# ORIGINAL



IN THE SUPREME COURT OF FLORIDA

GEORGE TAPLIS,
Petitioner/Appellant,

vs.

STATE OF FLORIDA,
Respondent.
_____/

S.Ct. Case No. 89,721

5th DCA Case No. 96-2467

**ON DISCRETIONARY REVIEW FROM THE FIFTH DISTRICT COURT OF APPEAL**

PETITIONER'S INITIAL BRIEF ON THE MERITS

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TABLE OF CONTENTS



## Points on Appeal

THE DECISION OF THE DISTRICT COURT QUASHING THE TRIAL COURT'S ORDER GRANTING TAPLIS'S MOTION IN LIMINE EXCLUDING CERTAIN PHYSICAL EVIDENCE SHOULD BE REVERSED BECAUSE:

## TABLE OF CITATIONS

CASES



STATUTES AND OTHER AUTHORITIES

## PREFACE

The instant petitioner/appellant, GEORGE TAPLIS, was the defendant before the circuit court and the respondent in the Fifth District Court of Appeal case *sub judice*. He is referred to herein as either "Taplis" or "the defendant."

The record document cited most extensively herein is the transcript of the August 7, 1996, limine hearing before the circuit court on the defendant's second motion in limine, at which hearing the court heard the testimony of seven witnesses for the state. References to the transcript of the proceedings of that hearing are herein designated by the abbreviation (T ), followed by the page number or numbers of the transcript. References to other record documents will provide the date and name or description of the document, followed, if the document consists of more than one page, by the relevant page number or numbers.

## POINTS ON APPEAL

THE DECISION OF THE DISTRICT COURT QUASHING THE TRIAL COURT'S ORDER GRANTING TAPLIS'S MOTION IN LIMINE EXCLUDING CERTAIN PHYSICAL EVIDENCE SHOULD BE REVERSED BECAUSE:

I. THE RECORD SUPPORTS A FINDING THAT THERE WAS A PROBABILITY TAMPERING OCCURRED.

II. THE STATE WAS UNABLE TO ESTABLISH ANY MEANINGFUL CHAIN OF CUSTODY FOR THE CAR OR ITS CONTENTS.

III. THE STATE FAILED TO SHOW THAT THE EVIDENCE IT SOUGHT TO INTRODUCE WAS IN SUBSTANTIALLY THE SAME CONDITION THAT IT WAS IN AT THE TIME OF THE FIRE --OR THAT IT EVEN EXISTED THEN.

IV. THE PHYSICAL EVIDENCE THAT THE STATE SEEKS TO ADMIT IS NOT EVEN "RELEVANT EVIDENCE," AS IT CANNOT BE TIED TO THE DEFENDANT OR THE FIRE.

V. THE HOLDING OF THE FIFTH DISTRICT COURT IMPROPERLY RESTRICTS THE DISCRETION OF TRIAL COURTS TO EXCLUDE PREJUDICIAL EVIDENCE LACKING IN INTEGRITY OR PROBATIVE VALUE.

## STATEMENT OF THE CASE AND FACTS

### The Facts

Around mid-morning of August 1, 1995, George Taplis was driving his wife's car along a rural Putnam County road when somehow the car caught fire. Firefighters who arrived to assist Mr. Taplis attempted to extinguish the fire by spraying high-pressure streams of water onto the engine and into the interior of the vehicle, whose windshield and windows were already melted out. (T 21-25, 27-28.) The high-pressure fire hose "knocked around" a quantity of loose debris, according to firefighter Doug McClure, and may also have moved some gasoline from the engine compartment into the vehicle's interior during the fire. (T 25, 28.) Despite the firefighters' efforts, the car was ultimately "consumed by fire." (T 11.) After the fire was out, McClure peered into the car's passenger compartment; he did not notice the presence of any gasoline there. (T 28-30.) The firefighters did not remove, cover, or secure the burned-out vehicle in any way before leaving it in the custody of the law enforcement officer who responded to the fire. (T 30-32.)

By the time that officer, Deputy Sheriff Chris Murphy, arrived on the scene, the fire was already out. (T 11-12.) Deputy Murphy inspected the interior of the vehicle; he did not notice any gasoline present there. (T 17-18.) In fact, Deputy Murphy's investigation gave him no reason to believe the fire was anything other than accidental in origin. (T 19.) He therefore did nothing whatever to secure the vehicle, which was simply left

in the roadway, uncovered and open to the elements and to any curious passersby. (T 19-21.)

There the vehicle remained until August 4, 1995, when Deputy Sheriff Cecil Manning happened to come upon it while on routine patrol. (T 35, 40.) He "glanced at" the car (T 37), noticing that the engine compartment was burned (T 40), but he did not make a close inspection of the car's interior and did not notice whether any gasoline was present inside the car. (T 40-41, 44.) The burned-out car, which Deputy Manning noted had been left "wide open" (T 43), was still sitting in and partially obstructing the roadway, so he summoned a private tow company, Palatka Auto Body, to come and remove it. (T 37, 41.) Deputy Manning did not consider the car to be evidence of any crime, and he neither secured it nor instructed the Palatka Auto Body tow operator to secure it or to treat it with any care. (T 41-42.)

Richard Carroll is the tow truck operator who came to remove the car from the road on August 4, 1995. (T 45.) At that time, the burnt car's fuel tank still had gasoline it (T 47-48, 51-52), although the filler tube had evidently become separated from the tank when the plastic component that connected them was destroyed in the fire. (T 81, 97.) Because its tires had been destroyed by the fire, the car had to be dragged (winched) up onto the bed of the rollback wrecker truck. (T 42-43.) Before leaving, Carroll cleaned up the fire site, including the area where the car had been, by shoveling up all the loose debris and throwing

it into the car's passenger compartment.[1] (T 46-47, 52-53.)

Carroll then took the burned-out car to Palatka and unloaded it into Palatka Auto Body's storage yard, an uncovered fenced area whose gates are left open in the daytime, although they are closed and locked at night. (T 55-56.) Carroll is not the owner or manager, however, nor is he the person who keeps the keys and locks up at night. (T 56.) According to Carroll, the storage yard is about one acre and holds about 100 wrecked cars (T 57), and no effort is made to drain gasoline from the tanks of those wrecked vehicles before they are hauled and deposited into the storage yard. (T 59.) Besides several unidentified Palatka Auto Body employees who work on the site, a number of unidentified wrecker drivers from various other unnamed companies have access and keys to the storage yard and are "in and out all day, and night, too," bringing in and taking out cars. (T 54-56.) During the several weeks it remained at Palatka Auto Body, the Taplis car was not kept segregated from other vehicles, it was not covered, and access to it was not restricted. (T 58.)

