IN THE SUPREME COURT OF FLORIDA

OSCAR RAY BOLIN,

Appellant, Case No. SC08-1963

vs.

STATE OF FLORIDA,

Appellee.

___________________________/

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

# INITIAL BRIEF OF APPELLANT

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## PRELIMINARY STATEMENT

This appeal arises from the denial of the Appellant, Oscar Ray Bolin's Motion for Post-Conviction Relief pursuant to Fla. R. Crim. P. 3.851 by the trial court after an evidentiary hearing. The record on appeal consists of four volumes and one supplement. The volumes are sequentially numbered and will be referred to in the Initial Brief by the volume number followed by the page number. The Appellant will be referred to by his proper name and the prosecuting authority, the State of Florida, as the State.

## STATEMENT OF THE CASE AND FACTS

On February 19, 1991, a grand jury for the Sixth Judicial Circuit, in and for Pasco County, Florida, returned an indictment against the Appellant, Oscar Ray Bolin, for the first-degree murder of Terri Lynn Matthews on December 5, 1986.(I,1-2)

Mr. Bolin was convicted as charged, however this Court reversed the first conviction in 1995. See, Bolin v. State, 650 So.2d 19 (Fla. 1995) Mr. Bolin was retried and again convicted as charged. This Court again reversed in Bolin v. State, 736 So.2d 1160 (Fla. 1999). Mr. Bolin was

tried and convicted as charged a third time. This Court affirmed the conviction in Bolin v. State, 869 So.2d 1196 (Fla. 2004). The mandate issued on April 1, 2004. (I,68) Errors which occurred during the third trial are the subject of this appeal.

Mr. Bolin filed his Motion for Post Conviction Relief pursuant to Fla. R. Crim. P. 3.851 on January 9, 2006. (Supplemental Record, 498-543). Mr. Bolin raised six grounds for relief: (I) Trial counsel was ineffective for failing to object to the testimony of Danny Ferns regarding his testimony that he saw blood on the ground; (II) Trial counsel was ineffective in failing to call a witness, Ray Bolin,Sr., who could have rebutted the testimony of Danny Ferns regarding the identification of the substance as blood; (III) Trial counsel was ineffective in failing to impeach witness Michelle Steen through cross examination and by calling Phyllis Bolin to testify as to the bias, prejudice and dislike that Ms. Steen had for Mr. Bolin; (IV) Trial counsel was ineffective for failing to call a witness who would have testified that Michelle Steen had admitted to giving false testimony at trial; (V) Mr. Bolin's waiver of his right to testify was involuntary due to misadvice of counsel; and (VI) the aforementioned errors

resulted in cumulative error.

The State's Response to the Motion for Post Conviction Relief was filed on February 6, 2006.(I,116-123) The State agreed an evidentiary hearing was needed on claims II-VI, but objected to a hearing on Claim I.(I,116-123)

The trial court conducted an evidentiary hearing beginning on November 16, 2006, before the Honorable Stanley Mills, circuit judge. The following summarizes the testimony presented at the evidentiary hearing:

Rosalee Bolin testified that she has been married to Mr. Bolin for ten years.(III,235) Mrs. Bolin has worked as a private investigator for fifteen years.(III,235) Mrs. Bolin first met Mr. Bolin through her employment with the Hillsborough Public Defender's Office where she served as the project manager for alternate sentencing and mitigation.(III,247) Mrs. Bolin as asked to work on Mr. Bolin's Hillsborough county cases.(III,247) Mrs. Bolin has testified in previous trials involving Mr. Bolin as a penalty phase witness.(III,248)

Mrs. Bolin first became involved in this case in 1995 when she was hired by Paul Firmani and Dean Livermore in preparation for the 1996 retrial.(III,236) Mrs. Bolin did not work as an investigator in the first trial.(III,237)

Mrs. Bolin became aware of a witness named Michelle Steen in this case when she was reviewing some police reports that contained a statement from Steen.(III,238) Mrs. Bolin was aware from other sources that Steen was the wife of a co-defendant of Mr. Bolin in a criminal case in Ohio.(III,238) Mrs. Bolin learned that Steen was a witness in this case.(III,239)

Sometime in 1996 Mrs. Bolin, with the permission of the trial attorneys, contacted Ms. Steen to determine if she had, in fact, given a statement to law enforcement that Mr. Bolin had essentially confessed to the crime in this case.(III,240)

Mrs. Bolin testified that when she contacted Steen in 1996 Steen was shocked to learn that she was a potential witness.(III,240) Steen claimed to Mrs. Bolin that she had not been contacted by anyone and had not even known that a police report had been generated from her statement.(III,240) Steen told Mrs. Bolin that she remembered giving a statement to law enforcement but couldn't remember the exact content.(III,240) Steen said that at the time the police were very confrontational with her and that she did not want to speak to them. (III,241) Mrs. Bolin read Steen the statement contained in the police

report and Steen denied ever making that statement.(III,240) Steen said the police report was a lie.(III,241) Steen told Mrs. Bolin that Mr. Bolin had never confessed to her.(III,241-42)

Steen then appeared as a state witness in the second trial in 1996.(III,243) Mrs. Bolin was present in the courtroom during Steen’s testimony.(III,268) Steen testified that she had been talking with Mr. Bolin and he stated he killed a girl in Florida and put a hose down her throat.(III,369) This testimony was consistent with the statement that she had given to law enforcement. (III,239) Mrs. Bolin recalled that another investigator with the public defender’s, George Fought, was called as a witness by the defense in 1996 and testified that Steen told him over the phone that Mr. Bolin had never made any statements to her.(III,270) Mrs. Bolin did not testify to impeach Steen in 1996.(III,271)

After Mr. Bolin was convicted, Mrs. Bolin called Steen on the telephone to ask her why she had testified in that manner.(III,243) Steen told Mrs. Bolin that law enforcement had forced her to come to Florida and to testify according to the police report by threatening to take her children if she refused.(III,243) Steen said she

was sorry, but that she was scared and intimidated.(III,243) Steen was sobbing during the phone call.(III,243)

After the 1996 conviction was reversed, Mr. Bolin was again tried. John Swisher [lead counsel] and Sam Williams [penalty phase counsel] were Mr. Bolin's counsel.(III,244) Mrs. Bolin was hired by Mr. Swisher to serve as the investigator in the case.(III,244) Mrs. Bolin worked with Mr. Swisher to prepare the case for trial.(III,244) Mrs. Bolin told Mr. Swisher about her prior contacts and conversations with Michelle Steen.(III,245) She also told Mr. Swisher about George Fought's conversations with Steen.(III,271;273) Mrs. Bolin would have been available to testify as a witness at trial in 2001.(III,245) Mrs. Bolin was not called as a witness.(III,274) She asked Mr. Swisher why she was not used, but did not get a reason.(III,274)

