IN THE SUPREME COURT OF FLORIDA

JAMES RANDALL,	:	
Appellant,	:	
vs.	:	Case No. 90,977
STATE OF FLORIDA,	:	
Appellee.	:	
	:	

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

INITIAL BRIEF OF APPELLANT

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TENTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE

James Randall was charged by indictment filed September 16, 1996 in Pinellas County with first degree murder of Wendy Evans (on October 20, 1995) and Cynthia Tate Pugh (on January 18, 1996) (R1/3-4). The two counts were initially severed; then were reconsolidated on motion of the defense (see R2/304; 6/966-67; 8/1236-37; 9/1396; T14/3-5). After pre-trial hearings on the defense's motion to suppress (see R4/630-33; supplemental record (SR) 1794-1916) and motion in limine (seeking to exclude, inter alia, evidence of other crimes, proclivity for choking women during sexual activity, appellant's fugitive status from the State of Massachusetts, and his flight from law enforcement officers on June 27, 1996) (see R4/628-29; 6/860-65,868-76,929-30,948-1005), the case proceeded to trial on February 25 - March 7, 1997, before Circuit Judge Susan F. Schaeffer and a jury. Appellant was found guilty as charged on both counts, and the jury unanimously recommended sentences of death (R9/1350-51,1372-73;T23/1436; 24/1613-14). On April 4, 1997, the trial court imposed death sentences (R9/1391-1406; 13/1748-66); this appeal follows (R10/1568).

STATEMENT OF THE FACTS

A. Suppression Hearing

Sergeant Stefanie Campbell and Detective Linda Hilliard of the Pinellas County Sheriff's Office went to the 3079 Belcher Road apartment shared by Terry Jo Howard and appellant James Randall on May 21 or May 26, 1996 (SR1809,1811-12,1822). Although they had no warrant, they were instructed to obtain some dog hairs and some carpet fibers for the purpose of comparison with evidence discovered on the bodies of the Clearwater murder victims (SR1810-11, 1821-22). The officers posed as individuals who were starting a dogwashing business. They handed out fliers in the neighborhood, and when they knocked on the door of apartment #2 Terry Jo Howard answered. They offered her a free sample dogwash and she invited them in. (SR1811-13,1821) Detective Hilliard washed Ms. Howard's dog in the bathtub and dried her off with a towel, thereby securing the dog hairs (SR1811,1813-14,1819). Then they all sat in the living room, talking and playing with the dog (SR1814). During this time, Sgt. Campbell pulled a few fibers from the tassel portion of a maroon or pink rug, as well as a sample from the tan carpeting beneath it (SR1817-18).

Corporal John Quinlan assisted in the Evans and Pugh crime scene investigations (SR1824-25). Some pink fibers and potential dog hair was recovered from both bodies, and there was a tire

impression at the scene where Evans' body was located (SR1825-26). The tire track was identified as possibly being made by a Firestone AXT, and it was learned that a set of such tires had been purchased by Terry Jo Howard from Don Olson Firestone in September 1995 (SR1827,1849,1858). These were the only four tires of that variety sold by Don Olson in 1994 or 1995 (SR1858-59). The officers then located a truck which was owned by Ms. Howard and driven by appellant (SR1827,1848). Their investigation focused on appellant and he was put under surveillance (SR1827-28,1849-50)

On May 6, 1996, while he was under surveillance, appellant went to Don Olson and replaced the two rear tires on his white Dodge pickup (SR1828). This was observed by investigators. The two rear tires were subsequently seized by Corporal Quinlan, who secured the advice of an expert, Peter McDonald (SR1828-29). McDonald suggested that it would be helpful to have the two front tires as well, so they could put them all on a vehicle similar to appellant's truck and make ink imprints of the tread (SR1829,2848, 1858). Quinlan had the manager of the Don Olson store call Terry Jo Howard and tell her that there was a problem with the two newly purchased rear tires, and if she came back in they would as a courtesy replace all four tires free of charge (SR1829-31). About a week later on May 17 -- after the manager rescheduled a missed first appointment -- Ms. Howard and appellant came in and had the

four tires replaced (SR1832-34). The tires were subsequently secured as evidence (SR1834).

In the early morning of June 27, 1996, Corporal Quinlan and Detective Klein went to the Belcher Road apartment to talk to appellant (SR1835-36). There were no other officers in the immediate vicinity, but some of the surveilling investigators (who were now down the street) had earlier watched Terry Jo Howard as she left the residence (SR1835-36,1855). Corporal Quinlan testified that it was not his intention at the time to arrest appellant for the murders of Cynthia Pugh or Wendy Evans (SR1836). His intention was to speak to appellant and asked him some questions"[i]n a non-custodial way" in the ongoing investigation of the Clearwater homicides (SR1836,1857). However, Quinlan was aware that appellant was a fugitive from Massachusetts and there was an outstanding warrant for his arrest (SR1836,1845,1852-57). The plan was that as soon as appellant entered his vehicle, the officers were going to stop him and arrest him on the outstanding Massachusetts warrant (SR1852-57). Quinlan acknowledged that the rationale for waiting to make the arrest until appellant was in his truck was to enable the officers to conduct a warrantless search of the vehicle incident to the arrest or pursuant to the Carroll[1] doctrine (SR1854-55).

[1] Carroll v. United States, 267 U.S. 132 (1925).

When appellant opened the door, Corporal Quinlan identified himself and asked him if Terry Jo Howard was home (although Quinlan knew she wasn't) (SR1837-38, see 1835,1855). Quinlan informed appellant that he was investigating some open homicides, and asked him if he was aware of the prostitute murders in North Pinellas (SR1839). Appellant indicated that he was aware of these events from television and newspaper reports (SR1839). Quinlan said he was contacting all women who had been arrested for prostitution in the North Fort Harrison area of Clearwater, and that he needed to speak with Terry Jo (SR1838-39). He showed appellant some photographs and asked him if Terry Jo knew any of them, or whether any of them had even been in her apartment or her vehicle (SR1839-40,1842). Appellant responded that they would have to ask Terry (SR1840, 1856). Appellant was then asked if he knew any of the victims or had had any contact with them and he replied that he did not (SR1840,1842).

The entire conversation lasted about ten minutes (SR1843). Corporal Quinlan never entered the residence, and appellant never gave any indication that he wanted to terminate the conversation (SR1843). When Quinlan left the front door area of the apartment, appellant went back inside where, Quinlan testified, he was free to go about his business (SR1844).

About ten minutes later, another team of detectives observed appellant leaving his apartment and getting into his truck

(SR1844,1855). A man named Maitland Nixon got into the truck with him and they drove southbound on Belcher Road (SR1844,1855). At this point a uniformed patrol attempted to initiate a traffic stop, using the overhead lights (SR1845). Their intent was to arrest appellant on the outstanding Massachusetts warrant (SR1845). However, the officers were unable to successfully arrest him on June 27, 1996, because he fled (SR1845). He was apprehended four days later on July 1, 1996 (SR1845).

On June 27, after appellant fled the police, Terry Jo Howard was contacted by law enforcement and she consented to a search of the apartment. She also gave consent to law enforcement to take the entire pink carpet which was in her living room, and to remove dog hairs from her pug dog (SR1845-46).

B. Trial

On the morning of October 20, 1995, a U.P.S. delivery driver found an unclothed body of an adult female in a wooded area just off Tampa Road and Myrtle Lane in northern Pinellas County (T16/427-31,435-37; T17/525). The driver flagged down a sheriff's deputy and reported what he'd seen (T16/431). The deceased was subsequently identified as Wendy Evans, who worked as a prostitute in the North Fort Harrison area (T16/438-40; 17/491; see T16/412-17,422-25). It appeared to the crime scene investigator that she had been killed at another location (T16/438,455). There was no

clothing or jewelry on the body, and none was found in a search of the area (T16.437,438,441). Trace evidence was collected from the body (T16/454-60,470,474). The investigators observed what appeared to be tire impressions in the mud and in the grass (T16/444-45,461-62,469). According to Detective Madden, the tracks in the mud "looked as though they had some characteristics, some detail to them", while the ones in the grass had no identifiable or discernible characteristics (T16/446-47). The tire impressions were photographed and casts were made (T16/444,446,462-68). Photographs were subsequently taken of the casts (T16/474-75)

On January 18, 1996, construction workers at the Emporium Flea Market on U.S. Highway 19 in Palm Harbor discovered the body of a female, later identified as Cynthia Pugh (T17/526,531). She was lying on her back beside a dumpster in a parking lot at a commercial site (T17/529-31,545). There was no clothing or jewelry on the body and none was found at the scene (T17/530). Trace evidence, including a brown and white piece of cigarette filter paper which was visible on the victim's right breast, was collected (T17/533-34,543-49). Crime scene technician Wold acknowledged that it was a windy day, and she didn't know what the wind might have blown onto the body before she arrived at the scene (T17/550).

Ms. Pugh, like Ms. Evans, worked as a prostitute on North Fort Harrison (T16/412-141,417-19,477-79). When last seen, the night

before, she was wearing dark jeans, a white shirt, and a dark jean jacket (T16/479).

The cause of death, in each case, was manual strangulation (T17/494-95,577). Both victims had external (Evans) or internal (Pugh) neck injuries, the hyoid cartilages were fractured, and Ms. Pugh had petechial hemorrhages in her eyes (T17/505-07,509-11,514,421,582-85,588,593-96,601). Dr. Hansen, who performed the autopsy on Ms. Pugh, testified that unconsciousness would have occurred from within seconds to a minute if the veins and arteries were compressed. If only the airway was compressed, it would be 30 seconds to a minute, maybe up to several minutes (T17/600). To cause death, pressure would have to be applied several minutes longer (T17/580,600-01). Dr. Davis, who conducted the Evans autopsy, stated that the time for unconsciousness to result would vary with the type of pressure applied; it could be 3 to 5 minutes or it could be shorter (T17/498-99,501,519). Death could occur within a very few minutes, or -- to be absolutely certain -- 5 to 10 (T17/500). Dr. Davis acknowledged that his time estimates were at the long end of the range; he didn't want to be accused of understating (T17/518).

Both Evans and Pugh had sustained other injuries. Ms. Evans had three broken ribs, and bruises on the left side of her head, left shoulder, in front of the hip bone, and right thigh (T17/503-05,507-08,511-13). The bruises occurred prior to death but Dr.

Davis couldn't tell whether they occurred prior to unconsciousness (T17/508-09,519-20). There was an injury to the external genitalia, but that could have been there for some period of time and was not necessarily recent (T17/513,519). No sperm or semen was present (T17/519; see 610). A lab analysis determined that there was cocaine in Ms. Evans' system at the time of her death (T17/513).

Ms. Pugh had sustained blunt trauma to the head and face, with bruises and scrapes on her cheeks, chin, and underneath her lip, and a small laceration to the back of her head (T17/577,582-86,591-94). There was an older, pre-existing bruise, with stitches present, above the eyebrow (T17/581-82,6-1-02). There were also small scrapes and bruises on her chest, under her right shoulder bone, and left hip, and abrasions on the back of her elbow and on her left hand (T17/585-86,594,605). The abrasions on her chest were consistent with being caused by a surface such as a rug, and were consistent with other things as well (T17/587,602). There was a very thin linear area of "black, sticky, adhesive-type substance" around each wrist. The substance was not unlike what you would find on the underside of duct tape, although duct tape is pretty wide and these lines were thin (T17/586-87,603). Dr. Hansen could tell that some, but not necessarily all, of the bruises and abrasions occurred while the victim was alive, because there was still some blood circulation (T17/598-600). Dr. Hansen could not

tell whether she was conscious or unconscious when those injuries occurred (T17/598). No sperm or semen was found (T17/575-76; see 614-15). Toxicology tests indicated the presence of cocaine and cocaine metabolites in Ms. Pugh's system at the time of her death (T17/597).

Tire print identification expert Peter McDonald received all four tires which had been removed from appellant's truck (T18/637). Based on the tests he conducted, and "based upon [his] knowledge of the relative rarity of this particular tread design and size, the mold characteristics that [he] found in the tire track at the scene, and the specific indications consistent with the delamination from the right rear", McDonald expressed the opinion that it was "a virtual certainty" that the right rear tire from appellant's truck left the tire impression at the Wendy Evans' crime scene (T18/693). McDonald acknowledged that he was not making a positive identification (T18/694).

Raymond Arel lived next door to the Belcher Road triplex where appellant and Terry Jo Howard resided (T18/747-48). On January 17, 1996, Arel arrived home from work at around 10:30 p.m. and a few minutes later, as he was taking out the garbage, he saw Jim (appellant) and another person walking into appellant's apartment (T18/751-55,760,762). The other person was either a female or "a guy with long hair" similar to Arel's; he saw them for just a second or two from 40 feet away, and he couldn't tell the person's

gender (T18/760-66). The other person was not Terry Jo Howard; he or she was shorter than appellant and also smaller than Terry Jo, who is a pretty big girl (T18/761-63). The person had light colored hair and was wearing dark jeans or pants and a bulky sweater or sweatshirt (T18/764).

Corporal John Quinlan testified about his conversation with appellant at the doorway of his apartment on the morning of June 27, 1996 (T18/768-70). [See Statement of the Facts -- Suppression Hearing]. Defense counsel asked for and was given a continuing objection to evidence of statements and appellant's actions (T18/769-70). Quinlan and Detective Klein identified themselves and asked if Terry Jo Howard was home (T18/770-71). They stated that, in the course of investigating the Pugh and Evans homicides in the North Fort Harrison area, they were contacting prostitutes (T18/771). Appellant indicated that he knew that Terry Jo Howard had been arrested for prostitution in the past (T18/771). He was aware of the homicides from TV and newspaper reports (T18/771). At some point in the conversation, Detective Klein got identification information from appellant, including his name, address, date of birth, and social security number (T18/777; 19/815-16).[2]

[2] Quinlan testified on cross that the information matched that which was on the Massachusetts probation warrant he had, except that a couple of numbers in the social security number were transposed (T19/815-16).

Quinlan showed appellant photographs of the homicide victims and asked him if Terry Jo knew them. He replied that they would have to ask Terry (T18/772,777). Asked whether Terry had ever had either of these women inside their apartment, or given a ride to either of them in their truck or car, appellant again answered that they'd have to ask her (T18/774-77). The officers then asked appellant if he knew either of the women, or if they had even been in his apartment or vehicle to his knowledge; his answer to each question was no (T18/772-73,775-77). According to Quinlan, appellant's right hand, which was up resting against the door, would tremble when he extended the photographs, and stop trembling when he withdrew them (T18/773-76). Appellant's left hand was down at his side, out of Quinlan's view (T18/775-76). Quinlan acknowledged on cross that he is not familiar with a neurological condition called essential tremors (T19/816).

Quinlan described the location in Oldsmar near Myrtle Lane and Tampa Road where Wendy Evans' body was found, and asked appellant if Terry Jo Howard had knowledge of the area or any personal business contacts there. Appellant said he'd have to ask Terry (T18/ 777). Asked about his own familiarity with the area, appellant said he knew where it was, but he had not been there and had no contacts there (T18/777-78).

The ten-minute conversation ended, and the officers went back to their vehicle (T18/778, see 768). Quinlan testified that it was

never made known to appellant during this conversation at the doorway that he was a suspect in the homicides (T18/782-83, 19/816). It was not until four days later, on July 1, after he had been arrested on the outstanding warrant, that he was notified that he was a suspect in the murders of Evans and Pugh (T18/783, 19/816).

Following the conversation in the doorway, after the officers left, appellant picked up Maitland Nixon and left in his truck (T18/778; 19/816) A decision was made to stop appellant's vehicle with a uniformed cruiser (T18/778). [Actually, as he acknowledged on cross, Corporal Quinlan was aware at the time he approached appellant at his residence that there was an outstanding probation warrant from another state (T19/815), and the traffic stop was being made in order to arrest appellant on the outstanding Massachusetts warrant (T19/816)]. As appellant traveled southbound on Belcher Road approaching State Road 580, "the patrol deputy initiated the traffic stop by turning his overhead lights on" (T18/782-83), and "the defendant fled at that point" (T18/782).

With the uniformed cruiser in full pursuit, appellant turned into a Chevron station, went through an alley, entered into an area called Heather Glen, and made a right turn which put him eastbound on Evans Road. At this point, his speed was excessive, over the speed limit. Quinlan was now involved in the pursuit and other units were called in (T18/779). Appellant proceeded to go east and

ran a stop sign, headed toward U.S. 19 (T18/779-80). The pursuing police cars had their overhead lights and sirens on (T18/780). Appellant turned southbound on 19, made a U-turn under the overpass, and headed northbound at a speed of seventy miles per hour (T18/780). The officers couldn't keep up with him because of traffic conditions -- "we couldn't drive as recklessly as he did" -- and they actually lost sight of him for a while (T18/780). Appellant made several more turns and went into a cul-de-sac called Mayfair (T18/780). At the end of the cul-de-sac the passenger, Maitland Nixon, was able to bail out of the vehicle; appellant left the roadway, ran up onto the grass, and went between two houses (T18/781). Staying off the roadway, appellant went a couple of streets over, abandoned his vehicle, and fled on foot (T18/781-82). Quinlan testified, "[W]e had, probably, between Clearwater Police Department, the Sheriff's Office and the helicopter, K-9, SWAT team, we had probably in excess of a hundred people out there", but they were unable to locate him (T782).

Appellant was arrested four days later, on July 1, when he was caught returning to his residence on Belcher (T18/782).

On June 27, 1996, after the events described by Corporal Quinlan took place, sheriff's office forensic specialist John Grubb collected several items from appellant's and Terry Jo Howard's residence, including the maroon throw rug (T19/832-41). Another specialist, John Mauro, while processing the apartment noticed

debris which appeared to be cigarette filter paper on the living room and bedroom floor (T19/844-47). On the same date, Detective Jeffrey Good obtained a dog hair sample from Terry Jo Howard's pug dog, Penny (T19/854-56). Good also testified that in January 1997 a blood sample was drawn from Ms. Howard and mailed to Cellmark (T19/856-57,864-65).