Next the insurance company enters the picture. According to Patrick Monegan, on or after August 25, 1995, Monegan's employer, either AIG Claim Services, Inc., or its subsidiary, American International Insurance Company, paid Mrs. Taplis's claim for her

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[1]That a substantial quantity of debris was added to the vehicle's interior after the fire was verified by firefighter Doug McClure, who testified that the interior of the car, as depicted in a more recent photograph, was different from what its appearance had been when he saw it on August 1, 1995, in that the photograph showed "stuff piled up into the car." (T 24-25.)

car (T 61), assumed ownership of the car (T 62), and arranged for it to be loaded up and trucked from Palatka to Orlando, where it was unloaded at a business known as The Greater Orlando Auto Auction. (T 60.) Monegan was not present when the vehicle was loaded, transported to Orlando, and unloaded; he did not know who had performed those tasks, how or under what conditions they were carried out, or what sort of treatment the vehicle was subjected to during the relocation process.[2] (T 64-65,69.) Monegan did not know whether any gasoline was present inside the car's interior at any time before it was moved to Orlando. (T 65-67.) Indeed, he did not personally see the car until some eleven months later, in July of 1996, when he visited The Greater Orlando Auto Auction's storage lot. (T 65-66.)

Monegan did, nevertheless, testify as to the conditions in The Greater Orlando Auto Auction's storage lot. Although the lot has "24 hour security" (T 62), an unknown number of unidentified Greater Orlando Auto Auction employees have unrestricted access to the storage lot, and an unknown number of unidentified non-employees also have access by simply "signing in." (T 71.) Monegan had no idea how many other wrecked and burned-out vehicles had been moved in and out or what other sorts of activities had transpired in the immediate vicinity of the Taplis vehicle after it was relocated to the Orlando lot. (T 70, 72.) However, it was not segregated from other burned vehicles but was

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[2]No evidence was presented as to those facts, and no one from The Greater Orlando Auto Auction testified.

left uncovered and exposed, with no instructions to protect or restrict access to it. (T 69-71, 106-107.)

In early September of 1995, Monegan's employer retained James M. Wark and Associates, a private investigation agency that works for insurance companies. (T 72, 76-77.) On September 6, 1995, some five weeks after the fire and nearly two weeks after the vehicle had been transported to The Greater Orlando Auto Auction storage lot, Matthew J. Wark (James M. Wark's son) went to the storage lot to examine the car, which he had never seen before. (T 78, 96.) Matthew Wark's examination of the interior of the car turned up no containers that might have been used to carry or pour gasoline in the car's interior. (T 95.)

From the floorboard of the car's interior, Matthew Wark obtained two samples, each consisting of a mixture of carpet, carpet padding from underneath the carpet, and debris from on top of the carpet. (T 88, 91, 101, 104.) One of these samples was later found to contain a small amount of partially evaporated gasoline. (T 92, 130-131.) Matthew Wark testified that the carpet itself had melted during the fire and hardened into a "shell" when the fire was extinguished. (T 87, 89.) James Wark also elaborated on how melted carpet could "seal" in and preserve any gasoline that might already be in the padding beneath it when the carpet solidified. (T 116-117.)

However, Matthew Wark could not recall if this particular sample's carpet "shell" or "seal" was actually intact or whether it was broken or cracked. (T 90, 102.) At the time he obtained

the sample, the interior of the windowless car contained a quantity of loose debris as well as puddles of accumulated rainwater. (T 81, 84-86, 104.) Matthew Wark could not rule out the possibility that the loose debris that was in the car's interior was contaminated with gasoline and that the gasoline found in his sample had in fact come from that debris, most but not all of which he had removed from atop the carpet before obtaining the sample. (T 101-104.) The loose debris Wark did remove was never separately sampled and tested for gasoline content (T 102-103) but was simply removed from the vehicle and dumped on the ground. (T 86.)

Matthew Wark sent his two samples to a private chemist, Wolfgang Bertsch, who performed analyses that detected a small amount of gasoline in one of them. (T 126-127, 129.) The results of Bertsch's analyses were consistent with the presence of as little a quantity of gasoline as might be measured in microliters--"about ten pinheads size of volume." (T 134.) The gasoline that Bertsch detected was not fresh or well preserved, nor was it the residue of gasoline that had been burned, but rather it was gasoline that had "undergone some weathering or some part of evaporation," as though it had been left exposed to the open air--the "weather[]"--for a time. (T 130-131.) But Bertsch was unable to determine when or how the gasoline had been introduced to the sample. (T 131, 136.)

James M. Wark did not participate in his son's September 6, 1995, examination and sampling of the Taplis vehicle and did not

personally inspect it until July 22, 1996, nearly a year after the fire. (T 122.) The only new item of interest he discovered was a section of broken and partially burned fan belt, which he found wrapped around the alternator pulley (or some other pulley located in the engine compartment), a fact that Wark admitted would be consistent with the belt having broken while the car was running. (T 117-118, 123, 142.) In a footnote found on the first page of its September 4, 1996, Petition for Writ of Certiorari in the Fifth District Court of Appeal, the state announced that it was withdrawing its intention to introduce the broken fan belt into evidence.

**The Case**

On December 1, 1995, the state filed a single-count information charging George William Taplis with burning to defraud an insurer, a felony in violation of Section 817.233 of the Florida Statutes. The state's theory was that Mr. Taplis had poured gasoline inside the car's passenger compartment and set it on fire.

On April 22, 1996, Taplis filed a Second Motion In Limine (his two other limine motions addressed matters of no direct relevance to this appeal). Referring to Sections 90.105 and 90.403 of the Florida Statutes, the limine motion asked the trial court to bar the admission of evidence related to the gasoline-tainted sample that Matthew Wark had obtained from the vehicle five weeks after the fire. (Page 1.) The motion alleged that the state was unable to establish a chain of custody; that during

the five weeks that elapsed between the fire and the sampling, the car and the evidence sample had "remained exposed to contamination, spoilation, disturbance, displacement, and tampering"; that the evidence Wark obtained may well have been the product of those things; and that the "probative value of such questionable evidence would be substantially outweighed by the danger of unfair prejudice and confusion of the issues." (Page 2.) The motion also alleged that the state had violated the defendant's due process rights by failing to preserve potentially exculpatory evidence. (Pages 2-3.)