Attorney John Swisher testified that he was in private practice in 2001 and was appointed to represent Mr. Bolin.(III,284) Sam Williams served as co-counsel.(III,285) Mr. Swisher was aware that there were two prior trials in this case and had read the transcripts of those

proceedings.(III,285;320) Mr. Swisher also read the prior opinions from the Florida Supreme Court in this case.(III,321)

Mr. Swisher hired Mrs. Bolin to serve as the investigator on the case.(III,297) Mr. Bolin made the choice to have her, but Mr. Swisher wanted her as well.(III,297) Nothing passed by Mr. Bolin without going through Mrs. Bolin and vice versa.(III,298) Mrs. Bolin was used for contact with Mr. Bolin's family members and client control.(III,298) Some other people also worked on the case, such as Susan Pullar.(III,298) Mr. Swisher was responsible as lead counsel for ensuring that the necessary investigative work was done in the case.(III,299)

Mr. Swisher recalled that one state witness in 2001 was Danny Ferns.(III,285) Mr. Ferns was a childhood friend of Phillip Bolin.(III,286;323) Mr. Swisher recalled that Ferns testified to seeing some blood outside the trailer a few days after the crime.(III,286;323) Mr. Swisher recalled that Mr. Ferns came forward after the fact, but he couldn't recall how long a period of time elapsed.(III,286) Fern's testimony was significant because it confirmed the presence of blood on the grass and corroborated the testimony of Phillip Bolin.(III,285)

Phillip Bolin was Mr. Bolin's half brother.(III,286) Phillip had given several conflicting statements about what he observed.(III,286) At one point, Phillip had recanted what he claimed to have seen.(III,287) As part of Phillip's testimony, Phillip claimed to have seen Mr. Bolin using a hose to wash off a body.(III,323) Mr. Swisher believed that this testimony was inconsistent with Danny Fern's claim to have seen blood on the ground because using the water would have washed away any blood on the ground.(III,323) Mr. Swisher made this argument to the jury.(III,324)

Mr. Swisher was familiar with serology and the testimony of both serologists and crime scene technicians.(III,288) Mr. Swisher acknowledged that often presumptive testing is carried out on substances at a crime scene.(III,T290) Samples are analyzed in a lab to determine what they are and if blood, whether it is animal or human, and what blood type is present.(III,291) In those instances, the experts will usually refer to a substance as "apparent" blood, but not actually blood because the substance has not been tested.(III,289)

Mr. Swisher believed that a lay person could offer their opinion that a substance was blood under the evidence

code.(III,292) Mr. Swisher acknowledged that there is a difference between a witness saying something is blood versus saying that something appears to be blood.(III,292)

Mr. Swisher agreed that in this case it was important to minimize the impact of Phillip Bolin's testimony that there was blood at a crime scene.(III,293) It would be appropriate to object to a witness rendering an opinion that it is blood.(III,294) Mr. Swisher did not object to Fern's rendering of his opinion that what he saw was blood.(III,294) Mr. Swisher agreed that a boy of thirteen would not have a very good background in identifying a soil stain or something on grass as blood.(III,295) Mr. Swisher could not state that he had a tactical reason for failing to object to Fern's testimony, but that he tried to attack his testimony in other ways.(III,295) Mr. Swisher then stated that if he followed up with Ferns with other questions he would have had a tactical reason to not object.(III,296) Mr. Swisher could not remember if he did, in fact, follow up to discredit Fern's testimony in other ways.(III,296)

Mr. Swisher testified that Ray Bolin, Sr., is Mr. Bolin's father.(III,296) Mr. Swisher talked to Ray Bolin

during the period of time he represented Mr. Bolin, but did not recall if he talked to him about Danny Fern's testimony.(III,297)

Mr. Swisher recalled that part of the defense was that hoses were on the property.(III,300) He could not recall if he had talked to Bolin, Sr., who would have told him that when he left to go on the road with the carnival any water hoses would have been taken along.(III,300) Mr. Swisher knew that Bolin, Sr. was out-of-state at the time of the homicide on the carnival circuit.(III,325) Mr. Swisher believed that the issues of whether or not the water hoses were taken became a joke during the trial based on the jury's laughter during the State's closing argument.(III,300) Mr. Swisher thought it was probably a mistake to use Bolin, Sr. for the hose testimony.(III,300)

Mr. Swisher was aware that prior to leaving on the carnival circuit, Bolin, Sr., had used red paint to touch up some items in the area outside the trailer.(III,301) Mr. Swisher believed the painting occurred several days or weeks prior to the homicide.(III,301) During cross an excerpt from Bolin, Sr.'s 1996 trial testimony was read and Bolin Sr. testified he left the Tampa area in November.(III,325) Mr. Swisher considered using Bolin,

Sr., to testify, but was told by both Mr. Bolin and Rosalee Bolin that Bolin, Sr. and his wife, Trudy, would not be good witnesses.(III,301) Mr. Swisher could not recall specifically talking to Bolin, Sr. about the paint issue or making an attempt to determine his credibility on that point despite Bolin, Sr. being present in Florida during the trial.(III,303)

Mr. Swisher had paid to have Bolin, Sr., brought to Florida at the time of trial.(III,299) He talked to both Bolin, Sr. and Trudy Bolin prior to penalty phase and determined that they would not be good direct witnesses.(III,301) They were not the brightest people in the world.(III,301) Mr. Swisher thought it was a disaster to try to prove a case using mom, dad, and the wife as witnesses.(III,302)

Mr. Swisher believed that Michelle Steen was a lady that was indirectly related to Mr. Bolin and was the wife of his co-defendant on some Ohio charges.(III,303) She purportedly had some conversation with Mr. Bolin about killing a lady in Florida and Mr. Bolin saying he stuck a hose down her throat.(III,303) Mr. Swisher recalled that Steen claimed to have thought that Mr. Bolin was joking and didn't believe him.(III,303) Mr. Swisher couldn't recall

whether or not Steen testified that the hose was turned on.(III,305) Mr. Swisher thought that Steen came and testified as a witness in the trial to that conversation.(III,303)

