IN THE SUPREME COURT OF FLORIDA

DEMETRIS OMARR THOMAS,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. SC00-1092

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIRST JUDICIAL CIRCUIT,
IN AND FOR OKALOOSA COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Appellant, Demetris Omarr Thomas, was the defendant in the trial court; this brief will refer to Appellant as such, Defendant, or by proper name. Appellee, the State of Florida, was the prosecution below; the brief will refer to Appellee as such, the prosecution, or the State.

The record on appeal will be referenced according to the respective volumes numbers, followed by any appropriate page number. "IB" will designate Appellant's Initial Brief, followed by any appropriate page number.

All bold-type emphasis is supplied, and all other emphasis is contained within original quotations unless the contrary is indicated.

STATEMENT OF THE CASE AND FACTS

Throughout this brief, the State clarifies and supplements facts on which Thomas relies. It also will dispute a number of Thomas' self-serving inferences. The State notes several of these items at this juncture.

Thomas (at IB 3) begins his rendition with the "fact" that his car was stolen. However, the State will argue that this supposed "fact" was part of conflicting stories to the police. (See, e.g., XV 721-22, 729-45) Therefore, the State clarifies that the "fact" was as Thomas related it to the police. In its argument, the State will compare the varying details of this story with other evidence.

Thomas claims (IB 3) the victim smiled "[a]s the couple left" the store. If Thomas is suggesting that, as they left, he and the victim were a romantically involved "couple," the State, in its argument, will clarify the evidence to the contrary. It will also clarify that the clerk assumed that the victim smiled. (XIV 506-508) The witness did not recall the victim showing any teeth (XIV 507), and, contrary to Thomas, whatever facial expression she exhibited was prior to being forced into the car (See XIV 506, 520: the assumed smile was when the victim said "Hey," catching Money's attention again).

Thomas posits (IB 4) that the victim "may have been conscious for some of the blows." The State contends that evidence, which the trier of fact could have accredited, showed that the victim was beaten in (See XV 691-92: blood spatter above passenger, where store clerk last saw victim, See, e.g., XIV 512, 523) and at her car (See XV 607-608, 672-74: multiple locations of victim's blood on exterior passenger side), and, at some point, she was strangled (See XIII 400, XIV 421). She was struck from behind while upright 109 feet from her car and facing away from it and Thomas (See XIII 343, XIV 426-29). She protected herself from the face-down fall (XIV 418, 428-29), and, after she rolled over face-up, (State's Exhibits #29, #30, #31, #34, #35) she sustained several defensive injuries (XIII 400, XIV 412, 416) before being beaten to death there (XIV 418-19, XV 676, 680).

Thomas states (IB 4) that "none of the victim's blood was found inside the car," but there was blood spatter (XV 691-92) immediately above where the victim was sitting (XIV 512, 523). The fact that the experts could not DNA-type it as either Thomas' or hers (XIV 589, 591) does not mean that it was not hers.

Later, for example, Thomas argues (IB 12) that the victim did not bleed at the construction site, but the State contends that evidence is to the contrary. For example, although the victim was found dead with her shoes on, her blood was on the tops and bottoms of her socks (XV 609, 684, State's Exhibit #46), thereby indicating that she had bled at the scene where her shoes were off, i.e., the hospital scene where the sexual intercourse occurred. Thus, debris generally matching the dirt and grass at the hospital scene (XIV 453-54, XV 648-49) was found on the victim's thigh and pubic areas (XIII 360-61).

Thomas contends (IB 13) that the victim's nosebleed explains her blood on her socks, but this ignores the evidence that her friend had seen the victim's nose bleed only about six droplets, not enough to fill a baby's eyedropper, nowhere near the quantity here (XVI 821, 823-24) and ignores the fact that the socks were soiled, making it unreasonable to infer the victim would take them off to wipe her nose. Further, this does not explain, for example, the blood spatter above the victim's head in the car, as indicated above.

The State submits these factual differences and additions, as well as those detailed in the ensuing pages.

SUMMARY OF ARGUMENT

On September 17, 1997, between 3 and 5 AM, Thomas created a horrendous trail of coercion and terror, punctuated at several points with spatters and pools of the victim's blood. At about 3 AM, a neutral witness observed Thomas snatch the victim's keys from her, coerce her into the victim's car, continue to confine her there as the victim opened the door three times and Thomas closed it three times, and then drive her away. He drove to remote locations, where he beat, strangled, raped, chased down, and pounded the victim to death with an eight-foot scaffolding brace. As she lay helpless on the road trying to fend off Thomas' blows, he ripped parts of her fingernails and literally knocked teeth out of her head, flinging one several feet away.

When the police closed in on Thomas as the perpetrator, he attempted to explain the facts the police revealed to him, revising his story as the police revealed more of their knowledge to him, but his revised story nevertheless failed to account for all of the facts the police were able to ultimately gather. His story falls of its own weight due to those conflicts, as well as its obviously concocted nature. His stories show his consciousness of guilt.

In spite of the compelling evidence to the contrary, Thomas argues that the State did not sufficiently prove Sexual Battery (ISSUE I) or Kidnapping (ISSUE II). According to Thomas, in the midst of his abducting, confining, beating, blood-spattering, and strangling the victim, he had no intent to do these things, and she engaged in consensual sex. Simply put, this is not a reasonable hypothesis.

Thomas also argues that he was too retarded to constitutionally waive his Miranda rights and talk to the police (ISSUE IV) and too retarded to sentence to death (ISSUE III). Facts and law belie his claims. Thomas' cognitive and adaptive abilities exceeded his IQ score according to his own expert. Indeed, for their validity, such scores depend upon the best efforts of the subject, and Thomas' statements already showed his attempts to manipulate facts. Thomas proved his current cognitive adaptability with the revisions of his story that persistently attempted to paint his actions in a light less culpable than the facts would otherwise indicate. Moreover, the trial court properly factored Thomas' mental deficiencies (ISSUE VI) and other mitigators (ISSUE V) into its sentencing decision.

In sum, the trial court's decision to follow the jury's 10-2 recommendation of death and its conclusion that the four aggravators (HAC, prior violent felony, on felony probation, committed during kidnapping) outweighed the mitigation is

supported by the record and justified when compared to other cases (ISSUE VII).

ARGUMENT

ISSUE I

DID THE TRIAL COURT ERR BY DENYING DEFENDANT'S MOTION FOR JUDGMENT OF ACQUITTAL OF THE SEXUAL BATTERY CHARGE BECAUSE THE STATE FAILED TO PROVE NON-CONSENT? (Restated)[1]

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[1] Thomas attaches several claimed constitutional violations to ISSUE I. These were not raised below (See XV 780-94, XVI 901), and, therefore, they are not preserved for appellate review. See White v. State, 753 So.2d 548, 549 (Fla. 1999) ("this argument [state Constitutional due process] was not raised to the trial court or to the district court of appeal during the direct appeal from his conviction ... we decline to consider this argument because White has not preserved this issue for review"); Knight v. State, 721 So.2d 287, 296 (Fla. 1998) ("Knight claims ... violation of the confidentiality provision of Florida Rule of Criminal Procedure 3.211, Knight's Fifth Amendment right against self-incrimination, and his Sixth Amendment right to counsel"; "never raised the confidentiality provision, Fifth Amendment, or Sixth Amendment issues in the trial court ... those sub-claims are procedurally barred"); Melbourne v. State, 679 So.2d 759, 765 (Fla. 1996)(jury selection claim waived if not renewed "before the jury was sworn"); James v. State, 615 So.2d 668, 669 (Fla. 1993) ("Claims that the instruction on the heinous, atrocious, or cruel aggravator is unconstitutionally vague are procedurally barred unless a specific objection on that ground is made at trial and pursued on appeal"); Hill v. State, 549 So.2d 179, 182 (Fla. 1989)("constitutional argument grounded on due process and *Chambers* was not presented to the trial court. Failure to present the ground below procedurally bars appellant from presenting the argument on appeal").

Moreover, constitutional arguments are not developed on appeal. See Bryan v. Dugger, 641 So.2d 61, 63 (Fla. 1994) ("deficiencies listed in issue nine do not allege sufficient facts to demonstrate ineffective assistance of counsel"); U.S. v. Wiggins, 104 F.3d 174, 177 n. 2 (8th Cir. 1997) ("Failure to specify error or provide citations in support of an argument constitutes waiver, ... so we decline to reach the propriety of the district court's actions in this regard"); U.S. v. Dawn, 129 F.3d 878, 881 n. 3 (7th Cir. 1997) ("Dawn

The jury convicted Thomas of Sexual Battery (XVII 1016), and the trial court adjudged him guilty of it (XI 2158).[2] ISSUE I attacks the Sexual Battery conviction, essentially arguing (IB 16) that the State produced "no evidence that refuted" consent. To the contrary, the State will argue that evidence showed that Thomas' force and violence permeated about a two-hour period, culminating in the murder and Thomas' multiple lies attempting to cover it up.

At about 3 or 4 AM, Thomas forcibly snatched the victim's keys from her hand, forced her into her car, forcibly kept her in her car as she tried to exit three times, hit her and drove her in her car to a remote location behind a hospital, had sex with her there, at that rape scene inflicted injuries on the victim yielding large quantities of her blood, then drove her to a second remote location and, as she tried to run away, brutally beat her to death with an eight-foot metal scaffolding brace. In the midst of this two-hour trail of coercion, blood, and agony, Thomas posits his self-serving,

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... argues that sentencing on the basis of his conduct abroad would violate his due process rights because he lacked notice that he would be held responsible for that conduct"; "has left this argument undeveloped, however, and consequently we need not address it").

[2] The trial court did not use the Sexual Battery as an aggravator, but rather, used Kidnapping, which is attacked in ISSUE II. (See XI 2167).

unreasonable, and ineffectual speculation that the victim consented to the sexual intercourse.

Standard of Appellate Review.

No matter how one views extant case law, Thomas' position (IB 10) that de novo is the applicable standard of appellate review is incorrect. Tibbs v. State, 397 So.2d 1120, 1123 (Fla. 1981), enunciated the

> general proposition[] [that] an appellate court should not retry a case or reweigh conflicting evidence submitted to a jury or other trier of fact. Rather, the concern on appeal must be whether, after all conflicts in the evidence and all reasonable inferences therefrom have been resolved in favor of the verdict on appeal, there is substantial, competent evidence to support the verdict and judgment. Legal sufficiency alone, as opposed to evidentiary weight, is the appropriate concern of an appellate tribunal.

The State contends that Tibbs' principle applies to Thomas' challenges to the sufficiency of the State's evidence to prove Sexual Battery (ISSUE I), as well as his challenge to Kidnapping (ISSUE II).

Appellant argues that Florida's circumstantial-evidence test[3] applies here. The circumstantial-evidence test does not, however, constitute review de novo. Instead, it requires that "the evidence [be] inconsistent with any reasonable hypothesis of innocence," Mungin v. State, 689 So.2d 1026, 1029 (Fla. 1995), rather than the standard test for sufficiency that "a

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[3] Miller v. State, 770 So.2d 1144, 1149 (Fla. 2000), upheld the "circumstantial evidence standard" of State v. Law, 559 So.2d 187, 188 (Fla. 1989).

rational trier of fact could have found proof of guilt beyond a reasonable doubt," Melendez v. State, 498 So.2d 1258, 1261 (Fla. 1986). The State contends that the circumstantial-evidence does not apply here because the State's case was not wholly circumstantial and that, therefore, the State was required only to prove that a rational jury "could have found proof of guilt beyond a reasonable doubt."

Orme v. State, 677 So.2d 258, 261 (Fla. 1996), enunciated the phases of the analysis:

> [O]ur analysis of this case must begin by determining the threshold question of whether the case against Orme was **wholly** circumstantial.

