IN THE SUPREME COURT OF FLORIDA

ROBERT J. LONG, :

Appellant, :

vs. : Case No. 83,595

STATE OF FLORIDA, :

Appellee. :

_____ :

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

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This is a direct appeal from Appellant Robert J. Long's third trial for the murder of Virginia Johnson, in Pasco County, Florida. Long's legal name is "Bobby Joe Long," and he will sometimes be referred to as "Bob" or "Bobby Joe" in this brief. References to the trial transcript, including penalty phase, will be designated by the letter "T." and the page number. Transcripts of the pre-trial and sentencing hearings, and other court documents, are numbered separately from the trial transcript, and will be referenced by the letter "R." and the page number. The supplemental record will be referenced by "SR." and the page number.

STATEMENT OF THE CASE

Appellant, Robert J. Long, was charged by indictment, filed December 6, 1984, with the first-degree murder of Virginia Johnson in Pasco County, Florida. (R. 6-7). At his 1985 trial, Long was convicted and sentenced to death This Court overturned Long's conviction because his confession was obtained in violation of his right to counsel. Lons v. State, 517 So. 2d 664 (Fla. 1987).

On September 23, 1985, prior to the reversal in this case, Long entered into a plea agreement in Hillsborough County, whereby he pled guilty to all offenses charged in Hillsborough County, which included eight counts of first-degree murder, eight counts of kidnapping, seven counts of sexual battery, and the kidnapping and sexual battery of Lisa McVey, whose abduction led to Long's arrest on November 16, 1984. Long agreed not to contest the admissibility of his confessions or the physical evidence, in return for which

the State agreed to the imposition of life sentences for all crimes charged, except the murder of Michelle Simms. The penalty for Simms' murder was to be determined at a penalty proceeding at which the State would seek the death penalty. The plea agreement provided that the State would not use the convictions resulting from the plea agreement against Long. (R. 61-64))

Long was sentenced to death for the Simms murder at a penalty proceeding in 1986. In 1988, this Court vacated his death sentence because the State used Long's Pasco conviction, which had since been vacated, to establish an aggravator. Long v State, 529 So. 2d 286 (Fla. 1988). Long was again sentenced to death for the Simms murder in a penalty trial moved to Daytona Beach. That sentence was upheld in Long v. State, 610 So. 2d 1268 (Fla. 1993).

In 1988, Long's was retried in this, the Pasco County case, in a trial moved to Fort Myers. The jury heard testimony and evidence concerning four Tampa homicides and the Lisa McVey sexual battery, all of which were covered by the Hillsborough County plea agreement. The State used the crimes covered by the Hillsborough County plea agreement to establish the "prior violent felony" aggravator. The jury returned a guilty verdict and the judge imposed the death penalty. Long v. State, 610 So. 2d 1276 (Fla. 1992). (R. 10-26)

This Court reversed on appeal, holding that the trial court erred by allowing the State to introduce four Hillsborough County convictions as Williams rule[1] evidence, because those homicides, rather than the one for which Long was on trial, became the

[1] See Williams v. State, 110 So. 2d 654, (Fla.), cert. denied, 361 U.S. 847 (1959).

"feature of the case," and because the State introduced portions of a CBS News videotaped interview with Bobby Joe Long, made after Long's first convictions in Pasco and Hillsborough Counties, without making the entire tape available to the defense. 610 So. 2d at 1280. The Court determined further that:

> 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 enteredintothe 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.
>
> Finally, with regard to the penalty phase, we note that the Hillsborough County pleas and convictions were considered as factors in aggravation against Long. In the Hillsborough County case, Long pleaded guilty to eight murders in return for, among other things, the promise that his guilty pleas would not be used against him in other subsequent penalty proceedings. Although that agreement was drafted to apply only to Hillsborough County and the Thirteenth Judicial Circuit, the record of the plea proceedings in that case indicates that both parties understood the agreement to mean that the pleas could not be used adversely against Long in any subsequent proceeding. Obviously, at the time he entered into that agreement, the first trial in this case had already been completed and the death sentence had been imposed. Thus, although the record clearly reflects Long's understanding that offenses for which he was convicted before he entered into the plea agreement could be used against him, there was no mention of the use of Long's Hillsborough County pleas in a subsequent retrial of this case. Little doubt exists that one of the major benefits intended to be received by Long in entering into the plea agreement was that his guilty pleas could not be used against him in subsequent proceedings. Consequently, to ensure the continued validity of the Hillsborough County

> plea agreement, we find that it was error to allow evidence of those murders to be introduced in aggravation against him in this case. . . .

As to the admissibility of the CBS tape at the retrial, this Court stated as follows:

> We disagree . . . 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 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 1280-81 (footnotes omitted). (R. 20-21)

Although Pasco County Judge Wayne Cobb heard and ruled on all pretrial motions, he recused himself and granted a change of venue for Long's third trial. (R. 345, 400) The trial was held in the Fifth Judicial Circuit, Ocala, Florida, commencing January 21, 1994. (R. 410) Sixth Circuit Judge Charles W. Cope presided. (R. 498) The jury found Long guilty as charged and recommended a sentence of death by a seven to five vote. (R. 499-500)

A sentencing allocution hearing was held March 9-11, 1994. (R. 511-18) On March 18, 1994, Long was sentenced to death. (R. 519) Although the judge did not orally enumerate the aggravating and mitigating circumstances found, he made and filed written findings in support of the death penalty on that date. (R. 522-29, 1913) He found three aggravating factors and various mitigation. (R. 522-29)

Notice of Appeal was filed April 18, 1994. (R. 646) The Public Defender for the Tenth Judicial Circuit was appointed to represent him on appeal. (R. 1915) This Court has jurisdiction pursuant to article V, section 3(b)(1) of the Florida Constitution.

STATEMENT OF THE FACTS

Guilt Phase

Alvin Duggan testified that the victim, Virginia Johnson, lived at his house just prior to her disappearance. (T. 489-90). Sometimes she was gone for periods of time, staying overnight elsewhere. (T. 500) In mid-October of 1984, he took Virginia to a health clinic. (T. 490-91) The last time he saw her was about a week after that when she left the house early in the morning to buy a pack of cigarettes at the Alamo Lounge. (T. 491). Virginia owned a floating heart necklace which she always wore. (T. 492).

Sharon Martinez met Virginia Johnson at the Alamo Liquors, a bar on North Nebraska Avenue. Johnson lived with her for about a month in 1984. (T. 1084-86). Martinez last saw her friend around the middle of October, 1984.[2] (T. 1124) According to Martinez, Johnson had an alcohol problem. When Martinez last saw Johnson, who had just returned from seeing her probation officer,[3] Johnson told her that she was injecting cocaine and heroin (speedballing), and engaging in prostitution. (T. 1086-89, 1112-13)

Nurse Bernadine Herrman examined Virginia Johnson on October 15, 1984, at the Hillsborough County Health Department's sexually transmitted disease clinic. (T. 512) Virginia, age 18, came to the clinic because she had been in contact with someone with gonorrhea. She reported that she last had sex a day earlier, and that she had

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[2] Although Johnson's body was found on November 6, 1984, she was not reported missing until November 18, 1984. She had been missing for about a month. Long, 610 So. 2d at 1277.

[3] Deputy Ken Hagin found a document in Johnson's belongings showing that she was on probation for prostitution. (T. 885-86)

had "many" sexual partners in the last month. (T. 516) She had been treated four times for gonorrhea, the last time being in 1984. (T. 519) Because her gonorrhea smear was positive, Ms. Herrman treated Virginia for gonorrhea and told her to return in a week for further test results. Virginia did not return. (T. 517-18)

On November 6, 1984, a horseback riding instructor, Linda Phethean Konst, and her student, Candy Linville, discovered the remains of a body while riding their horses on a dirt road in Pasco County. (T. 528-30, 543). The bones began 20-25 feet from the dirt road and were spread out in the high grass. (T. 534). The location was three or four miles from the Hillsborough County line, and about thirty miles from downtown Tampa. (R. 528-29, 545)

Pasco County deputy sheriff Christopher White responded to the scene, and the two women showed him where they found the bones, (T. 551-52) He observed a patch of grass that was pushed down a little, a dark area, and the skeletal remains of a body. They found a tuft of hair and a pair of women's underwear. (T. 552-53)

FDLE crime lab analyst Barbara Vohlken described their grid search. (T. 555-56) Grid A was the area in which they found dark stains and matted grass. Grid B was where most of the bones were found. They collected bones, hair, panties, a shoelace, and a cloth item found below the chin area. (T. 560-70) Ms. Vohlken used a metal detector, but found no bullets or other metal objects. She had no idea whether the victim died at that location. (T. 577)

Ken Hagin of the Pasco County Sheriff's office also responded to the scene. (T. 590-91) He observed the partially mummified and skeletonized upper torso of a human body. (T. 600) The grass

appeared trampled in a darkened area. (T. 598) He observed no tire tracks or drag marks. (T. 609) Over defense objection,[4] Hagin testified that, in his opinion, Johnson died "[e]xactly where I found the darkened area." (T. 609-10)

Bobby Joe Long was arrested in Tampa on November 16, 1984. (T. 605). On November 19, 1984, Hagin went to Terry Duggan's house and obtained some of Virginia Johnson's personal effects. (T. 695). Her parents and dentist, Jack Gish of Danbury, Connecticut, were located and contacted. Dr. Gish sent Johnson's dental x-rays[5] which Hagin took to Dr. Ken Martin, a dental consultant with the Medical Examiner's office. (T. 605-08) Hagin x-rayed the victim's teeth and confirmed Virginia Johnson's identity. (T. 637-40).

Dr. Joan Wood, the medical examiner, went to the crime scene on November 6, 1984. Dr. Wood participated in the grid search, and did not see any red fibers. (T. 1015-18, 1050) She observed a darkened area in the grass where the bones were found, caused by body fluids leaking during decomposition. (T. 1016) Dr. Wood estimated that the body had been dead from ten to fifteen days and had been in the field a significant amount of that time. Although it

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[4] Defense counsel objected to Hagin's testimony that he knew Johnson was killed where her body was found, because his knowledge was obtained from Long's suppressed confession. The prosecutor advised that Hagin would testify that he could tell that Johnson was killed where her body was found based on blood stains, an area of struggle, and the lack of tire tracks. Defense counsel objected because Hagin never testified in that fashion before; he previously testified that he made no conclusion as to where Johnson was killed. The judge overruled the objection. (T. 580-87, 609-10)

[5] Dr. Jack Gish identified Johnson's dental x-rays taken October 8, 1982, and testified that he sent them to Detective Hagin in Pasco county. (T. 630-32)

had decomposed there, she could not say whether the victim was actually killed there, or whether her body was deposited there after death. (T. 1017, 1042) She could not tell whether the victim was killed in Hillsborough or Pasco County. (T. 1049)

X-rays taken at the medical examiner's office did not reveal any bullets or fractures to the bones. (T. 1019) Dr. Wood removed a knit tank top from around the neck, and found a shoelace wrapped twice around the neck and a necklace with a floating heart pendant. At the tip of one end of the shoelace, was a small loop. (T. 1021-22). A second shoelace found at the scene had two loops, each big enough for a wrist. One contained a hand bone. (T. 1026)

After consulting with forensic anthropologist Curtis Wienker, a professor of anthropology at the University of South Florida, Dr. Wood determined that the remains were those of a white female.[6] (T. 1018, 1027). She found that the cause of death was "homicidal violence, probably garrotment." She based her opinion on the victim's young age, that she was found semi-nude in a field outside of her county of residence, shoelaces around her neck and wrists, and the absence of injury to the bones before death. (T. 1031) She found no fractures of the neck banes. (T. 1049)

Dr. Wood could not rule out other causes of death, She acknowledged that it was possible that the victim was stabbed or shot although they found no evidence of that. They were unable to do any testing to determine whether her blood contained cocaine, alcohol or other drugs. (T. 1044-45) Dr. Wood agreed that Johnson

[6] Dr. Wienker, who studied the skeletal remains at Dr. Wood's office, concluded that the victim was eighteen to twenty. (T. 646)

could have died from a blow to the head although there was no skull fracture. She did not know whether the ligature was placed around the neck before or after death.' (T. 1049). If the victim was strangled and the pressure continuous, it would have taken two to three minutes for her to die. If the pressure interfered with blood flow into the head, the victim could have become unconscious in as little as fifteen seconds. (T. 1033-34)

Lisa McVey testified that in 1984, when she was seventeen years old, she worked at a Krispy Kreme Donut Shop in Tampa. (T. 704). On November 3, 1984, she got off work around 2:30 a.m. and began to ride home on her bicycle. As she rode past a van, someone grabbed her off her bicycle and threw her to the ground. He told her to stop screaming or he would kill her. She felt a revolver at her left temple.' (T. 706-08) Her abductor drug her across the street to a car, and told her to keep her eyes shut. He shoved her into the car and told her she was going to show him a good time for two hours. He told her to strip, which she did. She saw a gun on the seat. The man said he had a knife although she never saw or felt the knife. McVey testified that she was blindfolded part of the time. (T. 710-13)

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[7] Dr. Wood acknowledged that some persons have accidentally suffocated from being strangled during orgasm to increase sexual excitement by creating a relative lack of oxygen. (T. 1043-44)

[8] Defense counsel requested that the record reflect that Lisa McVey started crying and was handed tissue by the bailiff. He objected to testimony that her abductor used a gun because there was no evidence of a gun in the Johnson case, and argued that McVey's testimony was becoming the feature of the case. Judge Cope overruled his objection because Judge Cobb had ruled that the probative value of the testimony outweighed the prejudice. (T. 708)

They arrived at an apartment building and Lisa's shirt, pants and shoes were "placed back on." They went into the apartment. About 24 hours later, they went back out to the car. She wore her white pants and a blue shirt. The man asked where she lived. They stopped at a bank and a gas station. The man dropped her off in a parking lot, gave her the rest of her clothing, and told her that if she notified the police, as he believed she would, she should describe him as having long hair. (T. 714-16)

Lisa notified the Tampa Police Department. (T. 716) She described the vehicle as a maroon two-door mid-sized car with a white interior, with the word "Magnum" on the dashboard in silver letters. The carpet was red. (T. 717-18). Lisa gave Detective Polly Goethe the clothing she was wearing.' (T. 719)

Over defense objection, Lisa McVey identified Long as her abductor. (T. 719) On cross-examination, however, she admitted that she was never able to see her abductor.[10] (T. 769) McVey also

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[9] Following McVey's direct testimony, the judge advised the jury that "the evidence which has been admitted to show similar crimes, wrongs or acts allegedly committed by the defendant will be considered only as that evidence relates to proof of identity on the part of defendant. . . . (T. 721-22) The judge denied the defense motion for mistrial based on the introduction of McVey's testimony about activities in the car, her abductor forcing her to remove her clothes, and guns and knives. (T. 723)

[10] Defense counsel told the judge that McVey had never been able to identify Long in ten years. The judge allowed him to question McVey outside the presence of the jury prior to cross-examination. (T. 719-21) McVey admitted she had never before been able to identify Long and never saw his face. She said she "knew his voice" and could "feel his presence," She touched Long's face ten years ago. At the time, she had been unable to pick out Long's photograph, however, and had recently said on a talk show that she never saw Long's face until the last trial. (T. 723-25)

testified that she signed a contract for book and movie rights. She received a down payment of $1500 in 1985. She was currently participating with the author, Joy Wallman, who was in the courtroom at the time. (T. 769-70)

On November 14, 1984, Detective Carson Helms received information about a suspect in the abduction of Lisa McVey. The suspect was a white male in his thirties, about five feet seven, medium build, with short brown hair, driving a maroon Dodge Magnum. (T. 804-05) On November 15, 1984, he and Detective C.D. Wolfe saw such a vehicle traveling north on Nebraska Avenue, driven by a white male. The officers pulled the vehicle over. The driver gave Helms a license which identified him as Bobby Joe Long. The detectives took photographs of Long and his car, and let him go. (T. 805-07)

Harold Winsett of the Hillsborough County Sheriff's Office, participated in the arrest of Bobby Joe Long at the Main Street Shopping Center in Tampa, where Long was coming out of a movie theater. (T. 810-11) Winsett transported Long to the sheriff's operation center. (T. 812) Lt. Randy Latimer of the Hillsborough County Sheriff's Office and Sergeant Price of the Tampa Police Department interrogated Long on November 16, 1984, in connection with the kidnapping of Lisa McVey. (T. 835-37) After being advised of his rights, Long admitted that he abducted Lisa McVey from a bicycle, asked her to undress in the car, and had taken her up to his apartment after dressing and blindfolding her. He used a gun to abduct her and threw it off a bridge or causeway. (T. 838-39)

Long's Dodge Magnum was impounded. (T. 815-16) Deputy Steve Moore vacuumed the car's interior and collected the sweepings. (T.

857-61). Detective Cribb drove the sweepings, a sample of Long's hair, and the carpet from Long's car to the FBI lab in Washington D.C., where he turned them over to Agent Mike Malone. (T. 864-70)

FBI agent Michael Malone, a specialist in hair and fiber analysis, testified that he found two bleached blonde Caucasian hairs, one from the right front seat and one from the left rear carpet of Long's car -- which were microscopically consistent with Virginia Johnson's hair sample. (T. 893-94, 911) While Malone found no dissimilarities, he acknowledged that, unlike fingerprint evidence, a hair cannot be matched back to a particular person to the exclusion of all others. Malone testified that the two hairs found in Long's car were bleached.[11] (T. 911) Because bleaching affects the characteristics of the hair, he could not determine the sex of the person whose hairs he found in Long's car. (T. 929-30)

Malone went through Johnson's hair mass, collected at the crime scene, and found a single red trilobal lustrous carpet fiber. (T. 904) It had the same microscopic properties as the red trilobal lustrous fibers in the carpet from Long's vehicle. Thus, it was consistent with Long's carpet fiber although Malone could not say that it came from Long's vehicle.[12] (T. 909-10) He did not know how many miles of that particular carpet were manufactured, how many companies the carpet was sold to, or how many cars the

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[11] Sharon Martinez, a friend of Virginia Johnson, testified that she was positive Johnson was a natural blonde. (T. 1085)

[12] Malone found carpet fiber on Johnson's clothing that was not from Long's carpet. (T. 925) He found a different red carpet fiber, and a blue and white carpet fiber, on her panties. (T. 934)

carpeting was installed in. (T. 927) Over defense objection to his lack of statistical expertise (T. 889-91), Malone testified that the match of both hair and fiber evidence compounded the likelihood that Virginia Johnson was in Long's car. (T. 912)

Malone also examined Lisa McVey's clothing, and found two kinds of red trilobal nylon carpet fiber -- one "lustrous" and one "delustered." Delustered fiber is treated with a delustering agent to keep it from being shiny. Malone concluded that the red fibers found on McVey's clothing were consistent with coming from Long's vehicle carpet. (T. 916-17) He also found a single brown Caucasian hair on McVey's shirt. It exhibited the same microscopic characteristics as Long's head hair. Again, the double transfer -- both a hair and a fiber -- were independent events that reinforced each other; he concluded that, at some point in time, McVey was probably in Long's vehicle and in contact with him. (T. 917-18)

Over strenuous defense objection, the court allowed the State to introduce a large portion of a videotaped interview of Bobby Joe Long, by Victoria Corderi, formerly a reporter with CBS News. (T. 1061-69) The portion played for the jury is quoted in Issue III of this brief, commencing at page 57, infra.[13] The trial judge gave a Williams rule instruction, informing the jury that it could consider the CBS tape evidence only to prove the identity of the defendant. (T. 1069-70)

[13] Judge Cope refused to review Judge Cobb's ruling regarding the CBS tape, but deemed the defense motions renewed; he ratified, approved and adopted the orders entered by Judge Cobb. (T. 1007-08)

Penalty Phase

Detective William E. Ferguson identified Long's fingerprints on three judgments and sentences. (T. 1408, 1412) Over defense objection, Detective Karen Collins, Pasco County Sheriff's Office, testified that, as a result of her involvement in the investigation of Virginia Johnson's death and Long's arrest, she read a police report prepared by FDLE Agent Terry Rhodes, and learned that Long was convicted of sexual battery in Pinellas County.[14] (T. 1477-80) Collins recited the details reported by the victim, Linda Nuttal, as contained in the police report. (T. 1479) Collins then recited the details of another rape of which Long was convicted in Pasco County, as reported by the victim, Sandra Jensen. (R. 1480-83) She learned the details of this offense from Detective Hagin and a police report prepared by Deputy Floyd. Collins was not involved in, nor had any responsibility for, these investigations. (T. 1481)

Although the defense had prepared mitigation, counsel decided to forego presenting it to the jury, in part because of the trial court's rulings that the State could present the expert testimony of Drs. Merin and Sprehe. (T. 1444-47, 1460-61, 1465, 1473-74) The jury recommended death by a seven to five vote. (R. 1660-61)

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[14] Defense counsel objected to Collins' testimony because she obtained her information from police reports and had no independent knowledge of the cases; he could not cross-examine triple hearsay. He also objected because the prosecutor had represented that he would introduce only the convictions. The prosecutor admitted he decided to present the details of the crimes only the night before. Thus, the defense was further prejudiced by lack of notice. (T. 1443, 1475, 1483-85) Also, the Pasco case concerning which Collins testified, was prosecuted by Mr. Halikitis. Juror Hickey, whom the judge refused to excuse for cause, was a friend of the Halikitis family, who might remember the facts of that case. (T. 1495)

Sentencing

Although defense counsel did not introduce mitigating evidence at penalty phase, he presented it to the judge at sentencing. Dr. Robert Berland, a forensic psychologist, testified that Long's 1985 MMPI profile indicated that Long was neither faking nor attempting to minimize his problems. The MMPI showed that Long was psychotic, manic and paranoid, with some history of hallucinations. Long's thinking was sociopathic or potentially criminal. He had both a biological mental illness and a character disturbance. (R. 1271-73)

Berland gave Long the MMPI again in 1988. The profile was consistent with Long's 1985 profile. Long was schizophrenic, paranoid, manic and to some extent psychopathically deviant. His "psychopathic" score was significantly lower in 1988. (R. 1273-75)

Dr. Berland administered the WAIS in October of 1985. The WAIS evidenced brain damage, especially in the left hemisphere of Long's brain. His scores differed by three standard deviations which is very unlikely to occur by chance. (R. 1283-85)

Over defense objection, Dr. Sidney Merin testified for the State, concerning his examination of Bobby Joe Long on October 25, 1988.[15] (R. 1694) In his opinion, the murder was not committed while Long was under the influence of extreme mental or emotional

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[15] Long objected because Merin relied on Long's confession and the Tampa homicides in forming his opinions. (T. 1960-91) Dr. Merin said in proffer that he could base his opinions only on the Johnson case, uninfluenced by his knowledge of other homicides. (T. 1695) He admitted, however, that he relied on Dr. Sprehe's testimony at Long's prior trials for his information concerning the Johnson case. (T. 1713-27) Judge Cope excluded Dr. Sprehe's testimony after Sprehe admitted he could not formulate his opinions without considering Long's confession and the other Hillsborough County homicides. (T. 1646-88)

disturbance. (R. 1728) He did not believe Long's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. (R. 1729)

Bob was born in West Virginia to Louella Long. (R. 1319-20) She divorced Bob's father, Joe Long, when Bob was ten months old. (R. 1320) Bob and his mother moved to Miami, Florida, when Bob was two. Mrs. Long rented bedrooms in homes where the owner would take care of Bob while she worked. She and Bob shared the same bed until Bob was'nearly twelve years old. (R. 1322)

Mrs. Long recalled that Bob suffered five severe head injuries while growing up. When he was four, he fell down the stairs. At age five or six, he fell from a swing and hit a large tree. She and Joe Long remarried when Bob was six, and moved to Huntington, West Virginia, where Bob was hit by a car.[16] (R. 1323, 1340) His face was torn up badly and his teeth shattered. He was in the hospital five or six days, and had facial and mouth surgery. At age nine, Bob was thrown from a horse. He landed on his head and was unconscious for fifteen or twenty minutes. At nineteen, he was in a motorcycle accident, after which his temper worsened, he had horrible headaches and could not stand noise. (R. 1324, 1333)

While living in Miami, Mrs. Long and Bobby moved around a lot. They traveled to West Virginia several times a year. His mother had little education, changed jobs a lot, and was often ill with a

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[16] Mrs. Long was married to Joe Long three different times. At the time of the trial, she was married to Long and they were good friends, but lived in separate houses. (R. 1340, 1349-50) Although she admitted that Joe Long had a bad temper, she said she hesitated to say anything bad about him because it might be in the newspaper and he would be very angry with her. (R. 1350)

chronic stomach problem related to stress and nerves. When Bob was a teenager, she married another man while divorced from Joe Long. She later learned that he was married to someone else. (R. 1335)

Bob was an ideal child until age fifteen. He worked as an electrician's helper from age thirteen until he went into the military. (R. 1326-27) Mrs. Long said that Bob saved her nephew's life by rescuing him from drowning. He would do anything he could to help people, even as an adult. (R. 1334)

Long's ex-wife, Cindy Bartlett, met Long when they were both about thirteen years old. (R. 1291) Although they were boyfriend and girlfriend from ages thirteen through fifteen, and saw each other almost every night after school, they did not begin a sexual relationship until age sixteen. Long did not drink or use drugs; nor did he lie or skip school, prior to age sixteen. (R. 1292-93)

Cindy testified that Bob's mother was a barmaid at Big Daddy's Lounge. She wore "hot pants" (real short shorts) to work. Bob did not approve of her attire. The kids in the neighborhood would tease him about his mother being a "Big Daddy's whore." (R. 1297) His aunts told him that his mother was a slut. (R. 1298)

Although Cindy and Bob drifted apart for several years, they reunited, became engaged, and were married at age twenty. (R. 1299) Cindy was pregnant with their son, Chris. (R. 1300) In 1974, when Bob was in the military service, he was thrown from a motorcycle and landed on his head. His helmet was cracked and the top badly roadburned. Bob was unconscious for about six hours. (R. 1300-04)

Although Bob had a temper before the accident, it became much worse afterwards. At times he would hit Cindy, which he had never

done before. (R. 1302) He had no patience and did not sleep well. He often complained of headaches. (R. 1303) He took amphetamines. (R. 1293) At times he was very irritable and "antsy." He became extremely sensitive to noise. (R. 1307) After the accident, one of the pupils in Long's eye was larger than the other. The left side of his face was numb. Long's sexual drive increased. He wanted to make love two or three times a day. Long received disability from the military for his ankle injury and brain damage. (R. 1308-09) Bob was a very decent father who spent time with his two children, even after the divorce. (R. 1304-05)

