IN THE SUPREME COURT OF FLORIDA

KENNETH WAYNE CHAKY,

Appellant,

v. CASE NO. 81,325

STATE OF FLORIDA,

Appellee.

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

INITIAL BRIEF OF APPELLANT

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INITIAL BRIEF OF APPELLANT

PRELIMINARY STATEMENT

This is a capital case involving a husband killing his wife. The record on appeal consists of 11 volumes of Record and transcripts. References to them will be by the usual letter "R" followed by the page citation.

STATEMENT OF THE CASE

An Indictment filed in the Circuit Court for Columbia County on December 19, 1991 charged Kenneth Chaky with the first degree murder of his wife and two counts of solicitation (R 1-3). He was tried before Judge Arthur Lawrence and found guilty of the murder and one solicitation (R 238). The jury acquitted him of the second solicitation charge (R 238).

It heard additional evidence at the penalty phase portion of the trial, and returned a death recommendation by a vote of 9-3 (R 269). The court followed that verdict and sentenced the defendant to death. In justifying that punishment, the court found in aggravation:

> 1. That he had been convicted of attempted murder while a soldier in Vietnam.
> 2. That he killed his wife for pecuniary gain (R 373-78).

In mitigation, the court recognized:

> 1. That Chaky was a good worker, having been employed for several years as a computer program analyst at an annual salary of $29,300.
> 2. That he was a good son. He also had good relations with his son and daughter.
> 3. That he has some potential for rehabilitation.
> 4. That he has a good prison record.

(R 376-78).

This appeal follows.

STATEMENT OF THE FACTS

In 1985 the University of Florida hired Kenneth Chaky to work there as a computer analyst (R 700). By October 1991, he had a yearly salary of about $29,000 (R 1056). Patsy, his wife of sixteen years, lived with him and their two children (Natalie, 16, and Hans, 3) in a trailer in a rural part of Columbia County (R 591, 786). Mrs. Chaky owned a house in Gainesville, and sometime during that month she and her husband decided to move there and rent the trailer (R 785, 793-94). During that month they were cleaning up the trailer and moving some things to town (R 793).

While Ken considered his marriage a good one (R 788), the move brought to a head festering problems the couple had. She hated to clean house, and as one neighbor described their trailer, it "looked like the Columbia County landfill." (R 789) She also did not like to cook, preferring instead to eat out, which the family did regularly, several times each week (R 789).

In 1976 Patsy had been in the Army Reserves and had suffered a head injury for which she received a twenty percent disability payment (R 791-92). Medication had been prescribed, but she refused to take it, and Chaky ascribed her subsequent seizures and quick temper to that injury (R 791-92).

When they got into arguments they yelled a lot and Patsy occasionally hit him to which he rarely retaliated (T 790-91). She had also threatened him with a gun and a knife (R 791).

Patsy was 5'4" tall and weighed 165 pounds. Ken was 5'9" tall and weighed 180 pounds (R 790-91).

On October 24, 1991 Ken left work about 4 p.m. and went to the Gainesville house where he left his two children (R 796). Patsy and he then took her white Oldsmobile and returned to the trailer. He made two trips to a dumpster, and was making a third when the car's transmission began acting up (R 798-99). He stopped at Barney Feinberg's auto repair business, opened the hood, and with Charlie Thompson's help, added some transmission fluid to the vehicle (R 799). He waved at Feinberg but said nothing to him, got back in his car, and returned to the trailer (R 799-800).

Patsy was waiting for him, and she was mad (R 800). His explanation apparently did little to mollify her because she went to her car and returned shortly with Chaky's .38 caliber gun (R 801). Ken, who was putting trash in a bag, froze when he saw her with the weapon, trying to cock it (R 802-804). He grabbed for it "pretty hard" while backing up. He tripped over something, pulling his wife (who still had hold of the gun) on top of him. They struggled, he got the pistol, and he hit her on the head with it twice (R 805). She fell to the floor unconscious, and Ken left her there while he locked the gun away (R 805). When he returned five minutes later, Patsy had not moved, so he carried her outside, and she died there (R 806).

Scared, Ken did not know what to do, so for reasons he could not explain, he returned to Feinberg's shop (R 807). He

told the mechanic what had happened, and he told Chaky to put his wife's body in the trunk of the car, and they would "do something." (R 808) After the defendant left, Feinberg told Charlie Thompson that the defendant wanted his car burned for the insurance (R 559).

When Chaky returned, Thompson drove the vehicle while he sat in the back seat. Thompson dropped the defendant at his trailer and drove away (R 809). Ken asked a neighbor to take him to Gainesville, claiming that his wife had left him (R 595, 809-10).

