IN THE SUPREME COURT OF FLORIDA

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|---|---|---|
| OSCAR RAY BOLIN, | : | |
| Appellant, | : | |
| vs. | : | Case No. 95,774 |
| STATE OF FLORIDA, | : | |
| Appellee. | : | |
| ______________________________ | : | |

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

# INITIAL BRIEF OF APPELLANT

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PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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## STATEMENT OF TYPE USED

I certify the size and style of type used in this brief is Courier 12 point, a font that is not proportionally spaced.

# PRELIMINARY STATEMENT

The record on appeal consists of two sections and a supplement. The first part, contained in volumes I through IV, consists of documents filed with the clerk. References to this part of the record on appeal will be designated by volume number, followed by "R" and the appropriate page number. The second part of the record on appeal is contained in volumes V through XIV and consists of transcripts from trial and the pretrial hearings. References to this part of the record on appeal will be designated by volume number, followed by "T" and the appropriate page number. References to the one-volume "supplemental record" will be designated "SR" and the appropriate page number.

By order dated April 3, 2000, this Court granted Appellant's motion to take judicial notice of the record from Bolin's previous trial and appeal to this Court in Case No. 78,468. References to this prior record will be designated "PR", followed by the appropriate page number.

## STATEMENT OF THE CASE

On August 1, 1990, Oscar Ray Bolin, Appellant, was indicted by a Hillsborough County grand jury for the January 1986 first degree murder, robbery with a weapon and kidnapping of Natalie Holley (I, R35-7). He was convicted at trial of all charges and a sentence of death was imposed. On appeal, this Court reversed his convictions because his former wife was permitted to testify to privileged marital communications (I, R38-45); Bolin v. State, 642 So. 2d 540 (Fla. 1994).

In another Hillsborough County homicide, Bolin was also convicted for first degree murder and sentenced to death. On appeal, this Court again reversed for violation of the spousal privilege; Bolin v. State, 650 So. 2d 21 (Fla. 1995). However, in that opinion, this Court stated that a letter from Bolin to the investigating detective might establish a waiver of the spousal privilege. 650 So. 2d at 23-4. It was left to the trial court to determine whether "the circumstances together with the content of the letter ... indicate that Bolin voluntarily consented to disclosure by Coby of what she knew about Bolin's alleged criminal activities". 650 So. 2d at 24.

On remand to the circuit court, the original trial judge disqualified himself on March 8, 1995 pursuant to Appellant's motion (I, R59-68). Bolin then moved to suppress the letter, seized from his jail cell following his attempted suicide in June 1991, which contained the possible waiver of the spousal privilege (I, R100-04). After a suppression hearing held August 3,

1995, the trial court ruled that the letter had been seized from Bolin's jail cell without probable cause that it was either contraband or evidence of a crime (III, R389; SR74-5). The State appealed to the Second District, which reversed on the rationale that the letter was "in plain view" and "evidence of the attempted suicide" (IV, R554-62); State v. Bolin, 693 So. 2d 583 (Fla. 2d DCA 1997). In an order dated July 10, 1997, this Court declined to accept jurisdiction (III, R401); Bolin v. State, 697 So. 2d 1215 (Fla. 1997). The United States Supreme Court denied certiorari; 522 U.S. 973 (1997).

The circuit court then heard Bolin's "Motion in Limine - Letters" (III, R404-9) on February 23 and March 16, 1998 (XIII-XIV, T1024-1118, 1186-1202). After hearing witnesses and evidence regarding the authenticity of a letter written by Bolin and addressed to his attorneys, the court ruled that this letter was not authentic (XIV, T1202).

The judge then addressed the waiver question. Appellant's "Amended Motion in Limine ... Waiver of Spousal Privilege ..." (I, 105-24) had originally been declared moot following the 1995 ruling which suppressed the letter (XIII, T1121; SR75). At the pretrial hearing of February 23, 1998, the court heard argument from defense counsel that Appellant's letter to Captain Terry should not be treated as a waiver of his spousal privilege (XIII, T1122-31). Counsel noted that Bolin did not disclose any confidential communication in the letter (I, R171; XIII, T1122). At the time that the letter was written, the trial judge had already

ruled that he no longer retained the privilege (I, R108, 176-8; XIII, T1122-3). Moreover, Bolin had placed a postage stamp on the letter, but never released it to the jail personnel for mailing (I, R176; XIII, T1077, 1125). Therefore, there was no voluntary delivery of the letter to Captain Terry (I, R108, 176; XIII, T1125).

Counsel further argued that Bolin's previous filing of a motion to discharge his attorneys because their actions had caused the trial judge to find a waiver of the spousal privilege showed his intent to assert his privilege at all times (I, R177; XIII, T1125-7). Therefore, his suicide note should not be construed as a voluntary waiver when the judge had already told him that he no longer retained the privilege (I, R108, 177-8; XIII, T1126-8).

The third point was even if the letter could be found to be a waiver, the waiver would only be prospective, not retrospective (I, R108, 181-3; XIII, T1128-9). Therefore, any waiver was subsequently revoked by reassertion of the privilege before Bolin's ex-wife testified at trial (I, R108, 174, 184-5; XIII, T1129, 1143). It was also contingent upon Bolin's attempted suicide actually resulting in his death (I, R109, 185-6; XIII, T1129-31).

In ruling, the trial court conjectured that this Court would have been aware of the sequence of events and accordingly must have found that any waiver could be applied retroactively to Cheryl Coby's deposition testimony (XIII, T1147-9, 1173-4, 1176).

He ruled Bolin's letter was a voluntary waiver which, while "prospective only in its tone, had the legal effect of acting or operating retroactively" (XIII, T1177). At the March 16, 1998 hearing, the court reiterated his ruling; "the ... letter amounts to a waiver of the spousal immunity privilege, subsequently withdrawn" (XIV, T1202).

At the February 4, 1999 hearing, defense counsel asked the judge to rehear his "Motion to Dismiss Counts Two and Three of the Indictment" (I, R81-3; III, R437-40; XII, T980). This motion, based upon the running of the statute of limitations before the indictment was returned, had originally been heard and denied on August 3, 1995 (I, R81; S89-92). The basis for rehearing was subsequent case law which was argued to the court (XII, T980-95). The trial judge adhered to the prior ruling (III, R437; XII, T995).

The court then considered Appellant's "Motion for Rehearing of Motion in Limine - Spousal Privilege" (III, R453-6; XII, T995-1002). The motion was based upon further research on whether a waiver of a privilege could later be revoked (III, R453-5; XII, T996-9). Defense counsel argued that a waiver can be revoked as long as the privileged material was not disclosed during the period that the waiver was in effect (XII, T996-9). The State insisted that the only issue before the trial court was whether Bolin's waiver in the letter was voluntary (XII, 1001). The judge denied the motion (III, R453; XII, T1002).

Defense counsel also moved to continue the trial based upon

his investigator's receipt of a telephone call from a prospective defense witness who would testify that another person confessed to the homicide shortly after it took place (III, R434-6; XII, T1005-11). This prospective defense witness could not be subpoenaed because he was avoiding warrants for his arrest (XII, T1009). However, he said that he was planning to turn himself in soon (XII, T1009). The court denied the motion for continuance (III, R434; XII, T1012).

On February 12, 1999, defense counsel served a "Motion to Exclude Prior Testimony of Cheryl Jo Coby" (III, R462-8). The motion was based upon several instances where prior counsel for Appellant had been ineffective in his crossexamination of the State's star witness, Bolin's ex-wife (III, R462-8). Immediately prior to trial, the judge stated on the record that he had read the motion and would deny it (V, T4).

Trial was held February 15-8, 1999 before Circuit Judge J. Rogers Padgett. During jury selection, Appellant objected when the State exercised a peremptory strike on a prospective African-American juror, Ms. Nellon (VI, T146-7). The court required the State to give a race neutral reason and found that the strike was "non-pretextural" [sic] (VI, T147-8). When defense counsel later accepted the jury, he renewed his objection to the excusal of the prospective juror (VI, T229).

Prior to opening statements, Appellant renewed his objection to use of all spousal statements which would have fallen within the privilege (VII, T253-4). The court granted a standing

objection (VII, T254). It was again renewed immediately before the playing of Cheryl Coby's videotaped testimony to the jury (VIII, T420). Before the prosecutor presented evidence about the letter from Bolin addressed to Captain Terry, defense counsel renewed his objection based upon illegal seizure and violation of Bolin's Sixth Amendment right to counsel (IX, T565-6).

When the State put on evidence which purported to link the seat upholstery of the vehicle once owned by the Bolins to fibers found on Holley's body, defense counsel argued that it should be excluded because the State could not show that the upholstery had not been replaced during the intervening years (VIII, T409). In allowing the evidence to come in, the court took judicial notice: "It's an American car and the upholstery will outlast the car" (VIII, T409).

Appellant charged the State with a discovery violation based upon their substitution of FBI agent Eric Gilkerson as an expert witness in footwear examination for William Heilman, who had testified at the prior trial (IX, T555-7). Defense counsel was not told of the substitution until six days prior to trial and did not learn until 1 1/2 hours before Gilkerson testified that his testimony would be materially different from that of Heilman (IX, T556-7). The court ruled that there was no discovery violation and no unfair prejudice to defense preparation for trial (IX, T586). The court also ruled that defense witness Robert Lima would not be permitted give his opinion that shoe manufacturers do not put the same size sole on different shoe

sizes (IX, T612-7).

After the State rested, defense counsel moved for judgment of acquittal, arguing that the State had produced insufficient evidence of kidnapping and should also not be permitted to proceed on a felony murder theory with kidnapping as the underlying felony (IX, T575). The court denied Appellant motion for judgment of acquittal and also the renewed motion after the close of all evidence (IX, T576; X, T661).

In the charge conference, defense counsel objected to instructing the jury on the two counts for which the statute of limitations had run - kidnapping and robbery with a weapon (X, T667). This objection was renewed prior to the court's reading of the instructions to the jury (X, T716).

After the jury retired to deliberate, they requested a copy of the letter written by Bolin to Captain Terry (IV, R504; X, T740). As agreed to by the defense, the judge told the jury that they already had all of the evidence that they were going to receive (X, T741-2).

The jury returned a verdict finding Bolin guilty as charged on all three counts (IV, R519-20; X, T744).

