IN THE SUPREME COURT OF FLORIDA

RAY LAMAR JOHNSTON

Appellant,

v. **Case No. SC01-1914**

STATE OF FLORIDA,

Appellee.
_____/

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

ANSWER BRIEF OF APPELLEE

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STATEMENT OF FACTS

While Defendant's Initial Brief contains a Statement of Facts relating to the guilt phase, Appellee writes to provide this Court with the evidence presented in the penalty phase. Following a mistrial on the first penalty phase proceedings, a second penalty phase was conducted April 10-12, 2001.

The State began with an overview of the evidence establishing Defendant's guilt for the murder of Janet Nugent. Detective Stanton testified that Ms. Nugent was murdered in her home. (XVIII/1929). The victim's body was found in her bathtub submerged in water and partially clothed. (XVIII/1930). Signs of a struggle, including a broken lamp, were evident in the victim's bedroom. (XVIII/1932). Defendant was identified as a suspect because his fingerprint was found on the bathtub faucet and on a plastic tumbler in the kitchen. (XVIII/1932-1933). Later, a mixture of DNA consistent with both the Defendant and the victim was also identified on the victim's bedsheets. (XVIII/1933-1934). The medical examiner provided the testimony establishing the heinous, atrocious and cruel (HAC) aggravator. The cause of death was manual strangulation with the assailant behind the victim using compression and release as opposed to continuous pressure, with the possibility that a ligature may also have been used. (XVIII/1957, 1973-1977,

1979). The victim also had multiple contusions to the face inflicted by blunt trauma consistent with a human fist. (XVIII/1958-1962). The strangulation markings which demonstrated that the assailant was behind the victim alternately compressing and releasing her neck also were consistent with the victim having been conscious, struggling and aware of the attack. (XVIII/1973, 1979). The victim had numerous injuries to her hips and buttocks. The patterned injuries were consistent with a looped implement such as a belt being used and were inflicted while she was alive. (XVIII/1980-1983). The victim also had defensive injuries on her hands and forearms which were inflicted while she was alive and conscious, trying to defend herself. (XVIII/1983-1984).

According to the medical examiner, at the bare minimum, Defendant's attack upon the victim lasted at least five minutes and she would have been aware of the attack for the vast majority of the time. (XVIII/1985). The attack would have been painful and the strangulation would have caused the most pain as far as not being able to breathe and having knowledge of what was happening. (XVIII/1986).

Next, the State brought forth three witnesses to establish Defendant's long history of prior violent felonies. First, Susan Reeder testified that the Defendant attacked her in 1974

in Birmingham, Alabama. After parking her car, Ms. Reeder approached her fiancé's apartment and was grabbed from behind by the Defendant who put a knife to her throat. He told her not to make a sound or he would cut her throat. (XVIII/1988). The Defendant then took her to a car and put her in the back seat. (XVIII/1989). He drove for thirty minutes to a deserted subdivision which was under construction. (XVIII/1989-1990). During the drive, Ms. Reeder told the Defendant she was menstruating. Upon arriving at the deserted location, he told her to undress and when he found out she had lied about menstruating, he made her lean over the hood of his car and he beat her on the buttocks with his belt. (XVIII/1991-1992). Then, the Defendant sexually assaulted Ms. Reeder. Later, he was prosecuted for kidnap and rape. (XVIII/1993).

The testimony of Carolyn Sue Peak, another victim of the Defendant's, was then read to the jury. Ms. Peak was attacked by the Defendant in June, 1988, in Jacksonville, Florida. (XVIII/1999-2000). While exiting her vehicle at her apartment complex, the Defendant confronted Ms. Peak and stuck a knife in her throat. He told her if she screamed, he would cut her throat. He got in the car and told her to drive. Shortly thereafter, he had her pull over. He then tied her up, put her in the back seat and drove off. (XVIII/2000-2001). Fortunately

for Ms. Peak, a police officer pulled over the car for a broken taillight. The officer then determined that a warrant was outstanding for Ms. Peak and Defendant was ultimately apprehended. (XVIII/2002-2003). After Defendant's arrest, a camera, surgical gloves and a mask were found in the Ms. Peak's car. (XVIII/2003).

Detective Willette was then called to testify regarding Defendant's confessed murder of Leanne Coryell. On August 19, 1997, Ms. Coryell's nude body was found submerged in a retention pond near a church parking lot. (XVIII/2007). The cause of death was manual strangulation. Ms. Coryell also suffered blows to the face and blunt trauma to her buttocks. (XVIII/2010). The injury to her buttocks was caused by her own belt which was found at the scene. (XVIII/2013-2014). At the time of her murder, Ms. Coryell lived in the same apartment complex as Defendant. (XVIII/2014). It was determined that she had been taken from the apartment parking lot based on groceries found abandoned in her parking spot and a grocery receipt indicating when and what items she had purchased. (XVIII/2015-2016). Her car was found in the church parking lot where her body was discovered. (XVIII/2016).

The State also moved into evidence a judgment and conviction from Georgia pertaining to a count of robbery by intimidation of

Judy Elkins committed by Defendant, and a Florida conviction for burglary with assault in 1988. (XVIII/2019-2020).

Finally, two witnesses were called to testify to victim impact evidence. John McCarthy was Janice Nugent's son-in-law. Mr. McCarthy discovered Ms. Nugent's body. Kelli McCarthy was the victim's daughter.

In mitigation, the defense presented clinical psychologist Dr. Harry Krop as an expert in neuropsychology, clinical psychology and forensic psychology. (XIX/2038). While Dr. Krop was initially hired to evaluate the Defendant in this case in 1997, upon meeting the Defendant he realized he had previously evaluated the Defendant in 1988 when the Defendant was charged with a sexual offense in Jacksonville, Florida. (XIX/2039). The 1988 evaluation was done for purposes of competency, sanity, and to recommend treatment. Dr. Krop concluded, in 1988, that further neuropsychological testing was appropriate based on Defendant's history of two head injuries at ages 6 and 10, poor impulse control as a child, and psychiatric hospitalization at age 14. However, no further study was done of the Defendant in 1988. (XIX/2049-2050).

Later, regarding the instant case, Dr. Krop was hired to do a neuropsychological analysis of the Defendant. (XIX/2051). Dr. Krop saw Defendant three times between 1997 and 2000. The

first time he administered psychological tests for about four hours and talked to Defendant about a half hour to get his history. The second time he spent two hours with the Defendant. And, the third time he spent an hour and a half with Defendant. (XIX/2053).

Defendant scored in the normal range for the majority of tests performed by Dr. Krop. Defendant has an IQ of 104 which is within the normal average intelligence range. (XIX/2053-2054). Defendant showed impairment on only the "categories test" and the "card sort test." These tests measure frontal lobe functions. (XIX/2054).

The Defendant also had a medical history of headaches and blackouts for which he sought treatment prior to the murder of Leanne Coryell. (XIX/2057). Defendant's Department of Correction records also show a history of seizures. However, whether Defendant had seizures has no bearing on whether he has frontal lobe problems. (XIX/2058-2059).

Ultimately, Dr. Krop concluded that Defendant had frontal lobe impairment. According to Dr. Krop, the results of a PET scan done on the Defendant supported this conclusion. (XIX/2059, 2075). The Defendant also has a history of substance abuse of prescription drugs, situational depression, and a personality disorder. (XIX/2076).

Regardless of Defendant's alleged frontal lobe impairment, Dr. Krop believed that Defendant knows the difference between right and wrong. (XIX/2074). Yet, Dr. Krop also testified that Defendant's ability to conform his behavior to the requirements of the law is impaired as a result of his organic brain syndrome. (XIX/2078). However, Defendant never admitted to killing Ms. Nugent. Therefore, he provided no information which would allow Dr. Krop to address Defendant's specific mental status at the exact time of the murder. (XIX/2085). Moreover, Defendant sought treatment from a neurologist just two months prior to the murder of Ms. Nugent, and the results of all tests showed no structural brain damage. (XIX/2096, 2102).

