IN THE SUPREME COURT OF FLORIDA

WILLIAM GREGORY THOMAS,

Appellant,

vs. Case No.: SC01-1439

STATE OF FLORIDA

Appellee.

_____/

APPELLANT'S INITIAL BRIEF

On appeal from the Circuit Court of the Fourth Judicial Circuit,
in and for Duval County, Florida

Dale G. Westling, Sr., Esquire
Florida Bar Number 203262
331 East Union Street
Jacksonville, Florida 32202
(904) 356-2341

Attorney for Defendant

TABLE OF CONTENTS

Table Of Citations iv

Preliminary Statement 1

Statement Of The Case 2

Statement Of The Facts 3

Summary Of The Argument 4

Argument 6

ISSUES:

I.

THE TRIAL COURT ERRED IN HOLDING THAT THE NEGOTIATED PLEA IN ANOTHER CASE WAIVED DEFENDANT'S RIGHT TO APPEAL FROM ANY ERRORS IN THE SENTENCING PHASE OF THE TRIAL IN THE INSTANT CASE; ALTERNATIVELY, DEFENDANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL BEFORE TRIAL, BECAUSE COUNSEL FAILED TO ADVISE DEFENDANT AGAINST ENTERING THE NEGOTIATED PLEA IN THE OTHER CASE 6

II.

APPELLANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL BECAUSE, BEFORE TRIAL, COUNSEL VISITED APPELLANT INFREQUENTLY, COUNSEL FAILED TO INVESTIGATE THE BACKGROUND OF A KEY WITNESS, AND COUNSEL FAILED TO INTERVIEW OR PRESENT THE TESTIMONY OF AVAILABLE IMPEACHMENT WITNESSES 11

III.

APPELLANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL DURING THE SENTENCING PHASE OF HIS TRIAL, BECAUSE COUNSEL FAILED TO OBJECT TO, AND THUS PRESERVE FOR REVIEW, IMPROPER COMMENTS BY THE STATE DURING ITS CLOSING ARGUMENT

24

IV.

APPELLANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL DURING THE SENTENCING PHASE OF HIS TRIAL, BECAUSE COUNSEL FAILED TO OBJECT TO, AND THUS PRESERVE FOR REVIEW, NUMEROUS COMMENTS BY THE PROSECUTOR WHICH SUGGESTED THAT THE LAW REQUIRED A DEATH PENALTY IN THE INSTANT CASE

30

V.

APPELLANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL DURING THE SENTENCING PHASE OF HIS TRIAL, BECAUSE COUNSEL FAILED TO OBJECT TO, AND THUS PRESERVE FOR REVIEW, ARGUMENT BY THE STATE WHICH TOLD THE JURY THAT THE UNDERLYING CRIME OF KIDNAPPING WAS AN AUTOMATIC AGGRAVATING FACTOR

36

VI.

APPELLANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL DURING THE SENTENCING PHASE OF HIS TRIAL, BECAUSE COUNSEL FAILED TO OBJECT TO, AND THUS PRESERVE FOR REVIEW, INSTRUCTIONS AND ARGUMENT WHICH UNCONSTITUTIONALLY AND INACCURATELY DILUTED THEIR SENSE OF RESPONSIBILITY FOR SENTENCING

39

VII.

APPELLANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL DURING THE SENTENCING PHASE OF HIS TRIAL, BECAUSE COUNSEL FAILED TO OBJECT TO, AND THUS PRESERVE FOR REVIEW, THE JURY INSTRUCTION REGARDING THE "COLD, CALCULATED, AND PREMEDITATED" AGGRAVATING FACTOR 46

VIII.

APPELLANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL DURING THE SENTENCING PHASE OF HIS TRIAL, BECAUSE COUNSEL FAILED TO OBJECT TO, AND THUS PRESERVE FOR REVIEW, THE JURY INSTRUCTION GIVEN REGARDING THE "HEINOUS, ATROCIOUS, AND CRUEL" AGGRAVATING FACTOR 49

CONCLUSION 51

CERTIFICATE OF SERVICE 53

CERTIFICATE OF COMPLIANCE 53

TABLE OF CITATIONS

Cases

Alvarez v. Bond, 225 F.3d 820 (7th Cir. 2000),
cert. denied, 121 S.Ct. 1192 (2001) 52

Alvord v. State, 322 So.2d 533 (Fla. 1975),
cert. denied, 428 U.S. 923 (1976),
rehearing denied, 429 U.S. 874 (1976),
receded from on other grounds, 524 So.2d 422 (Fla. 1988) 32-34

Arave v. Creech, 507 U.S. 463 (1993),
on remand, 989 F.2d 1574 (9th Cir. 1993),
cert. denied, 507 U.S. 1029 (1993) 38

Bassett v. State, 541 So.2d 596 (Fla. 1989) 14

Blake v. Kemp, 758 F.2d 523 (11th Cir. 1985) 13

Brookings v. State, 495 So.2d 135 (Fla. 1986) 40

Brooks v. State, 762 So.2d 879 (Fla. 2000) 32

Caldwell v. Mississippi, 472 U.S. 320 (1985),
on remand, 481 So.2d 850 (Miss. 1985),
cert. granted, 479 U.S. 1075 (1987),
on remand, 517 So.2d 1360 (Miss. 1987) 43-45

Cave v. Singletary, 971 F.2d 1513 (11th Cir. 1992) 22

Downs v. State, 740 So.2d 506 (Fla. 1999) 48

Dugger v. Adams, 489 U.S. 401 (1989),
rehearing denied, 490 U.S. 1031 (1989) 43

Eddings v. Oklahoma, 455 U.S. 104 (1982),
appeal after remand, 688 P.2d 342 (Okla.Crim.App. 1984),
cert. denied, 470 U.S. 1051 (1985) 33, 42

Espinosa v. Florida, 505 U.S. 1079 (1992),
rehearing denied, 505 U.S. 1245 (1992),
on remand, 626 So.2d 165 (Fla. 1993),
cert. denied, 511 U.S. 1152 (1994) 47, 49

Evitts v. Lucey, 469 U.S. 387 (1985),
rehearing denied, 470 U.S. 1065 (1985) 9

Fead v. State, 512 So.2d 176 (Fla. 1987),
receded from on other grounds, 545 So.2d 861 (Fla. 1989) 40

Ferry v. State, 507 So.2d 1373 (Fla. 1987) 40

Franqui v. State, __ So.2d __, 26 FLW S695 (Fla. October 18, 2001) 32

Gallo-Chamorro v. U.S., 233 F.3d 1298 (11th Cir. 2000),
cert. denied, 121 S.Ct. 2600 (2001),
rehearing denied, 122 S.Ct. 7 (2001) 11

Garcia v. State, 492 So.2d 360 (Fla. 1986),
cert. denied, 479 U.S. 1022 (1986) 40

Gardner v. Florida, 430 U.S. 356 (1977) 9

Garron v. State, 528 So.2d 353 (Fla. 1988) 32

Godfrey v. Georgia, 446 U.S. 420 (1980),
on remand, 246 Ga. 359 (1980),
appeal after remand, 248 Ga. 616 (1981),
cert. denied, 456 U.S. 919 (1982),
rehearing denied, 456 U.S. 1001 (1982) 47, 50

Goodwin v. Balkcom, 684 F.2d 794 (11th Cir. 1982),
cert. denied, 460 U.S. 1098 (1983) 12

Hall v. State, 614 So.2d 473 (Fla. 1993),
cert. denied, 510 U.S. 834 (1993) 49

Hallman v. State, 560 So.2d 223 (Fla. 1990) 40

Harris v. Dugger, 874 F.2d 756 (11th Cir. 1989),
rehearing denied, 885 F.2d 877 (11th Cir. 1989),
cert. denied, 493 U.S. 1011 (1989) 12

Henderson v. Sargent, 926 F.2d 706 (8th Cir. 1991),
opinion amended on rehearing, 939 F.2d 586 (8th Cir. 1991),
cert. denied, 502 U.S. 1050 (1992) 22

Henyard v. State, 689 So.2d 239 (Fla. 1996),
cert. denied, 522 U.S. 846 (1997) 32

Jackson v. State, 648 So.2d 85 (Fla. 1994),
appeal after remand, 704 So.2d 500 (Fla. 1997),
appeal after remand, 767 So.2d 1156 (Fla. 2000) 46-48

Johnson v. Wainwright, 778 F.2d 623 (11th Cir. 1985),
rehearing denied, 807 F.2d 999 (11th Cir. 1986),
cert. denied, 484 U.S. 872 (1987) 27

Jones v. State, 569 So.2d 1234 (Fla. 1990),
appeal after remand, 612 So.2d 1370 (Fla. 1992),
cert. denied, 510 U.S. 836 (1993) 52

Jurek v. Texas, 428 U.S. 262 (1976) 9

Kubat v. Thieret, 867 F.2d 351 (7th Cir. 1989),
cert. denied, 493 U.S. 874 (1989) 13

