IN THE SUPREME COURT OF FLORIDA

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|---|---|---|
| ROBERT THOMAS, | : | |
| | : | |
| Appellant, | : | |
| | : | |
| v. | : | CASE NO. 92,020 |
| | : | |
| STATE OF FLORIDA, | : | |
| | : | |
| Appellee. | : | |

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

# INITIAL BRIEF OF APPELLANT

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

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## STATEMENT OF THE CASE

An eleven count indictment filed in the Circuit Court for Duval County on May 23, 1996, charged the Appellant, Robert Thomas[1] and Darrell Lewis Davis with the following crimes:

1. First degree murder-Thomas and Davis

2. Armed Robbery (2 counts)-Thomas and Davis

3. Armed Kidnapping (2 counts)-Thomas and Davis

4. Aggravated Battery (of Monye Elvord)- Thomas and Davis

5. Sexual Battery (three counts)-Davis

6. Armed Burglary-Thomas and Davis

7. Aggravated Battery ( of Imara Skinner)- Thomas and Davis

(2 R 263-65)

Thomas pled not guilty to those crimes (9 R 1529), and subsequently he or the State filed the following motions or notices relevant to this appeal:

1. Notice of intent to classify the Defendant as a habitual violent felony offender (1 R 11).

2. Notice of intent to seek death penalty and request for statement of particulars of mental mitigation (1 R 12).

3. Notice of other crimes, wrongs, or acts evidence (1 R 43).

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[1]Thomas was also known as Robert Silas, but the parties below eventually dropped referring to him by that name.

4. Notice of alibi (1 R 45).

5. Motion to preclude state from introducing into evidence mugshot phootspread pictures (1 R 68). Denied (1 R 73).

6. Motion to prohibit instruction on aggravating factors 5(h) and 5(I) (1 R 102). Denied (1 R 105).

7. Motion to allow inspection of crime scene (1 R 195). Denied (1 R 197).

8. Motion in limine concerning other crimes evidence (2 R 205). Denied (2 R 208).

9. Defendant's motion for special verdict (2 R 220). Denied (2 R 222).

10. Motion to suppress statements, admissions, and confessions (2 R 223). Denied (2 R 226).

11. Motion for severance of Defendants (2 R 227). Granted (2 R 229).

12. Motion in limine to prevent the medical examiner to testify that the victim's death was homicidal (2 R 246). Denied (2 R 248).

13. State's second motion in limine to prevent testimony of witnesses that Thomas made exculpatory statements (2 R 289). Granted as to testimony of Thomas' future plans (2 R 291).

14. Motion to suppress lineup, showup, etc (2 R 316). Denied (2 R 318).

Thomas and Davis proceeded to trial before the honorable Henry Davis. While the Defendants were tried together, different juries considered only

evidence relevant to the respective Defendants. Each defendant was found guilty as charged on each count (2 R 373-80). Thomas later filed a Motion for New Trial that the court denied (2 R 387-90).

Relevant to the penalty phase part of Thomas' trial, the Defendant filed the following motions or request:

1. Motion in limine to allow counsel to argue "residual doubt" to the jury (3 R 512). Denied (3 R 513).

2. Defense requested instruction on actions by the Defendant after the death or unconsciousness of the victim (3 R 523). Denied (3 R 524).

After Thomas and the State had presented additional evidence and argument regarding the appropriate punishment, and the court had instructed the jury, it recommended the court impose a death sentence by a vote of 11-1 (4 R 719). The court followed that verdict, and justifying that sentence, it found in aggravation:

> 1. Thomas had a previous conviction for a violent felony.
>
> 2. The murder was committed during the course of a kidnapping and burglary
>
> 3. The murder was committed for pecuniary gain.
>
> 4. It was especially heinous, atrocious, or cruel.

(5 R 775-76).

In mitigation, the court found none of the statutory mitigation but considered the following nonstatutory factors,

1. Thomas was a good god-parent. Little weight.

2. He was a good and respectful son to his parent, grandparents, and neighbors. Significant weight.

3. He was a good inmate. Significant weight.

4. He had previously saved the life of another. Significant weight.

(5 R 777-79)

As to the other offenses, the court sentenced Thomas to consecutive life sentences except for two aggravated batteries. For those latter convictions, it imposed consecutive fifteen-year terms of imprisonment. (5 R 743-66).[2] It also applied concurrent three-year minimum mandatory prison sentences for several of the counts in which a firearm was involved (5 R 767).

This appeal follows.

[2]The court entered written reasons why it had departed from the sentencing guideline recommendations (5 R 784, 790).

## STATEMENT OF FACTS

At midnight on Friday April 12, 1996, eighteen-year-old Monye Elvord went to the Superdome in Jacksonville to see her boyfriend perform (14 R 522). She parked her 1991 four-door Geo Prism in a grassy lot nearby. There were some lights illuminating the area, but the spot where she had parked was not particularly well lighted (14 R 532). She went inside the building and stayed for about 3 ½ hours (14 R 523, 526). As she left, she met Imara Skinner, a man she had worked with in 1995, and whom she had not seen for over six months (14 R 528). He offered to escort her to her car, and, in return, she said she would return him to the front part of the Superdome because it was some distance to her car (14 R 529).

They got to her vehicle without incident, but two men came up, opened the doors, and ordered them out (14 R 533-34). They complied, and Elvord told them they could have her purse and car because she was pregnant and wanted to be left alone (14 R 537). She was ordered back in the car, and climbed into the backseat. Both assailants also got in with the one she later identified as Robert Thomas sitting in the driver's seat, and the other Defendant, Darrell Davis, sitting next to her in the rear seat. Skinner was in the front passenger seat (14 R 553).

As they took off, Davis told Thomas to turn down the radio (14 R 555). Then turning to Elvord, he asked if she and Skinner "had ever had sex before, and

we both responded no." (14 R 556). Davis said "that before this night is over, that you all are going to have to have sex." (14 R 556).

Thomas asked Skinner and Elvord if they had ATM cards. She said she did, but Skinner said he did not, but had $250 at home (14 R 557). Davis got mad because he wanted $500, and he "started popping Imara in the back of the heard wit the gun. And he was saying, 'I'm not a Jit. Do you think I'm stupid?'" (14 R 557-58) Davis also pointed his gun at Elvord and said that he "ought to shoot her for this." (14 R 558).

Elvord calmed him down, and told Davis she had about $130 in her account, and she gave him the $20 bill she had on her (14 R 558). They drove to a nearby ATM, and on the way, Davis told Skinner not to look at Thomas, and he hit him in the head again several time (14 R 560). Davis also put his gun in Elvord's face and had her lick it (14 R 560-61). He told her that she was going to have oral sex with him, and he would kill her "if I didn't make him come." (14 R 561).

When they got to the ATM, Davis and Elvord left and eventually got $110 from it (14 R 564). He wanted more, but that was all she had. They returned to the car, and he then forced her to have oral sex with her (14 R 587). It continued as the car pulled away, and until they got to Skinner's apartment (14 R 588). All the while Davis continued his threatening and hitting Skinner with the gun (14 R 590).

At Skinner's apartment Davis also told Thomas, "Cuz, if he tries anything, you better shoot him." (14 R 592). While the two men went inside, Davis continued to force Elvord to have sex with him (15 R 603).

A few minutes later Thomas returned alone. Davis asked his "Did he try you, man? Did he try you? Did you get him?" The Defendant replied "kind of, like-was like, 'Yeah, man." Skinner had tried to "buck" Thomas, and he had shot him (15 R 604, 16 R 951). Thomas drove off in a hurry, and Davis told him to slow down. They had not gone far when Thomas turned around and returned to Skinner's apartment because he had left the keys in the front door, and he had not wiped it to remove any fingerprints (15 R 605). As they drove away a second time, Davis said he wanted to have anal sex with Elvord (15 R 607). She did not want that, but she sat in his lap and leaned forward. He apparently tried but failed to have anal intercourse with her (15 R 610). Thomas, tired of Davis' efforts to have sex with her, told him "man, just leave her alone. We'll drop her in the cemetery, just leave her alone." (15 R 610). Davis refused, saying, "No, man, I'm going to get me a piece of this." (15 R 610). Eventually, he reached a "sexual climax." (15 R 613)

Davis then began "fidgeting" with his gun, and when he could not unlock the safety, he traded weapons with Thomas (15 R 617). Davis then shot Elvord in

the leg (15 R 618). He found the ejected shell then shot her a second time in the leg, telling her "that's for not having $500." (15 R 619).[3]

They drove to a housing development about 1½ miles from where Thomas lived (16 R 922). Davis told Elvord to get out, and she "kind of fell out" (15 R 620, 645). The car left, and it was abandoned some time later and burned (16 R 889, 895)

Over the next several weeks, the police let Elvord look at several thousand pictures. She did this because she could not "formulate an idea of how the driver looked," but would know him if she saw him (15 R 663). She had described Thomas as being a black male, five feet ten inches tall with an "Afro that was maybe an inch long, if not shorter." The hair also looked as if it had been "picked." (15 R 672) He was not bald (14 R 542, 15 R 671-72). He also had obvious scars or acne on his face and a very distinguishable cyst on the back of his head (15 R 662, 665, 670) He was slender. Davis was five feet seven inches tall and "visibly chunky" with a goatee (15 R 542-43)

Eventually, the police had her look at several photospreads, and she finally picked Thomas and Davis out of the ones presented to her (16 R 908-912). She was certain of her identification even though at the time of the assault, she had

[3]In his confession, Davis said Thomas told him "You're going to have to kill her." (16 R 952). Davis also told the police that after he had shot Elvord, the Defendant turned on the car's dome light and retrieved the shell casings (16 R 954).

been up almost 24 hours and was scared, Thomas had said little, and she was concentrating on Davis' demands (15 R 626, 664).

Skinner had been shot once at close range through the heart and lungs (16 R 847, 849). Because of the path of the bullet, he was either sitting when shot or stooped slightly as if lunging (16 R 861-62). The bedroom where the body was found was messier than the rest of the house, but the victim still had his watch and wallet (15 R 735, 16 R 863).

Thomas and his brother, Clarence, had planned to go to Daytona for the weekend of April 12 , and the latter reminded his younger brother on Friday of their plans (18 R 1279-80, 1296-97). About noon that day, Thomas had a local barber shave his head bald, the way he liked it (18 R 1253).[4] Late that evening, the Defendant was seen at the Superdome (18 R 1312). The brothers left Jacksonville about 11:00. or 11:30 a.m. and arrived in Daytona about an hour later (18 R 1332). They could not find a motel to stay, however, so about an hour and a half they returned home, getting there about 3 a.m. (18 R 1335, 1345). Thomas opened the door to their parent's home, but left the key in the door (18 R 1352, 1362). He went to sleep, but his father woke him a short time later when he came home and discovered the key in the door (18 R 1362). They argued for about 20

[4]Some State witnesses claimed Thomas did have an Afro of sorts the evening of the murder (16 R 813)

minutes (18 R 1363), and eventually Robert left and spent what remained of the night and the rest of the day with his girl friend (18 R 1338).

About two weeks later, the Defendant was taking his goddaughter to the hospital because she had a breathing problem (18 R 1414-15). He had been there once that day, but was returning when he and the child's mother could not get the prescription for medicine filled (18 R 1415-16). The infant was very sick, and Thomas, who was driving, began speeding and driving erratically on the interstate (17 R 1113, 19 R 1415). The police gave chase, and he soon stopped. According to him,[5] the police "jumped out of their cars as soon as we pulled over, screaming, with their guns out." (19 R 1418) Thomas panicked and sped away, eventually running the car into a ditch (19 R 1421). He was arrested a short time later (19 R 1144).

Now, Davis and Thomas came from the Sherwood area of Jacksonville, and had known each other since childhood (15 R 762).[6] They had not been especially close friends, just acquaintances who did not "hang out" together (16 R 842, 18 R 1309). During the Jam Splash weekend, Davis ran with some other friends, riding

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[5]See ISSUE I for the State's version of what happened.

[6]At the time of his arrest, Thomas denied knowing Davis, but a policeman saw the Defendant trying to communicate with Davis when they happened to pass each other at the jail (16 R 978-82)

to and from the Superdome, drinking liquor and snorting cocaine (15 R 767-68).[7] By early Saturday morning, he was drunk (15 R 796). No one saw him with Thomas that evening, and indeed, the last anyone saw the Defendant at the Superdome area was about midnight (15 R 771, 16 R 806, 821).

[7]When questioned by the police, Davis said he met Thomas about 12:45 a.m., and they discussed their common need for money. Davis had $20, but Thomas was "flat broke." (16 R 940)

## SUMMARY OF THE ARGUMENT

ISSUE I. The Court, over defense objections, admitted evidence that about 10 days after the murder, Thomas was stopped for speeding. The police tried to get him out of his car, but he sped away, eventually crashing the vehicle into a ditch and fleeing. Although the court admitted this evidence, it erred in doing so because there was no reasonable nexus between this flight and the murder the State would charge Thomas with committing. No evidence linked Thomas' flight with any belief the police were investigating him for the murder that had occurred, not hours, but days earlier. Bolstering this conclusion, there was virtually no media attention given to the Skinner murder, and Thomas had a legitimate reason, the needs of a sick child, to explain not only why he was speeding, but his flight. Finally, the State presented no other evidence to support the conclusion it wanted the jury to draw from his flight. Given the inherent ambiguity of flight days after and miles from the murder, the evidence the Court admitted did nothing other than present Thomas in a bad light and exhibit his bad character.

