IN THE SUPREME COURT OF FLORIDA

ROBERT JOE LONG, :

Appellant,

vs. Case No. 74,512

STATE OF FLORIDA, :

Appellee.

APPEAL FROM THE CIRCUIT COURT
IN AND FOR HILLSBOROUGH COUNTY
STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STAT —

One volume of the record on appeal was numbered separately from the rest of the record. That volume, containing the 136 page transcript of a pretrial motion hearing held on February 10, 1989, will be referenced by the letter H (Hearing), followed by the page number. The remainder of the record, including the supplements, will be referenced by the letter R (Record), followed by the page number.

STATEMENT OF THE CASE

On November 28, 1984, a Hillsborough County grand jury indicted the Appellant, ROBERT JOE LONG, a/k/a Bobby Joe Long, for the kidnapping, sexual battery, and first-degree murder of MICHELLE DENISE SIMMS on May 27, 1984. (R. 1159-60) Long entered into a plea agreement on September 23, 1985, whereby he pled guilty to all offenses charged in Hillsborough County, which consisted of eight counts of first-degree murder, eight counts of kidnapping, seven counts of sexual battery, and one probation violation.[1] (R. 1165-66) Pursuant to the plea agreement, Long agreed not to contest the admissibility of his confession or of physical evidence found in his car and apartment, including a knife found near his apartment. (H. 58, 70; R. 1166) In return, the state agreed to the imposition of life sentences for all of the murders except that of Michelle Simms. The penalty for the Simms murder was to be determined at a penalty phase proceeding at which the state would seek the death penalty. The agreement provided, however, that the state could not use the Hillsborough convictions resulting from the plea agreement as aggravating factors. (R. 1167)

Following a penalty phase trial which commenced on July 10, 1986, Long was sentenced to death for the murder of Michelle Denise Simms. (R. 1171-72) On June 30, 1988, this Court vacated Long's death sentence because the state introduced, to establish an aggravating factor, Long's prior conviction in Pasco County for the murder of Virginia Johnson. Long v. State, 529 So.2d 286 (Fla. 1988). The Pasco County conviction was vacated because the trial court failed to suppress Long's illegally obtained confessions. Long v. State, 517 So.2d 664 Fla. 1987). (R. 1163-1179)

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[1] Long also pled guilty to the kidnapping and sexual battery of Lisa McVey, the victim whose abduction and subsequent release led to Long's arrest on November 16, 1984, (R. 1165-67)

The trial judge appointed new counsel, Robert Fraser, to represent the Appellant in the second penalty phase proceeding.[2] (R. 1183) Because of the extensive pretrial publicity, the judge granted the defense motion for change of venue. (R. 1191-97, 1255) Thus, the second penalty phase trial was moved to Daytona Beach, Volusia County, in the Seventh Judicial Circuit. The Honorable Richard A. Lazzara, circuit court judge in the Thirteenth Judicial Circuit, presided. (R. 1255-57)

Long filed a pretrial motion to withdraw his guilty pleas in all of the Tampa cases. (R. 1224-26) He alleged that his prior public defender (Charles O'Connor) did not explain the plea agreement properly; thus, Long did not understand that, even though his pleas could not be used against him in Hillsborough County, they could be used in a new trial of the Pasco County case.[3] The motion was denied at a pretrial hearing. (H. 47-157; R. 1238-40)

On April 19, 1989, Long filed a pro se motion for a rehearing of his request to withdraw his guilty pleas. (R. 1263-1268) Long's motion enumerated his counsel's counterproductive actions at the February 10, 1989, hearing and efforts to prevent Long from withdrawing his guilty pleas despite Long's repeated requests to do so. (R. 1265-70) The judge considered and denied this motion at a May 3, 1989, hearing. (R. 1279-80) On May 9, 1989, Long filed a pro se motion to withdraw his pleas. That motion was denied May 15, 1989.[4] (R. 1281-97)

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[2] Long was represented by Ellis Rubin at the first penalty phase proceeding. (R. 1162)

[3] Long's pleas were used as Williams Rule evidence in the retrial of the Pasco County case and also to establish the "prior violent felony'' aggravating factor. (R. 48-49, 56-57)

[4] Prior to the first penalty phase proceeding, Judge Griffin granted Long's motion to withdraw these same pleas because Long did not know he was forfeiting his right to appeal the admissibility of his confession and because a crucial defense witness, Dr. Morrison, was not available to testify at penalty phase. After 24 hours af

On May 26, 1989, the judge granted a defense motion in limine to exclude any mention of insanity by any expert witness and any mention of any offense committed in Hillsborough County other than the crimes against Michelle Denise Simms. (R. 967-69) He denied the defense motion to exclude any mention during voir dire that the jury advisory sentence was not binding. (R. 969-78) He reserved ruling on other issues including the admissibility of hearsay and of testimony by psychiatrist Daniel Sprehe that Long committed the murder to eliminate a witness. (R. 987-90, 1298-99)

Long's second penalty phase jury proceeding, the subject of this appeal, was held June 26-29, 1989. (R. 1310) The jury recommended death by a vote of twelve on June 29, 1989. A Motion for New Trial was filed on July 10, 1989. (R. 1317-18) It was denied at a hearing on July 18, 1989, (R. 1316)

At the July 21, 1989, sentencing, Long was sentenced to concurrent life sentences for counts I and 11, and death by electrocution for count 111. (R. 958, 1324-27) Written findings supporting the death sentence were filed July 21, 1989. (R. 1328-39) The judge found all four aggravating factors upon which the jury was instructed, both statutory mitigating factors on which the jury was instructed, and no nonstatutory mitigation.[5] (R, 1329-35)

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deliberation, however, Long elected not to withdraw his pleas but to continue with the plea agreement. When Ellis Rubin was appointed, Long moved ta withdraw his pleas; this time on constitutional grounds. The judge denied his second motion to withdraw the pleas, The denial was upheld by this Court in Long v. State, 529 So.2d 286, 292 (1988). (See Issue I, infra.)

[5] The aggravating factors were that (1) Long was previously convicted of a felony involving the use or threat of violence; (2) the crime was committed while the defendant was engaged in a kidnapping; (2) the crime was especially heinous, atrocious or cruel; and (4) the homicide was committed in a cold, calculated and premeditated manner. (R. 865-67) The mitigating factors were that (1) the defendant's capacity to appreciate the criminality of his conduct or conform his conduct to the law was substantially impaired; and (2) the capital felony was committed while the defendant was

On July 26, 1989, Robert 30e Long filed a Notice of Appeal to this Court pursuant to Article V, Section 3(b)(1) of the Florida Constitution and Florida Rule of Appellate Procedure 9.030 (a)(1)(A)(i). (R. 1345) Long was found indigent for purposes of appeal and trial counsel, Robert Fraser, was appointed to represent him. (R. 1340-41, 1343-44) Pursuant to Long's pro se motion, however, Fraser was relieved of that responsibility and the Public Defender for the Tenth Judicial Circuit was appointed. (R. 1351-57)

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under the influence or extreme mental or emotional disturbance. (R. 865-68) Defense counsel did not urge the court to find any non-statutory mitigation because he thought it was included in the two statutory mental mitigators and did not want to "diminish" the two mental mitigators. (R. 921, 924-25) (See Issue XI, infra.)

STATEMENT OF THE FACTS

Lieutenant Randy Latimer, Hillsborough County Sheriff's Office, testified that he investigated the death of Michelle Denise Simms on May 27, 1984. (R. 327-28) Simms' nude body was found in a wooded area along Park Road just north of Interstate 4, near Plant City, Hillsborough County, Florida. (R. 328-29, 335) Both of Simms' wrists were tied with rope and a rope was tied around her front and back to restrict the movement of her hands. (R. 330) Her throat was cut and clothes were scattered around the area. Blood was found on her head and face. (R. 329) Apparent rope burns were found across her neck and chin.[6] (R. 332)

Dr. Lee Robert Miller, the Hillsborough County medical examiner, viewed the Simms' body at the location where it was found. (R. 364-65) He observed that her throat was cut and that she had deep lacerations on the head. He observed a rope tied loosely around Simms' neck and ligature marks around the neck and across the face. Dr. Miller agreed that the marks would be consistent with Simms having put her chin down and the rope being tightened. (R. 370-72)

Dr. Miller performed an autopsy on Simms the following day. (R. 357) He determined that she was 22 years of age, measured 5'5" tall, and weighed 119 pounds. (R. 357) In his opinion, there were three possible causes of death -- asphyxiation (strangulation or suffocation), closed head injuries (five lacerations to the scalp),[7] and exsanguination (bleeding from two knife slashes on the neck). (R. 368-76)

Because of the bleeding along the ligature marks, Dr. Miller concluded that

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[6] The prosecutor showed enlarged 16" by 20" photographs to demonstrate the condition of Simms' body when it was found and to depict the knife found near Long's apartment. (R. 329-37)

[7] The prosecutor also showed enlarged photagraphs of Simms during the autopsy, including one with part of her head shaved to reveal the lacerations. (R. 373)

Simms was alive when the rope was tightened around her chin and neck. She may or may not have been conscious. (R. 382) He also concluded that she was alive, and may have been conscious, when hit on the head five times with a blunt instrument. (R. 374-75) She was still alive when her neck was slashed but may not have been conscious. (R. 378, 382) If one of the blows to the head rendered Simms unconscious, she would not have felt pain when she was strangled (assuming it followed the blows to the head) or when her throat was slashed. Although Miller could not determine the sequence of the blows to the head and strangulation, he said that the cutting of the throat occurred last. (R. 383-85) Dr. Miller agreed that the way Simms died was entirely consistent with rage and did not suggest that the killing was cold, calculated or premeditated. (R. 380)

Lieutenant Randy Latimer testified that he and Sergeant Price, from the Tampa Police Department, interviewed Robert Joe Long ("Bobby Joe") on November 16, 1984. (R. 333-34) Long told them that, on the evening prior to the Simms murder, he purchased some rope, cut it in sections, and put it in the glove compartment of his car. (R. 335) He put a weapon in his car and drove along Kennedy Boulevard in Tampa looking for a prostitute. When he pulled up next to Michelle Simms, she asked if he wanted a date. When he asked "how much," she said "fifty dollars."' He agreed. They drove a half-mile to a mile away. He pulled a knife, made Simms undress, reclined the passenger seat into a prone position and at knife point tied her up. (R. 334)

Long told Latimer that he then drove fifteen to twenty miles to eastern Hillsborough County, in the Brandon area, where he raped Simms. (R. 334) He talked to Simms, at that time intending to take her back to where he picked her up, and told her he would do so. (R. 335, 338) Instead, however, he drove her to the Plant City area and tried to strangle her. Because she would not become unconscious, he hit her on the head with a club. He threw her out of the car,

cut her throat, and left her along the side of the road. He also threw her clothes out of the car. (R. 335)

On cross-examination, after defense counsel impeached his testimony with Long's taped confession, Latimer admitted that during the taped confession Long said he hit Simms on the head prior to trying to strangle her so that she would not suffer. Latimer said Long's untaped confession differed from his taped confession in this regard. Latimer agreed that Long's comment was open for interpretation as to whether he did not want her to suffer when he killed her or by living a life of prostitution. (R. 343-44)

According to Latimer, Long was calm and cooperative throughout the interrogation. (R. 340) He told Latimer where to find a knife that he had thrown out near his apartment.[8] (R. 341) He admitted that he used the knife to stab Simms. (R. 336)

Latimer also testified concerning Long's convictions for the burglary, kidnapping, robbery, and sexual battery (four counts) of Sandra Jensen, a housewife, on March 6, 1984, in Pasco County, Florida. (R. 338-40) He said that Long told him he was riding around and saw a house with a "For Sale" sign in front of it. He knocked on the door and asked the woman if he could look at the house. As soon as he gained entry, he pulled a gun and took the woman into the bedroom and raped her. He gathered up some jewelry which he later pawned in Tampa and left the house. (R. 339)

Major Chuck Troy, from the Pasco County Sheriff's Office, investigated the sexual battery of Sandra Jensen. (R. 354-55, 360) He said Jensen reported that, at approximately 10:30 a.m., a white male dressed in a business suit appeared at

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[8] Sergeant Jerry Nelms, Hillsborough County Sheriff's Office, testified that he was involved in the search of Long's apartment on November 16, 1984, and found the knife in the woods by the apartment. (R. 345-48)

her house which had a "For Sale" sign in the front yard and inquired about the price.' (R. 355-56) When she opened the door, he forced his way into the living room, placed his arm around her neck and put a gun to her temple. He walked her into the bedroom, tied her hands behind her back and taped her mouth shut with rope and tape from his pocket. She believed that he pulled out a pocket knife. He cut the front of her blouse open, forced her to the floor, and made her perform oral sex on him. He then picked her up, pushed her onto the bed, removed her pants and had sexual intercourse with her. (R. 356-58)

Afterward, the man removed her jewelry from her neck and rings from her fingers. She heard him rummaging through dresser drawers. He left the bedroom, then returned to digitally penetrate her rectum and vagina and bite her thighs and breasts. He again left the room and, apparently, the house. (R. 357)

Jensen sustained no serious physical injuries. (R. 360) When she was able to free her hands, she ran across the street to a neighbor's house where she telephoned the authorities. (R. 357) On April 17, 1985, Bobby Joe Long was convicted of the crimes against Sandra Jensen. (R. 358)

Terry Rhoads, formerly a detective with the Pinellas County Sheriff's Office, testified that he participated in the investigation of the 1984 sexual battery of Linda Nuttal, a housewife. (R. 386-87, 395) Ms. Nuttal reported to him[10] that, on the morning of May 29, 1984, she received a telephone call concerning her newspaper advertisement to sell bedroom furniture. The man told her he was a salesman for IBM. She gave him directions to her home in Palm

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[9] The judge granted defense counsel a continuing objection ta the hearsay testimony of Major Chuck Troy who testified as to what Sandra Jensen told him about her sexual battery, and Terry Rhoads, who testified as to what Linda Nuttal told him about her sexual battery. (R. 351-53)

[10] Defense counsel objected to the hearsay testimony. (R. 387)

Harbor. He arrived at her home about 10:00 that morning wearing a three-piece suit. (R. 388)

When they entered the bedroom, the man pushed her to the floor, sat on her, and tied her hands behind her. (R. 389) He blindfolded and gagged her with pieces of her bed sheets. He removed her shorts and cut her blouse and bra off. He walked her across the house to the den, removed the gag, and forced her to perform oral sex on him. He then had sexual intercourse with her. (R. 390)

Mrs. Nuttal had a four-year-old son and a one-year-old daughter at home. Before raping her, Long led the boy into his room and told him to stay there and that everything would be all right. (R. 390) Although he at first threatened to kill Mrs. Nuttal if she did not quit talking, toward the end he assured her that he would not harm her. (R. 389, 394) After the sexual battery, he "marched her" back to the bedroom and pushed her down on the bed. He put a pillow over her and began looking through her drawers. (R. 381) He removed her wedding ring and an opal ring from her hand. Before he left, he tied her feet together. (R. 392)

Eventually, Mrs. Nuttal was able to get off the bed and to the bedroom sliding glass door. She fell out the door, attracting the attention of landscape workers who called the sheriff's department to help her. (R. 392) Long was eventually arrested and charged with the crime. On July 12, 1985, he 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) He was sentenced to life in prison." (R. 397)

Long's mother, Louella Marlene Long, testified for the defense. (R. 403) "Bobby" was born October 14, 1953, in Kenova West Virginia, when his mother was seventeen years old. (R. 405) At that time, she was sick with colitis "every day

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[11] The state rested its case after this witness. (R. 393)

of [her] life." (R. 408) Although she was married, she was not prepared for motherhood. (R. 404) She had been "on her own" since she was eight years old. (R. 405) When Bobby was about eight months old, Mrs. Long left his father,[12] and moved to Huntington, West Virginia. They stayed in West Virginia for about a year and a half, during which time her aunt took care of Bobby while she worked. (R. 405)

They then moved to Miami, Florida where Mrs. Long was a carhop. (R. 405-06) She generally worked from six in the evening until two or three in the morning. They lived in various houses where someone would take care of Bobby while she worked. Bob was left with about twelve different persons when he was between the ages of two and eight. He shared a room with his mother and they slept in the same bed until Bob was more than ten years old. At that time, Mrs. Long began working all night and got home just in time to get Bob off to school. He changed schools frequently because Mrs. Long lost her jobs and moved. (R. 410-12)

After working as a carhop, Mrs. Long worked as a waitress at Lums and then as a barmaid. (R, 410) She wore hot pants and boots and little sexy outfits when she worked as a barmaid. (See photograph at R. 1463). When Bob was about thirteen, he asked her several times why she dressed that way. (R. 415)

When Bobby was ten, Mrs. Long's mother, sisters, nieces, and nephews all moved to Miami. They all shared a house in North Miami Beach, Mrs. Long was the only one who worked and Bobby was left at the house with her mother and sisters who fought a lot. No one really took care of him; he was "just there." Mrs. Long learned later that her sister told Bobby that his mother was a prostitute. (R. 418)

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[12] Mrs. Long said she was married to Bob's father, Joe, three different times. They were married at the time of her testimony. They had no other children. (R. 404)

Mrs. Long was married to Nelson Landon for a couple years between her marriages to Bob's father. Bob quit school at the age of fifteen to work with Landon, doing electrical work. (R. 417) When Mrs. Long found out that Nelson Landon was alreadymarried, however, she had the marriage annulled. Bob was hurt because he thought a lot of Landon. (R. 413) Mrs. Long lived with another man briefly when Bob was sixteen or seventeen. Bob despised the man and finally had a fight with him and the man left. (R. 421-22)

Bob suffered five serious head injuries as a child. He fell out of a swing and the rescue squad was called. Another time he fell down the stairs and was knocked out for fifteen to twenty minutes. He was hit by a car at the age of seven and his face was "torn up." His teeth were knocked into his head and his mouth and jaws damaged. He was in the hospital for a week or more. Another time he fell down a flight of stairs and was unconscious a couple minutes. When he was eleven or twelve, he was thrown from a horse and knocked unconscious. He threw up later but seemed all right so was not taken to a doctor. (R. 411-15)

At age fifteen, Bob was hospitalized for surgery to remove an enlarged breast. He had been extremely embarrassed for several years and wore only loose fitting shirts to cover the breast. The doctor removed six pounds of tissue from Bob's breast and diagnosed the problem as a hormone imbalance. (R. 423) (See photograph of Long in hospital after surgery at R. 1455)

The state showed the jury a videotaped deposition of Cynthia Bartlett, Long's former wife. (R. 444) "Cindy" was unable to testify in person because of high blood pressure. (R. 445) Bob met Cindy when he was thirteen. Cindy testified that when Bob was a teenager, he and his mother were always fighting. She said that Mrs. Long was a pushy woman who embarrassed her. Mrs. Long dated a lot of men and dressed in a "loose" fashion. (R. 455-56) Cindy said that Bob slept with his mother until he was about twelve and that his mother would frequently

wake him up to go sleep on the couch because she had different men there to spend the night. (R. 457) Bob referred to women who dressed "pretty loosely" as "sluts." He thought these women resembled his mother. (R. 458, 485) As a teenager, Bob sometimes used LSD and THC. (R. 483)

Bob lived with his mother until he was about twenty years old.[13] He married Cindy in January of 1974. (R. 429, 458) They were married for over six years, divorcing in 1980. Bob and Cindy had two children, a boy and a girl. (R. 446) Cindy said that Bob was currently supporting their children by directing that they receive his $250 per month disability check. (R. 457) She said that Bob was always good with the children and that just prior to his arrest she and Bob were very close to reconciling. (R. 468)

Long enlisted in the military in 1972. (R. 450) At age twenty, while in the army, he was in a serious motorcycle accident in Miami. He was thrown over a car and suffered serious head injuries. (R. 415, 458) He had various operations and spent about a year recuperating. (R. 460) He was different after the accident. He could not stand any noise. (R. 419, 456-57) He would explode about little things or nothing at all. Sometimes he would stay in his room for several days. One time he grabbed his mother and spanked her for no reason. She screamed and cried until he dumped her on the floor and left. He never mentioned it and denied having done it when questioned by his wife. (R. 418-21)

Cindy testified on videotape that Bob's sexual appetite increased after the motorcycle accident. Several days a week he wanted to have sex three or four

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[13] Long lived with his mother twice afterwards. (R. 430) At the time of the trial, Mrs. Long was remarried to Bob's father. They lived in Kenova, West Virginia where Mrs. Long owned a jean shop. (R. 434) Bob's father testified that he lived with his son approximately four or five years from Bob's birth until Bob entered the army. (R. 435) He said he was in frequent contact with his son now; that Bob seemed calmer than in the past; and was given daily medication to control his mood changes. (R. 436)

times a day. He increased his reading of Playboy, Hustler, and other such magazines. (R. 462-63) His moods varied and he experienced temper tantrums. Sometimes he was violent. He complained of headaches every day or two. Sometimes his balance was not normal. Sometimes he could not sleep. He experienced memory loss after the accident. He took amphetamines every day for nine months to a year. (R. 463-65)

Dr. John Money, a professor of medical psychology and pediatrics at John Hopkins University School of Medicine, testified that he specialized in psychoendocrinology and sexology. (R. 524-25) Although he had extensive experience teaching, writing, and researching,[14] he had testified in court only eighteen times and had only twice examined persons with pending murder trials to determine their mental status. (R. 531, 573-74) He treated about a hundred people with altered states of consciousness. (R. 591)

In 1987, Bob Long first wrote to Dr. Money because he read something in a magazine about Klinefelter's syndrome (47 chromosomes instead of 46) and thought he might have it.[15] (R. 533) Since that time, Dr. Money received 55 letters from Long, many of which were biographical. He correspond with Long and met with

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[14] Dr. Money founded a clinic at John Hopkins University for the treatment of sexual disorders in 1966. He taught or lectured at 37 universities in the United States, universities located in 25 provinces of Canada, all of the universities of Western Europe, two universities in Eastern Europe, four universities in the Middle East, four universities in Asia, two universities in the Pacific and seven universities in Latin America. He published 327 research papers, authored 29 books, and wrote chapters for 79 text books. He did studies on the mental process related to sex and criminal behavior and was on the sexual disorder committee for the Diagnostic and Statistical Manual, Third Edition. (R. 526-530, 591)

[15] One of the symptoms of Klinefelter's syndrome is enlarged breasts. Although Long experienced the growth of a female breast, tests showed that he did not have the 47 chromosomes that indicated Klinefelter's Syndrome. Dr. Money said, however, that Long might have a genetic disorder too small to photograph. (R. 537)

him in November of 1988 and again in June of 1989. Dr. Money talked to Long's mother by telephone and reviewed professional, medical, and police reports concerning Long. (R. 533-34)

Dr. Money diagnosed Long as hawing "sexual sadism," a brain disorder which caused his criminal behavior, (R. 535) He explained that a sexual sadist's brain signals regarding self-defense or defense of the species become crossed with the brain signals for reproduction, mating and sexual arousal. Thus, the two signals appear at the same time.