Lockett v. Ohio, 438 U.S. 586 (1978) 33

Mann v. Dugger, 844 F.2d 1446 (11th Cir. 1988),
cert. denied, 489 U.S. 1071 (1989) 43

Maynard v. Cartwright, 486 U.S. 356 (1988) 47

Middleton v. Dugger, 849 F.2d 491 (11th Cir. 1988) 13

Moore v. Blackburn, 774 F.2d 97 (5th Cir. 1985),
cert. denied, 476 U.S. 1176 (1986) 44

Nix v. Whiteside, 475 U.S. 157 (1986) 12

Nixon v. Newsome, 888 F.2d 112 (11th Cir. 1989) 22

Pait v. State, 112 So.2d 380 (Fla. 1959) 27

Porter v. Wainwright, 805 F.2d 930 (11th Cir. 1986),
rehearing denied, 810 F.2d 208 (11th Cir. 1987),
cert. denied, 482 U.S. 918 (1987),
cert. denied, 482 U.S. 919 (1987) 13

Ragsdale v. State, __ So.2d __, 26 FLW S682 (Fla. October 18, 2001) 12, 13

Rhodes v. State, 547 So.2d 1201 (Fla. 1989),
appeal after remand, 638 So.2d 920 (Fla. 1994),
cert. denied, 513 U.S. 1046 (1994) 25, 26

Richmond v. Lewis, 506 U.S. 40 (1992) 38

Roach v. Martin, 757 F.2d 1463 (4th Cir. 1985),
cert. denied, 474 U.S. 865 (1985),
rehearing denied, 474 U.S. 1014 (1985) 9

Routly v. Singletary, 33 F.3d 1279 (11th Cir. 1994),
rehearing and rehearing en banc denied, 43 F.3d 681 (1994),
cert. denied, 515 U.S. 1166 (1995) 12

Sochor v. State, 619 So.2d 285 (Fla. 1993),
cert. denied, 510 U.S. 1025 (1993),
rehearing denied, 510 U.S. 1159 (1993) 44-45

State v. Lambright, 138 Ariz. 63, 673 P.2d 1 (1983) 8

State v. Lara, 581 So.2d 1288 (Fla. 1991),
appeal after remand, 699 So.2d 616 (Fla. 1997) 13

Stevens v. State, 552 So.2d 1082 (Fla. 1989),
appeal after remand, 613 So.2d 402 (Fla. 1992) 14

Strickland v. Washington, 466 U.S. 668 (1984),
rehearing denied, 467 U.S. 1267 (1984),
on remand, 737 F.2d 894 (11th Cir. 1984) 11

Stringer v. Black, 503 U.S. 222 (1992),
on remand, 979 F.2d 38 (5th Cir. 1992) 38

Taylor v. Kentucky, 436 U.S. 478 (1978) 52

Tedder v. State, 322 So.2d 908 (Fla. 1975) 40

Thomas v. Kemp, 796 F.2d 1322 (11th Cir. 1986),
cert. denied, 479 U.S. 996 (1986) 13

Thomas v. State, 693 So.2d 951 (Fla. 1997),
cert. denied, 522 U.S. 985 (1997) 3 et passim

Thompson v. State, 759 So.2d 650 (Fla. 2000) 48

Tyler v. Kemp, 755 F.2d 741 (11th Cir. 1985)
rehearing denied, 765 F.2d 154 (11th Cir. 1985),
cert. denied, 474 U.S. 1026 (1985) 13

U.S. v. Hernandez, 227 F.3d 686 (6th Cir. 2000),
cert. denied, 121 S.Ct. 1967 (2001),
cert. denied, 122 S.Ct. 76 (2001) 52

Wasko v. State, 505 So.2d 1314 (Fla. 1987) 40

White v. State, 616 So.2d 21 (Fla. 1993),
cert. denied, 510 U.S. 877 (1993) 26

Woodson v. North Carolina, 428 U.S. 280 (1976) 32

Workman v. Tate, 957 F.2d 1339 (6th Cir. 1992) 22

Zant v. Stephens, 462 U.S. 862 (1983),
on remand, 716 F.2d 276 (5th Cir. 1983) 37

Other Authorities

McCormick On Evidence, §10 (1984 ed.) 18

PRELIMINARY STATEMENT

In this brief, all references to Appellant, Defendant, or Mr. Thomas, refer to Defendant William Gregory Thomas. All references to the record on appeal will be in the form “R.1-012," wherein “R” indicates the record on appeal, “1" indicates volume 1 of the record, and “-012" indicates page 12 of volume 1. All references to the transcript of the original trial proceedings will be indicated in the form “Trial.1422,” where “Trial” refers to the trial transcript and “1422" refers to the page number in the transcript, as originally paginated.

STATEMENT OF THE CASE

On October 5, 1998, Appellant filed his Motion To Vacate Judgment And Sentence With Special Request For Leave To Amend. R1.001. His initial attorney in this collateral proceeding filed a motion to withdraw on January 3, 2000. R.1-007. An order appointing the undersigned as successor counsel was entered on January 3, 2000. R.1-009. An Amended Motion To Vacate Judgment And Sentence (hereinafter referred to simply as "Amended Motion") was filed on April 19, 2000. R.1-011. On April 26, 2000, the trial court ordered the State to file a written response to the Amended Motion and to indicate which claims the State deemed to require an evidentiary hearing. R.1-075. On June 19, 2000, the State filed a response which simply stated that it had no objection to an evidentiary hearing on all claims raised in the Amended Motion. R.1-077. On August 15, 2000, Appellant filed an addendum to his Amended Motion which asserted two additional claims.

An evidentiary hearing on the Amended Motion was conducted on January 29, 2001. R.1-157. The parties then filed post-hearing memoranda of law. R.1-080, R.1-116. The trial court entered an order denying Appellant's Amended Motion on April 26, 2001. R.1-118. Appellant then timely filed his Notice Of Appeal on May 22, 2001. R.1-154.

STATEMENT OF THE FACTS

On direct appeal from Appellant's conviction and sentencing, this Court summarized the facts adduced at trial which it considered salient to Defendant's conviction:

> Thomas planned the kidnapping and murder of his wife, Rachel, in order to avoid paying his part of a settlement agreement in their pending divorce. Thomas and a friend, Douglas Schraud, went to Rachel's house, September 12, 1991, the day before a substantial payment was due, and Thomas beat, bound, and gagged Rachel. When Rachel tried to escape by hopping outside, Thomas knocked her to the ground and dragged her back inside by her hair. He then put her in the trunk of her car and drove off. She was never seen again.
>
> Thomas was charged with first-degree murder, burglary and kidnapping. The State presented numerous witnesses to whom he had made incriminating statements. Thomas presented no evidence during the guilt phase and was found guilty on all counts. During the penalty phase, several witnesses testified on his behalf and Thomas himself took the stand. The jury recommended death by a vote of eleven to one, and the judge imposed a sentence of death based on five aggravating circumstances and no mitigating circumstances.

Thomas v. State, 693 So.2d 951 (Fla. 1997), cert. denied, 522 U.S. 985 (1997).

Additional facts pertaining to the details of the legal representation provided to Defendant are set forth throughout the argument portion of this Initial Brief.

SUMMARY OF THE ARGUMENT

The trial court should not have enforced a negotiated plea **in a different case** in which Defendant waived his right to challenge any errors which occurred in the guilt phase of the trial. A review of such errors is constitutionally required because society must always be sure that the death penalty is being administered in a fair and rational manner. If the waiver is found valid and enforceable, Mr. Nichols' advice to Defendant that he accept such negotiated plea was an egregious error.

Mr. Nichols only visited Defendant in jail three times before trial and the three visits lasted a total of less than two hours. He did not interview impeachment witnesses suggested by Defendant. He did not interview Harry Mahon, Esquire, who represented Mr. Thomas in his divorce, even though the alleged motive for the murder was Defendant's inability to pay the financial obligations imposed by the divorce. Mr. Nichols did not even review the court file from the divorce case. Investigation would have revealed that the obligation for the lump sum payment, which purportedly prompted the murder, had already been satisfied.

The State made appeals to the jury's sympathy and it argued that it had already exercised discretion in deciding to seek the death penalty, but defense counsel made no objection. The State made the 'show him the same mercy he showed her'

argument but defense counsel failed to object even though he knew that such argument could provide grounds for appeal. The State suggested that a death penalty could be required if it proved certain facts, but defense counsel did not object.

The State argued and the trial court instructed the jury that the felony underlying Defendant's murder conviction was an automatic aggravating circumstance, but defense counsel did not object. This failed to guide the jury in exercising its discretion. This was compounded when, during voir dire as well as closing arguments, the State suggested that the jury had no responsibility for the ultimate sentencing decision, but defense counsel did not object. Finally, defense counsel did not object to the jury instructions on the CCP and HAC aggravators, even though both instructions were unconstitutionally vague.