ISSUE II. During its direct examination of the surviving victim, Monye Elvord, the State had her stepped off the witness stand and stand behind Thomas and Davis to show that she had identified them as her assailants. As she did that she dropped onto a bench or chair, moaning "Oh God. Oh God." Although the court excused the jury for a few minutes, it did nothing else to eliminate the

prejudice this understandable and foreseeable emotional distress created. Specifically, it never inquired of the jury about the impact of the outburst, and most important the trial judge never told the jury that Ms. Elvord's collapse must have no effect on their deliberations. These shortcomings were particularly crucial here because during cross-examination, the court had to excuse the jury for a second time so she compose herself. Defense counsel at another point stopped his questioning of her because she was so upset. With the court doing almost nothing to minimize the damning impact of Ms. Elvord's emotional displays, the jury's verdict has little reliability.

ISSUE III. By Saturday, April 5, Thomas' trial had lasted a day or two longer than the court had thought it would go. The jury had listened to five days of testimony, and Saturday afternoon they heard five hours worth of argument and instructions on the law. The court ordered the jury to immediately begin deliberating, but by 1:30 a.m. they had problems reaching a verdict. By 3:30, jurors were crying, and the foreman reiterated his conclusion they were deadlocked. The court let them go home to return at 1 p.m. that afternoon. They did, and even though the foreman again said they were deadlocked the court, without giving them an Allen charge, told them to resume deliberations. They did and sometime later returned their guilty verdicts. The court should have declared a mistrial as defense counsel had requested because the court, through its words

(including failure to give an Allen charge) and actions (notably, repeatedly directing the jury to continue deliberating without any indication that it could legitimately be hung) exerted its influence on the jury to reach a decision. Such coercion, whether intended or not, and whether subtle or open, was improper.

ISSUE IV. Thomas made repeated requests that the jury view the scene at the Superdome at night so they could appreciate his defense that the lighting conditions on the night of the murder were so poor that they had to question the certainty of Monye Elvord's identification of him as one of her assailants. What he wanted was reasonable, and the view would have assisted the jurors in analyzing her credibility. The court should have granted his request.

ISSUE V. Thomas attacked the reliability of Elvord's identifying him because she had picked his picture from a photospread more than two weeks after the murder and after she had looked at pictures of thousands of people. She saw him only briefly, in poor lighting, when she was under great stress from the robbery and kidnapping, but more significantly, from Davis' sexual attacks on her. She gave the police a description of him, but could never provide sufficient details for an artist to draw a picture of that assailant.

ISSUE VI. During the guilt phase charge conference, Thomas asked the court to instruct the jury on culpable negligence as an essential element of the lesser included offense of involuntary manslaughter. The court refused that

request. That was error because this court has held that element is essential to defining manslaughter. In addition, the evidence of the manner in which Skinner was killed supported Thomas' contention that the jury could conclude he committed a manslaughter by culpable negligence.

ISSUE VII. The murder of Skinner was not especially heinous, atrocious, or cruel because there evidence fails to show with any convincing clarity that Thomas intended for the victim to suffer before being killed. The threats made, for the most part by Davis, were conditional, that he would kill Skinner if he tried to fool him, and that he would shoot the victim if she did not stop looking at him.

As horrible as the felony murder must have been, there is no evidence Skinner was certain he was going to die. To the contrary, Thomas only wanted money, and both Defendants took their victims around Jacksonville looking for it. That the track of the bullet is consistent with Skinner lunging at the Defendant when struck, and it lends credence to the belief that the murder was not only unintended but also committed with no desire to cause Skinner any great or extraordinary mental suffering for no reason other than to enjoy his agony. The murder was not especially heinous, atrocious, or cruel.

ISSUE VIII. Although this court has repeatedly ruled that a Defendant cannot argue any "residual" or lingering doubt the jurors may have of his guilt as mitigation, this court should re-examine that position. Several state and federal

courts have recognized the extraordinary power such an argument has. This court should recognize the obvious: that jurors will, as a matter of common sense justice, consider the strength of their conviction of the defendant's guilt when they make a life or death recommendation. This court should remand so Thomas can tell the jury as much.

ISSUE IX. The jury's death recommendation was fundamentally tainted because the State argued in its closing that Thomas was a convicted murderer and the jury should show him as much sympathy as he showed Imara Skinner. That was clearly wrong, and in light of the problems the jury had reaching a guilt verdict in this case, the State's argument became fundamental error.

ISSUE X. The court denied Thomas' motion to suppress statements he had made after he had invoked his right to counsel for the crimes arising out of the interstate speeding incident. This court should re-examine its opinion in Sapp v. State, 690 so. 2d 581 (Fla. 1997), and adopt the dissenting opinion.

ISSUE XI. The prosecutor, in the guilt phase closing argument, attacked the credibility of Thomas' lawyer, gave his personal opinion, and testified about facts not in evidence. The accumulation of those errors requires this court reverse the trial court's judgment and sentence and remand for a new trial.

## ISSUE I

THE COURT ERRED IN ADMITTING EVIDENCE THAT ABOUT TWO WEEKS AFTER THE MURDER OF IMARA SKINNER, THOMAS WAS SEEN SPEEDING ON INTERSTATE 10 AND WHEN STOPPED HE FLED FROM THE POLICE, EVENTUALLY CRASHING THE CAR HE DROVE AND LEAVING ON FOOT, IN VIOLATION OF HIS FIFTH, SIXTH, AND FOURTEENTH AMENDMENT RIGHTS TO A FAIR TRIAL.

The State, following the dictates of Sections 90.402 and 90.404(2) Florida Statutes filed a "Notice of Other Crimes, Wrongs, or Acts Evidence" in which it alleged on April 24, 1996, Thomas fled from a police officer that resulted in a high speed chase. He also struck a police officer with a car after the latter had stopped him, and resisted arrest (1 R 43).

Thomas filed a "Motion in Limine" seeking to prohibit the State from introducing this evidence (2 R 205-207), but the court denied that request, and it was admitted, over renewed objection, at trial (2 R 208, 9 R 1400-35, 17 R 1098).[8]

The testimony at trial showed that about midnight on April 24, 1996, an Officer Clark of the Jacksonville Sheriff's Office saw Thomas driving his car about 90 miles per hour on I-10 (17 R 1097-1100). He chased it, but another officer, Long, stopped it, and ordered "the subjects" to put their hands in plain

[8]Thomas also renewed his motion at the end of the State's case (17 R 1168).

view (17 R 1103-1104).[9] Clark, who was wearing plain clothes (17 R 1105), moved to Thomas' vehicle and gave the Defendant some commands. While the passenger apparently obeyed, Thomas did not, and when Clark opened the door to take him out, Thomas took off. Clark held on for a second but then let go (17 R 1106-1107). The police gave chase again, and eventually Thomas crashed the car into a ditch and fled into some woods (17 R 1109, 1144). He was caught a short time later (17 R 1144). When Clark arrived, he learned for the first time that an infant was in the Defendant's vehicle (17 R 1109).

Thomas, when questioned, told the police that he was taking the baby, his godchild, to the hospital because the infant's mother had been unable to fill a prescription she had gotten earlier that day (19 R 1414). The child had begun gagging and struggling for breath, so they sped to the medical facility (19 R 1416). After the police stopped Thomas they "jumped out of their cars as soon as we pulled over, screaming, with their guns out." (19 R 1418). He and his passenger tried to let them know they had a sick baby, but by that time they were trying to get him out of the car (19 R 1419). Thomas panicked and sped away (19 R 1421).

The court admitted the evidence of Thomas' flight as relevant to show the Defendant's "consciousness of guilt." (2 R 208). It erred because this proof

[9]The car pulled over after Long had followed it for two miles (17 R 1149).

demonstrated only the Defendant's bad character and had no relevance to the charged crimes.

Evidence of flight is inherently ambiguous. Merritt v. State, 523 So. 2d 573 (Fla. 1988). Despite the proverb, that "The guilty fleeth when no man pursues," people, guilty and innocent, leave a crime scene for a variety of reasons. The inherent ambiguity becomes more pronounced when a defendant flees the police hours, days, or weeks after some crime has occurred. Hence, Florida law has admitted evidence of flight as evidence of consciousness of guilt but only when the proof showed the Defendant evaded the police because he or she had had some fear of being arrested for the charged crime, and the State presented other, substantial evidence that the Defendant fled for fear of being apprehended because he had committed the crime he currently is on trial for committing. Whitfield v. State, 452 So. 2d 548 (Fla. 1984)(Flight alone is no more consistent with guilt than with innocence.); Escobar v. State, 699 So. 2d 988 (Fla. 1997).

In Escobar, the Escobar brothers had stolen a car three days before a police officer stopped them. Dennis Escobar shot the officer, and the pair then fled, and a month later they were involved in a shoot out with California Highway Patrol Officers as the latter tried to stop them for traffic infractions. At their subsequent Florida trials, the court admitted evidence of the California shootings as evidence of their attempt to escape or avoid prosecution. It concluded by finding "This

evidence is probative of defendant's mental state and is, therefore, admissible. Straight [v. State, 397 So. 2d 903, 908 (Fla. 1981)]" Escobar, at 995.[10]

This court concluded that the lower court had erred in admitting that evidence. "[W]e do not find a sufficient evidentiary nexus in the record of this trial to have permitted the jury in this case to reasonably infer that appellant's acts in resisting arrest in California were related to the Estafan murder." Id. at 996. In reaching this conclusion the court clarified the law on admitting evidence of flight as evidence of a Defendant's guilt.

> We agree, as an abstract rule of law, that evidence of flight, concealment, or resistance to lawful arrest after the fact of a crime is admissible as "being relevant to consciousness of guilt which may be inferred from such circumstances." Straight v. State, 397 So.2d at 903, 908 (Fla.1981). However, in applying this principle to a particular case, there must be evidence which indicates a nexus between the flight, concealment, or resistance to lawful arrest and the crime(s) for which the defendant is being tried in that specific case. This is necessary in the application of this rule of law since the evidence creates an inference of a consciousness of guilt of the crime for which the defendant is being tried in that case. See Merritt v. State, 523 So.2d 573, 574 (Fla.1988). The ultimate admissibility issue is the relevance to the charged crime.

[10]Originally, the trial court had excluded the evidence, but the State petitioned the Third District Court of Appeal for certiorari review. The appellate court granted review and quashed the trial court's order. State v. Escobar, 570 So. 2d 1343, 1346 (Fla. 3d DCA 1990). This court reversed that ruling when it reviewed the case. Escobar v. State, 699 So. 2d 988, 995 (Fla. 1997).

The court then relied on an Eleventh Circuit case, United States v. Borders, 693 F. 2d 1318 (11th Cir 1982), which it had cited in Bundy v. State, 471 So. 2d 9 (Fla. 1985), to aid in its analysis. It specifically relied on language in the opinion that "the probative value of flight evidence is weakened: 1) if the suspect was unaware at the time of the flight that he was the subject of a criminal investigation for the particular crime charged, . . . 2) where there were not clear indications that the defendant had in fact fled, . . . . 3) where there was a significant time delay from the commission of the crime to the time of flight. . . . . The interpretation to be gleaned from an act of flight should be made with a sensitivity to the facts of the particular case. Borders, 693 F.2d at 1325. (Citations omitted.)

In rejecting the California evidence, this Court concluded that two of the three Borders' factors significantly weakened whatever nexus may have existed between the California crimes and the Florida homicide. The latter offense occurred 27 days before the California offenses, and the Defendant had no reason to believe he was the subject of the Florida murder investigation or that it had received any publicity in California. Also, because he had California warrants for his arrest outstanding, it was as likely he fled the police because of his guilt for them as for the Florida murder.

Escobar signals a major rethinking by this Court of the probative relevance of flight evidence. In concluding that the California attempted murder had no

pertinence to Escobar's Florida homicide trial, this Court had to distinguish and limit several other cases that had been routinely cited for the proposition that any evidence of flight was admissible. Straight v. State, 397 So. 2d 903 (Fla. 1981); Bundy v. State, 471 So. 2d 9 (Fla. 1985); Wyatt v. State, 641 So. 2d 1336 (Fla. 1994; Freeman v. State, 547 So. 2d 125 (Fla. 1989); Remeta v. State, 522 So. 2d 825 (Fla. 1988).[11] It also breathed a revitalizing life into Merritt, which after Bundy seemed to have been limited to its facts. This Court explicitly relied on the former case in concluding that the lower court in Escobar had erred in admitting the evidence the Defendant had resisted the California police.

From Escobar, proof of flight becomes relevant if there is a nexus between the flight and the charged crime. The reasonableness of that inference depends, in part, on the strength of the Borders factors.

The question in this case, therefore, focuses on the reasonableness of the belief that Thomas fled the police in fear of being apprehended for the murder he had allegedly committed.

There is, first and most important, no evidence Thomas knew the police wanted him because of their investigation of the Skinner murder. Indeed, not until an anonymous tip linked Davis to the Skinner homicide about May 2, 1996, would

[11]Significantly, the State in this case relied on Straight, Freeman, Bundy, and most tellingly, the Third District's opinion in Escobar to support its argument that the flight evidence should have been admitted (9 R 1406-1409).

they develop any clues that Thomas was the one who had shot the victim (7 R 1110). Moreover, when the law enforcement officers stopped him, his panic and flight more reasonably arose from having been pulled over for speeding rather than as a suspect in a homicide that had occurred weeks earlier.