He did not sleep that night, nor did he go to work the next day (R 811). When he told his daughter that her mother had left him, she urged her father to file a report with the police, which he did (R 816).

Meanwhile, Thompson had decided he would simply abandon the car in the woods rather than burn it (R 564). He drove it to his step-brother's house so he could give him a ride home, and while there they opened the trunk and saw Patsy Chaky's body wrapped in a rug (R 566-67). Both men were scared and excited, deciding at one moment to call the police, but changing their minds the next (R 567). They wiped off any fingerprints then agreed to return the vehicle to Feinberg (R 568). When they told the mechanic what was in the trunk he told them he wanted "it" off his property (R 569). The two brothers discussed the matter some more, and finally parked the vehicle near some dumpsters so the police would find it (R 570).

An officer, in fact, did discover the car the next day (R 604). He traced the ownership of the Oldsmobile to Chaky and when the defendant was informed where it was he eventually got it (R 607, 813). He called Feinberg for help, and the latter agreed to help him dispose of the body (R529). Feinberg himself was "pretty shaky" by now and the men finally left Mrs. Chaky's corpse in the woods near the small settlement of Ft. White (R 530). It was found several days later (R 479), badly decomposed (R 501). Murder was suspected when the medical examiner determined that Mrs. Chaky had been killed by two blows to her head (R 507).

The police questioned Feinberg about the murder in November, and he denied knowing anything about it (R 534). Sometime later he gave them some information about getting rid of the car, but he said nothing implicating Chaky (R 535). The next month, December, he testified before the Grand Jury, and again mentioned nothing about the defendant (R 535). A short time later he changed his story, and this time he squarely placed Chaky at the center of a plot to kill his wife.

Feinberg claimed to have known the defendant for several years, although until the summer of 1991, he had not seen him for three years (R 545). In August, he came to Feinberg's shop, and after looking at some tires, told the mechanic that he wanted him to kill his wife (R 516). He did not say why he wanted it done, nor did he say how he wanted it accomplished (R 516).

Chaky returned a few days later and told Feinberg he was going on vacation with his wife and children, and the mechanic could follow them and kill his wife after the defendant and his son and daughter had left their motel room (R 517). Feinberg demurred because he did not have a driver's license (R 517). Chaky approached him a third time, but told him someone "down south" might kill his wife (R 518).

Apparently nothing came of this last plan. On October 25th the defendant had pulled the Oldsmobile into Feinberg's shop, and he and Thompson were adding transmission fluid to it (R 521). Chaky asked the mechanic if everything was OK, and he asked Thompson (whom he had talked to a few days earlier about getting rid of the car (R 519)), who agreed (R 523). The defendant said "he was going to get the package ready," and he would be back (R 523). He returned within the hour with his wife's body in the trunk (R 524), and Thompson and Chaky then left as recounted above.

SUMMARY OF THE ARGUMENT

Chaky presents four issues for this court to consider: two coming from the guilt phase portion of the trial and the two others from the penalty phase.

ISSUE I. During its deliberations, the jury asked that the testimony of one of the state's witnesses, Charlie Thompson, be reread to them. The court agreed, and it read it to them, or rather only a portion of it. After listening to part of the direct testimony, the foreman told the court he had heard enough. The jury then retired to deliberate further. While Rule 3.410 Fla. R. Crim. P. allows them to have portions of trial testimony read, case law dictates that they have all of the testimony given to them. Without rehearing all the direct examination of Mr. Thompson, and none of the cross-examination, the jury may have given undue emphasis to what they did hear.

ISSUE II. Capital cases, with their particularly high concern with procedural regularity, have created a peculiar quirk in jury instructions. When a person has been charged with a first degree murder, Rule 3.390(b) Fla. R. Crim. P. requires that the charge to the jury be in writing and filed. The language of this rule uses the phrases "shall be in writing" and "shall be filed," indicating the court has no discretion in the matter but must do as it requires. In this case, nothing shows the court ever followed the commands of that rule. To the contrary, the jury asked for re-instruction on what constituted first degree murder, clear evidence the

court had failed to follow the mandates of this procedural dictate. Because Chaky's life is at stake, his lawyer's failure to object is no impediment to this court considering this issue.

