IN THE SUPREME COURT OF FLORIDA

ROBERT J. LONG,

Appellant,

vs. **CASE NO. 83,593**

STATE OF FLORIDA,

Appellee,

_____/

ANSWER BRIEF OF THE APPELLEE

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STATEMENT OF THE CASE AND FACTS

At trial Alvin Duggan testified that he knew the victim Virginia Johnson and last saw her going to the Alamo package store and lounge a block and a half away in the morning. (TR. 489-492). Bernadine Herrman, a nurse supervisor of STD clinic in Tampa, filled out a record on Johnson October 15, 1984 who had gonorrhea. She did not return in seven days. (TR. 512-519). Linda Phethean Konst and Candy Linville discovered a body in Pasco County on November 6, 1984 while riding horses. (TR. 530, 543-544). Former deputy sheriff Christopher White responded to the area off Brumwell Road at 11:00 or 11:30 a.m. on November 6 and interviewed Phethean and Linville. He observed an upper torso, ribs, head and skull, secured the area and called for a supervisor. (TR. 551-553). FDLE crime lab analyst Barbara Vohlken took some photos, conducted a grid search and returned the next day to seize evidence. Hair mass was in GRID A and GRID B. A pair of panties, shoelace and bones, skull and vertebrae with cloth around the chin were recovered. (TR. 559-569).

Detective Kenneth Hagin observed the crime scene. The upper torso was partially mummified and skeletonized; he saw ligature and piece of clothing around the neck area. (TR. 592-604).

After talking to people he contacted dentist Dr. Gish who provided dental x-rays which he took to Dr. Ken Martin. (TR. 605-608). He thought the victim died where her body was found. The ground with a darkened spot was trampled down and looked as if a struggle had occurred there. (TR. 609-613). A number of witnesses testified there had been no tampering at the crime scene. (TR. 614-629). Dentist Dr. Gish identified the dental records he sent to Detective Hagin (TR. 632) and Dr. Ken Martin, expert in forensic odontology, examined the jaws of the remains of a Caucasian female aged 18 to 22 at the medical examiner's office on November 8, 1984 and testified they matched Dr. Gish's records. (TR. 638-641). Professor of anthropology Dr. Curtis Weinker opined the bones were from a white female about eighteen to twenty years of age and approximately 5'5". (TR. 644-646).

The trial court ruled that Lisa McVey could testify about her abduction by Long but details of his treatment of her in the apartment and car (sexual battery) would not be admissible unless the defense opened the door. (TR. 699). On November 2, 1984, seventeen-year-old Lisa McVey was riding home on a bicycle after getting off work at two in the morning when someone grabbed her around the neck and pulled her off her bicycle. (TR. 704-707).

The man said to stop screaming or he'd kill her and she felt a revolver to her temple. She was dragged to a car, shoved in to the passenger side, told to keep her eyes closed and to strip. She saw a gun in the car and the man said he had a knife. She was blindfolded, rode in the car for about thirty minutes, put her shirt, pants and shoes back on and went into an apartment. On November 4 she went back out to the car and the man let her out at a parking lot, asking her to give a different description to police. He gave her clothing back. (TR. 708-716). She provided her clothing to Detective Horne and described the vehicle as maroon, two door with bright spoked wheels, maroon dashboard with white seats and red carpet, the word "MAGNUM" in silver letters on the dash, a green digital clock and no knobs to pull the locks up. (TR. 716-719). She identified Long as her assailant in court. (TR. 721).

Carson Helms of the Tampa police department received a description of the suspect and vehicle in the McVey case on November 14, 1984 and the next day saw such a vehicle. He stopped the maroon Dodge, the driver's license listed B. J. Long and he photographed the vehicle and Long. (TR. 804-808). Officer Winsett testified and the testimony of Tom Muck was read

concerning the search pursuant to warrant of Long's apartment and vehicle. (TR. 810-816). Long admitted to officer Lattimer, after Miranda warnings that he had abducted McVey and stated he threw the gun used off a bridge. (TR. 836-839). Steve Moore testified that samples from vacuum sweeping of Long's car were obtained, Lee Baker took hair samples from Long and Detective Cribb drove a truck with items of evidence to the FBI building in Washington. (TR. 857-870).

FBI hair and fiber expert Michael Malone testified that a red fiber in the hair mass of Virginia Johnson had the same exact microscopic and optical properties as carpeting from Long's car (TR. 909-910), that two hairs were located in the car (blonde Caucasian hairs which had been bleached) which were microscopically indistinguishable from that of Virginia Johnson, consistent in every respect including the artificial treatment leading to the conclusion that Johnson was probably in Long's car. (TR. 910-912). Similarly in the McVey case red fibers on her clothing exhibited the same microscopic and optical properties as carpet fibers in the Long car and brown head hair on the McVey shirt was microscopically indistinguishable from

that of Long's head hairs, leading to the conclusion that McVey had been in Appellant's car. (TR. 914-918).

CBS cameraman Ronnie James taped the interview between Long and correspondent Victoria Corderi; Long was not threatened or promised anything (TR. 945-946) and a videotape of the interview was played to the jury. (TR. 1061-1068).

Pathologist Dr. Joan Wood testified that body fluids and blood leaked into the ground staining the grass, the body was there for a significant period of time while it was decomposing. (TR. 1016). She opined that the cause of death was homicidal violence probably garrotement. (TR. 1031).

At penalty phase, fingerprint expert William Ferguson identified Long's prints on various judgments and sentences. (TR. 1410). Officer Karen Collins recited information concerning the facts relating to Long's convictions for sexual assaults on victims Nuttal and Jensen. (TR. 1477-1485). Long presented no witnesses to the jury. (TR. 1510-1511). The jury returned a 7-5 death recommendation. (TR. 1661).

At the subsequent sentencing hearing in March of 1994, the defense introduced testimony of psychologist Dr. Robert Berland (R. 1251-1290), Appellant's ex-wife Cindy Bartlett (R. 1291-

1314), Long's mother (R. 1319-1351), PET scan technician Richard Cacciatore (R. 1351-1373), and professor of neurology Dr. Frank Balch Wood (R. 1392-1488). The state countered with Dr. Edward Eikman, a physician specializing in radiology and nuclear medicine (R. 1506-1562), neurologist Dr Leon Prockop (R. 1570-1612), and Dr. Sidney Merin (R. 1692-1732). The defense submitted surrebuttal evidence by Dr. Kinsbourne, Dr. Wood, and Ruben Gur. (R. 1742-1850).

The trial court imposed a sentence of death finding three aggravators (HAC, CCP and prior violent felony convictions), each of which outweighed the mitigators. (R. 522-529).

SUMMARY OF THE ARGUMENT

I. The lower court did not err reversibly in allowing evidence of Long's abduction of Lisa McVey. This Court in its remand opinion announced that evidence of the McVey incident - information supplied by McVey which led to Long's arrest and examination of his vehicle for hair and fiber samples - was admissible to establish Long's identity and to connect him to the victim in this case. To the extent that Appellant now argues that a more expansive view of McVey should have been used to put events in context he may not do so since the argument he advanced

below was that no McVey evidence should be introduced. McVey evidence did not become a feature of the case. There was no violation of the plea agreement.

II. The lower court properly allowed in portions of the Long videotaped interview with CBS. After an evidentiary hearing was conducted wherein the lower could determine the credibility of witnesses, the lower court found that CBS had not agreed to furnish editorial control to Long's attorney, Mr. Rubin, and that Long and Rubin had engaged in a considered strategy to have the interview to assist his psychological defense.

III. The lower court properly allowed excerpts of Long's videotaped interview with CBS correspondent Corderi since it was an admission against interest describing his modus operandi and the selection of victims. The trial court limited the amount of material to be introduced and its relevance was not outweighed by unfair prejudice.

IV. The lower court did not err in allowing FBI hair and fiber expert testify to an opinion within his field of expertise. The determination of a witness' qualifications to express an opinion is peculiarly within the discretion of the trial judge

and Appellant has made no clear showing of error requiring reversal.

V. The lower court properly denied a motion for judgment of acquittal since sufficient evidence was presented that Virginia Johnson was premeditatedly killed and that Long was the perpetrator.

VI. The trial court properly permitted Detective Karen Collins to provide hearsay reports at the penalty phase of the facts surrounding Long's rape convictions of Nuttal and Jensen. See Long v. State, 610 So. 2d 1268 (Fla. 1993); Wyatt v. State, 641 So. 2d 355 (Fla. 1994); Rhodes v. State, 547 So. 2d 1201 (Fla. 1989); Finney v. State, 660 So. 2d 674 (Fla. 1995).

VII. The trial court correctly found the presence of the CCP aggravator in this methodical execution. Even if the trial court did err in this regard, it is clearly harmless error in light of the two remaining valid aggravators, each of which - the trial judge articulated - outweighed the totality of mitigation presented.

VIII. Appellant did not timely object to the HAC jury instruction and thus any complaint thereon is barred. Even if properly preserved, the instruction conformed to that approved by

this Court in Hall v. State, 614 So. 2d 473 (Fla. 1993).

IX. The trial court correctly found the presence of the HAC aggravator. Death by strangulation qualifies as especially heinous, atrocious or cruel. Sochor v. State, 580 So. 2d 595 (Fla. 1991).

X. The trial court did not err in failing to find and weigh mitigating factors. The court considered all and explained why it was accepting some and rejecting others. If Appellant is complaining that the trial court should have considered and found mitigating evidence not presented, the court was not required to do so.

XI. The death sentence should not be reduced to life. Mr. Long is an extremely violent man as indicated by his rapes of Nuttal and Jensen, the instant murder and the lack of adequate mitigation to support a life sentence.

XII. The claim that a bare majority recommendation of the jury is unconstitutional appears not to have been preserved for appellate review by objection below and is meritless.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT ERRED REVERSIBLY IN ALLOWING EVIDENCE OF LONG'S ABDUCTION OF LISA McVEY.

In Appellant's last appeal to this Court, the Court opined:

> "Under the unique circumstances of this case, including the plea agreement, we find that the four other murders could not be presented at this trial. We decline, however, to hold that all of the evidence regarding the McVey incident is inadmissible. We note that the confession Long made in the McVey case is valid and was made before he entered into the Hillsborough County plea agreement. Long was initially apprehended, as previously noted, through information supplied by McVey, and it was that arrest and the subsequent examination of his vehicle that supplied hair and fiber samples connecting him to the victim in this case. As such, that evidence is clearly admissible to establish Long's identity and to connect him to the victim in this case. However, in our view, the details of Long's treatment of McVey in his apartment and his guilty plea are not admissible under the circumstances of this case."

Long v. State, 610 So. 2d 1276, 1280-1281 (Fla. 1992)(emphasis supplied).

The Court remanded for a new trial at which:

> "(3) testimony concerning the McVey incident may be admitted to identify Long in this case so long as the details of Long's treatment of

> McVey in his apartment and his subsequent plea of guilty in that case are excluded..."

Id. at 1281).

At a motion in limine hearing on October 11, 1993, the defense argued that to allow evidence of the Lisa McVey abduction would violate the plea agreement. (R. 1962). The court denied the motion "except to reiterate what the Supreme Court has said." (R. 1964). The lower court granted in part and denied in part the motion in limine regarding the McVey testimony. (R. 1976, R 132).

At the trial on February 3, 1994, defense counsel argued that McVey's testimony would constitute improper Williams-rule and violated the plea agreement. (TR. 684). The state responded with its argument and the court ruled:

> "...that the details of Long's treatment of McVey in the apartment and the car should not be admissible. Counsel should conduct their examination -- that will not be admissible unless the door is opened or other circumstances mandate that it become admissible. And counsel should conduct their questioning of this witness consistent with Long v. State, 610 So. 2d...
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> * *
>
> The details of Long's treatment of McVey in his apartment and I'm going to extend that to what happened in the car.

MR. HEDDICKSON: As far as any sexual battery in the car.

THE COURT: That is correct."

(TR. 699).

The court reiterated that the witness was not going to testify that she was a rape victim and it found that the probative value outweighed its prejudicial impact. (TR. 700-701).

The trial court instructed the jury prior to McVey's testimony that it should be considered only as it relates to identity and the defendant was not on trial for a crime not included in the indictment (TR. 703) and the jury was reinstructed after her direct testimony (TR. 722).

McVey testified that on November 2, 1984 she was employed at the Krispy Kreme Donut Shop and after leaving work at about two in the morning someone grabbed her off her bicycle and threatened to kill her if she didn't stop screaming. (TR. 704-707). She felt a revolver to her temple. (TR. 708, 710). She was dragged into a car and told to keep her eyes shut. (TR. 711). The man ordered her to strip and she saw the revolver (TR. 712); he also said he had a knife. They drove for about thirty minutes and she thought they were on the interstate. When they stopped she

entered an apartment. On November 4 she went back out to the car. (TR. 713-714). The assailant drove her to a parking lot and released her. (TR. 715-716). She notified the police. McVey described the vehicle (maroon, two door, mid-size with spoked wheels, the dashboard had the word "MAGNUM" and there were no knobs to pull the locks up). (TR. 717-718). She provided her clothing to Detective Doethe and identified Long in court. (TR. 719, 721).

Long argues that the trial court misunderstood this Court's prior decision regarding the admissibility of the McVey evidence. He contends in this Court that the court below "ruled that the prosecution could use the evidence only to prove identity but allowed the jury to use it as Williams rule evidence." (Brief, p. 26). Long argues that this Court intended "that the trial judge permit sufficient evidence concerning Long's abduction of McVey and subsequent arrest to identify Long as the owner of the car in which two hairs were found, and from which carpet fiber was obtained to compare with the fiber found in Johnson's hair mass." (Brief, pp. 26-27).

