IN THE SUPREME COURT OF FLORIDA

ROBERT CARL HOEFERT,

Appellant,

v.

Case No. 76,714

STATE OF FLORIDA,

Appellee.

BRIEF OF THE APPELLEE

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TABLE OF CONTENTS

TABLE OF CITATIONS

STATEMENT OF THE FACTS

At trial Natalie Allen testified that on April 3, 1989, appellant was residing at 1123-1/2 - 36th Avenue North. (R 712 - 713) The witness went there at her mother's request to retrieve some items. She and Mr. Sanderlin unlocked the door -- she noticed an odor and they called the police. (R 714 - 15) There was a hole in the yard. (R 716)

Detective James Kappel arrived at the scene, entered the residence, and observed the body of a very young white female who had been wrapped with several sheets and blankets. A driver's license revealed her identity to be June Yvonne Hunt. (R 723) In the yard was a freshly-dug hole approximately four feet by three feet by three feet. (R 724) The victim's out-of-gas car was located at a doughnut shop in U.S. 19; appellant's car was found abandoned and Hoefert was ultimately arrested in Texas. (R 729) No cocaine or paraphernalia were found in the residence. (R 730)

Carol Spaulding, an employee at Duncan Doughnuts, testified that a white female arrived in an automobile at about 2:00 a.m. and she told another customer she ran out of gas. (R 743) The man was pacing up and down while she used a phone outside. (R 744)

Associate Medical Examiner Dr. Corcoran conducted an autopsy at the scene; it was nude except for a pair of blue jeans pulled down exposing the genital and anal region. (R 751) The victim was age 26, there was no evidence of trauma; there was no

evidence of disease process and they subsequently found no evidence of significant drugs in her body. (R 753) Her death was not related to cocaine". The cause of death was homicidal violence probably due to a type of asphyxiation. (R 754)

Toxicologist Ron Bell testified that a low concentration -- .02 mg./liter -- of cocaine was discovered in the blood. (R 777) There was no question about it: this was not toxic overdose. (R 778) Nor is it a reasonable possibility in this case for death to be caused by cocaine cardiotoxic effect. (R 780) Cocaine was not the cause of death. (R 781)

Ralph Corretjer knew appellant as an employee at his brother's place of business. Appellant worked there for two weeks. (R 788) On March 31, a Friday, he and Eugene and appellant went out for drinks that night. (R 789) The next day, Saturday, at work, appellant claimed that he had picked up a "titty dancer" at a doughnut shop. He said they went back to his apartment and engaged in sexual activities. (R 792) Hoefert said, "He got laid" and he "hadn't had none in a long time and he needed it." (R 793) He next saw Hoefert on Sunday at Hoefert's apartment. (R 794) It was hot outside and appellant was sweating badly in a sweat suit. When asked what he was doing Hoefert answered that he was digging a hole to get rid of some rubbish. His friends offered the use of a trailer and appellant responded "this debris he had to bury," Appellant wouldn't let Eugene inside to use the bathroom. The door was padlocked. (R 795) The witness saw no bags of debris. The hole in the yard

was too wide to bury any garbage he'd ever seen. (R 796) Appellant did not show up for work on Monday. (R 798)

Eugene McDonald similarly testified that appellant explained the reason for being late to work because he was with a girl he picked up at a doughnut shop. (R 805) On Sunday they surprised him at his residence and Hoefert said he was digging a hole to put some rubbish in. (R 807) The witness asked to use the bathroom; usually he let them in but the house was padlocked. (R 809)

Benjamin Corretjer also described appellant's declaration on Saturday that he had met a girl the night before and "I banged the shit out of her." (R 814) Later that week appellant telephoned and indicated that he was in Texas, had dyed his hair and was going to head for Mexico. He shaved his facial hair off and was using a different name. (R 816) Appellant was aware the police were looking for him. (R 816)

The testimony of Wesley Pope was proffered. (R 822 - 827) Pope knew Hoefert when the two were incarcerated in 1986 - 87. (R 822) The witness testified that appellant explained that his nickname was Hammer because "that's how he got his pussy, he hammered the shit out of them." (R 823) Hoefert explained how he liked sex, "he just take the pussy, he just hurt it and take it." (R 824) Appellant also described the offense for which he was serving time in Clearwater and said he should have killed the bitch, that he "was choking the shit out of her and I should have killed her and I wouldn't have to *go* through this shit." (R 824)

Appellant would squeeze rubber balls -- he said it would be easier to choke the shit out of somebody. (R 824 - 25) Appellant also said that during orgasm you get the "dying quiver" if you're choking them. (R 825)

The witness repeated the testimony in front of the jury. (R 828 - 833) Hoefert said it gave him a thrill to hurt them when he had sex. (R 831)

Kimberly Byerley testified that in Houston in 1982, appellant put his arm around her neck putting pressure on her throat. (R 842 - 43) He choked her with both hands and her six hour ordeal began. Mostly it involved mental abuse. (R 844) In the last thirty minutes he raped her. The more she struggled the more he choked her. He thrived on her fear. (R 845)

Katie Sleek was living in Monroeville, Ohio, in 1984; she was sixteen years old at the time (R 853) and met "Hammer" Hoefert at a party. Outside the house there appellant grabbed her around the neck and he strangled her until she passed out. She woke up in a field. (R 856) Appellant was on top of her, removing her shorts. He was choking her, telling her to shut up or he would kill her. (R 857) He raped her. (R 858) Appellant had a tatoo of a spider web on his neck and the name Hammer on his hand. (R 859)

Brenda McQuaid met appellant in Pinellas County in 1984. (R 878) While at the beach, appellant grabbed her around the neck and slammed her into the sand. He was applying pressure and she couldn't breathe. (R 882) She attempted to cooperate with him,

was able to get inside her vehicle and when she started to walk around the passenger side, she locked it and started to pull away in the car. Appellant banged on the window and jumped on top of the hood. (R 883)

Kimberly Salstrum of Houston, Texas came into contact with appellant in 1982. (R 887) She gave him a ride to his residence, he invited her inside and he began strangling her with both hands on her neck. (R 889) He raped her. (R 890) When she belittled him, he rolled to his side and she was able to escape (R 891)

Appellant Hoefert took the stand in his own defense. He admitted going to the doughnut shop in Pinellas Park on April 1, 1989, and encountering a young woman there. (R 906) Ms. Hunt approached and asked for assistance. She asked him to drive by a few places, a couple of homes in the area and no one was home. He claimed he told her it was getting late and had to get going but she asked if he liked to party. They went to his apartment. (R 907 - 08) She asked for an empty beer can and she produced a little bag of rock cocaine. She started smoking rock cocaine and appellant smoked marijuana and drank beer. He denied smoking crack. (R 910 - 11) He sat down on his bed and passed out. He awoke when the alarm went off at about 5:30 and saw Ms. Hunt talking to her wig on a Barby head. (R 911) Hoefert then went to work advising the victim that if she decided to leave, to lock the place up. (R 912) He told coworkers that he had met a "tittydancer" and he may have bragged about having sex with her

but he really hadn't. (R 913) Appellant claimed the victim telephoned him from his apartment and inquired when he would be back; he told her about 5:30 or 6:00 but instead he visited a friend in Seminole. (R 914) He planned to go out with his friends again that night. (R 916) When he walked in his apartment he observed the body of the young lady on the living room floor. (R 917) He went to the bathroom to flush the rock cocaine, grabbed a few beers and went to a bar with Ralph and Eugene. He had just gotten out of prison and knew he would be an immediate suspect if he went to the police. (R 918) He went home and pondered all night what to do; in the morning he started digging a hole to bury her but he stopped since he knew the police could figure out he lived there. He left and went to Texas and shaved his beard for a disguise. (R 919)

