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

INITIAL BRIEF OF APPELLANT

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE

On 8-1-90, the State Attorney for the Thirteenth Judicial Circuit, in and for Hillsborough County, Florida, filed an Indictment charging the Appellant, OSCAR RAY BOLIN, JR., with the First-Degree Murder, Attempted Robbery, and Kidnapping of Stephanie Collins occurring on 11-5-86. See § 782.04(1), Fla. Stat. (1985)(first-degree murder); §§ 812.13(1) & (2)(c), Fla. Stat. (1985)(attempted robbery); and § 787.01(1)(a)2, Fla. Stat. (1985). (V1/R45-48) Mr. Bolin was found guilty of first-degree murder and false imprisonment on 10-10-91 (the attempted robbery was dismissed on a motion for judgment of acquittal), and he was sentenced to death on the murder conviction. (V4/R620, 626-631) Mr. Bolin was granted a new trial by this Court on 2-9-95 in Bolin v. State, 650 So. 2d 21 (Fla. 1995), because the State had used Mr. Bolin's ex-wife's testimony at trial in viola-tion of the marital privilege. (V5/R804-813)

Mr. Bolin was retried, found guilty of first-degree murder and false imprisonment, and sentenced to death on 6-4-99. (V6/R1071-1136) On 7-13-01 this Court again reversed for a new trial, because the State had once again used Mr. Bolin's ex-wife's testimony in violation of the marital privilege. Bolin v. State, 793 So. 2d 894 (Fla. 2001). (V7/R1236-1247)

This appeal is from this Court's 2001 retrial order on Mr. Bolin's third trial on this case. After this third jury trial, Mr. Bolin was found guilty of first-degree murder (the State nolle

prossed the false imprisonment charges) on 11-2-06. (V8/R1519-1520;V9/R1689) Mr. Bolin was sentenced to death on 12-3-07. (V10/R1957-1962)

STATEMENT OF THE FACTS

A. Trial Testimony

Stephanie Collins was 17 years old and in high school when she disappeared from an Eckerd's Drug Store parking lot on 11-5-86. Her body was found about a month later.

Stephanie's mother, Donna Witmer, lived with Stephanie in the Carrollwood area of Tampa in November 1986. Stephanie belonged to her high school choir and worked part-time at the Eckerd's Drug Store on the corner of Ehrlich and Dale Mabry. At 6 a.m. on 11-5-86, Ms. Witmer left for work, and Stephanie was getting ready for school which started at 8 a.m.. When Ms. Witmer got home at 5:30 p.m., Stephanie and her car were not there; but her books were on the kitchen table. Ms. Witmer went to the Eckerd's where Stephanie worked on 11-6-86 looking for Stephanie. She found Stephanie's car in the parking lot, and the doors were not locked. (V16/T340-344)

Kathy Cumpstone was a friend of Stephanie's in 1986. On 11-5-86, she went with Stephanie to Stephanie's home after school. They were at Stephanie's for only a few minutes, and then Stephanie took her home. Stephanie was then going to Eckerd's to ask for more work hours for the holiday season, returning home for a shower, and going to a chorus rehearsal. Stephanie was wearing a white V-neck sweater, tank top underneath, pink and white striped leggings, slouch socks, white Keds with studs, and gold chains; and she was carrying a pocketbook. (V16/T345-349)

The assistant manager at the Eckerd's where Stephanie worked part-time, saw Stephanie about 4 p.m. when she came into the store to ask about working more hours. He did not have the schedule at that time, but he did offer to let her work that night. Stephanie, however, could not work that night; because she had choir. They talked for about 15-20 minutes. (V16/T350-353)

Jerry Cooley, a friend of Stephanie's at school, went to the Eckerd's parking lot at 9 p.m. to say "hi" to Stephanie. Her car was there, but she never came out to her car. He waited about 15 minutes and left without seeing Stephanie. (V16/T353-356)

Hennie Moss, a friend and neighbor of Stephanie's, and David Fessler were driving to a store on 11-5-86 at about 4 p.m. when Ms. Moss saw Stephanie. Stephanie was in the front passenger seat of a plain white commercial van that was not new. Ms. Moss made eye contact with Stephanie, and Stephanie waved at her with both arms like she was trying to get Ms. Moss' attention. Stephanie appeared to be excited. Both the van and the car with Ms. Moss were stopped at the time at a 3-way stop. Ms. Moss pointed out her neighbor to Mr. Fessler as she waved back at Stephanie, and then Ms. Moss and Mr. Fessler kept going. She could not see the face of the van's driver; but he was taller than her (she is 5'1"), had brown hair, and looked older than her (she was 18 at the time). Where Ms. Moss saw Stephanie was close to the Eckerd's where Stephanie worked. Mr. Fessler took a quick look at the van when Ms. Moss pointed out her neighbor Stephanie, and he saw Stephanie in the passenger seat. He also got a very quick glimpse at the

driver—a white male, dark hair, white T-shirt, late 20's, medium height, slender build. Mr. Fessler only saw a quick profile of the driver's face. (V18/T657-679)

Michael Long knew Mr. Bolin and his wife Cheryl in 1986. Mr. Long socialized with the Bolins, his (Long's) brother, and his brother's wife. After Stephanie's disappearance on 11-5-86, but before her body was discovered, Mr. Long was at his brother's apartment for a barbeque and to watch football. The Bolins were there. A news broadcast came on about the missing girl; and Mr. Long said that if they found out someone hurt the girl, whoever did it should be castrated with a dull razor. Mr. Bolin all of a sudden got upset, stood up, was red-faced, and said Long did not know what he was talking about. Long didn't know the circumstances. Mr. Bolin was irate, and the Bolins left. (V18/T680-683)

At some point in 1985 or 1986. Mr. Long saw Mr. Bolin in the parking lot of his (Long's) brother's apartment, and Mr. Bolin was in a white Ford commercial van. Mr. Long knew Mr. Bolin had a 1986 Ford pickup truck, and Mr. Long asked Mr. Bolin where he got the van. Mr. Bolin said he was using it to move some stuff. Mr. Long believed the van belonged to a painter who lived in the same apartment building as his brother. Although Mr. Long first spoke to the police about this case in August 1990, this was the first time in 20 years he's ever mentioned Mr. Bolin in a white van that belonged to a painter and not Mr. Bolin. No one ever asked him if he saw Mr. Bolin driving another vehicle before about 1 month ago. (V18/T684-695)

Jimmy Garrison worked for Hillsborough County as a mowing crew supervisor in 1986. At about 9 a.m. or 12-5-86, he discovered a wrapped up body in a ditch by Morris Bridge Road while mowing the grass. Mr. Garrison called the Hillsborough County Sheriff. (V16/T356-361)

Deputy Karen Crockett was on patrol and responded to Morris Bridge Road. She observed a white-female body approximately 10-20 feet from the road in a ditch. It was not visible from the road. The upper half of the body was wrapped in a blanket, the legs were exposed. A purse was near the body. The body was very decomposed. (V16/T362-366)

Capt. Harold Winslett viewed the body at the scene. Everything that was wrapped around the body was preserved—a blanket, pink sheet, pink and white sheet, towel marked "Hospital Property," and a kitchen towel. He also collected the clothes and jewelry. At the autopsy he saw 5 holes in the back of the victim's shirt and some blunt trauma to the head. Capt. Winslett also went to the shopping center where the victim's car was found on 11-5-86. The doors were unlocked and the key was on the car floor. (V16/T373-393)

The State and Defense stipulated that the body of the female found in the area of Morris Bridge Road on 12-5-86 was that of Stephanie Collins. (V16/T439) It was further stipulated that the jewelry found on the body and the purse found by the body with all its contents belonged to Stephanie. (V18/T697)

Items obtained from Stephanie's body were sent to the FBI lab

in Virginia. (V16/T384) Agent Robert Fram with the FBI worked in the trace evidence unit where they conduct hair and fiber evidence. When he makes a microscopic comparison of hairs, he uses 2 microscopes side by side comparing the known hair with the unknown. He only compares head and pubic hairs as they are the only ones that show a difference between people enough to make a significant comparison. His lab received exhibits in the Stephanie Collins' case in 1987 and a known hair from Mr. Bolin in 1990. Agent Malone originally received the case, and a technician removed a hair from the towel found with the body for Malone to review. Although Malone analyzed these hairs, Agent Fram was asked to re-analyze these hairs. Agent Fram re-analyzed these hairs in 1998, and the head hair found on the towel from a brown Caucasian head was consistent with Mr. Bolin's hair. Agent Fram noted that hair comparison does not establish identity—it is not like a fingerprint. (V18/T570-582)

Agent Fram knew the lab was being investigated in the early 1990's, charges had to be made, and the lab was not accredited until around 1996. Malone left the lab in 1993 or 1994 and was not available for trial—although Agent Fram did not know why. Agent Fram did not handle the towel and the initial analysis, that was Malone. Agent Fram did cut off 3/4" from the root end and sent it off to the mitochondrial DNA unit to test. The hairs found in the victim's right hand were consistent with the victim's hair. (V18/T585-606)

Agent Fram knew that Malone was named in the report for

misconduct, because in 1985 Malone gave incorrect and misleading testimony in several aspects in a particular case. The report also said Malone falsely testified before the judicial committee that he had personally performed a test, that he had testified outside his expertise and had inaccurately testified about test results. The FBI was so concerned about Malone that they re-analyzed everything he did. Because Agent Fram did not put the hairs on the slide from the towel, he could not say for a fact that the hair on the slide is really from the towel. For Agent Fram to testify that a hair was found on that towel, he had to rely on Malone; and if Malone made an error or put something false in his notes, Fram would have no way of knowing. All he could do was look at the slides. And although a technician may have initially put the hairs on the slide, the examiner can go back to the evidence and get more hairs. If the examiner wanted to mislead the court or manipulate it, the examiner had the ability to do so. (V18/T606-625)

Agent John Stewart, a program manager and examiner in the FBI lab in Quantico, Virginia, works in the DNA Analysis Unit where they do mitochondrial DNA. People inherit two types of DNA—nuclear that comes from both parents and mitochondrial which comes from the mother. Mitochondrial DNA passes from the mother to all of the children, so each child will have the same mitochondrial DNA profile as the mother. It helps with missing person cases to get samples from siblings, mothers, and/or grandmothers to test against unidentified human remains. They did a mitochondrial DNA analysis on a hair sample in this case and compared it to a blood

sample from Mr. Bolin. They received the samples on 5-26-98, finished the analysis on 6-29-98, and did the report on 7-9-98. In looking at the hair found in this case and Mr. Bolin's blood, there were no differences in the mitochondrial DNA. Population genetic frequency—the most they would expect to see with this particular profile—is less than 1% of the population. Mitochondrial DNA does not degrade as fast as nuclear DNA. Mitochondrial DNA is just as reliable as nuclear DNA, but it's not as discriminating. (V18/T628-641)

Christopher Bastan, a statistician in statistical genetics, analyzes data relevant to genetical systems. He has testified as an expert in population genetic frequency and statistical genetics. He reviewed Agent Stewart's report regarding the match of the hair and blood for statistical purposes in this case. The hair is 916 times more likely to be from Mr. Bolin or a maternally derived relative than from a random person in the Caucasian population. (V8/T642-647)

The Medical Examiner, Dr. Lardizabal, had passed away by the time of Mr. Bolin's third trial; so his prior testimony was read to the jury. Dr. Lardizabal performed an autopsy on Stephanie Collins. He observed six slits or cuts to the back of Stephanie's sweater. These cuts were an inch long and probably caused by a knife. None of the organs or tissue or anything like that was left due to decomposition.

According to Dr. Lardizabal, the skull had been hit with a heavy metallic blunt object such as a hammer or pipe. The skull

was in 28 fragments. The most vital part of the brain was next to where the skull was fragmented, and to fragment this area is 100%-200% deadly. No one could survive this injury. Based upon an examination of the skull, Dr. Lardizabal opined that there were nine points of impact to the top and sides of the skull. The blows would have been quickly fatal. The individual blows would have caused immediate unconsciousness. There was no way to know whether the stab wounds took place before or after the head wounds. Blows to the head with head wounds bleed a lot. The victim's clothes were arranged normally, intact. He could not determine if there was sexual activity, because there were no sexual organs. (V16/T418-438)

The death certificate for Cheryl Jo Haffner/Cheryl Coby was placed into evidence. Ms. Coby died on 10-23-92. (V16/T417) As a result of her death, a redacted version of her 1991 trial testimony via video tape was played to the jury. Cheryl Jo Coby testified she was born on 9-1-57, was married 4 times, was presently separated from Danny Coby, and was once married to Oscar Ray Bolin from 2-11-83 to 4-89. Cheryl and Mr. Bolin had 2 children—Christopher who was born 12-31-85 and died within 40 hours, and Jared who was born in 5-26-87. Cheryl was a severe diabetic, and the complications with the pregnancies caused her to be hospitalized numerous times in 1986. Cheryl would often take items like towels and blankets from the hospital and bring them home with her. As a result of her diabetes, Cheryl was legally blind, had a heart condition, and had lost both legs in the last year.

