IN THE SUPREME COURT OF FLORIDA

OSCAR RAY BOLIN,

Appellant,

vs. **CASE NO. SC95774**

STATE OF FLORIDA,

Appellee.

_____/

ANSWER BRIEF OF THE APPELLEE

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

CANDANCE M. SABELLA
Assistant Attorney General
Florida Bar No. 0445071
Westwood center
2002 North Lois Avenue, Suite 700
Tampa, Florida 33607-2366
(813) 873-4739
Fax (813) 356-1292

COUNSEL FOR APPELLEE

TABLE OF CONTENTS

TABLE OF CITATIONS

OTHER AUTHORITIES CITED

CERTIFICATE OF TYPE SIZE AND STYLE

This brief is presented in 12 point Courier New, a font that is not proportionately spaced.

STATEMENT OF FACTS

On the morning of January 25, 1986, Corporal Ron Valenti was dispatched to a Publix on Dale Mabry Highway at 1:56 a.m. (V7/340) In route to the call, he spotted two cars pulled off to the side of the road at Lake Magdalene and Smitter Road. One of the cars had its lights flashing and the cars were about 3 feet apart. (V7/341-43) After running one of the tags, which came back to a 2 door 1984 Pontiac registered to a Cheryl and Oscar R. Bolin, Valenti pulled up beside the second car. A white male between 25 and 30, with sandy hair and a moustache was seating in the driver's seat of the second car next to a 25 to 30 year old female with dark hair. Valenti identified appellant, Oscar Ray Bolin, as the man he saw that night.[1] (V7/345-47) Upon questioning, Bolin told Valenti that he had run out of gas and that she was taking him to get gas. Thinking that it was odd that if he ran out of gas he would be sitting in the driver's seat of her car, the officer leaned a little to the front to get a glimpse of the woman and said in her direction, "Are you okay?" As soon as he said that, Bolin looked at the woman and said some statement to her, which the officer could not hear. She then leaned forward and said something to the effect of, "I'm okay; everything is fine." With that the officer proceeded on to his original call. (V7/348)

---

[1] Valenti was shown a photopak on July 10, 1990 by Detective Staunko and from the pak identified Bolin as the man he had seen. He also identified Bolin at trial. (V7/347, 350)

Several hours later, as Gerald Sage jogged down a dirt path by his house, he noticed a set of tire tracks over his daughter's tire tracks made at approximately 1:00 to 1:30 that morning. Upon investigating, he discovered the body of Natalie Holley in an orange grove. (V7/T284-86, 294) Ms. Holley was the Assistant Manager of the Church's Chicken located on the corner of Nebraska and Fowler Ave. in Tampa, Florida and was last seen alive by co-worker, Vinda Woodson, at 1:30 a.m. on January 25, when they got off work. (V7/277-279)

An examination of Ms. Holley's body revealed that she had been stabbed to death; she received 8 knife wounds in her chest, 2 fatal wounds to her heart and lung and 2 in her neck. She was stabbed through her clothes and there was no evidence of sexual activity or defensive wounds. Ms. Holley was wearing jewelry and a tampon. (V9/497-502) She would have been unconscious in 2 minutes. (V9/503)

Ms. Holley's car was later discovered at the Lake Magdalene and Smitter Road location, 5.4 miles from where her body was found. Investigating officers collected hair and fibers from Ms. Holley's body and clothing and plaster casts were taken from tracks and prints. Shoe impressions found outside the car on Smitter road matched the impression from Trax shoes from Kmart. (V7/318-19, 330; V8/397-401)

After hearing about the discovery of the body and car, Deputy

Valenti contacted Sergeant Steve Raney and advised him of the encounter he had with the Bolin vehicle. Raney went to see Cheryl Bolin who advised him that her car was at her house at the time in question and they had not been driving it. (V7/330, 334; V8/447-48)

In the summer of 1990, detectives from the Hillsborough County Sheriff's Office again interviewed Cheryl Bolin. By that time, she had divorced Bolin in 1989, married Daniel Coby, changed her name to Cheryl Jo Coby and moved to Portland, Indiana. After first denying any knowledge of the crime, Cheryl Coby finally told the detectives about Oscar Ray Bolin's involvement in the 1986 murder of Natalie Holley. (V8/424, 450-51)

Cheryl Coby testified that in 1986 she was married to Oscar Ray Bolin. After getting out of the hospital in January 1986, she returned to their trailer on North Florida Ave. Melonda Williams and Frank Bolin occasionally stayed there. Melonda was Bolin's stepsister and worked at Church's with Natalie Holley. (V8/425-26) Cheryl and Oscar Ray Bolin owned a Grand Prix and an Isuzu 4x4. (V8/427) On January 24, 1986, they went to the Burger King across from the Church's on Fowler ave. They sat in the parking lot facing Church's for an hour. Bolin told her he was "scoping the place out." When they got home, she went to bed. Several hours later Bolin woke her up. She testified that she looked at the clock and that it was 2:00 a.m. when he woke her. He acted nervous

and upset. (V8/ 428-32, 468) He had blood on his shoes. They were Trax shoes from Kmart with a fairly distinctive tread pattern. Bolin dropped a purse at her feet and went through it. There were pills, a tampon, a wallet and seventy-five dollars in the purse. Bolin told her it belonged to the manager of the Church's Fried Chicken. (V8/433-37) She went with Bolin to Ehrlich Road. (V8/438) On the way he told her that he had followed Holley and got her to pull over by flashing his head lights. His plan was to take the days cash from the Church's deposit. (V8/439) When he pulled her over, Holley said "you scared me, but now that I know who you are I am not scared." Then the cop pulled up, so Bolin pulled out his gun and told Holley to tell the cop she was having car problems and he was helping her. (V8/440) He said he took her to an orange grove to kill her. He couldn't shoot her cause it would make to much noise, so he stabbed her and she started to scream. He then stabbed her in the throat. Bolin said he had to keep stabbing her because she wouldn't die. (V8/441) Bolin told her he wore gloves because he did not want to leave anything behind. (V8/469)

When they got to Holley's car at Smitter Road and Lake Magdalene, Bolin parked in the opposite direction of Holley's car. (V8/442) He got out of the truck, got a branch and dragged it across the ground covering up tracks. He came back to the truck and got a towel from under the seat. He used the towel to wipe the

car down inside and out. Bolin then wiped down tread marks from the truck and got back on interstate heading north. (V8/443-44) At Hwy 52, they exited and he threw the shoes and purse out of the window. (V8/445) Later that day, Bolin took the Grand Prix to a car wash and washed it thoroughly. (V8/446)

Upon receiving this information in 1990, Hillsborough County Sheriff's officials brought Cheryl Coby to Florida. Coby took Major Gary Terry to the locations she described, including the Church's Chicken, Bolin's residence and where Holley's car was found. They also located Bolin's 1984 Grand Prix in Scranton, Pennsylvania. (V8 406-7) They took swatches from both the carpet and the seats of the car for comparison with fibers found on the body. (V8/416) Two nylon fibers found on the victim were consistent with the fibers taken the seat of the Grand Prix. (V9/534) The shoe prints found outside of Holley's car and a pair of Trax shoes, which Cheryl said were the type Bolin was wearing the night of the crime, were found to be consistent.

After the state rested and motion for judgment of acquittal was denied the defense presented its case. Det. Lee Baker testified that he went to Indiana to interview Coby and collected clothes and shoes from her. (V9/578) Among the items were a pair of Pro-Line shoes which were represented to be Bolin's. (V9/587) He had no knowledge if Trax shoes were popular in 1986 and Pro-Lines were popular in 1990 nor could he say that the Pro-Line

shoes were Bolin's. (V9/587).

Royce Wilson, Bureau commander with the Hillsborough County Sheriff's Office testified that he did a comparison of twenty prints from Ms. Holley's Dodge Dart and that ten lifts were of comparison value. (V9/593) None matched Bolin. (V9/594) Seven were Holley's, one belonged to a police officer and he couldn't match the rest. (V9/595-96)

Sergeant Steve Raney testified that Trax shoes only came in blue. (V10/619). He interviewed Cheryl Bolin the day after the murder; she told him that they went to bed at 2230 or 2300 on January 24, 1986 and said no one drove her car. (V10/621-22) He interviewed Deputy Valenti. Valenti said he exited the car, said he couldn't see the female's face. (V10/623-24) Raney says when he bought the Trax shoe he was told the print looked like a size 9; he did not know why he picked up a 10. (V10/626)

Robert Lima testified that he was the manager of Men's Warehouse on Kennedy Blvd. He has sold shoes for forty years. He measured Bolin's feet and his shoes size is 7-1/2 to 8, preferably an 8. Defense counsel Ober is one of his customers. (V10/632) On cross examination he admitted that he is not an expert and that in most cases people wear a slightly larger size in sneakers; the measuring device is a starting point and there is a subjectivity on the range. (V10/633-634)

Melonda Williams Adams testified that she lived with Bolin and

Cheryl at time of murder. She stated that they were related by marriage. The Bolins would pick her up from work in either car; she would sit in the back seat. Bolin never asked her about how the money was handled at Church's. (V10/638-640) She testified she was at Bolin's the night of the murder. (V10/642) She doesn't remember Cheryl being in the hospital. (V10/643) She doesn't remember being interviewed or who interviewed her. She can't read well. She denies telling Det. Noblitt that Ray and Cheryl would come into Church's office and eat. (V10/644-46) On the two nights before the murder, Bolin picked her up in the Grand Prix and Natalie Holley was there. (V10/646)

After the defense rested, the state re-opened their case and called Sergeant Steve Raney. (V10/653) He introduced photographs of the shoe impressions from the scene. (V10/654)

Det. James Noblitt was also called. He described his interview with Melonda Williams and what she told them about Bolin coming into Church's and sitting in the restaurant. (V10/658) She had told him that Cheryl and Bolin would come into the Church's and eat. They would sit in the booth next to where she and Ms. Holley worked. (V10/658) Williams also told them that she did not work the night before Ms. Holley was murdered, but that two nights before, she worked and Bolin picked her up in the Grand Prix. (V10/658)

The jury returned a verdict of guilty as charged. (V10/744)

At the penalty phase the state introduced evidence concerning Bolin's prior convictions for kidnapping and rape in Ohio and evidence of the conviction for the first degree murder of Terri Lynn Matthews in Pasco County.

