IN THE SUPREME COURT OF FLORIDA

WILLIAM GREGORY THOMAS,

Appellant,

v. CASE NO. 84,256

STATE OF FLORIDA,

Appellee.

_____/

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

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE

The State has no significant disagreement with the factual correctness of matters stated in Thomas' statement of the case. The State would note, however, that Thomas' statement of the case includes matters that are irrelevant to this appeal. For example, there is no issue in this appeal of Thomas' mental health. Thomas was evaluated both prior to this trial and prior to his guilty plea to the charge of murdering his mother and was found to be competent in both instances (R 53-56, TR 1588-91). Thomas' trial attorney conceded that he had "no reason to dispute Dr. Miller's report" (TR 1590-91). The trial court agreed (TR 1590).

Nor is any issue of similar-fact evidence raised on this appeal. In fact, it should be noted that although Thomas' trial attorney did file a motion for new trial, he announced to the trial court that he could not "in good faith tell the Court that there is some error that needs to be corrected by a new trial at this time" (TR 1471).

As for the companion case, on July 14, 1994, Thomas pleaded guilty to the charge of the first-degree murder of his mother (TR 1579-80). In exchange for a recommendation of life imprisonment from the State in the companion case, Thomas agreed to waive his right to appeal any guilt-phase issue arising out of this case, in which he has been convicted of the murder of his wife and sentenced

to death (TR 1580-81, 1583-84). Thomas did, however, reserve the right to appeal any sentencing issues arising out of the wife-murder case (TR 1581).

The only guilt-phase issue raised on this appeal is the sufficiency of the evidence. In capital cases, this Court reviews the sufficiency of the evidence whether or not the issue is raised on appeal. Tibbs v. State, 397 So.2d 1120, 1126 (Fla. 1981), Stano v. State, 473 So.2d 1282, 1288 (Fla. 1985).. Therefore, whether or not Thomas has violated the terms of the companion-case plea agreement by raising one guilt-phase issue of evidentiary sufficiency on this appeal, and any question of just how the terms of the companion-case plea agreement might be enforced (either in the companion case or in this case), are matters that need not be addressed in this appeal.

STATEMENT OF THE FACTS

The State rejects Thomas' statement of facts as inadequate to describe the totality of the evidence supporting the conviction. The State offers the following complete statement of the facts.

The victim, Rachel Thomas, disappeared on September 12, 1991. She had been married to the defendant, but the couple had been separated since January of 1991, and she had filed for divorce (TR 1501). Rachel had custody of the couple's son Bennie (TR 1501). Sometime in July, 1991, Rachel and Bennie moved to an apartment on

Great Pines Court. They shared expenses with a roommate, Arlean Colocar, who was dating the victim's brother (TR 575, 577). Rachel bought furniture on layaway, which she planned to furnish the apartment with. At the time of her disappearance, the victim had not obtained possession of her furniture (TR 579).

The defendant, meanwhile, was working at a Publix warehouse (TR 567-68). In August of 1991, he talked to co-worker Johnny Brewer about his pending divorce. Thomas told Brewer that the court had ordered him to "pay some money to Rachel" and he did not have it. Since he wanted to see his son and he did not have the money to pay the divorce settlement, "he had to see that Rachel disappeared" (TR 569). Thomas talked to Brewer again early in September of 1991, at Brewer's home. Once again, Thomas complained that he did not have the money to pay Rachel for the divorce. Brewer had a beach ball in his hand. Thomas kicked the ball out of Brewer's hand and said, "that could be Rachel's head" (TR 571-72).

Thomas also talked to Joseph Stewart, another of his co-workers at the Publix warehouse, about his marital problems (TR 939-40). Thomas blamed his pending divorce on an affair Rachel was involved in, and Thomas was angry because Rachel was seeking custody of their son (TR 940). Thomas stated that he "would prevent that by any means in his power" (TR 943). Thomas also claimed that he was adopted and that Mario Andretti was his uncle.

He bragged that there was another side to his Andretti family, and that his uncle Leo was a leader of a criminal organization (TR 941-42).

Thomas met Jennifer Howe at his son's second birthday party in February of 1990. At the time, Howe was 17 years old. Thomas began calling her, first at work, then at home. This "friendship" evolved into an intimate relationship by May of 1990. (TR 774-82). Thomas even proposed to Howe in June of 1990, telling her that he planned to get a divorce (TR 782). In the next month or two, however, the relationship began to fizzle, and they saw little of each other for several months (TR 783-84). In February of 1991, Thomas again called her, complaining of "rough times" now that he and his wife were separated. Howe "got back involved with him hoping to make things better" (TR 784).

Thomas told Howe that he was adopted and that his real mother was Mario Andretti's sister (TR 786). Sometime after February 1991, Thomas began talking about a "darker" side to his biological family, claiming a Mafia connection. Although skeptical at first, Howe began to believe him, because he seemed to know her every move (TR 786-88). In August of 1991, Thomas asked Howe to meet him at a mall. Thomas left his truck at the mall, and they drove off in her car. Thomas was carrying some mail (TR 789). He directed her to Rachel's apartment. Thomas told Howe that she was going to take

the mail to Rachel's door and pretend that she lived in the area and that Rachel's mail had been delivered to Howe by mistake (TR 790). Thomas claimed that he had some papers that he wanted Rachel to sign, but that if Rachel did not cooperate, the "family" would take care of the situation, by whatever means were necessary (TR 791-92).

When they arrived at Rachel's apartment, Rachel was not at home. Thomas calmed down, turning "into a total different person" (TR 792). They drove to a telephone. Thomas made a call, reporting that the "family" had told him that Rachel was at the gym. Thomas told Howe that if she would cooperate in another attempt, Howe would be "financially set through the family" (TR 793). Howe used the excuse of defective headlights and approaching darkness to avoid another attempt that evening, however (TR 794). Thomas called later about another attempt, but Howe refused to participate (TR 795-96).

On September 16, 1991, Howe learned that Rachel had disappeared. She was afraid to tell the police what she knew until they were able to convince her that they really were the police and that Thomas had no Mafia family (TR 797-98, 808-09). She then agreed to be "wired up with a recording device" to talk to the defendant, but her parents persuaded her to change her mind (TR 798).

Thomas also told his Mafia/Andretti story to Douglas Schraud, another co-worker at the Publix warehouse (TR 818). Thomas claimed to be proficient at various martial arts techniques (TR 819). Schraud empathized with the defendant's marital difficulties, as Schraud was experiencing some of his own (TR 820). Thomas claimed he was getting a "raw deal" because Rachel sought full custody of their son and wanted some of the equity in their house (TR 821). He was not going to give in, however. He claimed to have had some "paperwork" drawn up to release custody of their child to him and also to retain complete control and ownership of their house (TR 821). If she refused to sign, he would take her to his uncle and they "were going to kill her and feed her to the sharks" (TR 822). Schraud believed in the defendant's "so-called Mafia connection" because Thomas "was very believable" (TR 823).

Thomas asked Schraud to accompany him to Rachel's house because she had a boyfriend and Thomas needed Schraud to "watch his back for him" (TR 823). The first time the pair went to Rachel's house, Thomas went to pick up his son. Rachel answered the knock on the door, but refused to open the door all the way. Thomas conversed briefly with her, then dropped off a box containing some of her belongings and took custody of Bennie (TR 824). As they drove off, Schraud observed that Rachel retrieved the box from the doorstep where Thomas had left it (TR 825).

Thomas told Schraud that he would get her to sign his papers the same way (TR 825). On Wednesday, September 11, Thomas told Schraud that "tomorrow will probably be a good day" (TR 827). As before, Schraud would accompany Thomas in case her boyfriend was there. If he was, they would put off their plan to another day. If not, then Thomas would ask her to sign the papers; if she refused, they would take her to his mafia uncle's house (TR 825-27).

Thomas called Rachel the next afternoon (September 12) to make sure she would be at home, and then told Schraud that "today would be the day" (TR 828-29). After work, they met at Thomas' house. Schraud left his car parked in Thomas' driveway, on the left-hand side (TR 830-31). Schraud described his car as an old 1964 Ford Falcon in rough condition (TR 830). Thomas was wearing tennis shoes (TR 832). They left before dark, and proceeded to Rachel's house in Thomas' truck (TR 832-34).

Thomas parked his truck in Rachel's driveway. Carrying the "paperwork" and a box containing children's clothes and several rolls of duct tape, he went to the victim's front door (TR 835). They conversed briefly, and then Thomas forced the door open and "jumped ... on top of her" (TR 835-36). As they struggled, Thomas ordered Schraud to hand him a roll of duct tape. With Schraud's assistance, Thomas taped her legs together (TR 836-37). Rachel

"was hollering" at Thomas, telling him she should never have trusted him and that she knew he would do something like this to her (TR 837). After Thomas got her legs taped together, "she was trying to get up and he was elbowing her in the back of the head and forcing her back down to the ground and that busted her face on the floor of the hallway" (TR 837). At this point, the victim, bleeding from the face, "lost her will to fight," being perhaps "semi-unconscious," and Thomas "proceeded to tape up her arms" behind her back (TR 838). She lifted her head, still trying to get up, and Thomas pulled some tape "around her mouth and then taped it around her head about three or four times" (TR 838).

Schraud and Thomas walked outside. Schraud asked for the keys to the truck so he could leave. Thomas gave him the key to the truck and searched in his pocket for the extra key to the victim's car that he had brought with him (TR 839). The key was missing. Thomas ran back into the house to look for it and found it underneath the victim (TR 839-40). Thomas went to the garage. Schraud was about to leave, but Thomas told him not to, because the garage door would not stay open. Before Schraud could help him with the door, however, Rachel "come hopping out of the house," managing to get to the front yard before Thomas ran to her, knocked her down, and dragged her by her hair back inside her house (TR 840).