(V16/T440-443)

While they were married, Cheryl and Mr. Bolin worked the carnival circuit. They returned to Tampa in late October 1986. They owned a Ford pick-up truck and had a travel trailer that they lived in. It was parked in a trailer park on North Nebraska Avenue in Tampa. Mr. Bolin was staying at the trailer and Cheryl had been staying with friends Paula Schaffer and Duane Cameron since they had arrived in town. Cheryl would go to the trailer from time to time, and she recalled taking a shower at the travel trailer during the afternoon of 11-5-86. (V16/T443-449,470)

On 11-5-86 Cheryl went with Paula Schaffer to a walk-in clinic and learned that she (Cheryl) was pregnant with her second child. Mr. Bolin did not want her to have another child, and the doctors had warned her not to get pregnant again because of the health risks. Cheryl and Paula went to a Waffle House restaurant around 6:00 p.m. on 11-5-86; and they met Ronnie and Duane there. Mr. Bolin arrived between 7:00 and 8:00 p.m.. Mr. Bolin sat down and ate a bowl of chili. Cheryl believed he acted like something was bothering him. Mr. Bolin asked if she was ready to leave, and Cheryl said she wasn’t ready. A little later they left in the pick-up together and went to the trailer. (V16/T448-451,467)

When they reached the travel trailer, Mr. Bolin backed the truck up to the door. Mr. Bolin went into the trailer while Cheryl waited in the truck. Cheryl could not see inside the trailer as the curtains were closed and the door was shut. Mr. Bolin was in the trailer for 10-15 minutes; and when he came out, he had

something wrapped in her quilt tossed over his shoulder. He put the object in the back of the truck. Cheryl described her quilt and sheets and then identified the items that had been wrapped around Stephanie's body—her quilt, sheets, and towels including one she had brought home from the hospital. These items had been in the trailer in November 1986. Mr. Bolin went back inside the trailer for about 10 minutes. When he came out, he drove them to Morris Bridge Road. Mr. Bolin stopped the truck, got out, took the body out of the truck, and threw it in a ditch. Mr. Bolin backed the truck up to make sure the headlights wouldn't shine on it and it could not be seen. The two then returned to the trailer. (V16/T452-458)

Cheryl went into the trailer and into the bathroom. Everything was wet—the floor, the ceiling, the cabinet doors. Cheryl saw blood on the curtains and wall. She saw a spot of blood on the carpet near the bed. She saw a butcher knife laying on the counter by the sink instead of in the drawer where it was normally kept, and the handle was wet. Cheryl did not see a heavy object in the trailer which could have been used to fracture a skull. (V16/T456-457,472)

Cheryl never saw Mr. Bolin driving a white passenger or commercial van around 11-6-86; and when he picked her up at the Waffle House on 11-5-86, it was in the silver and black pick-up truck. (V16/T466) Cheryl did not see a white van in the afternoon on 11-5-86, when she went to the trailer and took a shower. She never saw Mr. Bolin with Stephanie. (V16/T470,471)

Cheryl had become permanently blind when she was pregnant with her first son, so in November 1986 she could not see well at night and had problems distinguishing colors. But even though it was dark outside the trailer on 11-5-86, Cheryl said she could still see the color of the sheets. (V16/T467,473)

Cheryl did not tell anyone about this until Danny Coby asked her to marry him. Then she told Danny some things but not everything. She married Danny in April 1989, filed for divorce from Danny on 7-3-90; and Danny called Crime Stoppers on 7-12-90. (V16/T458,459,475) Cheryl was told that Danny had already collected $1000 for calling Crime Stoppers, and the initial reward of $5,000 had grown to $63,000 if there was a conviction in the death of Stephanie. Cheryl had asked her attorney to inquire into collecting the reward money; and if there is reward money as a marital asset, she wants a part of it. Cheryl stated that Danny had done nothing to merit him collecting the reward, but she was still trying to collect the reward. Cheryl also stated she had a lot of outstanding medical bills in July 1990—loss of her legs due to diabetes, heart surgery, kidney problems. She had at least $5,500 due in medical bills in July 1990, and she had not been able to work from 4-89 til 4-90. (V16/463-465,478-483)

Cheryl also stated that her young son Jared is the most important thing in her life. She had asked Mr. Bolin to give up his parental rights in the past. She also knew that one of the conditions of the reward was that the suspect has to be convicted of Stephanie Collins' death. (V16/T481,482)

Danny Coby's call to Crime Stoppers resulted in a visit from the Hillsborough County Sheriff's Office. Cheryl initially told them nothing, because she wanted to call her parents first. After speaking with her mother, she went back to the officers and told them what she knew. In July and August of 1990, Cheryl came to Tampa to assist law enforcement. She took them where the body had been taken on 11-5-86. Det. King from the Hillsborough County Sheriff's Office spoke to Cheryl Coby on 7-15-90. During her statement of what had happened, she never mentioned seeing a butcher knife with a wet handle. (V16/T459-461;V17/T489-501)

Colonel Gary Terry with the Hillsborough County Sheriff's Office was supervising the Stephanie Collins' homicide investigation. On 7-22-91, Mr. Bolin attempted suicide and had left an envelope in his cell for Terry. Inside the envelope was a suicide note. (V17/T535,543-546) Although the note was not read during Terry's testimony, the prosecutor read part of it during closing argument: "...you'll haft (sic) to ask Cheryl Jo, because she knew just about Everything that I was ever a part of. ...she know (sic) about....[this]homicide....Because it was her ideal on how to dump [the body]...." (V19/T765;V11/R1994)

A detective with the Hillsborough County Sheriff's Office searched for Mr. Bolin's 1986 pickup truck in 1990. The license plate number when Mr. Bolin had the truck was 724-BYL. (V17/T522) During closing argument, the prosecutor opened Stephanie's purse and pulled out a piece of paper that had "724-BYL Ray" on it. (V19/T570)

B. Penalty Phase Evidence

Mr. Bolin waived the jury recommendation part of the penalty phase. (V19/T832,833) Mr. Bolin also did not want to present mitigation, although a mitigation notebook was prepared by defense counsel and submitted to the trial court. (V20/T867-872)

1. State's evidence at Penalty Phase:

At the 11-6-06 hearing the State presented the following in pursuit of the death penalty to the trial court:

Sergeant Rick Luman, with the Wood County Sheriff's Office in Ohio, said he was corrections officer in jail on 1-4-88 when Mr. Bolin was an inmate there. Mr. Bolin was there on rape and kidnapping charges, and the investigation showed he was the master mind in an escape attempt. Srgt. Luman was attacked by Mr. Bolin and another inmate during that escape attempt. Mr. Bolin was convicted and sentenced in Ohio for rape and kidnapping and assault and escape. (V20/T878-887)

Marlene Long, a retired police detective from Wood County, Ohio, was the lead detective in the kidnapping and rape of Gennie Lafever. Ms. Lafever was taken from the Truck Stops of America where she worked. Medical personnel examined her, and the evidence was consistent with abduction and rape. Mr. Bolin pled guilty to these crimes and was armed with a gun at the time. (V20/T888-890)

Lieutenant Kling, with the Pasco County Sheriff's Office, was one of the detectives who investigated the murder of Terry Lynn Matthews. She was discovered off a dirt road. Her vehicle was

found at the post office where she was last seen. Various items of her mail were inside and outside the car. Cause of death was blunt trauma to the head from about 12 strikes. She also had 6 stab wounds to the throat and chest. Mr. Bolin was convicted and sentenced in her murder. (V20/T891-895)

2. Mr. Bolin's evidence at Penalty Phase:

Mr. Bolin's mitigation consisted solely of what was presented by counsel in a notebook. (That notebook had to be recreated due to its being inadvertently destroyed.) That notebook consists of the following:

1. 7-12-91 trial transcript in 90-11832 of defense witnesses Mary Baughman (defendant's mother), Sherry Jauregui (defendant's sister), and Robert M. Berland, Ph.D. (SV7/R1215-1330)

2. Defendant's sentencing memeorandum from the Pasco County case dated 12-4-01 (SV3/R463-468)

3. Sentencing Order rendered on 12-28-01 in the Pasco County case (SV3/R469-484)

4. PSI reports 11-01 (Pasco) and 1-07 (Hills.) and objections thereto by Rosalie Bolin on 12-11-01 (SV3/R485-607;SV4/R608-811;SV5/R812-1012;SV6/R1013-1211;SV8/R1331-1446;SV9/R1560-1576)

5. 8-30-01 depo of Rosalie Bolin (SV8/R1336-1446)

6. 10-6-92 depo of Robert Berland, Ph.D. (V10/R1812-1882)

7. 10-11-91 penalty phase transcript of Dr. Berland's testimony (SV4/R749-811)

8. Dr. Berland's notes, outlines, and other data (SV10/R1604-1673)

9. Report by Dr. Burdette. (SV10/R1697,1702)

10. Report by Dr. Wood. (SV9/R1577)

11. Spencer hearing information on 10-29-07 (SV53/R1180-1188)

12. 11-20-07 Medical Records submission (SV3/R523-607;SV4/R608-672)

The following are summaries of testimonies set forth in the mitigation notebook of Mr. Bolin's mother, sister, and psychologist who examined Mr. Bolin:

The testimony of Mary Baughman, Bolin's mother, was that she never married Mr. Bolin's father; but she had four children with him. Mr. Bolin, the eldest child, was raised in a hellish home environment where the parents fought constantly, both verbally and physically. The father refused to provide financially for the children. He often left the home for weeks at a time. On several occasions, he threatened Mr. Bolin's mother with a gun in front of the children. He physically abused Mr. Bolin. Mr. Bolin's parents separated and the children lived part of the time with each parent. Mr. Bolin's mother said that Mr. Bolin often returned from the custody of his father dirty, half-starved to death and barefoot. Nonetheless, Mr. Bolin constantly tried to run away from his mother because he wanted to reside with the father. She restrained him with a dog chain to keep him from running away. However, by the age of 12 or 13, Mr. Bolin was living exclusively with his father. When he was 17, he met Cheryl; and they subsequently married. (SV4/R725-748;SV7/R1215-1237)

The testimony of Sherry Jauregui, Mr. Bolin's sister, was that the parents "tried to kill each other all the time." The

father frequently abused Mr. Bolin, beating him with a baseball bat and a dog chain. On one occasion, the father locked the family in the house, doused it with gasoline, and tried to set it on fire. The grandfather stopped this. Sherry herself was physically abused by the father in the presence of Mr. Bolin. She married at age 14 in order to get away from home. Sherry Jauregui further stated that Mr. Bolin was emotionally devastated by the murder of their brother, Arthur, at age 18. Mr. Bolin was also deeply depressed by the death of his firstborn son. Sherry was a juvenile delinquent while growing up and twice attempted suicide. (SV7/R1238-1256)

Dr. Robert Berland, a board-certified forensic psychologist, testified that he did an extensive evaluation of Mr. Bolin. He administered the MMPI test on two different occasions. The results of these tests indicated that Bolin had profiles “fairly typical of people who are psychotic.” On the WAIS standardized intelligence test, Dr. Berland testified that Mr. Bolin’s scores showed a “clinically significant” deviation indicating damage to the brain. From interviews with Mr. Bolin and lay witnesses, Dr. Berland compiled a list of fourteen incidents which could have caused brain injury. His mother drank heavily during the pregnancy. At age 3, during an automobile accident, Mr. Bolin was thrown into the windshield and broke it. He was knocked unconscious when he was eight or nine; his sister noticed a change of behavior after this incident. Later at age 17, Mr. Bolin tried to hang himself in jail after being arrested. Although he was revived after several

minutes, Dr. Berland explained that damage was probably done to brain tissue.

Dr. Berland further testified that he compiled a list of twelve incidents during Mr. Bolin's upbringing which likely affected his emotional development. These included his being moved back and forth between parents and relatives. In one incident, Mr. Bolin's father demanded some money from the mother. When she didn't comply, the father shot holes in the floor at Mr. Bolin's feet. Mr. Bolin was five or six at the time. Dr. Berland characterized Mr. Bolin's upbringing as "a pattern of instability and violence."