Unlike the Bundy murders, there is no evidence that Skinner's homicide had generated any press. In fact, when Thomas sought to have the jury individually questioned because of the alleged "widespread publicity," the prosecutor gave his opinion "that this case got an unbelievably low amount of publicity." (9 R 1511)

That he had a sick child in the car who needed immediate, life saving medical attention, also provided another explanation for fleeing the police (19 R 1414-15). See, Stallings v. State, 618 So. 2d 319 (Fla. 1st DCA 1993); Crocker v. State, 616 So. 2d 1180 (Fla. 1st DCA 1993) (Error to give flight instruction when other reasonable inferences could be drawn from the Defendant's flight.)

Finally, the State presented no other evidence linking Thomas' flight to his consciousness of guilt. Merrit, cited above; State v. St. Jean, 658 So. 2d 1056 (Fla. 5th DCA 1995)("It is necessary, of course, that there be some evidence other than the flight to show that the fleeing was to avoid prosecution.")

It, moreover, repeatedly and at some length, used the April 29 police encounter to support its closing argument in the guilt phase of the trial (20 R 1626, 1652-54).[12]

There is, therefore, as in Escobar, an insufficient nexus between Thomas' flight two weeks after the murder and that homicide to make it relevant. Said another way, it is "simply not a reasonable inference" to infer Thomas fled the Jacksonville police because he was conscious of his guilt of the Skinner murder.

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

[12]Thomas also spent considerable time minimizing the flight evidence during his closing argument, and that could only have detracted his and the jury's attention from his primary argument: that someone other than him murdered Skinner (20 R 1615-20).

## ISSUE II

THE COURT ERRED IN DENYING THOMAS' MOTION FOR MISTRIAL AFTER MONYE ELVORD, ONE OF THE VICTIMS IN THIS CASE AND THE STATE'S CHIEF WITNESS, HAD AN EMOTIONAL BREAKDOWN WHEN THE PROSECUTOR ASKED HER TO STEP DOWN FROM THE WITNESS STAND AND STAND BY THE PERSONS WHO HAD RAPED AND SHOT HER, A VIOLATION OF THE DEFENDANT'S FIFTH AND FOURTEENTH AMENDMENT RIGHTS TO A FAIR TRIAL.

Monye Elvord was the star witness for the state in its prosecution of Thomas and Davis for the murder of Imara Skinner and other crimes committed on April 12-13, 1996. She had been sexually battered and shot by Davis then left on the road (15 R 620, 645). She also knew that Skinner, the friend who had offered to walk her to her car to protect her, had been shot. When called to testify and face the men she would identify as having done these atrocities to her and Skinner, she understandably faced a difficult task. Making it sublimely more onerous, the prosecutor directed her to step off the witness platform and go to where the Defendants sat and identify them. This is what then took place.

> Q. Mr. PLOTKIN [prosecutor]: Miss Elvord, I want you to look around the courtroom, and I want you to identify the man with the gun who first showed up and forced you out of your car by walking over to him and standing next to him? . . .
>
> A. (Witness complies)
>
> Q. Is that the man, Miss Elvord.

A. That's the man.

Q. Are you positive

A. I am positive.

MR. PLOTKIN: You Honor, may the record reflect that she is standing behind the Defendant Robert Thomas?

THE COURT: Yes, sir, the record will so reflect.

BY MR. PLOTKIN:

Q. Miss Elvord, I'd like you to identify the man who raped you by standing behind him.

MR. PLOTKIN: Your Honor, I think --

COURT: Okay. We'll be in recess for --

ELVORD: Oh, God. Oh, God.

COURT: Okay. Ladies and Gentlemen, we're going to take a recess for about fifteen minutes. Those of you in this jury, would you please go out the door, the officer will take you to the courtroom next door. Would you all please step into the jury room here, please? Thank you.

(Both juries retired from the courtroom and the following proceedings were held:)

THE COURT: Court will come to order.

* * *

ROLLE: On behalf of Mr. Thomas, Your Honor, we would move for a mistrial.

SHEA: Your Honor, we would join that motion, same arguments being offered by Mr. Rolle.

THE COURT: What's the basis for the motion?

ROLLE: Your Honor, just for the record, the Defense would object to the fact, and move for mistrial on the fact the way the State attempted to present identification of Defendant Thomas. It was done in, I think, the most -- I would have to say since I started following cases, Your Honor, I've never seen an actual case where there was little doubt to the fact of whether the victim would actually identify Mr. Thomas as a participant. We're not arguing misidentification. But to have Mr. Plotkin go through the series of events, bring out a very emotional response when she was already crying, then let that witness within two feet of my client, broke down and start crying, then leaning over the person she's accused of raping her, falls on her knees, yells out in pain about her emotional anguish, that has thoroughly tainted this jury, Mr. Thomas's jury, from any ability to render a fair and just verdict and being impartial and not be influenced to go ahead and make up their minds on whether or not Mr. Thomas was an actual participant. That emotional display was unwarranted. She could have made an identification from the stand. Mr. Plotkin chose to bring her within two feet of my client, also chose to bring her within four feet of Mr. Davis, causing such an emotional reaction. For the record, Your Honor, I believe the Court had to, at some point in time, convene Court just so the witness could, perhaps, recollection herself, or get herself together. She was lead out, people had to hold her, two or three people had to hold her leading out. She seemed almost unable to walk at certain points. That's thoroughly just influenced the jury. My client cannot get a fair trial by this jury based on the grandstanding of the prosecution.

THE COURT: The jury was not in when she was lead out of the courtroom. They had been excused at that time.

. . .

MR. SHEA: Your Honor, this is the closest thing I've seen to victim impact testimony. The emotional outburst I think is so prejudiced the jury, as far as identification of my client and as far as the statements that she made as she fell to the floor. Her anguish, they were all unsolicited.

THE COURT: You all, she didn't fall to the floor. She sat on that first bench.

MR. SHEA: She virtually fell down against the bench with the head bent over.

THE COURT: She sat on the bench, Mr. Shea. She didn't fall on the floor. She sat on the bench and leaned over.

MR. SHEA: . . . But it was in such an emotional state, with such anguish in her voice, all of the other body language that she portrayed really was more of an impact, was testimony, victim impact testimony.. . .

MR. PLOTKIN: ... Mr. Rolle likes to testify. But the bottom line is that Mr. Rolle and his opening, and all throughout has claimed misidentification. So, obviously, identification is a big issue. He said I lead her to a witness. I purposely stayed away from her, didn't even look at her, and she walked to where the defendants were located. I would like the record, if I could, Your Honor, to also note the way this courtroom is set up. Unfortunately, because of the multiple jurors, it would be questionable whether she could even necessarily point to, and see the defendants from where she is standing. I think they could clearly see her.

But the point being, Your Honor, I guarantee you that if I just had her stand, assuming she could do it, he would have had the typical closing argument of, you know that she just pointed in this general vicinity, and sort of sweeping fashion saying someone over there. It's not unusual in this City to have victims get off the stand and stand behind somebody they're identifying and, especially, in the way we have this courtroom

> set up at this point. I would certainly agree that she got emotional, but I think Mr. Rolle and Mr. Shea have overemphasized that to some disagree, and the fact of the matter is , Judge, that's just what happens....
>
> THE COURT: Okay. I don't find anything unusual, or surprising about her behavior based on what was done to her, so I'll deny the motion for mistrial.

(14 R 544-51)

Ms. Elvord returned to the stand, both juries took their seats, and the State, without any curative or cautionary instruction to the jury from the court, resumed its examination. Later, during the cross-examination by Davis' lawyer there was concern if she could

continue:

> Q. [Mr. Shea, counsel for Davis]: And at that time did you say that he had an ejaculation?
>
> A. I don't know. I don't know. I need a minute, sir, okay?
>
> Q**.** That's all right. I'm not going to ask you anymore in that regard. I understand it's difficult.
>
> THE COURT: You may step -- step in the room a moment.
>
> ELVORD: I need a minute. (Witness retired from the courtroom momentarily, after which the following proceedings were held:)
>
> THE COURT: Are you able to continue?

ELVORD: Yes, I am. Thank you.

COURT: Okay. Mr. Shea, you may continue.

(15 R 642-43)

Thomas' counsel encountered a similar situation:

Q. What thoughts were racing through your mind?

A. Lord, get me out of this. . .

Q. Well, unlike what you said to Mr. Plotkin -- do you need sometime? A. No, I'm fine. I'm fine.

Q. I'll give you all the time you need.

A. I'm fine.

(15 R 675-76)

The court erred in failing to grant Thomas' motion for mistrial because Ms Elvord's understandable emotional problems in identifying her attacker unfairly introduced an element of sympathy into this trial.

A. THE LAW

The law in this area reaches into the fundamental concerns we have that those charged with crimes have their guilt or innocence decided by fair and impartial jurors. Emotional outbursts such as crying, moaning, or collapsing obviously have no place in a trial. "A verdict is an intellectual task to be performed on the basis of the applicable law and facts. It is difficult to remain

unmoved by the understandable emotions of the victim's family and friends, even when the testimony is limited to identifying the victim. Thus, the law insulates jurors from the emotional distraction which might result in a verdict based on sympathy and not on the evidence presented." Jones v. State, 569 So.2d 1234, 1239 (Fla. 1990). The rule is based on the theory that the testimony of relatives is likely to be inflammatory and may arouse unwarranted jury sympathy for the victim, interjecting matters not germane to the issue of guilt or punishment. See, e.g., Dougan v. State, 470 So.2d 697 (Fla.1985); Welty v. State, 402 So.2d 1159 (Fla.1981); Lewis v. State, 377 So.2d 640 (Fla.1979). Even though feelings of sympathy naturally arise when jurors hear testimony such as Ms. Elvord's those emotions cannot enter the jury room. Thus, trial courts and this court have taken unusual precautions to prevent emotional outbreaks such as the one that occurred here from happening.

On the other hand, in matters of this sort, the trial court enjoys a large amount of discretion in ameliorating the prejudice that naturally arises when a victim cries, faints, or displays his or her emotions when testifying. It is in the best position to judge the prejudicial impact of the display, and this court has refused to grant aggrieved defendants relief because it has recognized the practical limits imposed by a "cold" appellate record in recreating the emotional atmosphere at the trial level. Arbelaez v. State, 626 So. 169, 176 (Fla. 1993); Torres-

Arboledo v. State, 524 So. 2d 403, 409 (Fla. 1988). Nevertheless, appellate courts will grant new trials when even the subdued record on appeal reflects the prejudice the defendant likely suffered.

In Arbelaez v. State, 626 So. 2d 169, 176 (Fla. 1993), the State called the mother of a murdered child.

> [A]s Graciela took the witness stand she was crying during the administration of the oath. The prosecutor requested a break for the witness to collect herself and then moments later she called Arbelaez a "murderer" and a "son of a bitch" in Spanish. Defense counsel moved for a mistrial. The trial judge sent the jury to the jury room and warned the witness to answer only the attorney's questions and to compose herself. The trial judge then surveyed the bilingual jurors to determine if they understood Graciela's comments during the emotional outburst. After surveying the bilingual jurors, the trial judge called the entire jury panel back into the courtroom. The trial judge then gave a curative instruction to the jury to disregard the witness's emotional outburst. After giving the curative instruction, the trial judge further inquired whether each juror could disregard the witness's emotional outburst. The record shows that each juror individually responded in the affirmative

On appeal, this court found no abuse of the trial court's discretion in denying the motion for mistrial because "this Court cannot glean from the record how intense the witness's outburst was at the trial, we defer to trial judge's ruling that the outburst was not of such an intensity as to require a mistrial." Id. The judge had also taken several affirmative steps to minimize any prejudice Arbelaez may have suffered: 1. It sent the jury out of the court. 2. It admonished the

witness to compose herself. 3. It surveyed the bilingual jurors individually to determine if they understood what Graciela's comments 4. It gave a curative instruction. 5. It inquired further whether each juror could disregard the witness' outbursts, and each one said he or she could.

In this case, the court took only the most timid step of briefly removing the jury to guarantee Thomas a fair trial. Moreover, unlike Arbelaez, the court and the attorneys spent some time describing what had happened when the prosecutor directed Ms. Elvord to stand behind Davis. So, more than in the earlier case, this Court can "glean" from the record the intensity of Elvord's reaction.

> The emotional outburst I think is so prejudiced the jury, as far as identification of my client and as far as the statements that she made as she fell to the floor. Her anguish, they were all unsolicited.
> THE COURT: She sat on the bench, Mr. Shea. She didn't fall on the floor. She sat on the bench and leaned over.

In Rodriguez v. State, 433 So.2d 1273, 1276 (Fla. 3 DCA 1983), the Third District Court of Appeal reversed Rodriguez' conviction for first degree murder because during the victim's wife testimony she shouted epithets and made passionate statements demonstrating her hostility toward Rodriguez. "Those outbursts, while understandable, were extremely prejudicial and created an atmosphere in which appellant could not receive a fair trial. Her conduct

necessarily engendered sympathy for her plight, and antagonism for Rodriguez, depriving him of a fair trial."(Emphasis supplied. Citations omitted.)

