IN THE SUPREME COURT OF FLORIDA

OSCAR RAY BOLIN, JR.,	:	
Appellant,	:	
vs.	:	Case No. SC02-37
STATE OF FLORIDA,	:	
Appellee.	:	
	:	

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

INITIAL BRIEF OF APPELLANT

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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PRELIMINARY STATEMENT

The record on appeal consists of two sections and a supplement. The first part, contained in volumes I through IX, consists of documents filed with the clerk, pre- and post-trial hearings, and the presentence investigation. References to this part of the record on appeal will be designated by volume number, followed by "R" and page number. The second part of the record on appeal is contained in volumes X through XX and consists of trial and penalty phase transcripts. References to this part of the record on appeal will be designated by volume number, followed by "T" and page number. References to the single volume supplement will be designated "S" and page number. References to the portion of the record in Case No. 89,385 which Appellant asked this Court to take judicial notice of will be designated "PR" followed by volume number and page number. References to the Appendix to this brief (containing the court's sentencing order) will be designated "A" and page number.

STATEMENT OF THE CASE

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

On remand, Bolin was again tried, convicted and sentenced to death. On appeal, this Court reversed a second time based upon denial of individual voir dire on pretrial publicity during jury selection. (I, R13-29). See, Bolin v. State, 736 So. 2d 1160 (Fla. 1999).

The retrial commenced October 15, 2001 before Circuit Judge Craig C. Villanti (X, T1). The record does not reflect whether the venire was sworn prior to jury selection. During jury selection, defense counsel challenged nine of the prospective jurors for cause based upon their answers suggesting that they would not allow

the defendant a presumption of innocence, but would require him to prove his innocence (XI, T326-31). The court denied the challenges for cause and Appellant exercised peremptory strikes to remove six of these prospective jurors (XI, T334-41).

Later, after the defense had exhausted peremptory challenges, defense counsel requested two additional peremptories and specified the prospective jurors whom he would excuse (XII, T457-8). After reviewing the questionnaires of these prospective jurors, the court declined to grant any extra peremptory challenges (XII, T458-9).

During trial, Juror Bradley discovered that she knew witness Kathleen Reeves (mother of the victim) as a customer of hers at Home Depot (XIV, T753). Bradley stated that this would not affect her ability to be impartial because "she [Reeves] wouldn't know who voted which way" (XIV, T753-6). Defense counsel's motion to strike Juror Bradley was overruled, but the trial judge said that he would be willing to reconsider his ruling later (XIV, T759-60).

Subsequently, after closing arguments and jury

instructions, the judge revisited the ruling on juror Bradley (XIX, T1654-5). At that point, defense counsel withdrew the motion to strike the juror (XIX, T1654). Counsel was asked by the judge to consult with Appellant to make sure that he was in agreement (XIX, T1654-5). Counsel reported back that he had consulted with Appellant and wanted to keep Ms. Bradley on the jury (XIX, T1655).

On the morning of October 19, 2001, it was reported that juror Cox telephoned the jury manager and a judicial assistant to inform them that he had breathing problems and would have to go to his doctor or an emergency room (XVI, T984). A hearing was held where the two persons who had spoken to juror Cox testified about what the juror had related to them (XVI, T990-4). Both agreed that juror Cox said that he has a history of emphysema and usually has to go to the hospital when he has breathing difficulties (XVI, T990-4). It was unclear as to whether the juror might be available later in the day or during the next week (XVI, T991-2). Over Appellant's objection that no medical information or update had been sought, the trial judge ruled that al-

ternate juror Tuttle would replace juror Cox (XVI, T995-6).

During the testimony of state witness David Walsh, defense counsel objected when the prosecutor asked the witness if the DNA evidence was a "match" with Bolin's (XVI, T1162-3). Appellant argued that use of the term "match" was improper under National Research Council standards (XVI, T1163-4). The prosecutor agreed that current standards disallowed such testimony, but stated that the judge in the prior trial had conducted a Frye hearing and ruled the witness could give this opinion (XVI, T1163). He urged the judge to allow the testimony based upon this Court's failure to comment about this issue in the opinion reversing for a new trial[1] (XVI, T1163). The court ruled that the doctrine of "law of the case" applied and made the witness's opinion admissible (XVI, T1164-5). The prosecutor went on to ask whether there was a match "within a reasonable degree of certainty in your profession" (XVI, T1165-6). Walsh replied, "Yes, there was" (XVI, T1166).

Defense counsel's motion for judgment of acquittal

[1]See, Bolin v. State, 736 So. 2d 1160 (Fla. 1999).

was heard and denied (XVII, T1280). After the defense case had been presented, a renewed motion for judgment of acquittal was also denied (XVIII, T1493). The jury returned a verdict of guilty of murder in the first degree as charged on October 24, 2001 (III, R467; XIX, T1660).

Before the penalty phase began, defense counsel told the court that Appellant wanted to waive a jury recommendation (XIX, T1669). After further inquiry, the judge held an on-the-record colloquy with Appellant (XX, T1684-9). The jury was discharged (XX, T1691-3). The court made a finding that Bolin's waiver was knowing, voluntary and intelligent (XX, T1715). Testimony from three state witnesses with regard to aggravating circumstances was presented to the judge alone (XX, T1693-1736). The court stated that the defense could present whatever evidence in mitigation they wanted at the Spencer hearing (XX, T1743). A presentence investigation was ordered (XX, T1744-5).

On December 14, 2001, the Spencer hearing was held (VIII, R1513-36). Defense counsel stated that Appellant had instructed him not to call any witnesses nor present

any evidence in mitigation (VIII, R1513). Counsel did dispute several allegations in the presentence investigation and noted that Appellant found it prejudicial to sentencing in that it contained additional aggravation (VIII, R1517-9).

The judge made personal inquiry of Appellant to make certain that he intended to waive presentation of mitigating evidence (VIII, R1521-3, 1526-8, 1530-1). Defense counsel rested on the written sentencing memorandum with respect to contesting the aggravating factors argued by the State (VIII, R1527). Defense counsel stated that he was unaware of any additional mitigation that had not been presented in prior trials, the presentence investigation, or otherwise brought to the court's attention (VIII, R1529-30). The prosecutor was also asked about awareness of other mitigation and replied that transcripts of prior proceedings had been furnished (VIII, R1532-4). The judge asserted that he would read all of the material and consider it before sentencing (VIII, R1534-5).

Sentencing was held December 28, 2001 (IX, R1700-36). Appellant addressed the judge, maintaining his

innocence (IX, R1702-8). He complained that this trial was as unfair as the previous ones which were reversed on appeal (IX, R1702-8). The court proceeded to announce the findings in his sentencing order (IX, R1709-36).

Three aggravating circumstances were found applicable: 1) prior violent felony [F.S. 921.141(5)(b)], 2) during the course of a kidnapping and attempted sexual battery [F.S. 921.141(5)(d)], and 3) especially heinous, atrocious or cruel [F.S. 921.141(5)(h)] [IX, R1710-22; IV, R718-23 (see Appendix)]. The court considered each of the statutory mitigating circumstances and found only impaired capacity [F.S. 921.141(6)(f)] applicable (IX, R1722-5; IV, R724-6 (see Appendix)]. Eleven nonstatutory mitigating circumstances were found and weighed (IX, R1725-35; IV, R726-32 (see Appendix)].

The court concluded that "each and every one of the aggravating factors in this case, standing alone, is more than sufficient to outweigh the entirety of mitigation" [IX, R1735; IV, R732 (see Appendix)]. A sentence of death was imposed [IX, R1736; IV, R732 (see Appendix); IV, R733-9].

Appellant filed his notice of appeal December 28, 2001 (IV, R741). The Public Defender was appointed for appellate representation (IV, R742). 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

About 10:00 a.m. on December 5, 1986, Donald Ray Gibson was headed to work when he saw what he thought was a flock of turkeys close to Greenfield road in the Kent Groves area of Pasco County (XIII, T530-3). He had his friend stop the vehicle and got out when he realized that the birds were buzzards (XIII, T533). Gibson walked up a little hill on the side of a dirt road and discovered a female body wrapped in a sheet (XIII, T533-5). He did not touch the body, but observed that there were no shoes (XIII, T535). Fresh truck tire tracks led up to the body (XIII, T536). He had his friend notify the Pasco County Sheriff's Office (XIII, T536).

