IN THE SUPREME COURT OF FLORIDA

RAY LAMAR JOHNSTON, :

Appellant, :

vs. : Case No. SC01-1914

STATE OF FLORIDA, :

Appellee. :

_______________________________:

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

AMENDED INITIAL BRIEF OF APPELLANT

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

STEVEN L. BOLOTIN
Assistant Public Defender
FLORIDA BAR NUMBER O236365

Public Defender's Office
Polk County Courthouse
P. O. Box 9000--Drawer PD
Bartow, FL 33831
(863) 534-4200

ATTORNEYS FOR APPELLANT

TOPICAL INDEX TO BRIEF

PAGE NO.

STATEMENT OF THE FACTS 1

SUMMARY OF THE ARGUMENT 37

ARGUMENT 39

ISSUE I

THE TRIAL COURT COMMITTED HARMFUL ERROR IN ALLOWING THE PROSECUTION TO INTRODUCE BEFORE THE JURY A SERIES OF STATEMENTS MADE BY APPELLANT DURING CUSTODIAL INTERROGATION CONCERNING "DWIGHT." 39

ISSUE II

THE TRIAL COURT COMMITTED HARMFUL ERROR IN ALLOWING THE PROSECUTION TO INTRODUCE EVIDENCE PERTAINING TO THE DISSIMILAR MURDER OF LEANNE CORYELL. 60

ISSUE III

THE CIRCUMSTANTIAL EVIDENCE PRESENTED BY THE STATE WAS INSUFFICIENT TO PROVE IDENTITY. 81

ISSUE IV

THE CIRCUMSTANTIAL EVIDENCE PRESENTED BY THE STATE IS INSUFFICIENT TO PROVE PREMEDITATION. 93

ISSUE V

FLORIDA'S DEATH PENALTY STATUTE, AND THE PROCEDURE BY WHICH APPELLANT WAS SENTENCED TO DEATH, ARE CONSTITUTIONALLY INVALID. 99

CONCLUSION 100

TABLE OF CITATIONS

CASES	PAGE NO.
A.V.P. v. State, 307 So. 2d 468 (Fla. 1st DCA 1975)	85, 86
Apprendi v. New Jersey, 530 U.S. 227 (1999)	99, 100
Arant v. State, 256 So. 2d 515 (Fla. 1st DCA 1972)	85, 86
Bell v. State, 659 So. 2d 1278 (Fla. 4th DCA 1995)	62, 80
Bottoson v. Moore, __So. 2d __ (Fla. 2002) [27 FLW S647]	100
Bradford v. State, 460 So. 2d 926 (Fla. 2d DCA 1984)	79
Branch v. State, 685 So. 2d 1250 (Fla. 1996)	79
Brown v. State, 473 So. 2d 1260 (Fla. 1985)	79
C.E. v. State, 665 So. 2d 1097 (Fla. 4th DCA 1996)	85
Carpenter v. State, 785 So. 2d 1182 (Fla. 2001)	94
Chandler v. State, 442 So. 2d 171 (Fla. 1983)	60
Chandler v. State, 702 So. 2d 186 (Fla. 1997)	62, 72
Chavez v. State, 702 So. 2d 1307 (Fla. 2d DCA 1997)	86, 87
Commonwealth v. Reynolds, 708 NE 2d 658 (Mass. 1999)	40
Coolen v. State, 696 So. 2d 738 (Fla. 1997)	93, 94
Cox v. State,	

TABLE OF CITATIONS (continued)

555 So. 2d 352 (Fla. 1989) 81, 82, 85, 93

Crump v. State,
622 So. 2d 963 (Fla. 1993) 62

Davis v. State,
376 So. 2d 1198 (Fla. 2d DCA 1979) 62, 80

Delgado v. State,
573 So. 2d 83 (Fla. 2d DCA 1990) 39, 40, 52-54

Drake v. State,
400 So. 2d 1217 (Fla. 1981) 61, 62, 69, 72, 80

Evans v. State,
692 So. 2d 966 (Fla. 5th DCA 1997) 52

Garcia v. State,
622 So. 2d 1325 (Fla. 1993) 54

Garrette v. State,
501 So. 2d 1376 (Fla. 1st DCA 1987) 60, 62, 63, 72, 80

Gore v. State,
599 So. 2d 978 (Fla. 1992) 51, 62

Gore v. State,
719 So. 2d 1197 (Fla. 1998) 63, 72

Gore v. State,
784 So. 2d 418 (Fla. 2001) 99

Green v. State,
190 So. 2d 42 (Fla. 2d DCA 1966) 39, 40, 52

Green v. State,
715 So. 2d 940 (Fla. 1998) 79, 94, 98

Hall v. State,
90 Fla. 719, 107 So. 246 (1925) 81

Hall v. State,
403 So. 2d 1319 (Fla. 1981) 94

Happ v. State,
596 So. 2d 991 (Fla. 1992) 79

Hardwick v. State,
461 So. 2d 79 (Fla. 1984) 79

Harrington v. State,
455 So. 2d 1317 (Fla. 2d DCA 1984) 79

Henry v. State,
574 So. 2d 73 (Fla. 1991) 81

Heuring v. State,
513 So. 2d 122 (Fla. 1987) 61

Hill v. State,
768 So. 2d 518 (Fla. 2d DCA 2000) 39, 40, 51, 52

Hill v. State,
549 So. 2d 179 (Fla. 1984) 79

Hoefert v. State,
617 So. 2d 1046 (Fla. 1993) 40, 51, 94

Hoskins v. State,
702 So. 2d 202 (Fla. 1997) 79

Jackson v. State,
451 So. 2d 458 (Fla. 1984) 39, 40, 52, 60

Jaramillo v. State,
417 So. 2d 257 (Fla. 1982) 82, 86

Joseph v. State,
447 So. 2d 243 (Fla. 3d DCA 1983) 62, 72, 80

Kirkland v. State,
684 So. 2d 732 (Fla. 1996) 94, 98

Knight v. State,
294 So. 2d 387 (Fla. 4th DCA) 85

Long v. State,
689 So. 2d 1055 (Fla. 1977) 82, 93

Madison v. State,
726 So. 2d 835 (Fla. 4th DCA 1999) 63, 80

Mansfield v. State,
758 So. 2d 636 (Fla. 2000) 79

TABLE OF CITATIONS (continued)

Martinez v. State,
761 So. 2d 1074 (Fla. 2000) 54

Mayo v. State,
71 So. 2d 899 (Fla. 1954) 82

McArthur v. State,
351 So. 2d 972 (Fla. 1977) 81

McCutcheon v. State,
96 So. 2d 152 (Fla. 1957) 93

Miller v. State,
791 So. 2d 1165 (Fla. 4th DCA 2001) 62, 69, 72, 78, 80

Mitchell v. State,
527 So. 2d 177 (Fla. 1988) 99

Mungin v. State,
689 So. 2d 1026 (Fla. 1995) 94, 98

Nardone v. State,
798 So. 2d 870 (Fla. 4th DCA 2001) 40, 62

Norton v. State,
709 So. 2d 87 (Fla. 1997) 94, 98

Olsen v. State,
751 So. 2d 108 (Fla. 2d DCA 2000) 94, 98

Orme v. State,
677 So. 2d 258 (Fla. 1996) 79

Pagan v. State,
__So. 2d __ (Fla. 2002) [27 FLW 299] 82, 94

Paul v. State,
340 So. 1249 (Fla. 2d DCA 1976) 39, 40, 52

Peek v. State,
488 So. 2d 52 (Fla. 1986) 39, 53, 60-63, 80

Perry v. State,
522 So. 2d 817 (Fla. 1988) 79

Pollard v. State,
780 So. 2d 1015 (Fla. 4th DCA 2001) 79

TABLE OF CITATIONS (continued)

Porter v. State,
400 So. 2d 5 (Fla. 1981) 79

Quince v. State,
414 So. 2d 185 (Fla. 1982) 79

Randall v. State,
760 So. 2d 892 (Fla. 2000) 61, 79, 94, 98

Rhoden v. State,
227 So. 2d 349 (Fla. 1st DCA 1969) 86

Ring v. Arizona,
No. 01-488, 2002 WL 1357257 (U.S. June 24, 2002) 99

Rivera v. State,
807 So. 2d 721 (Fla. 3d DCA 2002) 54

Savage v. State,
588 So. 2d 975 (Fla. 1991) 79

Shores v. State,
756 So. 2d 114 (Fla. 4th DCA 2000) 86

Snelson v. State,
704 So. 2d 452 (Miss. 1997) 40

Sorey v. State,
419 So. 2d 810 (Fla. 3d DCA 1982) 85

Spinkellink v. State,
313 So. 2d 666 (Fla. 1975) 93

State v. Bingham,
719 P. 2d 109 (Wash. 1986) 98

State v. DiGuilio,
491 So. 2d 1129 (Fla. 1986) 53

State v. Hayes,
333 So. 2d 51 (Fla. 4th DCA 1976) 85

State v. Johnson,
616 So. 2d 1 (Fla. 1993) 100

State v. Parker,
721 So. 2d 1147 (Fla. 1998) 56, 74

TABLE OF CITATIONS (continued)

State v. Savino,
567 So. 2d 892 (Fla. 1990) 61

Stewart v. State,
420 So. 2d 862 (Fla. 1982) 79

Stoll v. State,
762 So. 2d 870 (Fla. 2000) 53, 54

Straight v. State,
397 So. 2d 903 (Fla. 1981) 61

Swafford v. State,
533 So. 2d 270 (Fla. 1988) 23, 40, 44, 51

Tanksley v. State,
332 So. 2d 76 (Fla. 2d DCA 1976) 86

Taylor v. State,
601 So. 2d 1304 (Fla. 4th DCA 1992) 40, 62

Taylor v. State,
630 So. 2d 1038 (Fla. 1993) 79

Thompson v. State,
494 So. 2d 203 (Fla. 1986) 62, 63, 72, 78, 80

Tien Wang v. State,
426 So. 2d 1004 (Fla. 3d DCA 1983) 93

Tirko v. State,
138 So. 2d 388 (Fla. 3d DCA 1962) 85

Trushin v. State,
425 So. 2d 1126 (Fla. 1983) 100

Waterhouse v. State,
429 So. 2d 301 (Fla. 1983) 51

Waters v. State,
486 So. 2d 614 (Fla. 5th DCA 1986) 94

Whitehead v. State,
528 So. 2d 945 (Fla. 4th DCA 1988) 62, 72, 80

Willacy v. State,
696 So. 2d 693 (Fla. 1997) 79

Williams v. State,
143 So. 2d 484 (Fla. 1962) 82

Williams v. State,
247 So. 2d 425 (Fla. 1971) 85

Wilson v. State,
493 So. 2d 1019 (Fla. 1986) 93

STATEMENT OF THE FACTS

Ray Johnston was tried on October 3-6, 2000 for first-degree murder of Janice Nugent, which was alleged to have occurred on February 6 or 7, 1997 (1/19). At trial, the state introduced over objection evidence pertaining to the August 19, 1997 murder of Leanne Coryell (see 1/25-29). The jury in the Nugent case returned a verdict of guilty as charged (3/435; 12/1238). The penalty phase resulted in a 7-5 death recommendation, but the trial court granted a post-verdict motion for mistrial (3/475,510-14; 14/1507; 15/1522-24). A new jury was impaneled for a second penalty phase, which was held on April 10-12, 2001. An 11-1 death recommendation was returned, and on August 22, 2001, the trial judge imposed a death sentence (4/581,673-81; 21/2468-69; 23/2590-2602):[1]

The following is a summary of the evidence presented at trial:

Janice Nugent was a 47 year old divorced woman who lived alone in a house at 315 West Chelsea Street in Tampa, and was employed as a bookkeeper (7/423,429-30,440-41,443). The state called a co-worker of hers, Petra Disher, to identify a photograph of Ms. Nugent (7/423-26). On the morning of Thursday, February 6, 1997, between 8:30 and 9:30 a.m., Janice called in sick; she told Disher she was not feeling well due to a very bad menstrual period (7/426-27).

---

[1] The judge found HAC (great weight) and prior violent felony convictions (great weight) as aggravating factors. As mitigating circumstances he found impaired capacity (based on frontal lobe brain damage) (moderate weight) and several nonstatutory factors (each accorded slight weight) (4/673-81).

Janice Nugent had a daughter, Kelli McCarthy, who was 27 or 28 years old in 1997 and was married to John McCarthy (7/428-29,440-41). According to Kelli, her mother had a phone answering machine which she kept on her bureau on the right hand side of her bed (7/ 441-42). She always used it to screen her calls, and it was her habit to have a tape in it at all times. After a tape ran out, she would replace it and put the used tape in a bureau drawer to save the messages (7/441-44). On Wednesday, February 5, 1997, in the afternoon, Kelli phoned her mother at home (although she knew she was at work) to leave a message to call her back (7/442,451-52). Janice did call her back, and told her she was going out that evening (7/452). [Kelli knew that Janice was dating a man named Harry who drove a white sports car; she later told that to the police (7/452-53)].

Over the next couple of days, Kelli was unable to reach her mother by phone, and finally she asked her husband John to go check on her (7/431-32). Around 11:00 p.m. on Friday, February 7, John went to Janice's house. When he pulled into the driveway, he noticed that the side door was slightly ajar and the keys were hanging in the inside lock, which caused him to think there was something wrong (7/430-33,438-39). Janice's car was in the carport (7/432-33,437-38). As John went inside the house, he called his wife on his cell phone. He was calling out Janice's name and getting no response (7/433). He went through the living room, noticing that the dimmer switches were on and were all turned down very low (7/433,435). As he proceeded down the hallway toward Janice's bedroom he looked into the bathroom and saw that the bathtub was full of water and the

curtain was pulled partially shut (7/433). When he looked closer, he saw a bed comforter in the bathtub and Janice's hair sticking out from it (7/ 433-34). He immediately told his wife on the phone to call 911. John looked around quickly to make sure no one was still in the house, then went to a neighbor's house where he too called 911 (7/433-34).

John was inside the house for less than two minutes. The phone rang while he was there but he didn't answer it. He was never in the master bedroom or the kitchen (7/434-35).

Associate medical examiner Dr. Julia Martin arrived at the Nugent residence at 1:25 a.m. on February 8th (8/590). Janice Nugent's body was submerged in water in the bathtub; she was wearing panties and a brassiere and was covered by a comforter or blanket (8/591-92,641). Dr. Martin observed an earring in her right ear, but no earring in the left ear (8/592). Based on her observation, Dr. Martin believed Ms. Nugent had been dead for 24-48 hours; the window period would have been from approximately 1:00 a.m. the preceding Thursday (February 6) to 1:00 a.m. the preceding Friday (February 7), but these times were not exact and the range could have been a little bit longer or shorter than that (8/594, 640-41). Dr. Martin was able to say with reasonable medical certainty that she was dead before the clock turned to midnight on Saturday, February 8th (8/594).[2] Because

[2] Since Petra Disher spoke with Janice Nugent between 8:30 and 9:30 a.m. on Thursday, February 6 and John McCarthy found her body around 11:00 p.m. on Friday, February 7, Dr. Martin's testimony in light of this other evidence establishes a maximum "window period" of approximately 38 hours.

there was no sign of drowning, apart from some heaviness of the lungs which could have resulted from other causes, Dr. Martin was of the opinion that Ms. Nugent was already dead when she was submerged in the water (8/594-95).

Dr. Martin later conducted an autopsy, and concluded that Ms. Nugent's death was a homicide and the cause of death was manual strangulation (8/596-98,631). Dr. Martin found extensive bruising, which she described as "fingertip type contusions" to the neck and shoulder area (8/626-29). The hyoid bone and voice box were not fractured (8/630,646). Dr. Martin did not see any petechial hemorrhages in or around the eyes (8/630-31,646). [Petechiae, she explained, are sometimes seen in cases of strangulation where continuous pressure was applied, blocking the veins in the head so the blood can't come down, causing small blood vessels to break and producing little red dots in and around the eyes (8/630)]. The multiple deep bruising and fingertip contusions to the neck, combined with the absence of petechial hemorrhages led Dr. Martin to believe that this was not a constant, continuous compression, but rather it "was more of a manual throttling. . . meaning, it was more pressure, release, pressure, release. There was some fighting activity" (8/631,646). Dr. Martin believed that during at least a portion of these events Ms. Nugent's assailant was behind her (8/ 632-34). Dr. Martin also observed a faint furrow line which "may represent some type of ligature" or an abrasion from a piece of clothing such as a shirt collar (8/629-30,641-42). There were about five bruises to Ms. Nugent's face which Dr. Martin described as blunt impact injuries

consistent with blows from a fist, and some defensive-type fingernail abrasions over her nose and defensive injuries on the back of both hands and her right forearm (8/622-26,628,634-35). It was Dr. Martin's opinion that Ms. Nugent would have been conscious during "a good portion" of these events (8/632).

Dr. Martin also observed at least three to five blunt impact "pattern type injuries" to Ms. Nugent's buttocks and hips (8/635-37). One or two of these injuries, in Dr. Martin's opinion, were more probably than not inflicted by a belt (8/637,651), while the other injuries could have been caused by a belt or by some other implement, including (as to the injury to the left upper buttock) a vacuum cleaner hose (8/637-38,650-51). Dr. Martin described the injuries which she thought were from a belt as two parallel lines with a pattern in between; "[t]hat again is coming from a belt, especially if it is looped, and that's what we commonly see" (8/638-39,651). No specific belt was ever presented to Dr. Martin to compare with the injuries to Ms. Nugent's buttocks (8/651).

Dr. Martin testified that the various injuries to Ms. Nugent's face, upper torso, hips, and buttocks might have produced some internal bleeding, but she would not expect to see much bloodletting to the surrounding area where the injuries were sustained (8/ 639-40).

Testing of the ocular fluid indicated that Ms. Nugent had a blood alcohol level of .06, which would be consistent with her drinking a glass or more of wine prior to her death, or could also be a result of postmortem chemical changes (8/649). A "sexual assault

kit" was obtained during the autopsy and given to law enforcement for testing; she did not know the results (8/649). However, Dr. Martin saw no evidence of any tears, lacerations, or any other trauma to the vaginal or rectal areas (8/649-50). Dr. Martin testified that a forensic pathologist can determine with reasonable certainty whether a woman was having her menstrual period at the time of her death, and in Dr. Martin's opinion Ms. Nugent was not menstruating (8/652-53).

A few days after the body was discovered, Janice Nugent's daughter Kelli, accompanied by a detective, went through the house to determine if anything was missing. She was unable to find the answering machine tapes which Janice habitually stored in the top drawer of her bureau (7/443-44). Also, Janice had in her living room a portable phone in a cradle. The phone portion had caller ID, which stored numbers, attached. When Kelli went through the house, she observed that while the cradle was still there, the phone was missing (7/444-46).

