IN THE SUPREME COURT OF FLORIDA

RAY LAMAR JOHNSTON,	:	
Appellant,	:	
vs.	:	Case No. SC00-979
STATE OF FLORIDA,	:	
Appellee.	:	
	:	

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

AMENDED INITIAL BRIEF OF APPELLANT

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TENTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE

Ray Johnston was charged by indictment on September 3, 1997, and by superseding indictment on September 10, 1997, in Hillsborough County with first degree murder of Leanne Coryell, kidnapping, robbery, sexual battery, and burglary of a conveyance (1/59-70). The case proceeded to trial on June 7-17, 1999 before Circuit Judge Diana M. Allen and a jury, and appellant was found guilty as charged on each count (5/753-54; 15/1415-17). After the penalty phase, the jury recommended a death sentence by a 12-0 vote (5/777; 18/1187), and on March 13, 2000, Judge Allen imposed the death penalty on Count One, consecutive life sentences on Counts Two, Four, and Five, and 15 years imprisonment on County Three (robbery) (SR31-32; 5/856-76; 18/1838-39). This appeal follows (5/877).

STATEMENT OF THE FACTS

A. Trial

Leanne Coryell, a divorced woman with one child, lived at the Landings apartment complex in the Carrollwood area of Tampa, and was employed as an orthodontic assistant (8/287,299; 10/605-06; 12/972-73). On August 19, 1997, around 6:00 p.m., Ms. Coryell phoned her friend Skylar Norris from work, and told her that she was planning to leave work when they closed at 8:00, stop at Publix, and then go home (12/906-07). The orthodontist, Dr. Dyer, left the office around 8:00 or 8:15; Ms. Coryell and his other assistant Melissa Hill were still there when he left

(12/881-83). Ms. Coryell and Ms. Hill clocked out at 8:39, but did not leave until five or ten minutes after that, because they had difficulty setting the newly installed alarm. Ms. Coryell phoned Dr. Dyer's wife, who explained how to set the alarm (8/286-91,309-12). Ms. Hill testified that Ms. Coryell was wearing her uniform, consisting of khaki pants and a navy blue shirt with Dr. Dyer's logo (8/292-93,304; see 12/882-83). Her car was a black Infiniti. Ms. Hill last saw her driving in the direction of Dale Mabry (8/287,291-92). At 9:23 p.m., Ms. Coryell went through the cashier line at a Publix supermarket on North Dale Mabry. The cashier knew her from her shopping there. She paid for her groceries with a check. A security videotape made by the store, showing Ms. Coryell in the cashier line, was introduced into evidence (8/332-34, 347-50; 9/ 528-29).

Ray Johnston (appellant), Gary Senchak, and Margaret Vasquez shared a three bedroom apartment at the Landings (8/351-55; 9/409). Relations among the three roommates had become strained (9/411,422, 425-27). On August 18, 1997, an eviction notice for nonpayment of rent was posted on the door. This led to an argument, in which appellant told Senchak (accurately, as it turned out) that he had paid it by money order (8/358; see 14/1176-84). The next day, August 19, Senchak left a note for appellant requesting $163.92, which he claimed was owed for cable and phone bills (8/356-68, 382).

That evening, Margaret Vasquez went to church at nearby St. Timothy's around 8:30 p.m. (8/360; 9/411-12,418). Shortly

thereafter, appellant wrinkled up Senchak's note and said something like "I'm not giving you a damn dime" (8/360-61). Appellant then left the apartment (8/362). Senchak paged Ms. Vasquez, and she returned to the apartment around 9:30 or 10:00 (8/362-63; 9/412-13). Sometime around 10:00 or after 10:00, appellant came back to the apartment, went into Senchak's room, and threw 60 to 65 dollars on the bed, saying something like "That's all you're getting, you son-of-a-bitch" (8/364-65; see 9/414).

Senchak testified that appellant drove a Buick Skyhawk, which had been in a collision; the front end was wrecked and the headlights were out of alignment (8/369-71,375-76).

Around 10:30 or 10:40 on the night of August 19, John Debnar was walking his dogs on the property of St. Timothy's Church (9/443-44). As he walked down the pathway between a clump of trees and the pond, he noticed a pair of women's shoes on the ground (9/445-46). Debnar then saw a vehicle enter the church lot; it turned around in the loop and stopped by the basketball hoop, where another automobile was parked. Debnar thought the car which entered the lot was an older model Celica, not a Buick Skyhawk. It was gray or light blue, faded out, and one headlight beam (he thought it was the left one) shined almost straight up, as if it had been hit. Debnar could not see the driver well enough to tell even sex or race, and he couldn't tell if there were any passengers (9/447-48, 461). The first car stayed parked

next to the other car for 30-45 seconds, then exited the church lot (9/453).

Debnar played with his dogs for about ten minutes more, and then headed for home. One dog stopped at the pond, and when Debnar went back to retrieve him, he saw a body on the edge of the pond, maybe two feet inside the water (9/453-57, 462). The body was that of a white female with blonde hair (9/454-55). Debnar testified that her dress or skirt was hiked up above her waist, and she had on some kind of print or floral underwear (9/456, 462-64). Debnar grabbed his dog and "hightailed it" out of there; he didn't get anywhere near the body (9/455-57). When he got home he immediately called 911. He met a police officer and led her to the location where he'd found the body (9/457-58; see 9/465-67,472-74).

Hillsborough County Sheriff's officers arrived at the scene at St. Timothy's Church around 11:20 p.m. (9/468-69; 11/717). Deputies Roberts and Beck spotted the body of a white female lying face down in the water; they checked for a pulse and found none (9/470-71; 11/722). The body was totally naked; without any clothing or underwear (9/471,508). The deceased was identified by stipulation as Leanne Coryell (12/872; 4/694).

Officers secured the area, and photographed and videotaped the scene (4/470,477-79; 9/513-15; 11/726). Various articles of women's clothing, including a pair of blue shoes, beige trousers, a blue pullover shirt, a brown belt, and a bra and panties, were found in a sandy and grassy area near an oak tree, which was up a

little embankment from the pond (9/480-96, 507, 515-16; 11/722-23). There were some shoeprints in the general area where the clothing was found. Photographs and dental stone impressions were taken of these (9/479,498-02, 506-08). Divers from the Sheriff's Office searched the pond the next morning but found nothing of evidentiary significance (11/ 740-43).

The only car in the area was a black Infiniti, which was later established as belonging to Leanne Coryell. The keys were in the ignition and the engine was slightly warm (11/726-27). The automobile was removed from the scene and was subsequently inventoried and processed for evidence (9/523-24, 544-47; 11/809-14). Detective Minton took carpet samples and vacuumed for hairs and fibers (11/814). Eight latent prints were collected. All of these were from the exterior of the vehicle; they were unable to lift any prints from the interior or from the steering column. One of the latent prints was from the rear window on the driver's side (11/ 810-14,823,826).

Ms. Coryell's body was transported to the medical examiner's office, where an autopsy was performed by Dr. Russell Vega (10/628-29). Dr. Vega determined that the cause of death was manual strangulation (10/630-34,665,680). In Dr. Vega's opinion, the time of death was within a six hour period prior to 3:00 a.m. (10/631, see 10/624). Death occurred before the body was placed in the water (10/630-31). From the pattern of mud on the body and the presence of scrapes, Dr. Vega concluded that the body was dragged from some point on the bank or shore into the pond, and

that the victim was not wearing underwear or a dress at the time she was being dragged (10/640-43). Dr. Vega testified that depending on certain variables, death by strangulation usually takes a very short time, ranging from one to two minutes or less, to four or five minutes or perhaps a little longer (10/634).

Dr. Vega observed facial lacerations, one to the lower lip and one to the chin, which were consistent with blunt impact, such as a punch or falling to the ground (10/636-39). There was bruising on both the left and right sides of the buttocks. There was some superficial bruising, and also some deeper bruising in a very distinct pattern. Dr. Vega compared the injuries to the buttocks with the metal appliques on the belt which was found at the scene, and reached the conclusion that the injuries were inflicted by multiple blows from that belt. Specifically, in his opinion, the oval applique caused the bruising to the left buttock and the rectangular applique caused the bruising to the right buttock (10/643-52,669-71). Dr. Vega believed that the belt was grasped together at both ends to form a loop (10/650-51). Another object or a hand may also have caused some of the bruising (10/670-71,688-89).

Dr. Vega observed several external injuries -- and one internal injury, a small mucosal tear -- to the vaginal area. In his opinion, this indicated penetration by a relatively hard, blunt object (which could include a penis or an object other than a penis) (10/652-54,672-76). Dr. Vega believed that these injuries were the result of forcible penetration or contact

(10/688). He did not believe that the bruise to the right side of the vaginal orifice could likely have been caused by an errant stroke from the belt (10/672-76). Dr. Vega stated the opinion that the injuries to Ms. Coryell's lips and chin, buttocks, and vaginal area were all inflicted while she was alive, but at or near the time of death (10/639-40,654-46,649-50,652-54). Some soil and grass was observed between the fingers of her left hand, which, in Dr. Vega's opinion, were probably grasped during the assault (10/659-61).

In the course of the autopsy, vaginal, anal, and oral swabs, and hair combings were taken. The medical examiner's office does not conduct the testing on these items. Dr. Vega later received information than no semen was found (10/655,679-80).

Surveillance photographs and videos of appellant using automatic teller machines at a Barnett Bank, a Nations Bank, and a McDonald's, all on North Dale Mabry, were introduced into evidence. These transactions occurred in the late evening of August 19, 1997, and the following morning of August 20 (9/432-35,436-30,570-71; 11/753-55,831-33). Ms. Coryell's ATM card had a $500 daily limit (11/838-39,850). Altogether, there were four attempted transactions on the night of August 19, resulting in $500 being dispensed on the first attempt; and six attempted transactions on the morning of August 20, resulting in another $500 being dispensed on the first attempt (13/1050-54; see 11/842-50; 13/1044-50).

While investigating Ms. Coryell's death on August 20, 1997, Detective Iverson obtained the three ATM videos, made still photographs from them, and provided them to the media (11/752-55). Soon the detectives began receiving phone calls regarding the photograph of a individual using Ms. Coryell's ATM card (9/549-50). As a result of these calls, a search warrant was obtained for appellant's apartment. A pair of wet tennis shoes, and a pair of shorts similar to those they'd seen on the videotape, were seized from appellant's bathroom (9/550-52).

Appellant was interviewed by Detective Ernest Walters just after 2:00 a.m. on August 21, 1997; Detective Iverson was also present (9/553; 11/757-58). Appellant was not under arrest. He stated that he had come because he knew they were looking for him because his photograph had been televised; he came down to explain the situation (9/955; 10/592-93,603; 11/767). Appellant said he had known Leanne Coryell for several weeks. He had seen her at the apartment complex swimming pool and at Malio's restaurant, and they had gone out to dinner a couple of times. They became friends, but their relationship was not sexual (9/556-57; 10/587,597,604-05). On August 19, at about 6:15 p.m., they met at Malio's. They had a drink and then decided to go to Carabba's on Northdale for dinner. They arrived at Carabba's, in separate cars, around 7:30 or 7:45, and left there between 8:30 and 9:00. Appellant was going to go for a run, and Ms. Coryell was going to shop for groceries (9/557-59; 10/607-09); 11/759). When they separated at Carabba's, Ms. Coryell gave appellant here

ATM card and PIN number to repay $1200 which he had loaned her (9/559-60).

Appellant went home, changed his clothes, and went for his run. When he got home again, he had a disagreement with his roommate, Gary, over rent and cable TV payments (9/56-61,573-74; 10/ 585-86,613). He took a shower (either before or after the argument with Gary) and left the apartment. He went first to Taco Bell, then (between 11:00 - 11:30 p.m.) to Barnett Bank, where he found that the ATM wasn't working, and then to Nations Bank, where he withdrew $500 (9/560-61; 10/586,613-14).

At this point in the interview, appellant was placed under arrest for grand theft and was read his Miranda rights. He indicated that he understood his rights and agreed to continue the interview (9/562-66; 11/770-71).

The detectives told appellant that Ms. Coryell's time card indicated that she did not leave work until approximately 8:35. Appellant replied that evidently one of her co-workers had punched the clock for her (9/567-68; 11/763). When asked for the names of people who might have seen them at Malio's, appellant was unable to provide the names of anyone who saw him and Ms. Coryell together, but he stated that he goes to Malio's often and he is well known there (9/568-69). At Carabba's, Ms. Coryell had a salad; appellant didn't remember what he'd eaten. He did not recall if the waiter was male or female (9/569-70). Detective Walters asked appellant why Ms. Coryell would date someone like him, when she was known to date doctors, or people of influence

who had money and were well dressed. Appellant said they never discussed what either of them did for employment (9/570). Walters commented that it seemed strange that someone he'd known only a short time would lend him her bank card and PIN number. Appellant said it wasn't strange to him, and that he had loaned his bank card to friends on prior occasions (9/572).

Appellant acknowledged that the tennis shoes and shorts he had worn while running were the same ones found in the bathroom of his apartment (9/574-76). The shoes got wet when he jumped in the apartment complex' hot tub fully clothed after his run (9/575-76; 11/763).

Appellant knew that Ms. Coryell drove a newer model black vehicle. Asked if he'd ever been inside her car, appellant said he had not (10/586; 11/772). The detectives asked him if his fingerprints would be in or on the car. Appellant said his prints might be on the exterior of the car, as he had leaned against it while speaking to Ms. Coryell previously (10/586-87,606-07; 11/771-72). When asked if he had had any involvement in or knowledge concerning her death, he stated that he did not (10/590-91; see 10/597; 11/ 769). The second time he was asked if he had anything to do with Ms. Coryell's death, appellant advised detectives that they would not find any hairs or DNA or other physical evidence that would link him to the case (10/591; 11/772).

Detective Walters asked appellant where the ATM card was. Appellant said that when he was back at Malio's the day after the

homicide, people were telling him they'd seen his picture on the news. He left the restaurant, and while traveling north on Lois just north of Kennedy Avenue, he panicked and threw the card out the window (9/591-92; 11/763-64). The investigating officers attempted to locate the card on Lois Avenue, but they were unsuccessful (10/594,617; 11/763-64).

Detective Walters testified that during the search of Ms. Coryell's black Infiniti, nothing was found inside the vehicle that could be linked to appellant (10/617-19).

The state introduced videotapes of two news broadcasts in which appellant spoke with reporters by telephone from the jail (12/965-68,978; see 12/957-58). In both conversations, appellant denied killing Leanne Coryell (19/966-67,978). They were friends, and she had given him her ATM card and PIN number to withdraw money to repay a loan (12/966,978). He was supposed to meet her the next day back at Malio's; when he got there he learned of her death, and some people said they'd seen his picture on TV. He left and drove around for a while, then called the Sheriff's department and went down there on his own (12/966-67). Appellant told the reporter that the detectives had asked him about samples for DNA testing, and that they were welcome to test anything they wanted to; they would not find anything -- whether fluids, semen, hair, or skin -- that would link him (9/967).

The state presented the testimony of several of Leanne Coryell's friends and co-workers that she had never mentioned to

them anyone named Ray Johnston (8/293-94,313; 9/403; 12/980-91, 898,907). Two of her friends, who were part of her social circle and who said they knew the men she dated, testified that they did not know her to go to Malio's (12/896-97,904-06).

Malio's is a nightclub/restaurant on South Dale Mabry. Michael Swenson, the manager who doubles as a bartender, testified that he knew appellant as a regular customer (11/697-701). Sometimes there were women at his table (11/699). On August 19, 1997, appellant was in the bar at around 5:00 or 5:30 (11/699, see 704-06). According to Swenson, he was not with a woman that evening (11/700). Appellant was back in the bar the next night, August 20 (11/699, see 704-06). Swenson saw on television a photograph of appellant at an ATM machine (11/699,705).

At trial, Swenson was shown a photograph of Leanne Coryell. He had previously been shown a photograph of her a few days after her death. He testified that he did not see her in the bar on August 19, 1997, nor had he ever seen her before (11/700-01).

Appellant's apartment was searched twice pursuant to warrant, the first time around 11:00 p.m. on August 20, and the second time a few days later (11/756-57,765-66,851-52). A pair of tennis shoes were obtained from the master bathroom (11/756-57,773,852). Detective Iverson did not know whether these had any evidentiary significance (11/773). Aside possibly from that, nothing was found in either search to link appellant to Ms.

Coryell's death (11/765-66). Terrell Kingery is an FDLE crime lab analyst; one of his fields is footwear impression comparison (11/775-78). He explained that class characteristics are produced by design during the manufacture of a shoe, such as the shape, tread pattern, brand name, or logo. On the other hand, individual (or accidental) characteristics are those added or taken away from a shoe -- usually resulting from wear -- that cause the shoe to become unique or one of a kind (11/781-82). If there are enough individual characteristics which can be seen with enough clarity, you can establish an identification (11/783). Class characteristics, in contrast, can only be used for elimination purposes (11/781,799).

Kingery compared four sets of cast impressions from the crime scene (State Exhibits 26, 27, 28, and 29) with the tennis shoes found in appellant's apartment. He found a total of three partial impressions that were consistent in class characteristics with appellant's shoes (11/783-96,798-99). He also found some dissimilar or inconsistent impressions as well (11/799). Since the shoe impressions were partial -- i.e., lacking "a complete recording from toe to heel" -- Kingery could not tell the size of the shoes that made the impressions on the ground (11/798-99). In the three impressions which were similar or consistent, Kingery found no individual characteristics nor anything specific to match them to appellant's shoes, and therefore he could not say whether appellant's shoes did or did not make the impressions (11/800-01). Kingery cannot determine the age of a footwear

impression (11/797). The affidavit of Rodd Patten, a Reebok product development executive, was introduced be the defense. Patten had been asked by law enforcement to identify the tread design in the shoe impressions, and he initially concluded that (on the presumption that it was indeed a Reebok shoe and not a counterfeit or knockoff) the impression was that of a men's Reebok Classic Nylon (style no. 6390 or 6604). This model was introduced on the market in August 1994, and over the next three years 588,054 pairs of Classic Nylon with this tread design were produced (14/1172-75). Later, after reviewing additional documents and consulting with his supervisor, Patten learned that Reebok produced a couple of dozen other models of shoes with the identical tread design (14/1172-75).