Defense counsel's deficient performance undermines confidence in the result of the trial, the judgment and sentence should be vacated, and the cause remanded for further proceedings.

ARGUMENT

I.

THE TRIAL COURT ERRED IN HOLDING THAT THE NEGOTIATED PLEA IN ANOTHER CASE WAIVED DEFENDANT'S RIGHT TO APPEAL FROM ANY ERRORS IN THE SENTENCING PHASE OF THE TRIAL IN THE INSTANT CASE; ALTERNATIVELY, DEFENDANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL BEFORE TRIAL, BECAUSE COUNSEL FAILED TO ADVISE DEFENDANT AGAINST ENTERING THE NEGOTIATED PLEA IN THE OTHER CASE

In the Order Denying Defendant's Motion To Vacate Judgment And Sentence, R.1-118, the trial court addressed the merits of Mr. Thomas' claims pertaining to the guilt phase of the trial. However, the trial court first found, as an alternative basis for denying such claims, that Defendant, as part of his negotiated plea in another case **(Case No. 93-5393-CF)**, had waived his right to appeal from any matters pertaining to the guilt phase of his trial in the instant matter **(Case No. 93-5394-CF).** R.1-120, referring to Exhibit A to the order, R.1-146. Such finding is in error and the purported waiver should be held invalid by this Court.

This Court should disregard the purported waiver because it is repugnant to the Constitution and the potential use of such a waiver is repugnant to any honorable concept of ethics and professionalism. If this Court finds that the waiver is valid, it will constitute an endorsement and encouragement of the use of this procedure in other proceedings.

Richard Nichols, Esquire, was appointed to represent Defendant in the trial of the case at bar. R.1-183-184. Mr. Nichols was also appointed to represent Defendant in Case No. 93-5393, State vs. Thomas, in which the State alleged that Mr. Thomas had murdered his mother. R.2-240. The jury verdict in the guilt phase of the instant matter was returned on March 24, 1994. Trial.1224, 1271. The jury's advisory verdict on sentencing was returned on March 30, 1994. Trial.1456. A negotiated plea of guilty was entered in Case No. 93-5394 on July 14, 1994. R.2-240; R.1-146. That negotiated plea provides, inter alia, that

> I agree to waive my rights to appeal any matter whatsoever arising out of Cs # 93-5394 (Rachel A. Thomas) whether direct, colarteral [sic] or appeals under Rule 3.850 FRCP, However the defendant specifically reserves the right to appeal matters concerning the sentencing in 93-5394 on the count alleging 1° murder.

R.1-146.

The only goal served by such waiver was to hide from review errors made during the trial. The prosecutor had never before attempted to use such a waiver.

R.2-337. By requiring the waiver as a condition of the plea in Case No. 93-5393, the State embarked upon a novel experiment, an attempt to uphold the conviction in Case No. 93-5394, despite error, via an untried procedural device.

Of course, "death penalty cases are inappropriate vehicles for experimentation with new procedures . . .." State v. Lambright, 138 Ariz. 63, 673 P.2d 1, 8 (1983). This is true because these cases often elicit strongly emotional and charged adversarial attitudes. Because of the nature of the penalty and its finality, these cases call for the strictest safeguarding of the rights of the accused. This is best accomplished by following approved procedures with which the courts are well versed.

While Defendant has no reason to ascribe improper motives to the prosecutors in the case at bar, the viability of this devices has awesome implications. A prosecutor trying the first of two capital cases against a defendant could posture the cases so that he first went to trial on the case more difficult for the State. Knowing that he was going to offer a plea which included such a waiver on the case which was more likely to result in a conviction and, thus, was more likely to be accepted by the defendant, the prosecutor could take advantage of a less competent adversary in the first trial by offering evidence of questionable admissibility and making arguments which were not proper, knowing that there was some strong possibility that such misconduct would be shielded from appellate review.

Enforcing the waiver in this case runs counter to the notion that society should be protected from any perception that the death penalty is administered unfairly. "It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." Gardner v. Florida, 430 U.S. 356 (1977). To ensure that the death penalty is being administered, and is perceived as being administered, in a rational manner, appellate review of capital cases is essential. In fact, while there is no general constitutional right to appeal from criminal convictions, appellate review of death sentences is constitutionally required. Jurek v. Texas, 428 U.S. 262 (1976); Roach v. Martin, 757 F.2d 1463 (4th Cir. 1985), cert. denied, 474 U.S. 865 (1985), rehearing denied, 474 U.S. 1014 (1985).

"A system of appeal as of right is established precisely to assure that only those who are validly convicted have their freedom drastically curtailed. The State may not extinguish this right because another right of the appellant - the right to effective assistance of counsel - has been violated." Evitts v. Lucey, 469 U.S. 387, 399-400 (1985), rehearing denied, 470 U.S. 1065 (1985).

If this Court agrees with the trial court that the waiver should be enforced, then it should determine whether Mr. Nichols failed to render effective assistance of counsel by making a recommendation regarding the plea that shields from review the errors

committed during the guilt phase of the trial. The argument concerning the nature of those errors follows.

II.

APPELLANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL BECAUSE, BEFORE TRIAL, COUNSEL VISITED APPELLANT INFREQUENTLY, COUNSEL FAILED TO INVESTIGATE THE BACKGROUND OF A KEY WITNESS, AND COUNSEL FAILED TO INTERVIEW OR PRESENT THE TESTIMONY OF AVAILABLE IMPEACHMENT WITNESSES

The leading case concerning ineffective assistance of counsel is Strickland v. Washington, 466 U.S. 668 (1984), rehearing denied, 467 U.S. 1267 (1984), on remand, 737 F.2d 894 (11th Cir. 1984). In that case, the U.S. Supreme Court held that a defendant who sought appellate relief based on the ineffective assistance of counsel was required to satisfy two elements:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Strickland, 466 U.S. at 687.

A defendant seeking to vacate a judgment and sentence on the basis of ineffective assistance of counsel must prove the ineffective assistance by a preponderance of the evidence. Gallo-Chamorro v. U.S., 233 F.3d 1298 (11th Cir.

2000), cert. denied, 121 S.Ct. 2600 (2001), rehearing denied, 122 S.Ct. 7 (2001). This requires a "reasonable probability" that, but for the errors of counsel, the outcome would have been different. Nix v. Whiteside, 475 U.S. 157 (1986). The "reasonable probability" required is only a probability sufficient to undermine confidence in the outcome of the case. Routly v. Singletary, 33 F.3d 1279 (11th Cir. 1994), rehearing and rehearing en banc denied, 43 F.3d 681 (1994), cert. denied, 515 U.S. 1166 (1995).

In reviewing the trial court's ruling on a claim of ineffective assistance of counsel, this Court's standard of review is to "defer to the trial court's findings of fact and review, as questions of mixed law and fact, whether counsel was ineffective and whether the defendant was prejudiced by any ineffective assistance of counsel." Ragsdale v. State, __ So.2d __, 26 FLW S682, S683 (Fla. October 18, 2001).

The duty to render effective assistance begins before trial. It encompasses the reasonable investigation and preparation required during the pre-trial proceedings. "At the heart of effective representation is the independent duty to investigate and prepare." Goodwin v. Balkcom, 684 F.2d 794 (11th Cir. 1982), cert. denied, 460 U.S. 1098 (1983). While the duty to investigate has finite limits, any decision limiting the investigation must be based upon an informed judgment. Harris v. Dugger, 874 F.2d 756 (11th Cir. 1989), rehearing denied, 885 F.2d 877 (11th Cir. 1989), cert. denied, 493 U.S. 1011 (1989).

The duty to render effective assistance continues in the penalty phase of the proceedings. If the penalty phase is not "subjected to meaningful adversarial testing, 'counsel's errors deprived [defendant] of a reliable penalty phase proceeding.'" Ragsdale v. State, __ So.2d __, 26 FLW S682, 683 (Fla. October 18, 2001), quoting Hildwin v. Dugger, 654 So.2d 107, 110 (Fla. 1995).

Therefore, counsel has a duty to investigate and prepare available mitigating evidence to submit to a jury. Porter v. Wainwright, 805 F.2d 930 (11th Cir. 1986), rehearing denied, 810 F.2d 208 (11th Cir. 1987), cert. denied, 482 U.S. 918 (1987), cert. denied, 482 U.S. 919 (1987); Thomas v. Kemp, 796 F.2d 1322 (11th Cir. 1986), cert. denied, 479 U.S. 996 (1986); Tyler v. Kemp, 755 F.2d 741 (11th Cir. 1985), rehearing denied, 765 F.2d 154 (11th Cir. 1985), cert. denied, 474 U.S. 1026 (1985); Blake v. Kemp, 758 F.2d 523 (11th Cir. 1985). Again, defense counsel must make a "significant effort," based on "reasonable investigation." Kubat v. Thieret, 867 F.2d 351 (7th Cir. 1989), cert. denied, 493 U.S. 874 (1989). When defense counsel unreasonably fails to investigate and prepare mitigating evidence, the proceeding lacks unreliability because the facts adduced by the State have not been tested in a fair adversarial process. Middleton v. Dugger, 849 F.2d 491 (11th Cir. 1988); State v. Lara, 581 So.2d 1288 (Fla. 1991), appeal after remand, 699 So.2d 616 (Fla. 1997);

Stevens v. State, 552 So.2d 1082 (Fla. 1989), appeal after remand, 613 So.2d 402 (Fla. 1992); Bassett v. State, 541 So.2d 596 (Fla. 1989).

