

IN THE SUPREME COURT OF FLORIDA

OSCAR RAY BOLIN, JR.

Appellant,

v.

CASE NO. SC02-37

STATE OF FLORIDA

Appellee.

_____ /

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

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

Guilt Phase -

While on his way to work on the morning of December 5, 1986 with a friend Andy Berwick, construction worker Don Gibson observed what was thought to be turkeys but on closer inspection proved to be buzzards. There was a dirt road off the paved road and a few feet away he saw the victim's feet and head sticking out from under a white sheet. He did not see any shoes on or around the body. He noticed a set of tire tracks backed up beside where the body was laying. The police were called (R13, 530-37). Pasco County Deputy Sheriff Wood met with Gibson on the road at Greenfield Road and observed the body of a white female apparently in her mid-20's covered with a white sheet. He noticed injuries to the head area and that the body was damp which was unusual because there had been no rain. There were tire tracks from a large vehicle nearby (R13, 550-552). A former identification technician Roy Steven Corrigan described the body wrapped in a sheet that had the logo of St. Joseph's Hospital on it. He took custody of a set of car keys on the upper left arm area of the body and took plaster cast impressions of the tire tracks on that day and on a second day. He also took photographs and made a video recording of the scene which was played to the jury. One of the keys found was to a Honda automobile (R13, 577-99).

Homicide investigator Kenneth Hogan testified about his observations of the victim and tire tracks which appeared to be fresh at the crime scene and his seeing the victim's vehicle at the Land O' Lakes Post Office. There appeared to be a purse on

the driver's side of the console of the vehicle and mail was found on the ground by the vehicle (R13, 617-625). Crime scene technician Donald Bridges testified regarding his collection of evidence at the medical examiner's office, the pair of slacks from victim Teri Matthews and a vial of blood (R13, 627).

Gary McClelland who had dated Teri Lynn Matthews testified that he had seen her in the late evening of December 4, around 11 p.m. She left to go back home in Masaryktown in Pasco County and her parents had a post office box in Land O' Lakes. After she drove away in her red Honda Civic CRX, he did not hear from her that night or on the next day which was unusual. After an unsuccessful call, he went to her parents' house to retrace the steps she would have taken and saw her car at the Post Office; mail belonging to her and her parents was on the ground in the vicinity of the vehicle and her purse was in the car. He spoke to postal employees, noticed the head lights on the car were still on and the doors were unlocked. After contacting the sheriff's office he viewed a videotape taken by post office personnel which appeared to depict Matthews. He had not had sex with her that evening or within twenty-four hours and provided a blood sample to authorities (R13, 632-642).

Charles McClelland identified the body of Teri Lynn Matthews at the medical examiner's office (R13, 647). Former deputy Douglas Carney and Post Master William Ragin testified about the red Honda parked at the post office and the

surveillance camera recording the previous evening (R13, 649-653; 656-657).

Documents showed that Matthews was authorized to receive mail at the Reeves box (Box 1255) and that Bolin had a box (Box 1379) about three feet away (R659-660).

Post Office employee Mava Morris recalled seeing the car when she arrived at work at 6 a.m. on December 5 (R14, 668-672). The victim's mother Kathleen Reeves testified that it was convenient for Teri to pick up the mail each day - the post office was about eleven or twelve miles from the residence - and that Gary McClelland had called Friday morning to ask if Terri arrived (R14, 674-77).

Cooper Tire employee Mark Thomas met with a detective in January 1987 who had brought some plaster casts of tire impressions; they appeared to be a tire manufactured by Cooper and a design he had personally helped design (R14, 678-679). The tire that left the impression in the cast was 8.75 x 16 ½ (R14, 684).

Detective Hoskins investigating the case on August 7, 1990 spoke to Mr. and Mrs. Khales and attempted to locate a wrecker that had been assigned to Bolin on December 5, 1986; he found it located in the Orlando area, being repaired after it was burned. The tires were dumped and not located (R14, 686-687). Philip Bolin identified a photo of the burned out vehicle as depicting the wrecker appellant had driven (R14, 692).

Rosemary Khales Neal testified that she and her husband had owned a towing

business in Tampa and employee Oscar Ray Bolin had been with them for three or four weeks on December 4, 1986. His initial duties were to ride with a driver-trainer for weeks until he learned the field. That day he was assigned to driver Dale Veasey whose vehicle had the call name "22Bob". The tow truck wrecker had dual wheels (the back had two on the left and two on the right). They bought Cooper tires; her husband thought they were the best buy value dollar per tire (R14, 702-705). During the morning hours of December 4, they received a call to help a disabled vehicle in Pasco County. They were going to assign it to Veasey who had the most experience and had previously lived in Pasco County, but Bolin wanted to take the call since Christmas was approaching and he needed the money. Despite her husband's opposition, the sympathetic Mrs. Khaless allowed him to take the call and provided a tire buddy or tire knocker used to hit the tires to make sure they have air (a two foot wooden object filled with lead). She communicated with Bolin by radio and at the completion of the call when he reported they were going to pay by check she instructed him to return to the facility. He did not show up (R14, 706-713). Mr. and Mrs. Khaless went home and went to bed and they heard a screeching sound over the radio from a panicked Bolin who said he was lost. Bolin failed to obey their instruction that he should call from a landline phone, due to their difficulty in hearing him. They didn't hear further from him that night and when she went to work the next

morning at 7:00 or 7:30, 22Bob was not there. Bolin pulled up to the facility about 10 or 10:30. His overall appearance was dirty, wearing the same clothing when sent out and with a foul smell. Her husband was upset and wanted to fire him. Bolin was emotional and in tears. She won the debate and he remained employed. Later that afternoon a television broadcast the discovery of Teri Lynn Matthews' body. Bolin got very excited (R14, 713-722). Bolin carried a large knife on his hip that he would play with and sharpen. 22Bob is a one ton vehicle, one of the larger trucks in the facility (R14, 724-725).

Former homicide investigator Lee Baker went to Indiana and talked to Cheryl Colby who was divorced from appellant. He found out that Philip was Philip Bolin, talked to him and came back to Florida with in July of 1990. Philip had been living with a cousin in Indiana (R14, 746-51)¹.

Phillip Neil Bolin testified that on December 4, 1986 he was awakened at the double wide modular home by his stepbrother Oscar Ray Bolin who, scared and nervous, requested his help. Philip followed him to his camper, heard a muffling sound (Philip initially thought appellant hit a dog) and saw a white sheet with something

¹The Court had a discussion about juror Bradley who recognized Mrs. Reeves at Home Depot but it would not affect her verdict. The defense initially sought to strike Bradley and the court ruled he could renew the request later (R14, 756-760). Subsequently, the defense opted not to replace Bradley (R19, 1604-55).

underneath it. Appellant said it was a girl and that she got shot (R15, 764-774). Appellant pulled a twelve inch long stick with a little metal at the end of it, pulled the club over his head and Philip turned his head away and heard several thumping sounds. Nearby was a black Ford dual wrecker that Philip had not seen before. Appellant asked him to get and turn on the water hose. Philip just stood there. Appellant turned the water hose on and sprayed it by the head of the body. Appellant demanded Philip help him load the shoeless body onto the wrecker. Philip refused appellant's offer of money and appellant drove off alone to dispose of the body. Appellant returned twenty to thirty minutes later and related that there had been a drug deal in which the girl got shot. Philip told him he had to go to school the next day and couldn't go with him to Tampa. The next day he told his best friend Danny Ferns on the school bus what had happened and told him not to tell anyone. Afterward he showed him where the body had been (R15, 774-787).

Subsequently, Philip moved to Kentucky with his parents; he didn't tell them what happened out of fear. In 1989 he lived in Union City with his aunt and cousin for almost a year. Detectives visited in 1990 and he told them what he knew. He felt scared but relieved. He talked with them again in Pasco County. He moved back with and lived with his parents in 1996 (R15, 787-792). In January of 1996 he met with Rosalie Martinez whom he thought was appellant's lawyer at his parents' house. His

father Oscar Ray Bolin, Sr. was not happy about his testifying and Philip didn't want to because it hurt his parents. Ms. Martinez discussed his potential testimony, the notarized statement he wrote was copied from a document she had written and many of the words he did not understand, but Rosalie indicated he should write them. The document was not true and it was read to the jury (R15, 793-806).

Danny Ferns, Phillip's best friend, testified that Philip was shaking, very upset and crying on the bus in December of 1986. Ferns went back and looked at the property and saw blood and stuff on the ground. He didn't tell anyone about it until his mother told him to tell detectives what he knew in 1990 (R15, 869-878).

Detective Noblett went to Union City and spoke to Michelle Steen on July 22, 1990 (R15, 901-02). Michelle Steen testified that she was living in 1987 with her then-husband David Steen (a first cousin to appellant). During a conversation over drinks appellant responded to her question and said he had killed somebody. He elaborated that he had beaten a girl and put a hose down her throat and killed her in Florida. She thought he was joking and didn't tell anyone until detectives came to her house in 1990 (R15, 905-07).

Corrections bureau Lt. Stacey Jenkins identified state exhibit 5G as a letter sent from the detention center sent by appellant; the recipient was Philip Bolin (R15, 922-929).

