IN THE SUPREME COURT OF FLORIDA

JAMES RANDALL,

Appellant,

vs. **CASE NO. 90,977**

STATE OF FLORIDA,

Appellee.

_____/

ANSWER BRIEF OF THE APPELLEE

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STATEMENT OF THE CASE AND FACTS

Guilt Phase:

Appellant James Randall was charged by indictment with murder in the first degree of Wendy Evans (the offense occurring on October 20, 1995) and of Cynthia Pugh (the offense occurring on January 18, 1996). (Vol. I, R. 3-4). Trial by jury resulted in guilty verdicts. (Vol. IX, R. 1350-1351). Following a penalty phase proceeding the jury unanimously recommended a sentence of death on each count. (Vol. IX, R. 1372-1373). The trial court, the Honorable Susan Schaeffer, concurred and imposed a sentence of death, finding three aggravators (capital felony committed by a person previously convicted of a felony and under sentence of imprisonment or placed on community control or on felony probation; prior violent felony conviction; and especially heinous, atrocious or cruel) and some minor mitigation. (Vol. IX, R. 1396-1406). A copy of Judge Schaeffer's sentencing order is attached herewith (Appendix A).

At trial, the state introduced testimony from Detective Mark Weaver who had worked as a uniformed officer in the area of North Fort Harrison from July 1995 to July 1996. He and his partner were assigned to the prostitution activity in that area. On October 19, 1995, shortly after eight o'clock he stopped and talked to Wendy Evans. Weaver also knew Cynthia Pugh, who had been arrested

several times for prostitution-related activities in the North Fort Harrison area. A couple of days before the discovery of Pugh's body on January 19, 1986, he had stopped and talked to her. (Vol. XVI, TR. 411-418).

Phyllis Macon identified a photo of Wendy Evans and lived with her for about two weeks prior to her death. Although Evans wasn't working she was able to pay her rent money. Evans indicated she got her money from the people who dropped her off in the Fort Harrison area. (Vol. XVI, TR. 422-424). UPS delivery driver Robert Barnaky found the body of an unclothed lady laying perpendicular to the road twelve to fifteen feet off the roadway, on Myrtle on October 20, 1995. He reported his finding to authorities. (Vol. XVI, TR. 427-431). Sheriff's officer Michael Madden responded to the scene on October 20 at Myrtle Lane and Tampa Road in Oldsmar. The body lay face down, completely naked, no jewelry, glasses or anything in her hair. She was found in close proximity to an industrial park in a wooded area. No clothing or jewelry was found during a search of the area. The witness testified that the absence of clothing hinders or slows down an investigation in identifying the victim. He believed that the death occurred elsewhere and that she was dumped in this place. Thus, there was potentially a crime scene at another location which was not located on October 20. Madden noticed trauma on the left side of the head

to the victim and blood coming out of her ear. The witness identified a series of photos representing the scene including forensic tire castings. (Vol. XVI, TR. 435-445).

Walter Jacques of the Forensic Science Section of Pinellas County Sheriff's Office described the efforts to preserve the scene and recover trace evidence. He agreed that the homicide occurred elsewhere and the body was placed there. Trace evidence found on the body included some hairs found on the back of the victim and he described the castings to preserve tire impressions left at the scene. (Vol. XVI, TR. 450-467). Dana Zordan assisted Jacques and photographed the side with tread marks. (Vol. XVI, TR. 473-475).

Beulah Bergman knew Cynthia Pugh depicted in photo exhibit 8. Pugh was a prostitute on Fort Harrison. Her body was found on January 18, 1996, and the witness saw her the night before engaged in prostitution activity wearing dark blue jeans, a white shirt and a dark jean jacket. (Vol. XVI, TR. 477-479).

Associate Medical Examiner Dr. Robert Davis performed an autopsy on Wendy Evans on October 20. The victim was a white female, about 5 feet, one inch, and 110 pounds. He felt she had probably been dead eight to twelve hours. The witness thought the cause of death was manual strangulation. (Vol. XVII, TR. 487-494). Death can occur within minutes, five to ten, through asphyxiation; unconsciousness can result within three to five minutes.

Strangulation would have to continue after a person is unconscious and unresponsive in order to effect death. (Vol. XVII, TR. 500-501). Dr. Davis noticed injuries -- a contusion to the side of the head and a hematoma or bruise in the temporalis area caused by some kind of blunt trauma and injuries to the neck on both the right and left side. Exhibit 38B depicted injuries to the left side of the neck consistent with fingernail abrasion marks, also present in and around areas where the major blood vessels go that ultimately supply blood to the brain. There were bruises on the left shoulder and left interclavicular area; the existence of bruising or hemorrhaging indicates that the blood was still circulating when the injuries occurred thus prior to her death. The internal damage to neck structures include hemorrhage at base and on the left side of the muscles in the area of the voice box and a fracture of the hyoid. There were hematomas beneath the clavicles and on the left side ribs 8 through 10 were fractured. The hemorrhage associated with the broken ribs was ante-mortem. There was a bruise on the superior iliac crest and hematoma on the inner aspect of one thigh. There was injury to the genitalia but the witness could not say whether it was new or old. (Vol. XVII, TR. 502-513).

John Quinlan of the Pinellas County Sheriff's Office responded to both crime scenes, that of Evans on October 20 and of Pugh in Palm Harbor on January 18. The body of Pugh was located on the

east side of a dumpster; she was nude, laying on her back. She wore no jewelry or none was found on her at that time. The parking lot at this commercial site is about 150 yards from the roadway. The building was closed, under construction at the time but closed to the public. It is easy to get from the parking lot onto U.S. 19. From U.S. 19 you would not have a clear viewpoint to see the body -- you have to come over to the east side before you could see it. Quinlan observed trace evidence on the body; on the outside of her areola on the breast was a brown and white colored filter paper of a cigarette. Both victims were known to be prostitutes in the North Fort Harrison area, found in commercial areas in North Pinellas County, both victims were nude with no clothing or jewelry found near the scene (meaning that they had been removed from the bodies) and the manner of death of both was manual strangulation. Both victims were about the same size; 5'1" or 5'2" and less than 120 pounds. The two crime scenes were linked together by forensic evidence. (Vol. XVII, TR. 524-536). Crime scene technician Tonya Wold collected trace evidence at the Pugh crime scene including the piece of paper on the victim’s right breast. (Vol. XVII, TR. 542-549).

Dr. Marie Hansen, Associate Medical Examiner, autopsied Cynthia Pugh on January 18, 1996. No visible sperm was discovered. The cause of death was homicidal violence including manual

strangulation and blunt trauma to the head and face. (Vol. XVII, TR. 574-577). The witness described bruises observed and neck injuries included a fracture of the hyoid bone. (Vol. XVII, TR. 582-585). The back of the head had a laceration in the right external ear canal. On the left hand three fingers had portions of the false nails missing. The witness found evidence of binding, some linear areas of black, sticky, adhesive-type substance around each wrist (not unlike the underside of duct tape). Abrasions on the breasts were consistent with having been caused by a surface such as a rug. (Vol. XVII, TR. 585-586). The injuries where there was contusion or hemorrhage would be prior to death. (Vol. XVII, TR. 605).

Marta Strawser of the FDLE Orlando Regional Crime Laboratory reviewed the exhibits she had initialed (exhibits 12-26). She testified there were nine animal or dog hairs, one cat hair and nine other hairs not suitable for comparison. (Vol. XVII, TR. 616-624).

John Quinlan was recalled and testified that on May 6 he retrieved two tires which had been removed from the Randall vehicle at the Don Olsen Firestone Service Center and was present on May 17 at the same location when the two remaining front tires were removed and taken into custody. (Vol. XVIII, TR. 635-637).

Tire footprint expert Peter McDonald described in detail his investigation and testing on the Randall tires and stated that it was a virtual certainty that the tire impressions made by the tire submitted were the same, i.e., the impression left at the scene where Wendy Evans' body was found was a virtual certainty made by this tire. (Vol. XVIII, TR. 639-693). This particular size and model of ATX tire hasn't been manufactured since early 1992, the tire at the scene came from a particular model and it had to be made while the mold was still defective, before repaired through the routine manufacturing process, and that tire tracks left at the scene were made by a relatively new tire, one purchased or not used until shortly before October 20, 1995. The inventory of the Akron store revealed one not a set and a national search done by 1200 Firestone stores across the country in May 1996 revealed a single tire still available. People at Don Olsen Tires indicated that in this size they only had one set of four and that was sold to Terry Jo Howard. (Vol. XVIII, TR. 708-711).

Don Olsen Tires inventory manager David Wonsetler searched for a specific tire, a P-195/75-R-14 radial ATX article number 001-511. In the white letter version there were exactly four tires sold on September 11, 1995. State Exhibit 78 is the records he searched through and the specific invoice number was 142910. (Vol. XVIII,

TR. 714-718). Exhibit 43 was invoice 142910 dated September 11, 1995, the only sale found in his inventory. (Vol. XVIII, TR. 720).

Raymond Gilbert Arel who lived next to the triplex at 3079 Belcher Road where appellant and Terry Howard lived testified that on January 17, 1996, he saw Randall and a woman (not Howard) walk into Randall's apartment. (Vol. XVIII, TR. 747-764).

John Quinlan was recalled and testified that he and Detective Klein went to the Randall/Howard residence about 7:30 A.M. on June 27, 1996. (Vol. XVIII, TR. 768). The appellant had been under surveillance and Quinlan was aware Howard had left the residence before they arrived. Quinlan knew where the surveillance units were but were probably not visible to Randall. (Vol. XVIII, TR. 769). They conversed with Randall for about ten minutes. They identified themselves and Quinlan indicated they were contacting everybody that had been arrested for prostitution in the course of their investigation of the Pugh and Evans homicides. Appellant indicated that he knew Howard had been arrested for prostitution in the past. When asked if he was familiar with the Pugh-Evans homicides from North Fort Harrison, Randall answered that he was familiar from TV and news reports. He was shown photos of the victims and answered that he did not know them but they would have to ask Howard if she knew them. When the officer extended the photos of the two victims within a couple of feet of his face,

Quinlan noticed that appellant holding the screen door open with his right hand, the hand started to tremble notably. When the officer pulled the pictures back his hand stopped trembling. Randall admitted that he was the primary driver of the Dodge D-50 pick-up truck outside the residence and Howard drove a Pontiac 6000. Randall denied knowing or having given a ride to the victims and said they would have to ask Howard if she had done so. When officers showed him the photos a second time, Randall's hand started trembling, which stopped when the photos were removed. When asked if the victims had been inside the residence, appellant said to ask Howard. On a third occasion when the photos were shown, appellant's hand trembled. When asked if he were familiar with the area where Evens' body was found, Randall stated that he knew the area but claimed he had not been on Myrtle Lane and had not driven on it. Klein got personal information including Randall's name and date of birth. The conversation ended and the officers returned to their vehicle at 7:40 A.M. (Vol. XVIII, TR. 768-778). After appellant left the residence in the truck and picked up Maitland Nixon, the officers decided to stop his vehicle with a uniformed cruiser. (Vol. XVIII, TR. 778)[There was an outstanding Massachusetts warrant for a probation violation on Randall -- which they had not mentioned to him in the conversation at the residence -- and they intended to now arrest him on that

warrant -- Vol. XIX, TR. 814-816.] When the police cruiser initiated a traffic stop, turning on the overhead lights, appellant fled. The cruiser followed in full pursuit, other units were called and a high speed chase ensued. Randall made a U-turn at about seventy miles per hour. The police could not keep up because of traffic conditions and could not drive as recklessly as he did. The passenger, Nixon, was able to bail out at the end of a cul-de-sac. Randall fled on foot and was not apprehended until four days later on July 1 when he returned to his residence. Quinlan measured the general distance from the Belcher Road residence to the murder sites -- 2.4 miles to where Pugh's body was found and 5.5 miles to Evans' site, both north or northwest of the residence. North Fort Harrison would be southwest of the Randall residence. (Vol. XVIII, TR. 778-785).

Forensic science specialist John Grubb collected evidence inside the Howard-Randall residence on June 27, 1996. Underneath the sofabed was a maroon throw-rug-type of rug. (Vol. XIX, TR. 832-835). Supervisor John Mauro processed the scene at the residence gathering trace evidence. Law enforcement officers had received consent to search the residence from Terry Jo Howard. Debris on the floor appeared to be cigarette butts without the filter. They were in the living room and some were in the bedroom. (Vol. XIX, TR. 842-849). Detective Jeffrey Good came into contact

on June 27 with a dog named Penny the pug, owned by Terry Jo Howard and obtained hair samples of the dog. On January 20, 1997, he transported Howard to a local hospital to draw blood and delivered samples by Federal Express to Cellmark. (Vol. XIX, TR. 854-857).

FBI agent Christopher Hopkins, an expert in identification and comparison of fiber and hairs, found one fur white dog hair in the fingernail scrapings from Wendy Evans. (Vol. XX, TR. 911). In the pubic combings from Evans was a light pink carpet type fiber. (Vol. XX, TR. 915). On Cynthia Pugh the debris collected from the right breast revealed one dog hair, a guard hair, white and dark brown -- a banded hair which is not typical for dogs. A white and dark brown banded dog guard hair was taken from the victim's neck, a white fur dog hair from the victim's chin, the upper chest contained a white fur dog hair, and there were two white and dark brown guard dog hairs between her breasts. The victim's mouth had one white fur dog hair and pubic hair combings revealed one white and dark brown guarded dog hair (banded). All four hairs in Exhibits 13, 16, 25 and 35 were banded. (Vol. XX, TR. 924-934). The witness was provided with samples coming from Penny the pug and its hairs were consistent with that from the Evans fingernail clippings and the Pugh body had hair like that of Penny (same color, length, both banded, same microscopic characteristics). It is very rare for dogs to have banded hair. (Vol. XX, TR. 934-941).

Penny the pug is one of the breeds that could contribute the fur hair found in state exhibits 17, 24, 26 and 75. (Vol. XX, TR. 942-943).

Jerry Cirino of the FDLE laboratory, an expert in fur and fiber analysis, described the fibers in the rug as consistent with that found on Evans and Pugh. (Vol. XX, TR. 952-997).

