FILED
SID J. WHITE
MAR 20 1998
CLERK, SUPREME COURT
By
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

OSCAR RAY BOLIN, JR.,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

Case No. 89,385

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

INITIAL BRIEF OF APPELLANT

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

DOUGLAS S. CONNOR
Assistant Public Defender
FLORIDA BAR NUMBER 0350141

Public Defender's Office
Polk County Courthouse
P. O. Box 9000--Drawer PD
Bartow, FL 33831
(941) 534-4200

ATTORNEYS FOR APPELLANT

TOPICAL INDEX TO BRIEF

TOPICAL INDEX TO BRIEF (continued)

TOPICAL INDEX TO BRIEF (continued)

TABLE OF CITATIONS

TABLE OF CITATIONS (continued)

TABLE OF CITATIONS (continued)

TABLE OF CITATIONS (continued)

OTHER AUTHORITIES

PRELIMINARY STATEMENT

The record on appeal consists of two parts. The first part contains 876 pages and consists of documents filed with the clerk, transcripts of pretrial and post-trial hearings, and two supplements. References to this portion of the record will be identified by volume number, followed by "R" and the appropriate page number.

The second part of the record contains 2022 pages and consists of transcripts from Appellant's trial, both guilt and penalty phases. References to this portion of the record will be identified by volume number followed by "T" and the appropriate page number.

STATEMENT OF THE CASE

A Pasco County grand jury returned an indictment on February 19, 1991, charging Appellant, Oscar Ray Bolin, Jr., with first degree murder in the December 5, 1986 death of Teri Lynn Matthews (I, R1-2). In 1992, Appellant was tried, convicted and sentenced to death for this homicide. On appeal this Court reversed Bolin's conviction because improper evidence had been admitted at his trial. See, Bolin v. State, 650 So. 2d 19 (Fla. 1995).

On remand, Circuit Judge William R. Webb presided over the proceedings. The State moved to have the alleged eyewitness, Philip Bolin, declared a court witness (I, R171). At a pretrial hearing held August 9, 1996, Judge Webb granted this motion over Appellant's objection (IV, R732). On the same day, the court commenced a Frye hearing on the reliability of the DNA evidence produced in this case, with testimony given by the defense expert, Dr. Aimee Bakken (IV, R743-99). Testimony by the prosecution's witnesses concerning reliability of the DNA evidence was continued until midway during the trial itself (IV, R737-8, 799).

Because of the notoriety which Appellant had received in the media, defense counsel requested individual voir dire of prospective jurors who had been exposed to pretrial publicity. His motion was first heard and denied at a pretrial hearing held December 18, 1995 (I, R24-6, IV, R609-11). The motion was renewed immediately prior to the beginning of jury selection based upon additional publicity immediately prior to trial (I,

R133-4, V, T25-9). An exhibit containing the newspaper articles was filed with the clerk (II, R351-6, XVII, T1360).

During the course of jury selection, defense counsel again unsuccessfully requested permission to individually voir dire jurors who admitted exposure to pretrial publicity (VI, T212). He challenged for cause six prospective jurors who had knowledge of the case because the court's limitation on voir dire kept him from learning the extent of their exposure (VI, T214). The judge denied the challenges for cause (VI, T214). Defense counsel was permitted to proffer the questions which he would have posed to the prospective jurors had he been allowed to question them outside the presence of the panel (VI, T244). After the defense had exhausted their peremptory strikes, counsel requested four additional peremptories and identified four jurors on the panel which he would strike based upon their exposure to pretrial publicity (VII, T342). The court denied the defense motion for additional strikes (VII, T344). Defense counsel moved unsuccessfully to strike the jury panel, citing violations of the Sixth and Fourteenth Amendments, United States Constitution in denying him the ability to effectively examine the jurors about pretrial publicity (VII, T344). After the final juror was seated, counsel challenged this juror (Wade) for cause because of knowledge about the case (VII, T350). The court denied the challenge for cause as well as the defense request for an additional peremptory challenge to use on the prospective juror (VII, T350). After alternate jurors had been chosen, defense counsel renewed his

motion to strike the panel (VIII, T464-5). Before the jury was sworn, the motion was again renewed and defense counsel summarized the circumstances including the number of jurors exposed to pretrial publicity and the prejudice to Appellant (IX, T476-8). Before the penalty phase began, defense counsel once again unsuccessfully renewed his motion to strike based upon probable juror awareness from pretrial publicity of Bolin's prior death sentences (XXI, T1753).

During the State's opening statement, defense counsel moved for mistrial on two occasions because the prosecutor continually referred to Appellant by his family nickname, "Needles", and because the prosecutor misrepresented the testimony that would be given by defense expert witness, Dr. Bakken (IX, T507-8, 511-2). Defense counsel also objected and moved for mistrial on several occasions where the prosecutor referred (both indirectly and directly) to the fact that Appellant had a prior trial for this homicide (XI, T723-5, 733, 737-45, 750, XIII, T1050-1). The court gave a curative instruction to the jury and granted the defense a standing objection to identification of the prior proceeding (XI, T745). One of the motions for mistrial was taken under advisement (XI, T743), but eventually denied (XVI, T1342).

During the testimony of court witness Philip Bolin, defense counsel repeatedly objected to the overuse of leading questions in the prosecutor's examination (XI, T758, 759, XII, T816, 817, 834, 846, 889). He objected to the prosecutor's characterization of Philip Bolin's prior testimony as "truthful" (XI, T750). When

the State offered a letter purportedly from Appellant to Philip Bolin into evidence, defense counsel objected, saying that it may have been illegally seized (XII, T818-9, 821). The State replied that the letter had been provided in discovery before the 1992 trial and that no motion to suppress it had ever been filed (XII, T822). The court overruled the defense objection and motion for mistrial (XII, T828). Subsequently, the court also overruled defense counsel's objection to allowing the prosecutor to read the contents of the letter to the jury (XII, T830).

When defense investigator Rosalie Martinez was ejected from the courtroom, defense counsel moved for mistrial (XII, T813). Appellant made a pro se motion asking the trial judge to recuse himself and to have defense counsel discharged (XII, T814-5). See also, XV, T1210-3. These motions were denied (XII, T813, 815, XV, T1213). After Appellant was not permitted to confer with the defense investigator during a trial recess, defense counsel objected (XII, T851). The trial judge stated that he hadn't understood that Appellant wanted to confer with the investigator as well as counsel during the recess, but that he would have denied the request anyway (XII, T852).

During the continued portion of the Frye hearing, State witnesses Dr. Martin Tracey, David Walsh and Dr. Robin Cotton testified to the scientific reliability of the results obtained in the DNA testing by Cellmark Laboratories of a cutting from the homicide victim's pants (XIV, T1077 through XV, T1207). The court ruled that the DNA evidence met the Frye standard of

scientific reliability and stated that he would prepare an order detailing his findings (XV, T1209). This order was eventually prepared and filed on November 19, 1997 nunc pro tunc to August 12, 1996 (2d Supp., R873-6).

Defense counsel objected to allowing Sergeant Kling to testify that certain details about the homicide were withheld from the media because the testimony would be hearsay (XVI, T1328-30). The State argued that the business record exception to hearsay would permit Kling to testify that only the perpetrator or an eyewitness would know that the body was found wet and without shoes (XVI, T1329-33). Also, the State argued that the testimony would not be hearsay since Sergeant Kling would be testifying that he read all the newspaper articles and those details were not reported rather than testifying to what the media did report (XVI, T1334-6). The court overruled the defense objection and permitted the testimony (XVI, T1336).

After the State rested, the defense motion for judgment of acquittal was denied (XVI, T1341-2). Counsel's renewed motion for judgment of acquittal after the close of the defense case was also denied (XIX, T1965-6). A further renewed motion for judgment of acquittal after the conclusion of the State's rebuttal case was again denied (XIX, T1591).

Defense counsel interrupted the prosecutor's final closing argument with objections on six occasions (XX, T1689, 1695, 1697, 1698, 1705, 1706). At the finish of the argument, defense counsel moved for mistrial based upon 1) prosecutor interjecting

his personal opinion into the argument, and 2) prosecutor submitting his own mathematical calculations as evidence and argument, rather than relying upon the testimony of the expert DNA witnesses (XX, T1709-10). The judge denied the motion for mistrial (XX, T1710).

During the charge conference, defense counsel objected to instructing the jury on felony murder because there was insufficient evidence to support the State's theories of sexual battery and kidnapping as underlying felonies (XVII, T1357). The judge overruled the defense objection and gave instructions on first degree felony murder with either kidnapping or sexual battery as the predicate felony (XVII, T1357, XX, T1716-7). After the jury had been instructed, defense counsel renewed his objection to giving felony murder based upon the allegation of sexual battery (XX, T1734). The jury returned a general verdict of guilt of first degree murder as charged (XX, T1745, II, R384).

Before commencement of the penalty proceeding, defense counsel requested, in accordance with Dr. Berland's affidavit attesting to need, that a PET scan be performed on Appellant because brain damage was a mitigating circumstance to be presented to the jury (II, R357-8, XX, T1736-7, XXI, T1753-4). The State objected that the motion was untimely and would cause the penalty proceedings to be delayed (XX, T1742-3, XXI, T1755). The trial court denied the motion for a PET scan and then reaffirmed his ruling immediately prior to the beginning of the penalty trial (XX, T1743, XXI, T1755).

In the ensuing penalty trial, defense counsel unsuccessfully objected to allowing the detective from Ohio, Marlene Long, to testify to hearsay statements given by Bolin's co-defendant in the rape and kidnapping case (XXI, T1795, 1796). Multiple hearsay objections to allowing the Ohio jailer, Deputy Rick Luman, to testify about what detectives told him concerning their investigation of Bolin's attempted escape were also overruled (XXI, T1813-4).

Defense counsel requested three special instructions during the penalty charge conference which the court denied (XXI, T1921, II, 389, 392, III, 393). The jury returned a penalty recommendation of death (III, R402).

A hearing on Appellant's Motion for Arrest of Judgment/New Trial was incorporated into the sentencing proceeding held on September 25, 1996 (III, R551-74). The defense produced some additional evidence in mitigation (III, R553-60). The court allowed the defense to amend the motion for new trial before denying it (III, R426-30, 563-73).

On October 9, 1996, the court made findings and imposed a sentence of death (III, R499-508). The judge's written "Sentencing Order" was filed on the same date (III, R448-54). Four aggravating circumstances were found: 1) prior violent felony, 2) cold, calculated and premeditated, 3) heinous, atrocious or cruel, and 4) committed during the course of a kidnapping (III, R448-50, see Appendix). In mitigation, the court discussed the statutory mental mitigating factors and determined that Bolin had

"only minimal brain damage" (entitled to "moderate weight" as a nonstatutory mitigating factor) and "impaired, but not substantially impaired" capacity (entitled to "slight weight" as a nonstatutory mitigating factor (III, R451-2, see Appendix). Besides the above nonstatutory mitigating factors, six others were found and all were given little weight[1] (III, R453-4, see Appendix). The court found that the aggravating circumstances outweighed the mitigation and ordered that Appellant be sentenced to death (III, R454, see Appendix).

An "Amended Notice of Appeal" was filed October 28, 1996 (III, R465). Jurisdiction lies in this Court pursuant to Article V, section 3(b)(1) of the Florida Constitution and Fla. R. App. P. 9.030(a)(1)(A)(i).

---

[1]These were: 1) organic brain damage, 2) abusive childhood, 3) deprived childhood, 6) behavior at trial, 7) rescued a woman from drowning, 8) employed at time of offense.

STATEMENT OF THE FACTS

A) GUILT OR INNOCENCE PHASE

Around 10:00 a.m. on December 5, 1986, a passerby, Donald Ray Gibson, saw what he thought was a flock of turkeys close to Greenfield road in the Kent Groves area of Pasco County (IX, T529-30). He exited his vehicle to discover that the birds were buzzards, circling around a female body wrapped in a sheet (IX, T531). He did not touch the body, but observed that there were no shoes (IX, T531-2, 537). Truck tire tracks were leading to the body (IX, T532). He reported his discovery to the Pasco County Sheriff's Office (IX, T533). Gibson testified that he was friends with Philip Bolin who, at that time, lived right across the street from him and about one-half mile from where the body was found (IX, T541-2).

Deputy Robert Wood responded to the scene and observed the body of a young woman located ten to fifteen feet off the road (X, T554-5). She had head injuries, was wrapped in a sheet, and was fully clothed except for her shoes (X, 555). The deputy noted that the body was wet although it had not rained during the previous day (X, T556).

A crime scene technician, Roy Steven Corrigan, testified that he also thought it strange that the body was wet, while the surrounding area was dry (X, T564). The clothing he took into evidence consisted of a white sweater over a blue sweater, white slacks and nylon stockings (X, T564-5). No shoes were found (X, T564-5). He also collected a sheet wrapped around the victim

which bore the logo of St. Joseph's Hospital and the imprint 3-80 (X, T566-7).

Corporal Corrigan took photographs and made plaster casts of tire impressions which led to the body (X, T569-72). He described the tire tracks as being made by a "good size tire" (X, T571). The next day, he returned to make more casts from the tire tracks (X, T587). In his report, the technician referred to the tracks as having been made by a four wheel vehicle (X, T 591). Later however, he realized that there was something strange about the tire impressions and reached the conclusion that a vehicle with dual wheels had left them (X, T563-4, 598). Had he thought at the time that a dual-wheeled vehicle was involved, he would have taken plaster casts of both tires in the set instead of only one (X, T599).

A witness who had been a design engineer with the Cooper Tire Company, identified the tread impression as having been made by a size 8.75 x 16.5 Cooper Super Roadmaster tire (X, T651-3). He said that this was an uncommon size, typically used on a 3/4 ton or larger vehicle (X, T 654-6). From looking at the photographs and the casts, it was impossible for him to tell whether the tires were on a single or dual wheeled vehicle (X, T656-7).

Witness Gary McClelland testified that he and his girlfriend, Teri Matthews, had spent time together after work on December 4, 1986 and that she set out for her parents home about 2:00 a.m. (X, T609-11). He became concerned when she failed to telephone him as she customarily did after getting home (X,

T612). McClelland telephoned her mother sometime before noon on December 5th and learned that Matthews had never returned home from the previous night (X, T612). Becoming alarmed, he decided to drive along the route she would have taken home (X, T612-3). As he drove by the Land O'Lakes post office, he saw the red Honda owned by Matthews sitting in the parking lot (X, T613-5). The headlights were on and Teri Matthews' purse was on the front seat (X, T614).

McClelland then met with a police officer at the post office (X, T616, 626). Together they viewed a videotape made by a monitor in the post office lobby (X, T617, 628-9). McClelland identified Teri Matthews on the videotape (X, T617-8, 629). A timing device on the videotape indicated that it was 2:40 a.m. when Matthews picked up mail from her family's post office box (X, 633, 637, 662-3).

Gary McClelland's father, Charles McClelland, was requested to go to the Medical Examiner's Office where he identified the body found by the roadside as being that of Teri Matthews (X, 624). The Medical Examiner, Edward Corcoran, M.D., testified that he conducted an autopsy on the body (XIII, T1020). He found five separate stab wounds, one of which hit her jugular vein in the neck (XIII, T1021). There were "at least fifteen lacerations and associated skull fractures in the head" (XIII, T1021). He characterized some other bruises and scrapes as defensive wounds (XIII, T1021). There was no indication of a sexual assault (XIII, T1042).

Dr. Corcoran further testified that the victim would have lost consciousness from the stab wound to the jugular vein "within several minutes" (XIII, T1043-4). A great amount of force was used in the blunt trauma to the head; any one of these head injuries could have resulted in loss of consciousness (XIII, 1038, 1043). Both the stab wound to the neck and the blunt trauma to the head were sufficient to cause death (XIII, T1022).

The police investigation of the homicide was unproductive until July 1990 when detectives visited Appellant's ex-wife, Sheryl Jo Haffner, in her hometown of Portland, Indiana (XIII, T1061-2). According to her prior testimony (read to the jury at the current trial), she and Bolin resided in Tampa during 1986 (XIII, T1061). She was in and out of hospitals including St. Joseph's Hospital during that year because of complications with diabetes (XIII, T1061). She often brought hospital property such as towels and blankets home with her (XIII, T1061). The hospital's name was frequently imprinted on the items (XIII, T1061).

Haffner's former testimony also included the fact that she and Appellant maintained a post office box at the Land O'Lakes post office where she received her social security checks when the couple traveled (XIII, T1063). On the day of the homicide, December 5, 1986, Bolin brought her social security check to Tampa General Hospital, where she was a patient (XIII, T1062-3).

At that time, according to Haffner, Appellant was residing in a travel trailer in the backyard of his parents home in Land O'Lakes (XIII, T1065). His twelve or thirteen-year-old brother

Philip resided in the house, approximately five hundred feet from the trailer (XIII, T1065). Bolin was employed by the Kahles company and drove a one ton wrecker (XIII, T1064).

Rosemary Kahles testified that she and her late husband had operated a towing business in Tampa during 1986 which employed fourteen to twenty workers and maintained twenty-one wreckers (XI, T675-7). As of December 4, 1986, Bolin had been on the payroll for less than six weeks (XI, T677). In the morning of that day, the towing service received a call to handle a disabled vehicle in Pasco County (XI, T678). The witness testified that Bolin "begged" to be allowed to respond to this call (XI, 679-80). After some hesitation because of Bolin's inexperience, the company agreed to send him out with a wrecker named 22 Bob (XI, T681). This was a large one ton truck with dual wheels on the rear (XI, 681-2).

Eventually, Bolin located the customer and performed the job (XI, T682-3). Sometime between noon and 1:00 p.m., he was instructed over the two-way radio to return to the Tampa facility (XI, T684). However, Bolin failed to return that day; nor did he respond to their efforts to contact him on the radio (XI, 684-5). After midnight, when the witness and her husband had retired for the night, the radio started "screeching" and Bolin was trying to contact them (XI, T686-7). Evidently, he was outside the fifty mile radius where the radio could transmit clearly and the witness could only understand that Bolin was in a panicked state

(XI, T688-90). She instructed Bolin to telephone her, but he didn't (XI, T688-90).

In the morning around 10 or 10:30, Bolin returned 22 Bob back to the towing facility (XI, T690-1). His personal appearance was messy and he was crying (XI, T691, 705). His only explanation was that he got lost (XI, T692). Although the witness' husband wanted to fire Bolin on the spot, he remained an employee (XI, T692-3). Later that afternoon, the television was on at the shop and there was a newscast about the discovery of Matthews' body (XI, T693). Bolin became highly excited and brought other employees into watch the news account (XI, T694).

