IN THE SUPREME COURT OF FLORIDA

GEORGE TAPLIS,
Petitioner/Appellant,

vs.

STATE OF FLORIDA,
Respondent.

S.Ct. Case No.: 89721

5th DCA Case No.: 96-02467

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

PETITIONER'S BRIEF ON JURISDICTION

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ARGUMENT

THE DISTRICT COURT OF APPEAL'S DECISION IN THE CASE SUB JUDICE IS IN EXPRESS AND DIRECT CONFLICT WITH THE HOLDING OF THIS COURT IN PEEK V. STATE, 395 SO.2D 492 (FLA. 1980); WITH THE HOLDING OF THE THIRD DISTRICT COURT OF APPEAL IN DODD V. STATE, 537 SO.2D 626 (FLA. 3D DCA 1988); AND WITH THE HOLDING OF THE FOURTH DISTRICT COURT OF APPEAL IN BECK V. STATE, 405 SO.2D 1365 (FLA. 4TH DCA 1981).

TABLE OF CITATIONS

CASES CITED

STATEMENT OF THE CASE AND FACTS

The instant petitioner/appellant, George Taplis, was a defendant before the circuit court and was the respondent in the Fifth District Court of Appeal case ***sub judice***. Those facts relevant to this Court's jurisdiction that were set forth in the district court opinion below are as follows':

> George Taplis had been driving his wife's vehicle when it was reported that the vehicle was on fire. When the Putnam County officials responded to the scene, the vehicle was almost completely destroyed by fire. A member of the Fire Service pried open the trunk to extinguish the fire. When the owner had failed to have the car removed from the street within three days, the County had the vehicle towed to the Palatka Auto Body lot. After paying the insurance claim and after obtaining the consent of the owner (Taplis' wife), the insurance company had the vehicle towed to a secure lot in Orlando. Fire investigators from Tampa were then employed to examine the vehicle in order to determine the cause of the fire. Photographs were taken and samples of fire debris were taken from inside the passenger compartment. These samples were sent to a private lab for analysis. As a result of these tests, Taplis was charged with burning to defraud an insurer,
>
> Taplis moved to prevent the introduction of the evidence taken from the examination of the vehicle on the basis that the vehicle had not been properly preserved and therefore the results of the examination "may well be" the product of contamination or tampering, further, that by failing to properly preserve the vehicle, exculpatory evidence important to the defense may have been lost. The trial court, after taking testimony, granted the motion, stating:
>
> > Based on these findings, this Court concludes that there was an insufficient (if any) chain of custody to preserve the condition and integrity of the swatch and belt for evidentiary purposes. The risk of contamination/tampering (intentional or unintentional) renders the admission an intolerable risk of prejudice.

'That the opinion of the District Court conspicuously omitted other important relevant facts was argued in the Petitioner/Appellant's rehearing motion. (Appendix II)

It is evident from the above, and from other statements in the record, that the trial court was of the opinion that the mere possibility of contamination or tampering was sufficient to bar the introduction of the evidence. This belief may have been based on dictum in Dodd v. State, 537 So. 2d 626, 627-628 (Fla. 3d DCA 1988), in which the court stated: "Notwithstanding the testimony on redirect, a mere reasonable possibility of tampering is sufficient to require proof of the chain of custody." We believe that this statement is dictum because under the facts of Dodd, there was a probability of either mistake or tampering. In Dodd, the issue was the quantity of cocaine. A container and its contents weighing a combined 317.5 grams went to the lab where a contraband scale registered a combined weight of only 249.5 grams. The Dodd court observed that the "gross discrepancies" in the weight indicated "probable tampering," Id. at 628. We do not have that situation before us.

It is true that the vehicle was left unattended at the scene of the fire for three days. It was then towed to a secure lot and later towed to another secure lot. It is also true, even in these secure lots, that the public had access to the vehicle at least during business hours. But there is no indication in the record that tampering "probably" happened. The Fire Service officer who assisted in putting out the fire, two deputy sheriffs, employees of the secure lots, and the fire investigator all testified at the hearing on the motion and their testimony suggests that no material changes occurred to the vehicle prior to obtaining the samples.