At the penalty trial, defense counsel's request for three special jury instructions was denied (IV, R514-7; XI, T751-6, 850). One of these was intended to clarify the parameters of the pecuniary gain aggravating circumstance (IV, R514; XI, T751-4). Appellant objected to allowing the State to use photos of the body of Terry Matthews, the victim in a Pasco County homicide for

which Bolin was convicted (XI, T757-9). Counsel argued that the photos of her wounds were unduly prejudicial and outweighed any probative value (XI, T757-8, 765). The judge allowed the photos, finding that they were "not particularly gruesome" and relevant to illustrate testimony (XI, T767).

Over defense objection to presentation of hearsay with no fair opportunity to rebut it, the lead detective on the Matthews case, Gary Kling, was permitted to testify to what an alleged eyewitness, Philip Bolin, told him about the circumstances of that homicide (XI, T788-90).

The jury, by a vote of 11-1, returned a recommendation that Bolin be sentenced to death (IV, R521; XI, T851).

To supplement the evidence presented to the jury, defense counsel attached to his Sentencing Memorandum a transcript of testimony given during the previous penalty trial by Appellant's mother, Mary Baughman (IV, R530-53). At the Spencer hearing, held May 14, 1999, defense counsel did not comment further on this submission or other evidence; but argued that the pecuniary gain aggravating factor was improperly weighed by the jury (XIV, T1213-4). Appellant's motion for new trial was also heard and denied at this time (IV, R570-3; XIV, T1207-9, 1213).

At the June 4, 1999 sentencing hearing, the court imposed a sentence of death on the murder count and filed his sentencing order (IV, R578-80, 588-91; XIV, T1220). On the kidnapping and robbery with a weapon counts, Appellant was sentenced to consecutive terms of life imprisonment (IV, R581-6; XIV, T1221-2). No

sentencing guidelines scoresheet was before the court when these sentences were imposed (SR8).

The judge's Sentencing Order found three aggravating circumstances: 1) prior violent felony, 2) committed during a kidnapping, and 3) committed for financial gain (IV, R588-9; see Appendix). A total of ten nonstatutory mitigating circumstances were considered and found by the court (IV, R589-90; see Appendix). The judge gave "the greatest possible weight" to the first two aggravating factors and "some weight" to the third factor (IV, R591; see Appendix). "Little weight" was given to the first five mitigating factors (relating to Rosalie Bolin's testimony) and "some weight" was given to the other five mitigating factors (relating to Appellant's childhood) (IV, R591; see Appendix). The court agreed with the jury's death recommendation, finding that the aggravating circumstances outweighed the mitigation (IV, R591; see Appendix).

Appellant filed his notice of appeal June 4, 1999 (IV, R592). On the same day, court-appointed counsel was permitted to withdraw and the Public Defender appointed for appellate representation (IV, R601). Jurisdiction lies in this Court pursuant to Article V, section 3(b)(1) of the Florida Constitution and Fla. R. App. P. 9.030(a)(1)(A)(i).

## STATEMENT OF THE FACTS

### A. State's Evidence

The homicide victim, Natalie Blanche Holley, was last seen alive by her co-worker at a Church's Fried Chicken outlet in Tampa. The co-worker, Vinda Woodson, testified that after the store closed, she and Holley cleaned up and left at the same time "a little before 1:30 [a.m.]" on January 25, 1986 (VII, T277-8). Woodson also identified a photograph of Holley's car, which was later found abandoned (VII, T279).

Later that morning before 8:00 a.m., a local attorney, Gerald Sage, was jogging on a dirt road near his house when he noticed a body in the woods (VII, T283-4). Not knowing whether it was just someone sleeping or a dead body, Mr. Sage went home and called the Sheriff's Office (VII, T285-6). He also noticed tire tracks which had crossed over those left by his daughter when she returned from a date between 1:00 and 1:15 a.m. (VII, T284).

Hillsborough County Sheriff's Deputy Robert Libengood arrived and observed a deceased female with wounds to her throat (VII, T292-3). The area, which Deputy Libengood described as an overgrown orange grove, was sealed off (VII, T294). Dr. Lee Miller, Associate Medical Examiner of Hillsborough County, went to the scene and determined that the woman had been stabbed to death (IX, T496-7). At an autopsy conducted the next day, Dr. Miller counted eight stab wounds to the chest, two of which were fatal (IX, T498-9, 503). There were also two stab wounds in the

neck (IX, T499). Several items of jewelry and a Pulsar watch were found on the body (VII, T331; IX, T501-2). There was no evidence of any sexual attack (IX, T501).

The State and the defense stipulated that the homicide victim was identified as Natalie Holley (IX, T576).

Lead detective Steven Raney testified that he observed tire tracks at the scene where the body was found, but they were not distinguishable (VII, T304). Footprints near the body were also not distinguishable (VII, T304-5). A fiber was collected from the victim's pants (VII, T308).

That afternoon, Detective Raney went to the intersection of Lake Magdalene Blvd. and Smitter Road where Holley's Dodge Dart had been located (VII, T310-11). He noticed shoe impressions outside the driver's door (VII, T314). The impressions were photographed and plaster casts were made from them (VII, T314-5). A shoe pattern was also visible on the floorboard inside the victim's car (VII, T316-7). Subsequently, the detective purchased a pair of size 10 Trax tennis shoes at a K-Mart store because the tread pattern appeared to be identical to what he had seen by Holley's car (VII, T318-20, 330).

Corporal Ronald Valenti of the Hillsborough County Sheriff's Office testified that he stopped at the corner of Lake Magdalene and Smitter around 2:00 a.m. the morning of the homicide because he saw two cars parked in a grass area by the intersection (VII, T340-1). The car in the rear had its hazard lights flashing (VII, T341). Deputy Valenti used his mobile computer to check

the tag of the vehicle in the rear (VII, T344). The printout of this check showed that the vehicle was a 2 door Pontiac registered to Cheryl and Oscar Ray Bolin (VII, T345).

Valenti observed that a man and a woman were in the front car, the man in the driver's seat (VII, T346-7). He pulled alongside of them and asked if everything was all right (VII, T346). The driver explained that he had run out of gas and that the woman was taking him to a gas station (VII, T348). Deputy Valenti asked the woman if she was okay and she replied that she was (VII, T348). The deputy proceeded on his original dispatch (VII, T348).

After Natalie Holley's abandoned vehicle was found at the opposite corner of this intersection, Deputy Valenti was interviewed by Detective Raney to see if the otherwise routine event might be related to the homicide (VII, T359). At that time, Deputy Valenti estimated that he had run the tag sometime between 4:00 and 5:30 a.m. (VII, T359-60). Valenti had been aware of the victim's vehicle during the course of his shift, but believed that it was a third auto which had already been on the opposite corner when he checked the tag of the Bolins' Pontiac (VII, T349; VIII, 369-72, 374).

Detective Raney did a follow-up interview with Cheryl Bolin on January 28, 1986 (VII, T334-5; X, T621). At that time, she told the detective that her vehicle was parked at her residence and was not driven on the night of January 24-5, 1986 (X, T621-2).

The homicide investigation stalled for over four years. On July 16, 1990, pursuant to information given by her new husband, law enforcement officers spoke with Cheryl at her new residence in Indiana (VIII, T475-6). When she talked to the Hillsborough County detectives, she accused Appellant of committing this homicide (VIII, T476; IX, T567-8). A videotaped deposition taken to perpetuate her testimony was played for the jury (VIII, T421-83).

Cheryl Coby testified during this deposition that in January 1986, she and Appellant resided in a trailer park on North Florida Avenue in Tampa (VIII, T425). Bolin's stepsister, Melonda Williams, resided with them and was employed at the Church's Fried Chicken restaurant on the corner of Fowler and Nebraska (VIII, T426). On the evening of January 24, 1986, she and her husband went to a Burger King located across the street from Church's Fried Chicken (VIII, T429). They got coffee and parked in the lot for about an hour facing Church's (VIII, T430). W@hen she asked Appellant what he was doing, he replied that he was "scoping the place out" (VIII, T431).

They returned home, watched television, and the witness went to bed (VIII, T431). She was awakened at 2:00 a.m. by Appellant, who exclaimed, "Get up, come on, I got to show you something" (VIII, T431-2, 467-8). She saw Bolin changing his shoes in the bathroom and noticed that there was blood on the new Trax tennis shoes they had recently purchased at K-Mart (VIII, T432-3). Then he showed her a purse and dumped its contents on the bed (VIII,

T434). Appellant removed $75 and some pills; the other contents were put back into the purse (VIII, T435).

According to Cheryl Coby's testimony, Bolin told her that the purse belonged to the manager of Church's Chicken (VIII, T435). The couple left the trailer and went for a ride in their Izuzu 4x4, taking the purse and the bloodied shoes (VIII, T436-7). Coby testified that during the drive, her husband recounted the events of the night (VIII, T439).

Bolin allegedly told his wife that he followed the manager of Church's Chicken as she drove from the restaurant (VIII, T439). He got her to pull over by flashing the headlights of his vehicle at her (VIII, T439). Appellant said that he thought that the manager would be carrying the day's cash receipts to the bank and he intended to rob her (VIII, T439).

Once the manager had pulled her car off the road, she got out of her car and told Bolin that he had scared her (VIII, T440). When a police officer pulled up, Appellant put a gun in the manager's side and "told her to get rid of the cop" (VIII, T440). She told the policeman that she had car trouble and Bolin was assisting her (VIII, T440). When the deputy left, Appellant searched the car for money; but couldn't find any (VIII, T440-1).

Bolin's ex-wife further testified that Bolin told her he and the manager drove to an orange grove (VIII, T441). He said that it would have made too much noise if he shot the manager, so he stabbed her instead (VIII, T441). The manager started to scream, so Bolin stabbed her in the throat to stop her screaming (VIII,

T441). During the stabbing, Appellant stood at a distance to avoid hair or fiber transfers (VIII, T442). He also used rubber gloves (VIII, T442).

Cheryl Coby then described the location where Bolin stopped his vehicle and identified a photograph as depicting the site and the car that was there (VIII, T442-3). She watched as he dragged a tree branch to obscure tire tracks (VIII, T443). At his request, she handed him a towel which he used to wipe down both the interior and exterior of the parked car (VIII, 443-4).

