IN THE SUPREME COURT OF FLORIDA

OSCAR RAY BOLIN,	:	
Appellant,	:	
vs.	:	Case No. SC95775
STATE OF FLORIDA,	:	
Appellee.	:	
	:	

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

REPLY BRIEF OF APPELLANT

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

ANDREA NORGARD
Assistant Public Defender
FLORIDA BAR NUMBER O661O66

Public Defender's Office
Polk County Courthouse
P. O. Box 9000--Drawer PD
Bartow, FL 33831
(863) 534-4200

ATTORNEYS FOR APPELLANT

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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).

Initially, Appellee contends that this Court should decline to review the suppression issue on the ground that the opinion of the Second District established the "law of the case" and no exceptional circumstances which would result in "manifest injustice" exist. Brief of Appellee, Page 16-8. Appellee simply ignores this Court's prior decision of Preston v. State, 444 So. 2d 939 (Fla. 1984) which was cited in Appellant's initial brief. Under identical circumstances, the Preston court wrote:

> ... reconsideration of the suppression issue is proper. Section 921.141(4), Florida Statutes (1981), mandates automatic and full review of a judgment of conviction resulting in imposition of the death penalty. This Court has determined that the statute requires that "[i]n capital cases, the court shall review the evidence to determine if the interest of justice requires a new trial." Fla. R. App. P. 9.140(f). The interest of justice, substantive due process requirements and Florida's constitutional and statutory scheme of death penalty review jurisdiction support our decision to review this issue.

444 So. 2d at 942.

Turning to the merits, Appellee urges this Court to accept the Second District's reasoning that the seizure of Bolin's letters and personal effects was permissible in the course of an

investigation into his attempted suicide. The United States Supreme Court has previously rejected an attempted suicide exception to the warrant requirement in Thompson v. Louisiana, 469 U.S. 17 (1984). There, the defendant's daughter told police that her mother had shot her father and ingested a large quantity of pills in a suicide attempt. When the police arrived at the residence, they found the man dead and the woman unconscious. After the unconscious suspect was transported to the hospital, the police searched the house, seizing items which included a suicide letter.

The Court rejected the state court's conclusion that the circumstances created a "diminished expectation of privacy in petitioner's dwelling". 469 U.S. at 22. While agreeing that the police were justified in making a warrantless entry into the residence, the Thompson court concluded that the subsequent search after assistance had been rendered violated the Fourth Amendment.

As applied to the case at bar, Appellant recognizes that he did not have the same expectation of privacy in his jail cell that a person would have in his or her home. However, what expectation of privacy Bolin did have in the content of his personal writings was not decreased by the circumstances of his attempted suicide. Once Bolin was removed from his cell and given medical attention, there was no justification for Captain Terry and Corporal Baker to seize the letter at issue and Bolin's

other private papers to further their investigation and bolster the State's evidence at trial.

A more recent decision of the United States Supreme Court reaffirms the reasoning of Thompson. In Flippo v. West Virginia, 528 U.S. 11 (1999), the accused and his wife were vacationing at a cabin in a state park. He called the police to report that they had both been attacked and his wife killed. After the accused had been taken to the hospital, the police searched the cabin and its environs, collecting evidence which included photographs found in an unlocked briefcase. The prosecution argued that the evidence was permissibly seized without a warrant because the police were conducting a crime scene investigation. The state further relied on the "plain view" doctrine.

The Flippo court again rejected a "murder scene exception" to the warrant requirement of the Fourth Amendment. See also, Mincey v. Arizona, 437 U.S. 385 (1978). If there is no "murder scene exception" which allows a general investigatory search and seizure, the Second District's view that an attempted suicide permits a similar investigation is questionable, to say the least.

On page 25 of Appellee's brief, this Court's decision in Kight v. State, 512 So. 2d 922 (Fla. 1987) is cited for the proposition that "Bolin had no reasonable expectation of privacy, as he knew that he had no privacy in the cell or its contents". What this Court actually wrote in Kight is the following:

> Kight had no reasonable expectation of privacy in the clothing on his person. It is

> recognized that a pretrial detainee such as Kight, has a diminished expectation of privacy with respect to his room or cell.

