IN THE SUPREME COURT OF FLORIDA

WILLIAM GREGORY THOMAS,

Appellant,

v. CASE NO. SC01-1439

STATE OF FLORIDA,

Appellee.

_____/

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

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE

On September 12, 1991, William Gregory Thomas murdered his wife, Rachel Thomas. After successfully avoiding arrest for this murder for more than a year and a half, Thomas became emboldened enough to think that he could get by with murdering his mother, Elsie Thomas. On May 4, 1993, he did so. Unfortunately for him, this time he was caught virtually in the act, and was thereupon arrested both for this murder and, shortly thereafter, for the first. These two murder cases proceeded toward separate trials. Ultimately, Thomas was convicted by a jury and sentenced to death for the murder of his wife, and pled guilty to and received a life sentence for the murder of his mother. It is the conviction and death sentence for the murder of Thomas' wife which is at issue on this 3.850 appeal.

On May 20, 1993, Thomas was indicted in Duval County for the first degree murder and kidnapping of his wife, Rachel Thomas, and the burglary of her residence (TR 4).[1] In March of 1994, following a jury trial, Thomas was convicted on all counts (TR 84). Thereafter, a sentencing hearing was conducted before a jury, which culminated in an 11-1 recommendation of death (TR

[1] The State will cite to the trial record as "TR," and to the postconviction record as "PCR."

88). The sentencing hearing before the judge was deferred pending resolution of the case in which Thomas had been charged with having murdered his mother, Elsie Thomas (TR 1480). This pending charge was resolved by guilty plea on July 14, 1994 (TR 1579-80). In exchange for the State's recommendation of life imprisonment for the murder of Thomas' mother (case no. 93-5393), Thomas agreed to waive and give up any right to appeal – either directly or collaterally - any guilt phase issue arising out of his trial for the murder of his wife (case no. 93-5394). He did, however, reserve his right to appeal any sentencing issue arising out of that case (TR 1581). The guilty plea and colloquy in the mother-murder case were made a part of the record in the wife-murder case (TR 1579 et seq).

After hearing, the trial court sentenced Thomas to death for the murder of his wife Rachel Thomas, finding four aggravators, summarized by this Court on appeal as:

> Thomas had committed a prior violent felony; the murder was committed in the course of a burglary; the murder was committed for financial gain; the murder was especially heinous, atrocious, or cruel (HAC); the murder was committed in a cold, calculated, and premeditated manner (CCP).

Thomas v. State, 693 So.2d 951, fn. 1 (Fla. 1997).

Thomas appealed, raising nine issues. The only guilt phase issue raised by Thomas on direct appeal was an attack on the

sufficiency of the evidence based upon the State's alleged failure to prove corpus delicti (Rachel's body has never been recovered). In its brief on appeal, the State noted that Thomas had waived his right to appeal any guilt phase issue in the wife-murder case, but suggested that, since the only guilt phase issue raised by Thomas on appeal was a sufficiency of the evidence issue which this Court would review anyway in a capital case under its holdings in Tibbs v. State, 397 So.2d 1120, 1126 (Fla. 1981) and Stano v. State, 473 So.2d 1282, 1288 (Fla. 1985), it was not necessary at that time to address the validity or binding effect of Thomas' waiver. Initial Brief of Appellant, case no. 84, 256, at p. 2. The State thereafter argued, successfully, that the State had proved corpus delicti, and this Court agreed that the evidence was sufficient "to show that Rachel is dead and that Thomas had killed her." Thomas v. State, supra at 952-53.

This Court found no harmful error with respect to any of the remaining claims, and affirmed the conviction and death sentence. Id. at 953.

On October 5, 1998, Thomas filed in circuit court a motion to vacate his judgment and sentence. He filed amendments thereto on April 19, 2000, and again on August 15, 2000. An evidentiary hearing was conducted on all claims on January 29,

2001. On April 26, 2001, following the submission of post-hearing memoranda by the parties, the circuit court entered a 27-page written order denying all relief (PCR 1-118).

STATEMENT OF THE FACTS

In his postconviction motion and on this appeal, Thomas contends, inter alia, that he was denied the effective assistance of counsel at both the guilt and penalty phases of his trial. Because the evidence presented at trial is important to an evaluation of both prongs of the test for ineffective assistance of counsel, the State will present a statement of the facts shown by the trial record.

At the postconviction evidentiary hearing, testimony was presented from each of four witnesses relating to various of the issues raised on 3.850 and in this appeal. Rather than summarizing this divergent and tangentially related testimony it its entirety now, the State will present the testimony relevant to individual issues in its argument on those issues, as the trial court did in its order and Thomas has done in his brief on appeal.

Trial evidence, guilt phase

Rachel Thomas disappeared on September 12, 1991. She and the defendant had been separated since January of 1991, and she had filed for divorce (TR 1501). Rachel had custody of the

couple's son Bennie (TR 1501). In July, 1991, Rachel and Bennie moved to an apartment which they shared with Arlean Colocar (TR 575, 577).

In August of 1991, Greg Thomas told co-worker Johnny Brewer that, because he did not have the money to pay his divorce settlement, "he had to see that Rachel disappeared" (TR 569). He told co-worker Joseph Stewart that Rachel had cheated on him, and he would prevent her obtaining custody of their son "by any means in his power" (TR 940-43).

That same month, Thomas asked a former girlfriend, 17 year old Jennifer Howe, to meet him at a mall. Thomas left his truck at the mall, and they drove in her car to Rachel's apartment (TR 789). Thomas claimed that he had some papers that he wanted Rachel to sign, but that if Rachel did not cooperate, the "family" would take care of the situation, by whatever means were necessary (TR 791-92). Rachel was not at home this time, however, and Howe refused to get involved in any further such attempts (TR 792-96).

Thomas told a third co-worker, Douglas Schraud, that he was getting a "raw deal" and had drawn up "paperwork" to obtain custody of their child and sole ownership of their house (TR 818, 821). If Rachel refused to sign, he would take her to his mafia uncle and they "were going to kill her and feed her to the

sharks" (TR 822). Schraud believed Thomas' claim of a "Mafia connection" because Thomas "was very believable" (TR 823).

Schraud accompanied Thomas on a visit to Rachel's house to "watch his back for him" (TR 823). Thomas conversed briefly with Rachel, then dropped off a box containing some of her belongings and took custody of Bennie (TR 824).

Thomas told Schraud that he would get her to sign his papers the same way (TR 825). On Wednesday, September 11, Thomas told Schraud that "tomorrow will probably be a good day" (TR 827). If Rachel refused to sign the papers, they would take her to his mafia uncle's house (TR 825-27).

Thomas called Rachel the next afternoon (September 12) to make sure she would be at home, and then told Schraud that "today would be the day" (TR 828-29). After work, they met at Thomas' house. Thomas was wearing tennis shoes (TR 832). They left before dark, and proceeded to Rachel's house in Thomas' truck (TR 832-34).

Carrying the "paperwork" and a box containing children's clothes and several rolls of duct tape, Thomas went to Rachel's front door (TR 835). They conversed briefly, and then Thomas forced the door open and "jumped ... on top of her" (TR 835-36). With Schraud's assistance, Thomas duct-taped her legs together and her arms behind her back (TR 836-38). Rachel "hollered"

that she should never have trusted him and that she knew he would do something like this to her (TR 837). Thomas answered by taping her mouth and then wrapping tape "around her head about three or four times" (TR 838).

While Thomas and Schraud were trying to open the garage door, Rachel "come hopping out of the house," managing to get to the front yard before Thomas ran to her, knocked her down, and dragged her by her hair back inside her house (TR 840).

They got the garage door open, and Thomas used his key to start the victim's car and back it into the garage. Schraud propped the garage door up with a broom and opened the trunk of Rachel's car while Thomas went back inside, picked Rachel up, and carried her to her car (TR 841-42). She was still alive, and she looked at Schraud with a "very, very terrified" look in her eyes. Thomas put her into the trunk of her car. He told Schraud to drive the truck back to his house (TR 843).

Taking a couple of detours, Schraud drove to Thomas' house, where he met Thomas, who had driven over in Rachel's car (TR 852-53). Thomas told Schraud to leave, warning him to keep quiet about this or face retaliation by Thomas or his mafia relatives (TR 852). Christina Eagerton Thomas, who was intimately involved with Thomas at this time, testified that Thomas had told her Rachel planned to kill him, but his mafia

family would kill her first (TR 893-94). On September 12, 1991, at 5:45 p.m., Thomas came into his house through the garage door, wearing tennis shoes (TR 897-98, 900). He was "real hyper" and was "wet as if he has been sweating" (TR 898). He told Christina the "family" had taken Rachel and that she needed to meet him at the Roosevelt Mall (TR 899-900).

