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 REPLY BRIEF

RICHARD J. SANDERS, ESQUIRE
COUNSEL FOR APPELLANT
2728 52ND ST. SOUTH
GULFPORT, FL 33707
(813) 321-5913
FLORIDA BAR NO. 394701

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ISSUE II -- The striking similarity requirement applies here for two reasons. First, the striking similarity requirement applies to all similar fact evidence and evidence in this *case* was similar fact evidence. Second, identity-thorugh-modus-operandi is exactly what the state was trying to prove here.

The striking similarity requirement was not met. Asssuming arguendo the four similar fact incidents were strikingly similar to *each* Other, that by itself does not support admissibility. Rather, a striking similarity to the charged offense must be shown. No such similarity was shown in the present *case.*

The state's proffered relevance theories are all founded upon a simple propensity theory : that defendant must have raped and strangled June Hunt because he has done similar things in the past. The state's relevance theories are either simple rephrasings of this ultimate fact, or they address issues that are based upon the establishment of this fact. The similar fact evidence was used to do nothing less than prove the state's entire case. Without *the* similar fact evidence, *the* state proved *only* a set of vaguely suspicious circum-*stances*, with no clue as to exactly haw or why June Hunt died. The *exact*

circumstances of her death were established entirely by the similar fact evidence. The line of logic by which the circumstances were established is based *on* defendant's propensity : he must have raped and strangled June Hunt because he has that character trait.

ISSUE III -- The state does not address defendant's argument *on* this point : that such testimony was improper character evidence because it was not reputation testimony and defendant did not put his character in issue. The Swafford *case* cited by the state is distinguishable. In Swafford, the challenged statement was viewed as a direct admission to the charged crime; in the present *case*, defendant's statements are not admissions to the charged crime but rather statements concerning his general character. The Jackson "thoroughbred killer" case is directly on point : Pope's testimony only establishes that defendant was a "throughbred strangler" and was relevant to prove only that defendant must have acted in conformity with that character trait by strangling June Hunt.

ISSUE IV -- Defendant did not waive this issue because the failure to adequately define premeditation for the jury is fundamental error.

ISSUE V -- The criminal rules of procedure specifically provide that defense counsel must be given an opportunity to question *each* prospective juror. Defense counsel was deprived of that opportunity here. The O'Connell *case* is directly on pint.

ISSUE VI -- The trial court erred in finding this murder was committed in a cold, calculated and premeditated fashion. The error was not harmless because there is only one valid aggravator and significant mitigating evidence.

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ISSUE IX -- The trial court specifically considered nonstatutory aggravating circumstances in its sentencing order when it specifically mentioned *the* Sleek and McQuaid attacks as part of the aggravator of prior violent felony convictions. The fact that the jury was instructed *on* non-statutory mitigators is irrelevant to this point. The trial court's conclusory statement that "mitigation under this 'catch-all' option does not exist", R. 314, is insufficient to show the court properly considered and balanced the mitigating evidence, particularly in view of the fact that the uncontradicted evidence reasonably established several recognized nonstatutory mitigators.

II. ARGUMENT

ISSUE I -- THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE CONVICTION BECAUSE THE 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 asserts a cocaine overdose is not a reasonable hypothesis because both the medical examiner and the toxicologist testified to that effect. However, Dr. Corcoran said asphyxiation was "probably" the cause of death, R. 754, 765, but he was "not absolutely sure." R. 765. Although asserting asphyxiation might not cause visible physical injuries, R. 756, he admitted "there are cases where there has been rather extensive neck trauma.. .." R. 769. He admitted that "people have died from low levels of cocaine", R. 763, and that it was possible that happened here. R. 763-64. The toxicologist confirmed this. R. 780-84. Neither witness could say what effect June Hunt's pregnancy might have had on this possibility. R. 764, 783-84.

Such testimony is insufficient to establish strangulation as the cause of death.

Citing several prior cases from this Court, the state further asserts it "introduced competent evidence which is inconsistent with the defendant's theory of events'', thus warranting the denial of defendant's motions for judgment of acquittal. Ans.Br., P.13 (quoting State v. Law 559 So.2d 187, 189 (Fla.1989)). The state cites the following to support this conclusion :

> Appellant had testified to his observation of the victim allegedly smoking crack cocaine three times before he went to bed.

> (R. 941-942; R. 983.) Appellant claimed he found the body just laying on the livingroom floor. (R. 917.) Dr. Corcoran stated that the body did not appear to be in the natural position it would fall into, (R. 758, 989-990.) Appellant told his friends at work that he picked up a girl who was out of gas and that he didn't know what her auto problem was and presumably didn't ask. (R. 991-992; R. 792, R. 805, R. 907-908, R. 939-940, R. 743.) Appellant testified that he didn't have sex with the victim (R. 913), whereas he told his friends at work that he had. (R. 793, 805, 814.) Appellant claimed the girl telephoned him while at work to ask when he would return from work (R. 914) when witness Ben Corretjer testified he received no phone call that day. (R. 956.)
>
> Hoefert testified that he dug the hole in the back yard after the victim was dead (R. 923), that he lied to Detective Kappel when he told him he was really digging a hole to bury trash (the same lie he told to Nancy Jones). (R. 924.) Appellant admitted changing his appearance, fleeing the state, destroying evidence and lying to the police. He admitted telling Detective Kappel that he didn't want another officer present because he wanted it to be his word against Hoefert's. (R. 925.)
>
> **Ans. Br., P. 14-15**

First, it must be remembered that defendant moved for a judgment of acquittal at the close of the state's case. R. 893-94. The propriety of the trial court's denial of that motion must be judged by reference to the evidence at that point. See State v. Pennington 534 So.2d 393 (Fla.1988). At that point, none of the alleged inconsistencies cited above had been established. At the close of the state's case, there was no "defendant's story."

Second, the state does not prove it's case simply by proving the defendant is lying. See Howard v. State 552 So.2d 316

(Fla. 2nd DCA 1989) ("it is axiomatic that the trier of fact is free to disbelieve the testimony of a witness who has been impeached or discredited [;] it is another matter to suggest that this same testimony may somehow resurface as proof of guilt.")

In his Initial Brief, defendant argued that, even if the evidence is sufficient to establish strangulation as the cause of death, the evidence is still insufficient to establish the requisite premeditated intent. Defendant presented several reasonable hypotheses that are consistent with the evidence : consensual sex with nonconsensual choking; consensual sex with consensual choking; and any number of other possibilities that had little or nothing to do with sexual activity. The state rejects these hypotheses because 1) "[Defendant] himself did not urge it [in his] testimony at trial", and 2) "The totality of the circumstances including his technique of disabling women, his admission to Pope about not making the same mistake again to lead to his imprisonment, his attempt to bury the body, flight to Texas and lies to Detective Rappel." Ans.Br., P.15-16.

As to point #1, as noted above the evidence must be assessed as it existed at the close of the state's case without regard to defendant's testimony at trial. The state presented no evidence to directly establish the sequence of events leading to June Hunt's death. Thus, defendant's trial testimony is irrelevant in determining the propriety of the denial of the motion for judgment of acquittal at the close of the state's case. Further, as also noted above, the state does not meet its burden of proof

simply by impeaching the defendant's testimony.

As to point #2, defendant's "technique of disabling women" does not establish a premeditated design to kill June Hunt. Defendant's "admission to Pope about not making the same mistake again" does not establish this element either : to reach the state's conclusion, we must assume that defendant did rape June Hunt (since it makes no sense to conclude he would intentionally kill her before raping her) and then killed her to prevent her from reporting that crime to the authorities, These are large inferences to be based on a casual jailhouse "tough guy" boasting that occurred several years before, particularly in view of the facts that 1) there is no evidence of rape in the present case and 2) defendant did not kill either Sleek or McQuaid despite the fact he had been previously sent to prison by the testimony of Byerly and Salstrom.

As to the "flight" evidence of defendant's "attempt to bury the body, flight to Texas and lies to Detective Kappel", such evidence does not establish a premeditated design either. Flight evidence may establish consciousness of guilt, but guilt of what? The killer's mental state is not established by his flight after the killing. The second degree murderer is as likely to flee as the first degree murderer. Further, the inference of guilt raised by flight evidence is tenuous at best. The United States Supreme Court has asserted :

> We have consistently doubted the probative value in criminal trials of evidence that the accused fled the scene of an actual

> or supposed crime. In [a prior case] this Court said: ". . .it is not universally true that a man who is conscious that he has done a wrong, 'will pursue a certain course not in harmony with the conduct of a man who is conscious of having done an act which is innocent, right and proper'; since it is a matter of common knowledge that men who are entirely innocent do sometimes fly from the scene of a crime through fear of being apprehended as the guilty parties, or from an unwillingness to appear as witnesses. Nor is it true as an accepted axiom of criminal law that 'the wicked flee when no man pursueth, but the righteous are as bold as a lion.'"
>
> **Wong Sun v. United States 371 U.S. 471, 483 N.10, 83 S.Ct. 407, 415, 9 L.Ed. 2nd 441(1963)**

This Court has also recognized that "flight alone is no more consistent with guilt than innocence." Merritt v. State 523 So.2d 573,574(Fla. 1988); Fenelon v. State 17 FLW S101(Fla. 1992) (disapproving future use of flight instruction).