512 So. 2d at 927. Appellant agrees that his expectation of privacy was diminished, however he still had a reasonable expectation that his papers would only be searched for contraband; rather than read to gather evidence which could be used at trial to convict him.

Another exaggeration by Appellee should also be corrected. In footnote 2 of her brief on page 22, she states it was "undisputed" that the letter addressed to Captain Terry was on top of the box in Appellant's cell. In fact, it was very much disputed whether the letter was outside or inside the box seized by Terry and Corporal Baker. Appellant testified that a letter to his attorneys was on top of the box and the letter to Captain Terry was among several that were inside the box (XIII, T1031). Detective Ernest D. Walters did an detailed inventory of the contents of Bolin's cell immediately following the attempted suicide (XIV, T1189-93). Although he noted the box of Bolin's possessions and a white business envelope affixed to the top of it, he was unable to describe "any name or address" on that envelope (XIV, T1192-3).[1] Finally, it is the trial judge's original ruling which suppressed the letter that is entitled to the presumption of correctness. It was he, not the Second

[1]There appears to be nothing illegible about the address on the letter to Captain Terry as photographed in the record (III, R380, 388). Also, it appears that the letter in the photo is not affixed to the box, but merely laying on top of it (III, R380).

District, that heard the testimony and observed the demeanor of the witnesses. As this Court stated in San Martin v. State, 717 So. 2d 462 (Fla. 1998):

> A trial court's ruling on a motion to suppress comes to this Court clothed with a presumption of correctness and, as the reviewing court, we must interpret the evidence and reasonable inferences and deductions derived therefrom in a manner most favorable to sustaining the trial court's ruling.

717 So. 2d at 469. Accord, Rhodes v. State, 638 So. 2d 920 (Fla. 1994). Since the trial judge's findings were supported by the record, this Court should now order the letter suppressed and grant Bolin a new trial.

ISSUE II

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

Appellee asserts that this Court should give the trial judge's ruling on whether Bolin's letter to Captain Terry constituted a waiver of his marital privilege the same presumption of correctness that applies to a ruling on a motion to suppress evidence. Brief of Appellee, page 28-9. However, this is not the proper standard of review when the trial court's ruling is based upon interpretation of a written exhibit rather than live testimony. As the court explained in Town of Jupiter v. Alexander, 747 So. 2d 395 (Fla. 4th DCA 1998):

> Although generally decisions of the trial court come to this court with a presumption of correctness, in the instant case that

> presumption is slight at most. Where a trial court rules on the basis of a written record and not on testimony requiring credibility determinations, the appellate court has before it everything the trial court reviewed, and we have the same opportunity to weigh it as the trial court did.

747 So. 2d at 399. When a finding of fact by a trial judge rests "on conclusions drawn from undisputed evidence, rather than on conflicts in the testimony, [it] does not carry with it the same conclusiveness as a finding resting on probative disputed facts, but is rather in the nature of a legal conclusion". Holland v. Gross, 89 So. 2d 255 (Fla. 1956).

Indeed, the court's ruling at bar that Bolin's letter operated legally as a voluntary waiver of his marital privilege is comparable to a trial judge's construction of a contract. Regarding the latter, Judge Padovano of the First District observed:

> A decision construing a contract presents an issue of law that is subject to review on appeal by the de novo standard of review.
>
> * * *
>
> Here, the trial court did not decide any issue of fact. Nor did the court exercise judicial discretion. Because the order denying Powertel's motion to compel arbitration is based entirely on the trial court's construction of the contract and related documents, we review the decision by the de novo standard.

Powertel v. Bexley, 743 So. 2d 570 at 573 (Fla. 1st DCA 1999). Accordingly, this Court should examine Bolin's purported waiver under the de novo standard of review.

Appellee analogizes the trial court's ruling that Bolin's letter established a voluntary waiver "prospective only in its tone, [but] had the legal effect of acting or operating retroactively"[2] to the "inevitable discovery" exception to the Fourth Amendment. Brief of Appellee, pages 35-8. There are several defects in this reasoning. To begin with, waiver principles have nothing to do with Fourth Amendment protections against illegal searches or seizures. Certainly, there was nothing improper about the homicide detectives speaking to Cheryl Coby, Bolin's ex-wife, to learn what she knew about the Natalie Holley homicide or the others. Indeed, the majority of Coby's testimony, whether true or false, is unquestionably not subject to the marital communications privilege.