The witness further testified that Bolin carried a knife on his hip and would "constantly play with it" (XI, T694-5). Before Bolin left on the service call on December 4, he was given a wooden stick, about two feet long and filled with lead at one end, to use to check the tires (XI, T696-7, 701). Although the towing business bought Cooper tires when tires needed replacement, the witness did not know what brand was on the 22 Bob wrecker (XI, T695-6, 700).

Philip Bolin, Appellant's brother, testified as a court witness (XI-XII, T715-905). In July 1990, he was living in Union City, Indiana, when he was contacted by Florida detectives about this homicide (XI, T718-20). On August 1, 1990, he gave a sworn statement at the State Attorney's Office in Pasco County (XI, T720-1). He testified before a grand jury in February 1991 and gave a sworn deposition on April 14, 1992 (XI, T721-2). Then he

testified in a "courtroom proceeding" in October 1992 (XI, T723-4, 729), later identified by the prosecutor as a trial (XI, T737).

Philip Bolin was thirteen years old and living with his mother and father in December 1986 (XI, T729). Because his parents were out-of-town working at a carnival, Philip was living alone in their trailer sometimes and also staying at a neighbor's house on occasion (XI, T729-30). The witness said that on the night of December 4-5, 1986, he stayed at Ms. Kinard's house (the neighbor) (XI, T730-1).

At this point, the prosecutor read from Philip Bolin's statement given at the State Attorney's investigation where the witness said that he was alone in the trailer on the night of December 4-5, 1986, when Appellant came to the door and woke him up around 11 p.m. or midnight (XI, T731-2). The witness agreed that he had said "something like that", but disputed its truth; explaining "I said what you wanted me to say, sir" (XI, T732). The prosecutor then read at length from Philip Bolin's testimony at the prior trial and asked if the answers he had given were accurate (XI, T733-5). Philip replied that "some of them" were (XI, T735). Philip agreed that since his testimony at the prior trial, he had not told anyone about being pressured or having words put in his mouth (XI, T750). He also agreed that he had not wanted to testify at his stepbrother's retrial and that he had been told that his testimony was the only thing standing between Appellant and an acquittal (XI, T750-5).

Over defense objection to leading questions, the prosecutor was permitted to render his version of the encounter between Philip Bolin and Appellant on the night of the homicide with the witness replying, "Yes sir" to the prosecutor's rendition (XI, T755-60). The substance of this presentation was that Appellant woke up Philip on the night in question, asked him to help him, that Philip heard a noise that "might have been your dog being run over by a car", and saw a sheet covering a body which was apparently emitting the noise (XI, T756-61). When the witness said that he couldn't remember whether the sheet was "wrapped tightly around the body", the prosecutor again quoted from Philip's statement given at the State Attorney's investigation in August 1990 (XI, T761-2).

The prosecutor further recounted that Appellant asked the witness to get a water hose and that Philip refused (XI, T763). Philip Bolin agreed to the prosecutor's assertion that Appellant then got a hose, turned on the water, straddled the body, and acted like "he was trying to drown the body" (XI, T764). When the witness could not remember whether Appellant asked him to turn off the water hose, his grand jury testimony was read at length by the prosecutor and the witness asked if his memory was better at the time of the grand jury proceeding (XI, T764-6).

Next, the prosecutor referred to the tire tool mentioned in the grand jury testimony and asked Philip Bolin to describe it (XI, T766). The witness said it was a piece of wood, one or two feet long, and agreed that it had a piece of steel at the end

(XI, T766-7). The witness also agreed with the prosecutor's assertion that Appellant got this club from a wrecker that he was driving on the night in question (XI, T767). Philip Bolin was asked by the prosecutor, "how many times does he [Appellant] hit the body with the club?" (XI, T768). When the witness replied that he couldn't remember, the prosecutor got him to agree that it was more than one time (XI, T768).

Philip Bolin was then asked whether he heard "the sounds from the wooden object hitting the body?" (XI, T768). When he couldn't remember, the prosecutor read from the deposition where Philip had agreed that the noise "sounded like a pillow being hit" (XI, T769). The prosecutor also quoted Philip's deposition testimony that he had heard the sound five or ten times (XI, T769). When asked if this refreshed his recollection, Philip replied that he still could not remember (XI, T770). The prosecutor then read from the October 1992 trial testimony where Philip Bolin had testified that he heard "several thumps" (XI, T770-1).

When Philip Bolin said that he had trouble remembering whether he had asked his stepbrother "what have you done?", the prosecutor quoted again at length from the State Attorney's investigation where the witness stated:

> "I looked up and said, Needle[2], what have you done?" And he says, "Don't worry, he

---

[2]Appellant's longtime nickname in his family was "Needles". See XII, T903-4. Defense counsel's objection to allowing the prosecutor to refer to Appellant as "Needles" during opening statement was overruled by the trial court (IX, T507-8).

says, help me. ... So I walk over to her and grab her legs."

(XI, T773). The witness agreed that he had helped lift the body by the legs and load it onto the wrecker (XI, T773). He felt nylon stockings on the legs and agreed that there were no shoes on the body's feet (XI, T775-6). At the time that he helped put the body on the wrecker, there were no more sounds and the woman was apparently dead (XI, T778, 780-1).

Philip Bolin described the wrecker as black, with dual wheels on the rear (XI, T781). He agreed with the prosecutor's assertion that it was a Ford-Holmes wrecker named 22 Bob (XI, T782). Appellant asked him to join him while he disposed of the body, but the witness refused to go (XI, T782-3). He went back in the house and watched his stepbrother drive the wrecker out of the driveway (XI, T784). The witness agreed that twenty minutes later, Appellant returned and asked Philip Bolin to ride with him to Tampa (XI, T785). He declined to go because he had to go to school the next day (XI, T786). The witness agreed that as Appellant left, he told Philip not to say anything about this (XI, T786).

Philip Bolin said that he later learned that his neighbor, Donald Gibson, had found a body (XI, T787). After that, he told his classmate and best friend, Danny Ferns, about seeing his stepbrother kill a woman and load her onto his wrecker (XI, T787-9). He also told Danny Ferns not to tell anyone because he was afraid that Appellant would find out (XI, T789, 805). When the witness said that he talked to Appellant about the finding of the

body but could not remember what was said, the State read from the prior trial testimony (XII, T805-6). At that time, Philip Bolin testified that Appellant reacted to the news by just saying "well" (XII, T806).

When the witness said he could not recall whether Appellant habitually carried a knife back in 1986, the prosecutor read from the State Attorney's investigation (XII, T806-8). At that time, Philip Bolin stated that he had seen Appellant use a folding knife with a curved blade to cut wire and linoleum (XII, T808). Next, Philip Bolin was asked if he remembered hearing the body breathe on the night in question (XII, T809). When he replied "no, sir", the prosecutor read from the April 1992 deposition where the witness had stated that he heard a "real loud blowing", "something like" a breathing sound (XII, T810).

Philip Bolin was next asked if he remembered Appellant's explanation for the girl's death and he replied that Appellant said he met her, was going to do a drug deal, and she got shot (XII, T816). To this the prosecutor responded:

> He actually told you that she had come to Tampa to get him to do a drug deal with her, that she came down in her car and he followed her in the wrecker and that they parked at the Land O'Lakes Post Office and that they walked across the road where there's a ball field, then there was some shooting, he ran across the road and she got shot in the car, he picked her up, put her in the wrecker and came back to his place, right? ... Philip, did you understand that?

(XII, T816). The witness said yes when asked if this is what Appellant had said when he loaded the woman into the wrecker (XII, T816).

The prosecutor then showed Philip Bolin a letter and asked him if he recognized the handwriting (XII, T817-8). He replied that it was in Appellant's handwriting, but he never received the letter (XII, T818, 829). Over objection, the prosecutor read the contents (XII, T830-2). The gist of the letter was that the writer wanted Philip Bolin to stay away from Florida and not testify because otherwise, Appellant "wouldn't stand a chance in hell of beating it" (XII, T831-2).

The witness was asked whether Rosalie Martinez, an investigator, had contacted him in January 1996 and told him that his testimony was necessary for Appellant to be convicted (XII, T833). Philip Bolin agreed that she had said that, but denied that she had prepared a statement for him to copy and sign (XII, T833-4). He conceded that some of the words in the statement were ones that he didn't ordinarily use and that Ms. Martinez had coached him (XII, T834-6). He wrote the document because he wanted to help his stepbrother and make his parents happy (XII, T838, 847). The witness agreed to the prosecutor's assertion that he had said that the statement was "bullshit" at the time he wrote it (XII, T839). Nonetheless, he went to a notary on January 20, 1996 and swore that the statement was true (XII, T839). When he wrote out the statement, he often relied on Ms. Martinez to assist him in choosing the words to use and how to

spell them (XII, T846). Philip Bolin agreed with the prosecutor-'s assertion that the January 1996 statement was not truthful and that his prior testimony had been truthful (XII, T847).

On defense examination, Philip Bolin admitted that since he was first contacted by law enforcement in July 1990, he talked numerous times about the case with Detectives Baker and Kling before giving his statement at the State Attorney's investigation and his Kentucky deposition (XII, T854-7). He agreed that he had talked to them more than twenty times about his testimony (XII, T857). The witness was impeached by his testimony at the State Attorney's investigation, where he was asked about watering equipment or a hose near his stepbrother's trailer and answered that "the next day", he "noticed the water hose was stretched out" (XII, T860-3). At the State Attorney's investigation, the witness also said that he never told anyone else about the incident with his stepbrother and the body (XII, T867). He denied having talked with Donald Gibson, the neighbor who found the body, about any aspect of the event (XII, T870).

Philip Bolin was asked about the circumstances surrounding his letter of January 20, 1996, also referred to as the recantation (XII, T872-7). He agreed that "I don't know anything about this murder" was his own statement (XII, T874, 876-7). The notary asked him if the statement was the truth and Philip Bolin replied that it was (XII, T877). Then in June 1996, the witness met with Detective Kling and Investigator Haldeman at a motel (XII, T877-8). They told him that he could be charged if he

didn't tell the truth (XII, T878-9). By that, the witness inferred that the officers meant saying something different than he had at the prior proceedings (XII, T879). When asked if he told the officers "what they wanted to hear", Philip Bolin replied, "Pretty much, sir" (XII, T879).

On the Friday prior to this trial, Philip Bolin was staying with the Kinards when he talked to an investigator from the Public Defender's office (XII, T879-80). He told the investigator that he was being threatened by law enforcement and that charges would be filed if he didn't cooperate with them (XII, T880). He also admitted telling the investigator that his prior testimony was not true and that the only time he saw Appellant around the time of the homicide was on the "afternoon of the 4th" (XII, T880). The witness agreed that he had changed his story four times between January 1996 and trial (XII, T880-1).

On the State's redirect examination, Philip Bolin said that he didn't remember discussing the Kinards during the 1990 State Attorney's investigation (XII, T884). The prosecutor read from that statement to show that the witness previously said that after he heard from Donny Gibson's mother that the body had been "found beside the railroad tracks", he became frightened and spent the next two nights with the Kinards (XII, T884-6). Philip Bolin again agreed that his letter of January 1996 was not truthful and that he had written it "to help out the family" (XII, T896-8). He agreed with the prosecutor's assertion that when he had spoken to the investigator from the Public Defender's

office just prior to trial, his father and the Kinards were there (XII, T899-900). He said what he did to "make everybody happy", but agreed with the prosecutor's assertion that he "knew in [his] heart that [he was] lying" (XII, T901).

The State presented testimony to coorborate Philip Bolin's alleged eyewitness account from Daniel Ferns, Jr. (XII, T906-18), Michelle Steen (XIII, T949-75), and Sergeant Gary Kling of the Pasco County Sheriff's Office (XVI, T1322-40). Ferns testified that in 1986 he lived about three blocks from Philip Bolin, who was his best friend (XII, T907). They both attended Sanders Elementary School and were in the same grade (XII, T908). One day in December, while walking to the bus stop, Philip appeared very upset (XII, T909). Through "rumor in the community", the witness had learned that the body of a young woman had been found in the Kent Groves area (XII, T909). Later that day, at Philip's house, Ferns saw what he described as blood "poured out on the grass" maybe three to four feet in diameter between the large mobile home and the small travel trailer[3] (XII, T911, 915). He never told anyone about it until the police questioned him in 1990 because Philip said that Appellant might harm the witness or his family (XII, T912-3).

Michelle Steen testified that Appellant is her husband's first cousin (XIII, T950). Sometime before 1987, while Bolin was

---

[3]An alternative explanation for what Ferns saw was presented in the defense case. Oscar Ray Bolin, Sr. testified that before he went to North Carolina with the carnival, he had painted carnival rides on his property using red, yellow, orange and blue paint (XVIII, T1534).

visiting at their home in Ohio, she jokingly asked him if he had ever killed anyone (XIII, T950-1). Bolin replied that he had, and told her of beating a girl and putting a hose down her throat (XIII, T951-2). He said that the homicide took place in Florida and that Philip had witnessed it[4] (XIII, T953). Ms. Steen said that she didn't believe what Bolin had told her until detectives questioned her in 1990 (XIII, T953, 958, 969-70).

Sergeant Gary Kling of the Pasco County Sheriff's Office testified that certain details about a criminal investigation are withheld from the media in every case (XVI, T1328). The reason for this is to ensure that only a perpetrator or an eyewitness to the crime would have knowledge about these details (XVI, T1328-9). In this case, the news media was not informed about the wet condition of the victim's body, nor the detail that she was wearing nylon stockings, but her shoes were missing (XVI, T1337).

FORENSIC EVIDENCE

There were hotly contested battles between experts for the State and defense on the results of scientific testing of semen stains found on the victim's pants. FBI agent Robert Hall testified as a State expert in the field of serology (XIII, T976-1005). His testing of the semen stain for blood group substances showed the presence of the A blood group substance (XIII, T984-5). Although Appellant's blood type was AB secretor, the expert

[4]Philip Bolin testified that he told Michelle Steen about the homicide after he had given his statement in the State Attorney's investigation (XII, T849).

testified that he could not eliminate Appellant as the source of the semen (XIII, T987-8, 1003). He explained that AB secretors have both A and B blood group substances in their non-blood body fluids (XIII, T988). It is possible for an AB secretor to have unequal amounts of the A and B blood group substances in non-blood body fluids (XIII, T991-2). There could have been B blood group substance in the semen stain which was diluted so much that it couldn't be detected (XIII, T993). The witness said that only persons with O or B blood types could be absolutely eliminated as sources for the stain on the victim's pants (XIII, T993, 1001). Another possibility mentioned by FBI agent Hall was that the semen stain included some of the victim's vaginal fluid (XIII, T1001-2). Since Teri Matthews was an A secretor, the A blood group substance would be present in a mixed body fluid stain and she could also be a possible source (XIII, T1001-3).

The defense expert in serology, Dr. Aimee Bakken, contested Agent Hall's conclusions. She testified that she would exclude an AB secretor as the source of a sample which included only the A substance (XVII, T1424). It would be very uncommon for an AB secretor to secrete much smaller amounts of either the A or the B antigen (XVII, T1425). An FBI report analyzing Bolin's saliva (also a non-blood body fluid) showed that both A and B antigens were present in that sample (XVIII, T1469). Dr. Bakken concluded that this report "strongly" suggests that Bolin did not have the rare "allele" where there is a significant difference between the amount of A and B antigens produced (XVIII, T1469). Regarding

the conjecture that the victim, Teri Matthews, might be the source of the A blood substance, Dr. Bakken agreed that this was possible (XVIII, T1444-5).

The results from DNA testing of the semen stain sample were also in evidence. State witness David Walsh testified that he was formerly employed by Cellmark Diagnostics, where he was a staff molecular biologist (XV, T1215). Using the RFLP method of DNA analysis, he examined evidence consisting of cloth cuttings and known blood samples from Teri Matthews and Gary McClelland received by Cellmark on November 28, 1989 (XV, T1220-4). The banding pattern derived from the semen sample on cloth was distinctly different from the band patterns derived from the blood samples from Matthews and McClelland (XV, T1225). Walsh testified that he could exclude those two individuals from being the donor of the stain on Matthew's pants (XV, T1225).

On August 3, 1990, a tube of Appellant's blood was received and processed by the RFLP procedure (XV, T1226). The witness said that six bands were present on the autoradiograph derived from Bolin's blood which he compared to the five visible bands on the autoradiograph from the semen sample (XV, T1227). He determined that the five bands present on the semen sample autorad lined up with five of the six bands present on the autorad derived from Appellant's blood (XV, T1227, 1229-30). Walsh testified that "the samples did match" (XV, T1230, 1236-7, XVI, T1281-2). He said the frequency of such a match in the Caucasian population was 1 in 2200 (XVI, T1276, 1280).

When asked to explain the missing band from the semen sample, Walsh said that there was evidence of degradation caused probably by moisture and bacterial growth in the semen stain sample (XV, T1230-1). Degradation causes the largest bands to be affected first (XV, T1233-4). The band that was missing from the autorad of the semen sample corresponded to the second largest of the bands in the autorad from Bolin's blood sample (XV, T1234-5). Another possibility was that the small quantity of DNA in the semen sample had been exhausted before the final probe, resulting in an undetectable g3 band (XV, T1240-1).

On crossexamination, Walsh acknowledged that his preliminary report showed a g3 band, but that it was deleted in his final report (XVI, T1260). He disagreed with defense counsel's suggestion that Cellmark's own criteria would have termed the results in this case "inconclusive" (XVI, T1261-2). He admitted that he conducted his initial measurements on September 19, 1990 and then remeasured on October 2, 1990, one day after he had spoken with Detective Kling on the telephone (XVI, T1264-5). Walsh denied that he would ever alter his results "to comport with what law enforcement wanted" (XVI, T1272).

Dr. Robin Cotton, the current lab director of Cellmark Diagnostics, testified that most of their work was done for law enforcement, with only about 10% being for the defense (XVI, T1284, 1303). She reviewed the laboratory work done by David Walsh in this case (XVI, T1289). She agreed that the five bands observed in the evidence sample matched five of the six bands in

Appellant's blood sample (XVI, T1290-1). She said that one explanation, which was not unusual, was that the small DNA sample was consumed before all of the testing was completed (XVI, T1291-2). The other possibility was that there was no sixth band or that it was in a different position; in which case Bolin would be excluded as the source (XVI, T1292). Dr. Cotton testified that the frequency in the Caucasian population of such a five band match was 1 in 1800 (XVI, T1300-1).

