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

SUPPLEMENTAL BRIEF OF APPELLANT

JAMES MARION MOORMAN
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TENTH JUDICIAL CIRCUIT

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TOPICAL INDEX TO BRIEF

TABLE OF CITATIONS

TABLE OF CITATIONS (continued)

TABLE OF CITATIONS (continued)

ISSUE I

THE INTRODUCTION OF EDITED PORTIONS OF THE CBS VIDEOTAPE IN THE GUILT AND PENALTY PHASES OF THE TRIAL, WHILE THE DEFENSE WAS DENIED ACCESS TO THE REMAINING PORTIONS, WAS REVERSIBLE ERROR.

A. Preliminary Statement

Appellant reasserts the facts, arguments, and authorities set forth in his initial brief, p. 35-71, to demonstrate his legal and constitutional entitlement to the complete, unedited videotape as part of his preparation for trial, and for use at trial.

B. The Prosecution's Use of the CBS-Edited Tapes

In the guilt phase of the trial, over repeated defense objection, [1] the state introduced excerpts from the CBS broadcast videotape, showing appellant making the following statements to Victoria Corderi:

> ...[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.

In his closing statement to the jury, 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 jury was instructed, per the Florida Standard Jury Instruction on defendants' out-of-court statements, that it should consider appellant's statements to Ms. Corderi with caution and great care to make certain that they were freely and voluntarily made (R1409), and:

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[1] The objections, on Williams Rule relevancy grounds, and on grounds related to the trial court's failure to require CBS to produce the entire videotape, are detailed in the initial brief.

> In making this determination, you should consider the total circumstances, including but not limited to:
> Whether, when the Defendant made the statement, he had been threatened in order to get him to make it; and
> Second, whether anyone had promised him anything in order to get him to make it.
> If you conclude the Defendant's out-of-court statement was not freely and voluntarily made, you should disregard it.

(R1410)

In the penalty phase, the prosecution made the thirtsen-minute CBS-edited segment of the Corderi interview a focal point of its effort to obtain a death verdict. [2] When the state first offered it in evidence, defense counsel objected again, noting that the same problem existed as before; the so-called "context tape" was itself taken out of context of the complete interview (R1527). The court overruled the objection and the edited tape (State's Exhibit P-7) was played to the jury (R1528-29,4054-63). Defense counsel unsuccessfully 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).

During the defense's case in the penalty phase, the prosecutor used the edited videotape in his cross-examination of defense psychiatric expert, Dr. Michael Maher (R1978,2023,2077-78).

Meanwhile, the prosecutor had providedthe thirteen-minute edited videotape to each of his three psychiatric witnesses, Drs. Sprehe, Gonzalez, and Merin. In the state's case in rebuttal, the prosecutor asked Sprehe (and, phrased slightly differently, Gonzalez and Merin), "What was the significance of the tape

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[2] The frustrating circumstances under which the thirteen minute edited version came to be provided by CBS -- rather than the complete, unedited version which appellant requested in his subpoena duces tscum, and to which he was constitutionally entitled [see CBS, Inc. v. Cobb, 536 So.2d 1067 (Fla. 2d DCA 1988)] -- are described in appellant's initial brief, p. 37-53. As was emphasized in the brief and at oral argument, defense counsel repeatedly objected, moved to strike and moved for mistrial, and renewed his requests for the complete, unedited tape; to the point where the trial judge said "You have requested that enough, Mr. Eble. You don't have to run that [into] the ground" (R2093). Obviously, the state's "procedural default" argument, on which it relied in orals, is specious.

as far as you saw it -- as it relates to this case?" (R1978,2023,2077-78) [emphasis supplied]. 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 Sprehc'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.

(R2078)

Dr. Gonzalez also drew the following conclusion from what he saw of the CBS-edited tape, and explained to the jury:

> Also he would talk 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)

Near the end of his closing argument urging the jury to return a death verdict, the prosecutor told them:

> If you'll bear with me, ladies and gentlemen, I'm going to play this tape for you again because this tape puts the death of Virginia Johnson in context. 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.

(R2142)

He then proceeded to play CBS' thirteen-minute edited videotape to the jury for a second time (R2142).

C. The Outtakes

Finally -- and much too late for it to be of any use, except on retrial -- CBS has handed over the complete, unedited videotape. This event has occurred in response to this Court's order of March 2, 1992, after the appeal has already been briefed and orally argued. The order, along with the subsequent order for supplemental briefing issued March 27, 1992, indicates that this Court seeks to determine whether, in fact, any portion of the tape viewed by the jury was taken out of context of the entire interview. Appellant will show in this supplemental brief that, yes, in many significant respects the excerpts of the interview which the jury saw were very much out of context. Virtually every subject which was discussed by appellant and Ms. Corderi on the thirteen-minute edited tape which CBS deigned to provide (after the Second District Court of Appeal ruled that appellant was entitled to the whole thing) was discussed or explained further on the much longer portions of the tape which neither counsel, the psychiatric experts, the jury, nor the trial judge ever had an opportunity to see. Defense counsel was severely -- and unconstitutionally -- hamstrung in his ability to prepare for trial and for the penalty proceeding, in his ability to present his defense, and in his ability to cross-examine adverse witnesses (particularly the state's psychiatrists). In CBS, Inc. v. Cobb, 536 So.2d 1067, 1071 (Fla. 2d DCA 1988), which was decided prior to the penalty phase and while there was still time to reopen the evidentiary portion of the guilt phase[3], the District Court held inter alia, that the taped interview itself was "the best evidence of what was said by Long, including the context of Long's remarks"; that appellant had demonstrated a compelling need for the infarmation then in the possession of CBS; and that:

