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<p>Certiorari to the Colorado Court of Appeals Case No. 03CA1982</p> <p>JANINE BLOOM</p> <p>Petitioner</p> <p>v.</p> <p>THE PEOPLE OF THE STATE OF COLORADO</p> <p>Respondent</p>	<p>σ COURT USE ONLY σ</p>
<p>Douglas K. Wilson, Colorado State Public Defender ANNE STOCKHAM, #15257 1290 Broadway, Suite 900 Denver, CO 80203</p> <p><u>Appellate.pubdef@state.co.us</u> (303) 764-1400 (Telephone)</p>	<p>Case Number: 06SC597</p> <p>RECEIVED</p> <p>SEP 13 2007</p> <p>CLERK COLORADO SUPREME COURT</p>
<p>OPENING BRIEF OF PETITIONER</p>	

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INTRODUCTION

Petitioner was the defendant in the trial court and will be referred to by name or as the Defendant. Respondent, the State of Colorado, will be referred to as the prosecution or the State. Numbers in parentheses refer to the volume and page number of the record on appeal.

ISSUES ANNOUNCED BY THE COURT

I. Whether Petitioner's constitutional rights were violated when a prosecution witness testified that the only witness to support Petitioner's defense had failed a polygraph examination regarding his statements to the police in the summer of 2002.

II. Whether the trial court erred and violated Petitioner's constitutional rights when it found her competent to proceed to trial without conducting a meaningful competency evaluation.

STATEMENT OF THE CASE

On March 4, 2003, Janine Bloom was charged with first degree murder after deliberation in violation of §18-3-102(1)(a), 6 C.R.S. (2003), a class one felony and first degree murder, knowingly causing the death of a child under twelve years of age by one in a position of trust in violation of §18-3-102(1)(f), 6 C.R.S. (2003), a class one felony.(v1,p19-23) The alleged offenses had occurred eight months prior to the

filing of the charges, on June 29 or 30, 2002, and the alleged victim was Christopher Young.(v1,p19) Pretrial hearings took place on March 4, 2003, April, 11, 2003, May 12, 2003, May 22, 2003, July 7, 2003, July 28, 2003, August 1, 2003.(v2-7) Three hearings addressing defense counsels' request for a competency evaluation and determination were held on August 8, 2003, August 15, 2003 and August 18, 2003.(v8,9,supp v1) The district court ultimately found Ms. Bloom competent.(supp v1,p6-11) A jury trial commenced on August 19, 2003.(v10-13) The jury deliberated for more than three days, acquitting Ms. Bloom of murder after deliberation and convicting her of knowingly causing the death of the child.(v14,p2-3) She was sentenced to life imprisonment without parole on the day that the verdicts were returned.(v14,p15)

STATEMENT OF THE FACTS

Two people were present when Christopher Young, a six month old, died in the sparsely furnished apartment belonging to his mother, Janine Bloom, and her husband, Jeffrey McAllister.(v11,p162-163,192-195,203-204;v12,p35-36,39-40,Exh1-6) Those two individuals were Janine Bloom and Jeremy Ellis.(v11,p163,191) Ellis was making plans to move into the apartment with the couple and had his own key.(v11,p228-230) Ellis was sexually and romantically involved with both Bloom and McAllister.(v11,p227,260;v12p27) Christopher apparently died during the early

morning of June 30, 2002, while McAllister was in the hospital.(v11,p162,241,v12,p43-44) Ms. Bloom was interviewed on June 30, 2002 and July 22, 2002.(Exh22,23) She maintained throughout both interviews that she had discovered Christopher, dead, with a plastic bag over his head.(Exh22,23) Ellis's fingerprint was found on such a bag that was taken from the room where the child died.(v13,p33) Ms. Bloom's account of the night in question was substantially similar to Ellis's early accounts.(Exh22,23,A,B)

Jeremy Ellis was interviewed on June 30, 2002 and July 17, 2002.(Exh22,23) He told police that Bloom discovered the child dead the morning of June 30th and that he did not believe that she was involved in his death.(Exh A,B) He was not interviewed again until February 2003, by Army personnel in preparation for deployment and then by the police.(v11,p245-246,288-289) This time he made statements incriminating Bloom, claiming that she told him she had smothered the child.(v11,p246,256,Exh17,24,25) He later recanted these inculpatory statements when he testified at Ms. Bloom's trial and reaffirmed the initial accounts that he had twice provided in the summer of 2002.(v11,p251-258,269,288) There was evidence that the child had a cough the night of his death.(v11,p155,Exh22) The coroner was unable to determine the cause of death and reported that the death was "in keeping with SIDS."(v13,p41,47) He later changed his conclusion and determined that the death

was a homicide, based solely on Ellis's February 2003 statements incriminating Bloom.(v13,p44,47,56-57) Ms. Bloom was not charged with murder until after Ellis made the February 2003 statements.(v1,p1-4)

SUMMARY OF THE ARGUMENT

Ms. Bloom's constitutional rights were violated when the purported results of Jeremy Ellis' polygraph examination were revealed to the jury, and those results indicated that his statements and trial testimony supporting Ms. Bloom's defense were false. The trial court abused its discretion when it refused to grant a mistrial and that abuse of discretion violated Ms. Bloom's fundamental constitutional rights to due process and a fair trial, to confront the witnesses against her, and to a fair and impartial jury.

The trial court erred and violated Ms. Bloom's rights to due process of law when it found her competent to proceed to trial. The trial court failed to obtain a competency evaluation, to follow the statutory procedures for determining competency, and to otherwise properly assess her competency.

ARGUMENT

I. MS. BLOOM'S CONSTITUTIONAL RIGHTS WERE VIOLATED WHEN A PROSECUTION WITNESS REVEALED THAT JEREMY ELLIS HAD FAILED A POLYGRAPH EXAMINATION REGARDING HIS STATEMENTS TO THE POLICE IN THE SUMMER OF 2002.

A. The Standard of Review

The issue before this Court is preserved. Defense counsel objected to the inadmissible polygraph evidence and requested a mistrial; the trial court denied the motion for mistrial. By failing to grant a mistrial, the trial court violated Ms. Bloom's constitutional rights to due process of law and to a fair trial, to confront the witnesses against her, and to a fair and impartial jury. *See, e.g., U.S. Const. Amends V,VI,XIV; Colo. Const. Art. II §§16,23,25.* The error is constitutional and, as such, is subject to constitutional harmless error analysis. *See, e.g., Chapman v. California*, 386 U.S. 987 (1967); *Blecha v. People*, 926 P.2d 931,942(Colo.1998). Alternatively, the trial court abused its discretion by failing to grant the mistrial.

B. Jeremy Ellis' Statements and Trial Testimony

Jeremy Ellis gave two videotaped statements to the police, on June 30, 2002 and July 17, 2002.(v12,p4,Exh A,B) During his first interview, he told Detective Firpo the following: Ellis let himself into the apartment at sundown, using his own key, watched some television and received a telephone call from Bloom about four hours after he had arrived. Bloom came home about forty-five minutes after the call, the two of them played with Christopher for a few minutes until Bloom put the baby to sleep in a bedroom. He and Bloom talked and watched television until about 3 a.m. He looked in on Christopher around this time and could see that he was breathing

and did not see a plastic bag. The only light in the room was coming from the hall or the closet. Bloom wanted some food, and, therefore, Ellis took Bloom's car to Safeway. He got lost along the way and eventually returned with the groceries about one and a half hours later. Bloom was asleep when he returned. Ellis laid down on the loveseat but got up to take a bath. He fell asleep in the bathtub. When he awoke, he went outside to smoke, whereupon Bloom also woke up and joined him. They talked about visiting McAllister in the hospital. Bloom left to check on Christopher, then ran out of the bedroom screaming and called 911. Bloom was hysterical, so Ellis took the phone and performed CPR until medics arrived. The baby's neck was stiff. Bloom told him that a bag had been over the child, which she removed. The bag was not over Christopher when he entered the room, but it was close to the child. At first, Ellis said that he thought that he had had no contact with the bag but later said that he probably moved the bag. Firpo told Ellis that he might be asked to do a voice stress analysis. The interview lasted about one hour and fifteen minutes.(Exh A)

The second interview, two and a half weeks later on July 17, 2002, had a markedly different tone. The police had learned that Ellis had had sex with Bloom on the night of Christopher's death.(Exh B) Apparently, Ellis had not wanted to reveal this adultery in the first interview. Even more potentially damaging was that this disclosure led to Ellis's admission that, during this same period, he was sexually

involved with Bloom's husband, a soldier in his battalion.(v11,p226-227,Exh B) He admitted to being a bisexual in this second interview with a different officer, Detective Jaworski.(Exh B)

Jaworski was belligerent and threatening throughout the interview. He often raised his voice, including when he accused Ellis: "You can't keep your story straight because you can't remember what lie you told the last time." When Ellis was confused he sarcastically remarked: "Think hard." Ellis repeatedly maintained that the only lie that he had told was denying having sex with Bloom. He elaborated, stating that before they had sex, Bloom told him that he smelled and he took a shower. After he got out of the shower, the two had sex, and then before leaving for the Safeway, they looked in on Christopher who was alright. He said that during the first four hours after he arrived at the apartment he walked over to a gas station for some food.(Exh B)

