IN THE SUPREME COURT OF FLORIDA

OSCAR RAY BOLIN, JR.,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

Case No. 80,794

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

# REPLY BRIEF OF APPELLANT

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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## STATEMENT OF THE CASE

Appellant will rely upon the Statement of the Case as presented in his initial brief.

## STATEMENT OF THE FACTS

Appellant will rely upon the Statement of the Facts as presented in his initial brief.

## 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 her brief, Appellee does not contest Appellant's assertion that the prosecutor misrepresented the evidence before the trial judge when he obtained a favorable pretrial ruling allowing collateral crime evidence to be presented at trial. Instead, Appellee asks that this Court find a procedural bar because defense counsel did not discover the misrepresentation until the appellate record was carefully examined. In other words, Appellee would have the State rewarded for successfully deluding the trial judge by insulating the misrepresentations from attack on appeal.

Appellee also seeks to excuse the State's conduct. For instance, she writes: "Corporal Baker made it clear to the court

that he was testifying from reports and that he wasn't positive as to all of the evidence." Brief of Appellee, p.4. However, an examination of the record shows that Corporal Baker only said that his knowledge of the Pasco County (Matthews) case was limited to "what I've read and what I've seen" (R309). The misrepresentations of evidence concerning the alleged pattern of missing shoes and the crime scene locations had to do with the Hillsborough County cases. Moreover, Corporal Baker was asked:

> Q Are you familiar with the death investigation as it pertains to all three girls? (R291)

He replied, "Yes sir" (R292).

Appellee also asserts that "The court told defense counsel that if at the end of the hearing he had a problem with the evidence that was presented that he could tell the court how it differed and the court would reserve ruling." Brief of Appellee, p.4. However, the record reflects that the context of the trial court's remark was limited to any discrepancy between Corporal Baker's opinion on the cause of death of the victims and the medical examiners reports (R292-4). Again, this was not the area where the significant misrepresentations occurred.

Another question is whether defense counsel had a reasonable obligation to discover all of the evidence which the State possessed in the collateral crimes from Hillsborough County. Only if Appellant knew that the State had Natalie Holley's shoes in evidence could he have effectively rebutted the State's misrepresentation which led the trial judge to conclude "Two of the decedents were missing their shoes" (R71). Appellee cites no authority for

her assumption that the burden rests on Appellant to discover all misrepresentations. Rather, as Appellant contended in his initial brief, the prosecutor has an obligation to correct false testimony from a state witness. Napue v. Illinois, 360 U.S. 264 (1959); Giglio v. United States, 405 U.S. 150 (1972).

Finally, Appellee contends that any error was harmless. Since two of the four factors cited by the trial judge in allowing collateral crime evidence were founded only on the State's misrepresentations, there is a reasonable possibility that the judge's ruling would have been different had he known the true facts. The collateral crime evidence was such a significant part of the evidence which the jury considered that any error in its admission cannot be harmless. State v. Lee, 531 So. 2d 133 (Fla. 1988); State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986).

The remaining question is the proper remedy for the State's misrepresentation of evidence. In United States v. Kojayan, 8 F.3d 1315 (9th Cir. 1993), the Ninth Circuit considered similar prosecutorial misstatement of evidence. The court observed:

> In determining the proper remedy, we must consider the government's willfulness in committing the misconduct and its willingness to own up to it.

8 F.3d at 1318. Because the government attorney on appeal failed to acknowledge the seriousness of the prosecutor's misconduct at trial, the Kojayan court not only reversed the defendant's conviction; it further remanded the case for a trial court determination "whether to retry the defendants or dismiss the indictment

with prejudice as a sanction for the government's misbehavior". 8 F.3d at 1325.

At bar, Appellee has also sought to minimize the failure of the prosecutor to correct the misrepresentations of evidence upon which the trial judge relied in his ruling. It is often said that the prosecutor has an ethical responsibility to seek justice and to avoid overreaching in order to convict. When a conviction is reversed because of prosecutorial misconduct the taxpayers' resources are squandered if a retrial is required. It is therefore appropriate that the judiciary exercise its supervisory powers by holding a hearing in the trial court to determine whether misconduct on the State's part should be sanctioned by dismissal of the indictment or whether the State should be allowed to retry the defendant.

