IN THE SUPREME COURT OF FLORIDA

KENNETH W. CHAKY,

Appellant,

v. Case No.: 81,325

STATE OF FLORIDA,

Appellee.

_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE THIRD JUDICIAL CIRCUIT,
IN AND FOR COLUMBIA COUNTY, FLORIDA

# ANSWER BRIEF OF APPELLEE

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## PRELIMINARY STATEMENT

Appellee, the State of Florida, the prosecuting authority in the trial court, will be referred to in this brief as the state. Appellant, KENNETH W. CHAKY, the defendant in the trial court, will be referred to in this brief as Chaky. References to the record on appeal will be noted by the symbol "R," and will be followed by the appropriate page numbers in parentheses.

## STATEMENT OF THE CASE AND FACTS

The state cannot accept Chaky's five page statement of the case and facts, as it is incomplete. Because Chaky's version does not aid this Court in reviewing "the entire record" within the meaning of Gibson v. State, 351 So. 2d 948, 949 n.2 (Fla. 1977), cert. denied, 435 U.S. 1004 (1978), the state provides its own statement of the case and facts.

Kenneth Chaky was indicted on three charges: (1) the first degree murder of his wife, Patricia Chaky; (2) solicitation to commit the first degree murder of Patricia Chaky; and (3) solicitation to commit the first degree murder of Barney Feinberg (R 1-3). Chaky was found guilty on the first and second counts, and not guilty as to third count (R 1018).

The state adduced the following evidence of Chaky's guilt during Chaky's trial. Dwayne Jordan testified that, in October 1991, he stopped at a trash mound behind his grandmother's house and notice a "mound" on top of the trash pile (R 474). When Jordan went closer to investigate, he saw a human hand, immediately proceeded to his grandmother's house, and called 911 (R 475). Deputy Sheriff Lloyd Adcock testified that, on October 30, 1991, he responded to Jordan's 911 call (R 479).

Dr. Margarita Arruza, an associate medical examiner, testified that the victim had two lacerations on the back of her head (R 504). Under these lacerations, the victim had "a big skull fracture, over six inches long" (R 504). The fracture indicated "two very forceful blows to the back of the head, forceful enough to break the skull" (R 507). Arruza opined that the blows were forceful enough to cause death "because the brain underneath, even though the brain was decomposing, had a reddish brown discoloration that indicated that there was bleeding and there was injury to the brain in that area. That was the cause of death." (R 507). Arruza also opined that the blunt head trauma could have been caused by a heavy gun (R 508), one like a Smith and Wesson .38 Special (R 510).

Barney Feinberg testified that, in August 1991, Chaky visited him at his auto repair shop ostensibly for the purpose of purchasing tires for his Volkswagen (R 516). Chaky asked if Feinberg could help him with a problem (R 516). When Feinberg responded maybe, Chaky said he wanted to kill his wife (R 516). Feinberg told Chaky there were other ways to solve this problem, like leaving his wife (R 516). Chaky said he could not leave her, and offered no explanation (R 516). In total, Feinberg and Chaky had three or four such discussions, the next one occurring about a week later (R 516). At this time, Chaky said that he and

his family were going on a vacation; that he wanted Feinberg to follow them; and that he wanted Feinberg to kill his wife when he took his children out of the motel room (R 517). Feinberg refused, stating that he had no driver's license (R 517).

In one of these discussions, Chaky discussed buying a rifle for Feinberg so that Feinberg could shoot Chaky's wife (R 518). After the third such discussion, Chaky told Feinberg that he knew someone "down south" who would "do it" (R 518). Feinberg told Chaky to "Go ahead." (R 518). Feinberg recalled Chaky talking about disposing of his wife's body, wanting to have her put in the trunk of her car, have the car stolen, and then burned (R 519). Feinberg did not agree to dispose of the body, but recruited Charlie Thompson, a part time employee at Feinberg's auto shop, to burn the car (R 519-20). Feinberg did not tell Thompson that there would be a body in the trunk (R 520).

About October 25, 1991, Chaky visited Feinberg's shop, and Feinberg saw Thompson and Chaky adding transmission fluid to a white late model Oldsmobile Cutlass (R 521), which Feinberg later learned was Chaky's wife's car (R 522). As Feinberg walked past Chaky, Chaky said that he would be back, that he was going to get "the package" ready (R 523). At the time, Feinberg had no idea what the package was (R 523). About an hour later, Chaky returned in the same car,

got in the back seat, and Thompson got in the driver's seat and drove away (R 524). Chaky never told Thompson that there was going to be a body in the trunk (R 523). Several hours later, Thompson and his brother Jerry West returned to Feinberg's shop with the vehicle, and told Feinberg that there was a body in the trunk (R 525). Thompson asked Feinberg to look, but Feinberg did not (R 526). Feinberg asked Thompson and West to remove the car from his property, and later learned that they parked it about 3/4 of a mile from Chaky's house (R 526).

About 7:30 a.m. the next morning, Chaky pulled up to Feinberg's shop in his Volkswagen and asked what had happened (R 527). Feinberg related that the transmission had quit in the Oldsmobile, and Thompson had just parked it (R 527). Chaky knew where the Oldsmobile was because a police officer had notified him (R 527). Chaky again asked Feinberg to help him to dispose of his wife's body, and Feinberg agreed (R 528). Chaky wanted Feinberg to tow the Oldsmobile to Gainesville, but Feinberg's wrecker was inoperable (R 528). Feinberg also told Chaky that he would not drive Feinberg's wife's car to show Chaky places for disposal (R 528). After a few minutes, Percy Robinson, one of Feinberg's customers, requested a ride home (R 528). Chaky rode with Robinson and Feinberg, who dropped Chaky off to pick up the Oldsmobile; Chaky then followed Robinson and

Feinberg to Robinson's house; after Feinberg dropped off Robinson, Chaky followed Feinberg to a dump behind an old schoolhouse to dispose of the body (R 529-30). As soon as Chaky backed up the Oldsmobile next to the dump, Feinberg left in Robinson's car and did not see Chaky open the trunk (R 531). Chaky returned to Feinberg's shop later that afternoon to get his Volkswagen, but Feinberg was not there (R 532).

A few days later, Chaky visited Feinberg, asking him to get some wild dogs to take into the dump to get rid of the evidence (R 532-33). About a week later, Chaky called Feinberg using the alias of Jack Carson and said that "the heat was on" and, if Feinberg would leave the area for a couple of days and keep his mouth shut, Chaky would "take care of" him (R 533). Because Chaky mentioned insurance money, Feinberg guessed that that was what Chaky meant by "take care of" (R 533-34).

Sometime in November 1991, police officers visited Feinberg, but he told them nothing (R 534). The second time that police officers visited Feinberg, he told them about the car, but not about Chaky asking him to kill his wife (R 535). Before the grand jury, Feinberg once again "withheld evidence" and did not tell the jury about Chaky asking him to kill Chaky's wife (R 535). On December 5, 1991, however, Feinberg turned himself in, telling both Investigator

Williams and the grand jury about Chaky asking him to kill Chaky's wife and dispose of the body (R 536). On cross examination, Feinberg admitted to three prior felonies and acknowledged that he had pled guilty to two felonies concerning the instant murder -- tampering with evidence and accessory after the fact to murder -- but had not yet been sentenced for those two crimes (R 538-39, 546).

Percy Robinson testified that Feinberg was his mechanic, and that, in October 1991, he took his car to Feinberg for repair (R 549). Robinson reiterated Feinberg's account that Robinson drove Feinberg and "another gentleman" to the other gentleman's car, Robinson drove home with the other gentleman following him in a white car, and Feinberg took Robinson's car, presumably back to Feinberg's auto shop for repair (R 550-52).

Charles Thompson testified that, in October 1991, he did "piece work" for Feinberg at his auto shop (R 556). Thompson recalled meeting Chaky before Halloween, when he helped Chaky add transmission fluid to Chaky's Oldsmobile (R 557). Thompson witnessed a conversation between Chaky and Feinberg, but did not hear it (R 558). Thompson understood from Feinberg that Chaky had an older Oldsmobile -- "[']73 or so" -- that he wanted to get rid of for insurance

purposes (R 559).[1] Later that evening, Chaky returned with "an Oldsmobile, a '85 or something" (R 559). When Chaky asked Thompson about methods for disposing of the car, Thompson gave two options -- burning it, or putting it in a bad neighborhood, leaving the keys in it, and letting someone steal it (R 580). Chaky chose the burning method (R 580).