Her husband then drove onto Interstate 275 and went north several exits to Highway 52 (VIII, T444). During the journey, he threw the bloodstained tennis shoes out the window (VIII, T445). When they got off the interstate, Appellant discarded the purse (VIII, T445). Then they drove home to their trailer and went back to bed (VIII, T445).

Later that day, the couple took the Grand Prix to the car wash and thoroughly cleaned both outside and inside including the trunk (VIII, T446). Cheryl Coby also learned from Melonda Williams that the Church's Chicken manager had been found murdered (VIII, T446-7, 452). When a detective called her a few days later asking about the whereabouts of the Grand Prix on the night of the homicide, Cheryl told him that it was parked at their residence (VIII, T447). She also told him that she didn't drive anymore because of her poor eyesight (VIII, T447).

The first person Cheryl Coby told about these events was her next husband, Danny Coby, in 1988 just before they got married

(VIII, T448). It was he who alerted the Indiana police in July 1990 (VIII, T475-6). When the Hillsborough County deputies arrived in Portland Indiana on July 16, 1990, it took her by surprise (VIII, T449, 475-6). Eventually she talked to the officers and cooperated with their investigation (VIII, 449-50). Her testimony at trial was that she had planned all along to return to Florida and talk to law enforcement (VIII, 449-50).

In an attempt to corroborate Cheryl Coby's testimony, the State presented evidence that the Pontiac Grand Prix once owned by the Bolins had been traced to Scranton, Pennsylvania (VIII, T407). In July 1990, a swatch was cut from the fabric on the rear seat of this vehicle (VIII, T416). An agent from the FBI laboratory testified that he compared this swatch of upholstery with two fibers found on the body of Natalie Holley (IX, T516). He concluded that the fibers were consistent with the seat fabric (IX, T516-7). However, the fiber, classified as Nylon 6,6 is a pretty common fiber found in clothing and carpets as well as automobile seat upholstery (IX, T539). There was no way to be certain that Natalie Holley was ever in the Bolins' Grand Prix; indeed, the fibers found on her body might not have even come from a vehicle (IX, T528, 540).

An FBI footwear examiner testified that the design elements of the TRAX tennis shoes corresponded to the impression contained in the plaster cast made at the scene of Holley's abandoned car (IX, T545-8). He also said that it was not possible to determine what size shoe left the impression because the manufacturer might

have placed the same outsole on different shoe sizes (IX, T548-50). The examiner did agree that there was good correspondence between the impression and the size 10 TRAX shoes in evidence (IX, T551).

The final state witness was the 1990 Bureau Commander of the Criminal Investigation Bureau, Gary Terry (IX, T567). He testified that he accompanied Cheryl Coby to the various locations relevant to the homicide, calculating distances and driving time between them (IX, T568-71). On June 22, 1991, he received a letter from Appellant (IX, T571). He read a redacted portion of the letter to the jury:

> If there is ever anything else that you really want to know about, then you'll have to ask Cheryl Jo because she knew just about everything that I was ever a part of. She knew about this homicide, which I am charged with, because it was her idea on how to dump the body out.

(IX, T573).

B. Defense Evidence

Retired Hillsborough County Detective Lee Baker testified that as part of the 1990 investigation, he collected some of Bolin's old clothing from the Union City, Indiana residence of Cheryl Jo Coby (IX, T577-8). Among the items was a pair of Pro-Lines tennis shoes (IX, T587).[1]

Current Bureau Commander with the Hillsborough County

[1]This was relevant to rebut Cheryl Coby's testimony that Appellant "only wore one kind of tennis shoe and it was TRAX" (VIII, T468).

Sheriff's Office, Royce Wilson, testified that he reviewed the fingerprint evidence collected from Holley's Dodge Dart (IX, T589, 592). There were 12 latent prints of comparison value (IX, T593). Of these, two were identified as coming from Lead Detective Raney, but none matched Bolin (IX, T594-5).

Sergeant Steve Raney testified that model of TRAX tennis shoe that left the impression by Holley's vehicle was only manufactured in the color blue (X, T619).[2] When he interviewed Cheryl Jo Bolin on January 28, 1986, she told him that she and her husband went to bed around 10:30 to 11 p.m. on January 24 (X, T621). She also claimed that her vehicle never left her property on the date of the homicide (X, T621-2). When Detective Raney interviewed Deputy Valenti, Valenti told him that he was unable to see the face of the female occupant of the car during the incident where he ran the tag of the Bolins' Grand Prix (X, T624).

Deputy Linda Watts identified photographs of Holley's abandoned vehicle which were taken on the afternoon of January 25, 1986 (X, T628-30). She testified that the items shown in the

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[2]This was significant because Bolin's ex-wife testified:

Q. But you recall specifically him wearing these blue Trax, correct?
A. No, they were not blue.
Q. What color were they?
A. They were black and gray.
Q. Black and gray?
A. (Nodding head affirmatively.)

(VIII, T459).

photograph of the interior had been there when the car was first discovered (X, T630).[3]

Defense witness Robert Lima has been selling shoes for forty years (X, T631). He measured Bolin's foot with the standard Brannock device and determined that his shoe size was 7 1/2 to 8 (X, T632). A ruling of the court barred Lima from testifying that in his experience, shoe manufacturers don't put the same size sole on different shoe sizes (X, T612, 614-6).

Bolin's sister-in-law, Melonda Adams, testified that she resided with the Bolins in January 1986 and worked with Natalie Holley at Church's Chicken (X, T638-9). Because she didn't have a driver's license, she depended upon either Appellant or his ex-wife to pick her up after her shift (X, T639). As far as she remembered, Cheryl Bolin was always able to drive (X, T642). Appellant never asked her any questions about the way money was handled at the restaurant (X, T640).

Adams also testified that she didn't recall that the Bolins came into Church's to eat (X, T642). State rebuttal witness, Tampa Police Detective James Noblitt, contradicted that (X, T655-8). He testified that Adams told him that when both Bolins came to pick her up, they would sit in a booth while the workers finished closing up (X, T657-8). When Appellant came alone, she would give him something to drink and he would wait in the car

[3]The significance of the photograph of the interior photograph is that it showed a purse on the seat. In closing, defense counsel argued that this purse showed that Cheryl Coby's testimony about Bolin dumping the contents of Holley's purse while in their trailer was false (X, T683, 701).

(X, T657-8). Detective Noblitt agreed that Adams said that sometimes Cheryl Jo Bolin came alone to pick her up (X, T659).

C. Penalty Phase

In addition to a certified conviction for a prior first degree murder, the State presented testimony from Lt. Gary Lester Kling of the Pasco County Sheriff's Office regarding the details of this homicide (XI, T777-90). Photographs of the victim, Terry Matthews, were introduced into evidence (XI, T779-86). Lt. Kling testified about what Philip Bolin, an alleged eyewitness, told him concerning how the homicide was committed (XI, T788-90).

Jenny LeFevre testified about Bolin's conviction in Ohio for rape and kidnapping (XI, T791-806). She said that she was employed by Truck Stops of America in Stoney Ridge, Ohio on November 18, 1987 (XI, T791). She got off work around midnight, went to her car and got inside (XI, T791-2). A man, who she identified as Appellant, opened the driver's side door, put a gun in her side and forced her to move over (XI, T792). Then he drove her car about a mile to a deserted parking lot (XI, T792).

In the parking lot, a semi-trailer pulled up; then Appellant forced LeFevre to leave her car and get into the truck (XI, T793). Two men were already in the semi (XI, T793). Bolin told them to start driving as he pushed LeFevre into the sleeper compartment and closed the curtain (XI, T793-4). Soon after that he raped her while holding the pistol to her head (XI, T795-6).

LeFevre further testified that the driver, later identified

as Bolin's cousin David Steen, also tried to force her to have sex during her ordeal which lasted "several hours" (IX, T798-9). She fought him off and Bolin did not point his gun or otherwise interfere in that struggle (XI, T799). The three men talked often about whether to kill her (XI, T800-01). Finally, the truck stopped and Bolin directed the blindfolded LeFevre through a ditch and up to a fence (XI, T802). With his gun in her side, she begged for her life (XI, T802-3). Bolin lifted the witness over the fence and told her to run (XI, T803). She ran through the field and down a dirt road until she eventually came to another truck stop (XI, T803-4).

When charged with the kidnapping and rape of LeFevre, Bolin pled guilty and received a long prison sentence (XI, T805).

In the defense case, Appellant's wife, Rosalie Bolin, testified about their relationship (XI, T808-36). She explained that she met Appellant when she was working at the Public Defender's Office in Tampa as Social Services Coordinator (XI, T813-4, 826). She described their meeting and the close bonds that developed between them while she was investigating his background and preparing for trial (XI, T814-20). After she left the Public Defender, she continued to work pro bono as a mitigation specialist for Oscar Ray Bolin (XI, T820-1). During Bolin's trial in Pasco County, rumors in the media prompted her then-husband, Victor Martinez, to file for divorce (XI, T821-2, 829). The divorce was final twenty-one days later and soon after, the witness accepted Appellant's marriage proposal (XI, T822-3).

Rosalie Bolin further testified about good personal qualities her husband possesses (XI, T823-4). He has always been very kind to her (XI, T823). He is intelligent with a good sense of humor (XI, T823). They love each other and she visits him in prison at least once a week (XI, T824). In her former marriage, the witness enjoyed an affluent lifestyle; now she is "ruined financially" (XI, T824-5).

On crossexamination, the witness was asked whether she had taken some Armani suits once owned by her ex-husband and had them retailored to fit Appellant (XI, T833). Rosalie Bolin replied that Victor Martinez had given her those suits expressly for Mr. Bolin's use (XI, T833).

SUMMARY OF THE ARGUMENT

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

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

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

The State committed a discovery violation when they substi-

tuted a different expert witness on footwear examination who had a different opinion from the examiner who had testified at Bolin's prior trial. The judge did not allow the defense to cure the prejudice from the violation when Robert Lima (a witness with extensive experience in the shoe business) was not permitted to give his own opinion on the subject. The court erred by using a different standard to evaluate the defense proffered testimony than he had used for the State's witness.

The statute of limitations had already run on the robbery and kidnapping charges before Bolin was indicted. Although the judge ruled that the running of the statute had been tolled, this ruling was error. Bolin did not flee prosecution and Florida authorities always knew where to find him after he left the state.

