IN THE SUPREME COURT OF FLORIDA

OSCAR RAY BOLIN,	:	
Appellant,	:	
vs.	:	Case No. SC08-2148
STATE OF FLORIDA,	:	
Appellee.	:	
	:	

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

REPLY BRIEF OF APPELLANT

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PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE

Appellant relies on his Initial Brief.

STATEMENT OF THE FACTS

Appellant does not dispute most of the State's facts; however, there are some facts Mr. Bolin disputes.

In the State's Answer Brief, page 13, the State tries to draw similarities between Ms. Collins' and another person Mr. Bolin was convicted of killing in Pasco County--Ms. Matthews. The State claimed that "like Stephanie Collins, Matthews was stabbed six times in the throat and chest area. (V20:891-95)." The State cites to testimony in the penalty phase concerning Ms. Matthews, but does not cite to where Ms. Collins was stabbed in the chest and throat area. This is because the Medical Examiner testified to six stab wounds in the back of Ms. Collins' chest area--not in the throat. This was shown by six slits in the back of Ms. Collins' sweater, shirt, and bra. Due to decomposition and the lack of injury to the ribs, the Medical Examiner said it would be guessing to say the stabs in this area actually penetrated the chest cavity. (V16/T424-427) The Medical Examiner said nothing about stab wounds to the throat. (V16/T419-438)

In addition, the State claims that "[s]imilar to Stephanie Collins, Matthews' key ring was placed on top of her body…." Appellee's Answer Brief, page 13. According to Detective Karen Crackett who saw the body of Ms. Collins shortly after it was discovered on December 5, 1986, there was a purse lying near the body. (V16/T365) The detective did not describe anything being on

the body except what it had been wrapped in. (V16/T362-366) Captain Harold Winsett's testimony, however, contradicted this by saying the purse was on Ms. Collins' body. (V16/T375) There were photos taken at the scene where the body was discovered and before it was moved, but State Exhibit's 43 and 44 are difficult to determine where the purse is located (at least undersigned could not pick out the purse from the black and white copied photos in Appellant's record). (V12/R2215-18). It appears nothing is on the actual body, but it is not possible for undersigned counsel to conclusively determine this. In light of the State's conflicting witnesses and undersigned counsel's inability to conclusively determine where the purse was in the photos, the State's claim to their being a similarity between Matthews and Collins as to the keys (Matthews) and purse (Collins) being on the body should not be accepted by this Court.

SUMMARY OF THE ARGUMENT

Appellant relies on his Initial Brief.

ISSUE I

DID THE TRIAL COURT ERR IN DENYING APPELLANT'S MOTION TO EXCLUDE CHERYL COBY'S REDACTED 1991 TRIAL TESTIMONY?

Mr. Bolin relies on his initial brief on this issue, but does reject the State's claim that this Court does not have sole control over evidentiary matters involving court procedure. Matters of court procedure are "solely within the province of this Court to enact pursuant to article V, section 2(a) of the Florida Constitution." State v. McFadden, 772 So. 2d 1209 at 1213 (Fla. 2000).

The legislature may have defined spousal privilege as "communications" intended to be made in confidence between the spouses while they were married, section 90.504(1); but it is up to this Court to define "communications," which it did in Kerlin v. State, 352 So. 2d 45 (Fla. 1977), See also McFadden wherein this Court defined "conviction" as set forth in section 90.610(1). It is that definition of "communications" that Mr. Bolin is asking this Court to revisit and expand in light of the facts in this case.

As for this Court already having held in Bolin v. State, 650 So. 2d. 21, 23 (Fla. 1995), and Bolin v. State, 793 So. 2d 894, 897 ftnt. 3 (Fla. 2001), neither case discusses the issue but merely states "communications" does not apply to "observations." And the 1995 opinion merely relies on Kerlin for support. In

addition, this Court was dealing with all of Cheryl Coby's testimony in its prior Bolin decisions. It did not have before it a redacted version that showed how Cheryl's testimony intertwined what her husband told her with what she saw so as to make redacting just what she heard impossible.

