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Ray Lamar Johnston v. State of Florida

CHIEF JUSTICE: GOOD MORNING. IF COUNSELL READY, YOU MAY PROCEED.

MAY IT PLEASE THE COURT. I AM STEVE BOLOTIN OF THE PUBLIC DEFENDER'S OFFICE IN BARTOW AND I REPRESENT THE APPELLANT RAY JOHNSTON -- THE AND I REPRESENT THE APPELLANT, RAY JOHNSTON. RAY JOHNSTON WAS TESTED FOR THE COREAL MURDER. HE WAS, DURING THE WEEKS FOLLOWING, INVESTIGATED WITH REGARD TO A HOMICIDE COMMITTED SOME SIX MONTHS EARLIER INVOLVING JANIS NUGENT. DURING THE COURSE OF THOSE INTERROGATIONS, RAY JOHNSTON MADE SOME STATEMENTS CONCERNING THE BASIS OF IMPLIED ADMISSIONS USED IN HIS MURDER TRIAL. THAT, ALONG WITH THE WILLIAMS RULE EVIDENCE REGARDING THE LEANNE COREAL MURDER, ARE WHAT WAS FINDED ON APPEAL. IF IT WAS FOUND THAT THE JUDGE VIOLATED THE WILLIAMS RULE EVIDENCE, DOES THE DWIGHT ARGUMENT STAND ALONE? IN OTHER WORDS ISN'T THAT TIED TOGETHER WITH THE COREAL MURDER?

IT IS RELATED TO THE COREAL MURDER, BUT IT WAS INTRODUCED OUT OF CONTEXT. IN OTHER WORDS, THE PROBLEM HERE WAS THAT RAY JOHNSTON DID MAKE STATEMENTS INVOLVING DWIGHT, THAT COULD BE CONSTRUED AS IMPLIED ADMISSION TO SAY THE COREAL MURDER. IN OTHER WORDS, HE MADE STATEMENTS TO HIS OWN CONFIDENTIAL EXPERT, DR. MAHAR, TO THE EFFECT THAT HE WAS CONCERNED THAT HE WAS CONCERNED THAT DWIGHT MIGHT HAVE COMMITTED THE MURDER OF LEANNE COREAL. THOSE PROBABLY WOULD HAVE BEEN IMPLIED ADMISSIONS AND ADMITTED IN THE TRIAL FOR THE COREAL MURDER, BUT FOR THE FACT THAT THEY WERE ADMITTED TO HIS OWN EXPERT AND THUS WERE PRIVILEGED, SO THERE WAS NO ATTEMPT TO EVEN TRY TO INTRODUCE THE EVIDENCE IN THE GUILT PHASE.

SO YOUR STATEMENTS ABOUT DWIGHT, I MEAN THE STATEMENTS THAT YOU ARE CONCERNED CONCERNING DWIGHT, ARE NOT THE ACTUAL STATEMENTS THAT WERE MADE IN THIS CASE? BECAUSE IN THIS CASE, I AM HAVING A PROBLEM TRYING TO FIGURE OUT WHAT IMPLIED ADMISSION WAS THERE IN THE STATEMENTS THAT WERE MADE ABOUT DWIGHT IN THIS CASE.

THAT IS EXACTLY THE PROBLEM. THEY WERE NOT IMPLIED ADMISSION INS THIS CASE.

COULD YOU DEFINE WHAT YOU MEAN BY ADMISSION, UNDER THE RULE?

ADMISSION WOULD BE A STATEMENT IN WHICH THE PERSON EITHER EXPRESSLY ADMITS HAVING COMMITTED THE CRIME OR THAT CIRCUMSTANTIALALLY CAN BE TAKEN AS AN ADMISSION, IN VIEW OF CORRELATION, LET'S SAY, OF THE FACTS CONTAINED WITHIN THE SO-CALLED ADMISSION, CORRESPONDING WITH THE FACTS OF THE ALLEGED CASE, AND THAT WOULD --

HOW WOULD YOU RESPOND TO EARHART, IN HIS BOOK ON EVIDENCE, SAYS THE COMMON NAME OF MISCONCEPTION MAY BE MISLEADING, SINCE THERE IS NO REQUIREMENT THAT THE ADVERSARY ADMIT ANYTHING IN THE STATEMENT. A MORE RESIZE TERM FOR THE STATEMENT IS -- A MORE PRECISE SIZE TERM FOR -- A MORE PRECISE TERM FOR THE STATEMENT IS IT DOES NOT HAVE TO BE AN ADMISSION.

IT DOES HAVE TO BE RELEVANT.

TRUE.

AND HERE THE PROBLEM IS THAT THE STATEMENT IS HIGHLY PREJUDICIAL BUT NOT RELEVANT.

WHY DON'T YOU TELL US JUST WHAT EXACTLY THESE STATEMENTS WERE AND IN WHAT CONTEXT THEY WERE OFFERED, SO WE CAN --

AGAIN, AS I HAVE SAID, THERE WERE STATEMENTS MADE TO THE CONFIDENTIAL EXPERT TO THE EFFECT THAT DWIGHT MAY HAVE KILLED COREAL -- KILLED COREAL, AND THE SHOES THAT WERE USED IN BOTH INSTANCES, ON THE DAY BEFORE RAY JOHNSTON'S ARREST, THERE WAS A PERIOD OF SEVERAL WEEKS AFTER HIS ARREST, WHEN CNOBLETT AND STAND ONE -- AND STANTON ARE INTERVIEWING HIM WITH REGARD TO THE MURDER CASE. THE SECOND OFFICER ASKED RAY IF HE HAD ANY MENTAL PROBLEMS, AND RAY HAD MADE A STATEMENT TO THE EFFECT OF THAT HE BLACKOUTS AND SEIZURES, WHICH THAT, BY THE WAY, IS TRUE, BASED ON THE EVIDENCE IN THE PENALTY PHASE, AND THE MEDICAL HELP THAT HE HAS SOUGHT DURING THAT PERIOD OF TIME FOR BLACKOUTS AND SAYS YOURS, BUT HE SPONED THAT, YES -- AND SEIZURES, BUT HE RESPONDED THAT, YES, HE HAS BLACKOUTS AND PROCEDURES AND SOMETIMES HE GETS TO DOING SOMETHING AND DOING IT AND DOING IT AND WHEN IT IS OVER, HE DOESN'T KNOW WHAT HE HAS DONE, AND HE WAS ASKED BY NOBLETT AND STANTON IS THAT WHAT HAPPENED WHEN YOU KILLED JANIS? AND HIS ANSWER WAS, NO, I DID NOT KILL JANIS.

WHAT WAS THE EVIDENCE THAT THEY HAD AND DID THAT DISCLOSE ANY OF THAT OTHER EVIDENCE TO HIM?

AT THE TIME OF THE FIRST INTERVIEW, THEY DIDN'T REALLY HAVE MUCH OF ANYTHING. AT THE TIME OF THE SECOND INTERVIEW, THEY HAD A FINGERPRINT WHICH WAS LOCATED, THE THUMBPRINT THAT WAS LOCATED ON THE BOTTOM OF THE COLD WATER KNOB OF THE BATHTUB. TEST THIRD INTERVIEW, THEY HAD THE DNA SPOT, WHICH THEY MISCHARACTERIZEED AS HAVING BEEN A SPOT OF RAISED BLOOD FOUND ON THE BEDSHEET, WHEN IN FACT THE POINT OF EVIDENCE THE WAY IT CAME OUT, IT COULD HAVE BEEN ANYTHING OTHER THAN SEMEN T COULD HAVE BEEN BLOOD, MUCUS, SWEAT, SALIVA, IT COULD HAVE BEEN ANYTHING, BUT IT WAS INCONSISTENT WITH BEING SEMEN.

DID YOU DISCLOSE THIS TO HIM IN THE SECOND INTERROGATION?

IN THE SECOND INTERROGATION, THEY DISCLOSED THE FINGERPRINT ALTHOUGH THEY DIDN'T SAY EXACTLY WHERE IT WAS FOUND. THEY JUST SAID IT WAS FOUND IN A PLACE THAT IS INCONSISTENT WITH WHAT YOU ARE TELLING US. WHEN THEY EXPOSED THE DNA, THEY INCORRECTLY SAID WE FOUND YOUR BLOOD, A DNA BLOOD SPOT, I DON'T THINK THEY SAID WHERE THEY FOUND THE DNA BLOOD SPOT.

THEY SAID DNA.

AND INTERESTINGLY HERE, PART OF WHAT THE PROSECUTOR DID, IN HIS ARGUMENT FOR ADMISSIBILITY AND HIS ARGUMENT TO THE JURY, HE SAID OKAY, WHY IS IT THAT WHEN THE OFFICERS CONFRONTED HIM WITH THE DNA SPOT, WHY DOES HE TRY TO OUT DWIGHT? HE IS TRYING TO "OUT" DWIGHT, BECAUSE HE IS PUTTING THE BLAME ON DWIGHT FOR THE MURDER. THAT IS WRONG.

TELL US WHAT HAPPENED WHEN THEY DISCLOSED THESE THINGS TO HIM THAT SUGGESTED THAT HE WASN'T TELLING EVERYTHING TO THEM.

EVERY TIME THEY DISCLOSED TO HIM A PIECE OF EVIDENCE AND SUGGESTED TO HIM IN THIS INCREASINGLY ACCUSATORY MANNER THEY DIDN'T BELIEVE HE WAS TELLING THEM, HIS RESPONSE WAS TO INSIST THAT HE DID NOT KILL JANIS AND HE WAS NEVER IN HER HOUSE AT ANY TIME OTHER THAN THEIR DINNER DATE THREE WEEKS PRIOR TO THE MURDER.

