IN THE SUPREME COURT OF FLORIDA

OSCAR RAY BOLIN, JR. :

Appellant, :

vs. : Case No. 80,794

STATE OF FLORIDA, :

Appellee. :

_____ :

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

INITIAL BRIEF OF APPELLANT

JAMES MARION MOORMAN
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TENTH JUDICIAL CIRCUIT

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PRELIMINARY STATEMENT

The record on appeal consists of documents filed with the clerk of court, pretrial and posttrial proceedings which are numbered 00001 - 00724 followed by transcripts of the trial, numbered 1 - 1229. References to the documents in the clerk's file, the pretrial and posttrial proceedings will be designated "R", followed by the appropriate page number. References to the trial transcripts will be designated "T", followed by the appropriate page number.

STATEMENT OF THE CASE

A Pasco County grand jury returned an indictment on February 11, 1991 charging Oscar Ray Bolin, Jr., Appellant, with murder in the first degree (R1-2). Prior to trial, the State gave notice of an intent to introduce Williams Rule evidence at trial (R31). A hearing on the State's motion to admit Williams Rule evidence was held before Circuit Judge Stanley Mills on June 12, 1992 (R267-337). On June 29, 1992, the trial court entered an order conditionally granting the motion (R70-72).

The State also moved for an order to perpetuate the testimony of a witness, Cheryl Coby, who had been married to Bolin at the time when the homicide took place (R79). At a hearing held August 17, 1992, the court ruled that the State could take a deposition to perpetuate Coby's testimony (R227). The court also ordered that Coby's original deposition be sealed in the court file (R228). On August 31, 1992, the deposition of Coby (now Cheryl Haffner) was taken with the trial judge present (R401-469). Defense counsel objected to the portion of the testimony which contained matter subject to the husband/wife evidentiary privilege (R456-7). The court noted that a judge in Hillsborough County had previously ruled that Bolin waived his spousal privilege (R459-60). In accord with the prior ruling, the court found that the privilege had been waived and could not be reasserted at this point (R465-6). The deposition was ordered sealed to prevent public dissemination (R467-8).

Trial was held before Circuit Judge Stanley Mills and a jury on October 5 through 14, 1992 (R472-675, T1-1229). During jury selection, Appellant moved for a mistrial on the ground that the prosecutor repeatedly mentioned that Appellant had murdered other young girls (R583-4). The trial judge denied the motion for mistrial and noted that the collateral crime evidence would be admissible subject to the State's connecting the cases to Appellant (R586-7). At trial, defense counsel renewed his objection to Williams Rule evidence every time that the State offered it (T187, 394, 495, 511, 514, 526, 532, 562-4, 568-9, 624-8, 630-4, 638-9, 686, 747). When defense counsel moved for judgment of acquittal following the State's case, he also moved for a mistrial based on dissimilarity of the collateral crime evidence and because it became a feature of the case (T760-1). The trial court denied both motions (T760-1, 766).

During the trial proceedings, the jury submitted four written questions to the trial judge (T427-8). After a discussion of the questions, defense counsel moved for a mistrial on the basis that the questions indicated that the jury was already deliberating before all of the evidence had been received (T432). The court denied the motion for mistrial and also declined to question the jurors about their conduct (T432). Later, after both the State and defense rested their cases, the judge allowed the jury to go home for the weekend (T759, 762-3). When the jury reassembled on Monday, Appellant requested that the court inquire whether any of

the jurors had heard or read about the case over the weekend (T790). The court declined to do so in absence of any evidence of improper juror conduct (T791).

The jury returned a verdict of guilt to first degree murder as charged (T855, R119).

In the subsequent penalty trial, a police detective was permitted, over defense objections to hearsay and confrontation clause violation, to testify about an incident that Appellant's stepbrother, Philip Bolin, had told him about (T967-70). The jury recommended that Bolin be sentenced to death (R157, T1218).

On October 30, 1992, Judge Mills conducted sentencing proceedings (R676-707). Appellant's motion for new trial was heard and denied (R174-6, 678-90). After hearing argument, the court recessed to prepare a written sentencing order (R704). A sentence of death was imposed (R191-2, 705). In his written "Findings in Support of Sentence of Death", the judge found three aggravating circumstances proved (prior violent felony, HAC, and CCP) (R178-80, see Appendix). The court considered three statutory and four non-statutory mitigating circumstances, but gave each of them little weight (R181-3, see Appendix).

Appellant filed a timely Notice of Appeal on November 3, 1992 (R190). Jurisdiction lies in this Court pursuant to Article V, section 3 (b)(1) Fla. Const. and Fla. R. App. P. 9.030 (a)(1)(A)-(i).

STATEMENT OF THE FACTS

GUILT OR INNOCENCE PHASE

Sometime after midnight on December 5, 1986, Philip Bolin answered a knock on the door and found his stepbrother Oscar Ray Bolin, Appellant, at the doorstep (T458). Appellant asked Philip to get dressed and come outside (T459). When he got outside, Philip heard strange sounds, which made him think at first that his dog had gotten run over (T459). Philip followed Appellant to the side of Appellant's camper, where he discovered that the sounds were coming from a bundle wrapped in a white sheet (T460). Ray told Philip that it was a girl who had been shot in a drug deal at the Land O' Lakes post office (T461).

Appellant then got a garden hose and doused the bundle with water (T461-2). He took a wooden club, possibly a tire buddy, off the wrecker he was driving and started "thumping" the body (T462-3, 467). The noises stopped (T464). Ray then doused the body again with the water hose (T463-4). Appellant asked Philip to help him load the body onto his wrecker (T464). When Philip complied, he noticed that the feet were covered by stockings but the shoes were missing (T465).

Around 10:00 a.m. that morning, a female body was discovered about 1/2 mile from the Bolin residence (T222, 225). The body was fully clothed except for the shoes and was wrapped in a white sheet marked St. Joseph's Hospital (T223-4, 240, 281, 336). Homicide investigator Kenneth Hagin of the Pasco County Sheriff's Office

testified that it struck him "odd" that the victim's clothing was wet because it had not rained (T337). The medical examiner, Edward Corcoran, M.D. determined that death was caused by a combination of five stab wounds and blunt trauma to the head (T282-4).

The victim, identified as Teri Lynn Mathews, appeared on a videotape taken by a surveillance camera at the Land O' Lakes post office during the night in question (T292, 317). Her automobile was found in the parking lot of the post office with the headlights still on (T297, 303). The car was unlocked and her purse was sitting on the front seat (T303). The victim had apparently stopped at the post office to pick up mail from the box she maintained there with her parents (T296, 325, 329-30). Bolin also had a post office box at the Land O' Lakes post office (T325, 724-5).

A semen stain found on the pants that Teri Mathews was wearing was submitted to Cellmark Diagnostics for DNA analysis (T541, 544). It was compared to a blood sample taken from Appellant (T543-4, 547-51). Forensic scientist David Walsh testified that there was a match between the two (T551-2).

Further evidence tending to incriminate Bolin included testimony by his former employer that Appellant drove a wrecker for them during December 1986 (T438). On December 4, 1986, Bolin was dispatched to a service call in Pasco County (T439-40). He should have returned with the wrecker to Tampa by late afternoon, but did not report until 10:00 a.m. the following morning (T443-5). Tire tracks at the scene where Teri Mathews' body was discovered were made by a vehicle having dual wheels on the rear, consistent with

the wrecker Bolin was driving that night (T341, 351-2, 355, 360).

The deposition of Appellant's ex-wife, Cheryl Haffner, which was read into evidence, included her admission that she brought hospital property home with her after her stay in St. Joseph's Hospital during 1985 (T692). She also said that sometime after this homicide while she was riding with Bolin, he pointed out the spot where Mathews' body was found (T727).

The greater part of the case presented by the State consisted of evidence linking Bolin to two other homicides committed in Hillsborough County during 1986. Captain Gary Terry of the Hillsborough County Sheriff's Office testified that he headed up a task force created in July 1990 to examine links between the murders of Natalie Holley, Stephanie Collins and Teri Mathews (T487-8). He pointed out locations on a map of Hillsborough County where events related to the Holley and Collins homicides had occurred (T491, 496-7). He detailed similarities between the victims and the manner in which they were killed (T497).

On January 25,1986, the body of Natalie Holley was discovered in an overgrown orange grove (T511). Over defense objection, photographs of the victim came into evidence (T514-8). Dr. Lee Miller, an associate medical examiner testified that Holley was stabbed multiple times in the chest and neck (T533). Tests for acid phosphatase were negative except for the mouth where the results were equivocal (T535-6). There was no evidence of a sexual attack (T537). Over Appellant's objection, the clothing and shoes

found on the body of Natalie Holley were admitted into evidence (T563-5).

Deputy sheriff Ron Valenti testified that around 1:00 a.m. the morning of January 25, 1986, he encountered two vehicles parked on Smitter Road (T521-2). He stopped parallel to the occupied car and rolled down his passenger side window (T522-3). The male driver told Valenti that the woman passenger was taking him to get gas (T523). The woman told the deputy that everything was fine (T523). Valenti pointed out Bolin in court as the man he saw that night in 1986 (T524). When Valenti was shown a photograph of Natalie Holley, he said "the similarity was very close to what she looked like" (T525).

On December 5, 1986, a body was found 10-15 feet from the side of Morris Bridge Road in Hillsborough County (T566-7). Over Appellant's objection, photos of the heavily decomposed body were admitted into evidence (T568-71). Former chief medical examiner, Peter Lardizabal testified that the body was identified as that of Stephanie Collins, who had been missing for a month (T397, 402). He determined that the cause of death was multiple blunt trauma to the head (T400). Although there were slits in Collins' clothing, the decomposed state of the body prevented Lardizabal from determining what stab wounds might have been inflicted (T401, 403-4).