Donald Young testified that photos of the crime scene depicted dual wheels (R15, 931-958). Hillsborough County Sheriff's Officer Gary Terry testified that vials of blood were taken from Bolin by a nurse in his presence at a hospital in Ohio in 1990 (R16, 963-964).

The prior testimony of Cheryl Haffner was read. She had taken items from Tampa General and St. Joseph's Hospitals during her stays there in 1985 and 1986. She had a post office box (Box 1379) at Land O' Lakes office and appellant brought her her social security check on December 5, 1986, after having forgotten on the previous day (R16, 970-074).

Forensic consultant William Bodziak opined about the tracks left at the scene (R16, 1001-1017).

FBI forensic serology expert John R. Brown testified that appellant had blood Type AB and was a secretor (R16, 1056-1060). Robert Hall found seminal stains in the crotch of the pants of Teri Lynn Matthews. Hall subsequently learned that Bolin was an AB secretor and he could not eliminate Bolin as a contributor of the A blood group substance on the slacks or a contributor of the blood group substance found in the semen stain. Gary McClelland was a type B blood and secretor - could not have been the depositor of A blood group substance found in the stain (R16, 1066-1085).

Dr. Edward Corcoran performed the autopsy on Matthews; the cause of death

was homicidal violence, including blunt trauma to the head and stab wound to the neck. There were a total of twelve lacerations to the head and two open head injuries (a total of fourteen). As to defensive wounds she had bruises on the top of both of her hands. There was evidence of fluid in the stomach consistent with placing a hose in the mouth. The blunt trauma could be caused by the two foot wooden object with a heavy end to it. The victim's clothing was damp and she could still make gurgling sounds after being stabbed (R16, 1116-1129).

David Walsh, a staff molecular biologist at Cellmark Laboratories, was able to extract DNA from the semen stains on victim Matthews' slacks. The DNA banding pattern from the combined semen stain extract did not match DNA banding pattern obtained from the blood of McClelland and it did not match Matthews' banding pattern either. Walsh could exclude both victim and McClelland as donors of stains in the slacks (R16, 1150-59). In August of 1990 he received a known blood sample of Bolin, extracted the DNA, and got an autorad showing his banding pattern. Five bands were visible on the semen stain. He concluded that five of the six bands detected in the semen stain from the combined cuttings matched five of the six bands from the known blood sample of Bolin. One of the bands they were not able to visualize because of the small amount of DNA. He could exclude Matthews and McClelland but not Bolin as the donor (R16, 1160-1166).

Robin Cotton, forensic laboratory director at Cellmark Diagnostics, supervised the work of David Walsh in 1989-90. Cotton concluded that Bolin could not be excluded as possible DNA donor from the stain. Bolin has six bands, the stain has five which are completely consistent with five bands of Bolin. The most likely explanation for the missing band is that there was not much DNA obtained from the stain; that is not an unusual circumstance (R17, 1194-1200).

Dr. Christopher Basten, an expert in the field of population genetic frequency, testified that the databases were prepared by Cellmark. He testified that in his opinion concerning the population genetic frequency in this case that the evidence is 2100 times more likely that Bolin is the source than if it is some random unrelated person (R17, 1214-1223).

Penalty Phase -

At the beginning of the penalty phase, defense counsel informed the Court that Bolin did not want him to participate in the jury advisory proceeding, either by questioning or putting on evidence. Bolin confirmed this (R20, 1677-1690).

State witness Jenny Lefevre testified that on November 18, 1987, appellant kidnapped her at gunpoint at her automobile and began driving, with her as a passenger. He pulled into a parking lot and a semi-trailer truck also pulled into the lot. He pushed her out of the car towards the trailer; a driver and a passenger were inside

(R20, 1694-98). She thought they were being abducted as well. Bolin directed the driver to turn off the CB's and radios and to get on the turnpike. After going through the toll gate, they turned on the music and started laughing. She knew then they were all in it together. Bolin told her he was going to rape her and did so (R20, 1698-1701). The two other men were Roger Hall and David Steen. Bolin and Steen switched places. Steen started to pull her into the sleeper. She resisted and he did not rape her. Bolin told her he didn't know if he was going to kill her (R20, 1701-06). Steen and Bolin discussed getting rid of her and after several hours, she was removed from the vehicle blindfolded. Bolin lifted her over a fence and she ran (R20, 1706-10). They had gone from Ohio to Pennsylvania (R20, 1712).

Corrections officer Rick Luman testified that Bolin was an inmate at an Ohio county jail on June 4, 1988. Bolin and another inmate attempted to escape and struggled with the witness. Bolin subsequently was charged with and pled guilty to felonious assault and escape (R20, 1715-1727). Luman sustained permanent injuries (R20, 1729).

Marlene Long, a detective in Ohio, arrested Bolin, Hall and Steen for the kidnapping and rape of Jenny LeFevre in 1987. Bolin was convicted of the kidnapping and rape (R20, 1731-1733). She identified state's Exhibits A-D, the charges Bolin pled guilty to (R20, 1735).

The defense again indicated there was no evidence at that time (R20, 1736). A Spencer hearing was held December 14, 2001 (R8, 1511-1537).

At the Spencer hearing on December 14, 2001 (at which the defense was permitted to present penalty phase non-jury mitigation), again the defense related that Bolin had instructed them not to call any witnesses or present any evidence (R8, 1513). The prosecutor suggested that pursuant to the Mohammed decision the court should obtain a PSI to look for mitigation and review the prior testimony of Rosalie Martinez regarding mitigation on April 8, 1999 and February 19, 1999 (R8, 1514). The prosecutor also alerted the court to this Court's decision on 1996, synthesizing the previous mitigation findings in the prior trial (R8, 1515). The prosecutor also mentioned Ms. Bolin's deposition of August 30, 2001 (R8, 1516). The prosecutor noted that the state did not receive the PSI and did not care to see it unless it was made an exhibit for this hearing (R8, 1519). Bolin confirmed on the record that he had instructed counsel not to pursue mitigation, of his own free will, knowing the mitigation that would be available (R8, 1521). Bolin indicated he had made a statement that it would be hypocritical to try and mitigate a sentence for a crime he didn't believe he was guilty (R8, 1523). Defense counsel declared that at penalty phase they had been prepared to put on psychological testimony, three family members and mitigation specialist Rosalie Bolin (R8, 1524).

Bolin again declared that he wished to waive presentation of penalty phase evidence:

“I’ve read Mohammed three times. I understand the philosophy behind Mohammed, and I understand what counsel has told me. I’ve discussed it with them. I made a free and voluntary decision (R8, 1526).

The defense had no objection to considering its sentencing memorandum wherein the defense objected to the state’s aggravators (R8, 1427-28). Bolin again did not want to present mitigation (R8, 1531)².

At the sentencing hearing conducted on December 28, 2001 (R9, 1698-1737), appellant maintained his innocence and contended that witnesses had committed perjury (R9, 1702-1708). The judge imposed a sentence of death.

Sentencing Order -

The trial court’s order reflects that, despite Bolin’s knowing and intelligent waiver of penalty phase evidence and Spencer hearing mitigation evidence and argument, the court reviewed the “super” pre-sentence investigative report (only as to mitigation not aggravation). The court found in aggravation (a) that Bolin was

²The record also reflects the excerpts of testimony by Rosalie Bolin on April 8, 1999 in Hillsborough County Case No. 90-11833 (R3, 517-551), and in Case No. 90-11832 (R3, 552-582); an excerpt of testimony of Gertrude Bolin (R3, 583-605), a deposition of Rosalie Bolin on August 30, 2001 (R4, 606-716) and an envelope with PSI (R4, 772-800; R5, 801-1000; R6, 1001-1200; R7, 1201-1394).

previously found guilty of a felony involving the use or threat of violence to the person, i.e. three felonies of sexual battery, and kidnapping on an Ohio victim and felonious assault on a guard in an escape attempt; (b) the capital felony was committed while defendant was engaged in the commission or attempt to commit a kidnapping and/or attempted sexual battery; and (c) the capital felony was especially heinous, atrocious or cruel. In the effort to comply with Muhammad v. State, 782 So. 2d 343 (Fla. 2001) the court considered and gave little weight to information that appellant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. The court also articulated its consideration of several non-statutory mitigators and explained its reasons for finding or rejecting them (R4, 717 - 732).

SUMMARY OF THE ARGUMENT

I. The lower court did not err reversibly in denying appellant's challenges for causes. The trial court which was in a superior vantage point to observe the jurors and assess their credibility in response to questioning did not abuse its discretion. Appellant has failed to show that any juror who sat was not impartial. Jurors Almas and Glass were removed pursuant to peremptory challenges by the defense. Juror Gale did not affirmatively articulate any reason for disqualification. Juror Mr. Cox was properly replaced by an alternate juror before submission to the jury when he became ill and was hospitalized and appellant elected not to exercise the option of replacing juror Bradley. Appellant accepted the jury selected.

II. The lower court did not abuse its discretion in replacing juror Cox, who became ill and was hospitalized during the trial, with an alternate juror who had been selected with the approval of the parties. The court adequately made inquiry into the matter and determined that a mere delay for an uncertain time would be inappropriate in light of the availability and scheduling of remaining witnesses.