Here, far from being "wholly circumstantial," direct evidence included Janet Money eyewitnessing (See XIV 497 et seq.) Thomas' abduction of the victim from the Tom Thumb Store at approximately 3-4 AM, and Thomas eventually admitting[4] (XIV 448-51, 462-65, XV 726-27, 734-39) being at the crime scenes of his sexual intercourse with the victim and his murder of her. In addition, Thomas' blood was found in the victim's car

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[4] Admissions are considered direct evidence. See J.B. v. State, 705 So.2d 1376, 1379 (Fla. 1998) ("J.B.'s admission that the substance he possessed was 'beer' is direct evidence"); Moore v. State, 701 So.2d 545, 550 (Fla. 1997) (discussion of harmless error; "there was direct evidence from other witnesses that Moore possessed a gun on the actual day of the murder and direct evidence that Moore shot the victim"); Smith v. State, 699 So.2d 629, 644-45 (Fla. 1997) (discussion of harmless error; "direct evidence of Smith's guilt from his own confession"; "admitted participating in the initial crimes and retrieving duct tape from his stepfather's toolbox to bind the victims ... admitted that he was on the bridges when the victims were thrown into the water").

at several locations and at the murder scene.[5] Here, there is much more than the "direct evidence presented by the State plac[ing] Orme at the scene of the crime around the time of Redd's death," 677 So.2d 261-62.

In any event and under any standard, the State's evidence did rebut consensual sex.

Evidence Sufficiently Proving Non-Consensual Sex.[6]

Section 794.011(1)(a), Fla. Stat. (1997), provides the applicable definition of consent:

> (a) "Consent" means intelligent, knowing, and voluntary consent and does not include coerced submission. "Consent" shall not be deemed or construed to mean the failure by the alleged victim to offer physical resistance to the offender.

Here, although unnecessary under this statute, the State proved not only non-consent but "physical resistance." Thomas' coercion and a "physical resistance" that produced his blood and her blood at multiple locations permeated events within the two early-morning hours of September 13, 1997. Evidence showed that, in that period, Thomas–

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[5] Technically, the experts opined in terms of a probability of 1 in 6,800 for three smudges in the victim's car and the flung-blood at the murder scene (XV 611) and 1 in 24 billion for Thomas' sperm in the victim's vagina (XV 708).

[6] The discussion of the facts here is extensive because it lays the groundwork for several other issues.

- **Argued** with victim at the Tom Thumb store, as Janet Money[7] testified: "[T]hey're gesturing like they're talking or fussing about something. Like tense, like not relaxed, just kind of tense like" (XIV 510) and "[T]hey were having an argument" (XIV 525); although Money is operating a noisy leaf blower," she hears the victim yell "Hey" (XIV 506, 512);[8]
- **Forcibly "snatched"** the victim's keys from her, as Janet Money witnessed and as Thomas admitted to the police (XIV 468, 504, XV 734);
- **Forced the victim into her car**,[9] as Janet Money testified that he pushed her into the car through the passenger door and closed the door (XIV 508, 504);

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[7] Although Money did not identify Thomas at trial, his identity as the person interacting with the victim at the Tom Thumb store and at her car is undisputed. (See also defense counsel's closing argument at XVI 946-67)

[8] Money also testified that the victim "appeared to smile" (XIV 507), but it was "[l]ike a smile" (XIV 508), she did not remember the victim showing her teeth (XIV 507), and she could not hear what Thomas was telling the victim at that time due to the noisy blower (See XIV 505-506). Most importantly, whatever face the victim made was prior to Thomas forcing the victim into the car and forcing her to stay there. (See XIV 506, 520: the assumed smile was when the victim said "Hey," catching Money's attention again).

[9] Thomas told the police that he "pulled her to the car" (XIV 462), that he "had her get inside her vehicle on the passenger side" (XV 726), and that "I had her, like, by the arm. I was just, like pulling her – I wasn't pulling her, you know, she was coming along" (XV 735).

- **Forcibly restrained** the victim as she opened her door and Thomas closed it, as Money testified that when Thomas walked quickly around to the front of the car to "get around to the other side of the car," she opened her passenger door, and he quickly walked back to the passenger side and re-closed the door (XIV 504-505, 510-11, 522-23, 528);
- **Forcibly restrained** the victim as she opened her door a second time and Thomas re-closed it a second time, as Money testified that Thomas again started back to the front of the car, and she opened the door again, he quickly came back and closed the door again (XIV 511, 523, 528-29);
- **Forcibly restrained** the victim as she opened her door a third time and Thomas re-closed it a third time after saying or doing something to the victim while leaning into the passenger side door (XIV 511, 523, 529-30);
- **Coerced the victim** in the car as he drove her in her car (See XIV 512, 523, 525-26, 530), which, a moment-prior, she tried to exit three times; in the two-early-morning hours, Thomas drove her to two remote locations: an area behind a hospital (See, e.g., XIV 448-49, XV 620-23) and Louise Drive, which was a construction site on a cul-de-

sac (See, e.g., XIII 304-11, 314 et seq. and exhibits referenced there)[10];

- Thus, **assured that his malicious intents would not be eyewitnessed** by driving to the remote locations;[11]
- **Forcibly maintained coercion so as to yield, within two hours, blood spatter** on the interior roof of the car immediately above where the victim had been sitting (XIV 564, 573),[12] **blood** in the lap area of the victim's jeans (XV 677-78), the victim's (XV 607-608) **blood and**

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[10] Thomas may be inferring (IB 15: "one of the homeowners") that more than one of the houses on Louise Drive was occupied. This would be incorrect. Mr. Hopson lived in the only occupied house on Louise Drive, and his was located four houses down from the murder scene. (XIII 310-11) Hopson lived farther down Louise Drive (XIII 311: "way down there") from where Thomas parked the victim's car so Thomas would not have noticed that there was an occupied house.

[11] Concerning Thomas' story that he only wanted to talk to the victim about her supposed involvement in the theft of his car, he did not ask victim to discuss his stolen car at the Tom Thumb, "over coffee," or another public location. See discussions of his statements in this infra and under ISSUE IV infra.

[12] The expert was unable to DNA-type the blood on the passenger-side interior roof of the victim's car (i.e., on its passenger-side headliner) (XIV 589, 591), but an expert testified that it was "forceful blood" spattered at a medium velocity (XV 671), which is normally associated with beatings or stabbings (XV 669); it indicates that a forceful injury/beating occurred inside the car (XV 675); the spatter went straight up from the passenger seat (XV 691-92). Money, the last neutral witness to see the victim alive, placed the victim on the passenger side as Thomas drove the victim (See, e.g., XIV 512, 523) to her death. Thomas' blood was smudged at one location on the passenger side of the car. (Compare "contact stain or transfer stain" at XV 672 with XV 616)

forceful blood spatters (XV 672-74) at multiple sites on the exterior of passenger side of victim's car, a volume of the **victim's blood** that had pooled on the ground at the hospital scene (See XV 684-85),[13] and injury to the victim indicative of manual **strangulation** (See XIII 400, XIV 421);

- **Provoked resistance** on the part of the victim at some point because smears of Thomas' blood were found in the victim's car on the steering wheel, the passenger seat, and the driver's seat (XV 616-17, 672, 675), and a flung-off spatter (XV 686)[14] of Thomas' blood (XV 611) was found on the cement mixer near the victim's car at the Louise Drive site;
- **Chased the victim** about 109 feet (See XIII 343) as she ran away from him, catching her from behind with a blow

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[13] The victim's blood was found on a towel (XV 609-10) at the hospital scene (XIV 453-55, XV 622, 768, 777, State's Exhibit # 20A-I) and on the top and bottom of the victim's socks (XV 609); the victim was wearing her shoes at the Louise-Drive scene (See XV 684, State's Exhibit # 46), thereby indicating that the blood was placed there at the hospital scene; also noteworthy is that the hospital scene was comprised of grass and dirt (See, e.g., XIV 453-54, XV 648-49), whereas Louise Drive itself, where the victim ran for her life, was paved (See, e.g., State's Exhibit #s 30, 34, 35), and the bottom of the victim's socks were dirt-soiled (See State's Exhibit # 46).

[14] The spatter expert testified that if this were identified as Thomas' blood, it was consistent with him having a bloody hand and casting off that blood onto the mixer (XV 686), and, as indicated above, the blood was DNA-typed as Thomas'.

from the scaffolding brace (See, e.g., XIV 426-29), and then brutally beating her to death as she defenselessly lay there, See discussion of HAC aggravator and proportionality in ISSUE VII infra;

- **Told stories** about the events surrounding the early-Saturday-morning murder that **conflicted with each other and with other established facts**, thereby evincing a consciousness of guilt.

The State elaborates on Thomas' conflicting stories.[15] On September 24, 1997, the police served a search warrant on Thomas, which, in part, authorized them to seize blood and hair samples from Thomas. (I 1) The search warrant was read to Thomas. (XIV 439, XV 718-21, 722) Knowing that the police would probably match his DNA with fluids/sperm found in the victim, in STORY #1 Thomas admitted that he had sex with the victim, but he told the police that the sex was on Thursday (XIV 441-42, XV 721-22). In other words, he did not admit to being with the victim at the time she was killed, Saturday morning between about 3-4 AM and about 5 AM. Thomas indicated that he did see the victim Saturday morning but that he drove by her and "saw two black men walking towards the store" (XIV 447).

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[15] For ISSUE III (penalty-phase retardation claim) and ISSUE IV (motion-to-suppress confession retardation claim), the State will rely upon much of this discussion concerning Thomas' statements to the police.

When the police confronted Thomas with the eyewitness who saw him approaching the victim on Saturday morning and leaving with her, Thomas admitted that STORY #1 was not true (XIV 455-56)[16] and narrated STORY #2. In it, he admitted that he approached her even though she had waved him away moments before, took or "snatch[ed]" her keys from her, took her to her car, and drove away with her. (XIV 448, XV 726-27, 734-35)

Thomas' STORY #2 covered supposed matters that the Tom-Thumb eyewitness would not have seen but that would paint the brutal beating of the victim in a relatively favorable light for him. He stated that his motive for driving the victim to the remote location behind the hospital was to discuss the victim's supposed involvement in the theft of his car. He said that two black men had beaten him up and taken his car and that the victim was with the car thieves at that time. But, at the remote hospital site, "things became romantic" and they had consensual sex in the front seat of the victim's car.[17]

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[16] Shortly after the murder, Thomas told STORY #3 (which, chronologically would be the first story) to one of his friends. In it, he said that he believed that Terrence Peterson killed the victim because one of his hands was messed up (XVI 862, 864). This evidence was elicited on cross-exam of a defense witness.

[17] This "consensual sex" is incredible given his abduction of the victim minutes prior to it. Further, even though the police asked Thomas if he had a prior sexual relationship with the victim (XIV 465), Thomas failed to disclose one (XIV 455, XV 746). These facts conflict with Thomas' aunt who testified for him that about midnight, about 5-6 weeks before the murder, Thomas came by her house with the victim to get a condom (XVI 874-75, 879, 885). Also, Thomas

During the consensual sex, the victim had a nose bleed. He started to use a condom, but in the middle of the sex, he took it off and threw it out the window. (XIV 448-50, XV 731-32, 735-37. See also XV 726-27) They got dressed, and he drove out to the Louise Drive cul-de-sac. (XIV 449, XV 727, 737) He did not explain why he drove to the second location. (See XIV 450: "started driving around", XV 737)

At Louise Drive remote location, which Thomas called "Country View," Thomas said that "he confronted her about the theft of his car and why had she set him up." He said that the victim reacted by screaming and throwing things at him. The victim told Thomas to "get away from her," and Thomas said he was afraid of her, but at some point while he was outside of the car, she picked up a large pipe and hit him "up side the face" (XIV 450, XV 737-38). He said that "it wasn't hard, but it was enough to just make you mad as hell, man." (XV 738-39) At another point, he described it:

> ... I was just like swollen up in here a little bit. It wasn't that bad, man *** it wasn't a hard lick, but it was enough to knock your brains loose. I mean it wasn't a hard lick, but enough to make you real mad.

(XV 744)

Thomas said he snapped and reacted by taking the pipe from the victim and hitting her several times with it. (XIV 450, XV

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had reported his car stolen on July 23, 1997, (XIV 537-38) which was 52 days (over 7 weeks) prior to the murder, thus rendering this post-theft romance all-the-more implausible.