Ellis was adamant, despite Jaworski's claims both that he wanted to "help" Ellis and that Bloom was trying to "pin" the death on him. Jaworski banged on the table, insisting that "nobody gets that lost" referring to Ellis's statement that he had gotten lost on the way to Safeway. The detective repeatedly accused Ellis of lying and addressed him as "Dude." He said that Ellis needed to "stand up" and do the "right thing." Jaworski poked Ellis in the chest and insisted that "something in here is killing

you.” In an apparent effort to confuse Ellis about his first statement, Jaworski maintained that Ellis had previously denied ever seeing the bag and pretended to confirm this misrepresentation by referring to some papers.(see Exh A) Jaworski told Ellis that he didn’t think that he was a “bad guy” and suggested that “good people make mistakes.” The detective tried to use guilt to persuade Ellis to implicate Bloom: he asked Ellis about his future plans and asserted that Ellis had “a whole life in front of” him, but this “little boy doesn’t.” Jaworski tried to make Ellis jealous or angry, accusing Bloom of being promiscuous and having “hickeyes on her neck from some woman.” The detective threatened: “somebody suffocated that baby, it was either you or her.” None of these grueling tactics shook Ellis from his position that after he got out of the bath and smoked a cigarette with Bloom, she went to the bedroom, discovered the child’s body and ran back screaming. He said that Bloom never admitted killing Christopher and that when she said in the days after the child’s death that she had “killed” the child, he interpreted it to mean that she had done so through “neglect.” Ellis insisted that he wasn’t trying to protect Bloom.(Exh B)

Jaworski asked Ellis if he were willing to take a “truth verification examination.” Ellis agreed, and the detective said that he would schedule the examination for the next morning. Near the end of the interview, Jaworski left the room to “get that truth examination set up for tomorrow morning.” When he

returned, he asked whether Bloom had said anything when the two checked on Christopher during the early morning, and Ellis replied that she had said that he “looks so happy.” Jaworski told Ellis that the examination was scheduled for 8 a.m. at the sheriff’s department, instructed him not to talk with anyone before the examination and to get a good night’s sleep. The interview lasted almost an hour and forty-five minutes.(Exh B)

Seven months later, in February 2003, Ellis was contacted by the Army’s Central Investigations Detachment (CID).(v11,p245-246,288-289) He was about to be sent to Iraq, and CID wanted to close any investigation prior to his deployment.(v11,p289) He was interviewed by CID on February 11, 2003 and gave a written statement.(v11,p246,Exh24) Ellis wrote that he went to take a shower because Bloom had said that he smelled bad. He claimed that she called him out of the bathroom after about ten minutes to look at Christopher. He then wrote:

I could see something was not right and Janine had an odd sad sort of smile on her face. I turned badk (sic) to the bathroom and she went back to the living room, but before I had taken two steps into the bathroom, I stopped and went to check on Christopher. He was not breathing. I went to the living room and asked Janine what happened. She just looked at me with the same look that she had in the hallway and said I killed my baby.

Ellis added that the two then had sex, he took a shower, went for food, got lost, and found Bloom asleep when he returned. He claimed that he shook her awake, said that

he wanted to go home but stayed because she begged him to. Once again Ellis said that he fell asleep on the sofa, got up, took a bath, fell asleep in the tub, got up and went outside to smoke. He then wrote:

Janine got up and followed me out. We talked about going to see Jeff in the hospital, but she said she had to do something first. She walked back to (sic) back bedroom, then came out screaming to call 911.

Ellis said that Bloom called 911 but was hysterical so he took the phone, that the child was blue and stiff, and that "to protect Janine, I gave a false statement to [the sheriff's office]." (Exh24)

The following day Ellis again spoke to CID either because he wanted to add something or had been asked to return. (v11,p256) Ellis wrote that in the previous day's statement he had left out something "vital." (Exh25) He claimed that Bloom told him that "she put her hand over his face apparently to make him pass out but I don't know that for sure." He added that on June 30th Bloom had said that "she wished it was the SIDS," and he also wrote: "I forgot to mention that while sitting on the couch she told me she loved me." (Exh25)

Also on February 12, 2003, Detective Firpo interviewed Ellis. (Exh17) That interview was subdued and relatively short, about forty minutes. Ellis said that after he discovered that the child was not breathing, he went into the living room and said "What." Thereafter, Bloom purportedly volunteered that she had killed the child and

put her hand over his "mouth," rather than "face." (see Exh25) He said that in the same conversation where Bloom "wished it was SIDS," she also said she would "probably kill herself." Although pressed for supporting detail, Ellis maintained that the child was not "fussy," that Bloom's mood seemed "perfectly normal," and that she was not crying when she said that she killed the child. He said that Bloom described the child as looking "peaceful" when she had Ellis check on him. Ellis provided little explanation of how he and Bloom came up with the account that they gave to police when he described their conversation on the patio. Rather, he said that she announced that she had something to do, went to the child's room and came back out screaming. Ellis claimed that he had been trying to protect Bloom and that later he thought that if he came forward he would be "done for." Ellis said that the child was not breathing when he found him but was unable to explain how he knew this and denied picking up the child or attempting CPR. Ellis could not explain why, other than that he was scared, that after more than an hour he drove back to the apartment from Safeway rather than contact the police.

Ellis's claims appeared to be consistent with the CID written statements. However, Firpo reminded Ellis that he had sat in on the CID interview and accused Ellis of "flip-flopping" not only from his first interviews but also from the recent CID interview. Firpo asked "Why did you change your story from yesterday...?" (Exh17) It

is unclear what the detective was referring to, the interview with CID may not have been recorded and was not admitted at trial.

At trial, Ellis testified that Bloom never admitted putting her hand over the child's mouth or face and killing him.(v11,p251-252,258) He maintained that the recitation of events that he provided in his CID statement and interview on February 12, 2003, was false.(v11,p250-255) He testified that he and Bloom did not have sex after discovering that the child had died, but before.(v11,p252) Further, Bloom did not ask him to get food and then fall asleep on the couch after they knew that the child was dead, but before.(v11,p253-254) Likewise, he did not spend over an hour, lost, driving about and shopping at Safeway after discovering that the child had died, but had done so before his death.(v11,p253) Ellis testified that the only portion of his first interview on June 30, 2002 that was untrue was the description of what he and Bloom did after she put the baby to bed. Specifically, he had omitted that the two had sex.(v11,p242,269,288;v12,p5,Exh A)

Ellis testified that he falsely represented what Bloom had said and done in the CID statements and his February 2003 police interview because: "I was scared that they were going to open the whole thing up again and keep coming after me again and yelling at me again, and just the whole thing starting all over again."(v11,p290) The Army had not investigated the event since June 30, 2002.(v11,p288) In February

2003, Ellis had just gotten married, and he testified that he then “just wanted to go on living my life.”(v11,p266,290) As a result of his statements in February 2003, Ellis was charged and convicted of accessory to murder, a felony, and at the time of Bloom’s trial, was facing a possible twelve years in prison.(v11,p223-224,266) Obviously, his arrest and prosecution prevented his deployment to Iraq. He was testifying under a grant of immunity, except for any admission that he had in fact killed the child.(v11,p174-175,224)

A review of Ellis’s interviews supports his explanation. His first interview with Firpo, although lengthy, was not overly accusatory.(Exh A) However, by any measure, the second interview with Jaworski was a brutal experience.(Exh B) When, after seven months, Ellis was unexpectedly called in for yet another interview regarding the child’s death, he would understandably want to provide the kind of information that he thought would relieve him of any further hounding by the police. Moreover, in his July interview with Jaworski, he was clearly led to believe that he would be rewarded, not punished, if he gave the sheriff information incriminating Bloom.(Exh B) As his last interview with Firpo revealed, even then the detective also appeared to believe that Ellis would not be charged with an offense, and he indicated this just prior to leaving Ellis for over forty minutes at the end of the interview.(Exh17)

C. The Inadmissible Polygraph Evidence

Josh Gouge was called as a prosecution witness. During his direct examination, Gouge was asked whether he had spoken with Detective Jaworski in February 2003.(v12,p127) The conversation occurred near the time of Ellis's incriminating final interview.(Exh17) Gouge recalled that he had told Jaworski that little changes were appearing in Bloom's recitation of events surrounding the child's death. Specifically, this concerned matters such as how many cigarettes she had smoked and whether she had eaten. Gouge did not recall whether Bloom had provided a different account of how she and Ellis discovered the child. The prosecutor asked whether Bloom was saying "derogatory" things about Ellis.(v12,p127) When Gouge answered affirmatively, the prosecutor then asked, without guidance or qualification: "What was she saying?" Gouge replied: "That Ellis failed his polygraph the first time."(v12,p128)

D. The Trial Court's Erroneous Ruling

The defense objected, and the court instructed the jury to disregard the statement.(v12,p128) The trial was adjourned after Gouge's cross-examination and the brief testimony of another witness.(v12,p148-153) The next morning, prior to any testimony, defense counsel moved for a mistrial based on Gouge's revelation that Ellis had failed a polygraph test associated with his statements in June and July, 2002.

Counsel informed the court that there had been an agreement not to mention the results of the polygraph test.(v13,p3) The prosecutor responded that he had not been aware that Gouge knew of the polygraph tests and had not intended to elicit the statement.(v13,p5) The court noted that there had been mention of the polygraph tests earlier and that as a result the jury “undoubtedly would be speculating about the results.”(v13,p5-6) The videotape of Ellis’s July 17, 2002, interview showed him agreeing to a truth test that was then scheduled for the next morning.(Exh B) Nonetheless, the court indicated that its instruction to the jury at the time, coupled with a further instruction at deliberations, was sufficient to protect Bloom.(v13,p6) The jury received a generic instruction to disregard stricken evidence.(v1,p72;v12,p128) The court ignored that Ellis’s subsequent interview implicated Bloom, whereas the first two had not. The court stated that “had [the assertion of the test results] referred to a polygraph by Ms. Bloom, that would be a different matter, but **certainly the jury is in a position to judge Mr. Ellis’s credibility** for themselves, so the motion is denied.”(v13,p6)

The case rested on whether or not Ellis was telling the truth at trial and in his first two interviews of 2002, or whether his February 2003 interview and written statements recounted what had actually occurred. The paramount importance of Ellis’s various statements and credibility is undeniable. Charges were only filed

against Bloom after Ellis's February 2003 interview where he said that she confessed to suffocating the child. The jury requested transcripts of the videotaped statements and Ellis's trial testimony.(Env1) Information presented to the jury that concerned Ellis's credibility could not have been more important. As the trial court observed, the jury was doubtlessly eager to learn the polygraph test results, not of Bloom's polygraph tests, if any, because she never testified. Rather, it was Ellis's testimony that was most important. And, the jury learned that what was essentially Ellis's trial testimony had been assessed by a polygraph examiner and found to be untrue.

