IN THE SUPREME COURT OF FLORIDA

OSCAR RAY BOLIN,	:	
Appellant,	:	
vs.	:	Case No. SC95,775
STATE OF FLORIDA,	:	
Appellee.	:	
________________________________	:	

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

INITIAL BRIEF OF APPELLANT

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TOPICAL INDEX TO BRIEF

PAGE NO.

PRELIMINARY STATEMENT 1

STATEMENT OF THE CASE 1

STATEMENT OF THE FACTS 8

SUMMARY OF THE ARGUMENT 34

ARGUMENT 37

ISSUE I

THE TRIAL COURT'S RULING WHICH SUPPRESSED BOLIN'S LETTER ON BOTH FOURTH AND SIXTH AMENDMENT GROUNDS, WAS ERRONEOUSLY REVERSED BY THE SECOND DISTRICT IN STATE V. BOLIN, 693 SO. 2D 583 (FLA. 2D DCA 1997). 37

ISSUE II

THE TRIAL JUDGE ERRED BY RULING THAT BOLIN'S LETTER TO CAPTAIN TERRY ACTED AS A WAIVER OF THE SPOUSAL PRIVILEGE. 53

ISSUE III

THE TRIAL COURT ERRED IN RULING THAT MITOCHONDRIAL DNA EVIDENCE SATISFIES THE FRYE STANDARD FOR ADMISSIBILITY AND PERMITTING THE STATE TO INTRODUCE STATISTICAL PROBABILITIES BASED UPON MTDNA. 68

ISSUE IV

TOPICAL INDEX TO BRIEF (continued)

THE TRIAL COURT ERRED IN DENYING APPELLANT'S REQUEST TO ADMIT INTO EVIDENCE AND PUBLISH TO THE JURY PRIOR INCONSISTENT STATEMENTS OF CHERYL COBY THEREBY DENYING APPELLANT HIS SIXTH AMENDMENT RIGHT TO CONFRONT THE STATE'S WITNESS AND HIS RIGHT TO DUE PROCESS OR LAW. 88

ISSUE V

THE TRIAL COURT ERRED IN DENYING A MOTION FOR MISTRIAL REQUESTED BY THE DEFENSE AFTER THE STATE PRESENTED TESTIMONY THAT MR. BOLIN HAD ATTEMPTED SUICIDE WHERE THE TESTIMONY WAS HIGHLY IMPROPER AND INADMISSIBLE AS EVIDENCE OF CONSCIOUSNESS OF GUILT OR OF FLIGHT, IT HAD LITTLE TO NO RELEVANCE, AND ITS PREJUDICIAL IMPACT FAR OUTWEIGHED ANY PROBATIVE VALUE 94

ISSUE VI

THE PENALTY JURY RECOMMENDATION WAS TAINTED BECAUSE EVIDENCE ABOUT BOLIN'S CONVICTION FOR ANOTHER MURDER WAS PRESENTED BEFORE THE JURY AND THIS CONVICTION HAS SINCE BEEN VACATED. 97

CONCLUSION 100

APPENDIX

CERTIFICATE OF SERVICE

TABLE OF CITATIONS

CASES	PAGE NO.
Arizona v. Hicks, 480 U.S. 321 (1987)	41
Bell v. Wolfish, 441 U.S. 520 at 557 (1979)	45
Block v. Rutherford, 468 U.S. 576 (1984)	45
Bolin v. State, 650 So. 2d 21 (Fla. 1995)	1, 53
Bolin v. State, 697 So. 2d 1215 (Fla. 1997)	2, 38, 44
Bolin v. State, 642 So. 2d 540 (Fla. 1994)	53
Bolin v. State, 736 So. 2d 1160 (Fla. 1999)	98
Brim v. State, 695 So. 2d 268 (Fla. 1997)	69, 71, 84
Caso v. State, 524 So. 2d 422 (Fla. 1988)	52
Chandler v. State, 702 So. 2d 186 (Fla. 1997)	89
Chapman v. California, 386 So. 2d 18 (1967)	92
Coco v. State, 62 So. 2d 892 (Fla. 1953)	93
Colina v. State, 570 So. 2d 929 (Fla. 1990)	99
Coxwell v. State, 361 So. 2d 148 (Fla. 1978)	92, 93

TABLE OF CITATIONS (continued)

Davis v. Alaska,
415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed. 347 (1974) 90

Delaware v. Van Ardsell,
475 U.S. 673 (1986) 92

Delaware v. Van Arsdall,
475 U.S. 673, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986) 90

Dougan v. State,
470 So. 2d 697 (Fla. 1985) 99

Dragovich v. State,
492 So. 2d 350 (Fla. 1986) 98

Driskell v. State,
659 P. 2d 343 (Okla. Crim. App. 1983) 66, 67

Eastern Air Lines v. Gellert,
431 So. 2d 329 (Fla. 3d DCA 1983) 66

Flanagan v. State,
625 So. 2d 827 (Fla. 1993) 69

Frye v. United States,
293 F.1013 (D.C. Cir. 1923) 69

Green v. State,
604 So. 2d 471 (Fla. 1992) 60

Haag v. State,
591 So. 2d 614 (Fla. 1992) 55

Hadden v. State,
690 So. 2d 573 (Fla. 1997) 71

Harrison v. United States,
392 U.S. 219 (1968) 57

Hawthorne v. State,
408 So. 2d 801 (Fla. 1st DCA 1982) 58

TABLE OF CITATIONS (continued)

Hayes v. State,
660 So. 2d 257 (Fla. 1995) 72

Horton v. California,
496 U.S. 128 (1990) 41

Hoyas v. State,
456 So. 2d 1225 (Fla. 3d DCA 1984) 63

Hudson v. Palmer,
468 U.S. 517 (1984) 40, 43-46

In re Grand Jury Investigation,
604 F. 2d 672 (D.C. Cir. 1979) 63

In re State v. Schmidt,
474 So. 2d 899 (Fla. 5th DCA 1985) 65

Jaggers v. State,
536 So. 2d 321 (Fla. 2d DCA 1988) 90

Johnson v. Mississippi,
486 U.S. 578 (1988) 99

Jones v. State,
648 So. 2d 669 (Fla. 1994) 42

Jordan v. State,
694 So. 2d 708 (Fla. 1997) 38

Lewis v. State,
570 So. 2d 412 (Fla. 1st DCA 1990) 90

Long v. State,
529 So. 2d 286 (Fla. 1988) 98, 99

Lowe v. State,
203 Ga. App. 277, 416 S.E. 2d 750 (1992) 47

Maine v. Moulton,
474 U.S. 159 (1985) 51

TABLE OF CITATIONS (continued)

McCoy v. State,
639 So. 2d 163 (Fla. 1st DCA 1994) 40, 43-45, 47, 48

Meggison v. State,
540 So. 2d 258 (Fla. 5th DCA 1989) 95

Minnesota v. Dickerson,
508 U.S. 366 (1993) 41, 42

Murray v. State,
692 So. 2d 157 (Fla. 1997) 84

Palm Beach County School Board v. Morrison,
621 So. 2d 464 (Fla. 4th DCA 1993) 66

People v. Phillips,
219 Mich. App. 159, 555 N.W. 2d 742 (1996) 47

Peoples v. State,
612 So. 2d 555 (Fla. 1992) 50

Preston v. State,
444 So. 2d 939 (Fla. 1984) 38

Preston v. State,
564 So. 2d 120 (Fla. 1990) 99

Ramirez v. State,
651 So. 2d 1164 (Fla. 1995) 70

Robinson v. State,
487 So. 2d 1040 (Fla. 1986) 99

Rodriguez v. State,
25 Fla. L. Weekly S89 (Fla. February 3, 2000) 97

Saenz v. Alexander,
584 So. 2d 1061 (Fla. 1st DCA 1991) 66

Shell v. State,
554 So. 2d 887 (Miss. 1989) 61

Shellito v. State,
701 So. 2d 837 (Fla. 1997), rehearing denied,
cert.denied, 118 S.Ct. 1537 (1997) 95

Soca v. State,
673 So. 2d 24 (Fla.), cert.denied, 519 U.S. 910 (1996) 44

State of Florida v. James Deward Crow,
Case No. 96-1156-CFA 87

State v. Bolin,
693 So. 2d 583 (Fla. 2d DCA 1997) 2

State v. Cross,
487 So. 2d 1056 (Fla.), cert. dismissed, 479 U.S. 805 (1986) 44

State v. DiGuilio,
491 So. 2d 1129 (Fla. 1986) 92

State v. Jackson,
321 N.J. Super. 365, 729 A. 2d 55 (1999) 47

TABLE OF CITATIONS (continued)

State v. Martin,
322 N.C. 229, 367 S.E. 2d 618 (1998) 47

State v. Neely,
236 Neb. 527, 462 N.W. 2d 105 (1990) 47

State v. Stewartson,
443 So. 2d 1074 (Fla. 5th DCA 1984) 55

State v. Warner,
150 Ariz. 123, 722 P. 2d 291 (1986) 51, 52

Sykes v. St. Andrews School,
619 So. 2d 467 (Fla. 4th DCA 1993) 64

Texas v. Brown,
460 U.S. 730 (1983) 41

Trawick v. State,
473 So. 2d 1235 (Fla. 1985), cert.denied,
476 U.S. 1143 (1986) 99

Traylor v. State,
596 So. 2d 957 (Fla. 1992) 49

Truelsch v. Northwestern Mutual Life Insurance Company,
186 Wis. 239, 202 N.W. 352 (1925) 55

Truly Nolen Exterminating, Inc. v. Thomasson,
554 So. 2d 5 (Fla. 3d DCA 1989) 66

United States v. Cohen,
796 F. 2d 20 (2d Cir.), cert. denied, 479 U.S. 854 (1986)
and 479 U.S. 1055 (1987) 46, 47

United States v. Santos,
961 F. Supp. 71 (S.D.N.Y. 1997) 47

Walker v. State,
483 So. 2d 791 (Fla. 1st DCA 1986) 95

Williams v. State,

TABLE OF CITATIONS (continued)

386 So. 2d 27 (Fla. 2d DCA 1980) 93

Winston v. Lee,
470 U.S. 753 (1985) 45

TABLE OF CITATIONS (continued)

Zeigler v. State,
471 So. 2d 172 (Fla. 1st DCA 1985) 57, 58

OTHER AUTHORITIES

Fla. R. App. P. 9.030(a)(1)(A)(i) 8

STATEMENT OF TYPE USED

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PRELIMINARY STATEMENT

The record on appeal consists of two sections and a three volume supplement. The first part, contained in volumes 1 through 4 (pages 1-518) consists of documents supplied by the clerk. Reference to this part of the record on appeal will be designated by "V", the volume number (1-4), and "R" preceding the page number. The second part of the record contains the court transcripts from the trial and pretrial hearings. References to this part of the record will be referred to by "V", the volume number, then by "T" and the appropriate page number. References to the supplemental record will be referred to as "SR" and the appropriate page number.

STATEMENT OF THE CASE

A Hillsborough Grand Jury returned an Indictment on August 1, 1990, charging Oscar Ray Bolin, Jr. with first degree murder, attempted robbery, and kidnapping. (V1,R29-32) Appellant's subsequent convictions for first degree murder and false imprisonment were overturned by this Court on February 9, 1995. (V1,T33-41); Bolin v. State, 650 So. 2d 21 (Fla. 1995).

This Court reversed for a violation of the spousal privilege. In that opinion, this Court stated that a letter from Bolin to the investigating detective might establish a waiver of the spousal privilege. 650 So. 2d at 23-4. It was left to the trial court to

determine whether "the circumstances together with the content of the letter...indicate that Bolin voluntarily consented to disclosure by Coby of what she knew about Bolin's alleged criminal activities". 650 at 24.

On remand to the circuit court, the original trial judge disqualified himself on March 8, 1995, pursuant to Appellant's motion. (V1,R46-55) Bolin then moved to suppress the letter, seized from his jail cell following his attempted suicide in June 1991, which contained the possible waiver of the spousal privilege. (V1,R73-77) After a suppression hearing held August 3, 1995, the trial court ruled that the letter had been seized from Bolin's jail cell without probable cause that it was either contraband or evidence of a crime. (V2,R58;SR155-156) The State appealed to the Second District, which reversed on the rationale that the letter was "in plain view" and "evidence of the attempted suicide". State v. Bolin, 693 So. 2d 583 (Fla. 2d DCA 1997). In an order dated July 10, 1997, this Court declined to accept jurisdiction. (V2, R368); Bolin v. State, 697 So. 2d 1215 (Fla. 1997). The United States Supreme Court denied certiorari; 552 U.S. 973 (Fla. 1997).

The circuit court then heard Bolin's "Motion in Limine Letters" (V2,R371-376) on February 23 and March 16, 1998. (V11, T737-921) After hearing witnesses and evidence regarding the authenticity of a

letter written by Bolin and addressed to his attorneys, the court ruled that this letter was not authentic. (V11,T919)

The judge then addressed the waiver question. Appellant's "Amended Motion in Limine...Waiver of Spousal Privilege . . ." (V1,R83-102) had originally been declared moot following the 1995 ruling which suppressed the letter. (V6,R19,SR156) At the pretrial hearing on February 23,1998, the court heard argument from defense counsel that Appellant's letter to Captain Terry should not be treated as a waiver of his spousal privilege. (V11,T838) Counsel noted that Bolin did not disclose any confidential communication in the letter. (V2,R315-318,V11,T839) At the time that the letter was written, the trial judge had already ruled that he no longer retained the privilege. (V2,R315, 324-5; V11,T839-40) Moreover, Bolin had placed a postage stamp on the letter, but never released it to the jail personnel for mailing. (V2,R323; V11,T842, 844) Therefore, there was no voluntary delivery of the letter to Captain Terry. (V2,R316,323;V11,T840)

Counsel further argued that Bolin's previous filing of a motion to discharge his attorneys because their actions had caused the trial judge to find a waiver of the spousal privilege showed his intent to assert his privilege at all times. (V2,R324;V11,8t42-44) Therefore, his suicide note should not be construed as a voluntary waiver when the judge had already told him that he no longer retained the privilege. (V2,R324-25;V11,T842-45)

The third point was even if the letter could be found to be a waiver, the waiver would only be prospective, not retrospective. (V2,R321, 328-36;V11,T846-7) Therefore, any waiver was subsequently revoked by reassertion of the privilege before Bolin's ex-wife testified at trial. (V2,R106,331-332;V11,T1s46-49) It was also contingent upon Bolin's attempted suicide actually resulting in his death. (V1,R332-33;V11,T146-48)

In ruling, the trial court conjectured that this Court would have been aware of the sequence of events and accordingly must have found that any waiver could be applied retroactively to Cheryl Coby's deposition testimony. (V11,T864-865.869-70,873-74) He ruled Bolin's letter was a voluntary waiver which, while "prospective only in its tone, had the legal effect of acting or operating retroactively". (V11,T890,893-94) At the March 16, 1998 hearing, the court reiterated his ruling; "the... letter amounts to a waiver of the spousal immunity privilege, subsequently withdrawn". (V11, T919)

At the February 4, 1999 hearing, defense counsel asked the judge to rehear his "Motion to Dismiss Counts Two and Three of the Indictment" (V1,R19-21; V3,R464-465;V12,T1043) This motion, based upon the running of the statute of limitations before the indictment was returned, had originally been heard and denied on August 3, 1995. (V1,R19) The basis for the rehearing was subsequent case law, which

was argued to the court. (V12,R491,V12,T1058) The trial judge adhered to the prior ruling. (V3,R491;V12,T1058)

The court then considered Appellant's "Motion for Rehearing of Motion in Limine - Spousal Privilege." (V2,R468-471,V12,T1058-1065) The motion was based upon further research on whether a waiver of a privilege could later be revoked. (V3,R468-470;V12,T1059-1061) Defense counsel argued that a waiver can be revoked as long as the privileged material was not disclosed during the period that the waiver was in effect. (V12,T1059-1063) The State insisted that the only issue before the trial court was whether Bolin's waiver in the letter was voluntary. (V13,T1064) The judge denied the motion. (V3,R468;V12,T1065)

Defense counsel also moved to continue the trial based upon his investigator's receipt of a telephone call from a prospective defense witness who would testify that another person confessed to the homicide shortly after it took place. (V3,R487489;V12,T1068-1073. This prospective defense witness could not be subpoenaed because he was avoiding warrants for his arrest. (V12,T1072) However, he said that he was planning to turn himself in soon. (V12, T1072) The court denied the motion for continuance. (V3, R487; V12,T1075)

The defense successfully excluded tapes made by Cheryl Coby while wearing a body bug. (V3,R500-502)

Appellant sought to exclude evidence relating to Mitochondrial DNA from his trial. (V3,R395-463) Following a hearing on February 4, 1999, the Motion in Limine was denied. (V3,R395)

Mr. Bolin was tried by a jury on the charges of first degree murder and false imprisonment on April 6-8, 1999, with Circuit Judge J. Rogers Padgett, presiding. (V3,R464-465;491;V5-11)

Objections to the use of any statements which would have been excluded under a spousal privilege were renewed. During the trial Bolin moved to exclude Cheryl Coby's video-taped testimony which had been taken due to her ill health in an effort to preserve her testimony. (V3,R518) Defense counsel argued that the attorney who had represented Bolin when Coby's testimony was video-taped had been ineffective in cross-examining her on the tape. (V3,R513) On April 7, 1999, Defense counsel pointed out numerous instances where Coby's video-taped testimony differed from that in her earlier recorded statements and where the attorney had failed to point them out. (V9,T507) The motion was denied. (V3,R513) Three defense exhibits, a discovery deposition, Cherly Coby's testimony from the 1991 trial, and a deposition to perpetuate testimony were filed with the clerk by defense counsel. (SR3, R238-461)

During the testimony of Captain Terry, defense counsel objected to testimony that Bolin had attempted suicide. (V8,T380-381) Defense counsel argued that the suicide attempt was analogous to flight, was

not relevant, and cast Mr. Bolin in a bad light. (V8,T380-381) The trial court overruled the objection. (V8,T382)

The jury returned verdicts of guilty as charged on April 8, 1999. (V4,R555)

In the subsequent penalty trial defense counsel objected to the State's use of photographs of the body of Terry Matthews and Natalie Holley. Over objection, Gary Kling was permitted to testify about what an alleged eyewitness, Philip Bolin, to the Matthews case, had told him about the circumstances of that homicide. Over objection, John King testified as to the details of the Holley murder. (V10,T652-54) The jury was instructed on one aggravating circumstance, that Bolin had previously been convicted of a felony involving force or violence. (V4,R361)

The jury returned a recommendation of death by a vote of 12 to 0. (V4,T564)

Both the <u>Spencer</u> hearing and the hearing on the Motion for New Trial were held on May 14, 1999. (V4,R612-616) No testimony was taken. The Motion for New Trial was denied. (V12,T1100)

Mr. Bolin was sentenced to death on June 4, 1999. (V12,T1107) Sentencing orders were filed contemporaneously. (V12,T1107) The written order reflected the following findings: a single aggravating factor, that the defendant was previously convicted of a felony

involving the use of force or violence, which was assigned the "greatest possible weight". (V4,R629)

No statutory mitigators were found. Five non-statutory mitigators were found to exist from Mrs. Bolin's testimony: gentle and caring person; appealing sense of humor; defendant is respectful to her; she and defendant love each other; she visits defendant. Each was assigned little weight. (V4,R630) Five non-statutory mitigators were found based upon the transcript of Mr. Bolin's mother: defendant's father neglected him during his childhood; defendant's father abused and demeaned him physically and emotionally by beating him and ordering him to eat like a dog; the defendant witnessed frequent violence between his parents; the defendant's father threatened to kill him more than once; and that the defendant's mother took him to school chained to a dog leash. (V4,R630) Each was assigned some weight. (V4,R630)

Mr. Bolin was also sentenced to five years on the false imprisonment charge, to run consecutive to the death sentence. (V4, R624,626)

Appellant filed a timely Notice of Appeal on June 4, 1999. (V4,R632) Pursuant to Article V,Section 3(b)(1) of the Florida constitution and Fla. R. Crim. P. 9.030(a)(1)(A)(i), jurisdiction lies with this Court.