Gary Kling of the Pasco County Sheriff's Office testified that the body of Terri Lynn Matthews, a 26 year old female, was found on December 5, 1986, wearing wet clothes. She had 12 to 15 blows to her head and 5 or 6 stab wounds. (V11/777-781) Ms. Matthews had disappeared from the Pasco County Post Office where Bolin had a P.O. Box and drove a wrecker in the area. (V11/787) Det. Kling testified that Bolin's brother, Phillip Bolin, had witnessed the murder and told him about Bolin's murder of Matthews. (V11/788-90)

In support of the Ohio rape and kidnapping conviction, Jennifer LeFevre testified that on November 18, 1987, she was kidnapped by Bolin at gunpoint. (V11/790-92) Bolin put her in a semi-truck with 2 other males. (V11/793) She testified that she begged him not to kill her, not to rape her and he told her to just accept it because it was going to happen. After he raped her he would not let her get dressed. (V11/795-97) She testified that she heard them say they were going to have to get rid of her. (V11/801) Bolin blindfolded her and took her out into a ditch. (V11/802) She begged him not to kill her. Bolin tossed her over a fence and told her to run. Bolin pled guilty and was sentenced to 75 years. (V11/803)

Rosalie Bolin testified for the defense. She described going to work for the Public Defender and meeting Bolin. She described how lonely and scared Bolin was and how he shaved his mustache because she told him to do so. She also told the jury about the break up of her marriage to a prominent local attorney during this period of time and that shortly after her divorce she and Bolin were married. (V11/810-817)

The jury recommended death by a vote of 11 to 1. (V11/851)

SUMMARY OF THE ARGUMENT

ISSUE I - Bolin's first claim is that this Court should once again review the Second District's opinion overturning the circuit court's granting of a motion to suppress Bolin's letter to Major Terry. Bolin has not established either the existence of material changes in the evidence or the existence of an intervening decision by a higher court contrary to the decision in the former appeal which would result in manifest injustice and require reconsideration by this Court.

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

ISSUE II - Appellant's next claim is that the lower court erred in finding that Bolin's letter constituted a waiver of the spousal privilege. It is the state's position that Bolin waived the privilege when he wrote a letter to Major Gary Terry and gave

his permission for Major Terry to inquire of Cheryl Coby as to anything concerning these murders.

ISSUE III - Bolin's next claim is essentially that the state failed to present evidence he had planned on rebutting. Bolin now contends that although he did not object when he was notified as to the change in witness, he declined a chance to interview the witness and did not object to the witness testifying, since the second agent (Gilkerson) did not testify as the first agent (Heilman) had at the prior trial about the size of the shoe that made the print, Bolin was precluded from introducing testimony that would rebut the testimony FBI agent Heilman gave in the prior trial and was not presented in the instant trial. To suggest that this is error by the state or the trial court that requires a new trial defies all logic. Nothing precluded Bolin from presenting evidence to refute the state's contention that the impression was left by the same type of shoe that Bolin was known to wear. Nowhere is there any support for the contention that the state is required to present evidence simply because defense counsel was anticipating the opportunity to rebut it. This is especially true when it is undisputed that the state never argued that the shoe print was the same size as Bolin's. The trial court conducted a Richardson inquiry and correctly found no prejudicial error.

ISSUE IV - Bolin next contends that the trial court erred in failing to dismiss counts two and three of the indictment on the

basis that the prosecution was commenced beyond the four year statute of limitations for first degree felonies. In this case, Bolin does not dispute the fact that he was out of state from October 6, 1987 until he was brought back to face these charges in 1990. Consequently, on the facts developed below the trial court correctly denied the motion to dismiss. The time for filing the indictment for the instant offenses was tolled while Bolin was absent from the state. The statute of limitations for the instant offenses would have been exceeded by approximately seven months without the tolling of the limitations period allowed under section 775.15 (6). However, by operation of that provision the statute of limitations for the subject offenses was tolled while Bolin remained in Ohio for approximately three years. Accordingly, the trial court properly denied Bolin's motion to dismiss counts two and three of the indictment

ISSUE V - Appellant's next claim is premised on the introduction and consideration of his Pasco County conviction which was reversed and remanded for a new trial in 1999 based on the trial court's refusal to allow individual and sequestered voir dire of prospective jurors. While Bolin contends that since this conviction and the evidence in support of it were considered by the penalty phase jury, that jury's recommendation is tainted, he is also apparently suggesting that error was created by the type of evidence presented in support of the Pasco conviction. It is the

state's position that the evidence was properly presented and that the error created by the subsequent reversal of one of Bolin's prior felony convictions, is harmless.

ISSUE VI - Next appellant contends that the trial court committed reversible error in denying his request for an addition to the standard instruction on pecuniary gain. A trial court's ruling on whether or not to give a specially requested jury instruction is reviewed under an 'abuse of discretion' standard and a judgment should not be reversed for failure to give a particular jury charge where the instructions given are clear, comprehensive, and correct. In view of the jury's verdict in the guilt phase that Bolin was guilty of the kidnapping and robbery with a weapon of Natalie Holley this aggravating circumstance was established beyond a reasonable doubt and no further instruction was required.

ISSUE VII - Appellant's next claim is that the trial court committed several errors in the sentencing order, including considering the Pasco County conviction, a factual misstatement, finding of the pecuniary gain factor and summary treatment of mitigating factors. It is the state's contention that this order complies with this Court's holding in Campbell v. State, 571 So.2d 415 (Fla. 1990) and that error, if any is harmless beyond a reasonable doubt.

ISSUE VIII - Appellee agrees that if it is true that no scoresheet was prepared, that it was error to sentence Bolin to

life without a scoresheet reflecting that it is the appropriate sentence or written reasons reflecting the basis for any departure.

ARGUMENT

ISSUE I

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

This is Bolin's second trial for the kidnap and murder of Natalie Holley. The first conviction was overturned by this Court based on a finding that taking a discovery deposition did not constitute a waiver of marital privilege and, therefore, Bolin's former wife's testimony was improperly admitted. Bolin v. State, 642 So.2d 540 (Fla. 1994). The Court did not address the state's alternate argument that the contents of a letter Bolin addressed to Major Gary Terry of the Hillsborough County Sheriff's Office and placed on top of a box in his cell before attempting suicide constituted a waiver of the spousal privilege. Subsequently, however, upon review of Bolin's convictions for the murders of Stephanie Collins and Terri Lynn Matthews, this Court in Bolin v. State, 650 So.2d 21 (Fla.1995) and Bolin v. State, 650 So.2d 19 (Fla. 1995), held that if on remand the trial court determined from the circumstances in which a letter from Bolin to Major Terry was sent and from the content of the letter itself that the letter constituted a voluntary consent to such disclosure, then the marital privilege would be waived pursuant to section 90.507,

Florida Statutes and the testimony of Bolin's former spouse would be admissible.

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

Now on appeal, Bolin is once again urging this Court to review the Second District's opinion and suppress Bolin's letter to Major Terry. This Court has repeatedly held that all points of law which have been previously adjudicated become the "law of the case" and may be reconsidered only where exceptional circumstances exist whereby reliance upon the previous decision would result in manifest injustice. Van Poyck v. Singletary, 715 So.2d 930, 940 (Fla. 1998); Henry v. State, 649 So.2d 1361, 1364 (Fla.1994), cert. denied, 516 U.S. 830, 116 S.Ct. 101, 133 L.Ed.2d 55 (1995);

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

Bolin has not established either the existence of material changes in the evidence or the existence of an intervening decision by a higher court contrary to the decision in the former appeal which would result in manifest injustice. To the contrary what Bolin is seeking is essentially a second appeal on a question determined on the first appeal. This Court has held that review of

a prior decision should never be allowed when it would amount to nothing more than a second appeal on a question determined on the first appeal. Van Poyck, 715 So.2d at 940. Therefore, the Second District Court Of Appeal's prior finding that suppression was not warranted and this Court's denial of review, precludes reconsideration of this issue.

Assuming, arguendo, that this Court should determine that review is appropriate, a review of the Second District's decision below indicates that no relief is warranted.

