IN THE SUPREME COURT OF FLORIDA

JOHN CALVIN TAYLOR, II,

Appellant,

v. Case No. **SC96,959**

STATE OF FLORIDA,

Appellee.
_____/

AMENDED INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE[1]

On February 26, 1998, the Clay County grand jury indicted John Calvin Taylor, II, for the first-degree murder and armed robbery of Shannon Holzer. I 23-24. Taylor was tried before the jury on July 19-23, 1999, and found guilty of first-degree murder and robbery with a deadly weapon. IV 659-660, XVII 2064. The trial judge denied Taylor's motion for new trial on August 2, 1999, IV 689-698, V 800.

At the penalty phase proceeding on August 13, the state presented four witnesses and the defense presented twenty-two witnesses. The jury recommended death by a vote of 10 to 2. V 847, XX 2642. On September 9, the state and defense presented additional evidence and argument. V 930-939, XX 2676-2688. Both parties submitted sentencing memoranda, V 872-878, 943-961, and the court received a PSI. V 965-978. On October 7, the trial judge sentenced Taylor to death for the murder and life in prison for the robbery. The court found four aggravators, two of which merged, and three mitigating circumstances. V 973-996, XX 2702.

STATEMENT OF FACTS

Motion to Suppress

Deputy Noble testified that Shannon Holzer's husband, Jeff, reported his wife was missing around 7:30 a.m. on December 30, 1997. VII 137. Noble was a close friend of Shannon and her

[1]References to the twenty-volume record on appeal are designated by the volume number in Roman Numerals and the page number. All proceedings were before Clay County Circuit Judge William A. Wilkes.

parents, who were well known by many of the deputies in the St. Johns County Sheriff's Office. III 425-426. Noble learned Shannon was last seen at 1:10 the previous day, when she left the family business, Buddy Boy's Kountry Store, with a bank deposit. Several persons had seen Shannon pull up to the gas tanks with John Taylor in the passenger seat and heard her say Taylor needed a ride to Green Cove Springs. III 394-395. The bank deposit had not been made. Shannon also had not called her ex-husband to check on her daughter since that time or fed her horse. VII 138. Noble learned Taylor had not worked in two weeks due to a falling out with his father. Taylor drove a rented 1996 Geo Metro and resided at Vineyard Trailer Park on Highway 13. The information was put out on dispatch, and when Noble got to the trailer, Deputies Strickland and Lindsay were already there. III 399-402.

Strickland was off-duty when he learned from dispatch that Shannon was missing. III 428. Strickland and Robert Heaton, who was with him when he got the page, knew Shannon as a friend. They located Taylor's Geo in Vineyard Trailer Park and called for a marked unit. Strickland was told an Air One helicopter would be there in thirty seconds, as well as ground units. III 428-430, 444. Deputy Lindsay arrived, and they went to the door and knocked. Strickland wore his police badge and gun. Lindsay was in uniform with his gun at his side. The helicopter was hovering overhead and could be heard clearly. Michael McJunkin answered the door, and they asked if Taylor was home. McJunkin told them Taylor was in the shower and

invited them in. The two officers went inside, while Heaton stood at the threshold of the door. Heaton was not blocking the door, but anyone leaving the trailer would have to go past him. III 436-438, 445-446.

Taylor came into the living room in a towel. III 447. Strickland suggested he get dressed, then followed him through the kitchen and down the hallway to the bathroom to make sure he did not arm himself. Taylor put on a pair of jeans, while Strickland stood in the bathroom doorway, keeping Taylor in view the whole time. III 433, 438-441. They returned to the living room, and the officers told Taylor that Shannon was missing, he was reportedly the last person seen with her, and detectives wanted to talk to him. Taylor said Shannon gave him a ride home the day before. III 433, 440. Taylor sat down in a chair while they waited for another marked unit. Noble arrived, and in a few minutes, Deputy Lee arrived, and Strickland and Heaton left. Strickland thought Noble went inside before he left but did not see Lee go inside "because as he was pulling up, I was leaving. I shook his hand, got in my truck, and left." III 434.

Lindsay testified he went out to his patrol car to check Taylor's driver's license for outstanding warrants, leaving Taylor inside with Noble and Lee. III 447, 451. Lindsay did not recall whether he or another deputy got the license from Taylor. III 451. The trailer door was open and Lindsay could see inside the trailer. As Lindsay sat in his car, he saw Taylor look to the left and right, reach into his back pocket,

and stuff something under the seat cushion. III 448. Lindsay re-entered the trailer and told Taylor to stand up and walk toward the kitchen, which Taylor did. III 453. He asked Taylor what he had placed under the cushion, and Taylor said "nothing." Lindsay asked if he could look, and Taylor said yes. Lindsay lifted up the corner of the chair cushion and saw a roll of money with a hundred-dollar bill on top. At that time, he did not know what denominations were in the deposit Shannon was supposed to have made. III 455.

Noble testified that when he arrived, Strickland was at the open front door of the trailer, and Lindsay already had walked down the steps of the trailer. As Noble approached the trailer, Lindsay alerted him that Taylor had concealed something in a chair. III 403, 417-419. Noble walked inside and explained he was investigating the whereabouts of Shannon Holzer. Taylor said she had dropped him off at the trailer the day before. III 404, 420. After Lindsay came back in, Taylor was asked what he put under the cushion. Taylor said they could look, the wad of money was found, and Lindsay drew his weapon. Noble handcuffed and frisked Taylor, then walked him outside and placed him in the back of his patrol car. On the way to the car, he read Taylor his rights. Taylor did not reply, he "just kind of shrugged his shoulders." Taylor was not under arrest but was not free to leave. III 422-423, VII 139. Taylor was then unhandcuffed. The door of the patrol car was open, and his legs were out on the ground. III 407-410, VII 139, 144. Noble asked Taylor about the money, and Taylor

said, "I've had it." Noble told Taylor they had to search the trailer and his car, and Taylor signed consent forms for both. III 423, 477. Noble could not recall whether he read the forms to Taylor. III 411. While signing the forms, Taylor said there was more money in the car under the passenger seat. III 410. Noble found a Crown Royal bag under the passenger seat with a wad of money of different denominations inside it. III 414.

Noble told Taylor that Detective Lester wanted to speak with him at the sheriff's office. Taylor gave no verbal response, he "just kind of shrugged his shoulders." III 423. Noble drove Taylor to the sheriff's office in the back of his caged vehicle, which could be opened only from the outside. He was not handcuffed because "[h]e was not under arrest, he was just being taken down to speak with Detective Lester as I explained to him." VII 144. When they arrived, Noble put the handcuffs back on because they were going into a secured facility but told Taylor he was not under arrest. He placed Taylor in an interview room and shut the door. III 416.

Deputy Lee testified that Strickland and Noble were inside the trailer when he arrived. Strickland came out and talked to Lee for a minute, then Lee went inside. Noble was asking Taylor if he knew where Shannon was. III 465. After Taylor was removed from the trailer, Lee went to meet the helicopter. III 463.

Detective Lester knew Shannon and her parents and had been out to Taylor's trailer earlier that morning. When no one

answered the door, he went in through the unlocked door. He did not have a warrant. He found no one. III 478-479. Lester was in the helicopter when Taylor was located. He landed in the Shands Bridge area, where he met Deputy Lee, who told him Taylor and his "son"[2] had been found. Lester went to the sheriff's office to meet Taylor. When Taylor arrived, Lester met with him alone in an interview room. He removed the handcuffs and read Taylor his rights. Taylor indicated he understood and signed a waiver of rights form. III 472, 477. Lester told Taylor they were investigating Shannon's disappearance, and Taylor said the last time he had seen her was when she gave him a ride to his trailer the previous day. III 473. Lester asked Taylor about the money found in the trailer and the car, and Taylor said he would rather not talk about it. After two to three hours of questioning, Lester told Taylor he needed to tell them about the money because they had a missing person with money missing. At that point, Taylor said he had gotten the money from Mr. Yelton's truck near Crescent Beach eight days earlier. Lester verified Yelton's truck was burglarized December 22, and Taylor was arrested for burglary. Taylor was not free to leave during the interview but Lester did not have probable cause to arrest until he found out about the Yelton money. III 475-481, VII 152-157.

Guilt Phase

[2] Until the trial in this case, John Taylor and Michael McJunkin believed McJunkin was Taylor's biological son. Blood tests revealed he was not.

State's Case

Shannon Holzer, 30, was last seen December 29, 1997, when she left Buddy Boy's to make a deposit at Barnett Bank in Green Cove Springs. Shannon's father, Ira Bryant, said the deposit had to be made by 2 p.m., and Shannon usually took it. The deposit that day included $6,666 cash plus checks and was in a green Barnett Bank bag. The cash was wrapped in bank wrappers in increments of fifty. Mr. Bryant also asked Shannon to make a deposit for Carl Colee at the First Union Bank in Green Cove Springs. XII 1036-1046. Colee's deposit was made at 1:22 pm. XII 1169-1170, XII 1173-1178.

Several witnesses saw Shannon leave Buddy Boy's. Joseph Dunn was sitting in his truck by the front door when he saw a man sitting at the picnic tables near Shannon's parked car. Shannon came out, and they both got in her car. Shannon drove to the gas pumps in front of the store, then went inside. When she came out, she stopped and told some men who were standing there, "Don't tell [name of her husband], I'm only giving him a ride to Green Cove Springs." She went to her car, where the man was standing, they got in and headed north on Highway 13. XII 1048-1058, 1068-1069.