On cross-examination appellant conceded that he had fled the state and shaved off his beard because he didn't want the police to recognize him. (R 922) He admitted destroying evidence to prevent the police from completing an investigation. (R 923) He lied to Detective Kappel when he said he was digging a hole to bury trash and lied to Nancy Jones. (R 924)

He lied to the police when they talked to him in May of 1989; and he didn't want a second detective present during his interview in order that it be his word against Detective Kappel's. (R 925) He conceded that the victim may have had her jeans on in contrast to the version told to Kappel that victim had just gotten out of the shower and had a towel on. (R 927)

He denied refusing permission to his friends to use the bathroom. (R 931)

Rebuttal witness 'Ben Corretjer testified there were no phone calls at work on Saturday April 1, 1981, for appellant. (R 955)

The jury returned a guilty verdict. (R 1037)

The state introduced into evidence certified copies of the two Texas convictions for rape concerning Mr. Hoefert and victims Kimberly Byerley and Kimberly Salstrom (R 1045-46). The defense called appellant's father Wilbert Hoefert who testified that appellant was an adopted child (R 1050) and that he seemed to have problems adjusting to other children (R 1051). In school, his grades were poor and he couldn't seem to discipline himself to do the work as he should (R 1052). The witness had a good relationship with appellant; he found him to be very intelligent and they could work together. The parents still love him (R 1053). Appellant's mother Charlotte Hoefert testified that they did not have behavioral problems with their other child; appellant was a loving child (R 1056). The school system did not have the kind of structured classrooms and environment he needed. Appellant has communicated with them by letters, telling of his accomplishments while incarcerated (high school degree, degree in welding.) She begged for mercy (R 1057-1058). The defense declined to present the testimony of a confidential expert (R 1059)

The jury returned a recommendation of death by a vote of nine to three. (R 1096) The trial court, in agreement, imposed

a sentence of death finding two aggravating factors and no mitigating factors. (R 310 - 315) Hoefert now appeals.

SUMMARY OF THE ARGUMENT

I. The evidence was sufficient to convict of first degree murder, The hypothesis suggested-homicide occurred via self-induced cocaine use -- was repudiated by the state's medical experts.

II. Appellant's contention that the evidence pertaining to other offenses was improperly admitted is erroneous and should be rejected. The testimony was not adduced merely to demonstrate appellant's bad character but rather to demonstrate appellant's modus operandi in utilizing his unique practice of rendering disoriented his victims for sexual purposes and helps explain the reasons for, and the **manner** of, death of the victim in this case June Hunt.

111. The trial court did not err in allowing the testimony of cell mate Wesley Pope as it was corroborative of the testimony of the Williams-Rule witnesses and was relevant to demonstrating appellant's intent.

IV. The trial court did not err in giving the standard jury instruction on premeditation; the issue was not preserved for appellate review by objection below and is, alternatively, meritless.

V. The lower court did not err in excusing potential juror Harvard for cause as his answers clearly and unequivocally demonstrated a legal inability to serve.

VI. The lower court did not err in finding "CCP" as an aggravating factor. Even if there were error, it is harmless as

the remaining aggravating outweighed the no-mitigating factors present.

VII. The imposition of a death sentence is disproportionate sub judice and this case is distinguishable from Songer v. State, 544 So.2d 1010 (Fla. 1989).

VIII. The jury's recommendation was not tainted by receipt of guilt phase evidence. Appellant did not complain below on this issue and it is, therefore, procedurally barred. Moreover, the evidence was relevant to appropriately rebut statutory mitigating factors.

IX. The lower court did not err by improperly considering nonstatutory aggravating factors by failing to find appropriate mitigating factors or by failing to conduct appropriate balancing and weighing of the aggravating and mitigating factors.

ARGUMENT

ISSUE I

WHETHER THE EVIDENCE IS SUFFICIENT TO SUPPORT A CONVICTION FOR FIRST DEGREE MURDER.

Appellant contended below that there was a reasonable hypothesis of innocence; there was a trace amount of cocaine present and it was theoretically possible the victim could have died of self-induced cocaine (R 893). The state responded that it was not a reasonable possibility (the self-induced cocaine theory). Both experts, Dr. Corcoran and Mr. Bell indicated it was not anywhere close; death by asphyxiation was the only remaining reasonable possibility. (R 894 - 895)

As the prosecutor urged in his closing argument, the victim was last seen alive in the early morning hours of April 1, 1989, when she ran out of gas at the doughnut shop in Pinellas Park and she met Hoefert. (R 974) In the afternoon of April 3, the police arrived where Hoefert was staying and found her semi-nude body, dead of asphyxiation, wrapped in sheets and prepared for burial in a homemade grave dug by appellant. (R 974)

The medical examiner Dr. Corcoran opined that this was not a cocaine death; the autopsy showed no disease process. The only reasonable possibility was homicidal violence, asphyxia1 death. (R 981) Dr. Corcoran testified:

> "We found no evidence of trauma such as a fractured skull, stab wounds or gunshot wounds. We also found no evidence of a disease process like cancer or emphysema or heart disease. We also subsequently found no evidence of significant drugs in her body." (R 753)

He answered affirmatively to the question whether the toxicological test results eliminated any reasonable possibility that cocaine caused the death of June Hunt. (R 754) He opined there was no reasonable possibility that asphyxiation was not the cause of death. (R 754 - 755) Toxicologist Ran Bell detected a very low concentration of cocaine (.02 mg/liter) and stated:

> "The amount of cocaine required for an overdose -- toxicated as a result of an overdose would be a much, much higher concentration."
>
> (R 777)

> "Q. Thank you. Is there any question as to whether or not this is not a toxic overdose?
>
> A. No. There's *no* question.
>
> Q. And it is not?
>
> A. It is not."
>
> (R 778)

Moreover:

> "Q. Is that [cardiotoxic death caused by cocaine] a reasonable possibility under the facts of this case?
>
> A. No, it is not.
>
> Q. In your opinion, it is not a reasonable possibility?
>
> A. That's correct."
>
> (R 780)

As the prosecutor further argued, it is not a reasonable possibility for cocaine to cause cardiotoxic effect on an experienced user such as victim Hunt, (R 932, 785)

In State v. Law, 559 So.2d 187 (Fla. 1989), this Court stated:

> The question of whether the evidence fails to exclude all reasonable hypotheses of innocence is for the jury to determine, and where there is substantial, competent evidence to support the jury verdict, we will not reverse. *Heiney v. State*, 447 So.2d 210 (Fla.), *cert. denied*, 469 U.S. 920, 105 S.Ct. 303, 83 L.Ed.2d 237 (1984); *Ross v. State*, 425 So.2d 521 (Fla. 1982), *cert. denied*, 461 U.S. 909, 103 S.Ct. 1883, 76 L.Ed.2d 812 (1983), *disapproved on other grounds, Williams v. State*, 488 So.2d 62 (Fla. 1986).
>
> (text at 188)
>
> * * *
>
> [3,4] It is the trial judge's proper task to *review* the evidence to determine the presence or absence of competent evidence from which the jury could infer guilt to the exclusion of all other inferences. That view of the evidence must be taken in the light most favorable to the state. *Spinkellink v. State*, 313 So.2d 666, 670 (Fla. 1975), *cert. denied*, 428 U.S. 911, 96 S.Ct. 3227, 49 L.Ed.2d 1221 (1976). The state is not required to "rebut conclusively every possible variation" of events which could be inferred from the evidence, but only to introduce competent evidence which is inconsistent with the defendant's theory of events. *See Toole v. State*, 472 So.2d 1174, 1176 (Fla. 1985). Once that threshold burden is met, it becomes the jury's duty to determine whether the evidence is sufficient to exclude every reasonable hypothesis of innocence beyond a reasonable doubt.
>
> (text at 189)

See also Bedford v. State, ___ So.2d ___, 16 F.L.W. S665 (Fla. 1991) (circumstantial evidence rule does not require the jury to believe the defendant's version of the facts when the

state has produced conflicting evidence); Cochran v. State, 547 So.2d 928 (Fla. 1989); Huff v. State, 495 So.2d 145, 150 (Fla. 1986).

