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IN THE SUPREME COURT OF FLORIDA

MICHAEL TYRONE CRUMP,

Appellant,

vs. Case No. 74,230

STATE OF FLORIDA,

Appellee.

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

INITIAL BRIEF OF APPELLANT

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TENTH JUDICIAL CIRCUIT
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STATEMENT OF THE CASE

On March 23, 1988, a Hillsborough County grand jury indicted the Appellant, MICHAEL TYRONE CRUMP for the first-degree murder of Lavinia Palmore Clark. (R. 599-600) The state filed a notice of intent to rely on Williams Rule evidence, specifically designating the facts and witnesses from a prior case in which Crump was convicted of the first-degree murder of Areba Smith. (R. 610, 651) The trial judge denied court-appointed counsel's motion to exclude the Williams Rule evidence. (R. 636) Defense counsel also filed a motion to suppress evidence seized during the warrantless search of Crump's truck. (R. 658) The motion was heard and denied. (R. 4, 29)

Crump was tried by jury March 27-30, 1989, the Honorable M. William Graybill presiding, and found guilty as charged. (R. 661, 688) The jury recommended death by a vote of eight to four. (R. 689) A day later, the judge sentenced Michael Crump to death by electrocution. (R. 586, 695) Written findings supporting the death sentence were filed March 31, 1989. (R. 690-91)

Motions for new guilt phase and penalty phase trials were filed and denied at hearings held April 12 and 13, 1989. (R. 698, 701, 799-829) On May 23, 1989, Crump filed an amended Notice of Appeal to this Court pursuant to Article V, Section 3(b)(1), Florida Constitution, and Florida Rule of Appellate Procedure 9.030 (a)(1)(A)(i). (R. 707) The Public Defender was appointed to represent Crump on May 24, 1989. (R. 712)

STATEMENT OF THE FACTS

A. Guilt Phase

On the morning of December 12, 1985, the nude body of Lavinia Palmore Clark was discovered on the north side of Idlewild Avenue in Tampa. (R. 186-87) The body was found on the shoulder of the road, adjacent to Shady Lawn Cemetery. Detective Gerald Onheiser, the lead detective for the Hillsborough County Sheriff's Department, estimated that the body was 25 to 30 yards from the nearest tombstone. (R. 186-89, 202) Clark's wrists showed marks which appeared to have been made by a rope or ligature. (R. 196)

Onheiser and fifteen to twenty officers responded to the scene and secured the area. (R. 188) They found no clothing at the scene and no signs of a struggle. For these and other reasons, the officers concluded that Clark was murdered somewhere other than where her body was found. (R. 193)

The body was processed at the office of the medical examiner who obtained hair samples, fingernail scrapings, vaginal and anal swabs, fibers, and other potential evidence. (R. 197) Clark was identified by her fingerprints. (R. 198) During the investigation, the detectives determined that Ms. Clark was a prostitute and a heavy cocaine user. (R. 203) Although they developed various suspects, all were eventually discarded. (R. 203-215) Detectives worked on the case for about three months, interviewing approximately 100 people, before putting the case in the closed or "dead" file. (R. 199-201)

Detective Robert Parrish of the Tampa Police Department

testified concerning the murder of Areba Smith who was also a black prostitute.[1] (R. 244-45) Parrish testified that on October 9, 1986, he responded to a homicide scene where he observed the nude body of a black female lying in a field.[2] (R. 245-46) The field was bordered on one side by a tree line, beyond which was Centro Espanol Cemetery. (R. 248, 251, 359) The body was approximately ten feet from the south side of the cemetery fence. (R. 269) The area showed no signs of struggle. (R. 249) What appeared to be very fine ligature marks were found on Smith's wrists. (R. 276)

Tire tracks which appeared to be those of a large truck were found at the scene. (R. 250) Based on a description provided by a witness who had seen Areba Smith get into a truck the night of the homicide, Tampa police officers located the truck, which belonged to Michael Crump, and impounded it. (R. 257, 261) Tim Whitfield, formerly with the Pinellas County Sheriff's Office, processed the truck with laser equipment. He found hair and fiber evidence. (R. 280-85) Under the carpet on the passenger's side, he discovered the driver's license of Lavinia Palmore Clark. (R. 286-87) He found what appeared to be a restraining device wrapped around the gear shift. (R. 289) A small amount of blood, not

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[1] Evidence concerning Areba Smith's death was introduced as Williams Rule evidence over defense objection and denial of a defense motion to exclude it. (R. 636) Prior to Parrish's testimony, the court gave the Williams Rule cautionary instruction.

[2] Detective Parrish estimated that the field was the length of three football fields and the width of two to three football fields. It was searched by eight to fifteen officers ten to twelve hours after the homicide and before Crump told them Smith had a knife. No knife was found. (R. 273-74, 277)

visible to the naked eye, was found on the passenger side of the car. There was not enough blood, however, to determine the blood type or even whether it was human blood. (R. 291)

On February 13, 1987, the Appellant, Michael Tyrone Crump, was interviewed at the Tampa Police Department. (R. 263) During the course of the interview, he admitted choking Areba Smith. (R. 265) He told police that he picked her up because it started to rain and she wanted a ride to the Boston Bar. During the ride, they discussed sex and agreed on a price of $10.00. They drove to a field by the south side of a cemetery. She proceeded to give him a "blow job." Smith became frustrated because it was taking too long. When she pulled out a knife, Crump choked and killed her. (R. 266-67)

Dr. Lee Miller, associate medical examiner, testified that he performed an autopsy on the body of Areba Smith. (R. 299-310) Smith was 5'5" tall, weighed 120 pounds, and was 34 years old. Her cause of death was strangulation. She had scratches on both sides of her neck, extensive bruising and bleeding inside the neck, and a fractured hyoid bone. (R. 301) Pinpoint hemorrhages, characteristic of strangulation, were found in the whites of her eyes. The only other injuries were a slightly scraped bruise over the right eye and a set of narrow abrasions around the wrists, indicating that the wrists had been tied. There were two lines across the back of each wrist from one side to the other side, about a third of an inch wide, with a loop on top of one hand. No

marks were on the inside of the wrists.[3] (R. 302-03)

Dr. Miller found evidence of a recent nosebleed. A blood test showed evidence of alcohol. Bowel contents were found over Smith's anus and vaginal area. Miller took vaginal swabs but did not see any sperm cells.[4] (R. 303-05) His vaginal exam revealed a wadded up piece of paper. The inner two-thirds of the vagina was lined with an unidentified white cheesy substance. (R. 310)

Michael Malone, special agent with the FBI, testified concerning the analysis of hairs and fibers.[5] (R. 313-26) He compared a known hair sample from Lavinia Clark to hair samples submitted in the Areba Smith case. A hair found on the carpet of Crump's truck exhibited exactly the same individual characteristics as the head hair of Lavinia Clark. (R. 326-27)

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[3] Dr. Miller testified that the abrasions on Smith's wrists might have left skin tissue on whatever caused them. (R. 310) Michael Malone, FBI special agent, testified that the ligature found in Crump's truck was not submitted to the FBI laboratory for testing. (R. 331)

[4] Apparently, sperm was found later during laboratory testing because the prosecutor offered to stipulate that semen was found in Smith's vagina but not in Clark's vagina. (R. 334-37)

[5] While describing his credentials, Malone testified that he "published articles on the hair and fiber analysis or the role it plays in serial murder investigations." He said that, "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--" Defense counsel objected, arguing that the testimony implied that this murder was a serial killing and likened it to the Bobby Joe Long case. He requested a curative instruction and moved for a mistrial. The court overruled the objection and denied the motion, stating that it "merely went to his qualifications." (R. 315-18)

When defense counsel asked Malone whether his office was asked to determine if Lavinia Clark had semen in her vagina, the prosecutor objected. The court ruled that Malone could only testify as to his own personal knowledge. Malone said he knew this test was done but had no personal knowledge of the result. (R. 331-32) Although Malone had the results in his report, the court sustained the state's hearsay objection and refused to permit him to tell whether semen was found in Clark's vagina.[6] (R. 332-37)

Charles Diggs, medical examiner, testified that he performed an autopsy on Lavinia Clark. Clark was 5"2" tall, weighed 117 pounds and was 28 years old. (R. 339-42) The cause of death was strangulation. Dr. Diggs found a fracture of the hyoid bone and the thyroid cartilage, or Adam's apple; hemorrhaging in that area; and pinpoint hemorrhages on the whites of the eyes. (R. 342-43) She had a bruise on her scalp behind the ear and two bruises beneath the skin on the top of her head, indicating that she may have been struck on the head. There was slight hemorrhaging in the abdominal wall. No alcohol or drugs were present in her blood. Dr. Diggs took vaginal swabs but turned them over to law enforcement. (R. 343-44) No feces or paper were found in Clark's vagina. (R. 345) Diggs said that there appeared to be ligature impressions

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[6] Defense counsel wanted to introduce this evidence under the business records exception to the hearsay rule. The court ruled that if he did so, it would be considered part of the defense case and the defense would lose opening and closing argument. The prosecutor offered to stipulate to the finding of semen in the vagina of Smith but not Clark if it were part of the defense case. (R. 334-37) Defense counsel finally decided to leave out the semen evidence rather than lose opening and closing. (R. 365-66)

on the wrists but he did not include this in the autopsy report because the marks were faint and left no bruising. (R. 346)

Some time after closing the Clark file, Onheiser was contacted by the Tampa Police Department concerning Michael Crump. Onheiser interviewed the Appellant on February 4, 1987. (R. 355) Crump told him that he once picked up Lavinia Clark near a bar. He offered her a ride and she accepted. She was in his truck for about ten minutes. When they got into an argument, he pulled over to the side of the road and pushed her out of the truck. This was the last time he saw her. (R. 356-57)

Crump did not remember exactly what he and Clark argued about. There was no struggle other than his pushing her out of his truck. She left behind her purse. He discarded it, keeping only her driver's license. He didn't know why he kept the license. He saw Clark's picture in the newspaper later on. He hid the license behind the electric meter box at his house. When they moved, he hid it under the carpet in his truck. (R. 359)

The defense did not present a case.[7] (R. 366) Following closing arguments and jury instructions, the jury found Michael Crump guilty of first-degree murder. (R. 439)

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[7] When the state rested, defense counsel renewed his motion for mistrial based on Malone's statement regarding his investigation of serial murders. See note 4, supra. He then renewed his motion to exclude the Williams Rule evidence, requesting that the court consider that semen was found in the vagina of Areba Smith and not Lavinia Clark, even though the evidence was not before the jury. Counsel also argued that the state submitted no proof the crime was premeditated. The judge denied all motions. (R. 361-364)

B. Penalty Phase

At penalty phase the following day, Mittie Render, the Appellant's mother, testified that Crump was a slow learner in school. (R. 458-59) She described her son as "kind, considerate, thoughtful and playful." She said that Michael was friendly and outgoing and helped anyone who needed help. (R. 459-60)

Crump's sister, Gloria Baker, a licensed practical nurse, testified that she and her family lived with her mother at one time. She helped care for Crump when he was an infant and small child. (R. 463-66) She moved out of the house when Michael was seven but kept in close contact. Michael got along well with the family and did a lot of work around the house. (R. 466-68) Baker testified that Crump was presently married and had three daughters. One was ten or eleven and twins were four years old. (R. 467)

Another sister, Christina Taylor, never lived at home when Michael was growing up but went by daily. After she moved to St. Petersburg, Michael visited her during the summer. He got along well with her children and helped around the house. (R. 468-70) Patricia Howard was a neighbor of Christina Taylor in St. Petersburg. (R. 472-73) Although currently a teacher, Ms. Howard was formerly a social worker with HRS. (R. 474) She testified that Michael visited her frequently when he was a child, talked to her, helped around the house, and babysat while she went to the store. He was very good with her four children. (R. 474-75) She saw no evidence of violence in Michael. (R. 475)

Dr. Maria Elena Isaza, a clinical psychologist and

adjunct professor at the University of South Florida, was provided with raw data and test results from a prior psychologist.[8] (R. 483-84) She interviewed Crump and did additional testing for 3 1/2 hours. The testing showed that Crump had poor planning ability. His verbal score was much lower than his performance score which indicated that Crump was "more of a doer than a thinker." His judgment was consistently poor. Crump had poor impulse control; he acted first and reflected later. He also had poor reflecting ability. (R. 487-88) Because he was not capable of much planning, if he killed someone, he would have done it on the spur of the moment. (R. 505-06)

Michael Crump grew up without a father figure. (R. 487) Dr. Isaza said that, although Crump first comes across as a very mean, tough, intimidating individual, when you talk with him he has the capacity to be warm and caring. He is only comfortable, however, when he trusts someone. If he perceives a threat, he feels persecuted or exploited and anticipates that he will be diminished. He is very sensitive to rejection and any criticism, especially from women. When he feels threatened, he may act in a violent way, impulsively and without reflection. (R. 489)

Dr. Isaza concluded that Crump suffered from "hyper-vigilance," or a sense of feeling threatened. (R. 489) She found

