IN THE SUPREME COURT OF FLORIDA

ROBERT JOE LONG,

Appellant,

vs.

Case No. 74,017

STATE OF FLORIDA,

Appellee.

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

INITIAL BRIEF OF APPELLANT

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT
FLORIDA BAR NO. 0143265

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STATEMENT OF THE CASE AND FACTS

Robert Long was charged in Pasco County by indictment filed December 6, 1984 with first degree murder in the death of Virginia Johnson (R2711). After a trial in April, 1985, he was convicted and sentenced to death (R3326,3264-68, 3271-72). The conviction and death sentence were overturned on appeal when this Court found that Long's confession was obtained in violation of his right to counsel. Long v. State, 517 So.2d 664 (Fla. 1987), citing Miranda v. Arizona, 384 U.S. 436 (1966) and Edwards v. Arizona, 451 U.S. 477 (1981). After an unsuccessful attempt ta impanel a jury in Pasco County, a change of venue was granted, and the retrial was held in Fort Myers (R3482-83,3498). The jury returned a guilty verdict and a 9-3 recommendation of death (R1425,2187,3754, 3787). The trial judge imposed the death penalty (R3799-3809,4038-41), and this appeal follows.

A. Pre-Trial

Before trial, the state filed notices of intent to use Williams rule (collateral crime) evidence (R3274-76,3396-97), along with extensive Williams rule witness lists. The collateral crime evidence included nine Hillsborough County homicides, and the kidnapping and sexual battery of Lisa McVey. The defense moved in limine to exclude the evidence of other crimes, contending, inter alia, that there was no unique similarity between the Williams rule crimes and the charged offense, and that the collateral crime evidence would become the feature of the trial contrary to the requirements of Williams v. State 117 So.2d 473 (Fla. 1960) and Randolph v. State, 463 So.2d 186 (Fla. 1984)(R.3383,3381-84,3435-37, see R2616-19,2627-31).

After a pre-trial hearing on August 19, 1988, the trial court ruled that the state would be allowed to introduce Williams rule evidence as to four of the Hillsborough County murders, in which the victims were Lana Long (also known as Ngeun Thi Long and Peggy Long), Michelle Simms, Karen Dinsfriend, and Kim Swann (R2634-35). The five other Hillsborough cases were excluded. The trial court also stated:

> And I think I have to exclude the Lisa McVey [incident] on lack of similarity there. There is no death.
>
> MR. VAN ALLEN [prosecutor]: On the theory of Williams Rule?
>
> THE COURT: On the Williams Rule, right. That's all I'm dealing with now.

(R2633-34)

The trial court reiterated that he was excluding evidence of the rape of Lisa McVey because there was insufficient similarity "for her to be a Williams Rule situation" (R2636,2637-38). The prosecutor suggested that he might have some basis other than Williams rule to put her on (R2636).

At a subsequent hearing on October 24, 1988, the prosecutor asserted that he did not intend to use the Lisa McVey criminal episode "as a pure Williams Rule thing" (R2216). Instead, he intended to introduce it to show how appellant was arrested (R2216-18). Over strenuous defense objection (R2217,2219-20,2333-36), the trial court denied the motion in limine as to the McVey crimes, indicating that he would rule on the admissibility of that evidence at the time it was offered during the trial (R3582,2234-36). Defense counsel asked:

> Is the Court indicating at this time that you're going to let the State go into specific details of the McVey abduction?
>
> MR. VAN ALLEN [prosecutor]: We don't intend to do that.
>
> THE COURT: So long as they are relevant.
>
> MR. ALLWEISS [prosecutor]: We don't intend to make a feature of it.
>
> THE COURT: The rape itself, the crime itself?
>
> MR. ALLWEISS: We're not going to go into that.
>
> THE COURT: But the investigation appears that some of those fibers collected from the car were compared with those found in the murders, so it sounds like to me that those are relevant.
>
> MR. ALLWEISS: We'll only make it relevant to the point where we put them together and all the -- how should you say, the screaming, hollering and all the specific details we do not intend to make a feature out of what happened to Lisa McVey. It's not going to be a feature; just a connecting of the two of them together.
>
> THE COURT: Sounds to me like they'll say it was a sexual battery.

MR. ALLWEISS: That's all we're going to do,

(R2234)

At the beginning of the trial, on November 1, 1988, defense counsel moved for a mistrial after the prosecutor's opening statement, on the ground that:

> They talk about the McVey case and the details of the rape contrary to the reasons that they gave to this Court about what they were going to use the McVey case for. They convinced this Court that they were not trying to introduce it as Williams Rule and they were not going to go into details of the rape of Lisa McVey. And he has already given the jury the details of that rape and told the jury how she is going to testify to how she was raped and abducted. And that is subject to Williams Rule, and I object.

(R532)

B. The Charged Crime - The Murder of Virginia Johnson

Virginia Johnson was reported missing on November 18, 1984 by Sharon Martinez, an acquaintance from the Alamo Liquors lounge on North Nebraska Avenue (R533-34,536-37). This is a seedy area in Tampa known for prostitution (R541). According to Ms. Martinez, Virginia Johnson was a prostitute, a "real bad" alcoholic, and an abuser of drugs including cocaine and heroin (R535-36,540-41). At the time she was reported missing, nobody had seen her for two or three weeks (R536-37)

On cross-examination, Ms. Martinez stated that Virginia Johnson was a natural blonde; she was positive about that (R540).

Alvin Terry Duggan was a friend of Virginia Johnson's; she had stayed with him for a period of time (R543). He did not know that she was a prostitute, but he had heard rumors to that effect (R544,547). On one occasion -- he did not recall the date -- he took Virginia to the County Health Department (R544). The last time he saw her was on a Thursday in October, 1984; she was walking up to the Alamo Lounge to get a pack of cigarettes (R544). Duggan testified that Virginia owned a floating heart necklace which she always wore (R543).

Bernadene Herman, a nurse with the Hillsborough County Health Department VD Clinic examined Virginia Johnson on October 15, 1984 (R549-51) She found

indications of gonorrhea, and she told Virginia to come back in a week (R551-52) The tests came back positive, but Virginia did not return to the clinic (R554).

On November 6, 1984, Linda Phethean, a riding instructor, and her pupil Candy Linville were riding their horses up a dirt road in Pasco County when they came upon the skeletal remains of a body (R558-61,566-67). The bones were 25-30 feet from the road, in the high grass (R561-65). The women went to the office of a nearby mobile home park and asked them to call the Sheriff's Department (R561,567-68).

Pasco County deputy sheriff Chris White arrived at the scene, and Ms. Phethean and Ms. Linville showed him where the bones were (R571-72). The body was badly decomposed (R574). There was a scarf or cloth tied around the neck (R574). A little bit of dark or grey hair remained on the skull (R574-75). Inside the discolored area of the grass, he found a bunch of blonde hair and a pair of women's underwear (R574).

FDLE crime lab analyst Barbara Vohlken went to the scene off Brumwell Road (R578). A grid search of the area was conducted (R581-83). Items of evidence including bones, hair, clothing, and shoelaces were collected (R583-94). No red fibers were found in the grid search (R594).

Ken Hagin of the Pasco County Sheriff's office also responded to the scene (R642-43). Grid searches were conducted on November 6 and 7 (R646-48,651-52). A knit blouse was wrapped around the bones of the neck; underneath the blouse was a shoelace which appeared to have been used as a ligature (R645,647). There was also a gold necklace with a floating heart pendant (R646-47). No red fibers were found during the grid searches (R665).

Detective Hagin attended the autopsy on November 8, 1984, where it was determined that the victim was a white female, about 5'5" (R653-54). Appellant was arrested in Tampa on November 16 (R654). On November 19, Hagin spoke with Sharon Martinez, who had reported that hew friend Virginia Johnson had been missing for about a month (R654-55). Hagin went to Terry Duggan's house and obtained some of Virginia Johnson's personal effects (R655-56). Her parents were contacted and her dentist -- Jack Gish of Danbury, Connecticut -- was located (R655-56). It was confirmed through her dental records that Virginia Johnson was

the person whose remains had been found in Pasco County (R659-60). The prosecutor asked "This all occurred after Bobby Joe Long had been arrested?" and Detective Hagin answered "Yes" (R660-61).

Five Pasco County Sheriff's deputies, Karen Collins, Thomas Maston, Janice Baker, John Jerkins, and Barry Arnew were called as chain of custody witnesses to show that nobody tampered with the crime scene (R667-77). Petra Semple and her husband William Semple transported the remains to the Medical Examiner's office for the autopsy (R677-81).

Dr. Joan Wood, the medical examiner, went to the crime scene on November 6, 1984 (R682,685). The detectives asked her to gather a large amount of grass from the area where the body was found, and advised her to be on the lookout for fibers that might be present, particularly red ones (R685-86). Dr. Wood participated in the grid search, but did not see any red fibers at that time (R688,710-11). There was a darkened area in the grass where the bones were, caused by body fluids leaking during decomposition (R686-87). Dr. Wood estimated that the body had been dead from ten to fifteen days, and that it had been in that field for the majority of that period (R687).

At the autopsy, it was determined that the remains were those of a white female (R689). X-rays did not reveal any bullets or any fractures to the bones (R689). Dr. Wood removed a knit tank top shirt from around the neck area (R692). Underneath that was a shoelace wrapped twice around the neck and double knotted (R692). The knots appeared to Dr. Wood to be square knots, and there was nothing remarkable about them (R713). The two ends of the shoelace hung down from the knots; at the tip of one end was a small loop (R692). The circumference of the shoelace was nine and one-eighth inches (R692). Entwined in the shoelace was a necklace with a floating heart pendant (R691,693-94). A second shoelace had been found at the crime scene, near the small bones of one hand (R694-95). There were two loops tied in this shoelace, each big enough for a human wrist, measuring eight and one-fourth inches apart (R695).

In Dr. Wood's opinion, the cause of death was "homicidal violence, probably garrotment" (R699). She based her opinion an the victim's previous state of health, her young age, the fact that she was found semi-nude in a field not in

her county of residence, the shoelaces around her neck and wrists, and the absence of any type of injury to the bones other than injuries caused by animal activity (R700). However, Dr. **Wood** could not absolutely rule out other causes of death (R714-15). She acknowledged that it is possible to kill someone or render them unconscious by striking them with **a** blunt object without it showing **up** in the bones of the skeletal structure (R715). She further acknowledged that she did not know whether the ligature was placed araund the neck before or after death (R715). Moreover, even assuming that garrotment was in fact the cause of death, Dr. Wood could not say whether the victim was conscious or unconscious when that occurred (R715-16).

Dr. Curtis Wienker, **a** professor of anthropology at the University **of** South Florida, attended the autopsy (R717-19). Fromhis study of the skeletal remains, he concluded that the bones were those of a Caucasian female, age approximately 19 or 20, 5'5" tall (R719).

Dr. **Jack** Gish, a dentist from Connecticut, and Dr. Kenneth Martin, a forensic odontologist, testified regarding the identification of Virginia Johnson by her dental **records** (R723-31).

Deputy Sheriff William Ferguson participated in the grid searches at the crime scene, and also attended the autopsy (R732-33). He, along with crime scene technician Curtis Page and property supervisor Debbie Maffett, were chain of custody witnesses for several of the items of evidence obtained at the scene or at the Medical Examiner's office (R733-43).

C. The Abduction and Rape of Lisa McVey, and the Arrest of Appellant for that Crime

The state next called **Lisa** McVey (R770). Defense counsel objected:

> Your Honor, at this time I need to renew my motion in limine *to* prohibit this witness from testifying based on Williams Rule evidence. At the prior hearing, Your Honor, the **State** represented that they **were** not going to put Ms. McVey on but just her statements were going to be used, that based upon information provided by Ms. McVey, they obtained a search warrant and an arrest warrant for **Mr.** Long.
>
> This Court ruled that that much would be relevant. I argued what they were going to do is put her on and take her through the events that relate to her. I sub-

mit that's not relevant to this proceeding whatsoever and it would make it a feature of this case.

Furthermore, Judge, I would submit that it's not material to this case. The only thing material -- it's going to be put on for the truth of what happened and not for what was said or to show the context of how the police officers acted. By putting Ms. McVey on for the truth of her testimony, it clearly is inadmissible under the Williams Rule and, I submit, makes it the feature of this case.

It is not relevant. None of the circumstances of her abduction and kidnapping and sexual battery are similar to this case.

THE COURT: Mr. Eble, I think it is Williams Rule. I overruled that. It is admissible. I will accept the renewal of your motion, but my ruling is going to be the same.

(R770-71)

On the question of the Williams rule instruction, defense counsel asked:

Which one are you going to pick? We had this argument last week about whether this was being offered for identity. And you people took the position you were not offering it for identity because it's not similar. I submit it can't be offered for identity, and I would cite the Drake case, Your Honor.

MR. VAN ALLEN [prosecutor]: Judge, identity -- can I have just a second, Judge?

THE COURT: Yes.

MR. EBLE: That's just what the Drake case said couldn't be done with this type of evidence.

MR. VAN ALLEN: "Motive, plan, and identity."

MR. EBLE: Your Honor, I would submit for those three reasons it has to be a fingerprint; it has to be similar fact evidence. This evidence is dissimilar; it is nothing like Virginia Johnson's case or any other Tampa homicide. I would cite the Drake case, that this is going to be the feature of this trial.

R772-73)

Nevertheless, the jury was instructed that the evidence of other crimes committed against Lisa McVey was to be considered only "for the limited purpose of proving motive, plan, and identity on the part of the Defendant'' (R773-74).

Lisa McVey testified that in November 1984 she was seventeen years old and was working at a Krispy Kreme Donut Shop in Tampa (R774-75). On November 3, she got off work around 2:30 a.m. and began to ride home on her bicycle (R775). She did not make it home because she was abducted at gunpoint (R775). After being

dragged into the passenger seat of a car, she was told to strip and she did so (R776-77). She was very scared (R777). Lisa never did see the man who had abducted her, because she was at all times either blindfolded or under orders to keep her eyes shut (R776). However, she could see underneath the blindfold that she was in a maroon car with a white interior, with the word "Magnum" on the dashboard (R778). She could tell from the sounds that they were on the Interstate (R778). Her hands were tied but not very tightly (R778-79).

They arrived at an apartment building (R777-79). Lisa (who had gotten dressed again) and her abductor walked up a flight of stairs (R779-80). Once inside, she was raped repeatedly; four or five times in rapid succession (R780, 789-90). She saw and felt a gun (R780). She also heard he had a knife, but she never saw or felt a knife (R780). The rapes stopped several hours before daylight (R789,791). Lisa's assailant slept throughout most of the following day (R790-92). He had untied her hands and feet before daybreak, but she did not try to get away, thinking that if she cooperated he wouldn't kill her (R780-81, 790-91).

At about 3:00 a.m. the next morning, after about 24 hours in the apartment, the man woke Lisa up, told her it was time to go, and asked her where she lived (R781,788,795). She did not remember whether she was blindfolded on the way back (R795-96). She noticed that they stopped at an automatic bank teller machine and a gas station (R782-83). In that vicinity she saw two hotels, a Howard Johnson's and a Quality Inn (R782-83). The man then dropped her off in a parking lot at Hillsborough and Rome (R781,783). He told her to describe him to the police as ugly with a beard (R783). Lisa said she wasn't going to tell the police, but he said he knew she would (R796-97). [His actual description, as far as Lisa was able to see or feel, was a pockmarked face, a mustache but no beard, small ears, and (she thought) brown hair (R783)].

After her release, Lisa fell to the ground, "and I just sat in a state of shock" (R784). Then she got up, walked home, and told her grandmother and her [the grandmother's] boyfriend what had happened (R784). They called the police and spoke to an investigator named Polly Goethe (R784). Lisa described her

assailant and his vehicle to Detective Goethe, and gave her the clothing she was wearing (R785).

At the end of direct and again at the end of cross, defense counsel moved for mistrial on the grounds of improper Williams rule and that the collateral crime evidence was becoming the feature of the case (R786,801). The trial court denied the motions (R786,802).

Detective Polly Goethe of the Tampa Police Department interviewed Lisa McVey and got descriptions of the suspect and his car (R803-05). This information was given to Patrol Division so that officers on the street could be looking for the vehicle (R805).

The only location in Tampa where there was both a Quality Inn and a Howard Johnson's was at the intersection of Fowler Avenue and I-275 (R806). Detective Goethe found a bank in the 5800 block of Fowler Avenue that had a transaction on their automatic teller machine at 3:49 a.m. on the morning Lisa was released (R807). A few days later, Detective Goethe learned from bank records that the PIN number was owned by Robert Long (R807). Also, in checking who in the State of Florida owned Dodge Magnum automobiles, Detective Goethe determined that a person named Robert Joe Long owned such a vehicle (R807-08). Meanwhile, she learned that two Tampa police officer, Wolfe and Helms, had seen a vehicle generally matching the description and stopped Robert Joe Long on November 15 (R808-09). Based on the information she had obtained from Lisa, and from the two officers, the bank, and the Department of Motor Vehicles, Detective Goethe obtained warrants for appellant's arrest for the sexual battery and kidnapping of Lisa McVey, and for searches of his automobile and his apartment (R808-09).

Detectives Charles Wolfe and Carson Helms had received the information that a maroon Dodge Magnum automobile was possibly involved in a case then under investigation; the kidnapping and rape of Lisa McVey (R812-13,824). On November 15, 1984, they saw such a vehicle traveling north on Nebraska Avenue (R813,824-25). The driver appeared to fit the very general description they had; "white male, possibly early thirties, with possibly dark brown hair and a short mustache" (R813-14,824-25). The officers made a U-turn, used their lights and siren, and pulled the vehicle over (R814,825) The driver was asked to step out

of the vehicle and produce identification (R814-15,825). He gave Detective Helms a driver's licence which identified him as Bobby Joe Long (R815,825). The detectives fabricated a story that they were investigating a hit-and-run accident in which the suspect driver had pulled a gun on a city official (R815-16,825). They said they were under a lot of pressure from downtown to stop all red Dodge Magnums (R816). Detective Wolfs acknowledged that none of this was true, and that the purpose of the story was to see if they could get consent to search the car (R816,819-21). Appellant declined to allow a search, but he did agree to let them photograph him and his car (R817,826,831). He was then allowed to leave. A few minutes later, the officers went to the address he had given them (R817, 826). The Dodge Magnum was there (R826). The building was a small strip of stores with what appeared to be apartments upstairs (R817-18). Wolfe and Helms relayed the information they had learned to Detective Price (R819,827).

Lieutenant Randy Latimer of the Hillsborough County Sheriff's Office testified that he, along with Sergeant Bob Price, interrogated appellant at the Department on November 16, 1984, in connection with the rape and kidnapping of Lisa McVey (R837). Defense counsel at this point renewed his Williams rule objection concerning the McVey case, as well as all previous motions regarding the McVey confession (R837-38). The trial court reinstructed the jury that it could consider the evidence of other crimes only to prove "motive, plan, and identity on the part of the Defendant" (R839). Lt. Latimer then testified that, after being advised of his Miranda rights, appellant admitted that he had abducted Lisa McVey from a bicycle on the street, taken her to his apartment, raped her, threatened her with a firearm, and returned her to her house. (R840)

Defense counsel did not cross-examine Lt. Latimer, but he again renewed his Williams rule motion "in that this is becoming the main feature of the case" (R840). The court replied "Once in a while is all right, but unless you have something in particular, I'm not going to keep interrupting the proceedings" (R841).

The arrest warrant for the kidnapping and rape of Lisa McVey was executed on November 16, 1984 (prior to the interrogation by Detectives Latimer and Price) (R842-44,847,857-58). As appellant came out of a movie theater in the Carrolwood

section of Tampa, he was approached in the parking lot by several undercover officers who put him on the ground (R842-43,847,857-58). Appellant was handcuffed and placed inside a vehicle where officers read him the search warrant for his car (R844-45,858). The Dodge Magnum was impounded and removed to the evidence garage (R848,858-60). Detective Steven Moore vacuumed the various sections of the car's interior, and placed the sweepings into envelopes (R852-54, 860-61). The carpet from the interior of the vehicle was removed and sent to the FBI lab (R862).

D. Hair and Fiber Evidence - Virginia Johnson

FBI agent Michael Malone, a specialist in hair and fiber analysis, testified that in each of the two sets of sweepings -- one from the front seat and one from the back floorbaard of appellant's car -- he found one blonde Caucasian hair which was consistent with Virginia Johnson's hair sample (R877-79,886-91). The hairs had been forcibly removed (R891). While Malone found no dissimilarities (R891), he acknowledged that, unlike fingerprint evidence, hair comparison is not an absolute means of personal identification; a hair cannot be matched back to a particular person to the exclusion of all others (R884,905).

Malone testified that he can look at the shaft of a hair and tell whether someone bleaches their hair, dyes their hair, or has a permanent (R881). Malone further testified that the two hairs from the sweepings from appellant's car had been bleached, and were not naturally blonde (R910).

Malone also went through the hair mass of Virginia Johnson which had been collected at the crime scene, and found a single red lustrous nylon carpet fiber (R896,899). He explained that a delustering agent is what you put in a product to keep it from being shiny (R893). "I've got a suit on. And I don't want it shiny, so they put in a delustering agent in the fiber. And if you have something like a rug that you do want shiny -- shiny fibers -- you do not put a delustering agent in" (R893). A lustrous fiber, according to Malone, is "typical of what you might find in a carpet" (R900). The same is true of the trilobal shape; as Malone explained "If you see a fiber with this trilobal shape, we know

this has to be rug fiber. That's the only kind of fiber that has a trilobal shape, But again, it could be polyester or a nylon" (R894).

Malone compared the single red lustrous nylon trilobal fiber he had found in Virginia Johnson's hair mass with a sample of the carpet from the interior of appellant's car and found that they had the same class characteristics (R897, 900). From his testing, he concluded that the fiber from the hair mass and the fiber from appellant's automobile carpet must have been manufactured or at least dyed by the same carpet company (R901,912-13).

Malone again acknowledged on cross that nylon trilobal fibers are exclusively carpet fibers, and are "by far the most common" carpet fibers manufactured throughout the country (R910). He further acknowledge that the evidentiary value of common fiber is less than the evidentiary value of rare fiber (R913-14).

> MR. McCLURE [defense counsel]: Now it's not your job, I guess, to determine how much carpeting is out there of a particular kind.
>
> AGENT MALONE: Right.
>
> Q. And I don't suppose you know how many yards, in fact, of this carpeting were manufactured.
>
> A. Well, I do know that it's the original carpet from Chrysler. But, no, I don't know how many cars it was put in or how many yards were made.
>
> Q. Or where else this carpet might have been installed by the manufacturer.
>
> A. That's correct.

(R914)

E. The CBS Videotawe

Prior to trial, the defense had moved in limine to preclude the state from introducing a segment of a videotaped interview of appellant by Victoria Corderi of CBS News (R3527-28). Ms. Corderi had interviewed appellant for approximately an hour and a half on November 25, 1986 [1] (R2503,1323-24). CBS edited the interview and selected four "sound-bytes", totalling not more than a minute or so, which were broadcast on December 26, 1986 (R2503,2249,605,608-09,661). These

[1] The interview took place while appellant was on Death Row, prior to the decisions in his original appeals.

statements (said at different points in the interview, but edited so as to run them together) were:

> I don't know, you know, all in all I must have destroyed about a hundred people (see R605-06,942,945).
> ... [I]t was like A, B, C, D. I'd pull over, they'd get in. I'd drive a little ways, stop, pull a knife, a gun, whatever, tie them up, take them out. And that would be it (R4061, see R606, 942,945,950). And the worst thing is, I don't understand why, I don't understand why (R4055, see R9945-46,950).
> I figured it was so obvious there's something wrong with me, that when they did catch me, that they would fix me (R4054, see R606,946).