E. Caselaw and Polygraph Evidence

In *People v. Anderson*, 637 P.2d 354,358(Colo.1981), this Court determined that “any evidence of polygraph results and testimony of polygraph examiners is per se inadmissible in a criminal trial.” The court found that “the scientific theory or technique of the polygraph is [not] sufficiently advanced to permit its use at trial as competent evidence of credibility,” and its decision was also based on the lack of reliability inherent in such tests. *Id.* at 360. What has persisted in Colorado as the decisive factor in excluding the results of polygraph examinations, as first articulated in *Anderson*, is the fact that such evidence constitutes “a serious interference with and potential prejudice to a jury's evaluation of the demeanor and credibility of witnesses and their testimony.” *Id.* at 361; see *People v. Wallace*, 97 P.3d 262,268(Colo.App.2004).

In *People v. Dunlap*, 975 P.2d 723,756(Colo.1999), this Court reaffirmed the per se rule excluding the admission into evidence of polygraph test results. The court underscored that such exclusion was warranted even in the sentencing phase of a death penalty trial because of its potential impact on the jury. The court wrote that “the polygraph is unlike other scientific evidence, since what it attempts to measure - the truthfulness of a witness or defendant- is so directly related to the essence of the trial process.” *Id.* at 756; *quoting Anderson*, 637 P.2d at 361.

Several years later, in *People v. Wallace*, the Court of Appeals noted that the decision in *Anderson*, in so far as it was based on the lack of scientific evidence supporting the reliability of polygraph examinations, applied a test no longer in use. 97 P.3d at 267-268. Nonetheless, even assuming that current polygraph techniques were sufficiently reliable to meet the evidentiary standards of CRE 702, the court found that the evidence was properly excluded under CRE 403. *Id.* Thus, the court agreed that polygraph evidence “would invade the province of the jury and influence its decision regarding witness credibility,” and thus, its probative value was substantially outweighed by the danger of unfair prejudice. *Id.*; *see* CRE 403.

The most damaging aspect of the introduction of the evidence of a polygraph examination arises when the results of the examination are revealed to the jury. *See People v. Preciado-Flores*, 66 P.2d 155(Colo.App.2002); *see also Dunlap, Anderson, Wallace*,

supra. In *Preciado-Flores*, a translator improperly referred during trial to the existence of a polygraph examination of the defendant. *Id.* at 163. However, the appellate court found no abuse of discretion in denying a mistrial where the jury was *not* told that the defendant had failed the test and the revelation did not “send a message” that the officers believed the defendant was lying based on negative test results. *Id.*

One division of the Court of Appeals has opted to impose a test drawn from a Michigan case, *People v. Nash*, 625 N.W. 2d 87(Mich.App.2000)¹, to determine whether reversal is required where the trial court refuses to grant a mistrial after the introduction of inadmissible polygraph evidence. *People v. Kerber*, 64 P.3d 930(Colo.App.2002). In *Nash*, the reviewing court reversed the defendant’s murder conviction where the jury learned that the prosecution’s primary witness against the defendant had taken a polygraph exam and implied in her testimony that she had “passed” the exam. *Nash, supra*. Notably, the defendant in *Nash* had not asked for a mistrial, and the alleged error was reviewed under a lesser plain error standard. 625 N.W. 2d at 96-97. The factors considered by the court in *Nash* and adopted in *Kerber* were:

- (1) whether defendant objected and/or sought a cautionary instruction;
- (2) whether the reference was inadvertent;
- (3) whether there were repeated references;
- (4) whether the

¹ No other division of the Court of Appeals has relied on the *Nash* analysis in a published decision.

reference was an attempt to bolster a witness's credibility; and (5) whether the results of the test were admitted rather than merely the fact that a test had been conducted.

Id. at 98; *Kerber*, at 933.

In Ms. Bloom's case, as in *Nash*, the Defendant objected to the reference to the polygraph test, a factor weighing in favor of the Defendant.(v12,p128) *See Nash*, 625 N.W. 2d at 98. Moreover, not only did Bloom object, she also asked for a mistrial.(v13,p3) In *Nash*, the prosecution was attempting to rehabilitate the witness' credibility and, thus, her reference could not seem as "inadvertent," rather, "the prosecutor's question invited the answer." *Id.* at 99. Similarly, the prosecutor in Bloom's case was attempting to elicit testimony that was "derogatory" and, thus, was intended to discredit Ellis's character and credibility.(v12,p127-128;v13,p5) Gouge's reference to Ellis failing the polygraph exam was not unresponsive, where the prosecutor used a very open ended question and this weighs in favor of a mistrial. *See Nash* at 99. In any event, although a deliberate effort on the part of the prosecution to inject blatantly inadmissible evidence obviously weighs in favor of reversal, the inadvertent eliciting of such of evidence is a neutral factor.

Here, as in *Nash*, there were already references to the polygraph exam.(Exh A,B) Arguably, the trial court should have redacted those portions of Ellis' interviews that revealed that he had been given an exam. The presence of repeated references

weighs in favor of the Defendant's claim of error. *Nash* at 99. While it is not discernable what, if any, motive Gouge had for revealing that Ellis had failed the exam, the prosecution was eliciting negative information to undermine Ellis' favorable trial testimony. The prejudice suffered as a result of the erroneous admission of the polygraph exam in *Nash* was exacerbated because "[t]he credibility of the prosecution's key witness was crucial in this case and that witness had a history of lying." *Id.* at 100. Likewise, Ellis was the prosecution's strongest witness against Bloom despite his recantation of his February 2003 statements, and he too had a history of lying.

Lastly, the result of Ellis' first polygraph examination was unequivocally revealed to the jury; he purportedly "failed." (v12,p128) In *Nash*, even though the results were merely "implied" this too weighed in favor of the defendant's claim of error. *Id.* at 101. Other jurisdictions have given this factor, namely, whether the results of the test are revealed, a greater weight than the other factors included in the *Nash* and *Kerber* analysis. See e.g. *Olivera v. State*, 813 So. 2d 996, 998(Fla.4th DCA 2002) ("The law in Florida is clear that the mere mention of polygraph results in a criminal case is grounds for a mistrial" citing *Walsh v. State*, 418 So. 2d 1000(Fla.1982); *Kaminski v. State*, 63 So. 2d 339(Fla.1952)); *Buckley v. State*, 46 S.W. 3rd 333,336,337(Tex.App.2001) ("When the results [of a polygraph test] are revealed to the jury, failure to grant a

mistrial is generally error.” citing *Robinson v. State*, 550 S.W. 2d 54, 61 (Tex.Crim.App.1977); *Jones v. State*, 680 S.W. 2d 499,502(Tex.App.1983)). And courts have recognized that a mistrial is warranted, not only in situations where the testimony concerns a defendant and a polygraph exam but also testimony regarding “witnesses and their polygraph results which may weigh heavily in the case on the question of defendant’s guilt or innocence.” *Olivera*, 813 So. 2d at 998; citing *Simeon v. State*, 520 So. 2d 81(Fla.3d DCA 1988).

Federal courts have also focused on the impact of the disclosure of polygraph test results on the jury. In *United States v. Brevard*, 739 F.2d 180(4th Cir.1984), the court declared that:

The most important questions to consider in determining whether a curative instruction or a mistrial is appropriate after a reference to a polygraph test are these: (1) whether an inference about the result of the test may be critical in assessing the witness’s credibility, and (2) whether the witness’s credibility is vital to the case.

739 F.2d at 182; accord, *United States v. Walton*, 908 F.2d 1289,1294(6th Cir.1990), *United States v. Miller*, 874 F.2d 1255,1263(9th Cir.1989), *United States v. St. Clair*, 855 F.2d 518, 523(8th Cir.1988). Undeniably, Ellis’s credibility at the time of his February 2003 interview with the police was vital to the prosecution’s case. This is reflected in both the prosecution’s closing and opening arguments.(v11,p139-146;v13,p84-85,88-

89,92,116-121,129-130) The coroner changed his conclusions regarding the cause of death to a homicide solely on the basis of Ellis's February 2003 statement implicating Bloom.(v13,p44,56-57) Polygraph test results indicating that Ellis had lied when he gave the two interviews that did not implicate Bloom supported the prosecution's theory and were extremely prejudicial. The inadmissible test results undermined the credibility of Ellis' testimony and initial statements and bolstered the credibility of his later incriminating statement. It is beyond doubt that the results of Ellis's polygraph test "may have been critical in assessing the witness's credibility." *See Brevard, supra*.

In addition, Gouge's testimony as to what Bloom had told him about Ellis involved multiple layers of hearsay. *See* CRE 801. Whoever told Bloom, if indeed anyone had actually told her, that Ellis had failed the exam was not available for cross-examination. And, to force Bloom to testify in order to counter Gouge's assertion, assuming she could do so, would have violated her constitutional rights to remain silent. *See U.S. Const. Amend. V,XIV; Colo. Const. Art II §18*. Simply put, there was no way for the defense to challenge the assertion, and it is certainly possible that Ellis passed the exam.