Dr. Berland concluded that Mr. Bolin had a psychotic disorder characterized by hallucinations, delusions, and mood disturbance. He attributed the psychosis to a combination of brain injury and inherited mental disorder. Mr. Bolin was diagnosed as having an organic personality syndrome and organic mood disturbance. Dr. Berland stated that Mr. Bolin acted under the influence of a biologically caused mental and emotional disturbance. While Mr. Bolin's capacity to appreciate the criminality of his conduct was not substantially impaired, his ability to conform his conduct to the requirements of law was substantially impaired. (SV4/R749-811;SV7/R1257-1330)

SUMMARY OF THE ARGUMENT

Mr. Bolin is entitled to a new trial without Cheryl Coby's testimony for 2 reasons: (1) Her 1991 redacted testimony denied Mr. Bolin the right to a cross-examination that was meaningful, adversarial, and tested the credibility of Cheryl Coby. (2) Because Cheryl Coby's 1991 redacted testimony intertwined what Mr. Bolin told her (which was redacted) with what she observed, the spousal privilege had to apply to both what Mr. Bolin told Cheryl Coby and what she observed. Since there is no way to "fix" Cheryl Coby's testimony to comport with Mr. Bolin's constitutional rights of confrontation and due process, Mr. Bolin is entitled to a new trial without Cheryl Coby's testimony.

The trial court erred in not suppressing the suicide letter seized from Mr. Bolin's jail cell after his suicide attempt. There was nothing on the face of the envelope that contained this letter that made it immediately apparent it was evidence of an attempted suicide, so there was no "plain view" exception justifying the seizure of Mr. Bolin's letter. This Court has also recognized that a pretrial detainee has some Fourth and Sixth Amendment protections, and the State cannot go into a pretrial detainee's cell for the purpose of gathering evidence. The facts show that this is what happened in Mr. Bolin's case. In addition, the seizure of Mr. Bolin's papers may have implicated Mr. Bolin's right to counsel under the Sixth Amendment and tainted the seizure of the suicide letter.

The trial court also erred when it imposed a death sentence in this case. The trial court erroneously rejected a statutory mitigator “ability to conform conduct” which was clearly established by the defense expert, was uncontroverted, and was consistent with the evidence. The death sentence is also disproportionate in light of the substantial mitigation which outweighs the single aggravator.

ARGUMENT

ISSUE I

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

Mr. Bolin filed and argued his motion to exclude Cheryl Coby's 1991 trial testimony based on 2 grounds: (1) Due to the passage of time and the 1991 trial testimony's focus on inadmissible marital privilege communications, defense counsel's prior opportunity to cross-examine Cheryl Coby had become meaningless in light of the redacted testimony. Mr. Bolin's right to confront the most important witness at his trial was denied in violation of his constitutional rights under the Sixth Amend., U.S. Const.; 14th Amend., U.S. Const.; and Sec. 16, Fla. Const., Sec. 9, Fla. Const.; Mr. Bolin was also denied due process under the Fifth Amend., U.S. Const.; 14th Amend., U.S. Const.; and Sec. 9, Fla. Const.. (2) Because of the way Cheryl Coby's testimony intertwined what Mr. Bolin told her with what she observed, the spousal privilege had to apply to both what Mr. Bolin told Cheryl and what she observed. These grounds are addressed separately in this issue.

A. Right to Meaningful Prior Opportunity to Cross-Examine Cheryl Coby

In Crawford v. Washington, 541 U.S. 36 (2004), the United States Supreme Court stressed the importance of the Confrontation

Clause under the Sixth Amend., U.S. Const. and its applicability to the states under the 14th Amend., U.S. Const.. The Court held that testimonial statements of a witness who did not appear at trial would not be admissible unless that witness was unavailable and the defendant had had a prior opportunity for cross-examination. Id. at 59,68. The Court refers to "an adequate opportunity to cross-examine" as set forth in prior cases. Id. at 57. However, the Crawford opinion does not really discuss in any detail the quality of the opportunity for cross-examination. What Crawford did do, though, was to reject its earlier decision in Ohio v. Roberts, 448 U.S. 56 at 66 (1980), which created a test for admissibility of hearsay evidence that fell under a "firmly rooted hearsay exception" or bears "particularized guarantees of trustworthiness." The Court rejected the Roberts test because it allows the "jury to hear evidence, untested by the adversary process, based on a mere judicial determination of reliability.... Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes." Crawford, 541 U.S. at 62. The Court stressed the importance of cross-examination and how it could undermine trial court assumptions of a hearsay statement's reliability. Id. at 66.

In looking at Florida case law since Crawford, Washington v. State, 18 So. 3d 1221,1223 (Fla. 4th DCA 2009), the court stated:

> Following Crawford, the introduction of out-of-court testimonial statements violates the Sixth Amendment, regardless of any rule of evidence, unless the declarant is unavailable and the defendant has a prior mea-

> ningful opportunity to cross-examine the witness. Id. [at 68-69].

Thus, the Fourth District described the prior cross-examination as needing to be a meaningful opportunity. In Corona v. State, 64 So. 3d 1232 at 1241 (Fla. 2011), this Court reiterated what it had held in 2008 in rejecting depositions as not meeting Crawford's cross-examination requirement affording an adequate prior opportunity to cross examine. Discovery depositions were "not designed as an opportunity to engage in adversarial testing of the evidence against the defendant...." Id. citing Blanton v. State, 978 So. 2d 149 at 155 (Fla. 2008). Thus, this Court has looked at the prior opportunity for cross-examination as the opportunity to engage in the adversarial testing of the evidence against the defendant.

And though Garcia v. State, 816 So. 2d 554,561 (Fla. 2002), predates Crawford, its emphasis the importance of cross-examination and any limitation on that right falls in line with the Crawford reasoning:

> Both the United States and Florida constitutions provide that a defendant has the right to confront adverse witnesses. See U.S. Const. amend. VI; art. I, § 16(a), Fla. Const. The right of cross-examination is "implicit in the constitutional right of confrontation and helps assure the 'accuracy of the truth-determining process.'" Conner v. State, 748 So.2d 950,955 (Fla. 1999) (quoting Chambers v. Mississippi, 410 U.S. 284,295,93 S.Ct. 1038, 35 L.Ed.2d 297 (1973)). Cross-examination is the "principal means by which the believability of a witness and the truth of his testimony are tested." Davis v. Alaska, 415 U.S. 308,316,94 S.Ct. 1105, 39 L.Ed.2d 347 (1974).

Clearly, the right to confrontation requires a prior opportunity to cross-examine an unavailable witness that must be "ade-

quate," "meaningful," engaging in the "adversarial testing" of the out-of-court testimony, and one that allows the "believability" of a witness and the "truth" of the witness' testimony to be tested. Without a full opportunity to cross-examine a witness, the right to confrontation is made meaningless; and in a situation where the death penalty is at issue, that right should be given even more emphasis.

The Sixth Amendment Right to Confront should be treated similarly to the Sixth Amendment Right to Counsel. In 1999, this Court recognized that the right to counsel in capital cases required the "important step in ensuring the integrity of the judicial process in capital cases by adopting a rule of criminal procedure to help ensure that competent representation will be provided to indigent capital defendants in all cases." In re Amendment to Florida Rules of Criminal Procedure – Rule 3.112 Minimum Standards for Attorneys in Capital Cases, 759 So. 2d 610,611 (Fla. 1999). (The "indigent" reference has since been eliminated.) Because this Court was concerned as to the quality of the judicial process in capital cases, it created a rule requiring attorneys who wish to represent those defendants facing the death penalty on both the trial and appellate levels to meet certain requirements that exceed what is required to represent non-capital defendants. For example, the attorney must have at least 5 years of experience in criminal law, handled a minimum amount of serious trial/appeals, and attend a continuing legal education program of at least 12 hours every 2 years devoted specifically to the defense of capital cases. These

and additional requirements show that an attorney handling a capital case must be well-qualified in this area to do so. (There is an exception to this rule where the defendant chooses his counsel under his Sixth Amendment right to counsel and this counsel doesn't meet the minimum standards. The defendant has the constitutional right to counsel and that constitutional right must prevail over the rule requirements. See, Williams v. State, 932 So. 2d 1233 (Fla. 1st DCA 2006).) Thus, the right to counsel in capital cases is heightened under this Court's rules of procedure. It should follow that the right to cross-examination should also be heightened in capital cases. If "the quality of lawyering is critical" in capital cases "where the very life of the defendant is at risk," In re Amend. 3.112, 759 So. 2d at 613, then those specially trained lawyers need to be given the tool of confrontation with which to work.

This now brings us to Mr. Bolin's situation. The most crucial state witness in the case against Mr. Bolin was his ex-wife, Cheryl Coby. Allowing her to erroneously testify in trials 1 and 2 to privileged husband-wife communications resulted in this Court awarding new trials—twice. Bolin v. State, 650 So. 2d 21 (Fla. 1995); Bolin v. State, 793 So. 2d 894 (Fla. 2001). That is how important Cheryl's testimony is in this case. "The trial court's error is not harmless error, as Coby's testimony regarding Bolin's privileged statements was the central focus of the State's case against Bolin." Bolin, 793 So. 2d at 898. This crucial State witness became unavailable almost immediately after giving testi-

mony in the first trial in this case. Cheryl testified on 10-10-91 and passed away on 10-23-92, so she was not available for trials 2 and 3. Cheryl Coby's redacted testimony is frozen in time since 1991, and Mr. Bolin's highly qualified defense trial counsel had to deal with a cross-examination which took place 15 years ago, that focused on the privileged communication which had to be redacted, and conducted by a trial attorney who did not fall under the minimum standards for capital counsel (the 1991 trial predated the 2000 effective-date rule).

The original 1991 cross-examination of Cheryl Coby was focused on the privileged communication and appeared throughout the cross-examination. Thus, the cross-examination was chopped up (the redactions do not occur all in the same place); and not so hard hitting on other areas. For the convenience of the Court, the 1991 version of Cheryl's testimony is attached as Appendix A and is found at V8/R1552-1600,V9/R1601-1617. (The State's direct shows what was redacted, but it does not show what was redacted in cross-examination. Undersigned counsel has drawn attention to these redacted portions.) The 2006 redacted version of Cheryl's testimony is attached as Appendix B and is found at V16/T440-485. Cross-examination in 1991 was 31 pages and in 2006 was 21 pages—a reduction of about 33%. And had defense counsel not been so focused on the privileged communications, he may had developed cross-examination in other areas.

In addition, to the focus of the cross-examination being on what is now redacted, there is also the problem that a 15-year old

cross-examination of the State's main witness is frozen in time and does not allow for an adversarial testing of the witness and her credibility. All the other witnesses were faced with memory issues and conflicting statements that changed from trial to trial to trial, but the State's main witness has no such challenges. It is to be noted that undersigned counsel could not merely "lift" the Statements of Facts of the trial from prior briefs filed in the Collins homicide because the State's witnesses' testimonies were not the same (with the exception of the Medical Examiner's testimony which also had to be read from a prior trial since he had passed away before this 2006 trial).

An obvious change in testimony was when Michael Long testified he saw Mr. Bolin in a white Ford van sometime in 1984 or 1985 or 1986 borrowed from a painter. As was noted in cross-examination, this was the first time in 20 years Mr. Long had ever mentioned seeing Mr. Bolin in a white van and had only been asked about a white van about a month before trial by the prosecutor. (V18/T684-695) The State was able to benefit from having Mr. Long available in 2006 so that it could further its case. Mr. Bolin's counsel had no such opportunity to benefit from a more thorough and concentrated cross-examination of Cheryl Coby. For example, Cheryl stressed that she found out she was pregnant on 11-5-86 by going to a walk-in clinic; yet, no clinic records could be found for that date. Since that is also the date Stephanie Collins went missing, any attack on Cheryl's recollection of 11-5-86 would have been helpful. (V13/T14,15)

While the rest of the world has moved on and changed and the other State witnesses' in this case have changed their testimony, Cheryl Coby's testimony remains the same with no ability for defense counsel to attack her credibility and engage in an adequate, meaningful, adversarial testing of Cheryl Coby's 1991 testimony that was substantially redacted for 2006. The fact that the State was able to capitalize on a lack of credibility issues with Cheryl Coby's testimony by emphasizing this in closing arguments further proves Mr. Bolin's point. (V19/T767) That Mr. Bolin had to deal with this substantially redacted, improperly focused, frozen-in-time testimony 15 years later was not through any fault of Mr. Bolin's. These new trials were caused by the State's persistence in using impermissible spousal privilege testimony in trials 1 and 2.

But even if this Court believes the one and only opportunity to cross-examine Cheryl Coby in 1991 was adequate for confrontation purposes, it was not adequate under due process constitutional rights under the Fifth Amend., U.S. Const.; 14th Amend., U.S. Const.; Sec. 9, Fla. Const.. The special circumstances in this case show that the admission of Cheryl Coby's 1991 redacted testimony 15 years after she testified denied Mr. Bolin due process. There is no way this problem can be fixed. Through no fault of his own, Mr. Bolin's right to trial has been crippled with 15-year-old redacted testimony which had been originally focused on inadmissible privileged communications. Simply redact-

ing Cheryl's testimony for trial #3 didn't cure the problem with Cheryl's testimony where Mr. Bolin is concerned.