Schraud walked to the garage door and held it open. Thomas used his key to start the victim's car and back it into the garage. He gave Schraud the key and told him to open the trunk. Schraud propped the garage door open with a broom, and did as he was told (TR 841-42). Meanwhile, Thomas went back inside, picked Rachel up and carried her to her car (TR 842). She was still alive, and she looked at Schraud with a "very, very terrified" look in her eyes. Thomas put her into the trunk of her car. He told Schraud he would meet him back at the house, and to close the garage door. Schraud "kicked the broom out from under" the garage door to close it and left (TR 843).

Schraud drove the truck to Thomas' house, stopping along the way to buy beer and cigarettes because he was a "nervous wreck" (TR 844). Forty-five minutes after leaving Rachel's house, Schraud arrived at Thomas' house. Thomas was already there (TR 845). He met Schraud before the latter could even "cut the truck off," and told Schraud that if Schraud told anybody what had happened, Thomas would do the same thing to him, and if he was unable to it, "his uncles could" (TR 852). Rachel's gray Honda was at Thomas' house, parked behind a small white car (TR 852-53). According to Thomas, Rachel was still in the trunk (TR 852). Schraud got in his car and left (TR 853).

Christina Eagerton Thomas, the defendant's wife at the time of

the trial, testified that she met Thomas on a blind date in the spring of 1991 (TR 890-91). They began dating, and eventually became sexually intimate (TR 891). Thomas told her that he was adopted; that biologically he was related to Mario Andretti, and that he had an uncle Leo who was the head of a Mafia ring (TR 892). Christina did not believe him at first, but changed her mind when he began telling her where she had been and what she had done during the day while she was at work, which he claimed to know as the result of his family following her (TR 892-93).

Thomas told her he knew that Rachel was plotting to have him killed, because his Mafia family had his house bugged and were following her (TR 893-94). However, the family would kill Rachel before she had a chance to kill him (TR 894).

On September 12, 1991, Christina went to work as usual. She left work at 5:30 p.m. and arrived at the defendant's house five minutes later (TR 896). As usual for a Thursday, their plans were to go to the defendant's parents house to eat dinner (TR 896-97). When she pulled into the driveway, there was a "strange" car already in the driveway (TR 897). Christina described this car as "old and junky" (TR 900-901). She parked next to it and went into the house. Thomas was not at home. Fifteen minutes later, he came in, through the garage door (TR 897-98). He was "real hyper" and was "wet as if he has been sweating" (TR 898). He was wearing

tennis shoes (TR 900). He told her that he had met with the family and that the family had taken Rachel. He demanded Christina's car keys, saying he needed to move her car (TR 898). He went outside. Christina heard a noise in the garage area that sounded like a car was coming in (TR 901). This was significant to Christina because the garage 'was always real cluttered and it . . . was like an obstacle course just to get out just walking through there" (TR 902). Thomas came back inside and changed his clothes (TR 899). Then his father called and asked him what time they were coming over for dinner. When Thomas got off the telephone, he told Christina that she needed to meet him at the Publix at Roosevelt Mall (TR 899-900). She and Bennie started to leave by the door to the garage. Thomas stopped her and told her that she needed to leave by the front door, because he had parked her car in the street (TR 900). When she went outside, the "old junkie" car that had been parked on the left-hand side of the driveway was gone and the garage door was closed (TR 900-901).

Christina and Bennie drove to the Roosevelt Mall as directed and waited almost an hour. Thomas failed to show, so Christina drove to a public telephone to call home. She got the answering machine. She went back to the Publix and waited a while longer. Finally, Thomas showed up, driving the victim's gray Honda (TR 903). Thomas got out and wiped down Rachel's Honda with a towel

(TR 904). Leaving Rachel's car at the mall, they proceeded in the defendant's vehicle to his parents' house for dinner. Thomas told Christina that he had met with the "family" and that the "family had taken Rachel from her house" (TR 904). This was the day, Thomas said, that Rachel had planned to have him killed. When he got to her house, "two guys" were waiting for him at the door, and they "jumped him." Thomas bragged that he had done his "Kung Foo and he broke one of the guy's neck and he killed the other guy." The family jumped out from the bushes and took Rachel from the house to "kill her since she had plotted to kill him" (TR 905-06).

Just before they got to his parents' house, Thomas rolled a window down and threw a key out, stating, 'well I bet they will never find this" (TR 906).

At his parent's house, Thomas "got sick at the table" and had to leave for a minute. They left sometime between 8:30 and 9:00 p.m., went to her brother's house to get her clothes, and returned to the defendant's house shortly before 10 p.m. (TR 907-08).

Cynthia Halstead had worked with Rachel Thomas for two years. She had met the defendant once and had talked to him numerous times on the telephone, when he would call Rachel at work (TR 547-48). Halstead had lunch with Rachel on September 12, 1991. Sometime before 3 p.m. that afternoon, Thomas called and asked to speak to Rachel (TR 549). Rachel agreed to take the call. Halstead

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

Wendy Robinson testified that she was close friends with Rachel. They got together every Thursday. On Thursday, September 12, 1991, Rachel called her sometime before 2 p.m., angry and upset, because she was supposed to meet the defendant between 5 and 5:30 p.m. He supposedly was going to drop off some important papers (TR 556-58). Robinson got a second call from Rachel between 5 and 5:30 that afternoon. Rachel was still angry; the defendant had not shown up at her house. They went ahead with their plans for the evening, however. Rachel told Robinson that she would go to the gym and work out, come home, and then call Robinson between 9 and 9:30 to tell her when she would come by (TR 558-59). Rachel, however, never called again (TR 560). At 10 p.m., Robinson got a call from Rachel's roommate. Robinson went immediately to Rachel's house. When she entered, she noticed that the foyer was dirty and showed signs of a struggle; there were scuff marks on the wall, the air conditioning vent was dented, and some boxes and Rachel's shoes

were strewn around the floor (TR 560-61). The rest of the house was clean (TR 561).

Rachel's roommate, Arlean Colocar, testified that when they had moved into the apartment, it was neat, clean and freshly painted (TR 576). They kept the apartment "immaculate" (TR 580). They alternated the garage privileges weekly; the week that Rachel disappeared was Colocar's week to have the use of the garage. Before Rachel disappeared, the garage door worked (TR 581). The morning of September 12, 1991, they both exited the apartment at the same time. Rachel had Bennie ready to take to her mother's house. She backed out of the driveway and left. Colocar locked the door into the house from the garage, closed the garage door with her remote, and left for work (TR 585-86).

Colocar returned at 8 p.m. The garage door was ‘wide open and the lights were on" (TR 587). Rachel's car was nowhere around. Colocar pulled into the garage. When she entered the house, she discovered that the door into the house from the garage was unlocked. Then she noticed that "there was black dirt all over the tile in the foyer," that there ‘were scuff marks on the wall," and that there were infant clothes near the door (TR 588) . As she walked into the house and down the foyer, she stepped on Rachel's earring backs (TR 589). No one else was at home. Colocar began calling Rachel's friends and family. No one knew where she was, so

Colocar called the police (TR 592-94). A police officer arrived and looked around. At some point, he called the defendant (TR 594).

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

Arlean Colocar spent the night with her parents. The next morning, she and Rachel's sister Berna Crews went to the victim's home (TR 595, 747). They checked the house again. Rachel's closets were "all in order;" none of her clothes were missing. Hex dresser drawers appeared untouched; her makeup and her toothbrush "and everything else was in order" (TR 596). Her purse, her gym bag and her car keys lay together in the bedroom (TR 597). In the gym bag were Rachel's tennis shoes and workout clothes (TR 597). In the purse were Rachel's driver's license, her work identification card, a photograph of Bennie, and an A.T.M. slip with a $20 bill attached (TR 748). The date and time on the

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

Colocar testified that some quilts were missing from the garage, and that a beach chair that had been in the trunk of Rachel's car was now lying against the wall of the garage (TR 599). She also discovered a bracelet clasp and hair on the floor of the foyer, and bloodstains on the baseboard and the vent (TR 600, 604). Rachel had never stayed out all night before (TR 610). Colocar has neither seen nor heard from Rachel since September 12, 1991 (TR 610-11).

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

Rachel's father testified that Rachel had lived in the Jacksonville area since 1972 (TR 736). She had no history of any kind of mental illness. She was a stable person who had been a flag girl in her high school band, had been voted most photogenic, and had worked from the time she was 16 years old (TR 736, 738). She had a loving relationship with her family, she doted on her son, and she was not the kind of person to just walk out the door

and leave her family and her child behind (TR 739). She had been gone three years now, and her father believed she was dead (TR 739-40).

Rachel's 1987 Honda automobile was found at the Roosevelt mall on Sunday, September 15, 1991 (TR 669). It was very clean, like it had recently been washed (TR 671). Even though the victim habitually drove her car with the seat all the way forward (TR 752), the seat was all the way back when the car was found in the mall parking lot (TR 684-85). There were small white cloth fibers on the driver's side door that were consistent with someone having wiped that area with a towel (TR 679). There was a palm print on the trunk lid that was later matched to the defendant (TR 685-89, 701). There was also a small amount of blood on the inside of the trunk lid, near the edge of the trunk lid (TR 691). The blood on the inside of the trunk lid and the blood on the baseboard of the victim's house were both human blood, type "B" (TR 730). It was stipulated at trial that Rachel had type "B" blood (TR 731).

