IN THE SUPREME COURT OF FLORIDA

ROBERT JOSEPH LONG,

Appellant,

v. Case No. 74,512

STATE OF FLORIDA,

Appellee.

BRIEF OF THE APPELLEE

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STATEMENT OF THE CASE AND FACTS

Appellant Robert Joe Long was charged by indictment with kidnapping, sexual battery and first degree murder of Michelle Simms (R 1159 - 61). He entered a plea of guilty and following the imposition of a judgment and sentence of death, this Honorable Court on direct appeal affirmed the judgment but vacated the sentence and remanded for a new sentencing proceeding. Long v. State, 529 So.2d 286 (Fla. 1988).

On remand, appellant again sought to withdraw his plea and after a hearing the trial court denied the request (Vol. VII, H 1 - 114).

Thereafter, the court granted a change of venue and the case was tried in Volusia County. Hillsborough County Sheriff's Officer Randy Latimer testified that he went to the scene of the crime on May 27, 1984. Michelle Simms' body was nude, bound with rope and her throat was cut (R 329 - 330). Latimer interviewed Long at the Sheriff's Office on November 16, 1984. Long told him that on the evening prior to the 27th he had put some rope in the car, put a weapon in the car and went driving, looking for a prostitute.

He pulled up next to Michelle Simms who he thought looked like a prostitute. She asked if he wanted a date, he asked the price and she replied fifty dollars. He agreed and they drove one half to one mile from the scene. He pulled a knife on her, made her undress, reclined the passenger seat back to the prone position and tied her up. Then they left the area; he drove

fifteen to twenty miles to eastern Hillsborough County (Brandon area) where he raped her (R 333 - 334). He talked to her for a few minutes, told her he was going to take her back, but didn't; instead he drove her out to Plant City where he tried to strangle her but she wouldn't lose consciousness. He hit her on the head with a club to make her lose consciousness but he didn't know if she lost it or not. Long threw her out of the car, cut her throat and left her on the side of the road. He scattered her clothes in the area. Long admitted that he purchased rope and had sections of it cut up in his glove compartment. Long stated that he drove fifteen to twenty miles after the rape to where he killed her. A knife was found at Long's apartment and appellant said it was the same weapon he used to kill Simms (R 335 - 336).

The witness also recited that Long was convicted of the crimes against Sandra Jensen. Long admitted that while in Pasco County he drove by a house with a for sale sign. He knocked at the door and announced he was interested in buying. When allowed inside, Long pulled a gun and performed a sexual battery on her. When asked why he killed Simms, Long responded that it was his secret (R 338 - 340).

Officer Jerry Nelms found a large knife lying in the woods about fifty feet from Long's apartment (R 345 - 348).

Officer Troy became involved in the Sandra Jensen sexual battery case on March 6, 1984, and in his interview she revealed the details of the incident. On cross examination the witness admitted that the victim Jensen was not killed and she was not a prostitute (R 355 - 360).

Associate Medical Examiner Robert Miller performed autopsy on Michelle Simms. He opined the victim was beaten, stabbed and strangled to death (R 368). He said the victim was alive at the time ligature tightened around the neck -- pain was associated with it -- death by asphyxiation is almost never instantaneous (R 372). He opined the victim was alive when blows struck to her head (R 374 - 375).

There were two deep cuts in the throat, one of which cut through the carotid artery and across the windpipe; death by bleeding is inevitable with such an injury. Victim was alive when these cuts were inflicted and pain is associated with these wounds (R 376 - 379).

Officer Terry Rhoades interviewed rape victim Linda Nuttal at her home in May of 1984 (R 387). He related the details she had described (R 388 - 92). Long pled guilty to three counts of sexual battery, one count of kidnapping, five counts of armed robbery and one count of armed burglary (R 393). The parties stipulated to the offenses Long was convicted of in Pasco and Pinellas Counties in 1985 (R 396 - 97).

The defense called appellant's mother Lorella Long who described her life and her efforts in raising appellant. Long had suffered head injuries and she wore sexy outfits as a barmaid. Appellant had surgery to remove breast tissue because of a hormonal imbalance (R 404 - 424). She did not abandon appellant, made sure he had food and clothing. She loved him and worked to support him rather than abuse drugs and alcohol. The

Simms murder occurred fourteen years after he moved out of her house. She was not abusive to him (R 425 - 433).

Appellant's father also testified, relating that his marriage had broken up but that Mrs. Long worked hard and loved appellant (R 435 - 442).

Cynthia Bartlett, appellant's ex-wife, testified via video deposition. Appellant had a difficult time accepting authority in high school and used drugs on occasion. He fought with his mom who was pushy (R 445 - 451). She never saw appellant abuse his mom (R 456), nor saw Long beat or abuse her (R 470). Appellant described his 1974 motorcycle accident (R 459) Appellant's mother did not take cocaine or drugs and she fed appellant regularly and provided a home to him (R 470 - 471). When Long referred to women as "sluts" they resembled his mother (R 485).

Defense witness Dr. John Money a sexologist (R 525) became involved in this case after Long began a correspondence with him (R 533). He thought appellant was a sexual sadist, had bipolar mood disorder and antisocial personality, entered into an altered state af consciousness and opined that the two statutory mental mitigating factors were present (R 545 - 561). On cross examination the witness stated that while in an altered state of consciousness some one might or might not recall the details of the crimes (R 563 - 64). He thought there was no inconsistency in diagnosing appellant to be a sexual sadist - who acts purposefully to inflict pain -- with Long's statement to police

that he hit victim in the head with a board "so she would not suffer" (R 569 - 570). Money opined that at the time he killed Simms, he had no control over it because of his altered state of consciousness; the witness could not answer why he didn't also kill Nuttal or Jensen in this altered state (R 571). His experience was limited; he had examined only two people -- one of them Long -- charged with murder to determine their mental status. His expertise was not forensic psychiatry -- he had not testified on competency in a criminal trial, could not quote the legal criteria to determine competency, has not testified in court as to whether a criminal defendant was legally sane but he thought experience was important (R 571 - 79). Money admitted, giving information to Long as to his condition -- he didn't think Long was a con artist (R 581, 585), and he did not ask Long for details of the Simms' murder or think it important to question him (R 586 - 587).

Defense witness Dr. Robert Berland, a forensic psychologist opined that Long had a bipolar mood disorder and an organic personality syndrome (R 628). He also had two non-psychotic disorders, paraphilia and antisocial personality disorder (R 657). Berland explained that Nuttal and Jensen were not murdered because they were middle class looking whereas Simms looked like she was leading a sleazy, promiscuous life-style (R 663). He opined that long had no substantial impairment in the ability to appreciate the criminality of his act but there was substantial impairment in the ability to conform his conduct to the

requirements of law (R 666) and he opined Long was under the influence of extreme mental or emotional disturbance (R 667).

On cross examination the witness conceded he was always called by the defense in the last three years; not once by the prosecution (R 669 - 670). He did not believe Long when he said he beat victim with board so she would not suffer. The witness found Long to be a manipulator and con artist. His explanation of rage was not an outburst without thought (R 672 - 73). Long did not tell him why he killed Simms. He did not say Long was in an altered state of consciousness (R 674, 676 - 77). He agreed appellant had an antisocial personality disorder (R 677). Appellant is of above average intelligence (R 687). He acknowledged that his ideas on the reason Long killed were speculative (R 693).

State rebuttal expert psychiatrist Dr. Daniel Sprehe testified that appellant discussed the Simms murder and the planning involved -- he had equipment with him (length of rope, club, piece of wood, knife, auto that could be locked by electric lock, reclining seat for use to overcome victim) (R 733). Sprehe opined Long made conscious decision to kill, would not have done it if policeman standing there (R 735). Long suffered from no psychosis (R 736); did not have type of brain damage that would affect ability to think and reason. Long told Sprehe he killed Simms to eliminate a witness (R 743). Long does not fit profile for sadism; he's a rapist but does it for sexual satisfaction, not for inflicting pain (R 745). The witness opined that Long

was antisocial personality (R 737), was in total control at the time of the Simms' murder (using trickery, planning, subterfuge), was not under the influence of extreme mental or emotional disturbance nor was his capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of law substantially impaired. Many people with Long's background are quite successful and overcome their background (R 746 - 748).

The jury recommended death by a vote of 12 to 0 (R 1316). The trial court agreed and imposed a sentence of death finding as aggravating factors that (1) the capital felony was committed while engaged in a kidnapping; (2) the defendant was previously convicted of another felony involving the use of violence to the person; (3) that the homicide was cold, calculated and premeditated without pretense of moral or legal justification; and (4) was especially heinous, atrocious or cruel. The court found the presence of two statutory mitigating factors; (1) committed under the influence of extreme mental or emotional disturbance and (2) capacity to appreciate criminality of conduct or conform to requirements of law was substantially impaired (R 1328 - 39).

SUMMARY OF THE ARGUMENT

As to Issue I: The lower court did not err in denying appellant's motion to withdraw his pleas. The law of the case doctrine precluded relitigation of the claim urged on Long's prior appeal and the trial court did not err in disbelieving Long's testimony.

As to Issue 11: The lower court did not err reversibly in permitting hearsay testimony regarding the Jensen-Nuttal rapes. Chandler v. State, 534 So.2d 701 (Fla. 1988), permits hearsay testimony in the penalty phase, appellant was given the opportunity to rebut but his counsel candidly admitted the hearsay reports were accurate. Error, if any, is harmless as appellant stipulated to these convictions.

As to Issue 111: The lower court did not err in allowing the rebuttal testimony of Dr. Sprehe as appellant chose to make his mental/emotional condition an issue at penalty phase and Dr. Sprehe's testimony was relevant on this issue.

As to Issue IV: The lower court did not err in allowing Dr. Sprehe to testify that Long admitted killing the victim to eliminate a witness since it rebutted the defense expert altered state of consciousness-fugue state thesis. Any error would have to be deemed harmless since the jury was not instructed on it as an aggravating factor and the trial judge did not consider or find it as aggravating.

As to Issue V: The lower court did not err in permitting cross-examination of Dr. Berland on whether Long knew right from

wrong because Long's mental state was relevant under *F.S. 921.141(6)(b)* and *(f)*. Ponticelli v. State, So.2d ___, 16 F.L.W. S669 (Fla. 1991).

As to Issue VI: The lower court did not err in denying defense request to prohibit television cameras. They were unobtrusive, no request for hearing was made and no allegation was urged that witnesses were or would be inhibited.

As to Issue VII: The lower court did not commit any error under Caldwell v. Mississippi, 472 U.S. 320 (1985). The defense requested special instruction was confusing and erroneous and there was no denigration of the jury's responsibility.

As to Issue VIII: Appellant's complaints regarding prosecutorial argument may not be considered for the first time on appeal since no objection was interposed below. No fundamental error is apparent and some of the challenged comments cannot even be construed as improper.

As to Issue IX: The lower court did not err in considering transcripts of other mental health experts' testimony as it was requested by the defense, not objected to below and was considered only for a limited purpose. The trial court did not violate the plea agreement.

As to Issue X: The lower court did not err in finding the presence of F.S. *921.141(5)(i)*. This was not a spur of the moment killing but a highly premeditated act occurring miles away from the completed rape.

As to Issue XI: The lower court did not err in failing to consider and find proffered nonstatutory mitigating circumstances. The defense informed the court it was relying only on the two statutory mental mitigating factors. See Lucas v. State, 568 So.2d 18 (Fla. 1990). Moreover, the trial court's order reflects it considered all relevant data about Long.

As to Issue XII: The lower court did not err in sentencing appellant to death. His moral culpability is such as to merit the ultimate sanction. Appellant is not insane, the mental health experts are in sharp disagreement as to his condition or whether any mental mitigating factors are applicable and Long's purposeful conduct demands death.

As to Issue XIII: The trial court correctly determined that the statutory aggravating factors outweighed the nonstatutory mitigating.

ARGUMENT

ISSUE I

WHETHER THE LOWER COURT ERRED BY DENYING APPELLANT'S MOTION TO WITHDRAW HIS PLEAS.

