IN THE SUPREME COURT OF FLORIDA

ROBERT CARL HOEFERT

APPELLANT,

VS.

STATE OF FLORIDA,

APPELLEE,

CASE NO. :

76,714

ON APPEAL FROM THE SIXTH JUDICIAL CIRCUIT COURT, PINELLAS COUNTY, FLORIDA

# APPELLANT'S INITIAL BRIEF

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### A, SUMMARY

Following a jury trial, defendant was convicted as charged of first degree premeditated murder. R. 1-2, 284, 291-92. The trial court followed the jury's recommendation in the penalty phase and imposed the death penalty. R. 283, 310-17.

The deceased was a young lady named June Hunt. Her partially nude body was found in defendant's apartment on April 3, 1989. The state theorized defendant met her at a doughnut shop in the early morning hours of April 1. She asked defendant for assistance because her car was out of gas. Defendant took her back to her apartment, where he strangled her to death during or after a sexual encounter. On April 2, defendant was seen digging a hole in his back yard, apparently to bury the body. Shortly after that, defendant fled to Texas, where he was later arrested.

The defense conceded he had met the deceased at the doughnut shop and brought her to his apartment. However, he asserted he came home from work in the early evening of April 1 and found the deceased dead on the floor from an apparent cocaine overdose. Because he had recently been released from prison (and thus would be an immediate suspect, whose story would not be believed by the authorities), defendant panicked and, after an aborted attempt to bury the body, fled to Texas.

The state presented 13 witnesses at trial. Defendant's landlady told of discovering the body and the hole dug in the back yard. Detective Kappel also testified about these facts, and

about defendant's arrest in Texas. A waitress at the doughnut shop testified about defendant's meeting the deceased. Defendant's employer and two co-employees testified about his activities from March 31 to April 3. A former cellmate of defendant's testified to some statements defendant made to him several years earlier, in which defendant professed to enjoy raping and strangling women. Finally, four women testified as similar fact witnesses about attacks defendant had previously made upon them.

**B. NATALIE** ALLEN

Her mother owned the apartment where defendant was staying. He had been there approximately 10-14 days before the body was discovered. On April 3, she and a friend entered defendant's apartment, to retrieve an item belonging to her mother. They found the body of June Hunt and called the police. She also noticed a hole dug in the back yard. R. 712-16.

**C. DETECTIVE KAPPEL**

He arrived at defendant's apartment on April 3, after the body was discovered. R. 721-23. He described what he found as follows :

> It was a white female. She appeared very slight, very young. She was lying in somewhat of a fetal position. She bad been wrapped up with several sheets and blankets. On top of her, as she laid there, was a lady's wig and some other items that appeared to be of personal property.
>
> ....
>
> A purse, a ladies little bag. There was some clothing, including shoes, underwear, a bra, and also a top.

....

This was all in the same bundle where the lady was lying.

R. 723,

He said there were no signs of a struggle in the apartment, nor any signs of trauma to the deceased's body. R. 737. Neither foreign hair nor semen was found on the body. R. 732-33.

He also noticed "a fresh dug hole.. .about four foot by three foot, and at least three foot deep'' in the back yard. R. 724. He said the deceased's car was later found at a doughnut shop, out of gas. R. 729. He said defendant was later arrested in Texas. R. 729.

**D. CAROL SPAULDING**

She was a waitress at the doughnut shop. About 2:00 a.m. on April 1, a white female came to the shop and started talking to a man who had arrived earlier. The female "said something about she ran out of gas." The female later went outside and used the telephone; the man "was out there pacing up and down." R. 742-44.

**E. DR. CORCORAN, THE MEDICAL EXAMINER**

On April 3, Dr. Corcoran went to the scene to examine the body. He said the body was starting to decompose by the time he arrived and it was impossible to determine the exact time of death. He estimated she had died between 24 and 72 hours prior to the discovery. R. 751-52.

He performed an autopsy. He found no anatomic cause of death: there was no evidence of trauma or disease. R. 753. He concluded the cause of death was "homicidal violence...probably due to a type of asphyxiation." R. 754. He said that, although the deceased had a low level of cocaine in her blood, that was not the cause of death. R. 754. He said asphyxiation can be accomplished by choking off the flow of oxygen through the windpipe, or by a carotid artery restraint hold, in which the perpetrator uses his arm to pinch off the flow of blood to the head through the carotid arteries (on either side of the windpipe). R. 755-57. He said it would take about three minutes to kill someone by this method. R. 757. He said it would not be unusual to find no evidence of physical trauma on a person to whom such a hold had been applied. R. 756-57. However, he admitted "there are cases where there has been rather extensive neck trauma...due to struggling." R. 769.

On cross-examination, he admitted there was no physical evidence of strangulation. R. 764. He admitted he could reach no conclusion about the cause of death simply by examining the body, R. 764-65: "If I just got this body called into my autopsy room with absolutely no history, hadn't seen how it was found, I really couldn't draw any conclusion." R. 768. He admitted his conclusion was "not based on anything on the body, that [he] saw on this body, [but rather] on the lack of finding something on the body." R. 766.

> I based it on, number one, finding a young woman dead. That's the first part. Then we have to look for a -- see if we can

> find a cause of death. When we eliminate all the possible causes of death, we are then left with it had to be some type of violent death, and then it has to be a type of violent death that doesn't leave marks.. ..
>
> You need a violent type of death that does not leave marks on the body, does not leave evidence of significant drugs, and that pretty much leaves you with asphyxiation, with anything else very remote.
>
> R. 767

He concluded the cause of death was "probably asphyxiation" but he was "not absolutely sure." R. 765.

With respect to the cocaine in the victim's system, he admitted that cocaine can have cardiotoxic effects and that death can result from very low levels of cocaine. R. 763. He said it was "theoretically possible but not likely'' that cocaine caused this death. R. 764. He admitted that the deceased's being 18 or 19 weeks pregnant at the time of her death could have added to the possibility of a cardiotoxic cocaine reaction. R. 764.

He admitted he had taken vaginal swabs from the deceased, but had found no evidence of sperm. R. 772. However, he said he would not expect to find any sperm because of the length of the time the body had been dead. R. 772. Although genital injuries (such as tears and major bruises) would still be seen after that length of time, he found none on this body. R. 774. The deceased's fingernails were scraped and her pubic hair was combed; apparently, nothing of signifcance was found. R. 770, 774.

### F. RON BELL, THE TOXICOLOGIST

The toxicologist said there was a low level of cocaine in the victim's blood. However, he said it was too low a level to indicate an overdose. R. 777-78. He admitted death can result from a cardiotoxic reaction to a small amount of cocaine, but said "it's not very common." R. 780. He said it was "a remote possibility...not very likely in this particular set of circumstances." R. 781. He later said it was "a slight possibility, but it's very unlikely." R. 783. He admitted he was not aware of the victim's pregnancy; however, although admitting he was "not a physician," he said he did not "believe that would have any bearing." R. 783-84

### G. RALPH CORRETJER, EUGENE McDONALD AND BENJAMIN CORRETJER

At this time, defendant was working at a welding shop owned by Benjamin Corretjer. Also working there was Corretjer's brother Ralph and their cousin Eugene McDonald. All three testified about defendant's activities over the fatal weekend.

On Friday night, March 31, Ralph, Eugene and defendant went to a local disco to drink. R. 789, 803-04, 812. Around midnight, defendant disappeared. R. 789, 803-04. They did not see him until the next morning, Saturday, April 1. Defendant came to work at the welding shop about 11:00 a.m. R. 790, 804, 813. Defendant told them he had met a girl at a doughnut shop the night before; she ran out of gas and he gave her a ride. R. 792, 804-5, 814. He said he took her to his apartment and they had sex. R. 792-93, 805, 814.

Ralph, Eugene and defendant spent much of Saturday

afternoon together. R. 799-800, 818. On Saturday night, all three went back to the disco and defendant again separated from the other two. R. 793, 806-07. Ralph and Eugene went to defendant's apartment Sunday morning, about 10 to 11:00 a.m. R. 794, 807. They found defendant in the back yard, digging a hole. R. 795, 807. Defendant denied Eugene access to his apartment to use the bathroom; they noticed the door was padlocked. R. 795, 808.

Defendant failed to show for work Monday morning. R. 798, 809, 815-16. Later that week, defendant called Benjamin and told him he was in Texas. R. 816. He told Benjamin he knew the police were looking for him; he had dyed his hair and shaved his beard, R. 816.

**H. WESLEY POPE, DEFENDANT'S FORMER CELLMATE**

Pope met defendant in 1986 when both were inmates in a Florida prison. R. 829. He testified to several conversations he had with defendant during the several months they were confined together. He said defendant told him he (defendant) was nicknamed "Hammer" because "that's how he got his pussy, by hammering it out of them." R. 831. When asked if defendant had talked about his sexual habits, Pope said:

> He says he liked to take it because it gave him a thrill to hurt them, and when he took it, that's the way he liked to get it.
>
> ...
>
> 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. 831-32.

Pope also testified about a statement defendant made "about quivering" :

> Yeah. That's the dying quiver remark, where he said that he liked to choke the shit out of them when he was about ready to bust his nut, or have an orgasm, where he'd catch a dying **quiver.**

**R. 832,**

He said defendant would "carry around rubber balls and squeeze them" because "he said it would make his hands strong enough where he'd choke the shit out of somebody." R. 832. When asked whether he had talked to defendant about why **defendant** was in prison, he said defendant told him about "an incident on Clearwater Beach" :

> A. Yes, sir. Where he was **trying** to have sex with a girl, but he said he was choking the shit out of **her, and** pushing her **face** in the sand, and he said that he wished he killed the bitch because he wouldn't have been in trouble, but she somehow talked him into letting her get a blanket or something, and tried to hall on him, take off, and **--**
>
> Q. Okay. But the statement was he... should have **killed** her?
>
> A. He should have killed the bitch, was his word.
>
> Q. And why did he **say** he should have killed her?
>
> A. Then he wouldn't have been in trouble.

**R. 832-33.**

Defense counsel objected to this testimony on **several** occasions. Pope's name first surfaced during the pretrial motion in limine hearing at which the admissibility of the four similar fact witnesses' testimony was discussed. **As** discussed below,

the state offered several theories to support the admissibility of this testimony. One such theory was a "sexual gratification aspect," R. 501: The state argued "after [the similar fact witnesses] were incapacitated, the defendant had a definite perverted and deviant sexual excitement by placing them in fear and specifically by choking them, and as he raped them and moved to the point of orgasm, the choking increased." R. 500. While discussing this point, the state noted :

> We also note from his statements to another inmate that in order for him to normally gain sexual gratification, there must be some application of force. We also know that he practiced and strengthened his muscles because that would make it easier to choke people. "Choke the shit out of people" was the quote that I think he gave Mr. Pope who was an inmate. And this was prior to him getting out and being involved in the murder of June Hunt.
>
> R. 501.

The state also noted Pope's testimony when arguing the similar fact testimony was relevant to prove defendant's "motive and intent to kill the victim June Hunt," R. 502 :

> In this case, we have a series in all but, I think, one of the incidents he threatened to kill the victim. In one of them, he said he would bury them along with the others, and of course, we have the grave in the back yard, which I think is quite a significant statement. We have the statement to Mr. Pope, which is after he's in State prison before his 3.850 is granted and a pretrial is granted on the Baker case, where he makes a statement, in effect, "I should have killed the last victim." And then we find out, lo and behold, his next victim is in fact murdered.
>
> R. 502.

Following the motion in limine hearing, the trial court ruled that the similar fact testimony was admissible. R. 512-13. Pope's testimony was not mentioned. Four days later, on the morning of the first day of trial, defense counsel noted the trial court had not specifically ruled on the admissibility of Pope's testimony, noting "he's not really a Williams Rule witness." R. 523-24. The trial court agreed he was not, but held Pope's testimony was admissible as "admissions against interest made by the defendant at a prior time." R. 524.

On the first morning of trial, defendant was given a continuing objection to Pope's testimony. R. 547. Prior to Pope testifying, defense counsel renewed his objection to the testimony, asserting "it really has nothing to do with Williams Rule or this case, and it's just showing him as a bad guy....." R. 820. The state responded "well, the understanding is that he likes to hurt women when he's having sex, and he can't seem to get off unless he is hurting the women when he's having sex, and that he should have killed the girl in Clearwater." R. 820-21. The trial court decided to take a proffer of the testimony. R. 821. Following the proffer (which was consistent with Pope's trial testimony, outlined above), defense counsel argued Pope's testimony was irrelevant and unfairly prejudicial, asserting it was only being offered to show defendant is "a bad character [with] a propensity to do some terrible things to women..." R. 826. The state responded :

> Certainly the statement concerning the victim of the Clearwater battery where she

> was choked is a direct admission and it's corroborative of that Williams rule evidence, and it certainly is admissible from that standpoint, if no other.
>
> I think the statement that he should have gone ahead and killed that victim, which was the last of his victims, there's certainly a telling, foreshadowing, of what happened to the victim in this case, and would be relevant to intent since we're dealing with premeditation in the First Degree Murder case.
>
> And secondly, I think that the statement that referred concerning choking women as he achieved orgasm and his sexual excitement that he achieves through that not only corroborates the Williams Rule evidence, but is a very, very damning admission concerning his deviant manner of gaining sexual gratification to women. There is evidence that he had sex with this woman. There is evidence that she is asphyxiated. It seems to me this statement puts those two things together in a very highly unusual context, so I think it is relevant from that standpoint.
>
> R. 826-27.

Defense counsel replied "there's no evidence of rape,...choking or strangulation in this case" and thus Pope's testimony was "not relevant." R. 827. The trial court affirmed its prior ruling admitting the testimony. R. 827.

