to form. In questioning another juror, the prosecutor couched the question by stating ". . . and the law called for a recommendation of death?" (TR-365)

This confusion was reflected in the answers given by the jury. When the prosecutor asked if "you could vote for the death sentence in a proper case?", the juror responded "If it was required by law, yes."

In Florida, the death penalty is reserved for those murders that are "'the most aggravated and unmitigated". *State v. Dixon,* 283 So.2d, 1, 7 (Fla. 1973). Neither the federal or state constitutions allow for a death sentence process that mandates a death

sentence under any particular set of facts. *Woodson v. North Carolina, 428* U.S. 280, 304 (1976). The conclusion of a jury and a judge, the human element in the process, means that every case will be evaluated on its own merits. The statute, Section 92 1.14 1(2) (a), sets an eligibility requirement for a death sentence - at least one aggravating factor must be proved beyond a reasonable doubt. Once a defendant has been found to be death eligible, the jury determines from all of the evidence "whether the defendant should be sentenced to life imprisonment or death," Section 92 1.14 1(2) (c).

The prosecutor failed to acknowledge this basic precept. In his final question to the jury panel about the death penalty, the prosecutor asked

> If during the second part of the trial, the second phase of the trial, during the penalty phase would you all be able to recommend a death sentence if the aggravating factors outweigh the mitigating factors and the law called for -- and the law and the facts called for a recommendation of death? Would the rest of you be able to vote for a recommendation of death?

TR-379) (emphasis supplied). All jury panel members answered "yes."

The approval of a mandatory death sentencing scheme violates Mr. Thomas' right to due process and to have an individualized consideration of his case, as required by the Eighth Amendment. *Eddings v. Oklahoma, 455 U.S.* 104 (1982); *Lockett v. Ohio, 438* U.S. 586 (1978)

THE TRIAL COURT FAILED TO MAKE CLEAR TO THE JURY THAT IT COULD EXERCISE ITS REASONED JUDGMENT AND RECOMMEND LIFE IMPRISONMENT EVEN IF THE MITIGATING CIRCUMSTANCES DID NOT OUTWEIGH THE AGGRAVATING CIRCUMSTANCES IN MR. THOMAS' CASE

Mr. Thomas submits that the trial court's charge on the weighing of mitigating and aggravating circumstances created a reasonable likelihood that the jury would have believed that a death sentence was mandatory if mitigating factors did not outweigh aggravating factors, in violation of longstanding principles of state law.

The Court has long held, since *Alvord* v. *State,* 322 So.2d 533 (Fla. 1975), that while the determination that mitigating circumstances do not outweigh aggravating circumstances is a prerequisite to imposing a death sentence, that determination does not mandate the imposition of a death sentence.

> The law does not require that capital punishment be imposed in every conviction in which a particular state of facts occur. The statute properly allows some discretion, but requires that the discretion be reasonable and controlled. No defendant can be sentenced to capital punishment unless the aggravating factors outweigh the mitigating factors. However, this does not mean that in every instance under a set state of facts the defendant must suffer capital punishment.

322 So.2d at 540.

In keeping with this, the standard jury instructions concerning the jury's deliberative process explain that process in the following terms:

> If one or more aggravating circumstances are established, you should consider all the evidence tending to establish one or more mitigating circumstances and give that evidence such weight as you feel it should receive in reaching your conclusion as to the sentence that should be imposed . . .
> The sentence that you recommend to the court must be based upon the facts as you find them from the evidence and the law. You should weigh the aggravating circumstances against the mitigating circumstances, and you advisory sentence must be based on these considerations.

Fla. Standard Jury Instructions -- Penalty 79-80. Clearly, under these instructions, a jury could appropriately determine that even though aggravating circumstances outweigh mitigating circumstances, the mitigating circumstances are still weighty enough to recommend a life sentence.

The trial court also instructed the jury that "should you find sufficient aggravating circumstances exist, it will then be your duty to determine whether mitigating circumstances exist that outweigh the aggravating circumstances."

Reading these instructions on the jury's deliberative process as a whole, it is evident that a reasonable juror would have interpreted the instructions to mean that a death sentence was mandatory unless "sufficient mitigating circumstances exist to outweigh aggravating circumstances found to exist." The critical factor in this is that the jury was instructed that it should first determine if there were "sufficient aggravating circumstances" that would "justify the imposition of the death penalty." Upon such a finding, the jury would be death prone since these aggravating circumstances in and of

themselves "justified" the death penalty. The instruction then told the jury that it should determine if there were "sufficient mitigating circumstances" to "outweigh" the "aggravating circumstances found to exist." If the jury found mitigating circumstances but concluded that they did not outweigh the aggravating circumstances, the jury would logically think that it had to impose the death sentence since the charge instructed that "sufficient" aggravating circumstances "justified" its imposition.