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[3] See appellant's initial brief, p.41-44, detailing defense counsel's repeated requests to stay the trial proceedings or at least postpone the state's introduction of the broadcast videotape until the Second DCA had ruled on appellant's right to the outtakes. The trial court refused, based in part on the financial considerations of Pasco County and the State of Florida; but indicated that if the appellate court's ruling came in time, he would do his best to fashion an appropriate remedy.

> This is not merely a "fishing expedition" for evidence which could theoretically 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). A small portion of the interview already has been utilieed to Long's detriment, and he considers it imperative to determine whether this segment was edited, properly or otherwise, in a manner which rendered it unduly suggestive of distorted its content. We must not lose sight of the fact that Long is, literally, fighting for his life.

But for the trial court's inexplicable acquiescence to CBS' lawyer's suggestion (in the face of the Second DCA's clear ruling that it had no journalistic privilege to withhold any portion of the videotape) that he merely produce thirteen minutes of what he called "context out-takes", it might nat have been too late to at least partially cure the error which infected the guilt phase; and it clearly would not have been too late to prevent the error which completely distorted the penalty phase, and rendered it fundamentally unfair. Instead, over repeated, strenuous defense objections and frustrated requests for "the rest of the video tape that wasn't played, that CBS has back in their archives, that I never got" (R2093), the trial court allowed the news agency to unilaterally decide for itself what was or was not context, what was or was not relevant, what would or would not be useful in preparing for trial. And what CBS chose to provide to the various players in this trial, in this adversary system of justice -- the lawyers, the expert witnesses, the jury, the judge -- was thirteen minutes. Thirteen minutes which excluded portions of the interview which could have been used by the defense in the guilt phase to support its contentions that (1) the state may have proved that appellant was a serial killer, but did not prove that he committed the charged crime, and (2) the state did not prove that the death af Virginia Johnson was premeditated (or, in the penalty phase, "cold, calculated, and premeditated"). Thirteen minutes which excluded portions relevant to the circumstances under which the statements were made. Thirteen minutes which contained a "break" in the middle of the segment seen by the jury (R4056), at which paint CBS, apparently intentionally, edited out appellant's explanation of why he was reluctant to go into the specifics of the crimes. Thirteen minutes which enabled the prosecutor, in urging the jury to return a death verdict, to create highly damaging and misleading impressions of appellant in the minds of

the psychiatrists and in the eyes of the jurors -- a portrayal which could have been refuted, or at least defended against, if the defense had had access to the portions of the interview which CBS withheld. Cf. Coxwell v. State, 361 So.2d 148, 152 (Fla. 1978)("And here, as in Coco where the fingerprint expert 'purportedly gave the jury a complete picture' yet in reality did not, Kilpatrick's abridged testimony concerning his conversations with Coxwell left an accusatory implication which Coxwell was barred from refuting"), The withheld outtakes would have been useful to defense counsel in preparing his own psychiatric experts for direct and cross examination (just as the state used the CBS-edited version to prepare its experts). They would certainly have been useful -- more accurately, indispensable -- to defense counsel's cross-examination of the three state psychiatrists who gave the jury their (highly unfavorable) expert opinions of appellant's statements and demeanor on the thirteen-minute CBS-edited version of the tape. If the prosecution could use selected portions of appellant's statements to Ms. Corderi to prove aggravating circumstances (including improper ones like lack of remorse) and to rebut the mental mitigating factors; then appellant had the right to introduce other portions of the same interview to try to prove the mitigating factors and rebut the aggravating ones, as wall as to test the credibility of the state's witnesses on cross.

The trial court's plainly erroneous refusal to enforce appellant's right to the production of material evidence for his defense -- a right expressly vindicated by the Second DCA's decision in CBS, Inc. v. Cobb, but then nullified by the trial court's acquiescence to CBS' desire to turn over as little of the evidence as possible -- unfairly compromised appellant's ability to prepare for trial and fundamentally distorted the entire proceeding to his detriment. In United States v. Nixon, 418 U.S. 683, 709, 711 (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 of 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.
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> * * *
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> 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.

The Nixon Court also observed that the allowance of a privilege to withhold relevant evidence in a criminal trial "would cut deeply into the guarantee of due process of law and gravely impair the basic function of the courts" 418 U.S. at 712. In the instant case, after an appellate court correctly determined that appellant's constitutional right to defend himself outweighed any privilege CBS might have to withhold journalistic work product,[4] the trial court inexplicably allowed CBS to withhold most of it anyway. The result was that the prosecution was able to use CBS-edited portions of the interview to convict appellant and to put him in the electric chair, while appellant was completely blocked from defending himself with other portions of the interview. This kind af selective withholding of evidence, when there is no privilege to withhold any of it, is even more fundamentally unfair, more destructive of the adversary system and the ends of criminal justice, and more inimical to the guarantee of due process, than the situation addressed in U.S. v. Nixon.