Detective John McCallum went to Rachel's home early in the afternoon of September 13, 1991 (TR 616). He noticed first that the garage door rollers were off their track, and that there were tennis shoe footprints in some dirt near the door leading into the foyer (TR 622, 624). The apartment itself was immaculate except for the foyer (TR 625). In the foyer were what the officer

described as "obvious signs of a struggle," including "scuff marks on the wall," dirt on the floor, dents in the air-conditioning return vent, and "a couple of earring backings" (TR 625-26). There was also a "spot of blood" left on the vent (TR 629) and another bloodstain on the baseboard (TR 631). The dirt in the foyer and in the garage (and no where else in the apartment) was described as a "black ... rich looking soil" (TR 628, 632-33).

At 3 p.m., officer McCallum left the victim's residence and went to the defendant's house (TR 634). Thomas claimed to have last heard from Rachel the previous day when she left a message on his answering machine. He stated that he had returned the call just before 5 p.m. (TR 635-36). He denied calling Rachel any other time on September 12, and claimed that until he tried to call her at five, he had not contacted Rachel for two or three weeks (TR 636). When he did call at five, Rachel insisted that he come over. Thomas stated he did not want to go without someone accompanying him, so he waited until Christina was available, and then he and Christina and his son Bennie went to Rachel's home (TR 637-38). They arrived at 5:45. Thomas had brought two boxes with him, one containing some baby clothes and the other containing Rachel's wedding dress. Rachel's 1987 Honda was parked in the driveway, but she did not answer when he rang the doorbell. The garage door was open, and he walked a few steps into the garage, thought better

about it, and decided to leave. Thomas stated that he did not leave the expensive wedding dress, but he left the box of baby clothes on the door step (TR 638-40). Thomas claimed he had not gone inside the house (TR 641). Thomas demonstrated for the police how he had walked around Rachel's car while carrying two boxes. He indicated that he had not touched the victim's car (TR 642-43). While at the defendant's house, officer McCallum noticed that there was "black dirt or rich soil" in the bed of the defendant's truck (TR 645). McCallum testified that it took 10 to 15 minutes to drive from the victim's residence to the defendant's residence (TR 647).

McCallum examined the soles of the leather deck shoes Thomas was wearing. The pattern did not match the prints McCallum had seen in the dirt of the victim's garage (TR 648) . McCallum asked Thomas if he owned any other soft-soled shoes besides the ones he was wearing. Thomas said he did not (TR 649) . McCallum then went to where Christina worked. The story she told McCallum at that time was generally consistent with the defendant's alibi (TR 650), except that she could not remember whether or not the victim's garage door had been open or where her car had been parked (TR 651).

Christina testified that after the police called late in the evening of September 12, 1991, Thomas told her the "family needed

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

Thomas **was** "just real paranoid" about Rachel's disappearance. He felt that "the house was bugged, the cars were bugged and he just would never talk to me unless we were outside." He did tell her not to worry about where Rachel was "because the Mafia had

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

Christina testified that she was too afraid of the "family" to leave Thomas, and subsequently became pregnant by him and even married him (TR 919, 923).[1] Only after Thomas finally was arrested in May of 1993 did Christina begin to realize that Thomas had no Mafia connections, primarily because he insisted that she raise money in case a bond was set, but could not tell her how to "get in touch with the family" (TR 921-22). She went to see an attorney and then decided to "come clean" (TR 922).

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

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

left there, she was dead (TR 946). Stewart thought this was a "pretty farfetched story," but when he later joked with Thomas about it, Thomas "got very angry and he told me that if I ever brought up that subject or anyone heard that I knew of anything about the subject that he wouldn't be responsible for what his family would do to me" (TR 946). Stewart "got the message," and when later asked by investigators if he knew anything about Rachel's disappearance, he kept mum (TR 947).

Doug Schraud testified that he did not go to the police when he left the defendant's house the evening of September 12, because he did not know whose car was at the house parked in front of Rachel's car, and he thought it might be belong to one of Thomas' Mafia uncles (TR 854).[2] The next day, Thomas told Schraud not to worry; Thomas had cleaned the place "with a fine tooth comb" and the police had nothing (TR 855). Schraud **was** interviewed by the police, but he told him he knew nothing about Rachel's disappearance (TR 855). He did confide in a friend, however (TR 856).

Detective Herb Scott was the lead detective in the case. A year after Rachel had disappeared, the investigation was at **a** 'dead-end" (TR 764). He persuaded the newspaper to publish an

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[2]Actually, it had to be Christina's.

article on the anniversary of Rachel's disappearance, hoping that someone reading the article would come forward with information about the case (TR 765). Doug Schraud testified that when this article was published, the friend to whom he had confided advised him to turn himself in (TR 856). Schraud told the friend that he was afraid of being arrested and was afraid of Thomas' family. Soon afterwards, however, the police came to Schraud, and he finally decided to tell the truth (TR 766, 857-58). Moreover, he agreed to wear a body bug and talk to Thomas about Rachel's disappearance (TR 766, 858-59). Schraud talked to Thomas on two occasions wearing the body bug, first at Thomas' house and the next day at a day care center (TR 859-61).

The tapes of these conversations were played to the jury (TR 1048-1140). Because Thomas whispered many of his answers into Schraud's ear or answered with written notes (TR 860-62), many of Thomas' answers were inaudible. When Schraud first asked Thomas what had happened to Rachel, Thomas answered, "I am scared that you are wired, you know what I mean?" (TR 1054). However, Schraud pressed the issue, asking Thomas if she was dead. Thomas answered, "I know but I can't tell you" (TR 1062). Schraud stated that he supposed he would just have to keep on wondering. Thomas answered, "No, you don't. . . . Here, look" (TR 1062). Schraud explained that at this point, that Thomas began making swimming

motions and talking about fish eating (TR 1062). Soon afterwards, Thomas made the statement, "I am not queer." Schraud explained that when Thomas said that, he was patting him down, feeling "all over me searching for a body bug" (TR 1064-65). Later, among the inaudible whispers, Thomas stated: "(Inaudible.) Never, never tell -- (Inaudible.) Never. I told you before -- (Inaudible.) I will not go down, okay? . . . You hear me? I swear to God you'll never come up because nobody was there, ever helped me like that before." (TR 1079-80). Thomas told Schraud not to worry about the body being found (TR 1084). He claimed the police had nothing, that "all they are doing is blowing smoke" (TR 1055). Thomas did, however, warn that he had alibi witnesses and that if Schraud "started telling there is a good chance that I might not be there with you" (TR 1129, 1135).

Ahmad Dixon testified that while incarcerated in the Duval County jail on federal cocaine charges, he participated in a conversation with Thomas and another inmate in which Thomas talked about his wife (TR 955, 960-62). Thomas kept referring to his wife as a "bitch," who was "fucking his best friend" and who would not let him see his little boy (TR 962). Thomas claimed that he and a friend "picked up the bitch" (TR 962). The plan **was** to take her to **a** secluded area to get her to sign some custody papers, but when they got there, "it got out of hand." Thomas "chopped the bitch in

the throat" and she collapsed (TR 963). When he realized she was dead, he and the friend put her into the trunk of the car. Thomas dropped the friend off so he would not know where the body **was** (TR 963). Thomas never said what he had done with the body (TR 964).

James Bonner was another inmate at the Duval County jail. He had worked with Thomas at Publix and **was** good friends with him (TR 976-77). Bonner was arrested on grand theft charges in December of 1993 (TR 977-78). Thomas spotted him and was glad to see someone he knew (TR 980). At some point, Thomas began to confide in him concerning Rachel's disappearance (TR 981) . Thomas told him that he and Schraud had forced their way into her house. Once inside, they "took care of Rachel," which Thomas demonstrated with a hand across the throat motion (TR 981). Thomas stated that he was the only one who knew where Rachel's body was, because Thomas "didn't want nothing to come back on him if he was ever caught (TR 983).

Eddie Rhiles was the final jail-inmate witness. When he had first talked to the State about what he knew, he only had three or four days left on his sentence (TR 992). He was released at his scheduled release date, and had no deal with the state (TR 992). Rhiles testified that while he and Thomas had been in jail together, a news report came on the television that a body had been found. Thomas became "tense and nervous." Rhiles later teased Thomas about it. Thomas claimed he knew they had not found "her."

Thomas said "it's like the neighbor **say** that she **was** shark bait and when he said that he made **a** motion like he was fishing" (TR 988). Later, Thomas told Rhiles that his co-defendant was testifying to **"save** his own neck," and was lying because "they had beaten her together ... and placed her in the trunk of her car together" (TR 989). Thomas stated that the co-defendant was also lying when he said he knew Rachel **was** dead, because when they put her in the trunk she was not dead "yet" (TR 990) (emphasis supplied). As for his present wife, she only could tie Thomas to a car, not to a body (TR 990). Thomas said 'she never did see the body" (TR 991) (emphasis supplied).

The defense presented no evidence at the guilt phase of the trial. Based on the foregoing evidence, the jury found Thomas guilty of first degree murder, guilty of burglary during which a battery was committed, and guilty of kidnapping (TR 1271-72).

At the penalty hearing before the jury, the State presented testimony from Christina Thomas concerning the defendant's efforts to obtain the return of the divorce settlement money and his application for social security benefits (TR 1324 et seq).

Ronald Haylett, who had worked with Thomas at Publix for three years, testified for the defense that Thomas came to work regularly, on time, and did his job (TR 1347-48). He was not a bully or a tough guy, and gave no indication that he was involved

in violent behavior (TR 1348). Although Haylett testified on direct examination that he was a kind of supervisor to Thomas, he acknowledged on cross examination that he was not the defendant's supervisor (TR 1349-50). He admitted that he only knew Thomas from work; he never socialized with Thomas away from work (TR 1350). Haylett had never met the victim **(TR 1351).** Thomas had never shown Haylett any concern about the fact that Rachel was missing (TR 1353).