In Long's case, Dr. Money found evidence of hereditary disposition to this disorder. (R. 535) Another probable cause of Long's sexual sadism was the crowded conditions in which he grew up and his lack of a sleeping space of his own. Sleeping with one's mother becomes sexually arousing as a boy reaches toward puberty and there is no outlet for the arousal. (R. 544)

Tests revealed that although Long's hormones stimulated his testicles to produce the correct amount of testosterone, the male sex hormone, the testosterone level was below the lowest limit normal for a male. (R. 539) Dr. Money reported that a growing body of evidence suggested the paradoxical conclusion that sexual sadists are low rather than high in testosterone. (R, 540)

Dr. Money also diagnosed Long as having temporal lobe epilepsy, a peculiar kind of epilepsy that does not cause seizures but which causes one to enter an altered state of consciousness. In the altered state, the person appears to behave normally except to someone that knew the person when he or she entered the altered state. The altered personality is closely related to the phenomena of the dual or multiple personality, popularized by Robert Louis Stephenson in "Doctor Jckyll and Mr. Hyde." The person goes from one personality into another personality. The second personality is an altered state of consciousness. (R. 541-42) A person with temporal lobe epilepsy may go into an altered state of

consciousness for two or three hours. (R. 543) Temporal lobe epilepsy often occurs with the paraphilia of sexual sadism.16

Another overlapping syndrome is manic depressive disorder, in which a person experiences alternating periods of extreme high or mania and melancholy or despair. (R. 544) Additionally, all paraphiliacs, to a certain degree, have paranoid thinking and a schizophrenic preoccupation with ideas and obsessions that "won't give up." All paraphilias carry the possibility of an antisocial personality disorder (psychopathic personality), It is "in the very nature of the condition." Sometimes medical personnel diagnose a person as psychopathic, missing the paraphilia. (R. 545)

Dr. Money said that Long, by the very nature of his condition, had "antisocialism," which includes deceit. The good personality has to cover up what the bad personality is doing. For this reason, Dr. Money carefully sorted the information he received from Long into categories of that which could be substantiated and that which could not be substantiated. In other words, he was very careful not to be "gullible." (R. 547)

Dr. Money said that a head injury may be 100 percent responsible for sexual sadism. Long had five head injuries between the ages of three and nine. The major injury, however, was the motorcycle accident when Long was twenty years old. The head injury, which left him unconscious and in need of hospitalization, was the source of brain damage which may have produced paraphilia.[17] The onset

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16 Dr. Money earlier defined "paraphilia" as peculiar forms of sexual behavior in which the mental image range for the arousal of sexual behavior is quite different than what everybody would consider normal, commonly called perversions. (R. 527)

17 The adult head injury damaged the retina of Long's left eye. The damage can still be seen in an eye examination. The injury also permanently affected the left facial nerve producing numbness and tingling on that side of the face. Additionally, the

of epilepsy in the brain might also have produced the paraphilia. (R. 547-59)

Dr. Money said that the change in Long's sexual behavior following the accident, from normal to hypersexual, is characteristic of sexual sadism and would result from damage to certain areas of the brain. (R. 553-54) Long's masturbation imagery would also change, with the imagery of lovemaking contaminated by the mental pictures of an attack, or sadistic fantasies. The region of the brain affected by the injury (the limbic brain) controls the hormones from the pituitary glands, thus controlling both aggression and sexual behavior, (R, 555) The altered state of consciousness results from altered pathways in the limbic brain. (R. 557)

Although a sexual sadist becomes sexually aroused by inflicting pain, he is also capable of making love in a normal fashion, with a wife for example, so that no one suspects the sexual sadism. (R. 568-69) Because a sexual sadist does not know why he did what he did after he returns to his normal state, he attempts to rationalize his behavior. In the case of Bob Long, Dr. Money offered Long's statement to law enforcement officers that he hit Michelle Simms with a board so that she would not suffer when he killed her as an example of such rationalization. (R. 570)

Although no one has voluntary control of the limbic brain or the altered state of consciousness, Long discovered that he could keep these altered states "at bay" if he exhausted himself athletically for several hours. He would then be so tired he would sleep for several hours. That was only a temporary solution, however, because he would eventually have another attack. (R. 557) Long has some degree of remission from the tranquilizer "Sinequan" which he is

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injury damaged the inner organs of balance in the ear, causing Long to experience hallucinations of movement -- the room and walls seem to be moving. (R. 549) An EEG showed a slight defect in the deeper part of the left side of Long's brain. (R. 550)

given in prison. (R. 559)

Dr. Money concluded that his diagnosis of Long was sexual sadism (a paraphilia) and dual personality phenomena, neither of which Long could control. (R. 558) He said that Long's description of his feelings during the rapes of Jensen and Nuttal and the murder of Simms indicated that he was in an altered state of consciousness. Long would feel wired, lose interest in eating and other activities, and would feel as though he were on "automatic pilot." He could not stop the behavior he had started. (R. 560) Thus, although Long knew what he was doing when he killed Simms, he had no control over it. (R. 571)

In Dr. Money's opinion, Long killed Simms while under the influence of extreme mental or emotional disturbance. Long lacked the capacity to appreciate the criminality of his conduct because he was in an altered state of consciousness and could not control his behavior. (R. 561) Dr. Money also opined that Long's ability to conform his conduct to the requirements of law was substantially impaired when he killed Simms. (R. 562)

Dr. Robert Berland, a forensic psychologist, was court appointed to evaluate Bob Long. Dr. Berland testified that he had performed 1100 to 1200 forensic evaluations, testified between 120 and 140 times, and studied malingering. (R. 596-602) To evaluate Long, he administered psychological tests, interviewed Long and his ex-wife, and evaluated documents.[18] (R. 605-06)

Dr. Berland administered the Minnesota Multiphasic Personality Inventory ("MMPI") to Bob Long in 1985 and again in 1988. Both tests showed that, as opposed to malingering, Long may have made some selective effort *to* underestimate his problems. (R. 622-25) Berland explained that, because of the stigma of

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[18] Dr. Berland interviewed Long on several occasions in October, 1985, and again twice in October of 1988. He estimated the total time spent with Long at 20 hours. (R. 647)

mental illness, even persons who are facing serious criminal charges will go to extremes to avoid admitting certain problems. (R. 627-28)

The Rorschach test showed that Long was particularly guarded and was not willing to open up concerning his ideas, feelings, and problems. (R. 632) The test showed a paranoid disturbance. Because Long's responses were extremely conservative and guarded, Dr. Berland did not suspect malingering. (R. 633-34)

The Wexler Adult Intelligence Test ("WAIS") indicated that Long was above average in intelligence (118 IQ) and had an impairment from brain damage. (R, 637-37) Although the Bender Gestalt test did not officially show brain damage, it provided weak support for some such impairment. (R. 66-42) The Smith Simple Digit Modality Test showed a lower score than Long's IQ would indicate but not low enough to indicate brain damage. Berland had since discontinued this test because it was insensitive to intelligent persons. (R. 642-63) He said that both the Bender and the Smith tests often failed to show impairment that was later verified by empirical data and thus were not as reliable as the WAIS. (R. 643-44)

Dr. Berland found, consistent with the test results, that Long was guarded and hesitant to discuss certain subjects such as psychotic symptoms, hallucinations, paranoid delusional beliefs or mood or emotional disturbances, (R. 652) Information he learned from Long's ex-wife, Cindy, was consistent with his test results and interviews with Long. Berland found consistent evidence of psychosis from all three sources. (R. 653)

Dr. Berland determined that Long had two kinds of psychotic disturbance: (1) an inherited bipolar or manic-depressive psychosis; and (2) an organic personality syndrome caused by damage to brain tissue. The second psychosis may have been caused by Long's accident at age twenty, or his chronic amphetamine abuse following the motorcycle accident. When brain damage is added to an inherited bipolar disorder, the psychosis is worsened. Chronic amphetamine use may

also cause a psychosis or worsen an inherited psychotic problem. (R. 627-28, 705)

According to Dr. Berland, Long suffered from paranoid thinking which affected his judgment. He had mood problems, depressive episodes, manic episodes, periods of extraordinary energy and impulsiveness, and anger, The testing suggested that Long hallucinated. Dr. Berland said that the manic periods, during which Long was especially angry, were caused primarily by internal biological changes. (R. 653-55)

Dr. Berland explained that Long was one of a small number of psychotics who are so well organized in their thinking and perception that they are able to hide the symptoms of mental illness. Because they are already paranoid, they are especially sensitive to the fact that any statement out of the ordinary may get them locked up. Psychotics with the manic depressive or bipolar disorder are particularly likely to fall into this category. The larger group of psychotics cannot hide their symptoms and are locked up in hospitals or jails before they are able to commit crimes. (R. 655)

Dr. Berland said that, in addition to the psychoses, Long had two non-psychotic diagnoses: an antisocial personality disorder and paraphilia. (R. 658) Paraphiliacs share common backgraunds which include a very disorganized family situation with a dominant controlling, capricious, sometimes violent mother and a weak passive father. Family life is characterized by chaos, frequent movement, often drug or alcohol abuse, sexual promiscuity, and parental negligence alternated with control over petty matters. (R. 659)

Men with antisocial personality disorder and paraphilia typically take out their anger against women by raping or otherwise demeaning them, The combined effect of these disorders -- a bipolar disorder causing hypersexuality and a paranoia causing rage -- produces an irrationally, sometimes bizarrely and poorly controlled mental disorder with anger toward women its focus. (R. 660-63)

Long's paraphilia, compounded by the psychotic disturbance, caused him to murder Simms and not the two rape victims. The rape victims were in Long's category of "madonnas" or the small portion of women who are sweet, chaste, wholesome and kind. Simms, on the other hand, embodied what Long believed that women generally were -- nasty, sleazy creatures that tried to beat men down at every opportunity." (R. 664-65)

Dr. Berland testified that his evidence suggested that there was no substantial impairment of Long's ability to appreciate the criminality of his act in murdering Simms.[20] In his opinion, however, Long was substantially impaired in his ability to conform his behavior to the requirements of law because of the four disturbances described. Berland's opinion was that Long was under the influence of extreme mental or emotional disturbance when he killed Simms. (R. 665-67) He believed that Long killed Simms in a fit of rage. (R. 667)

The most critical factor, according to Dr. Berland, was the evolution af

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[19] Long classified women as "edibles" or "inedibles" and told Dr. Berland that he had met only five or six women of the nonslut variety. (R. 685) Although his descriptian of his mother included promiscuity, dishonesty, and domineeringness, he refused to classify her as a slut. (R. 588)

[20] On cross-examination, the trial court permitted the prosecutor to ask Dr. Berland, over a relevancy objection, whether Long knew right from wrong. (R. 692) Dr. Berland said that, as far as he knew, Long was able to distinguish right from wrong, but his ability to stop himself from committing the crime was substantially impaired. Defense counsel argued that whether Long was capable of telling right from wrong was the classic M'Naghten test which the court held irrelevant in its Order in Limine (see R. 967-69), and that M'Naghten is a much higher standard than either mitigator requires. The judge overruled the objection because defense counsel asked Berland about Long's capacity to appreciate the criminality of his conduct; thus, he ruled that the prosecutor's questioning was within the scope of direct. Defense counsel said he was just tracking the death penalty statute. The court instructed Dr. Sprehe, the next witness, not to get into the M'Naghten standard. (R. 712-18)

Long's bipolar disorder. The brain damage was not a huge impairment and the severity of the psychosis resulting from it was impossible to determine. For this reason, Dr. Berland believed the brain damage psychosis merely worsened Long's existing hereditary psychosis from the bipolar disorder. (R. 707-08)

Dr. Daniel 3. Sprehe testified in rebuttal for the state. (R. 725) He said that he had testified as an expert forensic psychiatrist in three or four thousand criminal cases, of which several hundred were murder cases. (R. 728) Dr. Sprehe examined Long for five hours in 1985, and reviewed relevant records, police reports, and the findings of Drs. Berland and Money. (R. 730-32)

Sprehe said Long told him that, when he killed Michelle Simms, he had with him a rope, a piece of wood, and a knife. Long's car had electric locks and a reclining passenger seat. (R. 732) Dr. Sprehe said that Long told him he wouldn't have killed Simms if a policeman had been standing there. (R. 735)

Sprehe's opinion was that Long made a conscious decision to kill Simms. (R. 735) He diagnosed Long as having an antisocial personality disorder rather than a psychosis. (R. 737) Sprehe said the MMPI was only useful to determine a person's current mental state and would not determine mental state at the time the crime occurred.[21] (R. 740) He looked at Long's MMPI scale and said it showed that Long was exaggerating to make himself look sicker than he was.[22]

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[21] Dr. Berland testified to the contrary earlier, stating that, although nothing in his profession was infallible, the MMPI was about the closest he had seen. He said it "'really works." (R. 601) He found that Long's test results shawed a clearly psychotic profile. (R. 622-27)

[22] Based on the same test results, Dr. Berland found that Long was not malingering but may have tried to underestimate his problems. Interestingly, Dr, Sprehe testified that Long was pretty frank when talking to him personally which seems to contradict his interpretation of the MMPI as showing malingering. (R. 760) Dr. Sprehe testified that one can assume things a defendant tells you which are admissions to the crime are generally true, but when a defendant tells you things that mitigate the crime, a good forensic

He said the test showed that Long had an antisocial personality disorder rather than a psychosis. (R. 741-42)

Sprehe also said that the WAIS test did not show that Long had brain damage. He said that the cranial nerve damage that Long suffered from his motorcycle accident would not affect his ability to think and reason. (R. 742) He did not believe Long was a sexual sadist; instead, he said Long raped for sexual pleasure and did not get satisfaction from inflicting pain. (R. 745)

Dr. Sprehe testified that Long told him he killed Simms "to eliminate a witness."[23] (R. 743) He told Sprehe he was not sure whether he hit Simms with the board to kill her or so that she would not suffer. (R. 744) Dr. Sprehe said Long's capacity to appreciate the criminality of his conduct or to conform his conduct to the law was not substantially impaired. (R. 747)

Dr. Sprehe admitted that Long had a severe personality disorder all of his life; thus, there was something wrong with him. (R. 749) He did not believe, however, that it was a mental illness or disease. (R. 750-58) He said the cause of an antisocial personality disorder is unknown. (R. 757)

Following closing arguments, the court instructed the jury on four aggravating factors as follows: (1) the defendant was previously convicted of a felony involving the use or threat of violence to the person; (2) the crime was committed while the defendant was engaged in a kidnapping; (2) the crime committed was especially heinous, atrocious or cruel ("HAC"); and (4) the homicide was committed in a cold, calculated and premeditated manner without any pretense of

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scientist is skeptical. (R. 767)

[23] On cross-examination, Dr. Sprehe could not explain why Long did not kill Linda Nuttal and Sandra Jensen, even though they were able to describe him to the police. He said a person with an antisocial personality decides to hurt some women and not others. (R. 752-53)

moral or legal justification ("CCP"). (R. 865-67) The court instructed the jury to consider in mitigation whether (1) the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired; (2) the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance; and (3) any other aspect of the defendant's character or record and any other circumstances of the offense. (R. 865-68)

The jury recommended death by a vote of twelve. (R. 882)

SUMMARY OF THE ARGUMENT

I: Long filed a pretrial motion to withdraw his guilty pleas entered in 1985 pursuant to a plea agreement which provided, among other things, that none of the other Tampa homicides he confessed to could be used against him as aggravation in the instant penalty phase trial. Long was not told, however, that his confessians and pleas could be used against him as Williams Rule evidence to convict him, and as aggravation in penalty phase, in a new trial of his Pasco County case, if that case was remanded. In fact, his attorney led him to believe the other Tampa homicides could not be used against him in any court. Thus, his pleas were involuntary and he must be permitted to withdraw them.

II: The trial court erroneously allowed two detectives to testify as to the hearsay reports of two rape victims, to establish the "prior violent felony" aggravating factor. Although hearsay is generally permitted in a penalty proceeding, in this case Long had no opportunity to rebut the hearsay.

III: In 1985, Drs. Sprehe and Gonzalez were appointed to examine Long to determine competency and sanity. Long was not given Miranda warnings nor told that the doctors could use what he told them for any purpose other than to determine competency. Over objection, the judge allowed Dr. Sprehe to testify for the state in rebuttal to establish statutory aggravators and negate mental mitigation. This was prejudicial error pursuant to Florida Rule of Criminal Procedure 3.211(e), and destroyed the fundamental fairness of Long's trial.

IV: Over defense objection, the trial court allowed Dr. Sprehe, a state witness, to testify in rebuttal that Long told him he killed Simms "to eliminate a witness." Long denied having said so and the testimony was contradicted by all other testimony. The judge and both counsel agreed that the "witness elimination" aggravating factar was not established. Thus, any probative value was greatly outweighed by the prejudicial affect of this questionable testimony.

V: Although, at a pretrial hearing, the trial judge agreed to preclude any mention of the "insanity standard," during the state's rebuttal, the court allowed the prosecutor to ask Dr. Berland if Long "knew the difference between right and wrong.'' The court allowed this testimony because defense counsel first asked Berland if Long could "appreciate the criminality of his conduct." The two are entirely different standards, the second being part of a statutory mitigator. Long's sanity was not at issue. Thus, the court erred in allowing the prosecutor to question Dr. Berland concerning Long's sanity at the time of the offense,

VI: Long filed a pro se pretrial motion to preclude television cameras in the courtroom. The trial court denied the motion at a hearing without hearing evidence or argument. At trial, the judge denied defense counsel's requested that the television cameramen be precluded from photographing the jury. Long was adversely affected by the cameras. The court erred by denying the defense requests without holding a meaningful hearing.

VII: Defense counsel requested that the court preclude any mention during voir dire that the jury verdict was only advisory. He also requested a jury instruction that the jury's advisory verdict was binding in some circumstances. Both were denied. Failure to advise the jury, upon request, that their recommendationmay be binding in some circumstances violates the eighth and fourteenth amendments' heightened need for reliability in the determination that death is the appropriate punishment.

VIII: The prosecutor made several prejudicial arguments in closing, Among other things, he argued conclusions based on facts not in evidence. Although defense counsel failed to object, the entire argument was so prejudicial that it constituted fundamental error, requiring a new penalty proceeding.

IX: Just prior to sentencing, both counsel presented to the trial judge various transcripts of testimony by a number of expert witnesses from Long's

other trials and cases, requesting that the judge read them for sentencing. Although the court questioned the advisability of reading the transcripts, because they contained numerous references to Long's other homicides, he read them and filed them in the record. This violated the plea agreement entered into by Long and further necessitates that Long be permitted to withdraw his pleas.

X: The trial court erred by instructing the jury on and finding the cold, calculated, and premeditated aggravating factor. The evidence showed only that Simms died of either head wounds, manual strangulation or bleeding, all of which could have taken place in a very short time. The evidence shows that Long did not decide to kill Simms until sometime after the sexual battery, The CCP aggravating factor requires heightened Premeditation greater than that needed for a finding of premeditated murder. There was no heightened premeditation.