The testimony of Mr. Nichols concerning his pre-trial preparation is illuminating by its lack of information:

> Q. When were you appointed to represent him?
>
> A. I don't know.

R.1-183-84.

> Q. All right. Now, when you became his attorney or got appointed, could you tell me, sir, what you remember your first task was?
>
> A. I don't have a clue.

R.1-184.

> Q. Did you employ an investigator in this case?
>
> A. I don't recall.

R.1-187. At the time of the pre-trial proceedings, Stephanie Feronda was a recent law school graduate who had volunteered to assist Mr. Nichols with the case in exchange for the experience which it would provide her. R.1-188. Addressing the penalty phase of the trial, Mr. Nichols was equally forgetful:

> Q. While seated at the counsel table, did Stephanie assist you in preparing your - - or for the penalty phase of the trial?
>
> A. I don't have any recollection of what she did.

R.1-192.

On cross-examination by the State, Mr. Nichols' recollection was equally poor:

Q. Okay. Do you recall approximately how many times you visited with the defendant?

A. I have no recollection.

Q. You can't give an estimation?

A. No.

R.2-275.

Although the defendant was accused of killing his ex-wife, Mr. Nichols also admitted that he never examined the court file pertaining to the divorce:

Q. Well, did you review the divorce file . . ..

A. I don't think I reviewed it, but I was under the impression that there had not - - I was under the impression that there was not an action pending, but that there was, I think, allegations of problems between Rachel Thomas and Greg Thomas.

R.2-303.

In contrast to counsel's lack of recall, Mr. Thomas testified unequivocally:

Q. Where was the first place that you met Mr. Nichols?

* * *

A. I believe it was in the court chute.

Q. That was shortly after he was appointed to represent you?

A. Yes, sir.

Q. Did you have - - how much time did you have with him at that time?

A. About five minutes, maybe.

Q. Now, did Mr. Nichols subsequently come to visit you at the jail?

A. Yes, sir.

***

Q. The first time that Mr. Nichols came to visit you at the jail, was he alone?

A. The first time he was, yes, sir.

Q. How long did he spend with you at that time?

A. Approximately about 30 minutes.

Q. What was the most time that Mr. Nichols spent with you during his visits in the jail?

A. 40.

Q. How many times do you remember him coming to visit with you in the jail?

A. Three.

R.2-347-48.

Based on the unrefuted testimony of Defendant, Mr. Nichols visited with him at jail for a maximum of less than 2 hours before trial. This is not a "significant effort." This is not a reasonable investigation. How could any decision by Mr. Nichols

regarding potential avenues of investigation be based upon an informed judgment after, at most, two hours of conversation with the defendant?

During the approximate two hours of conference with Defendant, Mr. Nichols was told that Christina Thomas, then Mr. Thomas's wife and a primary witness against him, suffered from post-partum depression and anxiety disorders .

Q. Did you ask him about that, whether or not he was - -

A. Yes, sir, I did.

Q. - - whether he was going to investigate it?

A. Yes, sir, I did.

Q. What did he say?

A. Said it wasn't relevant.

R.2-365.

Mr. Nichols did testify that "I don't think he ever told me that." R.2-210. However, shortly after giving that testimony, Mr. Nichols conceded that

> I don't know how many ways I can tell you this. I don't have specific detailed recollection of the conversations I had with him. I have a general recollection of having explained this entire thing to him with regard to how we were going forward with the trial.

R.2-213.

When a witness testifies using an expression such as "I think" or "my impression is," it is not objectionable if the expression refers to the fact that the witness was not totally attentive to the subject of the testimony or has some uncertainty in his memory; however, when the expressions indicate that the witness is testifying from conjecture or hearsay, it indicates that the testimony is not competent. McCormick On Evidence, §10 (1984 ed.)

In the case at bar, Mr. Nichols testified that he had no specific recollection of his conversations with Defendant. Any fair reading of the transcript from the Rule 3.851 hearing reveals that Mr. Nichols was testifying not on the basis of what he remembered, but what he now thinks he 'must have' done. This is conjecture. It is not competent testimony. Any testimony which he offered with respect to specific conversations that he had with Defendant lacked competency. Inexplicably, the trial court found Mr. Nichols' testimony on this subject to be more credible than that of Mr. Thomas, even though Mr. Nichols confessed that he had no specific recollection of his conversations with Defendant.

Mr. Thomas also told Mr. Nichols about witnesses who could refute the "jailhouse snitches." These witnesses included David Beck, Dell Goggins, Omar Jones, Mike Bell, Adrian Terry, Allen Vangosen, and others. R.2-368. Mr. Thomas testified that none of these witnesses were interviewed by Mr. Nichols. R.2-369. Mr.

Nichols did testify that he deposed three of the "jailhouse snitches," R.2-204, but he provided no direct rebuttal of Mr. Thomas' claim regarding these named impeachment witnesses. On cross-examination, Mr. Nichols did provide the following testimony on this subject:

> Q. And, to your recollection, did this defendant again ever provide you any names, phone numbers, addresses or information of any witnesses who could have assisted during the guilt phase of his trial?
>
> A. No.

R.2-270. However, Mr. Nichols had already testified that he had no specific recollection of any of his conversations with Defendant, so it is difficult to understand how his testimony on this subject could be given any weight.

Even if this Court believes that the trial court was correct in accepting Mr. Nichols' "testimony," unsupported by any specific recollection, over the testimony of Mr. Thomas, there was another deficiency in Mr. Nichols' preparations which was not contradicted by his testimony in the Rule 3.851 hearing. Mr. Nichols failed to investigate and call as a witness and extremely credible and available witness who could both refute, at least partially, the State's theorized motive and impeach an important State witness on the issue of that motive.

The primary motive espoused by the State was that the murder was committed for financial gain. R.2-313. Defendant and Rachel Thomas were divorced and she

had custody of their son; the State theorized that Defendant did not want to pay child support and that he wanted custody of their son. R.2-313. Pursuant to the terms of the final judgment, Defendant also owed a lump sum payment of $2,350 to Rachel. R.1-168.

The importance of this circumstance was emphasized by this Court when it summarized what it considered to be the salient facts of the case:

> Thomas planned the kidnapping and murder of his wife, Rachel, in order to avoid paying his part of a settlement agreement in their pending divorce. Thomas and a friend, Douglas Schraud, went to Rachel's house, September 12, 1991, **the day before the substantial payment was due**, and Thomas beat, bound and gagged Rachel.

Thomas, 693 So.2d at 951 (emphasis supplied). This Court also observed that Defendant had made "many inculpatory statements and admissions", and the Court's list began with this note:

> – He told coworker Johnny Brewer that he had "to see that Rachel disappeared" **because he could not make the settlement payment.**

Id. at 952, n.3 (emphasis supplied).

Harry Mahon, Esquire represented Defendant in his divorce from Rachel. R.1-167½ [this page of the record is actually unnumbered but is located between R.1-167 and R.1-168.] According to Mr. Mahon's testimony, Mr. Mahon had a chance encounter with Mr. Nichols in the courthouse hallway early during the proceedings.

R.1-171. He told Mr. Nichols that the lump sum had already been paid; it had been sent to Rachel's attorney. R.1-171. In response to this information, Mr. Nichols said "thanks" and he never again contacted Mr. Mahon regarding this matter. R.1-172.

When asked about this conversation, Mr. Nichols testified that

> I don't know whether I recall it or I just have the impression it took place because of conversations about this subject with the State, but I have a general recollection that there was some conversations between Mr. Mahon and myself.

R.2-219. Mr. Nichols testified that he discussed this subject with Defendant and they jointly decided to not call Mr. Mahon as a witness. R.2-220-221. This decision was undoubtedly guided by Mr. Nichols' perception of the issue:

> Within the context of the trial, whether or not Mr. Thomas had paid those monies or thought he had paid them, within the entire context of the trial it seemed to me that was not a point of any real significance.
>
> * * *
>
> Again - - and I don't know how many ways can I say this - - within the entire context of the trial, it didn't appear to me that financial testimony with regard to an aggravator was of any real significance to the jury. It didn't seem to me that that was something they were finding very important. To call a witness to eliminate an unimportant detail would have caused us to lose closing and at that point it seemed to me that trying to preserve closing was the only real - - real tactical weapon that we had.

R.2-222-223.