As explained by the Court in Nix v. Williams, 467 U.S. 431 (1984), the justification for the inevitable discovery exception to the exclusionary rule is that the state should be placed in the same position with respect to admissibility of evidence that it would have if no police misconduct had occurred. If evidence which would have been inevitably discovered through legitimate means were excluded because of police misconduct, the state would be placed in a worse position.

Such an analysis makes no sense when applied to a purported waiver of the marital communications privilege. Strong public policy arguments support a privilege which makes private communications inside a marital union inadmissible as evidence against

[2] vol. XIII, page T1177.

an accused. The state never had a reasonable expectation that Bolin's statements to his then-wife would be part of the evidence presented to the jury at trial. Only if Bolin waived his privilege could the spousal communications come in. Therefore, the state is basically arguing for a windfall rather than for being placed in the same position they would have without Bolin's suicide letter.

In this Court's prior opinion reversing Bolin's conviction, Bolin v. State, 642 So. 2d 540 (Fla. 1994), it was written:

> In the instant case Bolin and his attorneys tried to maintain the spousal privilege at every step of the proceedings.

642 So. 2d at 541. Nothing in Bolin's suicide letter should alter that conclusion. He never conducted himself in a manner that was inconsistent with maintaining the privilege. At most, he simply recognized that the police homicide investigation was dependent on what Cheryl Coby chose to tell them about her own activities. The marital privilege was not waived.

ISSUE III

THE TRIAL COURT ERRED IN RULING THAT MITOCHONDRIAL DNA EVIDENCE SATISFIES THE FRYE STANDARD FOR ADMISSIBILITY AND IN PERMITTING THE STATE TO INTRODUCE STATISTICAL PROBABILITIES BASED UPON mtDNA.

The states's argument centers upon a mistaken position that the dispute in the case at bar is one of challenges to the opinions of state's experts as opposed to a challenge to the question of whether or not mtDNA satisfies the Frye standard for

admissibility. (State's Brief, at 34-35) The State relies upon Berry v. CSX Transportation, Inc., 709 So. 2d 552, 564 (Fla. 1st DCA 1998), to support their position that the issue in this case is not the reliability of mtDNA, but rather an evidentiary difference of opinion. In Berry the district court dealt with the proper role of the trial court when conducting a Frye hearing. The Berry court held that the trial court, when conducting a Frye hearing, should be concerned with whether or not the novel scientific evidence has a sufficient indicia of reliability; not whether there is sufficient evidence to convince a juror that the opinion of the expert is correct. A thorough reading of Berry does not support the state's position that the issue in this case is the weight which should be afforded to mtDNA as opposed to the admissibility of the evidence. Rather, Berry supports Bolin's assertion that mtDNA evidence does not have sufficient reliability to be admitted in the courts of the State of Florida.

The issue presented in Berry was whether or not the trial court had properly excluded the plaintiff's expert testimony that Mr. Berry had suffered toxic encephalopathy (brain damage) and died as a result of his exposure to certain toxins in organic solvents during his employment with CSX railroad. In Berry the question of admissibility dealt with two areas of scientific knowledge -- toxicology (the adverse effects of chemical agents on biological systems) and epidemiology (a branch of science which uses studies to observe the effect of exposure to a single factor upon the incidence of disease in two identical popula-

tions). Berry presented the testimony of five experts, whose ultimate conclusion was that numerous scientific studies correlated a link between exposure to organic solvents and toxic encephalopathy. Berry's experts opined there was a general consensus in the scientific community of this fact. Berry's scientific experts testified that their conclusions had also been accepted by the World Health Organization, OSHA, the National Institute for Occupational Safety and Health, and several international conferences. The research relied upon by Berry dated back prior to 1990. Organic solvents penetrate the skin and accumulate in fat rich tissues, of which the brain is one. It was opined that Berry's exposure to these chemicals caused his disease.