Dorothy Locke knew Thomas from church (TR 1358). Thomas was the **same age as one** of Locke's sons. She saw Thomas frequently while he was in high school; he **was a** "delightful young man" (TR 1359). Thomas did not seem to be the kind of person who would have a capacity for violence (TR 1360). On cross-examination, Locke admitted that she **was** not persuaded from the evidence that Thomas had murdered his wife (TR 1361-62). She acknowledged that Thomas had a loving, supportive upbringing (TR 1362-63). She admitted that since 1985, she had not seen **Thomas** more than 3 to 6 times a year in visits of short duration (TR 1364-66).

Thomas testified in his own **behalf** in a rambling narrative (TR 1367 et seq), in which he claimed that he was innocent, that all of the State's witnesses were liars, and that Rachel not only was sleeping with his best friend, but possibly **was** a lesbian (TR 1373-74). His friends knew this because he had shown them the pictures

(TR 1374). Before Rachel died, she and the defendant were getting along better; for example, he stopped calling her "sleaze," which he had done even with his son present (TR 1375-76). Schraud, Thomas suggested, was the real killer (TR 1385-86).

After deliberating for an hour, the jury recommended a death penalty by an 11 to one vote (TR 1454-55).

By the time the sentencing hearing before the judge was conducted, Thomas had entered his plea of guilty to murdering his mother (TR 1581 et seq). The defense stipulated to the factual basis for the plea (TR 1597, 1601-02), which was that on May 4, 1993, between 7 and 9 p.m., Thomas shot his mother in the head with a .38 caliber pistol, then called the police to report that she had committed suicide. The physical evidence showed that suicide was not possible; that she had been seated at a table in a writing position and, despite being rendered immediately unconscious by the gunshot, she had been moved to the location where she had been found. There was no stippling or powder burns around the gunshot entry wound. The absence of such was inconsistent with a self-inflicted wound (TR 1595-96). The State had evidence to show that the defendant's mother had initially agreed to become an alibi witness for him, but had second thoughts about it and began to urge the defendant to admit his guilt. When she threatened to turn him in herself if he did not do so, he murdered her (TR 1600-01).

This factual recitation was supported by depositions that the defense agreed could be considered by the court (TR 1601-02, 1488). These depositions and the defendant's plea of guilty to the murder of his mother were offered in aggravation without objection and considered by the trial court on the issue of sentence (TR 1549, 1563).[3]

In addition, the defense presented additional testimony from Dorothy Locke, Nancy Cabase and Thomas himself. Locke still was of the opinion that Thomas was not guilty (TR 1507). Cabase testified that she was involved in a jail ministry. She got to know Thomas in his Christian activities and they began corresponding, talking to each other by telephone, and generally spending a lot of time together. Thomas, she testified, had been a positive Christian influence on his fellow inmates (TR 1510). She saw "a lot of good" in Thomas (TR **1511).** She, like Mrs. Locke, had "strong doubts" about the defendant's guilt (TR 1512). On cross-examination, Cabase admitted that she had fallen in love with Thomas and wanted to bear his children (TR 1513-14). In love letters to him, she has told him that she would marry him (TR 1514). Thomas feels the same way towards her (TR 1514). In their letters to each other, he

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[3]Concurrently with this brief, the State files a motion to supplement the record with these depositions and other exhibits admitted in evidence at this hearing but inadvertently omitted from the original record on appeal.

talked of wanting to escape, but he was only joking (TR 1515). They "joked" about her desire to minister in foreign countries, specifically in "Asian" countries (TR 1515). They began writing to each other in code (TR 1516). She denied ever discussing escape plans with Thomas during her visits to him at jail (TR 1517). However, she acknowledged that when inmate Michael Byrd escaped from the Duval County jail, Byrd called her twice, to tell her to tell the defendant that he (Byrd) was okay, and later just to ask how Thomas was doing (TR 1518-19). She also acknowledged carrying a letter to Thomas in which she expressed discouragement because Thomas should have been with Byrd, or it should have been Thomas who escaped instead of Byrd (TR 1523-24). She "kept thinking" that maybe Byrd would get him out (TR 1524). She went on:

> "I don't know how far I can go. Sometimes I get so scared of what the cost may be but the other scares me more. You dying for something that you didn't do is my worse [sic] fear that I daily rebuke and bind in the name of Jesus. The thing with my mom is the hard part. I don't want to do things in a way that I would have to be separated from her forever like me not ever being able to surface in Jacksonville. You know what I mean?" (TR 1525).

She denied that this letter was about escape (TR 1525). She acknowledged that when she was delivering this letter to Thomas at jail at 1:30 in the morning, she was searched by the prison guards who found a pen on the underside of her left foot, inside her sock, and that inside the pen, they found a Christmas tree ornament wire

hanger (TR 1520, 1522). The wire inside the pen inside her sock was "unintentional" (TR 1526). Although she "intentionally" put the pen inside her shoe, the wire was already there when she put her shoe on. That evening, something was in her shoe. She thought she would get it later, but it moved and she forgot about it (TR 1526). It quit irritating her foot (TR 1527). She had no idea that the wire could be used to undo handcuffs (TR 1527).

Thomas testified a final time. He claimed that Michael Byrd did not really escape; that he was working for the sheriff (TR 1532-33). The police were simply using a "Christian friend" to get Thomas. Rachel's family were liars and the media has used his son (TR 1534-35). His sister was the person who probably killed his mother, and she was a lesbian (TR 1537). Thomas could not understand why the police who responded to his report that his mother had committed suicide treated the situation as a homicide rather than as a suicide (TR 1537), but suspected it was "found out" by the homicide detectives who had been following him for a year and a half (TR 1537-38). He concluded by stating that he had killed no one (TR 1544).

The trial court sentenced Thomas to death, finding five aggravators: (1) prior violent felony conviction, (2) murder committed during a burglary and kidnapping, (3) murder committed for financial gain, (4) murder was heinous, atrocious or cruel, and

(5) murder was cold, calculated and premeditated (R 141-48).

SUMMARY OF THE ARGUMENT

There are nine issues on this appeal: (1) The State presented overwhelming circumstantial evidence of the corpus delicti and this evidence, coupled with the defendant's own confessions and admissions, more than sufficed to prove the corpus delicti and the defendant's guilt beyond any reasonable doubt. (2) Even if the trial court's treatment of mitigation in its sentencing order was inadequate under Campbell notwithstanding the defendant's failure to propose any valid nonstatutory mitigation, any error is harmless beyond a reasonable because any possible nonstatutory mitigation was minimal compared to the five statutory aggravating factors found by the trial court. (3) Thomas did not object to the CCP instruction, but in this case any error would be harmless. (4) Thomas has not preserved any issue about the prosecutor's death-qualification questions, but in any event, the prosecutor's questions did not misstate the law. (5) Thomas did not object to the trial court's penalty phase jury instructions. Furthermore, the standard instructions delivered in this case are not improperly burden shifting. (6) Not only has Thomas failed to preserve any issue as to the validity of the standard HAC instruction delivered in this case, but the instruction has been approved numerous times.

(7) Thomas did not object to the prosecutor's argument at trial and, absent fundamental error, it is too late to complain about it for the first time on appeal. (8) The felony-murder aggravator is not unconstitutional. Thomas cannot raise an issue about the adequacy of the jury instructions concerning this aggravator for the first time on appeal. (9) The evidence supports the pecuniary gain aggravator. Furthermore, the death sentence is proportionally warranted in this case.

ISSUE I

THE EVIDENCE, INCLUDING BUT CERTAINLY NOT LIMITED TO APPELLANT'S OWN STATEMENTS, MORE THAN SUFFICES TO ESTABLISH THE CORPUS DELICTI

Thomas argues that, because Rachel's body has not been recovered, whether or not she is dead is a matter that can only be shown circumstantially. Of course, circumstantial evidence can be (and in this case is) overwhelming. But the State did not present merely circumstantial evidence that Rachel is dead and that her death occurred through the criminal agency of another. Thomas ignores his own admissions and confessions about the matter of Rachel's death, which constitute direct evidence of her death. Hardwick v. State, 521 So.2d 1071, 1075 (Fla. 1988); Davis v. State, 582 So.2d 695, 700 (Fla. 1st DCA 1991).[4]

The evidence is set out at length in the statement of facts, and will not be fully repeated here. It may be summarized, however, as follows: (1) Thomas and the victim were getting divorced. This divorce was going to cost Thomas money as well as the custody of his child. Thomas threatened to prevent Rachel from

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[4]Arguably, some of Thomas' statements were admissions rather than full confessions. It has been suggested in a slightly different context that the confession/admission nomenclature is not dispositive. Burks v. State, 613 So.2d 441, 444 (Fla. 1993). But at any rate, at least to the extent that Thomas' statements "were confessional," they constitute direct evidence. Davis v. State, supra at 700.