By Mr. Nichols' testimony, he did not consider testimony that would at least partially refute the State's theory of motive to be important. By Mr. Nichols'

testimony, he did not consider testimony which would impeach Johnny Brewer's testimony to be important.

The failure to investigate key witnesses is ineffective assistance of counsel. Workman v. Tate, 957 F.2d 1339 (6th Cir. 1992); Henderson v. Sargent, 926 F.2d 706 (8th Cir. 1991), opinion amended on rehearing, 939 F.2d 586 (8th Cir. 1991), cert. denied, 502 U.S. 1050 (1992). Similarly, the failure to impeach key witnesses with available evidence is ineffective assistance of counsel. Nixon v. Newsome, 888 F.2d 112 (11th Cir. 1989). If Mr. Nichols had inquired of Mr. Mahon, he would have learned that the money had been deposited into Mr. Mahon's trust account on September 3, nine days before the disappearance of Rachel. R.1-171. This was the unrefuted testimony of Mr. Mahon.

Undoubtedly, the State will characterize this decision as one involving "trial tactics" which should not be second-guessed in hindsight. However, the fact that certain actions are characterized as being a part of counsel's "strategy" does not immunize those actions from review. Counsel's choice of tactics and strategy must be reasonable under the circumstances as they existed at the time of trial. Cave v. Singletary, 971 F.2d 1513 (11th Cir. 1992).

The failure to have any further conversation with Mr. Mahon and the failure to call him as a witness were terrible decisions, not just viewed in hindsight, but viewed

from the perspective of what a reasonable defense attorney would have done with the information available at that time. Mr. Nichols rendered ineffective assistance of counsel that prejudiced Defendant.

III.

APPELLANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL DURING THE SENTENCING PHASE OF HIS TRIAL, BECAUSE COUNSEL FAILED TO OBJECT TO, AND THUS PRESERVE FOR REVIEW, IMPROPER COMMENTS BY THE STATE DURING ITS CLOSING ARGUMENT

This issue was not considered on Mr. Thomas' direct appeal because his counsel, Mr. Nichols, did not make objections to preserve the error for review. Thomas v. State, 693 So.2d 951, 953 n.4 (Fla. 1997), cert. denied, 522 U.S. 985 (1997).

During its closing argument, the State made a direct and unnecessary plea to the sympathy of the jury, obviously calculated to influence their sentencing decision:

> During this trial all the defendant's rights have been honored. What rights of Rachel did he honor? He plundered those rights. He trampled those rights.
>
> Did he charge Rachel with a crime? Did he convene a grand jury and have them charge her with a crime? Did he give Rachel a trial before he executed Rachel? Did he convene a jury to listen to aggravating and mitigating?
>
> No, that defendant was arresting officer, he was judge, he was jury, he was executioner.

Trial.1429-1430.

> In closing I am going to ask you that if you are tempted to show this defendant some mercy, sympathy or pity I want to leave you with this thought and that is I am going to ask you to show that defendant the same mercy, the same compassion, the same sympathy that he showed to Rachel.

Trial.1436.

In Rhodes v. State, 547 So.2d 1201 (Fla. 1989), appeal after remand, 638 So.2d 920 (Fla. 1994), cert. denied, 513 U.S. 1046 (1994), this Court reviewed the closing argument of a different prosecutor in a different case. In Rhodes, the prosecutor asked the jury to try to place themselves at the scene of the crime, he argued that the how the body was handled after the murder supported the heinous, atrocious, cruel aggravator, he suggested that the defendant might be paroled sooner than 25 years if the jury recommended life, he compared the defendant to a vampire, and

> the prosecutor concluded his argument by urging the jury to show Rhodes the same mercy shown to the victim on the day of her death. This was an unnecessary appeal to the sympathies of the jurors, calculated to influence their sentence recommendation.

Rhodes, 547 So.2d at 1206. Since the errors of the prosecutor's argument in that case were preserved, this Court considered the merits of the claim. Although each error alone may not have warranted a mistrial, the cumulative effect was prejudicial in the absence of any curative instructions. Therefore, this Court vacated Rhodes' death sentence and remanded for a new sentencing proceeding.

In White v. State, 616 So.2d 21 (Fla. 1993), cert. denied, 510 U.S. 877 (1993), the prosecutor's closing argument similarly appealed to the jury's sympathies:

> If Miss Scantling had a choice of being in prison for life or being in that photograph with a shotgun hole in her back, what choice would Melinda Scantling have made? The answer is clear. She would have chosen to live, but, you see, she didn't have that choice. You know why? Because that man, right there, decided for himself that Melinda Scantling should die. And for making that decision, for making that decision, he too deserves to die.

White, 616 So.2d at 24. This Court reduced the sentence to a life sentence with no parole for 25 years, based on other reasons; however, it took the opportunity to caution prosecutors that this type of argument was improper and would result in a great and unnecessary expenditure of public funds because of the necessity to retry such cases.

In the case at bar, the prosecutor's comments similarly appealed to the jury's sympathies. Any distinction which the State might make between the argument in the instant case and the improper arguments in Rhodes and White would be a distinction without a difference. Appeal to the jury's emotions and sympathies is always improper.

These improper comments were further compounded by the prosecutor's display of a noose to the jury during his closing argument:

> The evidence in this case is this noose, and the evidence that you heard will hold the weight, the entire weight of the defendant's guilt.

> It's not some slip not [sic]. It's a noose and the noose is around his neck . . ..

Trial.1204; R.2-323-324. Again, this was a highly prejudicial appeal to the jury's emotions. Mr. Nichols failed to object because he thought, if it was error, it was invited by his use of a rope with a slip knot in it by which he intended to suggest that what appeared to be a tight knot was really just an illusion. R.2-246. This use of a rope did not invite the use of a noose any more than a defendant's use of notes on a pad of paper as a demonstrative aid would justify the State cutting out a paper pistol and pointing it at a defendant.

During the closing argument to the jury in the penalty phase of the trial, the prosecutor also made the following statement:

> Now I would submit to you that the state doesn't seek the death penalty on all first degree murders. It's not always proper. . . . [B]ut where the facts surrounding a murder demand the death penalty then the state seeks it, and I would submit to you this is one of those cases.

Trial.1410. Of course, "[a]n attorney's personal opinions are irrelevant to a sentencing jury's consideration." Johnson v. Wainwright, 778 F.2d 623, 631 (11th Cir. 1985), rehearing denied, 807 F.2d 999 (11th Cir. 1986), cert. denied, 484 U.S. 872 (1987).

In Pait v. State, 112 So.2d 380 (Fla. 1959), the prosecutor informed the jury that the defendant had a right to an appeal but the State did not, and then he told the jury that "before each murder trial that is prosecuted in this circuit, where I'm the State

Attorney, a conference is held between me and my assistants to determine whether or not the facts in the case justify the State's giving maximum punishment under the law." Id. at 383-84. Against the State's assertion that such error should be considered harmless, this Court observed that "an error which might be viewed as harmless under many circumstances can assume proportions of utmost importance when equated to the possibility of a mercy recommendation in a capital case." Id. at 385.

Unfortunately, the harm caused by the various improper arguments was not considered by this Court on Defendant's direct appeal. Why not? This is Mr. Nichols' explanation for why he did not object to the 'show him the same mercy' argument:

> The tactical reason was, I believe, although I can't remember exactly what I was thinking that many years ago, is that when those kind of statements are made I think that they are offensive. I think they're offensive to a jury and sometimes I allow prosecutors to go ahead and make them so I can make a response to it in my rebuttal, and I'm sure it would have been my intention to do it that way here.

R.2-238. But Mr. Nichols also knew that such prosecutorial errors held some possibility of having a sentencing set aside.

> Q. Did you know, at the time you made that tactical decision, that that was a statement that had been clearly defined by the Supreme Court as an unnecessary appeal, calculated to influence the sentencing recommendation, and part of the reason for reversing the - - or setting aside a trial? Did you know that?

A. I thought it was, yes.

R.2-238.

In the case at bar, the ineffectiveness of counsel is patent. No excuse was offered. The prejudice is patent.

IV.

APPELLANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL DURING THE SENTENCING PHASE OF HIS TRIAL, BECAUSE COUNSEL FAILED TO OBJECT TO, AND THUS PRESERVE FOR REVIEW, NUMEROUS COMMENTS BY THE PROSECUTOR WHICH SUGGESTED THAT THE LAW REQUIRED A DEATH PENALTY IN THE INSTANT CASE

Responding to a question about whether he could recommend a death sentence, a prospective juror told the State:

> THE VENIREMAN: I just don't feel like I would be comfortable saying for someone to die even though he - - you know, the person may be found that they should.
>
> MR. BATEH: Even though the law indicated that there should be a recommendation - -
>
> THE VENIREMAN: Right.
>
> MR. BATEH: Even if the aggravating circumstances outweighed the mitigating circumstances and the law required a death recommendation . . ..