Arthur Mishoe made two back-to-back trips to Buddy Boy's that day, driving from his uncle's house on Palmo Fish Camp Road. On the first trip with his sister, Heather Benedious, Mishoe saw a white/gray car at the intersection of Palmo Fish Camp Road and Highway 13, just across the street from Buddy Boy's. The man sitting in the car had on glasses and a short-sleeved

shirt. XII 1074-1087. On the second trip, with his uncle, Nolan Metcalf, he heard Shannon tell his uncle not to tell Jeff she was giving a guy a ride to Green Cove to get his car. On cross-examination, Mishoe said Shannon may have said, "I'm going to Green Cove Springs and I'm taking him to get his rental car." Shannon drove north on Highway 13. Five miles north of Buddy Boy's, a left turn onto Highway 16 took you over the Shands Bridge to Green Cove Springs. If you continued north on 13, Vinyard Trailer Park was a quarter mile up the road. XII 1087-1093.

Heather Benedious also went to Buddy Boy's twice that day. On the first trip with her brother, she saw a white Geo Metro parked on the side of the road. She had seen the car at Buddy Boy's before, driven by Taylor. A boy wearing glasses was sitting in the car. She had seen the boy with Taylor at Buddy Boy's before. Thirty-five minutes later, when she went to the store again, the Geo was gone, and Shannon's car was parked at the store. XII 1097-1103.

Nolan Metcalf saw Shannon and Taylor pumping gas. Taylor was wearing jeans, a light-colored T-shirt, a jacket, and white tennis shoes. Metcalf walked into Buddy Boy's behind Shannon and heard her talking to Cindy Schmermund. He walked outside and saw Taylor standing by the passenger side of Shannon's car. When Shannon came out, she stopped and asked him not to say anything to Jeff, that she was giving Taylor a ride to Green Cove to rent a car. Taylor pulled off his jacket when he got

into the car. It was a long-sleeved, blue, button-down jacket. XII 1110-1120.

Cindy Schmermund worked at the store with Shannon that day. The deposit typically included one hundred dollar bills but she did not know if there were any that day. XII 1163-1167. Taylor came in the store a few times a week. He was "friendly, joking, normal" and never said anything out of the way to Shannon or anyone else. XII 1129, 1152. His son looked much older than 19 and had brown hair, a mustache, and a beard. XII 1131-1132. Cindy saw Shannon walk out to her car, then pull up to the gas pumps with Taylor. Taylor pumped the gas, and Shannon came inside to pay. Shannon said she was taking Taylor to Green Cove to pick up a rental car. XII 1127, 1137, 1140. After Shannon went back outside, Taylor got into the passenger seat. XII 1143. He was wearing a dark jersey long-sleeved, zip-up jacket with a hood and dark pants. XII 1149.

Nancy Griffis saw Shannon that day, heading north on Highway 13, getting ready to turn left to go to Green Cove Springs on State Route 16. A tall man with dark hair and features and a beard was in the passenger seat. Shannon was "very, very pale" and looking straight ahead. The man was sitting catty-cornered, leaning forward, looking at Shannon. XV 1594-1598. He wore a black T-shirt with a stretched-out neck. Griffis picked someone out of a photo lineup three weeks later but the police told her she picked the wrong guy. XV 1599-1600.

Michael McJunkin said Taylor had come to Arkansas a few weeks earlier and brought him to Florida. They sometimes stayed at

Taylor's wife Mary Ann's house on Palmo Fish Camp Road and sometimes stayed at the trailer. Taylor once said he liked Shannon and wanted to get some of that p----. XI 911-915. He said he was going to rob her because he was behind on bills and knew when she would be going to the bank. XI 917. They were at Mary Ann's house the morning he decided to rob her. Taylor told McJunkin to drop him off at the side of the store and go home to wait for his call. XI 918. He dropped Taylor off at the mailbox by the side of the store, then drove up and down Palmo Fish Camp Road a few times. He parked on the side of the road a couple of times and went back to the house twice. The first time he went to the house, he missed Taylor's call. He drove around, then returned to the house and caught the second call. Taylor asked him where he was and told him to pick him up at the Citgo station in Green Cove Springs. XI 919-920. He picked his father up at the Citgo, and Taylor drove to the Dollar Store. In the parking lot, Taylor lifted up his sweatshirt and T-shirt and pulled several stacks of bills from his waistband and started counting it. He put the ones in a paper bag or Crown Royal bag, which he put in the glove compartment. He put some money between the front seats and some under the front passenger seat. He said if Shannon did not show up in a couple of days, everything should be fine. He also said he got her car stuck. XIII 1192, 1195-1196.

After the Dollar store, they went to Garber Ford Mercury and ERA realty in Green Cove. They went inside the realty agency and checked on houses in Green Cove. At Garber, they looked at

trucks. XIII 1196-1200. Before leaving Green Cove Springs, they took the road that goes past the Shands Bridge, went by the Citgo, did a U-turn, and came back around. On the way back to the Citgo, they turned on the road to the bridge and headed back to St. Johns County. They went to the trailer and Taylor changed clothes. He put the old clothes--pants, sweatshirt, old shoes--in a trash bag in the back seat of the Geo. XIII 1202-1205.

They went to Trader Jack's in St. Augustine to pay a bill. When they left, they pulled around to the back and threw the bag of clothes in the dumpster. XIII 1207-1208. At some point that day, they went to Mary Ann's house, and Taylor and Mary Ann talked in the bedroom. Mary Ann was upset, and his father was aggravated. He thought they went to Mary Ann's once when Mary Ann was not there. That time, Taylor put some money into the attic. XIII 1209-1210. They also went to a bank, where his father deposited some money. While Taylor was inside, McJunkin saw a knife on the floorboard. Taylor asked him to throw the knife off the Bridge of Lions, which he did. XIII 1212-1213. They returned to the trailer, then went to Terry's Place. They returned to the trailer and went to sleep. XIII 1214-1217.

The next day, they went to the mall, where he bought an earring and cassette tapes with some of the $200 his father gave him from the robbery. His father bought some new shoes. They ate, then went back to the trailer. XIII 1218-1222. The police came and took them to the station to be questioned.

XIII 1223. McJunkin did not tell the truth that day. He was questioned again that night or early the next morning and gave a recorded statement. Between interviews, he went to Mary Ann's house. After the second interview, he went back to Arkansas on a bus. Mary Ann gave him money for the bus. XIII 1224-1227.

On cross-examination, McJunkin said he had been in jail for 19 months on charges of first-degree murder and armed robbery. XI 924. The morning Shannon disappeared, he called his mother and talked to her for 19 minutes. He found out someone had shot at his mother. He was angry and wanted to get to Arkansas to deal with the person who shot at her. He had no way to get to Arkansas and no money. As far as he knew, his father had no money to give him. McJunkin admitted he stole a briefcase the week before the murder and gave it to Taylor. Taylor told him the briefcase had $5,000 in it but McJunkin saw Taylor looking through it and said there was no no money in it. XI 926-929.

McJunkin admitted he was hyperventilating when first questioned about Shannon and agreed he might have turned away every time her name was mentioned. He denied being in her Mustang and denied telling Mary Ann he had been in it. XI 935. In his initial statement to police, he said he went from Mary Ann's house to the trailer that morning to play video games and was supposed to pick his father up at Mary Ann's later that day. He told them he had not shown up, so his father hitched a ride with Shannon. XI 935-936. He denied saying he was growing up to be a serial killer. He admitted he had problems

with his temper when he was thirteen and was in a treatment center for violence. He was prescribed medication for his temper but was not taking the medication in December 1997. XI 954-956.

When arrested some weeks after Taylor was arrested, he had on two pairs of underwear, underwear and boxers. His boxers were taken when he was booked at the jail. XI 957-958. The boxers on the bathroom floor in Defendant's Exhibit A were his. XI 965.

In his sworn statement of December 31, he said Taylor called Mary Ann's according to the caller ID at 1:23 and 1:25, which was about the time Shannon was making a deposit at the First Union Bank. He said Taylor was wearing a white-gray, short-sleeved T-shirt and small black shoes and said nothing about a sweatshirt. XI 972-974. He said Taylor was inside the Citgo when he picked him up. XI 993. He also said Taylor put money from the robbery into Mary Ann's attic and Mary Ann may have been home at the time. XII 999-1000.

He did not have a driver's license and had little experience driving over wet terrain. He could drive an automatic but had problems with stick shifts. XII 1001, XIII 1242.

He called Taylor from Mary Ann's at the number on the caller ID, which was a pay phone. XIII 1251-1258. He initially told police he threw the knife over the Shands Bridge. XIII 1286. He thought the knife had a double edge. XIII 1299-1300.

In his sworn statement of January 11, he said they went to Mary Ann's house after Terry's Place, where he undressed and

started to go to sleep. He said Taylor put some money in a white bag into the attic, then went into the room with Mary Ann and they talked. Taylor came out, got the money from the attic, and they went back to the trailer. At trial, McJunkin denied this happened. XIII 1334-1344.

Lisa Brumbach, an employee at Garber Ford, said Taylor and his son took a test drive in a truck on December 23, 1997. Taylor said he was getting $4,000 from an insurance check. On December 29, he and his son came back, and he stuck his head in the office and said he was still waiting on the settlement but she would be hearing from him. He wore blue jeans and a blue T-shirt. XIII 1334-1344.

Julius Vandernack, the owner of Trader Jack's, said Taylor came in December 29 and paid $340 for some bounced checks plus a $40 fee. He had bounced checks before and paid them off. XIII 1349-1355.