FBI special agent Michael Malone, senior examiner of the hair and fibers unit of the FBI laboratory, testified that he received fibers from the three homicides for testing (T587-8, 590). He

found dark black wool fibers, consistent with coming from the same source, on all three victims (T593-4). He also found red wool fibers in all three cases which were consistent with coming from the same source (T599-600). He identified a head hair found on the body of Stephanie Collins as consistent with coming from Bolin (T602). However, Malone conceded that he couldn't connect Bolin in any way to a source for the red and black fibers (T606-7).

The deposition of Cheryl Haffner, read into evidence over Appellant's multiple objections, provided the most incriminating portion of the State's case in regard to the homicide victims Holley and Collins (T659-737). According to Haffner, on the evening of January 24, 1986, she and Bolin (her husband at that time) drove to a Burger King restaurant and sat in the parking lot drinking coffee (T694-5). They were facing the Church's Fried Chicken restaurant where Natalie Holley worked (T695-6). Appellant said he was "scoping the place out" (T696). They returned home, watched television and the witness went to bed (T697).

In the early morning of January 25, Appellant awakened her, saying "he had something he had to show me" (T698). Bolin was changing his shoes and she noticed that there was blood on the tennis shoes he took off (T698-9). He emptied out the contents of a purse on the bed and told his wife that it belonged to the manager of the Church's Chicken (T699-700). Appellant explained that he had tried to rob the manager of the night's receipts, but that she did not have them (T700). Bolin took $75 from the wallet which was in the purse (T700-1).

Next, the witness accompanied Appellant to the site where the manager's car was parked (T702). On the way, Bolin explained that he had intended to rob the manager, but he had to kill her because she could identify him (T702). Bolin said that after he had got the victim to pull over to the side of the road, a police officer drove up (T703). He put a gun in the manager's ribs and told her to get rid of the officer (T703). When she told the policeman that she had car trouble and that Bolin was helping her, the officer left (T703). Bolin said that he then took the manager to an orange grove where he stabbed her seven times (T703).

When Bolin and his wife arrived at the location where the manager's car was found, Bolin took a towel and wiped down the entire inside and outside of the vehicle (T704-5). From photographs, the witness identified Holley's car as the one which Bolin had wiped down (T706). When Bolin finished, he and Cheryl drove north on the interstate to the Route 52 exit (T708). During this drive, Bolin threw his tennis shoes and the manager's purse out the window (T708). They returned home where Appellant wiped down the Pontiac Grand Prix belonging to the couple (T708-9).

The witness never told anyone about this incident until she had divorced Bolin and was planning to get remarried to Danny Coby in April 1989 (T709). She told Coby because she "felt he had a right to know" (T709-10). In July 1990 she was questioned by detectives from the Hillsborough County Sheriff's Office, but initially denied that she knew anything (T710). Later that evening, she told the detectives what she knew (T710).

Turning to the homicide of Stephanie Collins, Cheryl Haffner testified that on November 5, 1986, she was at a Waffle House restaurant with friends (T712-3). Between 7 and 8 p.m., Bolin came in and joined them (T713). Then Bolin insisted that she leave with him because there was "something important that he needed to talk to me about" (T713-4). The witness left with Appellant in his black and gray Ford pickup (T711, 714).

As they drove, Bolin told his wife that there was a dead body in the travel trailer where they had been living (T714). He gave three different stories as to how the body happened to be there (T 715). In the first version, Bolin was discussing a plan to kidnap a boy with another man when the other man's girlfriend overheard them (T715). The other man killed the girl and then Bolin killed him (T715). The second version was similar except that Bolin killed the girl after she started screaming (T715). In the final version, Bolin said that he killed the girl because she could identify him and he would be in a lot of trouble (T715). Appellant said that he hit the girl over the head and then stabbed her (T715).

When Bolin and his wife arrived at the travel trailer, she stayed in the truck compartment while he went into the trailer (T716). Appellant returned with a bundle over his shoulder wrapped in a blue quilt (T717). The witness said that it appeared to be a human being (717). Bolin put the body in the back of the pickup (T718). Then he went back into the trailer for about ten minutes

(T719). When Bolin returned to the truck, he said that he had cleaned up the trailer the best he could (T719).

The couple then drove out of Tampa on Morris Bridge Road (T719-20). Bolin stopped the truck on the roadway, took the body out of the back and threw it in a ditch (T720-1). He tested to see that the headlights wouldn't shine on the blanket that the body was wrapped in (T721). Then the witness and Bolin returned to the travel trailer (T721). This time, she went inside and saw that everything was wet in the bathroom (T721-2). She saw what appeared to be blood on the curtains, the ceiling, the walls and the carpet (T722). Her butcher knife, its handle wet, was by the sink (T722).

One month later, December 5, 1986, Cheryl was confined at Tampa General Hospital when Appellant came to visit her (T723). They were watching a television newscast about the discovery of Stephanie Collins' body when Bolin exclaimed, "That's her, the girl in the travel trailer" (T723-4).

PENALTY PHASE

In the subsequent penalty trial, a Wood County, Ohio detective testified about Bolin's convictions in that state (T952-61). In 1987, twenty-one year old Jenny LeFever finished her shift as a fuel clerk at a Truck Stops of America location about 12:30 a.m. (T953, 956). As she was getting into her car, Bolin forced his way in at gunpoint (T953). He drove the car about a mile and then marched the victim into a truck occupied by two other men (T953). The victim was forced to disrobe in the sleeper compartment of the

truck (T954). During the next five hours as the truck was being driven into Pennsylvania, Bolin repeatedly raped LeFever (T954-5, 958-9). She was eventually turned loose in a field (T955).

While Bolin was incarcerated in the State of Ohio, he hid himself in the closet of an exercise room (T956). With a metal pipe from the exercise equipment, he attacked a jailer in an escape attempt (T956-7). The jailer was hospitalized; but other inmates subdued Appellant and thwarted his escape (T954).

The certificates of conviction for the two Ohio offenses were entered into evidence (T958). Also, the certificates of conviction for the offenses involved in the Holley and Collins homicides came into evidence (T964-5).

Over objection, Sergeant Gary Kling was permitted to testify about an incident that Philip Bolin had recounted to him (T966-70). Philip said that around Thanksgiving of 1986 he was a passenger in a truck being driven by Appellant (T968-9). When they saw a young female jogger, Appellant told his brother to take a gun, poke it in the girl's ribs, and force her into the truck (T969). Philip refused (T969). According to Detective Kling, Appellant then belittled Philip, boasting that he had "done it several times in the past" (T969).

The sole defense witness was Dr. Robert Berland, a forensic psychologist (T974-1088), In the course of evaluating Bolin, he administered two psychological tests, the Minnesota Multiphasic Personal Inventory and the Wexler [sic] Adult Intelligence Scale (T985). The results of the MMPI showed elevated schizophrenia and

paranoia scales (T1001). Also, Bolin scored quite high on the mania scale, suggesting that he was "energized because of some psychological defect in [his] brain" (T1001). Berland concluded that the MMPI profile showed evidence of both sociopathic thinking and biological mental illness (T1002).

The doctor testified that the WAIS test was useful not only as a measure of intelligence, but also as a reliable indicator of brain damage (T1013). Bolin scored an estimated full scale IQ of 99, placing him right at the average for intelligence (T1015). Dr. Berland found it significant that there was a 37 point difference between Bolin's highest score on the subtests and his lowest score (T1016). This wide difference suggests that Bolin once functioned at a higher level before brain injury reduced his capabilities in many areas (T1016-7).

In addition to the testing, Dr. Berland conducted a clinical interview of Appellant (T1017). Bolin admitted having some hallucinations and delusions which are commonly observed in mentally ill people (T1019-21). He acknowledged episodes of hypomania and depression (T1021-2). Dr. Berland said that Bolin's thinking was organized and that he "is able to present a normal appearance when you look at him" (T1024). Consequently, Berland classified Bolin's mental illness as mild to moderate (T1024).

Regarding brain damage, the doctor listed seven incidents during Bolin's life which could have injured the brain (T1025-29). These included heavy alcohol use by his mother during pregnancy, an automobile accident where his head went through the windshield,

being knocked unconscious at age eight or nine when he hit a rock pile after going down a steep hill in a wagon, and an attempted suicide in jail at age 17 where Bolin was revived after being without oxygen for six to seven minutes (T1025-7).

Dr. Berland also stated that Bolin's upbringing was disorganized, violent and abusive (T1029). As a child, he was moved frequently between living with his mother and living with his father (T1030). He suffered beatings from his father (T1030). When Appellant was five or six, his father shot a gun at his feet during a domestic dispute (T1030). Later, the father locked the family in the house, doused it with gasoline, and tried to set it on fire (T1031).

The doctor found a history of mental illness in both of Bolin's parents (T1032). Appellant's sister had also been admitted to a mental hospital (T1032). Family members and other lay witnesses reported that Bolin had a longstanding pattern of psychotic disturbance (T1035). Dr. Berland concluded that Bolin was suffering from a mental or emotional disturbance when he committed the homicide (T1039). Although Bolin could appreciate the criminality of his conduct, his ability to conform his conduct to the law was impaired by mental illness (T1042).

The State presented rebuttal testimony from Sydney Merin, a clinical psychologist (T1090-1123). Dr. Merin testified that he reviewed results from MMPI tests given by Dr. Berland, depositions of Dr. Berland and police reports (T1093). He disagreed with Dr. Berland's conclusion that Bolin was psychotic (T1094). Merin

described the MMPI results as showing "odd or peculiar thought processes" best designated as a character disorder (T1094). He said there was reason to question whether the person who took the MMPI was exaggerating certain types of mental disturbance (T1099). Dr. Merin stated that the combination of scores on Bolin's MMPI was most frequently found in antisocial personalities (T1100-05).

The witness further testified that despite the reports that Bolin's mother drank heavily during her pregnancy, there was no evidence that Bolin suffered from fetal alcohol syndrome (T1108). Dr. Merin disagreed with Dr. Berland's assessment of the WAIS results (T1108-1111). Rather than indicating that the rest of his brain functioning had been impaired, Bolin's particularly high score on one subtest merely "means that he may like numbers" (T1111).

