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

In response to matters raised in the Attorney General's Answer Brief, and in addition to the arguments and authorities presented in the Opening Brief, the Petitioner submits the following Reply Brief.

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.

The State in its Answer Brief asserts that a reference to the results of a polygraph exam does not violate federal due process protections.(Answer Brief p22) In support, the State cites *Maldonado v. Wilson*, 416 F.3d 470 (6th Cir.2005). In *Maldonado*, the appellate court affirmed the federal district court's denial of a habeas petitioner's claim that testimony regarding truth-testing violated federal due process. *Id.* at 478. The *Maldonado* court relied upon three cases that had been determined in the same procedural posture containing a habeas petitioner's claim of a due process violation. *Id.* at 477-478. However, the court expressly recognized that the three other cases were factually distinguishable. *Id.* at 477, nt 5. In so doing, the court stated that one of the two principle circumstances supporting a finding that the trials were fundamentally fair, despite the revelation of polygraph evidence, was that

"testimony about the test did not divulge the results and therefore did not play a key role in rehabilitating or discrediting a witness." *Id.*

The Colorado Supreme Court is not bound by a federal circuit court's interpretation of federal constitutional requirements. *People v. Dunlap,* 975 P.2d 723, 748 (Colo.1999); *People v. Rossman*, 140 P.3d 172, 176 (Colo.App.2006). Lower federal courts do not have appellate jurisdiction over state courts and, even on questions of federal law, their decisions are not conclusive on state courts. *Dunlap,* at 748, *citing People v. Barber*, 799 P.2d 936, 940 (Colo.1999). In addition, this Court has departed from the holdings of federal courts under the United States Constitution and found that provisions of the Colorado Constitution "provided our citizens with a higher degree of protection." *People v. District Court*, 834 P.2d 181, 192 (Colo.1992). This is so even where the constitutional provisions are similarly or identically stated. *Id.*

The State relies on the test drawn from *People v. Kerber*, 64 P.3d 930 (Colo.App.2002), and purportedly applied by the Court of Appeals in Ms. Bloom's case. A proper application of that test should result in a reversal of Ms. Bloom's conviction. Alternatively, this Court may fashion its own test to determine whether testimony concerning a polygraph exam warrants reversal.

The State takes the dubious position that the *Kerber* test is "based on two concerns."(Answer Brief p23) The first concern, according to the State, is whether

the testimony was the product of prosecutorial misconduct.(Answer Brief p23) Not surprisingly, in suggesting such a focus, the State veers toward a body of law not particularly favorable to the defendant. *See e.g. .Domingo-Gomez v. People*, 125 P.3d 1043, 1053 (Colo.2005) ("Only prosecutorial misconduct which is 'flagrantly, glaringly, or tremendously improper' warrants reversal." *quoting People v. Avila,* 944 P.2d 673, 676 (Colo.App.1997). In so doing, the State ignores the foundation of the rule that polygraph results are per se inadmissible. This exclusion is based on the unreliability of polygraph results and that the admission of such evidence, which bears directly upon credibility, invades the province of the jury to make such credibility determinations. *See People v. Dunlap*, 975 P.2d 723, 256 (Colo.1999); *People v. Wallace*, 97 P.3d 262, 267-268 (Colo.App.2004). Thus, the better focus is more akin to that adopted by the federal courts. There the courts have repeatedly focused on two factors: specifically whether "an inference about the result of the test may be critical in assessing the witness's credibility" and "whether the witness's credibility is vital to the case." *United States v. Tedder*, 801 F.2d 1437, 1444 (4th Cir.1986); *accord United States v. Brevard*, 739 F.2d 180, 182 (4th Cir.1984). Meanwhile, the actual revelation of the results of a polygraph exam will normally require reversal. *Buckley v. State*, 46 S.W. 3d 333 (Tex.App.2001).

In addition, *People v. Blaze*, 143 F.3d 585 (10th Cir.1998), relied upon by the State provides scant support for the notion that prosecutorial misconduct guides the analysis of the claim at issue in Ms. Bloom's case. There, the court determined that a prosecution witness' mention that he had agreed to do a polygraph examination was "unsolicited" and that a new trial was not warranted "particularly in light of the other evidence of guilt established at trial." *Id.* at 594. Moreover, there was no testimony regarding the **results** of the polygraph examination only a "mere reference to polygraph testing." *Id.* Thus, other factors underlie the court's decision.

