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IN THE SUPREME COURT OF FLORIDA

ROBERT J. LONG, :

Appellant, :

vs. : Case No. 83,593

STATE OF FLORIDA, :

Appellee. :

______________________________ :

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

REPLY BRIEF OF APPELLANT

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TENTH JUDICIAL CIRCUIT

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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).

Appellee urges this Court to reject Long's argument that the trial court erred by admitting significantly more evidence than necessary for the jurors to connect Long to the instant case, as this Court mandated in its prior opinion, because defense counsel allegedly failed to argue this specific ground below. This is not true. Although defense counsel argued that all of the McVey evidence should be excluded, he argued in the alternative that the evidence should be limited to that necessary to tie Long to the car in which the hair and fiber were found and, thus, to the Johnson homicide.[1] (See e.g., T. 465, 841-42, 1212-13, 1273, 1414-15; R. 1116) The repeated defense objections to the McVey evidence, the objection that McVey was becoming and became the feature of the case, and the argument that any McVey evidence that came in should be limited as this Court intended, were based on the same grounds.[2]

Appellee asserted that Long argued that "additional background facts should have been included to put matters in context." (See

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[1] Because the two hairs and one fiber were the only evidence linking Long to the Johnson homicide, it was necessary for the State to introduce evidence concerning Long's abduction of McVey to suggest to the jury why Long was even a suspect in this homicide.

[2] The grounds were: (1) lack of relevance; (2) violation of the Tampa plea agreement; (3) absence of fingerprint similarity; (4) it became a feature of the case; (5) any probative value was clearly outweighed by the unfair prejudice; and (6) this Court found it admissible only to connect Long to the car in which the hair and fiber were found. (R. 88-93, 1952-65, T. 684-99)

brief of Appellee, page 15; brief of Appellant, page 27.) Appellee may have misinterpreted Long's argument. Long did not ask the trial court to include "additional" facts but, instead, argued that the McVey evidence should be excluded, or at least limited to the facts needed to connect Long to this case ("background facts").

All that was necessary to connect Long to the Johnson evidence was for one officer to testify that Long was stopped, and his car impounded and searched, because he and his car met the description provided by a woman who was abducted and released in Tampa. Two hairs which were consistent with Johnson's were found in the car, and fiber from Long's car carpeting matched a fiber found in Johnson's hair mass. In fact, the officer would not even have had to tell the jury why Long was stopped. These few facts would have "identified" Long as a suspect in the Johnson case without unduly prejudicing his defense and creating the danger that the jury would convict Long based upon propensity.[3]

McVey testified that Long abducted her from her bicycle, made her disrobe in the car and get dressed again to go in his apartment, and that he returned her clothing when he dropped her off near her home. (T. 704-19) None of this testimony is probative of any issue

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[3] Instead, Detective Carson testified as to the description McVey gave and their subsequent sighting and stopping of Long. (T. 804-07) Officer Winsett testified about the arrest of Bobby Joe Long. (T. 810-12) Other officers testified that Long admitted he abducted McVey from a bicycle at gunpoint, made her undress in the car, and took her to his apartment (T. 835-39); that his car was impounded (T. 815-16); and that it was vacuumed for sweepings. (T. 857-61). Detective Cribb testified that he drove the sweepings and the carpet from Long's car to Washington D.C., where he turned them over to FBI Agent Mike Malone. (T. 864-70) Malone testified concerning the hair and fiber found in both cases. (T. 893-918)

in this case. The crimes were not similar. McVey's testimony was the most damaging and the least relevant. If this Court's intention was to connect Long to the Johnson case through his arrest in the McVey case, and the hair and fiber found in his car, then McVey's testimony was **totally** irrelevant. She could not testify about the arrest or the vacuuming of Long's car because she was not there.

Appellee also suggests that, because this Court already held that some of the McVey evidence was admissible to show "identity," Long is precluded from arguing that none of it should be admitted. Surely Long can argue this again at a new trial where the evidence admitted may not be exactly the same, and to continue to preserve the argument. Moreover, counsel suspected that this Court may not have realized that McVey was part of the Tampa plea agreement when making its decision.[4] This Court can always reconsider its prior decision based on new information or evidence in a new trial.

"At a new trial the parties may present new evidence or use different theories than were presented in the first trial. United States v. Shotwell Manufacturing Co., 355 U.S. 233 (1957) (quoted by this Court in Huff v. State, 495 So. 2d 145, 152 (Fla. 1986); cf. Hall v. State, 614 So. 2d 473, 477 (Fla. 1993); Preston v. State, 607

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[4] Defense counsel's argument that this Court was "in error for suggesting that [the McVey evidence] would be admitted," noted by Appellee at page 14 n.1, was based on counsel's belief that this Court may have overlooked the fact that the McVey case was part of the Hillsborough County plea agreement.

Appellee later argued that Long's argument that the McVey evidence violated the plea agreement was presented and rejected by this Court in Long's last appeal. See Brief of Appellee, page 19. To the contrary, this Court found that the McVey evidence was admissible because Long confessed to abducting McVey prior to exercising his right to counsel.

So. 2d 404 (Fla. 1992) (resentencing is new proceeding, and court is not bound by the original court's findings). "When a subsequent hearing or trial develops different facts and different issues, the 'law of the case' doctrine will not preclude a conclusion at variance with the initially adjudicated result." Steele v. Pendarvis Chevrolet, 220 So. 2d 372, 376 (Fla. 1969); see, e.g., Thompson v. State, 595 So. 2d 16 (Fla. 1992) (on second appeal, this Court suppressed remainder of confession which was upheld in first appeal, because defense counsel introduced new evidence and detective admitted previous testimony was in error).

Moreover, this Court has the power to reconsider and correct erroneous rulings in the interest of fairness and justice, notwithstanding that the rulings have become law of the case Love v. State, 559 So. 2d 198, 200 (Fla. 1990); Preston v. State, 444 So. 2d 939, 942 (Fla. 1984). Reconsideration is warranted in circumstances where reliance on the previous decision would result in manifest injustice. Preston, 444 So. 2d at 942. If this Court did not consider all of the evidence (including the plea agreement) when making its prior decision, it may reconsider if it so chooses.