Accordingly, Appellant requests this Court to not only vacate his conviction for first degree murder, but also to order the trial court to determine the appropriate sanction for the prosecutor's misconduct at trial coupled with Appellee's failure to acknowledge the ethical violation on appeal.

## 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.

In her brief, Appellee denies that the collateral crime evidence became an improper feature of the case and cites author-

ities for the proposition that the volume of evidence alone does not establish error. At bar however, the nature of the evidence as well as its volume prejudiced Appellant. In Duncan v. State, 619 So. 2d 279 (Fla. 1993), this Court held that it was error to permit the State to introduce into evidence a photograph of the victim of a prior unrelated homicide committed by the defendant. At bar, not only were there numerous photographs of the bodies of Natalie Holley and Stephanie Collins in evidence; there was extensive physical evidence and medical examiner testimony admitted as well. As in Duncan, the prejudicial effect of this collateral crime evidence clearly outweighed its probative value. See also, Rhodes v. State, 547 So. 2d 1201 at 1205 (Fla. 1989) (testimony about physical and emotional trauma suffered by victim of collateral crime was highly prejudicial and outweighed probative value).

It should also be remembered that the deposition of Bolin's ex-wife, Cheryl Haffner read into evidence, provided great detail with reference to the Holley and Collins murders, but very little concerning the case at bar. This plethora of highly prejudicial evidence concerning the collateral crimes ensured that they became a feature of the case for which Bolin was actually on trial. Accordingly, Bolin's conviction for the homicide of Teri Matthews must be reversed and a new trial held.

## 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.

Comparing the case at bar to that of Crump v. State, 622 So. 2d 963 (Fla. 1993), Appellee claims that the common features of the three homicides, taken together, "establish a sufficiently unusual pattern of criminal activity". Brief of Appellee, p.20. Appellee notes the fact that all three victims were white females between the ages of 17 and 26. Each had been abducted from her vehicle or while returning to it; each had been murdered at a different location; and the bodies were all dumped in rural areas. The only problem with this "unusual pattern of criminal activity" is that it fits other cases as well. For instance, in Justus v. State, 438 So. 2d 358 (Fla. 1983), the female victim was abducted at gunpoint from her vehicle in a parking lot of an Eckerds drugstore.[1] She was transported to a dirt road in Pasco County, where she was killed and her body abandoned.[2]

Appellee overstates the other common features of the homicides in her brief. First, she states that "two of the victims were wrapped in sheets and towels from St. Joseph's Hospital".

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[1] Stephanie Collins was also abducted from the parking lot of a Hillsborough County Eckerds Drugs (R496-7).

[2]The body of the victim in the case at bar, Teri Matthews, was also found off a dirt road in Pasco County (T227).

Brief of Appellee, p.20. In fact, the body of Teri Matthews was found wrapped in a sheet marked St. Joseph's Hospital (T239-40); while the body of Stephanie Collins was wrapped in a towel marked "hospital property" (T399). As Captain Terry testified, the only similarity was that both the sheet and the towel "had the word 'hospital' on them" (T497).

Second, Appellee's brief states that "matching black and red fibers were found on all three girls". Brief of Appellee, p.20. In reality, the fiber evidence was much less conclusive as this excerpt from Corporal Baker's testimony reveals:

> Q Okay. Now, these fibers, isn't it true that Mr. Malone, who was the fiber expert, testified that there were black fibers on each of the three girls?
>
> A That's correct.
>
> Q But because of the fact that they were black, he couldn't really say that they came from the same source; isn't that true?
>
> A That's what he said, yes, sir.
>
> * * *
>
> Q Okay. And as to the red fibers, the -- there were some red wool fibers found on the Matthews girl?
>
> A Yes, sir.
>
> Q And there were some similar fibers found on the Holley girl?
>
> A Yes, sir.
>
> Q There were also some other red fibers on the Matthews girl which were similar to some red fibers found on the Collins girl?
>
> A That's correct.

Q But the red fibers on the Holley girl were different and didn't match the red fibers on the Collins girl; right?

A That's correct.

Q And in fact, Mr. Malone could not say where these red fibers came from, other than they came from a similar source?

A That's correct.