The facts surrounding Major Terry's receipt of the letter were stated by the Second District as follows:

> At the suppression hearing, the following evidence was adduced. In June 1991, Bolin was awaiting trial in the Hillsborough County Jail for these two homicides. Major Terry of the Hillsborough County Sheriff's Office was the chief investigator on both homicides and was assisted by Corporal Baker. Part of the investigations took place in Ohio where Bolin was imprisoned. During the course of these investigations, Major Terry had personal contact with Bolin. Bolin was not hostile toward law enforcement officers and accepted their role in the investigations. At one point, Bolin sent a request through the jail to see Major Terry. The public defender advised Major Terry that Bolin would not be permitted to speak with him.
>
> While Bolin was in the Hillsborough County Jail in 1991, he was classified as a severe escape risk and danger to himself and others. Bolin was classified as a severe escape risk because he had been charged with murder, and because he had attempted to escape while incarcerated in Ohio. During this

attempted escape, Bolin hit a detention correctional officer with a piece of metal. Additionally, during Bolin's detention in the Hillsborough County Jail, there was evidence that Bolin plotted with his girlfriend and another inmate to kidnap members of Major Terry's family, Corporal Baker's family, the sheriff's family, and a judge's family. The alleged plan was to take the family members out-of-state and hold them for ransom in exchange for Bolin's release. After discovery of the plan, Bolin was placed in a one-man cell with an officer located outside of the cell door watching Bolin twenty-four hours a day.

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

At 7:00 a.m. on June 22, 1991, Lieutenant Rivers of the sheriff's office was notified that Bolin was observed in physical distress. The nurses and jail personnel continued to constantly monitor Bolin's condition. At 11:20 a.m., Lieutenant Rivers entered Bolin's cell and found Bolin lying on the floor and found a cardboard box on the commode. Bolin usually kept this box on the floor next to the bed. Lieutenant Rivers had the jail personnel take Bolin to the infirmary to receive medical attention. While in Bolin's cell, Lieutenant Rivers observed an envelope lying on top of the box on the commode. It was face-up and addressed to Major Terry. When he picked up the envelope, a paper inside the envelope fell out. Lieutenant Rivers read the first sentence or paragraph, and, believing the letter to be a suicide note, he placed the letter back into the envelope and laid it back on the box.

> In 1991, Major Terry was a Bureau Commander in criminal investigations and, in that capacity, routinely investigated suicides or attempted suicides in the jail. Major Terry would conduct an investigation at the jail if the suicide was successful or if an attempted suicide resulted in major injuries. On June 22, 1991, in response to a notification that Bolin had attempted suicide, Major Terry went to the jail. Corporal Baker met Major Terry at the jail. The officers went to Bolin's cell. By this time Bolin had been transported to the hospital, where it had been determined that he had attempted suicide.
>
> As soon as Major Terry was notified of the attempted suicide, he gave instructions for Bolin's cell to be sealed. When Major Terry and Corporal Baker entered Bolin's cell, they observed a cardboard box on Bolin's commode, with an envelope on top of the box. After the cell was photographed, Major Terry picked up the envelope and opened it in the presence of Corporal Baker. The envelope had a stamp on it and it was addressed to Major Terry. At the time Major Terry picked up the letter, he believed that it might be a suicide note. In Major Terry's opinion, the contents of the letter added significant information to the homicide investigations. After reading the letter, Major Terry handed the letter to Corporal Baker for proper disposition.
>
> Id. at 584-85

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

The court in McCoy had previously held that McCoy as a pretrial detainee whose cell was searched at the behest of the

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

Relying on Bell v. Wolfish, 441 U.S. 520, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979) (court upheld a room search rule against a Fourth Amendment challenge by pretrial detainees), the Second District rejected the conclusion in McCoy that Hudson did not apply to pretrial detainees. The court noted that there is nothing in Hudson that would support the First District's determination that it did not apply to pretrial detainees. The court additionally found that Florida case law supports the fact that a person in custody would not have a reasonable expectation of privacy. See, State v. Smith, 641 So.2d 849, 851 (Fla.1994).

The Second District further noted, this case can be distinguished from McCoy based on the facts as the search of the

prison cell in McCoy was for the sole purpose of trying to find incriminating statements made by the defendant, and was spear-headed by the prosecutor.

Conversely, the search of Bolin's cell was undertaken as part of an investigation of Bolin's attempted suicide. The officers did not come to the cell simply to find evidence that would bolster its case as the assistant state attorney did in McCoy. Finding a legitimate purpose for being in Bolin's cell, i.e., concern for institutional security, the Second District agreed that the inspection of the letter for evidence of the attempted suicide was not an unreasonable search and seizure where the unsealed letter was in plain view and plainly addressed to Major Terry.[2]

Appellant urges, however, that Hudson v. Palmer does not apply to pretrial detainees and, furthermore, that the plain view doctrine does not apply because the letter was not apparent evidence of a crime. Appellant suggests the fact that the letter was stamped, but not yet delivered to jail authorities, indicates that Bolin intended any delivery of the letter to be through the postal system and, until he released it, the letter would remain in his possession. To suggest that a letter found in plain view,

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

addressed to an officer who the defendant had previously attempted to contact, at the site of an attempted suicide is not apparent evidence of the attempted suicide and was not intended to be delivered to that officer, defies all logic.

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

Bolin's reliance on Jones v. State, 648 So.2d 669 (Fla. 1994) to support his claim of error is misplaced. In Jones, this Court held that even if Jones did not have an expectation of privacy in a bag of his clothing stored in his hospital room that he did have

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

a possesory right to the clothes themselves. This Court found that Jones had no reason to believe that his belongings would be turned over to police without his authorization even though hospital staff generally had joint access to and control of personal effects kept in patients' rooms, the staff cannot consent to search or seizure of effects, as it has no right to mutual use of patients' belongings. Id. at 675.

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

The evidence in the instant case establishes that Bolin, knowing that his cell was searched daily, placed the letter addressed to Major Terry in plain view and then attempted suicide. Under these circumstances he had every reason to believe that the letter would be turned over to Major Terry in his absence. In fact, the contents of the letter express just such an intent.

Bolin's letter directed Major Terry to forward his personal effects to Susie, that he had already written her a letter telling her what he had asked of Major Terry's office. He then apologized to Major Terry for "checking out like this." (V3/R382)

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

Thus, the Second District correctly concluded that the search of Bolin's cell following his attempted suicide was conducted solely to further the needs and objectives of the jail to ensure the safety of both the staff and inmates and that no constitutional violation occurred.

[4] It should also be noted that while Bolin asserts that he was not a prisoner but merely a pretrial detainee, the record shows that at the time of his attempted suicide, he was serving 2 consecutive 8 to 25 year sentences for the Ohio kidnapping and rape of Jennifer LeFevre. (V16/SR141) Thus, he was not simply a pretrial detainee for security purposes.

ISSUE II

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

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

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

> In this appeal, the State also claims that even if Bolin did not waive the spousal privilege by taking Coby's deposition, he personally waived the privilege in a letter he wrote to an investigating detective. There was no need to consider this issue at trial because the trial court ruled that Bolin waived the spousal privilege by taking the discovery deposition. In light of our conclusion here and in *Bolin I* that the discovery deposition did not waive Bolin's spousal privilege, the State will certainly raise at the retrial the issue of whether the letter was a voluntary waiver. We therefore address that issue here.
>
> We agree that a letter may be used to consent to the waiver of a privilege. See St. Paul Fire & Marine Ins. Co. v. Welsh, 501 So.2d 54 (Fla. 4th DCA 1987); People v. Fox,

862 P.2d 1000 (Colo.Ct.App.1993), cert. denied, No. 91CA0388 (Colo. Dec. 6, 1993); Mid-American Nat'l & Trust Co. v. Cincinnati Ins. Co., 74 Ohio App.3d 481, 599 N.E.2d 699 (1991). We further agree that if a person volunteers that his or her spouse may be questioned about his or her involvement in an event or events, this may equate to consent which constitutes a waiver pursuant to section 90.507, Florida Statutes (1993). See Shell v. State, 554 So.2d 887, 894 (Miss.1989), rev'd in part on other grounds, 498 U.S. 1, 111 S.Ct. 313, 112 L.Ed.2d 1 (1990). Section 90.507 specifically states that a waiver occurs when the person "consents to disclosure of any significant part of the matter or communication."

The issue then with respect to the waiver is whether the circumstances surrounding the letter and the content of the letter demonstrate that this defendant voluntarily consented to law enforcement officers talking with his spouse about her knowledge of his alleged criminal activities. (FN3) Because this issue was not addressed at the trial, the record is not sufficiently complete for us to determine whether the letter constituted a voluntary consent. (FN4) If on remand the trial court determines from the circumstances in which the letter was sent (FN5) and from the content of the letter itself that the letter constituted a voluntary consent to such disclosure, then the marital privilege would be waived pursuant to section 90.507. Bolin's voluntarily consented to the questioning of his former spouse about her knowledge of the criminal activities for which Bolin was being investigated would permit his former spouse to testify as to Bolin's statements to her regarding the murder because the statements comprised part of what she knew about his activities. See Hoyas v. State, 456 So.2d 1225 (Fla. 3d DCA 1984). If the court determines, however, that the circumstances together with the content of the letter do not indicate that Bolin voluntarily consented to disclosure by Coby of what she knew about

> Bolin's alleged criminal activities, then there was not a waiver.
>
> FN3. We note that Florida's Evidence Code does not require that the privilege holder's consent be knowing. See Charles W. Ehrhardt, Florida Evidence, Sec. 507.1, at 324 (1994 ed.).
>
> FN4. There is testimony in the record about the letter, but the letter itself is not included.
>
> FN5. The testimony of the officer who received the letter indicates that it might have been written in conjunction with a suicide attempt by Bolin. That fact alone would not render the content of the letter involuntary. The court, however, should consider the alleged suicide attempt as evidence relevant to whether the letter contained a voluntary consent.
>
> Bolin v. State, 650 So.2d 21, 23-24 (Fla. 1995).