The motion in limine was based on the defense's inability to obtain the "outtakes" of the Corderi interview (due to CBS' insistence that it was privileged to withhold those portions of the interview which it had edited out of the broadcast), and also on Williams rule and relevancy grounds (R3528). At a pretrial hearing on October 24, 1988, the prosecutor represented that the section of tape he had (i.e. the broadcast tape) "shows what we believe to be an admission made by Mr. Long concerning the deaths of the women in Hillsborough County" (R2247-48)(emphasis supplied).

Now, at trial, over numerous renewed defense objections including improper Williams rule, the court ruled that the state would be allowed to introduce most of what was on the broadcast tape [2] (R949-51). The attorneys approached the bench:

> MR. VAN ALLEN [prosecutor]: The rest is all Williams Rule.
>
> MR. ALLWEISS [prosecutor]: The rest of the evidence to be presented in the case is all Williams Rule. If the Court wants to give one general instruction to everything else that we're going to present, fram here on forward is all Williams Rule type evidence.

(R954)

Mr. Allweiss then backed off that statement to a certain extent, characterizing the CBS videotape as "a hybrid sort of thing" (R954). Before playing the tape, the court instructed the jury "Ladies and gentlemen, I think a lot of

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[2] The court excluded the line about destroying a hundred people as inflammatory (R949). The line where appellant says that he figured it was so obvious something was wrong with him that they would fix it was excluded as a self-serving declaration (R951).

the evidence that you are to receive today -- a lot of the remaining evidence in this case -- is going to be concerning evidence of other crimes allegedly committed by the Defendant", and that it could be considered only to prove motive, plan, and identity (R955-56). The CBS videotape was then played to the jury (R959).

F. The Murder of Lana Long

Prior to the state's presentation of its witnesses on four Hillsborough County homicides, defense counsel renewed his motion in limine regarding the Williams rule evidence (R834).

Two boys, Jason Westerman and Greg Adams, testified that around noon on May 13, 1984, they were hanging around near the dead end area of East Bay Road when they came upon a woman's nude body lying face down in a field (R865-66,867-69). They went back to Jason's house and told his parents, who called the police (R866,870).

Crime scene technician Daniel McGill of the Hillsborough County Sheriff's Office responded to the scene on East Bay Road and made plaster cast impressions of tire tracks (R960-63).

Judith Swann, also a Hillsborough crime scene technician, took photographs of the body which was found on East Bay Road (R964-67). She also collected a piece of white silk-like material from underneath the victim's head (R967-69).

Another Hillsborough County crime scene technician, Arthur Picard, attended the autopsy, where he obtained a piece of rope and a piece of cloth from the victim's wrist and hand area (R970-71). He also got a piece of rope which the medical examiner had cut from the victim's neck (R972).

The body was fingerprinted at the medical examiner's office (R990-92,1010-11). The police believed that she might be a missing person named Lana Long, also known as Ngeun Thi Long and Peggy Long (R981, see R993,1003). Fingerprint expert Royce Wilson went to the residence shared by Ms. Long and her boyfriend John Corcoran, and lifted latent prints from a drinking glass, a photograph cover, a perfume bottle, and other items (R980-82). When they were compared, the prints matched (R983-85).

John Corcowan testified that Lana Long was his fiancee (R993). She was employed as an exotic dancer at the Sly Fox Lounge on Nebraska Avenue (R996,999-1000). On May 14, 1984, after Lana had been missing for about a day, the police came to Corcoran's house and collected some personal items to dust for fingerprints (R994-98,1000). Defense counsel made a relevancy objection to certain of these items (including letters and notes exchanged between Corcoran and Ms. Long, and what were apparently magazine photographs depicting women in some sort of sexual activity), which was sustained (R995-99). Counsel also renewed his objection that the Williams rule crimes were becoming the feature of the case (R999).

The former owner of the Sly Fox Lounge, Herman Lamar Golden, testified that Lana Long was a dancer there; he identified her from a photo of her dancing in a different bar (R1002-03).

Dr. Charles Diggs, deputy associate medical examiner for Hillsborough County, performed the autopsy on Lana Long on May 14, 1984 (R1006-07). The body was markedly decomposed (R1007). There was a ligature around the neck (R1007). Her wrists were bound behind her back (R1009). The wrists were tied together, separated only by the knot (R1012-13). The cause of death was strangulation (R1010).

Corporal Lee Baker of the Hillsborough Sheriff's Department transported items of evidence, including the plaster tire casts, to the FBI in Washington, D.C. (R1014-16).

G. The Murder of Michelle Simms

On May 27, 1984, construction worker Louis Jordan was taking a morning walk near his home when he discovered a body (R1017-19). The location was Hillsborough County, north of Interstate 4, off Park Road (R1017-18).

At this point, defense counsel again renewed his Williams rule objections, and his contention that the other crimes had become the feature of the trial (1020-21).

Hillsborough crime scene investigator Donald Hunt went to the location where the body had been found (R1021-22). It was a wooded area (R1022). The body was mostly nude, except for a bloody green T-shirt holding her arms behind

her back (R1022,1030-31). Other articles of her clothing were lying in the limb of a tree (R1022,1025-26). The victim's arms were tied together and her throat had been cut (R1022,1029).

Tire tracks were observed at the crime scene (R1031). Deputy Hunt made seven plaster casts of the tire impressions (R1031-32).

The state moved into evidence three photographs of the victim (R1022-23) Defense counsel approached the bench:

> Judge, just to make it clear, again, I want to renew my previous objections, in particular, on this case. This is the cutting case, and I forgot to mention this before.
>
> This case is totally dissimilar on cause of death because of the cutting. There is no indication Virginia Johnson was cut.

(R1023)

At the crime scene, Hunt had collected a piece of string from the victim's stomach area (R1027). Later, at the medical examiner's officer, pieces of rope were removed from her arms and neck (R1028-29). While the victim's throat had been cut, the piece of rope around her neck had not been cut (R1029). The two pieces of rope were of different thicknesses (R1033). Both were like clothesline, not shoestrings (R1033).

Another crime scene technician, Arthur Picard, recovered a piece of red fuzz from the victim's thigh area at the M.E.'s office (R1034-35). He also obtained hair samples (R1035).

The victim was identified by her fingerprints as Michelle Denise Simms (R1035-38,1061-62,1064-66,1067-69). The prints taken at the M.E.'s office were compared with the prints from Ms. Simms April 30, 1984, arrest in St. Lucie County on traffic charges and for possession of cocaine andmarijuana (R1063-66).

Hillsborough deputy sheriff Steve Hawkins transported physical evidence in the Michelle Simms case to the FBI lab in Washington (R1070-71).

Dw. Lee Miller, associate medical examiner for Hillsborough County, went to the Simms crime scene on the day the body was discovered (R1072,1074). The victim was semi-nude, lying on her back, with her hands trussed and tied to her waist (R1074). She was bound with clothesline (R1079). She had obvious injur-

ies, including a cut throat (R1074). Dr. Miller estimated that she had been dead roughly twelve hours (R1074).

The next day, Dr. Miller performed an autopsy on Michelle Simms (R1073, 1075). He found:

> ...three different sets of injuries. The throat had been cut several times deep enough to sever large blood vessels and cause death; there were five impacts of the scalp causing lacerations or tears of the scalp and bleeding of the underlying brain beneath the skull; and there were also injuries to the muscles of the neck overlying the voice box and the skin of the neck, which together with pinpoint hemorrhages of the white of the eyes, characteristic of suffocation -- the whites of the eyes hemorrhages and the injuries to the neck indicated that, in addition to the cut throat and blows to the head, that Ms. Simms had been strangled to or near the point of death at one time or another before she died.

(R1075-76)

The causes of death were "exsanguination, that is bleeding or [hemorrhage]; asphyxiation, suffocation or strangulation; and closed head injuries" (R1077). The prosecutor asked whether the head injuries could have been caused by "a person striking Ms. Simms hard in the head with the butt or any part of a gun" (R1077). Dr. Miller replied that they could have been (R1077).

According to Dr. Miller, the strangulation-type injuries had to have come before the throat was cut, but he could not say at what point the blows to the head occurred (R1078). Therefore, Ms. Simms could have been unconscious at the time the ligatures were applied or at the time her throat was cut (R1078-79).

H. The Murder of Karen Dinsfriend

Prior to the testimony of Carl Nehring, defense counsel said "I want to make sure I renew all our motions and submit that the other ladies are becoming the main feature of the case. And I would ask for continuing objections -- forever" (R1081). The judge replied "Yes, sir" (R1081).

On October 14, 1984, Carl Nehring and James Singleton were hunting artifacts at Lake Thonotosassa when they came upon a woman's semi-nude body in an orange grove (R1082-83,1085-86). She was lying on her side in a twisted position, with her wrists bound (R1083,1086). A pullover shirt was pulled up to her neck and part way over her head (R1083,1086). It appeared to both Nehring and

Singleton that she had been dragged by the shirt from the road and around the fruit trees, and dropped underneath the trees (R1083,1086). Drag marks were visible on the ground (R1086).

Detective Steven Cribb of the Hillsborough Sheriff's Department responded to the scene (R1088). Over defense counsel's objection that the Williams rule victims had become the feature of the case, and that the photographs of their bodies "are clearly the most sensational aspect of this trial", the state introduced two photos of the Lake Thonotosassa victim (R1089-90). She was bound with different cords and shoelaces (R1095). There was a knotted shoelace on her wrist and around her neck which, as described by Cribb, "kind of hog-ties her together where it goes around her head and under her arms" (R1095,1097). Another knotted shoestring was on her leg and calf area, and a third on her ankle (R1096-97). Her feet and ankles were covered by a blanket, and her wrists were tied with a red bandanna (R1091,1097).

Detective Cribb testified that some red fibers were removed from the victim's jumpsuit at the crime scene (R092-93). Hair samples were obtained at the autopsy (R1094,1098).

On November 17, 1984, a second search warrant was executed on appellant's car (R1099). Cribb removed the carpeting from the inside of the trunk, and the molding between the trunk lid and the body of the trunk (R1099-1100). He also removed the tires from the vehicle (R1182). These items were packaged and sent to the FBI lab (R1099-1100,1182-83).

The Lake Thonotosassa victim was identified by her fingerprints as Karen Beth Dinsfriend (R1104-06,1107-08,1109-10). The prints taken at the autopsy were compared with Ms. Dinsfriend's booking fingerprint records from a January 4, 1984 arrest for solicitation for prostitution (R1104-06).

Associate medical examiner Lee Miller went to the crime scene when Karen Dinsfriend's body was discovered (R1110). He estimated that she had been dead from twelve hours to a day or more (R1111-12). She was dressed in a yellow short-sleeved sweatshirt, which was pulled around the waist (R1112). The lower legs were tied with what appeared to be a rust-colored bedspread (R1112). Around this were a torn blue sweatshirt and sweatpants, tied in a square or granny knot

(R1112). A long white shoelace was passed in a single loop around the neck, and was tied to the right wrist (R1112). Her hands were tied in the front by a red bandanna tied in a square knot (R1112). Her ankles were bound with a white cord, which appeared to be the drawstring from her sweatpants (R1112,1116).

From the ligature marks and injuries to the neck muscles, Dr. Miller determined that the cause of death was strangulation (R1112-13).

On cross-examination, Dr. Miller testified:

> DEFENSE COUNSEL: Now, Doctor, the ligatures on this case were different from the last one, were they not?
>
> A. Yes.
>
> Q. In fact, the ligatures on this woman, Karen Dinsfriend, actually had more bindings of different kind, did they not?
>
> A. Yes.
>
> Q. In addition to having bindings on the arms, we had the ankles bound together at this juncture, correct?
>
> A. Yes.
>
> Q. There's nothing really unusual about any of the knots that you found?
>
> A. No.
>
> Q. I assume you're not an expert in knots or knot tieing.
>
> A. No, I'm not an expert. But I can recognize knots other than the square or granny knot -- which I usually tie myself.
>
> Q. These are the common knots we all have a tendency to tie; is that correct?
>
> A. Yes.

(R1115)

Dr. Miller observed drag marks at the crime scene leading to the body (R1115). He could not rule out the possibility that she was killed elsewhere and then transported to the location where the body was found (R1115-16).

I. The Murder of Kimberly Swann

Defense counsel renewed his continuing · · rule objection and his contention that the other crimes had become the feature of the trial (R1119).

On November 12, 1984, Drake Reed was putting up a billboard when he saw what looked like a body, down the side of a hill or incline (R1120-21). Reed went down there, saw that the body was dead, and called the Tampa police (R1121).

The state next called Noah Swann (R1123). He testified that he was father of Kimberly Swann, and on November 11 or 12, 1984 he reported his daughter missing (R1123). Mr. Swann stated that Kim had developed a drug problem, and she was doing a lot of things he did not approve of (R1124). Kim had a baby who was a year and a half old, "[a]nd during that time, we did not have a problem with her as far as drugs. I believe that she was getting ready to get back into them" (R1124). She was living at home, but it was not uncommon for her to be gone a couple of days at a time, especially on weekends (R1124).

Defense counsel moved for a mistrial on the ground that Mr. Swann's testimony was irrelevant and inflammatory (R1125). The prosecutor contended that the testimony was appropriate because he reported her missing (R1125). Defense counsel continued:

> Here we've got a family member, and now he has testified about a child. It's not relevant. This has become the feature of this case, and the jurors are getting inflamed every time they see a dead body. Now they hear about a victim with a child from a family member.
>
> THE COURT: I'm not sure what the relevancy is. Are you going to call any more relatives?
>
> MR. VAN ALLEN [prosecutor]: No, just the one person who reported her missing.
>
> MR. ALLWEISS [prosecutor]: If he's talking about getting inflamed, the Defendant committed all these murders, Judge, and put himself in this position.

(R1126)

The court denied the motion for mistrial (R1126).

Tampa Police Department Detective Howard Smith went to the location off Orient Road where the body had been discovered (R1126-27). He found a pair of blue jeans and a blouse about ten feet from the body (R1132-33,1135). From the pockets of the jeans he obtained a driver's licence in the name of Kimberly Swann, and two traffic citations issued to the same individual (R1131-32). Adhering to the jeans were some orange-reddish fibers, which Smith removed and

placed in a sealed vial (R1134). The clothing and fibers, along with hair samples from the victim, were mailed to the FBI (R1135-36,1137-38,1139-41).

The Orient Road victim was positively identified by her fingerprints as Kim Swann (R1142-43,1144-45,1146-47,1151).

Dr. Lee Miller was recalled for the third time. He had gone to the Swann crime scene (R1147-48). "[T]he state of decomposition was about the same as the last case we discussed. Probably twelve hours minimum, possibly a few hours less, and maybe as much as a day" (R1148). The body was completely nude (R1149). No ligatures or bindings were found on the body or at the scene, but there were ligature marks on the neck and forearms (R1149-53). The marks on the neck went across the front of the neck towards the back, but not completely around it (R1149,1152-53). The marks were one above the other, indicating two loops of cord (R1149). The absence of ligature marks on the back of the neck did not necessarily mean that the ligature did not completely encircle the neck, but there was a good possibility that she was choked from behind with the ligature applied to the front of the neck (R1152). While the determination was made more difficult because of decomposition and lividity (due to the positioning of the body), Dr. Miller concluded at the autopsy that the cause of death was strangulation (R1147,1150-51).

On cross, Dr. Hiller testified:

> Q [by Mr. McClure]: [F]rom the actual markings you found, the ligature around the neck in this particular case, in Kim Swann, was quite different from the ligatures you found in Dinsfriend, was it not?
>
> A. It was different to the extent that I didn't see any marks going completely around the neck.
>
> Q. In fact, you didn't find a ligature around the neck.
>
> A. No.
>
> Q. And it was different from the other homicide as well, wasn't it?
>
> A. Yes.
>
> Q. In fact, the ligature marks that you found in the Swann case, which is the one that we're talking about, were really quite different from the bindings that were noted in the other two cases, weren't they?

A. Yes.

Q. And the ligature on the upper right arm -- did you say, Doctor -- or the left of her arm?

A. Well, there were marks across portions of the arm -- the right arm, yes.

Q. But the feet in this case were not bound?

A. There were no bindings marks on the feet,

Q. In fact, this body was completely nude as opposed to the other ones that were partially clothed.

A. Yes.

(R1152-53)

Dr. Miller stated that Kim Swann's body had been found lying on a steep incline or embankment, with the head tilted down (R1150-51). It appeared to him that the body could have been dumped from the roadway, and rolled down the embankment (R1154). There were scuff marks on the back and front of the body consistent with this possibility. Therefore, Dr. Miller acknowledged, it was equally possible that Ms. Swann was killed elsewhere (R1154).

J. Hair, Fiber, and Tire Track Evidence
(McVey, Lana Long, Simms, Dinsfriend, and Swann)

Hillsborough Detective Steven Cribb testified that he removed the tires from appellant's Dodge Magnum and took them, along with other items of evidence, to the FBI lab (R1182-83). The prosecutor showed him a composite exhibit consisting of two of the tires (R1183). Cribb identified one of these as a Vogue brand tire and the other as a Uniroyal (R1183).

Defense counsel renewed his objections to the Hillsborough County cases (R1184).

The state next called FBI agent David Attenburger, an expert in the field of tire tread comparison (R1185-87). Defense counsel objected to this testimony on relevancy grounds, noting that there were no tire tracks in the Virginia Johnson case (R1190). The trial court overruled the objection (R1192). Attenburger testified that he had compared State's Exhibit 47 (two of appellant's tires, a Vogue and a Uniroyal) with State's Exhibits 48 and 49 (twelve plaster tire casts from the Lana Long and Michelle Simms cases)(R1188-89,1193-95).

According to Attenburger, a Uniroyal is a very common, commercially available tire, while on the other hand a Vogue tire is extremely uncommon (R1194-95).

Two of the five plaster casts in the Lana Long case were suitable for comparison (R1195). However, Attenburger continued, "The problem I had in identifying areas -- the casts were taken six months earlier than the tire was recovered. During that time, wear changes and unique feature changes had occurred. Therefore I had no conclusion with regard to those two areas" (R1197). He did conclude that the Vogue tire corresponded to one of the casts in design and approximate size (R1197). With regard to the Uniroyal, the cast did not contain a lot of detail; it was "a design-only feature" (R1197). Therefore, Attenburger was only able to say that the two tires from appellant's car "could have made the tire impressions that were found near the place where Lana Long's body was found" (R1197).

Three of the seven plaster casts in the Michelle Simms case were suitable for comparison (R1197). These were a better quality tire impression, and contained more detail, than those from the Lana Long investigation (R1198). Once again, a substantial amount of time had passed from the time the casts were made until the recovery of the tires (R1198,1200). Moreover, Attenburger continued, plaster casts in Florida are very difficult to examine because of the sandy soil (R1200). Because of these two factors, "I lost a lot of that minute detail that I need" (R1200). Therefore, with the Simms tire impressions (as with those in the Lana Long case), Attenburger could not determine unique or individual characteristics, but only class characteristics (R1198,1200). He was able to say that appellant's Vogue and Uniroyal tires were similar in design and approximate size to the casts, and "could have made the tire impressions found at the Michelle Simms homicide scene" (R1198,1201-02).

The state recalled FBI hair and fiber expert Michael Malone. He testified that he received evidence concerning the murders of Lana Long, Michelle Simms, Karen Dinsfriend, and Kim Swann, and concerning the rape and abduction of Lisa McVey (R1206-07).

From the Lana Long crime scene, Malone received several pieces of fabric, which he processed for hairs and fibers (R1207-10). On one of these, a piece of

white silk material, he found a red trilobal lustrous nylon fiber (R1210). He compared this fiber with the interior carpeting of appellant's car, and found that it "was consistent with having originated from that rug" (R1211). The fiber was also consistent with the fiber from the Virginia Johnson case (R1213).

The carpeting from appellant's vehicle was processed and all of the hairs that were left on it were removed (R1212). Malone found one dark brown head hair of mongoloid origin which had been forcibly removed (R1212-13). He compared this hair with the hair sample from Lana Long (who was Cambodian), and concluded that they were consistent (R1212-13)

Malone also obtained fibers from the clothing of Michelle Simms, and one fiber that was reported as being from her thigh (R1215-19) He testified "There were more fibers from the Michelle Simms crime scene, and I detected a second completely different type of fiber that was not at the Lana Long crime scene.[3] And this was a delustered trilobal nylon fiber, a very, very unusual fiber in that it had a tremendous number of what are called voids" (R1220, see R1223). The voids are "a very distinctive feature" of delustered fibers (R1224). As Malone had previously testified, lustrous fibers are ordinary, typical carpet fibers (R900). Delustering agents are used when you want to keep a fiber from being shiny (R893,1223). "So if you would get a carpet with both lustrous and delustering fibers in it, you would tend to get highlights in that carpet. That's why it's done" (R1223).

Malone found both lustrous and delustered red carpet fibers on the clothing and thigh of Michelle Simms (R1219-20). "This was the first time [the delustered] fiber appeared" (R1223). In his opinion, the lustrous (i.e., common) fibers from Simms were consistent with the single fiber in the Lana Long case, the one fiber found in the hair mass from Virginia Johnson, and with the lustrous fibers in the carpeting of appellant's car (R1219-23). Malone further testified that he found in the carpet from appellant's vehicle delustered (and therefore uncommon) trilobal nylon fibers full of voids (R1220). According to Malone, the

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[3] This different type of fiber -- delustered as opposed to lustrous (and "very, very unusual" a5 opposed to extremely common) -- was not found at the Virginia Johnson crime scene either (See R892-902,910-14,1223).

delustered fibers from the Simms crime scene exhibited the same characteristics as the delustered fibers from appellant's automobile carpeting (R1220,1223-24)

When Malone processed the carpeting for hairs, he found a single light brown Caucasian head hair which had been forcibly removed (R1221). This hair was, in his opinion, consistent with having originated from Michelle Simms (R1221).

The next subject of Malone's testimony was the case involving the abduction and rape of Lisa McVey. He had processed Lisa's clothing, and:

> On every item of clothing that Lisa McVey was wearing --as it was reported to me -- when she was found, on every single item of clothing I was able to find the carpet fibers which matched the carpet fibers like Mr. Long's rug, both lustrous fibers and delustrous fibers.

(R1225)

Malone found a brown Caucasian head hair on Lisa McVey's shirt (R1226). He compared it with Lisa's hair sample, and determined that they did not match (R1226). He then compared it with appellant's hair sample, and concluded "that the brown head hair on Lisa McVey's shirt is consistent with having originated from Mr. Long'' (R1225-26).

Malone next testified that he had received the gold acrylic blanket which Karen Dinsfriend's legs were wrapped in when her body was found (R1227-28). On the trunk molding from appellant's car, Malone also found gold acrylic lustrous fibers (R1228-31). Upon microscopic examination, he concluded that the gold acrylic fibers fromthe trunkmolding were consistent withhaving originated from the blanket (R1231).

On the blanket, Malone found a brown Caucasian pubic hair (R1231). When he compared this hair with the pubic hair samples of Karen Dinsfriend and appellant, he concluded that it was inconsistent with Ms. Dinsfriend's hair, and that it was consistent with having originated from appellant. (R1232).

On the top and bottom of Karen Dinsfriend's sweat suit, Malone "found both types of red nylon carpet fibers, the delustered and the lustrous" (R1236, see R1232-22,1238). In his opinion, they matched the two types of fibers found in the carpeting of appellant's automobile (R1236,1238).

On the carpeting from the trunk of appellant's car, Agent Malone found a brown Caucasian head hair which had been forcibly removed, and which was consistent with Karen Dinsfriend's hair sample (R1235,1237).

In the Kim Swann case, a single red nylon carpet fiber had been found on her body, and more red nylon carpet fibers were removed from her jeans and shirt (R1239-42). According to Malone, they matched the fibers from the interior carpeting of appellant's car (R1242). Malone did not specify whether the fibers in the Swann case were lustrous, delustered, or some of each, but he stated that they matched the fibers from Lisa McVey, Lana Long, Michelle Simms, Karen Dinsfriend, and Virginia Johnson (R1242,1245)[4]

Malone also found a blonde head hair on the carpet of appellant's car which, in his opinion, was consistent with having come from Kim Swann (R1242-43).