Lisa Jones, the bartender at Terry's Place, said Taylor came in several times that December. He gave her a ride home once. On December 29, Taylor came in with his son. He wore jeans and a black T-shirt. He said he was getting or had gotten an insurance settlement of $1500-$1600. He spent $150-$200 and bought rounds for other customers. He seemed his normal self. He tipped her two $100 dollar bills. XIII 1358-1367.

James Bullard had known Taylor a year and lived with him for three months. They worked for Taylor's father in marine construction. Taylor quit working in early December because of an argument over money. Taylor had said he was behind on his

truck payments. They could not always pay their bills during those weeks. Taylor had said he wanted to go out with Shannon, that he was going to get some of that p----. Clothing was often on the floor of every room in the trailer. Michael sometimes threw his dirty clothes on the bathroom floor. XI 1015-1027.

Carrie Span, a Barnett Bank teller, said Taylor deposited $1,700 into his account at 3:48 p.m. that day. Photos of Taylor at the bank were introduced into evidence. XII 1153-1158. Diane Locker testified about Taylor's account during December. On December 4, he had a negative balance of $825.88. On December 5, he deposited $1,600, giving him a positive balance of $534.12. On December 11, he had a negative balance of $23.20. On December 12, he deposited $450, leaving him a positive balance of $426.80. On December 16, he had a negative balance of $107.03, which increased to a negative balance of $529.78 by December 29. After the December 29 deposit, he had a positive balance of $1159.95. XIV 1533-1537.

Phone records showed two calls were made from the Citgo phone booth to Mary Ann's house on December 29 at 2:32 and 2:38 p.m. XII 1180-1185. No calls were made from Mary Ann's to the Citgo. A nineteen-minute call was made to Arkansas at 9:51 a.m. XV 1584-1586.

Deputies Strickland, Lindsay, and Noble testified about the events that led to taking Taylor and his son into custody on

December 29.[3] XIV 1380-1518. On cross-examination, Noble conceded he did not include in his report, written that same day, that Taylor said there was more money in the car. XIV 1517-1518.

Officer Cardwell, the booking officer when Taylor was arrested, testified that his normal procedure was to pat down the inmate, place his property and shoes in a bag, take the inmate to the shower room, have him strip naked, put his remaining clothes in the bag, then fold the bag and staple it shut. Cardwell went through this process with Taylor. At Detective Lester's direction, he put the bag in a locked cabinet under the booking desk to await being picked up by FDLE. XIV 1421-1427. Normally, he would put the bag in a bin in the property room, where access was carefully monitored. XIV 1436. Cardwell was not the person who released the bag to the FDLE. XIV 1430, 1435. He did not remember what clothing Taylor was wearing but had a checklist he had filled out. The checklist did not have a listing for underwear and he had listed nothing under "other." Cardwell did not know if anyone had opened the bag while it was under the counter. He put a note on the bag saying it was evidence to be picked up by Lester. He believed the note was stapled to the bag. He did not know what happened to the note. XIV 1431-1437.

Alan Miller, a crime analyst for FDLE, retrieved the bag from the property desk at the jail, sealed it, and submitted it to the laboratory. XV 1626. Miller did not know who gave him the

[3]The officers' testimony essentially mirrored the testimony they gave at the suppression hearing.

bag. The bag was stapled shut when he got it, and he added a piece of brown tape to the top to keep the top down. XV 1636. He did not open the bag or look inside it. XV 1637. He locked it up in his evidence locker, then turned it in to evidence. Miller agreed a staple had been pulled out of the bag. XV 1639.

Jeffrey Fletcher, a DNA analyst, took possession of the bag on March 17, 1998. Inside was a pair of jeans, a pair of black and white boxer shorts, a sweatshirt, and a pair of LA Gear sneakers. XV 1650. Another FDLE employee, Jo Lewis, had unsealed the bag first, so Fletcher could not say which item was on top, which in the middle, and so on. XV 1653. Based on DNA samples from Taylor and McJunkin, Fletcher excluded McJunkin as being Taylor's son. Taylor and McJunkin were excluded as contributors to the blood stain on the boxers. XV 1680. The series and type on the boxers were the same series and type as samples from Shannon Holzer. XV 1691. DNA is present in blood, saliva, semen, and sweat. No DNA belonging to Taylor was found on the boxers. XV 1681. The test is very sensitive and detects very small amounts. XV 1692-1693.

Martin Tracy, a population geneticist, said the chances the DNA came from someone other than Shannon would be somewhere between 1 out of 190 and 1 out of 19,000. XV 1702-1703.

Shannon's car was located at 10:30 p.m. on December 30, 1997, in a wooded area two miles south of the Citgo. XIV 1544-1545. The car was stuck in the mud. The body was found around midnight fifty feet behind the car. The pants were pulled

below the knees and there was a cut across the zipper area. Her sneakers were very clean. XIV 1555-1563, XV 1606-1607.

Bonifacio Floro conducted the autopsy. There were abrasions to her face, an abrasion to her left hand inflicted with a sharp instrument, and a broken fingernail on the right hand. There was no evidence of sperm. XV 1706-1720. There were nine stab wounds to the upper left chest. Eight wounds were grouped together, all in the horizontal position, with one end sharper than the other and directed to the victim's right. The other wound was away from the others and had an abrasion underneath, representing the knife handle. This wound was probably deeper than the others and to the left. Each wound was fatal. The cause of death was bleeding. The wounds were made with a single-edge blade. In Floro's opinion, the direction of the isolated wound indicated Holzer struggled with her attacker. The other group of wounds all going the same way indicated she was not moving when they were inflicted. Assuming the isolated wound was the first one, with Holzer in the driver's seat and her attacker in the passenger seat, she would have become unconscious within a few seconds to a few minutes. The other wounds likely were inflicted while she was in a lying position and not moving. XV 1721-1729.

Defense Case

Taylor testified he and Michael spent the night of December 28 at Mary Ann's house. He and his wife had been living apart but were trying to get their marriage back together. Michael had been living with him for four weeks. He had not seen

Michael in five years and wanted to "make it right" between them because he was his son and he loved him. XV 1764.

That morning, after Mary Ann went to work, Michael took the Geo Metro to the trailer to play video games. Taylor told him to return by noon so he could get his insurance papers in order so he could buy another truck. XV 1765-1767. When Michael was not back by 12:30, Taylor walked to Buddy Boy's, two miles up Palmo Fish Camp Road, then half a block on 13. He used the restroom at Buddy Boy's, and when he came out, Shannon was walking to her car. He asked her if she was going towards Green Cove Springs, and she said yes. He asked her for a ride to his rental car, and she said yes. They put gas in the car, then drove north on 13 to Vineyard Trailer Park. As they were pulling in, Michael pulling out. Shannon rolled down her window, and Taylor asked Michael where he was headed. He said he was going to Green Cove to play darts at Tim's Place. Taylor told him he needed the car and couldn't take him. At that point, Shannon said Tim's was right where she was going and offered to give him a ride. Taylor got out of Shannon's car and into the Geo Metro, and Michael got in the car with Shannon. XV 1768-1770, XVI 1811.

Taylor got the insurance policy out of his truck, then drove to Mary Ann's to look for the claim order the insurance company had sent for them to sign. He could not find the papers, so he made himself a sandwich. He was eating the sandwich when Michael called and asked him to pick him up at the Citgo station in Green Cove Springs. Taylor drove to the Citgo and

Michael walked out from behind the building. Taylor told Michael he wanted to call Mary Ann because he thought he had seen her car on his way to the Citgo and he wanted to see if she had the insurance papers. Michael drove to Tim's Place to see if his friend was still there while Taylor made the call. Taylor called Mary Ann from the pay phone. He got the answering machine and hung up, called again and got the answering machine again. When Michael came back, Taylor noticed he was wet from the knees down. XV 1770-1774.

Taylor said he was wearing light blue jeans, brown boots, and a green Harley-Davidson T-shirt. When shown Defense Exhibit 5, a photograph of the bathroom in his trailer as it looked the last time he saw it, Taylor identified the green object in the middle of the photograph as the Harley-Davidson T-shirt he was wearing. The shirt had blue in the emblem in the front. The shirt was published to the jury with a magnifying glass. He said he wore the shirt all day long, until 11:30 p.m. XV 1775-1779.

From the Citgo, they went to Garber Ford, where he told the lady he talked to the week before that he was expecting the insurance claim within a week. They did not stop at Family Dollar or ERA Realty. After Garber Ford, they went to the trailer. At the trailer, Michael changed clothes and put the clothes he had been wearing in a white trash bag. XVI 1779-1782. Michael said he wanted to take them to Mary Ann's to wash in her washing machine. He saw Michael put the clothes in

the car but did not see what he did with the bag after that. XVI 1825.

They went to Barnett Bank, where Taylor deposited $1700 of the money he got from Chip Yelton. He deposited the money that day because checks were starting to come in. Michael had taken Yelton's briefcase when Taylor asked him to. The briefcase had a little over $5,000 in it. Taylor never told Michael he got money from the briefcase. XVI 1782-1784. They went to Trader Jack's to pay off some checks, then to Terry's Place, where they stayed until around 11 p.m. They went by Mary Ann's, and he and Mary Ann had a disagreement because he had been drinking. They stayed fifteen minutes, then went to the trailer. XVI 1784-1786.

The next morning, they went to Wal-Mart to make an appointment for Michael to get contact lens. Taylor bought himself a pair of tennis shoes. They went to the mall and Michael bought videotapes. They returned to the trailer. Taylor was getting out of the shower when he heard a knock on the door and a voice say, "Is John Taylor here?" An officer stuck his head through and he told him, "Yes, I'm here, can I get some clothes?" The officer said, "No, you need to come out here." So he wrapped a towel around himself and walked into the living room. When he got out to the living room, the officer said he could get some clothes on but the officer would have to go with him. He put on jeans, no underwear. XVI 1787-1791.