ISSUE III. In sentencing Chaky to death, the court found that he had killed his wife for pecuniary gain. That is, he killed her so he could collect on the insurance policy he had taken on her life. What the state introduced to prove this aggravator, when considered with the other evidence presented, cannot do so. The policy was for $185,000, a large sum, to be sure, but not a tremendous amount when considered in light of the amounts in other cases this court has considered. Chaky also had two children, one little more than an infant, who would have had claim to the proceeds. Further weakening this aggravator, the defendant had included his wife in the policy the University of Florida offered its employees. He had also made yearly increases only in modest amounts, the last being more than six months before her death. Finally, he never collected the insurance money, and until well into the trial, he did not know that his sister (a co-beneficiary) had done so.

ISSUE IV. As the psychologist who testified in Chaky's behalf said, the defendant was an "average person just like everybody else." If so, he does not deserve a death sentence. When the facts of this case are placed next to those involving murders for insurance money, they reveal that Chaky should spend the rest of his life in prison. The policy on Patsy Chaky's life was not exorbitantly high, nor was it purchased

with murder in mind. Unlike other similar type cases, only one person was killed, and the murder was neither heinous, atrocious, or cruel; or cold, calculated, and premeditated. There was also no evidence of any significant problems with their marriage.

While serving in Vietnam, Chaky had been convicted of trying to kill another soldier, and the court used that fact to aggravate his death sentence. The defendant, however, explained the times, the taut nerves that were stretched even tighter at his base camp, and the death threats he and his team had received from those who should have been his comrades. While sentenced to two years in prison for his crime, he nevertheless received an honorable discharge, a strange act unless what he did was not as serious as the bare face of the conviction would admit.

Since then Chaky has lived a law abiding, productive life. He has had no other criminal record. He was an average person, just like everyone else. He does not deserve to die.

ARGUMENT

ISSUE I

THE COURT ERRED IN NOT REREADING ALL THE TESTIMONY OF CHARLIE THOMPSON, WHICH THE JURY HAD REQUESTED AFTER IT HAD BEGUN DELIBERATIONS ON CHAKY'S GUILT, A VIOLATION OF HIS FIFTH, SIXTH AND FOURTEENTH AMENDMENT RIGHTS.

After the jury had begun deliberating on the question of Chaky's guilt, it asked the court to reread the testimony of one of the state's witnesses, Charlie Thompson (R 988). Defense counsel objected, arguing that the court should require it to rely on its collective memory (R 989, 990). Later, he wished the jury could have been more specific in what they wanted (R 991). The court rejected that complaint and granted the request (R 991). Most of Thompson's direct testimony was read. The jury heard that on the day of the homicide, Chaky came to Feinberg's shop and the witness helped the defendant put some transmission fluid in his car, and afterwards he had a short conversation with Feinberg (R 557-58). He solicited Thompson to burn the defendant's Oldsmobile as part of "an insurance deal." (R 559). Chaky returned that evening and had the witness drive him home. Before the defendant got out of the car, he told Thompson not to take anything out of it, especially the trunk (R 563). Instead of burning the vehicle as he had agreed to do, he drove it to his brother's house. While there the trunk was opened and Thompson's brother apparently saw Patsy Chaky's body (R 567). Excited and frightened, they considered calling the police but rejected

that idea (R 568). Instead, Thompson drove the car to Feinberg's house, and when Feinberg learned what was in the trunk he said "Fine" and told him he wanted the vehicle off his property (R 569). It was decided to leave it at some dumpsters, which is what happened (R 570).

At that point, the jury foreman stopped the rereading of Thompson's testimony:

> THE FOREMAN OF THE JURY: Your Honor, I think we have heard what we wanted.
>
> THE COURT: You are satisfied, you have heard all of Charlie Thompson's testimony, that you need?
>
> THE FORMAN: Yes, sir.

(R 1009)

Thompson gave 20 transcript pages of direct testimony (R 554-574) of which 16 were reread (554-570). The six pages of cross-examination (R 574-580) were not, neither was the 1 1/2 pages of redirect (R 580-81) or the 1/2 page of final recross-examination (R 582). The court erred when it acceded to the jury foreman's request and reread only part of Thompson's testimony. It should have either read none of it as defense counsel requested, or it should have read all of it.

Rule 3.410 Fla. R. Crim. P. provides the starting point for this issue.

> After the jurors have retired to consider their verdict, it they request additional instructions or to have any testimony read to them they shall be conducted into the courtroom by the officer who has them in charge and the court may give them the additional instructions or may order the testimony read to them. The

> instructions shall be given and the testimony read only after notice to the prosecuting attorney and to counsel for the defendant.

Florida law gives a trial court wide latitude in deciding whether or not to have testimony reread to the jury. Kelley v. State, 486 So. 2d 578, 583 (Fla. 1986). The question presented here focuses on if it abused that discretion when it read only a portion of one witness' evidence. Specifically, did the trial court here error when it read only part of Thompson's direct testimony and completely omitted all the cross-examination?