Taplis urges that the fact that water was sprayed on the vehicle, that the vehicle had been twice towed along the highway, and that the interior had been exposed to the weather for some time are themselves sufficient to create a probability of contamination. Under the facts of this case, we think not. The fire investigator testified that the heat of the ignited gasoline in the passenger compartment caused the top of the carpet to melt which sealed unburned gasoline in the padding underneath. It is difficult to conceive how the movement of the vehicle or the vehicle's exposure to the elements could affect the analysis of the padding. And even if gasoline were somehow brought into the passenger compartment by the water used to extinguish the fire, how it got under the sealed carpet is unexplained.

21 Fla. L. Weekly at D2451 (Fla. 5th DCA November 15, 1996). (Appendix I)

The district court therefore granted the State's petition for writ of certiorari, quashing the order of the circuit court, which had granted the defendant's limine motion to exclude the gasoline evidence. The district court wrote that "evidence should not be ruled inadmissible merely because there is a possibility that tampering might have occurred," Id.

The Fifth District Court of Appeal then denied the instant petitioner/appellant's rehearing motion (Appendix II) without comment on December 12, 1996. (Appendix III) Notice to invoke discretionary jurisdiction of this Court was filed on January 10, 1997.

SUMMARY OF ARGUMENT

The decision of the Fifth District court of Appeal in the case sub judice is in express and direct conflict with the holding of this Court in *Peek v. State, 395* So.2d 492 (Fla. 1980), which permits, but does not require, trial courts to admit relevant physical evidence where there is no probability, or no hint, of tampering; with the holding of the Third District Court of Appeal in Dodd *v. State, 537* So.2d 626 (Fla. 3d DCA 1988), which holds that it is error to admit such evidence where there is a reasonable possibility that tampering has occurred and where the chain of custody is incompletely proven; and with the holding of the Fourth District Court of Appeal in *Beck v. State, 405* So.2d 1365 (Fla. 4th DCA 1981), which holds that a trial court abuses its discretion and commits error in excluding such evidence only where there is no showing whatsoever of any likelihood of tampering. This conflict tends to create inconsistency and confusion as to the proper limits of judicial discretion to be exercised by the trial courts in such matters.

ARGUMENT

Article V, § 3(b)(3), of the Florida Constitution and Rule 9.030(a)(2)(A)(iv) of the Florida Rules of Appellate Procedure provide that this Court may exercise its jurisdiction to review any decision of a district court of appeal that expressly and directly conflicts with any decision of another district court of appeal, or of the Supreme Court, in respect to the same question of law. That such an direct and express conflict exists in the instant case is apparent on the face of the opinion below, rendered by the Fifth District Court of Appeals, which itself cites one such conflicting district court case.

To be sure, the relevant opinions of the several district courts issued since 1980 are all in agreement that issues regarding the determinations of trial judges to admit or exclude physical evidence that may have been subjected to tampering or contamination are controlled by the rule of law set forth in ***Peek v. State, 395*** So.2d 492 (Fla. 1980): "Relevant physical evidence is admissible unless there is an indication of probable tampering." *Id.* at 495. The ***Peek*** court held that the trial judge had not abused his discretion by permitting the introduction of evidence based on hair samples, because "[t]he record here reflects no hint of tampering." Id.