The State may have no issues with it, because the redacted version shows even less of an attack on Cheryl's credibility. As the Prosecutor argued to the jury in closing arguments:

> Because one thing you can consider and Judge Fleischer is going to tell you, in order to assess credibility, you can look at a person's demeanor, how they testify.
>
> You know, there is a famous baseball player who you see on these AFLAC commercials named Yogi Berra who once said, "You can observe a whole lot by watching." And you watched her. You saw her testify. Did she appear – did her demeanor appear to be someone who was vacillating, who was not being 100 percent accurate? You heard her cross-examination.
>
> Now, counsel in opening argument mentioned, you are going to see a video of Cheryl Coby and I won't get the chance to cross-examine her. And he didn't, because she had been cross-examined earlier. She was deceased in 1992. Just like I couldn't redirect questions towards her, counsel couldn't cross-examine her. But she was cross-examined. You heard the cross-examination.
>
> You heard about her having financial problems, her needing money. But did you hear anything of substance? Were there any inconsistencies? Remember the inconsistency? Well, did you move in with Paula Cameron? She said no. Well, let me read to you a deposition, and he reads a deposition. And what does Cheryl say? No, I didn't move in with her. I stayed with her, but I didn't move in with her. I had a post office box in Land O'Lakes. I stayed with her, I didn't move in with her. <u>That was the sum and substance of any prior inconsistent statement that Cheryl made</u>.

(V19/T766,767, emphasis added.)

Mr. Bolin's attorney's hands, however, were tied when it came to dealing with the State's main witness—he could not ignore the privileged communication and focus on the remaining portion of

Cheryl's testimony; he could not test her credibility with multiple prior statements or with the issues that came with the passage of time; and he could not delve into any evidence discovered during the last 15 years that could possibly reveal helpful information (just as the State was able to elicit new information from an old witness, Michael Long). Any ability to cross-examine Cheryl was gone for Mr. Bolin's counsel in trial #3, and this problem cannot be cured. All defense counsel could argue about Cheryl's testimony was that she needed money, there was reward money on this case, she had a son with Mr. Bolin she wanted to keep away from Mr. Bolin, her health was very poor, she never approached the authorities but was pushed into it by her fourth husband who called Crime Stoppers years later, her testimony about her bedding is not supported by any other testimony, Cheryl had years to come up with her story, and despite her being legally blind she makes many observations in the trailer. (V19/T779-791) This was all defense counsel had to argue about the State's main witness' credibility, because the opportunity to cross-examine Cheryl had been so eroded over the years and with this Court's decisions prohibiting the privileged communications. Mr. Bolin's due process rights were denied with the admission of Cheryl's 1991 redacted testimony.

The State's motion to admit Cheryl's 1991 testimony is at SV1/R67-72, and Mr. Bolin's motion to exclude this testimony is at SV1/R73-86. In that motion, Mr. Bolin raises the violation of his constitutional rights to confrontation and due process. (The newly

discovered evidence, however, focuses on the other pending Hillsborough County case and not the Collins case.) The hearings on this issue were on 6-6-05 and 5-8-06 (SV1/R158-193;V13/T6-17) and the objection was renewed at the beginning of the trial after voir dire. (V16/T300-303) The trial court allowed the use of Cheryl's redacted testimony and denied Mr. Bolin's motion to exclude on 6-15-05 in the other Hillsborough case (SV1/R87-91) but it was agreed by trial counsel that this order also applied to this case (SV57/R1216,1217). This issue was properly preserved.

Because Mr. Bolin's constitutional rights to confrontation and due process were violated when the State was allowed to introduce Cheryl Coby's 1991 redacted trial testimony and there can be no remedy that allows for Cheryl Coby's 1991 testimony, Mr. Bolin is entitled to a new trial without the admission of Cheryl Coby's 1991 testimony. As in prior appeals in this case, the error of using Cheryl Coby's testimony—the State's main witness against Mr. Bolin—cannot be deemed harmless error.

B. Spousal Privilege Under sec.90.504(1), Fla. Stat. (2011)

The Florida Legislature has created a husband-wife privilege in sec. 90.504 that gives a defendant spouse the right to prevent their witness spouse from disclosing communications made in confidence between the spouses while they were husband and wife:

> 90.504 Husband-wife privilege.
> (1) A spouse has a privilege during and after the marital relationship to refuse to disclose, and to prevent another from disclosing, communications which were intended to be made in confidence between the spouses

while they were husband and wife.

The purpose of this privilege is to protect society's "deeply rooted interest in the preservation of the peace of families, and in the maintenance of the sacred institution of marriage; and its strongest safeguard is to preserve with jealous care any violation of those hallowed confidences inherent in, and inseparable from, the marital status." Mercer v. State, 24 So. 154, 157 (Fla. 1898). Mercer goes on to state, "the reason of the rule for excluding the confidences between husband and wife...is found to rest in that public policy that seeks to preserve inviolate the peace, good order, and limitless confidence between the heads of the family circle so necessary to every well-ordered civilized society." Id. This Court then goes on to state such a spousal privilege is not confined to only statements but includes all knowledge obtained by reason of the marriage relation. Id. Mercer factually dealt with a written communication.

Years later in Kerlin v. State, 352 So. 2d 45 (Fla. 1977), this Court was faced with whether the spousal privilege extended to observation of criminal conduct (actions) of the defendant spouse by the witness spouse. This Court noted there have always been limitations on this privilege. For example, if a husband is beating his wife, the husband cannot seek protection in the privilege to silence the wife who very well may be the only witness. This exception/limitation is set forth in sec. 90.504(3)(b) and is supported by the purpose of this privilege is to preserve the peace of family, then that peace has already been

destroyed by such violence and there is no peace to protect. See Kerlin, 362 So. 2d at 48 and its cite to Mercer. Kerlin went on to cite Wolfle v. United States, 291 U.S. 7, 17 (1933), where the United States Supreme Court stated "[t]he privilege suppresses relevant testimony and should be allowed only when it is plain that marital confidence can not otherwise reasonably be preserved." Kerlin, 362 So. 2d at 50. (Wolfle rejected the privilege when the letter from a husband to his wife had been dictated to a stenographer.) This Court then went on to "approve the restricted interpretation of Dean Wigmore, an eminent authority on evidence, which limits the privilege of communications between husband and wife to spoken or written statements or gestures, a view which has been adopted by the courts in this state." Kerlin, 352 So. 2d at 51. Wigmore, however, rejected extending the privilege to acts by analogizing the husband-wife privilege to the attorney-client privilege. This is a poor analogy.

The attorney-client privilege, by necessity, can only apply to written or verbal communications made after the crime has been committed in a criminal case in order to allow the defendant to receive effective legal representation. The attorney must be made aware of all relevant facts in order to competently represent their client, and that kind of total disclosure can only be insured when the client knows their communication with the attorney is confidential. The limitations on this privilege are: (1) when the client is seeking legal assistance to commit a crime, (2) when a will is being contested, (3) an ineffective or

malpractice claim, (4) when the attorney is a witness to a legal document, and (5) when 2 or more clients subsequently develop adverse interests.

Clearly, the attorney-client privilege is essential in criminal cases where loss of liberty is at stake, and the client needs to know that what he tells his attorney is privileged—i.e., not revealed to anyone else. But this limited, and very important, privilege goes to a total nondisclosure to protect the client and allow the attorney's competent representation of that client. The spousal privilege is different. One spouse can go to the police to reveal the other spouse has committed a crime, but the accused spouse has the right to invoke the marital privilege at trial so that the jury doesn't hear what the accused spouse told the witness spouse in confidence. See State v. Grady, 811 So. 2d 829 (Fla. 2d DCA 2002). Although the accused spouse's statements to the witness spouse may be known to all parties, these statements do not come in as evidence in trial to protect the sanctity of the marriage. The preservation of the peace of the family keeps the witness spouse from becoming an adversary of the accused spouse in a court of law. To allow otherwise would create a serious adversary situation between the spouses that could irrevocably harm the marriage. Also, as noted in Smith v. State, 344 So. 2d 915, 919 (Fla. 1st DCA 1977), the State's attempt to analogize the marital privilege to the attorney-client privilege and claim the marital privilege should not apply to communications made in furtherance of a crime would not work. The

Court refused to apply such an exception upon the marital privilege, "because of the harm it would inflict upon the strong policy underlying the [marital] privilege." Id.

And finding that there is a strong public policy supporting the marital privilege is important to understanding the purpose for it. While the attorney-client privilege protects the client, the marital privilege goes beyond protecting the individual spouse—it protects the sanctity of marriage as a whole. See Smith; Jackson v. State, 603 So. 2d 670,671 (Fla. 4th DCA 1992). Going back to Mercer, 24 So. at 157, the purpose for the marital privilege was for the protection of the "sacred institution of marriage; and its strongest safeguard is to preserve with a jealous care any violation of those hallowed confidences inherent in, and inseparable from, the marital status." Id. Mercer noted this privilege should not be confined to mere statements, but should also include all knowledge obtained as a result of the marital relationship. Id. If the whole point behind the marital privilege is to protect the marriage by keeping the witness spouse from testifying against the defendant spouse in a court of law, then what is the point keeping out the statement by the defendant spouse to the witness spouse of, for example, "I committed this crime X" while allowing the witness spouse to testify that they saw the defendant spouse commit crime X? Keeping out the statement while still allowing the observance of the act does not preserve the sanctity of the marriage. And why should the act of a gesture constitute a privileged communication

(see Kerlin, 352 So. 2d at 51) when all other acts are not privileged?

When this Court was faced with extending the marital privilege for communications to acts, it examined other cases from Florida and determined that limiting the privilege to spoken or written statements or signs or gestures and not to acts had "been adopted by the courts in this state." Id. This restricted view, however, was not exactly adopted in the opinions cited by this Court. In Porter v. State, 160 So. 2d 104,110 (Fla. 1963), the discussion on this issue is contained in 2 short paragraphs that does not discuss acts versus statements. It merely rejects a claim that a wife can not testify against her husband in a criminal case unless she is an interested party. In rejecting this claim, this Court said the statute had done away with the common law rule that forbade either spouse to testify against the other. The issue of act versus statement was not addressed. In Gates v. State, 201 So. 2d 786,787 (Fla. 3d DCA 1967), the Court said the wife's testimony as to an event/act the defendant had committed was not privileged; because it was not a communication. However, should it be privileged the Court found the evidence to be merely cumulative and harmlessed-out the error. It should also be noted that the event concerned an act of violence against the wife's minor daughter. Under sec. 90.504(3)(b) there would be no spousal privilege when one of the spouse's child is the victim in a criminal case. In Ross v. State, 202 So. 2d 582,583-584 (Fla. 1st DCA 1967), the Court relied on Porter and Gates for support

in refusing to apply the marital privilege to an act; however, it also did what the Court did in Gates—it harmlessed-out any error based on the fact that the contested evidence was merely cumulative of other testimony. And in Smith v. State, 344 So. 2d 915,918 (Fla. 1st DCA 1977), the Court only addressed the "acts" as not being covered by the marital privilege in a one-sentence footnote and then cited to Ross. The other item to note in Smith is that it was reversed for a new trial, because the State had relied on actual privileged statements and had made a feature of those detailed acts going to the uncharged cover-up of the crime.

This Court should revisit its holding in Kerlin finding that the marital privilege only applies to statements, signs, or gestures and not acts—especially in this case. Here we have a witness spouse who testified at the first trial in this case in 1991 and then died in 1992. That frozen-in-time testimony has been redacted after 2 trials to try to eliminate the privileged communications from the non-privileged acts, but it was not entirely successful; because it was impossible to separate the 2 completely. During her testimony Cheryl initially referred to the "object" she saw Mr. Bolin bring out from their trailer (which was wrapped in her quilt—V16/R453), place it in their truck, and throw it in a ditch. Almost immediately thereafter Cheryl said Mr. Bolin took the "body" out of the truck and threw it in a ditch. (V16/T455) Even though there was no specific objection to this statement, defense counsel did state during the motion hearing to exclude Cheryl's testimony that "it is very difficult

when you go through the testimony to be able to ...decipher what it is she can testify to to what she viewed....” (SV31/R213) Defense counsel also argued that what Cheryl saw is intertwined with what Mr. Bolin said. (SV31/R212) This is clearly demonstrated when she turns the “object” Mr. Bolin was carrying into the “body.” She did not see a body that night according to her testimony, so the only way she could call what she claimed Mr. Bolin was carrying was a body is from what Mr. Bolin told her.