FBI hair and fiber expert Christopher Hopkins compared the dog hair samples from Terry Jo Howard's pug dog, Penny, with trace evidence recovered from the bodies of Ms. Evans and Ms. Pugh (T20/908-11,924-25,934-35,938-44,946-48). He testified that, with respect to dogs and cats and most other animals, there are two types of hair that make up the coat (T20/912). Fur hairs are small and fine, and they tend to look alike from breed to breed (although they may contain characteristics which are consistent with some breeds and not others), while guard hairs are thicker, coarser, and contain microscopic characteristics which may enable the examiner to distinguish more specifically between breeds (T20/912-13,945-46). Hopkins testified that the four brown and white banded guard hairs which were obtained from Cynthia Pugh's body were microscopically consistent with Penny's guard hair (T20/929-32,938-43). Banded hair is uncommon for dogs (T20/940-41). Three white fur hairs from Pugh's body were consistent with Penny's fur hair (T10/930-32,938-43). A single fur hair from Wendy Evans' fingernail scrapings was also consistent with Penny's fur (T20/911-

12,938-39).[3] The guard hairs and the fur hairs on the bodies, in combination, was consistent with coming from the breed of pug, and Hopkins could not exclude Penny as a possible source (T20/943-44).

FDLE microanalyst Jerry Cirino received trace evidence from the bodies of Ms. Evans and Ms. Pugh in or prior to March 1996 (T20/957-58,967-68). Among the items examined were cotton, wool, and synthetic fibers; pink, green, orange-red, black, pale brown, and white in color; some were compared, some were not compared, and some were of limited comparison value (T20/958-71,944). Cirino compared seven pale pink, coarse, synthetic fibers from Evans with a single pale, pink fiber from Pugh (T20/972-77). Three of the fibers from Evans and the one from Pugh were Nylon 6 fibers (a common, mass-produced carpet fiber); these were consistent in all observable microscopic characteristics and could have originated from the same source (T20/973,976-77,992-93). [A ninth pale pink synthetic fiber from the vaginal combings of Ms. Evans was later received from FBI agent Hopkins (T20/978-79)]. Cirino passed that information on to law enforcement (T20/977-78).

In September 1996, Cirino was supplied with a rug from the residence of appellant and Terry Jo Howard (T20/979-81,985). The rug appears to the eye to be maroon, mauve, or plum, but the individual fibers are pink (T20/985-88). The interior section is

[3] Hopkins acknowledge on cross that he had stated in his report that the fur hairs found on Pugh and Evans were too limited to be of value for comparison purposes (T20/943-44).

composed of pale pink Nylon 6 fibers, and the fringe is composed of polyester fibers (T20/982-84). Nylon 6 and Nylon 66 are the two most common forms of synthetic carpets and rugs throughout the United States, and they are mass-produced daily (T20/992-93). Polyester is also mass-produced and is used in rugs, clothing, and numerous other products (T20/993). Cirino acknowledged that there could be "easily thousands" of things all around us comprised of both Nylon 6 and polyester (T20/993).

Cirino testified that, of the eight pale pink fibers on Ms. Evans' body, the four which were Nylon 6 fibers (including the fiber from the vaginal combings) were microscopically consistent with the interior portion of the rug from appellant's living room, and could have originated from that rug (T20/985,989-93). The single pale pink fiber from Ms. Pugh's body was also consistent with the central portion of that rug (T20/991). Of the four remaining pale pink fibers from Ms. Evans, one fiber was consistent with the polyester fringe of the rug (T20/990-93). The three other pale pink fibers found on Evans' body did not match anything Cirino examined (T20/993).

Of the fibers that were consistent with the rug, the color of the dye also matched (T20/994-97). Cirino acknowledged that pale pink is a fairly common color, and he does not know how many pale pink Nylon 6 fibers are in existence (T20/997).

The next morning of trial, defense counsel -- apparently thinking that Linda Graham (appellant's ex-wife) was to be the next state witness (see T21/1012) -- renewed his pretrial objection to the evidence of appellant's propensity to choke women during sexual activity (T21/1002-11). [In the Williams Rule hearing on February 19, 1997, less than a week before trial, the defense argued extensively that the choking incidents involving appellant's girlfriend Terry Jo Howard and his ex-wife Linda Graham were inadmissible and should be excluded (R6/977-81,990-96). While prohibiting any mention of kidnapping or rape, the trial judge ruled that the choking incidents, and the testimony that appellant obtains sexual gratification from choking women, would be admitted into evidence (R6/983-84,996). On the morning of jury selection, February 24, 1997 (in conducting a colloquy with appellant to ensure that his waiver of the severance of the counts and the cross-admissibility of the Evans and Pugh homicides was voluntary), the judge recognized that as to the other items in the state's Williams Rule notice, "Obviously, Mr. Schwartzberg [defense counsel] objects to those items coming in, and I understand that" (T14/5). A written order (dated March 14, 1997, nunc pro tunc to February 24, 1997) was entered reaffirming that the state would be allowed to present evidence of the manual strangulations of Terry Howard and Linda Randall (Graham), as well as the testimony of either David Oikemus or Dr. Wesley Profit regarding sexual

gratification (R8/1236-39)]. While the renewed objection at trial was focused on Linda Graham, this was likely under the assumption that she was to be the next witness. During the renewed argument on the subject, the prosecutor brought up Terry Jo Howard:

> But what I believe [Ms. Graham's] testimony will be -- and I have worked to -- through a combination of somewhat leading questions, and trying to focus the inquiry, to try to comply with the Court's order, which I understood was choking behavior during sexual activity, or as a prelude to sexual activity, was relevant to establish motive in this case. And although we were not to prove it up as Williams Rule of a rape or a kidnapping, you were going to allow evidence of force or violence that occurred during the choking behavior, that that was permissible. That was my understanding of your ruling, as to Linda Graham.
>
> And of course, we've got similar incidents with Terry Howard, that you also ruled were admissible. And this is illustrative and corroborative.

(T21/1005-06).

The trial court adhered to her previous ruling:

> And yes, I agree with you, this is prejudicial. Williams Rule evidence generally is.
>
> But again, as I told you, this is a circumstantial case. I've heard it. And once again, I think that it is relevant. It tends to show, from the State's perspective, motive. It tends to show identity. It tends to show lack of mistake or whatever that -- accident or mistake. And so I'm going to let it in.

(T21/1009).

Shortly thereafter, the judge asked the prosecutor if Linda Graham was first, and the prosecutor answered "No. I was going to put on Terry Howard first, but . . ." (T20/1012)

Terry Jo Howard testified that when she met appellant in February 1994 she was a prostitute on the streets with a cocaine habit (T21/1014-15). He picked her up and they had sex (T21/1014). A romantic relationship developed between them, and they moved in together. Terry gave up the streets and her drug habit, and she lived with appellant until his arrest on July 1, 1996 (T21/1015, 1029). She testified that she was in love with appellant then, and she still loves him (T21/1032,1038,1045).

Within the first couple of months of their relationship, it became obvious that appellant had a problem with choking behavior during sexual activity (T21/1016,1019-21,1045-46). Appellant admitted to her that he became sexually stimulated by choking his sexual partners (T21/1016). Terry acquiesced "because I didn't want him to not get what he needed and then kill me two years down the road" (T21/106-17). She wanted to help him out with his problem, and she wanted him to have some control over it (T21/1017, 1045-46). [At this point the trial judge gave the jury a Williams Rule instruction to consider the evidence of the manual strangulation of either Terry Howard or Linda Randall [Graham] for the "limited purpose of proving the motive, intent or identity of James Randall, or the absence of mistake or accident on the part of

James Randall" in the Evans and Pugh murders (T21/1019, see 1017-18)]. Appellant would choke Terry from a face-to-face position, with both hands around her neck (T21/1021). While he was having orgasm, he would sometimes get up off choking her and start striking the pillow (T21/1021). Although Terry acquiesced to being choked, she was still distressed by it (T21/1020). It seemed to excite appellant more if she fought or showed fear; when she changed her reaction and did nothing, the conduct diminished and then pretty much stopped (T21/1020-21,1046-47).

However, in early October 1995, on the day of the O. J. Simpson verdict, Terry disclosed to appellant an incident (which had occurred during his recovery from heart surgery) in which a former employer or co-worker had coerced her into sexual activity (T21/1022). Appellant became angry. Terry helped him pack a bag, told him to get whatever he needed out of the bank, and he left (T21/1023). She didn't know if he was coming back. Later that day or the following day appellant returned. He grabbed Terry by the throat, threw her up against the wall, and began choking her and screaming at her "Don't you ever do that again. Don't you ever let another man take advantage of you ever again" (T21/1023). He continued to choke her with both hands around her neck until she lost consciousness (T21/1023-24). When she woke up she was on the bed and appellant was having sexual intercourse with her (T21/1024). Asked by the prosecutor to describe her injuries to the

jury, she testified, "You could not see anything but the blood, about [an] eighth of an inch thick in my eyes. There was no white. My voice, my throat was sore, and it hurt for a long time. But for about eight weeks you could not see any white in my eyes. . . . Every capillary in my eyeballs had been burst" (T21/1024).

Around that time, Terry had been planning to visit her mother, who was seriously ill, and her sister Tamara in West Palm Beach. She delayed the visit because of her injuries, and then went there for the last two weeks of October (T21/1025). Appellant drove her to West Palm Beach in their truck; he stayed over for a night and then drove back to Pinellas County (T21/1027-28). Appellant brought Terry's mother's pug dog, called Princess Penny Pickles, back with him, because her mother had become too ill to take care of the dog (T21/1027-28,1035-36). Terry remained in West Palm Beach and -- after a trip to North Carolina with her relatives -- returned to Pinellas County around the end of the month (T21/1031-32). While in North Carolina, she bought a car. After that, appellant drove the truck and Terry drove the Pontiac (T21/1032).

Terry went back to West Palm Beach on Christmas day; she wasn't sure if appellant came with her (T21/1034). On January 16, 1996, she went there again and stayed a week, to help out while her sister had surgery (T21/1033). Appellant did not accompany her on this trip (T21/1033-34). Terry testified that she and appellant both had ATM cards on her bank account; if there was a transaction

in Pinellas County on January 17, 1996, she did not do it because she was in West Palm Beach (T21/1035).

Terry testified that the dog, Penny, smoked cigarettes. Terry would give her a cigarette butt -- she wouldn't take it unless it had been smoked -- and she would flip it around in her mouth and suck on it until all the nicotine was gone. When she got tired of it she would just spit it out somewhere, so there were chewed up cigarette filter papers around the house most of the time (T21/1036-37; see also T21/1071-74 (testimony of Terry's sister Tamara Garcia)).

Terry testified that throughout the two and a half years she lived with appellant and saw him on a daily basis, he shakes when he is holding a newspaper or anything along those lines. After his heart surgery he started shaking more (T21/1059).

After appellant's arrest, Terry would visit him in the jail (T21/1038,1050). On one of those visits, in July 1996, she asked him "Why not me?", and appellant responded by air-writing backwards (so she could read it) on the window glass, "I hurt others so that I would not hurt you" (T21/1038-40,1050-54,1057-58,1060). She acknowledged on cross that on in an August 1996 sworn statement she had told the assistant state attorney she wasn't certain what appellant had written on the window and there were a lot of words she really didn't understand (T21/1054-55). At trial she asserted

that she was lying in the sworn statement because she was confused, upset, and in fear for her life (T21/1054-56).

Terry Jo Howard testified that she has been convicted of several felonies; she had no idea how many convictions, but she volunteered that she has been arrested 57 times (T21/1041).

Recalled briefly by the state on the next day of trial, after several intervening witnesses, Terry testified that she did not know Wendy Evans or Cynthia Pugh, and to her knowledge neither of them had ever been in her residence or vehicles (T22/1130-31)

Tamara Garcia is Terry Jo Howard's sister (T21/1063-64). When Tamara first met appellant, the two sisters were not close. Terry's troubles with drugs and prostitution had alienated her from her mother and sister (T21/1065). It wasn't until Terry and appellant started going out together and became a couple that Terry re-entered Tamara's life, and by the time of the trial the two sisters had developed a close relationship (T21/1065,1077-78).

During Terry's October 1995 visit, Tamara noticed that both of her eyes were bloodshot and it appeared to be the result of an injury (T21/1071). Terry told her sister how the injury occurred (T21/1071). Terry came down for another visit during the week of January 17, 1996, and from January through July of that year the two sisters visited each other frequently (T21/1074-75,1078).

Bank records were introduced which showed two ATM withdrawals of forty dollars each from Terry Jo Howard's account on January 17,

1996. The time and location of the first transaction was 9:10 a.m. at the East Dunedin branch of the Barnett Bank, while the second transaction occurred at 9:00 p.m. at the Bayshore office on Alternate 19 (T21/1097-1101).

Linda Graham, a resident of Massachusetts, was married to appellant for seven years, from June 1979 until January 1987 (T21/1101-03). During the course of their marriage, appellant would choke her during sexual activity (T21/1103-04). He derived sexual excitement or pleasure from choking her (T21/1103). Appellant would get on top of her and put his hands around her neck, using force (T21/1103). On several occasions this resulted in injury (T21/1103).

Linda Graham then testified about two specific incidents. On July 8, 1986, in their home, appellant choked her manually, from behind and then on top of her (T21/1104). The choking was against her will (T21/1104). It was clear to her that appellant was getting sexual excitement from her reaction to being choked (T21/1104). As a result of this incident, she sustained bruises on her neck, soreness and stiffness (T21/1104).

On September 6, 1986, appellant choked her during a sexual encounter that occurred outside her vehicle (T21/1104-05). He tied her hands behind her back with her shoelace, got on top of her, and choked her with his hands, causing marks on her neck and arms (T21/1105).

Dr. Wesley Profit, a Massachusetts psychologist, was employed in August 1986 at Bridgewater State Hospital, where he had occasion to interview appellant. Appellant described his having the urge to choke his partners during sexual intercourse or activity. This contributed to his arousal and enjoyment of the sexual encounter, and he also got pleasure out of choking (T21/1107-08). He indicated that force or violence was part of his choking behavior (T21/ 1110).

Angeli Ranadive, a forensic scientist at Cellmark Diagnostics, testified that she conducted DNA tests on the piece of cigarette filter paper which was found on Cynthia Pugh's body, and on a blood sample from Terry Jo Howard (T22/1187,1197-98). In her opinion, all six genetic markers were the same, and thus Ms. Howard cannot be excluded as being the source of the DNA on the cigarette paper (T22/1205,1207). Another Cellmark employee, population geneticist Lisa Forman, estimated that the frequency of the genetic profile found on the cigarette paper and in Ms. Howard's blood would be approximately 1 in 39,000 for Caucasians, 1 in 430,000 for African-Americans, and 1 in 140,000 for Hispanics (T22/1251, see 1253-54). These conclusions were based on a database consisting of "about a hundred and five Caucasians and about a hundred African-Americans" (T22/1243).

The testimony of Maitland Nixon (who was hospitalized with an illness) was read to the jury by stipulation (T22/1233-34,1236;

R8/1249-51). Nixon was appellant's neighbor, and would sometimes assist him in installing windows at different jobsites. On occasion they would drive home from work via North Fort Harrison (T22/1243). They sometimes talked about prostitutes. When appellant saw a female he believed to be a prostitute he would point her out and say, "She's a working girl" (T22/1235). In May 1996, Nixon noticed that the right rear tire on appellant's truck was making noise; he checked it and found that the belts had broken (T22/1235). He later learned that appellant had had both rear tires replaced (T22/1235).

On June 27, 1996, Nixon was with appellant when he left his residence in the white pick-up truck around 8:00 a.m. While southbound on Belcher Road, Nixon noticed a deputy behind them and told appellant, "I think we are going to be pulled over" (T22/1235). Appellant pulled into a Chevron station and, as the deputy followed, appellant said "I'm gonna run. I'm gonna run" (T22/1235). As the deputy was getting out of his cruiser, appellant took off. During the pursuit, appellant told Nixon that the cops had been to his house that morning. When Nixon asked to be let out of the truck, appellant said, "I can't do that, man. I can't do that. I got to go. I got to go. It's my life. I can't stop. They gonna -- they want me. They're gonna ship me back" (T22/1235-36). He kept repeating "It's my life" (T22/1236). Nixon asked him

what was up, and appellant replied "They want me for something up north" (T22/1236).

C. Penalty Phase

Appellant's ex-wife Linda Graham was recalled. In the early morning hours of July 19, 1986, appellant arrived home around 2:00 a.m. and came into their bedroom. He wanted to have sex and she wanted to go to sleep. He told her she was going to have sex with him whether she wanted to or not. He began choking her, squeezing hard on her neck, and forced her to have sexual intercourse (T24/1475-77).

The next morning he acted like nothing happened; he said he was sorry and wouldn't do it again. She got the kids together and went to a shelter (T24/1477). Appellant checked himself into a hospital, and then went to another hospital for a psychological evaluation (T24/1478). Linda visited him there, along with his parents (T24/1478). She pressed charges, got a restraining order, and moved out (T24/1478).

On September 6, 1986, after his discharge from Bridgewater and while they were in the process of getting a divorce, appellant's sister called Linda and asked if she could take her ten year old son Craig to an air show. She also asked her to bring some of appellant's clothes and work tools. They met halfway, in Rutland, Massachusetts (T24/1478-79,1491). After dropping Craig off, Linda started back home with the two younger children. She saw appellant's car off to the right, and appellant was standing in the middle of the road. She stopped; he came over and said all he

wanted to do was talk (T24/1480). At some point he got in the car and began choking her, making her lie on the floor. The kids woke up and started crying. Appellant drove down the road and pulled off into the woods. He made Linda get out of the car, and made the kids stay inside the car with the door locked (T24/1480-82). He tied Linda's hands behind her back with her shoelace, but she soon became untied (T24/1482),1490). He continued to choke her and forced her to perform oral sex (T24/1483).