STATEMENT OF THE FACTS

A. PRETRIAL HEARINGS

1. Frye Hearing Regarding Mitochondrial DNA

On February 20, 1999, the court conducted a hearing on the admissibility of evidence relating to Mitochondrial DNA. The following testimony was presented at that hearing:

John Stewart, a forensic examiner for the FBI laboratory, testified for the State. According to Mr. Stewart, his lab performs mtDNA analysis. (V12,T947) There are two types of DNA -- nuclear DNA and mtDNA. Nuclear DNA is contained in the nucleus of a cell and is inherited from both the father and mother. (V12,T948) mtDNA is found outside the nucleus of a cell and is inherited only from the mother. (V12, T948)

mtDNA differs from nuclear DNA in significant ways beyond the way it is inherited. (V12,T949) Nuclear DNA degrades very rapidly, mtDNA at a slower rate. (V12,T950) mtDNA is used when nuclear DNA is not available. (V12,T950)

It was first believed that mtDNA was homoplasmic, like nuclear DNA. (V12,T959) In 1997 it was determined that mtDNA is actually heteroplasmic. (V12,T959) There are two types of heteroplasmy-point and "C" stretch. (V12,T960) In point heteroplasmy a single individual can have two different bases at one spot. (V12,T960) It is estimated that this occurs in 8% to 10% of the population. (V12,T960) In "C" stretch heteroplasmy extra "C" bases are inserted in a long strain of "C"'s. (V12,T960)

mtDNA is subject to mutation. (V12,T960) A single paper published in 1997 estimated mtDNA mutates once in 33 generations. (V12,T961) There is disagreement within the scientific community on this figure. (V12,T961)

Mutation can also occur within an individual's mtDNA. (V12, T967) For example, one string of bases sequences might be viewed in one part of an individual and a different sequence found in another part of the same person. (V12,T967)

Contamination is a major concern with mtDNA. (V12, T961) FBI personnel wear gloves and lab coats. Efforts are taken to prevent cross contamination. (V12,T962) The FBI follows the guidelines developed by a technical working group called Twig Dam. (V12,T963) The FBI adopted a 10:1 (ten parts sample to one part contaminant) rule to deal with contamination.

Contamination is also a problem during the amplification process. (V12,T969) Amplification increases the copies of contamination. (V12,T969) This type of contamination is greater with mtDNA than the PCR amplification of nuclear DNA. (V12, T969) Contamination can also mimic heteroplasmy. (V12,T981)

According to Stewart, mtDNA analysis is used in different areas of academia and in the field of animal and plant biology. (V12,T952) It has been used to identify unknown remains. (V12, T952) The FBI

became involved in mtDNA analysis to help identify evidence that had been exposed the environment for long periods of time. (V12,T953)

Publication in the area of mtDNA began in 1988. (V12,T954) Another paper followed in 1990, this one generated by the FBI. (V12,T954)(State Exhibit 6) The FBI began testing mtDNA in 1992 and various employees of the FBI lab have published papers in 1994, 1995, and 1997. (V12,T956-959) (State's Exhibits 2,3,4) Stewart acknowledged that anything published prior to 1996 had relied upon the incorrect assumption that mtDNA was homoplasmic. (V12,T966-967)

mtDNA analysis is done by extracting very small amounts of DNA from the bone, teeth, or hair. (V12,T948) This extremely small amount of DNA is amplified, or copied many times. (12,T949;951) These copies are then sequenced to allow the individual base letters to be read. (V12,T949) Two regions (HV-1 and HV-2) of the mtDNA strand are read. (V12,T948) The questioned sample is then compared with the known sample. (V12,T949) A difference of two bases between the questioned sample and the known sample is an exclusion, assuming there is no heteroplasmy. (V12,T973) If there is no base difference between the known sample and the questioned sample, the individual cannot be excluded from being the source of the unknown sample. (V12,T973)

According to Stewart, mtDNA has been previously accepted in 13 instances, 12 in the United States and 1 in Australia. (V12,T979) Stewart opined that mtDNA was generally accepted in the scientific

community. (V12,T965) This opinion was based upon the input Stewart received at meetings and from other scientists. (V12,T966)

On cross-examination, Stewart acknowledged that other members of the scientific community aside from the FBI felt that mtDNA testing was in its infancy and that knowledge about the essential genetic features of mtDNA was scanty. (V12,T970) Stewart allowed that other studies were finding high degrees of mutation in pedigree samples. (V12,T970)

Stewart acknowledged on cross that mtDNA is the newest form of DNA testing. (V12,T972) mtDNA is the least sensitive and the least able to make differentiation of the available DNA testing methods. (V12,T982)

The database upon which the FBI relies upon to reach statistical comparison was composed of 1600 samples at the time of the hearing. (V12, T973) The samples were taken from 887 Caucasians, 99 Hispanics, 349 Africans, and 221 Asians. (V12,T978) At the time of the testing in this case the database numbered 1500. (V12,T973) In this case, there were 8 samples in the database that differed from the hair removed from the towel by one base and 36 samples that differed by two bases. (V12,T977) The eight samples that differed by one base could not be excluded according to FBI criteria (V12,T986-987) According to Stewart, Mr. Bolin's profile had not been seen before in the 887 Caucasians from the database. (V12,T981) The statistical calculation, according to Stewart, was that it was 141 times as likely that the hair came from Mr. Bolin than someone drawn at random and Caucasian; 55

times more likely that it came from an African at random; 16 times more likely than from a Hispanic; and 35 more times likely than an Asian at random. (V12,T1026-1027)

Stewart was not an expert in statistics and couldn't comment on challenges to the statistical computations that he submitted. (V12, T983-985) Stewart did know that the other 8 samples that could not be excluded were not figured into the statistical compilations reached in the this case by the statistician, Dr. Basten. (V12, T987) Stewart could not say whether the statistical method of computation in this case had ever been utilized in any other case anywhere. (V12,T989) Stewart was unaware of any peer review or of any publications dealing with the method of statistical calculation used in this case. (V12,T990)

Dr. William Shields testified for the defense. (V12,T990) Dr. Shields is a professor at State University of New York, Syracuse. (V12,T991) Approximately two thirds of his work there deals with DNA. (V12,T991) He conducts research into the area of population genetics. (V12,T992) Since 1990 Dr. Shields has been doing work on the statistical aspects and the database aspects of forensic DNA and examining the databases that are used at a variety of forensic laboratories that perform both nuclear and mtDNA analysis. (V12, T993) Dr. Shields has testified as an expert approximately 90 times, for both the defense and the prosecution. (V12,T993; 1021) Mr. Bolin's case

denotes the sixth time (and was the second case in Florida) wherein Dr. Shields testified on mtDNA. (V12,T993-994) In addition to his testimony, a copy of a paper by Dr. Shields was introduced as evidence. (V3,R443-463)

According to Dr. Shields, contamination is a very big problem with mtDNA. (V12,T994) The reason is two-fold: The samples of mtDNA are much smaller and consist of only 26,000 base pairs as compared to the billions of pairs with nuclear DNA. The number of amplifications that must be done in order to compare samples causes a much higher probability of contamination in mtDNA that affects validity of the final results. (V12,T995)

According to Dr. Shields, the safeguards against contamination used by the FBI that came from the Wilson paper are inadequate for two reasons. The first is that the testing which led to the 10:1 rule promulgated by the Wilson paper was only performed once and with too small a sample -- a sample size of only five. This sample was too small to produce valid results. (V12,T996) According to Dr. Shields, such a study would be the equivalent of watching Penny Hardaway shoot five free throws, see him make all five, and then conclude that he never misses. (V12,T997)

The second reason the 10:1 ratio is invalid relates to the faulty way the FBI has of washing hairs. (V12,T997) The initial method of washing the FBI used didn't get rid of contaminants. (V12, T997) They

have since switched to a somewhat better method. (V12,T997) This second method, though, was used by an different lab, Labcore. Labcore conducted validation studies in which they found that they could not get rid of contamination with the second method. (V12,T998) Labcore switched to third method, rejecting the one still employed by the FBI. (V12,T998)

Dr. Shields also questioned the validity of the FBI methods of statistical calculations as reported in published papers. (V12, T998) The samples the FBI used were not large enough to reach valid conclusions. (V12,T998) Sample size is crucial to the reliable use of mtDNA. (V12,T999)

According to Dr. Shields, the early papers validating mtDNA relied upon the false assumption of homoplasmy. (V12,T998) Homoplasmy was considered to be an important feature of mtDNA. (V12, T999) Nuclear DNA is homoplasmic, you inherit half from your mother and half from your father. (V12,T1000) Thus, all the cells in an individual will have the same DNA. (V12,T1000)

On the other hand, **mtDNA comes only from the mother**. (12, T1001) Therefore, if a mother has more than one kind of mtDNA, a child's mtDNA may differs from that of his mother or siblings. (V12,T1001) The mother can also pass on more than one kind of mtDNA to an individual child. (V12,T1003) Heteroplasmy results when an individual has some tests which show that they are consistent with the parent, and other

tests showing that they are inconsistent with the parent. (V12,T1001) With mtDNA you don't always get the same strand from an individual -- you can get different strands. (V12, T1002) Thus, when mtDNA is analyzed, you can end up with a family that shows differences on the same site across individuals that are supposed to be identical with each other. (V12, T1003)

Heteroplasmy can also occur in different samples. (V12,T1004) Thus, hair can show a different mtDNA sequence than the blood in the same individual. (V12,T1004) This is problematic in this case because the known sample from Mr. Bolin was blood and that was being compared to a different sample, the hair. (V12,T1004)

Heteroplasmy and mutation compound the problem of contamination with mtDNA. (V12,T1005) The only way to conclude that the results are correct is to test multiple samples to determine heteroplasia as opposed to contamination. (V12,T1006)

According to Dr. Shields, far greater levels of heteroplasia and contamination exist in mtDNA than Stewart would admit to. (V12, T1006) For example, even if the FBI examiners wear gloves, they produce enough floating DNA that it can get into the solutions they are testing and cause contamination. (V12,T1007) Dr. Shields is not alone in his conclusions regarding the high levels of contamination. (V12,T1007) Contamination leads to misreading of samples. (V12,T1007)

Mutation is also a great problem. (V12,T1008) The 33 generation mutation rate does not mean 33 generations as defined by reproduction. (V12,T1008) This rate is the rate of reproduction of the cells. These constantly occurring divisions can offer opportunity for mutation. (V12,T1008) This can lead to "somatic mutation", wherein a person could produce a patch of hair or skin that has a different mtDNA sequence than what that individual had to start with. (V12,T1008) In other words, an individual's mtDNA may change over time. (V12,T1008) Heteroplasmy may also be the result of mutation in an individual. (V12,T1009)

The older the DNA sample, the higher the probability that contamination occurs. (V12,T1009-1010) Bacteria, over time, will eat away DNA. (V12,T1009) As the DNA amounts decline, the level of amplification must be increased in order to get comparative samples. The greater the amount of amplification, the greater the odds of contamination. (V12,T1010)

Dr. Shields testified as to the statistical method employed by the FBI with the 1600 sample database. (V12,T1010) Dr. Shields opined the calculations made by the FBI with this database are **statistically indefensible**.(emphasis added)(V12,T1010) According to Dr. Shields, the FBI uses faulty reasoning to reach the conclusion that "It is not true that you didn't find it because you did find it". (V12,T1010)

The FBI databases are too small. (V12,T1011) The database is built from adjudicated cases. (V21,T1011) Dr. Shields found that the inclusion of "Zero", as in "This has been seen zero times before" was wrong, because it has been seen at least once. (V12, T1011) Dr. Shields found the use of zero "positively misleading". (V12,T1012) According to Dr. Shields, when you have only a small number in the database, you can't have anything be considered horrendously rare. (V12,T1012)

Instead, Dr. Shields believed that mtDNA should be analyzed with a statistical model called "pair-wise comparison". (V12,T1013) Dr. Shields had just published a paper on this and it was undergoing peer review. (V12,T1013) Pair-wise comparison takes into consideration the ethnicity of the database and compensates for the very rare and very common sequences, something that Dr. Basten's method fails to do. (V12,T1014) Pair-wise comparison is used by the British.

According to Dr. Shields, there was not broad agreement within the scientific community on which statistical treatment could be applied to mtDNA. (V12,T1018)

On cross-examination, Dr. Shields stated he had not been to the FBI labs, but had reviewed their protocols. (V12,T1021) Despite an FBI report to the contrary, Dr. Shields believed there were signs of contamination in this case. (V12,T1024) The FBI report did not state that no contamination was present -- just that no contamination that

caused them a problem was present. What this really means that no contamination in excess of the 10:1 ratio was found. (V12, T1030)

Dr. Shields had also read in the FBI reports that hetero-plasmy was not an issue in this case. (V12,T1024) Dr. Shields took issue with this finding. Because the FBI did not find it in their sample does not mean that it does not exist in this case. (V12, T1029) Heteroplasmy does not show up in every sample that is run and the FBI ran only one sample. (V12,T1030)

According to Dr. Shields it is not fair to say that Mr. Bolin is 444 more times likely than an individual selected at random to have this mtDNA pattern, the conclusion reached by Dr. Basten. (V12,T1031) This conclusion must include the caveat "based upon this database." (V12,T1031) The FBI numbers, of one in 887, with a high range or 1 in 1600 and a low of 1 in 400 is not accurate either, considering the quality of the database. (V12, T1031)

The court found by a preponderance of the evidence that mtDNA was sufficiently established to be admissible. The court "had a little more problem with finding that the State by a preponderance of the evidence has shown that the testing procedures used to apply that principle to the facts of the case at hand, and I emphasize those last few words, "has been proven," but I'm going to go ahead and rule that it has been." (V12,T1042) The court then denied a defense request to have the hair tested by an independent laboratory. (V12,T1043)

B. TRIAL TESTIMONY

1. Evidence presented by the State

Stephanie Collins was 17 years old in November 1986. (V7,T270) She was a student at Chamberlain High School and held a part-time job at an Eckerd drugs in the Marketplace North Shopping Center in Tampa, less than a mile from where she lived. (V7,T271)

On November 6, 1986, Donna Witmer, Stephanie's mother, reported her missing around 1:00 a.m. when Stephanie did not return home. (V7,T274) Mrs. Witmer did not see Stephanie before she left for school on the 5th, but she knew that Stephanie had stopped at home because her school books were on the table. (V7,T273) Mrs. Witmer knew that Stephanie had choir practice on the evening of the fifth, but some of Stephanie's friends told her that Stephanie had not come to practice. (V7,T274) Mrs. Witmer found Stephanie's car in the Eckerd parking lot on November 6th. (V7,T274-275)

Cathy Cumpstone was friends with Stephanie Collins in 1986. (V8,T370) On November 5th, she went home with Ms. Collins after school. (V8,T370) They stayed there 20 to 30 minutes, then Stephanie drove Cathy home around 4:15 p.m. (V8,T371) According to Ms. Cumpstone, Stephanie was going to go to Eckerd's to talk about her work schedule and then go to chorus practice at school. (V8, T371) Ms. Collins had on white tennis shoes, a white sweater, and pink leggings when she left Ms. Cumpstone. (V8,T372)

Keith Copeland was working at the Eckerds where Stephanie Collins worked in November 1986. (V7,T286) Stephanie came into the store around 4:00 p.m. and asked to work extra hours during the holidays. (V7,T287) Mr. Copeland asked Ms. Collins to work that evening, but she could not due to choir practice. (V7,T288) Ms. Collins was in the store fifteen to twenty minutes. (V7,T288)

Jerry Colley dated Stephanie Collins in 1986. (V7,T281) Around 9:00 p.m. on the evening of November 5, 1986, he saw her car in the parking lot at Eckerd's. (V7,T281) He stopped to say hello, waited fifteen minutes, but never saw Ms. Collins. (V7,T283) He believed Ms. Collins to be a cautious person. (V7,T284)