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[8] The prior psychologist was Dr. Berland. (R. 226-28) Dr. Isaza testified that Berland administered tests to Crump in 1987. She had not spoken with Dr. Berland. (R. 498) On cross-examination, the state brought out that Dr. Isaza was appointed in this case only four days earlier for the purpose of testifying in mitigation during this penalty proceeding. She first saw Crump "yesterday," after his conviction in this case. (R. 497)

some indication of sporadic hallucinations or hearing "god voices talking to him." He had difficulties in sexual development and adjustment -- a feeling of sexual inadequacy or a feeling that his manhood depended on his sexual performance.[9] (R. 490) Crump's symptoms were precursors of or consistent with a paranoid personality disorder. (R. 490)

According to Dr. Isaza, Crump was under the influence of extreme mental or emotional disturbance at the time of the offense and his capacity to appreciate the criminality of his conduct or to conform his conduct to the law was substantially impaired. (R. 494, 510) She opined that, if Crump was with a prostitute and it was taking too long, this could trigger the impulsive reaction he suffered from. (R. 510) He could become delusional, believing that he was threatened, abused, or mistreated. (R. 511)

The court instructed on two aggravating factors: (1) that the defendant was previously convicted of another capital offense or felony involving violence to the person; and (2) that the crime was committed in a cold, calculated and premeditated manner without pretense of moral or legal justification. (R. 559-60, 685) He instructed the jury to consider in mitigation (1) that the crime was committed while the defendant was under the influence of extreme mental or emotional disturbance; (2) that the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially

[9] Crump told Dr. Isaza that, at the age of sixteen, he would hire a prostitute when he had money. He was shy and had difficulty establishing relationships with women. (R. 509)

impaired; and (3) any other aspect of the defendant's character or record or other circumstance of the offense. (R. 686, 560) The jury recommended death by a vote of eight to four. (R. 689) In his written findings supporting the death sentence, the judge found the same aggravating and mitigating factors upon which he instructed the jury. (R. 690-91)

SUMMARY OF THE ARGUMENT

I: The state introduced Williams Rule evidence that Michael Crump admitted to killing Areba Smith, another prostitute. The prosecutor admitted that the state could not try the case without the use of this collateral crime evidence. The testimony should have been excluded because the similarities between the crimes were not unique and there were striking dissimilarities. The evidence showed nothing more than propensity. It prejudiced the jury against the Appellant and added nothing toward the development of facts pertinent to the issue of guilt of the murder of Lavinia Clark. The case must be reversed and Crump acquitted.

II: Over defense objection, Michael Malone, FBI special agent on hair and fiber analysis, testified that he participated in the investigation of various serial killings including the Bobby Joe Long case, the Hillside Strangler, and others. The testimony was unnecessary because Malone's credentials were established without this information. Moreover, it was very prejudicial because it insinuated to the jury that Michael Crump might also be a serial killer. The sole issue in the case was whether he killed one prostitute (Areba Smith) or two prostitutes (and Lavinia Clark). Although the testimony was extremely harmful, the judge refused to even give a curative instruction. A new trial is required.

III: Although the trial judge allowed the state to introduce Williams Rule testimony through hearsay, he twice sustained the

state's hearsay objections to evidence that defense counsel wanted to introduce. This created a hearsay double standard and an unfair disadvantage to the Appellant. Furthermore, the evidence excluded was crucial to the defense. The Appellant was denied a fair trial.

IV: Approximately six weeks after the Areba Smith homicide, law enforcement officers seized, impounded, and searched Michael Crump's truck which was legally parked on a public street, without a warrant. Although a warrant is no longer required because of the "automobile exception," officers still must have probable cause. Although a witness saw Areba Smith get into a truck resembling Crump's on the night of the homicide, there was no evidence that Crump killed her. Although tire tracks were found at the homicide scene, many trucks could have left them; thus, there was no probable cause to believe evidence would be found in Crump's truck.

V: When guilt is proved by circumstantial evidence, the evidence must be consistent with guilt and inconsistent with any reasonable hypothesis of innocence. The only direct evidence connecting Crump to the Clark homicide were a strand of hair and Clark's driver's license found in Crump's truck. Crump provided a plausible explanation. He once picked up Clark near a bar. When they argued, he pulled over to the side of the road and pushed her out of the truck. Clark left behind her purse containing her driver's license. Crump's explanation presented a reasonable hypothesis of innocence. Thus, a judgment of acquittal should have been granted.

VI: The state also failed to present sufficient evidence that Clark's homicide was premeditated. The only evidence was that she died from manual strangulation. When premeditation is shown by circumstantial evidence, the evidence must be inconsistent with any hypothesis of guilt. In this case, the state failed to prove that the homicide was premeditated.

VII: The prosecutor made a number of erroneous and prejudicial arguments during both guilt and penalty phase closing arguments. The same sort of arguments have been condemned by this Court before. Although defense counsel failed to object, the arguments were so prejudicial that Crump was denied due process and a fair trial. Thus, the errors were fundamental.

VIII: In the Florida scheme of attaching great importance to the penalty phase jury recommendation, it is critical that the jury be given adequate guidance. When, as here, the jury is given incorrect or inadequate instruction as to the definition of the cold, calculated, and premeditated aggravating factor, its decision may be based on caprice or emotion or an incomplete understanding of the law. Although a Florida jury recommendation is advisory rather than mandatory, it is a "critical factor" in determining whether a death sentence is imposed. Because the jury was instructed on CCP, with no definition given, Crump's death sentence was unreliable, thus violating his constitutional rights under the eighth and fourteenth amendments.

IX: The trial court erred by instructing the jury on and finding the cold, calculated, and premeditated aggravating factor. The evidence showed only that Clark died of manual strangulation. The CCP aggravating factor requires heightened premeditation, greater than that needed for a finding of premeditated murder. There was no evidence of heightened premeditation.

X: The judge, in his written findings, listed the three mitigating factors upon which he instructed the jury. He did not discuss them or relate them to this case. Moreover, he found the nonstatutory mitigator without specifying any nonstatutory mitigation he considered or found. Under recent caselaw, the trial judge must discuss all mitigation presented. The trial court failed to do so.

XI: The trial judge found two aggravating factors and three mitigating factors. One of the aggravators, CCP, is unwarranted. With only one aggravating factor remaining, and an abundance of mitigation, the death penalty is unwarranted. The sentence should be reduced to life.

ARGUMENT

ISSUE I

THE TRIAL COURT ERRED BY ADMITTING EVIDENCE OF ANOTHER MURDER, IN VIOLATION OF THE WILLIAMS RULE AND SECTIONS 90.402, 90.403, AND 90.404(2)(a) OF THE FLORIDA EVIDENCE CODE.

A main feature of Crump's trial was the detailed testimony concerning the murder of another prostitute. This evidence was admitted, over defense objection, as Williams Rule evidence. The collateral crime evidence should have been excluded because the similarities between the homicides were not sufficiently unique; therefore, the evidence was not relevant to any material issue. It showed only propensity and bad character. Moreover, the detailed testimony concerning Smith's death consumed at least half of the trial time. See Williams v. State, 117 So.2d 473, 475-76 (Fla. 1960) (evidence of subsequent crime by defendant which became the main feature of the trial was so disproportionate to issue of sameness that it may well have influenced verdict and should have been excluded even if relevant). The collateral crime evidence should also have been excluded because any probative value was far outweighed by the danger of unfair prejudice. Additionally, the evidence of an unrelated homicide must certainly have confused and misled the jury as to the issues. See § 90.403, Fla. Stat. (1985).

On May 6, 1988, the state filed a notice of intent to rely on Williams Rule evidence, specifically designating the facts and witnesses from a case in which Crump was convicted of the

first-degree murder of Areba Smith. (R. 610, 651) On February 15, 1989, defense counsel filed a motion in limine to exclude the Williams Rule evidence because it was irrelevant. The defense argued that, even if relevant, any probative value was outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence. (R. 636)

A motion hearing was held March 6, 1989. (R. 836-48) At the end of the hearing, the judge said he would temporarily grant the defense motion to preclude the evidence; that there would be no mention of it in opening arguments; and that he would reconsider the issue after hearing the medical examiner's testimony. (R. 841) When the prosecutor told him they could not try the case without the Williams Rule evidence, however, the judge scheduled an evidentiary hearing. (R. 841-48) On March 13, the judge denied the defense motion to exclude the evidence without prejudice to revisit the issue at the end of the state's case. (R. 771-83)

The prosecutor discussed the Areba Smith case in detail during her opening statement.[10] (R. 174-78) Detective Parrish later described the murder of Areba Smith in detail. (R. 244-91) The medical examiner then testified as to his findings. (R. 299-310) The testimony comprised approximately half of the trial. The state tried to make its Williams Rule testimony shorter, to avoid making it the main feature of the trial, by introducing a large

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[10] There were two prosecutors, Karen Schmid and Stephen Crawford. There were also two defense counsel. Daniel Hernandez was appointed to conduct the guilt phase of the trial and Thomas Cunningham to conduct penalty phase. (R. 632-33)

part of it through Detective Parrish, as hearsay.[11]

The correct focus in determining the admissibility of any evidence is relevance to some point at issue. Williams Rule[12] or similar fact evidence is only a special application of the general rule that all relevant evidence is admissible unless excluded by a rule of evidence. The requirement that similar fact evidence contain similar facts is based on the relevancy requirement. To be relevant, similar fact evidence of other crimes must be of such nature that it would tend to prove a material fact issue. State v. Savino, 15 F.L.W. S518 (Fla. Oct. 4, 1990). "The only limitations to the rule of relevancy are that the state should not be permitted to make the evidence of other crimes the feature of the trial or to introduce the evidence solely for the purpose of showing bad character or propensity, in which event it would not be

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[11] When defense counsel objected to the state's use of hearsay, the trial court twice overruled the objection. The prosecutor told the judge that the state was not calling Wayne Olds or the detective who located Crump's truck, but were instead using hearsay, to minimize the amount of Williams Rule evidence (R. 259)

[12] The Williams Rule, codified in the Florida Evidence Code at § 90.404(2)(a), takes its name from the case of Williams v. State, 110 So.2d 654 (Fla. 1959), cert. denied, 361 U.S. 847, 80 S.Ct. 102, 4 L.Ed.2d 86 (1959), in which this Court held that similar fact evidence of a prior criminal act is admissible if relevant except to prove bad character or criminal propensity. Section 90.404(2)(a) of the Florida Evidence Code provides:

> Similar fact evidence of other crimes, wrongs, or acts is admissible when relevant to prove a material fact in issue, such as proof of motive, plan, knowledge, identity, or absence of mistake or accident, but it is inadmissible when the evidence is relevant solely to prove bad character or propensity.

relevant, and such evidence, even if relevant, should not be admitted if its probative value is substantially outweighed by undue prejudice." Bryan v. State, 533 So.2d 744, 746 (Fla. 1988) (citations omitted).

Accordingly, to determine whether the evidence concerning the death of Areba Smith should have been admitted, we must first examine whether the evidence was relevant, other than to show bad character or propensity. If relevant, we must then consider whether it became a feature of the trial and whether its probative value was outweighed by unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence.

Relevance

Williams Rule evidence is admissible to show motive, plan, knowledge, identity, absence of mistake or accident. § 90.404 (2)(a), Fla. Stat. (1987). In the instant case, the state needed the collateral crime evidence to prove identity. Without it, by its own admission, the state had no case. (R. 351) The trial judge was apparently influence by this admission. At the end of the first hearing, he told counsel that he intended to grant the defense motion to exclude the evidence, subject to reconsideration after the medical examiner's trial testimony. When the prosecutor informed him that they could not try the case without the testimony, he scheduled an evidentiary hearing, at which he reversed his prior decision and ruled in the state's favor. (R. 783)

Although there were a number of similarities between the

two homicides, the similarities were not unique. Both victims were black female prostitutes and cocaine users. (R. 836, 839) Murders of prostitutes are common. Cocaine use is common among prostitutes. Murders of drug users are common. The ages of the two victims --28 and 34 -- are common ages for prostitutes. The sizes of the two women are common sizes for prostitutes.[13] That the women were found nude is also common when the victims are prostitutes.

Both women died of manual strangulation. (R. 836) Strangulation is a common means of committing a homicide. That the murders occurred within ten months of each other shows nothing. It was certainly not unusual that the victims were killed at a place other than where they were found. Murderers often attempt to cover up their homicides by relocated the body. According to Crump, he and Smith had sex in the field by the cemetery where her body was found. (R. 266-67) If this is true, Smith's body was not relocated and this was instead a dissimilarity.

That the bodies were found near cemeteries within one to five miles of each other was probably coincidental. (R. 836-38) The bodies were found in two separate areas -- one along the roadside and the other in a field next to a cemetery. (R. 186-89) They were not draped around tombstones nor even within the cemeteries. It would be logical to leave a body in a location away from houses where no one is around to observe the disposal of the body. Cemeteries are generally unpopulated (by the living) and

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[13] Lavinia Clark was 5'2" and weighed 117 pounds. Areba Smith was 5'5" and weighed 120 pounds. (R. 840)

have open space nearby.

Both victims had ligature marks on their wrists, consistent with the alleged restraint device found in the defendant's truck. The rope marks were also consistent with other binding devices, however. (R. 836-38) The marks on the two women's wrists were not just alike. Clark's were so faint they were hardly noticeable and did not cause bruising. (R. 346) There were no rope "braiding" marks. (R. 772-80) Smith, on the other hand, had a set of narrow abrasions around her wrists. There were two lines across the back of each wrist from one side to the other side, about a third of an inch wide with a loop on top of one hand. No marks were on the inside of the wrists. (R. 302-03) This Court has held that the binding of hands is not unusual. Drake v. State, 400 So.2d 1217, 1219 (Fla. 1981) (binding of hands occurs in many crimes involving many different criminal defendants).