Mr. Swisher admitted that Steen's mention of the hose was inconsistent with the physical evidence, but was consistent with the testimony of Danny Ferns and Phillip Bolin.(III,304) Mr. Swisher did not think that Steen's testimony was tactically detrimental to Mr. Bolin at trial.(III,304) Mr. Swisher testified that whether or not his decision was right or wrong, it was tactical decision to "let them go to this hose thing to a certain extent because it wasn't consistent with the medical examiner."(III,304) The medical examiner said there was no hose down the victim's throat, so Mr. Swisher believed if he could show there was not hose, then "you don't believe Phillip Bolin, you don't believe Danny Ferns, and you don't believe Michelle Steen." (III,305) Mr. Swisher did not believe Steen was damaging and believed the jury would disregard her testimony that Mr. Bolin had confessed to a murder to her because Steen thought Mr. Bolin was joking.(III,308) Steen was not damaging in Mr. Swisher's

opinion because she couldn't say when it happened, who the victim was, or when Mr. Bolin had made the statement.(III,308)

Mr. Swisher could not remember if Phyllis Bolin was Michelle Steen's mother-in-law.(III,306) Mr. Swisher was aware prior to trial that there were witnesses who would testify that Steen admitted to having lied in her trial testimony, namely Rosalee Bolin.(III,306-07) Rosalee Bolin's relationship with Mr. Bolin affected his decision to not use her as a witness. (III,312) Mr. Swisher sent Mr. Bolin that discussed using Mrs. Bolin as a witness.(III,338) An agreement to not use Rosalee was reached because of her experiences when testifying in the prior trials.(III,338) The letter acknowledged that Mr. Bolin might not agree, but Mr. Swisher believed as the trial began, Mr. Bolin was in agreement with the decision.(III,338-39;IV,492) Mr. Swisher felt that Mrs. Bolin's presence as a witness would be a large distraction and the case would be compromised if she testified or was present in the courtroom.(III,353) She generated a great deal of publicity due to the personal relationship with Mr. Bolin.(III,350-51) Mrs. Bolin's role in the case as an investigator was not compromised.(III,353)

Mr. Swisher did not hire a different investigator to talk to Steen because he didn't think Steen was damaging.(III,312) Mr. Swisher also did not get a different investigator because Mr. Bolin and Rosalee Bolin did not suggest that he do so.(III,313) Mr. Swisher acknowledged that Mrs. Bolin worked very hard on the case.(III,353) He has used Mrs. Bolin as his investigator in other cases, even after this trial.(III,352)

Mr. Swisher did not recall a second witness from the 1996 trial named Mr. Fought from the public defender's office that could also impeach Steen, despite claiming to have read and briefed the transcripts from the trial that contained Mr. Fought's testimony.(III,307;333) Mr. Swisher agreed that if Steen admitted on the stand that she had lied, that confronting her with the prior inconsistent statements would be important and would also be important if impeachment of Steen was going to be done through other witnesses.(III,306) Mr. Swisher's theory of defense was that there was no hose, despite Steen and Phillip Bolin, because there was no medical evidence a hose went down the victim's throat.(III,309) Mr. Swisher noted that "Obviously it didn't work, but that was a tactical idea I

made."(III,309) Mr. Swisher also observed that a lawyer would not necessarily want to do things again that had been done in prior trials that were not successful.(III,334)

Mr. Swisher acknowledged that in certain decisions made during the trial the defendant is the "captain of the ship."(III,313) One of those decisions is whether or not to testify.(III,313) Mr. Swisher could not identify any other areas where the client decision controls.(III,313) Mr. Swisher believed that the attorney's role in making strategic or tactical decisions was to make a recommendation and then the lawyer has the final call.(III,314)

Mr. Swisher discussed the right to testify with Mr. Bolin.(III,314) There were several discussions leading up to the trial.(III,336) He didn't recall how many meeting there were prior to trial.(III,336) Mr. Swisher recalled talking with Mr. Bolin during the trial.(III,335) Mr. Swisher, Mr. Williams, and Mr. Bolin were present.(III,335) Mr. Bolin told him he wasn't going to testify.(III,315) Mr. Swisher believed he talked with Mr. Bolin about the pluses and minuses of testifying, but he couldn't recall what those were at the evidentiary hearing.(III,315) The discussion was not very lengthy because Mr. Bolin already

had his mind made up that he wouldn't testify.(III,316)

Mr. Swisher knew that Mr. Bolin didn't have any prior testimony to be used as impeachment, but was aware that he had convictions from Ohio.(III,315) Mr. Bolin could be asked if he had ever been convicted of a crime and how many times.(III,316)

Mr. Swisher didn't recall having any discussions with Mr. Bolin about Williams rule evidence being admitted.(III,316) Whether or not Mr. Bolin testified would not affect anything to do with Williams rule evidence.(III,316) Mr. Swisher identified the procedure the State has to use regarding notification if it intends to present Williams rule evidence, but did not know if notice was required if the Williams rule evidence was offered as rebuttal evidence.(III,317) Mr. Swisher did not recall talking with Mr. Bolin about whether or not the prior Florida homicide convictions could be used as Williams rule evidence- he did not think they could be used as prior record because the convictions had been set aside at the time of trial.(III,318) Mr. Swisher was pretty sure that the state attorney, Mr. Halkitis, had told him that they were not going to use the Florida cases in the case in chief because he did not want the case to get reversed

again.(III,321) The reversal in 1991 was due to the improper use of Williams rule testimony from the Florida cases.(III,321) Mr. Swisher didn't think there was any issue about them coming up as rebuttal evidence.(III,319)

The court recessed without concluding the proceedings because two defense witnesses were not available. Further, Mr. Bolin, who intended to testify, was not feeling well and asked to postpone his testimony.(III,356-358)

The following testimony was presented on December 22, 2006:

At the onset of the hearing, defense counsel advised the court that he believed that Mr. Bolin had made the decision that he would not testify at the proceedings.(IV,402) Mr. Bolin was placed under oath by the trial court.(IV,434) Mr. Bolin acknowledged that at the November 2006 hearing, there were some discussions that indicated that he would testify.(IV,435) Since that date, Mr. Bolin had spoken about testifying with counsel.(IV,435) Mr. Bolin stated that he did not want to testify.(IV,435) It was his free and voluntary decision to not testify and he further stated he wished to waive his presence.(IV,435) Mr. Bolin told the court that he did not believe that post-conviction counsel had pushed him in any direction about

testifying or not testifying.(IV,439)

Oscar Ray Bolin, Sr., testified that in 1986 he was living in Florida off Valencia drive.(IV,408) Mr. Bolin is his son.(IV,409) In 1986 Bolin Sr. worked in the carnival business with his wife, Trudy Bolin.(IV,412) He would often be on the road on the carnival circuit.(IV,409) Generally, he would leave Florida in March and return in November.(IV,409) During November and December he would often do a carnival circuit in Florida.(IV,410) Bolin, Sr. thought he and Trudy left before Thanksgiving in 1986.(IV,414) They left Phillip Bolin with neighbors, the Kinards.(IV,414)