THIS DWIGHT THING.

I WANT TO MAKE CLEAR THAT THE DWIGHT THING, CONTRARY TO WHAT THE PROSECUTOR REPRESENTED TO THE JURY AND JUDGE, IN ARGUMENT FOR ADMISSIBILITY, THE DWIGHT THING WAS NOT MADE IN CONFRONTATION WITH THE DNA. THE RESPONSE TO THE DNA WAS I WASN'T THERE. I DIDN'T DO IT. THE INFORMATION ON DWIGHT DNA CAME OUT IN THE SECOND INTERVIEW, WHEN HE WAS ASKED IF HE HAD ANY MENTAL PROBLEMS AND HE TALKED ABOUT THE BLACKOUTS AND SEIZURES AND HE DID NOT MENTION DWIGHT AT THAT POINT IN THE THIRD INTERVIEW, CHARACTERIZED AS THE SMALL TALK THAT THEY HAD EXECUTED ANOTHER SEARCH WARRANT THERE, IS NO EVIDENCE IN EITHER TRIAL THAT ANYTHING OF SIGNIFICANCE WAS SEIZED AT THE TIME OF THAT SEARCH, BUT THEY MENTIONED THAT THEY HAD EXECUTED ANOTHER SEARCH WARRANT THAT, THEY HAD TAKEN JUST A FEW THINGS. THERE WAS TALK ABOUT WHO WAS GOING TO PICK UP THE REST OF HIS THINGS, AND THERE WAS SOME DISCREPANCY IN HIS MILITARY RECORDS THAT THEY TALKED ABOUT. AT THAT POINT, RAY SAID I THINK I HAVE A PROBLEM AND NOBODY LET SAID WHAT KIND OF PROBLEM. I ASKED YOU LAST TIME IF YOU HAD ANY MENTAL PROBLEMS AND ALL YOU MENTIONED WAS BLACKOUTS AND SEIZURES. THAT IS WHEN HE STARTS MENTIONING DWIGHT, AND HE HAS GOT THIS PERSON IN DWIGHT THAT HE SAID HAD BEEN WITH HIM SINCE HE WAS EIGHT OR TEN YEARS OLD. YOU WOULDN'T BELIEVE THE THINGS THAT HE HAS DONE AND I WOULD LIKE TO CUT HIM OUT OF MYSELF. I THINK THE "CUT HIM OUT OF MYSELF" STATEMENT WAS MADE A LITTLE BIT LOWER. -- A LITTLE BIT LATER. AT THAT POINT --

ARE THESE STATEMENTS THE STATEMENTS THAT WE ARE ACTUALLY TALKING ABOUT? I AM NOT SURE IF WE ARE TALKING ABOUT THOSE STATEMENTS OR STATEMENTS FROM THE COREAL.

INITIALLY YOU ARE TALKING ABOUT BOTH. INITIALLY WHAT WAS INTRODUCED WAS I HAVE GOT DWIGHT IN HAD ME. HE HAS BEEN WITH ME SINCE I WAS EIGHT OR TEN YEARS OLD. THE THINGS HE HAS DONE, YOU WOULD NOT BE LEEST. I WOULD LIKE TO CUT HIM OUT.

HOW -- WOULD NOT BELIEVE. I WOULD LIKE TO CUT HIM OUT.

HOW WOULD THAT BE CREDSNIBL.

THEY WERE STATEMENTS MADE AS IF THEY WERE HARMLESS BUT THEY WEREN'T. THE PROBLEM WAS COMPOUNDED --

THE STATEMENT STARTS OUT WITH A STATEMENT OF "I THINK I HAVE A PROBLEM". ISN'T THAT WHAT THE STATEMENT WAS? I THINK I HAVE A PROBLEM.

IN THE THIRD INTERVIEW,ING IT WAS.

IF THEY HAVE NOW, AND YOU HAVE TO HELP WAS THE SEQUENCE HERE, BUT IF THEY SAY, NOW IN ADDITION TO WHAT WE HAVE TOLD YOU BEFORE, WE ADD THE DNA AND FINGERPRINT AND WHATEVER, NOW WE HAVE EXECUTED ANOTHER SEARCH WARRANT, ALL RIGHT, AND HE SAYS, OF HIS THINGS, OF HIS PLACE, AND NOW HE SAYS, NOW I THINK I HAVE A PROBLEM, ALL RIGHT, NOW, WHY ISN'T THAT SORT OF THE BEGINNING OF A, WELL, YOU KNOW, NOW MAYBE YOU HAVE GOT ME?

TWO REASONS. FIRST OF ALL, BECAUSE THE DNA STATEMENT WAS MADE AFTER DWIGHT NOT BEFORE. HE WAS NOT CONFRONTED WITH THE DNA STATEMENT UNTIL AFTER THE DWIGHT STATEMENTS WERE MADE. HE WAS NOT CONFRONTED WITH ANYTHING INCRIMINATING FROM THE SECOND SEARCH WARRANT. IT WAS CHARACTERIZED BY NOBODY LET, HIMSELF, AS -- BY NOBLETT AS SMALL TALK AND WAS REFERRED TO BY NOBLETT AS, YOU WERE TELLING ME BEFORE ABOUT YOU HAD BLACKOUT PROBLEMS AND MENTAL PROBLEMS. THERE WAS TWO SITUATION THAT IS DISTINGUISHED THE STAFFORD PROBLEM AND ALSO THOSE WHICH THE TRIAL

COURT RELIED UPON AND ALSO DISTINGUISHES GORE AND HOLFERT AND WATERHOUSE. NUMBER ONE, THOSE WERE NOT MADE DURING CUSTODIAL INTERROGATION. THAT IS THE LEAST IMPORTANT OF THE THREE. NUMBER TWO IS THE FACT THAT, IN ALL FOUR OF THOSE CASES, THERE WERE DETAILS IN THE STATEMENTS WHICH TENDED TO CORRESPOND WITH FACTS OF THE CASE, SO THAT THERE WAS A FACTUAL NEXUS BETWEEN THE STATEMENTS THAT WERE ADMITTED AND THE FACTS OF THE CASE THAT IT WAS BEING USED TO. THEN THE THIRD AND MOST IMPORTANT FACTOR IS NONE OF THOSE OTHER FOUR CASES, WAS THERE AN IMMEDIATE EXPRESS, UNEQUIVOCAL DENIAL. IN OTHER WORDS, DETECTIVE STANTON, VERY PROPERLY, WHEN HE SAW WHERE THIS WAS GOING, YOU KNOW, YOU ARE BRINGING UP, YOU ARE TELLING ME THAT YOU HAVE GOT A PROBLEM. YOU ARE TELLING ME ABOUT DWIGHT. I HAVE NEVER SEE -- I HAVE NEVER SEEN THIS BEFORE. THE DETECTIVE SAID, WERE THROUGH AND DID DWIGHT KILL JANIS? EVERY TIME HE IS ASKED THAT, IMMEDIATELY AND UNEQUIVOCALLY, HE SAID NO, I DID NOT DO THIS. NO, I DID NOT KILL JANIS.

WHY WOULDN'T THAT BE IN THE CONTEXT OF THE FINDER OF FACT THAT, IT GOES TO THE EVALUATING OF THE STATEMENTS.

IT MIGHT BE, IN OTHER WORDS, IF THERE WAS AN ADDITION COUPLED WITH A LATER DENIAL, THEN MAYBE IT WOULD BE CONTEXT. WHAT WE HAVE HERE IS NO ADMISSION FOLLOWED BY DENIAL.

YOU DON'T BELIEVE THAT HIM SAYING TO THE OFFICERS IN THE CONTEXT IT WAS PRESENTED HERE, I THINK I HAVE A PROBLEM OR NOW I THINK I HAVE A PROBLEM, COULD BE CONSTRUED VIA FACT FINDER, AND THEN THE CONTEXT OF ALL OF THIS, IS I HAVE A PROBLEM, NOW MAYBE YOU HAVE GOT SOMETHING.

NOT, IT COULD NOT PROPERLY BE CONSTRUED AS THAT, PARTICULARLY IN LIGHT OF THE FACT, AND I HAVE TO KEEP GOING BACK TO THIS, IT WAS NOT MADE IN RESPONSE TO AN ACCUSATION. IT WAS NOT MADE IN RESPONSE TO HIS BEING CONFRONTED WITH ANY INCRIMINATING OR WHAT WAS PURPORTED TO BE INCRIMINATING EVIDENCE, AND IN FACT --

I AM HAVING AGENTS A LITTLE DIFFICULTY FOR YOU IN SAYING THAT IT IS NOT MADE IN THE CONTEXT OF HIM BEING CONFRONTED, BECAUSE HE HAS BEEN CONFRONTED BEFORE WITH EVIDENCE OF THE FINGERPRINT. HE HAS BEEN CONFRONTED BEFORE WITH EVIDENCE OF DNA.

NO. HE HAS NOT BEEN CONFRONTED BEFORE. THE DNA, HE WAS NOT CONFRONTED WITH ANY EVIDENCE OF DNA YOU MEAN AFTER THE DWIGHT STATEMENTS WERE MADE, AND AT THE TIME THAT HE IS CONFRONTED WITH EVIDENCE OF DNA, IF I CAN FIND IT HERE QUICKLY.