The defense also called Defendant's younger sister, Rebecca Vineyard. Vineyard testified to the Defendant's basically unremarkable family life and his positive interaction with her children. (XIX/2112-2130). Max Allen Johnston, Defendant's younger brother, also testified. (XIX/2131-2138). Max testified that Defendant caused trouble as a child, but he could not recall any specifics. (XIX/2132). At 14, Max thought Defendant received electroshock therapy, although the witness was not aware that the Defendant was given Dilantin which would have caused the same type of lethargic behavior. (XIX/2133, 2140; XX/2288). At times, Defendant's family sought treatment

for him, but their efforts failed. (XIX/2134-2138).

The State called neurologist Dr. Pollock as a rebuttal witness out of order. Dr. Pollock treated the Defendant in March 1997, prior to the murder of Ms. Nugent. The defendant presented complaining of headaches, vertigo, numbness on the left side and passing out. (XIX/2151). Heart problems had been ruled out as a cause of his symptoms. Tests were ordered, including an MRI, an EEG, a CAT scan and a spinal tap; all results were normal. (XIX/2152-2154). Defendant denied having a seizure disorder to Dr. Pollock. Ultimately, Dr. Pollock found no cause for Defendant's complaints. (XIX/2158).

The defense then called Lynn Mundy to testify about her romantic relationship with the Defendant. She testified to Defendant's loving behavior towards her during their relationship. The Defendant was incarcerated during the entire course of this relationship which ended when he dumped Mundy for Susan Bailey. (XIX/2181-2190). Mundy also testified that the Defendant never demonstrated any deviant sexual or violent behavior towards her during their six year relationship. (XIX/2196-2197).

Next, Susan Bailey's previous trial testimony was read into the record. Bailey had been married to the Defendant for two years. (XIX/2199). She also testified to the Defendant's

positive behavior toward her during their relationship. (XIX/2200-2206).

Defendant's mother, Sara James, was the last family member to testify on the Defendant's behalf. James testified that the Defendant was particularly attached to his father growing up. (XX/2226). Defendant was a musical child. He played the viola in the Birmingham Junior Symphony. He also taught himself the guitar and the piano, and had a gorgeous singing voice. (XX/2229). Defendant was an average student. (XX/2230). He did have some disciplinary problems in school such as being disruptive in class, so his parents placed Defendant in various military academies. (XX/2233-2236).

At thirteen, the Defendant was taken to a psychologist. However, his mother did not think that this helped. Defendant's behavior still became explosive at times. (XX/2237). After the Defendant stole a neighbor's car, they took him to Hillcrest Hospital. (XX/2239). The Defendant did not receive shock treatment, but he was heavily medicated for four weeks of treatment. (XX2241-2242).

The Defendant began getting headaches in his teens. He also fell from a moving vehicle as a child and hit his head on the curb. (XX/2244-2245).

On the positive side, the Defendant was well provided for

as a child and was never abused by his parents. (XX/2249-2250).

In fact, he was never physically, sexually or emotionally abused by anyone. (XX/2250-2251). His mother had no complications during her pregnancy with the Defendant or his birth. She sought appropriate prenatal care and took vitamins. He received appropriate medical attention growing up and was raised going to church. (XX/2253-2254).

The defense concluded its mitigation presentation with the testimony of forensic psychiatrist Dr. Michael Maher. (XX/2267). Dr. Maher testified that Defendant's MRI and CAT scan results were normal. (XX/2282). An EEG done when the Defendant was in Hillcrest Hospital had "vague indications," but it was not something that could be relied upon at the time. (XX/2283). The Hillcrest records from 1969 also show that Defendant was oriented more towards emotions rather than thinking in facts, that he was ***not*** given shock treatment, but that he did take Dilantin and Thorazine for possible seizure disorders. (XX/2285-2287).

In reaching his conclusions, Dr. Maher relied upon Defendant's medical records, the tests done by Dr. Krop and fifteen to twenty five hours spent interviewing the Defendant. (XX/2295-2297). Dr. Maher's physical diagnosis for Defendant was seizure disorder of uncertain character. According to Dr.

Maher, the Defendant has frontal lobe impairment and dissociative symptoms. (XX/2299, 2306). Dr. Maher also concluded that Defendant's disorder substantially impairs his ability to conform his conduct to the requirements of law. (XX/2303).

However, the Defendant is not legally insane, does not have multiple personalities and is not antisocial. (XX/2304, 2309-2310, 2311-2312). Nor does the Defendant have structural brain damage. (XX/2318). In fact, Defendant's abnormal impulses, including the murders of Ms. Nugent and Ms. Coryell, were not caused by frontal lobe impairment, but rather by his dependent personality and anger toward women. (XX/2321-2322, 2326). Dr. Maher based his conclusion that Defendant's crimes were not caused by frontal lobe impairment on the fact that Defendant demonstrated long periods of planning and premeditation prior to committing the offenses. (XX/2322).

Defendant also demonstrated the ability to deceive. For example, pertaining to Ms. Coryell's homicide, the Defendant initially told Dr. Maher there was a persona named Dwight within him who was bad and who did bad things. Then, after later confessing to the murder of Ms. Coryell following his conviction for that offense, Defendant admitted to Dr. Maher that Dwight was not responsible for the murder. (XX/2327-2328).

Accordingly, Dr. Maher agreed that Defendant has the intellectual capacity to exaggerate psychiatric symptoms and malinger. (XX/2328). Ultimately, Dr. Maher concluded that Defendant was not suffering from a dissociative episode when he murdered Ms. Coryell. Dr. Maher could not conclude whether Defendant had a dissociative episode when he murdered Ms. Nugent because the Defendant had not described his state of mind at the time of that crime. (XX/2335). Further, the Defendant was not suffering from a seizure episode during either homicide. (XX/2335-2336).

The State called Dr. Donald Taylor, a forensic psychiatrist, in rebuttal. (XX/2337). Dr. Taylor reviewed prison records, police reports, medical records, family history, including trial testimony of Defendant's mother and sister, and prior opinions and testimony of Drs. Krop, Maher, Woods and Pollock. (XX/2340-2342). Dr. Taylor also interviewed the Defendant twice for a total of four hours in the presence of Defendant's attorneys. (XX/2342).

Based on the review of this material and his interviews with the Defendant, Dr. Taylor concluded that Defendant is both a "sexual sadist" and a sadomasochist. (XX/2345). Defendant possibly has conversion disorder with pseudo seizures which are the result of stress and anxiety, not resulting from any organic

brain problem. (XX/2346). Defendant may also have a problem with alcohol and drugs. (XX/2347).

The Defendant also meets the criteria for a diagnosis of antisocial personality disorder. (XX/2347). This is strictly a behavioral diagnosis. (XX/2348). Defendant meets four of the seven criteria for this diagnosis, and only three criteria are required. (XX/2348-2350).

The fact of Defendant being diagnosed with both sexual sadistic tendencies and antisocial personality disorder is significant. Specifically, the severity of the sadistic acts increases over time and individuals with both these disorders may seriously injure or kill their victims. (XX/2350). Defendant's criminal history demonstrates this increase in severity of sexual sadistic activity. (XX/2351).

Dr. Taylor also concluded that Defendant has frontal lobe impairment, but that it is not related to brain damage. (XX/2351). And, any impairment Defendant had would not prevent him from planning or taking premeditated action against an individual. (XX/2352). This testimony concluded the evidence presented in the penalty phase.