Dr. Merin said that he had no reason to think that Bolin was psychotic or suffering from a biological mental illness in 1986 (T1114-6). He concluded that Bolin was "behaviorally impaired, but not mentally impaired" (T1119).

SUMMARY OF THE ARGUMENT

Due process provisions of the federal and state constitutions do not permit the State to misrepresent evidence in order to obtain a criminal conviction. At bar, in a pretrial hearing on the admissibility of Williams Rule evidence, the State misrepresented evidence to make the three homicides appear more similar. The trial court's findings of fact in an order admitting the collateral crime evidence relied upon four similarities, two of which were bogus and based upon State misrepresentations. The record reflects that during trial, the judge showed misgivings about allowing the collateral crime evidence. Consequently, the misrepresentations were material and violated Appellant's rights.

Even when collateral crime evidence is properly admissible, the prosecution cannot be permitted to make collateral crimes the "feature" of the case. From the beginning, the prosecutor emphasized to the jury that Bolin was a serial killer. Much of the testimony and evidence admitted during trial bore no relevance whatsoever to the homicide for which Bolin was being tried. The prosecutor created reversible error by presenting collateral crime evidence to demonstrate Appellant's bad character rather than prove material issues of the case.

In order for collateral crime evidence to be admissible on the issue of identity, the crimes must bear more than a general similarity. The homicides of Natalie Holley and Stephanie Collins did not exhibit unique characteristics shared by the homicide for which

Bolin was tried here. The collateral crimes should not have been admitted into evidence at all.

A list of written questions submitted by the jury during trial suggested that the jurors might be engaging in premature deliberations. The judge denied defense motions for mistrial and to inquire of the jurors to ascertain whether discussion had occurred and whether Bolin could have been prejudiced. Later, the court also denied a defense request for inquiry of the jurors as to whether they had been exposed to any media publicity about the case during their weekend recess. The court's failure to inquire of the jurors under these circumstances denied Bolin a fair trial.

The trial judge followed an earlier ruling by a Hillsborough County circuit judge that Bolin waived his marital communication privilege by deposing his ex-wife. The propriety of the Hillsborough ruling is currently pending before this Court in Case Nos. 78,468 and 78,905. If this Court rules in Appellant's favor in this issue in Case Nos. 78,468 and 78,905, his conviction in the case at bar should also be reversed because of the extensive and highly prejudicial testimony about marital communications.

Although Philip Bolin was a witness at the guilt phase of Appellant's trial, the State did not call him as a penalty phase witness. Instead, on a theory that hearsay is admissible, Sergeant Kling testified about an incident reported to him where Appellant allegedly suggested to Philip that he should abduct a female jogger by sticking a gun in her ribs. Under prior decisions of this Court, due process including the Sixth Amendment right of confron-

tation applies to the penalty phase of a capital prosecution. The defense could not effectively cross-examine Sergeant Kling or rebut his testimony because Kling had no first hand knowledge about the incident. Furthermore, the testimony was irrelevant to any aggravating circumstance; it merely proved bad character.

The limited evidence available surrounding the homicide of Teri Matthews suggests a chance encounter at the Land O'Lakes post office precipitated the episode. There is no evidence to prove a careful plan or prearranged design to the killing. Therefore, the cold, calculated and premeditated aggravating circumstance was erroneously considered by the jury and found by the sentencing judge.

Finally, the trial judge should not have instructed the penalty jury that Bolin's escape conviction from Ohio was a prior violent felony. Escape, like burglary, is a felony which may or may not be violent, depending upon the circumstances. Any finding about its violent or nonviolent character should have been made by the jury under appropriate instruction. Viewed in combination with the other penalty phase errors, this instructional error was not harmless.

ARGUMENT

ISSUE I

APPELLANT WAS DENIED DUE PROCESS OF LAW WHEN THE STATE OBTAINED A FAVORABLE PRETRIAL RULING ADMITTING COLLATERAL CRIME EVIDENCE BY MISREPRESENTATION OF THE ALLEGED SIMILARITIES CONNECTING THE COLLATERAL CRIMES.

In Miller v. Pate, 386 U.S. 1 (1967), the United States Supreme Court reversed a state conviction where the state's case included physical evidence consisting of a pair of undershorts allegedly containing dried bloodstains consistent with the victim's blood type. In fact, it was known to the prosecution that the stains on the undershorts came from paint, not blood. The Miller court affirmed the principle that the Due Process Clause of the Fourteenth Amendment cannot countenance a criminal conviction obtained by the prosecution's knowing misrepresentation of evidence.

The prosecution's failure to correct testimony from a state witness known to be false is also a due process violation. Napue v. Illinois, 360 U.S. 264 (1959); Alcorta v. Texas, 355 U.S. 28 (1957). Later in Giglio v. United States, 405 U.S. 150 (1972), this principle was extended to attribute responsibility to the prosecutor for failure to correct false testimony even where the use was negligent rather than knowing.

At bar, the prosecutor's misrepresentation of evidence did not occur before the jury, but before the judge at a pretrial hearing.

Appellant asserts a due process violation because the misrepresentation was a material factor in the trial court's ruling allowing evidence of other crimes committed by Appellant to be presented before the jury at trial. It should be noted that due process principles have been applied to vacate a conviction where the State's misrepresentation occurred before the grand jury and the defendant subsequently pled guilty. People v. Pelchat, 62 N.Y.2d 97, 464 N.E.2d 447 (1984). Consequently, due process can be violated by prosecution misrepresentation even if the conviction does not directly rest on the false testimony or evidence.

In addition to Fourteenth Amendment due process, Appellant relies upon Article I, section 9 of the Florida Constitution, which this Court has construed more broadly than federal due process. See, State v. Williams, 623 So. 2d 462 (Fla. 1993); Glosson v. State, 462 So. 2d 1082 at 1085 (Fla. 1985).

In the case at bar, a pretrial hearing on the admissibility of other crimes, or Williams Rule, evidence was held June 12, 1992 (R287-337). The court heard testimony from Corporal Lee Baker of the Hillsborough County Sheriff's Department (R291-311) and arguments by counsel before deciding to defer ruling (R337). On June 29, 1992, the court released a written "Order Conditionally Granting State's Motion to Admit Williams' Rule Evidence" (R70-2,A1-3). In finding that a "unique and unusual pattern of criminal activity" which would permit evidence of the collateral crimes to be introduced, the trial judge wrote:

> What are the odds that three young women would be abducted from their cars and stabbed to

> death in the same general geographic area, in the same year and have in common the following factors: (1) All have matching black fibers on their bodies with two of them also having matching red fibers on their bodies. (2) Two of the decedents were missing their shoes. (3) Two of the decedents were wrapped in hospital items. (4) The same two decedents that were wrapped in hospital items were last seen near State Road 41, a road which runs through both Hillsborough and Pasco Counties.

(R71,A2). In reality, two of the four factors upon which the court relied (Nos. 2 and 4) were nonexistent and based upon misrepresentations by the State.

A. Missing Shoes

It is undisputed that the victim in the case at bar, Teri Matthews, was found without shoes on her feet (T223). With regard to the Natalie Holley homicide, Corporal Baker testified at the pretrial Williams Rule hearing:

> Q. Now, could you tell us about Natalie Holley, when her body was located, was there anything missing that your personnel or yourself could observe?
>
> A. I believe her shoes and her purse was missing.

(R299). Based upon this testimony, the trial judge made his finding that "Two of the decedents were missing their shoes" as similar fact evidence (R71,A2).

However, at trial, the State actually introduced into evidence the shoes found on the body of Natalie Holley as State's Exhibit 28[1] (T561,563-4). The prosecutor knew or should have known that

[1] Listed as exhibits TT and SS for identification.

one of the prime similarities upon which the trial court relied in allowing the collateral crime evidence was false -- yet he did nothing to correct the State's misrepresentation.

B. Proximity to State Road 41

Initially, there seems to be some confusion over what road is meant. Both State Road 41 and U.S. Highway 41 run through both Hillsborough and Pasco Counties. However, the only connection which either road seems to have with respect to the homicides is that the Land O'Lakes post office, where the car of Teri Matthews was found, is located on U.S. 41 in Pasco County (T321).

Nevertheless, the following testimony was adduced at the hearing:

> Q. Okay. Is there any connection that you're aware of between the street locations, that you're aware of?
>
> A. As far as the Collins girl, no. The Matthews and Holley girls -- strike that. The Collins girl and the Matthews girl were both located near what would be known as State Road 41, which they were last seen at.
>
> Q. Okay. And that's Stephanie Collins and Teri Lynn Matthews
>
> A. Yes.

(R304-5). The prosecutor followed this up in his argument by stating, "The Collins and Mathews girls, the geographical location is all 41" (R324).

Appellant concedes that Teri Matthews was last seen by the camera at the Land O'Lakes post office on U.S. Highway 41. As Corporal Baker testified, Collins was last seen at an Eckerds

drugstore in a mall on Dale Mabry Highway in northwest Hillsborough County (R299). Her body was discovered on Morris Bridge Road in northeast Hillsborough County (R297-8). Accordingly, this is another uncorrected State misrepresentation upon which the trial judge relied in ruling the Williams Rule evidence admissible.

C. Prosecutor's Argument

In his argument at the pretrial hearing, the prosecutor exaggerated the similarity between the manner of killing the three victims. He represented:

> Judge, if you start off by looking first to the similarities as to cause of death, we had Natalie Holley, she died from stab wounds. We had Collins' cause of death, multiple stab wounds. Matthews' cause of death, multiple stab wounds.

(R323). Yet at trial, medical examiner Lardizabal testified that the cause of Collins' death was "severe multiple blunt impacts of the head" (T400). Matthews died from a combination of blunt trauma and stab wounds; but the stab wounds alone would have only been "possibly" fatal (T284). Thus, the trial judge's conclusion in his order that all the women were "stabbed to death" (R71) relies upon the prosecutor's misrepresentation.