Afterwards, Linda tried to remain calm and convince appellant she wasn't going to turn him in. They drove around for at least an hour. As it was getting dark, appellant said he wanted to have sex with her one more time (T24/1483-85). The pulled off at a shooting range; he started choking her again and they had sexual intercourse (T24/1485). She again assured appellant she wouldn't turn him in. She let him out of the car and drove to her mother's house, and from there to the police station (T24/1485-86). The entire sequence of events lasted three hours (T24/1486).

Linda testified (and documents were introduced indicating) that appellant pled guilty and was sentenced on one count of rape, two counts of aggravated rape, and one count of kidnapping arising from these two Massachusetts incidents (T24/1487-88, see 1471-72; R12/1643-44,1646,1648). He was sent to prison and was released in 1992; upon his release he was to be on probation for eight years

(T24/1488-89, see 1472). Linda never saw or heard from him again (T24/1489).

The probation warrants resulting from appellant's failure to report were introduced into evidence (T24/1471-72,1489-90; R12/1645, 1647, 1649-50).

The defense introduced evidence from appellant's mother that he was a wonderful, helpful son and she loves him (T24/1510-12); from an employee of a home improvements company (for which appellant was a subcontractor) that he was known as an excellent worker with a wonderful attitude and a pleasant demeanor (T24/1500-01); and from a corrections officer that there had been no disciplinary problems with him while he was in jail awaiting trial (T24/1506-09).

Dr. Michael Maher, a clinical psychiatrist, was called by the defense, and Dr. Sidney Merin, a clinical psychologist and neuropsychologist, was called by the state (T24/1514-15,1540-41). The two doctors agreed that appellant has what is known in medicine as sexual sadism, but disagreed on how this should be classified; Dr. Maher described it as an obsessive-compulsive type of illness or disorder (T24/1517-20,1524-25,1527), while Dr. Merin characterized it as a behavioral or personality disorder (T24/1544, 1547). Merin was also of the opinion that appellant has an antisocial personality (T24/1548-49).

SUMMARY OF THE ARGUMENT

The trial court erred in allowing the state to introduce evidence of dissimilar incidents in which appellant choked his ex-wife and his current live-in girlfriend during sexual intercourse, and in which he choked his girlfriend into unconsciousness and raped her after a domestic argument. This evidence showed only violent character and propensity; it was not admissible as similar fact evidence, nor as dissimilar fact evidence, nor as inseparable crime evidence. It's introduction was harmful error requiring reversal for a new trial. [Issue I]

The trial court also committed prejudicial error by allowing the state to introduce evidence of appellant's flight from the police when they attempted to arrest him on the outstanding Massachusetts probation warrant. The circumstances of the flight do not show consciousness of guilt of the charged crimes (of which appellant was never made aware that he was a suspect); they are equally consistent if not more consistent with being motivated by appellant's fear of being returned to prison in Massachusetts. The error was harmful in the guilt phase, and was also harmful (in combination with the ex post facto violation in Issue V) in the penalty phase. [Issue II]

Appellant was deprived of his right to a fair trial by the judge's comment to prospective jurors that the state would not "parade in five witnesses to repeat what one witness can tell you."

This comment flagrantly violated the rule against suggesting the existence of uncalled witnesses who would corroborate the state's case if they were called to testify. Such a comment may rise to the level of fundamental error when made by the prosecutor; it is even more destructive of the accused's right to a fair trial when made by the judge, who occupies the dominant position at trial and whose impartiality must be beyond question. [Issue III]

The state's evidence in this case, especially when considered in light of the evidence presented by the prosecution of appellant's history of strangling women (without killing them) because that is how he becomes sexually aroused, fails to exclude a reasonable hypothesis that the killings were not premeditated. In the absence of proof that appellant acted with "a fully formed and conscious purpose to take human life, formed upon reflection and deliberation", his convictions must be reduced to second degree murder and his death sentences vacated. [Issue IV]

The state's use of the "felony probation" aggravating circumstance violated the state and federal constitutional prohibition against ex post facto laws. Since the jury was instructed to weigh a legally invalid aggravating factor, appellant's death sentence violates the Eighth Amendment. [Issue V]

ARGUMENT

ISSUE I

THE TRIAL COURT ERRED IN ALLOWING THE PROSECUTION TO INTRODUCE EVIDENCE OF DISSIMILAR INCIDENTS IN WHICH APPELLANT CHOKED HIS EX-WIFE AND HIS LIVE-IN GIRLFRIEND DURING SEXUAL INTERCOURSE, AND IN WHICH HE CHOKED HIS GIRLFRIEND AFTER A DOMESTIC ARGUMENT.

A. Introduction

"A concomitant of the presumption of innocence is that a defendant must be tried for what he did, not for who he is. The reason for this rule is that it is likely that the defendant will be seriously prejudiced by the admission of evidence indicating that he has committed other crimes." United States v. Myers, 550 So. 2d 1036, 1044 (5th Cir. 1977). As this Court stated in Craig v. State, 510 So. 2d 857, 863 (Fla. 1987):

> In a criminal trial, it is generally improper to admit evidence tending to show that the accused committed crimes other than those of which he stands accused. This rule is but a specific application of the more general principle that all evidence must be relevant to a material issue. But "collateral crime" evidence is given special treatment because of the danger of prejudicing the jury against the accused either by depicting him as a person of bad character or by influencing the jury to believe that because he committed the other crime or crimes, he probably committed the crime charged. [Citations omitted]. A verdict of guilt on a criminal charge should be based on evidence pertaining

> specifically to the crime. The jury's attention should always be focused on guilt or innocence of the crime charged and should not be diverted by information about unrelated matters.

In the instant case, the evidence relied on by the state to persuade the jury that appellant committed the charged homicides of Wendy Evans and Cynthia Pugh was almost entirely circumstantial. The trial judge, during the pretrial Williams Rule hearing described it as "a very weak circumstantial case" (R6/967). In the trial itself, during a recess just after the admission of the flight evidence [see Issue II], the trial judge commented, "This case is hardly open and shut for anybody" (T19/793); and at the close of the state's case, in denying defense counsel's motion for judgment of acquittal, she stated, "I will grant you that many of the circumstances in this case do not point singularly to your client. There's no doubt about that. Anybody that knows anything about this type of evidence knows that" (T22/1275). What persuaded the trial judge that this was a jury case and not a case for judgment of acquittal was the similarity of the two charged murders and the trace evidence connecting one to the other (R22/1275).[4]

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[4] The Evans and Pugh cases were initially severed. After the trial court ruled that the two homicides were sufficiently similar to permit the state to introduce evidence of the Pugh murder in the Evans trial and vice versa, the defense moved to reconsolidate the two cases. In so doing the defense expressly waived its prior motion to sever and, as defense counsel stated, "[i]nherent in that would . . . be a waiver from Mr. Randall as to the issues in the Motion in Limine concerning the Court's ruling regarding evidence (continued...)

To bolster its case, the prosecution introduced, over defense objection (R4/628-29; 6/977-81,990-96; T14/5, 21/1002-11), evidence of unrelated incidents in which appellant choked other women. This evidence was ostensibly introduced to show identity, motive, intent, or absence of mistake or accident; but it was nowhere near similar enough to the charged homicides to be properly used to prove identity, and it was simply irrelevant to the other claimed purposes. Instead, it only served to put before the jury that appellant is a violent man with a propensity to choke the women in his life, both to obtain sexual excitement during intercourse and to lash out in anger after a domestic argument. The evidence of these repeated non-fatal assaults may have tended to show appellant's motive for choking Ms. Evans and Ms. Pugh (i.e., he likes to choke women -- in other words, propensity) but it does not in any way tend to show any motive for murdering them.[5] [Note that in the penalty phase, in arguing unsuccessfully for a jury

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[4](...continued)
of Cynthia Pugh in the Wendy Evans trial and Wendy Evans in the Cynthia Pugh trial" (T14/3-5; see R8/1237). As to the other items in the state's Williams Rule notice, the trial judge recognized, "Obviously, Mr. Schwartzberg [defense counsel] objects to those items coming in, and I understand that" (T14/5).

[5] If anything, this evidence introduced by the state may establish a reasonable hypothesis other than premeditation; that appellant picked up the prostitutes for the purpose of having sex; choked them violently during intercourse because that is how he becomes sexually aroused; and in so doing caused their deaths, but without deliberation and without forming a conscious purpose to kill. See issue IV, infra.

instruction on heightened premeditation (CCP), the prosecutor took the position -- rejected by the trial judge as speculative -- that the motive for the killings was witness elimination. The prosecutor asserted, "... I believe the evidence as to his motivation is that he gets sexual gratification from the fear, but . . . the murder which goes beyond unconsciousness, does not necessarily gratify him in any way" (T25/1562, see 1562-64)].

Where evidence of other crimes or violent acts has no relevancy except to show the accused's bad character and his propensity to commit crimes (and, especially, his propensity to commit the general type of crime for which he is on trial), such evidence is unfairly prejudicial and must be excluded. Castro v. State, 547 So. 2d 111, 114-15 (Fla. 1989); Peek v. State, 488 So. 2d 52, 55-56 (Fla. 1986); Jackson v. State, 451 So. 2d 458, 461 (Fla. 1984). As this Court stated in Peek:

> 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).

In the instant case, the testimony of Linda Randall Graham and Terry Howard that appellant choked them during intercourse because

that is how he becomes sexually excited (not to mention the testimony of Ms. Howard that he choked her into unconsciousness after a domestic argument and she later awoke to find him having sex with her) is classic evidence of propensity and bad character. It was

relevant to no other purpose but to persuade the jury that appellant probably committed the charged crimes because he's the kind of guy who likes to commit that type of crime.

Where collateral crime evidence is relevant to a legitimate purpose, and as long as its prejudicial impact does not exceed its probative value,[6] it may be admissible on one of three theories. These are "similar fact evidence", codified in Fla. Stat. §90.404(2)(a), "dissimilar fact evidence" under Fla. Stat. §90.402, and "inseparable crime evidence". See Sexton v. State, 697 So. 2d 833, 836-37 (Fla. 1997); Griffin v. State, 639 So. 2d 966, 968 (Fla. 1994). The challenged evidence in the instant case was not properly admissible under any of these theories. The jury heard the following testimony:

B. The Evidence

Terry Jo Howard. The prosecutor asked her if, during the early stages of their live-in relationship, " . . . did it become

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[6] Fla. Stat. §90.403. See e.g., Sexton v. State, 697 So. 2d 833, 837 (Fla. 1997); Steverson v. State, 695 So. 2d 687, 688-89 (Fla. 1997).

obvious . . . that he [appellant] had a problem with choking behavior?" (T21/1016, see 1019-21,1045-46). She answered yes (T21/1016). Appellant admitted to her that he became sexually stimulated by choking his sexual partners (T21/1016). Terry acquiesced "because I didn't want him to not get what he needed and then kill me two years down the road" (T21/1016-17). She wanted to help him out with his problem, and she wanted him to have some control over it (T21/1017,1045-46). Appellant would choke her from a face-to-face position, with both hands around her neck (T21/1021). While he was having orgasm, he would sometimes get up off choking her and start striking the pillow (T21/1021). Although Terry acquiesced to being choked, she was still distressed by it (T21/
1020). It seemed to excite appellant more if she fought or showed fear; when she changed her reaction and did nothing, the conduct diminished and then pretty much stopped (T21/1020-21,1046-47).

However, in early October 1995, on the day of the O. J. Simpson verdict, Terry disclosed to appellant an incident in which a former employer or co-worker had coerced her into sexual activity (T21/1022). Appellant became angry. Terry helped him pack a bag, told him to get whatever he needed out of the bank, and he left (T21/1023). She didn't know if he was coming back. Later that day or the following day appellant returned. He grabbed Terry by the throat, threw her up against the wall, and began choking her and

screaming at her "Don't you ever do that again. Don't you ever let another man take advantage of you ever again" (T21/1023). He continued to choke her with both hands around her neck until she lost consciousness (T21/1023-24). When she woke up she was on the bed:

> Q. [Prosecutor]: What was happening when you woke up on the bed?
>
> A. [Terry Jo Howard]: We were having sex, sir.
>
> Q. Sexual intercourse.
>
> A. Or he was. Or he was.

(T21/1024).

Asked by the prosecutor to describe her injuries to the jury, Terry testified, "You could not see anything but the blood, about [an] eighth of an inch thick in my eyes. There was no white. My voice, my throat was sore, and it hurt for a long time. But for about eight weeks you could not see any white in my eyes. . . . Every capillary in my eyeballs had been burst" (T21/1024).

Linda Randall Graham. During the course of their seven year marriage (which ended in divorce approximately nine years before the murders of Wendy Evans and Cynthia Pugh occurred), appellant would choke Linda during sexual activity (T21/1103-04). Asked whether he derived sexual excitement or pleasure from choking her, Linda answered yes (T21/1103). He would get on top of her and put

his hands around her neck, using force (T21/1103). On several occasions this resulted in injury (T21/1103).

Linda then testified about two specific incidents. On July 8, 1986, in their Massachusetts home, appellant choked her manually, from behind and then on top of her (T21/1104). The choking was against her will (T21/1104). It was clear to her that appellant was getting sexual excitement from her reaction to being choked (T21/1104). As a result of this incident, she sustained bruises on her neck, soreness and stiffness (T21/1104).

On September 6, 1986, appellant choked her during a sexual encounter that occurred outside her vehicle (T21/1104-05). He tied her hands behind her back with her shoelace, got on top of her, and choked her with his hands, causing marks on her neck and arms (T21/1105).

Dr. Wesley Profit. Dr. Profit, a Massachusetts psychologist, was employed in August 1986 at Bridgewater State Hospital, where he had occasion to interview appellant. Appellant described his having the urge to choke his partners during sexual intercourse or activity. This contributed to his arousal and enjoyment of the sexual encounter, and he also got pleasure out of choking (T21/1107-08). He indicated that force or violence was part of his choking behavior (T21/1110).

C. Inadmissibility as "Similar Fact" Evidence

The trial judge instructed the jury that one of the purposes for which it could consider the evidence of the manual strangulations of Terry Howard and Linda Graham was to prove identity on the part of James Randall in the murders of Ms. Evans and Ms. Pugh (T21/1019). The admission of the evidence for that purpose was plain and prejudicial error. As this Court held in Drake v. State, 400 So. 2d 1217, 1219 (Fla. 1981), and reaffirmed consistently thereafter:

> Williams v. State, [110 So. 2d 654 (Fla.), cert. denied, 361 U.S. 847, 80 S. Ct. 102, 4 L. Ed. 2d 86 (1959)] holds that evidence of similar facts is admissible for any purpose if relevant to any material issue, other than propensity or bad character, even though such evidence points to the commission of another crime. The material issue to be resolved by the similar facts evidence in the present case is identity which the State sought to prove by showing Drake's mode of operating.
>
> The mode of operating theory of proving identity is based on both the similarity of and the unusual nature of the factual situations being compared. A mere general similarity will not render the similar facts legally relevant to show identity. There must be identifiable points of similarity which pervade the compared factual situations. Given sufficient similarity, in order for the similar facts to be relevant the points of similarity must have some special character or be so unusual as to point to the defendant.

See Chandler v. State, 702 So. 2d 186, 192 (Fla. 1997) ("The common thread in our Williams rule decisions has been that startling similarities in the facts of each crime and the uniqueness of modus operandi will determine the admissibility of

collateral crime evidence"); Hayes v. State, 660 So. 2d 257, 261 (Fla. 1995); Peek v. State, 488 So. 2d 52, 55 (Fla. 1986); Thompson v. State, 494 So. 2d 203, 204 (Fla. 1986).

> When the purported relevancy of past crimes is to identify the perpetrator of the crime being tried, we have required a close similarity of facts, a unique or "fingerprint" type of information, for the evidence to be relevant.

Kimbrough v. State, 700 So. 2d 634 (Fla. 1997); State v. Savino, 567 So. 2d 892, 895 (Fla. 1990). See also Williams v. State, 662 So. 2d 419, 420 (Fla. 3d DCA 1995) (to be admissible, collateral crime must possess "obvious and telling similarities" to the crime charged, and especially when proffered to prove identity, must indicate circumstances so unique as to point only to the defendant); Evans v. State, 693 So. 2d 1096, 1100 (Fla. 3d DCA 1997); Bricker v. State, 462 So. 2d 556, 558-59 (Fla. 3d DCA 1985).

In the instant case, the dissimilarities are immediately apparent. The collateral incidents occurred in long-term intimate relationships; while the victims in the charged offenses were prostitutes and there is no evidence that appellant even knew them. In the collateral incidents the women were not killed. In fact, in only one of those occurrences -- the one involving Terry Jo Howard which took place during an intense domestic argument -- did the woman even become unconscious.

In most of the collateral offenses (except for the one with Terry Howard on the day or the day after the Simpson verdict) the

choking was done to heighten sexual arousal. In the exceptional collateral incident, the choking occurred in a jealous rage, and then, after Ms. Howard became unconscious, she awoke to find appellant having nonconsensual sex with her. In the charged offenses, there is no physical evidence that sexual intercourse even occurred. Perhaps that can be inferred from the fact that the victims were prostitutes and that they were found unclothed (although the absence of all clothing and jewelry is also consistent with state's theory that the bodies were left this way in an effort to avoid detection), but even if it is inferred that sexual intercourse occurred prior to the charged homicides, there is no way to tell whether it was consensual or nonconsensual, or whether it began consensually and then escalated. Even more importantly, there is no way to tell, in the charged homicides, whether the victims were choked to heighten sexual arousal (as in most of the collateral incidents, in which the women did not die); or whether something occurred during the encounter that ignited anger or rage (as in the incident involving Terry Howard on the day of the Simpson verdict); or whether the victims were deliberately choked to death to avoid arrest for aggravated battery or rape (as the prosecutor speculated in the penalty phase). [Note that if it is one of the first two explanations, then the state's circumstantial evidence was insufficient to prove premeditation. See Issue IV].