In the present case, the tenuous probative value of the flight evidence is shown by the state's own crucial evidence : defendant's past history. Given that, it is to be expected he would flee (regardless of the circumstances of June Hunt's death) because he would fear precisely what eventually occurred : no one would believe him and he would be accused of murder.

Assuming arguendo the evidence establishes that defendant killed June Hunt, the requisite premeditated state of mind has not been established.

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

The argument in the Initial Brief *can* be outlined as follows:

I. THE SIMILAR FACT EVIDENCE WAS INADMISSIBLE. BECAUSE NEITHER THE STRIKING SIMILARITY REQUIREMENT NOR THE RELEVANCY REQUIREMENT WERE MET.

A. STRIKING SIMILARITY :

1. The striking similarity requirement applies in the present case.

a. The striking similarity requirement is not limited to identity-through-modus-operandi cases

b. The similar fact evidence in the present case was relevant solely to prove identity-through-modus-operandi.

2. The striking similarity requirement was not met in the present case.

a. The similar fact incidents were not strikingly similar to the charged offense.

i. None of the similar fact victims were killed.

ii. The facts of the charged offense are largely unknown and thus cannot be compared to the similar fact incidents.

b. The similar fact incidents were not strikingly similar to each other.

B. RELEVANCE : Assuming arguendo the striking similarity requirement either does not apply or was met, the similar fact evidence is not relevant to any material issue of fact, other than to show bad character or propensity.

11. ASSUMING ARGUENDO THE SIMILAR FACT EVIDENCE WAS RELEVANT AND OTHERWISE ADMISSIBLE, DEFENDANT WAS UNFAIRLY PREJUDICED BY THE VOLUME OF THE TESTIMONY.

The points raised in the state's answer brief shall be discussed using this outline as a guide.

POINT I. A. 1a. -- THE STRIKING SIMILARITY REQUIREMENT IS NOT LIMITED TO IDENTITY - T CASES.

The state asserts the striking similarity requirement only applies when identity-through-modus-operandi is what is sought to be proven. Ans.Br., P. 26, 32. The state ignores several prior cases from this Court, which hold otherwise, including Henry v. State 574 So.2d 73(Fla. 1991) ("to be admissible under the Williams rule, an event must be similar to the crime for which the defendant is being tried and must tend to prove same fact in issue"); Garron V. State 528 So.2d 353(Fla. 1988) ("the focal point of analysis is whether there is actually any similarity between the alleged misconduct and the crime for which the appellant stands trial. That is, does the 'similar' fact bear any logical resemblance to the charged crime"); Huering V. State 513 So.2d 122(Fla. 1987) (striking similarity required even though "identity is not an issue"); and Thompson v. State 494 So.2d 203(Fla. 1986) (uncharged murder inadmissible because it is "not sufficiently similar in accordance with the standards set forth in Williams....").

The state does not address the arguments in the Initial Brief concerning the plain wording of the Williams decision itself and the difference in wording between §90.404(2)(a) and the comparable Federal Rule of Evidence. See Int. Br., P. 45-49. Rather, to support its contention, the state cites two cases from this Court -- Bryan v. State 533 So.2d 744(Fla. 1988) and Amoros v. State 531 So.2d 1256(Fla. 1988) -- and five District Court opinions : Gould v. State 558 So.2d 841(Fla. 2nd DCA 1990); Jensen v. State 555 So.2d 414(Fla. 1st DCA 1989); Coleman V. State 484 So.2d 624 (Fla. 1st DCA 1988); Mitchell V. State

491 So.2d 596(Fla. 1st DCA 1986) and Rossi v. State 416 So.2d 1166 (Fla. 4th DCA 1982). Ans. Br., P. 26 and 33. However, these cases did not support the state's position.

In Bryan, this Court affirmed a first degree murder conviction and held that evidence of uncharged crimes committed by the defendant was properly admitted. The defendant objected to evidence of an uncharged bank robbery and an uncharged boat theft. Rejecting the defendant's argument, this Court said "evidence surrounding the bank robbery was relevant to the issue of [the defendant's] ownership and possession of the murder weapon", and evidence of the boat theft "gave the jury a full and accurate picture of how [the defendant] came in contact with the victim and the full context of the crime." 533 So.2d at 747. In reaching that conclusion, this Court asserted :

> Evidence of "other crimes'' is not limited to other crimes with similar facts. So-called similar fact crimes are merely a special application of the general rule that all relevant evidence is admissible unless specifically excluded by a rule of evidence. The requirement that similar fact crimes contain similar facts to the charged crime is based on the requirement to show relevancy. This does not bar the introduction of evidence of other crimes which are factually dissimilar to the charged crime if the evidence of other crimes is relevant.

Id. at 746

Bryan thus recognizes the distinction between "similar fact" evidence and the broader category of "other crimes" evidence discussed in the Initial Brief. The *uncharged* crimes in Bryan were not "similar fact" crimes because they were connected to the charged crime by more than simply the defendant's involvement : they tended to show defendant's ownership and possession of the murder weapon and they explained how the defendant and the victim of the charged offense met each other.

Amoros was similar to Bryan's first theory of relevance: the uncharged crime in Amoros linked the defendant to *the* gun used in the charged crime. Again, this is not similar fact evidence because the charged and uncharged crimes are linked by something other than the defendant's involvement.

In Gould, the court noted "identity is not an issue in this case" and asserted "similar fact evidence relevant to prove a material fact other than identity need not meet the rigid similarity requirement applied when collateral crimes are used to prove identity." 558 So.2d at 485. As support for this conclusion, Gould directs the reader to "see Calloway V. State 520 So.2d 665, 668(Fla. 1st DCA 1988), Rev. denied, 529 So.2d 693(Fla. 1988)."

There are several problems with the quoted language. First, it is dicta. The Gould court noted the charged and *uncharged* acts "did share unique points of similarity"; it was "extremely similar behavior." The court went on to hold the similar fact evidence was admissible to prove the specific intent element of a kidnaping charge (against a defense of voluntary intoxication) even though identity was not an issue. The result in Gould is correct; however, since the striking similarity requirement was met in that case, the above quoted language is unnecessary to the decision.

Second, Gould conflicts with a prior case from the Second District: Edmond V. State 521 So.2d 269 (Fla. 2nd DCA 1988). In Edmond, the court reversed an attempted sexual battery conviction due to the improper admission of two uncharged sexual attacks. Citing and quoting Heuring, the court said "this striking similarity requirement applies when when identity is not an issue." 521 So. at 271 (emphasis added).

Finally, the authority the Gould court relies-on the Calloway decision-is itself suspect. In Calloway, the court upheld the use of two *uncharged*

acts in a child sexual offense prosecution. Citing and quoting this Court's Heuring decision, the Calloway court held the uncharged acts were admissible to corroborate the victim's testimony. Calloway rejected the defense argument that the uncharged acts were not strikingly similar by asserting "the rigidity with which the similarity requirement is applied in cases wherein the collateral crimes are introduced to prove a fact such as the identity of the perpetrator is not necessary in other situations such as the instant case where the evidence is relevant to corroborate the victim's testimony." 520 So.2d at 668. Oddly, Heuring is not mentioned at this point, despite the fact that opinion squarely holds to the contrary : the striking similarity requirement must be met when the similar fact evidence is used to corroborate the victim's testimony, even though "identity is not an issue." 513 So.2d at 125. Rather, as authority, Calloway cites another case relied upon by the *state* in the present appeal : Mitchell v. *State* 491 So.2d 596 (Fla. 1st DCA 1986). However, Mitchell is troublesome as well.

In Mitchell, the defendant was charged with manslaughter by culpable negligence and expoiting the elderly. Two elderly had died, and others had been very poorly cared for, at a nursing home the defendant operated. On appeal, the court approved the introduction of *the* following uncharged misconduct : the maltreatment of other residents of the same facility that housed the victims of the charged offenses; defendant's overcharging the relatives of the victims for the victims' poor care; the defendant's bouncing *checks* and failing to pay various expenses of the facility; and the defendant's recent similar problems with another facility of his in Iowa. Prior to discussing the facts of uncharged offenses, the District Court asserted the following :

> Williams Rule evidence is often referred to as "similar fact" evidence. Id. at 117. Indeed, Section 404(2)(a) uses that descriptive phrase, Such can be misleading for it is clear that some kinds of evidence admissible under the Williams Rule and under the above statute--i.e. evidence indicating that the accused has committed other crimes or reflecting adversely upon the accused's character —y not necessarily entail any factual similarities with the crime charged or with any other fact involved in the case.