The defense presented evidence concerning a PET scan performed on Bobby Joe Long's brain. Frank Wood, a neurology professor at Bowman Gray School of Medicine at Wake Forest, recommended the PET scan. He received the image scan from St. Joseph's Diagnostic Center in Tampa, where Long was tested, and identified various abnormalities in the area of the amygdala. (R. 1393, 1418-19)

The most obvious abnormality Wood found on Long's PET scan was a metabolic defect in the left anterior temporal lobe. A rim of tissue which should have been closed like a donut was shaped like a horseshoe. The affected region was part of the anterior of the amygdala.[17] The gap -- twenty to thirty percent of Long's brain, contained very, very low metabolic activity. (R. 1441-42)

Lesions of the amygdala generally impair the reward or punishment history of a given stimulus, and sometimes cause an increase

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[17] Dr. Leon Prockop defined the amygdala as a small nuclear structure on the anterior medial aspect of the temporal lobe. He agreed with Dr. Frank Wood that the amygdala was thought to effect emotions and behavior. (R. 1586)

in sexual appetite and/or eating, and a change in aggressive versus passive behavior. The amygdala controls the orbital frontal cortex which is the principal cortical region for inhibitory processing or "stop messages." It balances things out. (R. 1452-53)

Dr. Wood said that the PET abnormality was in a place where the MRI showed brain tissue; thus, the defect shown on the PET scan must be interpreted as a metabolic abnormality instead of a gap or vacancy of tissue. (R. 1477-78) Because the PET scan is the only instrument that measures metabolism, Wood's findings were dependant upon a normal MRI. (R. 1487-88)

Dr. Wood compared Long's values for the left and right hemispheres to the main "index" for his reference group,'" and obtained an index ratio more than five standard deviations below the mean, a value expected no more often than three times in ten million. (R. 1480-81) The defect is biological in nature, but Wood did not know whether it resulted from an injury or was congenital. Symptoms such as increased sensitivity to noise, lack of temper control, and increased sexual appetite are consistent with the defect shown on Long's PET scan. (R. 1492-93)

The State called Dr. Edward Eikman, a specialist in radiology and nuclear medicine at St. Joseph's Hospital in Tampa. (R. 1507, 1511) Eikman admitted he had not done research on quantitative normal PET scans and did not have his own normative scale. (R. 1541) He interpreted the area in which Dr. Wood found hypometabolism to be sulcus, or cerebral spinal fluid. (R. 1525, 1548)

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[18] Dr. Wood's reference group included 73 persons. He compiled the reference group from his research. (R. 1479)

Because cerebral spinal fluid is hypometabolic,[19] the hypometabolism on PET scan was normal. (R. 1530, 1548) He agreed an MRI would not detect a metabolic defect. (R. 1543)

In rebuttal, Dr. Frank Wood testified that the defect in Long's brain could not be a sylvian cistern artifact because, as Dr. Eikman pointed out, the sylvian cistern was on top the temporal lobe, and the three slices of the PET scan showing the defect were within the temporal lobe. The sulcal infolding discussed by Dr. Eikman was in a different area of the brain.[20] (R. 1796-97)

The State called Dr. Leon Prockop, chairman of the Department of Neurology at University of South Florida's College of Medicine. (R. 1570) Prockop had interpreted hundreds of MRI's and CT scans, and about ten or fifteen PET scans. He reviewed PET scans submitted in connection with articles for a neuroimaging journal of which he was founding editor. (R. 1574-77)

Dr. Prockop disagreed that Long's PET scan showed an abnormal area in the brain. He speculated that Dr. Wood saw decreased metabolism in spinal fluid structures adjacent to the amygdala. (R. 1598) He thought Long's PET scan showed, "a normal anatomical asymmetry that is a [cerebral spinal fluid] infolding." (R. 1611) Dr. Prockop testified that because PET scanning was a new tool, it must be used with other tests to make a diagnosis. (R. 1584)

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[19] In rebuttal, Dr. Ruben Gur explained that the existence of a sulcus or cerebral spinal fluid would not appreciably change the metabolic rate measured by the PET scan. Thus, Dr. Eikman's theory would not explain the hypometabolism in Long's amagdala. (R. 1840)

[20] Dr. Ruben Gur agreed that the defect could not be a sulcus or sylvian cistern artifact because of the location. (R. 1841)

Dr. Marcel Kinsbourne, associate professor of neurology and pediatrics at Duke University (R. 1743-44), was called by the defense. He explained that the amygdala is a paired structure close to the inner part of the temporal lobe and part of the limbic system which controls emotions. The amygdala is critical to many basic drives, and to a part of the prefrontal cortex which involves the forming and executing of plans. (R. 1747)

There are two major areas of the prefrontal cortex -- orbital and dorsolateral -- which oppose each other and struggle for ascendancy. The amygdala controls the balance so that a person will not swing violently. (R. 1754) Unilateral damage to the amygdala may cause rage, increased sexuality, lack of control over one's temperament and temper. (R. 1758-59) Dr. Kinsbourne agreed that hypometabolism of the left temporal lobe amygdala and hyper-metabolism of the left orbital frontal would be consistent with biologically caused lack of impulse control. (R. 1780-81)

Dr. Ruben Gur, a professor at the University of Pennsylvania Medical School, also testified for the defense. (R. 1808) His wife, Dr. Raquel Gur, recently agreed to serve on the editorial board of Dr. Prockop's neuroimaging journal. Dr. Prockop admitted that Drs. Raquel and Ruben Gur are leading experts in the country on PET research and interpretation. (R. 1603-04)

Dr. Ruben Gur was involved in designing the studies needed to obtain the funding for PET research. (R. 1808-09) Gur currently served in a study section that approves NIH research grants. Dr. Frank Wood was formerly in the same study section. (R. 1810) Dr. Gur's department performed the first human study showing the

importance of the amygdala in emotional regulation. (R. 1844) Of the hundreds of PET scans he reviewed, Long's was closest to those of patients with temporal lobe epilepsy, which causes severe behavioral problems. (R. 1834-35) Dr. Gur said that he was certain that the defect in Long's PET scan was within the amygdala. (R. 1837) In his opinion, the abnormality on Long's PET scan would affect Long's behavior because he had never seen it in anyone that was normal. (R. 1850)

On March 18, 1994, Long was sentenced to death. (R. 519, 1913) The judge filed written findings in support of the death penalty on that date. (R. 522-29) He found three statutory aggravators: (1) that Long had prior violent felonies; (2) that the crime was cold, calculated and premeditated; and (3) that the crime was heinous, atrocious and cruel. He found in mitigation that Long's ability to conform his conduct to the requirements of law was substantially impaired, and various nonstatutory mitigation. (R. 522-29)

SUMMARY OF THE ARGUMENT

On remand from this Court's second reversal, the trial court erroneously admitted extensive evidence concerning Long's abduction of Lisa McVey. Although this Court found that some testimony was necessary to tie Long to his car, carpet fiber, and two hairs, the trial court went overboard, allowing a myriad of McVey evidence, including tearful testimony by McVey herself, to prove Williams rule "identity." The crimes were not similar. (Issue I)

Even more prejudicial was the State's introduction, over strenuous defense objection, of a fairly extensive part of Long's videotaped interview with CBS. Although this Court held that the tape was admissible as an admission against interest under the hearsay rules, the tape was irrelevant, showed only propensity and bad character, and was unfairly prejudicial. (Issue III) In addition, the court erred by allowing this videotape because Long relied on representations by his then counsel, Ellis Rubin, that he had an agreement with CBS to edit the tape, and that it could not be used against him if he spoke in general terms. If the Court does not find that Rubin had such an agreement, he provided ineffective assistance of counsel. (Issue II)

Without foundation or predicate, FBI hair and fiber expert Michael Malone testified that independent events, such as his inconclusive hair and fiber matches, tend to reinforce each other. He told the jury that Johnson was almost certainly in contact with Long's car carpet because of the "double transfer." Malone had no expertise in statistics, and no basis for his conclusion. The judge erred by allowing his testimony. (Issue IV) Because the

inclusive hair and fiber evidence were the only direct, admissible evidence, the court should have granted Long's motion for judgment of acquittal; because it failed to do so, this Court should order Long discharged. (Issue V)

In penalty phase, the trial judge erred by allowing Detective Collins to testify concerning Long's two prior violent felonies, of which she had no independent knowledge. (Issue VI) The court also erred by instructing the jury on the HAC and CCP aggravators, which were not supported by the evidence; by failing to give a limiting instruction as to HAC; and by finding and weighing the two invalid aggravating circumstances. (Issues VII, VIII, and IX)

Moreover, the trial court failed to properly consider, find and weigh significant mitigation presented by defense counsel at the sentencing. (Issue X) Based on these sentencing errors, the trial judge imposed a death sentence that was not proportionately warranted. (Issue XI) Because the jury recommended death by only a bare majority, Florida's death penalty scheme is unconstitutional; thus, the trial judge should not have relied on the invalid jury recommendation. (Issue XII)

ISSUE I

THE TRIAL COURT ERRED BY ALLOWING IRRELEVANT AND PREJUDICIAL COLLATERAL CRIME EVIDENCE OF LONG'S ABDUCTION OF LISA MCVEY, IN VIOLATION OF THE HILLSBOROUGH COUNTY PLEA AGREEMENT, THE RULES OF EVIDENCE, AND THIS COURT'S OPINION IN Long v. State, 610 So. 2d 1276 (Fla. 1992).

This Court held that evidence concerning Long's abduction of Lisa McVey could be introduced only as necessary to show how Long was arrested, thus establishing his identity:

> 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. [fn4][21]
>
> 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 connected 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, 610 So. 2d at 1280. In conclusion, this Court mandated that "evidence of the murders to which Long entered guilty pleas in the Hillsborough County plea agreement may not be admitted under the circumstances of this case," but that "testimony concerning the McVey incident may be admitted to identify Long in this case so

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[21] [fn4] In Long, 517 So. 2d 664, we determined that Long's confessions to a number of murders had been obtained in violation of his right to counsel. However, his confession regarding the McVey incident was obtained before Long indicated that he needed an attorney and before his right to counsel had been violated.

long as the details of Long's treatment of McVey in his apartment and his subsequent plea of guilty in that case are excluded."[22] Id.

On remand, the court and counsel were unable to agree on the meaning of this Court's opinion. The prosecutor interpreted the opinion to allow all evidence concerning Lisa McVey's abduction (except the sexual batteries that occurred in Long's apartment) to be introduced and considered by the jury to establish identity and modus operandi under the Williams rule.[23] (T. 688) The court ruled that the prosecution could use the evidence only to prove identity, but allowed the jury to use it as Williams rule evidence. This is evidenced by the court's Williams rule instruction after each piece of evidence concerning McVey. (T. 857, 1216, 1282) The trial court clearly misinterpreted this Court's opinion.

The only interpretation consistent with the entirety of this Court's opinion is that the Court intended that the trial judge permit sufficient evidence concerning Long's abduction of McVey and

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[22] The Court held further that "evidence of the Hillsborough County guilty pleas and convictions resulting from Long's plea agreement may not be admitted as aggravating factors given the terms of the plea agreement." (R. 24-25)

[23] The prosecutor first argued that, despite this Court's opinion, he should be allowed to introduce all of the Tampa homicides in this case. (R. 1931) Judge Cobb ruled as follows:

> THE COURT: Well, I'm going to grant the [defense] motion. I don't think there's any question [the Florida Supreme Court] made their law up out of [whole cloth], but that's what the Supreme Court loves to do. So, I'm going to grant, except . . .

(R. 1931) He then proceeded to grant the defense motion to exclude the collateral crime evidence as to all murders but not as to the McVey testimony and evidence. (R. 1932)

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. In other words, a minimal amount of background facts were necessary for the jurors to know why Long was apprehended and considered a suspect in the instant case and, thus, to place the legal issues in context.[24]

This interpretation is supported by this court's finding that "Long was initially apprehended . . . 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." The Court concluded that "that evidence is clearly admissible to establish Long's identity and to connect him to the victim in this case." (R. 22-23) This Court's exclusion of the details of Long's treatment of McVey in his apartment (the sexual battery) is consistent with this interpretation because the sexual battery was unnecessary to connect Long through the hair and fiber evidence, and would have been unduly prejudicial.

This interpretation of the Long holding is the only one that makes any sense. Certainly, the abduction of Lisa McVey would not be admissible as Williams rule evidence for the purpose of proving identity because of the requirement of "fingerprint" similarity. See e.g., Peek v. State, 488 So. 2d 52 (Fla. 1986); Drake v. State, 400 So. 2d 1217 (Fla. 1981). McVey's abduction was not similar to the Johnson homicide because (1) unlike Johnson, McVey was not a

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[24] See, e.g., Gillion v. State, 573 So. 2d 810 (Fla. 1991) (information relevant for jury to place other testimony in context; disservice to jury to try case in a vacuum).

prostitute, alcoholic, or drug abuser -- she worked in a donut shop; (2) Johnson's body was found in a field in Pasco County, and McVey was taken to an apartment in Hillsborough County; (3) Long did not kill McVey, but let her go; (4) although Long abducted McVey from a bicycle and raped her repeatedly,[25] the evidence did not show that he abducted or raped Johnson; (5) while Long abducted McVey at gunpoint, Johnson was apparently bound and strangled with shoestrings, with no evidence of a weapon.

Additional evidence that this Court did not intend that the McVey evidence be used as collateral crime evidence is its holding that the trial court erred by allowing the prosecution to use four Tampa homicides, to which Long confessed, as collateral crime evidence in the last trial. Long, 610 So. 2d at 1280. If the Court found the homicides, which were more similar to this homicide than McVey's abduction, inadmissible under the Williams rule, then it obviously did not intend McVey to come in as similar fact evidence under the Williams rule to prove Long's identity.

Further evidence that this Court intended only minimal evidence concerning the McVey incident is the Hillsborough County plea agreement, which this Court has consistently upheld, and which included Long's convictions for the McVey abduction and sexual battery. In its first opinion upholding the plea agreement in

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[25] Although the State did not introduce evidence that McVey was raped repeatedly in this trial, it did in the last trial. See Long v. State, 610 So. 2d 1276 (Fla. 1992). When considering whether evidence is admissible as similar fact evidence to show identity, all of the facts must be considered. It would be unfair, misleading and unethical to admit only facts that were similar to those in the case for which the defendant was on trial.

Long's Hillsborough County case, this Court stated as follows:

> On September 23, 1985, Long entered into a plea agreement with the state for all the offenses charged in Hillsborough County. In summary, Long pleaded guilty to eight counts of first-degree murder, eight counts of kidnapping, and seven counts of sexual battery. In addition, Long pleaded guilty to charges of sexual battery and kidnapping in the Liaa **McVey** case. Under the agreement, except for the first-degree murder, kidnapping, and sexual battery counts in the Michelle Denise Simms murder, Long received life sentences on every count of each case and a five-year sentence on the probation revocation charge. The plea agreement provided for a full penalty phase proceeding before a jury in the Simms case and contained an express provision waiving Long's right to contest the admissibility of any statements he had given police. In the agreement Long also expressly waived the right to contest the admissibility of a knife found near his residence and other evidence seized from his car and apartment. The state agreed not to utilize any of the Hillsborough convictions resulting from this plea agreement as aggravating factors in the penalty phase of the Simms case, but retained the right to use prior convictions obtained in other counties as aggravating factors. . . .

Long v. State, 529 So. 2d 286, 288 (Fla. 1988).[26]

As to the plea agreement, this Court held as follows in its opinion reversing this case:

> Although that agreement was drafted to apply only to Hillsborough County and the Thirteenth Judicial Circuit, the record of the plea proceedings in that case indicates that both parties understood the agreement to mean that the pleas could not be used adversely against Long in any subsequent proceeding. Obviously, at the time he entered into that agreement, the first trial in this case had already been completed and the death sentence had been imposed. Thus . . . there was no mention of the use of Long's Hillsborough County pleas in a subsequent retrial of this case. Little doubt exists that one of the major benefits intended to be received by Long in entering into the plea agreement was that his guilty pleas could not be used against him in subsequent proceedings.

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[26] A footnote quoted relevant parts of Long's plea agreement which is contained in the record on appeal. (R. 61-64) The McVey case is included in the list of offenses covered by the agreement.

> Consequently, to ensure the continued validity of the Hillsborough County plea agreement, we find that it was error to allow evidence of those murders to be introduced in aggravation against him in this case. . . .

Long, 610 So. 2d at 1280. In Long's Hillsborough County opinion, issued the same day, this Court stated as follows:

> Long's claim that he was not told that his confessions and pleas could be used against him in his Pasco County case as Williams rule evidence and as aggravation in the penalty phase if that case was retried is moot. In our decision in Long v. State, 610 So. 2d 1276 (Fla. 1992), issued contemporaneously with this opinion, we reversed Long's Pasco County conviction, in part on the ground that his Hillsborough County pleas and confessions were improperly introduced into evidence in that case.
>
> Additionally, we held that, upon remand, Long's pleas and confessions could not be used against him in aggravation during a new penalty phase proceeding. We therefore deny this claim.

610 So. 2d at 1274. Thus, Long contends that this Court must have intended that the McVey abduction (and not the sexual batteries) be presently to the jury only as necessary to connect Long to the car where the fibers and hair were found, and thus to Virginia Johnson.

Defense counsel argued to the trial court by pretrial motion and during trial that all evidence concerning McVey should be excluded based on (1) lack of relevance; (2) the Tampa plea agreement and this Court's holding as to its continued validity; the facts that (3) McVey evidence would, and did, become a feature of the case; (4) the guilt phase testimony would be used by the jury in aggravation during penalty phase in violation of the plea agreement and this Court's holding; and (5) any probative value was clearly outweighed by unfair prejudice. He argued in the alternative that (1) McVey evidence was not admissible to show "Williams rule identity" because it lacked fingerprint similarity; and (2) this

Court found the evidence admissible only to connect Long to the car in which hair and fiber were found. (R. 88-93, 1952-65, T. 684-99)

At the first pretrial hearing, defense counsel argued that the McVey case was covered by the Hillsborough plea agreement;[27] therefore, to let in evidence of McVey's abduction was tantamount to allowing the jury to consider McVey as an aggravating circumstance in violation of the plea agreement. Long said that his understanding of the plea agreement was that the State could not use any cases within the agreement against him; but only those cases for which he had been convicted prior to the agreement. In Hillsborough County, the McVey evidence was not used in either trial because of the plea agreement. (R. 1978) The judge said that, although he could not argue with Long's logic, he was trying to do what this Court ordered in its opinion. (R. 1965-70)

Because this Court held that Long's pleas could "not be used adversely against [him] in any subsequent proceeding," 610 So. 2d at 1280, the trial court violated the plea agreement by allowing the State to introduce a myriad of details concerning Long's crimes against McVey, to which Long pled guilty under the plea agreement. The details of how Long kidnapped Lisa McVey were not relevant to the homicide of Virginia Johnson, except to the very limited extent of informing the jury that Long was arrested, and that his car was impounded and searched pursuant to a valid search warrant.

McVey, who was the only "victim" to testify, became the feature of the case. As such, she exemplified Long's alleged

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[27] See page 2 of the plea agreement (R. 61-64); number 8; case number 84-13310 C; victim Lisa Mary McVey. (R. 1957)

"victim." She cried on the witness stand. She said that Long threatened to kill her. He told her she was going to show him a good time for a couple hours. He made her remove all her clothes in the car and put them back on (except her underwear) to go into his apartment. He kept her in his apartment for 24 hours. She left in a different shirt. (T. 706-16) McVey identified Long in court even though she had maintained for ten years that she was blindfolded, and could not identify him.[28] (T. 723-25)

It must have been obvious to the jury that McVey was raped. Why else would she be forced to disrobe in Long's car, and kept in his apartment for 24 hours? She obviously undressed again in the apartment because she wore a different shirt when she left it. (T. 714-16) Moreover, what else would Long have meant when he told her she was going to show him a good time? The admission of evidence indicating a sexual battery defeated this Court's holding that details of Long's treatment of McVey in his apartment be omitted. Because they were told to consider the McVey evidence to prove identity, the jurors must have assumed it was introduced to prove that Long abducted and sexually abused Johnson before killing her.

To make matters worse, in addition to Lisa McVey's tearful testimony about her ordeal, the court allowed four other witnesses to testify about the McVey case, and allowed the State to play a portion of the CBS videotape in which Long admitted to McVey's abduction. Detective Helms testified about McVey's description of

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[28] Defense counsel tried unsuccessfully to keep out the identification. (T. 719-39) See note 10, supra.

Long and how they spotted, stopped and photographed him and his car. (T. 804-09) Deputy Harold Winsett testified about Long's arrest the next day for McVey's abduction. (T. 810-12) Detective Randy Latimer testified about the interrogation of Long and the details of Long's confession to McVey's abduction. (T. 835-39) FBI Agent Malone testified about his hair and fiber analysis in the Lisa McVey case. (T. 916-18) (See Statement of Facts, supra.)

The CBS videotape, discussed in detail in Issue III, infra, includes Long's own admissions to the McVey abduction.[29] It was totally unnecessary because Lisa McVey and three law enforcement

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[29] The following paraphrased and abbreviated excerpts from the CBS tape concerning McVey were introduced into evidence:

LONG: Do you know about the girl that I let go? That to me is a pretty important thing. . . . She didn't escape. I let her go.
MS. CORDERI: Why did you let her go?
LONG: I don't know. It was just different than other things that were going on at that time. . . . And when the McVey girl happened, I knew that they were right, you know, that it was going to get a lot worse. . . . It's like when they set up the task force in Tampa. I knew all I had to do was throw my stuff in the car and move . . . . They'd never have tracked me down. . . . That's why I let the McVey girl go. If I hadn't let the McVey girl go, they would never have tracked me down. . . .
And they all went exactly the same until McVey came along. I snatched her off a bicycle. This wasn't some streetwalker, you know. This was just a girl going home from work at the doughnut shop at 2:30 in the morning on her bicycle. And that was when I realized that I was . . . things were just starting to come into my mind, right, involving women that I knew, and I was -- I was wondering where is this going to stop, you know, what's next.
MS. CORDERI: Were you wondering that after you pulled her off the bicycle and you were doing what you were doing?
LONG; Yeah, 'cause that -- to me, that was a real clear sign that I was losing control, to do something like that. I mean, that's -- let's face it. That's insane. That's an insane thing to do -- pull off the side of the road, wait for some little girl to come back riding on a bicycle, snatch her off the bicycle, and keep her for twenty-some hours at your apartment.
You know, I guess that was the thing that really dawned on me that, you know, things are just really getting bad. (T. 1061-69)

officers had already testified about the McVey abduction and the investigation of that crime, thus identifying Long as a suspect in the Johnson murder. Latimer had even described Long's confession to the McVey abduction. Long's comments about McVey in the videotape do not tie Long to the car or the Johnson murder. Long's whole purpose in discussing McVey was to explain his growing concern about where his criminal activities were leading. He released McVey, knowing he would be caught. His comments about McVey are not relevant to the issues in this case. They merely inform the jury that he committed other crimes including murder, thus unfairly prejudicing Long's defense and adding to the accumulation of evidence making McVey a feature of the case.

Henry v. State, 574 So. 2d 73, 75 (Fla. 1991) resembles the instant case because of this Court's holding that some reference to the collateral crime was necessary to place the events in context and describe the investigation. As in Henry, this Court ruled that limited evidence of Long's arrest for McVey's abduction was needed to put the investigation into context by tying Long to the car.

John Henry was on trial for the murder of his wife in Pasco County, and the State introduced extensive Williams rule evidence of the murder of her young son, which occurred nine hours later in Hillsborough County. This Court reversed for a new trial, saying:

> We cannot agree that the killing of Eugene Christian qualifies as similar fact evidence. To be admissible evidence under the Williams rule, an event must be similar to the crime for which the defendant is being tried and must tend to prove some fact in issue. . . . [The evidence] did not provide sufficient points of similarity from which it would be reasonable to conclude that the same person committed both crimes. . . .

> Some reference to the boy's killing may have been necessary to place the events in context, to describe adequately the investigation leading up to Henry's arrest and subsequent statements, and to account for the boy's absence as a witness. However, it was totally unnecessary to admit the abundant testimony concerning the search for the boy's body, the details from the confession with respect to how he was killed, and the medical examiner's photograph of the body. Even if the state had been able to show some relevance, this evidence should have been excluded because the danger of unfair prejudice substantially outweighed its probative value. . . .

574 So. 2d at 75 (citations omitted).

Here, unlike Henry, there was no relationship between the victims or the crimes; there is no possible argument that McVey's abduction was "part of a prolonged criminal episode." Collateral crime evidence must be relevant and, if this standard is met, its probative value must outweigh its prejudice. The need for the McVey evidence was slight and the likelihood of misuse great.

Very little evidence concerning Long's arrest for McVey was needed. The testimony of Detectives Helms and Winsett would have been sufficient. Allowing the prosecution to put Lisa McVey on the stand to describe in detail how she was abducted from her bicycle at gunpoint, forced to strip and taken to an apartment, served no purpose except to inflame the jury. Allowing Detective Latimer to tell the jury that Long confessed to the crimes against McVey served no purpose except to improperly show his bad character and his propensity to abduct young women. See e.g., Straight v. State, 397 So. 2d 903, 908 (Fla. 1981); Peek, 488 So. 2d at 55-56. Needless to say, the CBS tape really topped the cake.

This Court has limited detailed penalty phase testimony by victims of prior violent felonies when they are unnecessary to

prove the offense occurred, because it is highly prejudicial. See, e.g., Finney v. State, 660 So. 2d 674 (Fla. 1995); Freeman v. State, 563 So. 2d 73 (Fla. 1990); Rhodes v. State, 547 So. 2d 1201 (Fla. 1989); Duncan v. State, 619 So. 2d 279 (Fla. 1993); Trawick v. State, 473 So. 2d 1235 (Fla. 1985). In Finney v. State, this Court explained that

> victims of prior violent felonies should be used to place the facts of prior convictions before the jury with caution. Cf. Rhodes, 547 So. 2d at 1204-05 (error to present taped statement of victim of prior violent felony to jury, where introduction of tape was highly prejudicial). This is particularly true where there is a less prejudicial way to present the circumstances to the jury. Cf. Freeman v. State, 563 So. 2d 73, 76 (Fla. 1990) (surviving spouse of victim of prior violent felony should not have been permitted to testify concerning facts of prior offense during penalty phase of capital trial where testimony was not essential to proof of prior felony conviction), cert. denied, 501 U.S. 1259, 111 S.Ct. 2910, 115 L.Ed.2d 1073 (1991). Caution must be used because of the potential that the jury will unduly focus on the prior conviction if the underlying facts are presented by the victim of that offense.
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> Evidence that may have been properly admitted during the trial of the violent felony maybe unduly prejudicial if admitted to prove the prior conviction aggravating factor during a capital trial. This is particularly true where highly prejudicial evidence is likely to cause the jury to feel overly sympathetic towards the prior victim. See e.g, Duncan, 619 So. 2d 279 (error to admit gruesome photograph of victim of prior unrelated murder for which defendant had been convicted where photograph was unnecessary to support aggravating factor) . . . .