On crossexamination, the witness said that while degradation of the evidence was a possible reason for only five bands to be present in the evidence sample, she didn't think that it explained the results in this particular case (XVI, T1308). She stated that the result fell into the category of "a partial match", not a match (XVI, T1312). The population frequency number of 1 in 1800 was calculated using the second NRC report, not the previous one (XVI, T1315-6).

Defense expert, Dr. Bakken, testified that she had previously analyzed the quality of Cellmark's lab performance on twelve to fifteen occasions (XVII, T1410-3). The categories of match criteria listed by Cellmark in their standard operating procedure are 1) match, 2) partial match, 3) inconclusive, and 4) exclusion (XVII, T1414). Based upon Cellmark's own criteria, Dr. Bakken would have termed the results in this case "inconclusive" (XVII, T1414, 1461).

The witness explained that a match can only be declared when the bands in both the sample and the reference are similar in

number and location (XVII, T1415). Because there was a different number of bands in the evidence sample and Appellant's blood sample, there was no match (XVII, T1415). Secondly, Dr. Bakken found that the autoradiograph produced was substandard because the control portion showed bands in addition to the seven known bands for this individual (XVII, T1415-6). This means that something went awry in the procedure and further testing should have been done to determine the source before any interpretation was attempted (XVII, T1416-7, 1457). However, this was not done in this case (XVII, T1417).

She reviewed Mr. Walsh's notes from the testing which showed that he had seen a g3 band from the evidence sample, but had not measured it (XVII, T1418-9, 1471, 1475). Nor was it included in the final report (XVII, T1419). In the process used by Cellmark, a band that is "sufficiently small" can actually run off the end of the gel so that it wouldn't be seen on the autoradiograph (XVII, T1421). If that were the case here, Bolin would be excluded as the source of the DNA evidence sample (XVII, T1422).

B) PENALTY PHASE

The State presented witnesses to testify about prior violent felonies committed by Bolin. Jenny Lefevre testified that she had been employed at a Truck Stops of America location in Stony Ridge, Ohio on November 18, 1987 (XXI, T1763-4). She left work at midnight and went to her car (XXI, T1764). Once she was inside her car, a man holding a gun forced his way into the

driver's side of the vehicle and told her to move over (XXI, T1765-6). They drove out of the parking lot and proceeded to a gravel area about a mile away (XXI, T1767). A semi-trailer then pulled into the area and the man forced her at gunpoint to leave her car and get into the truck (XXI, T1767-9). Once inside the semi, the witness was pushed back into the sleeper compartment (XXI, T1769-70). The two other men already in the truck were told to drive onto the turnpike (XXI, T1769). The witness identified Appellant as the person with the gun who abducted her (XXI, T1771).

Ms. Lefevre further testified that Appellant proceeded to take off her pants and have sex with her while keeping the handgun pointed at her head (XXI, T1774-6). Afterwards, the truck driver, David Steen, said that he wanted to switch places with Bolin (XXI, T1780). The truck came to a halt; Bolin and Steen switched positions (XXI, T1781). Steen tried to pull her back into the sleeper, but she fought him off because he didn't have a gun (XXI, T1781-2). After she had been in the truck for 4 1/2 to 5 hours and heard a lot of conversation about whether she should be killed, the truck stopped and Bolin wrapped her smock over her eyes (XXI, T1784-6). He helped the blindfolded witness down from the truck and led her across a field (XXI, T1787). Appellant told her that he was going to lift her over a fence and that she should run (XXI, T1787-8). That is what happened (XXI, T1788). She ran through a field, down a country road, and

eventually came to another Truck Stops of America location in Pennsylvania (XXI, T1789-90).

The witness later testified at the trial of David Steen (XXI, T1792-3). Bolin pled guilty to charges of rape and kidnapping and received a sentence of 25 to 75 years imprisonment (XXI, T1793, 1797-8). The third man in the truck, Roger Hall, contacted the investigating police agency and told them who was involved in the incident (XXI, T1795-8).

Corrections Officer Rick Luman from Bowling Green, Ohio, testified that on January 4, 1988, he and another officer were in charge of the Wood County Jail (XXI, T1800-1). Bolin was an inmate of that facility (XXI, T1801-2). While working the midnight shift on that date, he and the other officer were making their rounds when they were jumped by Bolin and another inmate (XXI, T1802-7). Officer Luman was wrestling with Appellant, while the other officer was trying to fend off the other inmate who was swinging a steel bar from the exercise equipment (XXI, T1807-8). During the course of the struggle, Luman was hit in the neck and back with the steel bar (XXI, T1808, 1811). The officers' cries for help were heard by some other inmates who came to their rescue (XXI, T1808-9).

Bolin pled guilty to felonious assault and escape charges arising from the incident (XXI, T1812-3). Luman testified that other deputies told him that rumor had it that Bolin planned the escape attempt while the other inmate was simply a "follower" (XXI, T1814-6).

For the defense, Dr. Robert Berland, a forensic psychologist, testified that he evaluated Bolin for mental impairment (XXI, T1825-6). One of the tests he administered, the Wechsler Adult Intelligence Scale, suggested that Appellant "has had a widespread loss of functioning" due to brain injury (XXI, T1826-33). Dr. Berland based this conclusion on the difference between Bolin's best score and his lowest on the WAIS (XXI, T1832-3). A difference of ten points is considered to indicate impairment by the research; Bolin's difference was thirty-five points (XXI, T1833). While his overall IQ shown by the test was 99, the results indicated that earlier in his life, Bolin would have functioned at a level of 123 or higher (XXI, T1833-4, 1836).

There were a variety of incidents during Bolin's life which could have accounted for the brain damage. Bolin's mother drank alcohol heavily during her pregnancy (XXI, T1842). In his childhood, Bolin suffered head injuries on several occasions (XXI, T1842-4). At age 17, he tried to hang himself after he had been arrested and was not quickly revived (XXI, T1844). From age 20 to 25, Appellant used amphetamines on a daily basis (XXI, T1844-5). Research indicates that six months of regular amphetamine usage is sufficient to cause permanent damage, "usually associated with severe behavioral and emotional problems" (XXI, T1845). While working on an electrical panel in Tampa, Bolin was shocked into unconsciousness and reported severe headaches and blurred vision for sometime afterwards (XXI, T1846).

Dr. Berland stated that brain damage frequently affects mental and emotional stability (XXI, T1846). He found evidence from talking to members of Bolin's family that he had shown a lot of behavioral change typically associated with brain damage (XXI, T1847-8). Dr. Berland also gave his opinion that Bolin's upbringing was a "significant contributor" to his ability to control his adult behavior (XXI, T1849). Bolin's childhood was characterized by great instability as he was shuffled back and forth between his separated parents and various relatives (XXI, T1850). When he was with his father, they traveled the carnival circuit and he was frequently watched by prostitutes following the carnival (XXI, T1851). Bolin seldom completed any grade in the same school where he had started the year (XXI, T1851-2). There were numerous incidents where he was abused by both parents and he witnessed several incidents of domestic violence in his homelife (XXI, T1852-4). In short, he was exposed to a very unstable and violent life from a very young age (XXI, T1854).

There were other significant psychological stresses affecting Appellant around the time that this homicide took place (XXI, T1854). His wife had severe complications from diabetes including loss of eyesight (XXI, T1855-6). During her first pregnancy in December 1985, the baby died (XXI, T1856). The couple had enormous financial difficulties (XXI, T1857). Appellant increased his alcohol and amphetamine consumption while paying little attention to personal grooming and cleanliness (XXI, T1857).

Dr. Berland gave his opinion that brain damage, childhood environment, and mental stress during the year when the homicide took place combined to adversely affect Bolin's ability to conform his behavior to the requirements of law (XXI, T1857-9). Appellant suffered from a "mild to moderate mental illness" (XXI, T1908). When asked whether Bolin's mental mitigation met the statutory definitions of "extreme" and "substantial", Dr. Berland replied that the extent was a factor to be decided by the jury (XXI, T1904). In his own personal opinion, Appellant's mental or emotional disturbance was "extreme" and his impaired ability to control his behavior "substantial" (XXI, T1904-5).

The state's rebuttal witness, Dr. Sidney Merin, testified that he reviewed the testing performed by Dr. Berland (XXII, T1932-3, 1939). There had been three MMPI tests administered to Appellant, one given in 1988; and the other two under the direction of Dr. Berland in 1990 and 1991 (XXII, T1933). The witness stated that he considered the results of the first test to be the most valid (XXII, T1933-4). This portrayed a sociopathic person with elevated scales for paranoia and mania (XXII, T1934). Persons with this type of profile tend to act out their aggressive feelings and have difficulty conforming their behavior to the requirements of law (XXII, T1934). They also have a great deal of energy (XXII, T1934-5, 1957). Dr. Merin gave his opinion that the later two MMPI results showed a person who was trying to appear more crazy than he was (XXII, T1937-8).

Regarding Bolin's performance on the Wechsler test, Dr. Merin said that the high score on one subtest indicated that Appellant was very good at paying attention (XXII, T1946-7). He dismissed the idea that the results showed mild to moderate brain damage (XXII, T1947). He stated that this one test alone could not determine the presence or absence of brain damage (XXII, T1947-9). Neither was there anything to indicate that Bolin suffered from fetal alcohol syndrome (XXII, T1951). Dr. Merin concluded that neither of the two mental mitigating circumstances were established by the evidence (XXII, T1953).

SUMMARY OF THE ARGUMENT

A trial judge has wide discretion in conducting voir dire and may often deny individual voir dire of prospective jurors. However, the court abuses its discretion when it does not permit a defendant to uncover prejudices or prejudgments among prospective jurors which may have been formed through exposure to prejudicial pretrial publicity. The newspaper publicity immediately prior to Appellant's trial featured numerous prejudicial facts which were inadmissible at trial. Five of the jurors who served had prior knowledge about this case, but Appellant was unable to determine whether they were truly impartial because of the trial court's rulings. The issue was properly preserved for appellate review.

Appellant's brother, Philip Bolin, was declared a court witness because he had made contradictory statements about whether he was an eyewitness to the homicide. While crossexamination of a court witness is permissible, the prosecutor went too far when he continuously read Philip Bolin's prior statements to the jury under the guise of impeachment or refreshing the memory of the witness. Several previous decisions of this Court have held that use of a witness's prior statements as substantive evidence of guilt is impermissible. The same error occurred at bar and was not harmless because Philip Bolin was the State's most important witness and his prior statements were undoubtedly considered by the jury when reaching their verdict.

The jury was informed by the prosecutor while Philip Bolin was on the witness stand that Appellant had a previous trial on this charge. The prosecutor's conduct should be considered intentional and therefore prejudicial error.

Over Appellant's hearsay objection, the lead detective Gary Kling was permitted to testify that Philip Bolin recited facts that had not been reported in the media. Kling's improper and prejudicial conclusion was that Philip Bolin's prior statements were credible because he knew details that only an eyewitness to the homicide would know.

This Court has previously held that DNA population frequency statistics must satisfy the Frye standard in order to be admissible. At bar, the prosecutor misused the population frequency statistics given by the expert witnesses as a basis for his own mathematical calculations which had no scientific validity. The jury was likely misled by the prosecutor's improper argument into thinking that the scientific proof of Appellant's guilt was more substantial than it actually was.

Appellant's investigator/mitigation specialist was expelled from the courtroom during the testimony of Philip Bolin because the trial judge observed her shaking her head. Although this expulsion may have been within the court's discretion, it was error to bar communication between Appellant and his investigator during a trial recess before the crossexamination of Philip Bolin began. The same standard applicable to consultation between a defendant and counsel during a trial recess should be applied to

consultation with an investigator who is an integral part of the defense team.

Although there was no evidence of a sexual battery, the trial judge instructed the jury that they could find Appellant guilty of first degree felony murder based on the underlying felony of sexual battery. This error was carried over into the penalty phase where the jury was instructed on sexual battery as an aggravating circumstance. The erroneous jury instructions were not harmless error despite sufficient evidence of premeditation and the judge's refusal to find and weigh the aggravating circumstance when imposing Appellant's death sentence.

The trial judge denied the request by defense counsel and the mental health expert that a PET scan be performed on Appellant before the penalty proceeding began. Since brain damage was diagnosed by Appellant's mental health expert, a PET scan could have produced relevant mitigating evidence. This Court has previously held that under these circumstances a PET scan must be allowed.

ARGUMENT

ISSUE I

THE TRIAL JUDGE ABUSED HIS DISCRETION BY NOT PERMITTING INDIVIDUAL VOIR DIRE OF PROSPECTIVE JURORS WHO HAD BEEN EXPOSED TO PRETRIAL PUBLICITY CONTAINING HIGHLY PREJUDICIAL AND INADMISSIBLE INFORMATION ABOUT OTHER HOMICIDES ALLEGEDLY COMMITTED BY APPELLANT AS WELL AS PRIOR DEATH SENTENCES IMPOSED IN THIS CASE AND OTHERS.

On the morning of trial (and the two previous days), local newspaper articles featured Bolin's upcoming retrial (II, R351-6). Excerpts of some of the prejudicial material in these articles include:

> Bolin was convicted in 1992 in Teri's death, juries also found him guilty of murdering two young Hillsborough women and the 34-year-old former truck driver was sentenced to die in the electric chair in all three cases.
>
> But while he sat on death row, Bolin's convictions were overturned.

(II, R352).

> "How do you get three murder convictions and not be guilty of something?" Reeves says. "I brought my child up to obey the law and to trust it. This is a sham of justice. And it's draining the life out of all of us."
>
> The Florida Supreme Court overturned all three murder convictions because trial judges allowed Bolin's wife to testify against him.
>
> * * *
>
> "This is a predator among all of us. If he gets out, he'll kill again. It will be someone else's daughter. It will be someone else's sister.

(II, R353)[5].

> Accused serial killer Oscar Ray Bolin's retrial begins today in New Port Richey under tight security.
>
> The 34-year-old former truck driver was convicted in 1992 and sentenced to die for killing 26-year-old Teri Lynn Mathews. But the Florida Supreme Court overturned that murder conviction and two others from Hillsborough County.
>
> * * *
>
> From his jail cell in 1990, Bolin was accused of plotting to kidnap the wives of the Hillsborough sheriff and two other officers.

(II, R354).

> Bolin, a 34-year-old former carnival worker, was convicted of Matthews' murder and of killing two other women in Hillsborough County, but the convictions were overturned by the state Supreme Court, taking Bolin off death row.
>
> In Bolin's trials for the 1986 murders of Natalie Blanche Holley, 25, and Stephanie Collins, 17, his ex-wife, Cheryl Jo Coby, testified that he had confessed to the killings. A conviction in the Matthews case was based in part on Bolin's previous convictions.

(II, R355). See also, II, R356 (same information about the convictions being reversed because Bolin's ex-wife testified "as to what Oscar Bolin had told her about the killings").

> During the first trial, Philip Bolin was a willing witness for the state, and his testimony played an important part in putting Oscar Bolin, now 34, on death row.

(II, R356).

Based upon this pretrial publicity concerning subjects which were not only prejudicial, but would not come into evidence,

---

[5]Reeves is victim Teri Matthews' mother.

defense counsel renewed his motion for individual voir dire concerning publicity before jury selection began (V, T25-9). The trial judge denied the motion (V, T29).

The juror questionnaires included questions about exposure to pretrial publicity and whether prospective jurors could be impartial (V, T40-1). The prosecutor agreed to excuse fourteen prospective jurors who indicated on the questionnaire that they couldn't be impartial (V, T43). The court excused the fourteen for cause (V, T44, 46).

During the prosecutor's examination of prospective jurors, he asked if any of the venire had read about the case (VI, T92). Five prospective jurors raised their hands, including Mr. Ringuette, Mr. Spack, and Ms. Copeland who eventually served on the jury (VI, T92). The prosecutor advised the prospective jurors who had been exposed to publicity:

> you understand because you read about this case it doesn't exclude you as a juror. What we're hoping is that what you read could be put aside and evaluate this case on just what you hear in this courtroom, nothing else.
>
> * * *
>
> We want to make sure we have fourteen people who for the next seven or eight days are going to be sitting here and basing their verdict on the testimony from witnesses and from Judge Webb, what Judge Webb tells you the law is. Is there anyone here who now feels they might have a problem doing that? May the record reflect there's no show of hands, Judge?

(VI, T92-3). When defense counsel's turn came, he asked the prospective jurors whether any of them who had been exposed to media coverage about the case had formed an opinion concerning

Bolin's guilt or innocence (VI, T155-6). No hands were raised (VI, T156).

Before the second group of prospective jurors was brought in, defense counsel agreed to the judge's suggestion that he simply eliminate those who had indicated on the questionnaire that they couldn't be fair and impartial (VI, T224). Three of the first fourteen indicated an inability to be impartial and were excused for cause (VI, T225-6). During examination of the second group of jurors, defense counsel asked:

> After further reflection, do any of you who have indicated that you have some knowledge feel that your opinion about this case or the guilt or innocence of my client is so strong that you cannot set that opinion aside?

(VII, T308). No hands were raised (VII, T308).

During the exercise of juror challenges, defense counsel first renewed his motion for individual voir dire as to the prospective jurors who had prior knowledge of the case (VI, T212). The court again denied the motion, but permitted defense counsel to proffer the questions he would have asked the prospective jurors (VI, T212-3, 244). Defense counsel then challenged six of the first jury panel for cause, based upon his inability to determine whether their exposure to pretrial publicity made them unsuitable jurors (VI, T214). The challenges for cause were denied and Appellant exercised peremptory strikes on two of the six he had challenged for cause (VI, T214, 217).

In the second round of challenges, Appellant challenged a prospective juror for cause who had been exposed to pretrial

publicity (VII, T338-9). When the cause challenge was denied, he exercised a peremptory challenge to excuse this juror (VII, T339). After his peremptory strikes were exhausted, defense counsel requested four additional peremptories in order to excuse four prospective jurors remaining on the panel who had prior knowledge of the case (VII, T342-3). Counsel's request for extra peremptories was denied (VII, T344). When the State's use of a peremptory brought another prospective juror who had been exposed to pretrial publicity onto the panel, the defense again challenged this prospective juror for cause and unsuccessfully requested an additional peremptory after the challenge for cause was denied (VII, T344, 350). Appellant also moved to strike the entire jury panel because of his inability to discover what aspects of the pretrial publicity the prospective jurors had been exposed to, citing the Sixth and Fourteenth Amendments, United States Constitution and the corresponding provisions of the Florida Constitution (VII, T344-5).