XI: Although the defense presented a myriad of nonstatutory mitigation concerning Long's abusive childhood, medical and psychiatric problems, and brain damage, defense counsel did not ask the trial judge to find any nonstatutory mitigation. Defense counsel thought that finding the nonstatutory mitigation would "diminish" the statutory mental mitigators, and erroneously believed that this Court had never upheld a death sentence where both mental mitigators were found. The trial judge was required to consider the nonstatutory mitigation and to find all mitigation reasonably established by the evidence despite defense counsel's erroneous beliefs and illogical reasoning.

XII: The trial court should have sentenced Long to life because the eighth and fourteenth amendments are violated by executing the mentally ill.

XIII: The trial court found both statutory mental mitigators and should have found extensive nonstatutory mitigation. This myriad of mitigation clearly outweighed the aggravating factors; thus the judge should have sentenced Long to life, Accordingly, this Court should reduce Long's sentence to life.

ARGUMENT

ISSUE I

THE TRIAL COURT ERRED BY DENYING LONG'S MOTIONS TO WITHDRAW HIS GUILTY PLEAS.

A plea must be entered knowingly and voluntarily. Brady V. United States, 397 U.S. 742, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970). For a plea to be knowing and voluntary, the defendant "must be made aware of the consequences of accepting or foregoing the plea bargain offered." Ward V. State, 433 So.2d 1221, 1223 (Fla. 3d DCA 1983) (citing Williams V. State, 316 So.2d 267 (Fla. 1975)). "When a defendant moves to withdraw his plea of guilty, the court should be liberal in exercising its discretion to permit the withdrawal, especially where it is shown that the plea was based on a failure of communication or a misunderstanding . . . . Such a situation may arise where the attorney for a defendant misrepresents to him the consequences of his plea." Tobey v. State, 458 So.2d 90, 91 (Fla. 2d DCA 1984) (citations omitted).

Florida Rule of Criminal Procedure 3.170(f) provides that the court "may, in ts discretion, and shall upon good cause, at any time before a sen ence, permit a plea of guilty to be withdrawn , . . ." Withdrawal of a plea should be allowed where justice and fairness require it. United States V. Swinehart, 614 F.2d 853 (3d Cir.), cert. denied, 449 U.S. 827, 101 S.Ct. 90, 66 L.Ed.2d 30 (1980). In this case, Long was not informed of all possible consequences of entering into the plea agreement; thus, he must be permitted to withdraw his plea in the interest of justice.

Through counsel, Long filed a pretrial motion to withdraw his guilty pleas in all eight Tampa homicide cases. (R. 1224-26) He alleged that his prior public defender (Charles O'Connor) did not explain the plea agreement thoroughly and, thus, misled him into believing that his pleas could not be used against him in

any court. The plea agreement actually provided that the "State of Florida shall not rely upon the pleas of guilty entered in any other case in the Thirteenth Judicial Circuit as aggravating circumstances in Case Number 84-13346-B [the Simms case], but may introduce into evidence and rely upon any other conviction of the defendant previously obtained, including those in Pasco, Pinellas, and Orange Counties." (R. 1166) Long testified that O'Connor told him his pleas could not be used against him "in court." (H. 59) Long assumed that his agreement with the "State of Florida" also bound the prosecutors in the Sixth Judicial Circuit (Pasco County). (R. 1224) Thus, he did not understand that his pleas could be used against him in a retrial of his Pasco County case.[24]

At the pretrial hearing on February 10, 1989 (H. 47-157), Long testified that although he signed the plea agreement, he never actually read it. (H. 54-56) His attorney, Charles O'Connor, did not show him the agreement but, instead, told him about it.[25] (H. 92-93) O'Connor told him that if he entered into the agreement, the seven cases that he received life sentences for could not be used in court against him. He assumed this meant in court against him anywhere. (H. 56) Long further alleged that he did not know all of the other terms of the agreement until he read this Court's opinion in Long v. State, 529 So.2d 286 (1988).[26] (H. 55, 58) He was unaware that he waived appeal of the admission

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[24] In contravention of what Long believed the agreement protected him from, his pleas and the circumstances of several of the Tampa murders were used against him as Williams Rule evidence to convict him of a Pasco County homicide. The pleas were also used against him in the penalty phase of that trial to support the "prior violent felony" aggravating factor. (H. 48-49, 56-57)

[25] See notes 27 and 28, infra.

[26] Copies of the plea agreement were apparently scarce. Defense counsel did not have a copy of the agreement either. He told the judge at the pretrial hearing that paragraph 3 of his motion was in error because it was based on a copy of what he believed was the plea bargain, obtained from Ellis Rubin, which was incomplete

of evidence such as the knife used in the Simms murder and evidence discovered in his car and apartment.[27] (H. 58, 70)

Prior to the first penalty phase proceeding in this case, Judge Griffin granted Long's motion to withdraw these same pleas because Long did not know he was forfeiting his right to appeal the admissibility of his confession and because a crucial defense witness, Dr. Helen Morrison, was not available to testify at penalty phase. After 24 hours of deliberation and discussion with lawyers from the public defender's office (H. 79), Long elected not to withdraw his pleas.[28] When Ellis Rubin was appointed to represent Long in the first penalty phase proceeding in this case, he filed a motion for Long to withdraw his

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and, in fact, was not the plea bargain at all. He said that it was not until he reviewed this Court's decision in Long v. State, 529 So.2d 286 (Fla. 1988), that he realized that the agreement he had was incomplete. (H. 9-10) Although the prosecutar had a copy af the plea agreement at the hearing, defense counsel still had not seen it. (H. 51-52) After looking through various files, the judge found a copy of the agreement. (R. 52-53) Because this record on appeal does not contain a copy of the plea agreement either, we are relying on the terms set out in the footnotes of this Court's abavc-cited opinion. (R. 1165-1167).

[27] Long signed the four-page plea agreement in open court on September 23, 1985. (H. 52-53, 112) Judge Lazzara read from the transcript of the original plea hearing in which Long testified that he "read over" the agreement. (H. 112) Long told the Judge Lazzara that he once "looked over" the agreement. When O'Connor first told him about it, O'Connor gave him only a day or two to make a decision and did not leave a copy of the agreement with him. (H. 92-93) Just before the plea took place, O'Connor handed him a copy which had all the charging documents attached. It was a large pile of papers. He only had time to skim through it and didn't even attempt to read it. (H. 94) He thought that he told Judge Griffin that he "looked over it." (H. 95)

[28] Long told the judge that even during the 24 hours when he was deciding whether to withdraw his pleas, he did not read the agreement. He had a "roundtable discussion" with a number of public defenders concerning the only real issue which was the appealability of the confession. No one gave him the agreement to read. He said he now knew he should have asked for it and did not know why he didn't do so. (H. 96)

pleas on constitutional grounds. The judge denied this motion. The denial was upheld by this Court in Long v. State, 529 So.2d 286 (1988).[29]

That Long was given an opportunity to withdraw his pleas once before and did not do so must not prejudice his rights in this case.[30] Long was under extreme pressure from his attorney not to withdraw the pleas. (H. 79) In fact, Long probably had not even considered reaffirming the plea agreement until his attorney urged him to do so. When Judge Griffin told Long he could withdraw his plea, O'Connor asked the judge to clarify that he really meant that Long could decide whether he wanted to withdraw the plea:

> MR. O'CONNOR: As I understand it, the court has authorized the defendant to make an election whether he wishes to continue on his previously-entered pleas of guilty or affirmatively wishes to elect to withdraw them. As I understand it subject to the court, that decision still rests with the defendant at this point?

Long v. State, 529 So.2d at 289. The judge then gave Long 24 hours to decide whether to withdraw his pleas. (R. 1169) O'Connor's "clarification" was the first indication that Long might not withdraw his pleas.

If Long did not want to withdraw the pleas, why did counsel go to the effort of filing the motion for Long to do so?[31] It seems apparent that,

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[29] The trial court, in the instant case, allowed Long to adopt as part of his motion the issue that he did not know he was giving up his right to appeal the admissibility of his confession when he first entered into the plea agreement, although the judge said he believed that this Court had foreclosed that argument. The judge said he would also consider the fact that Long still did not know he waived the issue of the admissibility of evidence from his car and apartment, and the knife. (H. 109)

[30] Judge Lazzara had authority to entertain Long's motion to withdraw his guilty pleas because a remand for rasentencing places the defendant in the same position he was in prior to his initial sentencing. See Harris v. State, 299 Md. 511, 474 A.2d 890 (1984).

[31] Judge Griffin noted that one reason he was granting Long's motion to withdraw his pleas was that Long was "laying himself open" to the possibility of eight death penalties; this would be a strong motivation not to file such a motion. He noted that the

although Long wanted to withdraw his pleas, his counsel did not want him to do so and, when the court granted Long's motion, counsel talked Long out of it. Various assistant public defenders met with and counseled Long during the 24-hour period he was given to decide whether to withdraw his pleas. (H. 88) Long testified that O'Connor talked him out of withdrawing his pleas. (H. 67)

Testifying for the state, O'Connor admitted that he advised Long against withdrawing his pleas, (H. 79)[32] O'Connor also admitted that he never told Long that the plea agreement allowed his pleas and the crimes to which he pled to be used as Williams Rule evidence in a retrial of the Pasco County case. (H. 81) When O'Connor discussed the agreement with Long, he believed that if the Pasco County case was reversed and remanded, Long could not be retried because there would not be enough evidence without Long's confession. (H. 79) Thus, he did not expect a retrial even if the confession was suppressed and the case remanded,[33] He was surprised when he learned that the state intended to use the Tampa homicides as Williams Rule evidence in the retrial of the Pasco County case in Ft. Myers. (H. 90) It apparently never occurred to any of the attorneys

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withdrawal substantially endangered Long's life which indicated that he truthfully entered into the agreement based on certain misconceptions. Long, 529 So.2d at 289 n.3. The judge's reasoning suggests that it had not occurred to him that Long would have the option of continuing with the plea agreement.

[32] Robert Fraser, court-appointed counsel in the instant penalty trial, also did not want Long to withdraw his pleas. Long argued in his pro se motion for rehearing that Fraser only went through the motions to appease him while trying to assure that the judge denied the motion. (R. 1263-68) On the other hand, when Ellis Rubin was appointed to replace O'Connor, he immediately moved to withdraw Long's pleas; it was too late. See Long, 529 So.2d 286.

[33] O'Connor admitted that he "was very apprehensive that the confession would ultimately be sustained," and "would hold up" on appeal. (H. 82, 86, 88) Conversely, Long's Pasco County assistant public defenders thought this Court would reverse the Pasco County case on that basis. Long said he believed his confession would be suppressed despite what O'Connor told him. (H. 58, 88, 90)

that, if the Pasco county case were reversed and remanded, the state might use the Hillsborough County homicides as Williams Rule evidence to reconvict Long. If it never occurred to any of the attorneys, Long certainly could not be expected to be aware of this possible consequence of his pleas,

The trial court denied Long's motion to withdraw his pleas, (R. 1239) On April 19, 1989, Long filed a pro se motion requesting a rehearing. (R. 1263-1268) He alleged that his court-appointed counsel, Robert Fraser, (1) refused to contact (or call to testify) any of several witnesses that Long requested;[34] (2) filed an intentionally vague motion because he wanted to preserve but not win the issue; (3) did not properly cross-examine Charles O'Connor because he did not want the motion to succeed; (4) told the judge that no rehearing was necessary when informed by the judge that he had received a letter from Long's father concerning the hearing; (5) refused to travel to Florida State Prison after that time to discuss the matter with Long; and (6) refused to request a rehearing. (R. 1263-65) Long's motion also enumerated what he believed to be counsel's reasons for refusing to pursue, and his efforts to prevent withdrawal of, Long's guilty pleas despite Long's repeated requests to do so. (R. 1265-70) The judge considered Long's pro se motion at a hearing on May 3, 1989, and denied it. In his written denial of the motion, the judge said he reread Long's letters, read a letter from Long's father,[35] and reconsidered the evidence. (R. 1279-81)

Long did not give up. On May 9, 1989, he filed a pro se motion to withdraw his pleas. Long again stressed that he did not understand that the plea agreement was not binding on Pasco County. The motion was denied. (R. 1009)

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[34] Only Long and his former assistant public defender, Charles O'Connor, testified. O'Connor was a state witness. (H. 74)

[35] In his letter of February, 1989, Long's father wrote to the judge that Long's attorneys talked him into entering into the plea agreement without giving him all of the facts. (R. 1243-51)

In Ward v. State, 433 So.2d 1221 (Fla. 3d DCA 1983), the district court reversed a conviction because the defendant entered a plea based upon his counsel's erroneous belief that he was subject to the death penalty for a sexual battery which occurred prior to the United States Supreme Court's decision in Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972). Because the death penalty was not applicable to the offense, the defendant's plea was not entered knowingly and voluntarily. Thus, the court remanded the case so that the defendant could withdraw his plea and proceed to trial.

In the instant case, counsel not only misled Long into thinking that the Hillsborough convictions could not be used against him in any court in Florida, but also neglected to warn him of extremely important possible consequences of the plea. Thus, Long, like Ward, entered into a plea agreement without a complete understanding of what he was facing.

The instant case is also similar to Alvis v. State, 421 So.2d 769 (Fla. 4th DCA 1982). In Alvis, the defendant entered a guilty plea pursuant to a plea agreement whereby he was placed on probation for five years. A condition of probation, however, about which he was not told, was that he could not drive or operate a motor vehicle without permission of the court. Because the condition was not contemplated by the plea agreement, the court reversed and remanded to permit the defendant to withdraw his plea.

The Alvis case is like ours except that the consequences were much more severe in the instant case. Long's counsel apparently failed to contemplate and thus did not warn Long of the possibility that his pleas could be used against him in a retrial of the Pasco County case. This was an extremely serious consequence because Long might not otherwise have been convicted in Pasco County, Thus, Long's pleas were not entered "'knowingly and voluntarily" and he must be permitted to withdraw them.

When a defendant relies in good faith upon a plea agreement, "courts will not let the defendant be prejudiced as a result of that reliance." Nova v. State, 439 So.2d 255, 259 (Fla. 2d DCA 1983). Long relied upon the plea agreement, in good faith, to protect him from the use of the Tampa homicides against him. When he signed the plea agreement, he had already been convicted in Pasco County and the only use contemplated for the Tampa homicides was to establish aggravating factors in the Simms penalty phase trial. Thus, Long believed that the plea agreement insulated him from further adverse consequences. He relied upon this belief when deciding to enter into and reaffirm the plea agreement. A plea bargain must be interpreted in light of the parties' reasonable expectations. United States v. Nelson, 837 F.2d 1519 (11th Cir.), cert. denied sub nom. Waldhart v. United States 488 U.S.829, 109 S.Ct. 82, 102 L.Ed.2d 58 (1988).

An analogous case in which the defendant's expectations were frustrated is United States v. Harvey, 791 F.2d 294 (4th Cir. 1986). The Harvey court determined that the plea agreement which stated in part that the "Eastern District of Virginia" agreed not to prosecute the defendant for any other possible crime arising from the offenses set out in the indictment, was ambiguous as to the reach of the immunity. Referring to the limitation as a "technicality," the court required the agreement to be interpreted to prevent prosecutions for such offenses anywhere and by any agency of government. Id. Similarly, in the instant case, the prosecutor limited Long's immunity as to the used of his pleas to one Hillsborough county case. The agreement should have been interpreted to protect Long from use of the pleas against him anywhere.[36]

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[36] Florida law is in agreement. In Dominguez v. State, 432 So.2d 799 (Fla. 2d DCA 1983), the court reversed because there was confusian concerning whether the defendant's sentences, pursuant to a plea agreement, were to be imposed consecutively or concurrent with other sentences imposed by a different judge. The appellate court held that, because there was confusion and legitimate

In Swinehart, 614 F.2d 853, the court stated that the parol evidence rule used to interpret a contract should not be rigidly applied to a plea agreement because of the unique nature of a plea bargain involving the waiver of constitutional rights. "The trial court must consider the plea bargain in light of the important constitutional rights being waived by the defendant." Id. at 858 (citing Jone v. Estelle, 584 F.2d 687 (5th Cir. 1987). Thus, the prosecution cannot avoid an obligation by claiming that the literal language of a plea bargain promises the defendant nothing. Swinehart, 614 F.2d at 858. In this case, although the prosecution complied with the literal language of the contract, Long did not receive what he believed was the full benefit of the bargain.

The circumstances changed after Long entered into the plea agreement. His Pasco County conviction and sentence were vacated. Thus, his pleas were based on a situation which no longer existed. The changed circumstances frustrated the bargain represented by the agreement, rendering it involuntary and invalid. See United States v. Jureidini, 846 F.2d 964 (4th Cir. 1988) (frustrated bargain).

Breach of a plea agreement, no matter how slight, is grounds for reversal of a conviction.[37] Santobello v. New York, 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971); [illegible] v. State, 522 So.2d 14, 16 (1988). The defendant's rights are violated when the plea agreement is broken or becomes meaningless, rendering his waiver of those rights involuntary. Wacker v. State, 500 So.2d 256, 258 (Fla. 3d DCA 1986) (quoting from Correale v. United States, 479 F.2d 944 (1st Cir. 1973)); see also Ward v. State, 156 Fla. 185, 22 So.2d 887 (1945).

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disagreement as to the terms of the plea negotiation, the trial court should have allowed the defendant to withdraw his plea. 432 So.2d at 800.

[37] See Issue IV, infra, concerning the trial court's consideration of the testimony of seven psychiatric experts from other proceedings, in violation of the plea agreement.

In this case, although the Pasco County prosecutor did not technically breach the Hillsborough County plea agreement, his actions frustrated the plea agreement and rendered it meaningless. Long relied on the agreement to protect him from the state's use of the Tampa homicides against him in court, not realizing that the provision applied only to the Simms case in Hillsborough County. Long's pleas were also based on his understanding, as explained by counsel, that if his confession was suppressed and the Pasco County conviction vacated, the state would not have sufficient evidence to retry him for that homicide. (H. 90) Thus, Long could not have known that the pleas could be used to reconvict him of and aggravate the Pasco County homicide if the case. Although a layman could not be expected to anticipate this result, his attorneys should have foreseen the possibility and advised Long accordingly. Long's erroneous beliefs were part of the inducement or consideration for Long's entering into the agreement. See Santobello v. United States, 404 U.S. at 262, 92 S.Ct. at 499, 30 L.Ed.2d at 433.

Long gave up his right to a jury trial, his right to confront the witnesses against him, and his right to have the state prove his guilt, for what he believed to be protection from the state's use of seven homicides against him. That protection turned out to be meaningless, Although the homicides were not used in the Simms penalty phase (he received a death sentence anyway), they were used to convict him and to ensure that he received another death sentence in the Pasco County retrial.[38]

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[38] A valid plea agreement presupposes fairness in securing the agreement between the accused and the prosecutor, Mabry v. Johnson, 467 U.S. 504, 104 S.Ct. 2543, 81 L.Ed.2d 437 (1983). Thus, a plea agreement should not become a game played by the prosecutor and defense counsel. In this case, the prosecutor was present when Long confessed and proposed the plea agreement because he knew the confession would probably not hold up. (H. 105)

Long was influenced by his attarneys to continue with the plea agreement despite his true wishes.[39] Whether or not Long skimmed or read the agreement, the evidence suggests that he listened to counsel and relied upon what he heard rather than trying to construe the terms of the plea agreement himself. (H. 67) Counsel is provided for indigent defendants precisely for this purpose. A layman is not expected to understand the legal implications of a plea agreement without the assistance of counsel,

In Williams v. State, 316 So.2d 267 (Fla. 1975), this Court noted that the taking of a guilty plea "is an extremely important step in the criminal process and should not be hurried or treated summarily." 316 So.2d at 271. Long's attorneys explained the plea agreement to him only summarily and explained only the parts they deemed important. O'Connor gave him only a day or two to decide whether to enter into the plea agreement. Judge Griffin gave Long only 24 hours to decide whether to withdraw his pleas. If Long had pled guilty to simple battery, this might have been sufficient; for eight homicides, however, it was not.

Little concern was given to ascertaining that Long understood all of the terms and implications of the agreement. Defense counsel should have gone over each and every term of the agreement with Long, explaining every conceivable

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[39] Long testified that O'Connor told the other attorneys at the "roundtable" discussion that he wanted Lang to reaffirm the plea agreement because he did not want to try eight murder cases. (H. 66) O'Connor testified that he was trying to minimize Long's exposure to the death penalty for the Hillsborough County cases. (H. 80) Although O'Connor may have believed that Long would be exposed to eight death penalties, O'Connor's belief was based an his erroneous assumption that Long's confession would be upheld on appeal. O'Connor did not even file a motion to suppress the confession in the Tampa cases. (R. 1147-49) The prosecutor admitted that without Long's confession, "there would be a 50/50 chance that [the state] could probably convict him on maybe one or two of these cases based on circumstantial evidence. . . ." (R. 102) Thus, O'Connor only enabled the state to convict Long of numerous crimes of which they could not otherwise have convicted him.

result, and then allowing Long to make his own decision. Florida Rule of Criminal Procedure 3.171 provides as follows:

> (c) Responsibilities of Defense Counsel.
>
> (1) Defense counsel shall not conclude any plea agreement on behalf of a defendant-client without his client's full and complete consent thereto, being certain that any decision to Plead guilty or nolo contendere is made by the defendant.
>
> (2) Defense counsel shall advise defendant of:
>
> (i) All plea offers; and
>
> (ii) All pertinent matters bearing on the choice of which plea to enter and the uarticulars attendant upon each plea, the likely results thereof as well as any possible alternatives which may be open to him.