D. The Question of Context

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[4] Actually, the Second DCA's decision, in applying a weighing test, was more generous to CBS than it should have been, since subsequent decisions of this Court make it clear that there is no journalistic privilege, qualified or otherwise, to withhold non-confidential materials which have been subpoenaed as evidence in a criminal trial. Miami Herald Publishing Co., Inc. v. Morejon, 561 So.2d 577 (Fla. 1990); CBS, Inc. v. Jackson, 578 So.2d 698 (Fla. 1991).

This Court's March 2, 1992 order, in response to which CBS belatedly produced the unedited tape, was phrased as follows:

> Long's entitlement to the videotape has been resolved by the Second District Court of Appeal in Cobb. CBS, Inc., however, has failed to furnish the ninety minutes of the videotape comprising Long's entire interview.
>
> A primary issue in the instant appeal is CBS's failure to comply with the subpoena duces tecum, and, as a result, Long's inability to determine if the portion of that tape viewed by the jury was taken out of context. It is necessary for this Court to examine the tape in its entirety to resolve the validity of Long's claim.

Appellant will show in this section that the portions of the tape viewed by the jury were taken out of the context of the interview as a whole. Before doing so, however, appellant must emphasize that the Court's apparent assumption that the validity of his claim depends entirely upon whether the portions of the videotape which the prosecution played to the jury were taken out of context vastly understates the scope of the problem. The prejudicial effect of the denial of appellant's right to production of the unedited interview includes his inability to have the relevant portions of the outtakes considered contemporaneously as provided in Fla.Stat. §90.108, but, as previously discussed in this brief and as recognized by the Second DCA in CBS, Inc. v. Cobb, the prejudicial affect is much broader than that. The preclusion of access to the outtakes also unfairly impaired appellant's ability to prepare for trial, his ability to make the jury aware of the circumstances under which the statements ware made, his ability to cross-examine adverse witnesses, his right to present evidence of relevant mitigating factors, and his right to rebut the state's evidence of aggravating factors. Section 90.108 and the rule of Thalheim v. State, 38 Fla. 169, 20 So. 938, 947 (1896) and its progeny are related but separate legal principles, both of which apply here.[5] § 90.108 provides:

> 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.

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[5] The legal discussion which follows is also contained in appellant's initial brief, p. 54-56, but in view of the wording of the March 2, 1992 order, it bears repeating here.

§ 90.108 applies to any written or recorded statement in a criminal or civil trial, and it concerns the order of proof, as well as the broader question of admissibility. As 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.
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> * * *
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> This section does not apply to conversations but is limited to writings and recordad 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.
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> 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 of 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

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[6] See Ehrhardt, Florida Evidence (Vol.1, Second Edition), § 108.1, p. 26-21, and see, generally, 23 C.J.S., Criminal Law §885, p. 94-96.

portion of a recorded statement 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.

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, 38 Fla. 169, 20 So. at 947:

> 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 also Morey v. State, 72 Fla. 45, 72 So.2d 490, 493 (1916); Bennett v. State, 96 Fla. 237, 118 So. 18, 19 (1928); 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 previausly noted, 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, either contemporaneously (when § 90.108 applies), or on cross, or in his own case. Needless to say, the accused cannot introduce the entire conversation, or even intelligently decide whether he wishes to introduce it, unless he has access to it. See CBS, Inc. v. Cobb, 536 So.2d at 1070.

Under the Thalheim principle, and under any conception of basic fairness, if the prosecution was permitted to use edited portions of the Corderi interview as "collateral crime" evidence to prove guilt, or to establish premeditation ([I]t was like A, B, C, D ..."), or to show aggravating factors (including improper ones like lack or remorse),[7] then appellant had the right to use other portions of the same conversation to show the circumstances under which the statements were made, to show lack of premeditation (and lack of "CCP"), and to show mitigating factors and rebut the aggravating ones.

Returning now to the question of context, virtually every single subject which was touched upon in the fragments of videotape which the jury (and the expert witnesses, and the attorneys, and the judge) saw was discussed or explained more fully elsewhere in the conversation between appellant and Ms. Corderi.

To begin with the broadcast excerpt which the prosecution played to the jury in the guilt phase:

> ...[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.

In his closing argument, the prosecutor made this an integral part of his Williams Rule theme:

> . . . [T]he inescapable conclusion. It was as easy as A, B, C, D. He'd drive up, they'd gat 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)

Defense counsel, in his closing statement, argued that the Williams Rule evidence and the "A, B, C, D" videotape did not prove that appellant committed the charged crime; i.e., the murder of Virginia Johnson (R1339-40). He also

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[7] See e.g. Derrick v. State, 581 So.2d 31, 36 (Fla. 1991); Hill v. State, 549 So.2d 179, 184 (Fla. 1989); Pope v. State, 441 So.2d 1073, 1078 (Fla. 1983)("[L]ack of remorse should have no place in the consideration of aggravating factors").

contended that the state's evidence did not prove that the killing of Virginia Johnson was premeditated (R1340-42,1344,1352,1392,1394).

