IN THE SUPREME COURT OF FLORIDA

JOHN CALVIN TAYLOR II,

Appellant,

v.

CASE NO. SC96,959

STATE OF FLORIDA,

Appellee.
_____________________/

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Appellant, JOHN CALVIN TAYLOR II, the defendant in the trial court, will be referred to as appellant or by his proper name. Appellee, the State of Florida, will be referred to as the State.

Pursuant to Rule 9.210(b), Fla. R. App. P. (1997), this brief will refer to a volume according to its respective designation within the Index to the Record on Appeal. A citation to a volume will be followed by any appropriate page number within the volume. The symbol "IB" will refer to appellant’s initial brief and will be followed by any appropriate page number. All double underlined emphasis is supplied.

STATEMENT OF THE CASE AND FACTS

Taylor was indicted by a grand jury for first-degree murder on February 26, 1998 (I 25). At trial, the evidence showed:

The chief medical examiner, Dr. Floro, testified that conducted the autopsy on Shannon Carol Holzer on December 31st 1997. (XV 1706). Shannon was stabbed nine times - six times in the heart and three times in the lungs. (XV 1721-1723). All nine wounds were fatal. (XV 1724). Shannon had defensive wounds on her left hand, a broken fingernail on the middle finger of her right and abrasions on her nose, eyelid and lips. (XV 1707, 1715-1718). Shannon's pants and panties were around her knees. (XV 1707). There were two small bruises in her vagina. (XV 1719).

The plaid black and white boxer shorts Taylor was wearing when he was arrested, the day after the murder, had a blood stain on them. (XV 1651, 1665). That blood was a "DNA match" of the victim's DNA. (XV 1691). Dr. Martin Tracy, a professor of biology at Florida International testified that only 1 in 1900 persons had that type of DNA. (XV 1702). Both Taylor and Michael McJunkin were excluded as possible contributors. (XV 1680).

Shannon's father owns a convenience store called Buddy Boy's and Shannon worked there (XII 1031-32). Shannon would take the deposits to the Bank in Green Cove Springs. The deposits had to be made by 2:00 (XII 1037). The cash part of the bank deposit stolen during the robbery totaled $6,666.00. (XII 1044). The total amount of money seized from Taylor and accounted for was

$6,347.00. Taylor had deposited $1,700 in his bank account at 3:48 on the day of the murder. (XII 1153-1158). The photographs made from the Bank's camera were introduced and showed Taylor making the deposit. (XII 1153-1158; XVI 1782). Taylor had paid the owner of Trader Jack's 340.00 for bad checks. (XIII 1349-1355). Taylor went to Trader Jack's between 3:00 and 3:30 on the day of the murder to pay this debt. The police recovered $1,672 dollars under the cushion in Taylor's trailer. (VIII 1467). The police recovered additional money in a Crown Royal bag under the passenger seat of Taylor's rented car.

Several witnesses, including Alex Metcalf and Cindy Schmermund, who both knew both Shannon and Taylor, saw Taylor in the passenger side of Shannon's car. (XII 1133, 1137, 1107 1116). Shannon was going to the Barnett Bank in Green Cove Springs to make the deposit at this time. Shannon told them both that she was giving Taylor a ride to Green Cove with her. (XII 1115-1117, 1140). Nancy Griffis, who delivered sandwiches to Buddy Boy's, testified that she saw Shannon with a man in the passenger seat that day, turning left onto State Road 16. (XV 1594-1599). A witnesses testified that she saw a boy wearing glasses in a White Geo Metro not Taylor around lunch time. (XII 1097-1103).

Michael McJunkin testified that Taylor planned this robbery. (XI 917). He testified that Taylor targeted Shannon because Taylor knew when she made the bank deposits for the store. (XI 917)

The theory of defense was that Michael McJunkin committed this crime. (XVII 1970). The defense presented eight witnesses. Taylor testified. (XV 1760). He testified that Shannon dropped him off at the trailer park. Shannon offered to give Michael a ride into Green Cove Springs. (XV 1769). He got gout of the car and Michael got in (XV 1770). He testified that he obtained "a little over $5,000.00" by having Michael stealing a briefcase from Mr. Yelton's truck yet Michael did not know about the money. (XVI 1783). Yelton testified his briefcase contained approximately $5,000.00 when it was stolen. (XVI 1868). Taylor testified that he did not put on any underwear the day he was arrested. (XVI 1791)

The jury convicted Taylor of first degree murder as charged and robbery with a deadly weapon. (XVII 2064; IV 659-660). During the penalty phase, the State presented two main witnesses. The second witness was the victim of a robbery that Taylor committed. (XVIII 2210-2207). Defense counsel presented numerous witnesses during the penalty phase, including the defendant's father, the defendant's younger sister, the defendant's half-brother, two aunts, a niece, step-daughter, a bus driver who drove the defendant to school as a child, two former employers, a step-mother, an ex-wife, his current wife, a former cellmate, a supervisor at Arizona State prison who knew the defendant, a license clinical social worker who had interviewed the defendant's family.

The jury recommended death to 10 to 2. (V 847). Both the State and the defense submitted written sentencing memoranda. (V

872-878;943-961). The trial court imposed the death sentence. (VI 979-955). The trial court found four statutory aggravators: (1) prior violent felony of armed robbery which were "quite similar"; (2) felony/murder with robbery as the underlying felony; (3) pecuniary gain and (4) "under sentence of imprisonment" aggravator. The trial court recognized that the felony murder with robbery as the underlying felony merged into the pecuniary gain aggravator and considered them as one aggravator. While the trial court found no statutory mitigators, it found three non-statutory mitigators: (1) Taylor was suffered abuse and neglect during his childhood (2) poor education and (3) basically good employment history. The trial court found that the three aggravators "greatly" and "far" outweighed the relatively insignificant mitigators.

SUMMARY OF ARGUMENT

ISSUE I

Taylor asserts that the encounter at his home was not consensual; rather, it was an arrest without probable cause. Taylor argues that he was arrested at four times: (1) when the officer followed him into bathroom to watch him while he dressed; or (2) when the officers directed him to go into the kitchen, handcuffed him and frisked him or (3) when he was partially placed in the backseat of the patrol with the door open unhandcuffed or (4) when he was transported to the sheriff's office. The State respectfully disagrees. The entry into the house was consensual and remained consensual when the officer watched Taylor dress for safety reasons. The directive to go to the kitchen, frisking and handcuffing Taylor was a valid *Terry* stop premised on reasonable suspicion based on Taylor's furtive hiding something under a cushion. Placing a suspect on the backseat of a patrol car with the door open and without handcuffs is not an arrest; rather, it continued to be a valid *Terry* investigative detention. The trial court found that Taylor consented to going to the sheriff's office when he shrugged his shoulders in response to the deputy informing him that the lead investigator wanted to speak with him at the sheriff's office. Furthermore, the officer had probable cause to arrest Taylor prior to taking him sheriff's office. The officers had probable cause to arrest Taylor for grand theft once they discovered an unemployed man hiding a roll of cash including $100.00 dollar bills in response to their questioning

regarding the missing person report and missing bank deposit. Thus, the trial court properly denied the motion to suppress.

ISSUE II

Taylor asserts that the trial court improperly admitted the testimony of four witness who testified that the victim said, as she was leaving to make the bank deposit, that she was giving Taylor a ride into Green Cove Springs with her. Taylor claims that this testimony was hearsay. However, these statements are covered by the hearsay exception concerning statements of intent or plan. § 90.803(3), Fla. Stat. Historically, a murder victim’s statement that she was taking a trip and the purpose of that trip was admissible. Additionally, the statement is admissible as an admission by a party opponent. Taylor adopted that statement by his conduct. Nor did the admission of this statement violate the Confrontation Clause. Taylor’s murder of the declarant waived his confrontation rights. Thus, the trial court properly admitted the victim’s statements.

ISSUE III

Taylor argues that the evidence relating to his credit application for the purchase of a truck which contained lies was irrelevant and improper propensity evidence. The State respectfully disagrees. First, the application was relevant. The dealership was located in Green Cove Springs. The testimony established that Taylor was in Green Cove Springs continuing to discuss the purchase of the truck on the day of the murder. Furthermore, there was no prejudice because the prosecutors did

not use the application as improper character or propensity evidence. Additionally, the error, if any, was harmless because the jury would not use Taylor's lie on the applications about his current employment status to convict him of murder. Thus, the trial court properly admitted the evidence.

ISSUE IV

Taylor asserts that the trial court improperly allowed the prosecutor to rehabilitate Deputy Noble by introducing his prior suppression hearing testimony because the testimony does not fit in the prior consistent statement hearsay exception. This prior testimony was admissible to rehabilitate regardless of the prior consistent statement hearsay exception. Deputy Noble's suppression testimony was admissible because it rebutted defense counsel's implication that Deputy Noble's trial testimony was unreliable. Moreover, the error, if any was harmless. Thus, the trial court properly permitted this rehabilitation.

ISSUE V

Taylor asserts that the trial court improperly admitted a pair of boxer shorts containing the victim's DNA. According to Taylor, the shorts were tampered with, e.g., either contaminated with the victim's DNA or planted. The state respectfully disagrees. To exclude evidence, the defendant must show that there was a probability, not merely a possibility, of tampering. Here, Taylor showed only that the outside of the evidence bag containing the shorts was immaterially altered. He showed no probability of tampering to the contents of the bag. Accordingly, the trial court properly admitted the boxer shorts.

ISSUE VI

Taylor asserts that his wife's testimony regarding a conversation they had about Michael needing money to return to Arkansas violated the husband-wife privilege. First, the conversation was not a privileged communication. This conversation occurred in jail. The husband-wife privilege is lost in certain places such as a jail. Taylor had no reasonable expectation of privacy in the jail. Furthermore, Taylor waived the privilege by calling his wife to testify. Moreover, the error if any was harmless. Taylor's wife had already testified in her direct examination that she had helped Michael buy a bus ticket. So the jury knew that Michael did not have enough money to by a bus ticket just three days after the robbery. The main point of this testimony was already known to the jury prior to the alleged violation of the privilege. Thus, the trial court properly permitted the wife's testimony.

ISSUE VII

Appellant asserts that the "under sentence of imprisonment" aggravator, § 921.141(5)(a), does not apply to him because he was not supervision and/or restraint. The State respectfully disagrees. Due to an administrative error, Taylor was improperly released from prison in Arkansas. The statute requires that a sentence of imprisonment be imposed not that the defendant be serving the sentence. This Court has previously held that this aggravator was properly applied to a person who was sentenced to incarceration but failed to report. Thus,

Taylor was under a senttence of imprisonment and the trial court properly found this aggravator.

ISSUE VIII

Taylor asserts that the trial court erring by finding five of the proposed mitigators were not supported by the evidence. The State disagrees. The trial court rejected the proposed mitigator that Taylor was not violent based on his prior violent felony which the trial court found as an aggravator. The prior violent felony was a robbery with a firearm in which Taylor shot at the victim three times. Competent substantial evidence supports the trial court's finding that Taylor was violent. One of the proposed mitigators, *i.e.,* that Taylor enjoys his family, is not truly mitigating in nature. Any error in the trial court's failure to provide an explanation in its sentencing order relating to the remaining proposed mitigators was harmless. The trial court considered the three most substantial mitigators to be proven. Thus, the trial court properly rejected the five proposed mitigators.

ISSUE IX

Appellant asserts that the death penalty in this case is not proportionate because the two remaining aggravators are weak aggravators. First, there are not two aggravators; there are three aggravators: (1) prior violent felony of armed robbery which were "quite similar"; (2) merged felony/murder and pecuniary gain and (3) "under sentence of imprisonment" aggravator. Moreover, both the "prior violent felony" and the "under sentence of imprisonment" aggravators are serious

aggravators. Additionally, the prior violent felony aggravator is factually strong regardless of the number of years that has elapsed since its commission because the facts of the earlier offense are so similar to the instant offense. Thus, the death penalty is proportionate.

ARGUMENT

ISSUE I

DID THE TRIAL COURT PROPERLY DENY THE MOTION TO SUPPRESS? (Restated)

Taylor asserts that the encounter at his home was not consensual; rather, it was an arrest without probable cause. Taylor argues that he was arrested at four times: (1) when the officer followed him into bathroom to watch him while he dressed; or (2) when the officers directed him to go into the kitchen, handcuffed him and frisked him or (3) when he was partially placed in the backseat of the patrol with the door open unhandcuffed or (4) when he was transported to the sheriff's office. The State respectfully disagrees. The entry into the house was consensual and remained consensual when the officer watched Taylor dress for safety reasons. The directive to go to the kitchen, frisking and handcuffing Taylor was a valid *Terry* stop premised on reasonable suspicion based on Taylor's furtive hiding something under a cushion. Placing a suspect on the backseat of a patrol car with the door open and without handcuffs is not an arrest; rather, it continued to be a valid *Terry* investigative detention. The trial court found that Taylor consented to going to the sheriff's office when he shrugged his shoulders in response to the deputy informing him that the lead investigator wanted to speak with him at the sheriff's office. Furthermore, the officer had probable cause to arrest Taylor prior to taking him sheriff's office. The officers had probable cause to arrest Taylor for grand theft once they discovered an unemployed man hiding a roll of cash

including $100.00 dollar bills in response to their questioning regarding the missing person report and missing bank deposit. Thus, the trial court properly denied the motion to suppress.

The trial court's ruling

Taylor filed an amended motion to suppress physical evidence. (II 364-386).[1] The motion asserted illegal entry into the home and that Taylor was arrested without probable cause. Relying on *Riley v. State*,722 So.2d 927 (Fla. 2d DCA 1998), the motion claimed that Taylor's concealing an item from the officers showed lack of consent. Taylor also argued that he was arrested when he was handcuffed, frisked and placed in the police car and that there was no probable cause to support the arrest. Taylor also filed a motion to suppress defendant's statements. The motion to suppress the statements made to Detective Lester regarding a separate burglary asserted that Taylor had been illegally arrested without probable cause at his home and

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[1] This was actually the third motion to suppress. The original motion to suppress argued that the money seized under the cushion and the car was illegally because the entry was illegal and Taylor was illegally arrested. (I. 89-91). The motion also asserted that the affidavit in support of the later obtained search warrant contained factual inaccuracies regarding the packaging of the money and the remaining facts did not support probable cause to issue the warrant.

An amended motion was filed which repeated the language of the original motion but added a claim that the search conducted pursuant to the warrant included items not listed in the warrant, i.e. .35 mm film; a daytimer, 2 VCR tapes, and a telephone ID (II 297-299).

The third motion added underwear taking from Taylor at the jail. The third motion was filed after the first motion to suppress hearing and the day before the second suppression hearing.

therefore, the statements were obtained in violation of *Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963).(I 98-100).

The trial court held a hearing on both motions. (III 387-483)[2] Deputy Noble testified that he received a missing person report from the victim's husband on December 30, 1997. (III 394). The husband, Jeff Holzer, reported that his wife, Shannon Bryant Holzer, had been missing for one day, *i.e.,* since December 29, 1997. (III 394). Deputy Noble was close friends of Shannon Holzer and her parents. (III 425). The last person who saw Shannon was Cindy Schmermund, an employee at her parent's store. Cindy Schmermund had last seen the victim on December 29, 1997 at 1:10 p.m. Cindy Schmermund had last seen the victim with Taylor as the victim was driving into Green Cove Springs. Ms. Schmermund identified Taylor by name. The victim told Ms. Schmermund that she was giving Taylor a ride to Green Cove Springs. Another person, Nolan Metcalf, verified that he had seen the victim with Taylor at that time in her car.(III 398). The victim's parents, who owned the store, informed the deputy that their daughter was going to make a deposit of store receipts with approximately $4,868 in cash. The deputy inquired of the bank whether a deposit was made and was informed that no deposit had been made. (III 398). Deputy went to Taylor's stepmother's house and was informed that Taylor had not been working for two weeks. (III 400). Deputy Noble then went to

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[2] The trial court held two suppression hearings. One on January 19 1999 and a second on March 30, 1999. Only the first is in the record on appeal.