III. Appellant's claim that the lower court erroneously allowed expert testimony regarding DNA because a prior ruling was law of the case is meritless. The record reflects that after some initial confusion about the defense objection at trial to the formulation of a question, the jury heard testimony from experts in both molecular

biology and in statistics to evaluate the testimony presented to them.

IV. Appellant's claim is both barred and meritless on the assertion that jurors may not have been sworn prior to the voir dire questioning. Appellant did not complain in the lower court at any point and raise this assertion and the record reflects that jurors were sworn prior to the beginning of any testimony.

V. The lower court did not commit reversible error by accepting appellant's waiver of a penalty phase jury recommendation and appellant is procedurally barred from raising this claim on appeal for the failure to object below. See Griffin v. State, 820 So. 2d 906 (Fla. 2002). The sentence of death imposed is proportionate.

ISSUE I

WHETHER THE LOWER COURT ERRED REVERSIBLY IN DENYING APPELLANT'S CHALLENGES FOR CAUSE.

The standard of review on the trial court's ruling of juror excusals is abuse of discretion because the trial court has an advantageous position to evaluate and observe the jurors' demeanor and credibility. See Lambrix v. State, 494 So. 2d 1143, 1146 (Fla. 1986); Overton v. State, 801 So. 2d 877, 894 (Fla. 2001) ("we conclude that the trial court did not abuse its discretion in denying Overton's cause challenge as to Mr. Heuslein on the basis of his views towards the death penalty").

(A) Prospective Juror Almas -

Juror Almas indicated on voir dire that the attorney has a job to try and win and this was good for the client and made the system work (R10, 178-179), that he would make his decision on the evidence ("whichever is more") (R183), and that he seemed to recognize Bolin's name at first and associated it with disaster, a premonition (R189)³. Initially when the court inquired about cause challenges the defense did not suggest anyone be removed (R10, 197).

Thereafter, the court heard argument on defense cause challenges to jurors Glass and Almas among others and the court denied the objections for cause (R11,

³Almas wanted "as much facts as I can receive." (R169)

231-334). The defense then exercised ten peremptory challenges on prospective jurors Robinson, Schoepfer, Chillura, Ursitti, Almas, Fugate, Glass, Wintersgill, Ramirez and McMichael (R11, 337-342). Subsequently, the court granted defense cause challenges for prospective jurors Perry, Moran, Wehlau, Cotton and Strickland (R12, 426-427) and Blalock (R12, 453-454). The state peremptorily excused Fornabio, Flowers, Judy Cox and Finch (R456). The defense asked for an extra peremptory challenge to use on Mr. Cox and when asked if that were the only one, the defense suggested a possible second additional peremptory for Bradley. The court denied additional peremptories (R457-459). The defense had no objection to alternates Tuttle and Robbins and appellant Bolin affirmatively stated on the record that he had participated in jury selection and agreed to them (R460-461)⁴. See Joiner v. State, 618 So. 2d 174 (Fla. 1992)(defendant waived Neil objection by accepting the jury).

(1) There is no Violation of U.S. Supreme Court Precedents -

In Ross v. Oklahoma, 487 U.S. 81, 101 L.Ed.2d 80 (1988) the Court held that the failure of the trial court to remove a juror for cause who should have been excused under Witherspoon v. Illinois, 391 U.S. 510 (1968) and Wainwright v. Witt, 469 U.S. 412 (1985) did not require reversal.

⁴The jurors who ultimately returned a verdict of guilty were Valchovich, Gale, Snyder, Tyler, Keith, Jundtz, Vitacco, Jacobs, Morgan, George, Bradley and Tuttle (R19, 1660-62).

“Any claim that the jury was not impartial, therefore, must focus not on Huling, but on the jurors who ultimately sat..... We conclude that petitioner has failed to establish that the jury was not impartial.” (Id. at 86)

The Court rejected the argument that reversal was required because the defense could have exercised a peremptory challenge differently if not forced to do so by the trial court’s error:

“In the instant case, there is no need to speculate whether Huling would have been removed absent the erroneous ruling by the trial court; Huling was in fact removed and did not sit. Petitioner was undoubtedly required to exercise a peremptory challenge to cure the trial court’s error. But we reject the notion that the loss of a peremptory challenge constitutes a violation of the right to an impartial jury. We have long recognized that peremptory challenges are not of constitutional dimension. [citations omitted]. They are a means to achieve the end of an impartial jury. So long as the jury that sits is impartial, the fact that the defendant had to use a peremptory challenge to achieve that result does not mean the Sixth Amendment was violated [citations omitted]. We conclude that no violation of petitioner’s right to an impartial jury occurred.” (Id. at 88)

Nor was there a violation of due process since the defendant received all that Oklahoma law allowed him. Id. at 91.

In U.S. v. Martinez-Salazar, 528 U.S. 304 (2000), the Court added to Ross and held that if a defendant elects to use a peremptory challenge after denial of a cause challenge on a juror who would favor the prosecution and is subsequently convicted by a jury on which no biased juror sat, there has been no deprivation of any rule-based or constitutional right:

“After objecting to the District Court’s denial of his for-cause challenge, Martinez-Salazar had the option of letting Gilbert sit on the petit jury and, upon conviction, pursuing a Sixth Amendment challenge on appeal. Instead, Martinez-Salazar elected to use a challenge to remove Gilbert because he did not want Gilbert to sit on his jury. This was Martinez-Salazar’s choice.

In choosing to remove Gilbert rather than taking his chances on appeal, Martinez-Salazar did not lose a peremptory challenge. Rather, he used the challenge in line with a principal reason for peremptories: to help secure the constitutional guarantee of trial by an impartial jury.” (Id. at 315-316)

Under Ross and Martinez-Salazar, the defense peremptory excusal of Almas did not violate the federal constitution since no biased juror ultimately sat on the jury.

(2) There was no Violation of Florida Law -

In Overton v. State, 801 So. 2d 877 (Fla. 2001), this Court affirmed a judgment and sentence of death. Even though the trial court was deemed to have erred in failing to excuse juror Russell for cause, since the court had granted an extra peremptory in the case it was necessary for Overton to establish that the trial court erred as to both Russell and Heuslein (a second challenged juror) to establish reversible error. Since it was not error to excuse Heuslein for cause, the defendant failed to demonstrate any error warranting reversal for new trial. Id. at 895. See also Watson v. State, 651 So. 2d 1159, 1162 (Fla. 1994); Cook v. State, 542 So. 2d 964, 969 (Fla. 1989).

In Trotter v. State, 576 So. 2d 691, 692-693 (Fla. 1991), this Court explained:

Trotter raises eight points on appeal. He first contends that the

trial court erred in refusing to excuse four prospective jurors for cause, thus forcing the defense to expend peremptory challenges in removing them. He argues that because he eventually exhausted his peremptory challenges and was denied an additional one, reversal is required under state and federal law. We disagree. Under federal law, the defendant must show that a biased juror was seated. *Ross v. Oklahoma*, 487 U.S. 81, 108 S.Ct. 2273, 101 L.Ed.2d 80 (1988). Trotter has made no such claim.

Under Florida law, “[t]o show reversible error, a defendant must show that all peremptories had been exhausted and that an objectionable juror had to be accepted.” *Pentecost v. State*, 545 So. 2d 861, 863 n. 1 (Fla. 1989). By this we mean the following. Where a defendant seeks reversal based on a claim that he was wrongfully forced to exhaust his peremptory challenges, he initially must identify a specific juror whom he otherwise would have struck peremptorily. This juror must be an individual who actually sat on the jury and whom the defendant either challenged for cause or attempted to challenge peremptorily or otherwise objected to after his peremptory challenges had been exhausted. The defendant cannot stand by silently while an objectionable juror is seated and then, if the verdict is adverse, obtain a new trial. In the present case, after exhausting his peremptory challenges, Trotter failed to object to any venireperson who ultimately was seated. He thus has failed to establish this claim.

See also *Hitchcock v. State*, 578 So. 2d 685, 689 (Fla. 1991); *Hall v. State*, 614 So. 2d 473, 476 (Fla. 1993); *Farina v. State*, 679 So. 2d 1151, 1154 (Fla. 1996) (“Although Farina sought additional peremptories to excuse certain jurors, we have already found that the jurors Farina complains of in Issue I were acceptable. Thus, there were no objectionable jurors on his panel, so it does not matter that he was forced to exercise peremptory challenges as he argues in Issue II”); *Mendoza v. State*, 700 So. 2d 670, 675 (Fla. 1997).

Here, the defense exercised its tenth and last peremptory challenge at R11, 342. Subsequently the parties stipulated to the removal of five prospective jurors for cause (R12, 427). The defense requested an additional peremptory “against Mr. Cox” (R12, 457). When the Court inquired if he would only want one if the court gave additional peremptories the defense added, “....actually, I was probably going to go against Ms. Bradley” (R12, 457). The court noted that Bradley said although she had read something she could set it aside and be fair (R12, 458), Cox hadn’t read anything and the court ruled there was no reason to expand the panel (R12, 458). The defense had no objection to alternate jurors Tuttle and Robbins. Bolin acknowledged he agreed with the panel selected (R12, 460-461)⁵. See, Joiner, supra.

In the instant case, assuming only arguendo of course, that the lower court erred in failing to excuse Almas for cause⁶, in effect Bolin was given extra challenges subsequently when Cox (whom the defense earlier wanted an extra peremptory for at R457) had to be replaced due to illness [see Issue II, infra] and the defense sought and

⁵Appellee additionally notes that the defense did not offer any complaint in the motion for new trial about the jury selection process (R3, 471-472).