Deputy Robert Wood responded to the scene and was shown the body by Gibson (XIII, T550). It was located fifteen to twenty feet off the road (XIII, T550-1). The dead young woman had head injuries, was wrapped in a sheet, and was clothed except for her shoes (XIII, T551-2). The deputy noted that the body was wet although it had not rained recently (XIII, T552). He saw a set of single tire tracks going in and out of the location

(XIII, T558-9).

A crime scene technician, Roy Steven Corrigan, testified that he also thought it strange that the body was wet when there hadn't been any rain for at least two days (XIII, T576). He collected a sheet wrapped around the victim which bore the logo of St. Joseph's Hospital (XIII, T5779). A set of car keys was found by the left arm of the body (XIII, T579-80, 595).

Deputy Corrigan was directed to take plaster cast impressions of the tire tracks leading to the body (XIII, T582-5). He took nylon hose off the body into evidence, but was unable to locate any shoes (XIII, T595-7). Other clothing on the body included a pair of white slacks and a white sweater over a blue sweater (XIII, T601).

PCSO homicide investigator Kenneth Hagin testified that he also went to the location where the body was found (XIII, T617-8). He arrived in the early afternoon and saw the victim lying facedown, dressed in a white sweater and white slacks (XIII, T618). A sheet, marked in red ink "St. Joseph's Hospital, 3-80" was wrapped around the body (XIII, T618). Although the body was

wet, everything else was dry and there weren't any bodies of water nearby (XIII, T619). Investigator Hagin observed some heavy tire tracks in the vicinity of the body (XIII, T619). These were single tire tracks, not dual tire tracks (XIII, T623).

Gary McClelland testified that he and his girlfriend, Teri Matthews, had spent time together after work on December 4, 1986 (XIII, T634). They both worked at the NCNB check processing center and got off work around 11:00 p.m. (XIII, T634). About three hours later, Matthews left for her home in Pasco County (XIII, T635).

McClelland became concerned when she failed to telephone him as she customarily did after getting home (XIII, T636-7). He telephoned her home the next morning and learned that Matthews had never returned home (XIII, T637). He decided to drive along the route she would have taken home (XIII, T637). As he drove by the Land O'Lakes post office, he saw the red Honda owned by Matthews sitting in the parking lot (XIII, T637-8).

As he went to the car, he found mail belonging to Matthews and her parents on the ground outside the car

door (XIII, T640). The headlights of the car were still on and Matthews' purse was on the seat (XIII, T640-1).

McClelland later met with a deputy at the post office (XIII, T620, 642). They viewed a videotape made by a surveillance monitor in the post office lobby (XIII, T611, 642, 651). McClelland identified Teri Matthews on the videotape (XIII, T642, 651-2, 661-4). A timing device on the videotape indicated that it was 2:40 a.m. when Matthews picked up mail from her family's post office box (XIII, 611, 645; XIV, T674-5).

Gary McClelland's father, Charles McClelland, was requested to go to the Medical Examiner's Office in Largo where he identified the body of Teri Matthews (XIII, T646-7). Dr. Edward Corcoran, former associate medical examiner for Pinellas and Pasco counties, testified that he performed an autopsy on the victim (XVI, T1119). He found the cause of death to be a combination of 14 blunt trauma injuries to the head and 5 stab wounds (XVI, T1119-20). One stab wound to the neck was potentially fatal (XVI, T 1126). There was no way to determine the sequence in which the wounds were inflicted (XVI, T1128).

The police investigation was unproductive until July 1990 when Lee Baker, a homicide investigator with the Hillsborough County Sheriff's Office, met with Appellant's ex-wife, Cheryl Colby, in Portland, Indiana (XIV, T745-7). From speaking with her, Baker decided to question Philip Bolin, Appellant's half-brother, who was also living in Indiana (XIV, T749-51).

A) Purported Eyewitness Testimony.

Philip Bolin became the State's star witness at trial. He testified that in December 1986, he was living with his parents on Valencia Drive in Pasco County (XV, T765). He attended Sanders Elementary School (XV, T766). On December 4, 1986, his parents were away in North Carolina, working with a carnival (XV, T766). Philip, age 13, was sleeping in a small camper trailer owned by his sister which was parked beside the main family residence (XV, T766-7). Appellant also owned a camper which was parked on the property (XV, T767-8).

During the night, Philip was awakened by a knock on the door (XV, T768-9). When he opened it, Appellant told him to get dressed and come outside (XV, T769-71).

Appellant appeared to be "scared and nervous" and told Philip that he needed his help (XV, T772). The two of them walked toward Appellant's camper (XV, T772).

Philip heard a muffled sound and imagined that Appellant might have run over his dog (XV, T773). Instead, he saw a big white sheet with something under it (XV, T774). According to Philip, Appellant told him that it was a girl who had been shot near the Land O'Lakes Post Office (XV, T774-5). Philip said that Appellant went over to the body, straddled it, and raised a wooden stick with a metal end over his head (XV, T776-7). Philip turned his head and heard several thumping sounds which he compared to hitting a pillow with a stick (XV, T777-8).

Next, Appellant asked Philip to get a water hose and turn it on (XV, T778). Philip was afraid and refused, so Appellant got the hose himself (XV, T778-9). He sprayed the body with the hose (XV, T779). Then Appellant asked Philip to help him load the body onto a wrecker which was parked nearby (XV, T780). Philip described the wrecker as a black Ford with four wheels on the rear and two in front (XV, T776-7). Philip tes-

tified that he had not seen the wrecker before (XV, T777).

After several demands, Philip picked up the body by the ankles and noticed that there were no shoes (XV, T781). He felt nylon stockings on the legs (XV, T781-2). Appellant and Philip placed the body on the side of the wrecker (XV, T782). Although Appellant offered him money to go with him, Philip refused to help dispose of the body (XV, T782).

Appellant drove the wrecker in the direction of Coon Hide Road and returned twenty or thirty minutes later (XV, T783). When Appellant returned, he seemed calmer and explained to Philip that the girl was shot "in some kind of big drug deal" (XV, T783-4). Appellant asked Philip to go to Tampa with him, but Philip said that he had to go to school the next day (XV, T784-5). When Appellant left, Philip unsuccessfully tried to go back to sleep (XV, T785-6).

The next day at school, Philip talked with his closest friend, Danny Ferns, about what happened the night before (XV, T786). After school, Philip showed Danny where the body had been (XV, T787). There was

blood on the grass in that area (XV, T787). Philip said that he never told his parents or anyone else about the incident because he was afraid (XV, T788).

The Bolin family moved to Kentucky soon afterwards (XV, T787, 810). Then in 1989, Philip moved in with an aunt and cousin who lived in Union City, Indiana (XV, T789-90). It was there that detectives from Florida interviewed him in July, 1990 (XV, T790). Then he moved back to live with his parents in West Liberty, Kentucky through 1996 (XV, T791-2). In January 1996, he was visited by Rosalie Martinez (now Bolin) who was working on Appellant's legal representation (XV, T792). Because Oscar Ray Bolin, Sr. was very hurt that Philip would testify against Appellant, Philip decided to write out a recantation of the statement which he had given to the police about Appellant's involvement in this homicide (XV, 793-6).

At trial, Philip Bolin testified that much of the language in the recantation was suggested to him by Rosalie Martinez (XV, T804-5). Rosalie Martinez and his parents drove him to a notary where the document was signed and witnessed (XV, T805-6).

On crossexamination, Philip said that his younger brother Clarence had also stayed behind when his parents went to North Carolina (XV, T811). Clarence stayed with a family named Kinnard while the parents were gone but Philip denied that he had stayed with Clarence and the Kinnards on the night of December 4th (XV, T812-4). Philip also agreed that he normally lived in his parents double-wide trailer where he had a room (XV, T813). He did not explain why he moved into his sister's trailer while she was gone with his parents on the trip to North Carolina (XV, T813--4).

Philip also agreed that Appellant had come to his trailer "around 11:00, 12:00, 1:00 a.m." (XV, T815-6). Although Philip admitted that he had given that time range under oath, he said that it was a guess (XV, T816, 822).

Philip also admitted that he had seen Appellant's ex-wife, Cheryl, while he was living in Union City (XV, T828-9). When he wrote the statement "I have in no way any informations regarding this homicide" and signed the affidavit in front of the notary, he was just trying "to stay in the good graces of everybody there" (XV, T831-

2).