739) He says that he then panicked and stopped a truck for a ride back to the Tom Thumb. (XIV 451)

When asked why he did not drive her car back to town, he replied, "I don't know, I was so damned paranoid and scared, man." (XV 740)

Thomas had not mentioned the victim bleeding at the remote hospital site until the officer confronted him with the bloody bottoms of her socks:

> [OFFICER]: Well, her socks had blood on them, on the bottoms of them. When was she bleeding and had her shoes off?
> THOMAS: At the time we was having sex, I think – no, no, it wasn't.
> [OFFICER]: Did she have a bloody nose or what?
> THOMAS: Okay, yeah, I think she had a bloody nose, because she – her nose started bleeding at the time we were having sex. I guess it was the pressure.
> [OFFICER]: Did her nose bleed?
> THOMAS: Yeah, and she was wiping like that and stuff, so I stopped, and I guess she was putting back on her shoes or something.

(XV 739-40) Thus, Thomas appeared to be improvising his story to accommodate newly disclosed facts as he went along.

Likewise, when asked about his footwear, Thomas improvised as he discovered what the police knew:

> [OFFICER]: What kind of shoes did you have?
> THOMAS: I had on, like white – no, I had on some black leather boots.
> [OFFICER]: Black leather boots?
> THOMAS: Uh-huh.
> [OFFICER]: You're sure?
> THOMAS: Yeah.
> [OFFICER]: Do you have white tennis shoes?
> THOMAS: White tennis, yes.
> [OFFICER]: What kind of shoes are they?
> THOMAS: They ain't mine. I just borrowed them from my cousin one night. They ain't my shoes.
> [OFFICER]: What are they?

THOMAS: They were Pumas.[18]
[OFFICER]: Pumas. Who's your cousin?
THOMAS: It's my cousin named Kenya Bess.
[OFFICER]: Kenya Bess?
THOMAS: Yeah.
[OFFICER]: Okay.
[OFFICER]: You're sure you didn't have those shoes on that night?
THOMAS: Which ones?
[OFFICER]: The Pumas.
THOMAS: I might have had. Yeah, I had my Pumas on. I thought I had on my black leather boots on, yeah, 'cause I'll wear them with no socks, the Pumas.

(XV 742-43)

To summarize the State's point so far, Thomas, knowing that he had left his semen in her, made up STORY #1 to cover that fact while distancing himself from the circumstances of the murder: He had consensual sex with her on Thursday. However, when confronted with the Tom-Thumb eyewitness, Thomas made up STORY #2: He had consensual sex with her on Saturday morning. Given the fact that he was the last person to be seen with the victim alive and given the brutal nature of her death, he also needed to explain why he killed her. But he also knew the victim's modest size of 5 feet 4 inches (XIII 391). As a result, Thomas wove a story of her going crazy and then him going crazy. Thomas fabricated each time.

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[18] The State's expert indicated that shoe prints found at the Louise Drive murder scene were made by either 10 Star or Puma shoes. (XV 651-53) Also, Janet Money testified that the black male who forced the victim into her car, forcibly kept the victim there three times, and drove her away had on bright white sneakers (XIV 504).

Accordingly, when he became aware of the victim's blood at the sex scene and police knowledge of his white tennis shoes, Thomas wove facts to explain them.

Thus, Thomas rationally reacted to the facts he knew the police possessed. However, as the State's evidence continued to be gathered for this murder case, Thomas' STORY #2, which included consensual sex, was riddled with conflicts. These conflicts are the natural result of a suspect trying to lie his way out of a situation. They include the following:

- Thomas said that the victim was with two men when they beat him up and took his car, but he told no such story to the officer who took the auto theft police report; instead, on July 23, 1997, Thomas reported to the officer that "he left the vehicle running and went inside the [Tom Thumb] store and while he was inside the store unknown persons or persons removed the vehicle from the parking lot," and Thomas had no visible injuries at the time (XIV 539-41);
- Thomas said that [within minutes prior to driving to Louise Drive and killing her] he and the victim had consensual sex in the front seat of the victim's car, but objective facts indicate that he had sex with the victim on the ground at the hospital scene: seeds and grassy material, recovered from the victim's right thigh and pubic hair region (XIII 360-61); a bloody towel containing the victim's blood (XV 609-10) and a hair

barrette, found on the ground there (XIV 453-55, 463, XV 622, 768, 777); further, as footnoted supra, the victim's blood and soiling dirt were on the bottom of her socks thereby indicating that the victim had been out of the car on the dirt subsequent to being beaten;

- In an attempt to explain the victim's blood, Thomas' said that during the consensual sex, the victim had a nose bleed; at trial, he also introduced evidence of the victim's nose bleeding in the past (XVI 820-21), but Thomas' story clashes with
  - the blood spatter straight **upward** from where the victim was sitting in the car,
  - the dirty condition of the bottom of the victim's socks,[19]
  - her blood in multiple places on the passenger side of the car, and
  - the volume of blood in the victim's lap;

  in contrast, the victim's friend testified that the nosebleeds she saw produced only about a "[h]alf a dozen little droplets," insufficient to fill a baby's eyedropper[20] (XVI 821, 823-24);

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[19] The medical examiner pointed out that the victim would have had to take off both of her dirty socks to wipe her nose with them (XIV 431-32).

[20] Indeed, the prosecutor showed the photos of the victim's socks to the witness who answered "[n]o" to the question whether she had ever seen her have a nose bleed like

- Thomas said that he started to use a condom during the supposed consensual sex with the victim, and in the middle of the sex, he took it off and threw it out the window behind the hospital, but even though the bloody towel was there, no condom or condom wrapper was found (XIII 357, XIV 453-55, 463, XV 628-29);
- Thomas admitted that, even though the victim told him to "get away from her" and even though he supposedly was afraid of her, he remained close to her; while within about eight feet of her, supposedly this 5 foot 4 inch victim hit him with the same eight-foot long metal scaffolding that he then used to pound the life out of her; in contrast, Thomas' own witness saw no sign of injury on Thomas shortly after the murder (XVI 865, 867), and the police saw no sign of it about ten days later (XIV 450).[21]

Indeed, Thomas knew he was "walking a fine line" concerning the amount of force that the victim supposedly used on him. From his perspective, it needed to be hard enough where one might understand his raging reaction but not so hard that it

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that. (XVI 824)

[21] The same aunt, who supposedly saw the victim friendly with Thomas about 4-5 weeks before the murder but apparently after the victim participated in the theft of his car, also testified that she saw a knot on Thomas' head the size of lemon, with not bleeding, no scab, his skin not broken, no bruise, and no other injury, and Thomas did not go to emergency room (XVI 877, 882-83).

would produce a long-lasting injury or one requiring medical attention.

The State submits that, with or without Thomas' statements, the evidence arrayed against his was overwhelming. Nevertheless, his statements bore multiple signs of someone who was trying to explain away facts any way other than a force-and-violence-riddled path perpetrated on the victim's person from Thomas' abduction of her, to his beating, strangling, and rape of her, to his brutal and terrorizing beating of her as she tried to escape the scene. See also discussion of HAC and proportionality in ISSUE VII infra.

Although the facts of this case are compelling by themselves, several cases assist in the analysis. The principle in Heiney v. State, 447 So.2d 210, 212 (Fla. 1984), is consistent with the applications discussed in the following paragraphs, and it, to some degree harmonizes the circumstantial evidence rule with the general principle applicable to judgments of acquittal:

> The question of whether the evidence fails to exclude all reasonable hypotheses of innocence is for the jury to determine, and where there is substantial, competent evidence to support the jury verdict, we will not reverse a judgment based upon a verdict returned by the jury. *Rose v. State*, 425 So.2d 521 (Fla. 1982), *cert. denied*, 461 U.S. 909, 103 S.Ct. 1883, 76 L.Ed.2d 812 (1983).

Here, in light of the totality of the evidence "support[ing] the jury verdict," the jury was properly allowed to determine whether the evidence rebutted consent.

Thomas discusses (IB 15-16) Duckett v. State, 568 So.2d 891 (Fla. 1990). Thomas argues that consent was not the issue in Duckett, but he misses the point. Assuming that the circumstantial evidence test applies here, Duckett clarified that the "total circumstances in this case" are used to determine if an otherwise reasonable defense theory was disputed. Here, the "total circumstances" included, for example, Thomas' hostile attitude towards the victim, forcing the victim into her car, forcing her to stay there three times in succession, driving her away against her will, beating her, strangulation, sex, and chasing her down and killing her – all within a two-hour period of the early morning hours. Thomas chose remote locations to perpetrate his crimes, but he left a trail of force, violence, blood, and lies all along the way. Given these "total circumstances," together with Thomas' internally and externally inconsistent multiple stories, Thomas' hypotheses of consensual sex is unreasonable and rebutted. In Duckett, the State's total evidence proved identity; here, the State's total evidence proved non-consent.

In Orme, 677 So.2d at 261-62, regardless of whether it is dubbed a circumstantial case, there was no eyewitness to the actual sex or to the murder, like here. As here, the defendant's "credibility clearly had been called into question by inconsistencies in his stories to the officials," and, accordingly, the credibility of Thomas' supposedly corroborating evidence was riddled with major inconsistencies.

For example, Jamiel Clark, the half-brother of a friend of Thomas (XVI 846), testified for Thomas that he saw Thomas and the victim hugging and kissing at the Tom Thumb before Clark entered the store (XVI 830), but he told the investigating officer that he saw Thomas snatch the victim's keys from her and place her in her car. The officer testified Clark related to him that, emotionally, Thomas and the victim appeared to be engaged in a "disturbance" and that Clark appeared to be describing an argument. Clark did not say anything about hugging or kissing. (XVI 895) After the police interviewed Clark, Clark swore at his deposition that they were hugging and kissing **after** Clark left into the store (XVI 841). Neutral-observer Janet Money saw no hugs or kisses or even friendly-like conversation exchanged between Thomas and the victim (XIV 510); instead, they appeared to be arguing (See XIV 506, 510, 513, 525), and ultimately she saw Thomas abduct the victim.

Clark also testified that he saw the victim get into driver's side and Thomas get into passenger side and the car drive off (XVI 831-32), but the neutral observer, Money, testified to the contrary. Even Thomas himself admitted to the police that he "pulled her to the car" (XIV 462) and "had her get inside her vehicle on the passenger side" (XV 726).

Especially given the incredible nature of Thomas' stories and the rest of his defense, the State submits that Orme's holding applies here:

> Based on this record, the State's theory of the evidence is the most plausible: that Orme was the one who had attacked and killed Redd. Put another way, competent substantial evidence supports the conclusion that the State had presented adequate evidence refuting Orme's theory, creating inconsistency between the State and defense theories.

Here, the State's theory is not only "most plausible," it overwhelms Thomas'.

Gudinas v. State, 693 So.2d 953, 962-63 (Fla. 1997), characterized the evidence as circumstantial but rejected a claim that "the evidence fails to exclude the reasonable hypothesis that he was merely soliciting Rachelle Smith for a consensual sex act." It held that "any support for that hypothesis was dispelled by Rachelle Smith's unequivocal rejection of Gudinas' advances toward her." There, the defendant tried to gain access to the victim's car three times and ceased only when the victim honked the horn. As here, the illicit nature of the defendant's intent was reasonably inferred by the surrounding circumstances. Here, instead of trying to force his way into the victim's car three times, Thomas forced her into it and then kept her there three times. Her unwilling entry into and presence in the car was tantamount to the rejection of Gudinas's victim. Instead of Thomas mouthing his intent to have sex with the victim, shortly after forcing her into the car he climaxed that sex, riddling it with her blood and culminating it in her death.

Thomas (IB 14) cites to State v. Ortiz, 766 So.2d 1137 (Fla. 3d DCA 2000), but he overlooks that Ortiz reversed the

trial court's dismissal of the sex crime, there attempted sexual battery. Ortiz and this case included evidence that the defendant had beaten the victim at a time proximate to the sexual aspect of the events and her death. A fortiori, the instant case includes the compelling facts surrounding the abduction.

Perhaps Thomas' parenthetical citation (IB 14) to Ortiz is suggesting that rapists who allow their victims to re-dress before killing them should be exonerated regardless of the incriminating nature of the other evidence.