Appellant's concern stated here that the trial court should have allowed a more expansive view of admissibility of McVey evidence is unavailing since not argued below -- in the lower

court the defense was vigorously arguing that McVey testimony could not be admitted at all and that this honorable Court was in error for suggesting that it would be admitted. (R. 1960-1974).[1]

Further, at the time of trial, the defense argued that just because the state Supreme Court had determined a limited admissibility for the McVey evidence "that doesn't mean that a federal court isn't going to agree with me completely." (TR 684). Long maintained that use of McVey would be improper Williams rule, would violate his plea agreement and that McVey would become a "feature" of the case. (TR. 684-685). When the prosecutor argued that the Florida Supreme Court indicated that the facts in the McVey case were admissible because "it's what happened to her that led to the arrest of the defendant and subsequently the search and seizure of the motor vehicle" (TR.

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[1]The defense maintained at the October 11, 1993 motion in limine hearing that to allow McVey in "even under the limited outlines set forth by the Supreme Court" would be to allow an improper aggravating circumstance (R. 1960), that allowing McVey abduction evidence constituted a violation of the plea agreement (R. 1962), that the Supreme Court "erred by not including the abduction of Lisa McVey....they did not go far enough when they did not include the abduction aspect" (R. 1962). The defense asked the court to bar the state from using Lisa McVey "as to the abduction as well." (R. 1962). When the lower court mentioned that some of the defense argument "was ruled against by the Supreme Court" defense counsel responded that unfortunately he didn't argue the case. (R. 1973-1974).

688), and that the prosecutor wanted to get into the sexual battery on Lisa McVey (because the Florida Supreme Court opinion at 610 So. 2d 1281 noted that Long's McVey confession was valid and made prior to the Hillsborough County plea agreement), the lower court adopted a more balanced view than that argued by the advocates: the treatment of McVey in the apartment and car would not be admitted - no mention of rape of McVey would be allowed and that the probative evidence of what was admitted outweighed its prejudicial impact. (TR. 699-700).

Since Long did not want any of the McVey evidence to be introduced, he cannot be heard to change his argument in the appellate court to argue that additional background facts should have been included to put matters in context. See Lindsey v. State, 636 So. 2d 1327, 1328 (Fla. 1994)("Because Lindsey failed to object to this testimony when given, and on the ground now argued, he failed to preserve this issue for review.")(emphasis supplied); Steinhorst v. State, 412 So. 2d 332, 338 (Fla. 1982); Terry v. State, 21 Florida Law Weekly S9 (Fla. 1996). To the extent that Appellant merely seeks as in a belated rehearing to re-argue the correctness of this Court's prior decision reported at 610 So. 2d 1276, he may not do so. The trial court correctly obeyed this Court's remand order and the court's prior decision

recognized that evidence about the Long-McVey incident "was clearly admissible to establish Long's identity and to connect him to the victim in this case." Id. at 1281. That Long both in the lower court and here disagrees with that determination is unfortunate, but not greatly so.

Quite apart from announcing his disagreement with this Court's prior ruling on the admissibility of McVey evidence - and boasting below that this court did not have the benefit of trial counsel's personal argument (R. 1973-1974) - Appellant argues that McVey became a "feature" of the case.[2] The jury was repeatedly cautioned on the limited purpose for which McVey's testimony was to be considered, i.e., that Long was not on trial for criminal offenses involving McVey. (TR. 703, 722, 801, 834, 856, 913). Her testimony was fairly brief (TR. 704-721) and certainly in terms of volume was nothing comparable to the last trial and appeal wherein this court observed:

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[2]Appellant's contention that the volume of testimony regarding the McVey incident was excessive must fail. See Wilson v. State, 330 So. 2d 457 (Fla. 1976)(approving introduction of six hundred pages of transcript pointing to separate crimes by the defendant); Burr v. State, 466 So. 2d 1051 (Fla. 1985)(evidence of three other incidents); Townsend v. State, 420 So. 2d 615 (Fla. 1982)(collateral evidence was not an impermissible feature although twice as many pages of testimony related to other crimes).

> "Approximately four hours of testimony was presented concerning the murder in issue in this case while more than three days of testimony was presented concerning these other offenses."

610 So. 2d at 1280.

McVey's two dozen pages of testimony hardly became a "feature" of the case. Long hypothesizes that it "must have been obvious to the jury that McVey was raped." (Brief, p. 32). Appellee disagrees that this was obvious, especially when the trial court adamantly refused to allow rape testimony. (TR. 699, 833).

Long complains that the lower court allowed four other witnesses to testify about the McVey case, citing the brief testimony of Detective Helms (TR. 804-809), Deputy Winsett (TR. 810-812), Detective Lattimer (TR. 835-839) and FBI hair and fiber expert Malone (TR. 916-918). Such truncated testimony was appropriate given this Court's mandate that the evidence of the McVey incident that was appropriate and admissible included "information supplied by McVey" and "the examination of his vehicle that supplied hair and fiber samples connecting him to the victim in this case." 610 So. 2d at 1281.

Long alludes, in footnote 29, to Appellant's admissions to CBS correspondent Victoria Corderi mentioning the McVey

abduction. While the transcript of the Long-Corderi interview approximates forty pages (R. 361-399), only a few pages were deemed admissible by the trial court (TR. 1061-1068) and only a few of his comments relate to McVey.

Both this Court and Mr. Long are well aware that in the prior appeal to review his conviction for this Virginia Johnson homicide Appellant argued (Point III, Case No. 74,017 reported at 610 So. 2d 1276) that it was error to admit "Williams-rule" evidence regarding the kidnapping and sexual battery of Lisa McVey because, inter alia, it was dissimilar. But evidence of other crimes, even if dissimilar, is admissible where relevancy to an issue at trial is established. See Bryan v. State, 533 So. 2d 744 (Fla. 1988); Swafford v. State, 533 So. 2d 270, 275 (Fla. 1988); Pittman v. State, 646 So. 2d 167, 170 (Fla. 1994); Gorham v. State, 454 So. 2d 556, 558 (Fla. 1984). And this Court previously determined that McVey evidence was "clearly admissible to establish Long's identity and to connect him to the victim in this case." 610 So. 2d at 1281. See also Buenoano v. State, 527 So. 2d 194 (Fla. 1988)(poisoning was unusual modus operandi and facts of other incidents admissible to show identity, motive and common plan or scheme).

The contention that use of McVey as a witness and evidence of her abduction which led to the development of evidence and apprehension of Long for the Virginia Johnson homicide violated the plea agreement was presented and rejected in Long's last appeal wherein the Court authorized the use of McVey evidence to establish Long's identity and to connect him to the victim in this case in the retrial. 610 So. 2d at 1280-1281.

Appellant contends that his admissions on the CBS videotape to Corderi mentioning McVey and distinguishing that victim from others was improper. In his last appeal this Court ruled:

> "We disagree, however, with Long's contention that no part of the videotape is admissible because it merely shows criminal propensity and because it refers to the Hillsborough County murders that Long claims were improperly introduced as Williams rule evidence. We find that, upon remand, the videotape may be admissible as an admission against interest; however, whether portions of it are irrelevant or whether the probative value of some of Long's statements are substantially outweighed by unfair prejudice are issues that can be addressed in the new trial."

(emphasis supplied) 610 So. 2d at 1280.

Appellant cites Henry v. State, 574 So. 2d 73, 75 (Fla. 1995) wherein the Court opined that evidence of the killing of Eugene Christian was inadmissible because it "did not prove

motive, intent, knowledge, lack of mistake, or....identity." In Henry's retrial this Court concluded that it was not error to permit some testimony concerning the murder of Eugene Christian. Henry v. State, 649 So. 2d 1366 (Fla. 1994). The facts in question relating to Eugene Christian's murder were inextricably intertwined with the facts pertaining to Suzanne Henry's murder; and in the prior Henry opinion this Court had acknowledged that some reference to the boy's killing may have been appropriate to place the events in context "to describe adequately the investigation leading up to Henry's arrest for Suzanne Henry's murder and the subsequent confession." 649 So. 2d at 1368. In the instant case, this Court's prior decision that evidence of the McVey incident which led to the examination of Long's vehicle that supplied hair and fiber samples connecting him to this victim was "clearly admissible to establish Long's identity and to connect him to the victim in this case." 610 So. 2d at 1281.

Long's admission to CBS correspondent Corderi about victim McVey was relevant; he acknowledged that he let her go (TR. 1062) and that victim McVey was different, "this wasn't some street walker" that he had "snatched her off a bicycle." (TR. 1068). His contrasting donut shop employee McVey with "street walker"

personnel who did not survive helps explain Long's modus operandi and his premeditated activity when a street walker was targeted:

> "When I saw them walking down the street, it was like A, B, C, D. I pull over, they get in, I drive a little ways, stop, pull a knife, a gun, whatever, tie them up, take them out. And that would be it..."

(TR. 1067-1068).

With respect to McVey's demeanor on the stand, the trial court stated on the record that, contrary to Appellant's representation, "this witness is not out of control or sobbing in an inappropriate manner." (TR. 709). Appellant cites Finney v. State, 660 So. 2d 674, 683 (Fla. 1995), a case where this Court rejected a defense argument that the victim of a prior crime's testimony at penalty phase was inflammatory and unduly prejudicial:

> "The testimony was not overly emotional; nor was it made the focal point of the proceedings. When the witness became upset, a recess was called and it is unclear whether the jury even noticed her lack of composure."

In the instant case it was not even necessary to call a recess for the witness to regain composure.

Long complains about the prosecutor's closing argument remarks at TR. 1183, 1208 and 1209-1210 wherein reference was made to the McVey incident, but the jury was instructed yet again

at that point that "the defendant is not on trial for a crime that is not included in the indictment" (TR. 1216-1217) and there can hardly be any undue prejudice resulting since defense counsel conceded in closing argument that Long had admitted abducting McVey. (TR. 1242).

ISSUE II

WHETHER THE LOWER COURT ERRED BY ALLOWING INTO EVIDENCE PORTIONS OF CBS VIDEOTAPED INTERVIEW WITH LONG BECAUSE OF AN ALLEGED AGREEMENT WITH ATTORNEY RUBIN.

In Long's prior appeal to this Court from his conviction for the Virginia Johnson homicide, this Court ruled:

> "We disagree, however, with Long's contention that no part of the videotape is admissible because it merely shows criminal propensity and because it refers to the Hillsborough County murders that Long claims were improperly introduced as Williams rule evidence. We find that, upon remand, the videotape may be admissible as an admission against interest; however, whether portions of it are irrelevant or whether the probative value of some of Long's statements are substantially outweighed by unfair prejudice are issues that can be addressed in the new trial."

Long v. State, 610 So. 2d 1276, 1280 (Fla. 1992).

Prior to trial, Appellant filed a motion to suppress/in limine to exclude and seal CBS interview. (R 65-77). At a hearing on October 15, 1993, the trial court granted the state's

motion to continue to obtain the testimony of Victoria Corderi. (R 2072). Ms. Corderi was deposed on October 28, 1993 (SR 1-46) and the court reviewed that deposition at the hearing on October 29, 1993. (R 984-985). Former trial defense counsel Rubin testified that Long's Hillsborough and Pasco County convictions were being appealed in the Florida Supreme Court. (R 999). Rubin came into contact with Ms. Corderi who wanted to interview Long for part of a program about serial killers. (R 1000). He claimed that Corderi agreed to his conditions that he review the interview before it was aired and that if he disapproved of parts of it they would be removed; he would remove anything that incriminated Long. (R 1001). Rubin claimed that he did not receive the tapes from CBS News and did not see or edit them. (R 1006). The witness explained the benefit by this alleged agreement was that he had a client who was maintaining that his actions arose out of the effects of a 1975 motorcycle accident and publication of Long's remarks "would verify what I had been arguing and what I was about to argue to the Supreme Court of Florida." (R 1007-1008).

On cross-examination Rubin conceded that he had no writing or memoranda or note that displays this agreement. Rubin also admitted that another author - Norris - had interviewed Long in

prison the day before the Corderi interview. There was an exchange of correspondence between Rubin and Norris. (R 1011-1012). Norris authored a book, a portion of which dealt with his conversations and interviews with Long. (R 1015). Appellant Long testified that Rubin and Corderi told him that Rubin had editorial control of the interview. (R 1021).

Victoria Corderi testified that she interviewed Long in Florida while employed as a CBS reporter between July 1986 and December 1987. (SR 6-7). She had a phone conversation with Ellis Rubin that led to the Long interview. (SR 9). Corderi testified she did not have authority to bind CBS News to any contract and she did not enter into any kind of agreement with Rubin or Long for the interview. The tape and content of the interview was the property of CBS News. Neither she nor CBS had to pay Long or Rubin for the interview. (SR 10). Rubin did not require any kind of editorial control, either over the content of the interview or the ultimate publication of the interview. She did not have to promise or threaten Long to get him to talk to her. (SR 11). To the best of her knowledge Long was aware that all or a portion of what they were talking about was going to be published. She did not make any promises or representations to Long that the purpose of the interview was not to incriminate him

in any way. She did not tell Rubin they would allow him to review the content of the interview prior to publication. (SR 12-13). She testified that she would not rest editorial control in anybody else's hands other than herself or CBS because contractually and ethically it's just not done. (SR 23, 42).

Following legal argument, the trial court denied the defense motion finding (A) that the statements were made voluntarily by Long to Corderi, (B) that Corderi honored a limited agreement not to ask about specific cases but that Long brought them up, (C) that there was no agreement that Rubin would have any kind of control over the product, (D) that Rubin's testimony and the Long-Corderi interview convinced the court that it was a strategy approved by Long and discussed with Rubin that they would present a "psycho babble defense" and that counsel was not ineffective since it was a considered strategy. The court found that Rubin did not tell Long the tapes could not be used against him. (R 1073-1075).