Conflict has arisen, however, as the respective district courts have gone about the process of applying, interpreting, and extending the ***Peek*** rule to different factual situations and even to cases where, as in the instant case, the trial court has exercised its discretion to exclude rather than to admit the questionable evidence. Troubling questions arise. Just how "probable" does the "probable" tampering have to be before the trial judge *must* exclude the evidence? Conversely, how improbable does the

occurrence of tampering have to be in order for the trial judge to be ***prohibited*** from excluding the evidence? Is an "indication" of tampering too little? Is a "hint" of tampering too much? The opinions of the several district courts following ***Peek*** have shown a marked divergence in the permissible range of discretion afforded trial judges when the ***Peek*** rule is applied,

In the instant case, the Fifth District Court held that the trial judge abused his discretion by excluding evidence where the trial judge, after hearing lengthy testimony regarding the absence of any chain of custody as well as the sundry agents, forces, and conditions to which the evidence had been exposed or subjected over a period of several weeks, found that "'[t]he risk of contamination/tampering (intentional or unintentional) renders the admission an intolerable risk of prejudice."' 21 Fla. L. Weekly at D2451. The district court opined that in so ruling the trial judge may have been misled by the language of ***Dodd v. State, 537*** So.2d ***626*** (Fla. 3d DCA 1988). The ***Dodd*** court, which held that the trial court had committed error by admitting the disputed evidence, wrote that "a mere reasonable possibility of tampering is sufficient to require proof of the chain of custody." ***Id.*** at 628.

A finding of such a reasonable possibility of tampering, held the Fifth District in the instant case, is ***not*** sufficient. Not only is it insufficient to ***require*** the trial court to establish an adequate chain of custody or exclude the evidence; it is insufficient even to ***allow*** the trial court to do so, Whereas the Third District, which in ***Dodd*** expressly cites and follows ***Peek,*** defines Peek's "indication of probable tampering" standard as being equivalent to a "reasonable possibility of tampering," the Fifth District dismisses the

Dodd language as "dictum," 21 Fla. L. Weekly at D2451, and holds that something more is needed to constitute the requisite level of probability. (The district court opinion does not indicate any minimum quantum of probability that would have sufficed, given the type of evidence and facts in the instant case, to allow the trial judge to exclude the evidence without abusing his discretion.

Other district courts have also undertaken further to define, refine, or apply the ***Peek*** standard, sometimes resulting in opinions setting forth the applied standard in language that appears to conflict with the result reached by the Fifth District in the instant case. ***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.] This suggests that had the record provided ***any*** support for even *some* likelihood of tampering, the decision of the trial court to exclude the questionable evidence might well have fallen within the trial court's proper range of discretion. In contrast, the instant case does contain facts supporting at least some likelihood (possibility) of tampering, but not, the Fifth District Court held, likelihood (probability) enough.

The ***Beck*** court's opinion provides additional insight into its holding regarding the proper understanding and application of the ***Peek rule.***

> The issue, however, is the condition of the blue jeans on the night of the stabbing; and a chain of custody is, without question, relevant. Deeb v. State, 131 Fla. 362, 179 So. 894 (1938). A body of law had developed on the subject when the physical evidence has been offered by the prosecution. Since Stunson v. State, 228 So.2d 294 (Fla. 3d DCA 1969) cert. denied 237 So.2d 179 (Fla.1970), Florida courts have recognized the principles initially

set forth in United States v. S. B. Penick & Co., 136 F.2d 413 (2d Cir. 943) and later recited in Gallego v. United States, 276 F.2d 914, 917 (9th Cir. 1960):

> 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 in making this determination include the nature of the article, the circumstances surrounding the preservation and custody of it, and the likelihood of intermeddlers tampering with it. . . . (Citations omitted.)

From what can be seen from the foregoing, custody is one factor the trial court must consider in satisfying itself that the physical evidence has not been changed in important aspects.

Beck, 405 So.2d at 1367.

The ***Beck*** court then went on to cite ***Peek,*** explaining that in ***Peek*** "the court affirmed the admission of contraband ***because there was no hint of tampering." Beck*** at 1367. [Emphasis added.] Again, the Fourth District's iteration of the law of the ***Peek*** case conflicts with the position taken by the Fifth District Court in the instant case. While the facts of the instant case show more than a "hint" that tampering may have occurred, the Fifth District holds there was not a sufficient probability to permit the trial judge to exclude the evidence.

At present, therefore, a conflict among the district courts exists as to the degree of probability of tampering that must in practice be shown in order to require that the trial court exclude the evidence--or, as in the case ***sub judice,*** the degree of probability of tampering that must be shown in order to permit the trial court to exclude the evidence.