CSX presented expert testimony as well. However, both CSX experts did not disagree with the link between the solvents and toxic encephalopathy. Instead, the CSX experts disagreed with whether or not Mr. Berry had suffered sufficient exposure to the solvents to have caused the damage he suffered. The CSX experts objected to the use of a patient's symptoms and history being used to diagnose the disease instead of measurements of the actual exposure to the chemicals. Only one of the CSX experts disagreed with the defense expert's opinions that the correlation between neurological damage and long-term exposure to the specific solvents was accepted in the scientific community.

The central issue facing the trial court in Berry was whether or not there was general acceptance in the scientific

community for the underlying principles that formed the basis of the expert's opinions regarding toxicology and epidemiology. Berry, at 564. In reviewing the trial court's finding that the evidence of the link between the solvents and the disease was inadmissible, the First District, quoting Frye noted that "the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs." Berry, at 565-566. The First District held that if the expert's opinion is well-founded and based upon generally accepted scientific principles and methodology, it is not necessary that the expert's opinion be generally accepted as well. The court found that it was error to exclude Berry's evidence.

Critical to the district court's conclusion was the fact the epidemiological studies (of which there was the most dispute over) were conducted independently of the Berry litigation. These studies had been peer-reviewed and accepted by journals that were widely acknowledged in the scientific community. The First District found that there was a mature epidemiological record with numerous peer-reviewed, published studies supporting the plaintiff's expert analysis which gave them an aura of reliability and validity. Interestingly, this is one of the principles that was pivotal in Daubert v. Merrill Dow Pharm., Inc., 43 F.3d 1311, 1317 (9th Cir. 1995). As noted by the Berry court, Daubert held that "That an expert testifies based on research he has conducted independent of the litigation provides

important, objective proof that the research comports with the dictates of good science." Berry, at 561, ftnt. 8.

The Berry court did not advocate the "abdication of the judicial "gate-keeping" role contemplated by Frye, to the editors of the scientific and medical journals." The First District found that the record in the case before them was not sufficient to permit judicial scrutiny of the scientific studies for methodological errors because there was insufficient testimony on the quality of those studies to enable the court to make legal conclusions about the probity of the studies.

The First District reversed, holding that it was error to exclude the plaintiff's expert testimony when all the experts derived their opinions from the same generally-accepted methodology, the same epidemiological studies, and just disagreed on how to interpret the scientifically reliable data.

In the case at bar, the thing from which the deduction is made (mtDNA) is not sufficiently established and understood within the scientific community so as to render it admissible in a criminal trial. The reliability of mtDNA is not sufficiently established at this time. The state's evidence at the Frye hearing and trial certainly did not meet that standard by virtue of the fact that almost every key component of mtDNA that Stewart testified to has been disproved or altered since April 1999.

The case at bar differs from Berry in several key areas. First, it was not demonstrated by the State in the case at bar that the studies submitted by the State's experts were generally

accepted in the scientific community. In fact, the State's experts were forced to admit that several of their early studies had been disproved. Since the hearing, Bolin has demonstrated that the later studies relied upon and generated by the FBI have also fallen into dispute due to advancing research into the characteristics of mtDNA.

Secondly, the critical factor relied upon the First District in finding the validity and reliability of the plaintiff's evidence had been established was the fact that the studies relied upon had been conducted independent of the litigation. That cannot be said for this case. The FBI lab has a vested interest in the litigation in this case and in seeing their laboratory testing methods receive a judicial stamp of approval. The FBI studies were not subject to independent peer-review. The FBI lab and it's testing procedures was not independently inspected. The FBI testing methods do not comply with other independent lab standards.

On the other hand, the defense expert, Dr. Shields presented testimony independent of this litigation. His lab had not retested the hair and offered a different conclusion, therefore he had no vested interest in the outcome. Instead, Dr. Shields, a member of the scientific community that was not connected with this litigation and who had no vested interest in the litigation, offered testimony generated by the scientific community outside the FBI. The additional research provided by the Appendix to the Initial Brief was generated by labs and research groups independ-

ent of this litigation by parties with no interest in it whatsoever.