Philip Bolin was again impeached when he denied signing another statement later (XV, T832). He was shown the transcript of a telephone conversation and admitted that he had also taken this transcript almost a year later to a notary to have his signature on it notarized (XV, T833). The witness said that he remembered the telephone conversation but didn't "recall that period" of time (XV, T834). In the defense case, the transcript of this conversation was read to the jury (XVIII, T1488-91). The telephone call was made by Philip Bolin to Rosalie Martinez on July 10, 1996 and concerned statements which Philip Bolin had given to law enforcement June 29, 1996 (XVIII, T1488-9).

In this telephone call, Philip Bolin stated that law enforcement had "put words in his mouth" (XVIII, T1489). Two Pasco County officers had threatened to put him in jail if he didn't say that Rosalie Bolin had coerced him into making the recantation statement on January 20, 1996 (XVIII, T1489). Philip Bolin admitted that he had recanted his prior testimony against Appellant "on [his] own free will" (XVIII, T1491).

Further impeachment of Philip Bolin's testimony came from Philip's mother (Appellant's stepmother), Gertrude Bolin (XVIII, T1468-86). She testified that in early December 1986, she and her husband were on the road in a carnival and left their children Philip and Clarence with neighbors named Kinnard (XVIII, T1468-9, 1472). Her daughter, Melonda, did not have a trailer (XVIII, T1469-70, 1476). When the witness and her husband went on the road, they took the water hose with them to use in their camper trailer (XVIII, T1470).

To corroborate Philip Bolin's account of the homicide, the State presented three witnesses, Rosemary Kahles Neal, Danny Ferns and Michelle Steen. Neal testified that she and her late husband, Robert Kahles, owned a towing business in Tampa, Kahles and Kahles, Inc. (XIV, T701-2). The firm had about 21 trucks and wreckers in December 1986 and was probably the largest towing facility for AAA in Florida (XIV, T702-3). Appellant had been employed by them for about three or four weeks on December 4, 1986 and was assigned as a trainee to an experienced wrecker driver named Dale Veasey (XIV, 704-5). Dale Veasey's wrecker was a one

ton vehicle with dual wheels on the rear (XIV, T705). The radio call name was 22 Bob (XIV, T705).

On the morning of December 4, 1986, AAA asked them to assist a disabled vehicle in Pasco County (XIV, T706). Dale Veasey was going to be assigned to the call (XIV, T707). However, Appellant begged them for the assignment because he needed the money and was not paid for being a trainee (XIV, T708-9, 732). The Kahles's decided to allow him to take the call and use the wrecker assigned to Dale Veasey (XIV, T709-10). Before Appellant left, the witness gave him a "tire buddy", a two foot long wooden club which had been drilled out and filled with lead (XIV, T710-1).

Appellant was directed to the Pasco County location with the two-way radio (XIV, T711-2). He completed the job and accepted a check which was approved (XIV, T712-3). He was supposed to return the wrecker to the shop that afternoon, but never showed up (XIV, T713).

After the Kahles's were in bed asleep, a call over the two-way radio came in from Appellant (XIV, T714-5, 732). He sounded panicked and said he was lost (XIV, T716-7). Because the radio had a lot of static and the

communication was broken up, Appellant was asked to go to the nearest pay phone to call them (XIV, T716-7). He never did (XIV, T718).

Around 10:00 the next morning, Appellant returned the wrecker to the facility (XIV, T719). Appellant appeared dirty and smelled "very foul" (XIV, T719). He was wearing the same clothing as the previous day (XIV, T719). Although her husband wanted to fire Appellant on the spot, he was allowed to remain but did not get another truck to drive (XIV, T720-2, 740). During the afternoon, there was television news coverage of the finding of Matthews' body (XIV, T722). The witness noticed that Appellant seemed to get very excited about the news (XIV, T722).

Rosemary Kahles Neal further testified that Appellant used to wear a large knife on his hip (XIV, T723). He was often seen sharpening it and throwing it into the wall or floor (XIV, T724). Danny Ferns testified that he and Philip Bolin were best friends back in 1986 when they attended Sanders Elementary School (XV, T871). One morning they met at the bus stop and Philip was very upset (XV, T871-2, 881). After school, the two went to

the property where Philip Bolin resided (XV, T872-3, 883). There on the ground, the witness saw about a three-foot circle of blood (XV, T874, 882-3). The end of a hose was nearby (XV, T883-4). Ferns didn't tell anyone at that time about what he had seen because he was afraid something could happen to him or his family (XV, T877). But when detectives visited him in 1990 when he was sixteen years old, he told them (XV, T878). By that time Philip Bolin had moved out-of-state and the two no longer communicated with each other (XV, T878).

Michelle Steen testified that she had been married to David Steen, Appellant's cousin (XV, T903-4). In early 1987, Appellant visited them at their home in Union City, Ohio (XV, T903-4). At one point, she and Appellant were alone in the kitchen and she asked him whether he had ever killed anyone (XV, T904-5). Appellant replied that he had (XV, T905). About an hour later, he said he had beaten a girl and put a hose down her throat in Florida (XV, T905). He said that his brother Philip had watched him do it (XV, T905-6).

At the time, the witness thought that Appellant was joking (XV, T907, 913). When detectives came to her

home in July 1990, she told them what Appellant had said (XV, T907). Michelle Steen had never met Philip until around the time that the detectives visited (XV, T908, 914). A relative of Philip's lived nearby her apartment and she first met him there (XV, T908-9). However, she denied discussing anything about Appellant with Philip (XV, T909, 914-5). She also denied discussing any of this with Cheryl Bolin, Appellant's ex-wife (XV, T909).

The State also introduced a letter addressed to Philip Bolin which was in Appellant's handwriting (XV, T807-8, 924-6). The letter, dated November 19, 1991, was intercepted and copied at the Pasco County Detention Facility (XV, T923-6). Over objection, the letter was received into evidence and read by the prosecutor to the jury (XV, T925-9). The contents of the letter can be summarized as a plea for Philip to stay away from Florida and not testify at Appellant's trial (XV, T926-9).

Further corroborative details came from the prior testimony of Appellant's deceased ex-wife, Cheryl Haffner, which was read to the jury (XVI, T967-76). She stated that on December 5, 1986, she was a patient at

Tampa General Hospital (XVI, T972-3). On that date, her then-husband, Appellant, came to visit and brought her Social Security check (XVI, T973-4). The check was sent to a post office box at the Land O'Lakes Post Office which the couple maintained to receive her checks (XVI, T973).

Appellant's ex-wife further said that due to complications with diabetes, she had been hospitalized in both Tampa General Hospital and St. Joseph's Hospital during 1985 and 1986 (XVI, T970). She often brought hospital items home with her such as towels and blankets (XVI, T970-1). Medical Records custodians from the two hospitals confirmed the dates of her hospitalizations (XVI, T1113-5; 1147-9). When Detective King of the Hillsborough County Sheriff's Office interviewed the witness in July 1990, she gave him two hospital sheets which were marked as hospital property (XVII, T1270-2).

B) Forensic Evidence.

Forensic evidence and expert witnesses were presented by both the prosecution and defense. An employee of the Cooper Tire Company, Mark Thomas, testified that

the tire impression preserved in the plaster cast was made by a Cooper Roadmaster tire (XIV, T678-9). The size of the tire was 8.75 by 16.5 (XIV, T679). This was not a popular size and would usually be utilized by 3/4 ton or 1 ton trucks (XIV, T680-1). Thomas further said that the impression had been made by a rear tire (XIV, T683).

When Hillsborough County Detective Kenneth Hoskins located the wrecker which Appellant had driven for Kahles towing, it was being repainted (XIV, T687, 693). It had several different size tires on it, including one Goodyear 8.75/16.5 (XIV, T693). None of the tires were Coopers (XIV, T693). The wrecker had dual wheels on the rear (XIV, T696).

Over Appellant's objection to his limited training (one eight hour course in 1972), Sergeant Donald Young of the Florida Highway Patrol was allowed to testify as an expert in tire track impressions (XV, T936-9). He was shown a blowup of a photograph taken where the body was found and pointed out a mark which he said was

caused by dual wheels[2] (XV, T940-5). When asked to point out the path followed by the truck, the witness agreed that the rear wheels would have gone through some bushes (XV, T948). He could not account for the lack of "torn-up bushes" in the photograph (XV, T948). He also could not state what kind of dual wheel vehicle might have made the marks (XV, T954-6). He concluded with his opinion that "All tires basically look alike" (XV, T958).