The primary danger of either reinstructing the jury on only part of the law governing the case or reading only part of a witness' testimony is that it may give undue emphasis to it. Trial courts, therefore, must be especially on guard that when they accede to a jury's request for reinstruction or a rereading of trial testimony. They should give complete instructions and the entire testimony of a witness.

For example, if a jury had asked to be retold what the elements of manslaughter were, the trial court must not only have instructed on that crime, it must also have defined excusable and justifiable homicide. Hedges v. State, 172 So. 2d 824 (Fla. 1965). The definition of that crime is incomplete without that additional guidance. Even if the foreman had agreed that what they had heard satisfied the jury, the court would have erred in giving only part of the law. Reynolds v. State, 332 So. 2d 27, 29 (Fla. 1st DCA 1976). As was said in

Reynolds, "We do not believe that judgment should be left entirely to jurors whose doubt of what they had heard prompted the request for repeated instructions in the first instance." Id.

A similar rationale should apply when the jury wants to hear a witness's testimony. Often the truth of what is heard on direct is modified by cross-examination. This is done by either attacking the witness' credibility, filling in the gaps of his testimony, or expanding on it. Such questioning presents a complete and more accurate picture of the evidence given on direct.

For example, in this case, when Chaky cross-examined Thompson, the jury learned that he had at first denied any involvement in Patsy Chaky's death (R 574). He also said that the defendant had acted normally when he saw him on the day of the homicide (R 577-78).

We do not know why the jury wanted only this witness' testimony reread, so it would be speculative to argue that hearing only part of the testimony was harmless. See, Hendrickson v. State, 556 So. 2d 440 (Fla. 4th DCA 1990).

This court should reverse the trial court's judgment and sentence and remand for a new trial.

ISSUE II

THE COURT ERRED IN FAILING TO REDUCE THE JURY INSTRUCTIONS TO WRITING FOR BOTH THE GUILT AND PENALTY PHASE PORTIONS OF THE TRIAL AS REQUIRED BY RULE 3.390(b) FLA. R. CRIM. P..

Rule 3.390(b) Fla. R. Crim. P. controls this issue. It provides, in pertinent part:

> (b) Form of Instructions. Every charge to a jury shall be orally delivered, and charges in capital cases shall, . . . also be in writing. All written charges shall be filed in the cause.

In both the guilt and penalty phases of this case, the court orally instructed the jury, but it never gave them a copy of the instructions to either follow as it read them, or to take with them to the jury room. Rule 3.400 Fla. R. Crim. P. permits them to use that guidance during their deliberations. Nor did it file either set of instructions as required by rule 3.390(b). While they considered their verdict, the jurors asked the court to reread the law on first degree murder, and it did so (R 1009-1017).[1] It made two mistakes: it failed 1) to reduce the oral instructions to writing, and 2) to file them in both portions of Chaky's trial.

Justice Overton, sitting as a member of the Fourth District Court of Appeal, said, regarding the jury's use of written instructions:

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[1]They also wanted the testimony witness Charlie Thompson reread, which was done over defense objection (R 989).

> The sending of written instructions with the jury for use in its deliberations can be a valuable aid in the jury's understanding of the applicable law, particularly in complex situations, and should be used when at all possible and practical.

Matire v. State, 232 So. 2d 209, 211 (Fla. 4th DCA 1970).

The rule's use of "shall" indicates that the trial court must put the instructions in writing and file them. C.f. Tascano v. State, 393 So. 2d 540 (Fla. 1981). Failure to do so, moreover, is reversible error because as this court said in another context: "If this mandatory duty could be circumvented on the basis of the harmless error rule, the effect of the mandatory provision in the rule would be negated." Murray v. State, 403 So. 2d 417 (Fla. 1981).

Except for one problem, Chaky would stop here, lean back in his chair, and wait for this court to grant him a new trial. The difficulty comes from his trial lawyer's failure to object. In McCaskill v. State, 344 So. 2d 1276, 1278 (Fla. 1977) this court held that the defendant had failed to preserve the same error as Chaky now raises because the defense counsel had failed to object. "Appellant's trial counsel neither requested the charges be reduced to writing nor objected to the failure of the trial judge to do so. The failure of the trial judge to comply with Rule of Criminal Procedure 3.390(b) under the circumstances of this cause was not prejudicial error." So, does appellate counsel pack his briefcase and leave court? No.