Holton v. State, 573 So.2d 284 (Fla. 1990), rejected two "challenges [to] his conviction for sexual battery with great force":

> Holton argues, therefore, that because the evidence could not conclusively establish the bottle was inserted in the victim's anus before death but could only prove that insertion occurred prior to the fire, the evidence was insufficient to support his conviction under section 794.011. Second, Holton charges that because the victim was a prostitute, it is reasonable to conclude that she consented to the penetration.

Here, as in Holton, the defendant erroneously claims that because the evidence did not "conclusively establish" an element, he is entitled to an acquittal. Here and there, the totality of the evidence refutes the defense hypotheses. In both cases, even though there was no direct evidence that the victim said "no" at the precise time of intercourse, there was evidence of violence to the person of the victim at a time proximate to her death. In both cases, the defendant made

statements that other evidence contradicted. In both cases, "there was substantial, competent evidence to support ... [the] conviction for sexual battery with ... force," there charged with "great force." In both cases, "after all conflicts in the evidence and all reasonable inferences therefrom have been resolved in favor of the verdict, there is substantial competent evidence to support the verdict and judgment"; there was "competent, substantial evidence ... submitted on each element of the crime," rendering "it ... for the jury to evaluate the evidence and the credibility of the witnesses." Here, the facts of the abduction, violence, and blood make non-consent a "reasonable inference[]."

In a situation where the State produced no witnesses to the actual incident, Finney v. State, 660 So.2d 674 (Fla. 1995) ("thirteen stab wounds, all but one penetrated the lungs causing bleeding and loss of oxygen, ultimately resulting in death. No bruises or other trauma was observed"), rejected a sufficiency claim and relied heavily upon the defendant's inconsistent versions of the events surrounding the victim's death:

> ... Finney's contention that he did not kill the victim was sufficiently inconsistent with the hypothesis that he killed the victim during a consensual sexual encounter gone bad to allow the jury to find premeditation to the exclusion of all other inferences.

660 So.2d at 679-880, citing Bedford v. State, 589 So.2d 245, 251 (Fla. 1991) (where expert testified that victim's injuries were consistent with erotic sexual asphyxia, evidence that

victim had been bound, gagged, and had abrasions to mouth indicating her attempts to scream, coupled with defendant's prior inconsistent versions of events was sufficient evidence from which jury could find premeditation); Holton v. State, 573 So.2d at 289-90 (Fla. 1990) (circumstantial evidence rule does not require the jury to believe defendant's version of events where State has produced conflicting evidence).

Accordingly, Bedford reasoned in part:

> Because each of Bedford's several versions of events was inconsistent with the others, the jury reasonably could have concluded that each of these accounts was untrue.

Here, Thomas' STORY #1 was that he had sex with the victim on Thursday, indicating that he was not with the victim when she died, but when confronted with other evidence, he concocted STORY #2, which, as detailed above, not only conflicted with STORY #1 but also with other evidence. Moreover, here the State's evidence established that Thomas inflicted much more pre-murder violence upon the person of the victim than "abrasions to mouth," Bedford. See also Carpenter v. State, 26 Fla. L. Weekly S125 (Fla. March 1, 2001) ("In addition to the above evidence presented by the State, it is clear that Carpenter's numerous statements to the police were inconsistent with one another. In similar situations, we have routinely held that the jury was free to reject the defendant's version of the events"), citing Finney and Bedford.

Zack v. State, 753 So.2d 9, 13-14, 17-18 (Fla. 2000) (footnote omitted), involved a claim of consent to sex and subsequent rage:

> After he was arrested, Zack confessed to the Smith murder and to the Pope and Chandler thefts. Zack claimed he and Smith had consensual sex and that she thereafter made a comment regarding his mother's murder. The comment enraged him, and he attacked her. Zack contended the fight began in the hallway, not immediately upon entering the house. He said he grabbed a knife in self-defense, believing Smith left the master bedroom to get a gun from the guest bedroom.

Here and in Zack, the State produced physical evidence and related expert opinions that conflicted with the defendant's hypothesis. Moreover, in Zack, unlike the abduction here, it appears that originally the victim willingly accompanied the defendant with the intent of consensual sex.

Hufham v. State, 400 So.2d 133, 135-36 (Fla. 5th DCA 1981), was cited approvingly in Taylor v. State, 583 So.2d 323, 328 (Fla. 1991), on which Thomas also attempts to rely (IB 15). Hufham rejected a defense claim of consent where there was no direct evidence that at the time of intercourse the victim said "no":

> Appellant says that the testimony of the victim is conflicting and is not credible on the issue of force and lack of consent, but he addresses this issue to the wrong tribunal.

There and here, the victim rebuffed the assailant early in the interaction, there on the dance floor and here when Thomas drove up the first time. There, the victim entered the assailant's car willingly; here, Thomas forced her in her car

and kept her there as he drove off. In both cases, the assailant drove to a remote location. There and here, at some point before intercourse, the defendant "became violent," there shaking the victim, producing "scratches on her arms and back," pressing his hand against the victim's mouth, and threatening "you better keep your ... mouth shut or something will happen to you," whereas here Thomas was violent enough, after abducting the victim, to produce blood spatter in the car and large quantities of her blood in multiple locations. There, even though the victim then "got into the back seat of the car and took her clothes off because she was frightened," the Court held that the resulting sex was not consensual. There and here, this claim is "address[ed] ... to the wrong tribunal." There was sufficient evidence that sex was not consensual. Here, the victim could not testify at trial, but other evidence testified for her.

In addition to Duckett, Thomas discusses (IB 15) Taylor v. State, 583 So.2d 323 (Fla. 1991). Thomas seems to be mistakenly arguing that all cases must contain refutation evidence like Taylor's or the evidence is insufficient. However, Taylor as precedent indicates that its totality of facts constitute an example of when evidence is sufficient, while not indicating that its facts are the only way to reach a sufficient level. The totality of facts in the instant case was also sufficient. In Taylor, the medical examiner's descriptions of the injuries to the victim's vagina

contradicted the defendant's story. Here, Thomas' STORY #1 contradicted STORY #2, and the totality of other evidence detailed above refuted Thomas' STORY #2. Moreover, in Taylor, "the jury reasonably could have rejected as untruthful Taylor's testimony that he beat the victim in a rage after she injured him," whereas here it was reasonable for the jury to reject Thomas' similar story (STORY #2) to the police. As in Taylor, there was no unbiased evidence of the supposed injury to the defendant. Here, Thomas' STORY #2 places him within eight feet of the victim outside the car when she was telling him to stay away from her and when he supposedly was scared of her and then he chases her down about 100 feet from the car, smashes her to the ground, and bludgeons her to death.

Taylor is also pertinent to the remedy that Thomas' ISSUE I requests: a new trial. (IB 16) Arguendo overlooking the double jeopardy implications of Thomas' requested remedy, Thomas may be suggesting that if he prevails on ISSUE I that he is entitled to relief regarding the First Degree Murder count. He would be incorrect. As Thomas correctly concedes in ISSUE II (IB 22), evidence was sufficient for premeditation, meriting affirmance of the conviction on COUNT I.[22] Here and in Taylor,

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[22] See, e.g., Johnson v. State, 720 So.2d 232, 236-37 (Fla. 1998) ("jury returned a general verdict of guilt *** evidence is sufficient to uphold the conviction based on a theory of premeditation or felony murder"); Donaldson v. State, 722 So.2d 177, 182 (Fla. 1998) ("sufficient evidence by which to sustain Donaldson's conviction of first-degree murder under a theory of either felony murder or premeditated

the extensive injuries to the victim were sufficient for premeditation. Compare facts regarding HAC discussed in ISSUE VII infra with Heiney v. State, 447 So.2d 210, 215 (Fla. 1984) (premeditation may be inferred from the manner in which the homicide was committed and the nature and manner of the wounds), as summarized in Taylor. Put in the terms of Rogers v. State, 26 Fla. L. Weekly S115 (Fla. Mar. 1, 2001) (evidence also included plan), the "deliberate nature" of the wounds inflicted upon the victim, and here, Thomas beat the victim at her car and subsequently chased the victim down for about 100 feet prior to inflicting multiple blows upon her with an eight-foot long instrument requiring broad, wide-ranging swings, See State's Exhibit #1. See also Hawk v. State, 718 So.2d 159, 161, n. 7(Fla. 1998) ("numerous massive wounds to the head consistent with hammer blows"; blood spatter; bragging); Ross v. State, 474 So.2d 1170, 1173-74 (Fla. 1985) ("angry with the victim and that he brutally beat her about the face, head, torso, and extremities, with fist, feet, and an unknown blunt instrument while she attempted to defend herself"); Preston v. State, 444 So.2d 939, 943-44 (Fla. 1984) ("nature of the injuries she sustained were particularly brutal"); Welty v. State, 402 So.2d 1159, 1163 (Fla. 1981) ("repeated blows" and "manual strangulation"); Sireci v.

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murder").

State, 399 So.2d 964, 967 (Fla. 1981) (hit victim with lug wrench and repeatedly stabbed victim).

ISSUE II

DID THE TRIAL COURT ERR BY DENYING DEFENDANT'S MOTION FOR JUDGMENT OF ACQUITTAL OF THE KIDNAPPING CHARGE BECAUSE THE STATE FAILED TO PROVE ITS RESTRAINT AND INTENT ELEMENTS? (Restated)

ISSUE II challenges Thomas' conviction of the Kidnapping charge in COUNT II of the indictment.

As in ISSUE I, the constitutional claims in ISSUE II were not preserved (See XV 780-94, XVI 901), and they are not developed here. Further, defense counsel's motion for judgment of acquittal, although at least mentioning the degree of restraint (XV 783-84) in the context of an argument based upon Walker v. State, 604 So.2d 475 (Fla. 1992), and Faison v. State, 426 So.2d 963, 965-66 (Fla. 1983), failed to challenge the intent element of kidnapping, thereby barring that claim on appeal (IB 20-22). See Woods v. State, 733 So.2d 980, 984-85 (Fla. 1999) ("Woods ... did not bring to the attention of the trial court any of the specific grounds he now urges this Court to consider"); Marquard v. State, 641 So.2d 54, 58 n. 4 (Fla. 1994) (judgment and death sentence affirmed; "not preserved as to the trial court's denial of motion for judgment of acquittal on murder charge" ***); Archer v. State, 613 So.2d 446, 447-48 (Fla. 1993) ("motion for judgment of

acquittal *** Archer did not make the instant argument in the trial court, and, therefore, this issue has not been preserved for appellate review"); §924.051, Fla. Stat. (preservation requires trial be informed "sufficiently precise" ground).[23]

However, arguendo, the State discusses the sufficiency of the evidence for the restraint and the intent elements of Kidnapping.

Here, as detailed in ISSUE I, Janet Money watched the abduction unfold. Therefore, the standard of review for direct evidence applies. In any event, the State adduced competent evidence that refuted any supposed hypothesis of innocence. See discussion of standard in ISSUE I.

Section 787.01, Fla. Stat., the Kidnapping statute, provides, in pertinent parts:

> (1)(a) The term "kidnapping" means forcibly, secretly, or by threat confining, abducting, or imprisoning another person against her or his will and without lawful authority, with intent to:
> ***
> 2. Commit or facilitate commission of any felony.
> 3. Inflict bodily harm upon or to terrorize the victim or another person.
> ***

Thomas first argues (IB 17-20) that the State failed to prove that he "forcibly, secretly, or by threat confining, abducting, or imprisoning another person against her ... will." The State respectfully submits that the evidence was

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[23] Thomas' ISSUE II properly concedes (at IB 22) the sufficiency of evidence of premeditation for COUNT I. See discussion of premeditation at the end of ISSUE I supra.

overwhelming for this element. The facts surrounding Thomas' **ABDUCTION** of the victim were discussed at length in ISSUE I; therefore, they will not be belabored here. Suffice to say that in the early morning hours, Thomas argued with the victim, snatched her keys from her, forced her into her car, and kept her there three times as she opened and he closed her car door each of those times. He then drove her to two remote locations, at which he bloodied her, strangled her, raped her, See ISSUE I, and brutally killed her, See ISSUE VII. **All of these events occurred within two hours.** In addition to clearly "forcibly ... confining" her to the car, at which point this element was satisfied, Thomas abducted her, thereby doubly satisfying this element.