Former FBI agent, William Bodziak, agreed that the photos from the scene showed a vehicle with dual wheels on the rear (XVI, T1005-12). He said that Cooper tires were mounted on the front wheels (XVI, T1016). Although the vehicle's path would have taken it over some shrubbery, Bodziak said that shrubbery "bounces right back" so no damage would be noticed (XVI, T1012-3). Bodziak testified that he couldn't tell what type of vehicle or what size tires made the impressions in the photographs (XVI, T1051-2).

FBI agent, John R. Brown, a forensic serologist,

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[2]This opinion was in conflict with the observers who had actually been at the scene. See, XIII, T559 (testimony of Robert Wood); XIII, T623 (testimony of Kenneth Hagin).

testified that Appellant's blood-type was AB (XVI, T1056, 1060). Bolin is also a secretor, meaning that his blood-type could be discerned in non-blood body fluids (XVI, T1060).

Tests of the slacks taken off Matthews' body showed semen stains with A blood group substance (XVI, T1068-9, 1073). Former FBI Laboratory serologist Robert Hall testified that he could not eliminate an AB secretor such as Appellant from being the source of the semen (XVI, T1075-6, 1079-81). Although Hall conceded that research had shown that the amount of B blood group substance in AB secretors is higher than the amount of A blood group substance, he said that an individual might have a different proportion (XVI, T1094-5). He said that he had taken notes when he did his testing, but didn't "have any idea" what became of them (XVI, T1098).

DNA testing was also done on cuttings from the slacks (XVI, T1154-6). David Walsh, a computer systems administrator, who had worked as a staff molecular biologist at Cellmark Laboratories from 1989-1992, testified that in 1989 he performed RFLP analysis on the semen stains and was able to produce an autorad (XVI, T1150-7;

XVII, T1171). The bands produced on the autorad matched neither Gary McClelland nor Teri Matthews (XVI, T1157-9).

Subsequently, in August 1990, he received a sample of Appellant's blood and performed RFLP testing on it (XVI, T1160). There were six bands on this autorad of Bolin's blood, five of which matched the bands in the autorad made from the semen stain (XVI, T1161). Over defense objection, Mr. Walsh was permitted to give an opinion that there was a match between the two and that the semen stain had come from Bolin (XVI, T1162-6).

On crossexamination, Walsh acknowledged that he used up the entire sample when he performed the RFLP testing and none was left for verification by an independent lab (XVII, T1174-5). He agreed the PCR testing requires much less of a sample, but did not choose this option because Cellmark was not performing PCR testing at that time (XVII, T1173-4). He admitted that a missing band from a test could be a reason to exclude a suspect as a possible donor of the sample (XVII, T1177). However, he said that the missing band could be explained (XVII, T1192).

Dr. Robin Cotton, forensic laboratory director at Cellmark Diagnostics, testified that the missing band in the autorad was probably due to the small amount of DNA in the semen stain (XVII, T1199-1200). She reviewed Mr. Walsh's procedures and stated that he correctly followed the protocol established by the laboratory (XVII, T1202). She gave her conclusion that "Bolin cannot be excluded as a possible donor of the DNA from the stain" (XVII, T1199). While she agreed that it was improper to call the results a "match", she said that she could state that five bands in the evidence match five of the six bands in Bolin's DNA pattern (XVII, T1211).

Dr. Christopher Basten testified as an expert in population genetic frequencies (XVII, T1213-49). He calculated that "about one in 2100 individuals in the Caucasian population" would have the same DNA profile as the Cellmark result (XVII, T1220). According to a verbal scale in general usage by the profession, the likelihood ratio of 2100 is considered a "very strong" likelihood that the sample came from the suspected individual (XVII, T1222-3).

On crossexamination, Dr. Basten admitted that he has

only testified for the defense on one occasion (XVII, T1224). He has testified frequently on cases involving Cellmark Labs and has never disagreed with their findings (XVII, T1224). He relied upon their database in order to arrive at his conclusion (XVII, T1225, 1232). Using an adjustment factor to account for sampling variation, the witness said that the likelihood ratio could be as low as one in 1200 (XVII, T1239). In other words, there might be 280,000 people in the United States that would match the DNA profile in this case (XVII, T1239).

In the defense case, forensic scientist Susan Pullar criticized the conclusions of the State's serology expert. She stated that if there was a sufficient amount of semen to do a RFLP DNA analysis, there would be enough for an ABO serology test (XVII, T1295-6). Given the evidence of A blood group only (the victim's blood type), the reasonable inference would be that the semen source was a nonsecretor (XVII, T1295).

Pullar also testified that if PCR testing had been done to determine DNA, the smaller sized sample required would have preserved part of the sample for future testing (XVII, T1298). She stated that labs were doing PCR

testing back in 1989 (XVII, T1299).

Regarding the tire track evidence, Pullar said that photographs should be taken perpendicular to the impression and should include a scale (XVII, T1300-4). When this is done, measurements of the dimensions of the tire track evidence can be done directly from the photograph (XVII, T1305-7).

Biology professor, William M. Shields, testified that he worked in the field of genetic statistical probability and had published work in statistics (XVIII, T1402-4). Dr. Shields disagreed with some of the statistics presented by the State's witness, Dr. Basten (XVIII, T1409). In particular, he criticized Dr. Basten failure to make further corrections to his statistical results to reflect for the fact that the genetic alleles are not entirely independent in human populations (XVIII, T1409-10). Regarding the DNA profile in evidence, Dr. Shields said that there was no match and that Appellant cannot be included as a possible contributor unless "extra assumptions" are made (XVIII, T1415).

Dr. Shields further testified that the likelihood ratio calculated by Dr. Basten of 1/2100 was error which

he attributed to Dr. Basten lack of experience in molecular biology (XVIII, T1418). He stated that the true range of likelihood was between "two times as likely to ten times as likely" (XVIII, T1419). In other words, 3 million people in Florida "could match" (XVIII, T1420).

He called the results of the testing conducted by Cellmark in this case unreliable because "the entire process is flawed" (XVIII, T1420-1). There is no way to know whether the test results did not drop an allele (in which case Bolin would be excluded) or whether the process did drop an allele (in which case Bolin should not be excluded) (XVIII, T1421).

C) Penalty Phase Evidence.

The prosecution presented three witnesses who testified before the judge after the jury had been discharged (XX, T1693-1736). Jenny LeFevre testified that on November 18, 1987, she was employed at a Truck Stops of America located in Stony Ridge, Ohio (XX, T1694). When she left work about midnight, she was accosted by a man holding a gun who forced his way into her car (XX, T1694-5). He drove her vehicle out of the parking lot

and proceeded to an empty parking lot about a mile away (XX, T1696). A tractor-trailer then pulled into the area and the man forced her at gunpoint to leave her car and get into the truck (XX, T1697-8). There were two men already in the truck (XX, T1697-8).

Once inside, the witness was placed into a sleeper area with a curtain in the rear of the cab (XX, T1698-9). The witness identified Appellant as the person with the gun who abducted her and was with her in the sleeper area (XX, T1699, 1712). As the truck pulled onto the turnpike, the men in front turned up the radio and started laughing (XX, T1699-1700).

Ms. Lefevre further testified that Appellant "was running" the gun "up and down her body" while telling her that he was going to rape her (XX, T1700-1). Then he took off her pants and had intercourse with her (XX, T1701-2). Afterwards, Bolin was having conversation with her and the men in the front of the cab (XX, T1702-4). The driver of the truck, who she later learned was David Steen, switched places with Bolin (XX, T1704).

By the time Steen came back into the sleeper area, the witness had gotten dressed (XX, T1704-5). Steen

tried to pull her back into the sleeper, but she fought him off (XX, T1705-6). After she had been in the truck for several hours and heard a lot of conversation about whether she should be killed, the truck stopped and Bolin wrapped her smock over her eyes (XX, T1707-10). He helped the blindfolded witness down from the truck and marched her across a field at gunpoint (XX, T1710). Appellant told her that he was going to lift her over a fence and that she should run (XX, T1710). That is what happened (XXI, T1710-1). She ran through tall grass, down a road, and eventually came to another truck stop located in Pennsylvania (XX, T1711-2).

The witness later testified at the trial of David Steen (XX, T1713). Bolin pled guilty and was sentenced to 25 to 75 years imprisonment (XX, T1713).