THAT IS WHY I WANTED THE SEQUENCE. WHEN, THIS SEQUENCE, WAS THE STATEMENT MADE THAT NOW I THINK I HAVE A PROBLEM. THAT WAS MADE WHEN THEY TOLD HIM THAT THEY EXECUTED ANOTHER SEARCH WARRANT S THAT CORRECT?

THERE WAS NOTHING TO MENTION THAT ANYTHING INCRIMINATING WAS FOUND IN THE EXECUTION OF THAT SEARCH WARRANT AND NOTHING AT EITHER TRIAL WAS THE PRODUCT OF THAT SEARCH WARRANT. NOBLETT SAYS THAT WE TALKED SOME ABOUT WHO IS GOING TO PICK UP THE REST OF HIS STUFF AND SOME TALK ABOUT DISCHARGE PAPERS AND SMALL TALK AND THAT WAS THE POINT BEFORE ANY CONFRONTATION ABOUT DNA.

WHAT WERE THE ONE OR TWO QUESTIONS LEADING UP TO THIS STATEMENT OF, NOW I THINK I HAVE A PROBLEM OR I THINK --

WELL, LET'S SEE IF I CAN FIND IT EXACTLY HERE. NOBODY LET -- NOBLETT TESTIFIED. I TOLD HIM WE HAD TAKEN A FEW THINGS AND WE HAD EXECUTED OUR SEARCH WARRANT AND TOLD HIM THAT WE HAD PICKED UP SMALL AMOUNT OF PROPERTY AND WHO WAS GOING TO PICK UP THE

AMOUNT OF PROPERTY THAT HE HAD, AND HE LOOKED AT DETECTIVE STANTON AND SAID "I THINK I HAVE A PROBLEM". THE DNA STATEMENT COMES AFTER THAT STATEMENT WAS MADE.

THIS IS AFTER THEY TELL HIM ABOUT THE EXECUTION OF THIS ADDITIONAL SEARCH WARRANT?

RIGHT. BUT THROUGHOUT THESE INTERVIEWS HAD, THERE IS ACCUSATORY QUESTIONING. THERE IS OFFICERS TELLING HIM. I DON'T BELIEVE YOU. WE HAVE GOT A FINGERPRINT. LATER ON WE HAVE GOT DNA AND EVERY TIME HE DOESN'T MENTION DWIGHT. HE SAYS AT THE POINT IN TIME WHEN HE WAS CONFRONTED BY DNA, HE SAYS DID YOU ADVISE MR. JOHNSTON THAT HE HAD DNA IN THE HOUSE? AND HE SAID YES. WHAT WAS HIS RESPONSE? HE ADAMANTLY DENIED THAT HE HAD ANYTHING TO DO IN THE HOUSE. HE HAD A DINNER DATE AND THAT WAS HIS STORY. DID YOU MAINTAIN THAT YOU HAD BEEN THERE WITH JANIS JOHNSON APPROXIMATELY TWO WEEKS BEFORE THE MURDER? YES. THE OTHER TEST WAS WHEN HE ASKED RAY WERE YOU THERE AND DID SOMEBODY ELSE DID IT? IT WOULD HAVE BEEN A PERFECT EXAMPLE OF TRYING TO "OUT" DWIGHT. HE ANSWERED NO, I WAS ONLY THERE ON ONE OCCASION THREE WEEKS PRIOR TO THE MURDER, SO IN ANSWER, HE MAY HAVE A DWIGHT THAT MAY BE TO SOME DEGREE A PROBLEM OR IT MAY BE SOMETHING THAT HE HAS MADE UP, THAT HIS STATEMENTS INDICATED THAT DWIGHT MIGHT HAVE KILLED LEANNE COREAL, AND IN THE CORYELL CASE, THAT WOULD BE AN IMPLICIT ADMISION, BUT IN THE NUGENT CASE, ALL HE SAID WAS I DIDN'T -- AN IMPLIED ADMISION. BUT IN THE NUGENT CASE, ALL HE SAID WAS I DIDN'T DO THIS. THE OFFICER SAID IS THIS WHAT YOU ARE TRYING TO SAY, RAY? AND HIS ANSWER WAS NO.

WOULD IT BE THAT THE OFFICER WAS SO TAKEN BY WHAT HE SAID, BECAUSE HE SITS BACK AND HIS KNUCKLES TURN WHITE AND HE GETS, THOUGH NOT PHRASED, THIS RAGE-TYPE LOOK, IS MY IMPRESSION FROM READING THE RECORD, AND THE NATURE OF THE MURDER IN THIS CASE WAS A VERY BRUTAL MANUAL STRANGULATION THAT TOOK AT LEAST FIVE MINUTES OR SO OR MORE AND BRUTAL BEATINGS OF THE BODY. IS THAT NOT RELEVANT, GIVEN THAT WE DON'T HAVE TO HAVE AN ADMISION, AS YOU AND I WOULD NORMALLY AND THE COMMON PERSON WOULD USE THAT, THAT PHRASE THAT, THAT IS NOT WHAT THIS EXCEPTION IS TALKING ABOUT, BUT A STATEMENT BY A PARTY OPPONENT, ISN'T THIS RELEVANT TO THE NATURE OF THIS CRIME, THAT HE WOULD, IN THE CONTEXT OF ADMITTING THIS DWIGHT, ALSO SHOW THIS INTENSITY, AS DESCRIBED BY THE OFFICER? TO THE JURY. TO UNDERSTAND HOW AN INDIVIDUAL COULD COMMIT A CRIME LIKE THIS AND WHETHER THIS INDIVIDUAL COULD DO SO.

WELL, I THINK YOU CAN INFER, I MEAN, INTENSITY, YEAH, I THINK IT WOULD BE A STRETCH TO INFER RAGE FROM THE TESTIMONY OF THE DETECTIVE NOBLETT.

THAT IS TOO STRONG.

I THINK THAT IS WAY TOO MUCH OF A STRETCH HERE. I THINK WHAT YOU HAVE, LIKE I SAY, I THINK THAT WHAT YOU HAVE IS A DENIAL. IT IS NOT AN ADMISION. IT IS A DENIAL. YET IT IS EXTRAORDINARILY PREJUDICIAL, AND THEN I WANT TO GET INTO THIS --

BUT IF IT IS RELEVANT AND IT COMES OUT AND IT IS A STATEMENT OF THE DEFENDANT, IT IS, THEN IT IS AN EXCEPTION, ALREADY, TO THE HEARSAY, THEN ISN'T THE ONLY, NOW YOU ARE GETTING INTO THAT THE PREJUDICE OUTWEIGHS ANY PROBATIVE VALUE. BECAUSE -- IT IS ADMISSIBLE.

I AM ARGUING THAT THERE IS NOTHING OF PROBATIVE VALUE AND IF ANYTHING, IT IS NEGATIVE PROBATIVE VALUE BECAUSE IT IS MISLEADING, BUT CERTAINLY IF IT HAS ANY PROBATIVE VALUE, THEN, YES, IT OUTWEIGHS IT PARTICULARLY BY THE WAY THE PROSECUTOR COMPOUNDED THE ERROR, BY THE MISLEADING WAY THAT HE PRESENTED THE STATEMENTS REGARDING DWIGHT AND IN TERMS OF THE CORYELL MURDER, WITHOUT INFORMING THE JURY THAT THE NUGENT STATEMENTS DID REFER TO THE CORYELL MURDER, AND WHEN HE EDITED RAY'S TESTIMONY FROM THE CORYELL TRIAL AND PRESENTED IT TO THE JURY, HE DID IT IN SUCH

AWAY TO ENABLE THE ARGUMENT, YOU SAY MAYBE THE JURY COULD INFER SOMETHING FROM THE DWIGHT EVIDENCE, WELL, FROM THE ACTUAL WAY THE EVIDENCE WAS SAID, NO THEY COULDN'T, BUT FROM THE WAY THE PROSECUTOR MISLEADINGLY PRESENTED IT, THE JURY DIDN'T KNOW ABOUT DR. MAHAR AND THE STATEMENTS THAT DWIGHT MIGHT HAVE HARMED MS. CORYELL, SO FROM THE STATEMENT OF THE CORYELL TRIAL, IT MADE IT APPEAR THAT, YEAH, I WAS MAKING IT UP ABOUT DWIGHT, AND IT WAS ACTUALLY ME, BUT THAT IS NOT TRUE.

THE TESTIMONY OF WHAT HE SAID IN THE MURDER CAME IN BECAUSE OF THE WILLIAMS RULE? THAT IS WHAT I STARTED OUT ASKING, AS FAR AS HOW MUCH IS TIED INTO, THAT SHOULDN'T WE BE LOOKING AT ISSUE TWO AND SEEING IF THAT EVIDENCE WAS PROPERLY ADMITED?

WELL, OKAY, THE TWO ISSUES ARE VERY MUCH INTERRELATED AND THEY ALSO ENTER RELATE WITH THE SUFFICIENCY OF PREMEDITATION. -- ENTER RELATE WITH THE SUFFICIENCY OF -- THEY ALSO INTERRELATE WITH THE SUFFICIENCY OF PREMEDITATION AND THAT IS HOW I AM MAKING MY POINT, BUT CLEARLY THE EVIDENCE OF THE CORYELL MURDER WAS NOT PROPERLY ADMITTED AS WILLIAMS RULE, BUT HE HAVE TEN IT WAS, EVEN IT WAS, THAT DID NOT JUSTIFY THE MISLEADING MANNER IN WHICH THE DWIGHT ERROR WAS COMPOUNDED, BY MAKING IT APPEAR TO THIS JURY THAT IT WAS SOMETHING THAT IT WAS NOT.