In the face of this evidence, Thomas argues that the victim did not cry out for help (IB 18), did not run away (IB 18), and "went willingly enough" (IB 19).[24] Thomas' arguments could

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[24] Thomas also argues (IB 20) that at one point the victim "smiled." The State discussed the assumed "smile" under ISSUE I.

Thomas also mentions that he and the victim "had had sexual intercourse" (IB 19), but, of course, any previous sex would not excuse Thomas' confining, abducting, and brutally murdering the victim. Further, as footnoted in ISSUE I supra, the police asked Thomas if he had a prior sexual relationship with the victim (XIV 465), but Thomas failed to disclose one (XIV 455, XV 746), and the supposed one prior instance of consensual sex, elicited in Thomas' evidence, incredulously occurred after Thomas suspected the victim of participating in the theft of his car. (Compare 5-6 weeks before the murder at XVI 874-75, 879, 885 with car reported stolen over 7 weeks prior to the murder at XIV 537-38) Further, the motion for judgment of acquittal after the defense case was perfunctory

be appropriate for closing argument to the jury, but it misses the mark when analyzing whether the evidence produced for the jury was sufficient. The issue is whether the evidence that was actually introduced was sufficient; the issue is not whether there could have been a stronger case or whether the victim could have done more to get away. The evidence showed that this element was doubly proved as she was confined **and** abducted, and the State submits that is where the analysis of this element should end. Moreover, as has been argued repeatedly supra, the evidence affirmatively shows that the victim did not "go willingly" at all and that she did try to run away. She made it 109 feet from her car, where Thomas again confined her, stopping her in her tracks with a blow to her head, pounding her to the ground.

In Bedford v. State, 589 So.2d 245, 250-51 (Fla. 1991), there was evidence that the victim originally went with the defendant willingly, but other evidence contradicted the theory that the encounter remained consensual. In Bedford and here, at some point, the victim struggled, and the outcome was her brutal beating. Bedford held:

> This evidence supports a finding that Herdmann was being forcibly abducted and confined against her will. Further, evidence that Herdmann was transported to the Everglades, an isolated area where there would be no possibility of meaningful contact with members of the public, was tantamount to "secretly" abducting and

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(See XVI 901), failing to preserve any claim based upon defense evidence.

> confining her. Robinson v. State, 462 So.2d 471 (Fla. 1st DCA 1984), review denied, 471 So.2d 44 (Fla. 1985).

Further, Bedford addresses the second claim of ISSUE II (IB 20-22), the attack on the intent element of Kidnapping:

> We also agree with the State that the evidence was sufficient to prove a specific intent to do bodily harm or to terrorize Herdmann under any definition of the latter term.

Here, within two hours of confining and abducting the victim, Thomas had bloodily beaten her, she had struggled, he had raped her, and he had chased her down and killed her. The only evidence that he simply wanted to talk with her came from Thomas, but, in light of the other evidence discussed in ISSUE I, this hypothesis is unreasonable. Thomas took the victim to remote, dark locations between 3 and 5 AM to "commit or facilitate commission of a[] felony," i.e., at least to rape her, and, ultimately, to kill her. In addition to the inconsistencies discussed in ISSUE I, the darkness and the abduction do not fit Thomas' supposed intent to just talk, and, moreover, neither does the bloody force he used on the victim to effect the rape.

Thomas tenders Rogers v. State, 660 So.2d 237 (Fla. 1995), as purported support for his claim that the State failed to prove intent. However, there the victim essentially refused to be confined: "Daniel testified that Hastings refused and drove in a different direction." 660 So.2d at 241. Here, Thomas effectuated his intent to confine the victim. Moreover, albeit unnecessary, his statement to the police, if it has any facial

credibility at all, provided the motive for the kidnapping: He wanted to get even for the victim's role in the theft of his car; he originally failed to report that role to the police, preferring to take care of it himself.

Indeed, the best evidence of Thomas' intent is what he immediately did within a short period after abducting the victim: He beat her, by itself satisfying the element of "intent to ... terrorize the victim," then he also raped her and killed her as she tried to get away. See also Schwab v. State, 636 So.2d 3, 6 (Fla. 1994) (discussion of corpus delicti for kidnapping; "Although the victim may have gone willingly with Schwab initially, the conclusion that at some point he was held against his will is inescapable"; facts included probable death by "strangling or smothering" and "victim's nude body"). Moreover, Thomas' intent as he chased her down was clearly to "[i]nflict bodily harm upon or to terrorize the victim."

ISSUE III

DID THE TRIAL COURT REVERSIBLE ERR BY SENTENCING THOMAS TO DEATH EVEN THOUGH THERE WAS EVIDENCE THAT HE WAS MENTALLY RETARDED? (Restated)

ISSUE III (IB 29) correctly acknowledges the precedent contrary to its position: Penry v. Lynaugh, 492 U.S. 302, 109 S.Ct. 2934 (1989) ("reasoning capacity of approximately a 7-year-old "), and Thompson v. State, 648 So.2d 692 (Fla.

1994) (IQ scores ranging from 56 to 70; "the trial judge gave "considerable weight" to Thompson's retardation").[25]

Moreover, Penry rejected poll results and thereby indicated the pertinent test for this claim to reach a constitutional level: "insufficient evidence of a **national consensus against executing** mentally retarded people convicted of capital offenses for us to conclude that it is categorically prohibited by the Eighth Amendment," 492 U.S. at 335. Contrary to Thomas' suggestion (IB 34-36), any increase in legislatures banning the death penalty does not establish the requisite "national consensus."

Here, the trial court proceedings fully complied with the law and provided the jury and the judge with the pertinent information, which was carefully considered. Dr. Larson testified for Thomas at the jury penalty phase. (XVII 1045-97) Defense counsel argued Thomas' lack of mental capacity to the jury. (XVII 1133-34) The trial court then instructed the jury that it could consider as mitigating "extreme mental or emotional disturbance" and the "substantial[] impair[ment]" of the "capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law." (XVII 1141) It continued by enumerating as mitigating, "Any other

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[25] There is pending legislation (SB 238, HB 1095) on this topic, which would apply prospectively if it becomes law, and the U.S. Supreme Court has related cases pending (E.g., McCarver v. Lee).

aspect of defendant's character, record or background, and any other aspect of the offense." (XVII 1141-42)

Accordingly, after the jury recommended death by a vote of 10 to 2 (XVII 1149), the trial court gave Thomas' mental retardation "significant weight" (XI 2170). Concerning the trial court's role in weighing aggravators and mitigators, see ISSUE V and ISSUE VI infra. Therefore, the proceedings here fully complied with Penry's mandate:

> In sum, mental retardation is a factor that may well lessen a defendant's culpability for a capital offense. But we cannot conclude today that the Eighth Amendment precludes the execution of any mentally retarded person of Penry's ability convicted of a capital offense simply by virtue of his or her mental retardation alone. So long as sentencers can consider and give effect to mitigating evidence of mental retardation in imposing sentence, an individualized determination whether 'death is the appropriate punishment' can be made in each particular case. While a national consensus against execution of the mentally retarded may someday emerge reflecting the 'evolving standards of decency that mark the progress of a maturing society,' there is insufficient evidence of such a consensus today.

492 U.S. at 340.

Further, a number of the facts of this case indicate that the trial court's attribution of "significant weight" to Thomas' retardation was quite generous, given the facts of this case. Compare Carter v. State, 576 So.2d 1291, 1294 (Fla. 1989) ("the evidence that Carter is mentally retarded is so minimal as to render the *Penry* issue irrelevant. Of the experts who examined Carter, only one found Carter was 'borderline mentally retarded'").

Here, the record indicates that any diminution of Thomas' accountability due to mental deficiencies was actually de minimis.[26] Dr. Larson also admitted that Thomas' "adaptive functioning in the community is actually higher" than his IQ score. Compare § 393.063, Fla. Stat. ("deficits in adaptive behavior" as part of definition of retardation).[27]

Dr. Larson testified that Thomas "has no problem in appreciating the criminality of his conduct." (XVII 1086) Thomas was license to drive in Florida, and, of course, proved his ability to navigate the roads in the dark to remote locations here when it suited his criminal purpose. See facts discussed in ISSUE I supra.

Thomas suffers from no "mental illness." (XVII 1080) Thomas is able to understand jail rules and conform his behavior accordingly. (XVII 1074) Thomas was able to understand and conform to the rules of three years of felony probation, except paying monthly moneys on time, with which almost everyone has a problem (See XVII 1033).

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[26] Further, in fairness, if there is a change in the rule applicable to this case by making the retarded per se death ineligible, retardation should be litigated on that basis, with both parties recognizing the all-or-nothing stakes.

[27] It also appears that Thomas failed to introduce evidence of IQ scores prior to Thomas reaching age 18. Compare § 393.063, Fla. Stat. (definition of retardation; "manifested during the period from conception to age 18"). His grandmother did testify that as a child Thomas stuttered and had problems reading (XVII 1104) and that he was a slow learner (XVII 1105).

Accordingly, Dr. Larson, earlier in the proceedings, had testified that Thomas' understanding was "surprisingly good given the fact that he's retarded" (VI 1149). Larson also testified that Thomas was "very clear about the charges against him, possible range of penalties," and Thomas "had an adequate understanding of the nature of the adversarial process." (VI 1160)

Indeed, Thomas during his trial told his attorneys to ask the "jury to find me guilty of Manslaughter or Second Degree," (X 1879, XVI 984-86) thereby displaying a tactical appreciation for the evidence amassed against him.

Larson also admitted to Thomas' capacity to learn by indicating "an appreciable difference" in Thomas' test results within a two-month span. (VI 1158. See also VI 1168) By the time of the motion to suppress hearing, Thomas supposedly comprehended "his Miranda rights." (VI 1166)

Thomas' grandmother testified for him that he graduated from high school. (XVII 1105)

Perhaps most importantly, Thomas demonstrated his mental capacity as he adapted his stories to cover what he thought the police knew about the instant crimes. See discussions in ISSUE IV and ISSUE I. When it served his needs, he characterized himself to the police as "paranoid" (XV 740).

In any event, Thomas received a full and fair hearing on the mitigator of mental retardation. It was fully considered. The resulting death sentence is lawful. See Penry; Thompson;

Hall v. State, 614 So.2d 473, 478, 479 (Fla. 1993) ("judge considered four statutory mitigators and more than twenty items of nonstatutory mitigating evidence grouped into three general areas, i.e., mental, emotional, and learning disabilities; abused and deprived childhood; and disparate treatment of co-perpetrator"; Justice Barkett's dissent indicated that the defendant has an "IQ of 60; he suffers from organic brain damage, chronic psychosis, a speech impediment, and a learning disability; he is functionally illiterate; and he has a short-term memory equivalent to that of a first grader"). See also Provenzano v. State, 760 So.2d 137, 140 (Fla. 2000) (competency to be executed; discussion defendant's mental capacity vis-a-vis purposes of capital punishment; "Provenzano has a factual and rational understanding of 'the details of his trial, his conviction, and the jury's recommendation by a vote of seven to five that he be sentenced to death' and of 'the fact that in accordance with the jury's recommendation, he was sentenced to death for the murder of Bailiff Arnie Wilkerson, and that he will die once he is executed.'")

ISSUE IV

DID THE TRIAL COURT REVERSIBLY ERR BY DENYING THOMAS' MOTION TO SUPPRESS HIS STATEMENTS TO THE POLICE? (Restated)

ISSUE IV attacks the admissibility of Thomas' STORY #2 to the police, discussed in ISSUE I supra,, which the police

ultimately tape recorded, which, in turn, the prosecution admitted into evidence and played for the jury.

At the trial level, "the State must demonstrate by a preponderance of the evidence that the confession was voluntary," Sliney v. State, 699 So.2d 662, 667 (Fla. 1997). Voluntariness is determined by the "totality of the circumstances surrounding the confession," Id. At the appellate level, Rolling v. State, 695 So.2d 278, 291 (Fla. 1997), enunciated the applicable standard of review:

> A trial court's ruling on a motion to suppress comes to the appellate court clothed with a presumption of correctness and the court must interpret the evidence and reasonable inferences and deductions derived therefrom in a manner most favorable to sustaining the trial court's ruling. *McNamara v. State*, 357 So.2d 410, 412 (Fla.1978).