Terry Jo Howard, appellant's girlfriend, had been a prostitute and drug user when she was picked up by Randall in February of 1994. They developed a romantic relationship and combined residences. (Vol. XXI, TR. 1014-1015). In the first six months of the relationship it became obvious that appellant had a problem with choking behavior; he admitted that he became sexually stimulated by choking his sexual partners. She acquiesced or allowed him to do that to her during sexual activity because she did not want him to not get what he needed and then kill her two years down the road. She wanted him to have some control over it. (Vol. XXI, TR. 1016-1017). Even though she acquiesced to the behavior she was still distressed by it. Howard recognized that he reacted to her reaction of fighting against it, it excited him more. She changed how she reacted to the choking by doing nothing and he did not continue the choking. It diminished. During the sexual activity he would choke her with both hands around the neck while face to face. (Vol. XXI, TR. 1021). In October of 1995, the

day of the O. J. Simpson criminal case verdict, she disclosed an incident to him in which a co-worker had coerced her into sexual activity at a time when Randall was ill. Randall became angry, packed a bag and left. When Randall returned later that day or the next day, he grabbed her by the throat, threw her up against the wall, began choking her, screaming that she should not let another man take advantage of her again. She lost consciousness and when she woke up on the bed they were having sexual intercourse. She sustained injuries (her voice was sore and hurt, no white in her eyes for about eight weeks). She delayed a planned visit to her ill mother because of her injuries and ultimately went in the last two weeks of October. At that time she and Randall only had the white Dodge pick-up truck; earlier in September she purchased tires for the truck at Don Olsen's and wrote a check (Exhibits 43 and 44 were the check and receipt). (Vol. XXI, TR. 1022-1026). Randall drove her in the truck to West Palm Beach, stayed for a night, then drove back to Pinellas County. He took with him her mother's dog Penny since the mother was unable to care for the dog. In October of 1995 and January of 1996 those tires purchased in September were still on the truck. Howard testified that they had a pink or mauve rug with a fringe on the sides in the house on Belcher Road and had it prior to her visit to her mother. (Vol. XXI, TR. 1026-1029). Howard and her mother visited her brother in North Carolina, but

anxious to return to Randall, she purchased a Pontiac 6000 and returned to Pinellas County. Afterwards he drove the truck and she drove the Pontiac. (Vol. XXI, TR. 1031-1032). In January of 1996 she went for another visit to West Palm Beach because her sister had wrist surgery; she left the week of her birthday (January 16) and stayed the entire week. She testified Randall had one of her two ATM cards, he had PIN codes and knew how to use it. There is an ATM teller about three blocks away from their residence on Belcher Road. Howard did not do any ATM transaction in Pinellas County on January 17, 1996. (Vol. XXI, TR. 1032-1035). The dog Penny had unusual habits. Howard is a smoker, appellant is not and the dog would take her smoked cigarette butts, flip it around in her mouth, suck on it until the nicotine was gone and spit it out. Thus, the house contained chewed-up cigarette filters and papers. (Vol. XXI, TR. 1036-1037). When appellant became a fugitive on June 27, 1996, she gave the pink rug to police for evidentiary purposes as well as access to the house. (Vol. XXI, TR. 1037). She visited Randall in jail and continued to have romantic feelings for him. Police had made her aware of suspicions they had concerning his involvement in the Evans and Pugh homicides. At some point in her visit with him at the jail in July of 1996 she confronted him and asked “Why not me?”, meaning why had she not been killed. Randall was concerned about being overheard and

responded by writing on the glass backwards “I hurt others so that I would not hurt you.” (Vol. XXI, TR. 1038-1040).

Howard’s sister, Tamara Lynn Garcia, confirmed that Howard had initially postponed her visit and her eyes were bloodshot when she saw her, that Penny the pug had the habit of chewing on cigarette, that her sister visited in January during her wrist surgery, and that her sister was hysterical, upset and scared after a jailhouse conversation with Randall in July. (Vol. XXI, TR. 1070-1076).

Bank employee Barbara Brenner testified that records showed two ATM transactions on Howard’s account for January 17, 1996; the second withdrawal was posted at the Bayshore office on Alternate 19, which is what Fort Harrison turns into as it goes north in Pinellas County. (Vol. XXI, TR. 1097-1101).

Appellant’s ex-wife Linda Graham testified that during their seven year marriage he would choke her during sexual activity and he derived sexual excitement or pleasure from choking her during sexual activity. She described incidents in July and September 1986 when he choked her during sexual activity; it was clear he derived sexual excitement or enjoyment from her reactions to the choking behavior. She did not want to be choked. (Vol. XXI, TR. 1101-1105).

Clinical psychologist Wesley Gene Profit testified that in an interview discussion with appellant in 1986 that was neither

privileged nor confidential that he derived sexual pleasure from choking behavior, having the urge to choke partners during sexual activity and that force or violence was part of his choking behavior. (Vol. XXI, TR. 1107-1110).

Terry Jo Howard was recalled and testified that to her knowledge neither victim Pugh or Evans had previously been to her residence or in the vehicles. It is not uncommon for a john to pick up a prostitute; in fact Randall had picked her up and taken her to his then-residence. (Vol. XXII, TR. 1129-1133).

Anjali Ranadive, is a staff molecular biologist at Cellmark Diagnostics, a private laboratory that does DNA identification testing. (Vol. XXII, TR. 1133). The court accepted her as an expert in forensic DNA analysis. (Vol. XXII, TR. 1140). After explaining the science and testing procedures the witness opined that all six genetic markers in both the piece of paper found on the breast of Pugh and the blood from Terry Howard were the same and Howard could not be excluded as being the donor of the DNA found on that paper. (Vol. XXII, TR. 1140-1205).

The state and defense stipulated that Maitland Nixon who was ill and unable to testify would testify they would take North Fort Harrison when driving back to their residences from work, would talk about prostitutes and Randall would point out a female and say, “she’s a working girl”. (Vol. XXII, TR. 1233-1234). On June

27, 1996, he was a passenger in the truck driven by appellant when a deputy attempted to pull them over. Randall took off, refused to let Nixon out of the car and kept saying, “It’s my life.” (Vol. XXII, TR. 1235-1236).

Lisa Forman, an expert accepted to give opinions as a population geneticist, a branch of study that allows someone to examine how common or rare certain inherited traits are within a group of individuals, calculated that as to the genotypes found in the piece of paper purported to come from the right breast of Cynthia Pugh and from Terry Howard in the Caucasian population the frequency you would see that characteristic together as a single genetic profile is approximately 1 in 39,000 people. (Vol. XXII, TR. 1237-1251).

Penalty Phase:

The state introduced without objection Exhibits 1 - 8 relating to appellant’s prior convictions for rape, kidnapping and aggravated rape on Linda Randall, the release of custody in December of 1992 of appellant and the probation warrant resulting from his failure to report for probationary sentence. (Vol. XXIV, TR. 1471-1472).

Linda Randall, appellant’s ex-wife, testified in more detail and described the incidents of July 18-19, 1986 and on September 6, 1986 in which he raped her, the latter occasion which also included

kidnapping her and forcing her to have sex when he tied her hands behind her back with a shoelace with the children present in the car. Appellant became more aroused by her fear and reaction to the choking during the marriage. (Vol. XXIV, TR. 1473-1492).

Defense witness Sandra Monica testified that Randall was pleasant and a good worker with a wonderful attitude and on cross-examination acknowledged that he seemed to have no problems controlling his behavior in her presence, never tried to choke her and did not know a lot about him other than his conduct at work. (Vol. XXIV, TR. 1499-1503).

The videotaped testimony of jail guard James Martin indicated that he had no problems with Randall but prisoners charged with a serious crime awaiting trial normally behave. (Vol. XXIV, TR. 1506-1508).

Appellant's mother Patricia Randall testified that James was a wonderful son, helpful around the house, good with animals and she loves him although she admitted having no contact with him since 1987 until this week. (Vol. XXIV, TR. 1509-1513).

Expert witness Dr. Michael Maher was asked a hypothetical question on a limited set of facts and opined that Randall "suffers" from sexual sadism and that there is no cure for this disease and it is difficult to treat. Maher conceded there is disagreement within the field on whether this behavior is an

illness. (Vol. XXIV, TR. 1515-1520). On cross-examination the witness stated that an element of sexual sadism is control of the victim through humiliation and torture (Vol. XXIV, TR. 1520-1521) and agreed with the statement by authority Park Dietz that:

> "The wish to inflict pain on others is not the essence of sexual sadism. One essential impulse is to have complete mastery over another person, to make him -- her an object of our will, to become her God, to do with her as one pleases; to humiliate her, to enslave her, as a means to this end. And the most important radical aid is to make her suffer, since there is no greater power over another person than that of inflicting pain on her, to force her to undergo suffering without her being able to defend herself. The pleasure, the complete domination over another person is the very essence of the sadistic drive."

(Vol. XXIV, TR. 1523-1524).

The witness acknowledged that the Diagnostic and Statistical Manual may refer to this as a disorder rather than a disease. Maher agreed that if sexual sadism exists along with antisocial personality disorder, it increases the risk of criminal behavior such as murder and he could not exclude Randall from being an antisocial personality. (Vol. XXIV, TR. 1524-1525). Although Dr. Maher was given clinical records from Randall's evaluations at the Heywood Hospital and Bridgewater State Hospital relating to 1986, he had not reviewed them because attorneys indicated it was not necessary for the questions they anticipated asking him. (Vol. XXIV, TR. 1528). Maher thought some sexual sadists are able to

seek help and restrict criminal activity as a result of that but had no opinion on whether Randall had voluntary control over whether he murdered that person that night. (Vol. XXIV, TR. 1533-1534). He was not suggesting that he did not have the capacity to say, "I'm not picking her up now. I might get caught." if a policeman were standing next to a prostitute. (Vol. XXIV, TR. 1534).

State rebuttal witness Dr. Sidney Merin reviewed the hospital records and opined that Randall was not under the influence of extreme mental or emotional substance, that Randall was a sexual sadist but it is a personality or behavior disorder not a disease. (Vol. XXIV, TR. 1542-1547). Randall's conduct in these murders was under his voluntary control as opposed to a compulsion, that Randall has an antisocial personality disorder and that is a very dangerous combination. (Vol. XXIV, TR. 1547-1549).

SUMMARY OF THE ARGUMENT

I. The lower court did not err in admitting evidence regarding appellant's having choked his ex-wife and girlfriend as the evidence was relevant to help explain his motive and intent and to put his conduct and admissions into context.

II. The lower court did not err in allowing evidence of appellant's flight from police when they attempted to stop his vehicle. This occurred almost immediately after a police conversation with him concerning their investigation of the Evans-Pugh murders and whether he or his girlfriend had had any contacts with them and the jury could infer his guilty knowledge fleeing following that incident.

III. The lower court did not deny appellant a fundamentally fair trial by a brief comment prior to voir dire inquiry. The comment was not objected to at the time to preserve for appellate review and any error was corrected by several subsequent and repeated instructions to the jury.

IV. The convictions should not be reduced to second degree murder because the combination of circumstantial evidence and appellant's admissions satisfactorily demonstrate that he killed Wendy Evans and Cynthia Pugh with a premeditated design and intent to kill.

V. The constitutional prohibition on ex post facto laws was not violated by the trial court's finding of the felony probation aggravator; the defense had informed the jury of the facts regarding this factor and any error is harmless in light of the strong aggravation and weak mitigation presented.

ARGUMENT

ISSUE I

WHETHER THE LOWER COURT ERRED IN ALLOWING EVIDENCE IN WHICH APPELLANT CHOKED HIS EX-WIFE AND GIRLFRIEND.

A. The Pre-trial Hearing

The state filed a pre-trial Notice of Intent to Use Evidence of Other Crimes, Wrongs or Acts, on or about February 13, 1997. (Vol. VI, R. 860-865). The acts included: (1) An incident in May of 1979 when appellant choked Susan Sylvester against her will and kissed her in South Royalston, Massachusetts. (2) An incident on March 3, 1984, in Massachusetts when Randall assertedly caused the death of Holly Cote through asphyxiation (her decomposed nude body was found abandoned and in a fishing area frequented by appellant with a ligature still tying her hands); he admitted to his wife two years later that he had not given her a chance and admitted Cote's murder in an earlier statement to non-professional personnel at a mental hospital when he sought to admit himself in between July 18 and September 16 rapes and in a separate later conversation with his wife at another psychiatric hospital. (3) On July 18, 1986, appellant committed a sexual battery upon Linda Randall. (4) On August 28, 1986, in a nonconfidential mental examination by Dr. Wesley Profit at the Bridgewater State Hospital Randall reported that he was sexually aroused when he choked his sister at age ten

or eleven, that he choked his next door neighbor at age fourteen, and reported that as an adult he would choke his sexual partners. Randall explained that he choked his wife during sexual intercourse and that it stimulated him sexually and described the experience as wanting to be in control and the choking of his sexual partner was asserting that control. (5) On September 16, 1986, appellant committed a sexual battery upon Linda Randall and in the process he tied her hands and choked her; on the same date he kidnapped Linda Randall with the intent to commit a sexual battery and committed a second sexual assault on her during a single kidnapping episode. (6) In 1994, Randall repeatedly choked his girlfriend Terry Howard during sexual intercourse; he admitted the September 1986 rape of his wife to Howard and confessed to his intense desire to choke and the sexual arousal he gained from it. Howard consented to this activity attempting to allow Randall to gain control over his impulses but he was so fixated once he began strangling that he would sometimes not stop until she repeatedly struck him in the head. Howard pretended not to be too frightened and Randall who appeared to be sexually excited by her fear and reaction then lost interest in choking her. (7) On September 28, 1995, Howard disclosed to Randall that she had been coerced into a sexual encounter by an employer while Randall had been ill earlier in the year. Randall became enraged, packed his bags and left. He went

to the individual's home and attacked him, then returned to the house where he began choking Howard without her consent until she lapsed into unconsciousness; when she regained consciousness, appellant was engaged in sexual intercourse with her. Less than one month later when Howard was out of town Wendy Evans was murdered. (8) On January 18, 1996, Randall killed Cynthia Pugh by asphyxiation, again while Howard was out of town and Randall was left alone in the residence. (9) On June 27, 1996, Randall was questioned at his residence concerning his knowledge of murdered prostitutes Wendy Evans, Cynthia Pugh, Ladonna Stellar and Peggy Darnell. Randall denied having been at the Myrtle Avenue site where a tire print was found by Evans' body. Shortly thereafter, when uniformed deputies attempted to stop Randall he fled and led the deputies on a high speed chase. Passenger Maitland Nixon reported that Randall kept saying, "It's my life." Appellant was a fugitive for four days and was arrested not far from his apartment. (10) Nixon also reported that when returning from a job site he and Randall would drive north on Ft. Harrison Avenue and Randall would point out those females walking in the area he felt were "working girls" (prostitutes).