IS THAT A SEPARATE POINT? IN OTHER WORDS WOULDN'T THE TRIAL JUDGE HAVE SAID AT SOME POINT YOU COULD EITHER ARGUE IT OR NOT ARGUE IT, IN TERMS OF THAT TESTIMONY THAT CAME IN, THAT IS JOHNSTON'S TESTIMONY DURING THE PENALTY PHASE OF THE OTHER MURDER?

WELL, THAT WAS OBJECTED TO ON WILLIAMS RULE GROUNDS, AS EVERYTHING ELSE ON THE WILLIAMS RULE WAS OBJECTED TO ON WILLIAMS RULE GROUNDS AND OVERRULED.

WHEN IT WAS COMING IN, COUNSEL ASKED FOR SOME TYPE AFTER LIMITING INSTRUCTION AS TO THAT PARTICULAR TESTIMONY.

NEW YORK CITY COUNSEL DID NOT. COUNS-- NO, COUNSEL DID NOT. COUNSEL'S POSITION IS THAT NONE OF THIS SHOULD HAVE COME IN IN ANY WAY. THERE WAS NOT A SPECIFIC OBJECTION TO THE MANNER IN WHICH THE, RAY'S TESTIMONY FROM THE PENALTY PHASE WAS REDACKED, BUT THERE WAS NOT AN OBJECTION TO -- WAS REDACTED, BUT THERE WAS NOT AN OBJECTION TO IT COMING IN AT ALL.

HOW IS THAT MISLEADING, THE WAY THE PROSECUTOR CHOSE TO ARGUE IT? HOW IS THIS MISLEADING? ONCE THE EVIDENCE OF THAT OTHER MURDER IS IN, HOW MUCH DOES THE DWIGHT ISSUE EVEN BECOME --

IT IS EXTRAORDINARILY MISLEADING, BECAUSE WHAT HAPPENED WAS THAT THE WAY THE EVIDENCE WAS ACTUALLY PRESENT MARYLAND IN THE CORYEL PENALTY PHASE, ITSELF, DR. MAHAR TESTIFIED, AND IT IS HARD TO KEEP THIS STRAIGHT, I UNDERSTAND, BUT IN THE CORYELL PENALTY PHASE, DR. MAHAR TESTIFIED THAT RAY HAD NOT MADE ANY ADMISSIONS TO HIM IN THE PENALTY PHASE BUT HE HAD MADE A VERY WILL HE HE HE -- A STATEMENT TO HIM VERY EARLY ON THAT HE DID NOT COMMIT MURDER BUT DIVIDE COULD HAVE. THAT CAME OUT IN THE PENALTY PHASE, WHEN THE DEFENDANT, WHEN RAY TOOK THE CONSTANT IN THE ROOO IN THE CORYELL PENALTY PHASE, THAT HE ADMITTED KILLING CORYELL, AND I AM INTO MY REBUTTAL TIME ALREADY, BUT THE STATE IN THE CORYELL CASE, TREATED THE TESTIMONY AS FALSE AND IN THE OTHER CASE, HE ARGUED IT AS BASIS FOR WILLIAMS RULE AND AS BASIS FOR FINDING SIMILARITIES, BUT WHAT HAPPENED IS THAT THE REALITY OF WHAT WAS SAID TO DR. MAHAR WAS THAT DWIGHT MIGHT HAVE KILLED CORYELL. THAT WAS ALL EDITED OUT OF WHAT WAS PRESENTED TO THE NUGENT JURY, SO IT WAS THE MISLEADING IMPRESSION WHICH THE JURY HAD ALREADY HEARD WITH REGARD TO NOBLETT AND STANTON, WITH REGARD TO IS IT TRUE, AND THE ERROR WAS EXTREMELY HARMFUL, AS WAS THE WILLIAMS RULE ERROR, AND I AM INTO

MY REBUTTAL TIME, SO I AM GOING TO NEED TO SIT DOWN. THANK YOU.

GOOD MORNING. MAY IT PLEASE THE COURT. KIM HOPKINS FOR THE STATE OF FLORIDA. TO BEGIN WITH, OBVIOUSLY THE CONVERSATION IN THE THIRD INTERVIEW WITH THE DEFENDANT THAT THE TIME FRAME HAS BECOME IMPORTANT AS TO WHAT CAME UP WHEN NOT FROM MEMORY BUT IF I COULD POINT THE COURT TO VOLUME TEN AT PAGE 71, THE DETECTIVE DOES GO BACK THROUGH EXACTLY HOW THAT THIRD INTERVIEW WORKED OUT, BEGINNING WITH THE DISCUSSION ABOUT THE WARRANT THAT HAD BEEN EXECUTED. KEEP IN MIND THIS IS THE THIRD INTERVIEW THAT THEY HAVE HAD WITH THE DEFENDANT ABOUT THE MURDER OF JANIS NUGENT THIS. IS NOT A CONVERSATION AT A COFFEE SHOP COMPLETELY OUT OF CONTEXT. THEY ARE THERE TO CONFRONT HIM ABOUT HIS GUILT FOR THIS MURDER. HE DOES MENTION DWIGHT LIVING IN SIDE HIM, PRIOR TO DNA BEING MENTIONED, BUT IT IS NOT COMPLETELY OUT OF CONTEXT. THEY ARE THERE, AGAIN, CONFRONTING HIM WITH THIS MURDER AND SOME OF THE EVIDENCE THAT THEY HAD OBTAINED WITH THE EXECUTION OF THE WARRANT. THE IMPORTANT THING --

WAS ANYTHING SAID ABOUT, I KNOW THIS STATEMENT SEEMED TO HAVE BEEN MADE, AT LEAST THE FIRST MENTION OF DWIGHT IN THIS CASE, WAS MADE AFTER THE POLICE HAD SAID SOMETHING ABOUT A SEARCH, AN ADDITIONAL SEARCH WARRANT HAVING BEEN EXECUTEED AND ITEMS BEING TAKEN AND WHAT WAS GOING TO HAPPEN TO THE REST OF HIS BELONGINGS. DID THE POLICE CONFRONT HIM, ACTUALLY CONFRONT HIM WITH WHAT KINDS OF ITEMS WERE TAKEN AND WHAT THAT MEANT?

MY RECOLLECTION IS THAT THEY MAY HAVE MENTIONED NOT WHAT IT MEANT. THEY MAY HAVE MENTIONED THAT WE GOT THESE SHOES THAT TURNED OUT LATER TO BE ONE OF THE PIECES OF EVIDENCE AGAINST HIM. I DON'T RECALL THAT THEY CONFRONTED HIM WITH THE IMPORT OF WHATEVER THEY FOUND, BUT THE STATE'S CONTENTION IS THAT THAT IS COMPLETELY IRRELEVANT. ACTUALLY THE STATE'S CONTENTION IS THAT IT DOESN'T EVEN MATTER WHEN THE DNA EVIDENCE COMES UP OR NOT, BUT TO THE EXTENT THAT THIS COURT THINKS IT IS IMPORTANT, I THINK WHAT SHOULD BE NOTED IS THAT, ONCE DNA IS MENTIONED TOM, IT IS ONLY THEN THAT HE BEGINS THIS SIGN ILL-LIKE DEMONSTRATION, CRUNCHING UP HIS FISTS AND BOLTING UP AND SAYING YOU HAVE GOT TO SEE THIS DWIGHT. HE IS REALLY MEAN, AND I JUST WIFERB THAT I COULD -- WISH THAT I COULD CUT HIM OUT OF MYSELF. THAT INCIDENT OCCURS AFTER THE DNA IS MENTIONED, AND WHEN YOU TAKE THAT EVIDENCE AND LOOK AT IT WITH WHAT HE TESTIFIED TO, THE DEFENDANT SAID I MAKE UP DWIGHT TO AVOID RESPONSIBILITY FOR MY ACTIONS, THAT IS WHEN IT BECOMES AN ADMISSIBLE ADMISSION 6 OF A PARTY OPPONENT.

HE MADE THAT -- ADMISSION OF A PARTY OPPONENT.

HE MADE THAT STATEMENT THAT I USED WHITE -- KNEW.

IN RELATION TO THE CORYELL TRIAL, AND IN RELATIONSHIP TO THE MURDER.

WHEN?

AFTER THE DETECTIVE INTERVIEWS, IT IS LATER ON IN THE STATE'S CASE THAT THEY READ HIS STUFF INTO THE RECORD, IF I AM RECALLING THAT.

SO THE STATE WAS ACTUALLY USING A DEFENDANT THAT THE MAID IN THE COREIAL -- IN THE CORYELL MURDER, IN THE GUILT PHASE OF THE NUGENT MURDER.

YES.

TO DEMONSTRATE THAT THE DEFENDANT WAS USING DWIGHT AS THE FALL GUY FOR THE MURDER HE HAD COMMITTED?

YES. THAT HE MENTIONED, THE POINT THAT WAS ARGUED WAS YOU NEVER HEAR ABOUT DWIGHT UNTIL WE ARE TALKING ABOUT A MURDER. YOU KNOW, HE HAS HAD MULTIPLE MENTAL HEALTH EVALUATIONS THROUGHOUT HIS LIFE. HE NEVER TOLD ANY OTHER PERSON EVER THAT YOU HAVE EVER HEARD IN THIS RECORD OR IN THE CORYELL MURDER, ANYTHING ABOUT DWIGHT, IN THE CONTEXT OF BEING CONFRONTED WITH HIS GUILT FOR INDIVIDUAL CRIMES.