In early November or early December 1986, Bolin, Sr. was fixing up some of the carnival equipment.(IV,410) He remembered doing some painting on the ground in an area near a mobile home on the Valencia property.(IV,410) A mobile home and a camper/trailer were on the property in 1996.(IV,413) Spray paint would often get into the grass.(IV,411) Bolin, Sr. often used red spray paint, as well as other colors.(IV,412;417)

In 1986 Bolin Sr. had five or six water hoses on the Valencia property.(IV,411;424) When he would leave on the circuit, the hoses were taken with him because they were

used to obtain water.(IV,411) The hoses were field type-not ordinary garden hoses.(IV,411) In early December 1986 there would not have been any hoses on the property if he was on the road.(IV,411)

Mr. Bolin, Sr. couldn't remember if he testified in 1999.(IV,419) He did recall having conversations with Rosalee Bolin, when she was an working as an investigator before she married Mr. Bolin and after they married.(IV,419) He might have sent her $1,000.00.(IV,419)

Bolin, Sr. remembered talking to Rosalee Bolin about Phillip Bolin, who is also his son.(IV,420) Bolin Sr. actually drove from Kentucky with Phillip for the trial in 1996.(IV,421) He was so angry with Phillip after he testified at trial that he threw his luggage out of the car and drove back to Kentucky without him.(IV,421)

Bolin, Sr. talked with police in 1990 and told them he didn't know where Phillip Bolin was.(IV,422) He couldn't recall whether or not he told the police that Mr. Bolin always carried a knife.(IV,422)

Defense counsel advised the court that he was having difficulty getting Phyllis Bolin to cooperate.(IV,441) Mr. Bolin did not wish to have counsel submit a proffer of Phyllis Bolin's testimony, so the court agreed to continue

the proceedings to procure that testimony.(IV,447) On August 13, 2007, counsel advised the court that Phyllis Bolin was continuing to be uncooperative and that she would no longer be called as a witness.(IV,459;461) Counsel advised the court that Phyllis Bolin, if called, would either claim she did not remember or would recant her previous statements to the defense.(IV,459) Mr. Bolin had been advised of the situation.(IV,461) Mr. Bolin signed a written waiver acknowledging that the failure to call Phyllis Bolin would result in a waiver of that issue.(II,131-32)

Subsequent to the November 2006 and December 2006 portion of the evidentiary hearing, the State filed a Motion to Strike Witnesses, which was heard on July 20, 2007.(III,381) The State asked that witnesses Fred Whitehurst and Stuart James be stricken. Both, according to defense counsel, were expert witnesses who would address issues related to the identification of blood by Danny Ferns.(III,385-86) The trail court granted the motion after advising the parties that he was not intending to treat Danny Fern's opinion as an expert opinion that what he observed was blood.(III,389-391)

The court held a final hearing on the case on November

26, 2008.(III,364) Counsel advised the court that the issue relating to trial counsel failing to call a witness to impeach Michelle Steen (Claim 3) would not pursue that claim because the witness, Phyllis Bolin, would not cooperate.(III,364) Mr. Bolin agreed to waive that issue.(III,364) Counsel further acknowledged that based on Mr. Swisher's testimony that his decision to forgo calling Rosalee Bolin to impeach Michelle Steen was tactical, the burden had not been met.(III,365-366) Counsel then argued why relief should be granted on Claims I and II.

The trial court entered a written order denying the Motion for Post Conviction Relief on September 17, 2008.(II,133-142)

A timely Notice of Appeal was filed on October 8, 2008.(II,218)

## SUMMARY OF THE ARGUMENT

ISSUE I: The trial court erred in finding that trial counsel did not err when he failed to challenge the opinion testimony on the identification of blood from state witness Danny Ferns. The trial court incorrectly determined that Ferns testimony that the substance he observed in a grassy area that was shown to him by Phillip Bolin was, in fact, blood and that he had no doubt the substance was blood.

Ferns was not an expert and had no qualifications which rendered him competent to offer an expert opinion. His testimony as a lay witness exceeded the permissible scope permitted under the evidence code. Contrary to the ruling of the trial court, Ferns' testimony was especially harmful in this case because it corroborated the testimony of the State's key witness, Phillip Bolin. The credibility of Phillip Bolin was hotly contested in light of his numerous inconsistent statements and his previous recantation of his statements and testimony that implicated Mr. Bolin in the crime.

ISSUE II: The trial court erred in finding that defense counsel was not ineffective when counsel failed to call a defense witness, Oscar Ray Bolin, Sr., who would have discredited and contradicted the testimony of Danny Ferns and Phillip Bolin as to the presence of blood on the ground. Bolin Sr. would have testified that within two weeks of the crime he had applied red spray paint to various items used in his carnival business in that same area, thus providing a reasonable explanation for the presence of a red substance that would not have been washed away by water.

## ARGUMENT

## ISSUE I

THE TRIAL COURT ERRED IN DENYING RELIEF ON CLAIM I WHERE COUNSEL WAS INEFFECTIVIE FOR FAILING TO OBJECT TO THE LAY OPINON TESTIMONY OF STATE WITNESS DANNY FERNS THAT HE ABSOLUTELY OBSERVED BLOOD ON THE GRASS AT THE APPELLANT'S HOME ON THE DAY AFTER THE CRIME WHERE FERNS WAS NOT QUALIFIED TO TESTIFY AS TO THE IDENTIFICATION OF BLOOD AND THE TESTIMONY CORROBORATED THAT OF THE STATE'S KEY WITNESS WHO'S CREDIBILITY WAS VITAL TO THE STATE'S CASE.

