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

REPLY BRIEF OF APPELLANT

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TENTH JUDICIAL CIRCUIT
FLORIDA BAR NO. 0143265

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ATTORNEYS FOR APPELLANT

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STATEMENT OF THE FACTS

Florida Rule of Appellate Procedure 9.210(c) provides that, in an answer brief, "the statement of the case and of the facts shall be omitted unless there are areas of disagreement, which should be clearly specified." See Dania Jai-Alai Palace, Inc. v. Sykes, 450 So.2d 1114, 1122 (Fla. 1984); Overfelt v. State, 434 So.2d 945, 949 (Fla. 4th DCA 1983). "This simple, concise statement plainly means that the appellee's answer brief shall not contain a reiteration of the statement of the case and . . . facts stated in appellant's brief, but shall only state wherein appellee disagrees with appellant's statement and supplement that statement to the extent necessary to correct any material misstatements and omissions in appellant's statement." Metropolitan Life and Travelers Ins. Co. v. Antonucci, 469 So.2d 952, 954 (Fla. 1st DCA 1985).

In its brief in this case, the Appellee has not indicated any disagreement with the Appellant's statement of the facts. With few exceptions, every piece of evidence in the Appellee's statement of facts was mentioned in the Appellant's statement of facts. The Appellee merely edited the Appellant's statement of facts, further summarizing and minimizing the mitigation evidence, and adding an item of evidence that was properly excluded by the trial court.[1]

Appellee's description of Dr. Isaza's penalty phase testimony was taken out of context and misleading. Appellee omitted most of Isaza's diagnosis and explanation of Michael

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[1] See brief of Appellee at 5. This was not a "material omission." It was properly omitted because the evidence was excluded by the judge and is irrelevant to any issue on appeal.

Crump's psychological problems. Appellee also failed to explain that Dr. Isaza did not consult with Dr. Berland, who had administered psychological tests to Crump in 1987, only because Dr. Isaza was appointed just prior to penalty phase to testify in place of Dr. Berland who was out of town. Moreover, Appellee omitted Dr. Isaza's testimony that she examined Dr. Berland's raw data and test results and administered additional tests on her own. She spent 3 1/2 hours with Crump prior to her testimony. (R. 483-84)[2]

If the Appellee is offering its statement of the facts as an alternative to the Appellant's statement and is representing it as a summary of the evidence presented at trial, the Appellant wishes to make clear that the Appellee has presented a distorted and misleading picture of the penalty phase of the trial.

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[2] All of this information is included in Appellant's initial brief at 9 and note 8.

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.

Appellee listed a number of similarities between the murders of Areba Smith and Lavinia Clark.[3] What Appellee overlooked was the non-unique nature of the similarities. Moreover, the Williams Rule evidence was so pervasive that it became a feature of the trial and so prejudicial that any probative value was outweighed by the danger that the jury found Crump guilty only because he killed Areba Smith.

In cases cited by the Appellee, such as Duckett v. State, 15 F.L.W. S439 (Fla. Sept. 6, 1990); Holsworth v. State, 522 So.2d 348 (Fla. 1988); Traylor v. State, 498 So.2d 1297 (Fla. 1st DCA 1986); Oats v. State, 446 So.2d 90 (Fla. 1984); and Justus v. State, 438 So.2d 358 (Fla. 1983), the evidence of other crimes was merely additional evidence that the defendant was guilty; that the murder was premeditated (Traylor);[4] or not an accident (Oats and

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[3] Appellee's list of similarities (brief of Appellee at 10) contains several errors: (6) neither body was found in a cemetery; (7) testimony was conflicting as to whether the cemeteries were within one or five miles of each other; and, most importantly, (12) Appellee did not admit to arguing with Areba Smith while in the truck. He said that they disagreed while having oral sex in a field near a cemetery, at which time Smith pulled a knife. (R. 186-89, 266-67, 269, 836-38)

[4] The jury found Traylor guilty only of second-degree murder despite the collateral crime evidence.

Justus). In both Oats and Justus, the defendants confessed to the murders.[5] Oats, 446 So.2d at 92; Justus, 438 So.2d at 364. In the instant case, there was no direct evidence that Crump committed the murder. Although he confessed to the murder of Areba Smith, he told the detectives that he did not kill Clark.

In Duckett and Holsworth, the collateral crime evidence was of crimes other than murder.[6] Additionally, there was much direct evidence of guilt in both cases, including witnesses and fingerprints, aside from the collateral crime evidence. Conversely, in the case at hand, the state admitted that Crump could not be tried without the admissibility of the Williams Rule evidence.[7]

Buenoano v. State, 527 So.2d 194 (Fla. 1988), also cited by Appellee, is distinguishable because poisoning is such a unique manner of killing. Manual strangulation is a common method of killing. Similarly, the binding of hands is a common murder technique. Drake v. State, 400 So.2d 1217 (Fla. 1981).