491 So.2d 598

No authority is cited to support this assertion. The court went on to hold the uncharged misconduct was properly admitted to show the defendant's knowledge of the conditions at the hane, his motive for exploiting his patients and to establish the "exploitation" element one of the crimes charged,

Again, the result in Mitchell is clearly correct. However, its statement about the striking similarity requirement is not. First, Mitchell was decided before the later cases from this Court cited and quoted above. Second, most of the uncharged misconduct evidence in Mitchell was not similar fact evidence anyway : the evidence related directly to the events surrounding the *charged* offenses.

The third case the state relies upon here is Jensen V. State 555 So.2d 414 (Fla. 1st DCA 1989). That case upheld the used of eight uncharged prior burglaries committed at the *same* house against the same victim, who was the father of the defendant's girlfriend. The victim had ordered the defendant to stay away from his house and his daughter, but the daughter had given the defendant a key to the house (for after hours meetings). The court said the uncharged misconduct showed the defendant's intent and a common scheme or plan. In so doing, the court cited this Court's Bryan opinion (discussed above) and asserted "90.404(2) does not bar the introduction of other crimes which are factually dissimilar to the crime charged if the evidence of the other crimes is

relevant." 555 So.2d at 415. As further authority, the court also cited its prior decision in Calloway.

The problems with the Calloway opinion have already been discussed. As has also been discussed, Bryan recognizes the distinction between similar fact evidence and other crimes evidence, and does not purport to overrule or modify any of the cases from this Court holding the striking similarity requirement applies to all similar fact evidence. As in Bryan, Jensen does not involve classic similar fact evidence because of the obvious relation (other than the defendant's involvement) between the charged and uncharged acts : the victim - whom the defendant knows, and has a grudge against - is the *same* in *each* crime, the defendant has a unique opportunity (the key and the daughter's invitation) to commit the *crimes*, and it appears all *the* crimes are linked in a common plan that has a specific common motive.

The final two cases cited by the state - Coleman and Rossi - do not support its position either. Coleman upheld the use of similar fact evidence in a capital sexual battery prosecution. The court rejected the defendant's argument that the "collateral crimes were not sufficiently similar to the crime *charged*" by asserting "we view the collateral fact evidence to be both sufficiently similar...and relevant...." 484 So.2d at 627. In Rossi, the defendant raised an insanity defense to charges of kidnapping, sexual battery and attempted murder. The District Court held that evidence of a "remarkabl[y] similar[]" attack *ten* years before was admissible to rebut this defense. 416 So.2d at 1168. At no point in either opinion did either court even hint that the striking similarity requirement did not apply or could be modified depending *on* the issue to be proved.

Thus, the case law relied upon by the state does not establish that the striking similarity requirement does not apply to all similar fact evidence. The history of the "Williams Rule", as interpreted by recent decisions from this Court, shows that requirement does apply to all similar fact evidence. Since the present case involves the use of similar fact evidence, that requirement must be met.

POINT I. A. 1.b. - THE SIMILAR FACT EVIDENCE IN THE PRESENT CASE WAS RELEVANT SOLELY TO PROVE IDENTITY-THROUGH-MODUS-OPERANDI.

The state asserts the similar fact testimony in the present case :

> was not proffered for the specific purpose of establishing identity through a unique or unusual modus operandi; rather the evidence was proffered to cooroborate the cause of death, *to* counter defense contentions that the absence of trauma negated asphyxiation as a cause of death, to show that techniques existed by which a victim could be subdued and asphyxiated without significant struggle or injury and that the defendant both h e w of this technique and had the ability to effectively execute it. Additionally, the testimony of Pope corroborated *one* of the "Williams Rule" witnesses, and helped to establish motive, intent and the absence of mistake or accident.

Ans. Br., P. 31

Close examination of these proffered theories of relevance shows they all rely on an identity-through-modus-operandi logic. Assuming the evidence was sufficient to show June Hunt was strangled to death, we are still left with the question : who did it? That was the issue the similar fact evidence was offered to prove : that defendant must have been the one that strangled June Hunt because he has done similar things in the past. This simple truth *cannot* be avoided by merely rephrasing the theory of relevance in different terms; vinegar does not become wine by slapping a new label of the bottle.

The state's alternative theories of relevance will be discussed in the order presented in the Answer Brief. Regardless of what label the state attaches, modus operandi is what was sought to be proven here.

"To corroborate the cause of death"

The phrase "cause of death" must first be analyzed. The phrase can be viewed two ways. In a narrow sense, the phrase refers only to the mechanism of

June Hunt's death : someone strangled her. In its broader sense, the phrase includes the identity of the strangler : the cause of June Hunt's death was her king strangled& defendant.

Evidence corroborating the cause of death in the narrow sense falls into two categories : scientific, forensic, or medical evidence concerning the condition of June Hunt's body or the crime scene itself, and the testimony of eye-or earwitnesses who saw or heard something that looked or sounded like someone was strangling her during the relevant time frame.

The similar fact evidence in the present case does not corroborate the cause of death in the narrow sense, Rather, it corroborates the cause of death only in the latter, broader sense : the evidence shows, not simply that June Hunt was strangled, but that she was strangled by defendant. Thus, the similar fact evidence corroborates the cause of death by showing the identity of the strangler and proving his modus operandi. The theory of relevance here is simple and straight forward : Dr. Corcoran says June Hunt was strangled to death: June Hunt was seen in defendant's company during the relevant time period; defendant has raped and strangled four women in the past; in conformity with this propensity, defendant must have strangled June Hunt; therefore, Dr. Corcoran is *correct* in asserting strangulation is the cause of death. This is clearly a modus operandi theory.

> "To counter defense contentions that the absence of trauma negated asphyxiation as a cause of death."

This is simply a rephrasing of the "corroborating the cause of death" theory of relevance just discussed. Again, the similar fact evidence is not relevant in the narrow, abstract sense of proving it is theoretically possible

for someone to asphyxiate another without leaving tram. The similar fact evidence "counters defense contentions" by proving defendant must have strangled June Hunt because he has done similar things in the past.

> "to show that techniques existed by which a victim could be subdued and asphyxiated without significant struggle or injury and that the defendant both knew of this technique and had the ability to effectively execute it."

The first part of this theory of relevance is a rephrasing of the "counter defense contentions that the absence of trauma negated aphyxiation as the cause of death" theory just discussed : such "defense contentions" are "countered" by showing "techniques exist by which a victim could be subdued and asphyxiated without significant struggle or injury." This, of course, in turn "corroborates the cause of death." Again, the similar fact evidence was not admitted to prove - in the narrow, abstract sense - that techniques existed by which a victim could be subdued and asphyxiated without significant struggle or injury. Dr. Corcoran's testimony proved that fact. Of course, such abstract testimony tells us nothing about *the* identity of the strangler. The similar fact testimony proves that such "techniques" exist only by proving defendant has strangled four women in the past.

As to the similar fact testimony being used to prove "that the defendant both knew of this technique and had the ability to effectively execute it", several things must be noted. First, this assumes June Hunt was killed by a carotid restraint. There is no evidence *she* was killed by such a hold (as opposed to being choked face to face, a "technique" clearly so common that a defendant's "knowledge" of it would not be such a material issue as to justify the introduction of the similar fact evidence used here),

Second, this relevance theory is again premised on the assumption the carotid artery restraint is something that is not commonly known. Defendant argued in his Initial Brief the hold is "well-known, having generated a great deal of publicity (and controversy) in recent years." Int. Br., P. 54. The state asserts defendant's position is "without support in the record" and is "demonstrably false": the carotid restraint "is not common knowledge (at least outside martial arts devotees or law enforcement agencies)." Ans. Br., P. 24-25. Of course, the state's assertion is equally "without support in the record." As the proponent of this evidence, it is the state's burden to lay the foundation for its admission. No foundation was laid here.

Third, the similar fact evidence does not establish defendant's use of a carotid restraint an all four similar fact victims. Dr. Corcoran described the carotid restraint as follows :

> It's a neck hold in which the arm is put around the neck, like this (Indicating) so that the fold in the arm is right over the air pip. The air pipe is not compressed so that the side of the forearm and the upper arm then compress the blood vessels on the side of the neck, especially the carotid artery, so you do not get blood flow into the head. It could cause unconsciousness in approximately six seconds or slightly more.
>
> R. 757 (Emphasis added)

The four similar fact witnesses do not describe such a hold being applied on them by defendant. Only one was rendered unconscious, although it is not clear how long that took or if it was accomplished by the hold itself.