## I, THE SIMILAR FACT WITNESSES

### 1. KIMBERLY BYERLEY

She met defendant at a bar in Texas in 1982. He offered to fix her shoes for free. She drove defendant to his house trailer and went inside. She used the bathroom there. Upon coming out, defendant grabbed her from behind in an arm lock and put a knife to her throat. He said he would let her go if she did not scream. She agreed; however, when he let her go, she screamed

and ran for the door. He then pushed her against the wall and started choking her. She passed out. R. 839-44.

She said that defendant first grabbed her in an arm hold, with her "chin down in the 'v' of [his] elbow." R. 848. She did not lose consciousness from this hold. R. 849. The choking that caused her to pass out was a different type of hold: "with his hands with the two thumbs in the middle of your neck and the four fingers around the sides of your neck." R. 849. She said she had some bruising and soreness as a result of the choking. R. 849-50.

When she came to, defendant pushed her to a couch "and proceeded to make a few advances towards [her], which [she] held him off for a while, and then the six hours started." R. 844. She said defendant did "different things" to her during this six hours. R. 844. When asked what types of things, she replied:

> A. Mostly mental abuse, sir. Turning garbage disposals on, sticking my hand in the garbage disposal. I had quite long fingernails. It chopped the fingernails right off, sir.
>
> Q. All right. But just other things not sexually related, is that --
>
> A. Not sexually related.
>
> R. 844.

She said that, in the last 30 minutes of her ordeal, defendant raped her. While he was raping her, he had one hand around her throat, choking her. R. 845.

> A. As time for the ejaculation became more apparent, the more I struggled, the more in-

> tent he became in choking around my throat, and as the time of the ejaculation, I completely passed out and he got off more.
>
> Q. Okay. So did he seem to be --
>
> A. He thrived on --
>
> Q. You said he got off more, What do you mean?
>
> A. He thrived on the fear, the more my body twitched, sir, the more he got into it.
>
> R. 845.

When asked if the defendant had threatened her, she said "he told me that he would kill me and bury me like the others." R. 845-46. Defendant objected and moved for a mistrial and a curative instruction, asserting "[this] goes beyond any Williams Rule, and I think it's prejudicial and indicates that he's got some prior murders in his past." R. 846. The state asserted this statement "was included in the proffered statement" and noted "the reference to burying, in light of what the facts of this case are,...is quite relevant." R. 846. Defendant's objection was overruled and his motions denied. R. 846.

She said defendant eventually allowed her to leave, but he told her not to report what had occurred or "someone would be looking for [her]." R. 847.

**2. KATIE SLEEK**

She met defendant at a party in Ohio in 1984. R. 852-53. Defendant called her out of the house to talk to her. R. 854-55. As she walked towards the back of the house, defendant grabbed her from the rear in an arm lock and strangled her until she passed out. R. 856. When she awoke, she was in a field. R.

856. Defendant was an top of her, removing her shorts. R. 857. She was numb; she could not move her arms and legs. R. 857. She could not stop crying. R. 857. Defendant was choking her, telling her to be quiet or he would kill her. R. 857. He raped her, choking her continuously throughout. R. 858. Again, this choking occurred "with his thumbs toward the middle of your neck and the four fingers around your neck." R. 861.

3. LINDA McQUAID

She met defendant at a bar in Pinellas County in 1984. R. 878. About 2:00 a.m., she told defendant she would give him a ride to a party. R. 879. Defendant asked her to pick up a friend of his in Clearwater Beach. R. 879. They parked by the beach. R. 880. Defendant told her to wait there while he went to his friend's house. R. 880. A few minutes later, he came back and said they would have to wait for his friend to come down. R. 881. After about 15 minutes, she said she was tired of waiting and was going to leave. R. 881. As she started to walk away, defendant grabbed her around the neck and forced her to the ground. R. 882. She convinced defendant to let her up, to go to her car. R. 882-83. She got in the driver's side and told defendant she would let him in the passenger's side, so they could go somewhere else. R. 883. As he walked around the car, she started it up and sped off. R. 883-84.

4. KIMBERLY SALSTROM

She said she met "a person known to [her] to be Robert Hoefert" in Texas in 1982. R. 887. He frequented a bar where she worked. R. 837-38. One morning, she gave him a ride home af-

ter she got off work. R. 838. Sometime earlier, he had taken a part from her car to fix it; now, he said it was finished and she should come into his house to pick it up. R. 838-39. As she was leaving, he grabbed her from behind, spun her around, and started choking her, with "both of his hands around her neck." R. 839. He put her on a bed and raped her. R. 890. "In periods, on and off throughout" the rape, he strangled her. R. 890. She said she had "quite a bit" of visible bruising for several days thereafter. R. 891-92.

She never made any in-court identification of defendant.

Defendant objected to the use of this testimony. He filed a pretrial motion in limine to prohibit this testimony, in which he argued that it was irrelevant and unfairly prejudicial; that it only established bad character or propensity; and that it failed to meet the "striking similarity" requirement applicable to such evidence. R. 207, 214-19. In a written response, the state argued this testimony was admissible for several purposes:

> corroborating the cause of death, negating mistake or accident as factors in Hunt's death, establishing the defendant's knowledge of and use of asphyxiation techniques which are consistent with and could have caused the victims death, establishing a specific motive by showing the defendant's gaining sexual gratification through the bizarre and highly unusual deviant sexual practice of strangulation during sexual activity, establishing intent to kill, and establishing a common scheme or pattern in the selection of victims consistent with his contact with the victim in this case.
>
> R. 228.

Four days before the trial began, a hearing was held to determine the admissibility of this testimony. The parties argued their respective positions, as outlined above. R. 486-512. The trial court ruled the testimony would be admissible because it showed "a striking and unique scheme, plan or modus operandi, that is common in all of the named cases and is relevant to the criminal acts alleged in the indictment.'' R. 513.

On the morning of the first day of trial, defendant was given a continuing objection to this testimony. R. 547. Prior to the witnesses testifying at trial, defendant renewed his objection. R. 832-38. At the close of the state's case, defendant moved for a mistrial because of the admission of this testimony. R. 893. The motion was denied. R. 897. The motion was renewed and denied again after the defense rested and after the state finished in rebuttal case. R. 954-55, 958.

**J. DEFENDANT'S TESTIMONY**

Defendant was the only witness for the defense. He met Hunt at the doughnut shop at about 2:00 a.m. on April 1. She asked him for assistance. He agreed and drove her to several different homes, to see if she could find any of her friends. When that was unsuccessful, she asked if he "liked to party," He demurred, noting he had to be at work early in the morning. She accepted his invitation to come back to his apartment. R. 907-08.

Once there, she tried unsuccessfully to call a friend. Defendant and she drank a beer. At her request, defendant provided her with an empty beer can. She fashioned this into a

makeshift pipe, pulled out a bag with several cocaine rocks, and began smoking. Defendant did not smoke. They talked a little; defendant then went into his bedroom and passed out. R. 909-11.

When the alarm went off about three and a half hours later, defendant walked into the livingroom and found Hunt had placed her wig over a lamp bulb and was engaging it in conversation. Defendant tried to chat with her; however, he got no response and he assumed she was "just incoherent or something." Defendant showered, dressed, and went to work. He told Hunt she could stay if she wished. R. 911-12.

He admitted that he had discussed Hunt with McDonald and the Corretjers at work. He could not recall if he told them he had sex with her; however, he said no sex had in fact occurred. Hunt called him at work about 11:30 that morning, asking him when he would be back. R. 913-14.

After leaving work that afternoon, he went to several places with his friends. He arrived home around 6:30 or 7:00 that evening. When he walked in the door he saw Hunt's body laying on the living room floor. R. 916-17.

He panicked. He had been released from prison a short time earlier; he was sure the police would think he had killed Hunt. He saw the homemade pipe and several cocaine rocks still in the house. Thinking he would be blamed for giving her the drugs that killed her, he destroyed these items. He left the apartment and went to the disco with his friends. He spent the night

drinking and trying to figure out what to do. He was afraid to call the police because he was sure they would not believe him. The next morning, he started digging a hole to bury the body. He decided that would not work either, so he fled to Texas in fear. R. 917-20.

**K. STATE'S REBUTTAL**

In rebuttal, the state recalled Benjamin Correjter. Be said defendant had no telephone calls at the welding shop on Saturday, April 1. R. 955-57.

**L. PENALTY PHASE**

The state presented no additional witnesses at the penalty phase. The state introduced certified copies of two rape convictions defendant had suffered in Texas, regarding Kimberly Byerly and Kimberly Salstrom. R. 252, 1045-46.

The defense presented two witnesses: defendant's adoptive mother and father. They adopted defendant when he was about three months old. He started having behaviorial problems when he was about three years old. They tried to get help for him. They said he was diagnosed at the University of Florida Clinic as having brain damage, but they were unclear as to the details. A psychiatrist recommended that he go to specially structured classes in school, but, unfortunately, such classes were not available in their school district. They said they had a good relationship with defendant; they described him as an intelligent and loving child. They asked the jury for mercy. R. 1050-58.

The state requested a jury instruction on only one aggravator: conviction of a prior violent felony. R. 1062-63.

The defense requested instructions on three mitigators: the crime was committed while defendant was under extreme mental or emotional disturbance; defendant's ability to appreciate the criminality of his actions or his ability to conform to the law was substantially impaired; and the residual mitigator concerning any other aspect or defendant's character or the offense. R. 1063-64. The jury was instructed accordingly. R. 1089-90.

By a vote of 9 to 3, the jury recommended the death penalty. R. 1096. A sentencing hearing was held about two and one half months later. R. 1102. No further evidence or argument was presented by either side. The trial court followed the jury's recommendation and imposed the death penalty. R. 283, 310-17. The trial court found two aggravators : that defendant had previously been convicted of a violent felony, and that the murder was committed in a cold, calculated and premeditated manner. R. 310-12. As to this second aggravator; the court's sentencing order provided as follows :

> This aggravating element is present and applies to this case. The evidence overwhelmingly shows that the Defendant regretted that he allowed his last victim LINDA GAIL BAKER McQUAID to live as it was through her testimony that he was incarcerated in a Florida State prison. (Statement made by Defendant ROBERT CARL HOEFERT to his prison acquaintance WESLEY POPE). Defendant knew that a living witness to the sexual contact-choking assault could once again result in his incarceration; the Defendant willfully eliminated the present victim JUNE YVONNE HUNT in an attempt to avoid detection. A plan to dispose of the body through burial in his year, although unexecuted, further evidenced his desire to avoid detection. All of ROBERT CARL HOEFERT'S actions were

done without moral or legal justification but to the contrary, were unlawfully willful and intentional.

R. 312.

The court found nothing in mitigation. R. 311-14.

## II. SUMMARY OF ARGUMENT

### A. GUILT PHASE

ISSUE I -- The evidence was insufficient to support the conviction because it was entirely circumstantial and it did not eliminate a reasonable hypothesis of innocence: that June Hunt died from an accidental cocaine overdose.

Alternatively, assuming arguendo stranuglation was the cause of death, the evidence did not establish the requisite premeditated design and defendant can only be convicted of a lesser included offense. Since the exact circumstances of June Hunt's death are unknown, it is reasonable to hypothesize she was killed in a heat of passion or unintentionally. This hypothesis is supported by the fact there is no physical trauma to her neck area, An intentional strangling generally causes significant physical trauma. Conversely, unintentional asphyxiation may occur quicky and without leaving physical trauma.

ISSUE II -- It was error to admit the similar fact testimony from defendant's four prior victims and his former cellmate Pope. Such similar fact testimony is admissible only if there is a striking similarity between the charged and uncharged offenses, and the similar fact evidence is relevant to a material fact in issue, other than proving the defendant's bad character or his propensity to engage in such conduct. Even if the striking similarity requirement is met and relevancy is shown, it is unfairly prejudicial to allow such testimony to become the feature of the trial. In the present case, the uncharged offenses were not stikingly similar to each other or to the charged offense; the

uncharged offenses were not relevant to any material fact in issue (other than bad character or propensity); and the testimony and argument concerning the uncharged offenses became the dominating theme of the trial.

The striking similarity requirement was not met here. The four similar fact incidents themselves were not strikingly similar to each other. The only similarities among these four incidents are of a type commonly found in such crimes: the opportunist - rapist grabs the victim from behind in a choke hold and forces himself upon her, choking her further in the process. A casual perusal of the caselaw and other authorities shows such actions are all-too-common. There is nothing unique or unusual about such attacks. On the other hand, there are significant dissimilarities among the details of the four similar fact attacks, including the times and places they occur; defendant's relation to the victims; the sequence of events from the initial attack to the completed crime; and defendant's treatment of the victims during and after the attack. Most importantly, it is sheer speculation to conclude any or all of the similar fact attacks are strikingly similar to the events surrounding June Hunt's death. The exact circumstances of her death are unknown, so it is impossible to compare the present case to any of the similar fact incidents.

The similar facts incidents are not relevant to any material fact in issue, other than to show defendant has a propensity for such attacks, The state's proffered theories of admissibility are either "propensity" under another name, or they

address non-material issues. The only way this testimony could "corroborate on the cause of death" or "negate mistake or accident" is by showing propensity: defendant has strangled women in the past, therefore, he must have done it here as well. Defendant's "knowledge of and use of asphyxiation techniques" is not a material issue here; further, there is no "technique" here, other than the (quite common) sudden attack from behind with an arm around the throat. This "technique" is no more unusual than shooting a gun or stabbing with a knife. Everyone knows how to do it. Defendant never denied knowing how to do it (indeed, he never even denied doing it to the similar fact victims). The similar fact testimony does not establish a "motive" to kill June Hunt, nor defendant's "intent" to do so, particularly in view of the fact there was not even an attempt to kill any of the similar fact victims. Finally, "a common scheme or pattern in the selection of victims" is not a material issue here. Defendant did not contest the facts surrounding his meeting with June Hunt. In any event, there is no "common scheme of plan" here. The circumstances surrounding defendant's meeting of the four similar fact victims and June Hunt are different.

Finally, the similar fact evidence was unfairly prejudicial. The graphic descriptions of these four attacks became the central dominating theme of the trial.