Based on the reasonable likelihood that the jury interpreted the trial court's charge in the manner described above, the trial court committed reversible error. Its charge precluded the jury from making a "reasoned judgment" about whether the "factual situations [in Mr. Thomas' case] c[ould] be satisfied by life imprisonment in light of the totality of the circumstances present in the evidence." *Alvord,* 322 So.2d at 540 Accord, *McCaskill v.* State, 344 So.2d 1276, 1279 (Fla. 1977).

THE TRIAL COURT'S INSTRUCTION ON "HEINOUS, ATROCIOUS OR CRUEL" WAS CONSTITUTIONALLY INADEQUATE

The trial court gave the following instruction to the jury on this aggravator:

> The crime for which the Defendant is to be sentence was especially heinous, atrocious or cruel. "Heinous" means extremely wicked or shocking evil. "Atrocious" means outrageously wicked and vile, "Cruel" means designed to inflict a high degree of pain with utter indifference, to or even enjoyment of, the suffering of others.
> The kind of crime intended to be included as heinous, atrocious, or cruel is one accompanied by additional acts that show that the crime was conscienceless or pitiless and was unnecessarily torturous to the victim.

(TR- 1450)

Mr. Thomas knows that this Court has specifically approved an identical instruction in *Hall v. State,* 614 So.2d 473, 478 (Fla. 1993). It is still constitutionally deficient under *Espinosa v. Florida,* 505 U.S. 112 (1992). The instruction by the trial court does not give a full or correct statement of the law as to heinous, atrocious, or cruel.

This instruction fails the basic test of channeling "the sentencer's discretion by clear and objective standards that provide specific and detailed guidance, and that make rationally reviewable the process for imposing a sentence of death." *Godfrey v. Georgia,* 446 U.S. 420,428 (1980)(footnotes omitted).

Because Florida juries are a co-sentencer or "constituent part" of the capital sentencing scheme, they must be properly instructed on the aggravating circumstances. ***Sochor v. Florida, 504*** US. ,____ 112 S.Ct. 2 114 (1992). "It is not enough to instruct the jury in bare terms of an aggravating circumstance that is unconstitutionally vague on its face." ***Walton v. Arizona, 497*** U.S. ***639*** (1990).

Important information relating to this instruction is not told to a jury. More precise instructions were necessary to address the consciousness and additional torturous acts language. Any determination that this case qualifies for the "heinous, atrocious or cruel" aggravating factor must be based on fine distinctions. By failing to offer instructions that note the relative nature of this determination, the trial court failed to give the jury the proper tools to make these subtle distinctions.

The trial court's finding as to this aggravator highlights the difficulty of making a thorough and fair analysis of Mr. Thomas' case. The trial court could only speculate as to the process that caused Rachel's death. There was no physical corroboration or medical testimony as to how Rachel died.

The instruction as given did not properly guide the jury in deciding whether the "heinous, atrocious or cruel" aggravating circumstance existed. This was reversible error.

THE PROSECUTOR'S CLOSING ARGUMENT DURING THE PENALTY PHASE VIOLATED MR. THOMAS' RIGHT TO A FAIR TRIAL

During his closing argument the penalty phase, the prosecutor made several statements that violated Mr. Thomas' right to a fair trial under the Florida and United States Constitution. Specifically, the prosecutor:

> (1) told the jury that the State does not seek the death penalty in all first-degree murderer cases but compared to other cases, the Thomas case was a death case; (2) that the mitigation evidence must outweigh the aggravating factors or else death was the sentence the law required; (3) that Mr. Thomas' separate conviction for kidnapping automatically made this murder worse; and (4) put the jurors in the shoes of the victim - Rachel Aquino.

Individually and collectively, these comments went beyond the bounds of fair comment and persuasion and the prosecutor's ultimately responsibility - to seek justice. These remarks by the prosecutor affected "the jury's exercise in its discretion of recommending life or death." *Mills v. Singletary,* 63 F.3d 999, 1029 (1 lth Cir. 1995).