This Court should reverse on this issue anyway because the trial court erred by allowing a myriad of unnecessary and unduly prejudicial evidence outside the parameters of this Court's finding in Long, 610 So. 2d at 1281. The Court can now find that any or all of the McVey evidence should have been excluded.

Appellee argues that the amount of McVey testimony was not excessive, citing several cases. (See Brief of Appellee, page 16, note 2.) In both Wilson v. State, 330 So. 2d 457 (Fla. 1976), and

Townsend v. State, 420 So. 2d 615 (Fla. 4th DCA 1982), the collateral crimes were very similar and, thus, admissible under the Williams rule. The Townsend court also found that, because the jury acquitted the defendant of a third murder, the collateral crime evidence obviously did not prejudice him to any great extent. Lisa McVey's assault was not similar to the homicide for which Long was on trial. The jurors might easily have imputed McVey's ordeal to Johnson.[5] Long was not acquitted of anything as in Townsend, but was convicted of a homicide based on two hairs and a carpet fiber.

Appellee asserts that McVey's testimony consumed only two dozen pages. (See Brief of Appellee, page 17.) Appellee failed to count Agent Malone's testimony about McVey, portions of the CBS tape concerning McVey, and the testimony of several officers concerning McVey. All of this evidence made McVey the feature of the case.

Appellee notes that, in Henry v. State, 649 So. 2d 1366 (Fla. 1994), the Court allowed some evidence of the defendant's stepson's death because it was inextricably intertwined with the facts pertaining to Henry's wife's murder. (See Brief of Appellee, page 20.) Henry took the child with him after killing his wife, and killed him nine hours later. As discussed in Long's Initial Brief, page 35, Lisa McVey's abduction was not intertwined with Johnson's murder which occurred about two weeks earlier. The women were apparently not acquainted with Long or each other, and had little in common. McVey lived at home and worked at a donut shop; Johnson was

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[5] Additionally, because Johnson was engaged in prostitution, she consensually engaged in sex unlike McVey, and may not have been at all traumatized by an abduction. McVey was not killed, so the evidence was not relevant to Johnson's homicide.

a runaway, on drugs and alcohol, and engaged in prostitution. McVey was released after her abduction; Johnson was found dead.

Appellee argues that only a few pages of the CBS tape were admitted and only a few comments related to McVey. (See Brief of Appellee, pages 17-18.) The portion of the videotape played for the jury covered five pages of Long's Initial Brief, and his comments concerning McVey, noted in footnote 29 of Long's Initial Brief, were taken from nine consecutive pages of transcript. (T. 1061-69) While it was not a huge amount of evidence, it was a substantial amount, and none of it was relevant or necessary. Some of it included the most prejudicial aspects of the videotape. The trial judge admittedly allowed those portions **only** because McVey was mentioned in them and he believed (or at least professed to believe) that this Court's opinion required him to allow every bit of evidence mentioning or relating to McVey, or even remotely connected with her abduction; everything except the rapes that occurred in the apartment and car.

Perhaps the most prejudicial comment in the CBS tape, which the prosecutor repeated and stressed over and over throughout his opening and closing arguments, was admitted solely because McVey was mentioned in the last sentence. Long's comment was 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. And that would be it. And they all went exactly the same until McVey came along.

Judge Cobb first ruled that

> 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.

(R. 2043) Shortly thereafter, however, he changed his mind and 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) After further pleading by the prosecutor, he found it admissible. Thus, although he admitted that the A, B, C, D portion of the CBS tape showed nothing more than propensity, he let it in anyway. (R. 1116) Nothing in Long's A, B, C, D comment, or the final sentence that, "they all went that way until McVey" had any relevance to this case. It in no way connected Long to the car and the hair and fiber as this Court intended.

Appellee argues that the admission of the A, B, C, D comment "helps explain Long's modus operandi and his premeditated activity when a street walker was targeted." (See Brief of Appellee, page 21.) This Court did not find the McVey evidence admissible to show modus operandi. To the contrary, it was inadmissible as similar fact evidence because of the absence of fingerprint similarity. Moreover, although the Court stated that some of the CBS tape **might be** admissible as an admission against interest, its holding that the four Hillsborough County murders were inadmissible as Williams rule evidence shows that the tape was not admissible to show modus operandi. See § 90.404(b)(2), Fla. Stat. (1995).

Secondly, the evidence was hardly admissible to show Long's premeditation when a street walker was targeted. Long never said he premeditated the homicides; he said they all went the same.

Moreover, even if he had premeditated hundreds of homicides, the evidence would not be admissible to show that he premedicated this one. The purpose of the Williams rule is to preclude evidence showing mere propensity. As this Court stated in Jackson v. State, 451 So. 2d 458 (Fla. 1984), "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." Id. at 461.

Lastly, Appellee contends that, even if the trial court did err in admitting the myriad of unnecessary and prejudicial evidence concerning McVey's abduction, it was harmless because defense counsel conceded in closing argument that Long admitted abducting McVey. Defense counsel would certainly not have made such a concession had the trial court excluded the evidence. The prejudice is obvious. Without McVey's testimony, the jurors would only have heard about a decomposed body and scientific evidence concerning two hairs and a fiber. McVey presented a live tearful victim who accusingly identified Long as her abductor and described in detail her terrifying experience, thus allowing the jurors to substitute McVey for Johnson to fill in the details of the crime. The prosecutor cannot be permitted to fill in voids by substituting a different victim. No one knows if or how Johnson was abducted, or what happened prior to her death. Combining the McVey and Johnson cases makes a nice story for the jury, but fiction will not support a verdict. Had the McVey evidence been excluded, the verdict might well have been different. See State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986).

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.

As Appellee noted, Ellis Rubin testified that he approved Long's interview with CBS News because he believed that a news story concerning Long's brain damage would verify what he had argued at trial and was going to argue to this Court on appeal. (R. 1007-1008) The trial judge concluded, therefore, that

> 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.