In McCaskill, the jury never requested the court reinstruct them on the most important instruction-what is first

degree murder. Why 12 members of the community in this case could not collectively remember what the court had said to them just minutes earlier remains uncertain. We know only that they were either so confused or forgetful that they had to be retold what first degree murder was. This, in no way, denigrates any of the jurors' intellectual ability because when the court read them the appropriate guidance it took him more than eight transcript pages to do so. Even lawyers would have gotten lost in the jungle of intertwined verbiage, so we should expect the average citizens who passed judgment on Chaky to be even more unsure of the law. If they had had the written instructions while the court was instructing them and during their deliberations, they could have resolved their uncertainties quicker and with greater reliability. The palest ink, after all, is brighter than the sharpest memory.

The lack of objection becomes even less an impediment when considering the court's failure to file the written penalty phase instructions. When a man's life is at stake, "little things mean a lot." Appellate courts, including this court and the United States Supreme Court have insisted sentencers follow a "super" due process in capital sentencing. This is done to ensure that only those most deserving of death are separated from other defendants who may have committed a murder but who nevertheless deserve punishment less severe. See, e.g. Van Royal v. State, 497 So. 2d 625 (Fla. 1986). Thus, legitimate rules, which in other contexts, would prevent this court from considering an issue, must give way to the greater concern of

just sentencing. Here, the failure of Chaky's lawyer to request the jury instructions in the penalty and guilt phases of the defendant's trial does not prevent this court from reviewing this issue.

This court should reverse the trial court's judgment and sentence and remand for a new trial.

ISSUE III

THE COURT IN FINDING CHAKY COMMITTED THE MURDER FOR PECUNIARY GAIN.

The court found that Chaky killed his wife to collect the money from an insurance policy he had on himself, his wife, and children. Supporting its conclusion that he murdered her for pecuniary gain, it said:

> 2. The Court concludes beyond a reasonable doubt that the Defendant murdered his wife for financial gain. Although he never expressly admitted same,the many circumstances surrounding the murder conclusively support this finding. Defendant was the beneficiary of a large insurance policy on his wife's life, and he was responsible for increasing the limits of it almost everytime that he was permitted to do so. The Defendant was experiencing some financial difficulties, but nothing of an extraordinary nature. While their marriage was not a perfect one, there was no significant evidence of any disharmony that could reasonably lead to the conclusion that this murder occurred as the result of a history of domestic violence. The jury as well as this Court rejected the Defendant's claim of self-defense.

(R 376)

The trial judge erred in finding that Chaky killed his wife to collect the insurance proceeds.

This court has said that the pecuniary gain aggravating factor applies when the murder was necessary to obtain some specific gain. Hardwick v. State, 521 So. 2d 701 (Fla. 1988). The link between the killing and the financial benefit must be direct and certain, as for example, it usually is in the typical robbery-murder. E.g. Lawrence v. State, 614 So. 2d 1092 (Fla. 1993). Of course, circumstantial evidence can

establish this factor, but as with other issues involving this type of proof, such evidence must exclude all reasonable hypotheses of innocence. Simmons v. State, 419 So. 2d 316 (Fla. 1982). Several cases show how the state has done this.

In Zeigler v. State, 580 So. 2d 127 (Fla. 1991) the defendant had concocted an elaborate scheme to make the murder of his wife appear as occurring during the robbery of his store. Zeigler had purchased a $500,000 insurance policy on her life, though he had only a $250,000 one on himself. He claimed this amount was for estate planning purposes, but it was far more than prudently necessary. More telling, he never informed his estate planning advisor about the policy though he had had many opportunities to do so. Such evidence proved that he killed his wife to collect the half million dollars.

In Byrd v. State, 481 So. 2d 468 (Fla. 1985), the defendant strangled and beat his wife. Shortly after killing her, he asked the desk clerk at the motel he managed to check with his life insurance company about the $100,000 policy he had bought on her life. Five days later he took the death certificate to the company and asked them when he could get the insurance money. Byrd killed his wife for pecuniary gain.

Men are not the only ones with greed in their hearts. In Buenoano v. State, 527 So. 2d 194 (Fla. 1988), Judy Buenoano had developed a cottage industry of murdering her husbands for insurance. In 1971, she killed her first husband to get the money that would have been denied her if she had divorced him. Amazed at her success, she suggested to a friend that she do

the same. The defendant then married and murdered her second husband and got the insurance from the policy she had taken out on him. At the time of her arrest for this homicide, she had married a third time, and had insured this latest spouse for $500,000 and was a 50% beneficiary under his will. In Buenoano, the link between the death and the insurance proceeds was direct and certain.