Christina drove to the Roosevelt Mall as directed. After she waited for more than an hour, Thomas showed up, driving Rachel's gray Honda (TR 903). Thomas got out and wiped down the Honda with a towel (TR 904). Leaving Rachel's car at the mall, they went to Thomas' parents' house for dinner. Thomas told Christina that "two guys" had been waiting for him at the door of Rachel's house and they had "jumped him." Thomas claimed to have used "Kung Foo" to kill them both. Then his "family" had jumped out from the bushes and taken Rachel from the house to "kill her since she had plotted to kill him" (TR 905-06). Just before they got to his parents' house, Thomas rolled a window down and threw away a key, stating, "well I bet they will never find this" (TR 906).

Cynthia Halstead had worked with Rachel Thomas for two years. Sometime before 3 p.m. on the afternoon of September 12, Thomas called and asked to speak to Rachel (TR 549). Halstead testified that Rachel became visibly upset during the call (TR

550-51). Halstead last saw Rachel when they left work at 4:20 that afternoon (TR 552). Rachel did not show up for work the next day (TR 552). Rachel had never given any indication that she was unhappy at her job, and she had left personal items at work. In addition, the day after she disappeared was payday (TR 552-53).

Wendy Robinson testified that she and Rachel got together every Thursday. On Thursday, September 12, 1991, Rachel called her sometime before 2 p.m., angry and upset, because Thomas wanted to deliver some important papers to her between 5 and 5:30 p.m. (TR 556-58). Between 5 and 5:30 that afternoon, Rachel called, complaining that Thomas was late. Rachel told Robinson that she would call Robinson between 9 and 9:30 to tell her when she would come by (TR 558-59). Rachel never called again (TR 560). At 10 p.m., Robinson got a call from Rachel's roommate and went immediately to Rachel's house. When she entered, she noticed that the foyer was dirty and showed signs of a struggle; there were scuff marks on the wall, the air conditioning vent was dented, and some boxes and Rachel's shoes were strewn around the floor (TR 560-61). The rest of the house was clean (TR 561).

Rachel's roommate, Arlean Colocar, testified that when they had moved into the apartment, it was "immaculate" (TR 576, 580).

The morning of September 12, 1991, they both exited the apartment at the same time. Rachel had Bennie ready to take to her mother's house. She backed out of the driveway and left. Colocar locked the door into the house from the garage, closed the garage door with her remote, and left for work (TR 585-86).

Colocar returned at 8 p.m. Rachel's car was nowhere around. The garage door was "wide open," the lights were on, and the door into the house from the garage was unlocked (TR 587). Some quilts were missing from the garage, and a beach chair that had been in the trunk of Rachel's car was now lying against the wall of the garage (TR 599). Rachel's earring backs and bracelet clasp lay on the floor of the foyer, which was covered with "black dirt" (TR 589). There were also "scuff marks on the wall" of the foyer, and bloodstains on the baseboard and the vent (TR 588, 600, 604).

Rachel's closets were "all in order;" none of her clothes were missing. Her dresser drawers appeared untouched; her makeup and her toothbrush "and everything else was in order" (TR 596). Her purse, her gym bag and her car keys lay together in the bedroom (TR 597). In the gym bag were Rachel's tennis shoes and workout clothes (TR 597). In the purse were Rachel's driver's license, her work identification card, a photograph of Bennie, and an A.T.M. slip with a $20 bill attached (TR 748).

The date and time on the withdrawal slip was 4:39 p.m. on September 12, and came from the Publix at Roosevelt mall (TR 750-51).

Christina Thomas testified that soon after she and Thomas got back home just before 10 p.m., Rachel's mother called, looking for Rachel. Thomas told his mother he had been to Rachel's house, but she had not been at home (TR 908). Between 11 and 11:30, a police officer called. Thomas told him essentially the same thing he had told Rachel's mother. Then he told the police officer that he had thought "you are supposed to have 48 hours before you could report a missing person." The officer "told him that he had been watching too much T.V." (TR 908-09).

Colocar testified that Rachel had never stayed out all night before (TR 610). She has neither seen nor heard from Rachel since September 12, 1991 (TR 610-11). Rachel's sister Berna Crews testified that Rachel had been happier since separating from the defendant. Rachel had never expressed any desire just to leave or to get away from it all (TR 746). At the time of her disappearance, Rachel's bank account had over $750 in it (TR 753-54). She has neither seen nor heard from Rachel since September 12, 1991 (TR 754).

Rachel's father testified that Rachel had lived in the Jacksonville area since 1972 (TR 736). She was a stable person who had been a flag girl in her high school band, had been voted most photogenic, and had worked since she was 16 years old (TR 736, 738). She was not the kind of person to just walk out the door and leave her family and her child behind (TR 739). She had been gone three years now, and her father believed she was dead (TR 739-40).

Rachel's 1987 Honda automobile was found at the Roosevelt mall on Sunday, September 15, 1991 (TR 669). It was very clean, like it had recently been washed (TR 671). Even though the victim habitually drove her car with the seat all the way forward (TR 752), the seat was all the way back when the car was found in the mall parking lot (TR 684-85). There were small white cloth fibers on the driver's side door that were consistent with someone having wiped that area with a towel (TR 679). A palm print on the trunk lid was later matched to the defendant (TR 685-89, 701). There was also a small amount of blood on the inside of the trunk lid, near the edge of the trunk lid (TR 691). The blood on the inside of the trunk lid and the blood on the baseboard of the victim's house were both human blood, type "B" - same as Rachel's (TR 730-31).

Detective John McCallum went to Rachel's home early in the afternoon of September 13, 1991 (TR 616). His description of the apartment (TR 622-33) was consistent with that of Arlean Colocar. At 3 p.m., officer McCallum left the victim's residence and went to Thomas' house (TR 634). Thomas told him he had called Rachel just before 5 p.m. on September 12, and had contacted her at no other time that day or in the past two or three weeks (TR 635-36). After this call, he had gone to Rachel's home, accompanied by Christina and his son Bennie (TR 637-38). Rachel's car was parked in the driveway and the garage door was open, but she did not answer when he rang the doorbell. Thomas left the box of baby clothes on the door step (TR 638-40).

McCallum noticed that there was "black dirt or rich soil" in the bed of the defendant's truck (TR 645). He examined the soles of the leather deck shoes Thomas was wearing. The pattern did not match the prints McCallum had seen in the dirt of the victim's garage (TR 648). McCallum asked Thomas if he owned any other soft-soled shoes. Thomas said he did not (TR 649). McCallum then went to where Christina worked. The story she told McCallum was generally consistent with the defendant's alibi (TR 650), except that she could not remember whether or

not the victim's garage door had been open or where her car had been parked (TR 651).

Christina testified that after the police called late in the evening of September 12, 1991, Thomas told her the "family needed for me to say that I was with him that day, that I had went to Rachel's house with him and that I needed to do this because if I didn't he wouldn't have any control over what the family would do to me" (TR 909-910). Christina thought that if she did not do exactly as she was told, she "would be killed like Rachel" (TR 910). Christina testified that, when she left Thomas' house the next morning, she noticed that an army duffle bag large enough to hold a body was missing from the garage (TR 924). That afternoon, Thomas called her and warned her that the police were coming to talk to her. She told the police the story that Thomas told her to tell them (TR 911-12). The next morning, Thomas told her to gather all his tennis shoes, because the police had been asking about them. They "took every pair of tennis shoes he had" and "threw them all in the dumpster" (TR 915-16). The morning after that (Sunday, September 16th), Thomas heard from a friend that Rachel's car had been found. Thomas told Christina, "well, I bet it's really clean" (TR 917-18). Thomas told her not to worry about where Rachel was

"because the Mafia had taken her deep sea fishing and chopped her up and fed her to the sharks" (TR 918).

Christina testified that she was too afraid of the "family" to leave Thomas (TR 919, 923).[2] Only after Thomas finally was arrested in May of 1993 did Christina begin to realize that Thomas had no Mafia connections, primarily because he insisted that she raise money in case a bond was set, but could not tell her how to "get in touch with the family" (TR 921-22). She went to see an attorney and then decided to "come clean" (TR 922).

Joseph Stewart testified that in early 1992, after Stewart had returned to Jacksonville, Thomas told him that he and one of uncle Leo's bodyguards had gone to Rachel's house to deliver clothes to Bennie. When they got there, Thomas was attacked by an armed assailant, but Thomas killed him with a blow to the neck (TR 944). Then two more men from another part of the house attacked them, and the body guard and Thomas "took out these two guys" (TR 945). Then, according to Thomas, they bound and gagged Rachel and put her into the trunk of her car. Uncle Leo was called and a crew was sent to Rachel's house to clean up (TR 945). Rachel was taken to Thomas' house. When she left there, she was dead (TR 946). Thomas warned Stewart that the family

[2] The matters she testified to preceded her marriage to Thomas (TR 923). There was no issue in this case of any marital privilege.

would take care of him too, if he told anyone about this (TR 946-47).

