IN THE SUPREME COURT OF FLORIDA

OSCAR RAY BOLIN,

Appellant,

vs. **CASE NO.**
SC95775

STATE OF FLORIDA,

Appellee.

______________________________/

ON APPEAL FROM THE CIRCUIT COURT
OF THE THIRTEENTH JUDICIAL CIRCUIT
IN AND FOR HILLSBOROUGH COUNTY, FLORIDA

ANSWER BRIEF OF THE APPELLEE

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

KIMBERLY NOLEN HOPKINS
Assistant Attorney General
Florida Bar No. 0986682
Westwood center
2002 North Lois Avenue, Suite 700
Tampa, Florida 33607-2366
(813) 873-4739
Fax (813) 356-1292

COUNSEL FOR APPELLEE

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STATEMENT OF FACTS

Appellee generally accepts Appellant's Statement of Case and Facts. However, for purposes of addressing Issue III which concerns whether the mitochondrial DNA evidence passed the Frye[1] test for the admission of novel scientific evidence, the following additional Statement of Facts, derived from the Frye hearing, is provided.

Frye Hearing

On February 4, 1999, the trial court held an evidentiary hearing to determine whether the State's mitochondrial DNA (mtDNA) evidence passed the Frye test for the admissibility of novel scientific evidence. The State sought to introduce the results of mtDNA testing of a hair that was found on Stephanie Collins' body. The defense filed a motion in limine to exclude this testimony.

At the hearing, the State presented the expert testimony of Dr. John Stewart, a forensic examiner for the FBI in the DNA unit which examines mtDNA. (V12, T946). Dr. Stewart was specifically trained by the FBI to compare sequences in mtDNA. (V12, T 949).

According to Dr. Stewart, mtDNA is found outside the nucleus of the cell and is only inherited from the mother. (V12, T948).

[1]Frye v. U.S., 293 F. 1013 (D.C. Cir. 1923)

mtDNA can be extracted in very small amounts from bone, teeth or hairs, and is then put through an amplification process so there is more with which to work. (V12, T948-949). Questioned samples are then compared to known samples, base by base, in search of a match. (V12, T949).

Because mtDNA tends to have a sure copy number or more pieces of it within the cell and tends not to degrade as quickly as the more common nuclear DNA, mtDNA is used when nuclear DNA analysis is not available. (V12, T949-950). Dr. Stewart testified that mtDNA is widely used in academic studies, as well as forensics, such as those involving human evolution, population studies and animal and plant biology. (V12, T952). mtDNA has been used to identify war dead and to identify the remains of the Czar of Russia and his family. (V12, T952).

mtDNA is examined by several laboratories, including the Armed Forces Institute of Pathology and private companies such as BODIE technology and Labcore. (V12, T953). The FBI began validation and studies of mtDNA in 1992. (V12, T956). While Dr. Stewart agreed on cross-examination that mtDNA was new in the sense that criminal case work using mtDNA began in 1996, he never stated that it was in its infancy nor that the understanding of the essential features of mtDNA was scanty. (V12, T970).

The State introduced a number of scientific papers through Dr. Stewart regarding the accepted use of mtDNA in forensic analysis. (V12, T954-959). Studies have confirmed that mtDNA exists inside human hairs. (V12, T954). Guidelines for using mtDNA sequencing in forensic analysis have also been established, including an accepted method for cleaning hair samples to allow the testing to be done. (V12, T955-957).

With respect to working with mtDNA, concerns include contamination, mutation and heteroplasmy. Dr. Stewart discussed each of these topics in general and specifically as related to this case. First, with contamination, the FBI adopted a 10:1 ratio of sample to contaminant to avoid ambiguous results. (V12, T958). Specific protocols have also been established with the FBI to avoid contamination problems, including blank controls and negative controls. (V12, T961-963). The FBI also follows the TWGDAM technical working group guidelines. (V12, T963-964).

The next issue is heteroplasmy which differentiates mtDNA from nuclear DNA which is homoplasmic. Two types of heteroplasmy exist, but both are observable as differences in the comparisons between the known and questioned samples when the two DNA sequences are compared. (V12, T959-960). Heteroplasmy occurs in eight to ten percent of the population,

and had been noted in some family studies as early as 1996. (V12, T959-960, 966). Importantly, Dr. Stewart testified that his tests, which specifically take the possibility of heteroplasmy into account, showed no sign of heteroplasmy in this case. (V12, T960).

In rendering conclusions based upon mtDNA analysis between a known sample and a questioned sample, three results can occur. Assuming no evidence of heteroplasmy in each of three possible results, if there is a one base difference between the known and questioned sample, the result is inconclusive. If there is a two base difference, there is an exclusion. And, if there are no differences, the results have failed to exclude the individual from contributing the sample. (V12, T973).

Additionally, mutation rates can occur intergenerationally with mtDNA. However, since this case dealt with a known sample of the defendant, the intergenerational problem would not occur. (V12, T961).

Dr. Stewart noted that mtDNA testing has been accepted in courts on 13 separate occasions in South Carolina, North Carolina, Maryland, Pennsylvania, Tennessee, Texas, Alabama, Illinois, New Mexico and Australia. In fact, mtDNA actually exonerated a defendant in a Michigan case. (V12, T 965, 979-980). Finally, Dr. Stewart testified that mtDNA testing and

mtDNA techniques are generally accepted in the scientific community. (V12, T965-966).

In contrast to the testimony of the State's forensic examiner, the defense called William Shields, a professor working in evolutionary biology and animal behavior, to testify regarding mtDNA. (V12, T991). Shields had never run any human forensic samples himself, nor had he used the FBI equipment used to evaluate mtDNA. (V12, T 1021). Shields never testified for the prosecution in any previous case regarding mtDNA. (V12, T1021).

As to statistical analysis, Shields actually agreed with the State's expert Dr. Basten's conclusion that Bolin was at least 141 times more likely to have been the source of the questioned hair than some unrelated Caucasian person with a confidence level of 99 percent. (V12, T1024-1025). Shields stated that those numbers would "produce a reasonable estimate of the likelihood of a match." (V12, T1025).

Ultimately, the trial court ruled that the mtDNA evidence was admissible pursuant to the Frye test.

SUMMARY OF THE ARGUMENT

ISSUE I - Bolin first claims that this Court should once again review the Second District's opinion reversing the circuit court's order suppressing Bolin's suicide letter to Major Terry. Bolin has failed to establish either the existence of material changes in the evidence or the existence of an intervening decision by a higher court contrary to the decision in the former appeal which would result in manifest injustice and require reconsideration by this Court.

The evidence in the instant case establishes that Bolin, knowing that his cell was searched daily, placed the letter addressed to Major Terry in plain view and then attempted suicide. Given the routine and frequent searches of Bolin's cell and his belongings for security purposes, Bolin knew he had no reasonable expectation of privacy in the cell or its contents. Thus, the Second District correctly concluded that the search of Bolin's cell following his attempted suicide was conducted solely to further the needs and objectives of the jail to ensure the safety of both the staff and inmates and that no constitutional violation occurred.

ISSUE II - Appellant's next claim is that the lower court erred in finding that Bolin's letter constituted a waiver of the spousal privilege. The State posits that Bolin waived the

privilege when he wrote a letter to Major Gary Terry and gave his permission for Major Terry to inquire of Cheryl Coby as to anything concerning these murders.

ISSUE III - Bolin also challenges the trial court's decision to admit the results of mtDNA testing of a hair found on the victim's body. Bolin maintains that mtDNA testing and the statistical analysis employed to interpret the results of said testing fails to meet the Frye standard. However, the trial court, after conducting the appropriate Frye hearing, appropriately determined that both the mtDNA testing and the statistical analysis are generally accepted in the scientific community. Thus, the mtDNA evidence was properly admitted.

Alternatively, if the mtDNA evidence was improperly admitted, any error must be deemed harmless. The State presented overwhelming evidence of Appellant's guilt, including expert hair analysis test results which rendered the mtDNA evidence cumulative.

ISSUE IV - Appellant argues that the trial court improperly prohibited defense counsel from impeaching the previously videotaped testimony of Bolin's deceased ex-wife, Cheryl Bolin Coby, at trial. The cross-examination of Coby was conducted at the time of the videotape by different defense counsel then that who represented Bolin at trial. Thus, Appellant's arguments

regarding the effectiveness of the original cross-examination constitute an ineffective assistance of counsel claim not properly brought on direct appeal. More importantly, the record demonstrates that Coby was effectively impeached. Thus, any challenge now raised is inappropriately grounded on the benefit of hindsight. As such, no reversible error occurred.

ISSUE V - Next, Appellant contends that a mistrial should have been granted when Major Terry testified that the letter from Bolin came into Terry's possession following Bolin's suicide attempt. However, the motion for mistrial was properly denied where the reference to the suicide attempt constituted proper evidence of consciousness of guilt.