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[5] In Rivera v. State, 561 So.2d 538 (Fla. 1990), also cited by Appellee, Rivera had confessed to a former employer and to several fellow inmates.

[6] The same was true in Rivera. The collateral crime evidence concerned a child that Rivera did not kill. As in Duckett and Holsworth, there was considerable direct evidence that Rivera committed the murder. See note 5, supra.

[7] Before he knew that the case hinged on the Williams Rule evidence, the judge was going to grant the defense motion to preclude it, subject to revisitation when the medical examiner testified at trial. He held an evidentiary hearing and reversed his intended ruling, again subject to revisitation at trial, so that the state could proceed with the case. (R. 841-48) It should be noted, however, that even if the state had not been able to try Crump for this offense, Crump would not have been freed because he is serving a life sentence for the murder of Areba Smith.

Appellee argues that the collateral crime evidence was necessary to establish the entire context of the crime.[8] Appellee's argument that the murder of Lavinia Clark would have been "incomprehensible to the jury" without explanation of his involvement in the Areba Smith case is totally specious. The only connection between the two crimes was the search of Crump's truck. There was no reason why the jurors needed to know how Crump became a suspect in the Clark homicide or why his truck was searched. They heard that a number of other men were suspects without knowing why. The jury needed only to know that Clark's driver's license, a hair fiber, and a ligature were found during a search of Crump's truck. The collateral crime evidence was introduced only to suggest that Crump had a propensity to commit murder.

The recent case of Henry v. State, 15 F.L.W. S54 (Fla. Jan. 3, 1991), is helpful in this regard. In that case, the two homicides occurred nine hours apart and the two victims were mother and son. The defendant took the son from the home after he killed the child's mother, his estranged wife. Nevertheless, this Court found that is was not necessary to tell the jury details of the son's murder to establish the entire context of the wife's murder. In the case at hand, there was no relationship between the victims. The homicides occurred ten months apart and were unrelated.

Appellee correctly noted that the number of pages of collateral crime evidence is not dispositive in determining whether that evidence became a feature of the case. Needless to say,

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[8] See brief of Appellee at 15-17.

however, the voluminousness of the evidence is some indication that the jury's attention was diverted from the crime charged. Although this Court once approved the introduction of 600 pages of collateral crime evidence,[9] that transcript must have been much longer than in the instant case. The trial transcript of the guilt phase in Crump, including voir dire, was only 410 pages long.

The reason the collateral crime evidence was so dangerous was because the jurors necessarily relied on it extensively to convict Crump. They could not have convicted him without it. If the jury found Crump guilty only because he committed the other crime, he was convicted on propensity alone and not because the jury found beyond a reasonable doubt that he committed the crime charged.

> The sanctioned use of similar fact evidence to establish a fact or facts in issue in a criminal prosecution continues to be fraught with the danger of convicting a person not for the crime charged, but for his criminal propensities or bad character. The concern is that "the jury may choose to punish the defendant for the similar rather than the charged act, or the jury may infer that the defendant is an evil person inclined to violate the law. Huddleston v. United States, ___ U.S. ___, ___, 108 S.Ct. 1496, 1499-1500, 99 L.Ed.2d 771, 780 (1988).

Snowden v. State, 537 So.2d 1383, 1383-84 (Fla. 3 DCA 1989). In this case, the similar fact evidence was not used to "establish a fact or facts," but instead was used to establish the case against Crump and to infer that he committed the instant murder because of an alleged propensity to strangle prostitutes.

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[9] Wilson v. State, 330 So.2d 457 (Fla. 1976). See brief of Appellee at 14-15, note 3.

ISSUE II

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

Appellee has attempted to distinguish the instant case from State v. Blasus, 445 N.W.2d 535 (Minn. 1989), because, in the case at hand, the prosecutor did not mention the notorious serial killings during his closing argument.[10] Nevertheless, the state's whole case was based on the argument that Crump killed Clark because the murder was committed in the same manner as the murder of Areba Clark, to which he confessed. In closing, the prosecutor urged the jury to convict Crump based on another murder. (R. 521) The jury may well have connected the state's argument to Malone's testimony to conclude that Malone was called in to testify because Crump was thought to be a serial killer. From here, of course, the jury would naturally have speculated that Crump may have killed other prostitutes.

Appellee also argues that Malone's testimony merely emphasized "the high caliber of work he had done and the confidence reposed in him by his superiors."[11] As in Blasus, however, Malone's credentials were already established. His testimony concerning his work in serial killings, during which he specifically emphasized a local case in which the defendant, Bobby Joe Long, killed prostitutes, was unnecessary and prejudicial. It is hard to

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[10] See brief of Appellee at 20.