(R. 1075) Although Rubin had yet to argue the Tampa case before this Court, he could not present the CBS interview to this Court because it was not part of the record. The only benefit to Rubin was publicity. It is well-known that Rubin enjoys publicity.

The hearing testimony indicates that Rubin left a message for Long that the reporter was coming. Clearly, Rubin would not have left leave a message, or even written a letter, telling Long that, if his "psychobabble defense" did not work, they could always claim ineffective assistance. There was no testimony that Rubin ever discussed the interview with Long. He merely advised him.

Before a tactical decision can be made, the trial attorney

must investigate the case and discuss the options with his client. See, e.g., Foster v. Dugger, 823 F.2d 402 (11th Cir. 1987), cert. denied, 487 U.S. 124 (1988). He must make an **informed** choice. Ellis did not discuss the options with Long, and had no idea what questions Long would be asked, or what Long would say. If Rubin made a "strategic decision," it was uninformed.[6]

In Heiney v. State, 620 So. 2d 171 (Fla. 1993), this Court noted that even tactical decisions are subject to review as to ineffective assistance. The Court found that Heiney's lawyer could not have made decisions regarding the presentation of mitigation for tactical reasons because he did not know what mitigation existed. In Stevens v. State, 552 So. 2d 1082, 1083 (Fla. 1989), defense counsel failed to investigate the defendant's background, presented no mitigation, and made no sentencing argument, thus essentially abandoning representation of his client at sentencing. In Heiney and Stevens, this Court held that counsel's decisions did not result from reasoned professional judgment.

In Blanco v. Singletary, 943 F.2d 1477, 1500 (11th Cir. 1991), counsel failed to pursue mental health mitigation including organic brain damage. In Code v. Montgomery, 799 F.2d 1481, 1483 (11th Cir. 1986), defense counsel failed to investigate a possible alibi witness. Where deficiencies in counsel's performance are severe

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[6] At the end of Appellee's response to this issue, Appellee argued that Rubin's strategy was reasonable. Appellee notes that strategic choices made after **thorough investigation of the law and facts** are virtually unchallengeable, citing Strickland v. Washington, 466 U.S. 668 (1984). As discussed herein, Rubin had no idea what the questions would be or how Long would answer them. Thus, his so-called strategy could not have been reasonable

and not a product of reasoned strategic judgment, counsel may be ineffective. A strategic decision cannot be reasonable when the attorney has not investigated and evaluated the options and made a reasonable choice between them. See Horton v. Zant, 941 F.2d 1449, 1462 (11th Cir. 1991), cert. denied, 117 L.Ed. 2d 652 (1992).

Despite the lack of evidence to support his conclusion, the trial judge said it was obvious by Mr. Long's interview that he had talked with Rubin and that Rubin had told Long they would allege ineffective assistance if the tapes were used against him. He ruled that there was no ineffective assistance because, "[t]hat was absolute strategy that had been discussed." (R. 1074-75)

It was not "obvious." In fact, nothing in Long's interview suggested that Rubin and Long had discussed ineffective assistance. Long twice clarified with Corderi during the interview that Rubin had editorial control, indicating that he had had little communication with Rubin concerning the interview and wanted to be certain that Corderi understood the agreement. He obviously believed Rubin was trying to protect him rather by providing effective assistance.

If Rubin did in fact make an agreement with Corderi that he had editorial control over the tape, he was still ineffective for two reasons. First, he failed to exercise editorial control. Secondly, even if he had edited out a large portion of Long's comments, CBS News would still have had the original outtakes, and could have provided them to the State Attorney. If Rubin failed to think of that possibility, he was clearly ineffective.

Appellee suggests that Rubin testified as he did merely to "advocate for" Long by urging his own ineffectiveness. Although it

may be common for defense attorneys to admit ineffectiveness -- a subjective opinion, surely opposing counsel is not suggesting that Rubin made up the entire agreement with Corderi. Had Rubin wanted to help Long, with no regard for the truth, he could have testified that he approved Long's interview with Corderi without thought for the consequences because the issue on appeal -- the voluntariness of Long's Tampa confession -- would not be affected.[7]

No effective advocate would advise his client to participate in a taped news interview with only an oral agreement as to content and editorial control, and no agreement to retain possession of the only original unedited tape. Even with such a written agreement, the advisability of such an interview would be questionable. There would be no way to know whether CBS retained an unedited copy of the videotape, and naive to believe they would not.

Appellee argues that the trial court was correct in believing Corderi, who said she made no such agreement with Rubin, rather than Rubin and Long. Rubin and Long's testimony was actually more believable because it was consistent and was supported by the tape itself. If no agreement was reached, Corderi should have corrected or questioned Long when -- twice -- he asked her to confirm that Rubin had editorial control over the contents of the tape.[8]

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[7] It is unlikely that Rubin even entertained the thought that the interview might some day be used against Long in a retrial of his Pasco County case which was pending on appeal.

[8] See Long's questions concerning Rubin's editorial control and Corderi's responses in the supplemental record at SR. 23-24 and SR. 32, and in our Initial Brief at pages 46-47.

Moreover, Corderi admittedly she remembered **nothing** Rubin said to her and **nothing** she said to him during the telephone call when she arranged the interview. She "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) She denied having made such an agreement only because she "wouldn't have done that." Both Rubin and Long remembered their conversations with Corderi.

Most telling, however, is the tape itself. The videotape -- obviously the best evidence -- supports Rubin and Long's version of what happened rather than Corderi's. Corderi's "explanation" of her affirmative response when Long asked her, on the videotape, if Ellis was going to get to "check this out," was feeble and illogical.[9] She had no explanation as to Long's second mention of the agreement because she did not remember it. (SR. 24-26, 31-32)

Appellee asserts that Corderi's affirmative response to Long's first question concerning the agreement shows only that Long and Rubin may have discussed the parameters of the agreement and how specific Long should be during the interview. To support this contention, Appellee quotes from the transcript of the videotape, omitting and substituting " * * * " for Long's question as to whether Rubin had editorial control and Corderi's affirmative response. (See Brief of Appellee, page 28.) The omission obviously distorts the meaning. The omitted portion, which Appellee replaced

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[9] Corderi 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 Rubin. (SR. 24-26)

by " * * * " is underlined and bracketed below:

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.