Major Terry testified that he received a letter from Oscar Ray Bolin on June 22, 1991, in which Bolin told him, "If there was ever anything else that he really wanted to know about [him] to ask Cheryl Jo because she knew just about everything [he] was ever a part of and that she knew about the homicides [he] was charged with." (V3/382-88) The trial court correctly found that this letter constitutes a personal waiver of any privileged communications. It is the state's position that, as in the case of a motion to suppress, the trial court's determination after hearing the evidence that this was a voluntary waiver of the privilege comes to this Court clothed with a presumption of correctness.

Accordingly, this Court must interpret the evidence and reasonable inferences and deductions derived therefrom in a manner most favorable to sustaining the trial court's ruling. Owen v. State, 560 So.2d 207, 211 (Fla.1990), receded from on other grounds, State v. Owen, 696 So.2d 715 (Fla.1997). The record supports the trial court's conclusion that the context in which the letter was conveyed to Major Terry combined with the statements in the letter established a waiver of the privilege. Thus, the court's ruling must be upheld. Compare, San Martin v. State, 717 So.2d 462, 23 Fla. L. Weekly S335 (Fla. 1998), Rhodes v. State, 638 So.2d 920, 925-26 (Fla.1994) (stating that ruling on motion to suppress is presumed correct and will be upheld if supported by the record).

The spousal privilege is deemed waived when the person who has the privilege consents to disclosure of any significant part of the matter or communication. Saenz v. Alexander, 584 So.2d 1060 (Fla. 1st DCA 1991). Thus, Bolin's statement in the letter to Major Terry that Cheryl Coby knew all about the homicides he was charged with and that Terry was free to ask about it constitutes a waiver of any privilege regarding the matter.

Nevertheless, Bolin contends that 1) the circumstances surrounding the letter, 2) the content of the letter, 3) the trial court's ruling and 4) the timing of the letter do not support a finding that the letter constituted a valid waiver of the spousal privilege rendering the evidence admissible. A review of each of

the claims, taken in the light most favorable to support the trial court's ruling, refutes this contention.

1. Circumstances Surrounding the Letter

A. Voluntary Delivery

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

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

Appellant's reliance on State v. Stewartson, 443 So.2d 1074 (Fla. 1984) for the proposition that the "interception" of a letter does not waive the privilege misses the point. In Stewartson, the defendant left a suicide note for her husband which was found by an investigating officer. The court found that Stewartson's letter seized by police officers was written during the marriage, left in the marital home, in a sealed envelope and addressed to the

husband. The court noted also that Stewartson's note was not found in the "crime scene" area and that little more than curiosity could have led the policewoman to open the envelope and read the letter. Whereas, in the instant case, the letter was not in a home but in Bolin's cell which was subject to daily searches, it was addressed to Major Terry and opened by Capt Terry. It was not mere curiosity that caused Terry to open the letter as it was clearly reasonable for him to assume the letter was intended for him under the circumstances. Moreover, the letter did not contain privileged information which anyone is suggesting was waived by the discovery of the letter.

Appellant also contends that under the "mailbox rule" the letter was never logged as required before mailing and, therefore, it could not be released to Major Terry. Undersigned counsel cannot find, and appellant counsel does not assert, that this particular argument was ever raised to the court below. Accordingly, it is waived. In any event, it is without merit. Appellant is apparently suggesting that until any item is logged in to the system, even when it is delivered directly to the intended receiver, that it is not a valid transfer. The "mailbox rule," concerns when documents mailed by prisoners are deemed to have been filed. Haag v. State, 591 So.2d 614 (Fla. 1992). Clearly, that is not the issue here. The only question is whether the statement contained in the letter was intended as a waiver which Bolin

intended for Terry to receive. Base on the facts of this case, it is clear that the waiver was intended for Terry and that it was a voluntary waiver.

B. Prior Events Establishing Bolin's Intent

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

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

> Here, however, the petitioner testified only after the Government had illegally introduced into evidence three confessions, all wrongfully obtained, and the same principle that prohibits the use of confessions so procured also prohibits the use of any testimony impelled thereby--the fruit of the poisonous tree, to invoke a time-worn metaphor. For the 'essence of a provision forbidding the acquisition of evidence in a

> certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all.' Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392, 40 S.Ct. 182, 183, 64 L.Ed. 319.
>
> In concluding that the petitioner's prior testimony could be used against him without regard to the confessions that had been introduced in evidence before he testified, the Court of Appeals relied on the fact that the petitioner had made a conscious tactical decision to seek acquittal by taking the stand after (his) in-custody statements had been let in * * *.But that observation is beside the point. The question is not whether the petitioner made a knowing decision to testify, but why. If he did so in order to overcome the impact of confessions illegally obtained and hence improperly introduced, then his testimony was tainted by the same illegality that rendered the confessions themselves inadmissible.
>
> Harrison v. United States, 392 U.S. 219, 222-23 (1968) (emphasis added)

Nothing in Bolin's letter or in Bolin's expressed desire to speak to Major Terry without his lawyers indicates that the waiver was part of a tactical plan that was necessitated by the finding of a prior waiver. Thus, unlike Harrison or Zeigler, Bolin was not painted into a corner by the court's ruling and the subsequent waiver was not intended to remedy any damage caused by the prior ruling. Rather, the situation is more akin to a defendant's making inculpatory statements after having been found guilty and thinking he had nothing left to protect. A subsequent reversal of the conviction would not render his inculpatory statements

inadmissible. Compare, Sikes v. State, 313 So.2d 436 (Fla.App. 2DCA 1975) (Confessions defendant made to prison employees while her first appeal was pending were admissible at her second trial); Long v. State, 610 So.2d 1276, 1278 (Fla. 1992); Long v. State, 689 So.2d 1055(Fla. 1997), rev. on other grounds (State next produced at Long's second trial videotaped interview of Long by CBS News which took place after his initial trial and conviction.)

2. Content of Letter

Appellant next argues that the content of the letter evidences that Bolin did not intend for Major Terry to speak to Cheryl Coby until and unless he [Bolin] died. Although, the letter does not actually say that Major Terry can only speak to Coby in the event Bolin's attempted suicide was successful, counsel suggests that the use of future terms (i.e. "you'll haft to") implies that Bolin expected Terry to only speak to Coby in the future when Bolin was dead. Again counsel is speculating that Bolin's intent may have been other than that expressly stated in the letter. As the trial court made a contrary finding that is supported by the evidence, this Court should reject appellant's claim.

3. The Trial Court's Ruling

The trial judge found that Bolin's waiver was voluntary and although it was prospective only in its tone, it had the legal effect of acting or operating retroactively. (V13/T1177) Appellant contends that the waiver was not retroactive and,

therefore, did not render the prior statements made by Coby admissible.

The "inevitable discovery" doctrine adopted in Nix v. Williams, 467 U.S. 431, 448 (1984), provides that evidence obtained as the result of unconstitutional police procedure may still be admissible provided the evidence could have ultimately been discovered by legal means. Under this theory, the fact that an officer may have already obtained information as a result of an illegal search, does not preclude admission of this same evidence where it can be established that the same evidence could have been obtained in a lawful manner. Hayes v. State, 488 So.2d 77, 11 Fla. L. Weekly 304, (Fla. 2d DCA 1986) (Defendant's inked fingerprints, though taken in violation of Fourth Amendment were admissible under inevitable discovery exception to exclusionary rule, where defendant's fingerprints were available from independent sources.) Therefore, as the content of Cheryl Coby's testimony would have been the same if Major Terry had spoken to her again immediately after receiving Bolin's letter, the failure to do so does not render this evidence inadmissible.

4. Retroactivity of the Waiver

Appellant again asserts that even if Bolin's letter was a waiver, it should not be applied retroactively. He suggests that the only time a voluntary but unknowing waiver is enforceable is when the holder of the privilege attempts to use the privilege as

both a sword and a shield. He urges that since Bolin did not do so, that his waiver, once retracted, acts as a bar to the admission of the evidence.

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

Second, although knowledge is not required, there is no showing that Bolin's waiver was unknowing. The statement in the letter very clearly gives Major Terry the authority to speak to Cheryl Coby about the prior homicides, despite counsel's prior attempts to keep this information out of the hands of law enforcement.

Finally, appellant has not presented this Court with any case law supporting the proposition that such a waiver is *only* valid when the defendant uses the privilege as a sword and a shield. He assumes that because it is a consideration in some cases, it is consideration in every case. To the contrary, nothing in the statute suggests that a waiver is only valid when the defendant stands to gain from the waiver. See, § 90.507, Fla. Stat. (Waiver of privilege by voluntary disclosure.) The only requirement is that the person maintaining the privilege (Bolin) ceases to treat

the matter as private. Bolin's statement to Major Terry that he was free to ask Cheryl Coby about any of these homicides that he was charged with clearly indicates that Bolin had ceased to treat the matter as confidential and had waived the privilege.