[11] See brief of Appellee at 20.

believe that Malone's reference to the Bobby Joe Long case was not intended to infer to the jury that this was such a case.

Appellee inferred that the prosecutor was using Malone's testimony to convince the jury that whoever killed Areba Smith also killed Lavinia Clark because Malone, the serial killing specialist, was called in. This is the precise reason the testimony constituted harmful error. Malone's testimony was not "similar fact evidence." It was a blatant inference that Crump was a serial killer, not based on any evidence in the case, but because Malone specialized in such cases.[12] A new trial is required.

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.

Appellee's argument that defense counsel did not complain about the prosecutor's use of hearsay to minimize the Williams Rule evidence is groundless.[13] Defense counsel objected to the hearsay throughout the testimony. The trial judge twice overruled his objections. (R. 254-56) Defense counsel was not required to object

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[12] Without Malone's testimony emphasizing his work on serial killings, his testimony would have had little impact. He testified only that a strand of hair found in Crump's truck was consistent with Lavinia Clark's hair, and that it was forcibly removed. Crump admitted that Clark was in his truck and that they had an argument. The hair could have been forcibly removed by Clark herself while combing her hair or even scratching her head.

[13] See brief of Appellee at 21-22.

again when the prosecutor tried to justify his use of hearsay while arguing against the defense objection.

Defense counsel was certainly not required to request the testimony of Wayne Olds. Olds' testimony was favorable to the state -- not the defense. Counsel properly objected to the state's introduction of Olds' testimony through hearsay. Had the judge sustained the defense objection, the prosecutor could then have decided whether to call Wayne Olds.[14]

Appellee's characterization of the details about other suspects as "gossip and third hand innuendo,"[15] suggests that information gathered by law enforcement officers during their investigations is unreliable. If this is so, Detective Parrish's hearsay testimony concerning Wayne Olds's description of the truck and the search of Crump's truck was unreliable and should not have been admitted. The "similar fact evidence" concerning another suspect, Clayborn Shepherd, who allegedly committed two or three similar crimes, was as crucial to the defense case as was Parrish's "similar fact evidence" to the state's case.

Defense counsel "chose not to" offer the evidence that semen was found in Smith but not Clark[16] only because the defense was backed into a corner and forced to choose between that evidence and last closing argument. Both were important rights. Because of

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[14] This last minute witness would, of course, have presented a discovery violation and necessitated a Richardson hearing. See Richardson v. State, 246 So.2d 771 (Fla. 1971).

[15] See brief of Appellee at 24.

[16] See brief of Appellee at 25.

the defense choice, the jury was not permitted to hear the primary difference between the two homicides. Because "death is different" and an erroneous verdict may result in the death of an innocent person, it is especially important that the jury hear all relevant evidence. Malone's excluded testimony concerning the contents of the FBI report was no different than Detective Parrish's testimony revealing what the experts and witnesses reported in the Areba Smith case. The trial judge used a double hearsay standard to exclude relevant evidence, thus denying Crump a fair trial.

ISSUE V

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.

Appellee argues that Crump's assertion that he and Clark did not struggle in the truck is contradicted by Malone's testimony that a hair strand found in Crump's truck was forcibly removed from Clark's head. In fact, however, Clark may have pulled the hair out while combing her hair or scratching her head. She may have pulled it out earlier and it merely fell off her clothing while she was in Crump's truck. The fact that the hair was forcibly removed does not prove that Clark and Crump struggled in the truck.

Although Crump's explanation that he hid Lavinia Clark's driver's license behind an electric meter box seems curious, it does not suggest, as does the Appellee, that he was trying to keep it from law enforcement officers. If that were the case, he would

have left it in Clark's purse which, apparently, was destroyed or lost because it was not admitted as evidence in the case. Crump's explanation had no bearing on whether he committed the murder. There was no reason for him to fabricate an implausible story.

Contrary to Appellee's assertion,[17] Crump provided a reasonable hypothesis of innocence in his explanation to law enforcement officers as to Clark's presence in his truck. Although Crump did not testify, the state introduced this reasonable hypothesis of innocence through law enforcement officers. There was nothing in the collateral crime evidence that was inconsistent with Crump's reasonable hypothesis of innocence. Just because he killed one prostitute -- which he admitted -- does not prove that he killed another.

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.

Although the Third District Court of Appeal sustained a comment comparing defense counsel's argument to a "squid" attempting to cloud the water,[18] that same court recently reversed because of the prosecutor's attacks on counsel and the accused.

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[17] See brief of Appellee at 33.

[18] Williams v. State, 441 So.2d 1157 (Fla. 3d DCA 1983). See brief of Appellee at 42.

