

IN THE SUPREME COURT OF FLORIDA

DEMETRIS OMAR THOMAS,

Appellant,

v.

Case No. **SC00-1092**

STATE OF FLORIDA,

Appellee.

-----/

REPLY BRIEF OF APPELLANT

NANCY A. DANIELS
PUBLIC DEFENDER

DAVID A. DAVIS
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NUMBER **0271543**
LEON COUNTY COURTHOUSE
301 SOUTH MONROE STREET, SUITE 401
TALLAHASSEE, FLORIDA 32301
(850) 488-2458

ATTORNEY FOR PETITIONER

TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF CONTENTS	i
TABLE OF CITATIONS	iii
ARGUMENT	
ISSUE I	1
THE COURT ERRED IN DENYING THOMAS’ MOTION FOR A JUDGMENT OF ACQUITTAL BECAUSE THE STATE’S CIRCUMSTANTIAL EVIDENCE NEVER EXCLUDED THE REASONABLE VERSION OF THE EVENTS THAT THE DEFENDANT AND MS. HOWARD HAD CONSENSUAL SEXUAL INTERCOURSE, A VIOLATION OF HIS FIFTH, SIXTH, AND FOURTEENTH AMENDMENT RIGHTS.	
ISSUE II	9
THE COURT ERRED IN DENYING THOMAS’ MOTION FOR A JUDGMENT OF ACQUITTAL BECAUSE THE STATE’S CIRCUMSTANTIAL EVIDENCE NEVER EXCLUDED THE REASONABLE VERSION OF THE EVENTS THAT THE DEFENDANT NEVER KIDNAPPED MS. HOWARD, A VIOLATION OF HIS FIFTH, SIXTH, AND FOURTEENTH AMENDMENT RIGHTS.	
ISSUE III	11
SENTENCING THOMAS TO DEATH, A MENTALLY RETARDED PERSON VIOLATES THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 17 OF THE FLORIDA CONSTITUTION.	

TABLE OF CONTENTS

(Continued)

PAGE
ARGUMENT

ISSUE IV 14

THE COURT ERRED IN DENYING THOMAS’ MOTION TO SUPPRESS HIS CONFESSION BECAUSE HIS MENTAL DEFECTS ARE SO SEVERE THAT HE COULD NOT KNOWINGLY AND INTELLIGENTLY WAIVE HIS MIRANDA RIGHTS, A VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS.

ISSUE V 20

THE COURT ERRED IN REFUSING TO GIVE ANY WEIGHT TO THE LEGITIMATE AND UNCONTROVERTED MITIGATION THOMAS PRESENTED, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

ISSUE VI 22

THE COURT ERRED IN REFUSING TO FIND THAT THOMAS’ CAPACITY TO APPRECIATE THE CRIMINALITY OF HIS CONDUCT OR TO CONFORM HIS CONDUCT TO THE REQUIREMENTS OF THE LAW WAS SUBSTANTIALLY IMPAIRED, A VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

TABLE OF CONTENTS

(Continued)

<u>PAGE</u>	
ARGUMENT	
ISSUE VII	25
A DEATH SENTENCE IS PROPORTIONALLY UNWARRANTED IN THIS CASE.	
CONCLUSION	29
CERTIFICATE OF SERVICE	30
CERTIFICATE OF FONT SIZE	30
APPENDIX	
31	

TABLE OF CITATIONS

CASES

PAGE(S)

<u>Beckwith v. United States</u> , 425 U.S. 341 (1976)	15
<u>Delgado v. State</u> , 776 So. 2d 233 (Fla. 2000)	10
<u>Finney v. State</u> , 660 So. 2d 674 (Fla. 1995).	8
<u>Furman v. Georgia</u> , 408 U.S. 238 (1972)	23
<u>Graham v. State</u> , 26 Fla. L. Weekly D680 (Fla. 2d DCA March 9, 2001)	6
<u>Green v. State</u> , 715 So. 2d 940 (Fla. 1998)	6
<u>Gregg v. Georgia</u> , 428 U.S. 153 (1976)	23
<u>Hall v. State</u> , 403 So. 2d 1319 (Fla. 1981)	5
<u>Holton v. State</u> , 573 So. 2d 284 (Fla. 1990)	8
<u>Kirkland v State</u> , 684 So. 2d 732 (Fla. 1996)	4,6
<u>Mann v. State</u> , 420 So. 2d 578 (Fla. 1982)	24,27
<u>McCarver v. North Carolina</u> , Case No. 00-8727 (March 26, 2001)	12
<u>McDole v. State</u> , 283 So. 2d 553 (Fla. 1973)	14
<u>Miranda v. Arizona</u> , 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966)	14,15,16,17,18

TABLE OF CITATIONS

(Continued)

CASES

PAGE(S)