⁶See also Johnson v. State, 660 So. 2d 637, 644 (Fla. 1995) (“jurors brought into court face a confusing array of procedures and terminology they may little understand at the point of voir dire. It may be quite easy for either the state or the defense to elicit strong responses that jurors would genuinely reconsider once they are instructed on their legal duties and the niceties of the law”).

withdrew a request to strike Bradley (R14, 759; R19, 1654), a request the Court would have granted if truly desired by appellant (R19, 1655). Relief must be denied. Overton, supra.

(B) Prospective jurors Glass and Gale -

At the beginning on the first day of jury selection, the trial court instructed prospective jurors that every citizen accused of a crime is presumed innocent, that the burden of proof in a criminal case lies solely upon the prosecutor, that the defendant has no burden and needs to prove nothing, and that the prosecutor must prove the charge beyond a reasonable doubt. The jurors acknowledged they understood these concepts and agreed to abide by them (R10, 16-17). Jurors Gale and Glass were among this group (R10, 20-21). The court then proceeded with the voir dire examination of fourteen of the original fifty selected (R10, 51- 53). Another small group was then brought in for questioning (R10, 73-75) and questioned until a lunch break (R10, 76 - 120). After lunch, the voir dire examination continued (R10, 155-200). Jurors Gale and Glass were again in the group examined later in the afternoon (R11, 207, 215). The prosecutor reiterated in his questions that under the law the defendant was presumed innocent, that the state had the burden of proof beyond a reasonable doubt and that the defendant had the right simply to require the state to prove it. The jurors acknowledged that no one had a problem with that concept. No

one had a problem with accepting the law as instructed by the court (R11, 250-252).

The jurors agreed that whatever prejudice or sympathy (either for the defendant or state) they would set aside and weigh and evaluate the evidence and testimony in returning a verdict (R11, 253). They could give Bolin a fair and impartial trial (R11, 270).

On the second day, October 16, 2001, voir dire continued with defense counsel's inquiry (R11, 276). The record does not demonstrate any affirmative assertion by prospective jurors Glass and Gale that they would require the defense to prove the appellant's innocence. The colloquy at R11, 290-292 provides:

MR. SWISHER: Okay. In that vein, let me ask you this, Mr. Avalos. What would you say my job here is in the courtroom as Mr. Bolin's attorney? What would you say my jobs or duties are?

PROSPECTIVE JUROR AVALOS: It would be to defend the person accused.

MR. SWISHER: All right. Would anybody here require me to prove his innocence?

PROSPECTIVE JURORS: (Indicating.)

MR. SWISHER: Okay. I see some shakes and I see some nods.

Mr. Flowers, would you expect me to prove his innocence?

PROSPECTIVE JUROR FLOWERS: Yes.

MR. SWISHER: All right. How many agree with Mr. Flowers?

Okay. We have Ms. McMichael. Who else? Raise your hand. We have Mr. Gale, Mr. Glass. Who else? We have Ms. Pruitt and Mr. Vitacco. Anybody else? I assume

by that that the rest of you would not expect me or require me to prove his innocence; is that a fair statement?

Ms. Julian, what would you say my job is?

PROSPECTIVE JUROR JULIAN: Your job is to perform a defense for the accused. But it's the State's job to prove beyond a reasonable doubt - - shadow of a doubt - -

MR. SWISHER: Don't use the shadow of a doubt. You'll never hear this.

PROSPECTIVE JUROR JULIAN: Reasonable doubt.

MR. SWISHER: You'll never hear the Judge say shadow of a doubt. You only hear that on television.

PROSPECTIVE JUROR JULIAN: Reasonable doubt.

MR. SWISHER: Because there's always a shadow. Right?

Who here would put me to the task if I didn't put my - - didn't put Mr. Bolin on the witness stand? Who wouldn't want to hear or require me to put Mr. Bolin on the witness stand? Anybody?

Mr. Glass. Mr. Gale. Mr. Straquadine. Anybody else? Ms. McMichael.

PROSPECTIVE JUROR PRUITT: I didn't understand the question.

MR. SWISHER: I'm sorry?

PROSPECTIVE JUROR PRUITT: I didn't understand the question.

MR. SWISHER: Who here would require me to put Mr. Bolin on the witness stand?

Ms. Pruitt?

PROSPECTIVE JUROR PRUITT: Yes.

MR. SWISHER: Anybody else? Ms. Bilby, right?

PROSPECTIVE JUROR BILBY: (Nodding head.)

MR. SWISHER: Anybody else?

PROSPECTIVE JURORS: (No response.)

While trial counsel may have initially thought Glass and Gale had indicated such a view, the record does not reflect that they confirmed his view. In any event, at the conclusion of the exchange, only prospective jurors Pruitt and Bilby affirmatively indicated they would require Bolin to testify. Pruitt and Bilby were subsequently excused for cause because they couldn't be fair and impartial (R11, 313). Trial defense counsel did not dispute it when the court inquired "Is there any dispute that Glass said he could follow the law?" (R11, 327) At most, some jurors like Julian didn't understand the question which confusedly asked "Who wouldn't want to hear or require me to put Mr. Bolin on the witness stand? Anybody?" (R11, 292)

This Court has observed on more than one occasion that when jurors are thrust into the courtroom, and exposed to the nuances of the criminal justice system it is not surprising what their responses can be especially when asked confusing or leading questions by one of the advocates. See, e.g., Johnson v. State, 660 So. 2d 637, 644 (Fla. 1995) ("...jurors brought into court face a confusing array of procedures and terminology they may little understand at the point of voir dire. It may be quite easy for either the state or the defense to elicit strong responses that jurors would genuinely reconsider once they are instructed on their legal duties and the niceties of the law... Moreover, the courts should not become bogged down in semantic arguments about hidden meanings behind the juror's words")' Castro v. State, 644 So. 2d 987, 990

(Fla. 1994) (“not surprisingly, the prospective jurors had no grounding in the intricacies of capital sentencing”); Overton v. State, 801 So. 2d 877, 893 (Fla. 2001) (“They are overwhelmingly unaware of the existence of the bifurcated process by which defendants may be tried and ultimately sentenced to the death penalty”).

Whatever confusing questions were first submitted, it is clear from the record that any remaining jurors who erroneously believed the defendant was required to submit evidence were subsequently excused and did not sit on the jury.

Finally, appellant may not prevail on any of his attacks on prospective jurors (Almas, Glass, Gale or anyone else) since appellant accepted the jury selected (R12, 460-416)⁷. See Joiner v. State, 618 So. 2d 174 (Fla. 1993) (defendant waived Neil objection by accepting the jury). Accord, Franqui v. State, 699 So. 2d 1332, 1334 (Fla. 1997); Johnson v. State, 750 So. 2d 22, 26 (Fla. 1999); Philmore v. State, 820 So. 2d 919, 930 (Fla. 2002); Rimmer v. State, 825 So. 2d 304 (Fla. 2002).

Appellant’s claim is meritless. Bolin was tried by a fair and impartial jury. Relief must be denied.

⁷Appellant did renew a request for additional peremptories regarding Bradley and Mr. Cox prior to the jury being sworn (R13, 482), but Cox was replaced due to illness [see Issue II, *infra*.] and the defense ultimately opted not to replace Bradley which the court would have allowed (R19, 1654-1655).

ISSUE II

WHETHER THE LOWER COURT ABUSED ITS DISCRETION BY REPLACING JUROR COX WITH AN ALTERNATE AFTER HE BECAME ILL.

(A) The proceedings below -

On the morning of October 19, 2001, the trial court and counsel discussed the problem with juror Cox (R16, 984-1000). The court had been informed that Mr. Cox was up all night (with only three hours of sleep). He had emphysema and breathing difficulties. Cox had informed the jury coordinator that he had not brought his oxygen for jury selection because he assumed after 9/11 that you couldn't bring an oxygen tank into a county building; he was on his way to the emergency room or to his doctor, whoever would take him. He would definitely not be in (R984). The court indicated they should impanel an alternate and the prosecutor requested the same. The prosecutor explained that the state would like to proceed with the trial that day since they had an expert witness who was committed all of the following week to other engagements, and there were two other people flown in from other parts of the country and they did not bring extra clothing with them. If the court passed the case to Monday, those two witnesses would have to be flown back at state expense and then flown back again. The prosecutor hadn't yet discussed with them whether they would even be available at that time. Everyone had selected alternates they were happy with

(R985 - 986).

The trial court recalled that juror Cox had been one of the prospective jurors that the defense had wanted an extra peremptory to remove but now indicated they preferred would stay⁸ (R986 - 87). Defense counsel noted that they didn't know Cox couldn't be here later that day. The court responded that they knew he was on his way to the emergency room, that he had a history of breathing problems and emphysema, that he can't make it, that he didn't sleep all night and that he was an elderly gentleman (R987). The court indicated it would give both sides a reasonable opportunity to investigate further to see if there was an update on his diagnosis. The jury coordinator told the trial judge that Cox was having much difficulty talking and breathing on the phone. The impression the court had was that the juror was not going to be able to serve anywhere in the near future (R988). At the prosecutor's request the court heard testimony of judicial assistant Mary Ellen Broughman and jury manager Nancy Hutchins (R989 - 992).