In 1986 Terri Lynn Matthews was found dead in Pasco County, Florida. She had been stabbed and bludgeoned to death. When discovered, the body was wet. Six years elapsed before Mr. Bolin was indicted for the murder.(I,1-2) Mr. Bolin was tried in 2001 for the homicide. During the case-in-chief the State called Danny Ferns as a witness.(I,21) Mr. Ferns testified as summarized below:

In 1986 Danny Ferns was Phillip Bolin's best friend.(I,23) Both boys attended Sanders Elementary School together and rode the same school bus.(I,23) Ferns was thirteen.(I,37)

Ferns testified that in early December 1986, Phillip Bolin came to the bus stop in the morning and appeared to be very upset- he was shaking and crying.(I,24) Ferns spoke with Phillip Bolin and agreed to accompany him back

to Phillip’s home on Valencia Drive.(I,24) Ferns testified he went with Phillip to be supportive and because he was curious to find out about what Phillip told him.(I,24)

Ferns and Bolin arrived at the property, which had several camper trailers and a mobile home located near each other.(I,26) Ferns looked on the ground where Phillip had directed him to and saw “A lot of blood and stuff on the grass. And the grass was kind of—I don’t know.”(I,26) Ferns testified that in 1986 he had seen blood before, knew what color blood was, and could tell “Absolutely” that what he saw on the grass was blood.(I,26) Ferns testified in response to the State’s question if he any doubt about whether or not it was blood on the grass that he had “No doubt. I knew it was.”(I,27) Ferns described the blood as being a “decent amount” and agreed on cross it could be a three to four foot circle.(I,34) Ferns described it as bright red and fresh.(I,35) Ferns also testified that he saw a water hose laying in the area.(I,36) The grass around the blood was dry- it had not rained recently.(I,36)

Ferns was really upset and felt really bad for Phillip.(I,37) Ferns later heard that a female body was found in the area.(I,38) Ferns claimed to have seen the blood before he learned of the body.(I,38)

Ferns did not contact the police because Phillip told him that Mr. Bolin would kill him or his family if he told and Ferns was scared.(I,29;33) Phillip moved from the neighborhood later that year, before school ended, and the two boys lost all contact with each other.(I,30-31) Ferns moved to Dade City a short time after Phillip moved.(I,40)

Ferns was interviewed by law enforcement in 1990. At the urging of his mother he purportedly told law enforcement that he saw blood on the ground of the Bolin property when he accompanied Phillip Bolin to the area in early December 1986. (I,30)

As this Court noted in the 2004 opinion, Danny Ferns was called as a witness to "corroborate Phillip's account of the murder, that there were blood stains on the ground at the site and that the grass in the area was disturbed." Bolin v. State, 869 So.2d 1196 (Fla. 2004). Ferns' testimony was critical to the State's case because Phillip Bolin had made numerous contradictory statements about whether or not he witnessed a crime being committed in December 1986. Phillip Bolin had recanted his account that Mr. Bolin committed a crime on at least two occasions, in addition to other inconsistencies in his numerous accounts. Thus, it was imperative on trial counsel to be able to

discredit the testimony of the one witness that most closely lent credibility to Phillip Bolin- Danny Ferns. The first opportunity that defense counsel had to challenge Ferns was to prevent him from being allowed to give improper opinion testimony on the identity of the substance he saw on the ground. Defense counsel failed to object to Ferns' improper testimony, thus rendering ineffective assistance of counsel at a critical juncture in the trial.

Claims of ineffective assistance of counsel are reviewed under the two-prong test enunciated in Strickland v. Washington, 466 U.S. 668 (1984). The first prong, deficient performance, must identify acts or omissions by the lawyer that are shown to be outside the broad range of reasonably competent performance under prevailing professional standards. The first prong is established if the defendant can prove that counsel's performance was unreasonable under the prevailing professional norms. Morris v. State, 931 So.2d 821, 828 (Fla. 2006) [quoting Strickland, 466 U.S. at 688]. The second prong requires a showing that the clear, substantial deficiency of counsel so affected the fairness and reliability of the proceeding that confidence in the outcome is undermined. The second prong is established if there is a reasonable probability

that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability has been defined as a probability sufficient to undermine confidence in the outcome. *Id.*[quoting Strickland, 466 U.S. at 694]. Because both prongs of Strickland present a mixed question of law and fact, this Court employs a mixed standard of review, deferring to the factual findings of the trial court that are supported by competent substantial evidence but reviewing the circuit court's legal conclusions de novo. See, Sochor v. State, 883 So.2d 766, 771-772 (Fla. 2004). This Court has adopted Strickland in that there is a strong presumption that trial counsel performed effectively. Strickland, 466 U.S. at 690. In this case, both prongs of Strickland have been satisfied as to Claim I.

Danny Ferns' testimony that he observed blood on the grass was clearly improper under §90.701(Fla. Stat. 2001). This section governs opinion testimony by lay witnesses. In general, lay witnesses are not permitted to give opinion testimony because such testimony usurps the function of the jury to determine the weight and credibility of such evidence. Further, before a lay person can offer opinion testimony, it must be shown that it is within the ken of an

intelligent person with a degree of experience. Floyd v. State, 569 So. 2d 1225 (Fla. 1990), *cert. denied*, 111 S.Ct. 2912, 501 U.S. 1259, 115 L.Ed.2d 1075 (1991). There is no dispute that Danny Ferns is in no way an expert, thus his testimony that he absolutely saw blood on the ground has to meet the requirements for lay witness opinion testimony. Opinion testimony by a lay witness is limited and is only permitted if two prerequisites are met. The first prerequisite has two parts: (1) the witness cannot otherwise communicate accurately and fully what he or she perceived and (2) the questioned testimony does not mislead the jury to the prejudice of the objecting party. If there is prejudice to the objecting party, §90.701(2) precludes the admission of the testimony. The second prerequisite for admission is that the opinion is not one that requires expert testimony. If the matter is one of specialized knowledge which requires an expert to draw the conclusion, §90.701(2) prohibits a lay witness from giving an opinion.

In this case neither of the prongs of the first prerequisite are met, nor is the second prerequisite. The trial court was wrong to conclude that Danny Ferns could not convey what he observed without telling the jury he was absolutely certain he what he saw was blood. Over one

hundred years ago, in Gantling v. State, 40 Fla. 237, 23 So. 857 (Fla. 1898), this Court held that while a lay witness may describe a stain and the color of a stain, he may not opine that the stain is blood. In the intervening century, this Court has not seen fit to alter this basic rule of evidence. In thousands of cases every year, crime scene technicians and other lay witnesses testify as to the color, consistency, and other physical characteristics of what they observe and believe to be blood at crime scenes but they are not permitted to say with absolute certainty that what they saw is blood.

Law enforcement officers are not permitted to testify as lay witnesses as to the identity of substances that require scientific testing. See, State v. Meador, 674 So.2d 826 (Fla. 4th DCA 1996). If a trained police officer is not qualified to identify a substance as blood, there is no reason that Mr. Ferns should not be held to the same standard. Under Gantling Mr. Ferns would have been permitted to testify as to the color, amount, and any other physical characteristics of the substance he observed on the ground, but not as to its absolute identity. There is nothing to indicate that Mr. Ferns was unable to testify about the characteristics of what he saw without

identification.