Put another way, a conflict exists regarding the parameters of trial courts' discretion in such matters.

In the Third District, under ***Dodd,*** the trial court *must* exclude evidence where even a "reasonable possibility of tampering" is shown and a complete chain of custody is not established. 537 So.2d at 628.

In the Fourth District, under ***Beck,*** the trial ***court cannot*** exclude evidence--if, that is, "the record completely fails to support any likelihood of tampering with the evidence." ***405*** So.2d at 1367.

And in the Fifth District, under that court's opinion in the instant case, the trial court cannot exclude evidence unless "a likelihood of tampering (probability)," 21 Fla. L. Weekly at D2451, is shown. The facts of the instant case, however, suggest that what the Fifth District in effect 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 the Third and Fourth Districts' respective decisions.

Arguably, therefore, a conflict also exists between the opinion ***sub*** *judice* and that of this Court in ***Peek*** itself, which held that the trial court ***need not*** exclude evidence where there was "no hint of tampering." 395 So.2d 495. ***Peek*** did not hold that the trial ***could not*** have excluded that evidence. The ***Peek*** opinion thus expressly upheld the discretion of trial courts in such matters; it did not, as in the instant case, expressly impose restrictions on that discretion.

CONCLUSION

For the reasons set forth above, the Petitioner/Appellant, George Taplis, respectfully requests this Honorable Court to exercise its discretionary jurisdiction and grant review of the Fifth District Court of Appeal's decision in this cause.

Respectfully submitted,

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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; and to the State Attorney's Office, Post Office Box 1346, Palatka, Florida 32178 by U.S. mail on this 17 &day of January, 1997.

MICHAEL W. WOODWARD

IN THE SUPREME COURT OF FLORIDA

GEORGE TAPLIS,
Petitioner/Appellant,

vs.

STATE OF FLORIDA,
Respondent.

S.Ct. Case No.:

5th DCA Case No.: 96-02467

APPENDICES TO PETITIONER'S BRIEF ON JURISDICTION

APPENDIX I	STATE V. TAPLIS, 21 Fla. L. Weekly D2450 (Fla. 5th DCA November 15, 1996)
APPENDIX II	Motion for Rehearing
APPENDIX III	Order Denying Rehearing

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statement of general applicability interpreting or prescribing law or policy, which the Division is required under section 120.535 to establish through proper rulemaking procedures. See *Christo v. Florida Dep 't of Banking and Finance, 649* So. 2d 318 (Fla. 1st DCA), *review dismissed mem., 660 So.* 2d 712 (Fla.1995).

Appellants assert that FMHA did not have standing to raise this issue because the alleged non-rule policies have yet to be applied to anyone. But one may have standing whose 'substantial interests are affected' by the lack of a rule. See *Cortese* v. *School Bd. of Palm Beach County, 425 So.* 2d 554, 556 n.4 (Fla. 4th DCA 1982), *review denied mem.,* 436 So. 2d 98 (Fla. 1983). We conclude that the uncertainty engendered by the Division's non-rule policy substantially affects the interests of mobile home park owners such that they have standing. See *Ward v. Bd. of Trustees of the Internal Improvement Trust Fund,* 651 So, 2d 1236 (Fla. 4th DCA 1995). FMHA has standing to raise this challenge because the prospectus is such a fundamental element of the mobile home park business that the absence of a procedure to obtain approval of amendments to the prospectus, and the confusion regarding the effective term of the prospectus, has direct impact on the business decisions and affects the substantial interests of FMHA's members. *See Televisual Communications, Inc. v. Florida Dep't of Labor & Employment Sec., 667 So.* 2d 372 (Fla. 1 st DCA *1995); Florida Dep 't of Professional Regulation v. Sherman College of Straight Chiropractic,* 20 Fla. L. Weekly D2534 (Fla. 1st DCA November 16, 1995). As this court explained in *Village Park,* 506 So. 2d at 429, the Division is charged with the responsibility of approving the prospectus. The mobile home park owner is statutorily obligated to provide tenants with an "approved" prospectus, and cannot enter into a binding rental agreement until after providing the prospective tenant with an "approved" prospectus. See §§ 723.011(1)(a), 723.014(1). Therefore, the mobile home park owners have demonstrated the requisite injury-in-fact attributable to the elimination of the process for approval of amended prospectuses. The record contains support for the conclusion that the abrogation of such review procedures without substituting alternative procedures implements non-rule policy that there will no longer be any process for review and approval of amendments, in violation of section 120.535.