Broughman testified that Cox called earlier that morning indicated that he was very ill, had emphysema, was a member of the jury and would not be able to make it today. He said he had slept two to three hours and generally when he's ill he has to

⁸See R 13, 482 where prior to the jury being sworn defense counsel renewed a motion for extra peremptories because Cox assertedly "would require me to prove Mr. Bolin not guilty".

go to the hospital. He led her to believe he had a history and pattern of this. He did not indicate whether or not he'd be available on the following Monday or in the afternoon. Hutchins testified that Cox sounded stressful and she could barely understand him. He was anxious to let her know he had a severe problem during the night and had been on oxygen. He had tried his medications, that nothing was relieving his breathing problem and that he was going to the doctor or the hospital, whoever could see him first. She could tell he was seriously ill and he did not indicate when he could be available (R989 - 992). Hutchins' impression was the man was not going to be available anytime soon including any time that day. She had been a nurse for twenty-one years and had many asthmatic patients. Hutchins stated he was definitely having an attack. Cox had had an aortic valve replaced which he thought was going to relieve a lot of his pulmonary problems, in July or August (R993 - 994).

The prosecutor then related that another witness Dr. Corcoran who was to testify that morning would be unavailable for all of next week (R994). Defense counsel added nothing else. The court then ruled:

In the interest of justice it would be very appropriate we impanel an alternate. It would be very inappropriate to continue the trial in the hopes that this juror might make some sort of miracle recovery. It's not in the cards. I don't see this gentleman getting well. Unfortunately he had an attack, he's an asthmatic, he has emphysema, he's not available, he's going to the emergency room. Right-minded people would not possibly honestly believe there's any serious likelihood of him being

rehabilitated to be back on this panel.

He hadn't had any sleep. The man normally utilizes oxygen. He had pulmonary problems. He has breathing difficulties. We all heard him coughing his brains out, so there is a problem. It wouldn't be fair to delay the case. And secondly, it would cause gross manifest injustice if I didn't proceed.

Secondly, my understanding was this is not going to be a half a day case today, it's going to be a potential breaking early, whatever that means. So it's not like a minor inconvenience. There's witnesses that can't be relocated easily, so we're going to have to impanel another alternative. That would be Jennifer Tuttle who would be next in line. (R995 - 996)

Bolin registered his personal objection (R996).

The prosecutor provided a case, Andrade v. State, 564 So. 2d 238 (Fla. 3 DCA 1990) and defense counsel indicated they didn't need to see the case since the court had ruled (R997 - 998). The court indicated a willingness to reconsider its ruling and the defense announced it was renewing the objection but didn't need to see the case.

The court responded:

I happened to have read that case. That's the primary case cited in the state of Florida. In fact, the judge was Marty Kahn, which happens to be a judge that teaches up at the judges' college in Tallahassee. Another case came down the pike by the name of Delahoya (phonetic). Same thing happened, the juror called in with the flu and the judge sua sponte excused the juror, impaneled an alternate. And the objection there was that the defense attorneys weren't allowed to participate in a hearing or inquiry to determine the extent of the illness or inquiry to determine the extent of the illness and it was determined they had no right to participate in the hearing, so he was upheld.

Here I think we've gone more than one step beyond. Secondly, we don't have flu here. We have something like emphysema, asthmatic,

man on oxygen, someone who is far beyond flu situation. And then we have - - we did have a hearing where both sides had the opportunity to question the information that was brought to my attention, I didn't do it sua sponte. So I think we're well above and beyond.

And secondly, they're first-degree murder cases just like we have. Everyone says death is different. So if there was some aberration in the case law, both sides have had a chance to fully explore it and I'm standing by the original rulings. We'll bring the jury back unless there's something else we need to take up. (R999 - 1000)

The jury was then informed that juror Tuttle was being empaneled for ill juror Cox (R1000). Appellant did not assert any complaint about this ruling among the grounds urged in his motion for new trial (R3, 471-472).

(B) Argument -

A trial court has broad discretion in impaneling jurors and replacing them with alternates. See Raleigh v. State, 705 So. 2d 1324, 1328 (Fla. 1994) (no abuse of discretion in dismissing juror over objection of defense counsel following expression of hostility toward prosecutor). Jennings v. State, 512 So. 2d 169, 172 (Fla. 1987). Discretion is abused only where no reasonable person would take the view adopted by the trial court. Huff v. State, 569 So. 2d 1247, 1249 (Fla. 1990); Hawk v. State, 718 So. 2d 159, 162 (Fla. 1998); Trease v. State, 768 So. 2d 1050, 1053 n. 2 (Fla. 2000).

See also U.S. v. Wilson, 894 F.2d 1245 (11th Cir. 1990) (district court did not abuse its discretion in determining that just cause existed to dismiss pregnant juror who

suffered from abscessed tooth and did not have affirmative duty to contact ill juror or her physician to investigate her absence before excusing her for just cause); U.S. v. Fajardo, 787 F.2d 1523 (11th Cir. 1986) (decision to remove juror and replace him with alternate is entrusted to sound discretion of trial judge whenever facts are presented which convince trial judge that juror's ability to perform his duty as juror is impaired; trial judge does not need defendant's consent to replace juror with alternate before juror retires - all that is required is reasonable cause for replacement); Wiley v. State, 427 So. 2d 283 (Fla. 1 DCA 1983) (trial court did not abuse its discretion in substituting alternate juror for juror who came in late on the second day of trial); Luckett v. State, 590 So. 2d 955 (Fla. 3 DCA 1991) (juror who did not arrive at session on time was properly replaced with duly chosen alternate); Andrade v. State, 564 So. 2d 238 (Fla. 3 DCA 1990) (excusing juror during murder trial and replacing him with alternate juror was not reversible error where juror called trial judge on morning of last day of trial and reported the he was sick with flu and would be unable to come to court); De La Hoz v. State, 576 So. 2d 812 (Fla. 3 DCA 1991); Orosz v. State, 389 So. 2d 1199, 1200 (Fla. 1 DCA 1980); State v. Tresvant, 359 So. 2d 524 (Fla. 3 DCA 1978).

Appellee notes that the instant case does not involve the issue of substituting a juror with an alternate after beginning of deliberations and consequently Williams v.

State, 792 So. 2d 1207 (Fla. 1998) is inapplicable.

Apparently not finding any of the Florida decisions sufficiently helpful, Bolin turns to a foreign jurisdiction and cites such decisions as People v. Page, 526 NE.2d 783 (NY 1988); People v. Olaskowitz, 556 NYS 2d 900 (App. Div. 1990); People v. Lowe, 631 NYS 2d 298 (App. Div. 1995) and People v. Powell, 579 NYS 2d 71 (1992). Page involved the court's interpretation of a rule pertaining to discharging a sworn juror on the ground that the juror was "unavailable for continued service". The Court held that the trial court had erred in discharging a juror who had called and reported she just got up and would get there when she could. Significantly the court upheld the trial court's action in the consolidated and companion case of People v. Washington where prior to discharge court personnel had attempted to locate the juror - the juror's mother had explained the juror had gone to the hospital but had refused to tell the court which hospital. The trial court also was not convinced the juror was not simply trying to avoid coming to court and four prosecution witnesses were scheduled to testify, one of whom had failed to appear previously and had to be subpoenaed. The instant case is closer to Washington than Page.

In Olaskowitz, the appellate court found the error reversible where the trial court failed to grant a one day continuance for a sick juror and made no record at all to explain its decision. The instant case in sharp contrast details the trial court's inquiry

with counsel and findings regarding both the serious health problem of the juror and the difficult situation with the prosecution witnesses. In Lowe, involving another sick juror who would not be in that day the trial court apparently failed to conduct any inquiry to ascertain the length of the juror's absence or the nature thereof, but seemed intent on avoiding a short delay. Powell involved another case where the juror would not be coming to court that morning, but the decision to reverse drew a sharp dissent from Justice Asch who opined that facts and reason were present which impelled discharge of the juror.

Even the jurisprudence of New York recognizes that where the court takes into account all the relevant circumstances, e.g. prior unavailable delay, other juror's concerns about the length of trial, the risk of not completing the trial with a full complement of jurors it is proper to excuse an absent juror and proceed with trial. People v. Robustelli, 592 NYS 2d 704 (N.Y.A.D. 1993). See also People v. Jeanty, 727 NE. 2d 1237 (Ct. of Appeals of NY, 2000) (permitting excusal of juror who does not appear after two hours and recognizing that as a rule replacement with an alternate juror is not a violation of the right to trial by jury).

In any event it is unnecessary for this Court to resolve which of the New York precedents or jurists best resolve the controversies and rules of New York. Suffice it to say that the Constitution does not require either that the defendant consent to

replacement by an alternate nor is the court compelled to contact the juror, doctor and hospital to determine the severity and duration of the medical condition. See Wilson, supra; Fajardo, supra. Appellant has failed to show that no reasonable jurist would have acted as the trial court here. Huff, supra; Trease, supra.