Long complains that the trial court's refusal to credit the testimony of former defense attorney, Ellis Rubin "in effect, accused Ellis Rubin of perjury." (Brief, p. 50). As this court well knows it is not uncommon for defense attorneys to continue to advocate for their clients by urging their own asserted

"ineffectiveness" which will obtain a benefit for the client. See, e.g. Atkins v. Singletary, 965 F.2d 952, 960 (11th Cir. 1992)(even if affidavit admitted ineffective performance we would give it no substantial weight because ineffectiveness is question we must decide so admissions of deficient performance by attorney are not decisive); Harris v. Dugger, 874 F.2d 756, 761 fn. 4 (11th Cir. 1989); Johnson v. Wainwright, 463 So. 2d 207, 211 fn. (Fla. 1985); Francis v. State, 529 So. 2d 670, 672, n 4 (Fla. 1988); Bottoson v. State, ___ So. 2d ___, 21 Fla. Law Weekly S38, 41, n 5 (Fla. Case No. 81,411, January 18, 1996)(J. Kogan, concurring in part and dissenting in part)(It is axiomatic that attorneys will not be heard to argue their own ineffectiveness).

In essence, Appellant insists that the trial court should have believed Rubin and Long and should have disbelieved the testimony of Victoria Corderi who repeatedly insisted that there was no agreement with Rubin to forfeit editorial control to Rubin - that it would be a contractual as well as ethical violation to do so and "it's just not done." (SR 11-13, 23, 42).[3] In his effort to have this court substitute its judgment for that of the

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[3]And as the prosecutor ably argued in the lower court it makes no sense for a reporter to agree in advance to unknown limitations on an interview and then do it. (R 1054).

fact finder below - and to credit the testimony of Long and Rubin whose demeanor has not been observed, Long hypothesizes as an analogy the interview of Connie Chung with the mother of Newt Gingrich and that Corderi probably agreed to Rubin's requests knowing she would not comply and hoping it wouldn't be a problem. More likely, the opposite conclusion - found by the trial court and supported by the testimony - is correct. There was no such agreement, Rubin did not have any written memorialization of it and never took any action even after CBS published the interview to the world to seek any relief for the alleged violation for the alleged agreement. And Rubin acknowledged the strategic and tactical basis for his action, to promote the idea that Long's behavior was the result of a 1975 motorcycle accident (R 1007) and:

> "...It would verify what I had been arguing and what I was about to argue to the Supreme Court of Florida.

(R. 1008).

Long is not aided by the two oblique reference in the Long-Corderi interview at R. 377 and R. 383. (See also SR 24, 31). Obviously, Long and Rubin had been in communication before the interview because the transcript contains the dialogue:

"Bobby: Well I tell you the truth, when I first started, I guess it's OK to talk about this as long as I don't talk specifics. That's what Ellis said...

* * *

Reporter: Obviously, Ellis called you, remember? Did you get...

Bobby: He didn't call me.

Reporter: You told me he left a message for you, that it was OK.

Bobby: Yeah, I got a note that you all were coming..."

(emphasis supplied)(R. 377).

That Rubin and Long may have discussed with each other the parameters of how specific he need be in the interview does not detract from Corderi's insistence that she made no such deal for Rubin to act as her editor; indeed, Corderi explained that her remark was a response to Long's indication that he had communicated with Rubin about specifics (SR 25) -- consistent with the trial court's view:

"...beyond any reasonable doubt that this was all strategy, approved by Mr. Long and discussed with Mr. Rubin..."

(R. 1074).

Long next asserts that while the usual rule is that ineffective assistance of counsel claims are not reviewable on

direct appeal and are more appropriate for post-conviction challenge via Rule 3.850 - see McKinney v. State, 579 So. 2d 80 (Fla. 1991), Ventura v. State, 560 So. 2d 217 (Fla. 1990) - in the instant case the claim should be considered because it was argued below. Appellee submits that simply requesting the relief in the trial court should be insufficient predicate for appellate review but in any event as in Ventura, in this record none of the claims warrant relief. Long contends that the lower court "refused to rule on whether attorney Ellis Rubin was ineffective." (Brief at p. 52). This is inaccurate. The trial court declared at the conclusion of the hearing and the presentation of all testimony that:

> "I find there wasn't any ineffective assistance of counsel. That was absolute strategy that had been discussed."

(R. 1074).

That the lower court declined to be further cross-examined by defense counsel to amplify its ruling is of no moment. (R. 1076). Courts frequently make summary rulings without detailed explanations.

In Strickland v. Washington, 466 U.S. 668, 80 L.Ed.2d 674 (1984) the court noted that "strategic choices made after thorough investigation of law and facts relevant to plausible

options are virtually unchallengeable." 80 L.Ed.2d at 695; see also Rogers v. Zant, 13 F.3d 384, 386 (11th Cir. 1994)(even if many reasonable lawyers would not have done as defense counsel did at trial, no relief can be granted on ineffectiveness grounds unless it is shown that no reasonable lawyer, in the circumstances, would have done so). Here, it was not completely unreasonable for Rubin to pursue his strategy of having Long give public remarks that might influence the courts of the defense theory of the case, especially if counsel suggests to his client not to be too specific about criminal offenses.[4]

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[4]As Appellant notes, Rubin did not represent Mr. Long on this the Virginia Johnson homicide. He represented Long in the 1986 Hillsborough County case (involving victim Michelle Simms) and he was aware of the pending appeals from the Hillsborough and Pasco County convictions. (R. 997-999). Rubin represented Long on the appeal from the Hillsborough County conviction. Long v. State, 529 So. 2d 286 (Fla. 1988). Appellant cites no case where alleged ineffective representation in one case results in overturning a conviction in another.

Additionally, as the prosecutor noted below, it is odd that Long accuses Mr. Rubin of ineffective assistance when he was repeatedly attempting to have Rubin appointed at taxpayers' expense to represent him in this trial. (R. 1064; see also R. 2001-2005, March 3, 1993 transcript of hearing on Long's request for Rubin).[5]

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[5]Appellant alludes to the court's instruction on the CBS tape at TR 1283 and argues that it was not helpful. He does not indicate whether, or where, he complained of that instruction below. If the jurors did not hear from Mr. Rubin assuming arguendo that he had admissible relevant testimony to give - perhaps it was because the defense did not call him. If Appellant desired other portions of the taped interview given, he does not identify in the record where he requested and was denied relief.

ISSUE III

WHETHER THE LOWER COURT ERRED BY ALLOWING THE STATE TO INTRODUCE PORTIONS OF LONG'S VIDEOTAPED INTERVIEW WITH CBS NEWS.

On the last appeal this Court declared:

> "We disagree, however, with Long's contention that no part of the videotape is admissible because it merely shows criminal propensity and because it refers to the Hillsborough County murders that Long claims were improperly introduced as Williams rule evidence. We find that, upon remand, the videotape may be admissible as an admission against interest; however, whether portions of it are irrelevant or whether the probative value of some of Long's statements are substantially outweighed by unfair prejudice are issues that can be addressed in the new trial."

610 So. 2d at 1280. After hearing argument and reviewing the forty page transcript of the taped CBS interview (R. 361-399) the court found all portions of the tape requested by the state to be relevant but that: "the probative value of all but the hereinafter referenced portions of the tape would be outweighed by their unfair prejudicial effect" and thus inadmissible. (R. 359). The court then listed the following portions to be admissible:

> That portion of the CBS interview commencing at Page 15 "Reporter: Is there a violent flame burning inside you?", and continuing to Page 16, "Bobby: I don't know.

> It was just different then other things that were just going on at that time.:' that portion commencing at Page 18 "Reporter: Did you feel like a killer? I mean, could you reconcile yourself to that person in the newspapers was ..."; and continuing through Page 20 "Bobby: Yeah, I thought about them. I thought about them a lot. I still do. And its not a pleasant memory, its not a pleasant thought.:' that portion of the interview commencing at Page 25 "Reporter: So you'd be doing the most normal things in the world, racketball, cooking yourself dinner, going to the grocery store. And you would have something come over you?" and continuing through Page 26 "Bobby Joe: Cause that was to me a real clear sign that I was losing control, ...You know, I guess that was the thing that really dawned on me is ahhh, you know, that things were really getting bad."

(R. 360). See also TR. 1061-1068 wherein these excerpts were played to the jury.

Appellant contends that none of the videotaped admissions against interest were relevant, that even if they were, they would be inadmissible as collateral crime evidence showing only propensity and bad character, and that the probative value was outweighed by unfair prejudice. Long maintains that although the lower court's ruling sounds reasonable the decision defies logic.

Appellant first maintains that his admissions to CBS correspondent Corderi are not relevant. Appellee disagrees. Long admitted that he was a killer and why the assault on McVey

did not result in a death in contrast to the instant case; McVey, after all, "wasn't some street walker ... just a girl going home from work at the doughnut shop at 2:30 in the morning on her bicycle." (TR. 1068).[6]

Long's admission of his intent and modus operandi is relevant to the instant homicide prosecution:

> "When I saw them walking down the street, it was like A, B, C, D. I pull over, they get in, I drive a little ways, stop, pull a knife, a gun, whatever, tie them up, take them out. And that would be it. And they all went exactly the same way until McVey came along.

(TR. 1067-1068). In conjunction with the other evidence presented - Virginia Johnson was walking down the street after leaving Mr. Duggan's house, her hair was found in the front passenger seat of the Long vehicle and a fiber found in her hair mass was indistinguishable from the carpet in Long's car, the

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[6]The trial court excluded from the jury consideration - erroneously in Appellee's judgment - more expansive remarks in this regard, e.g., McVey "wasn't like the others" (R. 365), McVey "was different" (R. 376), "they all fit a pretty common type" and "McVey wasn't like the others and that's probably why she is still alive, walking and talking today." (R. 385), he felt the loose women on Nebraska Avenue or Kennedy deserved it (R. 389), that others of a "pretty certain type" did end up in a field somewhere (R. 390).

ligature used to tie the victim's wrists - Appellant's admissions are relevant to the prosecution of the Virginia Johnson homicide.

Long next argues that the videotaped admission constitutes merely evidence which shows bad character or propensity. This Court - on the last appeal - rejected the contention.

> "We disagree, however, with Long's contention that no part of the videotape is admissible because it merely shows criminal propensity..."

610 So. 2d at 1280. Long's "A, B, C, D" admission, for example, is similar to Swafford v. State, 533 So. 2d 270 (Fla. 1988) wherein this Court approved the admission of defendant's boasting that "you just get used to it," noting that it was evidence tending to prove he had committed such a crime two months earlier and its sole relevancy was not to establish character or propensity.

To the extent that Long may be arguing that his admissions to CBS correspondent Corderi about other crimes was so disproportionate in terms of volume that they became a feature of the trial, Appellee disagrees. Only eight pages of his comments were ruled admissible and much of that constitutes innocuous chatter (he feels like he's "going faster" - TR. 1061, discussing Chris Wilder - TR. 1062, that he fully expected to be arrested -

TR. 1065, that no one gives a damn about his problems - TR. 1066-1067).

To the extent that Appellant complains that the truncated excerpts of his CBS interview suggested his committing other crimes, Appellee points out that all evidence is prejudicial in the sense that it incriminates and tends to convict. See Amoros v. State, 531 So. 2d 1256, 1260 (Fla. 1988);[7] Wuornos v. State, 644 So. 2d 1000, 1007 (Fla. 1994); Griffin v. State, 639 So. 2d 966, 970 (Fla. 1994). The point is that the evidence introduced here did not merely show propensity and with no other purpose; the CBS interview admissions show Long's modus operandi which is fully applicable to the Virginia Johnson homicide and gives Long's explanation of why surviving victim McVey did not meet the same fate.

Long contends that in any event the probative value of the admissions in his voluntary interview were outweighed by the

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[7]Appellant cites Delgado v. State, 573 So. 2d 83 (Fla. 2d DCA 1990) wherein the court condemned the trial court's admission of the defendant's boast that he killed ten people because "it did not relate to a material fact in issue," there was no evidence it was true and the jury received no Williams rule instruction. Id. at 85. In contrast, in the instant case, the jury did receive a cautionary instruction that Appellant was only being tried for the instant homicide and Long's admission to Corderi described his intent and modus operandi for this crime.

danger of unfair prejudice. Appellee submits that the lower court did not abuse its discretion in allowing the abbreviated version of remarks to be submitted to the jury. At the hearing on December 15, 1993 the prosecutor argued that the prejudice did not outweigh the probative value of Long's admission on the CBS videotape, citing F.S. 90.401 on relevant evidence and F.S. 90.403. The prosecutor also cited United States v. King, 713 F.2d 627 (11th Cir. 1983) wherein the court observed:

> [5, 6] Second, while prosecutorial need alone does not mean probative value outweighs prejudice, *United States v. Frick*, 588 F.2d 531, 538 (5th Cir.1989), the more essential the evidence, the greater its probative value[7], and the less likely that a trial court should order the evidence excluded. *See United States v. Mills*, 704 F.2d 1553, 1560 (11th Cir.1983)(because testimony "essential" and not introduced merely to "bolster" government's case, court unwilling to consider a Rule 403 violation); *United States v. Spletzer*, 535 F.2d 950, 956 (5th Cir.1976)(under Rule 403 important consideration relating to probative value is prosecutorial need for the evidence). The major function of Rule 403 is "limited to excluding matter of scant or cumulative probative force, dragged in by the heels for the sake of its prejudicial effect." *United States v. McRae, supra*, 593 F.2d at 707.

(Id. at 631). The prosecutor also cited Amoros v. State, 531 So. 2d 1256, 1259 (Fla. 1988).

"In the instant case the use of the gun in

> the prior incident was the only evidence the state had to link Amoros to the killing of Rivero."