In the penalty phase, the jury was exposed to the details of Bolin's conviction for another murder. This conviction has since been vacated by this Court. Moreover, some of the evidence would have been improper even if the conviction was affirmed. Because the jury must have considered the facts of the prior murder when they recommended death, the recommendation is tainted and a new penalty proceeding must be held.

An additional error occurred in the penalty phase when the judge denied the defense requested jury instruction on the limiting construction given to the pecuniary gain aggravating circumstance. The evidence at trial made it likely that the jury would weigh this aggravating factor unless they were instructed

on how it was to be applied. United States Supreme Court precedent holds that a Florida capital jury must be guided on proper application of aggravating circumstances.

The trial judge improperly weighed unproved aggravating circumstances. He did not follow this Court's procedural requirements in evaluating mitigating evidence. This Court should order the judge to reweigh the evidence and prepare a correct sentencing order.

Bolin should have been sentenced pursuant to the 1985 sentencing guidelines on the non-capital convictions. No guidelines scoresheet was considered. Moreover, his life sentence on the robbery count was illegal because it was only a first degree felony punishable by a statutory maximum of 30 years.

## ARGUMENT

### ISSUE I

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

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

In Preston v. State, 444 So. 2d 939 (Fla. 1984), this Court held that "law of the case" doctrine does not bar reconsideration in a capital case of a suppression issue already decided by a district court of appeal. The Preston court pointed to the statutory mandate of automatic and full review of all judgments resulting in imposition of a death sentence, substantive due process, and the interest of justice as factors warranting review of a search and seizure issue already litigated in the Fifth District. Similarly, in Jordan v. State, 694 So. 2d 708 (Fla. 1997), this Court considered whether to review the district court's granting of the State's certiorari petition to limit discovery. Because a death sentence had later been imposed, the Jordan court agreed to decide the merits of the appellant's claim despite the State's argument that it was procedurally barred.

At the suppression hearing, held August 3, 1995, evidence

established that in June 1991, Bolin was housed in the Hillsborough County Jail awaiting trial on two homicide cases (SR17). He was represented by the Public Defender (SR35-6). The portion of the Hillsborough County Sheriff's Office responsible for running the jail (detention bureau) is a separate department from the criminal division which investigates cases (SR31). Major (then Captain) Terry was in charge of the Criminal Investigations Bureau of the Sheriff's Office and of the investigation into the murders which Bolin was accused of having committed (SR16). His lead investigator on the charges against Bolin was Corporal Baker (SR17-18, 58).

Because Bolin was considered a security risk, his cell was searched at least every day (SR45). The box of papers which Bolin kept in his cell was examined during these shakedowns, but the contents were not read (SR46). Jail inmates typically keep similar boxes to store their legal materials (SR28). The purpose of these searches, conducted by detention personnel, was solely to find contraband (SR38-40, 46).

On the morning of June 22, 1991, jail personnel observed that Bolin was in physical distress (SR43). Eventually, a deputy responsible for monitoring conditions at the jail, Lieutenant Rivers, ordered that he be taken to the infirmary for medical attention (SR44). In Bolin's jail cell, the detention lieutenant noticed a letter addressed to Captain Terry on top of the cardboard box containing Bolin's personal possessions (SR46, 50).

Terry was notified that Bolin might have attempted suicide

(SR19). He ordered that the cell be sealed until he and Corporal Baker could examine it (SR21). When the two investigators entered Bolin's cell, they observed the stamped letter addressed to Terry (SR21-2, 55). The letter, along with Bolin's cardboard box of possessions, was seized and later read at another location (SR22, 56, 58-60). No contraband was found (SR61).

Major Terry conceded that the routine cell search was "not what [he and Baker] were doing" when they seized Bolin's box of papers and the letter on top of it (SR40). As well as the letter addressed to Terry, there were four or more letters written by Bolin to family members or friends which Baker took from the box and put into evidence (SR30, 59-61).

The Florida Administrative Code sets forth regulations for disposition of abandoned jail inmate property (SR28-9). Major Terry agreed that the notification procedures required by the Regulations were not followed with respect to the letters seized from Bolin (SR30).

The trial judge ruled that the letter had been seized from Appellant's jail cell without probable cause that it was either contraband or evidence of a crime (SR74-5). Alternatively, the trial court also ruled that the State had interfered with Bolin's constitutional right to counsel (SR74-5). An order suppressing the letter was entered (I, R100-4; III, R389).

In the subsequent state appeal to the Second District Court of Appeal, the trial court's ruling was reversed. 693 So. 2d 583 (Fla. 2d DCA 1997). The State argued that the United States

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

A) Plain View.

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

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

(1987).

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

The Second District attempted to skirt the probable cause requirement by labeling the letter "a suicide note" and "evidence of the attempted suicide" 693 So. 2d at 585. However, suicide notes are usually not placed in an addressed envelope and stamped. Major Terry acknowledged at the hearing that he didn't guess about the contents of the letter before he read it:

> At that time, I didn't know what it [the letter] would contain. I wasn't hopeful of anything" (SR24).

Corporal Baker took a more optimistic approach:

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

(SR55). Accordingly, it was not even apparent that the letter was relevant to the attempted suicide investigation, let alone evidence of a crime which could be seized without a warrant.

In Jones v. State, 648 So. 2d 669 (Fla. 1994), this Court applied Minnesota v. Dickerson, supra to a seizure from the defendant's hospital room. The facts showed that the police officers were lawfully in Jones' hospital room. They saw a bag

containing his clothing. However, the incriminating character of the clothing was not "immediately apparent"; it was not until the bag was searched and soil stains found on some clothing that it could be linked to the crime. Consequently, this Court held that the seizure of Jones' clothing was illegal and the evidence should have been suppressed.

The Second District's conclusion that "plain view" justified seizure of Bolin's letter is equally insupportable. Nothing was "immediately apparent" about the letter except that Bolin contemplated sending it to Captain Terry at a later time. The fact that the letter was stamped, but not yet delivered to jail authorities, indicates that Bolin intended that any delivery of the letter would be through the postal system. Until he released it, the letter remained Bolin's possession.

B) Pretrial Detainees Retain Diminished Fourth Amendment Constitutional Rights.

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

inapplicable to pretrial detainees). 693 So. 2d at 585.

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

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

When the United States Supreme Court has not addressed a particular search and seizure issue, Florida courts should rely upon their own caselaw precedents. Soca v. State, 673 So. 2d 24, 27 (Fla.), cert. den., 519 U.S. 910 (1996); State v. Cross, 487 So. 2d 1056 (Fla.), cert. dismissed, 479 U.S. 805 (1986). Since

the circumstances of the case at bar are materially different from those of Hudson, this Court should not try to extend its holding. The search and seizure issue should be decided on Florida precedent and persuasive decisions from other jurisdictions involving jail inmates awaiting trial.

The prior Florida precedent is McCoy v. State, 639 So. 2d 163 (Fla. 1st DCA 1994). Although the Second District's opinion in Bolin criticized McCoy because "there is nothing in Hudson that would support the First District's determination that Hudson does not apply to pretrial detainees" (693 So. 2d at 585), it is also true that the Hudson court did not "state that its holding applied to pretrial detainees as well as convicted inmates". McCoy, 639 So. 2d at 165. The McCoy court also found it significant that the Court released its opinion in Block v. Rutherford, 468 U.S. 576 (1984) on the same day as Hudson. Since Block examined in part the right of pretrial detainees to observe shakedown searches of their cells, it would have been easy for the Court to simply deny any Fourth Amendment standing to pretrial detainees as it did to convicted prisoners in Hudson. However, the Block court actually employed the usual balancing test to conclude that institutional security concerns demand that the sound discretion of institutional authorities (rather than the courts) should "reconcile conflicting claims affecting the security of the institution, the welfare of the prison staff, and the property rights of the detainees". 468 U.S. at 591 (quoting from Bell v. Wolfish, 441 U.S. 520 at 557, n.38 (1979).

On this analysis, the McCoy court concluded that "in Hudson, the Court did not intend to deprive pretrial detainees of all Fourth Amendment protections". 639 So. 2d at 165. Indeed, shortly after Hudson, the Court held in Winston v. Lee, 470 U.S. 753 (1985) that a pretrial detainee's Fourth Amendment right in the privacy of his person outweighed the prosecution's need for additional evidence of a crime which could only be obtained by surgically removing a bullet from the accused's chest. As an independent rationale, the McCoy court also concluded that Hudson was inapplicable to searches conducted for investigative purposes by the prosecution as opposed to searches conducted by detention personnel pursuant to legitimate needs of institutional security.

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

On appeal, the government relied upon Hudson and urged the court to hold that the fruits of a search conducted in a cell (whether occupied by a convicted prisoner or a pretrial detainee) may not be suppressed on constitutional grounds. The Second Circuit, however, distinguished Hudson saying that the Court

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

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

More recently, in State v. Jackson, 321 N.J. Super. 365, 729 A. 2d 55 (1999), the court reviewed cases involving this issue from several jurisdictions. The Jackson court noted that decisions where the warrantless search and seizure of evidence from the cells of pretrial detainees was upheld[4] involved searches related to jail security. Where the motivation for the search was obtaining evidence to be used at trial, the decisions held that the residual Fourth Amendment rights of the pretrial detainees were violated[5]. Because the search and seizure of

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

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

Jackson's correspondence and documents was motivated by the prosecution's desire to rebut his alibi defense, the routine general search where the material was seized was deemed merely a pretext. None of the material seized violated jail regulations. The court, in suppressing the evidence, wrote:

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

729 A. 2d at 63.

At bar, the circumstances are similar. Captain Terry and Corporal Baker were responsible for the investigation of the homicides Bolin was charged with (SR16-8, 58). They were in a different department of the Sheriff's Office than the Detention Bureau which is responsible for running the jail (SR31). Corporal Baker testified that when Captain Terry seized the letter from Bolin's cell, he (Baker) was hopeful that it contained evidence for their investigation (SR55). Captain Terry stated that the "admissions" in the letter added "significant information to my investigation" (SR26-7).