obtaining custody of his child by "any means in his power" and to see that she disappeared. He compared her head to a beach ball which he kicked out of a friend's hand. (2) Thomas made two practice attempts to get Rachel to open the door to her apartment and talk to him; in one instance using a girlfriend and the pretext of misdelivered mail, in the other using Doug Schraud and the pretext of dropping off Rachel's belongings. In each case, he explained to his accomplices that if Rachel did not cooperate, he would take care of her by whatever means were necessary, including feeding her to the sharks. (3) After the second dry run, Thomas stated that he would use the same approach the next time. The day before Rachel disappeared, Thomas told Schraud that tomorrow would be a good day. (4) After calling to make sure Rachel would be at home, Thomas once again enlisted Schraud's assistance. They drove to Rachel's home. Thomas brought several rolls of duct tape and a key to Rachel's car. He had already cleaned out a place to park her car in his own garage. (5) As soon as Rachel opened her door, Thomas attacked her. With Schraud's assistance, Thomas used the duct tape to bind and gag her. The last time anyone other than Thomas saw Rachel alive, she was looking at Schraud with a terrified look in her eyes as she was being lowered into the trunk of her car. (6) Thomas drove Rachel's car to his house and put it into the space he had cleared out in his garage. He told his

girlfriend Christina to drive to the Publix at Roosevelt mall and wait for him. After she waited for more than an hour, Thomas drove up in Rachel's car. He wiped the exterior with a towel. However, he left a palm print on the trunk lid of the victim's car. On the way to his parents' house for dinner that evening, Thomas threw away the key to Rachel's car, predicting that "they" would never find it. (7) Rachel has been neither seen nor heard from since that time. It is not characteristic of her to miss appointments or to leave behind her family and her beloved son. She had never even stayed out all night before. She not only missed a planned evening with a friend, she left behind her gym bag, her purse, her driver's license, a photograph of her son, twenty dollars in cash she had obtained only an hour before she disappeared, all her clothes, and the $750 she had in her bank account. Moreover, she disappeared the day before payday. She had given coworkers no indication she was unhappy in her job, and had never expressed to her family any desire to leave or get away from it all. (7) Rachel was a neat person, and kept her home immaculate. After her disappearance, her garage door was left standing wide open and the door into the house from the garage was left unlocked. There were signs of a struggle in the foyer, as well as blood on the baseboard and on the vent. Some quilts were missing from the garage. (8) Schraud and Christina both testified that Thomas wore tennis shoes the evening

of September 12, 1991. There was a tennis shoe print in some dirt in the floor of the garage. When asked by the police, however, Thomas denied owning any tennis shoes. The next day, he and Christina collected all his tennis shoes and threw them away. (9) Thomas kept any potential witnesses against him quiet with stories (which they believed) about his alleged Mafia family, and with his threats to turn his family loose on anyone who blabbed.

Even without Thomas' own statements, this evidence is sufficient to demonstrate that Rachel is indeed dead and that her death was due to the criminal agency of William Gregory Thomas. Sochor v. State, 619 So.2d 285, 289 (Fla. 1993); Robinson v. State, 487 So.2d 1040 (Fla. 1986). This case is not remotely similar to Golden v. State, 629 So.2d 109 (Fla. 1993), upon which Thomas relies. In Golden, "there was no evidence of foul play," id. at 110, 'no evidence that relations between the Goldens were anything but affectionate and cordial," id. at 111, and 'no wounds or other signs of violence on the body." Ibid. Moreover, "Golden never confessed or made anything but exculpatory statements." Ibid.

In this case, it is clear that relations between the Thomases were anything but affectionate and cordial. There is in this case clear evidence of foul play, and, while Rachel's body has never been recovered, there is direct evidence that before her disappearance there were wounds and signs of violence on the body.

Furthermore, Thomas has confessed and made incriminatory statements.

Thomas' appellate counsel characterizes his client's statements as "ludicrous." They may be to appellate counsel, but the people Thomas **was** dealing with believed his Mafia family stories (especially after Rachel disappeared) and were quite intimidated by them. Their fear and consequent reluctance to cooperate with the police delayed an arrest in this case for almost two years.

Some of the initial exculpatory statements Thomas made to police were flatly untrue. For example, he denied telephoning Rachel before 5 p.m. on September 12, 1991 (TR 635-36). Rachel's coworker testified to the contrary, however (TR 549). Thomas also denied owning any tennis shoes (TR 649), but soon afterwards threw away numerous pairs of tennis shoes he owned (TR 915-16). Furthermore, his statement to police that he had gone to the victim's apartment with Christina and that Rachel **was** not at home (TR 637-41), is directly contracted by the testimony of Christina Thomas and Doug Schraud.

To persons other than the police, Thomas made numerous inculpatory statements. He told Christina that if she did not do exactly as she was told, she "would be killed like Rachel" (TR 910). He told her that he had killed two people at Rachel's house

and that his "family" had taken Rachel from her house to kill her (TR 904-06). Rachel, Thomas claimed, had been chopped up and fed to the sharks (TR 918). Thomas repeatedly told Schraud not to worry about Rachel's body ever being found (TR 1084); everything had been taken care of (TR 854). To demonstrate Rachel's death, Thomas made swimming motions and talked about fish eating (TR 1062). He told Joseph Stewart that when Rachel left Thomas' house, she was dead (TR 946).

After he was arrested, Thomas made additional inculpatory statements. He told Ahmad Dixon that he (Thomas) had chopped Rachel in the neck and that she had died (TR 963). He told James Bonner that he (Thomas) and Schraud had forced their way into Rachel's home and that Thomas had taken care of Rachel. This statement was accompanied by a hand-across-the-throat motion (TR 981). Thomas did not say how Rachel had been killed, but did state that no weapons were used; that Thomas had used his hands (TR 982). Finally, he told Eddie Rhiles that Rachel's body would never be found; she was shark bait (TR 988). Furthermore, he bragged to all three of these inmates that only he knew where the body was (TR 963, 983, 990).

The evidence in this case is not merely adequate; it is overwhelming. Thomas' conviction is more than amply supported by substantial, competent evidence, and should be affirmed. Bassett

v. State, 449 So.2d 803, 807 (Fla. 1984) (where corpus delicti at issue, combination of circumstantial evidence and defendant's confession supported conviction); Buenoano v. State, 527 So.2d 194, 197-98 (Fla. 1988) (corpus delicti established by circumstantial evidence and defendant's confession); Stano v. State, 473 So.2d 1282, 1287 (Fla. 1985) (same); Robinson v. State, 487 So.2d 1040 (Fla. 1986); Sochor v. State, 619 So.2d 285, 289 (Fla. 1993); Clark v. State, 613 So.2d 412, 413 (Fla. 1992); Davis v. State, 582 So.2d 695 (Fla. 1st DCA 1991).

ISSUE II

THE TRIAL COURT DID NOT ERR REVERSIBLY IN ITS CONSIDERATION OF MITIGATING EVIDENCE

Thomas contends that the trial court's sentencing order violates the dictates of Campbell v. State, 571 So.2d 415, 419 (Fla. 1990), which holds that a trial court sentencing a defendant to death must 'expressly evaluate in its written order each mitigating circumstance proposed by the defendant to determine whether it is supported by the evidence and whether, in the case of nonstatutory factors, it is truly of a mitigating nature." (Emphasis supplied.) Thomas does not attempt to argue that any statutory mitigating circumstances exist in this case, but contends the trial court should have addressed non-statutory mitigators

"proposed" by the defendant. However, while the defense presented testimony in mitigation, the nonstatutory mitigators now argued by the defendant were not specifically proposed at trial.

By definition, nonstatutory mitigators are not specified by statute, and the potential range of nonstatutory mitigators is nearly infinite, although often of marginal relevance. "Because nonstatutory mitigating evidence is so individualized, the defense must share the burden and identify for the court the specific nonstatutory mitigating circumstances it is attempting to establish." Lucas v. State, 568 So.2d 18, 24 (Fla. 1990). Thomas has not done so. No list of proposed nonstatutory mitigators was presented to the trial court, and no valid nonstatutory mitigators were argued to the jury or to the court. To the jury, Thomas' trial attorney argued that pecuniary gain **was** not the motive for Rachel's death (TR 1441), that the jury could 'speculate" that Thomas was unstable and that something in him had just snapped (TR 1444), and that the death penalty itself **was** unacceptable (TR 1448). To the trial court, Thomas' attorney argued basically against the efficacy of the death penalty itself. None of the potential nonstatutory mitigation now argued on appeal was specifically identified to the trial court.

But in fact nothing of any mitigatory consequence appears in this record. Any error in failing to address specific nonstatutory

mitigators in the sentencing order is harmless beyond a reasonable doubt.

Thomas testified at the penalty phase hearing before the jury that he was innocent, that all of the state's witnesses were liars and that Rachel was sleeping with his best friend (and by implication deserved her fate?). Thomas accused Doug Schraud of being the real killer. At the hearing before the trial court, Thomas renewed his claim that he was innocent of not only the murder of his wife, but also innocent of the murder of his mother, notwithstanding his guilty plea. As to his mother, Thomas suggested that his sister was the real killer. None of this testimony was mitigating. As this Court has held consistently, 'residual or lingering doubt is not an appropriate nonstatutory mitigating circumstance." Bogle v. State, 655 So.2d 1103 (Fla. 1995).

Dorothy Locke's testimony that Thomas had a loving and supportive upbringing is not mitigating when one considers that he expressed his gratitude for this upbringing by murdering his own mother. As for her testimony that Thomas had been a "delightful young man," when he was in high school, her testimony shows that she has not been especially close to him since he left school. Furthermore, the deposition testimony, which was offered into evidence with the defendant's consent and considered without

objection, demonstrates clearly that Thomas was not a "delightful" adult.

The January before he died, the defendant's father underwent "very serious" hernia surgery and prostate surgery. The father "had really lost weight" from his physical problems. Supplemental Record, Deposition of Gayle Gazdik, at p. 22. Nevertheless, while he was still recovering from this serious surgery, the "delightful" defendant persuaded his father to come to his house and install a sprinkler system. Another time, Thomas called his father at 10 p.m. to come over and adjust the defendant's television set. Ibid.