The money the police found under the cushion came from Chip Yelton. Taylor had put it under the cushion when they got back to the trailer that morning. He stuck the money under the cushion while Michael was in the bathroom and put the rest of the stuff that was in his pocket under the wood chair. After the deputies said the detectives wanted to talk to him, he sat down in a chair. He leaned up, searching for a pack of cigarettes. He could not find them, so he looked in the next chair. He turned up the heater, and the next thing he knew, the officers drew their guns and told him to freeze. He never told Noble there was money in the car and did not know it was there. XVI 1791-1794. He had been convicted of 22 felonies. XV 1761-1762.

He did not have a beard that day and was not in the car with Shannon when Nancy Griffis saw her. XVI 1814. There was no working phone at the trailer that day. XVI 1831.

Jonathan Ruda, an investigator, testified that he drove the following route on Monday, July 12, starting at 1:30 p.m.: He drove from Mary Ann's house to County Road 13, then went west over the Shands Bridge to the Citgo. He waited ten seconds, then drove to the Family Dollar and waited a minute. He went to Garber Ford, waited a minute, then went back down County Road 16 a mile to a mile and a half past 16 on 17, made a U-turn, then came back up 16 and crossed the Shands Bridge again. He took 16 to U.S. 1, took a right, and went to Taylor's bank in St. Augustine. The trip took one hour and six minutes. XVI 1833-1835.

Mary Ann Taylor said her husband moved out in September, then moved back in Christmas of 1997, with Michael. XVI 1837-1840. On December 29, she got home around 9 p.m. Her husband and Michael got home around 10 or 11 p.m. Her husband had been drinking, which led to a disagreement, and they stayed only 15 minutes. John was wearing a pea-green Harley-Davidson shirt she had bought him and a pair of light blue jeans. She remembered the clothes because they looked "so awful together." XVI 1841-1845. The attic door had to be pulled down by a string, then a ladder pulled down from the door. She doubted it could be operated without her hearing it. She did not hear it that night. XVI 1846. That December, her husband was waiting for an insurance settlement for his truck. She had filled out papers as part of the claim. XVI 1848.

On December 30, 1997, Michael told her he had been inside Shannon's car. The police had called her at work and told her John was in custody and they were bringing Michael home. When she got home, the detectives told her Shannon was missing and that she drove a red Camaro. After they left, she wondered aloud how a flashy car like that could be missing, and Michael said, "yeah, I know, I've been in it." Michael stayed with her that night until about 3 a.m., when Detective Lester picked him up for questioning. She saw Michael the next day for a few minutes and helped him buy a bus ticket to Arkansas. XVI 1848-1853. On cross-examination, when asked if he had any money on him, she said he did. When asked how she knew that, she said, "maybe I did ask him. Or maybe John told me." XVI 1854-1855.

Over objection, she said she talked to John while he was in jail and he said Michael needed money to get to Arkansas. XVI 1856-1859.

Mary Ann thought she told Detective Redmond that Michael said he had been in her car. When she learned Shannon was dead, she did not want Michael in her home. The day before he left, his mother called eight times. XVI 1859-1861.

Richard Morris said he paid Chip Yelton $6,150 on December 18, 1997. The money was in one hundred dollar bills except for one fifty-dollar bill. XVI 1863-1864.

Yelton, a marine contractor, said his briefcase was stolen from his unlocked truck while he was on a job in St. Augustine on December 22, 1997. He reported it to the police. There was about $5,000 cash in the briefcase from the money Richard Morris had given him. The previous week, James Bullard and Taylor had come to his job site in Green Cove Springs. XVI 1866-1872.

Kenneth Binkley manned the property room at the Clay County Jail. Binkley had the clothing Michael was wearing when he was arrested, including a pair of Towncraft boxer shorts, size 32. The boxer shorts found in the bag containing Taylor's clothing were Towncraft, size 34. Items had come in and out of the bag since the clothes were turned in to the jail. XVI 1878-1880.

State's Rebuttal

Detective Redmond said when he interviewed Mary Ann after Taylor was arrested, she did not mention that Michael said he had been in Shannon's car. On cross-examination, Redmond said

he interviewed six people that day between 11:15 and 3:30, reducing the interviews to three written pages. He did not recall Elize and Richard Smith being present during the interview with Mary Ann. XVI 1887-1897.

Penalty Phase

State's Case

George Brewer testified Taylor was sentenced on January 6, 1982, in Pulaski County, Arkansas to 25 years in prison for aggravated robbery. On September 5, 1991, he was sentenced to 20 years for burglary of a Tires for Less in Pulaski County. The commitment for the burglary was not received until May 1993, at which time Taylor was no longer in prison. Someone "goofed" up the paperwork, and Taylor was never incarcerated on the burglary. With the good time policies in place, Taylor would have been eligible for parole in seven and one-half years and could discharge the sentence in ten years. XVIII 2192-2200.

Robin Manning testified about the 1982 armed robbery. She was making a night deposit when a man tried to rob her. He wore a bandana over his nose and mouth and had a gun. She had just stepped out of the car when he said, "Robin, get away from your car." She backed up, and he got in the car and drove off. The money was in her jacket. She saw the car's break lights go on and hid in the bushes. The car went around the bank three times. Each time, a shot went off. She did not hear the shots hit anything. The man left and she called the police. Her car was recovered that night a few blocks away. The police called

her soon after and said the robber had confessed. XVIII 2210-2209.

Defense Case

John Taylor's father, John Earlsley Taylor, and his mother, Becky, were separated from John's birth in 1960 until 1963, when they divorced. During that time, John and his two siblings, Joey and Barbara, were cared for by Becky. They lived next door to John Earlsley's father, John Calvin Taylor, also called "Pop." In 1963, Becky married John's grandfather, who then became his stepfather. Together, they had two other children, Todd and Jeff. Both caretakers drank and partied extensively and did not care for the children. XVIII 2217-2230, 2245. In June of 1968, Becky walked out in the middle of the night, and from 1968 until 1971, John and his four siblings lived with Pop in a small trailer in Moody Hollow, Arkansas, three miles down a dirt road from any other people. In June 1971, Clara Jean Taylor married Pop and became the primary caregiver for the children.

Barbara Henry, John's younger sister only vaguely remembered living with her mother when she was married to Pop. Just before she started first grade, she heard Becky and Pop arguing in the middle of the night. Becky was leaving Pop for another man, and Pop was begging her to stay. Becky crawled out the window in the middle of the night without saying good-bye. XVIII 2243-2245. After Becky left, Pop and the children moved to a trailer in Moody Hollow, where Becky's parents, Pearl and

Rose Moody, lived. It was very isolated, very poor farm land. They ate what they grew and did not have running water. Moody Hollow had a bad reputation, and "[e]ven the teachers, when they found out that's where you were from, you were a bad person." XVIII 2246-2252.

Pop worked rotating shifts in a linoleum company and was rarely home. When Pop wasn't there, "Joey was the boss. . . we were to listen to him, and we had best be five foot in the air asking how high when Joey said frog." Joey disciplined Barbara and John with whatever he could pick up, "[i]f it was darts, if it was a belt, if it was picking his .22 up and shooting at us." He was "very verbally, physically, and sexually abusive." He forced Barbara to have sexual intercourse with him when she was six and made John watch. XVIII 2253-2256. Her grandparents helped some but Rose worked during the day and Pearl tended the farm. Pearl also drank every day. Pearl kept Todd and Jeff when Pop was on the night shift or the older kids were at school. At the trailer, Barbara cooked and washed the dishes, standing on Coke crates so she could reach the stove and sink. Sometimes they didn't have enough food. John didn't go to church because Joey said church was for "pussies." Joey felt school was "wussy," and he taunted John about how wimpy and dumb he was. When they moved to Clara Jean's, Barbara felt her prayers were answered but also felt displaced. She was so used to caring for the kids, especially Todd and Jeff, "it was as if they were my kids." Barbara had just turned 10. XVIII 2259-2263.

Barbara said her childhood still affected her but she had stayed out of prison, and Todd and Jeff had done all right, too, while Joey was in prison and John had been in prison a lot. The difference was that Todd and Jeff were young enough to accept Clara Jean as their mother. Barbara had her grandmother and God. Joey and John "had no one." Barbara knew John had flaws but he had helped her with her children, especially her daughter, Jackie. Barbara's husband had been very abusive, and Jackie became terrified of men. John C. was the only one who could reach her and "get her back out of that shell." XVIII 2265.

Todd Taylor had no memory of living with Becky and considered Clara Jean his mother. At the Moody Hollow trailer, John, Joey, and Barbara "did as they pleased all day every day." Once it was sleeting, and all five kids were traipsing up and down the road in the middle of the night. There was no parental supervision at all. Clara Jean provided for Jeff and Todd and "gave us the guidance and love and support that we needed to become vital, productive human beings." Todd was 5 when Pop married Clara Jean but John was 11, and "it was too late." He was in trouble by the time he was 13 and had spent half his adult life in prison. "[T]hat's the only way he can function . . . John C. needs guidance and structure and someone telling him where to go and where to be and what to do." XVIII 2274-2287.