The prosecutor also filed a written Proffer of Williams Rule Testimony concerning the facts in the Wendy Evans case, the Cynthia

Pugh case, Randall's background in Massachusetts and his incidents and statements involving Terry Howard. (Vol. VI, R. 868-876).

Judge Schaeffer presided over a hearing on the admissibility of Williams Rule evidence on February 19, 1997. (Vol. XIII, R. 1652-1732). After hearing argument Judge Schaeffer ruled:

> Frankly, I've seen lots of Williams Rule arguments, and if there ever was a case that would seem to have an indication, this is it. The purpose of the Williams Rule, of course, you don't need Williams Rule if you have a confession, because identity is easily proved by direct evidence. So I don't generally let Williams Rule evidence in, because I think frankly prejudice outweighs any probative value. But in this case, as I look at the State's cases individually, frankly, if I were assessing the case, they have a very weak circumstantial case, so this is the very type of case where if you have some connection and some similarities in two cases, that the probative value outweighs the prejudice. Because in order to prove that it was indeed Mr. Randall who committed this crime, if they can, they almost have to link these two cases up, it seems to me. So certainly there is probative value if the facts outweigh the prejudice, if there are striking similarities. So now the question becomes, are there striking similarities? Frankly, these two cases are strikingly similar. They happened within a very brief time of each other, in the same County. The bodies were dumped in the same type of areas. Both prostitutes, white prostitutes. They both were manually strangled. They were both nude. They both had no clothes there. They had fibers from the same lot, which showed both bodies had been at the same place. Dog hair, similar, and whatever else. As far as I'm concerned, it's a real easy decision. Williams Rule will be allowed as to the Pugh case and the Evans case. And frankly, I don't need to hear that

> in the other cases. It would be the same argument, Mr. Schwartzberg?
>
> MR. SCHWARTZBERG: That's correct.

(Vol. XIII, R. 1690-1691).

Judge Schaeffer also ruled -- and the defense agreed -- that appellant's statement to Terry Howard was a statement against interest and did not constitute Williams Rule evidence. (Vol. XIII, R. 1691). With regard to Randall's statements and conduct toward Howard, Judge Schaeffer determined:

> THE COURT: All right. I'm inclined to let that in; not as Williams Rule evidence, necessarily, but it's inextricably intertwined, really, that there are folks who get sexual gratification choking others. I don't know that that's a commonly known thing to folks in Pinellas County, that they'd necessarily be aware of that particular gratification. So I think the jurors in the context of this case and in the context of prostitutes being manually strangled have the right to know that Mr. Randall has indicated this is a method of his gaining sexual gratification. I am not at this time letting in his admission to her that he raped his wife. I'll deal with that issue as we deal with the rape of the ex-wife. Also, on the second issue, I do not think there is any real relevancy. I think that just simply has no bearing on this case. I don't know how you're going to sanitize that. But as far as his having left and gone outside and struck or did whatever he did, that's out.

(Vol. XIII, R. 1706-1707).

Judge Schaeffer however also determined that evidence of Randall's admission of having raped his wife would not be admissible:

> That shows bad propensity, shows bad acts not relevant to anything, and certainly isn't similar to Williams Rule; and lastly, the probative value, if any, is far outweighed by the prejudice of three rapes. So, no rapes. . .

(Vol. XIII, R. 1711).

Judge Schaeffer also cautioned the state not to use two witnesses -- only one, either Dr. Profit or intake worker Oikemus -- concerning Randall's admission of deriving sexual stimulation and control from choking women so as not to make "this Williams Rule testimony a feature of the trial". (Vol. XIII, R. 1721). Judge Schaeffer indicated that she would not allow evidence that Randall supposedly choked his ex-wife's sister Susan Sylvester (Vol. XIII, R. 1722) and similarly would not allow evidence of the kidnapping of the wife ("too prejudicial")(Vol. XIII, R. 1722). When Judge Schaeffer noted the absence of similarity of the Cote homicide -- unlike the similarity in Evans and Pugh -- the prosecutor announced he would forego trying to put that in. (Vol. XIII, R. 1724).

Thereafter, the court entered a written order reciting in pertinent part (Vol. VIII, R. 1236-1239):

> 1. The Defendant was charged in a single indictment for the murders of Wendy Evans and Cynthia Pugh.
> 2. The Defendant's Motion to Sever the two counts was granted by the Court.
> 3. The State elected to proceed first with the case involving Wendy Evans.
> 4. The State filed a timely notice of

intent to use evidence of other crimes or wrongs in the murder trial involving Wendy Evans. The Defendant filed a timely motion to exclude such testimony. After hearing oral arguments from the State and the Defense, the Court granted in part and denied in part the Defendant's request to exclude such evidence. The Court ruled that the State would be allowed to present evidence regarding the murder of Cynthia Pugh, and limited evidence of manual strangulation by the Defendant against Terry Howard and Linda Randall (Graham), during the murder trial regarding Wendy Evans, in order to prove motive, intent or identification of James Randall, or the absence of mistake or accident on the part of James Randall. The Court further ruled the State would be allowed to present the testimony of either David Oikemus or Dr. Wesley Profit in order to establish the Defendant's motive of choking women for sexual gratification. The Court ruled the State would not be permitted to use the other evidence proffered at the "Williams Rule Hearing" in the guilt phase of the Evans' trial, although the evidence supporting prior violent crimes for which the Defendant had been convicted would be permitted in the penalty phase trial, if the Defendant were convicted of Murder in the First Degree at the guilt phase of the Evans' trial.

5. Subsequently, the Defendant made an oral motion to have the murder cases of Wendy Evans and Cynthia Pugh reconsolidated for trial. The Court granted this motion. The Defendant, through counsel, waived the admissibility in the trial involving Wendy Evans of evidence regarding the murder of Cynthia Pugh, and the admissibility in the trial of Cynthia Pugh of evidence regarding the murder of Wendy Evans. Further, the Defendant, through counsel, waived the State's obligation to file within 10 days of trial a notice of intent to use evidence of other crimes or wrongs in the trial involving Cynthia Pugh.

6. The Defendant, by requesting the reconsolidation of counts one and two of the

indictment, has waived his right to challenge the admissibility of evidence of the murder of Cynthia Pugh at trial for the murder of Wendy Evans, and of evidence of the murder of Wendy Evans at trial for the murder of Cynthia Pugh.

7. The State, having made an oral notice to present at trial for the murder of Cynthia Pugh evidence of the murder of Wendy Evans, and the Defendant, through counsel, having waived his rights as described above, it is

ORDERED that since counts one and two of the indictment have been reconsolidated for trial at the request of the Defendant, the State will be permitted to present evidence of the murder of Cynthia Pugh, and the manual strangulation by the Defendant against Terry Howard and Linda Randall (Graham), in the trial for the murder of Wendy Evans, and to present evidence of the murder of Wendy Evans, and the manual strangulation by the Defendant against Terry Howard and Linda Randall (Graham), in the trial for the murder of Cynthia Pugh.

IT IS FURTHER ORDERED that the jury may consider the evidence of the murder of Cynthia Pugh, and the manual strangulation by the defendant against Terry Howard and Linda Randall (Graham), in the trial involving the murder of Wendy Evans, as it relates to the motive, intent or identification of James Randall, or the absence of mistake or accident on the part of James Randall.

IT IS FURTHER ORDERED that the jury may consider the evidence of the murder of Wendy Evans, and the manual strangulation by the Defendant against Terry Howard and Linda Randall (Graham), in the trial involving the murder of Cynthia Pugh, as it relates to the motive, intent or identification of James Randall or the absence of mistake or accident on the part of James Randall.

IT IS FURTHER ORDERED that the State may present the testimony of either David Oikemus or Dr. Wesley Profit in the trials involving the murders of Wendy Evans and Cynthia Pugh in

order to establish the Defendant’s motive of

choking women for sexual gratification.[1]

Thus, Judge Schaeffer carefully determined that some collateral crime evidence was appropriate and excluded that which was inappropriate or unduly prejudicial.

A. Trial

At trial Randall's live-in girlfriend Terry Jo Howard testified without appellant's having renewed any contemporaneous objection he may have had at the time of the pre-trial hearing and ruling. (Vol. XXI, TR. 1013-1063). Howard was subsequently recalled, the defense briefly objected that she had already testified completely, and the court allowed the witness to briefly testify to matters that were not duplicative. (Vol. XXII, TR. 1128-1133). Psychologist Wesley Gene Profit provided brief testimony without the interposition of any contemporaneous objection. (Vol. XXI, TR. 1107-1110). Appellant's ex-wife Linda Graham testified again without any defense contemporaneous objection to her testimony. (Vol. XXI, TR. 1101-1105).[2]

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[1]See also Vol XIV, TR. 3-6 confirming the on-the-record waiver of severed trials and allowing the trial of both homicides (Evans and Pugh) at one time in one trial.

[2]The only defense complaint at trial occurred at Vol. XXI, TR. 1002-1013 in which the defense expressed a concern about the relevance of Linda Graham's testimony; specifically, defense counsel urged that it would be prejudicial for Graham to testify that Randall choked her during the course of non-consensual sex. (TR. 1004). The prosecutor responded that he intended to limit the testimony in accord with the court's prior ruling to Randall's choking her during sexual activity but he "was not going to get

With defense counsel's approval, Judge Schaeffer gave an instruction to the jury that:

> "The evidence you are about to receive from this witness and the next, concerning allegations of the manual strangulation of either Terry Howard or Linda Randall, will be considered by you 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 alleged murder of Wendy Evans or Cynthia Pugh. However, the defendant is not on trial for any crime, wrong or act not charged in the indictment that I have previously read to you."
>
> You may proceed.

(Vol. XXI, TR. 1019)

(1) <u>The Instant Claim is Procedurally Barred</u>:

Regretfully, the failure to object contemporaneously below in order to preserve the point for appellate review precludes consideration *ab initio* now. *See generally* <u>Steinhorst v. State</u>,

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into whether she consented or didn't consent to sexual activity". (TR. 1007). He was not going to get into the threats to kill her on September 6. (TR. 1007). Judge Schaeffer reiterated that she didn't want the prosecutor "going into any non-consensual sex that doesn't need to be asked and she [the witness] should not relate..." (TR. 1008). The court indicated the state should exclude evidence of the presence of the children in the car. (TR. 1008), reaffirmed that the evidence was relevant to show motive, identity, absence of mistake or accident and instructed the prosecutor not to get into the kidnapping. (TR. 1009). The defense was presumably satisfied with the judge's ruling as no objection was presented during the witness' subsequent testimony. (TR. 1001-1005). The colloquy prior to voir dire at Vol. XIV, TR. 3-6 concerned the waiver of Pugh and Evans evidence in the now non-severed trials and of the 10-day notice requirement. In any event, appellant did not renew any motion contemporaneously at the time of the testimony. <u>Cf</u>. <u>Chandler v. State</u>, 702 So.2d 186, 195 (Fla. 1997).

412 So.2d 332 (Fla. 1982); Occhicone v. State, 570 So.2d 902 (Fla. 1990); Mordenti v. State, 630 So.2d 1080 (Fla. 1994); San Martin v. State, 705 So.2d 1337, 1345 (Fla. 1997)("we note that San Martin's intelligence level was never argued to the trial court as a basis for suppressing the statements. Thus, that issue is not available for appellate review."); Hazen v. State, 700 So.2d 1207, 1211 (Fla. 1997)(issue regarding admissibility of witness' statements about Hazen staring during a pre-trial hearing procedurally barred for lack of a contemporaneous objection, although asserted in motion in limine prior to witness' testimony); Lindsey v. State, 636 So.2d 1327, 1328 (Fla. 1994)(When the sister testified some three witnesses after the proffer of Williams Rule evidence, Lindsey did not object specifically to her testimony about the car accident and claim was procedurally barred. Because Lindsey failed to object to the testimony when given and on the ground now argued, he failed to preserve this issue for review.); Correll v. State, 523 So.2d 562, 566 (Fla. 1988)(challenge to introduction of similar fact evidence "is not properly before this Court because of defense counsel's failure to object to the testimony at trial. Even when a prior motion in limine has been denied, the failure to object at the time collateral crime evidence is introduced waives the issue for appellate review.")(emphasis supplied); Lawrence v. State, 614 So.2d 1092, 1094 (Fla. 1993)(same); Norton v. State, 709 So.2d 87

(Fla. 1997)(appellant's motion for mistrial at the close of the witness' testimony insufficient to preserve issue for appellate review); Pomeranz v. State, 703 So.2d 465, 470 (Fla. 1997)(failure to object to collateral crime evidence when it is introduced violates contemporaneous objection rule and waives the issue for appellate review); Hardwick v. Dugger, 648 So.2d 100 (Fla. 1994)(failure to object at time collateral crimes evidence is introduced waives issue for appellate review, even where prior motion in limine relating to that evidence has been denied); Feller v. State, 637 So.2d 911 (Fla. 1994); Harmon v. State, 527 So.2d 182 (Fla. 1988); Perez v. State, 717 So.2d 605 (Fla. 3DCA 1998)(opinion granting rehearing holding that following the Criminal Reform Act of 1996 the appellant's failure to preserve the Williams-Rule claim by contemporaneous objection precluded reversal on appeal).