Under the direction of Detective Minton, investigators processed appellant's Buick Skyhawk. They dusted for latent prints, vacuumed, took carpet samples, and ran a Luminol test for blood. The Luminol test was negative (11/814-15,821-22). They photographed the headlights (on high beam and on low beam) by photographing a wall with the light shining on it. This showed the headlights to be out of adjustment, with the driver's side beam shining higher on the wall than the passenger side beam (11/816-18). A portion of the taillight on the passenger side was not glowing, although the lens was not broken (11/818-19,823-25). Minton did not recall observing any damage to the exterior of the vehicle (11/820).

Samuel McMullen, a latent fingerprint examiner with the Sheriff's office, compared appellant's known fingerprints to the one print of comparison value which was lifted from the rear driver's side window of Leanne Coryell's automobile. He concluded that it matched the middle finger of appellant's left hand (13/ 1063-64).

The state introduced financial records of both appellant and Leanne Coryell, seeking to persuade the jury that (1) appellant was in no financial condition to loan anyone $1200, and (2) Ms. Coryell was not in dire financial straits and had other sources, such as her parents and friends, from whom she could have borrowed money if necessary. (See 11/837-41; 12/906,948-53,969-70,976-77,987-96; 13/ 1028-42).

The state called Juanita Walker and Christine Cisilski. Appellant had been in a relationship with Ms. Walker from February to April, 1997, and they had lived together for a short time before they broke up. Ms. Cisilski had met appellant through her friend Ms. Walker, and she had visited them frequently (12/918-19,935-36). Ms. Walker was in the adult entertainment business, giving body rubs, and Ms. Cisilski sometimes drove her to her appointments (12/ 920,934,936). One Tuesday night in August, 1997, Walker had a 10:00 p.m. appointment at the Landings apartments in north Tampa. Cisilski was driving (12/920-21,936-37). As they were pulling into the apartment complex, between 9:50 and 10:00, they saw appellant driving out in a black (according to Cisilski) or dark-colored

(according to Walker) mid-size car (12/921-24,937-38). Cisilski did not see anyone else in the car (12/925,927,929). Walker testified that she turned to Cisilski and said, "I think that was Ray Lamar Johnston." They looked at each other and laughed, and kept on going (12/938,940-42). The next day, they saw a picture of appellant at an ATM machine on the TV news (12/923,932-33,943-44).

Last, the state introduced two letters written by appellant to an individual named Laurie Pickelsimer (13/1098,1106, see 13/106465,1067). For a one or two month period beginning in December, 1998, while appellant was in jail, Ms. Pickelsimer (a fifteen-time convicted felon with outstanding arrest warrants from three states) was his "pen pal" (13/1095-96,1110-12,1121-22). They corresponded by letter, and they had nearly a hundred phone conversations (13/ 1095-96,1121-22). Pickelsimer was having marital problems, and she and appellant expressed romantic feelings for each other (13/1096-97,1099-1100,1122). During one of their phone conversations, appellant suggested she could help him out with his case (13/1097). He then wrote her a letter in which he asked her to provide an alibi for him, to the effect that on August 19, 1997 they were together in the weight room from 9:00 p.m. until just before 10:00, when he left and then returned fifteen minutes later and got in the hot tub with her (13/1100). She was to say that she knew appellant from Malio's nightclub, and they had had one dinner date (13/1100). Appellant sent Pickelsimer a second letter which contained a script for her

to read to his attorney, telling him that she was with appellant in the weight room and hot tub at the Landings from around 9:00 until 10:20 or 10:30, except for a short period around 10:00 when appellant went back to his apartment to get them a drink for the hot tub (13/1106-08). They had met at Malio's a long time before, and appellant had given her golf lessons (13/1107).

Pickelsimer testified at trial that none of this was true; she was not with appellant on August 19, 1997, she did not know him from Malio's, and she had never gone out on a date with him or even met him in person (13/1101-02,1107-08,1120-21). When she received the letters, instead of calling appellant's attorney, she contacted law enforcement and had the letters delivered to the assistant state attorney (13/1111-12). While she had received no firm promises of leniency (other than the fact that the prosecutor had her three out-of-state warrants recalled so she could testify in this trial), she acknowledged that her attorneys in California, Oklahoma, and Kentucky certainly used her cooperation in the Florida prosecution to try to negotiate better deals for her, and she was hopeful that her cooperation would result in a lesser prison sentence in California (13/1112-20).

B. Penalty Phase

The state introduced victim impact testimony from Leanne Coryell's father, her employer, and the pastor of her church (17/1567-80). It recalled Dr. Vega, who reiterated that the cause of

death was manual strangulation, and that the time within which unconsciousness occurred could have been relatively short, up to a minute or two (17/1550). Death could have ensued within 2-5 minutes, up to perhaps 10, but probably considerably less than that (17/1550). Dr. Vega believed the victim was conscious at the time of the injuries to her buttocks, vaginal area, and lips (17/1550-51). He acknowledged the possibility that some or all of these injuries occurred after death, but said the likelihood was very small (17/1551-52). The state introduced judgments and sentences from appellant's prior felony convictions (17/1538,1541-42,1548-49; see 5/715; SR26), and called three of the victims in those cases (17/1533-47).

Dr. Diana Pollock, a neurologist in private practice, treated appellant from March (when he was admitted to a hospital after a blackout) through July, 1997 (17/1582-83). Appellant complained of headaches, usually on one side or the other, intermittent spells of tingling or weakness on the left side of his body, spells of confusion, and incidents of complete loss of consciousness which would sometime lead to auto accidents (17/1583). There were times when he went blank and didn't know what happened (17/1583). Dr. Pollock was convinced that appellant was indeed having the symptoms he reported to her; he was neither malingering nor trying to obtain narcotics (17/1584-88). Dr. Pollock gave appellant some neurological tests, including an MRI and arteriogram and an E.E.G. These did not reveal any structural deficiencies, lesions, or tumors (17/ 1583-

84,1589). She did not perform a PET Scan because she does not have that capability in her area (17/1589-90). She prescribed for appellant several medications for headaches and seizures (17/1586). Dr. Harry Krop, a clinical psychologist specializing in neuropsychology, examined appellant and administered a battery of tests designed to assess brain functioning (17/1648-54). Appellant, in Dr. Krop's observation, put forth a maximum effort, and was not malingering (17/1654,1658). Except for three of the tests, appellant performed within normal limits, consistent with what one would expect from his intelligence scale (104) (17/1654-58). Of the three tests on which appellant showed significant impairment, one was the result of physical problems affecting his left hand, while the other two were the two tests which measure frontal lobe functioning (17/1655-58). On both of those tests, appellant did extremely poorly, and became very frustrated because he couldn't figure out why he wasn't getting them right (17/1658). Dr. Krop concluded, based on the results of the neuropsychological testing and corroborated by independent neurological signs including his medical history of headaches, blackouts, accidents, and possible stroke, that appellant suffers from brain damage; specifically, frontal lobe impairment (17/1658-59,1662-63). Dr. Krop referred appellant for a PET Scan (performed by Dr. Wood), the results of which proved to be consistent with the neurological testing; i.e, it showed frontal lobe damage (17/1659-60,1663).

Dr. Krop testified that people with frontal lobe damage are impulsive. They react to situations or stimuli without much deliberation or thinking, and they have difficulty controlling or stopping their behavior once it gets started (17/1660-62).

Dr. Frank Wood, Ph.D, is a professor of neurology, specializing in neuropsychology and brain imaging, at the Bowman Gray School of Medicine of Wake Forest University (16/1481-83). Dr. Wood examined appellant and performed a PET (positron emission tomography) Scan (16/1493-94,1520). The defense introduced, and Dr. Wood explained to the jury, the photographic cross-sections of appellant's brain (16/1500-07). Based on the PET Scan, as well as review of medical records and consultation with other doctors, Dr. Wood concluded that appellant's brain is abnormal (16/1499-1500). His measured frontal lobe brain activity is below the bottom one percent of the normal scale, which, Dr. Wood explained, means that out of 100 randomly selected people, appellant's frontal lobe activity would be worse that the worst of them (16/1498,1509-10). These findings, Dr. Wood stated, were corroborated by appellant's medical and behavioral history, including his hospitalization at age 14, and the medical treatment he was receiving in 1997 in the months prior to the Coryell homicide (16/1499,1509).

The frontal lobe inactivity illustrated in appellant's PET Scan correlates with poor judgment, impulsivity, and disinhibited behavior; Dr. Wood analogized it to a person driving a car without good brakes (16/1509-11). There was no doubt in Dr.

Wood's mind that appellant is less able to exercise judgment or control his impulses than normal people are (16/1509).

Dr. Wood believed that appellant's frontal lobe abnormality dates back at least to the age of 14 (16/1512-13). Records from his psychiatric hospitalization at that time describe him as nearly manic; "excessive, outgoing, irritable and disinhibited, again with no brakes essentially" (16/1512-13). Appellant "has a medical history suggesting some problems with his cerebral blood vessel supply", which may have been causally related to his frontal lobe abnormality (16/1511). Medical records indicated that during the months preceding the homicide, appellant was having blackouts, and vascular and migraine problems which led to his seeing a neurologist (16/1512).

Dr. Michael Maher, a psychiatrist, evaluated appellant for competency, sanity, and mitigation issues (17/1591-94). He saw appellant five times for a total of nine hours, reviewed medical and psychiatric records, and consulted with other doctors who had examined him (17/1595-96,1599).

Dr. Maher concluded that appellant, while competent to stand trial, suffers from significant mental illness (17/1594-95), and that his mental health problems are related to the frontal lobe brain impairment which is evident on the PET Scan (17/1596-99). Dr. Maher explained the difference between an MRI (which shows the physical structure of the brain) and a PET Scan (which shows the brain's functional capacity; i.e., how that part of the brain is actually working) (17/1604-05). Since appellant's abnormality

is in the function of the brain, in the neurological tissue, Dr. Maher would expect to see precisely the combination he did see; a normal MRI and an abnormal PET Scan (17/1604-05).

Having reviewed the Hill Crest records and the problems reported by appellant's mother when he was a teenager, Dr. Maher was of the opinion that his brain impairment, and the resulting inability to control his impulses, already existed at that time (17/1599-1600).

As a consequence of appellant's frontal lobe abnormality:

> . . . [the] normal ability to inhibit an urge, to stop a feeling or a desire or a thought from being put into action, into behavior is significantly impaired. So when he has a strong urge, anger, jealousy, humiliation, rage, it is much more likely that that urge is going to be carried into action and not stopped or inhibited by the frontal lobe and the functioning of the frontal lobe.

17/1599).

In Dr. Maher's opinion, appellant's capacity to control a negative or angry thought, or to respond within appropriate limits to feelings of rejection or humiliation, is very much less than a normal person's (17/1603-04). In addition to, and related to, his brain impairment, appellant suffers from a dissociative disorder and from seizure activity (17/1601-03,1607). A dissociative disorder "is a psychiatric disorder in which some aspect or part of a person's total personality or awareness" is at times absent or unavailable to him (17/1607). Dr. Maher was of the opinion that the crime in this case was the result of a dissociative episode which was triggered by appellant's approach

to and rejection by Leanne Coryell in the apartment complex parking lot (17/1609). [The day before Maher testified, appellant told him he had committed the crime, and told him what had happened (17/1610-13). He had told his lawyers the day before that, after the verdict was in (17/1614). Previously, appellant had made no admissions, although when Dr. Maher first saw him he expressed a fear that someone within him whom he identified as Dwight had possibly committed the crime (17/1612-13)].

Dr. Maher testified that people like appellant with frontal lobe disorders function much better in the highly structured environment of a prison than they do in open society (17/1605-06).

Appellant's mother Sara James, testified that appellant had a normal early childhood, and was especially close to his father (17/ 1629-32). When he was three or four, he fell out of a car and hit his head on the curb (17/1641-42). By the fifth grade he was beginning to be a little disruptive in school, and the problems became more serious over the next couple of years (17/1635-36). Mrs. James testified that he had a sweet personality, but he would get explosive at times, and her other children didn't do that (17/ 1637). Appellant was sent to a preparatory school in Georgia, where they saw that he had problems and recommended that he be taken out of the school and see a psychiatrist (17/1636-37). For the next 7-8 months, appellant's parents took him to see a psychiatrist in Atlanta,

but it didn't accomplish much and he continued to have problems (17/1637-38).

In 1968, when appellant was 14, the family moved to Birmingham, Alabama, where he started high school (17/1638). He was becoming explosive and erratic, and a doctor recommended that she take him to Hill Crest for psychiatric evaluation. Appellant was hospitalized for four weeks and put on several medications, including Thorazine (17/1638-40). He was reporting dizzy spells, as well as double vision where images were side-by-side or superimposed on top of each other (17/1641).

Appellant took the stand. He admitted that he killed Leanne Coryell, but stated that he did not rape or sexually assault her (18/1710,1718-29,1729). Asked to recount the events, appellant testified that he had just left the hot tub area and was walking back to his apartment when Ms. Coryell drove in (18/1710-11). He had seen her before a couple of times, just to say hi (18/1711, 1731,1733). She was taking groceries out of her car. Appellant asked if he could help her. He thought she didn't hear him. She reached back into the car for more groceries, and he grabbed her arm and asked her again. As he described it, he just wanted her attention and didn't get it (18/1712,1715,1727). He grabbed her around the neck and it seemed like it just took a short time. Her legs gave out, and she hit her lip on the edge of the car door and her chin hit the ground (18/1712,1737).

Appellant didn't think she was breathing; he thought he'd broken her neck. He put her in the back seat of her car. He got

in the front seat and drove to the church parking lot, where he took her over to the tree (18/1712-13,1715-16). He was just angry. He couldn't describe the feeling -- you just have to feel it. It's like you know what you're doing and what's going on around you; you just can't stop (18/1715-16). He believed she was already dead, and to cover himself he wanted to make it look like she'd been assaulted, so he took her clothes off and scattered them, kicked her in the crotch area, struck her with her belt, and dragged her into the pond (18/1717-19,1729,1737). He laid her down and he laid there with her for a few minutes. A car came in, circled the lot, and went out. Appellant then ran back to the pool area of his apartment complex, and tried to wash the dirt off his legs; then he ran home and took a shower (18/1717-19,1735).

After showering, appellant returned to the pond in his own car to see if anyone had found her yet. He stopped by Ms. Coryell's car, took her purse, and drove off. There was a wallet and an address book in the purse. Her ATM card was the only plastic card in the wallet, and when he opened the front cover of the address book it had her PIN number written down (18/1719). Appellant went to Barnett Bank and withdrew $500, but then couldn't get the card out of the machine. He had to try different transactions before the card finally came out. He then went to Nations Bank, but there were no further transactions that could be made for that day (18/ 1720).

The next night he went to Malio's, where some acquaintances approached him and said they'd seen him on TV in connection with a girl named Leanne. Appellant told them he was just with her last night. Knowing that they had called Detective Shepard, appellant finished his drink and left. He checked into the Howard Johnson's to get his head straight. From there he called the Sheriff's Department and said he'd be there at midnight or 1:00 a.m. (18/ 1721-22).

In his testimony, appellant expressed remorse and sorrow for what he had done to Ms. Coryell (18/1725-26,1751). He admitted that he had made up the story about her loaning him her ATM card, that he had lied to the police and the news reporters and his attorneys, and that he had tried to get Laurie Pickelsimer to provide him a false alibi (18/1722-25,1738-42,1751).

Additional mitigating evidence was presented in the September 24, 1999 Spencer hearing. Appellant's mother testified that appellant's ex-wife, Susan Bailey, had had to have a kidney removed several years earlier, and now her other kidney was malfunctioning. She may need a transplant, and appellant has offered to donate a kidney to her if there is a tissue match. His offer is not contingent on whether he gets a death sentence or a life sentence (21/2284-86).

Dr. Harry Krop was recalled. He testified that the first time he met appellant was in 1988, when he examined him in connection with the Jacksonville incidents (21/2260-62). He concluded at that time that appellant has a psychosexual

disorder, and he also was aware, from appellant's history of blackouts and seizures, that there were indications of brain damage (21/2262). Dr. Krop recommended a neuropsychological evaluation, but appellant ended up entering a plea and the attorney never got back to him. As a result, Dr. Krop did not believe that any neurological evaluation was done at that time (21/2262-63).

In 1997 and 1998, in the instant case, Dr. Krop did administer a comprehensive battery of neuropsychological tests, and the results strongly suggested significant frontal lobe impairment (21/ 2262,2263-67). The subsequent PET Scan performed by Dr. Wood was very consistent with these findings (21/2268-69). Frontal lobe impairment, Dr. Krop explained, is functional rather than structural; you wouldn't see it with an x-ray (21/2272). The frontal lobes play a key role in regulating behavior and controlling impulses (21/2269-70). People with this disorder tend to overreact and use very bad judgment, particularly in stressful situations, and Dr. Krop believed that this was what was operating when this homicide occurred (21/2272-73). In Dr. Krop's opinion, the interaction of appellant's psychosexual disorder and his organic brain damage "resulted in what I would consider a serious emotional disorder occurring at the time of the offense" (21/2273).