F. Reversal is Required

In those instances where an abuse of discretion standard ordinarily applies to a trial court's actions, this standard does not apply if there is an infringement on the

defendant's rights secured by the constitution. See *Merritt v. People*, 842 P.2d 162,166(Colo.1992) citing *Delaware v. Van Arsdall*, 475 U.S. 673,679(1986)(limits placed on a defendant's cross-examination normally reviewed for an abuse of discretion unless infringes upon the defendant's confrontation clause rights). The jury's erroneous exposure to inadmissible evidence may violate a defendant's constitutional rights. The State must prove beyond a reasonable doubt that the error did not contribute to the conviction. *Chapman v. California*, 386 U.S. 18(1967); *Merritt, supra*. The inquiry "is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error." *Sullivan v. Louisiana*, 508 U.S. 275,279(1993); accord, *Blecha v. People*, 962 P.2d 931(Colo.1998); *Bernal v. People*, 44 P.3d 184 (Colo. 2002). If there is a "reasonable possibility that the evidence complained of might have contributed to the conviction" then the error is not harmless beyond a reasonable doubt. *Chapman*, 386 U.S. at 23; accord *People v. Rodgers*, 756 P.2d 980 (Colo.1988). Indisputably, the jury's exposure to the polygraph information that severely undermined Ellis' credibility created a "reasonable possibility" that such evidence contributed to Ms. Bloom's conviction.

Alternatively, if there is no infringement upon a constitutional right of the defendant, where evidence is wrongly admitted it must be examined in the context of

the evidence as a whole to determine whether its admission was harmless. *People v. Summitt*, 132 P.3d 320,327(Colo.2006). The reviewing court must inquire “whether, viewing the evidence as a whole, the contested evidence substantially influenced the verdict or affected the fairness of the trial proceedings.” *Id.*; *Medina v. People*, 114 P.3d 845,857(Colo.2005). The error is harmless, only “if the properly admitted evidence **shows guilt.**” *Id.*(emphasis added) Here, at the time of Gouge’s disclosure there was no other evidence, direct or implied, that Ellis had failed the July 2002 polygraph exam. Meanwhile, Ellis’ credibility was crucial to the prosecution’s case and to the defense’s case. The jury requested transcripts of the videotapes and Ellis’ trial testimony and deliberated for three and a half days before acquitting Bloom of murder after deliberation and convicting her of knowingly causing the death. The jury was surely and irreversibly prejudiced by polygraph test results.

The Court of Appeals itself summed up the importance of Ellis’ videotaped interviews and written statement when it acknowledged that: “Finally, defendant **asserts correctly** that the case centered on whether Ellis was telling the truth at trial and in his first two interviews, or whether his last interview and written statements recounted what had actually occurred.” *Slip op.* p27(emphasis added). The appellate court then laid out evidence at trial that it described as “ample evidence, apart from the polygraph comment, on which to reject Ellis’ trial testimony, therefore, the

statement about the test result did not ‘substantially influence the verdict or impair the fairness of the trial.’” *Slip op.* p27-28, *quoting Medina*, 114 P.3d at 857. The court then consistently misapplied the factors in *Kerber*, using the importance of the credibility determination **against** finding a mistrial and emphasizing that the test results did not “bolster” the witness. *Slip op.* p26-29. Inexplicably, the Court of Appeals found that undermining a witness’ credibility somehow differs from bolstering a witness’ credibility in an analysis of prejudice to the defendant. Obviously, the unacceptable influence upon the jury’s assessment of the evidence is the same and should have been a decisive factor weighing in favor of reversal.

In denying Bloom’s claim, the Court purported to apply the harmless error analysis as set forth in *Medina*, *supra*, and reiterated in *Summitt*, *supra*, but, in fact, misapplied this standard. The court failed to “view the evidence as a whole.” *Summitt* at 327, *Medina* at 857. And, the jury’s exposure to the inadmissible polygraph evidence was “harmless” only if the remaining properly admitted evidence “overwhelmingly shows guilt.” *Summitt*, 132 P.3d at 327. The court ignored this aspect of the harmless error analysis. Moreover, reversal is required unless “the error did not substantially influence the verdict or impair the fairness of the trial.” *Id.*, *Medina*. at 857.

The Court of Appeals in its analysis of the harm caused by the polygraph information wrongly focused on “inconsistencies” in Ellis’ accounts of the night of the child’s death and differences between Ellis’ statements and Ms. Bloom’s statements to the police. *Slip op.* p28-29. The contradictory nature of the evidence, including much that was exculpatory as to Ms. Bloom, weighs in favor of reversal. What the appellate court should have been focusing on was whether, given the discrepancies, the evidence as a whole overwhelmingly showed that Bloom was guilty of the charge. It simply did not. For example, in *Summitt*, this Court found the admission of inadmissible evidence harmless, not because it was contradicted, but because there was other “**uncontroverted** testimony proving [the Defendant’s] guilt on the kidnap, assault and domestic abuse charges for which the jury convicted him.” *Summitt*, 132 P.3d at 327.(emphasis added) The highly contested nature of Ellis’ trial testimony in which he retracted a previous statement and affirmed two others underscores how important every detail of his past statements were to the jury’s ultimate conclusion. It was Ellis’ eventually incriminating statements, retracted at trial, that prompted the coroner to alter his conclusion that the child had probably died of SIDS.

The contradictory nature of the evidence surrounding the child’s death, partly a result of Ellis’s conflicting statements, exacerbated the harm of inadmissible

polygraph evidence that indicated that a particular version of the events was false. And, most glaringly, the Court of Appeals failed to assess the strength of the evidence as a whole against Bloom. *See Summitt*. Only as a result of these failures and through a misapplication of the factors in *Kerber* could the Court of Appeals have concluded that there was no “reasonable possibility” that the polygraph evidence contributed to the jury’s guilty verdict. *See Summitt*, 132 P.3d at 327; *Kerber*, *supra*.

Although the trial court orally instructed the jury to disregard Gouge’s assertion that Ellis failed the polygraph examination, this was not sufficient to protect Ms. Bloom’s constitutional rights. “There are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored.” *Bruton v. United States*, 391 U.S. 123,135(1968). Given the paramount importance of the jury’s determination regarding Ellis’ credibility, to expect them to be able to completely disregard the polygraph test results ignored the practical and human limitations of the jury. *See Peltz v. People*, 728 P.2d 1271,1280 (Colo.1986)(Justice Quinn, dissenting) *citing People v. Madson*, 638 P.2d 18,31(Colo.1981).

The defendant in a criminal trial has a constitutional right to due process of law and a fair trial. *See U.S. Const. Amends. V,XIV, Colo. Const. Art. II, §25*. When

evidence is introduced that is “so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process clause of the Fourteenth Amendment provides a mechanism for relief.” *See Payne v. Tennessee*, 501 U.S. 808,825(1991) *citing Darden v. Wainwright*, 477 U.S. 168,179-83(1986).

The defendant in a criminal trial has a constitutional right to a fair and impartial jury. *Irvin v. Dowd*, 366 U.S. 717(1967); *Oaks v. People*, 150 Colo. 64, 68, 371 P.2d 443,446-47(1962); *see U.S. Const. Amends. VI; Colo. Const. Art. II, §16,23*. When a jury has been “mislead by inadmissible evidence” it can no longer be considered impartial. *Harris v. People*, 888 P.2d 259,264-264(Colo.1995); *People v. Walters*, 148 P.3d 331,334(Colo.App.2006). Moreover, assessing the “weight and the credibility of the witnesses” is a matter left to the jury, and actions which invade the province of the jury with regard to such determinations deprive him of the constitutional right to a jury. *Gallegos v. People*, 136 Colo. 321, 324, 316 P.2d 884,885(Colo.1957). Revelation of Ellis’ polygraph test results and the trial court’s refusal to thereafter grant a mistrial violated Ms. Bloom’s rights a fair and impartial jury.

The defendant in a criminal trial has a constitutional right to confront the witnesses against him. *See U.S. Const. Amend. V,XIV, Colo. Const. Art. II §16*. Gouge’s testimony as to what Bloom purportedly had told him about Ellis involved multiple layers of hearsay. *See CRE 801*. Despite the striking of the inadmissible polygraph

evidence, the jury was exposed to the extremely prejudicial hearsay in violation of Bloom's Confrontation Clause rights. See *Crawford v. Washington*, 541 U.S. 36(2004); *People v. Fry*, 92 P.3d 970(Colo.2004).

Revelation of Ellis' polygraph test results and the trial court's refusal to thereafter grant a mistrial violated Ms. Bloom's rights to due process and a fair trial, her Confrontation Clause rights, and rights to a fair and impartial jury. Accordingly, her conviction must be reversed and her case remanded for a new trial.

Alternatively, the trial court abused its discretion when it refused to grant a mistrial despite the extreme prejudice of the polygraph information disclosed to the jury. The trial court's decision to deny a motion for mistrial should be overturned where there is a gross abuse of discretion and prejudice to the defendant. *People v. Abbott*, 690 P.2d 1263,1269(Colo.1984). Where the prejudice to the accused is too substantial to be remedied by other means, the mistrial should be granted. *Id.* In the case of the jury's exposure to inadmissible evidence, the circumstances of the particular case must be reviewed to determine the degree of prejudice occasion by the inadmissible evidence. *Id.* One factor to be assessed is whether the inadmissible evidence is per se prejudicial. *Id.* The reviewing court may affirm the denial of a mistrial only where the probability that a jury's verdict would be affected by the

impermissible disclosure is insignificant. *See People v. James*, 117 P.3d 91,96(Colo.App.2004).