ISSUE III -- It was error to admit cellmate Pope's testimony because it was improper character evidence. This evidence was relevant only to prove defendant must have acted in conformity with a

trait of his character by strangling June Hunt during a sexual attack. However, not only is there no evidence of a sexual attack, 1) defendant's character was not in issue and 2) even if it had been in issue, Pope's testimony was not reputation evidence and thus was inadmissible in any event.

ISSUE IV -- The standard jury instruction on premeditated murder is fundamentally defective because 1) it is inherently contradictory; 2) it fails to adequately define the element of premeditated design; 3) it relieves the state of the burden of proving all the elements of the crime charged; and 4) it creates an improper presumption.

The first and second paragraphs of the instruction are inherently contradictory. The first paragraph says the state must prove the requisite premeditation both before and at the time of the killing. The second paragraph conflicts with that statement because it indicates the state need only show the premeditation existed at the time of the killing.

The instruction fails to adequately define the elements of the offense. The instruction requires only that there be a conscious decision to kill; it does not require that decision to be the product of reflection and deliberation, uninfluenced by a heat of passion brought on by an adequate provocation. Reflection is not defined and deliberation is not mentioned in the instruction. The instruction does not require the state to prove the defendant actually reflected upon and deliberated the intent to kill before the killing; rather it indicates that it is sufficient if he had enough time to do so, regardless of whether he did so.

Because of the failure to adequately define the elements of the offense, the instruction denies a defendant due process because it relieves the state of the burden of proving all the elements of the offense beyond a reasonable doubt. The inherent contradiction between the first and second paragraphss also deprives a defendant of a due process by creating an improper presumption.

**ISSUE V** -- The trial court erred in excusing a prospective juror for cause during the death-qualification process without giving defendant a chance to question or rehabilitate the prospective juror.

**B. PENALTY PHASE**

**ISSUE VI** -- The trial court erred in finding this murder was committed in a cold, calculated, and premeditated manner. Since the circumstances surrounding the death are unknown, it is sheer speculation to conclude defendant had a careful, prearranged plan to kill June Hunt.

**ISSUE VII** -- The death penalty was disproportionate because it is supported by only one valid aggravating circumstance and defendant presented significant evidence in mitigation.

**ISSUE VIII** -- The sentencing jury's recommendation was fundamentally tainted because that jury was aware of prejudicial testimony (introduced in the guilt phase) that would not have been admissible at the penalty phase, including 1) the details of the two similar fact incidents for which defendant had not been convicted; 2) cellmate Pope's testimony; and 3) the irrelevant de-

tails of the Kimberly Byerly attack (i.e., six hours of "mental abuse" and chopping her fingernails off in a garbage disposal).

**ISSUE IX** -- In imposing the death penalty, the trial court improprly considered non-statutory aggravating sentences, failed to find and consider mitigating circumstances that were established by reasonable proof, and failed to properly weigh the aggravating and mitigating circumstances. In considering the aggravator of "prior violent conviction," the trial court expressly considered the two similar fact attacks for which no convictions had been obtained. The trial court failed to find and consider several non-statutory mitigating circumstances: that defendant suffered organic brain damage as a child, which led to learning and behavorial problems; that defendant was a good son and came from a supportive family background; and that defendant was highly intoxicated during the crucial time period. All these circumstances were established by reasonable uncontradicted evidence. The trial court also engaged in a simple "counting process" rather than properly balancing and weighing the aggravating and mitigating cirucmstances.

## III. -- ARGUMENT

ISSUE I -- THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE CONVICTION BECAUSE TEE EVIDENCE WAS ENTIRELY CIRCUMSTANTIAL *AND* IT DOES NOT ELIMINATE A REASONABLE HYPOTHESIS OF INNOCENCE: THAT THE DECEASED DIED FROM A COCAINE REACTION. ALTERNATIVELY, THE EVIDENCE DOES NOT ESTABLISH A PREMEDITATED DESIGN TO KILL, BUT RATHER ONLY ESTABLISHES A LESSER DEGREE OF HOMICIDE.

The state's evidence does not eliminate all reasonable hypotheses of innocence because of the possibility June Hunt died of a toxic cocaine reaction. Alternatively, even if the evidence is sufficient to establish defendant killed June Hunt, the requisite premeditated design has not been proven and defendant can only be convicted of a lesser included offense.

Aside from the testimony of Pope and the similar fact witnesses, the state's evidence established the following :

> In the early morning hours of April 1, following a night at a local disco with friends, defendant met the deceased at a doughnut shop at about 2 a.m.;
>
> - in the late morning or early afternoon of April 1, defendant told his friends he had taken the deceased back to his apartment and had sex with her;
>
> - during the late afternoon and early evening of April 1, defendant and his friends went to several places, for social purposes;
>
> - for the rest of the evening of April 1, defendant and his friends went back to the local disco, where defendant disappeared about midnight;
>
> - about 11:00 a.m. on April 2, defendant was digging a hole in his back yard and he refused his friends entrance to his padlocked apartment;
>
> - on April 3, defendant fled to Texas and the deceased's body was found in his apartment;

- the deceased died somewhere between April 1 and April 2;

- by process of elimination, the state's experts concluded the deceased had probably been strangled to death, despite the lack of any corroborative physical evidence; and

- there was a possibility the deceased could have died from cardiotoxic cocaine poisoning, because people have been known to die from the small amount of cocaine found in her system.

Pope and the similar fact witnesses added the following :

- defendant has in the past raped women, and choked them during the sexual act, to enhance his own sexual pleasure; and

- defendant had been imprisoned because of such an attack, and he expressed regret at not killing his victim to silence her accusation.

The evidence was entirely circumstantial. "A special standard of review of the sufficiency of the evidence applies where a conviction is wholly based on circumstantial evidence." State v. Law 559 So. 2d 187, 190 (Fla. 1990). "Where the only proof of guilt is Circumstantial, no matter how strongly the evidence may suggest guilt, a conviction cannot be sustained unless the evidence is inconsistent with any reasonable hypothesis of innocence." Id.

The evidence does not eliminate a reasonable hypothesis of innocence : that June Hunt died from a cardiotoxic cocaine reaction, for which defendant bears no criminal responsibility. The state's experts conceded that it was possible she could have died from such a cause.

The state theorized defendant strangled June Hunt in the

course of sexual activity. The medical examiner testified the cause of death was "probably due to a type of asphyxiation." R. 754 (emphasis added). However, he admitted there was no evidence of strangulation; indeed, there was no evidence of any physical trauma whatsoever. R. 753, 764. Nor was there any evidence of any sexual activity or genital injuries. R. 772-74. He said strangulation might not leave any signs of physical trauma, R. 756-57, but it might also cause "rather extensive neck trauma." R. 769. He admitted he could come to no conclusion regarding the cause of death simply by looking at the body; rather, his conclusion was the result of a process of elimination based on "the lack of finding something [else]." R. 766-68. He concluded the cause of death was "probably asphyxiation" but he was "not absolutely sure." R. 765.

As to the possibility of a cocaine overdose, he admitted that death can result from the cardiotoxic results of a very low level of cocaine. R. 763. He admitted the deceased's pregnant condition could have increased this possibility. He concluded it was "theoretically possible but not likely" that cocaine caused this death. R. 764.

The toxicologist also conceded that death can result from the cardiotoxic effects of low levels of cocaine. R. 780. He said such deaths are "not very common," and it was a "remote" ox "slight" possibility in this case. R. 781, 783. However, he admitted he did not know the deceased was pregnant and, because he was not a doctor, he could only say he "believe[d] that would have [no] bearing" on his conclusion. R. 783-84.

Such testimony is insufficient to rebut defendant's reasonable hypothesis of innocence. Proving probabilities does not satisfy the standard of reasonable doubt.

The state's similar fact evidence does not remedy this deficiency. As argued below, this evidence should not have been admitted in the first place. Assuming arguendo it was properly admitted, this evidence does not establish any premeditated design to kill; indeed, to the contrary, it shows the opposite, because defendant did not kill (or attempt to kill) any of the similar fact witnesses. It does not eliminate or affect in any way the reasonable possibility of a cocaine overdose in the present case. It is sheer speculation to conclude that, because defendant has raped and strangled women in the past, he must have raped and intentionally strangled to death June Hunt as well, particularly in view of the fact that there is no physical evidence to support this hypothesis.

Assuming arguendo the evidence is sufficient to establish defendant killed June Hunt, the evidence does not establish he did so from a premeditated design. To prove a premeditated design, the state must prove defendant acted upon "a fully formed and conscious purpose to take human life, formed upon reflection and deliberation, entertained in the mind before and at the time of the homicide." Williams v. State 437 So.2d 133,134-35 (Fla.1983). "The fact of premeditation [must be] uninfluenced or uncontrolled by a dominating passion sufficient to obscure the reason based on an adequate provocation...." Forehand v. State 171So.241,243 (Fla. 1936).

The premeditated design must be "formed a sufficient length of time to admit of some reflection and deliberation..., and the party at the time of execution of the intent [must be] fully conscious of a settled and fixed purpose to take the life of a human being, and of the consequences of carrying such purpose into execution...." Williams, infra.

The evidence does not establish the requisite pre-meditated design. We do not know the circumstances that led to June Hunt's death. There are several possibilities that are consistent with the evidence. The choking could have occurred during a consensual sexual encounter, with the death being unintended. The choking itself could have been consensual; that is a recognized (albeit extremely dangerous) technique for increasing the sexual pleasure of the person being choked. See Tsavaris v. State 414 So.2d 1087 (Fla. 2nd DCA 1982), Rev. denied 424 So.2d 763 (Fla.1982). Finally, the choking may have had nothing to do with any sexual activity. Defendant and the deceased could have argued and fought about something that had little or nothing to do with sexual activity. For example, the deceased could have been a prostitute who became upset when defendant refused to pay the agreed-upon fee, or defendant could have been angered when the victim tried to extort a fee from him after the sexual act.

We do not know exactly when June Hunt died. The state's theory seems premised on the assumption she died on April 1, after she went back to defendant's apartment: the assumption is defendant attacked, strangled and (possibly) raped her that night.

However, other facts adduced at trial cast serious doubt on this assumption. Why would defendant brag to his friends about taking the deceased home and having sex with her while her body lay decomposing at his house? The logical thing to do would be to keep quiet about it, or to tell a story that denied any contact with the deceased. Indeed, given the evidence of defendant's subsequent endeavors to avoid prosecution, this logical possibility is greatly strengthened. Further, why would he go to work the next day and then go out with his friends that afternoon and evening, again with a dead body decomposing in his livingroom? The logical thing would be to make every effort to get rid of the damning evidence as quickly as possible.

If we assume June Hunt died sometime in the afternoon ox evening of April 1 (or the early hours of April 2) - an assumption that seems at least as logical as the first assumption, given the above facts - then the state's rape-strangulation theory is seriously damaged. If defendant attacked (but did not kill) June Hunt on the first night, why would she stay at his house? If she stayed voluntarily - the more logical assumption - it can only be concluded there was no attack on the first night, In other words, they could have had consensual sex (with no violence) the first night, with June Hunt deciding to stay the next night voluntarily. Under that scenario, the logic of an attack (or at least a sexual attack) on the second night is seriously undermined: If June Hunt was voluntarily engaging in sex with defendant, there would be no need for an attack. This in turn supports the hypothesis that

any choking in the present case was motivated by something different from that found in the similar fact cases, which in turn indicates the death might not have been intended.

It is well recognized that death can result very quickly from a choke hold, without the necessity of any intent to kill on the part of the person applying the hold. That of course is the major criticism of law enforcement's use of the carotid artery restraint. A recognized authority on forensic pathology has noted "pressure (and other types of stimuli) applied to the neck overlying the carotid sinuses can, in the predisposed victim, initiate catastrophic inhibitory vagal nervous impulses which can cause practically instantaneous stoppage of cardiac activity and death...." Adelson, The Pathology of Homicide, P.526. Adelson notes "the stimulus which initiates the fatal vagal reflex can be so atraumatic that it leaves no anatomic changes demonstrable at autopsy...." Id. at 527. By contrast, Adelson asserts that the typical strangulation death leaves noticeable physical trauma, particularly internally. Id. at 530-37.

The conclusion here is obvious: If the cause of death was indeed strangulation and there is none of the expected internal trauma that normally accompanies such an injury, it is reasonable to conclude the death occurred quickly and unintentionally. On this reasonable hypothesis, defendant cannot be convicted of first degree murder.

The trial court erred in denying defendant's motion for judgment of acquittal.

**ISSUE II -- THE TRIAL COURT ERRED IN ADMITTING THE SIMILAR FACT TESTIMONY.**

The basic legal principles applicable to similar fact evidence are well-settled:

> Similar fact evidence that the defendant committed a collateral offense is inherently prejudicial. Introduction of such evidence creates the risk that a conviction will be based on the defendant's bad character or propensity to commit crimes, rather than on proof that he committed the charged offense.
>
> "
>
> ..
>
> To minimize the risk of a wrongful conviction, the similar fact evidence must meet a strict standard of relevance. The charged and collateral offenses must be not only strikingly similar, but they must also share some unique characteristic or combination of characteristics which sets them apart from other offenses.
>
> ...
>
> In addition to the above requirements, the evidence must be relevant to a material fact in issue such as identity, intent, motive, opportunity, plan, knowledge, or absence of mistake or accident.
>
> **Huering v. State 513 So. 2d 122,125 (Fla.1987) (Emphasis added)**

Before similar fact evidence can be found to be "strikingly similar" to the charged offense, "the identifiable points of similarity must pervade the compared factual situations, and, if sufficient factual similarity exists, the facts must have some special characteristic or be so unusual as to point to the defendant." Thompson v. State 494 So.2d 203,204(Fla.1986). It is not enough to show the charged and uncharged acts "involve the same type of offense". Peek v. State 488 So.2d 52,55(Fla.1986); "a

mere general similarity" is insufficient. Drake v. State 400 So. 2d 1217,1219 (Fla.1981).