After alternate jurors had been chosen, defense counsel renewed his motion to strike the panel (VIII, T464-5). Before the jury was sworn, the motion was again renewed and defense counsel summarized the circumstances including the number of jurors exposed to pretrial publicity and the prejudice to Appellant (IX, T476-8). Before the penalty phase began, defense counsel once again unsuccessfully renewed his motion to strike based upon the prejudice ensuing from probable juror awareness of Bolin's prior death sentences (XXI, T1753).

As a result, Appellant was tried by a jury which had five jurors (Paul Ringuette, Sylvia Copeland, Stephen Spack, Cynthia Hill, and Robert Wade) with prior knowledge about the case (I, R238, VII, T342, 350, IX, T477). One of these jurors, Robert Wade, was chosen to be the foreman (XX, T1744). There is simply no way for us to know whether these jurors had only learned facts about the case which would come into evidence, or whether they had been exposed to such highly prejudicial and inadmissible specifics in the newspaper accounts as: 1) prior conviction and death sentence in this case, 2) prior convictions and death sentences in two other cases from Hillsborough County, 3) characterization of Appellant as a "predator" who would "kill again" "if he gets out" (II, R353), 4) kidnapping plot hatched from his jail cell directed at the wives of law enforcement personnel, 5) in prior trials, Appellant's ex-wife testified that "he had confessed" to the murders (II, R355), and 6) Philip Bolin had been a "willing witness" for the State in the first trial (II, R356).

An analysis must begin with the general proposition that whether individual voir dire of prospective jurors is allowed lies within the sound discretion of the trial judge. Randolph v. State, 562 So. 2d 331 (Fla. 1990). In Mu'Min v. Virginia, 500 U.S. 415 (1991), the United States Supreme Court wrote:

> Questions about the content of the publicity to which jurors have been exposed might be helpful in assessing whether a juror is impartial. To be constitutionally compelled, however, it is not enough that such questions might be helpful. Rather, the trial court's

> failure to ask these questions must render the defendant's trial fundamentally unfair.

500 U.S. at 425-6.

An illustration where the trial judge abused his discretion by refusing to permit individual voir dire is this Court's decision of Boggs v. State, 667 So. 2d 765 (Fla. 1996). In Boggs, as at bar, there was prejudicial newspaper publicity prior to retrial which not only recounted the procedural history of the case, but also featured a statement by the presiding judge that he thought Boggs was faking mental illness to escape the electric chair. Defense counsel was forced to use peremptory strikes to remove prospective jurors who had read about the case and formed an opinion about Boggs' guilt or innocence. This Court found reversible error because the trial court refused to allow individual voir dire of the jurors who had formed opinions about the defendant's guilt.

At bar, the judge did at least excuse for cause the prospective jurors (seventeen in all) who indicated on their questionnaires that they could not be impartial. However, he accepted at face value all of the assertions of impartiality contained on the prospective juror questionnaires and denied defense counsel an opportunity to conduct individual voir dire of those prospective jurors who admitted prior knowledge about the case but claimed to be able to remain impartial.

However, a prospective juror's conclusory claim of impartiality noted on a questionnaire cannot substitute for a searching and thorough voir dire, particularly when a significant

possibility of prejudice exists because of pretrial publicity. As the Eleventh Circuit noted in the context of prospective jurors exposed to pretrial publicity, "The juror is poorly placed to make a determination as to his own impartiality". Jordan v. Lippman, 763 F. 2d 1265 at 1274 (11th Cir. 1985) [quoting from United States v. Davis, 583 F. 2d 190 at 197 (5th Cir. 1978)]. This Court has recognized that defense counsel must be permitted "to ascertain latent or concealed prejudgments by prospective jurors". Stano v. State, 473 So. 2d 1282 at 1285 (Fla. 1985).[6] When a statement of impartiality is merely checked on a questionnaire, neither counsel nor the trial court is able to evaluate a prospective juror's demeanor which often reveals bias although none is admitted.

In Reilly v. State, 557 So. 2d 1365 (Fla. 1990), a prospective juror stated that he had read that the defendant had confessed to the crime, but that he had not formed an opinion about guilt and could be impartial. In finding the trial judge's refusal to strike this juror for cause reversible error, this Court wrote:

> The problem is that juror Blackwell knew that a confession had been given. This might not require disqualification if the confession were going to be introduced into evidence. Here, however, the confession had been suppressed. Thus, juror Blackwell was aware of a fact that was inadmissible which was far

---

[6]Compare the inquiry employed by the Eleventh Circuit: "Whether the procedure used for testing juror impartiality created a reasonable assurance that prejudice of the jurors would be discovered if present". United States v. Lehder-Rivas, 955 F. 2d 1510 at 1523 (11th Cir. 1992).

> more damaging to Reilly than anything which was actually introduced into evidence. While Mr. Blackwell subsequently gave the right answers with respect to whether or not he could be an impartial juror, it is unrealistic to believe that during the course of deliberations he could have entirely disregarded his knowledge of the confession no matter how hard he tried.

557 So. 2d at 1367.

At bar, the newspaper publicity also included reference that Bolin "had confessed to the killings" according to his ex-wife's prior testimony (II, R355). One or more of the five jurors exposed to pretrial publicity who actually served on the jury may have been aware of this, yet, like the prospective juror in Reilly, thought that he or she could remain impartial. Moreover, the most featured aspect of the pretrial publicity was Bolin's prior convictions and death sentences in two other murders which were reversed on appeal as was the case at bar (II, R352, 353, 354, 355, 356). If there was any single fact about Bolin that the prospective jurors exposed to pretrial publicity would know, this would likely be it.

When this Court vacated Bolin's prior conviction in this case, Bolin v. State, 650 So. 2d 19 (Fla. 1995), this Court held that the two Hillsborough County murders were not relevant to this case and "in the retrial this evidence should not be admitted during the guilt phase". 650 So. 2d at 21. It makes little sense to reverse a case with directions that certain evidence is inadmissible at retrial and to then seat five jurors who almost

undoubtedly had learned of this inadmissible evidence through pretrial newspaper publicity.

A meaningful voir dire is necessary to satisfy the constitutional requirements of a fair and impartial jury under the Sixth and Fourteenth Amendments, United States Constitution and the corresponding provisions in Article I, section 16 of the Florida Constitution. Morgan v. Illinois, 504 U.S. 719 (1992); Wilding v. State, 427 So. 2d 1069 (Fla. 2d DCA 1983). To this end, "[t]he scope of voir dire ...'should be so varied and elaborated as the circumstances surrounding the juror under examination in relation to the case on trial would seem to require'". Lavado v. State, 469 So. 2d 917 at 919 (Fla. 3d DCA 1985) (J. Pearson, dissenting).[7] Because Appellant was unable to ascertain how exposure to prejudicial pretrial publicity affected jurors who actually sat on his jury, his constitutional guarantee to trial by an impartial jury was not honored. Cf., United States v. Davis, 583 F.2d 190 at 196 (5th Cir. 1978) (court should have determined what each juror had read and determined for itself whether impartiality had been destroyed). A new trial should be granted.

---

[7]On review by this Court, Judge Pearson's dissenting opinion was adopted as this Court's opinion. Lavado v. State, 492 So. 2d 1322 (Fla. 1986).

ISSUE II

APPELLANT WAS DENIED A FAIR TRIAL WHEN THE PROSECUTOR REPEATEDLY INTRODUCED PRIOR STATEMENTS BY PHILIP BOLIN. PURPORTEDLY INTENDED TO IMPEACH THE WITNESS, THE PRIOR STATEMENTS (PRIMARILY FROM THE STATE ATTORNEY'S INVESTIGATION) WERE USED AND ARGUED AS SUBSTANTIVE EVIDENCE TO PROVE APPELLANT'S GUILT.

A) Summary of Caselaw Dealing with Improper Use of Prior Inconsistent Statements as Substantive Evidence.

In recent years, this Court has been presented with several cases in which the prosecution relied upon a witness's prior inconsistent statement to establish its case against the defendant. In State v. Delgado-Santos, 497 So. 2d 1199 (Fla. 1986), this Court approved the determination by the Third District that a police interrogation was not an "other proceeding" within the scope of §90.801(2)(a) of the Florida Evidence Code. Consequently, a statement previously made by a testifying witness during the course of a police interrogation is hearsay and cannot be admitted as substantive evidence of the defendant's guilt. See, Delgado-Santos v. State, 471 So. 2d 74 (Fla. 3d DCA 1985). Later, in Dudley v. State, 545 So. 2d 857 (Fla. 1989), this Court reversed where the State succeeded in having a witness who had given inconsistent statements called as a court witness for the purpose of presenting his prior statements to investigating detectives and another witness. Contrary to the limiting instruction given to the jury (that the former statements should

only be considered as impeachment), the prosecutor used the prior statements as substantive evidence of the defendant's guilt before both the jury and the judge. Justice Grimes' concurring opinion (joined by a majority of the court) went further, observing that the inconsistent statements were not even properly admissible as impeachment because the witness testified that he didn't remember the contents of the conversation which the State sought to introduce into evidence.

State

State v. Smith, 573 So. 2d 306 (Fla. 1990) was the next in this line of cases. There, this Court directly held that a sworn statement given during a State Attorney's Investigation was hearsay and not admissible as substantive evidence. The Smith court explained:

> No counsel was present to advise her [the witness] or to protect Smith's interests; no cross-examination was possible; and no judge was present or made available to lend an air of fairness or objectivity.

573 So. 2d at 315. Subsequently, in Ellis v. State, 622 So. 2d 991 (Fla. 1993), Smith was applied where a witness recanted his prior sworn statement to the prosecutor, was called as a court witness, and the prior out-of-court statement brought into evidence. In analyzing the prosecution's use of the prior statements, the Ellis court wrote:

> This was not simply an attack on Feagle's credibility. Rather, the State made an active effort to persuade the jury both to believe in the truthfulness of the out-of-court statements and to reject Feagle's in-court statements. In closing arguments the

> State even reiterated material from Feagle's out-of-court statement and emphasized that it was truthful and could be relied upon as evidence of Ellis' guilt. Accordingly, the State was using the prior statement almost entirely for its substantive effect on the fact finder.

622 So. 2d at 996. This Court concluded that the earlier statement was hearsay and its admission reversible error since it became "a prominent feature of the trial". 622 So. 2d at 998.

The most recent in this line of cases, Morton v. State, 689 So. 2d 259 (Fla. 1997), was tried by the same assistant state attorney who prosecuted the case at bar.[8] Although the Morton court found the prosecutor's improper impeachment of the state witnesses to be harmless error with respect to the guilt phase, it observed:

> The cumulative effect of continual impeachment made it all the more difficult for the jury to separate substantive evidence from the evidence it had been instructed to consider solely for impeachment. The prosecutor compounded the problem in closing argument in both the guilt and penalty phases by asserting the content of the impeaching statements as proven facts.

689 So. 2d at 264.

Within the framework of the above decisions, we will now examine the State's purpose for having Philip Bolin declared a court witness, introduction of his prior statements as his "truthful testimony", and their use by the prosecutor as the most

---

[8]It should be noted that this trial took place in August 1996, almost seven months prior to the release on March 6, 1997 of this Court's opinion in Morton.

significant substantive evidence of Appellant's guilt presented to the jury.

B) Declaring Philip Bolin a Court Witness and Setting the Stage for Introduction of His Prior Statements as Substantive Evidence.

Prior to trial, the State filed a "Motion in Limine" asking the court to call Philip Bolin as a court witness because he had made conflicting statements concerning the truth of his prior testimony (I, R171). At the pretrial hearing, defense counsel opposed this motion, noting that the Florida Evidence Code had been changed to allow a party to impeach its own witness (IV, R730). The trial judge observed that he would allow the parties greater latitude for examination by leading questions when a witness was called under section 90.615 of the Florida Evidence Code (IV, R730-2). The court granted the State's motion and called Philip Bolin as a court witness (II, R337, IV, R732).

When Philip Bolin took the stand at trial, as a preliminary matter, the State went over his prior contacts with law enforcement in this case, his prior sworn statements at the State Attorney's investigation, before the grand jury, at deposition, and "in a courtroom and offering testimony" in October 1992 (XI, T718-23). Defense counsel moved for a mistrial on the ground that the prosecutor's questioning was designed to inform the jury that there had been a prior trial (XI, T723-4). The court denied the motion for mistrial and also overruled Appellant's objection to allowing the prosecutor to place a chronology of prior state-

ments into evidence when there was, as yet, no statement of the witness that was inconsistent (XI, T724-5, 727-8).

Whether Appellant's objection should have been sustained is not truly important; the significant factor is that from the outset, the prosecutor had determined that Philip Bolin's prior statements were an important part of what he planned to introduce before the jury. It is clear error for the state to have a witness called as a court witness solely for the purpose of presenting prior inconsistent statements. Dudley v. State, 545 So. 2d 857 at 859 (Fla. 1989). The Morton court wrote:

> if a party knowingly calls a witness for the primary purpose of introducing a prior statement which otherwise would be inadmissible, impeachment should ordinarily be excluded.

689 So. 2d at 264. All of the federal circuit courts of appeal have interpreted the comparable provision, Rule 607 of the Federal Rules of Evidence similarly. United States v. Peterman, 841 F. 2d 1474 at 1479 n.3 (10th Cir. 1988), cerate. den., 488 U.S. 1004 (1989) (cases cited); United States v. Ince, 21 F. 3d 576 (4th Cir. 1994); United States v. Gomez-Gallardo, 915 F. 2d 553 (9th Cir. 1990) (holding that calling witness for the primary purpose of impeaching him was plain error).

At bar, Philip Bolin had alternately repudiated and validated his prior statements about being an eyewitness to the homicide, depending upon the audience. However, as the Fourth Circuit said in Ince, "Federal evidence law does not ask the judge, either at trial or upon appellate review, to crawl inside the prosecutor's head to divine his or her true motivation". 21

F. 3d at 580. What the court must do is to weigh the value of the statement as probative of the witness' credibility against the statement's prejudicial impact if considered by the jury as substantive evidence. Id. at 580-1; see also, Morton, 689 So. 2d at 263-4. When a prior inconsistent statement is truly introduced for the purpose of impeachment, the position is "not that the prior statement is true and the testimony in court is false, but that because the witness has not told the truth in one statement, the jury should disbelieve both statements." Ehrhardt, Florida Evidence, §608.4 (1997).

Contrary to this precept, the prosecutor clearly advocated that Philip Bolin's prior statements were truthful and should be believed by the jury. He constantly asked the witness, after reading his prior statements to the jury, if they were "truthful" and "accurate" (XI, T732, 735, 747-8, 750, 762, 766, 774-5, 777, 790, 791; XII, T808, 847, 886, 896). During closing arguments, he summarized the content from Philip Bolin's prior testimony as if recounting facts from testimony actually given by the witness in the present trial (XIX, T1610). He told the jury that Philip's prior statements were "consistent" (XIX, T1612). The dates of the prior statements were then set forth with the comment, "Ask yourselves what is the motivation for Philip Bolin to incriminate his own brother?" (XIX, T1614).

Becoming more direct, the prosecutor asserted:

> What else does Philip tell us? That no, what he said back in 1990 and 1991, 1992 under oath was accurate, was the truth, this is what really happened.

(XIX, T1617). Again vouching for the credibility of Philip Bolin's prior statements, the prosecutor flatly declared, "He told the truth in July 1990" (XX, T1706)[9].

Accordingly, the prosecutor not only presented Philip Bolin's prior statements as credible; he also argued to the jury that they should be considered as "truthful" substantive evidence to support Appellant's conviction. Applying the balancing test of Rule 403 as Morton suggests[10] [see also Parsons v. State, 608 So. 2d 67 at 69 (Fla. 2d DCA 1992)], the "extent to which the evidence is probative of the witness's credibility" is clearly outweighed by "the probity of the evidence if used prejudicially as substantive evidence". As in Ellis, the prosecutor "was using the prior statement almost entirely for its substantive effect on the fact finder". 622 So. 2d at 996.

C) Compilation of Statements Given by Philip Bolin at the August 1, 1990 State Attorney's Investigation which were Allowed into Evidence.

STATEMENT NO. 1

> Q. And you remember being asked this question while you were under oath by an assistant state attorney, page four, line three, "Drawing your attention back to the date of December 5th, 1986. Did you see Oscar Ray Bolin, Jr. that night?" Your answer, "On December 5th?" The question, "The late night

---

[9]This was when he first made statements to the police (XI, T718-9).

[10]689 So. 2d at 263-4, summarizing the approach of the federal courts.

of December 4th or the early morning hours of December 5th?" Your answer, "Yes." Question, "Why don't you describe for us how it was that you came into contact with Oscar Ray and where that was at." Your answer, "He had come up that night and I was in the trailer, the one I was staying in, my sister's trailer. He woke me up around 11:00 or twelve o'clock and I go to the door, open the door and he's standing there."

Do you remember making that statement under oath back on August 1st of 1990?

A. I believe I remember saying something like that.

Q. Mr. Bolin, isn't that what the truth was, sir, that on December 4th, December 5th you were in your trailer by yourself when there was a knock on the door, you opened it up and you saw Oscar Ray Bolin?

A. No. He come [sic] that afternoon and seen [sic] me.

Q. Sir, when you made that statement at the State Attorney's office that I just read you, was that a truthful statement?

A. I said what you wanted me to say, sir.

(XI, T731-2).

STATEMENT NO. 2

Q. And was the sheet wrapped tightly around the body, Philip?

A. I can't remember, sir.

Q. Philip, was your memory better back in August of 1990, you know, some six years ago?

A. I'd say it was, sir.

* * *

Q. And do you remember coming to the State Attorney's Office here in this courthouse and being asked questions under oath?

A. Yes, sir.

Q. And on page five, line twelve, the question that was asked of you Philip, "Was the sheet wrapped around anything that you could tell?" And your answer, "You mean, yeah, it was wrapped around the body." The question, "Okay. Could you tell at that point what was inside the sheet was a body?" Your answer, "Pretty much because the way it was, the way the sheet was real tight around. There wasn't no loose parts to it, it was tight. I could see how it was distinctly coming up and I pretty well figured it was a body." "Was the sheet wrapped tightly around the body?" Answer, "Yes."

Okay. Do you remember those questions and answers, Philip?