At a hearing on February 10, 1989, defense counsel brought forward appellant's motion to withdraw his plea of guilty (Vol. VII, H 9). Defense counsel mentioned that he thought the Fl'orida Supreme Court opined on the motion to withdraw plea cut off any inquiry from everything that went before under the law of the case doctrine. He added that he thought Long could still litigate the claim that it was Long's understanding at the time of the plea bargain that the state could not use evidence of any crimes contained within his confession other than the Michelle Simms murder (H 47 - 48). Long allegedly believed that this bargain included the proceeding to be held in Pasco County (ultimately tried in Fort Myers). Williams-rule evidence was used against him there (H 48). Thus because of the misapprehension, he didn't get what he bargained for and Long desired to withdraw his plea and be tried on all the murder counts (H 49).

Long testified that the plea bargain dated September 23, 1985 (pages 1340 - 1343 of the prior appeal in Case No. 69,259) he had never read. Long claimed that his attorney Charles O'Connor verbally explained to him that he would plead guilty to eight murder charges and get seven life sentences with the state getting one opportunity for a death sentence in the eighth case

(H 55). He assumed that seven cases in which he got life could not be used against him in court anywhere. He stated that in the Pasco County trial held in Fort Myers the state used these additional charges as aggravating factors (H 56 - 57). Long reiterated that he did not read the plea agreement (H 58). Long entered the plea agreement to limit his exposure to the death penalty and he didn't want to go through eight trials (H 65).

He claimed not to be aware he was waiving the right to appeal evidence seized from his apartment and car and the knife used in the Simms' sentencing (H 69).

Former trial counsel Charles O'Connor testified that he was aware during his representation that Long had confessed to all eight of the first degree murders. He identified Court's exhibit 1, the plea agreement in September of 1985 (H 76) No prosecutor from a jurisdiction other than Hillsborough County signed it. Long had already been sentenced to death in the **Pasco** County case for the murder of Virginia Johnson. O'Connor went over the plea agreement with Long prior to Long signing it. He testified that he explained in paragraph 6 that the state could use in the sentencing phase of the Simms' trial evidence stemming from the Johnson-Pasco County case but that nothing in the seven other Hillsborough County homicides could be used in aggravation in the Simms' case. O'Connor was satisfied Long understood this (H 77 - 78). In fact in December of 1985 Long attempted to withdraw his **plea** in front of Dr. Griffin, the judge said he would allow it and that O'Connor requested a 24-hour window to confer with

appellant. Thereafter, he and attorney Norgard spent substantial time explaining the consequences of withdrawing the plea. Long thereafter ratified and reaffirmed the plea bargain; he elected to continue it in place (H 79).

O'Connor insisted that he went over the plea agreement with appellant (H 79). He explained that he was trying to avoid four or five death sentences in place -- attempting to minimize Long's exposure to the death penalty for eight Hillsborough homicides and he explained that to Long and Long made the election to follow that approach (H 80). He recalled talking to him about the use of the other seven pleas in the Simms' case -- the fact they could be used somewhere else, other than Hillsborough County, was not brought up (H 81). He noted that he was apprehensive that the admissibility of Long's confession would be sustained (H 82). He made no legal or factual misrepresentations to Long. He did not recall advising Long that other state Attorneys were part of this plea bargain. Long made the final decision to accept the agreement (H 84)

O'Connor denied telling Long that these offenses could not be used "in court" ("I don't see why I would say something that global") (H 85).

Long insisted he never read the plea bargain (H 96).

The court referred to the September 23, 1985 plea transcript, the December 11, 1985 Motion to Withdraw transcript

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and the December 12, 1985 transcript reaffirming the plea (H 99).[1]

After argument, the court alluded to these transcripts and commented that this hearing constituted a credibility issue (H 113) and that based on the transcripts as well as the testimony of O'Connor and Long that appellant "knew full well the parameters of all aspects of this particular plea agreement" and the motion was denied (H 115 - 116).

The trial judge made a credibility determination that he did not believe Bobby Joe Long (H 113 - 116). As poetically observed many years ago in Creamer v. Bivert, 214 Mo. 473, 113 S.W. 1118:

> "We well know there are things of pith that cannot be preserved in or shown by the written page of a bill of exceptions. Truth does not always stalk boldly forth naked, but modest withal, in a printed abstract in a court of last resort. She oft hides in nooks and crannies visible only to the mind's eye of the judge who tries the case. To him appears the furtive glance, the blush of conscious shame, the hesitation, the sincere or the flippant or sneering tone, the heat, the calmness, the yawn, the sigh, the candor or lack of it, the scant or full realization of the solemnity of an oath, the carriage and mien. The brazen face of the liar, the glibness of the schooled witness in reciting a lesson, or the itching overeagerness of the swift witness, as well as honest face of the truthful one, are alone seen by him. In short, one witness, may give testimony that

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[1] These are also found at R 1778 - 1801, R 1574 - 1643, and R 1757 - 1777 of the record on appeal No. 69,259. The plea agreement is also recited at fn. 2 of decision 529 So.2d 286, 288.

> reads in print, here, as if falling from the lips of an angel of light, and yet not a soul who heard it, nisi, believed a word of it; and another witness may testify so that it reads brokenly and obscurely in print, and yet there was that about the witness that carried conviction of truth to every soul who heard him testify."

And less poetically but equally validly the Supreme Court commented in Wainwright v. Witt, 469 US. 412, 83 L.Ed.2d 841, 858 (1985):

> As we stated in Marshall v. Lonberger, supra, at 434, 74 L.Ed.2d 646, 103 S.Ct. 843:
>
> > "As was aptly stated by the New York Court of Appeals, although in a case of rather different substantive nature: 'Face to face with living witnesses the original trier of the facts holds a position of advantage from which appellate judges are excluded. In doubtful cases the exercise of his power of observation often proves the most accurate method of ascertaining the truth . . . How can we say the judge is wrong? We never saw the witnesses .To the sophistication and sagacity of the trial judge the law confides the duty of appraisal.' Boyd v. Boyd 252 NY 422, 429, 169 NE 632, 634.

See also Demps v. State, 462 So.2d 1074 (Fla. 1984) (Supreme Court will not substitute its judgment for that of trial court on questions of fact such as credibility of witnesses).

The lower court also correctly denied the requested relief because of the law of the case doctrine. On Long's prior appeal from the judgment and sentence imposed for the Simms' murder he raised as an issue the claim that the trial court should have

vacated the plea. This Court stated in Long v. State, 529 So.2d 286, **288 (Fla. 1988):**

> "The state agreed to utilize any of the Hillsborough convictions resulting from this plea agreement as aggravating factors in the penalty phase of the Simms case, but retained the right to use prior convictions obtained in other counties as aggravating factors."

See also 529 So.2d at **288**, fn. 2.

Appellant may not assert now a claim that the agreement was something other than what this Court has already determined. Cf. Tillman v. State, So.2d (Fla. Case No. **74,756**, opinion filed October **17, 1991).**

Appellant contends that he did not understand the plea agreement, that he had not read it and his counsel did not explain. As mentioned, supra, appellant's prior trial counsel offered contrary testimony **and** the trial judge disbelieved Mr. Long based on the testimony before him and the transcripts of the prior hearing.[2] Appellee has no desire to engage at this late date in a debate with Long with whether or not this Court erred or ruled correctly on his prior attempt to have this Court rule that the trial court had erred in not vacating the plea. This

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[2] The court indicated that it was relying on the September 23, **1985** entry of plea (found at R **1778 - 1801** of Appeal Case No. 69,259) the December 11, 1985 Motion to Withdraw Plea Transcript (R **1574 - 1643 of** Appeal 69, *259)* and the December **12, 1985** transcript wherein Long agreed not to withdraw his pela (R 1757 - **1777 of** Appeal **69,259)** See accompanying Motion to Take Judicial Notice.

Court rejected that claim in 1988 and with the denial of rehearing the law of the case doctrine precludes a revisit.

The trial court did not err in concluding that appellant was not truthful as the prosecutor argued below (Vol. VII, H 101 - 107; H 112 - 115). The instant case is distinguishable from cases cited by appellant which deal with an honest misunderstanding of an ambiguous plea bargain.

ISSUE II

WHETHER THE LOWER COURT ERRED BY DENYING THE DEFENSE MOTION TO EXCLUDE HEARSAY TESTIMONY BY TWO DETECTIVES RELATING DETAILS BY VICTIMS OF TWO UNRELATED RAPES.

At a hearing prior to the sentencing proceeding in Volusia County, a discussion occurred regarding the use of hearsay evidence. The defense mentioned that the Chandler decision[3] was "simply wrong" (R 980). The court said it would reserve ruling and see how the testimony develops (R 981). The defense also argued that to the extent that F.S. 921.141 allowed hearsay, it was unconstitutional (R 983). The prosecutor replied that in the last trial the state had used a case detective to discuss a woman's rape and the court might want to answer the question so that he could take appropriate steps to bring in the victim (R 984). The court said it would reserve ruling (R 985).

At the sentencing phase, the prosecutor mentioned the two rapes -- of victims Nuttal and Jensen (R 265). The prosecutor mentioned that these two women had been under subpoena, that he did not think defense counsel wanted these two victims near the courthouse, that he (the prosecutor) thought he could utilize the detectives to elicit the statements they took from these victims, and these women are emotional about the situation (R 268). The

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[3] Chandler v. State, 534 So.2d 701 (Fla. 1988).

defense repeated its belief that Chandler was wrongly decided (R 272) and objected an hearsay grounds (R 274).

The prosecutor added that there were indicia of reliability. There were certified copies of the two convictions, Long had made his own statement to Officer Latimer confessing to one crime (the Jensen case) and Long pleaded guilty to the other case (the Nuttal case) (R 274 - 276). Defense counsel acknowledged that he had nothing to rebut on this matter (R 278). Defense counsel further conceded that his understanding of the facts from the police reports "it's complete and correct." The court praised counsel's candor (R 280).

At the sentencing phase the prosecutor called Pasco County Sheriff's Officer Charles Troy, Jr., and Officer Terry Rhoades. Defense counsel objected on hearsay grounds "to protect the record" (R 351). Troy interviewed rape victim Sandra Jensen in March of 1984. Ms. Jensen reported that a man appeared at her residence to inquire of its price since she had a "for sale" sign on the lawn. She opened the door, he forced his way in, placed his arm around here neck and put a gun to her temple. The assailant walked her to the bedroom area, took rope from his pocket, tied her hands behind her and taped here eyes shut. He cut the front of her blouse open and made her perform oral sex on him. He then removed her pants and raped her. He removed her jewelry, rummaged through the dresser drawers, returned to digitally penetrate her rectum and vagina, bit her .breasts and thighs and left the room. When she felt he had left the house,

she freed her hands and fled to a neighbor's house (R 356 - 357) Troy testified that Long was arrested for this offense and was convicted in April of 1985 of four counts of sexual battery, robbery, burglary and kidnapping (R 358). On cross examination the witnesses conceded that Long had not killed this victim and that she was not a prostitute (R 360).

Officer Rhoades interviewed victim Linda Nuttal in May of 1984. She had run an ad in the paper attempting to sell furniture. A man telephoned and said he was interested in looking at it. A man arrived at her door at 10:00 a.m. and he identified himself a3 the prior caller but did not identify himself by name. As they entered the bedroom he pushed her to the floor. He tied her arms behind her with rope and threatened to kill her if she did not shut up. He blindfolded and gagged her, removed her shorts, cut her blouse with a knife. They moved to a den where he forced her to perform oral sex and then raped her (R 386 - 391). He looked through the bedroom and took two rings from her. Appellant was arrested for this incident and Long entered guilty pleas to three counts of sexual battery, one count of kidnapping, five counts of armed robbery and one count of armed burglary (R 392 - 393). On cross examination the defense elicited that Long assured the witness he would not hurt her and there was nothing to suggest she was a prostitute (R 394 - 95).

The parties stipulated to the multiple offenses that appellant was tried and convicted of an April 17, 1985 and to which he plead guilty on July 12, 1985 (R 396 - 397).