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

(SR. 23-24)

"Is Ellis going to get to check this out? " can in no way be construed to mean "Ellis said it's okay to talk about this as long as I don't talk specifics." The portion of the transcript that Appellee would like to omit is at the crux of this issue. It shows that Long relied on Rubin's representation that he had editorial control over the tape and would protect Long from any adverse consequences. Corderi obviously knew what Long was talking about although she may have tried to conveniently forget about it when she hung up the phone because she admittedly had no authority to enter into it and did not intend to abide by it.

Appellee questions whether preserving Rubin's possible ineffectiveness in the trial court is sufficient to make it an appropriate issue on direct appeal in this case. (See Brief of Appellee, page 29). This ineffectiveness claim differs from the norm because the allegation is not aimed at counsel in this case, but at Long's counsel in another case whose actions and advice

affected the outcome of this case.[10] Because the trial court held an evidentiary hearing on the defense motion, the error is apparent from the record. No further facts need be developed. Rubin, Long and Corderi testified, in court or in deposition. The only evidence the judge excluded was Rubin's opinion as to his effectiveness. Defense counsel proffered that Rubin would testify that, if he had not insisted on the agreement with CBS, he would have been ineffective. (R. 1028-29)

It is axiomatic that a defendant should not make incriminating statements to the news media. Rubin knew that Long had two cases on appeal and might be retried in one or both cases. Any positive affect of a television news story concerning Long's brain damage was greatly outweighed by the risk that Long might say something the prosecutor might use against him in a retrial.

Moreover, Rubin did not even accompany Long to the interview. Speaking with the news media without counsel is no different than making statements to law enforcement without counsel. Surely no effective defense lawyer would advise his client to talk to law enforcement without counsel, even in general terms.

Appellee correctly notes that the trial court did, in fact, rule on the ineffectiveness issue. (See Brief of Appellee, page

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[10] Appellee notes that Long cited no cases wherein ineffectiveness in one case resulted in overturning a conviction in another. See Brief of Appellee, page 30, note 4. Although this situation seems to present a novel question, it is not dissimilar to the situation in which this Court vacates the death sentence because the State presented evidence of a conviction that was overturned in another case. This occurred in Long v. State, 529 So. 2d 286 (Fla. 1988). Long's sentence was vacated when this Court reversed his conviction in this case because the court failed to suppress Long's confessions.

29). He found that there was no ineffective assistance because "that was absolute strategy that had been discussed." (R. 1074) In our initial brief, we noted that the judge refused to decide if Rubin's actions were reasonable and within the bounds of ethical standards for lawyers. (R. 1076) This statement, as noted by Appellee, was made after his original ruling.

Under Strickland v. Washington, 466 U.S. 668, 687 (1984), the defendant must satisfy a two-prong test to maintain an ineffective assistance claim: First, the defendant must show that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the errors were so serious as to deprive the defendant of a fair trial with a reliable result. The State does not contend that Rubin did not advise Long to participate in the CBS interview, and represent that he would control its publication for Long's protection. If Rubin had no agreement with CBS News to protect Long from exactly what happened, he was not functioning as the counsel guaranteed by the Sixth Amendment. The error was so serious that is deprived Long of a fair trial. Any jury would find Long guilty of any homicide after viewing the CBS tape in which Long admitted that he had a "violent flame" inside him, was a serial killer, and that a task force had been organized to apprehend him.[11]

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[11] In note 5, page 31, Appellee states that defense counsel did not object to the jury instruction on the voluntariness of the CBS tape; that he could have called Rubin to testify concerning his agreement with CBS News; and that he could have requested that the jury hear the portion of the tape in which Long referred to Rubin's agreement with CBS. The jury instruction, although not helpful, was not harmful and no objection was necessary. The issue of whether the tape should have been admitted into evidence is a question of

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 description of the trial court's findings, Appellee makes it sound as though the trial judge excluded a substantial amount of the CBS tape that the State requested. This is not accurate. Although he originally said he would exclude parts of the tape showing "murderous propensities, he did not. The judge allowed portions in which Long admitted having a "violent flame" inside him; that he looked in the mirror trying to see the difference between Bobby Joe, the person, and Bobby Joe, the killer; he could see the predictions he read about in the paper coming true; when someone looked at him "wrong" at a stoplight, he pulled a gun and would have shot the person if he had not pulled away first;[12] he was afraid that even if he went to Mexico, he would start killing again; and that he was losing control. He even included the "A, B, C, D," phrase because it ended with mention of McVey. (T. 1061-69, R. 2043-47)

Appellee attempted to justify the judge's finding that the CBS tape was relevant because "Long admitted that he was a killer and

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law. Jurors cannot be expected to hear evidence, find it inadmissible, and forget it.

[12] The judge found the part about Long pointing guns at people in cars was relevant "because it shows the intensity of his murderous propensities or flame. It's why he killed Virginia Johnson, I guess." (R. 1116)

why the assault on McVey did not result in a death in contrast to the instant case."[13] (See Brief of Appellee, pages 33-34.) Long never said he killed only prostitutes; he merely said McVey "wasn't some streetwalker." Why she was not killed is irrelevant.

The fact that Long talked about McVey and other unspecified Tampa homicides, but did not mention the rapes of Jensen or Nuttal in Pasco and Pinellas counties, further indicates that Long was discussing only Hillsborough County cases. His plea agreement specified that the Jensen and Nuttal cases were admissible against him in future proceedings, but the Hillsborough County cases were not. Evidence from this case would have been admissible against him because it was not part of the plea agreement. Thus, Long did not mention Johnson, Jensen or Nuttal.