There were also striking dissimilarities. Semen was found in the vagina of Areba Smith but not Lavinia Clark. Although Dr. Miller testified that he saw no sperm cells when he examined Smith, apparently the FBI lab found semen because the prosecutor was willing to stipulate to the fact that semen was found in Smith's vagina but not in Clark's vagina. (R. 334-37) Although the judge was made aware of this dissimilarity, the jury was not.[14]

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[14] At the end of the state's case, defense counsel argued that, even though the jury never heard the semen evidence, the judge should consider all dissimilarities as a matter of law. Otherwise, the defense had the burden to present evidence. (R. 352-54, 361) The judge apparently had no problem considering the semen evidence in his determination.

Feces were found over Smith's anus and vaginal area. (R. 303) Dr. Miller's vaginal examination of Smith revealed a wadded up piece of paper. The inner two-thirds of Smith's vagina was lined with an unidentified white cheesy substance. (R. 310) No feces or paper were found in Clark's vaginal area. (R. 345)

Michael Crump admitted picking up both victims in his truck at night from the same area of Tampa. Although Crump admitted having Clark in his truck, he said they argued and he let her out of the truck. (R. 651-52) Crump may have had many women in his truck at various times. Penalty phase testimony indicated that he began picking up prostitutes at age sixteen. (R. 509)

Crump did not remember when Clark was in his truck. It may have been weeks or more prior to her homicide. Although he argued with both women, he argued only with Clark in his truck. (R. 356-59) He and Smith argued while having sex in a field by the south side of a cemetery. Smith became frustrated because the "blow job" was taking too long. When she pulled out a knife, Crump choked and killed her. (R. 266-67) If this was accurate, Smith's body was not found in a location other than where the homicide took place. The judge's observation that Smith was found flat on her back [and Clark on her side] support's Crump's story. (R. 790)

Crump admitted to choking Smith but not Clark. (R. 362) Moreover, he did not confess to Clark's murder despite the finding of her driver's license under the carpet of his truck. In fact, when he was confronted by Detective Parrish with the license, he admitted killing Areba Smith but not Lavinia Clark. No driver's

license of Areba Smith was found. (R. 359) If this was part of the modus operandi, Crump would have kept Smith's license or other identification too.

This Court has held that where there are both similarities and dissimilarities, the admission of collateral crime evidence is prejudicial error. Thompson v. State, 494 So.2d 203 (Fla. 1986). The identifiable points of similarity **must pervade** the compared factual situations. Additionally, the similar facts must have some special character or be so unusual as to point to the defendant. Id. at 204.

In Thompson, as in the case at hand, both victims were women of about the same age and build. Both crimes occurred near St. Helen's Church parking lot. As in this case, the defendant was somehow connected with each crime (his fingerprint was on the box in which the murder victim was found and he was convicted of the sexual battery). On the other hand, one victim was beaten and the other sexually battered. Thus, the Thompson court found as many dissimilarities as similarities and vacated the conviction, remanding for a new trial. 494 So.2d at 204-05.

The same is true in this case. Although both victims were women of about the same age and build, both crimes occurred in the same part of town, and the defendant admitted having both victims in his truck in the past, Areba Smith was sexually battered and Lavinia Clark was not. Additionally, Crump admitted having choked Smith in self-defense and denied having killed Clark. He kept Clark's driver's license but kept nothing belonging to Smith.

The state also attempted to use collateral crime evidence to prove identity in Peek v. State, 488 So.2d 52 (Fla. 1986), Drake v. State, 400 So.2d 1217 (Fla. 1981), and Robinson v. State, 522 So.2d 869 (Fla. 2d DCA 1987). In each case, the courts found that the collateral crime evidence was not sufficiently similar to establish identification because the common points were not so unusual as to establish a sufficiently unique pattern of criminal activity. The same is true in this case.

Drake is particularly helpful because, on two prior occasions, Drake bound his rape victims' hands behind their backs. The murder victim was found with her hands tied behind her back with a bra. Additionally, both victims left bars with the defendant.[15] 400 So.2d at 1218.[16] The state introduced collateral crime evidence to prove identity by showing Drake's mode of operating. This Court stated as follows:

> The mode of operating theory of proving identity is based on both the similarity of and the unusual nature of the factual situations being compared. A mere general similarity will not render the similar facts legally relevant to show identity. There must be identifiable points of similarity which pervade the compared factual situations. Given sufficient similarity, in order for the simi-

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[15] This connected Drake to both crimes in the same manner that the presence of Smith and Clark in Crump's truck connected Crump to both homicides.

[16] The binding of hands is not unusual in a homicide. In Chandler v. State, 442 So.2d 171 (Fla. 1983), cited by the prosecutor in this case, the victims' hands were also bound. In that case, however, the hands were bound with items belonging to the victims, which made the crimes more similar. In the instant case, the evidence indicated only that the wrists had been bound with a ligature of some kind.

> similar facts to be relevant the points of similarity must have some special character or be so unusual as to point to the defendant. The only similarity between the two incidents introduced at trial and Reeder's murder is the tying of the hands behind the victims' backs and that both had left a bar with the defendant. . . . Even assuming some similarity, the similar facts offered would still fail the unusual branch of the test. Binding of the hands occurs in many crimes involving many different criminal defendants.

400 So.2d at 1219 (footnote omitted).

Other more recent examples are provided by State v. Savino, 15 F.L.W. S518 (Fla. Oct. 4, 1990) and Edmond v. State, 521 So.2d 269 (Fla. 2d DCA 1988). In Savino, a case involving the use of reverse Williams Rule testimony, this Court found that the defendant's wife's prior abuse of her one-month-old child, in a different state, a different marriage, and a different manner, was not sufficiently similar to be admissible in the defendant's trial for the death of her six-year-old child. 15 F.L.W. at S518.

In Edmond, the district court reversed because the only similarities between the two alleged rapes were that both began as social contacts; force was used in both cases, including the defendant's hands around the victims' throats; and both offenses occurred in the early morning hours. After citing several dissimilarities, the court concluded that the common aspects were not so unusual as to establish a sufficiently unique pattern of criminal activity to justify admission of the collateral crime evidence. 521 So.2d at 271 (quoting from Peek, 488 So.2d at 55, and Chandler v. State, 442 So.2d 171, 173 (Fla. 1983).

The Main Feature

When evidence of another crime becomes the main feature of the trial, it becomes so disproportionate to the issue of sameness that it may influence the verdict and, thus, must be excluded even if relevant. Williams v. State, 117 So.2d 473, 475-76 (Fla. 1960). In the case at hand, testimony concerning the death of Areba Smith consumed at least half of the trial time. (See Summary of the Facts, supra.) The state was basically trying two cases at once. The prosecutor admitted that the state could not present a prima facie case without the Williams Rule evidence. (R. 351, 778) More was known about the Areba Smith murder because Crump admitted to killing Smith in self-defense when she pulled a knife in an argument during a sexual encounter. Additionally, a piece of paper and a cheesy substance were found in Smith's vagina and feces in the vaginal area. Thus, the Smith homicide was more graphic, disgusting and offensive. It overshadowed Clark's murder, about which little was known.

In an attempt to minimize the collateral crime evidence, the state introduced a large portion of the Williams Rule evidence through hearsay. Detective Parrish testified that a witness saw Areba Smith get into a truck the night before she was killed. The witness described the truck. When defense counsel objected to the state's use of hearsay, the trial court twice overruled the objection. The judge ruled that the testimony was not presented for the truth of the matter but to explain why Parrish focused on this particular truck. He told the prosecutor to say, "based on

your investigation, you did find and locate. . . " The prosecutor, however, proceeded to ask Parrish the name of the witness and, "based on what Mr. Olds told you, did you develop a description of a particular truck . . . ." Detective Parrish then repeated the complete description given by Wayne Olds, all of which was hearsay. (R. 256-57) He went on to tell how the truck was found by other officers -- more hearsay. (R. 261)

The prosecutor told the judge that they were not calling witness Wayne Olds or the detective who located Crump's truck, but were instead using hearsay, to minimize the amount of Williams Rule evidence. (R. 259) The state cannot be permitted to make their collateral crime evidence appear less voluminous than it really is by calling fewer witnesses and substituting hearsay. Replacing a lay witness with a law enforcement officer is especially harmful because a law enforcement officer places a "cloak of credibility" on what would otherwise be less compelling testimony. See Lamb v. State, 357 So.2d 437, 438 (Fla. 2d DCA 1978); Issue III, infra.

Unfair Prejudice

Even when collateral crime evidence has some probative value, it is inadmissible if the limited probative value is substantially outweighed by the unfair prejudicial effect of the testimony. § 90.403, Fla. Stat. (1987);[17] Williams, 117 So.2d 473.

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[17] Relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence. § 90.403, Fla. Stat. (1987).

The same rule also prohibits relevant evidence if its probative value is substantially outweighed by confusion of issues, misleading the jury, or needless presentation of cumulative evidence. In the instant case, the state tried two cases instead of one. There was just as much evidence of the Areba Smith murder, including photographs of the victim and the crime scene, as there was of the Lavinia Clark murder -- perhaps more because of the sexual battery. Both investigators testified and both medical examiners testified. In the case of the Smith homicide, the state introduced other evidence through hearsay.[18] Despite hearing the cautionary instructions, the jurors were undoubtedly confused as to why they heard so much detail about Areba Smith's murder if they were not to consider Crump's propensity to commit murder.

The collateral crime evidence was also misleading and confusing because the jurors must have felt that they were deciding Crump's guilt of both homicides. Crump said he killed Smith in self-defense. Thus, the jurors in the instant case were in the position of deciding whether he was guilty of Smith's homicide and, if so, how it affected the Clark case. They may have decided that because Crump killed one prostitute, for which he might not even have been convicted, he deserved to be found guilty.

The evidence was particularly prejudicial because it involved another senseless killing. There is no way the jurors could deliberate Crump's guilt for killing Clark without being influenced by their knowledge that he killed another woman. When

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18 See Issue III, *infra*.

jurors hear that a defendant has already committed one murder, it goes a long way toward convincing them that he must have committed the murder for which he's on trial.

Harmful Error

"Our justice system requires that in every criminal case the elements of the offense must be established beyond a reasonable doubt without resorting to the character of the defendant or to the fact that the defendant may have a propensity to commit the particular type of offense. The improper admission of collateral crime evidence is `presumed harmful error because of the danger that a jury will take the bad character or propensity to crime thus demonstrated as evidence of guilt of the crime charged.'" Peek, 488 So.2d at 56.

Robinson v. State, 522 So.2d 869 (Fla. 2d DCA 1987) is instructive in this regard. In that case, the state introduced collateral crime evidence that two sexual batteries occurred the same year, in the same geographical location, at the same time of night, and on elderly victims. The district court found dissimilarities between the rapes, however, and reversed the conviction. The error was especially harmful because the defendant's conviction hinged upon collateral crime evidence. The victim could not identify her assailant; thus, the state's evidence consisted of a single fingerprint and the collateral crime evidence. 522 So.2d at 871. Similarly, in the instant case, the state could not try the case without the collateral crime evidence. (R. 351) In such

cases, collateral crime evidence is particularly harmful because, if the similarities are merely coincidental, an innocent person will undoubtedly be convicted based on propensity.

In Jackson v. State, 451 So.2d 458 (Fla. 1984), the court admitted testimony from a state witness that the defendant bragged that he was a "thoroughbred killer." Quoting from Paul v. State, 340 So.2d 1249, 1250 (Fla. 3d DCA 1976), cert. denied, 348 So.2d 953 (Fla. 1977), the Jackson court stated:

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

Without a doubt, the prosecution believed that the evidence that Crump killed Areba Smith would persuade the jury of his guilt of the first-degree murder of Lavinia Clark. It did. Without the collateral crime evidence, the state could not have tried the case and the jury could not have found Crump guilty. For this reason, the error was not harmless. State v. DiGuilio, 491 So.2d 1129 (Fla. 1986). The conviction must be vacated.

ISSUE II

THE TRIAL COURT ERRED BY OVERRULING THE DEFENSE OBJECTION TO FBI AGENT MICHAEL MALONE'S TESTIMONY THAT HE INVESTIGATED SERIAL MURDERS.

While describing his credentials, Michael Malone, special agent with the FBI, testified that he "published articles on the hair and fiber analysis or the role it plays in serial murder investigations." He said that, "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--" at which time defense counsel objected. (R. 315)

Defense counsel argued that the jury should not be permitted to hear such testimony because it implied that this murder was a serial killing and likened it to the Bobby Joe Long case. He requested a curative instruction and moved for a mistrial. The court denied the motion and overruled the objection, stating that the testimony "merely went to his qualifications.[19] (R. 316-18)

Although we were unable to find any Florida case directly on point factually, the Minnesota case of State v. Blasus, 445 N.W.2d 535 (Minn. 1989), is very similar to this case. In Blasus, the prosecutor cross-examined a defense psychiatric expert to attempt to demonstrate that he was not a disinterested witness because he had a defense bias. Id. at 538. The prosecutor asked

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[19] Defense counsel renewed his motion for mistrial based on Malone's statement when the state rested its case. The motion was denied. (361)

the witness, Dr. Stephans, whether he "testified for the defense in the Jurgen's[20] case?" After the defense objection was overruled, the prosecutor asked the witness about his testimony in other notorious cases --the Ming Sen Shiue, Hoffman, Mikulanec and Rairdon cases -- and established that the two defense psychiatrists had worked together in all these "recent major criminal cases," except Hoffman.[21] 445 N.W.2d at 539.