Todd had never known John to be violent. John had a "follower mentality." Joey was the "domineering ringleader,"

"a violent type, very, very overbearing." John C. was Joey's "slave" and "was abused by him every day of his life that I was around." XVIII 2274-2280, 2287-2290. Joey even battered Clara Jean. XVIII 2294. When asked why he and Jeff had done well, and Barbara okay, but not Joey or John, Todd said, "[Clara Jean] made all the difference in the world. Everything I'll ever be in this world was because of her . . . children have to have structure, and they have to have -- you know, learn respect and learn discipline because these things don't come from birth. And John C. and Joey had no opportunity." They raised themselves from the age of 3 or 4 years old until 10 or 11. "You didn't have one viable parent in the house being a bum, mostly." XVIII 2290-2292.

Karen Bean, Becky's younger sister, was raised in Moody Hollow with five siblings. Moody Hollow was very remote. Eight or ten families lived there, all related. None of the houses was in sight of each other. Karen babysat for the Taylor children at her mother's house when she was 10. Becky was married to her second husband, "Old Man John," and they drank and went to bars a lot. The kids were unkempt and always looking for food. John C. was "sweet little boy." Joey was a bully. XVIII 2299-2313.

Patsy Sue Mitchell, another of Becky's sisters, also had contact with the Taylor children at her mother's house. The kids were dirty. "Second John," Becky's husband, and Pearl would be drinking. John C. was a "sweet little boy." Joey was violent. He gave Rose two black eyes once. XVIII 2316-2322.

June Munson drove the bus the Taylor kids rode to school. It was a 28-mile trip on mostly dirt roads. The kids were mostly left alone, and Munson would honk the horn to wake them. They ate Hostess cupcakes for breakfast. John C. had a "smiley disposition" and "one hell of a hard life." Joey was "mean and belligerent and cruel." Barbara was timid and quiet, "just in a shell." Joey unloaded a shotgun at the bus once because she was going to report him to his father. Joey treated John "just horrible." Nobody ever came with the kids to school functions. When John grew up, he often waved her down to talk, and always hugged and kissed her hello. XVIII 2329-2341.

Becky testified her mother, Rose, married Pearl just after turning 14. Becky was their second child. Becky married at 17. Her husband was unfaithful and was never a father to their children. She married Pop, who was 21 years older, so he could take care of the kids. It was a "marriage of convenience." She met William Alexander and asked for a divorce. Pop became abusive, and she left in the middle of the night. John C. was even-tempered, a sweet, happy child, always smiling. When he got older, he often brought her money. As an adult, he treated her with great respect. She had never known him to be violent with anyone. XVIII 2343-2374.

Roy Osburn, Clara Jean's cousin, said John worked in his plumbing business for a year and half when John was 17-18 years old. He was a good worker, working 10-12 hour days, digging ditches and carrying pipes. XIX 2388-2394.

Clara Jean testified she married Pop two days after they met. The marriage was a business arrangement. Clara Jean got to stay home with her 11-year-old while she helped Pop raise his children. Clara Jean said Moody Hollow was "a very closed little community that nobody could hardly penetrate. It was a very rough place." Joey was physically violent with John C. and Clara Jean. Describing how Joey interacted with John C., Clara Jean said, "[John C.] was just there because Joey didn't allow him -- Joey was the boss." John had a problem stealing but was never violent with anyone. She had no trouble getting him to mind or do chores. He lived with them three years, then stole a truck and was sent to a boys training school. He was convicted of burglarizing a Wal-Mart when he was 18 and convicted of delivery of marijuana when he was 19. In October 1981, he was arrested for a string of crimes. Clara Jean believed he was using drugs because his appearance went from very neat to sloppy and dirty. Becky lived just up the road but never visited. She didn't even stop when the kids were outside playing. XIX 2395-2417.

Valerie Kelton married John in 1991. They were married 14 months. Valerie's son and the neighborhood kids were crazy about John. Michael McJunkin spent a lot of time with them, and John tried to be a good father. John did construction work and other work on the side. Although he had stolen things all his life, she did not think he could help it and still considered him "a really good person." She had never known him to be violent. After they divorced, he called regularly to see

if they were okay. No one could believe the murder. Everybody liked John. XIX 2422-2429.

Robert Link, an expert in criminal law, said John was convicted of burglary of a Wal-Mart in 1978 when he was 17. The store was closed at the time. That same month, he was convicted of delivery of marijuana. Between July 15 and October 17, 1981, he was convicted of burglary and theft of eight commercial establishments resulting in 16 convictions. He also committed a robbery in October 1981. He pled guilty to all the offenses in January 1982. He was 21. He received 25 years for the robbery, and 15 and 10 years concurrent on the burglaries and thefts. He was paroled, then committed burglary of a prison commissary in 1984, burglary of a business in 1990, and burglary of a business in 1993. XIX 2432-2440.

Tim Brown was in prison with John in Douglas, Arizona. Tim testified that John worked in prison "more than anybody else I know." He did anything that needed to be done--fixing electrical problems, plumbing, cooling, carpentry. He was a parts runner and was on call 24 hours a day. He also worked in the warden's office. Tim never saw a sign of violence in John. John taught Tim the craft of leather work and left Tim $900 worth of leatherworking tools. When John got out, he took care of Tim's vehicles and helped Tim's disabled mother. XIX 2441-2451.

Sharon Karn, Tim Brown's mother, said the first thing John did when he got out of prison was bring a message from Tim and offer to help her. He fixed her leaky roof, saw the skirting

had come off, and came back the next weekend and fixed that. John was "excited about his life" and "putting the past behind him." He gave her potpourri for Christmas and was "just grinning and puffed up and so excited" when she told him it was the perfect gift. He gave her $200 to help her with her bills once. She never saw any sign of violence. XIX 2503-2514.

Roger Szuch, a licensed clinical social worker and licensed marriage and family therapist, had been the clinical director of a residential treatment center for emotionally disturbed teenagers for eleven years and was now in private practice. Szuch characterized Taylor's family as "severely" dysfunctional. The main functions of a family, said Szuch, are providing safety and security; providing nurture; teaching children how to listen to words, needs, and feelings, and how to express themselves; teaching children to problem-solve; and identity formation. XIX 2468-2471. These basic functions were entirely lacking in the Taylor household. "A lot of things simply didn't happen, or happened primitively." XIX 2478-2481. The family's problems were numerous and included poverty, an extreme lack of competent, adult supervision, lack of bonding, alcoholism, abandonment, sexual abuse, physical abuse, sudden transitions, infidelity, and marriage between family members. XIX 2472-2476. Szuch said the early years are vital in a child's development, as it is during these years that children gain their initial sense of life and themselves. There were varying degrees of success among the five children because the two older boys got exposed to a lot more dysfunction early.

Barbara had her grandmother as a role model and protector, which gave her some relief, and Clara Jean got involved with Todd and Jeff while they were still young enough to be influenced. For Joey and John, "it was too late." XIX 2481.

Donna Leslie became friends with John in 1992. Her father met John independently and was his employer at the sewer plant in the correctional department. Leslie testified John was a hard worker and her father "thought the world" of him. XIX 2487-2490.

Jose Perez supervised John at Arizona State Prison for nine months in 1995. Perez testified that John was knowledgeable about everything--coolers, heaters, welding, carpentry--and was a very good worker and reliable. His skills were very valuable in prison and needed on a daily basis. He set a good example for other prisoners and taught other inmates carpentry, welding, and plumbing skills. Perez trusted him with tools. XIX 2492-2500.

Mary Ann Taylor said she married John in 1996. She was a special education teacher at the Arizona Department of Juvenile Corrections. Mary Ann had been married to her first husband for 24 years and had three children, Justin, Anita, and Troy. Her first husband had never wanted the kids around him. John developed a close relationship with Justin, her youngest, who was then 18. Justin said John taught him more in a few months than his father taught him in his whole life. John and Anita sometimes "butted heads" but John supported her 100%. When Anita had a baby, he watched the baby so she could go out with

friends. John also developed a close relationship with Mary Ann's nephew, Joe, who had been abandoned by his family. John realized Joe was all alone and insisted he have meals with them. Joey had planned on moving to Florida because of his relationship with John. XIX 2516-2522. John always doing things for strangers. He helped a woman whose car had broken down at the Circle K. And, once when they were driving through New Mexico, they came across a car that had broken down, and John drove the couple, their kids, and their dog to Albuquerque, which was out of his way. XIX 2523-2526.

John came to Florida to help his father because it was important to him to have ties with his family. Things were fine for a while, then John started drinking, which he had not done in Arizona, and seeing other women. He never got violent though. She still loved him and wanted to be involved in his life and wanted him in her children's lives. XIX 2526-2529.

John's father, John Earsley, said John came to St. Augustine in 1997 to work in his marine construction business. He began working the day after he arrived, working "twelve, fourteen, sixteen-hour days, seven days a week." He was a hard worker, one of the best his father ever had. He was very talented, was a master plumber, finish carpenter, good mechanic. He took an interest in the business and its welfare. Mr. Taylor was grooming him to take over the business. Then, on Thanksgiving, John went to Arkansas without saying where he was going. He returned with Michael, determined that his father hire him. Mr. Taylor refused to hire Michael, and two weeks later, he and

John had an argument, and he let John go. Mr. Taylor had never known John to be violent. XVIII 2230-2238.

Jackie Sharpe, John's niece, said John was the only one of her uncles who seemed to care. Whatever she had to say, he'd sit down and listen. She talked to him every week when he called from prison. He gave her good advice and encouraged her to stay in school and make something of herself. She wanted him to continue to be in her and her baby's lives. XIX 2537-2543.

Anita Gray, Mary Ann's daughter, was the director of an after-school program. She said John was a kid when it came to birthdays and Christmas and was as happy as a three-year-old when it came to opening presents. She never saw any sign of violence in him. Sometimes they argued, but John walked away from arguments. He helped her during her pregnancy, took her to the hospital to have the baby, and took part in the baby shower. He was excited about the baby and helped care for her. Anita wanted him to be a part of her and her daughter's lives. XIX 2545-2552.