Appellant's version need not be believed because his versions of events were inconsistent with other evidence. Appellant had testified to his observation of the victim allegedly smoking crack cocaine three times before he went to bed. (R 941 - 942; R 983) Appellant claimed he found the body just laying on the living room floor. (R 917) Dr. Corcoran stated that the body did not appear to be in the natural position it would fall into. (R 758, 989 - 990) Appellant told his friends at work that he picked up a girl who was out of gas and that he didn't know what her auto problem was and presumably didn't ask. (R 991 - *992;* R *792,* R *805,* R *907* - *908,* R *939* - 940, R 743) Appellant testified that he didn't have sex with the victim (R 913), whereas he told his friends at work that he had. (R *793,* 805, 814) Appellant claimed the girl telephoned him while at work to ask when he would return from work (R 914) when witness Ben Corretier testified he received no phone call that day. (R 956)

Hoefert testified that he dug the hole in the back yard after the victim was dead (R 923), that he lied to Detective Kappel when he told him he was really digging a hole to bury trash (the same lie he told to Nancy Jones). (R 924) Appellant admitted changing his appearance, fleeing the state, destroying evidence and lying to the police. He admitted telling Detective

Kappel that he didn't want another officer present because he wanted it to be his word against Hoefert's. (R 925) Appellant's story(ies) could be disbelieved by the jury.

Appellant now offers the thesis that Ms. Hunt may have died during consensual sexual activity involving the appellant while he was engaged in a dangerous choking technique. Appellant's prior history demonstrates not only in his engaging in choking and sex episodes unconsensually with women, but an admission to his cell mate that he'd gotten in trouble by letting his last victim leave.

We may reject the accidental death during consensual sex scenario, first of all, because appellant himself did not urge it. Hoefert's testimony at trial was that he did not have sex with the victim that he found her dead upon his return home and merely boasted to his coworkers; indeed, defense counsel argued to the jury that "he could have very well been telling the truth on this witness stand" (R 1009). Since appellant himself in his testimony has repudiated the hypothesis of innocence now asserted, this Court may do so and the jury did not err in failing to accept it. See Huff v. State, 495 So.2d 145 (Fla. 1986).

While trial counsel below also argued that at most there had been established murder in the second degree with no showing of an intent to kill (R 1014), the totality of circumstances including his technique of disabling women, his admission to Pope about not making the Same mistake again to lead to his

imprisonment, his attempt to bury the body, flight to Texas and lies to Detective Kappel compel the conclusion that an accidental death did not occur.

Appellant has cited Tsavaris v. State, 414 So.2d 1087 (Fla. 2d DCA 1982) but then-Judge Grimes specially concurring opinion points out that the alleged hypothesis of innocence looks less reasonable when viewed in the context of the other evidence including the defendant's behavior and statements. 414 So.2d at 1089. The testimony of cellmate Pope and the other victims adds further support to the premeditated nature of the offense.

ISSUE II

WHETHER THE LOWER COURT ERRED IN ADMITTING EVIDENCE OF OTHER, SIMILAR CRIMES.

June Hunt's body was found two days after her death, in the house where defendant had resided since his release from jail. She was found semi-nude in an unnatural "jackknife" position. Her genital and anal areas exposed in a posture suggestive of sexual assault or activity. Death was caused by homicidal asphyxiation accomplished in a manner that left no detectable abrasion on the skin, no bruises to surface or suboutaneous tissue, and caused no significant injury to her or her assailant. Trace amounts of cocaine and cocaine metabolite found in the victim's body were far too law to be toxic and were inconsistent with significant cocaine use in the hours preceding to her death. No cocaine or paraphernalia were found on the premises.

The defendant arrived late for work on the morning of June Hunt's death and admittedly bragged about his sexual exploits with her to workers. He indicated he had sex with the women, that he had "tore it up" and that he needed it -- he hadn't had any in a long time. (R 792, 793) He had dug a 4' x 3' x 3' hole in the backyard in which to bury the body, clothing and identifiction. (R 724) When he was later told the police were at his apartment, he fled the state, changing his name and appearance. Upon being arrested months later, he admittedly lied about the details of the offense including the reasons he had dug the hole in the backyard. (R 924) It was also clear that due to

presence of lividity and rigor mortis, Hunt's body could not have been placed in its contorted position at the time defendant alleges to have found her dead upon his returning home from work. (R 759, 763).

Despite uncontradicted expert testimony that cocaine was not a reasonable possibility as a cause of death, the defense continued to maintain that Hunt's death was not caused by asphyxiation.

Beginning in his opening statement (R 703) and continuing with the cross examination of Detective Kappel (R 734, 737) and Doctor Corcoran (R 764), defense counsel stressed that the absence of evidence of a struggle inside the apartment and the lack of obvious trauma to the neck were inconsistent with any form of strangulation, including the use of a carotid restraint. (R 769 - 770) These points were reiterated in both of the defense's closing arguments. (R 968, 973 and 1005, 1007 - 1008, 1010, 1012, 1014)

The testimony of four witnesses was presented who had been subdued, quickly and without struggle or significant injury by the same defendant through just such a technique; two were rendered disoriented or unconscious. Additionally, three of the victims, after being physically and psychologically controlled in this manner had been manually choked by the defendant as he sexually assaulted them -- with the defendant gaining apparently increased sexual gratification from the choking of the victims during the sex act.

The fourth victim had escaped from Hoefert by claiming to get a blanket; she identified him and he was sent to prison, where he met Wesley Pope. He confided in Pope that his nickname was "Hammer", that he enjoyed sex by choking the women and specifically that he liked to "choke the shit" out of them causing them to "quiver" as he himself reached orgasm. He admitted details of the attack on the fourth victim ta Pope, also acknowledging that he should have "killed the bitch", and that had he done so, he wouldn't be in trouble. Sixteen days after being released from prison on this charge, Hoefert encountered June Hunt at a Donut Shop, where her car had ran out of gas. She left with him, had sex with him, was asphyxiated by him and, unlike the previous victims was not left alive to testify.

This evidence is individually and collectively relevant to several crucial issues in the case. The defendant's effective use on all four witnesses of a form of carotid restraint to quickly overpower them without causing a struggle or significant injury rebuts the essential defense contention that a struggle, injuries and scratches would be expected to accompany an asphyxia1 death. It also shows not only that such a technique is possible, but that the defendant was knowledgable in it and experienced enough and powerful enough to effectively use it, The defendant's unique desire to obtain sexual gratification by engaging in sex while choking the victim, not during a struggle to subdue her, but during the sex act itself to enhance his own excitement and pleasure clearly defines the central motive in the

asphyxiation of June Hunt. Due to decomposition of the body, a rape could not be proven by medical evidence, but sexual activity is established by the defendant's own statements and corroborated by the circumstances in which the victim's body was found. His statement that he should not have left the last victim alive, clearly helps to identify why this strangling, unlike the others, proceeded to the victim's death.