WAS THERE A SEPARATE, AND MAYBE I JUST WANT TO MAKE SURE ABOUT THIS, BECAUSE IT SEEMS TO ME THAT, ALTHOUGH THERE MAY BE ARGUMENT AS TO THE FACT THAT THE CORYEL MURDER COMES IN AS WILLIAMS RULE, THE QUESTION ABOUT THE ROLE OF DWIGHT IN THE CORYELL MURDER THROUGH THE PENALTY PHASE TESTIMONY OF JOHNSTON, IS THERE A SEPARATE OBJECTION TO THAT PARTICULAR ASPECT COMING INTO EVIDENCE?

YES, YOUR HONOR, THE DEFENSE FILED A MOTION IN LIMINE AND THEY OBJECTED TLOU..

NOW ASSUME THAT THERE WAS A SUBPART. ASSUMING THAT THE JURY COULD HEAR THAT THERE WERE TWO MURDERS AND STRANGULATIONS AND STRANGE BUTTOCKS MARKS AND THERE IS THE WATER AT THE END AND THE FAMILIARITY, HOW IS IT, AND STILL, OF COURSE, WE KNOW, JUST BECAUSE WILLIAMS RULE COMES IN, THAT DOESN'T MEAN THERE IS NOT LIMITATIONS, HOW CAN THE PENALTY PHASE TESTIMONY OF JOHNSTON ABOUT DWIGHT IN THE CORYELL MURDER COME IN, IN THIS CASE? WHAT IS THE WILLIAMS RULE SIGNIFICANCE OF THAT?

I AM SORE I ARE YOU ASKING ME IF THERE IS ANOTHER BASIS OTHER THAN WILLIAMS RULE FOR IT TO COME?

ISN'T THERE A PROBLEM WITH HIS PENALTY PHASE TESTIMONY IN THE CORYELL MURDER, ABOUT DWIGHT, WHICH IS FULLY DEVELOPED, COMING INTO BUTT REDUCE WHAT -- TO BUTTRESS WHAT THE SIGNIFICANCE IS OF THE DWIGHT STATEMENT IN THE ENTER VU. RIGHT.

I THINK WHAT IS IMPORTANT WHEN YOU TALK ABOUT WHETHER OR NOT, AS JUSTICE BELL POINTED OUT, WHETHER OR NOT YOU NEED A FULL CONFESSION OR WHAT AN ADMISSION ACTUALLY IS, AN ADMISSION, ACCORDING TO SUAVEORD, IS ADMISSIBLE, IF IT TENDS IN SOME WAY, WHEN TAKEN TOGETHER WITH OTHER FACTS, TO ESTABLISH GUILT, AND THAT IS WHY THE OTHER STATEMENT IS ADMISSIBLE, AND I WOULD POINT OUT THAT NO OBJECTION WAS MADE BY THE DEFENSE, TO HOW THE TESTIMONY WAS REDACTED. IN FACT, ON THE RECORD THE DEFENSE THANKS THE STATE FOR GOING FORWARD AND DOING THAT, AND THEY CERTAINLY HAD EVERY OPPORTUNITY TO PROVIDE THE COURT WITH AN ALTERNATE EDITED VERSION AND THEY DIDN'T DO SO. THEY HAPPILY ACCEPTED WHAT WAS DONE BY THE STATE.

LET ME ASK, THIS AND MAYBE IT CAN HELP ME. IF THERE WERE POINTS OF SIMILARITY BETWEEN THE TWO MURDERS, SO AS TO MAKE IT CLOSE ON THE WILLIAMS RULE EVIDENCE, BUT THERE WAS ANOTHER MURDER THAT JOHNSTON ALLEGEDLY COMMITTED AND IT WAS DIFFERENT, IN TERMS OF HOW IT ACTUALLY OCCURRED, BUT IF, IN THE PENALTY PHASE OF THAT, JOHNSTON HAD SAID DWIGHT MADE ME DO IT.

RIGHT.

WOULD THE STATE WOULD STILL BE ARGUING THAT THAT PENALTY PHASE TESTIMONY SHOULD COME IN ON THIS BASIS OF THAT HE IS TALKING, EVERY TIME HE COMMITS A MURDER, IS TALKING ABOUT DWIGHT, AND THEREFORE ANY OTHER MURDER WE MENTIONS DWIGHT, THAT MURDER TESTIMONY SHOULD COME IN? IS THAT A SEPARATE ARGUMENT?

YES, OBVIOUSLY IT WOULD, BECAUSE IF YOU LOOK, FOR EXAMPLE, TO SUAVEORD, WHICH THE COURT RELIED UPON, YOU DON'T HAVE ANY WILLIAMS RULE EVIDENCE. HE IS TALKING ABOUT PLANNING ANOTHER ABDUCTION WITH A WOMAN WITH ONE OF HIS BUDDIES, TRYING TO

CONVINCE HIM TO COMMIT A CRIME IN THE SAME MANNER THAT HE HAD COMMITTED A CRIME CRIME THAT HE WAS ON TRIAL FOR, AND WHAT HE ULTIMATELY, HE IS SAYING WE CAN ABDUCT HER AND DO WHATEVER WE WANT WITH HER AND SHOOT HER AND SHE WILL NEVER BE ABLE TO IDENTIFY US. HIS BUDDY SAID ARE YOU CRAZY? AND HE SAID,, IT BROTH BOTHERS ME FOR A WHILE BUT -- AND HIS BUDDY SAID ARE YOU CRAZY? DOESN'T THAT BOTHER YOU? AND HE SAID, YES, AT THE BEGINNING, BUT YOU GET USED TO IT, AND WHEN TAKEN IN THE CONTEXT THAT IT WAS PRESENTED TO SUAVEORD, THAT IS WHETHER IT BECOME AS -- TO SUAVEORD, AND THAT -- SWAFFORD,IT BECOMES EVIDENCE AS IT HAS HERE.

WHEN WE LOOK BACK AT THE EVIDENCE OF THE MURDER, THE STATEMENTS OF JOHNSTON AS TO THE CORYELL MURDER AND HOW IT HAPPENS, THAT THE STATE IS TODAY EMBRACING THAT VERSION OF EVENTS?

NO, YOUR HONOR, THE STATE STRENUOUSLY OBJEBTS TO THAT CHARACTERIZATION BE AND -- OBJECTS TO THAT CHARACTERIZATION, AND IN TRYING TO KEEP HIMSELF FROM GETTING THE DEATH PENALTY, HE DOES NOT ADMIT TO A SEXUAL BATTERY AND HE CLAIMS THAT THE MURDER WAS AN ACCIDENT, THAT WAS PUT ON TO SHOW THAT HIS CONSCIOUSNESS OF GUILT IN THIS TRIAL. THE STATE ALSO PUT ON THE INVESTIGATING OFFICER AND THE MEDICAL EXAMINER FROM THE CORYELL TRIAL, WITH EVIDENCE, THE PHYSICAL EVIDENCE THAT BELIED HIS STORY. SO THE STATE BY NO MEANS WAS ADOPTING THIS VERSION OF EVENTS AS RAY JOHNSTON EVENTUALLY ADMITTED TO, AND THE JURY WAS WELL AWARE OF THAT, BECAUSE THEY HEARD THIS OTHER EVIDENCE THAT WAS PUT ON BY THE STATE, FOR EXAMPLE THE STATEMENT THAT SHE WAS ALIVE BECAUSE SHE HAD GRASS IN HER HANDS THAT, A SEXUAL BATTERY DID TAKE PLACE, THINGS OF THAT NATURE, WHICH WENT AGAINST RAY'S VERSION OF EVENTS.

I WANTED TO ASK YOUR COLLEAGUE THIS QUESTION, BUT LET ME ASK YOU, ASSUMING FOR THE MOMENT THAT WE FIND THAT THE DWIGHT STATEMENTS WERE IRRELEVANT, YOU ALSO ARGUE THAT ANY ERROR WAS HARMLESS BECAUSE THERE WAS OVERWHELMING EVIDENCE OF GUILT. CAN YOU ADDRESS THAT?