Justin Gray, 23, said John was more of a father to him than his real father. John was genuinely concerned about where his life was headed and was very generous. John remodeled their house and included him in it. He bought a car for him and they redid the engine together. John knew what he had done was wrong and he wanted to get past it. John got his boss to sponsor a softball team, which he and Justin played on together. Justin was considering moving to Florida to be near

John and his mother. John wanted to do everything at family gatherings. He said he had never had anything like that before in his life. Justin never saw John violent, never saw him lose his temper or raise a hand to anybody for any reason. XIX 2553-2565.

James Vavra was the contractor John worked for from 1995 to 1997. His wife, Carolyn, ran the office. John started as a carpenter, and within six months, was running a full crew and building big custom homes. Vavra said John was a "great person," "one of the best foremen I've ever had, and I've had a lot of them." He was very conscientious. He got along great with the people he supervised. They all loved him. If they didn't have a ride or their car broke down, he'd pick them up and bring them to the job. He was very loyal, like a son, and watched out for the company. Vavra asked him not to leave and had a hard time replacing him. When he left to work with his dad, it seemed like he was trying to pick up something from the past that was missing. Vavra never saw any sign of violence in him. He was happy-go-lucky, a very easy going person. With Anita's baby, he was like a happy grandfather. He loved everybody. When asked about the homicide, Vavra said, "[t]hat's not John. He -- I don't believe he did it." XIX 2566-2582. Carolyn Vavra said John was "very kind," "very trustworthy," and "very easy to get along with." He was well-liked by all the men under him. They hated for him to go but were excited for him because he wanted to have a relationship with his dad. She never saw John angry or violent. Even under

stress, he was very calm. Committing a violent crime was "completely out of character." XX 2584-2591.

SUMMARY OF ARGUMENT

Point 1. The trial court erred in denying Taylor's motion to suppress physical evidence seized from his residence and vehicle, his statements made while detained in the back of the patrol car and the police station, and the clothing seized when he was arrested. The evidence and statements were the fruit of illegal police action, and should not have been admitted. The deputies' initial consensual entry into Taylor's trailer became an unauthorized detention when an officer followed Taylor into his bathroom to watch him get dressed. The police action became more restrictive and coercive as four armed officers came and went from the trailer at will while a helicopter hovered overhead. These actions constituted a show of official authority such that a reasonable person under the circumstances would not have believed he was free to ignore the police presence and go about his business. Taylor was further restrained when Deputy Lindsay directed him to walk to the kitchen after Lindsay saw Taylor take something out of his back pocket and place it under a chair cushion. The deputies had no justification to seize Taylor as they did not know a crime had been committed, much less that he had committed one, and did not have probable cause to believe Taylor was armed. Taylor's consent to search the chair was tainted and rendered involuntary by the prior illegal seizure.

Taylor's consent to the search of his home and car, and his statement made while in the patrol car, also were not voluntary. Removing Taylor from his home in handcuffs and placing him in the back of the patrol car was a de facto arrest without probable cause, and the consents and statement were tainted fruit of that illegal detention and should have been suppressed.

Taylor's transportation to and continued detention at the police station also was illegal. There is no evidence Taylor actually consented to go to the police station, much less that he did so voluntarily. Because Taylor was taken to the police station without probable cause to arrest, his confession to the Yelton burglary was tainted fruit of his illegal arrest and should have been suppressed. Taylor's arrest was the fruit of his illegally obtained confession and itself illegal. The fruits of that arrest, including the clothing received during booking, also was tainted and should have been suppressed.

Point 2. The trial court erred in allowing four witnesses to testify to statements made by the victim about giving Taylor a ride to Green Cove Springs to get his rental car. The trial court admitted the statements as evidence that she was taken into the woods against her will, a necessary element of the kidnapping charge. There was no dispute that the victim was abducted against her will, however. Furthermore, her statement that she was giving Taylor a ride to Green Cove did not evince a specific intent not to voluntarily take him somewhere else.

The main relevance of the statements was to prove Taylor's state of mind, which is improper.

Point 3. The trial court erred in admitting into evidence the credit application Taylor submitted to Garber Ford the day of the murder. The application contained information of bad acts, such as lies about his employment and was completely irrelevant to any issue in the case. Accordingly, it was inadmissible.

Point 4. The trial court erred in allowing the prosecutor to bolster Deputy Noble's testimony with a prior consistent statement where the prior statement was given a year after any motive to fabricate would have arisen.

Point 5. The trial court erred in admitting into evidence a pair of boxer shorts purportedly taken from Taylor when he was booked into the jail. The booking officer took Taylor's clothes, placed them in a bag, and left the bag in a cabinet in the booking office unattended. There was no evidence boxers were placed in the bag. When the bag was retrieved, an identifying note was gone and a staple had been pulled out. Under these circumstances, where the state had to rely on the integrity of the bag for the existence of the underwear, and where the bag appeared to have been tampered with, a proper chain of custody was required, and the boxers should not have been admitted.

Point 6. The husband-wife privilege was violated when the trial court required Taylor's wife to testify that Taylor told her Michael McJunkin would need money for a bus ticket to

Arkansas. Waiver of the privilege occurs only when the substance of a privileged communication is revealed. Thus, Mrs. Taylor's testimony that she helped McJunkin buy a ticket did not "open the door" to any privileged matters.

Point 7. The trial court erred in instructing the jury on and in finding the under sentence of imprisonment aggravating factor based upon a 1991 Arkansas prison. This aggravator has never been held to apply to an offense for which the defendant was neither incarcerated nor placed under any type of supervision. The aggravator should not apply here, where Taylor never began serving the sentence due to administrative error and may not even have know he owed Arkansas any prison time.

Point 8. The trial court erred in finding the evidence failed to prove five of the proposed nonstatutory mitigating factors. The trial court's rejection of these mitigators is not supported by the record or by the court's own order.

Point 9. The death sentence is disproportionate because this is not one of the most aggravated and least mitigated of capital murders. The two relatively weak aggravators are balanced against significant mitigation, including severe abuse and neglect during Taylor's first eleven years and the ability to lead a useful and productive life in prison. When compared to other cases involving a similar balance of aggravation and mitigation, the death sentence is not warranted.

ARGUMENT

Point I

THE TRIAL COURT ERRED IN DENYING TAYLOR'S MOTION TO SUPPRESS PHYSICAL EVIDENCE SEIZED FROM HIS HOUSE AND VEHICLE, HIS STATEMENTS MADE WHILE DETAINED IN THE BACK OF THE PATROL CAR AND AT THE POLICE STATION, AND THE CLOTHING SEIZED AFTER HIS ARREST, WHERE THE EVIDENCE AND STATEMENTS WERE THE POISONED FRUIT OF ILLEGAL POLICE ACTION.

Prior to trial, Taylor moved to suppress numerous items of physical evidence seized from his person, residence, and vehicle on December 30, 1997,[4] and statements made outside his residence and at the police station that same day. I 98-100, II 297-300, 364-386. Taylor contended the evidence and statements were obtained as the direct result of illegal police activity in violation of the Fourth Amendment of the United States Constitution, and Article I, section 12, of the Florida Constitution, and should be suppressed as the fruit of the poisonous tree. The motions were heard on January 19 and March 30, 1999. On April 14, 1999, the trial court filed a written order denying the motions to suppress.[5] III 500-510 (**Appendix A**).

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[4]The items Taylor sought to suppress were $1,642 found under the chair cushion, $2,000 and Royal Crown bag, photo of LA Gear shoe box in car, two consent to search forms, LA gear box and receipt, Walmart tag and LA Gear tag, Burnett Realty paperwork and car rental contract, receipts from jewelry store and Music Land, insufficient fund notice, business card from Garber, LA Gear shoes, underwear, and swatch from underwear.

[5]At trial, Taylor renewed his objection to the admission of the evidence and statements that were the subject of his suppression motions, thereby preserving the issue for appellate review. XIII 1221, XIV 1411, 1503, 1506, 1509, 1568, XV 1610, 1671, 1688, 1691.

A. Background

At the suppression hearing, the following facts were adduced: Deputy Strickland and Deputy Lindsay arrived at John Taylor's trailer around noon on December 30, 1997, after learning from dispatch that Taylor was wanted for questioning in the missing person's case of Shannon Holzer. Shannon had not been seen since the previous afternoon, when she and Taylor left her family's store with a bank deposit. She had not fed her horse since then nor called her daughter at her ex-husband's, as she usually did. Strickland, who was off-duty, arrived first in an unmarked car, accompanied by a civilian friend named Robert Heaton. Lindsay arrived a few minutes later in a marked car. By the time Lindsay arrived, a police helicopter was hovering overhead. Strickland, Lindsay, and Heaton knocked on the door and were invited in by Taylor's son, who told the deputies Taylor was in the shower. When Taylor came into the living room with a towel wrapped around him, Strickland suggested he get dressed, then followed him to the back of the trailer and stood in the bathroom doorway and watched while Taylor put on his pants. The deputies then questioned Taylor about Shannon's disappearance. Taylor told them she had given him a ride to his trailer the previous day. Taylor then sat down while they awaited the arrival of more deputies.