Finally, in Simmons v. State, 419 So. 2d 316 (Fla. 1982) the state presented insufficient evidence the defendant killed his girlfriend's husband for pecuniary gain. Although he offered to pay two people to help in the murder, he never said where the funds would come from. One witness said Simmons offered a car in payment, but he could not testify if the defendant had gotten the vehicle as a result of the victim's death. Even when the state intercepted a note from the defendant to his girlfriend telling her to sell the car and trailer or land, that evidence proved insufficient to establish the defendant's avarice as his motive for the murder.

In Chaky's case, the state had even less proof that he killed his wife for some financial reason than it had in Simmons and certainly in Zeigler, Byrd, and Buenoano. The $185,000 insurance was obtained as a matter of course through Chaky's work. That is, as many employers do, the University of Florida (where Chaky worked) offered an insurance policy for its employees (R 698). Additionally, it insured his wife for half the amount it had on him, and it provided a much lower coverage for his children (R 695). During the six years he

worked there, he increased the insurance on himself and his wife almost every year in March (R 701). Periodically increasing ones' insurance coverage was normal for employees to do (R 698), and when he increased it, it was for only $20,000 (R 701).[2] The last increase was in March 1991, more than six months before he killed her (R 699).

Chaky had two children, 3 and 15, so if his wife had died the $185,000 would have to be used for day-care and other expenses that the death would have created. Unlike the policies in Zeigler and Buenoano, the benefits that he would have received were not exorbitant. Moreover, he would have collected nothing if convicted of murdering her (R 703).

More telling that the defendant had some other motive than greed in mind when he killed his wife is that he never, contrary to the defendant in Byrd, tried to collect on the policies (R 704-705, 818).[3] Instead, he gave his permission for his sister to receive the proceeds because she was the guardian of his children (R 818). Until his trial he did not know if she had gotten any of the insurance benefits (R 818) .

As might be expected, the defendant denied killing Patsy Chaky so he could collect the insurance, and that has a true ring (R 818). Why would he murder her for the money and then

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[2]He made no increases in 1987 or 1990 (R 701).

[3]His sister, Rebecca, was the contingent beneficiary of the policies (R 705).

claim she was a missing person? (R 614) No insurance company would pay a beneficiary a large sum just because the insured person had disappeared. Chaky would have had to have waited years to collect.

Moreover, he had no need for the money. The court, relying solely on the single, uncorroborated statement of Patsy's cousin (R 721) found that the defendant was experiencing some financial difficulties (R 376). The defendant denied that (R 1045), and the court's finding was belied by the couple's plan to rent, rather than sell, their trailer after they had moved to Gainesville (R 793-94).

If, for obvious reasons, Kenneth Chaky is no Judy Buenoano, he is likewise not in the same league as William Zeigler or Milford Byrd. This case most closely resembles Simmons, but even there, the facts of this case strongly suggest, and perhaps even compel, the conclusion that for whatever reason this defendant killed his wife, it was not for money. 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. This court should, therefore, reverse the trial court's sentence of death and remand for a new sentencing hearing before a jury. Chaky should get a new sentencing hearing because the court, over his objection (R 1086) instructed the jury on the pecuniary gain

aggravating factor, and it could well have concluded he committed the murder to satiate his greed.

ISSUE IV

UNDER A PROPORTIONALITY REVIEW, CHAKY DOES NOT DESERVE A DEATH SENTENCE.

When this court reviews death sentences, it compares the case at hand with others involving similar facts.

> Because death is a unique punishment, it is necessary in each case to engage in a thoughtful, deliberate proportionality review to consider the totality of circumstances in a case, and to compare it with other capital cases. It is not a comparison between the number of aggravating and mitigating circumstances.

Porter v. State, 564 So. 2d 1060 (Fla. 1990). Later, in Kramer v. State, 619 So. 2d 274, 277 (Fla. 1993) the court expanded on the quality of proportionality review it conducts:

> While the existence and number of aggravating or mitigating factors do not in themselves prohibit or require a finding that death is nonproportional. . . we nevertheless are required to weigh the nature and quality of those factors as compared with other similar reported death appeals.

Defendants who commit similar crimes should receive similar punishment. Uniformity thus drives this unusual form of appellate scrutiny. Tilman v. State, 591 So. 2d 167, 169 (Fla. 1991). In this instance, the relevant cases involve defendants who have murdered their spouses for insurance money. Zeigler v. State, 580 So. 2d 127 (Fla. 1991); Buenoano v. State, 527 So. 2d 194 (Fla. 1988); Fotopoulos v. State, 608 So. 2d 784 (Fla. 1992); Byrd v. State, 481 So. 2d 468 (Fla. 1985).