Obviously, a deliberate effort on the part of the prosecution to present inadmissible evidence involves considerations beyond the prejudice created and calls for some form of judicial intervention. *See United States v. Murray*, 784 F.2d 188 (6th Cir.1986) (conviction reversed where FBI agent deliberately revealed to jury that the defendant refused to take a polygraph examination); *United States v. Walton*, 908 F.2d 1289, 1293 (C.A. 6 (MI) 1990) (circuit precedent calls for reversal where government intentionally introduces information concerning a polygraph examination), However, the federal cases do not state that the absence of a deliberate introduction of polygraph evidence is a determining factor when assessing the harm done by the jury's exposure to such evidence. *See eg. Blaze; Walton.*

The State asserts that the "curative instruction" provided in Ms. Bloom's case was sufficient to avoid a mistrial.(Answer Brief p26). Yet, the federal cases relied upon by the State for this proposition are distinguishable from Ms. Bloom's case. In *United States v. Holman*, 680 F.2d 1340, 1352 (C.A. Fla. 1982), before reaching a conclusion that the error was remedied by an instruction to disregard the polygraph evidence, the court found that the "results of the test were not mentioned." The *Holman* court then relied upon two other circuit cases where, likewise, the results of the polygraph tests were not revealed to the jury. *Id. citing United States v. Martino,* 648 F.2d 367 (5th Cir. 1981); *United States v. Smith*, 565 F.2d 295 (4th Cir. 1977). The test applied by the court to determine if the error required reversal was whether the "evidence withdrawn from the jury with directions to disregard" was "so prejudicial to be incurable" by means of the instruction. *Id.* at 1352. In *United States v. Wallace*, 32 F.3d 921, 927 (C.A. 5 (La.) 1994), a prosecution witness referenced his own polygraph examination but did not reveal the results of the exam. There, the court observed that the witness' mention of the exam was non-responsive, but the court provided no further analysis of the error and relied upon the *Martino* decision, another instance where the results of the exam were not revealed to the jury. *Id.*

As the State observes, in *United States. v. Kiszewski*, 877 F.2d 210, 217 (C.A.2 (N.Y.) 1989), the court did note as a factor in its decision not to reverse the

defendant's conviction that the reference to the defendant refusing to take polygraph exam was "an isolated statement."(Answer Brief p27) But, other factors relied upon by the court included that defense counsel did not make an immediate objection, that the witness had asked the defendant to take a polygraph exam because he suspected him of lying about "a matter not directly at issue" in the case and that the witness' testimony was in response to a question from the trial court. *Id.* The analysis focused on the "prejudice" created by the inadmissible evidence. *Id.*

Evidence revealed to the jury that a defendant either took and failed a polygraph examination or refused to take a polygraph examination implicates the defendant's Fifth Amendment right not to incriminate himself. *Walton*, 908 F.2d at 1293. As a result, the *Walton* court declared that the standard of review applied by the federal court in these instances is the standard for errors of constitutional magnitude. *Id.* at 1294. The *Walton* court expressed the view that the standard of review in all other instances where evidence regarding a polygraph exam is presented and only a curative instruction is provided involves a two factor test. *Id.* at 1293. That test asks "'(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.'" *Id. quoting Tedder*, 801 at 1444. The State argues that *Walton* stands for the proposition that the "prejudicial impact" of the polygraph evidence is "minimized" if the

polygraph exam is not the defendant's.(Answer Brief p27) This is an inaccurate statement. In this regard, *Walton* simply observes that other constitutional concerns are presented when it is the defendant's polygraph examination that is impermissibly referenced. But such concerns do not act to the detriment of the analysis of polygraph evidence revealed in other circumstances. In *Walton*, a government witness was asked whether he was called to a grand jury, and in response he stated: "No, I had to take a polygraph before that." *Id.* at 1292. The defendants' convictions were upheld despite the reference because "the jury heard no evidence as to the results of he test" and there was "an abundance of other evidence against" the defendants. *Id.* at 1294.