At the evidentiary hearing the State relied upon a federal case from Missouri for the proposition that lay witness opinion testimony is properly admitted in Florida courts and argued such to the trial court. (III,342-344;IV,493-497) Not only is this federal case not binding on the state courts of Florida, it has no precedential value as there is law from this Court in direct contradiction. The prosecutor did not alert the trial court to the existence of contrary precedent of this Court to the federal case he was citing.(III,342-345)

There was no testimony to establish that Danny Ferns possessed the necessary degree of experience as a thirteen year old child to offer opinion testimony under Floyd. It was not established that Ferns had knowledge within the "ken" of an intelligent person with a degree of experience in order to meet the threshold requirements for opinion testimony by a lay witness. There is nothing in the record to establish the basis for Ferns' knowledge and experience in dealing with blood stains. Even if, for some inexplicable reason, Mr. Ferns was not capable of describing what he claimed he saw on the ground without

saying it was absolutely blood, the evidence would still be subject to exclusion because Mr. Bolin was prejudiced by the admission of the testimony.

As this Court has previously noted, Danny Ferns was called to corroborate the testimony of Phillip Bolin. Phillip Bolin had given at least five prior conflicting stories/recantations. Due to the length of time between the offense and the arrest of Mr. Bolin, it was impossible for any subsequent rebuttal of Danny Fern's improper opinion testimony. There were no photographs, no serology results, not even any observations by an adult. The only evidence of what that substance was came almost fifteen years later from the childhood memory of a then-thirteen year old.

Danny Fern's opinion that what he saw was blood was inadmissible because it also failed to satisfy the second prong for admissibility under §90.701(2) because the identification of a substance as blood is requires testing by an expert to confirm the identity of the substance. If lay witnesses are now to be permitted to offer conclusive testimony about substances such as blood, there will be no need for the continued existence of forensic labs, forensic

testing, and the experts who perform the testing which permits them to identify the true nature of a substance pursuant to the rules of evidence.

While it is true that some lay persons, by virtue of their experience and training, are capable of offering an opinion, Mr. Ferns did not fall into that category and not on the question of whether or not blood was on the ground. There was a simple alternative method for Mr. Ferns to testify about what he saw on the ground that did not require his "absolutely" correct opinion. Defense counsel was ineffective in failing to object to Mr. Ferns' testimony- an omission for which there was no legitimate tactical basis to rest upon. Danny Ferns' lay opinion testimony was inadmissible under the evidence code. Mr. Bolin has established that attorney Swisher rendered deficient performance in failing to object to Ferns' testimony under the first prong of Strickland.

The second prong of Strickland requires a showing that the deficient performance of trial counsel undermined confidence in the outcome of the proceedings. Mr. Bolin was prejudiced by trial counsel's substandard performance.

At the evidentiary hearing, trial counsel Mr. Swisher, acknowledged that Phillip Bolin was the State's critical

witness. Phillip Bolin testified that he witnessed Mr. Bolin beat a young woman, hose her down, and then drive off with her body after he assisted Mr. Bolin by carrying the body to a wrecker that was driven by Mr. Bolin. Swisher testified he had "no opinion one way or the other" as to whether or not Danny Ferns was an important witness in helping to corroborate Phillip Bolin. Mr. Swisher's refusal to acknowledge Danny Ferns' importance in this case is not credible. Apparently Mr. Swisher must have disagreed with this Court's assessment of the relative importance of Danny Ferns as expressed in the 2004 opinion of this Court. The Court characterized Danny Ferns as a witness called to corroborate the testimony of Phillip Bolin. If Mr. Swisher had recognized the role of Danny Ferns, he would have recognized the need to curtail his testimony to conform to the rules of evidence. Mr. Swisher would have understood the necessity of objecting to Mr. Ferns' inadmissible opinion testimony and to prevent him from bolstering the credibility of Phillip Bolin.

Phillip Bolin was a witness with serious credibility issues. Despite testifying in 2001 that he assisted Mr. Bolin in lifting a body onto a truck after having watched Mr. Bolin hit the body and hose it down, Phillip had

previously claimed this was not true. Defense Exhibit 2, which was introduced into evidence, was a statement made under oath by Phillip Bolin on July 10, 1996.(I,61) In this statement Phillip Bolin swore that his implication of Mr. Bolin in a statement he gave to law enforcement in July 1996 was false.(I,62) Phillip stated that he lied about Mr. Bolin because he had been threatened by law enforcement and was afraid of going to jail.(I,62) Phillip also said that law enforcement forced him to retract an earlier recantation that he made on January 20, 1996.(I,62) Phillip stated that he was not coerced by Rosalee Bolin to give the January 20, 1996 recantation.(I,64)

Ferns' corroboration of Phillip Bolin's account was significantly prejudicial to the defense. Due to the elapse of time between the crime and the eventual arrest of Mr. Bolin, no evidence of forensic value was available for examination and testing. Thus, the only evidence as to the identification of any substance seen by Ferns came from Ferns. Ferns' testimony that he "absolutely" saw blood and that there was "no doubt about it" went far beyond that which is permissible without proper qualification as an expert coupled with the appropriate scientific testing. Had Ferns been precluded from identifying an unknown and

untested substance with absolute certainty as blood that he saw on grass over a decade earlier when he was a thirteen year old elementary school student, there is a reasonable possibility that the jury would have rejected Phillip Bolin's account in light of his many other inconsistent statements and recantations. Had there been no corroboration of Phillip Bolin's testimony the result at trial would have been different.

## ISSUE II

THE TRIAL COURT ERRED IN DENYING RELIEF ON CLAIM TWO, THE FAILURE OF DEFENSE COUNSEL TO CALL OSCAR RAY BOLIN, SR. AS A WITNESS WHO WOULD HAVE TESTIFIED THAT THE RED SUBSTANCE SEEN IN THE GRASS BY DANNY FERNS WAS PAINT THAT HE HAD USED ON CARNIVAL EQUIPMENT.

In his second claim for relief, Mr. Bolin argued that trial counsel Swisher missed a second opportunity to undermine the testimony of Danny Ferns when he failed to call Oscar Ray Bolin, Sr. as a witness at trial. At the evidentiary hearing Bolin, Sr. testified that in mid to late November 1986 he painted some equipment used in his carnival business with red spray paint in the grassy area between the mobile home and camper in the area that thirteen year old Danny Ferns claimed to have seen blood. Bolin, Sr. testified that he and his wife, Gertrude or

Trudy Bolin left before Thanksgiving to travel with the carnival. Bolin, Sr. testified that he would have been available as a witness as he was actually present during the 2001 trial.