In reversing, the Minnesota Supreme Court agreed with the appellant that the testimony was highly prejudicial. Noting that bias is a legitimate issue for exploration, the court found that the prosecutor had already established that the defense experts testified more often for the defense than the prosecution before he pursued whether the doctor had testified in specific notorious cases. The evidence regarding the specific cases was highly prejudicial because the murders referred to were "gruesome and reprehensible, and the prosecution intended the jury to mentally link appellant with the frightening violence of these other cases." The court held that the evidence should have been excluded as more

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[20] State v. Jurgens, 424 N.W.2d 546 (Minn. App. 1988), rev. denied (Minn., July 6, 1988) (two year old boy beaten by adoptive mother after long period of extreme abuse).

[21] In the State v. Shiue, 326 N.W.2d 648 (Minn. 1982), the defendant kidnapped a former teacher and bludgeoned to death a six-year- old boy who witnessed the crime. Mikulanec killed the fiance of her former boyfriend after stabbing her 97 times and was acquitted on an insanity defense. Mr. Rairdon created a community uproar in a small Minnesota town by reporting to authorities that his daughter was abducted when he had killed her after she resisted his sexual advances. In State v. Hoffman, 328 N.W.2d 709 (Minn. 1982), the defendant killed his wife and dismembered her body. See Blasus, 445 N.W.2d at 539 n.1.

prejudicial than probative under Minnesota's equivalent to § 90.403 of the evidence rules. 445 N.W.2d at 540. The evidence was harmful because the case was close on the mental illness defense. Id.

The same is true in the case at hand. The only question for the jury was whether Crump killed one person or two. Thus, the error related to the sole issue in the case. The testimony implied that Crump was a serial killer, that he killed both Smith and Clark, and that he may have killed other women. It was especially damaging in the penalty phase because of the implication that Crump was a serial killer.

The prosecutor compounded this error by his illogical closing argument that the killing of Lavinia Clark was not "a mere chance encounter" because "we look to the circumstances of the killing of Areba Smith ten months later." The prosecutor argued that there was "no doubt" that Crump had planned, anticipated and prepared himself for Clark's murder by "bringing along this device, and, possibly, by making this device." (R. 521) The argument was logically unsound because the killing of Areba Smith did not occur until after the instant homicide and there was no evidence that Crump had done this sort of thing before. Yet the prosecutor's argument encouraged the jurors to speculate that this was some sort of serial killing.

As in Blasus, there was no purpose in eliciting the prejudicial testimony except to inflame the jury and prejudice the defense case. Michael Malone's outstanding qualifications had already been shown without need to reference specific notorious

serial killings. Reference to the Bobby Joe Long murders was especially prejudicial because of the similarity to the instant case. Long admitted to killing seven prostitutes in Hillsborough County. See Long v. State, 529 So.2d 286 (Fla. 1988). Because of the large amount of publicity generated by the case, it was undoubtedly familiar to some if not all of the jurors. The reference to this and other serial killings served no purpose except to inflame the jury and confuse the issues.

Defense counsel not only objected, but requested a curative instruction and moved for a mistrial. (R. 316-18) The trial judge denied even a curative instruction. See Garron v. State 528 So.2d 353, 358 (Fla. 1988) ("notwithstanding curative instructions, [the remarks] were so egregious, inflammatory, and unfairly prejudicial that a mistrial was the only proper remedy"). Malone's testimony, which was highly improper and totally irrelevant, destroyed any semblance of due process and fair trial. It cannot be said that this testimony was harmless beyond a reasonable doubt. See State v. DiGuilio, 491 So.2d 1129 (Fla. 1986) (reviewing court may not find error harmless unless it can be shown beyond a reasonable doubt that the error did not contribute to the defendant's conviction).

ISSUE III

THE TRIAL COURT ERRED BY PERMITTING THE STATE TO INTRODUCE HEARSAY BUT PRECLUDING THE DEFENSE FROM INTRODUCING HEARSAY, THUS CREATING A DOUBLE STANDARD.

Although the trial judge allowed the state to introduce Williams Rule testimony through hearsay, he twice sustained the state's hearsay objections to evidence that defense counsel tried to introduce. This created a hearsay double standard which was extremely damaging to the Appellant. The evidence excluded because of the hearsay rule was crucial evidence to the defense.[22]

A.

In an attempt to minimize the collateral crime evidence, the state introduced a large portion of the Williams Rule evidence through hearsay. Detective Parrish testified that a witness saw Areba Smith get into a truck the night before she was killed and described the truck. When defense counsel objected to the state's use of hearsay, the judge twice overruled his objection. He held that the testimony was not presented for the truth of the matter but to explain why Parrish focused on this particular truck.

The prosecutor asked Parrish the name of the witness and Parrish repeated the complete description of the truck given by Wayne Olds. (R. 256-57) Olds described the truck as a black or

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[22] Hearsay evidence favorable to the state, admitted over defense objection, is discussed under section A. below. Hearsay evidence favorable to the defense, excluded upon objection by the state, is discussed under sections B. and C. below.

dark wrecker type truck without a boom in the back but with rotating lights on top. One light was broken and the amber yellow metal cap that fits on top of the rotating light was missing. The truck had tinted windows and was raised off the wheels with large four by four tires. Parrish related that Olds had seen the truck in an area he referred to as the "hole," or a "dope hole," on Columbus Avenue. (R. 257) Parrish proceeded to describe how the truck was located, seized, and impounded by other officers -- more hearsay. (R. 261)

Parrish then related that Oral Woods of FDLE examined the tires on the truck to see if they appeared to match those found in the field near the body. (R. 262-63) "Based on his opinion," Parrish contacted Tim Whitfield, a laser expert, who found Clark's driver's license and other evidence. (R. 280-89)

The prosecutor told the judge that they were not calling witness Wayne Olds or the detective who located Crump's truck, but were instead using hearsay, to minimize the amount of Williams Rule evidence. (R. 259) Thus, the state gained a decided advantage by the judge's ruling allowing the hearsay evidence.

The state's advantage from introducing the Williams Rule evidence through a law enforcement officer is apparent when analogized to the prohibition against the repetition of prior consistent statements by law enforcement officers. In Lamb v. State, 357 So.2d 437, 438 (Fla. 2d DCA 1978), the court found that the law enforcement officer's repetition of a prior consistent statement "had the immediate effect of putting a cloak of credibility" upon

the testimony of the witness. 357 So.2d at 438; see also Perez v. State, 371 So.2d 714, 717 (Fla. 2d DCA 1979) (when corroborating witness is law enforcement officer who is generally regarded by jury as disinterested, objective, and highly credible, danger of improperly influencing jury becomes particularly grave and error cannot be harmless); Allison v. State, 162 So.2d 922 (Fla. 1st DCA 1964) (danger particularly acute when the out-of-court statement repeated to jury by law enforcement officer).

Although the judge ruled that the evidence was not admitted for the truth of the matter, this was obviously not true. The name of the witness and detailed description of Crump's truck were certainly admitted as evidence to prove that Crump committed the crime. Although Oral Woods' opinion was not specifically stated, it was obvious from the context of the testimony. Woods' and Whitfield's findings were also hearsay and were introduced for the truth of the matter.

Defense counsel argued that his objection to the state's introduction of hearsay was the same as the state's objection to his attempt to introduce what the judge found to be hearsay the day before. The judge disagreed. (R. 255-56)

B.

The day before, the judge sustained the state's objection to what defense counsel attempted to ask Detective Onheiser about earlier suspects in the case. (R. 204-13) Defense counsel first asked Onheiser whether they determined that some Colombians were

very angry with Lavinia Clark for stealing cocaine from them. The court sustained the state's hearsay objection. (R. 204) Defense counsel then asked if Clayborn Shepherd was at one time considered a suspect. Onheiser was permitted to answer only "yes." (R. 204-05) Defense counsel then asked Onheiser if he was given information and evidence that Shepherd had raped two women near cemeteries and was indicted for murder of someone in a cemetery. The court sustained the state's objection. (R. 205)

When defense counsel attempted to ask Onheiser if he was provided with a sheet of paper that specifically stated . . . , the state interrupted and the court asked the bailiff to remove the jury from the courtroom. (R. 205) Counsel argued that Onheiser's direct testimony that they interviewed over one hundred people and "unturned every possible stone" left the jury with the impression that there were no other suspects until Crump surfaced. (R. 207)

Defense counsel also argued that the testimony he wanted to elicit was not for the truth of the matter but to show what the investigation revealed. (R. 207) He said that the piece of paper indicated that another individual had something to do with Clark's murder. (R. 209) The court finally allowed defense counsel to ask Onheiser questions such as "wasn't so-and-so developed as a suspect," but not what people told him or what he learned from his investigation. The state then objected to use of the word "suspect" and the objection was sustained. (R. 214) Defense counsel then asked Detective Onheiser whether he "had the opportunity to interview" Randall Scott Williams, whether he "also

had occasion to . . . review" Eugene Simon Harris and Sedrick Everhardt, and whether he also had occasion to "focus on" Sidney Simpson. Onheiser answered "yes" to each question. (R. 214)

Although defense counsel was able to elicit testimony that other suspects had been ruled out, he was unable to introduce any facts tending to show that someone else committed the crime. "[W]here evidence tends in any way, even indirectly, to establish a reasonable doubt of defendant's guilt, it is error to deny its admission. § 90.404(2)(a), Fla. Stat. (1985)." Rivera v. State, 561 So.2d 536 (Fla. 1990); accord State v. Savino, 15 F.L.W. S518 (Fla. Oct. 4, 1990) (defendant may show someone else committed crime by introducing "reverse Williams Rule" evidence if relevant); Moreno v. State, 418 So.2d 1223, 1225 (Fla. 3d DCA 1982) (accused may show his or her innocence by proof of the guilt of another).

The testimony suggested that Clayton Shepherd might have committed crimes similar to the homicides of Smith and Clark. Counsel suggested that he had raped two women near cemeteries and was indicted for murder of someone in a cemetery. This similar crime evidence would have suggested that someone other than Crump committed the crime. Because the court sustained the state's objection, Onheiser was not permitted to explain. (R. 205)

Defense counsel also attempted to ask Onheiser if he was provided with a sheet of paper that indicated or specifically stated that another individual had something to do with Clark's murder. (R. 205, 209) This too was excluded. Because the evidence excluded by the court might have raised a reasonable doubt as to

Crump's guilt, its exclusion was extremely damaging.

When the trial judge admitted the state's hearsay Williams Rule evidence the following day, ruling that it was not admitted for the truth of the matter, defense counsel told him that this was exactly the same as the state's objection which he sustained the day before. He too argued that the information he tried to elicit from Onheiser was not for the truth of the matter but to show what the investigation revealed. Although the judge disagreed (R. 255-26), the two objections to the alleged hearsay testimony by the two detectives were exactly the same. Yet the judge sustained the state's objection and overruled the defense objection, creating a hearsay double standard.

C.

Yet another example of the double standard was the trial court's refusal to allow Michael Malone, FBI special agent, to testify as to whether sperm was found in Clark's vagina. Michael Malone was a state witness. He testified concerning hair and fiber analysis. Although he had the FBI report with him, the judge would not allow defense counsel, on cross-examination, to question him regarding the contents of the FBI report as to whether semen was found in Clark's vagina because he didn't do the test himself.

The judge said that the defense could call a witness during the defense case but could not ask Agent Malone to look at his FBI report and testify as to what was in it. Defense counsel argued that it was a business record but the judge said that he

would still have to introduce it during the defense case. (R. 333-34) The judge noted that this was a "trial tactic," that the state sometimes stays away from a subject so that the defense will have to present a case and lose the right to first and last closing arguments.[23]

The prosecutor offered to let defense counsel elicit the evidence out of order so Malone could leave; however, it would still be considered as a defense case. (R. 334-35) The other prosecutor had earlier offered to stipulate and was still willing to stipulate to the semen evidence but the judge reiterated that the defense would lose opening and closing arguments. (R. 335) Defense counsel consulted Michael Crump (R. 365-66) and decided to leave the stipulation out and keep the last closing argument. (R. 335) Thus, the jury never heard this evidence which was especially crucial as a dissimilarity between the Clark homicide and the similar crime evidence.

The judge's ruling again evidences a double standard. Although he allowed the state to present evidence through Detective Parrish concerning the reports of Oral Woods (by implication) and Tim Whitfield, he would not allow Michael Malone to tell the jury what was in the FBI report, even though he had it in front of him. The judge further damaged the defense case by insisting that, if

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[23] The judge said that the "State's trying to get you to lose your rebuttal argument by making you put on evidence other than Mr. Crump." (R. 336) Actually, it was more likely that the prosecutor was trying to keep the evidence out, although the other prosecutor had earlier offered to stipulate to it. (R. 335) There was no evidence that the state even thought about forcing the defense to present a case until the judge suggested it.

the defense elicited the evidence, it would create a defense case and cause the defense to lose first and last closing arguments. It is unlikely that the prosecutors had thought of this "trial tactic" until the judge suggested it to them.