At the beginning of the brief (2 page) cross-examination, Malone testified:

> Q. [by Mr. McClure]: Hair analysis is not an absolute proof of person identification, is it?
>
> A. That's correct.
>
> Q. And when you say that these fibers are identical, what you're really saying is most likely it came from the same manufacturer; is that correct?
>
> A. They were made by the same manufacturer.

(R1248)

K. The Hillsboroush County Guilty Pleas

The state's final witness, Detective Lee Baker of the Hillsborough Sheriff's Department, testified that Nebraska Avenue in Tampa has become known to law enforcement "as an area that prostitutes hang out at and operate from, homosexuals operate from, also consisting of numerous motels that are used for solicitation of prostitution, and it's also a drug area" (R1257). The Alamo Lounge was, in 1984, a place used for prostitution (R1258). The prosecutor asked:

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[4] According to Malone's earlier testimony, both delustered (unusual) and lustrous (common) fibers were found in the McVey, Simms, and Dinsfriend cases. In the Lana Long case, as in the charged crime (Virginia Johnson), only a single fiber was found, and it was a common (lustrous) carpet fiber,

And your investigation revealed that Virginia Johnson, Kim Swann, Karen Dinsfriend, Michelle Simms, and Lana Long frequented the Nebraska Avenue area, correct?

A. Except for Michelle Simms; our last involvement with her was we found her to be on Kennedy Avenue. And if I may comment on Kennedy Avenue, it would be a twin sister to Nebraska.

(R1258)

According to Baker, Lana Long had worked as a semi-nude or nude dancer at the Sly Fox on Nebraska (R1258). Investigation revealed that Michelle Simms "probably had been in town no more than twenty-four hours. Apparently she came over from the east coast and set up her business in the Kennedy area" (R1259). Her business, according to Baker, was prostitution (R1259). Karen Dinsfriend was described by Baker as "[a] well known prostitute and drug addict" (R1259). The prosecutor asked:

Q. Kim Swann?

A. Kim Swann was different. Our investigation revealed that although she was a girl of the evening, went out night, I don't believe we're talking about a prostitute but a girl who indulged in drinking and very carefree. Our investigation revealed that she was driving her vehicle before she disappeared.

Q. In the area of Nebraska Avenue, I believe.

* * *

A. Sir, I believe, if my recollection is correct after all these years, I believe she was last seen on Dale Mabry. Again, Dale Mabry is a highly populated area, and people travel that all hours of the night.

(R1260)

Lisa McVey, Baker continued, "was a young high school student or seventeen year old girl that was, I believe, working at a donut shop or something" (R1260). There was no indication of prostitution on her part (R1260).

The prosecutor, after describing the Hillsborough victims, with the exception of Lisa McVey, as "people of the evening", asked Baker if he observed any other common characteristic (excluding or including McVey)(R1262-63). Baker answered:

The common thing seemed to be that they were easily accessible type of victims, where they were at a certain time of night. I believe we're talking about from 10:00

p.m. to 2:00 or 3:00 o'clock in the morning. They would be last seen in a vulnerable type area that exposed themselves to people.

Q. [by Mr. VanAllen]: And in addition, the other common thing between the victims -- excluding Lisa McVey -- the victims, when they were discovered, were they clothed, unclothed, semi-clothed?

(R1263)

Baker replied that the bodies of Kim Swann and Lana Long were nude, while the bodies of Karen Dinsfriend and Michelle Simms were partially clothed (R1263-64). Over defense objection that the state was using Detective Baker to rehash the evidence which had already been testified to, Baker answered affirmatively to the prosecutor's questions of whether there was evidence that each of the deceased victims (i.e., excluding McVey) "had been tied in one fashion or another" (R1264); and whether there was evidence that each was "killed by a means of strangulation or associated with strangulation" (R1264). The prosecutor then stated "And of course, we have the common fiber among them all, and that's the common fiber, the red lustrous nylon trilobal fiber" (R1265). Baker answered "Yes, sir" (R1265).

The prosecutor then introduced the evidence of appellant's guilty pleas in Hillsborough County:

Q. On September 23, 1985, did you have occasion to come into contact with Robert Joe Long in Tampa, Hillsborough County, Florida?

A. Yes, sir.

Q. And at the time you had contact with Mr. Long in Tampa on September 23rd, did he admit that he killed Lana Long by pleading guilty to the murder?

A. Yes, sir.

Q. Did he admit that he killed Michelle Simms by pleading guilty to that murder?

A. Yes, sir.

Q. Did he admit that he killed Karen Dinsfriend by pleading guilty to that murder?

A. Yes, sir.

Q. And did he admit that he killed Kim Swann by pleading guilty to that murder?

A. Yes, sir.

Q. Pasco County is a different judicial circuit from Hillsborough County; is it not?

A. Yes, sir.

(R1265-66)

After the testimony regarding the Hillsborough County guilty pleas, the state rested (R1272). Defense counsel moved for a mistrial based on the state's misuse -- and overuse -- of Williams rule evidence (R2181-84). He argued that the crimes against Lisa McVey and the four Hillsborough County homicides were not uniquely similar to the charged crime so as to justify their admission in the first place, and "beyond that, they became the feature of this trial. We have had about three days of testimony on this. And by my count, we have spent about four hours on the actual Virginia Johnson case" (R1281-82). The trial court denied the motion (R1282). Regarding McVey, defense counsel said:

> Your Honor, we would make the same motion for mistrial based upon the presentation of the Lisa McVey case. There was no need to put that woman on the stand. The only purpose they needed her for was -- they had police officers, upon her statement, and they secured warrants which ed to the evidence which led to the homicides in these cases.
>
> Instead, they put Ms. McVey on, had her go through the sordid details of her situation. She became the feature of the case. She [became] the live victim presented to the jury. There was absolutely na relevance, no reason to go into that stuff, Judge. It wasn't material to these proceedings.
>
> At the pretrial hearing we had on this, Judge -- I wish I had a transcript of it, but we haven't had a chance to get that sent down to us -- Mr. Allweiss represented that all they were going to do is have the police officers testify in reference to the statements reported to them by another victim on a rape case, they they went and secured a warrant which led to the arrest of Mr. Long.
>
> What we had, sir, was we had an hour and half of testimony by a rape victim. I submit she became the feature of the case just like the other cases and was only introduced to show propensity of Mr. Long to commit offenses.
>
> THE COURT: I think that was presented in the same way as the other four murders, Mr. Eble -- plan and identity. I'm going to deny your motion for mistrial on that basis also.

(R1283-84)

SUMMARY OF THE ARGUMENT

[Issues I1 through X] All, or virtually all, of the voluminous collateral crime evidence introduced in this case was inadmissible under the Williams Rule. Moreover, apart from the question of admissibility, the collateral crime evidence was improperly allowed to become the overwhelming feature of the trial.

[Issue I] The state introduced at trial a fragmentary, edited-for-television portion (five sentences out of an hour and a half conversation) of an interview of appellant by CBS news reporter Victoria Corderi. The statements appeared to amount to a Williams Rule admission of being a serial killer, and they were used by the state as such. Issue I revolves around the defense's repeated and unsuccessful efforts to obtain the remianing portions of the Corderi interview (i.e., the portions which CBS News edited out of the broadcast), referred to as the "outtakes." Appellant was constitutionally entitled to the outtakes and CBS had no privilege to withhold them. CBS. Inc. v. Cobb, 536 So.2d 1067 (Fla. 2d DCA 1988); see also United States v. Nixon, 418 U.S. 683, 707-13 (1974); CBS, Inc. v. Jackson, __So.2d__ (Fla. 1991)[16 FLW S272]; Miami Herald publishina Co. v. Morejon, 561 So.2d 577 (Fla. 1990); Waterman Broadcasting of Fla. v. Reese, 523 So.2d 1161 (Fla. 2d DCA 1988); WBAL-TV, The Hearst Corporation v. State, 477 A.2d 776 (Md. 1984); In re Letellier, 578 A.2d 722 (Maine 1990); United States v. LaRouche Campaign, 841 F.2d 1176 (1st Cir. 1988). Ironically, both the trial judge (at least initially) and the Second District Court of Appeal ruled in appellant's favor on this issue, yet he never got the benefit of these favorable (and correct) rulings. Instead, even after the Second DCA emphatically (but too late for the guilt phase of the trial) held that appellant's constitutional right ta defend himself entitled him to production of the entire interview, CBS took it upon itself to provide only another self-edited portion of thirteen minutes, Then, in the penalty phase, the state proceeded to introduce the new partial videotape of the Corderi interview, and also used it to cross-examine the defense's psychiatric experts, to bolster the opinions of its own experts, and to bring out improper testimony about appellant's supposed lack

of remorse based on his demeanor on the edited tape. Repeated defense objections and requests for production of the entire videotape were overruled.

In both the guilt and penalty phases of this trial, the state's introduction and use of selected portions or the Corderi interview, while the defense was denied access to the remaining portions, deprived appellant of basic state and federal constitutional rights. Conversely, the third party involved here -- the Columbia Broadcasting System -- had no right and no privilege to withhold all or any part of the outtakes. Still less was it for CBS to decide for itself which portions of the interview were relevant or necessary to the defense. To the contrary, appellant and his counsel had a right to review the entire videotape to decide which portions might be helpful in his defense; with the ultimate decisions on admissibility (as distinguished from relevancy) to be made by the trial judge, in accordance with the general principle that when the state affcrs in evidence a part of a confession or admission against interest, the accused is entitled to bring out the whale of the conversation.

ARGUMENT

ISSUE I

APPELLANT WAS DEPRIVED OF BASIC STATE AND FEDERAL CONSTITUTIONAL RIGHTS -- INCLUDING THE RIGHT TO DUE PROCESS, THE RIGHT TO A FAIR TRIAL, THE RIGHT TO COMPULSORY PROCESS FOR OBTAINING MATERIAL EVIDENCE, THE RIGHT TO PRESENT EVIDENCE IN HIS OWN BEHALF, AND THE RIGHT TO CONFRONTATION OF ADVERSE WITNESSES -- WHEN THE STATE WAS ALLOWED TO INTRODUCE PORTIONS OF A VIDEOTAPED INTERVIEW OF APPELLANT BY CBS NEWS, WHILE THE DEFENSE WAS DENIED ACCESS TO THE REMAINING PORTIONS.

A,

On November 25, 1986, appellant was interviewed for approximately an hour and a half by Victoria Corderi of CBS News (R2503,1323-24). This took place while appellant was on Death Row, prior to the decisions in his original appeals, CBS edited the interview and selected four "sound-bytes", totalling not more than a minute or so, which was televised on December 26, 1986 (R2503,2249,605,608-09,661). These statements (spoken at different points in the interview, but edited for the broadcast so as to run them all together) were:

> I don't know, you know, all in all I must have destroyed about a hundred people (see R605-606,942,945).
>
> ...[I]t was like A, B, C, D. I'd drive a little ways, stop, pull a knife, a gun, whatever, tie them up, take them out. And that would be it (R4061, see R606,942,945,950). And the worst thing is, I don't understand why, I don't understand why (R4055, see R945-46,950).
>
> I figured it was so obvious there's something wrong with me, that when they did catch me, that they would fix me (R4054, see R606-946).

The state introduced the broadcast tape at trial. While appellant's statements do not specifically refer to the charged crime (the murder of Virginia Johnson), they amounted to an admission of being a serial killer, and they were used by the state in that manner. This Point on Appeal revolves around the defense's repeated and unsuccessful efforts to obtain the remaining portions of the Corderi interview (i.e., the portions which CBS News edited out of the broadcast), referred to as the "outtakes." Appellant was constitutionally entitled to the outtakes and CBS had no privilege to withhold them. CBS, Inc. v. Cobb, 536 So.2d 1067 (Fla. 2d DCA 1988); see also United States v. Nixon, 418 U.S. 683, 707-13 (1974); CBS, Inc. v. Jackson, __So.2d__ (Fla. 1991)[16 FLW S272]; Miami,

Herald Publishins Co. v. Morejon, 561 So.2d 577 (Fla. 1990); Broadcasting of Fla. v. Reese, 523 So.2d 1161 (Fla. 2d DCA 1988); WBAL-TV, The Hearst Corporation v. State, 477 A.2d 776 (Md. 1984); In re Letellier, 578 A.2d 722 (Maine 1990); United States v. LaRouche Campaign, 841 F.2d. 1176 (1st Cir. 1988). Ironically, both the trial judge (at least initially) and the Second District Court of Appeal ruled in appellant's favor on this issue, yet he never got the benefit of these favorable (and correct) rulings. Instead, even after the Second District Court of Appeal emphatically (but too late for the guilt phase of the trial) held that appellant's constitutional right to defend himself entitled him to production of the entire interview, CBS took it upon itself to provide only another self-edited portion. Then, in the penalty phase, the state proceeded to introduce the new partial videotape of the Corderi interview, and also used it to cross-examine the defense's psychiatric experts, and to bolster the opinions of its own experts. Repeated defense objections and renewed requests for production of the entire videotape were overruled.

In both the guilt and penalty phases of this trial, the state's introduction and use of selected portions of the Corderi interview, while the defense was denied access to the remaining portions, deprived appellant of basic state and federal constitutional rights, including the right to due process, the right to a fair trial, the right to compulsory process for obtaining material evidence, the right to present evidence in his own behalf, and the right to confrontation of adverse witnesses. Conversely, the third party involved here -- the Columbia Broadcasting System -- had no right and no privilege to withhold all or any part of the outtakes. Still less was it for CBS to decide for itself which portions of the interview were relevant or necessary to the defense. To the contrary, appellant and his counsel had a right to review the entire videotape to decide which portions might be helpful in his defense; with the ultimate decisions on admissibility (as distinguished from relevancy) to be made by the trial judge [see CBS Inc. v. Cobb, 536 So.2d at 1070], in accordance with the general principle that when the state offers in evidence a part of a confession or admission against interest, the accused is entitled to bring out the whole of the conversation. See e.g., Thalheim v. State, 38 Fla. 169, 20 So. 938,947 (1896);

Morey v. State, 72 Fla. 45, 72 So. 490,493 (1916); Louette v. State, 12 So.2d 168, 174 (Fla. 1943); Guerrero v. State, 532 So.2d 75,76 (Fla. 3d DCA 1988); Eberhardt v. State, 550 So.2d 102,105 (Fla. 1st DCA 1989).

B. The Defense's Thwarted Efforts to Obtain the Entire Videotape (Pre-Trial, Trial, and Penalty Phase)

On October 17, 1988, the defense moved in limine to preclude the state from introducing the videotape of the televised portion of the Corderi interview on the ground that CBS had refused to provide the portions of the interview which were not televised (R3527). The defense asserted:

> 5. Section 90.108 Florida Statutes provides in relevant part:
>
> > When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require him at that time to introduce any other part or any other writing or recorded statement that in fairness ought to be considered contemporaneously.
>
> 6. The excepts of the interview which were televised and provided to the Accused through discovery contain isolated statements taken out of context of the entire interview and omit potentially exculpatory statements of the Accused. To permit the State to introduce into evidence in either phase of the trial the edited portions of the video taped interview, will unfairly prejudice the Accused in that the jury will not have the benefit of the entire interview which puts the statements into context.

(R3527-28)

Accordingly, the defense requested, in the alternative, that the trial court either "enter an Order requiring the State to produce the entire unedited video tape of the [interview]...for review by counsel prior to the commencement of the trial and/or to enter an Order prohibiting the State from utilizing the edited, televised portion of the [interview]" (R3528)

Appellant also filed a motion for a subpoena duces tecum to compel CBS News to provide him with the unedited complete videotaped interview (R3577-78, 2245-46). At a pre-trial hearing on October 24, 1988, defense counsel (citing §90.108 of the Evidence Code) argued that the brief edited-for-television "blurb" which the state planned to introduce should not be admitted at trial unless and until

the defense was afforded an opportunity to see the entire interview, to determine what other parts might be relevant, or necessary to place the televised statements in context **(R2245-47).** The prosecutor stated that he had no objection to the court's granting the defense's motion for a subpoena duces tecum to compel production of the outtakes **(R2248).** However, the prosecutor contended, the defense's motion to exclude the televised segment was premature:

> First of all, the section of the tape or the piece of paper that we have shows what we believe to be an admission by Mr. Long concerning the deaths of the women in Hillsborough County,
>
> Secondly, Mr. Eble is making representations that this statement was taken out of context. I don't know that it was. He's making representations it's been an hour and a half worth of interview done. I don't know what it was. All I have is Mr. Long's indication that that is how long it took and I don't intend to rely upon that representation.[5]
>
> Mr. Eble has asked for issuance of subpoena duces tecum for whatever else they have. I don't know that the Court has granted that or not. If the Court hasn't, I have no objection to the Court granting that.
>
> Until such time as Mr. Eble can show this Court there is something more than what I have and I don't know that there is or isn't, this motion is premature.

(R2247-48)

* * *

> Anybody in the world could have seen it on television, and if there is more to that interview, I don't know that there is, I don't know that there isn't, but until such time as can be shown to this Court that this is out of context, then --
>
> THE COURT: If it was an interview I bet there is more to it.
>
> MR. VAN ALLEN [prosecutor]: Like I say, I'm not saying there isn't.

(R2249)

The trial court granted the motion for a subpoena duces tecum to compel production of the entire unedited videotaped interview (R3578, 2248-49).

---

[5] CBS' lawyer, Thomas Julin, subsequently confirmed that there were approximately an hour and a half of outtakes **(R1323-24).**

In the late afternoon of the first day of trial, CBS (appearing through attorney Thomas Julin) filed a motion to quash the defense's subpoena duces tecum, saying:

> The defendant seeks the production of all videotape recordings of statements made by Long, including those videotape "outtakes" which were not broadcast by CBS News. Defense counsel had indicated that he will ask the Court to exclude the broadcast portion of the videotape in the event that the defendant is not permitted to introduce the "outtakes,"
>
> CBS News and Corderi have declined to produce the "outtakes" to counsel for the defendant for the reasons outlined below.

(R3623-24)

CBS then proceeded to argue that it was privileged under the First Amendment to withhold all material gathered by a journalist, whether derived fram confidential sources or not (R3624). It contended that the qualified privilege could be defeated only if the party seeking to compel testimony or documents could show:

> (1) The information sought is relevant to the issues in the case;
> (2) The information sought cannot be obtained from any alternative source;
> (3) There is a compelling interest in the information.

(R3625)

Defense counsel objected to CBS' motion to quash the subpoena duces tecum (R598). After hearing argument (R598-618), the trial court denied CBS's motion (R613,615). CBS' attorney suggested in the alternative that the trial court review the auttakes in camera *to* determine whether there was a compelling need for appellant to have access to them (R616-17). He also suggested that the trial court might determine that the broadcast tape which the state sought to introduce was inadmissible, in which case there would be no need for the outtakes. (R618) The trial court replied:

> Mr. Julin, I'm going to decline those requests also. If, after the Defense has reviewed those tapes, you still have some problem with it, then I'll review it in camera, But I don't see any reason for me to look at them. They're better qualified to determine if it is a problem than I am.
>
> So I am going to decline to do that.

(R618-19)

CBS' attorney stated that he would seek review from the Second District Court of Appeal (R619). The prosecutor asked the judge "Are you ordering them to produce all of the outtakes or just around the statement that we intend to use?" (R619). The judge initially indicated (over defense counsel's objection that he needed the whole interview from start to finish) that a few minutes before and after each televised statement would be sufficient (R619-20) The CBS lawyer then stated:

> ...Your Honor, there is a physical problem. Those tapes are in New York and if what they're to do is find those that are several minutes before and several minutes after, I'm not sure that they can do all that tonight and get them to me and get them to --
>
> THE COURT: How large are the tapes, physically?
>
> MR. JULIN: I have been told that there are hours of out-takes. And I'm not sure how much time they --
>
> THE COURT: Are all of them of Mr. Long?
>
> MR. JULIN: Yes.
>
> THE COURT: Mr. Eble has indicated a willingness to watch the whole thing, so if they want to review it and sit through the whole thing, they can do that. If they want to just send down ten or fifteen minutes on either side of whatever was lifted, that's fine with me,

(R621)

The trial court again reserved ruling on the motion in limine to exclude the broadcast tape, and

> ...I'm also reserving ruling on your subpoena to Ms. Corderi. If you get those tapes, I don't see any reason to have her.
>
> MR. EBLE [defense counsel]: I understand. If I get the tapes, I don't need Ms. Corderi.

(R622)

That afternoon the judge received word that the Second DCA had granted CBS a stay of his order denying its motion to quash the subpoena duces tecum (R763). The DCA ordered appellant and the state to respond to CBS' petition for certiorari (R763). The prosecutor said he intended to introduce the CBS broadcast videotape the next morning (R765) Defense counsel once again argued that the state should not be permitted to introduce the broadcast tape unless and until appellant was afforded an opportunity to review the entire interview (R765-67):

> Mr. Van Allen took the position prior to trial and represented to this Court he believed my motion was premature because there were no out-takes. And the Court agreed with Mr. Van Allen. Now I believe you are going to find that there are out-takes. I submit that the State knew all along that there were out-takes, and, Judge, they've got you to rule that my motion was premature.
>
> So we went through the subpoena process again. We brought this up to be heard before trial. Mr. Allweiss tells this jury, at his peril, that he's going to put something on. And, you know, with all due respect, Mr. Long's Fifth Amendment and Sixth Amendment rights and my ability to adequately represent him during this trial -- as well as the Fifth Amendment rights -- are reflected by not being able to use these out-takes or at least see what they are, which this Court agreed with me yesterday that I should be entitled to see. (R766-67)

The trial judge said "I'm not sure why the Second District is trying to gum up our trial", but ruled that the state would be allowed to proceed and put the televised excerpts on (R767-68). "And if you find a problem with them later after getting to look at the tapes, we can correct that later" (R768, see R769). Defense counsel asked the trial court to stay the trial proceedings until the question of whether he would have access to the outtakes was resolved (R768). The judge refused, saying "This is costing Pasco County and the State of Florida a lot of money, a lot of money every day, and I don't see any reason for doing it, and . . . I'm not going to stay it" (R768).

On the morning of the third day of the trial, defense counsel renewed his request, asserting that appellant's Fifth and Sixth Amendment rights took precedence over CBS claim of a First Amendment privilege and the financial considerations of Pasco County (R934-35,940). He stated:

> ...our Clearwater [Public Defender branch] office is assisting me at this time. They are going to file a response to that with the Second District prior to tomorrow at 9:00; however, I don't know what good that's going to do us.
>
> THE COURT: I don't either.
>
> MR. EBLE: I would again request the Court to stay introduction of this evidence until the Second DCA rules.
>
> THE COURT: I'm going to decline to do that, but 1'11 do my best to fashion a remedy if it's appropriate.

(R953)

The state then called the CBS cameraman to authenticate the broadcast tape (R956-58). Over defense objection, the edited videotape was introduced into evidence as State's Exhibit 24, and was played to the jury (R959).

Before noon on the fourth day of trial, the state rested its case (R1272-73). Defense counsel indicated that he was not going to present any evidence, but again renewed his request to stay the proceedings until the issue of the outtakes was resolved by the Second DCA (R1273). The court said "I'm going to decline to do that, but if we get a ruling before Monday, we'll try to do something to assist you, Mr. Eble" (R1273).

On Friday, November 4, CBS' attorney was advised orally by the Clerk of the Second DCA that the stay which had been entered on Wednesday had been lifted, and that an opinion would be forthcoming on Monday, November 7 (R1322).

On Monday morning, defense counsel took the position that:

> ...the State's presentation of the partial tape from the beginning...was improper. And I would again renew my motion to strike that tape....
>
> I understand the Court is going to try and fashion a remedy, but I submit it's only going to call more attention to those tapes which I think are -- should not have been admissible in the first place. But there is an hour and a half worth of tapes here, Judge. And what Mr. Long's position is that, first of all, the tapes shouldn't be admitted and should be stricken now. By giving them to us now doesn't put them in the proper context in the orderly progress of the trial and the orderly progression of the preparation and presentation of the defense.