CERTAINLY. I THINK, WHILE THE DEFENSE FRIES TO MAKE IT -- TRIES TO MAKE IT SEEM THAT IT IS THE CORE OF THE PROSECUTION'S ARGUMENT BELOW, I WOULD FIRST POINT OUT THAT, IN THE CLOSING STATEMENT, WHAT THE STATE ENDS WITH IS THE FACT THAT RAY JOHNSTON, YOU KNOW, DID NOT ADMIT TO THINGS AS THE INTERVIEWS WENT FORWARD. IS HE GOING THROUGH THE THREE INTERVIEWS THAT THEY 4, AND AT STAGE -- THAT THEY HAD, AND AT EACH STAGE HE COMES UP WITH A DIFFERING VERSION OF EVENTS, AND AT ONE STAGE, HE HAS GOT THREE DIFFERENT VERSIONS, DEPENDING ON WHAT THE STATE IS TELLING HIM. THAT IS MENTIONED IN THE ARGUMENT IN CLOSING TO THE JURY. HE DOES BRING OUT THE DWIGHT ARGUMENT, BUT THAT IS, IN THE 35 PAGES OF THE CLOSING ARGUMENT THAT, IS NOT A HIFLT THE ARGUMENT AND -- IT WAS NOT A HIGHLIGHT OF THE ARGUMENT AND IT WAS CERTAINLY NOT SOMETHING THAT WAS OBJECTED TO, AND IN ADMISSION -- AND IN ADDITION, WITH THE FINGERPRINT ON THE BATHTUB KNOB, THAT IS HIGHLY INCRIMINATING EVIDENCE, WHEN YOU TAKE INTO ACCOUNT THAT THE VICTIM'S BODY WAS IN THE BATHTUB WITH THE WATER RUNNING AND HER HABITS ARE THAT SOMEONE THAT TAKES A SHOWER TWICE A DAY AND IS A NEAT FREAK, BASICALLY, AND THERE WAS ALSO THE FINGERPRINT OF THE DEFENDANT'S ON A CUP UNDERNEATH THE KITCHEN TABLE IN THE KITCHEN, AND ALL OF THIS IS IMPORTANT BECAUSE IT CONTRADICTS THE TESTIMONY OF THE DEFENDANT THAT HE WAS IN THE HOME THREE WEEKS EARLIER. AND IN ADDITION YOU HAVE SALIVA OR SWEAT MIXED WITH THE VICTIM'S ON HER BED SHEETS, WHERE HE CONSISTENTLY TO THIS TODAY DENNIS EVER BEING IN THE BEDROOM, DENNIS HAVING SEX WITH HER AND PROVIDES IN EXPLANATION WHATSOEVER -- NO EXPLANATION WHATSOEVER FOR HOW THE DNA GOT THERE, AND YOU HAVE THE SHOE PRINTS AND IT IS CONSISTENT WITH THE TYPE OF SHOE THAT HE WAS WATERING AND THAT WAS OBTAINED IN THE EXECUTION OF THE SEARCH WARRANT, SO BASED UPON THOSE THING, THE STATE DOES ARGUE THAT IT WOULD BE HARMLESS, IF THE COURT FOUND THAT THE DWIGHT TESTIMONY, IN ADMISSION, IN AND OF

ITSELF, WAS ERROR.

YOU ARE RAISING ANOTHER ERROR AND A THAT CONCERNS ME, AND THAT IS ISSUE NUMBER FOUR, THAT YOU ARGUE THAT THERE IS OVERWHELMING EVIDENCE THAT HE COMMITTED THIS MURDER, BUT I AM STRUGGLING TO FIND THE EVIDENCE OF PREMEDITATION. CAN YOU ADDRESS THAT?

THE EVIDENCE OF PREMEDITATION IS SUFFICIENT TO THAT IN BLACKWOOD AND DeANGELO, FROM THIS COURT. THE VICTIM WAS BEATEN AND STRANGLER IN A PROLONGED VIOLENT ATTACK AND THE PROSECUTOR HAD TESTIMONY THAT AT THE MINIMUM SHE WOULD HAVE BEEN ALIVE FOR FIVE MINUTES AND THAT SHE WOULD HAVE BEEN AWARE THROUGHOUT. SHE HAD EXTENSIVE DEFENSIVE WOUNDS AND THAT, COUPLED WITH THE WILLIAMS RULE EVIDENCE THAT THE STATE PRESENTED WOULD BE SUFFICIENT TO SHOW PREMEDITATION, WE BELIEVE, IN THIS CASE, AND THAT IS ACTUALLY STRONGER EVIDENCE, WE BELIEVE, THAN WHAT WAS FOUND IN BLACKWOOD, WHERE THIS COURT FOUND SUFFICIENT PREMEDITATION.

WOULD YOU ADDRESS THE WILLIAMS RULE ISSUE?

CERTAINLY, YOUR HONOR, WE HAVE EXACT THE TIME PERIOD THAT IS CONTEMPLATED BY WILLIAMS. HERE THE BODIES WERE FOUND IN SHALLOW WATER AFTER DEATH AND THEY WERE BOTH SINGLE WHITE FEMALES.

LET'S MAKE SURE, BECAUSE THE LAW GETS ESTABLISHED. ONE IS IN A BATHTUB AND THE OTHER IS IN A POND. CORRECT?

CERTAINLY.

SO WATER IS THE --

WATER IS THE SIGNIFICANT FACTOR THAT THE BODIES ARE SUBMERGED WITHIN THE WATER FORM CERTAINLY DIFFERENT OPPORTUNITIES PRESENTED -- IN THE WATER: CERTAINLY OPPORTUNITIES PRESENTED SHOWS DIFFERENT FACTS AND SCENARIOS, AND WHILE THE DEFENSE TRIES TO POINT TO DISSIMILARITIES, YOU COULD CERTAINLY FIND DISSIMILARITIES IN ANY CASE, BUT WHAT YOU ARE LOOKING FOR HERE IS SOME KIND OF SUFFICIENT INDICIA OF A FINGERPRINT TYPE OF CRIME AND YOU LOOK TO EACH, YOU DON'T LOOK TO EACH INDIVIDUAL FACTOR, NECESSARILY, BUT YOU LOOK TO THEM COMBINED. HOW THEY ACT TOGETHER, AND I BELIEVE, EVEN IF YOU JUST LOOK AT THE THREE, THAT THE BODIES ARE BOTH FOUND IN SHALLOW WATER AFTER DEATH. THAT THEY ARE BOTH STRANGLER VIOLENTLY FROM BEHIND AND THAT THEY BOTH HAD PATTERN BRUISES TO THEIR BUTTOCKS FROM A LOOPED BELT AS WELL AS SOME OTHER IMPLEMENT. THOSE STANDING ALONE WOULD BE ENOUGH. IN THIS CASE, YOU HAVE ADDITIONAL FRACTUREORS THAT THE TRIAL JUDGE FOUND -- FACTORS THAT THE TRIAL JUDGE FOUND. WHILE THE DEFENDANT TOOK ISSUE WITH THEM, CERTAINLY THE TRIAL COURT COULD USE ITS DISCRETION THAT CERTAINLY THEY WERE BOTH SINGLE WHITE FEMALES OF SIMILAR BUILD AND HE KNEW WHERE THE VICTIMS LIVED AND KNEW BOTH OF THEM BEFORE THEIR MURDERS AND ADDITIONALLY TO THAT, THEY WERE STRANGLER FROM BEHIND AND HAD BLUNT FORCE TRAUMA TO THEIR BODIES.

WHAT WAS THE FACT THAT, THE REASON THERE WAS WATER WAS TO AVOID EVIDENCE THAT HE WOULD NOT BE DETECTED, IFED BODIES WERE FOUND IN WATER?

I BELIEVE THERE IS CONTROVERSY IN TERMS OF THE CORYELL MURDER AND WHAT HE STATED. I BELIEVE HE STATE ADD THAT THE DEFENDANT KNEW THAT IF HE PUT THEM IN THE WATER, IT WOULD BE DIFFICULT TO DETERMINE THE CIRCUMSTANCES OF THE MURDER. BUT HE TESTIFIED THAT HE PUT HIMSELF IN THE WATER. HE WENT TO HIS A.M. COMPLEX AND PUT HIMSELF INTO THE POOL -- HE WENT TO HIS APARTMENT COMPLEX AND PUT HIMSELF INTO THE POOL.

WHAT ABOUT THE CONSENTUAL?

SHE WAS FOUND WITH HER UNDERWEAR ON, HOWEVER, IN THIS CASE, AND THERE WERE NO CHARGES OF SEXUAL BATTERY IN THIS PARTICULAR CASE IN THE JUDGEENT -- IN THE NUGENT MURDER.

IF WE LOOK AT, AND THE DANGER OF THE WILLIAMS RULE EVIDENCE IS THAT SOMEONE WHO IS GUILTY 6 ONE CRIME -- IS GUILTY OF ONE CRIME GETS CONVICTED OF AN ANOTHER. I AM CONCERNED ABOUT THE BRUISES ON THE BUTTOCKS, BECAUSE THAT SEEMS LIKE A UNIQUE FINGERPRINT. I AM CONCERNED WITH USING, YOU SAY ALL TOGETHER. STRANGULATION, UNFORTUNATELY UP HERE WE SEE MANY, MANY, MANY STRANGULATION MURDERS. THOSE FORM THE BASIS FOR THE HAC AND THERE ON, AND BEING IN WATER, I CAN, AGAIN, THINK OF MANY CASES WHERE THEY WERE IN A BATHTUB AND STRANGLED AND THAT WAS THE CASE. I MEAN, WHAT IF WE LOOK AND WE FIND OTHER CASES IN THIS COURT'S JURISPRUDENCE, WHERE IT IS THE SAME KIND OF CRIME? HOW DO YOU GUARD AGAINST THE FACT THAT, BECAUSE ONCE YOU HEAR THIS, YOU SORT OF SAY, WELL, THIS GUY, HE DID THIS. HE MUST HAVE DONE THE OTHER ONE. IT IS ALMOST LIKE THAT IS GOING TO PUT YOU OVER, AND OF COURSE IN THIS CASE, YOU HAVE SOME PRETTY STRONG OTHER EVIDENCE ABOUT THE DNA.

EXACTLY.