The jury must have been extremely confused about the semen evidence. Defense counsel mentioned in his opening argument, before he knew that the evidence would be excluded, that semen was found in Areba Smith's vagina but not Lavinia Clark's. (R. 180) The medical examiner, however, testified that he took a vaginal swab and found no semen in Areba Smith. (R. 303) Although there was no testimony concerning a finding of semen, apparently semen was later found by the FBI or FDLE because the prosecutor offered to so stipulate. The jury must have presumed otherwise, however, because of the medical examiner's testimony. The jury then heard defense counsel ask Malone whether semen was found in Clark but never learned the answer because Malone was not permitted to answer the question. Thus, the jury never heard the primary dissimilarity between the two allegedly "similar" crimes.

It was patently unfair for the court to allow the state to introduce hearsay to make its Williams Rule testimony appear less voluminous and refuse to allow the defense to introduce hearsay testimony that might have provided reasonable doubt that Appellant committed the crime. "Fair play and common sense dictates that what is sauce for the goose is sauce for the gander." Sharpe v. State, 221 So.2d 217, 219 (Fla. 1st DCA 1969).

ISSUE IV

THE TRIAL COURT ERRED BY DENYING APPELLANT'S MOTION TO SUPPRESS EVIDENCE OBTAINED FROM A WARRANTLESS SEARCH OF APPELLANT'S TRUCK BECAUSE THERE WAS NO PROBABLE CAUSE.

Approximately six weeks after the Areba Smith homicide, law enforcement officers seized, impounded, and searched Michael Crump's truck which was legally parked on a public street in front of his house, without a warrant. Defense counsel filed a motion to suppress the evidence seized in the warrantless search of Crump's truck. (R. 659) The main issue at the hearing on the motion to suppress was whether the automobile exception applied to the search of Crump's truck without a warrant.[24] (R. 4-29) At the outset of the hearing on the motion to suppress, however, the trial court and counsel attempted to narrow the issue by stipulation as to facts and issues. Although defense counsel's motion alleged that a warrant should have been obtained for the search of Crump's truck, defense counsel specifically refused to stipulate to probable cause for the search. (R. 7) Thus, the probable cause issue was

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[24] Defense counsel correctly argued at the hearing that no exigent circumstances existed. See Coolidge v. New Hampshire, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971); United States v. Spetz, 721 F.2d 1457 (9th Cir. 1983). The Smith investigation had been ongoing for about six weeks. Nearly a year had passed since Clark's death. Crump already had ample time to destroy evidence. The truck was legally parked on a public street. There was no evidence that Crump was about to take flight. He did not even know he was a suspect. There was no suspicion of contraband nor any reason that a warrant could not be obtained. In fact, Detective Childers testified that they did not get a warrant because Assistant State Attorney Lee Atkinson advised them that they did not need a warrant if the vehicle was parked on a city street. (R. 23)

preserved for appeal as part of counsel's motion to suppress.

Although a warrant is no longer required because of the "automobile exception," officers still must have probable cause for seizing an automobile or truck. California v. Carney, 471 U.S. 386, 105 S.Ct. 2066, 85 L.Ed.2d 406 (1985). Thus, the court erred in denying the motion not because of the lack of a warrant but because the officers lacked sufficient probable cause to believe Crump was engaged in criminal activity. Although a witness saw Areba Smith get into a truck resembling Crump's truck on the night prior to the homicide, there was no evidence that Crump killed her.

Detective Childers testified at the hearing that when Areba Smith's body was found, a witness (Wayne Olds) reported having seen her get into a truck the night of the murder. He described the truck and Detective Childers recognized the description as Crump's truck from another investigation. (R. 9) Olds described the truck as a black wrecker type truck without a boom in the back but with rotating lights on top. One light was broken and the amber yellow metal cap that fits on top of the rotating light was missing. The truck had tinted windows and was raised off the wheels with large four by four tires. Olds had seen the truck in an area he referred to as the "hole," or a "dope hole," on Columbus Avenue. (R. 257)

Mr. Olds was shown a photopack of trucks and identified that of Michael Crump. (R. 10) They found it parked on the street and on November 20, 1986, impounded and searched it without a warrant. (R. 10) The Smith investigation had been in progress

since October, 9, 1986. Crump came out while they were there and was cooperative. There was no evidence that he was trying to flee. (R. 10-11) Childers testified that they were not looking for any specific piece of evidence. (R. 10)

After the truck had been searched, Oral Woods, FDLE, examined the tires on the truck to see if they appeared to match those found in the field near the body. (R. 262-63) Based on his opinion, Parrish contacted Tim Whitfield who found Clark's driver's license, hair and fiber, and a ligature in the truck. Crump came to the Tampa Police Department on February 13, 1987, and was interviewed and arrested. (R. 263)

Although a witness saw Areba Smith get into a truck resembling Crump's truck on the night of the homicide, there was no evidence that Crump killed her. Although tire tracks were found at the scene of the homicide, they were not connected to Crump's truck; thus, there was no probable cause to believe that evidence would be found in Crump's truck. Only after the truck had been seized did Oral Woods, FDLE, examine the tires on the truck to see if they appeared to match those found in the field near the body. (R. 262-63) Areba Smith could have left Crump's truck and been killed later in the night. The fact that she entered his truck does not present probable cause for law enforcement to seize the truck on a "fishing expedition" to see what they could find. Childers testified that they were not looking for any specific piece of evidence. (R. 10)

In Caplan v. State, 531 So.2d 88, 91 n.1 (Fla. 1988),

this Court observed that police agents cannot search something just because it is in plain view. What is in plain view must create a suspicion that rises to the level of probable cause. See Coolidge v. New Hampshire, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971). Thus, even though the truck was in plain view, it was not subject to seizure absent probable cause.

Because a warrant is no longer necessary to seize a vehicle, even when there are no exigent circumstances, it is important that the officers have probable cause. In this case, the officers had insufficient evidence to arrest Crump. The only evidence was that someone saw Areba Smith get into a truck which appeared to be Crump's, the night before she died. The officers went on a fishing expedition by seizing and impounding Crump's truck with no warrant and no probable cause.

ISSUE V

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

When guilt is proved by circumstantial evidence, the evidence must be both consistent with guilt and inconsistent with any reasonable hypothesis of innocence. Wilson v. State, 493 So.2d 1019, 1022 (Fla. 1986); McArthur v. State, 351 So.2d 972 (Fla. 1977). Although this is generally a jury question, the verdict must be supported by legally sufficient evidence. See Heiney v. State, 447 So.2d 210 (Fla. 1984), cert. denied, 469 U.S. 930, 105 S.Ct. 303, 83 L.Ed.2d 237 (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). Accordingly, the question in this case is whether the state presented sufficient evidence to exclude all reasonable hypotheses of innocence.

The only direct evidence connecting Michael Crump to the Lavinia Clark homicide was a single strand of hair and Clark's driver's license found in Crump's truck. (R. 280-87, 326-27) Crump provided a plausible explanation for the presence of both. He told Detective Onheiser that he once picked up Lavinia Clark near a bar. He offered her a ride and she accepted. Clark was in his truck for about ten minutes. When they got into an argument, he pulled over to the side of the road and pushed her out of the truck. When he pushed Clark out, she left her purse behind. He discarded it, keeping only her driver's license. He didn't know why he kept the

license. (R. 355-58)

This was the last time Crump saw Lavinia Clark. (R. 356-57) He saw her picture in the paper later on, apparently after the homicide. Crump hid Clark's driver's license behind the electric meter box at his house. When they moved, he hid it under the carpet in his truck. (R. 359)

Crump's explanation presented a reasonable hypothesis of innocence.[25] It explained the presence of Clark's license and the hair strand in Crump's truck. Without the Williams Rule evidence introduced by the state, this would have been the only evidence against Crump. The prosecutor admitted that the state could not prosecute without the Williams Rule evidence. (R. 351) The circumstances of the Areba Smith homicide were not so distinctive or unusual that they could not have been purely coincidental.

The driver's license and hair strand proved nothing more than that Clark was in Crump's truck. There was no evidence that Clark was in Crump's truck just prior to her death or that Crump killed her. He might have picked her up weeks or months earlier. Dr. Isaza testified that Crump told her he hired prostitutes when he had money even when he was sixteen years old. (R. 509) This suggests that he habitually picked up prostitutes and that many women were in Crump's truck. Because Crump apparently frequented

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[25] Although Crump's story is unusual, the hiding of Clark's license behind the electric meter was not exculpatory. Thus, he had no reason to fabricate. It seems unlikely that he would make up sound an incredible story -- perhaps it was true.

prostitution, and was looking for prostitutes, it was not unusual that Clark was in his truck.

In general, where there is substantial, competent evidence to support a jury verdict of guilt as to the offense charged, the question of whether the evidence was inconsistent with any reasonable hypothesis of innocence becomes a jury question. Heiney, 447 So.2d 210; Rose, 425 So.2d 521. Nevertheless, when a criminal conviction is based solely on circumstantial evidence, it is the appellate court's duty to reverse the conviction if the evidence, even though strongly suggesting guilt, fails to eliminate any reasonable hypothesis of innocence. Jackson v. State, 511 So.2d 1047, 1048 (Fla. 2d DCA 1987); see also Horstman v. State, 530 So.2d 368 (Fla. 1988) (state failed to present substantial, competent evidence sufficient to enable jury to exclude every reasonable hypothesis of innocence).

The circumstantial evidence presented by the state was consistent with Crump's innocence as well as his guilt. Thus, a judgment of acquittal must be granted.

ISSUE VI

THE TRIAL COURT ERRED BY DENYING DEFENSE COUNSEL'S MOTION FOR JUDGMENT OF ACQUITTAL OF FIRST DEGREE MURDER BECAUSE THE STATE FAILED TO PRESENT SUFFICIENT EVIDENCE OF PREMEDITATION.

The state presented no direct evidence that the murder of Lavinia Clark was premeditated. The medical examiner testified only that the cause of death was strangulation. (R. 342-43) He found several bruises on Clark's head, suggesting that she may have been struck on the head. There was slight hemorrhaging in the abdominal wall. (R. 343-44) Although there appeared to be ligature impressions on Clark's wrists, the marks were very faint and left no bruising. (R. 346) The medical examiner, of course, had no idea how any of these injuries occurred.

Premeditation may 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). The circumstantial evidence, however, must be both consistent with guilt and inconsistent with any reasonable hypothesis of innocence. Wilson v. State, 493 So.2d 1019 (Fla. 1986); McArthur v. State, 351 So.2d 972 (Fla. 1977). Evidence establishing only a suspicion or probability of guilt is insufficient. McArthur, 351 So.2d at 976 n.12.

In Hall v. State, 403 So.2d 1321 (Fla. 1981), this Court found that, although the circumstantial evidence was not consistent with a reasonable hypothesis of innocence as to commission of the homicide, it was consistent with a reasonable exculpatory

hypothesis as to lack of premeditation. In the case at hand, if the circumstantial evidence does not show innocence of the homicide as argued in Issue IV, supra, the evidence is at least consistent with a reasonable hypotheses of innocence as to premeditation.[26]

Premeditation is defined by this Court in the often quoted Sireci case as:

> a fully-formed conscious purpose to kill which exists in the mind of the perpetrator for a sufficient length of time to permit of reflection, and in pursuance of which an act of killing ensues. Premeditation does not have to be contemplated for any particular period of time before the act, and may occur a moment before the act. 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 insofar as the life of his victim is concerned.

399 So.2d at 967 (citations omitted). In Sireci, the victim suffered 55 stab wounds and was also hit with a wrench. Nevertheless, this Court specifically noted that the victim's neck was also slit to ensure death. Sireci's contention that the homicide was a spur-of-the-moment act was further contradicted by previous admissions to other witnesses. None of these factors are present in the instant case.

Lavinia Clark may have aroused sudden passion in Crump by some threat or insult pertaining to his sexual prowess. He

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[26] See additional authority cited in Issue IV, supra.

confessed that, in the Smith homicide, he killed Smith only after she complained about the "blow job" taking too long and pulled a knife on him. A similar problem may have arisen when he was in the truck with Lavinia Clark. Because there was no evidence as to the manner in which Clark was killed, we might assume that her death occurred in circumstances similar to Smith's death because the state used evidence of Smith's death to convict Crump of the instant homicide. Thus, there is a reasonable hypothesis that Crump killed Clark in sudden provocation similar to the Smith incident and that the homicide was not premeditated.

Other evidence in this case suggests a "heat of passion" killing rather than a premeditated murder. See Forehand v. State, 126 Fla. 464, 171 So. 241 (Fla. 1936) ("heat of passion" killing is second degree murder). Crump did not know the victim. He had no reason to kill her. He told Detective Onheiser that he pushed Clark out of his truck because she was "running her mouth." If Crump strangled Clark, he may have intended only to quiet her and to stop before causing death. Because Crump was a large man, the homicide may have been effected very quickly.[27] The state presented no evidence as to how long it would have taken Crump to strangle Clark.