> Where is the evidence of premeditated intent to cause death in the Virginia Johnson case? They found bones, ladies and gentlemen. Bones. I would suggest to you that there is no proof of premeditation in the Robert Joe Long case wherein he is charged with the death of Virginia Johnson. And that's the one we're here to decide about folks. It's not whether he's guilty of the Tampa cases in Hillsborough County. It's not whether he abducted Lisa McVey or not. It's whether they can prove that he killed Virginia Johnson, and that he premeditated that death.
>
> Now it strikes me that the State wants you to believe that all of these cases are the same. And I invite you to use your own memories and your collective memories to dispute that. The cases are not all the same.
>
> And they called Lisa McVey . . .
>
> * * *
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> Well, folks, if all these cases are so similar, and it's A, B, C, D, pull a knife or a gun, get them in the car, tie them up, and take them out, then way was Lisa McVey able to testify to you? Why wasn't she killed? If Mr. Long killed everybody that gets into his car, then why isn't she dead? And if she isn't dead, and you have her in the car, why would you believe any more that he killed Virginia Johnson.

(R1343-44)

The Portion of the interview withheld by CBS contains a statement by appellant to Ms. Corderi to the effect that "I don't believe I had the intention of killing anybody when I picked them up." The "A,B,C,D" statement used by the state does not specifically say that appellant had the premeditated intent to murder every woman who got in his car, but it certainly projects the image that he was operating from a cold, calculated, almost mechanical plan -- and the prosecutor exploited that image to the hilt. This is precisely the type of unfairness which both § 90.108 and the Thalheim rule were designed to prevent; the prosecution's selective use of a defendant's statement to present a partial or misleading picture which is as damaging to him as possible, while the defendant is blocked from using the rest of his statements on the same subject to show the jury the complete picture, or to ameliorate the effect of the state's evidence. That is why the general rule that a defendant may not ab initio introduce his out-of-court "self-serving" statements goes out the window when the state uses the inculpatory portion of the conversation against him. Once that

happens, the defense is entitled to bring out any phase of the same conversation, even if exculpatory, that might in any way explain or contradict what was offered on direct. See Thalheim; Morey; Louette; Steinhorst; Burch; Guerrero; Eberhardt; Heggs, see also Bennett v. State, 96 Fla. 237, 118 So. 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"). [8]

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[8] The state may suggest that the defense could always have had appellant take the stand and testify to his state of mind at the time he picked up the Hillsborough County victims, and repeat to the jury the various things he told Ms. Corderi (assuming that he remembered them all; see CBS, Inc. v. Cobb, 536 So.2d at 1071). The problem with this is twofold. First, the jury would be unlikely to believe appellant if he tried to tell them he said something additional or different to Corderi than what they heard on the tape; whereas if they saw him say it on the tape, they might or might not believe the contents, but they would know that he did indeed say it. See CBS, Inc. v. Cobb, 536 So.2d at 1071 ("The taped interview is the best evidence of what was said by Long, including the context of Long's remarks"). Secondly, and just as important, a defendant cannot be penalized for exercising his constitutional right not to testify, See United States v. Walker, 652 F.2d 708, 714 (7th Cir, 1981), which also observes:

> In criminal cases where the defendant elects not to testify, as in the present case, more is at stake than the order of proof. If the Government is not required to submit all relevant portions of prior testimony which further explain selected parts which the Government has offered, the excluded portions may never be admitted. Thus there may be no "repair work" which could remedy the unfairness af a selective presentation later in th4e trial of such a case.
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> * * *
>
> [T]he Government's incomplete presentation may have painted a distorted picture of Walker's prior testimony which he was powerless to remedy without taking the stand.

The next example of how appellant was deprived of an apportunity to put his statements in context applies to both the guilt and penalty phases. The jury was properly instructed, pursuant to Florida Standard Instruction 2.04(e), that it should consider appellant's out-of-court statement with great care to make certain that it was freely and voluntarily made (R1409), and:

> In making this determination, you should consider the total circumstances, including but not limited to:
> Whether, when the Defendant made the statement, he had been threatened in order to get him to make it; and
> Second, whether anyone had promised him anything in order to get him to make it.
> If you conclude the Defendant's out-of-court statement was not freely and voluntarily made, you should disregard it.