Thompson got a pair of gloves and wire cutters to remove the battery, but Chaky said to leave the battery (R 560). Thompson got in the driver's seat, and Chaky got in the rear seat right behind Thompson (R 560). Chaky gave directions and Thompson drove to Chaky's trailer (R 561-62). Chaky stayed at the trailer after telling Thompson to burn the car, not to take anything out of the car, and not to sell it to a junk yard (R 563). Thompson understood that he would receive $500.00 for disposing of Chaky's car (R 563-64).

Thompson left Chaky's trailer and went to the house of his brother, Jerry West, having decided that he would not burn the car but would instead park it somewhere or put it in the river (R 564). Thompson intended for West to follow him to wherever he would dispose of Chaky's car so that

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[1] Thompson told Feinberg that getting rid of an old car would not bother him as much as getting rid of a new car (R 581).

Thompson would have a ride home (R 564-65). Thompson told West that he had to deliver a customer's car to Cross City and that he needed a ride home (R 565). West agreed but said he needed gas; Thompson said he could have some gas out of Chaky's car (R 565). While West looked for a hose for siphoning, Thompson examined Chaky's car (R 565). Thompson was curious about who owned the car, and looked for the registration in the glove compartment; while in the glove compartment, Thompson saw the automatic trunk release button and pressed it (R 566). Thompson heard West repeat several times excitedly: "Close the trunk." (R 566). Thompson walked back to the trunk and saw the body of a woman in the trunk (R 567).

Because West and Thompson were scared, they decided not to call the police; instead, they wiped their fingerprints from the outside of the car and drove to Feinberg's shop (R 568). Thompson told Feinberg about the body in the trunk, but Feinberg declined to look (R 569). Feinberg wanted the car off his property, and they decided to leave the car "somewhere where the cops would find it" (R 570). Thompson drove the car to the dumpsters on 441 and Bellamy Church Road, and left the window down and the key in the ignition (R 570).

The next morning, Thompson went to Feinberg's shop and saw Chaky drive up in a gray Volkswagen; he saw Chaky and

Feinberg discuss something, but could not hear the conversation (R 571-72). Chaky left and returned later; Chaky, Feinberg and Robinson then left together (R 572). Three days later, when detectives visited Feinberg's shop, Thompson told them nothing (R 573). Several days later, Thompson spoke with Investigator Williams and told him everything he knew (R 574).

Marshal Gerald West, Thompson's stepbrother, testified that, when Thompson opened the trunk of the Oldsmobile at his house, he saw a body in the trunk and told Thompson to close the trunk (R 584-85). When Thompson looked in the trunk, he became very upset (R 585). West and Thompson drove the car back to Feinberg's shop, Thompson driving the Oldsmobile, West driving his own truck (R 586). West followed Thompson when Thompson drove to the dumpsters to leave the Oldsmobile, and took Thompson back to Feinberg's afterwards (R 586).

Gregory Alan Galanus testified that, during the summer of 1991, Chaky's family had been in the process of moving to Gainesville (R 593). Chaky came to Galanus's door between 8:30 and 8:45 p.m. on October 24, 1991 to ask for a ride home (R 594, 601). Chaky explained that he and his wife had had a fight that "had come to blows" (R 596) and that, because his wife was mad, she had left him in the woods and had driven off (R 595, 600). Galanus took Chaky to his new

Gainesville residence (R 595). Galanus recalled Chaky as being nervous and agitated (R 596). Galanus described the interior of Chaky's trailer as resembling "the Columbia County landfill" and recalled that Chaky complained about it (R 598). Galanus also recounted witnessing some disagreements between Chaky and his wife, one topic of which was housekeeping (R 599).

Deputy Sheriff Charles R. Tate testified that, on the morning of October 25, 1991, he saw an Oldsmobile parked at the dumpsters on 441 and Bellamy Road (R 604). Upon checking the registration, Tate discovered that the car belonged to Kenneth and Patricia Chaky in the Fort White area (R 604). Tate checked the interior of the car, but saw no ladies' purse or shoes (R 605). After learning that there was no listed telephone number for the Chakys, Tate visited the post office in Fort White for assistance in locating their house (R 606). Tate then visited the Chaky home to ask if Chaky still owned the Oldsmobile (R 606). Chaky stated that he owned the car, and that, as a result of an altercation, his wife had left in it the previous evening (R 607). Chaky told Tate that he thought his wife might be at a friend's house in Alachua (R 607). Chaky followed Tate to the dumpsters and moved the Oldsmobile so that it would not interfere with parking (R 608). After securing the Oldsmobile, Chaky told Tate that he would return later to get it (R 608).

Deputy Sheriff Shawn Niles testified that, on Saturday, October 26, 1991, Chaky flagged him down to report that his wife had been missing since Thursday night (R 613-14). Chaky stated that he and his wife had gotten into an argument (R 615). Niles acknowledged that Chaky had flagged him down because he mistook Niles for Tate (R 616). Deputy Sheriff Michael Thomas Sweat testified that he took a missing person report from Chaky on October 28, 1991 (R 619). Chaky told Sweat that his wife had been missing since they had an argument and she left in her car (R 619).

Investigator Russ Williams testified that he met with Chaky on October 30, 1991, at Chaky's residence in Gainesville (R 631). Chaky recounted his wife's disappearance and said he had no information as to where she might be (R 631). The Oldsmobile was parked at Chaky's residence, and Williams asked Chaky if he could examine it (R 632). Chaky acquiesced to a search of the car, but hesitated about a search of the trunk (R 632, 633). The trunk was empty, but the rest of the car "was loaded with papers and garbage and things," which struck Williams as "being odd" (R 642). Chaky gave Williams his wife's shoes and purse and stated that these items were in the car when he picked it up from the dumpsters (R 642).

The afternoon of October 30th, Williams heard a dispatch about a body being found off the Greenwood Road

area; upon arriving on the scene, he observed a body that fit the description of Mrs. Chaky (R 644). Williams called Chaky for confirmation as to the victim's clothing; Chaky recounted white or gray shorts with a blue stripe and a t-shirt with some writing on the front (R 645). This description matched the clothing found on the body (R 645). On November 2, 1991, Williams received a positive identification from the Medical Examiner's Office and contacted Chaky at his Gainesville residence (R 646, 669). Williams witnessed no reaction by Chaky upon hearing the news of his wife's death, but saw Chaky's mother, father, daughter, and son become upset (R 647-48).

Chaky consented to an FDLE examination of the Oldsmobile (R 648). FDLE crime lab analyst Karen Cooper testified that she collected evidence from the Oldsmobile and determined that the upper edge of the trunk liner, the metal portion of the trunk lip, and trunk bottom tested positive for blood (R 678). FDLE serologist Suzanne Livingston testified that, although her testing of the swabbings collected by Cooper revealed the presence of blood, she could not determine whether it was human (R 687). However, one of her cuts on the trunk liner revealed not only the presence of blood, but human blood with blood factor A and two enzymes AK1 and ADA type 1 (R 689-90).

David Hermelbracht, retirement manager for the University of Florida in Gainesville, testified that he had obtained the application for life insurance by Chaky (R 691). Chaky had two accidental life insurance policies on his wife (R 693, 699). In April 1991 (R 698), the term life insurance policy had been increased on Chaky from $20,000 to $100,00; on Chaky's wife, from $10,000 to $50,000; and on Chaky's children, from $10,000 to $20,000 (R 695). The value of the other life insurance policy in October 1991 was $275,000 on Chaky; $135,00 on Chaky's wife; and $50,000 on each child (R 695). Hermelbracht testified that $135,000 had been disbursed to Chaky's sister, the contingent beneficiary (R 702).