660 so. 2d at 683. Although Lisa McVey testified in the guilt phase of Long's trial, the jury considered her testimony in both phases. Moreover, it was even more prejudicial to Long because the jury considered it in determining he was guilty of murder. Exactly what the Court predicted in Finney happened here. The testimony of Lisa McVey was totally unnecessary and cumulative; yet, the court

allowed her to testify tearfully, which must have caused the jury to focus on McVey, the prior victim, and feel unduly sympathetic toward her, thus making her a feature of the case. Although this Court held that some McVey evidence was admissible to connect Long with the car, it never held that Lisa McVey's personal testimony was admissible at this trial.

Despite this Court's order, the prosecution's purpose was to show Long's substantive guilt of the McVey crimes as similar fact evidence. The problem is, they weren't similar. See Peek, 488 So. 2d at 55; Drake, 400 So. 2d at 1219. As this Court has recognized:

> Our justice system requires that in every criminal case the elements of the offense must be established beyond a reasonable doubt without resorting to the character of the defendant or to the fact that the defendant may have a propensity to commit the particular type of offense. The admission of improper collateral crime evidence is "presumed harmful error because of the danger that a jury will take the bad character or propensity to crime thus demonstrated as evidence of guilt of the crime charged." Straight v. State, 397 So. 2d 903, 908 (Fla. 1981).

Peek v. State, 488 So. 2d at 56.

In his closing argument, the prosecutor compounded the error by arguing the facts of McVey's abduction as similar fact evidence to convince the jury that Long abducted Johnson in the same manner he abducted McVey:

> What happened in the McVey case, he pulled a gun, said hehadaknife. . . . (T. 1183) The defendant confessed to the McVey abduction, the circumstances surrounding the McVey abduction. . . . (T. 1208) He said, It's like Lisa McVey. She didn't escape. I let her go. . . . Why did you let her go? . . . I don't know. It was just different than other things that were just going on at that time. (T. 1209-10)

The implication, of course, is that McVey was different than "other things" because he did not kill her. The defense objected

and moved for mistrial because the prosecutor was arguing that what happened in "other cases" happened in this case. He said the prosecutor had violated this Court's ruling that McVey could only be argued for identity. The judge told the prosecutor to argue the McVey facts only for purposes of identity. (T. 1212-13)

Although the trial judge read the Williams rule instruction to the jury on the spot (T. 1216), it only made things worse. The language of the instruction told the jury to consider Long's other bad acts to establish identity, even though Long was not on trial for the other crimes. In effect, the judge told the jury to consider the McVey evidence to identify and convict Long as the perpetrator of the Johnson murder. This could only be done by considering propensity and bad character.

The prosecutor told the jurors that McVey's abduction was relevant to this case, and that they should consider it to determine whether Long was guilty. He argued that, although Long was not on trial for any crime not charged in the indictment, the jurors should not disregard the testimony concerning McVey. He said that "[t]he evidence which has been admitted during the course of this trial . . . is all relevant evidence, and I'll suggest to you that I'm about to tell you why. The prosecutor then talked about premeditation, and "who did it." (T. 1262-63)

The prosecutor continued to use the McVey evidence (this time illogically) as substantive evidence to argue that Long committed the crime. He told the jury that FBI Agent Malone "was right when he said the fibers were in the car on Lisa McVey's clothing. And now he's telling you, ladies and gentlemen, that the fiber from

that hair mass is the same." (T. 1268-69) He reiterated Malone's statistical analysis. That a fiber consistent with Long's carpet was found on McVey's clothing as well as in Johnson's hair does not make it any more likely that Johnson was in Long's car than if no fiber was found in the McVey case.[30] The evidence that the fiber was found on McVey's clothing is probative only of the fact that McVey was in Long's car, which we already knew. The prosecutor's recitation of Malone's statistical analysis was obviously intended to mislead the jury into thinking the McVey hair and fiber evidence somehow increased the likelihood that Johnson was in Long's car.

Despite the judge's earlier admonition, the prosecutor later argued to the jury as follows:

> "We've talked about A, B, C, D. A walk in the park. Drive up -- he drove up. They get in the car -- she got in the car. You drive a little ways, take a knife, a gun, whatever, as he did with Lisa McVey. You tie them up, as Virginia Johnson was tied up, and you take them out. A, B, C, D."

(T. 1273) Defense counsel objected, specifying the prosecutor's argument concerning the McVey evidence, to no avail. (T. 1273)

The McVey evidence affected both the guilt and penalty phases of Long's trial.[31] Although the McVey abduction was not specified as an aggravating factor in the jury instructions, the jurors were

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[30] Malone never testified that the fiber found on McVey's clothing matched the fiber found in Johnson's hair mass.

[31] During penalty phase, the prosecutor asked Detective Ferguson the date of McVey's abduction, presumably because the jury asked that question during its guilt phase deliberations. Defense counsel objected to the jury hearing about McVey's abduction during the penalty phase, because this Court said it could only be used to show identity and could not be used as an aggravator based on the plea agreement. The judge overruled the objection because the jury already heard the McVey evidence. (T. 1414-15)

not told to disregard it. They could not possibly forget the guilt phase evidence when considering a penalty verdict. In fact, the jury was instructed to also consider the guilt phase evidence in making a penalty recommendation. (T. 1407)

In the instant case, the only evidence tending to place Virginia Johnson in Long's car was a common (lustrous) carpet fiber and two hairs. Plainly, the improper admission of irrelevant McVey evidence was harmful error. It could easily have influenced the jurors to find Long guilty of the charges because the judge told them to consider it to prove identity. Because of dissimilarities between the two offenses, this could be done only through showing propensity. Improper Williams rule evidence is presumed harmful. Straight, 397 So. 2d at 908; see also State v. Lee, 531 So. 2d 133 (Fla. 1988) (reaffirming standard of State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986)), in context of improper admission of collateral crime evidence). Thus, any probative value was greatly outweighed by unfair prejudice. See § 90.403, Fla. Stat. (1993)

Moreover, the admission of McVey's testimony and Long's confession violated the Hillsborough County plea agreement and this Court's holding in Long, 610 So. 2d at 1280. It made McVey the feature of this case. Had the jury not considered McVey, its seven to five death recommendation might have instead been a life recommendation, Long's conviction and death sentence must be reversed and the case remanded for a new trial.

ISSUE II

THE TRIAL COURT ERRED BY ALLOWING THE STATE TO INTRODUCE INTO EVIDENCE PORTIONS OF A CBS NEWS VIDEOTAPED INTERVIEW WITH LONG, BECAUSE LONG WAS ADVISED BY HIS ATTORNEY, ELLIS RUBIN, AND BELIEVED THAT RUBIN HAD AN AGREEMENT WITH CBS NEWS WHEREBY RUBIN HAD EDITORIAL CONTROL OVER THE CONTENTS OF THE VIDEOTAPE, AND THAT LONG'S STATEMENTS COULD NOT BE USED AGAINST HIM.

In 1986, Bobby Joe Long agreed to talk to CBS News reporter Victoria Corderi on the advice of Ellis Rubin, his court-appointed attorney in the penalty trial and then-pending appeal for the murder of Michelle Simms in Hillsborough County.[32] Ms. Corderi interviewed Long for about ninety minutes on November 25, 1986. The interview took place after the first trial and conviction in this case and after Long entered into the plea agreement in Hillsborough County. Long, 610 So. 2d at 1279. CBS edited and broadcast about two minutes of the tape on December 26, 1986.

When Long was retried in this case in Fort Myers, in 1988, the State presented to the jury the approximately two minute portion of the tape aired on television. Lons v. State, 610 So. 2d 1276 (Fla. 1992). This Court reversed on appeal, holding that the trial court erred by allowing the State to introduce portions of the CBS News videotape, without making the entire tape available to the defense. 610 So. 2d at 1280. As to the admissibility of the CBS tape at the retrial, this Court stated as follows:

> We disagree . . . 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

[32] Rubin never represented Long in the Virginia Johnson case.

> remand, the videotape may be admissible as an admission against interest; however, whether 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 1280-81 (footnotes omitted).

Prior to this trial, defense counsel filed a motion to suppress and exclude the CBS interview. The motion alleged that Long's former attorney, Ellis Rubin, advised Long to grant the CBS interview, and told Long that he had an agreement with CBS, under which he would control the publishing of the interview, and that it could not be used against him, as long as he did not go into specifics concerning the crimes. Rubin never exercised editorial control. CBS broadcast a portion of the interview without permission or editing, and later sold the broadcast portion to the State Attorney for $150.00 CBS refused to provide the videotape to defense counsel until ordered to do so by this Court during the pendency of the last appeal in this case. (R. 65-77)

Defense counsel argued in the alternative that (1) the tape was inadmissible based on the alleged contractual agreement between Rubin and CBS (through agent Victoria Corderi), and Long's reliance on it; or (2) Ellis Rubin was ineffective by advising Long to talk to the press, failing to accompany him, and failing to exercise the editorial control he contracted for. In either event, the videotape must be excluded as evidence against Long.

This issue was not raised at Long's prior trial, apparently because defense counsel had not yet been able to obtain the entire videotape to determine its contents. Until the defense was able to view the tape, Appellant was not aware of the references to Rubin's

editorial control that are on the videotape itself. Thus, this was a new issue raised prior to this trial, in addition to the issues concerning the CBS tape raised by this Court's opinion in Long, 610 So. 2d at 1280, which are the subject of Issue III, infra.

At a pretrial hearing on the defense motion to exclude the CBS tape, Ellis Rubin testified that he appealed Long's first Hillsborough County conviction and death sentence, based in part on the illegality of Long's confession. He was aware that the Pasco County conviction and death sentence had also been appealed on that basis. Although both appeals were still pending, he believed that the case law was overwhelmingly in Long's favor. (R. 999)

Rubin testified that he spoke by telephone with Ms. Corderi concerning the CBS News interview with Long. He did not recall ever meeting her. (R. 1000) He told her that he must insist upon seeing the interview before it was aired, and if there were any parts of which he did not approve, they be removed before the program was aired. Because he was fighting a confession in an appeal before the Florida Supreme Court, he did not want any confessions by Long aired on television. Rubin testified that he would not otherwise have agreed to the interview. (R. 1001) He said that Corderi agreed to those terms. She said they did not plan to go into any specifics, but would discuss Long's background and childhood, and what compelled him to do what he did. Rubin agreed to the interview because he believed that the discussion of brain damage would be helpful to Long. (R. 1001-02)

Rubin told the prison officials that it was ok for Ms. Corderi to interview Long, and told Long that he could grant the interview.

He did not put the agreement with CBS in writing; and did not ask to be present at the interview because he was aware of the subject matter and felt very comfortable that neither Long nor Corderi would breach their understanding. (R. 1005-06) He did not know exactly when the interview was to take place. (R. 1009)

Ellis Rubin testified that he told Lang that he had an agreement with Victoria Corderi that he would be able to screen the tape and delete anything Long said during the interview. He told Long he would protect him; that after he saw the tapes and edited them, they would have no effect on any future trials. (R. 1006-07) In other words, he represented to Long that he had control over the interview's publication. (R. 1011)

Rubin never received the tapes from CBS, nor edited them. In fact, he never saw them. He believed that Corderi was bound by their agreement; that she spoke for CBS and he spoke for Long; and that CBS was bound by the agreement. (R. 1006) He did not contact CBS because he was never told that the interview had actually taken place, either by Long or CBS. (R. 1009) A year later, he learned that a portion of the tape had been broadcast. (R. 1008)

When he learned that CBS had broadcast a portion of the tape in violation of their agreement, Rubin did not contact CBS or take any action. (R. 1009-10) He did not know whether their agreement had been breached because he did not know what was an the tapes, and did not ask CBS to provide them to him. (R. 1010)

Bobby Joe Long testified solely for the purposes of the hearing. (R. 1018-26) When he met Ms. Corderi at the prison he confirmed that Ellis Rubin had editorial control over the tapes.

He would not have spoken to her otherwise. Twice on the tape, he brought it up. Once, Corderi verbally agreed and the other time she nodded her head, off camera. Had she not agreed, he would have stopped talking to her. (R. 1021-25) Long first found out that part of the tape had been aired just before the second Pasco County trial in Ft. Myers. (R. 1026)

Because the judge sustained the prosecutor's objections when defense counsel tried to question Rubin concerning ineffective assistance of counsel, defense counsel proffered that Rubin would testify that, if he had not insisted on the agreement with CBS that he had editorial control of the tapes, he would have provided ineffective assistance of counsel, below the minimum standard for a member of the legal profession. (R. 1028-29) He represented further, based upon a prior deposition, that Victoria Corderiwould say there was no agreement; that such an agreement would be unethical and not within the scope of her job.[33]

Corderi's deposition transcript confirms defense counsel's representations to the court.[34] Corderi represented that she had no authority to contractually bind CBS News, and that she did not enter into any kind of agreement with Ellis Rubin or Bobby Joe Long concerning the interview. (SR. 10) Although she recalled having

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[33] See Contract between CBS and Victoria Corderi, made June 18, 1985, entitled "Staff Reporter Agreement." Her contract provides that she is under the control of CBS, and that CBS has the authority to broadcast any or all of any of her programs and recordings, which are the property of CBS. (R. 141-60)

[34] Corderi's deposition to perpetuate testimony was taken on October 28, 1993, in New York City, because Corderi was pregnant and unable to travel. (R. 2072)

arranged the interview through Ellis Rubin, she did not remember anything that Reuben said to her or that she said to him. She said that she only knew she had made no agreement with him because, under her contract with CBS and their ethical code, she was not permitted to show tapes to anyone before publication. (SR. 22-23)

When she watched the videotape, Corderi heard the following:

> LONG: I guess it's okay to talk about this, as long as I don't talk specifics. That's what Ellis said. Is Ellis going to get to check this out?
>
> CORDERI: Yeah.
>
> LONG: Okay.
>
> CORDERI: Obviously, Ellis called you. Remember?
>
> LONG: He didn't call me.
>
> CORDERI: You told me he left a message for you that it was okay.

(SR. 23-24) Although Corderi admitted she heard this part, she said that, to her, "check this out" did not mean that Ruben was going to see the videotapes. She said that "yeah" meant only that she had spoken to Ellis Rubin. She said she was not answering a question when she said, "yeah," but was instead "giving a statement." She did not recall what she and Long discussed before the tape began, but agreed they had a conversation. (SR. 24-26)

Corderi said she had reviewed the videotape the day before at the request of Mr. Jacobs, an attorney for CBS, who was with her at the deposition. Jacobs stopped the tape several times, including after Long asked the question about Ellis checking out the video. (SR. 26-27) Attorney Jacobs refused to allow Corderito answer any questions concerning what he told her when they watched the video

because it was a privileged attorney/client communication. Corderi admitted that Jacobs rewound the tape and played part of it for her again. (SR. 27-30)

Counsel asked Corderi if she recalled the following exchange which was on the videotape:

> CORDERI: When you were -- you were hitting at something before when you were talking about when you feel -- you were stopped at the light and you just get real angry and you wanted to do something. Is that what would go through your mind before you went out on that night, you were going to murder?
>
> LONG: No. No. Now, I don't -- I don't know if I really ought to talk about specifics.
>
> CORDERI: I don't want you to tell me about, you know, specifics of the murders. What I want to know is what you felt inside before you went out.
>
> LONG: Well, you know, that/s-- I'd like to answer that, but to answer that, I would have to go into specifics about things, and I can't.
>
> CORDERI: No, I mean you were -- let me give you an example.
>
> LONG: I'm not --
>
> CORDERI: I obviously don't know what -- what went on. Were you sitting at home and feeling that rush -- or it doesn't matter where you were physically -- feeling that rush and saying, "I've got to go out and get somebody?"
>
> LONG: No. Let me try to answer that, cause you say Ellis has control over this tape. So, if he don't like it, he can cut it out. Okay.

(SR. 32) Corderi said that she did not remember the exchange and did not watch it on the video the day before. She did not recall whether she nodded off camera in response to Long's question. (SR. 31-32) Her attorney represented that the tape showed no verbal response by Corderi to the above question. He refused to certify that the camera was not focused on Corderi at that time, because he

was not a witness. Corderi agreed, however, that the camera was focused on Long, and that she was only visible at the end of the tape when the cameraman turned to get a picture of her. (SR. 32-34)

Defense counsel urged the judge to exclude the CBS tape based on the contract between Rubin and Corderi, which was obvious from the tape itself; or because Long's statements were rendered involuntary in light of Corderi's representations that it would be edited by Rubin, and Rubin's representation to Long (as his court-appointed attorney) that he had control over the tape and the statements could not be used against him. Alternatively, he argued that the tapes should be excluded because Ellis Rubin rendered ineffective assistance of counsel by advising Long to grant the interview with CBS and arranging it with prison officials; and by failing to get an agreement in writing and following through with the agreement to edit the CBS tapes. Counsel argued that, if Rubin's agreement with CBS News was invalid, then Rubin provided assistance of counsel beneath the minimum standard of a member of the legal profession. (R. 2058)

Judge Cobb ruled that Long's statements were made voluntarily. (R. 1073) He found as follows:

> THE COURT: There was a limited agreement or a promise by or statement by Miss Corderi that she would not get into any specific cases but was going to limit her questions to background, and I find that she did that. She honored that agreement. Although Mr. Long talked about some specific cases, she didn't ask him about any of them. He just brought those up.
>
> But there was no agreement. I find that Mr. Rubin would not have any kind of control over the product. That's -- Mr. Rubin did nothing to enforce it. He didn't show up; he didn't have any written contract; he didn't do anything to enforce it after it was published. I think it's

> patently absurd for me to believe at this time that there was any agreement that there would -- that he would have any kind of control over that -- editorial control over that tape.
>
> The testimony by Mr. Rubin and by -- and the statement, the interview by Mr. Long to Miss Corderi also convinces this Court beyond any reasonable doubt that this was all strategy, approved by Mr. Long and discussed with Mr. Rubin, that they were going to present some psychobabble defense. Mr. Rubin is famous for his psychobabble defenses, and that's all Mr. Long wanted to talk about in this interview was these murders and these rapes were caused by his second toe being longer than his first one or something almost as ridiculous.
>
> I find there was no ineffective assistance of counsel. That was absolute strategy that had been discussed. It was obvious by Mr. Long's interview that he had talked about that with Mr. Rubin and that that was what they intended to do. It certainly wasn't work product.
>
> It was voluntary -- the statement was voluntary, and I agree with Mr. Van Allen it's now in the public domain, and I suspect that the Fourth Amendment does give the State the right to use that. I'm not finding relevance or materiality, but I'm finding that this was a voluntary statement.
>
> DEFENSE COUNSEL: But, Judge, are you finding that Mr. Rubin's representation to Mr. Long that these tapes could not be used against him, and even if you find --
>
> THE COURT: I find he didn't tell him that. . . . He told him: It's not going to make any difference anyway, because we'll talk about ineffective assistance of counsel if they are used against you. And that's exactly what's happening right now today.

(R. 1075) The judge said that, although he was not finding that Rubin's strategy was to create ineffective assistance, he was finding it was "to promote some psychobabble defense to the Florida Supreme Court." He speculated that Rubin told Long that, if they used it against him, it wouldn't matter, "because we'll claim ineffective assistance of counsel. And we've got such a soft-headed judiciary in Florida, they'll buy that, too." (R. 1075-76)

The court refused to decide whether Rubin's actions were reasonable and within the bounds of ethical standards for lawyers. He said he would not even address the issue, and was not going to be cross-examined by counsel any further.[35] (R. 1076)

In his ruling, Judge Cobb, in effect, accused Ellis Rubin of perjury. His theory that Rubin and Long planned the whole thing to create a "psychobabble" defense was not based on evidence, but was unfounded speculation. Corderi admitted that she initiated the communication with Ellis Rubin, and that he agreed to the interview and arranged it with Long and the prison officials. Both Long and Rubin testified, under oath, that they believed that Rubin had an agreement with CBS that Rubin could delete from the interview any portions that might incriminate Long. The tape itself twice refers to this agreement and shows clearly that Long believed that the agreement existed.

This appears to be a situation similar to Connie Chung's CBS interview with the mother of Newt Gingrich -- she may have said it but she did not mean it. Corderi probably agreed to Rubin's requests, knowing that she would never follow through and, because they had no written agreement, he could never prove she agreed to his requests. She probably hoped it would not be a problem.

Ellis Rubin was obviously not worried about it. He admitted that he did not attend the interview because he trusted Long and

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[35] Defense counsel asked Judge Cope to revisit this issue. (R. 13-14) He told him that Judge Cobb accused him of babbling during the hearing, and he believed Cobb's decision would cause appellate reversal. (R. 716) Judge Cope told him to make a motion when the time came. (R. 718) Defense counsel made motions and objected on this and other grounds throughout the trial. See Note 36, infra.

Corderi to stick to the subject and not to go into specifics. It is obvious from the videotape that both Corderi and Long understood that agreement and tried to follow it. Long's questions to Corderi showed his obvious concern that he follow Rubin's instructions and not get into any specifics. Accordingly, he did not voluntarily make incriminating statements. Any incriminating statements he made were based on his understanding that they could not be used against him. He had no reason to doubt Rubin's representations as to their agreement and, therefore, did not voluntarily make any "admissions against interest" or confessions to any crimes.

The trial court erred by allowing the State to introduce Long's statements to convict him and to obtain a death sentence in this case. Accordingly, this Court should find Long's admissions involuntary based on the representations of counsel which Long reasonably believed would protect him from the use of his statements against him in future legal proceedings.

* * * * *

An indigent defendant has a right to court-appointed counsel. In this case, the court appointed Ellis Rubin to represent Long in his Hillsborough County case. An indigent defendant's right to appointed counsel includes the right to effective representation by such counsel. Anders v. California, 386 U.S. 738, 744-45 (1967); Nelson v. State, 274 So. 2d 256, 258 (Fla. 4th DCA 1973); see also Strickland v. Washington, 466 U.S. 668, 691-92 (1984) (right to counsel recognized as right to "effective" counsel).

Ineffective assistance is generally not reviewable on direct appeal. McKinney v. State, 579 So. 2d 80, 82 (Fla. 1991); Ventura

v. state, 560 So. 2d 217, 220 (Fla. 1990) (ineffective assistance claims more properly addressed in motion for postconviction relief under Fla. R. Crim. P. 3.850 because of opportunity for evidentiary hearing); State v. Barber, 301 So. 2d 7, 9 (Fla. 1974) (issue of adequacy of representation cannot be raised for first time on direct appeal). This case is different, however, because defense counsel raised the issue and requested relief from the trial court. Wright v. State, 428 So. 2d 746, 749 (Fla. 1st DCA 1983) (ineffective assistance appealable on direct appeal only if raised and ruled on in motion for new trial below).

The judge refused to exclude Long's ill-advised statement to CBS News, and refused to rule on whether Attorney Ellis Rubin was ineffective. If this Court agrees with the trial court's ruling that Rubin made no agreement with Corderi, then Rubin's ineffective assistance is apparent from the face of this record. It is blatently ineffective to advise a client who has appealed the trial court's failure to suppress his confession to discuss the crimes, even in general terms, with CBS News.

In Strickland v. Washington, 466 U.S. 668, 687 (1984), the United States Supreme Court explained that, to maintain an ineffective assistance of counsel claim, the defendant has the burden of satisfying a two-prong test. First, the defendant must show that counsel's performance was deficient. This requires a showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. When a defendant makes both

showings in a capital case, the conviction and death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Long meets both tests if this Court finds that Rubin had no reason to believe he had an agreement with CBS News to edit Long's interview and delete any incriminating statements. Although Long was represented by different counsel in the Pasco County case, Rubin was aware that that case was on appeal, and that the State would probably have insufficient evidence to retry and reconvict Long if his confession was suppressed. Rubin's representation was clearly deficient because no lawyer who is functioning adequately as counsel under the Sixth Amendment would advise his client to make incriminating statements on television when the State might not otherwise be able to prove his guilt.

In the Hillsborough County case, Rubin had filed Long's appeal of the conviction and death sentence. He had argued that Long should be allowed to withdraw his guilty pleas based, among other things, on the invalid confession. See Long, 529 So. 2d 286. To advise Long to grant a CBS television interview concerning what caused him to commit the Hillsborough County murders, the conviction for which was on appeal, without accompanying him or making any agreement with CBS to control publication of the interview, is blatently defective representation.

The prejudice to Long's defense is obvious. Although the Tampa prosecutor did not attempt to use the CBS tape against Long in his second penalty trial, and arguably could not have done so based on the plea agreement, the Pasco County prosecutor elected to

show a portion of the interview to the jury at Long's second and third trials, to prove guilt and argue for the death penalty.

The judge read the following jury instruction concerning the CBS News videotape:

> A statement claimed to have been made by the defendant outside of the court has been placed before you. Such a statement should always be considered with caution and be weighed with great care to make certain it was freely and voluntarily made. Therefore, you must determine from the evidence that the defendant's alleged statement was knowingly , voluntarily, and freely made.
>
> In making this determination, you should consider the total circumstances including but not limited to whether when the defendant made the statement he had been threatened in order to get him to make it, and whether anyone promised him anything in order to get him to make it. If you conclude the defendant's out-of-court statement was not freely and voluntarily made, you should disregard it.

(T. 1283) This was of no help, however, because the jurors did not hear Ellis Rubin's testimony or the parts of the tape where Long referred to Rubin's promise that the tape would not be used against him. Thus, the jurors could not determine voluntariness.