In Chandler v. State, 534 So.2d 701 (Fla. 1988), this Court held that *F.S. 921.141(1)* was not unconstitutional on its face or as applied. Three, the state used hearsay testimony from a police detective concerning statements made by a police chief, another detective and a state expert.

> "That Chandler chose not to rebut any hearsay testimony does not make the admission of such testimony erroneous."

(text at 703)

That appellant, below, opined that Chandler was wrong and should not be followed does not make it so. We agree with Chandler and disagree with Long. Accord, Lucas v. State, 568 So.2d 18, 21 (Fla. 1990); Hitchcock v. State 578 So.2d 685 (Fla. 1990);[4] Tompkins v. State, 502 So.2d 415, 419, 420 (Fla. 1986).

Whatever theoretical argument may have been available -- that the hearsay content of the report of rape victims Jensen and Nuttal to investigating officers was not reliable -- evaporated with the candid response of defense counsel to the court's inquiry that the facts from the police reports were "complete and correct" (R 280). Appellant may not at this time, ab initio, challenge them. To further support the reliability of the Jensen and Nuttal statements we have the fact that Long was found guilty after a trial in the Jensen incident and he plead guilty to the

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[4] Even if the testimony were to be held inappropriate, any error would be harmless in light of the stipulation as to the convictions for these offenses (R 396 - 397). Cf. Johnson v. State, 465 So.2d 499 (Fla. 1985); Tompkins, supra.

Nuttal crimes (R 358, 392 - 93, 396). Moreover, when appellant confessed to Hillsborough County Officer Randy Latimer his commission of the Simms' murder, he also admitted the crimes on Jensen (R 339 -340). Long was given the opportunity to rebut the matter but his counsel said "I don't have anything I can rebut" (R 280).

Appellant relies on Rhodes v. State, 547 So.2d 1201 (Fla. 1989), a decision which post dates the June 26, 1989 sentencing proceedings sub judice. Nevertheless, Rhodes is distinguishable. First of all Rhodes involved multiple error (use of a videotape of other victim's testimony, improper cross examination of a defense witness by the state, and improper closing arguments by the prosecutor). Secondly, apparently in Rhodes the only purpose for introducing the tape of the sixty-year-old rape victim in Nevada was to support the aggravating factor prior felony conviction involving the use or threat of violence to the person and the testimony by the victim as to the emotional trauma she suffered "was irrelevant, and highly prejudicial" to Rhodes' case. 547 So.2d at 1205. And, it would seem in that instance, the only way to refute the videotape would be to have the victim present to cross examine her regarding the resulting emotional trauma she suffered; even if the defendant wanted to testify to rebut it, he would be in no position to attest to her feelings,

In contrast, the testimony relating to Nuttal's and Jensen's rapes was factual concerning the circumstances of the offense and did not deal with resulting emotional trauma, the factual matters

were not disputed by the defense and Long could not and did not want to rebut them. Additionally, while the prosecutor certainly did seek to introduce the Nuttal-Jensen evidence in support of *F.S. 921.141(5)(b)*, that is not the only legitimate purpose for its introduction. The entire thrust of appellant's presentation to the jury dealt with the mental and emotional culpability of Long in the Simms' homicide. Defense witness Dr. Money was offered to have the jury believe that Long was in an altered state of consciousness, a fugue state (R 470) and defense witness Dr. Berland opined a "rage" theory to explain appellant (rejecting an altered state of consciousness theory) (R 670 - **77)**. Berland acknowledged Long was a con artist and manipulator (R **672)** and Money didn't think he was (R 585). State witness Dr. Sprehe disagreed with Money and Berland and didn't believe either of the two statutory factors -- *921.141(6)(b)* and *(f)* -- were applicable **(R 746 - 47),** opined that long made conscious decision to kill (R 735) and had no psychosis (R 736), or brain damage that would affect the ability to think and reason **(R 743).** He disagreed with the judgment that long was a sexual sadist -- rather appellant raped for sexual satisfaction, not to inflict pain (R 745). In short, the evidence of Long's behavior with Nuttal and Jensen is helpful to explain whether Long is a cunning rapist or somehow should be regarded as less culpable than his conduct would suggest. The testimony rebuts the mitigating factors urged.

ISSUE III

WHETHER THE LOWER COURT ERRED BY ALLOWING DR. SPREHE TO TESTIFY IN REBUTTAL BECAUSE HE WAS APPOINTED TO DETERMINE COMPETENCE AND SANITY RATHER THAN TO DETERMINE AGGRAVATION AND MITIGATION.

At the hearing conducted on February 10, 1989, the trial court considered defense counsel's motion to suppress the testimony of Dr. Daniel Sprehe (R 1219 - 21; Vol. VII, H 25 - 46). In the motion appellant contended that Dr. Sprehe was appointed to examine Long for competency by an order dated May 8, 1985 and that statements given were improperly used for rebuttal, contrary to *Rule 3.211(e)* R. Cr. P. (R 1219). The prosecutor admitted at the hearing that he had called Dr. Sprehe in rebuttal in the prior sentencing proceeding to rebut the defense effort to establish the two mental mitigating circumstances (H 27).

Defense counsel did not intend to call any psychiatrist in the pending sentencing proceeding. The prosecutor responded as to his intention to call Dr. Sprehe if the defense elicited from a defense expert testimony regarding the establishment of mitigating circumstances (H 28). Former trial counsel O'Connor had no recollection of previously filing a motion to have Long examined for competency (H 30). The prosecutor mentioned that within his file he had a defense notice of intent to rely on insanity elicited May 1, 1985, filed by Ms. O'Connor (H 33). The Court concluded that Long's attorney - Mr. O'Connor -- initiated the appointment of Dr. Sprehe pursuant to the rules. Defense counsel argued that pursuant to *Rule 3.211(e)*, a witness such as Dr.

Sprehe could be used only for competency determination purposes, not for other purposes (H 35 - 37). The prosecutor argued that this was not an appointment of a confidential expert pursuant to *Rule 3.216(a)* and the court could order a sanity examination be done by Judge Griffin's order (H 37 - 38; R 1219 - 21). The prosecutor did not believe *Rule* 3.211 barred his use of the experts to rebut an insanity defense (H 38).

The court indicated that his question of who initiated the action which led Judge Griffin to appoint Dr. Sprehe was the Estelle v. Smith decision and its progeny (H 41 - 42) and the court opined that under state decisions the prosecutor could use the expert in rebuttal. The motion was denied (H 42 - 43), the court noted that Judge Griffin's order also directed a sanity at the time of the offense examination (H 44).

Dr. Sprehe testified at penalty phase as a rebuttal witness and after his testimony, defense counsel renewed his objection and moved to strike Dr. Sprehe's testimony on the ground previously urged and the court explained on the record the reasons for denial (R 776 - 777). At a motion for new trial the trial court repeated its ruling (R 899).[5]

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[5] The record also includes the transcript of May 6, 1985, in front of presiding Judge Griffin wherein the prosecutor informed the court that defense counsel had filed a notice of intent to rely on insanity and the prosecutor requested two experts be appointed. The court appointed Dr. Sprehe and Dr. Gonzalez (R 1997).

To the extent that appellant may now be complaining that the precepts of Estelle v. Smith, supra, may have been violated, he is precluded from doing so. The thrust of his argument below was that *Rule 3.211(e)* only permitted testimony in proceedings to determine competency (Vol. VII, H 35; R **1317**). He may not alter the basis of his objection on appeal. Steinhorst v. State, 412 So.2d 332 (Fla. **1982**); Occhicone v. State, 570 So.2d 902 (Fla. **1990**).

But even if preserved, it would be meritless.

In Preston v. State, **528** So.2d 896 (Fla. **1988**), this Court rejected a post-conviction attack asserting a violation of Estelle **v.** Smith, **451** U.S. 454, **68** L.Ed.2d **359 (1981)**, noting inter alia, that the defendant (unlike in Estelle) underwent a court ordered psychiatric examination only after placing his sanity in issue and after notice to counsel; additionally, the psychiatric testimony was presented after he had opened the door through the introduction of psychiatric testimony of his own on the subject. In Hargrave v. State, **427** So.2d 713 (Fla. **1983**), the court similarly found Estelle to be distinguishable where the state used a psychologist to testify regarding statutory mitigating circumstances after the defense had requested a mental competency determination.

Appellant's filing of a notice of insanity defense (Vol. VII, H **33** - 34), the prosecutor's subsequent request to appoint two doctors and the court's appointment of Dr. Sprehe and Dr. Gonzalez (R 1997, R 1220), appellant's use of mental health

experts in the penalty phase to establish mental and/or emotional mitigating factors which the state should be permitted to rebut requires rejection of any Estelle v. Smith claim.[6]

See Ponticelli v. State, ___ So.2d ___, 16 F.L.W. 5669 (October 10, 1991), wherein this Court opined:

> " . . . we reject Ponticelli's contention that it was error to allow the state to elicit Dr. Mill's opinion that Ponticelli had the ability to differentiate between right and wrong and to understand the consequences of his actions. While this testimony is clearly relevant to a determination of a defendant's sanity, it is also relevant in determining whether circumstances exist under section 921.141(6)(b) (the defendant was under the influence of extreme mental or emotional disturbance) or section 921.141(6)(f) (defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired).
>
> (text at S672)

Long argues that ultimately the defense never used an insanity defense and entered into a plea agreement instead; he reasons that neither Long nor his counsel envisioned that the information furnished to Dr. Sprehe could be used against him in a penalty proceeding. But appellant and his counsel were aware from the judge's order that copies of the findings on competence were to be furnished to all parties and Dr. Sprehe testified he

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[6] It would also appear that Long previously waived any complaint with Sprehe's testimony by failing ta object when Dr. Sprehe testified in the prior sentencing proceeding in Hillsborough County without objection (Vol. VII, H 26 - 27).

evaluated Long both for competency and criminal responsibility at the time of the crime (R 770 - 71). It is not unfair to a defendant to use in rebuttal statements taken in the absence of Miranda warnings, whether they be given by the accused during an interrogation in a police station or to a psychiatrist appointed to determine competency or insanity.

Appellant contends apparently that any use of Dr. Sprehe in rebuttal at the penalty phase regarding aggravation and mitigation is improper because he was appointed to determine competence. But while Judge Griffin's May 8, 1985 order refers to an examination for competency, the order also declares in paragraph (3) that the expert(s) shall:

> " . . . determine whether the defendant was sane on the dates of the offenses . . . "

and paragraph (4) adds that the expert(s) shall report their findings with respect to competence:

> " . . . directly to this Court with copies to attorneys for the state and the defense . . ."
>
> (R 1221)

Appellant asks the court to rely on the assertions made by Mr. Long at the time of the hearing on motion for new trial when Long announced his disagreement with Dr. Sprehe. Suffice it to say that Mr. Long was not testifying under oath and subject to cross examination -- he did not testify in front of the jury -- and the court can treat his comments to the little weight they deserve,

Moreover, it is difficult to see how the state will ever be able to rebut mental health expert testimony without use of similar experts -- as required by cases such as Nibert v. State, 574 So.2d 1059 (Fla. 1990) -- and how the state will be able to do so competently absent an evaluation by an expert who can explain the reasons for his conclusions to the jury. Cf. Burns v. State, So.2d ___, 16 F.L.W. S389 (Fla. 1991); see Isley v. Dugger, 877 F.2d 47 (11th Cir. 1989). The point, very simply is that appellant chose to make in the sentencing proceeding the crucial issue of appellant's alleged mental and/or emotional problems. Since even the defense experts contradicted themselves, it was appropriate for the state to present a rebuttal expert to point out the limitations and errors in the defense experts' testimony.

Finally, any error must be deemed harmless. The prosecutor did not urge "witness elimination" as an aggravating factor, the trial judge did not consider or find witness elimination as an aggravating factor and the jury was not instructed the witness-elimination was one of the aggravating factors to be considered. Since the jury was told the exclusive statutory aggravating factors it cold consider, which did not include witness-elimination, that statement by Dr. Sprehe could not have formed an impermissible basis either for the jury's unanimous recommendation ok the judge's sentence. With respect to Dr. Sprehe's comment that Long indicated that he would not have committed the crime if a policeman had been standing there (R

735), appellee submits that such testimony is appropriate, legitimately helped the expert form an opinion as to the accused's state of mind and is appropriate to rebut the false impression being left in the mind by the defense expert witnesses that Long was in a fugue state, with an altered state of consciousness that compelled him to kill or otherwise satisfied some or all of the criteria of *F.S. 921.141(6)(b)* **or** *(f)*.