Mr. Swisher testified that he knew Bolin, Sr. and had talked to him prior to trial. Mr. Swisher could not recall if he talked to Bolin, Sr. about Danny Ferns' testimony.(III,297) Mr. Swisher acknowledged that Bolin, Sr., was present during the trial.(III,299) Mr. Swisher knew that Bolin, Sr. had used red paint to paint carnival equipment several days or weeks before the crime.(III,301) Mr. Swisher said he wasn't concerned about blood vs. paint because he tried to sell that nothing was there.(III,349)

Mr. Swisher testified that he was told by Mr. Bolin and Rosalee Bolin that neither Bolin, Sr. or his wife, Trudy, would be good witnesses at trial.(III,301) Mr. Swisher talked to Bolin, Sr. and Trudy about penalty phase and determined they would not be good witnesses for that part of the trial.(III,301) Despite testifying that Bolin, Sr. and Trudy would not have been good penalty phase witnesses, Mr. Swisher testified on cross by the State that a consideration in not using them in guilt phase might have been to save their credibility for penalty phase. (III,333)

Mr. Swisher did, in fact, call Trudy Bolin as a witness at the trial.(I,41-61;II,137) So much for the tactical determination that Trudy Bolin would not be a good witness and should not be used in guilt phase in order to preserve her for penalty phase.

Mr. Swisher could not recall ever speaking to Bolin, Sr. about the painting to determine whether or not he would be a good witness on that point or to asses his credibility on the issue of painting.(III,303) Mr. Swisher didn't think it was a good idea to prove your case with family members.(III,302) As noted, Mr. Swisher called Trudy Bolin as trial witness.(I,41-61;II,137) Mr. Swisher also admitted into evidence the recantations by Phillip Bolin that were taken by Rosalee Bolin.(I,61-64) So much for the tactical reason to not prove your case using family members.

Mr. Swisher was aware that Bolin, Sr. had testified at trial in 1996.(III,325) He did not identify anything particularly problematic when asked to review Bolin, Sr.'s prior testimony.(III,325-6)

During the 2001 trial Gertrude Bolin testified as a defense witness about her recollections of December 1986.(I,41) Gertrude testified that she, Oscar Bolin, Sr.,

Phillip and Clarence lived at Valencia Grove.(I,41) The family were on the road- between locations for their carnival business and their home on Valencia.(I,42) The children, Phillip and Clarence, were left with neighbors, the Kinards.(I,4) Gertrude wasn't sure if Mr. Bolin was living in Tampa in a mobile home or on a separate trailer on the Valencia property.(I,43) Mr. Bolin also owned an orange and white travel trailer that could be moved.(I,47) Mr. Bolin also had a trailer located on Coon Hide Road.(I,49)

When she and Bolin Sr. went on the road they would take all the water hoses with them since the hoses were used to obtain water while they traveled.(I,43) Sometime shortly before Thanksgiving 1986, she and Bolin Sr. went to work a carnival in Charlotte.(I,45) They were not in Pasco county on December 5, 1986. (I,45) Phillip and Clarence were left with the Kinards.(I,45)

Gertrude Bolin was not questioned about the painting of carnival equipment or any activities of Bolin Sr. before they left Florida.

The standard of review for this claim is the same standard set forth in Strickland v. Washington, 466 U.S. 668 (1984). Strickland requires that counsel has a duty to

bring to bear such skill and knowledge as will render the trial an adversarial testing process. Ibid., at 688. As in Issue I, Mr. Bolin must show that counsel's performance was deficient by demonstrating that counsel's performance "fell below and objective standard of reasonableness." Ibid., at6670-668. The trial court denied relief on this claim, finding that Swisher made tactical decisions to not call Bolin, Sr. and because Gertrude Bolin had been called as a witness.

The second prong of Strickland requires a finding of prejudice. The trial court did not address the second prong of prejudice, therefore review is limited to whether or not Mr. Bolin established that trial counsel's performance in failing to call Bolin, Sr. as a witness was deficient.

The appellate standard of review is plenary-the appellate court defers to the trial court's findings of fact if they are supported by competent, substantial evidence. McLin v. State, 827 So.2d 948, 954 n.4 (Fla. 2002). The legal conclusions of the trial court are reviewed de novo. Connor v. State, 979 So.2d 852 (Fla. 2008).

The trial court relied upon Henry v. State, 948 So.2d

609 (Fla. 2006) as the basis for denial. Under Henry, the tactical decisions made by trial counsel will not give rise to a finding of deficient performance if they are deliberate tactical strategies made after the consideration and rejection of alternative courses of action. The tactical decisions must be made knowingly. In Henry trial counsel, after discussion and consent from the defendant, made the decision to place Henry on the stand during guilt phase and question him about the facts of a prior old homicide for which he served prison time and for a second homicide committed just before the crime Henry was on trial for. At the evidentiary hearing defense counsel testified that they were convinced Henry would be convicted in the guilt phase of the murder and that the jury would be angered about learning of the two other homicides in penalty phase- a belief the trial attorney expressed would result in a death sentence. The chosen strategy that Henry agreed to was to "lay everything out on the table". The decision was made after numerous discussions with Henry and after all other available defenses and strategies were considered. The two critical components of Henry are that trail counsel make a deliberate and informed tactical decision after considering other strategies and that when

the tactical decision is potentially dangerous, the client have some knowledge and consent to the strategy. A tactical decision must have some rational basis in fact or law. Logically, a tactical decision must be made prior or at the time of trial. The alternatives are considered and rejected before the post-conviction process, not in response to it.

Mr. Bolin does not disagree with the legal precedent that this Court outlined in Henry, but this case differs factually from Henry, thus requiring a different result. Trial counsel in this case did not make deliberate tactical decisions prior to or during trial and he did not discuss his strategy with regards to guilt phase with Mr. Bolin or obtain his consent to the dangerous strategy to leave Danny Ferns' testimony unchallenged before forging ahead.

Mr. Swisher testified to four tactical reasons for not calling Bolin, Sr. at the evidentiary hearing. They were the belief that Bolin, Sr. and Gertrude Bolin would not be good penalty phase witnesses and it was possible that they should not testify in guilt phase to preserve their penalty phase credibility; that is was a big mistake to prove your case with family members; that there was no other evidence to corroborate Bolin, Sr. due to the passage of time; and

that the painting was done sometime prior to the murder. However, Mr. Swisher completely disregarded those same reasons that he offered as justification for his actions in failing to call Bolin, Sr. during the 2001 trial. By disregarding his own claimed "tactical" reasons that were offered only after his decision-making was questioned, Mr. Swisher demonstrated that his "tactical" reasons had no basis in law or fact considering his actual trial decisions.