Rubin's error in arranging Long's interview with CBS was so serious that it deprived Long of a fair trial in Pasco County. The result is certainly not reliable because, without the CBS tape, it is possible and perhaps even likely that the prosecutor could not have proved Long's guilt, or received a death recommendation from the jury. Because Long's death recommendation was based on a bare majority (seven to five), the exclusion of the CBS tape would almost certainly have changed the result. Thus, the ineffective assistance may have meant the difference between life and death. It can't get more serious than that.

ISSUE III

THE TRIAL COURT ERRED BY ALLOWING THE STATE TO INTRODUCE PORTIONS OF LONG'S VIDEOTAPED INTERVIEW WITH CBS NEWS BECAUSE THE INTERVIEW WAS IRRELEVANT, SHOWED ONLY CRIMINAL PROPENSITY, AND WAS EXTREMELY PREJUDICIAL, AND BECAUSE IT CONCERNED ONLY THE CRIMES WHICH WERE EXCLUDED BY THE HILLSBOROUGH COUNTY PLEA AGREEMENT AND BY THIS COURT IN ITS OPINION IN LONG.

In its opinion reversing Long v. State, 610 So. 2d 1276 (Fla. 1992) (R. 10-26), this Court stated, as to the admissibility of the CBS tape at retrial, as follows:

> We disagree . . . 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 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. (R. 20-21) In conclusion, this Court ruled that "the CBS interview may be admitted into evidence provided the entire videotape is available for viewing by the jury." (R. 24)

Defense counsel interpreted this Court's opinion to require that (1) the whole CBS tape must be available; but that (2) no evidence of any crimes except the murder of Virginia Johnson was admissible; except that (3) evidence concerning the McVey incident was admissible for the limited purpose of showing Long's identity, to place the evidence in context. (R. 828-30) This is the only interpretation that makes any sense.

In its opinion, 610 So. 2d at 1280, this Court held that the CBS tape was not inadmissible because it merely showed criminal propensity and referred to the Hillsborough County murders.

Nevertheless, the Court did not say that all, or even any, of the videotape was relevant or admissible. Although the Court found it admissible as an admission against interest under the hearsay exclusionary rule, it held that whether portions of it are irrelevant or the probative value of some of Long's statements are substantially outweighed by unfair prejudice were issues to be addressed at the new trial. (R. 830) Appellant contends that none of the videotape was relevant and, even if it were, that it was inadmissible as collateral crime evidence because it showed only propensity and bad character. Moreover, its probative value is obviously outweighed by the danger of unfair prejudice.[36]

Following two hearings concerning the admissibility of the CBS tape, Judge Cobb determined that (1) all portions of the CBS interview requested by the State were relevant; (2) the interview was not excludable simply because it contained evidence of other murders either because of a Sixth Amendment violation or Long's plea agreement; (3) the probative value of portions dealing with murderous propensity and other murders were outweighed by unfair prejudice except where inextricably connected with statements relating to McVey; and (4) pursuant to this Court's opinion, details of Long's treatment of McVey in his apartment were not

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[36] Defense counsel objected to the CBS videotape prior to (see, e.g., R. 1115) and throughout trial. At trial, he correctly argued that the tape was not specific to Virginia Johnson, and that this Court's opinion disallowed use of the Hillsborough County crimes as similar fact evidence. His objections were overruled. (T. 427, 431-33, 436, 442-43, 451-52, 465-66, 996-98, 1070-71, 1212-14, 1218-20, 1273) Judge Cope refused to revisit the issue, but said the defense motions would be deemed renewed. He ratified and adopted the orders entered by Judge Cobb. (T. 1007-08)

admissible. (R. 358-60) Although his rulings sound reasonable, his decisions as to what was admissible defy any logic. The portions of the CBS videotape, as edited, that were requested by the State and actually shown to the jury were as follows:

> MS. CORDERI: Is there a violent flame burning inside you?
>
> THE DEFENDANT: I don't guess there's any -- any way to deny that, is there? I don't think so. I don't think I could deny that.
>
> MS. CORDERI: Do you still feel it?
>
> THE DEFENDANT: Sometimes I still get the -- that same feeling I used to get, the one I was telling you about. I still get it in here, and it'll last for a week.
>
> MS. CORDERI: What is that? What is that feeling?
>
> THE DEFENDANT: I get -- 1 go even faster. I feel like I'm even going faster, if you know what I'm talking about.
>
> MS. CORDERI: Speed up?
>
> THE DEFENDANT: Yeah.
>
> MS. CORDERI: You feel like you're speeding up?
>
> THE DEFENDANT: Yeah. I sleep four [or] five hours a night instead of my regular eight or ten hours.
>
> MS. CORDERI: Does that make you want to be violent?
>
> THE DEFENDANT: I don't know. Not -- in here it doesn't make me want to be violent.
>
> MS. CORDERI: But outside you used to get that feeling and what would happen?
>
> THE DEFENDANT: Well, I'd get in fights. You know what happened. A lot of crazy things happened. it was getting to the point, see, where -- do you know about the girl that I let go?
>
> MS. CORDERI: Yeah.
>
> THE DEFENDANT: Okay. wow, you even know her first name. Well, you know, I look at that, that to me is a

pretty important thing. You know what I mean? I saw a movie a couple of weeks ago on TV about this guy Wilder, Chris Wilder. Did you see it?

MS. CORDERI: No. I covered it. I remember I was in Miami while it was happening?

THE DEFENDANT: So you're familiar with all the stuff about him? What happened to him?

MS. CORDERI: He died.

THE DEFENDANT: Wasn't there a Lisa with him?

MS. CORDERI: No, she escaped.

THE DEFENDANT: He let her go. He put her on an airplane. It's like Lisa McVey. She didn't escape. I let her go.

MS. CORDERI: Why did you let her go?

THE DEFENDANT: I don't know. It was just different than other things that were going on at that time.

MS. CORDERI: Did you feel like a killer? I mean, could you reconcile yourself to that person the newspapers were --

THE DEFENDANT: No. I'll tell you the truth, I used to stand in front of the mirror for an hour looking at myself, trying to see it.

MS. CORDERI: Trying to see what?

THE DEFENDANT: The difference. And I didn't see it.

MS. CORDERI: The difference between Bobby Joe the person and Bobby Joe the killer?

THE DEFENDANT: Yeah. And it got to the point where when I would meet, you know, a girl or something, I thought they could see it when they looked at me. And it was really -- it was starting to be a real problem. And I was starting to see these predictions that I was reading about in the newspaper coming true, happening more and more frequently. Then the McVey girl. And when the McVey girl happened, I knew that they were right, you know, that it was -- it was going to get a lot worse.

It got to the point where if I was driving and stopped at a red light and somebody in a car next to me looked at me wrong and I didn't like the way he looked at me, twice

I had the gun out. I was ready to shoot these people. I mean, cocked and aimed at their head. If they hadn't have took off, I would have shot them. There's no doubt in my mind. And for no reason. And I realized things were just getting completely out of hand. Completely.

MS. CORDERI: So what would you do then? I mean, would you -- all of a sudden the people would drive away. would you put the gun down and say, what am I doing? Or were you so involved in it that it didn't matter?

THE DEFENDANT: I was so mad that there wasn't really much thought involved. It was just anger. You know, I mean, that's scary. That scared me. Believe me, it did. It scared the hell out of me. And, uh, I don't know if you know about how I got busted.

MS. CORDERI: Yeah, I do. I mean -- I mean, I believe.

THE DEFENDANT: But do you know I was pulled over the day before that?

MS. CORDERI: Right. They say the car matched the description?

THE DEFENDANT: Right. They pulled me over and took a bunch of pictures of me and my car, telling me that it had been involved in a hit and run accident and I pulled a gun on the other driver, and they wanted to search my car, could they please search my car. I said no. They finally let me go, and I went home. And I heard after I was arrested that they had a tail on me, but I don't know. I never saw it.

And, yeah, I knew what was going on. You know, I knew they weren't taking pictures of me and holding me there for forty-five minutes because of some hit and run bull-shit, you know. And I fully expected them to come and get me sometime, you know.

MS. CORDERI: How did that make you feel? Were you relieved, or were you scared?

THE DEFENDANT: No, I wasn't relieved. 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 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.

MS. CORDERI: Did you think that things would be better in Mexico, that you would stop killing then?

THE DEFENDANT: Well, you know, I had spent a lot of time in Mexico, and, yeah, it would have been -- it would have been in a situation where I would have been so far away from civilization that, you know, I don't think these things could have kept on. But I didn't do that, because I was afraid that if I did go somewhere it would just start again.

It's like when they set up the task force in Tampa. You know, I knew all I had to do was throw my stuff in the car and move to Lakeland or Miami or Daytona or out of state, and they'd never have tracked me down. You know, there's no way. That's why I let the McVey girl go. If I hadn't let the McVey girl go, they would never have tracked me down. There's no way they could have.

MS. CORDERI: Did you want to be caught?

THE DEFENDANT: I don't know. I don't think consciously I really sat down and said, you know, gee, I want to get caught, I want to go to prison the rest of my life or sit in the electric chair and let them fry me. You know. To tell you the truth, I never even considered the electric chair. I never considered it. I figured it was so obvious there's something wrong with me that when they did catch me that they would fix me. But I learned real quick nobody gives a damn. Nobody cares what causes this.

MS. CORDERI: Did you want help?

THE DEFENDANT: Yeah, I wanted help. The cops knew I wanted help when they questioned me. They promised to give me help. Then my attorney told me what they meant was that they're going to see you get the electric chair. That's the kind of help they're going to get you.

MS. CORDERI: Did you think beyond -- when this was all happening, and you woke up the next day, and time after time it was getting clearer to you what you were doing, did you think about the victim? Did you think about -- or was it just what you do, what drove you? I mean, what was going on?

THE DEFENDANT: Yeah, I thought about them. I thought about them a lot. I still do, and it's not a pleasant memory. It's not a pleasant thought.

MS. CORDERI: So you would be doing the most normal things in the world, racquetball, cooking yourself dinner, going to the grocery store, and you'd feel something come over you?

THE DEFENDANT: 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 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 streetwalker. This was just a girl going home from work at the doughnut shop at 2:30 in the morning on her bicycle. and that was when I realized that I was -- you know, who knew what was going to -- things were just starting to come into my mind, right, involving women that I knew, and I was -- I was wondering where is this going to stop, you know, what's next.

MS. CORDERI: Were you wondering that after you pulled her off the bicycle and were doing what you were doing?

THE DEFENDANT: Yeah, 'cause that -- to me, that was a real clear sign that I was losing control, to do something like that. I mean, that's -- let's face it. that's insane. That's an insane thing to do -- pull off the side of the road, wait for some little girl to come back riding on a bicycle, snatch her off the bicycle, and keep her for twenty-some hours at your apartment.

You know, I guess that was the thing that really dawned on me, you know, things are really getting bad.

(T. 1061-69) Following the video, the judge instructed the jury as follows:

> 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 not included in the indictment."

(T. 1069-70) Defense counsel renewed his objections to the tape and moved for mistrial. Judge Cope found the objections contemporaneous, reaffirmed Judge Cobb's prior rulings, and denied the defense motion for mistrial. (T. 1070-71)

* * * * *

An admission against interest is an exception to the hearsay exclusionary rule. § 90.803(18), Fla. Stat. (1993). Because a statement is not excluded as hearsay does not automatically make it admissible. It must first be relevant. § 90.401, Fla. Stat. (1993). Relevancy includes the concept of materiality. Ehrhardt, Florida Evidence, § 401.1 (1995 ed.) The federal counterpart to this rule does not use the term "material," but instead employs the phrase, "any fact that is of consequence to the determination of the action." The intent of both definitions is the same. Ehrhardt, id. Accordingly, relevant and material evidence is "any fact that is of consequence to the determination of the action."

Logically relevant evidence must also be legally relevant. See, e.g., Taylor v. State, 583 So. 2d 323, 328 (Fla. 1991) (that victim used cocaine previously does not tend to show that she consented to sex on the night of her death). A test for legal relevance is set out in section 90.403, Florida Statutes, which is mandatory in its exclusion of evidence where the probative value is substantially outweighed by the danger of unfair prejudice. Another test is set out in section 90.404(b)(2) of the Florida Statutes, which excludes collateral crime evidence which shows only propensity and bad character.

Although this Court has previously determined that the CBS tape does not violate the hearsay rule because it qualifies as an admission against interest, we must also determine (1) whether it is relevant and material and, if so, (2) whether its admission is excluded by section 90.404(b)(2), as collateral crime evidence that shows nothing more than propensity and bad character, and (3)

whether its probative value is outweighed by unfair prejudice. Because of the unique circumstances of this case, we must also determine (4) whether its admission violates Long's Hillsborough County plea agreement which has been upheld by this Court.[37]

RELEVANCE

Long mentioned no unusual or specific facts which could support a presumption, or even a reasonable inference, that the Johnson murder was one of the crimes he referred to. His statements were way too general -- and the actions he described were far too common -- for the tape to be admitted to prove that Long killed Virginia Johnson in Pasco County. The statement does not indicate whether the "victims" were men or women, old or young, prostitutes or "people of the evening" or hitchhikers or small children. It does not say how the victims were "taken out," or whether they were killed in different ways. Although the statement refers to pulling a knife or a gun, and the evidence did indicate that Long had a knife and a gun when he abducted Lisa McVey, no such evidence existed in the charged crime. Long never mentioned anything even remotely connected to Virginia Johnson, to the exclusion of the millions of other homicides.

Long never mentioned committing a crime in Pasco County. All references were to Tampa. He mentioned the task force set up in Tampa to apprehend him. Long's "A, B, C, D" description never

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[37] In addition, this Court must determine whether the CBS tape should have been excluded because Long made the statements in reliance on counsel Ellis Rubin's representations that they could not be used against him, as argued in Issue II, supra.

stated that his victims were prostitutes. His only reference to prostitution was that McVey "wasn't some streetwalker." He saw "them" walking down the street; picked "them" up; drove "a little ways"; stopped, pulled a knife, a gun, or whatever; tied them up; "took them out." Virginia Johnson did not fit the picture. She was found thirty miles from Tampa -- more than "a little way." The State presented no evidence that she was picked up while walking down the street, or that Long used a knife or a gun. Nothing in Long's statement connected Johnson.

We know that Long did not mean, literally, that "all" of the abductions were the same. This Court found in Long, 610 So. 2d 1276, that four of the Tampa homicides were not "similar fact" evidence under the Williams rule. The trial judge had already determined that the remainder of the Tampa homicides were too dissimilar to be used in that fashion. Moreover, Sandra Jensen, Linda Nuttal and Lisa McVey were not killed. Although Long excluded McVey from his "A, B, C, D" description, he did not exclude Jensen and Nuttal. We know from Detective Collins' testimony that Long committed sexual batteries on these two women in their homes, and did not abduct or kill them. There is absolutely no evidence that any of Long's statements to Corderi included Virginia Johnson. The judge admitted this very prejudicial testimony only because the prosecutor told him that this Court had "gutted" his case, and that he needed this evidence to obtain a conviction. It worked.

The telling analysis is that, if Long did not kill Virginia Johnson, then his statements regarding other murders, and that he was a "killer," did not include or relate to the Virginia Johnson

murder. The State used Long's alleged guilt in the Virginia Johnson murder, which was the issue it was required to prove beyond a reasonable doubt, to convince the court that Long's statements to CBS included admissions to that murder. In turn, it used Long's admissions to other murders to convince the jury that Long killed Virginia Johnson. There is definitely something wrong with this logic -- and it shows that the CBS tape was clearly inadmissible.

The videotape contained substantial other admissions that had nothing to do with Johnson's, or any other, murder. He told Corderi that,

> It got to the point where if I was driving and stopped at a red light and somebody in a car next to me looked at me wrong and I didn't like the way he looked at me, twice I had the gun out. I was ready to shoot these people. I mean, cocked and aimed at their head. If they hadn't have took off, I would have shot them. There's no doubt in my mind. And for no reason. And I realized things were just getting completely out of hand.

This confession was clearly irrelevant and immaterial. Even worse, it evidenced Long's "bad character" and propensity to kill people, in violation of the Williams rule.

COLLATERAL CRIME EVIDENCE

Evidence of collateral crimes or bad acts is inherently prejudicial because it creates the risk that a conviction will be based on the defendant's bad character or propensity to commit crimes, rather than on proof that he committed the crimes charged. Straight v. State, 397 So. 2d 903 (Fla. 1981). To minimize this risk, the evidence must meet a strict standard of relevance. Heuring v. State, 513 So. 2d 122, 124 (Fla. 1987) (citations omitted). Evidence of other crimes must be of such nature that it

would tend to prove a material fact at issue. See State v. Savino, 567 So. 2d 892 (Fla. 1990). Even if relevant, such evidence must be excluded if its only relevance is to show bad character or propensity, or its probative value is substantially outweighed by danger of undue prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence. Brvan v. State, 533 So. 2d 744, 746 (Fla. 1988).

When evidence of collateral crimes or bad acts is so disproportionate that it becomes a feature rather than an incident of the trial, the State has gone too far. The evidence must be excluded even if relevant. Long v. State, 610 So. 2d 1276, 1280-81 (Fla. 1992); State v. Lee, 531 So. 2d 133, 137-38 (Fla. 1988); Williams v. State, 117 So. 2d 473, 475-76 (Fla. 1960). Otherwise, the defendant is deprived of his Fifth and Fourteenth Amendment rights to due process and a fair trial.

"The fact that evidence of collateral crimes comes from prior statements of the defendant does not exempt it from the Williams rule." Delsado v. State, 573 So. 2d 83, 85 (Fla. 2d DCA 1990). In Jackson v. State, 451 So. 2d 458 (Fla. 1984), the trial court admitted evidence that the defendant had bragged that he was a "thoroughbred killer." Reversing for a new trial, this Court said:

> There is no doubt that his admission [that he was a thoroughbred killer] would go far to convince men of ordinary intelligence that the defendant was probably guilty of the crime charged. But the criminal law departs from the standard of the ordinary in that it requires proof of a particular crime. Where evidence has no relevancy except as to the character and propensity of the defendant to commit the crime charged, it must be excluded.

451 so. 2d at 461. The Delgado court added that, where the

collateral crime evidence consists of prior statements of the defendant, the argument for inadmissibility is even more cogent. 573 So. 2d at 85.

Because the CBS videotape contained no specific or unusual facts which corresponded to the facts of the Virginia Johnson case, it was clearly inadmissible as similar fact evidence. Drake v. State, 400 So. 2d at 1219. Where there are both similarities and dissimilarities, the admission of collateral crime evidence is prejudicial error. Thompson v. State, 494 So. 2d 203 (Fla. 1986). The identifiable points of similarity must pervade the compared factual situations. Id. at 204. For similar facts to be relevant the points of similarity must have some special character or be so unusual as to point to the defendant. Drake, 400 So. 2d at 1219. Long's statements could have applied to any number of murders.

The function of similar fact evidence is to take two sets of unique or unusual circumstances, and use them to prove identity. In the instant case, the crimes Long referred to on the CBS tapes (McVey and other unspecified homicides) were not uniquely similar to the Johnson murder -- or what little was known about the Johnson murder -- to be used for this purpose. Having allowed the State to use the supposedly similar circumstances to prove identity, the judge turned around and used identity to prove the circumstances of the Johnson homicide in his sentencing findings, to find the HAC and CCP aggravators. (See Issues VIII and IX, infra.)

For the collateral crimes to have been properly admitted in the guilt phase, the circumstances of Johnson's death would have to have been known, proven and strikingly similar to the Hillsborough

murders. If that had been the case, there would have been no need in the penalty phase and sentencing to use the collateral crime evidence to fill in the gaps; there would have been sufficient evidence to determine the existence or non-existence of aggravating factors on the facts of the charged crime.

Judge Cobb admitted that portions of the CBS tape showed nothing more than propensity, but he let them in anyway. He said the part concerning Long's "murderous propensities and other murders [were] generally outweighed by unfair prejudice," but added, "except where they are inextricably connected with McVey." He found the part about Long pointing guns at people in cars relevant "because it shows the intensity of his murderous propensities or flame. It's why he killed Virginia Johnson, I guess." (R. 1116) The judge allowed the evidence despite his admission that its primary relevance was to show propensity.

PROBATIVE VALUE VERSUS UNFAIR PREJUDICE

"Relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence." § 90.403, Fla. Stat. (1993). The prejudicial impact on the jury of seeing Long admit to being a serial killer is self-evident. Although Long never mentioned Virginia Johnson, his statements amounted to an admission that he was a serial killer.

This Court determined, in its opinion reversing Long's prior conviction, that, upon remand, "whether 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. Judge Cobb held two pretrial hearings to determine the admissibility of the CBS tape. Although he made no rulings as to specific portions of the videotape at the first hearing, he made a generalized ruling, which he later reneged on. He first ruled as follows:

> I'm going to . . . find that the probative value of the comments about. . . his murderous tendency, again the A, B, C's of how easy it was for him, the probative value is outweighed by the prejudice on those. I'm going to exclude them at the guilt phase only, so I think under that it's all -- the only thing that's admissible at the guilt phase are the comments . . . about Lisa McVey.[38]

(R. 2043) Shortly thereafter, however, he said he did not want to make a decision on the A, B, C, D clause, because Long ended it with, "until McVey came along." He said that, "if we can get McVey in without that, I would exclude that." (R. 2047)

The prosecutor argued that this Court had, to a large extent, "gutted his case" and that Long's statements had become much more necessary to present a viable prosecution.[39] (R. 1985-86) The

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[38] The trial judge and the prosecutor interpreted this Court's opinion to allow evidence concerning the abduction of Lisa McVey as "Williams rule" evidence to establish identity. Long maintains that this Court never intended that the evidence be admitted to prove identity under the Williams rule, but that some evidence concerning McVey might be needed to connect Long to his car, and the carpet fiber evidence to the Johnson case. In this manner, Long would be "identified" as a "suspect." (See Issue I)

[39] Although the strength of the prosecution's case may be considered in determining whether relevant evidence is admissible, see Huddleston v. United States, 458 U.S. 681, 689 n.6 (1988), Williams rule evidence is not admissible simply because the prosecutor believes it is necessary to his case. See Ruffin v. State, 397 So. 2d 277, 279-80 (Fla. 1981). The need for such evidence is only considered to determine whether evidence which has already been found relevant should be excluded because its probative value is outweighed by unfair prejudice.

court made the following remarks to the prosecutor:

> Mr. Van Allen, if I were to approach this from an honest jurisprudential perspective I would certainly grant your request. But I can't do that, because it's been obvious throughout this case that the Supreme Court of Florida is not approaching this from an honest jurisprudential perspective. Both of the reversals in this case have indicated that they are willing to go to bizarre lengths to reverse his conviction. I'm convinced beyond a reasonable doubt that that's exactly what they're trying to do is to gut your case without opening themselves up to the charge of being soft on crime, which is bothering one of them right now greatly in the federal system.
>
> But I've got to look at this from the point of view of what they're going to do, because that's what the law is going to be in Florida whether I like it or not, whether I think it's correct or not. And I'm convinced that they're going to find that anything relating to those murders in -- any other of those murders unless connected explicitly, -- actually, inextricably with the McVey identity issue, is going to be considered to be unfair.
>
> And I think that's silly. I don't think it's honest, but I'm convinced that that's what they're going to decide, and based on that I think I have to deny your request. And it's very hard for me to -- to examine these things, because I've got to ignore all of the jurisprudence that I've learned in over thirty years in this business, but I'm convinced that's what's going to happen, and I think on that basis I've got to deny -- I think it's clear that they're not going to approve this -- these portions that you're asking for. . . .
>
> I'm saying that [the Florida Supreme Court's] attitude of affection toward Mr. Long convinces me beyond a reasonable doubt that they're going to find this unfair prejudice -- unfair.

(R. 1997-99) The judge then ruled that he would allow the "A, B, C, D" statement which included the final line, "And they were all exactly the same until McVey came along," because it referred to McVey and explained why she was alive and Johnson was dead. (R. 1101) He clarified that, "[t]he probative value of the portions of [Long's statements concerning his] murderous propensities and other murders are generally outweighed by unfair prejudice except where

they are inextricably connected with McVey," because McVey was relevant to show identity. (R. 1103)

The judge's ruling shows that he misinterpreted this Court's opinion. He was apparently under the unfounded and unreasonable belief that he was required by this Court's opinion in Long, 610 So. 2d 1276, to admit every single mention of McVey as evidence in the case -- with the exception of the details of Long's treatment of her in his apartment -- show Williams rule-type identity. In fact, however, this Court stated only that some evidence that Long abducted McVey in his car and released her was necessary to connect Long, the car, and the hair and fiber evidence to Virginia Johnson.

Because this Court found that Long's sexual battery of McVey in his apartment was irrelevant, 610 So. 2d at 1280, then certainly his reasons for letting her go were not relevant." This Court did not say that literally everything else concerning McVey's abduction must be admitted. This Court certainly intended that the trial judge should follow the rules of evidence to decide which of the McVey evidence was relevant and admissible, and whether its probative value was outweighed by unfair prejudice.

Long's statements were extremely prejudicial. He admitted to being a "killer," and to "taking them out." That was enough to convict Long for many murders, with no other evidence. The trial court should have excluded the references to killing, serial murders and Long's allegedly "violent flame," if nothing else.

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[40] Why Long did not kill McVey was clearly irrelevant; McVey was not similar fact evidence. Even if McVey evidence was relevant to show identity, the judge was required to determine whether it must be excluded under another rule of evidence, such as § 90.403.

VIOLATION OF THE HILLSBOROUGH COUNTY PLEA AGREEMENT

Defense counsel argued that Long's Hillsborough County plea agreement precluded the CBS tape because this Court said repeatedly that the cases covered by the plea agreement could not be used as evidence against Long in future proceedings. (R. 825-26) Moreover, it was inadmissible under the Williams rule, and any probative value was substantially outweighed by unfair prejudice. Counsel and the court were unable to agree on an interpretation of this Court's opinion in Long because, although the Court held that the CBS tape -- which was primarily about the Hillsborough County homicides to which Long entered guilty pleas -- was admissible as an admission against interest, it also held that evidence of the murders to which Long entered guilty pleas in Hillsborough County was inadmissible. The trial judge stated as follows:

> Well, this is such sloppy writing it's hard to understand what they're talking about, but they do say: Evidence of the murders to which Long entered guilty pleas in the Hillsborough County plea agreement may not be admitted under the circumstances of this case. And evidence of the Hillsborough County guilty pleas and convictions resulting from Long's plea agreement may not be admitted.