(R1410)

Under Florida law, once the state has introduced a confession or inculpatory statement, the defendant is entitled to present evidence to the jury pertaining to the circumstances under which it was made, so the jury can determine the weight ok lack of weight to be given the statement. palmes v. State, 397 So.2d 647, 653 (Fla. 1981); Bunn v. State, 363 So.2d 16 (Fla. 3d DCA 1978); McIntosh v. State, 532 So.2d 1129 (Fla. 4th DCA 1988); see Adams v. Wainwright, 804 F.2d 1526, 1536 (11th Cir. 1986). In the instant case, on the Monday morning after the Second DCA lifted it stay (this was still in the guilt phase, after the state and defense had rested, but before closing arguments and the jury charge), there was a conference regarding the videotape. Defense counsel renewed his motion to strike the excerpt of the tape which had already been introduced by the State (R1321). Defense counsel also stated:

> It's my understanding that these tapes were made by CBS News with the specific agreement and understanding that Mr. Rubin [Ellis Rubin, appellant's lawyer in the Hillsborough County case] would have the chance to edit and review these tapes. And I don't think that's been done. And on behalf of Hr. Long, we would submit that his Sixth Amendment right to counsel, when he was represented by Mr. Rubin, has been violated by CBS' handling of the tapes.
>
> MR. JULIN [CBS' lawyer]: There was no such aareement. I would iust state for the record.

(R1325)

Mr. Julin told the trial court that there were approximately an hour and a half of tapes, and that he had prepared a thirteen minute tape of what he called "context out-takes" (R1324,1326). Over strenuous defense objection (R1328-29)[9], the trial court agreed with Mr. Julin that that would be acceptable (R1326,1332).

The so-called "context out-takes" are transcribed at page 4054-63 of the record, and contain one peculiar interruption:

> A. I don't even remember the second [rape]. I remember the first one clear as a bell, but I don't remember the second or the third or -- after the first one, it's all just jumbled.
>
> (BREAK IN TAPE)
>
> A. (Continued) The first time that one of those happened I had been drinking. I -- I'm not much of a drinker. Okay?

(R4056)

Because of the trial court's acquiescence to CBS' desire to produce only what it chose to produce, neither he nor counsel knew what (if anything) occurred during the break in the tape. Since appellant's remarks before and after seemed to fit together, it appeared to be just a technical glitch. In fact, what happened was this: After appellant said "[I]t's all just jumbled", the tape ran out

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> 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 [prosecutor]: Ready? It's a thirteen-minute tape, Judge.

Defense counsel repeatedly renewed his objections, motions to strike, motions for mistrial, and requests for the unedited tape throughout the remainder of the trial (R1330-31,1494-95,1527,1529-30,1955,2093).

and they changed it. There was about five minutes of conversatian on other topics, and then Ms. Corderi asked: [10]

> You were hitting on something before, when you were talking about, when you'd feel, you were stopped at a light, and you'd just get real angry and you'd want to do something. Was that what would go through your mind before you went out, on the nights you committed murder?
>
> APPELLANT (slowly and pensively): No. . . No . . . How. I don't know if I really ought to talk about specifics.
>
> MS. CORDERI: I don't want you to tell me about, you know, specifics of the murders. I want to know what you felt inside, before you went out.
>
> APPELLANT: Well, you know, I'd like to answer that, but to answer that I'd have to go into specifics about things, and I can't.
>
> MS. CORDERI [pressing]: No. Let me give you an example, I obviously don't know what went on. Were you sitting at home and feeling that rush [Camera shows appellant shaking head negatively], or, doesn't matter where you are physically, feeling that rush and saying "I gotta go out and get somebody."
>
> APPELLANT [tone changing, now speaking faster and more brightly]: No. Let me try to answer that, because you say Ellis has control over this tam. so if he don't like it he can cut it out.
>
> [No response from MS. CORDERI].

At that point, the editors at CBS decide the interview becomes "relevant" again, and the thirteen-minute "context tape" resumes with appellant saying "The first time that one of those happened I had been drinking" (R4056).

Earlier in the interview -- also withheld by CBS -- was the following exchange:

> MS. CORDERI: So what did you think when you read all that stuff [in the newspapers], you're reading about yourself . . .
>
> APPELLANT: Well, I'll tell you the truth, when it first started -- I guess its okay to talk about this stuff as long as I don't talk specifics That's what Ellis said. Is Ellis gonna get to check this out?
>
> MS. CORDERI: Yeah, Ellis is . . . obviously, Ellis called you, remember. Did you get Ellis' mess . . .

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[10] As there is no transcript of the outtakes, undersigned counsel is quoting them to the best of his ability. The stage directions are also based on the undersigned's observation of the tape.

APPELLANT: He didn't call me.

MS. CORDERI: He told me he left a message for you, said it was okay.

APPELLANT: Yeah. I got a note that y'all were coming, but we don't have any access to phones here.

Whether or not there was an agreement that Ellis Rubin would have the opportunity to review and edit the tapes, it is clear that appellant thought there was, and it is equally clear that CBS' interviewer Corderi did nothing to disabuse him of the belief. A defendant's state of mind at the time he makes a confession or inculpatory statement is relevant and admissible, as are all of the surrounding circumstances which prompted the statement. Palmeg; Bunn; McIntosh. The taped interview was "the best evidence of what was said by Long, including the context of Long's remarks." CBS, Inc. v. Cobb, 536 So.2d at 1071. The jury was instructed to weight appellant's statements carefully to be sure that they were freely and voluntarily made; that they should consider the total circumstances including whether anyone had promised him anything in order to get him to make it; and that if they found that it was not freely and voluntarily made they should disregard it.