After his father died, Thomas pressured his mother to give him the money to open a gym and to give Christina enough money to open a day care center. Supplemental Record, Deposition of Debbie Thomas at 73. He insisted that his mother release his father's antique Model A Ford automobile to him even though the defendant had no place to keep it and did not know how to drive it. Id. at 66. While his mother was out of town, Thomas tried unsuccessfully to persuade his mother's neighbor to give him the key to his mother's house. Id. at 67. Confronted by his mother about this, he explained that he meant to take his father's stuff while she was not there. Id. at 68. When his mother reminded him that he did not know the security code to her alarm system, he quoted it to her

correctly. Id. at 69. His mother was very close to "cut[ting] the strings," and requiring him to pay his own way. Id. at 73.

Finally, a week after their mother was murdered, Thomas asked his sister if she had received any of their mother's rather sizeable estate yet, When she told him that she was still too distressed to be concerned about money, Thomas stated, "Well, the funeral was last week, you should be over that by now." Supplemental record, Deposition of Debbie Thomas at p. 15.

These are not the acts of a "delightful young man" who is "thoughtful of other people." Brief of Appellant at 20. Moreover, the notion that Thomas was a "very loving husband" is, under the circumstances, pure nonsense. He murdered his first wife, and kept his second wife under his control with threats of retaliation from his Mafia family if she stepped out of line.

As for Thomas' testimony that his 6-year-old son still loves him, his son obviously is not old enough to comprehend that he is without a mother and a grandmother because of violent behavior on the part of his father. Just how he will feel when he is old enough to understand that he is missing a large part of his family (including his father) because of his father's violence is a matter that worries his Aquino family, and they are probably correct that it is "going to have a major influence on the rest of his life" (TR 1502-03).

Nancy Cabase's testimony lacks any mitigating value. She is just one more woman who has been manipulated by the defendant. Like Mrs. Locke, Cabase thinks Thomas is innocent and, as a consequence of her passion for the defendant, Cabase apparently is willing to smuggle escape paraphernalia to Thomas in jail. Her testimony that there is a 'lot of good" in Thomas is utterly without credibility.

Finally, Thomas argues that the trial court should have addressed Ronald Haylett's testimony about the defendant's good work record and Haylett's opinion that Thomas had exhibited no violent behavior. Haylett also testified that he knew the defendant only from work and never socialized with Thomas away from work. Furthermore, he acknowledged that Thomas had never expressed any concern about the fact that Rachel was missing.

The most that reasonably could be said about Thomas in mitigation is that he came to work regularly, on time, and did his job (TR 1347-48). Even if the trial court should have addressed at greater length the evidence in mitigation notwithstanding that Thomas had not specifically identified any legitimate nonstatutory mitigation, any error was harmless in light of the strong aggravation and minimal mitigation. 'There is no indication that the trial court failed to consider any nonstatutory mitigation evidence brought to his attention by the defense, and the minimal

evidence [Thomas] now points to as mitigating could hardly ameliorate the enormity of his guilt." Henry v. State, 649 So.2d 1366, 1369 (Fla. 1994). See also Wickham v. State, 593 So.2d 191 (Fla. 1991) ('In light of the very strong case for aggravation, we find that the trial court's error in weighing the aggravating and mitigating factors could not reasonably have resulted in a lesser sentence. Having reviewed the entire record, we find this error harmless beyond a reasonable doubt."); Cook v. State, 581 So.2d 141 (Fla. 1991); Rogers v. State, 511 So.2d 526, 535 (Fla. 1987).

ISSUE III

THOMAS HAS NOT PRESERVED ANY ISSUE OF THE CCP JURY INSTRUCTION; MOREOVER, ANY ERROR WOULD BE HARMLESS

Thomas concedes that he did not object to the trial court's CCP instruction at trial and did not propose an alternative instruction (TR 1290, 1320, 1455). This issue is therefore procedurally barred. E.g., Gamble v. State, 659 So.2d 242, 245 (Fla. 1995); Dailey v. State, 659 So.2d 246, 247 (Fla. 1995); Windom v. State, 656 So.2d 432, 439 (Fla. 1995); Crump v. State, 654 So.2d 545, 548 (Fla. 1995). Even if preserved, any error would be harmless. The trial judge reviewed the evidence pursuant to the a

expanded definition of CCP set out in Jackson v. State, 648 So.2d 85 (Fla. 1994), which was decided after the jury returned its advisory sentence recommendation but before the judge imposed sentence (R 145-48), and found that the CCP aggravator was "clearly" satisfied. See Strinser v. Black, 117 L.Ed.2d 367, 369 (1992) (either constitutional harmless-error analysis or reweighing at the "trial or appellate level suffices to guarantee that the defendant received an individualized sentence"). Thomas argues that the evidence shows that he only planned in advance to kidnap the victim, not to kill her. But it would not have made sense for Thomas merely to kidnap Rachel. What would have been the point? Thomas (as he points out in his brief) wore no mask or other disguise to Rachel's house, and she was no stranger who would be unable to tell the police who had kidnapped her. This record does not support any reasonable inference that Thomas intended to be arrested. On the contrary, his intent was not to be arrested, and he succeeded for quite some time. Furthermore, there is direct evidence that he planned to kill Rachel. Thomas had talked about killing Rachel at least a month before the killing, to both Johnny Brewer and to Joseph Stewart (TR 569, 571-72, 943). He began to plan just how he would go about it weeks in advance, making two dry runs before actually carrying out the crime (TR 788-792, 823-25). Prior to or during each of these practice attempts, Thomas stated

his intention of "taking care" of Rachel, by whatever means were necessary (TR 791-91), including killing her (TR 822). Thomas announced to Schraud the day before the killing that "tomorrow" would be a good day. Thomas carried duct tape and a key to the victim's car to the victim's home (TR 835, 839), and had cleaned out a place in his garage to put the victim's car (TR 902, 911). Thomas attacked the victim as soon as she opened the door (TR 835-36). He then taped her up, put her into the trunk of his car, and, using the key he had the foresight to bring with him, drove her car to his house, where he put her car into the space he had cleaned out in his garage (TR 837-43, 845, 901-02, 911). Schraud not only helped to tie the victim up, but was there to drive the defendant's truck back to his house (TR 844). After Schraud left, Thomas disposed of the victim's body and left her car at a mall, where he met his wife according to his prearranged plan (TR 899-900, 903).

The evidence clearly shows that Rachel's murder **was** the subject of elaborate pre-planning. Not only was he prepared in advance to tie Rachel up and to bring her car to his house, but given the limited amount of time he had to dispose of the body before meeting Christina at the mall and proceeding to his parents' house for dinner, and the fact that he hid the body well enough that it still has not been found, it is apparent that he had prepared a hiding place for the body in advance.

Thomas coldly planned his crime, taking several weeks to concoct a careful plan and prearranged design to kill without being punished. There is no evidence, much less any kind of colorable claim, that he acted under any pretense of moral or legal justification. Thus, any error in CCP instructions to the jury would be harmless beyond a reasonable doubt even if Thomas had preserved the issue, not only because all four elements of the CCP aggravator would exist under any definition, Walls v. State, 641 So.2d 381, 388 (Fla. 1994), but also because in light of the remaining strong aggravators and the lack of mitigation, the jury's recommendation would have been the same regardless of the CCP instruction. Foster v. State, 654 So.2d 112, 115 (Fla. 1995); Fennie v. State, 648 So.2d 95, 99 (Fla. 1994); Henderson v. Singletary, 617 So.2d 313, 315 (Fla. 1993).

ISSUE IV

THOMAS HAS NOT PRESERVED ANY ISSUE CONCERNING THE PROSECUTOR'S VOIR DIRE EXAMINATION

During the voir dire examination, the prosecutor questioned some prospective jurors who had expressed a reluctance to impose a death sentence. One prospective juror, Ms. Bergamo, stated that she just did not know if she could vote to impose a death sentence (TR 355-56). The prosecutor followed up by asking, "Even if the

aggravating circumstances outweighed the mitigating circumstances and the law required a death recommendation, you don't think that you could recommend it?" (TR 357). The defendant's trial attorney interrupted to suggest that "I don't know of any place anywhere where it says the law requires a death penalty. . .." The trial court responded by taking over the examination of Ms. Bergamo and restating the prosecutor's question (TR 357-58), in a manner apparently acceptable to Thomas' trial attorney, as he did not object to it. Following Ms. **Bergamo's** answer to the trial court's question (that she could not vote for a death sentence), the prosecutor resumed his examination of the prospective jurors. He questioned Ms. Holmes without objection (TR 358-64). His final question to Ms. Holmes was whether it would be "fair" to **say** that her beliefs against the death penalty "would interfere with or substantially impair your ability to vote for death when the facts and the **law call** for a death recommendation?" (TR 364). There was no objection to this question (TR 364). Next, the prosecutor **asked a** similar question to Mr. Harris, i.e., "would you be able to recommend a death sentence if the aggravating factors outweighed the mitigating factors and the law called for **a** recommendation of death." (TR 365). There was no objection to this question. Finally, the prosecutor asked a similar question to the panel (TR 379). There was no objection to this question.