Alternatively, Crump could have choked Clark as part of a sexual act, not intending to kill her. See e.g., Drake v. State, 400 So.2d 1217, 1219 (Fla. 1981) (collateral crime witness testi-

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[27] Crump was about six feet two inches tall and weighed about 270 pounds. (R. 409)

fied that Drake choked her until she passed out "to give her a good rush"). Her wrists may have been bound as part of a sexual act.

Even if Crump did intend to kill Clark, it was most likely during a fit of uncontrollable anger or rage. "A rage is inconsistent with the premeditated intent to kill someone." Mitchell v. State, 527 So.2d 179, 182 (Fla. 1988) (victim stabbed 110 times). Accordingly, if Crump killed Clark because he was sexually threatened and became so angry with her that he lost control, the homicide was not premeditated. See Hansbrough v. State, 509 So.2d 1081 (Fla. 1987); Nibert v. State, 508 So.2d 1 (Fla. 1987) ("stabbing frenzy" does not establish heightened premeditation for aggravating factor).

In State v. Bingham, 40 Wash. App. 553, 699 P.2d 262 (1985), aff'd, 105 Wash. 2d 820, 719 P.2d 109 (1986), the court considered a homicide committed by manual strangulation. That court noted that three to five minutes of continuous pressure on the windpipe would be required to cause death by strangulation.[28] Although this would be sufficient time to permit deliberation, the evidence was insufficient to prove that the assailant actually deliberated. The court concluded that:

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[28] In the instant case, the strangulation may have been much quicker because of Crump's size. (R. 409) In Hounshell v. State, 61 Md.App. 364, 486 A.2d 789, 793 (1985), the court distinguished the case in which strangulation was accomplished by pressure to the throat from the case in which there was a fracture or sudden blow to the throat. In this case, death was caused by fractures to the hyoid bone and other bones in the neck. (R. 444) This might have taken only a moment instead of three to five minutes as in Bingham. The state presented no evidence as to how long the strangulation might have taken.

> as to the mental process involved in premeditation. This is not enough.

699 P.2d at 265. In its en banc affirmance, the Supreme Court of Washington stressed that "to allow a finding of premeditation only because the act takes an appreciable amount of time obliterates the distinction between first and second degree murder." State v. Bingham, 105 Wash. 2d 820, 719 P.2d 109, 111 (1986). "Premeditation is a separate and additional element to the intent requirement for first degree murder." Bingham, 719 P.2d at 113.

Similarly, in Austin v. United States, 382 F.2d 129 (D.C. Cir. 1967), the court noted that "the crux of the issue of premeditation and deliberation is not the time involved but whether the defendant did engage in the process of reflection and meditation. . . . The `appreciable time' element is subordinate, necessary for but not sufficient to establish deliberation." 382 F.2d at 136. Remanding for entry of judgment of second degree murder, the court stated:

> The facts of a savage murder generate a powerful drive, almost a juggernaut for jurors, and indeed for judges, to crush the crime with the utmost condemnation available, to seize whatever words or terms reflect maximum denunciation, to cry out murder "in the first degree." But it is the task and conscience of a judge to transcend emotional momentum with reflective analysis. The judge is aware that many murders most brutish and bestial are committed in a consuming frenzy or heat of passion, and that these are in law only murder in the second degree. The Government's evidence sufficed to establish an intentional and horrible murder -- the kind that could be committed in a frenzy or heat of passion. However, the core responsibility of the court requires it to reflect on the sufficiency of the Government's case.

382 F.2d 129, 138-39 (D.C. Cir. 1967).

In Austin, 382 F.2d 129, the court noted that the fact that the defendant used a knife was not probative of premeditation because he did not procure it specifically for that purpose. In the instant case, the rope or ligature suspected to have been used to bind Clark's hands was found in the Appellant's truck. He apparently kept it there. There is no evidence that he procured it to commit the homicide or even that he used it to kill Clark. He may not have owned it at the time of Clark's death. Even if he used it to bind her hands, he may have bound her hands without intending to kill her. The ligature was not the murder weapon. Clark was killed by manual strangulation. Thus, the ligature was not probative of premeditation.

In Smith v. Zant, 855 F.2d 712 (11th Cir. 1985), the defendant stabbed Turner, an 82 year old grocery owner, seventeen times and beat him with a hammer. The Eleventh Circuit observed that Smith's trial testimony indicated he may have thought the man was going to hit him with the hammer. "Turner's apparent (to Smith) intent to use the hammer might have aroused `sudden passion in the person killing so that, rather than defending himself, he willfully kills the attacker, albeit without malice aforethought, when it was not necessary for him to do so in order to protect himself.'" 855 F.2d at 720 (citation omitted). Dr. Isaza's testimony indicated that Crump might have felt threatened and committed a homicide when it was not necessary for him to do so to protect himself.

The most reasonable explanation of Clark's death is the

one suggested by the state's use of the Williams Rule evidence -- that Clark's death resulted from sudden provocation during a sexual act. This theory is supported by Dr. Isaza's testimony that Crump was a poor planner, had poor impulse control, and that he had poor reflecting ability. (R. 487-88) Because he was not capable of much planning, if he killed Clark, he would have done it on the spur of the moment. (See R. 505-06)

The facts presented by the state in this case failed to show premeditation. Thus, the circumstantial evidence was consistent with innocence as to first-degree murder. A judgment of acquittal of premeditated first-degree murder must be granted and the conviction reduced to second-degree murder.

ISSUE VII

THE TRIAL COURT COMMITTED FUNDAMENTAL ERROR BY ALLOWING THE PROSECUTOR TO MAKE CLOSING ARGUMENTS IN BOTH GUILT AND PENALTY PHASE THAT WERE NOT BASED ON EVIDENCE IN THE CASE AND BY URGING THE JURY TO CONSIDER FACTORS OUTSIDE THE SCOPE OF JURY DELIBERATIONS.

In Bertolotti v. State, 476 So.2d 130 (Fla. 1985), this Court described the function of closing argument as follows:

> The proper exercise of closing argument is to review the evidence and to explicate those inferences which may reasonably be drawn from the evidence. Conversely, it must not be used to inflame the minds and passions of the jurors so that their verdict reflects an emotional response to the crime or the defendant rather than the logical analysis of the evidence in light of the applicable law.

476 So.2d at 134. The accused has the right to a fair trial free from prejudicial conduct by the prosecutor. Chavez v. State, 215 So.2d 750 Fla. 2d DCA 1968). Conversely, the prosecutor has the responsibility to seek justice, not merely to win a conviction. Garron v. State, 528 So.2d 353, 359 (Fla. 1988) (violations of prosecutor's duty to seek justice and not merely "win" a death recommendation cannot be condoned by this Court); ABA Standards for Criminal Justice 3-5.8 (1980).

In both guilt and penalty phase, the prosecutor made arguments to the jury that have been found to be error. They were not based on evidence in the case and were extremely prejudicial to the Appellant. Although defense counsel made no objection to these arguments, they were so harmful when considered together that the

error was fundamental and a new trial is required. See Ailer v. State, 114 So.2d 348 (Fla. 2d DCA 1959); Waters v. State, 486 So.2d 614 (Fla. 5th DCA 1986); Ryan v. State, 457 So.2d 1084 (Fla. 4th DCA 1984).

The prosecutor opened and closed his guilt phase closing argument with inflammatory argument. He began with a lengthy story concerning the Holy Roman Emporors. When the body of the final emporor was taken to the crypt for burial, the "lord high chamberlain" knocked on the crypt door and announced, as was always done, that the "Lord Sovereign" was there. A voice would respond, "I know him not." The second time, the lord high chamberlain would announce "our exhaulted apostolic majesty or late emporor" was there. Finally, the chamberlain would announce "our brother, Frans Joseph." This time the crypt door would open. The point of this story was that "in death, we are all equal," whether king or prostitute. (R. 380-82)

By his elaborate and sentimental story, the prosecutor garnered emotion and sympathy for the victim. His argument was not based on the evidence. It was certainly not relevant.

The United States Supreme Court held that the eighth amendment precludes a capital sentencing jury from considering victim impact evidence. Booth v. Maryland, 482 U.S. 496, 107 S. Ct. 2529, 96 L. Ed. 2d 440 (1987). Instead of believing that a prostitute's life was worth less, the jurors were encouraged to be particularly mindful of the importance of this particular victim. The eighth amendment also prohibits remarks about the victim's

character by the prosecutor during argument. South Carolina v. Gathers, 490 U.S. ____, 109 S.Ct. 2207, 104 L.Ed.2d 876 (1989). Because the prosecutor apparently could think of nothing to say about the character of a prostitute and cocaine user, he used the story to emphasize her inherent worth as a person.

The prosecutor concluded his argument with an attack on defense counsel:

> What often the defendants will do reminds me of what an octopus does in the ocean. Because, you see, when an octopus is threatened, it exudes an inky substance in the water and clouds the water so the octopus can slither away.
>
> And, I submit for the remainder of the hour, that's what the Defense is going to try and do. They're going to try and cloud the water so that you can't see clearly through the three elements in the hopes that Michael Tyrone Crump can slither away from justice. Don't you let him. Remember what's at issue here. Find that the State has proven its case beyond a reasonable doubt. Thank you.

(R. 402)[29]

The prosecutor has a duty to refrain from inflammatory or abusive argument. Stewart v. State, 51 So.2d 494 (Fla. 1951). In this case, the prosecutor attacked and abused defense counsel by accusing them of "clouding the water." In Waters v. State, 486 So.2d 614 (Fla. 5th DCA 1986), the court ordered a new trial based upon cumulative error, one of which was the prosecutor's characterization of defense counsel's closing argument as "misleading and

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[29] In rebuttal, defense counsel said, "I assure you that I will not be spewing inky substance to divert your attention from the facts and the law." (R. 404)

a smoke screen." The Waters court found the comment harmful, even in the absence of an objection, because it served as an reason the defendant was not given a fair and impartial trial.

Ryan v. State, 457 So.2d 1084 (4th DCA 1984), rev. denied, 457 So.2d 1108 (Fla. 1985), provides another example of an attack on defense counsel. The prosecutor in Ryan referred to defense counsel as a "fancy attorney" and an "out-of-towner," and accused him of not being totally honest with the jury. 457 So.2d at 1089. The court stated that "[r]esorting to personal attacks on the defense counsel is an improper trial tactic which can poison the minds of the jury." Id. The Ryan court also found the comments to be fundamental error that could be considered on appeal without an objection. See also Redish v. State, 525 So.2d 928, 931 (Fla. 1st DCA 1999) (prosecutor's reference to defense counsel's "cheap trick" was beyond bounds of proper closing).

In Ailer v. State, 114 So.2d 348 (Fla. 2d DCA 1959), this Court stated:

> Firmly entrenched in the law in this state is the rule that the trial judge must halt improper remarks of counsel in their argument to the jury, whether objection is made or not. . . . It is also the duty of the trial judge not only to sustain objection to certain types of improper remarks by a prosecuting attorney, but he should so affirmatively rebuke that attorney as to impress the jury with the gross impropriety of this conduct. . . .
>
> An exception to [the rule requiring an objection] is where the improper remarks are of such character that neither rebuke or retraction may entirely destroy their sinister influence. In such event a new trial should be granted, regardless of the lack of

objection or exception.

114 So.2d at 351 (citations omitted). Ailer has been consistently followed and is still cited for this principle. See, e.g., Rosso v. State, 505 So.2d 611, 613 (Fla. 3d DCA 1987) (fundamental error based on prosecutor's remarks).

The prosecutor's penalty phase closing was even worse. She began as follows:

> At times, it's a frightening world in [sic] which we live in today, a world where it seems that all too often horrible, random and violent 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 no justice.
>
> You have decided by your verdict yesterday that there's no 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.

(R. 518)

It is impermissible to instruct the jury on its civic duty. Redish v. State, 525 So.2d 928, 930 (Fla. 1st DCA 1988) (jury would violate oaths by accepting defense). The above comment violated the prohibition against "sending a message to the community" by pointing out that horrible crimes occur daily in the world around us and all too often there is "no justice." The prosecutor of course followed up this remark with her opinion that "[j]ustice demands that Michael Tyrone Crump be sentenced to death for this crime." Her remarks were intended to encourage the jurors

to identify with the victim, picture themselves or loved ones as potential victims, and to feel responsible for protecting the world by recommending that Crump be sentenced to death. See Rhodes v. State, 547 So.2d 1201, 1205-06 (Fla. 1989) ("show Rhodes the same mercy he showed the victim" was unnecessary appeal to sympathies of jurors, calculated to influence sentencing recommendation); Garron, 528 So.2d at 359;[30] State v. Wheeler, 468 So.2d 978, 981 (Fla. 1985).

It has long been held improper for a prosecutor to ask the jury to "send a message to the community." State v. Wheeler, 468 So.2d 978 (Fla. 1985) (reversed because of prosecutor's "drugs in the schools" closing argument); Ryan v. State, 457 So.2d 1084, 1088 (Fla. 4th DCA 1984) (reversed based on "tell the community" argument and attack on defense counsel); Boatwright v. State, 452

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[30] The prosecutor's remarks in this case are very similar to several of the remarks this Court found to be error in Garron:

> The people of the State of Florida, ladies and gentlemen, have determined that in order to deter others from walking down the streets and gunning down . . .
>
> Ladies and gentlemen, I believe at this point I would hope at this point, that the jurors will listen to the screams and to the desires for punishment for the defendant and ask that you bring back a recommendation that will tell the people of Florida, that will deter people from permitting . . .
>
> [I]t is your sworn duty as you came in and became jurors to come back with a determination that the defendant should die for his actions.