Janet Henderson, a neighbor and friend of the Chaky family, testified that, in October 1991, Chaky had visited her house to report that his wife had left him after they had argued (R 718). Donna Hough, the victim's cousin, testified that the Chakys had been having financial problems in the summer of 1991 (R 721). Hough also testified that, in August, the Chakys had moved to a Gainesville house the victim had inherited from her mother (R 722).

John Simmons, Jr., Chaky's acquaintance from jail, testified that, in November and December 1991, Chaky talked about the witnesses who were going to testify against him, wanting them to "be taken care of or gotten rid of,"

specifically referring to Feinberg and the "village idiot" (R 727). Chaky told Simmons where the witnesses lived in hopes that Simmons could find someone to get rid of the witnesses for him (R 727). Simmons asked if Chaky just wanted the witnesses hurt, and Chaky said no, specifically requesting that the witnessed be "gotten rid of" (R 728). Chaky described several ways to get rid of witnesses: (1) drive by in a car and eliminate the witnesses when they came out of the shop or the race track; or (2) use the oxygen in the shop and torch it (R 728). Chaky concentrated more on Feinberg than the other witness, described Feinberg, and gave him a map of where Feinberg lived (R 729).

On December 16, 1991, Simmons spoke with Investigator Williams and agreed to wear a body bug upon his return to the jail cell (R 730). Chaky showed Simmons how to get to the witness's place since Simmons knew nothing about the area (R 734). Simmons testified that he did not know Barney Feinberg, Charlie Thompson, or Kenneth Chaky prior to meeting Chaky in jail (R 734). Simmons left the cell to give the map to Williams, and then returned to the cell to have another conversation with Chaky (R 736). Simmons asked more specific questions about the plan and provided Chaky with the telephone number of a contact, i.e., Investigator Williams's number (R 736). Chaky appeared more cautious upon Simmons's return to the cell (R 737). Simmons admitted to 10 to 13 felony convictions (R 737).

Investigator Williams testified again, this time recounting his actions in having Simmons wear a body bug (R 751). Williams recognized Chaky's voice on the tape because he had interviewed Chaky approximately 20 times previously (R 756).

FBI Agent Dennis Williams testified about the tape recording enhancement that was performed on the taped conversations between Chaky and Simmons (R 770). The tapes were played to the jury (R 780-81, 1140-96). The state then announced rest (R 782).

During the defense case, Chaky recalled arguments with his wife about her housekeeping habits and the frequency with which they ate in restaurants (R 789). Chaky stated that sometimes these arguments would escalate to cursing and physical hitting (R 790). Chaky described his wife as weighing 165 pounds and being 5'4" in height, and described himself as weighing 180 pounds and being 5'9" in height (R 790-91). Chaky recalled being fearful of his wife when they argued, because she had threatened him before with a knife and gun, and had hit him (R 791). Chaky said he and his wife had married in 1975 (R 792). A year later, his wife suffered a head injury in the Army Reserves, had a 20% disability, and was supposed to take medication, which she refused to take (R 791-92). After this injury, Chaky noticed a change in her demeanor, i.e., seizures and a quick temper (R 792).

Chaky said that his family had been moving to Gainesville so that the daughter could attend high school there and avoid riding the bus for almost two hours (R 792). Chaky regularly moved things from Fort White to Gainesville on a trailer attached to his car (R 793). On October 24, 1991, Chaky and his wife travelled from Gainesville to Fort White to continue moving items to Gainesville (R 796). Chaky loaded outside trash in the trunk of the Oldsmobile while his wife cleaned the living room; Chaky made two trips to the dumpster (R 797-98). During the second such trip, the transmission started slipping and Chaky visited Feinberg's auto shop (R 799). Chaky added the fluid, saw Thompson, spoke briefly to Feinberg, and returned to the trailer (R 799). Chaky denied speaking with Feinberg about "preparing the package" (R 799).

When Chaky returned to the trailer, his wife was mad that he had been gone so long (R 800). Chaky asked why she had not done more cleaning in the time that he had been gone, and they argued along those lines for a while in the living room (R 800). Chaky then went into the bedroom to gather some boxes, and his wife took some items to the car (R 801). Chaky heard her reenter the trailer and walk down the hall (R 801). Chaky was leaning over putting some things in a bag, looked up, and saw his wife pointing his

pistol at him.[2] Chaky's wife stated that it had discharged six times accidentally (R 801). She then placed both hands on the pistol and "was getting ready to thumb back the hammer" when Chaky grabbed the pistol (R 801). The victim "came after" the gun and Chaky; Chaky pulled her backward on top of him, struggled with her, and hit her on the head with the gun two times (R 802, 805).

Although Chaky testified that he did not know why he hit her, he stated that he "had a lot of fear at that point," because the victim

> was determined that she would get the gun back in her control, or something. I wasn't sure what she was going to do. She was on top of me, hitting me. I had the gun in my hand and I didn't know what to do, so I just reacted, it was a bad reaction, but I hit her.

(R 802). Chaky thought he had knocked her "out" and locked the gun in the trunk of the car to keep it away from her (R 805). Chaky sat outside for about 30 minutes, waiting on the victim to exit the trailer, but she never did (R 806). When Chaky checked on the victim, he realized that she had not moved and took her outside, where she died (R 806). Chaky did not know what to do, and sat outside for a while (R 807).

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[2] Chaky kept his pistol in the Oldsmobile (R 801).

Chaky then visited Feinberg's shop to see if Feinberg had "some ideas" about what to do (R 807). Chaky told Feinberg what had happened, and asked what to do (R 808). Feinberg told Chaky to put the victim in the trunk of her car and drive the car to his shop (R 808). Upon his return, Chaky got into the back seat, Thompson got in the driver's seat, and they drove away (R 808). Chaky asked Thompson what Feinberg had told him, and Thompson said something about burning the car (R 809). Thompson took Chaky to Chaky's trailer, and drove away; Chaky gathered some things, walked to Galanus's house, and had Galanus take him to Gainesville (R 809). Chaky's daughter asked where the victim was, and Chaky told her that she had driven off after an argument with him (R 810). Chaky knew that the victim was dead but could not tell his daughter; they drove around looking for the victim (R 810).

Chaky went back to the Fort White trailer the next day (R 811). Deputy Sheriff Tate came by to tell Chaky about finding the Oldsmobile, but Chaky told him nothing about killing his wife (R 812). After seeing the Oldsmobile at the dumpsters, Chaky drove to Feinberg's shop to find out what had happened (R 812). When Chaky told Feinberg that Tate "gave [him] the car back," Feinberg said he had a solution (R 813). Robinson, Feinberg, and Chaky drove to the dumpsters; Chaky got into the Oldsmobile, and followed

Robinson and Feinberg (R 813). Feinberg dropped Robinson off and turned down a road Chaky had never seen (R 813). Chaky thought that, if his wife was still in the trunk, they would "bury her or something" (R 814). Feinberg told Chaky to back up to a pile of old rugs; Chaky opened the trunk, and Feinberg unloaded the victim and covered her with carpets (R 814). Chaky followed Feinberg back to his shop, left his Volkswagen, and drove the Oldsmobile back to Gainesville (R 814).

Chaky denied approaching anyone with ideas about killing his wife (R 819). Chaky denied asking Simmons for assistance in eliminating witnesses (R 822). Chaky said that he discussed his case with Simmons, but that Simmons always brought up the subject first (R 822). Chaky said that Simmons showed him a map and that Simmons marked an X on it (R 823-24). Although Simmons gave Chaky the telephone number of an alleged hit man, Chaky never called the number (R 824).

On cross examination, Chaky admitted to taking the gun out of the trunk of the Oldsmobile, taking the gun back to Gainesville with him (R 828), and giving the gun to his sister (R 830). Chaky remembered blood being on the floor after hitting his wife in the head, and admitted to cleaning it up the next morning (R 829). Chaky acknowledged that cleaning up the blood was one reason he returned to Fort

White the morning after killing his wife (R 829). Chaky stated that he knew he had injured his wife and knocked her unconscious with a deadly weapon, but did not think that her injuries warranted medical attention (R 837). When Chaky eventually checked on his wife, her breathing was labored; she was bleeding from the head and "in a great deal of trouble" (R 837). Chaky did not call 911 or go to Galanus's house; instead, he dragged her outside and laid her on the ground by the car (R 838). Chaky placed his wife's body in the trunk (R 838).