Appellee refers to "other evidence" which supposedly tied in Long's "admissions" on the CBS tape. Johnson was "walking down the street after leaving Mr. Duggan's house, her hair was found in the front passenger seat of the Long vehicle and a fiber found in her hair mass was indistinguishable from the carpet in Long's car, the ligature used to tie the victim's wrists . . . ." (See Brief of Appellee, page 34.) That Johnson walked down the street is not unusual. Everyone does. Johnson left Duggan's house in the

[13] "Why" Long killed Johnson was not the issue. The issue was "whether" he killed Johnson. Although the State and the judge probably assumed Long killed Johnson because of his suppressed confession, it is possible that he did not. It is not uncommon for defendants or others to confess to crimes they did not commit, to get attention, or for other reasons. One purpose for suppressing confessions obtained without assistance of counsel (like Long's) is to avoid coerced confessions which are inherently unreliable.

morning and no one knows when she disappeared. Similarly, that Johnson's wrists were bound is not unusual. Tying up the victim is common in a homicide.

Contrary to Appellee's assertion, Johnson's hair was not found in Long's car. Hair **consistent with** Johnson's was found in his car. Unlike fingerprint evidence, a hair cannot be matched to a particular person to the exclusion of all others. Moreover, FBI expert, Michael Malone testified that the two hairs found in Long's car were bleached. (T. 911) Sharon Martinez, a friend of Virginia Johnson, testified that she was positive Johnson was a natural blonde. (T. 1085) Malone gave no estimate as to how may other blondes might have hair consistent with that found in Long's car, or how old the hair was. Hair might remain in carpet for a long time. Malone did not say ifr he compared the hair to that of others who had been in Long's car.

Nor was a fiber **from Long's car carpeting** found in Johnson's hair mass. Malone could not say whether the fiber came from Long's car. (T. 909-10) He had no idea how much carpeting like Long's was manufactured, how many companies the carpet was sold to, or how many cars the carpeting was installed in. (T. 927) Accordingly, the carpet may have been from any of millions of cars with the same carpeting. Johnson reported that she had many sexual partners in the last month. (T. 516) Thus, she must have been in lots of cars.

Appellee argues that this Court determined, in Long's last appeal, that the CBS tape was not merely evidence of bad character or propensity, quoting the Court's finding that it "disagreed with Long's contention that no part of the videotape is admissible

because it merely shows criminal propensity. . . " 610 So. 2d at 1280. We do not interpret this Court's finding as a determination, but rather, refusal to make a determination. The Court merely refused to find that "no part" of the tape was admissible. It concluded 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. . . Id. (emphasis added).

Swafford v. State, 533 So. 2d 270, 273-75 (Fla. 1988), cited by Appellee, and other cases cited therein, are distinguishable from this case. In Swafford, the defendant's comment when asked whether raping and shooting a girl bothered him, that "you just get used to it," was made to an acquaintance while discussing the potential commission of a similar crime. The comment was found to be an admission by a party opponent. Because Swafford was not known to have committed other such crimes, it might be inferred that his comment referred to the homicide for which he was on trial. Moreover, this evidence was combined with evidence that showed conclusively that Swafford's gun killed the girl.

In Wyatt v. State, 641 So. 2d 1336, 1339 (Fla. 1994), a more recent case in which this Court cited Swafford, the defendant's statement to his former employer that he had killed three people and could kill again was found admissible as an admission of a party in a case in which Wyatt was charged with killing three employees of Domino's Pizza. Wyatt must have meant the three murders for which he was on trial; he was not suspected of committing three other murders. Thus, the statement was probative.

Swafford made his "admission" to someone he believed was a "partner in crime," and, thus, had no reason to be a witness against him. In contrast, Long made his "admissions" to a CBS News reporter expressly for the purpose of publication. Why would he make admissions adverse to his interest in the Johnson homicide, to which he had not pled guilty? This case was on appeal and a new trial as to guilt was possible. He had pled guilty to the Tampa cases and could only win a new penalty determination. His comments about his mental problems might have helped in a penalty trial but would be (and were) disastrous at a trial as to guilt.

Moreover, he believed that his comments concerning the Hillsborough cases were protected by the plea agreement. There is no reason to believe his comments to Corderi pertained to the Johnson homicide (or other unknown homicides) rather than the eight homicides to which he had pled guilty in Tampa, pursuant to the plea agreement. If his "A, B, C, D" comment was probative as to the Johnson homicide, it was equally probative as to almost every other unsolved murder case in the Tampa Bay area, especially those involving young women. This is because it showed only propensity.

This case is more like Jackson v. State, 451 So. 2d 458 (Fla. 1984), in which this Court reversed for a new trial because the trial court admitted evidence that the defendant had bragged that he was a "thoroughbred killer." 451 So. 2d at 461. The reason this case falls under the Jackson line of cases, rather than Stafford, is that, Jackson's boast that he was a thoroughbred killer, and Long's glib remarks that it was "like A, B, C, D," were too general to point to any specific crime.

An admission made by a defendant is admissible if relevant. An admission is relevant if it tends in some way to establish the defendant's guilt. Wyatt, 641 So. 2d at 1339 (citing Stafford). Even logically relevant evidence must be excluded, if it is inadmissible under another rule. For example, section 90.403, Florida Statutes, excludes evidence where the probative value is substantially outweighed by the danger of unfair prejudice. Section 90.404(b)(2), Florida Statutes, excludes collateral crime evidence which shows only propensity and bad character.

The only reason Long's admissions would be logically relevant is to show propensity. Although propensity may be relevant, such evidence is not admissible and, thus, not legally relevant. That Long killed prostitutes[14] in Tampa is not relevant to show that he killed one particular prostitute whose body was found in Pasco County. Thus, it does not tend to establish Long's guilt in this case. Moreover, even if it were legally relevant, it would be inadmissible because the probative value (if any) is far outweighed by unfair prejudice. How could any jury fail to convict an admitted serial killer even if the State presented absolutely no evidence that he committed the crime charged.[15]

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[14] Long did not actually admit he killed prostitutes, although this may be inferred from his distinction of Lisa McVey, who was "not some streetwalker," from "the others."

[15] Appellee argues that this Court "reviewed the entire tape," and authorized its admissibility. Brief of Appellee, page 39. Although this Court stated that the entire videotape was available to both parties, it did not say the Court reviewed it. The Court concluded only that, "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. . . . Long, 610 So. 2d at 1280-81.

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.