This Court has the power to reconsider and correct erroneous rulings, even if those prior rulings have become "law of the case." Such "[r]econsideration is warranted only in exceptional circumstances and where reliance on the previous decision would result in manifest injustice." Preston v. State, 444 So. 2d 939, 942 (Fla. 1984). In a death case, it is mandated that this Court conduct an "automatic and full review of a judgment of conviction resulting in imposition of the death penalty" under section 921.141(4). Preston, 444 So. 2d at 942. Although Preston was dealing with the 1981 version of section 921.141(4), the 2011 version on the pertinent portion remains the same: "The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida…." This Court has interpreted this statute to require an "automatic and full review" of the conviction in a death penalty case. This Court further found that the statute requires this Court to review the evidence to determine if the interest of justice requires a new trial. Preston, 444 So. 2d at 942.

As was stated in Preston, Id., "[t]he interest of justice, substantive due process requirements and Florida's constitutional and statutory scheme of death penalty review jurisdiction" allows

this Court to reconsider its decision to exclude "observation" from "communications" under spousal privilege. The interests of justice and substantive due process requires a full review of this issue.

Mr. Bolin relies on his initial brief for the rest of this issue.

ISSUE II

DID THE TRIAL COURT ERRONEOUSLY DENY APPELLANT'S MOTION TO SUPPRESS THE SUICIDE NOTE?

The State appears to be making a quasi lack-of-preservation argument concerning the motion to suppress the suicide note in this case (Appellee's Answer Brief, pages 30-33). Defense counsel filed the same exact motion in Mr. Bolin's other pending Hillsborough County case lower #90-CF-11822 (SV1/R1-5) and made the argument to suppress the suicide note only (defense counsel had no issue with evidence of the attempted suicide itself coming in -- SV9/R1572-1576; V13/T17-18; V14/T3) in that case on September 28, 2005 (SV32/R275-292). The written motion to suppress filed in this case may not have been filed until November 6, 2006 (V9/R1692-1699 only has the first pages of the motion for this case but it has the November 6, 2006, file stamp; the complete motion is at SV9/R1572-1576), but the contents of the motion and the argument were known to the State and the trial court. So when defense counsel "renewed" his motion to suppress the suicide note when the State introduced the note at trial, the State did not object to the motion not having been filed in this case; and the trial court ruled on the merits of the motion by giving the "same ruling." (V17/T545-547) Clearly, the parties and trial court knew what objection was being made contemporaneously with the evidence of the suicide note being introduced; and the trial court ruled on the merits of the motion. The issue was

preserved. See F.B. v State, 852 So. 2d 226 at 229 (Fla. 2003).

The fact that everyone knew what was being argued is the result of the same trial attorneys and trial judge dealing with two homicide cases being retried for Mr. Bolin at the same time with some of the same motions. Sometimes the motions and orders would have both lower case numbers on them (90-CF1182 and 90-CF1183); and some oral arguments made in one case would be adopted in the other case, resulting in the need to reconstruct the record for transcripts filed in one case but used for both. Trying to keep track of each individual case can be difficult. For example, even the Assistant Attorney General in this case mistakenly referred to motion to suppress for 90-CF11833 as being at SV1/R1-5; but SV1/R1-5 is the same exact motion to suppress the suicide note filed in 90-CF1182. The motion to suppress the suicide note in 90-CF11833 is actually at SV9/R1572-1576. See Appellee's Answer Brief, pages 32, 33, ftnt. 8.

The State also argues that the "law of the case" is applicable here; because the Second District Court of Appeal ruled on this issue against Mr. Bolin in an interlocutory appeal taken by the State in State v. Bolin, 693 So. 2d 583 (Fla. 2d DCA), rev. den. 697 So. 2d 1215 (Fla. 1997), with this Court then agreeing with the Second's decision in Bolin v. State, 793 So. 2d 894 at 898 (Fla. 2001). As the State acknowledges, however, there is one exception to "law of the case"; and that exception is "where exceptional circumstances exist whereby reliance upon the previous decision would result in manifest injustice. Preston v State, 444

So. 2d 939, 942 (Fla. 1984)…." Henry v. State, 649 So. 2d 1361, 1364 (Fla. 1994). That exception exists in this case.

