IN THE SUPREME COURT OF FLORIDA

MICHAEL TYRONE CRUMP,

Appellant,

v. Case No. 74,230

STATE OF FLORIDA,

Appellee.

BRIEF OF THE APPELLEE

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

ROBERT J. LANDRY
Assistant Attorney General
2002 North Lois Avenue, Suite 700
Westwood Center
Tampa, Florida 33672
(813) 873-4739

OF COUNSEL FOR APPELLEE

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STATEMENT OF THE CASE AND FACTS

Appellant Michael Crump was charged by indictment with first degree murder of Lavinia Clark. (R 599 - 600) Prior to trial he filed a motion to suppress evidence obtained from a search of his truck. At the suppression hearing, Detective R.J. Childers testified that he assisted in the homicide investigation of one Areba Smith. He and Detective Parish became aware of a suspect truck from a description given by witness Wayne Olds. Olds had observed victim Areba Smith enter a black or dark blue four wheel drive type vehicle; it looked like a wrecker, chrome wheels, one yellow amber light and one missing over the passenger side. Childers was familiar with appellant's vehicle from another investigation. A photopack of trucks was shown to Olds and he made a 100% identification on Crump's vehicle. The vehicle was discovered parked on the street and impounded. (R 7 - 11) The trial court denied the motion to suppress. (R 29)

A hearing was held on March 13, 1989, on the defense request not to allow Williams-rule evidence pertaining to victim Areba Smith and after hearing argument the court denied the motion. (R 768 - 783)

At trial, Detective Gerald Onheiser testified that he was assigned to the homicide of Lavinia Clark. The victim's nude body was discovered on the shoulder of the roadway on December 12, 1985; a carpet matting was placed over the top of the body. (R 187) Based on the investigation they felt that she had not been killed at the scene where the body was found, only discarded

there (there was no clothing present, lividity, no sign of a struggle there, no scuff marks). (R 193) There was a ligature mark on the wrist. Onheiser worked on the case for three months before the case was put in a dead file. He talked to over one hundred people but didn't have much luck finding a suspect. The victim's body was found at Shady Lawn Cemetery -- not in the cemetery but on the shoulder of the road twenty-five or thirty yards to the nearest tomb stone. It looked like her hands had been tied by ligature. The victim was a prostitute and cocaine user. (R 199 - 203)

Detective Robert Parrish was a homicide detective in October 1986, assigned to the investigation of the death of Areba Smith. (R 245) A nude body of a black female was found in a field next to some oak trees; the lot bordered on a cemetery. There were no visual marks on the body -- it seemed to have been dropped there. (R 245 - 249) The witness described the presence of tire tracks of a truck (4 x 4 tires). (R 250)

They began to focus on a particular truck after talking to a witness Wayne Olds who described a particular truck. He described a wrecker-type truck without a boom in the back, dark colored, black with tinted windows with large 4 x 4 tires. He had seen it at a dope hole on Columbus Avenue. There was a unique characteristic -- it had rotating lights on top of it; on the passenger side the light was broken. The amber yellow metal cap that fits on rotating light was missing. The truck was located on the street and impounded. (R 254 - 261) The

detective talked to an F.D.L.E. expert on tires Corporal Woods then notified technical specialist Tim Whitfield of the Pinellas County Sheriff's Office who processed the truck. (R 262 - 263)

On February 13, 1987, the appellant came to the police department and was interviewed. Crump was given his rights from a consent to interview form. (R 263 - 265) At first, appellant denied knowing Areba Smith, then denied being in the field where her body was found. Then he changed his story and admitted being there to dump materials. Parrish told him that his tire tracks were identified 100% and that there was additional evidence linking him to the Smith murder. Crump confessed that he had choked her. (R 265)

Appellant admitted that he picked her up off Columbus and North Boulevard. It started to rain and she wanted a ride to the Boston Bar. During the ride they discussed sex and agreed on a ten dollar price. She gave him a blow job, she pulled a knife and he choked and killed her. No knife was recovered at the crime scene. Appellant became curious when Parrish told him he had additional evidence. Parrish showed him the driver's license of Lavinia Clark which had been recovered from appellant's truck and Crump admitted killing Smith. (R 265 - 267) There were fine ligature marks on both wrists of Areba Smith. (R 276)

Timothy Whitfield processed the Ford pickup truck with a laser finding hair and fiber evidence; the driver's license of Lavinia Clark was underneath the carpet. He also found a restraining device concealed in the vehicle and minute amounts of blood (R 282 - 291)

Associate Medical Examiner Dr. Lee Miller performed an autopsy on Areba Smith and found death was caused by strangulation. (R 301) There were ligature lines indicating the wrists had been tied. (R 302) The ligature marks were put there before death. (R 311 - 312)

F.B.I. special agent Michael Malone, an expert in hair and fiber analysis who had published articles and had testified over three hundred times (R 319) testified that on the carpeting from the passenger side of Crump's vehicle was a light reddish brown Negroid hair -- forcibly removed from the head -- which had the same microscopic characteristics as those of Lavinia Clark. (R 327)

Dr. Charles Diggs performed the autopsy on Lavinia Clark; the cause of death was strangulation. (R 341 - 342)

Detective Onheiser went to see appellant after being contacted by Detective Parrish. (R 355 - 356) Appellant admitted he met Lavinia Clark on one occasion ; he claimed he picked her up at 22nd and Columbus. She was running her mouth; they got into an argument and appellant claimed he pulled over and pushed her out. There was no struggle. (R 357) She left her purse behind, he went through it and found her driver's license. He kept it but didn't explain why. He said he hid it behind the electric meter box at his residence, then hid it under the dash behind the carpet in his truck. (R 359)

The jury returned a verdict of guilty. (R 439)

The state introduced at penalty phase a judgment and sentence for aggravated assault with firearm, judgments and sentences for three counts of aggravated battery without a firearm and a judgment and sentence for first degree murder. (R 455 - 456)

The defense called appellant's mother, Mattie Render who recalled that Crump was kind, considerate and thoughtful whose only problem in school was that he was a slow learner. The trial court refused to allow the prosecutor to inquire if one of his school problems involved suspension for throwing a girl down the stairs. (R 459 - 462) Both appellant's mother and appellant's sister and friends had not seen any evidence of emotional or mental problems. (R 463, 468, 471, 476)

Psychologist Dr. Isaza stated there was no report of child abuse but appellant had poor impulse control. (R 487) He may have impairments, a part of his personality that is unpredictable. (R 491) On cross-examination she admitted she had not spoken to witnesses in the case, the tests she had been provided were administered in 1987 and she had not spoken to the one who administered it. He "could have been" under extreme mental or emotional disturbance. (R 498 - 500)

The jury recommended death by a vote of eight to four (R 567) and the trial court agreed. (R 690 - 691)

SUMMARY OF THE ARGUMENT

Issue I - The lower court did not err in admitting evidence of appellant's involvement in another homicide as such evidence was relevant to establish identity pattern, mode of operation and common plan. His unique pattern amounted to appellant's signature. The evidence did not become an impermissible feature of the trial as the evidence did not transcend the bounds of relevance.

Issue II - The lower court did not err in overruling the defense objection to FBI agent Malone's testimony that he investigated serial murders as it merely served to help establish his expertise in hair and fiber analysis problems.

Issue III - The lower court did not err in its handling of hearsay problems during trial. The court correctly determined that the defense effort to utilize hearsay was not supported by any valid exception to the hearsay rule and that in those instances where the defense objected to the prosecutor's actions either there was no hearsay or that the evidence was appropriate and not condemned by the hearsay rules.

Issue IV - The lower court did not err in denying appellant's motion to suppress evidence. Appellant is now impermissibly changing the basis of his objection from that presented below in violation of Steinhorst v. State, 412 So.2d 332 (Fla. 1982). Additionally, the officers acted appropriately in seizing and impounding the vehicle based on the information available to them. The officers also acted in good faith

reliance on the advice of a prosecutor and the evidence would have been discoverable under the inevitable discovery rule.

Issue V - The lower court did not err in denying appellant's motion for judgment of acquittal as there was sufficient competent evidence to demonstrate that Crump who had killed Areba Smith also killed Lavinia Clark.

Issue VI - The lower court did not err in denying appellant's motion for judgment of acquittal as appellant's pattern and method of killing demonstrated premeditation.