Jimmy Joe Garrison worked for Hillsborough County as a mowing crew supervisor in 1986. (V7,T277) On the morning of December 5, 1986, he discovered a body in a ditch by Morris Bridge Road while mowing the grass. (V7,T278) Mr. Garrison called the Hillsborough County Sheriff. (V7,T279)

Deputy Karen Crockett was on patrol and responded to Morris Bridge Road. (V7,T290) She observed a body approximately 100 yards from the road. (V7,T291) The upper half of the body was wrapped in a blanket, the legs were exposed. (V7,T291) A purse was sitting on the body. (V7,T299) The body appeared to be in an advanced state of decomposition. (V7,T291)

Sergeant Harold Winslett viewed the body at the scene. (V7, T296) Based upon his earlier investigation, he believed that the body was that of Stephanie Collins. (V7,T296-296) The defense stipulated that the body was that of Stephanie Collins. (V7,T336)

The body was not moved until the medical examiner arrived. (V7,T299) The purse and some loose towels laying around the body were collected and bagged. (V7,T299) The body was then taken to the office of the medical examiner. (V7,T300)

According to Sergeant Winslett, a sterile sheet was placed on the floor, the body was placed on a table that was then placed on the sheet, and the body was unwrapped and undressed. (V7,T300-301) The first item removed was a bedspread. (V7,T301;347) The second item removed was a pink and white sheet. (V7,T303) After the sheet, a towel marked "hospital property" was removed. (V7,T304; 347) Each item of clothing was removed and placed on the sterile sheet. (V7, T309) Jewelry was also removed and identified by Ms. Collins' mother as belonging to Stephanie. (V7,T313;348)

More than one hair was found on the wrappings surrounding the body, however Sergeant Winslett could not recall how many were found. (V7,T311) Sergeant Winslett agreed that the number was around a half dozen. (V7,T313)

One hair found on the towel which wrapped the body was submitted to the FBI in March, 1998. (V9,T468) According to FBI hair analyst

Robert Fram, other hairs found were looked at, but Fram gave no testimony as to the results of those other examinations. (V9,T475) Fram compared the towel hair with the known hair of Mr. Bolin. (V9,T469) There was nothing unusual or remarkable about the hair found on the towel. (V9,T474) Fram concluded that the caucasian hair found on the towel was consistent as coming from Mr. Bolin. (V9,T469)

Fram had no idea how the hair got on the towel. (V9,T471) It could have come from someone using the towel after a shower and remained there. (V9,T472) After concluding his examination of the towel hair, Fram removed a 3/4" piece from the root end and forwarded that piece to the mtDNA lab. (V9,T470)

John Stewart, from the mtDNA section of the FBI lab, performed an analysis on the hair sent to him by Fram. (V9,T478;484) Stewart explained what mtDNA is. (V9,T481-483) (Stewart's explanation was substantially similar to that offered in the Frye hearing summarized previously in the Statement of the Facts). Stewart performed a comparison between the mitochondrial base patterns in the towel hair with the mitochondrial base patterns in a blood sample taken from Mr. Bolin. (V9,T484) According to Stewart, the mitochondrial sequences between the two samples were the same and Mr. Bolin could not be eliminated as the source of the hair. (V9,T485)

Christopher Basten, a research statistician at North Carolina University, conducts statistical genetics research. (V9,T488) Basten

also performs calculation probabilities in DNA analysis. (V9,T488) Basten performed that calculation in this case. (V9, T488) Basten was asked to determine the probability that the hair in question belonged to someone other than Mr. Bolin. (V9,T488)

Basten was furnished with FBI reports and used the DNA database frequencies supplied by the FBI lab. (V9,T488) Over objection to the use of these databases by Basten, Basten was allowed to offer his opinion. (V9,T491) Basten admitted he had no idea how the FBI determined whether or not a particular sample was excluded as a match. (V9,T494)

Basten stated the database he based his calculations on numbered 887 Caucasians and that there were no copies of this type of mtDNA in that database. (V9,T491) Basten added two to the database (Mr. Bolin and the true perpetrator) for a total of 888 and then divided that number by 2, for a probability of 1 in 444. (V9,T491) This number was the probability that the hair came from somebody unrelated to Mr. Bolin who was a Caucasian. (V9,T491)

Basten did calculate the probabilities from other racial databases in case the true perpetrator was not Caucasian. (V9,T492) Since the initial calculations had been done, a perfect match to this same mtDNA profile had occurred in the Hispanic database maintained by the FBI. (V9,T493) That database numbered 302 at the time of trial, giving a probability of about 1 in 101. (V9,T493) The African-American database

of 349 at the time of trial yielded a probability of 1 in 175. (V9,T494) These probabilities were all based upon the assumption that the perpetrator was not Mr. Bolin and not someone of maternal relation. (V9,T494)

Taken together, the total FBI database at the time of trial numbered only 2,246. In that database there was one exact match that had the same type mtDNA pattern as Mr. Bolin. (V9,T495) Basten had no idea who that person was. (V9,T496)

Dr. Peter Lardizabal performed a visual examination and autopsy on Stephanie Collins. (V8,T346) He observed six slits or cuts to Ms. Collins shirt. (V8,T351) The left cup of the brassiere and the right rear band of the brassiere were also cut. (V8,T351)

Dr. Lardizabal found no corresponding injuries to the ribs. (V7,T352) He found no evidence of injury to muscle or tissue due to the length of time the body had been outside. (V8,T352) Two ribs, two cervical vertebrae, and two lumbar vertebrae were missing from the body, likely the result of animals. (V8,T353-354) Dr. Lardizabal opined that it would be a wild guess to try to determine the path of any stabbing wounds. (V8,T354)

There were no remaining internal organs to be examined. (V8, T355) The brain was also missing. (V8,T35)

According to Dr. Lardizabal, the skull was the most important part of this autopsy. (V8,T355) The skull had been hit with a heavy

metallic blunt object such as a hammer or pipe. (V8,T355;363) The skull was fragmented into 28 parts. (V8,T355) Damage to the petrous portion of the left temporal bone was 100% deadly. (V8, T358) Based upon an examination of the skull, Dr. Lardizabal opined that there were nine points of impact to the top and sides of the skull. (V8,T358-363-364) The blows would have been quickly fatal. (V8,T365) The individual blows would have caused immediate unconsciousness. (V8,T366)

Royce Wilson, of the Hillsborough Sheriff's department, examined 32 finger print lifts from Stephanie Collins' car. (V7, T328) He found only 18 prints of comparable value. (V7,T328) None of the prints matched those of Mr. Bolin or Cheryl Bolin Coby. (V7, T332) No known prints of Ms. Collins were available for comparison. (V7,T309)

Over objection, a video tape of Cheryl Bolin Coby was played to the jury. (V8,T387-388) Cheryl Coby testified that she had been married to Mr. Bolin from February 11, 1983 until April of 1989. (V8,T392) She and Mr. Bolin had two children- Christopher, who was born December 31, 1985 and died within 40 hours, and Jared, who was born in May 1987. (V8,T393) Coby was a severe diabetic and the complications with the pregnancies caused her to be hospitalized numerous times in 1986. (V8,T393) Coby would often take items like towels and blankets from the hospital and bring them home with her. (V8,T394) As

a result of her diabetes, Coby was legally blind, had a heart condition, and had lost both legs in the last year. (V8, T393)

While they were married, Coby and Mr. Bolin worked the carnival circuit. (V8,T394) They returned to Tampa in late October 1986. (V8,T394) They owned a Ford pick-up truck and had a travel trailer that they lived in. (V8,T395) The trailer was about 12 feet wide and 30 feet long. (V8,T395) It was parked in a trailer park on North Nebraska Avenue in Tampa. (V8,T397) Mr. Bolin was staying at the trailer and Coby had been staying with a friend, Paula Cameron, since they had arrived in town due to marital problems between she and Mr. Bolin. (V8,T401;429) Coby would go to the trailer from time to time. (V8,T402) Coby recalled that she had taken a shower at the travel trailer during the afternoon of November 5, 1986. (V8,T429)

On the evening of November 5, 1986, Coby went with Paula Cameron to a walk-in clinic and learned that she was pregnant. (V8,T400) Mr. Bolin did not want her to have another child because of the health risks. (V8,T426) Coby and Cameron went to a Waffle House restaurant around 6:00 p.m. (V8,T400) They met someone named Ronnie and someone named Duane there. (V8,T402) Mr. Bolin arrived between 7:00 and 8:00 p.m. (V8,T402)

Mr. Bolin sat down and ate a bowl of chili. (V8,T403) Coby believed he acted like something was on his mind. (V8,T403) Mr. Bolin

asked if she was ready to leave and Coby said that it was too soon. (V8,T403) A little later they left in the pick-up together. (V8,T403)

While driving Coby asked Bolin if everything was okay. (V8, T404) Mr. Bolin responded that there was a dead body in the travel trailer and he offered three explanations as to how it got there:

1. That he had picked up a guy and a girl to help him kidnap the Chillura boy for ransom and they went to the trailer. The girl overheard he and the guy talking, so the guy killed her and left Mr. Bolin to get rid of the body;

2. The guy and the girl both came into the travel trailer and when the girl heard everything about the kidnapping she ran out screaming. Mr. Bolin brought her back in and the guy killed her. Mr. Bolin then killed the guy and dumped his body over the Gandy Bridge.

3. Mr. Bolin got rid of the girl because she could ID him. He did not say he killed her. (V8,T432) Mr. Bolin said he hit her over the head and stabbed her. (V8,T407)

On cross, Coby contended that it was her version of how she interpreted what Mr. Bolin said that led her to testify that he killed the girl. (V8,T432) In none of the versions did Mr. Bolin say anything about kidnapping Ms. Collins from the Eckerd's. (V8,T433) In none of

the versions was there anything about an attempt to rob Ms. Collins. (V8,T433)

When they reached the travel trailer, Mr. Bolin backed the truck up to the door. (V8,T407) Coby told Mr. Bolin that if he didn't commit the murder he should go to the police. (V8,T407) Mr. Bolin said he couldn't do that, they could end up just like the girl in the trailer. (V8,T408) The way Mr. Bolin said this made Coby think that it was possible that another individual had been at the trailer. (V8,T439) As he said this Mr. Bolin put his hand on a gun that was laying on the front seat of the truck. (V8,T408) Coby hadn't seen the gun before. (V8,T409) She could never give a description of it. (V8,T435)

Coby would not go inside, so Mr. Bolin entered the trailer for 10 or 15 minutes. (V8,T409) Coby saw Mr. Bolin pick something up that was wrapped in her quilt and toss it over his shoulder. (V8,T409) Mr. Bolin put the object in the back of the truck. (V8,T410) Coby identified the linens removed from the body of Stephanie Collins as being her sheets and comforter. (V8,T410)

Coby admitted that the lighting was minimal at the trailer. (V8,T437) She acknowledged that she was legally blind and had additional trouble seeing at night. (V8,T437)

Mr. Bolin went back into the trailer for 10 minutes. (V8, T411) He returned, saying that he had cleaned things up and had hosed down the bathroom. (V8,T411)

Coby and Mr. Bolin then drove off. (V8,T411) When they reached Morris Bridge Road Mr. Bolin stopped and took the body to the ditch. (V8,T411) Mr. Bolin checked to make sure the headlights didn't shine on it. Satisfied that the body couldn't be seen, they left. (V8,T412)

Coby and Mr. Bolin returned to the trailer and Coby went inside to get some clothes to take to Paula's. (V8,T412) She saw everything was wet -- the floor, the ceiling, the cabinet. (V8, T412) Coby noticed blood on the curtains, blinds, and wall. (V8, T413) She saw a spot of blood on the carpet near the bed. (V8, T413) Coby found a butcher knife laying on the counter by the sink instead of in the drawer. (V8,T413) Coby had not mentioned the knife in earlier statements. (V8,T436) Coby saw no heavy object in the trailer which could have been used to kill Ms. Collins. (V8, T436)

The incident was not discussed between she and Mr. Bolin again until December 1986. (V8,T415) Coby had been admitted to the hospital on December 2. (V8,T415) Hospital records confirmed that Coby was admitted to Tampa General Hospital on December 2, 1986 and discharged on December 5, 1986. (V9,T498) Mr. Bolin was in her room on December 5, 1986, watching live T.V. coverage of the discovery of the body of Stephanie Collins. (V8,T415) Mr. Bolin said "That's her, the girl from the trailer." (V8,T416) Hospital records are not kept of visitors, but the nursing charts will sometimes reflect visitors. (V9,T500) Nursing

charts did not reflect that Coby had visitor on December 5, 1986. (V9,T500)

Coby never saw Mr. Bolin with Stephanie Collins and she never knew Mr. Bolin to drive a white van. (V8,T424;430)

Coby told no one about this. She and Mr. Bolin divorced, and one month later in April of 1989, Coby was preparing to marry Danny Coby. (V8,T417;421;440) Coby told her future husband about Collins. (V8,T417)

When she and Mr. Coby separated in 1990, Mr. Coby called "Crime Stoppers" and reported what Cheryl Coby had told him. (V8, T418;440) Coby collected $1,000 for tipping "Crime Stoppers". (V8, T443) This led to the police questioning Cheryl. (V8,T418) Initially, Coby denied any knowledge of Stephanie Collins.(V8,T418) After speaking to her parents, Coby told the police what she knew and in July or August 1990 she went with Major Terry and showed him where Stephanie Collins' body had been left. (V8,T419)

Coby admitted that at the time she was contacted by the police she had large outstanding medical bills. (V8,T422) She was not working. (V8,T423) Coby admitted that in her first contact with the police they told her there was reward in this case. (V8,T443) Coby learned that the reward totalled $63,000. (V8,T444) Coby also learned that if there was no conviction, there would be no reward. (V8,T444) Coby had her

attorney find out how big the reward was and what steps needed to be taken to claim it. (V8,T445)

During divorce proceedings from Danny Coby, ownership of the reward money became an issue. (V8,T445) Coby did not want Danny to get it. (V8,T446) Coby admitted that she wanted the reward money. (V8,T450)

Coby admitted she did not want to be arrested for her role. (V8,T449)

Paula Cameron was living in Tampa in November of 1986. (V7, T315) She was friends with Cheryl Bolin Coby, whom she called JoJo, and she knew Mr. Bolin. (V7,T315) Ms. Cameron knew that Coby was a severe diabetic. (V7,T316) Ms. Cameron knew that Coby had lost a child in early 1986 and during that time she had been at Tampa General Hospital. (V8,T368)

Mr. Bolin and Coby lived in a travel trailer. (V7,T317) They worked the carnival circuit and had just returned to Tampa. (V7, T317) Mr. Bolin was driving a wrecker and was a long haul trucker. (V7,T317)

In November of 1986 she went with Coby to a walk-in clinic where Coby learned that she was pregnant. (V7,T316) Ms. Cameron and Coby went to a Waffle House restaurant to eat and Ms. Cameron offered to let Coby live with her to help her with her sugar during the pregnancy. (V7,T317) Around 7:00 p.m. Mr. Bolin came to the Waffle House and told Coby she was going with him. (V7,T318;320) Ms. Cameron objected,

saying that Coby needed to eat. (V7,T318) Mr. Bolin ate a bowl of chili and drank coffee while waiting for Coby to eat. (V7,T318) After eating, Coby and Mr. Bolin left in their black and silver pick-up truck. (V7,T318;320)

A few days later, Coby moved in with Ms. Cameron. (V7,T319) Ms. Cameron stated Mr. Bolin never drove a white van. (V7, T321)

Major Gary Terry was a captain in charge of criminal investigations in 1990. (V8,T377) He became acquainted with Mr. Bolin and developed a relationship with him as a result of their conversations over a period of time. (V8,T378-379)

Major Terry also became acquainted with Cheryl Coby. (V8, T379) Coby took Major Terry to the place where Stephanie Collins' body was discovered. (V8,T379)

On June 22, 1991, Mr. Bolin attempted suicide. (V8,T380) A motion for mistrial was made and denied. (V8,T380-384) Major Terry testified that after this incident he received a letter from Mr. Bolin. (V8,T384) The letter was addressed to him. (V8,T384) An excerpt from that letter directed Major Terry to ask Cheryl Coby about anything he wanted to know because Cheryl Jo "knew just about everything that I was ever a part of. She knew about this homicide, which I'm, charged with, because it was her idea on how to dump the body out." (V8,T384)

2. Evidence presented by the Defense

The defense sought to impeach the video-taped testimony of the deceased Coby by the use of inconsistencies from other statements she had made. (V9,T502) The defense sought to use these as rebuttal and to attempt to correct what was argued to be ineffective cross-examination of Coby by a different attorney during the video testimony. (V9,R507-8) The State objected because they could not redirect. (V9,T511;514;517;519;521) The court sustained the State's objection, observing that the effectiveness of the other attorney was another matter for another court at another time. (V9, T526) The three prior statements of Coby were made a part of the record and accepted by the trial court. (V9,T526-5272, SR3, R2138-461)

Hennie Neal and her boyfriend, David Fessler, knew Stephanie Collins in November 1986. (V9,T529;538) On November 5th, Hennie and David were going to an appointment around 4:00 p.m. or shortly after. (V9,T529-30) They were driving south on Ehrlich approaching the Gandy road intersection. (V9,T530;538) They saw Stephanie in the passenger seat of a white van that was heading east toward Bearss avenue. (V9,T531;538;540)

The van was described as not new, a commercial type, dirty and beat up. (V9,T532;539) Neither could see the driver of the van. (V9,T532) Hennie described him as a tall male, slender, with brown hair. (V9,T532;535) Hennie stated he was wearing a leather jacket. (V9,T534) David described the driver as a white male with straight

dark-black hair, very slender, probably tall build, and wearing a white T-shirt. (V9,T541;544) Neither Hennie nor David saw the man's face. (V9,T532;543) Neither would recognize him. (V9,T533; 543)