528 So.2d at 358-59.

So.2d 666 (Fla. 4th DCA 1984). This is because such an argument prompts the jury to consider matters extraneous to the evidence and is calculated to inflame the passions or prejudices of the jury. Id. at 667.

Here, the prosecutor's statement was a variation on the "send a message" argument. It might better be called a "cure the world of frightening violent crime with no justice" argument. Nevertheless, as in the "send a message to the community" argument, it prompted the jury to consider matters extraneous to the evidence. It suggested that a death sentence was the only result that would return justice to the world and cure the world of frightening crimes committed for no discernible reason.

As if this was not enough, the prosecutor later made the following previously condemned argument:

> 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 by his actions, and he alone.

(R. 525-27)[31]

In February of 1988, well before the trial in this case, this Court found the same argument improper in another Hillsborough County case. Jackson v. State, 522 So.2d 802 (1988). This Court stated as follows:

> We agree with Jackson's argument that the prosecutor's comment that the victims could no longer read books, visit their families, or see the sun rise in the morning as Jackson would be able to do if sentenced only to life in prison was improper because it urged consideration of factors outside the scope of the jury's deliberations.

522 So.2d at 809. The court characterized the prosecutor's argument as "misconduct," and stated that the trial judge should have sustained defense counsel's objection and given a curative instruction. The court declined to reverse the death sentence, however, concluding that the misconduct was not so outrageous as to taint the validity of the jury's recommendation.

The prosecutor's argument is improper for three reasons. First, it is clearly designed to inflame the jurors' passions so that their verdict will be an emotional response rather than based

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[31] Defense counsel noted that Crump was not prospering in prison. (R. 529)

on the evidence. Secondly, the argument is not related to any aggravating factor and, thus, is irrelevant. Thirdly, the prosecutor's argument is based on evidence that was not admitted nor admissible at trial.

In Garron v. State, 528 So.2d 353 (Fla. 1988), this Court addressed the issue of prosecutorial misconduct in a capital case:

> This is certainly not the first time prosecutorial misconduct has been brought to our attention, In State v. Murray, 443 So.2d 955 (Fla. 1984), and again in Bertolotti v. State, 476 So.2d 130 (Fla. 1985), this Court expressed its displeasure with similar instances of prosecutorial misconduct. Such violations of the prosecutor's duty to seek justice and not merely "win" a death recommendation cannot be condoned by this Court. ABA Standards for Criminal Justice 3-5.8 (1980); 476 So.2d at 133.

Garron, 528 So.2d at 359. Because of the egregious nature of the misconduct in that case and because prior warnings had gone unheeded, the Garron court reversed.

Similarly, the only appropriate remedy in the instant case is reversal of the death sentence improperly "won" by the prosecutor. Despite the Jackson case, Hillsborough County prosecutors continue to use this patently improper argument in capital cases.[32]Taylor

The argument is clearly designed to divert the jury from its task of fairly weighing the aggravating and mitigating factors with "eye for an eye" rhetoric and "victim impact" sympathy. See Booth v.

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[32] See initial briefs of appellants in Hudson v. State, 538 So.2d 829 (Fla. 1989), and Taylor v. State, Case No. 74y260, now pending in this Court.

Maryland, 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987). It does not correctly state the law because death is not the appropriate penalty for all first-degree murders. § 90.141, Fla. Stat. (1987).

Cumulative Error

It is a well established principle of Florida law that although errors at trial, standing alone, may not be cause for reversal, their cumulative effect can substantially prejudice a defendant, thereby warranting a new trial. See e.g. Rhodes v. State, 547 So.2d 1201, 1205-06 (Fla. 1989) (prosecutor's cumulative penalty phase arguments reversible error); Garron v. State, 528 So.2d 353, 359 (Fla. 1988) (cumulative prosecutorial misconduct overstepped bounds of zealous advocacy); Duque v. State, 498 So.2d 1334 (Fla. 2d DCA (Fla. 2d DCA 1986) (cumulative prosecutorial misconduct warranted new trial); Perkins v. State, 349 So.2d 776 (Fla. 2d DCA 1977) (two harmful comments by state witness, considered together, required reversal).

In Dukes v. State, 356 So.2d 873 (Fla. 4th DCA 1978), the court reversed the conviction and remanded for a new trial based on four alleged errors. As in this case, the prosecutor made improper prejudicial statements during closing argument. The court noted that although the public defender failed to object to many of the improprieties by the prosecutor, if the errors complained of destroy the essential fairness of a criminal trial, they cannot be countenanced regardless of the lack of objection." 356 So.2d at 874. The court concluded that "[w]hile we might be persuaded to

overlook any one of the errors about which appellant complains, the totality of the circumstances in this case leads us to believe the appellant was not afforded a fair trial." Id. As this Court stated in Perkins, "[w]hile a defendant is not entitled to an error-free trial, he must not be subjected to a trial with error compounded upon error." 349 So.2d at 778.

Fundamental and Harmful Error

In this case, no objection and curative instruction could have dispelled the likelihood that the jury was prejudiced in its duty to impartially weigh the aggravating and mitigating factors. The error was fundamental. See Garron, 528 So.2d 358. The prosecutor's arguments constituted fundamental error without objection because the Appellant was denied due process and a fair trial. Denial of due process is never harmless, especially in a case involving the death penalty. Nor was the error harmless. See Rhodes, 547 So.2d at 1206; State v. DiGiulio, 491 So.2d 1129 (Fla. 1986).

ISSUE VIII

THE TRIAL COURT'S INSTRUCTION ON THE COLD, CALCULATED AND PREMEDITATED AGGRAVATING CIRCUMSTANCE WAS UNCONSTITUTIONALLY VAGUE BECAUSE IT DID NOT INFORM THE JURY OF THE LIMITING CONSTRUCTION THIS COURT HAS PLACED ON THIS AGGRAVATING FACTOR.

Prior to trial, defense counsel filed a motion to declare Florida's death penalty statute unconstitutional because the cold, calculated and premeditated ("CCP") aggravating factor was too vague. (R. 643) The motion was denied. (R. 835) The trial judge instructed the jury during penalty phase on the cold, calculated and premeditated aggravating circumstance, § 921.141(5)(i), Fla. Stat. (1987), in the language of the standard instruction:

> The crime for which the defendant is to be sentenced was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification.

(R. 560) Although this Court has adopted a limiting construction of the CCP aggravating factor, the standard jury instructions do not include the definitions which supposedly narrow its applicability. Thus, the jurors were not informed of the limiting construction this Court placed on this aggravating factor in cases such as Rogers v. State, 511 So.2d at 533 (requires careful plan or prearranged design); Hansbrough v. State, 509 So.2d at 1086 (Fla. 1987) (requires "heightened" premeditation substantially greater than that necessary to sustain conviction for premeditated murder): Nibert v. State, 508 So.2d 1 (Fla. 1987) (requires coldblooded intent to kill that is more contemplative, more methodical, more

controlled than that necessary to sustain first-degree murder conviction); and Preston v. State, 444 So.2d 939, 946-47 (Fla. 1984) (requires "particularly lengthy, methodical, or involved series of atrocious events or a substantial period of reflection and thought by the perpetrator").

In Maynard v. Cartwright, 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988), the United States Supreme Court found the Oklahoma aggravating circumstance, "especially heinous, atrocious or cruel," unconstitutionally vague and overbroad under the eighth amendment because the language gave the sentencing jury no guidance as to which first degree murders met the criteria. The Court noted that the Oklahoma Court of Criminal Appeals had not adopted a limiting construction to cure its overbreadth. Consequently, the sentencer's discretion was not channeled to avoid the risk of the arbitrary imposition of the death penalty. 108 S.Ct. at 859.

Florida's statutory language "committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification" gives no more guidance than the Oklahoma statute in Cartwright. A reasonable juror might conclude that this aggravating factor applied to all premeditated murders unless there was a colorable claim of self-defense, defense of others, or accident. Crump's jury was given the vague statutory language which might be perceived as applicable to any premeditated murder.

In Oklahoma, the jury is the sentencer and must make written findings of which aggravating factors were found. In Florida, the jury's recommendation is advisory and no such findings

are made by the jury. Thus, we do not know whether some or all of the jurors found Crump's crime to be cold, calculated, and premeditated. There is a reasonable possibility, however, that at least some of the jurors found this aggravating circumstance applicable and that at least one of those jurors joined in the death recommendation. If the jurors had not been instructed on the factor, or if they had been given the limiting definition, their recommendation might have been life.

In the Florida scheme of attaching great importance to the jury recommendation, it is critical that the jury be given adequate guidance. When, as here, the jury is given incorrect or inadequate instruction, its decision may be based on caprice or emotion or an incomplete understanding of the law. Although a Florida jury recommendation is advisory rather than mandatory, it is a "critical factor" in determining whether a death sentence is imposed. LaMadline v. State, 303 So.2d 17, 20 (Fla. 1974). Because the jury was instructed on CCP, with no definition given, Crump's death sentence was unreliable, thus violating his constitutional rights under the eighth and fourteenth amendments.

We are aware that this Court rejected similar arguments as to the "heinous, atrocious or cruel" aggravating factor in Smalley v. State, 546 So.2d 720 (Fla. 1989), and refused to transfer Maynard v. Cartwright to the "cold, calculated and premeditated" aggravating factor in Buenoano v. State, 565 So.2d 309, 308 (Fla. 1990). Nevertheless, we request that the court reconsider this important constitutional question.

ISSUE IX

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

Over defense objection, the trial judge instructed the jury on the cold, calculated, and premeditated aggravating circumstance ("CCP") (R. 514, 685) In the judge's written findings supporting imposition of the death sentence, he also found that the murders were cold, calculated, and premeditated because "[t]he Defendant, while in possession of a restraint device, invited the victim into his truck, bound her wrists, and after manually strangling her, dumped her nude body near a cemetery."[33] (R. 691) The state presented no evidence that Crump premeditated the strangling of Lavinia Clark. Moreover, the judge's reasoning fails to support a finding of heightened premeditation.

A finding of CCP requires coldblooded intent to kill that is more contemplative, more methodical, more controlled than that necessary to sustain a first-degree murder conviction. Nibert v. State, 508 So.2d 1, 4 (Fla. 1987). Quoting from Preston, 444 So.2d 939, 946-47 (Fla. 1984), the Nibert court noted that CCP has been found when the facts show a "particularly lengthy, methodical, or involved series of atrocious events or a substantial period of

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[33] Defense counsel argued this issue extensively in his motion for a new penalty phase trial. (R. 799-829) The judge denied his motion and ruled that there was sufficient evidence of CCP to go to the jury. He did not mention his finding of CCP in his written order.

reflection and thought by the perpetrator." Id.

In Holton v. State, 15 F.L.W. S500, S503 (Fla. Sept. 27, 1990), this Court reaffirmed that simple premeditation of the type necessary to support a conviction for first-degree premeditated murder is not sufficient to support the "cold, calculated and premeditated" aggravating factor. See also Hamblen v. State, 527 So.2d 800, 805 (Fla. 1988). The facts in this case bear some similarity to those in Holton. The victim in Holton, also a prostitute, was found partially unclothed and bound around the neck and one wrist with pieces of nylon cloth. Although the neck of a glass bottle was partially inserted in her anus, tests for sperm were negative. 15 F.L.W. at S500. This Court found that the facts in Holton suggested that the strangulation murder occurred during the commission of a sexual battery and could have been a spontaneous act in response to the victim's refusal to participate in consensual sex. 15 F.L.W. at S503.

Crump's strangulation of Clark may also have occurred spontaneously when she refused consensual sex. Another alternative suggested by the evidence was that the strangulation occurred during consensual sex (Clark was a prostitute) because the sexual act was taking too long or when Clark did or said something which caused Crump to feel threatened.[34] "A rage is inconsistent with

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[34] This conclusion is suggested by the state's Williams Rule evidence and by the defense psychological expert's diagnosis of Crump. Detective Parrish testified that Crump told him that Areba Smith became frustrated because the "blow job" was taking too long. When she pulled out a knife, he choked her and killed her. (R. 266-67) Dr. Isaza testified that Crump suffered from "hypervigilance" or a sense of feeling threatened. (R. 489) Crump felt sexually

the premeditated intent to kill someone." Mitchell v. State, 527 So.2d 179, 182 (Fla. 1988). Accordingly, if Crump killed Clark because he felt threatened and was so angry with her that he lost control, CCP is not supported by the evidence.

In Nibert v. State, 508 So.2d 1 (Fla. 1987), this Court held that a "stabbing frenzy" does not establish the CCP aggravating factor; see also Hansbrough v. State, 509 So.2d 1081 (Fla. 1987) (victim stabbed over 30 times). In both Mitchell, 527 So.2d at 182, and Hansbrough, 509 So.2d at 1086, this Court found that the heightened premeditation needed to support the finding of CCP was not shown by the "frenzied stabbing" of the victim.