Issue VII - The lower court did not commit fundamental error in failing to act on unobjected to prosecutorial comments in the guilt and penalty phases. All the complained of remarks either were not improper or stated the obvious and was self-evident to all sentient beings. Any potentially improper remarks were too insignificant to merit reversal.

Issue VIII - Appellant's current complaint about the instruction on the cold, calculated and premeditated factor has not been preserved for appellate review. It is also meritless. Brown v. State, 565 So.2d 304 (Fla. 1990).

Issue IX - The lower court did not err in finding that the homicide was committed in a cold, calculated and premeditated manner without pretense of moral or legal justification as appellant's planned modus operandi demonstrates heightened premeditation.

Issue X - The trial court properly considered all mitigating evidence proffered and found it wanting.

Issue XI - The death penalty in the instant case is not disproportionate for this serial killer.

ARGUMENT

ISSUE I

WHETHER THE LOWER COURT ERRED BY ADMITTING EVIDENCE OF ANOTHER MURDER IN VIOLATION OF THE WILLIAMS-RULE.

The test for admissibility of evidence of other crimes is relevancy. Williams v. State, 110 So.2d 654 (1959); Ruffin v. State, 397 So.2d 277 (Fla. 1981); Bryan v. State, 533 So.2d 744 (Fla. 1988).

It will not suffice for appellant to complain that evidence pointing to the commission of another crime is prejudicial as all evidence that points to the defendant's commission of a crime is prejudicial. The true test is relevancy. Ashley v. State, 265 So.2d 685, 694 (Fla. 1972); Amoros v. State, 531 So.2d 1256 (Fla. 1988).

The trial court correctly permitted the state to introduce Williams-rule evidence of Crump's murder of Areba Smith[1] in light of the numerous points of similarity which virtually demonstrated appellant's signature. The similarities included:

> (1) Both victims were prostitutes (and cocaine users);
>
> (2) The victims were approximately the same size and age (Lavina Clark -- 5 feet, 2

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[1] Appellant Crump was previously convicted of the murder of Areba Smith and his judgment and sentence were affirmed by the Second District Court of Appeal in Crump v. State, 561 So.2d 1153 (Fla. 2d DCA 1990).

inches, 117 lbs, age 28; Areba Smith -- 5 feet, 5 inches, 120 lbs, age 34);

(3) Victims were both black females;

(4) Victims were killed by manual strangulation;

(5) Other than superficial signs of struggle (scratches and bruises) there were no injuries to the victims other than associated with strangulation.

(6) Both victims were discovered in or near cemeteries;

(7) The cemeteries were within one mile of each other;

(8) The victims were killed at a place other than where they were found and placed at the scene after death;

(9) The victims were completely nude when found;

(10) The victims were left uncovered with no attempt made to conceal them;

(11) Appellant admitted to picking up both victims, neither of whom he knew at night from Columbus Boulevard (Smith at Columbus by North Boulevard and Clark at Columbus and 22nd Street);

(12) Appellant admitted getting into an argument with each of the victims while they were in his truck;

(13) Both murders occurred in the same day of the week;

(14) The murders occurred within ten months of each other;

(15) Both victims had distinct, recent ligature marks on the outside of their wrists, consistent with each other and with a restraint device located in appellant's truck. (R 652 - 653; R 771 - 789)

In Duckett v. State, ___ So.2d ___, 15 F.L.W. S439 (Fla. 1990), this Court approved the use of Williams-rule evidence where the record established the defendant's tendency to pick up young petite women and make passes at them while he was in his patrol car at night on duty and in uniform. All of the incidents occurred within a matter of months. The Court found the incidents "to be relevant to establish Duckett's mode of operation, his identity, and a common plan and we find sufficient points of similarity to conclude that no Williams-rule violation occurred as to these two incidents." 15 F.L.W. at S441. The instant case involves even more numerous similarities to show Crump's unique signature modus operandi than were presented in Duckett.[2]

See also Buenoano v. State, 527 So.2d 194 (Fla. 1988) (defendant was charged with murder by use of poison, collateral evidence that defendant had poisoned two other men with whom she had a romantic relationship established an unusual modus operandi so that it was admissible to prove intent and identity); Holsworth v. State, 522 So.2d 348 (Fla. 1988) (in murder prosecution it was permissible to show defendant entered trailer of another woman three years earlier as both crimes occurred in early morning hours, involved surreptitious entry into house

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[2] Even factually dissimilar crimes are admissible so long as relevancy is established. See Bryan v. State, 533 So.2d 744 (Fla. 1988) (bank robbery and auto theft in two separate incidents).

trailers, the assailant covered the mouths of the victims and battered and threatened them, and quickly fled the way he came in); Traylor v. State, 498 So.2d 1297 (Fla. 1 DCA 1986) (evidence of similar Alabama murder admissible to prove murder in issue was premeditated and not a crime of passion as alleged by defense). See also, Oats v. State, 446 So.2d 90 (Fla. 1984) (permissible to introduce evidence of a separate robbery and shooting even though defendant's confession in charged crime had been introduced because other crimes evidence was relevant to rebut defendant's contention in his confession that instant murder was accident; Justus v. State, 438 So.2d 358 (Fla. 1983) (confession to a Georgia murder was relevant, showing motive, intent, absence of mistake, etc., with Florida murder to rebut claim in his confession that the Florida murder was an accident).

Appellant argues that the two crimes were sufficiently dissimilar and that Drake v. State, 400 So.2d 1217 (Fla. 1981) is controlling. In Drake, the only similarity of the two offenses was tying the victims' hands behind their backs and that both left a bar with the defendant. The dissimilarities were much greater: the collateral incidents involved mere sexual assaults while the principal crime involved murder with little evidence of sexual abuse. This Court found Drake to be distinguishable in Chandler v. State, 442 So.2d 171 (Fla. 1983) and determined that the trial court had correctly determined that the points of similarity considered in their totality established a common modus operandi, a sufficiently unique pattern of criminal

activity to justify admissibility on the issue of identity. 442 So.2d at 173. See also Rivera v. State, 561 So.2d 536, 539 (Fla. 1990), finding multiple similarities as in the instant case.

Appellant argues there were dissimilarities, e.g., semen found in the vagina of Areba Smith but not Lavinia Clark. Dr. Miller who autopsied Ms. Smith testified that he didn't see any sperm cells. (R 303) There was a white cheesy substance in the vagina, not consistent with semen. (R 310) F.B.I. agent and hair expert Malone testified that it was checked to see whether there was evidence of semen in Lavinia Clark but he didn't personally know the results. (R 334) Following a discussion regarding whether Malone's reports would be covered by the business records exception to hearsay rule, the prosecutor suggested that if the defendant wanted to introduce as defense evidence, out of order, and thereby lose closing argument that could be agreeable. (R 335) The prosecutor agreed to draft a stipulation that semen was found in the vaginal swabs of Areba Smith and not Lavinia Clark for the defense to introduce during their case in chief. (R 336) The defense agreed to think about it (R 336) and thereafter the defense stated that after conferring with Crump, they decided not to introduce the stipulation and instead retain open and closing arguments. (R 365 - 366)

The revelation that feces were found in Smith's vaginal area but not in Clark's demonstrates only that the hygiene of each victim was different. (R 311) The Smith victim had voided her

bowels which would not be unusual at the moment of death. (R 305) The claim that one victim was deposited on her side and the other lying on her back does not suffice for defeating the unique pattern of appellant's killings. Thompson v. State, 494 So.2d 203 (Fla. 1986) is distinguishable; there, the principal case involved a badly beaten victim with no substantial evidence of sexual abuse while the collateral crime involved a sexual battery without bodily harm or battery wherein the victim did not even want to report the crime.

Similarly Edmond v. State, 521 So.2d 269 (Fla. 2d DCA 1988) is inapposite. There, only three similarities were present (the incidents began as a social contact, force was used, and the offenses occurred in the morning hours). Dissimilarities included different crime scenes, in one instance a failed initial attempt at sexual intercourse, oral sexual battery in only one of the incidents and the perpetrator was clothed in one incident and removed his clothing in the other. The multiple unique factors present in Crump's behavior were clearly distinguishable.