The day after Rachel's disappearance, Thomas told Schraud not to worry; Thomas had cleaned the place "with a fine tooth comb" and the police had nothing (TR 855). Schraud was interviewed by the police, but he told them he knew nothing about Rachel's disappearance (TR 855).

Detective Herb Scott testified that the investigation was at a "dead-end" a year after Rachel's disappearance (TR 764). He persuaded the newspaper to publish an article on the anniversary of Rachel's disappearance, hoping that someone reading the article would come forward with information about the case (TR 765). Doug Schraud testified that when this article was published, a friend to whom he had confided advised him to turn himself in (TR 856). Schraud did not, because he was afraid of being arrested and was afraid of Thomas' family. Soon afterwards, however, the police came to Schraud, and he finally decided to tell the truth (TR 766, 857-58). He agreed to wear a body bug and talk to Thomas about Rachel's disappearance (TR 766, 858-59). Schraud talked to Thomas on two occasions wearing the body bug, first at Thomas' house and the next day at a day care center (TR 859-61).

When Schraud first asked Thomas what had happened to Rachel, Thomas answered, “I am scared that you are wired, you know what I mean?” (TR 1054). However, Schraud pressed the issue, asking Thomas if she was dead. Thomas answered, “I know but I can’t tell you” (TR 1062). Schraud stated that he supposed he would just have to keep on wondering. Thomas answered, “No, you don’t. ... Here, look” (TR 1062). Schraud explained that at this point, that Thomas began making swimming motions and talking about fish eating (TR 1062). Soon afterwards, Thomas said, “I am not queer.” Schraud explained that when Thomas said that, he was patting him down, feeling “all over me searching for a body bug” (TR 1064-65). Later, Thomas stated: “I swear to God you’ll never come up because nobody was there, ever helped me like that before.” (TR 1079-80). Thomas told Schraud not to worry about the body being found (TR 1084). He claimed the police had nothing, that “all they are doing is blowing smoke” (TR 1055). Thomas did, however, warn that he had alibi witnesses and that if Schraud “started telling there is a good chance that I might not be there with you” (TR 1129, 1135).

Three inmate witnesses testified to statements Thomas had made following his arrest:

Ahmad Dixon testified that Thomas described Rachel as a “bitch,” who was “fucking his best friend” and would not let him

see his little boy (TR 962). Thomas claimed that he and a friend "picked up the bitch," planning to force her to sign custody papers, but "it got out of hand." Thomas "chopped the bitch in the throat" hard enough to kill her (TR 963). He and the friend put her into the trunk of a car, and Thomas dropped the friend off so he would not know where the body was (TR 963).

Thomas admitted to James Bonner, whom Thomas had known before his arrest (TR 976-77), that he and Schraud had forced their way into Rachel's house. Once inside, they "took care of Rachel," which Thomas demonstrated with a hand across the throat motion (TR 981). Thomas stated that he was the only one who knew where Rachel's body was, because he "didn't want nothing to come back on him if he was ever caught (TR 983).

Eddie Rhiles, who only had three days left on his sentence when he first talked to the State (TR 992), testified that Thomas became "tense and nervous" while watching a television news report that a body had been found. Rhiles later teased Thomas about it. Thomas claimed he knew they had not found "her," because she was "shark bait" (TR 988). Thomas said Schraud was testifying to "save his own neck," and was lying because "they had beaten her together ... and placed her in the trunk of her car together" (TR 989). Schraud was also lying when he said he knew Rachel was dead, because when they put her

in the trunk she was not dead “yet” (TR 990). As for Christina, she only could tie Thomas to a car, not to a body; “she never did see the body” (TR 990-91).

Penalty phase proceedings

On March 24, 1994, the day before the sentencing hearing before the jury was to begin, defense counsel Nichols announced that he had discussed aggravation and mitigation with Thomas; that “we” previously had decided there were no witnesses to call in mitigation; and that “as recently as five minutes ago” Thomas had confirmed that “we still have no factual witnesses to call in mitigation” (TR 1283-84). The State noted that Thomas had been examined by a psychiatrist “many months ago” (TR 1286), and had personally rejected the court’s offer of an additional evaluation by another psychiatrist (TR 1287-89).

The next day, Thomas announced that, after thinking about the matter overnight, he had decided he might have a witness or two; he told the court: “After conferring with Mr. Nichols, I just felt this was a time to do this” (TR 1297). Nichols told the trial court that he would need “at least a few days to contact [these new] witnesses and try to secure their attendance” (TR 1298). The court granted a continuance (TR 1299).

Ultimately, Thomas and two additional witnesses testified in mitigation before the jury. Ronald Haylett testified that Thomas was a good worker who was not a bully or tough guy or a violent person; Dorothy Locke testified that she had known Thomas since he was a teenager, that he was a "delightful young man" who was not a violent person (TR 1347-53, 1358-66). Dorothy Locke testified again at the Spencer hearing (TR 1507), as well as Nancy Cabase, who thought Thomas had been a positive Christian influence on his fellow inmates (TR 1510-27).

Thomas testified before the jury, inter alia, that his father had died after Rachel disappeared; his wife, who was possibly a lesbian, had slept with his best friend and then left him; he missed her; he had lost weight; and he had gone on a "pity party" over the second girl he had ever fallen in love with and had tried to commit suicide (TR 1371-74). In addition, Thomas insisted on giving testimony proclaiming his innocence and accusing Schraud of the murder (TR 1385-86, 1400-01), despite being advised that such testimony was inappropriate at the penalty phase (TR 1376-85). Thomas explicitly declined to present testimony about his past life situation or to testify about his future plans and goals should the jury recommend mercy (TR 1386).

Thomas presented a statement at the Spencer hearing, accusing the police of bad faith; characterizing Rachel's family as liars; accusing his sister, whom he characterized as a lesbian, of having murdered their mother (notwithstanding his earlier guilty plea to that crime); suggesting (somewhat inconsistently) that police should have treated his mother's death as a suicide, not a homicide; and claiming to have killed no one (TR 1532-44).[3]

[3] The State presented evidence that on May 4, 1993, Thomas had shot his mother in the head with a .38 caliber pistol, then called the police to report that she had committed suicide. The physical evidence showed that suicide was not possible; the mother had been seated at a table in a writing position and, after being rendered immediately unconscious by the gunshot, had been moved to the location where she had been found. Moreover, there was no stippling or powder burns around the gunshot entry wounds, as there should have been if the wound had been self-inflicted. (TR 1597-1602). Testimony contained in the various depositions admitted in evidence at the penalty phase, including that of Thomas' sister Debbie Thomas, indicates that Thomas had originally planned to make the death of his mother look like a burglary/murder, but was forced to change to a quickly-concocted story of suicide when interrupted at his mother's home by a visit from his sister after he had shot his mother, but before he had time to set up the scene or leave the premises.

SUMMARY OF ARGUMENT

Thomas presents eight issues on appeal:

(1) When Thomas pled guilty to the murder of his mother, he agreed in exchange for a life sentence to waive any right to collaterally attack his conviction for the murder of his wife. Significantly, he reserved his right to attack his death sentence for having murdered his wife. A defendant may waive constitutional rights, including the right to attack effectiveness of trial counsel, by means of a plea agreement, unless the agreement was involuntary, or counsel was ineffective in recommending the plea agreement or waiver. Thomas' plea was entered knowingly, voluntarily and intelligently, and he has not shown that his counsel in the companion case rendered ineffective assistance in securing the State's recommendation and recommending that Thomas accept. Thomas should be held to his agreement, especially since he benefitted greatly from it, and the State gave up a chance to obtain a death sentence in a case in which the evidence of guilt was overwhelming and the aggravation extensive. Thus, Thomas is not entitled to relief on any guilt phase issue. (The State will, however, address such issues on the merits, in the alternative.)

(2) Thomas has failed to establish that trial counsel's preparation for trial was inadequate. Although his testimony

contradicted that of his trial counsel, the trial court determined that trial counsel was credible and that Thomas was not. Moreover, Thomas has failed to demonstrate prejudice, since he has failed to inform us what, if anything, trial counsel could and should have put on at either phase of the trial, other than the testimony of one witness who could have testified that Thomas had paid a sum of money to Rachel's attorney the day before she was killed. Given the ample evidence that Thomas had financial and other motives aside from this sum of money - which Thomas demanded back shortly after Rachel disappeared - trial counsel did not perform deficiently or prejudicially in deciding not to call this witness and thereby lose opening and concluding argument.

(3) Thomas fails to acknowledge that the trial court found time-barred his claim that trial counsel was ineffective at the guilt phase for failing to object to the prosecutor's display of a noose to illustrate the strength of the State's evidence of guilt. Thomas has never explained why he failed to raise this issue within the time allowed, and does not even attempt to explain why the trial court's determination is wrong. Even if the claim is addressable, however, Thomas has failed to establish ineffectiveness. Trial counsel felt, and the trial court agreed, that he had invited the State's response by his

own demonstration of and reference to a rope tied in a slip knot that counsel planned to use to show that the State's evidence was as illusory as his seemingly well-tied knot. Moreover, in light of the strong evidence of guilt, Thomas cannot demonstrate prejudice.