Two more patrol cars arrived, and Deputies Noble and Lee entered the trailer as Strickland and Heaton left. At some point, Deputy Lindsay obtained Taylor's driver's license and

went out to his patrol car to run a warrants check. While sitting in his car, which was positioned in front of the door of the trailer, Lindsay saw Taylor remove something from his back pocket and place it under the cushion of the chair upon which he was sitting. Lindsay re-entered the trailer and directed Taylor to stand up and walk towards the kitchen. He asked Taylor what was under the cushion and could he look. Taylor responded "nothing" and told Lindsay to go ahead. Lindsay lifted the cushion and saw a roll of money with a one hundred dollar bill on top. Lindsay immediately drew his weapon, and Noble handcuffed and frisked Taylor, then escorted him outside and placed him in the back of his patrol car with his legs out on the ground. Somewhere between the trailer and the car, he read Taylor his Miranda rights. Taylor did not reply, he just shrugged his shoulders. According to Noble, Taylor was not free to leave. Noble removed the handcuffs and asked Taylor where he got the money. Taylor told the deputy he "had it." Noble told Taylor they had to search his car and house. Taylor signed consent forms, and while signing the forms, said there was more money in the car under the passenger seat. Noble looked under the passenger seat and found a purple Royal Crown bag with money of different denominations in it. Noble told Taylor they needed to take him to the police station to speak with Detective Lester. Taylor just shrugged his shoulders Taylor was then taken to the police station in the back of the patrol vehicle. When they arrived, he was told he was not under arrest but was

handcuffed again and placed in an interrogation room. Detective Lester arrived and removed the handcuffs. Taylor was read his rights again, then questioned for two to three hours. When confronted with the fact that he had a large sum of money and that Shannon was missing along with a large sum of money, Taylor said he got the money eight days earlier from Chip Yelton's truck. Lester checked out the story and after learning Yelton's truck had been burglarized on the day Taylor had specified, he arrested Taylor for burglary. At Lester's direction, the booking officer held Taylor's clothing in the booking room as evidence. The clothing was picked up two weeks later and sent to a lab for testing. DNA on the clothing contained the same series and type as samples from Shannon.

In denying the motion to suppress, the trial court ruled: 1) the initial entry and contact with Taylor was consensual; 2) the search under the cushion was justified as a protective sweep of the premises and by Taylor's consent; 3) the handcuffing and frisk of Taylor was justified by reasonable suspicion that he was armed and dangerous; 4) Taylor's detention in the patrol car and at the police station was a valid investigative detention; 5) Taylor voluntarily consented to the search of his vehicle and trailer; 6) Taylor's statement that there was more money in the car was voluntary; 7) Taylor voluntarily agreed to go to the police station in lieu of being questioned at his trailer; 8) Taylor's

confession to the Yelton burglary was voluntary; 9) the clothing was validly seized incident to a lawful arrest.

B. Standard of Review

The trial court's conclusions as to the lawfulness of searches and seizures present mixed questions of law and fact, which must be reviewed de novo on appeal, subject to the caveat that findings of fact be reviewed under the clearly erroneous standard. Ornelas v. United States, 517 U.S. 690 (1996); United States v. Thomas, 863 F.2d 622, 625 (9th Cir. 1988); Graham v. State, 714 So. 2d 1142 (Fla. 1st DCA 1998).

C. Argument

1. The Initial Intrusion Was an Unlawful Seizure.

The well-established test for distinguishing a consensual encounter from a seizure[6] is whether there was a "show of

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[6] In construing the demands of the Fourth Amendment, the Supreme Court has recognized three types of police-citizen encounters. The first type, the mere approach and questioning of a willing person in a public place, involves no coercion and detention and is outside the domain of the Fourth Amendment. See Florida v. Royer, 460 U.S. 491 (1983)(plurality opinion). The second type of encounter is the brief investigative detention recognized in Terry v. Ohio, 392 U.S. 1 (1968). A Terry-type seizure satisfies the Fourth Amendment if the officer has an objective, reasonable suspicion of unlawful activity. At this level, a frisk for weapons is authorized only where the officer is justified in believing the person is armed and presently dangerous. The third tier of police-citizen encounters includes any seizure that exceeds the parameters of a lawful investigative stop. At this level, the seizure must be supported by probable cause. See Dunaway v. New York, 442 U.S. 200 (1979)(defendant may not be seized and transported to police station absent probable cause); Royer (defendant's removal from airport concourse to small office constituted de facto arrest without probable cause); Goss v. State, 744 So. 2d 1167 (Fla. 2d DCA 1999)(lawful stop became de facto arrest without probable

official authority" that would have communicated to a reasonable person that the person was not free "to decline the officers' requests or otherwise terminate the encounter." Florida v. Bostick, 501 U.S. 429 (1991).[7] A show of authority need not be explicit but may be shown by conduct that implicitly manifests authority to restrict the person's freedom of movement. See, e.g., United State v. Guapi, 144 F.3d 1393 (11th Cir. 1998)(stop occurred where agent boarded bus, held up his badge, asked to see bus passenger's ticket and identification, and then asked to search passenger's belongings and person without advising passengers they could refuse consent); Mosby v. State, 575 So. 2d 304 (Fla. 2d DCA 1991)(stop occurred when officers parked behind suspect's car with high beams and spotlight on and walked up to driver's and passenger's windows and asked for identification); Hernandez v. State, 666 So. 2d 208 (Fla. 2d DCA 1995)(stop occurred when uniformed deputy with patrol car told suspect to hang up telephone, while suspect could view arrested friend); Clayton v. State, 616 So. 2d 615 (Fla. 4th DCA 1993)(stop occurred when two police cars drove up to defendant, four officers jumped out, and one officer, wearing gun, aggressively

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cause when defendant placed in patrol car).

[7] In Bostick, the Court reviewed a drug interdiction program in which police randomly boarded buses and questioned the passengers. Prior to Bostick, the Court had held police may approach individuals in public places to ask questions and request consent to search, so long as a reasonable person would believe he or she was free to leave. In Bostick, the Court rejected the "free to leave" test articulated for street encounters because bus passengers may not want to leave.

inquired of defendant); State v. Martin, 532 So. 2d 95 (Fla. 4th DCA 1988)(retaining documents such as identification or bus ticket during encounter may transform encounter into seizure).

In the present case, the police asserted control over Taylor immediately, and their actions became progressively more restrictive and coercive. The officers were already present in the trailer when Taylor got out of the shower and entered his living room clad only in a towel. The police helicopter could be heard hovering overhead. After their initial entry, police officers came and went from the trailer at will, and new officers arrived and entered without seeking permission. The civilian, Robert Heaton, stood at the doorway of the trailer the entire time he was there, and anyone who wanted to leave had to go past him. All the officers were armed. Even Deputy Strickland, who was not in uniform, was wearing his badge and sidearm. Before the officers even told Taylor why they were there, Deputy Strickland followed Taylor to the bathroom and watched while he put on a pair of pants. At some point, Lindsay obtained Taylor's driver's license and took it outside to run a warrants check.

The trial court's conclusion that this encounter involved no coercion or detention defies common sense. The entire atmosphere was coercive and police-dominated. Deputy Strickland's action in following Taylor to his bathroom and watching him get dressed was an overt display of authority and a substantial intrusion on Taylor's privacy and freedom of

movement. In Terry, the Court characterized a frisk for weapons as "a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment." 392 U.S. at 16. Being followed to the bathroom in one's home and subjected to the watchful gaze of an officer while getting dressed is no less intrusive. This action alone "would [] have communicated to a reasonable person an attempt to intrude upon his freedom of movement." See Michigan v. Chesternut, 486 U.S. 567 (1988).

The trial court observed that the officers never threatened Taylor, did not put their hands on him, and did not block his path. The trial court said there was no evidence they acted anything but "professional" and that Strickland even shook Taylor's hand and thanked him for his help when he left. First, appellant can find no testimony in the record about anyone thanking anyone, and Strickland shook Deputy Lee's hand, not Taylor's, when he left.[8] Second, "professionalism"

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[8]During direct examination, Strickland testified:

> A Okay. After Deputy Lindsay arrived, he was -- Deputy Noble, I believe, came next and after him Deputy Lee.
> Q Okay. And did either of them go inside, to your knowledge?
> A I don't know. I don't recall. I believe that Deputy Noble may have.
> And I know that I did not see Deputy Lee go inside because as he was pulling up, I was leaving. I shook his hand, got in my truck, and left.

III 433-434. Deputy Lee testified:

is not the standard for determining whether a seizure has occurred. The test is whether a reasonable person would have felt free to decline the officer's requests or terminate the encounter. And, if by professionalism, the trial court meant behavior that would be nonoffensive if engaged in by ordinary citizens, Deputy Strickland's conduct in following Taylor to his bathroom to watch him dress would not meet that definition.

Furthermore, explicit restraints were unnecessary given the setting of the encounter. Taylor initially was confronted by two armed officers within the cramped confines of his tiny trailer. See State's Exhibit 3. Mr. Heaton stood at the doorway, and even if Heaton was not actually blocking the door, his presence there may have created the impression that Taylor would be prevented from leaving. Moveover, the officers never informed Taylor his cooperation was voluntary. They followed him to the bathroom, obviously restricting his movements, before they told him why they were there. They did not ask for his cooperation but informed him detectives "needed" to speak with him. Absent some positive indication he was free not to cooperate, it is doubtful a reasonable person under these circumstances would think he could refuse

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> Q And can you tell us what was taking place when you arrived and walked up to the residence?
> A As I pulled up Deputy Strickland saw me pull up and I was the day supervisor so he came out and talked to me, and I believe Deputy Noble was still inside the trailer.