<u>Orme v. State</u> , 677 So. 2d 258 (Fla. 1996).	5
<u>Penry v. Lynaugh</u> , 492 U.S. 302 (1989)	12
<u>Richardson v. State</u> , 604 So. 2d 1107 (Fla. 1992)	16
<u>Rogers v. State</u> , 660 So. 2d 237 (Fla. 1995).	10
<u>Schneckloth v. Bustamonte</u> , 412 U.S. 218 (1973)	18
<u>Schwab v. State</u> , 636 So. 2d 3 (Fla. 1994)	10
<u>State v. Dixon</u> , 283 So. 2d 1 (Fla. 1972)	23,26
<u>Trease v. State</u> , 768 So. 2d 1050 (Fla. 2000)	20
<u>Zack v. State</u> , 753 So. 2d 9 (Fla. 2000)	27

TABLE OF CITATIONS

(Continued)

CONSTITUTIONS AND STATUTES

PAGE(S)

United States Constitution

Amendment VIII 13

OTHER SOURCES

Doyle, Arthur Conan

The Memoirs of Sherlock Holmes. 11

Ellis, James W. and Luckason, Ruth,
“Mentally Retarded Criminal Defendants,”

53 George Washington Law Review 414 16,17,19

Florida Standard Jury Instructions (Criminal) 26,27

Laws of Florida

Ch 2001-202 13

ARGUMENT

ISSUE I

THE COURT ERRED IN DENYING THOMAS' MOTION FOR A JUDGMENT OF ACQUITTAL BECAUSE THE STATE'S CIRCUMSTANTIAL EVIDENCE NEVER EXCLUDED THE REASONABLE VERSION OF THE EVENTS THAT THE DEFENDANT AND MS. HOWARD HAD CONSENSUAL SEXUAL INTERCOURSE, A VIOLATION OF HIS FIFTH, SIXTH, AND FOURTEENTH AMENDMENT RIGHTS.

What Thomas said in his Initial Brief about the facts of his case bears repeating: "Thomas generally agreed with the sequence of events; he disagreed with the prosecution's conclusions." (Initial Brief at p. 12) Similarly, in the Reply Brief, Thomas again has few problems with the facts the State presents, even when done repeatedly, just the conclusions. More specifically, the State's argument, at trial and on appeal, still does not make much sense. On the other hand, Thomas' confession is believable, and more significantly, the evidence supports it. In short, the State has precious little to rebut the defendant's reasonable explanation of the events of September 13, 1997. This is important because the test in circumstantial evidence cases such as this focuses on whether the State's evidence, not its arguments, rebuts the defendant's hypothesis of innocence.

The prosecution's failure to do this, and its need for stronger proof of Thomas' guilt of sexual battery may explain some misstatements or stretching of

the facts presented in its brief. For example, on page 12, the State says that after the defendant “Forcibly restrained the victim as she opened her door a third time and Thomas re-closed it a third saying or doing something to the victim while leaning into the passenger side door (XIV 511, 523, 529,-30). There is no evidence he ever “forcibly restrained the victim.” Nor is there any proof of him “saying or doing something to the victim.” All Janet Money, the leaf blowing store clerk, could say about the third door closing was that Thomas “shoved it closed, pushed it closed.” (14 R 511) Indeed, she refused to say he slammed the door shut (14 R 530). She also admitted that she could not see or hear what Thomas and Howard were doing inside the car (14 R 530).

Also on page 12, the State says “Thomas drove her to two remote locations.” Hardly. The construction site was a residential area, not a field or abandoned building. Indeed, a homeowner discovered Howard’s body, not hidden, but lying in the middle of the street as he left his house to drive to work (13 R 297, 308). Moreover, common experience suggests that men work at construction sites, and her body, even if not found by one of the residents, would have been discovered quickly by the workers.

Similarly, hospitals are hardly remote locations. If anything, they are necessarily people intensive. They are open twenty-four hours a day, seven days a

week to serve the medical needs of the community. If Thomas wanted a more isolated area, almost anywhere else, except the middle of a street, would have qualified.

On page 13, the State says Thomas

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, blood in the lap area of the victim's jeans, the victims blood and forceful blood spatters at multiple sites on the exterior of passenger side of victim's car, a volume of victim's blood that had pooled on the ground at the hospital scene, and injury to the victim indicative of manual strangulation."

(Record citations and footnote omitted.)

The best that Jack Remus, the serologist, could say about that the spots in the headliner of the car was that they were possibly blood. "Well, the chemical indication test presumes the possible presence of blood because there are things that can mimic blood chemically. . .In this particular case the only result I have at this point is that it's a possible presence of blood." (14 R 591-92). Possibly blood, and certainly no evidence that it came from Howard. More likely it belonged to Thomas because the only blood found inside Howard's car came from him. That found on the victim's jeans must have been gotten there after she was outside.

If the State incorrectly says Howard's blood was inside the car it is also wrong about the "pooled" blood on the ground at the hospital, or anywhere else. Indeed, other than the bloody rag found at the hospital, the police found no blood there (15 R 607, 609-620)

On page 14 of its brief, the State says Thomas "provoked resistance on the part of the victim at some point" (emphasis supplied). Significantly, it cannot say Howard fought the defendant at the hospital, which is consistent with his explanation that the "provoked resistance" happened, not at the hospital but the construction site. On the same page, the State also recounts some of the details of the murder, but such retelling has scant relevance to the sexual battery. The latter offense ostensibly occurred almost two miles away, and was distinctly different from the events surrounding Ms. Howard's death.