(Id. at 1259).

* *

> [2] We recognize relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice. However, almost all evidence to be introduced by the state in a criminal prosecution will be prejudicial to a defendant. Only where the unfair prejudice substantially outweighs the probative value of the evidence should it be excluded. *See* C. Ehrhardt, *Florida Evidence* § 403 (2d ed. 1984). The focus in this instance was establishing Amoros' prior possession of the specific weapon which caused Omar Rivero' death. *Perkins* is clearly distinguishable because in that case the focus was on a similar pattern of criminal conduct rather than the linking of a defendant to a critical piece of evidence. We conclude the evidence was relevant and its prejudice did not substantially outweigh its probative value.

(Id. at 1260). Appellant's contention that the trial court erroneously believed that everything about McVey was admissible, without performing a relevancy or undue prejudice analysis is mistaken. (R. 1099, R. 359).[8]

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[8]Contrary to Appellant's suggestion why Long did not kill McVey helps explain why he did kill Johnson and was relevant and admissible. Cf. Finney v. State, 660 So. 2d 674 (Fla. 1995); Duckett v. State, 568 So. 2d 891 (Fla. 1990); Rivera v. State, 561 So. 2d 536 (Fla. 1990).

Appellant next argues that introduction of the CBS taped interview violated the Hillsborough County plea agreement. Obviously this Court disagreed when it authorized the admissibility of the tape as an admission against interest after having reviewed the entire tape ("We emphasize that, pursuant to an order of this Court, CBS has now provided a videotape of the entire interview, and that videotape is currently available to both the state and Long" - 610 So. 2d at 1280). The prosecutor correctly argued below:

> "So our contention is that, A, it's a statement against interest, but it has nothing to do with the plea agreement. It's subsequent to the plea agreement. And I don't see how by any stretch of the imagination that something that Mr. Long did in the plea agreement can be extended to give him for, lack of a better term, immunity from any statements he may have made subsequent to it when made freely and voluntarily without any type of coercion. If he had specifically talked about the murder of Virginia Johnson in this statement to Miss Corderi months after the plea agreement, that statement would be admissible notwithstanding the plea agreement or notwithstanding the opinion of the Supreme Court. The plea agreement has absolutely nothing to do with this statement."

(R. 819). Long refers to language in this Court's opinion which affirmed a Hillsborough County judgment and sentence but described the reversal of the Pasco conviction:

> 'Additionally, we held that upon remand, Long's pleas and confessions could not be used against him in aggravation during a new penalty phase prosecution."

(610 So. 2d at 1274). But this quoted excerpt does not proscribe the use of Long's videotaped interview with CBS containing admissions against interest - made subsequent to his Hillsborough plea - in the guilt phase of the instant trial. Long argues that he thought he was protected by the plea agreement and Ellis Rubin's representations when he made his general references to other crimes. The short answer is that he made a voluntary non-coerced admission against interest and must accept the consequences thereof. See Issue II, supra, explaining why reliance on Rubin is unavailing.

Long's informing Corderi that there is a violent flame burning inside him and describing how things speeded up is not improper; it does not even necessarily include his prior homicides committed in Hillsborough County; for example, at penalty phase evidence was introduced regarding his rapes and assaults on victims Nuttal and Jensen. Long argues that the most prejudicial and irrelevant part of the videotape was his statement to Corderi that he couldn't see the difference,

standing in front of the mirror between Bobby Joe the person and Bobby Joe the killer. (TR. 1063). Cf. Swafford, supra.

It was proper for the lower court to admit the excerpt of the CBS interview at TR. 1063 because the context of the conversation was Long's discussion about McVey and why he let her go and the police stopping his vehicle and photographing him. (TR. 1062-1064). This Court's prior decision acknowledged that McVey evidence was admissible "to establish Long's identity and to connect him to the victim in this case." 610 So. 2d at 1281.

Long argues that comments about his flight to Mexico were irrelevant. Long told Corderi:

> "I'll tell you the truth, I was thinking a lot about Mexico. You know, I had twelve hundred dollars in the bank, three major credit cards, and I was thinking about hauling ass to Mexico, 'cause I don't want to spend the rest of my life in jail or in a hospital or whatever."

(TR. 1065). Flight is indicative of guilty knowledge - irrespective of whether an instruction on it is appropriate pursuant to Fenelon v. State, 594 So. 2d 292 (Fla. 1992). It is for the trier of fact to weigh and determine whether Long's motives at the time of Johnson-McVey were noble or otherwise.

Long complains about his admission to Corderi that he didn't think consciously about wanting to get caught or wanting to go to

prison for life or facing the electric chair, and his self-serving comments that the authorities would 'fix" what was 'wrong with me." (TR. 1066). But by that time Long had killed Virginia Johnson so his concern about life imprisonment or the death penalty - or lack of concern - was not improper for the jury's consideration.

Long contends that it is preposterous to suggest that Long's "A, B, C, D" statement (TR. 1067-1068) shows that he killed Virginia Johnson. But since Johnson was walking the streets of Tampa and met the criteria for Long's selection decisions, it is not preposterous.

Appellant next complains about the prosecutor's closing argument at TR. 1181-1183 and TR. 1208-1210. Whatever problem there may be in the prosecutor's interpretations of the evidence adduced was adequately taken care of by the court's instruction again:

> "Ladies and gentlemen of the jury, I again would remind you that the evidence which has been admitted to show similar crimes, wrongs or acts allegedly committed by the defendant will be considered by you only as that evidence relates to proof of identity on the part of the defendant. The defendant is not on trial for a crime that is not included in the indictment."

(TR. 1216-1217).

With respect to the penalty phase closing argument the defense interposed no objection to the prosecutor's argument (TR. 1602-1624) so any complaint here ab initio is untimely and barred. Furthermore, the prosecutor legitimately argued Long's 'A, B, C, D" admission to CCP as supportive of the CCP factor in the post-jury recommendation sentencing argument to the judge. (R. 1880).

ISSUE IV

WHETHER THE TRIAL COURT ERRED IN ALLOWING FBI HAIR AND FIBER EXPERT MALONE TESTIFY TO AN OPINION ALLEGEDLY OUTSIDE HIS FIELD OF EXPERTISE AND WITHOUT PREDICATE.

Prior to the testimony of FBI hair and fiber expert Michael Malone, the defense objected that the witness was not an expert in statistics or independent variables and that would be beyond his expertise. (TR. 890-891). The court ruled the defense could cross-examine in this area. (TR. 891).

Malone testified to his educational background, the specialized training in his scientific field since his being employed with the FBI for twenty-three years, his teaching and lecturing and his publishing on the role of hairs and fibers in homicide investigations. (TR. 893-894). The witness was received as an expert in hair and fiber analysis. (TR. 895).

Malone examined head hair samples reported as from Virginia Johnson (TR. 896), vacuum sweepings from Long's car (TR. 897), the carpeting from the car (TR. 905), hair samples from Mr. Long and clothing of Lisa McVey (TR. 912) and gave his conclusions.

Malone explained that the two hairs from Long's car which were consistent with coming from Virginia Johnson and fiber located within the hair mass that was consistent in every respect with the carpeting from Mr. Long's car constituted a double transfer:

> "You're talking about a hair transfer and a fiber transfer. Basically, the fact that I found a fiber from the carpet that matched one in her hair, that I found hairs on the same carpet that matched hairs in her hair mass, two independent events told me that at some point in time Virginia Johnson was probably in Mr. Long's car.

(TR. 912).

He drew a similar conclusion that McVey **was** probably in Long's car based on two independent events of a double transfer of hair and fiber. (TR. 918).[9]

'Apparently not satisfied with the development of the record in this trial, Appellant in footnote 43 alludes to Malone's testimony in an earlier trial which this court described in 610 so. 2d at 1278. Appellee submits that Appellant's repeated attempts throughout this brief, see also Issue X, infra, to add 'facts" from other cases which were not presented or considered in this trial is improper and violative of this court's decision

To the extent that Appellant is claiming that Malone's testimony regarding hair and fiber on Lisa McVey's clothing adds nothing because "we know McVey was in Long's car because of other testimony" (Brief at p. 82), suffice it to say that the testimony, if cumulative, is corroborative of McVey's testimony concerning the identity of her attacker which this Court previously determined was appropriate. Long v. State, 610 So. 2d 1276, 1281 (Fla. 1992)("Testimony concerning the McVey incident may be admitted to identify Long in this case so long as the details of Long's treatment of McVey in his apartment and his subsequent plea of guilty in that case are excluded."). Additionally, Malone's testimony about the McVey clothing is not unduly prejudicial to Long (since he concedes in his brief that McVey was in his car).[10]

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in Johnson v. State, 660 so. 2d 648 (Fla. 1995). Any reference to testimony in another trial or appeal should be stricken by this court, Alternatively, should the court accept this new protocol, Appellee would suggest the court consider that the decision in Long v. State, 517 So. 2d 664, 666 (Fla. 1987) reports the fact that "Long made a full explanatory confession of Virginia Johnson's murder."

"Appellant cites Horstman v. State, 530 so. 2d 368 (Fla 2d DCA 1988) which is inapposite. That decision dealt with the sufficiency of the evidence to sustain a conviction and did not delineate the scope of testimony Malone could provide as a hair

Long argues that since Malone did not know how many miles of the carpet were manufactured (TR. 927), he had no basis for making his statistical conclusions. But as the trial court ruled in the pretrial motion in limine when discussing Malone's prior testimony:

> "Malone never provided a - an opinion as a statistician."

(R. 885). And he certainly did not do so in this trial.

In Terry v. State, so. 2d , 21 Florida Law Weekly, S9, 10 (Fla. 1996), this Court explained:

> "The determination of a witness's qualifications to express an expert opinion is peculiarly within the discretion of the trial judge whose decision will not be reversed absent a clear showing of error. Ramirez v. State, 542 So. 2d 352, 355 (Fla. 1989). An expert is permitted to express an opinion on matters in which the witness has expertise when the opinion is in response to facts disclosed to the expert at or before the trial. § 90.704, Fla. Stat. (1993). Section 90.702 requires that before an expert may testify in the form of an opinion, two preliminary factual determinations must be made by the court under section 90.105. First, the court must determine whether the subject matter is proper for expert testimony, i.e., that it will assist the

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and fiber expert. In any event Malone, sub judice, certainly was not claiming any infallibility in his science. (TR. 903, 911, 919).

> trier of fact in understanding the evidence or in determining a fact in issue. Second, the court must determine whether the witness is adequately qualified to express an opinion on the matter. Charles W. Ehrhardt, Florida Evidence § 702.1 (1994 ed.)."

No serious contention can be made that FBI agent Malone was not an expert in the field of hair and fiber analysis, especially since the defense declined to voir dire after hearing his educational background (Bachelor's and Master's degrees in biology), specialized training with the FBI during his twenty-three years, his lecturing at local, national and international seminars, his extensive publishing and his having qualified as an expert witness approximately five hundred times in forty-five states, the District of Columbia, the U.S. Virgin Islands and the Island of Saipan. (TR. 893-895). This Court has previously affirmed a trial court's use of FBI agent Malone as a hair and fiber analyst. See Crump v. State, 622 So. 2d 963, 969 (Fla. 1993); Duckett v. State, 568 So. 2d 891, 895 (Fla. 1990). See also Thomas v. State, 374 So. 2d 508, 514 (Fla. 1979) (jury permitted to accept expert witness's testimony that hair transference from another to the defendant who transferred it to the sexual battery victim).

In summary, Appellant's contention that agent Malone was improperly giving testimony as an expert statistician when he was not so qualified is inaccurate; he did not testify as an expert statistician. Malone testified within the parameters of his own discipline - hair and fiber expertise - and his judgment that 'at some point in time Virginia Johnson was probably in Mr. Long's car" (TR. 912) - comported with the scientific testing that the single red carpet fiber from the hair mass of Virginia Johnson was consistent with coming from the carpet in Long's vehicle (TR. 910) and that the two hairs from the rug and right passenger seat of Long's car were consistent with coming from Virginia Johnson (including the artificial treatment in the hair). (TR. 911) .[11]

[11]Appellant cites State v. Carlson, 267 NW 2d 170 (Minn 1978) which supports the state. The court there approved the admissibility of testimony by witness Strauss regarding microscopic hair comparison but disapproved - and found harmless - the mathematical testimony of witness Gaudette.

ISSUE V

WHETHER THE LOWER COURT ERRED IN DENYING THE **DEFENSE MOTION FOR JUDGMENT OF ACQUITTAL BECAUSE OF ALLEGED INSUFFICIENCY OF EVIDENCE.**

Alvin Duggan last saw victim Virginia Lee Johnson walking to the Alamo package store and lounge a block and a half away. (TR. **491-492).** Witnesses Linda Phethean Kunst and Candy Linville discovered the body on November 6, 1984. (TR. 530, 544). At the crime scene Detective Kenneth Hagin observed a ligature and piece of clothing around the neck area. (TR. 600-601, 604). He opined that the victim died where her body was found; the ground had a darkened spot and was trampled down and looked as if a struggle had occurred there. (TR. 609, 613). Medical examiner Dr. Jean Wood agreed that the body was there for a significant period of time while it was decomposing, perhaps ten to fifteen days. (TR. 1016-1017). The victim had a twice tied shoelace around the neck. (TR. 1022). The shoelace measured inside of two loops nine and one-eighth inches. (TR. 1023) . An additional shoelace found at the scene - two loops large enough for the wrists separated by eight and one-quarter inches and within one of the loops was the bone of a hand. The lace was not of a size that would be used in a normal shoe. (TR. 1026). Dr. Wood opined

that the cause of death was homicidal violence, probably garrotement. (TR. 1031). Dr. Gish provided dental records of Virginia Johnson (TR. 632) and forensic odontologist Dr. Ken Martin testified there was a match of the remains with Dr. Gish's records. (TR. 641).