Here, the polygraph evidence was per se inadmissible and prejudicial. *See Anderson, Wallace, supra*. And the particular facts of the case, discussed above, illustrate how likely it was that the jury was influenced by the inadmissible evidence that no doubt influence their assessment of Ellis' credibility. Accordingly, the trial court erred when it denied the motion for mistrial and Ms. Bloom's conviction must be reversed and her case remanded for a new trial.

II. THE TRIAL COURT ERRED AND VIOLATED MS. BLOOM'S CONSTITUTIONAL RIGHTS WHEN IT FAILED TO CONDUCT A MEANINGFUL COMPETENCY EVALUATION AND FOUND HER COMPETENT TO PROCEED TO TRIAL.

A. Standard of Review

The issues are preserved and the defendant objected to the trial court's rulings. Preserved errors of constitutional magnitude are reviewed under a harmless beyond a reasonable doubt standard. *See Chapman v. California*, 386 U.S. 987(1967); *Blecha v. People*, 926 P.2d 931,942(Colo.1998). A defendant's competence to stand trial is a question of fact and the reviewing court will reverse a trial court's competency determination where there is an abuse of discretion. *People v. Palmer*, 31 P.3d 863,865-866(Colo.2001); *Jones v. Dist. Court*, 617 P.2d 803,807-08(Colo.1980).

B. The Trial Court Proceedings

Ms. Bloom first appeared with counsel in court on March 4, 2003.(v1,p133,v2) On April 11, 2003, she waived her right to a preliminary hearing.(v3) On May 12, 2003, counsel appeared with Bloom and asked the court to order the sheriff's department to provide Bloom with the antidepressant, "Lexipro." Counsel stated that the antidepressant had been prescribed at the hospital where Bloom had recently given birth during the previous month.(v4,p2) Counsel said that the jail had refused to provide the medication. She stated that Bloom had "a history of postpartum depression" and that she had been on a suicide watch at various times during her incarceration. Counsel said that the antidepressant "will be very helpful to [Bloom] and also probably helpful to the jail staff."(v4,p3) The court refused to order the jail to provide the medication but stated that it would call the jail.(v4,p3-4)

Ten days later, on May 22, 2003, defense counsel reiterated that Bloom had been prescribed "Lexipro" by Memorial Hospital staff following childbirth.(v5,p43-44) Counsel stated:

The jail is refusing and continues to refuse to give her that medication. And certainly I think that is going to be something that she needs to have so that she can maintain and not be a risk to herself or anyone else at the jail.

Also, I think that absent them providing that medication, we may have **competency issues** that come up, and certainly that's going to delay these proceedings.

(v5,p44) The court again represented that it would call the jail and “at least get a physician to check on Ms. Bloom and determine whether they believe she is in need of further medical care.”(v5,p47) Trial was set for August 19, 2003, although defense counsel stated that the date conflicted with a previously scheduled trial.(v5,p45)

The next hearing occurred on July 7, 2003.(v6) A part of the hearing was continued July 28, 2003, due to the absence of prosecution witnesses.(v6,p2-3,31) Defense counsel stated that she would likely seek a continuance of the trial due to the need for further investigation and the resolution of the still pending motions.(v6,p31) At the July 28, 2003 hearing, counsel informed the court that Bloom was still not receiving an antidepressant or mental health treatment.(v7,p41) The jail was only willing to provide the antidepressant “Prozac,” but Bloom was unable to take that medication due to its side effects.(v7,p40-41) Counsel stated that she was “quite concerned” and said: “I don’t think that we can make it through a trial without [medicating Bloom].”(v7,p41) Counsel complained that Bloom’s need for psychiatric medication had not been assessed despite the court’s earlier representations.(v7,p42;v5,p47) Counsel thought the court had contacted the jail and ordered a mental health examination.(v7,p42) Counsel stated:

I am very concerned about proceeding through a trial with my client without some type of antidepressant medication. She has not been in this court one day without breaking

down into tears, and I don't think that we can make it through.

The medication takes four to six weeks to be fully effective, and that puts us right at the trial date. So I am having a lot of concerns about that, and I really am - - I don't know what else to do except ask the court to issue another order that she be medically evaluated and prescribed some sort of antidepressant by the jail.

That has been a huge problem, and I am not getting anywhere with that, just in trying to speak with them myself. So I'm not sure what the situation is and why they have chosen not to do any of those types of things.

But I do think that is something that needs to be done in this case. It's a very serious case, and certainly *I need to be able to have the assistance of my client and have her competent to proceed to trial.*

I'm not sure that she's at the point of incompetency, but I'm concerned as we proceed through the trial that it could get there, and I would like to avoid that up-front.

(v7,p42-43) The prosecution responded: "it sounds like she's incompetent..."(v7,p45)

The court said it had spoken with the jail commander and was "satisfied" that Bloom was receiving "adequate medical care" and "recalled" that she "did not want to take" the medicine that the jail was willing to provide. It added: "if that's her choice, then she's got to live with that decision." The court denied defense counsel's request for a continuance.(v7,p40,45)

On July 31, 2003, Bloom filed a "Motion For Competency Evaluation."(v1,p56-57) The motion contained factual allegations in support of the request that defense counsel had gleaned from conversations with individuals involved and medical records. Specifically, Bloom previously had been diagnosed with post-traumatic stress syndrome and post-partum depression and had attempted suicide in June 2002. She gave birth to a child while incarcerated, approximately four months earlier, in March 2003. That child was immediately taken from her, and, thereafter, her physician at Memorial Hospital prescribed "Lexipro" to treat her for another bout of post-partum depression. In addition, "every time" that Bloom had appeared in court she had cried and become "very emotional." Counsel maintained that it had been difficult to discuss the facts of the case and plea negotiations with Bloom, and described her mental condition as "fragile." The motion expressed concerns that Bloom was "unable to assist in her own defense due to her mental health condition" and "cannot assist in her defense in her present mental state."(v1,p56-57)

The court considered the motion for a competency evaluation on August 1, 2003.(v7,8-1-03) Counsel outlined numerous facts, suggesting that the continued lack of treatment and lack of medication had led to a degradation of Bloom's mental health. Counsel represented that Bloom had suffered in the past from post-traumatic

stress syndrome, attention deficit disorder, and post-partum depression.(v7 p2) Bloom was currently “unable to assist in her defense” or to make it through the trial. Counsel insisted that medication was necessary to enable Bloom to assist in trial preparations and in formulating her defense.(v7,p3) Counsel added that competency evaluations by the State Hospital were being conducted at the jail and no objection would be raised to having the examination there.(v7,p3-4) The prosecutor conceded that if the representations made by counsel were supported by a good-faith basis that the evaluation should take place but objected “for the record.”(v7,p4) Defense counsel added that Bloom “completely broke down” after the last hearing, that she was “not able to process” information about her case, and that it had been “extremely difficult” to discuss the plea offer, facts of the case, and preparation of the case with her.(v7,p5)

The court ruled that counsel had not established a “basis” to conduct a competency evaluation.(v7,p5-6) The court stated that videotapes of Bloom recorded a year earlier revealed no mental illness and that the judge’s observations of Bloom did not indicate to him that she was suffering from a “mental disease or defect.” The court ordered a hearing for August 8, 2003, so that he could make a preliminary finding and stated that jail personnel could testify.(v7,p6,10) The court erroneously stated that the Defendant’s burden of proof at the hearing would be a preponderance of the evidence.(v7,p6), *See* §16-8-111(1)(2), 6 C.R.S. (2003).

At the August 8, 2003 hearing, the court clarified that the hearing was to enable “preliminary findings” pursuant to Section 16-8-111(1).(v8,p3-4) Karen Vincent, a licensed practical nurse, testified that she had been elevated from the assistant administrator to the jail’s medical administrator a month prior.(v8,p4-5,18) She had no psychological training.(v8,p18) Vincent said that a psychiatrist, Dr. Michelle Moran, recently started work at the jail and could prescribe medication.(v8,p14) Bloom was “on the list” to see Moran.(v8,p15) Vincent had talked to Bloom, reviewed her file, and spoken to her treatment provider at the jail, a physician’s assistant, who was unavailable to testify.(v8,p5-6) She said that Bloom had been doing group therapy and seeing individual mental health providers.(v8,p6-7,16-18) Bloom was being treated for depression but was not given any psychotropic drugs during her pregnancy. After the birth, Bloom was kept in the medical unit and seen by mental health providers.(v8,p6-8) Bloom reported that she previously took Zoloft for post-traumatic stress disorder.(v8,p9-10) She was not allowed to take Zoloft because it was not on the county’s “formulary,” so her prescription was switched to Prozac. Vincent said Bloom refused to take Prozac and to see a psychiatrist to whom she had been referred.(v8,p10) After the birth and hospital discharge, Bloom was prescribed another drug that was not in the formulary. Vincent was concerned that Bloom had not been medicated for “quite a while,” and the jail’s mental health providers believed

that she should be evaluated for medications.(v8,p11) Bloom had been kept in the jail's medical wing for a couple of days partly due to her emotional state which was alternately cheerful and crying.(v8,p12-13) In the general population, Bloom continued to suffer from mood swings and crying; Vincent expressed a concern that "something further may happen because this is a very difficult time."(v8,p13,16,18-20) Bloom was fearful of other inmates, had been hit by one and felt threatened by others.(v8,p13,22-23) Due to a number of inmate suicide attempts, Bloom's emotions were "very high."(v8,p30) Vincent recommended a competency evaluation.(v8,p16)