ISSUE IV

WHETHER THE LOWER COURT ERRED BY DENYING DEFENSE COUNSEL'S MOTION TO EXCLUDE REBUTTAL, TESTIMONY OF DR. SPREHE THAT LONG TOLD HIM HE KILLED SIMMS TO ELIMINATE A WITNESS.

Rebuttal witness Dr. Sprehe was called to testify by the state to rebut the testimony of defense mental health witness Dr. John Money and Dr. Berland. Dr. Sprehe disagreed with the defense experts. He examined appellant and conducted a total of five hours of face to face interviews (R 732). Long admitted to him facts showing the planning behind the Simms' murder; he had equipment including a length of rope, a club, a piece of wood and a knife, an automobile which could be locked by an electric lock and a reclining seat to use to overcome the victim (R 733). Dr. Sprehe added that an antisocial personality disorder "is not thought by the mainstream of psychiatry to be a mental illness" (R 735). He opined that Long made a conscious decision to kill Michelle Simms. Dr. Sprehe testified that he asked Long if he would have killed the victim if a policeman were standing there and he said he would not (R 735).

Dr. Sprehe testified:

> Q. Did he tell you why he killed Michelle Denise Simms during your psychiatric interview?
>
> A. Well, he gave several sorts of ideas about it, The first thing he told me -- I believe it's on the second page of my notes. Yeah. I asked him why did he kill her, and the reason offered was to eliminate a witness.

Q. Did he then tell you something about beating her with a board or club?

A. Well, yes, he -- I wasn't sure whether he did that really with the intention of killing her or just to -- he said that he did that to -- so she wouldn't suffer.

And you know the medical examiner's report said multiple things killed her. So, that was one of the things.

Q. But the words out of his mouth to you was he killed Michelle Denise Simms to eliminate a witness,

A. The first thing, yes.

Q. Did he give you any other reason as to why he killed her?

A. Well, he didn't actually connect it up as a reason, but I wondered if it was a reason when I examined him the last time in October of 1985. He mentioned that she reminded him of a Susan Rapogal [sic], who was a former girlfriend, one he didn't like.

He didn't really connect that up as a reason, but I wondered if that could have had something to do with his reasoning. (R 743 - 44)[7]

There was no objection by defense counsel at the testimony elicited. (R 744)

Subsequently, at the conclusion of the testimony, defense counsel moved to strike all of Dr. Sprehe's testimony for unrelated reasons (see Point 111, supra) and the court denied the motion (R 775 - 777). When the discussion turned to the

[7] The prosecutor also had cross examined defense expert Berland on whether Long had told him why he killed the victim (Long had not). (R 674 - 676).

instructions pertaining to aggravating circumstances the prosecutor reasserted that his questioning of Dr. Sprehe was correct but that he would not request the witness elimination aggravating factor. *F.S. 921.141(5)(e)* (R 779). The court agreed not to give it, adding however, that the statements made to Sprehe by Long were appropriate and not irrelevant. Defense counsel requested a mistrial -- the first occasion to object on this point -- and it was denied (R 779).

The trial court did not find *921.141(5)(e)* as an aggravating factor (R 1328 - 39)[8]

Appellant reasons that since the trial judge and counsel agreed that "witness elimination" should not be given as an instruction to the jury it was totally irrelevant. His error is the assumption that Dr. Sprehe's testimony can be relevant only to the aggravating factor *(5)(e)* and not to other valid factors. Actually, Long's admission to Dr. Sprehe concerning the circumstances of, and the reasons for, the murder are relevant to aggravating factor *(5)(d)* (homicide during the commission of a kidnapping or sexual battery); *(5)(h)* (heinous, atrocious or cruel); *(5)(i)* (homicide committed in a cold, calculated and premeditated manner without any pretense or moral of legal justification). Moreover, Dr. Sprehe's testimony was relevant to

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[8] In denying the motion for new trial, the court explained that Dr. Sprehe's testimony about the defendant's explanation or why he killed the victim was relevant to explain Dr. Sprehe's ultimate expert opinion.

rebut the two statutory mental mitigating urged by the defense, *(6)(b)* and *(6)(f)*. Specifically, Dr. Sprehe's testimony is helpful to consider and refute the thesis of Dr. Money that Long may have acted in an altered state of consciousness (R 570) or Dr. Berland's thesis of a rage theory (R 670 - 74).

The trial court did not err in failing to grant appellant's belated and untimely request for a mistrial after Dr. Sprehe completed his testimony. See Garcia v. State, 492 So.2d 360, 366 (Fla. 1986) (evidence or comments intended to show calculated plan to execute all witnesses could also support aggravating factors of heinous, atrocious or cruel and cold, calculated and premeditated). The Garcia court added:

> " . . . facts cannot be antiseptically packaged when presented to the jury. The jury was properly instructed on the aggravating factors it could consider and we find no error."

ISSUE V

WHETHER THE TRIAL COURT ERRED BY PERMITTING DR. BERLAND TO TESTIFY THAT LONG KNEW RIGHT FROM WRONG BECAUSE THE INSANITY STANDARD ALLEGEDLY WAS IRRELEVANT.

The record reflects that at a presentencing phase hearing on May 26, 1989, defense counsel requested the court prohibit any mention of insanity by any expert witness (R 967). The prosecutor agreed except that if it were brought up the prosecutor could respond (R 968 - 69).

At the sentencing phase defense witness psychologist Dr. Robert Berland testified on direct examination and opined that appellant had two different kinds of psychotic disturbance, i.e., bipolar mood disorder and organic personality syndrome (R 628); he describe appellant's above-average intelligence and the functioning of the left and right hemispheres, of the brain (R 636 - 37). He utilized tests to determine there were brain damage (R 640 - 643) Berland opined that Long had two non-psychotic and two psychotic disorders (R 657 - 660). Also, Berland thought Long had no substantial impairment in the ability to appreciate the criminality of his act but there was substantial impairment in the ability to conform his conduct to the requirements of law and that he was under the influence of extreme mental or emotional disturbance (R 665 - 667).

On cross examination Berland admitted that he did not believe some of what Long told him and found him to be a manipulator and con artist (R 672). Long knew he was committing criminal behavior (R 692).

When the defense objected to the examination of the "right and wrong'' M'Naghten test, the trial court overruled the objection because on direct examination the defense had pursued Long's capacity to appreciate the criminality of his conduct and to conform to the requirements of law and thus the cross examination was a proper follow up on the direct (R 691, 712 - 714).[9]

The trial court explained that on the direct examination of Dr. Berland by defense counsel the witness was asked about the capacity of long to appreciate the criminality of his conduct and the ability to conform his conduct to the requirements of law being substantially impaired and that the prosecutor could pursue the "spectrum" of Long's psychosis.

> "And I perceive his cross examination of Dr. Berland to be a follow-up of your direct. You know, 'Doctor, where on the spectrum of psychosis does this substantial impairment fit in?'"
>
> (R 714)

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[9] It should be noted that after the jury's recommendation defense counsel argued to the trial court that it is unconstitutional to execute the insane (R 908) and even in defense counsel's closing argument it was urged that appellant was mentally and emotionally sick (R 828, 837) and that he had an altered state of consciousness (R 842), with a psychosis (R 844) and a "completely crazy outlook toward women" (R 848). He mantained that "it depends on how you look at sick" (R 850). "And he is a madman" (R 857). Appellant did not assert this current alleged "error" in his motion for new trial (R 1317 - 1318).

Appellant argues that any questioning of Dr. Berland on the McNaghten insanity standard was irrelevant to the penalty phase proceeding. Appellee disagrees. While it is true that the insanity test is not identical to the statutory mental mitigating factor of *F.S. 921.141(6)(b)* **and** *(6)(f)*, it was not at all irrelevant in helping to understand the precise nature and extent of Mr. Long's mental state. Appellant was urging that the jury be aware of a number of different kinds of maladies - even the defense experts were in disagreement on that score -- and it was important for the jury to be told of the insanity test to help put things in perspective.[10] The examination was proper to put all into perspective. See Coco **v.** State, 62 So.2d 892 (Fla. 1953); Jones v. State, 440 So.2d **570** (Fla. 1983).

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[10] For example defense witness Dr. Money believed Long had paraphilia and sexual sadism (R **527**, 535) bipolar mood disorder, antisocial personality disorder and dual personality phenomena (R **545**, 558). He thought both statutory mitigating factors **6(b)** and (f) **were** applicable (R 561). Dr. Berland thought Long had **a** bipolar mood disorder and organic personality syndrome (R 628), had two psychotic and two nonpsychotic disorders (R **657 - 660)** and opined that Long had no substantial impairment in the ability to appreciate the criminality of his **acts** but there was substantial impairment in the ability to conform his conduct to the requirements of law (R 665 - *666)* State rebuttal expert witness Dr. Sprehe disagreed with both, found neither statutory mental mitigating factor present (R **746** - 47), thought Long had an antisocial personality disorder, a non-psychotic condition (R **734 - 736),** found no indication of brain damage that would affect his mental capability **(R** 742 - **743) and** was not a sexual sadist (R **745).** Rather, appellant was in total control at the time **he** killed (R **746 - 47).**

See Ponticelli v. State, So.2d ___, 16 F.L.W. S669, 672 (Fla. 1991) (not error for state to elicit doctor's opinion that defendant had ability to differentiate between right and wrong and to understand consequences of his actions; while such testimony is clearly relevant to a sanity determination it is also relevant to determine whether F.S. 921.141(6)(b) and (f) are applicable).

Appellant cites Ferguson v. State, 417 So.2d 631 (Fla. 1982), but there the trial court's error was in believing that once the McNaghton, sanity test was satisfied, statutory mitigating factors 6(b) and (f) F.S. 921.141 could not be found. The trial judge did not make that error; in fact he found those factors present. Here, the trial judge simply determined correctly that testimony could be presented in light of the direct examination testimony. Moreover, in light of decisions such as Nibert v. State, 574 So.2d 1059 (Fla. 1990) requiring the state to combat expert evidence with expert evidence the failure to permit the state to show that Long was not insane might have led the trial court to erroneously conclude that McNaughten was not satisfied. See also Burns v. State, So.2d ___, 16 F.L.W. S389, 392 (Fla. 1991).

ISSUE VI

WHETHER THE LOWER COURT ERRED BY DENYING LONG'S MOTION TO PROHIBIT TELEVISION CAMERAS WITHOUT HOLDING AN ADEQUATE HEARING.

Long apparently sent the court a pro se motion -- while he was represented by counsel -- asking to have a closed or in chambers proceeding, that the presence of the press hampers him [this occurred in the Hillsborough County courtroom]. The court declared that cameras were allowed in the courtroom as long as they were not disruptive and they were not disrupting the proceedings (R 1942). The court denied Long's motion. (R 1943)

At the sentencing proceeding in Volusia County on June 26, 1989, after selection of the jury, defense counsel requested a restriction on cameras that the jury never be photographed (R 288). A colloquy ensued between the caurt and Mr. North of the media. Mr. North mentioned that they preferred to take a wide to medium shot of the panel, and did not feel it proper to restrict shooting of the jury altogether (R 289 - 290).

The court declared that it had already gone over this with the jury on voir dire, they had seen the camera in the courtroom and the jury had assured them they could be impartial. The cameras had not been obstructive. The defense request was denied (R 290; see also R 40 - 41, 123 - 124).