ISSUE VI - Appellant's next claim is premised on the introduction and consideration of his Pasco County conviction which was reversed and remanded for a new trial in 1999. Bolin contends that the jury's recommendation is tainted because the Pasco County conviction was introduced. He is also apparently suggesting that error was created by the type of evidence presented in support of the Pasco conviction. However, the evidence was properly presented, and any error created by the subsequent reversal of one of Bolin's prior felony convictions is harmless in the face of his two remaining valid prior violent felony convictions.

ARGUMENT

ISSUE I

WHETHER THIS COURT'S PRIOR DENIAL OF REVIEW OF THE SECOND DISTRICT COURT OF APPEAL'S RULING ON THE INTERLOCUTORY STATE APPEAL FROM THE TRIAL COURT'S GRANTING OF A MOTION TO SUPPRESS SHOULD BE REVISITED BY THIS COURT. (AS RESTATED BY APPELLEE).

This case is on direct appeal from the retrial of Bolin for the murder of Stephanie Collins. The first conviction was overturned by this Court based on a finding that taking a discovery deposition did not constitute a waiver of marital privilege. See Bolin v. State, 650 So. 2d 21 (Fla. 1995), citing Bolin v. State, 642 So. 2d 540 (Fla. 1994). While this Court determined that Bolin's former spouse could testify regarding her observations of Bolin's alleged criminal activity, she could not testify as to what Bolin told her about the murders because those statements constituted privileged communications. See Bolin, 650 So. 2d 21, 23. However, this Court also held that the privileged communications could be admitted on remand if the trial court found that Bolin voluntarily waived the spousal privilege afforded by Section 90.507, Florida Statutes, in a letter addressed to Major Gary Terry of the Hillsborough County Sheriff's Office left on top of a box in his cell before

attempting suicide.

In light of this ruling, Bolin filed a motion to suppress the letter in circuit court claiming that Major Terry's receipt of the letter constituted an illegal search and seizure. After an evidentiary hearing, the trial court found no probable cause for the search and suppressed the evidence. The State took an interlocutory appeal to the Second District Court of Appeal which reversed the ruling of the lower court. See State v. Bolin, 693 So. 2d 583 (Fla. 2d DCA 1997). Bolin then sought review in this Court which was denied. See Bolin v. State, 697 So. 2d 1215 (Fla. 1997). The United States Supreme Court also denied Bolin's Petition for Writ of Certiorari. See Bolin v. Florida, 522 U.S. 973 (1997).

Now, on appeal, Bolin once again urges this Court to review the Second District's opinion and suppress Bolin's letter to Major Terry. This Court has repeatedly held that all points of law which have been previously adjudicated become the "law of the case" and may be reconsidered only where exceptional circumstances exist whereby reliance upon the previous decision would result in manifest injustice. See Van Poyck v. Singletary, 715 So. 2d 930, 940 (Fla. 1998); Henry v. State, 649 So. 2d 1361, 1364 (Fla. 1994), cert. denied, 516 U.S. 830, 116

S.Ct. 101, 133 L.Ed.2d 55 (1995); Preston v. State, 444 So. 2d 939, 942 (Fla.1984); see also U.S. Concrete Pipe Co. v. Bould, 437 So. 2d 1061, 1063 (Fla. 1983) (holding that doctrine of law of the case is limited to rulings on questions of law actually presented and considered on former appeal); Strazzulla v. Hendrick, 177 So. 2d 1, 4 (Fla. 1965) (noting that "an exception to the general rule binding the parties to 'the law of the case' at the retrial and at all subsequent proceedings should not be made except in unusual circumstances and for the most cogent reasons--and always, of course, only where 'manifest injustice' will result from a strict and rigid adherence to the rule"). Exceptional circumstances include an intervening decision by a higher court contrary to the decision in the former appeal, Brunner Enterprises, Inc. v. Department of Revenue, 452 So. 2d 550, 553 (Fla. 1984), or a showing at a subsequent hearing or trial that material changes in the evidence have occurred. See Steele v. Pendaris Chevrolet, Inc., 220 So. 2d 372, 376 (Fla. 1969); Ball v. Yates, 29 So. 2d 729, 738 (Fla. 1946).

Bolin has failed to establish either the existence of material changes in the evidence or the existence of an intervening decision by a higher court contrary to the decision in the former appeal which would result in manifest injustice.

Instead, Bolin is essentially seeking a second appeal on a question determined on the first appeal. This Court has held that review of a prior decision should never be allowed when it would amount to nothing more than a second appeal on a question determined on the first appeal. See Van Poyck, 715 So. 2d at 940. Therefore, the Second District's prior finding that suppression was not warranted, as well as this Court's denial of review, precludes reconsideration of this issue.

Assuming arguendo, that this Court should determine that review is appropriate, a review of the Second District's decision below indicates that no relief is warranted. The facts surrounding Major Terry's receipt of the letter were stated by the Second District as follows:

> At the suppression hearing, the following evidence was adduced. In June 1991, Bolin was awaiting trial in the Hillsborough County Jail for these two homicides [that of Terri Lynn Mathews and Stephanie Collins]. Major Terry of the Hillsborough County Sheriff's Office was the chief investigator on both homicides and was assisted by Corporal Baker. Part of the investigations took place in Ohio where Bolin was imprisoned. During the course of these investigations, Major Terry had personal contact with Bolin. Bolin was not hostile toward law enforcement officers and accepted their role in the investigations. At one point, Bolin sent a request through the jail to see Major Terry. The public defender advised Major Terry that Bolin

would not be permitted to speak with him.

While Bolin was in the Hillsborough County Jail in 1991, he was classified as a severe escape risk and danger to himself and others. Bolin was classified as a severe escape risk because he had been charged with murder, and because he had attempted to escape while incarcerated in Ohio. During this attempted escape, Bolin hit a detention correctional officer with a piece of metal. Additionally, during Bolin's detention in the Hillsborough County Jail, there was evidence that Bolin plotted with his girlfriend and another inmate to kidnap members of Major Terry's family, Corporal Baker's family, the sheriff's family, and a judge's family. The alleged plan was to take the family members out-of-state and hold them for ransom in exchange for Bolin's release. After discovery of the plan, Bolin was placed in a one-man cell with an officer located outside of the cell door watching Bolin twenty-four hours a day.

Whenever Bolin was removed from his cell, he was shackled, handcuffed, and his activities severely restricted. To identify possible escape contraband, at least once or twice every eight-hour shift, jail personnel searched Bolin's cell. During the search, Bolin was removed from his cell, and an officer searched the cell, replaced Bolin's linens and bed materials, and searched all of the materials in the cell.

At 7:00 a.m. on June 22, 1991, Lieutenant Rivers of the sheriff's office was notified that Bolin was observed in physical distress. The nurses and jail personnel continued to constantly monitor Bolin's condition. At 11:20 a.m., Lieutenant Rivers entered Bolin's cell and found Bolin lying on the floor and found a cardboard box on the commode. Bolin usually kept this box on the floor next to the bed.

Lieutenant Rivers had the jail personnel take Bolin to the infirmary to receive medical attention. While in Bolin’s cell, Lieutenant Rivers observed an envelope lying on top of the box on the commode. It was face-up and addressed to Major Terry. When he picked up the envelope, a paper inside the envelope fell out. Lieutenant Rivers read the first sentence or paragraph, and, believing the letter to be a suicide note, he placed the letter back into the envelope and laid it back on the box.

In 1991, Major Terry was a Bureau Commander in criminal investigations and, in that capacity, routinely investigated suicides or attempted suicides in the jail. Major Terry would conduct an investigation at the jail if the suicide was successful or if an attempted suicide resulted in major injuries. On June 22, 1991, in response to a notification that Bolin had attempted suicide, Major Terry went to the jail. Corporal Baker met Major Terry at the jail. The officers went to Bolin’s cell. By this time Bolin had been transported to the hospital, where it had been determined that he had attempted suicide.

As soon as Major Terry was notified of the attempted suicide, he gave instructions for Bolin's cell to be sealed. When Major Terry and Corporal Baker entered Bolin’s cell, they observed a cardboard box on Bolin’s commode, with an envelope on top of the box. After the cell was photographed, Major Terry picked up the envelope and opened it in the presence of Corporal Baker. The envelope had a stamp on it and it was addressed to Major Terry. At the time Major Terry picked up the letter, he believed that it might be a suicide note. In Major Terry’s opinion, the contents of the letter added significant information to the homicide investigations. After reading the letter, Major Terry handed the letter to

Corporal Baker for proper disposition.

See Bolin, 693 So. 2d 583, 584-585.

Based on these facts, the Second District reversed the granting of the motion to suppress the suicide note found in plain view in Bolin's jail cell after the attempted suicide. The Second District agreed that the trial court erred in relying upon McCoy v. State, 639 So. 2d 163 (Fla. 1st DCA 1994).

The court in McCoy had previously held that McCoy as a pretrial detainee whose cell was searched at the behest of the assistant state attorney assigned to the case for the sole purpose of finding any writings by McCoy which would be incriminating in the pending prosecution was entitled to the protections of the Fourth Amendment. The McCoy court concluded that Hudson v. Palmer, 468 U.S. 517 (1984), which held that a prison inmate did not have a reasonable expectation of privacy in his prison cell entitling him to the protection of the Fourth Amendment against unreasonable search and seizures, did not apply to pretrial detainees where the search was not done in furtherance of any concern for institutional security and was done solely to bolster the state's case. See McCoy, 639 So. 2d at 167.