Fla. R. Crim. P. 3.171(c) (emphasis added). Although O'Connor ascertained that Long made the decision he believed was in Long's best interest, he did not ascertain that Long made the decision, as required by the rule, More importantly, he did not advise Long of "[a]ll pertinent matters bearing on the choice of which plea to enter and . . . the likely results thereof."

The prosecutor argued that whether Long was told about the possible use of the pleas against him elsewhere was both "immaterial" and "as remote as" telling Long that he would not have the right to hold a liquor license or to vote. (H. 103-06) If Long's purpose was to reduce his exposure to the death penalty, the fact that eight homicides might be used against him in court in some other county in Florida to procure a death sentence was certainly not immaterial. If Long's concern was to give the prosecutor only one shot at a death sentence, it was extremely important that Long understand that, although Mr. Benito would have only one shot, other Florida prosecutors would be guaranteed a death sentence because of the plea agreement.

Nor was the possibility of Long's pleas being used against him "remote." The prosecutor knew that there was a good chance that the Pasco County case would

be reversed for retrial. Thus, when he first proposed the plea agreement, he may have anticipated Pasco County's use of Long's pleas *to* reconvict him. The prosecutor told Judge Lazzara that he "was there the night [Long] confessed" and knew there were "some problems with the confession." (H. 105) This was his reason fox giving Long the option of allowing him only one shot at the death penalty. The possibility of the pleas being used against Long elsewhere was not remote; it was a very probable consequence of which the prosecutor was aware.

When Long entered into and reaffirmed the plea agreement, his Pasco County conviction had not yet been reversed. Had the Pasco County judge suppressed Long's illegally obtained confession, which he legally should have done, Long would not have been in the position where he was forced to play Russian Roulette with the Tampa prosecutor. He would have known what his options really were, Long's counsel further compounded the problem by telling him that this Court would never suppress his confession.

The prosecutor argued that Long's plea was a tactical decision made after conferring with his attorney. (H. 106) Long's "tactical" decision was made without knowledge of all of the facts and possible consequences, however. Had Long known what the plea agreement might be used for, he would surely not have entered into nor reaffirmed an agreement which ensured that he received a death sentence in Pasco County. Even one death sentence may prove fatal.

The possibility of Long getting a life sentence in the Simms case was illusory. The defense psychiatrists were unable to bring out all of Long's mental problems without alluding to his serial killing. (See expert testimany from other proceedings in supplement at R. 1472-1834) The prosecutor also knew he had Drs. Sprehe and Gonzalez to rebut the defense experts. At the time of the plea agreement, he also had the Pasco County homicide to use in aggravation, which nearly guaranteed him a death sentence.

The prosecutor was aware of all of the above and that he had little evidence to procure convictions without the confession which would probably not hold up. Defense counsel was aware of at least some of these factors. Long was not a lawyer and was aware of none of these possible consequences. He relied on the advice of his attorney who did not explain all possible consequences of entering into the agreement. See Mabry, 461 U.S. at 509, 104 S.Ct. 2543, 81 L.Ed.2d at 443; Santobello, 404 U.S. at 261-62, 92 S.Ct. at 495, 30 L.Ed.2d at 427 (valid plea agreement presupposes fairness between prosecutor and accused).

The United States Supreme Court's interpretation of the eighth amendment in the context of capital punishment is that uncertainty and unreliability cannot be tolerated when a sentence of death is imposed. This principle applies to both the guilt determination and the sentencing process. See generally Beck v. Alabama, 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980). This principle must apply where the guilt determination is based on the defendant's plea to a capital offense. It is not enough that the defendant is advised of some of the possible consequences of his plea. Unless he is advised of all nossiblp consequences of his plea, a death sentence imposed upon this plea must be vacated because the plea was not made "knowingly and voluntarily." Thus, it is unreliable when measured by the heightened standard of the eighth amendment. Accordingly, Long must finally be permitted to withdraw his guilty pleas.

ISSUE II

THE TRIAL COURT ERRED BY DENYING THE DEFENSE MOTION TO EXCLUDE HEARSAY TESTIMONY BY TWO DETECTIVES RELATING DETAILS TOLD TO THEM BY THE VICTIMS OF TWO UNRELATED RAPES OF WHICH LONG WAS CONVICTED.

In a death penalty sentencing proceeding, "evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules af evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements." Chandler v. State, 534 So.2d 701, 702 (Fla. 1988); § 921.141(1), Fla. Stat. (1989). This does not mean, however, that due process is not applicable. The requirements of due process apply to all three phases of a capital case in the trial court, Engle v. State, 438 So.2d 803, 813 (Fla. 1983); see also Gardner v. Florida, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977)). The trial judge's discretion in determining what evidence might be relevant to the sentence is not unbridled. Qtate v. DixoD, 283 So.2d 1, 7 (Fla. 1973).

In the case at hand, the trial court allowed two detectives to relate to the jury details of two prior rapes of which Long was convicted, as recounted to the detectives by the victims, even though neither victim testified and neither victim was unavailable. The testimony was unnecessary because the "prior violent felony" aggravating factor was already established. This hearsay testimony was improper for three reasons.[40] First, section 921.141(1) of the Florida Statutes, and the hearsay introduced under the statute, unconstitutionally violated Long's sixth amendment right to confrant the witnesses against him. Second, the statute and the hearsay introduced violated the eighth amendment which requires that the death penalty be supported by competent evidence, thus

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[40] These three reasons were argued by defense counsel at trial, (R. 980-87)

making the death penalty arbitrary and capricious. Even if the statute were constitutional, however, Long was not accorded a fair opportunity to rebut the hearsay evidence.

Long's counsel filed a pretrial motion in limine to preclude the use of this hearsay testimony. (R. 1298-99) He argued at the hearing that, because the constitution requires competent evidence to support the death penalty, section 921.141(1) is unconstitutional. Furthermore, the opportunity to rebut does not cure the statute's infirmities because it improperly shifts the burden of persuasion to the defendant, thus denying due process. The court reserved ruling on the motion. (R. 980-87)

Over defense objection at trial, the judge permitted the state to introduce hearsay testimony from Major Chuck Troy, of the Pasco County Sheriff's Office, and Detective Terry Rhoads, formerly a detective with the Pinellas County Sheriff's Office, concerning two unrelated rapes, of which Long was convicted.[41] (R. 265-80, 351-53, 387) Although the testimony was intended to establish the "prior violent felony'' aggravating factor, defense counsel had stipulated to the admission of the judgments and sentences and the detectives also testified about their rape investigations. (R. 274)

In Rhodes v. State, 547 So.2d 1201 (Fla. 1989), the trial court allowed a detective from Nevada to testify regarding his investigation of the defendant's prior conviction for battery with a deadly weapon and attempted robbery, to support the "prior violent felony" aggravating factor. The Nevada judgment and sentence had already been introduced into evidence. As part of his testimony, the detective identified a tape recording of an interview he conducted with the victim of the attempted robbery. The recording was admitted into evidence and

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[41] See summary of testimony in Statement of Facts, pp. 9-11.

played for the jury. As in our case, defense counsel argued that the judge denied Rhodes his sixth amendment right to confront the witnesses. Id. at 1204.

This Court found that, although it was not error to allow the detective's testimony, the introduction of the tape recording was error because the statements of the Nevada victim "came from a tape recording, not from a witness present in the courtroom.''

> Obviously, Rhodes did not have the opportunity to confront and cross-examine the witness. By allowing the jury to hear the taped statement of the Nevada victim describing how the defendant tried to cut her throat with a knife and the emotional trauma suffered because of it, the trial court effectively denied Rhades this fundamental right of confronting and cross-examining a witness against him. Under these circumstances if Rhodes wished to deny or explain this testimony, he was left with no choice but to take the witness stand himself.

Id. at 1204. (footnote omitted).[42]

Although this Court previously approved the introduction of penalty phase testimony concerning details of former violent felony convictions, Rhodes court determined that the line must be drawn when the testimony is not relevant, violates a defendant's confrontation rights, or the prejudicial value outweighs the probative value. 547 So.2d at 1204-05. Reversing for a new penalty phase, this Court found the tape recorded statement irrelevant and highly prejudicial because the "information presented to the jury did not relate to the crime for which Rhodes was on trial, but instead described the physical and emotional trauma and suffering of a victim of a totally collateral crime committed by the appellant." 547 So.2d at 1205. This Court noted further that the tape recording was unnecessary to support the aggravating factor because the state introduced a certified copy of the Nevada judgement and sentence indicating that Rhodes pled guilty and the detective testified regarding his investigation of the incident,

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[42] The omitted footnote stated that the Nevada victim was unable ta come to Florida to testify because of her age and health.

which was more than sufficient to establish the aggravating factor and the circumstances of the crime, 547 So.2d at 1205 n.6.

The instant case is exactly like Rhodes except that, instead of playing a tape recording of the victim's statement, the detectives were permitted to repeat what the victims allegedly said in the form of hearsay. As in Rhodes, Long had no way to cross-examine the victims because they were not present at trial. Additionally, the detectives' testimony describing their investigations of the rapes was more than sufficient to establish the aggravating factor and the circumstances surrounding them. The victims' hearsay statements were unnecessary and highly prejudicial.

"The sixth amendment right of an accused to confront the witnesses against him is a fundamental right made obligatory on the states by the due process of law clause of the fourteenth amendment to the United States Constitution." Engle, 438 So.2d at 814 (citing Pointer v. Texas, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965)). In Engle, this Court determined that a statement or confession of a codefendant was inadmissible in a penalty phase proceeding because the defendant had no opportunity to rebut the statement, 438 So.2d 803; see also Walton v. State, 481 So.2d 1197, 1200 (Fla. 1985); Gardner v. State, 480 So.2d 91, 94 (Fla, 1985) (applying the same rule to a police officer's testimony concerning incriminating statements of a codefendant).[43] In the instant case, although the hearsay introduced was not from a codefendant, the same rule should apply for the same reasons.

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[43] This Court thus applied Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968), to the penalty phase of a capital trial. The Supreme Court of Nevada followed Florida and other precedent in the recent case of Lord v. Nevada, 1991 WL 13535 (Nev.), noting its agreement with the California Supreme Court that the right of cross-examination and the need for accuracy are even more important in the penalty phase than the guilt phase. 1991 WL 13535, *10.

The state made no showing that the witnesses were unavailable and the court made no such finding.[44] The prosecutor told the judge that the two women did not want to testify again because it would be *too* upsetting for them to be reminded of the rapes. Prior to trial, however, at the June 20, 1989, pretrial hearing, the prosecutor informed the court that he intended to use videotaped testimony of the two rape victims. Long waived his attendance at the videotaping. (R. 1959-62) During trial, the prosecutor told the judge that the women were too emotional to even discuss the rapes on videotape. (R. 268-69)

While excusing the two woman was a nice gesture on the part of the prosecutor, it denied Long's right to confront the witnesses. If the judge did not want to insist that the women testify, he should have excluded the detectives' hearsay testimony. This Court's decision in Rhodes makes clear that the testimony of the women was unnecessary either in person or through the detectives. The judgments and sentences introduced and the detectives' testimony concerning their investigation were more than sufficient.

The purpose for the admissibility of hearsay during a penalty proceeding is not to relax the rules of evidence for the convenience of the parties nor to permit the parties to introduce evidence in a careless fashion, disregarding all svidentiary safeguards. Instead, hearsay is admissible "to allow the parties to present evidence which might have been barred or withheld from a trial on the issue of guilt or innocence," Dixon, 283 So.2d at 7. The relaxation of the

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[44] Under the Florida evidence rules, a witness may be declared "unavailable" if he or she is (a) exempted by the court an the ground of privilege from testifying concerning the subject matter; (b) persists in refusing to testify despite a court order; (c) has suffered a lack of memory concerning the subject matter; (d) is unable to be present because of death or mental or physical illness; or (e) is absent and the proponent of the statement has been unable to procure his attendance or testimony by process or other reasonable means. § 90.804(1)(e), Fla. Stat. (1989).

rules of evidence was most likely intended to provide an advantage to the defendant -- to permit the defendant to introduce mitigating evidence. See Dixon, 283 So.2d at 7.

The instant case is clearly distinguishable from Chandler v. State, 534 So.2d 701, cited by the prosecutor. In Chandler, a detective testified concerning statements made by a police chief, another detective, and a state expert, All of the declarants had testified and their testimony was consistent with the hearsay testimony. Defense counsel vigorously cross-examined the detective. 534 So.2d at 703.

In this case, neither rape victim testified. Furthermore, the rape victims were not affiliated with law enforcement or the prosecution as were the declarants in Chandler. Neither detective was capable of answering all of the questions Long's counsel might have wanted to ask on cross-examination. Thus, defense counsel was unable to adequately rebut the testimony. See generally Dragovich v. State, 492 So.2d 350, 355 (Fla. 1986) (defense unable to rebut hearsay that defendant had reputation as an arsonist).

The trial judge justified his admission of the hearsay by noting that Long's confession was consistent with the hearsay testimony given by the detective and that the testimony was related to the police investigation -- the officers took statements from the victims. (R. 897-99) Both reasons are irrelevant,

That the hearsay statements were part of a police investigation does not cure the problem created by the lack of cross-examination. Police officers are not permitted to repeat hearsay fromtheir investigations in court. See generally Postell v. State, 398 So.2d 851, 854 (3d DCA), rev. denied, 411 So.2d 384 (Fla. 1981). Moreover, the recording found inadmissible in Rhodes was also a witness interview from the investigation. 547 So.2d at 1205.

Although Latimer testified concerning Long's confession to the sexual battery of Sandra Jensen, there was no testimony concerning a confession to the sexual battery of Linda Nuttal. Latimer's testimony concerning Long's confession was brief and lacked detail. Latimer said only that Long told him he was riding around and saw a house with a "For Sale" sign in front of it. He knocked on the door and asked the woman if he could look at the house. As soon as he gained entry, he pulled a gun and took the woman into the bedroom and raped her, He gathered up some jewelry which he later pawned in Tampa and left. (R. 339)

The court's ruling allowed the state to select the most damaging part of the victims' statements to present to the jury and prevented the defense from eliciting anything to ameliorate it. The women were left physically unharmed after the rapes even though they were able to describe Long to the police. Long did not hit or beat the women. He did not mistreat Linda Nuttal's four-year-old son or her ane-year-old daughter. In fact, he directed her son into his bedroom and told him to stay there and that everything would be all right. (R. 390) Although he at first threatened to kill Mrs. Nuttal if she did not quit talking, toward the end he assured her that he would not harm her. (R. 389, 394) Had the women testified, the jurors would have been able to see that they were alive and at least survived the ordeal. Because the testimony concerning the two prior rapes was by far the most damaging testimony other than the details of the Simms murder, the error was not harmless.

ISSUE III

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

Defense counsel filed a pretrial motion to suppress the testimony of psychiatrists Daniel J. Sprehe and Arturo G. Gonzalez who were court-appointed to determine Long's competency and sanity in May of 1985.[45] (R. 1219-1221) Long's counsel relied on Florida Rule of Criminal Procedure 3.211(e):[46]

> (e) The information contained in any motion by the defendant for determination of competency or in any report of experts filed under this section insofar as such report relates to the issues of competency to stand trial and involuntary hospitalization, any information elicited during a hearing on competency or involuntary hospitalization held pursuant to this Rule, shall be used only in determining the mental competency to stand trial of the defendant or the involuntary hospitalization of the defendant,

Defense counsel argued that information concerning Long's mental state was illegally obtained during interviews and tests of Long to determine competency and was being used by the state to rebut the mitigation testimony of the defense experts contrary to the rule. He argued further that Rule 3.211(e) governs only the determination of competency to stand trial and sanity at the time of the offense and that the information obtained thereunder may be used only for those

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[45] Dr. Gonzalez did not testify in the instant praceedings.

[46] The rule was amended effective January 1, 1989, but is essentially the same. It now reads as follows:

> (e) The informatian contained in any motion by the defendant for determination of competency to proceed or in any report of experts filed under this section insofar as such report relates solely to the issues of competency to proceed and commitment and any information elicited during a hearing on competency to proceed or commitment held pursuant to this Rule, shall be used only in determining the mental competency to proceed or the commitment or other treatment of the defendant.

purposes. (H. 25-46)

Although a literal reading of the rule fails to prohibit the use of information learned by the doctor during the examination, the committee note following the rule specifies that the rule provides for the confidentiality of information obtained during the examination.[47] Thus it must have been a legislative oversight that information obtained during the examination was not mentioned in the rule. Alternatively, the legislature may have assumed that any information learned by the experts would be in their reports and did not envision a situation such as this wherein the experts testified for the state in a penalty phase proceeding mare than four years later concerning details of the crime learned during their examination but not contained in their reports.[48]

Citing Estelle v. Smith, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981), the judge found it important to determine which party was responsible for the appointment of the experts. (H. 41-42) Although the order appointing the experts was in the court file, the judge was unable to find a motion requesting the appointment. (H. 25-35; R. 1220) Charles O'Connor, Long's former counsel, was in the courtroom but did not remember whether he had filed a motion to determine competency. (H. 29-30) The prosecutor then found in his file a copy of a Notice of Intent to Rely on Insanity Defense filed by O'Connor, dated May 1, 1985, with a certificate of service to the prosecutor.[49] (H. 33) The

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[47] "(e) This provision provides for the confidentiality of the information obtained by virtue of an examination of the defendant pursuant to this section," Committee Note to Fla. R. Crim. P. 3.211, 1980 adoption.

[48] Although Dr. Sprehe's report is not in the record on appeal, his testimony indicated that the testimony concerning "witness elimination" was in his notes. See Issue IV, infra.

[49] Although the judge never found the Notice of Intent to Rely on Insanity Defense in the court file, he stated during the Motion for New Trial hearing that the record reflected the Notice

prosecutor then recalled that he asked Judge Griffin to appoint the doctors based on the defense filing of the Notice of Intent to Rely an Insanity Defense. (H. 34) The judge determined that Long initiated the appointment of experts by filing the Notice of Intent to Rely on Insanity Defense. (H. 35) Thus, he denied the defense motion, subject to a later determination as to scope, without addressing the alleged violation of Rule 3.211(e). (H. 43; R. 1239)

Under the federal case law cited by the judge, see Estelle v. Smith, the defendant's responsibility for the appointment of the experts in this case is somewhat questionable. Rule 3.211(c) requires the defendant to give notice of intent to rely on the insanity defense "no later than 15 days" after arraignment or filing of a not guilty plea. Thus, defense counsel was required to file the notice early in the case, before he had a chance to consider a plea agreement or to determine a definite defense. Fla. R. Crim. P. 3.216(c). A committee note to the rules suggests combining the competency and sanity examinations for judicial economy. See Committee Note to Rule 3.211(c).

Although defense counsel filed the Notice of Intent to Rely on Insanity Defense (the "Notice"), the prosecutor asked the court to appoint the two experts to determine competency. The judge even asked the prosecutor to set up the

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was filed May 1, 1985. (R. 899) The trial clerk said that the Notice (provided by the prosecutor) was made a part of the record. (R. 776) Thus, undersigned counsel requested the Notice of Intent to Rely on Insanity Defense to supplement the Record on Appeal. Although this Court granted the motion (R. 1936), the Hillsborough County clerk's office was never able to find the Notice. They did, however, find a transcript of a May 6, 1985, hearing during which the prosecutor requested that psychiatrists be appointed to determine Long's competency because defense counsel had filed a Notice of Intent to Rely on Insanity Defense. O'Connor was present at the hearing and said nothing to the contrary, nor did he object to the appointment of experts. (R. 1997-99) Undersigned counsel moved to supplement with the hearing transcripts in lieu of the Notice which could not be found in the file. (R. 1988-89) The motion was granted. (R. 1991)

appointments. (R. 1998-99) Had defense counsel wanted to determine Long's sanity, he would have used Rule 3.216 to have a confidential defense expert appointed. Once he filed the Notice, however, as required by the rule, he had no grounds to object to the appointment of experts to determine both competency and sanity. Long was required to cooperate with the psychiatrists. See Henry v. State, 574 So.2d 66, 70 (Fla. 1991) (court may refuse to allow insanity defense when defendant refuses to cooperate with state's experts),

As it turned out, defense counsel never used the insanity defense. Long entered into a plea agreement instead. Nevertheless, the information Long gave Dr. Sprehe, allegedly to determine his competency and sanity, was used against him in the penalty proceeding to procure a death sentence. This was obviously not what Long or his counsel envisioned when Long agreed to talk to Dr. Sprehe.