Alvarez v. State, 16 F.L.R. D106 (Fla. 3d DCA Jan. 2, 1991). In Alvarez, the prosecutor argued, "don't let the defense confuse you" and "if you are . . . trying to insult somebody's intelligence, as the defense is really doing today . . . ." The prosecutor also called the defendant "a madman, a violent animal" and asked the jury to "[e]xcise this cancer from society." Id.

In the instant case, the prosecutor warned the jury that the defense would try to "cloud the water so that you can't see clearly . . . in the hopes that Michael Tyrone Crump can slither away from justice." This is strikingly similar to the comments in Alvarez and comparable to those in Gomez v. State, 415 So.2d 822 (Fla. 3d DCA 1982) (reversed because jury urged not to let victim "walk away without justice"); see also Rosso v. State, 505 So.2d 611 (Fla. 3d DCA 1987); Jackson v. State, 421 So.2d 15 (Fla. 3d DCA 1982) (prosecutorial attacks on defense counsel).

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.

In Shell v. Mississippi, 498 U.S. ___, 111 S.Ct. 313, 112 L.Ed.2d 1 (1990), the Court found the "heinous, atrocious or cruel" aggravating factor constitutionally insufficient, even with the following limiting instruction:

> The word heinous means extremely wicked or shockingly evil; atrocious means outrageously

> wicked and vile; and cruel means designed to inflict a high degree of pain with indifference to, or even enjoyment of the suffering of others.

112 L.Ed.2d at 4. In the instant case, the trial court gave no limiting instruction as to the "cold, calculated and premeditated" aggravating instruction which is even more vague because of this Court's interpretation that there must be "heightened premeditation." Because Florida attaches great weight to the jury's sentencing recommendation, it is important that the aggravating factors be properly defined for the jury. We again request that this Court reconsider this important constitutional issue.

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.

None of the "facts" surrounding the homicide,[19] as set out by the Appellee, support the judge's finding that the homicide was cold, calculated and premeditated. Clark was killed ten months earlier than Smith. The similarity of the second killing would support premeditation only for the second killing -- not the first.

Appellee argues that this case is distinguishable from Holton v. State, 15 F.L.W. S500 (Fla. Sept. 27, 1990), because the murder in Holton may have been committed during a sexual battery,

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[19] See brief of Appellee at 47-48. As to Appellee's claim that the hair which was forcibly removed from Clark's head refutes Crump's claim of no struggle, see page 11 and note 12, supra.

raising a felony murder theory. The same is true in the instant case. Perhaps Crump would not agree to Clark's fee for prostitution and raped her. Her body was nude when it was found.

Appellee's argument that heightened premeditation was shown by Crump's "pattern" of picking up prostitutes, etcetera,[20] highlights the danger of the **Williams Rule evidence -- that just because the defendant committed one homicide, the jury will assume he committed another.** The strangulation of Areba Smith is but one incident and does not constitute a pattern.

ISSUE X

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

In this argument, Appellee again refers to the trial court's decision to disallow the prosecutor to question Crump's mother about an alleged incident when he was in school.[21] Because the court sustained defense counsel's objection, we do not even know whether the incident occurred. Furthermore, because the judge excluded it, he should not consider it as detracting from the mitigation, and he should certainly not consider it as nonstatutory aggravation. We can discern no reason why Appellee mentioned it here unless Appellee hopes it will influence this Court by portraying the Appellant as a "bad boy" when in school.

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[20] See brief of Appellee at 49.

[21] See brief of Appellee at 52. Appellee also included this excluded evidence in his statement of facts. See note 1, supra.

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.

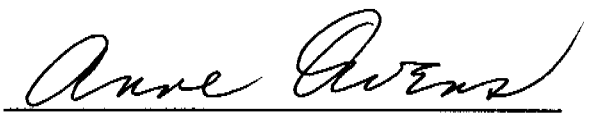
Appellee argues that this Court has never found the death penalty disproportionate for a "serial killer." We wish to point out that Crump is not a serial killer. The killing of Areba Smith does not constitute a series. Had the Williams Rule evidence not been admitted, Crump would undoubtedly have been acquitted of Lavinia Clark's murder. Crump was convicted only because the trial court admitted this prejudicial evidence.

Appellee's closing request that this Court "reject the defense invitation to expand the disproportionately [sic] analysis to award immunity from the electric chair merely because [Crump's] selected victims were black prostitutes or otherwise were not of significant socio economic [sic] status" is reminiscent of the prosecutor's opening lecture to the jury, insinuating that they might find Crump less guilty because his victims were prostitutes. (See Issue VII, supra.) It insults the integrity of both undersigned counsel and this Court.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Robert Butterworth, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, on this ~~28~~ 29th day of January, 1990.

Respectfully submitted,



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