The jury recommended a sentence of death by a vote of 11 to 1. (XXI/2469).

A Spencer hearing was conducted on June 13, 2001. The

defense brought forth a number of witnesses to testify to Defendant's behavior while incarcerated.

First, probation parole office John Walkup supervised the Defendant on probation for fourteen months in 1987. (XXII/2519). Defendant never missed an appointment, was gainfully employed and met his financial obligations during his supervision. (XXII/2520). Defendant was recommended for unsupervised probation, but then he reoffended and was arrested. (XXII/2520-2521).

Gloria Myers, a Department of Corrections educator, worked with the Defendant while he was incarcerated. (XXII/2523). Defendant carried out his responsibilities as teacher's aid appropriately, and Myers recommended gain time for the Defendant because he was a good worker. (XXII/2523-2527).

Mary Ann Grace, a prison choir director, worked with Defendant in the prison choir at Hamilton Correctional Institute. (XXII/2530). They continued to communicate after Defendant was released. (XXII/2531). He performed his responsibilities, and would function appropriately in a prison environment. (XXII/2531-2532).

The Defendant was a clerk for John Fields when Fields was a chaplain at Lake Correctional Institution. (XXII/2533). Defendant was a good worker, musically talented, and can

function appropriately in prison. (XXII/2533-2535). However, Fields had fired Defendant from the chapel because of his rude and abrasive behavior to others. (XXII/2537-2538). The Defendant was then transferred to another facility because of concern for Fields's safety and the safety and security of the institution. (XXII/2545). Disciplinary records also showed that Defendant

> ...threatened violence toward other inmates and other jail guards; that during a cell search in June of the year 2000, there was a razor blade that was found hidden in an envelope containing legal papers; that three months later, in September of 2000, there was a toothbrush with a razor blade found attached to it underneath his desk; that in June of 1999, he was found to have been in possession of a razor in his hand while on the telephone. Agin, in September of '97, which was shortly after incarceration, they found another razor blade and that in that same incident, that he threatened a deputy with bodily harm.

(XXII/2547).

Finally, the Defendant spoke on his own behalf. (XXII/2567-2582). The Defendant explained the circumstances of his disciplinary reports, as well as discussing his accomplishments while in prison. (XXII/2567-2579). Defendant also denied killing Ms. Nugent. (XXII/2579).

On or about August 22, 2001, the trial court entered its sentencing order, which reads, in relevant part, as follows:

A. AGGRAVATING FACTORS

1. The Defendant was previously convicted of a

felony involving the use or threat of violence to the person. F.S. 921.141(5)(b).

The State introduced both testimony of previous victims and certified judgments and sentences for the following, prior convictions of the Defendant: one count of Robbery by Intimidation in Georgia in 1974, sentenced to fifteen (15) years; one count of Rape in Alabama in 1975, sentenced to ten (10) years; two charges of Robbery in Alabama in 1976, sentenced to ten (10) years; two charges of Burglary with Assault and one count of Armed Kidnapping on two separate female victims in 1988, in Jacksonville, Florida, sentenced to eighteen (18) years; one count of Murder in the First Degree, Kidnapping, Robbery, Sexual Battery and Burglary of a Conveyance with Assault and Battery in Florida in 1997, sentenced to death. The facts of these prior violent felonies demonstrate a pattern of violence growing in severity.

This aggravating factor has been proven beyond a reasonable doubt and was given great weight by this Court.

2. The capital felony was especially heinous, atrocious or cruel. F.S. 921.141(5)(h).

The death of the victim was by manual strangulation. The strangulation was accompanied by additional acts of cruelty and degradation. The victim was clothed in her bra and underwear. The victim had been beaten so badly that there were numerous bruises over her entire body. There were also dark bruises on her buttocks which appeared to have been inflicted with an implement. The testimony of the medical examiner was that all the bruising occurred pre-death. The medical examiner testified that the victim was conscious at the time of the strangulation and the strangulation was by compression and release over a period of at least five (5) minutes. It is was also evident from the medical examiner’s testimony that the victim was strangled by a person facing her, and then again, when the victim was facing away from her attacker. The victim had numerous defensive bruises on her hands and forearms which demonstrated that she fought for her life.

Additionally, the fact the victim had dug her own fingernails into her own face in an attempt to breathe demonstrates that this victim fought for her life and was aware of her impending death after having been brutally beaten.

The aggravating circumstance was proved beyond a reasonable doubt and was given great weight.

Nothing, except as indicated above established beyond a reasonable doubt, was considered in aggravation. No other aggravating factors enumerated by statute are applicable to this case, and none other were considered by this Court.

B. MITIGATING CIRCUMSTANCES

1. The capacity of the Defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired. F.S. 921.141(6)(f)

The mental health experts for the Defendant testified that the Defendant suffers from frontal lobe brain damage. This is the portion of the brain that involves judgment and behavioral impulse control. The evidence was that the Defendant's frontal lobe tests show him to be significantly impaired, i.e., within the lowest first percentile.

Expert testimony was offered regarding the Defendant's mental condition based on the results of testing. The experts also testified that a PET scan corroborated the results of the testing. Dr. Krop did testify that the Defendant performed poorly on two types of tests that, according to Dr. Krop, demonstrated the Defendant had severe impairment of his frontal lobe. However, the Court finds that there is no credibility in the results of the PET scan due to their unreliability as set forth in the cross-examinations of Dr. Krop and Dr. Maher. It is evident from the testimony that there is no correlation between the alleged frontal lobe condition and this crime. The similarities of the crimes demonstrate that the Defendant carefully planned his crimes in advance and did not act on a random basis. The

Defendant targeted a specific type of woman to be beaten and humiliated in a specific manner.

The Court believes that the Defendant's mental condition is better explained by the testimony of Dr. Taylor. Specifically, the Defendant meets the criteria as a "sexual sadist", and sadomasochist, as well as, for antisocial personality disorder.

This mitigating circumstance has been given moderate weight.

2. The existence of any other factor in the Defendant's background that would mitigate against the imposition of the death penalty. F.S. 941.121(6)(h). The defense offered and this Court considered each of the following factors:

a. The Defendant has a long history of mental illness. His mother, sister, and brother testified about his hospitalization as a child at the Hillcrest Institution in Alabama, where as a teenager he received intensive treatments that left him in a zombie-like state and was thought to be schizophrenic. This mitigating factor was given slight weight.
b. As testified to by defense expert witnesses, the Defendant suffers from a dis-associative disorder, but there is no evidence that any such disorder contributed to this crime. This was given no weight.
c. The Defendant suffers from seizure disorder and blackouts, but there is no evidence that any such disorder contributed to this crime. This was given no weight.
d. The Defendant did not plan to commit the offense in advance, and it was the act of impulsiveness and not through careful planning. This was not proven and therefore it was not given any weight.
e. The Defendant's acts are closer to that of a "man-child" than that of a "hard-blooded killer". This was not proven and therefore was given no weight.
f. The Defendant is haunted by poor impulse

control resulting from his mental illness and brain damage. This was given no weight, because no correlation was demonstrated between the condition and the criminal act here.

g. The Defendant is capable of strong, loving relationships. His mother, sister, brother, and former wife testified at length to his ability to love and be loved. He lavished affection on his ex-wife, Susan Bailey, as well as her daughter. She believed they would be together had it not been for his mental problems. The Defendant was also affectionate to other family members. This was given slight weight.

h. The Defendant is a man who excels in a prison environment. Mary Ann Grace, John Walkup, Chaplain Fields [although Chaplain Fields was impeached with prison records showing a confrontation between himself and the Defendant which resulted in the Defendant being barred from the chapel and from seeing Chaplain Fields without prior approval. Additionally, prison records show that the Defendant was transferred from that facility because of an incident involving Chaplain Fields], and Gloria Myers established this in mitigation. Dr. Maher also testified that he would do well in the structured environment of prison. This was given slight weight, because of the impeachment of Chaplain Fields with prison records.