(R. 826-27)

In Long v. State, 610 So. 2d 1268 (Fla, 1992), decided the same day as the reversal in this case, the Court upheld the Hillsborough County plea agreement, stating as follows:

> Long's claim that he was not told that his confessions and pleas could be used against him in his Pasco County case as Williams rule evidence and as aggravation in the penalty phase if that case was retried is moot. In our decision in Long v. State, 610 So. 2d 1276 (Fla. 1992), issued contemporaneously with this opinion, we reversed Long's Pasco County conviction, in part on the ground that his Hillsborough County pleas and confessions were improperly introduced into evidence in that case.

> Additionally, we held that, upon remand, Long's pleas and confessions could not be used against him in aggravation during a new penalty phase proceeding. We therefore deny this claim.

610 So. 2d at 1274.

When Long made his statements to CBS News, he believed that he was protected not only by Ellis Rubin's representations (see Issue II, supra), but also by the Hillsborough County plea agreement. Thus, he believed he could make general references to the crimes covered by that agreement. He did not talk about the Pasco County case because it was still on appeal, not covered by the plea agreement, and Rubin had no control over what happened in Pasco County. If this Court now upholds the State's use of this evidence of the crimes for which Long was convicted pursuant to the plea agreement -- most of the CBS tape -- against him, the plea agreement will again be violated, and Long will be entitled to withdraw his guilty pleas in the Hillsborough County case.

Long's entire statement concerned Hillsborough County crimes for which he entered guilty pleas under the Hillsborough County plea agreement. It was his attorney in that case, Ellis Rubin, who advised Long to participate in the interview. (See Issue II, supra.) Anything else he admitted in the videotape (such as his urge to shoot at other drivers) was totally irrelevant and should have been excluded on that basis.

Long began by admitting to the reporter that he had a "violent flame" inside him. This is nothing more than a propensity for violence, It is evidence of "future dangerousness," as defense counsel argued or, as Judge Cobb put it, a "murderous tendency" or

a "murderous propensity." (R. 433, 1103, 2043) See Teffeteller v. State, 439 So. 2d 840, 844-45 (Fla. 1983) (argument to jury that, if defendant were released on parole, he would kill again was needless and inflammatory; no place in our system of jurisprudence for this argument). If the "violent flame" referred to any crimes at all, it was the series of homicides to which he pled guilty in Hillsborough County, pursuant to the plea agreement.

From there, Long went into the intensity building inside him at the time of the Tampa homicides. He told the reporter how his system "speeded up," causing him to act crazy and violent. He did not sleep much. As an example, he sometimes became so angry with other drivers (for no reason) that he pulled a gun and would have shot them had they not driven away.

When he abducted Lisa McVey, he realized that things were out of control. Her abduction was admittedly an insane thing to do. He realized that things had gone too far, that he was unable to stop, and that the only solution was to release McVey and allow himself to be caught and arrested. The murders he was unable to stop, of course, were those to which he pled guilty pursuant to the Hillsborough County plea agreement.

Long proceeded to tell Ms. Corderi how he was apprehended for the abduction of Lisa McVey. This is the only part of the entire video that was even remotely relevant. It was totally unnecessary, however, because three officers had already testified about how he was caught and arrested, and McVey had testified.

In response to questioning from Corderi as to whether he felt like a "killer," he said that he once spent an hour looking in the

mirror, trying to see the difference between Bobby Joe, "the killer" that he read about in the newspapers, and Bobby Joe, the person. He could not see the difference. This was perhaps the most prejudicial and irrelevant part of the videotape. It was exactly like the **thoroughbred killer" comment that this Court found prejudicial and irrelevant in Jackson, 451 So. 2d at 461. Long could only have been referring to one thing: the Hillsborough County homicides.

Long knew when he was stopped and questioned after releasing McVey, that he would be arrested. He thought of fleeing to Mexico, but was afraid the killing would just start up again. When they "set up the task force" in Tampa, he could have left town and never been caught. That's why he let Lisa McVey go; otherwise, he would never have been caught.[41] Long's reference to the Tampa "task force" refers to the search for a serial killer in Tampa, was extremely prejudicial, and has nothing to do with Johnson's murder. Long was arrested two days before Johnson was reported missing.

Long did not even think about the electric chair. He thought it was so obvious that something was wrong with him that when the authorities caught him, they would "fix" him. He had since learne d that they meant they would see that he was sent to the electric

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[41] Defense counsel objected to Long's references to his thoughts of flight, thus inferring guilt. This Court held that the flight instruction should no longer be given because it does not necessarily indicate guilt. Fenelon v. State, 594 So. 2d 292, 295 (Fla. 1992). Long's thoughts of flight were irrelevant because there was no evidence that his reasons to consider leaving Tampa had anything to do with this case.

chair. Defense counsel objected to Long's reference to the electric chair because it suggested that he had previously been convicted and sentenced to death for other crimes. (T. 1070-71) These would be the Hillsborough County crimes to which he pled guilty, and which were inadmissible in further court proceedings.

Long admitted that he sometimes thought about his victims and did not feel good about it. At this point, after Corderi asked him if the [violent flame] feeling came over him while he was doing normal things, he made the "A, B, C, D" statement. It was the abduction of McVey that made him realize he was out of control. McVey, of course, was a Tampa crime covered by the Hillsborough County plea agreement. Obviously, the victims that he "took out," and later thought about, were women he was convicted of killing pursuant to that agreement. It is preposterous to suggest that these statements showed that Long killed Virginia Johnson.

* * * * *

In his closing statements, the prosecutor greatly compounded this error by his outrageous use of the videotape as similar fact evidence, to argue propensity to the jury. He told the jury that Long was referring to Virginia Johnson in the videotape, citing no evidence to back up his assertion. Some of his most egregious and inflammatory comments were as follows:

> If I had to think of a name for this case, something to summarize what this case is all about, I think I'd call it A, B, C, D. It's simple, it's straightforward, it's matter of fact, and it explains how he explained to CBS his actions in this case: "When I saw them walking down the street, it was like A, B., C, D. I'd pull over, they'd get in, I'd drive a little ways, stop, pull a knife, a gun, whatever, tie them up, take them out. And it was exactly that way until McVey came along."

Folks, it doesn't get any better than this. This is the defendant's statement about what he did, about how he did it, to CBS. You'll have a chance to take this statement back with you to the jury room when you deliberate, to play the tape, to look at how he acted, how he reacted, what he said, how he said it, how matter of fact he was, how nonchalant he was. Just A, B, C, D. Just another walk in the park.

And that's the way it was. That's the way it was for Virginia Johnson, and that's the way it is for Bobby Joe Long. And what it is for Bobby Joe Long is murder, first degree.

When I saw them walking down the street, it was like A, B, C, D. Virginia Johnson was walking down the street. Left Mr. Duggan's house, went to the corner to get a pack of cigarettes. Walking down the street.

I'd pull over, they'd get in. Virginia Johnson got in. A hair was found on the front passenger seat of the defendant's motor vehicle . . .

They'd get in, I'd drive a little ways -- in this case from Hillsborough County up to Pasco County -- stop, pull a knife, a gun, whatever. What happened in the McVey case, he pulled a gun, said he had a knife. And then what did he say? What Mr. Long said to CBS was: I'd tie them up (displaying photograph) . . . I'd take them out. . . . And that was it for Virginia Johnson. . . .

(T. 1181-83) He continued later:

The defendant confessed to the McVey abduction, the circumstances surrounding the McVey abduction. And then we have the videotape, the CBS videotape. When you look at that tape, take a look at not only what he said but how he said it. What was his demeanor? What was his action? What was his reaction? What was his body language? How about his eyes, his ears, his nose, his hand, the smirk on his face. Look at all the things that tell you about an individual, the countenance of the individual, the way he appeared and what he said.

Nonchalant, relaxed. Just a walk in the park. Like talking about sports, like talking about the weather. Just A, B, C, D. Bang, bang, bang, bang.

Let's take a look at what he said on the CBS tape. Is there a violent flame burning inside you? I don't guess there's any way to deny that, is there? I don't think so. I don't think I could deny that.

> He said, It's like Lisa McVey. She didn't escape. I let her go. . . . Why did you let her go? . . . I don't know. It was just different than other things that were just going on at that time.
>
> Reporter: Did you feel like a killer? I mean, could you reconcile yourself to that person in the newspapers?
>
> Defendant: No. I'll tell you the truth, I used to stand in front of the mirror for an hour looking at myself, trying to see it. . . .
>
> He couldn't see the difference between Bobby Joe the person and Bobby Joe the killer because there was no difference. Bobby Joe the person is Bobby Joe the killer.

(T. 1208-10) The prosecutor continued, quoting Long's remarks about newspaper predications coming true, things getting worse, getting ready to shoot people in cars, being out of control, thinking of running away to Mexico except that the killings might begin again, thinking about the victims, and on and on. (T. 1210)

When he again quoted the A, B, C, D, paragraph, defense counsel objected and moved for mistrial, because the prosecutor was using statements from the CBS tape to argue that what happened in other cases happened the same way here. (T. 1212-13) He also objected because the prosecutor was arguing things Long said on the tape as admissions to this specific crime, which was not at all accurate. (T. 1214) The prosecutor gave the jury a Williams rule instruction (T. 1216) which did not help much because it told the jury that they could consider Long's other crimes to prove Long's "identity," which, to the jury, must have meant "identity as the perpetrator of this homicide."

In rebuttal, the prosecutor argued that, although Long was not on trial for any crime not charged in the indictment, the jurors

should not disregard the testimony concerning Lisa McVey,

> or the testimony concerning Mr. Long's pulling of a gun and cocking it at a red light because he was so angry. You are not to disregard any evidence unless you find it . . . [n]ot worthy of belief.
>
> And from that tape . . . you will have the opportunity to view Bobby Joe Long as he talks about the killing of Virginia Johnson. . . . [H]e talks about a burning violent flame. He talks about not being able to tell the difference between Bobby Joe Long the killer and Bobby Joe Long the person, and he talks about Lisa McVey.
>
> We've talked about A, B, C, D. A walk in the park. Drive up -- he drove up. They get in the car -- she got in the car. You drive a little ways, take a knife, a gun, whatever, as he did with Lisa McVey. You tie them up, as Virginia Johnson was tied up, and you take them out. A, B, C, D.
>
> I said he talked about the killing of Virginia Johnson on that tape. . . . [W]hen I saw them walking around the street it was like A, B, C, D. I'd pull over, they'd get in, I'd drive a little ways, stop, pull a knife, a gun.

(T. 1272) The prosecutor concluded his rebuttal as follows:

> Bobby Joe Long killed her. Bobby Joe Long took a shoelace, wrapped it twice around her neck, maintaining pressure until she died. A, B, C, D.

(T. 1273)[42]

The prosecutor continued his attack during his penalty phase closing. He argued that the tape showed Long's lack of remorse. (T. 1621) He cited Long's thoughts about flight to Mexico as evidence rebutting mental mitigation -- that Long did not lack the capacity to appreciate the criminality of his conduct. (T. 1622) In effect, he argued that Long was a serial killer because this is what Long considered running away from.

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[42] Defense counsel renewed all pretrial motions and objections. He argued that Lisa McVey and the CBS tape were the feature of trial. The court denied his motion for mistrial. (T. 1273)

In his sentencing argument to the judge, the prosecutor again gave the "A, B, C, D" argument to support CCP. The judge overruled the defense objection. (R. 1880-81) He also used "A, B, C, D" to support the HAC aggravator. (R. 1614) The trial judge found both aggravators, based in part on the CBS tape. (See Issues VII and IX)

The obvious feature of the prosecutor's closing arguments was "A, B, C, D." The prosecutor admitted that it was the whole case. It is what he would name this case. (T. 1181) In allowing the State to make collateral crimes the feature of this trial, the trial court committed reversible error, and Long was deprived of due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Sections 9 and 16, of the Florida Constitution. See Matthews v. State, 366 So. 2d 170 (Fla. 3d DCA 1979); see also Hills v. Henderson, 529 F.2d 397, 401 (5th Cir. 1976) (erroneous admission of prejudicial evidence can be of such a magnitude as to deny fundamental fairness in a criminal trial, thus violating the due process clause); Davis v. State, 276 So. 2d 846 (Fla. 2d DCA 1973); affirmed sub nom State v. Davis, 290 So. 2d 30 (Fla. 1974) (although appellate counsel failed to raise Williams rule issue, case reversed for fair trial).

It is obvious that the error was extremely harmful. State v. DiGuilio, 491 so. 2d 1129 (Fla. 1986). Although Long never referred to the Virginia Johnson case, the CBS videotape alone would have ensured his conviction. Long's conviction and death sentence must be reversed for a fair trial.

ISSUE IV

THE TRIAL COURT ERRED IN ALLOWING FBI HAIR AND FIBER EXPERT MICHAEL MALONE TO TESTIFY TO AN OPINION (1) OUTSIDE HIS FIELD OF EXPERTISE; AND (2) WITHOUT PREDICATE.

By pretrial motion (R. 168-73), and prior to FBI Agent Michael Malone's testimony (T. 889-91), defense counsel unsuccessfully moved to exclude Malone's unsupported opinion testimony as to the statistical significance of the "double transfer," of both hair and fiber. Malone's opinion was without predicate and, because he had no expertise in statistics, invaded the provence of the jury.

FBI agent Michael Malone, a hair and fiber analyst, testified that he found two bleached blonde Caucasian hairs -- one from the right front seat and one from the left rear carpet of Long's car -- which were microscopically consistent with Virginia Johnson's hair sample. (T. 893-94, 911) While Malone found no dissimilarities, he acknowledged that, unlike fingerprint evidence, a hair cannot be matched back to a particular person to the exclusion of all others.

Malone went through Johnson's hair mass and found a single red trilobal lustrous nylon carpet fiber with the same microscopic and optical properties as the red trilobal lustrous carpet fibers found in the carpet from Long's vehicle. (T. 904) Although it was consistent with Long's carpet (T. 909-10), he did not know how many miles of that particular carpet were manufactured, how many companies the carpet was sold to, or how many cars the carpeting was installed in.[43] (T. 927) Malone testified that the combination

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[43] Although Malone was not asked whether the carpet fiber he found in Johnson's hair was a common fiber, in Long's last trial in this case, Malone testified that he found a single "red lustrous

of the two independent comparisons meant that "at some point in time Virginia Johnson was probably in Mr. Long's car." (T. 912)

Malone also testified over defense objection that he examined Lisa McVey's clothing, and found two kinds of red trilobal nylon carpet fiber -- one "lustrous" and one "delustered." Malone said the red fibers found on Lisa McVey's clothing were consistent with Long's vehicle carpet. (T. 916-17) He found a single brown hair on McVey's shirt, which exhibited the same microscopic characteristics as Long's head hair. Again, he testified that the double transfer -- both a hair and a fiber -- reinforced each other, and concluded that, at some point in time, McVey was probably in Long's vehicle and in contact with him. (T. 917-18)

Of course, we know McVey was in Long's car because of other testimony. That a fiber consistent with Long's carpet fiber was found on McVey's clothing, as well as in Johnson's hair, does not make it any more likely that Johnson was in Long's car than if no fiber was found in the McVey case. The evidence that the fiber was found on McVey's clothing is probative only of the fact that McVey was in Long's car. The evidence had no probative value and merely encouraged the jurors to speculate that the matches in McVey's case somehow increased the likelihood that Long killed Virginia Johnson.

Malone's analysis and conclusions did not prove that Long killed Johnson. Hair cannot be traced back to a particular person

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nylon carpet fiber" in Johnson's mass of blond hair, and that, although this carpet fiber matched the carpet found in Long's car, it was a very common carpet fiber that was manufactured throughout the country. Long, 610 So. 2d at 1278.

to the exclusion of all others. In Horstman v. State, 530 So. 2d 368 (Fla. 2d DCA 1988), Malone apparently gave opinion testimony of the same nature as that involved here. Reversing for insufficiency of the evidence, the Second DCA said:

> Although hair comparison analysis may be persuasive, it is not 100% reliable. Unlike fingerprints, certainty is not possible. Hair comparison analysis, for example, cannot determine the age or sex of the person from whom the hair came. The state emphasizes that its expert, Agent Malone, testified that the chances were almost non-existent that the hairs found on the body originated from anyone other than Horstman. We do not share Mr. Malone's conviction in the infallibility of hair comparison evidence. Thus, we cannot uphold a conviction dependent on such evidence.

530 so. 2d at 370. In Long's case, Malone was not nearly as certain that the hairs were from Johnson's head. He could only say that the hair found was not dissimilar to Virginia Johnson's.

Malone found only one carpet fiber in Johnson's hair mass that was compatible with Long's automobile carpet.[44] (R. 881) He did not know how much of the carpet was manufactured, or how many cars it was installed in. (T. 927). Because Malone had no idea how much of the carpet fiber was manufactured and sold (R. 884), he had no basis for making his statistical conclusions. See Husky Industries, Inc. v. Black, 434 So. 2d 988, 992 (Fla. 4th DCA 1983) ("It has always been the rule that an expert opinion is inadmissible where it is apparent that the opinion is based on insufficient data"). Allowing him to make the cross-comparison without a factual basis was tantamount to letting him tell the jury Long killed Johnson.

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[44] Malone also found carpet fibers on Johnson's clothing that did not match Long's carpet (T. 925), a different red carpet fiber, and a blue and white carpet fiber, on her panties. (T. 934)

Refusing to exclude Malone's testimony, the judge stated that statistics are something that everybody has a general understanding of. (R. 885) If this is true, the judge erred by allowing Malone to testify as an expert on the subject. Experts can only testify when the subject matter is beyond the understanding of the common lay person. The trial judge specifically denied the defense motion to Exclude Malone's testimony on that basis. (R. 885).

This Court revisited the subject in the recent case of Terry v. State, 21 Fla. L. Weekly S9 (Fla. Jan. 4, 1996):

> 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 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.)

Id. at S10. Malone's testimony meets neither of these tests.

First, if, as the judge determined, "everybody has a general understanding of statistics," then Malone's testimony was not a proper subject for expert testimony. To be admissible, the expert testimony must be (1) so distinctively related to some science, profession, business or occupation as to be beyond the ken of the average layman, and (2) the witness must have such skill, knowledge or experience in that field that his opinion will aid the jury in its search for truth. Mills v. Redwing Carriers, Inc., 127 So. 2d 456 (Fla. 2d DCA 1961); Sea Fresh Frozen Products, Inc. v. Abdin, 411 So. 2d 218, 219 (Fla. 5th DCA 1982). In the often quoted case of Mills v. Redwing Carrier, Inc., 127 So. 2d at 456, the court

observed that

> [w]hen facts are within the ordinary experience of the jury, the conclusion from those facts will be left to them, and even experts will not be permitted to give conclusions in such cases. (citation omitted) Expert testimony is admissible only when the facts to be determined are obscure, and can be made clear only by and through the opinions of persons skilled in relation to the subject matter of the inquiry.

See also Florida Power Corn. v. Barron, 481 So. 2d 1309, 1310-11 (Fla. 2d DCA 1986) (court erred in allowing expert testimony that powers of concentration decrease from fatigue); Johnson v. State, 438 So. 2d 774 (Fla. 1983), cert. denied, 465 U.S. 1051 (1984) (eyewitness identification did not require special knowledge for jury to form conclusions).

Malone's testimony also fails to meet the second criteria in Terry, 21 Fla. L. Weekly at S10. Section 90.702, Florida Statutes, provides that an expert may render an opinion if the opinion is within the area of the expert's training, skill, experience, or knowledge. Wrisht v. State, 348 So. 2d 26 (Fla. 1977). Malone's expertise is in hair and fiber analysis -- not statistics.

Malone was qualified to do microscopic comparisons of hairs and fibers, and to give an expert opinion on his results. Just as clearly, he was not qualified to give an expert opinion on the statistical probability of the concurrent existence of independent facts, because he was not shown to be an expert in that field. Still less was he qualified to opine that Virginia Johnson was almost certainly in contact with Long's automobile carpet.

Malone's testimony concerning his lack of knowledge as to how much of the carpeting was manufactured, sold, and installed in cars

demonstrated the lack of a sufficient factual predicate for any probability calculations. See,., Spradlev v. State, 442 So. 2d 1039, 1043 (Fla. 2d DCA 1983). In addition, "expert testimony is not admissible at all unless the witness has expertise in the area in which his opinion is sought." Huskv Industries, 434 So. 2d at 992. In essence, Malone was improperly allowed to give a phony expert opinion on the evidentiary significance which should be accorded to his opinion. See Town of Palm Beach v. Palm Beach County, 460 So. 2d 879, 882 (Fla. 1984); see, e.q., United States v. Milne, 487 F.2d 1232, 1235 (5th Cir. 1973); Farlev v. State, 324 so. 2d 662 (Fla. 4th DCA 1975) (expert testimony amounting to opinion as to guilt inadmissible).

Mike Malone had no more expertise in statistics than did the jurors. Because the prosecutor failed to lay a foundation for Malone's statistical analysis, his testimony was meaningless. If Malone meant that the "double transfer" somehow compounded the likelihood that the victim was in Long's car, it is unclear how Malone reached that conclusion without knowing for certain that the hair came from Johnson's head, that the fiber came from Long's car, how many other persons' hair was indistinguishable from the two strands found in Long's car, and how many cars had the same carpeting. If the hair was not Johnson's and the fiber came from another car, then their concurrent existence meant nothing and the State had no evidence that Long committed this crime.

Expert testimony on the statistical probabilities of particular pieces of evidence pointing to guilt is fraught with the danger of misleading the jury. In State v. Carlson, 267 N.W. 2d

170 (Minn. 1978), the Supreme Court of Minnesota stated as follows:

> The use of statistical probability testimony . . . suffered from a fundamental deficiency. . . . [T]he data upon which the probability calculations were based was wholly without foundation. Instead of relying on empirical data collected in the course of a scientific study, the experts . . . merely estimated the frequency of occurrence of certain characteristics and based their probability projections on these estimates. And it was precisely this lack of demonstrable foundation to which the courts objected . . . .

267 N.W.2d at 175-76.

In Carlson, unlike this case, the foundation for the expert testimony was properly laid. Nevertheless, the court found it improperly admitted based on its potentially exaggerated impact on the jury. The court concluded that, "[t]estimony expressing opinions or conclusions in terms of statistical probabilities can make the uncertain seem all but proven, and suggest, by quantification, satisfaction of the requirement that guilt be established "beyond a reasonable doubt." 267 N.W.2d at 176.

Malone's testimony was a purported "scientific" opinion that Long was guilty, and was plainly incompetent and inadmissible. The testimony of an expert is accorded special importance and validity by the jury. Florida Power Corp., 481 So. 2d at 1310-11; Mills, 127 So. 2d at 456. The jury must have believed that Malone had some special expertise in statistics. Because the two hairs and the common fiber were the only pieces of evidence which pertained to the murder of Virginia Johnson, as opposed to McVey's abduction or the Tampa homicides, the erroneous admission of Malone's testimony was harmful error. State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986).

ISSUE V

THE TRIAL COURT ERRED BY DENYING THE DEFENSE MOTIONS FOR JUDGMENT OF ACQUITTAL BECAUSE THE STATE INTRODUCED INSUFFICIENT EVIDENCE TO SUSTAIN A CONVICTION.

This Court must find the evidence legally insufficient when the prosecution has failed to proved the defendant's guilt beyond a reasonable doubt. Terry v. State, 21 Fla. L. Weekly S9, S12 (Fla. Jan. 4, 1996); Tibbs v. State, 397 So. 2d 1120, 1123 (Fla. 1981), aff'd, 457 U.S. 31 (1982). In the instant case, the only direct evidence linking Long to the Johnson murder was two blond hairs and a common carpet fiber. The State's hair and fiber expert, FBI Agent Michael Malone, could not say that the hairs came from Johnson, to the exclusion of any other person, or that the fiber came from Long's carpet. Thus, the State presented no competent evidence to sustain a conviction.

In Horstman v. State, 530 So. 2d 368, 370 (Fla. 2d DCA 1988), Mike Malone apparently gave opinion testimony of the same nature as that involved here. Reversing for insufficiency of the evidence, the Second DCA said:

> Although hair comparison analysis may be persuasive, it is not 100% reliable. Unlike fingerprints, certainty is not possible. Hair comparison analysis, for example, cannot determine the age or sex of the person from whom the hair came. The state emphasizes that its expert, Agent Malone, testified that the chances were almost non-existent that the hairs found on the body originated from anyone other than Horstman. We do not share Mr. Malone's conviction in the infallibility of hair comparison evidence. Thus, we cannot uphold a conviction dependent on such evidence.

In Long's case, Malone was not nearly as certain that the hairs were from Johnson's head. He could only say that the hair

found was not dissimilar to Virginia Johnson's. He found only a common carpet fiber in Johnson's hair mass. (R. 881) He found carpet fibers on Johnson's clothing that did not match Long's carpet (T. 925); and a different red carpet fiber, and a blue and white carpet fiber, on her panties. (T. 934) Malone did not know how much of the carpet in Long's car was manufactured, or how many cars it was installed in. (T. 927). Malone did not testify that the fibers he found in Johnson's hair mass and on McVey's clothing had components which connected them to the actual piece of carpet installed in Long's vehicle. They could have come from any car with the same carpet.

The hair and fiber were the only direct evidence in this case. As discussed in Issues I, II, and III, supra, the trial court erred by allowing prejudicial and irrelevant collateral crime evidence concerning the abduction of Lisa McVey, and Long's statements on the CBS videotape. Without this evidence, the State has insufficient evidence to reprosecute this case. Even if some evidence that Long abducted McVey is relevant to tie Long to the car and the hair and fiber, this is still insufficient evidence to sustain a prosecution. That Long abducted McVey does not tend to prove that he killed Virginia Johnson, Malone's hair and fiber evidence is inconclusive. No evidence places Long with Virginia Johnson at the time of her death, or indicates that they were acquainted.

"[T]he criminal law departs from the standard of the ordinary in that it requires proof of a particular crime." Peek v. State, 488 So. 2d 52, 55 (Fla. 1984); Jackson v. State, 451 So. 2d 458, 461 (Fla. 1984); Paul v. State, 340 So. 2d 1249, 1250 (Fla. 3d DCA

1976). "Our justice system requires that in every criminal case the elements of the offense must be established beyond a reasonable doubt without resorting to the character of the defendant or to the fact that [he] may have a propensity to commit the particular type of offense." Peek, 488 so. 2d at 56. Without the improperly introduced Williams rule evidence (McVey and the CBS tape), the State had insufficient evidence to support a conviction.