Sometimes, as in Rodriguez, the outburst so obviously polluted the jury that the trial court could do nothing other than granting a request for mistrial. In other instances, it controlled or limited the impact of the witness' actions by promptly removing the jury from the courtroom, admonishing the distraught witness to control himself or herself, and especially by giving the jury a curative or cautionary instruction. This last measure seems the most significant, Emotional Manifestations by Victim or Family of Victim During Criminal Trial as Ground for Reversal, New Trial, or Mistrial, 31 ALR 4th 229, so the stronger its wording the less likely the emotions displayed will corrupt the verdict.[13]

[13]For example a trial court in Kentucky told the jury: "Gentlemen of the jury, the crying of these women here must be entirely disregarded by you. You are not to try the case on anything of that kind. The jury is expected to be calm and dispassionate and to try the case solely alone on the evidence and the instructions of the court which will be given to you. That is the guiding star that is to control your actions and nothing else." Taylor v. Commonwealth, 108 S.W. 645 (KY 1937).

B. AS APPLIED TO THIS CASE.

In this case, we have more, much more, than a relative crying on the stand or creating a disturbance in the spectator's gallery. The prosecutor had Ms. Elvord, the only surviving victim, step down from where she had testified so she could stand behind the two men who had accosted her (14 R 544). Although she could be near Thomas, she literally could not stand to behind Davis, and "collapsed" onto a bench near him. In obvious pain, she dropped her head and moaned "Oh, God, Oh God." (14 R 545) The court prudently recessed the trial for fifteen minutes for her to regain her composure, but it never urged her to control the understandable emotions she felt. Had it done so, Ms. Elvord may have been able to withstand Davis' and Thomas' cross-examination without having to stop the trial so she could re-compose herself (15 R 545, 643).

Most significantly, the court never told the jury to disregard her repeated breakdowns, and that they could have no impact on their deliberations. It made no inquiry, as the court in Arbelaez had done, of the jurors either as a group or individually to determine if the obvious strain Ms. Elvord had in testifying would affect their deliberations. Indeed, it did nothing to minimize the prejudice that naturally arose from her understandable problems in complying with the prosecutor's request to stand behind her assailants and talk about the horrible events of April 12/13. The jury could, therefore, have reasonably concluded that

could consider Ms. Elvord's emotional crisis in determining Thomas' guilt. See, Pearce v. State, 112 So. 83, 87 (Fla. 1927). Justifying that belief, the State, during closing, recounted the incident, telling the jurors that "when she walked over and stood behind this man, stood behind him and trembled, her knees were weak, she cried, and all the horror and brutality of that night came screaming back to her as she faced this man whom she knew as the man that had abducted her and the man who had killed Imara Skinner." (20 R 1568)

Moreover, unlike Arbelaez and other cases involving this issue, the prosecutor in this case deliberately invited Ms. Elvord's collapse by instructing her to step off the stand and to identify the men who had abducted and raped and shot her ( 14 R 544-45). Torres-Arboledo v. State, 524 So. 2d 403, 408-409 (Fla. 1988) (Witness cries on the stand when asked to identify a medallion owned by the murder victim.) Such a tactic (without the court's approval) is very unusual. Normally, witnesses remain on the witness stand and simply point to the Defendant and says that he is "the individual black male in the blue suit over there, with his hand on his chin." (17 R 1135) . The prosecutor then asks "Can the record reflect he's identified the defendant." (17 R 1135) The court responds with "The record will reflect that the witness has identified the [defendant.]" (17 R 1135) If the Defendant has any problem with that he makes it known then.

Except for the way it treated Ms. Elvord that is the procedure used by the State every time it asked one of its witnesses to identify a Defendant (15 R 761, 16 R 92317 R 1097-98, 1135). It justified the unusual courtroom identification procedure it invoked for her because "I guarantee you that if I just had her stand, assuming she could do it, he would have had the typical closing argument of, you know that she just pointed in this general vicinity, and sort of sweeping fashion saying someone over there." (14 R 550) That he had her stand behind the defendants because of the courtroom layout simply rings false because it never made the same request for any of its other witnesses. Moreover, if Thomas or Davis had had any problems with who the witness claimed were her assailants they would have objected then, as in fact they did on occasion (17 R 1135). Thus, the prosecutor deliberately invited Ms. Elvord's understandable and predictable breakdown, and that request verged on prosecutorial misconduct. See, Garcia v. State, 622 So. 2d 1325, 1332 (Fla. 1993); Stewart v. State, 51 So. 2d 494 , 494-95 (Fla. 1951)(Prosecutor's act was a "pure gratuity without any basis in the record for it.")

In light of the prosecutor's provocative directions to Ms. Elvord and the almost complete absence of any effective curative or corrective action by the court, it abused the discretion this Court normally allows trial courts in matters

like this. This court can only conclude that the lower court abused the freedom it had, and remand for a new trial.[14]

[14]In light of the extraordinarily difficult time the jury had in reaching a verdict of Thomas' guilt, as discussed in the next issue, the error raised in this one could not have been harmless beyond a reasonable doubt. Moreover, the mistake must have infected the reliability of the jury's death recommendation because the sentencing phase of a capital trial is particularly prone to emotional influences creeping into the jury room. See, Bertolotti v. State, 476 So. 2d 130, 133 (Fla. 1985).

## ISSUE III

THE TRIAL ERRED IN FAILING TO GRANT THOMAS' MOTION FOR A MISTRIAL ONCE IT BECAME OBVIOUS THAT NOT ONLY WAS THE JURY DEADLOCKED DURING ITS GUILT PHASE DELIBERATIONS BUT THAT ALMOST OPEN HOSTILITY AMONG THE JURORS WAS EVIDENT, A VIOLATION OF THE DEFENDANT'S RIGHT TO A FAIR TRIAL AND AN IMPARTIAL JURY AS GUARANTEED BY THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I SECTION 9 OF THE FLORIDA CONSTITUTION.

The facts relevant to this issue focus exclusively on the jury's deliberations about Thomas' guilt, the problems they had determining it, and the court's response to that difficulty. In brief, the jury began deliberations about 7 p.m., told the court about 1 a.m. that they were deadlocked, but continued until about 3:30 a.m. at which time they were hopelessly deadlocked. Rather than ordering a mistrial, as Thomas requested, the court sent them home with directions to return at 1 p.m. that afternoon. They did, and sometime later returned guilty verdicts on all charges.

Now, in greater detail. The guilt phase part of Thomas' trial lasted from March 31 to April 5, 1997, which was a Saturday. On the latter date, the trial began about 2:30 p.m.[15] At that time the State and Thomas gave their closing

[15]The court had apparently spent the morning concluding the trial in Thomas' co-defendant's case (20 R 1551).

arguments, after which the court instructed them on the relevant law. That ended about 7 p.m., and the jury began deliberating (20 R 1705). Sometime later, they sent the court a message requesting the testimony of five witnesses. Because they wanted so much testimony, the court refused their request, except if they absolutely had to have it to reach a decision (20 R 1712).

Later, the jury said they needed to rehear what Monye Elvord had said, particularly about "identification issues." (20 R 1714) They also wanted to hear what two other State witnesses had to say that "supposedly placed Mr. Thomas in the grassy lot--. . . on that night." (20 R 1715-16). They heard what one of them had to say then resumed deliberations.

Sometime after midnight, the jury foreman sent the court a note saying "We appear to be deadlocked. The rehearing of testimony is not having any effect on the member who is undecided." (20 R 1717) The judge conferred with the lawyers about what to do. He considered reading the "Allen" charge, [16] which the State objected to, but not Thomas (20 R 1717-18). When the court discussed the matter

[16] Allen v. United States, 164 U.S. 492, 17 S.Ct.. 154, 41 L. Ed. 528 (1896). See, Fla. Std. Jury Instr (Crim.) 3.06. "An Allen charge is a supplemental instruction generally given when it appears the jury is having difficulty reaching a verdict. . . .In giving an Allen charge, the trial court must avoid: (1) coercive deadlines, (2) threats of marathon deliberations, (3) pressure for the surrender of conscientiously held minority views, and (4) any implication of a false duty to decide. . . . A trial court should say nothing to a jury that would influence a single juror to abandon his conscientious belief as to the correctness of his position." Gahley v. State, 567 So. 2d 456 (Fla. 1st DCA 1990), cites omitted.

with the jury, the foreman said that the additional testimony had not "seemed to sway the juror that has a difference of opinion . . . . "[W]e all agree that it probably would not change by hearing more testimony." (20 R 1720). Judge Davis, while promising not to "keep you here all night, obviously," had them continue deliberating. Once they had retired, the court began considering what to do if they could not reach a verdict. The state wanted to "just let them go home and come back tomorrow," but defense counsel said the jury had to be sequestered. (17 R 1722-23). The court deferred ruling, but at 1:30 a.m. it decided it was going to end the proceedings for the night and sequester the jurors (20 R 1724). Apologetically, it told them:

> I know I told you this would be over Thursday or maybe Friday, and here it is Sunday already. But I must do everything that I can to have the matter resolved so that we would not have to start from the beginning on the case. . .

(17 R 1725)

The court had the jurors continue deliberating but decided to end it by 3:30 a.m. (20 R 1726). The jury foreman, however, believed "we were on the verge of a breakthrough a few minutes ago, and that's why I asked for a couple of more minutes." "If we can't reach a verdict tonight, quite honestly I don't think we'll come any closer tomorrow than we are tonight." (20 R 1727). So, the court had them continue deliberating. Thomas, however, said he had no objection to letting

the jury go home because any verdict returned now would be "based on the oppressive nature of wearing one person down." (17 R 1728) The State objected, noting that "They made it quite clear they want to deliberate." (20 R 1729).

About the time the court had decided to end the deliberations for the night, the jury gave the court another note that said they were as deadlocked as before (17 R 1734). After reading it, Thomas moved for a mistrial, but the State argued that only an Allen charge was needed (20 R 1732). The court denied the Defendant's motion (20 R 1734) even though the foreman had revealed "The discussions have broken down to open hostility. It's an unpleasant environment. Quite frankly, I don't think we'll ever reach a decision. I'm embarrassed to say that, but it's a fact." (20 R 1735) The "opening hostilities" extended beyond the jury room because some jurors were "mumbling." More disturbing, "there are no less than four jurors crying in the jury box" and "A juror is now leaving the box followed by another juror." (20 R 1736)

Thomas renewed his earlier motion for a mistrial reemphasizing that "Their emotional life has been broken by the fact it's now 4:30 a.m., they're indicating to this Court repeatedly that they cannot reach a verdict. Any verdict would be as a result of duress and pressure, not based on the law and the facts." (20 R 1737) The State, to the contrary, noted that several jurors wanted to come back (20 R 1738).

The court ordered the jury to return at 1 p.m. that afternoon (20 R 1739).

It did, and at 1:20 p.m. it gave the court one more note: "Please review for our jury the instructions that relate to reasonable doubt and our responsibility to rely on the evidence in making a decision. We have reviewed that a number, [number is underlined,] of times during deliberations. It didn't seem to be making an impact. We are at the same place in our deliberations as where we originally started, eleven to one. The holdout is not able to provide [a] rational explanation of their (sic) hard line position." (21 R 1742)

The court refused to read those instructions because they had them.[17] It also refused to give them an Allen charge because it "simply tells them to do what they have done for the last eight to ten hours." (21 R 1743) Nevertheless, the court inquired if it could do anything to help. The foreman asked for more time, noting however, that "As far as I know, we're still at the same position we were when we left last evening. . . " (21 R 1745) So, they retired and sometime later rendered their guilty verdicts (21 R 1747-48)[18]

The reliability of that decision, however, is suspect, in light of what the court told the jury, the long time it had them continue deliberating, and the physical and emotional exhaustion the jury experienced. The court should have granted Thomas' motion for a mistrial. That it did not was reversible error.

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[17]Rule 3.400(b) Fla. R. Crim. P.

[18]By this time Thomas had withdrawn his request for an Allen charge (21 R 1746).

Fundamental to our system of justice that relies on citizens to fairly pass on the guilt or innocence of those charged with crime is the notion that the verdict be the considered judgment of each juror. The jury must remain unaffected by external influences; and coercion, whether by words or actions, fatally calls contaminates the reliability of the subsequently rendered verdict. To preserve the integrity of that decision, courts have jealously guarded the sanctity of the jury room and what goes on there. So sacred are jury deliberations that even the judiciary is very careful about what it tells jurors so as to not give them any hint about what they believe the verdict should be. Webb v. State, 519 So. 2d 748, 749 (Fla. 4th DCA 1988) .

Indeed, as Justice Kogan noted in his dissent in Colbert v. State, 569 So. 2d 433, 436 (Fla. 1990): "Few portions of a trial are more sensitive than those in which the judge addresses the jury regarding its deliberations. A spontaneous statement by a judge at this crucial time could have serious repercussions; and we, as an appellate court, simply have no way of gauging what that effect might have been." Thus, a trial court normally says nothing about how a jury should conduct its deliberations. The Allen or "dynamite" charge presents the single, narrow exception to that rule. Moore v. State, 635 So. 2d 998 (Fla. 4th DCA 1994). It is used "when there is reason to conclude that a jury is deadlocked, but while there is still hope that a verdict can be reached." Id.

Coercion, as this court has recognized, can assume a more subtle form than putting gun to a juror's head or twisting his or her arm. The biggest, perhaps unwitting, source of pressure comes, as Justice Kogan implied, from the trial judge who, by his or her words or actions, can indicate a position on the merits of a case or suggest that holdouts agree simply to get a verdict. McKinney v. State, 640 So. 2d 1183, 1187 (Fla. 2d DCA 1994) ("The fear is that members of a deadlocked jury will improperly interpret the judge's word and actions as support for some position on the merits of the case.") That happened here. Judge Davis both said and did things to indicate his desire to for the jury to quickly resolve their differences.