D. Materiality

During the progress of the trial, the trial judge voiced misgivings about the Williams Rule evidence. At one point, the court said to the prosecutor:

> But that's what bothers me. We should never have got involved with the Williams Rule in this case at all. But I understand that it's your case to run.

(R502-3). Later, after the State had rested its case, the judge commented:

> Frankly, I'm not asking the State for a comment, but my guess is if they had to do it over again based on hindsight they might not mention the ruling Williams Rule, but in any event --

(R760). Although the trial judge did not accuse the prosecutor of misleading the court on the collateral crime issue, the judge's comments indicate that he probably would have changed his ruling admitting the Williams Rule evidence had he been correctly informed about its relation to the case at bar.

Ordinarily, a trial court's ruling on the admissibility of evidence enjoys a presumption of correctness on appeal and will not be reversed unless an abuse of discretion can be shown. Hall v. State, 568 So. 2d 882 (Fla. 1990) (expert witness testimony); Duest v. State, 462 So. 2d 446 (Fla. 1985) (photographs); Owen v. State, 560 So. 2d 207 (Fla.), cert.den., 498 U.S. 855 (1990) (ruling on motion to suppress); Martinez v. United States, 770 F.Supp. 621 (M.D. Fla. 1991) (admission of similar fact evidence). However, this presumption of correctness should not apply when the trial court's ruling was based in part upon prosecutorial misrepresentation. It especially should not apply where, as here, the trial

judge made repeated comments suggesting that he wished he had ruled differently. [2]

The only proper remedy is to grant Appellant a new trial without regard to whether Bolin's collateral crimes were sufficiently similar as to be otherwise admissible. Due Process cannot permit the State to benefit from its misrepresentation of evidence at the pretrial hearing. Nor can admission of collateral crime evidence be held harmless when it is "a focal point of the trial." See, State v. Lee, 531 So. 2d 133 at 137 (Fla. 1988). Bolin should now be awarded a new trial.

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[2] See e.g. T505 ("in any event, we're sort of tied up in Williams Rule now. Sometimes I wish we weren't").

ISSUE II

APPELLANT WAS DENIED A FAIR TRIAL ON THIS PARTICULAR CHARGE AND DUE PROCESS OF LAW BECAUSE THE PROSECUTION WAS PERMITTED TO MAKE THE COLLATERAL CRIMES EVIDENCE A FEATURE OF THE CASE.

From the outset, the State placed great emphasis on the facts of the other homicides for which Bolin had been convicted. During voir dire, the prosecutor make repeated mention of the homicides of Stephanie Collins and Natalie Holley as well as the victim in the case at bar (R569,582-3). This prompted one prospective juror to inquire, "Are we trying this defendant as a serial killer or just for one murder?" (R590). The trial judge echoed the prospective juror's sentiment when he exclaimed to the prosecutor midway through the trial:

> what are we trying him for and what is the nature? It sounds to me like the volume of evidence we are going to start ending up with two thirds of the evidence dealing with things that aren't really before us.

(T389).

As it turned out, fully one-third of the witness testimony was devoted to evidence solely connected to the homicides of Natalie Holley and Stephanie Collins (T395-405,510-38,558-86,620-46,689-724,731-7). Another sixty pages of testimony related the Holley and Collins homicides in some way to the case at bar (T487-507,587-612,738-48). This included testimony from the leader of the task force investigating the three homicides, Captain Terry (T487-507), and from the detective who accompanied Cheryl Haffner to the

various locations where events in the three homicides took place (T738-48). F.B.I. Agent Malone provided the only classic Williams Rule testimony when he linked fibers found on the three victims (T587-612).

The jury heard testimony solely connected to the Holley homicide from the medical examiner who performed the autopsy on her body (T530-8). Hillsborough County Sheriff's Deputy Ron Valenti testified about seeing Bolin parked beside the road on January 25, 1986 with an unidentified female who might have been Natalie Holley (T520-9). The clothing which Holley was wearing when she was killed was identified before the jury and admitted into evidence (T558-65). Numerous photographs of Holley's body, chain of custody testimony, and even photographs of vehicles belonging to Bolin and Holley came into evidence (T510-19,584-6,613,620-46).

A similar plethora of evidence about the Stephanie Collins homicide was presented. The medical examiner testified (T395-405). Several photographs of the body were admitted into evidence and the physical evidence was described (T566-83,620-46).

However, the most prejudicial testimony came from the deposition of Bolin's ex-wife, Cheryl Haffner. Haffner described in great detail her participation in coverup activities related to the Holley homicide (T691-710). She related Appellant's account of how he stopped Natalie Holley's car with the intention of robbing her and eventually stabbed her to death (T700-3). Haffner gave a blow-by-blow account of the removal of Stephanie Collins' body from the travel trailer she shared with Bolin and its disposal beside a

rural road (T711-23). She testified to three different explanations which Bolin gave her concerning the circumstances of the homicide (T715). She recounted Bolin's reaction when a television broadcast reported the discovery of Collins' body (T723-4).

By contrast, Haffner had very little to say relevant to the homicide at bar. She provided evidence that Bolin was at the Land O'Lakes post office at some time to pick up her social security check) (T724-5). She said that once when she was riding with him after the homicide, Appellant pointed to the area where Teri Matthews' body was found without admitting that he was responsible in any way (T727-8).

In sum, the prosecutor at bar conducted a three-ring circus where both the Holley and Collins homicides received equal billing with the Matthews homicide for which Bolin was actually being tried. Appellant does not concede that any of the collateral crime evidence was properly admissible (see Issue III, infra); but even if it were, it is reversible error when Williams Rule evidence becomes a feature rather than a sideshow of the case. Williams v. State, 117 So. 2d 473 (Fla. 1960).

The rationale of this Court's decision in Williams[3] is that where collateral crime evidence is admissible, the State may not "go too far in introduction of testimony about the later crime so that the inquiry transcend[s] the bounds of relevancy to the charge being tried." 117 So. 2d at 476. The trial may not become "an

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[3] Not to be confused with Williams v. State, 110 So. 2d 654 (Fla. 1959) which permits collateral crime evidence where relevant to issues other than criminal propensity.

assault on the character of the defendant whose character is insulated from attack unless he introduces the subject." 117 So. 2d at 476.

Under circumstances similar to those at bar, Florida courts have found reversible error. For instance, in Denson v. State, 264 So. 2d 442 (Fla. 1st DCA 1972), the court noted that the evidence of guilt was "almost conclusive." Nonetheless, the conviction was reversed because the prosecutor "parad[ed] before the jury a full review of the defendant's subsequent criminal conduct." 264 So. 2d at 442. Other decisions where extensive evidence of collateral crimes led to reversal include Long v. State, 610 So. 2d 1276 (Fla. 1992); Zeigler v. State, 404 So. 2d 861 (Fla. 1st DCA 1981); Matera v. State, 409 So. 2d 257 (Fla. 4th DCA 1982); and Matthews v. State, 366 So. 2d 170 (Fla. 3d DCA 1979). The Matthews court additionally noted that when collateral crimes become the feature of a trial, the defendant is deprived of due process under the Fourteenth Amendment, U.S. Constitution and Article I, sections 9 and 16, Florida Constitution.

In Randolph v. State, 463 So. 2d 186 at 189 (Fla. 1984), this Court suggested a test for determining whether collateral crime evidence exceeds permissible bounds. In affirming the defendant's conviction, the Randolph court wrote:

> Testimony was geared toward proving a material issue of the case rather than demonstrating Randolph's bad character.

463 So. 2d at 189.

A review of the case at bar shows that very little of the collateral crime evidence was relevant to any material issue of the Matthews homicide. The prosecutor was simply intent on impressing the jury with Appellant's bad character as a serial killer to ensure that the jury would return a verdict of guilty as charged. Appellant should not be granted a new trial where only evidence relevant to the Matthews homicide is admitted.

ISSUE III

THE COLLATERAL CRIME EVIDENCE SHOULD NOT HAVE BEEN ADMITTED BECAUSE THE HOMICIDES OF NATALIE HOLLEY AND STEPHANIE COLLINS WERE NOT SUFFICIENTLY SIMILAR TO THE CASE AT BAR AS TO BE ADMISSIBLE ON THE ISSUE OF IDENTITY.

In Peek v. State, 488 So. 2d 52 (Fla. 1986), this Court emphasized that collateral crime evidence does not become relevant and admissible merely because the offense is the same and it occurs in the same vicinity. This holding is particularly pertinent in the case at bar because the three victims were murdered in the Tampa Bay metropolitan area (population of nearly 2 million) over a period of almost eleven months. Unfortunately, other young women were also murdered during this time period in the Tampa Bay area.

The Peek court went on to discuss the appropriate test for admissibility of collateral crime evidence on the issue of the identity of the perpetrator. Quoting from Drake v. State, 400 So. 2d 1217 at 1219 (Fla. 1981), this Court wrote:

> [a] mere general similarity will not render the similar facts legally relevant to show identity. There must be identifiable points of similarity, which pervade the compared factual situations. Given sufficient similarity, in order for the similar facts to be relevant, the points of similarity must have some special character or be so unusual as to point to the defendant.

488 So. 2d at 55. Moreover, the trial judge must not only consider similarities between the crimes, he must consider the dissimilarities as well. Id., 488 so. 2d at 55.

Bearing these considerations in mind, we must compare and contrast the details of each of the two homicides admitted as Williams Rule evidence with the details of the Teri Matthews homicide.

A. Natalie Holley

The incident with Natalie Holley occurred January 25, 1986, over ten months before the homicide at bar (T697). Unlike the case at bar, Appellant's motive for stopping Holley was robbery (T702). He took her purse; unlike the present case where Matthews' purse was found in her car (T303).

The manner in which the Holley incident occurred was also dissimilar. Bolin followed Holley's car and got her to pull over to the side of the road by flashing his lights (T703). By contrast, the evidence at bar indicates that Matthews was probably intercepted while on foot in the parking lot of the post office (T297-8).