In Zeigler, the defendant summarily shot his wife in the back of the head and killed three other innocent people as part

of his plan to collect on the $500,000 policy he had recently taken on her life. The large amount was far more than this businessman should have bought, and this court rejected, as did the trial court, his claim that he had purchased such an extravagant amount for estate planning purposes. Zeigler never told his financial advisor of this policy though he had had many opportunities to do so.

In sentencing the defendant to death, the trial court found that he had committed the murder of one of the other victims in an especially heinous, atrocious, or cruel manner. It should have also recognized that Zeigler murdered his wife with a cold, calculated, and premeditated intent.

In Buenoano, an enterprising wife poisoned one husband and one common law husband for the veteran's benefits of one husband and insurance proceeds on both. When arrested for the 1971 murder of her first husband, she was living with her intended third victim. Buenoano was the beneficiary of his $500,000 life insurance policy and had a 50% interest in his will. Among the aggravating factors justifying her death sentence, the court found that the murder of her husband was especially heinous, atrocious, or cruel, and cold, calculated, and premeditated.

In Fotopoulos, the defendant, videotaped one Diedre Hunt murdering a Kevin Ramsey. He then used that evidence to coerce Hunt to kill his wife so he could collect $700,000 in insurance proceeds. Instead of doing the job herself, Hunt hired Bryan Chase. He botched the job several times, but finally managed

to wound the victim-spouse. Fotopoulos, trying to make that assault appear as occurring during a burglary, shot Chase several times. As to both murders, the court found, among other aggravating factors, that the defendant had committed them in a cold, calculated, and premeditated manner.

Finally, in Byrd, Byrd beat his wife on the head, shot her four times (non fatally), and finally strangled her to death. Within a day of reporting her death, the defendant made inquiries about the insurance policy on his wife. He also sought to expedite the settlement by taking the death certificate to the insurance company. When arrested two weeks after the murder, Byrd was in a motel room with his girlfriend. He claimed he had killed his wife because she would not give him a divorce. In sentencing him to death, the trial court found three aggravating factors, two of which were that he had committed the murder in an especially heinous, atrocious, or cruel manner, and it was cold, calculated, and premeditated.

Several significant points link these four cases beyond the fact that insurance money was involved:

1. In three cases, at least half million dollar insurance policies were involved Zeigler ($500,000), and Fotopoulos ($700,000), Buenoano.

2. In Zeigler and Buenoano, the policies were bought specifically with murder in mind. In Byrd the defendant actively sought to collect the proceeds within days and more likely hours of his wife's murder.

3. Interestingly, the defendants in two cases killed others besides their spouses. Zeigler, Fotopoulous, In Buenoano, the defendant killed two of her husbands and when arrested was trying to murder a third.

4. In every case, the trial court justified imposing death sentences in part because the murders were cold, calculated and premeditated.

5. In three of the cases, the especially heinous atrocious, or cruel aggravator applied, if not to the spouse, then to one of the other murder victims. Byrd, Zeigler (co-victim), Buenoano.

6. In these cases, unlike other spouse murder cases, there was no evidence of any marital problems between the defendant and his or her victim spouse that sparked the homicide. See, e.g. Garron v. State, 528 So. 2d 353, 361 (Fla. 1988) (Wife's murder occurred during a "heated domestic confrontation.")

How does Chaky compare with Zeigler, Buenoano, Fotopoulous, and Byrd? Very well.

1. The $185,000 was far less than the amounts in Zeigler and Fotopoulous.

2. There is no evidence the defendant here bought an insurance specifically for his wife immediately before he killed her. To the contrary, her coverage was part of the policy he bought as an employee at the University of Florida (R 698). It also contained benefits in case his children died (R 698). He had originally bought it when he started working for

the University of Florida six years before the murder (R 700). He also regularly increased it in modest amounts. His last change had been more than six months before her death (R 701). Chaky also never, before he was arrested or after, tried to collect the insurance. Instead, he signed his interest in the money to his sister so she could use it to benefit his children (R 818). As he said, until the trial, he was unaware if she had gotten it (R 818).

3. The defendant killed only one person, his wife.

4. The court did not find the murder to have been cold, calculated, and premeditated.

5. It also did not find it to have been especially heinous, atrocious, or cruel.

6. Patsy Chaky's death was prompted by her assault on Kenneth. Although he thought he had a good marriage, it had some dangerous rough spots. There is no evidence he ever beat her. On the other hand after her 1976 accident in the military she was a changed person. At times she had a violent temper and had accosted him with knives and guns (R 791). His daughter testified that her mother was violent at times while her father was not and that on one occasion she took a gun away from her (R 1079).