On May 29, 1996, the trial court heard argument (but no testimony) on the limine motion. On June 5, 1996, the court issued an order deferring ruling on the limine motion until such time as the state could have the opportunity to present testimony to lay a predicate to support admission of the evidence.

That testimony, and additional argument, was heard on August 7, 1996. On August 8, 1996, trial court issued an Order Granting Motion In Limine and, after hearing more argument, another order denying a state motion for rehearing. The Order Granting Motion In Limine set forth a number of findings of fact abstracted from the hearing testimony, based on which the trial court "conclude[d] that there was an insufficient (if any) chain of custody to preserve the condition and integrity of the [carpet] swatch and [fan] belt for evidentiary purposes. The risk of contamination/tampering (intentional or unintentional) renders the admission an intolerable risk of prejudice." (Page 2.)

In a separate August 8, 1996, order, the trial court granted the state's motion for a continuance to give the state the opportunity to appeal the trial court's decision.

The state's Petition for Writ of Certiorari was filed with the Fifth District Court of Appeal on September 5, 1996. Taplis filed a response to the petition.

On November 15, 1996, the Fifth District filed its opinion, granting certiorari and quashing the trial court's granting of the motion in limine. The opinion was subsequently reported as *State v. Taplis*, 684 So. 2d 214 (Fla. 5th DCA 1996). The district court opined that the trial court had mistakenly concluded, based on *Dodd v. State*, 537 So. 2d 626 (Fla. 3d DCA 1988), that a reasonable possibility of tampering would suffice to allow the trial court to exclude the evidence. *Taplis* at 215-216. Rather, held the *Taplis* court, the trial court had discretion to exclude such evidence only if a "likelihood" or "probability" of tampering were shown. *Id.* at 215. The district court reviewed the facts and concluded that "there is no indication in the record that tampering 'probably' happened" and that "no material changes occurred to the vehicle prior to obtaining the samples." *Id.* at 216. Furthermore, the district court found it inexplicable how any gasoline introduced after the fire started could have "got[ten] under the sealed carpet." *Id.*

On November 21, 1996, Taplis filed his Respondent's Motion for Rehearing. The motion pointed out two specific material facts of record that had been adduced in Taplis's response to the

state's petition but that the district court had omitted to mention in its opinion and had, apparently, overlooked: First, it was undisputed that the tow truck operator had altered the condition of the car's interior, and likely of the sample later obtained from it, by gathering up a considerable amount of debris from the fire site and throwing it into the car's passenger compartment. (Page 1.) Second, even if the carpet "seal" were intact, the sample in which the gasoline was found included not only padding from under the carpet but also debris from *on top of* that "sealed" carpet. (Page 2.)

On December 12, 1996, the district court issued an order denying Taplis's motion for rehearing without comment.

Notice to invoke the discretionary jurisdiction of this Court was filed on January 10, 1997; Taplis petitioned this Court for discretionary review, under Article V, § 3(b)(3), of the Florida Constitution and Rule 9.030(a)(2)(A)(iv) of the Florida Rules of Appellate Procedure, based on conflict of the Fifth District opinion with the opinions of other Florida district courts and of this Court. The order of this Court accepting jurisdiction and dispensing with oral argument was issued on May 14, 1997.

Taplis's case has not yet proceeded to trial but is still pending before the circuit court, awaiting the decision of this Court.

## SUMMARY OF ARGUMENT

The record before the trial court amply supported a finding that there was a probability that tampering occurred, tampering that altered the condition of or even created the evidence that the state seeks to introduce against Mr. Taplis. For example, it is not merely probable but certain that a tow truck operator altered the condition of the car's interior by throwing debris from the fire scene into the passenger compartment, from whence the gasoline-tainted sample was later obtained.

In addition, during the five weeks that elapsed between the time the fire occurred in Putnam County and the time the evidence was found in the car in Orlando, the windowless vehicle was left open both to the elements and to intermeddlers; it was left in a public roadway for several days, was at least twice dragged, loaded, hauled, and unloaded, and was placed in two different busy storage lots where it was not segregated from other wrecked vehicles or from activities involving them. Indeed, the number and identities of most of the people who had access to the car throughout that time are unknown and unknowable. The state was thus unable to establish any meaningful chain of custody.

The state was likewise unable to produce a single witness to show that the gasoline-tainted sample taken from the floor of the car on September 6, 1995, was in that same condition on August 1, when the fire occurred. Not one of the three state witnesses who saw the car in August, before it was moved from the fire scene, could testify to the existence at that time of any gasoline on the car's floorboard or elsewhere in its passenger compartment.

The state's theory that the gasoline found in the sample must have been sealed down into the carpet padding by melted carpet at the time of the fire ignores the fact that the sample mixture also included debris from on top of the carpet.

The state failed even to make a prima facie showing of the relevance of this gasoline evidence to the guilt or innocence of the defendant. None of the state's witnesses could connect the presence of the trace of gasoline found in the car in Orlando on September 6th with the activities of the defendant at the time the fire occurred in Putnam County five weeks earlier on August 1st, or at any other time. Nobody claimed to have seen or even heard of Mr. Taplis placing any gasoline into the car's interior. No containers were found, nor did the state offer any other evidence, explanation, or theory for how Mr. Taplis might have introduced that gasoline into the vehicle. The state established no predicate to link the gasoline to the defendant in any way.

By quashing the trial court's ruling that the gasoline evidence should not be admitted, the Fifth District effectively imposed a significant restriction on the discretion of trial courts to rule on the admissibility of questionable evidence. Under the Fifth District's holding on the facts of the instant case, it would be difficult to imagine any evidence so lacking in its chain of custody, so wanting in the integrity of its physical preservation, or so tenuous and remote in its connection to a defendant that a trial court could ever rule it inadmissible. The result is a restriction of discretion more severe than is consistent with the rules of evidence or with case law precedent.

## ARGUMENT

This case presents several issues, all of which can be summed up in one question: Just how bad does evidence have to be -- how lacking in integrity, probative value, or connection to the defendant--before a trial court is allowed to find it inadmissible?