If the jury had seen appellant's statements within the context of the entire interview, they might have determined not only that his decision to speak frankly with Corderi was motivated by the promise that his attorney would have editorial control, but also that that promise was reneged on. Instead, not only did Rubin not get the opportunity to edit the videotape, defense counsel (in the instant Pasco County trial) did not get the opportunity to see it. The decision as to what the jury could or could not consider was not even made by the trial judge; it was made by CBS,

The final straw (on this particular aspect of the multi-faceted videotape fiasco) was Dr. Merin's penalty phase testimony for the state that:

> 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 talk about these -- this behavior -- his murders and hi3 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 representa-

tion of the indif erence with which he met people, particularly women.

(R2078)

Obviously, if Dr. Merin had been able to see appellant's statements in context, he would have known that his reluctance to go into details was simply based on his attorney's advice. In fact, the interview as a whole conveys the strong impression that appellant was anything but evasive: rather he is quite straightforward [on at least one occasion, Ms. Corderi specifically tells him that] -- sometimes to his own detriment -- and even when he backs off of specifics on Rubin's advice, he appears to want to answer Ms. Corderi's question. Unfortunately, because of what the trial judge allowed CBS to do, none of the three state psychiatric experts, none of the three defense experts, none of the attorneys, and none of the jurors ever saw more than isolated fragments of the interview.

E. The Question of Context -- Penalty Phase

The next aspects of the "context'' question appellant will address specifically concern the penalty phase. At the outset, it should be noted that this was a lengthy, hotly contested penalty trial, the outcome of which depended greatly on the jury's assessment of the credibility of the six psychiatric experts, three for the defense and three for the state. Widely divergent portrayals of appellant's character and mental condition were placed before the jury.

According to defense experts, appellant had a psychiatric illness caused both by genetic and environmental factors, and he also suffered from organic brain damage as a result of numerous childhood head injuries and a very serious motorcycle accident in early adulthood. The brain injury affected the limbic region of the brain; damage to this area can impair the ability to control impulses, including the sexual drive. [Appellant's ex-wife, a reluctant witness, testifiedthat his entire personality changed right after the accident; he became violent with her and impatient with the children; he complained of headaches and insomnia; and his sexual activity increased to sometimes three or four times per day]. The defense experts testified that both mental mitigating factors existed;

appellant was under the influence of extreme mental or emotional disturbance, and his capacity to conform his conduct to the requirements of law was massively diminished.

As portrayed by the state's experts on the other hand, appellant was a calculating, remorseless, manipulative individual who had an antisocial personality disorder, but was not mentally ill. They expressed the opinion that he was a "con artist" and an escape risk, and that neither of the mental mitigating factors applied.

The one thing everybody agreed on was that appellant was the product of a nightmare childhood, including a psychologically devastating, quasi-incestuous relationship with his mother, and a humiliating experience in his early teens when he developed female breasts (a hormonal condition known as gynecomastia) which made him question whether he had turned into a girl, and which ultimately required surgery to correct. Even the state's experts described appellant's childhood as "emotionally traumatic", "pathological . . . sick . . . disturbed", and psycholagically "isolated, alone, abandoned, deserted"; and his relationship with his mother as "catastrophic" (see R1652,1664,1668,2023.2034-35,2075); and they agreed that there was a causal relationship between the childhood trauma and the crimes he grew up to commit (R2023,2048,2075).

The jury's recommendation of death was by a 9-3 vote. Therefore, it can clearly been seen that any error which related to the jury's assessment of appellant's character and mental condition, or its evaluation of the credibility of the expert witnesses, or its determination of whether the mental mitigators did nor did not apply, could easily have affected its penalty verdict. Moreover, if the jury had recommended life imprisonment (which would have required a shift of only three votes), the extensive evidence of mental illness, organic brian injury, and horrendous childhood trauma would plainly have required the trial judge to impose a life sentence in accordance with the Tedder standard. [11] See e.g. Ferry v. State, 507 So.2d 1373, 1376-77 (Fla. 1987); Hansbrouah v. State,

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[11] Tedder v. State, 322 So.2d 908 (Fla. 1975).

509 So.2d 1081, 1086-87 (Fla. 1987); Savage V. State, 588 So.2d 975, 980 (Fla. 1991).

Virtually everything on the thirteen-minute edited videotape which the jury saw (twice) in the penalty phase, and which the prosecution also used to bolster its expert witnesses' conclusions about appellant's character, was discussed or explained more fully in the outtakes which CBS withheld. The conversation on the edited tape jumps around from subject to subject, from how appellant felt when the rapes started; to his relationship with a nurse in Tampa; to the first murder; to the incident involving Lisa McVey; to the question of whether he wanted to get caught: to appellant's comment that ha figured it was so obvious something was wrong with him that when they did catch him, they would fix him. All of these subjects (except the first murder) were discussed in much more detail and depth in the outtakes; and that is virtually the definition of the word "context."