Relying on Bell v. Wolfish, 441 U.S. 520, 99 S.Ct. 1861, 60

L.Ed.2d 447 (1979) (court upheld a room search rule against a Fourth Amendment challenge by pretrial detainees), the Second District rejected the conclusion in McCoy that Hudson did not apply to pretrial detainees. The court noted that there is nothing in Hudson that would support the First District's determination that it did not apply to pretrial detainees. The court additionally found that Florida case law supports the fact that a person in custody would not have a reasonable expectation of privacy. See State v. Smith, 641 So. 2d 849, 851 (Fla. 1994).

The Second District further noted, this case can be distinguished from McCoy based on the facts because the search of the prison cell in McCoy was for the sole purpose of trying to find incriminating statements made by the defendant, and was spear-headed by the prosecutor.

Conversely, the search of Bolin's cell was undertaken as part of an investigation of Bolin's attempted suicide. The officers did not come to the cell simply to find evidence that would bolster the State's case as the assistant state attorney did in McCoy. Finding a legitimate purpose for being in Bolin's cell, i.e., concern for institutional security, the Second District agreed that the inspection of the letter for evidence

of the attempted suicide was not an unreasonable search and seizure where the unsealed letter was in plain view and plainly addressed to Major Terry.[2]

Appellant urges, however, that Hudson v. Palmer does not apply to pretrial detainees and, furthermore, that the plain view doctrine does not apply because the letter was not apparent evidence of a crime. Appellant suggests the fact that the letter was stamped, but not yet delivered to jail authorities, indicates that Bolin intended any delivery of the letter to be through the postal system and, until he released it, the letter would remain in his possession. To suggest that a letter found in plain view, addressed to an officer who the defendant had previously attempted to contact, at the site of an attempted suicide is not apparent evidence of the attempted suicide and was not intended to be delivered to that officer, defies all logic.

If speculation is the test, the State contends that the record more readily supports contrary inferences. It is far more likely that under these circumstances Bolin's intent was

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[2] It is undisputed that Major Terry was lawfully in the cell as part of his normal duties to investigate an attempted suicide and that the letter addressed to him was in plain view on top of a box of the defendant's belongings.

that Major Terry should receive the letter, whether it be by mail or by his insuring that the letter was placed in a highly visible location that would be spotted by personnel who searched his cell a number of times a day.[3] The fact that it had a stamp on it merely suggests that Bolin wanted to avoid the risk that the letter might not be delivered because it did not have a stamp. Moreover, whatever else it may or may not include, it is reasonable to assume that such a letter may include a statement of the defendant's intent in committing the suicide attempt.

Bolin's reliance on Jones v. State, 648 So. 2d 669 (Fla. 1994), to support his claim of error is misplaced. In Jones, this Court held that even if Jones did not have an expectation of privacy in a bag of his clothing stored in his hospital room that he did have a possessory right to the clothes themselves. This Court found that Jones had no reason to believe that his belongings would be turned over to police without his authorization even though hospital staff generally had joint access to and control of personal effects kept in patients' rooms. The staff could not consent to search or seizure of

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[3] In light of Bolin's prior escape attempts, at least once or twice every eight-hour shift, jail personnel would search his cell. During these searches, an officer would remove Bolin, then search all of the materials in the cell.

effects, as it had no right to mutual use of patients' belongings. Id. at 675.

Unlike a hospital, however, prison or jail officials have legitimate institutional security reasons for conducting such searches. Thus, prisoners do not have the same expectation of privacy that hospital patients have in their rooms. See Kight v. State, 512 So. 2d 922 (Fla. 1987)(seizure of clothing did not violate the Fourth Amendment as defendant could not have reasonably expected to have exclusive control over the clothing on his person once arrested and placed in detention because the "clothing could have been seized for legitimate health or security purposes at any time during his detention").

The evidence in the instant case establishes that Bolin, knowing that his cell was searched daily, placed the letter addressed to Major Terry in plain view and then attempted suicide. Under these circumstances, he had every reason to believe that the letter would be turned over to Major Terry in his absence. In fact, the contents of the letter expressed just such an intent. Bolin's letter directed Major Terry to forward his personal effects to Susie, that he had already written her a letter telling her what he had asked of Major Terry's office. He then apologized to Major Terry for "checking out like this."

(V3, R357)

Under these circumstances, even if appellant was correct in his assertion that, as a general proposition, pretrial detainees maintain some reasonable expectation of privacy, it is not dispositive of Bolin's claim.[4] Given the routine and frequent searches of Bolin's cell and his belongings for security purposes, Bolin had no reasonable expectation of privacy, as he knew that he had no privacy in the cell or its contents. See Kight, 512 So. 2d 922 (Fla. 1987).

Finally, Bolin attempts to argue that the seizure of the letter violated his constitutional right to counsel. However, the Second District correctly found that the letter did not contain any attorney-client privilege information implicating the Sixth Amendment. See Bolin, 693 So. 2d at 585. Moreover, as Appellant concedes, the Sixth Amendment is not violated when the State, by happenstance, obtains incriminating statements after the right to counsel has attached. See Maine v. Moulton, 474 U.S. 159, 176 (1985).

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[4] It should also be noted that while Bolin asserts that he was not a prisoner but merely a pretrial detainee at the time of his attempted suicide, he was serving 2 consecutive 8 to 25 year sentences for the Ohio kidnapping and rape of Jennifer LeFevre. Thus, he was not simply a pretrial detainee for security purposes.

Prior to obtaining the Bolin's letter to Terry, the State did not initiate contact with Bolin, nor did the State exploit an opportunity to confront Bolin without counsel being present. Compare Moulton, 474 U.S. 159. Neither did the letter contain any work product nor attorney client privileged information like that seized in Arizona v. Warner, 722 P.2d 291 (1986).

As such, the Second District correctly concluded that the search of Bolin's cell following his attempted suicide was conducted solely to further the needs and objectives of the jail to ensure the safety of both the staff and inmates and that no constitutional violation occurred. Thus, the Second District's ruling need not be revisited.

ISSUE II

WHETHER THE TRIAL JUDGE PROPERLY FOUND THAT BOLIN'S LETTER TO MAJOR TERRY ACTED AS A WAIVER OF THE SPOUSAL PRIVILEGE. (AS RESTATED BY APPELLEE).

Appellant's next claim is that the lower court erred in finding that Bolin's letter constituted a waiver of the spousal privilege. He contends that neither the circumstances surrounding the letter nor the content of the letter demonstrate that Bolin voluntarily consented to law enforcement officers talking with Cheryl Bolin concerning Bolin's criminal activities. The State posits that Bolin waived the privilege when he wrote the letter to Major Gary Terry and gave his permission for Major Terry to inquire of Cheryl Coby as to anything concerning these murders.

In reversing Bolin's prior conviction in this case, this Court held with regard to the letter:

> In this appeal, the State also claims that even if Bolin did not waive the spousal privilege by taking Coby's deposition, he personally waived the privilege in a letter he wrote to an investigating detective. There was no need to consider this issue at trial because the trial court ruled that Bolin waived the spousal privilege by taking the discovery deposition. In light of our conclusion here and in *Bolin I* that the discovery deposition did not waive Bolin's spousal privilege, the State will certainly raise at the retrial the issue of whether the letter was a voluntary waiver. We therefore address that issue here.

We agree that a letter may be used to consent to the waiver of a privilege. (citations omitted). We further agree that if a person volunteers that his or her spouse may be questioned about his or her involvement in an event or events, this may equate to consent which constitutes a waiver pursuant to section 90.507, Florida Statutes (1993). (citations omitted). Section 90.507 specifically states that a waiver occurs when the person "consents to disclosure of any significant part of the matter or communication."

The issue then with respect to the waiver is whether the circumstances surrounding the letter and the content of the letter demonstrate that this defendant voluntarily consented to law enforcement officers talking with his spouse about her knowledge of his alleged criminal activities. (FN3) Because this issue was not addressed at the trial, the record is not sufficiently complete for us to determine whether the letter constituted a voluntary consent. (FN4) If on remand the trial court determines from the circumstances in which the letter was sent (FN5) and from the content of the letter itself that the letter constituted a voluntary consent to such disclosure, then the marital privilege would be waived pursuant to section 90.507. Bolin's voluntarily consent to the questioning of his former spouse about her knowledge of the criminal activities for which Bolin was being investigated would permit his former spouse to testify as to Bolin's statements to her regarding the murder because the statements comprised part of what she knew about his activities. (citation omitted). If the court determines, however, that the circumstances together with the content of the letter do not indicate that Bolin voluntarily consented to disclosure by Coby of what she knew about Bolin's alleged

> criminal activities, then there was not a waiver.
>
> FN3. We note that Florida's Evidence Code does not require that the privilege holder's consent be knowing. See Charles W. Ehrhardt, Florida Evidence, Sec. 507.1, at 324 (1994 ed.).
>
> FN4. There is testimony in the record about the letter, but the letter itself is not included.
>
> FN5. The testimony of the officer who received the letter indicates that it might have been written in conjunction with a suicide attempt by Bolin. That fact alone would not render the content of the letter involuntary. The court, however, should consider the alleged suicide attempt as evidence relevant to whether the letter contained a voluntary consent.