Chaky admitted that he lied to Galanus, Tate, Niles, Sweat, and Williams to escape prosecution for killing his wife (R 839-40). Chaky admitted that he drove his wife's body to a dump to escape prosecution for killing her (R 841). Chaky acknowledged that he cleaned the trunk of the Oldsmobile, and admitted to being hesitant when Williams wanted to look in the trunk (R 842). However, Chaky permitted Williams to look so as to appear innocent (R 843). Chaky admitted to having one felony conviction (R 847).

The trial court instructed the jury on first degree murder, second degree murder, manslaughter, culpable negligence, attempted first degree murder, and criminal solicitation; the court also instructed the jury on self defense (R 964-75). During jury deliberations, the court read a note from the jury: "Foreman has been elected.

Number one, out of paper. Number two, description of first degree murder, second degree. Three, transcript of Charlie Thompson's testimony. Foreman, J.C. Drummond." (R 989). See also (R 236). Defense counsel registered no objection to reinstructing the jury on first and second degree murder (R 989).

Initially, defense counsel objected to rereading Thompson's testimony, stating that the jury "should try to rely on [its] own recollection" (R 989, 990). However, defense counsel then stated:

> Well, I -- you know, THAT'S FINE. If you all really want to read the whole thing. My concern, Judge, if there was some specific portion of the testimony they were wanting to hear, that might be a different matter, but READING THE WHOLE THING, FINE. I'm not objecting to it on the substantive ground. It would be nice if we could define it a little bit better, but if they can't, they can't.

(R 991) (emphasis supplied). The court brought the jury back into the courtroom and had the court reporter read back most of Thompson's testimony (R 993-1009). After the court reporter read Thompson's statement that, because Feinberg wanted the car off his property, Thompson took the victim's car to the dumpsters, the foreman advised the court that "I think we have heard what we wanted." (R 1009). The court queried: "You are satisfied [that] you have hear[d] all of

Charlie Thompson's testimony that you need?" (R 1009). The foreman replied affirmatively (R 1009). The court also fully reinstructed the jury on first degree murder (R 1009-17).

During the penalty phase, the state introduced a certified copy of Chaky's prior violent felony and all evidence presented at trial (R 1027). The state then announced rest (R 1028). Dr. Umesh Mhatre testified for the defense that he had been treating Chaky for depression (R 1032). Dr. Mhatre recounted speaking with Chaky's employer and family, all of whom had good things to say about Chaky (R 1034-35). Dr. Mhatre assessed Chaky as a good candidate for rehabilitation (R 1035), and stated that Chaky exhibited "some" remorse (R 1036).

On cross examination, Dr. Mhatre stated that he knew Chaky had been court martialled and convicted of attempted murder, but admitted that he had not spoken with any of the people involved in that 1971 incident (R 1039). Dr. Mhatre also stated that he knew that several of the same people he had spoken with wrote letters on Chaky's behalf in 1971 to the effect that he was a good candidate for rehabilitation (R 1040).

Chaky testified that he did not kill his wife to collect on the insurance (R 1045). Chaky stated that he had

signed documents so that the insurance money would be paid to his sister as guardian of his children (R 1046). Chaky acknowledged his 1971 conviction, stating that he had pled guilty in return for a sentence of three years under the threat of a sentence of 15 years (R 1047). Chaky recalled that the offense occurred in South Vietnam during the war and involved a fragmentation hand grenade (R 1047). Chaky described the grenade as killing those within 15 feet of it and wounding those within 30 feet (R 1047). Chaky stated that he had been on a six man team which was on a rest break (R 1048). During this break, his unit had been assigned to guard a man who had testified against other soldiers (R 1048). Chaky's unit was singled out by people who were after the guarded man; the unit took positions to return fire if fired upon (R 1048). Later that evening, Chaky escorted another man to another company and saw one of the men from the previous group (R 1048). Chaky took one of his two grenades and threw it close enough to the man to scare him but far enough away not to harm him (R 1048).

Chaky stated that he was in the service for about three years, and served in Vietnam about six months (R 1051). Chaky testified that he had been engaged in actual combat on more than one occasion and had sustained a neck wound from a grenade (R 1052). Although the state's exhibit showed that Chaky received a dishonorable discharge, Chaky said that he

actually had received an honorable discharge (R 1052). Chaky explained that the commanding general's legal staff had reviewed his case and recommended that, after prison time, Chaky should be given the opportunity for an honorable discharge (R 1053). Chaky was uncertain as to whether this recommendation was ever reduced to an order (R 1053). Chaky was restored to active duty, and according to form DD 214, was honorably discharged (R 1053). Chaky listed his previous employment with the University of Florida as a computer program analyst, and described himself as a good provider and father (R 1057-58).

Rebecca Carlson, a/k/a Dr. Rebecca Chaky, Chaky's sister and legal guardian of his children, testified that Chaky spoke with his children on a regular basis (R 1074) and was a very involved father (R 1075). Natalie Chaky, Chaky's daughter, testified that she had had a close relationship with Chaky all of her life and had not been as close with her mother (R 1078-79). Natalie had witnessed arguments that involved physical confrontations between her parents; Natalie recalled that her mother typically started these physical activities (R 1081). Natalie described Chaky as nonviolent (R 1081). The defense then announced rest (R 1084).

The court instructed the jury on two aggravating circumstances: (1) Chaky had been convicted previously of a

felony involving the use of threat or violence to some person; and (2) Chaky committed the murder for financial gain (R 1119). The court instructed the jury as follows on mitigation: "First that the defendant has no significant history of prior criminal activities. Next, any other aspect of the defendant's character or records and any other circumstance of the offense." (R 1120). The jury returned an advisory sentence of death by a vote of nine to three (R 1124).

Before the court imposed sentence, it heard from Chaky and several members of his family (R 303-31, 345-72, 425-42). The court then adjudicated Chaky guilty of solicitation to commit first degree murder, and sentenced him to 30 years' imprisonment (R 337-38, 341, 452). The court adjudicated Chaky guilty of first degree murder and sentenced him to death (R 337-38, 339, 452-53).

In its written findings, the court found beyond a reasonable doubt that Chaky had been convicted previously of a felony involving the use or threat of violence to the person of another, and that Chaky had committed the murder of his wife for financial gain (R 375-76). The court made the following findings concerning mitigation:

> The Defendant proposed several mitigating circumstances which are evaluated in the manner following.

1. That he has made a contribution to his community or society as evidenced by exemplary work, military, and family record.

(a) The Defendant's military record does not support this circumstance. He was in the military for hardly a year when he was convicted of attempted murder and served two years in confinement. His subsequent honorable discharge was not sufficient to rehabilitate his military service as a mitigating circumstance.

(b) Defendant apparently was a good worker, having been employed for the last several years as a computer program analyst at an annual salary of $29,300.00. There is nothing to suggest that he performed his job duties in less than a satisfactory manner.

(c) As to his family contributions, Defendant was apparently a good son and treated his parents favorably. He also had a good relationship with his 15 year old daughter and 3 year old son. However, it could not be said that he was cognizant of the best interests of his children, when he planned the murder of his wife and thus deprived his children of their relationship with their mother.

Taken as a whole, however, there is sufficient evidence to reasonably convince this Court that the foregoing constitutes a mitigating circumstance, notwithstanding that the Defendant's record in this respect is no better than you might expect of an ordinary or normal employee, son, and father.

2. That he has remorse and potential for rehabilitation; good prison record.

(a) The evidence did not support enough remorse to alone constitute a mitigating factor. While his witness

(psychiatrist) testified that the Defendant had some remorse, it was overshadowed by his testimony that the Defendant still feels justified in his action.

(b) Defendant has some potential for rehabilitation. However, the evidence supporting this came primarily from his psychiatrist-witness, who could give little basis for his opinion to that effect.

(c) Defendant has been a prisoner without any disciplinary record. He is cooperative and poses no problems within the atmosphere of his incarceration.