Appellee complains because Appellant referred to as aspect of Malone's testimony noted by this Court in its earlier opinion. See Long, 610 So. 2d at 1278. (See note 9, page 44, of Appellee's Answer Brief.) Although Malone did not testify in this trial that the carpet fiber was "common," he said virtually the same thing. He said that he did not know how many miles of carpet like Long's was manufactured, how many companies the carpet was sold to, or how many cars the carpeting was installed in. (T. 927) Johnson v. State, 660 So. 2d 648 (Fla. 1995) is inapplicable because it disapproved the "cross-referencing of briefs" and the "entertaining of separate records" rather than the mention of facts set out in opinions published by this Court. The testimony from Long's last trial, published by this Court, was not suppressed as was Long's confession that Appellee suggests this Court consider. Moreover, Appellant has referred to the fact that the confession was suppressed numerous times and is not trying to hide this fact from the Court. Certainly, the Court is well aware that it suppressed Long's confession and that the carpet fiber was previously described as common. Nevertheless, if the Court wishes to strike Appellant's footnote as Appellee suggests, it makes no difference.

Appellee argues that Malone's testimony about McVey's clothing is not unduly prejudicial to Long because he concedes that McVey was in his car. (See Brief of Appellee, page 47.) The prejudice

results from the inference his testimony created that the McVey incident somehow proved that Long killed Johnson. Why would Malone even talk about the results of hair and fiber comparisons in a totally different case?

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.

Appellee's response in this issue shows precisely why a judgement of acquittal must be granted. (See response beginning on page 49 of Appellee's Answer Brief.) The first paragraph, which takes up the first page and part of the second, describes what is known about the homicide -- where the victim was last seen, when and where her decomposed body was found, evidence found at the scene, and the medical examiner's findings as to the cause of death. Considering the evidence in the light most favorable to the State, that paragraph proves only that someone killed Virginia Johnson, apparently by strangulation with shoestrings. Nothing whatsoever connects Long to this scenario.

The second paragraph describes Long's abduction and release of Lisa McVey in Tampa, and Long's admission to that offense. It is a totally separate crime, unrelated to Johnson's death. Thus, the evidence is totally irrelevant to the Johnson homicide. At most, it shows Long's propensity to abduct and rape young women.

Appellee's third paragraph describes FBI Agent Michael Malone's findings. He found that two blonde from Long's car were indistinguishable from Johnson's, and that a carpet fiber found in

Johnson's hair mass was of the same type as that found in Long's car. Neither of these findings were conclusive evidence, either that Johnson was in Long's car, or that Long killed Johnson. That McVey's hair was found in Long's car is irrelevant. Long admitted that he abducted McVey. Malone gave no statistical data concerning how may other persons (he could not even determine the sex) had hair consistent with those found in Long's car, or how many other cars the same carpet had been installed in.[16] Moreover, even if the hair were from Johnson's head and/or the fiber from Long's car, the evidence showed only that Johnson was "probably" in Long's car -- not that he killed her. The State introduced no evidence that Long killed all prostitutes he picked up.

Appellee's next paragraph describes Long's taped interview with CBS, in which he talked about unnamed "victims." He also talked about his abduction and release of Lisa McVey who was unlike his other victims. He did not mention anything even remotely connected with Johnson or a Pasco County homicide. This too is irrelevant to the Johnson homicide.

Following a discussion of relevant case law, Appellee "concludes," that "Appellant has failed to provide an innocent explanation or hypothesis of innocence that satisfactorily explains the convergence of events in the testimony and evidence below." (Brief of Appellee, page 53.) Long is not required to prove his innocence. To the contrary, "a judgment of acquittal is appropriate if

[16] As far as we know, the State did not attempt to obtain hair samples from other blonde persons in Long's life for Malone to compare to the hairs found in Long's car.

the State fails to present evidence from which the jury can exclude every reasonable hypothesis except that of guilt." Atwater v. State, 626 So. 2d 1325, 1328 (Fla. 1993).

The evidence that Appellee asserts that Long must satisfactorily explain includes the hair and fiber, the shoelaces found at the scene, and Long's "A, B, C, D" statement to CBS News. Appellee inaccurately recites that **Johnson's hair was found in Long's car** (as was McVey's) and that **a carpet fiber from Long's car was found in Johnson's hair mass.** State witness Malone could not say whether the hair was Johnson's or whether the carpet came from Long's car; in fact, he did not even give a statistical probability as to its likelihood. The most he could say was that, **if** the hair was from Johnson's head, and **if** the fiber was from Long's car, then Johnson was **probably** in Long's car at some time.

Appellee next cites Long's admission to CBS reporter Corderi that he picked up streetwalkers in Tampa and "eliminated" them, and the medical examiner's opinion that Johnson was strangled with shoelaces, as evidence that Long must explain away. That Long picked up and "eliminated" some streetwalkers in Tampa does not prove that he picked up Johnson, drove her to Pasco County, and killed her. The State provided no statistics as to how many streetwalkers lived in Tampa, how many were killed, or how and where they were killed.[17] Thus, Long's admission on the tape did nothing to connect him to the Johnson homicide. The same is true with the shoelaces. Nothing connected them to Long. Long did not

[17] Of course, this sort of evidence would probably have been excluded as irrelevant, as were Long's admissions to CBS News.

say that he strangled prostitutes or that he used shoelaces. Thus, Long had nothing to explain -- not that he was required to do so.

The bottom line is that the State proved only that, if the hairs which were consistent with Johnson's actually came from Johnson's head, and if the carpet fiber found in Johnson's hair mass came from Long's car, rather than another car with the same carpeting, then Johnson was **probably** in Long's car at some time. This is the total amount of the State's proof. The jury found Long guilty only because it heard evidence showing that Long had the propensity of abduct and rape young women, and to pick up, tie up, and "take out" unspecified persons. One might infer that he picked up prostitutes although he never actually said so. That Johnson was a prostitute, however, is not sufficient to show that she was one of the unspecified victims he referred to on the tape.