(2) Merits:

Even if the issue were preserved for appellate review, the claim must be denied as meritless. Appellant maintains that the testimony of witnesses Terry Jo Howard and Linda Graham (and to some extent Dr. Profit) regarding Randall's choking practices during sexual activity and admissions of enjoyment of it should be deemed inadmissible because (a) as "similar fact" evidence it fails to meet the exacting requirements of cases like Drake v. State, 400 So.2d 1217 (Fla. 1981), (b) as "dissimilar" fact evidence for which

unique characteristics of similarity are not required the evidence should be deemed inadmissible on relevancy grounds and (c) as "inseparable" or "inextricably intertwined" evidence the acts are not so linked in time and circumstances to the charged Evans and Pugh homicides that they do not help to explain the crime charged. Appellee disagrees.

Terry Jo Howard testified briefly that early in her relationship with Randall he admitted to her that he became sexually stimulated by choking his sexual partners, that she acquiesced out of a concern about controlling his problem but was still distressed by it. (Vol. XXI, TR. 1016-1020). Randall reacted to her own reaction; it excited him more when she fought and when she did nothing his choking conduct diminished and stopped. (Vol. XXI, TR. 1020). She described an incident in October, 1995 when he became angry and choked her, after she reported to him an incident in which a co-worker had coerced her into sexual activity; from appellant's choking her, she sustained neck and eye injuries prior to a planned visit to her mother in West Palm Beach. (Vol. XXI, TR. 1022-1024).[3]

[3]Testimony by ex-wife Linda Graham was even more abbreviated that during their marriage from 1979 to 1986 Randall derived enjoyment by choking her during sexual activity and by her reaction to it (Vol. XXI, TR. 1103-1105), a factor corroborated by Randall's admissions to Dr. Profit (Vol. XXI, TR. 1109-1110). Appellee notes that even at the pre-trial hearing on February 19, 1997, at the discussion regarding testimony by Dr. Profit, the defense initially had expressed a concern that the state would attempt to

Since at least 1959 Florida jurisprudence on the admission of collateral crime evidence has been clear. As stated in the seminal decision of Williams v. State, 110 So.2d 654, 659, 660 (Fla. 1959):

> Our view of the proper rule simply is that *relevant* evidence will not be excluded *merely* because it relates to similar facts which point to the commission of a separate crime. The test of admissibility is relevancy. The test of inadmissibility is a lack of relevancy.
>
> * * *
>
> ...the rule which we have applied in affirming this conviction simply is that evidence of any facts relevant to a material fact in issue except where the sole relevancy is character or propensity of the accused is admissible unless precluded by some specific exception or rule of exclusion.

(emphasis supplied)(Id. at 663)

Accord, Chandler v. State, 702 So.2d 186, 191-192 (Fla. 1997); Medina v. State, 466 So.2d 1046 (Fla. 1985); Kimbrough v. State, 700 So.2d 634 (Fla. 1997); Consalvo v. State, 697 So.2d 805 (Fla. 1996); Foster v. State, 679 So.2d 747 (Fla. 1996); Pittman v. State, 646 So.2d 167 (Fla. 1994); Schwab v. State, 636 So.2d 3 (Fla. 1994); Crump v. State, 622 So.2d 963 (Fla. 1993); Williams v.

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put Dr. Profit on to talk about the diagnosis of sexual sadism and when the state responded that they didn't intend to do that the defense acquiesced and stated that however Profit's testimony was sanitized "I guess I'll leave to the Court" (Vol. XIII, TR. 1716, 1718). Dr. Profit testified briefly regarding appellant's admissions on choking and sexual gratification without objection (Vol. XXI, TR. 1109-1110).

State, 621 So.2d 413 (Fla. 1993). All evidence that tends to convict is prejudicial. The true test is relevancy. Ashley v. State, 265 So.2d 685 (Fla. 1972); Amoros v. State, 531 So.2d 1256 (Fla. 1988).

The testimony of Howard and Linda Randall Graham was not offered solely for propensity. Howard's testimony was relevant and admissible as it demonstrated appellant's motive and intent and put into context the selection of prostitutes Evans and Pugh as victims as well as explaining Randall's admission to Howard at the jail that he hurt others so as not to hurt her. In Hoefert v. State, 617 So.2d 1046 (Fla. 1993) this Court approved the admission of collateral crimes evidence that appellant had choked them while raping them and that he derived sexual gratification from the choking (according to one witness "the more I struggled, the more intent he became in choking around my throat . . . He thrived on the fear, the more my body twitched . . . the more he got into it"). Id. at 1049. This Court explained that the testimony described the central motive in Hunt's asphyxiation "to obtain sexual gratification by engaging in sex while choking the victim". Id. at 1049. Additionally, the Court approved the testimony of a cellmate Wesley Pope concerning his sexual proclivities (he derived a thrill from choking women during sexual intercourse) were

relevant to his intent and motive and corroborated the testimony from prior witnesses. Id. at 1050.

This Court has routinely recognized that evidence which also demonstrates commission of another crime or of bad acts can be admitted into evidence where it is relevant to some material issue, for example to show opportunity, intent, knowledge, motive, modus operandi and plan. *See, e.g.*, Jorgenson v. State, 714 So.2d 423 (Fla. 1998)(even though drug dealing was not similar to the crime for which he was being tried, trial court did not abuse its discretion in ruling that the evidence was relevant as it tended to support the state's theory of the motive in this case); Chandler v. State, 702 So.2d 186 (Fla. 1997)(even though collateral crimes are not exactly the same -- the dissimilarity could be attributed to differences in opportunities presented rather than differences in modus operandi and evidence was relevant to establish not only his identity as the killer but also his plan, scheme, intent and motive to lure women to his boat to commit violence upon them and relevant to establish his opportunity to murder the victims on his boat).

This Court has also approved the admission of evidence of other crimes, wrongs or acts to show knowledge; as Professor Ehrhardt states "Proof of knowledge may also show that the defendant did not act mistakenly or inadvertently and therefore had the necessary intent". Ehrhardt, Florida Evidence, § 404.13, p.

188, 189 (1997). Trepal v. State, 621 So.2d 1361 (Fla. 1993) (evidence that defendant charged with murder by using Thallium as a poison had been earlier involved with an amphetamine laboratory was admissible to show defendant's knowledge of chemistry and poisons). Here, appellant knew that his choking during sex behavior invariably led to injury to his partners (girlfriend and ex-wife) and thus his plan to select available targets Evans and Pugh at a time when Terry Jo Howard was out of town visiting her mother tends to refute a defense argument that the resultant injuries or death was accidental or inadvertent. Evidence of other crimes, wrongs or acts is admissible to show motive, the basis from which the jury may infer that defendant intended to do the act and thus requires no similarity demonstration. *See* Finney v. State, 660 So.2d 674 (Fla. 1995)(Overall similarity between the facts of the two offenses generally is necessary before the other crime evidence is considered relevant to the issue of identity; such is not the case when other crime evidence is used to prove motive). Appellant's acknowledged motive -- relayed to Howard in jail -- was to hurt others so he wouldn't hurt her. And why hurt others? To satisfy his habitual practice of enhancing the sexual experience violently by choking and enjoyment of the fear induced in his partners. That motive is seen via witnesses Linda Randall Graham and Terry Jo Howard. This Court has approved the admission of

collateral crime evidence to show modus operandi. *See* Williams v. State, 622 So.2d 456 (Fla. 1993)(In murder prosecution where drug dealer sent representatives to kill the victim, evidence that defendant sent two men to kill third person who had started his own drug business was admissible to show the defendant's modus operandi). Just as the defendant in the Hoefert case, appellant here sought out women to satisfy his combined desire for sexual conduct and choking behavior (Evans and Pugh were prostitutes, girlfriend Terry Jo Howard was an ex-prostitute he met and Linda Randall was and is his ex-wife).

The Court has permitted evidence of other crimes to put matters in context. Damren v. State, 696 So.2d 709 (Fla. 1997) (Court approved as inseparable crime evidence to give a complete and intelligible account of the crime charged evidence that accused had gone to the crime scene several weeks before the murder and stolen a portable generator which supported the state's theory he had the specific intent to burglarize the premises). In the instant case Randall's October 1995 choking incident of Howard to unconsciousness shortly before her planned visit to her ailing mother out of town served as the antecedent act to Randall's picking up and killing first victim Wendy Evans later that month when Howard did leave the residence. That choking incident with Howard also helps to explain in addition to his identity as

perpetrator here the reason for his having selected such available, vulnerable targets (whom he otherwise did not know) to avoid further harming his girlfriend Terry Howard -- as he digitally explained in his jailhouse admission to her -- and to make his detection less likely than if Howard became his victim.[4] *See* Hall v. State, 403 So.2d 1321, 1324 (Fla. 1981); Ruffin v. State, 397 So.2d 277, 280 (Fla. 1981)(collateral crime established the entire context in which crime occurred).

Finally, any error in the instant case is harmless. Florida Statute 924.051(3)(1997) provides that:

> (3) An appeal may not be taken from a judgment or order of a trial court unless a prejudicial error is alleged and is properly preserved or, if not properly preserved, would constitute fundamental error. A judgment or sentence may be reversed on appeal only when an appellate court determines after a review of the complete record that prejudicial error occurred and was properly preserved in the trial court or, if not properly preserved, would constitute fundamental error.

As asserted, *supra*, appellee submits that the instant claim was

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[4]While it is true the choking behavior of ex-wife Linda Randall Graham is more temporally remote, her brief testimony was not unduly prejudicial. Her testimony corroborated appellant's insistent desire for choking as a part of sexual gratification. *See* State v. Statewright, 300 So.2d 674 (Fla. 1974)(approving admission of evidence relating to a homosexual act committed five years prior to crime charged since relevant to motive and premeditation issue). *See also* Williamson v. State, 681 So.2d 688 (Fla. 1996)(evidence of prior homicide by defendant many years prior is admissible to show why state's key witness failed to come forward and defendant used witness knowledge of prior crime to influence him not to reveal it).

unpreserved by contemporaneous objection in the trial court and certainly the admission of relevant evidence of Randall's choking-sexual conduct with Terry Howard and his ex-wife which help explain his behavior with Evans and Pugh does not constitute fundamental error. Furthermore, F.S. 924.051(7) provides that in a direct appeal or collateral proceeding:

> ...the party challenging the judgment or order of the trial court has the burden of demonstrating that a prejudicial error occurred in the trial court. A conviction or sentence may not be reversed absent an express finding that a prejudicial error occurred in the trial court.

Appellant refers to the prosecutor's closing argument at Vol. XXIII, TR. 1333-1336 -- none of which was objected to below -- and it should be noted that in defense counsel's initial closing argument prior to that of the prosecutor he alluded to the testimony of Terry Jo Howard and Linda Graham and bluntly asserted "They're both lying" (Vol. XXIII, TR. 1316) and counsel minimized the importance of their testimony by reminding the jury of the Court's instructions to them on the limited purpose of the testimony. (Vol. XXIII, TR. 1317).

Appellant cites State v. Lee, 531 So.2d 133 (Fla. 1988) wherein the court held that it was improper in a prosecution for armed kidnapping, armed sexual battery, armed robbery, possession of a firearm by a convicted felon and possession of a firearm in

the commission of a felony for the state to offer evidence that the accused also robbed a bank that day since the evidence was not admissible on any proffered theory. This Court announced it could not conclude the error was harmless because "the improper collateral crime evidence was given undue emphasis by the state and was made a focal point of the trial". Id. at 137. The Court described the prosecutor's argument as urging the jury to convict at least in part "because he was an evil man intent on committing crime". Id. at 138. In the instant case the collateral crime evidence was not given undue emphasis or made a focal point of the trial; the testimony was brief and helped to explain Randall's motive, intent and conduct and the reason Evans and Pugh died at his hands; that Randall was the perpetrator is unchallenged in light of the physical evidence (tire track, hair, fibers, DNA). Even without it, affirmance would be required. State v. DiGuilio, 491 So.2d 1129 (Fla. 1986).

In conclusion, while the appellant may choose to look in isolation at what he perceives as an unpleasant, inconvenient, uneven shard of glass, the jury could permissibly see it as forming a small part of a beautiful mosaic.

ISSUE II

WHETHER THE TRIAL COURT ERRED WHEN IT ALLOWED EVIDENCE OF APPELLANT'S FLIGHT FROM POLICE WHEN THEY ATTEMPTED TO ARREST HIM (ON THE OUTSTANDING MASSACHUSETTS PROBATION WARRANT) ON JUNE 27, 1996.

A. Trial Testimony and Closing Arguments

At trial the prosecution called Pinellas County Sheriff's Officer John Quinlan to testify about a ten-minute interview he and Detective Klein conducted on June 27, 1996 with appellant at the Randall-Howard residence. They mentioned to Randall they were investigating the Evans and Pugh homicides and inquired whether Randall or Terry Jo Howard knew the victims, asked about the vehicles Howard and Randall drove and whether the victims could have been given a ride by either of them or if the victims could have been inside the residence. (Vol. XVIII, TR. 769-777). When Randall left the residence in his truck after the conversation ended and the officers had departed, a decision was made to stop his vehicle with a uniformed cruiser. When the cruiser indicated a traffic stop, turning on the overhead lights, appellant fled. A high speed chase ensued and police could not keep up because of Randall's reckless driving and the traffic conditions. Randall abandoned the vehicle, fled on foot and was not apprehended until four days later, on July 1. During the June 27 doorway conversation the officers did not advise Randall he was a suspect in the Evans and Pugh cases. (Vol. XVIII, TR. 777-783).

On cross-examination by defense counsel Quinlan conceded that on the approach to the Randall residence he knew there was an outstanding probation warrant for another state on Randall. Appellant gave the name James M. Randall which was the name contained on that warrant and he provided the address and social security number which was the same as on the probation warrant except for transposition of some numbers. Defense counsel elicited that the officers attempted to arrest Randall on the outstanding Massachusetts warrant after Randall left the residence. Quinlan notified Randall after his July 1 arrest on that warrant that he was also a suspect in the Clearwater homicides. (Vol. XVIII, TR. 814-816). On redirect examination, the witness added that the Massachusetts warrant led Quinlan to interview appellant's ex-wife and Dr. Wesley Profit as well as the latter's report. (Vol. XVIII, TR. 817).[5] Quinlan testified that there was no mention of the Massachusetts warrant nor did he make it known they had the information in the doorway conversation with Randall -- the only things asked related to the Evans and Pugh cases. (Vol. XVIII, TR. 822).