5. Revocation of Waiver

At the close of the motion in limine hearing on March 16, 1998, Circuit Judge Padgett found that the "letter amounts to a waiver of the spousal privilege, subsequently withdrawn." (XIV, T1202) Based on this finding, appellant again offers the unsupported proposition that the waiver only applied to any privileged material that was disclosed during the period that the waiver was in effect and not to information previously obtained. The state has previously addressed this claim. There was no requirement that Major Terry re-interview Ms. Coby to obtain information already given during the discovery deposition. Clearly, Bolin knew that Coby had given this information to law enforcement. Whatever motivated Bolin to write the letter, it was done with the knowledge that this information would lose it's privileged status when Major Terry received Bolin's directive to speak to Cheryl Coby.

While as a general proposition the state would agree that a waiver does not occur until there has been an actual disclosure of the confidential communication, Eastern Air Lines v. Gellert, 431 So.2d 329, 332 (Fla. 3d DCA 1983), justice no more requires that

previously obtained information be excluded where there is a subsequent waiver, than it does illegally obtained evidence which is later determined to be admissible as inevitably discovered.

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

ISSUE III

WHETHER THE TRIAL JUDGE ERRED BY FAILING TO FIND A DISCOVERY VIOLATION WHEN A DIFFERENT FBI AGENT TESTIFIED ABOUT SHOEPRINT EVIDENCE, PRECLUDING APPELLANT FROM REBUTTING THE PRIOR DEPOSITION TESTIMONY OF THE FBI AGENT.

Bolin's next claim is essentially that the state failed to present evidence he had planned on rebutting. As the following will show, this claim is not adequately preserved, it is meritless and harmless.

During the previous trial, FBI Agent William Heilman testified on behalf of the state concerning shoe print impressions found near the victim's car. On cross-examination, defense counsel asked Heilman a number of questions concerning the size of the Trax tennis shoe used as a known shoe for comparison to the print found:

> Q. [Mr. Firmani] And do you know what size the known shoe was?
> A.[Agent Heilman] I don't know without looking inside. They have the designation in the interior of the shoe as a size 10.
> Q. Okay. And being a size 10, do you know what the size of the shoe would be of the questioned impression?
> A. No. I do not. I should explain that several sizes of shoes may have made an impression that size. In other words, perhaps a ten-and-a-half or an 11, or a nine-and-a-half may have made an impression of a similar size that's represented by the questioned impression.
>
> *So in other words, if you ask me what size of shoe made the questioned impression, I would say I could not give you an accurate answer.* I could not say specifically it was a size 10. It may be a size 9; it may be a size ten-and-a-half or 11.
>
> (PR-V6/691)

Prior to the instant trial, FBI Agent Gilkerson was added to the state's witness list. Defense counsel did not object or request an opportunity to depose the witness prior to trial, despite the state's offer to make him available. (V9/557) Defense counsel did not notify the state until after the start of the trial that they intended on putting on a shoe expert. (V9/557)

Gilkerson testified at trial that he had compared the shoe impressions with Trax tennis shoes and that they were consistent.[5] (V9/544-48) He explained that there is no way to determine what size shoes made the impressions because the shoe size is an internal measurement of the shoe and the outsole of the shoe is an external feature of the shoe. Therefore, there is no direct correlation between the two. (V9/549) Gilkerson further explained that although he had read Heilman's prior testimony, he did not use it to arrive at his conclusions in this case. (V9/553) After Gilkerson testified without objection, the court took a 20 minute recess. When the proceedings resumed, defense counsel stated to the court that he wanted to put something on the record. He then explained to the court about his expectations that Gilkerson would testify as Heilman had previously about the shoe size. Counsel conceded that although he had learned of the substitution several days prior to trial, he had not asked to take the witness' deposition because it seemed to him the shoe print analysis was

[5] Sergeant Steve Rainey had previously testified that the prints had been found near Holley's car. (V7/299)

relatively cut and dried. (V9/556) He noted that the issue might more properly be raised in a Rule 3.850 proceeding. Counsel then noted the distinctions between Gilkerson and Heilman's testimonies and contended they were vastly different because Heilman gave a range for the shoe size that made the impression and Gilkerson could not. Accordingly, he asked the court to find a discovery violation, declare a mistrial or strike the testimony. (V9/557)

The state explained that defense counsel was advised of the substitution, that she offered to make Gilkerson available and that she did not know until after the start of trial that the defense was going to put on a witness to testify concerning Bolin's shoe size. (V9/557) The state also noted that because of the defense's late notice about their witness, the state was unable to find any one to refute evidence about Bolin's shoe size and, therefore, asked Gilkerson his opinion on being able to identify shoe size from a shoe impression plaster cast. (V9/557-58) Defense counsel explained that they had received a box from the sheriff's office last week that has 3 size 81/2 shoes. Knowing that the Trax shoe used at the last trial was a size 10, they formulated a plan to present evidence as to Bolin's shoe size.[6] The state noted that during the past thirteen years, Bolin could have informed his counsel what size shoe he wore. (V7/559)

---

[6] Sergeant Rainey testified that he bought the Trax shoes at Kmart in a size 10 because he thought somewhere it had been determined that shoe size was perhaps a 9 or 10. (V7/319)

The court subsequently noted that after conducting the Richardson hearing, and finding there was no violation and that the testimony is not unduly or unfairly prejudicial to the defense's preparation of the case, the motions were denied. (V9/586)

After the state rested their case, they were notified by the defense of a new witness who was going to testify as to Bolin's shoe size. The state objected to the evidence as a discovery violation. (V10/611) The court ruled that the defense witness could testify that he had measured Bolin's foot and as to what size it measured. He could not, however, testify that there is minimal variation within a style with respect to the size sole that would be put on a given shoe size. (V10/615)

Robert Lima testified for the defense that he was manager of the Men's Wearhouse and that he has sold shoes for forty years. (V10/631) He testified that Bolin's shoe size is 7-/2 to 8, preferably an 8. Mr. Lima also noted that defense counsel Ober is one of his customers. (V10/632) On cross-examination, Mr. Lima admitted that he was not considered an expert. He also agreed that in most cases people wear a slightly larger size in sneakers and that the measuring device used to ascertain size is a starting point and there is a subjectivity on the range. (V10/633-634)

Bolin now contends that since Gilkerson did not testify as Heilman had at the prior trial about the size of the shoe that made the print, he was precluded from introducing testimony that would

rebut the testimony FBI agent Heilman gave in the prior trial and was not presented in the instant trial. To suggest that this is error by the state or the trial court that requires a new trial defies all logic.

Agent Heilman's testimony that *"if you ask me what size of shoe made the questioned impression, I would say I could not give you an accurate answer,"* was presented at trial in 1991. The state never argued that the shoe print was the same size as Bolin's. The only evidence the state advanced was that it was consistent with Bolin's shoe of choice. Eight years later, if Bolin wanted to present evidence to refute the state's contention that the impression was left by the same type of shoe that Bolin was known to wear by producing evidence that the print was made by someone who wore a shoe size larger than the size he wore, all he would have to do is present an expert who could give an opinion as to what size shoe made the impression and then compare it with his shoe size. He certainly did not have to depend on the possibility that the state would present this evidence.

Furthermore, there is no support for the contention that the state is required to present evidence simply because defense counsel was anticipating the opportunity to rebut it. This is especially true when it is undisputed that

Relying on Mobley v. State, 705 So.2d 609 (Fla. 4th DCA 1997), appellant also contends that the trial court committed error by

failing to conduct an adequate Richardson hearing. Unlike Mobley, where the witness was not disclosed until after the jury was sworn and where defense counsel immediately objected, the record is clear, in the instant case, that no objection was made at the time Bolin was notified of the change or at the time of the witness's testimony. It was not until after Gilkerson testified that defense counsel noted that he wanted to put something on the record. At that point the judge conducted a Richardson hearing. While the state maintains that this objection was too little too late to preserve this claim for appeal, the trial court's inquiry was sufficient and there was no reasonable probability that the notice given prior to trial prejudiced the defense. State v. Schopp, 653 So.2d 1016, 1020 (Fla.1995). In Loren v. State, 518 So.2d 342, 346-47 (Fla.App. 1 Dist. 1987), the district court reviewed a discovery challenge where the Loren contended that a discovery violation occurred when the state, after advising defense counsel that it "did not know" whether the state intended to use any witness from the Florida Department of Law Enforcement Crime Lab, called FDLE employee David Leroy Williams, a firearm identification expert, to testify as to the type of weapon and ammunition used in the murder. Upon rejecting the claim, the court stated:

> We find, contrary to appellant's assertion, that the trial judge, although expressing some doubt that a Richardson issue was presented, nevertheless conducted an inquiry, and after a conference found that the firearms expert was inadvertently left off the

> discovery list furnished to defense counsel. The trial judge also recessed the trial to allow defense counsel to interview or depose the witness before proceeding. It is clear that the trial court was of the opinion that the defense was not prejudiced by the state's omission. Williams' testimony was merely cumulative and corroborative of codefendant Briggs' testimony as to the type of gun he used in the shooting, and of the testimony of Briggs and witness Robert Dukes that Dukes sold Blazer ammunition to codefendant Wilson on the day of the crime. We find no reversible error occurred. See, Cooper v. State, 336 So.2d 1133 (Fla.1976); Slaughter v. State, 301 So.2d 762 (Fla.1974); Taylor v. State, 386 So.2d 825 (Fla. 3rd DCA 1980).
>
> Loren v. State, 518 So.2d 342, 346-47 (Fla.App. 1 Dist. 1987)

In the instant case, defense counsel knew the state was going to present an FBI agent to testify as to the shoe print impression. The fact that the identity of that witness changed a week prior to trial, at which point counsel was notified of the change, does not alter the fact that appellant still knew that a witness would testify concerning that evidence. This situation is more akin to a changed testimony situation than the late notice of a witness. This Court has held that "unlike failure to name a witness, changed testimony does not rise to the level of a discovery violation and will not support a motion for a Richardson inquiry." Bush v. State, 461 So.2d 936 (Fla. 1984); Johnson v. State, 696 So.2d 326 (Fla. 1997).