The only real similarity between the collateral offenses and the charged offenses is the occurrence of manual strangulation, and unfortunately that is neither unique nor uncommon, much less a "fingerprint" type of characteristic. Out of all the incidents testified about by Terry Howard and Linda Graham, there was one in which Linda's hands were tied behind her back with her shoelace. The state may argue that Cynthia Pugh was found with a thin adhesive-type substance around each wrist, possibly consistent with binding (see T17/586-87,603). However, as noted in Drake v. State, 400 So. 2d 1217, 1219 (Fla. 1981):

> Binding of the hands occurs in many crimes involving many different criminal defendants. [Footnote omitted]. Thus binding is not sufficiently unusual to point to the defendant in this case, and it is, therefore, irrelevant to prove identity.

Even more so than in Drake, binding is irrelevant to prove identity in the instant case because binding occurred in only one of the numerous collateral incidents, and a different type of binding occurred (or may have occurred) in one of the charged homicides, while there is absolutely no evidence of binding in the other charged homicide.

Since the crimes and violent acts committed by appellant against his then-wife a decade earlier, and against his live-in girlfriend, were not sufficiently similar to the charged murders to be admissible as "similar fact" evidence, this distinguishes Hoefert v. State, 617 So. 2d 1046, 1049 (Fla. 1993). Hoefert

choked a series of women while raping them. Unlike the instant case, the collateral crimes did not occur in the context of intimate relationships. Each of the four Williams Rule victims in Hoefert testified that the defendant initially grabbed them in some type of arm lock around the neck. Hoefert applied pressure which resulted in unconsciousness in two of the prior cases and death in the charged case, yet neither the Williams Rule victims nor the homicide victim sustained any visible neck injuries. The similarities in Hoefert are much greater than in the instant case, and the dissimilarities in the instant case (both between the collateral offenses and the charged offenses, and among the collateral offenses themselves) are significantly greater than in Hoefert. [Note also that in Hoefert this Court found that the circumstantial evidence showing that the central motive in the asphyxiation, to obtain sexual gratification by engaging in sex while choking the victim, was consistent with an unlawful killing but was insufficient to prove premeditation].

D. Inadmissibility as "Dissimilar Fact" Evidence

Since the challenged testimony was clearly inadmissible as "similar fact" evidence, the next question is whether it might properly be admitted as "dissimilar fact" evidence to show motive, intent, or absence of mistake or accident. The answer, once again, is no. The requirement of unique similarity applies when

collateral crime evidence is used to prove identity, modus operandi, or common plan or scheme, but the similarity requirement does not necessarily apply when the evidence is introduced to prove motive. Finney v. State, 660 So. 2d 674, 681-82 (Fla. 1995); Evans v. State, 693 So. 2d 1096, 1101 (Fla. 3d DCA 1997); State v. Richardson, 621 So. 2d 752, 756-57 (Fla. 5th DCA 1993). On the other hand, the testimony must be genuinely probative of the motive for committing the charged offense; not merely a backdoor way of getting in propensity evidence. See Finney v. State, supra, 660 So. 2d at 682, in which this Court said:

> [T]he other crime evidence relied on here could have been used to support the finding of "pecuniary gain" if there was something about the facts of the other crime that made the evidence probative of the defendant's motive for the murder, other than the fact that it tended to prove propensity to commit robbery.
>
> In this case, the victim of the rape/robbery was not murdered and there was nothing about that crime that tends to explain why Finney murdered Ms. Sutherland. [Footnote omitted]. It is impossible to infer from the circumstances of the rape/robbery that Finney murdered Ms. Sutherland in order to obtain money, property, or other financial gain.

In the instant case, the collateral crime testimony goes to propensity, purely and simply. It was meant to bolster the state's circumstantial case as to identity by persuading the jury that appellant was probably the perpetrator because choking women gives him sexual pleasure. In other words, he's the kind of guy who would do this crime. Since Linda Graham and Terry Howard were not

murdered, and since only in the one incident which occurred in a rage after a domestic argument was the collateral victim even rendered unconscious, the evidence of appellant's propensity to choke his sexual partners proves nothing about why Ms. Evans and Ms. Pugh were murdered. See Finney. If they were killed without deliberation in a sexual frenzy, then this is at most a case of second degree murder. On the other hand, if a conscious decision was made to murder the victims -- which the evidence here does not show -- the collateral crime testimony does not explain why. Finney. The prosecutor speculated in the penalty phase that the motive for the killings was witness elimination, and argued that while appellant gets sexual arousal from his partner's fear (a proclivity which both Terry and Linda described in their numerous non-fatal encounters), the murder itself "does not necessarily gratify him in any way" (T24/1562, see 1562-64). Therefore, appellant's propensity to choke his partners during sex because that is how he becomes aroused does not prove his motivation or intent (assuming arguendo that he even had a motive or a specific intent) in murdering two prostitutes whom, it can be inferred, he picked up and brought to his home for consensual sex.[7]

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[7] In contrast, the kind of circumstances in which evidence of dissimilar crimes may be relevant to prove motive or intent in a homicide case are illustrated in State v. Richardson, supra, 621 So. 2d at 757, which cites Heiney v. State, 447 So. 2d 210 (Fla. 1984) (defendant's "desire to avoid apprehension for the shooting in Texas motivated him to commit robbery and murder in Florida so (continued...)

As for the instruction on "absence of mistake or accident", there is no material issue in this case that the choking (as opposed to the deaths) of the victims could have been a mistake or accident. While it is indeed possible that the victims may have been killed without conscious intent on the part of appellant to cause death, the collateral crime evidence of repeated non-fatal choking assaults on his ex-wife and girlfriend does not tend to negate this possibility; if anything it tends to make it more plausible.

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[7](...continued)
that he could obtain money and a car in order to continue his flight from Texas") and also:

> . . . Maharaj v. State, 597 So. 2d 786, 790 (Fla. 1992), cert. denied, ___U.S. ___, 113 S. Ct. 1029, 122 L. Ed. 2d 174 (1993) (evidence of newspaper article written by victim accusing defendant of illegally taking money out of Trinidad and of forging check relevant to prove motive of defendant in murdering victim); Grossman v. State, 525 So. 2d 833, 837 (Fla. 1988), cert. denied, 489 U.S. 1071, 109 S. Ct. 2354, 103 L. Ed. 2d 822 (1989) (defendant's burglary of home and subsequent possession of stolen handgun in violation of probation relevant to prove defendant's motive in murdering police officer who apprehended defendant and seized handgun); Craig v. State, 510 So. 2d 857, 863-864 (Fla. 1987), cert. denied, 484 U.S. 1020, 108 S. Ct. 732, 98 L. Ed. 2d 680 (1988) (evidence defendant had stolen employer's cattle was relevant to prove defendant's motive in subsequent murder of employer, who had discovered thefts).

E. Inadmissibility as "Inseparable Crime" Evidence

The third and last theory which the state may argue is "inseparable crime" evidence. Evidence of other crimes that are "inseparable from the crime charged, or evidence which is inextricably intertwined with the crime charged" is admissible under Fla. Stat. 90.402, "because it is relevant and necessary to adequately describe the crime at issue." Ferrell v. State, 686 So. 2d 1324, 1329 (Fla. 1996); Hartley v. State, 585 So. 2d 1316, 1320 (Fla. 1996); see Hunter v. State, 660 So. 2d 244, 251 (Fla. 1995); Griffin v. State, 639 So. 2d 966, 968 (Fla. 1994).

As explained by Professor Ehrhardt, Florida Evidence §404.17 (1998 Ed.) (Evidence of Other Crimes, Wrongs, or Acts -- Inseparable Crimes), p.192 and 195:

> Occasionally when proving that an act, deed, or crime occurred, the act will be so linked together in time and circumstance with the happening of another crime, that the one cannot be shown without proving the other. For example, if a defendant is charged with a sexual battery which occurred after a violent struggle with the victim, evidence of the struggle would be admissible even though it shows the commission of a battery. Evidence that the defendant forcibly removed jewelry from the victim during the struggle and took it from the victim's home would be admissible even though it showed the commission of a larceny. There is general agreement that this evidence is admissible. The Florida courts have reasoned that the evidence of an inseparable crime should be admitted as part of the "res gestae" and "where it is impossible to give a complete or intelligent

> account of the crime charged without reference to the other crime." [Footnotes omitted].
>
> . . .
>
> . . . [T]his evidence is not admitted because it shows the commission of other crimes or because it bears on character, but rather because it is a relevant and inseparable part of the act which is in issue. This evidence is admitted for the same reason as other evidence which is a part of the so-called "res gestae," it is necessary to admit the evidence to adequately describe the deed. [Footnotes omitted].

As was observed in State v. Richardson, 621 So. 2d 752, 755 (Fla. 5th DCA 1993):

> Evidence of collateral crimes may be admissible to establish the entire context out of which the alleged criminal conduct arose. Cases admitting such evidence have focused on the time frame in which the offenses occurred and the causal connection between the offenses. For example, collateral crime evidence may be admissible where the offenses occurred as part of one prolonged criminal episode, id., or where the offenses were an integral part of the factual context in which the charged crimes occurred. [Citations omitted].

See, e.g., Washington v. State, 118 So. 2d 650, 653 (Fla. 2d DCA 1960) ("statements or acts which are disconnected in point of time or otherwise with a main litigated fact are not admissible as part of the res gestae").

In the instant case, the choking incidents involving Linda Randall Graham took place nearly a decade before the charged offenses and over a thousand miles away. The incidents involving

Terry Howard were somewhat closer in time and considerably closer in geography, but they were not "an integral part of the factual context in which the charged crimes occurred", and they were not a part of the res gestae of those homicides. Contrast Ferrell (evidence of robbery of same victim two days before his murder "was properly admitted to complete the story of the crime on trial and to explain Ferrell's motivation in seeking to prevent retaliation by the victim"); Hunter (evidence of closely connected DeLand robbery was admissible as part of the context in which the murder took place); Griffin (taking of car keys from hotel room "was inextricably intertwined with the theft of the automobile, one of the charges before the jury", and thus was necessary to establish the entire context out of which the crime arose). Contrast also Smith v. State, 365 So. 2d 704, 706-07 (Fla. 1978) (evidence of second murder properly admitted "as part of a single transaction which spanned the night of, and included [the charged] murder"); Ashley v. State, 265 So. 2d 685, 693 (Fla. 1972) (charged homicide and collateral homicides occurred on the same night during "one prolonged criminal episode"; the same car and the same ice pick were used in both sets of crimes, and the victim of the second murder was one of the perpetrators of the first murder).

To adequately describe the charged homicides in the instant case, it was neither necessary nor proper to chronicle appellant's life history of choking his sexual partners. This was not

"inseparable crime" evidence, but rather evidence of propensity and bad character; it could only have served to persuade the jury in this otherwise circumstantial case that appellant is the kind of person who would commit this kind of crime. This is the classic situation in which evidence of other crimes or bad acts is inadmissible, and its introduction harmful and reversible error.

F. Harmfulness

> 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 52, 56 (Fla. 1986); see Castro v. State, 547 So. 2d 111, 115 (Fla. 1989); Williams v. State, 662 So. 2d 419, 420 (Fla. 3d DCA 1995).

Even apart from the presumption of harmfulness, in the instant case the prejudicial impact of the erroneously admitted collateral crime evidence is also affirmatively demonstrated by (1) the fact that the evidence that appellant committed the charged homicides was almost entirely circumstantial; (2) the trial judge's repeated comments that she did not view the state's circumstantial case as

particularly strong (see R6/967; T19/793; T22/1275); (3) the fact that the collateral crime evidence involved not one but many violent incidents, involving two different women over a substantial period of time; (4) the fact that some of the collateral crime evidence (e.g. Terry Howard's describing how she awoke from unconsciousness to find appellant raping her, and how for eight weeks you couldn't see any white in her eyes because every capillary in her eyeballs had been burst was particularly graphic; and (5) -- and perhaps most important of all -- as in State v. Lee, 531 So. 2d 133, 137-38 (Fla. 1988), the prosecutor unduly emphasized the propensity evidence in his closing argument to the jury.

The very beginning of the prosecutor's argument dealt not with the charged crimes but with the events of nearly ten years before:

> During the seven and a half years of the marriage between Linda Graham and James Randall, he choked her, forcefully, violently, against her will, while engaging in sexual activity, leaving bruising, soreness and fear. And you've heard relevant portions of two episodes, one in July and one in September of the year 1986, that provide you slices into that pattern of behavior, and give you a little bit of the knowledge of the inner works of James Randall's mind on July 18th, 1996.
>
> She came home, he choked her face-to-face, forcefully choked her from behind with his arm and engaged in sexual activity. On September 6th of 1986, she left the vehicle, had her hands tied behind her by James Randall, and was forcefully and violently choked, face-to-face, while he, again, became sexually aroused by the activity. And in between those two incidents, in August of 1986, at Bridgewater

State Hospital, he spoke to Dr. Wesley Profit, who told you that the defendant acknowledged the motive in this case.

He has a compulsion, a desire, to choke women, to achieve sexual arousal and sexual gratification. And force and violence are part of that arousal pattern. And there is no mistake from this evidence that is before you, unimpeached -- indeed uncross-examined -- that the fear of the victims increased his pleasure and motivated him even the more.

The strong, unimpeached evidence foreshadows the events that bring us to this courtroom last week and today: The brutal strangulation murders of Wendy Evans and Cynthia Pugh. It foreshadowed the escalating conduct against Terry Jo Howard, by the only man she'd ever loved, on the day the Simpson verdict came back. And it foreshadowed the culmination of these motives and these brutal strangulation deaths on October 20th, when Terry Jo Howard was out of town and Randall was in the apartment alone, and on January 18th of 1996, when she was, again, in West Palm Beach.

And if the injuries these victims sustained -- broken ribs, broken bones in the neck, crushed cartilage, extensive hemorrhage to the muscles of the neck, bruises and hemorrhage to the face -- if those injuries leave any doubt as to the intensity and self-directed nature of the Defendant's motive and intent in this case, then just consider the incident that happened on the day of the O.J. Simpson verdict:

Terry Jo Howard disclosed something, in which she was a victim. She had done nothing wrong. Instead of compassion, she gets anger. And when the anger returns that same day, or shortly thereafter, what happens? It's an excuse or a precipitating incident for this man to pin her against the wall, choke her to unconsciousness with such force that she damages her voice box and she had difficulty speaking; that the air is cut out and she can not breath; that the pressure builds up in her head and the vessels burst in the whites of

> her eyes. And finally, she lapses into unconsciousness.
>
> And what happens after the defendant has done that? Does he resuscitate her? Does he take her to the hospital or a doctor to help her injuries? Does he beg her forgiveness? No. Apparently unwilling to forego this very romantic moment, he drags her limp body to a bed, and while she's still unconscious, engages in sexual intercourse with her.

(T1333-36).

Later in his closing argument, when he got around to addressing the circumstantial evidence in the charged murders, the prosecutor continued to use the propensity evidence by continually reminding the jury of the testimony of Terry Howard, Linda Randall, and Dr. Profit (T23/1357,1369,1370,1381).

Therefore, whether the burden of persuasion is on the state [see State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986); State v. Lee, 531 So. 2d 133 (Fla. 1988)], or whether -- assuming arguendo that the Criminal Appeals Reform Act of 1996 is (a) constitutional and (b) applicable to the instant case[8]-- the burden of persuasion is

[8] The Reform Act became effective July 1, 1996 [see Chojnowski v. State, 705 So. 2d 915 (Fla. 2d DCA 1997)]. The charged homicides in the instant case occurred before that date. If the Reform Act's provisions purporting to address harmless error analysis change the substantive law, then they do not apply to appellant's case. On the other hand, if the legislation on this point is procedural, then it either (1) violates separation of powers, or (2) is superseded by this Court's pre-existing decisions in DiGuilio, Lee, Straight, and Peek, since matters of practice and procedure are the exclusive domain of this Court. As stated in Lee, 531 So. 2d at 136-37, n.1, this Court retains the authority to determine the analysis to be used in determining whether an error is harmless.

on the defense [see Jackson v. State, 707 So. 2d 412, 414-15 (Fla. 5th DCA 1998)], the bottom line is that this Court cannot dismiss the improper introduction of this collateral crime evidence as "harmless error" unless it is satisfied that there is no reasonable possibility that the error contributed to the verdict. See Jackson v. State, supra, 707 So. 2d at 414-15 (harmonizing the "Reform Act" with the DiGuilio standard). See also State v. Lee, supra, 531 So. 2d at 136-37, n.1 (while the authority of the legislature to enact harmless error statutes is unquestioned, the Supreme Court "retains the authority, however, to determine when an error is harmless and the analysis to be used in making the determination").

In the instant case, whatever analysis is used, the evidence of the prior crimes of violence against Linda Graham and Terry Howard was overwhelmingly harmful. Appellant's convictions and death sentences must be reversed for a new trial.

ISSUE II

THE TRIAL COURT ERRED IN ALLOWING THE PROSECUTION TO INTRODUCE EVIDENCE OF APPELLANT'S FLIGHT FROM THE POLICE WHEN THEY ATTEMPTED TO ARREST HIM ON THE OUTSTANDING MASSACHUSETTS PROBATION WARRANT.