A. Yes, sir.

Q. And if those were the questions and answers that you gave in August of 1990, were they truthful answers?

A. Yes, sir.

(XI, T761-2).

STATEMENT NO. 3

Q. And you after the thumping and seeing your stepbrother with the club asked Needles, what have you done? And he responded, don't worry, help me. Right? Remember that, Philip Bolin?

A. I believe so, sir.

Q. Are you sure or do you have a hazy recollection, Mr. Bolin?

A. I can't hardly remember back then, sir, honestly, truly.

Q. Now, remember coming to the State Attorney's Office on August 1st of 1990, right?

A. Yes, sir.

Q. And your recollection was a lot better then than it is today six years later as to certain specifics as to what you saw?

A. I would say so, sir.

Q. And going to page six of that State Attorney's investigation, ... line four of page six, question, "What happened at that point?" Your answer, "I looked down at it and I looked back up and I said, Needles, what have you done?" ... And he says "Don't worry, he says, help me. And then he said help me. And then I said no, I said no, I ain't going to help you. He said help me, she got shot, help me. So I walk over to her and grab her legs."
You remember that?

A. Yes, sir.

(XI, T772-3).

STATEMENT NO. 4

Q. And then when you refused to go with your stepbrother you saw him drive the wrecker down a road that takes you to Coonhide Road; remember that, Philip Bolin?

A. He left. I stayed.

Q. Do you remember seeing him drive on a road that takes you to Coonhide Road?

A. He turned out of the driveway and left.

Q. Mr. Bolin, going back to that State Attorney's Office investigation on ... August 1 of 1990, going to page twelve, line twenty-four, question, "Did you see him drive away?" Answer, "I didn't see him turn around and drive. I just seen him drive up the driveway maybe fifteen, twenty feet before he got to the road. And then I seen him get up there and turn right as I looked out the window, just about at the end of the driveway." Question, "Which way would he turn out of that driveway?" Answer, "Right." "What road is that?" Answer, "That takes you back out to Coonhide Road."

A. Yes, sir.

Q. Does that refresh your recollection?

A. Yes, sir.

Q. Is that what you saw?

A. Yes, sir.

(XI, T784).

STATEMENT NO. 5

Q. Also going to that State Attorney's Office investigation back on August 1st of 1990. Remember answering questions there?

A. Yes, sir.

Q. Going to page seventeen, line five, question asked of you, "Do you know whether or not Oscar Ray has a mailbox at the Land O'Lakes Post Office?" Your answer, "Yes, he had one there, but I don't know the answer because I never did -- I just went with him before there to check his mail and always sat in the truck." Question, "So you know he had a box there?" Answer, "Yes. Yeah." Question, "He would come out with mail?" Answer, "Yeah."

Back in August of 1990 if you indicated just what I read to you, was that truthful?

A. Yes, sir.

(XI, T791).

STATEMENT NO. 6

Q. Now, during this time period before December 5th of 1986, Mr. Bolin, you knew that Needles carried a big carpet knife with him all the time, right?

A. I -- honestly I can't remember. Not a knife.

Q. Well, did he carry a knife with him during this period of time?

A. I can't remember honestly.

Q. Was your memory a lot fresher back August 1st of 1990, Mr. Bolin?

A. I'd have to say it was.

Q. And remember being at the State Attorney-'s Office investigation once again?

A. Yes, sir.

Q. And you were asked questions by an assistant state attorney?

A. Yes, sir.

Q. No one forced you to say anything, did they?

A. No, sir.

Q. Nobody coerced you, told you what to say, did they?

A. No, sir.

Q. Pretty much you were asked to come to the State Attorney's Office, you saw a court reporter, a young lady like this, and you were asked to tell the truth; isn't that right?

A. Yes.

Q. And you attempted to do that, didn't you?

A. Yes, sir.

Q. And now page twenty-seven of that transcript, line eight, question, "Did you ever know him to have any weapons?" Speaking about Needles. Answer, "No, not that I know of." Question, "How about knives?" Your answer, "Just one big knife, a carpet knife." Question, "Can you describe that knife for me?" "Big wooden handle, big crooked knife." "You mean a curved blade?" Your answer, "Yes, a curved blade."
Does that refresh your recollection, Mr. Bolin, about the knife?

A. Honestly, I don't remember.

Q. If you would have had -- if you would have said that back in August of 1990 under oath, would it have been truthful?

A. Yes, sir.

Q. Going back to that same State Attorney's investigation transcript. Let me see if this refreshes your recollection. Page twenty-seven, question, line sixteen, "Describe that, please." That's in reference to the knife, Mr. Bolin. And your answer, "He used it when he was cutting some wire on his trailer, he was wiring the lights on the trailer, and I had seen him cutting linoleum with it." Question, "Is that a folding knife or a fixed blade knife?" Question, "Did it fold shut into the handle?" Your answer, "Yes."
Does that refresh your recollection at all about the knife?

A. Honestly, I don't remember no knife. I mean, if I did I would tell you, but honestly I don't remember no knife.

(XII, T806-8).

STATEMENT NO. 7

Q. And do you recall back when we spoke -- I'm sorry, when you spoke to an assistant state attorney on August 1st of 1990 at that State Attorney's Office investigation, do you remember discussing the Kinards?

A. Not really, sir, honestly.

Q. Well, let me see if this refreshes your recollection. Page eighteen, we'll start with line twenty-four. Page eighteen, line twenty-four, question, "Did they tell you where the body was found?" Your answer, "Not then. I never heard. And then I went home to my house after I stayed there a while, I went home and went down to Mr. and Mrs. Kinard's because I was scared." You were referring to after the body was found. ... "and I spent two nights with them. And then they said it was found, they found it in an orange grove. And then I heard from Donny's mother that it was found beside the railroad tracks."
Do you recall that?

A. Yes, sir.

Q. And when you talk about Donny in that answer, we're talking about Donny Gibson?

A. Yes, sir.

Q. And when we say the railroad tracks, that's where the body was found, correct?

A. Yes, sir, I believe.

Q. So when you went and stayed at Mr. and Mrs. Kinard's it was after Oscar Ray Bolin had killed that female and loaded her on the wrecker with you, correct?

A. Yes, sir.

Q. And it was fresher in your mind what happened in 1986 back in 1990 than it is today in 1996?

A. Yes, sir.

Q. And you were placed under oath and you wanted to be a hundred percent truthful?

A. Yes, sir.

(XII, T884-6).

STATEMENT NO. 8

Q. As a matter of fact, when you were first brought into the State Attorney's Office on August 1st of 1990 weren't you asked on page twenty-six, line five, "Okay. Everything that you're telling us about what happened that night December of '86 and the few days afterwards, has that been the truth?" And your answer, "Indicating affirmatively. The truth." Right?

A. Yes.

(XII, T896).

D) The Prosecutor's Improper Procedure when Examining Philip Bolin Brought Other Statements into Evidence Under the Guise of Impeachment.

In addition to using hearsay statements from the State Attorney's investigation as substantive evidence, the prosecutor-'s improper examination of Philip Bolin resulted in other prior statements being impermissibly read to the jury. Despite purporting to be impeachment, introduction of the prior statements was not triggered by Philip Bolin giving testimony that was contradictory to what he had said earlier. Rather, the prosecutor's questioning would track the script expected from the witness, and whenever Philip Bolin did not recall any aspect -- down to the most minute detail -- the prior statement would be read into evidence (XI, T764-5, 768-9, 770-1, 774, 777, 780-1, 789-90, 790-1, XII, T805-6, 810). Frequently, the prosecutor would follow up by asking Philip Bolin whether his memory was better at the time he made the prior statement and whether the prior statement was "accurate" or "truthful" (XI, T765-6, 774-5, 777, 789-90, 791, 805, 811). On redirect examination, the prosecutor did not even bother to ask the witness to testify from his present memory; he simply read Philip Bolin's prior testimony and asked him if he remembered making his own prior statements (XII, T891-4). The prosecutor even went so far as to "impeach" the witness, not from his prior testimony, but from the scenario which the prosecutor hoped to present to the jury. For example:

> Q. Tell me what you remember his explanation of how the girl got killed.

A. He said he met her and that he was going to do a drug deal and she got shot.

Q. He actually told you that she had come to Tampa to get him to do a drug deal with her, that she came down in her car and he followed her in the wrecker and that they parked at the Land O'Lakes Post Office and that they walked across the road where there's a ball field, then there was some shooting, he ran across the road and she got shot in the car, he picked her up, put her in the wrecker and came back to his place, right?

* * *

Q. Philip, did you understand that?

A. Yes, sir.

Q. Is that what ... Oscar Ray Bolin told you after he loaded her up in the wrecker?

A. Yes.

(XII, T816-7). In short, the prosecutor's examination of Philip Bolin resembled impatient prompting of an actor who has forgotten his lines.

1) A Testifying Witness' Prior Statement Must be Truly Inconsistent in Order to be Admissible.

In his treatise, Florida Evidence, Professor Charles Ehrhardt described admissibility of a witness' prior statements as follows:

> A prior statement of a witness is admissible to impeach credibility only if it is in fact inconsistent. The prior statement should be admitted if the prior statement directly contradicts the testimony, or there is a material difference between the two. If the prior statement does not mention a material circumstance which would have been natural to mention in the statement, the omission in the statement should be admissible as an inconsistent statement. The omission would gener-

> ally be of a significant fact rather than details. "Nit-picking" is not permitted under the guise of prior inconsistent statements.

Ehrhardt, Florida Evidence, §608.4 (1997 ed.) (e.s.). Similarly, when a witness testifies that he or she cannot recall what happened, it is improper to "impeach" the witness with prior statements, especially ones that are not materially inconsistent. Shere v. State, 579 So. 2d 86 at 93 (Fla. 1991); Parnell v. State, 500 So. 2d 558 at 561 (Fla. 1st DCA 1986), rev. den., 509 So. 2d 1119 (Fla. 1987). Florida courts have consistently found error where the prosecutor, as at bar, responded to a witness's lack of recall by reading the questions and answers from a prior proceeding. For instance, in Barnett v. State, 444 So. 2d 967 (Fla. 1st DCA 1983), a court witness testified that she remembered attending her deposition but did not remember how she answered the questions. Over objection, the prosecutor was permitted to read several of the questions and answers into evidence while asking the witness if she remembered being asked the questions and giving the answers. The First District reversed the conviction because there was no predicate for impeachment when the witness did not testify inconsistently, but only did not recall the prior statements. Consequently, reading portions of her deposition to the jury violated Fla. R. Crim. P. 3.220(h) which limits the use of a discovery deposition to "the purpose of contradicting or impeaching the testimony of the deponent as a witness". Accord, Rankin v. State, 143 So. 2d 193 (Fla. 1962); State v. James, 402 So. 2d 1169 (Fla. 1981).

Stated otherwise, impeachment of a witness is a shield to defend against adverse testimony that the witness may give at trial. It is not a sword to establish evidence by prior statement that may have been more favorable to the party, but which would be inadmissible if offered directly.

2) Prior Statements Cannot be Read Aloud in the Presence of the Jury Under the Guise of Refreshing the Memory of the Witness.

A closely related and equally improper prosecutorial tactic is to read prior statements to the witness in the presence of the jury, and then inquire if the witness' recollection was refreshed. When a prior statement is used to refresh a witness' recollection, "the contents of the statement are not to be put in evidence before the jury". Young v. United States, 214 F. 2d 232 at 237 (D.C. Cir. 1954), quoting United States v. Socony-Vacuum Oil Co., 310 U.S. 150 at 234 (1940) ("there would be error where, under the pretext of refreshing a witness' recollection, the prior testimony was introduced as evidence").

In Oliver v. State, 239 So. 2d 637 (Fla. 1st DCA 1970), quashed on other grounds, 250 So. 2d 888 (Fla. 1971), a court witness testified that she knew nothing about the defendant's participation in a crime. The prosecutor was allowed to read the questions propounded and the answers she gave in a prior interview given under oath under the theory that it would refresh the witness' memory. On appeal, the court held that "the procedure followed by the prosecution in this case was erroneous as a

matter of law". 239 So. 2d at 641. See also, Hill v. State, 355 So. 2d 116 (Fla. 4th DCA 1978) (reversible error found where tape recorded prior statement of the witness played in the jury's presence, judge stated that it was to refresh the witness' memory and instructed the jury not to consider it as evidence); Morton, supra., 689 So. 2d at 264 n.5; Ehrhardt, Florida Evidence, § 613.1 (1997 edition).

At bar, throughout Philip Bolin's testimony the prosecutor read questions and answers from prior proceedings to the witness under the pretext that he was refreshing Philip Bolin's memory. Excerpts from the record documenting the prosecutor's improper procedure are compiled in the following subsection.

E) Compilation of Prior Statements Erroneously Placed Before the Jury Under Guise of Impeaching a Lack of Recollection or Refreshing Philip Bolin's Memory.

STATEMENT NO. 1

Q. And he asked you to turn the hose off, didn't he?

A. I can't remember honestly, sir.

Q. Philip, remember testifying in the grand jury back on February 19th of 1991, and it was a courtroom?

A. I believe so, sir.

Q. Okay. There was no judge in that court-room , but you were asked questions under oath, right?

A. Yes, sir.

Q. Okay. Starting on page seven, line ... fifteen, question was asked of you Philip, was one of, "When he turns the water hose on does he have the water hose in his hand?" And your answer was, "First he tells me to go get it. I wouldn't do it. He goes and gets it. He pulls it over there. Tells me to go up there and turn it on and I wouldn't." Question, "Then what happens?" Your answer, "So he goes up there, he turns it on, then he stands over the top of the body, pulls the sheet down and does something, puts the hose down to her face or something." Question, "Does it look like he's washing whatever it is?" Your answer, "No. At first he was doing this and then he holds it still. I presume he was trying to drown her or something." Question, "Okay. What happens next?" Answer, "Then he tells me to go turn it off. I wouldn't do it so he goes back up there and he turns it off. He comes back and he picks up this little tire tool."

Do you remember those questions and answers, Philip?

A. Yes, sir.

Q. Was your memory a lot better in February of 1991 than it is in 1996?

A. I'd say it is, sir.

Q. Okay. If those were your answers back to that grand jury in February of '91, those would have been truthful answers, Philip?

A. Yes, sir.

(XI, T764-6).

STATEMENT NO. 2

Q. Now, does he hit the body more than one time with the club?

A. Yes, sir.

Q. Do you hear the sounds from the wooden object hitting the body?

A. I can't remember if I heard anything, sir.

Q. Okay. Philip, remember giving a deposition back in April of 1992? We talked about it earlier. It was at the Kentucky State Police Post in Morehead, Kentucky, right?

A. Yes, sir.

* * *

Q. You understood that you were placed under oath and it was your obligation --

A. Yes, sir.

Q. -- to be truthful. And going to page thirty-eight of that transcript, line eighteen, the question that was asked of you, "Now, your answer when you were talking about the noises when he was striking the body, you said it sounded like a pillow being hit; is that correct?" Your answer was, "Yeah." Question, "How many times did you hear this sound?" Your answer is, "I don't know. Five, ten, something around in that area. I really -- I never really counted them or anything, I just heard them." Right?

A. Yes, sir.

Q. Does that refresh your recollection, Philip, about you hearing him use the club to hit the body five to ten times?

A. Honestly, sir, I can't remember. I just, you know -- just never did --

(XI, T768-70).

STATEMENT NO. 3

Q. Do you, Philip, remember hearing a thumping sound?

A. I don't remember now, sir, honestly.

Q. Okay. Let's go back to the October 1992 testimony, okay. We talked about that , that's in this big courtroom with the judge sitting near your left, right?

A. Yes, sir.

* * *

Q. And the question on page forty-four, it looks like line fourteen, the question, "You saw him raise the club. Did you hear anything?" Your answer, Philip, was, "Yes."

* * *

Q. ... The question is, "What did you hear?" And your answer was, "Just some thumping sounds." The question was, "Thumping sounds?" Your answer is, "Yes." Question, "Did you hear one thump or more than one?" Your answer, "Several thumps." Question, "All right. And after you heard the thumps what did you see or what did you hear again?" And your answer, "Went and got the hose again."

Okay. Do you remember being asked those questions and giving those responses back in October of '92?

A. I believe so, sir.

(XI, T770-1).

STATEMENT NO. 4

Q. Now, during the course of while you were out there by where this body and sheet was, did your stepbrother use the word "her" when he referred to the body under the sheet?

A. I believe so, sir.

Q. Mr. Bolin, do you have a vivid recollection of him using the word "her" when he referred to the body?

A. She.

Q. She?

A. Yes, sir.

Q. Mr. Bolin, going back to that deposition in April of 1992 at the Kentucky State Police Post in Morehead, Kentucky, page twenty-two, line sixteen, question that was asked of you, "Do you remember his words when he said help me lift her, help me put her, did he keep

saying her?" Your answer, "Yeah, he kept saying her." Okay?

A. Yes, sir.

Q. Was that truthful when that statement -- your response was made?

A. Yes, sir.

(XI, T774-5).

STATEMENT NO. 5

Q. What color were the pants?

A. I honestly don't remember, sir.

Q. Mr. Bolin, I want to go back to when you answered questions in October of 1992, okay. That's that large courtroom setting with the judge sitting within feet from you.

A. Yes, sir.

Q. And you were asked questions, page forty-seven, going to line sixteen, the question that was asked of you "Now, you picked up, you said, the body by its ankles, you felt the stockings. Did you see whether the person was wearing pants or a dress?" Your answer, "Pants." Question, "Could you tell the color or anything about them?" Answer, "No. Just light color or something."
Now, when you gave testimony in October of 1992, would that have been accurate and truthful?

A. Yes, sir.

Q. And would your memory have been fresher in October of 1992 than it is today in 1996?

A. I'd say so, sir.

(XI, T777-8).

STATEMENT NO. 6

Q. Didn't you believe in your own mind when you picked up the ankles and loaded the fe-

male onto the wrecker that the body was dead and that your brother had killed her?

MR. FIRMANI: Objection. Speculation.

THE COURT: Overruled.

A. Ah -- yes, sir.

Q. Are you sure?

A. I'm not for sure, but you know --

Q. Mr. Bolin, let's go back to the deposition in 1992, in April of 1992, page twenty-eight. Question that was asked of you was question, line three, page twenty-eight, "When he loaded her on the wrecker did you form an impression or opinion as to whether she was dead or alive?" Your answer, "I figured that he killed her. She was dead."

A. I believe so, sir.

Q. So back in April of 1992 it was your impression or opinion that at the time she was loaded onto the wrecker she was, number one, dead, and number two, Needles had killed her?