The foregoing circumstances under Paragraph 2 are sufficient to reasonably convince this Court that same constitutes a mitigating circumstance.

3. Defendant further alleges that he has no significant history of prior criminal activity.

Defendant's conviction of attempted murder (described in detail as an aggravating circumstance), although committed 20 years before the murder of his wife, is nevertheless significant criminal activity and does not qualify as a mitigating circumstance.

(R 376-78). The court weighed the two mitigating circumstances against the two aggravating circumstances, and determined that the aggravating circumstances outweighed the mitigating circumstances (R 378).

## SUMMARY OF THE ARGUMENT

As to Issue I:

Although defense counsel initially objected to the rereading of Thompson's testimony and the court permitted him an opportunity to fully voice his objection, defense counsel subsequently withdrew his objection. Accordingly, this issue has not been preserved for appellate review. In any event, the trial court did not abuse its discretion in permitting the court reporter to reread Thompson's testimony to the jury. The jury requested such testimony, and asked the court to halt the rereading when it had heard all that it wished to hear.

As to Issue II:

Chaky claims three errors by the trial court: (1) it failed to reduce the oral instructions to writing; (2) it failed to file them in both portions of Chaky's trial; and (3) it failed to provide the jury with written instructions to guide them during deliberations. Because defense counsel failed to request that the charges be reduced to writing, or object when they were not, or request that the instructions be provided to the jury, the issue has not been preserved for appellate review. In any event, in light of Chaky's inability to show any prejudice by the trial court's failure to comply with rule 3.390(b), any error committed on this

point should be deemed harmless. After all, the court charged the jury in accordance with the standard jury instructions.

As to Issue III:

Chaky compares the instant facts to those from several other capital cases involving the pecuniary gain aggravating factor, to conclude that, because he never benefitted from his crime, the direct link between killing and the insurance proceeds is too weak to support the court's finding of the pecuniary gain aggravating factor. To the contrary, the record shows beyond a reasonable doubt that Chaky killed his wife to reap insurance benefits, if not just for himself, for those who aided him.

As to Issue IV:

Chaky's death sentence is proportionate to death sentences affirmed by this Court in cases involving similar facts and a similar balance of aggravating and mitigating circumstances.

## ARGUMENT

### Issue I

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN PERMITTING THE COURT REPORTER TO READ MOST OF THOMPSON'S TESTIMONY TO THE JURY PURSUANT TO THE JURY'S REQUEST FOR SAME.

Because **Fla. R. Crim. P.** 3.410 gives the trial court wide latitude in the area of reading testimony to the jury, this Court should not reverse a decision in this regard unless a clear abuse of discretion is shown. Haliburton v. State, 561 So. 2d 248 (Fla. 1990), cert. denied, 111 S. Ct. 2910 (1991). The trial court did not abuse its discretion in this case, because, pursuant to the jury's specific request, it had the court reporter reread Thompson's testimony until the jury said that it had heard all that it wished to hear.

Preliminarily, this Court should be aware that, although defense counsel initially objected to the rereading of Thompson's testimony and the court permitted him an opportunity to fully voice his objection, he subsequently withdrew it:

> Well, I -- you know, THAT'S FINE. If you all really want to read the whole thing. My concern, Judge, if there was some specific portion of the testimony they were wanting to hear, that might be a different matter, but READING THE WHOLE THING, FINE. I'm not objecting to it on the substantive ground. It would

> be nice if we could define it a little bit better, but if they can't, they can't.

(R 991) (emphasis supplied). Further, when the foreman advised the court that the jury had heard what it needed to hear, defense counsel remained silent (R 1009).

This Court has held that a party may not invite error below and then take advantage of the error on appeal. Pope v. State, 441 So. 2d 1073, 1076 (Fla. 1983). In Sullivan v. State, 303 So. 2d 632, 635 (Fla. 1974), this Court also held that, where a trial court has extended to counsel an opportunity to cure an error and counsel fails to take advantage of the opportunity, such error is invited and will not warrant reversal on appeal. Here, where the trial court presented defense counsel with a full and fair opportunity to explain the basis for his objection, but defense counsel chose to withdraw it, Chaky should not be permitted to claim error on appeal.

Further, based on defense counsel's silence after the court halted the rereading pursuant to the jury's request, Chaky should not be permitted now to argue that all or none of Thompson's testimony should have been reread. Even though defense counsel acquiesced to the rereading of the entirety of Thompson's testimony, he did not object when the jury foreman asked the court to halt the rereading or when

the court permitted the rereading to stop. Because defense counsel did not object when the rereading of Thompson's testimony was halted before read in its entirety, this issue has not been preserved for appellate review, and this Court should deem it procedurally barred. Nixon v. State, 572 So. 2d 1336 (Fla. 1990); Rose v. State, 461 So. 2d 84 (Fla. 1984).

If this Court nevertheless reaches the merits of this issue, it is clear that the trial court did not abuse its discretion in permitting the jury to hear only as much of Thompson's testimony as the jury deemed necessary. In Kelley v. State, 486 So. 2d 578 (Fla. 1986), cert. denied, 479 U.S. 871 (1987), the jury asked the trial court whether "'John J. Sweet received immunity in Florida for first degree murder and perjury before he gave information on the Mascy trial, and if he had anything to gain by his testimony.'" Id. at 583. The trial court declined to answer the jury's question explicitly because formulating an answer would have required him to interpret Sweet's testimony and make a judgment as to his motivation. Instead, the court offered to have Sweet's testimony reread in portions designated by the jury.

This Court found no abuse of discretion in such an action: "The court's insistence upon the jury's rather than its own choice of the passage to be re-read was proper, in

light of the latter's legitimate hesitation to comment upon the evidence." Id. at 583. See also Haliburton, 561 So. 2d at 250 (no abuse of discretion where the trial court rereads testimony specifically requested by jury). Likewise, in this case, when the jury asked the rereading of Thompson's testimony to be halted and the court made certain this was what the jury wanted, the court properly permitted the jury to hear only that which the jury wanted. See Roper v. State, 608 So. 2d 533, 535 (Fla. 5th DCA 1992) ("At the very least, the trial judge should have apprised the jury that a method was available to have the cross-examination, or specific portions of it, read to them.") (emphasis supplied). To order otherwise, and tell the jury that they must hear the cross examination and redirect, would be tantamount to commenting on the evidence.

As support for his contention that, when testimony is reread, it must be read in its entirety, Chaky seeks to have this Court adopt the rationale applied in reinstruction cases, i.e., although it is proper for a judge to limit the repetition of charges to those specifically requested, repeated charges should be complete on the subject involved. See Engle v. State, 438 So. 2d 803 (Fla. 1983). In light of Kelley and Haliburton, which are directly on point, adoption of the reinstruction rationale on this point is wholly unwarranted.

## Issue II

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN NOT REDUCING THE ORAL INSTRUCTIONS TO WRITING, IN NOT FILING THEM IN BOTH PORTIONS OF CHAKY'S TRIAL, AND IN NOT PROVIDING THEM TO THE JURY FOR USE DURING DELIBERATIONS.

Under this issue heading, Chaky claims three errors by the trial court: (1) it failed to reduce the oral instructions to writing; (2) it failed to file them in both portions of Chaky's trial; and (3) it failed to provide the jury with written instructions to guide them during deliberations. Initial Brief at 15. Even though Chaky acknowledges that defense counsel failed to request that the charges be reduced to writing, or object when they were not, or request that the instructions be provided to the jury, Chaky contends that, because death penalty cases are different, "legitimate rules, which in other contexts, would prevent this court from considering an issue, must give way to the greater concern of just sentencing." Initial Brief at 17-18.