Hennie made eye contact with Ms. Collins. (V9,T533) Hennie felt Ms. Collins was acting very animated, she was waving her arms and making a point to be seen by Hennie. (V9,T533) Hennie thought Ms. Collins seemed funny because she was moving so much. (V9,T536) David thought Ms. Collins was arguing with the driver. (V9,T539; 544)

Upon learning that Ms. Collins had disappeared, Hennie and David contacted the police and told them what they had observed. (V9,T534)

C. PENALTY PHASE

1. Evidence presented by the State

Detective John King testified that Mr. Bolin was convicted on February 18, 1999, of the murder of 25-year-old Natalie Holley on January 25, 1986. (V10,T652-654) Ms. Holley was discovered in an orange grove. Ms. Holley died from multiple stab wounds. (V10, T652) Photographs of the deceased body were admitted into evidence over objection. (V10,T654)

Lt. Gary Kling testified that Mr. Bolin was convicted of the murder of 26 year-old Terry Lynn Matthews which occurred in Pasco County in early December 1986. (V10,T675) Ms. Matthews died of multiple stab wounds and her body was discovered in an ditch wrapped in sheets from St. Joseph's hospital. (V10,T676-77) Mr. Bolin became a

suspect in 1990 after a tip. (V10,T677) Mr. Bolin was living within 1.1 miles of where the body was discovered. (V10, T677) Over objection, Kling stated that Phillip Bolin, Mr. Bolin's younger brother, had testified at trial that in the early morning hours of December 5, 1986, he had been led to an object wrapped in a sheet that was making whining sounds. (V10,T679) Mr. Bolin was washing the body down with water. (V10,T679) Phillip stated that Mr. Bolin stuck the body in head 12 to 15 times with a metal "tire buddy", then hosed it down again. (V10,T679) Kling acknowledged that Phillip Bolin had given many statements that were not consistent with the summary Kling gave at this proceeding. (V10,T681) Kling related only one of them. (V10,T681)

Jenny LeFevre testified that in November 1987 when she was 20 years old she was kidnapped by Mr. Bolin and two other men from a truck stop in Ohio. (V10,T657-659) She was raped at gun point in a semi-truck. (V10,T661) Ms. LeFevre was released several hours later in Pennsylvania. (V10,T662-667) Mr. Bolin pled guilty to charges arising from that incident and was sentenced to 25 to 75 years prison. (V10,T669)

<u>2. Evidence presented by the Defense</u>

Rosalie Bolin testified that she was from Tampa.(V10,T682) She married, had four children, and moved in Tampa's social circles. (V10,T682-686;697-698) Mrs. Bolin worked in various areas connected

with the judicial system and her ex-husband was a prominent local lawyer. (V10,T686)

In 1995 she met Mr. Bolin while working for the Public Defender's Office as a mitigation specialist. (V10,T689-693) While working on Mr. Bolin's case, Rosalie became aware that Mr. Bolin had developed feelings for her. (V10,T694) Rosalie learned about Mr. Bolin's impoverished background and became amazed that he had survived it. (V10,T695)

In 1995 Rosalie left the Public Defender's Office. (V10,T696) Rosalie continued to work on Mr. Bolin's cases. (V10,T698) During a trial she learned that her husband of 18 years had filed for divorce. (V10,T698) After the divorce was final, Mr. Bolin asked to marry her and she accepted. (V10,T700) Their marriage was highly publicized. (V10,T708)

Rosalie testified that Mr. Bolin is gentle to her. (V10,T701) He cares for her and puts her on an emotional pedestal. (V10,T701) Rosalie credits Mr. Bolin with saving her life. (V10,T703)

Additional evidence was introduced at a Spencer hearing on May 14, 1999. (V12,T1092-1102) Prior testimony of Mr. Bolin's mother was attached to the filed Memorandum of Law in Support of a Life sentence. (V5,R563-596;V12,T1100)

SUMMARY OF THE ARGUMENT

The trial judge's original ruling which suppressed the letter seized from Bolin's jail cell after his suicide attempt was correct. The Second District erred by reversing the trial court's ruling because the "plain-view" doctrine does not apply when the item is not apparent evidence of a crime. Also, many courts have agreed that pretrial detainees (as opposed to convicted prisoners) retain a limited expectation of privacy in their personal effects which is cognizable under the Fourth Amendment. While institutional security concerns are paramount, searches and seizures designed to find writings which will bolster the State's case at trial have been disapproved.

The language of the seized letter to Captain Terry did not establish a voluntary waiver. In the first place, the letter was not voluntarily delivered. Bolin did not invite Captain Terry to question his ex-wife; he simply acknowledged that questioning had been ongoing and assumed that his attempted suicide would succeed. Had the suicide been successful, there would not be anyone else with knowledge of Bolin's activities except Cheryl Coby.

Even if this Court finds that the content of the letter constituted a waiver, principles of fairness would allow Bolin to withdraw the waiver. He clearly did so before the marital communications were revealed at trial. Nothing new was learned by the State during the period when any waiver would have been in effect.

The trial court erred in finding that the prosecution had shown by a preponderance of the evidence that mtDNA has gained general acceptance in the relevant scientific community. The state's evidence showed that mtDNA is a new area of scientific research where the knowledge about it's essential genetic features is scanty. mtDNA is the least discriminating of DNA testing. The state's evidence acknowledged three significant areas of scientific debate that raise questions about the use of mtDNA in criminal cases. Two of these, heteroplasmy and mutation have direct impact on the accuracy of the testing and the determination of whether or not a match has occurred. The third, contamination, affects the reliability of the testing results.

Since the time of the Frye hearing and the trial itself, new research into mtDNA has substantially altered prior information about the key features of maternal inheritance, the frequency of heteroplasmy, and the incidence of mutation. Current developments in scientific research have created a lack of consensus in the scientific community regarding the application of mtDNA and its usefulness as a tool in the criminal arena.

The method by which the state experts assign a frequency to the results of mtDNA testing is the subject of intense scientific debate. The database used by the FBI is acknowledged by both sides to be insufficient. The FBI method has not been approved by any other

testing facility. A second method, used in Britain, is being urged for use in the United States as well.

The State's failure to produce evidence that their database and method for calculating frequency or rarity ratios is generally accepted by the relevant scientific community precludes a finding of admissibility. Because the mtDNA evidence was improperly admitted, reversal is required.

The trial court erred when it refused to permit Bolin to impeach the video testimony of Cheryl Coby with prior inconsistent statements. At the time of trial Coby was deceased and her testimony was presented to the jury by way of video-tape. Defense counsel sought to impeach this testimony and expand on the cross-examination of the video testimony of Coby with examples of inconsistent statements that she had made in a discovery deposition, a deposition to perpetuate testimony, and prior trial testimony. The trial court's refusal to permit these inconsistent statements to be published to the jury was a denial of Bolin's right to confront the witnesses against him through the use of full and fair cross-examination and to due process of law.

The trial court erred in denying Bolin's motion for mistrial after the state was impermissibly allowed to present evidence to the jury that before trial Bolin had attempted to commit suicide. The suicide attempt was improper evidence of consciousness of guilt, and any

relevance was outweighed by the prejudicial impact of such testimony.

The penalty jury recommendation was tainted because the evidence about Mr. Bolin's conviction for another murder was presented before the jury and this conviction has since been vacated.

ARGUMENT

ISSUE I

THE TRIAL COURT'S RULING WHICH SUPPRESSED BOLIN'S LETTER ON BOTH FOURTH AND SIXTH AMENDMENT GROUNDS, WAS ERRONEOUSLY REVERSED BY THE SECOND DISTRICT IN STATE V. BOLIN, 693 SO. 2D 583 (FLA. 2D DCA 1997).

As a preliminary matter, Bolin is entitled to review of this suppression issue despite the fact that this Court previously denied review. See, Bolin v. State, 697 So. 2d 1215 (Fla. 1997). The United States Supreme Court also denied certiorari; 522 U.S. 973 (1997).

In Preston v. State, 444 So. 2d 939 (Fla. 1984), this Court held that "law of the case" doctrine does not bar reconsideration in a capital case of a suppression issue already decided by a district court of appeal. The Preston court pointed to the statutory mandate of automatic and full review of all judgments resulting in imposition of a death sentence, substantive due process, and the interest of justice as factors warranting review of a search and seizure issue already

litigated in the Fifth District. Similarly, in Jordan v. State, 694 So. 2d 708 (Fla. 1997), this Court considered whether to review the district court's granting of the State's certiorari petition to limit discovery. Because a death sentence had later been imposed, the Jordan court agreed to decide the merits of the appellant's claim despite the State's argument that it was procedurally barred.

At the suppression hearing, held August 3, 1995, evidence established that in June 1991, Bolin was housed in the Hillsborough County Jail awaiting trial on two homicide cases (SR98). He was represented by the Public Defender (SR112-13). The portion of the Hillsborough County Sheriff's Office responsible for running the jail (detention bureau) is a separate department from the criminal division which investigates cases (SR112). Major (then Captain) Terry was in charge of the Criminal Investigations Bureau of the Sheriff's Office and of the investigation into the murders which Bolin was accused of having committed (SR99). His lead investigator on the charges against Bolin was Corporal Baker (SR98-99,133).

Because Bolin was considered a security risk, his cell was searched at least every day (SR117-19). The box of papers which Bolin kept in his cell was examined during these shakedowns, but the contents were not read (SR119,127). Jail inmates typically keep similar boxes to store their legal materials (SR109). The purpose of these searches,

conducted by detention personnel, was solely to find contraband (SR120-22,126).

On the morning of June 22, 1991, jail personnel observed that Bolin was in physical distress (SR124). Eventually, a deputy responsible for monitoring conditions at the jail, Lieutenant Rivers, ordered that he be taken to the infirmary for medical attention (SR125). In Bolin's jail cell, the detention lieutenant noticed a letter addressed to Captain Terry on top of the cardboard box containing Bolin's personal possessions (SR127,131).

Terry was notified that Bolin might have attempted suicide (SR100). He ordered that the cell be sealed until he and Corporal Baker could examine it (SR102). When the two investigators entered Bolin's cell, they observed the stamped letter addressed to Terry (SR102-3,136). The letter, along with Bolin's cardboard box of possessions, was seized and later read at another location (SR103, 137,139-41). No contraband was found (SR142).

Major Terry conceded that the routine cell search was "not what [he and Baker] were doing" when they seized Bolin's box of papers and the letter on top of it (SR40). As well as the letter addressed to Terry, there were four or more letters written by Bolin to family members or friends which Baker took from the box and put into evidence (SR111,138-42).

The Florida Administrative Code sets forth regulations for disposition of abandoned jail inmate property (SR110-11). Major Terry

agreed that the notification procedures required by the Regulations were not followed with respect to the letters seized from Bolin (SR111).

The trial judge ruled that the letter had been seized from Appellant's jail cell without probable cause that it was either contraband or evidence of a crime (SR156-57). Alternatively, the trial court also ruled that the State had interfered with Bolin's constitutional right to counsel (SR156-57). An order suppressing the letter was entered (V2,R58).

In the subsequent state appeal to the Second District Court of Appeal, the trial court's ruling was reversed. 693 So. 2d 583 (Fla. 2d DCA 1997). The State argued that the United States Supreme Court's decision in Hudson v. Palmer, 468 U.S. 517 (1984) stripped all Fourth Amendment protection from persons in custody. The State also relied upon the "plain view" doctrine to support the seizure of the letter in Bolin's jail cell. The Second District agreed, stating that the letter "was in plain view and was evidence of the attempted suicide". 693 So. 2d at 585. The court went on to criticize a decision of the First District Court of Appeal, McCoy v. State, 639 So. 2d 163 (Fla. 1st DCA 1994), which held that Hudson did not apply to pretrial detainees. 693 So. 2d at 585. Finally, the Second District declined to find a Sixth Amendment violation because the letter lacked "any attorney-client information". 693 So. 2d at 585.

A) Plain View.

At the outset, it should be recognized that the "plain-view" doctrine was inappropriately invoked by the Second District to legitimize seizure of the letter. Minnesota v. Dickerson, 508 U.S. 366, (1993), sets forth the parameters of "plain-view":

> if police are lawfully in a position from which they view an object, if its incriminating character is immediately apparent, and if the officers have a lawful right of access to the object, they may seize it without a warrant. See Horton v. California, 496 U.S. 128 (1990); Texas v. Brown, 460 U.S. 730 (1983) (plurality opinion). If however, the police lack probable cause to believe that an object is contraband without conducting some further search of the object -- i.e., if "its incriminating character [is not] 'immediately apparent'" Horton, supra, at 136, -- the plain-view doctrine cannot justify its seizure. Arizona v. Hicks, 480 U.S. 321 (1987).

At bar, the investigating detectives were lawfully in Bolin's jail cell; however, there was no probable cause to believe that the envelope contained contraband or evidence of a crime without opening the letter and reading it (a search). No incriminating character was apparent from the face of the envelope.

The Second District attempted to skirt the probable cause requirement by labeling the letter "a suicide note" and "evidence of the attempted suicide" 693 So. 2d at 585. However, suicide notes are usually not placed in an addressed envelope and stamped. Major Terry

acknowledged at the hearing that he didn't guess about the contents of the letter before he read it:

> At that time, I didn't know what it [the letter] would contain. I wasn't hopeful of anything" (SR105).

Corporal Baker took a more optimistic approach:

> Q. At that time, were you hoping that, that envelope, if in fact written by Mr. Bolin contained some evidence concerning the Holley or Collins murders?
> A. Yes.

(SR136). Accordingly, it was not even apparent that the letter was relevant to the attempted suicide investigation, let alone evidence of a crime which could be seized without a warrant.

In Jones v. State, 648 So. 2d 669 (Fla. 1994), this Court applied Minnesota v. Dickerson, supra to a seizure from the defendant's hospital room. The facts showed that the police officers were lawfully in Jones' hospital room. They saw a bag containing his clothing. However, the incriminating character of the clothing was not "immediately apparent"; it was not until the bag was searched and soil stains found on some clothing that it could be linked to the crime. Consequently, this Court held that the seizure of Jones' clothing was illegal and the evidence should have been suppressed.

The Second District's conclusion that "plain view" justified seizure of Bolin's letter is equally insupportable. Nothing was "immediately apparent" about the letter except that Bolin contemplated

sending it to Captain Terry at a later time. The fact that the letter was stamped, but not yet delivered to jail authorities, indicates that Bolin intended that any delivery of the letter would be through the postal system. Until he released it, the letter remained Bolin's possession.

B. Pretrial Detainees Retain Diminished Fourth Amendment Constitutional Rights.

Appellant recognizes that the seizure will still be upheld unless this Court agrees that he retained some expectation of privacy in his property within his jail cell which is cognizable under the Fourth Amendment, United States Constitution and Article I, section 12, of the Florida Constitution. The Second District agreed with the State's contention that Hudson v. Palmer, 468 U.S. 517 (1984) controlled this question and concluded that the trial judge erroneously relied upon McCoy v. State, 639 So. 2d 163 (Fla. 1st DCA 1994) (finding Hudson rule inapplicable to pretrial detainees). 693 So. 2d at 585.

In Hudson v. Palmer, a state prisoner had personal property in his cell seized and destroyed by a correctional officer. The prisoner filed a § 1983 action against the officer alleging a Fourth Amendment violation and seeking money damages. The Court held that a state prisoner, because of his status, has neither a right to privacy in his cell nor constitutional protection against unreasonable seizures of his personal property. Although the prisoner's constitutional claim

failed, he had a meaningful remedy for his loss under state law because he could file a tort claim against the officer.

At bar, Bolin was not a convicted state prisoner, but a county jail inmate being held for trial. The search of his cell was not carried out by detention personnel, but by the officers who were in charge of the criminal investigation. The seizure of his personal property was motivated by the desire to find incriminating evidence that would bolster the State's case at trial. Administrative procedures were disregarded in the seizure. These are entirely different circumstances from those in Hudson and embody several bases on which other courts have distinguished the Fourth Amendment issue.

When the United States Supreme Court has not addressed a particular search and seizure issue, Florida courts should rely upon their own caselaw precedents. Soca v. State, 673 So. 2d 24, 27 (Fla.), cert.denied, 519 U.S. 910 (1996); State v. Cross, 487 So. 2d 1056 (Fla.), cert.dismissed, 479 U.S. 805 (1986). Since the circumstances of the case at bar are materially different from those of Hudson, this Court should not try to extend its holding. The search and seizure issue should be decided on Florida precedent and persuasive decisions from other jurisdictions involving jail inmates awaiting trial.

The prior Florida precedent is McCoy v. State, 639 So. 2d 163 (Fla. 1st DCA 1994). Although the Second District's opinion in Bolin criticized McCoy because "there is nothing in Hudson that would support

the First District's determination that Hudson does not apply to pretrial detainees" (693 So. 2d at 585), it is also true that the Hudson court did not "state that its holding applied to pretrial detainees as well as convicted inmates". McCoy, 639 So. 2d at 165. The McCoy court also found it significant that the Court released its opinion in Block v. Rutherford, 468 U.S. 576 (1984) on the same day as Hudson. Since Block examined in part the right of pretrial detainees to observe shakedown searches of their cells, it would have been easy for the Court to simply deny any Fourth Amendment standing to pretrial detainees as it did to convicted prisoners in Hudson. However, the Block court actually employed the usual balancing test to conclude that institutional security concerns demand that the sound discretion of institutional authorities (rather than the courts) should "reconcile conflicting claims affecting the security of the institution, the welfare of the prison staff, and the property rights of the detainees". 468 U.S. at 591 (quoting from Bell v. Wolfish, 441 U.S. 520 at 557, n.38 (1979).