The carotid restraint or "sleeper" hold, when used properly, is an effective way of temporarily incapacitating someone. By applying pressure to the sides of the neck, the blood flow to the brain is stopped by occlusion of the carotid arteries causing unconsciousness within seconds and ending resistance. Raey & Holloway; "Changes in Carotid Blood Flow Produced by Neck Compression", The American Journal of Forensic Medicine and Pathology, (Vol. 3, No. 3, pp. 199 - 202; 1982). Typically, the subject is approached from the rear, and then the arm placed around the neck. The front of the head or face would be pointed to the "V" of the elbow and pressure applied to the sides of the neck by the forearm and upper arm. (R *756, 768 - 769)* Because the delicate structures at the front of the neck are not compressed and the trachea or airway not occluded and because pressure is applied over dhe relatively wide and long surface areas of the arm, a subject could be rendered unconscious *or* even killed without leaving bruising or injury. The carotid restraint should be distinguished from a "bar-arm" choke hold in which the forearm is used to compress the trachea and prevent the subject

from breathing. See City of Los Angeles v. Lyons, 461 U.S. 99, 103 S.Ct. 1660 (1983), fn. 1. McGrath, Alice, "Is is True What They Say About Choke Holds?", The Police Chief, (Nov. 1978) at pgs. 54 - 55. When a carotid restraint is improperly applied or applied to an already struggling subject (particularly when mental problems or intoxication are factors), it sometimes becomes a "bar-arm" hold and serious damage to the internal structures of the neck and even death can result. See, e.g., Reay and Eisele, "Death from Law Enforcement Holds", The American Journal of Forensic Medicine and Pathology, (Vol. 3, No. 3, September 1982).

The defense suggests that the testimony of Pope and the four victims shows nothing more than victim's being choked during a sexual assault or murder and that since this is routine, the incidents are, therefore, irrelevant. What the "Williams Rule" testimony shows, however, are assaults in two stages -- gaining control over or immobilizing a victim with a "sleeper" type hold without a struggle or injury and then once a victim is under control, choking the victim during the sex act itself in a different and face to face manner to increase the sexual gratification of the assailant.

The suggestion that either occurrence is commonplace is belied by the very studies upon which the defense relies. The 1981 study by Harm and Rajs showed that some form of strangulation was a factor in 13% of homicides (37 of 296) over the eight year period studied. Harm and Rajs. "Types of

Injuries and Interrelated Conditions of Victims and Assailants in Attempted and Homicidal Strangulation. Forensic Science International 18 (1981) 101 at 102 (1981). However, cases in which manual asphyxiation; was the sole cause of death or unconsciousness, but where there was not observable injury were extremely rare; the use of a sleeper hold was virtually nonexistent: even when the additional 79 surviving victims of strangulation are considered, only 3 were strangled with an arm around the neck. (Id. at 111) These holds were obviously not a carotid restraint as two of the victims suffered neck abrasions and none lost consciousness. (Id. at 112) In fact, the study seems to document that the use of strangulation during sexual assault or murder will increase the likelihood of struggle and of injuries to the victim and assailant.

The Dade County Study similarly shows that manual strangulation as a singular cause of death in fatal sexual assault cases is a relatively rare phenomena (5 of 41 cases). The article does not identify a single instance in which a homicidal asphyxiation occurred without leaving observable injury nor does it delineate whether any of the assailants used a "sleeper" hold. More importantly, neither of these studies nor the cases cited by appellant suggest that the defendant's motivation to seek sexual gratification by choking the victim/partner during the sex act (as opposed to choking to subdue the victim) is anything other than unique. This motive as expressed to Pope and witnessed by the previous victims clearly

is relevant to explain the motive for the asphyxiation death of June Hunt.

Appellant further implies that the manner of June Hunt's death to be commonplace by citing six opinions authored by the Court between January 1, and October 1, 1991, which allegedly involved similar evidence of sexual battery and asphyxiation. The underlying facts, however, do not support this premise, for none of the cases involved a manual asphyxiation death without the presence of observable injuries. Holton involved strangulation by ligature and the evidence clearly suggests a struggle had occurred resulting in injury to the defendant, 573 So.2d 284 (Fla. 1991). Engle was also a ligature strangulation with the victims' body reflecting multiple stab wounds to the back, scratches on her face (possibly postmortem) and a four inch tear to the vaginal area. 510 So.2d 881, at 882 (Fla. 1991). The victim of Perry Alexander Taylor was choked and beaten so violently that she sustained a minimum of ten massive blows to her head, neck, chest and abdomen, damaging almost all of her internal organs. Her larynx was fractured. 16 F.L.W. at S471 (Fla. 1991). The victim in the Gilliam case sustained brutal injuries to her face, neck, breast, anus, shins, arms, rectum and vagina. 16 F.L.W. S292 (Fla. 1991). Capehart v. State, involved the srnotherinq death of an elderly lady with a cushion during a burglary and sexual assault. She also sustained vaginal injuries. 16 F.L.W. S448 (Fla. 1991). The body of the victim in Sochor v. State was never recovered so the actual injuries

received could not be medically established, The confession and testimony suggest a struggle occurred with the victim screaming for help, striking the defendant and then being choked by the defendant in anger as if "possessed". 580 So.2d at 595 (Fla. 1991). Rather than being similar to the death of June Hunt and the assaults on the "Williams Rule" witnesses, these cases are in fact quite dissimilar and illustrate the unusual nature of Hoefert's ability to asphyxiate victims with little struggle or injury. None of these cases suggests (in fact, all seem to negate) the use of any type of "sleeper" hold in subduing the victims.

Appellant makes two somewhat inconsistent arguments suggesting in one part of his brief that the initial attacks on the victims were done in a dissimilar manner, while claiming in a later section that they are all identical because it can only be physically accomplished in one way. Appellant also suggests, without support in this record, that the carotid restraint is common knowledge. All of these statements are demonstrably false. As previously related the attacks on all of the "Williams Rule" witnesses were accomplished initially in an essentially identical manner. The absence of significant incidence in either case law or studies of sexual assaults of the use of this technique to inflict unconsciousness or death is testimony that is not common knowledge. Moreover, the means by which this technique works is simply not commonly known. Most lay persons believe that strangulation is accomplished by occluding the

airway and preventing a person from inhaling fresh oxygen to the lungs. This is exactly what the common meaning of the words "strangle" and "choke" connote. Websters, New World Dictionary. It is not common knowledge (at least outside martial arts devotees or law enforcement agencies) that compression of the carotid arteries will result in almost immediate unconsciousness. Even despite specific training, the hold is occasionally misapplied by police officers resulting in serious injury to the subject subdued. See Raey & Holloway; "Changes in Carotid Blood Flow Produced by Neck Compression", The American Journal of Forensic Medicine and Pathology, (Vol. 3, No. 3, pp. 199 - 202; 1982). Raey & Eisele, "Death From Law Enforcement Neck Holds", The American Journal of Forensic Medicine and Pathology, (Vol. 3, No. 3 pgs. 253 - 258, 1982). McGrath, Alice, "Is it True What They Say About Choke Holds?", The Police Chief, (Nov, 1978) at pgs. 54 - 55. Finally the carotid restraint is not a natural or intuitive use of the arm for strangulation. The most common usage is the "bar-arm" choke hold in which the forearm is pressed against the front of the neck and used to partially compress the trachea and airway.