Long was certainly never warned that anything he said could be used against him to procure a death sentence. He said that the doctors did not give him any Miranda rights. His counsel, Charles O'Connor, told him that it would make no difference what he said because the dactors would find him competent anyway; thus, he did not need counsel at the examinations. (R. 929) Had O'Connor known that the information Long gave to the experts could later be used against him to support the death penalty, he certainly would have accompanied Long to the examinations and warned him to be careful about what he told the doctors. Long said that the only reason he talked to the doctors was because it was necessary for a competency determination. (R. 929)

Although the court order requires a sanity determination, it seems that everyone involved believed the examinations were entirely or at least primarily to determine competency. Dr. Sprehe testified that he was court ordered to examine Long to determine competency to stand trial and not for criminal responsibility at the time of the crime. (R. 770-71) Although Dr. Sprehe's report is

not in the record on appeal, the record does contain a copy of Dr. Gonzalez's report. Gonzalez thoroughly discussed competency to stand trial. The only thing he said about Long's sanity was: "In regards to his competency at the time of the alleged offenses, it is my opinion that he was competent and that he knew the difference between right and wrong." (R. 1985-96)

Long also believed the examination was to determine his competence to stand trial. He said that both doctors told him they were appointed to determine competency. (R. 929) This is supported by Dr. Gonzalez's wording in his report (calling sanity "competency at the time of the offense") and by Sprehe's testimony. Long said that O'Connor told him it did not matter what he said because the doctors would find him competent anyway. (R. 928) Thus, all concerned believed that the examination was primarily to determine Long's competency.

In making his ruling, the trial court failed to address the alleged violation of Rule 3.211(e). Although federal case law may permit the introduction of expert testimony to rebut defense experts,[50] state law prohibits it. The purpose of subsection (e) is obviously to protect the defendant from unauthorized use by the state of information given to the examining doctors for purposes of determining competency and sanity. If it were known that such experts could use the information against the defendant to procure a death sentence, defendants would surely not cooperate with the experts during competency and sanity evaluations.

Rule 3.211(e), which precludes the use of information obtained during a competency examination, makes no reference to the sanity determination which is also covered by the same rule and is frequently a part of the examination.

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[50] See Estelle v. Smith, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 357 (1981) and Buchanan v. Kentucky, 483 U.S. 402, 407 S.Ct. 2906, 97 L.Ed.2d 336 (1987).

Presumably, the rule does not mention the sanity determination because the experts' testimony may be used by either party during a trial in which the insanity defense is used. The authors of the rule probably presumed that when a Notice of Intent to Rely an Insanity Defense is filed, the defendant will eventually use that defense at trial. In the instant case, however, Long never went to trial on the issue of guilt and never raised an insanity defense. After the mental examinations, he entered into a plea agreement. Thus, he only had a penalty proceeding in which he established both mental mitigators but did not argue insanity. In fact, he specifically attempted to preclude any discussion of sanity. See Issue V, infra.

When the plea agreement was signed, the Notice of Intent to Use Insanity Defense was, as a practical matter, rendered null and void. At that time, anything Long told Dr. Sprehe and Dr. Gonzalez should have been sealed and barred from any further use. The rule envisions use of the expert testimony to rebut an insanity defense at trial. Long's counsel did not argue that Long was insane at the penalty phase proceeding where the testimony was admitted in rebuttal.

The prosecutor argued that Rules 3.216(h) and 3.212 envision the use of such testimony as rebuttal in a penalty proceeding. (H. 40) An examination of the rules, however, proves otherwise. Both assume an insanity defense at trial.

Rule 3.216 is entitled "Insanity at Time of Offense or Probation or Community Control Violation: Notice and Appointment of Experts." Subsection (h) of the rule, cited by the prosecutor, reads as follows:

> (h) The appointment of experts by the court shall not preclude the State or the defendant from calling additional expert witnesses to testify at the trial. The experts appointed by the court may be summoned to testify at the trial, and shall be deemed court witnesses whether called by the court or either party. Other evidence regarding the defendant's sanity may be introduced by either party. At trial, in its instructions to the jury, the court shall include an instruction on the consequences of a verdict of not guilty by reason of insanity.

Fla. R. Crim. P. 3.216(h). This subsection refers to "other evidence regarding the defendant's sanity" and jury instructions on the insanity defense. It obviously applies only to a trial in which the insanity defense is raised.

Similarly, Rule 3.212 envisions a competency proceeding. It is entitled, "Competence to Proceed: Hearing and Disposition." The remainder of the rule discusses the competency proceeding, hospitalization and treatment, and further competency determinations. When the rule talks about the introduction of testimony by the experts appointed to determine competency, it refers to testimony at a competency hearing -- not rebuttal at a penalty phase proceeding,[51]

The trial judge cited two Florida cases in which this Court distinguished Estelle v. Smith. (H. 42) Both cases are clearly distinguishable from the case at hand. Both Hargrave v. State, 427 So.2d 713 (Fla. 1983) and Preston v. State, 528 So.2d 896 (Fla. 1988) were decided under Estelle v. Smith and its progeny rather than Rule 3.211(e). This makes them inapplicable to this case in which defense counsel objected pursuant to the rule.

These cases are also factually distinguishable. In Hargrave, 427 So.2d 713, this Court found that the fifth amendment did not preclude the psychiatric testimony because Hargrave made no objection at trial.[52] 427 So.2d at 715. In the instant case, Long objected strenuously both before and during trial. The Hargrave court found no sixth amendment violation because Hargrave and defense

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[51] "(a) The experts preparing the reports may be called by either party or the court, and additional evidence may be introduced by either party. . . . (b) The court shall first consider the issue of the defendant's competence to proceed . . . ." Fla. R. Crim. P. 3.211.

[52] Additionally, defense counsel elicited testimony favorable to Hargrave on cross-examination. 427 So.2d at 715 n.5. In our case, Dr. Sprehe had reviewed the defense experts' findings beforehand so was prepared to rebut everything they said. (R. 730-32) He did so. (R. 737-42) See Statement of the Facts, pp. 16-27.

counsel "decided to request the examination." 427 So.2d at 716. In our case, the prosecutor requested the examination although he relied on defense counsel's filing of the Notice. Quoting from Estelle v. Smith, 451 U.S. at 470-71, 101 S.Ct. at 1877, this Court noted that, in that case, defense counsel were not notified in advance that the psychiatric examination would encompass the issue of future dangerousness; thus the defendant was denied assistance of counsel in deciding whether to submit to the examination and to what end the psychiatrist's findings could be employed. Although the Hargrave court made the above observation, it did not deal with that issue, apparently finding it inapplicable in Bargrave's case. It is applicable in Long's case.

As in Estelle v. Smith, Long and his counsel were not advised that the psychiatric examination would encompass the applicability of the statutory aggravating and mitigating circumstances. In fact, at the time of the examination, a penalty proceeding was not yet contemplated. The applicability of the statutory aggravating and mitigating factors under Florida law is clearly analogous to future dangerousness under Texas law. Thus, Long was also deprived af assistance of counsel under the sixth amendment. Had Long and his counsel known that Dr. Sprehe could later testify to establish aggravating factors and to rebut the defense mitigation, Long would certainly not have talked to the doctors without counsel and some assurance of confidentiality.

Similarly, in Preston, the defense made no objection at trial, nor on direct appeal. 528 So.2d at 899. The Preston court also found that defense counsel had "opened the door through the introduction of psychiatric testimony of his own on the subject." Id. In our case, although defense counsel introduced psychiatric testimony to establish the mental mitigators, he was careful not to introduce testimony on the subject of sanity. He filed a pretrial motion to preclude any mention of the M'Naghten insanity test (which was granted) and

objected again at trial when the prosecutor cross-examined Dr. Berland, a defense expert, as to whether Long met the insanity standard. See Issue V, infra.

Thus, defense counsel did not open the door to Dr. Sprehe's testimony by introducing psychiatric testimony concerning insanity. Instead, he tried to keep the testimony out. Nevertheless, the judge allowed the prosecutor to introduce the testimony over defense objection. Long should not be penalized because the prosecutor "opened the door" to the subject of insanity over defense objection.

The trial court also mentioned Parkin v. State, 238 So.2d 817 (1970), which was decided lang before Rule 3.211 was adopted (1980) and before Estelle v. was decided (1981). He noted that Parkin held that there is no fifth amendment privilege when a defendant pleads insanity and puts his sanity at issue and the court orders psychiatrists to examine him. (H. 43) Parkin is not applicable to this case because Long did not put his sanity at issue. Had he been tried under an insanity defense, Dr. Sprehe's testimony would have been admissible. When the insanity defense was abandoned, Dr. Sprehe's testimony was no longer relevant.

Had Sprehe's testimony been excluded, the state would not have been without means to present psychiatric testimony at the penalty phase trial. The state could have asked the court to appoint a state expert to examine Long for that express purpose. Long would have been required to cooperate. If he did not, the court could have excluded the defense witnesses' testimony. See Henry v. State, 574 So.2d 66, 70 (Fla. 1991) (defendant must cooperate with state experts or defense may be precluded from using insanity defense). Had that occurred, however, Long would have been told that what he said could be used against him.

The bottom line is that it was fundamentally unfair to ask Long to cooperate with court-appointed experts for what he believed to be a competency determination, without counsel present and with no Miranda warnings, only to have the things he said used against him by the state to procure a death sentence.

The error was far from harmless because Dr. Sprehe contributed to Long several statements which were extremely damaging. He testified concerning Long's alleged statement about witness elimination.[53] Dr. Sprehe also said Long told him he would not have committed the crime if a policeman were there. (R. 956) The judge used that evidence to support his conclusion that the mental mitigators did not outweigh the aggravating factors. The judge wrote that "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." (R. 1336) Thus, Dr. Sprehe's testimony most certainly affected the penalty verdict. See State v. DiGiulio, 491 So.2d 1129 (Fla. 1988).

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[53] Long said he never told Sprehe the killing was a witness elimination. (R. 930) See Issue IV, infra.

ISSUE IV

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

Even though both counsel and the trial court agreed that "witness elimination" was not established as an aggravating factor, the court allowed Dr. Daniel Sprehe, a rebuttal witness for the state, to tell the jury that one of the reasons Long gave for killing Michelle Simms was "to eliminate a witness." (R. 743) Compounding the problem, the judge first permitted the prosecutor to ask Dr. Berland, a defense witness, if, assuming Long had told another expert that he killed Simms to eliminate a witness, this information would change his diagnosis.[54] (R. 674-76) Because the judge and both counsel agreed that the "witness elimination" aggravating factor was not established, the jury was not instructed to consider it. Thus, Dr. Sprehe's testimony was irrelevant and should not have been admitted, nor should the prosecutor have been permitted to ask Dr. Berland about the statement.

Defense counsel first raised this issue in a pretrial motion in limine. (R. 1298-99) His theory was that all evidence must be offered to prove an aggravating factor; thus, if this evidence was admitted and the judge later decided the witness elimination aggravator was not established, a mistrial would result. (R. 248-65, 987-90) Defense counsel argued that witness elimination was not

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[54] The prosecutor asked Dr. Berland whether patients opened up more to some psychiatric experts than others. When Dr. Berland said yes, he asked what if Long told a different doctor that he killed Simms to eliminate a witness. Dr. Berland said there were two possible explanations: (1) Long made it up after the fact to rationally explain his behavior; or (2) if true, the motive resulted from the antisocial personality aspect of Long's mental illness. The hypothetical information did not change his opinion that Long was under extreme mental and emotional disturbance. (R. 674-76)

established as an aggravating factor because it was not the "sole or primary'' motive for the killing. (R. 989) He explained that Drs. Berland and Money would testify that Long had a break with reality. Long did not tell either of them that his motive was witness elimination, nor did he give this reason to any law enforcement officers. (R. 250, 988) Even Dr. Sprehe admitted that Long gave him other inconsistent reasons for the killing.[55]

Defense counsel also argued that Dr. Sprehe's testimony was unbelievable that Long never said he killed Simms to eliminate a witness.[56] (R. 250, 988 Dr. Sprehe examined Long in 1985 and did not see him again prior to his testimony. (R. 744) Although he utilized notes to refresh his recollection, it would seem difficult to accurately recall a conversation that took place over four years earlier. Additionally, at the time Sprehe examined Long, Long had not yet entered into a plea agreement and was charged with eight Hillsborough County homicides. Dr. Sprehe may have been confused as to which homicide Long meant or whether he meant all of them. His testimony assumes that he asked Long why he killed each victim and kept separate detailed notes. At sentencing, Long told the judge he never said he killed Simms to eliminate a witness.[57] (R. 729-30)

Moreover, it seems highly unlikely that Long would have used the exact language fromthe statutory aggravating factor to describe his motive unless such a motive was suggested to him by the doctor. In 1985, prior to any trial, Long

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55 Dr. Sprehe said Long also told him that Simms reminded him of an old girlfriend that he did not like. (R. 744) This explanation is nat consistent with witness elimination.

56 On cross-examination, Dr. Sprehe could not explain why Long did not kill Linda Nuttal and Sandra Jensen, even though they were able to describe him to the police. He said a person with an antisocial personality decides to hurt some women and not others. (R. 752-53)

57 Long said he asked Dr. Sprehe to tape the interview but Sprehe refused, choosing to take notes instead. (R. 930-33)

would not have been familiar with the statutory language of the aggravating factors. One would normally think of a "witness" as someone who watched the crime rather than the victim of the crime. A more normal response would have been, "so that she wouldn't be able to call the police."

When the prosecutor first announced his intention to use Sprehe's witness elimination testimony, he said it was "extremely important" because it helped "establish an aggravating factor." (R. 249) After all agreed that the "witness elimination" aggravating factor was not established, however, he argued that Dr, Sprehe's testimony was relevant to counter the two mental mitigators. That particular argument has been disposed of adversely by this Court:

> Whatever doctrinal distinctions may abstractly be devised distinguishing between the state establishing an aggravating factor and rebutting a mitigating factor, the result of such evidence being employed will be the same: improper considerations will enter into the weighing process. The state may not do indirectly that which we have held they may not do directly.

Dragovich v. State, 492 So.2d 350, 355 (Fla. 1986). This is exactly what the prosecutor did in the instant case. Even if the testimony rebutted a mitigating factor, it was still probative to establish an aggravator that the court found inapplicable. An inapplicable statutory aggravator is no different from a non-statutory aggravating factor -- it cannot be considered by the jury or the court in sentencing, Dr. Sprehe's testimony encouraged the jury to consider this non-established aggravating factor.

The prosecutor argued it during his closing argument, further encouraging the jurors to consider it in aggravation. He did so indirectly, possibly to avoid a defense objection. He asked the jury to "compare who Long was honest with," arguing that he told only Dr. Sprehe that he killed Simms *to* eliminate a witness who was in his car for a long time. (R. 806)

Probative evidence is admissible in penalty phase regardless of its

admissibility under the exclusionary rules. Chandler v. State, 534 So.2d 701, 702 (Fla. 1988); § 921.141(1), Fla. Stat. (1989). Nevertheless, the evidence must be relevant. Chandler, 534 So.2d at 703. Because the judge ultimately found the witness elimination aggravator inapplicable, he should not have allowed this testimony to be presented to the jury, misleading them as to what they should consider in rendering their advisory verdict.

Even if the evidence had some relevance, it should have been excluded because of the danger of unfair prejudice. Florida Evidence Rule 90.403 provides that "[r]elevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence." More than forty years ago, this Court stated as follows:

> We conceive the rule to be that, if the introduction of the evidence tends in actual operation to produce a confusion in the minds of the jurors in excess of the legitimate probative effect of such evidence -- if it tends to obscure rather than illuminate the true issues before the jury -- then such evidence should be excluded.

Perper v. Edell, 44 So.2d 78, 80 (Fla. 1949).

Dr. Sprehe's testimony that Long said he killed Simms to eliminate a witness must have been confusing to the jurors because all of the other evidence indicated that this was not possible. If witness elimination were a motive, Long would have killed Nuttal and Jensen too. Although he wore no disguise and both rape victims were able to describe him to law enforcement officers, Long did not attempt to kill either of them. The only logical conclusion to be drawn from the psychiatric testimony was that Long killed Simms because she was a prostitute, a negative trait he associated with his mother. Thus, Dr. Sprehe's testimony surely confused and misled the jury. It "obscured rather than illuminated" the issue.

This extremely damaging statement was repeated throughout the penalty proceedings. Even before Dr. Sprehe testified, the prosecutor asked Dr. Berland if such information would change his diagnosis. The prosecutor later argued it to the jury. Thus, Dr. Sprehe's testimony, which conflicted with all other testimony, was repeated and emphasized throughout the penalty proceeding. It must certainly have been uppermost in the jurors' minds when they were deliberating. This error requires a new penalty proceeding with a new jury.

ISSUE V

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

Defense counsel filed a pretrial motion in limine to exclude any reference to the insanity standard because Long's sanity was not in question and, thus, it was irrelevant. (R. 1299) The prosecutor agreed to the request and the judge granted the motion at a pretrial hearing. (R. 967-69) The prosecutor noted, however, that if the subject came up, the state would introduce testimony in rebuttal. (R. 692)

Defense counsel objected as to relevance when, during cross-examination, the prosecutor asked Dr. Berland if, in his opinion, Long's psychosis was not such an extreme form of psychosis that he could not distinguish right from wrong. The court overruled the objection. (R. 692) Berland responded that, as far as he knew, Long was able to distinguish right from wrong although his ability to stop himself was substantially impaired.

After Dr. Berland finished testifying, defense counsel explained that the prosecutor's question -- whether Long was capable of telling right from wrong, was the classic M'Naghten[58] test. He reminded the judge that he had previously ruled that the insanity standard was irrelevant. The judge said he overruled the objection because defense counsel asked Dr. Berland about Long's capacity to appreciate the criminality of his conduct; thus, the question was within the scope of direct. Long's counsel said he was just tracking the statutory language of the mitigating factor. See § 921.141(6)(f). The judge instructed Dr. Sprehe, the next witness, not to get into the M'Naghten standard. (R. 712-18)

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58 M'Naghten's Case, 10 Clark & Fin. 200, 8 Eng. Rep. 718 (1843).

The ability to distinguish right from wrong (insanity test) is not the standard for application of the mental mitigators. The insanity standard is a much higher standard than the mental mitigators require. In State v. Dixon, 283 So.2d 1 (Fla. 1973), this Court stated:

> **Extreme mental or emotional disturbance is a . . . mitigating consideration . . . which is easily interpreted as** less **than insanity** but more than the emotions of an average man, however inflamed. . . .
>
> **Mental disturbance which interferes with but does not obviate the defendant's knowledge of right and wrong may** also **be considered as a mitigating** circumstance. . . Like subsection (b), this circumstance is provided to protect that person who, while legally answerable for his actions, may be deserving of some mitigation of sentence because of his mental state.

Id. at 10 (emphasis added).

In Ferguson v. State, 417 So.2d 631 (Fla. 1982), this Court reversed for resentencing because the judge "applied the wrong standard in determining the presence or absence of the two mitigating circumstances related to emotional disturbance . . . ." Id. at 637. In his written findings supporting the death penalty, the judge found that Ferguson "knew the difference between right and wrong and was able to recognize the criminality of his conduct and to make a voluntary and intelligent choice as to his conduct based upon knowledge of the consequences thereof." He concluded that the evidence required "the finding that this defendant was sane at the time of the commission of the instant offense consistent with the standards of the M'Naghten Rule and therefore this mitigating circumstance is not applicable." Id.

More recently, in Campbell v. State, 571 So.2d 415 (Fla. 1990), the trial judge found that the "impaired capacity" mitigator did not apply because no evidence suggested that Campbell was "insane" at the time of the killing. This Court stated that "[t]he finding of sanity . . . does not eliminate consideration of the statutory mitigating factors concerning mental condition." 571 So.2d at

418-19 (citing Mines v. State, 390 So.2d 332, 337 (Fla. 1980). The Campbell court found both mental mitigators applicable despite the trial court's conclusion to the contrary. Id.

In the instant case, the jury had no idea as to the standard for finding the mental mitigators. The M'Naghten test is obviously a much higher standard than is necessary to establish the "impaired capacity" mitigator which only requires that the defendant's capacity to "appreciate the criminality of his conduct" be impaired. Dixon, 283 So.2d at 10 (mental disturbance which interferes with but does not obviate the defendant's knowledge of right and wrong may be considered in mitigation). One difference in the language of the two standards is between the "criminality" of the conduct (§ 921.141(6)(f)) and the "morality" of the conduct (right or wrong). The major difference in the language, however, is between "knowing" and "appreciating." While discussing their use of the ward "appreciate" rather "know," the drafters of Standard 7-6.1 of the A.B.A. Standards for Criminal Justice (2d sd. 1984), explained that

> the focus of the inquiry into criminal responsibility should not be limited, as the term know might suggest, to a defendant's superficial intellectual awareness of the law or prevailing social morality. Instead, the nonresponsibility test should take into account all aspects of a defendant's mental and emational functioning relating to an ability to recognize and understand the significance of personal actions. The language of the standard allows a proper latitude for experts to testify fully concerning the defendant's mental and emotional condition and for juries to consider this testimony in deliberating on the issue of mental nonresponsibility.