i. The Defendant could work and contribute while in prison, as he has done in the past. He could teach and be an example to other prisoners to not follow the same life-course his has. This was given slight weight.

j. The Defendant has “extraordinary musical skills and is a gifted musician” according to the testimony of Chaplain Fields. This was given no weight.

k. The Defendant obtained additional education from the University of Florida through correspondence courses while he was prison in 1992. This was given no weight.

l. The Defendant served in the U.S. Air Force and was honorably discharged in 1974. This was given slight weight.
m. The Defendant received a “Certificate of Recognition” from the Secretary of Defense for services rendered during the cold war years. This was given slight weight.
n. During the time the Defendant was on parole, he excelled and was recommended for early termination, showing a propensity and desire to do well in the world. This was given slight weight.
o. The Defendant was a productive member of society after his release from prison, and took care of his wife and her daughter with a good job and supported the household. This was given slight weight.
p. When notified that the police were looking for him, he did not flee but turned himself in and otherwise offered no resistence to his arrest. This was given slight weight.
q. Defendant demonstrated appropriate courtroom behavior during trial. This was given slight weight.
r. The Defendant has tried to conform his behavior to normal time after time, but has been thwarted by his mental illness and brain dysfunction. This was given no weight because there was no correlation shown between the criminal acts committed by the Defendant and the mental condition.
s. The Defendant has a special bond with children, as testified to by his sister and ex-wife. This was given no weight.
t. The Defendant has the support of his mother, brother, and sister, who will visit him in prison. This was given slight weight.
u. The Defendant has been a good son, a good brother and a good uncle. This was given no weight.
v. The Defendant has a mother, a sister, three brothers, three nieces and two nephews who all love him very much. This was given slight weight.
w. The Defendant maintained a Florida Driver’s License demonstrating that he can follow the

rules in prison. This was given no weight.

x. The Defendant maintained credit cards and a bank account demonstrating that he can follow the rules in prison. This was given no weight.

y. The Defendant can be sentenced to multiple consecutive life sentences (in addition to the sentence for First Degree Murder), he will die in prison and the death sentence is not necessary to protect society. This was given no weight.

z. The totality of the circumstances do not set this murder apart from the norm of other murders. This was given no weight, because the defense is trying to have this court utilize proportionality, which is strictly within the Supreme Court's purview.

The Court has carefully considered and weighed the aggravating and mitigating circumstances found to exist in this case, being mindful that human life is at stake. The Court finds that the aggravating circumstances present outweigh the mitigating circumstances present. (IV/673-681).

This appeal ensued.

SUMMARY OF ARGUMENT

ISSUE I: Defendant's statements regarding a person named "Dwight" who lived inside him and who did bad things was properly admitted as an admission of a party-opponent. In context, Defendant referred to "Dwight" as a means of avoiding responsibility for the murder of Leanne Coryell, and in the trial for her murder, Defendant admitted that he created the concept of "Dwight" just for that purpose. Consequently, when the Defendant told law enforcement about "Dwight" in relation to the instant murder of Janice Nugent, the statement became an admission which was properly admitted as a hearsay exception.

Alternatively, any error in the admission of this testimony must be deemed harmless. Based on the overwhelming evidence of Defendant's guilt, including DNA and fingerprint evidence placing him at the scene of the homicide, no possibility exists that the admission of the challenged hearsay statements could have affected the outcome of the proceedings.

ISSUE II: No abuse of discretion resulted from the trial court's admission of Williams rule evidence concerning Defendant's confessed murder of Leanne Coryell. The collateral crime evidence was properly used where the common features, such as manually strangling the victims from behind, beating them with a looped belt on the buttocks and leaving the bodies submerged

in water, considered in conjunction with each other established a sufficiently unusual pattern of criminal activity. Moreover, the Williams rule evidence was not a feature of the trial, underscoring the harmless nature of that evidence in comparison with the other overwhelming evidence of Defendant's guilt.

ISSUE III: Relying upon several cases wherein fingerprint evidence alone was insufficient to prove identity, Defendant claims his motion for judgment of acquittal should have been granted as to identity. However, the fingerprint evidence in this case was especially damning where Defendant's print was found on the bathtub knob and the victim was found in the bathtub with the water running. Additionally, Defendant's DNA was found on the victim's bedsheets and Defendant provided no plausible explanation justifying the presence of his DNA. Finally, Williams rule evidence establishing that Defendant had confessed to the similar murder of Leanne Coryell further helped to identify Defendant as the murderer of Janet Nugent.

ISSUE IV: The State's evidence sufficiently demonstrated premeditation. The victim's injuries showed defensive wounds and a prolonged attack. This manner of death provided a sufficient basis for the jury to conclude that Defendant acted with purposeful intent to inflict death. Moreover, Defendant failed to provide a reasonably hypothesis of innocence. As

such, the State presented sufficient evidence of premeditation to withstand a Motion for Judgment of Acquittal.

ISSUE V: Defendant's challenge to Florida's capital sentencing statute must fail in light of the recent decisions in Bottoson v. Moore, 27 Fla. L. Weekly S891 (Fla. Oct. 24, 2002) and King v. Moore, 27 Fla. L. Weekly S906 (Fla. Oct. 24, 2002). Further, Defendant's death sentence is proportionate.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT ERRED IN ADMITTING DEFENDANT'S HEARSAY STATEMENTS AS ADMISSIONS OF A PARTY-OPPONENT. (AS RESTATED BY APPELLEE).

Defendant claims the trial court erred in admitting statements made by the Defendant to law enforcement concerning the murder of Janice Nugent. The defense moved to exclude the hearsay statements made by the Defendant claiming that a person named "Dwight" lived inside him.[1] However, relying on Swafford v. State, 533 So. 2d 270 (Fla. 1988), the trial court admitted the statements as admissions of a party-opponent. Defendant now argues he is entitled to a new trial based upon the admission of this testimony. The State disagrees.

In Swafford, 533 So. 2d 270, 274-275, the Florida Supreme Court explained the admissibility of an admission of a party-opponent pursuant to Section 90.803(18), Fla. Stat. (1985), as follows:

> In contrast to other hearsay exceptions, admissions are admissible in evidence not because the circumstances provide special indicators of the statement's reliability, but because the out-of-court

[1] In the pre-trial Motion in Limine, Defendant specifically sought to exclude testimony "That Ray Lamar Johnston has a person living inside him named 'Dwight' who is 'very mean,' and that 'you wouldn't believe everything that he (Dwight) had done.'" (III/407).

> statement of the party is inconsistent with his express or implied position in the litigation. McCormick on Evidence§ 262 (E. Cleary ed. 1984).
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> Of course, like all evidence, an admission must be relevant; i.e., it must have some logical bearing on an issue of material fact. In the context of a criminal trial, an admission of the defendant is admissible if it tends in some way, when taken together with other facts, to establish guilt. 4 C. Torcia, Wharton's Criminal Evidence §§ 651-653 (14th ed. 1987); see, e.g., United States v. Venditti, 533 F.2d 217, 220 (5th Cir.1976) (admission was "open to the prosecutor's permissible suggestion of an adverse inference"); United States v. Nakaladski, 481 F.2d 289 (5th Cir.) (admission relevant to intent), cert. denied, 414 U.S. 1064, 94 S.Ct. 570, 38 L.Ed.2d 469 (1973); Myers v. State, 256 So.2d 400 (Fla. 3d DCA 1972) (admission capable of raising inference of guilt admissible); Ebert v. State, 140 So.2d 63, 65 (Fla. 2d DCA 1962) ("an admission of guilt or of conduct from which guilt may be inferred" was admissible); Brown v. State, 111 So.2d 296, 298 (Fla. 2d DCA) (defendant's statement was "a declaration or admission of independent facts which might go to prove guilt or from which guilt might be inferred"), cert.denied, 114 So.2d 6 (Fla.1959).