C. Sentencing Order

In her order imposing the death sentence, the trial court found and gave great weight to the following aggravating factors: (1) appellant's prior convictions of felonies involving the use or threat of violence; (2) the homicide was committed in the course of a sexual battery and kidnapping; (3) it was committed for pecuniary gain; and (4) it was especially heinous, atrocious, or cruel (SR26-28). The trial court found and gave moderate weight to the mitigating factor that appellant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired (SR28). The other statutory mental mitigating factor -- that appellant was under extreme mental or emotional disturbance at the time of the offense -- was neither found nor discussed (see SR28-31). As other mitigating circumstances in appellant's background, the trial court found and gave slight weight to thirteen factors, and gave no weight to thirteen others (SR28-30).

SUMMARY OF THE ARGUMENT

Appellant's convictions and death sentence are constitutionally infirm due to the denial of his state and federal constitutional right to be tried by a fair and impartial jury as a result of (a) jury foreperson Tracy Robinson's being under prosecution by the same state attorney's office that was prosecuting appellant; (2) juror Robinson's concealment on voir dire of material facts concerning her prior and ongoing criminal

involvement; (3) juror Robinson's arrest for possession of crack cocaine and marijuana on the first day of the penalty phase (a mere five days after the jury's guilt phase deliberations), and the trial court's refusal to inquire into the circumstances of her drug activities during the trial; and (4) the failure of the trial court and counsel to ascertain the extent of the exposure of eight prospective jurors (including two who served on the jury) to inflammatory pretrial publicity which focused almost entirely on inadmissible material, including lurid and sensational revelations about appellant's prior crimes (those he was convicted of and those he was suspected of), his prison sentences and early releases, and his purported proclivities for violence, kinky sex, and con artistry.

The trial court also erred in sentencing appellant to death without any consideration of the statutory mitigating factor of extreme mental or emotional disturbance, as well as by refusing to instruct the jury on this important mitigator.

ARGUMENT

ISSUE I

IN THE FIRST PHASE OF THIS CAPITAL TRIAL, APPELLANT WAS DENIED HIS RIGHT, GUARANTEED BY THE FLORIDA AND UNITED STATES CONSTITUTIONS, TO A FAIR, IMPARTIAL, AND UNIMPAIRED JURY, AS A RESULT THE STATUTORY INELIGIBILITY AND GROSS MISCONDUCT OF JURY FOREPERSON TRACY ROBINSON, AND BY THE TRIAL COURT'S ERRONEOUS REFUSAL TO GRANT A NEW TRIAL OR EVEN TO CONDUCT AN INQUIRY INTO THE JUROR'S MISCONDUCT.

A. The Right to be Tried by a Panel of Fair, Impartial, and Unimpaired Jurors

"One of the most sacred and carefully protected elements of our system of criminal -- or civil, for that matter -- justice is the sanctity of an impartial jury that has not been infected by unlawful or improper influences. This is absolutely vital to the guarantee of a fair trial to an accused." Meixelsperger v. State, 423 So. 2d 416, 416 (Fla. 2d DCA 1982). This is a "paramount right which must be closely guarded." Durano v. State, 262 So. 2d 733, 734 (Fla. 3d DCA 1972). "This right is fundamental and is guaranteed by the sixth amendment to the United States Constitution and article I, section 16 of the Florida Constitution." Livingston v. State, 458 So. 2d 235, 238 (Fla. 1984). While the right to a trial before a panel of fair and impartial jurors is guaranteed and zealously protected in all cases, civil and criminal, an even greater degree of protection must be afforded in a case where the accused's life is at stake.

See Livingston, supra, 458 So. 2d at 237-39. As Justice Anstead wrote in his concurring opinion in Arbelaez v. Butterworth, 738 So. 2d 326, 331 (Fla. 1999)(footnote omitted):

> Our adversarial system of criminal justice depends almost entirely upon the procedural fairness and integrity of the process. This Court and the United States Supreme Court have held that the integrity of the process is of unique and special concern in cases where the State seeks to take the life of the defendant. See, e.g., Monge v. California, 524 U.S. 721, 118 S.Ct. 2246, 2252-53, 141 L. Ed. 2d 615 (1998); State v. Dixon, 283 So. 2d 1 (Fla. 1973).

See also Beck v. Alabama, 447 U.S. 625, 637-38 (1980) (requirement of heightened procedural protections in capital trial applies to guilt phase as well as penalty phase); Allen v. Butterworth, 756 So. 2d 52, 59 (Fla. 2000); Crump v. State, 654 So. 2d 545, 547 (Fla. 1995); Fitzpatrick v. State, 527 So. 2d 809, 811 (Fla. 1988) (all recognizing the principle that capital cases are unique and the penalty irrevocable; therefore a heightened degree of reliability and procedural fairness are required).

Finally, as was expressly recognized by both the five member majority and the four dissenting Justices in Tanner v. United States, 483 U.S. 107, 110 and 115 (1987), due process and the Sixth Amendment guarantee a defendant's right to an unimpaired jury; i.e., "a tribunal both impartial and mentally competent to afford a hearing" (both majority and dissenting opinions citing Jordan v. Massachusetts, 225 U.S. 167, 176 (1912)). Thus, the majority and the dissenters in Tanner apparently agreed that

juror intoxication, if established, would be grounds to set aside the verdict.[1] Florida courts have long recognized that this is true. Gamble v. State, 44 Fla. 429, 33 So. 471 (1902); Langston v. State, 212 So. 2d 51 (Fla. 1st DCA 1968); Golding v. Escapa, 338 So. 2d 871 (Fla. 3d DCA 1976); Baez v. State, 699 So. 2d 305 (Fla. 3d DCA 1997), compare Zeigler v. State, 632 So. 2d 48, 51 (Fla. 1993) ("We know of no rule which prohibits jurors from taking [prescribed] medication, and so long as it does not affect their competency, this cannot be a basis for impugning their verdict").

B. The Unfolding of the Facts Concerning Juror Robinson

In her juror questionnaire filled out prior to jury selection, Tracy Neshell Robinson checked the following responses:

> Have you ever served on a jury before? ___Yes _X_No
> If so: ___Civil ___Criminal
>
> Have you or any member of your immediate family or any close friend:
>
> 1. Been in law enforcement work? ___Yes _X_No
> 2. Been a witness to a crime? ___Yes _X_No
> 3. Been the victim of a crime? _X_Yes ___No
> 4. Been accused of a crime? _X_Yes ___No
> 5. Been involved in a civil lawsuit? ___Yes _X_No.

(SR12-13)(emphasis supplied)

[1] Where the majority and the dissenters in Tanner parted company was on the question of whether, under Federal Rule of Evidence 606 (b) and considered in light of the legislative history of that rule, the jurors themselves were permitted to testify concerning the allegations of intoxication. The clear contrast between the federal law and the Florida law on the latter question is discussed in Part E of this Point on Appeal.

During voir dire, the prosecutor addressed the matter of prior nncriminal involvement with the prospective jurors as a group:

> These jury forms ask very broad questions and, of course, this is where we're getting into that area where I'm not trying to embarrass anyone or intimidate anyone, but it asks, have you or any member of your family or any close friends ever been accused of a crime. That's what I want to go into now.
>
> I want to ask who was the person, what relationship was it to you; if it wasn't you, whether you felt that that person, whether it was you or someone else, was treated fairly in the process and whether you think that incident or experience would prevent you from being a fair and impartial juror.
>
> Before I move out, did I miss anybody else about prior jury service, though?
>
> [Prospective jurors indicating negatively.]
>
> MR. PRUNER: Mr. Diaz, we've talked to you about that already, right?
>
> MR. DIAZ: Yes, sir.

[Mr. Diaz had volunteered, earlier in voir dire, that he had been a defendant in a jury trial in Hillsborough County six years before, though this experience would not make him an unfair or unfit juror (6/49-51)].

The prosecutor then turned to prospective juror Tracy Robinson:

> MR. PRUNER: Ms. Robinson, who was that person?
>
> MS. ROBINSON: My son's father.
>
> MR. PRUNER: Okay. Did you follow along with that person's involvement in the

> criminal justice system, keep up with his case?
>
> MS. ROBINSON: Oh, yeah.
>
> MR. PRUNER: Was this in Hillsborough?
>
> MS. ROBINSON: Uh-huh.
>
> MR. PRUNER: Do you have an opinion whether that person was treated fairly or unfairly?
>
> MS. ROBINSON: It was fair.
>
> MR. PRUNER: Is there anything about your knowledge of his experience that would prevent you from being a fair and impartial juror?
>
> MS. ROBINSON: No.
>
> MR. PRUNER: Thank you.

(7/126-27).

Other jurors who had indicated in their questionnaires that they or someone they were close to had been accused of a crime were then questioned on this subject. In addition to an assortment of recalcitrant cousins, uncles, and brothers-in-law, one other juror, Mr. Sansoni, divulged that he personally had been accused of a crime (7/127-35). Tracy Robinson never amended her answer. She was selected to serve on this capital jury and ultimately became its foreperson (7/242; 15/1415-17; 5/753-54).

On Friday evening, June 11, 1999, the jury -- after less than an hour's deliberations -- found appellant guilty as charged of first degree murder and four other felony counts (15/1415; see 5/ 781). The jurors were instructed to return to the courtroom for the penalty phase the following Wednesday morning, and that

in the meantime the same rules applied to their conduct until they were released from their services as jurors (15/1423-25).

On Wednesday, June 16, the penalty phase began with both counsel's opening statements to the jury and the testimony of sixteen witnesses (17/1525-27). Court adjourned at 5:50 p.m. (17/1682). That night, jury foreperson Tracy Robinson was arrested and jailed for possession of crack cocaine, marijuana, and an illegal firearm (18/1687; 5/781). When the trial court announced what had occurred, defense counsel initially objected to the excusal of the juror, especially since "we previously moved to recuse the alternate that you're about to let sit on this case for shaking hands with and giving his sympathy to the family of the victim" (18/ 1688). Nevertheless, the alternate juror was seated and the last four penalty phase witnesses were called. Just prior to closing arguments, defense counsel expressed some concern:

> . . . about this arrest of this juror last night who did deliberate during the guilt phase. We would ask that Your Honor have her brought over at your convenience and inquire of her under oath whether or not she was under the influence of cocaine at any time during the guilt phase or the deliberations.
>
> THE COURT: I'm not going to do that. Denied.
>
> MR. HOOPER: Or the guilt phase, innocen[ce] or guilt phase of the trial.
>
> THE COURT: Excuse me. File a motion. I'm not bringing her over here.

(18/1765).

Later the same day, June 17, 1999, the jury recommended the death penalty (5/777; 18/1817). Defense counsel filed a motion for a new trial on June 21 (stating as one of the grounds that the trial court erred in dismissing juror Robinson and proceeding with the objectionable alternate) (5/778-80). An amended motion for new trial was filed on July 22, 1999 (5/784-86). While maintaining his objection to the alternate (5/785), counsel also asserted:

> The defense has discovered that jury foreperson TRACY NESHELL ROBINSON was under prosecution during the time she served as a juror in this case (see Exhibit A). This is quite different from being arrested or wanted by the police, facts known to the court between the guilt and penalty phases. The Capias annexed as exhibit A indicates that said juror was the subject of a complaint filed by the State Attorney for Hillsborough County. When a juror deciding a case is under prosecution by the same State Attorney's office the conviction must be overturned. In Reese v. State, [739 So. 2d 120 (Fla. 3d DCA 1999)]: a juror was arrested by an agent of the F.D.L.E. during deliberations. The court in remanding the case for a new trial noted "the very foundation of our criminal justice process is compromised when a juror who is under criminal prosecution serves on a case that is being prosecuted by the same state attorney's office that is prosecuting the juror." In the Florida Supreme Court case of Lowrey v. State, [705 So. 2d 1367 (Fla. 1998)] [i]t was discovered after verdict that a juror was under prosecution for battery. The juror later received an intervention program. The Supreme Court found no comfort in the trial judges opinion that there was "no reasonable grounds to believe that (Juror A) had any belief, thought, request, desire, (or) intent to receive more favorable treatment in the prosecution of his own case as a result of being a juror. . ." and instead noted inherent prejudice to the defendant is

> presumed and the defendant entitled to a new trial.

(5/785-86).

Appended to the motion for new trial was a capias dated January 13, 1999, directed to all the sheriffs of the State of Florida, stating:

> You are hereby commanded to take the above named defendant [Tracy Neshell Robinson] if found in your county . . . to answer a complaint found against the above named defendant by the State Attorney for the County of Hillsborough . . .

for failure to pay $150 in costs on the charge of obstructing or opposing an officer without violence (5/787).

Meanwhile, on July 7, 1999, defense counsel filed a written motion to interview juror Robinson to determine whether she was under the influence of narcotics during the trial, stating inter alia:

> . . . the defense has a legitimate and well founded concern that the forelady was not only possessing narcotics but was using same. Lt. Lewis Botenziano is quoted by the St. Petersburg Times as saying that "When Juror Robinson opened the door to her apartment he smelled Marijuana smoke. Although Juror Robinson attempted to put the blame on her boyfriend, her boyfriend was at the time in prison and had been for a couple of weeks. While courts do not like to delve into the internal workings of jur[ies], capital cases are treated differently, "If intoxicants be shown to have been used by the jury impaneled in a capital case, the presumption arises in favor of the convicted defendant that it resulted injuriously to him and the burden is on the State to show affirmatively, to the entire satisfaction of the court, that their use was to such a limited and moderate extent as to completely and satisfactorily negative any harm to the defendant from misuse by the

> jury, or any member of it." Gamble v. State, [44 Fla. 429, 33 So. 472 (1902)].

(5/781-82).

The motion to interview juror Robinson was heard on August 13, 1999. Defense counsel pointed out that based on the nature and timing of the drug charges, Ms. Robinson may have been under the influence of narcotics during the trial, and "We'll never know to what extent unless we do question her under oath" (21/2232).[2] In addition, relating to the issue raised in the amended motion for new trial:

> . . . is the fact that when she was arrested, she was under capias status. So that's another area we need to inquire of the juror. Did she know at the time that she was serving as a juror that she was under capias status by the very same State Attorney's Office that was prosecuting this case?
>
> And the case law is very clear on that. If she did know that, there would be motivation for her to try to curry favor with the State Attorney's Office by returning a guilty verdict.

(21/1133-34).

The prosecutor asked the court to deny the motion (21/2234). On the matter of the capias, the question arose whether Ms. Robinson was or was not on probation. The trial judge asked the prosecutor:

---

[2] A second ground for the juror interview proposed by trial counsel -- that the juror may have been motivated by her drug use and possible addiction, or her fear of sequestration, to coerce or persuade the other jurors to return an early verdict without meaningful discussion -- is abandoned by the undersigned on appeal, since these matters plainly inhere in the verdict.

Are you sure that's even the facts in this case, she was on probation? I thought the capias was issued for failure to pay some costs, not on probation. That's what I thought when I looked it up.

MR. PRUNER [prosecutor]: It is, Judge.

THE COURT: Well, that's not on probation--

MR. PRUNER: Well, then --

THE COURT: -- in county court. I know it's been a long time since you were there, Mr. Pruner, because they do this little thing that they order court costs and then they say if they're not paid by such and such a date, a capias will be issued and then, apparently, the clerk's office says we weren't paid, and the they issues capiases, but they're not under supervision.

MR. PRUNER: Then, Judge, let me do the quick backtrack. I assume from the fact there was a capias for her outstanding for outstanding costs, that she was under probation. I have not pulled her files.

THE COURT: But that scenario, assuming she wasn't on probation and she was ordered to pay court costs by such and such a date or a capias would be issued for her arrest and she didn't pay the court costs, she knew that, then that would seem to suggest that she knew there was a capias outstanding for her if she didn't pay the court costs.

MR. PRUNER: I don't know what she knew, Judge.

THE COURT: I don't know what she knew either, but we don't really want to get into that, do we?

MR. PRUNER: I prefer not.

THE COURT: So I don't know about that issue. But the use of narcotics argument, I didn't research it. But I do know that there is case law that says that a court cannot inquire into the process of the deliberations

for -- concerning anything that enures to the verdict, whatever that means. That's what the case law says. Do you know what that means? I don't know.

MR. PRUNER: Not well enough to articulate it in front of other people here today.

THE COURT: And there are -- I guess I can pull it out in there. We had it at the last judge's conference. My gut feeling is that these matters do not enure to the verdict and that they would be improper subjects for interviewing the juror.

As a matter of fact, what would happen is if I ordered this juror to be allowed to be interviewed and that took place, I mean, you can certainly anticipate what the answers are going to be. Were you under the influence of narcotics while you were on jury deliberations? No. Had you used narcotics? No. Were you in a hurry so you could go home and use narcotics? No. And how are you going to -- what are you going to do then? Interview the other jurors; say, hey, did she look like she was under the influence of narcotics? Did she hurry you along in your deliberations? An interview of her on that topic will get us absolutely nowhere.

MR. HOOPER [defense counsel]: Your Honor.

THE COURT: Yes.

MR. HOOPER: First, as to that issue, I don't think it's -- I don't think I would be doing my job if I failed to call a witness and questioned a witness under oath merely because I believe that the witness would probably lie. If that was the case, there would be a lot of people we would not call.

THE COURT: And probably shouldn't.

(21/2237-40)

Regarding the capias, defense counsel stated:

. . . as to the other issue in the Motion for New Trial, when we get around to arguing that, I'll have no problem arguing the

> semantics of whether someone was under prosecution or not under prosecution, but this is not that motion. This is a motion to interview the juror.
>
> And in all the cases cited, even by Mr. Pruner, the underlying rationale, the underlying rationale behind all of this is what's going on in the juror's mind. If the juror knows they're under prosecution or thinks they're under prosecution, they're going to have a desire to win points with the State Attorney's Office, and we'll never know that unless we interview the juror.