The first comment made by the prosecutor was clearly improper for a number of reasons. Initially, it was a prosecutor's personal comment. This is strictly forbidden,

> Now I would just submit to you that the State doesn't seek the death penalty on all first degree murders. It's not always proper . . , but where the facts surrounding a murder demand the death penalty then the State seeks it, and I would submit to you this is one of those cases.

"An attorney's personal opinions are irrelevant to a sentencing jury's consideration." *Johnson v. Wainwright,* 778 F. 2d 623, 631 (1 lth Cir. 1985)

The second and third comments are explained elsewhere in the brief as important misconceptions of the weighing process.

The fourth comment was an egregious example of prosecutorial misconduct. Under the guise of arguing in support of the jury finding specific aggravating circumstances, the prosecutor repeatedly referred to Rachel's son, Bennie; her parents, sisters, friends. (TR-1424; 1425-1426). The prosecutor then dropped any pretense and went to his core attempt to inflame the jury.

> During this trial all the defendant's rights have been honored. What rights of Rachel did he honor? He plundered those rights. He trampled those rights.
>
> Did he charge Rachel with a crime? Did he convene a grand jury and have them charge her with a crime? Did he give Rachel a trial before he executed Rachel? Did he convene a jury to listen to aggravating and mitigating?
>
> No. That defendant was' arresting officer, he was a judge, he was jury, he was executioner.

(TR-1429-1430)

That this argument was improper cannot be disputed. *White v. State,* 616 So.2d 21, 24 (Fla. 1993). *Rhodes v. State,* 547 So. 2d 1201, 1205 (Fla. 1989) catalogs the reason why this argument is reversible error. It asked the jury to put themselves in place

of the victim. It was a misstatement of the law, None of this argument was relevant to aggravation; it had nothing to do with the cold, calculated and premeditated factor. Finally, "the prosecutor concluded his argument by urging the jury to show Rhodes the same mercy shown to the victim on the day of her death."

The prosecutor in Thomas' case ended his penalty phase closing argument with "In closing I am going to ask you that if you are tempted to show this defendant some mercy, sympathy or pity I want to leave you with this thought and that is I am going to ask you to show the defendant the same mercy, the same compassion, the same sympathy that he showed Rachel." (TR-1436) This Court held in Rhodes that "This argument was an unnecessary appeal to the influence their sentence recommendation." *Rhodes v. State, 547 So.* 2d at 1206.

It is true that in Rhodes the defense attorney objected to the offending remarks and moved for a mistrial. However the trial judge overruled each objection. Mr. Thomas' lawyer did not object but the result was the same - the jury was allowed to consider, without rebuke, these words designed to appeal to their dark side. Star Wars; the Empire Strikes Back; Return of the Jedi - Darth Vaider v. Luke Skywalker.

This Court found that the cumulative effect of the multiple improper comments required reversal of the death sentence.

> While none of these comments standing alone may have been so egregious as to warrant a mistrial, this is not a case of merely a single improper remark. The prosecutor's closing

> **argument** was riddled with improper comments, and not once did the trial judge sustain an objection and give a curative instruction to the jury to disregard the statements. We believe the cumulative effect of the improper remarks in the absence of curative instructions was to prejudice Rhodes in the eyes of the jury and could have played a role in the jury's decision to recommend the death penalty.

The prosecutor's statements urged the jury to consider improper factors that were outside the scope of jury's deliberations. Mr. Thomas' death sentence must be reversed,

THE USE OF AN AUTOMATIC AGGRAVATOR VIOLATES FEDERAL AND STATE CONSTITUTIONAL LAW

The prosecutor argued to the jury

> Number one, the defendant in committing the crime for which he is to be sentenced was engaged or an accomplice in the commission of or an attempt to commit or flight after committing or attempting to commit the crime of burglary or kidnapping.
>
> Basically what that says is if the murder occurred while the defendant was trying to commit a burglary or kidnapping. That has clearly been established. You have already found this defendant guilty of burglary. You have already found him guilty of kidnapping, That has been proved beyond a reasonable doubt.
>
> The reason that this is an aggravating circumstance that supports a recommendation of death is because crimes like burglary or kidnapping are so dangerous, so dangerous that our law makers have said if you commit a burglary or a kidnapping and there is a murder or a killing that occurs during that is going to be ***an automatic aggravating circumstance*** that supports a recommendation of death.

(TR- 14 14- 14 15) (emphasis supplied).