On this analysis, the McCoy court concluded that "in Hudson, the Court did not intend to deprive pretrial detainees of all Fourth Amendment protections". 639 So. 2d at 165. Indeed, shortly after Hudson, the Court held in Winston v. Lee, 470 U.S. 753 (1985) that a pretrial detainee's Fourth Amendment right in the privacy of his person outweighed the prosecution's need for additional evidence of a crime

which could only be obtained by surgically removing a bullet from the accused's chest. As an independent rationale, the McCoy court also concluded that Hudson was inapplicable to searches conducted for investigative purposes by the prosecution as opposed to searches conducted by detention personnel pursuant to legitimate needs of institutional security.

Other jurisdictions which have considered this issue seem to draw the same line between searches of pretrial detainees motivated by institutional security concerns and those motivated by the prosecution's desire to obtain evidence to be used at the defendant's trial. In United States v. Cohen, 796 F. 2d 20 (2d Cir.), cert.denied, 479 U.S. 854 (1986) and 479 U.S. 1055 (1987), the court considered the warrantless search of a pretrial detainee's papers conducted by a corrections officer, but directed by an Assistant United States Attorney. Based on information gained from this warrantless search, a warrant authorizing seizure of "all written non-legal materials" from the defendant's cell was issued and served. The trial court suppressed some but not all of the papers seized. It declined to declare the search unlawful on Fourth Amendment grounds.

On appeal, the government relied upon Hudson and urged the court to hold that the fruits of a search conducted in a cell (whether occupied by a convicted prisoner or a pretrial detainee) may not be

suppressed on constitutional grounds. The Second Circuit, however, distinguished Hudson saying that the Court

> did not contemplate a cell search intended solely to bolster the prosecution's case against a pre-trial detainee awaiting his day in court....

796 F. 2d at 23. The Cohen court held that the validity of the search could be challenged because it was instigated by "non-prison officials for non-institutional security related reasons". 796 F. 2d at 24. The trial court's refusal to suppress all of the evidence seized on Fourth Amendment grounds was reversed.

More recently, in State v. Jackson, 321 N.J. Super. 365, 729 A. 2d 55 (1999), the court reviewed cases involving this issue from several jurisdictions. The Jackson court noted that decisions where the warrantless search and seizure of evidence from the cells of pretrial detainees was upheld[1] involved searches related to jail security. Where the motivation for the search was obtaining evidence to be used at trial, the decisions held that the residual Fourth Amendment rights of the pretrial detainees were violated[2]. Because the search and seizure of Jackson's correspondence and documents was motivated by the prosecution's desire to rebut his alibi defense, the

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[1]People v. Phillips, 219 Mich. App. 159, 555 N.W. 2d 742 (1996), and State v. Martin, 322 N.C. 229, 367 S.E. 2d 618 (1998).

[2]These cases were (in addition to Cohen): United States v. Santos, 961 F. Supp. 71 (S.D.N.Y. 1997); McCoy, supra; Lowe v. State, 203 Ga. App. 277, 416 S.E. 2d 750 (1992); and State v. Neely, 236 Neb. 527, 462 N.W. 2d 105 (1990).

routine general search where the material was seized was deemed merely a pretext. None of the material seized violated jail regulations. The court, in suppressing the evidence, wrote:

> He [Jackson] has been indicted but not yet convicted. At this juncture, he is cloaked with the presumption of innocence. While that cloak may not shield him or his property from the prying eyes of his jailers in their efforts to maintain institutional security, it will insulate him from surreptitious attempts of the prosecutor to obtain evidence without the benefit of a warrant.

729 A. 2d at 63.

At bar, the circumstances are similar. Captain Terry and Corporal Baker were responsible for the investigation of the homicides Bolin was charged with (SR98,133). They were in a different department of the Sheriff's Office than the Detention Bureau which is responsible for running the jail. (SR112) Corporal Baker testified that when Captain Terry seized the letter from Bolin's cell, he (Baker) was hopeful that it contained evidence for their investigation (SR136). Captain Terry stated that the "admissions" in the letter added "significant information to my investigation" (SR107-08).

Captain Terry further testified that jail inmates are permitted to keep a box with letters and legal materials in their cell (SR109). These materials may be searched at any time for security reasons (SR109). Lieutenant Rivers of the Detention Division of the Sheriff's Office testified that Bolin's box of papers was searched daily during

shakedowns (SR117-19). However, the contents were not read; these searches were strictly for contraband (SR126). Captain Terry conceded that this was not what he and Baker were doing when they seized Bolin's letter and the contents of the box in his cell (SR121). Moreover, he and Baker did not follow the administrative procedures applicable to jail inmate property when an inmate escapes or otherwise abandons his property before seizing Bolin's papers (SR110-11).

In short, the search and seizure of Bolin's papers from his cell was carried out by investigative rather than jail personnel and was not related to institutional security. If this Court follows this distinction, made by McCoy and the cases from other jurisdictions, the trial court's ruling suppressing the letter was correct. Bolin's conviction must be reversed because the waiver of spousal immunity depended upon language contained in the letter.

C. Seizure of the Letter Violated Bolin's Constitutional Right to Counsel.

The trial judge ruled that the seizure of Bolin's letter also violated his constitutional right to counsel. The court reasoned:

> I think that had -- had he still been there when Captain Terry went to investigate the suicide and Captain Terry found it necessary to speak with him regarding his investigation of the suicide and Mr. Bolin had been in the process of talking to Captain Terry about the suicide had [sic] admitted or made some incriminating statements about the homicide. I'm sure everybody would agree that the statement would not be used in light of the fact that [Bolin] was at that time

> represented by the Public Defender and Captain Terry knew that.

(SR155-56). In short, the court drew an analogy between oral questioning of an accused represented by counsel and seizure of that suspect's written communications. On the State's appeal, the Second District reversed this ruling with the comment that "the letter does not contain any attorney-client information which would implicate the Sixth Amendment". 693 So. 2d at 585.

First, the Sixth Amendment and the corresponding provisions of the Florida Constitution, Article I, sections 9 and 16 cover more than attorney-client communications. In Traylor v. State, 596 So. 2d 957 (Fla. 1992), the court discussed at length the parameters of the Florida constitutional rights against self-incrimination and to counsel, writing:

> Once the right to counsel has attached and a lawyer has been requested or retained, the State may not initiate any crucial confrontation with the defendant on that charge in the absence of counsel throughout the period of prosecution, although the defendant is free to initiate a confrontation with police at any time on any subject in the absence of counsel.

596 So. 2d at 968. Applying this holding to the facts at bar, it is evident that the State (through Captain Terry and Corporal Baker) initiated the perusal of Bolin's letters in the absence of his counsel. The more difficult question is whether this conduct amounts to a "crucial confrontation with the defendant".

While custodial interrogation of the defendant is clearly a "crucial confrontation", this Court has recognized that other circumstances also qualify. In Peoples v. State, 612 So. 2d 555 (Fla. 1992), the defendant had retained counsel and was released on bail. A co-defendant agreed to help the police by making telephone calls to the defendant and allowing tape recordings to be made of the conversations. The Peoples court stated:

> Because the phone recordings could significantly affect the outcome of the prosecution, the taping constituted a crucial encounter between State and accused whereby the State knowingly circumvented the accused's right to have counsel present to act as a "medium" between himself and the State.

612 So. 2d at 556.

At bar, Bolin did not make any oral statements, nor was he even present when the investigating detectives rifled through his writings. However, written statements should also pass through the "medium" of counsel unless the accused initiates the presentation.[3]

Turning to the federal constitutional provision, the core of a Sixth Amendment violation is interception of statements (whether direct or surreptitious) while an accused is represented by counsel. The United States Supreme Court wrote in Maine v. Moulton, 474 U.S. 159, 176 (1985):

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[3]Had Bolin actually mailed the letter to Captain Terry, he would have initiated the written communication.

> the Sixth Amendment is not violated whenever by luck or happenstance - the State obtains incriminating statements from the accused after the right to counsel has attached. However, knowing exploitation by the State of an opportunity to confront the accused without counsel being present is as much a breach of the State's obligation not to circumvent the right to assistance of counsel as is the intentional creation of such an opportunity.

At bar, Bolin's attempted suicide resulted in a "knowing exploitation by the State" because Captain Terry and Corporal Baker used the opportunity to seize and read Bolin's private letters. This was simply a fishing expedition while Bolin was in the hospital.

In State v. Warner, 150 Ariz. 123, 722 P. 2d 291 (1986), jail personnel seized a pretrial detainee's personal papers from his jail cell and turned them over to the prosecution. The Warner court began by assuming that there was no Fourth Amendment violation in the seizure; but then posed the question of what use could be made of the seized documents at trial. The court observed that the accused's right to counsel includes the right to privacy and confidentiality in communications with his attorney. When the State later undermined this privacy and confidentiality by seizing the accused's personal papers which included work product of defense counsel, a constitutional violation occurred. Accordingly, none of the seized material could be used at trial and the Warner court remanded the case for an evidentiary hearing to determine prejudice. The court stated that the State would have the burden to prove that "no evidence introduced at trial was

tainted by the invasion [of the attorney-client relationship]". 722 P. 2d at 296.

Although Bolin's letters contained no "work product of defense counsel" it is not clear from the record whether the box containing his personal effects also contained papers relating to trial preparation. If so, under the Warner holding, none of the seized material including the letter to Captain Terry would be admissible at trial.

Accordingly, this Court should now agree with the trial judge that the seizure of Bolin's papers violated his constitutional right to counsel. Alternatively, this Court could order an evidentiary hearing to determine whether the seized box of Bolin's effects included any trial preparation material.

D. Trial Judge's Ruling Entitled to Presumption of Correctness.

Finally, this Court should recognize that the Second District did not give proper deference to the trial judge's ruling that the warrantless seizure of the letter was improper. In Caso v. State, 524 So. 2d 422 (Fla. 1988), this Court wrote:

> A conclusion or decision of a trial court will generally be affirmed, even when based on erroneous reasoning, if the evidence or an alternative theory supports it.

524 So. 2d at 424.

At bar, the trial judge's finding that Bolin's property was seized without probable cause to believe it contained contraband or evidence

of a crime was supported by competent substantial evidence. The ruling suppressing the letter should have been affirmed.

ISSUE II

THE TRIAL JUDGE ERRED BY RULING THAT BOLIN'S LETTER TO CAPTAIN TERRY ACTED AS A WAIVER OF THE SPOUSAL PRIVILEGE.

In Bolin's appeal of his conviction for the murder of Natalie Holley, this Court reversed, holding that defense counsel did not waive the spousal privilege by taking Cheryl Coby's deposition. Bolin v. State, 642 So. 2d 540 (Fla. 1994); (V1,R38-44). The opinion noted that "Bolin and his attorneys tried to maintain the spousal privilege at every step of the proceedings". 642 So. 2d at 541. This Court simply remanded the case for a new trial.

It was not until the appeal of Bolin's conviction in the instant case that this Court discussed the State's alternative theory for waiver of Bolin's spousal privilege. In that opinion, Bolin v. State, 650 So. 2d 21 (Fla. 1995), this Court indicated that the contents of the letter addressed to Captain Terry and seized at the time of Bolin's attempted suicide might establish waiver of the spousal privilege. Specifically, this Court described the issue as "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" 650 So. 2d at 24. Noting that the record was insufficient for the appellate court to decide this issue, the opinion directed the trial judge on remand to determine whether or not the spousal privilege was waived by the letter before conducting a new trial. 650 So. 2d at 24.

I. Circumstances Surrounding the Letter.

A. Lack of Voluntary Delivery.

In Issue I, supra, Appellant argues that the letter was illegally seized from his jail cell. If he is correct, this Court need go no further since any waiver contained in the letter would be suppressed. However, even if the letter was properly seized, the circumstances show that Bolin did not voluntarily consent to delivery of the letter. Therefore, any waiver contained in the letter was also involuntary.

As developed in the pretrial hearings, the facts showed that the letter was found in Bolin's jail cell after he had been removed for medical treatment. It was addressed to "Capt:" [sic] Gary G. Terry and had the Hillsborough County Sheriff's Office mailing address (V2, R316). A first class postage stamp was affixed in the upper right corner (V2, R316; XI, T794). Counsel argued that these facts showed that Bolin contemplated that the letter would be delivered through the postal system if he decided to release it. Until Bolin gave the letter to jail personnel or died, it remained his personal property.

There is ample legal authority to support this position. In State v. Stewartson, 443 So. 2d 1074 (Fla. 5th DCA 1984) the defendant wrote and addressed a letter to her husband just before she attempted to commit suicide. The letter contained admissions to crimes and was seized by a police officer who investigated the attempted suicide and found it in the home. The Fifth District held that the contents of the letter were covered by the spousal privilege in spite of the police interception because the letter was composed and received during the marriage.[4]

As applied to the case at bar, Stewartson indicates that police interception of a suicide note cannot erase any privilege belonging to the writer when the writer survives the suicide attempt. Therefore, Bolin should have retained his right to possession of the letter and choice of whether to mail it to Captain Terry after he recovered from his attempted suicide.

This Court should also recognize that the "mailbox rule" is applied to inmates who send legal documents for filing in Florida courts. In Haag v. State, 591 So. 2d 614 (Fla. 1992), this Court held that a prisoner's pro se motion was deemed filed at the time that he gave it to prison officials for mailing. The Haag court noted that outgoing inmate mail is logged when received by prison authorities.

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[4]Had the suicide been successful, the court suggests that the privilege would not apply. See, Truelsch v. Northwestern Mutual Life Insurance Company, 186 Wis. 239, 202 N.W. 352 (1925).

Bolin's letter to Captain Terry was never logged by the jail; accordingly it was not released by Bolin under the appropriate procedures for inmates. If there was a waiver in the letter, it cannot be voluntary in absence of voluntary delivery of the letter by Bolin under established procedures.

B. Prior Events Show that Bolin Did Not Intend to Waive His Spousal Privilege.

From the time of Bolin's indictment for this homicide, on August 1, 1990, he was aware that his ex-wife, Cheryl Coby, provided virtually all of the incriminating evidence against him. He knew that Cheryl Coby was cooperating with law enforcement and could expect that she had already disclosed everything relevant to the Holley murder. Bolin also had attended his ex-wife's deposition to perpetuate testimony held in January 1991. He was present at the motion hearing of March 22, 1991, where the trial court ruled that defense counsel had waived Bolin's spousal privilege by questioning Coby about marital communications during the discovery deposition. 642 So. 2d at 541. Based upon this ruling, Appellant filed his own "Motion to Discharge Counsel" asking the court to discharge his trial lawyers for being so ineffective as to waive his spousal privilege without his consent. (PR1386-7).

It was against this background that Bolin began planning his suicide. As the prosecutor pointed out, there were numerous letters from Bolin to his family members which were seized at the same time as the letter to Captain Terry (V11,T850-853). These were all basically

goodbye letters, written over a period of time, which explained his reasons for choosing suicide (T850). At the same February 23, 1998 hearing, Captain (now Major) Terry testified that two or three weeks prior to Bolin's June 22, 1991 attempted suicide, he received word that Bolin wanted to talk to him (V11, T790-92). This interview never took place because the Public Defender's Office was notified of the proposed interview and Bolin's attorneys subsequently persuaded him not to talk with Captain Terry (V11, T791).

Defense counsel argued that totality of the circumstances preceding the suicide letter showed that Bolin believed that his spousal privilege had already been waived -- indeed the trial judge's ruling ensured that marital communications would be admitted into evidence at his then-upcoming trial (V1, R108, 176-7; V11, T842-43). Under these circumstances, who would consider the need to protect a privilege that had already been lost according to the trial court's ruling (V1,R108,176-7; V11, T842-43). Analogizing to Harrison v. United States, 392 U.S. 219 (1968), defense counsel argued that any waiver wouldn't be voluntary because it was induced by an erroneous ruling of the court (V1, R177-8; V11, T844-45).

There is Florida caselaw to support this position. In Zeigler v. State, 471 So. 2d 172 (Fla. 1st DCA 1985), the trial judge ruled that the defendant's statement to a police officer had not been illegally obtained. When the defendant went to trial, he testified in an effort

to explain his confession. Subsequently, the First District held that the inculpatory statements should be suppressed. The remaining question was whether the State could introduce Zeigler's prior testimony if a second trial were held.

The majority of the First District panel held that it would be unfair to allow the State to utilize Zeigler's prior testimony. The court determined that the defendant's trial testimony was essentially "fruit of the poisonous tree" because it was induced by inculpatory statements illegally obtained by the police. See also, Hawthorne v. State, 408 So. 2d 801 (Fla. 1st DCA 1982) (defendant's testimony in first trial inadmissible as impeachment in second trial because testimony had been induced by State's illegal action).

As applied to the case at bar, these decisions suggest that when a defendant's course of action is influenced by an erroneous ruling of the trial judge (failure to suppress inculpatory statements in Zeigler and Hawthorne; ruling that spousal communications privilege had been waived by taking deposition at bar), the defendant should not be unfairly prejudiced by operating in accord with the erroneous ruling. Bolin knew that his ex-wife had told the police confidential marital communications and that they would be admitted at his upcoming trial. Writing to the lead investigator that he would have to direct any further questions about Bolin's criminal activity to Cheryl Coby is

only an acknowledgment of what the investigator had already been doing with the trial court's approval.

II. CONTENT OF THE LETTER

As noted in this Court's opinion reversing Appellant's conviction, the prior record did not contain the letter in question. 650 So. 2d at 24, fn. 4. For that reason, this Court expressed no opinion on "whether the letter constituted a voluntary consent". 650 So. 2d at 24. In the current record on appeal, Bolin's letter to Captain Terry appears as Defense Exhibit #1 in volume II, pages R352-57.

There is no doubt that Bolin expected to be dead by the time that Captain Terry received this letter. The first paragraph requests that Appellant's property at the jail be sent to "Susie" (V2, R352). The second begins, "Now about checking out like this. Sorry! But I feel that it's best this way" (V2, R352). The body of the letter concludes, "Good luck and see you in the next world" (V2, R357).

The main theme of the letter concerns what Bolin might have said to Captain Terry if they had talked two or three weeks earlier. He writes that other than the homicides for which he had been indicted, there were only two more that he knew about (V2, R353). Evidently referring to a prior conversation between them, Bolin reports an

incident in Miami where he picked up a load[5] which included two dead bodies (V2, R353-4). Bolin says he was told that the two dead men were "cops" and he tells Captain Terry where the bodies were dumped (V2, R353-56).