A reasonable hypothesis of innocence which the State failed to exclude is that the hair was not Johnson's, the fiber was from another car, and Johnson was killed by an unknown perpetrator. Another reasonable hypothesis was that Long at some time picked up Johnson and paid her for sex. She lost two head hairs in his car and picked up a carpet fiber. She later got into a car with another man who strangled her and left her body in Pasco County.

How many bites at the apple does the State get? The purpose of the double jeopardy clause is to protect the defendant from being tried over and over for the same crime until the State finally gets it right. This is what has happened in this case. After eliminating the illegally obtained confession from Long's first trial, the State had only the hair and fiber evidence,

neither of which were conclusive and, thus, were 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).[18] Even after the second and third trials, in which the State introduced a myriad of evidence of other crimes, the State still has insufficient evidence from which a jury could reasonably conclude that Long committed this crime.[19]

The State must present substantial competent evidence to support the verdict. Terry v. State, 668 So. 2d 954, 964 (Fla. 1996). Sufficient evidence is "such evidence, in character, weight, or amount, as will legally justify the judicial or official action demanded." Tibbs v. State, 397 So. 2d 1120, 1123 (Fla. 1981), aff'd, 457 U.S. 31 (1982) (quoting Black's Law Dictionary 1285 (5th ed. 1979)). The double jeopardy clause precludes a second trial where the 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).

The constitutional prohibition against double jeopardy was designed to protect an individual from being tried more than once

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[18] Long had not yet pled to the Tampa homicides. The CBS tape did not yet exist. Even if the prosecutor had presented the McVey evidence, he had insufficient evidence to prove Long's guilt.

[19] Had Long not confessed to this crime, Long would never have been indicted or tried. Because of the suppressed confession, however, the State, and apparently the trial judge, are determined to convict Long. Despite his confession, it is possible that Long did not commit this crime, but merely confessed to all of the crimes the police asked him about. He could easily have created a scenario as to what happened because of the lack of evidence. Of course, whether he committed the crime is irrelevant because the State is legally required to prove that he did so.

for the same offense. Green v. United States, 355 U.S. 184, 187 (1957) (citing Blackstone's Commentaries 335).

> The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

Green, 355 U.S. at 188-89. When the defendant obtains a reversal on appeal, however, he may be tried again. This is justified because he has "waived" his right against double jeopardy, or because it is a continuation of the former jeopardy. Green, at 189; see also, Lockhart v. Nelson, 488 U.S. 33 (1988) (when case is reversed due to "trial error," defendant can be retried without violation of double jeopardy clause).

Although Long raised this issue prior to his third trial, 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). It may be raised any time including post-conviction proceedings. Id. Because his first two convictions were reversed due to "trial error," Long can be retried under the case law cited above. The "trial error" in each case, however, was that the judge allowed the State to use inadmissible evidence over defense objection. We do not believe that the spirit of the double jeopardy clause is furthered by affording the prosecution another opportunity to come up with sufficient admissible evidence which it failed to muster in the first three proceedings. The prohibition against double jeopardy was designed to protect an individual from

being subjected to trial after trial, and possible conviction, for the same offense. Burks, 437 U.S. at 11; Green, 355 U.S. at 188-89. (1957). Long has been tried three times. This time the Court should grant an acquittal, rather than giving the State yet another bite at the apple.

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 its response, Appellee totally ignored Appellant's argument in this issue. Appellee asserted, incorrectly, that this Court already approved "the identical procedure" involving Long's prior rape convictions.[20] The evidence approved by this Court was the testimony of the **investigating officers** in the two cases. Here, an officer who was not involved in either investigation read the police reports prepared by the investigating officers to the jury. The defense could not cross-examine police reports.

Appellee argues that the prosecutor exercised self-restraint by not calling the victims to eliminate emotional testimony. The record contains no mention of this. The prosecutor did not decide to put on this evidence until the night before. If he contacted the victims, they apparently did not want to testify.

Appellee's suggestion (page 59, note 13) that Long could have testified to correct the errors violated his Fifth Amendment right

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[20] See Brief of Appellee, page 57. Appellee cited the case of Wyatt v. State, 641 So. 2d 355, 360 (Fla. 1994), which is found at 641 So. 2d 1336. We were unable to find the portion Appellee referred to in Wyatt. so cannot respond.

not to testify. See Rhodes v. State, 547 So. 2d 1201, 1204 (Fla. 1989) (if Rhodes wished to deny or explain this testimony, he was left with no choice but to take the witness stand himself).

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.

Long did not mention shoelaces in his admissions to CBS News. That the shoelaces found at the crime scene were longer than a normal shoelace means nothing. Perhaps they were from boots. Either Long or Johnson might have worn boots. Certainly someone used shoelaces of that length or they would not be sold. Why not Long or Johnson? Any suggestion that the length of the shoelaces shows heightened premeditation is pure speculation.

Appellee's assertion that Long admitted that he did not simply lose control during a rape or an a consensual sexual romp gone awry is, of course, based on his "A, B, C, D" statement to CBS which did not refer to Johnson. Moreover, vague generalized rambling cannot be taken as gospel. Long may have been describing two or three Tampa homicides with little thought for accuracy.

As Appellee argues, the prosecutor may well have understood the difference between simple premeditation, CCP, and HAC. If he did, he intentionally tried to mislead the jury. This is evidenced by his argument, set out by Appellee in its Answer Brief, at pages 64-66. For example, strangling is not indicative of CCP, as argued by the prosecutor, but of HAC. (See Brief of Appellee, p. 66)

Despite the cases cited by Appellee, the bottom line is that

we do not know what happened prior to Johnson's strangulation. Strangulation alone does not prove CCP. That Johnson was found thirty miles from her home shows nothing because we do not know where she met Long, how much of their encounter was consensual, or whether he even thought of killing her prior to the strangulation. She may have said or done something that caused Long to go into an uncontrollable rage, resulting in Johnson's untimely death.