See Bolin, 650 So. 2d 21, 23-24.

Major Terry testified that he received a letter from Oscar Ray Bolin on June 22, 1991, in which Bolin told him, "If there was ever anything else that he really wanted to know about [him] to ask Cheryl Jo because she knew just about everything [he] was ever a part of and that she knew about the homicides [he] was charged with." (V2, R357) The trial court correctly found that this letter constitutes a personal waiver of any privileged communications. It is the state's position that, as in the case of a motion to suppress, the trial court's determination after hearing the evidence that this was a voluntary waiver of the privilege comes to this Court clothed with a presumption of

correctness. Accordingly, this Court must interpret the evidence and reasonable inferences and deductions derived therefrom in a manner most favorable to sustaining the trial court's ruling. See Owen v. State, 560 So. 2d 207, 211 (Fla. 1990), receded from on other grounds, State v. Owen, 696 So. 2d 715 (Fla. 1997). The record supports the trial court's conclusion that the context in which the letter was conveyed to Major Terry combined with the statements in the letter established a waiver of the privilege. Thus, the court's ruling must be upheld. Compare, San Martin v. State, 717 So. 2d 462 (Fla. 1998), Rhodes v. State, 638 So. 2d 920, 925-26 (Fla. 1994) (ruling on motion to suppress presumed correct and will be upheld if supported by the record).

The spousal privilege is deemed waived when the person who has the privilege consents to disclosure of any significant part of the matter or communication. See Saenz v. Alexander, 584 So. 2d 1061 (Fla. 1st DCA 1991). Thus, Bolin's statement in the letter to Major Terry that Cheryl Coby knew all about the homicides he was charged with and that Terry was free to ask about it constitutes a waiver of any privilege regarding the matter.

Nevertheless, Bolin contends that 1) the circumstances surrounding the letter, 2) the content of the letter, 3) the

trial court's ruling and 4) the timing of the letter do not support a finding that the letter constituted a valid waiver of the spousal privilege rendering the evidence admissible. A review of each of the claims, taken in the light most favorable to support the trial court's ruling, refutes this contention.

1. Circumstances Surrounding the Letter

A. Voluntary Delivery

Appellant first contends that even if the letter was properly seized, the circumstances show that Bolin did not voluntarily consent to the delivery of the letter and, therefore, the letter remained his personal property. This position is not supported by either the facts or the law.

First, the facts surrounding the suicide, the placement of the letter and the content of the letter established that Bolin intended for Major Terry to receive the letter when jail personnel entered the cell to remove Bolin after the suicide attempt. As previously noted, this letter was placed in a conspicuous place and clearly addressed to Major Terry. The placement of a stamp on the letter evidences that Bolin wanted to ensure that Terry receive the letter whether it was hand delivered or mailed.

Appellant's reliance on State v. Stewartson, 443 So. 2d 1074 (Fla. 1984), for the proposition that the "interception" of a

letter does not waive the privilege misses the point. In Stewartson, the defendant left a suicide note for her husband which was found by an investigating officer. The court found that Stewartson's letter seized by police officers was written during the marriage, left in the marital home, in a sealed envelope and addressed to the husband. The court noted also that Stewartson's note was not found in the "crime scene" area and that little more than curiosity could have led the policewoman to open the envelope and read the letter. Whereas, in the instant case, the letter was not in a home, but in Bolin's cell which was subject to daily searches. It was addressed to and opened by Major Terry. It was not mere curiosity that caused Terry to open the letter as it was clearly reasonable for him to assume the letter was intended for him under the circumstances. Moreover, the letter did not contain privileged information which anyone is suggesting was waived by the discovery of the letter.

Appellant also contends that under the "mailbox rule" the letter was never logged as required before mailing and, therefore, it could not be released to Major Terry. Undersigned counsel cannot find, and appellant's counsel does not assert, that this particular argument was ever raised to the court below. Accordingly, it is waived.

In any event, it is without merit. Appellant is apparently suggesting that until any item is logged into the system, even when it is delivered directly to the intended receiver, that it is not a valid transfer. The "mailbox rule" concerns when documents mailed by prisoners are deemed to have been filed. See Haag v. State, 591 So. 2d 614 (Fla. 1992). Clearly, that is not the issue here. The only question is whether the statement contained in the letter was intended as a waiver which Bolin meant for Terry to receive. Based on the facts of this case, it is clear that the waiver was intended for Terry and that it was a voluntary waiver.

B. Prior Events Establishing Bolin's Intent

Appellant contends that, against the backdrop of the history of this case, Bolin's statement in his letter to Terry was not intended to be a waiver. He contends that where Bolin thought counsel had already waived the privilege, Bolin no longer felt a need to protect the privilege that had been lost.

To support his claim, Bolin analogizes his waiver to those cases where a defendant testifies in order to explain a prior confession that has been erroneously admitted. See Zeigler v. State, 471 So. 2d 172 (Fla. 1st DCA 1985). Clearly, the situations are distinguishable. A defendant who is faced with an illegally obtained confession, may feel that the only way to

overcome the confession in front of a jury is to testify and explain the circumstances surrounding the confession. As the Court in Harrison, explained:

> Here, however, the petitioner testified only after the Government had illegally introduced into evidence three confessions, all wrongfully obtained, and the same principle that prohibits the use of confessions so procured also prohibits the use of any testimony impelled thereby--the fruit of the poisonous tree, to invoke a time-worn metaphor. For the 'essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all.' *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392, 40 S.Ct. 182, 183, 64 L.Ed. 319.
>
> In concluding that the petitioner's prior testimony could be used against him without regard to the confessions that had been introduced in evidence before he testified, the Court of Appeals relied on the fact that the petitioner had made a conscious tactical decision to seek acquittal by taking the stand after (his) in-custody statements had been let in * * *.But that observation is beside the point. The question is not whether the petitioner made a knowing decision to testify, but why. If he did so in order to overcome the impact of confessions illegally obtained and hence improperly introduced, then his testimony was tainted by the same illegality that rendered the confessions themselves inadmissible. (emphasis added).

See Harrison v. United States, 392 U.S. 219, 222-23 (1968)

Nothing in Bolin's letter or in Bolin's expressed desire to

speak to Major Terry without his lawyers indicates that the waiver was part of a tactical plan that was necessitated by the finding of a prior waiver. Thus, unlike Harrison or Zeigler, Bolin was not painted into a corner by the court's ruling and the subsequent waiver was not intended to remedy any damage caused by the prior ruling. Rather, the situation is more akin to a defendant's making inculpatory statements after having been found guilty and thinking he had nothing left to protect. A subsequent reversal of the conviction would not render his inculpatory statements inadmissible. Compare Sikes v. State, 313 So. 2d 436 (Fla. 2d DCA 1975) (Confessions defendant made to prison employees while her first appeal was pending were admissible at her second trial); Long v. State, 610 So. 2d 1276, 1278 (Fla. 1992); Long v. State, 689 So. 2d 1055 (Fla. 1997), rev. on other grounds (State next produced at Long's second trial videotaped interview of Long by CBS News which took place after his initial trial and conviction.)

2. Content of Letter

Appellant next argues that the content of the letter evidences that Bolin did not intend for Major Terry to speak to Cheryl Coby until and unless he [Bolin] died. Although, the letter does not actually say that Major Terry can only speak to Coby in the event Bolin's attempted suicide was successful,

counsel suggests that the use of future terms (i.e. "you'll haft to") implies that Bolin expected Terry to only speak to Coby in the future when Bolin was dead. Again, counsel is speculating that Bolin's intent may have been other than that expressly stated in the letter. As the trial court made a contrary finding that is supported by the evidence, this Court should reject appellant's claim.

3. The Trial Court's Ruling

The trial judge found that Bolin's waiver was voluntary and although it was prospective only in its tone, it had the legal effect of acting or operating retroactively. (V11, T894) Appellant contends that the waiver was not retroactive, and, therefore, did not render the prior statements made by Coby admissible.

The "inevitable discovery" doctrine adopted in Nix v. Williams, 467 U.S. 431, 448 (1984), provides that evidence obtained as the result of unconstitutional police procedure may still be admissible provided the evidence could have ultimately been discovered by legal means. Under this theory, the fact that an officer may have already obtained information as a result of an illegal search, does not preclude admission of this same evidence where it can be established that the same evidence could have been obtained in a lawful manner. See Hayes v.