Appellant' also complains that the Williams-rule evidence became an impermissible "feature" of the trial.[3] In the case of

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[3] To the extent that appellant may be complaining about the volume of pages devoted in the record to referring to the Areba Smith homicide, that claim too must fail. In Wilson v. State, 330 So.2d 457 (Fla. 1976), this Court approved the introduction of six hundred pages of transcript pointing to separate crimes by the defendant where relevant to establish similar pattern of conduct. As stated in Snowden v. State, 537 So.2d 1383, 1385 (Fla. 3d DCA 1989), "More is required for reversal than a showing that the evidence is voluminous." See also Headrick v. State, 240 So.2d 203 (Fla. 2d DCA 1970) (nine witnesses called to

Williams v. State, 117 So.2d 473 (Fla. 1960), the Court opined that the state had gone too far in introducing testimony about the collateral offense so that "the inquiry transcended the bounds of relevancy to the charge being tried." Id. at 475. There, the defendant was on trial for a murder committed at the H & K Market. The state also introduced evidence of a robbery at the Blue Grass Market wherein the butcher was wounded by appellant. While the evidence of the latter crime was admissible only because of its relevancy to the identity of the accused and the murder weapon and the similarity of the pattern in the two incidents, relevancy was transcended by the details concerning the accused's acquisition of the weapon and the details of the Blue Grass Market robbery, facts which were not relevant to the trial of the H & K Market offense.

Properly understood, the "feature" cases are concerned with whether or not the state has departed from litigating an issue relevant to the trial at hand. That is not the case here. Rather, the instant case falls within the purview of cases like Hall v. State, 403 So.2d 1321, 1324 (Fla. 1981); Ruffin v. State, 397 So.2d 277, 280 (Fla. 1981) and Smith v. State, 365 So.2d 704 (Fla. 1978), wherein this Court recognized the propriety of admitting evidence of a collateral crime to establish the entire

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establish six other burglaries); Stano v. State, 473 So.2d 1282 (Fla. 1985) (evidence of eight other murders in sentencing proceedings); Burr v. State, 466 So.2d 1051 (Fla. 1985) (evidence of three other incidents); Talley v. State, 160 Fla. 593; 36 So.2d 201 (Fla. 1948) (eight other victims to prove one rape) -- all cited in Snowden, supra at 1386.

context; or as stated in Nickels v. State, 106 So.2d 479, 489 (Fla. 1925) noted approvingly in Williams v. State, 110 So.2d 654, 661 (Fla. 1959) "where it is impossible to give a complete or intelligent account of the crime charged without reference to the other crime."

It is clearly the case in the instant trial that the Lavinia Clark homicide and its resolution by the apprehension of Michael Crump would have been incomprehensible to the jury without explanation of his involvement in the Areba Smith case.

Without explaining the Areba Smith homicide investigation the prosecutor can in no way explain the reason or circumstances for searching appellant's truck. Without explaining the search of the truck he cannot explain the discovery of victim Lavinia Clark's driver's license found secreted in that truck. In Amoros v. state, 531 So.2d 1256 (Fla. 1988), this court stated:

> "In the instant case, the use of a gun in the prior incident was the only evidence the state had to link Amoros to the killing of Rivero . . . .
>
> It was essential for the state to demonstrate Amoros' possession of the gun on a prior occasion, but as important was the necessity of showing this gun fired the bullet that killed Walter Loney. Without showing where the bullet in Coney came from, there is no basis to link the gun to the shooting of Rivero . . . .
>
> The possession of the weapon, the firing of the weapon, the retrieval of the bullet fired from the weapon from Loney's body, and the comparison of the two bullets are all essential factors in linking the murder weapon to Amoros."

(531 So.2d at 1259 - 60)

Here as in Amoros not only was there a similar pattern of criminal conduct, but the linking of the defendant to a critical piece of evidence.

Appellant cites Jackson v. State, 451 So.2d 458 (Fla. 1984), wherein this Court found that a witness'repeating appellant's boast of being a "thoroughbred killer" could not be relevant to a material fact in issue and the boast itself did not even prove that fact nor was that fact relevant to the trial. As explained above, the instant case is far different.

ISSUE II

WHETHER THE LOWER COURT ERRED BY OVERRULING THE DEFENSE OBJECTION TO F.B.I. AGENT MALONE'S TESTIMONY THAT HE INVESTIGATED SERIAL MURDERS.

The record reveals the following colloquy between prosecutor and F.B.I. agent Malone:

> "Q. During your 14 years, have you ever lectured in the area of hair and fiber analysis?
>
> A. After being qualified as a hair expert for a few years, I started teaching the hair and fibers school down at the FBI Academy in Quantico.
>
> Now, at the schools, we pull in local lab examiners, like from FDLE and whatever, and teach them the basics of hair and fiber exam. I taught extensively with the Air Force OSI. That's their investigators in their forensic program in Washington, D.C.
>
> The last three years, I've been going all over the United States lecturing in international, national and regional seminars on the forensic aspect of serial murder investigations, because I've handled several major serial murder cases including the Bobby Long case in Hillsborough County area.
>
> Q. Have you ever published in the field of hair and fiber analysis?
>
> A. Yes, I published articles on the hair and fiber analysis or the role it plays in serial murder investigations. And then in 1984, as a result of a rash of serial murders, the Hillside Strangler, the Green River, the Wayne Williams and the Bobby Long case, the National Institute of Justice --" (R 314 - 315)

Defense counsel objected to his expressing any experience with serial murders or likening the case to Bobby Joe Long and

the trial court denied a mistrial request on the basis that the state was inquiring into the witnesses' qualifications. (R 316 - 318) Apparently thereafter, the witness made no further comment on serial killers. (R 318 - 337)[4]

Appellant concedes that he cannot find any Florida law on point but he urges reversal on out of state authorities. In State v. Blasus, 445 N.W.2d 535 (Minn. 1989), defense mental health experts had testified during the penalty phase regarding the defendant's alleged "catastrophic reaction" which was no longer recognized as a disorder by the profession's standard diagnostic manual. The prosecutor cross-examined the witness about his participation for the defense in a number of notorious Minnesota murder cases. The Minnesota Court, while recognizing the right of the prosecutor to probe for bias of a witness on cross-examination, held the prosecutor had exceeded his scope; the witness had already conceded that he had not testified against a defendant in a criminal case since 1983 or 1984 and that in the five years prior to 1983 the witness had testified 2/3 of the time for the defense and 1/3 the time for the prosecution. Having countered the impression created by the defense with quantitative non-prejudicial evidence, the Court found it prejudicial and unnecessary to refer to specific

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[4] Malone also apparently testified as an expert in the field of hair analysis in the case of James Duckett v. State, ___ So.2d ___, 15 F.L.W. S439 (Fla. Case No. 72,711, opinion filed September 6, 1990).

gruesome, notorious cases which the prosecutor emphasized in his argument.

The instant case is different; the prosecutor did not inject the names of heinous murderers into evidence and seek to profit from it in closing argument. The prosecutor's closing argument contains no mention of the names of other famous - or infamous - serial killers or notorious criminals. (R 380 - 402)

Here the prosecutor simply had the witness explain his qualifications to the judge and jury -- his work experience and his publications. That that may have included working on other significant cases merely emphasizes the high caliber of work he has done and the confidence reposed in him by his superiors.

If the appellant is complaining that the prosecutor was attempting to show that whoever killed Areba Smith also killed Lavinia Clark, that certainly is true, but his complaint is baseless. That is what the legitimate purpose of similar fact evidence is. To the extent that Crump argues that the prosecutor's closing argument was illogical we disagree as did the jury and trial judge.[5] Crump's pattern of killing was established and he must be held accountable for it.

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[5] If Lavinia Clark was Crump's first victim, rather than his second, that does not detract from Crump's patterned serial killing.

ISSUE III

WHETHER THE LOWER COURT ERRED BY PERMITTING THE STATE ALLEGEDLY TO INTRODUCE HEARSAY BUT PRECLUDING THE DEFENSE FROM INTRODUCING HEARSAY.

A. During the testimony of Detective Parrish the witness was asked to explain how his investigation focused on the use of a particular truck when investigating the Areba Smith homicide. When the defense objected the court explained that the focus of the instant question was to show the action taken by the witness upon the receipt of information. (R 255 - 256) Appellant's next hearsay objection was at R 258 concerning the introduction of the photograph, Exhibit 11. He did not object to the testimony describing the vehicle at R 257.