When he initially decided the jury needed to rest for the evening (about 1:30 a.m.) he told them "I know I told you this would be over Thursday or Friday, but here it is Sunday already. But I must do everything that I can do have the matter resolved so that we would not have to start from the beginning on the case." (20 R 1725) He then added that arrangements were being made to sequester them, and they should resume deliberating (20 R 1726). Those words indicated his intention that the jury would continue deliberating some additional, unknown time that evening/morning, and that if they failed to reach a decision they would be isolated until they had. The court did not then, or later, ever give them the Allen charge caveat that if they could not resolve their differences the court would "declare this

case mistried, and will discharge you with my sincere appreciation for your services." Stand. Jury Instr. (Crim.) 3.06.

In Bass v. State, 611 So. 2d 611 (Fla. 2d DCA 1993), the trial court gave the deadlocked jury a modified Allen charge that urged the jurors to resolve their difference by considering "the expense that a new trial would involve." Those words, the Second District concluded, tended to coerce the jury to reach a verdict and required a new trial. Accord, Warren v. State, 498 So. 2d 472 (Fla. 3d DCA 1986). The trial court's revelation in Thomas' case of its concerns about needing to "have the matter resolved" put a similar subtle pressure on the jury in general and, the lone hold out juror in particular the court in Bass condemned.

The court continued to increase the tension when it refused to give them an Allen charge as defense counsel had repeatedly asked it to do. Of course, the judge inquired what it could do to resolve their differences (21 R 1744), but it never told them, as this special jury instruction does, that "if you simply cannot reach a verdict, then return to the courtroom and I will declare this case mistried and will discharge you." Fla. Std Jury Instr. (Crim.) 3.06. For all the jury knew when it reassembled on Sunday afternoon, the court intended for them to return to the court barely eight hours after having been dismissed for the evening and deliberating until they reached a verdict, somehow. Considering that the trial had lasted much longer than the court had anticipated, well into Sunday, and the jurors

had sat uninterrupted since 2 p.m. the previous day, the jury and the holdout could have had a well founded fear they would never escape from this case.

Moreover, if we consider what the court told the jury as a modified Allen charge, reversible error still occurred because the guidance it gave never provided the same approach to the deadlock or offered a similar solution as Allen does. Indeed, because this special instruction "Approaches the ultimate permissible form in its most acceptable form," the court's inadequate deviation from it almost guaranteed an error. Warren v. State, 498 So. 2d 472 (Fla. 3d DCA 1986)(In addition to an Allen charge, the court said she did not wish to try this case again because it would cost a great deal of money, and she hoped the jury could return a verdict.); Tomlinson v. State, 584 So. 2d 43 (Fla. 4th DCA 1991); United States v. Sewell, 550 F. 2d 1159 (9th Cir. 1977).

The court's actions of repeatedly asking the jury to continue deliberating after numerous notes telling them they were impossibly deadlocked also put pressure on the jury as a whole and the holdout in particular to reach a verdict regardless of any disagreements about the facts. By 3:30 a.m. the jury had been deliberating over eight hours after getting the case at 7 p.m., after listening to five hours of arguments and instructions, and after being awake for almost 24 hours. Their exhaustion became evident when they resumed deliberating at 1 p.m., barely eight hours after the court had sent them home. The jury foreman quickly let the

judge know that "we're still at the same position we were when we left last evening." (20 R 1745) Without giving the lone holdout any knowledge that he or she could legitimately maintain his or her position, as the Allen charge informs, it led him or her and the rest of the jury to believe they had no choice but to continue their deliberations until someone snapped.[19]

The jury foreman unintentionally added to the pressures on the holdout by telling the court that the vote for guilt was 11-1. Courts have routinely condemned trial judges asking deadlocked juries about the vote split. McKinney v. State, 640 so. 2d 1183, 1186-87 (Fla. 2d DCA 1994); Rodriguez v. State, 559 So. 2d 678 (Fla. 3d DCA 1990); Scoggins v. State, 691 So. 2d 1185 (Fla. 4th DCA 1997). Merely revealing the split--which is particularly egregious when a single juror has "stuck to his guns"--tends to be unfairly coercive. C.f. Lewis v. State, 369 So. 2d 667, 669 (Fla. 2d DCA 1979)("It is impermissible for a trial court to instruct in such a manner which tends to embarrass a single juror in holding to his honest convictions.") As the court in Scoggins said, "For whatever reason, whether to gauge the time for an evening recess or to decide whether to give the jury a deadlock charge, if a trial judge inquires into the sensitive area of the possibility of

[19]The court refused to give the jury the Allen charge because it simply tells them to do what they have done for the last eight to ten hours." (20 R 1743) Not quite. This special guidance also told them they could "legally disagree," and if they persisted in maintaining their positions, "I will declare this case mistried, and will discharge you with my sincere appreciations for your services." Std. Jury Instr. (Crim.) 3.06.

a verdict, the better practice is to admonish the jury at the outset not to indicate how they stand as to conviction or acquittal." Id. at 1187-88. (Footnote omitted.)

Now, Thomas is not alleging the trial court deliberately sought to coerce the holdout juror to capitulate. The fundamental question remains though of whether, regardless of the source of the error, the verdict fairly reflected the considered judgment of each juror free of external influences. In this case, giving the jury the case late on a Saturday evening, after having sat for five hours of arguments and instructions, then having them deliberate nonstop until 3:30 a.m. would have drained the physical and mental stamina of the strongest marine.[20] This jury, however, had ordinary citizens, some of whom, apparently, were elderly (20 R 1730). After being awake for almost 24 hours then given a break for barely eight hours before they had to return to court (on a Sunday) and resume trying to convince the lone holdout (who had "no rational explanation of their hard line position." (20 R 1742)). The jurors, and particularly the holdout juror, must have felt coerced to reach a decision. They should never have believed that, and the court abused its discretion in refusing to grant Thomas' motion for mistrial. Tejeda-Bermudez v. State, 427 So. 2d 1096, 1097-98 (Fla. 3d DCA 1983). This

[20]That everyone was tired then and when they reconvened becomes apparent when the court let the jury go without giving them the usual admonition regarding the influence of the media, friends, family, and other matters. Nor did it make any inquiry into this area of concern to defense counsel (20 R 1722) when they returned later that day. Such was error. Diaz v. State, 435 So. 2d 911 (Fla. 4th DCA 1983); See, Livingston v. State, 458 So. 2d 235, 237 (Fla. 1984).

Court must reverse the trial court's judgment and sentence and remand for a new trial.

## ISSUE IV

THE COURT ERRED IN FAILING TO GRANT THOMAS' MOTION FOR A JURY VIEW, A VIOLATION OF HIS FIFTH, SIXTH, AND FOURTEENTH AMENDMENT RIGHTS.

By way of a pretrial "Motion for Jury View" and again at trial, Thomas asked the court to let the jury view the lighting conditions at night around the Superdome area in Jacksonville. As he said in his motion:

> The State of Florida has presented testimony which allegedly evaluates the lighting conditions around the Superdome Club during the night and early morning hours of April 12, and 13, 1996. The manner by which the State has sought to introduce such evidence is by way of aerial photographs of the area depict lighting during daylight hours. The photographs do not depict adequately depict [sic] the lighting of the above-described area during nighttime. The State has presented testimony from Monye Elvord, an eyewitness, that her identification of the Defendant Robert Thomas was based on her ability to see him in the lighting of the field parking area of the Superdome Club that evening.

(2 R 322)

Monye Elvord, of course, was the State's key witness, and she presented the crucial testimony identifying Thomas as one of her abductors. In particular she told the jury that Skinner had escorted her to her car, which was parked in a grassy lot adjacent to the Superdome. This occurred about 3:30 a.m. and the only lighting around her car came from a street lamp "up front" and near the club. "Then, there is not a lot of bright lights, but some lights in the back." (14 R 532).

When the assailant opened the door of her car pointed and pointed the gun in her face the dome light came on (14 R 533). She saw the front of his face for less than a minute, claiming the light was sufficient to see him (14 R 533, 534). Elvord said she was a person that "looks somebody in the face when I talk to them" (14 R 538), and once outside the car she looked at her assailant again (14 R 538). During the next hour and a half, however, she may have looked at him again, but she was unsure (14 R 541).

The man she saw was a black male who had an Afro that was an inch long, if not shorter. He was slender and had a light brown complexion. He also had some scars (14 R 542). More specifically, he had a cyst or scar on his face and some acne that was very distinguishable (15 R 661-62)

She got in the back seat of the car behind the driver (14 R 553). The other assailant began sexually battering her. During this time she had her face down. When she got the money from the ATM, Davis took her to the machine while the man she identified as Thomas stayed in the car (14 R 586). After returning, Davis resumed his sexual attack on Elvord, forcing her to perform oral sex on him (14 R 587). They drove to Skinner's apartment, and Thomas took Skinner inside, returning a few minutes later.

When cross-examined by Thomas, she said the cyst was "very distinguishable." (15 R 663). It was like a "keloid" scar, which is "when you have

a scar of some sort that scar tissue continues to grow underneath that causes it to raise or to spread." (15 R 671). It was on his face (15 R 6709).

She also said Afro was about an inch long and "more picked out." (15 R 671-72) He was, in any event, not bald (15 R 671).

This entire ordeal, understandably, was extremely painful, and she was numb to the whole thing, thinking only "Lord, get me out of this." (15 R 675)

During this period she had her head was either down, facing away from the driver, or looking out the driver's side rear window. (15 R 673). She admitted that she told the police she could not describe Thomas, but would know him if she saw him (15 R 663). The police, therefore, never tried to get a more detailed description from her (15 R 663).

Thomas renewed his request for a jury view at the close of the State's case (17 R 1174) and stressed its importance because "now the lighting is of issue. The identification is of issue, and it's the crux of the defendant's case." Bolstering his argument, he added that the view would tend to impeach Monye Elvord's testimony identifying Thomas as one of the assailants. Such an attack became crucial because her testimony was the only evidence the State presented linking him with the murder (18 R 1238).

The court denied the request reasoning that

> no useful purpose would be served by viewing that. That's my ruling in this case. The defense can bring witnesses, or have a photographer make pictures at 3:00 or 3:30 in the morning, but it's within common knowledge of jurors that it's dark at 3:30 ; unless there's some lighting that it couldn't be seen, and the witness testified the car lights were on, a lot of cars in the parking lot, it was a crowded evening. So, since the scene cannot be substantially duplicated at this point, taking the jury to an empty parking lot would be certainly different from what the testimony was." (18 R 1238)

The court erred in making that ruling.

The primary purpose of the jury view is to assist them to analyze and apply the evidence taken at trial. Rankin v. State, 143 So. 2d 193, 194-95 (Fla. 1962). The court has some discretion in allowing such an examination, and this Court will reverse if the Appellant can show an abuse of that liberty. Panama City v. Eytchison, 134 Fla. 833, 184 So. 490, 492 (1938). That occurs when the view is important or material to resolving a key issue in the case. Darley v. Marquee Enterprises, 565 So. 2d 715, 719-20 (Fla. 1st DCA 1990) ("Since the conditions existing at the time of the accident constituted a key issue in this case, the trial court's refusal to conduct a nighttime view of the accident scene constituted an abuse of discretion.") Said another way, if, as the court found here, no "useful purpose could have been served" by the jury view then the court will have properly ruled in denying a defendant's request for the jury to look at the crime scene. Ferguson v. State, 28 So. 2d 427, 430 (Fla. 1946).

In Darley, cited above, the court allowed the jury to view the scene of an accident, but only in the daytime. It limited the purpose of the observation to show the distances involved and not the lighting conditions because the accident took place at night when the parking lot was "very dark." The Fourth District found the lower court had erred in refusing a nighttime view because the lighting at the time of the accident was strongly contested and "constituted a key issue in this case." The trial judge, therefore, abused his discretion in refusing to let the jury see the accident scene at night.

Similarly here, the lighting in the dimly lit parking lot became a crucial part of the key issue at trial: whether Thomas was one of the men who had attacked Elvord and Skinner. Contrary to conclusion in Ferguson, it would have served the "very useful" purpose of casting in doubt the reliability of her identification of the Defendant.

Of course, dark is dark, but Elvord said there was some lighting from a street lamp, but without the jury actually viewing the crime scene at night, they may not have appreciated Thomas' argument that Elvord's confidence in her identity of Thomas had little support from the way the existing light illuminated the remote area of the parking lot where the assault occurred.

Now, from the beginning of Thomas' closing argument to the end, Thomas focussed on the identity issue. At the start he argued "the evidence will show that

Ms. Elvord had to have misidentified Robert." (20 R 1580). Almost his final words were "If you have a doubt to the identity, you have to find him not guilty." (20 R 1625). The prosecution, recognizing the danger of that argument, responded, minimizing the discrepancies in Elvord's testimony and bolstering its confidence Thomas had killed Skinner (See, e.g., 20 R 1656-57). Predictably, the jury had problems with Elvord's identity because during its deliberations it asked to rehear her testimony "identifying Mr. Thomas." (20 R 1713)[21]

Hence, the conditions under which Elvord got her best view of Thomas or who ever it was that had accosted her constituted a key issue in this case. Darley, cited above. The trial court erred when it refused his reasonable request for the jury to view the crime scene at night. This court should, therefore, reverse the trial court's judgment and sentence and remand for a new trial.