AND ALL OF THIS WITHOUT THE WILLIAMS RULE. MY CONCERN IS JUST WITH THE CASE LAW OF HOW UNIQUE THESE TWO CRIMES REALLY ARE AND WHAT, WHETHER IT IS THE WATER OR THE, AND AS YOU SAY, IT IS THE COMBINATION, BUT HOW UNIQUE ARE THESE PATTERN BRUISES ON THE BUTTOCKS? MAYBE YOU CAN --

WELL, YOUR HONOR, CERTAINLY THE DEFENSE HAS NOT POINTED THIS COURT TO ANY CASES THAT ARE SIMILAR FACTUALLY IN EVERY CONSIDERS THAT THIS IS AND IN -- IN EVERY DOLLARS THIS IS, AND IN MY RESPECT, I THINK THEY ADDRESS THAT IT WAS ONE OTHER CASE STRANGLED FROM BEHIND AND WITHOUT THIS PATTERN OF BRUCING. THERE MAY BE SUCH CASE BUT MY SEARCH DID NOT DISCOVER ANY, AND AGAIN YOU, DO LOOK AT THEM COMBINED, AND WHILE THERE MAY BE SOME DIFFERENCES HERE, YOU ARE NOT WEIGHING SIMILARITIES VERSUS DISSIMILARITIES. YOU ARE LOOKING OVER ALL, AT WHETHER OR NOT THERE IS A FINGERPRINT-TYPE MARKER THAT IDENTIFIES THIS DEFENDANT, AND THAT IS EXACTLY WHAT GUARDS AGAINST THE DANGER OF, THAT YOU ARE DISCUSSING, BECAUSE HERE IS HE PRESENTED WITH TWO DIFFERENT OPPORTUNITIES, AND OBVIOUSLY HE, ALTHOUGH THE CASES WERE TRIED, CORYELL FIRST THEN NUGENT, HE ACTUALLY KILLS MISS NUGENT FIRST AND THEN SIX MONTHS LATER HE KILLS MISS CORYELL, SO THE FACT THAT HE IS ABLE TO KILL MISS CORYELL IN THE PRIVACY OF HER HOME WITHOUT THE DANGER OF BES WITNESSED AS MUCH AS IN A FIELD BY A POND, WHICH MS. NUGENT WAS KILLED, IT WAS SOMEWHAT DIFFERENT OPPORTUNITIES FOR STRANGULATION, BECAUSE IT IS MS. NUGENT THAT HE HAS THE MORE PROLONGED, RELEASE COMPRESSION STRANGULATION.

WHAT IS THE STATUS OF THE CORYEL CASE?

THIS COURT CONFIRMED IT ON DIRECT APPEAL.

WAS IT THE SAME TRIAL JUDGE IN BOTH CASES?

NO, YOUR HONOR. DIE AND ALLEN WAS THE JUDGE FOR THE -- DIANE ALLEN WAS THE JUDGE FOR THE CORYELL MURDER AND JUDGE BARBER WAS THE JUDGE IN THIS CASE. ALSO TO POINT OUT THAT, FOR THE SAKE OF ARGUMENT, THAT THIS WAS NOT A FEAT YOU ARE OF THE TRIAL, WHILE WE ARE ARGUING IT WAS VERY IMPORTANT EVIDENCE, IN A 4-DAY TRIAL, IT WAS ONLY 62 MINUTES OF TESTIMONY, AND THE DEFENSE COUNSEL DID AN EXCELLENT JOB OF POINTING OUT

DISTINCTION ON BOTH THE CROSS-EXAMINATION OF WITNESSES AND THE CLOSING ARGUMENTS, SOUGHT JURY WAS WELL AWARE OF WHAT THE DEFENSE NOW ARGUES ARE AN IMPORTANT DISTINCTION.

SO YOU DIDN'T TRY, IN THE CORYELL MURDER, TO GET THIS OR THE STATE DIDN'T TRY TO GET IN THIS --

NO, THERE WAS NO WILLIAMS RULE USED IN THE CORYEL MURDER.

WAS IT ATTEMPTED TO BE USED?

NOT TO MY RECOLLECTION, YOUR HONOR. THERE ARE EQUALLY STRONG CASES, BUT YOU DIDN'T NEED THAT IN THE NUGENT CASE, I MEAN IN THE CORYEL MURDER.

THE STATE DIDN'T NEED IT.

NO.

WE DON'T KNOW REALLY, WHY THEY, IF WE LOOK THROUGH THE RECORD, WE WOULD NO. -- WE WOULD KNOW. WHAT WOULD HAPPEN, IN TERMS OF FROM YOUR POINT OF VIEW, AS FAR AS FROM THE JURISPRUDENCE OF THIS STATE, AS YOU HAVE MENTIONED THESE TWO DIFFERENT JUDGES, IF THE JUDGE IN THE OTHER CASE ACTUALLY SUSTAINED THE MOTION AND GRANTED THE MOTION IN LIMINE, THAT, NO, I DON'T THINK THERE IS SUFFICIENT FINGERPRINT EVIDENCE.

AND THAT WAS MAKE NO DIFFERENCE HERE, BECAUSE IT IS PROPERLY ADMITED IN THIS CASE. IF THERE, NO FURTHER QUESTIONS, I WOULD RELY ON MY BRIEF FOR THE REMAINING ISSUES.

CHIEF JUSTICE: ALL RIGHT. MR. MARSHAL, HOW MUCH TIME FOR REBUTTAL?

WHAT THE STATE STARED TO SAY JUST A MINUTE AGO WAS -- STARTED TO -- WHAT THE STATE STARTED TO SAY JUST A MINUTE AGO WAS ABSOLUTELY TRUE, THAT THE EVIDENCE IN THE CORYELL CASE WAS STRONGER THAN THE NUGENT CASE AND THAT IS WHY THEY INJECTED CORYELL INTO THIS CASE. I THINK THE STATE ARCKT KOOIZ THE -- THE STATE CHARACTERIZES THE STANDARD THERE, AND WHEN THERE ARE SUFFICIENT SIMILARITIES AND DISSIMILARITIES, THE STATE CANNOT BE ALLOWED TO SHOW WILLIAMS RULE IDENTITY. IN THIS CASE, THE DISSIMILARITIES ARE OVERWHELMING N THIS CASE WHICH OCCURRED IN AUGUST 1997 -- IN AUGUST OF 1987, THE STATE ARGUED THAT THERE WAS A FORM AFTER DOWNWARD SPIRAL IN '97 AND NUGENT OCCURRED IN 1997 AND THERE IS NO ADVANCE NOTICE OF INFORMATION OR ROBBERY OR ANYTHING LIKE. THAT THE PROSECUTOR IN THE CORYELL CASE SAYS THAT, BECAUSE OF HIS DISPUTE WITH ROOMMATE GARY SANCHECK AND THE ISSUE OVER MONEY, HE TURNS TO LEANNE CORYELL, WHO HE KNEW BEFORE. HE KNOWS NUGENT SOCIALLY. SHE IS THE ONE THAT IS APPARENTLY AFTER HIM IN A ROMANTIC WAY. LEANNE CORYELL WAS ACCOSTED IN A PARKING LOT BESIDE HER CAR AND WAS KIDNAPPED AND TRANSPORTED TO A MORE OUTDOOR REMOTE LOCATION AND WAS FORCED TO HAND OVER HER WALLET AND REVEAL HER PIN NUMBER. SHE WAS FORCED TO DISROBE AND SHE WAS RAPED. NONE OF THOSE EXTREMELY IMPORTANT FACTORS OCCURRED IN THE NUGENT CASE, SO THE DISSIMILARITIES IN EVERY ASPECT OF THE NATURE OF THE CASE ARE OVERWHELMING. THERE ARE INDICATIONS, AS THE STATE POINTED OUT, THAT THERE WAS FIGHTING ACTIVITY IN THE NUGENT CASE AND AS JUSTICE CANTERO WAS QUESTIONING, WE DON'T KNOW WHAT OCCURRED BETWEEN THE TWO PEOPLE, WHETHER IT WAS RAY AND NUGENT OR SOMEBODY ELSE AND NUGENT, WHETHER SOMETHING OCCURRED. EVERYBODY AGREED THAT THESE PEOPLE KNEW EACH OTHER AND WERE SOCIALIZING. SOMEBODY SAID SOMETHING. A FIGHT OCCURRED. WHETHER IT WAS A MUTUAL FIGHT. WHETHER IT WAS ONE-SIDED, WE DON'T KNOW, BUT FOR THE STATE TO SAY THAT THE WILLIAMS RULE PROVES PREMEDITATION, IF ANYTHING IT PROVES THE OPPOSITE OF THAT, BECAUSE THE WILLIAMS RULE EVIDENCE THAT THE STATE INTRODUCED IN THIS CASE DOES NOT

SHOW THAT THE MURDER OF CORYELL WAS PREMEDITATED.

THE NUGENT BODY WAS WRAPPED IN A BED COMFORTER AND THEN SUBMERGED IN THE BATHTUB. WAS THE CORYELL BODY WRAPPED IN ANYTHING?

NO. IT WAS NOT. IT WAS FOUND FACEDOWN IN THE POND.

WHAT ABOUT THE AGE AND THE PHYSICAL APPEARANCE OF THE VICTIM?