This Court is not in the practice of overlooking a failure to preserve an issue simply because a case involves the death penalty. See, e.g., Nixon v. State, 572 So. 2d 1336, 1341 (Fla. 1990); Rose v. State, 461 So. 2d 84, 86 (Fla. 1984). As the Third District observed in Coggins v. State, 101 So. 2d 400, 403 (Fla. 3d DCA 1958):

It is true that the statute (Sec. 918.10(2), Fla. Stat., F.S.A.) requires the trial judge in a capital case to reduce to writing his instructions to the jury the purpose and intent being that such charges may be made available to the jury in their deliberations. See Sec. 919.04, Fla. Stat., F.S.A. In the case of Driggers v. State, 38 Fla. 7, 20 So. 758, 760, the same question was raised. The court in that case said:

> "No exception was taken to the manner in which this part of the charge (oral) was given at the time it was given. In the case of Hubbard v. State, 37 Fla. 156, 20 So. 235, it was held that, although the provisions of section 2920 of the Revised Statutes were mandatory, requiring the court to charge wholly in writing in capital cases, and that an oral charge in such a case would be ground of reversal if exception thereto was properly and seasonably taken, still, if the manner of giving the charge is not excepted to promptly at the time, it is given orally, the error will be held to have been waived thereby, and it will not be ground for reversal on writ of error. The reasonableness of such a rule is self-evident. When the court inadvertently proceeds in such a case to deliver a charge orally, and exception to the manner of its delivery is then promptly taken, the error can at once be rectified by reducing the oral charge to writing. Southern Express Co. v. Van Meter, 17 Fla. 783."

There is no evidence in the record before us that the appellant ever requested that the charges be made

> available to the jury during its deliberations. It therefore becomes obvious that no prejudice has been shown to have resulted to the appellant for the failure to have the charges in writing. In addition, we conclude that inasmuch as the exception was not duly taken at the time the charges were given but was first raised as a ground in the motion for new trial, the appellant is deemed to have waived such objection. See Weaver v. State, 58 Fla. 135, 50 So. 539.

See also McCaskill v. State, 344 So. 2d 1276, 1278 (Fla. 1977). This Court should deem this issue procedurally barred, and decline to address the merits.

If this Court nevertheless reaches the merits, because Delap v. State, 440 So. 2d 1242, 1254 (Fla. 1983), cert. denied, 467 U.S. 1264 (1984), and Rogers v. State, 511 So. 2d 526 (Fla. 1987), dispose wholly of Chaky's third claim of error, the state will not address it further. Regarding Chaky's first and second claims of error, the state contends that an abuse of discretion standard should apply. Because this Court has construed **Fla. R. Crim. P.** 3.400 as discretionary, see Delap, 440 So. 2d at 1254, this Court should apply a similar standard to a claim under a related rule, i.e., **Fla. R. Crim. P.** 3.390(b).

In Matire v. State, 232 So. 2d 209, 210 (Fla. 4th DCA 1970), the Fourth District acknowledged the purpose behind the requirement of section 918.10, the predecessor of rule

3.390, that written jury instructions in capital cases be in writing and filed in a case: "To establish a procedure which insures that instructions in capital cases are as correct as possible by having them reduced to writing, and thereby requiring their prior preparation before presentation to the jury. . . . It also provides an unquestioned verbatim record of the charge to the jury." With the institution of standard jury instructions, and the consistent use of court reporters, the purpose behind the rule appears extinct.

The state's suggestion in this regard is not unique. In Kimmons v. State, 178 So. 2d 608 (Fla. 1st DCA 1965), the First District examined the purpose behind the holding of this Court in Holton v. State, 2 Fla. 476 (1849), which held that jury charges cannot be sent to the jury after their retirement, to conclude that the reason for the rule no longer existed. Specifically, the First District noted that the rule had evolved based on charges having been written by hand, sometimes illegible and/or confusing, and based on the illiteracy of so many persons called to jury duty in 1849. Because those factors no longer existed, and section 919.04 had intervened, the First District declined to follow Holton.[3]

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[3] Moreover, the First District found that Kimmons had waived his objection by failing to object timely: "If such delivery had been in any way prejudicial to the defendant,

In this case, the court charged the jury in accordance with the standard jury instructions. See Guilt Phase Charge Conference (R 851-66); Guilt Phase Jury Instructions (R 961-84, 1009-17); Penalty Phase Charge Conference (R 1085-88); Penalty Phase Jury Instructions (R 1118-22). After instruction in both phases, defense counsel did not object,[4] did not request written instructions, and did not request that instructions be sent with the jury for use during deliberations. In light of this, it simply cannot be said that the trial court abused its discretion in failing to comply with rule 3.390(b).

Further, in light of Chaky's inability to show any prejudice by the trial court's failure to comply with rule 3.390(b), any error committed on this point should be deemed harmless. Chaky points to the jury's request for reinstruction on first and second degree murder to conclude that the jury must have been "either so confused or forgetful that [it] had to be retold what first degree murder was." Initial Brief at 17. This is rank speculation at its best. The jury may have simply desired confirmation

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the latter's counsel should have promptly interposed an objecti[on] so that the court might, if error or prejudice was demonstrated, take timely steps to eliminate any prejudicial effect." Kimmons, 178 So. 2d at 614.

[4] Other than making an objection in the guilt phase about the wording of the verdict form (R 984-85).

of a distinction it already understood. Speculation is not a basis for reversible error.

## Issue III

WHETHER THE TRIAL COURT PROPERLY FOUND THAT CHAKY KILLED HIS WIFE FOR PECUNIARY GAIN.

Under this issue heading, Chaky compares the instant facts to those from several other capital cases involving the pecuniary gain aggravating factor, to conclude: "Because the defendant never benefitted or intended to profit from his crime, the direct and certain link between killing and the insurance proceeds is so weak that it cannot hold enough circumstantial evidence to support the court's finding of this aggravating factor." Answer Brief at 23. To the contrary, the record shows beyond a reasonable doubt that Chaky killed his wife to reap insurance benefits, if not just for himself, for those who aided him.

Hermelbracht testified that Chaky had increased coverage on his wife in April 1991 (R 698), about six months before her death. At the time of her death, Chaky had two policies covering his wife -- one worth $50,000 and the other worth $135,000 (R 695). Chaky secured this insurance in 1985, increased it in April 1986, April 1988, April 1989, and April 1991 (R 701). Additionally, Feinberg testified that, because Chaky had mentioned insurance proceeds to him, Feinberg understood that, when Chaky said he would "take care of" Feinberg, he would receive some of that money (R

533-34). Thompson testified that Chaky told him he wanted to dispose of the Oldsmobile "for insurance purposes" and that Thompson would be paid $500.00 for burning the Oldsmobile (R 563). Finally, Donna Hough, the victim's cousin, testified that the Chakys had been having financial problems in the summer of 1991 (R 721).

This Court has held that, to establish the pecuniary gain aggravating factor, the state must prove a pecuniary motivation for the murder. Clark v. State, 609 So. 2d 513 (Fla. 1992). Although the above evidence clearly establishes such a motivation, Chaky argues that the pecuniary link here is far weaker than in other cases this Court has addressed. This contention is, quite simply, not accurate.

In Zeigler v. State, 580 So. 2d 127 (Fla. 1991), the trial court found pecuniary gain in aggravation, based on the purchase of a large insurance policy for Zeigler's wife; on the defense that the policy was taken out for estate planning purposes, but such a purchase was not a reasonable amount for estate planning purposes; and on the fact that Zeigler never told his estate planning advisor or attorney about the policy even *though he had discussed* estate planning with them on previous occasions. This Court upheld the trial court's rejection of Zeigler's assertion that he purchased the insurance for estate planning purposes, and

agreed that pecuniary gain had been established beyond a reasonable doubt: "We have previously upheld the application of this factor where the defendant became entitled to insurance proceeds on a victim's life. Buenoano v. State, 527 So. 2d 194 (Fla. 1988)." Zeigler, 580 So. 2d at 129 n.6.

Contrary to Chaky's assertion, the evidence in this gain that the murder was committed for pecuniary gain is stronger than that in Zeigler. Chaky promised insurance proceeds to both Feinberg and Thompson for their help in disposing of his wife and her vehicle. Chaky insisted on his wife being killed and the car being burned, declining other suggested alternatives. Finally, despite Chaky's never having received the insurance proceeds, Chaky was entitled, upon his wife's death, to said benefits, which would have helped his financial difficulties.[5] According to

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[5] Chaky claims he did not need the money, and contends that the fact that he planned to rent the Fort White trailer, instead of selling it, supports this theory. Initial Brief at 23. Hough's testimony directly contradicted Chaky's testimony on this point, and the jury evidently found Hough's testimony on this point more credible. In any event, Chaky may have wished to retain ownership of the trailer for the purpose of receiving monthly rental checks.