Vineyard Trailer Park to located Taylor at approximately noon. (III 401,402). When Deputy Noble arrived two other deputies, Deputy Strickland and Deputy Lindsey had arrived immediately before him. (III 402). Deputy Lee also arrived at this time. (III 403). As deputy Noble was entering the home, Deputy Lindsey, who was in his patrol car but could see through the trailer's open door, informed him that he has just seen Taylor conceal something under a cushion (III 403). Deputy Lindsey and Deputy Lee accompanied deputy Noble into the trailer to question Taylor regarding the object he concealed. Deputy Noble testified for they all went together for purposes of safety in case it was a weapon. (III 404). Deputy Noble asked Taylor what he had concealed. (III 406). Taylor responded: "nothing" and gestured toward the chair saying to the officer you can look. The officer then looked and found a "large amount of cash" and a hundred-dollar bill could be seen on top. (III 406). Deputy Noble then handcuffed Taylor and frisked him. (III 407,422). Deputy Noble testified that Taylor was not free to leave at this point but it was not his intent to arrest Taylor. (III 423). Deputy Noble then read Taylor his Miranda rights. Deputy Noble then placed Taylor in the back of his patrol car but removed the handcuffs. (III 409-410). Deputy Noble asked Taylor where he got the money. Taylor responded: "I've had it". Deputy Noble then requested permission in writing to search the Taylor's home and car. (III 410). The written consent form included the information that Taylor had the right to refuse to consent to the searches. (III 411-412). Taylor signed the forms. (III

410,413). Taylor informed the officer that there was additional money in his car. (III 413). Deputy Noble located a Crown Royal bag underneath the passenger seat of Taylor's car. (III 414). Inside the bag was a lot of cash in different denominations. Deputy Noble explained to Taylor that Detective Lester wanted to speak with him at the sheriff's office. (III 415). Taylor made no comment; he merely shrugged his shoulders. Deputy Noble then drove Taylor to the sheriff's office in his patrol car. (III 414). While Taylor was in the backseat he was not handcuffed. (III 415). At the sheriff's office, Deputy Noble explained to Taylor that he had to handcuff him because they were entering a secured facility but told Taylor that he was not under arrest. (III 415-416). Deputy Noble testified that this was done for safety. Deputy Noble escorted Taylor to an interview room. Taylor was left alone in the interview room to await Detective Lester and the door was not locked. (III 416). Detective Lester arrived shortly thereafter and Taylor was unhandcuffed at that point. (III 416).

Deputy Strickland testified. He was off duty on December 30, 1997 at noon. (III 427). He was not in uniform and was in his personal truck.(III 430). He was driving with a friend, Robert Heaton, who is a volunteer fireman. (III 428). He had been notified of Mrs. Holzer's disappearance. He was informed that the victim had gone to make a deposit for the store but never made the deposit and that she had been last seen with a white male named John Taylor. (III 428). He went to John Taylor's address. He informed the sheriff's office that a car matching

the suspect was outside Taylor’s home. (III 428). The sheriff’s office sent backup including ground units and a helicopter. (III 430). The helicopter arrived first and hovered overhead. (III 436). When Deputy Lindsey arrived in a marked car wearing a uniform, all they went to the door. (II 431-432). Mr. McJunkin answered the door. They identified themselves as officers and asked to speak with John Taylor. Mr. McJunkin said that John Taylor was home and he said to “come on in” to the deputies. (III 432). Both deputies entered but Mr. Heaton remained at the door. (III 437-438). Taylor came in the living room with a towel around him. Deputy Strickland suggested Taylor get dressed because it was cold and the door was open. (III 433). Taylor went into the bathroom and got dressed (III 433). Deputy Strickland accompanied Taylor to the bathroom and kept him in view to make sure Taylor did not get a weapon. (III 438-439). Once dressed, the deputies informed Taylor that a woman was missing and that he was the last person seen with her and that some detective wanted to speak with him about this. (III 432-433). Taylor claimed the she had given him a ride to his trailer. (III 433). Taylor did not, at any time, ask the deputies to leave or assert that he did not want to answer their questions. (III 442). Once deputy Noble and Deputy Lee arrived, Deputy Strickland left. (III 434). Deputy Strickland left prior to the cash under the cushion being discovered. (III 434).

Deputy Lindsey also testified. (III 444). He knocked and the door. (III 446). Mr. McJunkin opened the door and indicated come in. Deputy Lindsey, who has a computer in his patrol car,

went to check for any warrants and the check Taylor's drivers license (III 447). He did not recall how he obtained Taylor's license. (III 451). While in his car, deputy Lindsey saw Taylor appear to take something out of his pocket and stuff it under the cushion and then sit back down. (III 448). Deputy Lindsey immediately informed Deputy Lee of this. Deputy Lindsey asked Taylor want he had put under the cushion and Taylor responded nothing. (III 449). Deputy Lindsey asked if he could look and Taylor replied yes. (III 449). Deputy Lindsey raised the cushion and saw a "roll of money". He then drew his weapon. He testified that he thought there may be a weapon under the cushion as well. (III 449, 453). Deputy Lindsey ordered Taylor to stand up and walk toward the kitchen. (III 453). Deputy Lindsey understand that his duty was to make contact with Taylor and then the lead detective would come to the trailer. (III 452). Deputy Lindsey later counted the money found under the cushion. (III 452). The money totaled $1,672.00. (III 457).

Deputy Lee testified. (III 458). Deputy Lee went with Deputy Noble to investigate the missing person report on Shannon Holzer. (III 459). They met with her family at Buddy Boy's. The last person she was seen with was Taylor. (III 460). The door to the trailer was open and several other officer were already present when he arrived. (III 461). He did not ask for individual permission to enter the trailer or knock on the door. (III 463). He heard Deputy Noble asked Taylor if he knew anything about where Shannon was. (III 461). Taylor responded that Shannon had given him a ride and had dropped him off at his

trailer. (III 462). He did not see Taylor hide anything under the cushion although he was in the trailer. (III 464). Deputy Lee explained that the helicopter was not circling the trailer; rather, it was over Shands bridge. (III 462). Deputy Lee testified that he did not know if a crime had been committed at that point. (III 466).

Deputy Lester, who was the lead detective at the time, testified. (III 467). He was in the helicopter looking for Shannon Holzer's car. (III 468). They were flying along the route that Shannon would have taken to the bank. When Deputy Lester was notified that they had located Taylor, he flew to Shands bridge (III 469). He then flew to the sheriff's office to meet with Taylor when they brought Taylor to the office. (III 469). He met with Taylor within the hour. He removed Taylor's handcuffs. (III 480). He interviewed Taylor after reading him his *Miranda* rights.. (III 471-472). Taylor said that Shannon had given him a ride to his trailer. (III 473). Taylor after saying that he did not want to talk about the money found in his trailer, said that he took the money from Mr. Yelton's truck. (III 475). Deputy Lester told him that he needed to tell them about the money because they had a missing person with missing money. He testified that he did not have probable cause to arrest Taylor until Taylor told him about the burglary of the car. (III 481). He arrested Taylor for burglary of a car. (III 474-475). Deputy Lester on cross stated that he had gone to Taylor's trailer earlier and when no one answered he opened the unlocked door to look for Shannon. (III 479). He found no one

but turned off the coffee pot that was left on and then left. (III 479).

Defense counsel filed a proposed order on the motion to suppress. (III 492-499). The trial court denied the motions in a ten page written order. (III 500-510). The trial court found the entry into the trailer to be consensual because the son invited the officers inside. The trial court found that the officer accompanying Taylor while he dressed to prevent him arming himself was reasonable. The trial court found the encounter to be consensual until the officers saw Taylor make furtive movements. The trial court concluded that the officer had reasonable suspicion to conduct a Terry detention based on Taylor's furtive movements. The trial court concluded that the temporary handcuffing of Taylor did not amount to an arrest. The trial court found Taylor's consent to search the car and the trailer to be voluntary. The trial court found that Taylor voluntary accompanied the officer to the sheriff officer rather than being arrested. The trial court reasoned that while it would have been better for the detective to go to Taylor's home than having Taylor go to the sheriff's office because the detention was shorter, the detention was legal. The trial court denied the motion to suppress the underwear reasoning that searches incident to lawful arrest are proper based on *United States v. Edwards*, 415 U.S. 800, 94 S.Ct. 1234, 39 L.Ed.2d 771 (1974)(concluding that a search of clothing which was material evidence of the crime after an overnight stay in jail is a valid search incident to arrest).

Preservation

Defense counsel properly made a pre-trial motion to suppress evidence and statements and properly obtained a ruling from the trial court. Additionally, counsel properly renewed the objections at trial prior to the evidence and testimony being admitted (1221; 1411; 1503-1509; 1568; 1610; 1671; 168;8 1691). Defense counsel properly objected to Taylor's statement of that he had more money in the car immediately prior to the statement being introduced at trial. (VIII 1459-1460). Thus, this issue is preserved.

The standard of review

A standard of review is deference that an appellate court pays to the trial court's ruling. Martha S. Davis, *A Basic Guide to Standards of Judicial Review*, 33 S.D. L. REV. 468 (1988). There are three main standards of review: (1) *de novo*; (2) abuse of discretion and (3) competent substantial evidence test. PHILIP J. PADOVANO, FLORIDA APPELLATE PRACTICE § 9.1 (2d ed. 1997). Legal questions are reviewed *de novo*. Under the *de novo* standard of review, the appellate court pays no deference to the trial court's ruling; rather, the appellate court makes its own determination of the legal issue. Under the *de novo* standard of review, an appellate court freely considers the matter anew as if no decision had been rendered below. Questions of fact in Florida are reviewed by the competent, substantial evidence test. Under the competent, substantial evidence standard of review, the appellate court pays overwhelming deference to the

trial court's ruling, reversing only when the trial court's ruling is not supported by competent and substantial evidence. The equivalent federal fact standard of review is known as the clearly erroneous standard. Other issues are reviewed for an abuse of discretion. Under the abuse of discretion standard of review, the appellate court pays substantial deference to the trial court's ruling, reversing only when the trial court ruling's was "arbitrary, fanciful or unreasonable." *Canakaris v. Canakaris*, 382 So.2d 1197, 1203 (Fla. 1980).

A trial court's determinations of probable cause or reasonable suspicion is reviewed *de novo*. *Ornelas v. United States*, 517 U.S. 690, 116 S.Ct. 1657, 1659, 134 L.Ed.2d 911 (1996). However, "a reviewing court should take care both to review findings of historical fact only for clear error and to give due weight to inferences drawn from those facts by resident judges and local law enforcement officers." *Ornelas*, 517 U.S. at 699, 116 S.Ct. at 1663. Moreover, whether a defendant consented voluntarily or merely acquiesced because of duress or coercion is a question of fact that should not be overturned unless clearly erroneous. *Davis v. State*, 594 So.2d 264, 266 (Fla.1992). Additionally, Florida Courts are required by the Florida Constitution to interpret search and seizure issues in conformity with the Fourth Amendment of the United States as interpreted by the United States Supreme Court. Fla. Const. art. I, § 12; *Perez v. State*, 620 So.2d 1256 (Fla. 1993).

Merits

The Fourth Amendment to the United States Constitution guarantees "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. Amend. IV. Reasonableness is the ultimate standard under the Fourth Amendment. *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 652, 115 S.Ct. 2386, 2390, 132 L.Ed.2d 564 (1995). There are essentially three levels of police-citizen encounters: (1) consensual encounter which requires no basis; (2) an investigatory stop or investigatory detention, in which an officer may reasonably detain a person temporarily to investigate based on reasonable suspicion and (3) an arrest which must be supported by probable cause that the person has committed, is committing, or is about to commit a crime. *Popple v. State*, 626 So.2d 185, 186 (Fla. 1993). Moreover, such encounters often start as one type and becomes another. Here, the encounter was consensual until the officer handcuffed and frisked Taylor at which time it became an investigative detention, *i.e. Terry* stop and finally at the sheriff's office it became an arrest.

Consensual Entry into the home

Mr. McJunkin, who also lived at the trailer, give the officers permission to enter the home. *United States v. Matlock*, 415 U.S. 164, 94 S.Ct. 988, 39 L.Ed.2d 242 (1974)(noting that the person giving consent must have authority to do so); Illinois v. Rodriguez, 497 U.S. 177, 110 S.Ct. 2793, 111 L.Ed.2d 148

(1990)(noting that the person giving consent must reasonably appear to have authority to do so). A co-resident has authority to consent and the police are not obligated to seek consent from defendant as well. *State v. Purifoy*, 740 So.2d 29, 29 (Fla. 1st DCA 1999). Taylor never revoked that consent. The warrant requirement and heightened protections for a private home are not implicated where the door is voluntarily opened by occupants. *United States v. Gori*, 230 F.3d 44 (2d Cir. 2000). Thus, the entry into Taylor's home was consensual.

In *United States v. Dickerson*, 975 F.2d 1245 (7th Cir. 1992), the Seventh Circuit found that the district court properly denied the motion to suppress because the encounter inside Dickerson's home was consensual. Dickerson pleaded guilty to two counts of armed bank robbery. Tellers at the bank had described the bank robber has wearing a dark or black hat with a ribbon and bow and dark sunglasses with multi-colored frames and carrying a blue denim purse. A customer got the license number of the get away car. The officers went to Dickerson's house the based on the license number Six officers were stationed around the house. An FBI agent and three police officers, all with guns drawn, knocked on Dickerson's front door. One of these officers had a shotgun in his arms. Dickerson came to the door totally nude. When Dickerson opened the door about one foot, the agent stuck his foot inside so that Dickerson could not close it. He told the officers that he did not have any clothes on and needed to get dressed before he could talk. Dickerson also indicated that he was with a woman

in the bedroom in the back of the house and that she was naked too. However, the agent was able to see that the woman in the bedroom was fully clothed. The agent then requested permission to enter the house. Dickerson said "okay" or "all right" and opened the door further. Dickerson then made a hand motion indicating that they could enter the house. Dickerson went to the bedroom to get dressed. The agent followed Dickerson into the bedroom while the other officers conducted a security search of the house. In the bedroom, the agent saw a hat and a pair of sunglasses which matched the description given by the tellers. When the agent asked Dickerson about the Cadillac, Dickerson first stated that he had been in bed and the car had been at the house all morning. When confronted with the fact the car's engine was warm, however, Dickerson stated that he had started out for work but returned sick. Approximately 35 minutes after entering the house, the agent formally asked Dickerson for consent to search the house. Dickerson refused. The agent then arrested Dickerson. In a line-up outside the house, the tellers identified Dickerson as the robber. Dickerson filed a motion to suppress asserting that the warrantless entry into his home was not consensual and seizure of the hat, coat, purse and sunglasses was illegal. The *Dickerson* Court admitted that the facts "give us pause: Could any naked person facing four officers with guns drawn, one with his foot blocking the door open, feel that he was free to tell the officers to get lost?" However, the Court was convinced that the answer was yes and that the district court's conclusion

that Dickerson voluntarily consented to the warrantless entry was not clearly erroneous. The district court found that Dickerson's nakedness was a "ruse to bolster his alibi that he had been in bed most of the morning with his fiancé. The Court agreed he was trying to trick the law enforcement officers. Additionally, that Dickerson was able to twice say "no" to the agent and police officers after they were already inside his home, makes it unlikely that the consent given while the officers were on his doorstep was coerced. He had knowledge of his right to refuse because he exercised that right twice. *Dickerson*, 975 F.2d at 1248-1249.

Here, unlike Dickerson, the officer's gun were not drawn. No one had a shotgun. No officer attempted to blocked the door with his foot. In contrast to *Dickerson*, Taylor does not even factually dispute that the officers were given permission to enter the trailer. Rather, Taylor argues that the entire atmosphere was coercive and police dominated. Taylor claims that the additional officers entered without additional consent. But the door to the trailer was open. Taylor cites no case that holds that consent must be repeatedly sought and given for each officer. A civilian, Robert Heaton, was also present during the entire encounter. The civilian's presence, far from increasing the intrusiveness, lessens it. The civilian's presence and the door being open was the opposite of being held incommunicado. *Miranda v. Arizona*, 384 U.S. 436, 445, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966)(referring to the dangers of "incommunicado interrogation of individuals in a police-dominated

atmosphere.”). The trial court specifically found that neither the civilian nor the officers blocked Taylor’s exit based on Deputy Strickland’s testimony at the suppression hearing. (III 502, III 442). Taylor asserts that the officers were wearing uniforms, badges and had holstered guns. Yes, officers wear uniforms and have guns. If this is sufficient to turn encounters into arrest or to invalidate consent, then all encounters will be arrests and no consent given any uniformed officer will be valid. Taylor asserts that the deputy following him and watching him dress is an intrusion. Any intrusion was justified for the stated purpose of preventing Taylor from obtaining a weapon. One man watching another dressing is not coercion. Deputy Noble was only generally watching, he could not even answer the question regarding Taylor’s underwear because he was not watching closely enough to see where Taylor got the underwear. Moreover, the deputy suggested that Taylor get dressed. Taylor had the options of getting dressed prior to entering the living room.