As for the penalty phase arguments, the trial court credited trial counsel's testimony that his failure to object was strategic. Moreover, in view of the brevity of any objectionable argument, and the strength of the aggravation, Thomas has failed to demonstrate prejudice.

(4) Trial counsel successfully objected to the prosecutor's only voir dire question referring to a death sentence being "required;" afterwards, the prosecutor avoided the word "required" and sought to death qualify the jury by asking jurors about their ability to vote for a death sentence if the "law and the facts" would "call for" a death sentence. Since the jury is supposed to decide sentence based upon application of the law to the facts, trial counsel correctly refrained from lodging further objection. This was not ineffective assistance.

(5) There is no merit to Thomas' argument that trial counsel was ineffective for failing to object to the prosecutor's "automatic" aggravator argument. The jury convicted Thomas of burglary and kidnapping. Thus, at the time of sentencing, the

jury had found all the facts necessary to support the aggravator that the murder had been committed during a kidnapping and burglary. It was not improper for the prosecutor to point this out, and trial counsel did not perform deficiently for failing to object to the State's argument. Moreover, the trial court correctly instructed the jury, and Thomas has failed to demonstrate that he was prejudiced by the prosecutor's argument.

(6) Trial counsel was not ineffective for failing to object to instructions allegedly diluting the jury's sense of responsibility for sentencing. This Court has consistently rejected claims that it is improper to tell the jury that its sentencing recommendation is advisory or that the trial judge will impose the sentence. No more than that occurred here, except that the prosecutor did inform the jury that its recommendation "must" be given great weight. Such argument obviously did not dilute the jury's sense of responsibility to a greater degree than the standard instructions themselves.

(7) Because the then standard CCP instruction had not been invalidated at the time, trial counsel cannot be deemed ineffective for failing to object to it. Moreover, because this case was CCP by any standard, Thomas cannot show prejudice.

(8) Trial counsel cannot be deemed ineffective for failing to object to an HAC instruction that has been repeatedly upheld.

ARGUMENT

ISSUE I

THE TRIAL COURT CORRECTLY DETERMINED THAT THOMAS' WAIVER OF HIS RIGHT TO APPEAL ANY GUILT PHASE ISSUES IN THIS CASE, EITHER ON DIRECT APPEAL OR COLLATERALLY, WAS VALID AND BINDING

As noted previously, Thomas was tried first for the murder of his wife, in case no. 93-5394. Following his conviction for that offense, a jury recommended a death sentence for Rachel's murder, by a vote of 11-1, without knowing that Thomas had also murdered his mother. The trial court withheld final sentencing in this case pending the resolution of the case involving the murder of Thomas' mother, case no. 93-5393. After considering his options, Thomas, with the advice of counsel, agreed to plead guilty in case no. 93-5393. As shown by Exhibit A, attached to the trial court's order denying relief (PCR 146 et seq), in exchange for a life recommendation, Thomas agreed in case no. 93-5393 to plead guilty to the murder of his mother, Elsie Thomas, and to waive and give up any rights of appeal that he might have--either direct, collateral or under rule 3.850 of the Florida Rules of Criminal Procedure––as to any guilt phase issue in case number 93-5394 (the instant case).[4]

[4] Thomas stated in paragraph 1 of his plea: "I agree to waive my rights to appeal any matter whatsoever arising out of CS # 93-5394 (Rachel A. Thomas) whether direct, colarteral [sic]

The original trial prosecutor (now judge) Lance Day testified at the evidentiary hearing that this waiver by Thomas was an explicit part of the consideration received by the State in exchange for the State's waiver of the death penalty for Thomas' murder of his mother (PCR 330-31, 335-36). In Judge Day's view, the evidence in the Elsie Thomas case was "so overwhelming that we felt like we were giving up quite a significant consideration on our part to waive death in return for the plea" (PCR 334-35). He stated: "If we were going to give up the death argument in the Elsie Thomas case, we didn't feel like we should have to go back and revisit every aspect of the Rachael [Thomas] case again" (TR 337).

Trial counsel Richard Nichols explained why he advised Thomas to accept the State's offer. In his view, based on the overwhelming evidence available to the State in any prosecution for the murder of Elsie Thomas, Thomas surely would have been convicted. In addition, given the strong aggravation available to the State, Thomas would probably have been sentenced to death. Although Nichols understood that it was also likely that

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or appeals under Rule 3.850 FRCP. However the defendant specifically reserves the right to appeal matters concerning the sentencing in 93-5394 on the count alleging 1 [degree] murder. Further waive all appeal rights, whether direct, colateral [sic] or under FRCP 3.850 in CS # 93-5393 except matters of sentencing."

he would be sentenced to death for the Rachel Thomas murder, such a sentence was even more likely in the Elsie Thomas case and, in Nichols' view, such sentence was more likely to be upheld on appeal in the Elsie Thomas case than in the Rachel Thomas case (PCR 295-96).

On direct appeal in this case, Thomas raised no guilt phase issues except for a sufficiency of the evidence issue that this Court would have reviewed *sua sponte*. In his postconviction motion, however, Thomas raised a number of issues relating to trial counsel's effectiveness at the guilt phase of his trial. The State responded below that Thomas's prior waiver of his right to appeal, directly or collaterally, any guilt phase issues in case no. 93-5394 was valid and binding and precluded consideration of such issues raised in these postconviction proceedings. State's posthearing memorandum, PCR 86-88. The trial court agreed. After setting out the terms of the plea, as described above, the trial court ruled:

> The record reflects that Defendant entered that plea knowingly and voluntarily. (Record Volume XVII, pages 1580-1602.) Therefore, this Court finds that Defendant's allegations that counsel erred during the guilt phase of his trial have been waived by him, by virtue of his plea agreement, and thus, Defendant cannot prevail on those claims.

(PCR 120).

Thomas argues on appeal that this Court should "disregard" his waiver. Initial Brief of Appellant at 7. He cites no authority holding that such waivers are invalid or unenforceable, but contends that "appellate review of death sentences is constitutionally required." Initial Brief of Appellant at 9. However, Thomas has never waived review of his death sentence or any sentencing issues. Moreover, Thomas has had his direct appeal; we are now in postconviction proceedings. A death sentenced defendant need not pursue postconviction relief and may waive his statutory right to postconviction counsel. Hauser v. Moore, 767 So.2d 436 (Fla. 2000); Durocher v. Singletary, 623 So.2d 482 (Fla. 1993). If a defendant can forego postconviction relief altogether, it stands to reason that he may waive a part of his available postconviction remedies, including claims relating solely to the guilt phase.

In this case, Thomas avoided a death sentence in the Elsie Thomas case by agreeing to plead guilty to her murder and to waive *any* appeal, either direct, collateral, or 3.850, arising out of the guilt phase of the Rachael Thomas trial. Avoiding a second death sentence was, and remains, a great benefit to

Thomas, and a significant cost to the State.[5] Thomas should not be allowed to renege on his agreement.

"It is well settled that a defendant in a criminal case may waive 'any right, even a constitutional right,' by means of a plea agreement." U.S. v. Fleming, 239 F.3d 761, 763 (6th Cir. 2001). Thus, waivers of the right to appeal or to raise postconviction challenges to convictions and/or sentences, including claims of ineffectiveness of counsel, are generally enforceable, unless the waiver was involuntary or "the ineffective assistance of counsel claims relate *directly to the plea agreement or the waiver*." Davila v. U.S., 258 F.3d 448, 451 (6th Cir. 2001) (emphasis supplied). Accord, e.g., U.S. v. Cockerham, 237 F.3d 1179, 1183 (10th Cir. 2001); U.S. v. Abarca, 985 F.2d 1012, 1014 (9th Cir. 1993); U.S. v. Goings, 200 F.3d 539, 543 (8th Cir. 2000); Mason v. U.S., 211 F.3d 1065, 1069 (7th Cir. 2000); U.S. v. Wilkes, 20 F.3d 651, 653 (5th Cir. 1994).

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[5] Not only did Thomas have a better chance of obtaining relief on appeal from one death sentence than from two, but it would seem obvious that he will stand a better (if still minimal) chance of successfully attacking only one death sentence in the years of postconviction litigation that ensue following the initial affirmance of a death sentence on direct appeal.

In the case at hand, the waiver, although properly before the court as a consequence of its introduction in evidence in this case, was a part of a negotiated plea in a companion case. The judgment in that companion case has not been attacked, successfully or otherwise, by means of appeal or 3.850 motion. *This* case is not the appropriate forum to litigate the issue of the effectiveness of trial counsel or the voluntariness of a plea in another case, even if the defendant and trial counsel are the same in both cases. The judgment in case no. 93-5393 is a valid judgment, and, as such, the waiver contained therein is binding.