Kelli testified that her mother owned a massage table which she stored in a corner. Janice would bring it out into the living room when she was giving somebody a massage (which she did frequently for people she knew), and she would also bring it with her when she traveled (7/449-51). Whenever she finished using it she would put it away (7/451). Several photographs of Janice's living room taken by crime scene investigators showed the purple massage table with a pillow on it open in the living room (7/449-51, see 466-67; State Exhibits 9,10,13,14).

Kelli described her mother as a "creature of habit" and a "neat freak" (7/443,447). Nothing was ever out of place. She would mop her kitchen floor every week, and it would be very uncharacteristic of her to leave a cup unwashed for three or four weeks (7/447). There was only one bathtub in the house, and Janice habitually bathed twice a day (7/446-47).

Ron Pliego is a day trader and consultant in his mid-fifties 8/561). He had met Janice Nugent at Malio's -- a nightclub/restaurant on South Dale Mabry which both of them frequented -- and had known her for almost a year (8/562,568-69). On Wednesday evening February 5, 1997, Pliego went to Malio's to meet a friend of his, and he saw Janice there. After staying at Malio's for a while, Pliego decided to go to a late night jazz club called the Fox; he told Janice he was heading there. Pliego drove by himself in his own sports car, and a little while after he arrived at the Fox, Janice showed up there. They socialized and Janice invited Pliego to come back to her house (8/562-64,569).

They drove in separate cars to Janice's house around midnight (8/564,570). Pliego stayed for an hour or so, remaining in the living room the whole time, except possibly to use the bathroom (8/564-66,570,573). He did not eat or drink anything while he was there (8/566,571). Pliego and Janice had some form of sexual intercourse on the living room couch, but he testified that he could not remember whether it was vaginal or oral (8/565,571-72). Janice did not give him a massage that night (8/571). Pliego was aware of seeing a massage table in the living room, but he was not certain

whether he saw it for the first time that night or on the previous occasion he was at Janice's house, when they also had sex (8/565,569,571). He left around 1:00 a.m. and drove straight home (8/565,570).

The following Saturday, when he was getting ready to leave for North Florida for the weekend, a friend called Pliego and told him that a girl named Janice, who was in her thirties, had been killed. Pliego said it couldn't be the Janice he knew "because I knew she was a little older", and he and his friend discussed their ages (8/566-67). When Pliego got back, he learned that it was in fact the Janice he knew, and since he'd heard that people had seen him with her at Malio's he called Detective Stanton (8/567). He provided his fingerprints and a blood sample for their investigation (8/567-68, see 10/744-45).

Frances Aberle is a contract specialist at McDill Air Force Base. She was introduced to Ray Johnston (appellant) by a friend named Scott Bowles on Wednesday, January 15, 1997 (9/720-22,728). She was certain of the date because she had recorded it in her appointment book (9/722). Frances was also acquainted with Janice Nugent from Malio's (9/723). However, Janice was someone whom Frances did not care to be friends with (9/728).

On January 15, Frances was sitting between Ray and Scott at the bar, and Janice Nugent was seated beside Scott on his right (9/723-24). Ray was telling Frances and Scott that he was fairly new in town and that he'd been to Malio's a few times before. He told them he had taken Janice Nugent out on a date one time; they had gone to a

Chinese restaurant (9/724). [Frances did not know the specific date but it would have been sometime after January 3d and before January 15th (9/724-25)]. Ray told Frances and Scott that they had returned from the Chinese restaurant to Janice's house, when Janice started talking about having a ghost in her back bedroom. Ray said that Janice also showed him a videotape in which she was narrating her beliefs about the ghost being in the house and certain unusual religious beliefs that she had (9/725,730). It was really weird and uncomfortable, and he left without his jacket (9/725).

Despite this abrupt end to the evening, Ray told Frances and Scott that Janice was calling him to go out again, but he didn't want anything further to do with her (9/725,730). Janice had asked him what she should do with the jacket, and Ray said to bring it to him at Malio's sometime (9/725).

Frances testified that while they were all at the bar at Malio's on January 15, Janice left, came back, and put a jacket on the back of Ray's chair without saying a word to anyone; she then walked back and sat in her seat (9/726).

After that night, Frances began dating Ray, but when he would ask her to go to Malio's with him she would refuse, because she knew that Janice frequents there "and I just didn't care to be in that environment or that situation" (9/726,728,731). Based on the things she knew or had heard about that Janice had done previously, Frances was afraid she would retaliate against her for seeing Ray. For example, Janice had "keyed" Harry Norris' car, and if she met a man who was married she would call that person's wife (9/726,728-29).

Frances learned of Janice's death when Ray called her and told her after he'd read about it in the newspaper. He said it was terrible, and she, despite her feelings about Janice, agreed and expressed shock (9/726-27,729-31). In a later conversation, Frances said to Ray, "I just can't understand someone doing that. Why? No matter what somebody did, why somebody would do that." Ray was agreeing with her, and then he turned and said, "Well, now there's no reason you can't go to Malio's with me" (9/727.731).

Detective Robert Holland of the Tampa Police Department arrived at Janice Nugent's home on February 7, 1997 at around 11:45 p.m. to examine and document the crime scene (7/454-55,460-62,497). When he first observed Ms. Nugent's body submerged in the bathtub, a steady trickle of water was running from the spigot into the tub. A washcloth was hanging from the spigot. The comforter was removed from the body after the medical examiner arrived (7/478-80).

Numerous photographs were introduced depicting the rooms and locations in the house as they existed during the investigation on February 7th and 8th (7/460, see 7/515). There were no indications of forcible entry (7/507), and no signs of a struggle or disturbance in the living room, Florida room, storage room, guest bedroom, or the office area of the master bedroom (7/462,466,474-75, 483,503). No items were broken and overturned in the bathroom where Ms. Nugent's body was found (7/476-77). The only sign of a struggle which Detective Holland observed was in the master bedroom where a lamp on a bedside table had been broken and partially overturned (7/484,503,508; State Exhibits 31,32). A closeup photograph shows a

small lamp base; the center portion is broken, the top portion is tipped, and the light bulb is still in it, intact. Right next to it is a ceramic bowl, upright and unbroken. Inches from the lamp base, lying on its side on the table, is a pill bottle labeled antioxidant Coenzyme (State Exhibit 32, see also State Exhibit 31).

In the living room, there was a coffee table in front of a gray couch. There was a purple stain on the glass top of the table which appeared to Detective Holland to be a liquid stain, consistent with spilled wine (7/464-65,471,501). There was a similar colored stain on a pair of white denim shorts which were underneath or near the coffee table (7/465-66,471). There was a massage table, open in the living room, with jars of cocoa butter and massage oil on a nearby piece of furniture (7/467,504,512-13, see 10/842; State Exhibits 9,10,13,14). There was a phone base without the phone in it on a living room table (7/467-69,504). Detective Holland did not know whether the phone base was dusted for fingerprints (7/504).

On the drain board in the kitchen Detective Holland saw two wine glasses, turned upside down as if they'd been washed, and another similar purple stain. There were other wine glasses, along with vases and other objects, on a stand, and a bottle of wine in the cupboard (7/469-71,502). Underneath the kitchen table, next to one of the table legs, was a plastic tumbler lying on its side. It was dry; Detective Holland did not observe any liquid either in the tumbler or in its immediate area (7/472,506; State Exhibit 19).

The bed in the master bedroom was unmade (7/505). A portion of a post-type earring and a button were on the bed (7/485-87). The

earring matched the one which was in Ms. Nugent's right ear (see 8/592). No item of clothing was found which corresponded to the button (7/487). There were several areas of staining on the bedsheet which could either be blood or some type of body fluid (7/ 487,501). A bra and panties were on the bedroom floor, as was a single key (7/487-88). The key was never determined to fit or match any particular lock (7/487). The phone and answering machine on the bedroom dresser was unplugged, and the answering machine did not contain a cassette tape. The portion of the answering machine which holds a tape was in an upright and raised position (7/482-83). Detective Holland was unaware at the time that Ms. Nugent stored her answering machine tapes in a drawer/credenza, so he didn't know whether that particular area was dusted for fingerprints (7/506).

The only VCR which Detective Holland saw in the house was in the master bedroom (7/504-05; State Exh 36). [State Exhibit 36 shows a television and VCR on top of a chest of drawers in the bedroom. The VCR is inside a small VCR shelf compartment on top of the chest; the TV sits on the top of the shelf. There are two videotapes on top of the VCR, underneath the TV. State Exhibit 10 shows another TV, without a VCR, in the living room beside a stereo].

Detective Holland observed what appeared to be blood on the rim of the bathtub, and also a "minute particle" of what appeared to be blood on a pane of glass on the Florida room door (7/500-03,512). [Another apparent blood spot, on a chrome and glass table in the guest bedroom, was brought to the attention of Detective Richard Stanton by members of Ms. Nugent's family seven months later.

Samples of that potential blood were taken from the table and submitted to the FDLE lab (10/746)].

Crime scene technician Webster Green collected evidence from the Nugent residence in the early morning of February 8, 1997, including the top and bottom bedsheets, the earring, the white denim shorts, a Phone Mate answering machine, and a Bell phone/ clock (7/515-24). Three days later he recovered a remote control from a TV/VCR on the bed in the master bedroom which he had overlooked earlier (7/524-26). The television and VCR were located along the north wall of the bedroom (7/525). Six latent prints were lifted from the remote, eight from the answering machine, and six from the clock radio (7/525-26). Green did not know whether they were of any value for comparison (7/526).

Another crime scene technician, Joan McIlwaine Green, lifted prints from various surfaces and locations in the Nugent house on February 8. She testified that she dusted "[a]nything that was dustable," and got a total of 146 latent lifts (8/533-34,537,544). Since she does not do fingerprint comparisons, she did not know whether any of those latent prints were of sufficient quality for comparison or how many were matched to anyone (8/537,547). She lifted eight different latent impressions off the bottom of the plastic cup or tumbler which was found underneath the kitchen table (8/538,548,559-60). She lifted seven prints from the right (cold water) and six prints from the left (hot water) turn knobs on the bathtub, plus two more on the faucet and one on the bathtub rim (8/539-40,549-50). She dusted the kitchen floor and took photographs

of what appeared to be shoe impressions; these could not be seen with the naked eye (8/541-47,554). She did a presumptive identification blood test on the glass pane of the Florida room door, and it was positive for the presence of blood (8/551). She doesn't recall if she recovered any blood from the glass top of the living room coffee table (8/551-52).

Thomas Jones, a latent print examiner with the FDLE, was provided with the known fingerprints of Janice Nugent, Ray Johnston, Ron Pliego, and a person identified in the trial transcript as Harry Torgerson (9/677-78,681,684-85). Jones also received 98 latent lift cards (some of which contained more than one print) from the Tampa Police Department (9/685). These were evaluated and a total of 26 latent prints were determined to be of comparison value (9/685-86,713). Nineteen of these matched Janice Nugent's known prints, two matched Ray Johnston's known prints, and five were never identified (9/713). Of the five latent fingerprints which were of comparison value but were never identified, two were from the west doorway frame, one was from the top of the dresser in the master bedroom, one was from a stepladder in the kitchen, and one was from a pill bottle on an end table in the master bedroom, beside the broken lamp (9/713-14; see State Exh 32; 12/1179-80; 7/484,503,508).

The two prints which, in Jones' opinion, matched Ray Johnston's right index finger and left thumb respectively, were located on the bottom of the plastic cup under the kitchen table and on the right turn knob of the bathtub (9/686-88). Other fingerprints were lifted from the bathtub knobs and the faucet, but none of these were

suitable for comparison (9/709). Of the various latent prints captured from the phone and answering machine, the VCR remote, and the set of keys in the door, none were suitable for comparison purposes (9/710-11). Jones testified that the age of a fingerprint, i.e., how long it has been on a particular surface, cannot be scientifically determined (9/688,714).

On or about August 20, 1997, a search warrant was executed for Ray Johnston's apartment, during which Detective Stevan Young seized items including a pair of dark blue Reebok tennis shoes from his bathroom (9/733-34, see 8/584-85).

Oral Woods, a shoe and tire track examiner with the FDLE, received a pair of size 11 Reebok tennis shoes (State Exhibit 68-B), which he compared with photographs (which he had enlarged to scale) of shoe impressions from Janice Nugent's kitchen floor (10/750-51). Woods testified that "class characteristics" include such things as the name brand, tread design, and size of a shoe, while "individual characteristics" are unique marking or cuts in the sole of a shoe which occur as a result of wear or accident (10/755,758,767). A shoe track comparison must reveal matching individual characteristics in addition to class characteristics in order to enable the examiner to make an identification (10/758, 767). Conversely, where class characteristics are consistent but individual characteristics cannot be discerned, then Woods can neither eliminate nor identify a particular shoe (10/767).

From the four photographs which were submitted to him, Woods -- based on his training and experience -- was able to discern a total

of nine partial shoe tracks, representing five different tread designs (10/765-66). Of the nine tracks, two were similar in their general class characteristics (size, shape, and tread design) to the sole of the left shoe which, despite the discrepancy, Deputy Young identified as the one he seized from Ray Johnston's bathroom (10/756-58,771). Woods found no individual characteristics (10/758-59). Therefore, on direct examination by the state, he could only say that he could not exclude the left sole of that Reebok tennis shoe as being the source of the two partial shoe tracks depicted in the enlarged photograph (10/759, see 771). On cross-examination, he acknowledged that while you can clearly see the word "Reebok" on the sole of the shoe, you cannot see any part of the word "Reebok" in the scale photo of the shoeprint; this is because "that part wasn't recorded", but only the outside of the sole is recorded in the shoe impression (10/768-71). In fact, only 25 percent or less of the sole of whatever shoe made it can be seen in the photograph of the shoe impression (10/771). If he had had the entire sole, Woods agreed, he might have been able to come back with a stronger opinion (10/771).

None of the nine partial shoe impressions in the photographs seemed to match the right Reebok (10/766), and none of the other four tread designs which Woods observed in the photographs of Ms. Nugent's kitchen floor were ever identified to any source or possible source (10/765-66). There is no scientific way to determine the age of a shoe print (10/772).

Melissa Suddeth, a forensic serologist with the FDLE, received blood samples from Janice Nugent, Ray Johnston, and Ron Pliego, and

obtained DNA profiles from each (10/847-50,876-80). She also examined the top (flat) and bottom (fitted) sheet from Ms. Nugent's bed; testing for the presence of body fluid as well as testing the stains removed from those items (10/879). Suddeth identified a single stain -- about the circumference of a pencil eraser -- as being consistent with a DNA mixture from at least two individuals (10/879-80,894-96). The DNA profile from the major contributor to this stain was consistent with Ray Johnston's profile, while the DNA profile from the minor contributor was consistent with that of Janice Nugent (10/881,894-94). DNA can be found in sweat and mucus (10/898). The mixture stain was chemically consistent with blood, saliva, or sweat, but it was not consistent with semen (10/897-98). It could have been a blood/saliva mixture, a blood/sweat mixture, or a mixture of two individuals' blood, "but it wasn't a blood/ semen mixture" (10/897-98). Neither visual observation nor chemical testing indicated any semen on any of the sheets, pillowcases, or the underwear which was found on the bedroom floor (10/ 886). Suddeth also tested the vaginal, anal, and oral smears obtained during the autopsy of Janice Nugent. No spermatozoa were identified on any of the slides (10/885-86).

The other stains on the bedsheet were consistent with Janice Nugent's profile and inconsistent with Ray Johnston's (10/887,895-96). These stains were toward the middle of the sheet and closer to each other (10/895). The one stain which was consistent with being a mixture "is a little bit off to itself and close to one edge of the sheet or around the perimeter of the sheet, not along with the

majority of the other stains" (10/895-96). Several other items examined by Suddeth had DNA profiles consistent with Janice Nugent's, including stains on a pair of white shorts and a bra, two samples (chemically consistent with blood) from the shower, and fingernail scrapings from Ms. Nugent's right hand (10/887-88,900-02). DNA test results on fingernail scrapings from Ms. Nugent's left hand were inconclusive (10/889,900-03). In addition, one area of staining on the top (flat) bedsheet and one apparent bloodstain on a pillowcase yielded inconclusive DNA results (10/889-91). Of the items which Suddeth tested and was able to obtain a DNA profile, none were consistent with Ron Pliego's profile (10/887).

Suddeth also tested a swab from the glass and chrome table in the guest bedroom (10/903-04, see 10/746). She found the presence of blood and determined its DNA profile; it was not Janice Nugent's blood and it was not Ray Johnston's blood (10/903-04). This stain has never been matched to any particular person (10/904).

Suddeth testified that a serologist cannot tell how long DNA has been at a particular location (10/896). She agreed that if DNA is on a sheet or an article of clothing, it can remain even after the item has been washed or drycleaned (10/897).

Dr. Martin Tracey was called by the state as an expert in population genetics, which he described as the "statistical aspect" of the biological sciences (11/916-20). He stated the opinion that, using the "product rule" and the Caucasian data base, the odds that another person besides Ray Johnston would match the DNA profile of the major contributor to the eraser-sixed mixture stain are

astronomical (see 11/931-32); one in two hundred seventy nine trillion (11/927-28,931,951).

Tracey testified that all parts of the body contain DNA, and a forceful sneeze can leave DNA on a surface (11/944). In contrast to the testimony of the serologist, Melissa Suddeth, Tracey would not expect a DNA stain to survive a proper washing, but he acknowledged that "it depends on the nature of the cleaning. And if the cleaning is well done, the stain is gone. If it wasn't well done it may not be" (11/932-33,947-48). He was aware of incidents where DNA continued to exist on a garment after it had been washed or drycleaned (11/947-48).

On August 19, 1997, more than six months after Janice Nugent was killed, the body of a 30 year old woman named Leanne Coryell was discovered in a retention pond near St. Timothy's Church, and Ray Johnston (who was seen on surveillance videotape using Ms. Coryell's ATM card) was arrested for her murder (see 11/955,990, 1006-10).[3] During the two week period following Ray's arrest in the Coryell case, he was interviewed on three separate occasions by Detective James Noblitt in regard to the unsolved death of Ms. Nugent (10/806-08,812-13,821-22,828; see 10/776-77,781,787; 3/406). Noblitt spoke with Ray for a total of a little over two hours over the course of the three sessions. He chose not to videotape or tape record any of the interrogations; asked why, he replied "Just because

---

[3] Evidence concerning the Coryell murder was admitted over numerous defense objections in the instant trial for the murder of Janice Nugent.

we didn't -- we don't tape record every statement that we take" (10/828-30). Noblitt acknowledged that he has tape recorded interviews with other murder suspects (10/831). The other detective present, Stanton, was manually taking notes, but Noblitt does not know what happened to those notes; Stanton probably has them (10/829).[4] Accordingly, Detective Noblitt was testifying from his memory of conversations that occurred three years earlier (10/828,831).