Nor does the judge's boiler-plate language that the mitigation did not outweigh any one of the aggravators show that this error was harmless. In Geralds v. State, 21 Fla. L. Weekly S85 (Fla. Feb. 22, 1996), this Court stated as follows:

> The trial judge specifically stated in his sentencing order that he would impose the death penalty even without the cold, calculated, and premeditated aggravator. . . . Under our harmless error analysis, we independently examine all of the surrounding facts and circumstances and do not base our conclusions on the single subjective opinion of a trial judge. For this reason, we do not rely solely on the trial judge's explicit finding that even if we found the cold, calculated, and premeditated aggravator unsupported by the evidence, the remaining two aggravators would still far outweigh the mitigating factors, making death still an appropriate sentence.

21 Fla. L. Weekly at S85 n.14. The trial judge's attempt to "cover all his bases" does not preclude this Court's independent analysis.

ISSUE IX

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

As Appellee notes, the HAC factor is appropriate only in torturous murders that evince extreme and outrageous depravity exemplified by the desire to inflict a high degree of pain or utter indifference to or enjoyment of the suffering of another. Cheshire

v. State, 568 So. 2d 908, 912 (Fla. 1990). The State introduced no evidence that Long intended to cause unnecessarye pain or enjoyed the killing. He most likely did not intend to kill Johnson and did not bring a gun to make the killing less painful. Contrary to Appellee's assertion that Long's "A, B, C, D" comment evidences indifference, Long said he did not feel good about the murders.

ISSUE X

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

Appellee again argues that Long cannot rely on facts from this Court's opinions in prior cases. (See Brief of Appellee, page 85-86) We are not asking the Court to rely on facts but only to consider that such diverse judicial findings show that the death penalty was imposed in an arbitrary and capricious fashion, in violation of the Eighth and Fourteenth Amendments. (See Brief of Appellee, page 85, note 15) This Court routinely compares cases to determine proportionality. We are not asking this Court to consider facts that were suppressed, such as Long's confession; thus, Appellee's comparison is inappropriate.

Appellee argues that the trial court need not find that Long had an abused childhood because his mother "lied to the court." Long's mother's admission that, at Long's 1988 trial, she had not admitted Long's father had a violent temper because he might read about it in the paper and be angry (R. 1337, 1350), was fully explained. Mrs. Long admitted that she had not been completely honest about her husband's anger because of possible repercussions. (R. 1350) It is unfortunate that the judge did not realize that

fear of violence is a strong motivation to avoid provocation, and was no reason to believe that she lied about the entirety of Long's childhood. Indeed, at this trial, she "came clean," admitted that Mr. Long was violent, and explained why she had not revealed this sooner. She should be commended for her candor.

Appellee argues that defense expert, Dr. Frank Wood, had no formal medical or neurological training. Dr. Wood was a professor of neurology at Bowman Gray School of Medicine at Wake Forest. (R. 1393) He formerly served in a study section that approves NIH research grants. (R. 1810) Regardless of medical training, Dr. Wood had the most experience in PET scan interpretation. (R. 1479)

ISSUE XI

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

Appellee notes that this Court affirmed a death sentence in Ferrell v. State, 21 Fla. L. Weekly S166 (Fla. April 11, 1996), where the Court upheld only one aggravator. In Ferrell, the defendant had committed a prior similar murder. Upon his first arrest, he told the police he was glad he shot the victim and hoped she died. In Long, the court cannot consider the prior murders because of the Tampa plea agreement. Long's prior felonies were three rapes. In Ferrell, the nonstatutory mitigation merited little weight. Here, the court found one of the mental mitigators and significant nonstatutory mitigation.

Appellee contrasts this case to DeAngelo v. State, 616 So. 2d 440 (Fla. 1993). As inn DeAngelo, Dr. Berland testified at Long's

sentencing that Long was mentally ill. His MMPI profile showed that Long was psychotic, schizophrenic, manic and paranoid, with some history of hallucinations. He had both a biological mental illness and a character disturbance. (R. 1271-75) The WAIS evidenced brain damage. (R. 1283-85) That this evidence was presented only to the judge is immaterial. Even without having heard it, the jury recommended death by only a 7 to 5 vote.

In Spencer v. State, 645 So. 2d 377, 385 (Fla. 1995), this Court found that the trial court erred in rejecting Spencer's uncontroverted mitigating evidence. Although the trial judge found the testimony "speculative" and "conclusory," it was based on a battery of tests, clinical interviews, and records of Spencer's past life. Here too, Dr. Berland's testimony was based on testing, interviews, and Long's past life. The PET scan experts knew nothing about his past life and considered no tests other than the PET scan. Thus, Dr. Berland's testimony was unrebutted. Based on Berland's opinion, the judge should have found and weighed both mental mitigating factors.

Mental mitigation must be accorded a significant amount of weight based on this Court's previous decisions. See, e.g., Larkins v. State, 655 So. 2d 95 (Fla. 1995); Santos v. State, 629 So. 2d 838 (Fla. 1994); DeAngelo v. State, 616 So. 2d 440 (Fla. 1993). Although this is may be a borderline case because of Long's prior sexual battery convictions, the sentence should be reduced to life for the following reasons:

1. Although the trial court found three aggravating factors, CCP and HAC are inapplicable, leaving only one aggravator -- Long's prior violent felonies: three sexual batteries.

2. If Long committed this murder, he did so because of brain damage and serious mental problems beyond his control.

3. The trial judge found that Long's ability to conform his conduct to the requirements of law was substantially impaired, and various nonstatutory mitigation. (R. 522-29)

4. The homicide was not committed for financial gain. It was not a contract killings, drug-related killing, or mafia hit; Long was not involved in organized crime or drug-related activities.

5. The homicide may have occurred because of an involuntary rage that Long could not control due to his mental problems.

6. There was no evidence that Long enjoyed killing.

7. Long was divorced with two children, and a mother who loved him; he provided for his family and treated them well.

8. The jurors recommended death by only a 7 to 5 vote, even though they did not hear the psychiatric testimony; thus, five jurors did not believe the death penalty was warranted despite their knowledge that he was admittedly a serial killer (CBS tape).

9. If Long's sentence is reduced to life, he will never be released from prison because he has another death sentence and many consecutive life sentences.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Robert J. Landry, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, on this 16th day of September, 1996.

Respectfully submitted,

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