At the outset, defendant notes he is challenging each item of similar fact testimony, both in whole and in part. In view of the volume of the testimony, separate arguments directed at each bit of testimony will not be made. In particular, Kimberly Byerly's testimony about defendant's putting her hand in a garbage disposal and chopping off her fingernails, and defendant's threat to bury her "like the others" should not have been admitted even if the rest of her testimony was proper. This testimony was clearly irrelevant and unfairly prejudicial. The chopping of her fingernails proves nothing about June Hunt's death. The threat to bury her "like the others" indicates defendant has killed in the past; however, there is no other evidence to support this assertion. See Jackson v. State 451 So.2d 458(Fla.1984) (In murder prosecution, defendant's bragging of being "a thoroughbred killer" inadmissible.)

A. THE SIMILAR FACT EVIDENCE IS NOT STRIKINGLY SIMILAR TO THE FACTS OF THE CHARGED OFFENSE BECAUSE 1) NONE OF THE SIMILAR FACT WITNESSES WERE KILLED AND 2) THE FACTS OF THE CHARGED OFFENSE ARE NOT FULLY KNOWN AND THUS CANNOT BE COMPARED WITH THE SIMILAR FACT EVENTS. FURTHER, THE SIMILAR FACT INCIDENTS THEMSELVES ARE NOT STRIKINGLY SIMILAR TO EACH OTHER. RATHER, ANY SIMILARITIES AMONG THE SIMILAR FACT INCIDENTS ARE SUPERFICIAL AND QUITE COMMON TO CRIMES OF THIS NATURE, AND THERE ARE SIGNIFICANT DISSIMILARITIES AMONG THESE INCIDENTS.

The first problem in applying the striking similarity requirement here is obvious: none of the similar fact witnesses were killed. That by itself is a striking dissimilarity. The

second problem is equally obvious: since the exact circumstances of June Hunt's death are unknown, we cannot compare it to the similar fact occurrences. As argued in Issue I above, even if we assume defendant strangled June Hunt, the circumstances of that killing could be quite different than those found in the similar fact cases. It is sheer speculation to assert the circumstances of June Hunt's death were strikingly similar to the similar fact occurrences.

Further, the similar fact occurrences are themselves too dissimilar to each other to meet the striking similarity requirement. Kimberly Byerly testified that defendant put a knife to her throat, that he "mental[ly] abuse[d]" her for six hours prior to raping her, that he forced her hand into a garbage disposal and chopped off her fingernails, and that the choking seemed to increase in intensity as defendant approached ejaculation. None of the other three victims testified to such things. Two of the attacks occurred in defendant's residence, while the other two occurred in public places; indeed, one attack occurred in an area where others were in the immediate vicinity. Two attacks occurred in the early morning, one occurred around noon, and the last occurred in the early evening. Three of the victims were threatened with death; the fourth was not. One was told she would be buried "like the others"; the others were not. One was slammed to the ground; the others were not. One was threatened with harm if she reported the attack; the others were not. While three were choked during sex, one said it occurred only "in periods on and off throughout", while the other two said

it occurred throughout the rape. One was not raped at all. Two of the four had visible bruises following the attack; the other two did not. One victim was voluntarily released by defendant after the initial attack, after defendant extracted a promise from her to not scream; a second victim talked defendant into releasing her: the other two were not released.

The circumstances under which defendant met each of the victims are also dissimilar. In the present case, the evidence is uncontradicted that June Hunt first approached defendant and asked for his help. This did not occur in any of the similar fact cases. In two of those cases, defendant offered to do some free work for the victims. In the third case, he asked the victim for a ride from a bar. In the fourth case, he lured the victim away from a house and attacked her in a field.

Perhaps most importantly, there are substantial dissimilarities in the manner of attacking and choking the victims. Although each was initially attacked from behind and choked, the subsequent sequences of events differ significantly.

Kimberly Byerly testified defendant "jumped me from behind, stuck an object to my neck." R. 842. She said he grabbed her by "putting his arm around my neck and in this fashion, with an object to my throat with the other hand." R. 842. The object was "a sharp knife object...in a circular moon fashion." R. 843. He held her "in an arm lock, sir, with his arm around my throat like this, pushing pressure on my throat." R. 843. She said he squeezed her neck and "it restricted my movement quite so to

speak." R. 843. However, she did not lose consciousness from this hold; indeed it made her "stand up and take notice." R. 849. Defendant said he would let her go if she did not scream. R. 843. She promised; however, she did scream when he let go, so he grabbed her and started choking her face-to-face "with the two thumbs in the middle of [her] neck and the four fingers around the sides of [her] neck." R. 843-44, 849. It was this choking that made her pass out. R. 844, 849.

Katie Sleek testified that, as they were walking, defendant "fell in behind me and grabbed me with his arm...around the neck." R. 856. Her head was "in his elbow" and he strangled her until she lost consciousness. R. 856.

Linda McQuaid said defendant "grabbed me around the neck and slammed me into the sand." R. 882. Her head was located "right in the middle of his arm" and defendant was applying pressure so she "couldn't breathe." R. 882. Although she was "real disoriented," she did not testify that she lost consciousness. R. 882. She was not choked from the front as were the other three.

Kimberly Salstrom said defendant "grabbed me around my neck, spun me around and started strangling me." R. 889. She said "when he first grabbed [me] around [my] neck, [it was] with [my] head in the part of his arm" and he was "applying pressure when he was doing that." R. 889. He then "spun [me] around and he began strangling [me] with both of his hands around my neck." R. 889.

These four offenses do not share any unique characteristic or combination of characteristics that set them apart from other similar offenses. Indeed, as even a casual perusal of both the caselaw and other authorities shows, choking is an all-too-common element of a sexual attack. In the nine month time period between January 1 and October 1 of 1991, this Court has written opinions in six death penalty cases in which the victim was both sexually battered and asphyxiated. Taylor v. State 16 FLW S 469(Fla.1991); Capehart v. State 16 FLW S 447(Fla. 1991); Sochor v. State 580 So.2d 595 (Fla.1991); Gilliam v. State 16 FLW S 292(Fla.1991); Engle v. Dugger 576 So.2d 696(Fla.1991); Holton v. State 573 So.2d 284(Fla.1991). It is not known how many similar cases came before the lower courts of this state during this time. In a study done in 1983, the case histories of forty-one women who were raped and killed in Dade County between 1959 and 1981 were surveyed. It was found that "mechanical asphyxiation, usually manual strangulation, was the actual cause of death (or was significantly contributory) in [21 of the 41 cases]." Deming, et al, "Forensic Science Aspects of Fatal Assaults on Women," Journal of Forensic Sciences, Vol.28, No.3, July 1983, P. 572,574. The authors concluded this high percentage of asphyxiation deaths "reflects the intimate contact between the assailant and the victim as well as the impartiality of the assault." Id. at 575. In a study done in Sweden in 1981, the authors studied both living survivors of strangulation attacks and homicide victims. Of the 102 attacks in which the victim survived, 30 involved sexual

assaults. Ten of the 37 homicides involved sexual assaults. Harm and Rajs, Types of Injuries and Interrelated Conditions of Victims and Assailants in Attempted and Homicidal Strangulation, 18 Forensic Science International 101(1981). Other authorities have commented on the relation between choking and rape as follows:

> Strangulaton should be assumed to be homicide until the contrary is shown.... Violent rape or plainly homicidal injuries are sometimes present to show the nature of the strangulation. It may have been effected to facilitate rape.... Prostitutes will say their clients often "nearly strangle" them.. ..
>
> **Simpson, Forensic Medicine, P. 98-99.**

> Because manual strangulation is so common a lethal modality in rape-homicide, the pathologist should investigate the possibility of sexual assault whenever he autopsies a throttled woman.
>
> **Adelson, infra, at 530.**

> Homicidal manual and litigature strangling (throttling) are common events in urban areas. [Citation omitted]. If the victim is female, rape is often a coexistent injury.
>
> **Iserson, Strangulation: a Review of Ligature, Manual and Postural Neck Compression Injuries, 13 Ann Emerg. Med., March 1984: 179, 181.**

Prior caselaw from this Court and the District Courts clearly shows both that choking is a common element of sexual assaults and that the striking similarity requirement was not met

here. Drake, infra is directly on point. In that case, the defendant was charged with first degree murder. The facts of the charged offense were as follows :

> Drake was charged with the murder of Odette Reeder. Late in November 1977, Drake and Reeder met by chance at a lounge in Pinellas Park. After several drinks, they left the bar together. Reeder indicated to friends that she would return shortly: her friends thought she was going outside with Drake to smoke marijuana. Neither Reeder nor Drake returned to the lounge, and none of her friends ever saw Reeder alive again.
>
> Some six weeks later, Reeder's body was discovered in a wooded area in Oldsmar. The body was found lying on its back with a skirt covering the face and neck, a blouse beneath the body, and the hands tied behind the back with a bra. Although badly decomposed, the body exhibited eight stab wounds in the lower chest and upper abdomen. The medical examiner opined that these wounds caused Reeder's death, but she could not rule out other possibilities. The State theorized that Reeder was raped but this could not be confirmed by medical opinion because of the decomposition of the lower part of the body.
>
> **400 So, 2d at 1218.**

Two similar fact witnesses testified for the state. Both described prior sexual assaults the defendant committed upon them. The first occurred twenty months before Reeder's death :

> Drake had met K.T. at a lounge and offered her morphine. Thereupon they drove to Drake's apartment where he injected K.T. with the drug and then demanded payment. When she said she would pay him later, Drake stripped off her clothes, bound her hands behind her back, and violated her both vaginally and anally with a broomstick and a bottle. Then, "to give [her] a good rush",. Drake choked her until she passed out. When she regained

consciousness he choked her again, but this time K.T. only pretended to faint. Drake would not let her leave, and she had to make her escape as Drake slept.

**Id at 1218-19**
**(Emphasis added)**

The second similar fact incident occurred two months before Reeder's death :

> On this occasion a girl that Drake had been dating, one P.B., and Drake's roommate returned to Drake's apartment after spending the evening drinking, After a while **P.B.,** undressed and went into the bathroom. When **she** returned to the bedroom, Drake was alone in the room where **his** roommate had been. Angry at the thought that she had engaged in sexual activity with his roommate, Drake threw P.B. on the bed, tied her hands behind her, struck her several times in the abdomen, and eventually attempted intercourse.

**Id at 1219.**

On appeal, this Court reversed Drake's conviction and held the similar fact evidence was improperly admitted because the incidents were too dissimilar :

> The only similarity between the two incidents introduced at the trial and Reeder's murder is the tying of the hands behind the victims' backs and that both bad left a bar with the defendant. There are many dissimilarities, not the least of which is that the collateral incidents involved only sexual assaults while the instant case involved murder with little, if any, evidence of sexual abuse. Even assuming some similarity, the similar facts offered would still fail the unusual branch of the **test**. Binding of the hands occurs in many crimes involving many different criminal defendants. This binding is not sufficiently unusual to point to the defendant in this case, and it is, therefore, irrelevant to prove identity.

Drake is directly on point and dispositive of this issue. As noted above, choking a victim during a sexual assault is no more unusual (or "striking") than binding the victim's hands behind her back; indeed, it appears to be even less so. There is no more evidence of a sexual assault in the present case than there was in Drake: In both cases the victim voluntarily accompanied the defendant and was later found dead, with no direct evidence of the circumstances surrounding the death.

Numerous other cases have held that the striking similarity requirement is not met by facts such as those in the present case: Rivera v. State 561 So.2d 536(Fla.1990)(no error in rejecting defendant's proffered "reverse Williams Rule" evidence regarding rape/murder committed while defendant was in jail; "the only alleged similarities were that both [victims] were riding bicycles when they were abducted; they both were asphyxiated; their bodies were found in the same general area; and panty hose was discovered in the vicinity of their bodies") (emphasis added); Edmond V. State 521 So.2d 269(Fla.2nd DCA 1988) (both victims known to defendant; both choked during attack; in both cases defendant admits having sex, but says it was consensual and victims cried "rape" because he refused to pay them money: "here, aside from certain factors that are common to every sexual battery, the only points of similarity are that both crimes began as a social contact; force was used in each instance, including Edmond's hands around the victim's throat, and both offenses occurred in the early morning hours") (emphasis added);

Robinson v. State 522 So.2d 869(Fla.2nd DCA 1988)(both offenses involve attacks on elderly women late at night, in same area; both victims thrown to floor and raped); Frieson v. State 512 So.2d 1092(Fla 2nd DCA 1987)(within two hour period on same day, both victims attacked, grabbed in chokehold, and raped; one occurs at victim's workplace, other at defendant's home, to which victim voluntarily accompanied defendant; "only similarity...both sexual batteries"); White v. State 407 So.2d 247(Fla.2nd DCA 1981)(Both victims had *eyes* taped, arms and legs tied, torn sheet wrapped around head; assailant talks in strange voice, says he needs help, appears remorseful; "the similarities between the two cases are those that are apt to appear in any rape case.. .."); see also White v. Commonwealth 388 S.E. 2d 645 (Va. App. 1990) (both victims attacked on same day in public restrooms near interstate highway, three miles apart; assailant holds knife to both victims' throats; facts "not so unusual as to serve as a signature"); Commonwealth v. Brusgulis 548 N.E. 2nd 1234(Mass.1990) ("The features that are common to the incidents are common to numerous assaults on women: a secluded site; an attempt to drag or force the victim to a more secluded area; words of threat having no unique content, spoken to obtain compliance; and abandonment of the effort because of the assailant's concern over being discovered (an on-coming vehicle, a barking dog, a screaming victim). The differences are substantial: use of a knife in one instance and not in any other; the assailant was naked when one assault commenced; the municipalities, the season, and the time of day in the prior events dif-

fered from those in the **case** on trial; the manner of the assaults had no consistent pattern (for example, only the victim in the case on trial had her head and shoulders slammed against the ground").