Stringer v. Black, 503 U.S. 222 (1992) forbids a "weighing state", such as Florida, from using aggravating "factors which as a practical matter fail to guide the sentencer's discretion." An aggravating circumstance "must provide a principled basis" for determining who deserves capital punishment and who does not. "If a sentencer could

conclude that an aggravating circumstance applies to every defendant eligible for the death to every defendant eligible for the death penalty, the circumstance is constitutionally infirm." *Arave v. Creech* 1 13 S. Ct. 1534, 1542 (1993)

The felony murder aggravating factor used in Mr. Thomas' case is an unconstitutional automatic aggravating factor which does not provide the requisite narrowing. Under Florida law, capital sentencers may reject or give little weight to any particular aggravating circumstance.

Mr. Thomas was convicted of one count of first-degree murder, with burglary and kidnapping being the underlying felonies. The jury was instructed on both premeditated and felony murder and returned a general verdict. Mr, Thomas' request for a special verdict on premeditation (R-84) was denied. (TR- 1002) The prosecutor admitted that the evidence of felony murder was stronger than the evidence of premeditation. (TR-86-87)

At the penalty phase, the jury was instructed on the felony murder aggravating circumstance. The death penalty in this case was predicated upon unreliable automatic findings of a statutory aggravating circumstance - the very felonies underlying the conviction. The sentencer was entitled under the law to return a sentence of death solely upon a finding of first-degree murder. Every felony murder would involve, by definition, the finding of a statutory aggravating circumstance.

This procedure violates the Eighth Amendment because an automatic aggravating

circumstance is created, one which does not "genuinely narrow the class of persons eligible for the death penalty." *Zant v. Stephens, 462* U.S. 862, 876 (1983).

When Mr. Thomas was convicted of felony murder, he faced statutory aggravation that made his murder a capital offense. This felony murder aggravator was an "illusory circumstance" which "infected" the weighing process; this aggravator did not narrow and channel the sentencer's discretion but instead simply repeated the elements of the offense." *Stringer, 503* U.S. 222.

Both Tennessee and Wyoming recognize that a felony murder aggravating circumstance cannot by itself support a death sentence. *Engberg v. Meyer,* 820 P. 2d 70 (Wyo. 1991).

> When an element of felony murder is itself listed as an aggravating circumstance, the requirement in W.S. 6-5-102 that at least one "aggravating circumstance" be found for a death sentence becomes meaningless. Black's Law Dictionary, 60 (5th ed. 1979) defines aggravation as follows:
>
> > "Any circumstance attending the commission of a crime or tort which increases its guilt or enormity or adds to its injurious consequences, ***but which is above and beyond the essential constituents of the crime or tort itself."*** (emphasis added).
>
> As used in the statute, these factors do not fit the definition of "aggravation." The aggravating factors of pecuniary gain and commission of a felony do not serve the

> purpose of narrowing the class of persons to be sentenced to death, and the Furman/ Gregg weeding-out process fails.

820 P.2d at 89-90.

Compounding this error is this Court's position that the aggravating circumstance of "in the course of a felony" is not sufficient by itself to justify a death sentence in a felony-murder case. *Rembert v. State,* 445 So.2d 337, 340 (Fla. 1984); *Proffitt v. State,* 5 10 So.2d 896,898 (Fla. 1987). The jury was instructed in Mr. Thomas' case that this aggravating circumstance, if found beyond a reasonable doubt, was sufficient for a recommendation of death unless it was outweighed by the mitigating circumstances.

The jury did not receive an instruction explaining the limitation contained in *Rembert v. State.* It is clear the prosecutor believed this aggravator should be given great weight. "I would submit to you that that's an important aggravating circumstance because its an attempt to try to persuade criminals from not committing serious felonies like burglary and kidnapping because it puts those criminals on notice. You commit a burglary or kidnapping and a killing occurs during it not only is it first degree murder but you have got an aggravating circumstance that's going to support the death penalty." (TR-1414)

" [I]t is constitutional error to give weight to an unconstitutionally vague aggravating factor, even if other, valid aggravating factors obtain." *Richmond v. Lewis,* 113 Ct. 528,534 (1992).