See also Escobar v. State, 699 So.2d 984, 987 (Fla. 1997) ("we find no abuse of the trial court's discretion in the decision not to suppress appellant's statements"); Bonifay v. State, 626 So.2d 1310, 1312 (Fla. 1993) ("ruling on voluntariness will not be overturned unless clearly erroneous").

Here, "the evidence and reasonable inferences and deductions derived" from it supported the trial court's finding that Thomas "freely and voluntarily and with sufficient understanding of his Miranda rights, gave these statements to the investigating officers" (VI 1213). Thomas' production of "conflicting [evidence] does not in itself show that the State failed to meet its burden," Escobar, 699 So.2d at 994.

Here, one need not "infer[]" or "deduc[e]" in order to find support for the trial court's conclusion. Support is directly based on the evidence it heard from several witnesses, as well as listening to Thomas' tape recorded statement (See VI 1083-1210).[28]

As discussed in ISSUE I supra, the overriding theme of Thomas' statements to the police was his attempt to explain away what he thought the police knew. While knowing that the police would probably match his DNA with fluids/sperm found in the victim (See VI 1086, I 1: search warrant for Thomas' blood read to Thomas), but prior to knowing that the police had located a witness who recalled the abduction, Thomas admitted in STORY #1 that he had sex with the victim, but he told the police that the sex was on Thursday, thereby distancing himself from the abduction and murder. (See VI 1092-93) After the police confronted Thomas with the eyewitness who saw him abduct the victim on Saturday morning, Thomas narrated STORY #2. In it, he admitted many of the facts that he knew the witness would have seen: He admitted that he "snatched" the victim's keys from her and forced her to her car (VI 1102, 1200), which he then drove away (VI 1103, 1201). Thomas had not mentioned the victim bleeding at the remote hospital site until the officer confronted him with the bloody bottoms of her socks (See VI 1201-1205). When asked about his footwear,

[28] On advice of counsel, Thomas refused to testify at the motion to suppress hearing. (VI 1210-11)

Thomas improvised as he discovered what the police knew. (See VI 1208-1209, tape as played to jury quoted under ISSUE I)

Thus, Thomas waived his rights, not from ignorance, but from his desire to talk to the police and attempt to explain away their facts. Accordingly, he spontaneously volunteered STORY #1, while en route to the police station, not in response to police questioning and not even handcuffed. (See VI 1091-93, 1180-81)[29]

Even more directly to the point at issue here, the transcript of the motion to suppress hearing (VI) is replete with evidence supporting the trial court's findings:

- Thomas is no stranger to the system, with prior cases in 1991 and 1993 (VI 1170); in the 1993 prior case, the officer advised Thomas of his rights, Thomas appeared to understand them, and Thomas agreed to talk with the police (VI 1117-1119, 1133-34);
- The police described Thomas as "a little slow" (VI 1119) but the officer indicated that he was not retarded (VI 1128);[30]

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[29] Also, on September 29, a few days after STORY #1 and STORY #2, Thomas re-initiated contact with the police, who again advised Thomas of his rights, Thomas again waived his rights, and Thomas gave them another variation of his story. (See VI 1109-16, 1184-88)

[30] Dr. Larson admitted, at one point, that Thomas' understanding was "surprisingly good given the fact that he's retarded" (VI 1149). Larson also testified that Thomas was "very clear about the charges against him, possible range of penalties," and Thomas "had an adequate understanding of the

- Thomas drove a motor vehicle, navigated the roads, and appeared to have a Florida drivers license (VI 1101-1103, 1117, 1201-1203);
- Thomas' decision to waive his rights and talk to the police was informed by his knowledge of the contents of the search warrant (VI 1086-71, I 1);
- At Thomas' home, the police informed him of his rights from a card:

  > The right to remain silent, that anything he stated could be used against him in a court of law, his right to an attorney free of charge, the fact that if he answered questions,[31] that he could stop at any time, and he could ask for an attorney at any time. Did he understand the rights, and if he did so, would he answer the questions.

  (VI 1089) Thomas responded that he understood these rights (VI 1090, 1174-75, 1179);
- When the police arrived at the jail with Thomas, they again advised Thomas of his rights from a form (VI 1095, motion hearing State's Exhibit 1), which he indicated

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nature of the adversarial process." (VI 1160)

Indeed, Thomas during his trial told his attorneys to ask the "jury to find me guilty of Manslaughter or Second Degree." (X 1879)

Larson also admitted to Thomas' capacity to learn by indicating "an appreciable difference" in results within a two-month span. (VI 1158. See also VI 1168) By the time of the motion to suppress hearing, Thomas supposedly comprehended "his Miranda rights." (VI 1166)

[31] Dr. Larson said that Thomas understands the term "questioning." (VI 1162)

that he understood and was willing to waive and speak to the police (VI 1096);

- Thomas signed the part of the form that indicated that the rights were read to him, that he read them himself and fully understood them, and that he was willing to make a statement without an attorney (VI 1096); the officer read that entire paragraph to Thomas, who indicated that he understood it (VI 196-97);
- The officer also read aloud to Thomas the part of the form that indicated that he was ready and willing to make a statement without first consulting with a lawyer or having a lawyer present during questioning and that no promises, threats, persuasion, or coaxing had been used, which Thomas indicated he understood (VI 1097. See also VI 1132);
- Thomas never indicated that he did not understand his rights (VI 1098);
- Thomas never indicated a desire not to speak with the police (VI 1131);
- Thomas actually looked at and appeared to read over the form (VI 1098);[32]
- In his tape recorded statement, Thomas admitted that he had been advised of his rights at his residence and at

[32] Although the officer did not personally know Thomas' ability to read, there was no indication of an inability to read (VI 1098).

the county jail, indicated that he will talk with the police, and stated that they have not made him talk with them (VI 1194-95).

Especially in light of these facts[33] and also in light of the facts that Dr. Larson was unwilling to opine whether Thomas understood the rights as the police read them to him (VI 1163) and that most people in Thomas' IQ range have the capacity to comprehend Miranda rights (VI 1167), the trial court was free to disregard the opinions of Dr. Larson,[34] on which Thomas relies so heavily in this issue (See IB 72-74, 77-79, 81).

Indeed, the general rule is that the trial court is not required to abdicate its role to experts by automatically accrediting them; even without conflicting evidence, the trial court can disregard their opinions. Moreover, here, not only was there evidence that conflicted with retardation but also Dr. Larson's (and Crown's) testing was done while this case

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[33] See Johnson v. State, 660 So.2d 637 (Fla. 1995) (conflicting experts; "fact that evidence is conflicting does not in itself show that the State failed to meet its burden of proof except where the evidence actually supporting the State's theory, viewed in its entirety, does not legally meet the burden"). Cf. e.g., Tibbs v. State, 397 So.2d 1120, 1123 (Fla. 1980)("whether, after all conflicts in the evidence and all reasonable inferences therefrom have been resolved in favor of the verdict on appeal, there is substantial, competent evidence to support the verdict and judgment").

[34] Dr. Larson indicated that Thomas was only "mild[ly]" retarded (VI 1142, 1143). Moreover, earlier intelligence testing in September 1990, when Thomas was 18 years old (See 539, 730: Thomas' DOB, 6-12-72), had placed Thomas' IQ barely in the retarded range at 65-67 (VI 1141).

was pending (VI 1148, 1157) and depended upon the supposed best efforts of Thomas (See VI 1144-46, 1152), who was thus motivated to provide substantially less than his best and who, as discussed above, had proved his willingness to manipulate the system.

Construing Dr. Larson's opinion in the best light for Thomas, the discussion of Wuornos v. State, 644 So.2d 1000, 1009-1010 (Fla. 1994), citing Walls v. State, 641 So.2d 381 (Fla.1994), concerning expert opinion on "borderline personality" disorder, is on point:

> To that end, qualified experts certainly should be permitted to testify on the question, but the finder of fact is not necessarily required to accept the testimony. As we stated in Walls, even uncontroverted opinion testimony can be rejected, and especially where it is hard to square with the other evidence at hand, as was the case here.

Thompson v. State, 548 So.2d 198, 203-204 (Fla. 1989), rejected a claim like ISSUE IV here. Reasoning that, unless severe, "mental subnormality or impairment alone does not render a confession involuntary," it held that applying the "totality of the circumstances" test, "other substantial evidence suggesting that this subnormality was not so severe as to render" statements inadmissible. As here, there was some evidence showing that Thompson was capable of understanding his Miranda rights. As here, that evidence included no indication of "difficulty understanding the questions" during police discussions with the defendant. Further, as here, the defendant's attempted explanations of facts exhibited his

realization that "he was in trouble and appreciated the consequences of his conversations with the police."

Accordingly, Richardson v. State, 604 So.2d 1107, 1108 (Fla. 1992), reasoned and held:

> Richardson raises a number of issues on appeal. First, he argues that his confessions should have been suppressed. We disagree. While we acknowledge that an expert said Richardson appears to be mildly retarded, the overwhelming body of evidence in the record strongly supports the conclusion that he voluntarily and knowingly confessed. We can find nothing in the record showing he lacked this capacity. We also disagree that the trial court's order denying the motion to suppress was deficient for failure to expressly make a finding of voluntariness. The officers who received the confessions appropriately read Richardson his rights and testified that he was alert and had his wits about him. Counsel for the defense argued a lack of voluntariness, and the trial court was unpersuaded.

Viovenel v. State, 581 So.2d 930, 932 (Fla. 3d DCA 1991), collected cases and held:

> The state offered evidence in the form of lay testimony to prove Viovenel was sane and the state effectively impeached the testimony of Viovenel's experts. The trial judge, sitting as the trier of fact, resolved the conflict in the evidence in favor of Viovenel's sanity. The trial judge was permitted to reject the expert testimony and to give more weight to the lay testimony.

Analogously, Orme, 677 So.2d 262-63, rejected a claim that the defendant was "too intoxicated with drugs to knowingly and voluntarily waive his right to silence." Orme deffered to the trial court's accrediting the officer's testimony that the defendant was "coherent and responsive" in the face of conflicting evidence. As here, the trial court also reviewed the defendant's taped statements. Orme concluded: "Because

there is competent substantial evidence supporting this conclusion, we may not reverse it on appeal."

Therefore, ISSUE IV has no merit. Instead, the trial court merits affirmance. Moreover, the other evidence adduced in the case, primarily summarized in ISSUE I, renders any supposed error in admitting Thomas' statements harmless.

ISSUE V

DID THE TRIAL COURT REVERSIBLY ERR BY FAILING TO PROVIDE A REASON FOR GIVING NO WEIGHT TO TWO TENDERED NON-STATUTORY MITIGATORS? (Restated)

Here, as in Foster v. State, 25 Fla. L. Weekly S667 (Fla. Sept. 7, 2000), the trial court "assign[ed] 'little or no' weight to such factors as warranted by the relevant circumstances," thereby satisfying Trease v. State, 25 Fla. L. Weekly S622 (Fla. Oct. 11, 2000). There are "circumstances where a mitigating circumstance may be found to be supported by the record, but given no weight."

Where, as here, the "trial court consider[ed] all the evidence, the trial court's subsequent determination of a lack of mitigation will stand absent a palpable abuse of discretion," James v. State, 695 So.2d 1229, 1237 (Fla. 1997). The trial court expressly indicated that it had considered these tendered mitigators (XI 2170, 2171), as well as "all other testimony offered by the Defendant in the mitigation portion of this case ... ." (XI 2171 #12) See Dailey v. State, 659 So.2d 246, 248 (Fla. 1995) ("order further describes the

degree of weight allocated to those factors established in the record. We find no error").

Here, two mitigators to which the trial court gave "significant weight" and "substantial weight" were, respectively, Thomas' retardation and lack of "organized plan to kill the victim" (XI 2170-71 #s 1, 10). Thomas' ability to complete high school and perform well on the job patently conflict with the heavily weighed mitigators, thereby justifying not weighing them. If, indeed, mitigators #s 4 and 5 are given weight, then the weights of #s 1 and 10 would be diminished. This suggests the next point.