The parties stipulated that Maitland Nixon who was ill and unavailable to testify would state that he was in the truck with Randall on June 27, 1996 when he noticed they were about to be

[5]The trial court would not allow further inquiry as to what the Massachusetts warrant was for. (Vol. XVIII, TR. 821).

pulled over by a deputy.[6] Randall said, “I’m gonna run, I’m gonna run.” While being pursued by the deputies Randall told Nixon that cops had been to his house that morning and when Nixon asked to be let out of the vehicle appellant replied, “I can’t do that, man. I can’t do that. I got to go. It’s my life. I can’t stop. They gonna - they want me. They’re gonna ship me back.” When Nixon asked “What’s up?” Randall answered “They want me for something up north.” During the chase Randall kept saying “It’s my life.” (Vol. XXII, TR. 1235-1236, see also Exhibit 62 introduced without objection at Vol. XXII, TR. 1236; Vol. VIII, R. 1249-51). In closing argument the defense argued:

> And I can assure you that Mr. Crow or Mr. Martin’s going to get up here and make a big deal of the fact they came up, they were talking with Jim Randall about these two murders, and they try to stop him and he runs, and he’s gone for four days.
>
> But it’s important that you recall the stipulation of Maitland Nixon’s testimony. It’s important that you recall, when I asked Detective Quinlan, “At that point in time, you intended to arrest him for what?”
>
> “An outstanding violation of probation warrant from another state.”
>
> If you’ll recall the testimony of Maitland Nixon, the man that was in the truck with him when he took off, “A police officer’s going to stop me. I can’t stop. I can’t stop. They’re going to ship me back. They want me for something up north.”
>
> But according to the people of the State of Florida, that’s not important.

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[6]Appellant offered no objection to Maitland Nixon’s testimony, stipulated to its admissibility as well as having no objection to the written stipulation introduced as an exhibit. Any complaint now as to his testimony must be deemed barred.

> They talked with him about these two murders, but they were law enforcement officers, identified themselves as such, ask him for his name. He gave them the right name. And then, shortly thereafter, he gets -- attempted to be stopped, and, he runs. Because of what was holding him up in Massachusetts, the violation of probation.
>
> That's the testimony. They can tell you what they want you to believe. Once again, it's an implication of guilt. But the presumption of innocence outweighs that.

(Vol. XXIII, TR. 1324-1325)

The prosecutor's response in closing argument was:

> And you have the evidence of flight. And I'm not going to suggest to you this is essential to the State's case, but it is evidence to consider.

(Vol. XXIII, TR. 1371)

* * *

> 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.
>
> 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 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.

(Vol. XXIII, TR. 1372-1373)

* * *

Maitland Nixon. He’s -- you’ve heard a little reference to him. He’s too ill to be here. He’s hospitalized. And so there was a stipulation as to what his testimony would be, were he to testify.

And he tells you about the flight, about the statements, “it’s my life. It’s my life. It’s my life.” And also, that the -- when prompted for why he was doing this, and why Maitland, who desperately wanted to get out of the car, knowing the police officers, when they’re chasing him, with lights and sirens, also have guns and, wanted no part of it, that, “Well, they want me -- they’re going to take me back up north.”

Well, of course, does anybody really think that a defendant fleeing the police, knowing, at any minute, they’re going to converge, he may be stopped, he may not

> escape, that he's going to turn to the person next to him and say, "They want me because I killed two people," and give police the same type of evidence that he has fought so hard, in the dropping of bodies, in the manner in which he did; in fleeing from the police, to begin with, to deprive them of that evidence, that he's going to utter those words to someone? No.
>
> (Vol. XXIII, TR. 1378)

B. Legal Analysis

> The wicked flee when no man pursueth, but the righteous are bold as a lion.
>
> Proverbs 28:1

In Shellito v. State, 701 So.2d 837 (Fla. 1997), this Court approved the admission of evidence of Shellito's attempt to flee from an apartment during a police raid and rejected the defense contention that it was impossible to say whether the flight resulted from illegal activities taking place inside the apartment or from the homicide for which he was convicted. The Court found the case more comparable to Bundy v. State, 471 So.2d 9 (Fla. 1985) and Straight v. State, 397 So.2d 903 (Fla. 1981), than to Escobar v. State, 699 So.2d 988 (Fla. 1997) or Merritt v. State, 523 So.2d 573 (Fla. 1988).[7] Factors supporting admissibility of the flight evidence included the short time period (20 hours) since the

[7]In Merritt, the evidence of flight occurred three years after the crime; in Escobar, the flight occurred in another state 27 days after the murder at issue and defendant had no reason to believe he was a suspect in the murder at the time of the flight. In Bundy, the flight occurred only days after the crime at issue occurred. In Straight, the flight occurred one day after the murder.

murder, the fact that he had bragged about the murder in the apartment to others shortly before the raid, and the murder weapon was in his possession at the time of the flight. The Court explained:

> The fact that Shellito committed several robberies during the brief period of time between the murder and the raid does not prevent a jury from hearing evidence regarding his flight and use of force under these facts.
>
> (text at 841)

In United States v. Borders, 693 F.2d 1318 (11th Cir. 1982) -- utilized in this Court's analysis in Escobar -- the Court described two lines of cases that have held flight evidence inadmissible, one in which particular facts tend to detract from the probative value of such evidence (the "Beahm-Myers line of cases thus stands for the proposition that the probative value of flight evidence is substantially weakened if the suspect was not aware at the time of flight that he was the subject of a criminal investigation for the particular crime charged." Id. at 1326) and the second line of cases deals with a lapse of time defect ("When the flight is not immediate, the inference of a consciousness of guilt weakens." Id. at 1326). In Borders, the Court found no defects that would render Hastings' flight inadmissible; Hastings was aware of the fact that the FBI had focused its investigation on him and his departure from the hotel occurred as soon as he heard the FBI wanted to talk to him.

In the instant case, while it is true that the June 1996 visit by Quinlan occurred months after the Evans and Pugh homicides -- and only the Evans-Pugh investigation was discussed with Randall -- an even greater length of time had passed since his Massachusetts activity and it is not a reasonable inference that Randall was alluding law enforcement on the basis of an unmentioned out of state warrant.

The instant case is unlike Merritt v. State, 523 So.2d 573 (Fla. 1988). There the murder being prosecuted occurred in 1982, the defendant became aware he was a suspect while serving time on an unrelated conviction in Virginia in April 1985 and did not try to escape until December of 1995 while being transported to Florida on yet other unrelated charges in December of 1995.

In Bundy v. State, 471 So.2d 9 (Fla. 1985) this Court approved the admission of flight evidence and rejected a defense contention that the state must show that the accused had no other reason to flee. This Court found no defects to render the evidence presented inadmissible; he was apprehended in Pensacola after fleeing from the officer who had stopped him, only six days after the disappearance of victim Kimberly Leach:

> ". . . we feel it is a reasonable inference to make that Bundy fled from the officer as a result of consciousness of guilt on his part for the Leach crime. Likewise, it was two days after the Leach crime when Bundy fled from Officer Dawes after Dawes spotted the license tag on the floorboard of the car which Bundy was apparently using. It is reasonable

> that a jury could infer such circumstantial evidence to be evidence of guilt.
>
> Id. at 21.

Thus, the evidence of Bundy's flight from police in February of 1978 was proper, even though he also became the prime suspect in the January 1978 murders of the Chi Omega Sorority members in Tallahassee.

In Escobar v. State, 699 So.2d 988 (Fla. 1997), this Court held that the trial court erred in permitting the introduction of evidence of a shootout with California law enforcement officers (a month after the Estefan murder in Miami) in the latter's attempt to apprehend the defendant for a traffic violation. This Court agreed as an abstract rule of law that evidence of flight, concealment or resistance to lawful arrest is admissible as "being relevant to the consciousness of guilt which may be inferred from such circumstance." Straight v. State, 397 So.2d 903, 908 (Fla. 1981), but in applying the principle to a particular case "there must be evidence which indicates a nexus between the flight, concealment, or resistance to lawful arrest and the crime(s) for which the defendant is being tried in that specific case." 699 So.2d at 995. In Escobar, the Court did not find a sufficient evidentiary nexus to permit the jury to infer that resisting arrest in California was related to the Miami murder. The Court pointed to the lapse of time (27 days after the Estefan murder) and there was no evidence in the record that Escobar had any reason to believe at the time of

the California resisting that he was the subject of that murder case in either Florida or California. Indeed, California police learned information about the Florida murder only after Escobar was shot and arrested; when California authorities then notified officers in Miami, only then did he become a suspect in the Estefan murder.

Additionally, Escobar had outstanding warrants in California for California crimes and "It could be reasonably inferred that the California warrants alone were the cause of appellant's attempt to flee the California police." Id. at 996. The Escobar Court distinguished that situation from that presented in Freeman v. State, 547 So.2d 125 (Fla. 1989) because "Freeman was incarcerated for both offenses and it could reasonably be inferred that he attempted to avoid penalties for both." (emphasis supplied) 699 So.2d at 996.

In the instant case, the passage of time factor is insignificant; Randall murdered Wendy Evans in October of 1995, killed Cynthia Pugh in January of 1996 and was interviewed by Quinlan who mentioned only these Florida crimes on June 27, 1996 (whereas his Massachusetts probation warrant in 1992 antedated his local crimes by three years). Secondly, unlike Escobar, the evidentiary nexus of appellant to the Florida crimes is clear: the Quinlan-Randall interview of June 27 occurring minutes prior to appellant's life-endangering flight made no mention of the

officers' awareness of the Massachusetts outstanding warrant and the only matter discussed was a series of disturbing questions as to whether Randall or his girlfriend (former prostitute Terry Jo Howard) knew prostitute-victims Evans and Pugh or had ever given them a ride in their vehicle or had them inside the residence and whether Randall was familiar with the area where Evans' body was found.[8] And whether one believes that the death penalty is too frequently or infrequently exacted in Florida, certainly Randall and the jury would understand that the penalty for a double murder in Florida would likely be more severe than a probation violation in Massachusetts, warranting a life-endangering chase, irrespective of Maitland Nixon's request to be let go. Appellant points to Randall's comment to Nixon that he was wanted for something up north but that is hardly dispositive; one need not expect the appellant to admit a double murder to a colleague in what might be minutes prior to apprehension. The totality of circumstances reflects that the greater concern to Randall would be a police stop following the immediate discussion of the Evans-Pugh murders. But even a concern about his Massachusetts problem is not unrelated because Randall could know, as officers ultimately did, that discussion with his ex-wife on his strangling-sexual habits would be informative of the instant double homicide. *See also* Wyatt v.

[8]Randall knew he had killed Evans and Pugh (witness his jailhouse admission to Howard) and knew that he had brought the victims to the residence (as evidenced by the carpet fibers and Penny the pug's chewed cigarette papers left respectively on Evans and Pugh).

State, 641 So.2d 1336 (Fla. 1994)(evidence of Wyatt's attempt to flee from the South Carolina police officer was sufficient to support the conclusion that he was fleeing out of fear of apprehension for Florida murders; the fact that defendant stole two cars a week or more after the murders was not sufficiently probative of flight and should not have been admitted but constituted harmless error).

Finally, as indicated above, having established a sufficient evidentiary nexus to show Randall's flight to avoid prosecution on the Evans and Pugh homicides, it matters not that there was also additional offenses that he may have sought to evade. *See* Freeman v. State, 547 So.2d 125 (Fla. 1989)(permissible to show evidence of flight in murder prosecution for victim Epps where defendant incarcerated for two offenses -- Epps and murder victim Collier -- where both were serious offenses); Bundy v. State, 471 So.2d 9 (Fla. 1985)(evidence of flight permitted in Leach prosecution despite Bundy's committing Chi Omega murders a month earlier); Shellito v. State, 701 So.2d 837 (Fla. 1997)(flight from police apartment raid permissible in murder prosecution even though defendant committed several robberies during a brief period of time between murder and raid).

ISSUE III

WHETHER APPELLANT'S RIGHT TO A FUNDAMENTALLY FAIR TRIAL WAS IRREPARABLY COMPROMISED BY JUDGE SCHAEFFER'S COMMENTS NEAR THE BEGINNING OF VOIR DIRE.

Randall contends that Judge Schaeffer's comments at the beginning of voir dire constituted fundamental error mandating reversal and the awarding of a new trial. Certainly, the alleged error complained of now escaped detection and comment by trial counsel as no objection was lodged or request for relief interposed below. The failure to interpose an objection or seek relief in the lower court should result in a procedural bar precluding appellate review. See e.g., Mordenti v. State, 630 So.2d 1080, 1084 (Fla. 1994):

> [1] The majority of the issues raised by Mordenti were not objected to at trial and, absent fundamental error, are procedurally barred. Davis v. State, 461 So.2d 67 (Fla.1984), cert. denied, 473 U.S. 913, 105 S.Ct. 3540, 87 L.Ed.2d 663 (1985); Ashford v. State, 274 So.2d 517 (Fla.1973). "[F]or an error to be so fundamental that it can be raised for the first time on appeal, the error must be basic to the judicial decision under review and equivalent to a denial of due process." State v. Johnson, 616 So.2d 1, 3 (Fla.1993).

Accord, Rhodes v. State, 638 So.2d 920, 924 (Fla. 1994); Steinhorst v. State, 412 So.2d 332 (Fla. 1982); Occhicone v. State, 570 So.2d 902 (Fla. 1990); Farinas v. State, 569 So.2d 425 (Fla. 1990); Tillman v. State, 471 So.2d 32 (Fla. 1985). See also Smith v. State, 521 So.2d 106, 108 (Fla. 1988)(The doctrine of fundamental

error should be applied only in rare cases where a jurisdictional error appears or where the interests of justice present a compelling demand for its application); Allen v. State, 662 So.2d 323, 328 (Fla. 1995); Kilgore v. State, 688 So.2d 895, 898 (Fla. 1996); Chandler v. State, 702 So.2d 186 (Fla. 1997); Jones v. State, 612 So.2d 1370 (Fla. 1992).