(21/2241-42).

As she did when the request was first made on the day after Ms. Robinson's arrest in the midst of the penalty phase, the trial judge again denied the motion to interview the juror (21/2242).

The hearing on the motion for new trial was held along with the Spencer hearing on September 24, 1999. Documents introduced by the state indicated that on July 22, 1998 Tracy Robinson pled nolo contendere to a charge of obstructing or opposing an officer without violence, and was ordered to pay a total of $121 in court costs (5/849,850,852). She was notified in writing that she had until 4:30 p.m. on September 24, 1998 to pay these costs, or -- in the event she found herself unable to pay the costs on time -- to appear in courtroom 19 before Judge Martinez at 1:30 p.m. on September 25, 1998 (5/849). The notice further states -- in all capital letters -- that failure to pay on time or appear in court would result in a warrant for her arrest (5/849). The case progress sheet for Ms. Robinson's case appears to indicate that she received several additional notices and that her court date

was reset on one or more occasions, prior to a capias being requested on January 8, 1999 and issued on January 13 (5/851). The capias was canceled as a result of Mr. Robinson's June 16, 1999 arrest, during appellant's trial in which she was serving as foreperson of the jury (5/851).

In the hearing, the prosecutor argued that since, as he interpreted the situation, Ms. Robinson was not under active probationary supervision, "our position is that she was not under prosecution within the meaning of the case law" (21/2753-54). Defense counsel opined that the trial judge was drastically handicapped in making an informed decision on this issue without interviewing the juror. He renewed his motion to do so, which was again denied, as was the motion for new trial (21/2255). Later in the same hearing, the prosecutor introduced the documents concerning Ms. Robinson's status, which he had just obtained (21/2289, 2291). A lengthy and confusing dialogue took place concerning what the paperwork said and what was its significance (21/2289-92). The judge asked the prosecutor whether the disposition showed that Ms. Robinson "had a certain time in which to pay those costs and if she failed to do so that a warrant would be issued for her arrest?" (21/2290). The prosecutor replied, "No, Judge, it doesn't speak to that" (21/2290). Defense counsel, thoroughly confused by the differing offense dates in the documents, said, "Once again, it's my position that it's impossible for Your Honor to make any sense of this or make any informed decision without interviewing this

juror" (21/2291). The reason for the confusion came to light later in the hearing, when the prosecutor realized he had introduced this wrong documents pertaining to Tracy Robinson (21/2219). He was allowed to substitute the correct paperwork as State's Exhibit 1 (21/2319); these are the documents previously discussed which show on their face that Ms. Robinson was notified that failure to pay the costs on time or appear in court would result in a warrant for her arrest (5/849). Defense counsel stated:

> Your Honor, I have no objection to that substitution. I would just ask the Court to take careful note of the dates in the document as being presented by the State. It clearly indicates, Judge, that a capias was issued against the forelady on January 13th of '99. The trial of Mr. Johnston was June 7 to June 13 of '99. Thereafter on June 16th of '99, the forelady was arrested. So she was clearly under prosecution during the trial.
>
> On June 30th of '99, the Reese case came out, Reese v. State, at 24 Florida Law Weekly, D1538, holding that when a juror deciding a case is under prosecution by the same state attorney's office, the conviction must be overturned. Thank you, Your Honor.
>
> THE COURT. My ruling on that issue is the same. If they want to overturn it on that issue, fine. The nature of the capias being issued for failure to pay costs is that the person that it's issued against doesn't know it. So your argument concerning the relevant issue being her state of mind, thinking that she could somehow curry favor with the State in her case, there's absolutely no evidence that she was aware that there was a capias for her, so --
>
> MR. HOOPER: So --

> THE COURT: -- we're not having a debate. I'm putting that on the record.

(21/2319-20).

C. Juror Robinson was Under Prosecution by the Hillsborough County State Attorney's Office

Answering the certified question in Lowrey v. State, 705 So. 2d 1367, 1368 (Fla. 1998), this Court made it clear that "where it is not revealed to a defendant that a juror is under prosecution by the same office that is prosecuting the defendant's case, inherent prejudice to the defendant is presumed and the defendant is entitled to a new trial." In such a case, "there is a clear perception of unfairness and the integrity and credibility of the justice system is patently affected." 705 So. 2d at 1369-70. As reiterated a year later in Reese v. State, 739 So. 2d 120, 121 (Fla. 3d DCA 1999) (emphasis in opinion):

> The supreme court could not have been any clearer when it held that "the very foundation of our criminal justice process is compromised when a juror who is under criminal prosecution serves on a case that is being prosecuted by the same state attorney's office that is prosecuting the juror." Lowrey, 705 So. 2d at 1369-70. See also §40.013, Fla. Stat. (1997) ("No person who is under prosecution for any crime . . . shall be qualified to serve as a juror"). When, as here, a juror is being prosecuted by the same State Attorney's office that is prosecuting the defendant being tried, there exists an inherent presumption of prejudice. Id.
>
> In sum, the trial court erred when it denied the motion for mistrial and the motion

> to set aside the verdict. Under Lowrey, a new trial is required.

Under Lowrey and Reese, the question is simply whether Tracy Robinson was under prosecution by the Hillsborough County State Attorney at the time she served as a juror (and foreperson) in appellant's capital trial. If she was, then the trial court had no discretion other than to grant the motion for a new trial.[3] The relevant documents -- once the prosecutor got the right ones introduced -- showed that Ms. Robinson had pled nolo contendere to a Hillsborough County charge of obstructing or opposing an officer without violence (lower court case no. 98-12919), and costs were assessed; she was warned that failure to pay or to appear in court would result in a warrant for her arrest (5/849). When she failed to pay or appear, an arrest warrant was duly requested on January 8, 1999 and issued five days later (on the same case no.), and the arrest warrant remained active until Ms. Robinson's June 16, 1999 arrest on drug and firearm charges, in the midst of appellant's trial. The warrant commands all Florida sheriffs to arrest Tracy Robinson if found in their county, "to

[3] Ordinarily, the trial court's ruling on a motion for new trial is discretionary. State v. Hamilton, 574 So. 2d 124, 126 (Fla. 1991); Shere v. State, 579 So. 2d 86, 95 (Fla. 1991). "However, the showing required to reverse the denial of a new trial is less than that required to reverse the granting of a new trial" Chatman v. State, 738 So. 2d 970, 971 (Fla. 3d DCA 1999); see State v. Dunnaway, 778 So. 2d 378 (Fla. 4th DCA 2001). Under Lowrey and Reese, however, a new trial is mandatory whenever a person who was under prosecution by the same State Attorney's office served as a juror in the defendant's trial, so the trial judge had no discretion to rule otherwise (especially since her ruling was based on the legally and factually incorrect assumption that juror Robinson would not have known of her capias status).

answer a complaint found against the above named defendant by the State Attorney for the County of Hillsborough . . . " (5/787).

Clearly, under these circumstances, Ms. Robinson was "under prosecution" within the meaning of Lowrey and Reese. She was subject to being arrested and jailed on the warrant. If the costs were a condition of probation on the original conviction, her probation could be revoked; if they were instead in the nature of a fine, she could be found guilty of contempt of court. Either way, she was facing arrest and jail as a result of a prosecution and complaint by the Hillsborough County State Attorney's office, and that is enough to disqualify her as a juror in appellant's capital trial. The trial court erred in denying the motion for a new trial. Her attempt to distinguish Lowrey and Reese on the theory that "[t]he nature of a capias being issued for failure to pay costs is that the person that it's issued against doesn't know it" (21/2320) is not only an incorrect legal standard, it's wrong on the facts of this case.

D. Juror Robinson Committed Prejudicial Misconduct by Concealing her Capias Status, as well as her Underlying Criminal Conviction, from Counsel and the Court on Voir Dire

In other words, while appellant maintains that Lowrey and Reese are controlling, and mandate reversal for a new trial irrespective of whether Ms. Robinson knew or didn't know of her capias status, the fact remains that the trial court based her denial of appellant's motion for new trial on the wrong assumption that the juror would have been unaware of her

situation. The judge's misperception may have been caused in part by the prosecutor's introduction of documents which apparently concerned some other court case involving Ms. Robinson (21/2289-90). When the judge asked if the disposition showed that she had a certain time to pay the costs and if she failed to do so an arrest warrant would be issued, the prosecutor said "No, it doesn't speak to that." (21/2290). When the correct documents were eventually substituted by the state -- documents which clearly show on their face that Ms. Robinson was notified that her failure to pay or appear in court would result in a warrant for her arrest (5/849) -- the judge did not re-ask that question. She simply -- and rather brusquely -- persisted in her denial of the motion for new trial and her denial of defense counsel's repeated requests to interview the juror, saying:

> My ruling on that issue is the same. If they want to overturn it on that issue, fine. The nature of a capias being issued for failure to pay costs is that the person that it's issued against doesn't know it. So your argument concerning the relevant issue being her state of mind, thinking that she could somehow curry favor with the State in her case, there's absolutely no evidence that she was aware that there was a capias for her, so --
>
> DEFENSE COUNSEL: So --
>
> THE COURT: -- we're not having a debate. I'm putting that on the record.

(21/2320).

Not only did the trial court fail to follow the mandatory new trial rule of Lowrey and Reese, she further erred in denying the motion for new trial without at least conducting an inquiry

into Ms. Robinson's awareness of her capias status and her non-disclosure of this critical information on voir dire (not to mention her nondisclosure of her underlying criminal conviction). It is ironic that the trial judge could simultaneously berate defense counsel for "your argument concerning the relevant issue being her state of mind, thinking that she could somehow curry favor with the State in her case, there's absolutely no evidence that she was aware that there was a capias for her . . .", while (1) every time defense counsel requested a juror interview to enable the judge to make sense of the documents or make an informed decision, the request was denied (21/2255,2291), and (2) the state had just introduced evidence in the form of a document showing that the juror was, or certainly should have been, aware that there was a warrant for her arrest (21/2219-20; 8/849). If -- as the judge seemed to think -- the juror's awareness was the key issue, then she should have either granted the motion for new trial based on State's Exhibit 1, or at the very least conducted an inquiry to determine the true facts. Her failure to do either, and her basing of her ruling on a legally and factually incorrect premise, was a clear abuse of discretion.

As is the case with the other aspects of Juror Robinson's misconduct, "Article I, section 16, of the Florida Constitution, and the Sixth Amendment to the United States Constitution guarantee the criminally accused the right to a trial by an impartial jury", and this right is abrogated when a juror has concealed material and relevant background information during

voir dire which, if disclosed, would have provided a valid basis for a challenge for cause. Chester v. State, 737 So. 2d 557, 558 (Fla. 3d DCA 1999). As stated in Redondo v. Jessup, 426 So. 2d 1146, 1147 (Fla. 3d DCA 1983)(footnote omitted):

> When material information is either falsely represented or concealed by a juror upon voir dire, the entire proceeding is tainted and the parties are deprived of a fair and impartial trial. Loftin v. Wilson, 67 So. 2d 185 (Fla. 1953); Skiles v. Ryder Truck Lines, Inc., 267 So. 2d 379 (Fla. 2d DCA 1972).

In De La Rosa v. Zequeira, 659 So. 2d 239, 241 (Fla. 1995), this Court adopted a three-part test for determining whether a juror's nondisclosure of information during voir dire requires a new trial:

> First, the complaining party must establish that the information is relevant and material to jury service in the case. Second, that the juror concealed the information during questioning. Lastly, that the failure to disclose the information was not attributable to the complaining party's lack of diligence. Id. at 380. We agree with this general framework for analysis and note that the trial court expressly applied this test in its order granting a new trial.
>
> On numerous occasions, our appellate courts have reversed for jury interviews of new trials, where jurors allegedly failed to disclose a prior litigation history or where other information relevant to jury service was not disclosed. Bernal v. Lipp, 580 So. 2d 315 (Fla. 3d DCA 1991); Indus. Fire & Cas. Ins. Co. v. Wilson, 537 So. 2d 1100 (Fla. 3d DCA 1989); Mitchell v. State, 458 So. 2d 819 (Fla. 1st DCA 1984); Smiley v. McCallister, 451 So. 2d 977 (Fla. 4th DCA 1984); Mobil Chemical Company v. Hawkins, 440 So. 2d 378 (Fla. 1st DCA 1983); and Skiles v. Ryder Truck Lines, Inc., 267 So. 2d 379 (Fla. 2d DCA 1972).

When the three-part test is met, the trial court is required to grant a new trial, and her failure to do so is reversible error. See, e.g., Marshall v. State, 664 So. 2d 302 (Fla. 3d DCA 1995); Wilcox v. Dulcom, 690 So. 2d 1365 (Fla. 3d DCA 1997); Chester v. State, supra, 737 So. 2d at 558, as well as the earlier cases cited in Zequeria, 659 So. 2d at 241. On the other hand, sometimes one or several of the prongs of the Zequeira test require further factual development. When that is the case, Florida courts have held that the trial court's denial of a motion for new trial without first holding a juror interview or an evidentiary hearing is error requiring reversal for an evidentiary hearing (with the defendant then to be granted a new trial if the conditions of the test are met). Forbes v. State, 753 So. 2d 709 (Fla. 1st DCA 2000); Davis v. State, 778 So. 2d 1096 (Fla. 4th DCA 2001); James v. State, 717 So. 2d 1086 (Fla. 5th DCA 1998); see also Marshall v. State, 664 So. 2d 302, 304 n.2 (Fla. 3d DCA 1995). Marshall is especially pertinent to the instant case because, as here, it involves multiple problems with the juror in question:

> A case will be reversed because of a juror's nondisclosure of information at voir dire only when the following three-part test is met: (1) the information must be relevant and material to jury service in the case; (2) the information must be concealed by the juror during voir dire examination; and (3) the failure to discover the concealed information must not be due to the want of diligence of the complaining party. De La Rosa v. Zequeira, 659 So. 2d 239, 241 (Fla. 1995); Industrial Fire & Casualty Ins. v. Wilson, 537 So. 2d 1100, 1103 (Fla. 3d DCA 1989). Juror Giorgio's failure to mention

> her jail work was not a false response. While we would hope for more candor from veniremembers, defendant did not ask questions calculated to elicit Giorgio's jail work on voir dire. Whether the concealment and diligence prongs of the misconduct test have been met are close factual issues which would require a juror interview for resolution. However, as set forth below, Giorgio's subsequent misconduct mandates a new trial without the need to address these issues.

Although the juror's intent is not dispositive, and even an unintentionally false or materially incomplete response may deprive a defendant of a fair and impartial jury,[4] the circumstances of the instant case show rather convincingly that juror Robinson's concealment must have been deliberate. It is not likely that it slipped her mind that she had a misdemeanor conviction for obstructing or opposing an officer within the past year, or that she had neglected to pay the costs or show up in court. Nor did the question take her by surprise. Prior to voir dire, she filled out the questionnaire and answered YES to the question, "Have you or any member of your immediate family or any close friend been accused of a crime?" When the prosecutor delved into this subject on voir dire, he couldn't have made it much clearer that the question included whether the juror herself had been involved in the criminal process:

> These jury forms ask very broad questions and, of course, this is where we're getting into that area where I'm not trying to embarrass anyone or intimidate anyone, but it asks, have you or any member of your family

[4] See Redondo v. Jessup, supra, 426 So. 2d at 1147; Chester v. State, supra, 737 So. 2d at 558.

> or any close friends ever been accused of a crime. That's what I want to go into now.
>
> I want to ask who was the person, what relationship was it to you; if it wasn't you, whether you felt that that person, whether it was you or someone else, was treated fairly in the process and whether you think that incident or experience would prevent you from being a fair and impartial juror.

(7/125-26).

Two other prospective jurors, in Ms. Robinson's presence, acknowledged that they personally had been accused of a crime (6/49-51; 7/133). Yet Ms. Robinson, when asked directly "[W]ho was that person?", answered only "My son's father", and that she had kept up with his case, thought he had been treated fairly, and nothing about her knowledge of his experience would keep her from being a fair and impartial juror (7/126-27).

If Ms. Robinson had answered the question truthfully, counsel for the state and for the defense would have explored the matter more fully, and likely would have run her name through computerized court records. Her capias status would probably have come to light, and there is a very good chance she knew that. In any event, it is virtually certain that if Ms. Robinson had responded truthfully on voir dire, she would not have served on appellant's capital jury (at least up until the time of her drug arrest) because (1) she would have been challenged for cause by the state or the defense or both; or (2) she would have been peremptorily challenged; and/or (3) she would have been arrested. Ms. Robinson's motive for concealing her prior conviction and her capias status is obvious; either she really, really wanted to be

on this jury, or she didn't want to go to jail. Either way, appellant's right to a fair trial was irreparably compromised, especially in light of the later developments.

While defense counsel, in the hearing on the motion for new trial, repeatedly requested a juror interview to enable the trial court to make an informed decision and to make sense of the documents introduced by the state, this was primarily in response to the trial court's comments that she didn't think Ms. Robinson would have known about the arrest warrant. Neither counsel nor the court appear to have picked up on the fact that Ms. Robinson had concealed her underlying conviction on voir dire. The state may argue on appeal that the concealment issue is therby waived. However, given Ms. Robinson's multiple and cumulative acts of misconduct, most of which were brought to the trial court's attention, coupled with the fact that defense counsel twice requested a juror interview on the closely related issue of Ms. Robinson's knowledge of her capias status, appropriate relief should not be denied on procedural grounds. Trial counsel did not have a transcript of voir dire available to him at the time, and his failure to specifically recall Ms. Robinson's misleading response to the prosecutor's question should not be viewed as a waiver under the circumstances of this case.