Following the jury's unanimous recommendation, appellant filed a Motion for New Trial (R 1317 - 1318) in which he did not assert this camera issue. (See also R 891 - 935)

In Chandler v. Florida, 449 U.S. 560, 66 L.Ed.2d 740 (1981), the United States Supreme Court held that it was constitutional to have a state program permitting radio, television and photographic coverage of criminal proceedings over the abjections of the accused, absent a showing of prejudice. In Gore v. State, 573 So.2d 87 (Fla. 3d DCA 1991), the court rejected a defense contention that the trial court had abused its discretion in refusing to exclude the electronic media from the courtroom even after the defendant had presented medical evidence that the presence of the media would adversely affect his ability to testify.

In the instant case there is absolutely nothing in the record even to suggest that any prejudice resulted from having cameras in the courtroom; the trial court certainly did not abuse its discretion in denying defense counsel's request that no pictures be taken of the jury.

Appellant contends that the lower court erred in failing to hold a hearing as required by State v. Green, 395 So.2d 532 (Fla. 1991). Green, supra, involved a report of defendant's treating psychiatrist that the presence of electronic media would adversely impact his competency to stand trial and the trial court's refusal to take testimony on the issue. In contrast, in the instant case there was no contention made by any psychiatrist or lawyer or anyone that the media would render Long incompetent. There was no request for an evidentiary hearing.

Appellant cites Maxwell v. State, 443 So.2d 967 (Fla. 1983) and notes the requirement of filing a motion to preclude cameras and urges that he satisfied this requirement with Long's pro se motion (R 1942 - 43). First of all, since Long was represented by counsel at the time he filed his pro se motion, the trial court could have justifiably ignored it. See Smith v. State, 444 So.2d 542 (Fla. 1st DCA 1984) (defendant has no right to act as co-counsel with his attorney including the right to file separate motions and pleadings); Johnson v. State, 501 So.2d 94 (Fla. 1st DCA 1987); Salser v. State, 582 So.2d 12 (Fla. 5th DCA 1991); State v. Tait, 387 So.2d 338 (Fla. 1980).

Secondly, whatever the situation may have been at the pretrial hearing on May 3, 1989, in the Hillsborough County courthouse wherein Long asserted that "they're right in my face" and his feeling he had "to put on a show for the media every time I come in here" (R 1943), has no bearing on what the situation may have been almost two months later at the trial in Volusia County -- where the judge observed and commented on the media's unobtrusive nature -- and where significantly neither Long nor his attorney made even a bare allegation that their defense would be hampered ok disrupted. There was no need for the court to take any additional actian since the only defense request for relief was the cameras not focus on the jury, rather than any expression of concern that witnesses who testified might be inhibited or that a fair trial was for some other reason jeopardized.

Appellant refers to Long's rambling discourse at the allocution hearing on July 19, 1989, but the general context there shows Long referring to the trial in 1986 when his then attorney Ellis Rubin filed a motion to bar cameras from the courtroom.[11]

Appellant alludes next to R 977 to support his TV-mob argument. Again, the court must examine the context of the statement. On May 26, 1989, a month prior to the sentencing proceeding which was going to be held in Volusia County, the court conducted a hearing on pending motions (R 967). The defense brought up a motion in limine to prohibit the mention of insanity (R 967), a motion relying an Caldwell v. Mississippi, that the jury's role not be denigrated and a request the jury be told that in some circumstance their advisory recommendation is binding (R 970 - 978). It was during this Caldwell-Tedder discussion that this exchange occurred:

> "The Court: It seems to me I would still want to know -- if I went back there, I would want to know under what circumstances it's going to be binding.
>
> Judge, how about you telling me, *so* we're not back here wasting our time."
>
> Mr. Fraser: It's not a waste of time. All you're doing is telling them they don't go

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[11] That motion was heard, considered and denied by Judge Griffin and any attack on that ruling now is untimely after this Court's affirmance of appellant's conviction on June 30, 1988. Long v. State, 529 So.2d 286 (Fla. 1988).

> back there, "Just because the T.V. cameras are all over the courtroom and come back with what you think the mob wants in terms of a verdict, because it might very well be carried out." And at that stage it's very material. You have instructed them on the law, and they've heard the testimony, and it's their function to make this advisory sentence."

(R 977)

No honest person, whether advocate or jurist, can read the transcript from R 971 to 978 and conclude that the matter under discussion concerned a camera-in-the-courtroom fair trial issue or that the trial judge was on notice that Chandler v. Florida and its progeny were being considered. Appellant's attempt in this brief to convert it into one is disingenuous and, to be blunt, dishonest.

Appellant continues. In an attempt to demonstrate prejudice by camera presence he cites the 12 to 0 death recommendation. Appellee submits that the unanimous jury recommendation reflects the sound decision that Mr. Long's calculated actions and premeditated conduct deserved the ultimate sanction, especially since the mental health "experts" contradicted each other. Long seeks to supplement his argument, urging that the prosecutor made improper argument at R 800. Appellant's propensity to misread the record and misinterpret the context is apparently boundless. The prosecutor stated:

> Shortly, you'll be making a recommendation regarding this case. The question you will answer is clear. What is a jury in Volusia County going to say is the proper punishment for the murder of Michelle Denise Simms? That's the question you're going to answer.

> The answer is obvious, Bobby Joe Long deserves to die.

There is no impropriety. The prosecutor is telling them exactly what the status is. They, the jury in this case will decide what recommended sentence to give. This is not a declaration asking them to consider what the outside community will feel. If the jury in Volusia County is not going to make the recommendation as to the proper sentence, pray tell, who is?

ISSUE VII

WHETHER THE TRIAL COURT ERRED BY DENYING THE (1) DEFENSE MOTION TO PRECLUDE MENTION DURING VOIR DIRE THAT THE JURY VERDICT WAS ONLY ADVISORY; (2) REQUEST FOR A JURY INSTRUCTION STATING THE JURY VERDICT WAS BINDING IN SOME CIRCUMSTANCES; AND (3) MOTION FOR MISTRIAL BECAUSE THE STATE AND TRIAL JUDGE ALLEGEDLY DENIGRATED THE JURY'S FUNCTION.

Defense counsel requested at the hearing on May 26, 1989, that the jury be told that it's advisory sentence recommendation is entitled to great weight and Consideration and "that under some circumstances it is binding." (R 971) Appellant continued:

> "We don't have to go into a lot of detail as to when it's binding and when it isn't binding.
>
> It's sufficient to say that under some circumstances it's binding, therefore, treat it as though it's binding."

(R 971)

When the trial court inquired what would happen if the jurors asked when it was binding and when it was not, defense counsel replied:

> MR. FRASER: Judge, I think that's immaterial in their function.
>
> That has no real bearing on the gravity of their advisory sentence. That's precisely what Caldwell and Adams are directed to.

(R **971)**

The prosecutor commented that he was satisfied with the standard jury instruction and that it would be argued in this case "that it is an advisory sentence entitled to great weight." (R 972)

The trial court then explained what his preliminary instructions would be:

> "The punishment for the crime is death or life with a minimum twenty-five years in the Florida State Prison.
>
> The final decision as to what punishment will be imposed rests solely with the judge. However, the law requires that you, the jury, render to the Court an advisory verdict as to what punishment should be imposed upon the defendant.
>
> Then emphasize to them, although your verdict is an advisory one, it will be given careful consideration and great weight by the Court, and the fact that you only render an advisory verdict must not in any way be taken by any of you as a minimization of your role in the sentencing process in this case.

(R 973)

Appellant interjected a desire that the jury be told something to the effect that under some circumstances their advisory verdict could not be departed from by the court **(R 974)** and the court responded that it would give the same final instruction as it did in a previous case:

> Let me assure each **of** you that you do play a crucial part in the sentencing process, and the fact that you only render an advisory sentence to the Court must not taken by any of you as a minimization of your role in the sentencing process.
>
> Each of you have a very grave task ahead of you, and I assure you that the Court will give your advisory opinion, as to what the appropriate sentence in this case should be, careful consideration and great weight.

(R 974 - *975)*

The state objected to an instruction that under certain circumstances whatever their recommendation is would be binding. (R 975) The defense request was denied. **(R 983)** As promised the trial court instructed the jury preliminarily (R 293 - 294) and finally (R **861** - 875), emphasizing the seriousness and solemnity of their responsibility:

> In these proceedings it is not necessary that the advisory verdict of the jury be unanimous. The fact that the determination of whether you recommend a sentence of death or a sentence of life imprisonment in this case can be reached by a single ballot should not influence you to act hastily or without due regard to the gravity of these proceedings.
>
> Before your ballot you should carefully weigh, sift, and consider the evidence, and all of it, realizing that human life is at sake, and bring to bear your best judgment in reaching your advisory verdict.
>
> **(R 870 - 871)**
>
> * * *
>
> In closing, let me reemphasize to you that it is very important that you follow the law spelled out in these instructions in deciding your verdict.
>
> **(R 873)**
>
> * * *
>
> However, before you retire, let me emphasize again to each and every one of you that your function of rendering this advisory verdict to the Court its a truly awesome responsibility which must not be taken lightly under your sworn oaths as jurors.
>
> Let me assure each and every one of you that you do play a very important and crucial role in the sentencing process. And the fact that

> yau only render an advisory verdict to this Court must not, in any way, be taken by any of you as a minimization of your role in this sentencing process.
>
> Each of you has a very grave task ahead of you, and 1 assure you that this Court will give your advisory verdict, as to what the appropriate sentencing in this case should be, careful consideration and great weight.

(R 873 - 874)

The very short answer to Mr. Long's complaint on appeal that there has been a violation of Caldwell v. Mississippi, **472** U.S. **320, 86** L.Ed.2d **231 (1985)** by the trial court's instruction and failure to grant the defense request for instruction at R **971 - 978** is that this Honorable Court has consistently held that the standard jury instructions do not violate Caldwell or the Eighth Amendment. See Garcia v. State, **492 So.2d** 360 **(Fla. 1986); Ford** v. State, **522 So.2d 345** (Fla. **1988):** Grossman v. State, 525 So.2d 833 (Fla. **1988);** Combs v. State, **525 So.2d 853** (Fla. **1988);** Hill v. State, **549 So.2d 179** (Fla. **1989);** King v. Dugger, 555 So.2d 355 (Fla. **1990);** Owen v. State, 565 So.2d 304 (Fla. **1990).** Moreover, even the Eleventh Circuit Court of Appeals has acknowledged that an accurate and not misleading instruction on the **role** of the jury does not violate the Constitution. Harich v. Dugger, **844 F.2d 1464 (11th Cir. 1988).**

It is patently absurd to contend that taken in its entirety the comments made by the trial court to the jury denigrated their sense of responsibility under the capital statute since they were repeatedly informed of the gravity of the matter. Not only was

it unnecessary for the trial court to grant the requested defense instruction but also, appellee submits that it would have been error to do so as the requested instruction was erroneous and confusing. It is not correct to say that a mere recommendation of sentence is binding on the trial court. If a jury unanimously recommends death and no statutory aggravating factors are present, the recommendation is worthless; if the jury unanimously recommends life imprisonment and explains that the recommendation is based on defense counsel's stylish clothing, that recommendation is not binding on the trial court. When the trial court inquired what assistance should be given the jury if they asked when it was binding and when not, appellant advised not to get into any detail. The trial court correctly concluded that what appellant requested was more conducive to confusion than to clarity.[12]

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[12] Appellant also complains now about remarks made in voir dire by the trial court (R 12) and by the prosecutor (R 43 - 44). The remarks at R 12 were unabjected to and thus are unchallengeable on appeal and the mistrial request at R 44 - 45 was properly denied as the prosecutor correctly informed the jury that the court would give their recommendation great weight and careful consideration prior to imposing sentence (R 47).

ISSUE VIII

WHETHER THE LOWER COURT COMMITTED FUNDAMENTAL ERROR BY ALLOWING THE PROSECUTOR TO MAKE CLOSING ARGUMENTS ALLEGEDLY NOT BASED ON THE EVIDENCE AND BY ALLEGEDLY URGING THEM TO CONSIDER IMPROPER FACTORS.