The repeal of this rule also has the effect of instituting a second non-rule policy that a prospectus is valid for some undetermined period of time longer than the rental agreement. Although the Division argues that there is no such policy, there is ample record evidence to support the hearing officer's finding that such a policy exists. For example, Bureau Chief Norred testified that the statute and the case law did not establish the longevity of the prospectus, that the rule did, and that the reason the agency wanted to repeal the rule was because the definition of "tenancy" in *Herrick* had given a meaning to the rule contrary to *the policy of the agency.*

The Division failed to prove that rulemaking is impractical, and the hearing officer expressly held that there was "no credible evidence" of a good faith attempt to expeditiously use the rulemaking procedure' to address these policies. The Division failed to carry its burden-of establishing a valid defense under section *120.535. See Christo v. Florida Dep't of Banking &Finance, 649* So. 2d 318 (Fla. 1st DCA), *review dismissed mem., 660 So.* 2d 712 (Fla. 1995).

Accordingly, we hold that the present rule repeal is invalid because the elimination of an amendment process has the effect of vesting unbridled discretion in the Division over the manner of performance of a statutorily mandated obligation to approve prospectuses, in violation of section 120.54(4). The repeal also has the effect of implementing non-rule policy governing the term of a prospectus and concerning the lack of responsibility of the Division to approve amendments to prospectuses, in contravention of section 120.535. We therefore AFFIRM the order invalidating the repeal of Rule 61B-31.001(5), Florida Administrative Code. (BARFIELD, C.J., and KAHN, J., CONCUR.)

'There is no merit to the claim that this rule repeal is invalid under section 120.56 on the theory that the non-rule policy of the agency enlarges. modifies or contravenes the specific provisions of law the rule was intended to implement. In *Christo* v. *Florida Dep'r* of *Banking and Finance, 449 So.* 2d 318 (Fla. 1st DCA), *review dismissed mem., 660 So.* 2d *712* (Fla. 1995). the appellee had asserted that unpromulgated agency rules were invalid under both section 120.535 and 120.56. The hearing officer held that there was no violation of section 120.56 "because the manuals did not enlarge, modify or contravene the specific provisions of law they were intended to implement." *Id.* at *319. However, this court held that* "the Legislature. in enacting section 120.535, intended section 120.535 to be used as the exclusive method to challenge an agency failure to adopt agency statements of general applicability as rules." *Id.* at 32 Thus, the decision affirmed the ruling that the appellant had stated no claim under section 120.56. but rejected the reasoning of the hearing officer in the case.

* * *

Administrative law-Hearing officer's determination that Orlando-Orange County Expressway Authority was agency subject to Administrative Procedure Act at time it notified construction company of intent to consider disqualification of company in bidding on contracts is affirmed

ORLANDO-ORANGE COUNTY EXPRESSWAY AUTHORITY. Appellant, v. **HUBBARD CONSTRUCTION CO.**, Appellee. 5th District. Case No. 5D96-3081. Opinion filed November 15, 1996. An Administrative Appeal from the Division of Administrative Hearings. Counsel: Michael P. McMahon and William C. Turner, of Akcrman, Senterfitt & Eidson. P.A., Orlando, for Appellant. F. Alan Cummings, W. Robert Vezina, III and Mary M. Piccard of Cummings, Lawrence & Vezina. P.A., Tallahassee, for Appellee.