On the portions of the tape which CBS was allowed to withhold, appellant talks with Ms. Corderi about his motorcycle accident and the ensuing physical and psychological changes.[12] He felt -- and still feels -- like he is on speed all the time, except when he is on medication. He has always had a temper, but before the wreck it took alot more to set it off. His first charge of attempted rape (it ended up a lewd and lascivious) happened two months after the accident. When the attacks started happening, appellant was fooling himself, telling himself he could control it; that he would outgrow it, or just be able to stop.

Appellant complains that the police, prosecutors, and media were conveying a distorted impression of him, trying to make him look like a sneaky, scheming, conniving type of individual. Appellant tells Corderi that, to the contrary, he feels that he's been straightforward and cooperative, and its hurt him more than its helped him; "[I]f I'm so sneaky, conniving, and intelligent, I'm not doing a very good job of it."

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[12] Undersigned counsel will not attempt to summarize everything appcllant says on the tape, but will point to several examples where his statements related to what was contained in the edited version; and/or were relevant to mitigating circumstances; and/or could have been used by the defense to cross-examine the state's experts concerning their impressions of appellant on the edited tape.

Ms. Corderi asks appellant what he was feeling after the accident. He replies that he had employment problems, he was married and had a baby, and the situation was getting to him. The serial rapes started about a year after the accident. He couldn't sleep, didn't want to eat, and lost interest in everything else. If he tried not to do it, he would be okay for a day or two, but the feeling wouldn't stop until he did it. Then he would be okay for a week , or a month, or two or three, and then it would hit again.

[Note that an the thirteen-minute CBS-edited tape, what the jury heard on the subject of the rapes was that appellant had probably attacked a hundred women (R4061), and:

> And the worst thing is, I don't understand why. I don't understand why. When the rapes started I was married to a very cute little girl. We had no problems with sex or anything like that.
> Why? I don t know why.
> I know that after the first one I was driving home and I was thinking to myself, "You've got to be nuts. What are you doing? What did you just do? You've got a wife and two kids and a nice house." And, you know, I was -- I was getting ready to go to school, back to college.
> And -- you know, I remember that. I remember that as plain or plainer than any other aspect of all of that -- was that first drive home after that first one and what I was thinking.
>
> Q. The first rape or the first killing?
>
> A. The first rape. And thinking that -- that's -- it makes no sense, you know.
>
> Q. And how about after the second one? I mean, you might have said it made no sense --
>
> A. I don't even --
>
> Q. -- but you kept on doing it again.
>
> A. I don't even remember the second one. I remember the first one clear as a bell, but I don't remember the second or the third or -- after the first one, it's all just jumbled.
>
> (BREAK IN TAPE)
>
> A. (Continued) The first time that one of those happened I had been drinking. I -- I'm not much or a drinker. Okay?

(R4055-56)

The part of the conversation where appellant explains the obsessive and compulsive feelings and physical symptoms which began after the accident, and his inability to control them, remained in the CBS archives and were never made available to the defense or the jury].

As previously mentioned, the prosecutor providsdthe thirteen-minute edited videotape to his experts, He asked Dr. Sprehe to tell the jury "What was the significance of the tape -- as far as you saw it -- as it relates to this case" (R1978). Dr. 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)

Asked the same question, another state psychiatrist, Dr. Merin, opined:

> 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 talk about these -- this behavior -- his murders and his rapes, but he would never go into details. He would to 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.[13]

(R2078)

The state's presentation of evidence concerning appellant's supposed lack of remorse was improper and prejudicial in and of itself. Pope v. State, 441 So.2d 1073, 1078 (Fla. 1983); Hill v. State, 549 So.2d 179, 184 (Fla. 1983); Derrick v. State, 581 So.2d 31, 36 (Fla. 1991). Indeed, even in cases where there was a lot less mitigating evidence than in this one, this Court has not hesitated to reverse death sentences for a new penalty trial when the jury's

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[13] As shown earlier, if Dr. Merin and the jury had seen the whole conversation, they would have known the real reason why appellant did not go into details.

death recommendation was tainted by improper consideration of lack of remorse.[14] Hill; Derrick. Aside from that, however, once the state's psychiatrists drew damaging conclusions from appellant's demeanor and his manner of expression during the thirteen minutes they saw, that makes his demeanor and manner of expression throughout the entire interview relevant, both far purposes of cross-examination, or for evaluation by defense experts who might reach a contrary conclusion. This would be true in any event, but it is especially true here, because it turns out that in the portion of the interview which CBS withheld, appellant actually discusses his own on-camera demeanor and explains to Ms. Corderi why he tries to come across that way. He says to her:

> I see people doing interviews on TV all the time like this, okay, and a lot of them I just look at them and I just go , . . "That's . . . that's pathetic", because of the way they come across, and I don't know how I come across on camera or an a TV or whatever, okay,, but I sure don't want to come across as some kind of little -- whiny -- you know -- "Please don't" [he folds hands to illustrate somebody begging], you know what I'm saying, and I don't want to come across like that at all, and I hope I don't, and -- on the other hand, I don't want to come across like some kind of a hard ass, or, you know --
>
> MS. CORDERI: No, I think you've been real straight -- you're being real straightforward. What I'm interested in is -- how, what the behavior was and how it changed, you know, more than, than anything, like -- what you felt.
>
> APPELLANT: Well, what I'm getting at when I say that, about how I want to and not want to come across is -- I don't want to sound like I'm making excuses either