Byerly said defendant "put[] his am around my neck and in this fashion, with an object to my throat with the other hand [he had me] in an arm lock, sir, with his arm around my throat like this, pushing pressure on my throat." R. 842-43 (emphasis added). She did not pass out from this hold; to the contrary,

it made her "stand up and take notice" and she "grabbed his arm." R. 849. This does not describe a carotid restraint; rather, it sounds more like a bar-arm hold.

Sleek testified defendant "grabbed me around the neck [and] strangled me [until] I passed out." R. 856. She did not say how long this took. She said her head was "in his elbow", R. 856, but it is not clear if she passed out from the blockage of the flaw of blood to the brain, the blockage of her windpipe, or from sheer terror. Thus, it is not clear if this hold can be categorized as a carotid restraint.

McQuaid said defendant "grabbed me around the neck and slammed me into the sand." R. 882. Her head was "right in the middle of his arm" and she "couldn't breathe." R. 882. Although "real disoriented", she did not pass out and in fact "tried to pull his arm off my neck." R. 882. This again is clearly not a carotid restraint, but rather sounds more like a bar-arm hold.

Salstrom said defendant "grabbed me around my neck, spun me around and started strangling me." R. 889. Her head was "in the part of his arm" and he was "applying pressure." R. 889. She did not say she passed out. It is sheer speculation to say this was a carotid restraint.

Nor is it accurate to say the similar fact witnesses were sutdued quickly, without significant injury or bruising. Byerly said she "grabbed his arm" when defendant attacked her and she suffered "sane bruising...and soreness" as a result. R. 849-50. Sleek said her neck was "sore" after the attack. R. 859. McQuaid tried to pull defendant's arm off her neck, R. 882; she "had to wear a brace on [her] neck for about three months." R. 886. Salstrom said she had "quite a bit" of "visible bruises" for several days after the attack. R. 891-92. Obviously, since no autopsies were performed, we do not know what

internal damage any of these four suffered.

Even if we assume the similar fact attacks can all be said to involve a carotid restraint, we are left with a final major problem: how does the similar fact evidence prove defendant had the ability to effectively intentionally kill someone with a carotid restraint? There was not even an attempt to kill any of those four. The facts in those *cases* at *best* show a clumsy and ineffective attempt to use such a hold: of the four, only Sleek may be said to have been even rendered unconscious by the hold. *The* state's evidence shows defendant *cannot* even effectively knock someone unconscious with the hold, much less kill with it.

Beyond all the problems, at bottom defendant's knowledge of and ability to execute this hold is relevant to proving only one thing: identity-through-modus-operandi. Defendant must have intentionally strangled June Hunt to death because he knms how to do it.

> "THE TESTIMONY OF POPE CORROBORATED ONE OF THE 'WILLIAMS RULE' WITNESSES, *AND* HELPED ESTABLISH MOTIVE, INTENT AND THE ABSENCE OF MISTAKE OR ACCIDENT."

Pope's testimony *can* be divided into two basic components: the part that corroborates the testimony *of* similar fact witness McQuaid and the "thoroughbred strangler" part. The "thoroughbred strangler" testimony will be discussed in Issue III, below.

Pope's McQuaid corroboration testimony can be relevant only if McQuaid's testimony was itself properly admitted. Of course, McQuaid's testimony differs significantly from the testimony of the other three similar fact witnesses precisely because of the existence of Pope's corroboration. To fully understand this difference, the state's theory of the case must be closely examined.

Without the similar fact evidence, the state proved the following :

- June Hunt died sometime on April 1, or 2;

- Dr. Corcoran says the cause of death was strangulation, although there is no physical evidence to support this conclusion and there is some possibility Hunt died from a cocaine reaction;

- It is theoretically possible to strangle someone to death without leaving physcial evidence;

- Hunt was last seen alive in defendant's company, although defendant and Hunt were not together for m y hours over the crucial weekend;

- Defendant told his friends Hunt came to his apartment and they had sex;

- Hunt's semi-nude body was found in defendant's apartment; and

- After an aborted attempt to bury the body, defendant fled the state to avoid possible prosecution for Hunt's death.

Such evidence is woefully isufficient to support a first degree murder conviction. Assuming arguendo the necessary homicidal Violence (as *opposed* to an accidental cause of death, either by cocaine or by accidental ashyxiation) has been established, the identity of the killer is still subject to serious debate and the requisite premeditated design is not to be found.

The similar fact evidence establishes the following : on three occasions in the past, defendant attacked women in his company by grabbing them from behind *around* the neck, in a manner somewhat similar to a carotid restraint. He then raped all three women, *choking* them face-to-face in the process. He made no attempt to kill any of the three. On a fourth occasion, defendant grabbed a young woman from behind with a neck hold and slammed her to the ground. She escaped before anything further happened. Defendant was imprisoned as a re-

suit of this fourth attack. While there, he told his cellmate about the attack on McQuaid and expressed regret at not killing her (to prevent her from testifying against him).

The state asserts this similar fact evidence proves the following: defendant must have raped June Hunt, then killed her (using a carotid restraint) to prevent her from testifying against him. Thus, the McQuaid/Pope testimony establishes "motive, intent and the absence of mistake or accident" by assuming defendant raped and strangled June Hunt, as he has done in the *past*. This is clearly premised *on* a modus operandi theory.

"Identity-through-modus-operandi" is exactly what the similar fact evidence was used to prove in the present case. Thus, *even* if the striking similarity requirement only applies to such *cases*, that requirement still applies here.

POINT I. A. 2. -- THE **STRIKING SIMILARITY REQUIREMENT WAS NOT MET IN THE PRESENT CASE.**

The state makes no argument - as, **indeed,** it cannot - that the four similar fact incidents were strikingly similar **to** *the* charged offense. The state's argument is devoted to **proving** these incidents were sufficiently similar to ***each*** **other.** However, assuming arguendo **that** is **true,** that alone will not **justify** the admission of this evidence. Similar fact evidence **"must** be **similar to** the crime for which the defendant's being tried." Henry, infra, 574 So.2d at 75; Garron, infra, 528 So.2d at 357 ("the focal point of analysis is whether ***there*** is actually ***any*** similarity between the alleged **misconduct** and the [charged] crime.. **..").**

As to the similarity of *the* four uncharged **acts,** the state asserts they were **"extremely similar",** ***Ans.*** **Br.** P. 29, and notes :

> All four victims are initially assaulted from behind. The defendant uses a technique consistent with the carotid restraint (as described by Dr. Corcoran) to initially **subdue** the victim. The defendant **places** his arm around the victim's neck with **the "V"** of the **elbow** at **the** front, then applying **squeezing** pressure against **the** carotid arteries. All four victims are **subdued** or brought under control quickly without a struggle, or abrasion or scratching to the neck, Only one of the victims had significant bruising. All are intimidated by threats to kill. After initially being **subdued,** three of *the* **four** victims **were** *then* **choked in a** face to face manner during a sexual **assault.** Moreover, the assaults **show** a progression fran 1982 through 1984, Continuing to the death of **June** Hunt. The only bruising occurs in the second of the two **assaults** occurring in **October** of 1982.... **The** later assaults **in** 1984 involving Sleek **and** McQuaid involve more efficient use of the carotid restraint with both victims either completely **losing** consciousness or **blacking out** and becoming disoriented....
>
> Additional **threads** of **similarity** link **these** incidents and although not necessary **for** admissibility **establish** the continuing **pattern.** All of the victims were young **women,** and were either just met by Hoefert or **at most**

> casual acquaintances. The victims were targets of opportunity through chance social encounters. In all except Baker-McQuaid, the defendant isolated himself with the victims by offering or implying he would provide help. He offered to repair Kim Byerly's (R. 840) shoes, and offered to fix Kim Salstrom's carburetor. (R. 888) He asked to accompany Sleek from a party to where she was going to clean windows. (R. 856) The defendant took June Hunt back to his house after she had run out of gas in her own car. (R. 729)

As noted before, the evidence does not support the state's contention that "defendant uses a technique consistent with the carotid restraint [by] plac[ing] his arm around the victim's neck with the 'V' of the elbow at the front, then applying squeezing pressure against the carotid arteries." At best, only Sleek's testimony could be read in this fashion. As also noted above, it is not accurate to say all four victims were "subdued or brought under control quickly" (by the choking) without significant injury. Nor is it accurate to say "the assaults show a progression...to more efficient use of the carotid restraint." The last assault (on McQuaid) can hardly be called an "efficient use of the carotid restraint." She said defendant was putting pressure on her windpipe, not on the carotid arteries; she did not lose consciousness (despite being slammed into the ground). She was able to struggle (albeit ineffectively) with defendant, and she had to wear a neck brace for three months. This is simply a sudden, clumsy, brutal assault from behind, not the delicate, practiced application of some exotic disabling technique. The barroom brawler's ability to smash his drunken fist through a plaster wall does not qualify him for a black belt in karate.