The witness added that F.D.L.E. tire and footprint expert observed the tires and gave an opinion (the opinion was not stated) and thereafter Parrish contacted technical specialist Tim Whitfield. Defense counsel's hearsay objection was overruled. (R 262)

Timothy Whitfield testified without objection as to his findings in the vehicle. (R 280 - 292)

Appellant complains on appeal now that the prosecutor apparently utilized an unfair tactic below at R 259 by commenting that to avoid overemphasis on the similar fact evidence, they would be simplifying their presentation and not calling Wayne Olds and others. (R 259) If appellant had any complaints he did not voice them at that point and he should not be allowed to

initiate a complaint now. Steinhorst v. State, 412 So.2d 332 (Fla. 1982).

Appellant seems to urge that the state sought and received an advantage by having law enforcement officers give hearsay testimony rather than have non-law enforcement officers testify. The record does not bear this out. Detective Parrish testified as to his conduct following information from Wayne Olds -- going to Oral Woods and then to Tim Whitfield. The expert opinion was testified to by Whitfield -- not second hand; and to the extent appellant now desires Wayne Olds' direct testimony his failure to urge that ground below precludes consideration of it.

B. Appellant also complains that he received disparate treatment on his hearsay objections. On the previous day of testimony, the defense had attempted to ask Detective Onheiser about other suspects considered earlier in the investigation. The trial court sustained the prosecutor's objection to a question whether he learned there were Colombians who were angry with Lavinia Clark for stealing some cocaine. (R 204 - 205) The witness related that Clayborn Shepherd was once considered to be a suspect. (R 205) The court sustained an objection to a question whether there was information that Shepherd had raped two women near a cemetery and had been indicted for murder of someone near a cemetery. (R 205)

Defense counsel argued that he wanted to get into the substance of Onheiser's interviews, as to potential suspects created but that he was not submitting them to prove the truth of

the matter asserted. The court ruled this was hearsay. (R 207 - 208)

When the defense countered that he was simply asking for a suspect that surfaced as a result of the investigation, the judge asserted that he was not; that he had allowed a question about whether Shepherd was a suspect and he would not prohibit any question asking the detective about any suspect by name or whether he came up with any other suspect but not what was told to the officer to make him believe someone was a suspect. (R 210 - 211)

The prosecutor further objected that it would be impermissible opinion testimony to ask the officer who he thought committed the crime. (R 212)

The witness then testified that during the course of his investigation he had interviewed Randall Scott Williams, Eugene Simon Harris, Sedrick Everhardts and contacted Sidney Simpson. (R 214) After contacting these people, the file was moved to a dead file. (R 217).[6]

Crump seeks reliance on Rivera v. State, 561 So.2d 536 (Fla. 1990) and State v. Savino, ___ So.2d ___ 15, F.L.A. S 518 (Fla. Case No. 75,049, October 4, 1990), two decisions decided after appellant's trial. In Rivera, the Court held that it was permissible for a defendant to introduce "reverse Williams Rule"

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[6] A dead file or closed file can be reactivated later when additoinal information is received. (R 201).

evidence but that the trial court did not abuse its discretion in disallowing the evidence because of the lack of similarity in the crimes. In Savino, the Court reaffirmed Rivera and declared that the same strict standard of similarity applied to the admission of such evidence.

> "If a defendant's purpose is to shift suspicion from himself to another person, evidence of past criminal conduct of that other person should be of such nature that it would be admissible if that person were on trial for the present offense. Evidence of bad character or propensity to commit a crime by another, would not be admitted."

Neither Rivera nor Savino operated to, or was intended to, rewrite the rules of hearsay and its exceptions to allow in the most unreliable forms of gossip and third hand innuendo.

C. Appellant next argues that the court utilized a double standard in refusing to allow F.B.I.. Agent Malone to testify whether sperm was found in Clark's vagina. There was no double standard. Witness Malone testified that a check for evidence of recent sexual intercourse was done but of his own personal knowledge he didn't know the results. The state objected to a question that the witness relate the result because it was hearsay and the witness was not an expect in that field. (R 332) The defense argued that the testimony should come in under the business records exception to the hearsay rule and the court responded that the question was beyond the scope of direct examination, that the witness had testified about hair and fibers, not semen, and that to introduce the report must come

later during the defense presentation of evidence. (R 333 - 334) The state agreed that the defense could introduce in their case in chief the results of the analysis by Mr. Babyak and the defense announced it would consider that and decide later. (R 336) The defense subsequently decided not to introduce it. (R 365)

Appellant argues that the jury was probably confused because defense mentioned in opening statement that he thought the evidence would show there was semen in Smith but not Clark. (R 180) But if appellant wanted to offer evidence of that fact, he could have. Instead, he chose not to.

ISSUE IV

WHETHER THE LOWER COURT ERRED BY DENYING THE MOTION TO SUPPRESS EVIDENCE OBTAINED PURSUANT TO THE SEARCH OF APPELLANT'S TRUCK.

In his written pretrial motion to suppress evidence appellant complained only that the search of the vehicle had proceeded without a warrant. Crump did not complain that probable cause was lacking. (R 658) At the hearing on the motion counsel announced that he would rather not stipulate to probable cause. (R 7) He relied in large part on United States v. Spetz, 721 F.2d 1457 (9th Cir. 1983); unfortunately, the Ninth Circuit Court of Appeals abandoned Spetz five years ago in United States v. Bagley, 772 F.2d 482, 490 - 491 (9th Cir. 1985). See also, California v. Carney, 471 U.S. 386, 85 L.Ed.2d 406 (1985).

In his argument to the trial court following the receipt of testimony at the motion to suppress hearing, appellant made no assertion that the officers lacked probable cause; instead, he focused on the lack of exigent circumstances, the fact that the automobile was not fleeing and that appellant was cooperative. (R 12 - 27) Appellant's attempt now to change the basis of his objection on appeal should preclude review under Steinhorst v. State, 412 So.2d 332 (Fla. 1982) and Occhicone v. State, ___ So.2d ___, 15 F.L.W. S531 (Fla. Case No. 71,505, October 11, 1990).

But even if adequately preserved for judicial review, appellant cannot prevail.

Detective Childers testified that he received information from witness Wayne Olds that victim Areba Smith had gotten into a dark blue or black four wheel drive vehicle with chrome wheels; it looked like a wrecker, one yellow amber light and one missing on the passenger side. Childers was familiar with Crump's vehicle in another investigation. Photos were taken on several vehicles and Mr. Olds was shown a photopack of the trucks. He identified Crump's as being 100% the vehicle he saw that night. (R 9 - 10)

Appellant argues that there was insufficient basis to believe that Crump had killed victim Smith or that evidence would be found in his truck. Appellee submits that the description of the unusual vehicle provided by witness Olds who observed the victim get into such a vehicle, along with Olds' 100% identification of Crump's vehicle in a photo display along with the police knowledge that there were tire tracks left at the scene of the crime by a large vehicle (4 x 4 tires) (R 250) gave them reason to believe, or probable cause to seize the vehicle as an instrumentality of the crime.

See Cardwell v. Lewis, 417 U.S. 583, 592, 41 L.Ed.2d 325, 336 (1974) (probable cause shown where automobile similar in color and model to defendant's car seen leaving the scene of the crime and similarity corroborated by paint scrapings taken from defendant's and victim's vehicles -- demonstrating reason to believe the car was used in the commission of the crime).

As stated in Texas v. Brown, 460 U.S. 730, 75 L.Ed.2d 502 (1983):

> " . . . our decisions have come to reflect the rule that if, while lawfully engaged in an activity in a particular place, police officers perceive a suspicious object, they may seize it immediately."

(75 L.Ed.2d at 512)

* * *

> "As the Court frequently has remarked, probable cause is a flexible, common-sense standard. It merely requires that the facts available to the officer would 'warrant a man of reasonable caution in the belief,' Carroll v. United States, 267 U.S. 132, 162, 69 L.Ed. 543, 45 S.Ct. 280 (1925), that certain items may be contraband or stolen property or useful. as evidence of a crime; it dos not demand any showing that such a belief be correct or more likely true than false. A 'practical, nontechnical' probability that incriminating evidence is involved is all that is required. Brinegar v. United States, 338 U.S. 160, 176, 93 L.Ed. 1879, 69 S.Ct. 1302 (1949). Moreover, our observation in United States v. Cortez, 449 U.S. 411, 418, 66 L.Ed.2d 621, 101 S.Ct. 690 (1981), regarding 'particularized suspicion,' is equally applicable to the probable-cause requirement:
>
> > 'The process does not deal with hard certainties, but with probabilities. Long before the law of probabilities was articulated as such, practical people formulated certain common-sense conclusions about human behavior; jurors as factfinders are permitted to do the same -- and so are law enforcement officers. Finally the evidence thus collected must be seen and weighed not in terms of library analysis by scholars, but as understood by

those versed in the field of law enforcement.'