The case at bar does not present the unanimity among the scientific community with regards to the collection, testing, and interpretation of data regarding mtDNA that was present with the independent toxicological and epidemiological studies at issue in Berry. Neither does there exist a time-tested "mature" body of scientific research on mtDNA. The appendix attached to the Initial Brief demonstrates the exact opposite. The abstracts submitted by Bolin establish that there is no unanimity in the scientific community even regarding the most basic components of mtDNA at this time- components which are critical to the interpretation of mtDNA in the forensic arena.

The State failed to establish that mtDNA has sufficient reliability under Frye to be admissible.

In Stokes v. State, 548 So. 2d 188, 193-194 (Fla. 1989), this Court cautioned against the courts becoming the laboratories where scientific experiments are carried out. "If the scientific community considers a procedure or process unreliable for its own purposes, then the procedure must be considered less reliable for courtroom use." Later, in Hadden v. State, 690 So. 2d 573, 578 (Fla. 1997), this Court stated:

> We firmly hold to the principle that it is the function of the court to not permit cases to be resolved on the basis of evidence for which a predicate of reliability has not been established. Reliability is fundamental to issues involved in the admissibility of evidence. It is this fundamental concept which

> similarly forms the rules dealing with the admissibility of hearsay evidence... Novel scientific evidence must also be shown to be reliable on some basis other than simply that it is the opinion of the witness who seeks to offer the opinion.

This Court, though offered an opportunity to adopt the "scientific validity" test espoused in Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993), declined to change and chose to adhere to Frye in Flanagan v. State, 625 So. 2d 827 (Fla. 1993). Thus, the standard is still one of reliability.

This is not to say that the scientific understanding of mtDNA will never reach the point where it meets the Frye standard for admissibility. That point is just not now. Contrary to the assertion of the Attorney General, the State failed to prove that mtDNA satisfies the Frye standard for admissibility.

The Appellee next disputes the specific challenges Bolin made to mtDNA and attaches a study entitled "Mitochondrial DNA Sequence Analysis - Validation and use for Forensic Casework" as exhibit B (hereafter referred to as Exhibit B). According to the Appellee, this study refutes the points Bolin raised as to the unreliability of mtDNA and the appendix attached to the Initial Brief in support his argument.

State's Exhibit B fails to refute Bolin's claims. Exhibit B appeared in the June 1999 issue of Forensic Science Review. Presumably, there exists a period of time between the submission of an article and the actual publication of the article. This leads to the reasonable conclusion that the article was written

with no more research than was available at the time of the April 1999 trial. The research abstracts submitted by Bolin were presented in October 2, 1999, four months after the **publication** of Exhibit B. Exhibit B does not mention the articles or findings in the research submitted by Bolin, even to distinguish or dispute the findings. Exhibit B has clearly been contradicted by subsequent research and is no more accurate than the April trial testimony. If Exhibit B was published after the studies cited the Initial Brief and presented evidence which contradicted those conclusions, it would be persuasive. However, it was not and is not persuasive authority to contradict the more recent research findings on matrilineal inheritance, the increased presence of heteroplasmy, the mutational rate and it's implication in this case, and the difficulties of contamination in mtDNA.

The jury in this case was presented with a set of "facts" which purported to establish the reliability and validity of mtDNA. These "facts" allegedly explained to the jury the composition of mtDNA and it's key characteristics so the jury would be able to determine that mtDNA was reliable and valid evidence. The jury was to take these "facts" and the statistics they produced and use them to ascertain Bolin's guilt or innocence. These "facts" about mtDNA, as shown in subsequent research cited by Bolin, were not fact, but fiction. The jury, as the trier of fact, cannot make an educated and reasoned decision if the facts they are given are not true. mtDNA should not be utilized by the judicial system until the facts about mtDNA constitute a mature

body of knowledge that is not in a state of flux. Would the State of Florida be willing to accept the exoneration of a death row inmate premised on an mtDNA analysis at this point in time?

The state's assertion that Dr. Shields agreed with the statistical compilations of Dr. Basten is misleading. The record reflects that Dr. Shields found Basten's calculations to be more accurate than those of the FBI; however, Dr. Shields maintained that those calculations were inaccurate because they were based upon inaccurate data. (RVI, 1018, 1022, 1025) Neither did Dr. Shields advocate Dr. Basten's method over the method of calculation that he proposed be used. In Dr. Shields' opinion, his proposed method was more discriminating than the one used by Basten. An additional flaw in Basten's calculations was his failure to provide a lower confidence limit and only providing an upper confidence limit. (IV, R1031-32)

The final argument advanced by the state is one of harmless error. The state recites a selective set of facts they conclude would have resulted in a conviction even without the evidence of mtDNA. This argument is without merit.