After the beginning of jury selection, the prosecutor mentioned that he had an extensive witness list, that the defense had additional names and that it was possible that some or all of the people might be referred to in the testimony as well as those who do testify and Judge Schaeffer instructed that someone read the list of names. The prosecutor expressed the concern that he didn't want to imply to the jury these are our witnesses as opposed to these are people with relevant information. (Vol. XIV, TR 9-10). This exchange followed:

> 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.
>
> MR. CROW: The other thing you had -- we had talked about, but not resolved --
>
> THE COURT: By the way, I do want you to get Mr. Schwartzberg's names and read those as well as yours.
>
> MR. CROW: So you're not reading State's witnesses or defense witnesses --
>
> THE COURT: No. These are witnesses who may be called.
>
> MR. CROW: That's what I was concerned about too, because if he reads his separately, then there may be implied some burden to call

witnesses.

THE COURT: No. I want you to read them all and I'll take care of the rest of it.

(Vol. XIV, TR 10).

The defense offered no comment, suggestion, objection or complaint. After a discussion on unrelated items, the court addressed the prospective jurors at Vol. XIV, TR 26-27:

> Will counsel for the State please introduce yourself.
>
> 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 mater 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. They won't parade in five witnesses to repeat what one witness can tell you.
>
> So you're going to hear a lot of names. I don't know at this time and they may not know at this time exactly which witnesses might be called. So listen carefully to this long list. And then when they're done, I will be asking you whether or not you know any of those persons whose names have been read off.
>
> Gentlemen, if you'll introduce yourself and then read your witness list, please.
>
> MR. CROW: My name is a Doug Crow. I'm with the State Attorney's Office. My co-counsel is Glenn Martin.
>
> MR. MARTIN: I have the pleasure of reading the list.
>
> What I intend to do is, after each name that I read, I'll indicate to you whether or not that person is associated with a particular business or law enforcement. If I

> don't do that, and I give a city within the State of Florida, I'll just give the city. If it's an out of state, I'll just give the person's state. So you'll kind of know how to read this list.

The list of names was read to the jury (Vol. XIV, TR. 27-35) and at the conclusion Judge Schaeffer asked defense counsel Mr. Schwartzberg if there were "any names that you noticed that come to your mind, that were not read?" and he answered "No, you Honor, I don't believe so." (Vol. XIV, TR. 36).[9] The lower court then made inquiry of whether any of the jurors knew any of the persons whose names were read to them and whether they could serve as fair jurors. (Vol. XIV, TR. 36-40).[10]

During the subsequent voir dire process the court preliminarily instructed the venire panel (Vol. XIV, TR. 103-104):

> The defendant has entered a plea of not guilty. This means you must presume or believe the defendant is innocent. This presumption stays with the defendant as to each material allegation in the Indictment through each stage of the trial until it has been overcome by the evidence to the exclusion of and beyond a reasonable doubt.

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[9]An off the record conversation apparently occurred. No defense complaint was made when the parties returned on the record.

[10]Juror Ruhtz indicated she had recognized the names of Anthony Anderson and Raymond Whiteley but could be fair and impartial. (Vol. XIV, TR. 36-37). Juror Campbell knew Danny Carron and Randall Larson and could be fair and impartial. (Vol. XIV, TR. 38). Prospective juror Connolly knew Deputies Ackerson and Lightfoot, was "very pro police" (Vol. XIV, TR. 39) and was excused by the court on a defense cause challenge. (Vol. XIV, TR. 132, 139). The prosecutor and defense counsel and court reminded the jury panel that the state had the burden of proof beyond a reasonable doubt. (Vol. XIV, TR 105, 170; Vol. XV, TR. 272-273).

> To overcome the defendant's presumption of innocence the State has the burden of proving the following: No. 1, the crime with which the defendant is charged or a lesser included crime -- I will tell you a little bit about that in a minute -- was committed and, No. 2, that the defendant is the person who committed the crime. The defendant is not required to prove anything.
>
> Whenever the words "reasonable doubt" are used, you must consider the following: No. 1, a reasonable doubt is not a possible doubt, a speculative, imaginary or forced doubt. Such a doubt must not influence you to return a verdict of not guilty if you have an abiding conviction of guilt. On the other hand, if, after carefully considering, comparing and weighing all of the evidence there is not an abiding conviction of guilt of if, having a conviction, it is one which is not stable, but one which waivers and vacillates, then the charge is not proved beyond every reasonable doubt and you must find the defendant not guilty because that doubt would be reasonable.
>
> <u>It is to the evidence introduced during this trial and to it alone that you are to look for your proof</u>. A reasonable doubt as to the guilt of this defendant may arise either from the evidence, from conflicts in the evidence or from the lack of evidence. If you have a reasonable doubt, you should find the defendant not guilty. If you have no reasonable doubt, you should find the defendant guilty of whatever crime the State has proved, the highest crime the State has proved beyond a reasonable doubt.
>
> (emphasis supplied)

And again <u>after the jury was selected</u> and sworn Judge Schaeffer admonished

> your verdict <u>must be based solely on the evidence</u> or the lack of evidence and the law
>
> (emphasis supplied)(Vol. XV, TR. 360)

and

> This case must be tried by you only on the evidence presented during the trial in your presence and in the presence of the defendant and the defendant's lawyers and the lawyers for the State and me.

(emphasis supplied)(Vol. XV, TR. 363). The court also told the jury not to speculate on what a witness might have said if an objection had not been sustained. (Vol. XV, TR. 367).

At the conclusion of the case Judge Schaeffer in her closing instructions to the jury instructed in pertinent part (1) that the state must prove the defendant's guilt beyond a reasonable doubt, (2) that the jury must presume or believe the defendant is innocent and that presumption stays with the defendant until it has been overcome by the evidence, to the exclusion of and beyond a reasonable doubt, (3) that the defendant is not required to prove anything and (4) most significantly, "It is to the evidence introduced in this trial and to it alone that you are to look for that proof." (Vol. XXIII, TR. 1406, 1408-09, 1410). Additionally, the court instructed:

> Number two, this case must be decided only upon the evidence that you have heard from the answers of the witnesses and have seen in the forms of the exhibits in evidence and on these instructions . . .
> . . . Deciding a verdict is exclusively your job. I cannot participate in that decision in any way. Please disregard anything I may have

> said or done that made you think that I preferred one verdict over another.
>
> (emphasis supplied)(Vol. XXIII, TR. 1413-14).

The instant case does not involve an improper, overreaching argument by the prosecutor in closing argument; it does not involve an improper, prejudicial response by the court to a jury question. The challenged comment raised *ab initio* was a preliminary remark by the trial court to help explain why a large number of names might be heard in the testimony -- and to determine which jurors might know such witnesses -- while at the same time satisfying the concern that the defense has no obligation to call any witnesses on its behalf. And far from engaging in the improper prosecutorial tactic condemned in many of the cited cases, Judge Schaeffer immediately prior to her now-contested sentence declared:

> 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 course, is for the jury to decide . . .
>
> (Vol. XIV, TR 26-27)

Appellant cites Professor Ehrhardt's observation that the judge occupies a dominant position during a jury trial and that "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." Ehrhardt, Florida Evidence, § 106.1, p. 32 (1997). Judge Schaeffer did not

comment on the weight of the evidence, or the credibility of a witness nor did she sum up evidence to the jury. And despite the insertion of a singular sentence prior to commencement of voir dire which appellant now deems offensive, Judge Schaeffer repeatedly instructed the jury, both preliminarily in the course of voir dire and in the final instructions at the conclusion of the case that the fact finder must confine its analysis to the testimony and evidence introduced at trial. Thus, even if Judge Schaeffer misspoke initially, she repeatedly corrected any such problem which had even escaped the notice of two capable defense counsel. (Vol. XIV, TR. 104; Vol. XV, TR. 360, 363, 367; Vol. XXIII, TR. 1410, 1413-14). Of course, not every improper judicial comment mandates a mistrial, especially where unrequested by the defense. *See* Huff v. State, 495 So.2d 145, 148 (Fla. 1986)(even if remark by judge was an improper judicial comment, the motion for mistrial was properly denied because "Any prejudice which theoretically could have resulted from the remark could have been dispelled had the defense requested a curative instruction from the trial court."); Harmon v. State, 527 So.2d 182 (Fla. 1988)(trial court's comments on credibility of accomplice did not deny defendant right to due process or fair trial); Jones v. State, 612 So.2d 1370 (Fla. 1992)(appellate court will not reverse for a judge's comment on the evidence in the absence of an objection unless so prejudicial as to be fundamental error and the comment therein did not deprive the

accused of a fair trial); Scott v. State, 396 So.2d 271 (Fla. 3DCA 1981)("any impropriety in two isolated comments made by the trial judge during the jury selection process was not preserved for appellate review by a proper and timely objection, motion for mistrial, or request for corrective instruction . . . and the comments were not so pernicious as to cause us to recognize them as fundamental error"); Hamilton v. State, 261 So.2d 184 (Fla. 3DCA 1972)("although judge's statements . . . could reasonably be susceptible to interpretation that defendant would be required to present evidence, there was no reversible error, where a curative instruction properly explaining law was given by court shortly after the statements were made").[11]

[11]Appellant's speculative assertion of prejudice that several uncalled witnesses included law enforcement officers and the tire manufacturer employees is particularly weak in the instant case as Randall makes no challenge to the sufficiency of the evidence to convict, save for the premeditation aspect in Issue IV, *infra*.

ISSUE IV

WHETHER APPELLANT'S CONVICTIONS SHOULD BE REDUCED TO SECOND DEGREE MURDER AND THE DEATH SENTENCES VACATED BECAUSE THE EVIDENCE ALLEGEDLY IS INSUFFICIENT TO PROVE PREMEDITATION.

In the trial court appellant moved for a judgment of acquittal at the conclusion of the state's case, relying on Hoefert v. State, 617 So.2d 1046 (Fla. 1993) and Kirkland v. State, 684 So.2d 732 (Fla. 1996). (Vol. XXII, TR 1259-1267). The prosecutor argued that the instant case was more similar to Crump v. State, 622 So.2d 963 (Fla. 1993) than Hoefert. Crump involved a pattern of picking up and strangling prostitutes (Clark and Smith) and discarding their nude bodies near cemeteries. Unlike the instant case there were no injuries to the body in the Hoefert case and asphyxiation was determined to be the cause of death as there was no other anatomical or apparent forensic cause; in Randall's case both victims -- Evans and Pugh -- had been violently assaulted (fingernail marks on the neck, bruises, broken bones, hematomas, etc.). The prosecutor further urged that strangulations of this type are repeatedly upheld by this Court as demonstrating the "heightened premeditation" required for the aggravating factor in the penalty phase. Instead of a lovemaking incident gone bad, appellant -- on two separate occasions -- engaged in violent sustained assaults beyond the point of unconsciousness for minutes. Premeditation was shown in his double murder and Randall's

admission to Terry Jo Howard made perfect sense. In his relationship with women who knew him, with whom he could be easily associated, he did not kill. The homicides displayed sophistication and planning -- the bodies were nude with identification removed, jewelry removed and dumped in sites to make the obtaining of forensic evidence difficult and to escape detection. Randall knew where the prostitutes were and went there -- choosing the occasions when his girlfriend was out of town and would have no knowledge of it. (Vol. XXII, TR 1267-1271).

Judge Schaeffer reasoned that Hoefert involved a case in which the state was unable to prove the manner in which the homicide was committed and the nature and manner of any wounds inflicted -- the asphyxiation determination was based on a lack of finding something else, whereas there is no speculation or uncertainty that the Randall homicides resulted from manual strangulation. Here, death resulted several minutes after the strangulation, after unconsciousness occurs. The court denied the motion for judgment of acquittal recognizing that she "must take this evidence in the light most favorable to the state". (Vol. XXII, TR 1273-1275). The lower court added that it was significant that the two homicides were so similarly committed and the trace evidence connecting the one to the other. Judge Schaeffer opined that "the entire evidence is extraordinarily convincing", noting the testimony that it was a "virtual certainty" the tire made the track

(considering the rarity of all the events)[12] and that unlike many of the circumstantial evidence cases the instant trial contained the direct evidence of appellant's admission that he hurt "others" (not a singular form) so as not to hurt Howard. (Vol. XXII, TR 1275-1276).

At the motion for renewed judgment of acquittal hearing on May 14, 1997, the defense relied on Long v. State, 689 So.2d 1055 (Fla. 1997) and the prosecutor reiterated that the totality of evidence which forensically dovetailed into each other made a compelling case identifying Randall as the assailant and on the premeditation issue. (Vol. XIII, TR 1772-1777). The prosecutor explained that in Long, the kidnaping (of Lisa McVey) was not similar fact or Williams-rule evidence, whereas the instant case had ten to fifteen marked similarities in how the crimes were committed, who they were committed against, how the bodies were disposed of and Howard being out of town on both occasions. Additionally, there were two types of fiber found on a single rug in the defendant's house and both of those types of fibers were found on one victim and one of the fibers was found on the second; dog fur on one victim, dog fur and banded hairs on the second victim, the tire track (a virtual certainty), the chewed up piece of cigarette filter paper and Howard's dog's habit of chewing cigarettes. Randall -- knowing of his parole status that any offense for which he was arrested would

[12]Judge Schaeffer expressed awareness that fibers and dog hairs can come from more than one source. (Vol. XXII, TR 1275).

lead to significant jail time -- timed his homicidal activities to coincide when his girlfriend was not home, there were no witnesses and the victims were at a specific location for him to pick up. (Vol. XIII, TR 1776-1780).

Judge Schaeffer agreed with the prosecutor the Long case involved a singular homicide with no witness seeing Long with the victim; here, a neighbor saw Randall with a person meeting the description of one of the victims. Unlike Long which only had two strands of hair in the carpet fibers, the instant case included hair, fiber, statements, DNA, tire track and appellant's history of choking women. (Vol. XIII, TR 1783-1784). Again, unlike Hoefert, the cause of death here clearly was manual strangulation and appellant knew if he continued to choke a person beyond consciousness they would die.[13] (Vol. XIII, TR 1786).