Arguendo, any deficiency if weighing these two factors was harmless, in light of the mitigation that the trial court did weigh and the substantial aggravation. Bryant v. State, 26 Fla. L. Weekly S218 (Fla. Apr. 5, 2001) (footnote omitted), recently reasoned and held:

> [E]ven if we were to conclude that the trial court erred in failing to find this mitigating circumstance, the error would be harmless beyond a reasonable doubt. Bryant has prior violent felony convictions for sexual battery, robbery with a weapon, and aggravated assault with a mask; Bryant does not contest this aggravation. This Court has found prior violent felony convictions to constitute **strong aggravation**. *See Marshall v. State*, 604 So.2d 799, 806 (Fla. 1992). Further, Bryant was involved with the armed robbery of Leonie Andre, the deceased victim's wife.

Here, in addition to Thomas' "strong aggravation" of a prior violent felony (See XI 2167, XVII 1037-38, 1030), HAC in this case is compelling. See ISSUE VII infra. "Further," Bryant, at the time that Thomas committed this offense, he was on felony

probation (See XI 2166, XVII 1031) and the instant offense included kidnapping (See XI 2167, ISSUES I & II supra). In contrast to this aggravation, as well as the mitigation that the trial court already considered, ISSUE V's claim pales. See Bogle v. State, 655 So.2d 1103, 1109 (Fla. 1995) ("fact that the trial judge did not specifically list Bogle's artistic talent and capacity for employment in mitigation is insufficient to overrule the trial judge's imposition of the death penalty given the minor weight that would be afforded to those factors").

ISSUE VI

DID THE TRIAL COURT REVERSIBLY ERR BY REFUSING TO FIND THE MITIGATOR OF SUBSTANTIAL IMPAIRMENT OF CAPACITY TO APPRECIATE CRIMINALITY OR CONFORM? (Restated)

Thomas argues (IB 86) that the trial court "abused its discretion when it rejected this statutory mitigator." His argument incorrectly assumes that the trial court was required to interpret to Thomas' benefit any conflicts in Dr. Larson's testimony[35] or otherwise simply defer to selected portions of Dr. Larson's testimony. Although Thomas correctly identifies

[35] As quoted in Thomas' brief (IB 87), Larson, at one juncture, testified that Thomas did "understand the criminality of his conduct" and that impairment was only "to some degree." (XVII 1068) More importantly, the trial court considered "the entire facts and evidence in this case" (XI 2169) in reaching its conclusion. See discussions of evidence of Thomas' mental wherewithal in ISSUES I, III, IV.

the standard of appellate review as abuse of discretion, his application of it is erroneous, not the trial court's order.

Foster v. State, 679 So.2d 747, 755-56 (Fla. 1996), rejected a claim like ISSUE VI:

> During the penalty phase, Foster presented expert testimony that he was under the influence of extreme mental or emotional disturbance and that his capacity to conform his conduct to the requirements of law was substantially impaired. Foster claims that since this expert testimony was uncontroverted, the trial court should have found this statutory mitigator.

Foster, citing Provenzano v. State, 497 So.2d 1177 (Fla. 1986), reasoned that the trial court, in its discretion, can reject expert testimony: "expert testimony alone does not require a finding of extreme mental or emotional disturbance." See also discussions of expert evidence in ISSUE IV and accompanying citations to Wuornos; Walls; Viovenel; Orme. Here, as in Foster, the trial court considered this aspect of Thomas' mental deficiency, and therefore ISSUE VI distills to an improper appellate complaint that Thomas wants it considered more:

> It is clear from the sentencing order that the trial court gave some weight to nonstatutory mitigation; however, the trial court did not find that it rose to the level of this statutory mitigator. Accordingly, we find that the trial court did not abuse its discretion in finding that this mitigator was not established.

Similarly, James v. State, 695 So.2d 1229, 1237 (Fla. 1997), upheld the trial court's weight of a would-be statutory mitigator as non-statutory. Here and there, the trial court "considered all the evidence presented as to [the defendant's]

mental state" and "determin[ed] whether his mental or emotional disturbance at the time of the offense rose to the level sufficient to establish it as a statutory mitigator." The trial court's discretionary decision should not be disturbed, "especially given the fact that" related mental mitigation "was accorded 'significant'" weight, specifically here mental retardation, "significant weight" and "lack of organized plan," "substantial weight" (XI 2170-71, #s 1 and 10).

Moreover, arguendo, as in ISSUE V, given the weight the trial court afforded the mitigation and given the compelling aggravation, any error was harmless. See, e.g., Bogle.

ISSUE VII
IS THE SENTENCE OF DEATH PROPORTIONATE? (Restated)

As in Bryant v. State, 26 Fla. L. Weekly S218 (Fla. Apr. 5, 2001), this case includes the aggravator of a prior violent felony conviction, which is "strong aggravation." Also, as in Bryant, the aggravator of another felony applies. Moreover, Thomas was on felony probation at the time he abducted, raped and killed the victim. Perhaps most importantly, the instant crime brutally supports HAC, as the trial court found:

> 4. The capital felony was especially heinous, atrocious, or cruel. Section 921.141(5)(h).
>
> The evidence in this case indicates that on September 13, 1997, Brandy Nicole Howard, 18, was talking on a pay phone at a convenience story in Crestview, Florida, at approximately 3:00 o'clock A.M. when the

Defendant approached her, had a heated conversation with her, snatched her car keys from her hand, and forcibly pushed Miss Howard into the passenger's side of her Honda automobile. Testimony indicated that as the Defendant attempted to move around the vehicle to the driver's side, Miss Howard attempted to escape the vehicle on at least two occasions, whereupon the Defendant would come back to the passenger's side and forcibly push her back into the passenger's seat. He then drove out of the parking lot and this episode apparently began.

The evidence further indicates that the Defendant then drove the victim to a secluded area at which point the Defendant beat the victim causing her blood to be splattered on the passenger's side exterior of the automobile. Forensic evidence indicate that it was at this location that the Defendant physically beat the victim and forcibly raped her. The victim bled at this location from her face onto the ground and the tops of her white athletic socks after her tennis shoes had been removed to facilitate the removal of her jean pants.

Apparently, following the physical assault and sexual battery at that location, the Defendant forced the victim back into the Honda automobile and then drove to another secluded location on Louise Drive, a cul-de-sac street, where several houses were under construction. Upon arriving at this location, the victim, Brandy Nicole Howard, attempted to run from the Defendant, the defendant picked up a scaffolding brace, chased the victim down and beat her to death with the [s]caffolding [sic] brace. The evidence is uncontroverted that the victim was still conscious as she fell forward following the first blow with the scaffolding brace. She was able to break her fall with her bare forearms causing large abrasions to each as well as to her knees, but the evidence indicated that she was able to hold her head and face up as she fell and hit the pavement. The evidence the indicates that she rolled over on her back and began to attempt to ward off further blows being inflicted by the Defendant with the scaffolding brace. Her arms and hands received vicious blows that caused terrible lacerations and contusions to her arms and hands, her hand was broken, and several of her fingernails were broken and smashed. The medical evidence indicates strongly that the victim was trying her best to defend herself while laying on the ground with the Defendant striking blow after blow upon her body and head with

> the scaffolding brace. In addition to the blows that she blocked with her hands and arms, the Defendant struck the victim at least fifteen times to the head and body. The blows caused massive skull fractures and horrible disfigurement of the victims head and face. One or more blows to the mouth and jaw knocked several teeth out, one of which was found six feet from her body. Another blow nearly removed her entire scalp. The force of the blows caused her blood to be splattered sixteen feet or more from her head. Without any doubt whatsoever, Brandy Nicole Howard experienced severe and torturous pain and tremendous fear and horror as she knew she was being beaten to death. Brandy Howard's murder was extremely wicked and vile and clearly inflicted a high degree of pain and suffering. This aggravating circumstance has been proved beyond a [sic] reasonable doubt.

(XI 2167)

Accordingly, in addition to the non-medical evidence summarized in ISSUE I supra, the medical examiner testified, in parts (with the Court's indulgence, the State quotes at length due to the importance of this testimony):

> After the undressing of the body, one of the first things we did was, after collecting the trace evidence, to do some skull radiographs and some extremity radiographs. This is a plain skull x-ray showing that there's a diffuse number of fractures within the face region and a very large fracture up here at the top of the skull, another one over here to the right side, and the jaw or the mandible is shattered here of the left side. *** The black lines here denote very large linear skull fractures radiating back through the head, and you can see that jaw, once again, is busted on the left side there.
> ***
> We have multiple injuries each denoting a separate [XIII 395] blunt force impact to the head and face region. We have a large laceration up here, the center of the forehead, just to the left side. It's a full thickness laceration that goes all the way down to the underlying bone. In fact, the underlying bone actually is fractured right there, and you can see into the cranial cavity through the fracture that's there. We have an injury to the right eye with a large bruise around it and a laceration at the inferior aspect or

underneath the right eye. We've got another area of impact here to the left eye region that caves in and fractures the orbital bone around the left eye with associated bruising once again. We have another area of impact over the bridge of the nose that shatters the nose and the underlying face bones. We've got an injury to the upper lip here, and I want to draw your attention at the tip of the pointer, there is an abrasion there or a scratch or a set of scratches that we call a patterned abrasion because we're going to see this same pattern again or a pattern very similar to it in a couple other places on the body. We've got another laceration there, and then we've got several discrete additional blows to the mouth region. We've got one going right across like that, another one down here with lacerations and another blow right there to this side of the mouth. So we have a number of injuries that are all due to blunt force trauma to the face and head. [XIII 396]

***

[S]he had a number of lacerations inside her mouth due to her teeth, and she had several missing teeth that were present at the scene.

***

These are abrasions and small lacerations up to the temple area, and then her ear has a very large contusion without an associated abrasion or laceration, implying a softer sort of blunt force trauma, something different than what we're seeing that inflicted these other injuries that caused the lacerations. [XIII 397]

***

[T]he left side of the face showing that we have a number of separate, discrete injuries indicating separate blows to the head and face region. We've got the left-sided view of these large abrasions to the corner of the mouth and the jaw region. We've got a separate one right at the junction of the left earlobe. Once again we've got another large contusion to the upper part of the ear that's unassociated with any sort of abrasion or laceration. We've got an injury to the left cheekbone that's got a discrete bruise around it with a small little cut. We've got the left eye injuries, and then we've got at least two separate injuries to the left forehead and the top of the left scalp, a large one that's all the way across here, and then another one that runs all the way through down to the underlying bone. Both of those larger abrasions were associated with underlying skull fractures.

***

38M is a cleaned up photo with the hair shaved in the region of the injuries so you can better illustrate them. Once again we've got the large injury to the left

of the forehead, the large gaping laceration down to the [XIII 398] underlying bone. You can see the underlying skull fracture running along the top of the head, and this is a very large laceration that encompasses the entire left side of the head, as well as we've got an additional laceration in between the two that you couldn't see because of the hair in the previous photograph. [XIII 399]
***

The close association of all the trauma to the eye region can cause small numbers of hemorrhages, but there's an additional injury down within the deep neck structure. It's a hemorrhage of the thyroid cartilage which is a very protected structure up high in the neck. The combination of that hemorrhage coupled with these petechial hemorrhages is very suggestive of some sort of throttling or manual strangulation.
***

38P show the right hand initially when we got back to the morgue, and you can see on fingers three, four and five the fracture fingernails that are partially there and partially absent. *** Because it involves all three of the fingers like that, it's probably a defensive injury. *** Defense injury is an act where you put your hands or arm up un order to block a blow, and so the hand is struck then by the object trying to inflict the blow, so that's [XIII 400] probably the most likely mechanism, how those nails were knocked off.
***

This is the right hand cleaned up, and it's got a number of injuries to the knuckles, both the middle knuckle and then a couple of the proximal knuckles as well. These are all superficial abrasions, some deeper ones, and some outright cuts into the deeper tissue. We can also see that this hand in general has sort of a swollen appearance, and we've got some contusions and abrasions further up on the wrist and extending further up the wrist. *** These probably also represent defense injuries, trying to block blows.
***

Moving a little bit further up the right hand, *** there was just a diffuse area of hemorrhage down within all the deep tissues indicating a lot of trauma to the back of [XIV 402] that hand. We've got some abraded contusions here and then further on up the wrist. Once again these are discrete individual injuries, once again representing a number of blows to that particular hand. [XIV 403]
***

[There were] at least half dozen injuries to the hands *** [XIV 416]

Concerning the teeth that Thomas knocked out of the victim's mouth the expert testified:

> {T]he trauma that was ... was sufficient to knock out a couple of the central incisor teeth to the upper jaw as well as make multiple tears inside the inner surface of the mouth.
> ***
> Q Did you see or did she remark to you concerning the collection of a tooth some six to seven feet from the head of the victim?
> A Yes, there was a central incisor.
> Q Do you have an opinion as to how that incisor ended up six or seven feet from the head of the victim?
> A Blunt force trauma once again. An impact dislodged it and knocked it out.
> Q So it was knocked from her mouth to that location is you belief?
> A That's correct. [XIV 413]

The doctor opined that "the wound right on the top of her head, the one that runs straight front to back" was different from the others. He continued: "That would have been difficult to have inflicted that laceration with her head down on the ground in that position."