There was no evidence suggesting that Crump intended to kill Clark when he picked her up. The judge noted in his written findings that Crump invited Clark into his truck while in possession of a restraint device. (R. 691) The alleged restraint device was found in Crump's truck when the truck was impounded nearly a year after the homicide. (R. 10) There was no evidence that he owned the device at the time of Clark's death or, if he did, that he intended to use it to strangle her.

That Crump apparently bound Clark's wrists does not prove premeditation. He may have bound her wrists as part of a sexual act, either consensually or nonconsensually. The fact that, after manually strangling Clark, he dumped her nude body near a cemetery proves only that he attempted to cover up his involvement after the

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inadequate. (R. 490) When he felt threatened, he might act in a violent way, impulsively and without reflection. (R. 489)

homicide -- not that the crime was premeditated. See Austin v. State, 382 F.2d 129, 138-39 (D.C. Cir. 1967) (that defendant acted with deliberation after the murder not evidence of premeditation).

The prosecutor attempted to mislead the jury during her penalty phase closing argument by arguing that the homicide of Areba Smith, introduced as Williams Rule evidence by the state, showed that the instant homicide was cold, calculated and premeditated. She argued as follows:

> This wasn't a mere chance encounter. And, how do we know that? How do we know it was cold, calculated, and premeditated? Because we look to the circumstances of the killing of Areba Smith ten months later. And although Lavinia Clark was a total stranger to Michael Crump, there's no doubt that this was an encounter that he had thought about, that he had planned, that he anticipated and he prepared himself for by bringing along this device, and, possibly, by making this device.

(R. 521) The argument was logically unsound because the killing of Areba Smith did not occur until ten months after the instant homicide. There was no evidence that Crump had done this sort of thing before. Additionally, as noted above, there was no evidence that Crump owned the ligature found in his truck at the time of Clark's homicide. The prosecutor's argument encouraged the jurors to speculate that this was some a serial killing.[35] It also encouraged them to speculate that the killing was cold, calculated and premeditated instead of requiring the state to prove it beyond a reasonable doubt.

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[35] This speculation was also encouraged by the trial judge's failure to sustain the defense objection to Michael Malone's testimony that he specialized in serial killings. See Issue II.

Speculation regarding a defendant's unproven motives cannot support the "cold, calculated and premeditated" aggravating factor. Thompson v. State, 456 So.2d 444 (Fla. 1984). The burden is upon the state to prove, beyond a reasonable doubt, affirmative facts establishing the heightened degree of premeditation necessary to sustain this factor. Thompson v. State, 456 So.2d 444 (Fla. 1984); Peavy v. State, 442 So.2d 200, 202 (Fla. 1983). The burden is not on the defendant to prove that he lost control, acted in panic or for any other unknown reason. In Hamilton v. State, 547 So.2d 630 (Fla. 1989), this Court found that the degree of speculation present in the case precluded the finding of CCP beyond a reasonable doubt. The same is true here.

The homicide in this case was not an execution, contract murder, or witness elimination killing. See Hansbrough v. State, 509 So.2d 1081, 1086 (Fla. 1987) (CCP reserved primarily for execution or contract murders or witness elimination killings). Nor was it a "particularly lengthy, methodical, or involved series of atrocious events or a substantial period of reflection and thought by the perpetrator." See Preston, 444 So.2d at 946-47. The evidence suggests that Crump became threatened and enraged during a sexual encounter with a prostitute and strangled her. Thus, the trial court erred in instructing the jury on and in finding the CCP aggravating factor. If neither a new trial nor an acquittal is ordered, the death penalty must be vacated and the sentence reduced to life[36] or a new penalty phase granted.[37]

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[36] See Issue XI on proportionality.

ISSUE X

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

In Campbell v. State, 15 F.L.W. S342 (June 14, 1990), this Court held that the judge must expressly evaluate in his written sentencing order every statutory and nonstatutory mitigating factor proffered by the defendant. If the evidence reasonably establishes a given mitigating factor (question of fact) and if the factor is mitigating in nature (question of law), the judge must find it as a mitigating circumstance and weigh it against the aggravating factors. The judge cannot dismiss a factor as having no weight. The judge's final decision must be supported by "sufficient competent evidence in the record."

Thus, Florida law requires that the judge consider all mitigation. Campbell, 15 F.L.W. S342; Rogers v. State, 511 So.2d 526, 534 (Fla. 1987), cert. denied, 484 U.S. 1020, 108 S.Ct. 733, 98 L.Ed.2d 681 (1988). The guidelines set out in Campbell have since been applied in Nibert v. State, 15 F.L.W. S415, S416 (Fla. July 26, 1990), and Cheshire v. State, 15 F.L.W. S504, S505 (Fla. Sept. 27, 1990) (judge "is under an obligation to consider and weigh each and every mitigating factor apparent on the record,

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[37] Without CCP, there will be only one aggravating factor and three mitigating factors. Thus, the case must be remanded for a new sentencing. A new sentencing is also required because the trial court failed to adequately consider and discuss the mitigation in his written findings. Because the jury was permitted to consider the CCP factor, and because of the prosecutor's remarks during penalty phase closing, see Issue VI, supra, a new penalty phase should be ordered.

whether statutory or nonstatutory").

In the case at hand, the trial court judge instructed the jury to consider three statutory mitigators: (1) that the crime was committed while the defendant was under the influence of extreme mental or emotional disturbance; (2) that the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired; and (3) any other aspect of the defendant's character or record or other circumstance of the offense. (R. 686, 560) In his sentencing order, he apparently found the same three mitigators. (R. 691) He failed to discuss the mitigation, however, and it is unclear whether he actually weighed it against the aggravating factors because he failed to explain his findings. Furthermore, he "found" the "any other aspect of the defendant's character or record" mitigator without specifying what aspects he found mitigating (or failed to consider). He failed to mention any non-statutory mitigation.

The trial judge's entire findings conerning the three mitigators were as follows:

> 1. The capital felony for which the Defendant is to be sentence 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 his conduct or to conform his conduct to the requirements of law may have possibly been substantially impaired as evidenced by expert testimony in the case.
>
> 3. Any other aspect of the Defendant's character or record, any other circumstance of the

offense as evidenced by expert and lay testimony in the case.

(R. 691)

Although the judge added "may have possibly been" to the two mental mitigators, he failed to explain why he added this language. It would appear that he simply did not want to make a decision. The state presented absolutely no evidence rebutting these two mental mitigators. "[W]hen a reasonable quantum of competent, uncontroverted evidence of a mitigating circumstance is presented, the trial court must find that the mitigating circumstance has been proved." Nibert v. State, 15 F.L.W. S415, S416 (Fla. July 26, 1990); see also Campbell, 15 F.L.W. 341. A defendant's claim that a mitigating circumstance has been proved can only be rejected if the record contains competent substantial evidence to support the trial court's rejection of the mitigating circumstances. Nibert, 15 F.L.W. at S416 (citations omitted).

The record of the penalty phase testimony in the instant case contains much convincing and uncontroverted testimony by Dr. Isaza concerning Crump's mental and emotional incapacities. (See "Statement of the Facts -- Penalty Phase") The record also contains nonstatutory mitigating aspects of Crump's character. Crump's mother and two sisters testified that he was a supportive family member and helped others whenever they needed help. A desire to help others was found mitigating in Songer v. State, 544 So.2d 1010, 1012 (Fla. 1989).

In Rogers v. State, 511 So.2d 526 (Fla. 1987), cert. denied, 484 U.S. 1020, 108 S.Ct. 733, 98 L.Ed.2d 681 (1988), this

Court found that the trial court should have considered uncontroverted testimony that the defendant was a good husband, father, and provider as a mitigating factor. 511 So.2d at 535 (citing Lockett, 438 U.S. at 604-05). Similarly, in Harmon v. State, 527 So.2d 182, 189 (Fla. 1988), the court noted that a jury recommendation of life might be based in part on evidence that the defendant was "a good father as well as a good son." Michael Crump was married and had three children. (R. 469) There was no testimony as to whether he was a good father. His mother testified, however, that he was a good son. She described him as kind, considerate, thoughtful, playful, friendly, and outgoing, and said he helped anyone who needed help. Michael's two sisters testified that he got along well with the family, and did a lot or work around the house. A friend of one of Crump's sisters also testified that Crump was helpful and got along well with her children. (R. 463-75)

The "effects produced by childhood traumas . . . have mitigating weight if relevant to the defendant's character, record, or the circumstances of the offense." Rogers, 511 So.2d at 535; see also Kampff v. State, 371 So.2d 1007, 1010 (Fla.1979). Michael Crump grew up without a father or any father figure. (R. 487) His sisters were both apparently much older than crump. One sister, Gloria Baker, testified that she and her family lived with Crump and his mother until Crump was seven years old. (R. 463-66) The other sister, Christina Taylor, never lived at home while Crump was growing up. (R. 468)

His unusual childhood and family, consisting of all women

and small children, certainly must have figured in his feelings of sexual inadequacy. Crump told Dr. Isaza that he was shy and had difficulty establishing relationships with women. Thus, he began engaging prostitutes at the age of sixteen. His feelings of manhood depended on his sexual performance. (R. 490) Surely, his lack of a father figure played a part in his problems.

Because the trial court failed to adequately consider and discuss all of the mitigation presented by the defense, Michael Crump's sentence of death was unconstitutionally imposed in violation of the eighth and fourteenth amendments to the United States Constitution. See Hitchcock v. Dugger, 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987); Skipper v. South Carolina, 476 U.S. 1, 106 S. Ct. 1669, 90 L. Ed. 2d 1 (1986); Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982); Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978); Rogers, 511 So.2d at 534.

ISSUE XI

A SENTENCE OF DEATH IN THIS CASE IS DISPROPORTIONATE WHEN COMPARED TO OTHER CAPITAL CASES WHERE THE COURT HAS REDUCED THE PENALTY TO LIFE.

In State v. Dixon, 283 So.2d 1 (Fla. 1973), cert. denied, 416 U.S. 943 (1974), this Court noted that the death penalty was reserved by the legislature for "only the most aggravated and unmitigated" of first-degree murder cases. 283 So.2d at 7. Part of this court's function in capital appeals is to review the case in light of other decisions and determine whether the punishment is too great. 283 So.2d at 10. The instant homicide is not one of the most aggravated first-degree murder cases.

The trial judge found three mitigating factors and two aggravators factors. One of the aggravating factors, the cold, calculated, and premeditated aggravating factor, was unwarranted. See Issue IX. supra. Thus, only one aggravating factor remains. This Court has affirmed death sentences supported by only one aggravating factor only in cases where there is "either nothing or very little in mitigation." Nibert v. State, 15 F.L.W. at S416; Songer v. State, 544 So.2d 1010, 1011 (Fla. 1989).

The judge found both mental mitigators. The death penalty has been upheld in very few cases where the mental mitigators were found. See e.g, Fitzpatrick v. State, 527 So.3d 809 (Fla. 1988); Ferry v. State, 507 So.2d 1373 (Fla. 1987); Miller v. State, 373 So.2d 882 (Fla. 1979), on remand, 399 So.2d 472 (Fla. 2d DCA 1981). This alone was enough to outweigh the single aggravating factor.

Additionally, the judge found the nonstatutory mitigator, implying that he found some nonstatutory mitigation.

Although the one remaining aggravating factor, that Crump was convicted of another capital felony, deserves considerable weight, there are many cases in which the defendant's sentence was reduced to life where there was another victim killed or seriously injured in conjunction with the capital felony. See e.g., Garron, 528 So.2d 353; Masterson v. State, 516 So.2d 256 (Fla. 1987); Amazon v. State, 487 So.2d 8 (Fla. 1986) (atrocious double murder of a mother and her eleven-year-old daughter who were stabbed and sexually battered during burglary); Wilson v. State, 493 So.2d 1019 (Fla. 1986).

Although the jurors recommended death in the case at hand, the recommendation most likely resulted from the prosecutor's prejudicial and unfair closing argument. See Issue VII, supra. Crump's moral culpability is simply not great enough to deserve a sentence of death. This is not one of the "unmitigated" first degree murder cases for which death is the proper penalty. State v. Dixon, 283 So.2d 1, 7 (Fla. 1973).

CONCLUSION

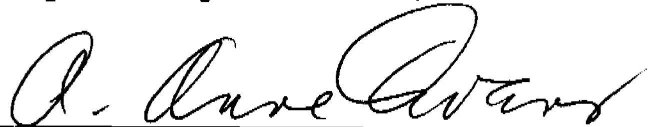
For the above reasons, Michael Crump should be acquitted because the state failed to prove that the circumstantial evidence was inconsistent with innocence, the Williams Rule evidence should have been excluded, and because the officers seized and searched Crump's truck without probable cause. If Michael Crump is not acquitted, he should be granted a new trial, based on various errors enumerated in this brief, for second-degree murder because the state failed to show that the homicide was premeditated.

If the Appellant is not acquitted and a new trial is not granted, Crump must be granted a new penalty phase trial because the judge erroneously instructed on CCP, or a new sentencing because the court failed to adequately consider and discuss the mitigation in his sentencing order.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to the Office of the Attorney General, 2002 N. Lois Ave., Tampa, Florida, 33602, this 31st day of October, 1990.

Respectfully submitted,



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