ON MOTION FOR REHEARING, CLARIFICATION OR CORRECTION

[Original Opinion at 21 Fla. L. Weekly D1942c]

(SHARP, W., J.) We grant Orlando-Orange County Expressway's motion for rehearing, clarification and correction, and correct the opinion to the following extent: On pages 2-3, the underlined portions are subsituted, and the opinion shall now state:

> Since then, the statute was amended effective October 1, 1996, to define "agency" as excluding "an expressway authority pursuant to chapter 348, or any legal or administrative entity created by an interlocal agreement pursuant to section 163.01(7) unless any party to such agreement is otherwise an agency as defined in this subsection or an expressway authority pursuant to chapter 348.

Hubbard's request for attorneys' fees under section 57.105 is denied because there was not a complete absence of jusriciable issues raised. *T.I.E. Communications, Inc. v. Toyota Motor Center, Inc.,* 391 So. 2d 697, 698, n. 3 (Fla. 3d DCA 1981) (GRIFFIN and THOMPSON, JJ., concur.)

* * *

Criminal law-Burning to defraud insurer—Evidence—Party seeking to exclude physical evidence because of gap in chain of custody must show probability, as opposed to mere possibility, that tampering occurred-Evidence that vehicle which was almost completely destroyed by fire was left at scene of fire for three days, towed along highway to secure lot, and then towed again to another secure lot where insurer's fire investigator examined vehicle, took samples of fire debris, and sent samples to private lab for analysis did not establish probability of tampering sufficient to support exclusion of samples taken from burned vehicle

STATE OF FLORIDA, Petitioner. v. GEORGE TAPLIS, Respondent. 5th District. Case No. 96-2467. Opinion filed November 15. 1996. Petition for Certiorari Review of Order From the Circuit Court for Putnam County, Stephen L. Boyles, Judge. *Counsel:* **Steve Alexander, State Attorney. and Gary Wood, Assistant State Attorney. Palatka, Petitioner. Michael W. Woodward Kcyser & Woodward. P.A.. Interlachen, for Respondent.**

(HARRIS, J.) The primary issue in this case is whether one must show a probability (as opposed to a mere possibility) of

tampering in order to exclude relevant physical evidence when there is a gap in the chain of custody. If so, a subsidiary issue remains as to whether the facts of this case reveal evidence of a probability of tampering. We hold that the burden of one attempting to bar otherwise relevant evidence is to show a likelihood of tampering (probability) and that the evidence in this case does not meet that test. We therefore grant certiorari and quash the trial court's order that bars the introduction of samples taken from the burned vehicle.

George Taplis had been driving his wife's vehicle when it was reported that the vehicle was on fire. When the Putnam County officials responded to the scene, the vehicle was almost completely destroyed by fire. A member of the Fire Service pried open the trunk to extinguish the fire. When the owner had failed to have the car removed from the street within three days, the County had the vehicle towed to the Palatka Auto Body lot. After paying the insurance claim and after obtaining the consent of the owner (Taplis' wife), the insurance company had the vehicle towed to a secure lot in Orlando. Fire investigators from Tampa were then employed to examine the vehicle in order to determine the cause of the fire. Photographs were taken and samples of fire debris were taken from inside the passenger compartment. These samples were sent to a private lab for analysis. As a result of these tests, Taplis was charged with burning to defraud an insurer.

Taplis moved to prevent the introduction of the evidence taken from the examination of the vehicle on the basis that the vehicle had nor been properly preserved and therefore the results of the examination "may well be" the product of contamination or tampering; further, that by failing to properly preserve the vehicle, exculpatory evidence important to the defense may have been lost. The trial court, after taking testimony, granted the motion, stating:

> Based on these findings, this Court concludes that there was an insufficient (if any) chain of custody to preserve the condition and integrity of the swath and belt for evidentiary purposes. The risk of contamination/tampering (intentional or unintentional) renders the admission an intolerable risk of prejudice.