Here, Defendant's comments about a person named "Dwight" living inside him, taken in context with his confession to killing Leanne Coryell, are material and relevant to whether Defendant murdered Janice Nugent, the victim in the instant case.

Defendant was interviewed by Detectives Noblitt and Stanton regarding the murder of Janice Nugent on three occasions. (X/806). The jury heard that, in the third interview, Defendant volunteered that a person named Dwight lived inside him, that

Dwight was very mean and that he wished he could cut Dwight out of himself. (X/824). In context with the statements made by Defendant in the trial for the murder of Leanne Coryell, the statements regarding "Dwight" were relevant and material admissions of a party-opponent because they were inconsistent with Defendant's denial of responsibility for Ms. Nugent's murder.

Defendant took the stand in the trial for the murder of Ms. Coryell and denied that a person named "Dwight" lived inside him. Defendant specifically explained that he created the concept of "Dwight" to avoid taking responsibility for his actions. (C18/1742).[23] Similarly, in the instant case, when the

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[2]While Defendant complains on appeal that his trial testimony from the Leeanne Coryell case was misused and/or was presented incompletely, at trial, defense counsel made no objection to the manner in which the testimony was edited and presented to the jury. In fact, defense counsel thanked the State on the record for redacting the testimony on its own to limit it to the issues before the court. (XI/995). The only objection raised concerned the trial court's decision to allow Williams' rule evidence to be presented at all. As such, this issue has not been preserved for appeal.

[3]Additionally, Defendant urges error resulting from the omission of the fact that his testimony from the Coryell murder trial blaming "Dwight" for that murder took place in a discussion with defense expert Dr. Maher about the Coryell murder only. According to Defendant, the reference to "Dwight" in the Coryell murder penalty phase which was read into the record in the guilt phase of this trial was confusing without the additional reference to Dr. Maher to distinguish it from the "Dwight" comment made to Detective Noblitt in the Nugent murder investigation. However, the record shows that the cross-

detectives interviewed the Defendant about Ms. Nugent's murder, Defendant volunteered the information about Dwight. Thus, under these particular circumstances, the statements about Dwight became an admission because Defendant was, once again, using the concept of Dwight to avoid responsibility for murder.

Given Defendant's testimony about inventing Dwight to avoid responsibility for his actions, his admission in the instant case was relevant to the material issue of whether he committed the murder of Janice Nugent. As such, the trial court properly determined that the comments were admissible and were not *unfairly* prejudicial to the Defendant. See Swafford, 533 So. 2d 270, 275 (emphasis supplied). Thus, no abuse of discretion

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examination of Defendant was solely related to the murder of Coryell. (XI/1011-1016). Additionally, during the penalty phase, the State's cross-examination of Dr. Maher pointed out that the discussion about "Dwight" pertained to Ms. Coryell's homicide. (XX/2327-2328). Thus, no confusion occurred.

Moreover, had any confusion arisen concerning which murder was being discussed, defense counsel was free to address this matter in his closing argument. The absence of such an explanation by defense counsel in closing or any objection to the testimony as presented confirms that no undue confusion resulted from the testimony as it was presented to the Nugent jury.

This conclusion is also bolstered by the discussion Defendant had with Detective Noblitt about the Nugent murder. After Defendant's mention of Dwight, Detective Noblitt immediately asked Defendant if Dwight killed Ms. Nugent, and Defendant denied that assertion. (X/824-825). Thus, the distinction between the two murders in reference to "Dwight" was apparent to the jury. Further, Defendant's claim of error on this point was not preserved, and is not cognizable on appeal.

occurred in the admission of this testimony. See Carpenter v. State, 785 So. 2d 1182, 1201 (Fla. 2001)(trial judge's ruling on the admissibility of evidence will not be disturbed absent an abuse of discretion).

Alternatively, should this Court determine that the admission of this hearsay testimony was improper, any error was harmless in the face of the overwhelming evidence of Defendant's guilt. Defendant's fingerprint was found on the bathtub knob where the victim's body was found and on a plastic tumbler found under a table in the victim's kitchen, (IX/686-688), his DNA was found mixed with that of the victim's on her bedsheets, (X/879-881), and a partial shoeprint found in the victim's kitchen was consistent with a pair of tennis shoes belonging to the Defendant. (X/756). Additionally, Defendant's statements to the police fail to explain why this physical evidence was present where it was found. While Defendant admitted to being in the victim's home several weeks before the murder, his statements regarding the details of that visit were contradicted by the physical evidence found at the scene of the crime.

In his first statement to police, Defendant denied ever going in the victim's bathroom. Only when confronted with the information that they found his print near the body did he first admit to using the bathroom. (X/818). When that did not

satisfy the detectives, Defendant came up with a story that he was burned by hot oil and took a shower weeks before the murder occurred. (X/819). The veracity of this story was fully refuted by the testimony of the victim's daughter that the victim bathed twice a day, that she had only one bathroom in her house, and that she was a meticulous housekeeper. (VII/446-447). Thus, Defendant's fingerprint could not have survived two or more weeks on the bathtub knob or on the plastic tumbler found under the kitchen table. More importantly, Defendant never admitted to being in the victim's bedroom and provided no explanation, plausible or otherwise, for how his DNA ended up on the victim's bedsheets.

In addition to the physical evidence implicating Defendant in the murder of Ms. Nugent, Williams rule evidence was also presented. The circumstances of Defendant's confessed murder of Leanne Coryell were so substantially similar to the instant offense that the evidence from that crime demonstrated motive, intent and identity with regard to Ms. Nugent's murder. In both murders, the Defendant selected attractive blonde women as victims, he strangled both women from behind, he also inflicted blunt trauma wounds to their heads and upper bodies, he severely beat each victim on the buttocks with a belt, and left both deceased victims submerged in water. (See Issue II below

for a further discussion of the Williams rule evidence).

Consequently, in view of the overwhelming evidence of Defendant's guilt, any error resulting from the admission of his statements concerning "Dwight" must be deemed harmless.[4] See Blackwood v. State, 777 So. 2d 399 (Fla. 2000); and LeCroy v. State, 533 So. 2d 750 (Fla. 1988). Compare Martinez v. State, 761 So. 2d 1074, 1080-1081 (Fla. 2000)(improper admission of officer's opinion testimony as to defendant's guilt reversible error where no physical evidence linked defendant to crime); Hill v. State, 768 So. 2d 518, 520 (Fla. 2d DCA 2000)(admission of inculpatory letter from defendant to judge not harmless where only evidence identifying defendant came from investigating officer, no fingerprints or other evidence linked defendant to cocaine).

Defendant's arguments to the contrary, nothing stated in the State's closing argument rendered the admission of Defendant's

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[4]Defendant's arguments to the contrary, nothing stated in the State's closing argument rendered the admission of Defendant's hearsay statements harmful. This is especially true where no objection was made to anything the prosecutor said in closing. See Gonzalez v. State, 786 So. 2d 559, 567-568 (Fla. 2001)(propriety of prosecutorial comment not raised in trial court; therefore, not preserved for appellate review). And, the State's closing remarks were a fair comment on the evidence presented. See Pagan v. State, 27 Fla. L. Weekly S299 (Fla. 2002). See also Reyes v. State, 700 So. 2d 458, 460-461 (Fla. 1997)(arguing a conclusion that can be drawn from evidence is permissible fair comment in closing).

hearsay statements harmful. This is especially true where no objection was made to anything the prosecutor said in closing. See Gonzalez v. State, 786 So. 2d 559, 567-568 (Fla. 2001)(propriety of prosecutorial comment not raised in trial court; therefore, not preserved for appellate review). And, the State's closing remarks were a fair comment on the evidence presented. See Pagan v. State, 27 Fla. L. Weekly S299 (Fla. 2002). See also Reyes v. State, 700 So. 2d 458, 460-461 (Fla. 1997)(arguing a conclusion that can be drawn from evidence is permissible fair comment in closing). Defendant is not entitled to a new trial as a result of this issue.