As in the above cases, in the present **case** the similarities among the similar fact offenses are not **so** unique or unusual as to satisfy the striking similarity requirement. There is nothing to set these offenses apart from a significant number of other crimes of this genre, **As** noted above, there are also significant dissimilarities among the similar fact offenses. Most importantly, it has not been shown the similar fact offenses are even superficially similar (much less strikingly so) to the charged offense.

**B. THE STATE'S THEORIES OF ADMISSIBILITY**

At the pretrial motion in limine hearing on the similar fact evidence, the state argued several theories of relevance to show this evidence was admissible. Although asserting the similar fact evidence did meet the striking similarity requirement, the state also argued that requirement did no apply to its theories of admissibility. The state asserted the striking similarity requirement only applied if the similar fact evidence was offered to prove identity through modus operandi and that **was** not what the state was trying to prove here. R. **487**, 491-92.

**First,** it is clear that identity is exactly what the state was trying to prove: that defendant must have been the one that strangled June Hunt because he has done similar things in the past. Further, striking similarity is a threshold requirement for

all similar fact evidence; it is not limited to "identity" or "modus operandi" cases. This conclusion is compelled by the plain wording and history of the Evidence Code, and by numerous prior decisions of this Court.

The Florida Rule of Evidence 404 (2)(a) provides :

> **(2) Other Crimes,** Wrongs, or **Acts.**
> (a) Similar fact evidence of other crimes, wrongs, or acts is admissible when relevant to prove a material fact in issue, such as proof of motive, opportunity, intent, preparation, **plan,** knowledge, identity, or absence of mistake or accident, but it is inadmissible when the evidence is relevant solely to prove bad character or **propensity**.
>
> **(Emphasis added)**

The Sponsor's Note to the Florida Rule provides :

> Section 90.404(2)(a) was amended by the Committee Substitute adopted by the Senate Committee on the Judiciary Criminal to closely paraphrase the language used in Williams v. State 110 So.2d 654,663 (Fla.1959)....

"Section **90.404(2)(a)** codifies Williams...." ~~Peek,~~ infra, **488 So.2d at 54(F.N.2). In** so doing, the Evidence Code imposes the striking similarity requirement as a threshold for the admission of all similar fact evidence,

This conclusion is reinforced by comparing the Florida statute to the analogous Federal Rule of **Evidence 404(b),** which provides :

> **(b) Other Crimes,** Wrongs, or **Acts,** Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.
>
> **(Emphasis added)**

The Florida Rule changes the Federal Rule in two respects: It added the phrase "similar fact" to "evidence of other crimes, wrongs, or acts", and it substitutes "bad character or propensity" for "character...to show he acted in conformity therewith." It is doubtful if this latter change has any substantive effect: the two phrases appear synonymous.

However, the first charge is significant: the Florida Rule applies to a more limited class of evidence, The Federal Rule applies to any "evidence of other crimes, wrong, or acts". The Florida Rule covers only such evidence that is "similar fact".

This is not a simple question of semantics, The difference between "similar fact" evidence and the broader category of "other crimes" evidence is determined by examining the relationship between the charged and uncharged acts. If there is no relation between the two acts other than the defendant's involvement, we are dealing with pure similar fact evidence. If there is some other relation, we are dealing with other crimes evidence.

Consider the following examples. The defendant is charged with burning the house of a man whom he assaulted three weeks earlier. The assault is the uncharged act. The assault would be admissible (even though it points to "other crimes") to show the motive for the arson. However, the assault is not "similar fact" evidence: it is clearly wholly dissimilar. Section 90.404 (2)(a) does not govern the admissibility of the assault evidence; the simple concepts of relevance controls.

In this example, there is a connection between the two crimes other than the defendant's identity: the victim of both crimes was the same and it is logical to infer the charged crime (arson) was connected in some direct way with the uncharged crime (assault).

By contrast, evidence that the defendant had burned someone else's home in the past (someone totally unconnected to the victim in the charged offense) is classic similar fact offense. The only connection between the two acts here is the defendant's alleged involvement. The striking similarity requirement would apply in this context.

Williams *itself* recognizes this distinction. Williams, of course, is a classic similar fact case: there was no relationship between the two offenses there except for the defendant's involvement. The Williams opinion starts by noting the appellant was asserting on appeal that it was error to admit evidence "of a collateral criminal act involving another person and unrelated by parties, fact, time or circumstances to [the charged act]." Williams, infra, 110 So.2d at *658*. The opinion then discusses at length this Court's prior cases, In this discussion, this Court asserts the prior cases had addressed the admissibility of the following types of evidence:

> **...other *crimes* "in *no way* related to the one** on trial.. **.."**
>
> **Id, at 660 (Emphasis in original).**

> ...evidence of a distinct crime "in no way connected by circumstances" with the crime in issue.
>
> **Id. (Emphasis in original),**
>
> ...evidence of collateral crimes "independent of **and** unconnected with" the crime charged.
>
> **Id. at 661.**
>
> ...another crime "wholly independent" of the crime charged.
>
> **Id.**
>
> ...evidence of a distinct crime "in no way connected by circumstances with the one" in issue...
>
> **Id.**
>
> ...evidence tending to reveal the commission of a separate and wholly independent offense,...
>
> **Id. at 662.**

Williams thus addressed the admissibility of similar fact evidence, not the broader **class** of "other crimes" evidence, Section 90.404 (2)(a) codified Williams. Thus, to be admissible under this secion, **all** similar fact evidence must meet the striking similarity threshold requirement,

This Court has so held on numerous **occasions.** Huering, infra, addressed the thorny issue of similar fact evidence in child molestation prosecutions and concluded such evidence may be admissible to corroborate the accusations of the victim of the charged **offense.** In **so** doing, this Court affirmed the striking similarity threshold requirement even though "identity is not an issue" in such cases. 513 **So.2d** at 125 (emphasis added). **After**

discussing the striking similarity requirement, this Court said "in addition to the above requirements, the evidence must be relevant to a material fact in issue such as identity, intent, motive, opportunity, plan, knowledge, or absence of mistake or accident." Id. (emphasis added). This Court then emphasized the validity of the striking similarity requirement (even though identity is not an issue) by noting "the trial court.. .correctly excluded direct evidence of [five proffered uncharged] molestations since they were not .sufficiently similar to the charged offenses." Id.(emphasis added).

In ,Henry v. State 574 So.2d 73 (Fla.1991), this Court reversed a murder conviction due to the erroneous introduction of a prior uncharged murder. This Court rejected the argument that the uncharged murder "was relevant to prove motive, guilty knowledge, identification, lack of mistake, and intent":

> We cannot agree that the killing of Eugene Christian qualifies as similar fact evidence. To be admissible evidence under the Williams rule, an event must be similar to the crime for which the defendant is being tried and must tend to prove some fact in issue. In this case, the killing of Eugene Christian was irrelevant to explain or illuminate the murder of Suzanne Henry. It did not prove motive, intent, knowledge, lack of mistake or, contrary to the state's assertion, identity, where the necessary factual points of similarity are totally absent. On this record, the fact that both victims were family members who were stabbed in the neck did not provide sufficient points of similarity from which it would be reasonable to conclude that the same person committed both crimes. [Citing Drake].

**Id. at 75 (Emphasis added)**

See also Garron v. State 528 So.2d 353 (Fla.1988) (in murder prosecution, uncharged act of defendant's sexual misconduct with stepdaughter not admissible to prove motive for murder of wife: "The focal point of analysis is whether there is actually any similarity between the alleged misconduct and the crime for which appellant stands trial. That is, does the 'similar' fact bear any logical resemblance to the charged crime") (emphasis added); Thompson v. State 494 So.2d 203(Fla.1986)(uncharged murder inadmissible because "not sufficiently similar in accordance with the standards set forth by this court in Williams,...")

It is thus clear that the striking similarity requirementmust be met before addressing the question of whether similar fact evidence is relevant to prove a material fact in issue. It is equally clear that the present case concerns classic similar fact evidence: there is no connection whatever among the charged and uncharged acts other than defendant's involvement. The state's assertion that the striking similarity requirement does not apply here is without merit.

Assuming arguendo, the striking similarity requirement either does not apply or was satisfied in the present case, the similar fact evidence was nonetheless improperly admitted. The state offered several theories in support of admissibility. These theories will be discussed in the order in which they appear in the state's written memorandum. R.228. Careful analysis of these theories shows that they are simply "propensity" arguments dressed in Eancy clothes, and that they often go to prove issues that are not material in the first place.

1. "CORROBORATING THE CAUSE OF DEATH."

Here again we run into a significant initial problem: none of the similar fact witnesses were killed. The only way the similar fact evidence could corroborate the cause of June Hunt's death is by showing propensity: defendant has strangled (but not killed) four women in the past, therefore, he must have strangled June Hunt to death as well. Allowing similar fact evidence for this type of "corroboration" would eliminate virtually all restrictions on its use.

> Corroborating evidence is merely evidence that confirms other evidence of a fact.... Any similar uncharged act generally corroborates in the sense that the act shows the defendant's propensity toward that type of crime and thereby increases the likelihood that the defendant committed the charged act. But that is precisely the theory of logical relevance forbidden by Rule 404(b). That "corroborative" use of uncharged misconduct would be a patent violation of Rule 404(b). If "corroboration" were a separate "exception" to the exclusionary reul, the exception would swallow the rule.
>
> **Imwinkelreid, Uncharged Misconduct Evidence, § 6:05 (1984)**

2. "NEGATING MISTAKE OR ACCIDENT AS FACTORS IN HUNT'S DEATH."

This is simply a rephrasing of #1, above: the similar fact testimony negates the defense theory of an accidental cocaine overdose (and thus corroborates strangulation as the cause of death) by establishing defendant has a propensity to strangle women and, therefore, he must have strangled June Hunt as well.

"Mistake or accident" has two related but distinct meanings in this context.

> One comes into play when the defendant admits performing an act but claims that he or she did so with innocent intent. The defendant confesses the actus reus but adds that he or she performed the act accidentally, inadvertantly, or mistakenly.
>
> **Imwinkelreid, infra, §4:03.**

This is not what is meant by "mistake or accident" in the present case. Rather, in this case, "the defendant denies committing the actus reus." Id. Similar fact evidence is admissible on this theory of relevancy because of the "doctrine of chances" :

> Based on ordinary common sense and mundane human experience, it is unlikely that a large number of similar accidents will befall the same victim in a short period of time. Considered in isolation, the charged fire or death may be easily explicable as an accident. However, when all similar incidents are considered collectively or in the aggregate, the doctrine of chances will create an inference of human design, The recurrence of similar incidents, incrementally reduces the possibility of accident. The improbability of a coincidence of acts creates an objective probability of an actus reus.
>
> **Id.**

"[This] theory of logical relevance rests on an objective or statistical improbability rather than on a subjective probability based on defendant's character." Id. at §2:10. "This is a theory of relevance in which it is easiest for the prosecutor to slip into improper character reasoning." Id. at §4:03. That is precisely what occurred in the present case. The similar fact incidents here are not "similar accidents'' which "incrementally reduce the possibility of [the charged crime being an] accident"

through "the improbability of a coincidence." The similar fact incidents here are clearly not accidents; nor did defendant ever assert they were. If other women had died in defendant's company of alleged accidental drug overdoses, this theory of relevance might be valid. But, in the present case, the similar fact evidence is relevant only to show propensity: defendant strangled the other four women, so that makes it more likely defendant acted in conformity with that character trait and strangled June Hunt as well.

**3. "ESTABLISHING THE DEFENDANT'S KNOWLEDGE OF AND USE OF ASPHYXIATION TECHNIQUES WHICH ARE CONSISTENT WITH AND COULD HAVE CAUSED THE VICTIM'S DEATH."**

The inference here (and in much of the state's argument during the trial) is that this case involves "asphyxiation techniques" that are esoteric and known only to a select few initiates: that one needs some specialized knowledge and training to know how to choke someone. In fact, it is a rudimentary procedure that most of us know full well before graduating from elementary school. See cases and authorities cited in Issue I above. Even the carotid artery hold is well-known, having generated a great deal of publicity (and controversy) in recent years. Of course, garrotting someone from behind with an arm around the neck was a technique known for centuries before medicine even discovered or named the carotid arteries. Given the design of the human body, such a hold can only be applied one way, with the chin of the victim naturally being caught in the crook of the perpetrator's arm.

Defendant's "knowledge of asphyxiation techniques" was not a material fact in issue in this case. If the cause of death were gunshot or stab wounds, would prior shootings or stabbings be admitted to prove the defendant knows how to fire a gun or wield a knife? In a rape case, would prior rapes be admitted to prove the defendant knows how to engage in sexual activity? In a burglary case, would prior burglaries be admitted to prove the defendant knows how to crawl into houses through broken windows? These latter activities ("or techniques") require the same degree of prior knowledge or specialized skill as strangulation,

Further, as noted above, there are significant dissimilarities in the attacks on the four similar fact witnesses : their testimony does not establish any "technique" at all, other than the all-too-common sudden attack from behind with an arm around the neck. Although never explicitly stated, the state's position at trial seemd to be that the similar fact chokings - at least the initial attacks - involved something similar to a carotid artery restraint : a "sleeper hold" that was, in effect, defendant's signature. However, the testimony of the similar fact witnesses shows no such signature.

Regarding the initial attacks, the four similar fact witnesses testified as follows :

BYERLY:

> He jumped me from behind, stuck an object to my neck. R. 842.
>
> In an arm lock...with his arm around my throat...putting pressure on my throat.... R. 842-43.

...He squeeze[d my] neck.... It restricted my movement..,. He let me go. ... R. 843.

[I] didn't pass out...but it did...make me stand up and take notice... . R. 849.

SLEEK:

He grabbed me around the neck ...[with my] head...in his elbow [and] strangled [me until] I passed out.... I woke up..,. I couldn't move. I felt numb, R. 856-57.