Thus, the initial encounter was consensual and remained so until Taylor changed the situation by attempting to hide something. The encounter remained consensual until the officer handcuffed and frisked him. At that point it become a *Terry* investigative detention based on reasonable suspicion.

Terry detention

Taylor’s furtive concealment of an object gave the deputies reasonable suspicion to support a *Terry* detention. Furtive gestures are analogous to flight. If a suspect flees upon

seeing the police, he is attempting to conceal himself. Rather than fleeing altogether, the suspect may remain but attempt to conceal evidence. Both situations involve concealment and hiding for the purpose of avoiding detection by the police. Both are forms of evasive behavior. The inference is that a person taking the evasive action has cause to fear police scrutiny. It’s not a perfect inference; they never are.

The United States Supreme Court has held that flight from the police in a high crime area alone is sufficient to support reasonable suspicion. *Illinois v. Wardlow*, 528 U.S. 119, 120 S.Ct. 673, 675, 145 L.Ed.2d 570 (2000). In *Wardlow*, an officer was participating in a police caravan sweep of a high-crime area. The officer observed Wardlow holding an opaque bag. Wardlow saw the officer and fled. The officer stopped Wardlow and frisked him. Wardlow had a loaded handgun. Wardlow was convicted of unlawful use of weapon by felon. The *Wardlow* Court held that stop was supported by reasonable suspicion despite the fact that flight is not by itself illegal and could have completely lawful, rational and innocent explanation. In their words, headlong flight ... is not necessarily indicative of wrongdoing, but it certainly is suggestive of such. *Wardlow*, 528 U.S. at 124, 120 S.Ct. at 676. The Court reasoned that nervous, evasive behavior is a pertinent factor in determining reasonable suspicion. *Wardlow*, 528 U.S. at 124, 120 S.Ct. at 676. The *Wardlow* Court described flight as “the consummate act of evasion...” *Wardlow*, 528 U.S. at 124, 120 S.Ct. at 676.

Taylor's actions of removing an unknown object from his pants and hiding it under the cushion is equally evasive and equally suspicious. Additionally, Taylor did not have the option of running for it like Wardlow did. There were several officers present and inside his house. The only option he had to leaving the cash in his pocket was to hide it while the officers were not looking. Taylor was successful in this attempt. The officers inside did not see him hiding the cash. It was the officer outside who actual saw Taylor hiding the cash. The act of hiding an object presence of police officers is sufficient to support. Morever, unlike *Wardlow* and most of the district court cases citing by Taylor[3], the reasonable suspicion here was obviously not based on the furtive gesture alone. The officers had a great deal of other information prior to entering Taylor's home.

Taylor's reliance on *Riley v. State*,722 So.2d 927 (Fla. 2d DCA 1998), is misplaced. The Second District held that the mere sight of defendant holding small object in her hand in her own home did not give deputy probable cause to seize object. Based on a tip, four officers went to Riley's house and asked for consent to search her house which she gave. While the officers were searching, one of them saw Riley with something in her left hand. He asked her what she had and she said "nothing". Without her permission, he physically removed from her hand the

[3] The district court cases cited by Taylor do not discuss or distinguish *Wardlow* or *Lightbourne v. State*, 438 So.2d 380 (Fla.1983). They are contrary this Court and the United States Supreme Court precedent.

object which turned out to be drugs. The deputy in *Riley* testified that he had no concern that defendant had weapon or that she would destroy the object. The trial court found that while she consented to the search of the house but she did not consent to the search of her person. The Second District agreed reasoning her concealment evidenced her lack of consent.

Here, unlike *Riley*, the officer were concerned for their safety. The small object in Riley could not have been a gun or knife. The object Taylor removed from his pocket could have a weapon. Either a gun of knife could have been under the cushion. Additionally, the tip in Riley involved drugs; whereas, here the situation here involved a missing person. Moreover, Riley was a probable cause case, not a reasonable suspicion. Reasonable suspicion is a lower standard. Furthermore, while concealment may show lack of consent in the sense that you do not want the police to find the object, the act of concealing gives the police probable cause to believe that the item is contraband.

Taylor argues that deputy Lindsey's order to stand and move away from the chair tainted Taylor's consent to search the cushion and Taylor's furtively hiding something under the cushion was not sufficient to justify a protective search for officer safety. First, the request or order to move away from the chair did not taint the consent. While this Court in *Popple* stated that there were three types of encounters, there are actually four. The fourth type is in between a consensual encounter and a *Terry* stop. It is a *de minimis* intrusion.

Pennsylvania v. Mimms, 434 U.S. 106, 98 S.Ct. 330, 54 L.Ed.2d 331 (1977)(holding that once vehicle is lawfully stopped, ordering driver out of car is a de minimis intrusion and driver has no Fourth Amendment interest in not being ordered out of car); *Maryland v. Wilson*, 519 U.S. 408, 117 S.Ct. 882, 886, 137 L.Ed.2d 41 (1997)(holding the police may order passengers out of a vehicle); *Hudson v. Hall*, 231 F.3d 1289, 1297 (11th Cir. 2000)(explaining that a police officer conducting a traffic stop may properly direct passengers to walk a reasonable distance away from the officer). Police officers may order citizens to do such things as exiting a car or removing their hands from their pockets and the encounter remains consensual. This fourth type was involved when the officers requested that Taylor get out of the chair. Whether the officer ordered or requested Taylor to move is constitutionally irrelevant; it is still a *di minimus* intrusion. Such instructions do not require any level of suspicion. Additionally, even if the order was a form of detention, detention does not invalidate the consent. Indeed, an person under arrest may still give valid consent to search his home.

Moreover, there was reasonable suspicion sufficient to justify ordering Taylor away and looking under the cushion for purposes of officer safety. Officer may order a suspect to move as part of a *Terry* stop. *United States v. Campa*, 234 F.3d 733, 739 (1st Cir. 2000)(finding that the Terry stop where the defendant were moved to the kitchen did not constituted a de facto arrest because while restraint on liberty was more severe in this

private apartment than in an open public setting, the defendant was not in a law-enforcement environment); *United States v. Maher*, 145 F.3d 907, 908-09 (7th Cir.1998)(police moved a suspect from his home to his front yard to do a pat-down). Once they discovered the cash they had reasonable suspicion to continue the detention for investigative purposes. The officers had the right to frisk and handcuff Taylor for their personal safety during this investigation. The officers could reasonably assume that Taylor may be armed and dangerous. The officer in *Terry* had not observed a weapon or any physical indication of a weapon. *Terry*, 392 U.S. at 28. The *Terry* Court explained that patting the clothes was not the "product of a volatile or inventive imagination, or was undertaken simply as an act of harassment". In *Terry*, it was the nature of the crime. *i.e.* robbery, that allowed the officer to frisk the defendant, not any additional facts regarding a weapon. This Court in *Reynolds v. State*, 592 So.2d 1082 (Fla.1992), agreed that reasonable belief that a suspect is armed and dangerous may be predicated on the nature of the crime. Reynolds argued that there were no specific, articulable facts that supported a reasonable belief that he was armed and dangerous to justify a pat-down. The State responded that a reasonable belief that a suspect may be armed may be predicated on the nature of the criminal activity, i.e. drug dealing. This Court agreed noting that the crime involved more than a simple street purchase of drugs. Thus, contrary to Taylor's claim, the trial court could properly rely on the fact that the officer were investigating a missing person who

disappeared with a large sum of cash to justify the officer frisking Taylor.

Additionally, this Court has held that furtive gestures justify a pat down. *Lightbourne v. State*, 438 So.2d 380 (Fla.1983). In *Lightbourne*, a police officer received a report of a suspicious car. *Lightbourne*, 438 So.2d at 387. The officer approached the defendant, who was sitting in a parked car, and asked him a few questions about his identity and the reasons for his presence. At this point, the officer had no probable cause or well-founded suspicion according to this Court. The officer conducted a pat-down. This Court stated that defendant's furtive movements and nervous appearance were sufficient to establish a reasonable ground for the officer to believe that the defendant was armed and potentially dangerous. *Lightbourne*, 438 So.2d at 388.

Handcuffing & placing in patrol car

Taylor asserts that the officer handcuffing him and placing him in the patrol car amounts to an arrest. First, while handcuffed inside his house, the officer removed the handcuffs once Taylor had been frisked and was outside in the patrol car. Officers may handcuff a suspect during a *Terry* detention and order him other places without the encounter becoming an arrest.

In *Reynolds v. State*, 592 So.2d 1082 (Fla.1992), this Court held that an officer may handcuff a suspect during a *Terry* stop depending on the demands of the situation. Once the pat-down reveals the absence of weapons the handcuffs should be removed.

Reynolds, 592 So.2d at 1085. The *Reynolds* Court also concluded that while a suspect's consent given while handcuffed could be valid, Reynold's consent was not valid. Reynolds that been told he was under arrested when he consented to be searched. The Court noted that due to inherently coercive nature of handcuffing, if a suspect is handcuffed at the time consent is given, the State's burden to show voluntariness would be "particularly difficult". *Reynolds*, 592 So.2d at 1085.

Here, unlike Reynolds, which occurred in public outside a store, Taylor was inside his house which could have contained firearms. But once the officer had Taylor outside where this was no longer a possibility, the officer removed the handcuffs. Moreover, Taylor was not handcuffed when he consented to the search of his car and trailer.

Taylor was placed in the backseat of the patrol car with the door open. Taylor was not even completely in the car - he had one foot outside the car. The handcuffs had been removed at this point.

In *United States v. Gil*, 204 F.3d 1347 (11th Cir. 2000), the Eleventh Circuit held that a suspect may be detained in a police car in handcuffs during a *Terry* stop without becoming a *de facto* arrest. Gil was convicted of conspiracy to possess cocaine with intent to distribute. She asserted that the *Terry* stop became an arrest when was detained for approximately 75 minutes and placed in handcuffs in a police car. The *Gil* Court explained that the handcuffing and being placed in the back of a police

car, although a severe form of intrusion, was necessary for officer safety and to protect the investigation *United States v. Gil*, 204 F.3d at 1351. Therefore, the motion to suppress was properly denied. *United States v. Cannon*, 29 F.3d 472 477(9th Cir. 1994)(asking suspect to sit in the back of the patrol car during the computer check on identification card was a reasonable precautionary measure); But see *Clinton v. State*, 780 So.2d 960 (Fla. 5th DCA 2001)(holding confinement in a locked police vehicle is a seizure); *Goss v. State*, 744 So.2d 1167 (Fla. 2d DCA 1999)(holding placing the suspect the patrol car was de facto arrest because the crime being investigating was a minor fraud crime not a violent or serious crime but agreeing that normally a *de facto* arrest involves physical removal from the scene and transportation, not just temporary placement, in a patrol car). Taylor was not arrested when he was partially placed in a patrol car with the door open and not handcuffed.

Driving Taylor to the station

Taylor asserts that driving him to the sheriff's office constituted a *de facto* arrest. The trial court found Taylor voluntarily accompanied the deputy to the sheriff's office. Consent is a factual question and a trial court's decision in this area should not be overturned unless clearly erroneous. *Davis v. State*, 594 So.2d 264, 266 (Fla.1992). The trial court found that Taylor was not treated as if he were under arrest. The sheriff's office policy was to handcuff those under arrest while transporting them and Taylor was not handcuffed during the trip to the sheriff's office. (III 508). Moreover, the officer

gave Taylor a ride to the sheriff's office because Taylor had consented to a search of his car and the evidence technicians had not arrived yet. So, Taylor had no means of transportation to the sheriff's office.

Deputy Noble told Taylor that the lead detective, Deputy Lester, "wanted" to speak with him at the sheriff's office. (III 415). The word "need" was defense counsel's, not the deputy's. (III 423). Nor does an officer's use of the word "need" for you to come to the station necessarily constitute an arrest. *United States v. Tobin*, 923 F.2d 1506, 1512 (11th Cir. 1991)(en banc)(holding consent to enter house was voluntary where agent knocked on the door for three to four minutes and shouted "I'm a police officer, I would like to talk to you, I need for you to come here," was a request which the defendant was free to deny).

When the deputy asked Taylor to go to the station, Taylor shrugged his shoulders. Shrugs and similar gestures as sufficient evidence of consent. *United States v. Wilson*, 895 F.2d 168, 172 (4th Cir.1990)(finding consent where defendant shrugged his shoulders and raised his arms); *United States v. Griffin*, 530 F.2d 739, 742 (7th Cir.1976)(noting that consent may be in the form of words, gesture, or conduct and finding consent to enter a house where person stepped back into the apartment, leaving the door open); *United States v. Stewart*, 93 F.3d 189, 192 (5th Cir.1996)(explaining that "magic words", such as "yes", are not necessary to evince consent; rather, inquiry is what a reasonable person would have understood by the exchange between the officer and the suspect); *Robbins v.*

MacKenzie, 364 F.2d 45, 47 (1st Cir.1966)(finding consent to enter a home where the defendant unlocked the door, opened it and then walked back into the room).

In *Suggs v. State*, 644 So.2d 64 (Fla. 1994), this Court held that a suspect's consent obtained after he voluntarily agreed to go to the police station, was voluntary. Suggs was convicted of first-degree murder, kidnapping, and robbery and sentenced to death. The victim who worked at a bar was missing. Money was missing from the bar as well. Police were on the look out for Suggs because he was the last person seen with the victim at the bar. Suggs was stopped for speeding. The police had not found the victim's body at this point. Suggs voluntarily agreed to accompany the officer to the station. Suggs was driven to the station in the officer's patrol car while an another officer drove Sugg's car to the station. Once at the station, Suggs voluntarily agreed to allow officers to search his home. The police found 170.00 in cash in the defendant's bathroom sink. This Court found that *Suggs* voluntarily agreed to go to the station. *Suggs*, 644 So.2d at 68

Hayes v. Florida, 470 U.S. 811, 105 S.Ct. 1643, 84 L.Ed.2d 705 (1985) is distinguishable. Hayes involved taking the suspect to the station for fingerprinting as part of a *Terry* stop which is not permitted. Here, the trial court found that the defendant consented to go to the sheriff's office.

Alternatively, the police had probable cause to arrest Taylor for grand theft once they saw the cash under the cushion.[4] *Michigan v. DeFillippo*, 443 U.S. 31, 37, 99 S.Ct. 2627, 61 L.Ed.2d 343 (1979)(defining probable cause to justify arrest as those facts that would warrant a prudent person, or one of reasonable caution, in believing that the suspect has committed, is committing, or is about to commit an offense.). Probable cause is a practical, nontechnical conception. *Illinois v. Gates*, 462 U.S. 213, 231, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983)). It does not even requiring a showing that the officer's belief is more likely true than false. *Texas v. Brown*, 460 U.S. 730, 742, 103 S.Ct. 1535, 75 L.Ed.2d 502 (1983). Probable cause analysis only requires that there is a "fair probability" that a violation occurred. *United States v. Antone*, 753 F.2d 1301, 1304 (5th Cir.1985). Probable cause even allows for reasonable mistakes. *Gerstein v. Pugh*, 420 U.S. 103, 112, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975).