Captain Terry further testified that jail inmates are permitted to keep a box with letters and legal materials in their cell (SR28). These materials may be searched at any time for security reasons (SR28). Lieutenant Rivers of the Detention Division of the Sheriff's Office testified that Bolin's box of

papers was searched daily during shakedowns (SR45-6). However, the contents were not read; these searches were strictly for contraband (SR46). Captain Terry conceded that this was not what he and Baker were doing when they seized Bolin's letter and the contents of the box in his cell (SR40). Moreover, he and Baker did not follow the administrative procedures applicable to jail inmate property when an inmate escapes or otherwise abandons his property before seizing Bolin's papers (SR28-30).

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

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

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

> I think that had -- had he still been there when Captain Terry went to investigate the suicide and Captain Terry found it necessary to speak with him regarding his investigation of the suicide and Mr. Bolin had been in the process of talking to Captain Terry about the suicide had [sic] admitted or made some incriminating statements about the homicide.

> I'm sure everybody would agree that the statement would not be used in light of the fact that [Bolin] was at that time represented by the Public Defender and Captain Terry knew that.

(SR74-5). In short, the court drew an analogy between oral questioning of an accused represented by counsel and seizure of that suspect's written communications. On the State's appeal, the Second District reversed this ruling with the comment that "the letter does not contain any attorney-client information which would implicate the Sixth Amendment". 693 So. 2d at 585.

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

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

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

While custodial interrogation of the defendant is clearly a

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

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

612 So. 2d at 556.

At bar, Bolin did not make any oral statements, nor was he even present when the investigating detectives rifled through his writings. However, written statements should also pass through the "medium" of counsel unless the accused initiates the presentation.[6]

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

> the Sixth Amendment is not violated whenever by luck or happenstance - the State obtains incriminating statements from the accused after the right to counsel has attached. However, knowing exploitation by the State of

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

> an opportunity to confront the accused without counsel being present is as much a breach of the State's obligation not to circumvent the right to assistance of counsel as is the intentional creation of such an opportunity.

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

In State v. Warner, 150 Ariz. 123, 722 P. 2d 291 (1986), jail personnel seized a pretrial detainee's personal papers from his jail cell and turned them over to the prosecution. The Warner court began by assuming that there was no Fourth Amendment violation in the seizure; but then posed the question of what use could be made of the seized documents at trial. The court observed that the accused's right to counsel includes the right to privacy and confidentiality in communications with his attorney. When the State later undermined this privacy and confidentiality by seizing the accused's personal papers which included work product of defense counsel, a constitutional violation occurred. Accordingly, none of the seized material could be used at trial and the Warner court remanded the case for an evidentiary hearing to determine prejudice. The court stated that the State would have the burden to prove that "no evidence introduced at trial was tainted by the invasion [of the attorney-client relationship]". 722 P. 2d at 296.

Although Bolin's letters contained no "work product of

defense counsel" it is not clear from the record whether the box containing his personal effects also contained papers relating to trial preparation. If so, under the Warner holding, none of the seized material including the letter to Captain Terry would be admissible at trial.

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

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

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

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

524 So. 2d at 424.

At bar, the trial judge's finding that Bolin's property was seized without probable cause to believe it contained contraband or evidence of a crime was supported by competent substantial evidence. The ruling suppressing the letter should have been affirmed.

## ISSUE II

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

In Bolin's first appeal of his conviction for Natalie Holley's murder, this Court reversed, holding that defense counsel did not waive the spousal privilege by taking Cheryl Coby's deposition. Bolin v. State, 642 So. 2d 540 (Fla. 1994); (I, R38-44). The opinion noted that "Bolin and his attorneys tried to maintain the spousal privilege at every step of the proceedings". (I, R42); 642 So. 2d at 541. This Court simply remanded the case for a new trial.

It was not until the appeal of Bolin's conviction for another homicide (that of Stephanie Collins) that this Court discussed the State's alternative theory for waiver of Bolin's spousal privilege. In that opinion, Bolin v. State, 650 So. 2d 21 (Fla. 1995), this Court indicated that the contents of the letter addressed to Captain Terry and seized at the time of Bolin's attempted suicide might establish waiver of the spousal privilege (I, R112-20). Specifically, this Court described the issue as "whether the circumstances surrounding the letter and the content of the letter demonstrate that this defendant voluntarily consented to law enforcement officers talking with his spouse about her knowledge of his alleged criminal activities" (I, R118); 650 So. 2d at 24. Noting that the record was insufficient for the appellate court to decide this issue,

the opinion directed the trial judge on remand to determine whether or not the spousal privilege was waived by the letter before conducting a new trial. (I, R118-9); 650 So. 2d at 24.

I. Circumstances Surrounding the Letter.

A) Lack of Voluntary Delivery.

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

As developed in the pretrial hearings, the facts showed that the letter was found in Bolin's jail cell after he had been removed for medical treatment. It was addressed to "Capt:" [sic] Gary G. Terry and had the Hillsborough County Sheriff's Office mailing address (III, R388). A first class postage stamp was affixed in the upper right corner (III, R388; XIII, T1077). Counsel argued that these facts showed that Bolin contemplated that the letter would be delivered through the postal system if he decided to release it. Until Bolin gave the letter to jail personnel or died, it remained his personal property (XIII, T1125).

There is ample legal authority to support this position. In State v. Stewartson, 443 So. 2d 1074 (Fla. 5th DCA 1984) the

defendant wrote and addressed a letter to her husband just before she attempted to commit suicide. The letter contained admissions to crimes and was seized by a police officer who investigated the attempted suicide and found it in the home. The Fifth District held that the contents of the letter were covered by the spousal privilege in spite of the police interception because the letter was composed and received during the marriage.[7]

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

This Court should also recognize that the "mailbox rule" is applied to inmates who send legal documents for filing in Florida courts. In Haag v. State, 591 So. 2d 614 (Fla. 1992), this Court held that a prisoner's pro se motion was deemed filed at the time that he gave it to prison officials for mailing. The Haag court noted that outgoing inmate mail is logged when received by prison authorities. Bolin's letter to Captain Terry was never logged by the jail; accordingly it was not released by Bolin under the appropriate procedures for inmates. If there was a waiver in the letter, it cannot be voluntary in absence of voluntary delivery of the letter by Bolin under established procedures.

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

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

From the time of Bolin's indictment for this homicide, on August 1, 1990, he was aware that his ex-wife, Cheryl Coby, provided virtually all of the incriminating evidence against him. He knew that Cheryl Coby was cooperating with law enforcement and could expect that she had already disclosed everything relevant to the Holley murder. Bolin also had attended his ex-wife's deposition to perpetuate testimony held in January 1991 (PR 1755-60). He was present at the motion hearing of March 22, 1991, where the trial court ruled that defense counsel had waived Bolin's spousal privilege by questioning Coby about marital communications during the discovery deposition. (XIII, T1122, 1125; PR 1337-40); 642 So. 2d at 541. Based upon this ruling, Appellant filed his own "Motion to Discharge Counsel" asking the court to discharge his trial lawyers for being so ineffective as to waive his spousal privilege without his consent (XIII, T1126; PR1386-7).[8]

It was against this background that Bolin began planning his suicide. As the prosecutor pointed out, there were numerous letters from Bolin to his family members which were seized at the same time as the letter to Captain Terry (XIII, T1133-5). These were all basically goodbye letters, written over a period of time, which explained his reasons for choosing suicide (XIII,

[8]This motion was heard and denied April 12, 1991 (PR1114-34).

T1133). At the same February 23, 1998 hearing, Captain (now Major) Terry testified that two or three weeks prior to Bolin's June 22, 1991 attempted suicide, he received word that Bolin wanted to talk to him (XIII, T1073-4). This interview never took place because the Public Defender's Office was notified of the proposed interview and Bolin's attorneys subsequently persuaded him not to talk with Captain Terry (XIII, T1074).

Defense counsel argued that totality of the circumstances preceding the suicide letter showed that Bolin believed that his spousal privilege had already been waived - indeed the trial judge's ruling ensured that marital communications would be admitted into evidence at his then-upcoming trial (I, R108, 176-7; XIII, T1125-7). Under these circumstances, who would consider the need to protect a privilege that had already been lost according to the trial court's ruling (I, R108, R176-7; XIII, T1126-7). Analogizing to Harrison v. United States, 392 U.S. 219 (1968), defense counsel argued that any waiver would not be voluntary because it was induced by an erroneous ruling of the court (I, R177-8; XIII, T1127-8).

There is Florida caselaw to support this position. In Zeigler v. State, 471 So. 2d 172 (Fla. 1st DCA 1985), the trial judge ruled that the defendant's statement to a police officer had not been illegally obtained. When the defendant went to trial, he testified in an effort to explain his confession. Subsequently, the First District held that the inculpatory statements should be suppressed. The remaining question was

whether the State could introduce Zeigler's prior testimony if a second trial were held.

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

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

## II. CONTENT OF THE LETTER

As noted in this Court's opinion reversing Appellant's other Hillsborough County conviction, the prior record did not contain the letter in question. (I, R118); 650 So. 2d at 24, fn. 4. For that reason, this Court expressed no opinion on "whether the letter constituted a voluntary consent". (I, R118); 650 So. 2d at 24. In the current record on appeal, Bolin's letter to Captain Terry appears as Defense Exhibit #1 in volume III, pages R381-8.

There is no doubt that Bolin expected to be dead by the time that Captain Terry received this letter. The first paragraph requests that Appellant's property at the jail be sent to "Susie" (III, R382). The second begins, "Now about checking out like this. Sorry! But I feel that it's best this way" (III, R382). The body of the letter concludes, "Good luck and see you in the next world" (III, R386).

The main theme of the letter concerns what Bolin might have said to Captain Terry if they had talked two or three weeks earlier. He writes that other than the homicides for which he had been indicted, there were only two more that he knew about (III, R383). Evidently referring to a prior conversation between them, Bolin reports an incident in Miami where he picked up a load[9] which included two dead bodies (III, R383-4). Bolin says he was told that the two dead men were "cops" and he tells Captain Terry where the bodies were dumped (III, R383-6).

The postscript to the letter is where the alleged waiver of

[9]Bolin was employed as a truck driver.

spousal privilege occurs. It reads in part:

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

(III, R386). The remainder of the postscript basically suggests that "sooner or later the truth will come out about her [Cheryl]" (III, R387).