E. The Trial Court Abused her Discretion in Denying the Motion for a New Trial Without Any Inquiry into the Nature and Extent of Juror Robinson's Use of Crack Cocaine and Marijuana During the Guilt Phase of Appellant's Capital Trial.

Probably the single most disturbing aspect of Ms. Robinson's misconduct during appellant's trial is her arrest for possession of crack cocaine, marijuana, and an illegal firearm, which occurred on Wednesday, June 16, 1999, the first day of appellant's penalty phase, and a mere five days after the jury (of which Ms. Robinson was foreperson) deliberated and found him guilty as charged of first degree murder and four other felonies. The timing of her arrest, and the highly addictive nature of crack cocaine, give rise to a more than reasonable concern that Ms. Robinson may have been under the influence of crack and marijuana throughout the time period of the trial, including the presentation of evidence, arguments, and instructions, as well as the jury's deliberations. The threshold question is -- Does it matter if she was? Under Florida law, the answer is most certainly yes.

In Langston v. State, 212 So. 2d 51, 52 (Fla. 1st DCA 1968), the appellate court found that the defendant was denied his right to a fair trial on several grounds, one of which was this:

> The appellant invokes the principle enunciated by the Florida Supreme Court in Gamble v. State, 44 Fla. 429, 33 So. 471 (1902) as follows:
>
> > "If intoxicants be shown to have been used by the jury, the presumption arises in favor of the convicted defendant that it resulted injuriously to him, and the burden is on the state to show affirmatively, to the entire satisfaction of the court, that its use was to such a limited and moderate extent as to completely and satisfactorily negative any harm to the defendant from

its use by the jury, or any member of it."

See also Goldring v. Escapa, 338 So. 2d 871, 873 (Fla. 3d DCA 1976) (excessive use of liquor by a juror during the trial "is such misconduct as will vitiate the verdict"); cf. Baez v. State, 699 So. 2d 305 (Fla. 3d DCA 1997) (trial court erred in declaring mistrial based on allegation that a juror had had a couple of beers at lunch without first inquiring into the condition of the allegedly impaired juror to determine whether he was competent to deliberate).

In Zeigler v. State, 632 So. 2d 48, 52 (Fla. 1993), this Court said, "We know of no rule which prohibits jurors from taking medication [prescribed by a doctor], and so long as it does not affect their competency, this cannot be a basis for impugning their verdict." In contrast, there are several rules, including felony and misdemeanor statutes, which prohibit jurors (or anyone else) from using crack cocaine or marijuana. For a juror to do so during a trial -- especially one in which a man's life is at stake -- conveys a disregard for her oath and for the gravity of the proceedings. Moreover, Zeigler plainly suggests -- consistent with Gamble, Langston, and Goldring -- that a juror's use of drugs or alcohol during a trial is a basis for impugning the verdict if it does affect the juror's competency. And there is simply no way for the trial judge to determine that without an inquiry.

Florida's Evidence Code prevents a juror from testifying as to any matter which essentially inheres in the verdict itself

(Fla. Stat. §90.607()(b)), but juror testimony is permitted as to overt acts committed by or in the presence of one or more jurors which might have compromised the integrity of the fact finding process. See Powell v. Allstate Insurance Co., 652 So. 2d 354 (Fla. 1995); Baptist Hospital of Miami, Inc. v. Maler, 579 So. 2d 97, 99-101 (Fla. 1991); State v. Hamilton, 574 So. 2d 124, 128 (Fla. 1991); Norman v. Gloria Farms, Inc., 668 So. 2d 1016, 1019-20 (Fla. 4th DCA 1996). As this Court observed in Powell, quoting Justice Kogan's separate opinion in Maler, the distinction under Florida law is between overt acts on the part of a juror (which can be the subject of an interview) and the jurors' subjective thought processes (which cannot). 652 So. at 357. Another distinction, noted in Devoney v. State, 717 So. 2d 501, 504 (Fla. 1998), quoting the District Court's opinion in State v. Devoney, 675 So. 2d 155, 158 (Fla. 5th DCA 1996), is whether the juror's misconduct infected the trial from an external source; if so, it does not "inhere" in the verdict:

> Powell appears to have established that a juror who spreads sentiments of racial, ethnic, religious or gender bias, fatally infects the deliberation process in a unique and especially opprobrious way and the courts will be vigilant to root it our. Powell identifies a special circumstance where the high court deemed interference necessary in order to "jealously guard our sacred trust to assure equal treatment before the law." Also, it is important that such biases are carried like germs from outside the process of the trial to infect the jury's deliberation, whereas discussions by a jury of one or more matters heard during the course of the trial, even where jurors have been instructed to "disregard" the matter

> discussed, is a matter internal to and inherent in the process of trial.

A new trial based on juror misconduct may be required under some circumstances "as a matter of public policy for the purpose of maintaining confidence in the integrity of jury trials." Norman v. Gloria Farms, supra, 668 So. 2d at 1020, quoting Policari v. Cerbasi, 625 So. 2d 998 (Fla. 5th DCA 1993). Jurors' racial jokes and comments are one such example, Powell, and the use of crack cocaine and marijuana by the jury foreperson during a capital trial should be another. The timing and circumstances of her arrest,[5] and the nature of the charges, gave rise to an objective and reasonable concern that Ms. Robinson may have been under the influence of highly addictive and mind-altering illegal substances during the presentation of evidence, arguments, and instructions and during the jury's guilt phase deliberations. [Contrast this Court's statement in State v. Hamilton, 574 So. 2d at 130, that an evidentiary hearing need not be conducted when an unreasonable allegation of juror misconduct is made]. Whether Ms. Robinson used the crack cocaine and marijuana, when and how often she used them, and how much she used, are all objective questions concerning overt illegal acts which occurred outside

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[5] In his motion to interview Ms. Robinson, counsel alleged "the defense has a legitimate and well founded concern that the forelady was not only possessing narcotics but was using same. Lt. Lewis Botenziano is quoted by the St. Petersburg Times as saying that "[w]hen Juror Robinson opened the door to her apartment he smelled Marijuana smoke. Although Juror Robinson attempted to put the blame on her boyfriend, her boyfriend was at the time in prison and had been for a couple of weeks" (5/781-82).

the trial process but which could be poisonous to the integrity of the trial. Under §90.607(2)(b), both the defense and the state would be permitted to inquire into the nature and extent of Ms. Robinson's drug use during the trial, so long as neither party elicited information about her subjective impressions and opinions or those of the other jurors. If the interview established as an objective fact that Ms. Robinson was using crack cocaine or marijuana during the trial, then the burden would shift to the state to show that she nevertheless remained competent to hear the evidence and deliberate:

> If intoxicants be shown to have been used by the jury, the presumption arises in favor of the convicted defendant that it resulted injuriously to him, and the burden is on the state to show affirmatively, to the entire satisfaction of the court, that its use was to such a limited and moderate extent as to completely and satisfactorily negative any harm to the defendant from its use by the jury, or any member of it.

Gamble v. State, supra, 33 So. at 473; Langston v. State, supra, 212 So. 2d at 52; see Zeigler v. State, supra, 632 So. 2d at 52.

This is also consistent with the broader principles of Florida law on juror misconduct, which is that if the moving party establishes an overt act of misconduct in a juror interview or evidentiary hearing, then there is a rebuttable presumption of prejudice, and he is entitled to a new trial unless the opposing party can demonstrate that there is no reasonable possibility that it affected the verdict. Hamilton, 574 So. 2d at 129; Maler, 579 So. 2d at 100, n.1; Norman, 668 So. 2d at 1020.

In the instant case, Ms. Robinson's possession and likely use of crack cocaine during her service on appellant's capital jury is particularly disturbing, and undermines confidence in the integrity of the proceeding. Society has a legitimate fear of crack cocaine (Revels v. State, 666 So. 2d 213, 217 (Fla. 2d DCA 1995)), because it is so highly addictive, See, e.g., Randolph v. State, 562 So. 331, 334 (Fla. 1990); Williams v. State, 623 So. 2d 462, 466 (Fla. 1993); and especially Jones v. State, 748 So. 2d 1012, 1025 (Fla. 1999) (penalty jury heard testimony of Jones' wife regarding the strength of his "compulsion for crack and the drastic effect it had on his ability to do anything but endeavor to secure more," as well as the testimony of an expert as to crack cocaine's addictive effect, the compulsion to obtain more no matter the cost, and its effects on behavior). According to the expert in Randolph, 562 So. 2d at 334, unlike alcohol intoxication, the effects of crack cocaine are not readily apparent from merely looking at a person. However, the effects of the drug stay in the blood, and its use over time affects the user's personality and behavior. People who repeatedly use crack cocaine become emotionally disturbed and experience "a quality of bizarreness" that overcomes thinking (expert witness in Caruso v. State, 645 So. 2d 389, 396 (Fla. 1994)); persons who ingest cocaine can become "hostile and paranoid" (expert in McBean v. State, 688 So. 2d 383, 386 (Fla. 4th DCA 1997)); they can experience psychosis even after the immediate effect of the cocaine wears off (expert in Robinson v. State, 761 So. 2d 269,

272 (Fla. 1999)). Appellant is not suggesting that Ms. Robinson could be asked in the interview whether her thought processes were in fact impaired in these ways; first of all, that would be an inquiry into "the emotions, mental processes, or mistaken beliefs of jurors" forbidden by §90.607(2)(b), and secondly, if her thinking was impaired by drug abuse, she wouldn't necessarily be aware of it. Rather, undersigned counsel is stressing the effects of crack cocaine on users as a class, to show that any juror's use of crack is a serious and overt act of misconduct, which -- in and of itself -- will vitiate a verdict unless the opposing party can show such a limited and moderate use that it could have had no effect on the proceedings. Gamble; Langston; Goldring v. Escapa; see Zeigler; Baez. And, in the case of crack cocaine, unlike alcohol or perhaps marijuana, there may be no such thing as limited or moderate use, although perhaps (in another case) the state could show that the use was too remote in time to have affected the trial. Given the charges against the juror and the timing of her arrest, the trial judge abused her discretion in refusing to inquire into the fact of whether juror Robinson was using crack cocaine and marijuana during this capital trial. If she was -- and if the state failed to overcome the presumption of prejudice during the inquiry or evidentiary hearing -- then appellant was entitled to a new trial.[6]

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[6] The trial judge also opined that any inquiry of juror Robinson would be pointless, because "you can certainly anticipate what the answers are going to be. Were you under the influence of narcotics while you were on jury deliberations? No. (continued...)

[6](...continued)
Had you used narcotics? No" (21/2240). When defense counsel pointed out "I don't think I would be doing my job if I failed to call a witness under oath merely because I believe that the witness would probably lie. If that was the case, there would be a lot of people we would not call", the judge quipped, "And probably shouldn't" (21/2240).

That kind of "see no evil, hear no evil" logic was an unsound reason to deny an inquiry. It would be the judge's job as fact-finder in the interview or evidentiary hearing to evaluate the credibility of witnesses based on their motivations, demeanor, the content of their testimony, and all of the other factors with which judges and attorneys are very familiar. If -- after putting her under oath and hearing her testimony -- the judge determined that Ms. Robinson could not be believed, that would be a reason to grant a new trial, since the state would not have met its burden of showing that her misconduct had no harmful effect. Moreover, there is no guarantee that Ms. Robinson, if placed under oath, would necessarily have denied using crack cocaine or marijuana during the trial. Maybe she would have admitted it, or maybe she would have invoked her privilege against self-incrimination. [The latter, appellant suggests, would give rise to an inference that she was using these drugs. A juror interview is not a criminal trial, and is more in the nature of a civil proceeding. See Roland v. State, 584 So. 2d 68, 69-70 (Fla. 1st DCA 1991); Sconyers v. State, 513 So. 2d 1113, 1117 (Fla. 2d DCA 1987); Fla. Bar Rules of Prof. Conduct, Rule 4-3.5(d)(4) (setting forth basis and procedure for interviewing jurors). Based on the reasoning of Baxter v. Palmagiano, 425 U.S. 2d 308 (1976), and especially since juror Robinson was not a party in the trial, her invocation of her Fifth Amendment privilege in a juror interview should give rise to an inference that the misconduct did occur. Cf. Atlas v. Atlas, 708 So. 2d 296, 299 (Fla. 1998))]. Or perhaps the state -- seeking to ascertain the truth -- might have given her use and derivative use immunity, which would have required her to testify truthfully about her drug use. Also, since all authorities (including even the majority opinion in Tanner v. United States, supra, 483 U.S. at 127) agree that non-jurors may give testimony regarding a juror's drug or alcohol use during trial, the judge or counsel could have called Lt. Botenziano or other law enforcement officers involved in Ms. Robinson's drug arrest. It certainly would have been relevant and interesting to know what was their probable cause to arrest her for possession of crack and marijuana during the time frame of this trial.

Because of the trial court's absolute refusal to inquire, Ms. Robinson was never asked under oath to admit, explain, or deny her use of crack cocaine and marijuana during appellant's trial. Under the circumstances of this case, and based on the

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One additional point needs to be addressed with respect to the trial court's failure to inquire into Ms. Robinson's drug use. The state will likely argue on appeal that Tanner v. United States, 483 U.S. 107 (1987) overrules the prior and subsequent Florida law on drug and/or alcohol impaired jurors. However, Tanner does not, cannot, and should not have that effect. Tanner is a 5-4 decision of the U.S. Supreme Court, in which both the majority and the dissenters, each citing Jordan v. Massachusetts, 225 U.S. 167, 176 (1912), agreed that the Sixth Amendment guarantees a defendant's right to an unimpaired jury. 483 U.S. at 110 and 115. Both the majority and the dissenters also agreed that jurors' drug and alcohol use is misconduct, and that a party may seek to impeach a verdict based on such misconduct. 483 U.S. at 127. The narrow issue decided in Tanner, and on which the majority and the dissenters disagreed, was whether under Federal Rule of Evidence 606(b), in light of the legislative history of that rule, jurors would be permitted to testify concerning allegations of their drug and/or alcohol intoxication. The majority's conclusion that Rule 606(b) prohibits such juror testimony was based heavily on its interpretation of the legislative history of that rule, 483 U.S. at 122-125, culminating in the following observation:

> Thus, the legislative history demonstrates with uncommon clarity that Congress

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[6](...continued)
information before the judge, this was an abuse of discretion.

> specifically understood, considered, and rejected a version of Rule 606(b) that would have allowed jurors to testify on juror conduct during deliberations, including jury intoxication. This legislative history provides strong support for the most reasonable reading of the language of Rule 606(b) -- that juror intoxication is not an "outside influence" about which jurors may testify to impeach their verdict.

Tanner v. United States, 483 U.S. at 125.

The U.S. Supreme Court's interpretation, in its supervisory capacity over the federal court system, of a federal rule does not overrule or supersede established Florida law, especially when the federal decision is expressly based on a legislative history that has no Florida equivalent. As Professor Ehrhardt has noted, Florida's Evidence Code is generally patterned after the Federal Rules of Evidence, but some sections differ slightly, while "[o]thers differ significantly; these provisions generally involve a substantive difference," and retain the pre-Code Florida law. Ehrhardt, Florida Evidence, §102.1 (2001 Ed.). With regard to the specific issue of juror testimony, he observes:

> The language of section 90,607(2)(b) adopted the pre-Code test in Florida, rather than to create uncertainty by following language used in the federal rule. Federal Rule of Evidence 606 somewhat differently provides that a juror is incompetent to testify to any matter occurring during the course of the jury deliberations, except extraneous prejudicial information brought to the jury's attention and outside influences brought to bear on an individual juror. The United States Supreme Court narrowly construed Federal Rule 606(b) in Tanner v. United States, where defense counsel in a motion for new trial offered juror

> allegations of alcohol and drug use by other members of the jury. According to the Tanner Court, this evidence was inadmissible because it was not relevant to whether an "outside influence" had been brought to bear on a member of the jury. "However severe their effect and improper their use, drugs and alcohol voluntarily ingested by a juror seem no more an "outside influence" than a virus, poorly prepared food, or a lack of sleep." Non-juror witnesses would not be barred by Rule 606(b) from testifying to this juror misconduct.

Ehrhardt, Florida Evidence, §607.2, p.429 (2001 Ed.).

Since §90.607(2)(b) adopted pre-Code Florida law and does not track the federal rule, and since it does not share the federal rule's legislative history where the U.S. Congress manifested a clear intent to preclude juror testimony concerning intoxication, it follows that Tanner has no effect on Florida law, and does not overrule the Gamble-Langston-Goldring-Zeigler-Baez line of cases which establish that in Florida juror intoxication is overt misconduct which can be the subject of inquiry, and which will vitiate a verdict unless the state can establish that the juror's competency was unaffected. [7]

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[7] Similarly, Devoney v. State, 717 So. 2d 501 (Fla. 1998) does not overturn the established Florida law on juror intoxication and drug use. Devoney (itself a 4-3 decision) holds only that jurors' discussions about the defendant's prior speeding ticket, which the trial court had instructed them to disregard, was a matter which inhered in the verdict, and thus did not warrant a new trial. While Tanner v. United States, supra, is discussed in Devoney, 717 So. 2d at 503-04, there was no reason for the parties in that case to argue Florida law on juror intoxication or to point out the differing legislative history of the federal rule, since juror intoxication was not at issue in Devoney. Where language in an opinion of this Court is not essential to the decision in that case and amounts to obiter dicta, it is not controlling in a subsequent case before this

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Florida is not alone among states whose rules of evidence allow, and in appropriate cases require, jurors to be interviewed regarding allegations of drug or alcohol abuse. See, e.g., People v. Burgener, 714 P. 2d 1251, 1257-61 (Cal. 1986); State v. Hart, 566 So. 2d 174, 178 (Ohio App. 1988); and Indiana Evid. Rule 606(b), quoted in Mitchell v. State, 726 N.E. 2d 1228, 1238 (Ind. 2000) and Robinson v. State, 720 N.E. 2d 1269, 1272-73 (Ind. App. 1999), and see Schultz v. Valle, 464 N.E. 2d 354 (Ind. App. 3 Dist. 1984). Indeed, the later cases which allow a juror interview often inure to the benefit of the state, since it may enable the state to
rebut the presumption of harmful effect. Earlier cases often held that any consumption of intoxicants by a deliberating juror was sufficient to require a new trial. See People v. Lee Chuck, 78 Cal. 317, 20 P. 2d 719 (1889) (and cases cited therein at 20 P. 2d at 725) (emphasizing that it was a capital case); see also Hedican v. Pennsylvania Fire Ins. Co., 58 P. 2d 574 (Wash. 1899).