ISSUE II

WHETHER THE TRIAL COURT PROPERLY ADMITTED WILLIAMS RULE EVIDENCE. (AS RESTATED BY APPELLEE).

Next, Defendant contends that reversible error resulted from the admission of the Williams Rule evidence concerning his confessed murder of Leanne Coryell. Based upon the substantial similarities between the murder of Ms. Coryell and the murder of Janice Nugent in the instant case, no abuse of discretion occurred with respect to the admission of the Williams Rule evidence. See Chandler v. State, 702 So. 2d 186, 195 (Fla. 1997).

Under the Williams rule, similar fact evidence is admissible if the evidence is "relevant to prove a material fact in issue, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." See Crump v. State, 622 So. 2d 963, 967 (Fla. 1993), citing Section 90.404(2)(a), Fla.Stat. (1989); and Williams v. State, 110 So. 2d 654, 662 (Fla.), cert. denied, 361 U.S. 847, 80 S.Ct. 102, 4 L.Ed.2d 86 (1959). Here, the similar fact evidence of Defendant's confessed murder of Ms. Coryell was relevant to prove each of the material facts contemplated above.

The important similarities found by the trial court included the following: 1) both bodies were found submerged in shallow

water after death; 2) both victims were single, white females with blonde hair and medium build; 3) the location of the residences of both victims were known to Defendant; 3) Defendant knew both victims prior to the murders; 5) both victims were strangled to death in a violent manner; and 6) both victims suffered patterned bruises to the buttocks consistent with the use of a belt. (III/409-414). More importantly, a review of both records reveals additional and notable similarities between the two murders.

For example, both victims suffered blunt impact trauma to their faces and upper body consistent with being punched. (C10/623-624, 636-639). The patterned bruising to the buttocks on both victims was not only consistent with the use of a belt, but showed evidence that the belt was held in a looped position when the blows were struck. (C10/638-639, 650-651). Also, portions of the bruising on both victims indicated that another object could have been used in addition to a belt. (C10/650, 670-671, 688-689). Both victims were already dead when they were submerged in water. (C10/595, 631). Finally, both victims were strangled from behind. (C10/632-633, 636). Under these circumstances, the trial court properly admitted the Williams rule evidence.

The decision of this Court in Crump, 622 So. 2d 963,

supports the ruling of the trial court below. In a strikingly similar factual scenario, evidence of another murder committed by Crump was properly introduced in the trial for Crump's murder of Lavinia Clark. See Crump, 622 So. 2d 963, 966.

On December 12, 1985, Crump's first victim, Lavinia Clark, was found dead. Ten months later, on October 9, 1985, a second victim, Areba Smith, was also found dead. An eyewitness lead police to Crump as a suspect in the murder of Smith. Crump eventually confessed to the murder of Smith, but consistently denied killing Clark. See Clark, 622 So. 2d at 967-968.

At the trial for the murder of Clark, the State introduced Williams rule evidence of Crump's murder of Smith to establish his identity as Clark's killer. See Clark, at 967. On appeal, this Court ruled the Williams rule evidence was properly admitted. See id. at 968.

As Defendant does in the instant case, Crump argued that the similarities between Smith's murder and Clark's murder were not sufficiently unusual to serve as evidence of identity. Id. at 967-968. For support, Crump cited Drake v. State, 400 So. 2d 1217, 1219 (Fla. 1981), in which this Court found that the similar features of crimes, such as binding both victim's hands and meeting the victim at a bar, were not sufficiently unusual to point to defendant in that case, and therefore irrelevant to

prove identity. Id. at 968. Defendant also attempts to rely on the Drake decision.

However, as found in Crump, this argument is without merit. This Court has upheld the use of collateral crime evidence when the common features considered in conjunction with each other establish a sufficiently unusual pattern of criminal activity. See id. 968, citing Chandler v. State, 442 So. 2d 171, 173 (Fla. 1983). Although the common features between the two murders committed by Crump may not be unusual when considered individually, this Court found that taken together these features established a sufficiently unusual pattern of criminal activity. See id.

> The common features of the two crimes included: both victims were African-American women with a similar physical build and age...; Crump admitted to giving a ride to each victim in his truck in the same area, off Columbus Boulevard in Tampa; Crump admitted to the police that he argued with each victim while giving the victims a ride in his truck; both victims' bodies showed evidence of ligature marks on the wrists; both victims died from manual strangulation; both victims' bodies were found nude and uncovered in an area adjacent to cemeteries within the distance of a mile from each other; and the victims were murdered at different sites from where the bodies were discovered.

See id. The cumulative effect of the numerous similarities between the two crimes established an unusual modus operandi which identified Crump as Clark's murderer, and justified the admission of the Williams rule evidence. See Crump, 968.

Similarly, in the instant case, the cumulative effect of similarities concerning the manner of strangulation, the patterned injuries to the victims, and the manner of disposing of the bodies established an unusual modus operandi identifying Defendant as Nugent's murderer.[5] Consequently, the trial court properly admitted the Williams rule evidence of Coryell's murder.

In the alternative, should this Court determine that error resulted from the admission of the Williams rule evidence, any such error should be deemed harmless. See Rivera v. State, 717 So. 2d 477, 487 (Fla. 1998)(erroneous introduction of Williams rule evidence harmless where "no reasonable possibility that the error contributed to the conviction." State v. DiGuilio, 491 So. 2d 1129, 1135 (Fla. 1986)). The physical evidence found at the murder scene, in conjunction with Defendant's statements to police contradicting that evidence, provided sufficient

[5]Arguably, several of these similarities are sufficiently unusual to establish Williams rule evidence taken individually as well as cumulatively. While Defendant may argue that many victims are strangled. It is rare for a victim to be strangled from behind. A review of Florida cases found only one case mentioning such a manner of death. See Overton v. State, 801 So. 2d 877, 882 (Fla. 2001)(medical examiner testified that victim was strangled by a ligature with pressure applied from behind). Also, while many victims may be beaten, it is highly unusual for a victim to have patterned bruising on their buttocks specifically from a looped belt. Again, a review of Florida case law found no murder cases involving this specific type of injury.

overwhelming evidence of Defendant's guilt such that the admission of the Williams rule evidence could not have contributed to the verdict. (See Issue I above).

It should also be noted that the Williams rule evidence presented by the State was not a feature of the trial. Cf. Long v. State, 610 So. 2d 1276, 1280 (Fla. 1993)(approximately four hours of testimony was presented concerning the murder in issue, while more than three days of testimony was presented concerning Williams rule offenses). The trial court noted on the record that presentation of the Williams rule evidence, in its entirety, took only 62 minutes, (XI/1018), over the course of four days of testimony. Thus, the brief nature of the relevant testimony underscores the harmlessness of the Williams rule evidence.

ISSUE III

WHETHER THE STATE PRESENTED SUFFICIENT EVIDENCE OF IDENTITY. (AS RESTATED BY APPELLEE).