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

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

Saying that Captain Terry *must* ask Cheryl is vastly different than inviting him to talk to her. And, it must be

remembered that Captain Terry had already questioned Cheryl Coby extensively without Bolin's consent. Indeed he complains in the same postscript, "you all used her to set me up" (III, R386). The language "you'll haft to ask Cheryl Jo" together with the context of the letter should not be interpreted as a voluntary consent or waiver.

This situation should be contrasted with what occurred in the case (cited by this Court in Bolin II) of Shell v. State, 554 So. 2d 887 (Miss. 1989), rev'd in part on other grounds, 498 U.S. 1 (1990). In Shell, the court found waiver of the spousal privilege based on the defendant's statement to the sheriff during questioning to "ask his wife if he [the sheriff] didn't believe his story". 554 So. 2d at 889. Clearly, Shell expected his wife to corroborate his alibi rather than impeach him. Bolin, on the other hand, could not expect anything favorable from further questioning of Cheryl Coby. The only reason for Captain Terry to ask Cheryl Coby anything is because Bolin himself would be unavailable (dead) and couldn't answer questions.

Defense counsel also argued below that if the letter was interpreted as a waiver, it was a waiver that was contingent on Bolin's death (I, R185-6; XIII, T1129-31). This is perhaps another way of looking at it; when Bolin survived, Captain Terry was no longer "compelled" to ask Cheryl, he could just as well ask Bolin himself. Bolin's recovery from his suicide attempt meant that an essential condition precedent to any consent was

unsatisfied.

## III. THE TRIAL COURT'S RULING

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

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

(XIII, T1177). By prospective, the judge meant that Bolin's letter referred only to a future interview that Captain Terry might conduct with Cheryl Coby, rather than his past questioning of her (XIII, T1173, 1176). The judge recognized that Captain Terry never acted on the purported waiver; he did not question Coby further after the letter was seized (XIII, T1143, 1154, 1161). The question was whether the alleged waiver could operate retroactively to make admissible all of the previous marital communications which Cheryl Coby had disclosed to the State (XIII, T1161, 1172). The prosecutor urged the judge not to "try to second-guess the Supreme Court" and argued that this Court must have already determined that any consent would operate retroactively[10] (XIII, T1161-2). The court ruled in accord with

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[10]Defense counsel's position was "the Supreme Court is essentially saying they are not a fact-finding body and they put some general principles of law out [into] which I believe we're

the prosecutor's contention (XIII, T1177).

At a later hearing, the trial judge clarified:

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

(XIV, T1202). The ruling that Bolin withdrew his consent was based upon defense counsel's reassertion of the spousal privilege prior to Bolin's first trial (I, R168, 183-4; XIII, T1123). It inspired Appellant to file his "Motion for Rehearing of Motion in Limine - Spousal Privilege" (III, R453-6) which asserted that a waiver of privilege may be withdrawn as long as the privileged information is not disclosed during the period where the waiver was in effect. After hearing argument and considering caselaw, the trial judge denied rehearing (XII, T995-1002).

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

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

> A privileged person would seldom be found to waive, if his intention not to abandon could

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trying to read a remarkable amount of knowledge we don't have" (XIII, T1170).

> alone control the situation. There is always the objective consideration that when his conduct touches a certain point of disclosure, fairness requires that his privilege shall cease whether he intended that result or not.

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

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

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

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

[Citations omitted]. 456 So. 2d at 1229. The court concluded: "Appellant's self-serving statement was given under circumstances which required waiver of the attorney-client privilege in order

to allow cross-examination, rebuttal and impeachment of appellant's testimony, in the interest of fairness". 456 So. 2d at 1229.

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

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

On appeal, the Fourth District wrote:

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

619 So. 2d at 469. The court went on to state that one purpose of waiver provisions is "to prevent a party from using the privilege as both a sword and a shield". Id. Because the petitioner abandoned any claim for emotional stress, the court determined that she "has dropped the sword". Id. Accordingly, the shield of the privilege was restored (waiver was revokable)

because the defense had not been prejudiced.

Similarly, even if Bolin's letter to Captain Terry could be viewed as a waiver of the marital communications privilege, there is no reason to hold that the waiver was irrevocable. The State took no action based upon the purported waiver; consequently they cannot have been prejudiced when Bolin reasserted his privilege prior to trial. Even if Bolin dropped his shield for a few weeks, he never raised a sword and should therefore be permitted to recover his shield.[11]

V. Any Waiver was Revoked Before Marital Communications Were Disclosed at Trial.

The trial court's ruling acknowledged that Bolin revoked any waiver prior to commencement of his prior trial (XIV, T1202). When Bolin asked the trial judge to rehear his motion with regard to the marital communications privilege, he argued that his revocation of any waiver should limit Cheryl Coby's testimony to any privileged material that was disclosed during the period that the purported waiver was in effect (III, R453-6; XII, T996-9). The prosecutor argued:

> I think that the clear instructions from the Supreme Court, and the opinions in this case when it was sent back, directed us to determine whether the waiver was voluntary.

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

> And the Supreme Court specifically said if [you] find that the waiver is voluntary, then the letter constitutes such a waiver.
>
> If you find that the writing of the letter was voluntary, then it is a waiver of the spousal privilege. And I don't see anything in any of these cases that changes that at all.

(XII, T1001). Apparently the court accepted this argument because he simply denied Appellant's motion for rehearing without explanation (XII, T1002).

As previously shown, the content and circumstances of Bolin's suicide letter were not before this Court in the prior appeal. This Court did not direct the trial judge in the way that the prosecutor contended; the opinion in Bolin II merely acknowledges that a privilege may be waived by a letter and that a waiver need not be knowing, only voluntary. It was certainly within the trial court's scope to decide the extent to which any waiver would reach.

Florida caselaw recognizes that a waiver "does not occur until there has been an actual disclosure of the confidential communication". Eastern Air Lines v. Gellert, 431 So. 2d 329, 332 (Fla. 3d DCA 1983); Palm Beach County School Board v. Morrison, 621 So. 2d 464 (Fla. 4th DCA 1993); Truly Nolen Exterminating, Inc. v. Thomasson, 554 So. 2d 5 (Fla. 3d DCA 1989), rev. dism., 558 So. 2d 20 (Fla. 1990). When a defendant consented to allow his communications with psychotherapists to be disclosed to his probation officer, he could not later quash a subpoena of his mental health records or bar deposition of the

professionals who later treated him pursuant to the "Deferred Prosecution Agreement". Saenz v. Alexander, 584 So. 2d 1061 (Fla. 1st DCA 1991). There does not, however, appear to be any Florida authority which addresses the precise issue at bar; actual disclosure of privileged communications prior to the purported waiver which is subsequently withdrawn before any additional action is taken.

One case was presented to the court by Appellant's trial counsel, Driskell v. State, 659 P. 2d 343 (Okla. Crim. App. 1983). In Driskell, the defendant gave his treating doctors permission to discuss his case with investigators for the state as well as his own attorney. Three days later, he revoked this waiver; but not before the doctors had talked to the prosecution. The doctors then testified as state witnesses at trial despite the defendant's reassertion of the doctor/patient privilege.

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

If the holding of Driskell were applied to the case at bar, only the privileged communications which were divulged by Bolin's

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

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

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

Finally, considerations of fairness direct that any waiver

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

## ISSUE III

THE TRIAL JUDGE ERRED BY FAILING TO FIND A DISCOVERY VIOLATION WHEN A DIFFERENT FBI AGENT WAS ALLOWED TO TESTIFY ABOUT SHOEPRINT EVIDENCE. THE ERROR WAS COMPOUNDED WHEN DEFENSE WITNESS, ROBERT LIMA, WAS NOT PERMITTED TO REBUT FBI AGENT GILKERSON'S TESTIMONY.

When the State provided the defense with the witness list for trial, FBI Agent William Heilman, who had testified in Bolin's previous trial, was named as the expert in footwear analysis (IX, T555). About six days prior to trial, defense counsel was first informed that FBI Agent Eric Gilkerson would substitute for Agent Heilman (IX, T556). Defense counsel did not request a continuance to take Gilkerson's deposition because of the late date and his expectation that there would not be any material difference in the testimony of the two agents (IX, T556-7).

It wasn't until 1 1/2 hours before Agent Gilkerson took the stand that defense counsel learned that he would give a different opinion with respect to the range of shoe sizes that made the impressions left next to the victim's car (IX, T557). After Gilkerson testified, defense counsel requested the judge to find a discovery violation and impose a suitable sanction (IX, T555-7).

The prosecutor justified her final question to Agent Gilkerson on the ground that she had only learned after commencement of trial that Bolin's shoe size would be part of the

defense evidence (IX, T557-8). The question, and Gilkerson's response, were as follows:

> Q. From looking at a plaster cast of footwear, is there any way to determine the shoe size of that footwear?
>
> A. No. there is no way to determine what size those impressions are. The shoe size is an internal measurement of the shoe. It tells you how well your foot fits inside the shoe. The outsole on the bottom of the shoe is an external feature of the shoe. There is no direct correlation between the two.
>
> So looking at those direct impressions, I cannot tell you what shoe size made those impressions ...

(IX, T548-9).

On crossexamination, Agent Gilkerson went on to testify:

> Q. Now, would the reason that you say that you can't tell shoe size is because the outside, the sole may not be related directly to the inside size; is that basically it? The size of the sole may not be directly related to the inside?
>
> A. That's correct. The outsole could be placed on more than one size, more than one shoe size, that is.
>
> Q. And more than one shoe size of the same - by the same manufacturer of the same style?
>
> A. Yes, that's correct.
>
> Q. So there may be other Trax shoes floating around that are of a different size than that but have the same sole?
>
> A. Are you referring to different shoe size?
>
> Q. Different shoe size.
>
> A. The outsole that you see on this Trax shoe could have been placed on a Trax shoe of different sizes, yes, that's correct.

(IX, T549-50). Although defense counsel was later able to establish that the shoe in evidence, size 10, "has a pretty good size correspondence to that impression" (IX, T551), he was unable to counter Agent Gilkerson's speculation that Trax might have manufactured virtually all shoe sizes with identical outsoles. Had the expert witness from the prior trial, FBI Agent Heilman, testified in this manner, he could have been impeached with his former testimony.

The trial judge ruled that there was no discovery violation and that Agent Gilkerson's testimony did not prejudice defense preparation for trial (IX, T586).