The procedural fairness and integrity of the process "is of unique and special concern in cases where the State seeks to take the life of the defendant." Arbelaez v. Butterworth, 738 So. 2d

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[7](...continued)
Court, State v. Florida State Improvement Commission, 60 So. 2d 747, 750 (Fla. 1952), and cannot function as ground-breaking precedent. Continental Assurance Co. v. Carroll, 485 So. 2d 406, 408-09 (Fla. 1986). See Dobson v. Crews, 164 So. 2d 252, 255 (Fla. 1st DCA 1964) (dicta "more often serve to confound than to clarify the jurisprudence of the State"). If the state chooses to contend that Tanner should supersede the established Florida law on juror intoxication, then it needs to try to persuade this Court in this case; Devoney simply has nothing to do with the issue.

326, 331 (Fla. 1999)(Anstead, J., concurring). See Beck v. Alabama, supra, 447 U.S. at 637-38; Allen v. Butterworth, supra, 756 So. 2d at 59; Crump v. State, supra, 654 So. 2d at 547; Fitzpatrick v. State, supra, 527 So. 2d at 811. And that is yet another reason why Tanner (which involved a non-capital trial) cannot apply to shield juror Robinson's drug activities during appellant's trial from judicial inquiry or appellate scrutiny. To whatever extent it is based on something other than legislative history, Justice O'Connor's opinion, for the five Justice majority in Tanner, emphasizes the importance of finality:

> There is little doubt that post-verdict investigation into juror misconduct would in some instances lead to the invalidation of verdicts reached after irresponsible or improper juror behavior. It is not at all clear, however, that the jury system could survive such efforts to perfect it. Allegations of juror misconduct, incompetency, or inattentiveness, raised for the first time days, weeks, or months after the verdict, seriously disrupt the finality of the process. See, e.g., Government of Virgin Islands v. Nicholas, 759 F. 2d, at 1081 (one year and eight months after verdict rendered, juror alleged that hearing difficulties affected his understanding of the evidence). Moreover, full and frank discussion in the jury room, jurors' willingness to return an unpopular verdict, and the community's trust in a system that relies on the decisions of laypeople would all be undermined by a barrage of post-verdict scrutiny of juror conduct.

483 U.S. at 120-21.

Apart from the question of how much community trust there would be for a system that turns a blind eye to crack users

serving on capital juries, "finality" in the context of death penalty cases is a double-edged sword. On the one hand, there is an important -- though not absolute -- interest in not having jury verdicts subject to endless attack or to "fishing expeditions" by counsel or interested parties. Unquestionably, jurors should not be badgered to reveal what occurred during their deliberations. [In the instant case, there was no fishing expedition, no badgering, and no undue delay. The facts giving rise to the defense's reasonable concern that the juror may have been under the influence of crack cocaine and marijuana during appellant's trial were not developed by anyone connected with the defense, but by law enforcement officers who arrested her for possession of those drugs, and who allegedly smelled marijuana in the apartment occupied by her (and not by her boyfriend) at the time of her arrest]. On the other hand, finality also refers to the finality of the ultimate penalty, and in death cases there should be no such thing as "close enough for government work." The Eighth Amendment demands heightened due process and procedural protection, and the integrity of the tribunal is infinitely more important than the finality of a tainted verdict.

F. The Combination of the Acts of Juror Misconduct and the Judicial Errors Arising Out of Tracy Robinson's Jury Service Require Reversal for a New Trial.

Appellate review of errors infringing an accused's right to a trial by a fair, impartial, and unimpaired jury:

> is not like measuring the effect of erroneous evidentiary rulings against the overall

> weight of properly admitted evidence. Errors involving the composition of the court or jury affect the legitimacy of the entire proceeding, leaving nothing to measure or weigh and requiring reversal. Chief Justice Rehnquist put it another way in [Arizona v.] Fulminante [499 U.S. 279 (1991)]. Errors that occur "during the presentation of the case to the jury" are susceptible to a harmless error analysis because they may "be quantitatively assessed in the context of [the] other evidence." Id. at 307-08, 111 S.Ct. at 1264. But errors that create "defects . . . in the trial mechanism" itself affect the "entire conduct of the trial from beginning to end," damage "the framework within which the trial proceeds," and are therefore not subject to harmless error analysis. Id., at 309-11, 11 S. Ct. at 1265.

State v. Anderson, 4 P. 3d 369, 378-79 (Ariz. 2000).

See State v. LaMere, 2 P. 2d 204, 214-17 (Mont. 2000); State v. Blem, 610 N.W. 2d 803, 809-10 (S.D. 2000); State v. Padilla, 11 P. 2d 589, 593-94 (N.M. 2000) (under Fulminante definition, errors materially impacting defendant's right to a fair and impartial jury are structural in nature, and require reversal for a new trial without regard to the strength or weakness of the evidence supporting the conviction). In addition to Fulminante, the Montana Supreme Court in LaMere quoted the earlier U.S. Supreme Court decision in Grey v. Mississippi, 481 U.S. 648, 668 (1987) (plurality opinion):

> Because . . . the impartiality of the adjudicator goes to the very integrity of the legal system, the Chapman harmless-error analysis cannot apply. We have recognized that "some constitutional rights [are] so basic to a fair trial that their infraction can never be treated as harmless error." Chapman [, 386 U.S. at 23, 87 S. Ct. at 827-28, 17 L. Ed. 2d at 710]. The right to an

> impartial adjudicator, be it judge or jury, is such a right.

2 P. 3d at 216-17 (emphasis in LaMere opinion).

See also Marshall v. State, 593 So. 2d 1161, 1163 (Fla. 2d DCA 1992) (citing Fulminante for the proposition that "[w]hen a jury has a membership that is different from that which should have heard the case, it is fair to suggest that the error may go to the `structure' of the trial and is not subject to harmless error analysis"). Contrast Wilson v. State, 764 So. 2d 813, 817-19 (Fla. 4th DCA 2000) (counsel's temporary absence was not a structural defect because it did not amount to a substantial violation of the constitutional right involved, and it did not infect the entire trial, where no evidence was presented and no instruction to the jury occurred at a time when the defendant was without representation, and "[o]n that crucial Friday morning, which we are putting under a microscope, no action was taken which could have influenced the jury's verdict").

In the instant case, Tracy Robinson would never have gotten on appellant's jury had she not concealed on voir dire critical information about her own prior and ongoing involvement in a criminal prosecution. She was a member of this jury throughout the guilt phase -- presentation of all the evidence, argument, and instruction. She took part in the especially sensitive portion of the trial -- deliberations[8] -- and she became foreperson of the jury which convicted appellant of first degree

[8] See Livingston v. State, 458 So. 2d 235, 238-39 (Fla. 1984); State v. Hamilton, supra, 574 So. 2d at 126.

murder and four other felonies. After a five day break, she, along with the other jurors, heard most of the penalty phase witnesses, and that night she was arrested for possession of crack cocaine and marijuana, with the smell of the latter (according to an arresting officer) wafting through her apartment. She should not have been on this jury in the first place, and she should not have been doing drugs while sitting in judgment of another person. All of her misconduct infected the entire guilt phase of the trial, and destroyed the integrity of the proceedings, and all of the judicial rulings blocking inquiry into her conduct and denying a new trial, especially when considered in combination, were structural error which can only be remedied by a new trial.

On a "better late than never" theory, the state may take a fallback position that the errors can be remedied by a post-appeal evidentiary hearing or juror interview. Appellant disagrees. There is simply too much wrong with Ms. Robinson [see Marshall v. State, 664 So. 2d 302, 304-05 and n.2 (Fla. 3d DCA 1995)] and too much time will have passed to make a reliable determination.[9] Moreover, at least one aspect of Ms. Robinson's

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[9] In the event that this Court were to order a post-appeal evidentiary hearing or juror interview on the issues of Ms. Robinson's concealment of material information on voir dire and her drug use during trial, it should be noted that (1) if appellant satisfies the three-pronged Zequeira test as to juror concealment, he must be granted a new trial [Davis, 778 So. 2d at 1097; Forbes, 753 So. 2d at 710; James, 717 So. 2d at 1086]; and (2) if he establishes that Ms. Robinson was using crack or marijuana during his trial, he must be granted a new trial unless the state can show that the timing or amount of her drug use was (continued...)

problems -- the fact that she was under prosecution by the state attorney's office -- by itself requires automatic reversal for a new trial. Lowrey; Reese. Based on the totality of the circumstances involved here, this Court should reverse appellant's convictions and sentences, including the death sentence, and remand for a new trial before an uninfected jury.

ISSUE II

APPELLANT WAS DEPRIVED OF HIS RIGHT, GUARANTEED BY THE FLORIDA AND UNITED STATES CONSTITUTIONS, TO A FAIR AND IMPARTIAL JURY, WHERE THE TRIAL COURT AND COUNSEL FAILED TO FOLLOW THROUGH ON HER EARLIER RULING ALLOWING INDIVIDUAL AND SEQUESTERED VOIR DIRE OF PROSPECTIVE JURORS WHO HAD KNOWLEDGE OF THIS CASE THROUGH PRETRIAL PUBLICITY, AND AS A RESULT APPELLANT WAS UNABLE TO ASCERTAIN HOW EXPOSURE TO THE PUBLICITY (WHICH INCLUDED, AMONG OTHER THINGS, APPELLANT'S PRIOR CRIMINAL CONVICTIONS FOR SEXUAL AND OTHER FELONIES; HIS PRISON SENTENCES AND EARLY RELEASES; HIS STATUS AS A SUSPECT IN THE MURDER OF ANOTHER WOMAN AND A SLASHING ATTACK ON YET ANOTHER WOMAN; POLICE REPORTS THAT HE HAD RECEIVED TREATMENT AS A SEXUAL PREDATOR; AND HIS OWN FAMILY'S OPINION THAT HE IS VIOLENT, DANGEROUS, AN HABITUAL LIAR, AND GUILTY OF THE CHARGED MURDER), AFFECTED THE JURORS, INCLUDING TWO WHO ACTUALLY SAT ON

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[9](...continued)
of "such a limited and moderate extent as to completely and satisfactorily negative any harm to the defendant" [Gamble; Langston; see generally Hamilton; Maler; Norman]; and (3) if Ms. Robinson or any other essential witness is unavailable, appellant must be granted a new trial. See Wright v. CTL Distributors, Inc., 650 So. 2d 641, 643-44 (Fla. 2d DCA 1995).

THE JURY WHICH CONVICTED HIM AND RECOMMENDED THE DEATH PENALTY.

A. The Applicable Law

A trial court has broad -- but not unlimited -- discretion in determining whether prospective jurors must be questioned about publicity the case has received. Bolin v. State, 736 So. 2d 1160, 1164 (Fla. 1999); Randolph v. State, 562 So. 2d 331, 337 (Fla. 1990). "Individual voir dire to determine juror impartiality in the face of pretrial publicity is constitutionally compelled only if the trial court's failure to ask these questions renders the trial fundamentally unfair." Bolin v. State, supra, 736 So. 2d at 1164. This Court has made the strong distinction between potentially prejudicial information contained in the publicity which is going to be introduced at trial (which may not require individual voir dire) and potentially prejudicial information which is not admissible at trial. Bolin v. State, supra, 736 So. 2d at 1164-66, citing Reilly v. State, 557 So. 2d 1365, 1367 (Fla. 1990); see also Boggs v. State, 667 So. 2d 765 (Fla. 1996); Kessler v. State, 752 So. 2d 545 (Fla. 1999). As stated in Bolin:

> Trial courts must ascertain whether prospective jurors possess information which is not admissible in the trial in which they will serve as jurors and which is so prejudicial to the defendant that the jurors' knowledge of the information creates doubt as to whether the jurors can decide the case based solely upon the evidence that will be admitted at trial.
>
> As we have stated, the defense counsel, the prosecutor, the trial judge, and this

> Court could not have known, absent individual voir dire, whether the five jurors, including the jury foreman, named by Bolin in this appeal had been exposed to the inadmissible and prejudicial information. Thus, we find that under the facts of this case the trial court abused its discretion in refusing to grant Bolin's request for individual and sequestered voir dire. Accordingly, we remand for a new trial.

736 So. 2d at 1166 (footnote omitted)

This Court in Bolin noted that group voir dire will not suffice under these circumstances: ". . . the entire jury venire likely would have been tainted by knowledge of all this inadmissible evidence if the trial judge or counsel had questioned prospective jurors in the presence of other venirepersons regarding exposure to pretrial publicity." 736 So. 2d at 1166. The Court also noted that a retrial might have been avoided "if the court had taken the time to determine what facts fewer than ten venirepersons knew about Bolin's case based on the news accounts they had read." 736 So. 2d at 1166, n.2.

B. The Vilification of Appellant in the News Media

The murder of Leanne Coryell, and appellant's arrest after his photograph was shown on television using her ATM card, were accompanied by extensive and sensational coverage in the Tampa Bay area print and electronic media. News and feature articles, several of which were prominently placed at the top of the front page of the Florida Metro and Tampa and State sections of the Tampa Tribune and St. Pete Times, were published, along with

photographs of appellant and the strikingly attractive murder victim (1/87-99). One photo of appellant, in an article under the headline, "Killing suspect no stranger to justice system" was captioned "Raymond Johnson served only half of an 18-year sentence for kidnapping" (1/98). Another photo of appellant, under the headline "Ties to earlier victim investigated", was captioned "Restaurant employees say they saw Raymond Lamar Johnston with Janice Nugent. She was killed in February" (1/92). A photograph of Ms. Nugent was on the same page, along with a photograph of Ms. Coryell (1/92). In the week following the discovery of Ms. Coryell's body, her death and appellant's arrest (and his criminal history, and the various other crimes he was suspected of, and his own family's belief that he was guilty, etc.) were the subject of at least 75 news broadcasts (some of them repeated half-hourly) on Tampa Bay Channels 8, 10, 13, 28, and 44 (1/134-44). Another two dozen broadcasts occurred over the next six weeks (1/144-47). While the media coverage was extensive, the content of the publicity was extraordinary.

Taking the newspapers first, they reported that appellant has a long criminal history spanning three states, including felony convictions for rape, kidnapping, robbery, and armed burglary, as well as arrests for auto theft and assault with intent to commit murder. He was sentenced to fifteen years imprisonment in Georgia, and was released after a little more than six years, then began serving a twenty year sentence in Alabama and was released after five. Two years later, in 1988,

he was convicted of kidnapping and burglary in Jacksonville;[10] he received an eighteen year sentence and served just five years (1/90-91,93-95,97-99):

> Johnston served less than half his sentence. He was released last year.
>
> "I find it difficult to comprehend that a man with a criminal record like this is still free in our environment," said Thomas Morris, the father of [Leanne] Coryell, who was murdered last week in Northdale.
>
> He does not blame law enforcement, but the judicial system that frees convicted criminals.
>
> "Why? Why? Why?", he asked.

(1/99)

[Another news article reported Mr. Morris' opinion, based on appellant having attended a service at the same church Ms. Coryell attended, that appellant was stalking his daughter (1/92-93)].

After his most recent release from prison, appellant moved to Tampa. He was living with his brother in an upscale residential area when a neighbor named Gillian Young, who worked as either a call girl or an escort, was assaulted and slashed. Appellant immediately became a suspect, and (although he was not arrested at the time due to a lack of physical evidence), the newspapers after the Coryell murder detailed the circumstantial evidence linking appellant to the slashing of Ms. Young,

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[10] The articles included details of the Jacksonville incident, stating that appellant broke into a 28-year-old woman's home while wearing a mask and gloves, put a knife to her throat, forced her to undress, and took nude photos of her (1/93,99).

including a blood-covered steak knife in his dishwasher, and his propensity (according to another neighbor) for wearing a stocking mask and surgical gloves (1/93-95,98-99). In a newspaper article about appellant's arrest for the Coryell murder, Ms. Young was quoted as having warned the police at the time of her own attack, "What's it going to take? Someone to die for you to arrest this guy?" and they replied "That's right" (1/98). Now that appellant was under arrest for the Coryell murder, Ms. Young said "The could have arrested him that night. They left him at home" (1/98). Ms. Young was not the only one who was reported by the media as being upset with the Sheriff's department:

> Johnston's brother, William, who let Raymond live with him after his release, now wants him locked in jail.
>
> "I am concerned why he was not arrested in December" William Johnston said, "<u>It could have possibly saved [Coryell's] life</u>."
>
> He added:
>
> "<u>If his bail was 10 cents, we wouldn't come up with one penny</u>."

(1/99; see 96-97).