(R1321-22)

CBS' attorney stated to the trial court:

> I have just been on the phone with the Clerk of the Second District, who advised me there is no opinion rendered yet and there is no decision by the Second District either granting or denying the petition.
>
> The difficulty that CBS has right now is that we don't have a decision one way or the other. I sort of glean from the fact that they're lifting the stay that their decision is going to be denying the petition for certiorari, but to serve my client, I just can't produce the tapes without an opinion denying it.
>
> THE COURT: Mr. Julin, you have a decision, and that decision is my order for you to produce those tapes. And that's not stayed any longer.
>
> MR. JULIN: Yes, sir, that's what I understand. I have consulted with my client with respect to what position they wanted ta take, and they have advised me to

advise defense counsel that we would make the tapes available to them in light that you were not inclined to wait for the Second District Court of Appeal to rule on the petition.

THE COURT: I am not inclined to wait. When are they going to do that?

* * *

THE COURT: There is an hour and a half of them?

MR. JULIN: Approximately.

(R1323-24)

CBS' attorney then said:

Your Honor, there is one other point I would like to raise, and that is with respect to exactly which of the out-takes need to be produced. There was a discussion of those out-takes which would show the context in which the two broadcast statements were made; and there was a discussion of the entire out-takes. Now what I have prepared is a tape that has just the context out-takes, and there is also a tape of --

THE COURT: I told you [that] you could do either one.

MR. ALLWEISS [prosecutor]: We're ready. Have you got them here?

MR. JULIN: Your Honor, then we would go ahead and produce the context tapes.

(R1326)

The judge and counsel for both sides adjourned to a hearing room to watch the videotape (R1328):

MR. ALLWEISS [prosecutor]: Judge, the tape is in the machine ready to roll.

MR. EBLE [defense counsel]: It's our understanding they're still not producing the entire tape which was my original request. I wanted to see that tape from start to finish. I think giving me a few minutes before is going to create the same problem we've got with the context. They apparently have given us only a blurb before and a blurb after the statements.

MR. ALLWEISS: Ready? It's a thirteen-minute tape, Judge.

(R1328-29)

After they viewed the Videotape, defense counsel renewed his request to strike the edited broadcast tape which the state had played to the jury in the

guilt phase, moved for a mistrial, and renewed his request to have the entire tape produced (R1330-31) He continued:

> That film clip that the State originally showed the Court refers *to* a television show which was done on brain injuries. I have reason to suspect that there are portions of that tape that specifically go into the motorcycle accident and the problems stemming from the motorcycle accident as a result of the head injuries he received. And we have not seen those portions,
>
> The portions of the tape we are seeking refer to other things that were discussed which apparently have not been shown to us. At one point in that portion of the tape where it says, "That's something that I forgot to mention before" -- so it's referring to some other portion of that tape we haven't seen.

(R1330-31)

Defense counsel stated that he did not want the judge to reopen the trial to present the thirteen minute edited tape to the jury, since to do so would re-emphasize the tape recorded statements. "...I appreciated the Court's efforts to fashion a remedy for us, but I think the remedy would only create more problems than what we've already got" (R1331).

The trial court denied defense counsel's motions and his request for the remaining portions of the interview, saying, "It sounds to me like you got enough of the tape to determine that -- what the context was that the statements were made that the state used." (R1332)

That same day, November 7, 1988, the Second District Court of Appeal released its opinion. CBS, Inc. v. Cobb, 536 So.2d 1067 (Fla. 2d DCA 1988). At the outset of the opinion, the DCA said:

> The state had obtained this broadcast footage [of the Corderi interview] and, over Long's objection, was permitted to introduce it during its case-in-chief, When he became aware of the state's plan to use the footage, Long served subpoenas upon the petitioners, directing them to produce the videotape of the entire Long interview. The circuit court denied petitioners' motion to quash the subpoena, resulting in the matter now before us.

CBS, Inc. v. Cobb, 536 So.2d at 1069.

Observing that CBS was claiming a "limited" or "qualified" privilege of non-disclosure under the First Amendment [see Branzburg v. Hayes, 408 U.S. 665 (1972)], the appellate court continued:

> Initially, there is some question whether the materials requested by Long are the sort to which a strong presumption of privilege should attach. At the hearing on the CBS motion to quash Long's counsel raised the interesting point, "[W]hat chilling effect is there if a person talks to a reporter and asks for a copy of what he told them?" Furthermore, we cannot help but note that CBS, by soliciting the damaging comments of a condemned killer (even one apparently willing to make such admissions to a nationwide audience), may have contributed to the controversy. Cf. Waterman Broadcasting of Florida, Inc. v. Reese, 523 So.2d 1161 (Fla. 2d DCA 1989)(murder suspect's admissions to television interviewer were "unique," thus their relevancy was "obvious," supporting requirement of disclosure).

CBS Inc. v. Cobb, 536 So.2d at 1069.

Nevertheless, in view of its prior decision in Johnson v. Bentley, 457 So.2d 507 (Fla. 2d DCA 1984), the DCA left open the possibility that "the scope of the First Amendment's protection may be broader than is necessary only to protect confidential informants, extending to the expense and harassment that might be foreseeable if litigants were allowed unlimited access to journalistic archives." CBS, Inc. v. Cobb, 536 So.2d at 1069-70. Therefore, the court assumed without deciding that some privilege attached to the CBS outtakes, and proceeded to address the three-pronged test outlined in Tribune Co. v. Green, 484 So.2d 722 (Fla. 1986), and Gadsden County Times v. Horng, 426 So.2d 1234 (Fla. 1st DCA 1983), i.e., whether the information sought is relevant to issues in the case; (2) whether any alternative source exists for the information; and (3) whether their is a compelling interest in the information.

> As to the first prong of the test, CBS argues that none of Long's statements, whether contained within the broadcast portion of the interview or not, should be admissible at trial, and therefore the outtakes sought by Long are not relevant. More specifically, they contend that Long's damaging admissions were not shown to relate to the murder for which he is now being tried, nor do they display sufficient similarity to the facts of that murder to justify their admission as "Williams Rule" evidence. Williams v. State, 110 So.2d 654, (Fla.), cert. denied, 361 U.S. 847, 80 S.Ct. 102, 4 L.Ed.2d 86 (1959). Furthermore, the only conceivable use Long would have for the outtakes would be if they contained "self-serving exculpatory statements" inadmissible under the hearsay rule. Moore v. State, 530 So.2d 61 (Fla. 1st DCA 1988).
>
> Be that as it may, the trial court has determined, since the time CBS filed its petition with this court, that the state will be allowed to introduce the interview excerpt in its possession. It is not within our

> present authority to rule upon the correctness of this decision, except to state that it strongly bolsters Long's claim of relevancy. Whenever part of a written or recorded statement is introduced by a party, an adverse party may require the introduction of any other part of the statement that in fairness ought to be considered contemporaneously. § 90.108, Fla.Stat. (1987). Concededly, Long is at somewhat of a disadvantage in that he cannot determine whether such "fairness" arises in this case--or even whether there is anything on the tape he may want the jury to hear--without first viewing the entire statement. Yet we must take care not to confuse relevancy with the ultimate question of admissibility of that evidence. The record in this case strongly suggests that if any segment of the interview is relevant, there is a good chance the rest of it is relevant also. Whether, beyond that, it is "pertinent and proper to be considered in reaching a decision" is for the trial caurt still *to* decide.

CBS Inc. v. Cobb, 536 So.2d at 1070-71

As to the second "prong", the court said:

> We further find that Long has adequately demonstrated the lack of an alternative source for the same information. CBS considers this alternative source obvious--Long himself. At the hearing in circuit court Long's counsel countered that Long does not remember everything he said to reporter Corderi during the course of the interview. CBS considers this "naked assertion" insufficient. However, the trial court indicated that "I don't know how we can expect him to remember how the questions and his answers were organized," and we are not persuaded that this conclusion was unreasonable.

CBS, Inc v. Cobb, 536 at 1071.

And as to the third prong:

> Finally, we hold that Long has demonstrated a compelling need for the information currently in the possession of CBS, notwithstanding his apparent inability to summarize the exact nature of that information without first being allowed to examine it. This is not merely a "fishing expedition" for evidence which theoretically could be useful to Long in the preparation of his defense. Rather, it is "a necessary step in [defendant's] due and proper preparation for trial." Gulliver's Periodicals, Ltd. v. Chas. Levy Circulating Co., 455 F.Supp. 1197 (N.D.Ill.1978).

CBS, Inc. v. Cobb, 536 So.2d at 1071.

The court emphasized that the Sixth Amendment to the U.S. Constitution and Article I, Section 16 of the Florida Constitution provide that the accused in a criminal proceeding shall have the right of compulsory process for obtaining witnesses in his favor, 536 So.2d at 1071. The court also stated: "We must not lose sight of the fact that Long is, literally, fighting for his life", and con-

trasted that situation to a civil case, "where the potential loss to a litigant is purely economic." 536 So.2d at 1071. In closing, the court concluded:

> We are satisfied that under the facts of this case as presented to us, the trial court's order constitutes a reasonable determination that Long's constitutional right to defend himself outweighs the constitutional right of CBS to withhold journalistic work product.

536 So.2d at 1071.

The next day, November 8, was the first day of the penalty phase and it was deja vu all over again:

> MR. EBLE [defense counsel]: Your Honor, I have been advised that the State intends to put that video tape in, the remaining portion of the video tape that was secured from CBS News yesterday. I would object and move in limine regarding their introduction. They are not relevant at this point in time.
>
> And I would further reassert 90.108. I would be asking for the entire video tape. The only way to put these two portions of the contents in is to get the whole. Without the whole, I am unable to put the entire conversation into context for the jury and to put in there what should be considered in all fairness.
>
> Now we have two more lengthy isolated blurbs of conversation. We don't have what precedes, what's in the middle, what's in the end. We don't have conversations regarding the motorcycle accident; we don't have conversations regarding the head injury.
>
> I submit they're being taken out of context, and I would be entitled to the whole thing, Judge. I renew my request to order CBS News, as I did before, to provide me the entire tape and not just isolated portions and move in limine to prohibit the State from putting these portions in without me having the opportunity to put in the whole tape.
>
> THE COURT: I'm going to decline -- deny that, Mr. Eble.

(R1494-95)

In its penalty phase case in chief, the state offered the thirteen-minute edited videotape of the Corderi interview into evidence (R1526). Defense counsel objected again, noting that the same problem existed as before; i.e. the so-called "context tape", which was belatedly provided by CBS and which consisted of the surrounding portions of the statements introduced in the guilt phase, was itself taken out of context of the complete interview (R1527).

> MR. EBLE [defense counsel]: Your Honor, they are not in the context of the interview, which talks about brain damage and how it affected him and the accident and how it affected him.

> You have to remember, Judge, this interview was done for the purpose of the television story on brain-damaged serial killers.
>
> THE COURT: Yes, sir.
>
> MR. EBLE: The only way the context of that can come to this jury is for them to see the interview from start to finish. By permitting the State to show just a portion, I submit, denies my client's rights under 90,108, as well as [effective] assistance of counsel.
>
> THE COURT: I'm going to overrule the objection. Thank you, Mr. Eble.

The tape (State's Exhibit P-7) was played to the jury (R1528-29,4054-63). Defense counsel renewed his objection, moved to strike it, and moved for a mistrial, pointing out that the tape "[o]bviously...ended in the middle of something", was out of context, and was inflammatory, prejudicial, and referred to non-enumerated aggravating circumstances (R1529-30). The motions were denied (R1530).

During the defense's case in penalty phase, in the cross-examination of psychiatrist Michael Maher, the prosecutor on several occasions called his attention to appellant's statements and his demeanor in the thirteen-minute segment of videotape (R1711-12,1726,1736-37).

Just prior to the beginning of the state's case in rebuttal, defense counsel <u>again</u> requested the judge to "order CBS to produce the rest of that taped interview so I can put those conversations into context" (R1955). Incredibly, the judge said "You've waited too late, Mr. Eble" (R1955). Also incredibly, the prosecutor said, "I would ask that Mr. Eble represent to the Court that he has seen it, he knows what's in it, and based on that, that he intends to put it on" (R1955). Mr. Eble answered:

> <u>No, sir, that's the whole point. I haven't seen it. I've asked for it for two weeks</u>. I still don't have it. I can't tell you what's in it, but I sure would put the rest of it on since the State has been allowed to have parts put in.

(R1955)

Meanwhile, the state had provided the thirteen-minute edited videotape to each of its three psychiatric witnesses, Drs. Sprshe, Gonzalez, and Merin (R1965, 2018,1065-66). In his direct examination, he asked Sprehe (and, phrased slightly

differently, Gonzalez and Merin), "What was the significance of the tape -- as far as you saw it -- as it relates to this case?" (R1978,2023,2077-78). Sprehe answered:

> Well, it showed sort of a cold-blooded, business-like approach to the activities he was engaged in; really in a kind of one, two, three routine. And it also showed to me as a psychiatrist, looking at the facial expressions -- it showed a lack of remorse. He did use some sort of words about being sorry about all this happened, but his affect, his feeling tone expressed in his face showed no real feeling. And that would have been an opportunity, since this was a public TV thing, to really emote, and he did not show any real significant emotion from the standpoint of a psychiatrist.

(R1978-79)

Dr. Gonzalez described the segment of videotape as "true vintage Bobby Long" (R2024). Dr. Merin's reaction to what he saw of the interview was similar to Sprehe's. Like Sprehe, he focused on appellant's demeanor and manner of speech:

> What impressed me the most was the relative coolness with which he expressed himself. I noticed too there was no great degree of remorse, no crying, no anguish, no hand-wringing. Also he would take about these -- this behavior -- his murders and his rapes, but he would never go into details. He would go up to the point where he would say, then, in effect, "I had to do something to her," then stop there. This was a representation of the indifference with which he met people, particularly women.

(R2078)

At the end of the state's rebuttal case, defense counsel tried again:

> MR. EBLE: I want to renew my request for the rest of that video tape.
>
> THE COURT: For what?
>
> MR. EBLE: My request for the rest of the video tape that wasn't played, that CBS has back in their archives, that I never got.
>
> THE COURT: You have requested that enough, Mr. Eble. You don't have to run that in the ground.

(R2093)

As the focal point of his closing argument asking for a recommendation of death, the prosecutor played CBS' edited videotape to the jury for a second time (R2142). With interesting choice of words, he told the jury he was going to play

the tape again because it "puts the death of Virginia Johnson in context'' (R2142). He continued:

> I want you to watch a cold-blooded killer as he outlines the deaths of these women and as he tries to con you as you sit there.
>
> (THEREUPON, State's Exhibit Number P-7 was again published to the jury.)
>
> That kind of brings it all together. "I remember the first one clear as a bell. I can't remember the rest." And yet he told the doctors about all of them.
> I feel sorry far the families." And yet he told Dr. Berland that ha took pleasure in thinking about the pain that he had caused the wives, the children, the mothers and fathers of the victims. Manipulating.

(R2142-43)

C. Appellant's State and Federal Constitutional Rights, and His Rights Under Section 90.108 of Florida's Evidence Code, Were Violated When the State Was Allowed to Introduce Edited Portions of the CBS Videotape, While the Defense Was Denied Access to the Complete Unedited Interview.

Appellant was entitled to the complete unedited videotape. CBS had no privilege to withhold all or any part of the outtakes. The trial court initially ruled correctly when he granted appellant's pre-trial motion for a subpoena duces tecum to compel CBS to provide him with the complete unedited videotaped interview, and when he denied CBS' motion to quash the subpoena duces tecum. When CBS sought a writ of certiorari to quash the order requiring them to provide the outtakes, the Second District Court of Appeal denied the petition, holding clearly and emphatically that even assuming arguendo that the limited First Amendment privilege that exists to protect journalists against unwarranted disclosure of their sources of information might under some circumstances apply to non-canfidential materials, appellant's constitutional right to defend himself in a capital criminal trial, and his right to compulsory process for obtaining evidence in his favor, took precedence. That decision was manifestly correct [especially in light of this Court's subsequent decisions in Morejon and Jackson]. Nevertheless, as a result of the combination of circumstances and rulings previously discussed, and as a result of the trial court's inexplicable refusal to require CBS to produce the complete unedited videotape after the

Second DCA issued its decision, the prosecution was able to introduce in the guilt phase two highly damaging "sound-bytes" out of the entire interview which had been selected by CBS for the televised broadcast -- and then was able to introduce in the penalty phase another thirteen-minute segment (also edited by CBS) -- while defense counsel repeatedly asserted the right to access to the complete interview, and continued to be thwarted. In the process, appellant was deprived of basic state and federal constitutional rights, as well as an important evidentiary protection provided by the Evidence Code.

When the state introduces a written or recorded confession or inculpatory statement against the defendant in a criminal trial, two related but independent principles of law come into play. The first is Fla. Stat. Section 90.108, which applies *to* **any** written or recorded statement in a criminal or civil **trial,** and which concerns **the** order of proof, as well as the broader question of admissibility.[6] It provides in part:

> When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require him at that time to introduce any other part or any other writing or recorded statement that in fairness ought to be considered contemporaneously.

The 1976 Law Revision Council Note to this Section explains:

> Generally, when a party introduces only a part of a writing or document, the adverse party may prove the contents of the remainder of the instrument or require his adversary to do so. See Crawford v. United States, 212 U.S. 183, 29 S.Ct. 260, 53 L.Ed. 465 (1909). The remainder of the document or writing can only be admitted in so far as it relates to the same subject matter and tends to explain and shed light on the meaning of the part already received, McCormick, Evidence § 56 (2d ed. 1970).
>
> This section allows an adverse party to have his opponent introduce the remainder of a writing at the same time that a portion of it is introduced, and also have contemporaneously introduced any other writing or recorded statement which in fairness ought *to* be considered contemporaneously. **The reasoning of this section is twofold. First, it avoids the danger of mistaken first impressions when matters are taken out of context. Second, it avoids the inadequate remedy of requiring the adverse party to wait until a later point in the trial to repair his case.**

---

[6] See Ehrhardt, Florida Evidence (Vol. 1, Second Edition), § 108.1, p. 26-27, and see, generally, 23 C.J.S., Criminal Law §885, p. 94-96.

* * *

> This section does not apply to conversations but is limited to writings and recorded statements because of the practical problem involved in determining the contents of a conversation and whether the remainder of it is on the same subject matter. These questions are often not readily answered without undue consumption of time. Therefore, remaining portions of conversations are best left to be developed on cross-examination or as a part of a party's own case.
>
> This treatment of conversations is in accord with Morey v. State, 72 Fla. 45, 72 So. 490 (1916), where in a criminal prosecution, when the state offered evidence of inculpatory statements made by the defendant, the court found that the defendant had the right to have placed before the jury, by means of cross-examination, the entire conversation or all statements made by the defendant at the same time and relating to the same subject matter, whether such other statements or the remainder af the conversation are exculpatory in nature.

Obviously, defense counsel cannot cross-examine a videotape. Nelson v. State, 490 So.2d 32, 34 (Fla. 1986). Therefore, when the state introduces a portion of a recordedstatement against a defendant, the opportunity to introduce (and, a fortiori, to have access to) the remaining portions of that recorded statement as provided by § 90.108 takes on a powerful constitutional dimension as well, in that it is the only way to effectuate the right of confrontation. See Nelson, 490 So.2d at 34.

The second relevant legal principle is that when the state introduces a confession or inculpatory statement against a defendant in a criminal trial, the entire conversation is ordinarily admissible, even if it is contains exculpatory or "self-serving" statements as well. As this Court said long ago in Thalheim v. State, 38 Fla. 169, 20 So.2d 938, 947 (1896):

> The general rule laid down by standard authorities in such cases is that the defendant is entitled to have before the jury all that was said upon the subject upon the particular occasion, whether prejudicial or beneficial to him. The state having opened the door by proving a part of the conversation, it cannot close it upon the defendant, so that he cannot offer the other part of the conversation which relates to the same subject-matter. The whole conversation should be before the jury, and they should determine what weight and effect should be given to the whole conversation.

See, e.g., Bennett v. State, 96 Pla. 237, 118 So.2d 18,19 (1928)("The defendant has the right to have all that he said at the time received into

evidence, if what he said is to be introduced at all"); Ackerman v. State, 372 So.2d 215 (Fla. 1st DCA 1979)(L.Smith, J., concurring)(where the state introduces an incriminating statement made by the accused in a conversation, "the accused is entitled to have the remainder of the conversation admitted into evidence even though favorable to him"). See also Morey v. State, 72 Fla, 45, 72 So. 490, 493 (1916); Louette v. State, 12 So.2d 168, 174 (Fla. 1943); Steinhorst v. State, 412 So.2d 332, 338 (Fla. 1982); Burch v. State, 360 So.2d 462, 464 (Fla. 3d DCA 1978); Guerrero v. State, 532 So.2d 75, 76 (Fla. 3d DCA 1988); Eberhardt v. State, 550 So.2d 102, 105 (Fla. 1st DCA 1989); Heggs v. State, 572 So.2d 991, 992 (Fla. 2d DCA 1990).

As previously discussed, when the state introduces the inculpatory statement in the form of a tape recording or videotape, rather than through a live witness, traditional cross-examination is impossible. Nelson. Therefore, when the state introduces only an edited segment of a recorded or videotaped conversation, the accused plainly has the right, under the principle recognized in Thalheim and the other decisions, to introduce the rest of what he said. And in most instances he also has the right, under § 90.108, to have it admitted contemporaneously with the portion sought to be introduced by the state. Needless to say, the accused cannot introduce the entire conversation, or even intelligently decide whether he wishes to introduce the entire conversation, unless he has access to it.

In United States v. Nixon, 418 U.S. 683, 709 (1974), the U.S. Supreme Court wrote:

> We have elected to employ an adversary system of criminal justice in which the parties contest all issues before a court of law. The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation af the facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence. To ensure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence needed either by the prosecution or by the defense.

The Court re-stated the well settled principle of law that "the public ...has a right to every man's evidence", except for those persons protected by a constitutional, common-law, or statutory privilege. 418 U.S. at 709. Regarding claims of privilege, the Court said "Whatever their origins, these exceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth." 418 U.S. at 710. On the other side of the coin:

> The right to the production of all evidence at a criminal trial similarly has Constitutional dimensions, The Sixth Amendment explicitly confers upon every defendant in a criminal trial the right "to be confronted with the witnesses against him" and "to have compulsory process for obtaining witnesses in his favor." Moreover, the Fifth Amendment also guarantees that no person shall be deprived of liberty without due process of law. It is the manifest duty of the courts to vindicate those guarantees, and to accomplish that it is essential that all relevant and admissible evidence be produced.

United States v. Nixon, 418 U.S. at 711.

In the context of a claim of privilege of confidentiality of Presidential communications, the Nixon Court said:

> ...[T]he allowance of the privilege to withhold evidence that is demonstrably relevant in a criminal trial would cut deeply into the guarantee of due process of law and gravely impair the basic function of the courts. A President's acknowledged need for confidentiality in the communications of his office is general in nature, whereas the constitutional need for production of relevant evidence in a criminal proceeding is specific and central to the fair adjudication of a particular criminal case in the administration of justice. Without access to specific facts a criminal prosecution may be totally frustrated.