Prior to trial, the defense had moved in limine to exclude as irrelevant and incurably prejudicial several statements made by Ray Johnston to Detectives Noblitt and Stanton during interrogation at the Orient Road jail during the weeks after his arrest for the murder of Leanne Coryell (3/406-07). One of these statements was to the effect that Ray has a person living inside him named "Dwight" who is very mean, and you wouldn't believe everything that he (Dwight) has done (3/407; see 2/367). Before Noblitt testified before the jury at trial, a substantial portion of his testimony was proffered to the trial court (10/774-75,776-94). On the subject of "Dwight", Noblitt testified on proffer:

> We began this [the third] interview by sitting down. I told him we had executed a search warrant at his residence. We had some minor conversation about the search warrant.

(10/787).

---

[4] Although Detective Stanton testified at trial, his testimony (less than four pages in the transcript) involved only the drawing of a blood sample from Ron Pliego, and the submission to the FDLE lab of a sample from the blood spot on the glass and chrome table in Ms. Nugent's guest bedroom (10/743-46).

There then followed some conversation about Ray's military service and a possible discrepancy regarding how long he had served (10/787-88). Noblitt continued on proffer:

> After that conversation, Mr. Johnston looked at me and said, "I think I have a problem." <u>And I said, "What kind of problem? I asked you the other day if you had any mental problems,</u>" and he only mentioned blackouts and seizures.
>
> He said, "There's another guy that's lives within me and his name if Dwight," and he's been there since he was a child. That Dwight did very bad things. He goes on to explain that this began because he was abused as a child. I guess, I'll go into this for the proffer.
>
> Q. Go ahead.
>
> A. Ever since he was eight or ten years old there was some neighbors or friends of his family named Ms. Emmie Out (phonetic), Mr. Harvin and a lady named Martha Maddux. He had explained that he had gotten in trouble for falsely being accused of chasing this six-year-old child around, that they had beaten him and drug him down the street; said -- he never explained Martha Maddux other than she was the one who delivered his medication with some pharmaceutical company.
>
> He told us that Dwight -- I went on to ask him if he had ever told anyone else about Dwight; in other words, throughout his life. He did name two people. He first said a lady named Tonya Gooding, who is a psychologist. The jury is not here, but that's within the Corrections Department.
>
> I said, "I'll be able to get ahold of her and verify this is an established problem that you have?" He said, "No, I don't think I ever told her." Then he named a lady named Diane Pollock, who is a neurologist for Morton Plant Hospital when he had a car wreck. He said he trusted her and he probably told her.

> I said, "I'll be able to get ahold of her and verify you've told her about this?" He said, "No, I don't think I ever told her." He then -- he actually sat there and he clenched his fists and kind of sat back in the chair, closed his eyes, clenched his fists until his knuckles turned white, and he made a statement to the effect that "you got to see him, man." I've never seen anybody in this kind of phenomenon before, so I just sat and listened.
>
> Then he made a statement that Dwight was very mean and he would like to cut him out of his body. <u>Then Detective Stanton asked if what occurred was that Dwight was responsible for what occurred. Because he had told us before that sometimes he would get to doing things and he didn't know what he was doing. And he said, no, he didn't kill Janice.</u>

(10/788-90).

Ray was asked if he can remember what happens when Dwight takes over. He said no (10/790). Later in the interview, Detective Stanton, to confront Ray, made the statement "Well after Dwight has done whatever Dwight has done, then Ray has to clean it up" (10/790). The interview was then terminated after Ray requested an attorney (10/790).

The state took the position that the testimony regarding "Dwight" could be introduced as an "implied admission" (10/797-99; see 10/796). Defense counsel pointed out that in the statements Ray "doesn't say Dwight harm[ed] Ms. Nugent and I didn't. That might be construed as an admission. He just says he has these problems. He doesn't connect them in any way to the death of Ms. Nugent" (10/797; see 10/795-97,799-800). Since the defense in this case was identity and not insanity, Ray's mental condition was not in issue; therefore, defense counsel argued, the "Dwight" statements were irrelevant,

prejudicial, and inadmissible (10/795-97,799-800). The trial judge, relying on Swafford v. State, 533 So. 2d 270 (Fla. 1988), overruled the defense's objection (10/801-03).

Detective Noblitt then testified before the jury regarding the three interrogations. In the first session, Ray told the detectives that he knew Janice Nugent, having met her at Malio's. He had danced with her a few times, and they went out on one dinner date, which took place several weeks before Valentine's Day (10/808-10,815,820,835-36). After eating at a Chinese restaurant they went back to Janice's house. There, Janice took him through the kitchen to a locked room at the rear of the house. She opened the empty room, which was very cold, and explained to Ray that she had seen ghosts in that room (10/810). Then they went back in the living room area. Janice put on a homemade "documentary type" videotape in which she was narrating her belief in ghosts (10/ 810,836-37,840). [Noblitt was aware for months prior to this interrogation (and before Ray Johnston became a suspect), that Janice "had taped her belief in ghosts" (10/837). The police department had recovered such a tape from her home; Noblitt is aware of its existence but he has never viewed it (10/836-37,840)]. Janice lit the fireplace and started showing Ray shadows in the fireplace where she said she saw Jesus on one wall and Joseph on a donkey on the other wall (10/810). Ray didn't see any of these things (10/810). Janice put on some very weird music and told Ray she gives massages. She went into the bedroom and came out in an "outfit" consisting of bra and panties (10/811,839). Ray, finding the whole thing too weird, got up and

left the house, leaving his jacket behind (10/811,839). On another evening a short while later, when he was at Malio's with Fran and Scott, he found his jacket returned on the back of a bar stool (10/811).

In response to the detectives' questions, Ray told them he never went out with Janice again; he was in the house for probably no more than half an hour that night; he and Janice did not have sex; and (other than what he'd already described) there was no fight or problem between them (10/811). Noblitt directly asked him "Did you kill her?" and Ray said "No" (10/811-12).

The second interview took place six days later (10/812). By that time, the detectives had gotten information that Ray Johnston's fingerprint had been identified as being on the shower knob in Janice Nugent's bathroom (10/812). Noblitt asked Ray to go back over the events of his dinner date with Janice, and he reiterated the same information (10/814-15). Noblitt then confronted him by saying "Your fingerprint is in a place very near where Ms. Nugent's body is" (10/816). Noblitt did not indicate where that was (10/334-35). Ray said he was only there once and only went in the rooms he had mentioned; then stopped and said "Wait a minute, I may have gone in the computer room" (10/816). Noblitt countered, "That won't explain the fingerprint", and told Ray he didn't believe he was telling him the truth (10/816). Noblitt asked again, as he had in the first interview, if he had had sex with Janice, and Ray adamantly denied that he had sex with her (10/817). Noblitt asked if he was injured in the house and Ray said "No, nothing happened" (10/817). Noblitt

then asked him if he knew where the body was found; at first Ray said no, then said "Oh, I think it was found in the bathroom." Asked how he knew that, he said he'd read it in the newspaper (10/817,838). Shortly after that, Ray mentioned to the detectives that he has blackouts and seizures. [Defense counsel's objection was overruled (10/817)]. In regard to the blackouts and seizures, Ray told the detectives "Sometimes I get to doing something and doing it and doing it and when it's over I can't remember what I've done". [Defense counsel's objection was against overruled (10/817-18)]. <u>Detective Stanton asked Ray "Is that what happened with you and Janice?", and Ray adamantly said "No, I did not kill Janice</u>" (10/817-18).

Noblitt continued to tell Ray he didn't believe him, and asked him "Was someone else there with you? Were you there and someone else did this?" Ray said "No, absolutely not" (10/818).

Noblitt insisted that "[s]omething happened. Your fingerprints are in a place where I know you were there the night she was killed" (10/818). Ray stopped for a second and said "I went to the bathroom". Noblitt took that as meaning that he went in to urinate, and he insisted to Ray that he didn't believe him and the print didn't get there that way (10/818-19). Ray thought about it for a few minutes, then said "Okay, I'm going to tell you the truth" (10/819). He told the detectives that after he and Janice had returned from dinner and they had had the conversation about ghosts and watched the video, she offered him a massage. Ray relented, took off his clothes, and got on the massage table. Janice heated up some

massage oil[5] and when she poured it on him it burned his buttocks and the back of his legs (10/819). He jumped up and ran into the shower, washed himself off, and fled out the door in his underwear (10/819). Noblitt continued to express his disbelief; Ray told him he was scared and that is why he didn't mention this occurrence during the first interview (10/820).

The third interrogation took place on September 2, 1997 (10/ 821,828). By this time, the detectives had received DNA test results indicating that Ray's blood was on Ms. Nugent's bed (10/ 821).[6] The detectives, as they had done in the prior interviews, advised Ray of his constitutional rights and told him they wanted to talk more about Janice Nugent's homicide (10/821-23). Noblitt testified:

> I told him that we executed our search warrant; told him we had only taken a few things; that most of his property was still there, and had some small talk about who was going to pick up whatever remaining property he had. And Mr. Johnston sit there and looked at myself and Detective Stanton and said, "I think I have a problem."

(10/23-24)

Over numerous renewed defense objections, Noblitt testified that Ray "went on to say he had another person living inside him"; that this other person's name was Dwight, and that Dwight had been with him since he was eight or ten years old (10/824).

---

[5] According to Noblitt, Ray initially said it was hot wax, and when asked about that he said he meant hot oil (10/838).

[6] The serologist's testimony at trial was that a DNA mixture consistent with Ray's profile was on an eraser-sized spot on the bed; it was chemically consistent with blood, saliva, or sweat (but not semen) (10/897-98).

> Concerning Dwight, he said that Dwight was very mean. He said that, "I got to be cautious." He said that Dwight was very mean. And I questioned him about the fact that Dwight controlled him because I don't know about this area very much.
>
> DEFENSE COUNSEL: Objection, Your Honor.
>
> THE COURT: Overruled. Go ahead.
>
> DETECTIVE NOBLITT: And during this interview Mr. Johnston sat and put his fists together and clenched his fists real tight with his knuckles almost turning white, and leaned back in his chair and kind of closed his eyes, and he made the statement, and I didn't know what he was going to do because I have never experienced this during an interview, but he sat back. So I sat back for maybe ten, fifteen seconds and he said, "You've got to see him, man," and I didn't know where we were going from there.
>
> DEFENSE COUNSEL: Objection, Your Honor.
>
> THE COURT: Don't extrapolate.
>
> DETECTIVE NOBLITT: I apologize. So I sit there kind of hesitant for a couple of minutes, <u>and Detective Stanton actually asked him, "Did Dwight do this? Did Dwight cause Janice to get killed? And he said, "No, definitely not. I did not kill Janice."</u> Later during the interview, made the statement that he wanted to cut Dwight out of himself.

(10/824-25).

Defense counsel again objected (10/826), and moved for a mistrial:

> . . . based on the testimony of the witness regarding Dwight and his associated comments. Anything regarding Dwight is improper. It's highly prejudicial and the idea being that the jury is now being asked to speculate that although the witness has acknowledged Mr. Johnston literally denied harming Ms. Nugent, the implication seems to be now, and I'm sure

> the State will attempt to argue later, that by admitting that Dwight is inside him and he wishes he could cut him out and you wouldn't believe the terrible things Dwight did, that he's really admitting to the homicide of Janice Nugent.

(10/827).

The trial court denied the motion for mistrial. (10/827).

On cross-examination, Detective Noblitt testified as follows:

> Q. At no time did he admit to you that he had killed Janice Nugent?
>
> A. As I testified in this court, I'm going to tell you exactly what he said. Each time we confronted him with that, he denied that he did that.
>
> Q. Or even harmed her in any way, much less killed her?
>
> A. As I testified earlier, we asked him about any altercation or fight and he denied that he had any other altercation or fight other than what he told us about the dinner date.
>
> Q. And including what you say that he allegedly said about this Dwight person, <u>he never tried to say that somebody else, some other person named Dwight harmed Ms. Nugent, did he?</u>
>
> A. <u>I didn't allegedly say it. I'm telling you, this court, that's what he said about Dwight and he did not say Dwight did this</u>.
>
> Q. And you remember this from over three years ago?
>
> A. Yes. It was very unique in my 25-year career. I remember it very well.

(10/830-31).

The final three witnesses pertained to the murder of Leanne Coryell; a collateral crime which the defense had unsuccessfully moved to exclude on the ground that the Coryell and Nugent homicides were not uniquely similar, and there were substantial dissimilarities between the two cases (2/362-64,365-72; 3/409-14,427-28; 5/3-30,97-116; 8/580-82,612,620-21,653-58; 9/665-70).

Detective Michael Willette was the lead detective in the Coryell case (11/955-56,974-75). Defense counsel renewed his objection to his testimony in its entirety (11/952-53).

The nude body of Leanne Coryell was found in a pond near St. Timothy's Church on August 19, 1997 (11/955,969,975-76). Her clothing (including her belt) was scattered on the ground in the vicinity of the pond, and her car was found nearby in the church's parking lot (11/970-72,976). Photographs of Leanne Coryell in life, of her body as it was found in the pond, and of her clothing were introduced over renewed defense objection (11/957-68,970-71). The trial court, in denying the defense's motion for mistrial, noted the reaction of one of the jurors to the photograph of Ms. Coryell's body in the pond (11/980, see 995).

Detective Willette testified that Ms. Coryell and Ray Johnston resided in different buildings of the same apartment complex known as the Landings (11/972-74).

On cross, Willette testified that Ms. Coryell had arrived at her apartment complex after grocery shopping. His investigation showed that she was apparently forcibly abducted from the Landings parking lot and taken to the location where her body was found

(11/976-77). Willette also became aware that, according to the medical examiner, there was evidence of a sexual battery (11/977). Certain property, including an ATM card, was stolen from Ms. Coryell, and money was later withdrawn from her bank account using that card (11/976).

Dr. Russell Vega is the associate medical examiner who went to the scene where Leanne Coryell's body was discovered, and who later performed the autopsy (11/981-83). Defense counsel renewed his objection to Dr. Vega's testimony (11/980,995-96).

Leanne Coryell was 30 years old at the time of her death; she was 5 feet 11 inches tall and weighed 138 pounds (11/990). An autopsy photograph of Ms. Coryell was introduced over objection (11/984-85). The cause of her death was strangulation; most likely manual strangulation (11/983,990-91). Dr. Vega could not rule out the possibility that a ligature could have been used (and he observed a knotted bra at the crime scene), but in his examination of the body he did not see any evidence that a ligature was used (11/984,990-91). There were many bruises and some abrasions and scrapes all over her neck area, and a bruise to the chin consistent with blunt trauma such as from a fist (11/984-85). The thyroid and cricoid bones inside her neck were fractured, but the hyoid bone was not (11/988-89). Dr. Vega found petechiae in the eyes and inside the eyelids of Ms. Coryell. These are breaks in the small blood vessels of the skin or mucosa, and are very common in cases of strangulation (11/991-92). One is more likely to find petechiae in strangulations where pressure was applied continuously until death results, and less likely to find

petechiae in strangulations involving compression and release of the neck (11/991).

According to Dr. Vega, Ms. Coryell's assailant was more likely behind her than in front of her while she was being strangled, although he couldn't rule out either possibility (11/984). He believed she was already dead when her body was dragged and placed into the water (11/989).

During the autopsy, Dr. Vega observed contusional bruising and some pattern abrasions on Ms. Coryell's buttocks (11/986). He compared the pattern injuries to the belt which was found among Ms. Coryell's clothing at the scene. That belt had a certain type of oval-shaped appliques, and based on those unusual markings he concluded that at least some of her injuries were inflicted by that particular belt (11/986-87,992-93). Some of the darker contusions (of which there were at least three and as many as seven) may have been caused by a heavier instrument than the belt (11/987-88,993-94).

Dr. Vega found some contusions and small mucosal tears in Ms. Coryell's vaginal area, including one superficial tear on the inside of the vaginal vault (11/988-90). These injuries, in his opinion, were consistent with a possible sexual battery (11/989-90).

Next, over renewed defense objection and motion for mistrial (11/995), Assistant State Attorney Chris Moody (who was not involved as a prosecutor in this trial) read to the jury a redacted version of Ray Johnston's testimony from the penalty phase of the Coryell trial, in which he confessed to having killed Leanne Coryell (11/995-96). The jury in the instant trial was informed only that the transcript

was from a "prior hearing" (11/996). The attorney conducting the direct examination was identified as Mr. Registrato (11/997), and the attorney conducting he cross-examination was identified as Mr. Pruner (11/1011). [Jay Pruner is the Assistant State Attorney who was the prosecutor in the instant trial].

In the excerpt of prior testimony which was read to the jury, Ray Johnston admitted that he killed Leanne Coryell, but stated that he did not rape or sexually assault her (11/997,1005-06). Asked to recount the events, Ray testified that he had just left the hot tub area and was walking back to his apartment when Ms. Coryell drove in (11/997). He had seen her before a couple of times, just to say hi (11/997,1012-13). She was taking groceries out of her car. Ray 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 (11/997-98,1011-12). 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 (11/998-99,1015).

Ray didn't think she was breathing; he thought he'd broken her neck (11/999-1000). He thought about taking her up to her apartment, but he didn't know the number or whether there was a security device (11/1000). Instead, 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 (11/1000,1003). He was just angry. He couldn't describe the feeling; it's like you know what you're doing and what's

going on around you; you just can't stop (11/1002-03,1010). 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 (11/1003-04,1015-16). He remained with her for a few minutes. A car came in, circled the lot, and went out. Ray 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 (11/1004-05). He knew that chlorinated water, or water itself, would remove trace evidence, and he acknowledged that -- once he realized what was really happening -- he took steps to cover up what he'd done (11/1014-15).

After showering, Ray 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 (11/1006-07). Ray 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 (11/1007).

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. Ray told them he was just with her last night. Knowing that they had called Detective Shepard, and figuring that the

police must know about his priors, he 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. (11/1008-09).

The transcript excerpt from Ray Johnston's testimony in the Coryell penalty phase contains a piece of cross-examination concerning "Dwight". This was read to the Nugent guilt phase jury, although they knew nothing about the nature of the evidence regarding "Dwight" which had apparently been introduced earlier in the Coryell trial, and to which the cross-examination referred:

> Q.[By Mr. Pruner]: There is no Dwight living inside you, is there?
>
> A. I don't think -- I don't think it's a multiple as I've been referred to before. I think it's me blaming it on something else and then you give it that name and that's part of it.
>
> Q. So you wouldn't take responsibility personally?
>
> A. Yes, sir, so you don't take the responsibility. You don't have to answer for it then.

(11/1016).

[The above excerpt which was read to the jury in the instant (Nugent) trial was actually immediately preceded by the following question and answer in the Coryell penalty phase, which was edited out:

> Q. And you manipulated Dr. Maher by lying to him about this person called "Dwight" that you wanted to place the blame on, didn't you?
>
> A. No, sir.

(C18/1742).