Isn't this part of the "context"? Isn't it something that, in fairness, Drs. Sprehe and Merin should have seen before they started drawing adverse conclusions about appellant's character from his demeanor? Isn't it something defense counsel should have had available for cross-examination? Isn't it something the jury should have known abaut before they evaluated appellant's

[14] One of defense counsel's many grounds for objecting to the thirteen-minute tape was that it was "out of context . . . inflammatory, prejudicial, and referred to non-enumerated aggravating circumstances" (R1529-30).

character and assessed the credibility of the experts? If the jury had been able to see the unedited videotape in context, from start to finish [15], they could have concluded from it that the absence of "crying, anguish, and hand-wringing'' did not necessarily mean that appellant was cold, remorseless, and manipulative; but rather that he was genuinely regretful about the crimes he had committed; that he was sincerely trying to understand the causes of his behavior and his inability to control it;[16] that he had, in a partly conscious, partly unconscious way, caused his own capture (by letting Lisa McVey go when he knew she could identify him), and that he intentionally did not leave the Tampa area when he could have, because he knew it was the only way to stop what he was doing; and that his calm, conversational demeanor with Ms. Corderi was simply an effort to maintain some dignity, and not beg for sympathy. Cf. Muhammad V. State, 494 So.2d 969, 975-76 (Fla. 1986). Perhaps most importantly, if the jury had seen the interview in its entirety, it could easily have affected their assessment of the expert witnesses' credibility, and the validity of their respective portrayals of appellant. It could have swung them away from the "cold, calculating, saciopath" characterization and toward the viewpoint espoused

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15 Because of the length of this brief, undersigned counsel will rely on the Court's observation of what is on the tape. He would also note that this is not necessarily the only impression which the jury might have had from appellant's demeanor and conversation. It is, however, a possible, reasonable, impression which some or all of the jurors might have had, and which defense counsel could have strongly reinforced with argument, if he had had access to the tape.

16 On the withheld portion of the outtakes, while talking about the nurse with whom he had had a relationship in Tampa [a subject which was discussed in less depth on the edited version], appellant told Ms. Corderi that he had thought he could stop the things he was doing if the nurse would get back together with him; "Maybe that's why I latched on to her so hard."

> MS. CORDERI: So you were really looking for a way to stop though all this?
>
> APPELLANT: Of course I was. I haven't gotten that across yet?
>
> MS. CORDERI: I just wanted to hear it from you.

by the defense that appellant's crimes were triggered by the effects of organic brain damage and the resultant inability to control his behavior; compounding the effects of a traumatic, sexually and psychologically disfiguring childhood. The trial court's refusal to require CBS to produce the unedited videotape changed the entire gestalt of the penalty phase, almost certainly to appellant's detriment.

F. Conclusiog

Because of the procedural prejudice caused by the trial court blatantly erroneous ruling, which severely impaired appellant's ability to prepare far trial, his ability to present evidence in his own behalf (in both the guilt and penalty phases), his ability to cross-examine adverse witnesses, and his right to the effective assistance of counsel, the "harmless error" doctrine does not even come into play. See e.g. Wilcox v. State, 367 So.2d 1020, 1022-23 (Fla. 1979). Even assuming arguendo that an error of this nature could ever be harmless, it clearly was not harmless in this case:

> Harmless error is not a device for the appellate court to substitute itself for the trier-of-fact by simply weighing the evidence. The focus is on the effect of the error on the trier-of-fact. The question is whether there is a reasonable possibility that the error affected the verdict. The burden to show the error was harmless must remain on the state. If the appellate court cannot say beyond a reasonable doubt that the error did not affect the verdict, then the error is by definition harmful.

State v. DiGuilio, 491 So.2d 1129, 1139 (Fla. 1986).

The state cannot begin to show beyond a reasonable doubt that the denial of appellant's constitutional[17] right to this highly material evidence had no effect on the jury's verdict in either the guilt phase or the penalty phase.[18]

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[17] See appellant's initial brief, p. 53-54,57-58,62,66-71, demonstrating the constitutional basis of his entitlement to the unedited videotape.

[18] In regard to the guilt phase, it should be remembered that the only evidence linking appellant to the victim of the charged crime consisted of two hairs and a commonplace carpet fiber. See Paul v. State, 340 So.2d 1249, 1250 (Fla. 3d DCA 1976)[quoted with approval in Jackson v. State, 451 So.2d 458, 461 (Fla. 1984)], recognizing that "the criminal law departs from the standard of the ordinary in that it require Proof of a particular crime".

Any "harmless error" argument the state might make should be seen for what it is -- an attempt *to* create a "serial killer exception" to the right to a fair trial.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Robert J. Landry, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, on this 20th day of April, 1992.

Respectfully submitted,

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