Many States follow a general rule of exclusion of evidence of other crimes; to be admissible, the evidence must fit an "exception" by being relevant to one of the number of permissible subjects which have become crystallized through precedent. Since at least Williams v. State, 110 So.2d 654 (Fla. 1959), however, Florida has joined the increasing number of states who admit all

such relevant evidence unless its sole relevance is to prove propensity. The statement of the rule as one of inclusion emphasizes the flexibility. In some, but not all situations, similarity is a factor in determining the relevance of evidence of other crimes. Bryan v. State, 533 So.2d 744 (Fla. 1988). The degree and nature of the required similarity may vary depending on the issues sought to be proven. Gould v. State, 558 So.2d 841 (Fla. App. 2d 1990), ref. on other graunds, 577 So.2d 1302 (Fla. 1991); Jensen v. State, 555 So.2d 414 (Fla. App. 1st DCA 1989) rev. denied, 564 So.2d 1086 (Fla. 1990); Mitchell v. State, 471 So.2d 596 (Fla. App. 1st DCA 1986) rev. denied, 500 So.2d 545 (1986). The existence of some dissimilarities will not prevent admissibility.

Relevance, not necessity, is the standard for admissibility. Before allowing admission, the Court should determine: (1) that the collateral crime or bad act and defendant's connection to it are sufficiently proven, e.g. Saxton v. State, 226 So.2d 925 (Fla. App. 4th DCA 1969), and (2) that the proffered evidence has a reasonable tendency to prove the defendant's guilt or the charged offense. Sheley, 265 So.2d 685 (Fla. 1972). On the other hand, the evidence need not be conclusive if "it is in the nature of circumstantial evidence forming part of the web of truth" proving the defendant to be the perpetrator. Bryant v. State, 235 So.2d 321 (Fla. 1970).

The state may intend to establish the prior crime or bad act for one or more of several purposes. Despite the numerous

"categories" or exceptions, proof tends to fall into general areas: to establish defendant as perpetrator of the charged crime, to establish the appropriate mens rea, to establish or corroborate the existence of the other elements of the corpus delicti, to establish motive or to corroborate the testimony of the victim. The similarities between the charged and collateral offense will necessarily differ depending on the purpose to be served and the issues to be proven.

The requirement of similarity is most demanding and most strictly applied, when the collateral crime's relevance is to prove identity of the perpetrator through showing the use of a similar modus operandi. Courts have repeatedly held that the evidence must show more than the mere similarity inherent in committing the same or similar crime, i.e., Braen v. State, 302 So.2d 485 (Fla. App. 2d DCA 1974). It is not necessary that individual similarities be unique or unusual; it is sufficient that the aggregate pattern of activity is so. Smith v. State, 479 So.2d 804 (Fla. App. 1st DCA 1985). In Drake v. State, 400 So.2d 1217 (Fla. 1981), this court explained "The mode of operating theory of proving identity is based on both the similarity of and the unusual nature of the factual situations being compared. A mere general similarity will not render the similar facts legally relevant to prove identity." Id. at 1219. The Court went on to rule inadmissible evidence that Drake had bound the hands of two women during separate sexual assaults, one whom he choked, a second whom he struck. These cases were not

sufficiently similar to the charged murder where the victim, although similarly bound, had been stabbed to death. (There was no proof of rape or sexual activity). Since the only common thread in all three cases was the binding of the hands behind the victims' back, this was not of such a special character or so unusual as to point to the defendant. Id.

This requirement of heightened similarity has been repeatedly held applicable to cases involving proof of identity through modus operandi. Even though the instant case did not involve this form of "Williams Rule" evidence, the lower court nonetheless found this standard to be met. The instant case is not analytically unlike Buenoano v. State, 527 So.2d 194 (Fla. 1988), where the defendant Tilled or attempted to kill relatives living with her by the administration of poison. Similarly, in Duckett v. State, 586 So.2d 891 (Fla. 1990), this Court authorized the admission of evidence showing that the defendant had a "tendency to pick up young, petite women and make passes at them while he was in his patrol car at night, on duty, and in unifarm," Id. at 895. The vict m in that case was an 11 year-old girl who was last seen with the defendant (a municipal police officer) at his patrol car near a convenience store. The victim's body was later found in a lake, having been sexually assaulted, strangled and drowned. A pubic hair similar to Duckett's was found in the victim's underpants and tire tracks in the mud near the lake were the same make and design as used on the city's two police cruisers. No blood was found in the

defendant's vehicle, nor was any mud or debris from the lake found on his person or on the cruiser.

In Duckett, the state presented evidence of two sexual encounters between Duckett;and young women as "Williams Rule" evidence. On one occasion, Duckett had encountered a petite 19 year-old woman who was looking for her boyfriend. Saying he was also looking for her boyfriend, he drove the victim around. While in the car, he placed his hand on her shoulder and attempted to kiss her, but stopped when she refused. Some months later picked up a second petite 18 year-old woman who was walking along the highway. He drove her to a remote area, parked the car then placed his hand on her breast, and attempted to kiss her. When she resisted, he stopped and drove her to where she requested. Clearly, there were dissimilarities in the age of the victims and in the end result. Neither of the "Williams Rule" victims had been raped and as in the instant case, only the final victim had been murdered. Moreover, since the victim was dead and the defendant denied involvement, there was no direct evidence of exactly how or where the fatal assault had occurred.

The evidence in the instant case has much greater similarity than that required for admissibility in Duckett. All four "Williams Rule" cases are extremely similar. All four victims are initially assaulted from behind. The defendant uses a technique consistent with the carotid restraint (as described by Dr. Corcoran) to initially subdue the victim. The defendant places his arm around the victim's neck with the "V" of the elbow

at the front, then applying squeezing pressure against the carotid arteries. All four victims are subdued or brought under control quickly without a struggle, or abrasion or scratching to the neck. Only one of the victims had significant bruising. All are intimidated by threats to kill. After initially being subdued, three of the four victims were then choked in a face to face manner during a sexual assault. Moreover, the assaults show a progression from 1982 through 1984, continuing to the death of June Hunt. The only bruising occurs in the second of the two assaults occurring in October of 1982. (It should be noted that since bruising is a vital process caused by circulation while the heart is pumping, the presence of bruising days later in a surviving victim does not mean they would have been present had the person died. See, e.g., Davis, Joseph M.D., "Asphyxia1 Deaths", Medicolegal Death Investigation, at page 258. The later assaults in 1984 involving Sleek and McQuaid involve more efficient use of the carotid restraint with both victims either completely losing consciousness or blacking out and becoming disoriented. Just as in Duckett where these circumstances of the victim's death were to some degree unknown, the manner in which victim Hunt was asphyxiated cannot be shown by direct proof. However, the evidence is consistent with the same techniques being used and there was evidence that the defendant had admitted to sexual activity.