McQUAID:

He grabbed me around the neck and slammed me into the sand.... [My] head [was] right in the middle of his arm, [He was] applying pressure.... I couldn't breathe. R. 882.

I tried to pull his arm off my neck...I was real disoriented. R. 882.

**SALSTROM:**

He grabbed me around my neck, spun me around and started strangling me. [My head was] in the part of his arm [and] he was applying pressure.... R. 889.

There is clearly no "technique" here. To say such evidence shows defendant knows and uses "asphyxiation techniques which are consistent with and could have cause the victim's death" is to say nothing mare than that defendant knows how to strangle, and has in the past strangled women. This is nothing but propensity.

4. "ESTABLISHING A SPECIFIC MOTIVE BY SHOWING THE DEFENDANT'S GAINING SEXUAL GRATIFICATION THROUGH THE BIZARRE AND HIGHLY UNUSUAL DEVIANT SEXUAL PRACTICE OF STRANGULATION DURING SEXUAL ACTIVITY."

The first thing we must ask here is: a "specific motive" for what? Defendant was charged only with premeditated

murder. The prior stranglings of the similar fact witnesses do not establish a motive to kill June Hunt. Testimony about defendant's deviant sexual practices does not establish a motive to kill June Hunt. The fact that the similar witnesses were not killed (nor was there even an attempt to do so) completely undermines this argument.

Secondly, there is no evidence the strangulation of June Hunt occurred during sexual activity. The only evidence to support such an assumption comes from Pope and the similar fact witnesses. Their testimony establishes such a motive is by showing propensity : he has done it in the past, he must have done it here as well.

The "motive" theory of admissibility in this context must be analyzed in light of the difference between "similar fact" evidence and "other crimes" evidence discussed above. There are two distinct branches of "motive" relevancy here. The uncharged act may supply the direct motive for the charged act (in a "cause/effect" manner), as where the defendant is charged with killing the crucial witness against him in the uncharged crime. Alternatively, both the charged and uncharged act may spring from the same basic motive, as in the arson/assault example discussed above. See Imwinklereid, infra, § 3:15-3:18; *see* also cases cited at Ehrhardt, Florida Evidence, 5404.15 (1989Supp.) In either event, we are not concerned with similar fact evidence; rather, we are dealing with other crimes evidence.

There is no "motive" theory available here. The charged

**and** uncharged acts are unconnected to each other in any way, except by defendant's involvement.

Finally, as noted above, while choking and raping women is clearly a "deviant sexual practice," it is hardly "bizarre and highly unusual." Indeed, it is distressingly commonplace. This theory of admissibility would allow testimony of any prior rape to prove a defendant's "bizarre and deviant sexual practice" of taking women by force. It would allow testimony of prior assaults or killings to **prove** a defendant's "bizarre and deviant practice" of settling personal disputes by violence. It would allow testimony of prior robberies to prove a defendant's "bizarre and deviant practice" of obtaining money or property by force. Indeed, it would seem to allow the use of any prior similar act to **prove** the defendant engages in "bizarre and deviant" criminal activity such **as** that he **is** charged with. By definition, criminal activity is bizarre and deviant. This again is nothing **but** propensity.

5. **"ESTABLISHING INTENT *TO* KILL."**

Again, the similar fact evidence does not establish that defendant intended to kill June Hunt, any more than it establishes a motive for doing so. Again, this argument is undermined by the fact the similar fact witnesses were not killed.

This theory of admissibility is obviously directed primarily to similar fact witness McQuaid, taken in conjunction with cellmate Pope's testimony. The state theorizes that defendant intentionally killed June Hunt to prevent her from

testifying against him and sending him back to prison. This theory in turn is based on defendant's statement to Pope that he should have killed McQuaid. However, the only reason defendant would have for fearing Hunt's testimony (that would parallel-and thus make relevant-the testimony of McQuaid and Pope) must be premised on the assumption that defendant raped June Hunt and then killed her to prevent her from reporting this crime. However, there is no evidence to support this rape theory. Again, the exact circumstances of June Hunt's death are unknown, as is defendant's motive (to the extent he had one) for killing her.

*6*. "ESTABLISHING A COMMON SCHEME OR PATTERN IN THE SELECTION OF VICTIMS CONSISTENT WITH HIS CONTACT WITH [JUNE HUNT]."

First, as noted above, there is no "common scheme or pattern" here. The only "common scheme or pattern" here is that defendant seems to take advantage of an opportunity when it arises. This is hardly unique among rapists.

Second, in view of the fact that defendant never contested the facts surrounding his meeting June Hunt, there was no "material fact in issue" to which the similar fact evidence might have some relevance. "A common scheme or pattern in the selection of victims" is not a legitimate issue in this case. "Neither a 'continuing course of conduct,' a 'plan or scheme.' nor a 'modus operandi' is an end in and of itself which may be proved in a criminal case." Duncan v. State 291 So.2d 241,243 (Fla.2nd DCA 1974) (emphasis in original). The proper scope of this theory of uncharged misconduct relevancy is as follows : "The prosecutor may prove any uncharged crime by the defendant which shows that

the defendant in fact and in mind formed a plan including the charge and uncharged crimes as stages in the plan's execution." Imwinklereid, infra, § 3:21 (emphasis partially deleted). Courts in this state have long recognized that similar fact evidence is admissible on this theory "where the crime charged is one of a system of criminal acts occurring so near together in point of time and being so nearly similar in means as to lead to the logical inference that they were all mutually dependent and committed in pursuance of some deliberate criminal purpose, and by means planned beforehand ..." 23 Fla. Jur. 2d, Evidence and Witnesses, §163 (citing numerous cases). (emphasis added).

There clearly was no plan here that included both the charged and uncharged offenses. Rather, the state's theory here is what Professor Imwinklereid criticizes as "the spurious plan" theory: "A-plan-to-commit-a-series-of-similar-crimes theory." Imwinklereid, infra, at § 3:23; see also Wright and Graham Federal Practice and Procedure, § 5244 (1991 Supp.)("to be properly admissible under Rule 404(b) it is not enough to show that each crime was 'planned' in the same way; rather, there must be some overall scheme in which each of the crimes is but a part").

### C. THE SIMILAR FACT EVIDENCE WAS UNFAIRLY PREJUDICIAL AND IT BECAME THE "FEATURE OF THE TRIAL."

Even if relevant to some material issue, similar fact evidence should nonetheless be excluded if it becomes the "feature of the trial." Bryan v. State 533 So.2d 744 (Fla.1988); Williams v. State 117 So.2d 473 (Fla.1960). "The 'feature' limitation ap-

pears to be a specific application of the more general proscription against prejudice outweighing probative value." Snowden v. State 537 So.2d 1383,1385, F.N. 2 (Fla.3rd DCA 1989). This limitation is of particular significance in capital cases if the similar fact evidence "may well have influenced the jury to find a verdict resulting in the death penalty [rather than] a recommendation of mercy, a verdict of guilty of murder of a lesser degree, or even a verdict of not guilty," Williams, infra, 117 So.2d at 476.

An important factor in determining if the similar fact evidence becomes the feature of the trial is the relative number of pages of testimony it consumes. See Snowden, infra. In the present case, the direct and cross examination of the eight non-similar fact witnesses consumed 105 pages in the record. The testimony of cellmate Pope and the four similar fact witnesses consumed 43 pages, the great bulk of which is direct examination; defendant's cross examination of these witnesses was perfunctory. Thus, the similar fact evidence comprised about 30% of the state's case.

This testimony was also repeatedly emphasized in closing argument. The state's closing argument consumed about 31 pages of transcript. R. 974-1005. About one-third of that was devoted to the similar fact evidence. Early in its argument, the state noted:

> You've heard the testimony of four young women who came forward...and relived some terrible nightmares caused by this man,... I

> think it was obvious to you that was not an easy experience for them but it's one they endured....
>
> **R. 975.**

The state later noted "the terrible evidence you've heard concerning what this man has done in the past.. .from Mr. Pope and the four ladies who took the **stand.**" R. 981-82. Pope's testimony was reiterated and emphasized in two and one-half pages of argument. **R. 984-86.** After mentioning Pope and the similar fact witnesses on five more occasions, **R. 987,989** (June Hunt "didn't consent to be choked and strangled and asphyxiated **so** this man could have an orgasm as her body quivered in death"), 991,993 ("of **course** he had been up all night, and you know what he was doing all night, just as he did with the other victims"), 997, the state again reiterated Pope's testimony in detail. R, **999-1000,** The state then "talk[ed] briefly about the testimony of these four ladies who came and endured the prospect of reliving these nightmares"; this "brief talk" consumed about five pages of transcript. **R.** 1000-1004. The state concluded "June Hunt...died of asphyxiation at the hands of this man, the same manner and a like manner as he asphyxiated and assaulted four previous victims," **R.** 1005.

The cumulative effect of this **parade** of horror could only be to instill in the jury manifest feelings of revulsion toward defendant, feelings that could not help but overwhelm any doubts they may have had about the strength of the state's case. **One** would expect the more charitable comments among the jurors to have been along the lines of "this is one nasty s.o.b. who should

have been fried a long time ago." One can hardly expect a reasoned deliberation in such an atmosphere.

The similar fact evidence was irrelevant and unfairly prejudicial. It should not have been allowed.

**ISSUE III -- THE TRIAL COURT ERRED IN ALLOWING CELLMATE POPE'S TESTIMONY BECAUSE SUCH TESTIMONY WAS INADMISSIBLE CHARACTER EVIDENCE, RELEVANT ONLY TO SHOW DEFENDANT ACTED IN CONFORMITY WITH A TRAIT OF HIS CHARACTER. DEFENDANT'S CHARACTER WAS NOT IN ISSUE AND POPE'S TESTIMONY WAS NOT IN THE FORM OF REPUTATION TESTIMONY.**

Pope testified to several statements defendant made while they were in prison together in 1986. He said defendant told him:

> -- That his nickname was Hammer because "that's how he got his pussy, by hammering it out of them":
>
> -- That he "liked to take it because it gave him a thrill to hurt them";
>
> -- That he "liked to choke the shit out of them when he was about ready to bust his nut, or have an orgasm, where he'd catch a dying quiver"; and
>
> -- That he squeezed rubber balls to "make his hands strong enough where he'd choke the shit out of somebody."
>
> **R. 831-32.**

Pope also said defendant told him he was in prison for choking a woman on Clearwater Beach, and that he "wished he killed the bitch because he wouldn't have been in trouble." R.833.

Pope's testimony was admitted as an admission, pursuant to §90.803 (18), Fla.Stat.(1989). This Court has recognized :

> Admissions are admissible in evidence...because the out-of-court statement of the party is inconsistent with his express or implied position in the litigation.... Of course, like all evidence, an admission must be relevant; i.e., it must have some logical bearing on an issue of material fact.
>
> **Swafford v. State 533 So. 2d 270,274 (Fla. 1988) (Emphasis added).**

Defendant's "position in the litigation'' is obvious: he did not kill June Hunt. The bulk of Pope's testimony - about defendant's nickname, his sexual proclivities, and his strengthening his hands for choking purposes - is relevant to prove only one thing: that defendant acted in conformity with his character (or a trait of his character) by strangling June Hunt, The law is clear that such testimony is not admissible to prove such a fact. The controlling provisions of the Evidence Code are §90.404(1)(a) and 90.405(1), Fla.Stat.(1989), which provide as follows :

> **$90.404 CHARACTER EVIDENCE : WHEN ADMISSIBLE**
>
> (1) Character Evidence Generally. Evidence of a person's character or a trait of his character is inadmissible to prove that he acted in conformity with it on a particular occasion, except :
>
> (a) Character of accused. Evidence of a pertinent trait of his character offered by an accused, or by the prosecution to rebut the trait.
>
> ...
>
> **§ 90.405 METHODS OF PROVING CHARACTER**
>
> (1) Reputation. When evidence of the character of a person or of a trait of his character is admissible, proof may be made by testimony about his reputation.

Defendant did not offer any evidence of any pertinent trait of his character to which Pope's testimony could be considered rebuttal. Even if defendant had offered such evidence, Pope's testimony is not reputation testimony and thus is not proper rebuttal in any circumstance.

Jackson v. State 451 So.2d 458(Fla.1984) is directly on point. In that case, the defendant was convicted of two execution-style murders. The state presented evidence that the defendant possessed many guns and had bragged of being "a thoroughbred killer." 451 So.2d at 460. This Court held such testimony was irrelevant and unfairly prejudicial. Id, at 461.

Pope's testimony established only that defendant is "a thoroughbred strangler." Its only relevance is to show he must have acted in conformity with that character trait by strangling June Hunt. Such testimony is clearly inadmissible.

Pope's testimony about defendant's statement about choking a woman on Clearwater Beach is objectionable for the same reason. This testimony is further objectionable because it is improper similar fact evidence, for the same reasons stated in Issue II above.

**ISSUE IV -- THE TRIAL COURT ERRED IN GIVING THE STANDARD JURY INSTRUCTION ON PREMEDITATION, THIS INSTRUCTION IS INHERENTLY CONTRADICTORY *AND* IT FAILS TO ADEQUATELY DEFINE ALL THE ELEMENTS OF THE CRIME, THE INSTRUCTION *ALSO* VIOLATES A DEFENDANT'S DUE PROCESS RIGHTS BECAUSE IT RELIEVES THE STATE OF THE BURDEN OF PROVING ALL THE ELEMENTS OF THE CRIME BEYOND A REASONABLE DOUBT AND IT CREATES AN IMPROPER PRESUMPTION.**

The trial court gave the standard jury instruction on premeditation, which provides in pertinent part as follows :

> Killing with premeditation, the definition, is killing after consciously deciding to do so. The decision must be present in the mind at the time of the killing. The law does not fix the exact period of time that must pass between the formation of the premeditated intent to kill and the killing. The period of time must be long enough to allow reflection by the defendant. The premeditated intent to kill must be formed before the killing,
>
> The question of premeditation is a question of fact to be determined by you, the jury, from the evidence. It will be sufficient proof of premeditation if the circumstances of the killing and the conduct of the accused convince you beyond a reasonable doubt of the existence of premeditation at the time of the killing.