Surviving victim Lisa McVey testified she was grabbed off her bike by an assailant as she rode home from work at two in the morning, (TR. 705-707). The assailant armed with a gun and knife dragged her to his car and ordered her to strip and keep her eyes closed. (TR. 710-712). She provided a description of the assailant's vehicle later and identified Long in court. (TR. 718-721). Long's vehicle was searched pursuant to warrant after his arrest. (TR. 816). Long admitted abducting McVey to officer Lattimer. (TR. 836-839).

FBI special agent Michael Malone, an expert in hair and fiber analysis (TR. 895), found a single red lustrous carpet fiber in the hair mass of Virginia Johnson furnished to him and this red fiber was compared with the carpet in Long's car and had the same exact microscopic and optical properties. (TR. 909). Two hairs located in the Long vehicle were blond Caucasian hairs - absolutely not the defendant's - were microscopically indistinguishable from that of Virginia Johnson and consistent in

every respect including the artificial treatment. (TR. 911). The double transfer, a hair transfer and a fiber transfer, were two independent events leading to the conclusion that Virginia Johnson was probably in Long's car. (TR. 911-912).

Similarly, the Lisa McVey clothing contained two kinds of red trilobal nylon carpet fiber. (TR. 916). The red fibers on her clothing exhibited exactly same microscopic and optical properties as the carpet fibers in Long's car. (TR. 916-917) A brown head hair on McVey's shirt was microscopically indistinguishable from the head hair of Long. Malone concluded that McVey was in Long's car. (TR. 918).

Long gave a taped interview with CBS reporter Victoria Corderi in which Long stated he thought about his victims a lot, that when he saw them walking down the street it was like "A, B, C, D," pull over, drive them a little way, pull out a gun or knife, tie them up and take them out. They all went the same way until McVey came along. (TR. 1067-68).

In Barwick v. State, 660 So. 2d 685, 694-695 (Fla. 1995) this Court explained:

> In a circumstantial evidence case such as this, a judgment of acquittal is appropriate if the State fails to present evidence from which the jury can exclude every reasonable hypothesis except that of guilt. ***Atwater v.***

State, 626 So.2d 1325, 1328 (Fla. 1993), *cert. denied,* *U.S.* , 114 S.Ct. 15'78, 128 L.Ed.2d 221 (1994); *State v. Law, 559* So.2d 187, 188 (Fla.1989). If a case is to proceed to trial where the jury can determine whether the evidence presented is sufficient to exclude every reasonable hypothesis of innocence beyond a reasonable doubt, the trial judge must first determine there is competent evidence from which the jury could infer guilt to the exclusion of all other inferences. *Law, 559* So.2d at 189. If there is an absence of such evidence, a judgment of acquittal is appropriate.

* *

[22, 23] However, the State need not conclusively rebut every possible variation of events which could be inferred from Barwick's hypothesis of innocence. *Id.; State v. Allen, 335* So.2d 823, 826 (Fla.1976). Whether the evidence fails to exclude *all* reasonable hypotheses of innocence is for the jury to decide. *Lincoln* v. State, 459 So.2d 1030, 1032 (Fla.1984). We have held that "[i]f there is room for a difference of opinion between reasonable people as to the proof or facts from which an ultimate fact is to be established, or where there is room for such differences on the inferences to be drawn from conceded facts, the court should submit the case to the jury." *Taylor v. State, 583* So.2d 323, 328 (Fla.1991).

See also Crump v. State, 622 So. 2d 963, 971 (Fla. 1993); Orme v. State, ___ So. 2d ___, 21 Florida Law Weekly S195 (Fla. 1995).

In the instant case Appellant has failed to provide an innocent explanation or hypothesis of innocence that satisfactorily explains the convergence of events in the testimony and evidence below. Homicide victim Virginia Johnson's hair was found in Appellant Long's vehicle (as was that of kidnapping victim McVey); a fiber from carpet in Long's vehicle was obtained in the hair mass of Virginia Johnson. Long admitted to CBS correspondent Corderi picking up streetwalkers in Tampa and eliminating them; shoelaces with loops to contain the wrists were found on the victim's body and the medical examiner determined that garrotement was the cause of death. Since there is no innocent explanation to these events, the state satisfied the requirements of State v. Law, 559 So. 2d 187, 189 (Fla. 1989) :

> "The state is not required to rebut conclusively every possible variation of events which could be inferred from the evidence, but only to introduce competent evidence which is inconsistent with the defendant's theory of events."

Appellant relies on Horstman v. State, 530 So. 2d 368 (Fla 2d DCA 1988). There, victim Sandra Peterson's body was found in an area near a bar within walking distance of the house she shared with her boyfriend Earl Jones. The defendant, Horstman,

had been seen with the victim at three bars the night before her murder. While Horstman's hair **was** found on the victim's clothing, the victim's pubic hair had been singed and a cigarette lighter found **near** the body had **a** fingerprint that did not match Horstman's suggesting someone else may have committed the crime. In the instant case, FBI hair and fiber expert Mike Malone's testimony regarding the convergence of hair and fibers of McVey and Virginia Johnson on the Long auto carpet is supported by the medical examiner's opinion that death was caused by garottement, the presence of shoelace ligature on the skeleton and Long's admission to CBS correspondent Corderi that it was "like A, B, C, D" and "tie them up, take them out, and that would be it. And they all went exactly the same way until McVey came along." (TR. 1067-68).

Appellant also appears to be arguing a type of double jeopardy argument, contending that since there were two prior reversals in this prosecution (once because his confession should have been suppressed and once because Williams rule evidence became a feature of the case and the CBS tape not being available to the defense), the failure of this Court also to dismiss the instant **case** in the prior appeal resulted in a double jeopardy violation for this retrial. The short answer is that no court

previously had determined that the evidence was legally insufficient to support the conviction. Since it was merely the presence of other legal error mandating a retrial, the double jeopardy issue does not arise.

ISSUE VI

WHETHER THE LOWER COURT ERRED BY ALLOWING PENALTY PHASE TESTIMONY OF DETECTIVE KAREN COLLINS WHO READ POLICE REPORTS OF OTHER **PRIOR VIOLENT FELONIES BY LONG.**

Pasco County Detective Karen Collins was assigned to the crimes against persons division in November of 1984. (TR. 1477). She was aware of the Pinellas County investigation involving Long and rape victim Linda Nuttall. (TR. 1478). According to a report of FDLE agent Terry Rhodes, the victim reported that in March of 1984 a man phoned and later arrived at her house about some furniture she was selling. He pushed her to the floor in the bedroom, tied her hands behind her, pulled a knife, cut her shirt and bra, blindfolded her, and forced her to have oral sex. He also had intercourse with her, tied her ankles with bed sheets and rummaged through her house. Long was convicted in Pinellas County following this incident. (TR. 1479-80). Long was also convicted in **Pasco** County of the rape of Sondra Jensen. (TR. 1480). From the reports of Kenny Hagin and Deputy Floyd, the

assailant appeared at the Jensen home with a for **sale** sign on the front yard. He checked to see if anybody else was there, then put a choke hold on her and pointed a gun to her head. He tied her hands behind her, taped her eyes shut, demanded oral sex and had sex with her. When her hands started to come loose he tied her hands to the headboard and also tied a rope around her neck telling her she would choke if she moved. He slapped her a couple of times, bit her in the thigh and squeezed her breasts hard. After he left she freed herself after fifteen or twenty minutes. (TR. 1480-83).

Appellant now contends that the lower court's admission of Collins' hearsay testimony was improper. In Long v. State, 610 SO. 2d 1268 (Fla. 1993) the prosecutor at the penalty phase in the Hillsborough County case involving murder victim Michelle Simms similarly had police officers testify regarding the sexual assaults upon Nuttall and Jensen for which Long was convicted. In affirming the judgment and sentence this Court stated:

> [2] In his second claim, Long alleges it was error to allow the State to present evidence in the penalty proceeding regarding his two prior rape convictions. Although the record reflects that Long's counsel stipulated and agreed that Long had been convicted of those offenses, Long asserts that the hearsay testimony of the investigating officers in those cases should

> not have been allowed. We disagree. In sentencing proceedings, "evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant." § 921.141(1), Fla.Stat. (1985). This is true even if the evidence would not be admissible under the exclusionary rules of evidence so long as the defendant has been provided a fair opportunity to rebut any hearsay statements. ***See Chandler v. State, 534*** So.2d 701 (Fla. 1988)(holding section 921.141(1) to be constitutional), ***cert. denied, 490*** U.S. 1075, 109 S.Ct. 2089, 104 L.Ed.2d 652 (1989). Here, when a question was raised about these convictions during the penalty proceeding, the court asked Long's counsel whether the police report contained correct information. He answered the court's inquiry by stating that the reports were "complete and correct." Additionally, he indicated that he could offer no rebuttal to the evidence the State wanted to present regarding these convictions. Given the state of this record, we find no merit in Long's claim on this point.

(Text at 1274-1275).

Since this Court has already approved the identical procedure involving Mr. Long's rape convictions of victims Nuttal and Jensen, supra, no error was committed by the lower court in similarly permitting an officer to relate the factual bases of these incidents. See also Wyatt v. State, 641 So. 2d 355, 360 (Fla. 1994) ("Wyatt also contends that the state presented improper hearsay testimony of several police officers concerning

Wyatt's prior violent felonies which violated his constitutional right to confront his accusers...In any event, hearsay evidence of this nature is admissible in the penalty phase."); Rhodes v. State, 547 So, 2d 1201, 1204 (Fla. 1989) (appropriate in penalty phase to introduce testimony concerning the details of any prior felony conviction involving the use of threat of violence to the person rather than the bare admission of the conviction; testimony concerning the events which resulted in the conviction assists the jury in evaluating the character of the defendant and the circumstances of the crime so that the jury can make an informal recommendation as to the appropriate sentence); Finney v. State, 660 So. 2d 674, 684 (Fla. 1995).[12]

To the extent that Appellant may be complaining that the details became a feature of the penalty phase, the claim is meritless as Collins' testimony was brief, was factual in nature, and involved nothing of a gruesome nature. Appellee notes that the prosecutor made an effort to restrict his own actions, choosing not to put on the victims themselves (to eliminate the emotional-type testimony of victims condemned in Rhodes, supra,

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[12]The trial court announced it would give the appropriate instructions at the conclusion of this phase of the trial. (TR. 1434).

at 1204) or the physical evidence tying Long to the crimes. (TR. 1485). Appellant cannot seriously complain that this testimony was a surprise that he could not respond to since it had previously been presented and approved by this Court. Long v. State, 610 So. 2d 1268 (Fla. 1992).

To the extent that Appellant argues that the testimony was not "necessary," Appellee simply relies on the established case law of Wyatt, supra, Rhodes, supra, and Hildwin v. State, 531 So. 2d 124 (Fla. 1988) that testimony about the details of the crime - as opposed to bare admission of the conviction - appropriately instructs the jury in evaluating the defendant's character.[13]

Appellant's claim is without merit.

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[13]Not only was the factual description of the Nuttal-Jensen incidents a matter of public record for years but also Long, as perpetrator of the crimes, could have provided any correction of errors if he chose to do so.

ISSUE VII

WHETHER THE TRIAL COURT ERRED BY FINDING THE AGGRAVATING CIRCUMSTANCE OF COLD, CALCULATED AND PREMEDITATED WITHOUT ANY PRETENSE OF MORAL OR LEGAL JUSTIFICATION.

The trial court found the presence of the CCP factor, reasoning:

> "The crime for which the Defendant is to be sentenced was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. The evidence failed to establish even a scintilla of moral or legal justification. The murder was premeditated, cold and calculated. Mr. Long coldly and without passion recited to the CBS interviewer the methodology of his killing. Independent of the tape the evidence showed beyond a reasonable doubt that Mr. Long prepared for the murder of Virginia Johnson in advance. Two shoelaces were used, one for confining Virginia Johnson and one for garrotment of Virginia Johnson. The shoelaces had to be available to Mr. Long and had to be tied in a precisely measured **way** so as to accomplish his sinister purpose. Virginia Johnson was last seen in the Dale Mabry area of Tampa, Florida on or about October 15, 1984. Her body was later discovered approximately some thirty (30) miles away in a vacant field in Pasco County, Florida. This Court is convinced beyond any reasonable doubt that Mr. Long lured or abducted Virginia Johnson into his automobile and thereafter tied her up and executed her by tortuously strangling her after transporting her from Tampa and

> delivering her to a vacant field in Pasco County, Florida, where she struggled and was strangled."

(R. 524).

Long criticizes the trial court's shoelace discussion as "illogical," arguing that he probably used shoelaces because they were the only thing available and two shoelaces is reasonable because people wear two shoes. If he had planned the crime, the argument goes, he would have taken something more substantial, such as a rope. But medical examiner Dr. Joan Wood testified the shoelace - similar to the one found about the neck -

> "...was quite long and not of a size that would be used in a normal shoe. It had two loops large enough for wrists, that were separated by eight and one-fourth inches. And withing one of the two loops there was actually a bone of a hand."

(TR. 1026).

That Long should have used a rope instead, suffice it to say that the tools that he employed worked. And Long knew what worked as his admissions to CBS correspondent Corderi reflect:

> "When I saw them walking down the street, I was like A, B, C, D. I pull over, they get in, I drive a little ways, stop, pull a knife, a gun, whatever, tie them up, take them out. And that would be it..."

(TR. 1067-68).