418 U.S. at 712-13.

In the instant case, appellant repeatedly asserted his right to the entire Corderi interview, and was repeatedly frustrated. Prior to trial, he requested, and was granted, an subpoena duces tecum to compel CBS News to provide him with the "unedited complete video taped [interview]" (R3577-78,2245-49). The prosecutor stated that he had no objection to the request (R2248). Under state as well as federal constitutional law, appellant had the right to production of that evidence. See State ex rel. Brown v. Dewell, 167 So. 687, 690 (Fla. 1936); Trafficante v. e, 92 So.2d 811, 815 (Fla. 1957); Rose v. Palm Beach County,

361 So.2d 135, 137 (Fla. 1978); Green v. State, 377 So.2d 193, 202 (Fla. 3d DCA 1979). As was stated in Green:

> The law is well-settled that the defendant in a criminal case is constitutionally entitled to compulsory process to have brought into the trial court any material evidence shown to be available and of being used by him in aid of his defense, including the beneficial enjoyment of the compulsory process of a subpoena duces tecum for that purpose. The constitutional right to campulsory process means not only the issuance and service of a subpoena by which a defense witness is made to appear, but includes the judicial enforcement of that process and the essential benefits of it by the trial court. With reference to the latter, a trial court has no more authority to refuse to enforce for a defendant's benefit the production of the evidence available to be procured and for which compulsory process has been issued than to deny the process itself in the first instance. State ex rel. Brown v. Dewell, 123 Fla. 785, 167 So, 687 (1936). Whenever the state objects, as here, to the production of dacumsnts under a subpoena duces tecum, the proper practice is for the trial court ta examine the subpoenaed documents to determine their relevancy resolving any doubts in favor of their production. Vann v. State, 85 So.2d 133, 136 (Fla.1956). The defendant also has a constitutional right to compulsory process of witnesses to produce testimony which is admissible in the cause for which he is on trial. Washington v. Texas, 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967).

Here, the state did not object to production of the complete videotape (although CBS certainly did). Even if the state had objected, it would have been the trial court's responsibility to determine the separate questions of relevancy and admissibility. The Second DCA recognized this when it denied CBS' petitian for certiorari:

> Concededly, Long is at somewhat of a disadvantage in that he cannot determine whether such "fairness" arises in this case--or even whether there is anything on the tape he may want the jury *to* hear--without first viewing the entire statement. Yet we must take care not to confuse relevancy with the ultimate question of the admissibility of that evidence, The record in this case strongly suggests that if any segment of the interview is relevant, there is a good chance the rest of it is relevant also. Whether, beyond that, it is "pertinent and proper to be considered in reaching a decision" is for the trial court still to decide.

536 So.2d at 1071-72

Instead, the trial court here in effect delegated to CBS the authority to decide for itself which portions of the videotape it wanted to provide. CBS made what its lawyer called a "context tape" of approximately thirteen minutes, out

af a conversation which occupied about an hour and a half of videotape. Neither defense counsel nor the trial judge ever had an opportunity to review the remaining hour and a quarter, despite defense counsel's repeated and strenuous objections that he needed to see the entire tape. In the guilt phase, for example, the state introduced what amounted to a Williams rule confession [see CBS, Inc. v. Cobb, 536 So.2d at 1070], in which appellant was shown giving a very general description of his crimes: "I'd pull over, they'd get in, I'd drive a little ways, stop, pull a knife, a gun, whatever, tie them up, take them out." However, the issue at trial was (or should have been) whether appellant killed Virginia Johnson in Pasco County, not whether he was a serial killer. In the complete hour and a half interview with Victoria Corderi, is it implausible that somewhere appellant made statements which would indicate more clearly which crimes he was referring to? If so, it certainly would have tended to explain or clarify the statement which the state had put before the jury. Note that in a pre-trial hearing, the prosecutor had represented that the section of tape he had (i.e., the broadcast tape) "shows what we believe to be an admission mads by Mr. Long concernina the deaths of the women in Hillsborough County" (R2247-48). Note also that appellant apparently agreed to talk to Ms. Corderi on the advice of Ellis Rubin, who was his attorney in the penalty phase and the then-pending appeal on the Hillsborough County charges (see R3680,2250-51,610,1325). Rubin never represented appellant on the Pasco County charge. Moreover, unlike several of the Hillsborough County cases (Michelle Simms and Lisa McVey, which were used as Williams rule in this trial, and Chanel Devon Williams (see R2589), which was not), there was absolutely no evidence of a knife or gun in the Virginia Johnson case. The prosecution's basic strategy in this case was to show that appellant was a serial killer, and convince the jury that since he had done the four Hillsborough County murders and the rape of Lisa McVey, he must also have killed Virginia Johnson in Pasco, even though the evidence of the charged crime amounted to a single hair and a commonplace fiber. In order to try to defend appellant against the collateral crime evidence that was the overwhelming feature of the trial, defense counsel had to try to persuade the jury that while the state may have proved appellant was a serial killer, it still hadn't proved its case:

> They showed you the video tape of Mr. Long. And they told you they would on opening statement, 'You'll see for yourself his admission." And what did he say? "It was like A, B, C, D. Pick them up, pull a gun or a knife, tie them up, take them out." And that's what he said. He didn't say, "I did that to Virginia Johnson."
>
> And the State is inviting you to consider that statement in light of this particular case. You may believe that he is a serial killer. You may believe that he's a bad man. But has the State proven by this that he killed Virginia Johnson? I would suggest to you that no, they have not.

(R1339)

The missing hour and a quarter of the videotaped interview could very likely have answered, or at least shed light on, that question. And it could have been relevant or helpful to the defense in a myriad other ways. See CBS, Jnc. v. Cobb, 536 So.2d at 1070. It was not for CBS to decide that thirteen minutes was enough. It was not for CBS to make de facto rulings on the relevance and admissibility of evidence in a capital trial -- rulings which counsel had no opportunity to argue and this Court has no opportunity to review. Such a procedure obliterates due process. It was not for the trial court to abdicate his responsibility to enforce the constitutional right of compulsory process and its essential benefits. "[A] trial court has no more authority to refuse to enforce for a defendant's benefit the production of evidence available to be procured and for which compulsory process has been issued than to deny the process in the first instance." Green v. State, 377 So.2d at 202, citing State ex rel. Brown v. Dewell; see United States v. Nixon. Once the Second DCA lifted its stay, the trial court had no authority and no legal basis to refuse appellant's repeated requests to compel CBS to produce the complete unedited videotape.

The trial court's already grievous error was campoundcd when the state chose to introduce CBS' thirteen-minute version in the penalty phase, since appellant was now deprived of any opportunity to put those statements in context, or to introduce any other parts of the conversation which may have been favorable to him; as he had a right to do under § 90.108 and the Thalheim; Morey; Bennett line of decisions. As defense counsel pointed out in (again) requesting the entire tape, the interview was done for the purpose of a television story on

brain-damaged serial killers, and the context included appellant's history of accidents and head injuries (see 1494-95,1527-28). If there were portions of the interview relevant to show aggravating factors (including improper ones like lack of remorse) or to rebut mitigating factors, then it is reasonable to assume that there could have been other portions of the interview relevant to show mitigating factors or to rebut the legitimate or illegitimate aggravating ones.

Not only did the prosecutor play the CBS-edited tape to the jury twice -- once during his penalty phase case-in-chief and again in the midst of his closing argument, he also provided it to his three psychiatric witnesses, and asked each of them to comment on what they saw as its significance. Two of them answered -- based on appellant's demeanor as well as his statements -- that it showed him to be remorseless, cold-blooded, and manipulative. This testimony was improper and prejudicial in and of itself. See e.g. Derrick v. State, __ So.2d __ (Fla. 1991)(case no. 73,076, opinion filed March 21,1991)(16 FLW S221, 223); Hill v. State, 549 So.2d 179, 184 (Fla. 1989); Trawick v. State, 473 So.2d 1235, 1240 (Fla. 1985); Pope v. State, 441 So.2d 1073, 1078 (Fla. 1983). But even assuming arguendo that the testimony was somehow admissible, defense counsel's ability to cross-examine the state's psychiatrists as to their interpretation of the significance of the videotape was severely and unconstitutionally hamstrung by his having no opportunity to review, or to call the witnesses' attention to, other parts of the interview where appellant's demeanor may well have been entirely different.

All in all, the CBS fiasco infringed about a half a dozen of appellant's constitutional rights, including his right to due process, his right to a fair trial, his right to compulsory process for obtainingmaterial evidence, his right to present evidence in his own behalf, his right to confrontation of adverse witnesses, and his right to the effective assistance of counsel. See e.g., United States v. Nixon, supra, 418 U.S. at 709-13; Taylor v. Illinois, 484 U.S. 400, 408-09 (1988); Washington v. Texas, 388 U.S. 14, 18-19 (1967); Webb v. Texas, 409 U.S. 95, 98 (1972); Chambers v. Mississippi, 410 U.S. 284, 302 (1973); Davis v. Alaska, 415 U.S. 308, 315-16 (1974); Crane v. Kentucky, 476 U.S. 683, 690 (1986); State ex rel. Brown v. Dewell, supra, 167 So.2d at 690; Green v.

State, supra, 377 So.2d at 202; CBS, Inc. v. Cobb, supra, 536 So.2d at 1070-71. It also gave the state the patently unfair advantage of using some of appellant's own words (edited by a news agency) to convict him and condemn him to death, while appellant was blocked from access to the rest of what he told the interviewer. The outtakes almost certainly contained statements which would have been admissible in the guilt and/or penalty phase, under the principle recognized in decisions such as Thalheim; Morey; Bennett; Louette; Burch; Guerrero; and Eberhardt, as well as under Fla. Stat. § 90,108. Moreover, as the Second DCA cautioned in this case:

> ...Long is at somewhat of a disadvantage in that he cannot determine whether such "fairness" [see § 90.108] arises in this case -- or even whether there is anything on the tape he may want the jury to hear -- without first viewing the entire statement. Yet we must take care not to confuse relevancy with the ultimate question of the admissibility of that evidence. The record in this case strongly suggests that if any segment of the interview is relevant, there is a good chance the rest of it is relevant also.

CBS, Inc. v. Cobb, 536 So.2d at 1070-71.

Appellant's conviction and death sentence must be reversed for a new trial, at which the state should not be permitted to use any portion of the CBS videotape unless and until CBS provides the complete unedited interview.

D. CBS Had No Privilege to Withhold the Outtakes

One last aspect of the issue needs to be addressed. The state may attempt to argue that, notwithstanding CBS, Inc. v. Cobb, CBS did have a privilege to withhold the outtakes and that this Court should overrule the Second DCA's decision to the contrary. The facile answer to such an assertion is that be that as it may, CBS v. Cobb was the law of the case at the time of this trial, and the trial court was obligated to follow it. The better answer is that CBS v. Cobb is a well-reasoned decision which protected (or tried to protect) the constitutional rights of a defendant on trial for his life, and which, if anything, was more solicitous of CBS' claim of a First Amendment privilege than what CBS was actually entitled to under the circumstances of this case. At the time, the Second DCA was the Florida appellate court which was the most liberal in allowing

claims of journalistic privilege, and was the only DCA which had held that a First Amendment privilege might under some circumstances permit a news agency to refuse to divulge information which was not obtained from a confidential source. See Johnson v. Bentley, 457 So.2d 507 (Fla. 2d DCA 1984); Tribune Co. v. Green, 440 So.2d 484 (Fla. 2d DCA 1983).

The DCA noted:

> Initially, there is some question whether the materials requested by Long are the sort to which a strong presumption of privilege should attach. At the hearing on the CBS motion to quash, Long's counsel raised the interesting point, "[W]hat chilling effect is there if a person talks to a reporter and asks for a copy of what he told them? Furthermore, we cannot help but note that CBS, by soliciting the damaging comments of a condemned killer (even one apparently willing to make such admissions to a nationwide audience), may have contributed to the controversy. Cf. Waterman Broadcasting of Florida, Inc. v. Reese, 523 So.2d 1161 (Fla. 2d DCA 1988)(murder suspect's admissions to television interviewer were "unique," thus their relevancy was "obvious," supporting requirement of disclosure).

CBS Inc. v. Cobb, 536 So.2d at 1069.

Nevertheless, in view of its prior decision in Johnson v. Bentley, the DCA left open the possibility that "the scope of the First Amendment's protection may be broader than is necessary only to protect confidential informants, extending to the expense and harassment that might be foreseeable if litigants were allowed unlimited access to journalistic archives." CBS Inc. v. Cobb, 536 So.2d at 1069-70, Therefore, the court assumed without deciding that some privilege attached to the outtakes, and proceeded to address the three-pronged test outlined in Tribune Co. v. Green, supra, and Gadsden County Times v. Horne, 426 So.2d 1234 (Fla. 1st DCA 1983), i.e, (1) whether the information sought is relevant to issues in the case; (2) whether any alternative source exists for the information; and (3) whether there is a compelling interest in the information. On each of these questions, the court emphatically found in favor of disclosure. 536 So.2d at 1070-71. Finding that appellant had demonstrated a compelling need for the information possessed by CBS, the Court wrote:

> This is not merely a "fishing expedition" for evidence which theoretically could be useful to Long in the preparation of his defense. Rather, it is "a necessary step in [defendant's] due and proper preparation for trial" (citation omitted).

536 So.2d at 1071.

On the ultimate question, the DCA f und that appellant's constitutional right to defend himself, and his right to compulsory process, outweighed any privilege CBS might have to withhold journalistic work product. 536 So.2d at 1071.

As previously mentioned, other District Courts of Appeal had not been a5 liberal as the Second in extending to the media a privilege to withhold a5 "work product" materials which were not obtained from a confidential source. [This Court's earlier decisions in Morgan v. State, 337 So.2d 951 (Fla. 1976) and Tribune Co. v. Huffstetler, 484 So.2d 722 (Fla. 1986) were each appeals by reporters from contempt convictions, and each involved an assertion of a limited or qualified journalistic privilege to protect the identity of a confidential informant. Applying the principles of Branzburg v. Hayes, 408 U.S. 665 (1972), this Court held on the facts of those cases that the reporters could not be required to reveal their sources' identities. The First DCA case of Gadsden County Times, Inc. v. Horne, 426 So.2d 1234 (Fla. 1st DCA 1983), which was the first Florida opinion to apply the three-pronged test, also involved an order compelling disclosure of the identity of confidential sources]. At the time of appellant's trial, the Third, Fourth, and Fifth DCAs had each declined to extend the qualified privilege to non-confidential sources or to generalized claims of journalistic "work product". Satz v. News and Sun-Sentinel Co., 404 So.2d 590 (Fla. 4th DCA 1985); Carroll Contractins Inc. v. Edwards, 528 So.2d 951 (Fla. 5th DCA 1988); Miami Herald Pub. Co. v. Morejon, 529 So.2d 1204 (Fla. 3d DCA 1988). In Carroll Contracting, 528 So.2d at 953, the Fifth DCA recognized "Neither the Florida Supreme Court nor the United States Supreme Court has as yet extended the First Amendment protection in the form of a qualified privilege to non-confidential news sources." In Morejon, the Third DCA also noted that this Court had never considered "whether the qualified journalist privilege established by Morgan and Huffstetler should be extended to include, as here, nonconfidential sources of information -- so as to create, in effect, a work product privilege as to all information learned, or evidence obtained, by a journalist while on a newsgathering mission." 529 So.2d at 1207. The Third DCA then said:

> We frankly have serious doubts as to whether a news journalist's qualified privilege to refuse to divulge information from confidential news sources, as established in Morgan and Huffstetler, would be extended wholesale to include all non-confidential sources of information and evidence so as to create, in effect, an across-the-board work product privilege for such journalists as the Second District has done in Green and Johnson--and are more inclined to the Fourth District's more moderate view on this issue in Satz. We lean to this view because the underlying rationale for creating the news journalist's qualified privilege for confidential news sources does not appear to apply to most non-confidential sources of information or other like physical evidence. Unlike confidential news sources which are likely to dry up if disclosed, non-confidential news sources and like evidence seem, for the most part, unlikely ta disappear if journalists are required to testify concerning same in a subsequent court proceeding--and thus newsgathering and dissemination do not appear to be seriously threatened by such disclosure,

529 So.2d at 1207.

See CBS. Inc. v. Cobb, 536 So.2d at 1069 ("[W]hat chilling effect is there if a person talks to a reporter and asks for a copy of what he told them?") See also Letellier, 578 A.2d at 728; U.S. v. LaRouche Campaign, 841 F.2d at 1181.

The Third DCA went on to say that it did not need to resolve the issue of whether the First Amendment could ever confer a privilege to withhold non-confidential materials, "because we think at the very least the qualified journalist privilege established in Morgan and Huffstetler has utterly no application to information learned by a journalist as a result of being an eyewitness *to* a relevant event in a subsequent court proceeding, such as the police arrest and search of a defendant in a criminal case." 529 So.2d at 1208, Since in Morejon the reporter's information was not based on any confidential news sources, but was derived entirely from his eyewitness observations of relevant events, there was no qualified privilege, and therefore no need to even apply the three-part test.

The issue in Morejon was certified as one of great public importance, and this Court approved the Third DCA's decision. Miami Herald Pub. Co. v. Morejon, 561 So.2d 577 (Fla. 1990). Rejecting the Miami Herald's claim of an across-the-board qualified privilege against compelled disclasure of any information obtained by a reporter while on a newsgathering mission, this Court said:

We adhere to the district court's conclusion that there is no privilege, qualified, limited or otherwise, which protects journalists from testifying as to their eyewitness observations of a relevant event in a subsequent court proceeding. The fact that the reporter in this case witnessed the event while on a newsgathering mission does not alter our decision. Holding that the limited and qualified privilege set forth by this Court in Morgan and Huffstetler has absolutely no application in this case make it unnecessary to balance the respective interests involved. See Huffstetler, 489 So.2d at 725 (Boyd, C.J., dissenting). While we are mindful of the importance of a vigorous and aggressive press, we fail to see how compelling a reporter to testify concerning his eyewitness observations of a relevant event in a criminal proceeding in any way "chills" or impinges on the newsgathering process. Unlike the factual situations in Branzburg, Morgan, and Huffstetler, there is no confidential source involved in this case which may "dry up" if revealed. The only source for Achenbach's article was his own personal observations.

The Herald further contends that requiring reporters to testify in every case which they may have witnessed a relevant event forces reporters to become "testifiers" and hampers their newsgathering abilities: if subjected to unrestricted exposure to subpoenas reporters may become reluctant to seek out the news due to the repeated inconvenience of being called into court to testify as to their knowledge of the case. We disagree that this claim is a valid consideration. The public "has a right to every man's evidence." 8 Wigmore, Evidence § 2192, at 70 (McNaughton rev.1961). See generally United States v. Bryan, 339 U.S. 323, 70 S.Ct. 724, 76 L.Ed. 375 (1932); Blair v. United States, 250 U.S. 273, 39 S.Ct. 468, 63 L.Ed. 979 (1919). The privilege not to disclose relevant evidence obviously constitutes an extraordinary exception to this general duty to testify. Garland v. Torre, 259 F.2d 545 (2d Cir., cert. denied, 358 U.S. 910, 79 S.Ct. 237, 3 L.Ed.2d 231 (1958); Democratic National Committee v. McCord, 356 F.Supp. 1394 (D.D.C.1973). Evidentiary privileges in litigation are not favored, and even those rooted in the constitution must give way in proper circumstances. Herbert v. Lando, 441 U.S. 153, 99 S.Ct. 1635, 60 L.Ed.2d 115 (1979). As the United States Supreme Court aptly stated in United States v. Nixon, 418 U.S. 682, 710, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974): "Whatever their origins, these exceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth." The fact that journalists may be somewhat inconvenienced by having to appear in court or other related proceedings does not lessen their duty to testify. Ordinary citizens would not be excused from testifying as to what they observed, and the first amendment should not be interpreted to make journalists' testimony privileged simply because they made their observations while on duty as a reporter.

Miami Herald Pub.Co. v. Morejon, 561 So.2d at 581-82.

On April 25, 1991, this Court decided CBS, Inc. v. Jackson, __So.2d__ (Fla. 1991)[16 FLW S272], a case involving a criminal defendant's request for videotaped "outtakes" depicting him in police custody, in order to assist in the preparation of his defense. This court (noting that it had accepted jurisdiction in Jackson before it published Morejon), said:

> In the case under review, the sought after discovery is the untelevised CBS videotapes of Jackson's arrest. From a first amendment privilege standpoint, we can perceive no significant difference in the examination of an electronic recording of an event and verbal testimony about the event. What Jackson seeks to discover is physical evidence of the events surrounding his arrest. His request does not implicate any sources of information. We see no realistic threat of restraint or impingement on the new-gathering process by subjecting the videotapes to discovery. Although the media may be somewhat inconvenienced by having to respond to such discovery requests, mere inconvenience neither eviscerates freedom of the press nor triggers the application of the journalist's qualified privilege. Because the qualified privilege does not apply under the circumstances of this case, we need not balance the respective interests involved. [Citations omitted]. Thus, we find no first amendment impediment to the compelled discovery of these videotapes.[7]

In the instant case, defense counsel was willing to forego his right to examine or cross-examine Victoria Corderi on the witness stand, provided he could get the complete, unedited videotape of the interview with Appellant (R622). Therefore the "inconvenience" to CBS and Ms. Corderi -- not a constitutionally significant consideration to begin with -- would be minimal. As in Morejon and Jackson, there was no confidential source involved in this case which may "dry up" if revealed. See In re Letellier, 578 A.2d 722, 727 (Maine 1990)("The First Amendment rights involved here will not be significantly impaired by the compelled production of the videotape of the full Letellier interview. Unlike the Confidential sources about whom the dissent in Branzburg expressed concern, Letellier is a publicly identified, nonconfidential source who voluntarily responded to a news reporter's questions"). See also Don King Productions v. Douglas, 131 F.R.D. 421, 426 (S.D.N.Y. 1990)(sports reporter ordered to produce

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[7] Note that there is no indication in Jackson that the prosecution intended to use the televised portion of the CBS videotape as evidence against Jackson. Thus, the unfairness of denying access to the outtakes is much more pronounced in the instant case than it would have been in Jackson.

tape recording for use as evidence in civil trial; District Court notes that "[d]isclosure of a public figure's statements that already have been published in part in an article which identified the non-secret source...hardly imperils 'the important interests of reporters and the public in preserving the confidentiality of journalists' sources...'").

As in Letellier, appellant is a publicly identified, nonconfidential source who voluntarily responded to Victoria Corderi's questions during an interview which lasted an hour and a half. Appellant didn't select the four "sound-bytes" which were spliced together for the broadcast, and almost certainly neither did Corderi; rather they were selected by a CBS news editor based on commercial and programming considerations. In this situation, "[W]hat chilling effect is there if a person talks to a reporter and asks for a copy of what he told them?", especially when that person is on trial for his life, and the prosecution is using the broadcast portions of the interview against him. CBS, Inc. V. Cobb, 536 So.2d at 1069; see Letellier, 578 A.2d at 728; LaRouche Campaign, 841 F.2d at 1181.

Where the shoe was on the other foot -- where it was the prosecution rather than the defense which sought to subpoena the outtakes of videotaped interviews by reporters of persons charged with crimes -- courts have rejected media claims of journalistic privilege, and found that the state was entitled to the unbroadcast portions of the interviews. WBAL-TV Divisian. The Hearst Corp. v. State, 477 A.2d 776 (Md. 1984); In re Letellier, 578 A.2d 722 (Maine 1990); cf Waterman Broadcasting of Fla. v. Reese, 523 So.2d 1161 (Fla. 2d DCA 1988). These decisions clearly show that, assuming arguendo that CBS had any qualified First Amendment privilege at all [contra Morejon], the Second DCA in CBS V. Cobb was correct in determining that appellant's constitutional rights must take precedence. The Fifth, Sixth, and Fourteenth Amendments protect the accused's right to due process, to a fair trial, to fully and fairly present his defense, and to confront adverse witnesses. While the state also has a right to a fair trial, and there is a strong public interest to consider, the prosecution's trial rights are not based on specific constitutional guarantees. Also, neither WBAL, Letelliel;, or Waterman Broadcasting involve the even more compelling situation

of the instant case, where one party introduces a portion of the statement and the other party -- as a matter of basic fairness -- seeks production of the entire statement. Rather, in those cases, the state simply sought the outtakes (or, in , the compelled testimony of the television reporter) for possible use as inculpatory evidence in the first instance. In WBAL, the Maryland Court of Appeals concluded:

> Our opinion today does nothing to impair the freedom of the press in this State. The summons issued to WBAL sought one specific and clearly identified piece of evidence; it did not seek to rummage through the files of a news organization on a fishing expedition [citation omitted]. We are satisfied that the State has not sought the video taves in bad faith for the purpose of harassing the press: See Branzburg, supra, 408 U/S, at 706, 92 S.Ct. at 2669. WBAL has been unable to articulate any threat to a free press posed by compelled production of the video tape in this case. Its vague and speculative claims of interference with the free functioning of the Fourth Estate are far outweighed by the public's overriding and compelling interest in the prosecution of an individual accused of a serious crime.