Flight evidence is relevant and admissible to show the defendant's consciousness of guilt of the charged offense when -- and only when -- the evidence shows that he fled to avoid prosecution for the charged offense. Conversely, flight evidence

is irrelevant and inadmissible to show the defendant's consciousness of guilt of the offense for which he is on trial when the evidence fails to establish that he fled for that reason. Merritt v. State, 523 So. 2d 573 (Fla. 1988); Escobar v. State, 699 So. 2d 988, 994-97 (Fla. 1997). When the evidence is equally consistent or more consistent with another motivation for the flight -- for example, other crimes or outstanding warrants -- it is inadmissible. Merritt, Escobar; see also, Evans v. State, 692 So. 2d 966, 969-70 (Fla. 5th DCA 1997).[9] The prejudicial effect of erroneously admitting flight evidence in this situation is compounded by the fact that it puts the accused "between a rock and a hard place" [Merritt, 523 So. 2d at 574]; in order to rebut the state's improper implication that he fled due to consciousness of guilt of the charged crime, the defense is forced to present the alternative explanation to the jury; and that usually involves uncharged, unrelated criminal activity. See Merritt; Evans, 692 So. 2d at 970.

In the instant case, the defense unsuccessfully sought to exclude the evidence of appellant's flight from the police on the morning of June 27, 1996 when -- after a ten minute non-custodial,

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[9] The mere fact that a defendant has committed more than one crime within a short period of time does not necessarily preclude the introduction of flight evidence, provided that the required evidentiary nexus exists to permit a reasonable inference that the flight was motivated by consciousness of guilt of the charged crime. Shellito v. State, 701 So. 2d 837, 840-41 (Fla. 1997).

non-accusatory conversation with police officers who were purporting to canvass anyone who might have known or had contact with the murder victims -- they attempted to arrest him on an outstanding Massachusetts warrant. (See R4/628-29, 6/1000,1002-04; T18/769-70). The testimony bearing on this issue is as follows:

In a pretrial hearing, Corporal John Quinlan testified that when he approached appellant's residence on the morning of June 27 it was not his intention to arrest him for the murders of Cynthia Pugh or Wendy Evans (SR1836). His intention was to speak to appellant and ask him some questions"[i]n a non-custodial way" in the ongoing investigation of the Clearwater homicides (SR1836, 1857). However, Quinlan was aware that appellant was a fugitive from

Massachusetts and there was an outstanding warrant for his arrest (SR1836,1845,1852-57). The plan was that as soon as appellant entered his vehicle, the officers were going to stop him and arrest him on the outstanding Massachusetts warrant (SR1852-57). Quinlan acknowledged that the rationale for waiting to make the arrest until appellant was in his truck was to enable the officers to conduct a warrantless search of the vehicle incident to the arrest or pursuant to the automobile exception (SR1854-55).

When appellant opened the door, Corporal Quinlan identified himself and asked him if Terry Jo Howard was home (although Quinlan knew she wasn't) (SR1837-38, see 1835,1855). Quinlan informed

appellant that he was investigating some open homicides, and asked him if he was aware of the prostitute murders in North Pinellas (SR1839). Appellant indicated that he was aware of these events from television and newspaper reports (SR1839). Quinlan said he was contacting all women who had been arrested for prostitution in the North Fort Harrison area of Clearwater, and that he needed to speak with Terry Jo (SR1838-39). He showed appellant photographs of the victims and asked him if Terry Jo knew them, or whether they had ever been in her apartment or her vehicle (SR1839-40,1842). Appellant responded that they would have to ask Terry (SR1840, 1856). Appellant was then asked if he knew the victims or had had any contact with them and he replied that he did not (SR1840,1842).

The entire conversation lasted about ten minutes (SR1843). Corporal Quinlan never entered the residence, and appellant never gave any indication that he wanted to terminate the conversation (SR1843). When Quinlan left the front door area of the apartment, appellant went back inside where, Quinlan testified, he was free to go about his business (SR1844).

About ten minutes later, another team of detectives observed appellant leaving his apartment and getting into his truck (SR1844, 1855). A man named Maitland Nixon got into the truck with him and they drove southbound on Belcher Road (SR1844,1855). At this point a uniformed patrol attempted to initiate a traffic stop, using the overhead lights (SR1845). The intent was to arrest appellant on

the outstanding Massachusetts warrant (SR1845). However, the officers were unable to successfully arrest him on June 27, 1996, because he fled (SR1845). He was apprehended four days later on July 1, 1996 (SR1845).

The defense's pretrial motion to exclude the flight evidence was denied (R4/628-29;6/1000,1002-04). At trial, near the beginning of Quinlan's testimony, defense counsel asked for and was given a continuing objection to evidence of appellant's statements and actions (T18/769-70). Quinlan's trial testimony about the conversation with appellant in the doorway was substantially similar to his testimony in the prior hearing. The officers asked if Terry Jo Howard was home (knowing that she wasn't), and they told appellant they were contacting known prostitutes (T18/770-71). The questioning was mainly directed at whether Terry knew the victims, although appellant was also asked if he knew them (T18/770-71). Quinlan (who acknowledged on cross that he is not familiar with a neurological condition called essential tremors) testified that appellant's right hand would tremble when he extended photographs of the victims to him (T18/773-76,19/816). [Terry Howard, a key state witness who gave very damaging testimony otherwise, testified that during the two and a half years she lived with appellant he often shakes, especially when holding a newspaper or anything along those lines. After his heart surgery he started shaking more (T21/1059)].

At some point in the conversation, appellant was asked for identification information, including his name, address, date of birth, and social security number (T18/777; 19/815-16). [Quinlan testified on cross that the information matched what was on the Massachusetts probation warrant, except that a couple of the numbers in the social security number were transposed (T19/815-16)].

The ten-minute conversation ended, and the officers went back to their vehicle (T18/778, see 768). Quinlan testified that it was never made known to appellant during this conversation at the doorway that he was a suspect in the homicides (T18/782-83; 19/816). It was not until four days later, on July 1, after he had been arrested on the outstanding warrant, that he was notified that he was a suspect in the murders of Evans and Pugh (T18/783;19/816).

Following the conversation in the doorway, after the officers left, appellant picked up Maitland Nixon and left in his truck (T18/778; 19/816) A decision was made to stop appellant's vehicle with a uniformed cruiser (T18/778). [Actually, as he acknowledged on cross, Corporal Quinlan was aware at the time he approached appellant at his residence that there was an outstanding probation warrant from another state (T19/815), and the traffic stop was being made in order to arrest appellant on the outstanding Massachusetts warrant (T19/816)]. As appellant traveled southbound on Belcher Road approaching State Road 580, "the patrol deputy

initiated the traffic stop by turning his overhead lights on" (T18/782-83), and "the defendant fled at that point" (T18/782).

With the uniformed cruiser in full pursuit, appellant turned into a Chevron station, went through an alley, entered into an area called Heather Glen, and made a right turn which put him eastbound on Evans Road. At this point, his speed was excessive, over the speed limit. Quinlan was now involved in the pursuit and other units were called in (T18/779). He proceeded to go east and ran a stop sign, headed toward U.S. 19 (T18/779-80). The pursuing police cars had their overhead lights and sirens on (T18/780). Appellant turned southbound on 19, made a U-turn under the overpass, and headed northbound at a speed of seventy miles per hour (T18/780). The officers couldn't keep up with him because of traffic conditions -- "we couldn't drive as recklessly as he did" -- and they actually lost sight of him for a while (T18/780). Appellant made several more turns and went into a cul-de-sac called Mayfair (T18/780). At the end of the cul-de-sac the passenger, Maitland Nixon, was able to "bail out of the vehicle"; appellant left the roadway, ran up onto the grass, and went between two houses (T18/781). Staying off the roadway, appellant went a couple of streets over, abandoned his vehicle, and fled on foot (T18/781-82). Quinlan testified, "[W]e had, probably, between Clearwater Police Department, the Sheriff's Office and the helicopter, K-9, SWAT

team, we had probably in excess of a hundred people out there", but they were unable to locate him (T782).

Appellant was arrested four days later, on July 1, when he was caught returning to his residence on Belcher (T18/782).

According to the passenger, appellant's friend and neighbor Maitland Nixon -- a state witness[10] -- it was he [Nixon] who noticed a deputy behind them and told appellant, "I think we are going to be pulled over" (T22/1235). Appellant pulled into a Chevron station and, as the deputy followed, appellant said "I'm gonna run. I'm gonna run" (T22/ 1235). As the deputy was getting out of his cruiser, appellant took off. During the pursuit, appellant told Nixon that the cops had been to his house that morning. When Nixon asked to be let out of the truck, appellant said, "I can't do that, man. I can't do that. I got to go. I got to go. It's my life. I can't stop. They gonna -- <u>they want me. They're gonna ship me back</u>" (T22/1235-36). He kept repeating "It's my life" (T22/1236). <u>Nixon asked him what was up, and appellant replied "They want me for something up north</u>" (T22/1236).

As in <u>Escobar</u>, 699 So. 2d at 997, based on the totality of the circumstances in the instant case it cannot reasonably be inferred that appellant's flight when the police attempted to arrest him on the Massachusetts warrant was motivated by consciousness of guilt

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[10] Nixon was hospitalized with an illness at the time of trial, and his testimony was read to the jury by stipulation (T22/1233-34,1236; R8/1249-51).

of the charged homicides. While it is true that appellant was the main suspect in the murders as a result of the tire track comparison (see SR1827-28,1848-50), there is no evidence whatsoever that he was aware that he was a suspect. See Escobar, 699 So. 2d at 996. The evidence which led the police to develop him as a suspect was obtained by ruse, and appellant was unaware of it. When Corporal Quinlan and Detective Klein spoke with appellant in the doorway, they intentionally did so in a non-custodial, non-accusatory, non-threatening manner, which was designed to appear as routine canvassing of anyone who might have information about the victims. First they asked him if Terry Howard was home, even though they knew she wasn't. They told appellant they were contacting known prostitutes in the North Fort Harrison area, and they needed to speak with Terry. Each question initially dealt with whether Terry knew either of the victims, or whether they had even been with Terry in the apartment or vehicles. Appellant would answer that they would have to ask Terry. Then -- appearing almost as an afterthought -- they would ask appellant if he knew or had ever been with either of the victims, and he would answer no.

Plainly, the manner in which the officers spoke with appellant was specifically designed not to make him aware that he was a suspect in the homicides. On the other hand, he was well aware that he was a fugitive from the state of Massachusetts for absconding from probation. When asked for identification

information by the officers, he gave his correct name and date of birth but transposed two of the numbers in his social security number; this is consistent with an effort to prevent the police from finding out about the warrant, or at least buy some time, if then ran his name in the computer. [If this is what appellant was thinking, it was futile; since the police already had the warrant and were preparing to arrest him on it].

Not only was appellant unaware that he was a suspect in the homicides, the record shows a compelling alternative explanation for his flight from the police. In Escobar, 699 So. 2d at 966, this Court said:

> Furthermore, the record reveals that police had outstanding warrants against appellant in California for California crimes. We conclude that the existence of the outstanding warrants is significant. It could be reasonably inferred that the California warrants alone were the cause of appellant's attempt to flee the California police.

In the instant case, Corporal Quinlan acknowledged that the plan was to stop appellant and arrest him on the outstanding Massachusetts warrant (SR1836,1845,1852-57;T19/815-16). Their rationale for waiting until appellant was in his truck was to enable the officers to conduct a warrantless search of the vehicle (SR1854-55), but appellant would have no way of figuring that out. From appellant's point of view, if the police were going to arrest him because they suspected him of the murders, they would have done so when they questioned him in the doorway. Instead, they left and

appellant went back into his apartment. When appellant and Maitland Nixon left in the truck ten minutes later and the police tried to pull them over, the most logical assumption for appellant to make was that they ran his name and learned of the warrant. That, in fact, is what he told Nixon during the pursuit; "It's my life", "they want me", "[t]hey're gonna ship me back", and -- when asked what was up -- "They want me for something up north" (T22/1236).

The prosecutor compounded the prejudicial effect of the error in admitting the ambiguous flight evidence by the speculative manner in which he connected it to the collateral crime evidence involving Linda Randall Graham -- evidence which itself was improperly introduced [Issue I]. As previously discussed, the trial court's ruling allowing the state to introduce the flight evidence forced the defense -- in order to rebut the implication that the flight was motivated by consciousness of guilt of the charged crimes -- to inform the jury about the Massachusetts warrant during its cross-examination of Corporal Quinlan. Merritt; Evans. Then, in his redirect examination of Corporal Quinlan, the prosecutor asked him if he'd interviewed and read a report by Dr. Wesley Profit (T19/817). When the trial judge asked where he was going with this, the prosecutor argued at the bench that the defense, by cross-examining Quinlan about the existence of the warrant, had "opened the door" to the state to get into the charges

which had led to the probation (T19/818-19). The judge said "That's what I was afraid of" (T19/818), and the prosecutor continued:

> . . . [w]hat I was doing at this point is simply to say their suspicions -- their suspicions relating to the homicide were not unrelated. The fact that -- and we're going to hear from Linda Graham. We're going to hear Wesley Profit.
>
> In fact, if Mr. Randall was aware that the officers had made the connection to his background in Massachusetts, it is directly related and would have heightened his fear that they suspected him of the homicides.
>
> Now, I'm not going to ask him to articulate in that fashion, but I think that is a legitimate argument that can be made to counteract what he's trying to suggest; that this was just a VOP.
>
> In fact, the knowledge that they had "made" his Massachusetts background meant they had access to very relevant, incriminating evidence as to the homicides and, therefore, the two are not completely unrelated items. In fact, they go hand in hand in enhancing their suspicions. And that's one of the reasons, from the warrant, they suspected him of doing the murders, because they found out about his background in Massachusetts; his knowledge that they knew it, combined --
>
> THE COURT: How do we know --
>
> MR. SCHWARTZBERG [defense counsel]: Exactly.
>
> THE COURT: -- he knew it?
>
> MR. CROW [prosecutor]: That's what their argument is, is that -- that he believed that he was being stopped on the Massachusetts warrants. The Massachusetts warrants were in cases in which his ex-wife was a victim of the multiple rape and kidnapping that led to all

> this information, and tons of incriminating evidence against him.
>
> And I -- the two are not unrelated, as Mr. Schwartzberg has suggested to the jury: "It's just a VOP," but, in fact, it's a connection to a wealth of incriminating information. And if he had realized that they had made that connection, then it would increase his fear.
>
> And certainly, if you combine that with what happened at the front door, I think those are legitimate arguments.

(T19/818-20).

The key phrase here is "if he had realized." The prosecutor's hypothesis is entirely speculative. Moreover, in those cases in which flight evidence is probative and admissible, it is because the circumstances of the flight are sufficient to show consciousness of guilt of the charged crime. An accused in mid-trial is still entitled to the presumption of innocence. It is inconsistent with that presumption to pyramid inferences the way the prosecutor tried to do here: We (the prosecution) believe from the other evidence that the defendant is guilty; therefore, he must have been conscious of his guilt; therefore, that must have been why he ran. In other words, the prosecutor is presupposing consciousness of guilt of the charged crime in an effort to establish a basis for admissibility. That is not necessarily the case, however; the warrant in and of itself -- which would have resulted in appellant's being sent back to Massachusetts and

returned to prison -- was motivation enough for him to flee when the police tried to arrest him.[11]

The judge asked the prosecutor if there was going to be testimony to support his theory, and the prosecutor replied that it was "an inference" (T19/820):

> There's been no testimony that Mr. Randall -- as to why Mr. Randall ran, what was in his mind. Was he really concerned about the VOP or was he concerned about the murders?
>
> All the defense is going to argue is, the warrant was in existence. Therefore, that's what he must have been thinking.
>
> I think I'm entitled to argue inferences that the two are not really unrelated.

(T19/820)

The judge ruled that the state would not be allowed to bring out what the warrant was for; "[w]hatever value that has is outweighed by the prejudice . . ." (T19/821).

In closing argument, the prosecutor argued the flight evidence as follows:

> And what does he do after that? Police try to stop him, and he takes off. And he doesn't just take off, he risks his life and he risked Maitland Nixon's life in the process.

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[11] Ironically, the prosecutor argued to the trial judge in the penalty phase -- with equal speculation -- that appellant's fear of being sent back to Massachusetts left him no choice but to murder the victims once he had choked them during sex (T24/1562). Yet the same prosecutor argued to the jury in the guilt phase, after having introduced the ambiguous flight evidence, that the Massachusetts warrants were insufficient motivation for appellant to run from the police (T23/1372-73).

> And the suggestion is, "Well, he had a probation violation." And, "Well, he mentioned that to Maitland Nixon."
>
> First of all, what evidence do you have to suggest that whatever that probation violation was sufficient to cause him to do what he did; drive across Belcher Road seventy miles an hour through traffic where detectives could not keep up with him? It was dangerous. Driving off the roads and through, backwards; being a fugitive in the northern area of Pinellas County for four days and existing on his own and eluding helicopters and dogs and a massive amount of police officers, risking his life under those circumstances.
>
> What evidence is there to suggest to you that that was sufficient motivation for him to do what he did, when the only thing the police had suggested to him was "Wendy Evans," "Cynthia Pugh."
>
> But I suggest to you more than that, that the two were not unrelated. Whatever fears he had about his involvement in the murders of Cynthia Pugh and Wendy Evans could only be heightened by the realization the detectives were in possession of a warrant that made the connection to Massachusetts and the connection back to Linda Graham, the connection back to Wesley Profit. Because what more damning evidence could come out than the past, as reflected in their testimony?
>
> So to suggest that, "Well, this is just this, and this is something different, and the two are not related," I think, is to distort what is really before you.
>
> Because the connection to Massachusetts certainly heightened the incriminating evidence against him. And he would be aware of that and know that, at the time he made his decision to risk his life, and Maitland Nixon's, to flee.