In this appeal Randall does not challenge the determination made by judge and jury that the state satisfactorily determined beyond a reasonable doubt that he killed Wendy Evans and Cynthia Pugh by strangulation (asphyxiation). Rather he argues that the evidence shows a reasonable hypothesis that the homicide occurred other than by premeditated design; that since Randall had previously choked his ex-wife Linda Randall Graham and girlfriend Terry Jo Howard during sexual activity, as well as his admission to Dr. Wesley Profit in Massachusetts that he derived sexual pleasure

[13]Judge Schaeffer over the state's objection did not instruct on CCP aggravator.

from choking behavior and that it contributed to his sense of arousal and enjoyment of the sexual encounter and that force or violence was part of his choking behavior (Vol. XXI, TR 1109-1110), the premeditation aspect is missing.

Appellant alludes to the fact that the lower court declined at the penalty phase to instruct the jury on the cold, calculated and premeditated aggravator -- which requires "heightened premeditation" -- but the rejection of the CCP factor at penalty phase does not mean that there has been a failure of proof of mere premeditation in the guilt phase. Moreover, to equate mere premeditation with the heightened premeditation required for the CCP aggravator might well render the statutory factor unconstitutional. *See, generally*, Crump v. State, 622 So.2d 963 (Fla. 1993); Holton v. State, 573 So.2d 284 (Fla. 1990)(evidence demonstrated first degree premeditated murder but evidence insufficient to satisfy the CCP requirement). *See* Harris v. State, 438 So.2d 787 (Fla. 1983)(CCP aggravating circumstance not intended by the legislature to apply to all premeditated murder cases); Walls v. State, 641 So.2d 381 (Fla. 1994)(at capital sentencing hearing, to establish CCP requires heightened premeditation, a premeditation over and above what is required for unaggravated first degree murder); Dolinsky v. State, 576 So.2d 271 (Fla. 1991) (for aggravating factor premeditation must exceed that level of premeditation required for conviction of first degree premeditated

murder). The instant case is factually similar to Crump and Holton.[14]

In Crump v. State, 622 So.2d 963, 971 (Fla. 1993), this Court explained:

> [10][11][12][13] The next issue is

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[14]Many of the cases cited by appellant are distinguishable from the case at bar. Mungin v. State, 689 So.2d 1026 (Fla. 1995) involved a convenience store robbery-shooting with no statements indicating an intent to kill and no continuing attack that would have suggested premeditation (Id. at 1029); Mitchell v. State, 527 So.2d 179 (Fla. 1988)(no issue of premeditation since jury convicted on felony-murder theory and CCP rejected because evidence consistent with a homosexual rage killing; this Court noted that there was no other evidence of premeditation -- Id. at 182); Kirkland v. State, 684 So.2d 732 (Fla. 1996)(Strong evidence militated against premeditation including no suggestion defendant ever exhibited or possessed intent to kill this one victim at any time prior to the homicide and scant, if any, evidence to indicate that he committed homicide according to a preconceived plan. There was no pattern of extreme violence -- Id. at 735); Fisher v. State, 715 So.2d 950 (Fla. 1998) and Cummings v. State, 715 So.2d 944 (Fla. 1998)(drive by shooting into a residence by four passengers in car may have been mere intent to frighten); C. Green v. State, 715 So.2d 940 (Fla. 1998)(stabbing and strangulation but no weapon recovered and little, if any, evidence that defendant committed the homicide according to a preconceived plan -- (Id. at 944); Norton v. State, 709 So.2d 87 (Fla. 1997)(single gunshot wound consistent with a spur of the moment killing with no evidence as to a possible motive and no evidence of continuing attack suggesting premeditation, lack of a sign of struggle and no other injuries aside from single gunshot wound to the head); Coolen v. State, 696 So.2d 738 (Fla. 1997)(stabbing during a drinking party consistent with an escalating fight over beer); Sam Wilson v. State, 493 So.2d 1019 (Fla. 1986)(as in the instant case, the defense urged a heat of passion hypothesis for the killing but this Court approved premeditated murder adjudication as to victim who was brutally beaten; the murder climaxed a protracted violent episode inconsistent with extreme rage, heat of passion scenario); Hoefert v. State, 617 So.2d 1046 (Fla. 1993)(state unable to prove manner in which homicide occurred and manner of wounds inflicted -- no evidence of trauma to neck, asphyxiation deemed cause of death with no indication of anything else; no admissions by defendant).

whether the trial court erred by denying Crump's motion for an acquittal of first-degree murder based on the State's failure to prove premeditation. Crump argues that the circumstantial evidence does not support a finding of premeditation, but shows that he killed Clark in a rage. We have held that premeditation can be shown by circumstantial evidence. Sireci v. State, 399 So.2d 964 (Fla.1981), cert. denied, 456 U.S. 984, 102 S.Ct. 2257, 72 L.Ed.2d 862 (1982), overruled on other grounds, Pope v. State, 441 So.2d 1073 (Fla.1983). In order to prove a fact by circumstantial evidence, the evidence must be inconsistent with any reasonable hypothesis of innocence. Cochran v. State, 547 So.2d 928, 930 (Fla.1989). The question of whether the evidence fails to exclude any reasonable hypothesis of innocence is for the jury to determine, and where there is substantial, competent evidence to support the jury verdict, the verdict will not be reversed on appeal. State v. Law, 559 So.2d 187, 188 (Fla.1989). Thus, the State must exclude every other reasonable inference that may be drawn from the circumstantial evidence to show that premeditation exists. Id. As this Court has stated:

> Evidence from which premeditation may be inferred includes such matters as the nature of the weapon used, the presence or absence of adequate provocation, previous difficulties between the parties, the manner in which the homicide was committed, and the nature and manner of the wounds inflicted. It must exist for such time before the homicide as will enable the accused to be conscious of the nature of the deed he is about to commit and the probable result to flow from it in so far as the life of the victim is concerned.

Holton v. State, 573 So.2d 284, 289 (Fla.1990) (quoting Larry v. State, 104 So.2d 352, 354 (Fla.1958)), cert. denied, --- U.S. ---, 111 S.Ct. 2275, 114 L.Ed.2d 726 (1991).

> Applying these principles to the instant case, we find that there was substantial and competent evidence to support the jury's verdict of premeditation. The medical examiner testified that Clark had bruises on her head which indicated that she had been struck, as well as an abdominal injury, which caused slight hemorrhaging. However, the medical examiner found that these injuries did not cause Clark's death. The medical examiner concluded that Clark was strangled because of a fracture of the upper hyoid bone, a fracture of the thyroid cartilage, and small pinpoint hemorrhages in the victim's eyes. Moreover, the Williams rule evidence showed that Crump killed both Clark and Smith in a criminal pattern in which he picked up prostitutes, bound them, strangled them, and discarded their nude bodies near cemeteries. Because the circumstantial evidence standard does not require the jury to believe the defense's version of the facts on which the State has produced conflicting evidence, the jury properly could have concluded that Crump's hypothesis of innocence was untrue.

Accord, Holton v. State, 573 So.2d 284, 289-290 (Fla. 1990)(victim found with ligature secured tightly around neck, death by strangulation; victim had long fingernails and defendant's chest had fresh scratch marks; his exculpatory statements need not be credited by jury). The instant case is not a heat of passion killing or mere rage. This is rage-plus. Randall on two separate occasions, months apart, waited until his girlfriend was out of town, and the opportunity was available, selected his victim-prostitutes to bring to his residence to engage in his strangulation-sexual activities. Selecting these victims was purposeful; unlike previous assault victims ex-wife Linda Randall

Graham and current girlfriend Terry Jo Howard who could press charges against him if the assaults continued or with whom he would naturally be suspect if he had killed them, Randall would have a better chance of avoiding prosecution by selecting and killing those with an isolated existence. Randall's case is like Crump, *supra*, and Long v. State, 610 So.2d 1268 (Fla. 1992). This Court approved Judge Lazzara's imposition of a judgment and sentence of death in Long.[15] Judge Lazzara reasoned:

> Moreover, the evidence is clear that had the Defendant encountered a police officer prior to the murder of his victim, he would not have committed this crime. This evidence, coupled with the deliberate steps the Defendant took to accomplish his nefarious scheme of seeking out, abducting, sexually battering and then killing a woman he believed to be a prostitute serves to lessen the mollifying impact of the mitigating circumstances found by this Court to exist when balanced against the aggravating circumstances found by this Court to exist.
>
> In sum, the two statutory mitigating circumstances found to exist, when balanced against the statutory aggravating circumstances found to exist, do not sufficiently demonstrate that the Defendant lacked the cognitive volitional and moral capacity to act with the degree of culpability associated with the imposition of a sentence of death.

[15]In another and different homicide prosecution Long v. State, 689 So.2d 1055 (Fla. 1997), this Court deemed the circumstantial evidence insufficient where no one had seen the defendant with the victim, thee were no statements by defendant he killed this victim and distinguished it from Crump v. State because of the latter's nearly identical second murder which was Williams-ruled on the identity issue.

(Id. at 1273)(emphasis supplied)

See also DeAngelo v. State, 616 So.2d 440 (Fla. 1993)(approving finding of premeditation and rejecting the defense argument that he killed the victim in a blind rage during an argument since the medical examiner testified that he would have had to choke the victim for five to ten minutes to kill her and a week earlier had backed out of her room after going in to kill her).

Obviously, Long and Crump and Randall are capable of forming a premeditated intent before and during a sexual episode (and if jurisdictions disagree they are free to form their own jurisprudence).[16] Penalty phase defense expert witness Dr. Michael Maher acknowledged he was not asserting that Randall did not have

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[16]Appellant cites a closely divided decision from the State of Washington, State v. Bingham, 719 P.2d 109 (Wash. 1986). As noted in Dupree v. State, 615 So.2d 713 (Fla. 1DCA 1993), there is a split of authority among the states on whether strangulation alone is sufficient evidence to justify submission of the question of premeditation to the jury. The Dupree Court added in footnote 1 of its opinion that:

> . . . even jurisdictions which hold it error to submit the question of premeditation to the jury based on evidence of strangulation alone acknowledge that strangulation, in conjunction with other facts, such as evidence of a struggle or other injuries inflicted prior to the strangulation, indicates that the assailant had sufficient time within which to reflect upon his or her actions prior to the strangulation, thereby justifying submission of the question of premeditation to the jury. . .
>
> (citations omitted including some decisions from the same jurisdiction - Washington - that decided Bingham)

the capacity to decide not to pick up a prostitute if a police officer were standing nearby. (Vol. XXIV, TR 1534).

The state presented sufficient evidence to demonstrate that appellant killed Wendy Evans and Cynthia Pugh with premeditated intent. The instant case is not a totally circumstantial evidence case -- appellant admitted to friend Terry Jo Howard in a jail visit conversation, forming the letters spelling out "I hurt others so that I would not hurt you." (Vol. XXI, TR 1040). *See* Meyers v. State, 704 So.2d 1368, 1370 (Fla. 1997)("Because confessions are direct evidence, the circumstantial evidence standard does not apply in the instant case."); Hardwick v. State, 521 So.2d 1071, 1075 (Fla. 1988)("We disagree that the case was circumstantial . . . . A confession of committing a crime is direct, not circumstantial, evidence of that crime."); Walls v. State, 641 So.2d 381, 390 (Fla. 1994).

A court should not grant a motion for judgment of acquittal unless there is no view of the evidence which the jury might take favorable to the opposite party that can be sustained under the law. DeAngelo v. State, 616 So.2d 440, 441-442 (Fla. 1993); Taylor v. State, 583 So.2d 323, 328 (Fla.), cert. denied, ___ U.S. ___, 115 S.Ct. 518, 130 L.Ed.2d 424 (1994); Lynch v. State, 293 So.2d 44, 45 (Fla. 1974). In moving for judgment of acquittal, a defendant admits the facts in evidence as well as every conclusion favorable to the state that the jury might fairly and reasonably

infer from the evidence. If there is room for a difference of opinion between reasonable people as to the proof or facts from which an ultimate fact is to be established, or where there is room for such differences on the inferences to be drawn from conceded facts, the court should submit the case to the jury. Lynch, Taylor.

While this Court has recognized that circumstantial evidence may be deemed insufficient where it is not inconsistent with a reasonable theory of defense, this Court has also recognized repeatedly that the question of whether any such inconsistency exists is for the jury, and this Court will not disturb a verdict which is supported by substantial, competent evidence. Spencer v. State, 645 So.2d 377, 380-381 (Fla. 1994); Cochran v. State, 547 So.2d 928, 930 (Fla. 1989); Heiney v. State, 447 So.2d 210, 212 (Fla.), cert. denied, 469 U.S. 920 (1984); Williams v. State, 437 So.2d 133, 134 (Fla.), cert. denied, 466 U.S. 909 (1984); Rose v. State, 425 So.2d 521 (Fla.), cert. denied, 461 U.S. 909 (1983). It is not this Court's function to retry a case or reweigh conflicting evidence; the concern on appeal is limited to whether the jury verdict is supported by substantial, competent evidence. Tibbs v. State, 397 So.2d 1120 (Fla.), aff'd., 457 U.S. 31, 102 S.Ct. 2211, 72 L.Ed.2d 652 (1982). Here, the evidence was more than sufficient for presentation and consideration by the jury and it supports the verdict returned.

ISSUE V

WHETHER THE STATE AND FEDERAL CONSTITUTIONAL PROSCRIPTION AGAINST EX POST FACTO LAWS WAS VIOLATED BY THE TRIAL COURT'S FINDING AS AN AGGRAVATOR THAT APPELLANT WAS ON FELONY PROBATION.