Trial.357. At this point, Mr. Nichols did object on the basis that the law never "requires" a death penalty. The trial court briefly assumed the questioning of the venireman but it made no effort to correct the erroneous impression which the prosecutor had made on the prospective jurors.

A few minutes later, the prosecutor returned to this line of questioning with another venireman:

> MR. BATEH: Okay. During the second part of the trial, during the penalty phase if I ask you to assume that this defendant has already been convicted of first degree murder, during that second phase, would you be able to recommend a death sentence if the aggravating factors outweighed the mitigating factors and the law called for a recommendation of death?
>
> THE VENIREMAN: Yes, sir.

Trial.365. This time, Mr. Nichols did not object. Shortly thereafter, a similar comment was again made:

> MR. BATEH: Would those views against the death penalty, would it interfere with your ability to vote for a death sentence during the penalty part of the trial if the facts and the law called for a recommendation of death?

Trial.367. Apparently encouraged by the lack of objections, a few minutes later, the prosecutor repeated his insidious suggestion to the prospective jurors:

> MR. BATEH: If, during the second part of the trial, the second phase of the trial, during the penalty phase would you be able to recommend a death sentence if the aggravating factors outweigh the mitigating factors and the law called for - - and the law and the facts called for a recommendation of death? Would the rest of you be able to vote for a recommendation of death?

Trial.379.

Under Florida law, it is clear that a prosecutor misstates the law when he says that the law requires a death penalty if the aggravating factors outweigh the mitigating factors, because a jury is never compelled or required to recommend a death sentence

under such circumstances. Franqui v. State, __ So.2d __, 26 FLW S695 (Fla. October 18, 2001); accord, Brooks v. State, 762 So.2d 879 (Fla. 2000); Henyard v. State, 689 So.2d 239 (Fla. 1996), cert. denied, 522 U.S. 846 (1997); Garron v. State, 528 So.2d 353 (Fla. 1988). In Franqui, this Court found that the misstatement was error but that it was not prejudicial to the defendant because, inter alia, the trial court gave defendant's requested instruction which told the jury that the weighing process was not to be a mere counting of factors but rather a reasoned judgment based on the nature of the aggravating and mitigating factors which they found. Nonetheless, this Court used the opportunity to caution prosecutors against making such incorrect statements of the law. Franqui at S701, n.8.

The Constitution does not allow any capital sentencing scheme which requires a death sentence under any particular set of facts. Woodson v. North Carolina, 428 U.S. 280 (1976). As this Court said in Alvord v. State, 322 So.2d 533 (Fla. 1975), cert. denied, 428 U.S. 923 (1976), rehearing denied, 429 U.S. 874 (1976), receded from on other grounds, 524 So.2d 422 (Fla. 1988):

> [t]he law does not require that capital punishment be imposed in every conviction in which a particular state of facts occur. The statute properly allows some discretion, but requires that this discretion be reasonable and controlled. No defendant can be sentenced to capital punishment unless the aggravating factors outweigh the mitigating factors. However, this does not mean that in every instance under a set state of facts the defendant must suffer capital punishment.

Alvord, 322 So.2d 533 (Fla. 1975).

In the case at bar, the prosecutor's comments to the prospective jurors carried a very real possibility that the jurors believed they did not have the right to exercise discretion if some particular set of facts was proven.

> Given that the imposition of death by public authority is so profoundly different from all other penalties, we cannot avoid the conclusion that an individualized decision is essential in capital cases.
>
> * * *
>
> The nonavailability of corrective or modifying mechanisms with respect to an executed capital sentence underscores the need for individualized consideration as a constitutional requirement in imposing the death sentence.

Lockett v. Ohio, 438 U.S. 586, 605 (1978).

> Thus, the rule in *Lockett* followed from the earlier decisions of the Court and from the Court's insistence that capital punishment be imposed fairly, and with reasonable consistency, or not at all. By requiring that the sentencer be permitted to focus "on the characteristics of the person who committed the crime," *Gregg v. Georgia, supra*, at 197, 96 S.Ct., at 2936, the rule in *Lockett* recognizes that "justice ... requires ... that there be taken into account the circumstances of the offense together with the character and propensities of the offender." *Pennsylvania v. Ashe*, 302 U.S. 51, 55, 58 S.Ct. 59, 60, 82 L.Ed. 43 (1937). By holding that the sentencer in capital cases must be permitted to consider any relevant mitigating factor, the rule in *Lockett* recognizes that a consistency produced by ignoring individual differences is a false consistency.

Eddings v. Oklahoma, 455 U.S. 104, 112 (1982), appeal after remand, 688 P.2d 342 (Okla.Crim.App. 1984), cert. denied, 470 U.S. 1051 (1985).

The Constitution simply does not allow a death sentence to be mandated by any particular set of circumstances. There cannot be an automatic death penalty if any particular set of facts is established. Nonetheless, the prosecutor's questions during voir dire certainly made that suggestion to the prospective jurors.

In its charge to the jury in the sentencing phase, the trial court stated

> it is your duty to follow the law that will be given to you and to render to myself an advisory sentence based upon your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty and whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist.

Trial.1449.

> Should you find sufficient aggravating circumstances do exist, it will then be your duty to determine whether mitigating circumstances exist that outweigh the aggravating circumstances.

Trial.1451. In view of the prosecutor's repeated suggestion that a death penalty recommendation could be required under certain circumstances, it is certainly possible that the jury construed the charge to mean that if sufficient aggravating factors were found, it **had to** recommend a death penalty unless sufficient mitigating circumstances were then found. This would preclude the jury from making a reasoned judgment about whether it should make a death penalty recommendation or whether justice would be "satisfied by life imprisonment in light of the totality of the circumstances present in the evidence." Alvord, 322 So.2d at 540. The import of this possibility

must be considered in conjunction with the effect of the prosecutors improper statements in the closing argument of the penalty phase, discussed more fully later in this brief.

V.

APPELLANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL DURING THE SENTENCING PHASE OF HIS TRIAL, BECAUSE COUNSEL FAILED TO OBJECT TO, AND THUS PRESERVE FOR REVIEW, ARGUMENT BY THE STATE WHICH TOLD THE JURY THAT THE UNDERLYING CRIME OF KIDNAPPING WAS AN AUTOMATIC AGGRAVATING FACTOR

At the guilt phase of the trial of this cause, the jury was instructed on both premeditated and felony murder. Trial.1226 et seq. Defendant requested a special verdict which would have asked the jury to specify whether a guilty verdict was based on premeditated murder or felony murder. That request was denied. Trial.1012. A general verdict was returned finding Defendant guilty of murder in the first degree. Trial.1271. We cannot know with absolute certainty whether the jury based its decision on the theory of felony murder theory or on premeditated murder. However, before trial, Mr. Bateh conceded that the evidence for felony murder was stronger than that for premeditated murder. Trial.86-87.

In closing argument at the penalty phase, as he began to enumerate the aggravating factors which the jury would consider, the prosecutor made the following statement:

> Number one, the defendant in committing the crime for which he is to be sentenced was engaged or an accomplice in the commission of or an attempt to commit or flight after committing or attempting to commit the crime of burglary or kidnapping.
>
> Basically what that says is if the murder occurred while the defendant was trying to commit a burglary or kidnapping. That has clearly been established. You have already found this defendant guilty of burglary. You have already found him guilty of kidnapping. That has been proved beyond a reasonable doubt.
>
> The reason that this is an aggravating circumstance that supports a recommendation of death is because crimes like burglary or kidnapping are so dangerous, so dangerous that our law makers have said if you commit a burglary or a kidnapping and there is a murder or a killing that occurs during that that is going to be an automatic aggravating circumstance that supports a recommendation of death.

Trial.1414-15.

This argument merely foreshadowed the jury instruction on the presence of this aggravating factor:

> The aggravating circumstances that you may consider are limited to any one of the following that are established by the evidence: One, the defendant in committing the crime for which he is to be sentenced was engaged or was an accomplice in the commission of an attempt to commit or flight after committing or attempting to commit the crime of burglary or kidnapping.

Trial.1450.

Under a long line of cases, the United States Supreme Court has consistently held that a capital sentencing scheme must "genuinely narrow the class of persons eligible for the death penalty." Zant v. Stephens, 462 U.S. 862, 877 (1983), on

remand, 716 F.2d 276 (5th Cir. 1983). "If the sentencer fairly could conclude that an aggravating circumstance applies to *every* defendant eligible for the death penalty, the circumstance is constitutionally infirm." Arave v. Creech, 507 U.S. 463, 474 (1993), on remand, 989 F.2d 1574 (9th Cir. 1993),
cert. denied, 507 U.S. 1029 (1993)(emphasis in original); accord, Stringer v. Black, 503 U.S. 222 (1992), on remand, 979 F.2d 38 (5th Cir. 1992).