As this Court noted the axiomatic standard of review on a trial court's ruling on a motion to suppress:

> comes to the appellate court clothed with a presumption of correctness, and the reviewing court must interpret the evidence and reasonable inference and deductions derived therefrom in a manner most favorable to sustaining the trial court's ruling. See Murray v. State, 692 So. 2d 157 (Fla. 1997). The reviewing court is bound by the trial court's factual findings if they are supported by competent, substantial evidence. See Butler v. State, 706 So. 2d 100 (Fla. 1st DCA 1998). The trial court's determination of the legal issue of probable cause is, however, subject to the de novo standard of review. See Ornelas v. United States, 517 U.S. 690 … (1996); Connor v. State, 803 So. 2d 598 (Fla. 2001).

Pagan v. State, 830 So. 2d 792, 806 (Fla. 2002). Although the reviewing court cannot reweigh the evidence and make its own credibility determination, the "reviewing court must defer to the factual findings of the trial court that are supported by competent, substantial evidence.'" Bautista v. State, 902 So. 2d 312, 313-14 (Fla. 2d DCA 2005) (quoting Cillo v. State, 849 So. 2d 353, 354 (Fla. 2d DCA 2003)). And more recently quoted in Duke v. State, 82 So. 3d 1155, 1157-1158 (Fla. 2d DCA 2012). In addition, "a trial court's decision on a motion to suppress requires a mixed standard of review. 'An appellate court is bound by the trial court's findings of historical fact if those findings are supported by competent, substantial evidence.' Ferguson v. State, 58 So. 3d 360, 363 (Fla. 4th DCA 2011)(citation omitted).

However, a de novo standard applies 'to the mixed questions of law and fact that ultimately determine constitutional issues.' Id. (citation omitted)." State v. Holland, 76 So. 3d 1032, 1034 (Fla. 4th DCA 2011).

In this case the trial court made no factual findings, because it was bound by the Second District's decision in State v. Bolin, 693 So. 2d 583 (Fla. 2d DCA 1997), and this Court's affirmance without discussion of that Second District Court of Appeal's opinion in Bolin v. State, 793 So. 2d 894, 898 (Fla. 2001). This Court is now the reviewing court of the Second District's de novo review with the factual findings that must be supported by "competent, substantial evidence" as found in the record. The record in this case, however, does not provide that "competent, substantial evidence" to support the factual findings the Second District set forth in its decision. Because the record does not support these factual findings, relying on the "law of the case"--especially where a death sentence has been imposed--would result in a manifest injustice. As this Court sated in Preston, 444 So. 2d at 942 (Fla. 1984):

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

our decision to review this issue.

The facts the Second District set forth in its 1997 interlocutory appeal are in that opinion and repeated in the State's Answer Brief, pages 37-41. The summarized facts are set forth at the motion to suppress suicide letter heard on September 28, 2005, in lower case #90-CF-11822 (which was the identical motion filed in this case's lower case #90-CF-11833) by trial defense counsel and not disputed by the prosecutor and facts at the 2006 trial as set forth in Appellant's Initial Brief, pages 43-45, 50-52. The most pertinent which show the Second District's factual findings are not substantiated by competent evidence are set forth below:

> • The Second District's opinion described the suicide note as being found in plain view, but the facts show that the note was inside an envelope that did not indicate on it that it had anything to do with Mr. Bolin's attempted suicide. Although the letter had been addressed to Major Terry, it was not voluntarily delivered--as this Court stated in Bolin, 793 So. 2d at 898. In order to be "in plain view," the incriminating character had to immediately apparent. Minnesota v. Dickerson, 508 U.S. 366, 375 (1993). In Mr. Bolin's case, the facts do not show any evidence of Mr. Bolin's attempted suicide on the envelope. As the Second District's opinion states, Major Terry believed the envelope addressed to him might be a suicide note. The facts, however, do not show that the envelope contained evidence of the attempted suicide. The note itself had to be removed from the envelope to reveal evidence of the attempted suicide. The Second District's conclusion that the suicide note was in "plain view" was not supported by the "competent, substantial evidence" in this case. (SV32/R275-292).