Bolin additionally asserts that the trial court's limitation of his shoe salesman's testimony compounded the error. Mr. Lima

testified that he had been a shoe salesman for forty years and that based on this experience he had measured Bolin's feet. There was nothing in his experience that qualified him to state that Trax shoes made soles of different sizes. Finney v. State, 660 So.2d 674 (Fla. 1995). This limitation was within the court's discretion and appellant has failed to show an abuse of that discretion.

Finally, despite Bolin's assertion that but for the alleged discovery errors, counsel would have been able to assert that "if it doesn't fit you must acquit," nothing in the facts of this case establish that even if the prints were not made by Bolin that this would have resulted in an acquittal of the charge. These prints were made on a public street and while they constituted circumstantial evidence of Bolin's guilt, the possibility that they were made by someone else has always existed and does not undermine the weight of evidence that supports Bolin's guilt for the instant offense. Accordingly, error, if any, is harmless beyond a reasonable doubt.

ISSUE IV

WHETHER THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTION TO DISMISS COUNTS TWO AND THREE OF THE INDICTMENT BASED ON HIS CLAIM THAT THE STATUTE OF LIMITATIONS HAD RUN ON THESE OFFENSES.

Bolin next contends that the trial court erred in failing to dismiss counts two and three of the indictment on the basis that the prosecution was commenced beyond the four year statute of limitations for first degree felonies. The State disagrees.

It was undisputed below that Bolin was absent from the state of Florida continuously from October of 1987 until he was brought back to Florida pursuant to a valid capias. Corporal Baker testified that Bolin left the state "around October sixth of 1987" and remained in Ohio until he was brought back to face the instant charges.[7] (SR 90). While in Ohio, Bolin was incarcerated from late 1987 and apparently remained in continuous custody. Id. Bolin was indicted on the instant offenses August 1, 1990. (R-1, 34-36). As there is no allegation of unreasonable delay in executing the capias, the prosecution is deemed to have commenced on the date of the indictment. Section 775.15(5)(1985)("A prosecution is commenced when either an indictment or information is filed, provided the capias, summons or other process issued on such indictment or information is executed without unreasonable

[7]Bolin was on probation in Florida for "domestic abuse" during 1987. (SR 91).

delay.").

The charged offenses occurred in January of 1986. (V-1, 35-37). Bolin correctly states that kidnapping and robbery charges carry a four year statute of limitations. Florida Statute 775.15(2)(a) (1985). However, Bolin mistakenly asserts that the State must establish diligent efforts to indict a defendant even when the defendant leaves the State. (Appellant's Brief at 69-70). The plain language of Section 775.15(6) provides that the period of limitation does not run during the time the defendant is continuously absent from the state. The Statute provides, as follows:

> The period of limitation does not run during any time when the defendant is continuously absent from the state or has no reasonably ascertainable place of abode or work within the state, but in no case shall this provision extend the period of limitation by more than 3 years.

Section 775.15(6).

In Sochor v. State, 619 So.2d 285, 289 (Fla. 1993), cert. denied, 510 U.S. 1025, 114 S.Ct. 638, 126 L.Ed.2d 596 (1994), the defendant claimed that the lower court committed fundamental error by failing to instruct the jury on the statute of limitations as an absolute defense to felony murder and kidnapping. This Court rejected the defense argument, stating:

> Had it been raised, the state could have shown that, even though Sochor was indicted for kidnaping beyond the applicable four-year limitation period, his undisputed, continuous

> absence from the state tolled the running of the statute. *See* § 775.15(6), Fla.Stat. (1989). Thus, the trial court did not commit fundamental error by failing to instruct the jury in this regard. In addition, capital crimes are not subject to a statute of limitation. Section 775.15(1), Fla. Stat. (1989). Hence, Sochor's argument that his murder conviction must be overturned and remanded for a new trial because the limitation period had expired on several of the underlying felonies supporting a possible felony-murder theory is untenable.
>
> Sochor, 619 So.2d at 290.

In this case, Bolin does not dispute the fact that he was out of state from October 6, 1987 until he was brought back to face these charges in 1990. Consequently, on the facts developed below the trial court correctly denied the motion to dismiss. The time for filing the indictment for the instant offenses was tolled while Bolin was absent from the state.

Bolin's reliance upon Brown v. State, 674 So.2d 738 (Fla. 2d DCA 1995), is misplaced. In Brown, the State filed informations against the defendant in 1983 within the applicable statute of limitations period. However, the State did not seek to execute the capias on the defendant until 1993, well after the statute of limitations had run on the charged offenses. The Brown court was only addressing the application of Section 775.15(5): Subsection (6) did not apply under the facts of that case. The Brown court noted that the only question presented "is whether the capiases were 'executed without unreasonable delay.'" The State made no

reasonable efforts to "execute" the capias within a reasonable time period in Brown. 674 So.2d at 740.

In the instant case, unlike Brown, the applicable statutory provision is section 775.15(6), not 775.15(5). The State did not file an information against the defendant and then wait an unreasonable period of time to execute the capias as in Brown. As noted above, section 775.15(6) excuses any delay in the indictment for up to three years as long as a defendant is continuously absent from the state. Section 775.15(6) does not impose upon the State a requirement that it make a diligent search before it may benefit from the extended period for the statute of limitations. It is enough that the defendant left the jurisdiction of the state. The statute protects against unreasonable delay in the prosecution by providing that the applicable tolling of the statute cannot exceed three years.[8]

A case more directly on point is King v. State, 687 So.2d 917 (Fla. 5th DCA 1997), rev. denied, 695 So.2d 700 (1997), which addressed the application of section 775.15(6). In King, the defendant was not served with the capias "within the four year

[8]The civil cases cited by Bolin provide little support for his argument on appeal. The applicable civil statute specifies that the out of state tolling provision does "not apply if service of process or service by publication can be made in a manner sufficient to confer jurisdiction to grant the relief sought." Section 95.051(1)(e), Fla.Stat. (1974 Supp.). The current statute also provides that if service can be made to confer jurisdiction, the statute of limitations will not be tolled. Section 95.051 (1)(h), Fla. Stat. (1999).

statute of limitation applicable to first degree felonies." 687 So.2d at 918. The defendant argued that while the indictment was filed in 1992, the State did not serve him with the "capias until October 20, 1995." The court noted with two minor exceptions, King was continuously outside of Florida while serving a federal prison sentence for bank robbery. Citing Picklesimer v. State, 606 So.2d 473 (Fla. 4th DCA 1992), the Fifth District rejected the defense contention that the prosecution was commenced beyond the statute of limitations:

> We agree with *Picklesimer's* conclusion that subsections 775.15(5)and (6) are independent provisions. Provided that *both* the information and capias are served within the applicable statute of limitations, whether or not that period is extended by the application of subsection 775.15(6), the prosecution must be deemed timely commenced. There is no need for an examination of whether the state was diligent in its efforts to serve a defendant under that scenario. Such is the instant case. Here, the period of limitation was tolled due to King's absence from the state. The information was filed and the capias was served within the period of limitation. Accordingly, the State's failure to adduce evidence that it had diligently attempted to execute the capias is irrelevant. The prosecution was timely commenced.
>
> King, 687 So.2d at 919.[9]

---

[9]The King court also distinguished Brown on the facts:

> In *Brown,* the informations were timely filed, but the capaises ere not executed until *after* the limitations period had expired. In determining whether the prosecutions had been timely begun, the Second District correctly focused on whether the capiases were "executed withiout unreasonable delay," a subsection (5) analysis. 687 So.2d at 919.

The statute of limitations for the instant offenses would have been exceeded by approximately seven months without the tolling of the limitations period allowed under section 775.15 (6). However, by operation of that provision the statute of limitations for the subject offenses was tolled while Bolin remained in Ohio for approximately three years. Accordingly, the trial court properly denied Bolin's motion to dismiss counts two and three of the indictment.[10]

[10]Assuming, *arguendo,* Bolin has established that prosecution for kidnapping and robbery commenced beyond the statute of limitations, the remedy would be simply to discharge Bolin on those two offenses. Bolin's murder conviction and death sentence would remain intact. See Sochor, 619 So.2d at 290-291 ("In addition, capital crimes are not subject to a statute of limitation. Section 775.15(1), Fla.Stat. (1989). Hence, Sochor's argument that his murder conviction must be overturned and remanded for a new trial because the limitation period had expired on several of t4he underlying felonies supporting a possible felony-murder theory is untenable.").