The manner in which the victims were killed is also different. Holley was simply stabbed to death (T533-4,703). While Matthews was also stabbed, the primary cause of death was blunt trauma (T284). More significantly, Holley was killed at the site where her body was found (T703). Matthews, on the other hand, was killed at one location and her body was dumped at another. Also, Holley's body was left uncovered while that of Matthews was wrapped in a sheet (T239,512).

The only specific detail of great similarity was the fiber evidence. F.B.I. Agent Malone testified that he found black wool

fibers on all three bodies which had consistent microscopic characteristics (T598-9). He also found a "very fine" red wool fiber on Holley's body which matched fibers from the other cases as to the dye characteristics (T596-7). Malone speculated that such fibers could have come from a blanket (T600).

However, the significance of this fiber evidence was diminished by the fact that the State could not show the source of the fibers. In fact, Malone conceded that the fibers could have come from different sources at different times (T606). There was no known connection between the fibers and Appellant (T606-7).

B. Stephanie Collins

Although Stephanie Collins was also a white female, she was a high school student almost ten years younger than Teri Matthews (T398). Collins was apparently abducted from a shopping mall parking lot during broad daylight as opposed to the apparent abduction of Matthews around 2:30 a.m. (T299).[4]

Admittedly, there are similarities in the manner that Collins and Matthews were killed and in the way that their bodies were dumped at sites several miles from where they were killed. However, the most glaring aspect of the Collins case is the total absence of evidence as to what occurred before she was murdered in Bolin's travel trailer. We do not even have any idea of what Appellant's motive was.

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[4] In Peek, supra, at 55, this Court found a significant dissimilarity between a crime committed at night and the collateral crime committed in daylight.

C. Conclusion

The dissimilarities between the Holley and Matthews homicides far outweigh the similarities. The standard set forth by this Court in Heuring v. State, 513 So. 2d 122 at 124 (Fla. 1987) is:

> The charged and collateral offenses must be not only strikingly similar, but they must also share some unique characteristic or combination of characteristics which sets them apart from other offenses.

This standard was not met by the different characteristics of the Holley and Matthews homicides.

As regards the Collins and Matthews homicides, there simply is not enough evidence available to conclude that the crimes were significantly similar and set apart from other homicides. This Court should compare the pervasive similarities found sufficient to admit the collateral crime evidence in Gore v. State, 599 So. 2d 978 (Fla. 1992) and Crump v. State, 622 So. 2d 963 (Fla. 1993) with the paucity of evidence in Drake v. State, 400 So. 2d 1217 (Fla. 1981). The circumstances at bar are closer to those in Drake than to those in Gore and Crump. Consequently, this Court should now hold that the admission of the collateral crime evidence against Bolin showed only bad character and propensity to murder young women rather than proof that he committed the charged offense of murdering Teri Matthews.

The error in admitting the collateral crime evidence cannot be harmless. A large part of the State's case was devoted to it (see Issue II supra). In Ellis v. State, 622 So. 2d 991 at 998 (Fla. 1993), this Court wrote:

> Whenever improper evidence becomes so prominent a feature of the trial, a court cannot find that the error was harmless beyond a reasonable doubt.

Accord, State v. Lee, 531 So. 2d 133 (Fla. 1988); State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986). Appellant should now be granted a new trial.

ISSUE IV

THE TRIAL JUDGE ERRED BY FAILING TO CONDUCT ANY INQUIRY WHATSOEVER INTO POSSIBLE JUROR MISCONDUCT WHEN APPELLANT'S REQUESTS FOR INQUIRY HAD A REASONABLE BASIS.

A. Premature Deliberations

During the State's evidence portion of the trial, the bailiff informed the judge that the jury asked why jurors couldn't ask questions in court (R421). The bailiff told the jury to put their questions in writing (R421). As presented to the court, the questions were:

> 1) Has Mr. Bolin entered a plea?
> 2) Did the man from Kales & Kales know who was driving the truck when the truck came in?
> 3) Can we play cards in the back room?
> 4) Can we help Cindy count the votes for Homecoming Queen for her school? This will be tomorrow?

(R118,T427-8).

Defense counsel expressed concern that the first two questions were not appropriate topics for discussion among the jurors at this time (T429). He suggested that the judge inquire of the jury as to how those questions happened to be written and whether there had been any discussion (T429-30). The court decided not to make an inquiry; but would merely instruct the jury (R432). Defense counsel's motion for mistrial was denied (R432).

The judge then addressed the jury in a rambling explanation of their role (T433-7). Regarding the first two jury questions, the judge stated:

> The first two questions deal with facts and matters that have been the results of questioning by the attorneys at this point. My problem is that I can't comment on that.

(T433).

The judge did allude to the possibility of premature deliberations:

> Then there's this second problem that in order to formulate the questions it might actually be necessary for jurors to talk about the case together, which as I've told you before, you certainly can't do until you have all the tools that you need to properly do your job in this case.

(T434-5). The court concluded:

> So, good questions. The first two I'm afraid I can't help you with except to explain to you again that these attorneys are quite experienced, they know what they can bring out and what they should not be bringing out. . . .

(T436-7).

The problem with the court's response to the jury questions is that he never ascertained whether the jury had discussed the case and whether Appellant could have been prejudiced. Moreover, the judge did not clearly admonish the jury that they should not be discussing the evidence presented until the case was submitted to them for deliberations.

There does not appear to be any Florida caselaw with regard to premature deliberations. However, in jurisdictions where this issue has been addressed, the likelihood of prejudice to the defendant has been noted. In Commonwealth v. Kerpan, 508 Pa. 418, 498 A. 2d 829 (1985), the Pennsylvania court expressly prohibited premature jury discussions. The Kerpan court explained:

> There are generally five reasons given for prohibiting premature jury discussion. First, since the prosecution's evidence is presented first, any initial opinions formed by the jurors are likely to be unfavorable to the defendant, and there is a tendency for a juror to pay greater attention to evidence that confirms his initial opinion. (Citation omitted)
>
> Second, once a juror declares himself before his fellow jurors he is likely to stand by his opinion even if contradicted by subsequent evidence. (Citation omitted)
>
> Third, the defendant is entitled to have his case considered by the jury as a whole, not by separate groups of cliques that might be formed within the jury prior to the conclusion of the case. (Citation omitted)
>
> Fourth, jurors might form premature conclusions without having had the benefit of the court's instructions concerning what law they are to apply to the facts of the case. (Citation omitted)
>
> Fifth, jurors might form premature conclusions without having heard the final arguments of both sides. (Citations omitted).

498 A. 2d at 831-2.

Similarly, in State v. Pierce, 346 S.E. 2d 707 (S.C. 1986), a murder conviction was reversed where the trial judge told the jurors that they could talk about the case during trial as long as they didn't make up their minds about the verdict. The court observed that once a juror declares an opinion, "he is apt to stand by his utterances to the other jurors in defiance of evidence." 346 S.E. 2d at 709. The "inherently prejudicial" instruction required reversal without any further proof that the defendant was denied a fair trial. See also, People v. Feldman, 87 Mich. App. 157, 274 N.W. 2d 1 at 2 (1978) ("Inclination would be to give special attention to testimony that confirms their prior expressions").

In the federal system, the court in Winebrenner v. United States, 147 F. 2d 322 (8th Cir.), cert.den., 325 U.S. 863 (1945) found that premature jury consideration of the evidence implicates both due process and the Sixth Amendment right to a fair trial by an impartial jury. Failure to admonish the jury that they should not discuss the case among themselves before they had heard all of the evidence, arguments of counsel and instruction by the court was held reversible error.

In Florida, premature jury discussions are barred by Section 918.06, Florida Statutes (1991), which provides in part:

> The court shall admonish the jury that it is their duty not to converse among themselves or with anyone else on a subject connected with the trial or to form or express an opinion on a subject connected with the trial until the cause is submitted to them.

At bar, the trial judge complied with the statute by initially instructing the jury not to form definite opinions or talk about the case before all the evidence, arguments of counsel and instructions on the law had been given to them (T200-01). However, when the jury later submitted the written questions, there was good reason to suspect that the admonition had been disregarded to some extent. It would seem that at least one juror had asked the others if they heard about a plea in the case or what the witness from "Kales and Kales" [sic] had testified to. Perhaps there were even full blown jury discussions of these points and others before the questions were submitted to the court. Since the trial judge declined to question the jurors about this, we simply can't know what happened in the jury room to prompt the written questions.

The circumstances at bar at most like those presented in United States v. Resko, 3 F.3d 684 (3d Cir. 1993). There, it came to light mid-trial that the jurors had been discussing the case among themselves. The trial judge declined to individually voir dire the jurors or grant a mistrial. A questionnaire asking for a "yes" or "no" answer to whether there had been discussions and whether the juror had formed an opinion as to guilt or innocence was distributed to the jurors. The jurors unanimously checked "yes" to discussing the case and "no" to forming a conclusion regarding guilt or innocence. On this basis, the trial judge ruled that the defendants had suffered no prejudice by premature deliberations.

On appeal, the Third Circuit termed the questionnaire "cursory" and found there was "no evidence in the record one way or the other regarding prejudice to the defendants" 3 F.3d at 690. The questionnaire revealed neither the nature nor the extent of the jurors' discussions. Consequently, the appellate court held that

> the district court erred by declining to engage in further inquiry -- such as individualized voir dire -- upon which it could have determined whether the jurors had maintained open minds.

3 F.3d at 691. Reversal was required because without evaluating the impact which the premature deliberations had on the jury, the court could only guess as to whether there was prejudice.

At bar, the trial judge similarly failed to conduct an adequate inquiry once the possibility of premature jury discussions was presented. Telling the jury that they asked good questions

which he couldn't answer was no substitute for finding out the nature of the jury discussions which led to the questions and the extent of any jury discussions of the evidence. As in Resko, the record only allow us to guess whether juror misconduct resulted in prejudice to Bolin.