Even if defense counsel's interruption of the questioning of Ms. Bergamo could be considered an "objection," the question was not answered; the trial judge asked the death-qualification question himself, without objection by the defense. No further questions by the prosecutor on this subject were objected to by the defense, and no objection was made to the jury as selected. This issue has not been preserved for appeal. Sochor v. State, 580 So.2d 595, 602-03 (Fla. 1982); Steinhorst v. State, 412 So.2d 332, 338 (Fla. 1982). Cf. Joiner v. State, 618 So.2d 174, 176 (Fla. 1993) (where defendant accepted jury without reserving earlier objection, reasonable to conclude that events occurring subsequent to his objection caused him to be satisfied with the jury about to be sworn). In any event, however, there was no error. The prosecutor was not trying to argue in favor of a "mandatory death sentencing scheme" as Thomas argues in his brief (at p. 29). The prosecutor was simply trying to determine whether the prospective jurors were conscientiously opposed to the death penalty to the point where it would prevent or substantially impair their ability to serve in this case, and if so, to make as clear a record on the point as possible. It certainly is not inaccurate to state that the jury's sentencing recommendation must be based on the law and the facts and upon the weighing of the aggravators against the mitigators. See Fla. Std. Jury Instr. (Crim) (Penalty Phase at

80) ("The sentence that you recommend to the court must be based upon the facts as you find them from the evidence and the law. You should weigh the aggravating circumstances **against the mitigating** circumstances, and your advisory sentence must be based on these considerations."). This issue is without merit.

ISSUE V

THOMAS HAS NOT PRESERVED ANY ISSUE OF THE TRIAL COURT'S PENALTY-PHASE INSTRUCTIONS; MOREOVER, THE STANDARD PENALTY-PHASE INSTRUCTIONS DELIVERED IN THIS CASE WERE NOT ERRONEOUS

Here, Thomas **complains** about the Florida Standard Jury Instructions relating to the penalty phase. He contends that under the instructions, once a sufficient aggravating circumstance is established, the death sentence is "mandatory" unless mitigating circumstances exist to outweigh the aggravating circumstances. Thomas, however, lodged no objections whatever to the sentencing-phase jury instructions, and this issue is not preserved for appeal (TR 1290, 1320, 1455). Kearse v. State, 20 Fla. L. Weekly S300, S301 (Fla. June 22, 1995). Moreover, Thomas cites no Florida cases which hold that the standard penalty phase instructions are improper, and arguments similar to the one made here have been rejected repeatedly by the Eleventh Circuit Court of Appeals. For example, in Bertolotti v. Dugger, 883 F.2d 1503, 1525 (11th Cir.

1989), the Court held:

> 'The jury was not instructed that it should presume death to be the appropriate penalty once an aggravating circumstance was established. . . . Rather, Bertolotti's jury was instructed that it must find an aggravating circumstance beyond a reasonable doubt before it need consider mitigating circumstances, and even then it need not look for mitigating circumstances if it found that the 'aggravating circumstances do not justify the death penalty.' If the jury did find that the aggravating circumstances justified the death penalty, it was to determine whether any other aspect of Bertolotti's record or character or offense stood in mitigation of his crime. This set of instructions adequately described the plan of Florida's capital-sentencing statute [as approved in] Proffitt v. Florida, 428 U.S. 242, 248-51, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976)..."

In the years since Bertolotti was decided, the Eleventh Circuit has consistently held that there is no impermissible burden-shifting in Florida's standard jury instructions at the penalty phase. See, e.g., Henderson v. Dugger, 925 F.2d 1309, 1317-18 (11th Cir. 1991); Jones v. Dusser, 928 F.2d 1020, 1029-30 (11th Cir. 1991); Kennedv v. Dusser, 933 F.2d 905, 915-16 (11th Cir. 1991).

This issue is procedurally barred and also without merit.

ISSUE VI

THOMAS HAS NOT PRESERVED ANY OBJECTION TO THE HAC INSTRUCTION DELIVERED IN THIS CASE; MOREOVER, THERE WAS NO ERROR

Thomas neither objected to the HAC instructions delivered in

this **case**, nor submitted **a** proposed limiting instruction (TR 1290, 1320, 1455). This issue is therefore procedurally barred. Kearse v. State, 20 Fla. L. Weekly S300, S301 (Fla. June 22, 1995); Dailey v. State, 659 So.2d 246, 247 (Fla. 1995). Moreover, the HAC instruction delivered by the trial court (TR 1450) mirrors the one this Court upheld in Hall v. State, 614 So.2d 473, 478 (Fla. 1993), and in Fennie v. State, 648 So.2d 95, 98 (Fla. 1994). Furthermore, any instructional error would have been harmless not only because under the facts of this case the murder would qualify as HAC "under any definition of the terms," but also because in light of the remaining **statutory** aggravating factors and minimal mitigation there is no reasonable possibility that any defect in the HAC **instruction** affected the jury's recommendation of death. Krawczuk v. State, 634 So.2d 1070, 1073 (Fla. 1994); Thompson v. State, 619 So.2d 255, 260-61 (Fla. 1993)); Henderson v. Singletary, 617 So.2d 313, 315 (Fla. 1993).[5]

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[5]Although Thomas does not contest the sufficiency of the evidence supporting the HAC aggravator, he does allege that the trial judge "could only speculate as to the process that **caused** Rachel's death." Appellant's brief at 34. Thomas himself stated, however, that he killed Rachel with his hands (TR 963, 982). Moreover, we know that the events leading up to Rachel's death include the facts that she was attacked and beaten, bound and gagged, placed into the trunk of her car and driven to the location where Thomas killed her. Clearly, the victim was "subjected to agony over the prospect that death was soon to occur." Routly v. State, 440 So.2d 1257, 1265 (Fla. 1983). The HAC aggravator is clearly supported by the evidence. Preston v.

ISSUE VII

THOMAS HAS NOT PRESERVED ANY ISSUE OF THE PROSECUTOR'S PENALTY-PHASE CLOSING ARGUMENT

None of the prosecutor's arguments at issue here were objected to at trial. It is well settled that, except in cases of fundamental error, prosecutorial argument cannot be objected to for the first time on appeal. E.g., Pangburn v. State, 661 So.2d 1182, 1187 (Fla. 1995); Susss v. State, 644 So.2d 64, 68 (Fla. 1994); Wvatt v. State, 641 So.2d 355, 359 (Fla. 1994); Street v. State, 636 So.2d 1297, 1303 (Fla. 1994). Even if any portion of the prosecutor's argument might have been objectionable, there was no fundamental error, and this issue is procedurally barred.

Thomas contends that the prosecutor's comments at TR 1429-30 are the kind that this Court condemned in White v. State, 616 So.2d 21, 24 (Fla. 1993) and Rhodes v. State, 547 So.2d 1201, 1205 (Fla. 1989). See also, Taylor v. State, 583 So.2d 323, 329-30 (Fla. 1991) (cited in White). In each of these cases, however, the prosecutor had contrasted the defendant's fate if given a life sentence to that of the deceased victim by emphasizing the victim's

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State, 607 So.2d 404, 410 (Fla. 1992); Fennie v. State, 648 So.2d 95, 98 (Fla. 1994).

inability to do all the things that the defendant would be able to do in prison. Such an argument, this Court held, "urged consideration of factors outside the scope of the jury's deliberations." Taylor, supra at 329.[6] The prosecutor in this case made no such argument. Instead, his argument addressed whether or not Rachel's murder had been committed without a pretense of moral or legal justification, which is an element of the CCP aggravator. He noted that Thomas had not "honored" Rachel's rights, had not charged her with a crime or given her a trial, and had not convened a jury to weigh aggravation and mitigation. Thomas had been **a** mere 'executioner." Hence, the prosecutor argued, "[t]here **was** absolutely no moral or **legal** justification to this murder" (TR 1429-30). This argument, unlike those condemned in White, Rhodes and Taylor, addressed the applicability of a statutory aggravator, and did not urge the consideration of any matters outside the proper scope of the jury's deliberations. See Tucker v. Kemp, 762 F.2d 1496, 1505 (11th Cir. 1985) ("If an argument focuses on a subject appropriately within the jury's concern, it ordinarily will not be improper.").

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[6]Compare, however, Brooks v. Kemp, 762 F.2d 1383, 1410 (11th Cir. 1985) (argument that victim would never sit at her family's dinner table again 'was no more than a compelling statement of the victim's death and its significance, relevant to the retributive function of the death penalty," and was "proper")

Thomas also contends that it was improper for the prosecutor to argue that the contemporaneous commission of a kidnapping 'made this murder worse." Appellant's brief at 35. The State is at loss to understand why it would be improper to argue that an aggravating factor makes the "murder worse." Aggravating factors, by definition, make the crime "worse."

Thomas cites to no portion of the record in support of his claim that the prosecutor improperly argued that the death penalty was mandatory unless the mitigation evidence outweighed the aggravation evidence. However, the prosecutor did address the weighing process at TR 1413. Thomas omits to note that the prosecutor stated at the outset that before the jury could recommend a death sentence, it would first have to decide "if aggravating factors have been established that justify a death recommendation." Therefore, under the prosecutor's argument, the mere fact that the aggravating factors outweighed the mitigating factors would not be enough to support a death recommendation; in addition, the aggravating factors would have to sufficiently strong to "justify" a death penalty. This was a correct statement of the law. See Bertolotti v. Dugger, supra, 883 F.2d at 1525.