Moreover, even if it were proper to litigate in this case any issues of the validity of a plea in another, separate case, the transcript of the plea hearing in the Elsie Thomas case, which is contained in the trial record in this case (TR 1580-1602), plainly establishes that Thomas' plea of guilty under the terms agreed to by both sides was knowing, intelligent and voluntary, as the trial court explicitly found both at the time that plea was taken (TR 1602) and again in its postconviction ruling (PCR 120).

Thomas does not appear to be raising any claim on appeal that counsel in case no. 93-5393 was ineffective for recommending that Thomas accept the plea. The State would

contend that he may not raise such a claim in this case, as discussed above, but would note, alternatively, that Thomas has not established that his counsel was ineffective in the companion case. The trial court found as fact that trial counsel fully advised Thomas on the consequences of his plea in the companion case (PCR 142-43). Given the strength of the State's evidence in that case, and the considerable aggravation the State would have been able to present, going to trial would simply have resulted in a murder conviction anyway and, in addition, a second death sentence. It was not unreasonable for trial counsel (a) to conclude that avoiding such a result would be worth giving up the right to collaterally attack guilt phase issues in the Rachel Thomas case, so long as sentencing phase issues in that case were preserved, or (b) to so advise Thomas.

Thomas should be bound by his waiver and this Court should affirm the trial court's ruling that "Defendant's allegations that counsel erred during the guilt phase of his trial have been waived by him, by virtue of his plea agreement, and thus, Defendant cannot prevail on those claims" (PCR 120).[6]

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[6] In his brief, Thomas characterizes this as an "alternative basis" for denying his guilt phase claims. Initial Brief of Appellant at 6. Since, among other things, the trial court made this ruling first, the State would contend that it makes more sense to regard this as the primary basis for denying Thomas' guilt phase claims, and the subsequent rejections on the merits as the alternative rulings.

ISSUE II

THE TRIAL COURT CORRECTLY REJECTED THOMAS' CLAIM THAT HIS TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO VISIT THOMAS, FAILING TO PRESENT A KEY WITNESS ABOUT MOTIVE, AND FOR ALLEGEDLY FAILING TO INTERVIEW OR PRESENT TESTIMONY FROM AVAILABLE IMPEACHMENT WITNESSES

In this claim, Thomas argues that trial counsel rendered ineffective assistance of counsel in several respects. While the State is in general agreement with the principles of law regarding claims of ineffective assistance of counsel set out in Thomas' brief, the State would emphasize that the burden is on Thomas to establish that his trial counsel was ineffective, and that he must make a two-pronged showing, not only of deficient attorney performance, but also of prejudice. E.g., Cherry v. State, 659 So.2d 1069, 1073 (Fla. 1995) ("The standard is not how present counsel would have proceeded, but rather whether there was *both* a deficient performance and a reasonable *probability* of a different result."). If Thomas fails to establish either prong of the test for attorney ineffectiveness, he cannot prevail on such a claim; proving one prong is not enough. E.g., Kimmelman v. Morrison, 477 U.S. 365 (1986).

Thomas initially attacks trial counsel's preparation for trial. It is not clear whether he is addressing preparation for the guilt phase, the penalty phase, or both. To the extent that

Thomas is making a claim of guilt-phase ineffectiveness, the State would respond that he is bound by his waiver, as addressed in the State's argument as to Issue I. In the alternative, however, the State would contend that Thomas has failed to establish ineffectiveness at either phase.

Citing portions of trial counsel's testimony at the postconviction hearing, Thomas argues that trial counsel spent less than two hours with Thomas before trial, which present counsel describes as "not a 'significant effort.'" Initial Brief of Appellant at 16. He contends that trial counsel's testimony is not competent (and therefore not credible) because trial counsel was merely testifying about what he thinks he "must have" done, not about what he actually remembers doing. Initial Brief of Appellant at 18.

Trial counsel testified that he could not recall exactly when he was appointed nor what his "first task" was (PCR 183-84). Nor could he say how precisely how many times he had visited Thomas in jail (PCR 275). However, counsel did testify that he and Thomas "spent a lot of time together" and had "conversations about every stage of trial, about what was going to happen, who was going to testify, [and] what the procedure [was]" (PCR 199). Trial counsel testified that he investigated, but, as it sometimes happens, there were no materially helpful,

available defense witnesses. Thus, Thomas' "only chance" was to retain opening and concluding argument and to hold the State to its burden of proof beyond a reasonable doubt (PCR 206-07, 209). Trial counsel, a member of the bar since 1973 (PCR 254), who has tried more than 300 jury trials (PCR 256), some 20 of which were capital cases (PCR 257), testified that his

> tactical theory in this case was that . . ., one, there had been no body, so one of the tactics was to argue that the lack of finding Rachael Aquino's body was a defect in the State's case with regard to that element of proof. The substantive witnesses against Mr. Thomas all had impeachable elements in their background and the theory and the tactic in trying the case was to show that the State had failed to meet their burden. There was no witness available that would show that Rachael was alive. There was no witness available who would give information that would show that Mr. Thomas could not have committed the crime. So, essentially, the only tactic that was available . . . is to show that the State hadn't carried their burden.

(PCR 212-13).

Regarding the penalty phase, trial counsel testified that Thomas initially decided not to call any witnesses at the penalty phase (PCR 263). He provided Nichols with no names of any potential witnesses until just moments before the penalty phase was to begin (PCR 264). And, of course, in this case there weren't any of the usual mitigation type witnesses,

because Thomas' father had died before trial and Thomas had murdered his mother, so they were unavailable and, because of the circumstances of the mother's death, the remaining family members were not helpful (PCR 264).[7] Thomas had suggested calling a medical doctor to testify about Thomas' steroid use, but since that use had begun only after Rachel Thomas had been murdered, it was deemed immaterial and the decision was made not to call him (PCR 261).[8] Thomas also decided not to call a psychiatrist (PCR 262). Thomas was equivocal about whether he wanted to testify himself, telling Nichols that he would let him know, which he finally did on March 30th, when court reconvened following the continuance granted on March 24th when Thomas had decided for the first time to present defense mitigation witnesses (PCR 263, 268). Given Thomas' behavior throughout the trial, his last-minute decision to testify at the penalty phase did not surprise Nichols (TR 114).

The State's general response to Thomas' argument that trial counsel failed to prepare for trial is that trial counsel's testimony showed that he did and the trial court's determination

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[7] The deposition of Thomas' sister in the original trial record shows that Thomas lost his sister's support when he murdered his mother.

[8] From Thomas' testimony at this hearing, it would seem that his only steroid use was in the form of a topical cream for his dry skin (PCR 407-08).

that trial counsel was more credible than Thomas (PCR 124) is entitled to this Court's deference. Stephens v. State, 748 So.2d 1028 (Fla. 1999).

To the extent that Thomas is arguing sentencing-phase ineffectiveness (Initial Brief of Appellant at 13), the State would note that the trial record corroborates trial counsel's testimony. The day before the jury sentencing hearing was to begin, Thomas confirmed that he had no witnesses in mitigation)TR 1283-84). Moreover, Thomas had been evaluated by psychiatrist several months earlier, but declined any additional evaluations, even though available (TR 1286-89). The next day Thomas changed his mind and, after the trial court gave defense counsel a continuance, mitigation testimony was presented, including testimony from Thomas himself (TR 134786).

It is clear that Nichols prepared for the penalty phase as well as he could under the circumstances[9] and correctly and fully advised his client about aggravation and mitigation. That his client testified about matters inappropriate at that phase was not Nichol's fault, for although "the attorney can make some

[9] "Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. In particular, what investigation decisions are reasonable depends critically on such information." Strickland v. Washington, 466 U.S. at 668, 691 (1984).

tactical decisions, the ultimate choice as to which direction to sail is left up to the defendant." Nixon v. State, 758 So.2d 618 (Fla. 2000). Thomas has failed to show deficient attorney performance.

Thomas also has failed to demonstrate prejudice, i.e., to demonstrate a reasonable probability that the result of the proceeding would have been different but for any deficient performance. Thomas has failed to inform us how he would have testified if he had been "properly" prepared, or to identify additional witnesses that could and would have testified in mitigation if counsel had "properly" investigated, or to inform us what these additional witnesses would have said if they had testified.[10] In short, he has failed utterly to demonstrate how the result of the penalty phase could possibly have been different, much less demonstrate a reasonable probability that it would have been different.

The two remaining arguments regarding ineffectiveness center around trial counsel's alleged failure to investigate and present impeachment of the State's so-called "jailhouse

[10] Trial counsel was asked about six specific names (PCR 308), but it appears from Thomas' testimony that these were potential guilt-phase witnesses, not mitigation witnesses (PCR 368). Thomas testified that he gave Nichols 15-20 names for the penalty phase, but could not name or otherwise identify any of these witnesses (PCR 361), and could not say what they would have testified about (PCR 399).

snitches," or to present the testimony of Harry Mahon to rebut the State's proffered motive for the murder. Initial Brief of Appellant at pp. 23.