The "additional threads of similarity" the state notes establish only that defendant is an opportunist/rapist. This is hardly unique.

The state ignores the significant dissimilarities in these attacks.

See discussion at Int. Br., P. 36-38.

The state cites two cases -- Duckett v. State 568 So.2d 891 (Fla. 1990) and Buenoano V. State 527 So.2d 194 (Fla. 1988) -- to support its contention that *the* striking similarity requirement was met in the present case. Both cases are clearly distinguishable; indeed, by illustrating the level of uniqueness necessary to warrant the introduction of similar fact evidence, these cases support defendant's contention that the striking similarity requirement was not met in the present case. Buenoano involved the slow *arsenic* poisoning of three of the defendant's male sexual partners (a husband, a common law husband and a fiance) for the purpose of collecting on their life insurance. This Court found "poisoning to be a particularly unusual modus operandi. ..." 527 So.2d at 197. And indeed it is : unlike the all-too-common rape/strangulation scenario, poisoning one's lover for insurance money is a ram and noteworthy phenomenon. Similarly, in Duckett the defendant was a police officer who had a "tendency to pick up young, petite women and make passes at them while he was in his patrol car at night, on duty, and in his uniform." 568 So.2d at 895. Again, this is hardly a commonplace occurence; indeed, *any* such allegations are sure to generate a great deal of public outcry and scrutiny. By contrast, a rape/strangulation is so common it will likely not even be reported in the local newspapers of any moderately sized metropolitan area.

The state does not discuss the cases cited by defendant in the Initial Brief, all of which show the similar fact incidents in the present case are not strikingly similar to each other. Nor does the state discuss Drake V. State 400 So.2d 1217 (Fla. 1981), a case virtually directly an point. In Drake, as in the present *case,* the victim was last seen alive in the defendant's company *and* was later found dead. In Drake, as in the present case, the *exact* circumstances of

the victim's death were unknown, although there was some indication the victim had engaged in sexual activitiy before her death. In Drake, as in the present case, the state sought to prove the circumstances of the charged offense (and, in the process, establish defendant's identity as the killer) by introducing similar fact evidence of the defendant's propensity to attack and rape women. As in Drake, the similar fact evidence should not have been admitted in the present case because it was not shown to be strikingly similar to the charged offense.

POINT I. B. -- ASSUMING ARGUENDO THE STRIKING SIMILARITY REQUIREMENT EITHER DOES NOT APPLY OR WAS MET, THE SIMILAR FACT EVIDENCE IS NOT RELEVANT TO ANY MATERIAL ISSUE OF FACT, *OTHER* THAN SHOW BAD CHARACTER OR PROPENSITY.

The state does not specifically address the possible relevance of Byerly's testimony about the "six hours of mental abuse", the chopping of her fingernails in the garbage disposal, and defendant's threat to "bury her like the others." Even if we accept any or all of the state's relevance theories as to the bulk of the similar fact testimony, this testimony was clearly irrelevant and unfairly prejudicial.

The state essentially recasts and reiterates the laundry list of relevance theories advanced in the trial court. *See* Ans. Br., P. 19-20, 31. These theories are analyzed at pages 52 through 60 of the Initial Brief. As argued there, these theories either address issues that *are* not material or use a propensity analysis to prove the issue.

What is missing in the state's argument is any analysis of exactly how the similar fact evidence goes to prove any of these asserted material facts. Close analysis of the state's relevance theories show that, with all these theories, the crucial link between the similar fact evidence and *the* ultimate material fact to be proven is defendant's propensity : defendant must have raped and strangled June Hunt because he has a propensity *to* do such things, as evidenced by the four prior attacks.

Similar fact evidence cannot be used "solely to prove bad character or propensity." §90.404(2)(a), Fla. Stat. (1989). This means similar fact evidence is inadmissible to circumstantially prove that a defendant acted in conformity with his character or a trait of his character on the occasion of the charged offense, See Earhart, Florida Evidence 4404.1 (3rd Ed. 1992). What is prohibited is "the prosecutor us[ing] character as a way station on the road

to an ultimate inference of conduct in comformity with character." Imwinklereid, infra, 2:18.

That is precisely what occurred in the present case. Regardless of the number of different labels, the substance in the bottle remains the same : the similar fact evidence is relevant to prove defendant acted in conformity with his character trait by raping and strangling June Hunt. The state's relevance theories are either rewordings of this simple fact or address issues that *are* either perpheral to or based upon the establishment of this basic fact.

The state asserts the similar fact evidence "is individually and collectively relevant to several crucial issues" :

> The defendant's effective use on all four witnesses of a form of carotid restraint to quickly overpower them without causing a struggle or significant injury rebuts the essential defense contention that a struggle, injuries and scratches would be expected to accompany an asphyxia1 death. It also shows not only that such a technique is possible, but that the defendant was knowledgeable in it and experienced enough and powerful enough to effectively use it. The defendant's unique desire to obtain sexual gratification by engaging in sex while choking the victim, not during a struggle to subdue her, but during the sex act itself to enhance his own excitement and pleasure clearly defines the central motive in the asphyxiation of June Hunt.
>
> **Ans. Br., P. 19-20**

These relevance theories will be discussed in order. They will be analyzed with the following questions : does the ultimate fact to be proven concern a material issue? If so, is the similar fact evidence logically relevant, i.e., does it make the existence of that ultimate fact more or less likely? And, if so, is the similar fact evidence legally relevant to this issue, i.e., does it cast light on the material issue by focusing *on* something other than the defendant's propensity?

> "Defendant's effective use on all four witnesses of a form of carotid restraint to quickly overpower them without causing a struggle or significant injury rebuts the essential defense contention that a struggle, injuries and scratches would be expected to accompany an asphyxial death."

First, it is not clear how accurate it is to say it was a "defense contention" that "a struggle, injuries and scratches would be expected to accompany an asphyxia1 death." Rather, this conclusion *seems* more to be a common sense proposition the jury is likely to subscribe to regardless of whether it is mentioned by the defense. The lack of any physical trauma to June Hunt is obviously an inherent weakness in the state's case, but not because of anything the defense did or said.

Second, it is not accurate to say "all four witnesses" were "quickly overpowered" *by* "a form of carotid restraint." As discussed above, the similar fact incidents do not show the use of a carotid restraint (or, at least, not the "effective" use of one); nor do they show the four victims were "quickly overpowered" without "a struggle or significant injury." All four victims were injured; at least two fought back. Only Sleek was "overpowered" in any sense by the chokehold itself. Byerly was threatened with a knife, then tried to *escape* after being released; Salstrom was grabbed, spun *around* and choked from the front. McQuaid was clearly "overpowered", but not by the chokehold : defendant's slamming her face first in the sand and pinning her with his body had something to do with it.

Beyond these problems, we must still analyze exactly <u>how</u> the similar fact evidence can be said to be relevant to "rebut" these "defense contentions." Certainly the cause of June Hunt's death was a material issue. The similar fact evidence was clearly logically relevant to that issue : the fact that defendant

has raped and strangled four women in the past certainly tends to prove that he did it to June Hunt as well. However, this logical relevance is based on propensity : defendant must have acted in conformity with his propensity to rap and strangle women on this particular occasion by doing the same thing to June Hunt. Thus, the similar fact evidence is not legally relevant to this issue; it "rebuts" this "defense contention" solely by proving propensity.

> "shows not only that such a technique is possible, but that the defendant was knowledgeable in it and *experienced* enough and powerful enough to effectively use it."

As discussed above, the similar fact evidence was not admitted to prove, in some abstract sense, "that such a technique *is* possible." As to defendant's being "knowledgeable, experienced and powerful", as also noted above, this 1) assumes the carotid restraint is some exotic "technique"; 2) assumes June Hunt was killed with such a hold: 3) assumes defendant did in fact "effectively use" such a hold on the similar fact victims; and 4) assumes the similar fact evidence proves defendant can "effectively use" this hold to kill. None of these assumptions have any factual support in the record. Thus, it must first be asked : in what sense is defendant's "knowledge and experience" in this "technique" a material issue?