In another article:

> William said he and other family members warned deputies throughout the investigation that Ray was a dangerous man.
>
> "My family called and told them they had a time bomb waiting to explode," William said. "<u>My sister predicted he would kill somebody before Christmas</u>."
>
> <u>Police are also looking at Ray Johnston in connection with the February slaying of Janice Nugent, whose body was found beaten and possibly strangled</u>, in her Seminole Heights home. Police believe he and the 47-

> year-old neighborhood activist may have crossed paths in a popular south Tampa watering hole.
>
> Relatives based their dire forecasts on what William described as a lifelong pattern of deceit and violence.

(1/97).

As with the slashing of Gillian Young, appellant was repeatedly identified in the news articles as a prime suspect in the murder of Janice Nugent (1/92,94-95,97). In another news story, the "popular south Tampa watering hole", where Ms. Nugent was last seen alive, was referred to by name as Malio's. Employees, who asked not to be identified, told investigators they'd seen appellant and Ms. Nugent together at the restaurant on many occasions (1/92).

It was reported that appellant had told deputies on several occasions that he had trouble controlling his violent urges toward women (1/94). To drive home this point, another newswriter saw fit to report that in August, 1996, appellant's wife of one month, Bambi Lynne Neal, sought a domestic violence injunction against him for beating her and jabbing her with a knife. According to her allegations reported in the press, appellant told his wife that he raped women and enjoyed it, and he also told her, "By the time I'm done with you, you'll hate men, period. You have not seen bad, but bad is coming" (1/99).

From the summaries compiled by the defense (which along with the newspaper articles were submitted to the trial court in the hearing on the motion for individual and sequestered voir dire),

it appears that the electronic media covered much the same ground. Various aspects of appellant's prior criminal record and his prison sentences were mentioned in at least 25 different TV broadcasts (1/134-147). About a dozen broadcasts contained references to appellant being a suspect in the slashing of the Valrico prostitute (Gillian Young) (1/137,139-143). In one of these segments, the victim of that crime was interviewed, and said she knows that appellant is the one who attacked her because his voice is the same (1/140; see 142). In another segment, a woman (masked so she could not be identified) mentioned the Valrico assault, and said she was certain appellant had done this type of thing before (1/137). Five TV broadcasts identified appellant as a suspect in the Seminole Heights murder of Janice Nugent (1/137,140-42). The media quoted police reports stating that appellant had been treated for being a sexual predator (1/141-42). There were stories to the effect that more people were coming forward with "chilling tales about their contact with Ray Johnston" (1/141-42), and that he was into sado-masochism and violence toward women (1/146-47). The specifics ranged from televised assertions that he had strangled a cat (1/146) or a dog (1/147) when he was two years old, to speculation that he might be a serial killer, i.e., "Leanne Coryell may be just one of the many women who have fallen victim to Ray Johnston" (1/142) and "other police agencies are looking at Ray Johnston with regards to their unsolved homicides" (1/141).

There were televised emotional interviews with Leanne Coryell's parents, in which they talked about the impact of her death on her own young daughter, and questioned why appellant was still on the streets when this happened (1/142,144). In stark contrast were the televised interviews with and comments by appellant's family members. His mother said he was an habitual liar (1/147), and his brother William said that the family had seen this coming for many years, and he apologized to Coryell's family (1/142-44). Viewers heard William say that the Johnston family believes Ray is dangerous, and they were glad he was in jail (1/142-44).

There were also numerous news segments discussing appellant's "alibi", and purporting to give reasons why it did not hold up (see 1/135,139-42,146).

At the March 20, 1998, hearing on the motion for individual and sequestered voir dire, the defense also introduced two versions of a feature article by David Karp which had been published that week (on the front page of the local news section) in the Tampa editions of the St. Pete Times (19/1926-28; SR42). The north Tampa regional edition (the side of town where Ms. Coryell and appellant lived, and where the crime occurred) had a banner headline entitled "A `Side of Evil'"; beneath that was a photo of a smiling Leanne Coryell holding flowers, and a subheading "With smooth talk and good looks, Ray Johnston ingratiated himself to many women. But records show he left a trail of violence." At the left of the page is a graphic

illustrating "Ray Johnston's Record", his charges (three counts of rape, three robbery, two burglary, two kidnapping, an assault with intent to murder, and an aggravated assault), his convictions (most of the above), his prison sentences, and the reduced time he actually served (SR42). The other version of the article contains the identical text, without the graphic, and with a small photo of appellant instead of the photo of Coryell. The headline is smaller and reads, "Murder suspect's dark side a surprise" (SR42).

The article begins with the insinuation (which was not supported by any evidence at trial) that appellant was stalking Ms. Coryell days before her murder:

> On a Sunday morning in August, a handsome man sat in church.
>
> He wore a dark suit with a Brandon Chamber of Commerce pin in the lapel. In his hand, he held the Bible.
>
> Ray Lamar Johnston, a military veteran, seemed at ease among parishioners packing Van Dyke United Methodist Church. He sang the Lord's hymns so beautifully, someone suggested he join the choir.
>
> A few rows behind Johnston, Leanne Coryell, 30, sat with her 6-year-old daughter, Ansley.
> Two days later, on Aug. 19, authorities would find Coryell's body about a mile from her Northdale area apartment. She had been strangled and raped.
>
> Minutes after the discovery, a Nations Bank camera photographed Johnston in his suit using Coryell's ATM card. Sheriff's deputies arrested him two days later on charges of first-degree murder, and in a trial scheduled to start March 23, prosecutors will ask for the death penalty.

> Now clad in an orange correctional uniform, Johnston says from jail that he did not kill Coryell. He says he loves her.
>
> That has been Johnston's pattern all his life. He could come across as a man that any woman would desire, then turn out to be the most violent kind of criminal. He preyed on a woman's biggest fear; that the nice guy you've met in church, or in a bar, is hiding another, darker side.
> "It could have been me," said Shirley Burdett, 48, a partner in a software consulting firm, who dated Johnston a year ago. . .

The article goes on to state that, as more than 1000 pages of court records reveal, "Johnston knew how to con women. He was equally adept at taking advantage of a revolving-door justice system that freed him again and again, even after he was convicted of violent crimes against women." Although appellant came from a "fine family", he had problems from the beginning, and he strangled a cat when he was two years old. He began committing adult crimes at around age 19, when he robbed a convenience store and forced a female clerk to disrobe in the back room. He returned to the same store a week later and led the same clerk to the same back room; this time he raped her, and told her to blame the crime on two black men. The article continues for the next several long columns to chronicle appellant's crimes, his con games, and his sexual proclivities (including domination, sadomasochism, bondage, and photography) in lurid detail. He was a steady customer of "escorts" and lingerie models, including a woman named Mistress Raven; he like

to have her spank him on the legs, back, and buttocks with a leather strap.

Next the article discusses appellant's connection with the attack on Gillian Young in Valrico, and the murder of Janice Nugent (whom he met at Malio's) in Seminole Heights.

In May, 1997, according to the article, appellant was dating a 40-year-old divorced mother named Diane Busch. When she was hospitalized after an asthma attack, the nurses thought he was very attentive and treated her like a queen. However:

> Sheriff's reports and interviews with hospital staff members show Johnston acted unusually possessive. He would not allow male nurses to touch Busch. He threatened female nurses, and Anderson asked security officers to walk her to her car.
>
> Johnston bought Busch a nightgown and painted her toenails. When she was medicated, he dropped sexual suggestions that Busch could not respond to. One time, medical alarms in the intensive care unit went off, and nurses found Johnston on top of Busch's bed.
>
> Busch's family grew suspicious. They told authorities that Johnston took Busch's Volkswagen Cabriolet and put about 2,900 miles on it. He left his car at her house. Inside his car, her relatives found a paring knife and surgical gloves -- the same kinds of instruments that had been used against [Gillian] Young, the escort.

After briefly discussing the events of August 19, 1997, culminating in the discovery of Leanne Coryell's body, the article ends in the same place it began:

> The next Sunday, more than 600 mourners packed into Van Dyke United Methodist for Coryell's memorial service. A week earlier, Johnston had sat in the same church.

> Now he was in jail, charged with murder and revealed to the community as a convicted rapist.
>
> "My safe haven has been invaded," said Coryell's best friend, Skylar Norris.
> She looked out at the pews where Johnston had sat.
>
> "I have seen the side of evil that I could have never imagined lived within another human being."

(SR42)

C. The Motion for Individual and Sequestered Voir Dire, and the Jury Selection Proceedings

In October, 1997, just as the initial torrent of publicity was beginning to subside, the defense unsuccessfully moved for a gag order to prohibit release of additional discovery information to the media (1/84-86,148; SR58-60). In denying the motion, the trial court commented:

> Ms. Goins, I did review your addendum to the motion which was covering the television news spots and I myself have seen some of the news reports on television; of course, the ones in the newspaper, and I think the concern here is not that the prosecutors are releasing discovery information or the police are saying okay, this has come in, we've sent this to FDLE, or whatever and certainly no concern of any court personnel making any extrajudicial statements or any statements at all, for that matter. But the concern seems to be the tact in which the media has taken to report some information that certainly is not going to be admissible in trial, including the feelings and comments by the defendant's family. And I don't think I have any authority to tell them to stop talking. They're not witnesses. They're not witnesses.
>
> But if anything is going to affect Mr. Johnston's right to a fair trial is going to

> be those kind of comments and that kind of information that's coming out that I don't think I have any control over.
>
> All I can say is, it's going to make things very difficult to get a jury if it keeps up. It's going to make things very expensive for the State of Florida to try the case if we have to go somewhere else to try it . . .

(SR58-59).

The defense moved pre-trial for individual and sequestered voir dire (2/238-46). At the hearing on this motion, the defense incorporated the news articles and TV summaries which were attached to the earlier motion (19/1929; 1/87-101,133-147) and submitted as exhibits two versions of the recently published feature article entitled A Side of Evil and Murder Suspect's Dark Side a Surprise (19/1926-28; SR42). The judge replied:

> All right. They don't have enough to print in that rag or what?
>
> MR. SKYE [defense counsel]: Apparently not, Your Honor.
> Mr. Littman just pointed out to me, and I also point it out to the Court, if you read them, the articles highlight Mr. Johnston's prior record.
>
> THE COURT: I read it. I only read the one on March 16th. I didn't read the one with the huge headline. I didn't see that.

(19/1928).

The trial court ruled that she would allow individual voir dire on certain subjects, including the juror's knowledge of the case (through publicity of otherwise), if the particular jurors "respond in such a way as to make it necessary or reasonable that they be questioned individually so that their responses can be

fully understood, but without the danger of contaminating the remainder of the venire" (4/629-30; 19/1931-32).

On the morning of jury selection, defense counsel renewed his motion:

> We would like to do individual voir dire, either in whole or in part. Well, we would like to do it totally, but we would especially like to do it on the publicity, pretrial publicity part.
>
> THE COURT: Well, that's denied. What we'll do is, we'll initially -- everybody is going to be brought in, and I'll do what I normally do at the beginning of every trial: Read the indictment in this case, explain the penalty very briefly, that the penalty -- what the possibilities are should he be convicted of first-degree murder, and I will ask them some questions concerning their feelings about the death penalty. They'll answer by a show of hands. You'll make notes of that, and then you can follow up on that.
>
> As far as the publicity, the only question I'm going to ask them is if anybody's heard the case, knows anything about the case. They'll answer by a show of hands. You'll make note of that. Then when it's your turn to inquire, you'll be able to ask them questions concerning their knowledge of the case. That can be done at the bench. I'm assuming now that not everybody is going to remember a whole lot about this.
>
> MR. REGISTRATO: Your Honor, yesterday, <u>in yesterday's St. Pete Times there was a great big old story about it.</u>
>
> THE COURT: <u>That doesn't surprise me a bit. They just love to prejudice every panel we get over here</u>.
>
> MR. REGISTRATO: Yes, ma'am.
>
> THE COURT: <u>If they all read it, then we'll all talk about it</u>.
>
> MR. REGISTRATO: All right, Judge.

THE COURT: I didn't read it. I don't read the St. Pete Times.

(6/8-9).

Of the panel of fifty prospective jurors, eight remembered (from the very limited description they were given from the reading of the indictment and during group voir dire) that they had read or heard something about the case. These jurors were Ms. Guntert (no. 27), Ms. Welch (no.34), Mr. McMinn (no.45), Ms. McGee (no.6), Mr. Ursetti (no.18), Mr. Arnold (no.15), Mr. James (no.20), and Mr. Rice (no.39) (6/20-21; 7/172,176-83,209-10; see SR9-11). These jurors, under the trial court's earlier rulings, could then have been questioned individually to determine the extent of their knowledge of the case from the media reports, and whether they had been exposed to prejudicial and inadmissible information. However, this did not occur. The judge did not conduct individual voir dire of these jurors on the publicity issue, and defense counsel did not ask to approach the bench. To the contrary, he specifically told the jurors, "I don't want to know what you think the details are because I don't want you to say this in front of the other people" (7/179). Counsel told the jurors that as long as they believed they could listen to the evidence with an open mind and decide the case based on the evidence presented in court, "I don't care what they said on some network channel or newspaper, that's okay" (7/178). Counsel asked many (though not all) of the publicity-exposed jurors if they thought they could nevertheless be fair and impartial. When Mr. James said, "I just remember it from the news", there was no

follow-up question; he was not even asked if he could put whatever it was aside and be fair and impartial (7/180). When Ms. Guntert said, "I believe I've seen something, but it wouldn't sway me", counsel replied, "That's all we're looking for. The fact that you read the newspaper doesn't disqualify you as a juror" (7/180-81). Again, neither she nor any other juror was asked what they knew about the case.

Of the eight jurors who knew something about the case from the media, three (McGee, Arnold, and Guntert) were challenged peremptorily by the defense, which subsequently exhausted its strikes (7/235,237,238,240; SR9-10). Rice was peremptorily challenged as an alternate juror by the defense, while the state's challenge for cause (on unrelated grounds) on Welch was granted (7/241-42; SR10). McMinn -- who may well have been excusable for cause (see 7/172, 177,183,209-10) -- had a high juror number and they never got to him (SR11). Two of the jurors who were exposed to the publicity -- Mr. Ursetti and Mr. James -- served on appellant's jury (7/242; 15/1415-18; 18/1817-19; 5/695). In the group examination on publicity, the sum total of questioning specifically directed to these two jurors as to the nature and extent of their exposure is as follows:

> MR. LITTMAN [defense counsel]: First row over here, which is the third row?
>
> MR. URSETTI: I recall something.
>
> MR. LITTMAN: I don't want to know what you think the details are because I don't want you to say this in front of the other people. Would that fact alone, Mr. Ursetti, keep you from being fair and impartial?

MR. URSETTI: It would not.

MR. LITTMAN: You can put aside anything? As I said, it may have been reported accurately or inaccurately.

(7/179)

* * *

MR. LITTMAN: Next row?

MR. JAMES: I just remember it from the news.

MR. LITTMAN: One person feels they were influenced by it. [Apparently referring to Mr. McMinn]. Next row, which would be Row 4?

(7/180).

D. Given the Inflammatory and Inadmissible Information and Innuendo Contained in the Print and Electronic Media Reports of this Case, Individual Voir Dire was Necessary to Preserve Appellant's Right to a Fair and Impartial Jury.

For appellant's undersigned counsel, detailing the media's sensational coverage of this case and appellant's life history is tricky business, because -- while it strengthens the legal issue -- it also paints appellant in as bad a light in this brief as the publicity itself did in the Tampa community. In other words, if even a fraction of what the media had to say about appellant is true, does he even deserve a fair trial? The short answer is under the United States and Florida Constitutions, whether he "deserves" one or not is beside the point; society itself has a paramount interest in seeing that he gets one. See Carter v. State, 332 So. 2d 120, 122 (Fla. 2d DCA 1976). Just as in

"Williams Rule" cases (where at least the accusations of other crimes and bad acts is subject to the protective procedures of the trial), our system requires that a defendant be tried solely for the crime charged, not for his misspent life.

In the instant case, under the standard of Bolin and Kessler, it is abundantly clear that appellant was entitled to individual and sequestered voir dire, where eight jurors indicated that they had some knowledge of the case from the media, and where the media coverage focused relentlessly on inflammatory and inadmissible material, including (but not limited to) (1) appellant's prior arrests and convictions for multiple rapes, robberies, burglaries, kidnappings, and assaults; (2) his three prior long terms of imprisonment, his early releases on all three occasions, and the anguish of the victim's father and appellant's own brother that he was put back on the streets to commit this murder; (3) his being a prime suspect in the beating and strangulation murder of Janice Nugent, and in the slashing attack upon Gillian Young; (4) his history of violence toward women and his predilection for kinky sexual practices, with specifics involving his ex-wife Bambi Lynne Neal (including a bone-chilling threat of what was coming), his girlfriend Diane Busch in the hospital, and the dominatrix Madame Raven; (5) police reports that he had received treatment as a sexual predator; (6) the consistent portrayal of appellant as a "con man" who preyed on women, and a smooth talker and habitual liar whose "alibi" was full of holes; (7) the suggestions that

appellant was stalking Ms. Coryell days before her murder, and (8) the opinions of appellant's own family that he was a ticking time bomb -- violent, dangerous, and guilty of the charged crime. The remaining questions are whose fault was it that nobody ever found out what information these jurors (including two who actually served on the jury) had, and whether it matters who is at fault.

In another context, the Third District Court of Appeal has emphasized the importance of the trial court's role in ensuring that a fair and impartial jury is obtained:

> Recent disclosures about the work of jury selection experts signal that trial judges should be more vigilant and less deferential in the process in order to preserve and protect the integrity of jury trials. "High-tech jury selection," according to the professionals, has as its objective stacking a jury with members who are biased in favor of the client. See Gail D. Cox, Experts Helped Pick King Jury, National Bar Journal, May 25, 1992, at 3. It is exclusively the function of the presiding judge to ensure that the goal of seating a fair and impartial panel is not undermined by masked misuse of peremptory challenges.