Calling the “object” Mr. Bolin was carrying a “body” is an obvious example of where Cheryl’s knowledge of what she observed was intertwined with what Mr. Bolin told her. Not so obvious might be how, with Cheryl being legally blind and unable to drive at night because she had problems seeing at night and had problems distinguishing colors (V16/T467,473) she could still see the color of the sheets Mr. Bolin was carrying at night in the dark to the back of the truck (V16/T454,473). With her poor eyesight, how could her knowledge of the sheets be based on only what she observed that night outside in the dark versus what Mr. Bolin told her? Would she have seen the spot of blood at the foot of the bed or on the curtains or on the wall if not for what Mr. Bolin told her? This is what defense counsel was arguing when he said Cheryl’s testimony about what she observed and what Mr. Bolin told her was so intertwined as to be impossible to separate (see Motion to Exclude hearing SV31/R211-214; SV29/R113,114;V13/T6;V16/T300-303).

And this argument is bolstered by what is found in the

unredacted version of Cheryl Coby's testimony. In the unredacted version Cheryl is talking with Mr. Bolin about 'getting rid of the body.' So when she describes what Mr. Bolin threw in the ditch as "the body," it is clear this information came from her privileged communication with Mr. Bolin. (V8/R1566-1574) Also in the unredacted version, Mr. Bolin tells Cheryl he had cleaned things up inside their trailer and had hosed down the bathroom; so when Cheryl testifies to what she observed in the trailer the next day (bathroom all wet, blood on curtains and wall and spot of blood on carpet), she was clearly looking around because of what Mr. Bolin had said to her. (V8/R1574-1577) Someone with eyesight as poor as Cheryl's might not have "observed" these things if she had not known to look for them.

As defense counsel argued, Cheryl's testimony has to be excluded. Simply redacting out the obvious privileged communications from Mr. Bolin cannot work in this case where the focus of her one and only trial testimony was on the privileged communications both on direct and cross examinations. The intertwining of what Mr. Bolin told Cheryl and what Cheryl said she saw could not be surgically separated by merely taking out what Cheryl said Mr. Bolin told her. Cheryl had obtained knowledge from what Mr. Bolin told her, and she then turned this knowledge into "observations." This Court's decision in Kerlin cannot apply in this case where, through no fault of Mr. Bolin's, the State relied on inadmissible marital privilege testimony in the 1991 and 1999 trial. Because of Cheryl's death in 1992, her 1991 trial testimony was used in

all subsequent trials and had to be redacted in this case's 2006 trial. But that 1991 testimony was focused on the privilege communications, and it didn't matter as to what Cheryl saw versus what Mr. Bolin told her. The two became intertwined, and it is now too late to fix. Mr. Bolin is entitled to a new trial without Cheryl's testimony.

ISSUE II

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

As a preliminary matter, Mr. Bolin is entitled to review of this suppression issue despite the fact that the Second District Court of Appeal had rejected this issue in State v. Bolin, 693 So. 2d 583 (Fla. 2d DCA 1997), in an interlocutory appeal; and this Court previously denied review. See Bolin v. State, 697 So. 2d 1215 (Fla. 1997). In Preston v. State, 444 So. 2d 939 (Fla. 1984), this Court held that "law of the case" doctrine does not bar reconsideration in a capital case of a suppression issue already decided by a district court of appeal. The Preston court pointed to the statutory mandate of automatic and full review of all judgments resulting in imposition of a death sentence, substantive due process, and the interest of justice as factors warranting review of a search and seizure issue already litigated in the Fifth District. Similarly, in Jordan v. State, 694 So. 2d 708 (Fla. 1997), this Court considered whether to review the district court's granting of the State's certiorari petition to limit discovery. Because a death sentence had later been imposed, the Jordan court agreed to decide the merits of the appellant's claim despite the State's argument that it was procedurally barred.

This trial was the third trial for Mr. Bolin in the Stephanie Collins' case. It was during the second trial that the motion to suppress Mr. Bolin's suicide letter was raised (V5/R844-848);

granted by the trial court (V5/R872); appealed by the State (V5/R873); and reversed by the Second District Court of Appeal in State v. Bolin, 693 So. 2d 583 (Fla. 2d DCA 1997). When Mr. Bolin was convicted after that second trial, this Court reversed for a new trial; because the trial court had erroneously allowed Cheryl's statements to come in at trial in violation of the marital privilege. Bolin v. State, 783 So. 2d 894 (Fla. 2001). The Second District Court of Appeal's decision that held the suicide letter should not be suppressed was noted by this Court in its 2001 Bolin decision, but it did not discuss the suppression issue itself. Although this Court stated "we agree with the Second District that the letter did not have to be suppressed," it was not dealing with the suppression issue. Bolin, 793 So. 2d at 898. Thus, this Court has not examined and ruled on the suppression of the suicide letter on its merits.

Perhaps because this was the third trial and because the Second District Court of Appeal had already rejected the issue, there was no suppression hearing—just a summation of the facts by defense trial counsel (not disputed by the prosecutor) and argument. (SV34/R275-292) The State had filed its motion to admit the evidence of Mr. Bolin's attempted suicide and the suicide letter. (V8/R1538-1548) Although the defense had no issue with the attempted suicide evidence coming in, an objection was made and subsequently argued as to the suicide letter coming in. (SV9/R1572-1576;V13/T17-18;V14/T3) When the suicide letter came in at trial during Col. Terry's testimony, the defense renewed the

previous objection. (V17/T544-547) The trial court had initially granted the State's motion to admit it at trial and gave that same ruling. (V8/R1551;V17/T545,546)

The facts from the suppression hearing are set forth in detail in the Second District Court of Appeal's decision in Bolin, 693 So. 2d at 584,585; but the abbreviated summation set forth by defense counsel gets to the heart of the matter. Mr. Bolin was in the Hillsborough County Jail in June 1991 awaiting trial in 2 murder cases and was being represented by counsel. The officers at the jail are responsible for the inmate's protection and security. Mr. Bolin, although not yet convicted, was classified as a security risk and had heightened security as a result. Mr. Bolin's single cell was checked daily for contraband or weapons or anything he wasn't allowed to have. Mr. Bolin had a box of personal effects and all his legal papers. Such boxes can be searched for contraband at any time—the officers can look through such boxes, but not read the papers and then use their contents later. On 6-22-91, Mr. Bolin was in medical distress and taken to the hospital. The officials at the jail called the supervising homicide investigator in the Collins' case—Col. Terry—and another investigator in this case—Corp. Baker—to tell them that Mr. Bolin had tried to commit suicide. Terry and Baker told the jail people to lock down Mr. Bolin's cell and that they were coming over. There was one letter in an envelope on top of Mr. Bolin's box addressed to then Major Terry. That letter, now referred to as the suicide letter, was taken and read by Terry. Other letters

from inside the box were also taken and read. Now the State has used the contents of Mr. Bolin's suicide letter against Mr. Bolin at his trial as incriminating evidence.

The defense argued that Mr. Bolin still had some Fourth Amendment protections against a search and seizure within a detention facility, and the State relied on the Second District Court of Appeal's decision.

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

A) Plain View.

At the outset, it should be recognized that the "plain-view" doctrine was inappropriately invoked by the Second District to legitimize seizure of the letter. Minnesota v. Dickerson, 508

U.S. 366, at 375 (1993), sets forth the parameters of "plain-view":

> if police are lawfully in a position from which they view an object, if its incriminating character is immediately apparent, and if the officers have a lawful right of access to the object, they may seize it without a warrant. See Horton v. California, 496 U.S. 128...(1990); Texas v. Brown, 460 U.S. 730...(1983) (plurality opinion). If however, the police lack probable cause to believe that an object is contraband without conducting some further search of the object -- i.e., if "its incriminating character [is not] 'immediately apparent'" Horton, supra, at 136,... -- the plain-view doctrine cannot justify its seizure. Arizona v. Hicks, 480 U.S. 321,...(1987).

At bar, the investigating detectives were lawfully in Mr. Bolin's jail cell; however, there was no probable cause to believe that the envelope contained contraband or evidence of a crime without opening the letter and reading it (a search). No incriminating character was apparent from the face of the envelope. The Second District attempted to skirt the probable cause requirement by labeling the letter "a suicide note" and "evidence of the attempted suicide." However, suicide notes are usually not placed in an addressed envelope and stamped. The exterior of the envelope did not reveal that the contents had anything to do with Mr. Bolin’s attempted suicide. Accordingly, it was not even apparent that the letter was relevant to the attempted suicide investigation, let alone evidence of a crime which could be seized without a warrant.

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

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

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

In this Court's subsequent decision from the second trial, this Court specifically noted the suicide letter was not voluntarily delivered. Bolin, 793 So. 2d at 898. And because it had not been voluntarily delivered, there could not be a voluntary waiver contained within that letter. The next logical conclusion is that Mr. Bolin did not voluntarily relinquish any privacy protections he had under the Fourth Amendment.

B. Pretrial Detainees Retain Diminished Fourth Amendment Constitutional Rights.

Mr. Bolin recognizes that the seizure will still be upheld unless this Court agrees that he retained some expectation of

privacy in his property within his jail cell which is cognizable under the Fourth Amend., U.S. Const., and Art. I, sec. 12, Fla. Const.. The Second District agreed with the State's contention that Hudson v. Palmer, 468 U.S. 517 (1984), controlled this question and concluded that the trial judge erroneously relied upon McCoy v. State, 639 So. 2d 163 (Fla. 1st DCA 1994) (finding Hudson rule inapplicable to pretrial detainees). Bolin, 693 So. 2d at 585. This Court, however, has subsequently approved of McCoy and applied it in Rogers v. State, 783 So. 2d 980 (Fla. 2001).

Rogers also dealt with Hillsborough County and its jail; and with Bolin, 693 So. 2d 583 (Fla. 2d DCA 1997), for support, the prosecutor instructed State Attorney investigators to conduct a warrantless search of Rogers' cell a week before trial to seize documents relating to Rogers' case. The prosecutor stated she did not believe a warrant was necessary, because Rogers had no reasonable expectation of privacy in jail and was a high-security risk prisoner subject to a daily jail shakedown. The prosecutor cited to Hudson and the Second District Court of Appeal's Bolin opinion. This Court, however, distinguished those 2 cases by holding that a shakedown of a prisoner's cell for contraband (Hudson) and an investigation into a detained person's attempted suicide (Bolin) was not a search of a cell simply to find evi-dence to support the State's case. The search done in Rogers was found to be unconstitutional by the trial court, and all the materials seized or any fruits from those materials could not be

used at trial. This Court found this ruling appropriate and saw no prejudice to Rogers in allowing the State Attorney for Hillsborough County to remain on the case as the trial court had found that none of the items seized had been viewed by anyone in the State Attorney's Office. This Court, however, was gravely concerned by the prosecutor's actions and its "potential to undermine the essential fairness of our system of justice based on an adversarial system with established procedures for gathering evidence and searching for the truth." Rogers, 783 So. 2d at 992. This Court held that the prosecutors or their representatives could not invade a defendant's cell without a warrant and seize the defendant's personal effects for the purpose of gathering evidence against the defendant. Id.

Clearly, this Court did provide a pretrial detainee with some Fourth Amendment and Sixth Amendment protections in Rogers in upholding the trial court's decision and approving McCoy. The problem is Mr. Bolin's case is the Second District Court of Appeal's finding that the officers did not go to Mr. Bolin's cell simply to find evidence to bolster the State's case. "The letter, which was addressed to Major Terry, was in plain view and was evidence of the attempted suicide. Additionally, the letter does not contain any attorney-client information which would implicate the Sixth Amendment." Bolin, 693 So. 2d at 585. This Court focused on the purpose of searching and seizing Mr. Bolin's property as for investigating an attempted suicide and not for finding evidence against Mr. Bolin. Rogers, 783 So. 2d at 992.

This finding by the Second District Court of Appeal is not supported by the facts. The fact is that Terry and Baker went to Mr. Bolin's cell to find evidence to support their investigation in the Collins' case.