In her sentencing findings, Judge Schaeffer recited (Vol. IX, R. 1396-98):

> A. AGGRAVATING FACTORS
>
> 1. The capital felony was committed by a person previously convicted of a felony and under sentence of imprisonment or placed on community control or on felony probation.
>
> The state introduced both testimony and documentary evidence in the penalty phase that the defendant pled guilty in 1987 to one count of rape which occurred on July 19, 1986, and to two counts of aggravated rape and one count of kidnaping which occurred on September 6, 1986. He was sentenced to 5 - 7 years for the July 1986 rape, and to a suspended prison sentence for the aggravated rapes and kidnaping which occurred in September, 1986. The suspended sentence included a probationary period of 8 years to begin after the defendant's release from prison.
>
> The defendant was released from prison in December, 1992. He never reported to the probation office as required. A probation warrant was issued. The defendant was actually arrested on the probation warrant in June, 1996 when he was the prime suspect in these murders.
>
> During the trial, the defense brought out testimony that the defendant was on probation at the time of his arrest, and argued to the jury that it was the probable prison time he was facing for his probation violation that caused him to flee when the Sheriff's Office tried to stop his truck and arrest him, rather

than the state's contention that he fled from the officers because he knew he had killed the victims in this case.

This aggravating factor has been proven beyond a reasonable doubt.

The defense argues that this aggravating factor should not be found because it did not exist at the time these murders were committed (although they concede it existed at the time of the penalty phase trial) and thus to apply it to Mr. Randall would violate the ex post facto clauses of both the United States and Florida Constitutions. This Court does not agree because the Florida Supreme Court's decisions regarding the use of aggravating factors did not exist at the time the crime was committed but did exist at the time of the penalty proceeding. The case closest to the circumstances here is Trotter v. State, 21 Fla. L. Weekly 512 (Fla. December 19, 1996) where the Court allowed the fact that the defendant was on community control to be considered in aggravation even though the Court had ruled in Trotter v. State, 576 So.2d 691 (Fla. 1990) that it was error to use the identical fact -- the defendant was on community control -- in aggravation. The only change that had occurred since the 1990 decision was that the legislature had specifically added community control to F.S. §921.141(5)(a) before the new Trotter penalty phase trial. The Court rationalized that "sentence of imprisonment" was extended to include "custody in the community." Now the legislature has further defined "custody in the community" to include either community control or felony probation. Parole has long been recognized as "custody in the community" and thus a "sentence of imprisonment." It appears using the same rationale as the majority of the Court did in Trotter v. State, 21 Fla. L. Weekly 512 (Fla. December 19, 1996), that applying the felony probation aggravator in this case is not an ex post facto violation.

> 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.

As noted in the sentencing order, the defense presented evidence to the jury elicited in the cross-examination of witness officer John Quinlan that Randall had an outstanding probation warrant from Massachusetts. (Vol. XIX, TR. 815-816). The defense again reminded the jury in guilt phase closing argument of "an outstanding violation of probation warrant from another state" and "what was holding him in Massachusetts, the violation of probation". (Vol. XXIII, TR. 1325). And in defense counsel's penalty phase closing argument he observed:

> Without question, the people of the State of Florida have proven of the existence of aggravating circumstances.
>
> The first is that Jim Randall was on probation. That's nothing new to you. You knew that in the first part of this trial. You also had some inkling of the fact that James Randall and Linda Graham had some interaction which had resulted in criminal conduct before, in the first part of this trial. Because if you'll remember, Mr. Crow specifically asked her about two specific dates, July 24th and September 8th. And when you go back and you look at those dates, you'll find out that those are exactly the dates of the crimes which James Randall has been convicted of. So once again, you'll find that the people of the State of Florida had proven to you the existence of an aggravating circumstance that will allow to you consider recommending death.

(Vol. XXIV, TR. 1592-93)

In Peek v. State, 395 So.2d 492, 499 (Fla. 1980), cert. denied, 451 U.S. 964 (1981), this Court stated, "Persons who are under an order of probation and are not at the time of the commission of the capital offense incarcerated or escapees from incarceration do not fall within the phrase 'person under sentence of imprisonment' as set forth in section 921.141(5)(a)." Later, however, another defendant challenged the legislature's addition of community control to this aggravator. Trotter v. State, 690 So.2d 1234 (Fla. 1996), cert. denied, --- U.S. ---, 139 L.Ed.2d 134 (1997). This Court found no ex post facto violation and stated,

> 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.

Id. at 1237. Thus, this Court disagreed with Trotter's claim, "just as [it has] found no violation in every other case where an aggravating circumstance was applied retroactively - even on resentencing." Id.; see e.g., Jackson v. State, 648 So.2d 85 (Fla. 1994) (victim was law enforcement officer aggravator); Valle v. State, 581 So.2d 40 (Fla. 1991) (same); Zeigler v. State, 580 So.2d 127 (Fla.) (CCP aggravator), cert. denied, 502 U.S. 946 (1991); Hitchcock v. State, 578 So.2d 685 (Fla. 1990) (under sentence of

imprisonment aggravator), vacated on other grounds, 505 U.S. 1215 (1992); Justus v. State, 438 So.2d 358 (Fla. 1983) (CCP aggravator), cert. denied, 465 U.S. 1052 (1984); Combs v. State, 403 So.2d 418 (Fla. 1981) (same), cert. denied, 456 U.S. 984 (1982).

Recently, this Court found that the proposed application of a new aggravator would be an ex post facto violation. In Hootman v. State, 709 So.2d 1357 (Fla. 1998), this Court held that subsection 921.141(5)(m), Florida Statutes (Supp. 1996), could not be applied to a murder committed prior to the new aggravator's effective date of October 1, 1996. The (5)(m) aggravator applies when "[t]he victim of the capital felony was particularly vulnerable due to advanced age or disability, or because the defendant stood in a position of familial or custodial authority over the victim." § 921.141(5)(m). Because "advanced age of the victim had not been part of any of the previously enumerated factors," this Court held that "the legislature altered the substantive law by adding an entirely new aggravator to be considered in determining whether to impose the death penalty." Hootman, 709 So.2d at 1360.

This case is more like Trotter than Hootman. As far as the "under sentence of imprisonment" aggravator is concerned, felony probation is the functional equivalent of community control. See ch. 948, Fla. Stat., entitled "Probation and Community Control."

Felony probation, just like community control, is a type of custody in the community. § 948.001, Fla. Stat. (1997). Therefore, felony probation is also an extension of custodial restraint and merely a refinement of the (5)(a) aggravator, rather than a substantive change like the (5)(m) advanced age aggravator. Thus, no error occurred when the trial court allowed the state to introduce evidence that Randall was on felony probation or when the trial court instructed the jury on, and then found, that the felony probation aggravator had been established.

Moreover, the correctness of the lower court's action is fortified by this Court's action in promulgating Standard Jury Instructions in Criminal Cases--No. 96-1, 690 So.2d 1263 (Fla. No. 89,053, March 6, 1997), wherein this Court ordered that these new instructions "will be effective on the date this opinion is filed". The pertinent instruction provides:

> F.S. 921.141(5) The aggravating circumstances that you may consider are limited to any of the following that are established by the evidence:
>
> Note to Judge Give only those aggravating circumstances for which evidence has been presented.
>
> 1. The crime for which (defendant) is to be sentenced was committed while [he] [she] had been previously convicted of a felony and [was under sentence of imprisonment] [or] [was placed on community control] [or] [was on felony probation];

(690 So.2d at 1265)

One day later, the Honorable Susan Schaeffer gave this instruction as directed. (Vol. IX, R. 1363).

In State v. Hootman, 709 So.2d 1357 (Fla. 1998) this Court held that retroactive application of F.S. 921.141(5)(m), the new aggravator that "[t]he victim of the capital felony was particularly vulnerable due to advanced age or disability" would violate the ex post facto law. The Court found the case to be distinguishable from decisions such as Trotter v. State, 690 So.2d 1234 (Fla. 1996)(applying community control extension retroactively); Valle v. State, 581 So.2d 40 (Fla. 1991); Hitchcock v. State, 578 So.2d 685 (Fla. 1990)(holding "committed by a person under sentence of imprisonment" aggravator applicable to defendant on parole) since in the latter cases the amendments were deemed to have "merely refined or extended existing aggravating factors". Id. at 1360. The Court commended the trial court's analysis in Hootman which had reasoned that in the previous instances and unlike 921.141(5)(m):

> The penalty phase juries were not given additional detrimental information to consider in making its sentencing recommendations.

This Court added its concern that the trier of fact and court "may now consider the victim's advanced age as the sole determining factor in finding an aggravating circumstance." Id. at 1360.

The concerns of the trial judge and this Court in Hootman are not present in the instant case. The jury was not given additional

detrimental information they would not otherwise have had. (The defense introduced information in the guilt phase as to Randall's felony probation status in Massachusetts and candidly acknowledged this fact in the penalty phase argument). This Court's necessarily speculative concern in Hootman (since the case was presented in a pre-trial posture via certification from the District Court of Appeal on a certiorari petition) that judge and jury might decide to impose death on the singular new aggravator is not present *sub judice* as Judge Schaeffer found multiple valid aggravators in addition to this challenged one -- including prior convictions of a felony involving the use or threat of violence (multiple counts of kidnapping and aggravated rape) and the especially heinous, atrocious or cruel aggravator to the Evans and Pugh murders for which Randall mounts no appellate challenge. Since the felony probation aggravator is a mere refinement to the previously enacted under-sentence-of-imprisonment-status aggravator, as was Trotter, *supra*, and since Judge Schaeffer deliberately gave it lesser weight than it might otherwise merit, it is clear that even if removed from the calculus by judge and jury, the sentence of death would be appropriate.

HARMLESS ERROR:

Finally, any error in this regard must be deemed harmless for the following reasons. First, the defense informed the jury during guilt phase about Randall's felony probation and conceded its

applicability in the penalty phase argument to the jury; thus, Randall is in a poor position to assert that the jury's awareness of it constituted undue prejudice. *See* McPhee v. State, 254 So.2d 406 (Fla. 1DCA 1971)(defendant estopped from urging a position on appeal contrary to that urged in the lower court); State v. Belien, 379 So.2d 446 (Fla. 3DCA 1980)("Gotcha! maneuvers will not be permitted to succeed in criminal any more than in civil litigation). Secondly, with respect to the trial judge's consideration and finding, Judge Schaeffer reasoned that because of the possible ex post facto application, "this Court will not give this aggravating factor the great weight she might otherwise give it, but only moderate weight". (Vol. IX, R. 1397-1398). Third, the remaining unchallenged valid aggravators of prior conviction of violent felonies and especially heinous, atrocious or cruel homicides greatly outweighed the mitigating evidence proffered.

After a thorough and detailed review of the record in which Judge Schaeffer listed Randall's four prior convictions for (1) the rape of Linda Randall committed 7/19/86; (2) the aggravated rape of Linda Randall committed 9/6/86; (3) another aggravated rape of Linda Randall committed 9/6/86; and (4) the kidnaping of Linda Randall committed 9/6/86 in which "this Court was appalled at the violence this defendant would inflict on his own spouse, in front of his own children, to selfishly satisfy some perverted sexual need of his own" (Vol. IX, R. 1398) and the prior convictions in

the Evans case of the murder of Cynthia Pugh and in the Pugh case of the murder of Wendy Evans -- which homicides were committed months apart -- and was accorded great weight. Judge Schaeffer found the strangulation homicides of both Evans and Pugh to be especially heinous, atrocious or cruel, especially considering the severe injuries inflicted by the sexual sadist, and this factor too was given great weight (Vol. IX, R. 1399-1400). In the scales, appellant's mitigation of sexual sadism (given very little weight), good work record (some weight), good jail conduct and courtroom demeanor (some weight) (Vol. IX, R. 1401-1405) did not merit any lesser sanction.

As Judge Schaeffer concluded:

> The Court has now discussed the aggravating and mitigating circumstances in this case. The aggravating circumstances in this case far outweigh the paucity of mitigation that has been shown to exist in James Randall's 42 years of life on this earth. It is no wonder the jury unanimously decided that the law required each of them to recommend to this Court that James Randall should die for each of his crimes. This Court agrees with the jury that in weighing the aggravating circumstances against the mitigating circumstances, the scales of justice tilt unquestionably to the side of death.
>
> (Vol. IX, R. 1405)

There is no reasonable possibility that the jury's recommendation or the trial court's sentence would have been different if the

"under sentence of imprisonment" status aggravator[17] had not been applied. *See* Rogers v. State, 511 So.2d 526, 535 (Fla. 1987), cert. denied, 484 U.S. 1020 (1988); Capehart v. State, 583 So.2d 1009, 1015 (Fla. 1991), cert. denied, 502 U.S. 1065, 117 L.Ed.2d 122 (1992). Consequently, this Court should affirm Randall's sentence of death for the first-degree murders of Wendy Evans and Cynthia Pugh.

[17]This Court in the past has found minimum weight to be accorded the under sentence of imprisonment aggravator. *See* Songer v. State, 544 So.2d 1010, 1011 (Fla. 1989)("Even the gravity of the one aggravating factor is somewhat diminished by the fact that Songer did not break out of prison but merely walked away from a work-release job.").

CONCLUSION

This Court has upon occasion reminded the Bench and Bar that the jury reflects the conscience of the community. *See, e.g.*, Grossman v. State, 525 So.2d 833, 846 (Fla. 1988); *see also* Hall v. State, 614 So.2d 473, 479 (Fla. 1993)("Hall . . . has received a death recommendation from every jury he has appeared before."). In the instant case, the conscience of the community -- *mirabile dictu* -- voted twelve to nothing that a sentence of death be imposed on sexual sadist James Randall for the murders of Wendy Evans and Cynthia Pugh. (Vol. IX, R. 1372-73). Their unanimity is fully supported by Judge Schaeffer's learned and comprehensive sentencing order. The judgments and sentences of death should be affirmed.

Respectfully submitted,

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_____

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Steven L. Bolotin, Assistant Public Defender, P. O. Box 9000, Drawer PD, Bartow, Florida 33831, this _____ day of December, 1998.

_____

COUNSEL FOR APPELLEE

IN THE SUPREME COURT OF FLORIDA

JAMES RANDALL,

Appellant,

vs. **CASE NO. 90,977**

STATE OF FLORIDA,

Appellee.

_____/

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