Defense counsel argued that an evaluation was necessary to accurately assess Bloom's competency and there was not enough information to support a reliable determination.(v8,p34-41) Counsel again represented that Bloom had demonstrated a "lack of understanding" regarding the pending case and a "lack of communication" with her attorneys that counsel described as "delusional."(v8,p35-36) For example, counsel stated that Bloom consistently believed that previous hearings were being held to dismiss the charges.(v8,p36) Despite counsel's attempts to explain, he felt that Bloom was unable to grasp what had occurred in the courtroom.(v8,p37) Counsel expressed his belief that Bloom was unable to understand the plea offer that had been extended.(v8,p38)

The trial court belligerently greeted counsel's argument, asking why the issue wasn't raised "until three weeks before trial?" When counsel stated that "the issue" had been raised, the court responded: "Not ever, even once the word "competency" has been raised...or a request for a competency evaluation was not made until after the court denied the defendant's motion to continue this trial."(v8,p39) This was not true.²

Counsel reminded the court of the ongoing concerns regarding Bloom's mental health and lack of medication, and counsel represented that it had become clear during trial preparations with Bloom that her competency was in doubt.(v8,p40-41)

² As early as May 12, 2003, counsel had alerted the court that Bloom was not receiving a prescribed antidepressant, that she had a history of depression, and that the medication would be "very helpful."(v4,p2-4) Ten days later, on May 22, 2003, counsel reiterated Bloom's need for medication and specifically stated: "I think that absent them [the jail] providing that medication, we may have **competency** issues that come up, and certainly that's going to delay these proceedings."(v5,p44) At the July 28, 2003 hearing, counsel informed the court that Bloom was still not receiving medication or mental health treatment and strongly voiced her concerns stating: "I need to be able to have the assistance of my client and have her **competent** to proceed to trial."(v7,p41-43)

Bloom's mental health, he said, had become progressively worse.(v8,p41) Counsel stated: "She won't take her medications at the jail." The court retorted: "That's been going on for months."(v8,p40) The prosecutor indicated that he had reviewed caselaw and conceded:

all those cases, in all candor to the Court, have gone through the, at least the initial competency proceeding where there has been a report and evaluation from the State Hospital, and I don't think we have that here.

He stated that the court could consider whether the request was a delaying tactic but made no argument.(v8,p42) Defense counsel, relying upon *People v. Palmer, supra*, argued that the court should order a competency evaluation and hold a subsequent hearing.(v8,p43-44)

The court suggested that its preliminary finding would be that Bloom was competent and that a hearing would be set in front of Judge Kane the next week for a final determination.(v8,p44) The court suggested that it would then order Moran, the jail psychiatrist, "to conduct an evaluation."(v8,p44-45) The court suggested that it would be up to Judge Kane to determine whether to "order a full-blown competency evaluation." Then the court stated that the **prosecution** could choose whether to follow this course of action or have the court "defer" preliminary findings until a competency evaluation was performed by the Mental Health Institute.(v8,p45) The

prosecution responded that “we would just prefer to go before Judge Kane and see if he makes a finding.”(v8,p47)

The court made the following findings: It had observed Bloom in court and except for being “hysterical throughout” her first appearance, that she was attentive and speaking to her attorneys.(v8,p47) She was able to “communicate effectively” during the court’s colloquy with her on April 11, 2003.(v8,p48)³ The court stated that “no evidence” had been presented that Bloom was “unable to understand the proceedings as to this point.”(v8,p48) Apparently, here the court failed to consider as “evidence” defense counsel’s representations that Bloom had not understood the proceedings.(see v8,p35-37) The court found that Bloom was able to communicate effectively with police officers during her videotaped interviews taken more than a year prior to the hearing.(v8,p48,see Exh22,23) The interviews were conducted before she gave birth in April 2003 and began suffering from post-partum depression.(see v4,p2) It also found that she “refused” to take medication. Lastly, the court noted that a defense request for a continuance was denied on July 28, 2003 and incorrectly stated that the competency matter was first “raised” on August 1, 2003. The court made the “preliminary” determination of competency and ordered a “final

³ However, at that hearing, Bloom spoke only four times in response to the court’s questions with either “Yes, sir” or “No, sir.”(v3,p3)

determination” made by Judge Kane.(v8,p49-50) The court ordered that Bloom be “evaluated by Dr. Moran” and that the doctor was “specifically directed to address with Bloom the legal competency status or legal competency determination which Judge Kane will be required to make at that time.”(v8,p50) The court found that Bloom had complied with the written request for a final determination imposed by statute.(v8,p52)

The parties appeared before Judge Kane for the final determination hearing on August 15, 2003.(v9) Dr. Moran testified that she was a psychiatrist and worked at the jail eight hours a week.(v9,p3-5) She interviewed Bloom on August 8, 2003 and had reviewed her chart.(v9,p6) She conducted a medication assessment and mental status exam to determine, in part, whether Bloom was thinking clearly.(v9,p7) In one exercise to test concentration, Bloom was hesitant and eventually unable to continue.(v9,p8) She reported anxiety, was tearful, and her chart revealed a previous diagnosis of post-traumatic stress.(v9,p9-10,17) Moran was aware of a past use of antidepressants but unaware of the April 2003 prescription issued by Memorial Hospital.(v9,p12-15) She noted an entry that Bloom refused some antidepressant, thought it was the Lexipro but was unsure.(v9,p13) Bloom reported blackouts in 2001, for which she was prescribed “Depakote” and had worked with a neurologist and psychiatrist.(v9,p16) Moran diagnosed Bloom with “adjustment disorder

depressed.”(v9,p20) The diagnosis indicated the possibility of a “biochemical imbalance” and that Bloom suffered from depression and “impaired reaction to stress.”(v9,p20) Bloom was “impaired by symptoms on a daily basis” but not “psychotic.”(v9,p21) She described Bloom as under “extreme psychosocial stress,” adding that she rarely classified patients as “extreme” but that it was warranted in Bloom’s case.(v9,p21) The doctor did not believe that Bloom’s condition was responsive to medication and noted that Bloom did not want to be medicated.(v9,p21)

Regarding the pending case, Moran warned Bloom not to discuss its “criminal aspects.”(v9,p19) She said that Bloom wanted to convince her that she “knew exactly what she was charged with” and that she could make “rational decisions.” Bloom was “aware” that she was charged with murder but the doctor did not explore Bloom’s understanding of the potential consequences.(v9,p19) The doctor said that Bloom spoke only generally about working with defense counsel and portrayed herself as “capable of understanding what was going on” and was “clear that she was accused of something she had not done.”(v9,p20) The doctor’s assessment was “limited” to “medications and treatable psychiatric illness.”(v9,p22)

Moran unequivocally testified that she did not assess Bloom’s competency to proceed to trial or perform a competency evaluation.(v9,p20,24) She had done such

exams and knew what they entailed.(v9,p24-25) She said that such an exam would focus on the defendant's "knowledge or understanding of the charges, potential consequences of the charges and ability to cooperate with the attorneys and defense."(v9,p25) Moran had not explored these topics with Bloom nor had she assessed her understanding of events taking place in the courtroom. She did not speak to her about the different roles of the judge, jury, and prosecutor.(v24-25) Moran testified that she had not reviewed the information necessary to conduct a competency exam, agreeing that such information included police reports and witness statements.(v9,p25)

Defense counsel renewed the request for a competency evaluation after Moran's testimony and stated that it was the Defendant's understanding that Judge Kennedy had previously ordered such an examination.(v9,p30) Counsel highlighted the missing information that would have been produced had such an examination taken place.(v9,p31) Counsel also argued that the court did not have sufficient information to make a valid competency determination and requested that the State Hospital be ordered to perform the exam.(v9,p32,35) The court noted that the transcript of Judge Kennedy's preliminary finding hearing confirmed that Moran had been ordered to do a "legal competency determination."(v8,p50;v9,p33) The prosecution expressly conceded that a competency evaluation had been ordered but

added: “that is a procedural problem.”(v9,p33) The prosecution proposed that the court question Bloom directly.(v9,p34) The court rejected this suggestion and found that Moran had been ordered to address competency and that somehow the order had not been communicated.(v9,p35-36) Accordingly, the court ruled: “I am going to order Dr. Moran to conduct a competency evaluation.” The court also found that Bloom was not “entitled” to have the exam done by the State Hospital and a hearing was set for August 18, 2003.(v9,p36) The court ordered Moran to appear at the hearing and stated that it did not want “this testimony repeated....I want to hear further in regard to a follow up competency evaluation.”(v9,p37)

Moran did not appear in court on August 18, 2003.(supp v1) Judge Kane announced that she had telephoned him and asserted, as a matter of “medical ethics,” that she should not, as Bloom’s “treating physician,” ask the questions necessary to perform a competency evaluation.(supp v1,p2) Counsel argued that Bloom was entitled to a competency evaluation conducted by the State Hospital, and that there was insufficient evidence for a reliable, final determination of competency in the absence of such an evaluation. Counsel asserted that a State Hospital evaluation was necessary to ensure the independence of the examiner.(supp v1,p4-5) No further evidence was presented.(supp v1)

The trial court ruled that:

I am not persuaded that the burden of proof has been met here to show that Mrs. Bloom is not competent to proceed. And accordingly, I decline to enter an order which would require a competency evaluation.