[21]They also wanted to rehear the testimony of Stephens and Lawhorn because "those are the two witnesses that supposedly placed Mr. Thomas in the grassy lot--" (20 R 1715)

## ISSUE V

THE COURT ERRED IN DENYING THOMAS' MOTION TO SUPPRESS THE PHOTO SPREAD AND IN COURT IDENTIFICATION OF THOMAS AS ONE OF THE PERSONS WHO ATTACKED MONYE ELVORD, A VIOLATION OF HIS FIFTH, SIXTH, AND FOURTEENTH AMENDMENT RIGHT TO A FAIR TRIAL.

By way of a pre-trial motion, Thomas sought to suppress Monye Elvord's identification of him as one of the assailants (2 R 316-17). By the first of May, the police had arrested Davis, and he had implicated Thomas in the murder of Skinner. Elvord had also looked at thousands of pictures in police "mug books" but had not found anyone that matched the description of her assailants (12 R 19, 16 R 905-906). During the first week of May the police put together two six picture photo spreads of persons who had matched the description of her assailants.[22] In one group, they placed Davis' picture, and in the other, Thomas' (16 R 910-12). When they showed her the two photo lineups, she identified Davis and Thomas as the ones who had assaulted her and murdered Skinner (12 R 20).

The law in this area is well developed, and this court can resolve this issue by applying the principles and factors developed by the United States Supreme Court. Neil v. Biggers, 409 U.S. 188, 93 S.Ct.. 375, 34 L.Ed.2d 401 (1972), and Manson v. Brathwaite, 432 U.S. 98, 97 S.Ct.. 2243, 53 L.Ed.2d 140 (1977),

[22]A week or so before the police had also shown Ms. Elvord two other sets of possible suspects, but Thomas' photo was not among them (16 R 906, 919)

articulated the appropriate standards and listed several considerations relevant to the reliability of eye witness identification. "The primary evil to be avoided in the introduction of an out-of-court identification is a very substantial likelihood of misidentification." Grant v. State, 390 So. 2d 341 (Fla. 1980)(relying on Neil v. Biggers). Suggestive identifications increase the possibility of a misidentification, and unnecessarily suggestive ones gratuitously raise that possibility to a probability. Neil at 198.

Yet, the United States Supreme Court rejected a per-se exclusion of such identifications, opting instead for a totality of the circumstances analytical approach. Manson, at 113. Based on it, "the [identification] procedure is not invalid if it did not give rise to a substantial likelihood of irreparable misidentification under the totality of the circumstances." Blanco v. State, 452 So.2d 520, 524 (Fla. 1984). To aid the analysis, the Neil court identified several factors relevant in deciding the likelihood of misidentification:

> 1. the opportunity of the witness to view the criminal at the time of the crime,
>
> 2. the witness' degree of attention,
>
> 3. the accuracy of the witness' prior description,
>
> 4. the level of certainty demonstrated by the witness at the confrontation,

5. and the length of time between the crime and the confrontation.

Neil at 198.

Applying the factors to this case reveals the following:

1. The opportunity to view. The parking lot where Elvord saw the assailant she later claimed was Thomas was dark with lighting only from a distant street light (14 R 532). See ISSUE V. She also said she saw him when the dome light of the car came on, but that observation came at the first of the encounter, while she got in the back seat of her car (14 R 533, 644). It could have been only for a brief period. This is in contrast to the sexual assault victim in Neil, who saw the defendant "directly and intimately" in a well-lit house and under a full moon. She also was with him for at least a half hour. Neil at 200.

Here, while Elvord said the entire episode last 90 minutes (12 R 24), most of the time she was being forced to have oral sex with Davis, so her attention was naturally elsewhere for a large part of that hour and a half (12 R 27).

2. The degree of attention. Elvord said the first thing she saw was “his face, then I did see a gun.” (12 R 25) She also said she was “a person that looks people in the face.” (12 R 25) Yet, Undoubtedly, she had little, if any special training in gathering details. Manson, at 115. Accenting this, during most of this

ordeal, Davis was forcing her to have sex with him, and most of her attention was naturally on him and what he was doing to her (12 R 27)

3. The accuracy of the witness' prior description. When pressed by the police to describe the first assailant Miss Elvord could not describe him so they could draw a picture of him (12 R 29). She saw his face, and if she saw a picture of him she would know him (12 R 30). See, Manson at 115 ("No claim has been made that respondent did not possess the physical characteristics so described.") She also said he had a “cyst or scar rising up above the cheekbone.” (12 R 28) He also had “scars of acne on his face” that very obvious and distinguishable (15 R 661-62) and an Afro about an inch long (12 R 41). Yet, Thomas neither had a cyst on his face, nor did he have any acne (20 R 1581, 92), and other State witnesses would say he did not have a one inch Afro on the night of the murder, but was shorter on the sides (16 R 821, 835).

4. The witness' level of certainty. One must wonder about her level of certainty when she could not give a description sufficient for an artist to render a drawing of the person who first assaulted her (12 R 29). Also, the photospread in which she identified Thomas had a pictures of two persons that had been in an earlier photospread that Elvord had said did not have her assailant (17 R 1074). Thus, rather than having six possible suspects to examine, she had, at most, only four.

5. The time between the crime and the confrontation.

While not the seven month lapse in Neil, it was much longer than the few minutes in Manson. The police showed her the photo spreads about two weeks after the murder (12 R 19).

Applying the Neil factors confirms the obvious. A substantial likelihood exists that Ms. Elvord irreparably misidentified Thomas as one of her assailants.

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

## ISSUE VI

THE COURT ERRED IN FINDING THE MURDER OF IMARA SKINNER TO HAVE BEEN ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL, IN VIOLATION OF THOMAS' EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

In justifying its death sentence in this case, the trial court found the murder to have been especially heinous, atrocious, or cruel. (5 R 776-77). Specifically, it said:

> The death of Mr. Skinner occurred shortly after he was shot once in the chest. However, he was subjected to inhumane horror and terror by ROBERT THOMAS and the Co-Defendant during the last hour of his life. He was abducted during a festive event. His desire to protect MONYE ELVORD was thwarted by two (2) unknown armed gunmen. Guns were pointed at him throughout the last hour of his life. He was beaten in the head by the Co-Defendant wit a gun. He witnessed the repeated raping of MONYE ELVORD. He was threatened with death while in the car and as he was force from the car and forced to walk about one hundred feet at gun point to his apartment Mr. Skinner must have known that both Defendants realized that he and MONYE ELVORD could identify the Defendants since neither Defendant made an effort to conceal his face or to disguise his voice during the hour they were together, mostly in a small car. In addition, in all probability, the lights were on in the apartment during the time ROBERT THOMAS and Mr. Skinner were in the apartment. This would certainly enable Mr. Skinner to identify ROBERT THOMAS. This fact would increase the terror being experienced by Mr. Skinner. He must have known that his life and MONYE ELVORD'S life were in grave danger. ROBERT THOMAS decided to kill Mr. Skinner in his

> bedroom, a place where every person has the absolute right to be safe.
>
> This aggravating factor was proven beyond a reasonable doubt and was accorded great weight in determining the appropriate sentence in this case James v. State, 22 FLW SD 223 (Fla. April 24, 1997).

(5 R 776-77)

The court erred in finding this aggravator because it could only speculate about what happened inside Skinner's house, and the evidence produced at trial showed the Defendants intended only to rob the victim and Ms. Elvord. Supporting this latter assertion, the Medical Examiner agreed that the track of the bullet through Skinner's body was such that the victim could have been lunging at the Defendant when shot (16 R 861). As such, the shooting could have been an unintended, impulsive shooting and not one done so that Thomas could somehow enjoy the suffering of his victim. State v. Dixon, 283 So. 2d 1, 9 (Fla. 1972).

Dixon provides the starting point for this argument, and that case defines the HAC aggravator:

> It is our interpretation that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and, that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. What is intended to be included are those capital crimes where the actual commission of the capital felony was accomplished by such additional acts as set the crime apart from the norm of capital felonies--the conscienceless or pitiless crime which is unnecessarily torturous to the victim.

Id. at 9.

This aggravator, thus, finds application only in torturous murders "those that evince extreme and outrageous depravity as exemplified either by the desire to inflict a high degree of pain or utter indifference to or enjoyment of the suffering of another." Richardson v. State, 604 So. 2d 1107, 1109 (Fla. 1992). For the HAC aggravator to apply the murder must at least involve some intentional mental agony. Stabbings, strangulations, and prolonged beatings typify those crimes for which it applies. Douglas v. State, 575 So. 2d 165 (Fla. 1991); Orme v. State, 677 So. 2d 258 (Fla. 1996); Geralds v. State, 674 So. 2d 102 (Fla. 1996).

On the other hand, shootings in which the victim dies instantly or very quickly typically do not qualify for this aggravator. Bonifay v. State 626 So. 2d 1310 (Fla. 1993); Burns v. State, 609 so. 2d 600 (Fla. 1992).

In this case, the victim and Ms. Elvord were kidnapped and driven around Jacksonville for an hour or so before Thomas and Davis took them to Skinner's house. Even though the victim may have died quickly from a single gunshot, the murder can nevertheless be especially heinous, atrocious, or cruel if Skinner had a prolonged fear or terror at his certain, impending doom.

For example, in Preston v. State, 607 So. 2d 404, 409 (Fla. 1992), Preston kidnapped the victim from a convenience store late at night forced her to drive to a remote location, made her walk at knifepoint through a dark field, coerced her to

take off her clothes then stabbed her so hard and so many times that her head was almost severed. Id. at 406. This court had little trouble finding the killing especially heinous atrocious, or cruel. "Undoubtedly, the victim suffered great fear and terror during the events leading up to her murder. Fear and emotional strain may be considered as contributing to the heinous nature, even where the victim's death was almost instantaneous." Id. at 409-10. The victim must have realized she was going to die when she was taken to a remote location, and that had to have heightened her terror. Swafford v. State, 533 So. 2d 270 (Fla. 1988)(victim taken to a remote location where she was raped and shot.); Cave v. State, 476 so. 2d 180 (Fla. 1985) (victim taken to a remote location and shot.)

On the other hand, if the Defendant had repeatedly reassured the victim that he had no intention of killing her, then the resulting murder may not be HAC even though the victim was kidnapped and sexually battered. Robinson v. State, 574 So. 2d 108, 111-12 (Fla. 1991); C.f., Cannady v. State, 620 So. 165, 169 (Fla. 1993).

In this case, although Thomas and Davis kidnapped Elvord and Skinner and drove them about Jacksonville for more than an hour, their intentions (until the single shot killed Skinner) never went beyond demanding money and trying to find it. In short, Skinner may have had a great fear, but it was of being robbed, not murdered. Were this court to find this murder HAC, then it would apply virtually

to every felony murder, a situation fraught with constitutional problems. Cannady, supra at p. 169. After all, the typical felony murder naturally gives rise to terror. To survive constitutional problems, that fear necessary for a murder to be HAC must be significantly greater, reflecting a prolonged, actual, and distinct realization of the inevitability of one's death.

In this case, Elvord undoubtedly experienced a sublime terror men cannot understand, and those who have not been robbed cannot appreciate. Yet, Davis' conditional threats never approached the magnitude of dread the victim in Preston felt as she knew with certainty she was being marched to her doom. There is no evidence Thomas ever intended to kill Skinner, and to the contrary, he probably lunged at the Defendant and was shot more in reaction to the attack than with some idea to enjoy watching him suffer. When Thomas returned to the car, where Davis had continued to rape Elvord, he told him that Skinner had "bucked" or resisted him (16 R 951). The shooting , therefore, was the unintended consequence of a botched effort to find some more money.

Ms. Elvord's testimony provides the primary evidence of the events surrounding the kidnapping, robbery, sexual batteries and murder. Most of what she had to say focussed, understandably enough, on the deprivations Davis had inflicted on her. She said much less about why he and Thomas had abducted her and Skinner. Nevertheless, the two men clearly wanted money, at least $500 (15

R 557, 559, 619), and getting it dominated their motive in abducting the pair. After forcing them into Elvord's car, Thomas asked them if they had any ATM cards, that they wanted $500 (14 R 557). When Elvord said she had one, Thomas drove to a nearby machine, and Davis took her to it to get some money (14 R 565). After that they drove to Skinner's apartment because Skinner had told his abductors he had $250 there (14 R 558). As Thomas took Skinner to his apartment, Davis told him that if "he tries anything, you better shoot him." (14 R 592). He had also threatened to shoot Elvord when Skinner said he had money at his house because he thought the latter was trying to "set us up." (14 R 558). Davis also said that if she looked at him, he would shoot her (14 R 634).

These threats unlike those made in other cases in which this court approved the HAC aggravator have a significant distinction. First, neither Davis or Thomas ever told Skinner they were going to kill him. They said they would shoot him "if" the latter "tries anything." Davis said he would shoot Elvord "if" she looked at him. Death was not an inevitable, unwanted companion in the car that night.