The State downplays the prejudicial impact of the testimony that Ellis failed his first polygraph exam, arguing that the testimony did not specify which of Ellis' statements caused him to fail.(Answer Brief p27-28) This ignores the fact that Ellis had little incentive to lie about anything other than the death of the child. In his interviews on June 30, 2002 and July 17, 2002, Ellis provided an account of the events of the night of the child's death that exonerated both him and Ms. Bloom.(Exh22,23) In *Thornburg v. Mullin*, 422 F.3d 113, 1124-1125 (C.A. 10 (Okla) 2005), the government's witness, Matheson, testified that he passed his polygraph examination concerning the events of the case. The court, in assessing the "facts and

circumstances of this particular case" observed that: Matheson's testimony at trial was "strongly corroborated in its essentials" by another witness who testified to the same events and was likewise an eyewitness to the same events as Matheson. *Id.* at 1124-1125. In addition, the evidence of the defendant's guilt was "overwhelming." *Id.* at 1125. The *Thornburg* court emphasized that these factors were more important to its determination than its observation that it was unclear what portions of Matheson's testimony were found truthful by the exam and that the statement was not referred to later in the trial. *Id.*

Moreover, by testifying that Ellis failed his polygraph "the first time," the witness in Ms. Bloom's case suggested that Ellis was given a second exam. The jury easily could have assumed that he passed the second exam and that it had been administered in February 2003, when he was next interviewed by the police and when he accused Ms. Bloom of killing the child. Unlike in *Thornberg*, there was no directly corroborating evidence to support Ellis' trial testimony other than his own previous, initial statements, no witness to the child's death other than the defendant, and the evidence of Ms. Bloom's guilt was not overwhelming.

There is no escaping that the revelation of the results of a polygraph exam, as opposed to a reference to the fact of an exam, is and must be the central factor in assessing whether reversal is required. Most of the federal cases relied on by the State

as well as the *Kerber* decision involve instances where the results were not revealed to the jury. And, regardless of the other, varying factors that may be part of assessing the error, the key to any decision involving a reference to a polygraph examination is the degree of harm or prejudice resulting from the reference. In Ms. Bloom's case that harm or prejudice was too substantial to be remedied by a curative instruction, and the trial court erred and violated her constitutional rights in refusing to grant a mistrial.

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.

The State argues that in order to show a violation of due process, Ms. Bloom must also show that "the violation caused the defendant to be tried while she was incompetent" but cites no authority for this proposition.(Answer Brief p32) Neither *Drope v. Missouri*, 420 U.S. 162 (1975), nor *Jones v. District Court*, 617 P.2d 803 (Colo.1980) imposes such a requirement. "Due process is violated when a trial court refuses to accord an accused an adequate hearing on his claimed incompetency to stand trial." *Jones* at 806 *citing Pate v. Robinson*, 383 U.S. 375 (1966).

The State, in its review of the pretrial hearings leading up to Ms. Bloom's request for a competency evaluation, emphasizes that on March 4, 2003, April 11, 2003, and May 12, 2003, no request for an evaluation was made.(Answer Brief p32-

33) Ms. Bloom was first charged with the offenses in this case on March 4, 2003, thus, her initial contact with counsel was likely to have been on or about March 4, 2003, and defense counsel would have been in contact with her for about ten weeks by May 12th.(v1 p19-23) Nonetheless, competency concerns apparently had emerged by May 23, 2003, as plea negotiations progressed and, no doubt, trial preparations became more intensified.(see v6 p2) These concerns were undeniably expressed to the trial court.(v5 p44) What is more remarkable is the trial court's callous response to Ms. Bloom's ongoing mental health problems and overriding interest in trying this first degree murder case within the first six months of speedy trial.(see v7 p45; 7-28-03)

The State suggests that defense counsel requested a competency evaluation "in order" to somehow force Ms. Bloom to take medications.(Answer Brief p36) This is not an accurate characterization of the record, although defense counsel did take a somewhat apologetic tone, probably as a response to the trial court's previous hostility.(v7 p3-5, 8-1-03) The State also takes the position, shared by the Defendant, that Judge Kennedy ordered a "competency evaluation" to be performed by Dr. Michele Moran on August 8, 2003.(Answer Brief p41)(v8 p50) In characterizing Moran's testimony on August 15, 2003, the State claims that she "stated that she had

no concerns regarding Petitioner's competency."(Answer Brief p42-43, citing v9 p26-27) The Defendant disagrees with this characterization of the record.