(A) Appellant complains for the first time on appeal - he did not object below -- to the prosecutor's statement in closing argument:

> " . . . The question you will answer is clear. What is a jury in Volusia County going to say is the proper punishment for the murder of Michelle Denise Simms. That's the question you're going to answer."
>
> **(R 800)**

The issue of improper prosecutorial argument was not preserved for review by objection below; See Thomas v. State, 326 So.2d **413** (Fla. **1975**); **Groover** v. State, **474** So.2d **1178 (Fla.** 1985); **Rose v. State, 461** So.2d **84 (Fla. 1984);** Dauqherty **v.** State, 533 **So.2d** 287 (Fla. **1988).**

Appellant contends it was fundamental error. It is easy to see why trial defense counsel did not object -- it was not error, fundamental or otherwise. The prosecutor was not urging the jury to "send a message to the community"; rather, the was reciting the self-evident that this jury **was** to decide the recommended sentence of death or **life** imprisonment.

Appellant's contention is frivolous.

(B) Appellant next complains about the prosecutorial argument at **R 814** about the trickery and deceit Long used to get into houses to **rape,** the same trickery and deceit used on Dr.

Money and Dr. Berland. Again, there was no objection below and appellant seeks to hang his hat on fundamental error. Appellant may not prevail for the argument was a fair comment on the evidence. Evidence was presented concerning Long's use of trickery and deceit to gain entry to the house to rape Linda Nuttal and it was fair comment to urge that Long had similarly fooled defense mental health witnesses especially since their testimony differed so sharply from state witness Dr. Sprehe and Berland and Lang were examined on whether Long was a con artist (R 585) and Berland did not believe some things Long told him. Berland agreed that Long was a manipulator and con artist (R 672). This claim is without merit.

(c) Next appellant complains, ab initio, to the unobjected to remark at R 823 - 824 which states:

> "What can one do in prison or life? What can one do in person for life? You can laugh, you can cry, you can watch T.V., you can listen to music, you can read, you can make friends **and,** in short, you are living. People want to live.
>
> If Michelle Denise Simms had a choice being in life in prison or in that picture, what do you think she would want? The answer is clear.
>
> People want to live. But, you see, Michelle Denise Simms didn't have that choice, because that guy right there, that guy decided for himself that Michelle Denise Simms should die.
>
> And for making that decision Robert Joe Long deserves to die. And without any hesitation, I am asking this jury to make that recommendation. The law allows it and justice demands it."

Appellant now relies on Taylor v. State, ___ So.2d ___, 16 F.L.W. 5469 (1991). Unlike Taylor there was no objection sub judice; similarly, there was no objection in Hudson v. State, 538 So.2d 829 (Fla. 1989), which resulted in an affirmance. The issue has not been preserved for appellate review. Thomas, supra; Groover, supra; Rose, supra; Daugherty, supra.

And far from being critical of the prosecutor defense counsel praised Mr. Benito, in his closing argument, for being "a very passionate advocate" . . . "the best trial lawyer I know" (R 826). Appellant then ably argued that it was unnecessary to decide Long's guilt -- he pleaded guilty and confessed to the police. The larger question for the jury was the penalty (R 827).[13] Defense counsel argued his view that the only valid reason for the death penalty is retribution and that retribution was not appropriate in this case. (R 856 - 857) He relied on the comments of poet John Danne (R 859 - 860) [which also had not been admitted into evidence]. Appellant does not inform us why it constitutes fundamental error -- meaning of course that the prosecutor's error was so egregious that the trial court should have sua sponte declared a mistrial and deprived the defense of a recommendation from the jury they had selected without inquiring if that was the defense desire (and risk a double jeopardy

[13] It apparently is not subject to condemnation that defense counsel can insert his own beliefs -- unsupported by evidence or testimony -- that he believes in the death penalty just as much as does the prosecutor. (R 828)

challenge if the trial judge were mistaken in the fundamental error ruling) for the innocuous, self-evident declaration that victims like most people prefer living to being murdered and that people in prison are, in fact, alive and that fundamental error could have been avoided by using philosophical - legal terminology such as "retribution" or "deterrence" as defense counsel did.

In Sanford v. Rubin, 237 So.2d 134 (Fla. 1970), this Honorable Court explained that fundamental error is error which goes to the foundation of the case and that an appellate court "should exercise its discretion under the doctrine of fundamental error vexy guardedly" Ibid. at 137. The prosecutor's comment in the instant case does not constitute fundamental error because the comment now challenged is a self-evident observation, one that reflects "the common knowledge and are probably the sentiments of a large number of people" Breedlove v. State, 413 So.2d 1, 8, n.11 (Fla. 1982); indeed, if the prosecutor had remained silent the jury would still have known -- as all sentient humans know -- that the dead are dead and the imprisoned are alive. See also Muehleman v. State, 503 So.2d 310, 317 (Fla. 1987) (prosecutorial arguments must be examined in context; a statement out of place when made in evaluating guilt may quite properly bear on penalty . . . we cannot make the slaying less reprehensible than it was).

Most recently, in Payne v. Tennessee, 501 U.S. ___, 115 L.Ed.2d 720 (1991) the United States Supreme Court in overruling

Booth v. Maryland, 482 U.S. 496, 96 L.Ed.2d 440 (1987) and South Carolina v. Gathers, 490 U.S. 805, 104 L.Ed.2d 876 (1989) described the closing arguments of the prosecutor and apparently found no fundamental error present:

> "But we do know that Nicholas was alive. And Nicholas was in the same room. Nicholas was still conscious. His eyes were open. He responded to the paramedics He was able to follow their directions.
>
> He was able to hold his intestines in as he was carried to the ambulance. So he knew what happened to his mother and baby sister." Id., at 9.
>
> "There is nothing you can do to ease the pain of any of the families involved in this case. There is nothing you can do to ease the pain of Bernice or Carl Payne, and that's a tragedy. There is nothing you can do basically to ease the pain of Mr. and Mrs. Zvolanek, and that's a tragedy. They will have to live with it the rest of their lives. There is obviously nothing you can do for Charisse and Lacie Jo. But there is something that you can do for Nicholas.
>
> Somewhere down the road Nicholas is going to grow up, hopefully. He's going to want to know what happened. And he is going to know what happened to his baby sister and his mother. He is going to want to know what type of justice was done. He is going to want to know what happened. With your verdict, you will provide the answer." Id., at 12.
>
> In the rebuttal to Payne's closing argument, the prosecutor stated:
>
> "You saw the videotape this morning. You saw what Nicholas Christopher will carry in his mind forever. When you talk about cruel, when you talk about atrocious, and when you talk about heinous, that picture will always come into your mind, probably throughout the rest of your lives.

* * *

". . . No one will ever know about Lacie Jo because she never had the chance to grow up. Her life was taken fro her at the age of two years old. So, no there won't be a high school principal to talk about Lacie Jo Christopher, and there won't be anybody to take her to her high school prom. And there won't be anybody there -- there won't be her mother there or Nicholas' mother there to kiss him at night. His mother will never kiss him good night or pat hi as he goes off to bed, or hold him and sing him a lullaby.

* * *

"[Petitioner's attorney] wants you to think about a good reputation, people who love the defendant and things about him. He doesn't want you to think about the people who love Charisse Christopher, her mother and daddy who loved her. The people who loved little Lacie Jo, the grandparents who are still here. The brother who mourns for her every single day and wants to know where his best little playmate is. He doesn't have anybody to watch cartoons with him, a little one. These are things that go into why it is especially cruel, heinous, and atrocious, the burden that that child will carry forever." Id., at 13 - 15.

(115 L.Ed.2d at 728 - 729)

It would be incomprehensible to reach the conclusion that the prosecutor's statement sub judice constitutes fundamental error.

(d) Cumulative error --

No fundamental error is present; no improper prosecutorial argument has been preserved for appellate review by timely and appropriate objection. No finding of reversible error in the totality of the record is compelled.

ISSUE IX

WHETHER THE TRIAL COURT ERRED BY CONSIDERING TRANSCRIPTS OF PRIOR TESTIMONY OF DRS. MAHER, BERLAND, MONEY, SPREHE, GONZALEZ, HEIDI AND MORRISON, IN SENTENCING BECAUSE THEY CONTAINED REFERENCES TO OTHER TAMPA MURDERS, THUS ALLEGEDLY VIOLATING THE PLEA AGREEMENT.

The record reflects that after the jury returned a unanimous 12 - 0 death recommendation (R 882), defense counsel requested that he be allowed to present transcripts of additional expert testimony for the court to consider in the sentencing process (R 887).

At the sentencing hearing on July 19, 1989, trial defense counsel argued whether it was apprapriate to punish the mentally healthy and sick alike "for murdering ten women, raping one hundred and killing his mother by extention" (R 907). Trial defense counsel alluded to the opinions of Dr. Sprehe and Dr. Gonzalez (R 913) and Dr. Maher (R 914) and Dr. Money (R 916), defense counsel reiterated that Long "killed ten women" (R 920, 925)

The trial court responded that it was bound by the plea agreement and added:

> "My consideration of what sentence to impose would be based upon the facts and circumstances in the case involving Michelle Denise Simms, and I will give no consideration whatsoever to any other murder that's applicable here.
>
> * * *
>
> So I want this record to be clear, I know they're out there, but I have shielded myself from knowing anything about the facts and

> circumstances of those cases. And I want to focus on this case and this **case** alone, and what is in this record here."
>
> (emphasis supp ied)
> **(R 925 - 926)**

The court stated that it had received and reviewed transcripts of testimony of Drs. Maher Berland, Money, Sprehe, Gonzalez, and Maher in the Pasco County case, and a deposition of Dr. Maher. The court stated that was all the defense had submitted to it and asked if there were anything else the defense wanted to submit and defense counsel said, "No, sir." (R 926).

The court expounded that other homicides were mentioned "but I have focused on these transcripts merely from the point of view of what is the mental state of Mr. Long, and what is his **background;** what brought it about." (R 927)

The court added:

> "**But,** again, my focal point was not in terms of what other crimes Mr. Long may have committed, but in terms of what is his true mental state, and what brought it about; okay?"
>
> **(R 927)**

No defense complaint was uttered. Two days later, the court imposed sentence (R 937 - 963). Again, the court explained that it had not taken into account the other multiple murders prohibited by the plea agreement in imposing sentence (R 957).

Appellant complains now that the trial court's reading the transcripts of mental health experts -- as requested by defense counsel -- which contained references to other homicides violated the plea bargain.

First of all, appellant cannot raise this complaint ab initio on appeal since he failed to preserve it by complaint below. See Steinhorst v. State, 412 So.2d 332 (Fla. 1982); Occhicone v. State, 570 So.2d 902 (Fla. 1990); Hill v. State, 549 So.2d 179 (Fla. 1989); Farinas v. State, 569 So.2d 425 (Fla. 1990); Bertolotti v. State, 565 So.2d 1343 (Fla. 1990).

Not only did appellant not complain below, he affirmatively sought to have the trial court review and consider the transcripts of the mental health experts. See McPhee v. State, 254 So.2d 406 (Fla. 1st DCA 1971); State v. Belien, 379 So.2d 446 (Fla. 3d DCA 1980) ("Gotcha!" maneuvers will not be permitted to succeed in criminal any more than in civil litigation).

Quite apart from the procedural default resulting from the failure to object and preserve the issue for appellate review, the contention is meritless to the extent that it suggests that the trial judge's "awareness" of other matters disqualifies him from imposing a sentence. See Alford v. State, 355 So.2d 108 (Fla. 1977) (trial judge may be aware of facts without considering them); Brown v. Wainwright, 392 So.2d 327, 1331 (Fla. 1981). And the trial court repeatedly declared that he was not considering Long's other homicides. Cf. Glock v. Dugger, 537 So.2d 99 (Fla. 1989) (trial court stated that while he did hear the victim impact statement, he did not consider it in his sentencing determination).[14]

[14] Appellant is in a poor position to complain that the trial judge was aware of other homicides when defense counsel

In essence, far from considering matters prejudicial to Long, the trial court merely sought to utilize -- at the defense request -- additional mental mitigating evidence and appellant was beneficiary of this effort because the trial court found the presence of "mental and emotional afflictions which were categorized as atypical psychosis, sexual sadism paraphilia), paranoic bipolar disorder, a dual personality and organic brain damage" (R 1334).[15] The court reiterated it statements at the sentencing hearings an July 19 and 21 in the sentencing order that neither the court nor the jury was contaminated by consideration of the multiple murders of other young women as prohibited by the plea agreement (R 1337, 1339 fn. 3).