Second, the evidence shows that Davis made the threats, not Thomas. That is significant because a murder that might be especially heinous, atrocious, or cruel is not so as to the Defendant, if he did not intend it to be. In Archer v. State, 613 So. 2d 446 (Fla. 1993), for example, the co-defendant, Bonifay, killed the victim in an arguably heinous, atrocious, or cruel manner. While Archer had

contracted with the former to kill the victim, he had never said he wanted it done to unnecessarily increase the misery of the victim. As such, as to Archer, the murder was not HAC. Thus, even if Davis' conditional threats elevate this felony murder to one that qualifies for the heinous, atrocious, or cruel aggravator, they do not apply to Thomas because the State never showed he intended the murder to have been unnecessarily cruel.

Indeed, all the evidence shows is that Thomas wanted money. Davis was the one in charge of the events of the night from the kidnapping, getting money from the ATM, and repeatedly raping Elvord. He was the one giving the orders to Skinner and Elvord. Thomas talked when he wanted to know if they had ATM cards and to get directions to a cash machine. Elvord noted that he was the quiet one of the pair (15 R 644).

Thus, although Elvord was terrified, that fear came from Davis, not Thomas, and any fear of death was conditioned on her disobeying Davis' orders, something she never did. For his part, Skinner undoubtedly was scared, but that fear came from Davis, and again was largely based on his conditional threats. It was not much different than that felt by anyone unfortunate enough to be a victim of a felony/murder. As such, the evidence never showed beyond a reasonable doubt that Thomas ever intended to mentally torture his victim or in any way enjoyed the

suffering of Skinner. The latter's death, therefore, was not especially heinous, atrocious, or cruel.

Because the court gave "great weight" to this aggravator and to other significant mitigation (5 R 775), this Court must reverse its sentence of death and remand for a new sentencing hearing before a new jury. A new recommendation is needed because the jury may have found this aggravator for the same reasons the court did. Hence, the jury's recommendation is tainted, and only empaneling a new body of citizens will erase the impact of finding that improper aggravating fact.

## ISSUE VII

THE COURT ERRED IN REFUSING TO GIVE A COMPLETE INSTRUCTION ON THE NECESSARILY LESSER INCLUDED OFFENSE OF MANSLAUGHTER, IN VIOLATION OF THOMAS' FIFTH, SIXTH, AND FOURTEENTH AMENDMENT RIGHTS.

During the guilt phase charge conference counsel for Davis and Thomas and the court discussed the instruction on the lesser included offense of manslaughter (14 R 1463-65). Specifically, both lawyers wanted the court to give the standard instruction on "culpable negligence." (14 R 1463, 1520-21) The court refused to do so, finding "there is no evidence of culpable negligence here. So, I'll give the manslaughter instruction as prepared." (14 R 1466). Accordingly, the court told the jury that manslaughter was a lesser crime of first degree murder (2 R 341), and to find Thomas guilty of that offense, it required the state to have proved:

1. Imara Skinner is dead.

2. ROBERT THOMAS intentionally caused the death of Imara Skinner.

(2 R 345)[23]

The court omitted the third element of the offense, that the "death of the victim was caused by the culpable negligence of Thomas" and the definition of "culpable negligence." That was error.

[23]It also gave the rest of the standard instruction on manslaughter.

Manslaughter is a necessarily lesser, or category 1 lesser, offense of premeditated and felony murder. Schedule of Lesser Included Offense, Std Jury Inst (Crim.); Brown v. State, 124 So. 2d 481, 483 (Fla. 1960). Thus, the court had to instruct on it, which it did. It erred in defining only voluntary manslaughter (an intentional homicide) and excluding involuntary manslaughter (a homicide done with culpable negligence). Reed v. State, 531 So. 2d 358 (Fla. 5th DCA 1988)

Manslaughter, as defined in section 782.07, Florida Statutes (1996), is "The killing of a human being by the act, procurement, or culpable negligence of another , without lawful justification . . . :

The Standard Jury instructions require the State to prove:

1. (Victim) is dead.

2. [Defendant]

(a) intentionally caused the death of (victim)

(b) intentionally procured the death of (victim)

(c) The death of (victim) was caused by the culpable negligence of (defendant).[24]

Significantly, a marginal note to the trial judge tells him or her to "Give 2(a), (b) or (c) depending upon allegations and proof."

[24]This guidance also includes a lengthy definition of culpable negligence.

In Campbell v. State, 306 So. 2d 482 (Fla. 1975), this court held that culpable negligence was an essential element of manslaughter and failing to define it was reversible error. Of course, the statute reads in the disjunctive, and the State and the court here interpreted that to mean the jury could only be given one choice: that the death was intentional. Neither one considered the option of letting the jury consider whether Skinner's death was either a voluntary or an involuntary manslaughter. The court believed the evidence showed only that the homicide was intentional, or a voluntary manslaughter. It never viewed the proof in the light most favorable to giving an instruction on involuntary manslaughter done with "culpable negligence," so it need not have been included as an essential element of manslaughter (19 R 1465).

The Fifth District Court of Appeal, tried to clarify that apparent confusion in Reed v. State, 531 So. 358, 359 (Fla. 5th DCA 1988):

> Although the jury instructions are written in the disjunctive, a complete charge on manslaughter includes the culpable negligence instruction. In Campbell v. State, 306 So. 2d 482 (Fla. 1975) . . . The supreme court stated that culpable negligence is an essential element of manslaughter and the failure to define it was reversible error.

The Fifth District continued by noting that the "vast majority" of manslaughters will have been caused by the Defendant's culpable negligence, and by omitting that term as an essential element of that crime term the jury will have

"no real opportunity" to distinguish involuntary manslaughter from greater degrees of homicide. Id. at 360. Because the evidence supported including that element in the definition of manslaughter, the trial court committed reversible error by excluding it.[25]

Relying on Campbell, since culpable negligence is an essential element of manslaughter the court should have instructed on it. That it omitted that crucial requirement was error. End of argument.

Alternatively, the evidence presented at trial justified giving the requested guidance. As Thomas' lawyer said, "Your Honor, I think on the evidence of stippling indicated that there was some lunging on the part of the victim. This could have been at the person who had the gun, because of the manner by which the bullet entered." (19 R 1465) Davis' counsel also noted that "We don't know what happened upstairs in that room." (19 R 1466) When this circumstantial evidence is read in the light most favorable to giving instruction, the court should have provided the requested, standard guidance on culpable negligence. See, Campbell v State, 577 So. 2d 932, 935 (Fla. 1991); Smith v. State, 424 So. 2d

[25] The Reed court's analysis created a logical hole because if culpable negligence is an essential element of manslaughter, it should be included as part of the definition of that crime in every instance rather than in the "vast majority" manslaughter trials. The Fifth District postulated the latter conclusion to accommodate the marginal guidance provided to THE trial judge. To the extent that it conflicts with this court's holding in Campbell, it is incorrect. Yohn v. State, 476 So. 2d 123 (Fla. 1985) (The standard jury instructions do not necessarily reflect the law applicable to a particular case.)

726, 732 (Fla. 1982) ("A defendant is entitled to have the jury instructed on the rules of law applicable to his theory of defense if there is any evidence to support such instruction.") By doing so, the jury would have had the option of finding Thomas guilty of involuntary or voluntary manslaughter, the latter offense being what the court instructed them on.

If a court should give a requested instruction, particularly a standard one, if "any evidence" supports it, Smith, the court in this case should have included the guidance provided and fully defined manslaughter to include culpable negligence as an integral part of manslaughter. That it did not is reversible error. This court should, therefore, reverse the trial court's judgment and sentence and remand for a new trial.

## ISSUE VIII

THE COURT ERRED IN REFUSING TO LET THOMAS ARGUE RESIDUAL DOUBT AS TO HIS GUILT IN THE PENALTY PHASE OF THE TRIAL AS A LEGITIMATE REASON FOR THE JURY TO RECOMMEND LIFE AND FOR THE COURT TO HAVE IMPOSED THAT SENTENCE.

By way of a motion in limine Thomas sought to argue, during the penalty phase closing argument, that the jury could consider any "residual doubt" they had of his guilt as mitigation (3 R 512-13). The court, relying on Franklin v. Lynaugh, 487 U.S. 164, 108 S.CT 2320, 101 L.Ed.2d 155 (1988), and King v. State, 514 So. 2d 354 (Fla. 1987), denied his request (10 R 1594-95). This Court should reconsider what it said in King, and it should allow a defendant facing a death sentence the opportunity to argue that any residual or lingering doubt a jury might have about a Defendant's guilt can be used to mitigate the absolute unreviewability of a death sentence.

Appellate Counsel is well aware that this court has ruled that residual doubt as to a defendant's guilt does not mitigate a death sentence. Thirteen years ago he argued that point and lost. Burr v. State, 466 So. 2d 1051 (Fla. 1985). This court has reiterated that holding several times since then. Sims v. State, 681 So. 2d 1112, 1117 (Fla. 1996); Bogle v. State, 655 So. 2d 1103, 1107 (Fla. 1995); Preston v. State, 607 So. 2d 404, 411 (Fla. 1992); White v. Dugger, 523 So. 2d 140 (Fla. 1988); Tafero v. Dugger, 520 So. 2d 287, 289 (Fla. 1988). He also knows that the

United States Supreme Court has decided that a state can prevent a defendant from so arguing. Franklin v. Lynaugh, 487 U.S. 164, 108 S.CT 2320, 101 L.Ed.2d 155 (1988). This case, however, shows why those rulings are wrong, and why this court should allow defendants facing a death sentence to argue that legitimate, residual doubt can mitigate a death sentence.

In Burr, this court said, in rejecting residual doubt as a mitigator

> [A] convicted defendant cannot be a 'little bit guilty.' It is unreasonable for a jury to say in one breath that a defendant's guilt has been proved beyond a reasonable doubt and, in the next breath, to say someone else may have done it, so we recommend mercy.

Id. at 1054.

Yet, others have not seen the problem that way. They have focussed instead on the uncertainty inherent in any verdict in a criminal case and the conclusive finality of a death sentence.

Justice Marshall, in two dissents from denials of certiorari, considered that doubt as to guilt could validly mitigate a death sentence.

> [T]he 'reasonable doubt' foundation of the adversary method attains neither certainty on the part of the fact finders nor infallibility , and accommodations to that failing are well established in our society. . . . In the capital sentencing context, the consideration of possible innocence as a mitigation factor is just such an essential accommodation.

Burr v. Florida, 474 U.S. 879, 106 S.CT 201, 203, 88 L.Ed.2d 170 (1985).

> There is certainly nothing irrational-indeed, there is nothing novel-about the idea of mitigating a death sentence because of lingering doubts as to guilt. It has often been noted that one of the most fearful aspects of the death penalty is its finality. there is simply no possibility of correcting a mistake. the horror of sending an innocent defendant to death is thus qualitatively different from the horror of falsely imprisoning that defendant. The belief that such an ultimate and final penalty is inappropriate where there are doubts as to guilt, even if they do not rise to the level necessary for acquittal, is a feeling that stems from common sense and fundamental notions of justice.

Heiney v. Florida, 469 U.S. 920, 921-22, 105 S.CT 303, 83 L.Ed.2d 237 (1984).

Residual doubt is so strong a mitigator that the framers of the Model Penal Code's death penalty statute absolutely precluded a death sentence where there was some lingering question that the defendant may not have committed the charged murder

> Death Sentence Precluded. When a defendant is found guilty of murder, the Court shall impose sentence for a felony of the first degree [i.e. a non capital felony offense] if it is satisfied that:
>
> * * *
>
> (f) although the evidence suffices to sustain the verdict, it does not foreclose all doubt respecting the defendant's guilt.[26]

ALI Model Penal Code Section 210.6(1) p. 107 (Official Draft, 1980).

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[26]Florida's death statute tracks, in many respects, the Model Penal Code's capital sentencing statute.

Even members of this court have dissented from following the holding and reasoning of Burr and its progeny. King v. Dugger, 555 So. 2d 355, 360 (Fla. 1990); Melendez v. State, 498 So. 2d 1259, 1263 (Fla. 1986)(Barkett, dissenting.) ("[T]he 'reasonable doubt' foundation of the adversary method attains neither certainty on the part of the fact finders nor infallibility, and accommodations to that failing are well established in our society."

Federal Courts, including the United States Supreme Court, have also recognized the powerful persuasiveness of a lingering doubt defense in the penalty phase of a capital sentencing proceeding. In Andrews v. Collins, 21 F.3d 612, 623, fn. 21 (5th Cir. 1995), the court said,

> Moreover, the record reflects that counsel, during the punishment stage, relied solely upon what he believed to be the jury's residual doubts about the evidence presented at the guilt phase of Andrews' trial. Such a strategy has been recognized as an extremely effective argument for defendants in capital cases. Lockhart v. McCree, 476 U.S. 162, 181, 106 S.CT 1758, 1769, 90 L.Ed.2d 137 (1986) (internal quotation omitted); see also Stringer[ v. Jackson, 862 F.2d 1108, 1116 (5th Cir. 1988)] (finding that counsel's decision to rely on residual doubt did not constitute ineffective assistance).

Accord, Kirkpatrick v. Whitley, 992 F. 2d 491, 498 (5th Cir 1993)("We have frequently recognized the strategic value of relying on 'residual doubt.'"); Kyles v. Whitley, 5 F. 3d 806, 863 (5th Cir 1993). Indeed, the United States Supreme Court in Lockhart at 476 U. S. At 181, noted "[A]s several courts have observed,

jurors who decide both guilt and penalty are likely to form residual doubts or 'whimsical doubts' ... about the evidence so as to decide against the death penalty. Such residual doubt has been recognized as an extremely effective argument against the death penalty."