Thus, this defendant lacks the vicious, remorseless determination to kill his spouse and anyone else that got in his way to satiate his greed that Zeigler, Fotopoulous, Buenoano, and Byrd amply demonstrated.

Of course, Chaky has a prior conviction for attempted murder, and this court has tended to affirm death sentences in domestic killings when the defendant had a conviction for a violent felony. Hudson v. State, 538 So. 2d 829 (Fla. 1989); Lemon v. State, 456 So. 2d 885 (Fla. 1984); Williams v. State, 437 So. 2d 133 (Fla. 1983). But, the facts underlying this defendant's crime and those in the cases just cited are so disparate as to render his attempted murder of little aggravating value.

Chaky's prior felony occurred more than twenty years earlier when he was an infantryman in Vietnam. He had volunteered to fight as part of a sniper team, and after completing missions he and the rest of his unit would return to the relative safety of a base camp to rest (R 1047-48). This was 1971, however, and the United States Army in Vietnam was collapsing. In particular some men at Chaky's firebase refused to fight. Several soldiers, who had stayed in the rear, threatened to kill a cook because he had testified against them (R 1048). To protect him until he was moved out, Chaky and his team were assigned to guard the man. They in turn were singled out. At one point, the danger became so acute that they retreated to their billets and took up a defensive position (R 1048).

One evening during this tense rest period, the defendant escorted a man about the compound. He saw one of the men who had breathed out the threats and was afraid for his life. Chaky, lightly armed with only a .45 pistol and two fragmentary

grenades, threw one of them to scare the soldier (R 1048). For that he pled guilty to attempted murder and served two years in prison. Very significantly, he did not receive a dishonorable or even a general discharge. Instead, after his case was reviewed, he was honorably released from military service (R 1052-53). Since returning from Vietnam, Chaky has lived a law abiding life. Even while he sat in the local jail waiting trial, he had no problems and created none (R 1036).

In contrast, in the cases cited above, the defendants had recently committed their violent crimes, had just been released from prison, or were on some form of legal restriction when they murdered. Two of them had directed their aggression to women. One can only conclude that but for the restraint of iron bars, these defendants would brutalize anyone(and particularly women) who got in their way. They created terror where ever they went. Chaky, on the other hand, reacted unwisely to the tensions he faced in a land and time where life was cheap and the means of its extinction readily available. When he left that unhappy country his violent tendencies stayed there. When Hudson, Lemon, and Williams left prison they brought mayhem with them.

Chaky for most of his adult life has been a contributing member of society. For the last six years he held an important position as a computer analyst at the University of Florida. He had accumulated the usual debts and problems of middle class life. In fact, little distinguished him from the millions of Americans who work hard, pay their taxes, and raise good

children. As the psychologist who examined him said, "he is an average person just like everybody else probably." (R 1034) While Chaky must pay for the death of his wife, the price should not be his life. This court should reverse the trial court's sentence and remand with directions that the trial court sentence him to life in prison without the possibility of parole for twenty-five years.[4]

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[4]This court should also consider, in light of Payne v. Tennessee, ___ U.S. ___, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991), the effect Chaky's execution will have on the defendant's 16 year old daughter, Natalie. She is already a victim, yet at the defendant's trial she provided compelling mitigating evidence for her father. She said they were "very close." (R 1078) She and her mother, on the other hand, were not so (R 1079). She had also witnessed her mother's violent aggression against Chaky (R 1080). With such strong support for him so evident, this court should long consider what executing this girl's father will do to her before it affirms his death sentence.

CONCLUSION

Based on the arguments presented here, Kenneth Chaky asks this honorable court for the following relief: 1) Reverse the trial court's judgment and sentence and remand for a new trial. 2) Reverse the trial court's sentence and remand for new sentencing hearing before a jury. Or, 3) Reverse the trial court's sentence and remand with instructions that it sentence the defendant to life in prison without the possibility of parole for twenty-five years.

Respectfully submitted,

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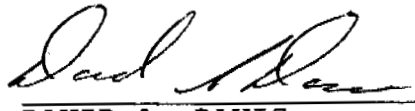

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Richard B. Martell, Assistant Attorney General, by delivery to The Capitol, Plaza Level, Tallahassee, Florida, and a copy has been mailed to appellant, KENNETH WAYNE CHAKY, #543523, Union Correctional Institution, Post Office Box 221, Raiford, Florida 32083, on this 6th day of May, 1994.

DAVID A. DAVIS