Clark v. State, 601 So. 2d 284, 286 (Fla. 3d DCA 1992).

In Bolin, 737 So. 2d at 1166, and Kessler, 752 So. 2d at 551, this Court also recognized that the trial judge is not merely a referee, but that he or she has an affirmative obligation to ensure the seating of a fair and impartial jury:

> Trial courts must ascertain whether prospective jurors possess information which is not admissible in the trial in which they will serve as jurors and which is so prejudicial to the defendant that the jurors' knowledge of the information creates doubt as

> to whether the jurors can decide the case based solely upon the evidence that will be admitted at trial.

The twin purposes of the contemporaneous objection rule are:

> . . . [i]t places the trial judge on notice that error may have been committed, and provides him an opportunity to correct it at an early stage of the proceedings. Delay and an unnecessary use of the appellate process result from a failure to cure early that which must be cured eventually.

Castor v. State, 365 So. 2d 701, 703 (Fla. 1978).

See Williams v. State, 619 So. 2d 487, 492 (Fla. 1st DCA 1993) (purpose underlying requirement of contemporaneous objection below is "to fully advise the trial court of the grounds of the objection"); Dodd v. State, 232 So. 2d 235, 238 (Fla. 4th DCA 1970); Carr v. State, 561 So. 2d 617, 619 (Fla. 5th DCA 1990) (purpose of requiring contemporaneous objection "is to signify to the trial court that there is an issue of law and to give notice as to its nature and the terms of the issue").

In the instant case, the trial judge was well aware of the inadmissible and extraordinarily prejudicial content of the publicity, and she was -- or clearly should have been -- well aware of the need to find out what these eight prospective jurors knew or had been exposed to, before any of them could be allowed to serve on appellant's capital jury. As early as the hearing on the motion for a gag order, the judge stated that she'd seen some of the newspaper articles and TV news broadcasts, and "the concern seems to be the tact in which the media has taken to report some information that certainly is not going to be

admissible in trial . . ." (SR59). She further stated ". . . if anything is going to affect Mr. Johnston's right to a fair trial [it's] going to be those kind of comments and that kind of information that's coming out that I don't think I have any control over. All I can say is, it's going to make things very difficult to get a jury if it keeps up" (SR59). In the subsequent hearing on the motion for individual and sequestered voir dire, the defense also submitted the feature article variously entitled "A `Side of Evil'" and "Murder Suspect's Dark Side a Surprise." This article is a virtual encyclopedia of sensational, inflammatory, and inadmissible information, innuendo, and hearsay about appellant's career as a violent sexual predator and con artist, from the age of two when he strangled a cat to the Coryell murder. The trial judge read the article,[11] so she was familiar with its content (19/1928). After this hearing, the judge granted the motion for individual and sequestered voir dire on the issue, inter alia, of the jurors' knowledge of the case (through publicity or otherwise) (4/629-30; 19/1931-32).

At the very beginning of jury selection, the defense -- perhaps unnecessarily -- renewed its motion for individual voir dire, saying, "We would like to do it totally, but we would especially like to do it on the publicity, pretrial publicity

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[11] The judge stated that she only read the March 16 article, and not the one with the huge headline (19/1928). However, the text of the article is identical in both editions (SR42).

part" (6/8). This time, inexplicably, the judge said, "Well, that's denied" (6/8), but she left the door open to individual questioning at the bench in the event that particular jurors indicated they had knowledge of the case (6/8-9).[12] Defense counsel called the court's attention to the fact that there was publicity at the time of trial:

> Your Honor, yesterday, in yesterday's St. Pete Times there was a great big old story about it.
>
> THE COURT: That doesn't surprise me a bit. They just love to prejudice every panel we get over here.
>
> MR. REGISTRATO: Yes, ma'am.
>
> THE COURT: If they all read it, then we'll all talk about it.

(6/9).

But they didn't talk about it, and nobody ever asked the eight publicity-exposed jurors when they had read, seen, or heard reports about the case, or whether they had read yesterday's St. Pete Times article (see 7/172,176-83,209-10).

Even during the trial itself, in making the decision to sequester the jury during deliberations, the trial judge noted that appellant's prior record has "been in every newspaper article every time. The press has tried their darndest to get that before the jury" (14/1243).

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[12] Whether the architecture and acoustics of the courtroom would have permitted jurors to be individually questioned at the bench, without the other jurors hearing the answers, is not apparent on the record.

And how do we know they didn't succeed? Whether with reference to appellant's prior record or all of the other inadmissible and highly prejudicial reportage, nobody ever asked the jurors if they knew about it, and defense counsel actually told a venireman who served on the jury (Mr. Ursetti) that he didn't want to know, because he didn't want anything said in front of the other people (7/179). All we know about the media exposure of the other juror who served (Mr. James) is "I just remember it from the news" (7/180). Clearly defense counsel dropped the ball here, or seriously misunderstood the judge's ruling, but that doesn't mean the trial court didn't abuse her discretion in failing to ensure that a fair and impartial jury was seated, and in failing to ascertain whether prospective jurors (including the two who served) possessed prejudicial information which was not admissible in the trial. Bolin; Kessler. The judge knew exactly what the media had broadcast to the community about appellant, and her comments make it clear that she knew how this could destroy his right to a fair trial, yet (after issuing an arguably confusing set of rulings) she sat on her hands while defense counsel evidenced the mistaken belief that he couldn't ask the jurors what they knew without tainting the remaining jurors. While the denial in this case of appellant's constitutional right to be tried by a fair and impartial jury is attributable to a combination of judicial error and counsel's inattentiveness or misunderstanding, the judicial

error alone is sufficient to require reversal of appellant's convictions and death sentence.

E. If Defense Counsel's Failure to Ask to Approach the Bench is Deemed a Waiver of the Trial Court's Obligation to Ascertain Whether the Jurors Possessed Prejudicial and Inadmissible Information from the Media Coverage, then that Omission Deprived Appellant of his Right to the Effective Assistance of Counsel

The state will undoubtedly argue that, notwithstanding all of the information that was before the trial court, defense counsel waived the right to ascertain what the jurors knew by failing to ask to approach the bench to question the jurors individually there. Undersigned counsel maintains that the purposes of the contemporaneous objection rule were satisfied, the grounds were fully argued, the judge from her own comments plainly understood the reasons why individual voir dire was necessary in this case, and she had more than enough information before her to trigger her obligation to ascertain what the jurors knew from the publicity. Assuming arguendo, however, that the state persuades this Court that counsel's inaction amounts to a waiver, then it also amounts to ineffective assistance. After arguing strenuously pre-trial that individual voir dire was constitutionally necessary in the face of the overwhelmingly prejudicial media coverage, and after renewing the motion (even after it had been granted pre-trial), saying "we would especially like to do it on the . . . pretrial publicity part", it would be unreasonable to believe that the defense attorneys changed their minds as some sort of "strategic" decision. Moreover, any such "strategy" would be indefensible as a matter of law and logic. Is there any conceivable way, in a trial where the defense was

identity, that counsel could have wanted jurors who might know about appellant's life history as a sexually violent criminal, or the fact that he was a prime suspect in the beating and strangulation murder of another woman, or that his own family was sure he was guilty?

Ordinarily, claims of ineffective assistance of counsel require further evidentiary development, and are properly raised on a post-conviction motion under Rule 3.850 rather than on direct appeal. Blanco v. Wainwright, 507 So. 2d 1377, 1384 (Fla. 1987). Frankly, undersigned counsel believes that to be true of this claim as well, and he would prefer to reserve it for a post-conviction motion in the event that appellant's convictions and death sentence are affirmed on direct appeal. However, in light of this Court's disposition of a superficially comparable ineffectiveness claim in Brown v. State, 755 So. 2d 616,637 (Fla. 2000) (Brown's 3.850 claim that his guilt-phase counsel was deficient in failing to question a juror as to the extent of her knowledge of a newspaper account of the trial held to be "procedurally barred as it should have been raised on direct appeal"), undersigned counsel believes that the issue of trial counsel's ineffectiveness in failing to ascertain whether the jurors had knowledge of prejudicial and inadmissible information from the intense publicity in this case must at least be put before this Court on direct appeal, either as a claim of ineffective assistance of counsel on the face of the record [see Blanco v. Wainwright, supra, 507 So. 2d at 1384; Ross v. State,

726 So. 2d 317 (Fla. 2d DCA 1998)] or at least to request that any affirmance be without prejudice to litigate this claim (along with any other claims of ineffective assistance arising from this trial and penalty phase) on a 3.850 motion. See Williams v. State, 438 So. 2d 781, 786-87 (Fla. 1983); cf. Watson v. State, 633 So. 2d 525 (Fla. 2d DCA 1994).

Where it is alleged that the acts or omissions of counsel during voir dire deprived the defendant of his right to be tried by a fair and impartial jury, that is a facially sufficient claim of ineffective assistance of counsel, and unless the allegations are conclusively refuted by the record, the defendant is entitled to an evidentiary hearing under Rule 3.850. See Black v. State, 771 So. 2d 583 (Fla. 4th DCA 2000) (allegations that counsel failed to object to time limitation on voir dire, and failed to exercise peremptory challenges to jurors whose statements indicated bias or who had been victims of crimes similar to the charged offenses); Fernandez v. State, 758 So. 2d 1199 (Fla. 4th DCA 2000) (allegations that counsel failed to protect the defendant's right to a fair trial by an impartial jury, and failed to object when the trial court neglected to place the prospective jurors under oath prior to voir dire); Monson v. State, 750 So. 2d 722 (Fla. 1st DCA 2000) (allegation that counsel failed to object to, or properly question during voir dire, three prospective jurors having various ties to law enforcement); Miller v. State, 750 So. 2d 137 (Fla. 2d DCA 2000) (allegation that counsel failed to move for a change of venue in

the face of enormous media coverage that "portrayed [the defendant] negatively as a previously convicted sex offender"); Baber v. State, 696 So. 2d 490 (Fla. 4th DCA 1997) (allegation that trial counsel failed to preserve error in the trial court's striking of an African American juror upon the state's peremptory challenge); Powell v. State, 673 So. 2d 119 (Fla. 4th DCA 1996) (allegation that counsel failed to strike a juror whose answers in voir dire indicated an "inability to refrain completely from prejudging [the defendant]"); Gibbs v. State, 604 So. 2d 544 (Fla. 1st DCA 1992) (allegation that counsel failed to object to a biased juror); Romano v. State, 562 So. 2d 406 (Fla. 4th DCA 1990) (allegations that counsel failed to move for a change of venue due to print media and television reporting, and conveyed to the jury during voir dire that the defendant had a criminal record).

In the instant case -- which, in contrast to the eight above-mentioned decisions, involves the death penalty and the heightened due process protections which are constitutionally mandated -- there was overwhelming hostile and inflammatory publicity which presumed appellant's guilt of the charged murder (as well as an uncharged murder and an uncharged assault), and relentlessly informed the community of his prior criminal record, his previous imprisonments and early releases, his propensities to violence, kinky sexual practices, and con artistry, etc. To preserve his right to a trial by a fair and impartial jury, appellant had a right to individually question the jurors to

determine the extent of their exposure, and whether they possessed any inadmissible information from the media. Bolin; Kessler. The trial court's announced denial of individual voir dire on publicity (6/8) was error, but she did leave the door open for defense counsel to ask to approach the bench, and not only did he inexplicably fail to take the opportunity that was given, he went so far as to tell a juror who actually served that he didn't want to know what the juror knew about the case, because he didn't want it spoken in front of the other jurors (7/179).

In the event that this Court were to find that counsel's actions or inactions waived appellant's right to ascertain the extent of the jurors' exposure to the publicity, and the inadmissible information contained therein, then this clearly amounts to a legally sufficient claim that appellant was also deprived of his Sixth Amendment right to the effective assistance of counsel. See Miller v. State, supra, 750 So. 2d at 138 (Miller's assertions of jury partially due to pretrial publicity, if true, compromise the very foundation of the criminal justice system); Black; Fernandez; Monson; Baber; Powell; Gibbs; Romano.

Therefore, in the event that this Court affirms appellant's convictions (and regardless of whether it affirms or reverses the death sentence), any such affirmance should be without prejudice to appellant's right to raise a claim of ineffective assistance of counsel (as to this issue, and as to any other acts or omissions by counsel which may constitute ineffective assistance)

pursuant to Rule 3.850. See Williams, 438 So. 2d at 786-87. Alternatively, if this Court determines that counsel's ineffectiveness is apparent on the face of the record, and "to avoid the legal churning which would be required if we made the parties and the lower court do the long way what we ourselves should do the short" [Ross v. State, supra, 726 So. 2d at 319, quoting Mizell v. State, 716 So. 2d 829,830 (Fla. 3d DCA 1998)], this Court can reverse for ineffective assistance on the face of the record.

ISSUE III

THE TRIAL COURT ERRED BY FAILING TO FIND OR EVEN DISCUSS IN HER SENTENCING ORDER THE STATUTORY MITIGATING CIRCUMSTANCE THAT THE HOMICIDE WAS COMMITTED WHILE APPELLANT WAS UNDER THE INFLUENCE OF EXTREME MENTAL OR EMOTIONAL DISTURBANCE.

In the Spencer hearing, Dr. Harry Krop testified that appellant suffers from "a serious emotional disorder which was manifested as a combination of a neurological impairment and the psychosexual disorder which were in order at the time the violence occurred in this case" (21/2271). Shortly thereafter, when asked for his opinion with respect to appellant's psychological state at the time this homicide occurred, Dr. Krop reiterated that the interaction of appellant's brain damage and his psychosexual disorder "resulted in what I would consider a serious emotional disorder occurring at the time of the offense" (21/2273). These conditions are chronic and permanent (21/2271).

In light of this testimony, especially considered in combination with the penalty phase testimony of Dr. Michael Maher that appellant suffers from significant mental illness (17/1594), as well as testimony concerning his psychiatric history, his dissociative disorder, and his frontal lobe impairment, the trial court should have found and weighed, or at least considered, the statutory mitigating factor that the homicide was committed while appellant was under the influence of extreme mental or emotional disturbance. See Campbell v. State, 571 So. 2d 415, 419 (Fla. 1990); Walker v. State, 707 So. 2d 300, 318-19 (Fla. 1997); Merck v. State, 763 So. 2d 295, 297-98 (Fla. 2000). As stated in Walker

> . . . the "result of this weighing process" can only satisfy Campbell and its progeny if it truly comprises a thoughtful and comprehensive analysis of any evidence that mitigates against the imposition of the death penalty. We do not use the word "process" lightly. If the trial court does not conduct such a deliberate inquiry and then document its findings and conclusions, this Court cannot be assured that it properly considered all mitigating evidence.

707 So. 2d at 318-19.

The trial court's failure to find, weigh, or discuss the "extreme mental or emotional disturbance" mitigator (see SR28-31), coupled with his unexplained finding on "background" mitigators that "As testified to by Dr. Michael Maher, the Defendant suffers from a dissociative disorder. This is given no

weight" (SR20),[13] is reversible error, since "[t]his Court cannot be assured that [the trial court] properly considered all mitigating evidence." Walker. This omission is especially critical in light of the fact that the extreme mental or emotional disturbance mitigator (along with the impaired capacity mitigator, which the trial court did discuss and find) are "two of the weightiest mitigating factors -- those establishing mental imbalance and loss of psychological control." Santos v. State, 629 So. 2d 838, 840 (Fla. 1994). Therefore, this Court should reverse appellant's death sentence and remand for resentencing.

ISSUE IV

THE TRIAL COURT ERRED IN REFUSING TO INSTRUCT THE JURY ON THE EXTREME MENTAL OR EMOTIONAL DISTURBANCE MITIGATOR.

The trial court also erred in refusing to instruct the jury on this statutory mental mitigator (21/1671-72; see 18/1809). Although it is true that Dr. Maher stated on cross that the homicide occurred during a mild dissasociative episode (21/1608), he also testified that appellant (while not incompetent to stand trial), suffers from significant mental illness (21/1594). Page

[13] While Trease v. State, 768 So. 2d 1050, 1055 (Fla. 2000) allows the sentencing judge to find that a mitigating factor exists but accord it no weight, this is proper only when the sentencer determines "in the particular case at hand that it is entitled to no weight for additional reasons or circumstances unique to that case." 768 So. 2d at 1055. Where, as here, the judge provides no reason for giving the mitigator no weight, the principles of Campbell and Walker are still violated,as is the Eighth Amendment. See Eddings v. Oklahoma, 455 U.S. 114, 115 (1982).

limitations prevent the undersigned from recapitulating the penalty phase evidence supporting an instruction on this statutory mental mitigator, but based on the testimony of Drs. Maher, Wood, and Krop, along with appellant's psychiatric history, and the lay testimony of his sister concerning his inability to cope with rejection, the instruction should have been given. Bryant v. State, 601 So. 2d 529, 533 (Fla. 1992); Toole v. State, 479 So. 2d 731, 733-34 (Fla. 1985). In view of the importance of this mitigating factor [Santos v. State, supra, 629 So. 2d at 840], and the fact that appellant's mental and emotional condition was the focus of his penalty phase defense, the state cannot show that the error could have had no harmful effect. Reversal for a new penalty phase is necessary.

CONCLUSION

Based on the foregoing argument, reasoning, and citation of authority, appellant respectfully requests that this Court reverse his convictions and death sentence and remand for a new trial [Issues I and II], and reverse his death sentence and remand for a new penalty phase trial and/or resentencing [Issues III and IV].

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Robert Butterworth, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4739, on this _____ day of December, 2002.

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