This referred to the testimony of psychologist Michael Maher given earlier in the Coryell penalty phase, in which Dr. Maher had testified that when he first say Ray in connection with the Coryell case Ray had expressed a fear that another personality within him named Dwight had possibly committed the murder of Leanne Coryell (C17/1612-13)].

The state rested its case (11/1017). The defense renewed its motion for mistrial based on the Williams Rule evidence (11/1026-29), and moved for judgment of acquittal on the grounds that the circumstantial evidence was insufficient to prove identity (11/ 1029-37; 12/1117-18) or to establish premeditation (11/1037-53; 12/1117-18). When the trial judge stated that he had a problem with the premeditation aspect (11/1054, see 1065), the prosecutor repeatedly argued that, in addition to the act of strangulation itself, you could look to the Williams Rule evidence to determine whether there was preparation and planning (11/1054,1056,1065). The judge denied the motion for JOA as to identity (12/1099), and reserved ruling as to premeditation (12/1099,1108-09,1118,1244). [The motion for JOA on the issue of premeditation was ultimately denied as well, just prior to the beginning of the (first) penalty phase (13/1292)]. After hearing the closing arguments of counsel, the jury retired to deliberate (12/1230). Nearly two hours into their deliberations, the jury returned with a question as to "how many fingerprints were found that were valid for comparison on the two bathtub knobs, hot and cold, according to the latent fingerprint expert, Tom Jones?"

(12/1232-22; 3/434). A portion of Jones' testimony was read back to the jury, to the effect that of the latent fingerprints captured from the knobs and faucet of the bathtub -- other than the one which he identified as matching the defendant Ray Johnston -- none of the others were suitable for comparison purposes (12/1236). After two further hours of deliberations, the jury returned a verdict finding Ray Johnston guilty of the first degree murder of Janice Nugent (12/1237-38; 3/435).

SUMMARY OF THE ARGUMENT

The trial court committed harmful error in allowing the state to introduce, in the guise of an "implied admission", statements made by appellant during custodial interrogation concerning a person living within him named "Dwight". Appellant clearly and unequivocally told the police that neither he nor "Dwight" committed the charged murder of Janice Nugent, and that he was never even in her house except for one occasion some three weeks prior to the murder. Contrary to the prosecutor's assertions to the trial court (and his argument to the jury) the "Dwight" statements were not made in response to being confronted with DNA evidence; appellant's response to that was to maintain his innocence and that he was only in the house that one time several weeks earlier. Instead, the "Dwight" statements were made after some small talk at the beginning of the third interview, after appellant had already told the detectives about his blackouts and seizures during the second interview. The "Dwight" evidence was irrelevant to prove the charged

offense; it showed only criminal or violent propensity, bad character, and possible craziness. Also, the prosecutor put a very misleading and highly prejudicial spin on the "Dwight" evidence through his misuse and creative editing of the transcript of appellant's confession to the collateral murder of Leanne Coryell. Finally, the prosecutor emphasized Dwight as the climax of his closing argument [Issue I].

The trial court also committed harmful error in allowing the state to introduce Williams Rule evidence pertaining to the murder of Ms. Coryell, because the dissimilarities between the two crimes were pervasive. The motive for the Coryell murder was financial; it was -- according to the prosecutor -- a crime born out of appellant's "downward financial spiral in the summer of 1997", and triggered by a dispute with his roommate over money. The charged homicide of Janice Nugent occurred six months earlier and there was no evidence of any financial motive. Coryell was abducted from her apartment complex parking lot by a virtual stranger; Nugent (as both parties agreed) was killed by someone with whom she had been socializing in her home. Coryell was sexually battered and robbed of her ATM card. There was no evidence of either sexual battery or robbery in the Nugent case; only an after-the-fact taking of answering machine tapes and a portable phone for the apparent purpose of concealing the perpetrator's identity, or possibly his motive. In contrast, there was only one significant or unusual similarity (the bruising to the victims' buttocks, caused by a belt in Coryell's case and consistent with a belt in Nugent's). Several of the other purported

similarities found by the trial court resulted from the prosecutor's improper tactic of taking inconsistent positions regarding appellant's penalty phase testimony in the Coryell trial [Issue II].

The state's circumstantial evidence was insufficient to prove identity [Issue III] or premeditation [Issue IV]. The death sentence was imposed pursuant to a constitutionally invalid statute and procedure, in which the predicate aggravating factors were neither pled in the indictment nor expressly found by the jury [Issue V].

ARGUMENT

ISSUE I

THE TRIAL COURT COMMITTED HARMFUL ERROR IN ALLOWING THE PROSECUTION TO INTRODUCE BEFORE THE JURY A SERIES OF STATEMENTS MADE BY APPELLANT DURING CUSTODIAL INTERROGATION CONCERNING "DWIGHT."

". . . [T]he criminal law departs from the standard of the ordinary in that it requires proof of a particular crime." Jackson v. State, 451 So. 2d 458, 461 (Fla. 1984); Paul v. State, 340 So. 1249, 1250 (Fla. 2d DCA 1976). Where an item of evidence has no relevancy except to show the defendant's bad character or his criminal or violent propensities, it must be excluded. Jackson; Paul; see also Peek v. State, 488 So. 2d 52, 55-56 (Fla. 1986); Hill v. State, 768 So. 2d 518, 520 (Fla. 2d DCA 2000); Delgado v. State, 573 So. 2d 83, 85 (Fla. 2d DCA 1990). The fact that the evidence of other crimes or bad acts comes from prior statements of the defendant does not exempt it from the Williams Rule, but rather makes the

argument for inadmissibility all the more cogent. Delgado v. State, supra, 573 So. 2d at 85, citing Jackson and Green v. State, 190 So. 2d 42, 47 (Fla. 2d DCA 1966).

An admission, like any other evidence, is admissible only if it is relevant to prove a material fact at issue in the charged case. Hoefert v. State, 617 So. 2d 1046, 1050 (Fla. 1993). If an admission is shown to be relevant to the charged offense, then it may be admissible even if it incidentally shows other crimes or wrongs or casts the defendant's character in a bad light [Hoefert, 617 So. 2d at 1050, citing Swafford v. State, 533 So. 2d 270, 275 n. 5 (Fla. 1988)], so long as the prejudicial effect of the evidence does not substantially outweigh its probative value. See Hill v. State, supra, 768 So. 2d at 520. Conversely, when an admission shows only bad character or criminal propensity and is not shown to relate to the charged offense, then it is plainly inadmissible and presumptively harmful. See Jackson, 451 So. 2d at 460-61; Green, 190 So. 2d at 47; Paul, 340 So. 2d at 120; Delgado, 573 So. 2d at 85-86; Hill, 768 So. 2d at 520-21. See also Commonwealth v. Reynolds, 708 NE 2d 658 (Mass. 1999); Snelson v. State, 704 So. 2d 452 (Miss. 1997).[7]

In the instant case, Ray Johnston was on trial for the February 1997 murder of Janice Nugent. During the months after the Nugent homicide no arrest was made. In August 1997, more than six months

---

[7] The standard of review for admissibility of evidence is abuse of discretion, but a trial court's discretion is limited by the rules of evidence. Nardone v. State, 798 So. 2d 870, 874 (Fla. 4th DCA 2001); Taylor v. State, 601 So. 2d 1304, 1305 (Fla. 4th DCA 1992).

after the charged offense, a woman named Leanne Coryell was found murdered and Ray Johnston (who was seen on surveillance videotape using Ms. Coryell's ATM card) was promptly arrested for that crime. During the next two weeks, Ray was interviewed on three separate occasions by Detectives Noblitt and Stanton who were investigating the unsolved homicide of Janice Nugent (10/806-08,812-13,821-22, 828; see 10/776-77,781,787; 3/406).

Throughout all three interrogation sessions, in the face of increasingly accusatory questioning by Detective Noblitt, Ray consistently maintained that he did not kill Janice Nugent, and that he was only in her house on a single occasion -- several weeks prior to her murder -- when he and Janice had returned there after their one and only dinner date.

During the second interview, Ray mentioned to the detectives that he has blackouts and seizures, and "[s]ometimes I get to doing something and doing it and doing it and when it's over I can't remember what I've done" (10/817-18). Detective Stanton asked Ray "Is that what happened with you and Janice?", and Ray adamantly said "No, I did not kill Janice" (10/817-18).

Noblitt continued to tell Ray he didn't believe him, and asked him "Was someone else there with you? Were you there and someone else did this?" Ray said "No, absolutely not" (10/818).

By the time of the third interrogation, the detectives had received DNA test results indicating that Ray's blood was on Ms.

Nugent's bed.[8] The detectives, as they had done in the prior interviews, advised Ray of his constitutional rights and told him they wanted to talk more about Janice Nugent's homicide (10/821-23). Noblitt testified:

> I told him that we executed our search warrant; told him we had only taken a few things; that most of his property was still there, and had some small talk about who was going to pick up whatever remaining property he had. And Mr. Johnston sit there and looked at myself and Detective Stanton and said, "I think I have a problem."

(10/23-24)

This is where the "Dwight" statements came up. Prior to trial, the defense had moved <u>in</u> <u>limine</u> to exclude as irrelevant and incurably prejudicial several statements made by Ray Johnston to Detectives Noblitt and Stanton during interrogation at the Orient Road jail during the weeks after his arrest for the murder of Leanne Coryell (3/406-07). One of these statements was to the effect that Ray has a person living inside him named "Dwight" who is very mean, and you wouldn't believe everything that he (Dwight) has done (3/407; see 2/367). Before Noblitt testified before the jury at trial, a substantial portion of his testimony was proffered to the trial court (10/774-75,776-94). On the subject of "Dwight", Noblitt testified on proffer:

> We began this [the third] interview by sitting down. I told him we had executed a search

---

[8] The serologist's testimony at trial was actually that a DNA mixture consistent with Ray's profile was on an eraser-sized spot on the bed; it was chemically consistent with blood, saliva, or sweat (but not semen) (10/897-98).

> warrant at his residence. We had some minor conversation about the search warrant.

(10/787).

There then followed some conversation about Ray's military service and a possible discrepancy regarding how long he had served (10/787-88). Noblitt continued on proffer:

> After that conversation, Mr. Johnston looked at me and said, "I think I have a problem." And I said, "What kind of problem? I asked you the other day if you had any mental problems," and he only mentioned blackouts and seizures.
>
> He said, "There's another guy that's lives within me and his name if Dwight," and he's been there since he was a child. That Dwight did very bad things. He goes on to explain that this began because he was abused as a child. I guess, I'll go into this for the proffer.
>
> Q. Go ahead.
>
> A. Ever since he was eight or ten years old there was some neighbors or friends of his family named Ms. Emmie Out (phonetic), Mr. Harvin and a lady named Martha Maddux. He had explained that he had gotten in trouble for falsely being accused of chasing this six-year-old child around, that they had beaten him and drug him down the street; said -- he never explained Martha Maddux other than she was the one who delivered his medication with some pharmaceutical company.
>
> He told us that Dwight -- I went on to ask him if he had ever told anyone else about Dwight; in other words, throughout his life. He did name two people. He first said a lady named Tonya Gooding, who is a psychologist. The jury is not here, but that's within the Corrections Department.
>
> I said, "I'll be able to get ahold of her and verify this is an established problem that you have?" He said, "No, I don't think I ever told her." Then he named a lady named Diane

> Pollock, who is a neurologist for Morton Plant Hospital when he had a car wreck. He said he trusted her and he probably told her.
>
> I said, "I'll be able to get ahold of her and verify you've told her about this?" He said, "No, I don't think I ever told her." He then -- he actually sat there and he clenched his fists and kind of sat back in the chair, closed his eyes, clenched his fists until his knuckles turned white, and he made a statement to the effect that "you got to see him, man." I've never seen anybody in this kind of phenomenon before, so I just sat and listened.
>
> Then he made a statement that Dwight was very mean and he would like to cut him out of his body. Then Detective Stanton asked if what occurred was that Dwight was responsible for what occurred. Because he had told us before that sometimes he would get to doing things and he didn't know what he was doing. And he said, no, he didn't kill Janice.

(10/788-90).

The state took the position that the testimony regarding "Dwight" could be introduced as an "implied admission" (10/797-99; see 10/796). Defense counsel pointed out that in the statements Ray "doesn't say Dwight harm[ed] Ms. Nugent and I didn't. That might be construed as an admission. He just says he has these problems. He doesn't connect them in any way to the death of Ms. Nugent" (10/797; see 10/795-97,799-800). Ray's mental condition was not in issue; therefore, defense counsel argued, the "Dwight" statements were irrelevant, prejudicial, and inadmissible (10/795-97,799-800). The trial judge, relying on Swafford v. State, 533 So. 2d 270 (Fla. 1988), overruled the defense's objection (10/801-03).

Before the jury, over numerous renewed defense objections, Noblitt testified that Ray "went on to say that he had another person

living inside him"; that this other person's name was Dwight, and that Dwight had been with him since he was eight or ten years old (10/824).

> Concerning Dwight, he said that Dwight was very mean. He said that, "I got to be cautious." He said that Dwight was very mean. And I questioned him about the fact that Dwight controlled him because I don't know about this area very much.
>
> DEFENSE COUNSEL: Objection, Your Honor.
>
> THE COURT: Overruled. Go ahead.
>
> DETECTIVE NOBLITT: And during this interview Mr. Johnston sat and put his fists together and clenched his fists real tight with his knuckles almost turning white, and leaned back in his chair and kind of closed his eyes, and he made the statement, and I didn't know what he was going to do because I have never experienced this during an interview, but he sat back. So I sat back for maybe ten, fifteen seconds and he said, "You've got to see him, man," and I didn't know where we were going from there.
>
> DEFENSE COUNSEL: Objection, Your Honor.
>
> THE COURT: Don't extrapolate.
>
> DETECTIVE NOBLITT: I apologize. So I sit there kind of hesitant for a couple of minutes, <u>and Detective Stanton actually asked him, "Did Dwight do this? Did Dwight cause Janice to get killed? And he said, "No, definitely not. I did not kill Janice."</u> Later during the interview, made the statement that he wanted to cut Dwight out of himself.

(10/824-25).

Defense counsel again objected (10/826), and moved for a mistrial:

> . . . based on the testimony of the witness regarding Dwight and his associated comments.

> Anything regarding Dwight is improper. It's highly prejudicial and the idea being that the jury is now being asked to speculate that although the witness has acknowledged Mr. Johnston literally denied harming Ms. Nugent, the implication seems to be now, and I'm sure the State will attempt to argue later, that by admitting that Dwight is inside him and he wishes he could cut him out and you wouldn't believe the terrible things Dwight did, that he's really admitting to the homicide of Janice Nugent.

(10/827).

The trial court denied the motion for mistrial. (10/827).

On cross-examination, Detective Noblitt testified as follows:

> Q. At no time did he admit to you that he had killed Janice Nugent?
>
> A. As I testified in this court, I'm going to tell you exactly what he said. <u>Each time we confronted him with that, he denied that he did that</u>.
>
> Q. Or even harmed her in any way, much less killed her?
>
> A. As I testified earlier, we asked him about any altercation or fight and he denied that he had any other altercation or fight other than what he told us about the dinner date.
>
> Q. And including what you say that he allegedly said about this Dwight person, <u>he never tried to say that somebody else, some other person named Dwight harmed Ms. Nugent, did he?</u>
>
> A. <u>I didn't allegedly say it. I'm telling you, this court, that's what he said about Dwight and he did not say Dwight did this</u>.
>
> Q. And you remember this from over three years ago?
>
> A. Yes. It was very unique in my 25-year career. I remember it very well.

(10/830-31).

From the totality of Detective Noblitt's testimony on proffer (10/787-94) and before the jury (10/823-26), it is clear that the vast majority of what Ray stated about Dwight came at the beginning of the third interview, immediately after "some minor conversation" about the search warrant and Ray's military discharge papers (see 10/787-88,791,794,823-24), and before he was confronted with the detectives' less than accurate assertion that they has his blood on Janice Nugent's bed (see 10/787,790-92,794,821,823-26). A few of the later statements regarding Dwight may have been made after the subject of the DNA was brought up, although Noblitt's testimony on proffer appears somewhat confused as to the sequence (see 10/790-94). In his testimony before the jury, however, there is no confusion; Noblitt indicates that virtually the entire conversation about Dwight took place immediately after their "small talk" about the search warrant and who was going to pick up the rest of Ray's property (10/823-25). The one comment which came later in the interview was that he wanted to cut Dwight out of himself (10/825). With regard to Ray's reaction when he was confronted with the purported blood evidence, Noblitt's trial testimony -- on direct examination by the prosecutor -- was as follows:

BY MR. PRUNER:

Q. At some point did you advise Mr. Johnston that you had his DNA in the house?

A. Yes.

Q. And what was his response to that?

A. He adamantly denied that anything occurred within the house. The same story: That he had been there for dinner, that he had left. He talked about the hot wax being poured on him. He ran into the bathroom. He washed it off of his buttocks and his legs and he ran out, leaving his jacket, and maintained that nothing happened between him and Janice other than what he had already told us.

Q. Did he maintain that he had been only there at Janice Nugent's house one time approximately two weeks before the murder?

A. Yes.

10/826).

The trial court's ruling allowing the state to introduce the "Dwight" evidence as an "implied admission" was profoundly prejudicial error, and its harmful effect was subsequently compounded by the prosecutor's use of it in the Williams Rule segment of his case, and in his closing argument. Its inevitable effect on the jury was to suggest that Ray Johnston is violent, dangerous, out-of-control, and possibly crazy, and -- worse yet -- it misleadingly made it appear in this wholly circumstantial murder case that Ray (notwithstanding his repeated assertions of innocence in the face of accusatory interrogation) was somehow tacitly admitting guilt (see 12/1146). In fact, the prosecutor invoked "Dwight" in this way at the very climax of his closing argument:

> That interview concludes. They go back a third time with a DNA result that puts him in the bedroom, a place where he's never admitted he has been and has consistently said he didn't kill her and didn't have sex with her.
>
> And he's confronted with the DNA and his admission is not I killed her, but I got a problem, and he trots out Dwight. He talks

> about how he gets to doing something and doing it and doing it and, man, you wouldn't believe how mean Dwight is.
>
> Why, when confronted with DNA in a room this defendant says he's never been in, did he start talking about Dwight? Because he would not take personal responsibility for the killing of Janice Nugent.
>
> By your verdict in this case, after reviewing the evidence, and I submit to you leading to one and only one conclusion, that this defendant killed Janice Nugent in a premeditated fashion, <u>by your verdict can you place responsibility for Janice Nugent's murder not on the shoulders of Dwight, but on Ray Lamar Johnston</u> who throttled Janice Nugent to death.

(12/1152-53; see also 12/1146).