• The Second District found that Major Terry was only at Mr. Bolin's cell to investigate the attempted suicide and not to obtain evidence for the homicide investigation; yet, the opinion notes that Corp. Baker--another investigator in the Collins' murder case--met Major Terry at Mr. Bolin's cell. In addition, Major Terry believed the suicide note added "significant information to the homicide investigations." Major Terry then gave the letter to Corp. Baker for "proper disposition." Nothing is stated about the letter being part of any attempted suicide investigation. In addition, the hearing at the motion to suppress pointed out that once Mr. Bolin was taken to the hospital when he was discovered in medical distress (nothing about an attempted suicide), the officials called then Col. Terry (the supervising homicide investigator in the Collins' case) and another investigator in the in the Collins' case--Corp. Baker. There are no facts to show that Corp. Baker had anything to do with investigating suicides or attempted suicides. The only facts present show that Col. Baker was only present in Mr. Bolin's cell to look for incriminating evidence in the Collins' case. Finally, the motion to suppress hearing notes that Col. Baker said he was hoping to find evidence of Mr. Bolin's guilt since his guilt was the reason behind the suicide attempt. (SV32/R289)

The Second District's attempt to distinguish Mr. Bolin's case from McCoy v. State, 639 So. 2d 163 (Fla. 1st DCA 1994), is not supported by the evidence. In McCoy the First District held that pretrial detainees had some Fourth Amendment rights in jail against unreasonable searches and seizures. Those limited rights were applied in the search of appellant's cell ordered by the assistant state attorney prosecuting the case and carried out by a police officer in the presence of the assistant state attorney, not by officials connected with the detention facility, solely for the purpose of trying to uncover incriminating writings which could be used against appellant at trial--not out of concern for either security or order of the

detention facility. McCoy held "that appellant had a legitimate expectation that he would be protected from such a search under the Fourth Amendment; that the search was unreasonable; and that, therefore, the Fourth Amendment was violated." Id. at 167.

This Court clearly agreed with McCoy's reasoning in Rogers v. State, 783 So. 2d 980, 992 (Fla. 2001), stating that prosecutors or their representatives are "precluded from invading the defendant's cell without a warrant and seizing his personal papers and effects for purposes of gathering evidence. We emphasize this is not a case where the search was justified by prison security concerns and where the prison officials themselves deemed it necessary to search Rogers' cell." Id. Even though the prosecutor in Rogers justified the authorization of a warrantless search of Roger's cell by her office's investigator because Rogers had no expectation of privacy in jail and because Rogers was a high-security risk prisoner subject to a jail shakedown once a day on random basis, this Court rejected such reasoning. This Court found the facts showed the sole purpose for the warrantless search was to seize Rogers' personal papers for gathering evidence and not for prison security concerns.

The evidence in Mr. Bolin's case shows it is not distinguishable from McCoy. Major Terry and Corp. Baker were contacted by jail personnel after Mr. Bolin was removed from his cell for medical reasons because they were the lead investigators in the Collins' case--not because they were investigating an attempted suicide. If it were for the purpose of investigating an attempted suicide at the jail, then there would not be a need for Corp. Baker's presence; and Corp. Baker was hoping to find evidence of Mr. Bolin's guilt as his guilt was the reason behind the suicide attempt. Col. Terry's testimony at the 2006 trial said he responded to Mr. Bolin's cell regarding an inmate suicide attempt, but he said nothing about investigating a suicide attempt. Mr. Bolin was no longer in his cell. Col. Terry and Det. Baker and Det. Walters went into Mr. Bolin's cell and went through Mr. Bolin's papers--including the undelivered envelope

> addressed to then Capt. Terry. Col. Terry acknowledged he was in charge of investigating Ms. Collins' death. (V17/T535, 543-548) The facts that led the Second District to conclude that Terry did not go to Mr. Bolin's cell simply to find evidence against Mr. Bolin are not supported by competent, substantial evidence.

Because the Second District's attempt to distinguish McCoy was not based on competent, substantial evidence; this Court should reject "law of the case." Exceptional circumstances exist that make relying on the Second District's 1997 decision in Bolin and this Court's affirming of that decision without discussion in it's 2001 decision in Bolin a reliance resulting in manifest injustice. The Second District's 1997 Bolin decision was based on a mixed standard of review of law and fact determining a constitutional Fourth Amendment issue of an illegal search and seizure, and this Court must apply a de novo standard of review of the 1997 decision.