Defendant suggests that the circumstantial evidence identifying Defendant as the murderer of Janice Nugent was insufficient. On a motion for a judgment of acquittal in a circumstantial evidence case, if the State introduces competent evidence which is inconsistent with the defendant's theory of events, the State's threshold burden is met. It then becomes the jury's duty to determine whether the evidence is sufficient to exclude every reasonable hypothesis of innocence beyond a reasonable doubt. See Darling v. State, 808 So. 2d 145, 155 (Fla. 2002)(citations omitted). As discussed above, the State presented substantial and overwhelming evidence establishing that Defendant murdered Ms. Nugent. Consequently, the trial court properly denied Defendant's Motion for Judgment of Acquittal.

Taking the evidence in the light most favorable to the State, substantial, competent evidence was presented which was inconsistent with any theory of innocence on Defendant's part. First, Defendant's fingerprints were found on the bathtub knob and on a cup in the victim's kitchen. (IX/686-688). While Defendant cites to numerous cases where convictions were

unsustainable based upon fingerprint evidence *alone*,[6] no reasonable explanation exists for his prints being found on the bathtub knob where the deceased victim was found with the water running.

Moreover, the evidence against Defendant went far beyond simple fingerprints. The most damaging evidence was the presence of Defendant's DNA mixed with the victim's DNA on her bedsheets. (X/978-881). This was especially incriminating given that Defendant consistently denied ever being in the victim's bedroom or having sex with her. (X/780-781, 781-787, 817). A partial shoe print found in the victim's kitchen was also consistent with a pair of tennis shoes belonging to Defendant. (X/756). This physical evidence, combined with the Williams rule evidence, was sufficient to overcome the Motion for Judgment of Acquittal, with or without the fingerprint evidence. See Crump, at 970-971. See also generally Morris v. State, 811 So. 2d 611, 669 (Fla. 2002). As such, no error occurred.

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[6]See e.g., Jaramillo v. State, 417 So. 2d 257 (Fla. 1982)(prints in victim's home only evidence against defendant); Shores v. State, 756 So. 2d 114 (Fla. 4th DCA 2000)(print only evidence connecting defendant to burglary).

ISSUE IV

WHETHER THE STATE PRESENTED SUFFICIENT EVIDENCE OF PREMEDITATION. (AS RESTATED BY APPELLEE).

Defendant also challenges the sufficiency of the State's evidence of premeditation. However, where premeditation can be shown by circumstantial evidence, Crump, at 971, citing Sireci v. State, 399 So. 2d 964 (Fla.1981), cert. denied, 456 U.S. 984, 102 S.Ct. 2257, 72 L.Ed.2d 862 (1982), overruled on other grounds, Pope v. State, 441 So. 2d 1073 (Fla. 1983), the State's evidence in the instant case sufficiently demonstrated premeditation.

Once again this Court's decision in Crump is illustrative. In Crump, at 971, the following substantial and competent evidence supported the jury's verdict of premeditation:

> The medical examiner testified that Clark had bruises on her head which indicated that she had been struck, as well as an abdominal injury, which caused slight hemorrhaging. However, the medical examiner found that these injuries did not cause Clark's death. The medical examiner concluded that Clark was strangled because of a fracture of the upper hyoid bone, a fracture of the thyroid cartilage, and small pinpoint hemorrhages in the victim's eyes. Moreover, the Williams rule evidence showed that Crump killed both Clark and Smith in a criminal pattern in which he picked up prostitutes, bound them, strangled them, and discarded their nude bodies near cemeteries.

Because the circumstantial evidence standard does not require the jury to believe the defense's version of the facts on which

the State has produced conflicting evidence, the jury properly could have concluded that Crump's hypothesis of innocence[7] was untrue. See id.

Similarly, Defendant's hypothesis of innocence was wholly unreasonable. Defendant never put forth any hypothesis of innocence other than he did not commit the murder. In other words, he provided no explanation to specifically negate the question of premeditation.

While he implausibly claimed to have taken a shower during a visit to the victim's home weeks before the murder, Defendant did not even come up with that story until confronted with the information that his fingerprint was found near the body. (X/781-787). Moreover, the victim's daughter testified to the victim's cleaning habits, as well as her personal hygiene habits, which would have prevented any print from lasting on the bathtub knob for weeks. (VII/446-447). This is especially true where there was only one bathroom in the home and the victim's body was found in the tub with the water running. And, again, even discounting the fingerprint evidence, Defendant never explained how his DNA came to be mixed with the victim's on her

[7]Crump claimed that he did not kill Clark. His explanation for having her driver's license was that he had given her a ride and pushed her out of his vehicle after an argument. He claimed she left her purse in his truck and he had thrown it away, but kept the license. See Crump, at 966-967.

bedsheets when he denied ever entering her bedroom or ever having sex with her. Finally, the Williams rule evidence also demonstrates that Defendant's hypothesis of innocence is simply untrue.

With respect to premeditation, the evidence of the victim's injuries to her face and upper body, the patterned bruising on her buttocks, the defensive wounds to her face showing that she tried to remove something from her face, and the fact that she was manually strangled sufficiently establish premeditated intent. See Blackwood v. State, 777 So. 2d 399 (Fla. 2000). Here, the medical examiner testified that Ms. Nugent suffered blunt trauma to her head, face and upper body. (VIII/598, 623-624). Additionally, Ms. Nugent had defensive fingernail injuries on her nose and defensive bruising on her arms and hands. (VIII/625-626, 634-635). Ms. Nugent was also manually strangled in a prolonged attack involving alternating pressure and release. The medical examiner was able to opine that the victim would have been conscious for a good portion of the attack. (VIII/632-633).

In virtually identical circumstances, the murder victim in Blackwood, also had markings on her neck and bruises on the neck muscle indicating both ligature and manual strangulation. Small scratches on the victim's neck indicated the victim had tried to

remove whatever was binding her neck. The medical examiner also explained that the victim's injuries indicated that the pressure around the victim's neck was released and reapplied. The number of hemorrhages detected suggested that the victim was alive and struggling while being strangled and that it took a while for death to occur. See Blackwood, 777 So. 2d 399, 404. This Court determined that the manner of death in the Blackwood case belied the defendant's argument that he did not intend to kill the victim. Id., at 406-407. "The circumstances of the crime, including the physical evidence, the nature of the victim's injuries, and the manner of death, provide a sufficient basis for a jury to conclude that [defendant] acted with a purpose to inflict death." Id. See also Woods v. State, 733 So. 2d 980, 985 (Fla. 1999), quoting Spencer v. State, 645 So. 2d 377, 381 (Fla. 1994)(Evidence from which the element of premeditation may be inferred includes "the nature of the weapon used, the presence or absence of adequate provocation, previous difficulties between the parties, the manner in which the homicide was committed, and the nature and manner of the wounds inflicted.").

Thus, where Defendant beat and strangled Ms. Nugent to death in a prolonged act of violence, and engaged in a pattern of similar crimes resulting in murder, the State presented

sufficient evidence of premeditation to withstand a Motion for Judgment of Acquittal. Accordingly, no error occurred.

ISSUE V

WHETHER FLORIDA'S CAPITAL SENTENCING SCHEME VIOLATES RING V. ARIZONA. (AS RESTATED BY APPELLEE).

Defendant next contends that his death sentence is unconstitutional based upon the United States Supreme Court decision in Ring v. Arizona, 2002 WL 1357257 (U.S. June 24, 2002), applying the principles set forth in Apprendi v. New Jersey, 530 U.S. 227 (1999), to Arizona's capital sentencing scheme. However, this Court recently announced, in Bottoson v. Moore, 27 Fla. L. Weekly S891 (Fla. Oct. 24, 2002), that Ring had no impact on Florida's death penalty statute.