If "knowing" should not be the standard for determining nonresponsibility for criminal behavior, certainly "knowing" should not be considered by a death penalty jury in determining whether a mental mitigator applies. Because the prosecutor was permitted to ask Dr. Berland, on cross-examination, if Long knew right from wrong, the jury must have assumed this was the applicable standard to

determine whether the "impaired capacity" mitigator applied, and that his knowledge of right and wrong rebutted Dr. Berland's earlier testimony that Long's capacity to appreciate the criminality of his conduct was impaired. The insanity standard does not rebut the statutory mitigator. See Dixon, 283 So.2d at 10. The judge clearly erred by permitting the jurors to be misled into applying the insanity standard to determine whether a mental mitigators was established.[59] One need not be legally insane to qualify for mental mitigation. Dixon. This was a critical error and clearly requires a new penalty proceeding.

The difference between the two standards was especially important in this case. Although Long may have known that society considered killing to be wrong, he may not have been able to appreciate the criminality of his actions because of his mental state at the time of the crime. If he believed that Simms was a whore and a slut and that such persons were better off dead, the mental defect that caused Long to commit the crime may also have prevented his normal comprehension of right and wrong from meaning anything to him while he killed Simms.

In the Florida scheme of attaching great importance to the jury recommendation, it is critical that the jury be given adequate guidance. When, as here, the jury is misled as to the standard for considering a mitigating factor, the weighing of the factor is necessarily affected. Although a Florida jury recommendation is advisory rather than mandatory, it can be a "critical factor" in determining whether a death sentence is imposed. LaMadline v. State, 303 So.2d 17, 20 (Fla. 1974). Because the jury was misled concerning the applicability of one of the mental mitigators, Long's death sentence was unreliable, thus violating his eighth and fourteenth amendment rights.

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[59] The trial court permitted the jury to be further misled in their consideration of the mental mitigators by allowing Dr. Sprehe to testify that Long tald him he killed Michelle Simms to eliminate a witness. See Issue IV, supra.

ISSUE VI

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

The Appellant first objected at a pretrial hearing on May 3, 1989, to television cameras in the courtroom. Long sent a pro se motion requesting closed proceedings to the judge prior to the hearing. Long's counsel agreed to handle the motion at the pretrial hearing although he had not read it in advance. (R. 1941-42)

According to the judge, Long was arguing basically that the press "hampered him." He noted that this Court had ruled that cameras are allowed in the courtroom as long as they do not disrupt the proceedings. The judge noted further that a camera was in the courtroom at that time; that members of the press were there; and that it was not disrupting the proceedings. Long responded, "It's disrupting me, sir." The following ensued:

> THE DEFENDANT: I mean, it wasn't bad enough they had to sit back here where nobody could see them, and now they're right in the corner where they're right in my face.
>
> So, I have to put on a show for the media every time I come in here.
>
> THE COURT: Nobody is asking you to put on any show. I'm going to deny that motion until such time as the Florida Supreme Court changes the rule.

(R. 1942-43)

At trial, defense counsel moved that the court impose a restriction that the jury not be photographed by television cameras in the courtroom. (R. 288) He thought such a restriction was reasonable and noted that "in these high profile cases the more we put the jury under the gun in terms of television, the more we get what they think the community wants as opposed to what their conscience dictates." (R. 288) The judge said he knew of no case law restricting

what the cameras could photograph. Defense counsel responded that the trial judge has discretion to impose reasonable restrictions.

The judge then requested that a representative of the news media come forward. Rob North responded that the media "generally acquiesced to not taking specifically tight shots of the jury," but preferred to be allowed to take a wide to medium shot of the panel. He said that although the jurors were "not from our market,"[60] he did not think it fair to restrict the media from photographing the jurors at all. The judge said he had already ascertained that the cameras would not impair the jurors' impartiality, and that the jurors had already seen the camera in the courtroom. Thus, he denied counsel's request.[61] (R, 290)

The judge made three errors. First, he failed to hold the hearing required by this Court in State v. Green, 395 So.2d 532, 536 (Fla. 1981). Second, he failed to consider whether the media interfered with the defendant's ability to assist his counsel. Third, he failed to determine whether the restriction requested by defense counsel was reasonable. The judge applied the wrong standard. The question is not whether the cameras will disrupt the jurors but whether they will interfere with the defendant's right to a fair trial.

If a defendant can show "a reasonable and substantial likelihood that an identifiable prejudice to the right to fair trial will result from the presence of electronic media," the trial judge must hold a hearing to determine whether he should permit electronic coverage of the trial. State v. Green, 395 So.2d 532, 536 (Fla. 1981). This hearing requirement was mentioned specifically in Chandler v. Florida, 449 U.S. 560, 101 S.Ct. 802, 66 L.Ed.2d 740 (1981), a case in which

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[60] North is with Channel 8 in Tampa rather than from Volusia County where the jurors lived.

[61] Undersigned counsel was unable to find any record of the judge's discussion of the cameras with the jurors.

the United States Supreme Court upheld Florida's decision to allow cameras in the courtroom. Absent a hearing, "the contemplated broadcast may adversely affect the conduct of the participants and the fairness of the trial, yet leave na evidence of how the conduct or the trial's fairness was affected." Id. at 577,

To be entitled to this evidentiary hearing, the defendant must allege specific facts; general allegations of prejudice are insufficient. Green, 395 So.2d at 538. "In all instances, a showing must be made that the prejudice or the special injury resulted solely from the presence of electronic media in the courtroom in a manner which is qualitatively different from that caused by traditional media coverage." Id.

A.

In Maxwell v. State, 443 So.2d 967, 970 (Fla. 1983), this Court required the filing of a pretrial motion to preclude television cameras. In the case at hand, Long filed a pretrial motion to restrict television cameras altogether. The judge noted that the motion alleged basically that the cameras "hampered" Long. (R. 1942) Long told the judge that the cameras "were right in [his] face," and that they "disrupted" him and caused him to feel compelled to "put on a show." (R. 1942-43) Thus, Long made a showing of specific possible prejudice. The trial judge denied this motion summarily without ever asking counsel for argument. He did not even ask Long why he was "hampered" or "disrupted" or why he felt compelled to put on a show.[62]

The judge said this Court had determined that television cameras were permissible unless they disrupted the proceedings. (R. 1942) He failed ta consider whether there was "a reasonable and substantial likelihood that an

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62 The judge told Long that no one was asking him to put on a show and that he was going to deny the motion until this Court changed the rule. (R. 1943)

identifiable prejudice to the right to fair trial [would] result from the presence of electronic media." State v. Green, 395 So.2d 532, 536 (Fla. 1981). When this is shown, the trial judge must hold a hearing to determine whether to permit electronic coverage of the trial. Because Long told the judge that television coverage would "disrupt" him, the court was required to determine whether this was true and, if so, whether the cameras should be precluded.

In Green, this Court affirmed the district court decision and remanded the case for a new trial because the television coverage rendered the otherwise competent defendant incompetent. A defense psychiatrist alleged that the appearance of the electronic media would heighten the defendant's anxiety and depression and would actively interfere with her ability to defend herself and to communicate with counsel. 395 So.2d at 535. The Green court found that this specific prejudice mat the requirements of the "qualitatively different" test in In re Post-Newsweek Stations, Florida, Inc., 370 So.2d 764 (Fla. 1979).

The district court found that the trial court erred by failing to require a pretrial evidentiary hearing on the defense motion to exclude the electronic media. The trial court heard arguments on the merits of the motion but refused to take any testimony. The district court held that it was "incumbent upon the trial court to conduct a full evidentiary hearing thereon which, at a minimum, should have included testimony or reports by the court-appointed psychiatrists as to the impact which electronic media coverage of this trial would have on the defendant's competency to stand trial." 395 So.2d at 536 (citing district court opinion at 377 So.2d at 200-01).

"An evidentiary hearing should be allowed in all cases to elicit relevant facts if these points are made an issue, provided demands for time or proof do not unreasonably disrupt the main trial proceeding." State v. Palm Beach Newspapers, 395 So.2d 544, 548 (Fla. 1981). The Green court noted, however, that

it is not always necessary to hold an evidentiary hearing if a decision may be made based upon affidavits. Nevertheless, all parties must be heard. In this case, the court had no affidavits to rely on. He did not consult Long as to his specific problems with the media nor did he consult the court-appointed psychiatrists concerning whether the media would affect Long's competence to stand trial or his ability to communicate with and assist counsel.

Long's motion set forth facts which, if proven, would justify the entry of a restrictive order. See Green, 395 So.2d at 538. The judge summarized Long's motion as alleging that the cameras "hampered" him. If this was so, it would require the court to restrict the cameras. If the cameras did hamper Long's defense, the trial court's denial of the motion denied Long a fair trial. The "qualitatively different" test has constitutional dimensions because the constitutional right to a fair trial is at issue. Id.

Had the judge asked Long how and why the cameras bothered him, Long certainly would have explained the problems to him. At the allocution hearing, Long told the judge that whenever he was alone in the courtroom during breaks, the reporters and cameras were "screaming questions'' at him. (R. 933-34) Thus, the cameras did affect him during the trial. Harassment by the media would cause stress and would surely have affected Long's demeanor and concentration during the trial. If he was constantly angry with the media, he was certainly not able to adequately assist counsel.

The Green court noted further that the chief judge in each circuit is responsible for placing the cameras in locations which would not interfere with or disrupt the trial. "Cameras should not be situated so that they interfere with the proceedings or with any of the trial participants or their activities, especially defense counsel-defendant conferences in criminal trials." 385 So.2d at 539. Long said at the pretrial hearing that the camermen, who had apparently

been in the back before, were "now . . . in the corner where they're right in my face." (R. 1942-43) If the cameras were situated so close to Long that they were "in his face," and cameramen were "screaming questions at him" during breaks, the cameras surely upset Long and adversely affected his defense.

Because the trial court denied Long's motion without evening holding a meaningful hearing, this Court should now reverse for a new trial, free from any prejudice caused by television cameras in the courtroom.

B.

Defense counsel also made the necessary specific showing of possible prejudice qualitatively different from traditional prejudice when he asked the judge to preclude television camera from photographing the jury. He noted that the case was a "high profile" case; thus, the jurors were more likely to decide the case based on what they perceived to be community standards rather than their own conscious.

This is especially true in a death penalty case. The jurors were certainly aware of the public outcry for quicker executions and the pro death penalty atmosphere during the Martinez era. Knowing that they would be shown on television during the evening news would assure that their families, neighbars, and friends would know they were on the Long jury. Thus, people would be likely to ask them about their verdict after the trial.

Defense counsel argued, during his request for a jury instruction that the advisory verdict was sometimes binding, that such an instruction would tell the jury that "because the TV cameras are all over the courtroom, don't come back with what you think the mob wants in terms of a verdict, because it might very well be carried out." (R. 977) The request was denied. (See Issue VII, infra.)

The electronic media does not have a constitutional first or sixth amendment right to cover a courtroom proceeding. In re Petition of Post-Newsweek

Stations, Florida, 370 So.2d 764, 774 (Fla. 1979). Indeed, respected legal authority suggests that the constitution does not allow electronic media in the courtroom at all, **Estes v. Texas**, 381 U.S. 532, 552, 85 S.Ct. 1628, 14 L.Ed.2d 543 (1965) (Warren, J., concurring). Consequently, the trial judge may constitutionally exclude the media or impose any reasonable restrictions.

When defense counsel moved to restrict the media, the judge consulted only the media which, of course, preferred not to be restricted. Rob North, who responded, did not even seem very opposed to the motion although the media naturally preferred to be able to photograph whatever they wanted to photograph. Although the judge said that the jury had assured him that the cameras would not affect their impartiality, he never asked Long how he would be affected. There is no record of the judge's discussion with the jurors; thus, we do not know whether the judge asked them if the cameras might affect their verdict. Absent a hearing, this Court has no evidentiary basis for concluding that the trial was fair. See Chandler, 449 U.S. at 557, 101 S.Ct. 802, 66 L.Ed.2d 740.

One indication that the jurors were indeed prejudiced by the cameras was the 12 to 0 death recommendation. The prosecutor helped make the jurors conscious of the affect their verdict would have on the community by his closing argument commencing, "What's a jury in Volusia County going to say is the proper punishment for the murder of Michelle Denise Simms?" (R. 800) This certainly reminded the jurors of their community and made them conscious of having to explain their advisory verdict to their friends and acquaintances who would have seen them on television and perhaps even heard the prosecutor's closing. This would suggest to them that because their verdict was only advisory, it would behoove them to vote for death and let the judge get them off the hook later.

For the foregoing reasons, this Court should reverse and remand for a new penalty proceeding with a new jury.

ISSUE VII

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

"[I]t is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." Caldwell v. Mississippi, 472 U.S. 320, 328-29, 105 S.Ct. 2633, 86 L.Ed.2d 231, 239 (1985). The danger is that "[e]ven when a sentencing jury is unconvinced that death is the appropriate punishment, it might nevertheless wish to 'send a message' of extreme disapproval for the defendant's acts." Caldwell, 412 U.S. at 331, 86 L.Ed.2d at 241.[63] In the instant case, the jury was especially conscious of public opinion because of the television cameras. (See Issue VI, infra.) Jurors may have voted for death to avoid public disapproval, knowing their verdict was only advisory and the judge could still sentence Long to life. Because the judge was from a different part of the state, the jury may have felt fore comfortable placing the burden of public disapproval on him.

Defense counsel diligently pursued this issue.[64] He first filed a motion

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[63] The Caldwell Court held invalid a capital sentencing proceeding because the prosecutor led the jury to believe that the responsibility for determining the appropriateness of the death sentence rested with the appellate court rather than with the jury.

[64] The Supreme Court reversed an Eleventh Circuit decision without reaching the merits because the Caldwell claim was procedurally barred. Dugger v. Adams, 489 U.S. 401, 407-08 n.4, 109 S.Ct. 1211, 103 L.Ed.2d 435, 442, 443 n.4 (1989). The Court reasoned that, even though Caldwell had not been decided at the time of the trial and direct appeal, both trial and appellate

in limine requesting that the court preclude any mention during voir dire that the jury verdict was only advisory. (R. 969-70, 1298) He then requested an instruction that the jury's advisory verdict was binding in some circumstances. Although neither the court nor the prosecutor disagreed that this was the law,[65] the prosecutor objected. (R. 975) Long's counsel argued that the instruction would merely tell the jurors that "just because the TV cameras are all over the courtroom, don't come back with what you think the mob wants in terms of a verdict, because it might very well be carried out." (R. 977) Noting that "Florida law doesn't go that far yet," the judge denied the motion.[66] (R. 978)

In Mann v. Dugger, 844 F.2d 1446 (11th Cir. 1988) (en banc), cert denied, 489 U.S. 1071, 109 S.Ct. 1353, 103 L.Ed.2d 821 (1989), the Eleventh Circuit vacated a death sentence because the jury was misinformed concerning its role in the sentencing procedure, The prosecutor told the jury that the decision as to whether to impose the death penalty rested with the judge and was not on their shoulders. Following a lengthy analysis of Florida law, the Mann court concluded

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counsel could have objected to the denigration of the jury's function because it misstated Florida law. Id. The Eleventh Circuit found the claim barred by "adequate and independent" state grounds in Clark v. Dugger, 901 F.2d 908 (11th Cir. 1990).

[65] See Garcia v. State, 492 So.2d 360, 367 (Fla.), cert. denied, 479 U.S. 1022, 107 S.Ct. 680, 93 L.Ed.2d 730 (1986) (affirming death sentence where judge instructed jurors that their recommendation "would not be overruled unless there was no reasonable basis for it" because "this is the law"); Tedder v. State, 322 So.2d 908 (Fla. 1975) (judge can override life recommendation only when "the facts [are] so clear and convincing that virtually no reasonable person cauld differ"),

[66] The judge suggested that if the jurors were told that in some cases their verdict would be binding, they would want to know under what circumstances it would be binding. They would say, "Judge, how about you telling me, so we're not back here wasting our time." (R. 977) The judge's reasoning suggests that if the jurors knew their recommendation was not binding, they would think they were wasting their time.

that this Court interpreted section 921.141 as evincing a legislative intent that the sentencing jury play a significant role in the Florida capital sentencing scheme. 844 F.2d at 1450. The court concluded that there was a danger that the Mann jury was misinformed with regard to its role and the jury's sense of responsibility was thus diminished, violating the eighth amendment, as interpreted in Caldwell, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231.

Prior to and during voir dire in the instant case, the judge and the prosecutor explained to the jury that its function would be to render an "advisory verdict." (R. 12, 43-44) The judge said the final decision as to punishment "s the responsibility of the court," but that he would give "careful consideration and great weight to the advisory verdict.'' He told the jurors that the fact that they would "only be rendering an advisory verdict to the Court" should not be considered a "minimization of the very important role that you will play in the sentencing process in this case," (R. 12-13)

The prosecutor told the jury that, "as Judge Lazzara has pointed out to you, your decision will be a recommendation. It will be an advisory sentence." (R. 44) Following defense counsel's objection,[67] he told the jurors that the judge was required by law to give their recommendation great weight and careful consideration before making his final decision as to whether Long should live or die. (R. 46-47) The prosecutor proceeded to ask each prospective juror whether he or she could "recommend" death given the proper circumstances. (R. 75-115)

"The final decisian as to the punishment is the court's responsibility," and you will "only be rendering an advisary verdict" tells the jurors their verdict is not binding. "Advisory" tells the jurors that their verdict is merely

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[67] Defense counsel renewed his objectian *to* the court's denial of his requested jury instruction following jury instructions. (R. 875) He again raised this issue in his motion for new trial. (R. 900)

"advice" to the judge. "Careful consideration and great weight" imply that the jury recommendation is not binding, The instruction suggests that the judge will do whatever he wants to do, and is just required by law to have a jury recommendation prior to imposing sentence.

In LeDuc v. State, 365 So.2d 149, 151 (Fla. 1978), cert. denied, 444 U.S. 885, 100 S.Ct. 175, 62 L.Ed.2d 114 (1979), this Court stated that "[t]he primary standard for our review of death sentences is that the recommended sentence of a jury should not be disturbed if all reasonable data was considered, unless there appear strong reasons to believe that reasonable persons could not agree with the recommendation." In Smith v. State, 515 So.2d 182 (Fla. 1987), this Court approved the death sentence, in part, "on the basis that a jury recommendation of death is entitled to great weight, . . ."[68] Because the advisory verdict really is binding unless reasonable persons could not agree, the trial caurt should have so instructed the jury.

We recognize that this Court has disagreed with the Eleventh Circuit's analysis of the Florida capital sentencing procedure and found Caldwell distinguishable. See Brown V. State, 565 So.2d 304, 308 (Fla. 1990); Grossman v. State, 525 So.2d 833 (Fla. 1988), cert. denied, 489 U.S. 1071, 109 S.Ct. 1354, 103 L.Ed.2d 822 (1989), Combs v. State, 525 So.2d 853 (Fla. 1988). In Combs, this Court found that the standard penalty phase jury instructions properly cxplainedthe jury's role. Nonetheless, Long contends that failure to advise the jurors, upon request, that their advisory verdict may be binding violates the eighth amendments' heightened need for reliability in the determination that death is the appropriate punishment. See Woodson v. North Carolina, 420 U.S. 305, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976); State v. Dixon, 283 So.2d 1 (Fla. 1973).

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[68] *See* additional Florida cases cited by the Eleventh Circuit in Mai v. Dugger, 044 F.2d at 1451.

ISSUE VIII

THE TRIAL COURT COMMITTED FUNDAMENTAL ERROR BY ALLOWING THE PROSECUTOR TO MAKE CLOSING ARGUMENTS THAT WERE NOT BASED ON EVIDENCE IN THE CASE AND BY URGING THE JURY TO CONSIDER FACTORS OUTSIDE THE SCOPE OF JURY DELIBERATIONS.

In Bertolotti v. State, 476 So.2d 130 (Fla. 1985), this Court described the function of closing argument as follows:

> The proper exercise of closing argument is to review the evidence and to explicate those inferences which may reasonably be drawn from the evidence. Conversely, it must not be used to inflame the minds and passions of the jurors so that their verdict reflects an emotional response to the crime or the defendant rather than the logical analysis of the evidence in light of the applicable law.

476 So.2d at 134. The accused has the right to a fair trial free from prejudicial conduct by the prosecutor. Chavez v. State, 215 So.2d 750 Fla. 2d DCA 1968). Likewise, the prosecutor has the responsibility to seek justice, not merely to win a conviction. Garron v. State, 528 So.2d 353, 359 (Fla. 1988) (violations of prosecutor's duty to seek justice and not merely "win" a death recommendation cannot be condoned by this Court).