State, 488 So. 2d 77 (Fla. 2d DCA 1986) (Defendant's inked fingerprints, though taken in violation of Fourth Amendment were admissible under inevitable discovery exception to exclusionary rule, where defendant's fingerprints were available from independent sources.) Therefore, as the content of Cheryl Coby's testimony would have been the same if Major Terry had spoken to her again immediately after receiving Bolin's letter, the failure to do so does not render this evidence inadmissible.

4. Retroactivity of the Waiver

Appellant again asserts that even if Bolin's letter was a waiver, it should not be applied retroactively. He suggests that the only time a voluntary but unknowing waiver is enforceable is when the holder of the privilege attempts to use the privilege as both a sword and a shield. He urges that since Bolin did not do so, that his waiver, once retracted, acts as a bar to the admission of the evidence.

This argument has several flaws. First, as previously noted, under the inevitable discovery doctrine this evidence is admissible because law enforcement obtained it before the waiver of the privilege was revoked. Under these circumstances, the waiver, once given, could not be retracted because the information had already been received.

Second, although knowledge is not required, there is no

showing that Bolin's waiver was unknowing. The statement in the letter very clearly gives Major Terry the authority to speak to Cheryl Coby about the prior homicides, despite counsel's prior attempts to keep this information out of the hands of law enforcement.

Finally, appellant has not presented this Court with any case law supporting the proposition that such a waiver is *only* valid when the defendant uses the privilege as a sword and a shield. He assumes that because it is a consideration in some cases, it is a consideration in every case. To the contrary, nothing in the statute suggests that a waiver is only valid when the defendant stands to gain from the waiver. See § 90.507, Fla. Stat. (Waiver of privilege by voluntary disclosure.) The only requirement is that the person maintaining the privilege (Bolin) ceases to treat the matter as private. Bolin's statement to Major Terry that he was free to ask Cheryl Coby about any of these homicides that he was charged with clearly indicates that Bolin had ceased to treat the matter as confidential and had waived the privilege.

5. Revocation of Waiver

At the close of the motion in limine hearing on March 16, 1998, Circuit Judge Padgett found that the "letter amounts to a waiver of the spousal privilege, subsequently withdrawn." (V11,

T919). Based on this finding, appellant again offers the unsupported proposition that the waiver only applied to any privileged material that was disclosed during the period that the waiver was in effect and not to information previously obtained. The state has previously addressed this claim. There was no requirement that Major Terry re-interview Ms. Coby to obtain information already given during the discovery deposition. Clearly, Bolin knew that Coby had given this information to law enforcement. Whatever motivated Bolin to write the letter, it was done with the knowledge that this information would lose it's privileged status when Major Terry received Bolin's directive to speak to Cheryl Coby.

While as a general proposition the state would agree that a waiver does not occur until there has been an actual disclosure of the confidential communication, Eastern Air Lines v. Gellert, 431 So. 2d 329, 332 (Fla. 3d DCA 1983), justice no more requires that previously obtained information be excluded where there is a subsequent waiver, than it does illegally obtained evidence which is later determined to be admissible as inevitably discovered.

Based on the foregoing, the state urges this Court to affirm the trial court's conclusion that this was a voluntary waiver of the spousal privilege which rendered the testimony of Cheryl

Coby admissible.

ISSUE III

WHETHER THE TRIAL COURT PROPERLY FOUND THAT THE STATE'S MITOCHONDRIAL DNA EVIDENCE PASSED THE FRYE TEST FOR THE ADMISSION OF NOVEL SCIENTIFIC EVIDENCE. (AS RESTATED BY APPELLEE).

Following the requisite Fyre hearing, the trial court admitted the results of mitochondrial DNA (mtDNA) testing of a hair recovered from Stephanie Collins' body. The results of the mtDNA testing concluded that Bolin was at least 141 times more likely to have been the source of the questioned hair than some unrelated Caucasian person represented within the FBI's database of Caucasian samples of mtDNA, with a confidence level of 99 percent. (V12, T1024-1025). Despite the fact that Appellant's own expert agreed that the results of Dr. Basten's statistical analysis of the mtDNA evidence would "produce a reasonable estimate of the likelihood of a match," (V12, T1025), Appellant now argues that the mtDNA testing, as well as the statistics used to interpret the test results, are not generally accepted in the scientific community. The evidence presented at the Frye hearing demonstrated otherwise.

In utilizing the Frye test:

> [T]he burden is on the proponent of the evidence to prove the general acceptance of both the underlying scientific principle and the testing procedures used to apply that principle to the facts of the case at hand. The trial judge has the sole responsibility to determine this question. The general acceptance under

> the Frye test must be established by a preponderance of the evidence.

See Murray v. State, 692 So. 2d 157, 161 (Fla. 1997), citing Ramirez v. State, 651 So. 2d 1164, 1168 (Fla. 1995).

The trial court must conduct a step-by-step analysis before admitting into evidence the testimony of an expert witness concerning a new scientific principle. A trial court must determine (1) whether such expert testimony would assist the jury in understanding the evidence or in deciding a fact in issue; (2) whether such testimony is based on a scientific principle that has gained general acceptance in that particular scientific community; and (3) whether the expert witness is sufficiently qualified to render an opinion on the subject. Finally, if these criteria are met, the expert witness may testify at trial, and the jury can assess the expert's credibility. See Murray, 692 So. 2d 157, 161, citing Ramirez, 651 So. 2d 1164, 1166.

In this case, the trial court properly applied the Frye test to the mtDNA evidence. On appeal, Appellant has only challenged the general acceptance of mtDNA evidence in the scientific community. Thus, the following discussion is limited to that sole prong of the Frye test.

While each specific challenge raised by Appellant to the mtDNA evidence will be addressed below, it is important to first

understand that none of these challenges actually impacts the Court's decision as to whether mtDNA evidence is generally accepted in the scientific community. In reality, Appellant has improperly challenged the ultimate opinions of the State's experts rather than the underlying methodology relating to mtDNA testing in a forensic setting which is generally accepted, reliable and, therefore, admissible. See Berry v. CSX Transp. Inc., 709 So. 2d 552, 564 (Fla. 1st DCA 1998).

Dr. Stewart testified that mtDNA testing is generally accepted in the scientific community. (V12, T965-966). mtDNA is widely used in academic studies, as well as forensics, such as those involving human evolution, population studies and animal and plant biology. (V12, T952). mtDNA has been used to identify war dead and to identify the remains of the Czar of Russia and his family. (V12, T952).

mtDNA is examined by several laboratories, including the Armed Forces Institute of Pathology and private companies such as BODIE technology and Labcore. (V12, T953). THE FBI actually began validation and studies of mtDNA in 1992. (V12, T956). At the Frye hearing, the State introduced a number of scientific papers through Dr. Stewart regarding the accepted use of mtDNA in forensic analysis. (V12, T954-959). Studies have confirmed that mtDNA exists inside of human hairs. (V12, T954).

Guidelines for using mtDNA sequencing in forensic analysis have also been established, including an accepted method for cleaning hair samples to allow the testing to be done. (V12, T955-957).

Dr. Stewart noted that mtDNA testing has been accepted in courts on 13 separate occasions in South Carolina, North Carolina, Maryland, Pennsylvania, Tennessee, Texas, Alabama, Illinois, New Mexico and Australia. In fact, mtDNA actually exonerated a defendant in a Michigan case. (V12, T 965, 979-980). Notably, while only one Florida court has refused to admit statistical analysis of mtDNA testing based on the counting method[5], even that court specifically found that the process for extracting and testing mtDNA has gained acceptance as being reliable in the scientific community. (Appellant's Exhibit 4, p. 2). A similar ruling has been reported in a non-published Pennsylvania case. (See Appellee's Exhibit A).

Furthermore, in aid of this Court's *de novo* review of the admissibility of the mtDNA evidence, Appellee would also cite to another article which has been published since the Frye hearing took place in this case. In June 1999, Drs. Holland and

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[5]As discussed below, the statistical analysis employed in this case used a likelihood ratio, not the counting method. Thus, the Seminole County decision on the issue of statistics has no bearing on this case.

Parsons, both of the Armed Forces DNA Identification Laboratory (AFDIL), published "Mitochondrial DNA Sequence Analysis - Validation and Use for Forensic Casework" in the Forensic Science Review. (Appellee's Exhibit B).

This article specifically addressed the forensic uses of mtDNA testing. The AFDIL article confirmed Dr. Stewart's testimony that mtDNA results have been admitted into evidence in at least ten states. (Appellee's Exhibit B, p. 40). Moreover, mtDNA has been used in more than 400 forensic cases. With at least 40 laboratories in ten other countries across Europe performing mtDNA analysis, the AFDIL article concluded that mtDNA analysis is a generally accepted forensic DNA profiling method worldwide. (Appellee's Exhibit B, pp. 40-41).

Under such circumstances, Appellant's challenge to this testing cannot undermine the basic reliability of the mtDNA methodology. Rather, Appellant raises points which merely demonstrate a difference of opinion between the experts on the ultimate conclusions to be drawn from this testing. Such argument does not rise to the level of a true Frye challenge. See Berry, 709 So. 2d 552, 565-567. Consequently, the trial court properly ruled that the mtDNA testing done in this case, coupled with the statistical analysis performed by statistician Dr. Basten, passed the Frye standard for admission of novel

scientific evidence.