Defense counsel moved for a judgment of acquittal at the end of the State's case. (T. 1071) In addition to the above arguments, he argued that the State presented insufficient evidence to show venue; it is equally likely that Johnson was killed in Hillsborough County. The State also presented insufficient evidence of premeditation. The evidence was entirely circumstantial. The CBS tape contained no specific reference to Virginia Johnson. (T. 1071-73)

Defense counsel appropriately renewed the motion following the defense case. (T. 1128, 1133-34) He renewed the sufficiency argument at Long's motion for new trial. (R. 1907)

This case has been reversed twice before based on errors by the State. The first time, the trial court erroneously allowed the State to use Long's confession as evidence. This Court overturned Long's conviction because his confession was obtained in violation of his right to counsel. Lons v. State, 517 So. 2d 664 (Fla. 1987). In 1988, Long was retried. The jury returned a guilty verdict and the judge imposed the death penalty. Long v. State, 610 so. 2d 1276 (Fla. 1992). This Court reversed on appeal, holding that the trial court erred by allowing the State to introduce four Hillsborough County convictions as Williams rule evidence, because

those homicides, rather than the one for which Long was on trial, became the "feature of the case," and because the State introduced portions of the CBS News videotaped interview with Bobby Joe Long, without making the entire tape available to the defense. Long v. State, 610 So. 2d at 1280.

Long filed a motion to dismiss, prior to trial, based on the double jeopardy clause of the Fifth and Fourteenth Amendments, and Article 1, section 9, of the Florida Constitution. (R. 227-233) The double jeopardy clause precludes a second trial where conviction in a prior trial was reversed solely for lack of sufficient evidence to sustain the jury's verdict. Burks v. United States, 437 U.S. 1 (1978). Even if the government presents additional evidence, the judge may refuse to order a new trial if the prosecution had the opportunity to fully develop its case and did not do so at the first trial. Id. at 5.

Judge Cobb held a hearing on the motion. (R. 763-66) The defense argued that, after the first trial, Long's case should have been dismissed because the only remaining evidence was a hair and a fiber. The State's expert could not say that the hair came from Johnson's head, to the exclusion of all others, or that the fiber came from Long's car. Inconclusive hair and fiber evidence is insufficient to sustain a conviction. See Jackson v. State, 511 So. 2d 1047 (Fla. 2d DCA 1987); Horstman v. State, 537 So. 2d 368 (Fla. 2d DCA 1988) (hair not fingerprint science).

The only evidence at Long's second trial were the hair and fiber, and the CBS tape which was nonspecific. Thus, Long's case should also have been dismissed on the second appeal.

The evidence in this case is entirely circumstantial. Where the evidence is circumstantial, a conviction cannot be sustained unless the evidence is inconsistent with any reasonable hypothesis of innocence. MacArthur v. State, 351 So. 2d 972 (Fla. 1977). As the circumstantial evidence clearly fails to meet that standard, the Court should have vacated Long's death sentence, reversed his conviction and remanded to the trial court with directions to enter an order of acquittal. Cox v. State, 555 So. 2d 352 (Fla. 1989).

The right not to be twice placed in jeopardy is fundamental. State v. Johnson, 483 So. 2d 420, 423 (Fla. 1986); Plowman v. State, 586 So. 2d 454, 455 (Fla. 2d DCA 1991). Accordingly, a double jeopardy violation may be raised at any time. The double jeopardy clause forbids another trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding. The prohibition against double jeopardy was designed to protect an individual from being subjected to trial and possible conviction more than once for the same offense. Burks, 437 U.S. at 11; Green v. United States, 355 U.S. 184 (1957).

In this case, the prosecution has had three chances to convict Long. Each time the State has used inadmissible evidence to obtain a conviction. The only evidence that connects Long to the Johnson homicide is a hair and fiber, both of which are inconclusive evidence. Horstman. Because the appropriate remedy would have been to order acquittal, this Court should at this time order Long's acquittal, based on insufficient evidence.

ISSUE VI

THE TRIAL COURT ERRED BY ALLOWING THE PENALTY PHASE TESTIMONY OF DETECTIVE KAREN COLLINS WHO READ POLICE REPORTS PREPARED BY OTHER OFFICERS REPORTING HEARSAY FROM TWO VICTIMS OF LONG'S ALLEGED PRIOR VIOLENT FELONIES.

In the penalty phase of a capital case, "evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements." Chandler v. State, 534 So. 2d 701, 702 (Fla, 1988); § 921.141(1), Fla. Stat. (1993); see also, Lucus v. State, 568 So, 2d 18 (Fla. 1990). This does not mean due process is inapplicable. The requirements of due process apply to all three phases of a capital case. Engle v. State, 438 So. 2d 803, 813 (Fla. 1983); see also Gardner v. Florida, 430 U.S. 349 (1977). In Hitchcock v. State, 578 So. 2d 685, 690 (Fla. 1990), this Court reiterated that, "[w]hile the rules of evidence have been relaxed somewhat for penalty proceedings, they have not been rescinded."

In this case, the trial court allowed Pasco County Detective Karen Collins to relate to the jury details of two prior rapes of which Long was convicted, as evidence to support the "prior violent felony" aggravating factor. The defense objected because (1) the State had already established this aggravator by introduction of the judgments and sentences (T. 1408); (2) until the night before, the prosecutor represented that the details would not be presented to the jury (T. 1483); and (3) Collins read police reports prepared by other detectives, with no independent knowledge of the crimes or investigations, precluding cross-examination. (T. 1417-25, 1483)

Over defense objection, Collins testified that, as a result of her involvement in the investigation of Virginia Johnson's death and Long's arrest, she read a report prepared by FDLE Agent Terry Rhodes, and learned that Long had been convicted of sexual battery in Pinellas County. (T. 1477-80) She recited the details reported by alleged victim Linda Nuttal in Rhodes' report. (T. 1479)

Collins then recited the details of a rape of which Long was convicted in Pasco County, as reported by alleged victim Sandra Jensen. She learned the details of this offense from Detective Hagin and a report prepared by Deputy Floyd. Collins was not involved in, nor had any responsibility for, either investigation. (T. 1480-83) The judge refused counsel's request for a limiting instruction telling the jurors to consider Collins' testimony only to establish the prior violent felony aggravator. (T. 1443, 1475)

This Court has repeatedly held that the details of prior violent felonies must not be emphasized to the point where they became the feature of the penalty phase. Finney v. State, 660 So. 2d 674 (Fla. 1995); Duncan v. State, 619 So. 2d 279, 282 (Fla. 1993). It has limited detailed penalty phase testimony by victims of prior violent felonies when they are unnecessary to prove the offense occurred. See, e.g.,Finnev, 660 So. 2d 674; Freeman v. State, 563 So. 2d 73 (Fla. 1990); Rhodes v. State, 547 So. 2d 1201 (Fla. 1989); Duncan, 619 So. 2d 279; Trawick v. State, 473 So. 2d 1235 (Fla. 1985). (See Issue I, supra, at pp. 35-37)

This is precisely what occurred here. Collins' hearsay testimony was the sole feature of the penalty phase. The defense presented no penalty phase evidence. The only evidence, besides

the introduction of prior judgements and sentences, concerned the two prior rapes and Lisa McVey's abduction.[45] (See Issue I, susra.)

In Rhodes v. State, 547 So. 2d 1201 (Fla. 1989), the trial court allowed a detective from Nevada to testify regarding his investigation of the defendant's prior convictions to support the "prior violent felony" aggravating factor. The judgment and sentence had already been introduced. Over defense objection, the court allowed the detective to play for the jury his tape recorded interview with the victim of an attempted robbery. Id. at 1204. This Court found the introduction of the tape recording error:

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

Id. at 1204. (footnote omitted).

In Rhodes, this Court determined that the line must be drawn when the testimony was not relevant, violated a defendant's confrontation rights, or the prejudicial value outweighed the probative value. 547 so. 2d at 1204-05. The necessity for testimony concerning prior violent felonies is also a factor in its admissibility. Finney, 660 So. 2d at 684; Freeman v. State, 563 So. 2d 73, 76 (Fla. 1990). In this case, the judgement and sentences were sufficient to prove the aggravating factor. As in Rhodes,

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[45] During penalty phase, the prosecutor asked Detective Ferguson the date of McVey's abduction. See footnote 26, supra.

this testimony related to crimes which were totally collateral to the one for which Long was on trial. Long had no way to cross-examine the victims because they were not present at trial. Even worse, Long could not cross-examine the officers who made the reports because they were not there either. He could not cross-examine Collins because she had no independent knowledge of the facts she reported. As in Rhodes, Long "was left with no choice but to take the stand himself." 547 So. 2d at 1204. The error here was compounded by the admission of the extensive evidence of Lisa McVey's abduction (a collateral crime), including her own testimony, during the guilt phase.[46]

The prosecutor cited, and the court relied on this Court's opinion in Long v. State, 610 So. 2d 1268 (Fla. 1992), in which the same two sexual batteries were used to support the prior violent felony aggravating factor. In that case, however, the officers who made the reports testified. Thus, they could be cross-examined as to the accuracy of their reports, and any details they left out of their reports. Moreover, Long's Hillsborough County attorney agreed that the police reports contained complete and correct information, and represented that he could offer no rebuttal to the evidence. 610 So. 2d at 1274-75. In this case, Long's counsel did not admit to the accuracy or completeness of the reports, and expressed a desire for cross-examination.

The instant case is clearly distinguishable from Chandler, 534 So. 2d 701, cited by this Court in Long, 610 So. 2d at 1275. In

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[46] See Issue I, supra.

Chandler, a detective testified concerning statements made by a police chief, a detective, and a state expert. The declarants testified and their testimony was consistent with the hearsay. Defense counsel vigorously cross-examined the detective. 534 so. 2d at 703. In this case, neither victim, nor the detectives who interviewed them, testified. Defense counsel was unable to cross-examine Collins because she had no personal knowledge of the rapes.

The trial court's ruling allowed the State to select the most damaging part of the victims' statements to present to the jury and prevented the defense from eliciting anything to ameliorate it. Because the testimony concerning the prior rapes was the most damaging testimony except for that of McVey, and the only feature of the penalty phase, the error was not harmless. The hearsay testimony unconstitutionally violated Long's Sixth Amendment right to confront the witnesses against him. It violated the Eighth Amendment to the United States Constitution, which requires that the death penalty be supported by competent evidence. The death penalty must be vacated.

ISSUE VII

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

Over defense objection, the trial judge instructed the jury to consider the cold, calculated, and premeditated aggravating circumstance ("CCP"). (T. 1491-92, 1524-25) Because the State presented no evidence of the events leading up to Johnson's death, or the manner of her death, the judge could not properly conclude that the murder was CCP. See Richardson v. State, 604 So. 2d 1107 (Fla. 1992); Bundy v. State, 471 So. 2d 9, 21-22 (Fla. 1985). In Bundy, this Court stated as follows:

> Bundy argues that the absence of proof establishing the cause of Leach's death and the attendant circumstances surrounding it give the court no factual basis which can justify a finding that [the HAC] aggravating factor exists. We must agree. No specific cause of death could be determined from the autopsy reports. There was no clear evidence offered to show that Kimberly Leach struggled with her abductor, experienced extreme fear and apprehension, or was sexually assaulted before her death.

471 So. 2d at 22; see also Rhodes v. State, 547 So. 2d 1201, 1208 (Fla. 1989) (HAC improperly found where victim, who was manually strangled, may have been semiconscious at the time of her death).

"Cold" and "calculated" are connected to "premeditated" by the connector " and" rather than "or" as in "heinous, atrocious, or cruel." § 921.141(5)(h),(i) Fla. Stat. (1993). This means that, to establish this aggravator, the homicides must meet each element of the definition. Although this record does not suggest any pretense of legal or moral justification, it is equally devoid of evidence that Long killed Johnson in a cold and calculated manner.

In his written findings supporting imposition of the death sentence, the judge found that the murders were cold, calculated, and premeditated, and stated as follows:

> 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) The judge's reasoning fails to support a finding of heightened premeditation. The evidence did not show beyond a reasonable doubt that Long prepared for the murder of Virginia Johnson in advance.

That "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," is illogical. Long probably used shoelaces from his or Johnson's shoes because they were the only thing available. That he used two shoelaces is reasonable because people wear two shoes and, thus, have two shoelaces with them. If he had planned to bind and strangle someone, he would have taken something more substantial, such as a rope. That Long tied the shoelaces in a particular way is not probative of heightened premeditation. The

evidence indicated that he tied them around Johnson's wrists, which would could not have been done in advance.

That Long apparently bound Johnson's wrists does not prove premeditation. He may have bound her wrists as part of a sexual act, either consensually or nonconsensually. Although this may not be the most likely scenario, it is certainly not an unreasonable theory. An aggravator must be proved beyond a reasonable doubt. If he bound her wrists to commit a sexual battery, this does not establish premeditation for murder. Even if he bound her wrists so that she would not escape while he strangled her, this shows only simple premeditation at most. See Perry v. State, 522 So. 2d 817 (Fla. 1988) (the premeditation of a felony cannot be transferred to a murder that occurs during the felony for purposes of the CCP aggravating factor); Rogers v. State, 511 So. 2d 526 (Fla. 1987).

The judge also was "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) The judge obviously thought up this scenario to explain how the crime might have occurred, by piecing together the evidence found at the crime scene, Lisa McVey's testimony about her own abduction, and some of Long's statements on the CBS tape which did not refer to any specific offense. No evidence was presented to support the judge's "theory."

Speculation regarding a defendant's unproven motives cannot support the "cold, calculated and premeditated" aggravating factor.

Thompson v. State, 456 So. 2d 444 (Fla. 1984). The burden is upon the state to prove, beyond a reasonable doubt, affirmative facts establishing the heightened degree of premeditation necessary to sustain this factor. Thompson, 456 So. 2d at 446; Peavy v. State, 442 So. 2d 200, 202 (Fla. 1983); see also Hamilton v. State, 547 so. 2d 630 (Fla. 1989) (finding of CCP not supported by judge's speculation and conjecture).

The judge obviously based some of his findings on Long's taped statements to CBS. As discussed in Issues II and III, supra, the CBS videotape should not have been admitted. Even if it were admissible as collateral crime evidence, however, the judge cannot assume that Virginia Johnson died in a manner similar to homicide victims in Hillsborough County. Moreover, his victims were not all strangled, or even killed.

A theory just as reasonable as that suggested by the judge is 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. Johnson was "speedballing" (injecting cocaine and heroin) at the time. 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, who was very drunk and drugged by then, decided she did not want to engage in sex, Long became angry. He removed a shoelace from his tennis shoe, tied Johnson's wrists, and initiated further sex. Johnson passed out from drinking and drugs in the midst of the sexual encounter, which made Long so angry that he removed his other shoe

lace and used it to strangle her.[47] He drug her body into a field off the highway, and returned to Tampa.

This case is similar to Crump v. State, 622 So. 2d 963 (Fla. 1993), in which this Court held that the State failed to prove heightened premeditation beyond a reasonable doubt. In Crump, the nude body of a prostitute was found strangled in an open area by a cemetery. She had ligature marks on her wrists. The prosecutor presented Williams Rule evidence of a similar murder, to which Crump had confessed, to prove identity and modus operandi. The sentencing judge relied on the Williams rule evidence to find heightened premeditation; in other words, he assumed that Crump committed the instant murder in the same manner as the former murder,[48] although the State presented no evidence as to how the instant murder was accomplished. This Court stated as follows:

> In the sentencing order, the judge relied on the Williams rule evidence to show that heightened premeditation exists. We find 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. The State failed to prove beyond a reasonable doubt the aggravating circumstance of cold, calculated, and premeditated without any pretense of moral or legal justification.

622 So. 2d at 972 (footnote omitted).

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[47] "A rage is inconsistent with the premeditated intent to kill someone." Mitchell v. State, 527 So.2d 179, 182 (Fla. 1988). Accordingly, if Long killed Johnson because he was in a rage and lost control, CCP is not supported by the evidence. Lack of control over ones behavior renders the person incapable of heightened premeditation.

[48] The judge stated in his sentencing order that Crump, "while in possession of a restraint device, invited the victim into his truck, bound her wrists, and after manually strangling her, dumped her nude body near a cemetery." 622 So. 2d at 972 n.4.

The judge did the same in this case. Because the State presented absolutely no evidence as to how Johnson was killed, and only circumstantial evidence suggesting the cause of death, the trial judge relied on Long's statements in the CBS videotape, which were of a general nature and dealt with other crimes committed in Hillsborough County. When the judge wrote that "Long coldly and without passion recited to the CBS interviewer the methodology of his killing," he was apparently referring to Long's statement that,

> 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.

(T. 1968) This was not a description of the killing of Virginia Johnson, but a generalized statement about other homicides to which Long pled guilty, and which could not be considered in this case pursuant to the Hillsborough County plea agreement and this Court's ruling in Long, 610 So. 2d 1276. There is no evidence that Johnson was walking down the street when she met Long, or that Lang picked her up. He might have met her in a bar. The State presented no evidence that Long had a knife or a gun. If he met Johnson in Tampa and killed her in Pasco County, as the State contended and the jury found, he did not drive "a little ways." Tampa is thirty miles from the location where Johnson's body was found.

In Trawick v. State, 473 So. 2d 1235, 1240 (Fla. 1985), this Court also struck down the trial court's finding of an aggravating circumstance (great risk of death to many persons), and said:

> The finding was based on evidence that before going to the store where the murder took place, appellant fired the weapon from inside a moving car. This incident, though it was admissible in evidence as part of the res

> gestae of the offense, should not have been relied on to establish this aggravating circumstance because it was not directly related to the capital felony. See Elledse v. State, 346 So. 2d 998 (Fla. 1977).

In order to satisfy the Eighth Amendment's requirement of reliability in capital sentencing, the facts supporting a sentence of death must be those of the charged crime, not assumptions based on evidence derived from other crimes.

The facts in this case bear some resemblance to those in Holton v. State, 573 So. 2d 284 (Fla. 1990), in which this Court reaffirmed that simple premeditation of the type necessary to support a conviction for first-degree premeditated murder is not sufficient to support the "cold, calculated and premeditated" aggravating factor. The victim in Holton, also a prostitute, was found partially unclothed and bound around the neck and one wrist with pieces of nylon cloth. This Court found that the facts in Holton suggested that the strangulation occurred during the commission of a sexual battery and could have been a spontaneous act in response to the victim's refusal to participate in consensual sex. This Court rejected the CCP aggravator. Id.

CCP requires a coldblooded intent to kill which is more contemplative, methodical, and controlled than that necessary to sustain a first-degree murder conviction. Nibert v. State, 508 So. 2d 1, 4 (Fla. 1987); see also Preston v. State, 444 So. 2d 939, 946-47 (Fla. 1984) (CCP requires "particularly lengthy, methodical, or involved series of atrocious events or a substantial period of reflection and thought by the perpetrator.") The defendant must have had "a careful plan or prearranged design" to kill. Besaraba v.

State, 656 So. 2d 441 (Fla. 1995); Jackson v. State, 648 So. 2d 85, 89 (Fla. 1994); Rogers, 511 So. 2d 526.

The killer's state of mind is the essence of CCP. Mason v. State, 438 So. 2d 374 (Fla.), cert. denied, 465 U.S. 1051 (1983); Hill v. State, 422 So. 2d 816 (Fla. 1982), cert. denied, 460 U.S. 1017 (1983). The State introduced absolutely no evidence of Long's state of mind at the time of Johnson's homicide, or even of the events leading up to her death, from which state of mind could be discerned. The homicide was not an execution, contract murder, or witness elimination killing. See Hansbrough v. State, 509 So. 2d 1081, 1086 (Fla. 1987) (CCP reserved primarily for execution or contract murders, or witness elimination killings). Nor did the evidence prove beyond a reasonable doubt that Long planned or prearranged to commit murder before the crime began. See Thompson v. State, 565 So. 2d 1311 (Fla. 1990).

To establish the CCP aggravating factor, the state must prove beyond a reasonable doubt that the murder, not an accompanying felony, was committed with heightened premeditation. See Perry v. State, 522 So. 2d 817 (Fla. 1988) (premeditation of felony cannot be transferred to murder that occurs during felony for purposes of CCP aggravator); Rogers, 511 So. 2d 526. Thus, if Long planned to pick up a prostitute, tie her up and rape her, and did not plan to kill her, heightened premedication was not established.

The rapes of Sandra Jensen and Linda Nuttal, introduced into evidence in the penalty phase, suggest that Long did not intend to kill Johnson. In those cases, Long located women who advertised something for sale and used this excuse to get into their homes to

rape them. Long bound both Jensen and Nuttal when he raped them. He had a knife during both rapes. (T. 1479-83) Nevertheless, he did not kill the victims. Similarly, he did not kill Lisa McVey after her abduction. He let her go. (T. 714-16) Because Long did not kill Jensen, Nuttal and McVey, it must be inferred that his planning did not include murder. Thus, the judge's conclusion should have been that Long premeditated only a sexual encounter similar to that of Nuttal, Jensen and McVey.

The judge may have based his findings on the prosecutor's misleading sentencing argument, to which defense counsel objected. (R. 1881) The prosecutor argued to the judge as follows:

> 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. . . .
>
> 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. . . . 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. 1880-81) The prosecutor obviously confused CCP with (1) the simple premeditation required for a conviction; and (2) HAC. His remarks about releasing the pressure so that the victim would live

are not applicable to heightened premeditation, but only to the simple premeditation required for a first-degree murder conviction. His remark that strangulation is generally found to support the CCP aggravator is incorrect; instead, strangulation is generally found to support simple premeditation, see, e.g., Sirici, and to support the HAC aggravator. See, e.g., DeAngelo v. State, 616 So. 2d 440, 443 (Fla. 1993) (evidence of HAC arguable because state failed to prove victim was conscious during killing; she may have been unconscious due to choking or having been hit on head). CCP requires a careful plan or prearranged design to kill. Rogers, 511 So. at 533.

The prosecutor's argument that Long did not just happen to have an extra set of shoelaces with him ignores the more likely explanation that he did just happen to have shoelaces with him -- that he removed the shoelaces from his shoes or the victim's shoes, which were not found at the scene. He may have had a pair of gym shoes in the car, or found some old shoes discarded in a field. The prosecutor did not make a single argument in support of CCP.

Although the judge correctly gave great weight to the jury's recommendation of death, the seven to five death recommendation was tainted because the court have a CCP jury instruction containing no limiting definition. The prosecutor's closing argument further misled the jury as to the proper definition of the CCP aggravator. The prosecutor argued to the jury as follows:

> [I]f 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. . . Mr. Long had to have been 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 have been 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... 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.

(T. 1615-17) The prosecutor's argument to the jury, like his sentencing argument to the judge, misled the jurors as to the criteria needed to establish the CCP aggravator. His argument that Johnson may have taken three minutes to die may be applicable to HAC, but not CCP. That Long did not change his mind and release the victim before she died shows only simple premeditation.

The trial judge instructed the jury on the cold, calculated and premeditated aggravating circumstance, § 921.141(5)(i), Fla. Stat. (1993), in the bare language of the statute:

> 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.

(T. 1649) Although defense counsel apparently neglected to object to the vagueness of the instruction, the instruction left the jury without sufficient guidance to determine the presence or absence of the factor. See Espinosa v. Florida, 505 U.S. 1079 (1992). When the jury is instructed that it may consider such a vague aggravating circumstance, it must be presumed that the jury found and weighed the invalid circumstance. Because the judge is required to give great weight to the jury's recommendation, the court then indirectly weighed the invalid circumstance. The result of the process creates the potential for arbitrariness in imposing the death penalty. Id.; see also Kearse v. State, 662 So. 2d 677, 686 (Fla. 1985); Jackson v. State, 648 So. 2d 85, 90 (Fla. 1994) (standard CCP jury instruction, which merely repeats language of statute, is unconstitutionally vague because it does not inform jury of limiting instruction this Court requires); Hitchcock v. State, 614 So. 2d 483 (Fla. 1993) (remanded for new penalty proceeding because court gave erroneous HAC instruction).

Because the jurors in this case were not informed of the limiting construction this Court placed on the CCP aggravating factor they would have been unduly influenced by the prosecutor's closing argument. Because the victim had been dead for some time before her body was found, there is no evidence as to how she died. We do not know whether she struggled (or was even conscious). The fact that the shoelace was wrapped around Johnson's neck twice does not indicate that he planned the crime ahead of time. No evidence shows that the killing was cold; Long may have been extremely angry with the victim, or overwhelmed by an uncontrollable "flame" or

passion and, for some unknown reason, decided to kill her. See Penn v. State, 574 so. 2d 1079, 1083-84 (Fla. 1991) (while Penn "obviously decided, for some unknown reason, that he should kill his mother," there is no evidence of the cold calculation prior to the murder necessary to establish this aggravating factor.)

Because there was no evidence Long planned the murder before the crime began, the sentencing judge erroneously relied on the CCP aggravator, as well as the jury's tainted death recommendation, to impose the death penalty, thus rendering Long's death sentence unconstitutional under the Eighth and Fourteenth Amendments to the United States Constitution. Proffitt v. Florida, 428 U.S. 242 (1976); State v. Dixon, 283 So. 2d 1 (Fla. 1973), cert. denied, 416 U.S. 943 (1974). The death penalty must be vacated and a new penalty phase proceeding granted.

ISSUE VIII

THE TRIAL COURT ERRED BY INSTRUCTING THE JURY ON THE "HEINOUS, ATROCIOUS AND CRUEL" AGGRAVATING CIRCUMSTANCE WITHOUT A SUFFICIENT LIMITING INSTRUCTION.

In Sochor v. Florida, 504 U.S. 527 (1992), the United States Supreme Court stated that the "heinous, atrocious and cruel" aggravating factor would be appropriate in a conscienceless or pitiless crime which is unnecessarily torturous to the victim. In this case, defense counsel objected to the "heinous, atrocious and cruel" aggravating circumstance ("HAC") because the instruction was vague and did not sufficiently narrow the class of murders under which the death penalty may be imposed. The judge overruled his objection (T. 1596-97), and gave the standard jury instruction, as follows:

> "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 induced as heinous, atrocious, and cruel is one accompanied by additional acts that show that the crime was conscienceless or pitiless and was unnecessarily torturous to the victim.

(T. 1648-49) Although the second sentence contained the "unnecessarily torturous" language approved in Sochor v. Florida, 504 U.S. 527 (1992) and Richardson v. State, 604 So. 2d 1107 (Fla. 1992), the definitions in the first paragraph rendered the instruction defective under Godfrey v. Georsia, 446 U.S. 420 (1980) (aggravating circumstance of "outrageously or wantonly vile, horrible, and inhuman" too subjective).