In the case at hand, the prosecutor made arguments to the jury that have been found to be error. They were not based an any evidence in the case and were extremely prejudicial to Long. Although defense counsel made no objection to these arguments, they were so harmful when considered together that the error was fundamental and a new trial is required. See Ailer v. State, 114 So.2d 348 (Fla. 2d DCA 1959); Waters v. State, 486 So.2d 614 (Fla. 5th DCA 1986); Ryan v. State, 457 So.2d 1084 (Fla. 4th DCA 1984).

A.

It is impermissible to instruct the jury o its civic duty. Redish v. State, 525 So.2d 928, 930 (Fla. 1st DCA 1988) (argument that jurors would violate oaths by accepting defense). In the instant case, the prosecutor commenced his

closing argument as follows: "What's a jury in Volusia County going to say is the proper punishment for the murder of Michelle Denise Simms?" (R. 800) The question violated the prohibition against "sending a message to the community" by making the Volusia County jurors responsible for protecting the community. The prosecutor suggested that by recommending that Long be sentenced to death, the jury would send a message to the community that murder is unacceptable.

It has long been held improper for a prosecutor to ask the jury to "send a message to the community." State v. Wheeler, 468 So.2d 978 (Fla. 1985) (reversed because of prosecutor's "drugs in the schools'' closing argument); Ryan v. State, 457 So.2d 1084, 1088 (Fla. 4th DCA 1984) (reversed based in part on "tell the community" argument). This is because such an argument prompts the jury to consider matters extraneous to the evidence and is calculated to inflame the jury's passions or prejudices. Boatwright v. State, 452 So.2d 666, 667 (Fla. 4th DCA 1984).

B.

The prosecutor also argued to the jury that Long "got into houses to rape using the same trickery and deceit he used on Dr. Money and Dr. Berland." (R. 814) There was absolutely no evidence that long tricked or deceived Dr. Money or Dr. Berland. Thus, the prosecutor was testifying.

In Huff v. State, 437 So.2d 1087 (Fla. 1983), this Court dealt with a similar situation. The prosecutor was unable to get into evidence the fact that the defendant may have forged his father's name on a guarantee. Thus, during his closing, the prosecutor argued to the jury that they should examine the defendant's signature on the guarantee in evidence and compare it with the signature on his father's will, also in evidence. This Court found that "[t]he state's injection of this important element into its closing argument to intimate appellant's motive for the murders violates the rule that argument of counsel be

channeled by the evidence produced at trial." 437 So.2d at 1091.

In the instant case, the prosecutor could not, of course, elicit evidence that Long lied to the defense experts; there was no such evidence. Therefore, he injected this bare allegation inta his closing argument, apparently hoping that the jurors would believe that it was somehow suggested by the evidence.

C.

As if this was not enough, the prosecutor later made the following previously condemned argument:

> What can one do in prison? You can laugh, you can cry, you can watch TV, you can listen to music, you can read, you can make friends and, in short, you can live. People want to live. Michelle Simms didn't have that choice.

(R. 823) In February of 1988, well before the trial in this case, this Court found the same argument improper in another Hillsborough County case. Jackson v. State, 522 So.2d 802 (1988). This Court stated as follows:

> We agree with Jackson's argument that the prosecutor's comment that the victims could no longer read books, visit their families, or see the sun rise in the morning as Jackson would be able to do if sentenced only to life in prison was improper because it urged consideration of factors outside the scope of the jury's deliberations.

522 So.2d at 809, This Court characterized the prosecutor's argument as "misconduct," stating that the trial judge should have sustained defense counsel's objection and given a curative instruction. The Jackson court declined to reverse the death sentence, however, concluding that the misconduct was not so outrageous as to taint the validity of the jury's recommendation.

More recently, in Taylor v. State, 16 F.L.W. 5469 (Fla. June 27, 1991), this Court reversed for a new penalty phase proceeding because the state made the same argument and misled the trial judge into believing that the argument was approved by this Court. Unlike Taylor, there was no objection in the case at hand. Nevertheless, the prosecutor's misconduct in continuing to use this

previausly condemned argument also requires reversal in this case.

The prosecutor's argument is improper for four reasons. First, it is clearly designed to inflame the jurors' passions so that their verdict will be an emotional response rather than based on the evidence. Second, the argument is not related to any aggravating factor and is irrelevant. Third, the prosecutor's argument is based on evidence that was not admitted nor admissible at trial. See Huff, 437 So.2d at 1091 (argument must be channeled by evidence at trial). Finally, the prosecutor's argument is clearly not the law, Death is not the appropriate punishment in every murder case,

In Garron v. State, 528 So.2d 353 (Fla. 1988), this Court addressed the issue of prosecutorial misconduct in a capital case:

> This is certainly not the first time prosecutorial misconduct ha5 been brought to our attention. In State v. Murray, 443 So.2d 955 (Fla. 1984), and again in Bertolotti v. State, 476 So.2d 130 (Fla. 1985), this Court expressed its displeasure with similar instances of prosecutorial misconduct. Such violations of the prosecutor's duty to seek justice and not merely "win" a death recommendation cannot be condoned by this Court. ABA Standards for Criminal Justice 3-5.8 (1980); 476 So.2d at 133.

Garron, 528 So.2d at 359. Because of the egregious nature of the misconduct and because prior warnings had gone unheeded, the Garron court reversed.

Similarly, the only appropriate remedy in the instant case is reversal of the death sentence improperly "won" by the prosecutor. Despite the Jackson case, Hillsborough County prosecutors continue to use the argument enumerating the advantages of prison over death in capital cases.[69] The argument is clearly designed to divert the jury from its task of fairly weighing the aggravating and mitigating factors with "eye for an eye" rhetoric. It does not state the law because death is not the appropriate penalty for all first-degree murders. See

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[69] See e.g., Taylor, 16 F.L.W. S469; Hudson v. State, 530 So.2d 829, 832 n.6 (Fla. 1989), and initial brief; initial brief in Crump v. State, No.74,230 (orally argued April 8. 1991).

§ 921.141, Fla. Stat. (1987).

D.

Although errors at trial, standing alone, may not be cause for reversal, their cumulative effect can substantially prejudice a defendant, thereby warranting a new trial. See e.g. Rhodes v. State, 547 So.2d 1201, 1205-06 (Fla. 1989) (prosecutor's cumulative penalty phase arguments reversible error); Garron v. state, 528 So.2d 353, 359 (Fla. 1988) (cumulative prosecutorial misconduct overstepped bounds of zealous advocacy); Dugue v. State, 498 So.2d 1334 (Fla. 2d DCA 1986) (cumulative prosecutorial misconduct).

Errors which destroy the essential fairness of a criminal trial cannot be countenanced regardless of the lack of objection. Dukes v. State, 356 So.2d 873 (Fla. 4th DCA 1978) ("While we might be persuaded to overlook any one of the errors about which appellant complains, the totality of the circumstances . . . leads us to believe the appellant was not afforded a fair trial.") As stated in Perkins v. State, 349 So.2d 776, 778 (Fla. 2d DCA 1977), "[w]hile a defendant is not entitled to an error-free trial, he must not be subjected to a trial with error compounded upon error.

> Firmly entrenched in the law in this state is the rule that the trial judge must halt improper remarks of counsel in their argument to the jury, whether objection is made or not. . . .
>
> An exception to [the rule requiring an objection] is where the improper remarks are of such character that neither rebuke or retraction may entirely destroy their sinister influence. In such event a new trial should be granted regardless of the lack of objection or exception.

Ailer v. State, 114 So.2d 348, 351 (Fla. 2d DCA 1959).

In the instant case, the prosecutor's arguments constituted fundamental error without objection because Long was denied due process and a fair trial. Denial of due process is never harmless, especially in a case involving the death penalty, See State v. DiGiulio, 491 So.2d 1129 (Fla. 1988).

ISSUE IX

THE TRIAL JUDGE 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 VIOLATING THE PLEA AGREEMENT,

The prosecutor provided the judge with various transcripts of prior testimony by psychiatric experts, requesting that he read and consider them for the purpose of imposing sentence. Defense counsel also provided the court with transcripts of such testimony by different psychiatrists. (R. **1472-1934)** The transcripts are replete with references to the other homicides (R. **1513, 1529, 1532, 1534, 1536, 1540, 1594, 1599, 1620, 1645, 1693, 1765, 1768-77, 1780, 1794, 1796, 1800-05, 1834, 1892, 1923)** and describe Long as a serial killer. (R, 1485-86, **1539, 1728, 1791, 1825, 1913)** In addition, the transcripts contain references to 50 to 100 prior rapes allegedly committed by Long. (ie, R. **1760-66, 1778-82, 1797-98)**

The trial judge expressed concern as to whether he should read and consider this outside testimony because Long's plea agreement specifically provided that the other Tampa homicides would not be used as aggravation in the Simms case. (R. **926)** The judge said he knew the transcripts contained mention of other serial killings but that he would focus on Long's mental state (R. 927-28) He said he would not consider the other murders in sentencing because he was bound by the plea agreement. (R. **925)** He stated further that, "to do otherwise would allow [Long] to withdraw his plea of guilty." (R. **925)**

One of the primary provisions of the plea agreement was that the other seven homicides to which Long pled guilty would not be used against him in the Simms penalty proceeding. (See Issue I, supra.) This was part of the "inducement and consideration" provided by the agreement. Nevertheless, the trial judge read

and considered these transcripts, with numerous references to the serial killings. In his written sentencing order, he noted that he had carefully considered "the additional evidence presented by the Defendant and the State of Florida subsequent to the sentencing proceeding . . . ." (R. 1338-39) He stated later, however, that he had not considered the fact that Long confessed to and pled guilty to "the multiple murders of other young women as prohibited by the plea agreement" in arriving at his findings of fact and conclusions af law. (R. 1337, 1339 n.3)

That the trial judge expressly denied considering the other murders shows that they were on his mind. Throughout his weighing of the aggravating and mitigating factors, he must have constantly reflected on the serial killings while attempting to decide whether he was subconsciously considering them. After reading the lengthy transcripts concerning the other homicides, it would be almost impossible for him not to consider them, at least subconsciously, in reaching his decision.

In Santobello v. New York, 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971), the United States Supreme Court wrote that, "when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." 404 U.S. at 262. The primary question posed when a plea agreement is violated is not whether the sentencing judge was influenced by the violation but merely whether the violation occurred. In Santobello, the sentencing judge also denied that he was influenced by the breach of the plea agreement. Nevertheless, the United States Supreme Court vacated the judgment and sentence because the bargain was not honored,

A plea bargain is not merely a contract between an accused and the state because it induces the accused to waive important constitutional rights. Smith

v. Blackburn, 785 F.2d 545 (5th Cir. 1986). When the defendant pleads guilty in return for a promise, breach of this promise taints the voluntariness of his plea. Id. In the case at hand, Long's plea was conditioned upon the promise that the other Tampa homicides would not be considered or used as aggravating factors at his penalty phase trial for the Simms murder, Although the judge and both counsel were careful not to mention these other homicides in front of the jury, the judge read page after page of evidence concerning them just prior to sentencing Long. Long's guilty pleas were rendered involuntary by the judge's breach of the agreement. Thus, Long must be permitted to withdraw his pleas. See Lee v. State, 501 So.2d 591 (Fla. 1987); Lollar v. State, 443 So.2d 1079 (Fla. 2d DCA 1984).

Defense counsel did not object to the trial judge's reading of the various transcripts. Sentencing error does not require a contemporaneous objection, however, when it is apparent from the face of the record. See e.g., State v. Whitfield, 487 So.2d 1045 (Fla. 1986). Moreover, in a capital case, this court always undertakes a complete review of the evidence to ascertain that it supports the trial court's findings. Harvard v. State, 375 So.2d 833 (Fla. 1977). Both the prosecutor and the trial court read the plea agreement (the prosecutor apparently authored it) and were responsible for assuring that the promises therein were kept, even if defense counsel failed to object.

This logic is illustrated by a hypothetical example. Suppose that defense counsel, during the penalty phase trial, requested that the trial judge inform the jury that Long pled guilty to seven other homicides of Tampa prostitutes. Certainly, if the judge had agreed to do so, Long's plea agreement would have been null and void because the consideration for the contract would no longer exist and the plea would be involuntary, Similarly, the judge's violation of the terms of the plea agreement rendered it null and void despite defense counsel's

participation in the violation and failure to object,

The state must be held to a meticulous standard in the performance af a plea agreement. In United States v. Garcia, 519 F.2d 1343 (9th Cir. 1975), the court vacated a defendant's conviction, ruling that the government was held to the literal terms of the written plea agreement. The same should result here. In this case, the prosecutor violated the plea agreement by giving the judge transcripts with references to the other homicides. Even though the judge insisted that he did not consider the other homicides, and probably believed that he put them out of his mind, the judge's reasoning shows that he did consider them. He specifically found that Long planned the murder of the victim in this case because he used rope and had a knife with him. (R. 947-49) Long also used rope and knife in the two rapes which the state used to establish the "prior violent felony" aggravating factor; however, Long did not kill the two rape victims, Thus, the inference fromthose offenses -- the only ones introduced at the Simms penalty phase trial -- must be that Long's planning did not include murder. The judge's reasoning in his oral and written findings conclusively shows that he considered the other murders in imposing sentence. Thus, Long must be permitted to withdraw his guilty pleas in all of the Tampa cases.

ISSUE X

THE TRIAL COURT ERRED BY **FINDING** THAT **THE HOMICIDE WAS COMMITTED IN A COLD, CALCULATED AND** PREMEDITATED **MANNER WITHOUT ANY PRETENSE OF MORAL OR LEGAL JUSTIFICATION.**

Over defense objection, the trial judge instructed the jury on the cold, calculated, and premeditated aggravating circumstance **("CCP").** (R. 493, **866-67)** In his written findings supporting imposition of the death sentence, the judge also found that the murders were cold, calculated, **and** premeditated, and stated as follows:

> 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 to be Michelle Denise Simms. After he fulfilled his objective he drove approximately one-half to one mile, subdued the victim with a knife, undressed her, and tied her up with the rope. In that regard the Cauwt personally reviewed the photographs introduced at the sentencing proceeding which depicted the manner in which the Defendant bound the victim with rope (State's Exhibits 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 from 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 a 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 of 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.

(R. 1330-32) The judge's reasoning fails to support a finding of heightened premeditation.

A finding of CCP requires coldblooded intent to kill that is more contemplative, more methodical, and more controlled than that necessary *to* sustain a first-degree murder conviction. Nibert v. State, 508 So.2d 1, 4 (Fla. 1987). Quoting from Preston, 444 So.2d 939, 946-47 (Fla. 1984), the Nibert court noted that CCP has been found when the facts show a "particularly lengthy, methodical, or involved series of atrocious events or a substantial period of reflection and thought by the perpetrator." Id.

The facts in this case are similar to those in Holton v. State, 15 F.L.W. S500, S503 (Fla. Sept. 27, 1990). In Holton, this Court reaffirmed that simple premeditation of the type necessary to support a conviction for first-degree premeditated murder is not sufficient to support the "cold, calculated and premeditated" aggravating factor. Accord Hamblen v. State, 527 So.2d 800, 805 (Fla. 1988). The victim in Holton, also a prostitute, was found partially unclothed and bound around the neck and one wrist with pieces of nylon cloth, 15 F.L.W. at S500. This Court found that the facts in Holton suggested that the strangulationmurder occurred during the commission of a sexual battery and could have been a spontaneous act in response to the victim's refusal to participate in consensual sex. 15 F.L.W. at S503.

"A rage is inconsistent with the premeditated intent to kill someone." Mitchell v. State, 527 So.2d 179, 182 (Fla. 1988). Accordingly, if Long killed Simms because he was in a rage and lost control, CCP is not supported by the evidence, Dr. Berland testified that he believed that Long was in a fit of rage when he killed Simms.[70] (R. 667) Although Long only remembered hitting Simms once, he apparently hit her repeatedly. Dr. Berland believed Long was in an "energetic frenzy." (R. 670-72)

Dr. Money testified that Long lacked the capacity to appreciate the criminality of his conduct because he was in an altered state of consciousness, which caused him to operate on "automatic pilot." During this time he could not control his behavior. (R. 560-62) Lack of control over ones behavior renders the person incapable of heightened premeditation.

Dr. Hiller, the Hillsborough County medical examiner, also believed that the murder may have been committed while Long was in a rage. (R. 370) He listed three possible causes of death -- asphyxiation, closed head injuries, or two knife slashes on the neck. (R. 368-76) Dr. Miller agreed that the way Simms died was entirely consistent with rage and did not suggest that the killing was cold, calculated or premeditated. (R. 380)

In Nibert, 508 So.2d 1, this Court held that a "stabbing frenzy" does not establish CCP. In both Mitchell, 527 So.2d at 182, and Hansbrouah v. State, 509 So.2d 1081 (Fla. 1987) (victim stabbed over 30 times), this Court found that the heightened premeditation needed to support the finding of CCP was not shown by

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[70] The prosecutor asked Dr. Berland haw he reconciled his belief that this was a rage killing with Long's alleged statement that he hit Simms over the head so that she would not feel pain when he killed her. Dr. Berland said that Long was inclined to minimize the impact of things, or clean things up at lot in his description. Thus, the statement was not necessarily based on what Long felt at the time. (R. 670-72)

the "frenzied stabbing" of the victim.

CCP has been rejected in cases in which there were more drawn out acts of killing than in the instant case. Far example, in Herzog V. State, 439 So.2d 1372 (Fla. 1983), the defendant first attempted to smother the victim with a pillow. When this failed, the defendant strangled the victim to death with a telephone cord. The body was then taken to a remote location and disposed of by drenching it with gasoline and setting it on fire. Even this did not establish the "cold, calculated and premeditated" aggravating factor. In this case, Long strangled, hit and stabbed Simms in immediate succession, although the order is uncertain, at one location, It would have taken a very brief period of time.

There was no evidence suggesting that Long intended to kill Simms when he picked her up. In fact, his confession compels the opposite conclusion, Long told Detective Latimer that when he pulled up next to Michelle Simms, she asked if he wanted a date. When he asked, "how much," she responded, "fifty dollars." He agreed. They drove a half-mile to a mile. He made Simms undress, reclined the passenger seat into a prone position and at knife point tied her up. (R. 334-35)

Long then drove fifteen to twenty miles into eastern Hillsborough County where he raped Simms. (R. 334) He talked to her at that time, intending to take her back to where he picked her up. He told her he would do so. (R. 335, 338) Instead, however, he drove her to the Plant City area and killed her. (R. 335) Thus, Long's confession confirms that he did not intend to kill Simms even after he raped her. He intended to take her back to Tampa but for some reason became so uncontrollably angry that he killed her.

The judge noted in his written findings that Long admitted having rope and a knife in his car and looking for a prostitute. This does not prove heightened premeditation. Long apparently bound Simms' wrists to commit a sexual battery. To establish the CCP aggravating factor, the state must prove beyond a reasonable

doubt that the murder, not an accompanying felony, was committed with heightened premeditation. See Perry v. Statg, 522 So.2d 817 (Fla. 1988) (the premeditation of a felony cannot be transferred to a murder that occurs during the felony for purposes of the CCP aggravating factor; Rogers v. State, 511 So.2d 526 (Fla. 1987), cert. denied, 404 U.S. 1020, 108 S.Ct. 733, 98 L.Ed.2d 681 (1988) (utter lack of evidence that Rogers had a careful plan or prearranged design to kill during the robbery); Bardiwick v. State, 461 So.2d 79 (Fla. 1984) (plan to rob, alone, does not establish the necessary mental state).

In the instant case, the evidence showed only a design to commit sexual battery. There was no evidence that he intended to kill the victim. The rapes of Sandra Jensen and Linda Nuttal, whom Long did not kill, show similar planning. Long also used rope when he raped Jensen. He had a knife during both rapes. (R. 356-58, 390) Nevertheless, he did not harm the victims.

Because Long did not kill Jensen and Nuttal, it must be inferred that his planning did not include murder. The judge's reasoning -- that Long's preparations evidenced premeditation of murder -- suggests that the judge considered the other Tampa murders which Long's plea bargain strictly forbid. See Issue IX, supra. Otherwise, his conclusion should have been that Long premeditated a sexual battery similar to that of Nuttal and Jensen.

The trial court found that there was "absolutely no evidence to suggest that a pretense of moral or legal justification existed to rebut the otherwise cold and calculating nature of this homicide" and 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." (R. 1332) This is not true. "[U]nder the capital sentencing law of Florida, a 'pretense of justification' is any claim of justification or excuse that, though insufficient to reduce the degree of homicide, nevertheless rebuts

the otherwise cold and calculating nature of the homicide." Banda V. State, 536 So.2d 221, 224 (Fla. 1988). A pretense is "something alleged or believed on slight grounds: an unwarranted assumption.'' Id. at 224 n.2 (quoting Webster's Third New International Dictionary 1977).

As noted above, the evidence did not show a careful plan to murder a woman. It showed only a plan to rape. Additionally, there was "some evidence" to suggest that Long believed the killing of this prostitute to be justified because he did not want her to "suffer" by living a life of prostitution. (R. 343-44) Psychiatric testimony showed that Long was traumatized throughout his childhaod by his mother's suggestive attire and by her relatives' accusations that she was a prostitute. Perhaps Lang believed that Simms was better off dead than leading a life of prostitution.