A. Mitochondrial DNA testing is generally accepted within the scientific community, and, thus, the results of such testing in this case were properly submitted to the jury.

Appellant raises four specific challenges to the admissibility of the mtDNA test results. These challenges include the matrilineal inheritance of mtDNA, the issue of heteroplasmy, the mutational rate of mtDNA, and contamination problems with mtDNA testing. While none of these issues impact the general acceptance in the scientific community of mtDNA testing, each issue is addressed below for purposes of demonstrating the meritless nature of Appellant's assertions.

1. Matrilineal inheritance

As noted by the State's expert, Dr. Stewart, one key characteristic of mtDNA is the fact that it is inherited matrilineally. (V12, T948). Appellant points to one theoretical, not empirical, scientific article discussing one study involving only five human data sets to argue that matrilineal inheritance in mtDNA has been discounted. (Appellant's Initial Brief, pp. 73-74; and Appellant's Exhibit 1). Accordingly, Appellant contends that the fact that this one study contradicts Dr. Stewart's testimony on the issue of matrilineal inheritance precludes the introduction of mtDNA evidence. Such an extreme conclusion is unwarranted.

First, the study noted by Appellant is much more limited in scope than is suggested. The article specifically notes that the possibility of both maternal and paternal influence in the makeup of mtDNA would trigger a shake-up in the field of *anthropology*, not forensic science. (Appellant's Exhibit 1). This recombination of maternal and paternal DNA "could be a blow for researchers who have used mtDNA to trace human evolutionary history and migrations." (Appellant's Exhibit 1).

However, the study makes no mention of any impact on the forensic use of mtDNA where a questioned sample is compared to a known sample of DNA. In fact, the article notes that not every mtDNA study would be invalidated by recombination. (Appellant's Exhibit 1). More importantly, the article actually states, "many researchers aren't ready to accept these data as ironclad evidence of recombination." (Appellant's Exhibit 1). Under these circumstances, the lone article cited by Appellant fails to discount the testimony of Dr. Stewart regarding the matrilineal character of mtDNA.

Furthermore, on the issue of maternal inheritance, the AFDIL article noted that this is a key trait in mtDNA. Maternal inheritance of mtDNA is primarily based on the fact that sperm contains only a few copies of mtDNA compared to the many thousands of copies in the ovum. (Appellee's Exhibit B, p. 24).

Additional studies have demonstrated the existence of mechanisms that specifically eliminate sperm-derived mtDNA. (Appellee's Exhibit B, p. 24). Thus, any trace of paternal mtDNA would necessarily be minuscule in comparison to the maternal mtDNA.

Notably, while the AFDIL article mentioned above recognized that "the mechanism for elimination of paternal mtDNA is not fully elucidated, nor known to be absolute in terms of extremely low level persistence, it is clear that from the practical standpoint of mtDNA forensic testing, mtDNA behaves as maternally inherited." (Appellee's Exhibit B, p. 25).

In a study comparing 69 father-child pairs, no paternal sequence was detected by direct sequencing of PCR-amplified mtDNA (the method used for forensic testing). (Appellee's Exhibit B, p. 25). Moreover, instances of heteroplasmy, mixtures of more than a single mtDNA within an individual (discussed in detail below), are not the result of paternal influence. (Appellee's Exhibit B).

Consequently, the question of maternal inheritance of mtDNA fails to impact the ultimate issue of whether mtDNA testing is generally accepted in the scientific community for forensic purposes. The experts clearly agree that mtDNA testing, in and of itself, is generally accepted. However, even if the matrilineal character of mtDNA is called into question, the

AFDIL article explains that this would not negatively impact the forensic interpretation of mtDNA evidence.

2. Heteroplasmy

As briefly mentioned above, mtDNA can be heteroplasmic. Dr. Stewart explained at the Frye hearing that heteroplasmy differentiates mtDNA from nuclear DNA which is homoplasmic. Two types of heteroplasmy exist, but both are observable as differences in the comparisons between the known and questioned samples when the two DNA sequences are compared. (V12, T959-960). Heteroplasmy occurs in only eight to ten percent of the population. (V12, T959-960, 966). Importantly, Dr. Stewart testified that his tests, which specifically take the possibility of heteroplasmy into account, showed no signs of heteroplasmy in this case. (V12, T960).

Nonetheless, Appellant now seeks to discredit the general acceptance of mtDNA evidence by stating that heteroplasmy occurs more often than Dr. Stewart testified. Toward that end, Appellant cites to one study which found heteroplasmy in 22 out of 43 individuals. (Appellant's Exhibit 2-5). However, this number has no bearing on the use of mtDNA in forensic settings.

While both Dr. Stewart and the authors of the AFDIL article recognized the potential for heteroplasmy, it was simply not an issue in this case. Dr. Stewart looked for heteroplasny on the

samples provided and found none. Additionally, the AFDIL article noted that heteroplasmy has the potential to both complicate and strengthen forensic identity testing, but that it occurs in only 8 to 10 percent of the population. (Appellee's Exhibit B, p. 25).

The AFDIL article explained that scientists expected readily detectable sequence variations within the mtDNA of single individuals. This expectation led to testing which reported only a single mtDNA within thousands of individuals. (Appellee's Exhibit B, p. 25). However, "given the untold trillions of mtDNA molecules in an individual, we are all heteroplasmic at some trace, but only occasionally at levels that are of functional significance to forensic identity testing." (Appellee's Exhibit B, p . 26).

In fact, it appears that there are two predominant hot spots for heteroplasmy. Thus, where heteroplasmy occurs at quite tractable levels at only a site or two within individuals, it actually represents an additional level of variation that can increase the power of mtDNA testing rather than confuse the results. (Appellee's Exhibit B, p. 26).

In other words, a heteroplasmic individual will manifest the signs of heteroplasmy at the same base position on his or her mtDNA molecules, thus providing an additional means of

identifying a match. (Appellee's Exhibit B, p. 26). (See also Appellant's Exhibit 2-1, the Groover Report ("The presence of sequence-based heteroplasmy will generally enhance the discrimination power of mtDNA analysis.")) As such, had heteroplasmy been detected in this case, it would have provided further verification of a match. Under these circumstances, Appellant cannot demonstrate lack of reliability with respect to mtDNA testing based on the issue of heteroplasmy.

3. Mutational rate of mtDNA.

Next, Appellant challenges the general acceptance in the scientific community of mtDNA evidence based on the possibility of mutation. Appellant seems to argue that Bolin's mtDNA would mutate over time. Even assuming this assertion is true, it is unclear how that would affect the scientific reliability of the mtDNA match made in this case. Mutation, by definition, would lead to exclusion, not an improper match. Thus, this point is irrelevant to whether mtDNA evidence can pass the Frye test.

Additionally, the question of "intergenerational substitutions," or mutation occurring between generations, is relevant only to mtDNA identity testing among familial generations. If, for example, such mutations occurred even within an individual that fact would need to be considered when maternal relatives are compared to avoid the potential of false

exclusions. (Appellee's Exhibit B, p. 27). The fact of mutation would have no impact, however, on a comparison, such as that done in the instant case, between a questioned sample and a known sample which did not result in an exclusion. (V12, T961).

4. Contamination.

Appellant claims that Dr. Stewart's testimony concerning methods used by his lab to avoid contamination did not meet the generally accepted standards of the scientific community. Again, Dr. Stewart testified that the FBI adopted a 10:1 ratio of sample to contaminant to avoid ambiguous results. (V12, T958). Specific protocols have also been established with the FBI to avoid contamination problems, including blank controls and negative controls. (V12, T961-963). The FBI also follows TWGDAM technical working group on DNA analysis methods. (V12, T963-964).

The methods employed by the FBI to avoid contamination were specifically noted in the AFDIL article. In fact, Appellant actually identified co-author Dr. Holland in the Initial Brief as an authority on the subject of contamination.

By way of comparison, the AFDIL article mentions the following contamination avoidance procedures, all of which Dr. Stewart's lab followed: lab coats, avoidance of cross-

contamination between areas in the lab where amplification is performed versus where extractions from samples takes place, reagent blanks, negative controls, TWGDAM guidelines, and proficiency testing as a part of an extensive training program. (Appellee's Exhibit B, pp. 36-37; and V12, T961-965).

As such, Appellant has failed to demonstrate any deficiency on the part of Dr. Stewart's testimony regarding contamination procedures employed by the FBI lab. These procedures are standard in the scientific community and Appellant has failed to refute the State's proof of same.

B. The statistical testimony presented in this case interpreting the results of the mtDNA testing is generally accepted in the scientific community, and was properly admitted below.

At the Frye hearing, the State presented two different statistical methods for translating the results of the mtDNA testing done in this case. While the FBI calculations were challenged by the defense expert, Dr. Shields, the second calculation presented in Dr. Basten's report was the actual calculation presented at trial. (V9, T487-496).