Chaky also argues that he could not have killed for pecuniary gain because he reported his wife as missing: "Why would he murder her for the money and then claim she was a missing person?" Initial Brief at 22-23. Chaky himself answered this question, stating that he reported his wife as missing to keep up appearances with his daughter, neighbors, and police officers. Chaky must have suspected that eventually someone would discover his wife's body, and

this Court's holdings in Zeigler and Buenoano, the entitlement aspect is the focus, not the actual disbursement of the benefit proceeds. See, e.g., Porter v. State, 429 So. 2d 293, 296 (Fla. 1983) (the fact that Porter personally did not profit from murder did not negate the finding of pecuniary gain). Here, there can be no serious contention that Chaky was not entitled to the insurance proceeds.

Chaky attempts to soften the entitlement aspect by alleging that, if he had received the money, it would have been used for day care and other child expenses. Again, this argument misses the mark, because use is not the focus. Chaky also argues that he could not have killed his wife for pecuniary gain because, if convicted of murdering her, he would have received nothing. This argument is untenable for several reasons. First, there is no evidence that Chaky in fact knew he would receive nothing if he killed his wife. Second, even if he knew, Chaky's design to have his wife's body burned in the car could have frustrated, if not destroyed, attempts to connect him with her murder.

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no doubt hoped that no one would discover his dirty deed so that he could collect the insurance money.

Regardless, speculation is not required, as need, or the lack thereof, is not the focal point of whether a murder is committed for pecuniary gain. As shown in text, the question centers on entitlement.

In Buenoano, this Court upheld the pecuniary gain aggravating factor, noting:

> Constance Lang testified that Buenoano never discussed the possibility of ending her marriage by divorce, but only mentioned using poison to solve her marital problems. The evidence showed that as a result of Goodyear's death, Buenoano became entitled to and received life insurance proceeds and veteran's benefits. Had Buenoano chosen to end her marriage by divorce, she would not have been entitled to any of this money. Additionally, Mary Beverly Owens testified that Buenoano advised her not to divorce her husband, but rather told her to take out additional life insurance on his life and then poison him. Further, Buenoano admitted to both Owens and Lodell Morris that she killed Goodyear.

527 So. 2d at 199.

Similarities between this case and Buenoano are immediately apparent. Despite Feinberg's suggestion that any problems Chaky was having with his wife could have been solved by his leaving her, Chaky insisted that she would have to be killed. Although Chaky makes much of the fact that he did not seek to obtain his wife's insurance benefits for himself, this is an observation without much significance. There are a number of scenarios, other than Chaky did not kill his wife for pecuniary gain, that could explain why Chaky never made a claim for these proceeds. For example, the autopsy established that the victim had

been killed, and any claim may have been delayed until the investigation/ prosecution was completed or because Chaky became a suspect in his wife's murder so quickly. This Court should refuse to indulge in such speculation, and should focus on the facts and case law. Upon the death of his wife, Chaky became entitled to insurance proceeds in the amount of $185,000.00. As shown above, entitlement is the key under this Court's cases.

In Byrd v. State, 481 So. 2d 468 (Fla. 1985), Byrd hired another to kill his wife, and then returned to find her body. That same morning, Byrd asked a desk clerk at his motel to contact a life insurance company regarding a policy on his wife; Byrd was the sole beneficiary of a $100,000 policy. Five days later, Byrd took a copy of his wife's death certificate to the insurance company and twice asked how long settlement of the policy would take. This Court affirmed the trial court's finding of pecuniary gain, rejecting Byrd's contention that the murder was committed solely because of a love triangle between himself, his wife, and his girlfriend.

Chaky argues that the fact that the benefits he would have received from his wife's insurance "were not exorbitant," Initial Brief at 22, is somehow proof that he did not kill his wife for pecuniary gain. This is disingenuous speculation. Amount is not the key for

pecuniary gain. After all, this Court upheld pecuniary gain in Byrd based on an amount much smaller than the instant $185,000.00. Further, under Clark, the killing must be motivated by the prospect of pecuniary gain. In Clark, this Court aptly showed that pecuniary gain can encompass much more than amount or lump sum payment:

> the trial court relied on Clark's statement, upon returning to the car after the killing, that "I guess I got the job now," and on the fact that Clark went to the fishing boat the next morning, knowing Carter was not going to show up, and claimed Carter's job. We agree with the court's finding that obtaining Carter's job was Clark's motivation for the murder. While this is not a typical scenario, we also agree that killing for the purpose of obtaining the victim's paying job does constitute commission of a murder for pecuniary gain, and we uphold the trial court's finding that this aggravating circumstance is present in this case. Cf. Craig v. State, 510 So. 2d 857, 868 (Fla. 1987) (finding pecuniary gain where defendant killed victims in order to protect cattle rustling scheme, to gain control of cattle ranch, and to prevent victim from taking defendant's job at the ranch), cert. denied, 484 U.S. 1020 . . . (1988); Parker [v. State], 458 So. 2d [750,] 754 [Fla. 1984)] (finding pecuniary gain where victim murdered so defendant could establish a reputation as a collector of debts to solidify his drug-dealing network) [cert. denied, 470 U.S. 1088 . . . (1985)].

609 So. 2d at 515.

Predictably, Chaky claims that this case most resembles Simmons v. State, 419 So. 2d 316 (Fla. 1982). There, as a result of becoming involved with the victim's wife, Simmons killed the victim by striking him in the head twice with a roofing hatchet. This Court struck the finding that the murder was committed for pecuniary gain:

> [T]he judge pointed to testimony that appellant had offered money to two individuals for their help in murdering the victim. One of these witnesses testified that appellant told him that he, appellant, would receive a new Trans-Am automobile as one of the fruits of the crime. The judge attributed such testimony to another witness as well, but the record does not support such a finding.
>
> There was no testimony or other evidence pertaining to where the money to pay for assistance in the killing was going to come from, nor was there any direct testimony establishing the existence of the Trans-Am automobile or showing how appellant was to come into possession of it as a result of the murder. There was also the intercepted note written by appellant, although not cited by the trial court, telling Betty Hardy to sell the car and trailer or the land, indicating a possible expectation of monetary benefit. There was not, however, sufficient evidence to prove a pecuniary motivation for the murder itself beyond a reasonable doubt. Such proof cannot be supplied by inference from circumstances unless the evidence is inconsistent with any reasonable hypothesis other than the existence of the aggravating circumstance.

419 So. 2d at 318. Thus, this Court reversed strictly on the basis that the record did not support the trial court's factual findings regarding this aggravating circumstance. Here, the explicit testimony of both Feinberg and Thompson fully supports the court's findings.

Were this Court to find error on this point, the state points to the strong, uncontested evidence supporting the remaining aggravating circumstance -- Chaky's commission of a prior violent felony -- and the minimal nonstatutory mitigating circumstances. In its written order, the lower court emphasized the facts of this aggravating circumstance, not only in the section detailing aggravating circumstances but in the mitigating circumstances section as well:

> While a member of the United States military services, and stationed in Viet Nam [sic], Defendant was convicted of attempted murder, in 1971. The victim was a fellow member of the United States military services. He was sentenced to four years[']] confinement, but later reduced on appeal to two years of confinement. A dishonorable discharge was subsequently changed to an honorable discharge.

(R 376).

> Defendant's conviction [for] attempted murder (described in detail as an aggravating circumstance), although committed 20 years before the murder of his wife, is nevertheless significant criminal activity and does not qualify as a mitigating circumstance.

(R 378).

## Issue IV

WHETHER CHAKY'S DEATH SENTENCE IS PROPORTIONATE TO OTHER DEATH SENTENCES UNDER SIMILAR FACTS.