In examining the Second District's legal reasoning in Bolin 1997, it is clear the Court soundly rejected McCoy and found that pretrial detainees have no expectation of privacy in a jail cell. Although that opinion does not rely on the fact that Mr. Bolin was classified as a severe escape risk subject to searches for possible escape contraband every eight hours in its conclusion, those facts are prominently noted in its opinion. Bolin, 693 So. 2d at 584. This conclusion that pretrial detainees have absolutely no Fourth Amendment protection rights has been rejected by this Court in Rogers. The State tries to salvage the Second

District's holding by pointing to the recent United States Supreme Court case of Florence v. Board of Chosen Freeholders of County of the Burlington et. al., 132 S. Ct. 1510 (2012), wherein the United States Supreme Court held that a jail could conduct strip searches for minor offenses without violating the Fourth Amendment protections. The Court emphasized "that correctional officials must be permitted to devise reasonable search policies to detect and deter the possession of contraband in their facilities." Id. at 1517. The Court went on to state that officials in charge of the jail must be given deference "unless there is 'substantial evidence' demonstrating their response to the situation is exaggerated....the record provides full justifications for the procedures used." Id. at 1518.

Mr. Bolin's case is not like that in Florence. Due to his high risk status, Mr. Bolin's jail cell was constantly searched for contraband--but not to read his personal papers. But when given the opportunity to search Mr. Bolin's jail cell for evidence of the Collins' crime, Terry and Baker seized that opportunity by reading Mr. Bolin's personal letters--not to investigate the attempted suicide. Terry and Baker's response went way beyond what was necessary and violated Mr. Bolin's limited Fourth Amendment right not to have his personal papers and effects seized without a warrant for purposes of gathering evidence in his pending criminal case.

Based on the exceptional circumstances in this case--a full exploration of the facts as supported by competent, substantial

evidence and a review of those facts under the Fourth Amendment protections by a pretrial detainee in their jail cell as has evolved since the Second District's 1997 decision--manifest injustice would occur if no exception to "law of the case" was made in this case. This Court must conduct a de novo review of this issue.

Mr. Bolin relies on his Initial Brief for the remainder of this issue.

ISSUE III

DID THE TRIAL COURT ERR IN IMPOSING A DEATH SENTENCE IN THIS CASE WHEN IT ERRONEOUSLY REJECTED A PROVEN STATUTORY MITIGATOR AND WHEN THE SUBSTANTIAL MITIGATION IN THIS CASE OUTWEIGHED THE SINGLE AGGRAVATOR?

The State claims that Mr. Bolin waived the presentation of mitigating evidence, so he cannot now complain about the trial court rejecting the statutory mitigator of Mr. Bolin's ability to conform his conduct to the requirements of law being substantially impaired as established by Dr. Berland. The State is in error when it claims Mr. Bolin waived all mitigation.

The record shows that while the jury was out deliberating the guilt phase, the trial court asked defense counsel about mitigation. Defense counsel stated he had a whole file of investigation he would be using as mitigation, but Mr. Bolin did not want to present any of this to a jury - - "he does not wish to us to argue for life imprisonment, and that's why he wants to waive it." (V19/T838) There is discussion about Mr. Bolin's right to waive a jury recommendation and Mr. Bolin's right to waive presenting any mitigation to a jury. The prosecutor asked defense counsel if defense counsel was going to present mitigation, and defense counsel responded affirmatively while noting he and Mr. Bolin had gone over the mitigation. Defense counsel re-stated that Mr. Bolin had chosen not to present mitigation with the jury, but they would be prepared to present it at a Spencer hearing. (V19/T838-845) After the jury came back with its finding of guilt, Mr. Bolin made it clear he was waiving a jury

mendation for penalty phase in this case. Defense counsel did state the defense was going to be prepared to present mitigation to the trial court. Defense counsel had spoken with Mr. Bolin as to what items would be presented as mitigation; but Mr. Bolin did not want those items presented to a jury, which is why Mr. Bolin wanted to waive the jury in penalty phase. The trial court then had Mr. Bolin place his waiver of a jury recommendation on the record. (V19/T854-859)