The final two portions of the prosecutor's argument that Thomas complains about for the first time on appeal might have been objectionable, but there was no objection, and Thomas can

demonstrate no fundamental unfairness. The federal cases he cites do not support his position. In both Mills v. Singletary, 63 F.3d 999, 1029 (11th Cir. 1995) and Johnson, 778 F.2d 623, 631 (11th Cir. 1985), the Court found no fundamental error. In those cases, as here, any improper arguments (i.e., the prosecutorial-expertise argument and the show-the-defendant-the-same-mercy-he-showed-the-victim argument) were very brief, especially compared to the entire speech, which focussed upon the evidence and the aggravating factors shown by the evidence. Moreover, there were four valid aggravating factors presented to the jury, and nothing of any consequence in mitigation. The presence of these strong aggravators in this **case** demonstrate the lack of fundamental error. Mills v. Singletary, supra at 1029. As in Johnson v. Wainwright, supra at 631, the prosecutors' emphasis on the aggravating and mitigating factors, the trial court's jury charge correctly outlining the proper factors for the jury's consideration and the fact that the 'evidence of aggravating circumstances **was** overwhelming," eliminate "any reasonable probability that any transgressions during the prosecutor's closing argument caused the jury to recommend death when it would not otherwise have done so." In fact, the lack of any objection to the prosecutor's argument at trial is by itself a relevant indication that the argument was not fundamentally unfair. Williams v. Kemp,

846 F.2d 1276, 1288 (11th Cir. 1988). Not only did trial counsel not object when the prosecutor delivered his argument, but trial counsel told the trial court in argument on the motion for new trial that he had filed the new-trial motion 'in order to perfect any rights on appeal but frankly . . . I can't in good faith tell the Court that there is some error that needs to be corrected by a new trial at this time" (TR 1471). Clearly, trial counsel, at least, saw no fundamental unfairness in the prosecutor's closing argument to the jury at the penalty phase.

Even if Thomas were not procedurally barred from complaining about the prosecutor's closing argument for the first time on appeal, and even if some portions of the prosecutor's closing argument were improper, given the overwhelming evidence in aggravation and the absence of any consequential mitigation, there is no error that in reasonable possibility affected the sentence. State v. DiGuilio, 491 So.2d 1129, 1139 (Fla. 1986).

ISSUE VIII

THE STATE'S RELIANCE ON THE CONTEMPORANEOUS FELONIES OF BURGLARY AND KIDNAPING IN AGGRAVATION VIOLATES NEITHER FEDERAL NOR STATE CONSTITUTIONAL LAW

Thomas was convicted not only of first degree murder, but also of burglary and kidnaping. The jury was instructed on the felony murder aggravating circumstance.

Thomas argues that this "automatic aggravating circumstance"

is unconstitutional because it does not sufficiently narrow the class of persons eligible for the death penalty. It fails to do so, he contends, because the aggravator merely duplicates an element of the offense for which he was convicted. This constitutional argument was not raised below, however, and is therefore procedurally barred. Jones v. State, 648 So.2d 669, 679 (Fla. 1994). Moreover, this argument has been rejected by the United States Supreme Court, Lowenfield v. Phelps, 484 U.S. 231, 108 S.Ct. 546, 98 L.Ed. 568 (1988), by the 11th Circuit Court of Appeals, Bertolotti v. Dugger, 883 F.2d 1503, 1527 (11th Cir. 1989), and by this Court. Stewart v. State, 588 So.2d 972, 973 (Fla. 1991); Engle v. Dugger, 576 So.2d 696, 704 (Fla. 1991); Squires v. State, 450 So.2d 208, 121 (Fla. 1984). To the extent that the law of another state might be relevant (Thomas alludes to Tennessee and Wisconsin law, but only cites a Wisconsin case), the State would note that our neighboring state of Georgia has also rejected the kind of argument Thomas makes here. Ford v. State, 257 Ga. 461 (360 S.E.2d 258) (1987); Jefferson v. State, 256 Ga. 821 (353 S.E.2d 468) (1987).

Thomas also contends that in any event, the jury should have been instructed that the felony-murder aggravator by itself is not sufficient to support a recommendation of a death sentence. At trial, however, Thomas neither objected to the standard

instructions delivered by the court, nor requested any kind of expanded instructions (TR 1290, 1320, 1455). Therefore, any complaint he might raise now about the court's instructions is procedurally barred. Kearse v. State, 20 Fla. L. Weekly S300, S301 (Fla. June 22, 1995). Furthermore, neither of the two cases Thomas cites in his brief (at p. 42) hold that the felony-murder aggravator is invalid, or can never justify a death sentence. Instead, both Rembert v. State, 445 So.2d 337, 340 (Fla. 19841, and Proffitt v. State, 510 So.2d 896, 898 (Fla. 1987), involve an application of this Court's proportionality review, under which this Court will seldom affirm a death sentence supported by only one aggravator (of any kind). Thompson v. State, 647 So.2d 824, 827 (Fla. 1994). Proportionality review is a matter for this Court, not the jury. In fact, the trial court ultimately found five aggravators, not just one, and Thomas' death sentence was not disproportionate, as will be more fully argued elsewhere in this brief.

This claim is procedurally barred and meritless.

ISSUE IX

THE EVIDENCE SUPPORTS THE PECUNIARY GAIN AGGRAVATOR

Thomas concedes that he benefitted financially from his wife's

death; as he points out in his brief, he obtained the return of approximately $2,400 he had paid as part of the divorce settlement, his child support payments were discontinued, and he obtained social security benefits on behalf of his son. Appellant's brief at 43-44. He argues that these facts, by themselves, do not establish a pecuniary motive for the murder, see Clark v. State, 609 So.2d 513, 515 (Fla. 1992), and claims that the "only" evidence that this murder was motivated by the prospect of pecuniary gain was testimony from Johnny Brewer that Thomas stated to him that he did not have the money to pay the divorce settlement. In fact, Thomas told Brewer not only that Thomas did not have the money but also that, because he did not, "he had to see that Rachel disappeared" (TR 569). In addition, Thomas told Doug Schraud that Rachel wanted some of the equity in their home (which Thomas had possession of), and that, unless Rachel gave up that claim, he was going to kill her (TR 821-22). In addition to these statements, the evidence shows that Thomas killed Rachel the day before she was to receive the divorce settlement (TR 1332). Once he killed Rachel, he immediately sought the return of the $2,400 divorce settlement, contacting his attorney about the money the day after Rachel's car was found (TR 1325-26).

The trial court was authorized on this evidence to conclude that the successful post-disappearance efforts to obtain financial

gain from Rachel's death were not an afterthought, but that the murder had been an integral step in obtaining a specific gain contemplated and sought prior to the murder. Chakv v. State, 651 So.2d 1169, 1172-73 (Fla. 1995). The circumstances and the defendant's own statements establish the requisite pecuniary motive. Allen v. State, 662 So.2d 323, 330 (Fla. 1995) ('by his own admission," defendant was motivated by pecuniary gain); Echols v. State, 484 So.2d 568, 576-77 (Fla. 1986) ("all evidence and matters appearing in the record should be considered which support the trial court's decision"); Thompson v. State, 533 So.2d 153, 156 (Fla. 1989) (crime committed for pecuniary gain even if defendant also was motivated in part by revenge); Clark v. State, 609 So.2d 513, 515 (Fla. 1992) (pecuniary gain aggravator proper where victim killed so defendant could get his job); Buenoano v. State, 527 So.2d 194, 199 (Fla. 1988) (pecuniary gain aggravator proper where defendant became entitled to receive life insurance proceeds and veterans benefits as result of victim's death which would have been unavailable if defendant had merely obtained divorce).

Even if this Court were to disagree with the foregoing, however, any error would be harmless in light of the remaining strong aggravators and the lack of mitigation.

Finally, although Thomas does not raise any issue concerning the proportionality of his death sentence, the State would note

that this Court has consistently approved death sentences for defendants in cases similar to this one, Thomas does not contest the prior violent felony aggravator. The record shows that besides murdering his wife, Thomas murdered his own mother because she was becoming increasingly reluctant to support his alibi for the murder of his wife. It appears from the evidence that Thomas initially planned to make the murder look like a crime committed during a burglary, but when his sister unexpectedly showed up, he hurriedly attempted to make it look like his mother had committed suicide. Supplemental record, deposition of Herbert Scott at 53-54.

In addition, the crime in this case was motivated for pecuniary gain, was committed during a burglary and kidnaping, and it was both cold, calculated and premeditated and heinous, atrocious or cruel. There is no valid mitigation in this case. This crime is more aggravated than numerous domestic cases in which this court has upheld the death penalty. Henry v. State, 649 So.2d 1366 (Fla. 1995) (defendant convicted of murder of estranged wife; two aggravators: prior violent felony and HAC); Lindsey v. State, 636 So.2d 1327 (Fla. 1994) (defendant killed girlfriend and her brother; two aggravating factors, including prior conviction of second-degree murder); Porter v. State, 564 So.2d 1060 (Fla. 1990) (defendant killed his former girlfriend and her current boyfriend; three valid aggravators: prior violent felony conviction, murder

committed during burglary, CCP); Lemon v. State, 456 So.2d 885 (Fla. 1984) (defendant killed his girlfriend; aggravators included prior violent felony conviction and HAC); King v. State, 436 So.2d 50 (Fla.1983) (defendant killed girlfriend, two aggravators, including previous murder conviction); Harvard v. State, 414 So.2d 1032 (Fla. 1982) (defendant killed former wife, two aggravators, including prior violent felony conviction).

The jury recommended a death sentence by a vote of eleven to one (even without knowing about the murder of the defendant's mother). The trial judge found five aggravating factors and nothing in mitigation, and determined that death is the appropriate penalty for Thomas. The death sentence should be affirmed.

CONCLUSION

For the foregoing reasons, Thomas' conviction and death sentence should be affirmed.

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 Mr. Steven L. Seliger, Garcia and Seliger, 16 North Adams Street, Quincy, Florida 32351, this 1st day of March, 1996.

CURTIS M. FRENCH
Assistant Attorney General