The fact that the police did not, at the time of the alleged arrest, know that a murder had occurred is not relevant, as long

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[4] Detective Lester testified that he did not have probable to arrest Taylor. However, an officer's personal opinion as to whether probable cause exists is irrelevant. *Knox v. State*, 689 So.2d 1224, 1225 (Fla. 5th DCA 1997)(noting that it seems well settled that the officer's personal opinion as to whether probable cause exists is irrelevant); *Routly v. State*, 440 So.2d 1257, 1260-1261 (Fla.1983)(explaining that the legal conclusion of the officer regarding the existence of probable cause does not prevent the state from arguing and presenting evidence that probable cause did in fact exist); *Florida v. Royer*, 460 U.S. 491, 507, 103 S.Ct. 1319,1329, 75 L.Ed.2d 229, 242 (1983)(stating that the fact that the officers did not believe there was probable cause would not foreclose the State from justifying custody by proving probable cause).

as they had probable cause to believe some offense had been committed. Here, when the officer contacted the bank and was informed no deposit had been made, the officer knew that at least grand theft had been committed. Taylor was one of two person who was last seen near the money that was taken. The police also knew that the other person who was missing was unlikely to have been involved in the theft. This was not an just employee missing with the money. She was the daughter of the owners of the money. The officers knew the victim and her character. Moreover, the officers were familiar with the business and its operations. The officer knew that she routinely made these deposits with no problem. Taylor was the last person seen with her in her car on the way to the bank. Taylor was identified by a person who knew him. Taylor was seen with the victim at 1:10 and she was suppose to make that deposit before 2:00. The officers then observed Taylor hiding a wad of cash including 100 dollar bills just as they were questioning him about her disappearance. His statement that he wasn't hiding anything was contradicted by the personal observation of the officer and was belied by the officers finding the wad of cash under the cushion. Moreover, Taylor's statement that the victim drove him to his trailer contradicted the statement of the victim who had said she was going to give Taylor a ride to Green Cove. And now in the face of an investigation regarding that missing person and money, Taylor was hiding cash from the officers. Additionally, the officers located more cash under the passenger seat of Taylor's car in a Crown Royal bag which

is an unusual place to store cash. The reasonable inference is that the money in the car was recently acquired. They knew that Taylor was unemployed yet he had large sums of cash. The officers had probable cause to belief that he was involved in taking this money. Thus, while the officers may not have had probable cause to arrest Taylor for murder and robbery prior to locating the victim’s body, they did have probable cause to arrest Taylor at his home for grand theft once they discovered the cash.

In *United States v. Gil*, 204 F.3d 1347 (11th Cir. 2000), the Eleventh Circuit noted that the officers had probable cause to arrest the suspect. While the *Gil* Court determined that the seizure was a *Terry* stop, not an arrest, the Court observed that the officer could have properly arrested Gil. *Gil*, 204 F.3d at 1350, n.2. Ms. Gil's husband had been meeting with a confidential informant for several months. Mr. Gil planned to purchase twenty kilograms of cocaine. Mr. Gil obtained the first five kilograms of cocaine and took the cocaine back to the house he shared with Ms. Gil to be tested. Approximately fifteen minutes later, federal agents observed Ms. Gil leaving the residence. She was carrying plastic bags large enough to contain either cocaine or money. Ms. Gil placed the bags in a yellow Cadillac and drove away. A few blocks from the house, the agents stopped her car. They requested permission to search which was granted. The agents discovered a plastic bag containing $12,500.00. When an agent asked Ms. Gil who the money belonged to, she stated she did not know. On the way back

to the house an agent again ask her who the money belong to and that time she admitted it was her husband's money. The Gil Court explained that in the alternative, the officer had had probable cause to arrest Ms. Gil at the time that they discovered the bag containing $12,500 in her car. Ms. Gil must have known that the bag contained a large quantity of cash. This knowledge combined with the fact that Ms. Gil left the house fifteen minutes after the cocaine arrived, was sufficient evidence to establish probable cause.

Here, as in *Gil*, the officer had probable cause to arrest Taylor for grand theft upon the discovery of the money under the cushion.

Right to refuse consent

Taylor asserts that there is no evidence that the police advised him of his right to refuse. First, a suspect does not have to be informed of his right to refuse. *Schneckloth v. Bustamonte*, 412 U.S. 218, 247-248, 93 S.Ct. 2041, 2058, 36 L.Ed.2d 854 (1973). Taylor's consent to search was valid regardless of his knowledge of his right to refuse. Moreover, as Taylor acknowledges, the consent form that he signed contained a statement informing him of his right to refuse. There is no requirement that the police read the form to a suspect.

Taylor's reliance on *Gonzalez v. State*, 578 So.2d 729 (Fla. 3d DCA 1991), is misplaced. The officers in *Gonzalez* obtain consent to enter the house "to speak with her"; They did not

obtain consent to search. So, the officer's room-to-room search immediately after entering home was an unreasonable warrantless search. *Gonzalez* is an outside the scope of consent case. The officers obtained consent to enter the house but began searching the house without consent. The police obtained consent to do one thing, *i.e.* enter the house, and then proceeded to do another thing without consent, *i.e.*, search the house.

Here, in contrast, the officer obtained consent to search the car and then searched the car. The officers specifically obtained consent to search his trailer as well. Thus, here, the officer obtained consent prior to and specifically for the searches. Thus, the trial court properly denied the motion to suppress.

<u>Remedy</u>

Even of the officer driving Taylor to the station constitutes a *de facto* arrest for which there was no probable cause, the only evidence that was suppressable based on this allegedly illegal arrest is Taylor's underwear. The officer had obtained Taylor's written consent to search the car and his house prior to driving Taylor to the sheriff's office. Moreover, Taylor had made both statements. *i.e.*, that Shannon gave him a ride to his trailer not Green Cove and the statement "I had it" referring to the cash, prior to the officer requesting that Taylor accompany him to the sheriff's office. Thus, the cash and Taylor's statements are admissible regardless of the possible illegal arrest.

ISSUE II

DID THE TRIAL COURT PROPERLY ADMIT THE TESTIMONY OF FOUR WITNESS THAT THE VICTIM SAID THAT SHE PLANNED TO GIVE TAYLOR A RIDE TO GREEN COVE UNDER THE STATE OF MIND EXCEPTION TO THE HEARSAY RULE? (Restated)

Taylor asserts that the trial court improperly admitted the testimony of four witness who testified that the victim said, as she was leaving to make the bank deposit, that she was giving Taylor a ride into Green Cove Springs with her. Taylor claims that this testimony was hearsay. However, these statements are covered by the hearsay exception concerning statements of intent or plan. § 90.803(3), Fla. Stat. Historically, a murder victim's statement that she was taking a trip and the purpose of that trip was admissible. Additionally, the statement is admissible as an admission by a party opponent. Taylor adopted that statement by his conduct. Nor did the admission of this statement violate the Confrontation Clause. Taylor's murder of the declarant waived his confrontation rights. Thus, the trial court properly admitted the victim's statements.

The trial court's ruling

Joseph Dunn, a meter reader for Florida Power & Light, testified. (XII 1048). He knew the victim. (XII 1049). He worked in the area and went to the store for lunch on the day of the murder. (XII 1050). He was not sure of the time. (XII 1055). Mr. Dunn saw a man get up from a picnic table and enter Shannon's car and seat in the passenger seat at the same time He saw Shannon walk out of the store and get into the driver's seat

of car. (XII 1053-1056). On her way out of the store, Mr Dunn saw Shannon stop to talk with some people. (XII 1058). He heard the conversation. Defense counsel objected that the victim's statement was hearsay which was not covered by an exception. (XII 1058). The prosecutor argued that spontaneous statement and the state of mind exceptions covered the statement. (XII 1059). Defense counsel asserted that the victim's state of mind was not relevant. The prosecutor relying on *Peede v. State*, 474 So.2d 808, 816 (Fla. 1985), explained that in a kidnapping case, the victim's state of mind is relevant. The prosecution intended to ask for an kidnapping instruction based on the fact that the victim's body was found in the woods. (XII 1061). The prosecutor also argued that the victim's statement was covered by the spontaneous statement exception because she saw that these men were watching her and that they saw the man in her car. (XII 1060). Defense counsel asserted that the State was putting the evidence in to show what Taylor asked the victim to do. The prosecutor responded it was also to show where the victim intended to take Taylor and the purpose for which he was in her car. (XII 1062,1067). Defense counsel argued that the statement was not covered by the spontaneous statement exception because there was no evidence that the victim was describing something that she had just perceived. (XII 1063-1064). Defense counsel stated that he could not cross-examine her about "because the declarant isn't here. (XII 1067). The trial court quoting *Peede v. State*, 474 So.2d 808, 816 (Fla. 1985), agreed that it was hearsay but that the reasoned that her state of mind

was at issue. (XII 1064-1067). The trial court overruled the objection. (XII 1068).

Arthur Mishoe, who often went to Buddy Boy's store, testified. (XII 1074). He knew Shannon. (XII 1076). He was at the store on the day of the murder and saw Shannon at the gas pump. (XII 1079). He and his uncle Nolan Metcalf were talking to the FPL meter man. (XII 1080). Mr. Mishoe, saw a man who he could not identify, in the passenger side of Shannon's red Ford Mustang. (XII 1080-1081). Mr. Mishoe testified that he heard Shannon her his uncle not to tell her husband that she was giving a guy a ride to Green Cove to get his car. (XII 1082). Defense counsel objected making the same objection and requesting standing objections to the victim's statement for each witness. The trial court responded : "right" (XII 1082). Mr. Mishoe then testified that Shannon then got in the driver seat and drove off. (XII 1083).

Alex Metcalf, a truck driver who is a frequent customer of Buddy Boy's and Mishoe's uncle, testified (XII 1107). He had known the victim since she was a little girl. (XII 1108). Mr. Metcalf also knew Taylor. (XII 1110). Mr. Metcalf went to the store on the day of the murder at 12:30 or 12:45 for a drink with his nephew. (XII 1108). Inside the store, he heard Cindy and Shannon arguing in "pretty loud" voices about Shannon's intention to give Taylor a ride. (XII 1112). Defense counsel objected that this was also hearsay. (XII 1113). Mr. Metcalf exited the store and was talking to the meter man when he saw Taylor standing at the passenger side of Shannon's car. (XII

1114-1115). As Shannon exited the store, she asked Mr. Metcalf not to say anything to Jeff, her husband, about giving Taylor a ride to Green Cove to rent a car. (XII 1115-1116). Taylor got into Shannon's car in the passenger seat just as Shannon was making the statement. (XII 1116). They drove off going North on 13. (XII 1117)

Cindy Schmermund, who was an employee for six years at Buddy Boy's, testified. (XII 1122). She was friend with Shannon. (XII 1124). She knew Taylor who was a weekly customer for the past eight months. (XII 1128-1129). She explained that Shannon was going to Barnett Bank in Green Cove Springs to make the deposit and that the deposit had to be made by 2:00 (XII 1125-1126). It was about 12:50 or 1:00 when Shannon started to get ready to go. (XII 1126). When Shannon pulled up to the gas pump, Ms. Schmermund, saw Taylor get out of the passenger side and start pumping gas. (XII 1133, 1137). She was surprised to see Taylor in the car. (XII 1134). Defense counsel objected based on relevance and hearsay. (XII 1137). The prosecutor explained that this testimony was showed that she went to Green Cove Springs not his trailer and her state of mind was therefore, relevant. (XII 1139). The testimony rebutted his Taylor's defense that she only gave him a ride to his trailer not Green Cove Springs. (XII 1139.). The trial court overruled the objection. Ms. Schmermund was concerned that Shannon was taking Taylor with her. (XII 1139). Ms. Schmermund understood that Shannon was taking Taylor to Green Cove Springs to pick up a rental car. (XII 1140).

Preservation

This issue is preserved. Defense counsel objected when the first witness testified to the victim's statement on the same ground he asserts as error in appeal. Moreover, defense counsel requested a standing objection to the victim's statement for each witness which the trial court granted. (XII 1082). Thus, the issue is properly preserved for appellate review.

The standard of review

The admission of evidence is within the trial court's discretion and will not be reversed unless defendant demonstrates an abuse of discretion. *Thomas v. State*, 748 So.2d 970, 982 (Fla. 1999); *General Elec. Co. v. Joiner*, 522 U.S. 136, 118 S.Ct. 512, 517, 139 L.Ed.2d 508 (1997)(stating that all evidentiary rulings are reviewed for "abuse of discretion"). Under this standard, a determination of that the statement are admissible will be upheld by the appellate court "unless the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable man would take the view adopted by the trial court." *Canakaris v. Canakaris*, 382 So.2d 1197, 1203 (Fla. 1980). The abuse of discretion standard of review is one of the most difficult for an appellant to satisfy. *Ford v. Ford*, 700 So.2d 191, 195 (Fla. 4th DCA 1997).

Merits

The hearsay exceptions statute, § 90.803(3), provides:

> The provision of s. 90.802 to the contrary notwithstanding, the following are not inadmissible as evidence, even though the declarant is available as a witness:
>
> Then-existing mental, emotional, or physical condition.--
>
> (a) A statement of the declarant's then-existing state of mind, emotion, or physical sensation, including a statement of intent, plan, motive, design, mental feeling, pain, or bodily health, when such evidence is offered to:
>
> 1. Prove the declarant's state of mind, emotion, or physical sensation at that time or at any other time when such state is an issue in the action.
>
> 2. Prove or explain acts of subsequent conduct of the declarant.

The victim's statement that she was going to give Taylor a ride to Green Cove Springs was her plan or intention. The victim's statement was a statement of intent or plan which proved her subsequent conduct of giving Taylor a ride to Green Cove Springs.

The testimony fits squarely within the statutory exception and therefore, is admissible.

Traditionally, a murder victim's statement on setting out on the journey which is an explanatory of the journey is admissible. In *Thornton v. State*, 45 So.2d 298 (Ala 1950), the Alabama Supreme Court held that a declarant's statement regarding a trip was admissible over a hearsay challenge. Thornton was convicted of first degree murder. The victim told his wife that he was going to the defendant's house to get back the several hundred dollars that he loaned the defendant. The victim's body was located near the defendant's house the next day and the several hundred dollars was found in the defendant's house. Defendant made contradictory statements regarding the

money. Thornton objected to the wife's testimony as hearsay. The *Thornton* Court held the statement was admissible as res gestae. The Court explained that statements made at the beginning of a trip are admissible to establish that the trip was made. *See also Zumbado v. State*, 615 So.2d 1223, 1236 (Ala. App. 1993)(allowing testimony of victim's intent to travel with defendant prior to murder over hearsay objection citing and quoting);*Hayes v. State*, 395 So.2d 127, 141 (Ala. App 1981)(holding that murder victim's statement to her friends that she would get a ride home with the defendant was admissible because a statement on setting out on the journey which is an explanatory of the journey is admissible as *res gestae* evidence).[5] This Court has admitted such statements. *Bowen v. Keen*, 154 Fla. 161, 17 So.2d 706, 711 (1944)(stating that statements of a deceased person as to the purpose and destination of a trip or journey he is about to make are

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[5] These case are still valid even though the res gestae reasoning is out-dated. Florida's Evidence Code retained much of old "res gestae" concept and codified the doctrine in three exceptions including the state of mind exception. *State v. Adams*, 683 So.2d 517 (Fla. 2d DCA 1996)(noting that to the extent that evidentiary doctrine of res gestae has been incorporated into specific provisions of the Florida Evidence Code, it retains its vitality); *Alexander v. State*, 627 So.2d 35, 43 (Fla. 1st DCA 1993)(explaining that the res gestae rule was now codified in sections 90.803(1), (2), and (3), Florida Statutes (1991), which define the conditions for admissibility of (1) spontaneous statements, (2) excited utterances, and (3) then existing mental and emotional conditions of the declarant). Thus, these cases are valid under the Evidence Code's state of mind exception.

admissible in worker compensation case). Federal courts also have admitted such statements.[6]

In *Muhammad v. State*, 782 So.2d 343 (Fla. 2001), this Court held the victim's statement were not admissible under the state of mind hearsay exception. Muhammad was convicted of first degree murder. The victim was speaking on the phone with his mother when Muhammad approached him. The victim ran and Muhammad chased after him shooting him. At trial, the victim's mother testified regarding the phone call. She testified that her son said he was planning to go to the courthouse to obtain a license for his business. She further testified that her son was talking about the business and getting excited and talking about his life. Defense counsel objected based on hearsay. The State argued that the hearsay testimony was admissible under the exception for statements of future plans or intent. This Court

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[6]*Shelden v. Barre Belt Granite Employer Union Pension Fund*, 25 F.3d 74, 79 (2d Cir. 1994)(explaining that it is "well settled" that the existence of a plan to do a given act is relevant to show that thereafter the act was in fact done and under a long-established exception to the hearsay rule, the existence of the plan or intention may be proven by evidence of the person's own statements as to its existence. citing 6 J. Wigmore, Evidence Sec. 1725, at 129 (Chadbourn rev. 1976) and *Mutual Life Insurance Co. v. Hillmon*, 145 U.S. 285, 294-300, 12 S.Ct. 909, 912-14, 36 L.Ed. 706 (1892) and Fed.R.Evid. 803(3)(hearsay statement of declarant's then-existing intention or plan to perform a certain act is not excluded by hearsay rule and holding admissible testimony employee's friend that the employee asked him to take him to the Union office to apply for disability pension benefits and the friend's description of that trip was admissible to show that employee in fact made such an application); *Great Am. Indem. Co. v. McCaskill*, 240 F.2d 80, 82 (5th Cir.1957)(finding that statements of a decedent prior to his death to his brother regarding the purpose of his trip were admissible under a well recognized exception to the hearsay rule).

held that the evidence was not admissible prove or explain acts of subsequent conduct of the declarant pursuant to § 90.803(3)(a)2 because the victim's statement that he was planned to go to the courthouse was not offered to prove that he subsequently went to the courthouse. Thus, the statement was not admissible under this exception.