The postscript to the letter is where the alleged waiver of spousal privilege occurs. It reads in part:

> P.S. These were the only five in the [S]tate of Fla. that I know anything about. If there's ever anything else that you really want to know about then you'll haft [sic] to ask Cheryl Jo. Because she knew just about everything that [I] was ever a part of. ... and she knew about all 3 of these homicides which I'm charged with.

(V2, R357). The remainder of the postscript basically suggests that "sooner or later the truth will come out about her [Cheryl]" (V2, R357).

Analyzing the language of Bolin's purported consent for Captain Terry to interview his ex-wife, "you'll haft to" is not language of voluntary consent. An axiom of statutory construction is that language should be given "its plain and ordinary meaning". See, e.g. Green v. State, 604 So. 2d 471 (Fla. 1992). The same principle should apply when construing the meaning of any writing. A dictionary can be consulted to determine a word's "plain and ordinary meaning". Id., 604 So. 2d at 473.

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[5] Bolin was employed as a truck driver.

Bolin's writing "haft to" is clearly a phonetic rendition of "have to". "You'll" indicates a future event. One of the meanings listed for "have" in Webster's II New College Dictionary (1999) is "To be obliged to: MUST I have to leave now". Bolin is saying that Captain Terry _must_ ask Cheryl if he wants answers to any questions because Bolin won't be around to answer them.

Saying that Captain Terry _must_ ask Cheryl is vastly different than inviting him to talk to her. And, it must be remembered that Captain Terry had already questioned Cheryl Coby extensively without Bolin's consent. Indeed he complains in the same postscript, "you all used her to set me up" (V2, R357). The language "you'll haft to ask Cheryl Jo" together with the context of the letter should not be interpreted as a voluntary consent or waiver.

This situation should be contrasted with what occurred in the case (cited by this Court in _Bolin II_) of _Shell v. State_, 554 So. 2d 887 (Miss. 1989), _rev'd in part on other grounds_, 498 U.S. 1 (1990). In _Shell_, the court found waiver of the spousal privilege based on the defendant's statement to the sheriff during questioning to "ask his wife if he [the sheriff] didn't believe his story". 554 So. 2d at 889. Clearly, Shell expected his wife to corroborate his alibi rather than impeach him. Bolin, on the other hand, could not expect anything favorable from further questioning of Cheryl Coby. The only reason for

Captain Terry to ask Cheryl Coby anything is because Bolin himself would be unavailable (dead) and couldn't answer questions.

Defense counsel also argued below that if the letter was interpreted as a waiver, it was a waiver that was contingent on Bolin's death (V12, T1129-31). This is perhaps another way of looking at it; when Bolin survived, Captain Terry was no longer "compelled" to ask Cheryl, he could just as well ask Bolin himself. Bolin's recovery from his suicide attempt meant that an essential condition precedent to any consent was unsatisfied.

III. THE TRIAL COURT'S RULING

The trial judge ruled that the language of the letter established a voluntary waiver of the spousal privilege. Quoting from the trial court's ruling:

> I hope I'm reading this Supreme Court opinion right, that they indicate that the waiver contained in the letter, which in this Court's opinion was clearly prospective, was voluntary. I'll rule that it was voluntary but prospective only in its tone, had the legal effect of acting or operating retroactively. I hope I'm reading it right.

(V11, T894). By prospective, the judge meant that Bolin's letter referred only to a future interview that Captain Terry might conduct with Cheryl Coby, rather than his past questioning of her (V13, T890, 893). The judge recognized that Captain Terry never acted on the purported waiver; he did not question Coby further after the letter was

seized (V13,T862,871,878). The question was whether the alleged waiver could operate retroactively to make admissible all of the previous marital communications which Cheryl Coby had disclosed to the State (V13, T1161,1889). The prosecutor urged the judge not to "try to second-guess the Supreme Court" and argued that this Court must have already determined that any consent would operate retroactively[6] (V11, T1878-79). The court ruled in accord with the prosecutor's contention (V13,T894).

At a later hearing, the trial judge clarified:

> the first letter amounts to a waiver of the spousal immunity privilege, subsequently withdrawn. It's a close question, but it opens a window, and the State can handle that accordingly.

(V11,T919). The ruling that Bolin withdrew his consent was based upon defense counsel's reassertion of the spousal privilege prior to Bolin's first trial. It inspired Appellant to file his "Motion for Rehearing of Motion in Limine - Spousal Privilege" (V3, R468-71) which asserted that a waiver of privilege may be withdrawn as long as the privileged information is not disclosed during the period where the waiver was in effect. After hearing argument and considering caselaw, the trial judge denied rehearing. (V12,T1065)

[6] Defense counsel's position was "the Supreme Court is essentially saying they are not a fact-finding body and they put some general principles of law out [into] which I believe we're trying to read a remarkable amount of knowledge we don't have" (V13, T887).

IV. IF BOLIN'S LETTER DID ACT AS A WAIVER, IT SHOULD NOT BE APPLIED RETROACTIVELY.

Before reaching the retroactivity question, one footnote in this Court's Bolin II opinion bears examination. Ehrhardt's Florida Evidence is cited for the proposition that waiver requires only voluntary consent, not knowing consent. 650 So. 2d at 24, n.3. The reason for this is, as Professor Wigmore explained:

> A privileged person would seldom be found to waive, if his intention not to abandon could alone control the situation. There is always the objective consideration that when his conduct touches a certain point of disclosure, fairness requires that his privilege shall cease whether he intended that result or not.

In re Grand Jury Investigation, 604 F. 2d 672, 675 (D.C. Cir. 1979) quoting 8 Wigmore, Evidence §2327 (McNaughton rev. 1961).

The touchstone therefore is fairness, both in whether a waiver has occurred and whether the privilege may later be reasserted. One type of analysis used by courts in determining this question is the sword/shield principle. For example, in Hoyas v. State, 456 So. 2d 1225 (Fla. 3d DCA 1984) (cited in Bolin II, 650 So. 2d at 24), the attorney-client privilege was held waived when the client testified at trial to a portion of his private communications with his former attorney. The trial judge ruled that this self-serving testimony opened the door for the State to compel the former attorney to testify

as a rebuttal witness to incriminating portions of the attorney-client communications.

In approving the trial court's ruling, the Third District agreed with caselaw stating

> the privilege was intended as a shield, not a sword. Consequently, a party may not insist upon the protection of the privilege for damaging communications while disclosing other selected communications because they are self-serving.

[Citations omitted]. 456 So. 2d at 1229. The court concluded: "Appellant's self-serving statement was given under circumstances which required waiver of the attorney-client privilege in order to allow cross-examination, rebuttal and impeachment of appellant's testimony, in the interest of fairness". 456 So. 2d at 1229.

By contrast, at bar Bolin never disclosed any portion of the spousal communications. He did not seek to use privileged conversations to his own benefit; in short, he always employed the marital communications privilege as a shield rather than a sword.

In Sykes v. St. Andrews School, 619 So. 2d 467 (Fla. 4th DCA 1993), the psychotherapist/patient privilege was in issue. The plaintiffs originally sought damages for emotional distress to the mother in addition to damages for injuries to the daughter. However, the mother later abandoned this claim and asserted the psychotherapist/patient privilege. Nonetheless, the trial court ordered discovery of records relating to the mother's mental condition.

On appeal, the Fourth District wrote:

> Petitioner initially placed her mental and emotional condition in issue by seeking damages for her own emotional distress. In doing so, she activated the waiver provisions of both the statute and the rule. The issue is whether such a waiver is irrevocable.

619 So. 2d at 469. The court went on to state that one purpose of waiver provisions is "to prevent a party from using the privilege as both a sword and a shield". Id. Because the petitioner abandoned any claim for emotional stress, the court determined that she "has dropped the sword". Id. Accordingly, the shield of the privilege was restored (waiver was revokable) because the defense had not been prejudiced.

Similarly, even if Bolin's letter to Captain Terry could be viewed as a waiver of the marital communications privilege, there is no reason to hold that the waiver was irrevocable. The State took no action based upon the purported waiver; consequently they cannot have been prejudiced when Bolin reasserted his privilege prior to trial. Even if Bolin dropped his shield for a few weeks, he never raised a sword and should therefore be permitted to recover his shield.[7]

As previously shown, the content and circumstances of Bolin's suicide letter were not before this Court in the prior appeal. This

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[7] See also, In re State v. Schmidt, 474 So. 2d 899 (Fla. 5th DCA 1985) (Client did not waive attorney/client privilege by misunderstanding at deposition; lawyer's conduct "particularly appropriate" because client not "attempting to use the privilege as a sword"). 474 So. 2d at 902, n.1.

Court did not direct the trial judge in the way that the prosecutor contended; the opinion in Bolin II merely acknowledges that a privilege may be waived by a letter and that a waiver need not be knowing, only voluntary. It was certainly within the trial court's scope to decide the extent to which any waiver would reach.

Florida caselaw recognizes 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); Palm Beach County School Board v. Morrison, 621 So. 2d 464 (Fla. 4th DCA 1993); Truly Nolen Exterminating, Inc. v. Thomasson, 554 So. 2d 5 (Fla. 3d DCA 1989), rev. dism., 558 So. 2d 20 (Fla. 1990). When a defendant consented to allow his communications with psychotherapists to be disclosed to his probation officer, he could not later quash a subpoena of his mental health records or bar deposition of the professionals who later treated him pursuant to the "Deferred Prosecution Agreement". Saenz v. Alexander, 584 So. 2d 1061 (Fla. 1st DCA 1991). There does not, however, appear to be any Florida authority which addresses the precise issue at bar; actual disclosure of privileged communications prior to the purported waiver which is subsequently withdrawn before any additional action is taken.

One case was presented to the court by Appellant's trial counsel, Driskell v. State, 659 P. 2d 343 (Okla. Crim. App. 1983). In Driskell, the defendant gave his treating doctors permission to discuss his case

with investigators for the state as well as his own attorney. Three days later, he revoked this waiver; but not before the doctors had talked to the prosecution. The doctors then testified as state witnesses at trial despite the defendant's reassertion of the doctor/patient privilege.

The trial court in Driskell ruled that the doctors could testify only to what "had been disclosed while the waiver was in effect". 659 P. 2d at 352. Conversations between the doctors and the investigating officers which took place either before the waiver period or after it were specifically excluded from evidence. The appellate court approved this ruling and held that "it was sufficient for admissibility purposes that the doctors testified the disclosures were made during the period of the waiver". 659 P. 2d at 352.

If the holding of Driskell were applied to the case at bar, only the privileged communications which were divulged by Bolin's ex-wife to the authorities during the period between Bolin's letter to Captain Terry and the beginning of his trial would be admissible. In fact, there was no disclosure during this period; Captain Terry found no need to re-interview Cheryl Coby after seizing the letter from Bolin's jail cell. Therefore, none of the spousal communications should have been admitted into evidence.

In conclusion, there are several reasons why Bolin's letter addressed to Captain Terry should not be treated as a waiver of the

spousal communications privilege. First, Bolin did not voluntarily deliver the letter for mailing. His writing to Captain Terry reflected the trial court's erroneous ruling that he had already waived the husband-wife privilege by taking Cheryl Coby's deposition. Indeed, Bolin's language in the letter does not establish consent to interview Cheryl Coby; it simply assumes that his suicide attempt would be successful, making Bolin himself unavailable for an interview, while acknowledging that Captain Terry has previously interviewed Coby extensively.

Even if this Court decides that the letter does operate as a waiver, there is no precedent which would deem the waiver irrevocable. The trial judge correctly found that Bolin revoked his waiver and attempted to reassert the privilege before his initial trial. Since nothing was disclosed during the period while the waiver was in effect, none of the spousal communications should have been admitted into evidence.

Finally, considerations of fairness direct that any waiver should not act retroactively to make admissible Cheryl Coby's prior statements to the police. Bolin never tried to use the marital communications privilege as anything but a shield; thus, his conduct was consistent with maintaining the privilege.

ISSUE III

THE TRIAL COURT ERRED IN RULING THAT MITOCHONDRIAL DNA EVIDENCE SATISFIES THE FRYE STANDARD FOR ADMISSIBILITY AND PERMITTING THE STATE TO INTRODUCE STATISTICAL PROBABILITIES BASED UPON MTDNA.

The State was successful in seeking a pre-trial ruling under Frye from the trial court that it could present evidence of mtDNA in Bolin's trial. A single hair had been found on a towel removed from the victim's body. A small fragment of this hair was sent to the FBI laboratory, where a mtDNA analysis was performed on it. In this analysis, mtDNA from the hair was compared to mtDNA obtained from a blood sample taken from Bolin.

A hearing on the admissibility of mtDNA, the results of the analysis between the hair and Bolin's blood sample, and the statistical computations calculated from those results was held on February 4, 1999. The defense urged the trial court to exclude this evidence on the basis that neither mtDNA nor the statistical calculations based upon the FBI database met the standard for admissibility of novel scientific evidence under Frye v. United States, 293 F.1013 (D.C. Cir. 1923)(hereafter referred to as Frye. The trial court ruled that in both instances the Frye standard was met. The State then presented mtDNA evidence to the jury.

DNA evidence involves two different sciences. One is molecular biology, which includes the scientific analysis of the components of

DNA itself and the way it is tested and matched. The other is the science of population genetics/statistical frequencies that give meaning to the match. Both are presented to the jury as scientific evidence and both must meet the Frye standard of admissibility. See, Flanagan v. State, 625 So. 2d 827 (Fla. 1993) and Brim v. State, 695 So. 2d 268 (Fla. 1997).

Under Frye, in order to introduce expert testimony deduced from a scientific principle or discovery, the principle or discovery "must be sufficiently established to have gained general acceptance in the particular field in which it belongs." Frye, 293 F. at 1014. In Ramirez v. State, 651 So. 2d 1164 (Fla. 1995) this Court reaffirmed the Frye standard in Florida. It also set forth a four step process for trial judges to use in applying Frye.

First, the trial judge must determine whether such testimony will assist the jury in understanding the evidence or determining a fact in issue. Second, the trial judge must decide whether the expert testimony is based on a scientific principle or discovery that is "sufficiently established to have gained general acceptance in the particular field in which it belongs."

The third step in the process is for the trial judge to determine whether a particular witness is qualified as an expert to present opinion testimony on the subject in issue. Fourth, the judge may then allow the expert to render an opinion on the subject of his or her

expertise. It is then up to the jury to determine the credibility of the expert's opinion, which it may either accept or reject. Ramirez, 651 So. 2d at 1167 (citations omitted).

It is Bolin's position that the application of the Frye standard to mtDNA and to the database and statistical frequency calculations derived from mtDNA testing renders this evidence inadmissible. mtDNA and the FBI statistical base used in this case fall woefully short of meeting the requirement that mtDNA is sufficiently established so as to have gained general acceptance within the particular field in which it belongs.

In the case at bar, trial counsel produced scientific literature and expert testimony which raised serious issues concerning the scientific underpinnings of mtDNA and of the application of statistical formulas based on the FBI database. Scientific study conducted on mtDNA since the Frye hearing and Bolin's trial has completely disproved the entire scientific basis relied upon by the State's experts to establish the admissibility of mtDNA evidence.

As a preliminary matter, Bolin is entitled to bring to this Court's attention contradictory scientific reviews of mtDNA that have been published since the 1999 Frye hearing and trial. In reviewing the admissibility of scientific evidence this Court has employed a de novo standard of review as a matter of law. Brim v. State, 695 So. 2d 268, 274 (Fla. 1997) ("This means that the trial judge's ruling will be

reviewed as a matter of law rather than by an abuse-of-discretion standard . . . The latter standard would prohibit an appellate court from considering any scientific material that was not part of the trial record in its determination of whether there was general acceptance within the relevant scientific community. We find that the abuse-of-discretion standard is incorrect . . .). According to Ehrhardt, "Under this standard of review, the appellate court may examine scientific progress and evidence not considered by the trial court." Charles Ehrhardt, Florida Evidence, §702.3, p.570 (1999). In conducting this review, this Court "...may examine expert testimony, scientific and legal writings, and judicial opinions in making its determination." Hadden v. State, 690 So. 2d 573, 579 (Fla. 1997).

A. mtDNA has not been sufficiently established so as to have gained general acceptance within the scientific community and fails to satisfy the evidentiary requirements.

Two types of DNA are known to be present in the human body. Nuclear DNA is found in the nucleus of a cell. Nuclear DNA has been found to be admissible evidence by this Court in Hayes v. State, 660 So. 2d 257 (Fla. 1995).

The second type of DNA, mtDNA is found in larger concentrations in the structures of the cell called mitochondria. It is a very new branch of DNA science and it's admissibility has not been determined by an appellate court in this state.

Each type of DNA has specific genetic components which affect the physical structures of the DNA molecule, how it is inherited, and it's forensic application. According to state expert John Steward, the essential genetic components of mtDNA differ from nuclear DNA in three main areas: (1) mtDNA is inhereited solely matrilineally; (2) mtDNA is heteroplasmic in 8% to 10% of the population; and (3) mtDNA has a mutation rate, the frequency of which is subject to debate. In addition to having basic genetic differences from nuclear DNA, the process by which mtDNA is amplified creates a fourth area of significant difference from nuclear DNA. Contamination is a major concern in both the collection and amplification stages of mtDNA processing because mtDNA must be amplified far more than nuclear DNA. (V12,T947-981)

These four significant features of mtDNA were highly debated issues within the scientific community at the time of trial and continue to be at the present time. The rapidity at which scientific knowledge about mtDNA currently changes prohibits a finding under Frye that mtDNA research is "sufficiently established" within the scientific community to which it belongs. An examination of each of these four factors demonstrates mtDNA's glaring failures as acceptable evidence in the criminal justice system at this time.