A. Yes, sir.

(XI, T780-1).

STATEMENT NO. 7

Q. Now, back during this period of early December of 1986 when this all happened you knew Needles was married to Sheryl Jo Bolin?

A. Yes, sir.

Q. And she was in the hospital in Tampa at the time, wasn't she?

A. I can't remember if she was in the hospital or where she was at.

Q. Mr. Bolin, let's go back to the October 1992 proceeding where you testified in open court. Okay?

A. Yes, sir.

Q. Now, on page fifty, line twelve, there was a question asked of you, question is, "When you said you were in your home, the Defendant occupied a camper, do you know where Sheryl was during this period of time?" And your answer was, "In a hospital in Tampa." Right?

A. Yes, sir.

Q. Mr. Bolin, does that refresh your recollection a little bit?

A. Honestly it don't, sir.

Q. Bit if you told us that in October of 1992 in that open courtroom under oath, would it have been truthful?

A. Yes, sir.

Q. And was your memory much better in October of '92 than it is in 1996?

A. Yes, sir.

Q. So if you said that in October of '92 that would have been an accurate statement, that Sheryl, his wife, was in a hospital in Tampa?

A. Yes, sir.

(XI, T789-90).

STATEMENT NO. 8

Q. Now, you knew that Needles and Sheryl had a post office box at the Land O'Lakes Post Office?

A. I can't remember, sir, if I knew or not.

Q. Let's go back to the October testimony, okay. Right? Just referred to it earlier. It's the testimony in the open courtroom. Going to page fifty, line nine, the question that was asked of you, "Now, to your knowledge did Sheryl Bolin and Oscar Ray Bolin have a post office box anywhere?" Your an-

swer, "Yeah, at the Land O'Lakes Post Office."

Okay. Would it have been truthful back then in October if you said it?

A. Yes, sir.

(XI, T790-1).

STATEMENT NO. 9

Q. Now, after you found out that Danny -- Donny Gibson found the body, you actually had a conversation with Needles about that, didn't you?

A. I believe I did.

Q. Didn't you talk to him about it?

A. I think I -- I'm pretty sure I did.

Q. And do you remember what he said?

A. No, not -- not really.

Q. Well, let's go back to your testimony in October of 1992, okay?

A. Yes, sir.

Q. And once again, as you said earlier, it would have been fresher in your mind in October of '92 than it is in '96, correct?

A. Yes, sir.

Q. And you were asked these questions, page fifty-one, line three, question, "Now, that same day that you heard about the body being found by Don Gibson, did you see Oscar Ray Bolin that afternoon?" Your answer was, "Yes." Question, "And could you tell us about that?" Your answer, "He just come over, asked me how I was doing. I told him that they found -- that my neighbor found that body." Question, "What did he say?"

* * *

Q. Question, "What did the Defendant say about that? You told the Defendant, Oscar

Ray Bolin, that the girl's body was found by Donald Gibson, right?" Your answer is, "Yes-." Question, "What did the Defendant say when you told him that?" And here was your answer, Mr. Bolin, back in October '92, "He stood there and just said, well. That was about it." Does that refresh your recollection a little bit?

A. Yes, sir.

Q. So when you told Needles that Donny Gibson found the body he said well?

A. Yes, sir.

(XII, T805-6).

STATEMENT NO. 10

Q. Now, Mr. Bolin, I want to go back to that nighttime of December 5th of 1986. During the time you were out there and you've described to us the body with the sheet over it, did you ever hear breathing coming from the body?

A. No, sir.

Q. Mr. Bolin, I want to go back to that ... April of 1992 deposition at the Kentucky state police barracks in Morehead, Kentucky, all right?

A. Yes, sir.

* * *

Q. And you were asked to read it prior to offering testimony in October of 1992, right?

A. Yes, sir.

* * *

Q. Going to page thirty-four of that deposition, Mr. Bolin, line eighteen, question, "A few things that we need to go over again here now. When you first came out of the trailer you described as hearing something that you said were like dog sounds. Can you please describe the sounds that you heard?" Your

answer, "Now, well, I -- it's hard to explain, you know. It's a funny sound, just -- " Question, "Was it like a whining, a whimpering or something like that?" Your answer, "Like a real loud blowing, you know. It was like, you know, like when your lips are moving back and forth when you blow them and blow them." Question, "Like a type of breathing sound, is that it?" Answer, "Yeah, something like that. Can't remember. It's kind of hard to explain what kind of sound it was."

Does that refresh your recollection?

A. I remember saying that, yes.

Q. Is that what you heard if it was said back in 1992?

A. Yes, sir.

(XII, T809-11).

STATEMENT NO. 11

Q. Well, if I could ... go back to page seven, Mr. Bolin, line ... twenty. The question in the grand jury that was asked of you, Mr. Bolin, "Then what happens?" Your answer, "So he goes up there, he turns it on, then he stands over the top of the body, pulls the sheet down and does something, puts the hose down to her face or something." Question, "Does it look like it's -- he is washing whatever it is?" Answer, "No. He just -- at first he was doing this and then he holds it still. I presume he was trying to drown her or something." Question, "What happens next?" "Then he tells me to go turn it off. I wouldn't do it, so he goes back up there, turns it off, and then he comes back and he picks up this little tire tool." Remember that?

A. Yes, sir.

Q. Then later on page eight do you recall describing it further for the grand jurors?

A. Yes, sir.

Q. Question, that same page, line twelve, "Okay. What does he do with this tire tool?" Answer, "He raised it up, then I turned my head. I hear struck, hitting sounds." Question, "Okay. You assumed when you turned your head that he was hitting something with the tool?" Answer, "Yes."

* * *

Q. ... Question, "Because it made a sound like he was hitting something with the tool, right?" Your answer was, "Yes." Question, "Could you describe this tool a little better for us?" And your answer, "It's just about two feet, two foot long wood, got a piece of steel at the end of it."

Do you remember being asked those questions and giving those answers?

A. Yes, sir.

Q. So when you said earlier in response to Mr. Livermore's question that it was a little tire tool, you went ahead and described it with more specificity for the grand jurors?

A. Yes, sir.

(XII, T891-3).

STATEMENT NO. 12

Q. When you used the term tire buddy, when you described the object, what were you meaning?

A. Just a thing that you check your tires with.

Q. Okay. And what does it look like, this tire buddy?

A. Just about two foot long with a piece of steel on the end.

Q. Okay. Going to page forty-eight of that transcript, question, "The object that you described to us ... can you describe that wood club any more than you've already told us? You told us it was a wood club, but what else about it?" Your answer, "It looked like

> a tire buddy. It had a metal end on it, tape around the handle part of it."
>
> Do you remember telling that back in October of 1992?
>
> A. I believe so, sir. I can't answer honestly.

(XII, T894).

F) Whether Trial Counsel Preserved the Record for Appeal by Adequate Objection or Whether the Error is Fundamental?

Trial counsel did not make an ideal series of objections to the prosecution's examination of Philip Bolin. The primary defense objection at trial to the form of examination was "leading questions" (XI, T758, 759, XII, T816, 817, 834, 846, 889) and the objection was always overruled. The court indicated throughout that leading questions were appropriate in the examination of a court witness. Indeed, section 90.615 (1) of the Florida Evidence Code specifically allows "all parties" to cross-examine a court witness. The Evidence Code further specifies that, "Ordinarily, leading questions should be permitted on cross-examination". section 90.612 (3).

At bar, however, the trial court went too far in allowing the prosecutor to lead to the point that almost 100% of the factual scenario developed while Philip Bolin was on the stand came from either the previously mentioned improper reading of former testimony or the prosecutor's assertion of factual details, followed by Philip Bolin's response of "Yes, sir".[11] As

---

[11]Cf., Ellis, 622 So. 2d at 998. ("A large number of [the witness'] statements are merely 'yes' or 'no' replies to detailed leading questions put by the State").

to the latter, the following is a representative excerpt from the examination of Philip Bolin:

> Q. Philip, he told you to follow him to his camper, right?
>
> A. Yes, sir.
>
> Q. And his camper was located right near where you were staying, right, your trailer or camper? Right?
>
> A. Yes, sir.
>
> Q. On the same property --
>
> A. Yes, sir.
>
> Q. -- right?
>
> A. Yes, sir.
>
> Q. And he told you to come on over to his camper and help him, correct?
>
> A. Yes, sir.
>
> Q. And still you didn't know what was going on, it was late at night, you had just been woken out of your sleep, it was dark out there, and all you know is you heard a sound that you thought might have been your dog being run over by a car, right?
>
> A. Yes, sir.
>
> Q. And when you get over to Needles' camper you see something on the ground that's unusual, correct?
>
> A. Yes, sir.
>
> Q. What do you see?
>
> A. I see a sheet laying there.
>
> Q. And it looked like the sheet was wrapped around a body, didn't it?
>
> A. Yes, sir.

Q. And the sheet was a whitish color sheet, right?

A. Yes, sir.

Q. And you heard noises that appeared to be coming from the sheet, from the body, right?

A. Yes, sir.

Q. You didn't touch the body, Philip, but you got close enough to tell that it was a body, correct?

A. Yes.

Q. Right then?

A. Yes, sir.

(XI, T760-1).

In this whole excerpt, the only fact that Philip testified to was that he saw a sheet laying on the ground. The rest of the factual scenario came entirely from the prosecutor's mouth, almost in the manner that a director would coach an actor walking through a scene. While Philip Bolin was purportedly the eyewitness, at trial it was the prosecutor who told the jury the crucial factual details that tied Appellant to this homicide. See also, XI, T756-8, 758-9, 763-4, 775-7, 782-3, 787-9, XII, T816-7, 889-91.

Accordingly, defense counsel's repeated objections to allowing the prosecutor to ask constant leading questions of Philip Bolin did highlight this error, which was independently reversible. Trial counsel also futilely objected to allowing the prosecutor to prepare for introduction of an inconsistent prior statement before Philip Bolin had given one (XI, T725, 728). He

further objected to the prosecutor's characterization of Philip Bolin's prior testimony as "truthful" (XI, T750). In short, the trial judge was made aware that the prosecutor's procedure was improper.

Admittedly, counsel did not argue that admission of Philip Bolin's prior statements from the State Attorney's Investigation violated Appellant's Sixth Amendment right to confrontation; nor did he request the judge to instruct the jury that the prior statements could not be considered as substantive evidence as counsel in Morton did. However, as this Court has recognized, even when the jury is instructed to consider the prior statements only as impeachment, one cannot be certain that the jury was able to avoid confusion and follow the instruction. Morton; Dudley, 545 So. 2d 857 at 859-60 ("Although limiting instructions were given to the jury, the evidence was used by the State as substantive evidence -- not in its limited impeachment capacity. Admission of this evidence was clear error."). See also, Parsons, 608 So. 2d at 69 ("meticulous instructions cannot always be relied upon to erase the prejudice created after the jury has heard the substance of the prior statements.") Courts from other jurisdictions have also noted the likelihood that the jury may ignore any limiting instruction given by the trial judge and consider the evidence for substantive purposes. Ince, 21 F. 3d at 581; State v. Hunt, 324 N.C. 343, 378 S.E. 2d 754 at 757-8 (1989).

Accordingly, the failure of trial counsel at bar to request a limiting instruction (which the jury would probably have ignored) should not operate as a procedural default. In United States v. Gomez-Gallardo, 915 F. 2d 553 (9th Cir. 1990), the court reviewed impeachment of a witness by otherwise inadmissible prior statements despite the absence of any defense objection. In reversing for a new trial, the Gomez-Gallardo court concluded that the government's action amounted to "plain error" because the prior statements were both highly prejudicial and used substantively against the defendant. The same is unquestionably true of Philip Bolin's prior statements at bar and this Court should treat the error as fundamental.

Finally, it should also be recognized that Appellant himself objected to the trial procedure while Philip Bolin was on the witness stand. In an oral pro se motion to discharge counsel and to disqualify the trial judge, Appellant stated to the court:

> I'm entitled to a fair and impartial trial by a jury. I'm entitled to a representation, adequate representation; this Court's depriving me of that.
> Every rule's been broken so far in this trial. The State has been able to do virtually anything unlimited, whatever they want.
> You've showed virtually -- you haven't been fair and impartial and that's the way I perceive it.

(XII, T814-5). While Appellant exaggerated when he said that "every rule's been broken so far in this trial", there were enough rules of evidence broken to constitute a denial of fundamental fairness as guaranteed by the Due Process Clause of the Fourteenth Amendment, United States Constitution. His statement

to the court adequately preserves this issue for appellate review.

G) Harmless Error Analysis.

Black's Law Dictionary defines harmless error as "an error which is trivial or formal or merely academic and was not prejudicial to the substantial rights of the party assigning it and in no way affected the final outcome of the case". 6th edition, 1990, p. 718. By this standard, admission of highly prejudicial prior statements of the sole purported eyewitness to a homicide could never be harmless error because this evidence is hardly "trivial" or "merely academic".

For an error to be harmful does not mean that the remaining evidence must be insufficient or even constitute a weak case. As this Court recognized in State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986), error may be harmful even in the face of overwhelming evidence. Quoting former California Justice Traynor, the DiGuilio court wrote:

> Overwhelming evidence of guilt does not negate the fact that an error that constituted a substantial part of the prosecution's case may have played a substantial part in the jury's deliberation and thus contributed to the actual verdict reached ...

491 So. 2d at 1136.

At bar, Philip Bolin was the star witness for the prosecution. Although his actual testimony at trial consisted mainly of "yes sir"'s and "no sir"'s, the prosecutor was able to interweave prior statements and leading questions into a fabric which, if believed, was an eyewitness account of Appellant clubbing to

death a moaning woman wrapped in a sheet. The jury could hardly ignore such a dramatic presentation and base their verdict solely on the other, mostly circumstantial, evidence produced at trial.

Indeed, the prosecutor argued to the jury:

> As a matter of fact, you can disregard the physical evidence. You can believe Dr. Bakken that there's all sorts of mistakes, but if you believe Philip Bolin, Philip Bolin's testimony by itself is enough to convict that man sitting over there.

(XX, T1703). The prosecutor continued:

> There's not been one shred of evidence to suggest why in July of 1990 Philip Bolin would have said he saw his brother commit a murder. Why would he say his own brother, his older brother Needles committed a murder back then unless he just knows what he's talking about, unless he's telling you the truth, unless he saw this woman killed?

(XX, T1705). Here, the prosecutor's emphasis in closing argument was on Philip Bolin's prior July 1990 statement in the State Attorney's investigation which should not have come into evidence. Consequently, the jury was urged to consider improper evidence during closing argument; and it is likely that they did so.

In Sullivan v. Louisiana, 508 U.S. __, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993), the United States Supreme Court clarified what a reviewing court must consider in harmless error analysis. The question is not what effect the error might be expected to have on a hypothetical "reasonable jury", but its effect upon the guilty verdict returned in the case being reviewed. The appellate court must look "to the basis on which 'the jury actually

rested its verdict.'" 124 L. Ed. 2d at 189, quoting from Yates v. Evatt, 500 U.S. 391, 114 L. Ed. 2d 432 at 449 (1991).

At bar, the improper evidence presented while Philip Bolin was on the witness stand must have contributed to the jury's verdict in the guilt or innocence phase. Unlike Morton, Appellant did not confess to the police; the prior statements of Philip Bolin were the strongest evidence of his guilt. Accordingly, this Court should reverse for a new trial on the first degree murder charge.

ISSUE III

THE TRIAL COURT ERRED BY DENYING APPELLANT'S MOTION FOR MISTRIAL AFTER THE PROSECUTOR INTENTIONALLY INFORMED THE JURY THAT THERE HAD BEEN A PRIOR TRIAL IN THIS CASE.

In Jackson v. State, 545 So. 2d 260 (Fla. 1989), this Court considered the prejudice to a defendant whose jury is informed that there was a previous trial in the case. The Jackson court wrote:

> The fact that there has been a prior trial, although not admissible evidence, many times is inadvertently presented to the jury through various means during the course of a second trial. In this instance the presentation of evidence of a prior trial was not inadvertent but intentional. ... The prejudicial effect upon a jury of testimony that a defendant has been previously convicted of the crimes for which he is now on trial is so damaging that it cannot be said beyond a reasonable doubt that a jury would return a verdict of guilty absent the testimony.

545 So. 2d at 263.

At bar, the prosecutor chose from the very beginning of Philip Bolin's testimony to convey to the jury that Philip had testified against Appellant at a prior trial without actually mentioning the word "trial". Defense counsel objected repeatedly to the prosecutor's descriptions of the settings for Philip Bolin's prior statements such as the following:

> Q. Then do you remember after that in October of 1992 actually being in a courtroom and offering testimony? Remember in October of 1992 being there, being asked questions by the prosecutor, myself, and an attorney representing your brother?

(XI, T723). Appellant's motion for mistrial was denied at this point (XI, T723-4), but it was soon renewed when the prosecutor actually identified the proceeding as a trial:

> Q. She told you, Mr. Bolin, that she was concerned about your testimony in that October 1992 trial, that that was going to hurt --

(XI, T737). This time, the judge took Appellant's motion for mistrial under advisement (XI, T738-43) and gave this curative instruction to the jury:

> Ladies and gentlemen of the jury, you are hereby instructed to disregard any prior question and/or answer regarding the nature of the October 1992 court proceeding.

(XI, T745).

Although the court later denied Appellant's motion for mistrial, the prosecutor's continued descriptions of the October 1992 proceedings made certain that the jury could not help but realize that a prior trial had been held (XI, T733, 750, XIII, T1050-1, XVI, T1342). Consider for instance this excerpt from the prosecutor's closing argument:

> Remember I had to read from the testimony of October of '92. Philip, do you remember being asked questions under oath? Yes. Do you remember being in a courtroom that was larger than this? Yes. Do you remember the judge sitting three feet to your left? Yes. Do you remember the bailiff? Yes. Do you remember the clerk? Yes. Do you remember people inside coming and going in that courtroom? Yes.

(XIX, T1612). The only purpose for this elaboration was to reinforce the fact that a prior trial had been held. Appellant's

contemporaneous objection to this argument was overruled and his subsequent motion for mistrial denied (XIX, T1613, 1641-2).

Appellant recognizes that juror awareness of a prior trial is not always grounds for reversal. Jennings v. State, 512 So. 2d 169 (Fla. 1987). However, when a prosecutor continuously skates on thin ice with descriptions of the prior proceedings, he should not be excused when he falls in the water by actually uttering the word "trial". At bar, the prosecutor's informing the jury of the prior trial should be viewed as intentional and treated the same as the prosecutor's questioning in Jackson. Appellant was prejudiced and the court's attempted curative instruction did nothing except reinforce the jury's perception that a prior trial had been held.