Initially, the State would note, as the trial court did, that Thomas "has failed to allege [in his motion] that any witnesses could have testified on his behalf, that he actually informed counsel of those witnesses, what the substance of those witnesses' testimony would have been, or how their testimony would have assisted the defense." (PCR 124-25). As for any possible impeachment of the inmate witnesses, Thomas testified at the postconviction hearing that he gave his trial counsel the names of six witnesses who trial counsel could and should have called for that purpose (PCR 368-69). Trial counsel testified that Thomas gave him none of these names (PCR 267, 270, 273, 308). According to trial counsel, when he discussed with Thomas the fact that some jail inmates were going to testify that Thomas had made incriminating comments to them or in their presence, Thomas would think it over and then ask, "well, what if I could get somebody to say this, what if I could get somebody to say that, what if it happened like this" (PCR 267-68, 273). Instead of telling trial counsel that the conversation did not take place or could not have taken place because the witness could not have been there at the relevant

time, or furnishing names of persons who were present who could refute the testimony of the state's witnesses, Thomas would come up with "wild scenarios . . . in the form of a hypothetical" (PCR 267-68, 274). Nichols concluded that, without actually coming right out and admitting that these state's witnesses were telling the truth about Thomas having made incriminating statements, Thomas essentially acknowledged that they were, and there was no reason to call witnesses to prove otherwise.[11]

The trial court found trial counsel's testimony more credible than Thomas' (PCR 129). Accepting this finding, no deficient attorney performance has been shown, because (a) Thomas never identified any potential witnesses to refute the State's witnesses, (b) Thomas has failed to show how trial counsel might otherwise have discovered them and (c) Thomas has failed to show that such witnesses even exist given his implicit admission to trial counsel that the State's witnesses were telling the truth. But even if one does not believe trial counsel's testimony on this matter, deficient attorney performance still has not been shown. Thomas has never shown how his six named witnesses could have refuted the testimony of any State's witness, and none of these witnesses testified at

[11] Trial counsel did depose each of the three jail house witnesses and obtained impeaching information by doing so, which he then used at trial (TR 56).

the postconviction hearing. Given Thomas' failure in the evidentiary hearing in this case to establish that these witnesses exist other than in his own mind, or to establish that they would have been available to testify at trial, or to prove what their testimony would have been, he cannot demonstrate that it was unreasonable attorney performance not to have called these witnesses. Furthermore, Thomas has in all events failed to establish prejudice, given these same failures of proof.

As for the claim that trial counsel was ineffective for failing to call Harry Mahon to rebut the State's alleged motive for Thomas having murdered his wife, the State would once again note its position that Thomas has waived the right to raise this guilt-phase issue. Addressing the merits in the alternative, however, it is the State's position that no ineffectiveness of counsel has been shown.

Initially, the State would note that the trial court rejected Thomas' testimony that trial counsel deprived him of the chance to call Mahon as a witness by not disclosing the pre-trial conversation counsel had with Mahon. The trial court instead credited trial counsel's testimony that he had discussed the possibility of calling Mahon as a witness and concluded that any benefit of doing so would have been more than offset by the loss of the final closing argument (PCR 133). The trial court

concluded that since Thomas had been properly informed and had agreed to this decision, he could not now complain that trial counsel was ineffective for agreeing to Thomas' own decision (PCR 133). In addition, trial counsel concluded that such a tactical decision would not constitute ineffective assistance of counsel (PCR 133).

The trial court's findings were correct. It is undisputed that trial counsel was aware of Mahon's testimony and rejected calling him as a matter of trial strategy. Such strategic decisions after adequate investigation and consideration by experienced counsel are properly accorded great deference and such strategic decisions seldom if ever are grounds for a finding of ineffective assistance of counsel. Oats v. Singletary, 141 F.3d 1018, 1023 (11th Cir. 1998); Maharaj v. State, 778 So.2d 944, 951 (Fla. 2000)("counsel cannot be ineffective for strategic decisions made during a trial").

Furthermore, the trial record corroborates trial counsel's good judgment. Thomas had told a friend that he did not have the money to pay the divorce settlement and, because he did not, "he had to see that Rachel disappeared" (TR 569). In addition, he told Doug Schraud that he was getting a "raw deal" because Rachel wanted custody of their son and some of the equity in their home; unless she gave up these claims, he was going to

kill her (TR 821-22). He told a coworker that he was angry because Rachel was seeking custody of their son and that he "would prevent that by any means in his power" (TR 943). After his arrest, Thomas told another inmate that his wife was a "bitch" who was "fucking his best friend," and would not let him see his son (TR 962). Thus, Thomas had financial and other motives for murder above and beyond the $2350.

Moreover, although Thomas had paid a $2350 settlement before Rachel was murdered, it is significant that he she was murdered *the day before* she was to receive this money (TR 1332). Furthermore, *the day after Rachel's car was found*, Thomas sought the return of this money (TR 1325-26). In addition, he sought the discontinuance of child support payments and successfully obtained social security benefits on behalf of his son (TR 1327, 1330). Given these circumstances, the mere fact that Thomas had paid $2350 to Rachel's attorney before her death simply does not materially contradict the State's alleged pecuniary motive for the murder.

It cannot be said that no reasonable attorney would have made the strategic decision that Nichols did, which was not to call a witness who could not have materially benefitted the defense case especially where doing so would have lost the

defense the final closing argument. This claim of ineffectiveness is meritless and was correctly denied.

Having failed to demonstrate deficient attorney performance or prejudice, Thomas has failed to establish that his trial counsel was ineffective for any reason argued here.

ISSUE III

THE TRIAL COURT CORRECTLY REJECTED THOMAS' CLAIM THAT HIS TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO PROSECUTORIAL CLOSING ARGUMENT

Here, Thomas contends trial counsel was ineffective for failing to object to four portions of the prosecutor's closing arguments. Although Thomas does not make it clear when they occurred, three occurred at the penalty phase, and one during the guilt phase. The State will address the two phases separately.

1. *The guilt phase argument characterizing the State's evidence as a noose*. Thomas first raised this claim by way of a second amendment to his postconviction motion, filed on August 15, 2000 - more than three years after mandate issued on direct appeal.[12] The trial court found that this claim was waived pursuant to his plea agreement in case no. 93-5393, and also was procedurally barred based upon Thomas' failure to allege any reason for

[12] Mandated issued on March 20, 1997.

failing to include this claim in his original, timely motion (PCR 141). Thomas addressed the former ground by way of his argument in his Issue I on appeal, but has utterly failed to respond to the trial court's finding that this claim is time barred. Amendments to postconvictions are not filed outside the time limits as a matter of right, but as a matter of the court's discretion. Huff v. State, 762 So.2d 476, 481-82 (Fla. 2000). Given Thomas' failure to explain the reason for delay in presenting this claim or otherwise justifying an exception to the time limits for filing postconviction claims, the trial court properly rejected Thomas' second amended motion as time barred. Jones v. State, 732 So.2d 313, 321-22 (Fla. 1999).

Besides being time barred and waived, the claim that trial counsel was ineffective for failing to object to this portion of the State's guilt-phase closing argument is without merit. The display of the noose came occurred at the conclusion of then prosecutor Lance Day's argument at the guilt phase of the trial. He told the jury:

> Now at the beginning of this trial Mr. Nichols held up two pieces of rope and he said something – and I was sitting there going what is he doing with this rope. It's almost been like his worry beads during the trial manipulating this rope all during the trial, and I believe what he told you was this:

He says that for you to convict Greg Thomas both pieces had to be tied tightly together, and he said one piece shows Rachel is dead and the other piece shows that Greg Thomas did it.

Now I suspect Mr. Nichols is somehow going to show you how that when you look at this piece - two pieces of rope that really looks solid and that's a solid know and everything, and I think as he told you when you pull on it simply though it unravels somehow like an illusion and he used the word an illusion.

I suspect he is going to show you how this tight know supposedly that the state has brought before you is just going to slip away.

Well, I differ with Mr. Nichols on that rope. It's not a knot. It's not a knot. It certainly not a slip knot. It's a noose plain and simple. The evidence that's presented is a noose. It's a tight noose, a very tight noose.

The evidence in this case is this noose, and the evidence that you heard will hold the weight, the entire weight of the defendant's guilt.

It's not some slip knot. It's a noose and the noose is around his neck and it was by his own words on the tape, by his own words to the people in the jail and by the people that he brought into this crime. The rope is a noose. It's a noose that he made for himself.

(TR 1203-05).[13] Judge Day acknowledged in his testimony at this hearing that, "at one point" during his argument, he held a noose in his hand (PCR 325).