(supp v1,p10) Acknowledging that it had ordered a competency evaluation, the court stated that it was “persuaded that [Dr. Moran’s] medical evaluation included sufficient evidence with regard to Mrs. Bloom’s competency to proceed.”(supp v1,p10-11) The court made findings based on Moran’s testimony, including that: Bloom had “trouble focusing, but [Moran] testified it was not so as to make her incompetent to proceed,” that Bloom suffered from mood swings, that Bloom did not presently suffer from post-traumatic stress disorder, that there was “no biological mental history and no blackouts,” and that Bloom’s ADHD was not an “indicator of incompetence.” The court noted that Bloom had portrayed herself to the doctor as innocent and capable of working with counsel, concerned with “social stigma” attached to the charges. The court found that Bloom’s “thought processes were appropriate and linear.”(supp v1,p11)

The record does not support the court’s findings or conclusion. Moran was careful not to couch her testimony in terms of Bloom’s “competency” despite the prosecution’s efforts to have her do so.(v9,p26-27) When the prosecution asked Moran whether she had “concerns about her understanding or her competency to

proceed,” she responded: “[a]gain, I was not specifically addressing competency.” Moran then added that she did not think that Bloom’s “moods” impaired her to the extent that she “could not do her best in terms of cooperating with her defense.”(v9,p27) Meanwhile, Moran testified that Bloom did not “endorse” on a list the symptoms associated with PTSD and that she did not believe that it was “affecting her to any great degree.”(v9,p9-12,17) Bloom reported that any family history of mental illness was unknown. Moran said that her focus was to determine what medications Bloom might need so she did not explore Bloom’s purported blackouts.(v9,p9-12,16) Despite the court’s conclusion, had it not believed that an actual competency evaluation was, in fact, necessary on August 15, 2003, immediately following Moran’s testimony, it would not have ordered one to be completed over the weekend and presented at a Monday hearing.

C. The Defendant’s Statutory and Constitutional Rights

“It has long been accepted that a person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to a trial.” *Drope v. Missouri*, 420 U.S. 162,171(1975). Placing a defendant on trial in a criminal proceeding when he or she is incompetent violates due process of law. *Id.*; *People v. Zapotocky*, 869 P.2d 1234(Colo.1994); see *U.S. Const. Amend. V,XIV*;

Colo. Const. Art II, §25. A defendant who suffers from a mental disease or defect which renders him incapable of 1) understanding the nature and course of the proceedings against him, or of 2) participating or assisting in his defense or cooperating with his defense counsel, is “incompetent to proceed.” *People v. Palmer*, 31 P.2d 803,806(Colo.2001); §16-8-102(3), 6 C.R.S. (2003).

Section 16-8-110 prohibits the trial of an individual who is incompetent to proceed at the trial stage of a criminal prosecution. §16-8-110, 6 C.R.S. (2003). The legislature has set forth procedures that must be followed when the defendant’s competency is placed at issue:

(1) Whenever the question of a defendant's incompetency to proceed is raised, the court shall make a preliminary finding either that the defendant is competent to proceed or that the defendant is not. **If the court feels that the information available to it is inadequate for making such finding, it may order a competency examination or such other investigation as it deems advisable.**

(2) The court shall immediately notify the prosecuting attorney and defense counsel of the preliminary finding. If neither the prosecuting attorney nor defense counsel requests, in writing, a hearing within a time limit set by the court, the preliminary finding becomes a final determination. Upon the timely written request of either the prosecuting attorney or defense counsel, **the court shall hold a hearing and may commit the defendant for a competency examination prior to the hearing if adequate psychiatric information is not already available. At the conclusion of the hearing, the court**

shall make a final determination. Upon the request of either party, the judge shall set the matter for hearing before another judge. At any hearing held pursuant to this subsection (2), the burden of submitting evidence and the burden of proof by a preponderance of the evidence are upon the party asserting the incompetency of the defendant.

§16-8-111, 6 C.R.S. (2003)(emphasis added). The purpose of the legislation is to ensure that there is no violation of the defendant's right to due process of law that would otherwise arise if he were incompetent but, nonetheless, required to stand trial. *Cappelli v. Demlow*, 935 P.2d 75,61(Colo.App.1996). The procedures are designed to lessen the risk of an erroneous decision by the trial court regarding the defendant's competency. *Id.* at 62. Therefore, only a minimal standard is imposed upon the party or the court in order to set in motion the procedures to assess the defendant's competency. *Id.* Specifically, the court has a duty to suspend the proceedings and determine whether the defendant is competent whenever it "has reason to believe" that the defendant is incompetent. *Id.* And, in those instances where a party raises the issue, that party need only "raise a doubt" as to the defendant's competency to trigger the protections of the legislation. *Id.* This nominal standard exists because the State has a weighty interest in safeguarding the defendant's due process rights, maintaining a reliable criminal justice system and assuring the finality of criminal convictions. *Id.* Consequently, competency statutes are meant to ensure that the court err on the side

of assessing the defendant's competency, rather than fail to address his competency or find him prematurely competent. *See id.*

Due process is violated when a trial court refuses to accord an accused an adequate hearing upon a claimed incompetency to stand trial. *Drope v. Missouri, supra*; *Pate v. Robinson*, 383 U.S. 375(1966); *Jones v. District Court*, 617 P.2d 803(Colo.1980); *see U.S. Const. Amend. V,XIV; Colo. Const. Art II, §25*. Once the issue of a defendant's competency is properly raised, failure to follow the procedural provisions set forth in the competency statute constitutes a denial of due process and also requires reversal of an ensuing conviction. *People v. Arkadie*, 692 P.2d 1145(Colo.App.1984); *accord, People v. Matthews*, 662 P.2d 1108(Colo.App.1983)(reversible error where trial court failed to set a time limit within which to request a competency hearing pursuant to §16-8-111). In addition, where defense counsel's representations raise a substantial issue as to the defendant's competency to stand trial, the trial court's refusal to order a competency evaluation constitutes an abuse of discretion. *See Jones*, 617 P.2d at 808.

D. Application of Erroneous Legal Standards

In Ms. Bloom's case, the trial court erroneously imposed a burden of proof of a preponderance of the evidence at the preliminary finding stage of the competency proceedings. Mental competency need only be "raised" by the defense pursuant to Section 16-8-110, in order to invoke the protections of Section 16-8-111, because

there is “no ‘burden of proof’ requirement in raising this issue.” *Jones*, 617 P.2d at 806, nt3. By relying on an overly restrictive standard the court shirked its duty to order a competency evaluation. Instead, the court only authorized jail personnel to testify. Accordingly, Vincent testified and it was apparent that she did not have the qualifications or sufficient knowledge of Bloom’s mental health to provide the information necessary to assess her competency.

Here, the prosecution recognized that a competency evaluation was required by law after the preliminary findings hearing of August 8, 2003.(v8,p42) Because the prosecution conceded that a competency evaluation was required at the end of the preliminary finding hearing, it has also waived any argument on appeal that a competency evaluation was not required. *See People v. Salazar*, 964 P.2d 502(Colo.1998) (prosecution conceded in the trial court that an investigatory stop had occurred and, therefore, could not raise issue of whether encounter was actually consensual for first time on appeal). Accordingly, any argument by the State to the contrary should be foreclosed.

Whenever defense counsel has reason to believe that the defendant is incompetent, he is obligated to bring the issue to the court’s attention. *Jones*, 617 P.2d at 807. The trial court may not summarily reject defense counsel’s request for a competency evaluation where the request is supported by counsel’s representation

that the defendant is unable to assist in his defense due to a deteriorating mental condition. *Id.* Defense counsel's evaluation of the defendant's ability to consult on his case and to understand the proceedings may be as valuable as a psychiatric opinion regarding competency. *Id.* at 808. Moreover, because counsel is an "officer of the court," the court should assume that his statements carry the reliability of those made under oath. *Id.* Throughout these proceedings, the trial court gave insufficient consideration to defense counsel's representations to the court.

There are few cases in Colorado where the trial court's refusal to grant a competency evaluation has been upheld. And, those cases are easily distinguished. *E.g.* *People v. Seigler*, 832 P.2d 980(Colo.App.1991)(competency raised by defense counsel on first day of trial after motion to continue denied three days before trial; defense counsel refused to give specific reasons to support his opinion that defendant incompetent, stating that his opinion was based on privileged information; adequate support for trial judge conclusion that competency raised as a delaying tactic); *People v. Morino*, 743 P.2d 49(Colo.App.1987)(defense counsel requested competency evaluation on the second day of trial after defendant showed up late from methadone treatment; defendant interrupted, stating that she wanted to proceed; trial court specifically questioned defendant about what was happening and determine that she understood the proceedings). There is a clear preference for requiring the defendant

to undergo a competency evaluation conducted by a qualified physician whenever the defendant's competency is legitimately questioned. *See e.g. People v. Thomas*, 962 P.2d 263,269(Colo.App.1997) *citing People v. Sherrer*, 670 P.2d 18(Colo.App.1983)(trial court has duty to order evaluation whenever a doubt is entertained as to defendant's competency.). Here, the trial court violated Bloom's due process rights, exceeded its jurisdiction and abused its discretion when it applied an erroneous standard of proof, contrary to §16-8-111, and refused to order a competency evaluation after making a preliminary finding of competence.

E. The Trial Court's Inadequate Protection of Bloom's Rights

Where there has been a preliminary finding regarding the defendant's competency, any subsequent hearing on the issue broader than that initial hearing "would be meaningless until trained medical experts were afforded a reasonable opportunity to observe and examine [the defendant] and report their finding." *Cappelli*, 935 P.2d at 63. "An accused's competency must be assessed with specific reference to the nature of the proceeding with which he is confronted and the appropriate level of understanding necessary for meaningful cooperation with his attorney." *Jones*, 617 P.2d at 807. A competency evaluation is designed to address these specific issues. *See Cappelli, supra*.