Assuming this is a material issue, is the similar fact eivdence logically relevant to prove it? The major problem at this point is defining the material issue with precision : in speaking of defendant's ability to "effectively use" this hold, do we mean "effectively use to disable" or "effcectively use to kill?" Again, defendant was charged only with premeditated murder. The state asserts he intentionally strangled June Hunt to

death during or after raping her. Whether he "quickly overpowered her without causing significant injury" is not the issue here. As argued above, the similar fact evidence does not even prove defendant can use this hold to effectively disable someone, much less to kill them. Clearly, the similar fact evidence does not prove defendant is "knowledgeable, experienced and powerful enough" to kill June Hunt with a carotid restraint.

In any event, this relevancy theory is clearly premised on the assumption the defendant acted in conformity with his propensity by raping and strangling June Hunt.

> "The defendant's unique desire to obtain sexual gratification by engaging in sex while choking the victim, not during a struggle to subdue her, but during the sex act itself to dance his own excitement and pleasure clearly defines the central motive in the asphyxiation of June Hunt,"

First, it is clear that a "desire to obtain sexual gratification by engaging in sex while choking the victim" is hardly "unique" to defendant. To the contrary, it is all too common. See discussion at Initial Brief, P. 39-44. Second, only one of the similar fact witnesses testified to such facts : Kimberly Byerly. There was no sex at all with McQuaid. Salstrom said defendant was "touching" her during the rape "mostly...around my neck and face"; she was strangled "in periods, on and off, throughout.. .." R. 890. She did not testify defendant's "own excitement and pleasure" was "enhanced" by this. Sleek did not testify to any such enhancement either; although she did say she was choked during the rape, she indicated that was done to keep her quiet. R. 857-58.

In any event, it is not clear how this sexual gratification theory "defines the central motive in June Hunt's death." None of the similar fact victims were killed.

This theory of relevance is directed primarily to the testimony of McQuaid and Pope : the motive for intentionally killing June Hunt was to prevent her from reporting the fact that defendant raped her and thus send him back to prison. The testimony of the *other* three similar fact witnesses does not in any way establish a motive to kill June Hunt. And, of course, the Mcquaid/Pope testimony is relevant only if we assume defendant raped June Hunt; otherwise, there is no motive to kill her. And, again, rape is established only by showing defendant's propensity to do such things.

The basic problem with the state's relevance theories becomes clear if we start with a simple question : How is the similar fact evidence relevant to any of the material issues in the charged offense? Obviously, it *goes* to prove defendant must have raped June Hunt and then intentionally strangled her to death to prevent her from turning him in. And how does the similar fact evidence proves these facts? By focusing solely on defendant's propensity : he must have raped June Hunt because that is exactly what he has done or tried to do four times in the past. After raping her, he intentionally strangled her to death, as he inferred he would do to cellmate Pope following the last of his prior attacks.

In its argument to the jury, the state made no pretense of disguising its theory of the case. The state's theory was plainly stated in its opening statement. The state first noted that, in the present case, "there was no

evidence of sexual battery because she had began [sic] decomposing and was so far along." R. 696. The inference was obvious : there was a sexual battery, but we have no evidence to show it. This inference was quickly made explicit.

> [Defendant] had four prior encounters with women, three of which were sexual batteries, and in each and every one of those encounters, they bore characteristics similar to this.
>
> R. 697

After noting defendant's "manner and mechanism by which he conducts these assaults on women" and citing Pop's testimony that defendant "could not sexually gratify himself unless he hurt women", R. 698, the state assured the jury it would prove defendant "murdered June Hunt by asphyxiation, choking her, during the course of the committing of a sexual battery...." R. 698 (emphasis added).

This theory was also forcefully argued in closing argument. The state noted "the real specific insight that Mr. Pope gave you into how this man operates and what happened to June Hunt, as well as the other victims." R. 984 (emphasis added). The state noted Pope's testimony proved

> [T]he way [defendant] like[s] to get his women. Use of force. That's the way [he] like[s] it. That's *the* only way [he] *can* enjoy it.... [He] really like[s] to *choke* them.... [T]his man gets off on Violence. He gets off *on* choking.
>
> R. 984-85

Although asserting at one point "we can't know with specificity the *exact* sequence of events that led to June Hunt's death", R. *987*, and recognizing that "we can't say for certain that June Hunt would not have...consented to

sexual activity", R. 988, the state nonetheless asserted "she didn't consent to being choked and strangled and asphyxiated so this man could have orgasm as her body quivered in death." R. 898. Noting defendant was late for work Saturday morning, the state asserted "you know what he was doing all night, just as he did with the other victims." R. 993 (emphasis added). The state then mentioned Pope's testimony again, noting "how he likes to have sex and needs to hurt victims in order to enjoy it." R. 999-1000. The state then repeated twice "I really like to choke them." R. 1000. The state noted "that sexual connection, and the sex of the sexuality and choking, violence and sexual gratification", R. 1004, and concluded

> June Hunt...died of asphyxiation in the hands of this man, the same manner and a like manner as he asphyxiated four previous victims.
>
> R. 1005 (emphasis added)

This is clearly a "propensity" argument: defendant must have raped June Hunt because he has done similar things in the past.

The reason the state is able to come up with such a long laundry list of relevance theories should now be obvious: the state is using the similar fact evidence to do nothing less than establish virtually its entire case. Certainly, the similar fact evidence establishes nothing less than the entire factual scenario of June Hunt's death. The state is using the similar fact evidence not only to establish identity-through-modus-operandi, but the modus operandi of the charged offense as well.

The rape of June Hunt is the core of the state's case. The rape of June Hunt is also the core of the state's similar fact relevance theories. (This is

not surprising, since the state's case essentially is *the* similar fact evidence.) Unless we assume *the* rape of June Hunt, *the* state's relevance theories (along with its case) collapse. And the rape of June Hunt is established "solely by bad character or propensity" : defendant must have raped June Hunt because he is an opportunist/rapist (as evidenced by his prior attacks) and he must have acted in conformity with that character trait on this particular occasion.

This is precisely the theory of logical relevance expressly forbidden by 90.404. Thus, with respect to this crucial issue, the similar fact evidence *is* "relevant solely to prove bad character or propensity." The trial court erred in admitting this evidence.

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.

In his Initial Brief, defendant argued that Pope's "thoroughbred strangler testimony was improper character evidence because 1) it was offered to show he acted in conformity with a trait of his character by strangling June Hunt; 2) defendant had not placed his character in issue; and 3) Pope's testimony did not concern defendant's reputation and thus was inadmissible in any event. Int. Br., P. 64-66. In its answer brief, the state does not address this argument. Rather, the state simply reasserts the position it took below: that Pope's testimony "not only corroborated the Williams Rule Evidence, but also was a very damning admission concerning his deviant manner of gaining sexual gratification through women." Ans. Br., P. 38. However, the only way this testimony could support either of those facts is by showing defendant's "Character or a trait of his character.. .to prove that he acted in conformity with it on a particular occasion...." Section 90.404(1), Fla. Stat.(1989). The Evidence Code is clear such testimony can be used by the state only to rebut character evidence offered by the accused. Section 90.404(1)(a), Fla. Stat. (1989). The Evidence Code is equally clear that, if a defendant's character is properly in issue, only reputation evidence can be used to rebut it. Section 90.405(1),Fla. Stat. (1989). The state does not argue - as indeed it cannot - that Pope's testimony was properly admitted under these statutory provisions. Defendant did not place his character in issue and Pope's testimony was not reputation testimony.

The state cites Swafford v. State 533 So.2d 270 (Fla. 1988) to support its position. Ans.Br., P. 39-40. That case is clearly distinguishable. In Swafford, the defendant was convicted of abducting, raping and killing a convenience store clerk. The state introduced evidence that, two months after that crime, the defendant discussed committing a similar crime with a friend. When the friend asked if that type of activity "bothered" him, the defendant replied "you just get used to it." 533 So.2d at 273. In upholding the admission of this testimony, this Court said :

> Swafford's statement that "you just get used to it," when viewed in the context of his having just said that they could get a girl, do anything they wanted with her and shoot her twice in the head so there wouldn't be any witnesses, was evidence which tended to prove that he had committed just such a crime in Daytona Beach only two months before.
>
> **Id. at 273-74**
> **(Emphasis added)**

Thus, the testimony in Swafford was viewed as being a direct admission to guilt of the crime charged. That logic is not applicable to Pope's testimony, which cannot be read as such an admission, The line of relevance points backward in Swafford: in saying "you just get used to it," Swafford was effectively admitting he had committed such crimes in the past and, since the crime he was charged with was similar to what he was contemplating when he made the statement, that in turn creates an inference that he committed the charged crime. By contrast, the line of relevance in the present case points forward : defendant's past statements about liking to rape and choke women creates an inference

that he acted in conformity with that desire (i.e., character trait) by raping and strangling June Hunt. As the Evidence Code makes clear, this line of relevance will not support the admissibility of evidence.