When error occurs, the burden is on the beneficiary of the error to demonstrate beyond a reasonable doubt that the error did not contribute to the conviction or affect the jury's verdict. Chapman v. California, 386 U.S. 18 (1967); State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986). The state cannot meet that burden in the case at bar.

This Court has recognized the devasting impact DNA evidence has on a criminal trial. In Thorp v. State, 25 Fla. L. Weekly S1056 (November 16, 2000), this Court found the improper admission of DNA evidence was not harmless error due to its conclusive nature. This Court found the error to be harmful, even in light of the defendant's inciminating statements to a third party.

Without the misleading mtDNA testimony, the State had but one witness- Cheryl Coby. The jury's task was straightforward- either Coby was lying through her teeth for a variety of reasons (including but not limited to obtaining a sizable reward and saving her own skin) or she was telling the truth. There was no independent evidence to shore up Coby's credibility save the illusory statistical conclusion's reached by the mtDNA analysis. As the only independent evidence which buttressed Coby's testimony, the use of the mtDNA evidence cannot be harmless error. It is reasonable to assume the conclusions regarding the probability that the single hair came from someone other than Bolin greatly influenced the jury's verdict. If the state didn't intend for that evidence to have influence, why would they have sought to have it admitted in the first place?

This Court has recognized the impact that DNA testimony has in a criminal trial and the enormous weight such testimony is accorded by juries. To suggest that DNA testimony does not affect the verdict is ridiculous.

Neither does the brief testimony about the consistency between the two hairs affect the harmful impact of the mtDNA

testimony. The credibility of the FBI lab, especially the hair and fibers section, has been seriously undermined. Given the pre-trial ruling that mtDNA analysis of the hairs was admissible, it would have been futile to argue over visual characteristics of the hair.

ISSUE IV

THE TRIAL COURT ERRED IN DENYING APPELLANT'S REQUEST TO ADMIT INTO EVIDENCE AND PUBLISH TO THE JURY PRIOR INCONSISTENT STATEMENTS OF CHERYL COBY THEREBY DENYING APPELLANT HIS SIXTH AMENDMENT RIGHT TO CONFRONT THE STATE'S WITNESS AND HIS RIGHT TO DUE PROCESS OF LAW.

The state's response to Mr. Bolin's argument that he was denied the right of cross-examination by the trial court's ruling is to claim that Mr. Bolin was improperly raising a claim of ineffective assistance of counsel. (State's Brief at p.50) Nothing is further from the truth.

Mr. Bolin clearly pointed out in the Initial Brief that case at bar did not rest on a claim of ineffective assistance of counsel. (Initial Brief, p. 91, ftnt. 10). Mr. Bolin's position is that the refusal of the trial court to permit trial counsel Donnerly and Ober from utilizing statements that Coby made in discovery depositions to impeach Coby's previously video-taped trial testimony violated Bolin's Sixth Amendment right of confrontation and denied him his right to a full and fair cross-examination. At the risk of being repetitious, a brief summary

of the facts will explain the apparent confusion on the part of the State.

Trial counsel Ober and Donnerly moved on April 4, 1999 by written motion to exclude the testimony of Cheryl Coby (V3,R514-515) and argued the motion on April 7, 1999. (V9,T597-526) At the hearing trial counsel made a second request- since the prosecution testimony was admitted (that being the video-taped testimony of Coby from the prior trial), then they (defense counsel) should be allowed to introduce and publish other statements that Coby had made that were inconsistent with the video testimony as appropriate rebuttal and impeachment evidence. (V9,T507;522) Defense counsel was prepared to impeach the video testimony with Coby's statements in both a discovery deposition and in a deposition to perpetuate testimony. The depositional testimony had been given under oath on January 8 and 9, 1991 and on January 11, 1991.