(75 L.Ed.2d at 514)

The Court continued at 513:

> "In Colorado v. Bannister, 449 U.S. 1, 3 - 4, 66 L.Ed.2d 1, 101 S.Ct. 42 (1980), we applied what was in substance the plain-view doctrine to an officer's seizure of evidence from an automobile. Id, at 4, n. 4, 66 L.Ed.2d 1, 101 S.Ct. 42. The officer noticed that the occupants of the automobile matched a description of persons suspected of a theft and that auto parts in the open glove compartment of the car similarly resembled ones reported stolen. The Court held that these facts supplied the officer with 'probable cause,' id., at 4, 66 L.Ed.2d 1, 101 S.Ct. 42, and therefore, that he could seize the incriminating items from the car without a warrant. Plainly, the Court did not view the 'immediately apparent' language of Coolidge as establishing any requirement that a police officer 'know' that certain items are contraband or evidence of a crime. Indeed, Colorado v. Bannister, supra, was merely an application of the rule, set forth in Payton v. New York, 445 U.S. 573, 63 L.Ed.2d 639, 100 S.Ct. 1371 (1980), that '[t]he seizure of property in plain view involves no invasion of privacy and *is presumptively reasonable, assuming that there is probable cause to associate the property* *[460 U.S. 742]* *with criminal activity.*' Id., at 587, 63 L.Ed.2d 639, 100 S.Ct. 1371 (emphasis added).

There are additional reasons for affirmance. First of all, affirmance should be predicated on the fact that the officer acted in good faith reliance on the advice of prosecutor Atkinson and would otherwise have sought a warrant. (R 23) See United

States v. Leon, 468 U.S. 897, 82 L.Ed.2d 677 (1984); Massachusetts v. Sheppard, 468 U.S. 981, 82 L.Ed.2d 737 (1984); United States v. DeLeon-Reyna, 898 F.2d 486, 491 (5th Cir. 1990).

Secondly, it is clear that the state would have prevailed on the inevitable discovery rule. Nix v. Williams, 467 U.S. 431, 81 L.Ed.2d 377 (1984); Hayes v. State, 488 So.2d 77 (Fla. 2d DCA 1986). Since the officers had photos and casts of tire tracks at the crime scene which matched the tires on appellant's truck and a 100% I.D. by Wayne Olds that the Crump vehicle picked up Areba Smith, expert Corporal Woods from F.D.L.E. could have examined the tires on the scene to confirm they matched those at the crime scene and obtained a warrant,[7] and conducted a subsequent search as they did.

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[7] Appellant is not aided either by Coolidge v. New Hampshire, 403 U.S. 443, 29 L.Ed.2d 564 (1971) or Caplan v. State, 531 So.2d 88 (Fla. 1988). Coolidge involved an impermissible trespass on defendant's property to seize the vehicles, whereas Crump's car was parked on the street. (R 10) In Caplan the search could not be justified on an inventory theory because the driver had not transferred custody of the vehicle to the officer and the mere visual observation of hand rolled cigarettes did not create probable cause. There was nothing to suggest the vehicle either was evidence or contained evidence that made it an instrumentality of a crime.

ISSUE V

WHETHER THE TRIAL COURT ERRED BY FAILING TO GRANT DEFENSE COUNSEL'S MOTION FOR JUDGMENT OF ACQUITTAL BECAUSE THE EVIDENCE WAS INSUFFICIENT TO PROVE CRUMP'S GUILT.

Appellant contends that in this circumstantial evidence case the state failed to produce sufficient evidence to exclude all reasonable hypotheses of innocence.

Crump argues that he provided a valid explanation for the strand of hair and the victim's driver's license found hidden in his truck. Appellee disagrees. If appellant is now asserting a theory of factual innocence the issue has not been preserved for appellate review by his motion for judgment of acquittal; there he complained only that no premeditation was shown. (R 364) Appellant should not be permitted to initiate a new argument on appeal. Steinhorst v. State, 412 So.2d 332 (Fla. 1982); Farinas v. State, ___ So.2d ___, 15 F.L.W. S555 (Fla. Case No. 70,361, October 11, 1990); Occhicone v. State, ___ So.2d ___, 15 F.L.W. S531 (Fla. Case NO. 71,505, October 11, 1990); Bertolotti v. State, 514 So.2d 1095 (Fla. 1987).

Even if preserved, the claim is meritless. Crump told Detective Onheiser that there was no struggle when he pushed the victim out of his vehicle (R 357); that is contradicted by the testimony of FBI hair and fibers man Michael Malone that the Lavinia Clark hair sample found in appellant's truck had been forcibly removed. (R 327) Additionally, Crump's explanation regarding the possession of the victim's driver's licence is not

a plausible one. He went through the victim's purse, found the driver's license, hid it behind the electric meter box at his residence, then removed it from there and hid it under the dash behind the carpet in his truck. (R 359) Obviously the secreting of this remaining evidence of his fatal contact with the victim demonstrated a desire to keep available evidence away from curious law enforcement officers searching near the scene where the body was deposited.

When this evidence is added to the similar fact evidence concerning the episode of Crump's murder of Areba Smith -- his unique modus operandi in selecting prostitutes to pick up, tying them, manually strangling them and discarding their nude bodies close to nearby cemeteries -- the jury verdict of guilt must be sustained.

In State v. Law, 559 So.2d 187 (Fla. 1989), this Court opined:

> The question of whether the evidence fails to exclude all reasonable hypothesis of innocence is for the jury to determined, and where there is substantial, competent evidence to support the jury verdict, we will not reverse. *Heiney v. State*, 447 So.2d 10 (Fla.), *cert. denied*, 469 U.S. 920, 105 S.Ct. 303, 83 L.Ed.2d 237 (1984); *Rose v. State*, 425 So.2d 521 (Fla. 19820, *cert. denied*, 461 U.S. 909, 103 S.Ct. 1883, 76 L.Ed.2d 812 (1983), *disapproved on other grounds, Williams v. State*, 488 So.2d 62 (Fla. 1986).
>
> (text at 188)
>
> * * *
>
> [3,4] It is the trial judge's proper task to *review* the evidence to determine the presence

> or absence of competent evidence from which the jury could infer guilt to the exclusion of all other inferences. That view of the evidence must be taken in the light most favorable to the state. *Spinkellink v. State*, 313 So.2d 666, 670 (Fla. 1975), *cert. denied*, 428 U.S. 911, 96 S.Ct. 3227, 49 L.Ed.2d 1221 (1976). The state is not required to "rebut conclusively every possible variation" of events which could be inferred from the evidence, but only to introduce competent evidence which is inconsistent with the defendant's theory of events. *See Toole v. State*, 472 So.2d 1174, 1176 (Fla. 1985). Once that threshold burden is met, it becomes the jury's duty to determine whether the evidence is sufficient to exclude every reasonable hypothesis of innocence beyond a reasonable doubt.
>
> (text at 189)

The trial judge correctly allowed the jury to consider the matter and allow them to decide that it was not a reasonable hypothesis to believe that the murderer of Areba Smith was not the one who also killed Lavinia Clark in this case.

See Huff v. State, 495 So.2d 145, 150 (Fla. 1986) (jury could appropriately reject defendant's version of events where there was no evidence introduced to support his story). In the instant case appellant offered no testimony, not even his own, suggesting a reasonable hypothesis of innocence.

ISSUE VI

WHETHER THE LOWER COURT ERRED IN FAILING TO GRANT JUDGMENT OF ACQUITTAL FOR THE ALLEGED FAILURE TO PROVE PREMEDITATION.