After the jury was discharged, the trial court said it was going to have a discussion about mitigation on Monday morning. (V19/T861-862) On November 6, 2006, defense counsel presented the trial court with a mitigation notebook, which included Dr. Berland's testimony. Mr. Bolin then stated on the record that he was not going to present any mitigation, and it appears that this meant Mr. Bolin himself presenting mitigation. The State then placed in the record mitigation testimony by Rosalie Bolin and Dr. Berland, that neither defense counsel nor Mr. Bolin objected to. Mr. Bolin specifically stated he had no objection to the trial court reading Mrs. Bolin's testimony, and defense counsel specifically said he had no objection either. (V20/T867-874,899)

After the State presented three witnesses for aggravator purposes on November 6, 2006, the defense stated it had nothing to present. (V20/T895) At the Spencer hearing on October 29, 2007, defense counsel said it was relying on the mitigation notebook--including Dr. Berland's testimony from a previous penalty phase--and a PET scan and Presentence Investigation. Defense counsel did

point out that the doctor had indicated the existence of mental illness that supports a statutory mitigator. Mr. Bolin then stated he did not wish to make any type of statement or any further argument. (SV53/R1180-1188) Nothing further is presented by the State or defense at sentencing on November 30, 2007. (V21/T903-926) The trial court, however, listed all the items it considered contained within the mitigation notebook when it discussed the mitigation. (V10/R1951-1956)

These facts clearly show that Mr. Bolin did not waive all mitigation. He waived the jury portion of the penalty phase, and he waived making any personal statements to the trial court for mitigation purposes. Mr. Bolin did not object to his attorney giving the trial court his mitigation notebook nor did he object to the State giving the trial court Rosalie Bolin's transcript and Dr. Berland's deposition. Unlike the situation in Koon v. Duggar, 619 So. 2d 246, 249 (Fla. 1993), wherein Koon prohibited defense counsel from presenting mitigation and would make a scene if counsel did so, Mr. Bolin did not bar his attorney from presenting the mitigation notebook. Dr. Berland's testimony figured prominently in this notebook--Dr. Berland's July 12, 1991, testimony in 90-11832; Dr. Berland's October 6, 1992, deposition; Dr. Berland's October 11, 1991, penalty phase transcript and data.

The State never objected to anything contained within the mitigation notebook; so any issue it may have had with the prior testimony and depositions of Dr. Berland, should have and could have been addressed in 2006. Instead, the State now claims it did

not have an opportunity to introduce evidence rebutting Dr. Berland's opinion. (State's Answer Brief, page 50) This argument was never made by the prosecutor at trial; and if it had been made, it would have been disingenuous. Dr. Berland's prior testimonies came from trials and a deposition occurring in 1991 and 1992 where the State had ample opportunity to cross-examine Dr. Berland. The State not only had more than an opportunity to rebut Dr. Berland at that time, but it also had time after the notebook was presented on November 6, 2006, and before sentencing on November 30, 2007, to present any rebuttal it could come up with. It did not. But what makes the State's present argument even more specious is the fact that the State Attorney presented the trial court with Dr. Berland's 1992 deposition for purposes of mitigation at the November 6, 2006, hearing. (V20/T899)

The State's argument that the trial court's rejection of the statutory mitigation of being unable to conform his conduct to the requirements of law was waived by Mr. Bolin must be rejected. The trial court considered this issue based on evidence presented in the mitigation notebook and ruled on it. The issue has been preserved. See F.B..

Mr. Bolin relies on his Initial Brief for the remainder of this argument.

CONCLUSION

Based on the foregoing arguments and authorities, this Court should reverse and remand Mr. Bolin's case.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Stephen Ake, Concourse Center #4, 3507 E. Frontage Rd. - Suite 200, Tampa, FL 33607, (813) 287-7900, on this 14th day of June, 2012.

CERTIFICATION OF FONT SIZE

I hereby certify that this document was generated by computer using Microsoft Word with Courier New 12-point font in compliance with Fla. R. App. P. 9.210 (a)(2).

Respectfully submitted,

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