Specifically, this Court ruled as follows:

> Linroy Bottoson, a prisoner under sentence of death and an active death warrant, petitions this Court for a writ of habeas corpus. He seeks relief pursuant to Ring v. Arizona, 122 S. Ct. 2428, 2443 (2002), wherein the United States Supreme Court held unconstitutional the Arizona capital sentencing statute "to the extent that it allows a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty."
>
> Although Bottoson contends that he is entitled to relief under Ring, we decline to so hold. The United States Supreme Court in February 2002 stayed Bottoson's execution and placed the present case in abeyance while it decided Ring. That Court then in June 2002 issued its decision in Ring, summarily denied Bottoson's petition for certiorari, and lifted the stay without mentioning Ring in the Bottoson order. The Court did not direct the Florida Supreme Court to reconsider Bottoson in light of Ring.
>
> Significantly, the United States Supreme Court repeatedly has reviewed and upheld Florida's capital

> sentencing statute over the past quarter of a century, and although Bottoson contends that there now are areas of "irreconcilable conflict" in that precedent, the Court in Ring did not address this issue. In a comparable situation, the United States Supreme Court held:
>
> > If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the [other courts] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.
>
> Rodriquez De Quijas v. Shearson/American Express, 490 U.S. 477, 484 (1989).

See Bottoson, 27 Fla. L. Weekly S891 (footnotes omitted). See also King v. Moore, 27 Fla. L. Weekly S906 (Fla. Oct. 24, 2002). As such, Defendant's constitutional challenge based on Ring must fail.

While the decisions in Bottoson and King sufficiently dispose of the constitutional challenges stemming from the Ring opinion, the State would address those specific claims raised by Defendant for purposes of providing a complete response.

Initially, the Ring decision is not subject to retroactive application under the principles of Witt v. State, 387 So. 2d 922, 929-30 (Fla. 1980). Thus, Defendant cannot seek relief on the basis of Ring.

Substantively, to the extent that Defendant claims Ring requires that the aggravating circumstances be charged in the

indictment and presented to a grand jury, that argument must also fail. The Fifth Amendment's grand jury clause has not been extended to the States under the Fourteenth Amendment. Apprendi, 530 U.S. at 477, n.3 (2000); Hurtado v. California, 110 U.S. 516 (1984) (holding there is no requirement for an indictment in state capital cases). This distinction, standing alone, is dispositive of the indictment claim. Moreover, neither the United States Supreme Court nor the Florida Supreme Court has ever ruled that aggravating factors must be charged in an Indictment under the Florida capital sentencing scheme. Therefore, no such relief is warranted.

Moreover, Ring does not apply to Defendant's death sentence where one of the two aggravators found was the recidivist factor of a prior violent felony. Even in the wake of Ring, a jury only has to make a finding of one aggravator and then the judge may make the remaining findings. Ring is limited to the finding of an aggravator, not any and all additional aggravators, nor mitigation, nor any weighing. Ring, 122 S.Ct. 2445 (Scalia, J., concurring)(explaining that the fact finding necessary for the jury to make in a capital case is limited to "an aggravating factor" and does not extend to mitigation or to the ultimate life-or-death decision which may continue to be made by the judge). This is because it is the finding of one aggravator

that increases the penalty to death. Ring, 122 S.Ct. 2445 (Kennedy, J., concurring)(noting that it is the finding of "an aggravating circumstance" that exposes the defendant to a greater punishment than that authorized by the jury's verdict).

Constitutionally, to be eligible for the death penalty, all the sentencer must find is one narrower, ***i.e.***, one aggravator, at either the guilt or penalty phase. Tuilaepa v. California, 512 U.S. 967, 972 (1994)(observing "[t]o render a defendant eligible for the death penalty in a homicide case, we have indicated that the trier of fact must convict the defendant of murder and find one 'aggravating circumstance' (or its equivalent) at either the guilt or penalty phase."). Given that requirement, Florida's death penalty statute does not violate Ring.

Ring simply expanded the ruling in Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), which explicitly exempted recidivist factual findings from its holding. Apprendi, 530 at 490, 120 S.Ct. at 2362-63 (holding, other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt). Thus, where a trial court, sitting alone,

may make factual findings regarding recidivism, Walker v. State, 790 So. 2d 1200, 1201 (Fla. 5th DCA 2001)(noting that Florida courts, consistent with Apprendi's language excluding recidivism from its holding, have uniformly held that an habitual offender sentence is not subject to Apprendi); McGregor v. State, 789 So. 2d 976, 978 (Fla. 2001)(rejecting a claim that the jury must find certain facts relating to the prison releasee reoffender statute because it is a recidivist statute to which Apprendi does not apply), the finding of a prior violent felony as an aggravator exempts Defendant from relying on Ring.

Finally, although Defendant raises no other challenge to the penalty phase of his trial or to the death sentence imposed, the State contends that Defendant's sentence of death is proportionate. The trial court found two aggravating circumstances: 1) prior violent felonies, including one count of robbery by intimidation in Georgia in 1974, sentenced to fifteen years; one count of rape in Alabama in 1975, sentenced to ten years; two counts of robbery in Alabama in 1976, sentenced to ten years; two charges of burglary with assault and one count of armed kidnapping on two separate victims in 1988 in Jacksonville, Florida, sentenced to eighteen years; and one count of murder in the first degree, kidnapping, robbery, sexual battery and burglary of a conveyance with assault and battery in

Tampa, Florida in 1997, upon Leeanne Coryell, sentenced to death; and 2) that the capital felony was especially heinous, atrocious and cruel. (Vol. IV, 674-675). The trial court described the evidence in support of HAC as follows:

> The death of the victim was by manual strangulation. The strangulation was accompanied by additional acts of cruelty and degradation. The victim was clothed in her bra and underwear. The victim had been beaten so badly that there were numerous bruises over her entire body. There were also dark bruises on her buttocks which appeared to have been inflicted with an implement. The testimony of the medical examiner was that all the bruising occurred pre-death. The medical examiner testified that the victim was conscious at the time of the strangulation and the strangulation was by compression and release over a period of at least five (5) minutes. It is was [sic] also evident from the medical examiner's testimony that the victim was strangled by a person facing her, and then again, when the victim was facing away from her attacker. The victim had numerous defensive bruises on her hands and forearms which demonstrated that she fought for her life. Additionally, the fact the victim had dug her own fingernails into her own face in an attempt to breathe demonstrates that this victim fought for her life and was aware of her impending death after having been brutally beaten.

(Vol. IV, 674-675).

In mitigation, the trial court gave moderate weight to the statutory mitigator that the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired. (Vol. IV, 675). The trial court also gave slight weight to the following non-statutory mitigation: 1) defendant's

history of mental illness; 2) the defendant is capable of strong, loving relationships; 3) defendant excels in a prison environment; 4) defendant could work and contribute while in prison; 5) defendant was honorably discharged from the U.S. Air Force; 6) defendant excelled while on parole; 7) defendant was a productive member of society after release from prison; 8) defendant turned himself in to police; 9) defendant demonstrated appropriate courtroom behavior during trial; and 10) defendant has family support; 11) defendant's family loves him. (Vol. IV, 676-680).

When compared to other similar crimes resulting in a death sentence, Defendant's sentence is proportionate. See e.g., Rogers v. State, 783 So. 2d 980, 987 (Fla. 2001); Blackwood v. State, 777 So. 2d 399 (Fla. 2000); Spencer v. State, 691 So. 2d 1062 (Fla. 1996); Heath v. State, 648 So. 2d 660, 666 (Fla. 1994); and Lemon v. State, 456 So. 2d 885, 888 (Fla. 1984).

CONCLUSION

Based on the foregoing arguments and authorities, the judgment and sentence should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to, Steven Bolotin, Assistant Public Defender, Polk County Courthouse, P.O. Box 9000-Drawer PD, Bartow, Florida 33831 this 19th day of December, 2002.

CERTIFICATE OF TYPE SIZE AND STYLE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

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