In its analysis of a defendant's right to a competency evaluation, the State cites *People v. Bolton*, 859 P.2d 303 (Colo.App.1993), in support of its position that the first judge, Judge Kennedy, was able to make a determination that a "bona fide" doubt as to Ms. Bloom's competency had not been raised based on its observations of the defendant.(Answer Brief p48-50) The facts in *Bolton*, however, demonstrate a much greater interaction between the court and the defendant than that relied upon by Judge Kennedy. On appeal, the defendant in *Bolton* claimed that the trial court should have suspended the trial and ordered a competency evaluation. 859 P.2d at 307. He maintained that the trial court should have done so when, during trial, the defendant asked to proceed pro se, and during that request the defendant asserted that he had taken some antibiotics that impaired his ability to think clearly. 859 P.2d at 307. In *Bolton*, the defendant personally addressed the trial court at that time and on at least two prior occasions when he asked to represent himself during hearings on January and April 1991 and engaged in direct, verbal exchanges with the court. *Id.* at 306. Moreover, prior to trial, the defendant raised the issue of competency, was examined by a court-appointed psychiatrist, and defense counsel had expressly conceded that the defendant was competent to proceed to trial. *Id.* at 307. And, the court noted,

those procedures were not challenged on appeal. *Id.*. The Court of Appeals found that the trial court had not ruled that the defendant was "incompetent to waive counsel" and that "in light of the trial court's prior finding of competence, the defendant's statement concerning the effects of the 'antibiotics,' standing alone, was not sufficient to raise a 'bona fide doubt' as to his competence to stand trial." *Id. citing People v. Matthews*, 662 P.2d 1108 (Colo. App. 1983) Thus, factually and procedurally the *Bolton* case is readily distinguishable from Ms. Bloom's case.

The State writes that a defendant's history of mental illness is not enough to raise a doubt as to her competency and cites several federal and out-of-state cases in support of this assertion.(Answer Brief p48-49) These cases are largely irrelevant to the issue presented to this Court because, although Ms. Bloom had a history of mental illness, she did not rely on that alone in her request for a competency evaluation. In *United States v. Teague*, 956 F.2d 1427 (7th Cir.1992), the defendant complained on appeal that the trial court should have *sua sponte* ordered a competency evaluation when it learned that he had previously suffered from several mental illnesses. However, when those illnesses were disclosed to the court by defense counsel, he was asked if he was raising the issue of competency and counsel replied: "I don't believe it rises to the level of competency proceedings." *Id.* at 1430. Similarly, in *United States v. Collins*, 949 F.2d 921 (C.A.7 (Ill.) 1991), the issue on appeal was again whether the trial

court should have *sua sponte* ordered a competency hearing. There, the defendant was questioned prior to the acceptance of his guilty plea about previous competency evaluations in which he had been found competent, and, in response to questioning by the court, defense counsel responded that he thought the defendant was competent and offered the basis of his opinion. *Id.* at 923. The case of *United States. v. Burns*, 811 F.Supp. 408 (E.D.Wis.1993), involved a request for a competency evaluation brought in 1992 primarily supported by a reported mental breakdown suffered by the defendant in 1978. In *Bryant v. State*, 563 S.W.2d 37, 38 (Mo.1978), the appellate court determined that the trial court is not required to, "sua sponte, hold an evidentiary hearing on a defendant's mental competence to proceed to trial whenever a psychiatric report indicates the defendant is suffering from a mental disease or defect" and "the report also states that the defendant understands the nature of the charges against him and he is able to cooperate with counsel in his own defense."

Based on the foregoing caselaw, the State contends that Judge Kennedy "was not required to observe the procedures in §16-8-111" because Ms. Bloom's "threshold showing of incompetence" was "so weak."(Answer Brief p49) This suggestion is not supported by the law or the record on appeal.

Despite the fact that a competency evaluation was twice ordered by the district court, once by Judge Kennedy and again by Judge Kane, the State urges this Court to

find that one was never required nor necessary to assess Ms. Bloom's competency.(Answer Brief p50) As the court observed in *Cappelli v. Demlow*, 935 P.2d 57, 62 (Colo.App.1996), "the purpose of commitment for a competency evaluation is to furnish both the state and the defendant with an opportunity to assess the defendant's mental status, to determine if treatment is appropriate, and to ensure the protection of members of society." The evaluation is a part of the due process safeguards that the competency statutes are designed to ensure. *Id.* at 61-63.