It is evident from the above, and from other statements in the record, that the trial court was of the opinion that the mere possibility of contamination or tampering was sufficient to bar the introduction of the evidence. This belief may have been based on dictum in *Dodd* v. *State,* 537 So. 2d 626, 627-628 (Fla. 3d DCA 1988), in which the court stated: "Notwithstanding the testimony on redirect, a mere reasonable possibility of tampering is sufficient to require proof of the chain of custody." We believe that this statement is dictum because under the facts of *Dodd,* there was a *probability* of either mistake or tampering. In *Dodd,* the issue was the quantity of cocaine. A container and its contents weighing a combined 317.5 grams went to the lab where a contraband scale registered a combined weight of only 249.5 grams. The *Dodd* court observed that the "gross discrepancies" in the weight indicated "probable tampering." *Id.* at 628. We do not have that-situation before us.

It is true that the vehicle was left unattended at the scene of the fire for three days. It was then towed to a secure lot and later towed to another secure lot. It is also true, even in these secure lots, that the public had access to the vehicle at least during business hours. But there is no indication in the record that tampering "probably" happened. The Fire Sdrvicc officer who assisted in putting out the fire, two deputy sheriffs, employees of the secure lots, and the fire investigator all testified at the hearing on the motion and their testimony suggests that no material changes occurred to the vehicle prior to obtaining the samples.

Taplis urges that the fact that water was sprayed on the vehicle, that the vehicle had been twice towed along the highway, and that the interior had been exposed to the weather for Some time are themselves sufficient to create a probability of contamination. Under the facts of this case, we think not. The fire investigator testified that the heat of the ignited gasoline in the passenger compartment caused the top of the carpet to melt which scaled unburned gasoline in the padding underneath. It is difficult to conceive how the movement of the vehicle or the vehicle's exposure to the elements could affect the analysis of the padding. And even if gasoline were somehow brought into the passenger compartment by the water used to extinguish the fire, how it got under the sealed carpet is unexplained.

While the weight that the jury should give this evidence because of the matters raised by defense is certainly subject to argument, the evidence should not be ruled inadmissable merely because there is a possibility that tampering might have occurred. See *Peek* v. *Stale,* 395 So. 2d 492 (Fla. 1980), *cert. denied,* 451 U.S. 964, 101 S.Ct. 2036, 68 L.Ed.2d 342 (1931).

Certiorari granted and order granting the second motion in limine is quashed. (COBB and GRIFFIN, JJ., concur.)

* * *

Criminal law-Sentencing-Probation revocation—Where defendant received sentence of imprisonment on one offense followed by term of probation on second offcnsc, defendant is entitled to credit for time served on first offense on sentence imposed following revocation of probation—Issue is cognizable as rule 3.800(a) motion to correct illegal sentence

ROBERT J. WHITFIELD. JR.. Appellant, v. STATE OF FLORIDA. Appellee. 5th District. Case No. 96-1998. Opinion filed November 15, 1996. Appeal from the Circuit Court for St. Johns County, Robert K. Mathis, Judge. Counsel: Robert J. Whitfield, Jr.. Crestview, pro se. Robert A. Butterworth, Attorney General, Tallahassee, and Wesley Heidt, Assistant Attorney General, Daytona Beach, for Appellee.

(DAUKSCH, J.) Appellant, Robert Whitfield, timely appeals the trial court's order denying his petition for writ of *habeas corpus.*

Appellant was sentenced to a twelve-year term of imprisonment for the offenses of principal to sexual battery, uttering a false or forged instrument and two counts of forgery. The sentencc was to bc followed by ten years probation for the separate offense of dealing in stolen property, Following appellant's violation of probation, the trial court adjudicated him guilty of the underlying offcnsc and scntenccd him to serve five years imprisonment with credit for 166 days. Appellant filed a petition for writ of *habeas* corpus in which he alleged that he was entitled to immediate release based upon the trial court's failure to credit him with the twelve years previously served for the offenses of principal to sexual battery, uttering a false or forged instrument and two counts of forgery. The trial court denied appellant's petition.