That, quite simply, is nothing but a gross mischaracterization of his own improperly admitted evidence. Ray, in fact, told the detectives in the <u>second</u> interview (before either DNA or Dwight were ever mentioned by anyone) that he has blackouts and seizures and sometimes he gets to doing something and doing it and when it is over he can't remember what he's done. Detective Stanton asked him if that was what happened with him and Janice, and Ray said "No, I did not kill Janice" (10/817-18). Detective Noblitt said he didn't believe him, and (giving him the perfect opportunity to "trot out Dwight" if that had been his inclination) asked "Was someone else there with you? Were you there and someone else did this?" Ray said "No, absolutely not" (10/818). In the third interview, contrary to the prosecutor's assertions, Ray did <u>not</u> "trot out Dwight" as a response to being confronted with DNA evidence. Detective Noblitt opened the interview with what he described as "minor conversation"

and "small talk" about the search warrant and Ray's military discharge papers (10/787-88,823-24), and <u>that</u> was when Ray said "I think I have a problem" (10/788,823-24). Because Ray had previously mentioned only the blackouts and seizures, Noblitt said "What kind of problem? <u>I asked you the other day if you had any mental problems</u>." (10/788). At that point, Ray began telling them about Dwight and how he'd been with him since he was eight or ten years old (10/788,824). The detectives wanted to know if any doctors or correctional personnel could confirm this history (10/789). Quite properly seeking to clarify where he thought Ray might be going with this, Detective Stanton asked him whether Dwight might have killed Janice Nugent or caused her to get killed. Ray unequivocally answered, "No, definitely not. I did not kill Janice" (10/790,825).

Later, upon being confronted with the DNA spot which the detectives thought was blood, Ray did not "trot out Dwight". To the contrary, as the prosecutor's own direct examination of Detective Noblitt reveals, Ray continued to maintain his innocence; that he had only been in Janice's house on one occasion approximately two weeks before she was murdered, and that nothing had occurred in the house other than what he'd already told them (10/826). As Noblitt bluntly stated on cross, when asked if it were true that Ray had never tried to say that some other person named Dwight harmed Ms. Nugent:

> I didn't allegedly say it. I'm telling you, this court, that's what he said about Dwight <u>and he did not say Dwight did this</u>.

(10/831).

Thus, there was no admission to the charged crime, "implied" or otherwise. Instead, the "Dwight" evidence amounted to just an admission of propensity for bad, violent, and out-of-control behavior, <u>coupled with an express and unequivocal denial of the charged crime</u>.

As defense counsel pointed out in making his objection at trial (10/797), apart from showing Ray's criminal or violent propensities, there is absolutely no factual information contained in the "Dwight" statements which correspond to the known circumstances of the Nugent murder. See <u>Hill v. State</u>, 768 So. 2d 518, 520 (Fla. 2d DCA 2000) (trial judge abused his discretion in admitting evidence where ". . . Ms. Hill's letter is of very questionable relevance. It neither admits she committed any particular crime, nor contains any other fact material to this case"). Based on (1) Ray's express statements that neither he nor Dwight committed the charged crime, and (2) the absence of any nexus between the "Dwight" evidence and the facts of the charged crime, the case relied on by the trial judge in allowing the testimony, <u>Swafford v. State</u>, 533 So. 2d 270, 272-75 (Fla. 1988) is thoroughly distinguishable, as are <u>Hoefert v. State</u>, 617 So. 2d 1046,1047 and 1050 (Fla. 1993), <u>Gore v. State</u>, 599 So. 2d 978, 983 (Fla. 1992), and <u>Waterhouse v. State</u>, 429 So. 2d 301, 306 (Fla. 1983). In each of those cases, the defendant made incriminating statements -- not in the course of custodial interrogation -- which contained sufficient factual information corresponding to the known facts of the charged crime to permit a circumstantial inference that the statements referred to the charged crime. Moreover, in none of

these cases did the defendant immediately, expressly, and unequivocally deny having committed the charged crime.

In the instant case, there is insufficient evidence of a nexus between the "Dwight" statements and the murder of Janice Nugent to permit the jury to draw the inference which the prosecutor urged; i.e., that they were tacit admission of guilt. See Evans v. State, 692 So. 2d 966, 969-70 (Fla. 5th DCA 1997). Rather, they showed only bad character, criminal or violent propensity, and possible craziness, and the judge abused his discretion in allowing these statements to be placed before the jury. See Jackson, 451 So. 2d at 460-61; Green, 190 So. 2d at 47; Paul, 340 So. 2d at 120; Delgado, 573 So. 2d at 85-86; Hill, 768 So. 2d at 520-21.

The erroneous interjection of "Dwight" into this trial was extraordinarily harmful. The circumstantial evidence linking Ray Johnston to the charged murder of Janice Nugent consisted of three or at most five items (depending on whether the shoeprint comparison is deemed to have minimal probative value or none at all). There were two fingerprints matched to Ray and a tiny spot of his DNA from an unidentified body fluid. Of the numerous other fingerprints lifted in the house, five were suitable for comparison and belonged to neither Ray Johnston nor Janice Nugent, and were never matched to anyone. A spot on a table in the guest bedroom was determined to be blood, and its DNA profile matched neither Ray nor Janice. There was a maximum "window period" of 38 hours on February 6-7, 1997, during which the murder of Janice Nugent could have taken place. Ray told the police he was in Janice's house only one time, after their dinner

date (several weeks prior to her murder) when he'd left without his jacket. The state had no witnesses who saw Ray and Janice together at any time after January 15 when, according to Fran Aberle, Janice wordlessly placed his jacket on his chair at Malio's. Thus, the state's entire case against Ray was predicated on persuading the jury that the items of physical evidence could not possibly have survived three weeks in Janice's house, particularly since her daughter described her as a "neat freak". The defense, on the other hand, pointed out that there could easily have been <u>more</u> of his prints or DNA in the house when he was there in January, and that the few items which the prosecution claimed could only have gotten there at the time of the murder were actually all that remained after the approximately three week interval between his visit and Janice's murder.

In Issues III and IV, appellant contends that the state's circumstantial evidence in this case was legally insufficient to prove either identity or premeditation. But even assuming <u>arguendo</u> that the state's case was sufficient to withstand the motions for judgment of acquittal, it was far from overwhelming. Moreover, even if the state's proof had been stronger, that is not the test for whether error in the introduction of evidence may be found harmless. Rather, the burden is on the state, as beneficiary of the error, to prove beyond a reasonable doubt that the error did not contribute to the verdict. <u>State v. DiGuilio</u>, 491 So. 2d 1129, 1135 (Fla. 1986); see also <u>Stoll v. State</u>, 762 So. 2d 870, 877-79 (Fla. 2000). Introduction of irrelevant evidence of other crimes or

bad acts is "presumed harmful error because of the danger that a jury will take the bad character or propensity to crime thus demonstrated as evidence of guilt of the crime charged." Peek v. State, 488 So. 2d 52, 56 (Fla 1986); Delgado v. State, 573 So. 2d 83,86 (Fla. 2d DCA 1990). The harmful effect of the "Dwight" evidence was compounded by the prosecutor's emphasis on it as the climax of his closing argument to the jury (12/1146,1152-53), as well as his inaccurate assertion that Ray "trot[ted] out Dwight" upon being confronted with the DNA evidence. See e.g., Martinez v. State, 761 So. 2d 1074, 1081 (Fla. 2000) (erroneous admission of "opinion of guilt" testimony could not be found harmless beyond reasonable doubt, "especially when it was again highlighted in closing argument"); Rivera v. State, 807 So. 2d 721, 722 (Fla. 3d DCA 2002) (prosecutor's reference in closing argument to officer's inadmissible testimony compounded error); Stoll v. State, supra, 762 So. 2d at 878 (prejudicial effect of improperly admitted evidence "was exacerbated by the State's reliance on this evidence during closing arguments"); Delgado v. State, supra, 573 So. 2d at 85 (prosecutor's closing argument "compounded the likelihood of unfair prejudice").

The prosecutor put one final misleading spin on the "Dwight" evidence which compounded the error still further. See Garcia v. State, 622 So. 2d 1325, 1331 (Fla. 1993) (prosecution may not subvert truth-seeking function of trial by deliberate obfuscation of relevant facts). As explained in undersigned counsel's motion to take judicial notice of the trial and penalty phase transcripts of Ray Johnston's trial for the murder of Leanne Coryell, which was granted

by this Court on July 24, 2002, Ray did not testify in the guilt phase of the Coryell trial, but the state introduced his in-custody exculpatory statements to Detectives Walters and Iverson, as well as considerable other evidence contradicting his statements and -- if believed by the trier of fact -- circumstantially establishing his guilt. The jury found Ray guilty of first degree murder, sexual battery, kidnapping, robbery, and burglary. In the penalty phase of the Coryell case, Ray took the stand as a defense witness and admitted that he had killed Leanne Coryell unintentionally when he grabbed her by the neck after she didn't respond to his offer to help her unload her groceries. When he realized what he'd done, and believing she was dead, he drove her to the church property and -- as a cover-up -- took her clothing off, kicked her in the crotch area, struck her with her belt, and dragged her body into the pond (C18/1710-28). The prosecutor in his cross-examination questioned the veracity of Ray's story (see C18/1729-30). In his closing argument to the jury, the prosecutor aggressively contended that Ray's version of what occurred was unworthy of belief and inconsistent with the state's guilt phase evidence (C18/1772-75).

Thus, in the Coryell trial, Ray's narrative of the events of Leanne Coryell's death was introduced by the defense, and the state clearly took the position that it was false. In the Nugent trial, however, the same prosecutor made a 180 degree turn and presented the same evidence as true (or at least without contesting its truthfulness) for his own purposes. First, he used it to establish what he characterized as similarities between the Coryell and Nugent

killings, in order to persuade the trial judge to rule that evidence of the Coryell murder was admissible under the Williams Rule. [See Issue II]. Secondly (after the judge overruled the defense objections to the Williams Rule evidence), the prosecutor presented -- by having a redacted transcript read to the Nugent guilt phase jury -- Ray's confession to the murder of Leanne Coryell. [In addition to deleting some obviously irrelevant material and references to the prior jury, the prosecutor also edited out the portions of his own cross-examination of appellant in which he had challenged the veracity of appellant's version of the events]. This tactic was, at best, highly questionable and borderline unethical; at worst it was a violation of due process. See State v. Parker, 721 So. 2d 1147, 1150-51 (Fla. 1998). Not only did it thoroughly infect the Williams Rule issue, it also compounded the "Dwight" error, and this is how:

Earlier in the Coryell penalty phase, on the day before Ray took the stand, the defense had called psychiatrist Michael S. Maher as a mental mitigation witness. Dr. Maher concluded that Ray suffers from significant mental illness, related to frontal lobe brain impairment (C17/1594-99). As a consequence:

> . . . [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.

(C17/1599).

In Dr. Maher's opinion, Ray'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 (C17/1603-04). In addition to, and related to, his brain impairment, Ray suffers from a dissociative disorder and from seizure activity (C17/1601-03,1607). 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 (C17/1607). Dr. Maher was of the opinion that the crime in this case was the result of a dissociative episode which was triggered by Ray's approach to and rejection by Leanne Coryell in the apartment complex parking lot (C17/1609).

Dr. Maher testified that after the Coryell jury returned its guilty verdict, Ray admitted to him and to his lawyers that he had killed Leanne Coryell, and told them what happened (C17/1610-14). Prior to that, he had made no direct admissions, but when Dr. Maher first saw him he "expressed a fear that someone who he identified as Dwight being within him had possibly committed this crime" (i.e., the murder of Leanne Coryell) (C17/1612-13)

[Of course, none of the preceding testimony of Dr. Maher was heard by the Nugent guilt phase jury].

On the next day of the Coryell penalty phase, Ray testified on his own behalf, and on cross-examination -- after questioning Ray about his having lied to the media and his own lawyers -- the prosecutor asked:

Q. And you manipulated Dr. Maher by lying to him about this person called "Dwight" that you wanted to place the blame on, didn't you?

A. No, sir.

Q. There's no Dwight living inside you, is there?

A. Well, I don't think -- I don't think it's a multiple, as I've been referred to before. I think it's -- it's me blaming it on something else and then you give it that name, and that's part of it.

Q. So you wouldn't take responsibility personally, right?

A. Yes, sir. So you don't take responsibility; you don't have to answer for it then.

(C18/1742).

The same prosecutor, during the Williams Rule portion of his case in the Nugent trial, took the "Dwight" cross-examination regarding Ray's implied admissions to the murder of Leanne Coryell made to his own confidential expert, and presented it to the Nugent jury telescoped and completely out-of-context:

Q. When she fell, what she hit was the concrete parking space, right?

A. Yes, sir.

Q. There is no Dwight living inside you, is there?

A. I don't think -- I don't think it's a multiple, as I've been referred to before. I think it's me blaming it on something else and then you give it that name and that's part of it.

Q. So you wouldn't take responsibility personally?

> A. Yes, sir, so you don't take the responsibility. You don't have to answer for it then.

(11/1015-16).

The crucial omission, of course, is Dr. Maher. The Nugent guilt phase jury, having heard nothing about Ray's conversation about Dwight with Dr. Maher, could only have assumed (inaccurately) that the cross-examination must be related to the only Dwight testimony they'd heard; i.e., Ray's statements to Detective Noblitt and Stanton. There is a world of difference between the two. Ray's statements to Dr. Maher that he feared that Dwight might have murdered Leanne Coryell are indeed "implied admissions", and they would have been admissible as such <u>in the Coryell guilt phase</u> but for the fact that they were privileged, having been made to a confidential psychiatric expert. In contrast, Ray never expressed a fear to Detectives Noblitt and Stanton that Dwight might possibly have murdered Janice Nugent. He clearly, unequivocally, and repeatedly told them -- in the face of Noblitt's accusatory questioning -- that neither he nor Dwight killed Janice, and that he was only in her house on the one occasion, several weeks before she was killed. Unfortunately, because the Nugent jury knew nothing about what Ray had said <u>to Dr. Maher</u> suggesting that "Dwight" might be responsible for <u>Leanne Coryell's</u> murder, it could only take the out-of-context reference to Dwight which was left in the edited transcript by the prosecutor in the way the prosecutor intended; i.e., as confirmation that appellant's comments <u>to Detective Noblitt</u> about Dwight amounted to an admission that he had killed <u>Janice</u>

Nugent, notwithstanding his unequivocal statements to Noblitt to the contrary (See 12/1146,1153).

The devastating effect, in an otherwise tenuous circumstantial case, of introducing statements which show only bad character, criminal or violent propensity, and mental instability -- and then, through redacted cross-examination from a different trial, putting an out-of-context spin on the statements so as to make it misleadingly appear that the defendant was admitting his guilt of the charged offense -- is manifest. Ray Johnston's conviction for the murder of Janice Nugent must be reversed for a new trial.

ISSUE II

THE TRIAL COURT COMMITTED HARMFUL ERROR IN ALLOWING THE PROSECUTION TO INTRODUCE EVIDENCE PERTAINING TO THE DISSIMILAR MURDER OF LEANNE CORYELL.

Florida's Evidence Code codifies the Williams Rule as follows:

> Similar fact evidence of other crimes, wrongs, or acts is admissible when 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, but it is inadmissible when the evidence is relevant solely to prove bad character or propensity.

Fla. Stat. §90.404(2)(a).

As explained in Garrette v. State, 501 So. 2d 1376, 1378 (Fla. 1st DCA 1987):

> This evidentiary rule has been the subject of numerous appellate decisions emphasizing the dangers of permitting jurors charged with determining guilt or innocence with respect to a particular crime charged to consider the fact that the defendant has committed other, similar

> crimes. Most recently, in Peek v. State, 488 So. 2d 52 (Fla. 1986), our Supreme Court reviewed and quoted extensively from its prior decisions in the cases of Jackson v. State, 451 So. 2d 458 (Fla. 1984); Chandler v. State, 442 So. 2d 171 (Fla. 1983); Drake v. State, 400 So. 2d 1217 (Fla. 1981), and Straight v. State, 397 So. 2d 903 (Fla. 1981), among others, and concluded that collateral crime evidence "is not relevant and admissible merely because it involves the same type of offense." 488 So. 2d at 55. The Peek court reiterated that the improper admission of collateral crime evidence is to be "presumed harmful," and repeated its prior statement that:
>
> > [a] mere general similarity will not render the similar facts legally relevant to show identity. There must be identifiable points of similarity which pervade the compared factual situations. Given sufficient similarity, in order for the similar facts to be relevant, the points of similarity must have some special character or be so unusual as to point to the defendant.
>
> 488 So. 2d at 55.
>
> The court emphasized that in determining whether to admit collateral crime evidence, the trial judge must consider both the similarities and the dissimilarities between the crime charged and the collateral crime.

(Emphasis in opinion).

To minimize the risk of a wrongful conviction, where "similar fact evidence" is offered to prove identity it must meet a strict standard of relevance, and the state -- as proponent of the evidence -- has a "high threshold to meet." Randall v. State, 760 So. 2d 892, 903 (Fla. 2000) (Pariente, J., joined by Anstead, J., concurring), citing Heuring v. State, 513 So. 2d 122, 124 (Fla. 1987). "When the purported relevance of past crimes is to identify the perpetrator of

the crime being tried, we have required a close similarity of facts, a unique or `fingerprint' type of information, for the evidence to be relevant." State v. Savino, 567 So. 2d 892, 894 (Fla. 1990). In cases "where there are both similarities and substantial dissimilarities, then the admission of collateral crime evidence is prejudicial error." Whitehead v. State, 528 So. 2d 945, 946 (Fla. 4th DCA 1988), citing Thompson v. State, 494 So. 2d 203 (Fla. 1986). See also Drake v. State, 400 So. 2d 1217, 1219 (Fla. 1981); Peek v. State, 488 So. 2d 52, 55-56 (Fla. 1986); Davis v. State, 376 So. 2d 1198 (Fla. 2d DCA 1979); Joseph v. State, 447 So. 2d 243, 245-46 (Fla. 3d DCA 1983); Garrette v. State, 501 So. 2d 1376, 1378-79 (Fla. 1st DCA 1987); Bell v. State, 659 So. 2d 1278 (Fla. 4th DCA 1995); Miller v. State, 791 So. 2d 1165, 1169-71 (Fla. 4th DCA 2001). Conversely, where the "similarities are pervasive and the dissimilarities insubstantial", similar fact evidence is admissible. Gore v. State, 599 So. 2d 978, 983-84 (Fla. 1992); see also Crump v. State, 622 So. 2d 963, 967-68 (Fla. 1993); Chandler v. State, 702 So. 2d 186, 191-95 and n.6 (Fla. 1997)].