**R. 1019.**

This jury instruction if fundamentally defective because it is inherently contradictory and it fails to adequately define the elements of the offense.

First degree murder is defined by statute as a killing "perpetrated from a premeditated design." 5782.04 (1)(a) 1.,(Fla. Stat.(1989). Premeditation is "more than a mere intent to kill...." ,Wilson v. State 493 So.2d 1019,1021 (Fla.1983). This Court has noted :

> [T]he one essential element which distinguishes first-degree murder from second-de

> gree murder is premeditation. The term 'design' as mentioned in each of the two degrees, means the specific intent to kill, and in second-degree murder such specific intent may or may not be present. The difference is, that in second degree murder, if present, it is not premeditated. Thus, premeditation is the ever-present distinguishing factor....
>
> **Anderson v. State *276* So.2d 17,18 (Fla.1973)(Emphasis partially added) (Quoting Polk v. State, 179 So.2d 236(Fla.2nd DCA 1965)**

This Court has also recognized that "a well defined purpose to kill may be induced, compelled, or constrained by anger of such degree as for the moment to cloud the reason and momentarily obscure what might otherwise be a deliberate purpose by its impelling influence.. .." Forehand v. State 171 So. 241(Fla. 1936). It is well-settled that "a sudden transport of passion, caused by adequate provocation, if it suspends the exercise of judgment, and dominates volition, so as to exclude premeditation and a previously formed design, may not excuse or justify a homicide, but it may be sufficient to reduce a homicide below murder in the first degree, although the passion does not entirely dethrone the actor's reason." Whidden v. State 64 Fla.165, 59 So. 561(1912). Thus, to prove first degree murder, "it is necessary that the fact of premeditation uninfluenced or uncontrolled by a dominating passion sufficient to obscure the reason based on an adeuuate provocation must be established...." Forehand, infra, 171 So. at 243(emphasis added). This crucial distinction has been fully explained as follows :

> A premeditated design to effect the death of a human being is a fully formed and conscious purpose to take human life, formed upon reflection and deliberation, entertained in the mind before and at the time of the homicide. The law does not prescribe the precise period of time which must elapse between the formation of and the execution of the intent to take human life in order to render the design a premeditated one; it may exist only a few moments and yet be premeditated if the design to take human life was formed a sufficient length of time before its execution to admit of some reflection and deliberation on the part of the party entertaining it, and the party at the time of the execution of the intent was fully conscious of a settled and fixed purpose to take the life of a human being, and of the consequence of carrying such purpose into execution, the intent or design would be premeditated within the meaning of the law although the execution followed closely upon formation of the intent.
>
> **Williams v. State 437 So.2d 133, 134-35 (Fla. 1983) (Quoting McCutcheon v. State 96 So.2d 152 153 (Fla.1957)(Emphasis added)**

It is not enough to show the accused had time to reflect and deliberate upon the intent to kill; it must be shown he did in fact do so :

> The phrase "a premeditated design to effect death" means a design to effect the death that was thauqht upon for any length of time, however short a time, before the act.... A premeditated design...is a design to kill a human being, which design was thought upon before the act.... The killer must have thought upon the design to kill during some time, however short, before the fatal act.
>
> **Miller v. State 75 Fla.136, 77 So, 669,671 (1918) (Emphasis added)**

[It must be shown] the purpose to kill was definitely formed and definitely acted upon.. ..

**Breyand, infra, 171 So.at 243 (Emphasis added)**

One noted authority has stated as follows :

To be guilty of this form of first degree murder the defendant must not only intend to kill but in addition he must premeditate the killing and deliberate about it. It is not easy to **give** a meaningful definition of the words "premeditate" and "deliberate" as they are used in connection with first degree murder, Perhaps the best that can be said of "deliberation" is that it requires a cool mind that is capable of reflection, **and** of "premeditation" that it requires that the one with the cool mind did in fact reflect, at least for a short period of time before his act of killing,

It is often said that premeditation and deliberation require only a "brief moment of thought or a "matter of seconds," and convictions for first degree murder have frequently been affirmed' where such short periods of time were involved. The better view, however, is that to "speak of premeditation and deliberation which are instantaneous, or which take no appreciable time, destroys the statutory distinction between first and second degree murder...." This is not to **say**, however, that premeditation and deliberation cannot exist when the act of killing follows immediately after the formation of the intent. The intention may be finally formed only as a conclusion of prior premeditation and deliberation, while in other cases the intention may be formed without prior thought **so** that premeditation and deliberation occurs only with the passage of additional time for "further thought, and a turning over in the mind."

It is not enough that the defendant is shown to have had time to premeditate and deliberate. One must actually premeditate ,and deliberate, as well as actually intend to

kill, to be guilty of this sort of first degree murder. A killer may, in a particular situation, be incapable of that cool reflection called for by the requirement of premeditation and deliberation....

It has been suggested that for premeditation the killer asks himself the question, "Shall I kill him?" The intent to kill aspect of the crime is found in the answer, "Yes, I shall." The deliberation part of the crime requires a thought like, "Wait, what about the consequences? Well, I'll do it anyway."

**LaFave and Scott, Criminal Law, 73 (1972) (Emphasis added) (citations and footnotes partially omitted)**

Thus, to prove a homicide was perpetrated from a premeditated design, the state must prove:

1. The defendant had a fully formed and conscious purpose to take a human life, that was

   a. The product of deliberation and reflection and,

   b. Was not influenced or controlled by a dominating passion sufficient to obscure his reason, brought on by an adequate provocation:

2. This conscious purpose to kill was fully formed **before** the killing and present in the mind at the time of the killing; and

3. The defendant had sufficient time to reflect upon and deliberate the intent to kill before the killing **occurred,** and did in fact do **so.**

The standard instruction does not comport with this definition of premeditation. The standard instruction is inher-

ently contradictory and it fails to adequately define the elements of the offense, particularly with respect to the crucial distinctions recognized above.

The inherent contradiction can be seen by comparing the first and second paragraphs of the instruction. The first paragraph says the intent to kill must be both "formed before the killing" and "present in the mind at the time of the killing." The second paragraph conflicts with these statements when it says "it will be sufficient proof of premeditation if the circumstances of the killing and the conduct of the accused convince you...of the existence of premeditation at the time of the killing." This paragraph eliminated the requirement that the intent to kill "must be formed before the killing" by asserting premeditation is established if the intent to kill exists at the time of the killing.

The standard instruction also fails to adequately define the element of premeditated design. The instruction requires only that the defendant "consciously decid[e]" to kill; it does not require that that decision be fully formed upon reflection and deliberation, uninfluenced by a dominating passion based on an adequate provocation. The instruction says only that enough time must pass between the formation of the intent to kill and the killing itself. "to allow reflection by the defendant" (emphasis added). It does not require that the defendant actually reflect and deliberate upon that intent to the extent that he was fully conscious of that intent and the consequences of his act. In

other words, the instruction indicates premeditation may be found if the defendant had enough time to reflect, regardless of whether he did in fact do so. The concept of "reflection" - a crucial part of the premeditation formula - is mentioned only **once** in the instruction; the term is not defined and, as noted above, the instruction does not require the state to prove the defendant actually did reflect upon his intent (only that he had time to do so). The **second** crucial part of the premeditation formula - "deliberation" - is not mentioned in the instruction at **all,** despite the fact that it has been recognized that :

> Deliberation is the element that distinguishes first and second degree murder. [Citation omitted]. It is defined as a prolonged premeditation and so is even stronger premeditation.
>
> **Owen v. State 441 So.2d 1111,1113 F.N. 4 (Fla.3rd DCA 1983)**

Read as a whole, the instruction could reasonably be interpreted as follows :

> Premeditation means the defendant had consciously decided to kill the victim at the time of the killing, provided the defendant had enough time to reflect upon this decision before the killing, regardles of whether he actually did so reflect.

This reformulated instruction is obviously inadequate to define the offense of murder from a premeditated design. **Yet,** read as a whole, the standard instruction could lead a reasonable juror to conclude that the reformulated instruction is an accurate definition of the offense. The standard instruction thus fails to adequately and properly define the elements of the offense.

In the present **case**, the **state** basically argued this reformulated instruction in its closing argument :

> [P]remeditated...means simply killing **after** consciously deciding **to** do so, whether in an instant, the instant it takes to aim and pull the trigger in a firearm death, that's sufficient time to reflect on that, that person's going to die by my actions, I want this to occur.
>
> **R. 978.**
>
> We've talked about the definition of premeditated being killing after consciously deciding to do so. Not cold blood, not planned for three **days**, but in the instant that it takes you to realize that you are going to **effect** someone's death, to reflect on that, act on it and continue.
>
> **R. 986.**

This Court has recognized that the **standard** jury instructions are not necessarily accurate, and that they may be confusing and misleading. State v. Smith 573 So.2d 306 (Fla.1990) (standard instruction on excusable homicide "may mislead"); Yohn v. State **476** So.2d **123(Fla.1985)(standard** instruction on insanity does "not adequately and correctly charge the jury"). This Court has also recognized that the failure to completely and adequately define premeditation is fundamental error. In Anderson, infra, this Court said:

> [T]he one essential element which distinguishes first-degree murder from second-degree murder is premeditation.... Thus, premeditation is the ever-present **distin**guishing **factor**; and no doubt should be left in the minds of the jury as to its complete and full legal import. No door should be left open for confusion as to what it means,.

> Without the full and complete definition of premeditation, the jury would have neither an understanding of what they were looking for to determine it, nor what to exclude to reject it.

**276 So.2d at 18 (Quoting Polk v. State 179 So.2d 236 (Fla. 2nd DCA 1965) (Emphasis added)**

The standard instruction also violates a defendant's state and federal constitutional right to due process because it relieves the state of the burden of proving all the elements of the crime with which he is charged beyond a reasonable doubt. Mullaney v. Wilbur 421 U.S. 684,95S.CT.1881,44 L.ED. 2d 508 (1975). The instruction also creates an unconstitutional presumption: after stating the premeditated design "must be formed before the killing," the instruction then goes on to state premeditation is established "if the circumstances of the killing and the conduct of the accused convince you beyond a reasonable doubt of the existence of premeditation at the time of the killing." In effect, the instruction says that "before the killing" premeditation may be presumptively established by circumstances and conduct establishing "at the time of the killing" premeditation. It is well-settled, this type of presumption is unlawful. Francis v. Franklin 471 U.S.307,105S.Ct. 1965, 85 L.Ed. 2d 344(1985); Sandstrom v. Montana 442 U.S. 510,99 S.CT. 2450 61 L.Ed. 2d 39(1979).

**ISSUE V -- THE TRIAL COURT ERRED IN EXCUSIDJG A POTENTIAL JUROR FOR CAUSE WITHOUT GIVING DEPENDANT A CHANCE TO QUESTION OR REHABILITATE THE JUROR.**

In the opening portion of voir dire, prior to the potential jurors being questioned by either attorney, the trial court asked several questions of each prospective juror. One such question concerned the juror's views on the death penalty. In response to the court's question, prospective juror Harvard said he was "opposed to the death penalty." R. 611. The following exchange then occurred :

> THE COURT: Would you automatically vote against imposition of the death penalty without regard to the evidence shown or the instructions of the Court in all cases?
>
> VENIREMAN HARVARD: Yes, sir.
>
> THE COURT: Counsel approach the bench.
>
> (Bench Conference)
>
> THE COURT: I intend -- I think that there's a wealth of authority that would indicate that an individual that would vote against the death penalty in all cases, regardless of the evidence and the law, is not qualified to sit on a First Degree Murder case where a death penalty is a possibility. It appears clearly to the Court that Mr. Harvard has fallen in that category.
>
> [Defense Counsel]: For the record, didn't he say that no matter what the evidence was, he wouldn't vote for the death penalty. Is that what he said, Judge?
>
> [Defense Counsel]: He didn't have to vote for it. It's would he consider it.
>
> [Defense Counsel]: Would he consider it, could you ask him that?

> THE COURT: Well, I'll tell you what, let me hear his precise response that he gave, Madam Court Reporter, to my question.
>
> (Whereupon the court reporter read back)
>
> THE COURT: That's as clear as the Court can phrase. I see no further inquiry would be fruitful. Do you wish to confer with your client on that?
>
> [Defense Counsel]: I already have and we're objecting to --
>
> THE COURT: All right. That individual will be excused by the Court over Defense Counsel's objection.
>
> **R. 611-12.**

Over defendant's objection, juror Harvard was excused for cause. R. 612. This was error.

O'Connell v. State 480 So.2d 1284(Fla. 1984) is directly on point. It is reversible error in a capital case to excuse a juror for cause over a defense objection without giving the defense a chance to examine (and possibly rehabilitate) that juror. Such actions by the trial court deprive the defendant of his state and federal constitutional rights to a fair and impartial jury and due process. See Wainwright v. Witt 469 U.S. 412,105 S.Ct. 844, 83 L.Ed. 2nd 841(1985). Such actions also violate the defendant's eighth amendment rights by increasing the possibility that the death penalty will be imposed in an arbitrary manner.

It was error to excuse this juror for cause.

**ISSUE VI -- THE TRIAL COURT ERRED IN FINDING THIS MURDER WAS COMMITTED IN A COLD, CALCULATED AND PREMEDITATED FASHION.**

The trial court relied on two circumstances to find this aggravator was established: defendant's statement to cellmate Pope in 1986 that he "should have killed" his last victim because "then he wouldn't have been in trouble," R. 832-33, and the abortive attempt to bury June Hunt's body. From this, the trial court concluded defendant had a premeditated plan to eliminate June Hunt so she would not be the witness that returned him to prison. R. 312.