Dr. Basten's report, based upon the FBI database, provided a likelihood ratio that Bolin was at least 141 times more likely to be the source of the evidence sample than some other unrelated Caucasian person. (V12, T1024). Bolin's own expert, Dr. Shields, ultimately agreed that this conservative

calculation "would produce a reasonable estimate of the likelihood of a match." (V12, T1025).

Despite the agreement among competing experts at the Frye hearing, Appellant now claims that the statistical evidence presented at trial is not generally accepted in the scientific community. This assertion is simply false.

While, admittedly, mtDNA is not a unique identifier, the scientific community agrees that empirical evaluations of the net result, i.e., the frequency with which particular sequences are detected within various populations, can be determined. (See Appellee's Exhibit B, p. 29). In fact, it is clear that many scientifically accurate statements can be made concerning mtDNA match significance. (Appellee's Exhibit B, p. 31).

One accepted approach to evaluating the strength of mtDNA evidence uses "likelihood ratios." (Appellee's Exhibit B, p. 32). This is the method presented by Dr. Basten, through his report at the Frye hearing and through his testimony at trial, with which the defense expert agreed. Thus, Appellant's challenge to the "counting method" for evaluating mtDNA evidence is wholly irrelevant.

Instead, the question should be whether the "likelihood ratio" used to evaluate the mtDNA evidence in this case is generally accepted in the scientific community. And, it is.

(Appellee's Exhibit B, pp. 32-33).

The counting method disallowed in the Seminole county case cited by Appellant simply reported the number of times the relevant mtDNA profile had been observed in the database without any further interpretation. (See Appellant's Exhibit 4, p. 3; and Appellee's Exhibit B, p. 31). In contrast, the statistical analysis conducted by Dr. Basten, as explained by the defense expert, concluded with a 99 percent confidence limit that it was 141 times as likely that the mtDNA came from Bolin than a Caucasian drawn at random, 55 times more likely that it came from Bolin than from an African at random, 16 times as likely that it came from Bolin than a Hispanic, and 35 times more likely that it came from Bolin than an Asian. (V12, T1026-1027).

Again, the likelihood ratio method of interpreting the mtDNA evidence in this case was accepted by both Dr. Basten for the State and Dr. Shields for Bolin. Moreover, this method of evaluating the results of mtDNA testing is specifically recognized by Drs. Holland and Parsons of the AFDIL. (Appellee's Exhibit B, pp. 32-33). Thus, Appellee properly demonstrated the general acceptance in the scientific community of this statistical interpretation of mtDNA results pursuant to the dictates of Frye.

C. Harmless error.

Should this Court ultimately determine that the mtDNA evidence was admitted in error, Appellant’s conviction and sentence must still be affirmed given the other, independent overwhelming evidence of Appellant’s guilt. The State’s case against Bolin provided enough additional evidence establishing Bolin’s guilt for the murder of Stephanie Collins so as to render any error relating to the admission of the mtDNA evidence harmless.

First, the victim’s body was found wrapped in bed sheets and hospital towels identified by Bolin’s wife, Cheryl Bolin Coby, as belonging to the Bolins. (V7, T301, 303, 347; V8, T410). The hair found on the victim’s body was also examined by a hair expert from the FBI who determined that the hair was consistent with Bolin’s hair. (V9, T469).

By video, Bolin’s deceased ex-wife, Cheryl Bolin Coby, testified at trial. Coby testified that on November 5, 1986, the day Stephanie Collins disappeared, Bolin told her there was a dead body in their trailer. (V8, T407). Although Bolin provided three different versions of events, he ultimately told Coby that he killed the girl because she could identify him. Bolin said he hit her over the head and stabbed her. (V8, T432). This version was consistent with the testimony of the

medical examiner. (V8, T351-366).

Coby went on to reveal that she observed Bolin, at the trailer on November 5, 1986, pick up an object wrapped in her bed linens and put it in the back of the truck. (V8, T409). Bolin then told Coby that he cleaned up the trailer and hosed down the bathroom. (V8, T411). Coby and Bolin then drove to Morris Bridge Road and Bolin discarded the body in the ditch. (V8, T411-412).

Upon returning to the trailer, Coby observed that everything inside was wet. She saw blood on the curtains, blinds and wall. Coby also saw a butcher knife on the counter. (V8, T412-413).

Lastly, on December 5, 1986, Coby and Bolin were watching live television coverage of the recovery of Stephanie Collins' body. At that time, Bolin told Coby, "That's her, the girl from the trailer." (V8, T415-416).

Later, Coby eventually came forward to police about her knowledge of the murder. Then, in July or August of 1990 she led Captain Terry to the location where Stephanie Collins' body had been left. (V8, T419).

Most importantly, at trial, Appellant did not challenge the fact that he disposed of the victim's body. Instead, Appellant's theory of the case argued that someone else

committed the murder and Bolin disposed of the body. Appellant did not even deny that the body had been in his trailer and was wrapped in his bed linens. Rather, Appellant argued to the jury that his hair could have been on the body simply by his actions after the other unknown person committed the murder. (V9, T577-578, 582).

In view of this overwhelming evidence of Bolin’s guilt, any error relating to the admission of the mtDNA evidence must be deemed harmless. This is especially true in view of the additional expert testimony finding Bolin’s hair to be consistent with the hair found on the victim’s body. The mtDNA evidence was actually cumulative of this testimony. As such, no reversible error occurred.

ISSUE IV

WHETHER THE TRIAL COURT PROPERLY PROHIBITED DEFENSE COUNSEL FROM IMPEACHING THE VIDEOTAPED TESTIMONY OF CHERYL BOLIN COBY WHERE THE STATE COULD NOT HAVE REHABILITATED THE DECEASED WITNESS. (AS RESTATED BY APPELLEE).

Appellant claims error resulted from prior defense counsel's cross-examination of Cheryl Bolin Coby during her videotaped testimony which was admitted at trial. According to Appellant, defense counsel failed to adequately cross-examine Coby regarding allegedly prior inconsistent statements. As seemingly admitted by Appellant, (Initial Brief, p. 91, n. 10), this issue challenges the effective assistance of counsel during cross-examination which is not appropriately raised on direct appeal. See Strickland v. State, 739 So. 2d 1195, 1196 (Fla. 1st DCA 1999)(citation omitted).

However, if this matter were properly addressed on direct appeal, failing to present cumulative impeachment evidence does not constitute ineffective assistance. See State v. Reichman, 25 Fla. L. Weekly S163 (Fla. February 24, 2000), citing Valle v. State, 705 So. 2d 1331, 1334-35 (Fla. 1997); Provenzano v. Dugger, 561 So. 2d 541, 545-46 (Fla. 1990). Here, the defense counsel who cross-examined Coby during her videotaped testimony effectively impeached her on multiple points. Thus, Appellant's claim of ineffective assistance cannot succeed.

In cross-examining Coby on the videotape, defense counsel attacked her credibility based upon her dire financial situation and her knowledge of and affirmative actions towards obtaining the reward money of $63,000.00. (V8, T443-445). At the time that Coby finally spoke to police about the murder of Stephanie Collins, Coby was not working due to ill health and had outstanding medical bills over $5,000.00. (V8, T442-423). In her divorce from her second husband, Coby was actually fighting to ensure that she recovered the reward money. (V8, T445-446). Coby's credibility was further called into question based on her admitted fear that she would be charged as an accessory after the fact in this case and the fact that no charges had been brought against her at the time of her testimony. (V8, T448-449).

Further, defense counsel used Coby's prior statements to impeach her videotaped testimony concerning whether Bolin ever admitted to killing Stephanie Collins and whether he threatened Coby with a gun on the night he disposed of the body. (V8, T432 and 435). Defense counsel also fully elicited testimony from Coby regarding her poor vision and the poor lighting at the trailer in order to cast doubt on what she may have actually been able to observe. (V8, T425-426,436-438). Upon further questioning by defense counsel, Coby admitted the possibility

that someone other than Bolin could have been involved in the murder. (V8, T439). Finally, on cross-examination, defense counsel brought out the fact that Coby initially lied to police when they first approached her about Bolin's crimes. (V8, T442).

Finally, defense counsel focused his closing argument on Coby's lack of credibility. The argument highlighted numerous inconsistencies in her testimony as well as other ulterior motives Coby possessed for implicating Bolin in the murder. (V9, T584-591). Under these circumstances, defense counsel cannot be deemed ineffective for failing to impeach the witness on every minute difference in her various statements only gleaned from the record by the benefit of hindsight. See Cherry v. State, 659 So. 2d 1069, 1073 (Fla. 1995)(standard is not how present counsel would have proceeded, in hindsight, but rather whether there was both a deficient performance and a reasonable probability of a different result).

ISSUE V

WHETHER THE TRIAL COURT PROPERLY DENIED DEFENDANT'S MOTION FOR MISTRIAL BASED UPON MAJOR TERRY'S TESTIMONY THAT THE LETTER FROM BOLIN CAME INTO TERRY'S POSSESSION FOLLOWING BOLIN'S SUICIDE ATTEMPT. (AS RESTATED BY APPELLEE).