The trial court sub judice had just cause and acted reasonably in excusing juror Cox who had become ill and was unable to continue because of his breathing difficulties and replacing him with juror Tuttle. It cannot be said that no reasonable person would take the view adopted by the trial court. Neither Florida decisional law nor the federal courts require the adoption of the view advanced by appellant. To summarize, in this case:

- 1). The trial court had received information that Cox who had a history of medical problems of this nature had severe breathing difficulties (with little sleep the previous night) requiring medical and/or hospital assistance and would not be in that day to perform his duties. The juror had more than the flu.
- 2). The court offered and appellant apparently declined the invitation to check further into the situation with Cox's doctor or hospital officials (R987);
- 3). The delay would occasion difficulty in the trial as the prosecutor had

related that two experts (Bodziak and Dr. Corcoran) would be unavailable the following week and two other witnesses flown in from other parts of the country had not brought extra clothing which would necessitate another flight and return flight at the state expense (R985 - 986, 994);

4). The parties had accepted Tuttle as a valid alternate and it is difficult to avoid the suspicion that Bolin's claim is disingenuous regarding a desire to keep juror Cox when earlier he had sought an extra peremptory challenge for the specific purpose of removing Cox (R13, 482).

Appellant's claim is meritless. The failure of Bolin to demonstrate an abuse of discretion requires rejection of this claim and denial of any application for reversal and remand for a new trial.

ISSUE III

WHETHER THE LOWER COURT ERRED IN ALLOWING EXPERT DNA TESTIMONY ASSERTEDLY ON THE GROUND THAT A PRIOR RULING WAS LAW OF THE CASE.

Standard of Review - the admissibility of evidence is within the sound discretion of the trial court and its ruling will not be reversed absent a clear abuse of that discretion. See Ray v. State, 755 So. 2d 604, 610 (Fla. 2000); Alston v. State, 723 So. 2d 148 (Fla. 2000); Zack v. State, 753 So. 2d 9, 25 (Fla. 2000); Cole v. State, 701 So. 2d 845 (Fla. 1997).

During the testimony of state witness David Walsh, a staff molecular biologist who had worked for Cellmark Laboratories, defense counsel objected to the question whether in his opinion there was a match of the bands in the semen sample as compared to the bands in Oscar Ray Bolin's blood. The defense complained that the use of the word "match" was improper but that the word likelihood could be used. The state responded that there had been a prior hearing on the issue, that the court had ruled on it and the case had been appealed. (R16, 1162 - 1163). The defense replied that after the last trial the National Research Council revised its view. The state countered that the defense could pursue it on cross-examination (that it went to weight not admissibility). The court initially observed that a ruling had been made and had

become the law of the case and if the defense wanted to change the law of the case they should have asked for a new Frye hearing; it went to weight not admissibility (R16, 1164).

The defense clarified that he was not asking for a Frye hearing (the previous Frye hearing had been on the admissibility of DNA evidence) and that he was only objecting to the form of the question. This colloquy ensued:

“The Court: That’s different then. The form of the question was in your opinion. Now he didn’t say within a reasonable degree of medical probability; is that why you’re objecting?

Mr. Swisher: That’s part of it, yeah.

The Court: Any objection to rephrasing it?

Mr. Halkitis: Yeah, no problem.

The Court: Okay. Let’s move on then”. (R16, 1165)

The testimony then continued without further objection:

“Q. Sir, I just want to qualify my last question by asking you within a reasonable degree of certainty in your opinion was there a match between the two?

A. Yes, there was.

Q. In your opinion did it come from the same source?

A. In my opinion it did come from the same source.”

(R16, 1166)

Defense counsel cross-examined Walsh (R17, 1171 - 1194).

On cross-examination, the witness stated it was apparent that the book he was being shown was the second one from 1996 of the National Research Counsel and he

was familiar with it. (R17, 1179). Then, this exchange occurred:

“Q. Do you recognize that as an authority in the field?

A. To the extent of the way we do our procedures, but I am not a population geneticist, so for the population genetics portion I don’t feel qualified to comment on that as an expert” (R17, 1179).

The defense moved to strike his testimony regarding a match since he was not qualified as a population geneticist (R1180). The court denied the motion to strike (R1181). Walsh testified that a population geneticist was a person who specializes in the statistical analysis and the genetics of populations of origin to determine the overall frequencies and appearances of certain characteristics of the DNA in various populations (R1190).

Dr. Christopher Basten, as expert in population genetics (R1213-18), then testified without objection that “on the average you’d expect to see about one in 2,100 individuals in the caucasian population with the same profile at the DNA level”. He explained that the likelihood ratio was that it was 2100 times more likely that Bolin is the source than if it’s some random unrelated person (R17, 1228 - 1231).

(A) The instant claim is procedurally barred -

The lower court resolved appellant’s complaint at trial regarding the use of the word “match” in the testimony. If appellant believed that there was an improper ruling about the law of the case he certainly did not register that objection

contemporaneously nor subsequently; it was not mentioned among the grounds asserted in his motion for new trial (R3, 471 - 472). If appellant felt that the trial court had made an erroneous ruling earlier, it was incumbent upon him to assert that below and urge the court to correct itself. See Lucas v. State, 376 So. 2d 1149, 1152 (Fla. 1979) (counsel “deferred to the trial court’s statement of the applicable law. This court will not indulge in the presumption that the trial judge would have made an erroneous ruling had an objection been made and authorities cited contrary to his understanding of the law”)⁹.

(B) The instant claim is meritless -

As indicated, supra, while the trial court initially mentioned the law of the case when the dialogue appeared to be about whether another Frye hearing was being belatedly sought, when defense counsel clarified that he did not seek a Frye hearing but only rephrasing of the question, the prosecutor complied and examination of the witness proceeded.

The gist of Bolin’s argument - that there was some type of error under Brim v.

⁹If there was any confusion, perhaps it was exacerbated by trial counsel requesting prior to the commencement of trial to adopt prior motions and rulings including the previous Frye hearing and ruling in 1996 (R13, 478 - 479). When the court mentioned the law of the case doctrine, appellant neither objected nor interposed any view on that (R13, 480). There was no request or suggestion that the court was committing error.

State, 695 So. 2d 268 (Fla. 1997) and later cases - is not present here. Appellant might have a more persuasive argument if the state only produced a molecular biologist without an accompanying statistical expert to explain both aspects of DNA evidence. But that error did not occur. Instead, Walsh and Cotton explained the biological prong and Dr. Christopher Basten explained the statistics, that it was 2100 times more likely that Bolin was the source than if it is some random unrelated person. There was no error in Walsh's having used the term "match" since he was referring to the bands on the autorads and Dr. Basten explained the statistical meaning of that event. See Butler v. State, _So. 2d_, 27 Fla. L. Weekly S461, 464 (Fla. 2002) ("Dr. Eberhardt's testimony did for the jurors what the expert's testimony could not - it explained the significance of the information and data they were given... She explained that she then calculated a statistical frequency that could tell her "how common or rare that type of profile would be found in any given population"... This testimony quantitatively helped the jury and the trial court understand the importance of a DNA match"). Dr. Basten's testimony similarly applied that function to supplement the Walsh - Cotton testimony.¹⁰

¹⁰There is no reasonable likelihood that the jury was unreasonably or irrationally swayed by Walsh's describing a match of the banding pattern in the autorads in light of Dr. Basten's explanation that regarding the one in 2100 figure and applying an adjustment factor to arrive at 1 in 1200, there would be about 200,000 to 280,000 people in the United States

Appellant's suggestion that Walsh and his supervisor Dr. Robin Cotton disagreed about the results of the testing is erroneous. Dr. Cotton testified that he supervised the work of David Walsh (R17, 1198), that he looked at the autorads and Bolin could not be excluded as a possible donor of the DNA stain. He testified that Bolin had six bands, the stain had five and the five bands in the stain are completely consistent with the five bands from Bolin. One band was missing and the most likely explanation for that is that there was not very much DNA obtained from the stain (R17, 1199). Cotton reviewed Walsh's procedures - there was nothing inconsistent with Cellmark protocol - and Walsh's notes were very detailed. He correctly followed the protocol that was in use for RFLP testing (R17, 1202). Cotton reiterated that the band missing from the semen stain was a G-3 probe and in this case the G-3 probe was likely the last one done and the ability of the DNA on the nylon to give a clear signal gets reduced (R17, 1204 - 06). On cross-examination he declared that he could say within a reasonable degree of scientific certainty that he had five bands in the evidence that match six bands in Bolin, i.e., he can say five match five of the six (R17, 1211).

Cotton's testimony was consistent with that of Mr. Walsh who testified that he extracted DNA from semen stain on the slacks he received (R16, 1155). He produced an autoradiograph, a piece of x-ray film and was able to see a banding pattern (R16,

that might match that (R17, 1239).

1157). The DNA banding pattern from the combined semen stain extract did not match the DNA banding pattern obtained from the blood of Gary McClelland or Teri Lynn Mathews and they could be excluded as donors of the stain on the slacks (R16, 1159). In 1990 he received a blood sample from Bolin, extracted his DNA and produced an autorad showing his banding pattern. He saw six bands though the four probes and five bands were visible on the semen stain (R16, 1160-61). He concluded five bands detected on the semen stain matched five of the six bands from the known blood sample of Bolin. The one unseen band on the evidentiary sample was not seen because you lose a portion of DNA through the process (R16, 1161-62). There was a match of the bands and he could not exclude Bolin as the source (R16, 1166-67). Contrary to appellant's suggestion, there is no similarity to Murray v. State, _So. 2d_, 27 Fla. L. Weekly S816 (Fla. 2002).