Corrections Officer Rick Luman from Bowling Green, Ohio, testified that on January 4, 1988, he was assigned to the Wood County Jail (XX, T1715-6). Bolin was an inmate of that facility awaiting disposition of felony charges against him (XX, T1717). While working the midnight shift on that date, he and another officer were making their rounds when they were jumped by Bolin and

another inmate (XX, T1717-24). While Officer Luman was wrestling with Appellant, the other inmate was hitting the other officer with a steel bar from the exercise equipment (XX, T1724-5). During the course of the struggle, Luman was hit in the neck and back with the steel bar (XX, T1725). The officers' cries for help were heard by some other inmates who came to their rescue (XX, T1725-6).

Bolin pled guilty to felonious assault and escape charges arising from the incident (XX, T1727). Luman testified that he suffered a permanent injury to his back from the incident (XX, T1728-9).

Retired detective Marlene Long testified that she investigated the rape and kidnapping of Jenny LeFevre (XX, T1731-2). Three men, including Bolin, were arrested for their participation (XX, T1732). The witness brought certified copies of Bolin's Ohio convictions, which were entered into evidence (XX, T1734-6).

SUMMARY OF THE ARGUMENT

Several prospective jurors expressed opinions that the defendant would have to present a case in order to win acquittal. The trial court erred by not excusing these jurors for cause upon Appellant's request. Appellant had to exhaust his peremptory strikes and his request for additional peremptories was denied. Some of the jurors that heard the trial were unacceptable to the defense.

A juror who had become ill during an overnight recess was replaced by an alternate juror over Appellant's objection. The court erred by making an insufficient inquiry into the juror's medical condition to determine whether he would be available to continue his jury service without causing an inordinate delay of the trial.

An opinion by a state witness that the DNA evidence showed "a match" was admittedly improper by current National Research Council standards. When the trial judge allowed the opinion based upon "law of the case", he simply perpetuated a error from Bolin's previous

trial. The jury may have given great weight to this expert's opinion even though it should not have been allowed.

The record does not reflect whether the prospective jurors were ever sworn before voir dire commenced. This Court should remand this case to the circuit court for an evidentiary hearing into whether Fla. R. Crim. P. 3.300(a) was complied with.

This Court should recede from Griffin v. State, 820 So. 2d 906 (Fla. 2002) in so far as it requires a capital defendant to first attack a waiver of a jury penalty recommendation in the trial court before this issue can be reviewed on direct appeal. Previous authority from this Court indicates that the sufficiency of a waiver should be reviewed under the statutory provision of automatic review in this Court of judgment and sentence in cases where a death sentence has been imposed. Examination of the waiver colloquy at bar shows that Appellant was not specifically informed of the protections provided by a jury's penalty recommendation before the purported waiver was accepted.

ARGUMENT

ISSUE I

THE JUDGE ERRED BY DENYING APPELLANT'S CHALLENGES FOR CAUSE TO PROSPECTIVE JURORS WHO WOULD REQUIRE APPELLANT TO PROVE HIS INNOCENCE.

During jury selection, defense counsel challenged prospective juror Glass for cause on the ground that he would require the defense to prove the defendant's innocence (XI, T326-7). The prosecutor objected, saying that prospective juror Glass said that he could follow the law (XI, T327-8). The court denied the challenge for cause to prospective juror Glass (XI, T330).

Defense counsel then challenged several other prospective jurors for cause based upon the same reason (XI, T330-1, 335-6). The judge denied these challenges for cause also (XI, T334). Subsequently, defense counsel exercised peremptory strikes on prospective jurors Almas, Schoepfer, Robinson, Ursitti, Chillura, and Glass (XI, T337-8, 341). All of these were prospective jurors who had previously been challenged for cause.

Ultimately, Appellant exhausted his ten peremptory

strikes (XII, T342). He requested two additional peremptory strikes and stated that he would use them to excuse prospective jurors Cox and Bradley (XII, T457-8). After considering the questionnaires which the two prospective jurors had submitted, the court declined to grant extra peremptory strikes (XII, T457-9, S15-6). Consequently, the jury which heard Bolin's trial consisted of two jurors (Herbert Gale and Frank Vitacco) who had been unsuccessfully challenged for cause as well as jurors Ronald Cox and Sandra Bradley who would have been excused had the judge allowed additional peremptory challenges (XI, T330; XII, T464). Before the jury was sworn, defense counsel renewed his request for extra peremptory strikes and specifically tied this request to the court's disallowance of challenges for cause to prospective jurors "who said that they would require me to prove Mr. Bolin not guilty" (XIII, T482, 488). The judge adhered to his previous ruling (XIII, T482).

In Hamilton v. State, 547 So. 2d 630 (Fla. 1989), the defendant's challenge for cause to a prospective juror who said that the defendant "would be required to introduce evidence to convince her that he was not

guilty" was denied. 547 So. 2d at 633. This Court held that the juror "did not possess the requisite impartial state of mind necessary to render a fair verdict" and should have been excused upon the defendant's request. 547 So. 2d at 633. The conviction was reversed for a new trial.

Similarly, in Overton v. State, 801 So. 2d 877 (Fla. 2001). this Court decided that a prospective juror who indicated reluctance to accept a defendant's right not to testify should have been excused for cause. The Overton court noted that the prospective juror also assured the trial judge that he would be able to follow the law as instructed. However, this Court concluded "on the totality of his responses" that the prospective juror was not unbiased. 801 So. 2d at 892.

The applicable standard of review on denial of a challenge for cause is whether the court abused its discretion. Overton, 801 So. 2d at 890. We turn now to the responses of the prospective jurors who Bolin challenged for cause.

A) **Prospective Juror Almas**.

Of all of the prospective jurors who were challenged, the record shows that Mr. Almas made the most extensive responses to questioning. Defense counsel asked, "Well, how many of you feel that once the State's presented their case you still want to hear more"? (X, T169). The following exchange ensued:

> PROSPECTIVE JUROR ALMAS: Of course. I want as much facts as I can receive.
>
> MR. SWISHER (defense counsel): Well, what would that mean? Would I have to do something?
>
> PROSPECTIVE JUROR ALMAS: Present evidence. You'd have to present witnesses.
>
> MR. SWISHER: What if I didn't? Would you believe that I didn't have it?
>
> PROSPECTIVE JUROR ALMAS: That weakens your case, basically.

(X, T169-70). Voir dire continued with:

> MR. SWISHER: And you'd require me to put on both sides or I wouldn't be doing my job, would you say? Does everybody -- I mean everybody's head's shaking.
>
> PROSPECTIVE JUROR ALMAS: That's true.
>
> MR. SWISHER: That's true? Everybody but Mr. Pyle thinks that?
>
> PROSPECTIVE JURORS: Yes.

MR. SWISHER: Everybody but Mr. Pyle agrees that I need to put somebody on and present my side; is that right?

PROSPECTIVE JURORS: Yes.

MR. SWISHER: And if I didn't, then, what? You assume the State must have presented their case?

PROSPECTIVE JUROR ALMAS: You're jeop-ardizing your client.

MR. SWISHER: You said, you're jeopar-dizing your client?

PROSPECTIVE JUROR ALMAS: Yes.

(X, T171). Finally, Prospective juror Almas admitted that he had a "premonition" about Bolin's case:

MR. SWISHER: Okay. Any other thoughts come to mind? Anybody, what thoughts did you have when you came in here, in the courtroom and looked over and saw Mr. Bolin sitting there? Anything? Did any of you ask yourself, gee, I wonder what he did? Did any of you think that?

PROSPECTIVE JUROR ALMAS: Yes.

MR. SWISHER: Okay. Why do you think you thought that, Mr. Almas?

PROSPECTIVE JUROR ALMAS: Because I seemed to recognize the name at first. And I associated it with something that was a disaster. And I assumed it was a murder, something of that [sic], or homicide, whatever. But I wasn't sure. I knew it happened a while ago.

MR. SWISHER: Right. So you had some kind of preconceived notion when you came in the courtroom?

PROSPECTIVE JUROR ALMAS: Premonition.

(X, T188-9).

B) **Prospective Jurors Glass and Gale**.

The record shows the following responses from prospective jurors Glass and Gale during voir dire:

MR. SWISHER: All right. Would anybody here require me to prove his innocence?

PROSPECTIVE JURORS: (Indicating).

MR. SWISHER: Okay. I see some shakes and I see some nods.
Mr. Flowers, would you expect me to prove his innocence?

PROSPECTIVE JUROR FLOWERS: Yes.

MR. SWISHER: All right. How many agree with Mr. Flowers?
Okay. We have Ms. McMichael. Who else? Raise your hand. We have Mr. Gale, Mr. Glass....