In the written motion counsel Donnerly and Ober claimed that Mr. Bolin's earlier lawyers who had been present during the video-taped testimony had been ineffective in their cross-examination of her because they had failed to question her on certain key areas that were in conflict with the depositional testimony. This argument relating to ineffective assistance was presented as providing the basis for excluding Coby's video testimony in its entirety. (V3,R514;517-518) At the hearing Defense counsel's position was that if the court rejected their request to exclude the video due to the ineffective cross, <u>then</u> defense counsel

should be able to bring out the additional inconsistencies that 1991 counsel had failed to bring out in the video to attempt to rectify the deficiencies of 1991 counsel and as proper impeachment and rebuttal evidence. (V9,T522-523)

The trial court rejected Bolin's first request to exclude the Coby video testimony because 1991 trial counsel was ineffective. (V9,T526) The trial court specifically stated that "Let me say one thing for the record. Mr. Firmani's sufficiency of cross-examination and his sufficiency of representation will be addressed by another court at another time in the future, I'm afraid. We're stuck with it case we are, I'm afraid." (V9,T526,ln.10-14) The trial court rejected the second request- 1999 trial counsel was prohibited from introducing into evidence the Coby's statements from the January 1991 depositions that were inconsistent with the video testimony- because the State could not redirect. (V9,T526-527) It was clear on the trial record that all parties understood that the ineffectiveness of counsel was not the basis for the ruling and that that issue would be addressed in a 3.850 "presuming a conviction and affirmance." (V9,T527,ln.19-25)

The issue presented to this Court arises from the denial of the second request, the denial of counsel's request to introduce additional statements that were inconsistent with the video testimony under a claim that they were proper impeachment and rebuttal evidence and vital to a full and fair cross-examination. The issue presented by Bolin in the case at bar does not rest on

the first request- that being to exclude Coby's video testimony because 1991 counsel was ineffective.

It is Bolin's position that the January depositional statements were admissible as appropriate cross-examination and impeachment of Coby. Since Coby was deceased, defense counsel could not ask the overlooked inconsistencies directly of Coby, the only tool available to ensure additional cross-examination was to permit the use of the depositional statements. The trial court violated Bolin's Sixth Amendment right to confrontation and his constitutional right to a full and fair cross-examination by denying him the use of the additional inconsistent statements. Had Coby been living in 1999, defense counsel would not have been bound or limited in cross-examination. The State should not benefit from the death of Coby by being able to prevent prior inconsistent statements made by her under oath during which the State had the power of cross-examination to be excluded from this case. The state attorney was quick to cry foul when she believed Coby's death might be to her detriment if the prior inconsistent statements were used, but was more than willing to force the defense to proceed under the detriment she wished to avoid.

The citations of authority and argument relating to the effectiveness of counsel cited in the Answer Brief are irrelevant to the case at bar. Bolin will rely upon the unchallenged citations of authority and argument presented in the Initial Brief in Issue IV.

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.

Appellee argues that admission of evidence about Bolin's since-reversed conviction for the murder of Terry Matthews was harmless error because the prior violent felony aggravator was otherwise established by Bolin's convictions for kidnapping and rape in Ohio. While this Court has found harmless error in some instances where prior crimes were improperly admitted into evidence, Appellant knows of no case where the erroneous conviction was for murder.

Indeed, this Court made exactly this distinction in Long v. State, 529 So. 2d 286 (Fla. 1988). Long had other prior violent crimes which were properly admitted in the penalty phase evidence, however, the improperly admitted conviction for murder was enough to taint the jury's penalty recommendation. Certainly a prior conviction for murder carries with it much greater weight than any other violent crime. We must assume that Bolin's jury gave the Terry Matthews homicide very significant weight which may have meant the difference between a recommendation of death and a recommendation of life. Therefore, the error cannot be harmless.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to the Kimberly N. Hopkins, Assistant Attorney General, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4739, on this _____ day of July, 2001.

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Respectfully submitted,

JAMES MARION MOORMAN
Public Defender
Tenth Judicial Circuit
(863) 534-4200

ANDREA NORGARD
Assistant Public Defender
Florida Bar Number 0661066
P. O. Box 9000 - Drawer PD
Bartow, FL 33831

AN/ddj