The standard of review for admissibility of evidence is abuse of discretion, but the trial court's discretion is narrowly limited by the rules of evidence. Nardone v. State, 798 So. 2d 870, 874 (Fla. 4th DCA 2001); Taylor v. State, 601 So. 2d 1304, 1305 (Fla. 4th DCA 1992). In Miller v. State, supra, 791 So. 2d at 1170-71, the similarities were "that the victims were white females, about the same age and height, the incidents occurred late at night in apartment buildings and knives were used as weapons", while "the

`marked dissimilarities' [were] that in one instance the perpetrator hid in the victim's apartment, went to great length to conceal his identity and used a weapon obtained from the victim's apartment and in the other, he used a ruse to gain entry into the apartment, made no attempt to conceal his identity and brought his own weapon." The appellate court held that the trial judge abused his discretion in admitting the collateral crime evidence. The erroneous admission of a substantially dissimilar collateral crime can deny the accused his constitutional right to a fair trial on the charged offense [see Thompson v. State, supra, 494 So. 2d at 204; Madison v. State, 726 So. 2d 835, 836 (Fla. 4th DCA 1999)], and is presumptively harmful. Peek v. State, supra, 488 So. 2d at 56; Gore v. State, 719 So. 2d 1197, 1199 (Fla. 1998); Garrette v. State, supra, 501 So. 2d at 1378; Madison v. State, supra, 726 So. 2d at 836.

In the instant case, in a pretrial Williams Rule hearing, the trial judge asked the prosecutor if he wasn't asking him and the jury to speculate about the Nugent case in order to correlate it to the Coryell case (5/26), and even in his written order allowing the state to rely upon the Williams Rule evidence he noted that several "substantial dissimilarit[ies]" between the two cases were "somewhat troubling" (3/413). On the subject of another important distinction urged by the defense, the trial court listed it both as a similarity and as a dissimilarity. Under the heading of similarities, he wrote:

> Defendant knew both victims prior to the murders (The Defendant dated and/or had a social acquaintance with Nugent. But the Defendant only lived in the same complex as Coryell and had only greeted Coryell).

(3/410-11).

Under the heading of dissimilarities, the trial court wrote:

> During the Coryell trial the State asserted that Defendant did not know Coryell (which creates an issue of fact as to State's assertion in instant case that Defendant knew both victims prior to having killed them). In either event, at best the Defendant only knew Coryell by sight as a neighbor who he greeted on occasion, while he actually socialized with Nugent.

(3/411).

This illustrates a major complication in this case which also affects the "Dwight" and premeditation issues but especially this Williams Rule issue; the inconsistent positions taken by the state in the Coryell trial and the Nugent trial. [See appellant's Motion to Take Judicial Notice, granted by this Court on July 24, 2002].

In the Coryell trial, Ray Johnston was charged by the state with the first degree murder, kidnapping, sexual battery, and robbery of Leanne Coryell, as well as burglary of her automobile (C1/59-70). Ray did not testify in the guilt phase, but the state introduced his in-custody exculpatory statements in which he explained his possession and use of Leanne Coryell's ATM card by telling police that he and Ms. Coryell were friends; she had lent him her card to repay a $1200 loan (C9/556-57; C10/597,604-05). They had gone out to dinner a couple of times, and on August 19, 1997 (the night of her murder) they met at Malio's for drinks and then went to Carabba's for dinner (C9/556-61). Before they separated, Ms. Coryell gave Ray her ATM card and PIN number (C9/556,559). Detective Walters asked Ray "not to be rude or anything, but . . . why would Ms. Coryell date him

when, in fact, she was known to date doctors, in other words, you know, people of influence who had money, well-dressed, et cetera"(C9/570). Ray replied they'd never discussed their employment.

Having introduced these statements, the state spent much of the rest of the trial proving them false. The state introduced evidence showing that Ms. Coryell was still at the orthodontist's office where she worked during the period of time Ray told the detectives she was with him (C8/286-91,309-12; C12/881-83). It introduced financial records of both Ray and Ms. Coryell seeking to persuade the jury that (1) Ray 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. (C11/837-41; C12/906,948-53,969-70.976-77,987-96; C13/1028-42). And the state presented several of Leanne Coryell's friends, who were part of her social circle and knew the men she dated, who testified that they did not know her to go to Malio's and she'd never mentioned anyone named Ray Johnston (C8/293-94,313; C9/403; C12/890-91,898,904-07).

The prosecution also emphasized the financial motivation for the crime. It introduced evidence of a dispute between Ray and his roommate Gary Senchak over an eviction notice for nonpayment of rent, and -- just hours before Leanne Coryell was murdered and robbed -- Senchak had left a note for Ray requesting $163.92, which he claimed was owed for cable and phone bills. When Ray found Senchak's note he wrinkled it up and said "I'm not giving you a damn dime". Ray left

the apartment and when he returned (after abducting, robbing, raping, and killing Ms. Coryell, according to the state's hypothesis), he went into Senchak's room, threw 60 to 65 dollars on the bed, and said "That's all you're getting, you son-of-a-bitch" (C8/356-65,382; C9/412-14). The prosecutor spent the first quarter of his closing argument in the Coryell case contending that "this is a crime born out of desperation. It is born out of desperation of Ray Lamar Johnston and his downward financial spiral in the summer of 1997" (C15/1333, see 1333-45). After the dispute with Gary Senchak came to a head:

> The pressure's mounting on Mr. Johnston at that time. He has nowhere to turn. He has no real estate. He has no one to loan money or borrow money from. He has no stocks. He has no bonds. He has no jewelry. He has nothing he can even pawn.
>
> Where does he turn to? Unfortunately and tragically and violently, <u>he turns to a neighbor he has never met before</u>, a neighbor who he confronts in the apartment complex parking lot, who lives a few hundred feet away: Leanne Coryell. <u>And his desperation is evidence and his motive and the viability of his explanation is evidence when you look at the manner of his ATM card use.</u> He gets $500 out within minutes of her death and then 500 out the next day, but that's not the complete financial picture.

(C15/1339-40).

The Coryell jury found Ray guilty as charged of first degree murder (general verdict), kidnapping, robbery, sexual battery with great force or a deadly weapon, and burglary of a conveyance with an assault (C5/753-54; C15/1415-17).

In the penalty phase of the Coryell case, Ray took the stand as a defense witness and admitted that he killed Leanne Coryell but stated that the killing was not intentional (C18/1710,1712, 1729). He denied raping or abducting her (C18/1718-19,1729-30,1745). Ray acknowledged that the story he'd told the police about how he got the ATM card was a lie; he did not know Leanne Coryell at all except to nod and say hi (C18/1711,1721-23,1731-34). He testified that he had approached her in the parking lot and offered to help her unload her groceries, but she didn't respond. Unable to get her attention, he grabbed her around the neck and next thing he knew her legs gave out and she fell to the ground, hitting her lip and chin. Ray thought her neck was broken and she was dead. Unsure what to do, he thought about taking her up to her apartment, but he didn't know the number or whether she had a security alarm. Instead he put her in her own car and drove to the church property. Still angry -- and wanting to cover himself and make it look like something different and happened -- he took off her clothing, kicked her in the crotch area, struck her with a belt, and dragged her into the pond. He then left the area and returned to his apartment complex, where he washed himself off and showered. He then returned to the scene and took Ms. Coryell's purse out of her car, and that was when he found her ATM card and PIN number (C18/1710-26).

On cross-examination (on the subject of a prior sexual battery in which the victim was not killed), the following exchange took place:

> MR. PRUNER [prosecutor]: And you raped Mr. Reeder just like you raped Leanne Coryell?
>
> RAY JOHNSTON: No, sir. Leanne was not raped.
>
> Q. Please call her Ms. Coryell. <u>You didn't have any relationship with her before that night.</u>
>
> A. No, sir.
>
> Q. <u>There is no reason for you to call her Leanne because you have no familiarity with her outside of this courtroom</u>.
>
> A. Ms. Coryell was not raped.

(C18/1745).

The prosecutor in his cross-examination and especially in his closing statement to the jury, aggressively contended that Ray's version of what occurred was inconsistent with the state's guilt phase evidence and should not be believed (C18/1729-30,1772-75).

Prior to the Nugent trial, the state gave notice of its intent to introduce evidence of the murder, kidnapping, and rape of Ms. Coryell (1/25). The defense moved <u>in</u> <u>limine</u> to exclude this evidence, pointing out a number of significant differences between the two criminal episodes (2/362-63). The state filed a response, to which it attached a copy of Ray's penalty phase testimony in the Coryell penalty phase (2/365-73, see 2/365 n.2, 370,371). After a pre-trial hearing (5/3-30; see also 5/97-116), the trial court entered an order granting the state's motion to rely on Williams Rule evidence (3/409-18). [The defense's objections to the evidence pertaining to the Leanne Coryell murder were renewed many times

during the Nugent trial (8/580-82,612,620-21,653-54,665-70; 11/952-53,956,970-71,980,984-85,995-96,1026-29)].

In his written order the trial judge listed the following similarities:

> Succinctly put, (1) the intended use of water to destroy evidence; (2) the intended use of the victims' apartments (3) both victims had multiple blows from a fist to the head and upper body; (4) the murders involved here were committed eighteen day apart; (5) both victims were single white females with blonde hair and medium build; (6) location of the residences of both victims were known to Defendant; (7) Defendant knew both victims; (8) Both victims were strangled to death in a violent manner and with the use of great force which left multiple areas of dark, widespread contusions on the victims' neck; and (9) patterned Bruises on Buttocks which the medical examiner will testify were consistent with a belt, which was the weapon used on Coryell.

(3/414, see 409-11).

Of these findings, number 4 is factually wrong (the murders were separated by more than six months), number 7 is much more of a dissimilarity than a similarity under the evidence in the two trials, number 6 is of little significance, and numbers 3, 5, and 8 are general similarities common to many crimes [see Drake v. State, 400 So. 2d 1217, 1219 (Fla. 1981); Miller v. State, 791 So. 2d 1165, 1170 (Fla. 4th DCA 2001)]. Numbers 1 and 2 are discussed infra. Only number 9 constitutes an unusual similarity for Williams Rule purposes. As will be shown, this one similarity, alone or in combination with the other eight general, misleading, or nonexistent ones, pales in comparison with the pervasive dissimilarities.

In comparing the two cases, the problem is which version of the Coryell homicide do you use? If it is the version which the state relied on during the Coryell trial, then the dissimilarities are immediately apparent. First, as asserted by the prosecutor, the Coryell murder was a crime motivated by money; a "crime born out of . . . desperation of Ray Lamar Johnston and his downward financial spiral in the summer of 1997." Leanne Coryell was robbed of her ATM card and forced to provide her PIN number (see C15/1358-59). The murder of Janice Nugent occurred in <u>February</u> 1997; there was no evidence of any downward spiral or any financial motivation for the crime. Other than the answering machine tapes and a portable phone with caller ID attached, there is no evidence that anything was taken from Janice Nugent or from her residence.[9] Leanne Coryell was forcibly abducted as she was unloading groceries from her car in the parking lot of her apartment complex. She was taken in her own car to a more secluded outdoor location, where she was forced to disrobe (see C18/1775). Janice Nugent, in contrast, was in her own house, apparently drinking wine and having a conversation with a person whom

---

[9] Both parties agreed that the person who killed Janice Nugent (whether it was Ray Johnston as the state claimed or someone else as the defense claimed) knew Janice, and took these items either to avoid being connected as a possible suspect or because they contained incriminating information (12/1123-24; 1158-59,1199-1200,1204). These items were never recovered, and were never linked to Ray. There was no evidence at trial that Ray had ever called Janice (though there was testimony that she had called him) and -- as defense counsel pointed out -- no evidence that he knew she saved her answering machine tapes, or knew where she kept them (12/1199-1200,1204). See Issue III, <u>infra</u>. In any event, whoever took the tapes and the phone clearly took them to avoid detection for the murder, not as a "financial motive" for committing it. See 11/1087-90; 12/1100-07).

she knew, and who was there by her invitation. The lights in the living room were on dimmer switches, and were all turned down very low (7/435). Her massage table was out in the living room, unfolded.

According to the state's theory (and the jury's guilty verdict) in the Coryell trial, Leanne Coryell was sexually assaulted (see C15/1361; C18/1774-75). Her body was found nude and there was external and internal vaginal trauma (C10/652-54,672-76,688). In the Nugent case, Janice Nugent's body was clothed in panties and a bra (which is consistent with having had, or preparing to have, consensual sex; or with giving a massage to a male companion; or with having spilled wine on her shorts, see 12/1125); there was no evidence of vaginal trauma, and no semen found in the swabs taken at the autopsy or on any of the bedsheets. The last important distinction between the two cases is that Ray Johnston knew 47 year old Janice Nugent; he had talked and danced with her at Malio's, he had gone out with her on one occasion and had been invited back to her house, where it was she who came on a little too strong. As corroborated by the testimony of state witness Fran Aberle, Janice was trying to pursue a relationship with Ray but Ray was not interested in her. Leanne Coryell had just turned 30, she was 5'11" tall, strikingly beautiful (see C14/1231-32; State Exhs. 7 (Coryell trial) and 57 (Nugent trial)), and in the expressed opinion of Detective Walters, way out of Ray Johnston's league. She was known to date doctors and men with money and influence. The state spent a great deal of time and effort in the Coryell trial proving that Ray did not know her (and Ray ultimately admitted this was true, except

maybe to nod and say hi). As the prosecutor put it in his closing argument, Ray -- in his financial straits -- "turns to a neighbor he has never met before, a neighbor he confronts in the apartment complex parking lot, who lives a few hundred feet away: Leanne Lynn Coryell" (C15/1340).

To summarize, in the Coryell homicide (1) the triggering motive for the crime was financial, (2) Ray didn't know her, (3) she was accosted in the parking lot beside her car; (4) she was kidnapped and transported to a more secluded location, where (5) she was robbed, and (6) she was raped. None of these factors applies to the Nugent homicide. These dissimilarities are neither "insubstantial" nor mere "differences in the opportunities with which [the perpetrator] was presented" [see Gore v. State, supra, 599 So. 2d at 984; Chandler v. State, supra, 702 So. 2d at 194 and n.6]. Rather, they are basic and pervasive differences in the nature of the crimes themselves. See Thompson; Drake; Miller; Whitehead; Garrette; Joseph.

If, on the other hand, instead of using the version of the Coryell homicide which the state relied on in the Coryell trial, you use the version which it presented in the Nugent trial (i.e., Ray's confession), then several of the dissimilarities appear to drop away, since Ray testified that he did not kidnap, rob, or rape Coryell. Unfortunately for the state, that version also tends to undermine its one significant similarity -- the patterned bruises consistent with a belt on each victim's buttocks -- since Ray testified that Coryell was already dead when those injuries were inflicted. While it is certainly true that the state introduced evidence in the guilt phase

of the Coryell trial inconsistent with Ray's version, and while it is true that Ray was found guilty of kidnapping, robbing, and raping Coryell and burglarizing her car, this simply illustrates the impropriety of allowing the state to use an inconsistent version of the events for Williams Rule purposes. In the Coryell trial the evidence of financial motivation, robbery, kidnapping, and rape suited the state's goal of securing convictions on all five counts. In the Nugent trial these factors no longer suited the state's purposes because they showed how extremely different the two crimes were. As a result, you get the prosecutor in the pre-trial Williams Rule hearing using what he believed to be false testimony (but which he would later introduce) to try to blur the differences:

> Of course, you can pick apart crimes and say it's dissimilar in this regard. There was no ATM machine. There was no proof of sexual battery, to wit: Insertion of the penis or object in a vagina.
>
> But on that note, when this defendant took the stand in his penalty phase, he denied that there was a sexual battery. He indicated laceration to the vagina of Ms. Coryell occurred to make it look like something other than what it was. He kicked the victim in the vagina after she was already dead.
>
> So whether there was or was not a sexual battery does not make this not Williams Rule evidence. That was poorly worded, but I think you understand my point.[10]

---

[10] Similarly, in denying the defense's renewed motion for mistrial based on the Williams Rule evidence, when defense counsel pointed out as one of the many differences that Coryell was the victim of a sexual battery while Nugent was not, the trial judge replied:

(continued...)

(5/28-29)

Undersigned counsel therefore submits that, in addition to the Williams Rule error as a matter of Florida evidentiary law, it was also a violation of due process for the state -- having attacked a critical piece of defense testimony as false and unworthy of belief in Trial A (Coryell) -- to then turn around and introduce the same testimony as state evidence in Trial B (Nugent) and use its content to assert similarities and try to rebut dissimilarities in its effort to prove identity through collateral crimes. See State v. Parker, 721 So. 2d 1147, 1149-51 (Fla. 1998).

Returning to the nine similarities enumerated by the trial judge, the first and second of these are "(1) the intended use of water to destroy evidence; (2) the intended use of the victims' apartments" (3/414). In the Nugent case, while the state and the defense disagreed on the identity of the perpetrator, both sides agreed that there was no forceful or surreptitious entry; whoever killed Janice Nugent knew her and was in her home by invitation. Her body was found in her bathtub, submerged in water and covered by a bed comforter. Leanne Coryell was either killed in the parking lot

---

[10](...continued)

> Let me comment on that because the testimony of the medical examiner was that there was evidence of sexual battery. The testimony from Mr. Johnston, which was read into the record, indicates that he used a portion of his foot and kicks her in that area, that it was not sexual battery. He denied sexual battery. So although this argument -- what I'm saying is there are arguments on both sides of that.

(11/1027).

of her apartment complex (if Ray's penalty phase testimony is believed), or abducted from there (if the state's theory in the Coryell trial is believed). Her body was found in a pond. The source of the findings regarding the purported similarities of intended use of water to destroy evidence and intended use of the victims' apartments is Ray's testimony in which he acknowledged that he knew that chlorinated water or water in general can destroy trace evidence (11/1014; C18/1735-36). [This statement was made in the context of cross-examination regarding his having washed off his legs and shoes in the apartment complex swimming pool, not in connection with Ms. Coryell's body being found in the pond (11/1014; C18/ 1735-36)]. In his order allowing the state to introduce Williams Rule evidence, the trial court plainly relied on Ray's penalty phase testimony from the Coryell trial to turn a non-similarity into a "profound" similarity:

> a. Both bodies were submerged in shallow water after death. This may not in and of itself be a valid similarity. Coryell was dumped in a pond, face down, while Nugent was dumped in a bathtub of running water. The fact that both bodies of water (the pond and the bathtub), were shallow does not create a similarity. However, during the penalty phase of the Coryell murder case the Defendant testified. The Defendant testified that he originally wanted to take the body up to the victim's apartment, but was scared that she had some type of alarm system. Additionally, the Defendant testified that he submerged the Coryell body in the pond because he thought the water would destroy evidence. Hence, the use of water in both instances (and the Defendant wanting to use the Coryell's apartment, but not having the opportunity) with the Defendant's stated belief that water would destroy evidence makes the similarities between the two cases

profound. See transcript of proceedings of June 17, 1999 at pages 6 and 7 and pages 28 and 29.

(3/410).