Additional threads of similarity link these incidents and although not necessary for admissibility establish the continuing

pattern. All of the victims were young women, and were either just met by Hoefert or at most casual acquaintances. The victims were targets of opportunity through chance social encounters. In all except Baker-McQuaid, the defendant isolated himself with the victims by offering or implying he would provide help. He offered to repair Kim Byerly's (R 840) shoes, and offered to fix Kim Salstrom's carburetor. (R 888) He asked to accompany Sleek from a party to where she was going to clean windows. (R 856) The defendant took June Hunt back to his house after she had run out of gas in her own car. (R 729) These incidents, particularly when corroborated by the testimony of Pope, clearly meet the standards for admissibility for proving modus operandi through the so-called "Williams Rule".

The evidence in the instant case, however, was not proffered for the specific purpose of establishing identity through a unique or unusual modus operandi; rather the evidence was proffered to corroborate the cause of death, to counter defense contentions that the absence of trauma negated asphyxiation as a cause of death, to show that techniques existed by which a victim could be subdued and asphyxiated without significant struggle or injury and that the defendant both knew of this technique and had the ability to effectively execute it. Additionally, the testimony of Pope corroborated one of the "Williams Rule" witnesses, and helped to establish motive, intent and the absence of mistake or accident. Viewed in terms of these issues, the evidence was clearly relevant and probative.

This Court, as well as the District Courts, have recognized the "similarity" requirement may vary depending on the issue sought to be proved. In Bryan v. State, 535 So.2d 744 (Id. 746) for instance, this Court allowed evidence of dissimilar collateral crimes which it felt relevant to an issue in the case. This Court ruled: "Evidence of 'other crimes' is not limited to other crimes with similar facts. So-called similar fact crimes are merely a special application of the general rule that all relevant evidence is admissible unless specifically excluded by a rule of evidence. The requirement that similar fact crimes contain similar facts to the charged crime is based on the requirement to show relevancy. This does not bar the introduction of other crimes which are factually dissimilar to the charged crime if the evidence of other crimes is relevant."

The rigid similarity requirement applicable to proving identity through modus operandi is not applicable when similar fact evidence is used to prove other issues such as intent over knowledge. Gould v. State, supra; Jensen v. State, supra; Mitchell v. State, supra. For instance, Court's have held that evidence of dissimilar collateral crime in which a gun was relevant to place defendant in possession of the weapon subsequently to murder an unrelated victim. Amoros v. State, 531 So.2d 1256 (Fla. 1988). See also Bryan v. State, 533 So.2d 744 (Fla. 1988). Evidence of the kidnapping and tying up of a previous girlfriend has been held relevant to show intent when the defendant was charged with later kidnapping, tying up and

threatening a girlfriend. Gould, supra, at 485. See also, Rossi v. State, 416 So.2d 1166 (Fla. App. 4th DCA 1982). When the defendant was charged with abuse or exploitation of the elderly, the Court allowed use of evidence of financial dealings with others to establish motive, as well as evidence of the general conditions of the ACLF not directly related to the charged victims. Evidence of difficulties the defendant had previously experienced in a similar facility in Iowa was admissible to explain why the defendant would have a motive to pay special attention to the home's day to day management. Mitchell v. State, 491 So.2d 596 (Fla. App. 1st 1986). Finally, in Coleman v. State, 484 So.2d 624 (Fla. App. 1st DCA 1986), the District Court affirmed the use in trial involving sexual battery of a nine-year-old of evidence of similar sexual batteries against the same and other witnesses. The Court approved the use of such evidence as tending to show the "capacity to obtain gratification from oral sex with young children" and because it supported an inference "that he had a motive to have such a relationship with a child. Id. at 625, 627.

The appropriate questions to determine admissibility of the "Williams Rule'' evidence are: was it relevant to show that the defendant had knowledge of an the ability to use asphyxiation techniques that could immobilize or even kill a victim without having detectable injury or evidence of a struggle, and did the proffered evidence tend to prove this. The judge was correct in deciding the evidence was relevant and admissible.

The defense also challenges the testimony of Wesley Pope as inadmissible evidence of bad character. If Pope's testimony is relevant to issues such as intent or knowledge, or motive, however, this argument fails. Unlike the Jackson case cited by appellant, the probative value of Pope's brief testimony did not lie in a general statement of character about being a "thoroughbred killer", Rather, the defendant's statements to Pope corroborate the admissible testimony of Linda Baker McQuaid as to the incident on Clearwater Beach; establish a specific reason why he would intend to kill his next choking victim and establish his motivation for having sex with women while strangling woman. These highly specific and unusual admissions are of significant probative value in this unique case.

Although Florida Courts have not always allowed generalized admissions as to criminal activity, more specific admissions have bene found relevant and allowed in evidence by both trial and appellate courts. In Waterhouse v. State, for instance, a generalized statement was admissible that the defendant experienced problems in sexual activity and he would become frustrated and angry when he wanted to have sex with a woman who was menstruating and that this had happened that night. The victim in that case (who had been menstruating) had been drowned after being bludgeoned repeatedly. 429 So.2d 301 at 303.(Fla. 1983), vacated on other grounds, 522 So.2d 341 (Fla. 1988). A bloody tampon was stuffed down her throat and her rectum had been lacerated by a foreign object. Id. at 303. A witness was also

allowed to testify that Waterhouse told him he liked anal intercourse and liked being with women who allowed themselves to be hit and slapped. Id. at 304. In Swafford v. State, 533 So.2d 270 (Fla. 1988), the Court held relevant a generalized statement by the defendant made several months after the charged murder, that he wouldn't be bothered if they (he and the witness) got a girl, did that they want with her, then shot her in the head so there wouldn't be any witnesses; the defendant had added: "you just get used to it". Distinguishing Drake, supra, this court held the statements were relevant in their own right to establish a prior murder. Since they "tended" to prove or disprove a material issue, the jury was entitled to consider them for "what it was worth." Id. at 274. In Grossman v. State, the Court held that statements of the defendant indicating a fear of going back to prison for a violation of probation, were admissible to prove premeditation in the murder of a wildlife officer who caught him in possession of a firearm. Committing an assault on the officer and taking her gun but leaving her alive would only have worsened his situation since she could identify him as her assailant. Id. at 837. Accord, Jackson v. State, 498 So.2d 406 (Fla. 1986). In Floyd v. State, 497 So.2d 1211 (Fla. 1986), the Court held that a defendant's statements that he had been in jail before and didn't want to *go* back was relevant to corroborate other evidence on the issue of flight. As the Court noted in Cohen v. State, 581 So.2d 928 (Fla. App. 3d DCA 1981), "While evidence of motive is not necessary in order to obtain a conviction it is admissible when

it is available and would help the jury understand the other evidence presented" even though it reveals the commission of crimes not charged.

Appellant also suggests that the relevance of this evidence related to false or'contrived issues. However, the trial record reveals that trial counsel argued the death could have been accidental and thus a lower degree crime (R 1014) an argument which he continues to make on appeal. (See pages 32 - 34 of Appellant's Brief). The trial record clearly reveals repeated cross examination and argument by the defense that the absence of accompanying injury eliminated asphyxiation as a likely cause of death. The defendant testified and the defense argued that Hoefert did not have specialized knowledge of how to asphyxiate anyone without there being such injuries. (R 1012) The appellant asserts that prior intentional acts cannot be used to disprove that subsequent actions nor results might have been accidental or unintended. This is clearly not the case in Florida. As one Court has noted -- "The more frequently an act is done, the less likely it is that it is innocently done." Jensen v. State, 555 So.2d 414 (Fla. App. 1st DCA 1989). Courts have upheld use of separate intentional acts of a defendant against the same or separate victim, to show the subsequent acts and results were indeed not accidental. See, e.g., State v. Everette, 532 So.2d 1124 (Fla. App. 3d DCA 1988). Dodson v. State, 334 So.2d 305 (Fla. App. 1st DCA 1976), cert. denied, 341 So.2d 1081 (Fla. 1976); Outler v. State, 322 So.2d 623 (Fla. 3d DCA 1975); Andrews v. State, 172 So.2d 505 (Fla. 1st DCA 1965).