If an aggravating factor fails to give guidance to a sentencer in making the choice between life and death, the aggravating factor is unconstitutionally vague. Richmond v. Lewis, 506 U.S. 40, 46 (1992). Further, in a "weighing" state such as Florida, it is constitutional error for the sentencer to give weight to an unconstitutionally vague aggravating factor even if other valid aggravating factors are present. Id.

This error was not considered on Mr. Thomas' direct appeal because his counsel, Mr. Nichols, did not make an objection to preserve the error for review. Thomas v. State, 693 So.2d 951, 953 n.4 (Fla. 1997), cert. denied, 522 U.S. 985 (1997). Counsel was ineffective. Counsel was ineffective because he was not aware of any case law which stated that the use of an automatic aggravator was reversible error. R.2-239-240. It is not obvious that the jury would have recommended a death sentence in the absence of the instruction of which Defendant now complains. The prejudice is patent.

VI.

APPELLANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL DURING THE SENTENCING PHASE OF HIS TRIAL, BECAUSE COUNSEL FAILED TO OBJECT TO, AND THUS PRESERVE FOR REVIEW, INSTRUCTIONS AND ARGUMENT WHICH UNCONSTITUTIONALLY AND INACCURATELY DILUTED THEIR SENSE OF RESPONSIBILITY FOR SENTENCING

During jury selection, the prosecution began to chisel at the potential juror's sense of responsibility for the sentencing recommendation they would ultimately make:

> MR. BATEH: Now it's important to realize that at this point that Judge Wiggins can impose a death sentence no matter what the jury recommends.

Trial.349.

In its final argument to the sentencing jury, the State said

> [t]he final decision is not made by you. It's made by Judge Wiggins. It's not a difficult process.

Trial.1410.

"It's not a difficult process." What message does this send to a jury?

Again, the State made this suggestion to the jury:

> the proper recommendation in this case is a death recommendation to the Judge who makes the final decision what the sentence will be.

Trial.1436. These statements undermined the jury's sense of responsibility for the recommendation it would make. These statements suggested to the jury that the responsibility for sentencing rested with the presiding judge who was free to ignore their recommendation. This powerfully dangerous suggestion was planted in the minds of the jurors contrary to established Florida law.

In 1994, an experienced prosecutor or criminal defense attorney knew the established law on this subject. A jury recommendation regarding imposition of the death penalty is entitled to deference unless the facts were "so clear and convincing that virtually no reasonable person could differ." Tedder v. State, 322 So.2d 908, 910 (Fla. 1975); accord, Hallman v. State, 560 So.2d 223 (Fla. 1990); Fead v. State, 512 So.2d 176 (Fla. 1987), receded from on other grounds, 545 So.2d 861 (Fla. 1989); Ferry v. State, 507 So.2d 1373 (Fla. 1987); Wasko v. State, 505 So.2d 1314 (Fla. 1987); Brookings v. State, 495 So.2d 135 (Fla. 1986); Garcia v. State, 492 So.2d 360 (Fla. 1986), cert. denied, 479 U.S. 1022 (1986).

In the case at bar, the prosecutors misleading statements to the jury about the responsibility for sentencing were actually reinforced by the statements of the trial court at the beginning of the sentencing hearing:

> The final decision as to what punishment shall be imposed rests solely with myself, however, the law requires that you, the jury, render to myself an

> advisory sentence as to what punishment should be imposed upon the defendant.

Trial.1323, and it was again compounded by the trial court's statement as it began to deliver the jury instructions:

> As you have been told, the final decision as to what punishment shall be imposed is my responsibility . . ..

Trial.1448-49.

In a capital sentencing proceeding, a jury is placed in an uncomfortable position. Jurors are asked to decide an awesome issue on behalf of their community and the guidance which they are given is, at best, incomplete. Given the enormity of the situation and the discomfort of the jurors in their roles, it is understandable that jurors could find solace in the suggestion that their role is minimal, rather than pivotal. However, a jury making a determination of whether a defendant will live or die must understand the extent of its responsibility if the decision is to be made responsibly. It is not permissible to cause the jury to believe that its decision has less importance than it actually does. The sentence to be decided is too important to be made by a decision maker laboring under false pretenses. The Constitution does not allow it.

> [I]t is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere. This Court has repeatedly said that under the Eighth Amendment "the qualitative difference of death from all other punishments requires a correspondingly

greater degree of scrutiny of the capital sentencing determination." California v. Ramos, 463 U.S., at 998-999, 103 S.Ct., at 3452. Accordingly, many of the limits that this Court has placed on the imposition of capital punishment are rooted in a concern that the sentencing process should facilitate the responsible and reliable exercise of sentencing discretion. See, e.g., Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982); Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) (plurality opinion); Gardner v. Florida, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977) (plurality opinion); Woodson v. North Carolina, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976).2

> FN2. See also Barefoot v. Estelle, 463 U.S. 880, 924, 103 S.Ct. 3383, 3406, 77 L.Ed.2d 1090 (1983) (BLACKMUN, J., dissenting) (Woodson's concern for assuring heightened reliability in the capital sentencing determination "is as firmly established as any in our Eighth Amendment jurisprudence"); Eddings v. Oklahoma, 455 U.S., at 118, 102 S.Ct., at 878 (O'Connor, J., concurring) ("[T]his Court has gone to extraordinary measures to ensure that the prisoner sentenced to be executed is afforded process that will guarantee, as much as is humanly possible, that the sentence was not imposed out of whim, passion, prejudice, or mistake"); Godfrey v. Georgia, 446 U.S. 420, 443, 100 S.Ct. 1759, 1772, 64 L.Ed.2d 398 (1980) (Burger, C.J., dissenting) ("[I]n capital cases we must see to it that the jury has rendered its decision with meticulous care").

In evaluating the various procedures developed by States to determine the appropriateness of death, this Court's Eighth Amendment jurisprudence has taken as a given that capital sentencers would view their task as the serious one of determining whether a specific human being should die at the hands of the State. Thus, as long ago as the pre-Furman case of McGautha v. California, 402 U.S. 183, 91 S.Ct. 1454, 28 L.Ed.2d 711 (1971), Justice Harlan, writing for the Court, upheld a capital sentencing scheme in spite of its reliance on jury discretion. The sentencing scheme's premise, he assumed, was "that jurors confronted with the truly awesome responsibility of decreeing death for a fellow human will act with due regard for the consequences of their decision...." Id., at 208, 91 S.Ct., at 1467. Belief in the truth of the assumption that sentencers treat their power to determine the appropriateness of death as an "awesome

> responsibility" has allowed this Court to view sentencer discretion as consistent with--and indeed as indispensable to--the Eighth Amendment's "need for reliability in the determination that death is the appropriate punishment in a specific case." Woodson v. North Carolina, supra, 428 U.S., at 305, 96 S.Ct., at 2991 (plurality opinion). See also Eddings v. Oklahoma, supra; Lockett v. Ohio, supra.

Caldwell v. Mississippi, 472 U.S. 320, 328-330 (1985), on remand, 481 So.2d 850 (Miss. 1985), cert. granted, 479 U.S. 1075 (1987), on remand, 517 So.2d 1360 (Miss. 1987); accord, Mann v. Dugger, 844 F.2d 1446 (11th Cir. 1988)(en banc), cert. denied, 489 U.S. 1071 (1989) (discussing the critical role of the jury in sentencing). The holding of Caldwell, as well as the concerns expressed therein, applies to Florida's capital sentencing scheme. Dugger v. Adams, 489 U.S. 401 (1989), rehearing denied, 490 U.S. 1031 (1989). The Caldwell Court discussed the remedy to be applied for the violation. Because it could not be said that the improper comments had no effect on the sentencing decision, the sentencing was found to be deficient under the requirements of the Eighth Amendment, the sentence was vacated, and the cause remanded for further proceedings. Caldwell, 472 U.S. at 341.

In 1985, the Fifth Circuit denied a motion for stay of execution which was based, in part, on a Caldwell claim. Addressing what was, arguably, a new claim being raised in a successive petition, the Fifth Circuit denied the petition, finding that failure to have included the claim in the prior petition was "an abuse of the writ. Claims must

be included in the prior petition if a competent attorney should have been aware of the claims at the time of the prior petition. That a competent attorney should have been aware of this claim is apparent from the Supreme Court's Caldwell opinion." Moore v. Blackburn, 774 F.2d 97 (5th Cir. 1985), cert. denied, 476 U.S. 1176 (1986) (citations omitted).

Despite the clarity of the law on this subject, despite the fact that the claim should have been apparent to a competent attorney, Mr. Nichols failed to ever object to these misstatements of the law. In fact, on direct appeal, this Court held that the error was not preserved for review. Thomas v. State, 693 So.2d 951, 953 n.4 (Fla. 1997), cert. denied, 522 U.S. 985 (1997).