Because Appellant's rights to a fair trial by an impartial jury and due process as guaranteed by the United States Constitution, Sixth and Fourteenth Amendments, and the Florida Constitution, Article I, sections 9 and 16 were disregarded by the trial court, Appellant should now be granted a new trial.

B. Publicity During Trial

When court reconvened after a weekend recess, Appellant requested the trial judge to inquire of the jury whether any juror had read or heard anything about the case during the weekend. The trial judge declined to do so saying:

> these folks have been instructed repeatedly and I think it would be counterproductive to basically insult them by letting them know that the Judge suspects them of somehow violating their duties as jurors. I see no evidence that any of them would have done that.

(T790).

In Robinson v. State, 438 So. 2d 8 (Fla. 5th DCA), rev.den., 438 So. 2d 834 (Fla. 1983), the trial judge also denied a defense request to inquire of the jurors whether they had read newspaper articles during the trial. The Robinson court held that when potentially prejudicial publicity arises after the jury has been

selected, the trial court must 1) inquire if any of the jurors had read the material, and 2) if any juror has been exposed, the juror must be questioned to determine whether the defendant has been prejudiced. Because the trial judge in Robinson failed "to take any action to determine whether the jurors had been exposed to and prejudiced by the articles" a new trial was ordered.

Other Florida courts have followed Robinson in finding reversible error when the trial court denied defense requests to inquire whether jurors had been exposed to media reports during trial. See, Kruse v. State, 483 So. 2d 1383 (Fla. 4th DCA 1986), rev. dism., 507 So. 2d 588 (Fla. 1987); Duque v. State, 498 So. 2d 1334 (Fla. 2d DCA 1986). The issue also arose in Derrick v. State, 581 So. 2d 31 (Fla. 1991) where this Court quoted with approval from Robinson and stated:

> the judge should have examined the subject news article when defense counsel first called it to the court's attention.

581 So. 2d at 35. However, the error in Derrick was cured when the judge later inquired whether any of the jurors had read any newspaper accounts during the trial and the jurors replied they hadn't.

At bar, in contrast to Derrick, the jurors were never asked if they had been exposed to any publicity during the trial or their weekend recess. Because the jury had been separated for an entire weekend after all of the evidence had been received in this capital case, the inherent danger of improper influences was great. Cf. Livingston v. State, 458 So. 2d 235 (Fla. 1984) (no requirement of jury sequestration prior to deliberations, but weekend recess dur-

ing deliberations was reversible error despite jurors' negative responses to inquiry about exposure to media coverage). Appellant's right to a fair trial under the Sixth Amendment, United States Constitution, and Article I, section 16, Florida Constitution was impermissibly compromised. A new trial should be ordered.

ISSUE V

THE TRIAL COURT ERRED BY FOLLOWING THE RULING FROM APPELLANT'S PRIOR TRIAL IN HILLSBOROUGH COUNTY THAT APPELLANT WAIVED HIS SPOUSAL PRIVILEGE, ADMISSION OF THE MARITAL COMMUNICATIONS WAS REVERSIBLE ERROR.

At Cheryl Haffner's deposition to perpetuate testimony held August 31, 1992, the husband/wife marital communications privilege was discussed with regard to the portion of Haffner's testimony which repeated statements that Bolin made to her during their marriage (R453-67) The prosecutor relied upon the earlier ruling in Hillsborough County that Bolin had waived his marital privilege by taking his ex-wife's deposition (R453). Defense counsel contended that the issue could be relitigated in the case at bar (R456).

The trial judge ruled that once a privilege is waived, it is waived forever (R460,465). He adopted Judge Graybill's Hillsborough County finding that Appellant waived his spousal privilege (R465-6).

At trial, Appellant preserved this issue for appellate review by objecting to the reading of Cheryl Haffner's deposition because of the marital communications it contained (T682). The court adhered to his pretrial ruling and noted that everyone was relying upon what occurred in Hillsborough County (T683).

The marital privilege issue was thoroughly briefed in Appellant's appeals from his Hillsborough convictions to this Court in Case Nos. 78,468 and 78,905 currently pending. Because the

ruling in the case at bar was predicated upon the court's ruling for the two Hillsborough County cases, it follows that the disposition by this Court of the issue on the already pending appeals should control the result here.

ISSUE VI

THE TRIAL COURT ERRED BY ALLOWING SERGEANT KLING TO TESTIFY IN PENALTY PHASE ABOUT AN INCIDENT WHICH PHILIP BOLIN RELATED TO HIM BECAUSE APPELLANT WAS DENIED HIS SIXTH AMENDMENT RIGHT TO CONFRONTATION OF ADVERSE WITNESSES.

In Engle v. State, 438 So. 2d 803 (Fla. 1983), cert.den., 465 U.S. 1074 (1984), this Court stated that "[t]he requirements of due process of law apply to all three phases of a capital case in the trial court."[5] 438 So. 2d at 813. In particular, the sixth amendment right to confrontation secured by cross-examination of adverse witnesses is a fundamental right applicable to capital penalty and sentencing proceedings. Id. at 814; Pointer v. Texas, 380 U.S. 400 (1965). Relying on Engle, this Court ordered a new penalty proceeding in Walton v. State, 481 So. 2d 1197 (Fla. 1985), because confessions given by Walton's codefendants were presented to the penalty jury without the codefendants being available for cross-examination.

At bar, a comparable error occurred when Sergeant Kling was allowed to present to the penalty jury an account of an incident where Appellant and his stepbrother encountered a female jogger. While Philip Bolin was not a codefendant and his statement was not a confession, Appellant's right to cross-examine Philip, the

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[5] (1) Guilt or innocence phase, (2) Penalty phase before the jury, and (3) Sentencing by the judge.

eyewitness to the incident, was negated when the State unaccountably put Sergeant Kling on the stand instead of Philip Bolin.[6]

The prosecutor admitted that Kling's testimony was hearsay, but argued that hearsay is admissible in the penalty phase. As authority, the prosecutor cited a case where this Court allowed an investigating detective to testify to the details of a prior conviction[7] (T967). The trial court permitted Kling to testify and further observed that criminal propensity was relevant to the defendant's character -- thus admissible during penalty phase (T967-8).

Pursuant to this ruling, Detective Kling testified that around Thanksgiving of 1986, Philip Bolin was riding in a truck driven by Appellant (T968). They were parked beside a bar about 11 p.m. when a young female jogger passed them (T969). Appellant allegedly told Philip to take a gun, hold it to the jogger's side and force her into the truck (T969). Philip Bolin refused; Appellant belittled him, saying it was easy and "he ha[d] done it several times in the past" (T969). Sergeant Kling conceded that there was no evidence of a gun being in the truck at the time (T970).

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[6] Philip Bolin testified in the guilt or innocence phase of the trial (T455-78). The jogger incident was the subject of proffered testimony (T365-8). Although the trial judge ruled that Philip's testimony about this incident was admissible (T389), the prosecutor decided not to use it in the guilt or innocence phase (T421).

[7] The State cited Boardhouse [sic] v. State (T967). Presumably, Waterhouse v. State, 596 So. 2d 1008 (Fla. 1992) was the decision they meant.

Although the parties and the trial judge termed Kling's testimony "hearsay", the significant portions (Appellant's alleged directions and admissions to his stepbrother) were actually double hearsay. Had Philip Bolin testified, Appellant's boast that he had abducted women in the past by putting a gun in their ribs would have been hearsay, but admissible as an exception to the Hearsay Rule under section 90.803(18)(a) of the Florida Evidence Code (admission of a party-opponent). Cf. Swafford v. State, 533 So. 2d 270 (Fla. 1988). However, Kling's testimony about Philip Bolin's report of Appellant's declaration constituted double hearsay or "hearsay within hearsay" which has never been held admissible. For instance, this Court in Hill v. State, 549 So. 2d 179 (Fla. 1989) rejected the defendant's argument that he should have been allowed to present testimony of a person who would have testified that a co-worker told him that another co-worker had confessed to the homicide. The Hill court wrote:

> the proffered testimony is hearsay within hearsay from a witness who did not himself hear the declaration against penal interest and, thus, had no knowledge of whether the declaration was actually made. . . .
>
> We conclude that the hearsay within hearsay was not admissible under Florida law. . . .

549 So. 2d at 182.

The same result should apply to the facts at bar. While hearsay may be admissible in penalty phase, it is subject to the qualification that the defendant must be "accorded a fair opportunity to rebut any hearsay statements." §921.141(1), Fla. Stat. (1991). Appellant could not effectively cross-examine Sergeant

Kling because Kling had no firsthand knowledge as to whether the statements had been made. Realistically, Kling could only respond that Philip Bolin told him the entire substance of his testimony. In effect, Sergeant Kling was vouching for the credibility of the witness who should have testified, Philip Bolin.

Another defect in the testimony should also be considered -- its lack of relevance to the penalty phase. If believed, the testimony about the jogger incident tends to shed light on how Ray Bolin persuaded his female victims to accompany him and also inculpates him as to having done it previously. These matters, however, are not germane to any statutory aggravating circumstance. In reality, the testimony only goes to prove a highly prejudicial nonstatutory aggravating circumstance -- that Ray Bolin attempted to recruit his thirteen-year-old stepbrother into committing similar acts.

The State contended that the testimony was relevant to establish the cold, calculated and premeditated aggravating circumstance (T968).[8] However, at most, the incident with the jogger shows Bolin's readiness to engage in criminal activity on the spur of the moment. Appellant never said anything about killing the jogger or proposed anything other than forcing her into the truck at gunpoint. In any event, a pattern which demonstrates

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[8] This Court should note that the prosecutor cited this Court's decision in Pace v. State, 596 So. 2d 1034 (Fla.), cert.den., ___U.S.___, 113 S.Ct. 244, 121 L. Ed. 2d 178 (1992) as authority for the proposition that Appellant's remarks to Philip showed heightened premeditation (T878-9). However, the cold, calculated and premeditated aggravating circumstance played no role whatsoever in Pace.

a method of attacking females has been held insufficient to establish the cold, calculated and premeditated aggravating circumstance. Power v. State, 605 So. 2d 856 at 864 (Fla. 1992), cert.den., ___U.S.___, 113 S. Ct. 1863, 123 L. Ed. 2d 483 (1993). See also, Issue VII infra.