Long urges as his thesis that since the trial judge insisted throughout that he was not considering appellant's other homicides, the utterance in fact proves that he was considering them and using them in his weighing process. Under this upside down logic we must disbelieve the apparently good faith

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repeatedly informed the court there had been ten murders (R 920, 925, 907). Moreover it would be impossible not to know of the multiple homicides since this Court's opinion remanding for a new sentencing referred to such facts. Long v. State, 529 So.2d 286 (Fla. 1988).

[15] In so finding the trial court apparently rejected the state's rebuttal expert witness Dr. Sprehe who opined that the two statutory mental mitigating factors were not present (R 746 - 747). If anyone should complain about the review of transcripts of other experts, it should be the state.

declaration of a judicial officer acting pursuant to his sworn obligation and credit as truthful the opposite of what he says. Appellant's contention proves too much; for if we accept it there is not need to believe anything a judge writes in an order concerning what he has considered and what he has found. Cf. Brown v. Wainwright, 392 So.2d 1327, 1333 (Fla. 1981) (just as trial judges are aware of matters they do not consider in sentencing, Alford v. State, [citation omitted], so appellate judges are cognizant of information that they disregard in the performance of their judicial tasks.); Harris v. Rivera, 454 US. 339, 345, 70 L.Ed.2d 530, 536 (1981); Ford v. Strickland, 696 F.2d 804, 811 (11th Cir. 1983).

There simply has been no violation of the stipulated plea agreement and the cases relied on by appellant are inapposite.

ISSUE X

WHETHER THE LOWER COURT ERRED IN FINDING THE AGGRAVATING FACTOR, *F.S. 921.141(5)(i)*.

During a break in the sentencing phase -- prior to the testimony of either the defense mental health experts or the state rebuttal expert -- the parties engaged in a dialogue with the trial court about the appropriate penalty phase instructions for the jury (R 490 - 516). The prosecutor opined that "CCP" was applicable (R 492 - 93) and the defense disagreed (R 493) Subsequently, the court instructed the jury on "CCP" (R 866 - 867) and found it as an aggravating factors in his order (R 1331 - 1332):

> "The evidence at the sentencing proceeding demonstrated that the evening prior to the murder of the victim the Defendant had placed cut-up sections of rope and a knife (State's Exhibit 9) in his motor vehicle. The next day he was driving his motor vehicle on Kennedy Boulevard with the specific intent to find and pick up a prostitute which turned out ta be Michelle Denise Simms. After he fulfilled his objective he drove approximately one-half to one mile, subdued the victim with the knife, undressed her, and tied her up with the rope. In that regard the Court personally reviewed the photographs introduced at the sentencing proceeding which depicted the manner in which the Defendant bound the victim with rope (State's Exhibit 2 - 5). To say the least the Defendant was well versed in rope tying and it is a reasonable inference that in tying up his victim he was very methodical and deliberate. The testimony further showed that the car seat in which the victim was placed was capable of reclining anyone who sat in it to a prone position so that the individual could not be seen by passing motorists.

> After abducting and confining the victim, the Defendant then drove her twenty miles to a remote area where he committed sexual battery on her. He then drove her to another remote area twenty miles away where he eventually murdered her. Although the medical examiner could not pinpoint the exact cause of death, it is abundantly clear from his testimony that death was caused by any of three ways -- severe blows to the head by means of a club, strangulation by means of a rope ligature, or slashing of the throat by use of a knife. Whatever the cause of death, it is clear form the evidence that the Defendant had a singular purpose in mind -- the death of this victim by any means available to him no matter how agonizingly long it took.
>
> Although the Court has carefully considered the testimony of the medical examiner that the injuries suffered by the victim were consistent with being inflicted by a person in a rage **and** there is nothing to suggest that the perpetrator of this crime did so in a cold, calculated and premeditated manner, nevertheless, the totality of the evidence, including the Defendant's confession, convinces this Court that this Defendant had careful plan or pre-arranged design to abduct, sexually batter and murder in a highly secretive manner a woman he believed to be a prostitute and did so with heightened premeditation.
>
> Moreover, there is absolutely no evidence to suggest that a pretense or moral or legal justification existed to rebut the otherwise cold and calculating nature of this homicide. That is, no colorable claim exists that this homicide was motivated out of any other reason than a careful plan to seek out, abduct and later murder a woman whom the Defendant believed to be a prostitute."

Appellant argues that the "CCP" factor is inappropriate because the case is analogous to Holton v. State, 573 So.2d 284 (Fla. 1990) which also involved a sexual battery victim. The

instant case cannot be at all analogized to Holton which apparently involved a strangulation murder during a sexual episode with the victim. Holton also later told someone he didn't mean to kill. Here, in contrast, according to Long's confession to Officer Latimer, Long put some rope in the car and put a weapon in the car prior to riding along Kennedy Boulevard, looking for a prostitute. He picked up victim Simms, drove to a spot where at knife point he made her undress, recline in a prone position and tied her up. He left the area, drove fifteen to twenty miles where he raped her. Then he drove to Plant City where he tried to strangle her, hit her on the head with a club to make her lose consciousness and cut her throat after telling the victim he would take her back where he picked her up (R **333 - 336)**. Thus, unlike Holton this was not a killing during a sexual adventure that went awry or a spur of the moment act without reflection. See Asay **v.** State, **So.2d ___, 16** F.L.W. S385 (Fla. 1991) (CCP found; although victim found by chance while defendant was looking for prostitutes, sufficient evidence that it was not impulsive spur of the moment decision to kill without reflection); Klokoc v. State, So.2d ___, 16 F.L.W. S603 (Fla. 1991) (upholding CCP factor in defendant's dispassionate slaying of daughter hurt estranged wife and pretense of moral or legal justification not present), Davis v. State, **So.2d ___ 16** F.L.W. **S602** (Fla. 1991) (CCP factor found where defendant **used** butcher knife, then resorted to second knife to continue the brutal slaying); Stano v. State, **473** So.2d **1282** (Fla. **1985).**

It should also be noted that Long told Dr. Sprehe that he killed Simms to eliminate a witness (R 743) and even Dr. Berland who described a "rage" theory did not use the term in the same context of an impulsive act as we laymen might understand it. It is not necessarily a short burst without any thought, but rather an act of vengeance and anger to spend a great deal of energy on (R 673). The defense experts contradicted each other and were hopelessly in conflict with the facts. For example, Dr. Money opined Long was in an "altered state of consciousness" when he murdered Simms and raped Nuttal and Jensen -- although Long remembered the details of these crimes (R **563 - 65**). He opined that the "altered state" made Long kill Simms but can't answer why Long didn't kill Jensen or Nuttal in the "altered state" (R 571). Money's testimony should not be too surprising since his expertise is not forensic psychiatry, he has not testified on competency issue in a criminal trial, couldn't quote the legal criteria to determine competency and his experience was limited (R **574 - 79**).[16] Money has only interviewed two people facing the death penalty (R 582). The witness did not think it important to question Long (R 587). He found no inconsistency in Long telling the police he hit the victim in the head and cut her throat "so she would not suffer" (R 570). Dr. Berland disagreed with Money

[16] The witness' testimony in this regard seems not too dissimilar to that by the state expert criticized by the court in Nowitzke v. State, 572 So.2d **1346** (Fla. 1990).

in that former believed Long had no substantial impairment in the ability to appreciate criminality of his act (R 665); Berland did not believe Long when he said he beat the victim so she could avoid suffering (R 672) He could not answer why Long would allegedly be concerned about the victim's suffering if his act is one of vengeance on a prostitute (R 673). Long was not open with him in explaining why he killed Simms (R 674) Berland rejected the Money view on altered state of consciousness (R 676 - 77).

Appellant contends that the planning prior to the murder cannot be used to infer an intent to murder because Long also engaged in planning for the Jensen-Nuttal rapes, victims who were not murdered. But defense counsel informed the jury in opening statement that it was crucial for them to understand why the rape victims survived an Simms died -- that Long had rage for women whom he associated with his mother and were sluts (R 310) and the defense witness Dr. Berland explained that the non-murders of Jensen and Nuttal can be explained that they were middle class looking whereas Simms looked like she was leading a sleazy promiscuous life style (R 663). Appellant's heightened premeditation can be shown in his planning beforehand (the vehicle with reclining seat, knife an rope), and the activities after the rape (driving to a secluded area miles away to effectuate the murder). The suggestion that appellant killed while in an altered state of reality or being unable to control himself during a sexual episode, is simply contrary to the facts of Long's confession.

ISSUE XI

WHETHER THE LOWER COURT ERRED BY FAILING TO CONSIDER AND FIND NONSTATUTORY MITIGATING CIRCUMSTANCES.

Appellant next contends that the lower court erroneously failed to consider and find nonstatutory mitigating circumstances. Since much of that argument is repeated in different form in Issue XIII, infra, appellee will not repeat that argument verbatim here, but generally relies on it as applicable under this point.

First of all, the trial court could not commit reversible error on this score since he twice asked defense counsel and was told that appellant was relying only on the two statutory mental mitigating factors. (R 921 - 925) See Lucas v. State, 568 So.2d 18, 23 - 24 (Fla. 1990) (the defense must share the burden and identify for the court the specific nonstatutory mitigating circumstances it is attempting to establish); see also McPhee v. State, 254 So.2d 406 (Fla. 1st DCA 1971) and State v. Bellen, 379 So.2d 446 (Fla. 3d DCA 1980) on the refusal to reward defendants by granting appellate relief or their urging of course of action by the trial court subsequently attacked.

But even if appellant had not psocedurally defaulted on this issue, the claim is meritless as the trial judge's order clearly reflects that he considered all that was proffered of a mitigating nature. The sentencing order alludes to appellant's deprived childhood, blows to the head, abuse of drugs, brain damage and mental and emotional afflictions (R 1334; R 1336). As

this Court stated in Downs v. State, 572 So.2d 895, 901 (Fla. 1990):

> " . . . after reviewing the record and the sentencing order in its entirety, we are satisfied that the trial court properly considered that evidence and conducted the appropriate balance."[17]

Since the trial court validly explained why the mitigating was less substantial than the aggravating, this Court should affirm. Cf. Bruno v. State, 574 So.2d 76 (Fla. 1991); Robinson v. State, 574 So.2d 108 (Fla. 1991); Gunsby v. State, 574 So.2d 1085 (Fla. 1991); Holton v. State, 573 So.2d 284 (Fla. 1991).

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[17] If the complaint is that the trial judge failed to follow a formula commanded by Campbell v. State, 471 So.2d 415 (Fla. 1990), the trial court may not be criticized for failure to predict a 1990 appellate formula when drafting a 1989 sentencing order. Moreover, Campbell is not a fundamental change in law. Gilliam v. State, ___ So.2d ___, 16 F.L.W. 292 (Fla. 1991). There is no error since the judge considered all that was presented.

ISSUE XII

WHETHER THE TRIAL COURT SHOULD HAVE SENTENCED APPELLANT TO LIFE IMPRISONMENT BECAUSE IT IS ALLEGEDLY UNCONSTITUTIONAL TO EXECUTE THE MENTALLY ILL.