Beyond pointing out these discrepancies, Thomas reiterates his position that this Court should use the de novo standard of review as encompassed by the special set of rules developed for cases involving circumstantial evidence. But, the State argues on pages 9-10 of its brief, this case is not "wholly circumstantial," so, it need only prove "that a rational jury 'could have found proof of guilt beyond a reasonable doubt.'" Decisions by this Court in other capital cases refute that argument

Notably, in Kirkland v State, 684 So. 2d 732 (Fla. 1996), no question existed that Kirkland killed Coretta Martin by slashing, probably repeatedly, her throat with a knife. Significantly, as here, the defendant asked the court to grant his motion for a judgment of acquittal because he had lacked the premeditated intent to kill. The trial judge denied that request, but this Court said it had erred in doing so because the “circumstantial evidence in this case ‘is not inconsistent with any reasonable exculpatory hypothesis as to the existence of premeditation..’” Id. at 734 (Citing Hall v. State, 403 So. 2d 1319, 1321 (Fla. 1981)).¹ Even though the State presented evidence that Ms. Martin had the major neck wound caused by many slashes, had been beaten with a walking case, and the defendant and her had bad blood between them, the state high court found this circumstantial evidence insufficient overcome the standard used to evaluate such proof. In contrast to the State’s theory, Kirkland’s un rebutted hypothesis of innocence included (1) No evidence the defendant ever exhibited any intention to kill the victim; (2) No eyewitnesses saw the murder; (3) He made no special arrangements to get the knife that was used to kill her; (4) There was scant evidence Kirkland had any preconceived plan to kill;

¹ Note that this Court used the correct standard and found the evidence did not exclude the defendant’s reasonable hypothesis of innocence rather than a “most plausible” approach to evaluating the State’s case. Orme v. State, 677 So. 2d 258 (Fla. 1996).

and (5) He had an IQ in the 60s. Id. at 735. The Supreme Court also found that insufficient circumstantial proof Kirkland had committed a felony murder, so it reduced the homicide to a second degree murder. Id.

Kirkland is no aberration in the law; instead it is only a relevant example of how the appellate courts of this state have routinely applied the special standards applicable to cases not involving wholly circumstantial evidence. Indeed, the court in that case laid out the applicable rule of law when the defendant alleges the state failed to prove he committed first degree murder.

We have stated that such a motion should be granted unless the State can ‘present evidence from which the jury can exclude every reasonable exculpatory hypothesis as to the existence of premeditation.’” State v. Law, 559 So. 2d 187, 188 (Fla. 1989). . . . [A] review of the record forces us to conclude, as a matter of law, that the State failed to prove premeditation to the exclusion of all other reasonable conclusions. “Where the State’s proof fails to exclude a reasonable hypotheses [sic] that the homicide occurred other than by premeditated design, a verdict of first-degree murder cannot be sustained.” Hoefert v. State, 617 So. 2d 1046, 1048 (Fla. 1993).

Other cases from this and other appellate courts of this State have reaffirmed the routine holding of Kirkland. Graham v. State, 26 Fla. L. Weekly D680 (Fla. 2d DCA March 9, 2001)(two first-degree murders reduced to second-degree murder where no evidence produced of prior animosity between defendant and his mother/victim, no signs of a struggle at the murder scene, and no evidence

of how or when the murder gun was obtained.); Green v. State, 715 So. 2d 940 (Fla. 1998)(no evidence of a preconceived plan and low intelligence of the defendant).

Now, the State in its brief makes much of the supposed conflict between Thomas' two admissions. In the first he admitted having sexual intercourse with Howard the day before her death. In the second, and after being confronted with other evidence, he admitted having consensual sex with her and killing her, but he claimed he did the latter unintentionally. Obviously, it was more complete than the first, and conflicted only in the date he and Brandy Howard had sex. See Appellee's Brief at p. 28. ² Once he admitted he had killed her he never changed or recanted that confession. No significant conflicts exist between his two confessions.

So, the State has to look for other evidence to refute Thomas' consistent claim that he and Howard had had consensual sexual intercourse. The blood evidence could have done so, but like the confession, it fails to show that the defendant sexually battered Howard. If, as the State contended, he raped and beat

² What is more, after making that damning admission, he provided corroborating evidence when he took the police to the hospital and , and they found a rag with her blood on it.

her at the hospital, where is the blood? A lot of it should have been discovered on the ground there. For all that was found on the car, we would expect some, indeed “pools” of it there. Other than the rag, however, there was none.