OKAY. LEANNE CORYEL HAD JUST TURNED 30. SHE WAS 5 FOOT 11, 138 POUNDS. YOU CAN SEE FROM HER LIFE PHOTOS THAT SHE WAS STRIKINGLY BEAUTIFUL. SHE DATED DOCTORS AND PEOPLE WERE DRESSED WELL AND IN PRESTIGIOUS POSITIONS. THERE WAS TAPE IN THE CORYELL TRIAL OF HER GOING THROUGH A GROSSRY LINE, THAT AN UNIDENTIFIED -- IN THE GROCERY LINE THAT, AN UNIDENTIFIED PATRON STARED AT HER AND WHO WOULDN'T STARE AT HER. SHE WAS STUNNING. IN THE NUGENT CASE, SHE WAS 49 YEARS OLD. THE STATE DOESN'T HAVE ANY EVIDENCE OF HER HEIGHT AND WEIGHT AND THE ONLY THING THAT WE HAVE TO THAT IS GOING TO THE SHOES, RAY JOHNSTON INDICATED THAT SHE WAS 5 FOOT 4 AND 142 POUNDS. I GATHER THAT HE GOT THAT FROM DISCOVERY MATERIALS.

ARE YOU TELL ME GO THAT IN THIS RECORD WE DON'T HAVE ANY EVIDENCE ABOUT THE SIZE AND WEIGHT OF THIS VICTIM?

WE DON'T HAVE ANYTHING IN THE RECORD ABOUT THE SIZE AND WEIGHT OF NUGENT. YOU HAVE GOT THE SIMILARITIES THAT BOTH HIM FEMALE, BOTH WERE WHITE AND BOTH WERE BLONDE. IT IS -- THAT BOTH WERE FEMALE, BOTH WERE WHITE AND BOTH WERE BLONDE. IT WAS SCHREER THAT THE PROSECUTION -- IT WAS CLEAR THAT THE PROSECUTION CONTENDED THAT CORYELL WAS WAY OUT OF JOHNSTON'S LEAGUE. IT IS AT BEST A GENERAL SIMILARITY, BUT IN TRUTH I WOULD SAY IT IS REALLY NO SIMILARITY AT ALL.

WHAT ABOUT, THOUGH, AGAIN, SOMETHING COULD BECOME, THE VICTIMS COULD BE DIFFERENT, BUT IF SOMEBODY HAD THE MOST UNIQUE WAY OF MURDER, SO THAT IT WAS A FINGERPRINT, AND IT WAS LIKE SOME TERRIBLE WAY WHERE THEY DID SOMETHING YOU KNOW, THAT WAS JUST SO UNIQUE, WHAT ABOUT, WOULD THE BUTTOCKS, WHAT WOULD YOU SAY ABOUT THAT?

WHAT I WOULD SAY ABOUT THAT IS THIS. THERE ARE EXTREME AND VERY SIGNIFICANT DISSIMILARITIES IN THIS CASE. THE JUDGE GAVE NINE SIMILARITIES IN THIS CASE. SEVERAL OF THOSE COME FROM RAY'S STATEMENT, WHICH THE STATE IS CLAIMING THEY DIDN'T USE FOR ITS TRUTH, BUT THEN FOR EXAMPLE THE STUFF ABOUT THE SHALLOW WATER AND THE STUFF ABOUT THE INTENDED USEFUL THE VICTIM'S APARTMENT, THAT MAKES SENSE ONLY IF YOU TAKE RAY'S STATEMENT AS TRUE. THE JUDGE, HIMSELF, SAID THAT THE SHALLOW WATER, IN AND OF ITSELF, WOULD NOT BE A SIMILARITY BUT IT ONLY BECOME AS PROFOUND SIMILARITY IN LIGHT OF RAY'S STATEMENT, BUT SO ANYWAY WHAT YOU HAVE GOT THERE IS WRONG SIMILARITIES, SUCH AS THAT THE CRIMES OCCURRED 18 DAYS APART WHEN IN FACT IT WAS SIX MONTHS. YOU HAVE GOT MEANINGLESS SIMILARITIES. YOU HAVE GOT A FEW GENERAL SIMILARITIES, SUCH AS THE FACT OF STRANGULATION, SUCH AS THE FACT OF THE BLUNT, YOU KNOW, THE BEATING INJURIES TO THE FACE AND THE CHEST, WHICH AS I POINTED OUT IN MY BRIEF, VIRTUALLY MOST OF THE STRANGULATION CASES THIS COURT HAS DECIDED ARE ACCOMPANIED WITH BLUNT TRAUMA INJURIES. THE STATE SAYS THE STRANGULATION OCCURRED FROM BEHIND, BUT THE REASON THE VAST MAJORITY OF STRANGULATION CASES DON'T SAY WHETHER THE STRANGULATION OCCURRED FROM IN FRONT OR BEHIND, AND IN POINT OF FACT WHAT YOU HAVE FROM THIS CASE IS YOU HAVE ONE CASE WHERE THERE WAS FIGHTING ACTIVITY, NUGENT, AND THE MEDICAL EXAMINER SAID AT SOME POINT, RAY, THAT WHOEVER DID THE NUGENT MURDER WAS BEHIND THE VICTIM, AND IN THE CORYEL CASE, YOU HAVE GOT THE MEDICAL EXAMER SAYING THERE IT COULD HAVE BEEN EITHER. I CAN'T EXCLUDE EITHER BUT I THINK IT WAS SLIGHTLY MORE ACCURATE THAT THE MURDER OCCUR FROM FIND. THE NATURE OF THE ---

COULD OCCUR FROM BEHIND. THE NATURE OF THE TWO MURDERS WAS DIFFERENT. ONE WAS A THROTTLE MURDER AND THE OTHER WAS DISSIMILAR.

WAS THE APPARENT SQUEEZING, WAS THAT TRUE AS TO BOTH?

NO. AS TO ONLY NUGENT AND IN THE CORYELL CASE THE THYROID BONE AND OTHER CONSISTENT PRESSURE THAT THAT WAS MORE CONSISTENT WITH.

WHAT ABOUT IF I GIVE YOU THE HYPOTHETICAL THAT WHAT IF THERE WAS A MURDER, AND EVERY TIME HE COMMITS THE MURDER, HE LEAVES A PIECE OF PAPER ON THE CHEST OF THE VICTIM WITH THE WORD "SCORPION" ON IT. OTHER THAN THAT THERE IS NO SIMILARITY. SOME ARE YOUNG, SOME ARE FEMALE, SOME ARE MALE, SOME ARE YOUNG, SOME ARE OLD, IS THAT THE NOT ENOUGH TO CONSTITUTE A SIGNATURE?

THERE ARE A COUPLE OF QUESTIONS FORM I WOULD WANT TO KNOW -- THERE ARE A COUPLE OF QUESTIONS. NUMBER ONE, I WOULD WANT TO KNOW WHAT ARE THE DISSIMILARITIES IN THE CASES, BUT I WOULD BE CONCERNED WITH A COPYCAT. I THINK THAT YOU HAVE TO LOOK AT THE SIMILARITIES AND THE DISSIMILARITIES IN CONTEST WITH -- IN CONTEXT WITH EACH OTHER. SO I WOULD BEHESTTANT TO SAY WHETHER IN ALL CASES THE SCORPION THING IS ADMISSIBLE. I DO WANT TO ADDRESS THE STATE'S ARGUMENT THAT THE ERRORS WERE HARM LIST, BECAUSE THE EVIDENCE WAS -- WERE HARMLESS, BECAUSE THE EVIDENCE WAS OVERWHELMING. NUMBER ONE, I WANT TO POINT OUT IN MY BRIEF THE EVIDENCE WAS STANDARD AND NUMBER TWO THE EVIDENCE WAS VERY, VERY HE FAR FROM OVERWHELMING AND -- VERY, VERY FAR FROM OVERWHELMING. NUMBER TWO, THERE WAS A 38-HOUR WINDOW PERIOD OF WHICH THE MURDER OF JANIS NUGENT COULD HAVE OCCURRED. WE DON'T THINK THAT IT WAS ADVERSE THAT JANIS NUGENT WAS IN HER HOME FOR SEXUAL OR OTHER PURPOSES AND WE KNOW FROM A FRIEND THAT SHE MAY HAVE HAD SOME ENEMIES OR THERE COULD HAVE BEEN SOME PEOPLE WHO HAD A PROBLEM WITH HER AND THAT COULD HAVE GONE TO THE MISSING ANSWERING MACHINE TAPE, TOO. THERE COULD HAVE BEEN OTHER MOTIVES. THE SHOES, THERE WERE AT LEAST FOUR TREAD DESIGNS FOUND ON THE FLOOR THAT WERE NOT MATCHED TO ANYONE. THE TREAD OF ONE WAS CLASSIC WITH REGARD TO RAY'S SHOES AND NUMBER ONE, WE DON'T KNOW IF HE HAD THOSE SHOES SEVEN MONTHS BCH THEY WERE SEIZED. -- SEVEN MONTHS BEFORE THEY WERE SEIZED. SO THE SHOES HAD NOTHING TO DO WITH THE SEARCH WARRANT THAT OCCURRED WITH NOBLETT OVER THE ARREST THING AN ARREST WARRANT. AND THERE WAS BLOOD THAT DID NOT MATCH JANIS OR RAY BUT CLEARLY BLOOD AND FIVE AREAS OF FINGERPRINTS IN THE HOUSE, TWO LOCATED WHERE THE FIGHTING ACTIVITY HAD TO HAVE OCCURRED. ONE WAS ON A DRESSER TOP AND ON A PILL BOTTLE BY A BROKEN LAMP, WHICH THE STATE IS CONTENDING WAS THE SIGHT OF THE STRUGGLE. THE LAMPS AND THE PHONE WERE NEVER LINKED TO RAY. THERE WAS NO INDICATION THAT RAY WOULD HAVE HAD THEM OR KNOWN WHERE SHE KEPT THEM. MY TIME IS UP. I WISH HAD HAD TWO HOURS. THANK YOU.