In addition, the California Supreme Court has explicitly allowed evidence of a residual doubt as to guilt during the penalty phase of a capital trial. Siripons v. Calderon, 35 F. 3d 1308 (9th Cir 1994); People v. Johnson, 842 P. 2d 1, 40-41 (Cal. 1992).

Finally, as a practical matter, jurors are going to consider the strength of their conviction of the defendant's guilt in the penalty phase, much as they probably realize in the guilt phase portion that if they return a verdict of guilt they will have to consider whether a death sentence should be imposed. Obviously, the jury in Burr, based its life recommendation on their persistent, residual doubt that he had committed the charged murder. It was the only thing that could have mitigated a death sentence in his case. Similarly, three jurors in Wike v. State, 596 So. 2d 1020 (Fla. 1992), had enough doubt that Wike had kidnapped two young girls, raped one of them, and had brutally slashed both of their throats, killing one to have voted for life. At a subsequent resentencing, where the evidence showing he did not commit the murders was excluded, none of the jurors recommended life. Wike v. State, 648 So. 2d 683 (Fla. 1994). Jurors will include their doubt as to the

defendant's guilt in their sentencing deliberations, despite rulings in cases like Burr that said to do so was unreasonable. Human beings cannot compartmentalize their decisions with the logic expounded by this Court in Burr. Life is too uncertain, and the consequences of decisions too far reaching for anyone but those too blind to see that mistakes are made even under the best of circumstances. It is supremely reasonable to allow jurors the comfort of knowing that when they seriously consider a defendant's fate, any lingering doubt they may have about his guilt can mitigate a death sentence. To wrap the guilt and sentencing phase issues into neat, separate, logical packages defies human experience and practical realities.

In this case, the only question the jury had to consider was whether Thomas was one of Skinner's and Elvord's attackers (20 R 1580). The evidence supporting that conclusion was hardly overwhelming. The Defendant strongly challenged Elvord's identification of him, particularly that he had the cyst and a scarred face (20 R 1580). Specifically, she said that the person she identified as Thomas had a "picked" Afro, and that although it was short, less than an inch in length, her assailant "certainly was not bald." (15 R 671-72) Contradicting that Thomas presented several witnesses who testified he had gotten a haircut on the day of the murder, and the barber had cut it all off so he was bald (18 R 1253, 1297, 1364, 1381).

Further bolstering his defense, he called his brother who testified that at the critical times on April 13 he and Thomas were either in Daytona or returning home (15 R 1332-36, 1338, 1376). The Defendant could not, therefore, have been at the Superdome at the time Elvord claimed. This affirmative defense distinguishes this case from Burr and other cases in which residual doubt has been raised but no evidence was introduced that the Defendant was elsewhere than where and when the murder occurred.

This evidence must have had some persuasiveness because the jury remained hung for hours on convicting Thomas because of the conflict regarding Elvord's identification of him (20 R 1713-15). (See ISSUE III)

Finally, in Windom v. State, 656 So. 2d 432 (Fla. 1995), this court approved admitting victim impact evidence, not because it had any relevance to the aggravating or mitigating factors, but simply so the jury could be aware of the victim's uniqueness and the resultant loss to the community. See, also Booth v. Maryland, 482 U.S. 496, 107 S.Ct.. 2529, 96 L.Ed. 2d 440 (1987).[27] Rejecting the defendant's attack on the constitutionality of admitting such evidence, this court said, "We do not believe that the procedure for addressing victim impact evidence,

[27]In rejecting residual doubt as valid mitigation, Justice O'Connor in Franklin v. Lynaugh, 487 U.S. at 188, concluded that any "residual doubt" about a defendant's guilt did not mitigate a death sentence because it did not relate to the defendant's character or background, or the circumstances of the offense. The same could be said of victim impact evidence.

as set forth in the statute, impermissibly affects the weighing of the aggravators and mitigators." Id. at S202.

If victim impact evidence has no constitutionally cognizable impact on jury deliberations then it is difficult to understand how doubt as to the defendant's guilt can, in anyway, unfairly tip the "playing field." If anything, such evidence and argument should be admitted under the rationale of Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), that any aspect of the case that could rationally support mitigation is relevant for the jury to consider. Such evidence has greater logical relevancy than victim impact evidence, which has no bearing on the defendant's character or the nature of the crime, the measure of relevancy in a capital sentencing. Lockett, at 601; Section 921.142(2), Fla. Stat. 1995.

Thus, given the weaknesses of the state's case against Thomas, he respectfully asks this honorable court to reverse the trial court's sentence of death and remand for a new sentencing hearing so he can present evidence and argue that any lingering doubt the jury may have of his guilt can mitigate a death sentence.

## ISSUE IX

THE COURT ERRED IN ALLOWING THE STATE TO ASK, DURING ITS CLOSING ARGUMENT, THE JURY TO SHOW THOMAS AS MUCH SYMPATHY AS HE SHOWED THE VICTIM AND RECOMMEND DEATH, IN VIOLATION OF HIS FIFTH, SIXTH, AND FOURTEENTH AMENDMENT RIGHTS.

Almost at the end of its penalty phase closing argument, the State made the following unobjected to call for vengeance:

> Robert Thomas doesn't' care. He has no mercy.
>
> What does he want? Mercy.
>
> We have proven to you beyond a reasonable doubt that this was a murder. We have proven to you beyond a reasonable doubt that it was a murder in the first degree. We have proven to you beyond a reasonable doubt that Robert Thomas is a murderer.
>
> Today is Robert Thomas' day of reckoning. I ask you to show him the same mercy that he showed to Imara Skinner on that day.

(22 R 1944)

Clearly, this argument was improper. Rhodes v. State, 547 So.2d 1201 (Fla. 1989); Richardson v. State, 604 So.2d 1107 (Fla. 1992). In Rhodes, this court said, regarding a similar plea by the prosecutor:

> Finally, the prosecutor concluded his argument by urging the jury to show Rhodes the same mercy shown to the victim

> on the day of her death. This argument was an unnecessary appeal to the sympathies of the jurors, calculated to influence their sentence recommendation.

Id. at 1206.

In Richardson, this court, citing Rhodes, agreed that "the state committed error in asking the jury to show Richardson as much pity as he showed his victim." Richardson, at 1109.

Such a comment, essentially asking the jury to disregard the law and recommend death simply because Thomas was a remorseless murderer amounted to fundamental error in this case because it precluded the jury from rationally considering what recommendation they should make. Rutherford v. Lyzak, 698 So. 2d 1305 (Fla. 4th DCA 1997) Sentencing hearings naturally tend to evoke an emotional response from juries, and that is why the final decision on what punishment a Defendant receives rest with the more experienced court. State v. Dixon, 283 So. 2d 1 (Fla. 1973). Thus, improper penalty phase closing arguments more readily become fundamentally wrong because jurors sympathies and passions easily slip from their restraints, and find easy expression with a death recommendation. Such was the case here.

The jury had heard Monye Elvord testify about being repeatedly raped, shot, and then dumped along side the road. They had seen her at trial collapse and moan "Oh God, oh God," when asked to stand behind the defendants (14 R 544-

51). They had deliberated to exhaustion on Thomas' guilt, and must have been upset at the lone holdout. So, with expected predictability they recommended death by the same vote, 11-1, as when they were deadlocked (4 R 719). The prosecutor's final comments, therefore, were improper, unfair, and inflammatory. They gave the jury that final push it needed to quickly recommend death (23 R 1974-80). But its argument also created fundamental error, and this court should reverse the trial court's judgment and remand for a new sentencing hearing.

## ISSUE X

THE COURT ERRED IN DENYING THOMAS' MOTION TO SUPPRESS STATEMENTS MADE TO THE POLICE, A VIOLATION OF HIS FIFTH, SIXTH, AND FOURTEENTH AMENDMENT RIGHTS TO THE UNITED STATES CONSTITUTION.

After Thomas had been arrested for the crimes arising out of the April 24 incident on Interstate 10, he signed a form called an "Edwards notice" telling the police that he did not wish to talk with the police without the presence of counsel (7 R 1133). By May 2, 1996 the police suspected that he may have been involved in the Imara Skinner murder, so they questioned him about that. They brought him to the police station and claimed to have read him his Miranda rights before questioning him (7 1135-37). He apparently waived those rights and told the police that he did not know Darrell Davis and that he was in Daytona the weekend of the murder Skinner was murdered (7 R 1137-38). After giving the alibi he asked for a lawyer, and according to the police, they began to ask him detailed information concerning his family, his mother, people to support this alibi. He then invoked and request an attorney." They then "ended the interview." (7 R 1138)

Thomas said that as soon as the police began questioning him, he demanded his attorney (8 R 1328). The police ignored that request, and in response to their

interrogation, he told them he had been in Daytona with his brother (8 R 1329). One of the detectives got mad at him, and moved towards him, scaring "the hell out of me." (8 R 1330) The police read him his rights after they had questioned him (8 R 1335), and he signed the form because he was frightened (8 R 1343).

Thomas filed a motion to suppress the statements he made to the police (2 R 223), and at the hearing on the motion, two District Court of Appeals cases, Sapp v. State, 660 So. 2d 1146 (Fla 1st DCA 1995) and State v. Guthrie, 666 So. 2d 562 (Fla. 2d DCA 1995) formed the legal basis for the arguments presented (8 R 1372). The State relied on the United States Supreme Court case of McNeil v. Wisconsin, 501 U.S. 171, 111 S.CT 2204, 115 L.Ed. 2d 158 (1991) ( R 138586).The court, relying on Sapp, denied Thomas' motion and found the statements to have been voluntarily made (2 R 226). Accordingly, at trial, and over defense objection (16 R 987), the State introduced those statements (16 R 982-83, 992, 1029-32).

Although by the time Thomas filed his Motion for New Trial, this court had decided Sapp v. State, 690 So. 2d 581(Fla. 1997), and Thomas' counsel acknowledged it (10 R 1561), this court should re-examine that decision in light of the facts of this case and adopt the dissent in that case. This court should reverse the trial court's judgment and sentence and remand for a new trial.

## ISSUE XI

THE COURT ERRED IN FAILING TO GRANT THOMAS' MOTION FOR A NEW TRIAL WHEN HE NOTED THE PROSECUTOR HAD MADE SEVERAL IMPROPER ARGUMENTS DURING HIS GUILT PHASE CLOSING ARGUMENT.

During the State's guilt phase rebuttal closing argument, the prosecutor made three comments that fatally corrupted the fairness of Thomas' trial. First, in talking about his burden to prove Thomas' guilt beyond a reasonable doubt, he said, "It's not higher because Mr. Rolle [Defense counsel] puts his arm around his client and parades around like some martyr. It's not higher because Mr. Rolle doesn't like police officers, and it's not higher because Mr. Rolle has no respect for Monye Elvord." (20 R 1630) At that point, Thomas objected. The court sustained the objection, telling the State, "Let's not personalize it." (20 R 1630).

Later, regarding the scars Elvord said she saw on Thomas, the prosecutor argued, "And Mr. Rolle wants to make a big deal out of trying to minimize the scar on the back of his neck." (20 R 1641). Almost immediately after, it said "And you know what she saw in the rear-view mirror to, by the way." (20 R 1641-42)

Those, comments, taken in light of Thomas' defense that Elvord had misidentified him, and that the State's case hung exclusively on the strength of her claim that Thomas was one of her abductors, was error.

First, the prosecutor cannot express his personal opinion, nor can he try to destroy the Defendant's case, by attacking the character of defense counsel. Brown v. State, 593 So. 1210 (Fla. 2d DCA 1992). Clearly, that is what the State did when it told the jury that "Mr. Rolle has no respect for Monye Elvord." Such an argument was "not only an improper appeal for sympathy for the victim which would have the natural effect of creating hostile emotions toward the accused,. . . , but also an improper expression of personal belief." Id. (Cites omitted.)

In Adams v. State, 192 So. 2d 762 (Fla. 1966), this court reversed Adams' conviction "not because the prosecutor's remarks conclusively prejudiced the defendant, not because the remarks could have prejudiced the defendant, not even because the remarks would have prejudiced the defendant but, because they might have been prejudicial to his cause." Hightower v. State, 592 So. 2d 689 (Fla. 3d DCA 1991)(Gersten, dissenting) This court should do the same in this case.

Deciding to reverse because the State attacked defense counsel becomes easier in light of the other comments it made regarding Elvord's opportunity to see the scars on her abductor's neck through the rear view mirror. First, the scar she described was on the man's face, not his neck (15 R 609-610). Second, there is no evidence she ever saw anything in the rear view mirror. While the State can make arguments based on the evidence presented at trial, and draw reasonable inferences from it, it cannot either create it or speculate about what it would have liked to

have had it shown. It did both with those comments. That was error, and when combined with the attack on Thomas' lawyer, provided sufficient reason for this court to question the reliability of the jury's verdict. This court should, therefore, reverse the trial court's judgment and sentence and remand for a new trial.

## CONCLUSION

Based on the arguments presented here, the Appellant, Robert Thomas, respectfully asks this honorable court to either 1. reverse the trial court's judgment and sentence and remand for a new trial, or 2. reverse the trial court's sentence of death and remand for a new sentencing hearing before a jury.

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Richard W. Martell, Assistant Attorney General, by delivery to The Capitol, Plaza Level, Tallahassee, FL 32399-1050; and a copy has been mailed to appellant on this date, October 12, 1999.

Respectfully submitted,

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_____

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