(XI, T290-1). Defense counsel followed up his questioning:

MR. SWISHER: ... Who here would put me to the task if I didn't put my -- didn't put Mr. Bolin on the witness stand? Who wouldn't [sic][3] want to hear or

[3]The context shows that the court reporter erred in transcribing the word "wouldn't" when "would" was actually said.

> require me to put Mr. Bolin on the witness stand? Anybody?
> Mr. Glass. Mr. Gale. Mr. Straquadine. Anybody else? Ms. McMichael.

(XI, T292). Neither of the two prospective jurors (Glass and Gale) were further questioned about their inability to accept the defendant's presumption of innocence.

C) **Preservation**.

In Trotter v. State, 576 So. 2d 691 (Fla. 1990), this Court held that in order to preserve error for appellate review when the court denies a challenge for cause, the defendant must exhaust peremptory challenges and request an additional peremptory strike. Furthermore, counsel must name a juror on the panel who is unacceptable and who would be excused if an additional peremptory was granted.

At bar, the error in failing to excuse prospective jurors Almas, Glass and Gale for cause was preserved for review. Appellant first exhausted his ten peremptory challenges (XI, T342). He requested additional peremptory challenges and identified jurors Cox and Bradley as

the ones who would be excused if two additional peremptories were granted (XII, T457-8). The court declined to allow any additional peremptory strikes (XII, T459). As well as the two jurors who counsel had asked to strike, the jury included Herbert Gale, who should have been excused for cause (XII, T464).

D) **Conclusion**.

In Singer v. State, 109 So. 2d 7 (Fla. 1959), this Court set forth the standard applicable when a prospective juror's ability to be impartial is challenged:

> if there is basis for any reasonable doubt as to any juror's possessing that state of mind which will enable him to render an impartial verdict based solely on the evidence submitted and the law announced at the trial he should be excused on motion of a party, or by the court on its own motion.

109 So. 2d at 23-4. Because voir dire disclosed very reasonable doubt that prospective jurors Almas, Glass, and Gale would be able to set aside their beliefs that the defendant should prove his innocence, the challenges for cause should have been granted.

Accordingly, Appellant's conviction and sentence

should be vacated and a new trial ordered. Hamilton v. State, supra.; Gibson v. State, 534 So. 2d 1231 (Fla. 3d DCA 1988).

ISSUE II

THE COURT ERRED BY REPLACING JUROR COX WITH AN ALTERNATE JUROR WITHOUT A SUFFICIENT SHOWING THAT JUROR COX WOULD BE UNABLE TO CONTINUE SERVICE.

Midway through trial, on the morning of Friday, October 19, 2001, juror Cox telephoned Judge Villanti's judicial assistant and the jury manager to report that he had breathing problems during the night and would be seeking medical attention instead of coming to court (XVI, T984). The judge proposed impaneling an alternate juror (XVI, T984-5). The prosecutor agreed, stating that one expert witness would not be available if the trial was continued over the weekend (XVI, T985-6). Also, there were two witnesses from other parts of the country who had been flown in to testify (XVI, T986). A continuance until Monday would mean that the State would incur the expense of flying them home for the weekend and back to testify during the following week (XVI, T986).

Defense counsel said that Appellant would prefer to have juror Cox remain on the jury and suggested that the

juror might be available later in the day (XVI, T987). He noted that the scheduled witnesses were likely to take only half-a-day anyway (XVI, T987).

The persons who received the telephone calls from juror Cox were brought into court to testify about their communications with the juror (XVI, T989-94). Both agreed that the juror reported a history of emphysema, that he sounded like he was very ill, and that he would either see his doctor or go to the hospital (XVI, T990-4). Juror Cox did not say anything about whether he might be available if the trial was continued until the afternoon (XVI, T991-2).

The judge asked the jury manager, "Is it fair to say your present impression is that this man is not going to be available any time soon, including any time today"? (XVI, T993). Over defense objection that the question called "for a medical opinion", the witness was allowed to say that she had been a nurse for 21 years and that the juror "was definitely having an attack" (XVI, T993-4). The judge ruled that it would be appropriate to replace juror Cox with an alternate juror rather than "continue the trial in the hopes that this juror might

make some sort of miracle recovery" (XVI, T995). Appellant objected to the court making this ruling without any medical information on the juror's present condition or prognosis (XVI, T996).

After a recess to consider caselaw, the prosecutor submitted Andrade v. State, 564 So. 2d 238 (Fla. 3d DCA 1990), where a juror who was sick with the flu called the judge and was excused from duty (XVI, T997-9). The Third District found no error in the replacement of the sick juror with an alternate juror. The trial judge also cited De La Hoz v. State, 576 So. 2d 812 (Fla. 3d DCA 1991) as additional caselaw[4] (XVI, T999-1000).

Fla. R. Crim. P. 3.280(a) controls the selection of alternate jurors. It provides in part:

> The court may direct that jurors, in addition to the regular panel, be called and impanelled to sit as alternate jurors. Alternate jurors, in the order in which they are impanelled, shall replace jurors who, prior to the time the jury retires to consider its verdict, become unable or disqualified to perform their duties.

The pertinent question with respect to juror Cox is

[4]Apparently, Andrade and De La Hoz were co-defendants who were tried together. It does not appear that either of them objected to replacement of the sick juror with the alternate.

whether there was a sufficient showing that he was unable to continue performing his duties. The applicable standard of review for questions involving jury impanelment is abuse of discretion. San Martin v. State, 717 So. 2d 462 (Fla. 1998).

Replacement of a seated juror with an alternate during deliberations requires a mistrial. Williams v. State, 792 So. 2d 1207 (Fla. 2001). When replacement occurs during the presentation of evidence, the possibility of prejudice is less obvious. Nonetheless, the defendant does have a substantial right in being tried by the jurors who he helped to select.

In People v. Page, 526 N.E. 2d 783 (N.Y. 1988), the Court of Appeals of New York determined that the trial court must balance the defendant's right to the jury as seated against the unfairness which could result from delaying the trial proceedings. The Page court wrote:

> A trial court's decision dismissing a juror must safeguard the important right of a defendant to be tried by jurors in whose selection the defendant has had a voice. It thus necessitates a reasonably thorough inquiry and recitation on the record of the facts and reasons for invoking the statutory authorization of discharging and replac-

> ing a juror based on continued unavailability. This requires a reasonable attempt to ascertain where the absent juror is, why the juror is absent, and when the juror will be present.

526 N.E. 2d at 785.

Applying these criteria, the Page court reversed the defendant's conviction where a juror was replaced by an alternate because the juror had telephoned saying that "she just got up and she'll get here when she can". 526 N.E. 2d at 784. At the time when trial recommenced, it was only 47 minutes after the scheduled time. The Page opinion holds that the trial judge abused his discretion by not making a reasonable effort to determine when the absent juror would be present in the courthouse.

Other decisions have applied the Page reasoning to the situation where a juror became sick during the course of trial. In People v. Olaskowitz, 556 N.Y.S. 2d 900 (App. Div. 1990), a juror called in sick on the second day of a one month trial and was immediately replaced by an alternate. The court's refusal to grant a one-day adjournment as requested by defense counsel was held reversible error.

Similarly, in People v. Lowe, 631 N.Y.S. 2d 298

(App. Div. 1995), the trial judge discharged a juror who was absent because of sickness, but was expected to return for the next trial day. The court's desire to avoid interrupting the trial for one day by impaneling an alternate juror was found to warrant reversal when weighed against the defendant's right to be tried by the original jury.

Finally, in People v. Powell, 579 N.Y.S. 2d 71 (App. Div.), aff'd, 600 N.E. 2d 624 (N.Y. 1992), a juror called in to inform the court that her husband had been hospitalized and that she would not be in court that morning. When afternoon arrived, the judge seated an alternate over the defendant's objection. The appellate court reversed for a new trial because the trial judge had not inquired whether the juror would be available to return to the trial on the next day.

At bar, the trial judge similarly declined to pursue more information as to when (or whether) juror Cox would become available for continued jury service. Certainly, it would not have been too difficult to find out whether juror Cox had been admitted to the hospital or whether he had been treated by his doctor and sent home. In-

stead, the trial judge relied upon speculation about the juror's medical condition based upon reports about how juror Cox "sounded" on the telephone. This was an inadequate basis upon which to discharge the juror and seat an alternate juror over Appellant's objection.