### I.

### THE RECORD SUPPORTS A FINDING THAT THERE WAS A PROBABILITY TAMPERING OCCURRED.

"Relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence." Section 90.403, Florida Statutes (1995). "A trial court's action taken under this rule will not, however, be overturned absent an abuse of discretion." *State v. Aylesworth*, 666 So. 2d 181, 182 (Fla. 2d DCA 1995).

*Gallego v. United States*, 276 F. 2d 914 (9th Cir. 1960) is often cited for its articulation of the rule of law governing the admission, in criminal cases, of physical evidence whose integrity or probative value is in question:

> Before a physical object connected with the commission of a crime may properly be admitted in evidence there must be a showing that such object is in substantially the same condition as when the crime was committed. This determination is to be made by the trial judge. Factors to be considered ... include the nature of the article, the circumstances surrounding the preservation and custody of it, and the likelihood of intermeddlers tampering with it. If upon consideration of such factors the trial judge is satisfied that in reasonable probability the article has not been changed in important respects, he may permit its introduction in evidence.

*Id.* at 917. (Citations omitted.)

In Florida, the rule governing the admissibility of physical evidence whose integrity, and hence its legitimate probative value, is questioned was articulated by this Court in *Peek v. State*, 395 So. 2d 492, 495 (Fla. 1980): "Relevant physical evidence is admissible unless there is an indication of probable tampering." *Peek* held that the trial court had not abused its discretion by permitting the introduction of evidence based on hair samples taken directly from the defendant, and demonstrably received at the lab in the same condition as when taken from him, because "[t]he record here reflects no hint of tampering." *Id.*

In *Dodd v. State*, 537 So. 2d 626 (Fla. 3d DCA 1988), the district court held that the trial court *had* committed error by admitting the disputed evidence, which was not in the same condition when received by the crime lab as it was when it was seized from the defendant and for which a sufficient chain of custody was not established. Applying the *Peek* rule, the *Dodd* court wrote that "a mere reasonable possibility of tampering is sufficient to require proof of the chain of custody" before admitting the evidence. *Dodd* at 628.

The trial court in the instant case, although employing in its August 8, 1996, Order Granting Motion In Limine such terms as "risk" and "intolerable risk" (page 2) rather than "probability" or "possibility," found what amounts to a probability of tampering, and rightly so. The factual record on which the trial court relied in the instant case showed that there had been more than a "hint," *Peek* at 495, more than an "indication," *id.*, and

more than either a "possibility," *Dodd* at 628, or "probability" of tampering. In fact, the record shows that the vehicle was most certainly tampered with (*i.e.*, subjected to material alteration or conditions likely to result in such) on several specific occasions, and was otherwise so extensively exposed to conditions inviting additional tampering and contamination that it would be surprising if none occurred.[3]

The condition of the vehicle was effectively tampered with on August 1, 1995, when, after the vehicle's windshield and other glass had melted away, streams of high-pressure water were directed onto and into it. (T 25.) This action, notwithstanding its proper purpose, inevitably resulted in alteration of the vehicle's interior and is also reasonably likely to have moved some small amount of gasoline or gasoline-laden debris from the car's engine compartment, which was opened, into the passenger compartment through the windshield opening. (T 24-25, 27-28.)

The condition of the vehicle was effectively tampered with on August 4, 1995, when it was removed from the site of the fire. In the process it had to be winched and dragged up onto a flatbed

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[3]This actual and probable tampering occurred between the point in time that the fire began on August 1, 1995, and the time that the carpet and debris sample containing a trace of gasoline was obtained from the car's interior floorboard on September 6, 1995. Those two times are important because the state seeks to introduce the gasoline trace as evidence that the defendant had placed that gasoline there in order to start the fire. Therefore, the gasoline-bearing sample obtained from the car's interior floorboard on September 6 could be relevant only if that same gasoline were shown or assumed to have been present inside the car's passenger compartment at the time the fire began.

tow vehicle (with the reverse process occurring when the vehicle was unloaded at the Palatka Auto Body lot). (T 42-43.) At that time the car still had gasoline in its tank. (T 47-48, 51-52.) After loading the car, the tow operator picked up all the loose debris from the fire site and threw it into the car's interior. (T 46-47.) Likely some of this debris was contaminated with gasoline that had escaped from the car's gas tank or fuel system during the fire or the loading process. (T 110-111.)

The vehicle was effectively tampered with on or about August 25, 1995, when some unknown person or persons, presumably hired by the insurance company, again loaded up the burned vehicle and trucked it from Palatka to Orlando, unloading it at another storage yard there. (T 64-65.) Presumably the windowless car once again traveled on an open flatbed truck or trailer moving at highway speeds, the car's interior fully exposed.

Indeed, the condition of the car's interior was effectively tampered with by its being left fully exposed to the elements throughout the entire period from August 1 to September 6, 1995. Heavy rainfall occurs frequently in Florida during the summer months, and the insurance company investigator who examined the car observed water on the floorboards. (T 104-107.) Such accumulated water would have splashed and swirled around the vehicle's interior each time the car was loaded, transported, or unloaded, carrying with it any gasoline or loose gasoline-contaminated debris that was previously introduced by the activities of the firefighters, the tow operator, or others.

In addition to the above instances of known tamperings with the vehicle prior to its September 6, 1995, examination, each of which is likely or certain to have altered the condition of the vehicle's interior, the windowless car and its interior were at all times subsequent to the August 1, 1995, fire left exposed to conditions that created opportunities for and likelihood of additional tampering and contamination of the vehicle's interior prior to the evidence being obtained from the car's floorboard.

First the car sat completely exposed and unprotected on the right-of-way of a country road for several days, on a site likely contaminated by gasoline from the burning vehicle's fuel system, inviting contaminative exploration by passersby, neighborhood children, or even animals, the purposeful or inadvertent activities of any of which would be reasonably likely to have introduced into the car's interior a small amount of gasoline or gasoline-laden dirt or debris from the car's engine compartment, its fuel system, or the fire site. (T 19-21, 31, 41, 43-44.)