Here, unlike *Muhammad*, the State introduced the victim's statements that she was planning to give Taylor a ride to Green Cove Springs to prove she subsequently went to Green Cove Springs with Taylor. The State used the victim's statements in the exact manner that the *Muhammad* Court stated was proper.

This Court's recent decision in *Brooks v. State*, 2001 WL 326683 (Fla. 2001), is distinguishable. The victim's statements reflected her intent to travel with co-perpetrator, not Brooks and therefore, their admission was error. The *Brooks* Court explained that statements of intent can ordinarily be used to prove the subsequent acts of the declarant, not a defendant. Because the victim's statement were used to establish that Brook went on the trip not merely the co-perpetrator, the admission of the victim's statements was error.

Here, unlike *Brooks*, there is no third party involved. There is no co-perpetrator. The victim's statement did not concern a third person; her statement concerned herself and the defendant Taylor. Thus, the problem in *Brooks* did not arise in this case.

Additionally, the victim's state of mind becomes an issue to rebut a defense raised by the defendant. As this Court explained in *Stoll v. State*, 762 So.2d 870, 875 (Fla. 2000),

relying on *State v. Bradford*, 658 So.2d 572, 574-75 (Fla. 5th DCA 1995), the victim's statements of fear of the defendant may become admissible to rebut the defendant's theory that the victim willingly let him inside her car and that is how his fingerprint got in her car. The *Stoll* Court explained that only if the defendant puts forth the theory that the victim willingly let him in her car, does her state of mind become an issue.

Taylor's defense, which was explained to the jury in opening statements, was that while the victim gave him a ride, it was a ride to his trailer not to Green Cove Springs. The State was entitled to rebut the defense that they never went to Green Cove with the victim's statement that she was giving him a ride to Green Cove Springs, not his trailer.

Additionally, as *Peede v. State*, 474 So.2d 808, 816 (Fla.1985), the State was entitled to introduce this statement to prove the kidnapping theory of felony murder. In *Peede*, the victim voluntary agreed to pick Peede up at the airport but she did not agree to go outside of Miami or to North Carolina. Peede was charged with kidnapping and it was necessary for the State to prove that the victim had been forcibly abducted against her will. This Court held that the trial court did not abuse its discretion in admitting the victim's statements to her daughter just prior to her disappearance because they demonstrated the declarant's state of mind at that time was not to voluntarily accompany the defendant outside of Miami or to North Carolina.

Here, as in *Peede*, while the victim agreed to drive Taylor to Green Cove but she did not agree to drive him two miles past her destination to the woods. Taylor attempts to distinguish *Peede* by claiming that he does not dispute that the victim was kidnapped just not by him but that is not the point. The point is that the State's was required to prove that Shannon had been forcibly abducted against her will. It is not Taylor's defense that defines relevant evidence under *Peede*. It is the State's theory that defines the relevant evidence under *Peede*. The victim's statement established the scope of her consent. All the witness at Buddy Boy's testified that the victim willingly gave Taylor a ride. Without the statement, the jury would not have known the exact contours of that agreement. Thus, this statement was admissible under the same logic as *Peede*.

Alternatively[7], the statement was admissible as an admission by a party opponent. The hearsay exception statute, § 90.803(18)(b), provides:

> Admissions.--A statement that is offered against a party and is:
>
> A statement of which the party has manifested an adoption or belief in its truth;

Unlike the cases cited by Taylor, the defendant was present when the victim made the statement. Taylor's conduct manifested a

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[7] The *Muhammad* Court states that this Court has disapproved of the tactic of arguing for the first time on appeal that evidence was admissible because it was nonhearsay. *Id citing Hayes v. State*, 581 So.2d 121, 124 n. 8 (Fla.1991). However, the *Muhammad* Court then states that a trial court's ruling on an evidentiary matter will be affirmed even if the trial court ruled for the wrong reasons, *citing Caso v. State*, 524 So.2d 422, 424 (Fla. 1988). The first statement is wrong. The *Hayes* footnote does not "disapprove of the tactic" of arguing for the first time on appeal that the testimony was not hearsay; rather, it just observes that the argument was not timely made in the trial court and informs litigants to specifically state their objection in the trial court. This statement clearly applies to trial attorneys, not appellate attorneys. Moreover, this paragraph is contradictory in that it seems to imply that it is improper for an appellate attorney to argue an alternative basis but proper for the Court to do so on its own. *Helvering v. Gowran*, 302 U.S. 238, 245, 58 S.Ct. 154, 158, 82 L.Ed. 224 (1937)(holding that "if the decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason"). Furthermore, making alternative arguments on appeal is not a "tactic"; it is a well recognized appellate principle and practice. *Dade County School Bd. v. Radio Station WQBA*, 731 So.2d 638, 645 (Fla.1999)(observing that "if an appellate court, in considering whether to uphold or overturn a lower court's judgment, is not limited to consideration of the reasons given by the trial court . . ., it follows that an appellee is not limited to legal arguments expressly asserted as grounds for the judgment in the court below and explaining that it stands to reason that the appellee can present any argument supported by the record even if not expressly asserted in the lower court"). Thus, the State may properly assert this position for the first time on appeal.

belief in the statement. *Neuman v. Rivers*,125 F.3d 315, 320 (6th Cir. 1997)(explaining that the adoption can be manifested by any appropriate means, such as language, conduct, or silence). Taylor got in the passenger's seat of the victim's car just as Shannon was making this statement to Mr. Metcalf. He obviously thought that the victim was going to give him a ride. The victim was outside the store heading toward her car and the car was parked at the pump closest to the store with the passenger side of the victim's car being closest to the store. Taylor's conduct manifested a belief in the statement. Thus, the victim's statement also was admissible as a admission by a party opponent.

Taylor argues that the statements are unreliable because the declarant was "unavailable" and that their admission violated his Confrontation rights. First, both the state of mind exception and the party opponent exception are firmly rooted and therefore, evidence admitted pursuant to either does not violate the confrontation clause. *White v. Illinois*, 502 U.S. 346, 356 & n.8, 112 S.Ct. 736, 743, 116 L.Ed.2d 848 (1992)(explaining that the Confrontation Clause is not violated when the declaration falls within a firmly rooted hearsay exception); *Terrovona v. Kincheloe*, 852 F.2d 424, 427 (9th Cir. 1988)(finding no Confrontation Clause violation where declarant's statement was within firmly-rooted state of mind exception in a murder case where the victim telephoned the defendant to come help him and the defendant's girlfriend testified that the defendant told her this before leaving which

was used to show that defendant intended to meet and to help the victim which placed the defendant at the murder scene); *Nelson v. State*, 748 So.2d 237, 243 (Fla. 1999)(finding the testimony of two persons who heard a conversation regarding the murder to be admissible as an admission by silence and therefore, because there was an admission by the defendant, there can be no Confrontation Clause violation). Moreover, the declarant was unavailable because Taylor killed her. *United States v. Rouco*, 765 F.2d 983, 995 (11th Cir. 1985)(concluding that the defendant waived his right to confront the witness by killing him and quoting the Fifth Circuit: "[t]he law simply cannot countenance a defendant deriving benefits from murdering the chief witness against him."). Taylor waived any confrontation rights. Hence, the admission of the statement did not violate his right to cross-examination.

Harmless Error

The error if any, was harmless. *Muhammad v. State*, 782 So.2d 343 (Fla. 2001)(concluding that the error in admitting the hearsay which did not properly fall within the state of mind exception was harmless because there was no reasonable possibility that the admission of these statements contributed to the guilty verdict). Here, the statements were not as important as the conduct that these witnesses saw. The four witnesses placed Taylor in passenger seat of the victim's car with their own eyes. There was independent testimony that the victim had the bank deposit with her at that time and was going

to Green Cove Springs to deposit the funds in the bank. Even without the victim's statement, the jury would have known that Taylor was in the car with the victim as she started her trip into Green Cove Springs with the bank deposit. Thus, the error if any was harmless.

ISSUE III

DID THE TRIAL COURT PROPERLY ADMIT THE CREDIT APPLICATION? (Restated)

Taylor argues that the evidence relating to his credit application for the purchase of a truck which contained lies was irrelevant and improper propensity evidence. The State respectfully disagrees. First, the application was relevant. The dealership was located in Green Cove Springs. The testimony established that Taylor was in Green Cove Springs continuing to discuss the purchase of the truck on the day of the murder. Furthermore, there was no prejudice because the prosecutors did not use the application as improper character or propensity evidence. Additionally, the error, if any, was harmless because the jury would not use Taylor's lie on the applications about his current employment status to convict him of murder. Thus, the trial court properly admitted the evidence.

The trial court's ruling

The State presented the testimony of Lisa Brumbach, an employee at Garber Ford Mercury in Green Cove Springs. VII 1331. On December 23, 1997, she showed Taylor and his son a truck and let them take a test drive. VII 1334. She testified that she pulled a credit report on Taylor. Defense counsel objected to the admission of the credit report as "an attack on character" and not relevant. VII 1335-1336. While defense counsel admitted that the dealership form was relevant, he asserted the credit application was not important to put in. The prosecutor agreed to delete the credit report but explained that he wanted to

explore how much money Taylor would have to pay as a down payment for the truck. Defense counsel agreed to removing the credit report but also assert that the credit application should not be admitted. VII 1337. Defense counsel claimed that only the dealership form that Taylor signed should be admitted. The trial court then inquired what was the objection to the credit application. VII 1338. Defense counsel stated "it's got a lot of statements by Mr. Taylor on it" and was not relevant. Defense counsel identified one of the statements as what his monthly salary was and asserted that the State can argue that he lied in this application because he was fired from his job and the lies on the application had nothing to do with the murder. The prosecutor then attempted to explained that the State was not interested in the lie about his employment on the application. The trial court overruled the objection. VII 1338. The witness then testified that Taylor told her he was getting a check for $4,000 and that in her opinion someone with his credit history would need a "good chuck of change down". VII 1341-1342. She also testified that Taylor returned on December 29, 1997, (the day of the murder) and told her that while he did not have the money yet, she would be hearing from him. VII 1343. On cross-examination, the witness testified that Taylor would need approximately $1,000.00 dollars as a down payment.

The standard of review

The admission of evidence is within the trial court's discretion and will not be reversed unless there is an abuse of

discretion. *Thomas v. State*, 748 So.2d 970, 982 (Fla. 1999); *United States v. Vaandering*, 50 F.3d 696, 704(9th Cir. 1995)(stating that a district court's ruling on the relevance of evidence is reviewed for an abuse of discretion).

Merits

The admissibility of relevant evidence statute, § 90.402, Florida Statutes provides:

> All relevant evidence is admissible, except as provided by law.

The definition of relevant evidence statute, § 90.401, Florida Statutes, provides:

> Relevant evidence is evidence tending to prove or disprove a material fact.

The relevance of this application form is that the State was establishing that Taylor, who was unemployed at the time, began a transaction to purchase a truck that he would need a large cash down payment to complete. Moreover, Garber Ford Mercury is located in Green Cove Springs. The employee testified that Taylor was at the dealership on the day of the murder to discuss the purchase of the truck. Thus, application is relevant because it tends to prove Taylor whereabouts on the day of the murder.

Taylor claims that the credit application was not necessary to establish that Taylor was going to purchase a truck; rather, this same proposition could have been established using the dealership form alone. However, necessity is not part of relevancy. *Gore v. State*,475 So.2d 1205, 1208 (Fla.

1985)(explaining that the test of admissibility is relevancy and not necessity). Because of the State's high burden of proof, *i.e.*, beyond a reasonable doubt, it "needs" every piece of evidence available. The application was relevant and therefore admissible.

Additionally, to the extent that appellant is arguing that the prejudicial effect substantially outweighed the probative value of this evidence, there was no prejudice. The prosecutors did not use the evidence in this manner. While prosecutors established that Taylor was unemployed, the purpose was to highlight to the jury that unemployed man had thousands of dollars. The prosecutor did not attempt to persuade the jury that they should convict based on the lie regarding Taylor's current employment status containing in the credit application. There was no improper character or propensity use of this evidence.

Appellant's reliance on *Bozeman v. State*, 698 So.2d 629 (Fla. 4th DCA 1997), is misplaced. Bozeman was convicted of battery on a police officer and resisting an officer with violence. The testimony was that Bozeman was in a "special management" unit and the jury heard testimony that to be placed in the unit, an inmate had to be "violent," and "have exhibited that propensity for violent behavior towards other inmates and staff." The *Bozeman* Court held this evidence was inadmissible prior bad acts

evidence used to prove that defendant acted consistently with pattern of conduct in striking officer. So, in *Bozeman* what the jury heard was the worst type of propensity evidence, *i.e.*, that the defendant had a habit of striking officers which was the exact charged crime. Here, by contrast, the jury heard nothing of the sort. Mispresentations on credit application are not prejudicial propensity evidence in a murder case.

Harmless Error

Moreover, any error in the admission of this testimony is harmless. The general rule is that the erroneous admission of collateral crime evidence is presumptively harmful. *Czubak v. State*, 570 So.2d 925, 928 (Fla.1990)(remanding for a new trial based improper admission of the fact that defendant was an escaped convicted). However, the rule that collateral crime evidence is presumptively harmful is only true depending on the seriousness of the collateral crime. This type of propensity evidence is akin to speeding tickets. If a jury improperly hears evidence of a nonviolent misdemeanor, they will not convict a defendant for a serious violent felony based on such a minor collateral crime. Even if you view the lie on the application in the worst light, as evidence of credit fraud, jury heard evidence of an credit application fraud which is a minor, white-collar, non-violent crime. The jury would not

convict Taylor of this brutal first degree murder in which the victim was stabbed nine times and sentenced Taylor to death based on his propensity to fill out forms incorrectly.

Moreover, all the additional evidence of Taylor's guilt renders the admission of the application harmless. The underwear that Taylor was wearing when arrested had blood on it that was an DNA match of the victim. Taylor, not Michael McJunkin, was the one with $1672.00 in his pocket. Taylor, not Michael McJunkin, was the one who deposited $1,700 in his bank account the same day after the robbery. Taylor, not Michael McJunkin, was the one who was paying off his debts at Trader Jack's and handing out $200.00 tips to the waitress the night of the robbery. Thus, the error, if any, was harmless.

ISSUE IV

DID THE TRIAL COURT PROPERLY PERMIT THE PROSECUTOR TO REHABILITATE DEPUTY NOBLE? (Restated)

Taylor asserts that the trial court improperly allowed the prosecutor to rehabilitate Deputy Noble by introducing his prior suppression hearing testimony because the testimony does not fit in the prior consistent statement hearsay exception. This prior testimony was admissible to rehabilitate regardless of the prior consistent statement hearsay exception. Deputy Noble's suppression testimony was admissible because it rebutted defense counsel's implication that Deputy Noble's trial testimony was unreliable. Moreover, the error, if any was harmless. Thus, the trial court properly permitted this rehabilitation.