Relying upon *Tripp v. State, 622 So.* 2d 941 (Fla. 1993), appellant correctly contends on appeal thar upon his violation of probation he was entitled to credit for the twelve years previously served on the first case for which hc was scntenccd. In *Tripp,* the supreme court held that the trial court's imposition of a term of probation on one offense, consecutive to a sentence of incarceration on another offense, entitles a defendant to credit for time served on the first offense on the sentence imposed following a revocation of probation on the second offense. See *also Cook v. State,* 645 So. 2d 436 (Fla. 1994). Appellant also correctly contends that his argument is cognizable as a 3.800(a) motion to correct illegal sentence because an illegal sentence can bc corrected at any time. See *Dock v. State,* 671 So. 2d 297 (Fla. 5th DCA 1996). Accordingly, the order appealed is reversed and the cause remanded to the trial court with directions to credit appellant for all time previously served in the first case. See *Tripp; Dock.* If hc is entitled to release then that should bc done.

REVERSED and REMANDED. (COBB and HARRIS, JJ., concur.)

* * *

DISTRICT COURT OF APPEAL
FIFTH DISTRICT

STATE OF FLORIDA,
Petitioner,

vs.

GEORGE TAPLIS,
Respondent.
_____/

5th DCA Case No.: 96-02467
Putnam
L.T. Case No.: 95-1757-53

RESPONDENT'S MOTION FOR REHEARING

Respondent, George Taplis, moves for a rehearing, and as grounds shows:

1. In finding 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," the court's opinion appears to overlook the fact that the record indicates that the tow operator who was summoned by law enforcement to remove the car from the fire scene first loaded the car onto the roll-back truck and then threw ***a considerable quantity of debris taken from the scene directly into the vehicle's interior.*** (Response, page 4; App. F, page 46 lines 22-25, page 47 lines 1-9.) That undisputed fact is material because it shows actual, not merely probable, tampering -with the condition of the car's interior. This was a material change to the vehicle because the debris, scraped up from the ground near the car and tow truck, is likely to have been contaminated with gasoline escaping from the car's fuel system either before or during the loading process; the fuel tank still contained unburned gasoline when the car was loaded onto the truck. (Response, page 4; App. F, pages 47-48, 51-52, 80, 110-111.) Subsequent movements of the car would inevitably distribute that contaminated debris to the car's floorboard areas.

II

2. In finding that "how [gasoline] got under the sealed carpet is unexplained," the court appears to be under the erroneous impression that the sample in which a trace of gasoline was found consisted solely of carpet padding taken from beneath a "sealed" crust of melted carpet, This apparent misapprehension overlooks the undisputed facts that (1) the fire investigator was not sure that in this case the melted carpet "seal" was actually intact; and (2) even if the "seal" was intact, *the sample in which the gasoline was found contained not only padding from beneath the carpet but also extraneous debris that was lying* on *top of the 'sealed" carpet.* (Response, page 8; App. F, pages 89-91, 101-104.) Those facts are material because they show that the small quantity of gasoline found in the sample could easily have come from debris the tow operator threw into the vehicle's interior or from other contamination occurring subsequent to the melting of the carpet.

WHEREFORE the Respondent respectfully moves the court for a rehearing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to the State Attorney's Office, Post Office Box 1346, Palatka, Florida 32178 by U.S. mail on this 19th day of November, 1996.

MICHAEL W. WOODWARD

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

STATE OF FLORIDA,

Petitioner,

v. Case No. 96-2467

GEORGE TAPLIS,

R e s p o n d e n t .

DATE: December 12, 1996

BY ORDER OF THE COURT:

ORDERED that Respondent's MOTION FOR REHEARING, filed November 21, 1996, is denied.

I hereby certify that theforegoing is
(a true copy of) the original court order.

Frank J. Habershaw
FRANK J. HABERSHAW, CLERK

BY: _____
Deputy Clerk

(COURT SEAL)

cc: Office of the State **Attorney**, Palatka
Hon. Stephen L. Boyles
Michael W. Woodard, Esq.

III