Appellant's claim is both barred and meritless and should be denied by this Court. The lower court did not abuse its discretion in allowing the introduction of evidence.

ISSUE IV

WHETHER APPELLANT IS ENTITLED TO A NEW TRIAL WHERE THE RECORD DOES NOT REFLECT THE FACT THAT PROSPECTIVE JURORS WERE SWORN FOR VOIR DIRE AND APPELLANT DID NOT ASSERT SUCH A CLAIM BELOW.

Standard of Review - Legal questions are reviewed de novo. In this instance, this claim is procedurally barred as it was not even presented to the lower court for resolution.

The instant record merely does not affirmatively reflect the fact that prospective jurors were or were not sworn prior to voir dire; it does reflect the fact that after voir dire the selected jurors were sworn prior to the beginning of trial (R13, 488 - 489) Appellant did not offer any complaint or objection below at the time of or after trial and consequently his claim is procedurally barred.

Florida courts and those courts which review Florida cases have held that there is no reversible or fundamental error where, as here, appellant has not submitted any evidence that in fact prospective jurors were not sworn before voir dire. See United States v. Pinero, 948 F.2d 698, 699 (11th Cir. 1991) (“The mere absence of an affirmative statement in the record, however, is not enough to establish that the jury was not in fact sworn”), citing also United States v. Hopkins, 458 F.2d 1353, 1354 (5th

Cir. 1972).

In Pena v. State, 829 So. 2d 289 (Fla. 2DCA 2002), the court through Judge Altenbernd disposed of a similar claim:

[4] Mr. Pena argues that the trial court committed fundamental error when it failed to swear the venire prior to jury selection. Florida Rule of Criminal Procedure 3.300(a) requires that the members of the venire, the group of jurors from which a jury will be selected, each swear that they will truthfully answer all questions during jury selection. Mr. Pena does not cite any prior cases directly on point. Instead, he relies on cases holding that it is error for the trial court to fail to swear the trial jurors prior to the commencement of trial as required by Florida Rule of Criminal Procedure 3.360. See *Brown v. State*, 29 Fla. 543, 10 So. 736 (1892); compare Fla. R.Crim. P. 3.300(a) with Fla. R.Crim. P. 3.360 (requiring jurors to swear they will truly try issues in case and render a true verdict according to law and evidence).

[5] In response, the State argues that it is a common practice for another judge or a deputy clerk to swear the potential jurors in another room, when they are part of a general jury pool, prior to the venire's assignment to any particular courtroom. Case law permits a trial judge to delegate to a deputy clerk the process of swearing potential jurors. See *Johnson v. State*, 660 So. 2d 648, 660 (Fla. 1995). From its own experience, this court is aware that the oath is sometimes given to the venire in another courtroom in the presence of a different court reporter. Nevertheless, we cannot and will not rely on factual information about the jury selection process that is outside our record.

It is clear from our record that the trial judge did not swear the venire. It is clear that no lawyer asked the judge to swear the venire or to confirm that the potential jurors were already sworn. Mr. Pena has not alleged or proven by posttrial motions or affidavits that the venire was unsworn.

We are not required to decide whether it would be fundamental error to conduct a trial with members of a venire that had not been sworn. In this

case, there is simply no record as to whether the venire was sworn. As a result, Mr. Pena is unable to demonstrate that the jurors from the venire were not sworn. He does not claim that any member of the venire gave untruthful answers during questioning. In this case, we merely hold that **fundamental error is not established by a record that fails to demonstrate, one way or the other, whether the venire received the oath required by 3.300(a).**

The instant claim does not constitute fundamental error and appellant is procedurally barred from urging on appeal a claim not preserved by objection in the lower court. In Martin v. State, 816 So. 2d 187 (Fla. 5DCA 2002), another case asserting as error the failure of the record to show the jurors were sworn prior to voir dire examination, the court ruled:

However, Martin failed to raise this objection at trial. Had counsel objected at trial the prospective jurors could have been sworn or if they had already been sworn, the judge could have noted that fact in the record. See *Ellis v. State*, 25 Fla. 702, 6 So. 768 (1889). In addition, Martin accepted the jury. Jury selection issues are deemed waived after acceptance of the jury, unless the objection is renewed, or the jury is accepted subject to an earlier objection. See, e.g., *Joiner v. State*, 618 So. 2d 174 (Fla. 1993) (defendant waived any objection to prosecutor's use of peremptory strikes against minority jurors where, without reserving earlier objection, defense affirmatively accepted the jury immediately before it was sworn); *Stripling v. State*, 664 So. 2d 2 (Fla. 3d DCA 1995) (defense claims that trial court unduly restricted *voir dire* inquiry were not preserved for appellate review where defendant affirmatively accepted the jury and did not renew his objection at any time prior to swearing of the jury); *Casimiro v. State*, 557 So. 2d 223 (Fla. 3d DCA), *rev. denied*, 567 So. 2d 434 (Fla. 1990) (defendant waived all objections concerning jury composition when defendant accepted jury panel); *Springer v. State*, 513 So. 2d 736 (Fla. 3d DCA 1987) (if defendant objects before trial to possible interim service by one or more of his

jurors, court must afford supplemental *voir dire*; however, that objection is waived if the defendant fails to raise or re-urge the objection before trial when supplemental *voir dire* could effectively be held). (Id. at 188)

The Martin court rejected a defense argument of fundamental error by noting that it had found no case so holding and similar claims have been held not to rise to the level of fundamental error citing Fernandez v. State, 786 So. 2d 38 (Fla. 3d DCA 2001) (failure of contemporaneous objection precluded reversal where transcript did not reflect that interpreter took interpreter's oath and it was not fundamental error) and Rodriguez v. State, 664 So. 2d 1077 (Fla. 3d DCA 1995) (failure to have interpreter sworn was not fundamental error, there was no contemporaneous objection, and the matter could have readily been cured if timely called to the attention of the trial court). See also, Lott v. State, 826 So. 2d 457 (1 DCA 2002) (Denying claim of ineffective assistance for failure to object to failure to place jurors under oath prior to voir dire.)

The Lott court explained:

The oath in controversy here is the preliminary oath prospective jurors are required to take to ensure that they will give truthful answers to questions regarding their qualifications. See Fla. R.Crim. P. 3.300(a). The defendant does not contend that the judge neglected to administer the trial oath to the jurors once they had been selected to serve in his case. See Fl. R.Crim. P. 3.360. According to the motion, the defendant's trial counsel was "deficient in her performance" in that she "failed to object when the trial court judge failed to place [the] prospective jurors under oath prior to voir dire."

[2] By this statement, the defendant has merely alleged that the

preliminary oath was not given in the courtroom by the trial judge. He has not alleged that the jurors failed to take the oath. In many Florida courts, the preliminary oath is administered to the venire in a jury assembly room, before the jurors are questioned about their legal qualifications and before they are divided into smaller groups for questioning in individual cases. *See Pena v. State*, 27 Fla. L. Weekly D1542 (Fla. 2d DCA July 3, 2002); *Gonsalves v. State*, 26 Fla. L. Weekly D2530 (Fla. 2d DCA Oct. 19, 2001). Rule 3.300(a) does not require that the preliminary oath be given at a particular time or that it be given more than once. If the jurors have taken the oath in the jury assembly room, they need not take it again in the courtroom.

We are unable to determine whether the jury in this case had taken the preliminary oath earlier in the day, but the defendant did not eliminate this possibility in his motion. It may well be that the defendant's *459 counsel said nothing about the oath before the questioning on voir dire in the courtroom, because she knew that it had been given already. The defendant has failed to account for this entirely innocent explanation of his lawyer's conduct. Consequently, he has not made a facially sufficient claim that her performance was deficient.

[3] The motion is facially insufficient for the additional reason that it does not allege that the neglect or omission by counsel caused any harm. The defendant is unable to show prejudice arising from his counsel's silence in the face of the trial court's failure to administer the oath, because he can not show that the results of the proceeding would have been different had counsel objected. He does not claim, for example, that an unsworn juror provided false information and that the defendant would likely have prevailed at trial with a different juror.

We acknowledge that the defendant's argument appears to be supported by a decision of the Fourth District Court of Appeal. *See Fernandez v. State*, 814 So. 2d 459 (Fla. 4th DCA 2001). However, the opinion in *Fernandez* does not address the potential prejudice a defendant might suffer if his counsel fails to ensure that the preliminary oath is given. Nor is this point discussed in any of the cases cited as authority in the *Fernandez* opinion. *See Mesidor v. State*, 521 So. 2d 333 (Fla. 4th

DCA 1988); *Ex parte Hamlett*, 815 So. 2d 499 (Ala. 2000); *Duren v. State*, 813 So. 2d 928 (Ala. Crim. App. 2000). Perhaps the motion in *Fernandez* did adequately state a claim of prejudice and that fact was simply not discussed in the opinion. In any event, we adhere to the view that a defendant asserting a claim of ineffective assistance of counsel must allege that the act or omission of counsel was prejudicial. (Id. at 458-459)

For these reasons, we conclude that the defendant's postconviction motion was facially insufficient to state a claim of ineffective assistance of counsel, and the trial court correctly denied the motion without an evidentiary hearing.