Clearly, Bolin was prejudiced by this testimony. The defense theory of the case was that Cheryl Coby had a great deal of knowledge about this homicide because she had accompanied the real killer, who was not Appellant. The most significant forensic evidence at trial was the shoe impressions taken from where the victim's car was abandoned. Since Appellant was later able to establish that his shoe size was between 7 1/2 and 8 (X, T632), pinning down the expert witness to a conclusion that the shoeprints were made by Trax shoes that were size 10 (or close to it) was a critical matter. Then it would be left to the prosecution to try to explain why Bolin might have been wearing shoes that were several sizes too large for him. If defense counsel had been able to argue to the jury, "if the shoe does not fit, you must acquit", there might have been a different result at trial.

A) Failure to Conduct an Adequate Richardson Hearing.

When a discovery violation is shown, the trial judge must hold a hearing as mandated in Richardson v. State, 246 So. 2d 771 (Fla. 1971). The court should determine "whether the state's violation was inadvertent or willful, whether the violation was trivial or substantial, and most importantly, what effect did it have upon the ability of the defendant to properly prepare for trial". Richardson, 246 So. 2d at 775.

At bar, the court erred in finding no discovery violation. The State did not disclose the substitute witness until after the time when defense counsel had deposed the other FBI investigators who might testify[12]. Defense counsel was not alerted to any material difference between the testimony that Agent Gilkerson would give and that of the prior footwear examiner until it was too late to prepare for the surprise assertion that a shoe manufacturer might place the same size sole on a wide range of shoe sizes. Clearly, had defense counsel known about this in time, he could have subpoenaed the expert in the prior trial, Agent Heilman, as his own witness or obtained another expert.

In Mobley v. State, 705 So. 2d 609 (Fla. 4th DCA 1997), the court reversed a conviction where the State did not disclose an additional eyewitness until after the jury was sworn. The defendant objected to this late disclosure which deprived her of the ability to obtain rebuttal or impeachment evidence. The

[12]Defense counsel also was not informed when Agent Gilkerson was available to be deposed; "I was told this morning he was available yesterday" (X, T614).

Mobley court agreed that the defense was procedurally prejudiced.

The same is true at bar. Bolin was also prejudiced by an untimely disclosure which deprived him of the ability to obtain rebuttal or impeachment evidence. It does not matter that Bolin did not complain of the discovery violation until after the witness had testified. See, Wilcox v. State, 367 So. 2d 1020 (Fla. 1979).

B) The Prejudice Was Compounded When the Testimony of Defense Witness Robert Lima Was Limited.

Defense counsel attempted to cure some of the prejudice from Agent Gilkerson's surprise testimony by asking the judge to allow witness Robert Lima, a shoe salesman for forty years, to testify that in his experience, he had never seen soles which did not correspond to the inside size of the shoe (X, T612-6). The judge refused to permit this opinion testimony, explaining:

> If I was interested in that fact, I would contact Trax and I would say do you ever put the same size sole on different shoe sizes and see what the answer is. Right off the bat, if they say, no, that takes care of that, but he didn't do that. I don't know where that testimony was coming from because he didn't say he knew anything about the Trax manufacturer;...

(X, T616). As Trax has been defunct for years, this information would be difficult, if not impossible, to obtain (X, T617).

What the trial judge did not recognize is that Agent Gilkerson was permitted to give his opinion without any foundation of knowledge about Trax's practices. It seems only

fair that if a State witness is allowed to testify to a general opinion about what shoe manufacturers in general might do, that a defense witness should be able to rebut that opinion by reference to his experience with shoe manufacturers in general. Bolin was treated differently than the State on the admissibility of similar opinion evidence.

This "double standard" applied by the trial judge constitutes a due process violation. See, O'Connell v. State, 480 So. 2d 1284 (Fla. 1985) (reversible error to permit prosecutor more leeway than defense in questioning prospective jurors during voir dire). Accordingly, Bolin's convictions should now be reversed and a new trial held.

## ISSUE IV

THE TRIAL JUDGE SHOULD HAVE GRANTED APPELLANT'S MOTION TO DISMISS COUNTS TWO AND THREE OF THE INDICTMENT BECAUSE THE STATUTE OF LIMITATIONS HAD RUN ON THESE OFFENSES.

Whether prosecution is barred by passage of time is controlled by the statute of limitations in effect at the date that the offense was committed. Brown v. State, 674 So. 2d 738 (Fla. 2d DCA 1995). Since the robbery and kidnapping charges that Bolin was convicted of took place January 25, 1986, the appropriate statute is §775.15(2)(a), Fla. Stat. (1985), which provides:

> (a) A prosecution for a felony of the first degree must be commenced within 4 years after it is committed.

Bolin was not indicted for these crimes until August 1, 1990 (I, R34-6). Since this was more than four years after the offenses were committed, prosecution is barred unless the State can show that the running of the statute was tolled for a sufficient period of time. Once the defendant has questioned the jurisdiction of the court by raising a statute of limitations defense, the burden falls upon the State to prove timely prosecution. State v. King, 282 So. 2d 162 (Fla. 1973).

At the hearing held August 3, 1995, Appellant's "Motion to Dismiss Counts Two and Three of the Indictment" was heard by the trial court (I, R81-3, SR89-92). Corporal Baker testified that his investigation revealed that Bolin left Florida "around

October 6, 1987, I believe" (SR90). He was arrested and incarcerated in Ohio later in 1987 (SR90). Bolin remained in custody in Ohio until he was extradited to Florida to face these charges (SR90).

On crossexamination, Corporal Baker admitted that Bolin had been on probation in Florida during 1987 and transferred out-of-state (SR91). The witness could not recall whether he had contacted Florida probation officers to find out Bolin's current whereabouts (SR91). During 1986 and 1987, Bolin was not a suspect in this homicide (SR92).

The trial judge denied the motion to dismiss without hearing argument (SR92).

After the State's appeal to the Second District regarding the search and seizure issue, Bolin reraised the statute of limitations defense in his "Motion for Rehearing of Motion to Dismiss Counts Two and Three of the Indictment" (III, R437-40). The motion was reheard on February 4, 1999 (XII, T980-95).

At this rehearing, Appellant relied upon two cases, Brown v. State, 674 So. 2d 738 (Fla. 2d DCA 1995) and State v. Miller, 581 So. 2d 641 (Fla. 2d DCA), rev. dism., 584 So. 2d 999 (Fla. 1991), for the proposition that a defendant's absence from the state is not sufficient to toll the statute of limitations when his conduct did not prevent the State from commencing prosecution. The State argued that these two cases involved failure to timely execute a capias which is controlled by subsection (5) of the statute, §775.15, Fla. Stat. (1985). The pertinent subsection in

the case at bar is §775.15 (6), Fla. Stat. (1985), which reads:

> (6) 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 ...

Accordingly, the prosecutor argued that this Court's decision in Sochor v. State, 619 So. 2d 285 (Fla. 1993) applied to toll the running of the Statute with respect to Bolin's kidnapping and robbery charges. The trial judge agreed and denied Appellant's motion (XII, T995).

In Sochor, the defendant, like Bolin, was not indicted for kidnapping until after the applicable four year period. However, Sochor had always been a suspect from the time of the offenses. He fled Florida to New Orleans when he became aware that the police were looking for him. From New Orleans, Sochor moved to Atlanta where he was eventually arrested almost 4 1/2 years later.

By contrast, Bolin was never a suspect in the homicide, robbery and kidnapping of Natalie Holley until after the four year limitations period had run on the robbery and kidnapping counts. He did not flee Florida; indeed, he had moved to Ohio with the permission of Florida probation officials. Later, Bolin was incarcerated in Ohio where he remained until Florida sought his extradiction on these charges.

In the civil context, this type of distinction makes all the difference in whether the limitations period continues to run while a defendant resides outside the state. In Friday v.

Newman, 183 So. 2d 25 (Fla. 2d DCA 1966), the court held that when service of process can be made on a defendant, the statute of limitations continues to run even though the defendant is in another jurisdiction. A complaint filed against an out-of-state defendant after the limitations period was dismissed even though the defendant left Florida four days after the alleged assault.

Similarly, in Smith v. Griggs, 164 Ga. App. 15, 296 S.E. 2d 87 (1982), the court wrote with respect to Georgia resident defendants who moved to Florida:

> if process could be lawfully served on the defendant, thus enabling the plaintiff to proceed with his action, the period of the defendant's absence from the state is not to be excluded from the period of limitation, and the statute continues to run during the absence.

296 S.E. 2d at 89.

This Court should also consider an older decision which predates the current statute of limitations, Rouse v. State, 44 Fla. 148, 32 So. 784 (1902). In Rouse, the defendant evaded capture for an offense until after the limitations period had expired. This Court observed:

> There are no exceptions to this statute on account of an accused concealing himself or absenting himself from the state after the commission of an offense...
>
> It is the rule in this state, in reference to offenses to which the two-year statute of limitations applies, that, if it appears from an indictment that the offense charged was committed more than two years before the indictment was found, it will be quashed on motion made for that purpose.

32 So. at 785. While the legislature has changed the statute

since Rouse, it is a reasonable inference that the legislative intent was to toll the statute of limitations only where the accused evaded prosecution by leaving the state and not when he left the state but was always available if the authorities wanted to serve him with a warrant.

Such reasoning underlies the cases which Bolin relied upon in the pretrial hearing on his motion. In State v. Miller, 581 So. 2d 641 (Fla. 2d DCA), rev., dism., 584 So. 2d 999 (Fla. 1981), the court noted that when "the appellee left the state of Florida, there were no charges pending against him and no reason requiring him to stay in Florida". 581 So. 2d at 642. Since neither absence from the state nor the defendant's conduct prevented prosecution, the Miller court held that the statute of limitations was not tolled during the period the defendant resided out-of-state.

Similarly, in Brown v. State, 674 So. 2d 738 (Fla. 2d DCA 1995), the defendant was out-of-state in federal prison when Florida informations were filed against him. Florida did not attempt to extradite him or place any detainer on him. The Brown court wrote:

> we cannot agree that there should be an exception or a tolling of the limitation period in those cases where a defendant is incarcerated out of state. Such an exception would contravene the purpose of a statute of limitations and deprive the defendant of a substantive right.