Appellant recognizes that premeditation can be shown by circumstancial evidence. Spinkellink v. State, 313 So.2d 666 (Fla. 1975); Sireci v. State, 399 So.2d 964 (Fla. 1981). As stated in Cochran v. State, 547 So.2d 928, 930 (Fla. 1989):

> [2,3] But the question of whether the evidence fails to exclude all reasonably hypotheses 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 apepal. *Heiney v. Stae*, 447 So.2d 210, 212 (Fla.), *cert. denied,* 469 U.S. 920, 105 S.Ct. 303, 83 L.Ed.2d 237 (1984); *Williams v. State,* 437 So.2d 133 (Fla. 1983), *cert. denied,* 466 U.S. 909, 104 S.Ct. 1690, 80 L.Ed.2d 164 (1984); *Rose v. State*, 425 So.2d 521 (Fla. 1982), *cert. denied,* 461 U.S. 909, 103 S.Ct. 1883, 76 L.Ed.2d 812 (1983). The circumstantial evidence standard does not require the jury to believe the defense version of facts on which the state has produced conflicting evidence, and the state, as appellee, is entitled to a view of any conflicting evidence in the light most favorable to the jury's verdict. *Buenoano v. State,* 478 So.2d 387 (Fla. 1st DCA 1985), *review dismissed,* 504 So.2d 762 (Fla. 1987).

See also Brown v. State, 473 So.2d 1260, 1270 (Fla. 1985).

> If one person strikes another person across the neck with a sharp knife or razor, and thereby inflicts a mortal wound, the very act of striking such a person with such weapon in such a manner is sufficient to warrant a jury in finding that the person striking the blow intended the result which followed.
>
> *Rhodes v. State*, 104 Fla. 520, 523, 140 So. 309, 310 (1932). The same principle applies to one who tightens a garrote around the neck

> of another thereby causing asphyxiation. We therefore conclude again that the evidence was sufficient to show premeditation; *Enmund* and the felony murder rule are not applicable.
>
> (emphasis supplied)

Scott v. State, 411 So.2d 866, 868 (Fla. 1982) (victim's hands and feet tied before death); McKennon v. State, 403 So.2d 389, 391 (Fla. 1981) (premeditated murder found where victim suffered multiple blows to the head, manual strangulation and multiple wounds of the neck); Herzog v. State, 439 So.2d 1372 (Fla. 1988).

In Rhodes v. State, 5478 So.2d 1201 (Fla. 1989), this Court upheld the conviction of the defendant where the medical examiner determined manual strangulation to be the cause of death because the hyoid bone in the victim's throat was broken. Id. at 1202. In the instant case Dr. Diggs testified that death was due to strangulation and described the fracture of the hyoid bone in Lavinia Clark as well as the hemorrhages in the larynx and eyes. (R 342 - 343)[8]

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[8] In Rhodes, however, the Court rejected a finding of heinous, atrocious or cruel as an aggravating factor because there had been conflicting stories told by the accused referring to the victim as knocked out or unconscious and other evidence supported the view of a semiconscious victim. Id. at 1208. On this point we need not address the penalty phase of aggravating issues (but see Issue IX, infra); in any event, the instant case contains no evidence to support a conclusion that the victim was unconscious at the time of the murder.

Appellant argues that instead of a premeditated killing it could have been a "heat of passion" second degree murder. Crump says that the killing of Lavinia Clark is similar to his killing of Areba Smith (Brief, p. 52). If so, we know that appellant was convicted of the first degree murder of Areba Smith (R 455 - 456) and that conviction has been affirmed on appeal. Crump v. State, 561 So.2d 1153 (Fla. 2nd DCA 1990).

It is not a reasonable hypothesis to suggest that Crump may have choked his victim Lavinia Clark as part of a sexual act not intending to kill her because if that were the case he would not have maintained a hidden restraint device in his vehicle and tied both his victims prior to strangling them.

Appellant contends that even if he did strangle the victim it was most likely during a fit of uncontrollable rage. There was no testimony presented in the guilt phase to support an uncontrollable rage theory and the cases cited by appellant Mitchell v. State, 527 So.2d 179, 183 (Fla. 1988); Hansbrough v. State, 509 So.2d 1081 (Fla. 1987) and Nibert v. State, 508 So.2d 1, 3 (Fla. 1987) -- all dealt with the propriety of finding the heightened premeditation required for a finding of the presence of the statutory aggravating circumstance in the penalty phase; in fact, Nibert, supra, approved a finding that the death was a result of premeditated design with the excessive number and nature of the wounds inflicted. 508 So.2d at 3.

Appellant is not aided by consideration of his version of events. With respect to his involvement in the Areba Smith

episode, Crump first denied everything and then urged that he had strangled the victim when she pulled a knife. Since there was no knife at the scene, that version could be disbelieved. With respect to the Lavina Clark incident, appellant has not maintained to anyone any theory of a heat of passion or unpremeditated killing: his statement to Detective Onheiser was that he pushed her out of his vehicle when they engaged in an argument and to the extent that counsel now relies on the penalty phase testimony of Dr. Isaza who did not testify in the guilt phase, appellant denied committing the offense to her. (R 502) Therefore, any supposition of an impulsive, unpremeditated murder is without any evidentiary support and cannot be accepted as a reasonable hypothesis of innocence.

In the instant case, appellant's premeditated conduct is demonstrated by his pattern of picking up prostitutes, his use of a restraint device, the ligature marks on the victims, the strangulation and disposal of the nude corpses at the cemeteries.

Appellant cites Austin v. United States, 382 F.2d 129 (D.C. Cir. 1967), but that case was subsequently distinguished in the en banc decision of United States v. Henson, 486 F.2d 1292 (D.C. Cir. 1973), wherein the Court stated at P. 1301, n. 9):

> Further, appellant's complaint that the trial judge erred in granting his motion for acquittal of the first degree murder charge is without support. The facts that there were two victims, both sexually assaulted in apparently the same manner and both shot, more than once, with the same gun, in close proximity of time and space to one another, suffices not only to distinguish Austin v.

United States, 127 U.S. App. D.C. 180, 383 F.2d 129 (1967) -- upon which appellant solely relies -- but also illustrates the sufficiency of the evidence for purposes of denying appellant's motion.

Appellant Crump cites a decision out of the State of Washington, State v. Bingham, 699 P.2d 262, affirmed, 719 P.2d 109 (1986) presumably for the proposition that premeditation requires more than a showing that the homicide required an appreciable length of time to be committed; however, if we are to be guided by the state of Washington's jurisprudence, appellee would rely on State v. Bushey, 731 P.2d 553 (C/A Wash. 1987), wherein the Court distinguished Bingham, finding that premeditation was found where the victim's hands were bound with nylon stocking ligature, acts consistent with planning but inconsistent with impulse or spontaneity.[9]

Appellant also cites Smith v. Zant, 855 F.2d 712 (11th Cir. 1988) a decision which carries no precedential value (in addition to being distinguishable from the case at bar). It has no percendential value because the Eleventh Circuit Court of Appeals took the case in banc which resulted in the panel opinion being vacated. Smith v. Zant, 873 F.2d 253 (11th Cir. 1989). Thereafter, the Court of Appeal announced that the judges were

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[9] Victim Lavinia Clark had sustained bruises to the head as well as the strangulation injuries. (R 343) Also there was minor trauma and hemorrhage to the abdominal wall. (R 344).

equally divided and that the district court order was affirmed as a matter of law. Smith v. Zant, 887 F.2d 1407 (11th Cir. 1989).

Appellant's contention must be rejected.

ISSUE VII

WHETHER THE LOWER COURT COMMITTED FUNDAMENTAL ERROR BY ALLOWING PROSECUTORIAL CLOSING ARGUMENTS IN THE GUILT AND PENALTY PHASES ALLEGEDLY NOT BASED ON THE EVIDENCE.

Appellant next complains about various arguments made by the prosecutor during his closing arguments in the guilt and penalty phases.

(1) At pages 380 - 382 of the record, the prosecutor began his summation with an allusion to the funeral of Franz Joseph of the Hapsburg family. The point of the reference was that in death all are equal -- from the most powerful to the lowest member of society. There was no objection interposed by the defense.

(2) At page 402 the prosecutor referred to an octopus exuding an inking substance and sneaking away. There was no defense objection.

(3) In the penalty phase argument again without objection by the defense the prosecutor urged:

> "MISS SCHMID: At time, it's a frightening world in which we live today, a world where it seems that all too often horrible, random crimes occur, violent crimes that occur without any disservable [sic] reason, a world where we try to make sense sometimes out of the incomprehensible. And it seems that all too often, there is not justice.
> You have decided by your verdict yesterday that there's a reasonable doubt that Michael Tyrone Crump committed the premeditated, deliberate, conscious first degree killing of Lavinia Clark. Justice demands that Michael Crump be sentenced to death for this crime. It's without any pleasure, whatsoever, the State comes and asks you to impose the ultimate sentence in this crime."