In the instant case relief must be denied as there is no fundamental error and the asserted error is procedurally barred for the failure to contemporaneously object at trial¹¹.

¹¹Since there is Florida law on this point it is unnecessary to study the nuances of Alabama law as suggested by appellant. Appellee would note that in Fortner v. State, 2001 WL 1148122 (Ala. Crim. App. Sept. 28, 2001), the Alabama Court of Criminal Appeals explained that the primary concern in Ex parte Hamlett, 815 So. 2d 499 (Ala. 2000), was the ineffective assistance of counsel claim (which the courts are reluctant to waive). Fortner upon narrowing its reading of Hamlett concluded that the separate claim that the jury venire or petit jury was not properly sworn is not jurisdictional and is waivable.

ISSUE V

WHETHER THE LOWER COURT ERRED REVERSIBLY BY ACCEPTING APPELLANT'S WAIVER OF PENALTY PHASE JURY RECOMMENDATION.

Standard of Review - The standard by which the reviewing court determines the voluntariness of a waiver is similar to that of determining the validity of a plea. The court looks to the procedures and body of law dealing with pleas and challenges associated with therewith in determining the validity of a waiver. Griffin v. State, 820 So. 2d 906, 912 (Fla. 2002).

Appellant's last claim is that the lower court erred in accepting his waiver of a penalty phase jury recommendation. He acknowledges that Griffin v. State, 820 So. 2d 906 (Fla. 2002) is adverse and dispositive to his position. In Griffin this Court concluded:

“Consistent with our established practice in dealing with a plea-related voluntariness claim presented on appeal for the first time, we now hold the failure of a capital defendant to first attack the voluntariness of a waiver of a sentencing jury at the trial court precludes review on direct appeal. Hence, because of Griffin's failure to first challenge the waiver at the trial court, we cannot address his claim at this stage as he is restricted to collaterally attack the waiver through a post-conviction motion.” (820 So. 2d at 913)

The record reflects that at the penalty phase on October 24, 2001, defense

counsel informed the court that Bolin had advised that he did not desire an advisory opinion nor counsel to participate in an advisory opinion (R20, 1677). Defense counsel explained that Bolin did not want them to call mitigation witnesses (R20, 1683). Bolin confirmed on the record that he instructed counsel to not pursue a jury mitigation advisory sentence, that he did not want them to put on mitigation evidence in front of the jury (R1684). He wanted to waive the penalty phase by the jury and understood the court alone would conduct the penalty phase. He was not under the influence of any alcohol, drugs or medication and he was making this waiver of his own free will, understanding his rights (R1686). There wasn't anything that he didn't understand and needed his attorneys to clarify. Defense counsel confirmed to the court that Bolin was fully aware of his rights and was making a knowing and intelligent waiver. Bolin understood that once the jury was dismissed he could not change his mind about a jury recommendation (R1687). Bolin had talked to both his lawyers Mr. Swisher and Mr. Williams, had all his questions answered and was making a free and voluntary decision (R1688 - 89). The court informed the jury that Bolin had waived the jury in penalty phase and discharged them (R1691).

After the state had presented its penalty phase witnesses' testimony to the court, the court permitted the defense to rest and to present mitigation at the Spencer hearing (R20, 1740). The court indicated a desire for sentencing memoranda prior to the

Spencer hearing, and signed an order for a P.S.I. (R1742).

At the Spencer hearing on December 14, 2001, defense counsel repeated that Bolin had instructed not to call any witnesses nor present any evidence (R8, 1513). A discussion ensued on the requirements of the Mohammed decision and available possible mitigation evidence (R1513 - 17). The court acknowledged receipt of the sentencing memoranda. Defense counsel stated that Bolin objected to the entire P.S.I. (R1517 - 18). Bolin confirmed on the record that he had instructed counsel not to pursue mitigation of his own free will and he was aware of the mitigation that would be available (R1522). Bolin, yet again, confirmed that he wished to waive presentation of penalty phase evidence, that he had read the Mohammed decision three times and understood the philosophy behind it and what counsel had told him; he was making a free and voluntary decision (R1526). There was no defense objection to consideration of the defense sentencing memorandum (R1527). Bolin again repeated his desire not to present mitigation (R 1530 - 31).

The court issued its sentencing order on December 28, 2001 and indicated its review of the “super” Pre-sentence Investigation Report (R4, 718). See also Volumes 4 - 7 of the record on appeal for P.S.I. material. Any contention that the trial court failed to take any additional appropriate action or should have done more is meritless, even frivolous.

Appellant's reliance on Koenig v. State, 597 So. 2d 256 (Fla. 1992) is misplaced. There the transcript of his nolo contendere plea did not affirmatively show that Koenig knowingly and intelligently entered his plea of no contest. This Court also found the plea deficient because the trial judge failed to inquire into the factual basis for the plea. There was "absolutely no evidence in the record of the crimes to which Koenig entered his plea". *Id.* at 258. In contrast, the trial in the instant case established the "factual basis" for the jury's guilty verdict and Bolin was adequately questioned regarding his decision to waive penalty phase jury and the presentation of mitigation evidence.

As this court well knows, Mr. Bolin is not a novice uninitiated to capital trials. See Bolin v. State, 650 So. 2d 19 (Fla. 1994); Bolin v. State, 736 So. 2d 1160 (Fla. 1999); Bolin v. State, 642 So. 2d 540 (Fla. 1994); Bolin v. State, 650 So. 2d 21 (Fla. 1995).

Proportionality -

The imposition of a sentence of death is warranted under the proportionality jurisprudence of this Court.

This Court stated in Robinson v. State, 761 So. 2d 269 (Fla. 1999):

Upon review, we find that death is the appropriate penalty in this case. In reaching this conclusion, we are mindful that this Court must consider the particular circumstances of the

instant case in comparison with other capital cases and then decide if death is the appropriate penalty. *See Sliney v. State*, 699 So. 2d 662, 672 (Fla. 1997)(citing *Terry v. State*, 688 So. 2d 954, 965 (Fla. 1996), *cert. denied*, 118 S.Ct. 1079 (1998)); *Livingston v. State*, 565 So. 2d 1288, 1292 (Fla. 1988). Proportionality review is not simply a comparison between the number of aggravating and mitigating circumstances. *Terry*, 688 So. 2d at 965. Following these established principles, it appears the death sentence imposed here is not a disproportionate penalty compared to other cases. (footnote omitted) *See Spencer v. State*, 691 So. 2d 1062 (Fla. 1996); *Foster v. State*, 654 So. 2d 112 (Fla. 1995).

(Id. at 277-278)

In performing its proportionality review function the Court must ‘consider the totality of the circumstances in a case and ...compare it with other capital cases.’” *Nelson v. State*, 748 So. 2d 237, 246 (Fla. 1999); proportionality review requires a discrete analysis of the facts entailing a qualitative review by the Court of the underlying basis for each aggravator and mitigator, rather than a quantitative analysis. *Urbin v. State*, 714 So. 2d 411 (Fla. 1998); *Porter v. State*, 564 So. 2d 1060, 1064 (Fla. 1990). It is not a comparison between the number of aggravating and mitigating circumstances. The Court must consider and compare the circumstances of the case at issue with the circumstances of other decisions to determine if death penalty is appropriate.

Moreover, proportionality review function is “not to reweigh the mitigating

factors against the aggravating factors; that is the function of the trial judge.” Holland v. State, 773 So. 2d 1065, 1078 (Fla. 2000); Bates v. State, 750 So. 2d 6 (Fla. 1999); Kearse v. State, 770 So. 2d 1119, 1134 (Fla. 2000).

This Court has acknowledged the very weighty position the HAC aggravator occupies in the capital sentencing jurisprudence. See Maxwell v. State, 603 So. 2d 470, 493 (Fla. 1992); Larking v. State, 739 So. 2d 90, 95 (Fla. 1999); Card v. State, 803 So. 2d 615, 623 (Fla. 2001).

In the instant case the trial court found three weighty aggravating factors which remain unchallenged (prior violent felony convictions, homicide committed during a kidnapping and/or attempted sexual battery and especially heinous, atrocious or cruel). The mitigation considered was insubstantial. The instant case is similar to Ray L. Johnston v. State, __So. 2d__, 27 Fla. L. Weekly S1021 (Fla. 2002) (victim killed while struggling for life after being sexually assaulted and aggravators included prior violent felony convictions during the commission of a sexual battery and kidnapping and HAC); Singleton v. State, 783 So. 2d 970 (Fla. 2001) (victim stabbed seven times and two aggravators of prior violent felony conviction and HAC); Spencer v. State, 691 So. 2d 1062 (Fla. 1996).

Appellant’s claim is meritless as well as barred and death is the appropriate penalty.

CONCLUSION

WHEREFORE, for the foregoing reasons and based on the arguments and authorities cited, the judgment and sentence should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to James Marion Moorman, Public Defender, Tenth Judicial Circuit and Douglas S. Connor, Assistant Public Defender, Polk County Courthouse, P.O. Box 9000-Drawer PD, Bartow, Florida 33831, this ____ day of February, 2003.

CERTIFICATE OF TYPE SIZE AND STYLE

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

COUNSEL FOR APPELLEE