The car sat entirely exposed for several more weeks in a storage yard that was undoubtedly contaminated by gasoline from the countless other wrecked and burned vehicles that were then and had in the past been stored there. (T 57-58.) Other such junk vehicles, most of which would still contain some gasoline (T 59) and many of which would have fuel systems whose integrity had been compromised, were loaded and unloaded, moved in and out "all day, and night, too" (T 56), in the close vicinity of the subject vehicle. (T 58.) Such activities, of a sort not customarily

performed with an excess of gentle care, are reasonably likely to have resulted in gasoline or gasoline-laden materials from other vehicles or from the storage site itself being brought into contact with the subject vehicle and its unprotected interior. Moreover, the storage yard was throughout the daytime hours freely accessible to the general public as well as to several employees, the purposeful or inadvertent activities of any one of which would be reasonably likely to have introduced into the vehicle's interior a small amount of gasoline or gasoline-laden dirt or debris. The state produced only one of those Palatka Auto Body storage yard employees, Richard Carroll, at the hearing. Carroll testified that he was not the person who locked the storage area at night, that other people had keys to it, and that he did not know how many other employees worked there at the time. (T 54-56.)

Finally, the car was subjected to similar conditions, and a similar probability of contamination or tampering, for the additional twelve days or so that it sat in the Orlando salvage yard before the insurance company's fire investigator obtained the floorboard carpet/debris sample in which a small quantity of gasoline was later found. (T 64, 68-71.)

Taken in the aggregate, the things that are known to have been done to the vehicle and the things that are reasonably likely to have happened to it as a result of the conditions to which it was exposed for five weeks constitute ample factual basis for the court below to find a possibility, a probability,

and even a dead certainty that material tampering capable of affecting the integrity of the evidence occurred on one or more occasions during that period. The trial court therefore did not abuse its discretion by finding the state's proffered evidence inadmissible, particularly as the state was unable to show an adequate chain of custody for it.

**II.**

**THE STATE WAS UNABLE TO ESTABLISH ANY MEANINGFUL CHAIN OF CUSTODY FOR THE CAR OR ITS CONTENTS.**

While it may well be that great care was taken with the gasoline-tainted sample after it was removed from the car's interior, little or no care was taken of the car or its interior for the five weeks between the time of the fire and the time the sample was taken from it. No meaningful chain of custody exists for that period because for some of that time no one had custody of the vehicle at all; because the identities of many of the persons who did, at various points during that time, have some form of custody of it are unknown; and because the identities and even the numbers of persons who had access to the vehicle and its contents during that time are unknown and unknowable.

The firefighters left the vehicle in the custody of a law enforcement officer. (T 30-31.) The officer, Deputy Murphy, left the windowless vehicle sitting in the road, totally unsecured, where it remained several days in no one's custody. (T 19-21.)

Deputy Manning found it there and had Richard Carroll haul it away to Palatka Auto Body. (T 37, 41, 45.) There it remained

three weeks in a lot whose gates were open all day to several unidentified employees and an unknown number of customers, gates which even when locked at night are freely accessible to a number of unidentified people who have keys. (T 55-56.)

From there, some unknown person or persons transported the car by some unspecified means (presumably by open flatbed truck or trailer) to Orlando, (T 64-65, 69), ending up at The Greater Orlando Auto Auction, where it apparently remained for about twelve days before the sample was obtained from it. However, the state presented no testimony from anyone affiliated with The Greater Orlando Auto Auction, where an unknown number of unidentified employees and other persons had easy access to the car during those twelve days. (T 71.)

The trial court was, therefore, amply justified in finding that "there was an insufficient (if any) chain of custody to preserve the condition and integrity" of the evidence prior to its being removed from the car's interior. (August 8, 1996, Order Granting Motion In Limine, Page 2.) Lacking a chain of custody, and having been subjected to a variety of activities and forces that had surely altered its condition, the car and any evidence taken from it five weeks after the fire--five weeks after the car's last association with the defendant--could not properly be admitted absent a showing that the evidence was in the same condition when it was taken from the car as it was at the time of the fire or the time that the car was last in the defendant's possession and control.

## III.

**THE STATE FAILED TO SHOW THAT THE EVIDENCE IT SOUGHT TO INTRODUCE WAS IN SUBSTANTIALLY THE SAME CONDITION THAT IT WAS IN AT THE TIME OF THE FIRE -- OR THAT IT EVEN EXISTED THEN.**

At hearing, the state attempted, primarily by showing its witnesses snapshots of the vehicle, to establish that the car's physical appearance was substantially the same at various points in time as it was on the day of the fire. (T 14-16, 24-25.) In its September 4, 1996, Petition for Writ of Certiorari in the Fifth District Court of Appeal, the state went so far as to assert that "[t]here has been no testimony in the instant case ... that the condition of the car in question is any different from August 1, 1995 through September 6, 1995 (when the carpet samples were taken by Matthew Wark)." (Page 6.)

Even if that assertion were correct, and it is not, it would still be somewhat beside the point. The general condition or appearance of the car is not really the issue, because the car itself is not what the state seeks to introduce into evidence. What the state seeks to have admitted is evidence of a sample of gasoline-tainted carpet and debris. The relevant question is not one that addresses only the condition of the *car*. The relevant question is whether it was shown that the *gasoline-tainted sample* was in substantially the same condition when it was obtained on September 6, 1995, as it was at the time the fire began on August 1, 1995, or at the time shortly thereafter when the car ceased to be in the defendant's possession and control.

At hearing, the state and its witnesses were unable to show that the condition of that sample was substantially the same on September 6, 1995, as it had been at any time on August 1, 1995, or even that that gasoline-tainted evidence was anywhere in existence on August 1, 1995. (T 18-19, 29-30, 40-41, 65-67, 96.) The closest the state came to making such a showing was insurance company fire investigator Matthew Wark's testimony that at the time the fire was extinguished the top layer of carpet had melted and formed a "hard shell" that, if intact, would tend to seal in any liquids already present in the underlying carpet padding and seal out liquids from above. However, Wark admitted that this carpet "shell" may not have been intact and that the sample later found to contain a trace of gasoline included some debris found *on top of* the carpet "shell" as well as some material taken from below it. (T 89-91, 101-104.)

Thus the state did not and cannot establish the condition or even the bare existence of the gasoline-tainted sample for any time prior to September 6, 1995.

And on that point the case law favoring admission of evidence despite incomplete chains of custody is readily distinguished from the instant case. Those cases all deal with evidence regarding which there were some minor gaps or technical irregularities within a chain of custody, but in each case it was clearly shown that the evidence the state sought to introduce at trial had been in existence in substantially the same condition at the relevant time and place.