(4) And at pages 525 - 526 of the record the prosecutor gave this unobjected to argument:

> "Well, I ask you to consider: What is life imprisonment?
>
> Michael Crump comes to you having been sentenced back in July of '87 to life in prison for the killing of Areba Smith. You look at him today. You've observed his demeanor today. This man is undergoing the punishment of life imprisonment. He appears to be prospering. Life in prison is just that. It's life.
>
> You can read in prison. You can write in prison. You can make friends in prison. You have daily contact with other human beings. You can watch television. You can follow sports. You can follow world events. You have contact with people in the outside world.
>
> Life in prison is life. It's living. And, in prison, by serving a life sentence, you can hope. You can hope that one day your 25 years will end and one day you can be released.
>
> Lavinia Clark and Areba Smith don't have such a hope. People want to live. Michael Tyrone Crump wants to live. Michael Tyrone Crump wants you to show him mercy and to spare his life. He holds his own life as precious, much more precious than he holds the lives of others. But, in the end, it's not you who are responsible for his death. In the end, it's Michael Tyrone Crump who's responsible for his actions, and he alone."

With respect to all four remarks now challenged, appellant has failed to preserve the issue for appellate review by appropriate objection in the trial court. See Thomas v. State, 326 So.2d 413 (Fla. 1975); Groover v. State, 489 So.2d 15 (Fla. 1987); Hoffman v. State, 474 So.2d 1178 (Fla. 1985); Rose v.

State, 461 So.2d 84 (Fla. 1984); Daugherty v. State, 533 So.2d 287 (Fla. 1988); Holton v. State, ___ So.2d ___, 15 F.L.W. S500 (Fla., September 27, 1990).

Appellant contends that the prosecutor's first comment -- the reference to the funeral of the Holy Roman Emperors was an impermissible comment, one prohibited by Booth v. Maryland, 482 U.S. 496, 96 L.Ed.2d 440 (1987) and its progeny. As noted above, the failure to make a Booth objection in the lower court precludes appellate review. Clark v. Dugger, 559 So.2d 192 (Fla. 1990); Porter v. Dugger, 559 So.2d 201, 202 (Fla. 1990); Parker v. Dugger, 550 So.2d 459 (Fla. 1989).[10]

As to comment (2), not only is appellant's failure to object fatal to his request for relief now, but also it cannot be deemed fundamental error as a similar argument has been sustained in Williams v. State, 441 So.2d 1157 (Fla. 3d DCA 1983):

> "The prosecutor compared defense counsel's argument in closing to that of a 'squid' attempting to cloud the water. Not all proper arguments need be cogent ones; indeed, as here, they may even be regarded as dubious or unpersuasive by some. We trust that juries can sort out the cogent from the unpersuasive in argument by counsel and conclude that no error was committed in allowing the prosecutor herein to make this argument. A prosecutor's jury argument need not rise to the level of the giants of our profession in order to be proper under the law."

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[10] Even if the claim had been preserved it would be meritless as the remark only stated the obvious that all humans are subject to death and reinforces the belief that all stand equal in the halls of justice.

(441 So.2d at 1158 - 59)[11]

In comment (3) -- at the risk of redundancy we urge the issue has not been preserved -- there is no error apparent. A remark that we live in a frightening world where random, violent crimes occur is a self-evidence observation, one that reflects "common knowledge and are probably the sentiments of a large number of people." Breedlove v. State, 413 So.2d 1, 8, n. 11 (Fla. 1982).

Moreover, appellant's comparison to other cases about "sending a message to the community" during the guilt phase of a trial is inapposite. Here, the jury had already determined appellant's guilt and the issue to be resolved was whether death or life imprisonment was the proper sanction. As stated in Muehleman v. State, 503 So.2d 310, 317 (Fla. 1987), a remark found out of place and prejudicial when made to a jury evaluating the defendant's guilt may quite properly bear on the aggravating circumstances (in that case description of the feeble victim -- while it could tend to excite passion -- was not required to be ignored; a reprehensible slaying need not be described as less reprehensible). Even if it may be possible for a prosecutor to

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[11] It is true that the prosecutor sub judice referred to an octupus and its ink, rather than a squid. But appellee respectfully submits that reversible error does not inhere in alluding to the genus Octopus rather than the genus Loligo. As Shakespeare might have said, a nocturnal marine mollusk by any other name would smell as sweet.

dwell in improper fashion on emotional aspects of the case, the tame remark at R 518 would not fall into such a category.

The instant case is distinguishable from Garron v. State, 528 So.2d 353 (Fla. 1988), which involved numerous, improper objected-to remarks which this Court found that only a mistrial could cure (including Golden Rule comments to imagine the pain of the victim, misstatements of the law [if aggravating factors out number mitigating], comments as to what the victim would argue, etc). Such repeated, egregious errors by the prosecutor are not present here.

The final challenged comment (4) at R 525 - 526 in addition to not being preserved for appellate review is not improper. The argument accurately stated that life imprisonment was living and reading and writing is permitted and even in Jackson v. State, 522 So.2d 802, 809 (Fla. 1988) this Court found that while a defense objection should have been sustained the failure to do so did not mandate reversal. The misconduct was not so outrageous as to taint the validity of the jury's recommendation.

The prosecutor did not err in giving an anticipatory argument to rebut the defense closing argument that a life sentence without eligibility for parole for twenty-five years was an adequate punishment. (R 557 - 559) Moreover, defense counsel's argument was misleading in part by suggesting that Crump "will never again live outside a prison." (R 558) Defense counsel was speculating that with a life recommendation the judge might impose a life sentence consecutive to that imposed for the

murder of Areba Smith and thus Crump would spend at least fifty-years in prison. While that is possible, it wasn't necessarily so. A concurrent life sentence would make Crump eligible for parole in twenty-five years, and it is unknowable whether the trial court would sentence concurrently or consecutively.

At page 65 of his brief, appellant chastises Hillsborough County prosecutors for continuing to use patently improper argument in capital cases citing Hudson v. State, 538 So.2d 829 (Fla. 1989). In footnote 6 of Hudson at page 832, this Court declared that it had considered the defendant's claim of improper prosecutorial argument and "find that they are not supported by the record and that no reversible error occurred." One can only wonder what educative function would be served by reversing a case on the basis that no reversible error appears on the record; one possible result might be that prosecutorial argument, from the perspective of a defense attorney, might get worse.

Since there are no errors present, appellant's cumulative error argument must be rejected.

Appellant's claim must be rejected.

ISSUE VIII

WHETHER THE TRIAL COURT'S INSTRUCTION ON COLD, CALCULATED AND PREMEDITATED WAS UNCONSTITUTIONALLY VAGUE BECAUSE IT DID NOT INFORM THE JURY OF A LIMITING CONSTRUCTION.

Appellant filed a pretrial motion below to declare *Florida Statute 921.141(5)(i)* unconstitutional. (R 643) The motion was denied. (R 643, 835) Apparently defense counsel made no specific request in the jury instructions. If he is now complaining that a more limited instruction should have been given, the failure to request it below has resulted in a failure to preserve the issue. See Steinhorst v. State, 412 So.2d 332 (Fla. 1982).

Even if the issue had been preserved, relief must still be denied. See Brown v. State, 565 So.2d 304, 308 (Fla. 1990); Occhicone v. State, ___ So.2d ___, 15 F.L.W. S531, 532 (Fla. 1990).

ISSUE IX

WHETHER THE LOWER COURT ERRED BY FINDING THAT THE HOMICIDE WAS COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER WITHOUT PRETENSE OF MORAL OR LEGAL JUSTIFICATION.

The trial court found that the homicide for which appellant was sentenced was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification, reasoning that the defendant -- in possession of a restraint device -- invited the victim into his truck, bound her wrists and after manually strangling her dumped her nude body near a cemetery. (R 690 - 691)

Appellant contends that there is insufficient evidence to support a finding of heightened premeditation. Appellee disagrees.