The trial court's ruling

Deputy Noble testified that when the officers discovered the cash under the cushion, he asked Taylor about the money. (VIII 1499). Taylor responded: "I've had it". Deputy Noble further testified that Taylor said that he had more money in the car under the passenger seat. (VIII 1506-1507,1514). During cross examination, defense counsel asked a series of questions about the importance of accurate and prompt written reports in investigation. (VIII 1515-1517). Defense counsel elicited that the "lengthy" six page missing person report Deputy Noble wrote

contained a great many details. The report was written on December 30, 1997 the day Taylor was arrested. Defense counsel pointed out that the report did not contain Taylor's statement that there was more money in the car (VIII 1517). The second prosecutor then referred to deputy Noble's testimony at the suppress hearing held in January 1999. (VIII 1521). Defense counsel objected claiming that this was a prior consistent statement which is only permitted if the motive to falsify arises before the statement was made. (VIII 1473)[8]. The trial court overruled the objection. (1475). The prosecutor then asked deputy Noble if he recalled his prior suppression testimony where he testified that he discovered the money under the passenger seat in the Crown Royal bag "where he indicted to me, I guess, that the money was". (1524). Deputy Noble the testified that his "I guess" testimony meant that he could not recall Taylor's exact words but that Taylor "indicted to me in some form or fashion by statement or motion or whatever" that there was additional money under the passenger seat of his car. (1524-1525). Deputy Noble testified that defense counsel was correct that Taylor's statement was not in his report. (1526).

[8] Deputy Noble's testimony was presented via videotape. The transcript contains objections during the taping that do not appear during the version shown to the jury.

Preservation

This issue is preserved. Defense counsel objected in the trial court on the same grounds Taylor asserts as error in this appeal.

The standard of review

The admissibility of evidence is within the sound discretion of the trial court, and the trial court's ruling will not be reversed unless there has been a clear abuse of that discretion. *Ray v. State*, 755 So. 2d 604, 610 (Fla. 2000); *Zack v. State*, 753 So. 2d 9, 25 (Fla. 2000); *Cole v. State*, 701 So. 2d 845 (Fla. 1997); *Jent v. State*, 408 So. 2d 1024, 1039 (Fla. 1981); *General Elec. Co. v. Joiner*, 522 U.S. 136, 118 S.Ct. 512, 517, 139 L.Ed.2d 508 (1997) (stating that all evidentiary rulings are reviewed for "abuse of discretion").

Merits

The exceptions to the hearsay, statute, § 90.801(2)(b), Fla. Stat., provides:

> A statement is not hearsay if the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement and the statement is:
>
> Consistent with the declarant's testimony and is offered to rebut an express or implied charge against the

declarant of improper influence, motive, or recent fabrication

However, this rule does not govern the admissibility of this evidence. This evidence rule, excluding certain prior consistent statements from definition of hearsay and permitting them to be used as substantive evidence, does not restrict admissibility of prior consistent statements that are offered, not as substantive evidence, but to rehabilitate a witness. When a prior consistent statement is offered to rehabilitate witness, a more relaxed standard is applied. The requirements of rule do not apply. The rule governs the admissibility of evidence use as substantive evidence of guilt, not as here, were the evidence is used solely to rebut or rehabilitate. The prior consistent statement hearsay exception did not displace the common law rule that prior consistent statements could be introduced to rehabilitate a witness. The common law doctrine about prior consistent statements was that prior statements were admissible if the statement tended to show the statement is not really inconsistent when it is understood in its proper context. *United States v. Ellis*, 121 F.3d 908, 920 (4th Cir.1997); *United States v Simonelli*, 237 F.3d 19, 27 (1st Cir. 2001)(joining the "majority view" as expressed by the Fourth Circuit in *United States v. Ellis*, 121 F.3d 908, 920 (4th Cir.1997)); *United States v. Holland*, 526 F.2d 284, 285(5th Cir.1976)(allowing the government to use a statement made in the same grand jury

proceeding to correct an earlier misstatement in the grand jury testimony which had been used to impeach the witness); *United States v. Harris*, 761 F.2d 394, (7th Cir. 1985)(holding that the use of the prior consistent statements was permitted notwithstanding that motive to testify falsely may have been present at time statements were made);*Engebretsen v. Fairchild Aircraft Corp.*, 21 F.3d 721 (6th Cir. 1994)(holding that a report of an expert was admissible to rebut charges of inconsistency) *United States v. Rubin*, 609 F.2d 51, 67 (2d Cir.1979)(Friendly, J., concurring)(arguing that use of prior consistent statements for rehabilitation should be generously allowed "since they bear on whether, looking at the whole picture, there was any real inconsistency").

The jury was entitled to know that real time frame involved was approximately one year, not a year and a half as the defense counsel's unrebutted cross-examination would have falsely lead the jury to believe. Defense counsel was implying that Deputy Noble's current trial testimony could not be relied on because he did not include the Taylor's statement in his report written the day of the arrest. Defense counsel implied that the report which was written on the same day as the deputy searched Taylor's car, December 1997 was more reliable because it was fresher than his trial testimony given in July of 1999. The jury was entitled to know that Deputy Noble testified to

Taylor's statements in his suppression testimony given in January of 1999. The State was entitled to rebut the implication of delay in reporting by giving the jury an accurate picture of the true time frame.

Contrary Taylor's argument that the motive to fabricate may have arisen prior to the suppression testimony, the motive to fabricate logic does not apply at all to rehabilitative use of prior consistent statements. The holding in *Tome v. United States*, 513 U.S. 150, 115 S.Ct. 696, 130 L.Ed.2d 574 (1995), does not apply to the use of prior consistent statements as rebuttal evidence rather than when the statements are offered for their truth. *United States v. Ellis*, 121 F.3d 908, 920 (4th Cir.1997); *United States v Simonelli*, 237 F.3d 19, 27 (1st Cir. 2001). The question of motive to fabricate is not present.

Harmless error

Taylor asserts that the prejudice here was that the prosecutor argued in closing that the money found in the car in addition to the money found in the trailer was more money than the Taylor's version could account for Taylor possessing. However, this is not the prejudice that flows from the admission of the prior consistent statement; rather, it is the "prejudice" that flows from the evidence. The prosecutor would have made this exact argument regardless of the rehabilitation of deputy Noble. That is what the evidence established regardless of the deputy's note

taking ability. The additional cash was in fact found in the car.

The only possible actual prejudice is what Taylor labels the "bolstering" of deputy Noble's credibility. All rehabilitative testimony has the effect of "bolstering" the witness' credibility. That is its purpose. Deputy Noble testified that Taylor informed him that there was more money in the car under the passenger seat. However, Taylor testified that he did not tell Deputy Noble that there was more money in the car. (XVI 1829). But there was additional money found in the Taylor's car exactly. It was the cold, hard cash found under the passenger's seat of Taylor's rental car that actually "bolstered" deputy Noble's testimony, not his suppress testimony. The jury would have focused on the actual cash that was found to resolve this credibility issue, not Noble's suppression testimony.

Moreover, there can be no argument that even if this is inadmissible "hearsay", it was unreliable or that the admission of the suppression testimony violated Taylor's Confrontation rights. This was not merely a prior statement; this was sworn testimony given in a suppression hearing and subject to full adversarial testing. Thus, the error if any was harmless.

ISSUE V

DID THE TRIAL COURT ABUSE ITS DISCRETION BY OVERRULING THE TAMPERING OBJECTION TO THE ADMISSION OF TAYLOR'S UNDERWEAR? (Restated)

Taylor asserts that the trial court improperly admitted a pair of boxer shorts containing the victim's DNA. According to Taylor, the shorts were tampered with, e.g., either contaminated with the victim's DNA or planted. The state respectfully disagrees. To exclude evidence, the defendant must show that there was a probability, not merely a possibility, of tampering. Here, Taylor showed only that the <u>outside</u> of the evidence bag containing the shorts was immaterially altered. He showed no probability of tampering to the contents of the bag. Accordingly, the trial court properly admitted the boxer shorts.

<u>The trial court's ruling</u>

Detective Strickland testified that when he arrived at Taylor's trailer on December 30, 1997, Taylor was wearing a towel. (VII 80). Strickland suggested that Taylor put on some clothes, and followed Taylor to the bathroom where Taylor put on some pants. (VII 81, 87). Strickland did not notice if Taylor put on any underwear. (VII 87).

Officer Cardwell testified that he booked Taylor into the St. John's County jail on December 30, 1997. (VII 161). Cardwell, following standard booking procedures, had Taylor undress, took

his clothing, and placed it in a bag. (VII 162-165, XIV 1427). Normally clothing taken at the time of booking is placed on the first appearance shelf in the back of the jail; however, Detective Lester told Cardwell that FDLE would pick up Taylor's clothing. (VII 165-166; XIV 1428). Consequently, Cardwell stapled the bag shut with a note indicating that it would be picked up by FDLE and locked it in a cabinet under the booking desk. (VII 165, 168; XIV 1427, 1438). Cardwell stated that only booking officers had access to the cabinet, and that he saw the bag daily in the same place under the cabinet until it was picked up by FDLE. (XIV 1429, 1435). Cardwell could not remember if Taylor was wearing underwear when he booked Taylor into jail; however, he placed whatever Taylor was wearing into the bag. (XIV 1434-1435). Cardwell indicated that underwear is not an item that would be listed in the jail's booking records. (XIV 1433-1434).

Alan Miller, a crime laboratory analyst for FDLE, testified that he picked up Taylor's clothing from the jail on January 13, 1998. (XV 1601, 1636). When he received the bag, it was stapled shut. (XV 1636). He placed a piece of evidence tape at the top of it to secure the staple seal, and made some notations on the tape. (XV 1636-1638). Miller, when shown the bag at trial, stated that his seal was not tampered with. (XV 1638).

When the state attempted to admit the boxer shorts contained in Taylor's clothing bag, defense counsel objected arguing it was evident that the bag had been tampered with because the note that Cardwell stapled to the bag was no longer on the bag when Miller received it and because one of the staples was loose. (XV 1656-1657). Further, defense counsel stated that no one could testify that Taylor was wearing underwear that day nor that underwear was initially put in the bag; thus, the connection of the underwear to Taylor could only be established by the integrity of the bag. (XV 1660). The court asked defense counsel if he was claiming that the bag had been opened and the boxer shorts placed in it, and defense counsel responded affirmatively. (XV 1659). The prosecutor then asked the court to look at the bag and stated that no one took the staple out; rather, it had only come loose from one side. (XV 1660). The trial court ruled that there had been no showing of tampering and admitted the boxer shorts. (XV 1661).

Preservation

This issue is preserved. Defense counsel objected in the trial court on the same grounds Taylor asserts as error in this appeal.

Standard of Review

The admissibility of evidence in the face of a tampering or chain of custody claim is within the trial court's discretion and will not be reversed unless the defendant demonstrates an abuse of discretion. *United States v. Miller*, 994 F.2d 441, 443 (8th Cir. 1993); *Thomas v. State*, 748 So.2d 970, 982 (Fla. 1999).

Merits

To exclude evidence due to an alleged gap in the chain of custody, the defendant must show that there was a probability of tampering with the evidence. *State v. Taplis*, 684 So.2d 214 (Fla. 5th DCA 1996), *rev. dismissed*, 703 So.2d 453 (Fla.1997). A mere possibility of tampering is insufficient to bar the evidence presented. *Nieves v. State,* 739 So.2d 125,126 (Fla. 5th DCA 1999).

For example in *State v. Taplis*, 684 So.2d 214 (Fla. 5th DCA 1996), defendant reported that his car was on fire. When firefighters arrived, the vehicle was nearly destroyed. *Taplis*, 703 So.2d at 215. The car was left in the street for three days before it was towed by the county to an auto body lot in Palatka. After the insurance company paid defendant's claim, the company towed the vehicle to a secure lot in Orlando where investigators took samples of debris from the passenger compartment. When tested, the samples revealed unburned gasoline

under the car's carpet. As a result of the tests, the defendant was charged with burning to defraud an insurer. Defendant moved to suppress the tests on the grounds that the vehicle had not been properly preserved and thus, the carpet padding test results may note have been the product of contamination or tampering. The trial court granted this motion finding that it was possible that the evidence had been tampered with or contaminated. On appeal, the court reversed. *Taplis*, 703 So.2d at 216. According to the court, demonstrating a mere "possibility" of tampering or contamination is insufficient; rather, a "probability" of tampering must be shown. The court explained that while it may have been possible, it was not probable that the interior of defendant's car was tampered with or contaminated when it was left open to the public in the street and on the Palatka auto lot, or when it was towed on the highway. The court noted that firefighters and officers who assisted in putting out the car fire testified that no material changes appeared to have occurred to the vehicle prior to taking the samples. *Id.* Moreover, the court stated, "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." *Id.*

Accordingly, the court ruled that the evidence was admissible; however, the court observed that a possibility of tampering or contamination is a fact that can be considered by the jury in determining the weight to be accorded to the evidence. *Id.*; *See United States v. Washington*, 11 F.3d 1510, 1514 (10th Cir. 1993)(explaining that flaws in the chain of custody go to the weight of the evidence, but do not preclude admissibility); *See United States v. Allen*, 106 F.3d 695, 700 (6th Cir. 1997)(explaining challenges to the chain of custody go to the weight of the evidence, not its admissibility).

Here, Taylor alleges that the bag containing the clothes he wore on the day of his arrest was tampered with because: (1) it was allegedly kept unattended during the time between his arrest and the time it was retrieved by the FDLE analyst; and (2) the note attached by Office Cardwell to the outside of the bag was removed and a staple on the bag was loose. These allegations do not demonstrate any *probability* of tampering.

First, the bag containing Taylor's clothing was never left unattended. It was kept at the jail in a locked compartment under the booking officers' desk. Only booking officers could access the compartment, and as such, the evidence was secured no differently than if it had been stored in a police property room where property officers have constant access to the evidence. As indicated in *Taplis*, wherein the public had access to the

evidence for a lengthy period of time, simply suggesting that others have had access to the evidence is not enough. It must be shown that the evidence has been materially changed in order for it to give rise to a possibility of tampering. *Taplis*, 703 So.2d at 216; *See United States v. Allen*, 106 F.3d at 700(demonstrating that numerous persons, including non-police persons, who did not testify, had access to the evidence without showing that alteration actually occurred raised only a possibility of tampering, which is insufficient to render evidence inadmissible on grounds of faulty chain of custody).

Second, Taylor's claim that the contents of the bag containing the boxer shorts were materially altered is unreasonable. The testimony at trial indicated that Taylor's clothes from the night of his arrest were placed in a bag that was stapled shut with a note on the outside of the bag. At trial, the note was no longer on the bag and one side of one staple in the bag was loosened. At best, all that was shown was that the outside of the bag had been altered. There was no evidence indicating that the loosened staple created a gap sufficient to allow someone to either alter the boxer shorts or to plant a pair of boxer shorts in the bag. Moreover, it is difficult to conceive how one of the booking officers, the only persons who had access to the locked cabinet at the jail, could have obtained a sample of blood which contained DNA consistent

with that of the victim to place in the bag. Accordingly, Taylor failed to establish any probability of tampering, and the trial court's ruling must be affirmed.

Finally, it should be noted that Taylor was afforded ample opportunity to allow the jury to consider his claim of tampering. Absent a showing of reasonable probability, challenges to the chain of custody go to the weight of the evidence, not to its admissiblity. *Taplis,* 703 So.2d at 216; *Washington*, 11 F.3d at 1514; *Allen*, 106 F.3d at 700. Here, the possibility of tampering was vigorously argued to the jury by defense counsel during closing argument. (XVII 1971-1980).

Harmless Error

The error if any was harmless. This was not the only physical evidence against Taylor. The State introduced videotape and photographs showing Taylor depositing $1,700 in his bank account following the robbery. The prosecution focused significantly on the missing money. Thus, the error, if any was harmless.