In *Peek v. State*, 395 So. 2d 492 (Fla. 1980), a police officer was able to testify that following a murder he had taken hair samples directly from the defendant. Although the hair samples became lost *after* they were tested, the trial court did not abuse its discretion by admitting the test results, as there was no difficulty in showing where, how, and with whom they had originated, and the combined testimony of the lab technician and the officer established that the hair samples were in the same condition when tested as when they were taken from the defendant. (The *Peek* court did not, however, hold that it would have been an abuse of discretion to *refuse* to admit the evidence.)

In the instant case, by contrast, the gasoline evidence was not taken from the defendant, his presence, or any object or location in his possession or control. Moreover, the gasoline evidence, which may have originated any number of ways, cannot be shown even to have been in existence, let alone in substantially the same condition, at the time of the fire or at the time of the defendant's last contact with the car. (T 136.)

Similarly, in *Armbruster v. State*, 453 So. 2d 833 (Fla. 4th DCA 1984), police officers could testify that they had obtained 265 bales of marijuana directly from the presence of the defendants when they were arrested. There was no question but that the marijuana had existed then, and the officers presumably could also testify that it appeared to be in the same condition. Thus the *Armbruster* court found that the trial judge did not err by admitting several bales of the marijuana into evidence despite

a technical gap in the chain of custody. (The *Armbruster* court did not, however, hold that it would have been an abuse of discretion for the trial judge to *refuse* to admit the evidence.)

In the instant case, however, the gasoline evidence was not obtained from Mr. Taplis and cannot even be shown to have been in existence, let alone the same condition, at the time and place of the fire or any other time when Taplis was present. (T 136.)

Other cases in which evidence was admitted follow a similar pattern, in which there were minor technical flaws in the chain of custody but no real issue as to the origin and condition of the evidence. In *Beck v. State*, 405 So. 2d 1365 (Fla. 4th DCA 1981), a bloody pair of blue jeans was admissible where their owner was able to testify that they were the same jeans and in the same condition at trial as when he removed them immediately after the incident. In *Pierre v. State*, 579 So. 2d 923 (Fla. 3d DCA 1991), *Bernard v. State*, 275 So. 2d 34 (Fla. 3d DCA 1973), and *Stunson v. State*, 228 So. 2d 294 (Fla. 3d DCA 1969), the Third District held that the respective trial courts did not err by admitting drug evidence despite technical irregularities in the chain of custody, since in all three cases there was no question but that the drugs had been purchased directly from the defendants. (The district court did not, however, hold in those cases that it would have been an abuse of discretion for the trial judge to have *refused* to admit the evidence.)

Once again, the facts of the instant case are readily and significantly distinguished from all of those cases in that in

the instant case the gasoline evidence was not taken from the defendant, cannot be shown to have originated with the defendant, and cannot be shown to have been in the same condition or even in existence at the time the alleged crime was committed. (T 136.)

Even *State v. Lewis*, 543 So. 2d 760 (Fla. 2d DCA 1989), which approved the admission of blood-stained carpet removed from a murder scene months afterward, is readily distinguished from the instant case. In *Lewis*, the bloody carpet evidence was known to exist at the crime scene at the time of or immediately after the crime. Furthermore, it remained in that same location in a locked house until taken into police custody, and every person who had access to that evidence from the time of the murder until the day of trial could be identified and produced to testify at trial. *Id.* at 767. The defendant's bloody footprint on the carpet also tied the evidence directly to him. *Id.* at 766.

In the instant case, by contrast, the gasoline found in a sample of carpet and fire debris, unlike the blood in the *Lewis* carpet, cannot be shown even to have been in existence at or near the time and place of the alleged crime. Furthermore, unlike the *Lewis* house, the car from which the evidence was obtained in the instant case was open and largely unsecured for the five weeks between the time of the alleged crime and the time the gasoline-tainted sample was taken; the identities of all persons having access to the vehicle during that time are not and cannot be known; and there is nothing--no footprint, no fingerprint, no DNA--nothing to tie that gasoline to Mr. Taplis.

## IV.

## THE PHYSICAL EVIDENCE THAT THE STATE SEEKS TO ADMIT IS NOT EVEN "RELEVANT EVIDENCE," AS IT CANNOT BE TIED TO THE DEFENDANT OR THE FIRE.

Whereas Section 90.403, Florida Statutes, provides for--indeed requires--the exclusion of "relevant evidence" whose probative value is substantially outweighed by the danger of prejudice or confusion, evidence that is not even relevant to begin with should also be excluded. Section 90.105(2) of the Florida Statutes points out that whether or not a particular item of evidence is relevant can depend on whether the existence of a logically necessary "preliminary fact" can be shown. In such cases, some "prima facie evidence ... to support a finding of preliminary fact" must at some point be adduced in order for the proffered evidence to be relevant and hence admissible. *Id.*

In the instant case, the relevance, and consequently the admissibility, of the proffered gasoline evidence logically depends on whether or not some preliminary fact can be shown that would link the evidence to Mr. Taplis or to the fire. Another reason, therefore, that the trial court did not abuse its discretion by excluding the gasoline evidence is that even though the state was afforded a lengthy hearing at which to adduce some preliminary fact that would lay a predicate for the admission of the gasoline evidence, the state failed even to make a prima facie showing that the proffered gasoline evidence had been present in the car at any relevant time or place or that it was in any way connected with Mr. Taplis.

Florida case law holds that evidence which cannot be reliably linked to the defendant or to the alleged crime is not relevant evidence and cannot be admitted to prove the defendant's guilt.

In the recent case of *Pickard v. State*, 666 So. 2d 579 (Fla. 2d DCA 1996), the trial court committed reversible error by admitting testimony regarding a blood-spattered shirt that police had obtained from the defendant's father. The appellate court reversed the defendant's conviction, holding that the shirt and the testimony concerning it were irrelevant and inadmissible because "there was no evidence presented as to who owned the shirt, whose blood was on the shirt, or when the blood got there." *Id.* at 579-580. Similarly in the instant case, while we know that it was the Mr. Taplis's wife who owned the *car*, the state has presented no evidence whatsoever as to whose *gasoline* is in the carpet/debris sample, or when or how the gasoline got there. (T 136.)

*Duncan v. State*, 583 So. 2d 439 (Fla. 4th DCA 1991) reversed another conviction as a result of the trial court's error in admitting into evidence bloodstained underwear found in the defendant's garbage can several days after the alleged crime. There was no adequate predicate for the admission of the underwear because the blood was not shown to be that of the victim or the defendant, and at trial no one identified the underwear or established how it would link the defendant to the crime. This is analogous to the instant case in that here

nothing in any way links the gasoline evidence to the defendant (or to any other identifiable source), and no showing has been made that the gasoline found inside the car in Orlando on September 6, 1995, was present there in Putnam County five weeks earlier at the time and place of the alleged crime.