The fact that Terry was a Bureau Commander in Criminal Investigations and routinely investigated suicides or attempted suicides in cases involving major injuries was mentioned in the Second District Court of Appeal's opinion, but not during the motions and arguments contained in the hearing for this trial, nor was it mentioned at the 2006 trial. The State's motion to admit evidence of Mr. Bolin's attempted suicide focused on the attempt being evidence of guilt. (V8/T1538-1548) The State's motion does not address the illegal search and seizure issue of the suicide note. On the other hand, Mr. Bolin's motion to suppress illegally obtained evidence (i.e., the suicide letter) states that Terry and Baker and Walters of the Hillsborough County Sheriff's Office went to Mr. Bolin's cell to conduct an investigation and not for any purpose or concern for security of the jail. (SV9/R1572-1576) Nothing is mentioned about an investigation into the attempted suicide. At the 9-28-05 hearing on the 2 motions (State's to admit and defendant's to suppress), defense counsel points out that the 2 officers contacted by the jail once Mr. Bolin is taken to the hospital are Terry and Baker—the 2 detectives in charge of the Collins' criminal investigation. According to defense counsel, uncontested by the State, Terry and Baker went to Mr. Bolin's cell to see what they could find

(SV32/R278); they were looking for incriminating evidence (SV32/R282), and 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 State relied on "previous" arguments apparently made in 1998 before a different judge without saying what those arguments were and the arguments made at the Second District Court of Appeal level. The Rogers 2001 decision is not mentioned. (SV32/R291) The trial court's order filed on 5-8-06 simply granted the State's motion to admit evidence of Mr. Bolin's attempted suicide, which included the suicide letter, without any facts or reasoning. (V8/R1551) At the 2006 trial then Col. Terry states he was supervising the homicide investigation of the Collins' case in 1990. (V17/T535,548) Although Terry mentioned it was part of his duties as Bureau Commander of Criminal Investigations to investigate incidents of any unusual nature or any inquiry in the Hillsborough County jail system back on 6-22-91, he did not specifically state it was part of his duties to respond to inmates attempting suicide. (V17/T543) And when he went to Mr. Bolin's jail cell on 6-22-91, Mr. Bolin was in the hospital and Terry was with Det. Baker and Det. Walters. Terry said he mentioned something "unusual" in Mr. Bolin's cell and that was an envelope addressed to him (Terry). It was when Terry opened the envelope that he saw it pertained to Mr. Bolin's attempted suicide. (V17/T544-546)

The fact that this suicide letter was not in plain view has already been discussed in subsection A of this issue. There

is nothing evident about Mr. Bolin's attempted suicide from an envelope with Terry's name on it. It was only after the envelope was opened and the letter's contents read that the nature of the letter was known. Mr. Bolin had not sent the letter to Terry, so he had not voluntarily given it to Terry. There is a reasonable expectation of privacy in jail for a pretrial detainee as this Court held in Rogers and the approved-of decision in McCoy. And the concept of Terry looking through Mr. Bolin's cell and all his papers to investigate Mr. Bolin's injuries is not born out by the facts that Terry showed up with 2 other detectives, one of which assisted him the Collins' homicide investigation (Baker), and uncontested statements that Terry and Baker's true mission in going to Mr. Bolin's cell was to look for incriminating evidence in the Collins' investigation. That, plus the fact that Terry never gives any conclusion about any supposed investigation into Mr. Bolin's attempted suicide at trial, shows that he was not really there to investigate an attempted suicide.

And even though this Court appears to accept the Second District's reasoning that the seizure of Mr. Bolin's letters and personal effects was permissible in the course of an investigation into his attempted suicide, the Second District's reasoning is in error. The United States Supreme Court has previously rejected an attempted suicide exception to the warrant requirement in Thompson v. Louisiana, 469 U.S. 17 91984). There, the defendant's daughter told police that her mother had shot her father and ingested a large quantity of pills in a suicide

attempt. When the police arrived at the residence, they found the man dead and the woman unconscious. After the unconscious suspect was transported to the hospital, the police searched the house, seizing items which included a suicide letter.

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

Another decision of the United States Supreme Court reaffirms the reasoning of Thompson. In Flippo v. West Virginia, 528 U.S. 11 (1999), the accused and his wife were vacationing at a cabin in a state park. He called the police to report that they had both been attacked and his wife killed. After the accused had been taken to the hospital, the police searched the cabin and its environs, collecting evidence which included photographs found in an unlocked briefcase. The prosecution argued that the evidence was permissibly seized without a warrant because the police were conducting a crime scene investigation. The state further relied on the "plain view" doctrine. The Flippo court again rejected a "murder scene exception" to the warrant requirement of the Fourth Amendment. See also, Mincey v. Arizona, 437 U.S. 385 (1978). If there is no "murder scene exception" which allows a general investigatory search and seizure, then a warrantless search and

seizure in an attempted suicide should not be allowed as an "attempted suicide" exception.

As applied to the case at bar, Mr. Bolin recognizes that he did not have the same expectation of privacy in his jail cell that a person would have in his or her home. However, what expectation of privacy Mr. Bolin did have in the contents of his personal writings was not decreased by the circumstances of his attempted suicide. Once Mr. Bolin was removed from his cell and given medical attention, there was no justification for Terry and Baker to seize the letter at issue and Mr. Bolin's other private papers. The officers did not need Mr. Bolin's private papers to investigate Mr. Bolin's attempted suicide. The obvious reason for these officers to take Mr. Bolin's papers was to further their investigation and bolster the State's evidence at trial.

Mr. Bolin's case cannot be distinguished from Rogers or McCoy as to the bottom line—Mr. Bolin's letters and papers were seized in an attempt to find evidence that would bolster the State's case in the Collins' homicide. And because Mr. Bolin's highly prejudicial statement of telling Terry to ask Cheryl about this homicide because it was her idea on how to dump the body was contained in the suicide letter and was read to the jury in closing argument by the State and emphasized as evidence of Mr. Bolin's guilt, it cannot be said the admission of this note is harmless error. See State v. DiGuillio, 491 So. 2d 1129,1135 (Fla. 1986). The State cannot prove beyond a reasonable doubt that introducing the contents of the suicide letter in violation

of Mr. Bolin's constitutional rights "did not contribute to the verdict or, alternatively stated, that there is no reasonable possibility that the error contributed to the conviction." Id.

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

The Second District Court of Appeal's opinion in Bolin also rejected any finding implicating the Sixth Amendment right to counsel. That one-line conclusion is in error.

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

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

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

While custodial interrogation of the defendant is clearly a "crucial confrontation," this Court has recognized that other circumstances also qualify. In Peoples v. State, 612 So. 2d 555

(Fla. 1992), the defendant had retained counsel and was released on bail. A co-defendant agreed to help the police by making telephone calls to the defendant and allowing tape recordings to be made of the conversations. The Peoples court stated:

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

Id. at 556.

At bar, Mr. Bolin did not make any oral statements, nor was he even present, when the investigating detectives rifled through his writings. However, written statements should also pass through the "medium" of counsel unless the accused initiates the presentation. (Had Mr. Bolin actually mailed the letter to Captain Terry, he would have initiated the written communication.)

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

> the Sixth Amendment is not violated whenever by luck or happenstance - the State obtains incriminating statements from the accused after the right to counsel has attached. However, knowing exploitation by the State of an opportunity to confront the accused without counsel being present is as much a breach of the State's obligation not to circumvent the right to assistance of counsel as is the intentional creation of such an opportunity.

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

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

Although Mr. Bolin's letters contained no "work product of defense counsel," it is not clear from the record whether the box containing his personal effects also contained papers relating to trial preparation. If so, under the Warner holding, none of the

seized material including the letter to Terry would be admissible at trial.

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

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?

This issue has 2 parts—(1)the trial court erroneously rejected the "ability to conform conduct" statutory mitigator which was clearly established by the defense expert, uncontroverted, and was consistent with the evidence; and (2) the disproportionality of the death sentence when there is substantial mitigation which outweighs the single aggravator.

A. Ability to Conform Conduct

Initially, Mr. Bolin argues the trial court erred in failing to find and give any weight to the mitigating factor of ability to conform his conduct to the requirements of the law. Even though the trial court found 14 statutory and nonstatutory mitigators, it rejected the mitigation of ability to conform conduct to the requirements of law substantially impaired in spite of expert testimony to the contrary. Should this Court agree that the trial court erred in failing to find and give any weight to this mitigating factor, then this Court should add this mitigation to the already-found substantial mitigation (see Williams v. State, 37 So. 3d 187,204-207 (Fla. 2010)) or vacate the death penalty in this case and send the case back to the trial court for re-evaluation of the mitigation and the sentence (see Coday v. State,

946 So. 2d 988,1005 (Fla. 2006).

This Court in Coday set forth the basic principles that go into the analysis of evidence offered in mitigation of a possible death sentence, and those basic principles were more recently set forth in Williams, 37 So. 3d at 204 (Fla. 2010):

> The trial court must find a mitigating circumstance if it "has been established by the greater weight of the evidence." Coday v. State, 946 So. 2d 988, 1003 (Fla. 2006). "However, a trial court may reject a proposed mitigator if the mitigator is not proven of if there is competent, substantial evidence to support its rejection." Id. When expert opinion evidence is presented, it "may be rejected if that evidence cannot be reconciled with the other evidence in the case." Id. Trial judges have broad discretion in considering unrebutted expert testimony; however, the rejection of the expert testimony must have a rational basis, such as conflict with other evidence, credibility or impeachment of the witness, or other reasons. Id. at 1005.

Both Coday and Williams dealt with the same mitigation—the ability to conform conduct—and the same type of evidence—uncontroverted evidence of an expert that was not inconsistent with the evidence.

In Mr. Bolin's case, the trial court rejected Dr. Berland's opinion that Mr. Bolin had substantial impairment in his ability to conform this conduct to the requirements of the law; because he knew what he was doing, never admitted being involved in the murder, is intelligent, and dislikes/distrusts women:

> 2) The capacity of the Defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.
>
> Dr. Berland previously testified, "[H]e did appear to appreciate the criminality of his conduct at the time....[T]here was a substantial impairment in his ability to conform his conduct to the requirements of law even though he might appreciate the criminality of what he was doing." (October 11, 1991 transcript, pp. 998,999). Dr. Berland further testified as follows:

[THE STATE]: And you can't really state the degree of impairment, whether it be a significant or diminished?

[DR. BERLAND]: No, I really have no way of doing that unfortunately.

(October 6, 1992 transcript, p. 62).

* * *

In terms of being a direct causative factor, the evidence that I have suggests that it was not a direct causal factor in the sense of hearing a voice that told him to do it or anything like that.

(October 11, 1991 transcript, pp. 998,999).

[THE STATE]: And he knew what he was doing?

[DR. BERLAND]: The evidence that I have suggests that he did.

(October 11, 1991 transcript, p. 1003).

The Defendant never admitted any involvement in the murder, he simply acknowledged "disposing of the body."

On the day he murdered Stephanie Collins, the Defendant was careful not to use his own truck to drive Ms. Collins from Eckerd's. He deliberately involved his wife in disposing of the victim. He washed down the interior of his trailer and dumped the victim's body in an area where it was not easily seen.

The Defendant is intelligent. He has an IQ of 99. He clearly disliked and distrusted women. He was involved in brutal attacks on women at least three times in 1986 and 1987.

The Court is not reasonably convinced that this factor exists and therefore has given it no weight.

(V10/R1953,1954) None of these reasons are based on a conflict with other evidence, credibility, or impeachment of the witness; and Dr. Berland's expert opinion was not inconsistent with the

other evidence—it could be squared with other evidence. The trial court's rejection of this statutory mitigator was in error as it is not supported by "a rational basis." Coday, 946 So. 2d at 1005; Williams, 37 So. 3d at 205.

Dr. Berland's deposition and trial testimony is very consistent. (V10/R1812-1882;SV4/R749-811;SV7/R1257-1330) In his 10-6-92 deposition, Dr. Berland did testing and interviews with people who know Mr. Bolin. The WAIS test indicated brain impairment, and there was a long list of incidences in Mr. Bolin's history that could have caused head injuries:

> 1. Mr. Bolin's mother was a daily heavy alcohol user throughout her pregnancy with Mr. Bolin, and it's well known that alcohol is damaging to the fetus.
>
> 2. At age 3 Mr. Bolin was in a car accident where he was thrown into the windshield and broke the windshield.
>
> 3. At age 8 a horse fell on Mr. Bolin after Mr. Bolin hit the ice and was knocked out. This was the beginning of Mr. Bolin's severe headaches and nosebleeds.
>
> 4. Between ages 8 & 9 Mr. Bolin was hospitalized with a high fever, had nosebleeds, diarrhea, and abdominal pain.
>
> 5. Between ages 8 & 9 Mr. Bolin was tied to a wagon and pushed over a steep hill, hit the rocky bottom with his head, and was knocked out.
>
> 6. Between ages 9 & 10 Mr. Bolin fell out of a tree, impaled his leg on a spiked fence, and hit his head on a clothesline pole. Mr. Bolin was unconscious 2-3 hours.
>
> 7. At age 10 Mr. Bolin's brother beat him (Mr. Bolin) with a baseball bat that broke Mr. Bolin's wrist and had blows to the back of his head.
>
> 8. At age 10 Mr. Bolin fell out of a barn loft, hit a beam, and was bleeding. Although he did not lose consciousness, he slept all the next day, was dizzy for

> several days, had headaches, and threw up the soup he had eaten. Mr. Bolin had problems for 4-5 days, but there was no hospitalization because the grandfather could not drive.
>
> 9. At age 10 or 11 Mr. Bolin was hospitalized for blood loss. During that hospitalization, Mr. Bolin went on the hospital roof and threatened to jump off—he said he was afraid of everyone because everyone was in white.
>
> 10. At 17 Mr. Bolin was arrested drunk on Quaaludes and tried to hang himself in jail. He was reportedly revived after 6-7 minutes without oxygen, and the doctors said he would not live.
>
> 11. From 20-25 Mr. Bolin said he used 4-5 amphetamines a day, seven days a week.
>
> 12. At 23 he was hit in the forehead with a wrench, he fell off the machine he was working on, and hit the concrete 6 feet below in the back of the head.
>
> 13. At 23 he was knocked out from an electric shock.