Similarly, we would expect that her blood would be found inside her car. As the State’s incredible theory goes, after beating and raping her at the hospital Thomas loaded Howard back into the car so he could take her to a residential site almost two miles away to beat her with some scaffolding bracing he fortuitously found there. Yet, for all of her blood on the outside of the car, none was inside. How could that be? The evidence simply undercuts the State’s version of what happened, and it gives more credence to Thomas’ confession to the police. Specifically, and contrary to the facts in Holton v. State, 573 So. 2d 284 (Fla. 1990), the evidence, even in the light most favorable to the State, never showed that the violence inflicted on Howard was at a time proximate to the sexual battery. To the contrary, it happened later and miles away from where she and Thomas had had sexual intercourse. He never said the homicide arose out of a consensual sexual encounter gone bad. (Appellee’s Brief at p. 27); Finney v. State, 660 So. 2d 674 (Fla. 1995). The murder occurred separately, both in time and space, from the sex.

In short, and again as said in the Initial Brief at page 10, “Simply put, the State’s case that Thomas sexually battered Brandy Howard does not make much

sense. Its scenario is bizarre and the facts simply fail to support its version of what happened.”

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

ISSUE II

THE COURT ERRED IN DENYING THOMAS’ MOTION FOR A JUDGMENT OF ACQUITTAL BECAUSE THE STATE’S CIRCUMSTANTIAL EVIDENCE NEVER EXCLUDED THE REASONABLE VERSION OF THE EVENTS THAT THE DEFENDANT NEVER KIDNAPPED MS. HOWARD, A VIOLATION OF HIS FIFTH, SIXTH, AND FOURTEENTH AMENDMENT RIGHTS.

The State has two fundamental problems with its kidnapping argument.

First, from her perspective, Janet Money, the clerk blowing the leaves in the parking lot, never saw anything in the argument between Thomas and Howard to raise her concerns. Even though the defendant took Howard’s keys and had “forced” her into the car three times, she thought they were just “having an argument.” Howard never did anything to alarm the clerk that the girl was being abducted against her will, particularly when it would have been easy for her to have screamed or yelled for help when Money was only a few short feet from the couple (14 R 509).

Instead she merely smiled at her (14 R 506). Thomas did nothing to raise her fears,

and she apparently continued blowing leaves from the parking lot rather than trying to stop the incipient kidnapping or to call the police.

Second, even when the facts are resolved in favor of the State, the situation remained, at best, ambiguous. Yet, it is when such doubt remains that the law on circumstantial evidence requires this Court to reverse. Thomas may have intended to kidnap Howard, the evidence may even have probably shown this, but even such a high level of certainty is insufficient, as a matter of law, if the State failed to present evidence rebutting Thomas' claim that Howard went with him without being forced. This Court cannot simply say, as the State implies, well she was killed, and since no one consents to that, she must have been forced to go with him. Human experience, however, refutes that line of reasoning. Cf. Delgado v. State, 776 So. 2d 233 (Fla. 2000). If it were otherwise every murder would include a kidnapping, a position this Court has rejected. Rogers v. State, 660 So. 2d 237 (Fla. 1995). Indeed, the court in this case found the murder to have been a "situational heat of the moment type murder." (11 R 2171) Thus, if a defendant intended to "terrorize the victim" (Appellee's brief at p. 37), such a design must have existed at the inception of the kidnapping and not have developed later, during the course of the murder. Or, as with burglary, more than a subsequent murder needs to be shown in

order to prove a defendant kidnapped his victim.³ Moreover, unlike the intent required in sexual battery, it is his intent, not his victim's "refus[al] to be confined" (Appellee's brief at p. 36) that is significant. Confinements or abductions incidental to or parts of a murder do not become kidnappings because the victim was killed. The essence of the State's argument on this point, however, is to the contrary, and wrong.

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

ISSUE III

SENTENCING THOMAS TO DEATH, A MENTALLY RETARDED PERSON VIOLATES THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 17 OF THE FLORIDA CONSTITUTION.

³ Schwab v. State, 636 So. 2d 3, 6 (Fla. 1994), cited by the State in its brief at page 37, has no relevance. In that case, Schwab complained that the State had failed to prove the corpus delicti for the charged murder, sexual battery, and kidnapping before it introduced the defendant's confession. This Court noted that generally the State proves a crime was committed and then that the defendant committed it, "But in many cases the two elements are so intimately connected that the proof of the corpus delicti and the guilty agency are shown at the same time." (cite omitted.) That opinion has no controlling relevance here because this Court simply held that "the state submitted sufficient proof of the corpus delicti to admit Schwab's admissions. . ." Id.

The State's Answer is akin to the dog that did not bark in a Sherlock Holmes mystery.⁴ More is told by its silence than what it said. In its Answer Brief, it spends its entire effort on Issue III arguing what Thomas has conceded. The trial court found Thomas to be mentally retarded, and it gave that mitigation significant weight (11 R 2170). But, as said in the Initial Brief, "While the court considered Thomas' retardation as mitigation, it erred in considering it only as such. . . . [M]ental retardation is so significant a disability, that ... a person's very low intellect should absolutely bar, as a matter of state and national constitutional law, his execution for the murder he or she may have been convicted of committing." (Initial Brief at pp. 25-26). As to that argument, the State has remained silent, and that is deafening. Society, at the national and state levels, has evolved so much in the last decade regarding its treatment of the mentally retarded, especially in the death penalty arena, that the Appellee should have said something to defend the former status quo. Not simply in the last ten years, but recently, and very recently at that, the winds of fundamental change have filled the sails of Thomas' argument on this issue.