Appellant posits that Long met Virginia Johnson in a bar in Tampa, they became somewhat intoxicated, and she agreed to leave with him in his car to drink, use drugs and have sex; in this scenario the victim was injecting cocaine and heroin at the time and that Long agreed to pay her for sexual services so that she could buy more drugs, They drove out into the country, drinking along the way, and ended up in Pasco County where they disrobed and had sex. When Johnson decided she did not want to engage in sex Long allegedly became angry, removed a shoelace from his tennis shoes, tied her wrists and initiated further sex. When the victim passed out, Long became angry, removed his other shoelace and used it to strangle her.

Appellant compares his case to that of the defendants in Crumn v. State, 622 So. 2d 963 (Fla. 1993) and Holton v. State, 573 so. 2d 284 (Fla. 1990). In Holton this Court found CCP lacking because the murder occurred during the course of a sexual battery and "could have been a spontaneous act in response to the victim's refusal to participate in consensual sex" and a witness testified that "Holton stated that he did not mean to kill the victim." 573 so. 2d at 292. In Crump the defendant admitted giving victim Lavinia Clark a ride in his truck but that he had pushed her out because of an argument. This Court held that the

state did not prove beyond a reasonable doubt that Crump had a careful prearranged plan to kill the victim before inviting her into his truck. 622 So. 2d at 972. In contrast to these two cases, the instant case involves Long's admission that he did not simply lose control during a rape or in a consensual sexual romp gone awry. In his videotaped interview with CBS correspondent Victoria Corderi, Long acknowledged that there is a violent flame burning inside him (TR. 1061) and

> "When I saw them walking down the street, it was like A, B, C, D. I pull over, they get in, I drive a little ways, stop, pull a knife, a gun, whatever, tie them up, take them out. And that would be it. And they all went exactly the same **way** until McVey came along.
>
> MS. CORDERI: And it was different, huh?
>
> THE DEFENDANT: I snatched her off a bicycle. You know, this wasn't some street walker, you know. This was just a girl going home from work at the doughnut shop at 2:30 in the morning on her bicycle."

(TR. 1067-68).

Unlike Holton who reacted to being jilted in consensual sex and didn't mean to kill the victim and unlike Crump where the state failed to show a prearranged plan to kill before the victim entered the car, Long admitted his pattern of picking up and killing his homicide victims - "And they all went exactly the same **way**" - until non-streetwalker McVey came along.

Appellant contends that the prosecutor in his closing argument confused CCP with simple premeditation and with HAC. Appellee disagrees. In his argument at sentencing to the trial judge on March 11, 1994, the prosecutor well understood that the WAC aggravator emphasizes the victim's perspective while the CCP factor focuses more on the mindset of the defendant:

> "But you have more. I refer to the heinous, atrocious, and cruel aggravating circumstance, in my estimation, as being the victim aggravator, and I refer to cold, calculated, premeditated, in my estimation, as being the defendant aggravator. And the reason that I do that is because, in my estimation of the aggravating circumstances, emphasis is placed under heinous, atrocious, and cruel, on the suffering of the victim, the enjoyment of that suffering, by the defendant. And the emphasis is placed, in cold, calculated, and premeditated, on the defendant, upon the calculated nature of his actions, the coldness of his heart at the time he commits the murder, and the heightened premeditation in the mind of the defendant at the time of the death."

(R. 1877).

> "If you will recall the arguments -- and I'm not going to reiterate the whole thing again, because you have told us several times that you retain well -- the wrists were tied of Virginia Lee Johnson. There was a ligature about her neck, with a loop on it. There is no reason to bind a living person -- a dying person or an unconscious person. There is no reason to take the clothes off of a dying person. The evidence is that the

clothes were removed from the body of Virginia Lee Johnson prior to her death. There's no reason to place Virginia Lee Johnson into the position of submissions prior to her death, that she must have been in, based upon the evidence.

And as I indicated, and as Dr. Wood testified, death by strangulation is not sudden death, and while unconsciousness can come about as early as 15 seconds following the application of pressure, constant pressure to the throat -- you have been in court many times, Mr. Eble and I have been in court many times, and we have all seen it done, in deliberating your sentence, and in looking at heinous, atrocious, and cruel, watch the clock for 15 seconds, and count how many times you take a breath.

I suggest to you, Your Honor, there was absolutely no reason to torture this woman. And that's what was done to her. That aggravating factor standing alone, without consideration of either of the other ones that I suggested have been proven, is sufficient to justify the application of the death penalty in this case.

Finally, cold, calculated, and premeditated. As I indicated, in my estimation, there is the defendant's aggravator, because it places emphasis on what the defendant -- what the murderer does in order to achieve his goal of killing.

We know from the tape, the modality of Mr. Long, the methods by which he attained his victims, and the manner in which he inflicted or caused their death. "When I saw them walking down the street, it was like A, B, C, D. I pull over. They get in. I drive a little ways. stop. Pull a knife, a gun, whatever. Tie them up, take them out. That would be it. And they all went exactly the same way."

MR. EBLE: Objection.

THE COURT: Overruled.

MR. VAN ALLEN: Mr. Long did not have to tie up Virginia Lee Johnson. Mr. Long did not have to bring her into Pasco County to kill her, Mr. Long did not have to take her clothing.

The testimony was that they were some 30 miles away from where Virginia Lee Johnson belonged in Tampa. I would suggest to the Court that Mr. Long did not just happen to have an extra set of shoe laces in his pocket.

I would suggest to the Court that the type of death, again, the strangulation, is indicative, in and of itself, of cold, calculated, premeditated.

I believe that we cited the case to the Court, during the charge conference, that stood for that proposition. And again, **as** I have said in this, as in other cases, had Mr. Long wanted to end the suffering, had Mr. Long wanted to **save** the life of Virginia Lee Johnson following the application of the constant pressure that led to her death, all Mr. Long had to do **was** to release that pressure.

It's not a single gunshot. It's not **a** single swipe with a knife. It's a cold, calculated, highly premeditated manner of causing death.

(R. 1870-1881).

Similarly in the prosecutor's argument to the jury at penalty phase on February 8, 1994, he contended:

"The third aggravating circumstance that you will hear is cold, calculated, premeditated. And again the crime for which the defendant is to be sentenced was committed in a cold, calculated, and

premeditated manner without any pretense of moral or legal justification.

And you say to yourself, well, wait a minute. I heard the word "premeditated" last week. If Mr. Long is guilty of first-degree premeditated murder, and he is, then why doesn't this apply automatic? It says cold, calculated, and premeditated.

The reason is because this aggravating circumstance requires a heightened degree of premeditation. I would suggest to you -- and we talked about the fact during voir dire that just because a person is found guilty of first-degree murder it does not necessarily follow that the death penalty would be appropriate. And I would suggest to you, ladies and gentlemen, that if we had a situation where Mr. Long confronted Virginia Johnson on the street somewhere in the world, and became mad over something, and pulled his revolver or drew his knife and shot Virginia Johnson once in the head or stabbed her one time, one thrust to the heart, therefore causing her death in either event, that you would have first-degree premeditated murder, but you would not have the heightened degree of premeditation of coldness, of calculation, that has been shown to you by the evidence in this particular case.

It certainly was not a swift and painless death.

Cold, calculated. While heinous, atrocious, and cruel -- heinous, atrocious, and cruel is, I would suggest to you, victim related, cold, calculated and premeditated is defendant related.

What evidence do you have that there was a heightened degree of premeditation, a chilling coldness, or a calculation about the manner in which this murder was accomplished? First of all, ladies and gentlemen, Mr. Long had to have been prepared. He had to have been prepared to commit this crime. And if

you recall Mr. Hellickson's description, rather, I think Miss Chane indicated, silly description about the person walking down the street, who just happens to have two extra sets of shoelaces or an extra set of shoelaces, and comes across a body and says, I'll just dispose of these extra shoelaces by tying them around the body, around the hands, rather.

Mr. Long had to be prepared. He had to have his ligature. Perhaps he carried an extra set of shoelaces with him just in case. I would suggest to you he had to be prepared.

He required submission of Virginia Johnson. The leash, the bindings around her wrist. He removed her clothes. He dragged her miles and miles and miles away from familiar areas.

He did not -- repeat, he did not wrap the ligature around Miss Johnson's neck one time. He did not use his hands, indicating some frenzied attack. He took the time and the effort to wrap the ligature about her neck twice and to tie it tightly.

How long did it take before Virginia Johnson died? I would suggest one does not know, because with the exception of Mr. Long there is no evidence or indication that anybody else was present. But the medical examiner says death occurs within two to three minutes. Three minutes. And if at any time he had wanted her to live, all he had to do was remove the shoelace. That's all.

Does that show a calculation? Does that show coldness? Does that show a heightened degree of premeditation sufficient to require you as a jury to recommend to the Court the ultimate penalty? In and of itself, the answer is yes."

(R. 1615-1617).

The instant case satisfies the court's criteria to sustain a CCP finding. The killing was the product of cool and calm reflection and not an act prompted by emotional frenzy, panic or rage. Archer v. State, ___ so. 2d , 21 Florida Law Weekly S119 (Fla. 1996); Fennie v. State, 648 So. 2d 95 (Fla. 1994). This execution murder was the product of a prearranged design - the victim was transported to an isolated area thirty miles away where she was strangled to death after her hands were bound. Shere v. State, 579 so. 2d 86, 95 (Fla. 1991). That Virginia Johnson may not have been the actual subject of the planning, CCP is applicable since it is the manner of the killing, not the target which is the focus of this aggravator. Sweet v. State, 624 So. 2d 1138, 1142 (Fla. 1993). Obviously, there is and can be no pretense of moral or legal justification to explain Appellant's conduct.

Finally, even if this court were to agree with Long that the trial court erred in finding the cold, calculated and premeditated aggravating factor, affirmance would still be appropriate because such error is harmless. The remaining valid aggravators - prior violent felony convictions (rapes and other crimes on victims Nuttal and Jensen) and heinous, atrocious and cruel for the strangulation death of Virginia Johnson outweigh

the weak proffered mitigation. The trial court in its sentencing order stated:

> "...The Court has determined the mitigating circumstances do not outweigh any one of the aggravating circumstances. The mitigators, statutory and non-statutory, cumulatively do not outweigh the following sole aggravating circumstance when standing alone, to wit: the defendant has been previously convicted of a felony involving the use or threat of violence to some person.
>
> The Court finds the cumulative statutory and non-statutory mitigating circumstances do not outweigh the sole following aggravating circumstance, to wit: the crime for which the defendant is to be sentenced was especially heinous, atrocious or cruel.
>
> The Court finds the cumulative statutory and non-statutory mitigating circumstances do not outweigh the sole following aggravating circumstance, to wit: the crime for which the defendant is to be sentenced was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification."

(emphasis supplied) (R. 528-529).

See Geralds v. State, ___ So. 2d ___, 21 Florida Law Weekly S85 (Fla. 1996) (erroneous finding of CCP aggravating factor constituted harmless error where valid aggravator HAC and homicide during a robbery/burglary remain and trial judge concluded that death appropriate even without CCP); Ferrell v. State, ___ So. 2d ___, 21 Florida Law Weekly S166 (Fla. 1996)(single aggravator of prior violent felony bearing more

earmarks of the present crime sufficient to sustain death sentence).

ISSUE VIII

WHETHER THE TRIAL COURT ERRED BY INSTRUCTING THE JURY ON THE HAC AGGRAVATING CIRCUMSTANCE WITHOUT AN ALLEGEDLY SUFFICIENT LIMITING INSTRUCTION.

Long did not submit a proposed jury instruction on the HAC aggravating factor among his proposed penalty phase jury instructions. (R. 448-452). At the jury charge conference the defense argued that the evidence was insufficient to support an HAC finding (R. 1492-1498); there was no contention that the instruction was unconstitutionally vague. The trial court found the evidence to be sufficient to provide an HAC instruction. (R. 1523). Shortly prior to the jury being instructed, defense counsel objected to the HAC instruction suggesting that it was vague and did not sufficiently narrow the class of murders to which the death penalty could be imposed. Counsel did not propose an instruction and the motion was denied. (R. 1597).

The court gave the following instruction to the jury:

> " Two, the crime for which the defendant is to be sentenced was especially heinous, atrocious, and cruel. "Heinous" means extremely wicked or shockingly evil.

> "Atrocious" means outrageously wicked and violent. 'Cruel" means designed to inflict a high degree of pain with utter indifference to or even enjoyment of the suffering of others.
>
> The kind of crime intended to be included as heinous, atrocious or cruel is one accompanied by additional acts that show that the crime was conscienceless or pitiless and **was** unnecessarily torturous to the victim."

(R. 475).

On March 11, 1994, a month after the jury recommendation, the defense argued that HAC was too vague (R. 1862), and added that he was objecting to the instruction (R. 1905). The court ruled that the proposed request for instruction **was** not timely:

> "THE COURT: Counsel, I will acknowledge that you made an argument relative to that in a timely manner. However, the publication of that proposed instruction or request for that instruction, obviously, is not timely made; in other words, that you have made substantively that argument, but the indication of a proposal for a statute instruction as to that is not a timely observation.
>
> Accordingly, the -- not accordingly -- but I will deny the motions for new trial and also deny the motion as is contained within the supplemental motion for new trial."

(R. 1906-07).

Appellee respectfully submits that Long's failure to submit a proposed 1imiting instruction should result in a procedural bar

precluding appellate review. Beltran-Lopez v. State, 626 So. 2d 163 (Fla. 1993).

Should the court conclude **that** Appellant's complaint below was timely and sufficient to permit appellate review, Long may not prevail since the claim is meritless. The given instruction was the one approved previously by this court. See Hall v. State, 614 So. 2d 473, 478 (Fla. 1993); Taylor v. state, 630 So. 2d 1038 (Fla. 1993); Stein v. State, 632 So. 2d 1361 (Fla. 1994); Whitton v. State, 649 So. 2d 861 (Fla. 1994); Barwick v. State, 660 so. 2d 685 (Fla. 1995).