Trial counsel did not object to this argument or the brief display of the noose.[14] He considered objecting, but it was a "judgment call" whether or not to do so (PCR 293). First of all, he had probably opened to door to the prosecutor's display by conducting his own rope demonstration in his opening statement and by thereafter displaying his knotted rope

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[13] According to the dictionary, a "noose" is a "loop with a running knot that binds closer the more it is drawn." The word is not uncommonly used as a figure of speech in legal discourse. See, e.g., Lerman v. Flynt Distributing Co., Inc., 745 F.2d 123, 138 (2nd Cir. 1984)("To hold otherwise would draw a tight *noose* around the throat of public discussion choking off media First Amendment rights.")(emphasis added); U.S. v. Cochran, 499 F.2d 380, 387 (5th Cir. 1974)("It is obvious that when the evidentiary *noose* was tightened by the witness' testimony, Stanley decided to change his plea to guilty and testify.")(emphasis added); David B. Fischer, Comment, Bank Director Liability Under FIRREA: A New Defense for Directors and Officers of Insolvent Depository Institutions--or a Tighter *Noose*?, 39 UCLA L.Rev. 1703 (1992)(emphasis added); Stewart v. Peters, 958 F.2d 1379, 1387 (7th Cir. 1992) ("Stewart's main argument . . . is that by pleading guilty to a form of murder that requires intent to kill, he placed his head in the *noose*")(emphasis added).

[14] It should be noted that although appellate counsel complained on direct appeal about other portions of this argument even though no objection was interposed at trial, he did not complain about any reference to a "noose." See Brief of Appellant, case no. 84,256, Issue 7, pp. 35-38.

throughout the presentation of evidence (PCR 246, 288, 290-91).[15] Furthermore, at the time the State's argument was presented, trial counsel was still planning to do his own rope trick during his rebuttal argument (although after the break between the two arguments, and after discussing the matter with Thomas, he decided not to) (PCR 293).

Judge Day testified that he and prosecutor George Bateh discussed the necessity for a response to trial counsel's continual display of his rope and decided "if you were going to use a rope to describe the strength of the case, we used a different kind of a rope" (PCR 323). He thought his argument and his brief display of the noose was "fair response" to trial counsel's actions, and "fair comment" on the strength of the State's evidence (PCR 325, 329).

The trial court concluded that, because defense counsel had performed "rope manipulations" throughout the trial, the prosecutor's argument was legitimate invited response; thus, trial counsel was not ineffective for failing to object to it (PCR 142). The trial court's rejection of Thomas's claim was not erroneous. Trial counsel's decision not to object was a

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[15] The trial record shows that Nichols referred to and displayed a rope in his opening statement, apparently used it to demonstrate some sort of knot, and implied that the knot was as illusory as the State's case (TR 532-34).

tactical and strategic decision that has not been shown under the circumstances to fall outside the range of reasonably effective attorney performance. Moreover, Thomas has not shown that the result would have been different if Nichols had objected, because (a) the prosecutor's argument was legitimate under the circumstances and (b) even if it weren't, in view of the overwhelming evidence of guilt in this case Thomas cannot show and has not shown a reasonable probability of a different verdict had any reference to or display of a noose had been excluded.

2. *The sentencing phase argument.* Thomas urges that trial counsel was ineffective for not objecting to prosecutorial argument noting that the State does not always seek death sentences in first degree murder cases; pointing out that Thomas had not honored Rachel's rights but was a judge, jury and executioner; and asking the jury to show Thomas the same mercy he had showed the victim.

Portions of this argument were objectionable, as trial counsel knew (PCR 238). However, trial counsel was also of the view that "no lawyer can maintain credibility with a jury if they're jumping up and down" objecting (PCR 231). Moreover:

> [S]ometimes when you let a prosecutor do something that may be objectionable, it may create an opportunity for you to make a more

> beneficial point or more effective point in your response to them.
>
> Many times I've sat still and watched prosecutors do things that I knew were objectionable, and I knew the Court could stop them from doing it, but tactically I thought to allow them to do it and then my - it would beneficially affect my response.

(PCR 232-33). Counsel testified that when improper comments are made, they are often offensive to the jury, so counsel would often allow them and then respond on rebuttal (PCR 237-38).

Based on this testimony, the trial court concluded that trial counsel had not objected for tactical reasons and Thomas had failed to show that trial counsel's failure to object was unreasonable under the circumstances. (PCR 139-40). This judgment cannot be faulted.

Moreover, the prosecutor in this case did not contrast the defendant's fate if given a life sentence to that of the deceased victim by emphasizing the victim's inability to do all the things that the defendant would be able to do in prison. See Taylor v. State, 583 So.2d 323, 329-30 (Fla. 1991) (relied on in White v. State, 616 So.2d 21 (Fla. 1993), which Thomas cites in his brief at p. 26). Instead, his argument addressed whether or not Rachel's murder had been committed without a pretense of moral or legal justification, which is an element of the CCP aggravator. The prosecutor noted that Thomas had not

"honored" Rachel's rights, had not charged her with a crime or given her a trial, and had not convened a jury to weigh aggravation and mitigation. Thomas had been a mere "executioner." Hence, the prosecutor argued, "[t]here was absolutely no moral or legal justification to this murder" (TR 1429-30). This argument, unlike those condemned in White and Taylor, addressed the applicability of a statutory aggravator, and did not urge the consideration of any matters outside the proper scope of the jury's deliberations. See Tucker v. Kemp, 762 F.2d 1496, 1505 (11th Cir. 1985) ("If an argument focuses on a subject appropriately within the jury's concern, it ordinarily will not be improper.").

While portions of the prosecutor's argument may have been objectionable, any improper argument was very brief, especially in the context of the entire closing argument, which focused upon the evidence and the aggravating factors shown by the evidence. Moreover, there were four valid aggravators presented to the jury and little of any consequence in mitigation. In these circumstances, Thomas has not demonstrated prejudice. Mills v. Singletary, 63 F.2d 999, 1029 (11th Cir. 1995); Johnson v. Wainwright, 778 F.2d 623, 631 (11th Cir. 1985)(the prosecutor's emphasis on the aggravating and mitigating factors, the trial court's jury charge correctly outlining the proper

factors for the jury's consideration and the fact that the evidence in aggravation was overwhelming eliminate "any reasonable probability that any transgressions during the prosecutor's closing argument caused the jury to recommend death when it would not otherwise have done so"). The trial court correctly denied this claim of ineffectiveness.

ISSUE IV

THE TRIAL COURT CORRECTLY REJECTED THOMAS' CLAIM THAT HIS TRIAL COUNSEL WAS INEFFECTIVE WITH REGARD TO PENALTY BECAUSE HE FAILED TO OBJECT TO PROSECUTORIAL COMMENTS DURING THE VOIR DIRE EXAMINATION ALLEGEDLY SUGGESTING THAT THE LAW REQUIRED A DEATH PENALTY IN THIS CASE

During the voir dire examination, the prosecutor was trying to determine whether or not prospective jurors were conscientiously opposed to capital punishment to the point where it would prevent or substantially impair their ability to serve. He asked one prospective juror whether she could recommend death if "the aggravating circumstances outweighed the mitigating circumstances and the law required a death recommendation" (TR 357). Trial counsel objected to this question, on the ground that the law never "requires" a death penalty. The trial court responded by questioning the juror itself (TR 357-58).

Thereafter, the prosecutor avoided using the word "required," instead asking jurors about their ability to vote for a death sentence if the "law and the facts" would "call for" a death sentence (TR364, 365, 379).

Thomas argues that the prosecutor misstated the law and trial counsel should have objected. He contends that the jury is never "compelled or required" to recommend a death sentence, even if the aggravators outweigh the mitigators. However, trial counsel objected to the prosecutor's only reference to a death sentence being "required," and Thomas has not shown that the prosecutor ever used that phraseology again. As trial counsel noted in his testimony in this hearing, "calls for is not synonymous with requires" (TR 76). Trial counsel testified that having objected to the initial question and pointing out to the court in the presence of the jury that a death sentence is never required, there was no good reason for him to continue to object when the prosecutor changed to the expression "calls for" (TR 76-78).

The prosecutor was simply trying to death-qualify the jury by determining whether prospective jurors were conscientiously opposed to the death penalty to the point that they could not recommend a death sentence in an appropriate case. It is difficult to imagine how a juror could decide what sentence to

recommend except by application of the law to the facts, or why it would be inaccurate to state that a jury's sentencing recommendation must be based on the law and the facts and upon weighing aggravation against mitigation, or to state that a death sentence may be "called for" if the aggravating circumstances are (a) sufficient to warrant a death sentence and (b) outweigh mitigating circumstances. Demps v. State, 395 So.2d 501, 506 (Fla. 1981). No more than that occurred here, but even if it did, Nichols' strategic decision not to object more than once was not so unreasonable as to fall below the wide range of reasonable attorney assistance. Thus, no deficient attorney performance has been demonstrated. Further, given the trial court's penalty phase instructions informing the jury about its duties with respect to weighing aggravation and mitigation and making a sentencing recommendation, Thomas has failed to to demonstrate a reasonable probability that his sentencing recommendation would have been different if his counsel had made additional objections to the prosecutor's voir dire examination, as the trial court found (PCR 136).