477 A.2d at 783

In CBS v. Cobb, the Second DCA found that appellant's constitutional right to defend himself clearly outweighed any privilege CBS might have to withhold journalistic work product, and stressed, "We must not lose sight of the fact that Long is, literally, fighting for his life." 563 So.2d at 1071. If the prosecution was entitled to the outtakes it sought in WBAL and Letellier, and the compelled testimony it sought in Waterman Broadcasting, then appellant's need for the complete, unedited videotape of the Corderi interview in the instant case was even more critical.

The Letellier case contains the following highly pertinent observations:

> ...[B]ecause the grand jury already has available the broadcast portions of the Letellier interview and those public portions contain inculpatory statements, the outtakes become that much more important because they and they alone will permit the grand jury to assess the full context in which Letellier made his videotaped statements. The videotape presents an invaluable and irreplaceable opportunity for the grand jury to observe Letellier's demeanor and to hear an unedited version of his story in his own words with any subtle nuance that it may reveal. The grand jury can then draw its own inferences and conclusions and thereby can effectively and completely discharge the weighty obligation it owes to both Letellier and the people of the State of Maine. WCSH-TV generated an even greater need for the grand

> jury to have the unedited videotape by extensively paraphrasing Letellier's comments during its broadcast report on the Letellier investigation. The out-takes may reveal shades of meaning different from WCSH-TV's paraphrase and may therefore be at least partially exculpatory. They may also contain further inculpatory admissions. In any event, it is essential that the grand jury have access to the full videotape, if only for context. Otherwise, exclusive power is vested in WCSH-TV to decide how much it will allow the public, as well as the prosecuting attorney and the grand jury, to know about what Letellier said or did not say.

578 A.2d at 729

In the instant case, where the prosecutor actually introduced before the trial jury in the guilt phase an excerpt (edited by CBS) of the videotaped interview which appeared to amount to a Williams Rule admission of being a serial killer, and then introduced another excerpt (also edited by CBS) in the penalty phase and elicited very damaging (and improper) evidence from his psychiatric experts based on that excerpt, appellant's need for and right to access to the full videotape was far greater than the state's need and right in Letellier. The trial court in denying defense counsel's repeated requests for the complete unedited tape, abdicated his responsibility to enforce appellant's right to compulsory process (as well as the other constitutional trial rights previously discussed), and delegated exclusive and unreviewable power to CBS News to decide what was relevant and admissible.

For the reasons stated in Part C of this Point on Appeal, appellant's conviction and death sentence must be reversed, and the case remanded for a new trial.

ISSUE II

APPELLANT WAS DEPRIVED OF A FAIR TRIAL AND DUE PROCESS BECAUSE THE PROSECUTION WAS ALLOWED TO MAKE THE EVIDENCE OF OTHER CRIMES THE OVERWHELMING FEATURE OF THE TRIAL.

For nearly as long as the Williams Rule has been known by that name, this Court and the District Courts of Appeal have recognized an important corollary that (assuming the collateral crime evidence is admissible in the first place) "the prosecution should not be allowed to go too far in introducing evidence of other crimes. The state should not be allowed to go so far as to make the

collateral crime[s] a feature instead of an incident." Randolph v. State, 463 So.2d 186, 189 (Fla. 1984), citing Williams v. State, 117 So.2d 473 (Fla. 1960). When the prosecution violates the caveat in Williams, the defendant is deprived of a fair trial and reversible error is committed. Macklin v. State, 395 So.2d 1219, 1221 (Fla. 3d DCA 1981). See e.g. State v. Davis, 290 So.2d 30, 35 (Fla. 1974), affirming Davis v. State, 276 So.2d 846 (Fla. 2d DCA 1973); State v. Lee, 531 So.2d 133, 137-38 (Fla. 1988); Denson v. State, 264 So.2d 442 (Fla. 1st DCA 1972); Smith v. State, 344 So.2d 915 (Fla. 1st DCA 1977); Knox v. State, 361 So.2d 799 (Fla. 1st DCA 1978); Matthews v. State, 366 So.2d 170 (Fla. 3d DCA 1979); Ziegler v. State, 404 So.2d 861, 863 (Fla. 1st DCA 1981); Mattera v. State, 409 So.2d 257, 259 (Fla. 4th DCA 1982); Selver v. State, 568 So.2d 1331, 1333 (Fla. 4th DCA 1990).

In the instant case, the Williams Rule evidence was not only a feature of the trial, it was the overwhelming feature, to the point where the evidence of the charged crime (the murder of Virginia Johnson) was dwarfed by comparison. The collateral crime evidence was greatly disproportionate to the evidence of the charged crime -- disproportionate in quantity, in quality, and in prejudicial impact. In fact, it is difficult to imagine a capital trial in which the "feature of the case" rule could be more thoroughly violated than it was in this one. The state's whole approach -- since it did not have sufficient admissible evidence to prove that appellant killed Virginia Johnson -- was to prove that he was a serial killer and a rapist, and thereby persuade the jury that he was probably guilty of the charged crime as well. In Peek v. State, 488 So.2d 52, 55-56 (Fla. 1986), this Court observed:

> Our justice system requires that in every criminal case the elements of the offense must be established beyond a reasonable doubt without resorting to the character of the defendant or to the fact that the defendant may have a propensity to commit the particular type of offense. The admission of improper collateral crime evidence is "presumed harmful error because of the danger that a jury will take the bad character or propensity to crime thus demonstrated as evidence of guilt of the crime charged." Straight v. State, 397 So.2d 903, 908 (Fla. 1981).

See also Paul v. State, 340 So.2d 1249, 1250 (Fla. 3d DCA 1976), quoted with approval in Peek and in Jackson v. State, 451 So.2d 458, 461 (Fla. 1984), which states:

> It is evident defendant is a habitual criminal and that he frequently commits burglaries. 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.

In Peek, the Court agreed with the defendant's contention that the collateral crime evidence was prejudicial and should have been excluded, and reversed for a new trial, but disagreed with his other contention that, absent this evidence, insufficient evidence existed to sustain a conviction. 488 So.2d at 56. See also Thompson v. State, 494 So.2d 203, 205 (Fla. 1986). In the instant case, in contrast, the state's evidence pertaining to the murder of Virginia Johnson is insufficient to establish appellant's guilt of that crime, without resorting to character or propensity to commit that type of crime. Peek; Paul. In this entire lengthy trial, there was no direct evidence that appellant killed Virginia Johnson, and the only circumstantial evidence (apart from the collateral crimes) consisted of a single commonplace fiber and two head hairs. See Scott v. State, __So.2d__ (Fla. 1991)[16 FLW S416]; Cox v. State, 555 So.2d 352 (Fla. 1989); Jackson v. State, 511 So.2d 1047, 1049 (Fla. 2d DCA 1987); Horstman v. State, 530 So.2d 368, 370 (Fla. 2d DCA 1988). Out of 59 witnesses, who testified 76 separate times, only one, FBI agent Michael Malone, gave any testimony which specifically tended to connect appellant to the Virginia Johnson case. Because of the paucity of its evidence relating to the charged crime, what the prosecution chose to do instead was to literally Williams Rule appellant to death. The best way to illustrate the extent to which the collateral crime evidence dominated this trial is to look at it session by session:

November 1, 1988 (afternoon). In a shortened (two-hour) session, seven witnesses testified regarding the Virginia Johnson homicide: Sharon Martinez, who reported her missing; Terry Duggan, another friend of Virginia's; Bernadene Herman, the nurse at the VD clinic; Linda Phethcan and Candy Linville, who discovered the remains; and Deputy Sheriff White and PDLE crime lab analyst

Vohlken, who went to the scene and participated in the collection of evidence. Photographs of the scene, including two of the skeletonized remains, were introduced into evidence.

November 2, 1988 (morning). Fifteen more witnesses (ten of whom were chain of custody witnesses) testified regarding the Virginia Johnson homicide. Of the substantive witnesses, Deputy Sheriff Hagin participated in the grid search at the scene, attended the autopsy, and -- when Virginia Johnson was reported missing -- obtained some of her personal effects which ultimately led to her identification. Dr. Wood, the medical examiner, went to the crime scene and performed the autopsy; she determined that the cause of death was "homicidal violence, probably garrotment", although she could not positively rule out other causes. The anthropology professor, Wienker, studied the skeletal remains and concluded the bones were those of a caucasian female of 19 or 20, about 5 foot 5. Dentists Gish and Martin testified as to the identification of Virginia Johnson by her dental records.

November 2, 1988 (afternoon). The session opened with Lisa McVey's testimony concerning her kidnapping and sexual battery. Lisa testified that she was abducted at gunpoint, dragged into a car, forced to strip, blindfolded and bound, and taken to an apartment where she was raped repeatedly. After about 24 hours in the apartment, she was driven by her assailant to a parking lot near her home and released. Detective Polly Goethe testified that she interviewed Lisa after her ordeal, and received descriptions of the assailant and his car, Detective Goethe recounted the police investigation of the rape, based on information received from Lisa, which brought appellant's name to their attention. Detectives Wolfe and Helms testified about their coincidental stop of appellant's car, based on its meeting the general description. Detectives Winset, Muck, Moore, and Cribb testified regarding appellant's arrest (pursuant to an arrest warrant for the kidnapping and sexual battery of Lisa McVey), the search of his apartment, and the impoundment and search af his car. Lieutenant Randy Latimer testified that he and Sergeant Price interrogated appellant about the rape and kidnapping of Ms. McVey, and after being advised of his constitutional rights,

appellant admitted that he had "abducted her from a bicycle on the street, taken her to his apartment, raped her, threatened her with a firearm and returned her to her house" (R840).

Two witnesses in the Lana Long homicide, the boys who found her body, testified out of order.

The last witness in this session, FBI agent Malone, was also the last witness in the trial to testify regarding the Virginia Johnson homicide. He gave the opinions that the two blonde head hairs found in the sweepings from appellant's car were consistent with Ms. Johnson's hair sample, and that the red lustrous, trilobal nylon fiber found in the hair mass of Ms. Johnson had the same class characteristics as fibers from the interior of appellant's car. Therefore he concluded that they must have been manufactured or at least dyed by the same carpet company.

November 3, 1988 (morning). At the beginning of the session, the prosecutors announced to the trial court that all of the rest of the evidence to be presented in the case was Williams Rule (R954). When the jury was returned to the courtroom the broadcast portion of the CBS videotape was played. In his statements on the tape, appellant did not mention any specific homicide, but he made what amounted to a Williams Rule admission of being a serial killer. See Delgado v. State, 573 So.2d 83, 85 (Fla. 2d DCA 1990)("The fact that the evidence of collateral crimes comes from prior statements of the defendant does not exempt it from the Williams rule"). The state then presented nine more witnesses in the Lana Long homicide, including a crime scene technician who made plaster cast impressians of tire tracks, the associate medical examiner who performed the autopsy, and Ms. Long's fiance John Corcoran. A photograph of Ms. Long dancing at a bar, and another photograph of her body at the scene, were introduced into evidence. *Next* the state called the *first three* of *its* witnesses in the Michelle Simms homicide, including the construction worker who discovered her body, and crime scene investigator Hunt, who described the condition of the victim at the scene. Her throat had been cut. Hunt made plaster cast impressions of tire

tracks at the crime scene. Three photographs of Ms. Simms' body were admitted into evidence,

November 3, 1988 (afternoon). Four more witnesses in the Michelle Simms homicide were called, including Dr. Miller who performed the autopsy. He found three different sets of injuries which caused her death; the cut throat, five impacts to the head resulting in lacerations and internal bleeding, and strangulation. The state next presented seven witnesses in the murder of Karen Dinsfriend, and nine witnesses in the murder of Kim Swann. Photographs of their bodies were introduced. Among the witnesses in the Swann homicide was the victim's father, Noah Swann, who told the jury that Kim was the mother of a year-and-a-half old child.

November 4, 1988 (morning). Hillsborough County Detective Cribb testified that he removed the tires from appellant's automobile and took them to the FBI lab. A composite exhibit consisting of two of the tires -- a Vogue and a Uniroyal -- was introduced into evidence.[8] FBI tire tread expert Attenburger testified that a Uniroyal is a very common commercially available tire, while a Vogue tire is extremely uncommon, He compared State's Exhibit 47 (appellant's tires) with State's Exhibits 48 and 49 (twelve plaster tire casts from the Lana Long and Michelle Simms cases). While he was unable to determine any individual characteristics, he found that appellant's Vogue and Uniroyal tires were similar in design and approximate size to the five plaster casts which were suitable for comparison, and therefore "could have made the tire impressions" found at the Lana Long and Simms crime scenes.

The state then recalled FBI agent Malone, who testified regarding his comparison of hairs and fibers in the Lana Long, Simms, Dinsfriend, and Swann murders, and in the rape and abduction of Lisa McVey. In the Simms, Dinsfriend, and McVey cases, Malone found "a second completely different type of fiber that was not at the Lana Long [or the Virginia Johnson] crime scene" (R1220). This was a delustered trilobal fiber, which (in contrast to the extremely common

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[8] There were no tire tracks in the Virginia Johnson case.

lustrous fiber), Malone described as "a very, very unusual fiber" (R1220). Appellant's automobile carpeting contained both kinds of fibers. (This is done, Malone explained, to get highlights in the carpet). According to Malone, the delustered fibers from the clothing of Simms, Dinsfriend, and McVey were consistent with the delustered fibers in appellant's carpeting, while the lustrous (i.e., common) fibers in the various Williams Rule cases were consistent with the single lustrous fiber in the charged crime, and with the lustrous fibers in appellant's carpeting.

Malone also compared gold acrylic lustrous fibers found on the trunk molding from appellant's car with fibers from the gold acrylic blanket in which Karen Dinsfriend's legs were wrapped. He concluded that they were cansistent.

In the sweepings from the interior of appellant's car, Malone found three head hairs (one apiece) which he concluded were consistent with the hair samples of Lana Long, Michelle Simms, and Kim Swann, respectively. A head hair found on the carpeting of appellant's trunk was found to be consistent with Karen Dinsfriend's hair. A pubic hair faund on Ms. Dinsfriend's blanket was, according to Malone, inconsistent with her pubic hair sample, but consistent with having originated from appellant. Similarly, a brown head hair found on Lisa McVey's shirt did not match Lisa's hair sample, but was consistent with appellant's.

The trial's final witness was Detective Baker. He testified that Nebraska Avenue in Tampa is an area frequented by prostitutes, homosexuals, and drug abusers. The prosecutor asked:

> And your investigation revealed that Virginia Johnson, Kim Swann, Karen Dinsfriend, Michelle Simms, and Lana Long frequented the Nebraska Avenue area, correct?
>
> A. Except for Michelle Simms; our last involvement with her was we found her to be on Kennedy Avenue. And it I may comment on Kennedy Avenue, it would be a twin sister to Nebraska.

(R1258)

According to Baker, Lana Long had worked as a semi-nude or nude dancer at the Sly Fax on Nebraska. Investigation revealed that Michelle Simms "probably had been in town no more than twenty-four hours. Apparently she came over from the east coast and set up her business in the Kennedy area". Her business,

according to Baker, was prostitution. Karen Dinsfriend was described by Baker as "[a] well known prostitute and drug addict". The prosecutor asked:

> Q. Kim Swann?
>
> A. Kim Swann was different. Our investigation revealed that although she was a girl of the evening, went out night, I don't believe we're talking about a prostitute but a girl who indulged in drinking and very carefree. Our investigation revealed that she was driving her vehicle before she disappeared.
>
> Q. In the area of Nebraska Avenue, I believe.
>
> * * *
>
> A. Sir, I believe, if my recollection is correct after all these years, I believe she was last seen on Dale Mabry. Again, Dale Mabry is a highly populated area, and people travel that all hours of the night.

(R1260)

Lisa McVey, Baker continued, "was a young high school student or seventeen year old girl that was, I believe, working at a donut shop or something". There was no indication of prostitution on her part.

The prosecutor, after describing the Hillsborough victims, with the exception of Lisa McVey, as "people of the evening", asked Baker if he observed any other common characteristic (excluding or including McVey). Baker answered:

> The common thing seemed to be that they were easily accessible type of victims, where they were at a certain time of night. I believe we're talking about from 10:00 p.m. to 2:00 or 3:00 o'clock in the morning. They would be last seen in a vulnerable type area that exposed themselves to people.
>
> Q. [by Mr. Van Allen]: And in addition, the other common thing between the victims -- excluding Lisa McVey -- the victims, when they were discovered, were they clothed, unclothed, semi-clothed?

(R1263)

Baker replied that the bodies of Kim Swann and Lana Long were nude, while the bodies of Karen Dinsfriend and Michelle Simms were partially clothed. Over defense abjection that the state was using Detective Baker to rehash the evidence which had already been testified to, Baker answered affirmatively to the prosecutor's questions of whether there was evidence that each of the deceased victims (i.e., excluding McVey) "had been tied in one fashion or another"; and whether there was evidence that each was "killed by a means of strangulation or associ-

ated with strangulation". The prosecutor then stated "And of course, we have the common fiber among them all, and that's the common fiber, the red lustrous nylon trilobal fiber". Baker answered "Yes, sir".

With that, the prosecutor delivered the Williams Rule coup de grace:

> MR. VAN ALLEN: On September 23, 1985, did you have occasion to come into contact with Robert Joe Long in Tampa, Hillsborough County, Florida?
>
> DETECTIVE BAKER: Yes, sir.
>
> Q. And at the time you had contact with Mr. Long in Tampa on September 23rd, did he admit that he killed Lana Long by pleading guilty to the murder?
>
> A. Yes, sir.
>
> Q. Did he admit that he killed Michelle Simms by pleading guilty to that murder?
>
> A. Yes, sir.
>
> Q. Did he admit that he killed Karen Dinsfriend by pleading guilty to that murder?
>
> A, Yes, sir,
>
> Q. And did he admit that he killed Kim Swann by pleading guilty to that murder?
>
> A. Yes, sir.
>
> Pasco County is a different judicial circuit from Hillsborough County; is it not?
>
> A. Yes, sir.

The state then rested.

If you count the number of witnesses, or record pages, or evidentiary exhibits in this trial, it can be seen that at least 60 percent and probably closer to two thirds of this capital trial was Williams Rule. Of the six sessions in which evidence was presented, only the (shortened) first session and the second were devoted entirely to the Virginia Johnson homicide. The third was split between the charged crime and the kidnapping and rape of Lisa McVey; it included Lisa's live testimony and appellant's confession to those crimes. The fourth, fifth, and sixth sessions were all Williams Rule, leading up to the climactic testimony of Detective Baker. That much collateral crime evidence makes it a "feature of the trial" almost by definition. See e.g. State v. Davis,

290 So.2d 30, 35 (Fla. 1974), affirming Davis v. State, 276 So.2d 846, 848 (Fla. 2d DCA 1973); Mattera v. State, 409 So.2d 257, 259 (Fla. 4th DCA 1982). When you consider the nature and quality of the evidence, in addition to the quantity, the disproportionate emphasis on the Williams Rule crimes in the instant case is even more overwhelming. There was a rape victim (Lisa McVey) taking the stand and describing her ordeal. There was a confession by appellant to the police (in the Lisa McVey case). The jury saw inflammatory photographs of the bodies of the four Hillsborough County victims (photographs which showed no similarity to the photos of the skeletonized remains of Virginia Johnson). The jury heard irrelevant testimony from the fiance of Lana Long and the father of Kim Swann, and heard Mr. Swann say that Kim was the mother of a baby. There was evidence that the tire tracks found at the Lana Long and Michelle Simms crime scenes were consistent in design and approximate size to appellant's tires, even thoughthere were no tire tracks in the Virginia Johnson case. Worse yet, there was evidence that the very unusual delustered fibers found in the McVey, Simms, and Dinsfriend cases matched the delustered fibers in appellant's automobile carpeting, even though there were no delustered fibers in the Virginia Johnson case. There was the CBS broadcast videotape, in which the jury saw appellant apparently admitting that he was a serial killer. Finally, there was the last thing the jury heard -- the testimony of Detective Baker that appellant admitted the four Hillsborough County murders by pleading guilty to those charges.

In stark contrast, the evidence against appellant relating specifically to the murder of Virginia Johnson was two hairs and a common (lustrous) fiber. To say that the evidence of other crimes was not a feature of this trial would be like saying that gambling is not a feature of Las Vegas. To the contrary, Williams Rule is what this trial was all about.

In allowing the state to make collateral crimes the overwhelming feature of this trial, the trial court committed reversible error, and appellant was deprived of due process of law as guaranteed by the Fourteenth Amendment of the U.S. Constitution and Article I, Sections 9 and 16 of the Florida Constitution. Appellant's conviction and death sentence must be reversed for a new trial.

ISSUE III

THE TRIAL COURT ERRED IN ALLOWING THE STATE TO INTRODUCE IRRELEVANT AND HIGHLY PREJUDICIAL WILLIAMS RULE EVIDENCE REGARDING THE KIDNAPPING AND SEXUAL BATTERY OF LISA MCVEY, OSTENSIBLY FOR THE PURPOSE OF SHOWING "MOTIVE, PLAN, AND IDENTITY ON THE PART OF THE DEPENDANT".

At the August 19, 1988 pre-trial hearing on the motion to exclude Williams Rule evidence, the trial court stated:

> And I think I have to exclude the Lisa McVey [incident] on lack of similarity there. There is no death.
>
> MR. VAN ALLEN [prosecutor]: On the theory of Williams Rule?
>
> THE COURT: On the Williams Rule, right. That's all I'm dealing with now.

(R2633-34)

The trial court reiterated that he was excluding evidence of the rape of McVey because there was insufficient similarity "for her to be a Williams Rule situation" (R2636,2637-38). The prosecutor suggested that he might have some basis other than Williams Rule to put her on (R2636).

At a subsequent hearing on October 24, 1988, the prosecutor asserted that he did not intend to use the Lisa McVey criminal episode "as a pure Williams Rule thing" (R2216). Instead, he intended to introduce it to show how appellant was arrested (R2216-18). Over strenuous defense objection (R2217,2219-20,2333-36), the trial court denied the motion in limine as to the McVey crimes, indicating that he would rule on the admissibility of that evidence at the time it was offered during the trial (R3582,2234-36). Defense counsel asked:

> Is the Court indicating at this time that you're going to let the State go into specific details of the McVey abduction?
>
> MR. VAN ALLEN [prosecutor]: We don't intend to do that.
>
> THE COURT: So long as they are relevant.
>
> MR. ALLWEISS [prosecutor]: We don't intend to make a feature of it.
>
> THE COURT: The rape itself, the crime itself?
>
> MR. ALLWEISS: We're not going to go into that.

THE COURT: But the investigation appears that some of those fibers collected from the car were compared with those found in the murders, so it sounds like to me that those are relevant.

MR. ALLWEISS: We'll only make it relevant to the point where we put them together and all the -- how should you say, the screaming, hollering and all the specific details we do not intend to make a feature out of what happened to Lisa McVey. It's not going to be a feature; just a connecting of the two of them together,

THE COURT: Sounds to me like they'll say it was a sexual battery.

MR. ALLWEISS: That's all we're going to do.

(R2234)

When, on the second day of the trial, the state called Lisa McVey to the stand, it appeared that the prosecutors had forgotten their prior representations and the trial court had forgotten his prior rulings.

MR. EBLE [defense counsel]: Your Honor, at this time I need to renew my motion in limine to prohibit this witness from testifying based on Williams Rule evidence. At the prior hearing, Your Honor, the State represented that they were not going to put Ms. McVey on but just her statements were going to be used, that based upon information provided by Ms. McVey, they obtained a search warrant and an arrest warrant for Mr. Long.