Although Long's motives are uncertain, the killing is just as susceptible to the conclusion that Long killed in an uncontrollable rage, possibly because of Simms' prostitution, as it is to the judges's conclusions. In fact, the judge's findings require considerable speculation. Speculation regarding a defendant's unproven motives cannot support the "cold, calculated and premeditated'' aggravating factor. Thompson v. State, 456 So.2d 444 (Fla. 1984). The burden is upon the state to prove, beyond a reasanable doubt, affirmative facts establishing the heightened degree of premeditation necessary to sustain this factor. Id.; Peavy V. State, 442 So.2d 200, 202 (Fla. 1983). The burden is not on the defendant to prove that he lost control, acted in panic or for any other unknown reason. In Hamilton v. State, 547 So.2d 630 (Fla. 1989), this Court found that the degree of speculation present in the judge's findings precluded the finding of CCP beyond a reasonable doubt. The same is true here.

The homicide in this case was not an execution, contract murder, or witness elimination killing. See Perry, 522 So.2d at 820 (CCP aggravating factor

frequently and appropriately applied to contract murders and execution style killings; emphasizes cold calculation before the murder itself); Hansbrough v. State, 509 So.2d 1081, 1086 (Fla. 1987) (CCP reserved primarily for execution or contract murders or witness elimination killings). Nor was it a "particularly lengthy, methodical, or involved series of atrocious events or a substantial period of reflection and thought by the perpetrator." See Preston, 444 So.2d at 946-47. The evidence suggests that Long became enraged following a sexual encounter with a prostitute and strangled her because he was unable to control his behavior, possibly while in an altered state of reality.

Last year this Court clarified the application of the cold, calculated and premeditated aggravating factor, as follows:

> Many times this Court has said that Section 921.141(5)(i) of the Florida Statutes (1987) requires proof beyond a reasonable doubt of "heightened premeditation." We adopted the phrase to distinguish this aggravating circumstance from the premeditation element of first-degree murder. See e.g., Hamblen v. State, 527 So.2d 800, 805 (Fla. 1988); Rogers v. State, 511 So.2d 526, 533 (Fla. 1987), cert. denied, 484 U.S. 1020 (1988). Heightened premeditation can be demonstrated by the manner of the killing, but the evidence must prove beyond a reasonable doubt that the defendant planned or prearranged to commit murder before the crime began. . . .

Thompson v. State, 565 So.2d 1311, 1317-18 (Fla. 1990). There is absolutely no evidence that Long planned the murder before the crime began.

The trial court improperly applied section 921.141, Florida Statutes, by instructing the jury on and finding CCP. This misapplication renders Long's death sentence unconstitutional under the eighth and fourteenth Amendments. See Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976); State v. Dixon, 283 So.2d 1 (Fla. 1973). Thus, because the trial court may not have sentenced Long to death had he not weighed this aggravating factor against the myriad of mental mitigation, the death penalty must be vacated and a new penalty phase proceeding granted.

ISSUE XI

THE TRIAL COURT ERRED BY FAILING TO CONSIDER AND FIND NONSTATUTORY MITIGATION WHICH WAS REASONABLY ESTABLISHED AND WAS NOT REBUTTED.

The United States Supreme Court has mandated that the trial judge must consider all relevant mitigating evidence before determining whether to impose a life or death sentence. See Eddings v. Oklahoma, 455 U.S. 104, 115-16, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982); Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2958, 57 L.Ed.2d 973 (1978). In the case at hand, the trial judge did not consider any nonstatutory mitigation. Even though defense counsel failed to object (and, in fact, suggested that the judge not find any nonstatutory mitigation), the error requires resentencing. Sentencing error needs no objection when it is apparent on the face of the record. State v. Whitfield, 487 So.2d 1045 (Fla. 1986).

In Rogers v. State, 511 So.2d 526, this Court discussed the sentencing judge's obligation with respect to mitigating evidence. If mitigation is supported by the evidence and is of a nature which reduces a defendant's moral culpability for the homicide, then it must be weighed against the aggravating circumstances. "Judges may not refuse to consider relevant mitigating evidence.'' 511 So.2d at 535 (citing Eddinss v. Oklahoma).

More recently, in Campbell v. State, 571 So.2d 415 (Fla. 1990), this Court held that the judge must expressly evaluate in his written sentencing order every statutory and nonstatutory mitigating factor proposed by the defendant. If the evidence reasonably establishes a given mitigating factor (question of fact) and if the factor is mitigating in nature (question of law), the judge must find it a mitigating circumstance and weigh it against the aggravating factors, The judge cannot dismiss a factor as having no weight. The judge's final decision must be supported by "sufficient competent evidence in the record."

These guidelines were established to promote uniform weighing of the mitigating factors. Although the trial judge in the instant case, did not have the benefit of Campbell, prior case law required that the mitigating factors be considered by the trial court and, if mitigating, given some weight.[71] See e.g., Rogers v. State, 511 So.2d at 535. The judge, in his written findings in this case, failed to find and praperly weigh all mitigating factors.

In an apparent effort to assure that the two mental mitigators would not be "diminished" by nonstatutory aggravators, defense counsel did not request that the judge find any nonstatutory mitigators but suggested that the nonstatutory mitigation was all a part of the two mental mitigators. (R. 921) Accordingly, the trial judge found bothmental mitigators -- that Long was under the influence of emotional disturbance at the time of the murders and that his capacity to appreciate the criminality of his conduct was substantially impaired.

In many cases in which the mental mitigators are faund, however, non-statutory mitigation is also found. In fact, nonstatutory mitigation such as an abusive and depraved childhood must always contribute to the mental mitigators.

Whether a particular nonstatutory factor is "mitigating in nature'' is a question of law:

> A mitigating circumstance can be defined broadly as "any aspect of a defendant's character or record and any of the circumstances of the offense" that reasonably may serve as a basis for imposing a sentence less than death.

Campbell v. State, 571 So.2d 415, 419 n.4 (1990) (citing Lockett). The Campbell court gave as examples a non-exclusive list of recognized nonstatutory mitigating factors, the first of which was "abused ok deprived childhood." Other decisions of this Court which establish that a defendant's disadvantaged or pathological

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[71] We recognize that Campbell is not retroactive; nevertheless, prior caselaw requires the same conclusion.

family background and/or hi5 traumatic childhood and adolescence are valid nonstatutory mitigating factors include Nibert v. State, 574 So.2d 1059, 1061-62 (Fla. 1990); te, 552 So.2d 1002, 1086 (Fla. 1989); Brown v. State, 526 So.2d 903, 907-08, (Fla. 1988); Burch v. State, 522 So.2d 810, 813 (Fla. 1988); Rogers v. State, 511 So.2d at 535; and rough v. State, 509 So.2d 1081, 1086 (Fla. 1987). See also Eddings v. Oklahoma.

Long's childhood was filled with mitigation. He was born to a seventeen year old girl, admittedly unprepared for motherhood, and an alcoholic father. He failed to thrive his first year. (R. 404-05, 1709-10) His mother and father separated when he was an infant. (R. 404) His mother worked as a carhop and later in bars in Miami, wearing suggestive outfits including "hot pants'' and boots. (See photograph at R. 1463) Long had a psychologically devastating, quasi-incestuous relationship with his mother while, at the same time, she was cold, domineering and unavailable to his real needs. (R. 544, 588) Long shared a bed with his mother until he was ten or twelve years old. (R. 410, 450)

During part of this time, Long's mother supported a houseful of relatives (her mother and sisters and their children) who did not work. Her sisters told Long that his mother was a prostitute. (R. 418) Long and his mother were constantly moving; he attended numerous schools before finally dropping out at age fifteen. (R. 411, 417)

During his childhood, Long sustained a series of head injuries, several of which resulted in unconsciousness or vomiting. On one of those occasions, when he was seven, he was hit by a car. His face, mouth and jaw were torn up. His teeth were knocked back into his head. (R. 411-15)

When Long was in his teens, a humiliating medical problem arose. He developed female breasts caused by a hormonal condition. He was ashamed and embarrassed and would only wear large, loose-fitting clothes. The condition

eventually required surgery to correct. The doctor removed six pounds of tissue. (R. 423) (See photograph of Long in hospital after surgery at R. 1455)

When Long was twenty and in the military, he suffered the last in the series of head injuries, While riding his motorcycle, he was hit by a car and thrown over the car. He landed on his head, fracturing his helmet. (R. 415, 458) Even after several operations, Long complained of headaches and numbness. Both his mother and his wife noticed marked changes in his behavior. He could no longer stand loud noises such as those made by his children. His temper grew noticeably worse. He would explode about little things or about nothing at all. (R. 418-19) His ex-wife, Cindy, reported that the frequency of their sexual activity increased markedly, to sometimes three or four times a day. (R. 462-63) He took amphetamines for chronic headaches following the accident. He could not sleep, His balance was not normal. He had temper tantrums and became violent. He experienced memory loss; he once spanked his mother unmercifully for no apparent reason and never mentioned it again. (R. 463-65)

Long had good qualities despite his criminal behavior. He joined the military although he did not complete his service due to a head injury. (R. 450) He attempted to get an education and to support his family. After he was incarcerated, he directed that his V.A. benefits be sent to his ex-wife to support his two children, (R. 457) Cindy said that Bob was a good father. Prior to his arrest they were close to reconciling. (R. 468) See Roaers, 511 So.2d at 535 (good husband, father, and provider is mitigating).

The court's failure to even consider this myriad of nonstatutory mitigation, except as it related to the mental mitigators, violated Florida's death penalty law and federal case law. The sentence of death must be vacated.

ISSUE XII

THE TRIAL COURT SHOULD HAVE SENTENCED LONG TO LIFE IN PRISON BECAUSE IT IS UNCONSTITUTIONAL TO EXECUTE THE MENTALLY ILL.

Defense counsel argued unsuccessfully that it is unconstitutional to execute the mentally ill. (R. 907-08) Persons who are seriously mentally disturbed are either unable to control their behavior or their thinking is too confused for them to consider whether the death penalty might be applicable to the offense committed. The likelihood that a mentally ill person has made the kind of cost-benefit analysis that attaches any weight to the possibility of execution is so remote as to be virtually nonexistent Thus, executing the mentally ill would not satisfy society's desire for deterrence.

Similarly, society's desire for retribution likewise fails to justify the execution of the mentally ill, Imposition of the death penalty requires a "highly culpable mental state," Tison v. Arizona, 481 U.S. 137, 156, 107 S.Ct. 1676, 1680, 95 L.Ed.2d 127 (1987), and must be directly related to the defendant's "personal responsibility and moral guilt." Enmund v. Florida, 458 U.S. 782, 801, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982). Mentally ill offenders have disturbed thought patterns and emotions and a reduced ability to think rationally. Thus, by definition, mentally ill offenders do not have the highly culpable mental state that the eighth amendment requires to justify the retributive punishment of death. Sentencing the mentally ill to die in the electric chair does not measurably contribute to either of the two penological goals that capital punishment is intended to achieve. Thus, it is nothing more than the purposeless and needless imposition of pain and suffering and thus an unconstitutional punishment in violation of the eighth and fourteenth amendments to the United States Constitution.

ISSUE XIII

THE DEATH SENTENCE SHOULD BE REDUCED TO LIFE BECAUSE THE TRIAL COURT FOUND BOTH MENTAL MITIGATORS AND SHOULD HAVE FOUND NONSTATUTORY MITIGATION, ALL OF WHICH OUTWEIGHED THE AGGRAVATING FACTORS.

In State v. Dixon, 283 So.2d 1, 7 (Fla. 1973), this Court stated that, because death is a unique punishment in its finality and total rejection of the possibility of rehabilitation, it is proper that the legislature has "chosen to reserve its application to only the most aggravated and unmitigated of most serious crimes," There is nothing more mitigating than mental illness,

Long's defense counsel urged the trial judge to find both mental mitigators even if he imposed death because he believed that this Court had never upheld a death sentence where both mental mitigators were found.[72] (R. 911) In an apparent effort to assure that the judge would find both mental mitigators, defense counsel did not request that he find any nonstatutory mitigators but suggested that the nonstatutory mitigation was all a part of the two mental mitigators. (R. 921) The trial judge found both mental mitigators and sentenced Long to death. (R. 1331-37) He reasoned that even though Long had mental problems, he knew what he was doing and could have stopped. (R. 1335-37)

The judge's reasoning shows that he used an improper standard to balance the mitigating factors against the aggravating factors. The issue was not whether Long knew right from wrong or could have stopped if he had seen a police officer. Whether he knew it was wrong and could have stopped but didn't is the M'Naghten test for sanity. The sanity standard cannot be used to determine the

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[72] Defense counsel was incorrect in believing that this Caurt had never affirmed a death sentence where both mental mitigators were found. See Hudson v. State, 538 So.2d 829 (Fla. 1989); Ferguson v. State, 474 So.2d 208 (Fla. 1985). Since then, one other such case has been affirmed. Brown v. State, 565 So.2d 304 (Fla. 1990).

weight of a mitigating factor. See Campbell v. State, 571 So.2d at 418-19. The judge's admission of Dr. Berland's testimony on the insanity standard shows he didn't know insanity differed from the mental mitigators. See Issue V, supra.

The evidence showed that Long was mentally ill since birth. There was no evidence to the contrary. Both defense experts found that Long suffered from a bipolar disorder, had brain damage, and was severely psychotic. Dr. Money believed that he suffered from temporal lobe epilepsy which caused him to depart from reality for periods of time, during which he would become extremely energized. (R. 571) All of the psychiatrists whose reports the judge reviewed for sentencing believed Long was seriously mentally ill. (R. 1472-1934)

Even Dr. Sprehe, the state's psychiatric expert, who disagreed diametrically with everything else the defense experts said, agreed that Long was a "severely disturbed psychopath." That's the very least he is. Even if Long had nothing wrong other than an antisocial personality, the fact that the defendant was suffering from a personality disorder has been held to be mitigating as a matter of law. Eddings v. Oklahoma, 455 U.S. 104, 107, 115, 102 S.Ct. 869, 71 L.Ed.2d 1, 6, 11 (1982) (antisocial personality disorder); Campbell, 571 So.2d 415 (borderline personality disorder); Masterson v. State, 516 So.2d 256, 258 (Fla. 1987) (post-traumatic stress disorder).

Of course, the question is not whether mitigation was established but, rather, whether the mental mitigation outweighed the aggravating factors. As discussed in Issue IX, supra, the trial court should have found numerous non-statutory mitigators. At the very least, he should have found a sexually abusive and psychologically devastating childhood; lack of a father figure throughout most of Long's childhood; serious brain damage; prior drug use; and both serious and humiliating medical problems in childhood. He should also have found mitigating the fact that Long directed that his V.A. pension be sent to support his

children. See Rogers, 511 So.2d at 535.

This Court has affirmed a death sentence in only three cases in which the trial court found both mental mitigators. In Ferguson v. State, 474 So.2d 208 (Fla. 1985), the trial court found only "some evidence" to indicate that the mental mitigators applied. In the case at hand, the mental mitigation was overwhelming and the judge clearly found both mental mitigators. Similarly, in Hudson v. State, 538 So.2d (Fla. 1989), this Court declined to disturb the trial court's finding that the mental mitigators were entitled to "little weight." The third case, Brown v. State, 565 So.2d 304 (Fla. 1990), did not involve long term mental illness but rather short term problems resulting fram family pressure.

In only fourteen cases has the trial court imposed death despite finding both mental mitigators. This small number of cases, when combined with the large number of capital defendants who are mentally ill, suggests that capital defendants in Florida with both an impaired capacity and an emotional or mental disturbance are normally sentenced to life rather than death in the electric chair.

This Court reversed four of these fourteen cases for a new trial: Thompson v. State, 548 So.2d 198 (Fla. 1989); Garron v. State, 528 So.2d 353 (Fla. 1988); Gibson v. State, 474 So.2d 1183 (Fla. 1985); and Freeman v. State, 377 So.2d 1152 (Fla. 1979). In four more of the cases, this Court reduced the death sentence to life in prison: Smalley v. State, 546 So.2d 720 (Fla. 1989); Sonser v. State, 544 So.2d 1010 (Fla. 1989); Fitzpatrick v. State, 527 So.2d 809 (Fla. 1988); and Ferry v. State, 507 So.2d 1373 (Fla. 1987). In the ninth case, Miller v. State, 373 So.2d 882 (Fla. 1979), this Court remanded to the trial court for reconsideration of the sentence but almost mandated that the trial caurt impose a life sentence. It did. See Miller V. State, 399 So.2d 472 (Fla. 2d DCA 1981). The tenth case was this case which, of course, was reversed €or a new penalty proceeding. Long v. State, 529 So.2d 286 (Fla. 1988). The eleventh case, Trotter

v. State, 576 So.2d 691 (Fla. 1990), was reversed and remanded for resentencing because the court found an improper aggravating factor, The twelfth case, Ferguson, is one of the three cases in which this Court affirmed a death sentence where both mental mitigators were found. Ferguson's death sentence was affirmed after this Court remanded for a new sentencing and Ferguson was resentenced to death. Ferguson v. State, 474 So.2d 208 (Fla. 1985). The last two cases are Hudson, 538 So.2d 829, and Brown, 565 So.2d 304, the two other cases in which this Court affirmed a death sentence where both mental mitigators were found.

In several other cases, this Court determined that the trial court should have found the two mental mitigators when it did not. This Court then remanded and directed the trial court to enter a life sentence. Huckaby v. Statg, 343 So.2d 29 (Fla. 1977); Shue v. State, 366 So.2d 387 (Fla. 1978); Burch v. State, 343 So.2d 831 (Fla. 1977); Jones v. State, 332 So.2d 615 (Fla. 1976). In Mines v. State, 390 So.2d 332 (Fla. 1980), the trial court expressly rejected the two mental mitigators. This court remanded for reconsideration of the sentence because the judge should have considered the mental mitigation. The trial judge imposed a life sentence, See Miller v. State, 399 So.2d 472 (Fla. 2d DCA 1981).

Thus, this Court has only three times affirmed a death sentence in a case in which the trial judge found both mental mitigators. At some point in Florida's legal process, such defendants normally get a life sentence. In this case, both mental mitigators were found by Judge Griffin, 529 So.2d at 293, and by Judge Lazzara. Judge Lazzara should have, and certainly would have if defense counsel had argued it, found nonstatutory mitigation.

The court found four aggravating factors: (1) Long was previously convicted of a violent felony; (2) the crime was committed while Long was engaged in a kidnapping; (3) the crime was especially heinous, atrocious or cruel; and (4) the crime was committed in a cold, calculated and premeditated manner. (R. 1329-32)

As discussed in Issue X, supra, CCP should not have been found.

The fact that Long committed other murders cannot be considered by this Court, just as it could not be considered by the trial court, in determining the sentence. The plea agreement strictly forbids consideration of the other homicides to establish aggravating factors. It is extremely difficult to know that Long was a serial killer and not consider it. See Issue IX, supra. We submit that the trial court was unable to do so because the two mental mitigators and Long's abusive and traumatic childhood far outweigh the aggravators in this case.

Long's prior violent felonies were two rapes in which he did not physically harm the victims. The fact that the murder was committed during a kidnapping should not be given much weight because the kidnapping was part of the homicide and was brief in nature. Although the crime was heinous, atrocious and cruel, it did not involve torture or unnecessary infliction of pain. With the elimination of the incorrectly found CCP factor, the mental mitigation even further outweighs the remaining aggravating factors.[73]

There are similar cases in which this Court has reduced a death sentence to life. For example, in Peavy v. State, 442 So.2d 200 (Fla. 1983), this Court threw out one aggravating circumstance, leaving three to be weighed against two mitigating factors, as in this case. In Ferry v. State, 507 So.2d 1373 (Fla. 1987), this Court found that extreme mental illness required a life sentence. In Fitzpatrick v. State, 527 So.2d 809 (Fla. 1988), this Court approved five aggravating factors. There were only three mitigating factors. Fitzpatrick's sentence was reduced to life despite the jury's recommendation of death because of his mental illness. This Court should do the same in Long's case.

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[73] Even if the other homicides were considered, the fact that Long killed a number of prostitutes that he did not even know, and raped other women while married and the father of two children, is evidence of serious mental illness.

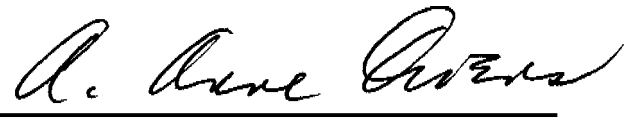
CONCLUSION

For the foregoing reasons, this Court should vacate Long's sentence and allow Long to withdraw his guilty pleas. If the Court does not do so, however, the death sentence must be vacated and the case remanded for a new penalty proceeding based upon numerous errors argued in this brief. Alternatively, this Court should reduce Long's sentence to life in prison for reasons stated in the last two issues above.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to the Office of the Attorney General, 2002 N. Lois Ave., Tampa, Florida, 33602, this 31st day of July, 1991,

Respectfully submitted,



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