ISSUE IX

WHETHER THE TRIAL COURT ERRED BY FINDING THE "HAC" AGGRAVATOR.

The trial court articulated the following finding:

> '2. The crime for which the Defendant is to **he** sentenced **was** especially **heinous,** atrocious or cruel. The State established beyond and to the exclusion of every reasonable doubt that the cause of death of Ms. Johnson **was** the use of homicidal violence, to wit: garrotment, a form of strangulation. Strangulation involves the victim's knowledge of impending death, extreme anxiety and pain and **a** fore-knowledge of death. A shoelace was used for the garrotment of Virginia Johnson and remained on her decomposed body around her neck, beneath the shirt which had been pushed up around her neck area. An additional shoelace was discovered on the wrist **bone,**

> establishing **that** the victim had been bound prior to being placed in a position of submission. There was evidence of a struggle of **a** conscious victim where the body was left to decompose. The Supreme Court of Florida has recognized that strangulation is a method of killing in which the circumstance of heinousness is applicable. Evidence disclosed that death by strangulation is a slow and deliberate means of murder which differentiates it from the single thrust of a knife or the instantaneous death brought about by the firing of a single shot. The evidence further supports that the panties of Virginia Johnson were removed from her person prior to death. The totality of the physical evidence, and the CBS taped interview as edited and considered independently, convinced this Court beyond and to the exclusion of every reasonable doubt that the Defendant's acts relating to the death of Virginia Johnson show the crime was without conscience and pitiless, and **was** unnecessarily torturous to the victim."

(R. 523-524) .

Dr. Wood testified that in examining the bones of Virginia Johnson she looked for any evidence of any type of injury to the bone which might have occurred at or before the time of death such as a knife or bullet injury. X-rays of the head and neck did not reveal any fractures nor any metal that would have come from bullets. (TR. 1019). When she removed the cloth from around the victim's neck, Dr. Wood noticed that a long shoelace was tied with a small loop in the end measuring over nine inches

in length. (TR. 1022-23). The victim's bikini underpants were in the same area but not on the body during decomposition because they were lacking such material as pieces of skin and pubic hair. (TR. 1024). A second shoelace with two loops large enough for wrists were separated by eight and a quarter inches; a bone of the hand was within one of the two loops. (TR. 1026). She opined that the cause of death was homicidal violence, probably garrotment, i.e., a ligature placed tightly enough around the neck to cause strangulation. (TR. 1032). If the pressure about the neck was continuous and not intermittent and it only interfered with venous drainage out of the head, death would take two to three minutes, If pressure were continually applied and interfered with blood flow into the head as well as blood drainage out of the head, the time to unconsciousness could be as little as fifteen seconds and the time to death two to three minutes. (TR. 1033). Dr. Wood found no evidence of injury to the bone consistent with a stab wound. (TR. 1044). She found no evidence of any injury to any bone of the body consistent with a gunshot. (TR. 1045). It would not be reasonable to suggest that drugs represent the cause of death. (TR. 1046).

This court has held that a strangulation death qualifies to meet the HAC aggravating factor. See Sochor v. State, 580 So. 2d

595 (Fla. 1991); Holton v. State, 573 So. 2d 284 (Fla. 1990); Sochor v. Florida, 504 U.S. , 119 L.Ed.2d 326 (1992). See also Geralds v. State, ___ So. 2d , 21 Florida Law Weekly S85, at 87 (Fla. 1996) citing Cheshire v. State, 568 So. 2d 908, 912 (Fla. 1990) ('The factor of heinous, atrocious or cruel is proper only in torturous murders - those that evince extreme and outrageous depravity as exemplified either by the desire to inflict a high degree of pain or utter indifference to or enjoyment of the suffering of another."). This indifference to the victim's suffering is clearly manifest in Long's videotaped admission to CBS reporter Victoria Corderi that it "was like A, B, C, D...I drive a little ways, stop, pull a knife, a gun, whatever, tie them up, take them out. And that would be it." (TR. 1067-68). Appellant cites Teffeteller v. State, 439 So. 2d 840 (Fla. 1983) and Kearse v. State, 662 So. 2d 677 (Fla. 1995) (murder by gunshot) but in footnote 12 of Geralds, supra, this Court explained that the Teffeteller-living-in-pain-for-several-minutes scenario does not qualify for HAC is a wholly different scenario than the stabbing-beating context presented in Geralds, and, the state would submit, the strangulation-death sub judice. Those who kill by gunshot ordinarily presume that death will promptly result; those who employ other means should

reasonably be aware of the non-instantaneous type of conclusion. Strangulation is set apart from the norm of capital felonies.

The trial court correctly found the presence of this aggravator.

ISSUE X

WHETHER THE TRIAL COURT ERRED BY FAILING TO FIND AND WEIGH MITIGATING FACTORS.

Appellant next contends that the trial court failed to consider two mitigators argued by defense counsel: (1) that Long allowed himself to be caught after abducting McVey, rather than running, thus making an effort to stop because he was out of control and (2) the court observed Long's uncontrollable outbursts, rage, and inability to get along with counsel during the trial. (R. 1872-75).

The context of defense counsel's argument below pertaining to Long's permitting himself to be caught after the McVey abduction and his outbursts in court was to support the defense thesis that Long was brain damaged. The trial court's sentencing order summarizing and noting what was accepted and what was rejected from defense witnesses Dr. Berland, Dr. Wood, Dr. Kinsbourne, and Dr. Wood and state witnesses Dr. Eikman, Dr.

Prockop and Dr. Merin more than adequately address Mr. Long's alleged mental problems. (R. 525-528).

Additionally, the assertion that Long had disagreements with his counsel from time to time throughout the course of the trial constitutes nothing of a mitigating nature. The prosecutor ably explained this at R. 1875:

> "MR. VAN ALLEN: Your Honor, Mr. Eble has indicated to you just now that you have seen what he qualifies as the ravings and rantings of a brain-damaged individual. What I would suggest to the Court is something that I have suggested to jurors and courts in the past, concerning Mr. Long, and that is Mr. Long is nothing more than a spoiled brat, who when he doesn't get his way, gets mad and screams and yells. That is what we have seen time and time again through this trial. That's what we saw during confrontations between he and Mr. Eble that occurred during the course of this trial. Nothing more. Nothing less."[14]

With respect to Long's allowing McVey to live, Appellant's self-serving statement to Victoria Corderi acknowledged no particular reason for it. ("I don't know. It was just different

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[14]Appellee notes, for example, that at one juncture where he was waiving his presence Long called the prosecutor "a lying piece of shit" and a "crippled fuck." (TR. 1440). The trial court could permissibly conclude that Long's boorish and insulting behavior truly did not rise to the level of mitigation that would warrant rejection of the jury's death recommendation and was unworthy of discussion as proffered mitigation.

than other things that were going on at that time." - TR. 1063) and in the same interview he conceded that as the police investigation got closer:

> "...I pretty much took the outlook whatever happened happened. I'll tell you the truth, I was thinking a lot about Mexico. You know, I had twelve hundred dollars in the bank, three major credit cards, and I was about hauling ass to Mexico, cause I don't want to spend the rest of my life in jail or in a hospital or whatever."

(emphasis supplied)(TR. 1065).

To the extent that Long is positing his McVey remarks as supportive of some theory of remorse, it is important to note that Long's selected vehicle - an interview with a hopefully sympathetic television reporter - avoided being subject to cross-examination under oath by a prosecutor and indeed Long has not acknowledged personal responsibility specifically naming Virginia Johnson as his victim. Any error committed by the lower court must be regarded as de minimis.

Appellant next engages in a critique of the trial court's sentencing order. Cf. Larkins v. State, 655 So. 2d 95, 102 (Fla. 1995) (J. Well, concurring and dissenting) (noting that an order not as artfully written as some others may be corrected by having trial judges attend judicial education courses rather than have

the court simply 'grade" the trial judge's writing). Appellant complains **that it is not clear whether the** trial court found Long's **mental problems to be established or if it weighed them.** Appellee submits that the sentencing order adequately reports that with respect to Dr. Wood's testimony - who was rebutted by state witness Dr. Eikman and Dr. Prockop on the topic of PET scans and hype-metabolism - "the Court is unpersuaded by the weight of his testimony." (R. 527). Contrary to Appellant's assertion, the trial court did not "consider" the testimony of Dr. Sprehe; **rather, the order recites** that:

> 'The State next presented in rebuttal the testimony of Dr. Daniel Sprehe, Ph.D. Dr. Sprehe's testimony was excluded for **evidentiary reasons,"**

(R. 526).

That the court may have heard a proffer of testimony prior to ruling that the testimony was excluded does not mean the testimony was considered. See Alford v. State, 355 So. 2d 108 (Fla. 1977).

The **trial court did find from a review of the totality of** the evidence that the defendant's capacity to conform his conduct to the requirements of law **was** substantially impaired but that the capacity to appreciate the criminality of his conduct was not

substantially impaired and Long was not under the influence of extreme mental or emotional distress when he committed the crime. (R. 528).

Appellant states - erroneously - that the trial court treated Long's ex-wife's testimony concerning the motorcycle accident as 'uncorroborated." (Brief, p. 126). Actually, the court's order recites that former wife Cynthia Barrett testified about the motorcycle accident and that recitation contains no judgmental comment. (R. 525). In the next paragraph, the order in discussing Appellant's mother's testimony regarding Long's childhood notes that it gave 'minor credibility" to her testimony because she "did not testify truthfully as to the temper of the Defendant's father, which places a cloud over the entirety of her testimony." (R. 525). This Court has consistently reiterated that determinations of the credibility of witnesses and the weight it placed on their testimony is within the province of the trial court. It is simply not the law that the trial court must give the same weight to proffered mitigation that the defense desires. See Atkins v. Sinsletary, 965 F.2d 952, 962 (11th Cir. 1992); Nixon v. State, 572 So. 2d 1336, 1334 (Fla. 1994)(clear that trial court considered and rejected all mitigating evidence offered); Robinson v. State, 574 So. 2d 108, 112 (Fla.

1991) (trial court's comprehensive order discussed all mitigating evidence presented and reflected it considered it and weighed it); Gunsby v. State, 574 So. 2d 1085, 1090 (Fla. 1991) (resolution of factual conflicts is solely the responsibility and duty of the trial judge and as appellate court we have no authority to reweigh that evidence); Zeigler v. State, 580 So. 2d 127, 130 (Fla. 1991)(no error in weight trial judge assigned to mitigating evidence; judge could properly consider witnesses' relationship to defendant and their personal knowledge of his actions in deciding what weight to give their testimony); Sochor v. State, 580 So. 2d 595, 604 (Fla. 1991) (deciding whether family history establishes mitigating circumstances is within trial court's discretion); Pettit v. State, 591 So. 2d 618, 621 (Fla. 1992)(decision as to whether mitigation has been established lies with the trial court). The court stated that it had considered 'evidence of the treatment of the Defendant as a child." (R. 528). That the trial court failed to deem it as devastating as Long's counsel would insist does not render the ruling below erroneous.

Appellant next expresses some unhappiness that the lower court declined the defense offer to lump transcripts of prior expert testimony in prior cases upon it. Let us review. At the

penalty phase portion in front of the jury, Long declined to present any mental health expert testimony and released the witnesses it anticipated using. The reason for that tactic was the defense did not want the state to be able to use the testimony of Drs. Sprehe and Merin on rebuttal as the court had indicated it would allow.

> "MR. EBLE: What I'm suggesting is I am going to argue this case based upon what they've put into evidence and nothing else at this point, and that's why I want a recess after this phase. That's what I'm telling you. I have made a decision that this case will be over today. I am going to argue what they presented over my objection. That's all. I'm not going to suggest he was not violent to women or passive to women. I'm not going to present any medical testimony. I'm not going to present any doctors in this hearing.
>
> I want to renew my motions that I made regarding Sprehe and Merin. Your ruling is going to be the same, and I'm not going to present. I'm not going to make an issue of that stuff. They've got it. They have it."

(emphasis supplied) (TR. 1429).

> " [MR. EBLE:] I would also announce on the record it's my intention to release all of my experts. I think I've made that decision this morning. I intended to present them. I thought their testimony was reasonable, necessary, and the costs of them coming down here and working with me in anticipation of trial testimony was absolutely necessary for a fair determination of this cause.

> However, in light of pretrial rulings regarding Dr. Sidney Merin and Dr. Sphere I have elected that I am not going to present any evidence at all in penalty phase. I want to make that clear to this Court that I am not going to put this man -- I'm not going to argue this man's character as to being pleasant to women or being nonviolent or anything of that nature.
>
> I want to make this perfectly clear before the Court permits this testimony. My intention is to argue the facts already presented in evidence before this Court and that alone, and I'd like to have permission to release all of those witnesses to try to minimize any further costs to Pasco County at this time, get them back on planes, back to their families and homes."

(TR. 1444-45).

> "MR. EBLE: You're -- I'm not saying I'm not going to argue mitigation. I'm not electing to put on the medical, psychiatric, psychological testimony to this jury. I still have another sentencing hearing that I get with the Judge, anyway."

(TR. 1460).

Subsequently, after the jury had given a death recommendation, the defense sought to introduce transcripts of prior testimony by mental health experts before other judges in an effort to have the trial court accept as mitigation what some other judges had found. The state objected, insisting that the credibility of those experts required live testimony so that the trial court could best evaluate the appropriate weight to give

it. (R. 1143-53). The court determined that it was imperative for it to see and observe the demeanor of the witnesses to weigh their testimony. (R. 1160, 1176).