In reviewing a death sentence, this Court "looks to the circumstances revealed in the record in relation to those present in other death penalty cases to determine whether death is appropriate." Watts v. State, 593 So. 2d 198 (Fla. 1992). Chaky's death sentence is proportionate to death sentences affirmed by this Court in cases involving similar facts and a similar balance of aggravating and mitigating circumstances.

In Fotopoulos v. State, 608 So. 2d 784 (Fla. 1992), Fotopoulos arranged to have his wife killed by another so that he could collect $700,000.00 in insurance benefits. Although Fotopoulos's wife survived, Fotopoulos killed two others in furtherance of this plan. Regarding the Ramsey murder, the trial court found three aggravating factors: (1) previous violent felony; (2) committed to avoid arrest; and (3) committed in a cold, calculated, and premeditated manner. As to the Chase murder, the trial court found two additional aggravating factors: (4) committed during a burglary; and (5) committed for pecuniary gain. The trial court found five nonstatutory mitigating factors: (1) good son; (2) good family; (3) hard working; (4) good manners and sense of humor; and (5) master's degree.

In Zeigler v. State, 580 So. 2d 127 (Fla. 1991), Zeigler obtained $500,000.00 of insurance on his wife's life after purchasing two revolvers. Zeigler shot and killed his wife, her parents, and another man. The resentencing court found four factors in aggravation: (1) committed in an especially heinous, atrocious, or cruel manner; (2) committed for pecuniary gain; (3) committed to avoid arrest; and (4) previous capital felony.[6] The court found one statutory mitigating circumstance -- no significant history of prior criminal activity.

In Buenoano v. State, 527 So. 2d 194 (Fla. 1988), Buenoano killed her husband by poisoning his food with arsenic. After his death, Buenoano collected life insurance worth approximately $33,000.00 and $62,000.00 in dependency indemnity compensation from the Veterans' Administration. The trial court found four aggravating circumstances: (1) committed for pecuniary gain; (2) committed in an especially heinous, atrocious, or cruel manner; (3) committed in a cold, calculated, and premeditated manner; and (4) previous violent felony. The court found nothing in mitigation.

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[6] The court stated that it would have found that the murders were committed in a cold, calculated, and premeditated manner but for its belief that application of this factor would violate *ex post facto* prohibitions.

In Byrd v. State, 481 So. 2d 468 (Fla. 1985), Byrd arranged for another to kill his wife. The day he discovered her body, Byrd made contact with the life insurance company that carried a $100,000.00 policy on his wife. Five days after his wife's death, Byrd took his wife's death certificate to the insurance company and twice asked how long it would take to settle the claim. The trial court found three aggravating factors: (1) committed for pecuniary gain; (2) committed in an especially heinous, atrocious, or cruel manner; and (3) committed in a cold, calculated, and premeditated manner. The court found one statutory mitigating circumstance -- no significant history of criminal activity.

In the present case, the testimony of Hermelbracht, Feinberg, Thompson, Hough, and Chaky himself establishes beyond a reasonable doubt that Chaky killed his wife for pecuniary gain: Chaky regularly increased the coverage for his wife; Chaky made mention of insurance proceeds to Feinberg and Thompson for the purpose of paying them for services rendered in disposing of Chaky's wife and her automobile; and Chaky was experiencing some financial difficulties. The court found two factors in aggravation: (1) committed for pecuniary gain; and (2) prior violent felony. In mitigation, the court found two nonstatutory circumstances: (1) contribution to community or society as

evidenced by exemplary work, military, and family record; and (2) remorse, potential for rehabilitation, and good prison record. Because Chaky's death sentence is proportionate to those imposed in similar cases, this Court should affirm it.

Chaky's cursory mention of "domestic killing" is nothing more than a red herring. Initial Brief at 30. The facts in this case simply do not establish "a case of aroused emotions occurring during a domestic dispute." Garron v. State, 528 So. 2d 353, 361 (Fla. 1988). The only evidence of a dispute was Chaky's own self-serving testimony that he and his wife had quarrelled on the day of her death about his being gone for 20 minutes, and the testimony of other witnesses who had witnessed prior disputes about common matters such as housekeeping. Contrast Blakely v. State, 561 So. 2d 560, 561 (Fla. 1990) (Blakely bludgeoned his wife to death with a hammer "as the result of a long-standing domestic dispute" over finances and her treatment of his children from a previous marriage); Garron, 528 So. 2d at 361 (Garron's shooting of his stepdaughter could not have been committed in a cold, calculated, and premeditated manner because the facts evidenced "a passionate, intra-family quarrel, not an organized crime or underworld killing."); Wilson v. State, 493 So. 2d 1019, 1023 (Fla. 1986) (killing of the victim was "the result of a heated, domestic confrontation").

Chaky also focuses on the remoteness and circumstances of his prior conviction, arguing that these aspects render the conviction of little aggravating value. Initial Brief at 30. This Court is well aware that remoteness does not affect the aggravating value of this factor. See Thompson v. State, 553 So. 2d 153, 156 (Fla. 1989), cert. denied, 495 U.S. 940 (1990) (Section 921.141(5)(b), Fla. Stat. (1991), "is silent as to when or where a previous conviction for a violent felony must have taken place."); see also Kelley v. Dugger, 597 So. 2d 262, 264 (Fla. 1992).

Although this Court in Elledge v. State, 346 So. 2d 998, 1001 (Fla. 1977), recognized that the circumstances surrounding a prior conviction are relevant, this Court explained the basis for this examination as resting on a defendant's character: "[T]he purpose for considering aggravating and mitigating circumstances is to engage in a character analysis of the defendant to ascertain whether the ultimate penalty is called for in his or her particular case. Propensity to commit violent crimes surely must be a valid consideration for the jury and the judge." Here, Chaky's propensity to commit violent crimes cannot be disputed, despite the Vietnam setting for the prior conviction. Throwing a fragmentary grenade at a fellow soldier simply to scare him is, under any definition, violent. Chaky himself described the grenade as killing

those within 15 feet of it and wounding those within 30 feet (R 1047).

Chaky would have this Court focus on his "ordinary person" status. Initial Brief at 31. Although Chaky might be classified as ordinary[7] in some aspects, i.e., married-with-children,[8] job-holding, and debt-paying, the murder of his wife in no way was ordinary. Chaky planned her death, enlisted the help of others, and disposed of her body in such a way that it might never have been discovered.

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[7] Chaky cites to the testimony of his penalty phase defense expert Dr. Mhatre's testimony that Chaky was "an average person just like everybody else probably." Initial Brief at 32. This Court should be aware that such testimony was offered in response to a defense question about Chaky's potential for rehabilitation. Although Dr. Mhatre opined that Chaky had the potential to be a good person in the future (R 1035), he recognized that his opinion as to Chaky's future was speculative and could "not be told with one hundred percent accuracy." (R 1040). Dr. Mhatre also admitted that, although he was aware of Chaky's 1971 conviction for attempted murder, he had not spoken with the victim, the officers who testified against Chaky, or the prosecutor (R 1039). Dr. Mhatre also acknowledged his awareness that, in 1971, family members had written letters on Chaky's behalf, claiming that Chaky could be rehabilitated and would not commit other crimes (R 1040).

[8] Via footnote, Chaky asks this Court to consider the effect his execution would have on his daughter. In response, the state simply reminds this Court that both the jury and court heard, weighed, and considered this testimony. Chaky essentially asks this Court to reweigh the evidence, which is outside this Court's province. See Troedel v. State, 462 So. 2d 392, 397 (Fla. 1984) (there was no basis to reverse Troedel's death sentence based on an allegation that Troedel acted under the substantial domination of another, because the only evidence of same was Troedel's own version of events, which the jury and judge apparently chose not to believe).

Further, as shown above, the murder did not occur in the course of a heated domestic dispute.

## CONCLUSION

Based on the above cited legal authorities and arguments, the state respectfully requests this Honorable Court to affirm Chaky's convictions and sentences.

Respectfully submitted,

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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 DAVID A. DAVIS, Assistant Public Defender, Leon County Courthouse, Fourth Floor North, 301 South Monroe Street, Tallahassee, Florida 32301, this 21st day of July, 1994.

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