⁴ "the curious incident of the dog in the nighttime. The dog did nothing in the nighttime. 'That was the curious incident,' remarked Sherlock Holmes." Arthur Conan Doyle, The Memoirs of Sherlock Holmes.

First, the United States Supreme Court has accepted jurisdiction in McCarver v. North Carolina, Case No. 00-8727 (March 26, 2001), to reconsider the question of executing the mentally retarded that it had temporarily resolved over a decade earlier in Penry v. Lynaugh, 492 U.S. 302 (1989). As pointed out in the Initial Brief, at least half of the States in the union forbid executing anyone, or more on point, particularly the mentally retarded. That is especially compelling in light of the United States Supreme Court's current Eighth Amendment analysis that looks to actions of the state legislatures as the measure of society's evolving standards of decency.

Second, on June 12, 2001, after Thomas and the State had filed their briefs, Governor Jeb Bush signed into law Ch 2001-202, Laws of Florida. (See Appendix) It absolutely prohibits the execution of the mentally retarded, and it provides a procedure by which the mental retardation issue can be raised. This legislation is so important and fundamental to this issue that Thomas asked this Court to take judicial notice of it. In an order dated July 18, 2001 this Court granted that request and asked for supplemental briefs addressing "the impact of Ch 2001-202, Laws of Florida, . . . on Issue III of the already filed initial brief." Thomas has done that, and has filed a supplemental brief along with this Reply Brief.

Therefore, for the several reasons advanced in the Initial Brief, re-emphasized here, or argued in the Supplemental Brief, Demetris Thomas respectfully asks this honorable Court to reverse the trial court's sentence of death and remand with directions that it impose a sentence of life in prison without the possibility of parole.

ISSUE IV

THE COURT ERRED IN DENYING THOMAS' MOTION TO SUPPRESS HIS CONFESSION BECAUSE HIS MENTAL DEFECTS ARE SO SEVERE THAT HE COULD NOT KNOWINGLY AND INTELLIGENTLY WAIVE HIS MIRANDA⁵ RIGHTS, A VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS.

We, first of all, must focus on the issue presented here. It is not about the voluntariness of Thomas' various statements to the police. It is about whether he knowingly and intelligently waived his Miranda rights. The State has, understandably enough, focused on the former, which, while making its argument easier, ultimately fails because it never addressed the problem Thomas has presented to this Court.

All statements made to the police must be freely and voluntarily made. Even those in which the police have told a defendant his rights, the court must find them to have been voluntarily given. McDole v. State, 283 So. 2d 553 (Fla. 1973). In most conversations with citizens, the police can chat, question, and argue without ever telling them they have the right to remain silent, they can have a lawyer, etc. Even if the police believe a person has committed a crime and he or she has

⁵ Miranda v. Arizona, 384 U.S. 436 (1966).

become the focus of their investigation, they need not inform them of their rights.

Beckwith v. United States, 425 U.S. 341 (1976).

On the other hand, those rights must be read in the narrow, special circumstances of custodial interrogation. Why? The Supreme Court in Miranda provided the reason:

We have concluded that without proper safeguards the process of in custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely. In order to combat these pressures and to permit a full opportunity to exercise the privilege against self-incrimination, the accused must be adequately and effectively apprized of his rights and the exercise of those rights must be fully honored.

Miranda, at 467.

If the defendant never knowingly and intelligently waived those rights then any subsequent confession is presumed tainted and cannot be used in the prosecution's case in chief against the defendant even though it may have been otherwise voluntarily made. The focus of Thomas' motion to suppress, therefore, was not on whether he had freely and voluntarily confessed, but whether he had intelligently and knowingly waived his rights. The standards for measuring the voluntariness of Thomas' statements thus differ from those used in determining if he had waived his Miranda rights. Moreover, underlying any analysis in this case is

the troublesome nature of mental retardation. Typically, the mentally retarded generally and Thomas specifically (6 R 1165) have an innate desire to please authority figures, such as Major Worley, and they will freely confess to committing some crime.⁶ Because of their retardation, however, they will also have great difficulty in knowingly and intelligently waiving their rights.

The State, therefore, has simply missed the issue and focused on the voluntariness of what Thomas told the police when it says on pages 44-45 of its brief, “thus, Thomas waived his rights, not from ignorance, but from his desire to talk to the police and attempt to explain away their facts.” This conclusion gains support from its reliance on this Court’s opinion in Richardson v. State, 604 So. 2d 1107 (Fla. 1992). The issue there focused on the voluntariness of his confession, not whether he knowingly and intelligently had waived his Miranda rights. That case, rather than supporting the State’s argument, merely shows that it has focused on an issue Thomas never raised.