In Shell v. Mississippi, 498 U.S. 1 (1990), the United States

Supreme Court found the Mississippi jury instruction used to define the heinous, atrocious, or cruel aggravating circumstance unconstitutionally vague even though it was identical to portions of the language approved in State v. Dixon, 283 So. 2d 1, 9 (Fla. 1973), which in turn was approved by Proffitt v. Florida, 428 U.S. 242 (1976). Like "heinous" and "atrocious" themselves, the phrases "extremely wicked or shockingly evil" and "outrageously wicked and vile" could be used by a person of ordinary sensibility to fairly characterize almost every murder. See Arave v. Creech, 123 L.Ed. 2d 188, 199 (1993) ("especially heinous, atrocious, or cruel" or "outrageously or wantonly vile, horrible and inhuman" describe crime as a whole and have been held unconstitutionally vague).

In this case, the trial court read the standard jury instruction on HAC. After the Court approved this instruction in 1990, it referred it back to its Committee on Standard Jury Instructions (Criminal) for further consideration in light of motions for rehearing. Upon reconsideration, the committee recommended a different instruction which would have adequately defined the intent element of the aggravating circumstance:

> The crime for which the defendant is to be sentenced was especially heinous, atrocious or cruel. To be heinous, atrocious or cruel, the defendant must have deliberately inflicted or consciously chosen a method of death with the intent to cause extraordinary mental or physical pain to the victim, and the victim must have actually, consciously suffered such pain for a substantial period of time before death.[49]

[49] Defense counsel also objected to the vagueness of the HAC instruction at sentencing (R. 1862), and in his motion for new trial argument where he read into the record the instruction

The Court denied rehearing on May 29, 1991, declining to follow the committee's revised recommendation.

The applicable law in this case was that, to establish the HAC aggravator, the state had the burden of proving beyond a reasonable doubt that the crime "was meant to be deliberately and extraordinarily painful." Porter, 564 So. 2d at 1063 (emphasis in opinion). Even if the language in the standard instruction defining "cruel" ("designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others") could be considered somewhat equivalent to the intent to cause extraordinary mental or physical pain, this would not save the standard instruction because it goes only to the definition of "cruel." The aggravator is framed disjunctively -- "heinous, atrocious, or cruel" -- and the instruction allows the jury to find it without proof of the requisite intent merely by finding that the crime was "heinous" or "atrocious." See Shellv. Mississippi, 498 U.S. 1, 4-5 (1991) (Marshall, J., concurring) (where definitions of "heinous" and "atrocious" were constitutionally inadequate, it's of no consequence that he defined "cruel" in arguably more concrete fashion, since aggravator was submitted to jury on alternative theories).

A defendant's intent to cause extraordinary mental or physical pain is an essential element of the HAC aggravator which must be proven beyond a reasonable doubt. When intent is an element of a criminal offense, and a challenged jury instruction relieves the

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recommended by the committee. (R. 1905-06) The judge held that his objection on vagueness was timely made but his request for the proposed instruction was not timely. (T. 1907)

state of its burden of proof on the critical question of the defendant's state of mind, the instruction amounts to constitutional error under the Fourteenth Amendment. Sandstrom v. Montana, 442 U.S. 510, 521 (1979). In the penalty phase of a capital trial, where the Eighth Amendment requires heightened standards of reliability, Lockett v. Ohio, 438 U.S. 586, 604 (1978), an instruction which relieves the state of its burden to prove the intent necessary to establish the aggravator is equally defective.

The error was not harmless. Because Johnson's body was decomposed when it was found, it was not possible to determine how she died. No evidence suggested that Long inflicted, or intended to inflict, unnecessary pain or enjoyed killing the victim. Moreover, the prosecutor argued that the jury should find HAC based on incorrect criteria. (See Issue IX, infra.) In the portion of the CBS tape introduced by the State, Long said that he thought about his victims a lot, and it was not a pleasant memory. (T. 1068-69) In light of these circumstances, the jury might have found that Long did not act with the intent to inflict extreme mental or physical pain. The instruction could easily have made the difference as to whether the jurors found the HAC factor, which in turn may have made the difference between the seven to five death recommendation and a recommendation of life imprisonment.

This instruction was error. It denied Long's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and Article I, sections 2, 9, 16, 17, 21 and 22, of the Florida Constitution. Accordingly, Long's sentence must be vacated.

ISSUE IX

THE TRIAL COURT ERRED BY FINDING AND WEIGHING THE "HEINOUS, ATROCIOUS AND CRUEL" AGGRAVATOR.

The State must prove the existence of an aggravating circumstance beyond a reasonable doubt before it may be weighed in imposing a death sentence. State v. Dixon, 283 So. 2d 1, 9 (Fla. 1973); accord Geralds v. State, 601 So. 2d 1157, 1163 (Fla. 1992). When the evidence is circumstantial, a reasonable hypothesis which rebuts an aggravating circumstance must be accepted if the evidence supports it. Geralds, 601 So. 2d at 1163. Eutzy v. State, 458 So. 2d 755, 757-58 (Fla. 1984); Peavy v. State, 442 So. 2d 200, 202 (Fla. 1983). Not even "logical inferences" will support a finding of a particular aggravating circumstance when the state's burden has not been met. Clark v. State, 443 So. 2d 973, 977 (Fla. 1983). As in Bundy v. State, 471 So. 2d 9, 21-22 (Fla. 1985), not enough was known about the circumstances of the victim's death for the State to meet the standard of proof.

Rejecting the HAC factor in Richardson v. State, 604 So. 2d 1107 (Fla. 1992), this Court cited Sochor v. Florida, 504 U.S. 527 (1992), in which the Court stated that the HAC factor would be appropriate in a conscienceless or pitiless crime which is unnecessarily torturous to the victim. Accordingly, the homicide must be both conscienceless or pitiless and unnecessarily torturous before HAC may be found and weighed. Richardson, 604 So. 2d at 1109.

Defense counsel unsuccessfully objected to the trial court instructing the jury on the HAC aggravating circumstance, arguing that the evidence did not support it. (T. 1491-92) In his

sentencing order, the trial court found as follows:

> 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 foreknowledge 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. 524)

Johnson's body was found ten to fifteen days after her death. (T. 1017) Although the medical examiner opined that Johnson died from "homicidal violence, probably garrotment," based on the shoelaces found around the victim's neck area (T. 1031), Dr. Wood could not rule out other causes of death. She acknowledged that it was possible that the victim was stabbed or shot or died from a blow on the head. (T. 1044-45, 1049) Perhaps Long knocked her unconscious before strangling her so that she would not suffer. Thus, the trial court judge could not possibly have found beyond a reasonable doubt that Virginia Johnson died of strangulation.

Dr. Wood said they were unable to do any testing to determine whether Johnson's blood contained alcohol or drugs. Thus, Johnson may have passed out from drinking or drugs prior to her death. She may have been bound as part of a sexual act -- a not uncommon sexual activity. Accordingly, the trial judge could not possibly have found bevond a reasonable doubt that Johnson knew of her impending death, and suffered extreme anxiety and pain. If she was strangled, she could have become unconscious in as little as fifteen seconds. (T. 1033-34) If she had passed out, she may not have suffered at all.

Moreover, it not sufficient to show that the victim in fact suffered great pain. Teffeteller v. State, 439 So. 2d 840, 846 (Fla. 1983). The State must prove that the defendant intended to torture the victim, or that the crime was meant to be deliberately and extraordinarily painful. See Robertson v. State, 611 So. 2d 1228, 1233 (Fla. 1993); Santos v. State, 591 So. 2d 160, 163 (Fla. 1991); Omelus v. State, 584 So. 2d 563, 566-67 (Fla. 1991); Porter v. State, 564 So. 2d 1060, 1063 (Fla. 1990)

More recently, in Kearse v. State, 662 So. 2d 677, 686 (Fla. 1995), this Court found HAC inapplicable. The Kearse Court stated as follows:

> A murder may fit this description if it exhibits a desire to inflict a high degree of pain, or an utter indifference to or enjoyment of the suffering of another. Cheshire v. State, 568 So. 2d 908, 912 (Fla. 1990). . . While the victim in this case sustained extensive injuries from the numerous gunshot wounds, there is no evidence that Kearse "intended to cause the victim unnecessary and prolonged suffering." Bonifay v. State, 626 So. 2d 1310, 1313 (Fla. 1993). The medical examiner could not offer any information about the sequence of the wounds and stated both that the victim could have re-

> mained conscious for a short time or rapidly gone into shock. . . . Thus we cannot find beyond a reasonable doubt that this murder was heinous, atrocious, or cruel.

Although the medical examiner's "best guess," based on the physical evidence, was that Johnson died of strangulation, she could not be sure. As in Kearse, she could offer no information concerning the sequence of events that led to Johnson's murder. Thus, the State failed to prove that the defendant intended to inflict unnecessary pain or that the crime was heinous, atrocious or cruel.

The judge found in his written order that "a conscious victim" struggled where the body was left to decompose. Although a detective testified that it looked as though there had been a struggle because the grass was pushed down, his testimony was unbelievable. Evidence indicated that he so testified because the State needed his testimony to prove venue. He had testified in the past that he could not tell where Johnson died. (T. 580-87, 609-10)

Dr. Wood said the body had decomposed at that location for ten to fifteen days. The skin was gone and the bones scattered. It was obvious that animals had been in the area, eaten parts of the body, and scattered the bones. After ten to fifteen days it would be impossible to tell whether a struggle occurred. Even if the judge believed the grass indicated activity, Virginia Johnson was a prostitute and may have engaged in consensual sex with Long at that location. Common sense shows that the State did not prove beyond a reasonable doubt that a conscious victim struggled there.

The trial judge also considered the CBS tape, which made absolutely no mention of Virginia Johnson, to support his conclusion that the crime was HAC. The taped statement made no reference

to any evidence in this case. Long said nothing that could possibly lead anyone to believe that he was in any way referring to the murder of Virginia Johnson in Pasco County, The trial court could not find, beyond a reasonable doubt, that the murder of Virginia Johnson in Pasco County was "without conscience and pitiless, and unnecessarily torturous to the victim," based on Long's vague references to unspecified homicides. Even the improperly introduced CBS tape does not suggest that Long tortured his victims or intentionally caused unnecessary pain. See Santos, 591 so. 2d at 163 (HAC appropriate only "in torturous murders involving extreme and outrageous depravity"), citing Douqlas v. State, 575 So. 2d 165, 166 (Fla. 1991) (example of HAC where defendant committed heinous acts extending over four hour period, indicating that defendant enjoyed torturing victims).

The physical and circumstantial evidence introduced in this case is entirely consistent with the reasonable hypothesis that the victim was already unconscious when Long strangled her. No evidence indicated that Long inflicted, or intended to inflict, unnecessary pain or enjoyed killing the victim. To the contrary, in the portion of the CBS tape introduced by the State, Long said that he thought about his victims a lot, and it was not a pleasant memory, nor a pleasant thought. (T. 1068-69)

The prosecutor made matters worse by asking the jury to find this aggravating circumstance based on improper factors:

> [W]hat has the evidence shown to you? First of all, A, B, C, D. As you've heard it defined, the method. Virginia Johnson was brought thirty miles to a desolate field in Pasco County, Florida. The evidence indicates . . . that while in that desolate field she struggled. .

> Someone removed her underwear, whether it was she or Mr. Long. Someone pushed her blouse up around her neck, whether it (was] she or Mr. Long. But a semi-nude Virginia Johnson is struggling in the grass in a field in Pasco County. How was she struggling? Her wrists were tied. How long had they been tied? There is a leash around her neck.
>
> Did she feel? Was she scared? Did she know she was going to die? Was any pity shown to Virginia Johnson? Is there any evidence of a swift death? Or is the evidence to the contrary, that she was dominated, she was tied up, tortured, and killed. Heinous, atrocious, and cruel.

(T. 1614) Because the State must prove each aggravating factor beyond a reasonable doubt, it would be improper for the jury to speculate, as the prosecutor argued, that Long's "method" -- A, B, C, D, -- applied to Virginia Johnson. Even if it did, however, nothing that Long said established HAC. Long's description was matter of fact; he "took them out" with no enjoyment of it.

As discussed above, Johnson's bones began 20-25 feet from a dirt road and were spread out in the high grass. (T. 534) Obviously, no one could tell whether she struggled or whether she was conscious. Although the location at which the body was found was about thirty miles from downtown Tampa (R. 528, 545), no evidence showed where Long met or picked up Johnson. Because she was a prostitute, it is likely that she went with Long willingly, and that she removed her clothing willingly. The prosecutor's argument that Long dominated and tortured Johnson, and showed her no pity, is not based on any evidence.

In Perry v. New Jersey, 590 A.2d 624 (N.J. 1991), the "murder involving torture" aggravator was found improper in a strangling case because the evidence did not indicate that the defendant intended to cause extreme physical or mental suffering. The court

stated that the method of killing cannot constitutionally support such an aggravator by itself. The New Jersey Supreme Court's concern was that, if the aggravator could be sustained based solely on the method of killing, there would be "no principled way to distinguish this case, in which the death penalty was imposed, from many cases in which it was not." 590 A.2d at 646. The court continued that, "[b]ecause [the "murder involving torture" aggravator] focuses on the criminal's state of mind it cannot be supported solely by reference to the means employed to commit the murder." Id.

Because no evidence showed that Long intended to inflict unnecessary pain, the trial judge erred in instructing on, finding and weighing the HAC aggravator. This error prejudiced both the jury's recommendation and the judge's consideration of the proper penalty. Thus, Long's death sentence should be reversed for re-sentencing with a new jury. See Omelus v. State, 584 So. 2d 563 (Fla. 1991).

ISSUE X

THE TRIAL COURT ERRED BY FAILING TO FIND AND WEIGH CLEARLY ESTABLISHED MITIGATORS.

Although the trial judge did not orally announce which aggravating and mitigating circumstances he found, he made written findings supporting imposition of the death penalty, which he was filing at that time. (R. 522-29, 1913) In his sentencing order, he discussed and made the following findings on proposed mitigation:

Statutory --

1. Mental or emotional disturbance: Not established.
2. Capacity of defendant to appreciate criminality of his actions: Not established.
3. Capacity to conform conduct to the requirements of law: Established.

Non-statutory --

1. Remorse: Considered slight and matter of fact.
2. Saved cousin from drowning: Considered established although might or might not be true.
3. Good father: Considered and weighed.
4. Mental problems: Considered but unclear whether established and weighed.
5. Childhood: Considered and weighed although "uncorroborated and unreliable."

The trial judge stated that he considered the above mitigation but found that it did not outweigh even one of the three aggravating circumstances. (R. 528-29) He set out in some detail the testimony presented at the sentencing hearing, although some of his conclusions are vague and unclear. He also failed to even mention two mitigators that defense counsel argued: (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) Long's uncontrollable outbursts, rage, and inability to get along with counsel during the trial. (R. 1872-75)

To insure the proper consideration of mitigation, this Court determined that the sentencing judge must expressly evaluate each proposed mitigator. Campbell v. State, 571 So. 2d 415, 419 (Fla. 1990). If the evidence reasonably establishes a mitigating factor (question of fact) and the factor is mitigating in nature (question of law), the judge must find it as a mitigating circumstance and weigh it against the aggravating factors. The judge must, in his written order, expressly evaluate every statutory and nonstatutory mitigating factor proposed by the defense. Id. In this case, the trial judge failed to mention two of defense counsel's proposed mitigators which were clearly established and mitigating in nature.

It goes without saying that Long's actions in letting McVey go, instead of killing her, were mitigating. Long told the CBS News reporter that he knew he would be caught but let McVey go anyway because he knew he was out of control and needed help. (T. 1061-69) The other proposed mitigator -- Long's uncontrollable outbursts, rage, and inability to get along with counsel during the trial -- was obvious. In fact, the judge went out of his way to accommodate Long when he refused to be present during sentencing hearings.[50] This mitigation shows Long's ongoing mental problems.

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[50] Long was angry because defense counsel told him that his mother and ex-wife and other witnesses would not have to testify again and he did not want them to do so. They were required to testify because the judge refused to take judicial notice of their testimony in Long's other penalty trials. (T. 1161-62, 1180-81) Long wanted to shorten the sentencing so that he could return to UCI. Thus, Long no longer wanted Mr. Eble to represent him, and refused to cooperate. He also did not want to be in the courtroom, especially if Drs. Sprehe and Merin testified. The judge provided Long with a listening device so that he could listen to the proceedings from the holding cell. (T. 1181-82)

The sentencing judge stated in his order that he considered and weighed (1) Dr. Berland's testimony concerning Long's biologically determined mental illness; (2) the testimony of Long's former wife concerning his motorcycle accident; (3) the testimony of his mother concerning his prior head injuries and "purported difficult childhood," to which he gave "minor credibility" because she did not testify truthfully as to the temper of Long's father; (4) the testimony of Dr. Frank Wood who examined Long's PET scan and found and described an abnormality in Long's left temporal lobe which compromised and impaired the amygdala, a self-control "apparatus"; (5) rebuttal of Dr. Ed Eikman who reviewed the PET scan and felt that it was a normal brain metabolism image; (6) rebuttal of Dr. Leon Prockop who thought PET scanning was unreliable as a diagnostic tool; (7) the rebuttal witness, Dr. Daniel Sprehe, whose testimony was excluded for evidentiary reasons; and (8) rebuttal of Dr. Sidney Merin who testified in legal conclusions that Long did not meet the two statutory mental mitigators. (R. 525-526)

Although the judge quit enumerating the witnesses at this point, he then discussed the testimony of the defense surrebuttal witness, Dr. Kinsbourne, who agreed that Long may have impulse and emotional control problems, a disinhibited control mechanism and driven behavior caused by a dysfunction of the amygdala; and Dr. Reuben Gur, who said that Long's PET scan was similar to temporal lobe epilepsy which would be expected to, but does not always, cause a behavioral problem. The judge said that, even if he were to accept Dr. Wood's rebuttal of Dr. Eikman, he was unpersuaded by the weight of Dr. Wood's testimony. (R. 527)

He continued that he had given "great consideration" to the contested fact that Long had a lesion on his amygdala caused by a head injury, but the evidence failed to persuade him that Long was under the influence of extreme mental or emotional distress when he committed the murder. Although he found that the evidence failed to establish that Long's capacity to appreciate the criminality of his actions was substantially impaired, he did find to a reasonable degree of certainty that Long's capacity to conform his conduct to the requirements of law was substantially impaired (R. 528), thus establishing the "impaired capacity" mental mitigator.

Although the above conclusions are clear, albeit not based on the totality of the evidence, the court's further discussion of the nonstatutory evidence is not so clear. He concluded as follow:

> The court has considered evidence of non-statutory mitigators. The CBS tape, as edited, did indicate remorse, albeit slight and matter of fact. The mother's testimony that the Defendant rescued a young cousin from drowning may or may not be true, as her testimony was found to be uncredible, but for the purpose of this analysis the Court will accept that testimony as non-statutory mitigation.
>
> The uncorroborated testimony that the defendant was a good father prior to his arrest is also considered and weighed as a mitigating circumstance.
>
> 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) Although the judge stated that he considered Lang's mental problems, and did not find that they reached the level of a statutory mitigator, it is not clear whether he found them to be established or weighed them at all. If he weighed them, he gave

them little if any weight. It is unclear whether he based this determination on the testimony of Drs. Berland and Merin, or the PET scan evidence or both. He listed Dr. Sprehe as a witness he considered, although he excluded his testimony.

He said that he considered and weighed what he termed, "the uncorroborated and unreliable evidence of the treatment of the Defendant as a child." (R. 528) It is obvious that he gave this evidence little if any weight because he found it "uncorroborated." He also stated that Long's ex-wife's testimony concerning his motorcycle accident was "uncorroborated." He failed to note that the testimony of Long's ex-wife, Cindy, was corroborated by Long's mother and, to some extent, vice-versa. Moreover, Louella Long and Cindy Bartlett were the only witnesses with first-hand information about Long's childhood and adolescence, and their testimony was uncontradicted. Although the judge described their testimony as "uncorroborated, he also failed to note that their testimony was also **unrebutted.** See Nibert v. State, 574 So. 2d 1059, 1062 (Fla. 1990) (when reasonable quantum of competent uncontroverted evidence is presented, trial court must find mitigating circumstance).

The defense presented extensive unrefuted evidence that Long was the product of a nightmare childhood. The testimony established that he came from a broken family; that the relationship between his mother and father (when the latter was present) was violent and abusive; that Long and his mother were constantly moving, and that he attended numerous schools before dropping out in ninth grade. Long had a psychologically devastating quasi-incestuous relationship with his mother; he shared a bed with her until age eleven or

twelve. She worked as a barmaid and wore suggestive outfits, including "hot pants." Long was very upset about her wearing these outfits. During part of this time, Long and his mother lived with a houseful of relatives who talked to Long behind his mother's back, telling him she was a prostitute. (R. 1297-98, 1319-22, 1335)

In addition, Long sustained a series of head injuries, several of which resulted in unconsciousness. (R. 1323-34, 1340) When he was nineteen and in the military, he suffered the last in the series of head injuries. While riding his motorcycle, he was hit by a car and landed on his head, fracturing his helmet. After surgery, his mother and his ex-wife, to whom he was then married, noticed marked changes in his behavior. His temper grew noticeably worse. His sexual drive increased markedly. (R. 1300-07, 1333)

For some reason, the trial judge was extremely bothered by the Long's mother's admission that, at Long's 1988 trial, she had not admitted that Long's father had a violent temper because he might read about it in the paper and be angry. (R. 1337, 1350) At the time of this trial, Mrs. Long was still married to Joe Long, but they were living apart. (R. 1340, 1349-50) Thus, she was probably less afraid to be truthful about his anger. It seems extremely unfair and unjustified that the judge all but dismissed the nonstatutory mitigation presented by Long's mother and ex-wife because of his mother's admission. The judge stated in his sentencing order that:

> 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) Thus, Long's nightmare childhood has come back again to haunt him; his mother, who was a major character in his childhood, and his father, who was not a major character but who apparently has a violent temper, have inadvertently caused the trial judge to ignore Long's disastrous childhood, including his injuries, thus skewing his sentencing in favor of death.

Mrs. Long admitted that she was not completely honest about her husband's anger because of possible repercussions. (R, 1350) This was an honest admission. It is unfortunate that the judge did not realize that fear of violence is a strong motivation to avoid provoking further violence. Moreover, that Joe Long had a violent temper probably seemed unimportant compared to the threat of retaliation by her husband. It certainly does not indicate that she lied about the entirety of Long's childhood, including his injuries.

If the judge was really concerned as to whether Mrs. Long was telling the truth, he would have noted that her testimony about Long's childhood was consistent in Long's former cases, thus supporting her veracity. The judge must have read this Court's opinions in Long's former Hillsborough and Pasco County cases at some time during the trial. Expert testimony reported in this Court's opinions also supported her unrebutted testimony.[51] See

[51] Defense counsel asked the sentencing judge to review the transcripts of prior testimony of expert witnesses, which would have supported Mrs. Long's testimony and given the judge better insight into Long's problems. The judge refused to read the transcripts, preferring live testimony. Although defense counsel did produce live testimony from a number of doctors, he did not procure Dr. Money, Dr. Maher, Dr. Morrison, Dr. Lewis, or Dr. Gonzalez, who, among others, evaluated Long and testified in former trials.

Long, 610 So. 2d 1276; Long, 610 So. 2d 1268; Long, 529 So. 2d 286. In Long's first Hillsborough County case, the defense presented testimony from four expert witnesses who stated that Long met both statutory mental mitigators, and that "the evidence reflected that appellant led an extremely troubled family life, had suffered numerous head injuries, which had led to brain damage and severe mental problems." 529 So. 2d at 291. This Court then concluded:

> There is no question in the court's mind that for some period of time prior to the murder of Michelle Denise Simms that the defendant, Robert Joe Long, had had serious mental and/or emotional problems. The history of this defendant's development as a human being shows with stark clarity the effect that parental actions and physical trauma to the brain of a person can have on his subsequent actions and his interactions with other members of society.

Long, 529 So. 2d at 291. In Long's second Tampa appeal, the

> testimony reflected that Long was born when his mother was seventeen, and that, when Long was eight months old, his mother left his father. Other evidence reflected that he slept with his mother off and on until he was approximately twelve years of age and that he disapproved of his mother's occupation and dress. His mother worked as a carhop and barmaid and wore hot pants, boots, and sexy outfits. At one point she was married to a man who became a father figure to Long and who taught him the electrical trade. However, his mother later determined that the man was already married and, consequently, had the marriage annulled. . . .
>
> Testimony was also presented that Long had suffered the following head injuries: he had fallen out of a swing and was knocked unconscious for a few minutes; he had fallen down a flight of stairs and had been knocked out for fifteen to twenty minutes; he had been hit by a car at age seven and had his face torn up (this resulted in his being hospitalized for a week or more); he had been thrown from a horse and knocked unconscious; and, finally, at age twenty and while in the army, he had been in a serious motorcycle accident in which he had been thrown over a car and had suffered serious head injuries.

Long, 610 So. 2d at 1271.

Had the judge reviewed these decisions before hastily making a judgment that Mrs. Long's testimony "had a cloud over it" and lacked credibility, he might have reconsidered the weight he accorded to this nonstatutory mitigation. Because this Court's rulings are "law of the case," the judge cannot readily ignore them, substituting his judgment for that of this Court. See Henry v. State, 649 So. 2d 1361, 1363-64 (Fla. 1994) (all points of law previously adjudicated by a majority of the Court may be reconsidered only where a subsequent hearing or trial develops material changes in evidence, or where exceptional circumstances exist whereby reliance on previous decision would result in manifest injustice); accord Green v. Massey, 384 So. 2d 24, 28 (Fla. 1980); Ball v. Yates, 29 So. 2d 729, 738 (1946), cert. denied, 332 U.S. 774 (1947). Although these conclusions were made in Long's Hillsborough County cases,[52] they were based on substantially the same evidence concerning Long's background and childhood. Even if the decisions would not technically constitute law of the case because they were found in a different case, albeit with the same defendant, the same principle applies. Had Long's sentencing judge considered these prior decisions, he would have realized that Mrs. Long and Cindy both testified consistently in prior trials.