Another point bears mentioning. The judge noted that the juror was wheezing during jury selection and that the juror had told the jury coordinator that he hadn't brought his oxygen tank because he thought it wouldn't be permitted in a county building (XVI, T984). The judge did not say whether or not juror Cox was advised that he could bring oxygen with him during jury service. Certainly the court must make a reasonable accommodation for jurors who have medical disabilities.

The trial court's hasty replacement of juror Cox by an alternate effectively denied Appellant's Sixth Amendment right to be tried by the jury which he originally selected. This Court should now vacate Bolin's conviction and remand this case for a new trial.

ISSUE III

THE JUDGE ERRED IN ALLOWING IMPROPER EXPERT TESTIMONY ABOUT DNA EVIDENCE ON THE GROUND THAT A PRIOR RULING WAS LAW OF THE CASE.

During the testimony of David Walsh, a former employee of Cellmark Laboratories now working as a computer systems administrator, the prosecutor asked whether the DNA comparison of the semen sample and Bolin's blood showed "a match" (XVI, T1162). Defense counsel objected because the National Research Council guidelines said that the term "match" was improper (XVI, T1163). The prosecutor argued that a Frye hearing had been conducted before Bolin's prior trial and the previous judge had allowed the opinion that there was "a match" to be given (XVI, T1163). The prosecutor further suggested that no caselaw said that it was an improper question; it was just "a Research Council opinion" (XVI, T1164). The trial judge ruled that law of the case made the question allowable (XVI, T1164). The judge then asked the prosecutor to rephrase the question to say "within a reasonable degree of medical probability"

(XVI, T1165).

Subsequently, Walsh testified as follows:

> Q. Sir, I just want to qualify my last question by asking within a reasonable degree of certainty in your profession was there a match between the two?
>
> A. Yes, there was.
>
> Q. In your opinion did it come from the same source?
>
> A. In my opinion it did come from the same source.

(XVI, T1166).

In the first place, it should be recognized that even Walsh's former supervisor, Dr. Robin Cotton, agreed that she couldn't say "within a reasonable degree of scientific certainty" that the evidence was "a match" because there were only five bands in the sample (XVII, T1211). The case at bar is similar to the recent decision of Murray v. State, 27 Fla. L. Weekly S816 (Fla. October 3, 2002) where the initial analyst and his supervisor disagreed about the results of the DNA testing. Another similarity between Murray and the case at bar is the fact that all of the semen sample was consumed in the test, making it impossible for the defense to con-

duct an independent analysis (XVII, T1174-5, 1206-7).

When the trial judge at bar ruled that "law of the case" made Walsh's conclusion admissible, he was merely perpetuating an error in the ruling made at Bolin's prior trial. There, the court specifically adopted in his "Order Permitting DNA Evidence" the standard of Brim v. State, 654 So. 2d 184 (Fla. 2d DCA 1995) ("where there are two differing, but both generally accepted deductions that can be made from generally accepted scientific evidence, they may both be admitted provided that the underlying scientific evidence satisfies Frye"). (PR 2d Supp., R876). This analysis was disapproved by this Court in Brim v. State, 695 So. 2d 268 (Fla. 1997).

This Court's standard of review of a trial court's ruling on a Frye issue is de novo. Brim, 695 So. 2d at 274. Therefore, the admissibility of Walsh's opinion that the DNA testing showed "a match" must be reviewed as a matter of law rather than under an abuse of discretion standard. Murray, 27 Fla. L. Weekly at S817.

This Court has always given considerable weight to recommendations by the National Research Council in its

reports on DNA technology when determining general acceptance in the scientific community. See, Brim, 695 So. 2d at 274-5; Henyard v. State, 689 So. 2d 239, 249 (Fla. 1996) (precise conformity with NRC recommendations not essential). Allowing the prosecutor to solicit terminology from a state expert witness which was specifically disapproved by the National Research Council raises grave doubts about admissibility under Frye.

Certainly the trial court's ruling that "law of the case" controls is error. When a ruling on scientific evidence is reviewed de novo on appeal, the appellate court considers acceptance in the scientific community as of the time of review - not whether the evidence would have been accepted by the scientific community in the dark ages (or whenever the trial court originally ruled).

This Court should now disapprove allowing Walsh's opinion that DNA testing of the semen sample and Bolin's blood showed "a match". All of the scientific authority presented to the court by counsel, Walsh's supervisor, and even the prosecutor indicated that this terminology was improper by current standards in the field for DNA

testing when one band was missing. The jury may well have given great weight to this seemingly authoritative opinion in their verdict. Consequently, this Court should vacate Appellant's conviction and sentence and order a new trial.

ISSUE IV

APPELLANT MAY BE ENTITLED TO A NEW TRIAL BECAUSE THERE IS NO RECORD THAT THE PROSPECTIVE JURORS WERE SWORN FOR VOIR DIRE.

There is no indication in the record that the prospective jurors were sworn prior to their questioning on voir dire (X, T3-9).

Florida Rule of Criminal Procedure 3.300 requires that the prospective jurors must be sworn prior to their examination on voir dire. Rule 3.300 provides, in pertinent part:

> (a) Oath. The prospective jurors shall be sworn collectively or individually, as the court may decide. The form of oath shall be as follows:
>
> "Do your [sic] solemnly swear (or affirm) that you will answer truthfully all questions asked of you as prospective jurors, so help you God?"
>
> * * * *
>
> (b) Examination. The court may then examine each prospective juror individually or may examine the prospective jurors collectively. Counsel for both the state and defendant shall have the right to examine jurors orally on their voir dire.... The right of the parties to conduct an examination of each juror orally shall be preserved.
>
> (c) Prospective Jurors Excused.

> If, after the examination of any prospective juror, the court is of the opinion that the juror is not qualified to serve as a trial juror, the court shall excuse the juror from the trial of the cause. If, however, the court does not excuse the juror, either party may then challenge the juror, as provided by law or by these rules.

Both the federal and state constitutions guarantee the right of the accused to trial by an impartial jury. U.S. Const. amends. VI and XIV; Art. I, § 16(a) and 22, Fla. Const. Rule 3.300 protects the right of the accused to trial by an impartial jury by providing a mechanism for determining which prospective jurors may be disqualified or biased and for removing such prospective jurors. It is necessary to swear the prospective jurors for voir dire to impress upon them their duty to provide truthful answers so that the court and counsel may make reasoned decisions regarding their qualifications, possible biases, and whether they should be excused. Failure to swear the prospective jurors creates an unacceptable risk that unqualified or biased jurors will not be honest in their responses so that the court and counsel cannot properly evaluate their ability to serve as impartial jurors. This, in turn, may cause the unknowing

and unintentional violation of the defendant's right to an impartial jury.

The standard of review for a question of fact is whether the court's ruling is supported by competent substantial evidence. State v. Glatzmayer, 789 So. 2d 297, 301 n.7 (Fla. 2001); Butler v. State, 706 So. 2d 100, 101 (Fla. 1st DCA 1998). The standard of review for a question of law is de novo. Glatzmayer, at 301 n.7; Butler, at 101.

In this case the trial court did not make any ruling regarding the swearing of the prospective jurors. However, the absence of any record of the prospective jurors being sworn means that there is no competent substantial evidence in the record to establish that they were sworn. This Court must determine the legal consequences of the absence of any record that the prospective jurors were sworn for voir dire. This is a question of law subject to de novo review.

In Fernandez v. State, 758 So. 2d 1199 (Fla. 4th DCA 2000), the court considered an appeal from the trial judge's summary denial of a Rule 3.850 motion for post-conviction relief. One of the grounds asserted by the

defendant for relief was ineffective assistance of trial counsel based upon his failure to object when the trial judge did not place the prospective jurors under oath prior to commencing voir dire. The Fourth District held that this ground "may be legally sufficient" and remanded the case for further proceedings.

Subsequently, the trial judge again summarily denied the claim and attached portions of the record. In Fernandez v. State, 814 So. 2d 459 (Fla. 4th DCA 2001), the court again reversed because the attached record showed only that another judge placed the venire under oath before the prospective jurors were brought into the courtroom for voir dire. The Fernandez court wrote:

> Those pages are entirely inconclusive on the question of whether the prospective jurors ever were sworn, and, as we previously noted, that ground may be legally sufficient.

814 So. 2d at 460.

Among the authorities cited in Fernandez was Ex parte Hamlett, 815 So. 2d 499 (Ala. 2000). There, the defendant petitioned for post-conviction relief from a conviction of trafficking in cannabis on the grounds that the venire was not properly sworn before the voir

dire examination began as required by an Alabama rule of criminal procedure. On certiorari review, the Alabama Supreme Court held that a statement in the trial transcript that the jury venire was 'asked the qualifying questions' was an insufficient basis upon which to deny relief. A remand for the trial court to determine whether the venire was properly sworn was ordered.