> I believe her head was in a more upright position. Whether she was standing, sitting, kneeling, whatever, I can't say, but I think her head was in a more upright position than the way it was finally depicted at the scene. [XIV 414]

Later, he explained that this injury was inflicted "before some of the later ones" (XIV 432) and that other injuries to the victim indicated that the victim fell forwards. (XIV 426) Due to "no corresponding brush abrasion to her face," it would be a "protective fall" (XIV 428-29). As noted earlier, this was 109 feet from the victim's car (XIII 343). Ultimately, she was "struck numerous times as she lay on her back" (XIV 429).

Accordingly, the blood spatter expert pointed out that, as the victim lay dead on the road, there was no blood on the seat of the victim's jeans and no blood directly under her, "indicating that she was actually lying in the street when a lot of the forceful impacts" were inflicted upon her. (XV 676, 680) In contrast, there was abundant spattered blood in the area surrounding the victim on the road.(See State's Exhibits #34, #35, XV 676-77)

In total, the victim "received a minimum of at least seventeen separate blows to the head and face." (XIV 415) Of these, a couple were not inflicted using the scaffolding. Instead, they were "consistent with her being struck in the side of the head with a hand or fist." (XIV 415-16)

The medical examiner opined as to cause of death and the victim's consciousness as Thomas inflicted it upon her:

> She died from multiple cranial cerebral injuries as a result of blunt force trauma to her head and face. *** She was certainly conscious for some of them because we have a number of defensive injuries to the arms, the hands, the broken bones in the hands, things like that. [XIV 412]

Combining the above facts with those discussed in ISSUE I, Thomas perpetrated a bloody trail of terror between 3 and 5 AM on September 17, 1997, in which he

- argued with her,
- snatched the victim's keys from her hands,
- forced her into her car and forced her to stay in her car three times,

- drove her to two remote areas,
- beat the victim so that her blood spattered multiple places on her car,
- at some point strangled the victim without killing her,
- raped her,
- chased her down to a point 109 feet from her car, and, as she faced away from him, smashed her to the ground with the eight-foot scaffolding brace,
- after the victim broke her fall and turned on her back, hit her in the face and head numerous times with the eight-foot scaffolding brace, as she lay helpless on the ground,
  - inflicted over 17 blows to the victim's head and face,
  - knocked a number of the victim's teeth out, including one found 6-7 ft from the victim's head (See also XIII 343), and
- terrorized the conscious victim, who suffered multiple defensive injuries to her hands, including ripping some of her fingernails.

It is difficult to imagine a more terrorizing series of events. Compare, e.g., Chandler v. State, 534 So.2d 701, 704 (Fla. 1988) ("heinous, atrocious, or cruel after considering that this elderly couple, of whom the wife was very frail, must have suffered great fear and apprehension after being subdued and abducted from their home by a young man armed with a baseball bat and knife and then beaten to death in each

other's presence"); Heiney v. State, 447 So.2d 210, 215-16 (Fla. 1984) (upheld HAC; defensive wounds and "Seven severe hammer blows were inflicted on the victim's head").

Moreover, contrary to Thomas' position (IB 94), it is well-settled that HAC is viewed from the victim's perspective, not from the perpetrator's. Thomas confuses CCP, which focuses on the perpetrator's state of mind, but not an aggravator used here, with HAC, which focuses upon the victim's terror. There is no "enjoy[ment]" or "desire" element to HAC; there is only terror.

Bogle v. State, 655 So.2d 1103, 1109-1110 (Fla. 1995) ("struck [the victim] a total of seven times" with great force), was a case involving HAC less aggravated than here. It collected instructive authorities, reasoned, and held:

> When we compare the circumstances of this case to other cases in which the death penalty has been imposed, we find that the sentence of death is not disproportionate. *See*, e.g., *Owen v. State*, 596 So.2d 985 (Fla.) (where victim was raped and beaten, death penalty was appropriate in light of three aggravating circumstances and little mitigation), cert. denied, --- U.S. ----, 113 S.Ct. 338, 121 L.Ed.2d 255 (1992); *Bowden v. State*, 588 So.2d 225 (Fla. 1991) (where victim was beaten to death with a rebar, death was appropriate in light of the two aggravating circumstances of previous conviction of violent felony and HAC and mitigation of "terrible childhood and adolescence"), *cert. denied*, 503 U.S. 975, 112 S.Ct. 1596, 118 L.Ed.2d 311 (1992) ***.

In addition to the enormity of HAC in this case, as echoed in the trial court's order, the other aggravators were significant in spite of Thomas' attempts to minimize them (at IB 91-95). For example, he attempts (IB 93-94) to minimize his

kidnapping of the victim while ignoring its reflection on his character and the terror to the victim as he abducted, beat, strangled, raped, and killed her in the two-hour-or-less sequence of events.

Concerning his prior violent felony, Thomas attempts to minimize the store robbery with "That was it" (IB 93), while ignoring that at 2 AM he threatened to kill the store clerk, who, though he saw no weapon, "feared[ed] ... bodily harm" (XVII 1030).

Accordingly, Dailey v. State, 659 So.2d 246, 248 (Fla. 1995), has characterized convicted-of-another-violent-felony, murder committed during a sexual battery, and HAC as "three strong aggravating circumstances."

Several additional cases provide guidance. Booker v. State, 25 Fla. L. Weekly S803 (Fla. Dec. 22, 2000), is significant not only for its holding but also for its discussion of several other pertinent cases:

> Additionally, we find persuasive our proportionality analysis in *Spencer v. State*, 691 So.2d 1062 (Fla. 1996). In *Spencer*, the defendant bludgeoned and stabbed his wife to death. *See Spencer v. State*, 645 So.2d 377, 379-80 (Fla. 1994). Consistent with the jury's recommendation, the trial court sentenced Spencer to death, determining that the two aggravating circumstances in the case--prior violent felony and HAC-outweighed the two statutory mental mitigating circumstances and numerous nonstatutory mitigators, including drug and alcohol abuse, paranoid personality disorder, sexual abuse by defendant's father, honorable military record, good employment record, and ability to function in structured environment. *See Spencer*, 691 So.2d at 1063. On appeal, we rejected the defendant's proportionality challenge and affirmed the imposition of the death penalty. *See id.* at 1064-65. We similarly

> reject Booker's claim here, where four aggravating circumstances, including HAC, have been established, which are balanced against statutory and nonstatutory mitigating circumstances similar to those established in Spencer. *See also Zack v. State*, 753 So.2d 9 (Fla. 2000) (upholding death penalty in case involving four aggravating circumstances, including HAC and crime committed during commission of a robbery, sexual battery, or burglary, balanced against statutory mental mitigating circumstances and three non-statutory mitigating circumstances), *petition for cert. filed*, (U.S. June 19, 2000) (No. 99-10062); *Hildwin v. State*, 727 So.2d 193, 194, 197-98 (Fla. 1998) (upholding death penalty in case involving four aggravating circumstances, including HAC, prior violent felony, and under sentence of imprisonment at the time of the crime, balanced against statutory mental mitigating circumstances and significant nonstatutory mitigation, including prior sexual abuse and history of drug and alcohol abuse). In sum, after considering the particular circumstances in this case in light of our prior decisions, we determine that death is a proportionate penalty in this case.

Here and in Booker, there were four aggravators, including HAC, "balanced against statutory and nonstatutory mitigating circumstances."

Here, there was substantially more aggravation than in Spencer, and in both cases there were mental mitigating circumstances and nonstatutory mitigators.

Here, the aggravators were similar to those in Zack, including HAC and crime committed during commission of a felony, balanced against mental mitigating circumstances and non-statutory mitigating circumstances. A fortiori, the HAC here was not only overwhelming, but also Thomas' aggravation included prior violent felony, which Bryant, 26 Fla. L. Weekly S218 (Fla. Apr. 5, 2001), characterized as the "strong aggravation."

Hildwin, like here, involved four aggravating circumstances, including HAC, prior violent felony, and under sentence of imprisonment at the time of the crime, balanced against statutory mental mitigating circumstances and, according to the trial court here, significant nonstatutory mitigation.

Lawrence v. State, 698 So.2d 1219, 1221-22 (Fla. 1997) (upheld HAC; "We have consistently upheld HAC in beating deaths"; collected cases), is instructive because it also involved "learning disability and low IQ," as well as "a deprived childhood ..., "under the influence of alcohol at the time of the crimes, ... and a violent history." Like Lawrence, Thomas had mental problems, which here, if anything, the trial court generously weighed to Thomas' benefit, See ISSUE III.

See also James v. State, 695 So.2d 1229 (Fla. 1997) (three aggravators, including HAC and committed during another felony; sixteen mitigators, including "significant weight" given to "ability to appreciate the criminality of his conduct or conform his conduct to the requirements of the law was substantially impaired due to drug and alcohol abuse" and "under the influence of moderate mental or emotional disturbance at the time of the offense"); Branch v. State, 685 So.2d 1250 (Fla. 1996) (10-2 death recommendation; three aggravating circumstances included "committed in the course of a sexual battery; Branch had been convicted of a prior violent felony; and the murder was especially heinous, atrocious, or

cruel"; "several nonstatutory mitigating circumstances"; "death sentence in this case is proportionate"); Henyard v. State, 689 So.2d 239 (Fla. 1996) (finding four aggravators, including HAC, prior violent felony conviction, and murder during commission of kidnapping and sexual battery outweighed two statutory mitigators and minor nonstatutory mitigation), as summarized in Guzman v. State, 721 So.2d 1155, 1162 (Fla. 1998); Schwab v. State, 636 So.2d 3 (Fla. 1994) (befriended then confined child, punched victim twice, and rape victim followed by strangulation or suffocation; three aggravators, including HAC, prior violent felony, and committed during another felony; "trial court considered the statutory mitigators and forty items of allegedly nonstatutory mitigation, but found little in the tendered material actually to be of a mitigating nature or to have been established by the record"); Duckett v. State, 568 So.2d 891 (Fla. 1990) ("trial judge properly found two statutory aggravating factors, and we find no error in his determination that the aggravating circumstances outweighed the mitigating evidence"; eight-to-four jury vote for death sentence; murder was committed during or immediately after sexual battery; HAC; no significant history of prior criminal activity; family background and education as nonstatutory mitigating evidence).

CONCLUSION

Based on the foregoing discussions, the State respectfully requests this Honorable Court affirm Appellant's judgment and sentence entered in this case. If, for any reason, law applicable to this case is changed so that retardation per se renders a defendant death ineligible, the State requests a full and fair hearing on whether Thomas meets whatever definition of retardation is adopted.

SIGNATURE OF ATTORNEY AND CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to David A. Davis, Esq., Assistant Public Defender, Leon County Courthouse, Suite 401, 301 South Monroe Street, Tallahassee, Florida 32301, by MAIL on May 29, 2001.

Respectfully submitted and served,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the font requirements of Fla. R. App. P. 9.210.

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