In conclusion, this Court should order a new penalty trial for Appellant where testimony about the jogger incident is either excluded as irrelevant or else presented only by Philip Bolin, the sole witness to the incident.

ISSUE VII

THE SENTENCING JUDGE ERRED BY FINDING THAT THE COLD, CALCULATED AND PREMEDITATED AGGRAVATING CIRCUMSTANCE WAS PROVED.

In his "Findings in Support of Sentence of Death," the judge started from this Court's pronouncement in Rutherford v. State, 545 So. 2d 853 (Fla. 1989) that the cold, calculated and premeditated aggravating circumstance "is not confined to contract or execution-style murders" (R179, see Appendix). However, the sentencing judge ignored the facts in Rutherford (plan formed weeks in advance to force victim to write a large check and then kill her in manner that would appear to be an accidental drowning) which formed the basis of this Court's statement on the aggravating factor.

At bar, there was no evidence of any careful plan in Appellant's killing of Teri Matthews. The limited evidence available suggests a chance encounter between Bolin and Matthews at the Land O'Lakes post office. One can only speculate as to how Bolin induced Matthews to accompany him. The semen stain left on the victim's pants leg indicates that the attack on Matthews probably had a sexual motivation. The only reason ever given for her killing [she had been involved in a drug deal (T461)] seems patently absurd.

The totality of these circumstances is most like those presented in Gore v. State, 599 So. 2d 978 (Fla.), cert.den., ___U.S.___, 113 S.Ct. 610, 121 L. Ed. 2d 545 (1992). Gore kidnapped his female victim, took her to a remote area, and killed

her. However, there was no evidence of the circumstances surrounding the murder itself. Therefore, this Court found it possible that the murder resulted from "a robbery or sexual assault that got out of hand." 599 So. 2d at 987. Because there was no evidence of "a calculated plan to kill" the victim, the Gore court struck down the cold, calculated and premeditated aggravating circumstance. 599 So. 2d at 987.

At bar, like Gore, the paucity of the evidence tends to suggest a sexual assault that got out of hand. While Bolin may have "prowled the streets" [in the sentencing judge's words (R180)], the evidence in the Teri Matthews homicide is devoid of any careful plan or prearranged design to kill her. Cf., Rogers v. State, 511 So. 2d 526 (Fla. 1987), cert.den., 484 U.S. 1020 (1988).

The question remains as to whether the evidence from Bolin's other crimes can support the cold, calculated and premeditated aggravating circumstance. The decision of this Court most relevant on this point is Crump v. State, 622 So. 2d 963 (Fla. 1993). Williams Rule evidence was admitted in Crump to show that the defendant had a pattern or picking up prostitutes, binding them, strangling them, and discarding their nude bodies near cemeteries. 622 So. 2d at 971. This evidence was insufficient to prove the cold, calculated and premeditated aggravating circumstance because

> the State did not prove beyond a reasonable doubt that Crump had a careful prearranged plan to kill the victim before inviting her into his truck.

622 So. 2d at 972.

Comparing the case at bar to Crump, there is even less reason to find the cold, calculated and premeditated aggravating factor here. Crimp had a restraint device in his truck which he used to hold his victims while he bound their wrists. Bolin, on the other hand, made no such careful preparations. Also, Bolin's victim in Ohio, Jenny LeFever, was eventually released after the kidnapping and rape ordeal. This suggests that Bolin did not necessarily intend to kill Teri Matthews when he encountered her at the Land O'Lakes post office. Cf. Power v. State, 605 So. 2d 856 (Fla. 1992), cert.den., ___U.S.___, 113 S. Ct. 1863, 123 L. Ed. 2d 483 (1993) (impossible to infer premeditated design to kill when previous similar crime did not result in death of victim).

Because the penalty jury heard both irrelevant testimony from Sergeant Kling and the prosecutor's misleading legal argument as to the applicability of the cold, calculated and premeditated aggravating circumstance, Appellant should now be granted a new penalty trial before a new jury. See, Jones v. State, 569 So. 2d 1234 (Fla. 1990); Trotter v. State, 576 So. 2d 691 (Fla. 1991); Omelus v. State, 584 So. 2d 563 (Fla. 1991).

ISSUE VIII

THE TRIAL JUDGE ERRED BY INSTRUCTING THE PENALTY JURY THAT ESCAPE IS A VIOLENT FELONY QUALIFYING FOR THE AGGRAVATING CIRCUMSTANCE.

In Johnson v. State, 465 So. 2d 499 (Fla. 1985), this Court considered a penalty phase instruction given by the trial judge stating that burglary is a crime of violence. Citing Mann v. State, 420 So. 2d 578 (Fla. 1982), the Johnson court remarked that whether or not burglary is a crime of violence depends upon the facts of offense. The court held:

> simply to instruct the jury at the sentencing phase of a capital felony trial that burglary is a felony involving the use or threat of violence for purposes of applying the aggravating circumstance in section 921.141(5)(b), without making clear that this depends on the facts of the burglary, is error.

465 So. 2d at 505.

Similarly, in Sweet v. State, 624 So. 2d 1138 (Fla. 1993), this Court found error in an instruction that possession of a firearm by a convicted felon qualified as a prior violent felony. The jury must be instructed "that they had to consider the individual circumstances of the crime in order to determine if it was violent before weighing it as a prior violent felony." 624 So. 2d at 1143.

At bar, during the penalty charge conference, the judge recognized the defense objection to the proposed instruction on the prior violent felony aggravating factor (R1131). However, he overruled it, stating:

> I think here the escape and felonious assault are basically wrapped up all in one package and each involved not only the potential of violence but the actual infliction of violence.

(T1131-2). Based on this rationale, the court instructed the jury:

> The crimes of rape, kidnapping, felonious assault, and escape are felonies involving the use of or threat of violence to another person.

(T1204).

There are two reasons why this instruction was error. First, Bolin's Ohio convictions for felonious assault and escape derived from a single incident where he hit a jail guard with a pipe and attempted to run out of the facility (T956-7). The two convictions should be classified as one violent felony (felonious assault) and one nonviolent felony (escape). Accordingly, the judge at bar should not have mentioned the escape conviction when instructing the jury.

Alternatively, if the jury should have been permitted to consider the escape conviction, the judge should not have decided for himself that it was a violent felony. In accord with Johnson and Sweet, supra, the judge should have left this finding to the jury by instructing then to consider the circumstances of the crime before weighing escape as a violent felony.

The question remains as to whether this instructional error was harmless. In Johnson and Sweet, this Court concluded that similar error was harmless. At bar, however, the penalty proceeding was infected with other errors such as denial of confrontation and due process in the hearsay testimony of Sergeant Kling (Issue

VI) and erroneous consideration of the cold, calculated and premeditated aggravating circumstance (Issue VII). Viewed in combination with the other errors, the penalty jury instruction error produced a cumulative effect which denied Bolin the reliable capital sentencing proceeding guaranteed by the Eighth and Fourteenth Amendments, United States Constitution. A new penalty proceeding should be ordered.

CONCLUSION

Based on the foregoing argument, reasoning and authorities, Oscar Ray Bolin, Jr., Appellant, respectfully requests this Court to grant him relief as follows:

As to Issue I through V, reversal of conviction and remand for new trial.

As to Issues VI through VII, vacation of death sentence and remand for a new penalty proceeding before a new jury.

Respectfully submitted,

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APPENDIX

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PASCO COUNTY, FLORIDA

STATE OF FLORIDA

vs.

CASE NO. 91-00521CFAWS-03

148878

OSCAR RAY BOLIN, JR.

_____/

ORDER CONDITIONALLY GRANTING STATE'S
MOTION TO ADMIT WILLIAMS' RULE EVIDENCE

THIS CAUSE HAVING COME before the Court upon the State's Motion to Admit Williams' Rule Evidence and the Court having heard the testimony of Corporal Lee Baker of the Hillsborough County Sheriff's Office and the arguments of the attorneys and the Court being otherwise fully advised in the premises, it is

ORDERED AND ADJUDGED as follows: (a) Based upon the limited testimony presented to the Court at this point in time, the Court cannot establish that the defendant has been positively connected with the two collateral crimes that have been specified. Such a positive connection is required by White v. State, 407 So.2d 247 (Fla. 2d D.C.A. 1981). In view of the fact that such a positive connection has not been demonstrated to the Court on the record, any rulings made herein must, of necessity, be conditional. (b) It is assumed by the Court that the "similar fact" evidence proposed by the State is being admitted for purposes of establishing identity. The evidence presented to the Court as of the date of this Order is insufficient to establish the exact purpose of the "similar fact" evidence and, therefore, the Court is making the

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assumption will require the highest degree of proof by the State. In point of fact, this Court is operating on the basis that a general similarity will not render "similar fact" legally relevant to show identity. As indicated by the Supreme Court of Florida in Drake v. State, 400 So.2d 1217 (Fla. 1981):

> A mere general similarity will not render the similar facts legally relevant to show identity. There must be identifiable points of similarity which pervade the compared factual situations. Given sufficient similarity, in order for the similar facts to be relevant, the points of similarity must have some special character or be so unusual as to point to the defendant.

(c) In reviewing the recent case of Gore v. State, _____ So.2d _____, 17 FLW S247 (Fla. 1992), is obvious that the Court must consider more than whether or not the common points are sufficiently unique or unusual on an individual basis. The Court must also consider all of the common points together and determine whether or not they establish a unique or unusual pattern of criminal activity. In the instant case, as this Court interprets the case law, the Court must, in effect, ask itself the following question:

> What are the odds that three young women would be abducted from their cars and stabbed to death in the same general geographic area, in the same year and have in common the following factors: (1) All have matching black fibers on their bodies with two of them also having matching red fibers on their bodies. (2) Two of the decedents were missing their shoes. (3) Two of the decedents were wrapped in hospital items. (4) The same two decedents that were wrapped in hospital items were last seen near State Road 41, a road which runs through both Hillsborough and Pasco Counties.