ISSUE VI

DID THE TRIAL COURT PROPERLY ADMIT THE TESTIMONY OF THE DEFENDANT'S WIFE REGARDING A CONVERSATION THEY HAD AT JAIL? (Restated)

Taylor asserts that his wife's testimony regarding a conversation they had about Michael needing money to return to Arkansas violated the husband-wife privilege. First, the conversation was not a privileged communication. This conversation occurred in jail. The husband-wife privilege is lost in certain places such as a jail. Taylor had no reasonable expectation of privacy in the jail. Additionally, Taylor waived any privilege by calling his wife to testify and opening the subject of her giving money to Michael for the trip. Moreover, the error if any was harmless. Taylor's wife had already testified in her direct examination that she had helped Michael buy a bus ticket. So the jury knew that Michael did not have enough money to by a bus ticket just three days after the robbery. The main point of this testimony was already known to the jury prior to the alleged violation of the privilege. Thus, the trial court properly permitted the wife's testimony.

The trial court's ruling

Taylor filed a notice of invocation of the marital privilege regarding any statements made by Taylor to his wife Mary Ann Taylor. (IV 588). The defense called Taylor's wife, Mary Ann

Taylor, as a witness at trial. (XVI 1836). During her direct, Mrs. Taylor testified that she helped Michael McJunkin buy a ticket back to Arkansas. (XVI 1849-1850) During cross-examination, Mary Ann Taylor testified that Michael McJunkin returned to Arkansas and that she had helped with the money to pay for the trip. (1853-1854). She "just assumed that he had no money" (1854). The prosecutor then asked if Michael had some money before Mrs. Taylor gave him approximately $100.00. She testified that she knew he had some money and the prosecutor inquired how she knew that? (1854). She responded that maybe she asked him or maybe John told her. She had seen Taylor on New Year's Eve and maybe the defendant told her then. (1854). She testified that Taylor told her that Michael need money to get back to Arkansas. Defense counsel then objected referring to his pretrial motion concerning the husband-wife privilege.(1855-1856). The prosecutor explained that defense counsel had opened the door by asking the witness if she had helped Michael buy the ticket. (1856-1857). Defense counsel asserted that it is clear that Taylor has a privilege. (1857). The prosecutor explained that he was concerned about putting the conversation in the correct time frame. The trial court agreed that the door was opened as to the timing of the conversation when Taylor told his wife that Michael needed money to get back

to Arkansas. (XVI 1856). The conversation occurred at the jail. (1855, 1858).

Preservation

This issue is preserved. Defense counsel contemporaneously objected at trial to this testimony as a violation of the husband-wife privilege.

The standard of review

An evidentiary ruling on application of marital communications privilege is reviewed for an abuse of discretion. *United States v. Madoch*, 149 F.3d 596, 602 (7th Cir. 1998). The admissibility of testimony generally is reviewed for abuse of discretion.

Merits

The husband-wife privilege statute, § 90.504(1), Florida Statutes, provides:

> A spouse has a privilege during and after the marital relationship to refuse to disclose, and to prevent another from disclosing, communications which were intended to be made in confidence between the spouses while they were husband and wife.

Because privileges obstruct the truth-finding process, they are construed narrowly. *United States v. Nixon*, 418 U.S. 683, 709-10, 94 S.Ct. 3090, 3108, 41 L.Ed.2d 1039 (1974)(explaining

that privileges are exceptions to the demand for every man’s evidence and should not be expansively construed because they are in derogation of the search for truth).

The conversation at issue here was not covered by the marital privilege. This conversation occurred in a jail. The husband-wife privilege does not apply to conversations that occur at a prison.

In *Johnson v. State*, 730 So.2d 368 (Fla. 5th DCA 1999), the Fifth District held that a husband/defendant and his wife have no reasonable expectation of privacy in a conversation at a police station and therefore, their conversation was not covered by the husband/wife privilege. Johnson voluntarily went to the police station to answer question regarding an armed robbery. At the end of the interview, the detective left and Johnson’s wife went into the interview room. The interview room had hidden video cameras and microphones. The police recorded their conversation. Both Johnson and his wife testified that they thought their conversation in the interview room was private. Johnson filed a pre-trial motion to suppress a conversation he had with his wife in an interview room at the police station. The trial court denied the motion finding the relevant question under both the Fourth Amendment and the husband/wife privilege was whether Johnson and his wife had a reasonable expectation of privacy. The trial court ruled that it was “inconceivable” that

the parties had a reasonable expectation of privacy. The Fifth District found that the lower court's analysis was consistent with prevailing law citing this Court's decision in *State v. Smith*, 641 So.2d 849 (Fla.1994)(holding a person sitting in backseat of a police car during a consensual search of his car had no reasonable expectation of privacy in statements which were recorded). The Fifth District affirmed.

In *United States v. Madoch*, 149 F.3d 596 (7th Cir. 1998), the Seventh Circuit held that the marital privilege did not apply to a phone conversations that occur at a prison. Mudoch's husband, Larry, who was a co-conspirator, was talking to her on the telephone from a prison. The conversation was tape-recorded. The district court allowed the government to introduce the tape. Madoch argued that this tape was a privileged marital communication between her and her husband. The district court reasoning that while normally her statements would have been covered by the marital communication privilege, communications made from jail are likely to be overheard by others, and, thus, it is unreasonable to intend such a communication to be confidential. Thus, because the marital communications privilege protects only communications made in confidence, under the unusual circumstances where the spouse seeking to invoke the communications privilege knows that the other spouse is incarcerated, and bearing in mind the well-known need for

correctional institutions to monitor inmate conversations, the Seventh Circuit concluded that any privilege Madoch and Larry might ordinarily have enjoyed did not apply. *Madoch*, 149 F.3d at 602; See also *United States v. Harrelson*, 754 F.2d 1153, 1169 (5th Cir.1985)(holding there is no interspousal communications privilege during prison visit because there is no reasonable expectation of privacy in jail conversations).

This Court has also explained that the privileged character of the communication between a husband/defendant and his wife is lost when they speak in a manner and place where they had a reasonable chance of being overheard, and they knew of that possibility at that time. *Proffitt v. State*, 315 So.2d 461, 465 (Fla. 1975)(holding that the testimony of a renter in the defendant's home who overheard the defendant telling his wife that he stabbed and killed a man and beaten a woman during an attempted robbery did not violate the husband-wife privilege). A jail is such a place. Because the conversation between Taylor and his wife occurred while Taylor was in jail, there was no husband-wife privilege.

Furthermore, Taylor waived any privilege by calling his wife to testify and opening the subject of her giving money to Michael for the trip. *United States v. Nobles*, 422 U.S. 225, 95 S.Ct. 2160, 45 L.Ed.2d 141 (1975)(holding the defendant waived the work-product privilege with respect to matters covered in

his testimony by calling an investigator to testify about interviews he had conducted with witnesses to a crime).

Harmless error

The violation of the privilege, if any, was harmless. Taylor's estranged wife had already testified that she had given Michael money for the trip back to Arkansas. So the main point of this testimony, i.e., that Michael did not have even money to get back to Arkansas without borrowing money, was already established and known to the jury prior to any alleged violation of the privilege. Appellant claims the prejudice is that this testimony tended to supports the State's theory that Michael had no money because it was Taylor rather than Michael who had robbed and killed the victim. However, this was established by Mrs. Taylor's direct testimony regarding giving Michael money. The "prejudice" occurred regardless of any violation of the privilege.

The conversation here was not a confession to the murder. *Bolin v. State*, 650 So.2d 21, 23 (Fla. 1995)(holding that error in admitting the marital communications, in which defendant admitted to committing the murder, was not harmless). Thus, the violation was harmless.

ISSUE VII

DID THE TRIAL COURT PROPERLY INSTRUCT AND PROPERLY FIND THE "UNDER SENTENCE OF IMPRISONMENT" AGGRAVATOR? (Restated)

Appellant asserts that the "under sentence of imprisonment" aggravator, § 921.141(5)(a), does not apply to him because he was not supervision and/or restraint. Due to an administrative error, Taylor was improperly released from prison in Arkansas. The State respectfully disagrees. The statute requires that a sentence of imprisonment be imposed not that the defendant be serving the sentence. This Court has previously held that this aggravator was properly applied to a person who was sentenced to incarceration but failed to report. Thus, Taylor was under a sentence of imprisonment and the trial court properly found this aggravator.

The trial court's ruling

Taylor filed a memorandum of law in favor of a life sentence. (V. 872-878). In this memo, he argued that the aggravator did not apply because Taylor was not incarcerated or on parole because Arkansas had misfiled or failed to file the required papers. (V. 873). The State in its memorandum, noted that the penalty phase evidence established that Taylor was sentenced to twenty years imprisonment for aggravated robbery in Arkansas. (V. 950). Taylor should have been incarcerated when this murder

occurred in 1997 as he was not eligible for parole until December 1998. (V. 950). The State argued the aggravator applied citing *Stone v. State*, 378 So.2d 765, 772 (Fla. 1979). (V. 952). The trial court in its sentencing order found the "under sentence of imprisonment" aggravator reasoning that Taylor should have been in prison at the time the murder occurred. (VI 983-984).

Preservation

This issue is preserved. Taylor makes the same claim on appeal that he made in the trial court. *Rodriguez v. State*, 609 So.2d 493, 499 (Fla. 1992)(noting that it is well settled that the specific legal ground upon which a claim is based must be raised at trial and a claim different than that raised below will not be heard on appeal).

The standard of review

Whether the statute language of this aggravator encompasses a defendant who is sentenced to imprisonment but is not serving his sentence is a question of statutory interpretation subject to *de novo* review. *Racetrac Petroleum, Inc. v. Delco Oil, Inc.*,721 So.2d 376, 377 (Fla. 5th DCA 1998)(stating judicial interpretation of Florida statutes is a purely legal matter subject to de novo review, citing *Operation Rescue v. Women's*

Health Center, Inc., 626 So.2d 664, 670 (Fla.1993)); *Cf. Campbell v. State*, 571 So. 2d 415 (Fla. 1990)(stating that whether a particular circumstance is truly mitigating in nature is a question of law and subject to de novo review).

Merits

The death penalty statute aggravating circumstances provision, § 921.141(5)(a), Florida Statutes, provides:

> The capital felony was committed by a person previously convicted of a felony and under sentence of imprisonment or placed on community control or on felony probation.

The Model Penal Code equivalent aggravating circumstances provision, § 210.6(3)(a), provides:

> The murder was committed by a convict under sentence of imprisonment.

The "under sentence of imprisonment" aggravator does not apply only to prisoners committing murder within confines of prison walls. The Florida Legislature has expanded the Model Penal Code definition to include both community control and probation. ch. 96-290, § 5, Laws of Fla; Ch. 91-271, § 1, Laws of Fla. Moreover, this Court has held that this aggravator applies to control releasees. *Davis v. State*, 698 So.2d 1182, 1193 (Fla. 1997)(discussing which situations that the "under sentence of imprisonment" aggravator applies), *cert. denied*, 522 U.S. 1127, 118 S.Ct. 1076, 140 L.Ed.2d 134 (1998).

The statute requires that a sentence of imprisonment be imposed not that the defendant be serving the sentence. The statutory language is "by a person previously convicted of a felony and under sentence of imprisonment". Taylor was convicted and sentenced - that is all the statute requires. Appellant seeks to add an additional element to this aggravator, *i.e.* supervision and/or restraint. Neither is required by the statutory language. Appellant seeks to alter the words of the statute from "under a sentence of imprisonment" to "serving a or under supervision due to a sentence of imprisonment".

This Court has held that the "under sentence of imprisonment" aggravator applies to a defendant who fails to report to prison. *Gunsby v. State*, 574 So. 2d 1085, 1090 (Fla. 1991). Gunsby had been sentenced to incarceration but had not reported to jail as ordered. A warrant was issued for his arrest. The *Gunsby* Court rejected the contention that there must be an escape for this aggravating circumstance to apply. This Court concluded that this aggravating circumstance was properly found because the record clearly established that Gunsby had been sentenced to incarceration.

Here, Taylor, like Gunsby, had been sentenced to incarceration. Here, as in *Gunsby*, that it all that is required for the aggravator to be found. Taylor, like Gunsby, should have been in prison. Appellant contends that he was not under

supervision and/or restraint. But that is exactly the point - he should have been under supervision and/or restraint. He was convicted and sentenced and should have been in prison when this murder occurred.

Taylor's status is akin to an escapee. In *State v. Gundlah*, 702 A.2d 52 (Vt. 1997), the Vermont Supreme Court held that the "under sentence of imprisonment" aggravator applied to escapees. Gundlah escaped from a prison work crew and murdered a schoolteacher. Gundlah argued that because he was neither physically restrained nor submissive to authority when the murder occurred, the sentencing court erred in finding the "in custody under sentence of imprisonment" as an aggravating factor.[9] Gundlah contended that the "under sentence of imprisonment" aggravator, § 2303(d)(1), applied only to prisoners committing murder within the confines of prison walls, speculating that the Legislature intended to protect correctional officers and inmates from harm. The Vermont

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[9] Vermont's penalty for first degree murder statute, 13 V.S.A. § 2303(d)(1), provides:

> aggravating factors shall include the following:
>
> The murder was committed while the defendant was in custody under sentence of imprisonment.

Vermont's aggravator, unlike Florida's equivalent, requires that the defendant be in custody. Vermont's aggravator is similar to the Model Penal Code's definition. Unlike Florida's aggravator, Vermont's does not have any of the legislative expansions of the aggravator.

Supreme Court found “no merit to this argument”. The Vermont Supreme Court concluded that the aggravator was not limited only to prisoners committing murder within confines of prison walls. The “under sentence of imprisonment” aggravator is intended as an additional deterrent to homicide by persons less likely to be deterred by the prospect of further confinement. *Gundlah*, citing Model Penal Code § 210.6(3)(a), commentary at 136 (Official Draft 1980). The Vermont Supreme Court explained that the rationale behind this policy applies with equal, if not greater force, to escapees, who face an even longer term of imprisonment after apprehension and whose conduct demonstrates the need for greater deterrence. *Gundlah*, 702 A.2d at 57.

Appellant argues that this aggravator cannot serve as a deterrent if the defendant lacks knowledge that he should be in prison. Surely, appellant is not arguing that Taylor was unaware that he was supposed to be in prison serving a twenty year sentence for the 1991 burglary at the time of this murder. One cannot be convicted and sentenced for a crime in *absentia* unless one willfully absconds. Taylor did not lack knowledge; rather, he was exploiting an administrative blunder. Therefore, the deterrence rationale of the “under sentence of imprisonment” aggravator applies to this situation. Thus, the trial court properly instructed the jury and properly found this aggravator.

The State agrees that *Stone v. State*, 378 So.2d 765, 772 (Fla. 1979) is distinguishable. The *Stone* Court held if an appeal is pending, including in federal court as a habeas petition, the defendant remains under sentence of imprisonment for purposes of this aggravator. In other words, this aggravators applies even if the conviction is being challenged on appeal. The rationale of *Stone* does not really apply to this case. Taylor's conviction was final at the time of the murder. The Arkansas appellate court had affirmed Taylor's conviction prior to Taylor being improperly released and prior to this murder. However, while *Stone* is distinguishable, *Gunsby, supra*, is not.

ISSUE VIII

IS THERE COMPETENT AND SUBSTANTIAL EVIDENCE TO SUPPORT THE TRIAL COURT'S REJECTION OF THE FIVE OF THE EIGHT PROPOSED MITIGATORS? (Restated)

Taylor asserts that the trial court erring by finding five of the proposed mitigators were not supported by the evidence. The State disagrees. The trial court rejected the proposed mitigator that Taylor was not violent based on his prior violent felony which the trial court found as an aggravator. The prior violent felony was a robbery with a firearm in which Taylor shot at the victim three times. Competent substantial evidence supports the trial court's finding that Taylor was violent. One of the proposed mitigators, *i.e.,* that Taylor enjoys his family, is not truly mitigating in nature. Any error in the trial court's failure to provide an explanation in its sentencing order relating to the remaining proposed mitigators was harmless. The trial court considered the three most substantial mitigators to be proven. Thus, the trial court properly rejected the five proposed mitigators.