(1) The lack of consensus in the scientific community on the issue of exclusive matrilineal inheritance

At the time of Bolin's trial state expert Stewart testified that mtDNA is inherited solely from the mother. (V12,T948) This assumption has come under attack as further research has indicated that mtDNA shows signs of paternal influence.

A study conducted by three British scientists and reported in the December 1999 issue of Science magazine found signs of mixing between maternal and paternal mtDNA, a process called recombination, in humans and chimpanzees. (Exhibit 1) How recombination could occur is still unknown, for it had been believed that there was no physical contact between maternal and paternal mtDNA during the fertilization process. Scientists who study mtDNA agree that further study is necessary before the British study is accepted "as ironclad evidence of

recombination". According to the article, recombination of mtDNA would trigger a major shake-up in the field of mtDNA research.

These findings, as commented upon by leading geneticists in the article, call into question the practical and research uses of mtDNA. Especially affected could be the use of mtDNA to identify human remains. The possibility of recombination is on the cutting edge of mtDNA research and significant debate remains as to its implications for the use of mtDNA.

The possibility of recombination directly contradicts the testimony of state expert Stewart. The lack of consensus in the scientific community about the existence of recombination, the rate of its occurrence, and the effect of recombination on the use of mtDNA as a tool for identification purposes in the forensic arena precludes a finding under Frye that mtDNA has been sufficiently established within the scientific community to permit it to be used as an evidentiary sword by the State.

2. The lack of consensus in the scientific community on the issue of Heteroplasmy

Nuclear DNA is homoplasmic, which means that the DNA sequence is identical from tissue to tissue within an individual. In other words, a piece of nuclear DNA taken from a bone will match that taken from a hair on the same individual. mtDNA is heteroplasmic, which means an individual's mtDNA sequence is not identical from tissue to tissue. A

single individual may possess many different mtDNA sequences within their body. Thus, an mtDNA sequence obtained from the blood of an individual may be different than the mtDNA sequence obtained from the hair of that same individual. According to state witness Stewart, heteroplasmy is present in 8% to 10% of the population. (V12,T960) A single sample of Bolin's blood was submitted for mtDNA extraction. According to Stewart, no evidence of heteroplasmy was seen in this single sample and in the one test that was performed on it.

The presence of heteroplasmy and its implications for forensic examination is under much debate. Current research suggests that heteroplasmy occurs in significantly larger percentages than testified to by Stewart. Critical new research findings on the issue of heteroplasmy in mtDNA were announced at the 10th International Symposium on Human Identification held on September 29 through October 2, 1999, an conference sponsored by the Promega Corporation. (Exhibit 2, #1-5) In each instance new research confirmed the occurrence of heteroplasmy is significantly greater than previously believed. Unanimous recommendations for more accurate testing to determine the presence of heteroplasmy when comparing samples was called for.[8]

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[8] Speaker abstracts from this symposium reflect five separate abstract presentations concerning mtDNA heteroplasmy. The presentations were: (1) Jennie C. Grover, Mitchell Holland,and Marie-Gaelle Le Roux, An International Study on the Detection of Heteroplasmy in Mitochondrial DNA, a collaborative project with the Armed Forces DNA Identification Laboratory and the Laboratoire de Genetique Moleculaire (continued...)

The Calloway research group (no.5) examined the level and frequency of heteroplasmy across various tissue samples and age groups. Samples from 5 different organs were taken from 43 cadavers. Heightened measures against contamination were made during the removal of the tissue samples and during each stage of the testing procedure. Sequencing was conducted on the HV1 and HV2 regions (those regions are the most routinely examined in mtDNA analysis and the ones used in this case). Instead of the 8% ratio of heteroplasmy Stewart said existed, the Calloway study found a heteroplasmy rate of 51.2%. The Calloway abstract notes that heteroplasmy was observed at multiple positions within a single individual and multiple individuals were heteroplasmic at identical positions. Heteroplasmy was observed more frequently at

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[8](...continued)
de l'Hospital de Nantes, Nantes France; (2) Lois Tully, Frederick Schwartz, and Barbara Levin, Development of a Heteroplasmic Mitochondria DNA Standard Reference Material for Detection of Heteroplasmy and Low Frequency Mutations, National Institute of Standards and Technology, Gaithersburg, MD; (3) Kazumasa Sekiguchi, Kentaro Kasai, and Barbara Levin, Human Mitochondrial DNA Heteroplasmic Variation Among Thirteen Maternally Related Family Members,a collaborative study between the National Institute of Standards and Technology, Gaithersburg, MD and the National Research Institute of Police Science, Kashiwa-shi, Chiba, Japan; (4) Kimberly Nelson, Mark Stoneking, and Terry Melton, Mitochondrial DNA Testing: Casework in the Private Sector, Heteroplasmy and Genetic Diversity within the United States, a collaborative study between Mitotyping Technologies, LLC, State College, PA, the Max Plank Institute for Evolutionary Anthropology, Leipzig, Germany, and the Department of Biology, Pennsylvania State University, University Park, PA; and (5) Cassandra Calloway and Rebecca Reynolds, Characterization of Heteroplasmy Across Various Tissue Types and Age Groups, Roche Molecular Systems. Each abstract will be referred to by the last name of the first listed author.

the HV1 region, consistent with previously reported hair studies. The frequency of heteroplasmic point mutations increased with age.

The Groover abstract (no.1) concluded that heteroplasmy occurs at a higher rate than originally inferred and that all humans are heteroplasmic to some degree. This finding was consistent with the Colloway research. Despite mounting evidence that heteroplasmy exists in each individual, there are not standards governing the testing procedures for heteroplasmy. According to the Tully abstract (no.2), standards for quality control and to determine the presence of heteroplasmy in the medical, forensic, and toxicological testing are still under development. Heteroplasmy presents significant problems at the forensic level and there are few quality control measures.

While heteroplasmy is believed to exist in all individuals, how and where an individual can be heteroplasmic is not fully understood. It is unknown whether heteroplasmies exist in mtDNA in individual mitochondria, in different mitochondria in the same cell, or in mitochondria from different cells within the same tissue according to the Sekiguchi abstract (no. 3).

Heteroplasmy becomes critical when comparisons between samples are made. The FBI currently permits a one base mismatch to be considered a match and not an exclusion due to the possibility of undetected heteroplasmy. Heteroplasmy clearly impacts on the ability of mtDNA

testing to accurately determine whether sequences that are compared were the same or different.

The likelihood of heteroplasmy raises significant questions about the forensic testing in this case. While Stewart opined that there was no evidence of heteroplasmy in this case, this opinion was not based upon fact or scientific analysis and Stewart gave no reasons to support this conclusion. No specific tests which can often determine the existence of heteroplasmy (including a technique called cloning) were performed. Only one blood sample from Bolin was analyzed. No hair or other tissue samples were tested to determine if other mtDNA sequences were present. A single test on a single sample could not detect the presence of heteroplasmy.

According to Dr. William Shields, the problem with heteroplasmy is that it permits a single individual to have different mtDNA sequences in their body. Heteroplasmy is especially problematic with attempts are made to compare different types of tissues, as was done in this case with a comparison being made between a hair and blood.

The significantly higher rate of heteroplasmy (from 50% to 100%) essentially guarantees that mtDNA testing of other tissue samples of Bolin would produce results which would exclude him as the source of the hair or cause another individual to be identified as the hair source. According to the current research, in this case insufficient samples were tested to determine the presence of heteroplasmy. These

testing failures are most likely to have produced a false positive result. The jurors in this case were presented with evidence that was inaccurate and misleading under current testing standards.

New questions are raised by the significantly increased occurrence of heteroplasmy in the population and the impact this will have on forensic analysis is under debate in the scientific community. The questions which have arisen from the new research on heteroplasmy will only be answered with further research. The continued scientific debate over this feature of mtDNA renders it inadmissible under Frye.

3. The lack of consensus in the scientific community on the mutational rate of mtDNA.

A third distinct feature of mtDNA is mutation. Unlike nuclear DNA, which remains constant throughout an individual's lifetime, mtDNA mutates. Mutation is the process by which mtDNA can change, over time, within an individual. The rate of mutation is estimated to be at once in every 33 generations. This figure is the result on only one study published in 1997 and was acknowledged by Stewart to be the subject of dispute in the scientific community. (V12,T960-961) Stewart acknowledged that other studies are finding much higher rates of mutation than that believed to exist by the FBI. (V12,T970) (Exhibit 3) As Dr. Shields testified, this rate is not once in every 33 generations of life, but once in every 33 reproductions of the cell. Mutation can result in the mtDNA in an individual changing over a period of time.

The implications mutation raise in this case are significant because of the time gap between when the hair was found and when the mtDNA analysis was performed. The hair found on the towel was recovered in 1986. The testing of Bolin's blood and the comparison between the mtDNA in the blood sample with the mtDNA in the hair did not occur until 1998- a lapse of twelve years. This twelve year lapse is more than sufficient time to have permitted numerous mutations of the mtDNA in Bolin's body. There is simply no way to exclude the possibility that the mtDNA present in Bolin's blood sample in 1998 was different than the mtDNA present in his body in 1986.

The continuing scientific debate over mutational rate and its impact on forensic testing renders mtDNA inadmissible under the Frye standard because there is not a general acceptance within the scientific community as to the rate of mutation and its significance in forensic testing.

4. The lack of consensus in the scientific community as to acceptable levels of contamination in mtDNA samples.

John Stewart acknowledged that contamination during the amplification process is of greater concern with mtDNA that nuclear DNA. Contamination, is in fact, a major concern. (V12,T961)

The method of isolating and multiplying mtDNA is different from that used with nuclear DNA. mtDNA sequencing requires the isolation of and identification of individual chemical bases. Contained in the circle of the roughly 16,000 based pairs of mtDNA contained in the organelle, there is one noncoding region that varies among individuals known as the HV1 and HV2 regions. In these regions you will have variation between individuals by eight or so base pairs. On the other hand, nuclear DNA analyzes stretches of the DNA molecules that make up specific genes.

mtDNA is subject to many additional PCR cycles known as cycle sequencing. Cycle sequencing involves taking the mtDNA after it has been amplified and making even more copies of the segments that are of interest. This stage of amplification is where the increased risk of contamination occurs.

The risk of contamination, according to Mark Wilson, program manager of the mtDNA unit at the FBI and,Dr. Bruce Budolwe, of the FBI, and Dr. Mitchell Holland, of the American Armed Forces Institute of Pathology with mtDNA is great:

> The most critical potential source or error in mtDNA sequencing is contamination. If more than one individual's DNA is extracted and amplified,the sequencing results will reflect this mixture. In extreme cases the contaminating DNA can greatly exceed the DNA from the donor, and thereby yield a false positive result.

Guidelines for the Use of Mitochondrial DNA Sequencing in Forensic Science, Wilson, Budowle, and Holland, 1993. In order to address the issue of contamination, the FBI has established a contamination ratio of 10:1, which permits one part contamination per 10 parts mtDNA sample. This ratio was arrived at through a single testing procedure trial of 5 samples performed by the FBI.

Wilson and Dr. Budlowle have conceded that the FBI's method of assessing acceptable contamination rates in the lab is one that is not utilized by any other DNA testing lab in the world.

DNA is present everywhere. It is present in the labs, on the gloves of the technicians, and present randomly at the time evidence is collected. (V3,R455) According to Dr. Shields, the purpose behind mtDNA is to make very small amounts visible, and to do this you must amplify a sample billions and billions of times. However, when you magnify the mtDNA enormously, you also make the contamination visible and replicate it as well.

Dr. Shields testified that the FBI has insufficient data to permit the use of the 10:1 contamination ratio that they alone have adopted as acceptable. This calculation was arrived at from a sample size of only

five, and the test was performed only once. This sample size is consistent with a 35% error rate. (V3,R455)

According to Dr. Shields, no one agrees with the FBI's approach to continued testing in the face of contamination ratios of less than ten to one, and he knows of no scientist who would continue to test in the face of a defined contamination ratio.

No testimony was presented by the state to support the FBI's conclusion that its testing methods have general acceptance within the scientific community outside their own lab or that there results have been independently validated.

In addition to contamination during the amplification process, Dr. Shields testified that an additional source of contamination occurs as a result of the method the FBI uses to wash the hairs it tests. The method employed by the FBI has been rejected by other labs and is no longer used because other labs found that is was not sufficient to remove contaminants, which could include other mtDNA that could be transferred to the hair when it is collected, stored, or from the technicians performing the analysis.

There is continuing debate in the scientific community concerning the acceptable level of contamination in mtDNA comparisons. The absence of any independently determined standards other than the self-serving 10:1 contamination ratio promulgated by the FBI for its lab cannot satisfy the general acceptance standard of Frye.

The state presented no evidence to contradict Dr. Shield's testimony that FBI washing methods have been rejected by other labs within the scientific community. The FBI's use of a method which has been discarded by the scientific community is clearly contrary to Frye's requirements.

The sharply contrasted testimony of John Stewart and Dr. Shields conclusively demonstrated the lack of consensus within the scientific community regarding the acceptable levels of contamination and the acceptable methods to curtail contamination of mtDNA samples. In fact, uncontroverted testimony established that much of the standards adopted by the FBI have been outright rejected by independent laboratories. There "general acceptance" standard of Frye was not met on the narrow issue of contamination.

Three primary characteristics of mtDNA identified by the State have been shown to be an ongoing source of scientific debate. Since the hearing and trial, these three characteristics of mtDNA have been disproved by continued scientific research. These factors prevent a favorable ruling for admissibility under Frye. Perhaps the only principals testified to by Stewart that have gained general acceptance in the scientific community which researches mtDNA is that it is the newest form of DNA evidence. It is the least sensitive, the least able to make differentiation. mtDNA research is in it's infancy and the knowledge on mtDNA's essential genetic features is scanty. (V12,T970-

972;982) The lack of consensus on mtDNA's genetic features and the lack of generally accepted standards for it's testing prohibit it from being used as evidence at this time.

B.<u>The statistical calculations and the method used to obtain them do not meet the Frye standard for admissibility</u>.

Evidence about whether or not two DNA samples match is meaningless without providing information to the jury about the likelihood of that occurrence. This is the second prong of DNA analysis -- population genetics and statistical theories which guess at the probability of finding the same genotype randomly in the population. A report issued by the National Research Council in 1992 noted " [t]o say that two patterns match, without providing any scientifically valid estimate (or, at least, an upper bound) of the frequency with which such matches might occur by chance, is meaningless." This Court has accepted this observation in <u>Murray v. State</u>, 692 So. 2d 157 (Fla. 1997), and <u>Brim v. State</u>, 695 So. 2d 268 (Fla. 1997).

The National Research Council notes that this number may be given only in theory and not in reality because of the impracticability of testing the entire population for DNA genotypes. National Research Council, <u>The Evaluation of Forensic DNA Evidence</u>, (1996).

The population frequency that is calculated by the FBI with mtDNA is different than that done for nuclear DNA. The "counting method" is used for mtDNA by the FBI instead of the fixed bin procedure with a

product rule and a ceiling principle that is utilized with nuclear DNA. The FBI has a database of mtDNA sequences and they compare the mtDNA sample sequence to the database. The problem presented by this method is the size of the database that the FBI utilizes. It is simply too small.[9] The FBI acknowledges that it is too small to permit the same statistical calculation method that is used in nuclear DNA. So, instead of being able to say that the questioned sample sequence match excludes "X"% of the population as is done with nuclear DNA, the FBI testifies that the defendant cannot be excluded from the population that could have provided the unknown sample. With the counting method, they testify that the known sample and the unknown sample have the same sequence and that this sequence has been seen only "X" other times, (often "O" times) in the database. According to Stewart, Bolin's mtDNA sequence had not been seen in the FBI database at the time of the Frye hearing. At the time of trial, Bolin's mtDNA sequence had a perfect match in the database. In addition to the perfect match, the one base different matches were not included in the statistical comparisons given to the jury, despite Stewart's earlier testimony that one base mismatches are not considered exclusions because of the risk of

[9] According to John Stewart, the database numbered only 1600 samples at the time of the Frye hearing in this case and only 1500 at the time the testing was conducted. (V12,T9-78). The 1600 samples were drawn from 887 Caucasians, 99 Hispanics, 349 Africans, and 221 Asians.

undetected heteroplasmy. There were eight other samples that differed from Bolin's by one base. (V12,T977)

The State presented no evidence that the FBI's method of statistical calculation or the minuscule FBI database are accepted in the general scientific community outside of the FBI lab. Stewart acknowledged that he could not say that the counting method was used anywhere else. (V12,T987) Stewart was unaware of any time when the counting method of comparison had undergone peer review or of any published study which supported its use.

The defense presented testimony through Dr. William Shields which completely discredited the counting method and the FBI database. According to Dr. Shields, the statistical calculation method and the small database produced **statistically indefensible** results. Dr. Shields, in his article submitted as a defense exhibit at the Frye hearing, noted that the due to the paucity of frequency data, it is impossible to assign a rarity measurement to sample comparisons. (V3,R460) The danger, according to Dr. Shields, is that permitting testimony as to rarity in the population leaves the jury believing that mtDNA typing is similar to other DNA which can discriminate among individuals and permit matches to be described as "rare". mtDNA is not that discriminating. (V3,R460-62)

According to Dr. Shields, the scientific community has not reached agreement on which statistical treatment should be applied to

mtDNA. Dr. Shields advocates a method called the "pair-wise method" instead of the counting method. (V3,R460) Pair-wise comparison is what is utilized by British labs. It is not used by the FBI and was not used in this case. (V3,R460)

Dr. Shields also questioned the FBI's practice of not including in their calculations the matches that differed by one base. This number is considerably larger than a perfect match. Since the FBI considers a match to mean both perfect matches and one base mismatches, the probability of a random match must include both events according to Shields. In this case, at the time of trial there had been one other perfect match found in the database since the time of the Frye hearing and there were 8 one base mismatches. According to Shields, the FBI statistics were inaccurate and misleading because the eight one base different samples were excluded from the statistical calculation.