ISSUE V

WHETHER THE PENALTY PHASE JURY RECOMMENDATION WAS TAINTED BECAUSE EVIDENCE ABOUT BOLIN'S CONVICTION FOR ANOTHER MURDER WAS PRESENTED BEFORE THE JURY AND THIS CONVICTION WAS REMANDED FOR A NEW TRIAL.

Appellant's next claim is premised on the introduction and consideration of his Pasco County conviction which was reversed and remanded for a new trial in 1999 based on the trial court's refusal to allow individual and sequestered voir dire of prospective jurors. Bolin v. State, 736 So.2d 1160 (Fla. 1999). While Bolin contends that since this conviction and the evidence in support of it were considered by the penalty phase jury, that jury's recommendation is tainted, he is also apparently suggesting that error was created by the type of evidence presented in support of the Pasco conviction. It is the state's position that the evidence was properly presented and that the error created by the subsequent reversal of one of Bolin's prior felony convictions, is harmless.

In the instant case, Bolin was convicted of the first degree murder, robbery with a weapon and kidnapping of Natalie Holley. (V1/35-37) The jury recommended death by a vote of 11 to 1. (V11/851). The trial judge followed this recommendation and sentenced appellant to death for the first degree murder conviction and to two life sentences for the kidnapping and robbery convictions. The trial court found the following aggravating factors:

AGGRAVATING FACTORS

1. The defendant was previously convicted of a felony involving the use or threat of violence to another.

The court and jury heard the testimony of the victim of a kidnapping and rape committed by the defendant in Ohio in 1987 and certified court records of the defendant's convictions for those offenses were received into evidence. Additionally, certified court records of the defendant's earlier conviction for First Degree Murder of Terry Lynn Matthews in Pasco County were received into evidence.

This aggravating factor was proved beyond a reasonable doubt.

2. The capital felony was committed while the defendant was engaged in commission of kidnapping.

The testimony of witnesses Valenti and Coby showed that the victim was abducted by the defendant from the parking lot of her place of employment and driven, at gunpoint, for some miles before her death.

This aggravating factor was proved beyond a reasonable doubt.

3. The capital felony was committed for financial gain.

The testimony of witness Coby was that she saw the defendant in possession of the victim's purse immediately after the killing, that he took $75.00 therefrom, and commented that he had expected, or hoped, that the victim would be carrying her employer's money.

This aggravating factor was proved beyond a reasonable doubt.

(V4/588-91)

This Court has had the opportunity to consider similar cases where a prior violent felony conviction has been reversed and remanded for a new trial. In Rivera v. State, 629 So.2d 105 (Fla.

1993) this Court noted that where a prior conviction is reversed it is subject to the harmless error rule under Preston v. State, 564 So.2d 120 (Fla. 1990) and Johnson v. Mississippi, 486 U.S. 578 (1988). This Court has specifically recognized that where, as here, the reversed prior violent felony did not serve as the sole basis of the prior violent felony aggravator that a subsequent reversal does not mandate a new sentencing proceeding. Duest v. Dugger, 555 So.2d 849 (Fla. 1990) (Not entitled to new sentencing proceeding when conviction for prior armed assault with intent to murder was vacated where defendant's part in robbery conviction remained undisturbed and there was thus still a basis for aggravating circumstance of prior conviction of violent felony, and there were three other valid aggravating circumstances applicable to the sentence); Daugherty v. State, 533 So.2d 287 (Fla. 1988) (Reversal of one prior conviction for violent felony did not render defendant's death sentence unconstitutionally unreliable or require resentencing where the aggravating circumstance that defendant had previously been convicted of another capital felony or felony involving the use or threat of force applied by virtue of defendant's other prior convictions for murder, armed robbery, and aggravated assault)

As previously noted, the evidence in the instant case, included a prior conviction for the rape and kidnapping in Ohio. In support of the Ohio rape and kidnapping conviction, Bolin's

victim, Jennifer LeFevre, testified during the penalty phase. On November 18, 1987, she was kidnapped by Bolin at gunpoint. (V11/790-92) Bolin put her in a semi-truck with 2 other males. (V11/793) She testified that she begged him not to kill her, not to rape her and he told her to just accept it because it was going to happen. After he raped her he would not let her get dressed. (V11/795-97) She testified that she heard them say they were going to have to get rid of her. (V11/801) Bolin blindfolded her and took her out into a ditch. (V11/802) She begged him not to kill her. Bolin tossed her over a fence and told her to run. (V11/803)

In addition to the LaFevre rape and kidnapping, the trial court also found that the instant crime was committed during the course of a kidnapping and for pecuniary gain. Finally, the state would note that this error is further rendered harmless by the fact that in the event of a remand, Bolin's conviction and sentence for the murder of Stephanie Collins could be considered in support of the prior violent felony aggravator. In that case, which is currently pending on appeal to this Court in Case No. SC95775, Bolin was re-sentenced to death on the same date that the sentence in the instant case was entered. (V14/1220) As violent felony convictions suffice for purposes of the prior violent felony aggravator when the convictions *predate the sentencing*, even when the crimes underlying the conviction occurred after the crime for which the defendant is being sentenced, the Collins conviction

could have been considered in support of the prior violent felony aggravator. Knight v. State, 746 So.2d 423, 434 (Fla. 1998) Therefore, since upon remand the lower could rely on this conviction, the consideration of the Pasco conviction is harmless.

In light of the facts of this case, the jury's recommendation of death by a vote of 11 to 1, the insignificant mitigation presented, the Jennifer LeFevre and Stephanie Collins' prior violent felonies, it is beyond a reasonable doubt that the vacating of the Pasco sentence was harmless and that resentencing is not required.

As for appellant's argument that the court erred in allowing Det. Kling to testify regarding the prior conviction, this Court has repeatedly held that the admission of such evidence is proper. Hudson v. State, 708 So.2d 256, 261 (Fla.1998); Clark v. State, 613 So.2d 412, 415 (Fla. 1992); Jones v. State, 748 So.2d 1012, 1026 (Fla. 1999); Waterhouse v. State, 596 So.2d 1008, 1016 (Fla.1992). Appellant's contention that he was denied the opportunity to present to the jury the fact that Philip changed his testimony several times prior to trial is equally without merit. Defense counsel could have introduced this evidence through the cross-examination of Det. Kling or during his own case. The failure to avail himself of this opportunity does not equate with a denial of the right to rebut the hearsay evidence.

The challenge to the introduction of the photographs of Terri

Matthews' body is also without merit as this evidence was relevant and admissible to assist the jury in evaluating the character of the defendant and the circumstances of the crime. Upon rejecting a similar argument in Zakrzewski v. State, 717 So.2d 488 (Fla. 1998), this Court noted that §921.142(2), Florida Statutes (1995), describes the procedure for the penalty phase of a capital case, states "[a]ny such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence...." Id.at 494-495. Accordingly, as the photographs were not unduly focused upon in the proceeding, or made a feature of the trial and as they were relevant to assist the jury in evaluating the character of the defendant and the circumstances of the crime, no error resulted from their admission. See, Jones v. State, 748 So.2d 1012, 1026 (Fla. 1999); Hudson v. State, 708 So.2d 256, 261 (Fla.1998).

Moreover, as previously noted, any error with regard to the consideration of this evidence was harmless beyond a reasonable doubt, where the factor is well established by the evidence presented in support of Bolin's other prior violent felony convictions.

ISSUE VI

WHETHER THE TRIAL JUDGE ERRED BY DENYING APPELLANT'S SPECIALLY REQUESTED PENALTY JURY INSTRUCTION ON THE PECUNIARY GAIN AGGRAVATING FACTOR.

Next appellant contends that the trial court committed reversible error in denying his request for an addition to the standard instruction on pecuniary gain. "A trial court's ruling on whether or not to give a specially requested jury instruction is reviewed under an 'abuse of discretion' standard." Shearer v. State, 2000 WL 380214 (Fla.App. 1 Dist. 2000), citing Beatty v. State, 500 So.2d 173, 174 (Fla. 1st DCA 1986). A judgment should not be reversed for failure to give a particular jury charge where the instructions given are clear, comprehensive, and correct. Shearer.

This Court has repeatedly approved the standard instruction on pecuniary gain instruction. In Walker, infra., this Court held:

> As to the pecuniary gain aggravator and instruction, this Court stated in Chaky v. State, 651 So.2d 1169 (Fla.1995), that the pecuniary gain aggravator applies where "the murder is an integral step in obtaining some sought-after specific gain." Id. at 1172. We further explained the applicability of this aggravator in Finney v. State, 660 So.2d 674 (Fla.1995), stating that "[i]n order to establish this aggravating factor, the State must prove beyond a reasonable doubt that the murder was motivated, at least in part, by a desire to obtain money, property, or other financial gain." Id. at 680. Thus, the standard instruction which the jury received in this case was appropriate in light of the evidence showing that Walker did not want to

> take responsibility for Quinton Jones, asked Joanne Jones to get the support payments reduced, and killed both victims after arguing with Ms. Jones about child support.
>
> Walker v. State, 707 So.2d 300, 316 (Fla. 1997).