(T23/1372-73, see 1378)

Thus, the erroneous admission of ambiguous flight evidence resulted in a triple whammy before the jury. First, even though

the required nexus between the flight and the charged homicides was not established, the jury may have taken it as showing consciousness of guilt of the murders. Second, the jury heard prejudicial testimony that appellant was on probation in another state, that he was a fugitive, and that there was a warrant for his arrest. And third -- due to the combination of the improper collateral crime evidence elicited from Linda Graham and the manner in which the prosecutor juxtaposed the flight evidence with the collateral crime evidence in closing argument -- it was strongly insinuated to the jury that the Massachusetts charge underlying the warrant had something to do with appellant's propensity to choke women.

Whether the burden of persuasion is on the state or on the defense, this Court cannot conclude beyond a reasonable doubt that the error in admitting the flight evidence did not contribute to the jury's verdict in the guilt phase. See appellant's argument in Issue I, p.50-51; State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986); Jackson v. State, 707 So. 2d 412, 414-15 (Fla. 5th DCA 1998). The evidence pointing to appellant's guilt was almost entirely circumstantial, and far from "overwhelming". In a recess immediately after the introduction of the flight evidence, the trial judge commented, "This case is hardly open and shut for anybody" (T19/ 793), and she made similar observations both in a pretrial hearing (R6/967) and -- more importantly -- at the close

of all the evidence (T22/1275). Moreover, in combination with the ex post facto violation regarding the use of the "probation" aggravating factor, the erroneous admission of the flight evidence had the effect of putting inadmissible and prejudicial information before the jury in the penalty phase. Appellant's conviction and death sentence must be reversed for a new trial.

ISSUE III

APPELLANT'S RIGHT TO A FUNDAMENTALLY FAIR TRIAL WAS IRREPARABLY COMPROMISED WHEN, JUST PRIOR TO HAVING THE PROSECUTOR READ TO PROSPECTIVE JURORS THE LENGTHY LIST OF POSSIBLE WITNESSES, THE TRIAL JUDGE MADE AN EXTEMPORANEOUS COMMENT WHICH COULD ONLY HAVE BEEN TAKEN BY THE JURORS AS MEANING THAT FOR EVERY WITNESS THE STATE ACTUALLY CALLED AT TRIAL, THERE WERE NUMEROUS OTHER UNCALLED WITNESSES WHO COULD CORROBORATE THAT PERSON'S TESTIMONY.

> The dominant position occupied by a judge in the trial of a cause before a jury is such that his remarks or comments, especially as they relate to the proceedings before him, overshadow those of the litigants, witnesses and other court officers. Where such comment expresses or tends to express the judge's view as to the weight of the evidence, the credibility of a witness or the guilt of an accused, it thereby destroys the impartiality of a trial to which the litigant or accused is entitled.

Hamilton v. State, 109 So. 2d 422, 424-25 (Fla. 3d DCA 1959); Robinson v. State, 161 So. 2d 578, 579 (Fla. 3d DCA 1964); Fogelman v. State, 648 So. 2d 214, 219 (Fla. 4th DCA 1994).

Quoting Ehrhardt, Florida Evidence, §106.1, p.22, the Fogelman opinion also states:

> During a jury trial, the judge occupies a dominant position. Any remarks and comments that the judge makes are listened to closely by the jury and are given great weight. Because of the credibility that the comments are given and because they would likely overshadow the testimony of the witnesses themselves and of counsel, Section 90.106 recognizes that a judge is prohibited from commenting on the weight of the evidence, or the credibility of the witness, and from summing up the evidence to the jury. If such comment and summing up were permitted, impartiality of the trial would be destroyed.

Accordingly, "[t]he firmly established rule in Florida is that the trial judge should avoid making directly to or with the hearing of the jury, any remark which is capable of conveying directly or indirectly, expressly, inferentially or by innuendo, any intimation as to what view he or she takes of the case or as to what opinion the judge holds concerning the weight, character, or credibility of any evidence adduced." Del Sol v. State, 537 So. 2d 693, 694 (Fla. 3d DCA 1989). See, e.g., Whitfield v. State, 452 So. 2d 548, 549 (Fla. 1984); Hamilton v. State, supra, 109 So. 2d at 424-25; Seward v. State, 59 So. 2d 529, 531-32 (Fla. 1952); Leavine v. State, 109 Fla. 447, 147 So. 897, 902 (1933); Speights v. State, 668 So. 2d 317 (Fla. 4th DCA 1996); Moton v. State, 659 So. 2d 1269 (Fla. 4th DCA 1995); Fogelman v. State, supra, 648 So. 2d at 219; McCrae v. State, 549 So. 2d 1122 (Fla. 3d DCA 1989); Reyes v. State, 547 So. 2d 347 (Fla. 3d DCA 1989); March v. State, 458 So. 2d 308, 310-11

(Fla. 5th DCA 1984); James v. State, 388 So. 2d 35 (Fla. 5th DCA 1980); Ferber v. State, 353 So. 2d 1256 (Fla. 2d DCA 1978); Abrams v. State, 326 So. 2d 211 (Fla. 4th DCA 1976); Parise v. State, 320 So. 2d 444 (Fla. 3d DCA 1975). This principle applies both in criminal and civil trials [see also Gendzier v. Bielecki, 97 So. 2d 604, 607 (Fla. 1957); Whitenight v. International Patrol and Detective Agency, Inc., 483 So. 2d 473, 475 (Fla. 3d DCA 1986)], but it is especially important in a criminal prosecution. Whitfield v. State, supra, 452 So. 2d at 549; Speights v. State, supra, 668 So. 2d at 318. In Hamilton v. State, supra, 109 So. 2d at 424-25, the appellate court reversed for a new trial, notwithstanding the lack of a timely objection below, where the trial court's remarks ". . . although unintentional, nevertheless constituted a comment by the court upon the guilt of the appellant and as such were prejudicial and denied him a fair and impartial trial."

In the instant capital case, the trial court made an ill-chosen extemporaneous comment to the prospective jurors which was capable of destroying their ability to decide the case fairly upon the evidence presented in court. The comment would have been flagrantly improper and prejudicial if it had been made by the prosecutor, but the fact that it was made by the judge herself -- the dominant figure in the trial and the one person whose impartiality must be, and must appear to be, beyond question -- makes the comment infinitely worse. See Steinhorst v. State, 636

So. 2d 498, 501 (Fla. 1994); Goines v. State, 708 So. 2d 656, 660-61 (Fla. 4th DCA 1998) (trial before a judge whose impartiality may reasonably be questioned "would present grave due process concerns" because "proceedings involving criminal charges . . . must both be and appear to be fundamentally fair").

Just prior to voir dire, the prosecutor asked the judge to read the entire list of possible witnesses, including the names provided by the defense, to the jurors. The judge said she would let the prosecutor read off the names because he was more familiar with them. The prosecutor said:

> What I don't want to imply to the jury, these are our witnesses, as opposed to these are people with relevant information. Because we -- so if we can preface it that way, is that okay with the Court, these are witnesses who may testify or who may be referred to in testimony?
>
> THE COURT: I usually handle that -- I usually tell them, while you've heard a lot of names, you know, the State would only call those witnesses they feel are necessary to prove their case, so undoubtedly you're not going to hear from all those people.

(T14/9-10)

If the judge had simply done what the prosecutor asked, and informed the jurors that the list was comprised of persons who might testify or might be referred to in testimony, and not to expect that everyone on the list would actually be called, there would have been no problem. If the judge added what she said she was going to add -- that "the State would call only those

witnesses they feel are necessary to prove their case" -- she would have been getting dangerously close to improperly suggesting that there were uncalled witnesses who could corroborate whatever testimony the state presented. But what the judge actually said to the jurors went way beyond suggestion:

> And, ladies and gentlemen, at this time I'm going to ask one of the Assistant State Attorneys to read you a rather comprehensive list. This is a list of -- of any person, presumably, who may have any knowledge, no matter how small, about the case.
>
> I will tell you now, as this list is very long, that you will not be hearing from all these people. It will be the State's job to prove their case beyond a reasonable doubt, if they can, and they will call whatever amount of witnesses they feel is appropriate to do that. Whether they have met their burden of proof, of course, is for the jury to decide. <u>They won't parade in five witnesses to repeat what one witness can tell you</u>.

(T14/26-27)

This comment could only have been taken by the jurors as the judge telling them that the witnesses they would hear in court were just the tip of the iceberg; that there was a lot more evidence "out there" which the prosecution simply felt it didn't need.

The judge asked the prosecutor to read the witness list to the jury; it consisted of over 250 names and included each person's place of residence and, where relevant, his or her occupation (T14/27-25). Among the names on the list who did not testify in the trial, fifteen were identified as FBI agents or employees; five were Massachusetts law enforcement officers (and three more were

civilian residents of Massachusetts); three were with the FDLE; three, including one doctor, were with the Medical Examiner's office; three were forensic specialists; and four were associated with the Bridgestone/Firestone tire manufacturing company (as well as seven others from the Don Olson tire retailers) (T14/27-35). More than 100 other were identified as law enforcement officers, mostly from the Pinellas County sheriff's department and the Clearwater police, but with the Polk and Hillsborough sheriff's offices represented as well (T14/27-35).

When comparable remarks have been made to juries by prosecutors such comments have been condemned as improper and prejudicial, necessitating reversal for a new trial. See Ford v. State, 702 So. 2d 279, 281 (Fla. 4th DCA 1997) ("[a]n argument suggesting to the jury that there is evidence harmful to the accused that the jury did not hear is highly improper"); Hazelwood v. State, 658 So. 2d 1241, 1244 (Fla. 4th DCA 1995) (prosecutor cannot suggest that there are other witnesses who would corroborate the state's case had they been called to testify); Tillman v. State, 647 So. 2d 1015, 1016 (Fla. 4th DCA 1994) (reference by state in closing argument "as to other witnesses who would corroborate the state's case" had they been called to testify violated established rules and necessitated reversal); Stewart v. State, 622 So. 2d 51, 56 (Fla. 5th DCA 1993) (new trial required where "prosecutor's statement clearly suggest[ed] that the State

had additional evidence and proof of the defendant's guilt that it had not provided to the jury"); Landry v. State, 620 So. 2d 1099, 1102 (Fla. 4th DCA 1993) (finding dispositive the holding in Thompson v. State, 318 So. 2d 549 (Fla. 4th DCA 1975), cert.denied, 333 So. 2d 465 (Fla. 1976) that it is "fundamental error for a prosecutor to argue in closing that there was other evidence which could have been introduced but wasn't"); Williams v. State, 548 So. 2d 898, 899-900 (Fla. 4th DCA 1989) (prosecutor cannot suggest that there are other witnesses who would corroborate the state's case had they been called to testify); Williamson v. State, 459 So. 2d 1125, 1126 (Fla. 3d DCA 1984) ("[d]efendant correctly contends that the prosecutor's comments were improper as they implied the existence of additional, highly incriminating testimony"); Richardson v. State, 335 So. 2d 835 (Fla. 4th DCA 1976) (prosecutor's comment that he could have brought in a lot of police officers implied the existence of additional, harmful evidence and constituted reversible error); and Thompson v. State, 318 So. 2d 549 (Fla. 4th DCA 1975) (prosecutor's statement to the jury that he could have put on other police officers but he saw no need to was highly improper and prejudicial, and required reversal for a new trial even in the absence of an objection below).

The rule against suggesting that there are uncalled witnesses who would corroborate the testimony the jury heard is so basic to a fair trial that its violation constitutes fundamental error

[Thompson; see Landry], and reversal is required even when the comment was made in response to a prior defense argument criticizing the state's investigation or questioning its failure to present certain witnesses. Hazelwood; Tillman; Williams; Williamson. In Hazelwood, for example:

> defense counsel questioned the lack of testimony from witnesses Southward and Ison. Although this comment opened the door to a fair response regarding the defense's subpoena power, the state cannot go so far as telling the jury that the additional, uncalled witnesses would corroborate the state's case. This is exactly what happened here; the state stepped outside the boundaries of a "fair reply." Therefore, because the prosecutor suggested that Southward and Ison would corroborate the state's case, the closing argument was impermissible.

658 So. 2d at 1244.

In Tillman, 647 So. 2d at 1016, the reversal was based on the precedent of Thompson and Williams:

> In Williams v. State, defense counsel commented that there were seven to ten witnesses and the state only presented one. Williams, 548 So. 2d 898, 899 (Fla. 4th DCA 1989). In response, the state replied, "Why would we call seven to ten people to say the same thing?" Id. This court reversed and found this reply to be clearly violative of the rule that the response cannot suggest there are other witnesses who would corroborate the state's case had they been called to testify. Id.

In the instant case, with no provocation by the defense, it was the trial judge who inadvertently tainted the jury's ability to decide this capital case based soley on the evidence presented in

court, by telling them that the state "won't parade in five witnesses to repeat what one witness can tell you." A clearer violation of the rule against suggesting that there are uncalled witnesses who would corroborate the state's case can hardly be imagined, and the fact that here it was the judge who said it greatly increases its prejudicial impact upon the jury. Juries are aware that the prosecutor is an advocate for one side. The judge, on the other hand, is the dominant figure in the trial and the one person whose neutrality must be beyond question; even the appearance of partiality on the part of the judge raises grave due process concerns and threatens the fundamental fairness of the proceedings. Hamilton; Steinhorst; Goines. "Any remarks and comments that the judge makes are listened to closely by the jury and are given great weight" Ehrhardt, Florida Evidence, §106.1 (1998 Ed.). The prohibition against judicial comment on the evidence is "[b]ecause of the credibility that the comments are given and because they would likely overshadow the testimony of the witnesses themselves . . . ." Ehrhardt, Florida Evidence, §106.1 (1998 Ed.). The fact that the judge's comment in the instant case was made at the beginning of jury selection does not lessen its harmful impact, since it could easily have affected how the jurors listened to all of the testimony which was subsequently introduced by the state; knowing that whatever the witness said -- whatever they thought of his or her demeanor or credibility or how he or she

held up on cross -- there were other uncalled witnesses out there who would corroborate the testimony if the state saw fit to call them.

For the reasons discussed in Issues I and II, this Court cannot find beyond a reasonable doubt that the error did not contribute to the jury's verdict. See also Stewart, 622 So. 2d at 57; Williamson, supra, 459 So. 2d at 1128.

Thompson v. State, supra, 318 So. 2d at 551, and Hamilton v. State, supra, 109 So. 2d at 424-25, show that the judge's improper comment was so destructive of appellant's right to a fair trial that a new trial must be afforded notwithstanding the failure of defense counsel to object below. In Thompson (where the prosecutor told the jury he could have put on other police officers but he saw no need to), the appellate court said:

> We note, at the outset, that the absence of an appropriate objection or motion by defense counsel below is not fatal to our consideration of this point on appeal. The rule is generally stated that:
>
> > ". . . whether requested or not, it is the duty of the trial judge to check improper remarks of counsel to the jury, and by proper instructions to remove any prejudicial effect such remarks may have created. A judgment will not be set aside because of the omission of the judge to perform his duty in the matter unless objected to at the proper time. This rule is, however, subject to the exception that if the improper remarks are of such character that neither rebuke nor retraction may entirely destroy their sinister influence, in such event, a new trial should be awarded re-

> gardless of the want of objection or exception." Carlile v. State, 129 Fla. 860, 176 So. 862, 864 (1937).
>
> Accord, Wilson v. State, 294 So. 2d 327 (Fla. 1974); Grant v. State, 194 So. 2d 612 (Fla. 1967); Pait v. State, 112 So. 2d 380, 385 (Fla. 1959); Goddard v. State, 143 Fla. 28, 196 So. 596, 600 (1940). We believe the prosecutor's remarks in this case to have been so prejudicial to the rights of the accused and unsusceptible to eradication by rebuke or retraction as to necessitate the reversal of appellant's conviction for the award of a new trial.

See, generally, Robinson v. State, 520 So. 2d 1, 7 (Fla. 1988) ("Our cases also have long recognized that improper remarks to the jury may in some instances be so prejudicial that neither rebuke nor retraction will destroy their influence, and a new trial should be granted despite the absence of an objection below or even in the presence of a rebuke by the trial judge").

In the instant case, once the trial judge told the jury in effect that the state had more evidence of appellant's guilt than they would find it necessary to present, there was no way to unring that particular bell. An instruction to disregard that statement would have been useless [Thompson; see also Williamson v. State, supra, 459 So. 2d at 1128], or worse than useless if it reemphasized the point. Maybe the trial court could have rebuked herself "to impress upon the jury the gross impropriety of being influenced by improper arguments "[see Williamson], but again -- under the circumstances -- it would have been completely

ineffective to cure the error. As in Hamilton v. State, supra, 109 So. 2d at 424-25, and as in Ferber v. State, 353 So. 2d 1256 (Fla. 2d DCA 1978), the judge undoubtedly did not mean for her words to come out the way they did, but as in Hamilton and Ferber her inadvertent but highly prejudicial comment amounted to fundamental error. As stated in Hamilton:

> The dominant position occupied by a judge in the trial of a cause before a jury is such that his remarks or comments, especially as they relate to the proceedings before him, overshadow those of the litigants, witnesses and other court officers. Where such comment expresses or tends to express the judge's view as to the weight of the evidence, the credibility of a witness, or the guilt of an accused, it thereby destroys the impartiality of the trial to which the litigant or accused is entitled. The court's remarks as delineated above, although unintentional, nevertheless constituted a comment by the court upon the guilt of the appellant and as such were prejudicial and denied him a fair and impartial trial. [Citation omitted].

ISSUE IV

APPELLANT'S CONVICTIONS SHOULD BE REDUCED TO SECOND DEGREE MURDER, AND HIS DEATH SENTENCES VACATED, BECAUSE THE CIRCUMSTANTIAL EVIDENCE, WHILE SUFFICIENT TO PROVE THAT THE KILLINGS WERE UNLAWFUL, IS INSUFFICIENT TO PROVE THAT THEY WERE PREMEDITATED.