The facts to which Mrs. Long and Cindy Bartlett testified were clearly mitigation. The Campbell Court gave as examples a non-exclusive list of recognized non-statutory mitigating factors, the

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[52] In Long's two prior Pasco County appeals, this Court never reached the penalty phases, because it reversed and remanded for new trials based on error in the guilt phases. See Long, 517 So. 2d 664; Long, 610 So. 2d 1276.

first of which was "abused or deprived childhood." 571 So. 2d 415. Other decisions of this Court which establish that a disadvantaged or pathological family background and/or traumatic childhood and adolescence are valid non-statutory mitigating factors include Nibert v. State, 574 So. 2d 1059, 1061-62 (Fla. 1990); Stevens v. State, 552 So. 2d 1082, 1086 (Fla. 1989); Brown v. State, 526 So. 2d 903, 907-08 (Fla. 1988); Rogers, 511 So. 2d 526; see also Eddings v. Oklahoma, 455 U.S. 104, 115 (1982). This is probably the most recognized and strongest of nonstatutory mitigating circumstances.

Although the judge found the second half of the "impaired capacity" mitigator (that Long's capacity to conform his conduct to the requirements of law) established, he rejected the other mitigators. It is unclear whether he considered them as nonstatutory mitigation. Although the judge stated that he considered Long's mental problems, he failed to say whether he found them established or weighed them at all. (R. 528)

Long's counsel filed a pretrial motion to declare section 921.141, Florida Statutes, unconstitutional, because two judges had found both mental mitigators and two judges had found neither mental mitigator, thus making imposition of the death penalty arbitrary and capricious. (R. 443-45) In Long's first Hillsborough County case, Judge Griffin "found two firm statutory mitigating circumstances concerning Long's mental condition." Long, 517 So. 2d at 291. On appeal, this Court found that the two strong statutory mental mitigators were abundantly supported by the record, and, in light thereof, this Court could not say that Long's

murder conviction in this case, which was used as an aggravating factor and had since been vacated, would not have affected the jury recommendation. Id. In Long's second Hillsborough County case, Judge Lazzara also found and weighed both statutory mental mitigators. Long, 610 So. 2d at 1272.

Although Judge Ray Ulmer found no mitigation in Long's first trial in this case, this Court did not review his sentencing order because the Court reversed Long's conviction based upon the trial judge's failure to suppress Long's confession. 517 So. 2d 664, 666 (Fla. 1988) Although this Court did not discuss Judge Cobb's findings in Long's second Pasco County case, 610 So. 2d at 1276, for the same reason, defense counsel represented that both Judge Cobb and Judge Ulmer found no mental mitigation. (T. 1359)

Defense counsel argued that, if four judges cannot agree on the existence of mitigation, the statutory criteria is meaningless and the death penalty unconstitutional. (T. 1359, 1449-50) Now, we have five judges who cannot agree whether the mental mitigators were established. In fact, unlike the first four judges, two of which found both mental mitigators established, and two of which found neither mental mitigator established, Judge Cope found only one of the mental mitigators established. The mitigating evidence presented in each case was substantially the same.

A judge can reject a defendant's claim that a mitigator has been proven only if the record contains competent substantial evidence to support that rejection. In Cheshire v. State, 568 So. 2d 908, 912 (Fla. 1990), this Court stated that, although the statute required that the emotional distress be "extreme," it would

clearly be unconstitutional for the state to restrict

> the trial court's consideration solely to "extreme" emotional disturbances. Under the case law, any emotional disturbance relevant to the crime must be considered and weighed by the sentencer, no matter what the statutes say. Lockett; Rogers. Any other rule would render Florida's death penalty statute unconstitutional.

568 So. 2d at 912. In this case, we submit that both statutory mental mitigating circumstances were established. Even if this Court determines that the judge did not abuse his discretion in finding that not all of the statutory requirements were met, he erred by failing to clearly weigh Long's emotional and mental disturbance as nonstatutory mitigation. Cheshire, 568 So. 2d at 912.

Dr. Berland testified that Long was psychotic, manic, schizophrenic, and paranoid, with some history of hallucinations. Long was to some extent psychopathically deviant in his thinking. He had both a biological mental illness and a character disturbance. His "psychopathic" score on the MMPI was significantly lower in 1988 than 1985. (R. 1271-75) Further testing showed brain damage, especially in the left hemisphere of Long's brain. His WAIS scores differed by three standard deviations which is very unlikely to occur by chance. (R. 1283-85)

Defense counsel argued that because Bob was not a problem prior to age 15, he was not an antisocial personality but, instead, was brain damaged. (T. 1868) Even if Long had nothing wrong other than a personality disorder, however, that the defendant suffers from a personality disorder is mitigating as a matter of law. Eddings, 455 U.S. at 115 (antisocial personality); Campbell, 571 So. 2d at 419 (borderline personality); Masterson v. State, 516 So.

2d 256, 258 (Fla. 1987) (post-traumatic stress disorder).

Although Dr. Merin opined that Long did not meet the criteria for the two mental mitigators (R. 1728-29), his testimony lacked a believable predicate. He administered nine tests, but did not say what tests they were or report any results from them.[53] Defense counsel objected because Dr. Merin relied on Long's suppressed confessions and the Tampa homicides. (T. 1960-91) Dr. Merin said in proffer that he could answer questions based solely on the Virginia Johnson case, uninfluenced by other homicides and Long's confession. (T, 1695) He admitted, however, that he based his opinions of the testimony of Dr. Sprehe at other proceedings, and tests performed by Dr. Berland and other experts. Dr. Sprehe had admitted that he could not be certain his facts concerning Virginia Johnson, on which Merin relied, did not come from Long's illegal confessions. (T. 1713-27) The court refused to allow Dr. Sprehe to testify after ho admitted in proffer that he could not completely remove Long's confession from his mind. (R. 1666, 1676, 1688)

Defense counsel also presented evidence concerning Long's PET scan to the sentencing judge. Dr. Frank Wood testified that Long's PET scan showed a metabolic defect in the left anterior temporal lobe. (R. 1440) The affected region was part of the amygdala, a small nuclear structure thought to effect emotions and behavior. (R. 1586) Dr. Wood said that lesions of the amygdala sometimes

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[53] Defense counsel argued at sentencing that Dr. Merin's testimony was totally unsupported by evidence and should be disregarded. Merin took into account Dr. Berland's testing but did not dispute it. He did not testify that he spoke to Long's mother or any family members concerning Long's brain damage. (R. 1865)

cause an increase in sexual appetite and a change in passive versus aggressive behavior. The amygdala controls the principal cortical region for inhibitory processing or "stop messages." (R. 1452-53)

Although the defect was biological in nature, Wood did not know whether it resulted from an injury or was congenital. A head injury is a common cause, and symptoms such as increased sensitivity to noise, lack of temper control, and increased sexual appetite are consistent with the defect on Long's PET scan. (R. 1492-93)

Dr. Marcel Kinsbourne explained that the amygdala is critical to many basic drives. (R. 1747) The amygdala controls balance so that a person will not swing violently. (R. 1754) Unilateral damage to the amygdala may cause rage, increased sexuality, lack of control over one's temperament and inability to control one's temper. (R. 1758-59) Dr. Kinsbourne agreed that hypometabolism of the left temporal lobe amygdala and hypermetabolism of the left orbital frontal were consistent with biologically caused lack of impulse control. (R. 1780-81) Dr. Ruben Gur testified that, of the hundreds of PET scans he reviewed, Long's was closest to those of patients with temporal lobe epilepsy, which causes severe behavior problems. (R. 1834-35) He believed the abnormality on Long's PET scan would affect his behavior. (R. 1850)

In rebuttal, Dr. Edward Eikman interpreted Long's PET scan as a normal brain metabolism image. (R. 1517, 1522) Dr. Leon Prockop opined that Long's PET scan showed, "a normal anatomical asymmetry that is a [cerebral spinal fluid] infolding." (R. 1611) Prockop opined that because PET scanning was a new tool, it must be used with other tests to make a diagnosis. (R. 1584)

Even if the judge did not abuse his discretion by failing to find both mental mitigators established, he erred by failing to clearly weigh Long's "emotional and mental disturbance" as non-statutory mitigation. The court cannot ignore evidence of mitigating circumstances in the record. Parker v. Dugger, 498 U.S. 308 (1991); Eddings v. Oklahoma, 455 U.S. 104 (1982); Lockett v. Ohio, 438 U.S. 586 (1978). Under no circumstances may the court give a mitigator no weight by excluding it from consideration. Eddinss, 455 U.S. at 114-15. A trial court must consider mental disorders, even if they do not meet the criteria for statutory mitigating factors. Foster v. State, 614 So. 2d 455, 465 (Fla. 1992). This is true even if there is a conflict in the evidence. Although Drs. Prockop and Eikman were not convinced that Long's PET scan showed an abnormality, they did not otherwise evaluate Long, and in no way rebutted the Dr. Berland's testimony that Long met the criteria for both statutory mental mitigators.

It is unclear whether and to what extent the judge considered Long's mental disturbance. To the extent that he failed to give appropriate weight to mitigation supported by the record, however, he committed error of constitutional dimension. Lockett: Eddings; see also Magwood v. Smith, 608 F.Supp. 218, 225-28 (D.C. Ala 1985), affirmed, 791 F.2d 1438, 1447-50 (11th Cir. 1986). "To find that mitigating circumstances do not exist where such mitigating circumstances clearly exist returns us to the state of affairs which were found by the Supreme Court in Furman v. Georgia to be prohibited by the Constitution." Magwood v. Smith, 791 F.2d at 1448 (quoting district court opinion at 608 F.Supp. at 228).

ISSUE XI

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

In State v. Dixon, 283 So. 2d 1, 7 (Fla. 1973), this Court stated that, because death is a unique punishment in its finality and total rejection of the possibility of rehabilitation, it is proper that the legislature has "chosen to reserve its application to only the most aggravated and unmitigated of most serious crimes." Thus, under Florida law, the death penalty is reserved only for the most aggravated and least mitigated murders. Kramer v. State, 619 So. 2d 274 (Fla. 1993); DeAngelo v. State, 616 So. 2d 440 (Fla. 1993); Songer v. State, 544 So. 2d 1010 (Fla. 1989).

The trial court found three aggravating circumstances: (1) Long was previously convicted of another violent felony; (2) the crime was cold, calculated and premeditated without any pretense of legal or moral justification; and (3) the crime was heinous, atrocious and cruel. In mitigation, he found that Long's capacity to conform his conduct to the requirements of law was substantially impaired; remorse; that Long rescued his cousin from drowning; and that he was a good father. Although he considered Long's mental problems, it is not clear whether he found them established. He also considered and weighed evidence of Long's treatment as a child. He found that each of the aggravating circumstances outweighed any one of the mitigating circumstances. (R. 528)

As discussed supra, he should not have found CCP or HAC, because the State presented no direct evidence as to how Virginia Johnson died. In finding HAC and CCP, the court improperly relied

in part on the alleged pattern established by Mr. Long in the Hillsborough County homicides, based on the CBS tape, and in the abduction of Lisa McVey, to fill in the gaps of the largely unknown circumstances of the death of Virginia Johnson. As a result, his findings were tainted by his consideration of facts not directly related to the charged offense. See Finney, 660 So. 2d at 684; Freeman, 563 So. 2d at 76; Trawick, 473 So. 2d at 1240 (Fla. 1985). Absent speculation as to what occurred based on the Williams rule evidence, there was insufficient evidence to prove these aggravators beyond a reasonable doubt. If those factors are eliminated, only one aggravating circumstance remains.

Although prior violent felonies carry significant weight, Long's were not murders. That Long committed other murders cannot be considered by this Court, just as it could not be considered by the trial court, in determining the sentence. The plea agreement strictly forbids consideration of the other homicides and McVey's abduction, to establish aggravating factors. This Court also excluded Long's guilty plea in the Lisa McVey abduction as an aggravating circumstance. Long, 610 So. 2d at 1281. Thus, the prior violent felonies that may be considered to establish and weigh the aggravator, are two sexual batteries in which Long did not physically harm the victims, and an aggravated assault for which he was on probation when arrested.[54]

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[54] Although defense counsel did not object, the aggravated assault should not have been used as an aggravating factor because it was part of the Hillsborough County plea agreement which required that the cases to which he pled guilty not be used against him in subsequent proceedings. (R. 61-64) Although it may not have been harmful, this was an additional breach of the plea agreement.

This Court has affirmed death sentences supported by one aggravating circumstance "only in cases involving 'either nothing or little in mitigation."' White v. State, 616 So. 2d 21 (Fla. 1993) (quoting Nibert, 574 So. 2d at 1163, and Songer, 544 So. 2d at 1011). In most cases where this Court sustained only one aggravating factor, it reduced the sentence to life. See, e.g., Knowles v. State, 632 So. 2d 62 (Fla. 1993); Santos v. State, 629 So. 2d 838 (Fla. 1993); White v. State, 616 So. 2d 21 (Fla. 1993); DeAngelo v. State, 616 So. 2d 440 (Fla. 1993); Clark v. State, 609 so. 2d 513 (Fla. 1992); Klokoc v. State, 589 So. 2d 219 (Fla. 1991); McKinney v. State, 579 So. 2d 80 (Fla. 1991); Douglas v. State, 575 So. 2d 165 (Fla. 1991); Nibert v. State, 574 So. 2d 1059 (Fla. 1990); Penn v. State, 574 So. 2d 1079 (Fla. 1990); Smalley v. State, 546 So. 2d 720 (Fla. 1989); Songer v. State, 544 So. 2d 1010 (Fla. 1989); Ross v. State, 474 So. 2d 1170 (Fla. 1985).

In DeAngelo, 616 So. 2d 440, this Court found only one valid aggravating factor: that the murder was "cold, calculated and premeditated." Dr. Berland, who also testified in this case, conducted an extensive examination and diagnosed the defendant with organic personality syndrome and an organic mood disturbance, caused by brain damage, and bipolar disorder, a mental illness which causes paranoid thinking, episodes of depression and mania,

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Breach of a plea agreement, no matter how slight, is grounds for reversal. Santobello v. New York, 404 U.S. 257 (1971); Tillman v. State, 522 So. 2d 14, 16 (1988). The defendant's rights are violated when the plea agreement is broken or becomes meaningless, rendering his waiver of those rights involuntary. Macker v. State, 500 So. 2d 256, 258 (Fla. 3d DCA 1986) (quoting from Correale v. United States, 479 F.2d 944 (1st Cir. 1973).

hallucinations and delusions, irritability, explosiveness, and chronic anger." Id. at 443. Although the trial judge rejected the statutory mental mitigatiors, he found that DeAngelo did have the mental health disorders Dr. Berland described. Id. Long's mental illness, as described by Dr. Berland and others, was similar.

The CCP aggravating factor found in DeAngelo is one of the most serious aggravators, at least comparable in weight to the prior violent felony aggravator found in this case. Furthermore, the trial court did not find that DeAngelo's mental impairment established the statutory mental mitigators; yet, this Court vacated DeAngelo's sentence and remanded for a life sentence. In this case, the judge at least found one of the mental mitigators (impairment to conform conduct to requirements of law), and a substantial amount of nonstatutory mitigation. As discussed in Issue X, supra, he erred by failing to find and weigh more of Long's extensive mental mitigation and childhood neglect.

In Knowles v. State, 632 So. 2d 62 (Fla. 1993), the defendant shot and killed a ten-year-old girl whom he had never met. Knowles then shot his father, pulled him from his truck, threw him to the ground, and left in the truck. The trial court found only one aggravating circumstance in connection with the murder of the child and three aggravating circumstances in connection with the murder of Knowles' father. The trial court rejected the statutory mental mitigating circumstances, but found as nonstatutory mitigating factors that Knowles had a limited education, had on occasion been intoxicated on drugs and alcohol, had two failed marriages, low intelligence, poor memory, inconsistent work habits, and loved his

father. This Court struck two of the aggravating factors the judge found as to the murder of Knowles' father, and found that the court erred in failing to find uncontroverted mitigating circumstances, including the mental mitigators. Based on the "bizarre circumstances" of the two murders and the substantial unrebutted mitigation established, this Court found death not proportionately warranted. Long's case is comparable because, in both cases, the trial court found two inapplicable aggravating circumstances and failed to find and weigh substantial established mental mitigation.

In Clark v. State, 609 So. 2d at 515-16, the Court vacated the death penalty in favor of life because only one aggravating factor remained and substantial mitigation existed. Clark killed a man so that he could get the man's job. He presented uncontroverted evidence of alcohol abuse, emotional disturbance and an abused childhood. Although the defense expert testified that the statutory mitigating circumstances were not applicable, this Court found that the strong nonstatutory mitigation made the death penalty disproportionate even though Clark's jury recommended death.

In several other cases, this Court determined that the trial court erred by failing to find the two mental mitigators. This Court remanded the cases and directed the trial court to enter a life sentence. See Huckaby v. State, 343 So. 2d 29 (Fla. 1977); Shue v. State, 366 So. 2d 387 (Fla. 1978); Burch v. State, 343 So. 2d 831 (Fla. 1977); Jones v. State, 332 So. 2d 615 (Fla. 1976). In this case, Long's sentencing judge did find one mental mitigator -- that Long's capacity to conform his conduct to the requirements of law substantially impaired.

In Santos v. State, 591 So. 2d 160 (Fla. 1991), the trial court rejected the unrebutted testimony of Santos's psychological experts. This Court determined that substantial, uncontroverted mitigating evidence was ignored. The Court reversed and remanded for the judge to properly consider the mitigation. On remand, the judge again imposed death. This Court vacated the death sentence and remand for imposition of a life sentence because the mitigation clearly outweighed the one aggravating factor -- a contemporaneous capital felony. Santos v. State, 629 So, 2d 838 (Fla. 1994).

In this case, the jury's seven to five death recommendation should also be given less weight than in the usual case because, as discussed in Issues VII, VII, and IX, supra, it was tainted by the jury's consideration of two invalid aggravating factors. Moreover, as defense counsel argued, although Long's jury did not hear any of the mental mitigation presented to the judge at sentencing, five jurors found enough mitigation in the guilt phase of Long's trial to recommend a life sentence. As discussed in the following and final issue, it is highly questionable whether the provision of Florida's death penalty statute which allows a death recommendation to be returned by a bare majority vote is constitutional under the Sixth, Eighth, and Fourteenth Amendments to the Constitution.

Defense counsel submitted, at sentencing, that in our society, under the law, we don't execute people who science can show are brain damaged, and the abnormality is biologically controlling their behavior. (R. 1875) Because the judge found that Long's ability to conform his behavior to the requirements of law was substantially impaired, he must have believed the defense expert

witnesses who examined Long's PET scan and found evidence that Long was unable to control his behavior. Executing someone who cannot control his criminal behavior accomplishes nothing.

The likelihood that a mentally ill person has made the kind of cost-benefit analysis that attaches any weight to the possibility of execution is so remote as to be virtually nonexistent. Long admitted in the CBS interview that he never even thought about the electric chair, He thought it was so obvious that something was wrong with him, that when he was caught, they would fix him. (T. 1061-69) Thus, executing the mentally ill does not satisfy society's desire for deterrence.

Society's desire for retribution likewise fails to justify the execution of the mentally ill. Imposition of the death penalty requires a "highly culpable mental state," Tison v. Arizona, 481 U.S. 137, 152, 158 (1987), and must be directly related to the defendant's "personal responsibility and moral guilt." Enmund v. Florida, 458 U.S. 782, 801 (1982). Mentally ill offenders have disturbed thought patterns and emotions, and reduced ability to think rationally. Thus, mentally ill offenders do not have the highly culpable mental state that the Eighth Amendment requires to justify the retributive punishment of death.

Sentencing the mentally ill to die in the electric chair does not measurably contribute to either of the penological goals that capital punishment is intended to achieve. It is merely the senseless imposition of pain and suffering, unconstitutional under the Eighth and Fourteenth Amendments. Thus, if the Court does not reverse Long's conviction, it should reduce his sentence to life.

ISSUE XII

THE PROVISION OF FLORIDA'S DEATH PENALTY STATUTE WHICH ALLOWS A DEATH RECOMMENDATION TO BE RETURNED BY A BARE MAJORITY VOTE VIOLATES THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The United States Supreme Court has repeatedly recognized that the Eighth and Fourteenth Amendments require a heightened degree of reliability when a death sentence is imposed. Lockettv. Ohio, 438 U.S. 586, 604 (1978); see also Caldwell v. Mississippi, 472 U.S. 320, 329-30 (1985); Zant v. Stephens, 462 U.S. 862, 884-85 (1983). The jury's recommendation of life or death is a crucial element in the sentencing process and must be given great weight. Grossman v. State, 525 So. 2d 833, 839 n.1, 845 (Fla. 1988). When a penalty jury reasonably chooses not to recommend a death sentence, it amounts to an acquittal of the death penalty within the meaning of the state's double jeopardy clause. Wright v. State, 586 So. 2d 1024, 1032 (Fla. 1991). In the overwhelming majority of capital cases in Florida, the jury's recommendation determines the sentence ultimately imposed. See Sochor v. Florida, 504 U.S. 527 (1992) (Stevens, J., joined by Blackmun, J., concurring in part and dissenting in part). To the extent that Florida's death penalty scheme allows a death recommendation to be returned by a bare majority vote of the jury, it violates the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.[55]

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[55] To the extent that § 921.141 allows a death recommendation to be made by a bare majority of the jurors, it is inconsistent with Rule 3.440's requirement that no verdict may be returned unless all of the jurors concur in it. The rule controls and the statute is unconstitutional to the extent of the conflict. See Haven Federal Savings and Loan Assoc. v. Kirian, 579 So. 2d 730

Long recognizes that this Court has previously rejected arguments challenging the imposition of death sentences based on bare majority jury recommendations. See, e.g., Jones v. State, 569 So. 2d 1234, 1238 (Fla. 1990); Brown v. State, 565 So. 2d 304, 308 (Fla. 1990). Whether the Sixth, Eighth, and Fourteenth Amendments require jury unanimity (or at least a substantial majority) in this state's death penalty proceedings is ripe for re-evaluation now, however, because it has become clear that a Florida penalty jury's role is not merely advisory. Under Florida's capital sentencing scheme, the penalty phase jury is recognized as a co-sentencer. Johnson v. Sinsletarv, 612 So. 2d 575 (Fla. 1993); see also Espinosa, 505 U.S. 1079. "If the jury's recommendation, upon which the judge must rely, results from an unconstitutional procedure, then the entire sentencing process necessarily is tainted by that procedure." Riley v. Wainwrisht, 517 So. 2d 656, 657 (Fla. 1987).

In Williams v. Florida, 399 U.S. 78 (1970), the Court held that a statute providing for a jury of fewer than twelve in non-capital cases does not violate the Sixth and Fourteenth Amendments. The Court noted that no state provided for fewer than twelve jurors in capital cases, "a fact that suggests implicit recognition of the value of the larger body as a means of legitimating society's decision to impose the death penalty." 399 U.S. at 103. Two years later, in Johnson v. Louisiana, 406 U.S. 356 (1972), the Court concluded that a Louisiana statute which allowed a substantial majority (nine to three) verdict in non-capital cases did not

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(Fla. 1991); Bernhardt v. State, 288 So. 2d 490, 491 (Fla. 1974); State v. Garcia, 229 So. 2d 236 (Fla. 1969).

violate the due process clause for failure to satisfy the reasonable doubt standard. Justice Blackmun noted, however, that a seven to five standard, or less than 75 percent, would cause him great difficulty. 406 U.S. at 366 (Blackmun, J., concurring).

Florida's sentencing scheme further violates constitutional guarantees because of its failure to require unanimity or even a substantial majority in order to find that a particular aggravating circumstance exists, or that any aggravating circumstance exists. Under the law of this state, aggravating circumstances substantively define those capital felonies for which the death penalty may be imposed. Vaught v. State, 410 So, 2d 147, 149 (Fla. 1982); State v. Dixon, 283 So. 2d 1,9 (Fla. 1973). An aggravating factor "must be proven beyond a reasonable doubt before being considered by judge or jury." State v. Dixon, 283 So. 2d at 9. A death sentence is not legally permissible where the State has not proved beyond a reasonable doubt at least one aggravator. Thompson v. State, 565 So. 2d 1311, 1318 (Fla. 1990). Accordingly, aggravating circumstances function as essential elements, in the absence of which a death recommendation cannot lawfully be made.

Because neither unanimity nor a substantial majority is required to find an aggravating circumstance *or* recommend the death penalty, the Florida procedure allows a death recommendation even if five of the twelve jurors find that no aggravating factors were proved beyond a reasonable doubt, as long as the other seven jurors find one or more aggravators and conclude that these are not outweighed by mitigating circumstances. The seven jurors voting for death could each find a different aggravating factor, while

five jurors found no aggravators at all, as long as each of the seven determined that his or her aggravator was not outweighed by mitigators. Thus, a death recommendation would be possible under Florida's procedure even if each aggravator submitted were rejected by eleven out of the twelve jurors.

When the State convinces only a bare majority of jurors that death is the appropriate sentence, a sole juror could effectively make the difference between whether the defendant lives or dies. Such a result makes Florida's death penalty scheme arbitrary in capricious, in violation of Furman v. Georsia, 428 U.S. 238 (1972). Because Long's death sentence was based on a seven to five jury death recommendation, this Court should find the requirement for only a bare majority verdict unconstitutional, vacate Long's death sentence, and remand for imposition of a life sentence.

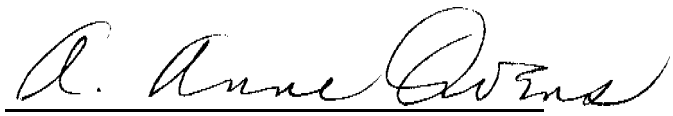
CONCLUSION

For the reasons stated above, this Court should discharge Long because the State presented insufficient evidence to prove its case, If Long is not discharged, however, the Court should reverse his conviction and sentence and remand for a new trial, excluding the CBS videotape, evidence concerning Lisa McVey's abduction, and the testimony of Mike Malone. If the case is not reversed, Long must be granted a new penalty trial because the trial court allowed a detective to testify to hearsay of which she had no personal knowledge, and erroneously instructed the jury on invalid aggravating factors. Additionally, Long must be resentenced because the sentencing judge found the two invalid aggravators, failed to consider and weigh all established mitigation, and because the death penalty is not proportionately warranted in this case.

CERTIFICATE OF SERVICE

I certify that a copy of this corrected brief, originally filed April 1, 1996, has been mailed to the Office of the Attorney General, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, on this 19th day of April, 1996.

Respectfully submitted,



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