In evaluating the prejudice to Appellant, this Court should also recognize the cumulative aspect in relation to Issues I and II of this brief. In Issue I, Appellant argued that his jury was not impartial because five of the jurors had been exposed to prejudicial pretrial publicity. The prosecutor's mention that Bolin had a previous trial undoubtedly strengthened their recollection of Bolin's three prior murder convictions and death sentences which were reversed on appeal. With respect to using Philip Bolin's prior statements as substantive evidence in this trial (Issue II), mention of a prior trial could only bolster credibility in this trial of Philip Bolin's prior statements and encourage the jury to base their verdict upon that testimony. Therefore, this Court should not find harmless error in informing

the jury of Appellant's prior trial, but should weigh the cumulative impact of this error with that established in other guilt phase issues. See e.g., Amos v. State, 618 So. 2d 157 (Fla. 1993); Jackson v. State, 498 So. 2d 906 (Fla. 1986).

ISSUE IV

THE TRIAL COURT ERRED BY ALLOWING DETECTIVE KLING TO TESTIFY ABOUT DETAILS OF THE HOMICIDE WHICH WERE ALLEGEDLY NOT REPORTED TO THE MEDIA BECAUSE THE TESTIMONY WAS NOT ADMISSIBLE UNDER THE BUSINESS RECORD EXCEPTION TO THE HEARSAY RULE AND ITS TRANSPARENT PURPOSE WAS SIMPLY TO BOLSTER PHILIP BOLIN'S CREDIBILITY.

During the testimony of Sergeant Gary Kling, the prosecutor asked him whether certain details are withheld from the media in criminal investigations (XVI, T1328). The witness replied that details are withheld as an investigative tool so that law enforcement will know that only the perpetrator or an eyewitness to the crime will be aware of certain facts (XVI, T1328). Over defense counsel's objection to hearsay, the prosecutor questioned Sergeant Kling to establish that police reports indicated what details were not released to the media and that these police reports were both public records and business records (XVI, T1329-30).

In arguing that Sergeant Kling should be permitted to testify to his review of these police reports, the prosecutor took the position that the testimony would not be hearsay, while the court seemed to indicate that the business records exception to the Hearsay Rule would apply (XVI, T1332-6). In any case, defense counsel's objection was overruled and Sergeant Kling was permitted to testify that the newspapers did not report that the

victim's body and clothing were wet, that her shoes were missing, nor that she was wearing nylon stockings (XVI, T1337).

First, there is no doubt that Sergeant Kling's testimony was hearsay. The State admitted that the contents of the newspaper reports of this homicide was hearsay, yet took the position that if Kling testified to what was not in the newspaper accounts, this would not be hearsay (XVI, T1334-6). This is somewhat similar to what occurred in this Court's recent case of Norton v. State, Case No. 88,803 (Fla. December 24, 1997) [23 Fla. L. Weekly S12]. There, another detective testified that he had gone to several stores and "could not find anyone who sold tires to defendant". 23 Fla. L. Weekly at S15. This Court held that the detective's conclusion was inadmissible hearsay because it was predicated on information provided by others.

At bar, Sergeant Kling's negative conclusion about the media coverage is based upon his comparison of newspaper articles to details withheld according to the police reports. Both the newspaper articles and the police reports[12] are hearsay. Kling's conclusion depended upon information from others in the same way that the detective's statement in Norton did. It should also not be overlooked that Sergeant Kling was not involved in

---

[12]Police reports are specifically excluded from the Florida Evidence Code section 90,803(8) hearsay exception for public records. ("matters observed pursuant to duty imposed by law as to matters which there was a duty to report, excluding in criminal cases matters observed by a police officer or other law enforcement personnel").

this investigation from the beginning; he didn't become involved until April 1989 (XVI, T1333).

Since the trial judge may also have relied upon the business records exception to the Hearsay Rule [section 90.803(6) of the Evidence Code], that should also be considered as a basis for admission. It fails because no records were offered or admitted. Oral testimony about the contents of business records is not admissible under this hearsay exception. Smith v. Frisch's Big Boy, Inc., 208 So. 2d 310 (Fla. 2d DCA 1968). See also, Adams v. State, 521 So. 2d 337 (Fla. 4th DCA 1988) (records prepared by probation department might be admitted under the business records exception to the Hearsay Rule, but testimony by an officer about her review of these records is not within the exception).

Additionally, the purported relevance for admission of Sergeant Kling's testimony was anticipatory rebuttal of "an argument that counsel could pose during closing arguments, a very viable argument, you know, that Philip knew about it because he read it in the newspaper" (XVI, T1336). Had defense counsel "opened the door" in this manner, media coverage could have become relevant. However, because the defense never mentioned media coverage, it was irrelevant. Cf., State v. Baird, 572 So. 2d 904 (Fla. 1990) (testimony by FDLE agent that information had been received about defendant being a major gambler was error because it was elicited prematurely).

Appellant was greatly prejudiced by the error in admitting Sergeant Kling's testimony because it had the effect of bolster-

ing Philip Bolin's credibility. By labeling Philip Bolin's prior testimony about 1) observing the victim's body being washed down with a garden hose, 2) picking up the body and noticing that the shoes were missing, and 3) being aware that the victim was wearing nylon hose as "facts that only an eyewitness would know", Sergeant Kling effectively gave the jury his opinion that Philip Bolin should be believed. Sergeant Kling's testimony invaded the province of the jury and denied Appellant due process of law because the jury is the sole arbiter of credibility.

When police officers comment on the credibility of a witness, the air of authority and legitimacy which surrounds their testimony is highly prejudicial and has resulted in reversal. Bowles v. State, 381 So. 2d 326 (Fla. 5th DCA 1980). Expert opinions on the credibility of a witness have long been held inadmissible. See, Audano v. State, 641 So. 2d 1356 (Fla. 2d DCA 1994); Kruse v. State, 483 So. 2d 1383 (Fla. 4th DCA 1986) and cases cited therein. Even vouching by a lay witness for the credibility of another witness may be reversible error. Smith v. State, 674 So. 2d 791 (Fla. 5th DCA 1996) (mother's statement that her child had not made false allegations of criminal behavior against anyone in the past).

At bar, the error in allowing Sergeant Kling to label details from Philip Bolin's testimony as facts that only an eyewitness would know cannot be harmless. Philip Bolin was the key witness for the State and his credibility the main issue in

dispute at trial. Accordingly, Appellant's conviction should be reversed and a new trial ordered.

ISSUE V

MISUSE OF THE DNA STATISTICAL EVIDENCE DURING THE PROSECUTOR'S CLOSING ARGUMENT CREATED REVERSIBLE ERROR.

Prior to trial, Appellant filed a "Motion in Limine - Expert Testimony and DNA Evidence", arguing that the DNA testing and results in this case did not meet scientific standards of reliability (I, R95-6). A Frye hearing was held pretrial and continued during the trial itself (IV, R737-99, XIV, T1077 through XV, T1207). At its conclusion, the trial judge ruled that the DNA evidence would be admitted (XV, T1209). His order setting forth his findings was eventually prepared and filed November 19, 1997 nunc pro tunc to August 12, 1996 (2d Supp., R873-6).

The major problem with the judge's order admitting the DNA evidence is that it specifically adopts the standard of Brim v. State, 654 So. 2d 184 (Fla. 2d DCA 1995) ("where there are two differing, but both generally accepted deductions that can be made from generally accepted scientific evidence, they may both be admitted provided that the underlying scientific evidence satisfies Frye"). (2d Supp., R876). Evidently, the judge was not aware that this Court had disapproved the 2d DCA's Brim decision in Brim v. State, 695 So. 2d 268 (Fla. 1997). In particular, this Court disagreed with the Second District and held that population frequency statistics must also meet the Frye standard in order to be admissible. This Court remanded Brim to the trial court to determine "whether the methods used to calcu-

late the State's population frequency statistics would satisfy the Frye test in 1996". 695 So, 2d at 274.

At bar, Dr. Martin Tracey testified that the population frequency standards used by Cellmark Diagnostics are those recommended in the 1996 National Research Council report (XIV, T1110). However, the two witnesses from Cellmark testified to different population frequencies for the partial match of 5 out of 6 bands found in this case. David Walsh testified that the frequency for the partial match was 1 in 2200 (XVI, T1276). On the other hand, lab director Dr. Robin Cotton testified that further research in the database revised the frequency to 1 in 1800 (XVI, T1300-01).

This discrepancy between statistics is only minor compared to the prosecutor's manipulations of the figures during closing argument. He told the jury:

> Anyway, one out of eighteen hundred Caucasians have that five bands matching to the five bands found in Oscar Bolin's blood. If you convert that to a hundred that would be .05555 percent. So percentagewise 99.9444 percent of Caucasians do not possess that -- those traits. So the frequency would be that 99.94 percent are excluded based on that. 99.94 percent.
>
> But let's take it a step further. We know that the source was a semen source. You can exclude half of the pop -- Caucasians because you can exclude women. We're now up to one out of three hundred -- thirty-six hundred. If you do your multiplication on that you're going to find that that increases it to 99.97 percent. 99.97 percent --

(XX, T1694-5). At this point, defense counsel objected that these were not the facts in evidence (XX, T1695). When the court overruled Appellant's objection, the prosecutor continued:

> What about the AB, AB secretors? Mr. Hall from the FBI say [sic] that's only found in thirty-three percent of the population, one third of the population. So let's take it one step further. Exclude the women and exclude the people that couldn't have left that based on the serology. We're talking about one out of ten thousand eight hundred.

(XX, T1695).

Apparently, the prosecutor thought that scientific evidence in the form of mathematical population frequencies was merely a springboard for him to pull out a calculator and perform his own computations. When he later exclaimed, "Blood evidence doesn't lie" (XX, T1697), he truly demonstrated the old adage that "figures don't lie - but liars can figure". The prosecutor's mathematical manipulations were improper on two bases: First, it is appropriate to say that one in 1800 Caucasian men could have left the semen stain, not 1 in 3600 people. Second, Agent Hall testified only that he could not eliminate Appellant, an AB secretor, as the source of the semen stain which contained an A blood group substance. There was no testimony from Agent Hall to support the prosecutor's leap into tripling the population frequency statistics.

This Court's opinion in Brim subjects population frequency statistics to analysis under the Frye standard. It is clear that the prosecutor's seat-of-the-pants calculations do not meet this standard. One more example of throwing improper statistical

evidence into his argument occurred when the prosecutor vouched for the truth of Philip Bolin's testimony:

> Philip Bolin had a 99.94 chance if he was lying of being proven a liar through the blood. If he was lying then there was a 99.94 percent chance he could have been proven wrong. You look at all the blood, the serological blood, the AB, the AB secretor, he had a 99.99 percent chance of being proven wrong.

(XX, T1704-5).

Defense counsel's objection to this argument was sustained (XX, T1705). Accordingly, when defense counsel moved for a mistrial at the close of the prosecutor's argument, this issue was preserved for appellate review (XX, T1709-10). This Court should now disapprove the prosecutor's misuse of statistics in closing argument and vacate Appellant's conviction.

ISSUE VI

REVERSIBLE ERROR WAS COMMITTED WHEN APPELLANT WAS NOT PERMITTED TO CONSULT WITH AN INTEGRAL PART OF THE DEFENSE COUNSEL TEAM DURING A TRIAL RECESS.

During the testimony of Philip Bolin, the trial judge ordered the jury taken out and stated that he had observed Rosalie Martinez, the defense team's investigator/mitigation specialist, shaking her head (XII, T811). The judge explained that he was concerned because Martinez had taken a statement from Philip Bolin and that she had previously been advised not to make any gestures during witness testimony (XII, T811-2). The prosecutor requested that the court expel her from the courtroom (XII, T812). Although defense counsel stated that Ms. Martinez was an essential part of the defense team and that she would not disobey the court's admonition, the judge decided to exclude her from the courtroom for the remainder of Philip Bolin's testimony (XII, T812-3). Defense counsel's motion for mistrial and Appellant's pro se complaint that he was being denied effective assistance of counsel and the ability to communicate with his investigator were both denied (XII, T813-5).

Subsequently, a trial recess was taken after Philip Bolin's direct examination (XII, T850). When the parties returned, defense counsel objected that the bailiffs prevented Rosalie Martinez from being present during the discussion between Appellant and his counsel (XII, T851). The trial court stated that he didn't understand that counsel wanted to confer with both Marti-

nez and their client during the recess, but that he wouldn't have granted the request anyway (XII, T852).

This Court has consistently held that a defendant must be permitted to consult with counsel during any trial recess. Amos v. State, 618 So. 2d 157 (Fla. 1993); Thompson v. State, 507 So. 2d 1074 (Fla. 1987); Bova v. State, 410 So. 2d 1343 (Fla. 1982). While Ms. Martinez was not a lawyer, she was an essential member of the defense team. Effective assistance of counsel is denied when counsel and the defendant are prevented from appropriate trial preparation with assistance from investigators and experts. Blake v. Kemp, 758 F. 2d 523 at 532-3 (11th Cir. 1985); Garron v. Bergstrom, 453 So. 2d 405 (Fla. 1984). Consequently, denying consultation during a trial recess between an investigator and the defendant can deprive a defendant of a fair trial just as surely as denial of consultation with counsel. The circumstances should be analyzed applying the same harmless error test as this Court applies to denial of attorney-client consultation during a trial recess. Thompson, 507 So. 2d at 1075.

In the case at bar, the assistance of Ms. Martinez was critical to Appellant's ability to crossexamine Philip Bolin effectively. A good deal of Philip Bolin's testimony concerned Rosalie Martinez's contact with him and the circumstances surrounding his notarized statement of recantation (XII, T833-47). She was the only member of the defense team with direct knowledge of these events and therefore the person most able to suggest productive avenues of crossexamination. While Appellant was not

as completely foreclosed from effective crossexamination as the defendant in Davis v. Alaska, 415 U.S. 308 (1974), he was nonetheless deprived of his Sixth Amendment right to effective assistance of counsel and to confrontation of witnesses against him.

Moreover, exclusion of Ms. Martinez from the conference between counsel and Appellant during the trial recess served no legitimate purpose. First, the trial judge should have considered whether shaking one's head is the type of gesture which deserves expulsion from the courtroom. The judge was aware of the contact between the witness and Ms. Martinez and should have been aware of her importance to the defense team in terms of being able to impeach Philip Bolin's testimony (XII, T811-2). Even if the trial judge acted within his discretion by excluding her from the courtroom, he went too far when he denied Appellant her assistance as a member of the defense team at the point where her input was most critical; immediately prior to crossexamination of Philip Bolin. Sanctions against counsel or a member of the defense team should only punish the transgressor and not deprive the defendant of a fair trial. See e.g., Wilkerson v. State, 510 So. 2d 1253 (Fla. 1st DCA 1987) and cases cited therein.

The denial of input from Appellant's investigator/mitigation specialist should also be considered from the perspective of fundamental fairness. In Ake v. Oklahoma, 470 U.S. 68 (1985) the Court wrote:

> Meaningful access to justice has been the consistent theme of these cases. We recog-

> nized long ago that mere access to the courthouse doors does not by itself assure a proper functioning of the adversary process, and that a criminal trial is fundamentally unfair if the State proceeds against an indigent defendant without making certain that he has access to the raw materials integral to the building of an effective defense.

470 U.S. at 77. Of course, the defendant at bar was not denied the raw materials (an investigator was provided); however, he was deprived of any benefit the investigator could provide in the crossexamination of the key witness against him. This too rises to the level of a Fourteenth Amendment due process violation.

Finally, Appellant recognizes that in Perry v. Leake, 488 U.S. 272 (1989), the United States Supreme Court held that a testifying defendant need not be allowed to consult with counsel during a short recess prior to crossexamination. The important distinction between Perry and the case at bar is that Appellant was not on the stand during the recess; it was Philip Bolin, the state's principal witness. The holding in Perry rests directly on the proposition that

> when a defendant becomes a witness, he has no constitutional right to consult with his lawyer while he is testifying. He has an absolute right to such consultation before he begins to testify, but neither he nor his lawyer has a right to have the testimony interrupted in order to give him the benefit of counsel's advice.

488 U.S. at 281. Therefore, Perry actually supports the argument that denying a non-testifying defendant access to counsel during a trial recess amounts to "'[a]ctual or constructive denial of the assistance of counsel altogether' ... not subject to ...

prejudice analysis". 488 U.S. at 288. Even a short consultation with the defense investigator/mitigation specialist, Rosalie Martinez, who was the subject of much of Philip Bolin's testimony could have produced a much more effective crossexamination.

Accordingly, Appellant's conviction should be vacated because it was obtained in violation of the Sixth and Fourteenth Amendments, United States Constitution and the corresponding provisions in Article I, sections 9 and 16 of the Florida Constitution.

ISSUE VII

THE TRIAL COURT ERRED BY INSTRUCTING THE JURY ON FELONY MURDER WITH SEXUAL BATTERY AS THE UNDERLYING FELONY BECAUSE THERE WAS INSUFFICIENT EVIDENCE TO PROVE SEXUAL BATTERY.

During the charge conference, defense counsel objected to the case being submitted to the jury on the State's felony murder theory (XVII, T1357). The prosecutor replied that there was evidence to support kidnapping and evidence that the victim "was sexually molested by way of the semen stain that was left" (XVII, T1357). The judge overruled Appellant's objection and instructed the jury on first degree felony murder with kidnapping and sexual battery as the underlying felonies (XVII, T1357, XX, T1716-7, II, R360-2). After the jury had retired for deliberations, defense counsel unsuccessfully renewed his objection to the felony murder instruction on the ground that there was insufficient evidence of a sexual battery (XX, T1734).

When the medical examiner, Dr. Corcoran, testified on crossexamination, he agreed that his autopsy showed no evidence of a sexual assault (XIII, T1042). Therefore, the semen stain on Matthews' pants was the only indication of any sexual conduct. There are many possible explanations for the presence of a semen stain which do not involve a sexual battery. Accordingly, the jury should not have been allowed to find Appellant guilty of first degree felony murder with sexual battery as the underlying felony.

A case on point is McKennon v. State, 403 So. 2d 389 (Fla. 1981) where this Court found error in the trial court's instruction on felony murder with robbery as the underlying felony when there was insufficient evidence to establish a robbery. However, the McKennon court found the instruction to be harmless error because there was sufficient evidence to support a verdict of premeditated murder.