Neither the "Williams Rule" evidence nor the statements the defendant made to witness Wesley Pope became an improper feature of the trial. The direct examination of the five witnesses comprised only 33 pages of 207 pages of testimony before the jury. While the testimony was necessarily detailed enough to establish relevance to the charged crime, the direct examinations were focused and brief averaging only about 6 pages each. Closing argument from the state contained only 8 - 9 pages concerning both Pope and the "Williams Rule" witnesses. The bulk of the state's closing focused, as it should have, on the issue of cause of death, jury instructions and the inconsistency of the defendant's testimony with the testimony of other witnesses and the physical evidence. The time and emphasis devoted to this testimony was appropriate to its probative value and significant to many issues in this case. Clearly no reversible error occurred in this regard. Coleman v. State, 484 So.2d 620 (Fla. App. 1st DCA 1986) is helpful in analyzing this. Nothing the trial court's broad discretion in deciding issue of this sort and the use of limiting instructions, the Court upheld admission in a sexual battery case of three unrelated sexual assaults on the same victim, as well as evidence of similar assaults on the same victim, as well as evidence of similar assault son three separate child victims. The Court held that the collateral crime evidence had not become a feature of the trial.

Appellant's claim is meritless, and must be rejected.

ISSUE III

WHETHER IT WAS ERROR FOR THE TRIAL COURT TO ALLOW THE TESTIMONY OF CELL MATE WESLEY POPE BECAUSE IT WAS ALLEGEDLY INADMISSIBLE CHARACTER EVIDENCE.

The record reflects that prior to the testimony of Ms. Wesley Pope, defense counsel objected claiming that the testimony was not relevant to the crime charged, to-wit: the murder of June Hunt and was not relevant to any of the so-called Williams Rule evidence. Defense counsel argued that the testimony was merely offered to show that appellant was a bad individual and had a propensity to do some terrible things to women. (R 825, 826) The prosecutor argued below in response to the defense counsel's motion that number one, the statement concerning the victim of the Clearwater battery where she was choked is a direct admission and is corroborative of that Williams Rule evidence. Hoefert's statement to Pope that he should have gone ahead and killed the victim constituted a foreshadowing of what happened to the victim in this case and would be relevant to show his intent. Secondly, the prosecutor argued the statement of Hoefert concerning his choking women as he achieved orgasm and his sexual excitement that he achieves through that not only corroborated the Williams Rule evidence, but also was a very damning admission concerning his deviant manner of gaining sexual gratification through women. There is evidence in the instant case that he had sex with this woman and there is evidence that she was asphyxiated. Consequently, it seemed to the prosecutor that

Heofert's statements to Mr. Pope put those two things together in a very highly unusual context and was relevant. (R 826, 827)

Mr. Pope then testified on direct examination that he had met Mr. Hoefert in prison in 1987, that Mr. Hoefert's nickname was "Hammer" and that appellant told him that he got that nickname because that's haw he got his pussy by hammering it out of them. Haefert admitted to Mr. Pope concerning his sexual practices that it gave him a thrill to hurt women "He said he liked to take it, that he liked to hurt them. That's how he got his kicks. That's how he got off." (R 832) The witness also testified that appellant said, "That he liked to choke the shit out of them when he was ready to bust his nut, or have an orgasm, where he'd catch a dying quiver." (R 832) Hoefert also used to carry around rubber balls and squeeze them and told Mr. Pope that it would make his hands strong enough to where he could choke the shit out of somebody." Appellant also confided to the witness that he was in prison following an incident on Clearwater Beach and that he should have killed the bitch so he wouldn't have been in trouble. (R 832, 833)

Appellant contends that it was improper to allow cell mate Wesley Pope to testify as to the comments made to him by Hoefert while in jail and he cites Swafford v. State, 533 So.2d 270 (Fla. 1988) and Jackson v. State, 451 So.2d 458 (Fla. 1984). In Swafford, supra, this Court approved the admissibility of statements made two months after the murder in which he acknowledged that you get used to shooting a victim in the head.

The Court reasoned that the state did not present the testimony to establish the commission of a crime so similar in its manner as to point to Swafford as the perpetrator of the instant homicide; rather, it was offered primarily to inform the jury of a particular statement made by defendant -- that you get used to shooting a victim in the head so there wouldn't be any witnesses was evidence tending to prove he had committed such a crime in Daytona Beach two months earlier. Id. at 274. This Court then in footnote 2 alluded to a number of decisions wherein the courts had allowed relevant evidence in and its probative value left to the trier of fact.

Here, appellant's admissions to Pope not only are relevant to establishing his unique modus operandi of sexual dealings with women which helps explain the reason for, and cause of death, to victim Hunt, but also provides a statement of his intent at the next opportunity he has of not leaving behind a surviving witness to provide testimony.[1] Without belaboring the point, appellee refers to its earlier argument under Point II, supra.

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[1] This case is unlike Jackson v. State, supra; the testimony elicited of the defendant's boasting of being a thoroughbred killer from Detroit had no relevance to any material fact in issue and the state had not suggested any.

ISSUE IV

WHETHER THE TRIAL COURT ERRED IN GIVING THE STANDARD JURY INSTRUCTION ON PREMEDITATION.

The record reflects that trial defense counsel's requested a jury instruction with regard to circumstantial evidence which was denied. R 257) There was no request for a different instruction on premeditation nor any complaint concerning the instruction given. (R 1016 - 1035) Consequently, this claim has not been preserved for appellate review. See Steinhorst v. State, 412 So.2d 332 (Fla. 1982) and Occhicone v. State 570 So.2d 902 (Fla. 1990). Appellant's claim is also meritless in that there is no case law within the state holding this instruction to be invalid.

ISSUE V

WHETHER THE TRIAL COURT ERRED IN EXCUSING POTENTIAL JUROR HARVARD FOR CAUSE WITHOUT GIVING THE DEFENDANT THE CHANCE TO REHABILITATE THE JUROR.

The record reflects the following colloquy between the trial court and venire man Harvard:

> "THE COURT: Thank you, sir. William Harvard, are you opposed to the death penalty?
>
> VENIRE MAN HARVARD: Yes.
>
> THE COURT: Would you automatically vote against the imposition of the death penalty without regard to the evidence shown or the instructions of the court in all cases?
>
> VENIRE MAN HARVARD: Yes, sir.

(R 611)

A bench conference ensued wherein defense counsel asked the court if the court would ask whether the juror would consider the death penalty. The trial court responded that he would have the court reporter read back the question and answer. (R 612) After the court reporter read back juror Harvard's response, the court declared, "That's as clear as the court can phrase. I can see no further inquiry would be fruitful.'' The trial court then excused the juror over defense counsel's objection.