Appellant cites Tison v. Arizona, 481 U.S. 137, 95 L.Ed.2d 127 (1987) and Enmund v. Florida, 458 U.S. 782, 73 L.Ed.2d 1140 (1982) in support of his argument. Neither involved "mentally ill" defendants but rather dealt with the culpability and blameworthiness, for capital punishment purposes, of defendants who did not themselves kill. They are inapposite here as it is undisputed that Long acted alone and killed alone.[18]

In any event it is abundantly clear to all that Long is not insane. (1) Defense witness Dr. Money labelled Long a sexual sadist but conceded appellant knew what he was doing when he killed Simms (R 571); (2) Psychologist Dr. Robert Berland -- whom this Court knows is ubiquitous as a defense witness in capital trials, see Henry v. State, 574 So.2d 66 (Fla. 1991) -- opined

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I* If Long meant to rely on Ford v. Wainwright, 477 U.S. 399, 91 L.Ed.2d 335 (1986) for the proposition that the Eighth Amendment prohibits the infliction of the death penalty on an insane person, suffice it to say that Ford was concerned with the imposition of the death penalty -- not the imposition of the judgment and sentence -- and Long's claim is premature. Years from now if and when the Governor signs a death warrant on Mr. Long after completion of the instant appeal, vehicles exist for determination of appellant's then-sanity to be executed should the issue arise [and if Ford still remains good law as surviving the analysis of decisions such as Payne v. Tennessee, 501 U.S. ___, 115 L.Ed.2d 720 (1991) -- see Justice Marshall's dissent therein lamenting at page 753 that Ford may be on the "endangered precedents" list].

that appellant was an antisocial personality (R 677), described his paraphilia as nonpsychotic (Long is a sex offender) (R 658), and added that appellant had no substantial impairment in the ability to appreciate the criminality of his act (R 665, 692). (3) State rebuttal psychiatrist Dr. Daniel Sprehe opined that Long made conscious decision to kill and was not suffering from any psychosis during Simms' kidnapping, rape and murder (R 735 - 736). Long told Sprehe he killed Simms to eliminate a witness (R 743). Appellant does not fit profile for sexual sadist (R 745). He was in total control at time of Simms' killing and the two statutory mental mitigating factors were not applicable to him (R 746 - 747) When evil people commit evil acts they may not justifiably expect to be immunized from punishment by attaching an invisible cloak of "mental illness" to hide their naked wickedness.

The Court should take this opportunity to reject the counterfeit doctrine that incredibly aggravating factors present must yield per se mitigation: If the crimes are horrible and numerous enough the perpetrator must be excused or granted the lenity of life imprisonment. Only the most morally obtuse among us will accept the notion that more (crimes) should equal less (punishment). Rather, the Court should acknowledge that the seemingly inexplicable behavior of serial rapists and those who kill is not rendered more explainable, or tolerable, by attaching an innocuous label of "mental illness,"

ISSUE XIII

WHETHER THE SENTENCE SHOULD BE REDUCED TO LIFE IMPRISONMENT BECAUSE THE TRIAL COURT FOUND TWO STATUTORY MENTAL MITIGATORS, ALLEGEDLY SHOULD HAVE FOUND NONSTATUTORY MITIGATION AND ALL ALLEGEDLY OUTWEIGHED THE MITIGATING FACTORS.

In the first place it must be noted that defense counsel in response to direct questioning by the court below twice asserted that he was not urging any mitigation other than the two statutory mitigating factors -- *Florida* ***Statutes 921.141(6)(b)*** and *(f).*

> THE COURT: Let me ask you a couple of questions.
>
> So, you're urging upon me those two statutory mitigating circumstances. Do you contend that *any* other exist in this record?
>
> MR. FRASER: I have thought about that, and the problem I have is that all of the evidence supports those two.
>
> Now, if Your Honor wants to think in terms of the kind of upbringing he had, and this argument could be made, being unstructured and so forth, as being another mitigating circumstance, fine.
>
> The only reason I don't make that argument isn't because I don't think it should be made. It's because I don't want to diminish the two statutory ones.
>
> Sooner or later they get watered out, what we're dealing with is kind of like being dropped at sea in the night. Who knows what these terms mean?
>
> These terms are so standasdless, that it's a small wonder the jury could reach any decision at all.
>
> Of course, this is absolutely no criticism of the Court, we're dealing here with ideas that are vague, at the very best, at the very best.

In terms of instructions, we could have just as well as asked the jury, "What do you think?" and send them out. Because that's essentially what we did.

(R 921 - 922)

* * *

THE COURT: I guess my question to you is, other than these two, are there *any* other statutory mitigating circumstances that you want to urge upon me, as well as, are there any other nonstatutory mitigating circumstances that you wish to urge upon me?

MR. FRASER: No, Judge. Mr. Benito put it probably as well as anyone when -- on the day the jury returned its verdict. He went on television and referred to my client as a rabbid **[sic]** dog. And he asked rhetorically, "What do you do with a rabbid [sic] dog? You kill it.''

I don't disagree with that, except he's a rabbid [sic] human being, and we don't kill rabbid [sic] human beings.

~~But in~~ terms of answering the Court's question more directly, *no*, I think that those two statutory circumstances, if the Court focuses all of the evidence that we've introduced and the evidence that the State introduced, and what the Court must know, he killed ten women, raped on hundred -- if you focus in on those two mitigating circumstances, then those mitigating circumstances are established, and I really can't ask for much more than that.

emphasis supplied (R 924 - 925)

In Lucas v. State, 568 So.2d 18 (Fla. 1990) this Court declared:

"As the state points out, Lucas did not point out to the trial court all of the nonstatutory mitigating circumstances he now faults the court for not considering.

> Because nonstatutory mitigating evidence is so individualized, the defense must share the burden and identify for the court the specific nonstatutory mitigating circumstances it is attempting to establish. This is not too much to ask if the court is to perform the meaningful analysis required in considering all the applicable aggravating and mitigating circumstances.

(text at 23 - 24)

The instant case involves not only the nonspecific reliance on mitigating factors presented in Lucas, supra, but an affirmative representation to the court below that no other factors were being urged. Appellant now asks this Court to endorse and approve the defense tactic of urging reversal of the trial court for his reliance on the request of the defense. This should not be countenanced. McPhee v. State, 254 So.2d 406 (Fla. 1st DCA 1971); State v. Belien, 379 So.2d 446 (Fla. 3d DCA 1980) ("Gotcha!" maneuvers will not be permitted to succeed in criminal any more than in civil litigation).

Even if this argument were now assertable and had not been procedurally defaulted, it is meritless in light of the weakness of such urged mitigation. First of all, the trial court's order acknowledged having taken into consideration everything about the appellant's history.

> "The evidence, although in conflict, established that as a result of an extremely deprived childhood, several incidents of blows to the head, and personal abuse of drugs, this Defendant, prior to the commission of the murder in this case, was suffering from mental and emotional afflictions which were categorized as atypica1 psychosis, sexual sadism

(paraphilia), paranoia, bipolar disorder, a dual personality and organic brain damage.''

(R 1334)

* * *

"The Court finds and concludes after a proper consideration of the mitigating circumstances that the aggravating circumstances outweigh the mitigating circumstances. While it is true that the Defendant established a history of mental and emotional problems brought on by a deprived childhood, organic brain damage and use of drugs, it is this Court's opinion that such problems, in the context of this case, did not give this Defendant (who has a propensity of violence to women as evidenced by his actions in this case and in the cases involving Mrs. Jensen and Mrs. Nutall) a license to deliberately stalk and abduct a woman he believed to be a prostitute for the purpose of committing sexual battery on her and later murdering her in an especially heinous, atrocious and cruel manner.

Moreover, the evidence is clear that had the Defendant encountered a police officer prior to the murder of his victim, he would not have committed this crime. This evidence, coupled with the deliberate steps the Defendant took to accomplish his nefarious scheme of seeking out, abducting, sexually battering and then killing a woman he believed to be a prostitute serves to lessen the mollifying impact of the mitigating circumstances found by this Court to exist when balanced against the aggravating circumstances found by this Court to exist.

In sum, the two statutory mitigating circumstances found to exist, when balanced against the statutory aggravating circumstances found to exist, do not sufficiently demonstrate that the Defendant lacked the cognitive, volitional and moral capacity to act with the degree of culpability associated with the imposition of a sentence of death. That is, even taking into careful consideration the Defendant's personal and family background and

> relationships and his emotional and mental health problems, the Court concludes that these two statutory mitigation circumstances did not lessen his culpability when weighed against the statutory aggravating circumstances."

(R 1336 - 37)

See Downs v. State, 572 So.2d 895 901 (Fla. 1990) (After reviewing the record and the sentencing order in its entirety, we are satisfied that the trial court properly considered that evidence and conducted the appropriate balance).

Appellant complains that the court erred in not concluding that mitigating features such as "his psychologically devastating childhood" and lack of a father figure during his childhood and "humiliating" medical problems in childhood outweighed the aggravating factors. With regard to his "devastating childhood", Mrs. Long conceded on cross-examination that she never abandoned appellant and worked hard to insure food and clothing for him -- she just did not sit around the house and drink or use cocaine (R 426 - 428). She was not abusive to Long; she herself had had a rough childhood without robbing , kidnapping ok killing anyone (R 433). Appellant's father confirmed that Mrs. Long loved her son and was a hard worker (R 438). She tried to do what was right (R 442). Appellant's ex-wife Cynthia Bratlett never saw Mrs. Long abuse or beat him (R 470). There was testimony that many people with Long's background are quite successive and overcome such deficiencies (R 748).

Appellant recites a litany of cases apparently to urge that death is inappropriate where two mental health statutory mitigating factors have been found. Long distinguishes cases where the trial court found the mental mitigating to be of little weight; he argues that since there is not minor mental illness problems sub judice, a different result should obtain. In response, appellee would point out that the trial court reasonably explained why the mental mitigating circumstances in the instant case were not entitled to a conclusion that they outweighed the aggravating factors (R 1328 - 1339). And having done so, this Court need not substitute its judgment for the trial court. See Sochor v. State, 580 So.2d 595 (Fla. 1991); C.J. Jones v. State, 580 So.2d 143 (Fla. 1991); Cook v. State, 542 So.2d 964 (Fla. 1989).

Appellee finds that it is interesting to note that when appellant finds it convenient or advantageous to urge upon a court that Mr. Long is a serial killer -- and apparently thereby worthy of compassion and a sanction less than a penalty of death -- that comment is made (R 907, 919, 920 925). If a trial judge acknowledges hearing what the defense says the accusation is made that there has been a violation of the plea bargain. There has been no violation of the plea bargain. Paragraph 6 of that agreement recited that the state shall not rely on the guilty pleas entered in any other case in the Thirteenth Judicial Circuit as aggravating circumstances in Case 84-13346B (The Simms case) 529 So.2d at 288, fn.2. The state did not rely on them below and the trial judge did not consider them.

Appellant argues herein that this Court cannot consider the fact that Long committed other murders just as it could not be considered by the trial court (Brief p. 104). Appellee disagrees with appellant's reading of the scope of the plea bargain; it does not embrace a limitation on this Court's proportionality review examination and, of course, the state does not have the power to engage in an agreement divesting this Court of its authority. For example, the state could not in a capital case enter into a plea bargain with the defendant agreeing that he not have a direct appeal of the judgment and sentence imposing death.

The state did not below and does not here urge that Long's commission of other homicides should be considered as aggravating factors pursuant to *F.S.* 921.141.

To the extent that appellant may have urged below or may be urging here that the commission of other murders should be construed as mitigating, appellee rejects it. To the extent he is urging that the weight to be given the prior rapes of non-homicide victims Jensen and Nuttal should be minimized because they were not physically harmed (Brief, p. 104), appellee disagrees and urges as this Court stated in Hudson v. State, 538 So.2d 839 (Fla. 1989), that this Court will not reevaluate and reweigh the evidence presented as to aggravating and mitigating.

Appellant's effort to have this Court adopt a per se rule that the presence of mitigating factors *6(b)* and *(f)* require a reduction to life imprisonment should be rejected. See Hudson, supra; Ferguson v. State, 474 So.2d 208 (Fla. 1985); Brown v.

State, 565 So.2d 304 (Fla. 1990); Stewart v. State, ___ So.2d ___, 16 F.L.W. S617 (Fla. 1991).

This Court should reject the view that appellant's record in comparison with other cases requires, from a proportionality viewpoint, that his sentence of death be reduced to life. Long's purposeful conduct merits the death penalty.

CONCLUSION

Based on the foregoing arguments and authorities, the sentence of death should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to A. Anne Owens, Assistant Public Defender, Polk County Courthouse, P.O. Box 9000, Drawer PD, Bartow, Florida 33830, this 25th day of October, 1991.

OF COUNSEL FOR APPELLEE.