The trial court's ruling

Defense counsel proposed eight mitigators. In its sentencing memorandum, the State did not dispute the facts any of the rejected proposed mitigators except one. (V 956-957). The State disputed the facts surrounding the proposed mitigator that

Taylor was not violent. The State asserted that Taylor was violent based both on the prior robbery and the facts of the instant murder. The trial court accepted three of the eight proposed but rejected five proposed mitigators. (VI 985-992). The trial court rejected the proposed nonstatutory mitigator that Taylor was not a violent person because Taylor has been convicted of twenty two offenses including a prior robbery with a firearm during which Taylor shot three times at the victim. The trial court rejected the proposed nonstatutory mitigator that Taylor: (1) makes friends easily and has done good deeds for others; (2) enjoys his family; (3) performs well when he has structure in his life and (4) has been a positive influence in the lives of his family members because they were not proven.

<u>The standard of review</u>

This Court in *Campbell v. State*, 571 So. 2d 415 (Fla. 1990), established the standards of review for mitigating circumstances: 1) Whether a particular circumstance is truly mitigating in nature is a question of law and subject to *de novo* review by this Court; 2) whether a mitigating circumstance has been established by the evidence in a given case is a question of fact and subject to the competent substantial evidence standard; and finally, 3) the weight assigned to a mitigating

circumstance is within the trial court's discretion and subject to the abuse of discretion standard.

A trial court may reject a proposed mitigator if the record contains competent substantial evidence to support the rejection. *Mansfield v. State*, 758 So. 2d 636, 646 (Fla. 2000). The federal equivalent of Florida's competent, substantial standard of review is the clearly erroneous standard of review. Under this standard of review, an appellate does not reverse the trial court's ruling unless the ruling strikes the appellate court as wrong "with the force of a 5 week old, unrefrigerated, dead fish." *United States v. Taylor*, 248 F.3d 506, 515 (6th Cir. 2001)(finding no error in a district court factual findings regarding a sentencing issue); *Parts and Elec. Motors, Inc. v. Sterling Elec., Inc.*, 866 F.2d 228, 233 (7th Cir. 1988)).

However, the weight to be given a mitigator is within the trial court's discretion. *Bonifay v. State*, 680 So.2d 413 (Fla. 1996) (decision as to whether a mitigating circumstance has been established, and the weight to be given to it if is established, are matters within the trial court's discretion); *Wyatt v. State*, 641 So.2d 355 (Fla. 1994) (decision whether any mitigating circumstances had been established was within trial court's discretion); *Arbelaez v. State*, 626 So.2d 169 (Fla. 1993) (trial court has broad discretion in determining applicability of mitigating circumstances). Taylor is not

entitled to appellate relief as to his sentence merely because he disagrees with the sentence. He must show an abuse of the trial court's broad discretion. He has failed to do so.

Merits

A mitigating circumstance is defined as "any aspect of a defendant's character or record and any of the circumstances of the offense" that reasonably may serve as a basis for imposing a sentence less than death. *Rogers v. State*, 783 So.2d 980, 995 (Fla. 2001). As this Court has explained, with nonstatutory factors, a trial court must decide not only if the factor exists but if the factor "is truly of a mitigating nature". *Rogers*, 783 So.2d at 995. Moreover, there are "no hard and fast rules about what must be found in mitigation in any particular case . . . . Because each case is unique, determining what evidence might mitigate each individual's sentence must remain with the trial court's discretion." *Lucas v. State*, 568 So.2d 18 (Fla. 1990). Nor must a trial court assign any particular amount of weight to a mitigator it has found. The relative weight given to each mitigating factor is within the discretion of the trial court. So long as the trial court conducts a "thoughtful and comprehensive analysis," *Walker v. State*, 707 So.2d 300, 319 (Fla. 1997), of the defendant's proposed mitigators, the trial court's "determination of lack of mitigation will stand absent

a palpable abuse of discretion." *Foster v. State*, 654 So.2d 112 (Fla. 1995).

The trial court fully considered, thoughtfully analyzed, and expressly evaluated in its written sentencing order each of the proposed mitigators. Contrary to appellant's claim that the trial court did not explain why it rejected the proposed nonstatutory mitigation that Taylor was not a violent person, the trial court did explain its reasoning. The trial court rejected this mitigator for the simple reason that Taylor clearly was a violent person. This finding was implicit in the trial court's discussion of its rejection of this mitigator. The trial court referred to the prior violent felony that he had found as an aggravator in its rejection of this mitigator. The trial court had explained the facts of the prior violent robbery with a firearm including the fact that Taylor shot at the victim three times earlier in its sentencing order. Hence, the trial court informally incorporated by reference its findings regarding this prior crime in the aggravators section of its sentencing order. A trial court is not required to repeat its findings in its sentencing order - once is enough. Indeed, it would have been inconsistent for the trial court to have found as an aggravator a prior violent felony and then find that Taylor was not a violent person as a mitigator. Competent substantial evidence supports the trial court's finding that

Taylor was violent. Thus, the trial court properly rejected this proposed mitigator.

In *Trease v. State*, 768 So. 2d 1050, 1055 (Fla. 2000), this Court receded in part from *Campbell v. State*, 571 So. 2d 415 (Fla. 1990). The *Trease* Court held while a court must consider all the mitigating circumstances, it may assign little or no weight to a mitigator. Taylor's reliance on *Nibert v. State*, 574 So.2d 1059, 1062 (Fla.1990) is misplaced because that portion of *Nibert* also has been receded from by this Court in *Trease*. A trial court is now free to assign no weight to a mitigators and that is what this trial court did.

The trial court rejected the four remaining proposed nonstatutory mitigators, *i.e.*, Taylor makes friends easily and has done good deeds for others; enjoys his family; performs well when he has structure in his life and has been a positive influence in the lives of his family members because they had not been proven. The trial court meant that they were not proven in the weighing sense not in the evidentiary sense. The trial court addressed the evidence and concluded that the proposed mitigators did not mitigate this offense. Thus, the trial court did not abuse its discretion in finding that the proposed mitigators were not entitled to any weight.

Harmless Error

The error, if any, in rejection of the four remaining proposed mitigators was harmless. The trial court would have imposed the death sentence even if it had found all four proposed mitigators. None of the proposed mitigators, either individually or collectively, was substantial enough to change the trial court's finding that the aggravators outweighed the mitigators. *Cf. Morton v. State,* 2001 WL 721089 (Fla. June 28, 2001)(finding the trial court's rejection, without discussion, of proposed mitigator of antisocial personality disorder to be harmless error considering the substantial aggravators and due to the trial court's proper consideration of overlapping, similar mitigators); *Miller v. State*, 770 So.2d 1144, 1150 (Fla. 2000)(holding that the rejection of defendant's uncontested long-term alcohol and substance abuse as mitigating factor was harmless error). Here, the trial court considered the three most substantial mitigators to be proven. The four proposed mitigators were innocuous in comparison with the mitigators that the trial court found. Thus, the trial court would have imposed a death sentence even if it had given weight to the four additional proposed mitigators. Hence, the error was harmless.

<u>ISSUE IX</u>

WHETHER THE DEATH SENTENCE IS PROPORTIONATE? (Restated)

Appellant asserts that the death penalty in this case is not proportionate because the two remaining aggravators are weak aggravators. First, there are not two aggravators; there are three aggravators: (1) prior violent felony of armed robbery which was "quite similar"; (2) merged felony/murder and pecuniary gain and (3) "under sentence of imprisonment" aggravator. Moreover, both the "prior violent felony" and the "under sentence of imprisonment" aggravators are serious aggravators. Additionally, the prior violent felony aggravator is factually strong regardless of the number of years that has elapsed since its commission because the facts of the earlier offense are so similar to the instant offense. This Court has found death appropriate where there were less than the three aggravators present here. Moreover, this Court has also found the death penalty the appropriate punishment where facts of the murder were similar to this murder. Thus, the death penalty is proportionate.

<u>The trial court's ruling</u>

The jury recommended death by a 10 to 2 vote and the trial court imposed the death sentence. (VI 979-955). The trial court found four statutory aggravators: (1) prior violent felony of

armed robbery which were "quite similar"; (2) felony/murder with robbery as the underlying felony; (3) pecuniary gain and (4) "under sentence of imprisonment" aggravator. The trial court recognized that the felony murder with robbery as the underlying felony merged into the pecuniary gain aggravator and considered them as one aggravator.[10] While the trial court found no statutory mitigators, it found three non-statutory mitigators: (1) Taylor was suffered abuse and neglect during his childhood (2) poor education and (3) basically good employment history. The trial court found that the three aggravators "greatly" and "far" outweighed the relatively insignificant mitigators.

The trial court's sentencing order addresses both relative culpability and proportionality. (VI 992-994). The co-defendant, Michael McJunkin, entered a plea to accessory after the fact and armed robbery with a deadly weapon. The co-defendant was sentenced to 126 months incarceration. The trial court found, because the jury was given an *Enmund* instruction that death was not appropriate if they believed McJunkin to be the actual killer, the jury must have concluded that Taylor was

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[10] When the underlying felony of a murder is robbery, the aggravators of murder committed for pecuniary gain and murder committed during the course of an enumerated felony cannot be doubled and must be treated as one. *Monlyn v. State*, 705 So.2d 1, 6 (Fla.1997). However, concurrent use of the prior violent felony and the parole aggravators is proper. *Rose v. State*, 26 Fla. L. Weekly S210 (Fla. April 5, 2001)

the actual shooter.[11] The trial court distinguished *Larkins v. State*, 739 So.2d 90 (Fla.1999) because *Larkins* involved two aggravators not the three aggravators present here.

The standard of review

The standard of review of whether the death penalty is proportionate is *de novo*.[12] Proportionality review is a task of this Court. However, this Court does not reweigh the mitigating factors against the aggravating factors in a proportionality review, that is the function of the trial court. For purposes of proportionality review, this Court accepts the jury's recommendation and the trial court's weighing of the aggravating and mitigating evidence. *Bates v. State*, 750 So.2d 6, 12 (Fla. 1999).

Merits

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[11] *Enmund v. Florida*, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982); *Tison v. Arizona*, 481 U.S. 137, 107 S.Ct. 1676, 95 L.Ed.2d 127 (1987).

[12] *State v. Middlebrooks*, 995 S.W.2d 550, 561, n.10 (Tenn. 1999)(noting that proportionality review is *de novo*);*State v. Wyrostek*, 873 P.2d 260, 266 (N. Mex. 1994)(observing that the determination of whether a death sentence is disproportionate or excessive is a question of law); *State v. Hoffman*, 851 P.2d 934, 943 (Idaho 1993)(stating that when making a proportionality review, state supreme court makes a *de novo* determination of whether the sentence is proportional after an independent review of the record).

This Court reviews the propriety of all death sentences. To ensure uniformity, this Court compares the instant case to all other capital cases. *Foster v. State*, 778 So.2d 906, 921 (Fla. 2000).

First, the robbery aggravator is not a weak aggravator. While the evidence to support an aggravator can be strong or weak, aggravators themselves are not strong or weak. All aggravators, as a matter of law, are serious.

Furthermore, ignoring the felony murder aggravator, the other two aggravators are serious. Both the prior violent felony and the "under sentence of imprisonment" aggravators are serious. The prior violent felony aggravator is a recidivist aggravator. Legislatures have historically and consistently viewed recidivism as serious, aggravating and deserving of increased punishment. The Florida Legislature has, at least since the 1920's, increased the penalty for crimes committed by repeat offenders. *Cross v. State*, 119 So. 380 (Fla. 1928)(upholding a statute that increased the punishment for a fourth felony conviction, chapter 12022, Acts of 1927, which took effect on June 3, 1927, against various constitutional challenges). Furthermore, the prior violent felony must have involved the use or threat of violence to another person to be an aggravator. Violent recidivism is a traditionally viewed as an aggravating circumstance in all types of sentencing. Thus, the two

remaining aggravators, ignoring the felony murder aggravator, are serious aggravators.

Additionally, the prior violent felony aggravator is factually strong regardless of the number of years that has elapsed since its commission because the facts of the earlier offense are so similar to the instant offense. First, the statutory language of the prior violent felony aggravator contains no limit regarding how recent the prior conviction must be. § 921.141(5)(b). There is no time limitation on prior violent felonies because the legislature did not create one. *United States v. Wright*,48 F.3d 254, 255-256 (7th Cir. 1995)(rejecting a stale conviction challenge to the Armed Career Criminal Act where defendants prior was fifteen years old because while the statute requires that the felonies be "violent", the statute does not place any time restrictions on the felonies and observing that Congress knows how to create time limitations and when it wants to attach these restrictions to statutes, it does); *United States v. Turner*, 1 F.3d 1243, (6th Cir 1993)(unpublished opinion)(rejecting a stale conviction argument that the sentence enhancement should not be imposed because the prior conviction was over 15 years old because the plain language of statute placed no restriction on how recent prior convictions for violent felonies must be); But cf. *Sexton v. State*, 775 So. 2d 923 (Fla. 2000)(upholding prior violent felony

aggravator based on a 1965 conviction against a remoteness challenge because the trial court accorded "little weight" to it).

Additionally, even if prior violent felonies become stale at some point, where the prior offense involves that the same type of criminal behavior as the instant offense the prior conviction becomes unstale. *United States v. Hernandez-Guevara*,162 F.3d 863, 873 (5th Cir. 1998)(allowing eighteen year old prior conviction for smuggling to be used as "other crimes, wrongs, or acts" evidence to show intent in a smuggling prosecution because the prior conviction "involved exactly the same crime."). While the robbery with a firearm occurred sixteen years prior to this murder, Taylor shot at the victim in the prior robbery three times. Moreover, the victim of the armed robbery was a woman making a deposit at a bank. Taylor targets such victims.

Furthermore, one of the reason for the gap in Taylor's criminal history was that he was in prison for that prior offense for over a decade. The premise of Taylor's argument is that he has not been violent for sixteen years but this is because he was incarcerated and had no opportunity to be a violent criminal during much of that sixteen years. *United States v. Burroughs*, 72 F.3d 136 (9th Cir. 1995)(rejecting a staleness challenge where the defendant was incarcerated during the period because the purpose of not considering old

convictions is to let a criminal avoid a sentencing enhancement where he has avoided serious crimes during fifteen years of freedom and explaining that the social concern is whether the individual has behaved himself while free, not how long ago he was last sentenced). Thus, the prior violent felony aggravator is factually a serious aggravator regardless of the age of the prior conviction.

The death sentence in this case is proportionate. This Court has found the death penalty proportionate in other cases involving similar aggravators. *Hildwin v. State*, 727 So.2d 193 (Fla. 1998)(finding death penalty proportional in case involving four aggravating circumstances, including HAC, pecuniary gain, prior violent felony, and under sentence of imprisonment balanced against two statutory mental mitigators and five nonstatutory mitigators including prior sexual abuse for a strangulation murder motivated primarily for economic gain). Moreover, this Court has also found the death penalty the appropriate punishment where facts of the murder were similar. *Rogers v. State*, 783 So.2d 980 (Fla. 2001)(finding death penalty proportional where victim was stabbed twice and where the motive for the murder was to obtain the victim’s property).

Appellant’s reliance on *Johnson v. State*, 720 So.2d 232 (Fla.1998) and *Larkins v. State*, 739 So.2d 90 (Fla.1999), is misplaced. In *Johnson*, one of the prior violent felonies was

due to a misunderstanding with his brother. Taylor’s prior violent felony was not a misunderstanding; rather, it was a planned robbery with a firearm. Larkins was 22 years old at the time of the time. Taylor, by contrast, was 37 years old at the time of this murder. (XVIII 2190). *Larkins* involved two aggravators, not the three aggravators present here. In *Larkins*, both statutory mental mitigators were present; whereas, here, neither are present. Larkin was mental retarded with severe mental problems and substantial memory impairment. Taylor is not. Thus, the death penalty is proportionate.

CONCLUSION

The State respectfully requests that this Honorable Court affirm appellant's conviction and death sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing ANSWER BRIEF has been furnished by U.S. Mail to Nada Carey, Esq., Leon County Courthouse, Suite 401 301 South Monroe Street, Tallahassee, FL 32301 this 18th day of July, 2001.

____
Charmaine M. Millsaps
Attorney for the State of Florida

CERTIFICATE OF FONT AND TYPE SIZE

Counsel certifies that this brief was typed using Courier New 12.

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