While it is always certainly desirable to permit the opportunity to rehabilitate a juror who may have been unclear or equivocal in the responses as to their willingness and ability to consider the evidence and follow the law, the trial court did not abuse its discretion in the instant case since venire man

Harvard's response was unequivocally clear that he would automatically vote against imposition of the death penalty without regard to the evidence shown or the instructions of the court in all cases. In this issue appellant phrases his argument in terms of the trial court's denial of giving him an opportunity to question or rehabilitate the juror. The record showed not that defense counsel wanted to conduct additional questioning himself to clarify a confusing or equivocal response; he simply wanted the trial court to ask the juror whether he would consider imposition of the death penalty, a question which had already been asked by the trial court and answered by the juror. In short, he simply wanted to ask a repetitive question. It is for the trial court to determine from the demeanor of the juror whether he is capable of serving. See Alphonso Green v. State, 583 So.2d 647 (Fla. 1991).

Appellant relies on O'Connell v. State, 480 So.2d 1284 (Fla. 1984), but his reliance is misplaced. In that case, this Court found error in a double standard imposed on the part of the trial court, permitting the prosecutor the opportunity to question each juror individually and to re-examine the jurors after defense counsel had questioned them, but that a similar opportunity on the part of the defense to question and rehabilitate prospective jurors had been denied. That situation was nat presented sub judice.

ISSUE VI

WHETHER IT WAS ERROR FOR THE TRIAL COURT TO FIND COLD, CALCULATED AND PREMEDITATED AS AN AGGRAVATING FACTOR.

Appellant argues that many things are possible: That sexual activity may have been consensual, that the choking may have started consensually with the result in unintentional death; and that the abortive burial tends to negate rather than establish premeditation (because a better solution could have been concocted). But the state need not demonstrate that appellant's plan approached the level of genius for this factor to be applicable. Nothing in the evidence shows consensual choking, at least by the victim; we do know from appellant's history with other women and his admissions to Mr. Pope that his consensual activity included choking women as part of his sexual ethics and the declaration that next time to avoid prison he should not leave the victim alive. Moreover, appellant was subtle enough to maintain his facade with co-employees till he made good his escape. The state will agree with and rely on the reasoning of the trial judge found at page 312 of the record on appeal.

Finally, even if in the event this court were to find that the trial court erred in finding this aggravating factor to be present, any such error would clearly be harmless as there was still a valid unchallenged aggravating factor and no mitigating factors to support a life sentence.

ISSUE VII

WHETHER THE DEATH PENALTY IS DISPROPORTIONATE.

Appellant cites Nibert v. State, 574 So.2d 1059 (Fla. 1990) quoting from Songer v. State, 544 So.2d 1010 (Fla. 1989). But Songer involved a single aggravating factor and nearly a dozen mitigating factors found so by the sentencing judge. There is nothing disproportionate in imposing death for the appellant where his history demonstrates that he is a continuing threat -- a veritable walking time bomb to any woman he meets and the mitigating evidence proffered below was abysmally weak (his parents still love him, he couldn't discipline himself to do his school work), not even a mental mitigating expert was submitted (the defense declined the opportunity to present the testimony of a confidential expert (R 1059)).

ISSUE VIII

WHETHER THE JURY RECOMMENDATION WAS TAINTED BECAUSE IT HEARD IN THE GUILT PHASE ALLEGEDLY PREJUDICIAL EVIDENCE OF NONSTATUTORY AGGRAVATING CIRCUMSTANCES.

Appellant contends that the jury recommendation of death is fundamentally flawed or tainted by the receipt of nonstatutory aggravating factors in the guilt phase of trial. Be refers to the facts pertaining to the similar fact attacks on the victim's Sleek and McQuaid (for which there were no convictions), the Kimberly Byerley testimony regarding mental abuse, cell mate Pope's testimony regarding defendant's sexual proclivities.

The record reflects that at the beginning of the penalty phase the prosecutor announced that he had no additional evidence other than that presented in the guilt phase except for the certified copies of the two Texas rape convictions regarding victims Byerley and Salstrom. The defense had no objections. (R 1045) If appellant had a complaint about what had transpired previously for the jury's consideration it was incumbent upon him at that time to object and request a limitation or a cautionary instruction to the jury. His failure to do so amounts to a procedural default precluding an issue of judicial review here. See Steinhorst v. State; Occhicone v. State.

Moreover, even if we were to assume that it is improper to utilize non-convictions of Sleek and McQuaid as aggravating factor 5b, evidence of such crime is admissible in penalty phase to rebut mitigating factor 6a [whether the defendant has no

significant history of prior criminal activity]. A criminal conviction is not necessary to demonstrate history of prior criminal activity. See Washington v. State, 362 So.2d 658, 666 and 667 (Fla. 1978), Booker v. State, 397 So.2d 910, 918 (Fla. 1981); Smith v. State, 407 So.2d 894, 901 (Fla. 1981), Lucas v. State, 568 So.2d 18, 22, fn. 6 (Fla. 1990), Walton v. State, 547 So.2d 622 (Fla. 1989).

Finally, the testimony of the details of Kimberly Byerley's assault were appropriate to demonstrate aggravating factor 5b and the testimony of Wesley Pope regarding appellant's choking sexual contact hobbies directly related to the CCP factor and the episode of Ms. Hunt's murder.

Appellant relies on Cpstro v. State, 547 So.2d 111 (Fla. 1989), but appellee submits that that case does not entitle him to relief. In Castro, this Court found that impermissible evidence violating the dictates of Williams v. State, 110 So.2d 654 had been introduced, but that such evidence was harmless in the guilt phase of the trial, but the state failed to meet its burden to demonstrate harmless error in the penalty phase of the trial. For reasons previously stated in Issue 11 of this brief, appellee does not at all concede that the evidence that was introduced at guilt phase was erroneous under the Williams Rule. This Court in Castro could not find that the admissibility of the evidence was harmless because there was testimony from a mental health expert apparently, that the defendant had an alcohol and drug addictive personality and also testified that he had been

victimized by a history of child abuse, especially incest which began at the age of four and which might account for his bizarre thinking and aggressive behavior. The court concluded that without the improper Williams Rule evidence, the jury might well have been influenced to return a life recommendation. In contrast to Castro there was no such mental health or evidence of extenuating circumstances in appellant's background brought to the attention of the judge and jury in the instant case. Instead, the jury was merely told by appellant's parents that they loved their child.

ISSUE IX

WHETHER THE TRIAL COURT ERRED BY IMPROPERLY CONSIDERING NONSTATUTORY AGGRAVATING FACTORS, BY FAILING TO FIND APPROPRIATE MITIGATING FACTORS AND BY FAILING TO CONDUCT AN APPROPRIATE BALANCING AND WEIGHING OF THE AGGRAVATING AND MITIGATING FACTORS.

The record reflects that in the trial court's sentencing order the judge stated that he weighed "statutory aggravating elements" and both statutory and nonstatutory mitigating factors. (R 310) The order also reflects a recitation of the statutory aggravating factors and the discussion of their applicability or nonapplicability. (R 310 - 312) There was no mention of consideration of any nonstatutory aggravating factors and appellant's claim to the contrary is meritless.

The trial court also explained why all of the statutory mitigating factors were inapplicable (R 312 - 314); additionally, the court stated that the jury was instructed and that he had considered the catchall factor of any other aspect of the defendant's character or record that appellant wished to present and that mitigation under this catchall option did not exist. (R 314) Appellant's claim on this issue is meritless. See Wickham v. State, 16 F.L.W. S777 (Fla. 1991).

CONCLUSION

Based on the foregoing arguments and authorities the judgment and sentence of the lower court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Richard J. Sanders, Esq., 2728 - 52nd Street South, Gulfport, Florida 33707, this 31st day of January, 1992.

OF COUNSEL FOR APPELLEE