The State, on pages 49-50 of its briefs says that a trial court could ignore the testimony of Dr. Larson regarding Thomas’ inability to understand the terms in the Miranda warnings and the rights guaranteed in them. Of course it could, but not

⁶ James W. Ellis and Ruth Luckason, “Mentally Retarded Criminal Defendants,” 53 George Washington Law Review 414, 431.

without providing some reason for doing so. If the expert's opinion "is hard to square with other evidence at hand," the court can ignore it. For example, the court could have dismissed Dr. Larson's testimony that the defendant did not know what "consult," "interrogation," "entitled," and "right" meant if it had other evidence that he had scored, for example a 1500 on the SAT test, or that he have even obtained a high school diploma. It could have disregarded this expert's testimony that Thomas had no idea that the right to have an attorney or the right to be silent were absolute if the State had presented evidence that he had asked for a lawyer or told the police he did not want to talk with them. To the contrary, this defendant acted just like a mentally retarded person. He willingly talked with the police, agreeing to see them, and particularly Major Worley, because that is the nature of his disability: to please persons in authority and to mask his intellectual deficiency by seeming to agree with what the interrogator wants.⁷ The state never presented any evidence which the court could have used to reject or reduce the impact of Dr. Larson's testimony that focused, not on Thomas' ability to freely and voluntarily confess, but on his capacity to knowingly and intelligently waive his Miranda rights. It could not, therefore, simply toss what he said aside because it did not want to believe it

⁷. Ellis and Luckason, cited above.

and conclude from “totality of the evidence in this case,” (6 R 1212-134) that this mentally retarded defendant knowingly and intelligently waived or understood his Miranda rights.

In any event, the Court’s order gives no hint that the court had disregarded or ignored Dr. Larsen’s expert opinion. To the contrary, it became part of “the totality of the evidence in this case.” (6 R 1212) If so, the court never squared its finding that Thomas knowingly and intelligently waived his Miranda rights with Dr. Larson’s clear and uncontroverted opinion that he did not understand its key words and concepts

Other small points merit reply.

1. On page 44 of its brief, the State is only speculating when it says, “While knowing that the police would probably match his DNA with fluids/sperm found in the victim. . . .”

2. On page 46 it says that “Thomas’ decision to waive his rights an talk to the police was informed by his knowledge of the contents of the search warrant.” Huh? That document never told the defendant he had any right to refuse to cooperate with the police. Indeed, the police have no constitutional obligation to have informed him of any right to refuse a search, Schneekloth v. Bustamonte, 412 U.S. 218 (1973), which, in any event, he had no right to do in this case.

3. On page 48 of its brief it claims Thompson was willing to “manipulate the system.” There is no evidence of that. To the contrary, Dr. Larsen says he was not doing so (6 R 1169).

4. The State shows a repeated misunderstanding of the nature of mental retardation. In footnote 34 on page 48 of its brief, the State says that Thomas was “only mild[ly] retarded,” implying this disability was like having only a “mild” cold. In truth, it is more like having a “mild” case of AIDS. Those whose IQs are “barely in the retarded range at 65-67” (Appellee’s Brief at p 48, footnote 34) rank in the lowest two percent of the human population in intelligence. This is a severe, significant learning disability that no pill or placebo can cure. While educable, their learning disability is so severe that they typically cannot live in modern society by themselves. They know that they are different in a very negative way, and they try to hide their disability.⁸ Thomas “never indicated he did not understand his rights,” or “never indicated a desire not to speak with the police,” or “actually looked at and appeared to read over the form,” (Appellee’s Brief at p. 47, emphasis supplied) is typical of what the retarded do when confronted by the police. See Initial Brief at p. 80.

⁸ Ellis and Luckason, cited above.

This Court should, therefore, reject the State's argument on this point and reverse the trial court's judgment and sentence and remand for a new trial.

ISSUE V

THE COURT ERRED IN REFUSING TO GIVE ANY WEIGHT TO THE LEGITIMATE AND UNCONTROVERTED MITIGATION THOMAS PRESENTED, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The crux of the State's argument comes from the last paragraph on page 51 of its brief:

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 weighted 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.

A novel justification but one the trial court left unused. Indeed, it simply rejected finding these proven mitigators for no reason at all. Thomas' argument is simply that while under Trease v. State, 768 So. 2d 1050 (Fla. 2000), it could give that mitigation no weight, it could not do so without providing a reason justifying ignoring it. As to that contention, the State says nothing.

Moreover, the State's argument makes no sense. First, contrary to the State's assertion, Thomas never completed high school. That is, he never graduated in the way normal students do. He merely received a certificate of attendance, which, presumably even warm rocks could get.