The evidence demonstrates initially a premeditated killing of Lavinia Clark by Crump. Investigating Detective Onheiser testified that the victim's body had been discarded where it was discovered near a cemetery. There was a ligature mark on her writs. (R 193; 202) The state produced evidence of a restraining device found concealed in appellant's vehicle. (R 288) The driver's license of victim Lavinia Clark was discovered concealed in appellant's vehicle underneath the carpet. (R 267, 286) The cause of her death was manual strangulation. (R 342) Appellant "explained" to Detective Onheiser that he had picked up Lavinia "Lady" Clark, that they got into an argument and he pushed her out of the vehicle, never seeing her again. He

claimed there was no struggle. (R 357) He further explained that he found her driver's license in the purse she left behind in the truck and that he hid her license behind the electric meter at his residence and then under the dash behind the carpet in the truck. (R 359) Appellant's claim of no struggle is refuted by the testimony of Michael Malone -- FBI Agent -- specialist in hair and fibers -- who stated that on carpeting of passenger's side of Crump vehicle were found light reddish brown Negroid hair -- forcibly removed from the head -- that had the same microscopic characteristics of those of Lavinia Clark. (R 327) That this premeditated murder was more than an isolated incident, a happening that may have occurred for one of a number of reasons is the indisputable fact that it is part of a pattern of appellant's conduct wherein he picks up prostitutes (Lavinia Clark, Areba Smith) strips them, ties their hands, strangles them to death, and deposits their nude corpses near cemeteries.

Crump argues that the finding of this aggravating factor is improper, analogizing the case to Holton v. State, ___ So.2d ___, 15 F.L.W. S500 (Fla. 1990). There, the accused was convicted of murder and sexual battery. The victim died of strangulation. This Court determined there was insufficient evidence of the heightened premeditation, "the evidence must indicate that a defendant's actions were accomplished in a calculated manner, i.e., by a careful plan or a prearranged design to kill." 15 F.L.W. at S503. The Court reasoned that since the homicide occurred during the commission of another crime (sexual battery),

it could have been a spontaneous act in response to the victim's refusal to participate in consensual sex. And another witness testified Holton had said he did not mean to kill the victim. In the instant case in contrast, there was no alternative theory of felony-murder available (R 380 - 402; 423 - 435) and no testimony has been presented about a lack of intent to kill.

Crump suggests that the strangulation may have occurred when the victim refused consensual sex or even during consensual sex. While it is true that we do not know the totality of details about the homicide, appellant's pattern of picking up his prostitute-victims, having a hidden restraint device available in the vehicle, leaving ligature marks on their wrists and leaving the naked corpses deposited near a cemetery more than sufficiently exhibits "a careful plan or prearranged pattern to kill" not the accident appellate counsel envisions.

ISSUE X

WHETHER THE TRAIL COURT ERRED BY FAILING TO CONSIDER AND DISCUSS ALL MITIGATION.

Appellee disagrees with Crump's contention that the lower court failed to consider all proffered mitigating evidence. First of all, the trial court found the following three mitigating factors, although they were of minuscule weight:

> "1. The capital felony for which the Defendant is to be sentenced was committed while he may have possibly been under the influence of extreme mental or emotional disturbance as evidenced by expert testimony in the case.
>
> 2. The capacity of the Defendant to appreciate the criminality of this conduct or to conform his conduct to the requirements of law may have possibly been substantially impaired as evidence by expert testimony in the case.
>
> 3. Any other aspect of the Defendant's character or record, and any other circumstance of the offense as evidenced by expert and lay testimony in the case."

(R 691)

To the extent that appellant is critical of the lower court formulation of findings (1) and (2), supra, such criticism must take into account the uncertain, tentative and speculative nature of the testimony offered by the defense "expert." Dr. Isaza opined that Crump may have at times impairments but that is part of his personality that is unpredictable (R 490 - 491) and on cross-examination the witness offered only that he "could have been" under extreme mental or emotional disturbance. (R 500) Since the defense expert could only opine as to the possibility

of mental mitigating evidence, the trial court did not err in its order.

Appellant relies on Campbell v. State, ___ So.2d ___, 15 F.L.W. S342 (Fla. 1990), a decision which postdates the trial court's entry of his written order. In Campbell, this Court declared:

> "The court next must weigh the aggravating circumstances against the mitigating and, in order to facilitate appellate review, must expressly consider in its written order each established mitigating circumstance. Although the relative weight given each mitigating factor is within the province of the sentencing court, a mitigating factor once found cannot be dismissed as having no weight. To be sustained, the trial court's final decision in the weighing process must be supported by sufficient competent evidence in the record . . . ."

(15 F.L.W. at S344)

It is not clear from the Campbell opinion what the court means by "cannot be dismissed as having no weight." On the one hand, it may mean that the trial judge may not in his internal mental process simply dismiss the factor as having no weight. On the other hand, it may meant that the trial judge may not even say in his written order that the factor has no weight; if the latter is correct, then compliance with Campbell requires the trial judge to articulate in his written order that he is giving at least infinitesimal weight rather than no weight to the mitigating factor. In Downs v. State, ___ So.2d ___, 15 F.L.W. S478 (Fla. Case No. 73,988, September 20, 1990), this Court rejected an attack complaining of the lack of discussion of

mitigation in the sentencing order, finding upon a review of the record and the sentencing order that the trial court had considered the evidence and conducted the appropriate balance. While perhaps not a model order here, the trial judge clearly did consider all and appropriately concluded that death was the appropriate penalty.

Appellant complains that no mention was made of the testimony of mother and sisters that he was a supportive family member. Appellant's mother testified that Crump's only problem in school was that he was a slow learner -- the trial court would not permit the prosecutor to inquire on cross-examination whether the witness was aware that one of Crump's problems at school included being suspended for throwing a girl down the stairs. (R 460 - 462) Neither the mother nor the sister nor friend Patricia Howard could testify that they saw evidence, such as bizarre behavior, of emotional or mental problems. (R 463, 468, 471, 476)

Appellant's reference to testimony regarding Crump's being a thoughtful caring sibling to his sisters and child to his mother were satisfactorily covered by the trial court in finding (3) wherein the court took into account "any other aspect of the defendant's character or record." (R 491)[12]

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[12] Dr. Izasa also spoke of Crump's ability to form bonds. (R 491) Both Areba Smith and Lavinia Clark learned first hand about appellant's bonding talents as evidenced by the medical examiner's testimony of ligature marks on the wrists. (R 302, 346; see also 196, 202, 276)

ISSUE XI

WHETHER A SENTENCE OF DEATH IS DISPROPORTIONATE WHEN COMPARED TO OTHER CASES.

The lower court's order sentencing appellant to death does not violate the proportionality principle enunciated in this Court's jurisprudence.

> "Appellant is a good man, except that sometimes he kills people.
>
> J. Grimes concurring in part and dissenting in part, Fead v. State, 512 So.2d 176, 180 (Fla. 1987).

Appellant argues that the trial court found two aggravating factors (prior conviction of another capital felony -- [F.S. 921.141(5)(b)] and cold, calculated and premeditated murder without pretense of moral or legal justification [921.141(5)(i)], three mitigating factors [F.S. 921.141(6)(b),(f) and Crump's character]; that one of the aggravating factors was unwarranted and the presence of mental mitigating factors requires a reduction to life imprisonment.[13]

While it may be true that there have been decisions wherein the Court found significant mental mitigating factors warrant a reduction in sentencing appellant can cite no decision wherein

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[13] In addition to the prior murder conviction found as an aggravating factor, evidence was introduced that Crump had previously been convicted of aggravated assault without a firearm and three counts of aggravated battery without a firearm. (R 455 - 457)

this Court has held that the death penalty is disproportionate for a serial killer. This is not a jury override case like Amazon v. State, 587 So.2d 8 (Fla. 1986) or Ferry v. State, 507 So.2d 1373 (Fla. 1987) wherein this Honorable Court searches for a rationale to sustain the jury's recommendation nor does it involve a defendant who in a single incident in his lifetime engages in a heated "domestic confrontation" with a spouse or girlfriend as in Garron v. State, 528 So.2d 358 (Fla. 1988) or Wilson v. State, 493 So.2d 1019 (Fla. 1986). Rather, this appellant killed on two separate occasions two separate victims in a premeditated fashion. Appellee requests this Court reject the defense invitation to expand the disproportionately analysis to award immunity from the electric chair merely because his selected victims were black prostitutes or otherwise were not of significant socio economic status.

CONCLUSION

For the foregoing reasons, the judgment and sentence should be affirmed.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

ROBERT J. LANDRY
Assistant Attorney General
Florida Bar ID#: 0134101
1313 Tampa Street, Suite 804
Park Trammell Building
Tampa, Florida 33602
(813) 272-2670

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to the Office of the Public Defender, Polk County Courthouse, P.O. Box 9000, Drawer PD, Bartow, Florida 33830, Florida 32301, this 21st day of December, 1990.

OF COUNSEL FOR APPELLEE.