All of these incidents have a fair likelihood of having created a brain injury, and there is evidence Mr. Bolin has a widespread brain injury. (V10/R1863-1870)

Dr. Berland knew Mr. Bolin was not stupid as he has an IQ of 99, but he definitively believed that Mr. Bolin is mentally ill. The doctor has reason to believe that at least part of his (Bolin's) mental illness is related to his brain injuries. And even though the doctor believes Mr. Bolin knows the difference between right and wrong and the criminality of his conduct, Mr. Bolin's kind of mental illness "created an impairment in his ability to conform his conduct." (V10/R1872,1873) The doctor also believed Mr. Bolin has all "the core symptoms of a psychotic disturbance." (V10/R1875) Mr. Bolin had very typical symptoms of a brain-damaged child by the time he was 7 or 8; and he had, and still has, manic

disturbances that affect significantly his judgment and decision-making ability. When he's more manic, he's also more paranoid; and this is a powerful biological influence on his behavior. The doctor acknowledged that this was not a case where Mr. Bolin had no control over his behavior and he recognized the wrongfulness of what he was doing, but under stress a person can control manifestations of their mental illness for an hour or hour and a half. Mr. Bolin could control his manic disturbance during a brief encounter with the police so it wasn't obvious. (V10/R1875-1878)

In Dr. Berland's 10-11-91 trial testimony in this case for the first trial, Dr. Berland determined Mr. Bolin was not insane at the time. (SV4/R757,758) Mr. Bolin could appreciate the criminality of his conduct. However, Mr. Bolin was under the influence of biologically caused mental and emotional disturbance; and in the doctor's opinion there was a substantial impairment in Mr. Bolin's ability to conform his conduct to the requirements of the law even though he might appreciate the criminality of what he was doing. Mr. Bolin has distortions in his judgment and his reasoning and an increase in other problems, like paranoid thinking, that are going to significantly affect that way Mr. Bolin acts. (SV4/R795,796)

Dr. Berland based his opinions on his testing of Mr. Bolin and historical facts as set forth by reliable family members. In his opinion there was no evidence that Mr. Bolin was exaggerating or faking his problems. Mr. Bolin admitted to problems that were genuine and may have been underestimating those problems.

(SV4/R760) The MMPI and WAIS tests were given to Mr. Bolin. The MMPI showed a biological, permanent disorder—permanently psychotic involving some kind of hallucinations and delusions. This is a biologically caused disorder caused by an imperative disorder and/or brain injury. (SV4/R771-773) The WAIS test showed Mr. Bolin had impairment from brain damage, and this was supported by what people had said about Mr. Bolin's head injuries as a child (see specific incidents already set forth above). (SV4/R774-778)

Mr. Bolin admitted to a number of commonly observed delusional, paranoid beliefs and psychotic mood disturbances, particularly hypermanic episodes where the person becomes highly energized. This is a biological process that results in a distortion of the person's judgment and thinking. When going through a hypermanic episode, hallucinations are more intense and the person becomes more paranoid. Mr. Bolin also had the opposite of manic episodes with psychotic depressive episodes. In this episode the person is slow, has a severe loss of energy, just lays around. Mr. Bolin has experienced both types of episodes periodically starting at about 10 for some of the symptoms. (SV4/R780)

Dr. Berland spoke to lay witnesses about Mr. Bolin's childhood not just to obtain a history of physical injuries but to find out about things that harm Mr. Bolin's emotional and personal development. The doctor discovered Mr. Bolin had a consistent pattern of both abuse and neglect by both parents:

1. Mr. Bolin was moved back and forth between parents and used as a pawn from ages 4-9.

2. Moved around every few months among other relatives

til 14.

3. Mother moved very frequently and father spent a lot of time on the carnival circuit.

4. When Mr. Bolin was 5 or 6, his parents were arguing over money. The father shot holes through the floor at Mr. Bolin's feet in an effort to frighten the mother.

5. Father beat Mr. Bolin and made threats of violence. The mother was aware of this and tolerated it.

6. The father locked the family in the house and tried to burn it down.

(SV4/R784-786) The doctor concluded Mr. Bolin had a childhood of instability and violence that was not a positive, formative environment. (SV4/R786)

The doctor's diagnostic conclusion was Mr. Bolin has a psychotic disorder which involves hallucinations, delusions, and mood disturbance. Some of his problems were a by-product of brain injuries and some were inherited. Mr. Bolin also has an "antisocial personality disorder" which can involve criminal kinds of thinking. Mr. Bolin has a history of drug and alcohol abuse. Mr. Bolin suffers from both mental illness and character disturbance. Mr. Bolin does not have any long term control over his afflictions. The only treatment is chemical, and a person's attempt to self-medicate with drugs and alcohol is not successful. As to Mr. Bolin's awareness of his mental problems, the doctor said Mr. Bolin may deny doing some things because he can't admit it to himself or isn't fully aware of it. Then there are aspects of his mental illness that he's aware of over the years. When asked about his conduct and activities late afternoon and early evening of 11-

5-86, Mr. Bolin acknowledged disposing of a body; but he denied having committed the offense. (SV4/R787-792)

Dr. Berland could say that Mr. Bolin's mental problems affected his judgment and thinking on 11-5-86, because Mr. Bolin has had his mental illness for some years prior to these incidents and it's a permanent condition that exists for life. (SV4/R792,793)

On cross-examination Dr. Berland's testimony remained consistent—Mr. Bolin's condition didn't make him do what he did on 11-5-86. There was no evidence of a direct causal factor, like hearing a voice that told him what to do. Mr. Bolin knew what he was doing and that it was wrong. (SV4/R800) Mr. Bolin also has a historic dislike and distrust of women. (SV4/R808) The concept of a kidnapping and multiple stab wounds of a woman could have an element of domination and control, but there are or may be other elements. Multiple stabbings that go beyond what may be necessary are an example of manic behavior. (SV4/R800,801,809)

On re-direct Dr. Berland noted that a sex offender who kills, and there is no doubt Mr. Bolin is a sex offender, almost inevitably they are psychotic; and that mental illness is a significant factor in what happens in them even though they may not be overwhelmed by mental illness. (SV4/R810)

Dr. Berland's trial testimony in Mr. Bolin's other Hillsborough County murder case (which is presently pending a new trial after the Second District Court of Appeal reversed on a jury instruction issue—see Bolin v. State, 8 So. 3d 428 (Fla. 2d DCA

2009), in lower case no. 90-11832) on 7-12-91 is basically the same testimony as on 10-11-91. (SV7/R1257-1330)

In addition to Dr. Berland's opinion, a PET Scan was done and a report submitted by Dr. Wood on 9-21-07. Although the findings did not rise to the level of a true abnormality, they are consistent with someone whose "attentional and impulse control capabilities are below average." (SV9/R1577) Thus, Dr. Wood's PET Scan findings support Dr. Berland's opinion that Mr. Bolin had a substantial impairment in his ability to conform his conduct to the requirements of the law.

As this Court can see, Dr. Berland's expert opinion that Mr. Bolin's ability to conform his conduct to the requirements of the law was substantially impaired at the time of the murder is uncontroverted and is consistent with the other evidence in this case.

The trial court in this case focused on Mr. Bolin's denial of the murder, the use of someone else's vehicle, involving his wife in disposing of the victim, his cleaning up of his trailer, his intelligence (average IQ of 99), and his dislike and distrust of women resulting in brutal attacks on women. These factors all appear to be based on Mr. Bolin's ability to appreciate the criminality of his conduct and knowing the difference between right and wrong (Dr. Berland acknowledged this in his opinion and believed Mr. Bolin was not insane), not a substantial impairment in his ability to conform his conduct to the requirements of the law. Although Mr. Bolin knew right from wrong, his mental illness

distorted his judgment and reasoning. In Coday where the trial court found the inability to conform his conduct to the requirements of the law had not been established, this Court stated "it appears that the trial court confused the standard for insanity with the mental mitigation in question." Coday, 946 So. 2d at 1003. The uncontroverted expert evidence was that Coday was unable to conform his conduct to the requirements of the law at the time of the murder, and the trial court's belief that the defendant should be accountable for his conduct and was aware of the consequences of his actions was the standard in an insanity context. Id. In addition, how the defendant had managed to lawfully conduct himself after the incident was not inconsistent with the experts who said the defendant was unable to conform his conduct to the requirements of the law at the time of the murder. The lay witnesses who testified to the defendant living without incident never recited any stressful relationship-based incidents where the defendant could cope. Coday's inability to conform his conduct arose, according to the experts, when he was rejected by women. Id. at 1004,1005. In addition, Coday being found highly intelligent did not impact on the expert finding him to be mentally ill. Id. at 1004.

In Mr. Bolins' case his intelligence and IQ do not contradict Dr. Berland's finding of mental illness and the resulting substantial impairment to his ability to conform his conduct to the requirements of the law. In fact, it is axiomatic that mental illness—which can be caused by a brain injury and/or inherited—can

strike anyone regardless of their intelligence. Mr. Bolin's intelligence is not a rational basis for rejecting the uncontroverted expert evidence in this case.

As for not using his own truck, cleaning up, and disposing of the body are factors that go to a person's ability to appreciate the criminality of their actions and know right from wrong—not his inability to conform his conduct to the requirements of the law. Again, the expert opinion is not in conflict with the facts; and the trial court's reasoning is not a rational basis for rejecting the uncontroverted expert evidence in this case.

Because the uncontroverted expert testimony was not in conflict with other evidence in this case and because the trial court did not provide a rational basis in this case for rejecting the uncontroverted expert testimony, the trial court erred in rejecting this statutory mitigator. The statutory mitigating factor of inability to conform his conduct to the requirements of the law was reasonably established by the greater weight of the evidence and should have been considered by the trial court as having been established. This court should either add this mitigator to the rest of the substantial mitigation in this case and reduce Mr. Bolin's sentence to life as it did in Williams on a proportionality basis or vacate the death penalty imposed and remand to the trial court for reevaluation of the mitigation and sentence as it did in Coday.

B. Proportionality

The trial court found only one aggravator in this case, albeit one of the weightiest, but also found 14 statutory and non-statutory mitigators. The trial court also erroneously rejected a statutory mitigator which adds to the weight of mitigation when properly considered. As this Court said in State v. Dixon, 283 So. 2d 1 (Fla. 1973), and more recently in Ballard v. State, 66 So. 3d 912, 920 (Fla. 2011), "the death penalty is reserved only for those circumstances where the most aggravating and the least mitigating circumstances exist." This is not such a case.

"Proportionality review is a unique and highly serious function of this Court." Green v. State, 975 So. 2d 1081,1087 (Fla. 2008). The death penalty in Florida is reserved for only the most aggravated and least mitigated of first-degree murders, and both prongs of that inquiry must be satisfied in order for a death sentence to be upheld. Cooper v. State, 739 So. 2d 82,85 (Fla. 1999); Almeida v. State, 748 So. 2d 922,933 (Fla. 1999); Crook v. State, 908 So. 2d 350,357 (Fla. 2005). Accordingly, the death penalty is not proportionally warranted in a single aggravator case unless there is very little or nothing in mitigation. See, e.g. Green, 975 So. 2d at 1088; Almeida, 748 So. 2d at 933; Offord v. State, 959 So. 2d 187, 191-92 (Fla. 2007); Jones v. State, 705 So. 2d 1364,1366 (Fla. 1998); DeAngelo v. State, 616 So. 2d 440,443-44 (Fla. 1993); Nibert v. State, 574 So. 2d 1059,1063 (Fla. 1990). As this Court said in Jones:

> The people of Florida have designated the death penalty as an appropriate sanction for certain crimes [footnote omitted], and in order to ensure its continued viability under our state and federal constitutions "the Leg-

> islature has chosen to reserve its application to only the most aggravated and unmitigated of [the] most serious crimes." State v. Dixon, 283 So. 2d 1,7 (Fla. 1973) [footnote omitted]. Accordingly, while this Court has on occasion affirmed a single-aggravator death sentence, it has done so only where there was little or nothing in mitigation. See Nibert v. State, 574 So. 2d 1059,1063 (Fla. 1990) ("[T]his Court has affirmed death sentences supported by one aggravating circumstance only in cases involving 'either nothing or very little in mitigation.'"); Songer v. State, 544 So. 2d 1010,1011 (Fla. 1989) ("We have in the past affirmed death sentences that were supported by only one aggravating factor...but those cases involved either nothing or very little in mitigation."). See also Thompson v. State, 647 So. 2d 824,827 (Fla. 1994) (same). To rule otherwise on this issue would put Florida's entire capital sentencing scheme at risk. [footnote omitted].