Appellant argues that the testimony that he had attempted suicide was improperly admitted. In context, Captain Terry testified that he came into possession of the suicide letter discussed above in Issues I and II following Bolin's attempted suicide. The trial court properly denied the defense motion for mistrial based upon Captain Terry's statement, stating that the testimony was proper evidence of consciousness of guilt. See Walker v. State, 483 So. 2d 791 (Fla. 1st DCA 1986), rev. den., 492 So. 2d 1336 (Fla. 1986).

Defendant's reliance upon the contrary holding in Meggison v. State, 540 So. 2d 258 (Fla. 5th DCA 1989), is misplaced. In Meggison, the defendant's suicide attempt was admitted along with an instruction that permitted the jury to construe the attempted suicide as evidence of flight. The case was reversed based on the appellate court's determination that the timing of the attempted suicide, after the defendant had pled guilty and was awaiting sentencing, indicated the evidence was not probative of flight from a pending prosecution. See Meggison,

540 So. 2d 258, 259. Thus, the pivotal issue addressed in Meggison does not exist in the instant case.

Here, as in Walker, Bolin's suicide attempt occurred while charges were pending against him. Moreover, the suicide note specifically referenced all three of the murders charged against Bolin. So, if the defense had questioned at trial whether the suicide attempt was actually probative of guilt for the murder of Stephanie Collins as opposed to one of the other murders, the rest of the letter would have been admissible for rebuttal purposes. See Meggison, at 259. As such, the trial court properly allowed evidence of the attempted suicide to be admitted.

Alternatively, assuming any error occurred based upon Terry's reference to the attempted suicide, such error must be deemed harmless. First, Appellant's assertions to the contrary, the date of the attempt could not have prejudiced the jury in terms of a possible retrial any more than the date of the actual offense. Moreover, as stated above, Terry's testimony, in context, referred to circumstances surrounding the admissibility of the letter and how it came into his possession. Thus, Terry's testimony was relevant for reasons other than to demonstrate consciousness of guilt.

Finally, the overwhelming evidence of Bolin's guilt,

discussed above in Issue IV further merits a determination of harmless error. Any error in the reference to Bolin's attempted suicide fails to require reversal in the face of the other strong evidence of guilt.

ISSUE VI

WHETHER THE DEATH SENTENCE RECOMMENDATION OF THE JURY WAS TAINTED BY EVIDENCE OF BOLIN'S CONVICTION FOR THE MURDER OF TERRY MATTHEWS WHICH WAS LATER VACATED. (AS RESTATED BY APPELLEE).

Appellant next argues that the introduction and consideration of his Pasco County conviction for the murder of Terry Matthews, a conviction which was later overturned, Bolin v. State, 736 So. 2d 1160 (Fla. 1999), improperly tainted the outcome of the penalty phase in the instant case. Appellant also challenges the evidence of the Matthews murder as presented through the testimony of Detective Kling. The State contends that the evidence was properly presented, and any error created by the subsequent reversal of one of Bolin's prior felony convictions must be deemed harmless.

Here, Bolin was convicted of the first degree murder and false imprisonment of Stephanie Collins. (V4, R555). The jury recommended death by a vote of 12 to 0. (V4, R564). The trial judge followed the jury's recommendation and sentenced Bolin to death for the first degree murder conviction, finding the following aggravating factor:

> 1. The defendant was previously convicted of a felony involving the use or threat of violence to another.
>
> The court and jury heard the testimony of the victim of a kidnapping and rape committed by the

> defendant in Ohio in 1987 and certified court records of the defendant's convictions for those offenses were received into evidence. Additionally, certified court records of the defendant's earlier conviction for First Degree Murder of Terry Lynn Matthews in Pasco County were received into evidence. And, finally, certified court records of the defendant's conviction for First Degree Murder of Natalie Holley in Hillsborough County were received into evidence.
>
> This aggravating factor was proved beyond a reasonable doubt. (V4, R628-629).

Consequently, while Bolin's conviction for the murder of Terry Matthews was later overturned, the aggravating factor used in this case was also based upon other valid prior violent felonies: the rape and kidnap of the Ohio woman and the murder of Natalie Holley. Therefore, the subsequent reversal of the Matthews conviction does not mandate a new sentencing proceeding for the murder of Stephanie Collins. See Duest v. Dugger, 555 So. 2d 849 (Fla. 1990)(not entitled to new sentencing proceeding when conviction for prior armed assault with intent to murder was vacated where defendant's part in robbery conviction remained undisturbed and there was still a basis for aggravating circumstances of prior conviction of violent felony); and Daugherty v. State, 533 So. 2d 287 (Fla. 1988)(reversal of one prior conviction for violent felony did not render defendant's death sentence unconstitutionally unreliable or require resentencing where the aggravating circumstance that defendant

had previously been convicted of another capital felony or felony involving the use of threat of force applies by virtue of defendant's other prior convictions for murder, armed robbery, and aggravated assault).

Instead, where a prior conviction is reversed and remanded for a new trial, this Court must determine the harmless nature of the reversal. See Rivera v. State, 629 So. 2d 105 (Fla. 1993), citing Preston v. State, 564 So. 2d 120 (Fla. 1990), and Johnson v. Mississippi, 486 U.S. 578 (1988). Here, the existence of two other prior violent felonies committed by Bolin, including a separate murder conviction[6], clearly demonstrates harmless error with regard to the reversal of the Matthews conviction.

As for Appellant's argument that the court erred in allowing Detective Kling to testify regarding the prior conviction for the Matthews' murder, this Court has repeatedly held that the admission of such evidence is proper. See Jones v. State, 748 So. 2d 1012, 1026 (Fla. 1999); Waterhouse v. State, 596 So. 2d 1008, 1016 (Fla. 1992); Hudson v. State, 708 So. 2d 256, 261 (Fla. 1998); and Clark v. State, 613 So. 2d 412, 415 (Fla. 1992). The hearsay testimony from Detective Kling was

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[6]Compare Long v. State, 529 So. 2d 286, 293 (Fla. 1988)(death sentence reversed where *only prior murder* conviction used to support aggravating factor reversed and vacated).

permissible, as noted by Appellant, pursuant to Rodriquez v. State, 753 So. 2d 29, 45 (Fla. 2000). Moreover, Appellant was able to challenge the credibility of the hearsay statements attributed to Phillip Bolin on cross-examination of Detective Kling by pointing out that numerous contradictory statements had been made by Phillip Bolin. (V10, T681). Thus, Appellant was not denied the opportunity to rebut the hearsay testimony.

Finally, the challenge to the introduction of photographs of Terry Matthews' body is also without merit as this evidence was relevant and admissible to assist the jury in evaluating Bolin's character and the circumstances of the crime. Upon rejecting a similar argument in Zakrzewski v. State, 717 So. 2d 488 (Fla. 1998), this Court noted that Section 921.142(2), Florida Statutes (1995), describes the procedure for the penalty phase of a capital case, states "[a]ny such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence...." Id., at 494-495. Accordingly, as the photos were not unduly focused upon or made a feature of the trial, and as they were relevant to assist the jury in evaluating the character of the defendant and the circumstances of the crime, no error resulted from their admission. See Jones v. State, 748 So. 2d 1012, 1026 (Fla. 1999); and Hudson v. State, 708 So. 2d

256, 261 (Fla. 1998).

In conclusion, any error with regard to the consideration of Bolin’s conviction for the murder of Terry Matthews must be deemed harmless beyond a reasonable doubt. Where the aggravating factor concerning Bolin’s previous violent felony convictions was well established by the evidence in support of Bolin’s other violent felony convictions, Appellant’s death sentence must be affirmed.

CONCLUSION

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

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

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KIMBERLY NOLEN HOPKINS
Assistant Attorney General
Florida Bar ID#: 0986682
2002 N. Lois Avenue, Suite 700
Tampa, Florida 33607
(813) 873-4739
(813) 356-1292 Fax

COUNSEL FOR APPELLEE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Andrea Norgard, Assistant Public Defender, P.O. Box 9000-Drawer PD, Bartow, Florida 33831-9000, this _____ day of December, 2000.

____

COUNSEL FOR APPELLEE

CERTIFICATE OF TYPE SIZE AND STYLE

I HEREBY CERTIFY that this brief is presented in 12 point Courier New, a font that is not proportionately spaced.

____

COUNSEL FOR APPELLEE

IN THE SUPREME COURT OF FLORIDA

OSCAR RAY BOLIN,

Appellant,

vs. **CASE NO. SC95775**

STATE OF FLORIDA,

Appellee.

______________________________/

INDEX TO APPENDIX

Exhibit A	Commonwealth of Pennsylvania v. Patricia Lynne Rorrer, Superior Court of Pennsylvania No. 3080 Philadelphia 1998, October 22, 1999
Exhibit B	Mitochondrial DNA Sequence Analysis - Validation and Use for Forensic Casework in the Forensic Science Review, Volume Eleven, Number One, June 1999 by Drs. M.M. Holland and T.J. Parsons