The trial court found that two of Swisher's reasons for not using Bolin, Sr. were that he didn't want to use family members to prove his case and he didn't want to discredit those family members in anticipation of the penalty phase.(II,137) Despite these alleged "tactical" reasons, Swisher did use both Gertrude Bolin and Rosalee Bolin to prove his case- by calling Gertrude Bolin as a guilt phase witness to testify about the removal of hoses from the property and by utilizing evidence of recantation obtained by Rosalee Bolin to discredit Phillip Bolin. Swisher's actions contradict his testimony at the evidentiary hearing and disprove his claim that his rationale for not calling Bolin, Sr. was based on either of these two "tactical reasons" made before trial. His

testimony, disingenuous at best, during the evidentiary hearing that these were the tactical reasons he relied upon in determining that Bolin, Sr. would not be called as a witness are little more than a thinly disguised effort to protect himself from a finding that he was ineffective. If Swisher truly made a tactical decision to forgo calling Bolin, Sr. because he was family and he would not use him in penalty phase due to his deficiencies, but needed to keep him from being a guilt phase witness so his credibility would not be damaged at penalty phase, he would not have called Gertrude Bolin or utilized the work of Rosalee Bolin during guilt phase. Swisher’s testimony is not credible- his tactical decisions were made during the post-conviction proceedings, they were not made at the time of trial after a thorough and knowing consideration of the alternative- calling Bolin, Sr. to rebut the testimony of Danny Ferns.

The other two excuses cited by Swisher for not calling Bolin, Sr. are equally unpersuasive as tactical reasons. The trial court found that an additional tactical reason for failing to call Bolin, Sr. was that there was no independent testimony that corroborated his testimony.(II,137) While nothing could corroborate Bolin,

Sr.'s testimony, nothing contradicted it either. The State called no witness in 1996 that undermined Bolin, Sr.'s testimony that he had painted his carnival equipment in late November. Swisher claimed to have both read and briefed the 1996 testimony so he knew that the State called no witnesses who would have contradicted Bolin, Sr.. There is no deliberate tactical reason for not calling Bolin, Sr. to undermine the testimony of Danny Ferns given Ferns' importance to the State's case. Bolin, Sr. was as good, if not better, witness than Gertrude Bolin because he could address both the hoses and the painting. There is no sound tactical reason for failing to call Bolin, Sr. due to a lack of corroborative evidence because Gertrude Bolin was called by Swisher to testify about the hoses when there was no additional corroborative evidence of her testimony.

The trial court also found that Swisher offered that he did not call Bolin, Sr. because he had done his painting before the crime and before his departure.(II,137) Gertrude Bolin testified that the hoses were collected and removed before the crime, so why would a sound tactical reason for failing to call Bolin, Sr. be that he painted carnival equipment and left paint on the grass before the crime? If Bolin, Sr. painted after the crime it would made

sense not to call him because his testimony would have had little value- but painting before the offense provides a defense to and reasonable explanation for the testimony of Danny Ferns and Phillip Bolin. Swisher's decision to call Gertrude Bolin does not support his reasons for his decision to ignore Bolin, Sr.. Swisher's testimony at the evidentiary hearing does not support the trial court's conclusion from Henry that the Swisher's decision was truly tactical and was made after a full consideration and rejection of the alternative.

Critical to the outcome of Henry was the undisputed testimony from trial counsel that Henry was consulted on numerous occasions about the dangerous strategy, that alternatives were discussed between both attorneys representing Henry and between Henry and both his attorneys. Only after that level of consultation did Henry agree to the strategy. In this case the testimony of Swisher does not support the trial court's finding that Mr. Bolin consented to a decision to not present the testimony of Bolin, Sr. on the issue of the painting.(II,137-138) Mr. Swisher testified he talked with Mr. Bolin and Rosalee Bolin about using Bolin, Sr. and Gertrude Bolin as penalty phase witnesses and it was felt by all that they would not

be good witnesses for that part of the trial. Swisher could not recall any conversations with his client about Bolin, Sr. as a trial witness or what the value of his testimony might be. Swisher did not testify that he obtained Mr. Bolin's consent to forgo a challenge to the paint vs. blood theory when he made the dangerous decision to forgo any impeachment of Danny Ferns. This record does not contain competent, substantial evidence that Swisher discussed with Mr. Bolin the strategy of not challenging Danny Ferns' testimony. While Swisher may have discussed the use of Bolin, Sr. at penalty phase, there is no testimony from Swisher that Bolin, Sr.'s guilt phase testimony was addressed.

The trial court's basis for denial based the finding that Gertrude Bolin's testimony was admitted on the issue of both the hoses and the spray painting of the carnival equipment is not supported by competent, substantial evidence. Gertrude Bolin did not testify about any painting during her 2001 trial testimony. She was not asked once about anything related to paint. She testified that she and Bolin, Sr. left at the end of November to go on the road and they took all their hoses with them because the hoses were necessary during their travel. Thus, her

testimony does not refute the claim that defense counsel erred by failing to call Bolin, Sr. as a witness to discredit the testimony of Danny Ferns on the question of whether or not the substance he saw was blood or paint. The jury heard no testimony to refute the assertion by Danny Ferns that what he saw was blood because Swisher failed to call Bolin, Sr. as a witness.

Mr. Swisher failed to render effective assistance of counsel to Mr. Bolin when he failed to take the steps necessary to challenge the testimony of Danny Ferns. Ferns was clearly a critical witness. By failing to challenge Ferns' improper opinion testimony and by failing to present a reasonable explanation for what Ferns claimed he saw on the grass at Valencia drive, the cumulative effect of these errors was to undermine confidence in the outcome of the proceedings. The trial court's denial of relief should be reversed.

## CONCLUSION

The order of the trial court denying relief should be reversed. Trial counsel was ineffective in failing to subject the State's case to adversarial testing when counsel failed to challenge the testimony of Danny Ferns by allowing him to testify without objection that he

absolutely saw blood on the grass of a property linked to Mr. Bolin and by failing to present the testimony of Oscar Bolin, Sr. that the substance Ferns observed was likely red spray paint. Reversal is warranted with a remand for further proceedings consistent with a finding of a deprivation of Mr. Bolin's right to counsel under the federal and Florida constitutions.

Respectfully submitted,

___________________________
ANDREA M. NORGARD
Attorney at Law

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the forgoing Initial Brief has been furnished by U.S. Mail to the Office of the Attorney General, Concourse Center 4, 3507 E. Frontage Road, Suite 200, Tampa, FL this ___ day of July, 2009.

## CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of font used in this Initial Brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

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