The State suggests that defense counsel was required to represent that Ms. Bloom "suffered from a particular mental disease or defect that would render her incompetent to proceed" citing §16-8-102(3) C.R.S. (2006). (Answer Brief p51) No such requirement exists to trigger the defendant's right to a competency evaluation. *See* §16-8-110 & 111, C.R.S. (2006).

The State argues that this Court should assess, on scant to non-existent evidence, how Ms. Bloom fared at trial in determining whether she should have been afforded a pre-trial competency evaluation.(Answer Brief p51) It cites *People v. Woods*, 931 P.2d 530, 534 (Colo.App.1996) in support of its position. However, *Woods* involved a challenge on appeal to the trial court's failure to *sua sponte* order a competency examination despite a pre-trial discussion of the defendant's mental health regarding counseling and treatment that he had received six years earlier. *Id.* at

534. The court in *Woods* observed that the defendant did not suffer from any mental health problems "at the time of the pre-trial hearing." *Id.* And, in *Woods* the subsequent information available to the court was in fact a competency evaluation in which the defendant was found competent. *Id.* Moreover, it is not clear why the examinations were conducted in *Woods*, whether upon court-order or otherwise. *Id.* Here, subsequent observations by the prosecution, which apparently are the only post-trial observations made in Ms. Bloom's case, are not proper considerations for determining the legality of the pre-trial competency proceedings. Ms. Bloom did not testify at trial and, therefore, her thought processes were not observable. When she did have a verbal exchange with the court, it was to briefly respond during her Curtis advisement.(v13 p64-68) That she was writing during trial and passing notes to defense counsel is absolutely irrelevant because the content of her writings is unknown.(v14 p11-12)

The State contends that the law of the case doctrine is inapplicable and thus the trial court was not obligated to adhere to either of its two orders for a competency evaluation.(Answer Brief p53-54) Although the doctrine has been characterized as a "discretionary rule of practice" it "is usually applied unless to do so would work a manifest injustice." *Verzuh v. Rouse*, 660 P.2d 1301, 1303 (Colo.App.1982) (citations omitted) Nonetheless, the State seizes upon a portion of the language in *Buckley*

Powder Company v. State, 70 P.3d 547, 557 (Colo.App.2002), where the court observed that a trial court may change its ruling "when it is the result of a legal or factual error." The State claims that the trial court's mistaken belief that Dr. Moran would perform a competency evaluation was a "factual error."(Answer Brief p54) Surely a "factual error" as conceived by the court in *Buckley* calls for more. A "factual error" must be more akin to a mistaken conclusion regarding the factual underpinnings of a decision made by the court, a decision requiring the court to engage in some kind of actual fact-finding. In addition, any mistake on the trial court's part in assuming that Moran could perform the evaluation should be attributed to the court, not the defendant. This is especially so because defense counsel clearly informed the court on August 1, 2003, that the State hospital was performing competency evaluations at the El Paso County Jail and that Ms. Bloom was willing to have such an exam performed there, rather than at the State hospital in Pueblo.(v7 p3-4)

While observing that prior rulings are generally to be followed, the court in *People v. Warren* 55 P.3d 809, 813 (Colo.App.2002), mirrors the test articulated in *Buckley*, that the trial court may only reverse a prior ruling if it determines that "its former ruling is no longer sound because of changed conditions, it needs to correct its previous ruling because of a legal or factual error, an intervening change in the law has

occurred, or manifest injustice would result from its original ruling." *Accord, Buckley,* 70 P.3d at 557.

In addition, the main thrust of the decision in *Pearson v. District Court*, 924 P.2d 512, 515 (Colo.1996), which addressed the law of the case doctrine was that the doctrine "does not require nor encourage a trial court to render a judgment erroneous in law." There, this Court refused to apply the doctrine where the reconsidered orders were not binding and "were in error." *Id.* There is no argument to be made here that the two orders for a competency examination made by the trial court in Ms. Bloom's case were themselves erroneous.

CONCLUSION

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

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CERTIFICATE OF SERVICE

I certify that, on November 6, 2007, a copy of this Reply Brief of Petitioner was hand-delivered to the Colorado Court of Appeals for deposit in the Attorney General's mailbox to the attention of:

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