Other Alabama cases where failure to swear properly the prospective jurors before voir dire has been recognized as a ground for a new trial include Holland v. State, 668 So. 2d 107 (Ala. Cr. App. 1995) (where record is silent as to whether prospective jurors had been sworn before voir dire, remand for evidentiary hearing is required. If oath was not administered, conviction must be vacated.) and Fortner v. State, 825 So. 2d 876 (Ala. Cr. App. 2001), cert. den., (Ala. 2002) (failure to swear venire is reversible error, but not jurisdictional).

Appellant recognizes that other Florida District Courts of Appeal have not treated this issue favorably. In Lott v. State, 826 So. 2d 457 (Fla. 1st DCA 2002), the First District approved the summary denial of a

motion for post-conviction relief which alleged that the preliminary oath had not been given to prospective jurors in the courtroom by the trial judge. The Lott court stated that it was permissible to swear the venire in a jury assembly room before the jurors are assigned to individual cases. Because the defendant had not alleged that his jurors had not been sworn before reporting to the courtroom, he failed to state a facially sufficient claim of ineffective assistance of counsel.

The Lott decision further held the claim insufficient because the defendant did not allege that he was prejudiced by a failure to swear the venire. The court did recognize that the Fourth District's opinion in Fernandez, supra did not require an allegation of prejudice in order to trigger an evidentiary hearing. Rather than certify conflict with Fernandez, the Lott court speculated that prejudice might have been alleged in the motion but not discussed in the opinion.

Florida District Courts of Appeal have also not granted any relief on this issue on direct appeal. Most recently, the Second District in Pena v. State, 27 Fla. L. Weekly D1542 (Fla. 2d DCA July 3, 2002), declined to

decide whether it would be fundamental error to conduct a trial where the venire had not been sworn prior to voir dire. The court observed that the record did not show whether the venire had received the oath required by Fla. R. Crim. P. 3.300(a). However, the defendant's counsel did not ask the judge to confirm that the prospective jurors had already been sworn. Nor did the defendant allege in a post-trial motion that the venire was unsworn. The Pena court held that the record was insufficient to show fundamental error.

In Martin v. State, 816 So. 2d 187 (Fla. 5th DCA 2002), the court held that any error in failing to swear the venire prior to voir dire was unpreserved where counsel did not object at trial. Furthermore, the Martin court classified this as a jury selection issue which is waived after acceptance of the jury without reservation of an earlier objection.

When the defendant argued this issue in Gonsalves v. State, 26 Fla. L. Weekly D2530 (Fla. 2d DCA October 19, 2001), the State supplemented the record to show compliance with Fla. R. Crim. P. 3.300(a). The Gonsalves court noted "difficult problems" where the record does

not show that prospective jurors were sworn prior to voir dire. The court wrote:

> we encourage trial judges to include on the record either the swearing of the prospective jurors or to recite that the prospective jurors were properly sworn prior to questioning.

Turning to the case at bar, this Court should not duck the issue by simply finding the issue unpreserved or the record insufficient to prove fundamental error. Perhaps the record can be supplemented to show that the oath was actually given to the prospective jurors before they appeared in the courtroom for jury selection in Bolin's trial. Otherwise, this Court should remand this case for an evidentiary hearing in the trial court. It will certainly be easier to develop an adequate record now to determine whether Rule 3.300(a) was satisfied or not than it would be to reconstruct the record years later in a postconviction proceeding.

ISSUE V

THE TRIAL COURT ERRED BY ACCEPTING APPELLANT'S WAIVER OF A PENALTY PHASE JURY RECOMMENDATION AS TO SENTENCE WITHOUT A SUFFICIENT INQUIRY INTO WHETHER APPELLANT UNDERSTOOD ALL OF THE RIGHTS THAT HE WAS RELINQUISHING.

At the outset, Appellant recognizes that this Court held in Griffin v. State, 820 So. 2d 906 (2002) that when a capital defendant waives a penalty jury, he cannot attack the voluntariness of the waiver on direct appeal unless he first challenges the waiver in the trial court. At bar, Bolin did not move to withdraw his waiver of the jury's penalty recommendation or otherwise challenge the voluntariness of his waiver in the trial court. If this Court adheres to Griffin, he is precluded from raising this issue except through collateral attack.

However, this Court should recognize that the opinion in Griffin is totally opposed to what this Court earlier held in Koenig v. State, 597 So. 2d 256 (Fla. 1992). There the State's argument that a capital defendant must move to withdraw his plea in the trial court

in order to make voluntariness reviewable on direct appeal was rejected. The Koenig court wrote:

> This Court is required to review the judgment of conviction in death penalty cases. §921.141(4), Fla. Stat. (1989). In order to review the judgment of conviction in this case, we must review the propriety of Koenig's plea, since it is the plea which formed the basis for his conviction.

597 So. 2d at 257, n.2. This Court went on to vacate Koenig's plea because the "superficial" plea colloquy was insufficient to show that the plea was voluntary and intelligent.

This Court's automatic review encompasses both the judgment and sentence in cases where a sentence of death is imposed. §921.141(4), Fla. Stat. (1991). Since a jury recommendation of penalty is an essential stage of the process before a death sentence may be imposed, it follows that this Court should review the propriety of a defendant's waiver of a penalty trial by jury in the same way that the Koenig court reviewed the defendant's waiver of a guilt or innocence trial[5].

[5]Notably, this Court's opinion in Griffin does not distinguish Koenig, in fact it never considers Koenig.

If this Court does agree to review Bolin's waiver of a penalty recommendation by the jury, it is clear that the colloquy between Bolin and the trial judge was insufficient to establish a voluntary waiver. The record of the colloquy shows that Bolin was asked the conclusory questions:

> THE COURT: Are you making this waiver of your own free will, understanding your rights?
>
> THE DEFENDANT: Yes.
>
> THE COURT: Okay. You consider yourself making an intelligent waiver?
>
> THE DEFENDANT: I'm not under any influence or anything.
>
> THE COURT: Well, no, because I've seen you participating right along. You seem to be very articulate, very intelligent. You seem to understand all these proceedings, from my observations.
>
> Is there anything you don't understand, you need your attorneys to clarify at this juncture?
>
> THE DEFENDANT: No.
>
> THE COURT: You understand everything; is that correct?
>
> THE DEFENDANT: (Indicating).
>
> THE COURT: Okay. Counsel, can you assure the Court your client is fully

> aware of his rights and [is] making a knowing and intelligent waiver?
>
> MR. SWISHER: Yes, sir.

(XX, T1686-7).

The problem with this colloquy is that the Court never advised Appellant of the protections inherent in a jury penalty recommendation before accepting his waiver. Chief among these is the jury's role as co-sentencer whose penalty recommendation must be given great weight and that a life recommendation cannot be overridden by the judge unless no reasonable person would agree. Tedder v. State, 322 So. 2d 908 (Fla. 1975). Asking the defendant whether he "understand[s] everything" and his counsel whether "your client is fully aware of his rights" cannot substitute for an on-the-record advisement of the rights being relinquished by waiving a penalty phase jury.

Accordingly, this Court should vacate Bolin's death sentence and remand this case for resentencing.

CONCLUSION

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

As to Issues I, II and III - reversal of conviction and remand for a new trial.

As to Issue IV - remand to the circuit court for an evidentiary hearing to determine whether the jury was properly sworn.

As to Issue V - remand to the circuit court with instructions that Bolin be allowed to withdraw his waiver of a penalty jury recommendation if he chooses to do so.

APPENDIX

PAGE NO.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Richard E. Doran, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4739, on this _____ day of November, 2002.

CERTIFICATION OF FONT SIZE

I hereby certify that this document was generated by computer using Wordperfect 5.1 format with Courier 12 Point Font. The Office of the Public Defender, Tenth Judicial Circuit, is currently in the process of converting from Wordperfect 5.1 format to Microsoft Word format in order to comply with Rule 9.210(a)(2), since Courier New 12 Point Font is not available in Wordperfect 5.1. As soon as this upgrade is completed, Courier New 12 Point Font will be the standard font size used in all documents submitted by undersigned. This document substantially complies with the technical requirements of Rule 9.210(a)(2) and complies with the intent of said rule.

Respectfully submitted,

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