This Court ruled that that much would be relevant. I argued what they were going to do is put her on and take her through the events that relate to her. I submit that's not relevant to this proceeding whatsoever and it would make it a feature of this case.

Furthermore, Judge, I would submit that it's not material to this case. The only thing material -- it's going to be put on for the truth of what happened and not for what was said or to show the context of how the police officers acted. By putting Ms. McVey on for the truth of her testimony, it clearly is inadmissible under the Williams Rule and, I submit, makes it the feature of this case.

It is not relevant. None of the circumstances of her abduction and kidnapping and sexual battery are similar to this case.

THE COURT: Mr. Eble, I think it is Williams Rule. I overruled that. It is admissible. I will accept the renewal of your motion, but my ruling is going to be the same.

(R770-71)

On the question of the Williams Rule instruction, defense counsel asked:

Which one are you going to pick? We had this argument last week about whether this was being offered for identity. And you people took the position you were not offering it for identity because it's not similar. I

submit it can't be offered for identity, and I would cite the Drake case, Your Honor.

MR. VAN ALLEN [prosecutor]: Judge, identity -- can I have just a second, Judge?

THE COURT: Yes.

MR. EBLE: That's just what the Drake case said couldn't be done with this type of evidence.

MR. VAN ALLEN: "Motive, plan, and identity."

MR. EBLE: Your Honor, I would submit for those three reasons it has to be a fingerprint; it has to be similar fact evidence. This evidence is dissimilar; it is nothing like Virginia Johnson's case or any other Tampa homicide. I would cite the Drake case, that this is going to be the feature of this trial.

(R772-73)

Nevertheless, the jury was instructed that the evidence of other crimes committed against Lisa McVey was to be considered only "for the limited purpose of proving motive, plan, and identity an the part of the Defendant" (R773-74). Lisa then took the stand and testified in detail about her abduction at gunpoint from her bicycle, and the repeated rapes which followed (R773-801,872-76). At the end of direct and again at the end of cross, defense counsel moved for mistrial on the grounds of improper Williams Rule and that the collateral crime evidence was becoming the feature of the case (R786,801). The trial court denied the motions (R786,802).

Not only did the prosecutors introduce Lisa's testimony, they also called Lieutenant Randy Latimer of the Hillsborough County Sheriff's Office, who interrogated appellant after hi5 arrest. (R837) Defense counsel at this point renewed his Williams Rule objections concerning the McVey case (R837-38). The trial caurt reinstructed the jury that it could consider the evidence of other crimes only to prove "motive, plan, and identity on the part of the Defendant" (R839). Lt. Latimer then testified that, after being advised of his Miranda rights, appellant admitted that he had abducted Lisa McVey from a bicycle on the street, taken her to his apartment, raped her, threatened her with a firearm, and returned her to her house (R840).

The state initially represented that it did not intend to go into the specific details of the crimes against Lisa McVey, but merely intended to show

how appellant was arrested. In State v. Baird, 572 So.2d 904, 907-08 (Fla. 1990), this Court held that the testimony of a police officer in a racketeering prosecution that he had received a tip that the defendant was a "major gambler" was not admissible to present a logical sequence of events leading up to the arrest. Agreeing with the Fourth DCA in Harris v. State, 544 So.2d 322, 324 (Fla. 4th DCA 1989), this Court said:

> ...[W]hen the only purpose for admitting testimony relating accusatory information received from an informant is to show a logical sequence of events leading to an arrest, the need for the evidence is slight and the likelihood of misuse is great. In light of the inherently prejudicial effect of an out-of-court statement that the defendant engaged in the criminal activity for which he is being trisd, we agree that when the only relevance of such a statement is to show a logical sequence of events leading up to an arrest, the better practice is to allow the officer to state that he acted upon a "tip" or "information received." without going into the details of the accusatory information. 544 So.2d at 324.

See also Barnes v. State, __ So.2d __ (Fla. 4th DCA 1991)[16 FLW D804]; Burney v. State, __So.2d__ (Fla. 4th DCA 1991)[16 FLW D944].

While Baird involved a hearsay issue, its logic applies even more strongly in the context of otherwise inadmissible (because of lack of unique similarity) collateral crime evidence; the need for the evidence is slight and the likelihood of misuse is great. In Henry v. State, 574 So.2d 73, 75 (Fla. 1991), the defendant was on trial for the murder of his wife in Pasco County, and the state introduced extensive Williams Rule evidence of the murder of her young son, which occurred nine hours later in Hillsborough County. This Court reversed for a new trial, saying:

> We cannot agree that the killing of Eugene Christian qualifies as similar fact evidence. To be admissible evidence under the Williams rule, an event must be similar to the crime for which the defendant is being tried and must tend to prove some fact in issue. In this case, the killing of Eugene Christian was irrelevant to explain or illuminate the murder of Suzanne Henry. It did not prove motive, intent, knowledge, lack of mistake or, contrary to the state's assertion, identity, where the necessary factual points of similarity are totally absent. On this record, the fact that both victims were family members who were stabbed in the neck did not provide sufficient points of similarity from which it would be reasonable to conclude that the same person committed both crimes. Drake v. State, 00 So.2d 1217 (Fla.1981); C. Ehrhardt, Florida Evidence § 401.10 (2d ed. 1984).

> There remains the question of whether the evidence of the killing of Eugene Christian was admissible as being part of a prolonged criminal episode. (Citation omitted). Some reference to the boy's killing may have been necessary to place the events in context, to describe adequately the investigation leading up to Henry's arrest and subsequent statements, and to account for the boy's absence as a witness. However, it was totally unnecessary to admit the abundant testimony concerning the search for the boy's body, the details from the confession with respect to how he was killed, and the medical examiner's photograph of the body. Even if the state had been able to show some relevance, this evidence should have been excluded because the danger of unfair prejudice substantially outweighed its probative value. § 90.403, Fla.Stat. (1985).

In the instant case, the prosecutor's contention that the evidence of the kidnapping and rape of Lisa McVey was admissible to show how appellant was arrested is even less compelling than in Henry. Here, unlike Henry, there was no relationship between the victims or between the crimes; there is no possible argument that the rape of McVey was admissible as being "part of a prolonged criminal episode". It is not at all uncommon for a defendant to be arrested for one offense, and then, while he is in custody, to be charged with one or more completely different offenses. That does not make the crime for which he was arrested free Williams Rule in the trial for the other crimes; the standards of relevance must still be met. Henry. How Appellant was arrested for the kidnapping and rape of Lisa McVey was not relevant to the homicide of Virginia Johnson, except perhaps to the very limited extent of informing the jury that appellant's car was impounded and searched pursuant to a valid search warrant. It is also worth noting that before it introduced any of the evidence of the crimes against McVey, the state had already appropriately informed the jury that appellant had been arrested. Pasco County Detective Ken Hagin testified that on November 16, 1984, appellant was arrested in Tampa (R654). On November 19, Hagin spoke with Sharon Martinez, who had reported Virginia Johnson missing. Hagin contacted Virginia's parents and her dentist, and it was confirmed through her dental records that Virginia Johnson was the person whose remains had been found in Pasco County. The prosecutor asked, "This all occurred after Bobby Joe Lona had been arrested?", and Detective Hagin answered "Yes" (R660-61).

Allowing the prosecution to put Lisa McVey on the stand to describe in detail how she was abducted from her bicycle at gunpoint, forced to strip, taken to an apartment, and raped repeatedly served no purpose except to inflame the jury. Henry. Allowing them to call Detective Latimer to tell the jury that appellant had confessed to the crimes against Lisa served no purpose except to improperly show his bad character and his propensity to commit sexual offenses. See e.g. Straight v. State, 397 So.2d 903, 908 (Fla. 1981); Peek v. State, 488 So.2d 52, 55-56 (Fla. 1986).

The introduction of appellant's in-custody confession to the McVey crimes, which occurred after his arrest for those crimes, plainly belies the prosecution's original contention that its purpose in going into those matters was merely to show a logical sequence leading up to the arrest. To the contrary -- and as it developed at trial -- the prasecution's purpose was to show appellant's substantive guilt of the McVey crimes as similar fact evidence. The problem is, they weren't similar.

In fact, the circumstances surrounding the abduction and rape of McVey were strikingly dissimilar to what little we know about the circumstances of the homicide of Virginia Johnson. Johnsan was killed; McVey was not killed, and in fact was released by her assailant. Johnson, according to the medical examiner, was "probably'' killed by garrotment, based on the presence of a ligature around the bones of the neck. McVey was not choked or strangled in any manner. Johnson was a prostitute, a "real bad" alcoholic, and an abuser of drugs including cocaine and heroin. McVey worked in a donut shop, There was absolutely no indication of prostitution on her part. Johnson's bady was found in a field in Pasco County, and it was the state's hypothesis that she was killed at that location. McVey was taken to an apartment in Hillsborough Caunty. McVey was raped repeatedly. There was no evidence of sexual intercourse in Johnson's case (and even assuming there had been, there was no way of knowing whether it was cansensual or non-consensual)(see R3801). McVey was abducted at gunpoint; there was no evidence of a gun in the Johnson case. Delustered (unusual) and lustrous (very common) carpet fibers were found on McVey's clothing. Only a single fiber

was found in the Johnson case, and it was of the lustrous (common) variety. The list of dissimilarities can go on and on.

As in Henry, the evidence of the crimes against Lisa McVey did nothing to explain or illuminate the murder of Virginia Johnson, and was totally irrelevant to identity, motive, or plan. There were insufficient points of similarity to conclude that the same person committed both crimes. Henry. Rather, the evidence of what happened to McVey, and appellant's confession to kidnapping and raping her, "tend[ed] to prove only two things - propensity and bad character," Drake, 400 So.2d at 1219; Peek, 488 So.2d at 55. As this Court has recognized:

> Our justice system requires that in every criminal case the elements of the offense must be established beyond a reasonable doubt without resorting to the character of the defendant or to the fact that the defendant may have a propensity to commit the particular type of offense. The admission of improper collateral crime evidence is "presumed harmful error because of the danger that a jury will take the bad character or propensity to crime thus demonstrated as evidence of guilt of the crime charged." Straight v. State, 397 So.2d 903, 908 (Fla. 1981).

Peek v. State, 488 So.2d at 56.

In the instant case, the only evidence tending to place Virginia Johnson in appellant's car was a common (lustrous) carpet fiber and two hairs. Plainly, the improper admission of the evidence of the Lisa McVey offenses was harmful error, in that it could easily have influenced the jury to find appellant guilty of the charged crime; especially since they were instructed that they could consider it to prove identity. Peek; Straight v. State, 397 So.2d 903, 908 (Fla. 1981); see also State v. Lee, 531 So.2d 133 (Fla. 1988)(reaffirming and applying the standard of State v. DiGuilio, 491 So.2d 1129 (Fla. 1986) in context of erroneous admission of collateral crime evidence). Appellant's conviction and death sentence must be reversed for a new trial.

ISSUE IV

THE TRIAL COURT ERRED IN ALLOWING THE STATE TO INTRODUCE AS WILLIAMS RULE EVIDENCE THE HILLSBOROUGH COUNTY MURDERS OF LANA LONG, MICHELLE SIMMS, KAREN DINSFRIEND, AND KIM SWANN, AS THOSE CRIMES WERE NOT SHOWN TO BE UNIQUELY SIMILAR TO THE MURDER OF VIRGINIA JOHNSON.

This Court has said, most recently in State v. Savino, 567 So.2d 892, 894 (Fla. 1990):

> The test for admissibility of similar-fact evidence is relevancy. Williams v. State, 110 So.2d 654 (Fla.), cert.denied, 361 U.S. 847 (1959). When the purported relevancy of past crimes is to identify the perpetrator of the crime being tried, we have required a close similarity of facts, a unique or "fingerprint" type of information, for the evidence to be relevant. Drake v. State, 400 So.2d 1217 (Fla. 1981); State v. Maisto, 427 So.2d 1120 (Fla. 3d DCA 1983); Sias v. State, 416 So.2d 1213 (Fla. 3d DCA), review denied, 424 So.2d 763 (Fla. 1982).

In Drake v. State, 400 So.2d 1217, 1219 (Fla. 1981), the Court explained:

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

Sea e.g. peek v. State, 488 So.2d 52,55 (Fla. 1986); Thompson v. State, 494 So.2d 203, 204-05 (Fla. 1986); Heuring v. State, 513 So.2d 122, 124 (Fla. 1987); Davis v. State, 376 So.2d 1198 (Fla. 2d DCA 1979); Mattera v. State, 409 So.2d 257 (Fla. 4th DCA 1982); Green v. State, 427 So.2d 1036 (Fla. 3d DCA 1983); State v. Maisto, 427 So.2d 1120 (Fla. 3d DCA 1983); Bricker v. State, 462 So.2d 556, 558-59 (Fla. 3d DCA 1985); Edmond v. State, 521 So.2d 269 (Fla. 2d DCA 1988); Florida v. State, 522 So.2d 1039 (Fla. 4th DCA 1988); Whitehead v. State, 528 So.2d 945 (Fla. 4th DCA 1988).

In the present case, the extensive evidence concerning the murders of four women in Hillsborough County was admitted over repeated and strenuous defense abjection, and the jury was instructed that they could consider it to prove motive, plan, and identity. In fact, all it proved was appellant's bad character and criminal propensity, since the Hillsborough murders were not so uniquely

similar to the murder of Virginia Johnson (or, more accurately, to what little is known about the circumstances of Ms. Johnson's death) so as to show that the same individual committed both. Instead, the state simply used the voluminous collateral crime evidence as the feature of the case [see Issue 11, supra] to prove that appellant is a serial killer, and therefore -- because he had that propensity -- must have been responsible for the death of Virginia Johnson in Pasco County as well, The distinction was well explained in Bricker v. State, 462 So.2d 556, 558-59 (Fla. 3d DCA 1985):

> Although collateral crime evidence is admissible to show a common plan, scheme, or pattern of criminality, or to establish identity, it is not admissible where the collateral crime is merely similar to the crime for which the defendant is on trial. Crammer v. State, 391 So.2d 803 (Fla. 2d DCA 1980). The test for admissibility is not that there be greater similarity than dissimilarity between the crimes, Rather, as we stated in Green v. State, 427 So.2d 1036 (Fla. 3d DCA), pet.for rev.denied, 438 So.2d 834 (Fla. 1983), "[t]he similar crimes test is a stringent one: there must be something so unique or particularly unusual about the perpetrator or his modus operandi that it would tend to establish, independently of an identification of him by the collateral crime victim, that he committed the crime charged." Id, at 1038, citing Sias v. State, 416 So.2d 1213 (Fla. 3d DCA), pet. for rev.denied, 424 So.2d 763 (Fla. 1982); Beasley v. State, 305 So.2d 285 (Fla. 3d DCA 1974); Duncan v. State, 291 So.2d 241 (Fla, 2d DCA 1974); Marion v. State, 287 So.2d 419 (Fla. 4th DCA 1974). In this case, as we held in Green, there are no features of the prior incident which are so unique as to be, when compared with the present offense, a "fingerprint type" characteristic. The statute is calculated to prevent the unfairness of convicting the accused on the basis of a showing that he had a propensity to commit a crime such as the one charged. Evidence that the defendant has committed a similar act will frequently prompt a more ready belief by the jury that he might have committed the one with which he is charged, thereby predisposing the minds of the juror to believe the accused guilty. Waterhouse v. State, 429 So.2d 301 (Fla. 1983). For the reason that the jury will view the irrelevant evidence of the demonstrated criminal activity as evidence of guilt of the crime charged, the admission of such irrelevant evidence is presumed harmful error. Straight v. State, 397 So.2d 903 (Fla.), cert.denied, 454 U.S. 1022, 102 S.Ct. 556, 70 L.Ed.2d 418 (1981). Violations of the Williams rule may be considered harmless only where proof of guilt is clear and convincing so that even without the collateral

evidence introduced in violation of Williams, the defendant would clearly have been found guilty.[9]

Appellant recognizes that, under some circumstances, evidence of another crime to prove motive or plan might not be, strictly speaking, "similar fact" evidence, and the requirement of unique or "fingerprint" similarity might be wholly inapplicable. Examples of this type of Williams Rule evidence as to motive are Grossman v. State, 525 So.2d 833, 837 (Fla. 1988) ("[T]he fact that [Grossman] was on probation for previous crimes and that the theft of a gun violated his probation was relevant to his motive in killing Officer Park when she apprehended him and seized the weapon"); and Craig v. State, 510 So.2d 857, 859-60, 863 (Fla. 1987) (evidence of thefts of cattle from employer was relevant to prove motive for murders which occurred when employer figured out that Craig was stealing his cattle). Compare Garron v. State, 528 So.2d 353 (Fla. 1988) (rejecting state's contention that evidence of Garron's alleged sexual misconduct with his two stepdaughters was relevant to show his motive for killing his wife and one of the stepdaughters).

The instant case, however, obviously does not involve that type of "motive" issue -- the state did not claim that appellant killed Virginia Johnson to avoid apprehension for the Hillsborough murders, or anything of that nature. Rather, the state's theory appears to be one of modus operandi or "common plan or scheme", and the requirement of unique or "fingerprint" similarity clearly does apply to that type of Williams rule evidence. Drake; Heuring; Mattera; Maisto; Edmond. In other words, under the circumstances of this case, if the four Hillsborough County murders were not uniquely similar to the killing of Virginia Johnson so as to show that the same individual committed both (i.e., to prove

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[9] In the instant case, absent the collateral crime evidence, the evidence against appellant consists of two hairs and a commonplace carpet fiber, Even assuming for the sake of argument that this would be legally sufficient to sustain a conviction for the murder of Virginia Johnson [but see Scott, Cox, Jackson, and Horstman to the contrary], the state plainly cannot show that the jury would necessarily have convicted appellant based solely on the evidence pertaining to the charged crime. See also State v. DiGuilio, 491 So.2d 1129 (Fla. 1986); State v. Leg, 531 So.2d 133 (Fla. 1988); King v. State, 545 So.2d 375, 379 (Fla. 4th DCA 1989).

identity), then those collateral crimes were also irrelevant to prove a common motive or plan. See also Henry v. State, 574 So.2d 773, 775 (Fla. 1991).

The prosecutor in the instant case used his final witness, Hillsborough County Detective Lee Baker, to both summarize the supposed Williams Rule similarities, and to deliver the Williams Rule coup de grace. Detective Baker testified that Nebraska Avenue has become known to law enforcement "as an area that prostitutes hang out at and operate from, homosexuals operate from, also consisting of numerous motels that are used for solicitation of prostitution, and it's also a drug area" (R1257). The Alamo Lounge was, in 1984, a place used for prostitution (R1258). The prosecutor asked:

> And your investigation revealed that Virginia Johnson, Kim Swann, Karen Dinsfriend, Michelle Simms, and Lana Long frequented the Nebraska Avenue area, correct?
>
> A. Except for Michelle Simms; our last involvement with her was we found her to be on Kennedy Avenue. And if I may comment on Kennedy Avenue, it would be a twin sister to Nebraska.

(R1258)

According to Baker, Lana Long had worked as a semi-nude or nude dancer at the Sly Fox on Nebraska (R1258). Investigation revealed that Michelle Simms "probably had been in town no more than twenty-four hours. Apparently she came over from the east coast and set up her business in the Kennedy area" (R1259). Her business, according to Baker, was prostitution (R1259). Karen Dinsfwiend was described by Baker as "[a] well known prostitute and drug addict" (R1259). The prosecutor asked:

> Q. Kim Swann?
>
> A. Kim Swann was different. Our investigation revealed that although she was a girl of the evening, went out night, I don't believe we're talking about a prostitute but a girl who indulged in drinking and very carefree. Our investigation revealed that she was driving her vehicle before she disappeared.
>
> Q. In the area of Nebraska Avenue, I believe.
>
> * * *
>
> A. Sir, I believe, if my recollection is correct after all these years, I believe she was last seen on Dale Mabry. Again, Dale Mabry is a highly populated area, and people travel that all hours of the night.

(R1260)

The prosecutor, after describing the Hillsborough victims, with the exception of Lisa McVey, as "people of the evening", asked Baker if he observed any other common characteristic (excluding or including McVey) (R1262-63). Baker answered:

> The common thing seemed to be that they were easily accessible type of victims, where they were at a certain time of night. I believe we're talking about from 10:00 p.m. *to* 2:00 or 3:00 o'clock in the morning. They would be last seen in a vulnerable type area that exposed themselves to people.
>
> Q. [by Mr. Van Allen]: And in addition, the other common thing between the victims -- excluding Lisa McVey -- the victims, when they were discovered, were they clothed, unclothed, semi-clothed?

(R1263)

Baker replied that the bodies of Kim Swann and Lana Long were nude, while the bodies of Karen Dinsfriend and Michelle Simms were partially clothed (R1263-64). The prosecutor asked whether there was evidence that each of the deceased victims (i.e., excluding McVey) "had been tied in one fashion or another" (R1264); and whether there was evidence that each was "killed by a means of strangulation or assaciated with strangulation" (R1264). Baker answered affirmatively (R1264). The prosecutor then announced "And of course, we have the common fiber among them all, and that's the common fiber, the red lustrous nylon trilobal fiber" (R1265). Baker replied "Yes, sir" (R1265).

The prosecutor then elicited Baker's testimony that appellant had entered guilty pleas in Hillsbarough County to the murders of Lana Long, Simms, Dinsfriend, and Swann (R1265-66).

In his questioning of Detective Baker, the prosecutor unintentionally demonstrated not only that the four Hillsborough County murders were not similar to the Virginia Johnson case, but that they were in many respects not even uniquely similar to each other. Those circumstances which they did have in common were all very general similarities, which fall far short of the "unique" or "fingerprint" characteristic necessary to prove identity via the Williams Rule. The proffered similarities of the victims being "people of the evening", that they were "killed by a means of strangulation or associated with strangula-

tion" and that they "had been tied in one fashion or another" are hardly unique, especially considering that the crimes occurred in a metropolitan area with a population exceeding two million, over a *six* month period of time. See Drake v. State, 400 So.2d at 1219.

To begin with, very little is known about the circumstances of Virginia Johnson's death. She was a prostitute, a drug abuser, and a severe alcoholic, who frequented the North Nebraska Avenue area. In November, 1984, after she had not been seen around for two or three weeks, an acquaintance reported her missing. Meanwhile, the skeletal remains of a body (later identified by dental records as Virginia Johnson) was discovered in Pasco County. A tank top shirt encircled the neck bones. Beneath that was a shoelace, wrapped twice around the neck and double knotted. The medical examiner testified that the knots appeared to be square knots and there was nothing remarkable about them. A second shoelace was found at the crime scene, near the small bones of one hand, with two loops, each big enough for a human wrist. In the medical examiner's opinion, the cause of death was "homicidal violence, probably garrotment", but she could not eliminate other possible causes of death (see R699-700,714-16).

Neither the fact that Virginia Johnson was a prostitute, the fact that she was (probably) strangled, or the fact that her wrists apparently were tied -- nor the combination of these three facts -- is unique or unusual enough to provide a basis to presume that any other murder with these characteristics must have been committed by the same person. See Drake. In fact, this Court has recently decided one capital appeal [Holton v. State, 573 So.2d 284 (Fla. 1990)] and has heard oral argument in another capital appeal [Crump v. State, case no. 74,230], each involving the strangulation murders of Hillsborough County prostitutes. The victim in Holton and the two victims in Crump all had ligature marks on their wrists.

The "similarities" which the prosecutor tried to summarize for the jury in his examination of Detective Baker -- "people of the evening"; "killed by a means of strangulation or associated with strangulation", and "tied in one fashion or another" -- are clearly insufficient to qualify as admissible similar fact evidence, especially in view of the overwhelmingly prejudicial impact on the jury

of learning of appellant's propensity to murder women. See Heuring v. State, 513 So.2d at 124 ("The charged and collateral offenses must be not only strikingly similar, but they must also share some unique characteristic or combination of characteristics that set them apart from other offenses").