The state distinguishes Jackson v. State 451 So.2d 458 (Fla.1984) by asserting that, in that case, "the testimony elicited of the defendant's boasting of being a thoroughbred killer from Detroit had no relevance to any material fact in issue and the state had not suggested any." Ans.Br, P.40, F.N. 1. However, close examination of Jackson shows it is directly on point. The defendant in Jackson had been charged with the execution style shooting of two individuals with whom he had a dispute regarding drugs. The objectionable testimony was more than simply the defendant's prior admission that he was a "thoroughbred killer." Rather, the state elicited testimony (from a friend and accomplice of the defendant's) that the defendant had several guns and bulletproof vests that he always carried with him; that he bragged of making his living as a killer and he knew "how to kill somebody and do it right"; and that he once pulled a gun and threatened to kill the witness during a dispute over drugs. 451 So.2d at 460, F.N. 1. This testimony is obviously quite similar to Pope's testimony and it is relevant on much the same theory of admissibility : It shows that Jackson had a habit of using violence to settle drug disputes and that he had killed (apparently execution style) others in the past. This in turn supports an obvious inference that he had committed the charged murders. However, this

Court said such testimony "is precisely the kind forbidden by the Williams rule and section 90.404(2)." Id. at 461.

Jackson is directly on point and dispositive of this issue. It was error to admit Pope's testimony.

ISSUE IV -- THE TRIAL COURT ERRED IN GIVING TEE *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 TEE CRIME BEYOND A REASONABLE DOUBT AND IT CREATES AN IMPROPER PRESUMPTION.

The state first asserts defendant waived this issue by failing to raise it below. Ans.Br., P. 41. However, this Court has recognized it is fundamental error to fail to give the jury "a full and complete definition of premeditation." Anderson v. State 276 So.2d 17,18(Fla.1973). The state further asserts "there is no case law within the state holding this instruction to be invalid." Ans.Br., P. 41. However, it is equally true there is no case law holding the standard instruction is adequate, at least not with respect to the argument defendant makes here. The law would become quite petrified if novel legal arguments are to be rejected simply because there is no law directly supporting them; indeed, such an argument seems to reject the entire concept of a developing common law.

ISSUE V -- TEE TRIAL COURT ERRED IN EXCUSING A POTENTIAL JUROR FOR CAUSE WITHOUT GIVING DEFENDANT A CHANCE TO QUESTION OR REHABILITATE THE JUROR.

The state asserts the trial court "did not abuse its discretion in the instant case since venire man Harvard's response was unequivocally clear" and that defense counsel did not want "to conduct additional questioning himself" but rather "simply wanted [the trial court] to ask a repetitive question." Ans. Br., P. 42-43. However, the colloquoy with Mr. Harvard occurred during the early stages of voir dire, during which the trial court was asking the questions. At that point neither party had begun to question prospective jurors. The trial courts excusing Mr. Harvard for cause at that stage was a plain violation of Fla. R. Cr. P. 3.300(b). which provides :

> (b) Examination. The court may then examine *the* prospective jurors collectively. Counsel for both state and defendant shall have the right to examine jurors orally on their voir dire. The order in which the parties may *examine* each juror m y be determined by the court. The right of the parties to conduct an examination of *each* juror orally shall be preserved. (Emphasis added.)

The state attempts to distinguish O'Connell V. State 480 So.2d 1284 (Fla. 1984) by asserting :

> In that case, this Court found error in a double standard imposed on the part of the trial court, permitting the prosecutor the opportunity to question each juror individually and to re-examine the jurors after defense counsel had questioned them, but that a similar opportunity on *the* part of the defense to question and rehabilitate prospective jurors had been denied. That situation was not presented sub judice.
>
> Ans. Br., P. 43

The state misreads O'Connell That decision is not based on a "double standard" analysis. O'Connell held "the trial judge committed reversible error

when he did not allow defense counsel to examine excluded jurors on voir dire." 480 So.2d at 1286 (emphasis added). Although factually distinguishable, O'Connell is directly on point in principle.

The facts in O'Connell were as follows :

> [T]wo jurors who, when *examined* by the prosecutor, stated that they were opposed to the death penalty were excluded for cause *by* the trial judge, over defense counsel's objection that he had had no opportunity to *examine* these jurors or try to rehabilitate them. The trial judge noted counsel's objections, but stated :
>
> > *Sane* of these people that Terry--I don't believe could rehabilitate under any stretch of the imagination because I wouldn't accept a change of moral values between now and the hour he *gets* through.. .. That's right. And as I pointed out before, they wouldn't impose it under any circumstances, they would not be heard to change their minds in an hour.
>
> Id.

In reversing O'Connell's conviction, this Court first quoted from Rule 3.300(b). This Court then rejected the state's argument that the trial court's actions were within its discretionary power to control voir dire because "defense counsel never got to ask either of them a single question.'' Id. at 1287. The Court then noted :

> In contrast, the prosecutor not only had the opportunity to question *each* juror individually, he was also permitted to reexamine the jurors after defense counsel had questioned them and in several cases after defense counsel had challenged them for cause, for the purpose of rehabilitating them. This double standard on the part of the trial judge amounted to a violation of due process.
>
> Id.

The Court went *on to* hold the trial court also *erred* in failing to *excuse* for cause two jurors challenged by the defendant. The Court concluded:

> [T]he combination of the two errors: 1) refusing to allow defense counsel to examine excluded jurors on voir dire, and 2) refusing to excuse three jurors for *cause* who would automatically recommend death in a capital case permeated the convictions themselves and therefore warrant a new trial.
>
> **Id. (Emphasis added.)**

O'Connell thus squarely holds-twice-that the error in that case was the failure to allow defense counsel to examine the excluded prospective jurors. That is precisely what occurred in the present *case. As* O'Connell clearly shows, the fact that the trial court m y feel further questioning is useless does not justify the denial of defendant's right to voir dire.

The trial court erred in striking Mr. Harvard for cause.

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

The state relies on the trial court's sentencing order on this point and notes the following :

> Appellant argues that many things are possible: That sexual activity may have been consensual, that the choking may have started consensually with the result in unintentional death: and that the abortive burial tends to negate rather than establish premeditation (because a better solution could have been concocted). But the state need not demonstrate that appellant's plan approached the level of genius for this factor to be applicable. Nothing in the evidence shows consensual choking, at least by the victim; we do know from appellant's history with other women and his admissions to Mr. Pope that his consensual activity included choking women as part of his sexual ethics and the declaration that next time to avoid prison he should not leave the victim alive. Moreover, appellant was subtle enough to maintain his facade with co-employees till he made good his escape.
>
> **Ans. Br., P. 44**

The problems with the trial court's sentencing order were discussed at Initial Brief, P. 78-80. While it is true the state need not show a defendant's calculated plan "approached the level of genius", it is equally true the state must establish the requisite "deliberate plan formed through calm and cool reflection," Santos v. State 591 So.2d 160(Fla.1991), beyond and to the exclusion of every reasonable doubt. Even if we accept the state's assertion that "nothing in the evidence shows consensual choking", this aggravator is not established simply by showing the victim was strangled to death. Hardwick v. State 461 So.2d 79

(Fla. 1984). This is particularly true in the present case because the lack of physical trauma on the victim indicates her death happened suddenly. See Int. Br. P.34. Defendant's "history [of] choking women" does not establish this aggravator, particularly in view of the fact there was no attempt to kill any of the prior victims. As to defendant's statements to Pope, Pope did testify that defendant told him "that next time to avoid prison he shouldn't leave the victim alive", Ans. Br. P. 44: rather, Pope said defendant said "he wished he killed the bitch because he wouldn't have been in trouble." R. 832. Expressing remorse for a past mistake is not the same as expressing an intent to do otherwise in the future, Again, the fact that defendant made no attempt to kill either Sleek or McQuaid (after being sent to prison by Byerly and Salstrom) undercuts this argument.

As to defendant's being "subtle enough to maintain his facade with co-employees till he made good his escape", it must first be asked: at what time? If we are talking about defendant "maintaining his facade" at work on Saturday, we must first assume the victim was in fact dead at that point. The medical examiner said only that the victim died sometime over the weekend. As argued at pages 32 to 34 of the Initial Brief, there are serious flaws with this assumption. Further, it is not clear how the ability to "maintain a facade" after the crime establishes a cold and calculated plan to commit the crime. If we are talking about defendant "maintaining his facade" on Sunday, we can only ask: in what way was defendant's facade maintained on that day? His

friends surprised him sweating in the backyard digging an apparent grave on the pretext of burying trash (an obviously bogus explanation); defendant then had to hurriedly (and quite inconsistently with past practices) deny his friend access to the restroom in his apartment. One of defendant's friends said his behavior that day "blew my mind[;] I didn't have no idea what was going on." R. 807. This is hardly "maintaining a facade"; rather, such actions are more reminiscent of the sheepish hobbling of a man trying to conceal the fact he just shot himself in the foot.