Jones, 705 So. 2d at 1366.

Even when the one aggravator is one of the weightiest aggravating circumstances, "this Court had also held that the death penalty is reserved only for those circumstances where the most aggravating and the least mitigating circumstances exist." Ballard, 66 So. 3d at 920. In Ballard the trial court found the aggravator CCP, which this Court has stated is one of the weightiest aggravators, was outweighed by all the numerous mitigating factors found by the trial court (even though, as the dissent noted, those mitigators were given "less than substantial weight," "sleight weight," "little to slight weight," and "little weight"— Id. at 922). This Court found Ballard's death sentence disproportionate and reduced the sentence to life.

In Almeida v. State, 748 So. 2d at 933,934, this Court reversed a death sentence as disproportionate when the single aggravator of committing a prior violent felony involved 2 prior

first-degree murders. The trial court had found 3 statutory and many nonstatutory mitigators, including a brutal childhood and vast mental health mitigation. This Court also found the defendant to be young at the time of the crime—20, and those prior felonies and the present crime arose from a single brief 6-week period of marital crisis. This Court found that Almeida's case was not the least mitigated, and the record showed the opposite—a most mitigated case.

Although this Court has held that the only aggravator found in Mr. Bolin's case—previously convicted of a capital offense or prior violent felony involving the use or threat of violence—is one of the "most weightly" aggravators (Bevel v. State, 983 So. 2d 505,524 (Fla. 2008)), all of Mr. Bolin's numerous statutory and non-statutory substantial mitigating factors do not make this case the most aggravating and least mitigating. The death penalty in this case is disproportionate.

The trial court found the sole aggravator of previously convicted of another capital felony or of a felony involving the use or threat of violence to the person based on 3 different incidents resulting in convictions: (1) the conviction and death sentence for the murder of Terry Lynn Matthews in Pasco County, Florida; (2) the convictions for kidnapping and rape of Gennie Lefever in Ohio in 1988; and (3) the convictions for felonious assault and escape in 1988 in Ohio. (V10/R1948-1951) The trial court rejected all other aggravators argued by the State.

The trial court found numerous statutory and non-statutory

mitigators, but only considered one with supporting evidence to have no weight—capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law substantially impaired (the rejecting of the mitigator was erroneous and has already been discussed in this issue). The remaining mitigators supported by evidence were found and set forth by the trial court. All those findings on mitigators are as follows:

> 1) The capital felony was committed while the Defendant was under the influence of extreme or emotional disturbance.
>
> Although the Court does not find the Defendant was under extreme mental or emotional disturbance when he committed the murder, the Court does find that the Defendant had some mental or emotional disturbance.
>
> Dr. Robert Berland testified on behalf of the Defendant on July 12, 1991 in unrelated case and on October 11, 1991 in the prior trial of this case. Dr. Berland met with the Defendant several times, administered various tests including the MMPI and the Wechsler Intelligence Test (WAIS), conducted a clinical interview of the Defendant, and spoke with family members and other lay witnesses who knew the Defendant. The doctor also reviewed police reports related to the case. He determined that the Defendant was mentally ill. He "tentatively" arrived at the conclusion that the Defendant had " psychotic disorder, one that involved...[h]allucinations and delusions and mood disturbance." Dr. Berland indicated that some of the Defendant's problems were due to brain injuries while others were consistent with an inherited disorder.
>
> Further, the Defendant also had a pattern of depressive episodes that began at age 10 and manic episodes which began in his twenties which the doctor said "suggests" either a schizoaffective disorder or bipolar disorder.
>
> The doctor also found that there was some evidence of character disturbance so that "he appeared to be what's called an antisocial personality disorder."
>
> According to Dr. Berland:

> There is evidence from a variety of sources that he appears to have been psychotic, under the influence of a biologically-caused mental or emotional disturbance from a time period long preceding this offense through to the present.

(July 12, 1991 transcript, p. 91)

* * *

> [T]his biologically caused psychotic condition, it is one that the evidence suggests you have for life. Once you have it, you have it for good. The symptoms may wax and wane from time to time but it's there from that point forward.

(July 12, 1991 transcript, p. 89).

> There is clear evidence from the lay evidence, from him, in history that he had these kinds of problems for some years prior to these incidents and has them through to the present time. I don't know that, of course, I am in a position where I can't tell you specifically that he had them on that night because he didn't admit to anything on that night, but there is evidence that he has had this disorder consistently for a long time.

(October 11, 1991 transcript, p. 996).

> [H]e has more than a minimal psychotic disturbance and more than a minimal dose of mania. To what degree it was the factor in these—in the Hillsborough offenses which is all I can speak to, I have no way of knowing. There is just no way to know. ...I am certainly not in any way suggesting that there was some voice that told him to commit these crimes or that in some way he was completely overcome by his psychotic disturbance and that he had no control over his behavior. There is no doubt whatsoever that I can rule that out.

(October 6, 1992 transcript, pp. 65-66).

The doctor, however, testified that there were no confirmatory tests done. No EEG was done; there were no x-rays or other diagnostic tests that might confirm brain damage. Further, the doctor could not say what brain damage might have occurred after 1986 or may have become more severe after 1986. The doctor acknowledged he did not evaluate the Defendant in 1986. Further, it is clear from an examination of the CT and PET scan test

results of 2007 that there is no significant brain dysfunction. As Dr. Wood says, there is..."a significant personal weakness in impulse control that would be manifested in episodes of disinhibited outward behavioral expression of anger and related emotions."

The Court has given some weight of this factor.

2) The capacity of the Defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

Dr. Berland previously testified, "[H]e did appreciate the criminality of his conduct at the time. ...[T]here was a substantial impairment in his ability to conform his conduct to the requirements of law even though he might appreciate the criminality of what he was dong." (October 11, 1991 transcript, pp. 998,999). Dr. Berland further testified as follows:

> [THE STATE]: And you can't really state the degree of impairment, whether it be a significant or diminished?
>
> [DR. BERLAND]: No, I really have now way of doing that unfortunately.

(October 6, 1992 transcript, p. 62).

* * *

> In terms of it being a direct causative factor, the evidence that I have suggests that it was not a direct causal factor in the sense of hearing a voice that had told him to do it or anything like that.

(October 11, 1991 transcript, pp. 998,999).

> [THE STATE]: And he knew what he was doing?
>
> [DR. BERLAND]: The evidence that I have suggests that he did.

(October 11, 1991 transcript, p. 1003).

The Defendant never admitted any involvement in the murder, he simply acknowledged "disposing of the body."

On the day he murdered Stephanie Collins, the Defendant was careful not to use his own truck to drive Ms. Collins from Eckerd's. He deliberately involved his wife in disposing of the victim. He washed down the in-

terior of his trailer and dumped the victim's body in a area where it was not easily seen.

The Defendant is intelligent. He has an IQ of 99. He clearly disliked and distrusted women. He was involved in brutal attacks on women at least three times in 1986 and 1987.

The Court is not reasonably convinced that this factor exists and therefore has given it no weight.

3) The age of the Defendant at the time of the crime.

The Defendant was twenty-four at the time of this offense. The Defendant and his wife had lost a child and were struggling to make ends meet. The Defendant was also dealing with the stress of his wife's pregnancy and hospitalizations due to her severe diabetes.

The Court has given this factor little weight.

4) The existence of any other factors in the Defendant's background that would mitigate against imposition of the death penalty.

a). The Defendant suffered from the effects of his mother's alcoholism and his own substance abuse.

According to Dr. Berland the Defendant suffered from fetal alcohol effects as a result of this mother's use of alcohol during her pregnancy.

The Defendant also reported almost daily use of amphetamines between the ages of twenty and twenty-five. According to the PSI (Pasco), the Defendant also reported using marijuana and amphetamines. Although the Defendant says that he began drinking regularly at age twelve, he indicated that he did not consider himself an alcoholic.

The Court has given this factor little weight.

b.) The Defendant was abused as a child.

The Defendant was constantly shuttled between his father and mother. His father threatened him and beat him with brooms, bats, and his hands. His father also beat his mother in front of the Defendant. At one time his father locked the family inside their house and tried to burn the house down. He was sexually abused by carnival workers and others.

The Court has given this factor some weight.

c). The Defendant had a poor and unstable childhood.

The Defendant grew up poor, without electricity or running water. His family struggled to survive. The Defendant was a pawn between the parents and not only lived with this mother and father, but also with this grandfather and various uncles and cousins.

The Court has given this factor little weight.

d). The Defendant had a sporadic, minimal education.

The Defendant only completed the tenth grade.

e). The Defendant received his GED while incarcerated.

f). The Defendant developed skills which included welding, electrical, plumbing, and small machinery skills.

g). The Defendant saved the life of another.

He saved the life of Kim Harrison who almost drowned.

h). The Defendant was gainfully employed at the time.

i). The Defendant behaved appropriately at trial.

j). The Defendant has adapted to institutional living and has not received any disciplinary reports.

k). The Defendant has been married for 11 years and he seems to maintain that relationship, considering the obvious limits.

l). The Defendant's physical and mental medical history indicates several problems.

The Defendant has diabetes, hypersomnia, psychomotor retardation, and continued stress resulting in hair and appetite loss.

As a result of an accident at sixteen, he was left without teeth and having to wear dentures. The Defendant suffered several falls although the CT scan and

> PET scan conducted on June 14, 2007 indicate no "out-right brain dysfunction."
>
> The Defendant has attempted suicide more than once.
>
> The Court has considered mitigators (d) through (l) and given them little weight.

The trial court's sentencing order (V10/R1952-1956).

In Mr. Bolin's case, Dr. Berland's expert testimony established Mr. Bolin's mental illness by noting all his brain injuries, but he also examined Mr. Bolin's childhood to find out about incidents that harmed his emotional and personal development. What Dr. Berland discovered was a consistent pattern of abuse and neglect by both parents. This finding was supported by Mr. Bolin's mother and sister's testimony.

Mr. Bolin's mother, Mary Baughman, and sister, Sherry Jauregui, testified on 7-12-91 in another unrelated case (90-11832); and that testimony was part of the mitigation. Ms. Baughman said Mr. Bolin's father would physically and verbally attack Mr. Bolin, how the father would not support his children, and he would threaten to kill Mr. Bolin. Ms. Baughman acknowledged she had an awful relationship with Mr. Bolin's father (they never married), and they fought verbally and physically all the time. What was not specifically mentioned in the sentencing order was that Ms. Baughman would chain her son to the bed and then walk him to the bus stop for school with the chain on to keep her son from running away. (SV7/R1215-1237)

Mr. Bolin's sister, Ms. Jauregui, remembered all the verbal and physical fights between her parents that happened frequently.

These fights were to the point where they tried to kill each other all the time. She saw her father strike Mr. Bolin many times using various objects, and she recalled the time her father tried to kill them all by locking them in the house and trying to burn it down. She also saw her mother chain her brother up. When Ms. Jauregui turned 13 or 14, she got married just to get away from the home. She, herself, had developed problems and had tried to commit suicide twice. She also testified how the death of their 18-year-old brother Arthur and the death of Mr. Bolin's son had devastated Mr. Bolin. (SV7/R1238-1256)

This constant child abuse by both parents along with all the brain injuries Mr. Bolin suffered and Mr. Bolin's mental illness combined with all the other mitigating facts found by the trial court—defendant only 24 at the time and having just lost a child while dealing with the stress of his wife's poor health conditions due to severe diabetes while struggling financially; sporadic, minimal education; received GED while in custody; developed working skills; saved the life of one Kim Harrison; working at the time; behaved appropriately at trial; no DR's while in jail; married for several years and maintaining a relationship while incarcerated; multiple suicide attempts; physical and mental issues; losing his teeth at 16—to show the substantial mitigation in this case. Add to this the statutory mitigation the trial court erroneously rejected—inability to conform conduct to the requirements of law—and this is a case with substantial mitigation that outweighs one, albeit it weighty, aggravator. See Ballard and

Almeida. This is not the most aggravating and least mitigating case. The death penalty in this case is disproportionate, and the sentence must be reduced to life.

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 _____ day of March, 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).

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