A more recent decision by this Court, Munqin v. State, 689 So. 2d 1026 (Fla. 1995), presented the converse situation: proof of premeditation was insufficient but there was evidence to support a verdict of felony murder. The Munqin majority affirmed the defendant's conviction because the jury returned a general verdict of guilt to first degree murder and it was supportable on one of the alternative grounds. Justice Anstead dissented from the holding that the erroneous instruction was harmless error. In his view, a general verdict of guilt should be set aside when it is possible that the verdict rests on the improper ground. See e.g., Mills v. Maryland, 486 U.S. 367 (1988).

The case at bar also presents the situation where the jury may have found Appellant guilty of first degree murder on an insufficient ground, namely felony murder with sexual battery as the underlying felony. This Court should now re-examine Justice Anstead's position as stated in Munqin and not simply find the erroneous instruction at bar harmless because there was sufficient evidence of premeditated murder. A trial court's erroneous instruction will confuse a jury that has been told to follow, not

disregard the judge's instructions. Accordingly, an error in defining the permissible bases for conviction should not be harmless. Justice Anstead's view that a capital defendant is entitled to a special verdict form should be adopted.

This error in the guilt or innocence phase was carried over to the penalty phase where the jury was instructed that they could consider that the murder was committed while Appellant "was engaged in the commission of the crime of sexual battery or kidnapping" as an aggravating circumstance (III, R411-2, XXII, T2008). While the trial court did not mention sexual battery in his sentencing order, the jury may have been misled and weighed sexual battery in their penalty recommendation.

This Court has recognized that erroneous jury instruction on aggravating circumstances may taint a jury's penalty recommendation. Omelus v. State, 584 So. 2d 563 (Fla. 1991); Jones v. State, 569 So. 2d 1234 (Fla. 1990). There is also error under the Eighth Amendment, United States Constitution when a Florida jury, as co-sentencer, considers an invalid aggravating factor even when this factor is not weighed by the judge. Espinosa v. Florida, 505 U.S. 1079 (1992). Accordingly, the death sentence at bar should be reversed at least, if not the conviction as well.

ISSUE VIII

THE TRIAL COURT ERRED BY DENYING DEFENSE COUNSEL'S REQUEST TO HAVE A PET SCAN PERFORMED ON APPELLANT BEFORE THE COMMENCEMENT OF THE PENALTY TRIAL.

While the jury was still deliberating on guilt or innocence, Appellant's counsel moved the court to authorize costs and continue the penalty proceeding to have a PET scan performed on Bolin (II, R357-8, XX, T1736-7). The State argued that the motion was untimely because the defense was aware in October 1992 that brain damage was a possible mitigating factor and that medical tests were available to diagnose it (XX, T1742-3). The court denied the defense motion (XX, T1743). The next morning, prior to the commencement of penalty phase, defense counsel filed an affidavit from Dr. Berland attesting to the usefulness of a PET scan and acknowledging that he didn't inform counsel of his recommendation until the previous day (XXI, T1753-4). The prosecutor continued to object and asserted "this appears to me to be just an attempt to delay the proceedings" (XXI, T1755). The judge reaffirmed his prior ruling denying a PET scan (XXI, T1755).

In State v. Sireci, 502 So. 2d 1221 (Fla. 1987), this Court allowed the defendant an evidentiary hearing and wrote:

> a new sentencing hearing is mandated in cases which entail psychiatric examinations so grossly insufficient that they ignore clear indications of either mental retardation or organic brain disorder.

502 So. 2d at 1224. Subsequently, this Court affirmed the circuit judge's finding that Sireci was denied due process when his court-appointed psychiatrist failed to order additional testing to determine if he suffered from an organic brain disorder. State v. Sireci, 536 So. 2d 231 (Fla. 1988).

At bar, Dr. Berland conducted some testing on Bolin in 1991 to determine possible brain injury (organic disorder) and concluded that the testing showed a likelihood that it existed (XXI, T1828, 1833). By the time that this case was retried (1996), reasonable medical standards had changed as PET scans became available as a diagnostic tool for determining the presence of brain damage (XX, T1742, XXI, T1837-9). Consequently, what may have been an adequate mental health investigation in 1991 was insufficient by the time of Bolin's new penalty trial. The trial judge should have recognized the need for the PET scan in order for Appellant to receive effective assistance in presentation of mitigating evidence to the penalty jury.

Bolin was clearly prejudiced by being limited to testing which no longer met reasonable medical standards. The state's expert, Dr. Merin, testified that he "would never use just this test [WAIS] alone to determine the presence or absence of brain damage" (XXII, T1947). While Dr. Merin never stated that Appellant did not have brain damage, he did say that such a diagnosis could not be made on the basis of Dr. Berland's testing (XXII, 1949, 1955-6). Significantly, Dr. Merin agreed that sociopathic behavior could result from brain damage:

> It could come from brain damage under two types of conditions; one, it could be a reaction to brain damage because a person is depressed. Although they don't generally become sociopathic, they're more likely to become just depressed, maybe withdrawn, so on, or it can come from a certain type of impairment of the brain. And usually that impairment of the brain would be in what we call the limbic system, which is deep inside the brain that controls many of the powerful emotions, and/or the prefrontal part of the brain that controls an individual's ability to regulate behavior, make decisions, plan ahead, anticipate, things of that sort.

(XXII, T1958-9). Without reliable evidence that such brain damage existed, Dr. Merin was able to conclude that Bolin's sociopathic behavior was "a matter of choice, a matter of style of life" (XXII, T1960).

In Ake v. Oklahoma, 470 U.S. 68 (1985), the Court held that an indigent defendant in a capital case is entitled to appointment of a competent psychiatrist when the defendant's mental condition is a significant factor at trial. The Ake decision, which rests on the Due Process Clause of the Fourteenth Amendment, was based upon the recognition that an individual's interest in life or liberty outweighs the State's financial interest in not spending money on indigents. Above all is the "compelling interest of both the State and the individual in accurate dispositions". 470 U.S. at 79.

An additional federal constitutional provision applicable here is the Equal Protection Clause of the Fourteenth Amendment. Lack of financial ability cannot be a barrier to procuring tests which could establish mitigating evidence sufficient to prevent a

death sentence from being imposed. Indeed, other indigent capital defendants in Florida have been provided with PET scans when relevant to their defense. The trial court's action may have also deprived Appellant of his Eighth Amendment right to an individualized sentencing process where his jury could consider all relevant mitigating evidence which could cause them to reject a sentence of death. Lockett v. Ohio, 438 U.S. 586 (1978); McCleskey v. Kemp, 481 U.S. 279 at 306 (1987). As the Eleventh Circuit wrote in Westbrook v. Zant, 704 F. 2d 1487 (11th Cir. 1983):

> We interpret Lockett v. Ohio and Gregg v. Georgia as vehicles for extending a capital defendant's right to present evidence in mitigation to the placing of an affirmative duty on the state to provide the funds necessary for production of the evidence. Permitting an indigent capital defendant to introduce mitigating evidence has little meaning if the funds necessary for compiling the evidence is unavailable.

704 F, 2d at 1496 (e.o.).

At bar, a psychological expert was appointed to assist Appellant, but he was not permitted to arrange for a PET scan which was the appropriate testing to either bolster or disprove his opinion that Appellant was brain damaged. Although the request should have been made at an earlier stage in order to avoid continuing the penalty trial, the fault lies with either the defense expert or counsel and should not be an excuse to deprive Bolin of an effective penalty defense. The facts at bar are directly on point with those in the recent decision of Hoskins v. State, Case No. 84,737, 22 Fla. L. Weekly S643 (Octo-

ber 16, 1997) where this Court found that the trial judge abused his discretion in denying the defendant's expert's request for a PET scan. As at bar, the purpose of the requested PET scan in Hoskins was "to enable his ...psychologist to more accurately determine the extent of Hoskins' purported brain damage". 22 Fla. L. Weekly at S645. If anything, Bolin was more prejudiced than Hoskins because the State did not contest the mental mitigation in Hoskins, whereas the state expert at bar, Dr. Merin, essentially ridiculed Dr. Berland's reliance on the WAIS test to establish that Appellant had brain damage.

Accordingly, the remedy ordered by this Court in Hoskins, remand for performance of a PET scan on Appellant, should also be ordered here. Because the case at bar involved a "battle of the experts", both Dr. Berland and Dr. Merin should be included in the subsequent evidentiary hearing to determine whether the PET scan results would have changed the trial testimony. If either of the experts would change their testimony based upon the PET scan results, then a new penalty proceeding before a new jury should be held.

CONCLUSION

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

As to Issues I through VI, reversal of his conviction for first degree murder, with remand for a new trial.

As to Issue VII, reversal of conviction and/or death sentence, with remand for a new trial/penalty proceeding.

As to Issue VIII, remand for performance of a PET scan and an evidentiary hearing concerning the results.

Respectfully submitted,

JAMES MARION MOORMAN
Public Defender
Tenth Judicial Circuit
(941) 534-4200

DOUGLAS S. CONNOR
Assistant Public Defender
Florida Bar Number 0350141
P. O. Box 9000 - Drawer PD
Bartow, FL 33831

/dsc

APPENDIX

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

STATE OF FLORIDA

VS.

OSCAR RAY BOLIN, JR.
_____/

CASE NO.: 91-0521CFAWS
SPN: 148878

FILED IN OPEN COURT
THIS 9 DAY OF OCT, 1996
Jed Pittman, Clerk
BY _____ D.C.

SENTENCING ORDER

The defendant was tried before this Court on August 12, 1996 - August 21, 1996. The jury found the defendant guilty of Murder in the First Degree. The same jury re-convened and evidence in support of aggravating factors and mitigating factors was heard. On August 23, 1996, the jury returned a unanimous recommendation that the defendant be sentenced to death. The Court requested memoranda from both counsel for the State and counsel for the defendant. The memorandum from the State was received on August 29, 1996 and the memorandum from the Defense was received on September 25, 1996. On September 25, 1996, the Court held a further sentencing hearing where both sides made further legal argument and the testimony of George Forte was received. The Court set final sentencing for October 9, 1996.

This Court, having heard the evidence presented in both the guilt phase and penalty phase, having had the benefit of legal memoranda and further argument both in favor and in opposition to the death penalty, finds as follows:

A. AGGRAVATING FACTORS

1. The defendant was previously convicted of four (4) felonies involving the use or threatened use of violence to another person. Each felony conviction was shown, beyond a reasonable doubt, to be violent and perpetrated against persons. The defendant, as to the Ohio rape case, did enter a guilty plea thus allowing the victim to avoid the necessity of a trial as to the defendant and that was given some minimal

weight by this Court as a non-statutory mitigating factor. The defendant's four (4) felony convictions involving the use or threatened use of violence to another person have been given great weight by this Court as an aggravating factor.

2. The murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. The evidence conclusively demonstrates that the victim was abducted from the area of the Land O' Lakes Post Office to which she had driven at night and where she had a post office box. The evidence does not support robbery as the defendant's purpose for the victim's abduction due to there being no articles of significance found missing from victim's automobile or purse. The defense has argued in its sentencing memorandum that the victim's abduction and murder was committed in an impulsive, disorganized manner. The evidence, however, is to the contrary. The defendant abducted the victim from the area of a post office, late at night in his vehicle, and took the bleeding, but alive body of the victim to his house to obtain assistance from his brother in disposing of the body. The defendant then proceeded to beat the victim with a heavy club and then washed the body with large amounts of water from a hose. The defendant then transported the body to another location and dumped the victim off the road. The evidence fully supports the conclusion that the murder was committed in a cold, calculated, and premeditated manner and same has been proved beyond a reasonable doubt. The Court has given great weight to the aforesaid aggravating factor.

3. The murder was especially heinous, atrocious, and cruel. The evidence shows that the victim, after being abducted from the post office, was brought to the defendant's home where his brother was residing. She was bloodied, but alive, emitting an animal like moan according to the defendant's brother. The defendant then beat the victim, in his brother's presence, repeatedly with a large and heavy

club. No further sounds emanated from the victim. Defense has argued that the defendant's actions in beating the victim repeatedly, shows that the defendant intended to hasten her death thereby to decrease her suffering. That interpretation of the defendant's actions is not supported by any reasonable view of the evidence. The evidence fully supports the conclusion that the murder was especially heinous, atrocious, and cruel and same has been proved beyond a reasonable doubt. The Court has given great weight to the aforesaid aggravating factor.

4. The murder was committed during the course of a kidnapping. The evidence adduced at trial is that the victim was taken forcibly by the defendant from the Land O' Lakes Post Office, leaving behind the victim's car with headlights on and the victim's purse on the front seat. The defendant transported the victim from this public place to the relatively isolated, rural area of his home. Once there he proceeded to bludgeon her repeatedly with a club and wrap her bleeding and bloody body in a sheet prior to transporting to an area away from his home where he dumped her body, still wrapped in a sheet. The evidence fully supports the conclusion that the defendant committed the murder during the commission of the felony of kidnapping. The Court has given great weight to the aforesaid factor.

None of the other aggravating factors enumerated by statute are applicable to this case and none other was considered by this Court. Nothing, excepted as previously indicated in above paragraphs 1-4 above, was considered in aggravation. B. MITIGATING FACTORS:

Statutory Mitigating Factors

As to mitigating factors, the Court acknowledges its responsibility to consider all non-statutory mitigating factors as well as the statutory mitigating factors set forth in Florida Statute 921.141(6). In his sentencing memorandum, the defendant requested the Court to consider the following statutory mitigating factors:

1. The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

The defendant cites the opinion of Dr. Robert Berland to support this statutory mitigating factor. Dr. Berland was of the opinion that the defendant had brain damage at the time of this murder. Dr. Berland testified that this opinion was based upon the Minnesata Multiphasic Personality Inventory results and the defendant's history as furnished by the defendant and the defendant's family who were supportive of the defendant. The testimony and opinion of Dr. Sidney Merin, however, was that he had reviewed the defendant's MMPI results (1988, 1990, and 1991). Dr. Merin opined that the defendant manipulated the tests to attempt to appear to have a mental illness (brain damage) and that the Wechsler Adult Intelligence Test did not show brain damage. Moreover, contrary to Dr. Berland, Dr. Merin observed that the defendant did not suffer from fetal alcohol syndrome, pointing out that the defendant exhibited no physical or psychological symptoms which are characteristic of this syndrome. The Court has concluded that if the defendant experienced brain damage, it was extremely minimal in that the defendant was able to perform all ordinary and customary functions of daily life including working, conversing with co-workers, and engaging in familial relationships including marriage. The defendant's cunning and methodical commission of this murder is likewise contrary to the notion that defendant suffered brian damage. Therefore, the Court finds that this mitigating factor does not exist as a statutory mitigating factor but only minimal brain damage as a non-statutory mitigating factor and gives it some moderate weight.

2. At the time of the offense, the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired.

The defendant suggests that this mitigating factor exists, based on Dr. Berland's opinion, on a bad childhood, brain damage, fetal alcohol syndrome, a poor education, alcohol and drug use, and a wife in poor health. The evidence demonstrates that the defendant did poorly in school, not that he received a poor education. The evidence demonstrates that if the defendant was brain damaged, it was minimal and did not affect his everyday functioning in society. The opinion of Dr. Berland that the defendant had a bad childhood, used alcohol and drugs, and suffered fetal alcohol syndrome was based upon the defendant's and his immediate, supportive family' s information. Dr. Berland testified that he did not attempt to , not did he, confirm this information outside the defendant or his supportive family. Dr. Berland did concede that he disregarded information regarding the defendant from one source outside the defendant's immediate, supportive family. The evidence confirms that the defendant's wife was hospitalized at the time he committed this brutal murder . There is no plausible evidence that the defendant was concerned about his wife's hospitalization. Dr. Merin was of the opinion that defendant possessed no statutory mental mitigators. Therefore, this Court finds that the mitigating statutory factor of the defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired, but not substantially impaired. It is accepted as a non-statutory mitigating factor and given some slight weight.

3. The age of the defendant at the time of the murder was twenty-four years.

The evidence from Dr. Merin was that the defendant was of average intelligence. No contrary evidence was submitted. The defendant's age at the time of the crime is not a statutory mitigating factor.

Non-Statutory Mitigating Factors

1. The defendant has organic brain damage.

2. The defendant was an abused and battered child.

3. The defendant had a deprived childhood and poor upbringing.

4. The crime for which the defendant is to be sentenced was committed while he was under the influence of mental or emotional disturbance.

5. The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired.

6. The defendant's behavior during trial. The Defendant was respectful to all parties at all times.

7. The defendant's actions in saving the life of another when he saved Kim Harrison from a potential drowning.

8. The defendant was gainfully employed at the time of this offense.

The Court has previously in this opinion addressed the aforesaid numbered non-statutory mitigating factors and has found that while factor 4 exists, it is minimal and gave it some moderate weight. Factor 5 is accepted as a non-statutory factor and given slight weight. Factors 1, 2, and 3 are accepted as mitigating circumstances, but in light of the defendant's ability to perform all usual and customary functions of daily life, they are given little weight.

6. The defendant was not disruptive during the trial. The Defendant stated that he would have to be restrained to be present for the testimony of the victim of his Ohio rape. It was not necessary, however, to physically restrain the defendant. The Court accepts this as a non-statutory mitigating factor and assigns it little weight.

7. The defendant told the investigator for his lawyer that he had rescued a friend, Kim Harrison, from drowning. The investigator called a telephone

number and spoke to a person who identified herself as Kim Harrison who confirmed defendant's story. The Court accepts this as a non-statutory factor and gives it little weight.

8. The evidence supports the defendant's contention that he was employed at the time he murdered the victim and the Court gives it little weight.

The Court has very carefully considered and weighed the aggravating and mitigating circumstances found to exist in this case, being ever mindful that human life is at stake in the balance. The Court finds, as did the jury, that the aggravating circumstances present in this case outweigh the mitigating circumstances present. Accordingly, it is

ORDERED AND ADJUDGED that the defendant, Oscar Ray Bolin, Jr. is hereby sentenced to death for the murder of the victim, Terri Lynn Matthews. The defendant is hereby committed to the custody of the Department of Corrections of the State of Florida for execution of this sentence as provided by law.

DONE AND ORDERED in New Port Richey, Pasco County, Florida this 9th day of October, 1996.

WILLIAM R. WEBB
Circuit Judge

copies to : State Attorney
Public Defender