Appellant now impermissibly attempts to rely on the facts presented in prior Long appeals to this Court but which were not presented to or considered by the sentencing judge sub judice. (Brief, p. 129-130). Long apparently urges that whatever testimony or facts alluded to in those opinions somehow have become law of the case binding on all future courts whether they are exposed to such testimony or not and that whatever mitigating factor may have been found in another trial by circuit Judges Griffin, Lazzara or Cobb must now be binding on circuit Judge Cope.

This novel view need not be accepted and Appellee had thought similar protocols had been disapproved by this Court in Johnson v. State, 660 So. 2d 648 (Fla. 1995) (entertaining of separate records and cross-referencing of briefs not encouraged and subject to a motion to strike). Any reference to testimony or mitigation findings made by other judges in other trials which Long now urges in this brief should be stricken.[15]

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[15]It is of no moment for example that Dr. John Money testified previously that Long had the disease of "sexual sadism," Long v.

The Court should adhere to its well-established view that when a resentencing (or retrial) is ordered, the new proceeding starts with a new slate and prior aggravators or mitigators found are not automatically found anew. See Hall v. State, 614 So. 2d 473, 477 (Fla. 1993); Preston v. State, 607 So. 2d 404, 408 (Fla. 1992); King v. Duaaer, 555 So. 2d 355, 358 (Fla. 1990).

Appellant repeats a concern that the trial court should have found abused childhood as **a** mitigating factor, yet the trial court clearly did not abuse its discretion, **especially since** Long's mother had lied to the court and no expert mental health testimony proffered dealt with alleged childhood abuse. Long repeats at pages 131-132 of the brief an argument that other judges with different witnesses have made different findings. Appellee repeats that is irrelevant, especially when different defense theories are bing advanced from **case** to case.

Appellant argues that even if the trial court did not abuse its discretion in failing to find both statutory mental

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State, 610 So. 2d 1268, 1271 (Fla. 1992) or that upon hearing such testimony the jury returned a unanimous death recommendation. Id. at 1272. Certainly this Court would not tolerate the state's attempting to urge that Long gave a full confession to the Virginia Johnson murder by simply alluding to this Court's prior opinion in Long v. State, 517 So. 2d 664, 666 (Fla. 1987) and ignoring that this Court had ordered such a confession suppressed.

mitigators, it failed to consider and weigh them as non-statutory mitigators. After summarizing Dr. Berland's testimony in the statutory mitigating section (R. 525), the trial court separately wrote about non-statutory mitigation presented including:

> "The Court has considered the mental problems of the Defendant, which evidence did not, in the Court's opinion, reach the level of a statutory mitigator. The Court has further considered and weighed the uncorroborated and unreliable evidence of the treatment of the Defendant as a child."

(R. 528).

Dr. Berland's testimony could be given minimal weight since on cross-examination the witness stated that he thought Long had a left hemisphere impairment (TR. 1287) and wouldn't be sure about right hemisphere impairment (TR. 1288) yet in Long's prior trial he stated the left side was possibly impaired but the main one was on the right side (TR. 1289).

Long concedes that Dr. Merin opined that Appellant did not meet the criteria for the two mental mitigators (R. 1728); he contends that his testimony lacked a believable predicate and apparently asks this Court to substitute its evaluation of the witness for that of the trial court. While Long now argues an insufficient predicate for the opinion, the defense below did not

ask Dr. Merin on cross-examination (R. 1731) any questions regarding the nine tests he gave.[16]

Long also alludes to the PET scan testimony and again seeks to have this Court substitute its judgment for that of the trier of fact. Defense witness Dr. Frank Balch Wood had no formal medical training (R. 1411), had no formal training in radiology, nuclear medicine or neurology (R. 1413). The PET scan might reveal organic brain abnormalities. (R. 1418).

Dr. Wood conceded that Long's MRI was normal and that no lesion could be seen on the MRI. (R. 1487). He opined that the only dysfunction he noted was hypometabolism in the area of the amygdala. He did not find any evidence of structural damage to the amygdala. (R. 1497).

Dr. Edward Eikman, a physician specializing in radiology and nuclear medicine (R. 1507) and director of St. Joseph's Positron Center where Long was tested (R 1511, 1514) was not asked to view or read the results when the Long test was given although normally as part of the referral he or a colleague would do the interpreting. (R. 1515, 1411-12). He had now reviewed the

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[16]The defense rigorously sought to exclude - somewhat successfully - much of Dr. Merin's testimony. (R. 1697-1727).

photos and opined that the MRI was normal, he saw a normal pattern of metabolism. (R. 1518, 1522). What had been labeled an area of metabolism was cerebral spinal fluid. (R. 1525). The MRI assisted in confirming his findings on PET scan which were that normal structures containing cerebral spinal fluid were present. (R. 1527, 1530). Long had a normal metabolic imaging. (R. 1537).

Neurologist Dr. Leon Prockop testified that PET scanning has strict limitations as a diagnostic tool alone; its experiential use was very small. (R. 1583). Prockop opined that the resolution of the method of PET scan is not sufficient to say whether you're seeing the amygdala or not and there was no consensus of opinion about the function of the amygdala and its effect upon human behavior. (R. 1586-87). He thought Dr. wood's statement about the amygdala and it's effect on behavior to be a Very superficial statement about human behavior." (R. 1588). The PET scan here was a normal study, not an indication of hypometabolic rate, (R. 1591).

The Court's order indicates that it considered all. Appellee relies on the cases cited, supra, indicating that a sentencing judge need not agree with all that is proffered and accept the defense view, especially where, as here, there is much

that is disputed and controverted. The trial court's articulation sub judice certainly exceeds that of the sentencing judge in Barwick v. State, 660 So. 2d 685 (Fla. 1995) (although trial judge stated that he did not consider Barwick's history of child abuse a mitigating factor, we find that the sentencing order indicates the judge properly considered abuse in his order).

ISSUE XI

WHETHER THE DEATH SENTENCE SHOULD BE REDUCED TO LIFE BECAUSE THIS ALLEGEDLY IS NOT ONE OF THE MOST AGGRAVATED AND LEAST MITIGATED OF MURDERS.

The trial court sub judice found three aggravating factors (prior felonies involving the use of threat of violence, HAC and CCP). (R. 522-524). The lower court also ruled:

> "A careful review of the totality of the evidence fails to persuade this Court to a reasonable certainty that Mr. Long **was** under the influence of extreme mental or emotional distress when he committed the crime of murder in the first degree upon Virginia Johnson. Additionally, the similar review process of all the evidence fails to establish that the capacity of Defendant to appreciate the criminality of his act was substantially impaired. The Court does, however, find to a reasonable certainty that the Defendant's capacity to conform his

> conduct to the requirements of law were substantially impaired."

(R. 528).

The Court added that the totality of statutory and non-statutory mitigators did not outweigh either of the three aggravating circumstances standing alone. (R. 528-529).

> "Appellant is a good man, except that sometimes he kills people."

Fead v. State, 512 So. 2d 176, 180 (Fla. 1987) (J. Grimes, concurring in part and dissenting in part).

Long argues that the trial court should not have found CCP and HAC because the circumstances of Virginia Johnson's death remain unclear and he claims that the lower court improperly relied on the CBS tapes regarding Hillsborough County homicides and the Lisa McVey abduction and thus did not pertain to the charged offense. In actuality, the lower court's discussion of HAC and CCP below at R. 523-524 does not allude to McVey at all and the analysis is strictly confined to the Johnson murder; the CBS interview displays the methodology of Long's killing. But assuming arguendo, for the moment, that the HAC and CCP factors were stricken, death would still be the appropriate sanction.[17]

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[17]Appellee does not concede that HAC and CCP were factors improperly found. As stated in earlier arguments this

In Ferrell v. State, ___ So. 2d , 21 Florida Law Weekly S166 (Fla. April 11, 1996), this Court acknowledged that affirmance of a death sentence is appropriate 'where the lone aggravator was especially weighty." In Ferrell, the trial court had found but assigned little weight to a number of mitigating circumstances. Similarly, in the instant case, the trial court made it unmistakably clear that the totality of proffered statutory and non-statutory mitigation was outweighed by each of the three found aggravators. In Ferrell, this Court determined that the single aggravator - prior violent felony conviction - was weighty; in that case it was a second degree murder conviction bearing many of the earmarks of the present crime. The Court also cited Duncan v. State, 619 So. 2d 279 (Fla. 1993) in its proportionality review and Duncan like the instant case involved a defendant with a similar history of prior violent offenses. See also Lemon v. State, 456 So. 2d 885 (Fla. 1984) (prior violent felony involved assault with intent to commit murder) and Harvard v. State, 414 So. 2d 1032 (Fla. 1982). Other decisions approving

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strangulation death qualifies as heinous, atrocious or cruel. Sochor v. State, 580 So. 2d 595 (Fla. 1991); Sochor v. Florida, 504 U.S. , 119 L.Ed.2d 326 (1992). Similarly, Long's preparation in picking up his victim, binding the wrists, transporting her to Pasco County and strangling her qualifies as CCP.

a sentence of death where a single aggravator was found include Duncan, supra, Cardona v. State, 641 So. 2d 361 (Fla. 1994); Arango v. State, 411 So. 2d 172 (Fla. 1982); Armstrong v. State, 399 So. 2d 953 (Fla. 1991); LeDuc v. State, 365 So. 2d 149 (Fla. 1978); Douglas v. State, 328 So. 2d 18 (Fla. 1976); Gardner v. State, 313 So. 2d 675 (Fla. 1975).

The instant prior violent felonies are weighty.[18] As the trial court makes clear, Long had committed a number of violent felonies perpetrated upon women. (R. 523). There were three counts of sexual battery, a kidnapping, armed robbery and armed burglary/assault on Linda Nuttal. State's Exhibit 1, TR. 1478-1480. There were the multiple sexual batteries, burglary, kidnapping and robbery of victim Sandra Jensen. State's Exhibit 4, TR. 1480-1483.[19]

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[18]Not included as part of the lower court's analysis is the murder conviction and affirmance report at Long v. State, 610 So. 2d 1268 (Fla. 1992).

[19]Appellant makes a footnote observation at page 138 Of his brief suggesting that introduction of the aggravated assault conviction, Exhibit 2, may have violated the plea agreement. Long correctly points out that there was no complaint or objection to the introduction of this exhibit when it was introduced (TR. 1412), defense counsel had earlier announced he had stipulated to the judgments and sentences to be used (TR. 1397-1398). Moreover, there is no violation of the plea agreement. This Court stated "we find that it was error to allow evidence of those murders to be introduced against him in this

Appellant compares his case to that of the defendants in DeAngelo v. State, 616 So. 2d 440 (Fla. 1993); Knowles v. State, 632 So. 2d 62 (Fla. 1993); Clark v. State, 609 So. 2d 513 (Fla. 1992). DeAngelo had presented significant mental mitigation and confessed to the crime. The trial court there had found that DeAngelo had the mental health disorders described by Dr. Berland (bilateral brain damage, hallucinations, delusional paranoid beliefs, psychotic disorders caused by brain damage and a mental illness causing unstable moods). Long, in contrast, has not admitted his crime and the defense declined to present any mental health expert testimony to the jury. With respect to the evidence presented at the post-recommendation sentencing, the state's evidence (Dr. Merin - R. 1728) sharply disputed the defense contention that Long was under the influence of extreme mental or emotional disturbance and had an impaired ability to appreciate the criminality of his conduct and to conform to the requirements of law. Moreover, state experts Dr. Eikman and

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case. We emphasize, however, that our ruling in this case does not preclude the introduction of relevant evidence regarding offenses for which Long was convicted before he entered into the Hillsborough County plea agreement." 610 So. 2d at 1281 (emphasis supplied). The Exhibit 2 aggravated assault was a revocation of probation for which Long had apparently previously been convicted.

neurologist Dr. Prockup maintained that Long's PET scan was normal, contradicting the defense expert view. Unlike Knowles, supra, which involved uncontroverted neurological deficiencies resulting from extended alcohol abuse, almost all that was proffered as mitigating sub judice was disputed. Reliance on Clark v. State, 609 So. 2d 513 (Fla. 1992) is unavailing; there much uncontroverted evidence was presented regarding alcohol abuse (especially at the time of the crime) and abused childhood. Long, of course, had no alcoholic impairment, the mitigating presented was controverted by the state's experts and the testimony below from Appellant's mother regarding his childhood was given little credence:

> "The Court gives minor credibility to Mrs. Long's testimony. Mrs. Long did not testify truthfully as to the temper of the Defendant's father, which places a cloud over the entirety of her testimony."

(R. 525).

Appellant's claim is meritless and must be rejected.

ISSUE XII

WHETHER THE PROVISION OF THE FLORIDA DEATH PENALTY STATUTE PERMITTING RECOMMENDATION BY BARE MAJORITY VIOLATES THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE TJNITED STATES CONSTITUTION.

Appellant does not identify where he presented this claim below to enable him to urge it as error in this Court. If he did not argue this claim in the lower court, he is procedurally barred from initiating the argument here. Steinhorst v. State, 412 So. 2d 332, 338 (Fla. 1982); Occhicone v. State, 570 So. 2d 902, 905-906 (Fla. 1990).

Alternatively, even if the claim had been preserved, this Honorable Court has consistently rejected arguments similar or identical to this one. See Brown v. State, 565 So. 2d 304, 308 (Fla. 1990); Jones, 569 So. 2d 1234, 1238 (Fla. 1990); Tavlor v. State, 638 So. 2d 30, 33, n.4 (Fla. 1994), cert. denied, ___ U.S. ___, 130 L.Ed.2d 424 (1994).

CONCLUSION:

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copy of the foregoing has been furnished by U.S. Regular Mail to A. Anne Owens, Assistant Public Defender, P. 0. Box 9000 -- Drawer PD, Bartow, Florida 33830, this 12th day of July, 1996.

Robert J. Landry

COUNSEL FOR APPELLEE