THE EVIDENCE WAS INSUFFICIENT TO SUPPORT A FINDING THAT THE MURDER WAS COMMITTED FOR PECUNIARY GAIN

The trial judge found that the State proved this aggravating circumstance beyond a reasonable doubt. Section 92 1.14 1(5)(f). Specifically, the trial judge found

> **FACT:**
> Rachel Aquino Thomas was murdered to relieve William Gregory Thomas of his obligation to pay Rachel Aquino Thomas a financial settlement connected to their dissolution of marriage and child support payments, and to effect the return of previously paid child support payments. Shortly after the kidnapping and murder of Rachel Aquino Thomas, William Gregory Thomas sought the return of the settlement payment, which Rachel Aquino Thomas was scheduled to receive on September 13, 199 1, the day after she was kidnapped. Additionally, William Gregory Thomas sought the return to the child support payments made by him to Rachel Aquino Thomas, as well as termination of the deduction of child support payments, termination of child support deduction as well as payment of social security benefits.

(TR- 143- 144)

To be clear, this killing was not committed during a theft or robbery. The trial court sought to impose this aggravator because of events that occurred after Rachel's disappearance. These events were:

1 - Four days after Rachel's disappeared, Thomas contacted his lawyer about getting the approximately $2,400.00 he had paid as part of the divorce settlement. (TR- 13251326).

2 - Thomas instructed his lawyer to have the child support payments discontinued because his son was now living with him. (TR- 1327)

3 - Thomas applied for social security benefits on behalf of his son. Through the efforts of a lawyer, Thomas was able to get these benefits approved. (TR-1330)

The only other evidence the State presented was testimony from Johnny Brewer that he did not have the money to pay Rachel that the divorce required. Brewer told Thomas that if he did not pay the money, "they" would put Thomas in jail. (TR-569)

"To establish this aggravator, the State must prove a pecuniary motivation for the murder." *Clark v. State,* 609 So.2d 513, 515 (Fla. 1992) In Clark, this Court upheld this aggravator because Clark had told another person after the killing that "I guess I got the job now". This comment was a reference to a job on a fishing boat that Clark had applied for but that the victim had gotten. Clark actually went to the fishing boat the next morning to claim the victim's job.

There is no evidence that Thomas told anyone that his reason for killing his wife was for some financial gain. It is true that after her disappearance, he used every legal avenue available to return the moneys he expended in the divorce proceeding. This is not equivalent to "a pecuniary motivation for the murder." See *Finney v. State,* 660 So.2d 674, 680 (Fla. 1995)

In *Hill v. State,* 549 So.2d 179, 182-183 (Fla. 1984), Hill was convicted of the murder of a woman who was found at her place of employment. Apparently the victim

has a wallet on her person containing money and the wallet was missing when her body was found. The State established that Hill knew the victim had money and he had none. Hill did not have any money to pay for some drinks right before the murder occurred.

This Court decided that the aggravator was not proven beyond a reasonable doubt because the "money could have been taken as an after-thought." So it was with Mr. Thomas. There is nothing that tied the death of Rachel with Thomas' desire to financially benefit from the death. There is no question that Thomas took every legal advantage from her disappearance but there is no evidence that this was his primary motivation.

These post-disappearance acts were not proved to be part of "an integral step in obtaining some sought after specific gain." *Chaky v.* State, *65* 1 So.2d 1169, 1172-1173 (Fla. 1995). Chaky had two life insurance policies on his wife. The amount of the policies increased during Chaky's employment tenure with the last increase six months before his wife's death at his hands. Chaky had hired another person to burn the car he had placed his dead wife in.

The trial court found the pecuniary gain aggravator but this Court reversed., "Although one could surmise under these circumstances that Chaky killed his wife to obtain the insurance proceeds, we must conclude that the evidence in this record is insufficient to support that hypothesis beyond a reasonable doubt." The State presented no other reason why Chaky killed his wife.

Mr. Thomas' case should be similarly judged. His case did not involve large amounts of money paid to him or returned to him because of Rachel's death. It is simply speculative to say he killed to benefit financially. This aggravator was not proved.

CONCLUSION

Based on the arguments made in Mr. Thomas' initial brief, requests this court to take any of these alternative actions. First, reverse his conviction for first-degree murder. This would of course, meet any death sentence issues.

If this Court affirms his conviction for first-degree murder, then Mr. Thomas is entitled to a new sentencing hearing before a newly empaneled jury.

Finally, Mr. Thomas requests a new sentencing hearing before the trial court to address all of the mitigation offered in this case.

CERTIFICATE OF SERVICE

I HEREBY *CERTIFY* that a copy of the foregoing has been furnished by United States mail this 27th day of November, 1995 to **Mr. Richard Martell,** Assistant Attorney General, The Capitol, Tallahassee, Florida 32399-1050.

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