ISSUE V

THE TRIAL COURT CORRECTLY REJECTED THOMAS' CLAIM THAT HIS TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO WHAT POSTCONVICTION COUNSEL CHARACTERIZES AS AN "AUTOMATIC AGGRAVATOR"

At the penalty phase, the prosecutor told the jury that, because it had already convicted Thomas of burglary and kidnapping, the aggravator that the murder had been committed during burglary or kidnapping was already established; it was, the prosecutor stated, "automatic" (TR 1414-15). Thomas contends trial counsel was ineffective for failing to object to this argument, noting that an aggravator is constitutionally infirm if it applies to every defendant eligible for the death penalty. However, it is obvious that not every first degree murder is committed during a kidnapping or burglary, or any of the other felonies enumerated in Section 921.141 (d), Fla. Stat., and, hence, the so-called felony murder aggravator does not apply to every first degree murder. In this case, the so-called felony murder aggravator was simply one of the circumstances of the offense. Like other such aggravators, including CCP, HAC, witness elimination and the like, it is often proved by the evidence presented at the guilt phase of the trial, and was in this case. In addition, the jury had found Thomas guilty of the burglary and kidnapping. Thus, the jury had already determined all the necessary facts to support the aggravator that the murder had been committed during a burglary and kidnapping. The prosecutor's argument cannot reasonably be construed to mean any more than that. Thus, trial counsel's

failure to object cannot be deemed such a serious error that he did not function as the counsel guaranteed by the Sixth Amendment. Strickland v. Washington, 466 U.S. 668, 688-89 (1984).

Moreover, this Court has consistently rejected arguments that "Florida's capital felony sentencing statute is unconstitutional because every person who is convicted of first-degree felony murder automatically qualifies for the aggravating circumstance of commission during the course of an enumerated felony." Blanco v. State, 706 So.2d 7, 11 (Fla. 1997). The trial court properly instructed the jury concerning its consideration of aggravation and mitigation. Thomas has failed to show prejudice, as the trial court correctly found (PCR 140).

The trial court correctly rejected this claim.

ISSUE VI

THE TRIAL COURT CORRECTLY REJECTED THOMAS' CLAIM THAT HIS TRIAL COUNSEL WAS INEFFECTIVE WITH REGARD TO PENALTY BECAUSE HE FAILED TO OBJECT TO INSTRUCTIONS AND ARGUMENT ALLEGEDLY DILUTING THE JURY'S SENSE OF RESPONSIBILITY FOR SENTENCING

Thomas argues that trial counsel was ineffective for failing to object to argument and instructions that, he contends, impermissibly diluted the jury's sense of responsibility for sentencing, in violation of Caldwell v. Mississippi, 472 U.S. 320 (1985). This claim requires no extended discussion. It is not disputed that the instructions given in this case were the standard jury instructions which have been upheld against attacks relying on Caldwell. Burns v. State, 699 So.2d 646, 654 (Fla. 1997); Wuornos v. State, 644 So.2d 1000, 1010 (Fla. 1994); Sochor v. State, 619 So.2d 285, 291-92 (Fla. 1993). Trial counsel cannot be deemed ineffective for failing to object to a standard jury instruction which had not been invalidated at the time of sentencing or since. Thompson v. State, 759 So.2d 650, 665 (Fla. 2000). Nor did the prosecutor misstate the law. His argument accurately informed the jury that its decision was not final and that the judge would make the final determination. Although Thomas argues that the prosecutor belittled the jury's determination, he fails to acknowledge that the prosecutor also informed the jury that its recommendation "must be given great weight" (TR 1410). Thomas' argument that the prosecutor impermissibly diluted the jury's sense of responsibility for

sentence is meritless, as is his contention that trial counsel was ineffective for failing to object to this argument.[16]

ISSUE VII

THE TRIAL COURT CORRECTLY REJECTED THOMAS' CLAIM THAT HIS TRIAL COUNSEL WAS INEFFECTIVE AT THE SENTENCING PHASE FOR FAILING TO OBJECT TO THE THEN STANDARD JURY INSTRUCTION ON THE CCP AGGRAVATOR

The trial court delivered to Thomas' jury the then standard jury instruction as to the CCP aggravator. Three weeks later, but before the trial court sentenced Thomas, the Florida Supreme Court decided Jackson v. State, 648 So.2d 85 (Fla. 1994), in which the Court issued a recommended expanded instruction defining the CCP aggravator. The trial court evaluated the CCP

[16] Thomas also complains about the prosecutor's statement, "It's not a difficult process," demanding to know what kind of message that statement sent. Initial Brief of Appellant at 39. The State would note that the prosecutor did not tell the jury that its decision would be easy (although in view of the strong aggravation in this case it was probably relatively so) only that the "process" was not difficult. It is reasonable to infer from the context that the prosecutor was merely trying to explain the weighing "process," which arguably is not difficult to comprehend. If so, it is difficult to see what is objectionable about this one sentence, especially when it immediately preceded the statement that the jury's recommendation "must" be given "great weight." See Donnelly v. De Christoforo, 416 U.S. 637, 647 (1974) ("a court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations").

aggravator under Jackson and found that CCP was "clearly" established (TR 145-48).

Thomas complained about the CCP jury instruction in his issue III on appeal. This Court found this complaint procedurally barred (Thomas, 693 So.2d at 953, fn. 4), presumably because, as the State contended in its brief, it was undisputed that trial counsel had not objected to the CCP instruction at trial. In rejecting Thomas' appeal, this Court implicitly rejected Thomas' argument that the instruction was fundamental error in this case. Thomas cannot reargue any claim of CCP jury instruction error on the merits, but now contends that his trial counsel was ineffective for failing to preserve such issue for appeal.

The problem Thomas cannot overcome, however, is that, at the time the jury instruction was delivered, it had not been invalidated. It is well settled that trial counsel cannot be deemed ineffective for failing to object to a standard jury instruction which, at the time of sentencing, had not been invalidated. E.g., Thompson v. State, supra. Thus, the trial court correctly determined that Thomas cannot demonstrate deficient performance (PCR 134).

Furthermore, although additional argument seems unnecessary, it must be noted that this case was clearly cold, calculated and

premeditated under any standard, as the murder was the subject of elaborate pre-planning over a period of several weeks. Walls v. State, 641 So.2d 381, 388 (1994) (finding no harmful error in CCP jury instruction because murder was CCP by any standard). In addition, this was a highly aggravated murder even without CCP. Foster v. State, 654 So.2d 112, 115 (Fla. 1995) (CCP instructional error harmless in light of other strong aggravation and minimal mitigation). Thus, especially given the trial court's own review of the evidence under the new standard, there could have been no harmful error even if the jury instruction issue had been preserved for appeal, and Thomas cannot establish prejudice, as the trial court found (PCR 134).

ISSUE VIII

THE TRIAL COURT CORRECTLY REJECTED THOMAS' CLAIM THAT HIS TRIAL COUNSEL WAS INEFFECTIVE AT THE SENTENCING PHASE FOR FAILING TO OBJECT TO THE STANDARD INSTRUCTION ON THE HAC AGGRAVATOR

Here, although Thomas concedes that the jury instruction delivered in this case as to the HAC aggravator is the one explicitly approved by this Court in Hall v. State, 614 So.2d 473, 478 (Fla. 1993), he contends that trial counsel was ineffective for failing to object to it.[17] But, once again, it

[17] Thomas complained about the HAC instruction in his direct appeal, as issue VI. Because the objection had not been preserved for appeal, it was rejected as procedurally barred.

is well settled that trial counsel cannot be deemed ineffective for failing to object to a standard jury instruction which has not been invalidated at the time of a defendant's sentencing. Thompson, supra. Here, the instruction was valid at the time of sentencing and is still valid, as this Court has consistently rejected challenges to the HAC instruction given in this case. E.g., Nelson v. State, 748 So.2d 237, 245-46 (Fla. 1999); Walker v. State, 707 So.2d 300, 316 (Fla. 1997); Chandler v. State, 702 So.2d 186, 201 (Fla. 1997). The trial court correctly found that Thomas cannot demonstrate deficient performance or prejudice here (PCR 137).

CONCLUSION

WHEREFORE, for all the foregoing reasons, the State respectfully asks this Honorable Court to affirm the judgment of the court below.

Respectfully submitted,

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Thomas, supra, fn. 4. Thomas is not entitled to a second appeal on the merits of his HAC objection.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Dale G. Westling, Sr., Esquire, 331 East Union Street, Jacksonville, Florida 32202, this 11th day of February, 2002.

_____
CURTIS M. FRENCH
Assistant Attorney General

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief was typed in Courier New 12 point, a font which is not proportionally spaced.

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