When presented with the same query regarding whether or not the FBI method of calculation meets the Frye standard, the answer in the Eighteenth Judicial Circuit, Seminole County, was "No". The Honorable O.C. Eaton, in the case styled State of Florida v. James Deward Crow, Case No. 96-1156-CFA, ruled that the results of a comparative test of mtDNA samples did not meet the Frye standard and was inadmissible as evidence in an order granting the defendant's motion to exclude mtDNA evidence from his trial. (See, Exhibit 4)

After hearing testimony from both defense and state experts, Judge Eaton ruled that the evidence presented was that the FBI database was too small and is insufficient to provide reliable statistical conclusions. Judge Eaton further found that the "counting method" failed to provide meaningful comparison to assist, rather than confuse, the jury. Judge Eaton's order excluded mtDNA evidence from the trial.

The evidence presented by the state in the case at bar did not establish that the statistical method employed by the FBI has become sufficiently established within the scientific community so as to have gained general acceptance within the small group of labs and scientists who research mtDNA. The FBI's self-serving acceptance of their own methods, which have not been subject to outside peer review and independent validation studies, is not sufficient to meet the Frye standard.

The State failed to meet its burden under Frye in establishing that mtDNA was admissible in Bolin's trial. The testimony from Stewart presented skewed, inaccurate, and misleading evidence to the jury as to whether the questioned hair could have been Bolin's. The use of this inaccurate and misleading testimony could only lead to confusion, resulting in harmful error. The trial court erred in permitting testimony concerning mtDNA to be admitted in this trial, and reversal is required.

ISSUE IV

THE TRIAL COURT ERRED IN DENYING APPELLANT'S REQUEST TO ADMIT INTO EVIDENCE AND PUBLISH TO THE JURY PRIOR INCONSISTENT STATEMENTS OF CHERYL COBY THEREBY DENYING APPELLANT HIS SIXTH AMENDMENT RIGHT TO CONFRONT THE STATE'S WITNESS AND HIS RIGHT TO DUE PROCESS OR LAW.

Cheryl Bolin Coby was the State's star witness. At the time of this trial she was deceased, so her testimony was presented to this jury through the use of videotaped testimony which was recorded during the first trial in this case on October 9, 1991. In 1991 Mr. Bolin was represented by two lawyers, Mr. Firmani and Mr. Conners. In the case at bar attorneys Mark Ober and Brian Donnerly represented Mr. Bolin.

On April 4, 1999, Mr. Bolin moved to exclude Coby's video-taped prior trial testimony by arguing that cross-examination had been ineffective in that proceeding. To illustrate this point, the motion listed numerous instances where Coby had given prior sworn statements in both a discovery deposition on January 8 and 9, 1991 and a deposition to perpetuate testimony given on January 11, 1991, that were inconsistent with the October trial video testimony. The motion was argued on April 7, 1999. (V9,T507-526) In addition to the argument relating to cross-examination, counsel further argued that the prior inconsistent testimony was admissible as rebuttal or impeachment evidence. (V9,T507) Over objection by the State which was premised on

their complaint that they couldn't rehabilitate the deceased Coby, the trial court denied counsel's request to introduce the transcripts and publish to the jury the inconsistent statements. (V9,T526-527)

The trial court's refusal to permit trial counsel to introduce the prior inconsistent statements into evidence and publish them to the jury was error. The inability to impeach Coby's testimony with her prior inconsistent statements denied Mr. Bolin his constitutional right to confront the witnesses against him through the use of full and fair cross-examination and to due process of law.

All witnesses who testify place their credibility in issue and all parties on cross-examination may inquire into matters that affect the truthfulness of a witness's testimony. According to Ehrhardt, the credibility of a witness is always a proper subject of cross-examination. Charles W. Ehrhardt, Florida Evidence, §608.1 (1999 ed.). Section 90.608(1)(a) of the Florida Evidence Code specifically authorizes the use of statements which are inconsistent with the witness's present testimony as a means of attacking the credibility of that witness. This Court has recognized the importance of cross-examination. See, Chandler v. State, 702 So. 2d 186 (Fla. 1997), and the cases cited therein.

Under Section 90.801 (2)(a), a statement is not hearsay if the declarant testifies at trial and the statement is inconsistent with his testimony and was given under oath subject to the penalty of perjury at

trial, hearing, or other proceeding, or in a deposition. Both the discovery deposition and the deposition to perpetuate testimony were not excludable as hearsay.

The right to cross-examination as a means of exposing a witness's motivation in testifying is a proper and important function of the constitutionally protected Sixth Amendment right of confrontation. Davis v. Alaska, 415 U.S. 308,316, 94 S.Ct. 1105, 1110, 39 L.Ed. 347 (1974); Delaware v. Van Arsdall, 475 U.S. 673, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986). It is, of course, fundamental that a criminal defendant has a constitutional right to a full and fair cross-examination to show a witness's possible bias or motive to be untruthful. Lewis v. State, 570 So. 2d 412 (Fla. 1st DCA 1990), citing Davis v. Alaska.

A jury must have information regarding bias, motive, prejudice, intent, and corruptiveness if they are to correctly asses the credibility of a witness. This is particularly true when that witness is crucial to the state's case and there is little to no independent evidence which establishes the defendant as the perpetrator. Limiting the scope of cross-examination in a manner which keeps from the jury relevant and important facts bearing on the trustworthiness of the crucial testimony constitutes error. Jaggers v. State, 536 So. 2d 321, 328 (Fla. 2d DCA 1988). The importance of a full and detailed cross-examination is rather colorfully summed up by the Fifth District Court

of Appeal in the case of Gamble v.State, 492 so. 2d 1132, 1134 (Fla. 5th DCA 1986). In Gamble the defendant had been limited in his cross-examination of the rape victim as to the arrest affidavits she had filed against her jealous and violent boyfriend. The court stated:

> The exclusion of defense counsel's inquiry as to these specifics was error. This was similar to serving up spice cake without the spice, or a bloody Mary without the vodka. It is the specifics, the details, the nitty-gritty of life that proves or disproves generalities and which permits effective cross-examination.

In this case, the testimony of Coby was crucial to the State's case. Defense counsel was under severe limitations regarding Coby's testimony. Due to Coby's death, counsel was left what he deemed an ineffective cross-examination as a whole, but he did have certain specific instances where Coby's trial testimony was contradicted in previously given sworn deposition and deposition to perpetuate testimony that had not been pointed out in the video-taped testimony that the jury heard.[10] Defense counsel pointed to numerous instances of conflict in the written motion. (V3,R514-517) These included inconsistent testimony about Mr. Bolin's demeanor on the night of the

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[10] Defense counsel had argued to the trial court that prior counsel had rendered ineffective assistance of counsel by failing to adequately cross-examine Coby. Claims of ineffective assistance of counsel are more properly addressed in post-conviction proceedings rather than on direct appeal. Any issue relating to ineffectiveness of counsel is not being argued in this Brief and counsel specifically does not waive this issue for later review in the more appropriate forum.

alleged homicide (V3,R514,ex. 1), inconsistencies in the three alleged versions of how the homicide occurred that Cody had claimed that Mr. Bolin told her (V3,R514-515, Exhibit 2-5), inconsistencies as to whether or not Mr. Bolin admitted to killing Stephanie Collins (Vol.3,R515, ex.6 and 7), whether or not Mr. Bolin threatened Coby with a gun while they were outside the trailer and she was urging him to tell the police (V3,R516,ex.9-10), whether she saw blood in the trailer (V3,R516,ex.11), Mr. Bolin's alleged description of the homicide (V3,R518,ex.14), and whether or not Coby actually believed that Mr. Bolin had committed the homicide (V3,R517,ex.13). In each and every instance outlined in the motion, Coby's testimony that was presented to this jury was far more damaging to Mr. Bolin than the earlier deposition testimony given on the same issue.

The standard of review applicable to the denial of the Sixth amendment right to confrontation is that of harmless error. Delaware v. Van Ardsell, 475 U.S. 673 (1986). The harmless error standard was established by the United State's Supreme Court in Chapman v. California, 386 So. 2d 18 (1967)and adopted and explained by this Court in State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986). This standard places the burden on the State, as the beneficiary of the error, to demonstrate beyond a reasonable doubt that the error did not contribute to the conviction or affect the jury's verdict. Chapman, at 23-24. The

State cannot meet their burden to establish that the error did not affect the jury's verdict or contribute to the conviction in this case.

The cross-examination of a key prosecution witness in a case is paramount, and the need is even greater in a capital case. In Coxwell v. State, 361 So. 2d 148 (Fla. 1978), this Court held that

> . . . where a criminal defendant in a capital case, while exercising his sixth amendment right to confront and cross-examine the witnesses against him, inquires of a key prosecution witness regarding matters which are both germane to that witness' testimony on direct examination and plausibly relevant to the defense, an abuse of discretion by the trial judge in curtailing that inquiry may easily constitute reversible error.

In Coxwell the defendant had been precluded from cross-examining the State's key witness about testimony that the witness gave which had implied that Coxwell had tried to hire him to kill his wife six months before her death. See also, Williams v. State, 386 So. 2d 27 (Fla. 2d DCA 1980); Coco v. State, 62 So. 2d 892 (Fla. 1953). Coby was the prosecution's key witness. Coby's credibility was paramount in this case. Her testimony was critical to the State's case and was the only source of any alleged admissions by Mr. Bolin. There was little to no physical evidence linking Mr. Bolin to the crime.

Mr. Bolin's ability to cross-examine Coby and to point out to the jury her inconsistent statements was critical. For example, Mr. Bolin's demeanor on the night of the homicide was heavily relied on by

the State as evidence of guilt. Likewise, Coby's claim that she did not go to the police and went along with Mr. Bolin during the disposal of the body because Mr. Bolin threatened her with a gun portrayed her as sympathetic to the jury and offered a far different explanation for her silence as opposed to her earlier statement that she didn't go to the police because she had no real evidence that Mr. Bolin committed a crime.

Each of the instances detailed by trial counsel were important facts bearing on the trustworthiness and credibility of Coby that the jury should have been given. The error was not harmless and a new trial is required wherein Mr. Bolin is entitled to fully exercise his Sixth Amendment right against those whose testimony is presented by the State.

ISSUE V

THE TRIAL COURT ERRED IN DENYING A MOTION FOR MISTRIAL REQUESTED BY THE DEFENSE AFTER THE STATE PRESENTED TESTIMONY THAT MR. BOLIN HAD ATTEMPTED SUICIDE WHERE THE TESTIMONY WAS HIGHLY IMPROPER AND INADMISSIBLE AS EVIDENCE OF CONSCIOUSNESS OF GUILT OR OF FLIGHT, IT HAD LITTLE TO NO RELEVANCE, AND ITS PREJUDICIAL IMPACT FAR OUTWEIGHED ANY PROBATIVE VALUE

During the testimony of Major Terry, the state asked Terry how he came to be in possession of a letter written by Mr. Bolin. (V8, T380) Terry responded that on June 22, 1991, Mr. Bolin had attempted

suicide.(V8,T380) Defense counsel immediately requested a mistrial because the comment was improper character evidence and called Mr. Bolin's mental state into question, it placed Mr. Bolin in a bad light, and was not relevant. Counsel argued the suicide was improper evidence of consciousness of guilt, which the defense would be unable to explain since the attempt had arisen over an adverse ruling in another murder case (the Holley murder) and not in this case. (V8,T380-381) The state argued that the statement was proper evidence relating to consciousness of guilt. (V8,T381) Upon questioning by the court, the state conceded that the jury would not hear the part of the letter where Mr. Bolin discussed suicide. The trial court ruled it was proper evidence as consciousness of guilt because ". . . I don't see any other way out except to declare a mistrial." (V8,T382) The trial court's ruling was error which requires a reversal of Mr. Bolin's conviction.

In Meggison v. State, 540 So. 2d 258 (Fla. 5th DCA 1989), the State sought to introduce evidence of a defendant's suicide attempt after a plea as evidence of consciousness of guilt. The defendant had pled, attempted suicide, then withdrew his plea and went to trial. The Fifth DCA held that this was error, as the suicide was not evidence of flight from prosecution.

The First District reached a contrary conclusion in Walker v. State, 483 So. 2d 791 (Fla. 1st DCA 1986), rev. denied, 492 So. 2d 1336 (Fla. 1986). In Walker the court admitted evidence of a suicide

attempt after a defendant was suspected of murder when the State proved beyond a reasonable doubt that it was an attempt to avoid prosection. The case law relating to flight requires that the state establish, through sufficient evidence, that the defendant fled to avoid prosecution of the charged offense and where a sufficient nexus exists in order to permit the jury to reasonably infer consciousness of guilt. Shellito v. State, 701 So. 2d 837 (Fla. 1997), rehearing denied, cert.denied, 118 S.Ct. 1537 (1997).

In this case the State could not establish the appropriate nexus in order to make the suicide attempt admissible. Factually, the suicide attempt came after an unfavorable ruling in another case, not this one. The existence of the additional pending charges relating to the Holley murder were not admissible in this case and any evidence relating to them would undeniably be grounds for reversal. Thus, the State could not establish a sufficient nexus to this crime to admit the suicide attempt as evidence of flight without using inadmissible evidence pertaining to the Holley murder. Nor could Mr. Bolin, as defense counsel pointed out, explain the suicide attempt and establish that it was not evidence of consciousness of guilt in this case without divulging to the jury the existence of other pending murder charges. Under the circumstances, the evidence was inadmissible.

Once improperly admitted, the error cannot be said to be harmless. First, Terry referenced the date of the attempt, eight years prior to

the current trial. This was harmful in that it implied to the jury that this case might have been tried before due to the extraordinary length of time between the note and this trial. Secondly, suicide is probably the most extreme measure of flight that an individual can take and a juror is likely to believe that someone would not take such an extreme step unless they were truly guilty. It cannot be said that this error did not affect the jury's decision. The erroneous admission of this inflammatory evidence is reversible error requiring a new trial.

ISSUE VI

THE PENALTY JURY RECOMMENDATION WAS TAINTED BECAUSE EVIDENCE ABOUT BOLIN'S CONVICTION FOR ANOTHER MURDER WAS PRESENTED BEFORE THE JURY AND THIS CONVICTION HAS SINCE BEEN VACATED.

Lieutenant Gary Lester Kling of the Pasco County Sheriff's Office testified for the State during penalty phase concerning the details of the homicide of Terry Matthews for which Bolin had been previously convicted. (V10,675-81) Appellant specifically objected to two aspects of Kling's presentation, introduction of photographs showing the wounds suffered by Matthews and hearsay testimony about what Philip Bolin, an alleged eyewitness, told Kling about the details of the homicide. V10,679)

Defense counsel argued that the prejudicial impact of the photos outweighed their relevance under section 90.403 of the Florida Evidence Code.

With respect to Philip Bolin's statements to Lieutenant Kling about the Matthews homicide, Appellant recognizes that this Court recently wrote:

> We reaffirm our precedent allowing a neutral witness to give hearsay testimony as to the details of a prior violent felony because it tends to minimize the focus on the prior crime. However, we caution both the State and trial courts against expanding the exception to allow witnesses to become the conduit for hearsay statements made by other witnesses who the State

> chooses not to call, even though available to testify.

Rodriguez v. State, 25 Fla. L. Weekly S89, 94 (Fla. February 3, 2000). Although the State called Philip Bolin when Appellant was tried for the Matthews homicide, Philip was a witness who had several times recanted his testimony. He was extensively impeached by both the State and defense during the trial of the Matthews homicide. Accordingly, in the case at bar, Appellant did not have a fair opportunity to rebut Kling's testimony because he couldn't present Philip Bolin's prior inconsistent statements to this jury. A similar error was found reversible by this Court in Dragovich v. State, 492 So. 2d 350 (Fla. 1986).

Shortly after sentencing in the case at bar, this Court reversed Bolin's prior conviction for the murder of Terry Matthews and ordered another retrial. See, Bolin v. State, 736 So. 2d 1160 (Fla. 1999). Therefore, the jury was not only allowed to consider the prejudicial photographs and the tainted hearsay regarding the Matthews conviction; they shouldn't have even heard about the conviction at all.

In Long v. State, 529 So. 2d 286 (Fla. 1988), this Court ordered a new penalty trial when the jury had been exposed to evidence of a prior murder conviction which was later vacated on appeal. Long, like Bolin, still qualified for the prior violent felony aggravating circumstance, but this Court emphasized that the reversed conviction was the

> only prior <u>murder</u> conviction available for use in the sentencing proceeding, although there were other criminal convictions of violent crimes presented in the penalty phase.

529 So. 2d at 293. Therefore, evidence of the reversed murder conviction could not be considered harmless error.

Other cases where this Court has reversed for a new penalty trial because the jury heard improper evidence in aggravation include <u>Colina v. State</u>, 570 So. 2d 929 (Fla. 1990); <u>Preston v. State</u>, 564 So. 2d 120 (Fla. 1990); <u>Robinson v. State</u>, 487 So. 2d 1040 (Fla. 1986); <u>Trawick v. State</u>, 473 So. 2d 1235 (Fla. 1985), <u>cert.denied</u>, 476 U.S. 1143 (1986); and <u>Dougan v. State</u>, 470 So. 2d 697 (Fla. 1985). Both these authorities and the Eighth Amendment, United States Constitution require reliability in capital sentencing. See, <u>Johnson v. Mississippi</u>, 486 U.S. 578 (1988). In accord with those cases, and especially <u>Long</u>, this Court should grant Bolin a new penalty proceeding before a new jury.

CONCLUSION

Based on the foregoing argument, reasoning, and authorities, Oscar Ray Bolin, Jr., Appellant, respectfully requests this Court to reverse his convictions and remand for a new trial as requested in each Issue of this Brief.

APPENDIX

	PAGE NO.
1. EXHIBIT 1	1-3
2. EXHIBIT 2	1-5a
3. EXHIBIT 3	1-2
4. EXHIBIT 4	1-8

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Robert Butterworth, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4739, on this ___ day of _______________, 2001.

Respectfully submitted,

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