The purported "similarity" of "intended use of water to destroy evidence" is based on mistaken facts and flawed reasoning. Contrary to the trial court's finding, Ray never said he put Coryell's body in the pond to destroy evidence; rather, he stated that he washed off his legs and shoes in the swimming pool knowing that <u>that</u> would destroy evidence (11/1014; C18/1735-36). Since pretty much everyone over the age of ten with an ounce of common sense knows that, it is not a "similarity" from which Ray's identity as the perpetrator of the earlier Nugent homicide can properly be inferred. Moreover, such an inference would be based on nothing more than speculation. All we know about the placement of Janice Nugent's body is that she was found submerged in her own bathtub; we do not know why. Ray Johnston's awareness (shared with most of us) that water will destroy evidence is not a "similarity" to the Coryell case unless you <u>begin with the assumption</u> that Ray was the individual who put Nugent in the tub. In other words, the prosecution is using circular logic; it is <u>assuming</u> Ray's identity as the killer of Janice Nugent in order to establish a predicate for the introduction of the Coryell murder, ostensibly for the purpose of <u>proving</u> Ray's identity as the killer of Janice Nugent. In contrast, the proper use of Williams Rule evidence to prove identity is when the <u>known</u> circumstances of two crimes are so uniquely similar that it can reasonably be inferred that the

person who committed the collateral crime must also have committed the charged crime.

As far as the "intended use of the victims' apartments" or residences, Ray testified in the Coryell penalty phase that after he thought he'd broken Ms. Coryell's neck in the parking lot and she was dead, "I didn't know what to do. I was going to first take her up to her apartment . . .", but he didn't know the number or whether she had a security device, so instead he put her in her own car and drove to the church property (11/1000; C18/1713). Consequently, the <u>only</u> evidence which might support a Williams Rule similarity of intended use of both victims' residences rests on the assumption that Ray's version of the Coryell homicide was accurate. If, on the other hand -- as the state contended in the Coryell trial -- Ray, motivated by financial desperation, forcibly abducted Leanne Coryell from the parking lot and drove her to the church property where he sexually assaulted, beat, and robbed her, and then strangled her to death, then there was no evidence of "intended use of [her] apartment" and no Williams Rule similarity. Moreover, there is no evidence of any "intended use" of Janice Nugent's house. Whoever killed her was socializing with her <u>in</u> her house -- there is no evidence of any preexisting motive or intent to kill -- and we don't know what happened between them other than it resulted in her homicide.

Since the crimes occurred more than six months apart in a large metropolitan area, that is not a similarity. Since Ray knew Janice Nugent but did not know Leanne Coryell, that is not a similarity. The fact that Nugent and Coryell were both "single white females with

blonde hair and medium build" is at best a general or commonplace similarity. See Thompson v. State, supra, 494 So. 2d at 204; Miller v. State, supra, 791 So. 2d at 1170. Moreover, there is a significant disparity between their ages; Nugent was 47 while Coryell had just turned 30, much closer in age to Nugent's daughter who was 27 or 28 in 1997 (7/440-41). Coryell was a very tall woman, an inch under six feet, and she weighed 138 pounds (11/990). The state (which, as proponent of the Williams Rule evidence, has the burden of establishing pervasive similarities) provided no evidence that Nugent had a comparable build.[11]

The facts that Nugent and Coryell were both killed by manual strangulation and that they both sustained multiple blows to the head and upper body are not unique or even unusual. A quick review of Florida published opinions (which excludes most negotiated plea cases and all PCAs) suggests that strangulation homicides are often -- maybe even usually -- accompanied by beatings and/or blunt trauma injuries.[12] Moreover, in Nugent's case Dr. Martin testified that the

---

[11] The only indication in the record of Janice Nugent's height and weight is contained in a pro se post-trial motion filed by appellant, in which he states that she was 5'4" and 142 pounds (4/647). Undersigned counsel acknowledges that this representation (apparently gleaned from discovery materials) is not evidence. However, the state presented no evidence on this point either.

[12] See, e.g., Randall v. State, 760 So. 2d 892, 895 (Fla. 2000); Mansfield v. State, 758 So. 2d 636, 645 (Fla. 2000); Green v. State, 715 So. 2d 940, 941 (Fla. 1998); Hoskins v. State, 702 So. 2d 202, 204 (Fla. 1997); Willacy v. State, 696 So. 2d 693 (Fla. 1997); Branch v. State, 685 So. 2d 1250 (Fla. 1996); Orme v. State, 677 So. 2d 258, 260 (Fla. 1996); Taylor v. State, 630 So. 2d 1038, 1043 (Fla. 1993); Happ v. State, 596 So. 2d 991, 992 (Fla. 1992); Savage v. State, 588 So. 2d 975, 977 (Fla. 1991); Hill v. State, 549 So. 2d

(continued...)

multiple deep bruising and fingertip contusions to the neck, combined with the absence of petechial hemorrhages, led her to believe that this was not a constant, continuous compression but rather it "was more of a manual throttling . . . meaning, it was more pressure, release, pressure, release. There was some fighting activity" (8/631,646). In contrast, Dr. Vega found petechiae in the eyes and inside the eyelids of Leanne Coryell, which is more consistent with pressure having been applied continuously, and less consistent with compression and release (11/991-92). Nugent had defensive injuries on her hands and forearm (8/634-35); Coryell did not. Nugent's facial injuries were more extensive than Coryell's (see 8/622-26; 11/985). All of this is consistent with the differing nature of the two crimes; Coryell was abducted by a stranger for financial and sexual motivations and -- as the prosecutor argued -- was under her killer's control throughout (C15/1358-61). Nugent was in her own house socializing with someone she knew (see 12/1123-25), and the evidence is entirely consistent with an argument culminating in an unplanned rage killing.

Undersigned counsel will concede that of the nine points of comparison relied on by the trial judge, one -- the patterned bruises

---

[12](...continued)
179, 180-81 (Fla. 1984); Perry v. State, 522 So. 2d 817,, 819 (Fla. 1988); Brown v. State, 473 So. 2d 1260, 1269 (Fla. 1985); Hardwick v. State, 461 So. 2d 79, 80 (Fla. 1984); Stewart v. State, 420 So. 2d 862, 863 (Fla. 1982); Quince v. State, 414 So. 2d 185, 187 (Fla. 1982); Porter v. State, 400 So. 2d 5, 6 (Fla. 1981); Pollard v. State, 780 So. 2d 1015, 1016 (Fla. 4th DCA 2001); Bradford v. State, 460 So. 2d 926, 927 (Fla. 2d DCA 1984); Harrington v. State, 455 So. 2d 1317 (Fla. 2d DCA 1984).

on the victims' buttocks -- does constitute an unusual similarity, if not quite a "fingerprint". In Coryell's case, Dr. Vega was able to conclude, by comparing certain markings in the pattern injuries with the oval-shaped appliques on the victim's belt which was found at the scene, that at least some of her bruises were made by that particular belt (11/986-87,992-93). In Nugent's case, Dr. Martin was only able to express the opinion that there was a reasonable medical probability (defined as 51% or better) that some of her injuries were caused by a belt (5/115-116; 8/576-82,637-39; see 3/427-39; 5/97-114). Photographs of both victims' injuries show that the rest of Coryell's injuries are much deeper and darker (purple, almost black) than those of Nugent (see 11/987; compare St. Exh. 61 with St. Exhs. 45 and 46; see also St. Exhs. 98 and 103 from the Coryell trial). Notwithstanding these distinctions, undersigned counsel agrees that the presence of bruising on the buttocks consistent with a belt is a significant similarity, but it is not nearly enough to overcome the pervasive dissimilarities between the two crimes. <u>Thompson</u>; <u>Drake</u>; <u>Peek</u>; <u>Miller</u>; <u>Bell</u>; <u>Whitehead</u>; <u>Garrette</u>; <u>Joseph</u>; <u>Davis</u>. Erroneously admitted collateral crime evidence is presumptively harmful [<u>Peek</u>; <u>Garrette</u>; <u>Madison</u>], and all the more so when (1) the collateral crime is another murder, (2) the evidence linking the defendant to the <u>charged</u> murder is entirely circumstantial and far from overwhelming, and (3) the evidence of the collateral murder is capable of evoking (and does evoke) an emotional response from the jurors.[13]

---

[13] The trial judge noted the reaction of one of the jurors to (continued...)

Appellant's conviction for the murder of Janice Nugent must be reversed for a new trial.

ISSUE III

THE CIRCUMSTANTIAL EVIDENCE PRESENTED BY THE STATE WAS INSUFFICIENT TO PROVE IDENTITY.

A person accused of a crime is presumed innocent unless and until proved guilty beyond and to the exclusion of a reasonable doubt. "It is the responsibility of the State to carry this burden. When the State relies upon purely circumstantial evidence to convict an accused, we have always required that such evidence must not only be consistent with the defendant's guilt but it must also be inconsistent with any reasonable hypothesis of innocence." Cox v. State, 555 So. 2d 352,353 (Fla. 1989), quoting Davis v. State, 90 So. 2d 629, 631 (Fla. 1956); McArthur v. State, 351 So. 2d 972 (Fla. 1977).

> Circumstantial evidence must lead "to a reasonable and moral certainty that the accused and no one else committed the offense charged." Hall v. State, 90 Fla. 719, 720, 107 So. 246, 247 (1925). Circumstances that create nothing more than a strong suspicion that the defendant committed the crime are not sufficient to support a conviction. Williams v. State, 143 So. 2d 484 (Fla. 1962); Davis; Mayo v. State, 71 So. 2d 899 (Fla. 1954).

---

[13](...continued)
the photograph of Leanne Coryell's nude body in the pond (11/980). See Henry v. State, 574 So. 2d 73, 75 (Fla. 1991) ("Indeed, it is likely that the photograph [of collateral crime victim] alone was so inflammatory that it could have unfairly prejudiced the jury against Henry").

Cox v. State, supra, 555 So. 2d at 353.

See also Long v. State, 689 So. 2d 1055, 1057-58 (Fla. 1977); Jaramillo v. State, 417 So. 2d 257 (Fla. 1982).[14]

In the instant case, the circumstantial evidence in its totality raises more questions than it answers as to who killed Janice Nugent. It is undisputed that Ray Johnston knew Janice and that he was in her house, at her invitation, after a dinner date approximately three weeks prior to her February 6 or 7, 1997 murder. He maintained that he was never in her house at any other time, and that he did not kill Janice. There was no testimony that anyone ever saw Ray and Janice together at any time after January 15, when state witness Fran Aberle saw Janice leave Malio's and return with Ray's jacket, which she placed on the back of his chair. Ron Pliego was in Janice's house for an hour or so on the night of February 5-6; they had sex and Pliego said he left around 1:00 a.m. Between 8:30 and 9:30 on the morning of the 6th, Janice called in sick to work. Her body was found around 11:00 p.m. on the following night of the 7th, so (according to the associate medical examiner's estimations, see 8/594,640-41) there was a 38 hour period during which the homicide may have occurred.

Apart from Williams Rule and "Dwight", the circumstantial evidence relied on by the state to prove that Ray Johnston was the person who killed Janice Nugent consisted of three, or at most five,

---

[14] In reviewing a motion for judgment of acquittal, the standard of review is de novo. Pagan v. State, __So. 2d __ (Fla. 2002) [27 FLW 299, 301].

items. There were two fingerprints matched to Ray; one on the right (cold water) turn knob of the bathtub, the other on the bottom of a plastic cup or tumbler underneath the kitchen table. There was a stain the size of a pencil eraser on a bedsheet which contained a mixture of Ray's DNA and Janice's DNA. The DNA which matched Ray's profile was from an unidentified body fluid; it could have been blood, sweat, saliva, or mucus, but it was chemically inconsistent with semen. Finally, there were two partial (i.e., 25% or less of the sole surface) shoe impressions on the kitchen floor which were consistent in their general class characteristics with a Reebok tennis shoe (the left one) obtained during a search of Ray's apartment six months after Janice Nugent was murdered. There was no evidence that Ray owned those shoes in February of 1997. The shoe impressions contained no individual characteristics, and the expert was unable to make an identification; the most he could say was he couldn't exclude it. He acknowledged that while you can clearly see the word "Reebok" on the sole of the shoe, you cannot see any part of the word "Reebok" in the scale photo of the shoeprint; this is because "that part wasn't recorded", but only the outside of the sole is recorded in the shoe impression. In fact, only 25% or less of the sole of whatever shoe made it can be seen in the photograph of the shoe impression. If he had had the entire sole, the expert agreed, he might have been able to come back with a stronger opinion (10/768-71).

From the photographs the expert was able to discern a total of nine partial shoe tracks, representing five different tread designs,

on the kitchen floor. None of these appeared to match the right Reebok seized from Ray's apartment, and none of the other four tread designs were ever matched to any source or possible source. The expert stated that there is no scientific way to determine the age of a shoe impression (10/772).

Likewise, as acknowledged by the state's latent print examiner and forensic serologist, there is no scientific way to tell how long a fingerprint or a DNA stain has been on a particular surface (9/688,714; 10/896-97). Therefore, the state's entire case against Ray was predicated on persuading the jury that the two prints and the stain could not possibly have survived three weeks in Janice's house, particularly in view of her daughter's testimony that she was a "neat freak" who bathed twice daily and habitually mopped her kitchen floor every week. The defense, on the other hand, pointed out that there could easily have been <u>more</u> of his prints or DNA in the house when he was there in January, and that the few items which the prosecution claimed could only have gotten there at the time of the murder were actually all that remained after the interval between his visit and Janice's murder. (See 12/1178-79, 1187-88,1190-93). Moreover, whatever probative force the "habit" evidence might have is diminished by the fact that the state presented no evidence that Janice Nugent was even at home during much of that interval.[15] It is

---

[15] Janice Nugent lived alone and had no pets (7/430). Her daughter Kelli visited with her children "almost every other weekend" and her last visit was a week and a half to two weeks prior to Janice's murder (7/443,448-49). The weekend before that Janice was at a religious retreat (7/449). The evidence does not indicate (continued...)

the responsibility of the state to carry the burden of proving guilt to the exclusion of a reasonable doubt [Cox], and while it is ordinarily assumed that people are at home except when they're not, a murder conviction cannot be based on assumptions. See Arant v. State, 256 So. 2d 515, 516 (Fla. 1st DCA 1972); A.V.P. v. State, 307 So. 2d 468, 469 (Fla. 1st DCA 1975) ("guilt cannot rest on mere probabilities").

> Where fingerprint evidence found at the scene is relied upon to establish identity, the evidence must be such that the print could have been made only when the crime was committed. Tirko v. State, 138 So. 2d 388, 389 (Fla. 3d DCA 1962). Tirko was relied on by this court in Knight v. State, 294 So. 2d 387, 389 (Fla. 4th DCA), cert.denied, 303 So. 2d 29 (Fla. 1974); see also Williams v. State, 247 So. 2d 425, 426 (Fla. 1971) (fingerprint evidence showed only that defendant had been at crime scene, not when he was there). If the state fails to show that the fingerprints could only have been made at the time the crime was committed, the defendant is entitled to a judgment of acquittal. Sorey v. State, 419 So. 2d 810, 812 (Fla. 3d DCA 1982); State v. Hayes, 333 So. 2d 51, 54 (Fla. 4th DCA 1976).

C.E. v. State, 665 So. 2d 1097, 1098 (Fla. 4th DCA 1996) (emphasis in opinion).

See also Jaramillo v. State, 417 So. 2d 257 (Fla. 1982); Shores v. State, 756 So. 2d 114 (Fla. 4th DCA 2000); Chavez v. State, 702 So. 2d 1307 (Fla. 2d DCA 1997); Tanksley v. State, 332 So. 2d 76

---

[15](...continued)
whether Janice was at home during the remainder of the time period. She could have been on vacation or visiting relatives. She was dating a man named Harry (see 7/452; 9/682,684-85); she could have been staying with him. In any event, the state has the burden of establishing that Janice was at home during all or most of the time period in order for its habit evidence to have much significance.

(Fla. 2d DCA 1976); A.V.P. v. State, 307 So. 2d 468 (Fla. 1st DCA 1975); Arant v. State, 256 So. 2d 515 (Fla. 1st DCA 1972); Rhoden v. State, 227 So. 2d 349, 351 (Fla. 1st DCA 1969).

A total of 166 latent fingerprints were lifted from various locations in Nugent's house (7/525-26; 8/533-34,537,544; see 12/1177, 1202). Twenty-six were of comparison value (9/685-86,713). Nineteen of these matched Janice Nugent's known prints, two matched Ray Johnston's, and five were never identified (9/713). One of the unidentified prints was on top of the dresser in the master bedroom, and another was on a pill bottle on the end table in the master bedroom, beside the broken lamp which -- according to the state's hypothesis -- was overturned during the struggle between Janice and her killer (9/713-14; see State Exh. 32; 7/484, 503,508; 12/1125-26, 1179-80). The two prints which, in the examiner's opinion, matched Ray Johnston's right index finger and left thumb respectively, were located on the bottom of the plastic cup under the kitchen table and on the right turn knob of the bathtub (9/686-88). Other fingerprints were lifted from the bathtub knobs and the faucet, but none of these were suitable for comparison (9/709). Of the various latent prints captured from the phone and answering machine, the VCR remote, and the set of keys in the door, none were suitable for comparison purposes (9/710-11).

Was it proved beyond a reasonable doubt that Ray's two prints could only have been made at the time of Janice's murder, or does the evidence leave open the reasonable possibility that those two prints could have been all that remained from Ray's visit three or more

weeks earlier? Of the two prints, the one on the bathtub knob is in a much more incriminating location. The prosecutor argued that common sense would tell you that the reason Ray's print was of comparison value was because he was the last person to touch the knob; otherwise it would have been smeared or obliterated (see 12/1138-39). But that argument makes sense only if you assume that anyone else who used the bathtub gripped the knob in the same place. See Chavez v. State, supra, 702 So. 2d at 1308. Nobody turns on a faucet using only their left thumb. If Ray, as he said, took a shower at Janice's house three weeks earlier, it is likely that he gripped the knob with all five fingers, and that four of the resulting fingerprints were later smeared or obliterated. Regardless of how many baths Janice may have taken in the next three weeks, if her usual or most comfortable grip was different from Ray's she may very well not have smeared his thumbprint.

Another aspect worth pointing out is the state's theory that the reason Janice's body was submerged in the bathtub was to destroy trace evidence (see 12/1130-31). It seems reasonable that a killer who was consciously making an effort to leave no incriminating evidence -- going to the extent of lifting a body into a bathtub and running the water -- would be aware that turning the knobs might leave fingerprints, and he would wipe them off. In this case -- as the prosecutor himself pointed out to the jury -- there was a washcloth hanging right on the bathtub faucet (7/480; 12/1129). Yet the killer, whoever he may have been, obviously did not wipe off either the faucet or the knobs, since seven prints were lifted from

the cold water knob, six from the hot water knob, and two from the faucet (8/53940,549-50). One possibility, as the state will argue, is nobody ever said criminals were smart. But it is also very possible, in light of Dr. Martin's testimony that Janice Nugent's assailant may or may not have been wearing gloves (8/642-44), that he felt no need to wipe off the knobs or faucet because he knew he wasn't leaving any prints.