Premeditation is the essential element which distinguishes first degree from second degree murder. Coolen v. State, 696 So. 2d

738, 741 (Fla. 1997). Under Florida law, premeditation means "a fully formed and conscious purpose to take human life, formed upon reflection and deliberation, entertained in the mind before and at the time of the homicide." Spinkellink v. State, 313 So. 2d 666, 670 (Fla. 1975), quoting McCutcheon v. State, 96 So. 2d 152, 153 (Fla. 1957). See also Wilson v. State, 493 So. 2d 1019, 1021 (Fla. 1986); Tien Wang v. State, 426 So. 2d 1004, 1005 (Fla. 3d DCA 1983). Reflection is an integral requirement for premeditation. Waters v. State, 486 So. 2d 614, 615 (Fla. 5th DCA 1986).

Premeditation is "more than a mere intent to kill; it is a fully formed conscious purpose to kill"; this purpose may be formed a moment before the act, but it must also exist for a sufficient length of time to permit reflection. Green v. State, __So. 2d __ (Fla. 1998) (case no. 86,983 decided May 21, 1998) [23 FLW S281, 282]; Norton v. State, 709 So. 2d 97, 92 (Fla. 1997); Coolen v. State, supra, 696 So. 2d 741; Wilson v. State, supra, 493 So. 2d 1021 (Fla. 1986). And, as this Court explained in Coolen:

> While premeditation may be proven by circumstantial evidence, the evidence relied upon by the State must be inconsistent with every other reasonable inference. Hoefert v. State, 617 So. 2d 1046 (Fla. 1993). Where the State's proof fails to exclude a reasonable hypothesis that the homicide occurred other than by premeditated design, a verdict of first-degree murder cannot be sustained. Hall v. State, 403 So. 2d 1319 (Fla. 1981).

696 So. 2d at 741.

See also Fisher v. State, __So. 2d __ (Fla. 1988) (case no. 86,665, decided June 12, 1998)[234 FLW S351,352]; Cummings v. State, __So. 2d __ (Fla. 1988) (case no. 86,413, decided June 11, 1998)[23 FLW S305, 306]; Green v. State, supra, 23 FLW at S282; Norton v. State, supra, 709 So. 2d at 92; Kirkland v. State, 684 So. 2d 732, 734 (Fla. 1996).[12]

In the instant case, it was the prosecution itself -- by introducing over objection the evidence of appellant's long history of choking his partners in order to heighten his sexual arousal[13] -- which affirmatively showed a reasonable hypothesis that the homicides occurred other than by premeditated design. Both Linda Randall Graham (appellant's ex-wife) and Terry Jo Howard (his more recent live-in girlfriend) testified for the state that appellant would forcefully choke them with his hands during sexual activity (T21/1016-17,1019-21,1046-47,1103-05). This sometimes caused injury (T21/1103-05) and, on one occasion when appellant was enraged at Terry Howard, unconsciousness (T21/1023-24). Linda and Terry both testified that appellant became sexually stimulated or

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[12] The defense in the instant case moved for judgment of acquittal both as to proof of identity (T22/1259,1275-77) and as to proof of premeditation (T22/1259-75). The trial court denied the motions (T22/1272-77).

[13] By challenging the sufficiency of the evidence of premeditation, appellant does not retreat from his position asserted in Issue I that the evidence of appellant's history of choking women was improperly introduced, and that a new trial is required.

aroused by choking them, and especially from their reaction to it (T21/1016,1020-21,1104). Terry observed that it seemed to excite appellant more when she fought him or showed fear (T21/1020-21, 1046-47). When she changed her reaction and did nothing, the choking behavior tapered off and eventually pretty much stopped (T21/1020,1046-47). The state also presented Dr. Wesley Profit, who interviewed appellant in a Massachusetts hospital in 1986. Appellant told Dr. Profit of his urge to choke his partners during sexual intercourse, using force or violence to heighten his arousal (R21/1107-10).

Thus, the prosecution introduced evidence of numerous non-fatal assaults during sexual intercourse wherein appellant choked his partner with his hands in order to become sexually aroused, as well as evidence from a doctor that appellant admitted to having an urge or compulsion to do that. Yet, as the prosecutor himself asserted to the trial judge in the penalty phase:

> So I think, once you realize that this is a man who, once he commits a crime against a stranger, once he takes that person to his residence, then he has no choice but to murder them -- and I believe the evidence as to his motivation is that he gets sexual gratification from the fear, but the -- the murder, which goes beyond unconsciousness, does not necessarily gratify him in any way. And I think it's a deliberate act, intentionally done to prevent him being caught and to --

(T24/1562)

The prosecutor's somewhat convoluted theory at that stage was that appellant picked up the two women, both of whom were prostitutes in the North Fort Harrison area, and brought them to his house for sex, during which he choked them forcefully (as was his longtime sexual proclivity), and then deliberately murdered them to eliminate them as witnesses to their own (up to that point) non-fatal choking. (See T24/1562-63). The judge correctly rejected this theory as speculative, and refused to instruct the jury on the "cold, calculated, and premeditated" aggravating factor, saying:

> They may be, Mr. Crow, but in my humble opinion, there is just as much evidence the other way. For the jury to have this aggravating factor, they would have to speculate. I would have to speculate. I could not find it. If I found it, the Florida Supreme Court could very well reverse this if, in fact, the death penalty were to be imposed. It's speculation.
>
> It may well be just as you say. It may well be, however, that this was a man who had this disease that everybody's talking about, sexual sadism, where he has this necessity to choke his victims, which he's done on numerous occasions, according to the State's own testimony, and where, this time, it went too far.
>
> After that happens, naturally, one has to dispose of the body.
>
> So. I understand where you're coming from. I think I could not find it in this case, and I think it would be inappropriate for the jury to have it.

(T24/1563-64)

All of the circumstantial evidence relating to the nature of the killings was presented in the guilt phase. For the same reason

that the state's evidence was insufficient to prove heightened premeditation (an essential element of the CCP aggravator in the penalty phase), it was also insufficient to prove deliberation (an essential component of premeditation, which distinguishes first and second degree murder). There were no witnesses to the events immediately preceding the homicide.[14] The was no evidence or statements indicating any preconceived plan to kill.[15] There was no evidence of any previous difficulties between appellant and either of the victims,[16] and no evidence -- notwithstanding the prosecutor's speculative witness elimination theory -- that he had any motive to kill them.[17]The prosecutor acknowledged that appellant

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[14] See Green v. State, supra, 23 FLW at S282; Norton v. State, supra, 709 So. 2d at 92; Kirkland v. State, supra, 684 So. 2d at 735; Mungin v. State, 689 So. 2d 1026,1028 (Fla. 1997).

[15] See Kirkland v. State, supra, 684 So. 2d at 735; Mungin v. State, supra, 689 So. 2d at 1029. See also Green v. State, supra, 23 FLW at S231-32 (insufficient evidence of premeditation under totality of circumstances; there was little, if any, evidence that Green committed the homicide according to a preconceived plan, notwithstanding a witness' testimony that she'd overheard Green the afternoon before the murder say "I'll get even with the bitch, I'll kill her").

[16] See Green v. State, supra, 23 FLW at S282, quoting Holton v. State, 573 So. 2d 284, 289 (Fla. 1990) and Larry v. State, 104 So. 2d 352, 354 (Fla. 1958); see also Kirkland v. State, supra, 684 So. 2d at 734-35 (cited in Green; premeditation not found despite evidence of a prolonged attack against the victim and a history of friction between the victim and the defendant).

[17] See Norton v. State, supra, 709 So. 2d at 92 (while proof of motive is not an essential element of first degree murder, where proof of premeditation rests on circumstantial evidence absence of proof of motive may become important).

did not necessarily get any sexual gratification from the act of killing; it was his partner's reaction while being choked that aroused him. This is entirely consistent with the testimony of Linda and Terry and Dr. Profit. The less Terry showed fear, the sooner appellant lost interest in choking her. The state's evidence, therefore, is entirely consistent with the reasonable hypothesis that appellant, in having sex which was either consensual or at least began consensually,[18] started forcefully choking the women. They, not being aware of appellant's compulsion as Linda and Terry were, may have reacted with more fear or more of a struggle than his ex-wife or his girlfriend did, which in turn ignited his arousal or rage. See Mitchell v. State, 527 So. 2d 177, 182 (Fla. 1988) (a rage is inconsistent with the premeditated intent to kill someone); State v. Bingham, 719 P. 2d 109, 113 (Wash. 1986) (questioning one's ability to deliberate or reflect while engaged in sexual activity). Under these circumstances, there is no proof that appellant acted on either occasion with a "fully formed and conscious purpose to take human life, formed upon reflection and deliberation"; and therefore the evidence fails to sustain the convictions of first degree murder. See Green v. State, supra, 23 FLW S282, citing Hoefert v. State, 617 So. 2d

[18] Note that appellant was not charged with, and the jury was not instructed on, sexual battery or felony murder. Nor would the record support a conviction of felony murder. See Kirkland v. State, supra, 684 So. 2d at 735.

1046, 1048-49 (Fla. 1993) (premeditation not found despite evidence the strangled victim was found partially nude and the defendant had a history of strangling women while raping them). Instead, the evidence establishes second degree murder, which is defined as the "unlawful killing of a human being, when perpetrated by any act imminently dangerous to another and evincing a depraved mind regardless of human life, although without any premeditated design to effect the death of any particular individual". Fla. Stat. §782.04(2). See Fisher v. State, 23 FLW at S352; Cummings v. State, 23 FLW at S306; Kirkland v. State, 684 So. 2d at 735.

Manual strangulation, without more, does not establish premeditation; depending upon the circumstances it may be as consistent or more consistent with second degree murder. Green; Hoefert; Bingham. As the Supreme Court of Washington recognized in Bingham, 719 P. 2d at 113:

> . . . to allow a finding of premeditation only because the act takes an appreciable amount of time obliterates the distinction between first and second degree murder. Having the opportunity to deliberate is not evidence the defendant did deliberate, which is necessary for a finding of premeditation. Otherwise, any form of killing which took more than a moment could result in a finding of premeditation, without some additional evidence showing reflection.

Nor do the incidental blunt trauma wounds (which were more extensive in the Evans case than in the Pugh case, and which were not a contributory cause of death) prove that the killings occurred

upon deliberation and reflection. Green, 23 FLW at S281-82; Kirkland, 684 So. 2d at 734-35.

As the trial court correctly understood in denying the CCP instruction (T24/1563-64), disposal of a homicide victim's body and concealment of evidence is just as consistent with second degree murder or even manslaughter as with premeditated murder. Norton v. State, 709 So. 2d at 93; see also Hoefert v. State, 617 P. 2d at 1049. The after-the-fact "statement" which Terry Jo Howard said appellant made to her by air-writing it with his finger on the window glass at the jail[19] is also equally consistent -- in fact, probably more consistent -- with unlawful but unpremeditated killings which occurred as a result of his compulsion to strangle his partners during sex; a compulsion of which Terry was well aware. Not only did appellant not admit to any intent to kill the victims, he did not say, "I killed others so that I would not kill you." What he said, in response to her question "Why not me?", was "I hurt others so that I would not hurt you" (T21/1038-40). Since the evidence showed that appellant often strangled Terry during sex, but gradually stopped doing so when she stopped reacting and showing fear, appellant's statement is completely consistent with

[19] Terry acknowledged on cross that in her pretrial sworn statement she had told the assistant state attorney she wasn't sure what appellant had written on the window, and there were a lot of words she didn't understand (T21/1054-55). At trial she said she was lying in the sworn statement because she was afraid, confused, and upset (T21/1054-56).

the likelihood that his unsatisfied compulsion drove him to seek an outlet elsewhere; i.e., with prostitutes when Terry was out of town. The statement does not in any way prove or even suggest that he murdered them with premeditated intent.

The trial judge, in distinguishing Hoefert and denying the JOA motion, said:

> . . . you know, if one person died, you might be able to say "Well, gee, a person died", and they did what they'd always done, which was, you know, what they'd done a lot, which was a little choking and heightened sex, and gee, this person just -- her neck bone broke, and it wasn't meant.
>
> I think you could make that argument. But I don't know how you make it the next time. In other words, it seems like you'd learn that, if you push too hard, the neck bone breaks, and the person dies.
>
> And you have two deaths here.

(T22/1274).

Indeed it does seem like you'd learn, and the fact that appellant didn't learn is ample proof that he twice committed an imminently dangerous act resulting in death, and did so with a depraved mind without regard to human life. It does not prove beyond a reasonable doubt that on either occasion he had a fully formed and conscious purpose to take human life, formed upon reflection and deliberation. Appellant's convictions must be reduced to second degree murder, and his death sentences vacated.

ISSUE V

THE STATE AND FEDERAL CONSTITUTIONAL PROHIBITION AGAINST EX POST FACTO LAWS WAS VIOLATED BY THE TRIAL COURT'S INSTRUCTION TO THE JURY THAT IT COULD WEIGH AS AN AGGRAVATING CIRCUMSTANCE THE FACT THAT APPELLANT WAS ON FELONY PROBATION, AND BY THE TRIAL COURT'S FINDING OF THIS AGGRAVATING CIRCUMSTANCE IN HER ORDER SENTENCING APPELLANT TO DEATH.

A. The May 30, 1996 Addition of Probationary Status as an Aggravating Factor

The charged offenses in this case were committed on October 20, 1995 and January 18, 1996. At the time of the offenses, Florida's death penalty statute provided, in pertinent part:

> (5) Aggravating Circumstances, - Aggravating circumstances shall be limited to the following:
> (a) The capital felony was committed by a person under sentence of imprisonment or placed on community control.

Fla. Stat. §921.141(5)(a).

The clearly established law in this state, at the time these offenses were committed, was that aggravating circumstance (5)(a) was not applicable to persons on probation. Peek v. State, 395 So. 2d 492, 499 (Fla. 1981); Ferguson v. State, 417 So. 2d 631, 636 (Fla. 1982); Bolender v. State, 422 So. 2d 833, 837038 (Fla. 1982).

After the offenses in the instant case occurred (seven months after the Evans homicide and four months after the Pugh homicide), the legislature amended the (5)(a) aggravating circumstance to add the words "or on probation." Laws 1996, c. 96-290, §5, subsec. (5), effective May 30, 1996. The legislature subsequently revised the (5)(a) aggravator again, effective October 1, 1996, to specify "felony probation" and that the defendant have been previously convicted of a felony. Laws 1996, c. 96-302, §1, subsec. (5). For purposes of this ex post facto argument, the operative date is May 30, 1996, because prior to that date probationary status (for a

felony or otherwise) was not a statutorily enumerated aggravating factor; moreover, the decisions of this Court made it clear that probationary status was not included within this aggravating factor. Peek; Ferguson; Bolender.

B. The Defense Objection, the Jury Instruction, and the Trial Court's Finding

In the penalty phase of this trial, defense counsel objected to the jury being instructed on the felony probation aggravating circumstance, saying "That law wasn't in effect at the time of these crimes. It came into effect later" (T24/1555). The trial judge recognized that the defense was "making an argument on an ex post facto law, and that would be preserved" (T24/1555). The judge, however, was of the view that "aggravating factors -- are as they are at the time of sentencing, and not what they were at the time of the commission of the offense or otherwise" (T24/1555). Consequently, the judge, noting again that "your record is preserved s to whether or not ex post facto shouldn't be applied", said she would give the instruction (T24/1556)

Subsequently, the judge instructed the jury on only three aggravating factors, one of which was:

> Number one, the crime for which James Randall is to be sentenced was committed while he had previously been convicted of a felony and was on felony probation.

(T24/1604)

The trial judge also found this as an aggravating factor in her order sentencing appellant to death (R9/1397-98; see R13/1749-50). She relied on Trotter v. State, 690 So. 2d 1234 (Fla. 1996) to support her conclusion that it was proper to use aggravating factors that did not exist at the time the crime was committed but did exist at the time of the penalty proceeding (R9/1397). Hedging, she added "Because of the possible legal ramifications of applying this factor in violation of the ex post facto laws of Florida, this Court will not give this aggravating factor the great weight she might otherwise give it, but only moderate weight" (R9/1397-98, 13/1750). [Not to suggest that it would have cured or obviated the error in any event, but note that the trial court's instruction to the jury on this aggravator did not contain any cautionary advice to give it less weight because it might be unconstitutional. Under Florida's capital sentencing procedure, the jury is the co-sentencer and the trial court must give its penalty recommendation great weight. When the jury is instructed that it can consider and weigh a legally invalid (as opposed to a factually unsupported) aggravating factor, the weighing of that factor violates the Eighth Amendment, and taints both the jury's penalty verdict and the sentence ultimately imposed by the judge. See Sochor v. Florida, 504 U.S. 527, 538 (1992); Espinosa v. Florida, 505 U.S. 1079, 1081-82 (1992); Jackson v. State, 648 So. 2d 85, 90 (Fla. 1994)].

C. The Instruction on and the Finding of the Felony Probation Aggravating Factor Violated the Ex Post Facto Clauses of the United States and Florida Constitutions

Under Florida law, aggravating circumstances:

> actually define those crimes . . . to which the death penalty is applicable in the absence of mitigating circumstances. As such, they must be proved beyond a reasonable doubt before being considered by judge or jury.

State v. Dixon, 283 So. 2d 1, 9 (Fla. 1973).

In Vaught v. State, 410 So. 2d 147, 149 (Fla. 1982), this Court reiterated:

> We find that the provisions of section 921.141 are matters of substantive law insofar as they define those capital felonies which the legislature finds deserving of the death penalty.