Yet only saying that reply does not meet the fundamental assumption implicit in the State's argument. That is, it contends that the mentally retarded are just that: warm rocks. They have the funny grins, the warm, fuzzy personalities, and the abilities of, well, warm rocks. Yet, such is far from the truth. Those mildly mentally retarded can be trained, and while they need assistance to live in modern society they can and do work, and do well when matched with tasks equal to their limited abilities, as Thomas did for a while when employed washing cars. Such menial labor in no way detracts from the weight given to the other mitigators found by the court. Instead, they testify of the truth that runs throughout this case: Thomas' mental retardation defines this defendant and defined the way he committed his crimes.

Finally, the State says this mitigation, even if erroneously excluded, would not have changed the court's sentence because of the strong aggravation present. As argued in Issue VII of the Initial Brief, none of the the aggravators either singly or taken as a whole presents a compelling picture that Thomas is among the worst

of the worst of capital defendants. Thus, the court's error here, cannot be harmless beyond all reasonable doubts.

ISSUE VI

THE COURT ERRED IN REFUSING TO FIND THAT THOMAS' CAPACITY TO APPRECIATE THE CRIMINALITY OF HIS CONDUCT OR TO CONFORM HIS CONDUCT TO THE REQUIREMENTS OF THE LAW WAS SUBSTANTIALLY IMPAIRED, A VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

When the irresistible force of judicial discretion meets the immovable object of capital sentencing, judicial discretion is deflected and shunted into a less burdensome form. This limitation on a trial court's freedom in the death penalty arena becomes important in this issue because the State's argument distills into one that the trial court did not abuse its discretion in rejecting finding that Thomas' ability to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was not substantially impaired.

Before 1983 trial courts in non capital cases exercised an almost unlimited or unreviewable amount of discretion in sentencing matters. In that year, the sentencing guidelines were adopted, and over the years this Court has limited or controlled the amount of judicial discretion trial courts have exercised. Scoresheets

and written reasons from departing from the recommended sentence became means to impose a uniform sentencing scheme and greater rationality into the world of criminal sentencing.

This trend to limit judicial sentencing discretion was foreshadowed by the severe limitations imposed on the sentencer who was faced with imposing a capital sentence. Indeed, in Furman v. Georgia, 408 U.S. 238 (1972), the United States Supreme Court struck then current death penalty statutes because they gave the sentencer too much discretion in deciding who should live or die.

Furman mandates that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.

Gregg v. Georgia, 428 U.S. 153, 189 (1976).

This Court in State v. Dixon, 283 So. 2d 1, 10 (Fla. 1972), interpreting and giving a Florida emphasis to the United States Supreme Court opinions said, of judicial discretion in death penalty sentencing:

Thus, the discretion charged in Furman v. Georgia, *supra*, can be controlled and channeled until the sentencing process becomes a matter of reasoned judgment rather than an exercise in discretion at all.

Sentencing orders, therefore, became the mechanism through which this Court could determine if the trial court had properly exercised the severely limited

discretion given it. Because a person's life hung on the words used, that pronouncement, and the reasons for imposing a death sentence, had to be "crystal clear," or, as this Court said in Mann v. State, 420 So. 2d 578, 581 (Fla. 1982), "The trial judge's findings in regard to the death sentence should be of unmistakable clarity so that we can properly review them and not speculate as to what he found; this case does not meet that test."

So, in this case, we have a trial court exercising, according to the State (Appellee's Brief at p 54), its discretion, in rejecting the testimony of Dr. Larson that the defendant's ability to appreciate the criminality of his conduct was substantially impaired on the night of the murder (11 R 2169). First, could the trial judge reject Dr. Larson's testimony? Of course. Could it do so without providing any reason for doing so? In the world of noncapital sentencing, perhaps so, but in the capital sentencing arena, absolutely not. To provide the "crystal clear" sentencing order this Court has required when the State has sought to extinguish a man's life, it has to provide a compelling reason or justification for rejecting the uncontroverted and uncontradicted testimony of this expert.

Of course, all this wonderful discussion, and indeed the State's argument on the issue, misses the point of Thomas' argument. As the defendant said in his Initial Brief on page 86, "[The trial court] simply failed to consider or overlooked Dr.

Larson’s testimony on re-direct examination in which he clearly said [this mitigator] applied (17 R 1096).” Hence, the court’s error amounted to more than simply improperly rejecting what this expert had to say. It never considered all of his testimony that when taken in its entirety clearly supports finding this mitigation. It could not have rejected finding this mitigation as casually as it did. Instead, to make to make its order “crystal clear” for this Court’s review, it would have had to have provided far more justification than it did when it said, “as the testimony of Dr. Larson, when considered with the entire facts and evidence in this case tend to demonstrate, there was no substantial impairment of the Defendant’s ability to appreciate criminality of his conduct.” (11 R 2169)

This Court should reverse the trial court’s sentencing order and remand for re-sentencing.

ISSUE VII

A DEATH SENTENCE IS PROPORTIONALLY UNWARRANTED IN THIS CASE.