Similarly, one fingerprint on the bottom of the plastic cup in the kitchen matched Ray's right index finger. Unless you're trying to spin it like a basketball, nobody holds a cup that way. Crime scene technician Joan Green lifted eight different latent prints from the bottom of the cup, but apparently none from the circular outer sides of the cup (see 8/538,548,559-60). This would seem to suggest that the cup probably had been washed or rinsed out, but not the bottom part. Therefore, if Ray had a drink of water when he was there several weeks earlier, his prints likely would have been on the sides of the cup where you grip it; not just the bottom. If somebody else used the cup later and rinsed it, any prints (Ray's and any subsequent users') would have been washed off the sides but not necessarily off the bottom. Moreover, the cup was not shown to have any connection to the murder, nor even to the wine Janice and whoever was with her were drinking that evening, since the crime scene detective did not observe any liquid or any of the purple stains either in the cup or in its immediate area (7/472,506; see 12/1202-03).

Lastly, the eraser-sized stain on the bedsheet does not prove that Ray Johnston killed Janice Nugent or that he was there at the time of her murder. The portion of the stain which was attributable to Ray could have been any body fluid except semen; it could have been blood, sweat, saliva, or mucus. Ray's portion and Janice's portion did not have to have gotten there simultaneously (and the state offered no plausible explanation of how they would have gotten there simultaneously). The stains on the sheet which were identified as blood were consistent with Janice and inconsistent with Ray (10/887,895-96); these were all toward the middle of the sheet and close to one another (10/895). The mixture stain was off to itself, near the edge of the sheet (10/895-96). There is no evidence that Janice's killer sustained any injuries which would have caused him to bleed. However, since the medical examiner testified that there was fighting activity (see 8/631) it is possible that he did. But then (assuming arguendo that Ray was the perpetrator) what are the odds that only a single drop of his blood (or sweat or saliva) would have been spilled, and that it would land on the sheet -- away from all the other bloodstains -- in exactly the same spot as a single drop of Janice's blood. In other words, if Ray's DNA got there during the murder, it would seem like there should have been more of it. On the other hand, another possible explanation for the eraser-sized mixture stain is that at one time there was more of Ray's DNA on the sheet, overlapping with (but not necessarily coextensive with) an area of Janice's body fluids (such as sweat or menstrual blood) which were either already there or got there later, and the tiny "mixture stain"

is what remained after washing. The state's serologist testified that if DNA is on a sheet or an article of clothing, it can remain even after the item has been washed (10/897). The state's population geneticist said "it depends on the nature of the cleaning. . . . [I]f the cleaning is well done, the stain is gone. If it wasn't well done it may not be" (11/932-33,947-48).

The state will contend that it proved that Ray's unidentified body fluid could not have gotten on the sheet during his visit to Janice's house after their dinner date because he told Detective Noblitt that he was only in certain rooms in the house and the bedroom was not among them. First of all, the sheet did not necessarily have to have been on the bed on that evening three or more weeks prior to the murder. It could have been in a laundry basket or pile in the living room or the storage room, or it could have been folded on the couch or in a closet. It could have been on the massage table. Secondly, Ray also told Detective Noblitt that Janice showed him a videotape in which she was narrating her belief in ghosts. [Noblitt confirmed the existence of such a videotape; the police recovered it from Janice's house long before Ray became a suspect]. At the time of Janice's murder, the only VCR in the house was in the master bedroom (7/504-05; St. Exh. 36). Therefore, while it is conceivable that Janice used to have two VCRs and got rid of one, or that she moved the one she had, it is at least equally reasonable to conclude that Ray must have been in the bedroom when Janice showed him the videotape (see 12/1194-95), and that he either forgot this seemingly unimportant fact in the seven months between

the dinner date and his interrogation, or else Noblitt's recollection of all of the details mentioned in the three interview sessions may have been less than perfect.

The circumstantial evidence was consistent with the reasonable possibility that someone other than Ray Johnston murdered Janice Nugent in the following ways: (1) the 38 hour window period in which the murder could have occurred; (2) the fact that Ms. Nugent was not necessarily averse -- as illustrated by the testimony of state witness Ron Pliego -- to inviting men into her home; (3) the fact -- brought forth in the testimony of state witness Fran Aberle -- that her conduct with men she met at Malio's might have made her some enemies (see 9/726-31; 12/1158-59, 1200,1204); (4) the presence of at least four other tread designs in the shoe impressions on her kitchen floor; (5) the presence of a spot on a glass and chrome table in the guest bedroom which <u>was</u> identified as blood, and its DNA profile did not match either Janice or Ray (10/746,903-04; see 12/1164,1181), and (6) the presence of five fingerprints (one of which was on the pill bottle next to the overturned lamp in the master bedroom, another on the top of the dresser) which were of comparison value but were never identified (9/713-14; see St. Exh. 32; 7/484,503,508; 12/1179-80). A seventh important consideration is the fact that Ray was never linked in any way with the answering machine tapes or the portable telephone which were missing from Janice's house. The prosecutor argued that the taking of these items was proof that Janice was killed by someone she knew (12/1123-25). Defense counsel agreed with the prosecutor that the evidence showed "[t]hat the person that killed Janice Nugent

knew her and was invited to her home" (12/1199). Defense counsel made the further point that it was probably somebody who knew Janice well, better than Ray Johnston:

> How would they know to remove the tapes from the drawer? How would they know they were in the drawers? In other words the house wasn't ransacked. You can see that for yourself . . . . Someone didn't pull the house apart looking for those tapes. They knew right where to go.

(12/1199-1200, see 1204).

The tapes and phone were never recovered, and never connected to Ray Johnston. The state presented no evidence that he had ever even called Janice. [Fran Aberle testified that Ray told her and Scott Bowles that Janice was calling him to go out, but he didn't want anything further to do with her (9/725,730)]. There was no evidence that Ray knew that she saved her answering machine tapes, much less that he knew where she stored them. No fingerprints matching Ray were found anywhere in the bedroom, but there were two fingerprints of comparison value which belonged to someone else, and were never identified. We have no idea what may have been on those tapes -- whether they provided someone with a motive for murder, or whether they were simply taken in an after-the-fact effort to avoid detection. Either way, there is no evidence that Ray Johnston knew about the tapes or that he took the tapes.

"Circumstances that create nothing more than a strong suspicion that a defendant committed the crime are not sufficient to support a conviction." <u>Cox v. State</u>, 555 So. 2d 352, 353 (Fla. 1989); see <u>Long</u>

v. State, 689 So. 2d 1055, 1058 (Fla. 1997). Accordingly, this murder conviction cannot stand.

ISSUE IV

THE CIRCUMSTANTIAL EVIDENCE PRESENTED BY THE STATE IS INSUFFICIENT TO PROVE PREMEDITATION.

[Since this Point on Appeal only comes into play in the event that this Court rejects appellant's first three issues, undersigned counsel will assume without conceding -- for the purposes of this issue only -- that the evidence established that appellant committed the homicide and that the Williams Rule and "Dwight" evidence was properly admitted].

Premeditation is the essential element which distinguishes first degree from second degree murder. Coolen v. State, 696 So. 2d 738, 741 (Fla. 1997). Under Florida law, premeditation means "a fully formed and conscious purpose to take human life, formed upon reflection and deliberation, entertained in the mind before and at the time of the homicide." Spinkellink v. State, 313 So. 2d 666, 670 (Fla. 1975), quoting McCutcheon v. State, 96 So. 2d 152, 153 (Fla. 1957). See also Wilson v. State, 493 So. 2d 1019, 1021 (Fla. 1986); Tien Wang v. State, 426 So. 2d 1004, 1005 (Fla. 3d DCA 1983). Reflection is an integral requirement for premeditation. Waters v. State, 486 So. 2d 614, 615 (Fla. 5th DCA 1986). And, as this Court explained in Coolen:

> While premeditation may be proven by circumstantial evidence, the evidence relied upon by the State must be inconsistent with every other reasonable inference. Hoefert v.

> State, 617 So. 2d 1046 (Fla. 1993). Where the State's proof fails to exclude a reasonable hypothesis that the homicide occurred other than by premeditated design, a verdict of first-degree murder cannot be sustained. Hall v. State, 403 So. 2d 1319 (Fla. 1981).

See also Kirkland v. State, 684 So. 2d 732, 734-35 (Fla. 1996); Mungin v. State, 689 So. 2d 1026, 1029 (Fla. 1995); Norton v. State, 709 So. 2d 87, 92-93 (Fla. 1997); Green v. State, 715 So. 2d 940, 943-44 (Fla. 1998); Randall v. State, 760 So. 2d 892, 901-02 Fla. 2000); Carpenter v. State, 785 So. 2d 1182, 1196-97 (Fla. 2001); Olsen v. State, 751 So. 2d 108, 110-11 (Fla. 2d DCA 2000).

The standard of review is de novo. Pagan v. State, __So. 2d__ (Fla. 2002) [27 FLW S299,301].

Here, at the close of the state's case, the defense renewed its motion for mistrial based on the Williams Rule evidence (11/1026-29), and moved for judgment of acquittal on the grounds that the circumstantial evidence was insufficient to prove identity (11/1029-37; 12/1117-18) or to establish premeditation (11/1037-53; 12/1117-18). The trial judge said, "I have a problem with the premeditation aspect, especially when you look at some of the Supreme Court cases that have come out recently" (11/1054). The judge ("thinking out loud. Maybe I shouldn't do that. It's dangerous") also noted that:

> [t]he problem with the [state's] argument is, it is almost two sided. There is two possible interpretations from this set of facts, which if that is true, then the circumstantial evidence does not disprove negligent homicide or second degree murder.

(11/1065).

The prosecutor's response was to argue that, in addition to the act of strangulation itself, you could look to the Williams Rule evidence to determine whether there was preparation and planning (11/1054,1056,1065). The judge reserved ruling, and eventually (just before the beginning of the penalty phase) denied the motion for JOA on the issue of premeditation (12/1099,1108-09,1118,1244; 13/1292).

This was error. There was no evidence in this trial to prove that the killing occurred from "a fully formed and conscious purpose to take human life, formed upon reflection and deliberation", and the Williams Rule evidence which the state presented suggests, if anything, a lack of preparation and planning.

The state put on no evidence that the collateral murder of Leanne Coryell was premeditated. Detective Willette testified that his investigation indicated that Coryell was forcibly abducted from her apartment complex parking lot, that she was robbed of her ATM card, and that there was evidence of a sexual battery (11/976-77) (none of which established that Coryell's murder was premeditated, and -- in any event -- none of which were shown to have occurred in the charged murder of Janice Nugent). Dr. Vega testified that the cause of Coryell's death was strangulation -- most likely manual strangulation -- and that she had injuries to her neck, chin, vagina, and buttocks. At least some of the injuries to her buttocks were inflicted with her belt and its oval-shaped appliques. Lastly, the state presented Ray Johnston's testimony from the penalty phase of the Coryell trial, in which he admitted that he killed Leanne Coryell but denied raping or abducting her. He testified that he had

approached her in the parking lot and offered to help her unload her groceries, but she didn't respond. Unable to get her attention, he grabbed her around the neck and next thing he knew her legs gave out and she fell to the ground, hitting her lip and chin. Ray thought her neck was broken and she was dead. Unsure what to do, he put her in her own car and drove to the church property. Still angry -- and wanting to cover himself and make it look like something different had happened -- he took off her clothing, kicked her in the crotch area, struck her with a belt, and dragged her into the pond. He then left the area and returned to his apartment complex, where he washed himself off and showered. He then returned to the scene and took Ms. Coryell's purse out of her car, and that was when he found her ATM card and PIN number (C18/1710-26).

Ray's testimony -- introduced by the state -- shows a homicide committed <u>without</u> reflection or deliberation, and without a fully formed and conscious purpose to take human life; i.e., a second degree murder. [Ray's Coryell penalty phase testimony also included the following piece of cross-examination by the prosecutor, which he edited out of the transcript which was read to the Nugent jury: "Q. And all you've told this jury is what we already know: That you killed Leanne Coryell, right? A. Yes, sir. Q. You're telling this jury, however, you didn't premeditate her killing, aren't you? A. Yes, sir; I did not." (C18/1729; see 11/1011-16)]. Detective Willette's testimony, conclusory though it was, might be said to contradict Ray as to whether there was a kidnapping, robbery, or sexual battery (none of which has any applicability to the Nugent

case), but neither Willette's testimony nor Dr. Vega's established that the murder of Coryell was premeditated. Therefore, if you look, as the prosecutor urged, to the Williams Rule evidence pertaining to the Coryell homicide to determine whether there was preparation and planning in the Nugent homicide which occurred more than six months earlier, the state comes up empty.

Another aspect of the state's evidence (also introduced over defense objection) which tends to indicate a lack of premeditation is Detective Noblitt's testimony regarding his second interview with Ray. This is when Ray mentioned to the detectives that he has blackouts and seizures; "[s]ometimes I get to doing something and doing it and doing it and when it's over I can't remember what I've done" (10/817-18). Asked if that is what happened with him and Janice, Ray replied, "No, I did not kill Janice" (10/817-18). Assuming, however, that the evidence was sufficient to prove Ray's guilt, and that his statements concerning his blackouts and seizures and his inability to stop his actions once they get started were properly introduced, then these statements suggest that he acted without reflection and deliberation, and without a fully formed conscious purpose to kill.

A homicide by manual strangulation, which occurs during fighting activity and under unexplained circumstances, does not necessarily establish premeditation; it could be equally consistent with an unpremeditated "depraved mind" second-degree murder. See Green v. State, 715 So. 2d 940 (Fla. 1998). As the Supreme Court of

Washington recognized in State v. Bingham, 719 P. 2d 109, 113 (Wash. 1986):

> . . . to allow a finding of premeditation only because the act takes an appreciable amount of time obliterates the distinction between first and second degree murder. Having the opportunity to deliberate is not evidence the defendant did deliberate, which is necessary for a finding of premeditation. Otherwise, any form of killing which took more than a moment could result in a finding of premeditation, without some additional evidence showing reflection.

In the instant case, there was no evidence of a preconceived plan.[16] There were no prior statements or indications of an intent to kill.[17] No steps were taken to procure a weapon.[18] There were no witnesses to the events immediately preceding the homicide.[19] The indications of struggle and fighting activity are consistent with a killing committed with a depraved mind but without premeditation.[20] The state's circumstantial evidence in this case falls far short of

---

[16] See Norton, 709 So. 2d at 93; Green, 715 So. 2d at 944.

[17] See Kirkland, 684 So. 2d at 735; Mungin, 689 So. 2d at 1029; Randall, 760 So. 2d at 902; Olsen, 751 So. 2d at 111.

[18] See Kirkland, 684 So. 2d at 735; Norton, 709 So. 2d at 93; Green, 715 So. 2d at 944; Olsen, 751 So. 2d at 111.

[19] See Kirkland, 684 So. 2d at 735; Mungin, 689 So. 2d at 1029; Norton, 709 So. 2d at 92; Green, 715 So. 2d 944; Olsen, 751 So. 2d at 111.

[20] A rage is inconsistent with premeditation. Mitchell v. State, 527 So. 2d 177, 182 (Fla. 1988). Contrast Gore v. State, 784 So. 2d 418, 429 (Fla. 2001) ("the evidence suggests that Gore acted with deliberation by removing the victims from their vehicles prior to stabbing them. Further, there was no evidence that any of the victims resisted or struggled with Gore, an indication that Gore acted calmly and with deliberation).

proving premeditation beyond a reasonable doubt. Accordingly -- in the event that this appeal does not result in a new trial or discharge for the reasons shown in the first three issues -- appellant's conviction must be reduced to second degree murder and his death sentence vacated.

ISSUE V

FLORIDA'S DEATH PENALTY STATUTE, AND THE PROCEDURE BY WHICH APPELLANT WAS SENTENCED TO DEATH, ARE CONSTITUTIONALLY INVALID.

In light of the constitutional principles set forth in Apprendi v. New Jersey, 530 U.S. 227 (1999) and applied to capital sentencing in Ring v. Arizona, No. 01-488, 2002 WL 1357257 (U.S. June 24, 2002) [15 FLW Fed S464a], Florida's death penalty statute is constitutionally invalid. Under Florida's system, the statutory aggravating factors function as the equivalent of "elements" of the death penalty which determine whether death is a permissible sentence, and which are then weighed against the statutory and nonstatutory mitigating factors to determine whether death is the appropriate sentence. "Ring requires that the jury, as the finder of fact, find the aggravators beyond a reasonable doubt." Bottoson v. Moore, __So. 2d __ (Fla. 2002) [27 FLW S647, 649] (Pariente, J., concurring). Moreover, Apprendi requires that the aggravating sentencing factors must be pled in the charging document. Florida's capital sentencing law fails to comply with either of these constitutional requirements. The facial constitutional invalidity of

the statutory procedure under which appellant was sentenced to death may properly be challenged on appeal even without an objection below. See Trushin v. State, 425 So. 2d 1126, 1129-30 (Fla. 1983); State v. Johnson, 616 So. 2d 1, 3-4 (Fla. 1993). In the instant case, however, the defense made numerous pre-trial and pre-penalty phase objections on Apprendi grounds (see 1/158-64; 2/260-61,354-59,402-03,484-94; 15/1539,1612-24; 20/2366-67; 23/ 2646-65). Since no aggravating factors were alleged in the indictment nor expressly found by the jury in this case, appellant's death sentence cannot constitutionally be upheld.

CONCLUSION

Based on the foregoing, appellant respectfully requests that this Court reverse his conviction for a new trial [Issues I and II], or for discharge [Issue III], or reduce it to second degree murder [Issue IV]. For all of these reasons, and those asserted in Issue V, appellant requests that his death sentence be vacated.

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 September, 2002.

CERTIFICATION OF FONT SIZE

I hereby certify that this document was generated by computer using Wordperfect 5.1 format with Courier 12 Point Font. The Office of the Public Defender, Tenth Judicial Circuit, is currently in the process of converting from Wordperfect 5.1 format to Microsoft Word format in order to comply with Rule 9.210(a)(2), since Courier New 12 Point Font is not available in Wordperfect 5.1. As soon as this upgrade is completed, Courier New 12 Point Font will be the standard font size used in all documents submitted by undersigned. This document substantially complies with the technical requirements of Rule 9.210(a)(2) and complies with the intent of said rule.

Respectfully submitted,

____

JAMES MARION MOORMAN
Public Defender
Tenth Judicial Circuit
(863) 534-4200

STEVEN L. BOLOTIN
Assistant Public Defender
Florida Bar Number O236365
P. O. Box 9000 - Drawer PD
Bartow, FL 33831

SLB/ddj