Turning now to the four Hillsborough County homicides, there was no evidence that Lana Long was a prostitute; only that she worked as a nude or semi-nude dancer. Kim Swann, in Detective Baker's own words, was "different"; not a prostitute, but a girl who liked to go out at night, and who "indulged in drinking". Since he was unable to prove that the Hillsborough victims were all prostitutes (hardly a "fingerprint" characteristic in any event), the prosecutor described them as "people of the evening"; meaning that they were likely to be out someplace between 10 p.m. and 2 or 3 a.m.

Michelle Simms' death was caused by three different sets of injuries: her throat had been cut several times deep enough to sever large blood vessels and cause death; there were five impacts to the head causing lacerations of the scalp and bleeding of the brain; and she had been strangled (apparently with a rope, which was like clothesline, not a shoelace)(R1075-79,1033). Lana Long, Karen Dinsfriend, and Kim Swann, in contrast, had no cutting or blunt trauma injuries. As for the victim of the charged crime, Virginia Johnson, there was no way to tell one way or the other. The medical examiner, Dr. Waod, said that x-rays of the bones did not reveal any bullets or fractures (R689). However, she could not with certainty rule out other causes of death, since she acknowledged that it is possible to kill someone or render them unconscious by striking them with a blunt object without it showing up in the bones of the skeletal structure (R714-15). Dr. Wood did not know whether the ligature was placed around Virginia Johnson's neck before or after death, or whether she was conscious or unconscious when that occurred (R715-16). In other words, we have no way of knowing whether Virginia Johnson's death occurred in the same general manner as Michelle Simms', or the three other Hillsborough victims, or neither.

Nor was the state able to show anything unique, or anything uniquely similar, in the manner in which the victims were tied, or in the positions in which their bodies were found. Lana Long's body was nude, lying face down in a

field. Pieces of rope were around her neck and wrists, The wrists were bound tightly together behind her back, separated only by the knot. Her legs were in a spread-eagle position [R970-72,1007,1009,1012-13, State Exhibit 25 (photo)].

Michelle Simms was found semi-nude in a wooded area, with a green T-shirt holding her arms behind her back. She was lying on her back. Her throat had been cut, and her neck and wrists were bound with clothesline-type rope of different thicknesses. Her hands were tied to her waist; and they were at her sides, apart from each other (not bound together as in the Lana Long case) [R1022,1028-31,1033,1074-76,1079, State Exh. 33 (photos)].

Karen Dinsfriend was found semi-nude in an orange grove. She was lying on her side in a hunched posture, almost in the fetal position. Her legs were pulled up, and the lower portions were wrapped in a blanket. A pullover shirt was pulled up to her neck and part way over her head. Drag marks were visible, and it appeared that she had been dragged by the shirt from the road. Ms. Dinsfriend was bound with more different ligatures (sweatshirt, sweatpants, bandanna, shoelace, drawstring from sweatpants) than any of the other victims, and she was the only victim whose legs and ankles were bound. [This was the only one of the four Hillsborough County cases in which, as in the charged crime, a shoelace was found]. The medical examiner testified that the knots were all common square or granny knots, and there was nothing unusual about any of them [R1082-86,1095-97,1112,1115-16, State Exh. 39 (photos)].

Kim Swann's body was lying face down on a steep embankment, with her head tilted down and her legs in a spread-eagle position. She was completely nude. Unlike any of the other Hillsborough cases, and unlike the Virginia Johnson case, no ligatures or bindings were found on the body or at the scene. There were, however, ligature marks on her neck and forearms. The marks on the neck went across the front of the neck but not completely around it. According to Dr. Miller, the absence of marks on the back of the neck did not necessarily mean that the ligature did not completely encircle the neck, but he stated that there was a "good possibility" that she was choked from behind. [R1121,1149-53, State Exh. 43 (phota)]. Dr. Miller acknowledged on cross:

> Q. [by Mr. McClure]: In fact, the ligature marks that you found in the Swann case . . . were really quite different from the bindings that were noted in the other two cases [Simms and Dinsfriend], weren't they?
>
> A. Yes.

(R1153)

Finally, the body of the victim of the charged crime, Virginia Johnson, was skeletonized due to decomposition. Identification could only be made through dental records. A knit blouse was wrapped around the bones of the neck; underneath that was a shoelace wrapped twice around and double knotted. The knots were square knots and there was nothing remarkable about them. Asecond shoelace was found near the small bones of one hand, with two loops in it, each big enough for a human wrist, [R572-775,590-92,645-47,692-95,713, State Exh. 4 and 5 (photos)].

Another significant difference is the fact that there were indications at each of the four Hillsborough County crime scenes that the victim may have been killed elsewhere and then transported to the scene, while in the charged Pasco County case, the state insisted that Virginia Johnson was murdered at the location where she was faund. Tire tracks were found at the Lana Long and Michelle Simms crime scenes. (In fact, the prosecution introduced twelve plaster tire casts and two of appellant's tires, and the testimony of FBI tire tread comparison expert Attenburger that the casts which were suitable for comparison were consistent in design and approximate size with appellant's tires, even though there were no tire tracks in the charged crime), In the Dinsfriend case, it appeared to the two men who found the body that she had been dragged by the shirt from the road and dropped underneath the fruit trees. Drag marks were visible at the crime scene, and the medical examiner stated that he could not rule out the possibility that she was killed elsewhere (R1083,1086,1115-16). Kim Swann's body was found on a roadside embankment, and it appeared *to* the medical examiner that she could have been dumped from the roadway. There were scuff marks on the back and front of her body consistent with being rolled or sliding down the slope. Dr. Miller stated that it was equally possible that she was killed elsewhere (R1121,1150-51,1154, State Exh. 43).

In the Virginia Johnson case, there were no such indications, and (in order to try to persuade the jury on the venue question) the prosecutor emphasized this difference in his closing argument. "No testimony about any drag marks from anywhere from Brumwell Road or any other direction'' (R1370). He continued:

> Another interesting point abaut the other crimes as it relates to the case of Virginia Johnson has to do with Mr. McClure's argument that we didn't prove to you that Virginia Johnson died where she was found. Well, we talked about four murders, and Mr. McClure talked about two, and that's the murder of Kimmie Swann and Karen Dinsfriend.
>
> Why those two? Because there was evidence that those two women had been killed in one place and brought to another. Remember the drag marks everybody talked about? Two kids out looking for Indian artifacts, and they found the body and they found the drag marks around the tree. There is no evidence -- no evidence at all -- to indicate that there was anything like that at Virginia Johnson's crime scene.

(R1381-82)

Where it was beneficial to the prosecutor's case for the crimes to be similar, they were similar. On the one point where he needed them to be different, they were different. Where there were pieces of unique or unusual evidence (delustered fibers, Vogue brand tire tracks) which incriminated appellant in the Williams Rule cases, but which did not exist in the Virginia Johnson case, that evidence was put before the jury to show appellant's prapensity to murder women, and to make the very weak physical evidence in the charged crime misleadingly appear to be strong.

That leads back to the fiber. Just before he had Detective Baker tell the jury that appellant had pled guilty to the four Hillsborough murders, the prosecutor said, "And, of course, we have the common fiber among them all; and that's the common fiber, the red lustrous nylon trilobal fiber" (R1265). Later, in his closing argument, he said to the jury, "A common scheme, a common fiber if you will, that runs throughout these cases. And that's why you heard the evidence of the other crimes" (R1381).

The prosecutor chose the right adjective for the lustrous carpet fiber. One of the many serious problems in this trial is that there was a unique or unusual fiber (at least according to Mr. Malone), and it existed in three of the Williams Rule cases, but not in the charged crime. Arguably, assuming that trace

evidence can under some circumstances be considered in determining whether two or more crimes are sufficiently similar to be used as Williams Rule, the **very, very unusual" delustered carpet fiber might be a unique similarity which might justify introducing some evidence of the rape of Lisa McVey and the murder of Michelle Simms in a trial for the murder of Karen Dinsfriend. But if the requirement of unique or "fingerprint" similarity means anything, it means that the unique feature must not only apply to the collateral crime and to the defendant, it must apply to the charged crime as well. Otherwise, all it shows is propensity: the state proves that the defendant committed the collateral crimes based on the unique or unusual pieces of evidence, and then the jury finds him guilty of the charged crime -- not because the unique evidence exists there as well, but because he has been shown to be the kind of guy who commits that kind of crime. That is exactly what the Williams Rule prohibits [see Peek; Straight], and exactly what the state achieved in this case.

According to Malone's own testimony, a lustrous fiber is typical of what one finds in a carpet. Trilobal fibers are "by far the most common" carpet fibers manufactured throughout the country. In comparing the fiber from Virginia Johnson's hair mass with the lustrous fibers from appellant's car, he was only able to conclude that they had the same class characteristics, and that they must have been manufactured or at least dyed by the same carpet company. Malone acknowledged that he had no idea how much of that carpeting was out there, but "I do know that it's the original carpet from Chrysler." Nor did he know where else that carpet might have been installed by the manufacturer (R893-94,897,900-01,910,912-14).

So, in other words, in a metropolitan area with a population of more than two million, Malone's testimony narrows the sources from which the fiber found in Virginia Johnson's hair could have originated to any Chrysler, Dodge, or Plymouth with red carpeting (or any other vehicle or place where that type of carpet might have been installed),

The prejudicial effect of the state's blurring of the distinction between the unusual and the commonplace fiber, and its use of the fiber as a "similarity", is better illustrated by an analogy to a more traditional Williams Rule

situation. Say there are three crimes, generally somewhat similar, but with a number of significant differences between each, and no unique features except this: In crime A, there is evidence that the perpetrator drove a blue Toyota. The defendant owns a blue Toyota. Not very unusual and not very incriminating so far. In Crimes B and C, there is evidence that the perpetrator drove a blue Toyota with a dent in the rear passenger-side door, Wisconsin plates, and a Mondale-Ferraro bumper sticker. The defendant's blue Toyota fits that description. Under these facts, it might well be appropriate to introduce evidence of Crime C in a trial for Crime B to prove identity, since they have a unique feature in common. On the other hand, it is improper and extremely prejudicial to introduce evidence of Crimes B and C in a trial for Crime A, since the critical unique feature exists in the collateral crime and applies to the defendant, but does not exist in the charged crime. In this situation, the collateral crime evidence is not relevant to prove identity. Instead, the much more compelling evidence of Crimes B and C becomes the feature of the trial, and persuades the jury that the defendant ha5 a propensity to commit that kind of crime; therefore he must have also done Crime A, even though the evidence there is much weaker. That is virtually the definition of improper Williams Rule. Peek; Straight; see especially Bricker v. State, 462 So.2d 556, 559 (Fla. 3d DCA 1985). Also, the illusory "unique similarity" between the Williams Rule crimes and the charged crime makes the "blue Toyota" (or in this case "lustrous fiber") evidence in Crime A seem much more conclusive than it actually is.

Plainly, the fiber in the Pasco County case was not unusual or unique enough to provide a basis for the Hillsborough murders to be used as Williams Rule.

Nor, for several reasons, was Malone's hair comparison testimony a proper basis for introducing the excessive collateral crime evidence. First of all, it is only by circumstantial inference that a particular piece of trace evidence, such as a hair or fiber, found at a crime scene or pursuant to a search, has anything to do with the crime. A hair found in an automobile allegedly involved in a crime could have just as easily been deposited there at an earlier time, or a later time, or by secondary or tertiary transfer, See Horstman v. State, 530

So.2d at 370; Jackson v. State, 511 So.2d at 1049. Secondly, there are questions about the reliability of hair comparison. While admissible, hair comparison cannot establish a positive identification. Scott; Cox; Horstman; Jackson. As stated in Horstman, 530 So.2d at 370:

> Although hair comparison analysis may be persuasive, it is not 100% reliable. Unlike fingerprints, certainty is not possible. Hair comparison analysis, for example, cannot determine the age or sex of the person from whom the hair came. The state emphasizes that its expert, Agent Malone, testified that the chances were almost nonexistent that the hairs found on the body originated from anyone other than Horstman. We do not share Mr. Malone's conviction in the infallibility of hair comparison evidence. Thus, we cannot uphold a conviction dependent on such evidence.

Appellant is not suggesting that the testimony of Mr. Malone concerning his comparison of two blonde head hairs from the sweepings from appellant's car with the hair sample of Virginia Johnson, or his opinion that they were consistent, was inadmissible. The probative value of the comparison was for the jury to determine. Appellant maintains, however, that it is one thing to allow hair comparison testimony pertaining to the charged crime to be considered by the jury, and an entirely different thing to allow it to be used to open the floodgates to collateral crime evidence, on the hypothesis that there were consistent hairs in those cases as well. To permit hair comparisons to be used in that manner pyramids inference on top of inference on top of inference. It presumes, before the evidence is even submitted to the jury, that the hair comparisons were accurate and had probative value, and it assumes that each of the hairs examined was in fact deposited at the time of the respective crimes. The effect on the jury is to created the impression that so many consistent hairs in so many different crimes could hardly be a coincidence; the defendant must therefore be guilty of the charged crime. But if the hair comparison in the charged crime was not accurate, then the pyramid falls apart like a house of cards. Then the other crimes (if their hair comparisons were accurate, or even if not) serve only to show propensity, and to overwhelmingly prejudice the accused's ability to defend himself in the crime for which he is supposed to be on trial.

Under the circumstances of the instant case in particular, the hair comparison pertaining to Virginia Johnson was clearly not certain enough or reliable enough to justify the introduction of four other murders and a kidnapping and rape. On direct examination, Malone described his field of expertise as follows:

> Well, very simply, with a hair, like anything else in forensic science, what we're trying to do is very simple. Your just taking an unknown commodity, something that you don't know where it came from, and you're comparing it against a known commodity, that is you do know where it came from. And you're trying to do one of two things: You're trying to say the unknown is different from the known and could not have originated from that source; or the second conclusion, this unknown is the same as or consistent with or similar to a known and could have come from that known, Now the way you have to do this with hair is with a microscopic examination.

(R879)

On cross, Malone further testified:

> Q. [by Mr. McClure]: Now it's also true that -- I think you said this on direct examination -- that hair comparison -- let's focus on that for a minute -- is not an absolute means of personal identification, correct?
>
> A. That's correct.
>
> Q. In fact, you've probably been including that in your reports since you have been writing reports on hair analysis; is that right?
>
> A. Yes, it's a rule of the lab. It has to be in there.
>
> Q. So that's a5 to not mislead anybody that hair is like a fingerprint, because it is not.
>
> A. That's correct,
>
> Q. Fingerprints can be classified, but hair cannot be classified.
>
> A. Well, hairs can be classified, but hairs cannot be matched back to a particular person to the exclusion of all others like you can do with a fingerprint.
>
> Q. Now there is no way to tell what sex hair is, is there?
>
> A. Yes, if you have a large portion of a follicle which has been pulled out, you can do the chromosome test on the follicular cells. But you have to have a large part of the follicle, and you have to get to it quickly. And, of course, these hairs were not table for that.
>
> Q. Because they decomposed having set out in the elements for a period of time?

> A. That and there was not enough follicle.
>
> Q. And there is also experimentation now about DNA printing on hair.
>
> A, Yes.
>
> Q. And these hairs that you examined were not suitable for DNA comparison either, were they?
>
> A. Well, I examined them in '84. And DNA comparison on hairs did not exist. It's in the research stages now.

(R905-06)

Malone also acknowledged that no two hairs from the same person's head are identical (R906).

Thus, in addition to the usual limitations of hair comparison evidence, there are also in this case other factors suggesting a lack of reliability; including the amount of decomposition, the lack of sufficient follicle to do a chromosome test, and some question about whether Virginia Johnson's hair was bleached or naturally blonde [see R881,910 (Halone); 540 (Sharon Martinez)]. The hair comparison was admissible, but it was not certain or reliable enough to be used as a predicate for the introduction of collateral crime evidence.

As recognized in Peek v. State, supra, 488 So.2d at 55, "the criminal law departs from the standard of the ordinary in that it reauires proof of a particular crime." In the instant case, the state had insufficient admissible evidence to prove that appellant killed Virginia Johnson, so it proved instead that he was a serial killer. Williams Rule evidence became the overwhelming feature of the trial. However:

> Our justice system requires that in every criminal case the elements of the offense must be established beyond a reasonable doubt without resorting to the character of the defendant or to the fact that the defendant may have a propensity to commit the particular type of offense. The admission of improper collateral crime evidence is "presumed harmful error because of the danger that a jury will take the bad character or propensity to crime thus demonstrated as evidence of guilt of the crime charged." Straight v. State, 397 So.2d 903, 908 (Fla. 1981).

peek, 488 So.2d at 56.

Appellant's conviction and death sentence must be reversed for a new trial.

ISSUE V

THE TRIAL COURT ERRED IN ALLOWING THE STATE TO INTRODUCE THE TELEVISED PORTION OF THE CBS VIDEOTAPE, SINCE IT SHOWED ONLY CRIMINAL PROPENSITY, AND SINCE THE HILLSBOROUGH COUNTY HOMICIDES TO WHICH IT REFERRED WERE IMPROPERLY INTRODUCED AS WILLIAMS RULE EVIDENCE.

"The fact that evidence of collateral crimes comes from prior statements of the defendant does not exempt it from the Williams rule." Delgado v. State, 573 So.2d 83/85 (Fla. 2d DCA 1990). Quoting this Court's opinion in Jackson v. State, 451 So.2d 458, 461 (Fla. 1984), Delgado states:

> There is no doubt that his admission (to prior unrelated crimes) 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.

The court in Delgado added that where the collateral crime evidence consists of prior statements of the defendant, "[t]he argument for inadmissibility is, in fact, more cogent" [quoting Green v. State, 190 So.2d 42, 47 (Fla. 2d DCA 1977)].

In the guilt phase of the instant case, the state played to the jury a videotaped statement of appellant, consisting of five sentences out of an hour and a half interview:

> ...[I]t was like A, B, C, D. I'd pull over, they'd get in. I'd drive a little ways, stop, pull a knife, a gun, whatever, tie them up, take them out. And that would be it. And the worst thing is I don't understand why, I don't understand why.

The statement amounts to a generalized admission of being a serial killer. There is no mention of Virginia Johnson or Pasco County. No unusual or specific facts are mentioned which could support a presumption, or even a reasonable inference, that the Johnson murder is the crime, or one of the crimes, being referred to. The statement is way too general -- and the actions it describes far too common -- for it to be admitted to prove identity on a modus operandi theory. See Drake, 400 So.2d at 1219; Green, 427 So.2d at 1038; Maisto, 427 So.2d at 1122; Bricker, 462 So.2d at 559. The statement, if considered without reference to the improperly admitted Williams Rule crimes, does not indicate

whether the victims were men or women, old or young, prostitutes or "people of the evening" or hitchhikers or small children, It does not say how the victims were "taken out", or whether they were killed in the same way or different ways. The statement refers to pulling a knife or a gun; there was evidence indicating the use or presence of a knife and gun in two of the collateral crimes (Lisa McVey and Michelle Simms), but no such evidence in the charged crime. As is true of the bulk of the evidence in this trial, the fragmentary videotape shows only criminal propensity.

Prior to trial, the defense had moved in limine to exclude the videotape based on CBS' refusal to provide the complete, unedited interview, and also on the ground that the statements were irrelevant to the guilt phase (R3527-28). At a hearing on the motion (and on appellant's request for a subpoena duces tecum for the outtakes), the prosecutor stated that the broadcast tape "shows what we believe to be an admission made by Mr. Long concerning the deaths of the women in Hillsborough County" (R2247-48). It should also be noted that appellant apparently agreed to talk to the CBS reporter on the advice of Ellis Rubin, who was his attorney in the penalty trial and the then-pending appeal on the Hillsborough County charges (see R3680,2250-51,610,1325). Rubin never represented appellant in the Virginia Johnson case.

Interestingly, in trying unsuccessfully to persuade the Second DCA to quash the trial court's order requiring them to produce the outtakes of the Corderi interview, CBS argued that:

> none of Long's statements, whether contained within the broadcast portion of the interview or not, should be admissible at trial, and therefore the outtakes sought by Long are not relevant. More specifically, they contend that Long's damaging admissions were not shown to relate to the murder for which he is now being tried, nor do they display sufficient similarity to the facts of that murder to justify their admission as "Williams Rule" evidence.

CBS, Inc. v. Cobb, 536 So.2d at 1070.

The DCA answered this contention as follows:

> Be that as it may, the trial court has determined, since the time CBS filed its petition with this court, that the state will be allowed to introduce the interview excerpt in its possession. It is not within our present authority to rule upon the correctness of this

> decision, except to state that it strongly bolsters Long's claim of relevancy [of the outtakes].

536 So.2d at 1070.

At trial, before the broadcast tape was played to the jury, defense counsel renewed all of his prior objections, including relevancy, Williams Rule, and that any probative value of the tape was far outweighed by its prejudicial impact (R948,951,959). Just before playing the tape, both prosecutors announced to the court that "[t]he rest of the evidence to be presented in the case is all Williams Rule" [although Mr. Allweiss backed off that statement to a certain extent, characterizing the tape as "a hybrid sort of thing" (R954)]. The judge gave the collateral crimes instruction immediately before the tape was played (R955-56).

In his closing statement, the prosecutor used the videotape as similar fact evidence, arguing, "As Mr. Allweiss said, the inescapable conclusion. It was as easy as A, B, C, D. He'd drive up, they'd get in. He'd drive off a little ways and stop, pull a knife, a gun, whatever, tie them up, take them out. Just like that, And just as inescapably as A,B,C,D leads to E, Lana Long, Michelle Simms, Karen Dinsfriend, and Kim Swann and Lisa McVey lead to Virginia Johnson" (R1383).

The admissibility of the CBS videotape is governed by the Williams Rule [Delgado], and because it contained no specific or unusual facts which corresponded to the facts of the Virginia Johnson case, it was clearly inadmissible as similar fact evidence. Drake. The prejudicial impact on the jury of seeing appellant admitting to being a serial killer is self-evident. A new trial is required.

ISSUES VI - XIV

GUILT PHASE AND PENALTY PHASE ISSUES DELETED IN ORDER TO COMPLY WITH THIS COURT'S ORDER OF JUNE 12, 1991.

Appellant originally submitted a brief of 146 pages, raising fourteen Points on Appeal. In his motion for leave to file an enlarged brief, undersigned counsel represented that, in his professional judgment, a brief of that length was necessary for full review of the issues. Nevertheless, on June 12, 1991,

this Court declined to accept the brief, and ordered it reduced to 100 pages or 1ess.

In order to comply with the Court's order, undersigned counsel trimmed as much as he could from his lead issues (I through V), and was able to eliminate eleven pages. Still, there was no way to meet the 100 page limit without either gutting the strongest issues, or eliminating other meritorious issues. The undersigned very reluctantly chose the latter course. He wishes to make it clear that appellant LONG has stated repeatedly and emphatically that he does not wish to waive any issues. The decision to delete these issues is being made solely by undersigned counsel -- not because he believes the issues are meritless, but only as a result of the Hobson's Choice created by the June 12, 1991 order. The deleted issues involve:

(VI) Incompetent Opinion Testimony of FBI Agent Malone.
(VII) Irrelevant and Inflammatory Photographs.
(VIII) Denial of Motion for Mistrial when Kim Swann's Father Told Jury that she was the Mother of a Young Child.
(IX) Insufficient Evidence (Absent Improper Williams Rule.
(X) Invalidity of Hillsborough Guilty Pleas.
(XI) Improper Testimony of Detective Hagin (re Venue Issue.
(XII) Irrelevant and Inflammatory Penalty Phase Evidence.
(XIII) Various Penalty Phase Errors, Including Refusal to Exclude Testimony of Drs. Sprehe and Gonzalez.
(XIV) Improper Findings of Aggravating Factors, and Failure to Evaluate and Find Non-Statutory Mitigating Factors.

CONCLUSION

Based on the foregoing argument, reasoning, and citatian of authority, Appellant respectfully requests that this Court reverse this conviction and death sentence.

Respectfully submitted,

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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 5th day of July, 1991.

Respectfully submitted,

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