Remoteness in time can be highly relevant to the issue of relevance. In *Gallagher v. L.K. Restaurant & Motels, Inc.*, 481 So. 2d 562 (Fla. 5th DCA 1986), a restaurant customer who became ill after eating a meal wanted to introduce as evidence the testimony and report of a health inspector who had inspected the restaurant twenty-nine days earlier. *Id.* at 563. The trial judge found that because of its remoteness in time the evidence lacked probative value, and so the judge refused to admit it. *Id.* The district court affirmed, holding that "[t]he general rule that remoteness in point of time goes to weight rather than admissibility" does not apply to proffered evidence

> when the time is so far removed as to deprive the circumstances of any evidentiary value. Nothing was presented by customer to suggest that conditions in the health inspector's report caused the customer's illness or even existed on the day in question.

*Id.* (Citations omitted). Even evidence obtained from the same place where the relevant event occurred was too remote in time to be admissible when an interval of twenty-nine days stood between the time the evidence was obtained and the time of the relevant event. The plaintiff failed to show any preliminary facts to establish that the evidence "even existed" at the relevant time.

In the instant case, not only was the gasoline evidence not found at the same place--or even in the same county--where the fire occurred, but it was found some thirty-six days later, a period of time greater than that which the *Gallagher* court found so remote as to deprive the evidence of any probative value. And just as the *Gallagher* plaintiff could not show that the proffered evidence was representative of conditions as they existed a month later, in the instant case the state was unable to show that the gasoline evidence was representative of the condition of the car's interior floorboard more than a month earlier. The state failed to show that its gasoline evidence "even existed" then.

See also *Huhn v. State*, 511 So. 2d 583, 588-89 (Fla. 4th DCA 1987) (holding that a gun found in the defendant's car five months after the offense was inadmissible because there was no evidence that the defendant had used the gun in the crime, and "[t]he test for admissibility is of evidence is relevance, not necessity"); and *Longshaw v. State*, 343 So. 2d 1290, 1291 (Fla. 3d DCA 1977) (police chemist's testimony regarding contents of alleged drug packets was inadmissible because "there is nothing to establish a necessary link between the chemist's testimony as to the contraband and the defendant").

Section 90.401 of the Florida Statutes defines "relevant evidence" as "evidence tending to prove or disprove a material fact." In the instant case, the state wants to introduce the gasoline-tainted sample in order to try to prove that Mr. Taplis put that very same gasoline into the passenger compartment of the

car at the time of fire occurred (or immediately beforehand). Unless that same trace of gasoline that was found inside the car in Orlando on September 6, 1995, was also present inside the car when the fire began on August 1, 1995, it is not relevant to any material fact in this case.

In the instant case, therefore, the court below was entirely correct and most certainly did not abuse its discretion in excluding the evidence obtained from the vehicle some five weeks after the fire and a hundred miles distant from Mr. Taplis. In contrast to such cases as *Lewis*, the "bloody carpet" case cited above, here there is absolutely nothing in the record to tie the evidence either to the fire scene or to the defendant.

Nothing ties the September 6 gasoline to the August 1 fire. The sample in which the gasoline was found contains both carpet padding from below the carpet and debris from above it. (T 101, 103-104). Thus, even if the state's much-relied-on carpet "seal" were intact (which is unknown--T 90, 102), there is no way to know whether the gasoline was present at the time of the fire because there is no way to know whether the gasoline came to be there before or after the "seal" formed. And according to the state's expert witness, Dr. Bertsch, the gasoline found in the car's interior on September 6 had not been burned--he admitted that it was gasoline, partially evaporated to be sure, as though it had been exposed to open air, but not a residue of combustion, not "something other than gasoline that would be left over after burning." (T 131.) Nothing indicated it had been in a fire.

Nothing ties that September 6th gasoline to the defendant, either. Nobody claims to have seen Mr. Taplis pour gasoline onto the floorboard of the car or to have heard him say he did such a thing. No one reports finding any cans, bottles, or containers by means of which Mr. Taplis might have poured gasoline into the car's interior (T 95), nor did the state's witnesses offer any other explanation of how he might have introduced gasoline into the car's interior. On the other hand, as detailed above, the record is replete with plausible examples of other ways, ways not involving Mr. Taplis, in which a small quantity of gasoline or gasoline-laden debris could have come to be on the car floorboard as the result of any one of the various persons and forces that acted upon or had opportunity to act upon the vehicle during the five weeks between the time of the fire and the time the gasoline-tainted sample was obtained.

Admitting the state's proffered gasoline evidence against Mr. Taplis would make as much sense as admitting, in a drug case, a marijuana joint found in a windowless and doorless house five weeks after the defendant had moved out of it.

In sum, one more reason the trial court did not abuse its discretion in finding that the gasoline evidence should not be admitted is that the trace of gasoline found on the floorboard of the car in Orlando on September 6th was simply not probative of the presence of gasoline on the floorboard of the car in Putnam County on August 1st, and it was not it any way linked to Mr. Taplis so as to make it relevant to his guilt or innocence.

## V.

## THE HOLDING OF THE FIFTH DISTRICT COURT IMPROPERLY RESTRICTS THE DISCRETION OF TRIAL COURTS TO EXCLUDE PREJUDICIAL EVIDENCE LACKING IN INTEGRITY OR PROBATIVE VALUE.

The right of persons accused of crimes to due process in the adjudication of their guilt or innocence is guaranteed by the Fifth Amendment to the Constitution of the United States and by Section 9, Article I of the Florida Constitution. Due process is not afforded when irrelevant or unfairly prejudicial evidence is admitted against a defendant, and it is the responsibility of the trial judge to exclude such evidence in keeping with rules of evidence such as those codified in Sections 90.105(2), 90.401, and 90.403 of the Florida Statutes.

By quashing the trial court's ruling that the gasoline evidence should not be admitted in the instant case, the Fifth District has effectively imposed a significant and excessive restriction on the discretion of trial courts to rule on the admissibility of questionable evidence. Indeed, under the Fifth District's holding on the facts of the instant case, it would be difficult to imagine any evidence so lacking in its chain of custody, so wanting in integrity of its physical preservation, or so tenuous and remote in its connection to a defendant that a trial court could ever rule it inadmissible. The result is a restriction of discretion more severe than is consistent with the Constitutions of the United States and Florida, with the rules of evidence, and with the body of Florida case law precedent.