In analyzing the "cumulative effect" of the similarities among the three crimes, the Court finds that more than a general similarity has been established. The Court finds that a unique and unusual pattern of criminal activity has been established which allows evidence of the collateral crimes to be admitted at the trial of the above-style case under Florida Statute 90.404, subject to the instructions called for under Florida Statute 90.404(2)(b)(2).

DONE AND ORDERED in Chambers in New Port Richey, Pasco County, Florida this 29th day of June, 1992.

Stanley R. Mills
Circuit Judge

Copies furnished to:
Michael Halkitis, Esquire
Douglas Loeffler, Esquire

H-00072
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Pittman, Clerk 3:58pm
D.C.

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PASCO COUNTY, FLORIDA

STATE OF FLORIDA

vs. CASE NO. CRC 91-00521 CFAWS-03

OSCAR RAY BOLIN, JR.

_____/

FINDINGS IN SUPPORT OF SENTENCE OF DEATH

The Court, having reviewed the sentencing memorandum submitted by the defense and the Court having been present throughout the guilt phase and the sentencing phase of the above-styled case, and the Court further having had the benefit of the arguments of counsel and the evidence presented at the sentencing proceeding, the Court makes the following findings as required in Florida Statute 921.141(3):

1. There are sufficient aggravating circumstances to support the imposition of the sentence of death in the above-styled case. In particular the Court makes the following findings of fact:

(a) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to another person. Evidence presented during the sentencing phase clearly establishes that the defendant has been convicted of first degree murder on two previous occasions and, in addition to his convictions for these capital felonies, the defendant has also previously been convicted of kidnapping, rape, escape and felonious assault. There is absolutely no contradiction concerning these factors. Although the escape might not be considered violent in and of itself, it was clearly established by the State that the felonious assault was upon a guard and was perpetrated in an extremely violent fashion during the course of the

escape attempt. Even if the defendant's prior convictions for first degree murder should be reversed on appeal, and the Court acknowledges that those convictions are presently under appeal, the remaining convictions set forth in this paragraph would still convince this Court that the State has clearly established this aggravating factor and that it is entitled to great weight.

(b) The murder for which the defendant was convicted in this case was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. At the outset, the court acknowledges that this aggravating factor requires the establishment of a heightened level of premeditation beyond the level of premeditation which is necessary to justify a conviction of premeditated first degree murder. The Court finds that the State has clearly established such a heightened level of premeditation in this case. The case law establishes that this aggravating factor is not confined to contract or execution-style murders. Rutherford v. State, 545 So.2d 853 (Fla. 1989). The combination of the similar fact evidence concerning the Hillsborough County murders and the evidence concerning the kidnapping and rape of a young woman in the State of Ohio clearly establish a pattern demonstrating the defendant's deplorable attitude toward young women. With the possible exception of one of the Hillsborough County murders, it has clearly been established that neither robbery nor sex appear to have motivated the killings perpetrated by the defendant. Nothing of significance was taken in two of the three murders and, in fact, jewelry and other items of value, such as the contents of a purse, were deliberately left untouched and, other than evidence of one semen stain on the clothing of the victim in the instant case, no evidence of sexual assault has been developed in any of the murders. Under the circumstances, the Court concludes that the defendant's only motivation in at least two of the three murders was to perpetrate a completely brutal and vicious assault upon innocent young women who had had no prior dealings with the defendant. The

evidence indicates that the defendant prowled the streets, selecting his helpless victims at random merely because they were young women and alone. This factor is also assigned great weight by the Court.

(c) The murder was especially heinous, atrocious or cruel. The Court acknowledges that this factor is construed and has been construed by this Court in a very narrow fashion and applies only to conscienceless or pitiless murders that are unnecessarily torturous to the victim. The Court acknowledges that actions perpetrated upon an unconscious victim cannot form the basis for this aggravating factor. In the evidence established during the course of the trial, it is clear that the defendant arrived at his step-brother's house with the victim's body wrapped in cloth. The step-brother testified that he heard sounds coming from within the material in which the body was wrapped and he described those sounds as sounds that reminded him of a dog that had been run over by a motor vehicle. It is obvious that the unfortunate victim was still alive when the defendant arrived at his step-brother's home. The state clearly established that the defendant then proceeded to viciously beat the victim with a club-like implement until the sounds and, sadly, the victim's life, ceased. There was also evidence concerning a defensive wound on one of the victim's hands, however, the medical examiner conceded that this bruise could have occurred in ways other than the victim attempting to defend herself against a perceived attack. However, the medical examiner also indicated that there were numerous stab wounds present on the victim's body would have almost certainly inflicted great pain upon the victim. The Court notes that the majority of these painful wounds were to the front of the victim's body. Although the Court does give weight to this factor, the Court expressly finds that the absence of this factor would have no effect upon the sentence imposed by the Court.

2. As to mitigating factors, the Court acknowledges its responsibility to consider all non-statutory mitigating as well as statutory mitigating factors set forth in Florida Statute 921.141(6). The Court specifically finds as follows:

(a) Judged by the standard of "reasonable certainty" the Court clearly finds that the defendant was approximately twenty-four (24) years of age at the time of the offense and is now approximately thirty (30) years of age. The Court has serious doubts that relative youth on the part of the defendant is, standing alone, sufficient to establish this statutory mitigating factor. Even if such relative youth were determined to be a mitigating factor in and of itself, there are no other factors linked with the defendant's relative youth which would permit the Court to accord this mitigating factor any significant weight.

(b) The Court has also considered and weighed the evidence tending to indicate that the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired and that the defendant was under the influence of extreme mental or emotional disturbance. While the defense has argued very ably that the defendant's conduct was triggered by stress centering on the defendant's wife's medical problems and hospitalization due to problem pregnancies, there is precious little evidence to establish that the defendant was suffering from any unusual stress as a result of his wife's unfortunate problems. As a matter of fact, there was clear evidence that he was more concerned with virtually boasting about his actions when he attempted to call his wife's attention to the murders. One can hardly imagine that an individual concerned with his wife's extremely delicate condition would go out of his way to shock her with information concerning his outrageous and contemptible conduct. In addition, it should be noted that the defendant's own expert was clearly unable to testify that the defendant's ability to conform his conduct to the requirements of law

was substantially impaired. In contrast, Dr. Sidney Merin, the expert called to testify on behalf of the State was quite definite in opining that, although a possibility of fetal alcohol exposure existed, there was no evidence whatsoever of organic brain damage and no indication that the defendant's ability to conform his conduct to the requirements of the law was even moderately impaired, much less substantially impaired. Having considered these matters, the Court assigns them only slight weight.

(c) As to non-statutory mitigating factors, the defendant presented extensive testimony through Dr. Berland that the defendant had suffered numerous head injuries during his youth. Setting aside the fact that much of this information came from the defendant's family and was not actually verified by any impartial source, it would appear that the majority of the alleged head injuries were little more than the normal injuries suffered by most active children during the course of their early lives. On the other hand, Dr. Berland was able to verify an extremely serious suicide effort on the part of the defendant which may well have deprived his brain of oxygen for a significant amount of time. Despite this testimony, Dr. Merin provided powerful and highly credible testimony that no brain damage resulted from this suicide effort. Even conceding the likelihood that some amount of brain damage may have occurred as a result of trauma or the combination of traumas during the defendant's earlier life, contrasting those factors against the fact that the defendant married, established a home and was gainfully employed, the Court can assign only minimal weight to this factor.

(d) While the defendant has provided unrefuted evidence that the defendant was emotionally, physically and possibly sexually abused as a child, the Court again notes that this information was provided primarily by the defendant's mother and sister. The evidence also indicted that the defendant's mother suffers from an extremely serious alcohol abuse problem and

that the sister has herself suffered from mental problems. The testimony provided by the defendant's family members was not corroborated in any fashion and is, of course, provided by individuals who have a significant interest in the sentence to be imposed in this case. Under the circumstances, the Court finds that the defendant has established that he was emotionally, physically and sexually abused under a standard of "reasonable certainty", however, the Court, for the reasons previously set forth herein, accords little weight to this mitigating factor.

(e) As previously indicated, the Court also finds that the defendant has established, by uncontroverted evidence, that he was incarcerated in an adult facility at age seventeen (17) and was sufficiently traumatized by this episode to have made an extremely serious effort to commit suicide by hanging himself. While the Court has considered this factor, the Court finds that the defendant's consideration of suicide many years before the instant offense is not a mitigating factor which can be afforded any significant weight by the Court. Similarly, the Court acknowledges that the defendant has established to a "reasonable certainty" the fact that the has a family history of mental illness. His family history of mental illness seems to have had no effect on the defendant's ability to find and marry his wife, establish a household, establish gainful employment and otherwise project the outward appearance of a reasonably normal lifestyle. Under the circumstances, the Court accords the family history of mental illness only slight weight.

The Court, having considered the foregoing factors, must now determine or not there exists a reasonable and rational basis for the jury's unanimous vote recommending the imposition of the death penalty. The Court hereby determines that are sufficient aggravating factors in existence to justify the sentence of death and that there are insufficient mitigating circumstances to even come close to outweighing the aggravating circumstances that have been established.

The Court has considered the possibility that one or both of the defendant's previous convictions for first degree murder may be overturned on appeal and the Court finds that, even if this is the case, the mitigating circumstances established by the defense would still be insufficient to outweigh the remaining aggravating circumstances that have been relied upon by the Court.

DONE AND ORDERED in Chambers in New Port Richey, Pasco County, Florida this 30th day of October, 1992.

Stanley R. Mills

Stanley R. Mills
Circuit Judge

Copies furnished to:
Public Defender's Office
State Attorney's Office

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Robert Butterworth, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, on this 24th day of February, 1994.

Respectfully submitted,

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