Q And Mr. Malone had absolutely no evidence presented to him with which he could connect any red fibers to Oscar Ray Bolin, did he?

A That's correct.

(R308-9).

Finally, this Court should recognize that these homicides took place in 1986; while the task force to investigate the links between the three was not formed until July 1990 (T487-8). Coincidentally, this was the same month that Danny Coby went to the Indiana authorities with information leading to the arrest of Bolin for the three homicides (T488-9). Clearly, the task force was created because Bolin was accused of all three homicides and not because someone noticed a unique pattern of criminal activity linking them.

Accordingly, the collateral crime evidence admitted against Appellant showed only a propensity to murder young women rather than a compelling modus operandi which would identify Bolin as the murderer of Teri Matthews. Appellant should be granted a new trial at which the collateral crime evidence will not be allowed.

## 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.

Appellant will rely upon his argument as presented in his initial brief.

## 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.

As Appellee concedes, this Court has already decided this issue in Bolin v. State, Case No. 78,468 (Fla. April 21, 1994). Since the filing of Appellee's brief, rehearing has been denied; and the mandate issued July 20, 1994. The arguments presented in Appellee's brief have already been considered and rejected by this Court when the State's motion for rehearing was denied in Case No. 78,468.

The only remaining question posed by Appellee's brief is whether the error in admitting the marital communications was harmless beyond a reasonable doubt. Appellee points out that there was other evidence supporting Bolin's conviction for the murder of Teri Matthews. However, harmless error analysis is not concerned with whether a defendant would be convicted on retrial.

As this Court explained in State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986):

> The test is not a sufficiency-of-the-evidence, a correct result, a not clearly wrong, a substantial evidence, a more probable than not, a clear and convincing, or even an overwhelming evidence test. Harmless error is not a device for the appellate court to substitute itself for the trier-of-fact by simply weighing the evidence. The focus is on the effect of the error on the trier-of-fact. The question is whether there is a reasonable possibility that the error affected the verdict. The burden to show the error was harmless must remain on the state.

491 So. 2d at 1139.

At bar, the deposition testimony of Cheryl Haffner was filled with privileged marital communications, particularly concerning the two collateral homicides. By reversing Bolin's conviction in Case No. 78,468, this Court necessarily found that the marital communications were harmful error as to that conviction.[3] Thus, the jury at bar considered testimony found to be harmful in another case as well as other collateral crime evidence supporting convictions which have been reversed. This was a substantial portion of the State's case and the jury clearly must have considered it when reaching their verdict. Accordingly, the error cannot be harmless.

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[3]In Case No. 78,905 this Court also issued an opinion on April 21, 1994, reversing Bolin's conviction. However, an order rendered June 27, 1994, granted the State's motion for rehearing to the extent that an oral argument was scheduled.

## 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 addition to the authorities cited in his initial brief, Appellant directs this Court's attention to the decision of Rhodes v. State, 547 So. 2d 1201 (Fla. 1989), where this Court wrote:

> Although this Court has approved the introduction of testimony concerning the details of prior felony convictions involving violence during the penalty phase of a capital trial, (citations omitted), the line must be drawn when that testimony is not relevant, gives rise to a violation of a defendant's confrontation rights, or the prejudicial value outweighs the probative value.

547 So. 2d at 1204-5. At bar, Sergeant Kling's testimony suffers from all three defects; it is not relevant, it violates Appellant's confrontation rights, and the prejudice clearly outweighs any probative value.

## ISSUE VII

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

Appellant will rely upon his argument as presented in his initial brief.

## ISSUE VIII

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

Appellant will rely upon his argument as presented in his Initial brief.

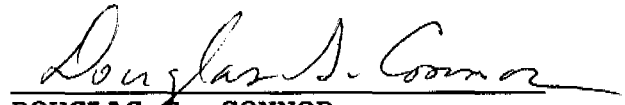
## CONCLUSION

Based upon the argument, reasoning and authorities in Issue I, Appellant respectfully requests this Court to vacate his conviction and to remand to the trial court with directions to consider whether to dismiss the indictment as a sanction for the State's misconduct or whether to retry Appellant. Otherwise, Appellant renews his request for the relief he sought in his initial brief.

## CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Candance M. Sabella, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, on this 15th day of August, 1994.

Respectfully submitted,



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