Such case law falls into three categories. It appears that the majority of relevant Florida appellate cases, such as *Peek v. State*, 395 So. 2d 492 (Fla. 1980), and most of the other cases cited above, have affirmed trial courts' exercise of discretion in determining the admissibility of questionable evidence.[4]

In other cases the reviewing courts have, in order to safeguard the rights of persons accused of crimes, placed limits on the trial courts' discretion to admit evidence lacking in integrity or probative value. *Dodd v. State*, 537 So. 2d 626 (Fla. 3d DCA 1988), discussed above, is one such case, and articulates a reasonable application of the *Peek* rule to cases in which, unlike *Peek*, the proffered evidence really is so bad that a trial court would abuse its discretion by admitting it against a defendant.

*Dodd* reversed a trial court's admission of evidence that was not in the same condition when tested as it was when it was taken from the defendant and for which the state failed to show sufficient chain of custody. The *Dodd* court wrote that "a mere reasonable possibility of tampering is sufficient to require proof of the chain of custody" before admitting the evidence. *Dodd* at 628. That language does not necessarily mean that "a mere reasonable possibility of tampering" would by itself bar admission of the evidence. What *Dodd* seems to be saying is that

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[4]This does not even take into account any relevant cases in which the trial courts' discretion to admit or exclude evidence may have been affirmed per curiam without written opinion.

once the defendant has shown such a reasonable possibility of tampering, the state then has the burden of demonstrating the existence of a chain of custody sufficient to provide reasonable assurance of the integrity of the evidence. If the state is unable to do so, then the evidence must not be admitted.

A third, and fairly small, category of cases are those in which the appellate courts have limited the discretion of trial courts to *exclude* evidence that is not really all that suspect. *Beck v. State*, 405 So. 2d 1365 (Fla. 4th DCA 1981) is an example.

In *Beck*, the Fourth District held that the trial court had abused its discretion and committed error in excluding evidence (blood-stained blue jeans), because "the record *completely* fails to support *any* likelihood of tampering with the evidence." *Id.* at 1367. (Emphasis added.) That holding, too, articulates a reasonable limit on a trial court's discretion, because it suggests that had the record provided any credible support for even some likelihood of tampering, the decision of the trial court to exclude the questionable evidence would have fallen within the trial court's proper range of discretion, particularly if the state failed to adduce a sufficient chain of custody: "[C]ustody is one factor the trial court must consider in satisfying itself that the physical evidence has not been changed in important aspects." *Id.* *Dodd* and *Beck* thus seem to be in agreement, applying the same reasonable standard to substantially different facts.

In the instant case, by contrast, the Fifth District Court's holding has severely restricted the discretion of a trial judge to exclude evidence, evidence that in this case clearly has been subjected to some form of tampering and for which the state was unable to show any semblance of a complete chain of custody or even any connection to the defendant. The Fifth District *Taplis* court held that the trial judge had abused his discretion by excluding evidence where the trial judge, after hearing lengthy testimony demonstrating the absence of any meaningful chain of custody as well as the presence of sundry agents, forces, and conditions to which the evidence had been exposed or subjected over a period of several weeks, found that the state's chain of custody was virtually nonexistent and that "[t]he risk of contamination/tampering (intentional or unintentional) renders the admission an intolerable risk of prejudice." (August 8, 1996, Order Granting Motion In Limine, page 2.)

A finding of such a risk, likelihood, possibility, or probability of tampering as is demonstrated by the facts of the instant case, held the Fifth District, is insufficient. "[T]he evidence in this case does not meet that test." *Taplis*, 684 So. 2d at 215. Not only are the facts of this case insufficient to *require* the trial court to exclude the evidence in the absence of an adequate chain of custody; according to the Fifth District opinion the facts are insufficient even to *allow* the trial court to exclude the evidence.

Of course, the Fifth District's *Taplis* opinion does make reference to *Peek*[5] and its "probability of tampering" standard, which the district court reasoned to be a standard equivalent to "likelihood" but stricter than "possibility." *Taplis* at 215-216. Under the facts of the instant case, however, what the Fifth District opinion evidently means by "likelihood" or "probability" requires a quantum of proof that moves the Fifth District's definition of those terms significantly closer to "certainty" than what was intended, stated, and given application in *Peek*, *Beck*, *Dodd*, or any other Florida appellate decisions. Indeed, given the type of evidence and the facts in the instant case, it is difficult to imagine any circumstances, short of absolute proof of intentional tampering, that would ever meet the Fifth District's *Taplis* standard to permit a trial court to exercise its discretion to exclude poorly preserved evidence lacking a chain of custody and a demonstrable connection to the defendant.

The result of the Fifth District's decision has been to create "an intolerable risk of prejudice" not only for George Taplis but also for all similarly situated defendants, present and future. The result has also been to place an inappropriately restrictive limitation on the ability of trial judges to apply and administer the rules of evidence in their courtrooms.

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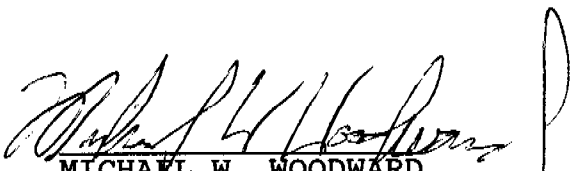
[5]395 So. 2d 492 (Fla. 1980). However, *Peek* affirmed a trial court's discretion to admit evidence; it did not, on its facts, purport to restrict trial courts' discretion to exclude evidence. *Peek* held that the trial court *need not* exclude evidence where there was "no hint of tampering." *Id.* at 495.

## CONCLUSION

For the reasons set forth above, the Petitioner/Appellant, George Taplis, respectfully requests that this Honorable Court quash the opinion of the district court, reinstate the order of the trial court granting his second motion in limine, and remand this case to the trial court for further proceedings.

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to the Honorable Robert A. Butterworth, Attorney General, The Capitol, Tallahassee, Florida 32399-1050; to Ann M. Childs, Assistant Attorney General, 444 Seabreeze Blvd., 5th Floor, Daytona Beach, Florida 32118; and to Garry L. Wood, Assistant State Attorney, Post Office Box 1346, Palatka, Florida 32178 by U.S. mail on this 9th day of June, 1997.



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