This aggravator is "intended to apply to execution or contract-style killings." Garron v. State 528 So.2d 353, 358 (Fla.1988). To establish this aggravator, it must be shown "the defendant's actions were accomplished in a calculated manner, i.e., by a careful plan or prearranged design to kill." Holton v. State 573 So.2d 284,292(Fla.1990). It is not enough to show the defendant killed "intentionally and deliberately." Maxwell v. State 443 So.2d 967,971(Fla.1983); rather, it must be shown the defendant had a "deliberate plan formed through calm and cool reflection...." Santos v. State 16 FLW S633, 636(Fla.1991). This aggravator is not automatically established when the death results from a choking which took several minutes to accomplish. Hardwick v. State 461 So.2d 79(Fla.1984).

As noted, the trial court relied on defendant's statement to Pope and his attempt to bury the body to establish this aggravator. From this, the trial court concluded "defendant

willfully eliminated the present victim...in an attempt to avoid detection." R. 312.

The trial court's logic seems to proceed as follows : three years prior to June Hunt's death, defendant expressed regret at not killing Linda McQuaid because, had he done so, he would not have been sent to prison. Some time after meeting June Hunt, defendant formed a careful plan to kill June Hunt, so she could not testify against him and send him back to prison. In furtherance of this plan, he started digging a grave in his back yard sometime after killing her.

This logic is flawed at several points and it relies on assumptions that are not established beyond a reasonable doubt. Most particularly, why would defendant be worried about June Hunt sending him back to prison? The obvious answer : because he raped her. However, it is sheer speculation to conclude defendant raped June Hunt, much less that he had a careful, prearranged plan to kill her afterwards. Again, the circumstances under which June Hunt died are unknown. The evidence is uncontradicted that she voluntarily left the doughnut shop with defendant: there was no abduction or coercion involved. There is nothing in the record to show she did not voluntarily accompany him to his house. There is nothing in the record to show there was any sexual battery. As argued above, any sexual activity would have been consensual; indeed, it is possible any choking could have started consensually. Regardless of whether the choking was consensual or nonconsensual, the resultant death could have been unintentional.

Assuming the killing was intended, there is nothing in the record to establish when that intent was formed.

The abortive attempt to bury the body only tends to negate, rather than establish, this aggravator. If defendant had formulated a careful plan or prearranged design to kill June Hunt, he surely would have come up with a better solution for disposing of the body. Being caught by friends while digging a makeshift grave in one's backyard in the middle of a residential neighborhood on a Sunday afternoon shows a desperate panic, not a calculated prearranged design.

This aggravator was not established beyond a reasonable doubt.

**ISSUE VII -- THE DEATH PENALTY IS DISPROPORTIONATE**

As argued above, there is only one valid aggravator in this case : that defendant has a prior violent felony conviction. The cold, calculated and premeditated aggravator found by the trial court was not sufficiently established.

As discussed in Issue IX below, defendant presented significant mitigating evidence. It is well-settled "death sentences supported by one aggravating circumstance [will be affirmed] only in cases involving 'either nothing or very little in mitigation'." Nibert v. State, 574 So.2d 1059,1063(Fla.1990) quoting Songer v. State, 544 So.2d 1010,1011(Fla.1989). The death penalty is thus disproportionate here.

**ISSUE VIII -- THE SENTENCING *JURY'S* RECOMMENDATION WAS FUNDAMENTALLY TAINTED BECAUSE IT BAD HEARD (IN THE GUILT PHASE) HIGHLY PREJUDICIAL EVIDENCE OF NONSTATUTORY AGGRAVATING CIRCUMSTANCES**

The jury that made the recommendation in the penalty phase was the same jury that heard the evidence in the guilt phase. Thus, the sentencing jury was fully aware of the gruesome facts concerning 1) the two similar fact attacks for which defendant was not convicted (Sleek and McQuaid) 2) Kimberly Byerly's testimony about "six hours of mental abuse," including chopping off her fingernails in a garbage disposal; and 3) cellmate Pope's testimony about defendant's sexual proclivities. This evidence would clearly be inadmissible in the penalty phase because it does not go to establish any statutory aggravators or rebut any mitigating evidence defendant presented. This evidence was not specically reiterated in the penalty phase; the only new evidence introduced by the state at that time was certified copies of the convictions defendant had suffered for the other two similar fact offenses. R. 1045-46. However, the state prefaced the introduction of these documents by asserting (in the jury's presence) "Judge, we have no additional evidence other than the evidence presented in the initial phase of the trial..." R. 1045 (emphasis added). Thus, it is wholly unrealistic to expect the jury gave this evidence no thought during its sentencing deliberations.

In Elledge v. State 346 So.2d 998 (Fla.1977), this Court addressed a similar situation. In the penalty phase of that case, the jury heard a taped confession to a murder for which the defendant had not yet been convicted. Although the defendant did

not object to this tape being played, this Court said "that should not be conclusive of the special scope of review by this Court in death penalty cases." Id. at 1002. This Court found the jury's consideration of the non-conviction murder was not "harmless because of the lack of objection and the existence of substantial additional aggravating circumstance.'' Id. Rather, the sentence was vacated and the cause remanded for resentencing because :

> Regardless of the existence of other authorized aggravating factors we must suard against any unauthorized aggravating factor going into the equation which might tip the scales of the weighing process in favor of death.
>
> ...
>
> Would the result of the weighing process by both the jury and the judge have been different had the impermissible aggravating factor not been present? We cannot know. Since we cannot know and since a man's life is at stake, we are compelled to return this case to the trial court for a new sentencing trial at which the factor of the [non-conviction] murder shall not be considered.

**Id. at 1003 (Emphasis added)**

Castro V. State 547So.2d lll(Fla.1989) is also on point. In Castro, this Court held it was harmless error to introduce evidence of an uncharged assault during the guilt phase of the defendant's trial. However, the error tainted the penalty phase, even though the uncharged misconduct evidence was not reiterated at that time. As in the present case, in Castro the state presented no new penalty phase evidence, asserting it would simply "proffer all the evidence...that was admitted in the first phase,

in support of...the aggravating circumstances...." 547 So.2d at 116. In finding the error harmful in the penalty phase, this Court stated :

> Substantially different issues arise during the penalty phase of a capital trial that requires analysis qualitatively different than that applicable to the guilt phase, What is harmless as to one is not necessarily harmless as to the other, particularly in light of the fact that a Williams rule error is presumed to infect the entire proceeding with unfair prejudice.

**Id. at 115.**

Also worth noting is Williams v. State 117 So.2d 473 (Fla.1960). Although this case predated the present capital sentencing statute, this Court nonetheless recognized that the jury's consideration of improperly admitted similar fact evidence during its sentencing deliberation is harmful error because it "may well have influenced the jury to find a verdict resulting in the death penalty [rather then] a recommendation of mercy...." Id. at 476.

As in the above cases, in the present case the jury's recommendation was fundamentally tainted by the fact that it was aware of this devastating evidence, evidence that clearly has no place in the Florida capital sentencing scheme. This violated defendant's state and federal constitutional rights to a procedurally and substantively fair and impartial sentencing determination, in which the sentencer's discretion is properly channeled to prevent an arbitrary and capricious result. Defendant is entitled to a new sentencing hearing before a new jury. Lucas v. State 490 So.2d 943(Fla.1986).

**ISSUE IX -- THE TRIAL COURT IMPROPERLY IMPOSED THE DEATH PENALTY BECAUSE IT IMPROPERLY CONSIDERED NON-STATUTORY AGGRAVATING CIRCUMSTANCES, IT FAILED TO FIND MITIGATING CIRCUMSTANCES THAT DID IN FACT EXIST, AND IT FAILED TO PROPERLY BALANCE AND WEIGH THE AGGRAVATING AND MITIGATING CIRCUMSTANCES.**

In considering the aggravator of prior violent felony convictions, the trial court improperly considered the testimony of all four similar fact witnesses, "all of whom were victims of the defendant's acts of violence." R. 311. However, defendant had suffered actual convictions for only two of these offenses. R. 252. It is well-settled that prior violent acts for which no convictions had been obtained cannot be considered as aggravating circumstances. Elledge, infra. When such non-statutory aggravators are expressly considered by the sentencing judge, the death sentence must be vacated. Id,; Atkins V. State 452So.2d 529 (Fla. 1984); Mikenas V. State 367 So.2d 606(Fla.1979).

The trial court also erroneously failed to find the existence of mitigating circumstances which were established by undisputed evidence, and failed to properly evaluate and weigh the mitigating circumstance against the sole aggravating circumstance.

This Court has outlined the proper procedure in this regard as follows :

> When addressing mitigating circumstances, the sentencing court must expressly evaluate in its written order each mitigating circumstance proposed by the defendant to determine whether it is supported by the evidence and whether, in the case of non-statutory factors, it is truly of a mitigating nature. [Citation omitted]. The court must find as a mitigating circumstance each proposed factor that has been reasonably established by the evidence and is mitigating in nature....

> The court next must weigh the aggravating circumstances against the mitigating and, in order to facilitate appellate review, must expressly consider in its written order each established mitigating circumstance.
>
> **Campbell v. State 571 So.2d 415,419-20 (Fla. 1991)**

A mitigating circumstance will be "reasonably established by the evidence" as follows :

> Where uncontrovered evidence of a mitigating circumstance has been presented, a reasonable quantum of competent proof is required before the circumstance can be said to have been established..., Thus, when a reasonable quantum of competent, uncontroverted evidence of a mitigating circumstance is presented, the trial court must find that the mitigating circumstance has been proved. A trial court may reject a defendant's claim that a mitigating circumstance has been proved, however, provided that the record contains "competent substantial evidence to support the trial court's rejection of these mitigating circumstances." [Citation omitted]
>
> **Nibert v. State 574 So.2d 1059,1062 (Pla.1991)**

"Mitigating evidence must at least be weighed in the balance if the record discloses it to be both believable and uncontroverted, particularly where it is derived from unrefuted factual evidence." Santos v. State 16FLW S 633,634(Fla.1991).

In the present case, the trial court failed to find, consider and weigh several non-statutory mitigating circumstances which were established by uncontroverted evidence.

Both of defendant's stepparents testified without contradiction that, as a child defendant was diagnosed as having

brain damage that caused serious behavorial problems, and that he needed special assistance to keep up in school. R. 1051,1054,1056-57. This Court has recognized such facts constitute a non-statutory mitigating circumstance. State v. Sireci 502 So.2d 1221 (Fla.1987); Mason v. State 489So.2d 734(Fla. 1986); Neary v. State 384 So.2d 881(Fla.1980). Both parents also testified without contradiction that defendant was a good and loving son, and that they continued to love and support him. R. 1053-54, 1056-58. This Court has also recognized such facts are valid non-statutory mitigation. Thompson v. State 456 So.2d 444 (Fla.1984).

It is also uncontradicted defendant was under the influence of drugs and alcohol during the crucial time period. The Corretjers and McDonald testified that defendant was drinking the whole weekend. R. 789,793,798,803,812-13. Ralph Corretjer said defendant was "doing a lot of pills...downs," R. 797, and he had passed out on his brother's couch in the afternoon of April 2. R. 799. The waitress at the doughnut shop where defendant met June Hunt said defendant asked her where his food order was after he had already eaten it, and he "was coming down from a high." R. 743. Defendant said he had been "drinking pretty heavily" at the bar until he met June Hunt about 2:00 a.m., R. 907, and that he drank beer and smoked marijuana after they got to his house. R. 909-11. He said he was "pretty drunk" and he "passed out." R. 911. This Court has held on numerous occasions "such evidence must be considered in mitigation...especially where established by uncontroverted factual evidence in the record." Hardwick v.

State 521 So.2d 1071,1076(Fla.1988); Smalley v. State 546 So.2d 720 (Fla.1989)("minor marijuana use on the day of the killing"); Fead v. State 512 So.2d 176(Fla.1987)(collecting cases).

In its sentencing order, the trial court noted the "reference to beer and cocaine consumption'' when considering the statutory mitigator of "under the influence of extreme mental or emotional disturbance," but it concluded "it was not established to exist at the level envisioned as to constitute mitigation." R. 313. The trial court did not consider this as a non-statutory mitigator; nor did it specifically address the other non-statutory mitigating evidence, Rather, with respect to non-statutory mitigation, the court simply stated as follows:

> The jury had the opportunity to consider all facts in addition to those that comprise statutory aggravating and statutory mitigating circumstances. This Court did as well. Further, this Court notes that nothing additional was presented at this sentencing hearing. This Court now finds that mitigation under this "catch all" option does not exist.
>
> R. 314.

The trial court concluded "there are no (0) mitigating elements" and that "the aggravating circumstance (elements) substantially outweigh any mitigating circumstance (statutory element) and any other mitigation two (2) to zero (0), thus the penalty of death is imposed...." R. 314-15.

The trial court's sentencing order improperly considered nan-statutory aggravating circumstances and it failed to expressly evaluate and consider undisputed mitigating evidence for which

there was a reasonable quantum of competent proof. The trial court also failed to properly evaluate and weigh the aggravators and mitigators; rather, the court simply engaged in "a mere counting [or] tabulation of the aggravating and mitigating circumstances." Floyd v. State 569 So.2d 1225,1233(Fla.1990). This was improper both as a matter of state and federal law, as it deprived defendant of an individualized sentencing determination and led to the death penalty being imposed in an arbitrary and capricious manner, Forman v. Georgia 408 U.S.238,33 L.Ed.2d 346, 92 S.Ct. 2726(1972). The sentence must be vacated and the cause remanded for resentencing.

## IV. CONCLUSION

In the alternative, defendant requests this Court to vacate the judgment and/or the sentence and :

1. Remand for entry of a judgment of acquittal;

2. Remand for entry of a judgment of conviction of a lesser offense and for resentencing;

3. Remand for imposition of a life sentence;

4. Remand for a new capital sentencing hearing before a new jury; or

5. Remand for a new capital sentencing hearing before the trial court.

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. Mail to the Attorney General, 2002 North Lois Avenue, Suite 700, Tampa, Florida 33607-2366 on October 28, 1991.

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