The aggravating factors are strictly limited to those enumerated in the statute. Kormondy v. State, 703 So. 2d 454, 463; (Fla. 1997); Geralds v. State, 601 So. 2d 1157, 1162 (Fla. 1992); Miller v. State, 373 So. 2d 882, 885 (Fla. 1979). Quoting from Elledge v. State, 346 So. 2d 998, 1003 (Fla. 1997), this Court wrote in Miller:

> We must guard against any unauthorized aggravating factor going into the equation which might tip the scales of the weighing process in favor of death.

373 So. 2d at 885.

See also Kormondy v. State, 703 So. 2d at 463 ("turning of a blind eye to the flagrant use of nonstatutory aggravation

jeopardizes the very constitutionality of our death penalty statute").

Article I, section 10 of the Florida Constitution and Article I, section 10 of the United States Constitution prohibit ex post facto laws. In State v. Hootman, 709 So. 2d 1357 (Fla. 1998), this Court recently "approve[d] the ruling of the trial court that an aggravating factor enacted into law after the commission of a capital crime may not be considered in the sentencing of a defendant" 709 So. 2d at 1358. The Hootman Court wrote:

> Recently, the Supreme Court of the United States in Lynce v. Mathis, 519 U.S. 433, 117 S. Ct. 891, 137 L. Ed. 2d 63 (1997), held that for a law to "fall within the ex post facto prohibition, [it] must be retrospective -- that is `it must apply to events occurring before its enactment' -- and it `must disadvantage the offender affected by it' by altering the definition of criminal conduct or increasing the punishment for the crime." Id. at ___, 117 S. Ct. at 895, (citations omitted); accord Miller v. Florida, 482 U.S. 423, 430, 107 S. Ct. 2446, 2451, 96 L. Ed. 2d 351 (1987); Weaver v. Graham, 450 U.S. 24, 101 S. Ct. 960, 67 L. Ed. 2d 17 (1981); Britt v. Chiles, 704 So. 2d 1046 (Fla. 1997); cf. Dugger v. Williams, 593 So. 2d 180, 181 (Fla. 1991) (holding that a law violates ex post facto prohibition where it is retrospective in effect and "diminishes a substantial substantive right the party would have enjoyed under the law existing at the time of the alleged offense"). In other words, "[a] law is retrospective if it `changes the legal consequences of acts completed before its effective date.'" Miller, 482 U. S. at 430, 107 S. Ct. at 2451.

The Hootman opinion then discusses the decisions of the Arizona Supreme Court in State v. Correll, 715 P. 2d 721 (Ariz. 1986), and the Arkansas Supreme Court in Bowen v. State, 911 S.W. 2d 555 (Ark. 1995), each of which held that the retrospective application of a new aggravator would be an ex post facto law and could not constitutionally be upheld. The statutory amendments to the death penalty law were substantive rather than procedural, and the defendant could be disadvantaged if the aggravator were to apply against him. See Hootman, 709 So. 2d at 1359; Correll, 715 P. 2d at 73; Bowen, 911 S.W. 2d at 563-64.

Returning to the Florida death penalty statute, the Hootman Court continued:

> . . . there is no doubt that application of section 921.141(5)(m) would be retroactive in effect since Hootman's alleged conduct occurred before the statute was enacted. It is equally apparent that section 921.141(5)(m) disadvantages Hootman by altering the definition of the criminal conduct that may subject him to the death penalty and increasing the punishment of a crime based upon the new aggravator. Under section 921.141(5)(m), the State may proffer evidence that "[t]he victim of the capital felony was particularly vulnerable due to advanced age or disability" in seeking the death penalty. See §921.141(5)(m), Fla. Stat. (1997). This Court held in State v. Dixon, 283 So. 2d 1, 9 (Fla. 1973), "The aggravating circumstances . . . actually define those crimes . . . to which the death penalty is applicable." Indeed, the severity of the death penalty and the role of the judge and jury in considering the prescribed aggravating circumstances make aggravating circumstances a critical part of the substantive law of capital cases. Before

> the legislature enacted section 921.141(5)(m), advanced age of the victim had not been part of any of the previously enumerated factors. In enacting section 921.141(5)(m), therefore, the legislature altered the substantive law by adding an entirely new aggravator to be considered in determining whether to impose the death penalty.

709 So. 2d at 1360.

In the instant case, just as in Hootman, before the legislature amended §921.141(5)(a) effective May 30, 1996, probationary status had not been part of any enumerated aggravating factor. Moreover, there was caselaw from this Court directly on point for at least fifteen years prior to the 1996 amendment that made it clear that probationary status was not an aggravator and was not included within the definition of "under sentence of imprisonment" in subsection (5)(a). Contrast Trotter v. State, 690 So. 2d 1234, 1237 (Fla. 1996). The legislature's addition of probationary status as an aggravating factor, when for decades it had been prohibited from being used as an aggravating factor, was a 180-degree change in the law; not a mere "refinement". The reasoning in Hootman applies with full force, and the retrospective application of the "felony probation" aggravator violates the constitutional prohibition against ex post facto laws.

The case relied upon by the trial court, Trotter v. State, 690 So. 2d 1234 (Fla. 1996) [referred to hereafter as Trotter II] is plainly distinguishable, but appellant also submits that Trotter II was wrongly decided as a matter of state and federal constitutional

law, and this Court should reconsider that decision in light of Hootman (as well as the opinions from other jurisdictions discussed in Hootman). Appellant suggests that the concurring opinion of Justice Kogan in Ellis v. State, 622 So. 2d 991, 1002 (Fla. 1993) and the dissenting opinion of Justice Anstead, joined by Justice Kogan, in Trotter II are consistent with the ex post facto analysis in Hootman and in United States Supreme Court decisions such as Weaver v. Graham, 450 U.S. 24 (1981) and Miller v. Florida, 482 U.S. 423 (1987), and correctly state the applicable law.

Even assuming arguendo that Trotter II was not implicitly overruled by Hootman, it is inapplicable to the instant case. As previously discussed, the addition of probationary status as an aggravator was a 180-degree change in the law. For years it clearly wasn't an aggravator; then -- as of May 30, 1996 by act of the legislature -- it was one. The community control aggravator at issue in the two Trotter decisions had a very different history. In Trotter v. State, 576 So. 2d 691 (Fla. 1990) [Trotter I], this Court had held that community control status or violation could not be considered as an aggravating circumstance under subsection (5)(a), and remanded for resentencing. Immediately after the decision on appeal but before the resentencing took place, the legislature amended subsection (5)(a) to encompass community control. This aggravator was applied to Trotter on resentencing.

In concluding, in Trotter's second appeal, that this did not violate ex post facto provisions, this Court wrote:

> Trotter claims -- as he did in his original appeal -- that the trial court erred in finding that community control is an aggravating circumstance. We agreed with Trotter originally, but in light of subsequent legislation making clear legislative intent, we now disagree. At the time of Trotter's initial appeal, the capital sentencing statute was ambiguous -- it failed to mention community control specifically, speaking instead of "sentence of imprisonment" broadly:
>
> (5) AGGRAVATING CIRCUMSTANCES. -- Aggravating circumstances shall [include] the following:
>
> (a) The capital felony was committed by a person under sentence of imprisonment. §921.141, Fla. Stat. (1985).
>
> Although the phrase "under sentence of imprisonment" was read by two members of this Court in Trotter as embracing community control, the majority felt compelled under traditional rules of statutory construction to give the phrase a strict construction . . . .

Trotter II, 690 So. 2d at 1236 (footnote omitted).

Crucial to the decision in Trotter II was the fact that immediately following the decision in Trotter I, "the legislature -- in its next regular session -- amended section 921.141(5)(a) to specifically address community control. . . " 690 So. 2d at 1237. Under these unusual circumstances, this Court concluded:

> Custodial restraint has served in aggravation in Florida since the "sentence of imprisonment" circumstance was created, and enactment of community control simply extended traditional custody to include "custody in the community." See §948.001, Fla. Stat. (1985).

> Use of community control as an aggravating circumstance thus constitutes a refinement in the "sentence of imprisonment" factor, not a substantive change in Florida's death penalty law.
>
> . . .
>
> In light of the specificity and promptness of the 1991 amendment to section 921.141(5)(a), and in view of our prior caselaw giving retroactive application to other aggravating circumstances effecting a refinement in the law, reliance on Trotter would result in manifest injustice to the people of Florida by perpetrating an anomalous and incorrect application of the capital sentencing statute.

Trotter II, 690 So. 2d at 1237.

Consequently, this Court receded from its holding in Trotter I on the use of community control as an aggravator, and noted that "this renders Trotter's original trial error-free". 690 So. 2d at 1237. Implicit in this holding is the conclusion that, contrary to the opinion in Trotter I, community control was always (or from its inception) a form of custodial restraint within the meaning of the "under sentence of imprisonment" aggravator.

The probation aggravator in the instant case is unlike the community control aggravator in Trotter in every significant respect. First, there has never been any ambiguity in the statute or in the caselaw -- until May 30, 1996 it was absolutely clear that probationary status was not an aggravator. Second, probation -- unlike community control -- is not a custodial restraint that

can be likened to incarceration.[20] Third, there was no swift legislative response to "clarify its intent"; this Court held as early as 1981 that probation was not included in the (5)(a) aggravator [Peek, 395 So. 2d at 499] and reiterated that holding twice in 1982 [Ferguson; Bolender], while the amendment adding probation as a new factor which can be considered in aggravation was not adopted until 1996. Unlike Trotter, this was not a "refinement" or a clarification of an arguably ambiguous provision; it was a clearcut change in the substantive law which seriously disadvantaged appellant when it was retrospectively applied to him in the penalty proceedings in this case. Hootman. The protection against ex post facto laws guaranteed by the Florida and United

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[20] Fla. Stat. §948.001(2) defines community control as:

> a form of intensive, supervised custody in the community, including surveillance on weekends and holidays, administered by officers with restricted caseloads. Community control is an individualized program in which the freedom of an offender is restricted within the community, home, or noninstitutional residential placement and specific sanctions are imposed and enforced.

On the other hand, probation is defined in Fla. Stat. §948.001(5) as:

> a form of community supervision requiring specified contacts with parole and probation officers and other terms and conditions as provided in s. 948.03.

States Constitutions was violated, thus allowing the jury to weigh a legally invalid aggravating circumstance [see Sochor; Espinosa; Jackson] and compromising the reliability of the penalty proceedings. See, e.g., Lockett v. Ohio, 438 U.S. 586 (1978); Caldwell v. Mississippi, 472 U.S. 320 (1895) (recognizing that the Eighth Amendment requires a heightened degree of reliability in capital sentencing).

D. The Trial Court's Instruction on Felony Probation Allowed the Jury to Weigh a Legally Invalid Aggravating Factor, and Thus Violated the Eighth Amendment and Tainted the Jury's Penalty Verdict.

Under Florida's death penalty law, the jury is a co-sentencer. Johnson v. Singletary, 612 So. 2d 575, 576 (Fla. 1993); see Espinosa v. Florida, 505 U.S. 1079 (1992). For this reason, the Eighth Amendment's prohibition against weighing an invalid aggravating factor, see Sochor v. Florida, 504 U.S. 527 (1992), applies not only to the judge but "applies with equal vigor to what the jury actually weighs in its deliberations" Johnson v. Singletary, supra, 612 So. 2d at 576. In Jackson v. State, 648 So. 2d 85, 90 (Fla. 1994), this Court held that where the unconstitutionality of a jury instruction on an aggravating factor has been properly preserved for review:[21]

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[21] In the instant case, defense counsel objected to the instruction on the ground that the probation aggravator was not in effect at the time of the crimes, but came into effect later; the (continued...)

> As the [United States] Supreme Court explained in [Sochor], while a jury is likely to disregard an aggravating factor upon which it has been properly instructed but which is unsupported by the evidence, the jury is "unlikely to disregard a theory flawed in law." See also, Griffin v. United States, 502 U.S. 46, 59, 112 S. Ct. 466, 474, 116 L. Ed. 2d 371 (1991) ("When jurors have been left the option of relying upon a legally inadequate theory, there is no reason to think that their own intelligence and experience will save them from that error.")

Similarly, in Kearse v. State, 662 So. 2d 677, 686 (Fla. 1995), this Court wrote:

> As the United States Supreme Court noted in Espinosa v. Florida, 505 U.S. 1079, 1082, 112 S. Ct. 2926, 2929, 120 L. Ed. 2d 854 (1992), "if a weighing State decides to place capital-sentencing authority in two actors rather than one, neither actor must be permitted to weigh invalid aggravating circumstances." While a jury is likely to disregard an aggravating factor upon which it has been properly instructed but which is unsupported by the evidence, the jury is "unlikely to disregard a theory flawed in law." Sochor v. Florida, 504 U.S. 527, 538, 112 S. Ct. 2114, 2122, 119 L. Ed. 2d 326 (1992); Jackson, 648 So. 2d at 90.

In the instant case, the constitutional error in instructing the jury on the probation aggravator, which was legally invalid because that aggravating factor did not exist at the time of the crimes, enabled the jury to weigh three aggravating factors instead of two against the nonstatutory mitigators presented and argued by

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[21](...continued)
trial judge twice expressly recognized that the defense's objection was based on the prohibition against ex post facto laws, and that it was preserved (T24/1555-56).

the defense (see T24/1597-1602). It enabled the prosecutor, in his penalty phase closing argument, to label appellant as "the probation violator and fugitive" (T24/1571), and to argue:

> What are the aggravating factors on which you'll be instructed?
>
> The defendant was convicted of a felony and on probation. And the judge will give you the exact language. But again, that's proven beyond a reasonable doubt. The defense conceded and argued to you, he was a probation violator, and the judgments and sentences are in the record. He was convicted of four felonies. Rape, two aggravated rapes; a kidnapping on his then-wife, now ex-wife, Linda Graham; sentenced to five to seven years in the State penitentiary; was released, placed on an eight-to-ten year probation, which required a psychiatric treatment as a condition of it.
>
> And within days of release from prison, he fled. And within two weeks, the warrants had been issued.
>
> Now, why is this an aggravating factor, and why should it be entitled to weight in your consideration today? Well, I suggest to you, when society identifies and is able to identify someone as a criminal and attempts, through the legal means available to it, to control this behavior in the future, instead of accepting those controls, instead of attempting to resolve his criminal problems, he scoffs at it. He flees. He ignores society's attempt to make him a lawful citizen. And that's a factor of significance in the debate today.
>
> And you look at the judgments and sentences, if there is a watershed in the escalating life of James Randall's criminal career, beginning with the offenses against his ex-wife and culminating after the brutal assault on Terry Howard, for the murders of Wendy Evans and Cynthia Pugh, it's that day that he got out of prison, because he chose not to go on probation, not to undergo the psychiatric exam, but to leave and continue

> fueling his sadistic fantasy and sadistic behavior, which culminated in the murders that brings us all here this week. It's a factor of significance. Society tried, society failed, because of his decisions.

(T24/1572-73).

The state will undoubtedly argue that the evidence that appellant was on probation in Massachusetts and absconded from supervision was introduced by the defense in the guilt phase. This is certainly true, but it was as a direct result of another harmful error -- the introduction of the (at best) ambiguous flight evidence. See Merritt v. State, 523 So. 2d 573, 574 (Fla. 1988) (defendant "was between a rock and a hard place once the court erroneously admitted the evidence"; to rebut the state's improper implication that he escaped to evade prosecution for the charged murder, defense counsel introduced testimony that he escaped while being returned to Florida on unrelated charges); see also Evans v. State, 692 So. 2d 966, 970 (Fla. 5th DCA 1997). Thus, one consequence of the combination of errors in the guilt-phase admission of the flight evidence and the penalty-phase ex post facto violation was that the jury heard highly prejudicial evidence and argument which should not have been admitted in either phase. The flight evidence error requires reversal for a new trial [Merritt; Escobar v. State, 699 So. 2d 988, 994-97 (Fla. 1997)], but it also resulted in harmful error affecting the penalty determination. See, e.g., Castro v. State, 547 So. 2d 111, 115-16

(Fla. 1989); Morton v. State, 689 So. 2d 259, 265 (Fla. 1997)(guilt phase errors found harmful as to penalty).

Moreover, even assuming arguendo that the flight evidence had been admissible in the guilt phase, it would only be for the purpose of showing consciousness of guilt of the charged crime. Escobar, 699 So. 2d at 995; Straight v. State, 397 So. 2d 903, 908 (Fla. 1981). Once appellant was found guilty and the case entered the penalty phase, his "consciousness of guilt" was no longer at issue. The fact that the defense introduced guilt-phase evidence of appellant's Massachusetts probation warrant as an alternative explanation for his flight does not open the door for the prosecutor to argue as nonstatutory aggravation that appellant is a "probation violator and fugitive"; that he "chose not to go on probation"; that he scoffs and the law and flees; and that this is an aggravating factor of significance and weight (T24/1571-73). See Kormondy v. State, 703 So. 2d 454, 463 (Fla. 1997), in which this Court recognized that for evidence to be admissible in a penalty-phase proceeding it has to be directly related to a specific statutory aggravating factor; "[o]therwise, our turning of a blind eye to the flagrant use of nonstatutory aggravation jeopardizes the very constitutionality of our death penalty statute".

In the instant case, the only aggravating factor to which the evidence and argument concerning appellant's violation of probation

was relevant was the felony probation aggravator -- a legally invalid aggravating factor because its use in this case violated the prohibition against ex post facto laws. The instruction which allowed the jury to weigh this legally invalid aggravator violated the Eighth Amendment and tainted both the jury's penalty recommendation and the ensuing death sentence. Sochor; Espinosa; Jackson; Kearse. Appellant's death sentence cannot constitutionally be carried out, and reversal for a new penalty proceeding before another jury is necessary.

CONCLUSION. Appellant requests that this Court grant a new trial, a new penalty proceeding, and/or reduce his convictions to second degree murder.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Robert Butterworth, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4739, on this _____ day of April, 2000.

Respectfully submitted,

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