674 So. 2d at 741.

At bar, Bolin was incarcerated in Ohio when he first became

a suspect in this homicide. The prosecution was not delayed a single day by Bolin's conduct because they were able to locate him at once and extradite him to Florida. Certainly, had Bolin been in a Florida prison, the robbery and kidnapping counts would be barred from prosecution because the limitations period ran before the indictment was presented. The mere fact that he was in an out-of-state prison, without more, should not be sufficient to toll the statute.

Accordingly. Bolin's convictions and sentences for robbery and kidnapping must be vacated and he should be forever discharged on these offenses.

## ISSUE V

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

Lieutenant Gary Lester Kling of the Pasco County Sheriff's Office testified for the State during penalty phase concerning the details of the homicide of Terry Matthews for which Bolin had been previously convicted (XI, T777-90). Appellant specifically objected to two aspects of Kling's presentation, introduction of photographs showing the wounds suffered by Matthews and hearsay testimony about what Philip Bolin, an alleged eyewitness, told Kling about the details of the homicide (XI, T757-9, 764-5, 782, 785-6, 788).

Regarding the photographs, defense counsel objected to three photographs of Matthews body showing where she was found (Exhibit 47), that she had blunt trauma to the forehead (Exhibit 48), and that she had blunt trauma on the rear of her head (Exhibit 49) (XI, T757-9, 764-5, 782, 785-6). Relying on Duncan v. State, 619 So. 2d 279 (Fla. 1993), he argued that the prejudicial impact of the photos outweighed their relevance under section 90.403 of the Florida Evidence Code (XI, T757-9, 765). Unlike the case of Lockhart v. State, 655 So. 2d 69 (Fla. 1995), there was no particular similarity between the crimes because Matthews was beaten to death while Holley was stabbed. The court found that the photos were not "particularly gruesome" and admitted them

into evidence (XI, T765, 767).

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

> We reaffirm our precedent allowing a neutral witness to give hearsay testimony as to the details of a prior violent felony because it tends to minimize the focus on the prior crime. However, we caution both the State and trial courts against expanding the exception to allow witnesses to become the conduit for hearsay statements made by other witnesses who the State chooses not to call, even though available to testify.

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

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

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

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

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

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

## ISSUE VI

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

During the penalty charge conference, Bolin requested an addition to the standard jury instruction on the pecuniary gain aggravating circumstance (XI, T751-3). The proposed special instruction (Defendant's No. 1) reads:

> This aggravating circumstance applies only where the murder is an integral step in obtaining some sought after specific gain.

(IV, R514). Defense counsel argued that Espinosa v. Florida, 505 U.S. 1079 (1992) requires the penalty jury to be informed of the proper application of aggravating circumstances (XI, T752-3). The trial judge first ruled, "why not, better safe than sorry" (XI, T753). However, upon the State's insistence that "this is more of a guidance for the Court than for the jury", the judge reversed himself and denied the special instruction (XI, T753-4).

In Peterka v. State, 640 So. 2d 59 (Fla. 1994), this Court gave a limiting construction to the pecuniary gain aggravating circumstance. The fact that a defendant gained financially from the homicide is not sufficient in itself to establish the aggravating factor. Rather, financial gain must have been a motive for the murder.

Appellant's proposed jury instruction is a direct quote from Peterka and the earlier decision of Hardwick v. State, 521 So. 2d 1071 (Fla.), cert. den., 488 U.S. (1988). See, 640 So. 2d at 71.

It is an accurate statement of the law.

Given the facts of the case at bar, it was essential that the jury be informed of the limiting construction given to the pecuniary gain aggravating circumstance. According to Cheryl Coby's testimony, Bolin stole Natalie Holley's purse which contained $75 (VIII, T435). However, the motive for the homicide was probably unrelated to stealing the purse. The jury might well have considered that the taking of the purse (while robbery) was only an afterthought and not a "sought-after specific gain" inducing the murder.

The United States Supreme Court held in Espinosa v. Florida, 505 U.S. 1079 (1992) that the jury and judge act as co-sentencers in Florida capital sentencing proceedings. The Eighth Amendment requirement of reliability in capital sentencing is violated when a Florida jury is not told the limiting construction given by this Court to an otherwise vague aggravating circumstance. Espinosa specifically rejects the prosecutor's contention that limiting constructions are "more of a guidance for the Court than for the jury" (XI, T753).

Although Espinosa dealt specifically with the "heinous, atrocious or cruel" aggravating circumstance, its reasoning may apply to any aggravating circumstance which has been more narrowly defined. This Court has already applied Espinosa to the "cold, calculated and premeditated" aggravating factor and amended the standard jury instruction to better explain the scope of the aggravator to the jury. Jackson v. State, 648 So. 2d 85

(Fla. 1994).

Because Bolin's penalty jury may have weighed the pecuniary gain aggravating circumstance due to the court's failure to grant the defense requested instruction, the jury recommendation does not meet the Eighth Amendment's standard of reliability. A new penalty trial before a new jury is mandated.

## ISSUE VII

THE TRIAL COURT'S SENTENCING ORDER IS DEFECTIVE BECAUSE IT WEIGHS IMPROPERLY FOUND AGGRAVATING FACTORS AND GIVES ONLY SUMMARY TREATMENT TO MITIGATION.

The trial judge's sentencing order has several faults with respect to the finding of aggravating circumstances. First, the judge considered Bolin's Pasco County conviction for first degree murder which has since been reversed by this Court. Bolin v. State, 736 So. 2d 1160 (Fla. 1999). This aggravating factor was given "the greatest possible weight" by the judge (IV, R591; see Appendix).

Secondly, the court made the following finding of fact about the felony aggravator, kidnapping:

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

(IV, R589; see Appendix). There was no evidence in the record from which the court could have found that Natalie Holley was abducted "from the parking lot of her place of employment". Similarly, there is nothing but conjecture to support the notion that she was "driven, at gunpoint, for some miles before her death". Because the judge also gave "the greatest possible weight" to this aggravating factor, the weighing process was compromised by the erroneous finding of fact.

Finally, the court improperly found the pecuniary gain aggravating factor simply because Bolin took $75 from the

victim's purse (IV, R589; see Appendix). As explained in Issue VI, supra, this aggravating circumstance applies only when "the murder is an integral step in obtaining some sought after specific gain". Peterka v. State, 640 So. 2d 59 (Fla. 1994). There was no evidence to indicate that Natalie Holley was murdered in order to obtain her purse. Before Holley was murdered, the killer also realized that she wasn't carrying her employer's cash receipts. Therefore, this could not have been a motive for the murder either.

With respect to mitigation, the trial judge's summary treatment does not satisfy the requirements of Campbell v. State, 571 So. 2d 415 (Fla. 1990). The judge simply listed five nonstatutory mitigating circumstances that were presented to the jury and five additional nonstatutory mitigating circumstances gleaned from the prior testimony of Bolin's mother (IV, R590; see Appendix). The court weighed the mitigation as follows:

> The court assigns little weight to mitigating factors one through five and some weight to mitigating factors six through ten.

(IV, R591; see Appendix).

This summary treatment of the mitigating factors is comparable to what occurred in Crump v. State, 654 So. 2d 545 (Fla. 1995) and again in Crump v. State, 697 So. 2d 1211 (Fla. 1997). In both Crump decisions, this Court emphasized that Campbell requires the sentencing judge to "expressly evaluate" each mitigating circumstance. The second Crump order summarily recited:

> 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.

697 So. 2d at 1212. The Crump court found that this summary treatment of mitigation and weighing process was insufficient and remanded the case for the trial judge to reweigh the evidence and prepare a proper sentencing order.

At bar, the trial judge conducted an even more abbreviated weighing process than that in Crump. Accordingly, Bolin's death sentence must be vacated. If this Court does not order a new guilt phase or penalty phase retrial, there must at least be a reversal for reweighing by the trial judge and preparation of an adequate sentencing order.

## ISSUE VIII

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

At the sentencing hearing following the court's imposition of the death sentence, both the prosecutor and defense counsel erroneously represented to the judge that Bolin's two non-capital convictions were both "first PBLs" (XIV, T1221). The court immediately imposed consecutive sentences of life for each of Bolin's convictions for robbery and kidnapping (XIV, T1221-2; IV, R581-6). There is no evidence that a guidelines scoresheet was ever prepared or considered (SR8).

In the first place, Bolin was charged with robbery with a weapon, §812.13 (1) and (2)(b), Fla. Stat. (1985) in Count Two of the Indictment (I, R35). This is a first degree felony punishable by a maximum penalty of thirty years imprisonment, not life, as represented by counsel at the sentencing hearing.

Secondly, Bolin was entitled to be sentenced pursuant to the sentencing guidelines as they existed at the date of the offense, January 25, 1986. This was the 1985 version of the sentencing guidelines.

This Court recently addressed in Maddox v. State, 25 Fla. L. Weekly S367 (Fla. May 11, 2000) which sentencing errors may be reviewed on direct appeal even though they were not preserved by objection in the trial court. Bolin's sentence of life for a crime carrying a statutory maximum of thirty years falls into the category of "illegal sentence". Maddox holds that "an

unpreserved error resulting in a sentence in excess of the statutory maximum should be corrected on direct appeal as fundamental error". 25 Fla. L. Weekly at S370.

Bolin's life sentence for kidnapping appears to be a departure from the sentencing guidelines, although it is not possible to tell for sure since there is no scoresheet in the record. Maddox says that departure sentences imposed without written reasons remain fundamental error that is reviewable on direct appeal. 25 Fla. L. Weekly at S372-3.

Accordingly, this Court should vacate Bolin's sentences for robbery and kidnapping and order him resentenced pursuant to the 1985 sentencing guidelines if this Court does not accept Appellant's argument in Issue IV that the statute of limitations had run for these two offenses.

# CONCLUSION

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

As to Issues I - III, vacation of all convictions and sentences with remand to the circuit court for a new trial.

As to Issue IV, vacation of judgments and sentences for Counts II and III of the Indictment.

As to Issues V and VI, vacation of death sentence with remand to the circuit court for a new penalty trial before a new jury.

As to Issues VII and VIII, vacation of sentences with remand to the circuit court for resentencing before the judge alone.

APPENDIX

PAGE NO.

1. Sentencing Order (IV, R588-91) A1-4

CERTIFICATE OF SERVICE

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

Respectfully submitted,

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