On page 95 of the Initial Brief, Thomas said “his mental retardation defines not only this defendant, but it permeated everything he did.” That remains true, yet it is a fact the State steadfastly refuse to discuss in its answer to the defendant’s

proportionality argument. None of the cases cited or discussed in its argument involved a mentally retarded defendant. Thus, most of what it has to say has little to do with the proportionality issue presented by this case.

It justifies its approach by dismissing, in a single, short paragraph, and then without any citations to bolster its claim, that

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.

(Appellee's Brief at p. 62)

The standard jury instruction on the HAC aggravator, and indeed, this Court's opinion in State v. Dixon, 283 So. 2d 1, 10 (Fla. 1972), from which the instruction was taken, clearly refute the notion that the defendant's mental state is irrelevant in measuring the applicability of that aggravating factor.

8. The crime for which the defendant is to be sentenced was especially heinous, atrocious or cruel. "Heinous" means extremely wicked or shockingly evil. "Atrocious" means outrageously wicked and vile. "Cruel" means **designed** to inflict a high degree of pain with **utter indifference** to, or even **enjoyment** of, the suffering of others. The kind of crime intended to be included as heinous, atrocious, or cruel is one accompanied by additional acts that show that the crime was **conscienceless** or **pitiless** and was unnecessarily torturous to the victim.

Fla. Std. Jury Instr. (Crim.)(emphasis supplied.)

While the victim's suffering is particularly important, it becomes relevant because it tends to show the defendant's indifference to the agony he or she is enduring, and even an enjoyment in torturing the victim. Indeed, as this Court said in Mann v. State, 420 So. 2d 578, 581 (Fla. 1982), "There is frequently a significant connection between the grossness of a homicide and perpetrator's mental condition." The State, therefore, is simply wrong in its contention that the defendant's mental state has relevance only to the cold, calculated, and premeditated aggravating factor. This Court has held otherwise.

Hence, the litany of cases it discusses on pages 62-64 have no relevance to this case because none of them involved mentally retarded defendants. Moreover, the facts in them are so different from those in this case that they have value in resolving this issue. For example, in Zack v. State, 753 So. 2d 9 (Fla. 2000), the defendant killed two women within 12 hours. Previously, he had stolen a car in Tallahassee, and guns in Panama City. That defendant never claimed he was retarded, and this Court found in him a terrifying cunning in his scheme of seducing, raping, and killing women. That case has little similarity to the facts of this case. And so do none of the other cases cited by the State.

In short, the State has strung together several cases whose similarity to this case lies only in that they have four aggravators, including HAC. Its argument ignored the wealth of mitigation presented, much of it given great or significant weight by the trial court. Instead, it is seemingly content to focus on the apparent heinousness of the murder and the fact that the court found four aggravating factors to carry its proportionality argument. It should have done more.

It should have discussed why the court's finding of the statutory mental mitigator that at the time of the murder Thomas was under the influence of an extreme mental or emotional disturbance deserves little weight even though the trial court gave it great weight. It did not. It should have argued that Thomas' mental retardation has little consideration in this proportionality review. It did not. It should have justified ignoring the abundance of other mitigation found by the court. But, again, it did not.

So, what did it do beyond waving the HAC aggravator before this Court? Not much, and it did so little for good reason. There is not much to work with. This Court should find that sentencing Thomas to death proportionately unwarranted, reverse his sentence of death, and remand with instructions that he be sentenced to life in prison without the possibility of parole.

CONCLUSION

Based on the arguments presented here, the Appellant, Demetris O'Marr Thomas, respectfully asks this honorable Court for the following relief: (1) Reverse the trial court's judgment and sentence and remand for a new trial; (2) Reverse the trial court's sentence of death and remand for imposition of a life sentence without the possibility of parole; or (3) Reverse the trial court's sentence of death and remand for a new sentencing hearing.

Respectfully submitted,

NANCY DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

DAVID A. DAVIS
Fla. Bar No. **0271543**
Assistant Public Defender
Leon County Courthouse
301 South Monroe Street, Suite 401
Tallahassee, Florida 32301
(850) 488-2458

ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY a copy of the foregoing has been furnished to **STEPHEN R. WHITE**, Assistant Attorney General, by hand delivery to The Capitol, Plaza Level, Tallahassee, Florida 32399-1050, and a copy has been mailed to Petitioner, **DEMETRIS OMAR THOMAS**, #221834, Florida State Prison, Post Office Box 181, Starke, FL 32091-0181, on this day, July 27, 2001.

CERTIFICATE OF FONT SIZE

I HEREBY CERTIFY that, pursuant to Rule 9.210 (a)(2), Fla. R. App. P., this brief was typed in Times New Roman 14 point.

DAVID A. DAVIS
Fla. Bar No. **0271543**
Assistant Public Defender

IN THE SUPREME COURT OF FLORIDA

DEMETRIS OMAR THOMAS,

Appellant,

v.

Case No. **SC00-1092**

STATE OF FLORIDA,

Appellee.

-----/

**APPENDIX TO
REPLY BRIEF OF APPELLANT**

APPENDIX

DOCUMENT

A

Ch 2001-202, Laws of Florida