The state also asserts any error in this regard is harmless. However, with only one valid remaining aggravator and significant mitigating evidence, the error was not harmless. Atkins v. State 452 So.2d 529(Fla.1984); Elledge v. State 346 So.2d 998(Fla. 1977).

ISSUE VII -- THE DEATH PENALTY IS DISPROPORTIONATE

The state asserts the death penalty is not disproportionate because "[defendant's] history demonstrates that he is a continuing threat - a veritable walking time bomb to any woman he meets and the mitigating evidence proffered below was abysmally weak. ..." Ans.Br., P. 45. First, defendant's being "a continuing threat" and "a walking time bomb" are not proper factors or considerations on this point. Second, the mitigating evidence was not weak; indeed, the undisputed evidence clearly established several well-recognized nonstatutory mitigators. See discussion at Initial Brief, P. 86-88. Since there is only one valid aggravator, the death penalty is disproportionate.

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

The state first asserts defendant waived this issue by failing to raise it below. Ans.Br., P.46. The state does not address Elledge v. State 346 So.2d 998(Fla. 1977), which held it is fundamental error to allow the sentencing jury to hear about violent crimes the defendant has committed if there are no convictions for those crimes.

The state also asserts the non-conviction evidence was admissible to rebut the mitigator of no significant prior criminal history. Ans.Br., P. 46-47. However, the jury was not instructed on this mitigator and defendant introduced no evidence to which the state's evidence could be considered rebuttal. This court has recognized that the concept of anticipatory rebuttal is inapplicable in this context. Fitzpatrick v. State 490 So.2d 938 (Fla. 1986); Maggard v. State 399 So.2d 973(Fla. 1981).

The state cites five cases to support its position. All are clearly distinguishable; indeed, they support defendant's argument on this point. Washington v. State 362 So.2d 658 (Fla. 1978) (trial court did not err in failing to find mitigator of no prior significant criminal history: convictions not required for rebuttal); Booker v. State 397 So.2d 910(Fla. 1981) (if defendant testifies during penalty phase, non-conviction priors admissible to rebut mitigator); Smith v. State 407 So.2d 894(Fla. 1981) (same as Washington); Lucas v. State 568 So.2d 18(Fla. 1990) (same as

Washington) (dicta); Walton v. State 547 So.2d 622(Fla. 1989) (evidence of defendant's drug dealing properly admitted to rebut defendant's evidence that he was nonviolent and had never been convicted of a crime; "once a defendant claims that this mitigating circumstance is applicable, the state may rebut,...") (Emphasis added).

In the present case, defendant is not asserting the trial court erred in not finding the mitigator of no significant prior criminal history. Defendant never claimed this mitigator was present. Indeed, he had no chance to : this evidence was admitted in the guilt phase. And, clearly, it was not admitted at that point to rebut any potential mitigators.

The state further asserts that Pope's testimony "directly related to the CCP factor and the episode of Ms. Hunt's death." Ans.Br., P. 47. As to its relation to the CCP factor, two things should be noted. First, the jury was not instructed on this aggravator. The jury was instructed only on the aggravator of prior violent felony convictions; indeed, that is all the state requested. R. 1063-64, 1089-90. The issue here concerns the jury's hearing this evidence, not whether the trial court could properly consider it in its sentencing order (which of course it could not). Defendant argues that the jury's death recommendation was fundamentally tainted by this irrelevant and highly prejudicial evidence. Had the jury not heard this evidence, it may have recommended life. If the trial court would have followed that recommendation, the prejudice to defendant is obvious. Even

if we assume the trial court would have rejected that recommendation and still imposed the death penalty, defendant is nonetheless prejudiced: this Court uses a different standard to review jury overrides. See Tedder v. State 322 So.2d 908 (Fla.1975). Second, most of Pope's testimony is not related to this factor in any event, not even as improper character evidence (see discussion at Issue 111, above). The only part of Pope's testimony that could conceivably help establish this aggravator is the part about defendant's remorse at not killing his last victim. Even with respect to this part of his testimony, the relevance to the CCP factor is tenuous at best; the bulk of Pope's testimony - about defendant's being a "thoroughbred strangler" who squeezes rubber balls to strengthen his hands for choking women while raping them - is not relevant at all.

As to Pope's testimony being "directly related to...the episode of Ms. Hunt's death", defendant fails to grasp the state's point here. In the penalty phase, the parameters of relevance are defined by the aggravating and mitigating circumstances. Pope's "thoroughbred strangler" testimony is merely character evidence that has no bearing on either the aggravator the jury was instructed upon or the mitigating evidence defendant presented. Pope's testimony regarding defendant's attack on McQuaid and his regret at letting her live is equally irrelevant: since there was no conviction in the McQuaid attack, the jury should not have heard about that in the first place.

The jury's recommendation was fundamentally tainted. The sentence must be vacated and the cause remanded for a new penalty phase.

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.

The state asserts "there was no mention [in the trial court's sentencing order] of consideration of any nonstatutory aggravating factors and appellant's claim to the contrary is meritless." Ans.Br., P. 49. In fact, when considering the aggravator of prior violent felony covictions, the trial court stated :

> This aggravating element is present in that the Court received as evidence in the guilt determination phase of the trial and in the sentencing phase of the trial testimony from [all four Williams rule victims], all who were victims of the defendant's acts of violence.

R. 311 (Emphasis added.)

There was no evidence defendant was convicted of any crimes regarding the attacks on Sleek or McQuaid. This is clearly an explicit consideration of nonstatutory aggravation and it is clearly reversible error. See authorities cited at Page 85 of the Initial Brief.

As to the trial court's failure to consider and weigh defendant's undisputed evidence of nonstatutory mitigation, the state asserts this point is meritless because :

> The trial court also explained why all of the statutory mitigating factors were inapplicable (R. 312-314); additionally, the court stated that the jury was instructed and that he had considered the catchall factor of any other aspect of the defendant's character or record that appellant wished to present and that mitigation under this catchall option did not exist. (R. 314).

Ans. Br., P. 49

The trial court's explanation regarding the statutory mitigators is irrelevant; defendant is not challenging the trial court's finding in that regard. The fact that the jury was instructed on nonstatutory mitigators is equally irrelevant. The jury's failure to properly weigh and consider the mitigating evidence is **not** the issue here; it is the trial court's duty to do so. The sentencing order in the present case fails to conform to the standards established by this Court's prior decisions.

The uncontradicted evidence reasonably established several recognized nonstatutory mitigators, including defendant's drug and alcohol use at the time of the offense, his family background, and the fact he had brain damage which caused emotional and behavorial problems since his youth. ***See*** discussion at Initial Brief, P. 86-88. This Court has made it clear that such evidence must be "expressly evaluate[d]" by the trial court to determine if the proposed nonstatutory mitigation "is supported by the evidence and...is truly of a mitigating nature." Campbell v. State 571 So.2d 415, 419-20(Fla. 1991) (emphasis added). When mitigating circumstances are established by a reasonable quantum of undisputed evidence (as was the case here), the trial court "must **expressly consider** in its written order each established mitigating circumstance," Id. (emphasis added). This duty is **not** discharged by the conclusory statement "**This** Court now finds that mitigation under this 'catch all' option does not **exist.**" R. 314. Santos **v.** State 591 So.2d 160(Fla. 1991) (Defendant presents unrefuted evidence of prior psychological problems and abusive child-

hood; trial court's stating "that it had reviewed the nonstatutory mitigating circumstances and found that they 'do not outweigh the aggravating circumstances in this case'" insufficient, particularly when court "did not state what those factors might be"); Campbell, infra, (trial court's merely "discussing" proposed mitigators and then concluding they were "not applicable" or "not a mitigating circumstance" insufficient); Lamb v. State 532 So.2d 1051 (Fla. 1988) (trial court's conclusory statement that defendant's proposed nonstatutory mitigating evidence did not rise "to the level of a mitigating circumstance to be weighed in the penalty decision" insufficient).

The trial court failed to find and properly weigh nonstatutory mitigation that was established by a reasonable quantum of proof. 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 a new trial;

4. Remand for imposition of a life sentence;

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

6. 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 ~~April 28~~ MAY 4, 1992.

RICHARD SANDERS, ESQUIRE
2728 52nd Street South
Gulfport, FL 33707
(813) 321-5913
Florida Bar No. 394701
Attorney for Appellant