At the conclusion of the preliminary findings hearing, and upon defense counsel's request, the trial court was required by statute to set a hearing to make a final determination regarding Bloom's competency and did so.(v8,p49-50) *See* §16-8-111(2). Also, the statute mandated that a different judge hear the matter based upon such a request by the defendant. §16-8-111(2). The statute authorized only one other action, specifically, that the court "may commit the defendant for a competency evaluation prior to the hearing if adequate psychiatric information is not already available." §16-8-111(2). Unlike the provisions governing a preliminary finding, the court is not authorized to "order...such other investigation as [the court] deems advisable." §16-8-111(1). The Court of Appeals ignored the plain language of the statute and erroneously interpreted Section 16-8-111(1) when it found that the trial court did not err by ordering less than an actual competency evaluation **after** making its preliminary finding of competence. *Slip. Op.* p16. The "other investigation" authorized by statute is only available to assist the court in making its preliminary finding under subsection (1), not in making a final determination under subsection(2). *See Palmer*, 31 P.3d at 870-871. The appellate court erroneously found that subsection (1) applies to every step in the competency procedures. *Slip Op.* p16. However, the court then also characterized Judge Kennedy's order made after the preliminary finding as one for a "competency evaluation." *Slip Op.* p17.

Here, on August 8, 2003, the trial court obviously believed that “adequate psychiatric information” was “not already available” to enable a final determination. *See* §16-8-111(2). Vincent, who had just testified, but had no psychological training, recommended a competency evaluation, and the court actually ordered Dr. Moran to perform an evaluation of sorts.(v8,p50) The trial court apparently, but erroneously, believed that it was statutorily authorized to order some lesser mental health evaluation that could be performed by the jail’s psychiatrist that would not be a “full-blown competency evaluation.”(v8,p45) And, the court refused to involve the state hospital in that evaluation.(v8,p45-47) Here, the trial court exceeded its jurisdiction and abused its discretion by ordering something less than a competency evaluation at this stage in the proceedings. *See Matthews, supra*. The competency statute does not authorize the tepid action taken by the trial court and by violating its procedures, the court in turn violated Ms. Bloom’s state and federal due process rights. *See Cappelli, supra*.

F. Errors at the Final Determination Hearing

Judge Kane conducted the final determination hearing pursuant to §16-7-111(2).(v9) He believed that a competency examination had been ordered after the preliminary findings hearing, perhaps, because that order would have been consistent with the statutorily authorized procedures.(v9,p33-37) This is further evident in the

Judge Kane's refusal to make the final determination in the absence of such a report.(v9,p35-37) Judge Kane ordered, in no uncertain terms, a "competency evaluation," and the final determination hearing was continued to August 18, 2003.(v9,p36) When Moran informed the court that she could not ethically perform the competency evaluation, the court should have delayed the proceedings and ordered the State Hospital to conduct such an exam. *See Jones, supra*, §16-8-111. But the court did not, rather it reversed its earlier ruling that a competency evaluation was necessary and decided to rely on Moran's earlier testimony.(supp v1,p10-11) This too was an abuse of discretion and violated Ms. Bloom's due process rights.

G. The Trial Court's Final Determination of Competency

With any claim of incompetency, the trial court must determine whether the defendant is incapable of understanding the proceedings against him or of assisting in his defense. *Palmer*, 31 P.3d at 868. Such a determination is a fact-specific inquiry requiring a review of the totality of the circumstances of the particular case. *Id.* at 868-870. The trial court's decision will be reversed where there is found an abuse of discretion. *Id.* The burden of proof with regards to competency imposed at the final determination hearing is a preponderance of the evidence resting with the party claiming the defendant's incompetence. §16-8-111(2). In Bloom's case the court found that she had failed to meet that burden of proof.(supp v1,p10) But, it was the

court's repeated refusal to secure a competency evaluation by an appropriate expert that impeded Bloom's ability to present the facts proving her incompetence. That denial of expert assistance was itself an abuse of discretion, as well as a violation of her constitutional rights to due process. *See Cappelli*, 935 P.2d at 63.

The court's actions effectively increased the burden of proof beyond that required by statute in violation of Bloom's rights to a fair trial and due process of law. *See U.S. Const. Amends. V, XIV; Colo. Const. Art. II §25; §16-8-111(2)*. The combination of counsel's representations and the psychological evidence available was sufficient proof of Bloom's incompetence to meet a preponderance of the evidence standard and the trial court abused its discretion in finding that Bloom was competent to proceed.

H. Rule of the Case Doctrine

Prior rulings by the trial court in an ongoing case must be followed by that court unless to do so would result in error or a change in conditions makes the prior ruling no longer sound. *People ex. rel. Gallagher v. District Court*, 666 P.2d 550, 553(Colo.1983); *People v. Vialpondo*, 954 P.2d 617(Colo.App.1997). For the trial court to exercise its discretion to alter a prior ruling, there must be some evidence of changed circumstances warranting a reopening of an issue that has already been decided. *See Vialpondo*, at 624. Moreover, where the court intends to correct a prior

ruling, the reasons for the modification must be articulated. *Gallagher*, 666 P.2d at 553. The court on August 18, 2003, gave no principled basis for the reversal of its order for a competency evaluation, nothing regarding the posture of the case had changed over the weekend, no further evidence had been submitted by either party, and no error would have resulted from ensuring that a professional evaluate Bloom's competency. Such an examination was necessary to safeguard Bloom's rights and the court's reversal of its order for a competency evaluation was error and violated her rights to due process of law. *See Cappelli, supra; Arkadie, supra.*

I. The Defendant's Right to an Independent Examination

Defense counsel objected to the court's reliance on Moran's testimony, arguing in part, that because she was not employed by the State Hospital, her views did not constitute an independent examination to which Bloom was entitled. (supp v1,p4-5,7-8) The competency statute contemplates that the trial court will appoint an expert from a Colorado psychiatric hospital in Denver or the Colorado Mental Health Institute in Pueblo to conduct competency evaluations. *See* §16-8-106(1), 6 C.R.S. (2003); *see also Palmer*, 31 P.3d at 870-871. Consistent with this aspect of the statutory scheme, the defendant is not entitled to have the State pay for an expert of his own choosing. *See Palmer* at 871; *Massey v. District Court*, 180 Colo. 359, 363, 506 P.2d 128,130(1973). The court ordered Bloom's treating psychiatrist rather than a State

Hospital examiner to assess her competency. The examination was not performed due to the doctor's ethical obligations, which in itself highlights why an independent examiner is required. Here again, the court ignored the procedures of the competency statute and violated Bloom's rights to due process of law.

Counsel also requested that Bloom be allowed an examination by a psychiatrist of her own choice pursuant to §16-8-108.(supp v1,p7-8) The court rejected this argument.(supp v1,p12-13) Section 16-8-108 requires the trial court to order the examiner of the defendant's choice to be given a reasonable opportunity to examine the defendant upon a showing of "good cause." *Palmer*, 31 P.3d at 871. Good cause clearly existed because Moran never performed the ordered competency evaluation. The court erred when it refused to allow Bloom to secure her own evaluation, that ruling and the court's finding of competency violated Bloom's due process rights and were abuses of discretion. Her conviction must be reversed and her case remanded for a new trial. *See Drope v. Missouri, supra*.

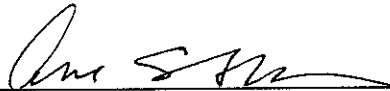
The Court of Appeals' rejection of Bloom's claims regarding the trial court's reversals of Judge Kane's August 15, 2003 unequivocal order for a competency evaluation and Judge Kennedy's earlier order for some type of evaluation is partly based on its determination that Moran's refusal to testify rendered the orders for an evaluation "unsound." *Slip Op.* at 18. This is not the kind of change in circumstances

contemplated under the law of the case doctrine. *See Gallagher, supra; Vialpondo, supra.* In *Vialpondo*, the trial court's decision not to sever a prior charge at a retrial, although the court had severed the charge in the first trial, did not violate the doctrine because the "original reason for severing the charges was no longer present." 954 P.2d at 624. The reason for ordering a competency evaluation after Moran's August 15, 2003 testimony was to enable the court to accurately assess Bloom's competency. That Moran could not conduct the exam, for whatever reason, did not add to the evidence available to assist in this determination nor did it diminish the need for an evaluation; it merely inconvenienced the proceedings. This inconvenience was in no way attributable to Bloom. Moreover, in the context of a competency determination, the statutory procedures, as a matter of due process of law, must be followed when the issue of a defendant's competency is properly raised. *Arkadie, supra; Matthews, supra.* Once a competency evaluation is ordered, the competency statutes do not allow for that order to be rescinded. *See* §16-8-110-111. And, the Court of Appeals acknowledged that no Colorado case has been determined where the trial court has entered a "final determination" order pursuant to Section 16-8-111(2) in the absence of a competency evaluation. Nonetheless, the appellate court declined to find an abuse of discretion or constitutional violation despite this glaring omission that occurred in Ms. Bloom's case.

CONCLUSION

Based on the foregoing arguments and authorities, Ms. Bloom's conviction must be reversed and her case remanded for a new trial.

DOUGLAS K. WILSON
Colorado State Public Defender



ANNE STOCKHAM, #15257
Deputy State Public Defender
Attorneys for JANINE BLOOM
1290 Broadway, Suite 900
Denver, CO 80203
303-764-1400

CERTIFICATE OF SERVICE

I certify that, on September 13, 2007, a copy of this Opening Brief was hand-delivered to the Colorado Court of Appeals for deposit in the Attorney General's mailbox to the attention of:

Jason R. Dunn
Assistant Attorney General
Appellate Division, Criminal Justice Section
1525 Sherman Street, 5th Floor
Denver, CO 80203