In its arguments to the trial court on the Rule 3.851 motion, the State claimed that the Caldwell claim was without merit, because, unlike the instant case, the prosecutor in Caldwell had misled the jury about the nature and scope of appellate review in Mississippi. R.1-85-86. Actually, the prosecutor in Caldwell told the jury that their sentencing decision would be reviewed by the Mississippi Supreme Court. It was simply a slightly different way of trying to dilute a jury's sense of responsibility for its sentencing decision.

In arguing the merits of the instant Rule 3.851 motion to the trial court, the State also cited Sochor v. State, 619 So.2d 285 (Fla. 1993), cert. denied, 510 U.S. 1025

(1993), rehearing denied, 510 U.S. 1159 (1993), in which this Court held that Florida's standard jury instructions did not violate Caldwell. In Sochor, this Court also held that the Caldwell issue had not been preserved for review in that case. Sochor, 619 So.2d at 292.

VII.

APPELLANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL DURING THE SENTENCING PHASE OF HIS TRIAL, BECAUSE COUNSEL FAILED TO OBJECT TO, AND THUS PRESERVE FOR REVIEW, THE JURY INSTRUCTION REGARDING THE "COLD, CALCULATED, AND PREMEDITATED" AGGRAVATING FACTOR

In its charge to the sentencing jury, the trial court instructed on the "cold, calculated, premeditated" aggravator:

> Four, the crime for which the defendant is to be sentenced was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification.

Trial.1451.

This CCP instruction, as given, was found by this Court to be unconstitutional. Jackson v. State, 648 So.2d 85 (Fla. 1994), appeal after remand, 704 So.2d 500 (Fla. 1997), appeal after remand, 767 So.2d 1156 (Fla. 2000). However, this error was not considered on Mr. Thomas' direct appeal because his counsel, Mr. Nichols, did not make an objection to preserve the error for review. Thomas v. State, 693 So.2d 951, 953 n.4 (Fla. 1997), cert. denied, 522 U.S. 985 (1997).

At the hearing on the Rule 3.851 motion, Mr. Nichols did not even remember if the CCP instruction had been given at the conclusion of the sentencing phase of the trial. However, when asked if he had done any research to determine whether that instruction was presently under attack in the Supreme Court, Mr. Nichols replied "How would I do that? . . . What would I do? Read every appellate decision on a murder case to find out whether someone had raised that issue on a pending case? No, the answer is I never researched whether or not any pending cases had raised that issue."

R.2-226.

The simple answer to Mr. Nichols is that he could have asked the attorneys in the local public defender's office who routinely handle death penalty cases. He also could have asked the attorneys in the Second Circuit Public Defender's office who routinely handle appeals in capital cases. The Jackson case involved an appeal from the Circuit Court of Duval County and the appeal was being handled by the Public Defender for the Second Circuit. Further, the Jackson decision made it clear that the CCP instruction was constitutionally infirm for the same reasons HAC-type instruction had been found lacking in Espinosa v. Florida, 505 U.S. 1079 (1992), rehearing denied, 505 U.S. 1245 (1992), on remand, 626 So.2d 165 (Fla. 1993), cert. denied, 511 U.S. 1152 (1994); Maynard v. Cartwright, 486 U.S. 356 (1988); and Godfrey v.

Georgia, 446 U.S. 420 (1980), on remand, 246 Ga. 359 (1980), appeal after remand, 248 Ga. 616 (1981), cert. denied, 456 U.S. 919 (1982), rehearing denied, 456 U.S. 1001 (1982). Undeniably, the objection was obvious to some attorneys before Jackson was decided by this Court, because we know that Jackson's trial counsel preserved the issue for appeal.

In the case at bar, the order denying the Rule 3.851 motion summarily dismissed this claim, citing Thompson v. State, 759 So.2d 650 (Fla. 2000) and Downs v. State, 740 So.2d 506 (Fla. 1999) for the proposition that a defense attorney is not deficient for failing to object to standard instructions which have not been invalidated at the time of sentencing. In those cases, the actual holdings appear to be that the assistance of counsel in those cases was not ineffective because the Jackson decision would not have been available on direct review from those sentencing proceedings if the errors had been preserved for review. However, in the case at bar, the Jackson decision would have been available to this Court and should have resulted in the death sentence being vacated and the case being remanded for further proceedings.

VIII.

APPELLANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL DURING THE SENTENCING PHASE OF HIS TRIAL, BECAUSE COUNSEL FAILED TO OBJECT TO, AND THUS PRESERVE FOR REVIEW, THE JURY INSTRUCTION GIVEN REGARDING THE "HEINOUS, ATROCIOUS, AND CRUEL" AGGRAVATING FACTOR

In its charge to the sentencing jury, the trial court gave an instruction on the "heinous, atrocious, cruel" aggravator:

> 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 or 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 intended [sic] in heinous, atrocious, or cruel is one accompanied by additional acts that show the crime was conscienceless, pitiless and was unnecessarily torturous to the victim.

Trial.1450.

Although Defendant acknowledges that the instruction given was approved in Hall v. State, 614 So.2d 473 (Fla. 1993), cert. denied, 510 U.S. 834 (1993), he contends, nonetheless, that it is deficient under Espinosa v. Florida, 505 U.S. 1079 (1992), rehearing denied, 505 U.S. 1245 (1992), on remand, 626 So.2d 165 (Fla.

1993), cert. denied, 511 U.S. 1152 (1994). This instruction did not channel "the sentencer's discretion by clear and objective standards that provide specific and detailed guidance, and that make rationally reviewable the process the process for imposing a sentence of death." Godfrey v. Georgia, 446 U.S. 420 (1980), on remand, 246 Ga. 359 (1980), appeal after remand, 248 Ga. 616 (1981), cert. denied, 456 U.S. 919 (1982), rehearing denied, 456 U.S. 1001 (1982) (footnotes omitted). The jury needed additional instructions to address the "conscienceless" and "unnecessarily torturous" language. A decision that this case qualified as "heinous, atrocious, or cruel" required the jury to make fine distinctions. By failing to inform the jury how it could make these distinctions, the instruction did not give the jury the guidance which it needed. This was especially true in this case, where no body was ever recovered, there was no medical examiner to testify about the manner of death, and the jury was left to speculate about how Rachel Thomas had died.

This error was not considered on Mr. Thomas' direct appeal because his counsel, Mr. Nichols, did not make an objection to preserve the error for review. Thomas v. State, 693 So.2d 951, 953 n.4 (Fla. 1997), cert. denied, 522 U.S. 985 (1997).

CONCLUSION

In the case at bar, Mr. Nichols' representation of Defendant was so deficient that, on direct appeal, this Court believed

> Thomas planned the kidnapping and murder of his wife, Rachel, in order to avoid paying his part of a settlement agreement in their pending divorce. Thomas and a friend, Douglas Schraud, went to Rachel's house, September 12, 1991, the day before a substantial payment was due, and Thomas beat, bound, and gagged Rachel.

Thomas v. State, 693 So.2d 951 (Fla. 1997), cert. denied, 522 U.S. 985 (1997). This Court did not realize that the substantial payment had already been paid. The jury was undoubtedly also misled by the failure of counsel to present any evidence at trial, a failure which was the natural result of failing to prepare in advance of trial.

Even if this Court believes that the deficient performance of counsel is not a sufficient reason to vacate the judgment and sentence, the cumulative effect of the other errors presented - failure to object to misleading statements by the prosecutors during jury selection and during closing statements, failure to object or seek any corrective measures for the dilution of the jury's sense of responsibility for sentencing, failure to object or seek any corrective measures for the improper suggestion that a death penalty would be required under some particular state of facts, and failure to object to jury instructions which were unconstitutionally vague - the cumulative effect

of these errors is to undermine confidence in the result of the trial. The cumulative effect of these errors was to deny Mr. Thomas the due process of law promised under our federal and state constitutions. U.S. v. Hernandez, 227 F.3d 686 (6th Cir. 2000), cert. denied, 121 S.Ct. 1967 (2001), cert. denied, 122 S.Ct. 76 (2001); Alvarez v. Bond, 225 F.3d 820 (7th Cir. 2000), cert. denied, 121 S.Ct. 1192 (2001); Taylor v. Kentucky, 436 U.S. 478, 487 n.15 (1978); Jones v. State, 569 So.2d 1234 (Fla. 1990), appeal after remand, 612 So.2d 1370 (Fla. 1992), cert. denied, 510 U.S. 836 (1993).

The judgment and sentence entered by the trial court should be vacated and the cause remanded for a new trial.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Appellant's Initial Brief has been furnished to Curtis M. French, Esquire, Capital Collateral Appeals, Office of The Attorney General, The Capitol, Tallahassee, Florida 32399-1050; by mail delivery, this 6th day of November, 2001.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief has been printed in the Times New Roman 14-point font available in Corel WordPerfect 8, in compliance with Fla.R.App.P. 9.210.

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DALE G. WESTLING, SR., ESQUIRE
Florida Bar Number 203262
331 East Union Street
Jacksonville, Florida 32202
(904) 356-2341
Attorney for Defendant