In the instant case, the trial court found the following in support of the pecuniary gain factor:

> 3. The capital felony was committed for financial gain.
>
> The testimony of witness Coby was that she saw the defendant in possession of the victim's purse immediately after the killing, that he took $75.00 therefrom, and commented that he had expected, or hoped, that the victim would be carrying her employer's money.
>
> This aggravating factor was proved beyond a reasonable doubt.
>
> (V4/588-591)

Moreover, in view of the jury's verdict in the guilt phase that Bolin was guilty of the kidnapping and robbery with a weapon of Natalie Holley this aggravating circumstance was established beyond a reasonable doubt and no further instruction was required.[11] See, Cole v. State, 701 So.2d 845, 852 (Fla. 1997); Fotopoulos v. State, 608 So.2d 784, 793 (Fla. 1992); Perry v. State, 522 So.2d 817, 820 (Fla.1988). As appellant has failed to establish as abuse of discretion on the part of the trial court, this claim should be denied. However, even if this Court should find that this instruction should have been altered, under the circumstances of this case, any error would be harmless.

[11] Bolin does not challenge either of these convictions on appeal.

ISSUE VII

WHETHER THE TRIAL JUDGE'S SENTENCING ORDER PROPERLY WEIGHS AND FINDS CERTAIN AGGRAVATING FACTORS AND GIVES ONLY SUMMARY TREATMENT TO THE MITIGATION EVIDENCE PRESENTED.

Appellant's next claim is that the trial court committed several errors in the sentencing order, including considering the Pasco County conviction, a factual misstatement, finding of the pecuniary gain factor and summary treatment of mitigating factors. It is the state's contention that this order complies with this Court's holding in Campbell v. State, 571 So.2d 415 (Fla. 1990) and that error, if any is harmless beyond a reasonable doubt.

a. Pasco County Conviction

As stated in Issue V, the court's consideration of the subsequently reversed Pasco Conviction is harmless.

b. Findings in Support of Kidnapping Aggravator

Appellant objects to Judge Padgett's findings that the victim being abducted from the parking lot at her place of employment and to her being driven at gunpoint for some miles before her death. The state contends that the reference to the parking lot is a harmless misstatement of fact and the reference to the abduction at gunpoint is well supported by the record.

Cheryl Coby testified that she and Bolin sat in the parking lot while Bolin surveyed the Church's Chicken where Ms. Holley worked. (V8/428-32) Bolin then subsequently followed Ms. Holley

after she got off work, until he was able to force her off the road. He then held her at gunpoint until they drove to the orange grove. Cheryl testified that Bolin told her he couldn't shoot Ms. Holley because it would make too much noise, so he stabbed her. When she started to scream, he stabbed her in the throat. (V8/439-41) Furthermore, the jury convicted Bolin of Ms. Holley's kidnapping. Accordingly, any error in the recitation of these facts is harmless, as the finding is well supported by the evidence. Bates v. State, 750 So.2d 6, 13 (Fla. 1999)

c. Pecuniary Gain

As previously noted in Issue VI, in view of the jury's verdict in the guilt phase that Bolin was guilty of the kidnapping and robbery with a weapon of Natalie Holley this aggravating circumstance was established beyond a reasonable doubt. See, Cole v. State, 701 So.2d 845, 852 (Fla. 1997); Fotopoulos v. State, 608 So.2d 784, 793 (Fla.1992); Perry v. State, 522 So.2d 817, 820 (Fla.1988).

d. Treatment of Mitigation

Appellant next claims that the trial court's treatment of the mitigating factors was insufficient and compares it to the sentencing order in Crump v. State, 654 So.2d 545 (Fla. 1995). A comparison of the order found insufficient in Crump bears no resemblance to the order written in the instant case. Crump's sentencing order and it's deficiencies were described as follows:

> The sentencing order we are now presented with is three pages in length, and the only mention of the specific non-statutory mitigation proposed by Crump is the attached list of suggested mitigation filed by Crump himself. The sentencing order contains only the following language concerning the evaluation and weighing of the non-statutory mitigation:
>
> 6. Each non-statutory mitigating circumstance proposed by the Defendant was reasonably established by a greater weight of the evidence; considered to be mitigating in nature; and given some, but very little, weight.
>
> 7. The non-statutory mitigating circumstances, when considered collectively, should be and are given slight weight.
>
> 8. The statutory aggravating circumstance clearly outweighs the non-statutory mitigating circumstances and justice demands that the Defendant be sentenced to death.

In contrast the order in the instant case, with regard to the mitigating circumstances extensively sets forth the factors found and the weight assigned to each factor:

MITIGATING FACTORS

> The defendant elected to call one witness during the penalty phase of the trial, his wife. She married the defendant since his confinement to death row and her testimony in mitigation amounted to her description of the defendant's attitude and conduct toward her and in her presence. In that context she testified to the following non-statutory mitigating factors:
>
> 1. The defendant can be a gentle and caring person.

2. The defendant has an appealing sense of humor.

3. The defendant is respectful towards her.

4. The defendant loves her and she loves him.

5. She visits him regularly and would continue to do so.

In addition the defendant attached to his sentencing memorandum a transcript of the testimony of his mother which was given in an earlier penalty phase. Regarding the defendant's childhood she testified to the following non-statutory mitigating factors:

6. The defendant's father, with whom the defendant's mother lived, more or less, but never married, neglected the defendant during his childhood by frequent extended absences, refusal of material support and withholding of attention.

7. The defendant's father abused and demeaned the defendant physically and emotionally by beating him and sometimes throwing food on the floor and ordering the defendant to "eat it like a dog".

8. The defendant witnessed frequent violence between his mother and father, including gunfire.

9. The defendant's father threatened, more than once, to kill him.

10. The defendant was taken by his mother to and from the school bus stop with a dog chain attached to his waist.

The defendant offered no statutory mitigating factors.

WEIGHING PROCESS

> The court, after careful consideration, assigns the greatest possible weight to aggravating factors one and two and some weight to aggravating factor three.
>
> The court assigns little weight to mitigating factors one through five and some weight to mitigating factors six through ten.
>
> Although the jury did not hear the testimony of the defendant's mother, still the court agrees with the jury that the aggravating factors outweigh the mitigating factors.
>
> (V4/589-591)

This order complies with the dictates of Campbell, where this Court explained that if a death sentence is imposed, the court must not only consider any and all mitigating evidence, but must "expressly evaluate in its written order each mitigating circumstance proposed by the defendant to determine whether it is supported by the evidence." Campbell, 571 So.2d at 419 (footnote omitted). The order in the instant case clearly shows what factors were found and considered by the court and the weight the court assigned to each factor.

No error has been shown. Assuming, arguendo, that the court's order is insufficient in some regard, this Court has made it clear that such errors can be harmless. Recently, in Bates v. State, 750 So.2d 6,(Fla. 1999), this Court addressed as similar argument and held:

> In his fifth issue, appellant contends that the trial court erred by failing to

> evaluate or even consider other nonstatutory mitigation. At his allocution hearing, appellant presented the trial court with: (1) his Department of Corrections records, asserting in his sentencing memorandum that he had a good institutional record; and (2) a sworn waiver of parole. Regarding appellant's waiver of parole, we have already determined that this was irrelevant evidence and find that the trial court did not err by not considering the waiver. Regarding the prison records, we find that the trial court's failure to address appellant's prison records in the sentencing order was error. See Campbell v. State, 571 So.2d 415, 419 (Fla.1990) ("When addressing mitigating circumstances, the sentencing court must expressly evaluate in its written order each mitigating circumstance proposed by the defendant...."). However, we conclude that this error was harmless beyond a reasonable doubt. See Foster v. State, 679 So.2d 747 (Fla.1996); Lucas v. State, 613 So.2d 408, 410 (Fla.1992)
>
> Bates at 750 So.2d 13

Based on the foregoing the state urges this Court to find that the order in the instant case sufficiently complies with Campbell and that, error, if any, is harmless.

ISSUE VIII

WHETHER THE TRIAL JUDGE ERRED IN SENTENCING BOLIN ON THE NON-CAPITAL FELONY COUNTS.

Appellee agrees that if it is true that no scoresheet was prepared, that it was error to sentence Bolin to life without a scoresheet reflecting that it is the appropriate sentence or written reasons reflecting the basis for any departure. It is apparent, however, from the statements of both the state and the defense that they were aware of what Bolin's score would be and that he would score out to life for each of the non-capital convictions.[12] (V14/1221)

Even if this were a departure sentence, the capital conviction is a valid basis for departure. See Benedith v. State, 717 So.2d 472, 477 (Fla. 1998) and Hansbrough v. State, 509 So.2d 1081, 1087 (Fla. 1987) (conviction and sentence for first-degree murder is valid reason for departure from sentencing guidelines). Therefore, appellant can be resentenced on these convictions either within the guidelines or with reasons stated for the departure.

[12] The prior record on appeal shows that a scoresheet was prepared on these same offenses. (PR13/1607)

CONCLUSION

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

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

_____

CANDANCE M. SABELLA
Assistant Attorney General
Florida Bar ID#: 0445071
2002 N. Lois Avenue, Suite 700
Westwood Center
Tampa, Florida 33607
(813) 873-4739
(813) 356-1292 Fax

COUNSEL FOR APPELLEE

CERTIFICATE OF SERVICE

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

_____

COUNSEL FOR APPELLEE