III 460-461.

to cooperate. See United States v. Washington, 151 F.3d 1354 (11th Cir. 1998)(stop occurred where federal agent boarded bus, held up his badge, asked to see tickets and identification, and then asked to search passenger's belongings and person without advising passengers they could refuse consent); United State v. Guapi (same); Gonzalez v. State, 578 So. 2d 729, 733 (Fla. 3d DCA 1991)(where three police officers clad in raid jackets knocked at defendant's door and told defendant's wife when she answered that they were conducing narcotics investigation and "would like to speak with her," wife's "invitation" to enter may well have been acquiescence to authority, not voluntary consent to enter).

The circumstances here were much more intrusive, intimidating, and coercive than the facts in Bostick and other cases involving encounters between police and citizens in public places. Unlike street encounters or even a bus sweep, Taylor was in isolation and partial undress when initially confronted by the officers. Furthermore, because Taylor was in his home, he had a heightened expectation of privacy resulting in a heightened degree of intrusion. See Payton v. New York, 445 U.S. 573 ("Freedom from intrusion into the home or dwelling is the archetype of the privacy protection secured by the Fourth Amendment").

The totality of the circumstances surrounding this encounter--the initial confrontation in his living room by two armed officers, with a third person standing at the door; a

police helicopter overhead; being followed to the bathroom and watched while he dressed; the arrival of two more uniformed deputies who entered the trailer without permission; the removal of his driver's license to another location--were so coercive and intimidating that a reasonable person under the circumstances would not believe he was "at liberty to ignore the police presence and go about his business." See Michigan v. Chesternut, 486 U.S. at 569. The initial contact with Taylor therefore was a seizure within the meaning of the Fourth Amendment. A Terry-type seizure meets constitutional safeguards only if the police have a reasonable suspicion of criminal activity based on articulable and specific facts known to them when the seizure occurred. The seizure here did not meet this standard. The deputies knew only that Shannon Holzer was missing under suspicious circumstances and that she was last seen with Taylor. They did not know if a crime had been committed or if Taylor was involved. These facts were insufficient to support a reasonable suspicion of criminal activity, and the initial intrusion was therefore unlawful.

2. The Search Under the Cushion was Illegal Because Taylor's Consent was the Product of Coercion and the Deputies did not have Probable Cause to Believe Taylor was Armed and Dangerous.

The trial court upheld the search of the chair cushion on two grounds, one, Taylor's furtive movement in placing something under the cushion justified a protective sweep of the area, and two, Taylor voluntarily consented to the search. Neither theory justifies the search.

The search of the chair cushion cannot be justified by consent because Taylor's consent was tainted by the prior illegal police activity. In order to rely upon consent to justify the lawfulness of a search, the state has the burden of proving the consent was freely and voluntarily given. Bumper v. North Carolina, 391 U.S. 543 (1968). Whether a consent to search was voluntary or was the product of coercion, express or implied, is determined from the totality of the circumstances. When consent is obtained after illegal police activity, however, the unlawful police action presumptively taints and renders involuntary any consent to search. Brown v. Illinois, 422 U.S. 590 (1975); Wong Sun v. United States, 371 U.S. 471 (1963); Norman v. State, 379 So. 2d 643 (Fla. 1980); Bailey v. State, 319 So. 2d 22 (Fla. 1975). The consent will be held voluntary only if there is clear and convincing evidence of an unequivocal break in the chain of illegality between the prior unlawful police action and the purported consent. Norman; Bailey.

Here, Officer Lindsay was seated in his police car running a warrants check on Taylor's license when he saw Taylor remove something from his back pocket and place it under the cushion of the chair upon which he was sitting. As the trial court noted, it is unclear whether Noble and Lee were inside the trailer when Taylor made the movements Lindsay observed. Noble testified Lindsay and Strickland were coming out of the trailer as he entered and Lindsay told him before he entered that Taylor hid something under the cushion. III

403, 417-419. Lindsay testified Noble and Lee were inside the trailer when he went outside to run the license. III 447, 451. In any event, Lindsay re-entered the trailer and ordered Taylor to stand up and walk toward the kitchen, which Taylor did. Lindsay then asked him what was under the cushion, and Taylor responded "nothing." Lindsay asked if he could look, and Taylor said "go ahead."

As discussed in point 1 above, Taylor had been unlawfully seized and the officers were therefore unlawfully in Taylor's presence when Lindsay observed him place something under the chair cushion. And, before Lindsay asked if he could look under the cushion, he asserted explicit control over Taylor by directing him to stand up and walk toward the kitchen. The consent was given immediately after this directive. Taylor's consent thus was the direct product of the prior illegal police activity, as no intervening circumstances broke the chain of illegal conduct. The fruits of the search therefore should have been suppressed. See Barna v. State, 636 So. 2d 571 (Fla. 4th DCA 1994); LaFontaine v. State, 749 So. 2d 558 (Fla. 2d DCA 2000); Pirri v. State, 428 So. 2d 285 (Fla. 4th DCA), review denied, 438 So. 2d 834 (Fla. 1983). Furthermore, Taylor's attempt to conceal the object evinced a lack of voluntary consent and tends to prove his words "go ahead" were acquiescence to apparent authority rather than true consent. See Riley v. State, 722 So. 2d 927 (Fla. 2d DCA 1998)(householder's concealment of small object in her hand evidenced her lack of consent).

Nor can the search of the chair be justified as a protective sweep for weapons. In finding the search justified as a protective sweep, the trial court relied on Michigan v. Long, 463 U.S. 1032 (1983), and Maryland v. Buie, 494 U.S. 325 (1990). These cases do not apply here, however, because they authorize protective searches during lawful seizures where the officer has a reasonable belief the area to be swept poses a danger. Long held police may conduct a limited "frisk" of an automobile during a lawful stop when the officer has a reasonable belief the suspect is dangerous and may gain immediate control of weapons. Buie held police may conduct a protective sweep in conjunction with an in-home arrest when the officer has a reasonable belief the area harbors a dangerous individual.

Here, in contrast, the search of the cushion took place during an unlawful seizure, was the direct result of that unlawful seizure, and the money found therefore was inadmissible under Wong Sun. See Daniels v. State, 543 So. 2d 363 (Fla. 1st DCA 1989)(a lawful patdown for weapons or protective search presupposes a lawful stop); Alexander v. State, 693 So. 2d 670 (Fla. 4th DCA 1997)(same).

Second, even if the officers were lawfully in Taylor's presence when he appeared to place something under the chair cushion, a protective search was not justified because Lindsay did not possess a reasonable belief Taylor was armed and dangerous. In numerous cases, courts have held that furtive movements, with no other facts to support the suspicion that

the defendant has a weapon, fail to justify a warrantless seizure and search. See Brown v. State, 687 So. 2d 13 (Fla. 5th DCA 1997); Breedlove v. State, 605 So. 2d 589 (Fla. 4th DCA 1992); Blue v. State, 592 So. 2d 1263 (Fla. 2d DCA 1992); Dees v. State, 564 So. 2d (Fla. 1st DCA 1990); Baggett v. State, 531 So. 2d 1028 (Fla. 1st DCA 1988); Ruddack v. State, 537 So. 2d 701 (Fla. 4th DCA 1989); Jenkins v. State, 524 So. 2d 1108 (Fla. 3d DCA 1988); Walker v. State, 514 So. 2d 1149 (Fla. 2d DCA 1987); G.J.P. v. State, 469 So. 2d 826 (Fla. 2d DCA 1985); Currens v. State, 363 So. 2d 1116 (Fla. 4th DCA 1978); Conner v. State, 349 So. 2d 709 (Fla. 1st DCA 1977). Rather, furtive movements must be one of several "specific and articulable" facts that cause an officer to reasonably believe a person is armed and dangerous. See, e.g. Brown v. State, 714 So. 2d 1191 (Fla. 4th DCA 1998)(officer had reasonable suspicion defendant was going for weapon when he turned away from officer and reached under waistband after running toward patrol car in threatening manner and where officer knew defendant had prior arrests for battery on a law enforcement officer and resisting arrest with violence), review dismissed, 734 So. 2d 421 (Fla. 1999).

Here, there were no additional facts from which Lindsay could have entertained a reasonable suspicion that Taylor was armed and dangerous. As the trial court recognized, Taylor had been "cooperative in every way," and Lindsay identified no objective facts to support a reasonable conclusion that led him to reasonably believe Taylor placed a weapon under the

cushion. See Dees (defendant's movement of taking something from dash area and placing it under front seat insufficient to justify stop and frisk); Conner (defendant's movement of taking something out of his hat and putting it in his shoe and officer's testimony that "I don't really know that it was a knife or gun or ax or what" insufficient to justify frisk). The facts relied upon by the trial judge--that Shannon and the bank deposit were missing and she was last seen with Taylor after saying she was giving him a ride to Green Cove Springs--do not justify a protective sweep because these facts do no more than raise a bare suspicion of criminal activity. A protective sweep is authorized only where a reasonably prudent officer is justified in believing the person with whom he is dealing is "armed and presently dangerous to the officer or others." If the facts relied on by the trial judge were sufficient to justify a frisk, then a frisk would be permissible during any authorized stop. The Court rejected this standard in Terry. Accordingly, the search of the chair was illegal, and the fruits of the search inadmissible.

3. The Police Exceeded the Permissible Scope of Terry Resulting in a De Facto Arrest Without Probable Cause when they removed Taylor from his Home in Handcuffs and Placed Him in the Back of a Patrol Car.

Immediately after the money was found under the chair cushion, one or more officers drew their weapons and handcuffed Taylor. He was immediately frisked and taken

outside to Officer Noble's patrol car, a caged unit, where he was placed in the back seat. He was informed of his Miranda rights either inside the residence or at the police car. These actions constituted a de facto arrest for which there was no probable cause.

A Terry stop may "last no longer than is necessary to effectuate the purpose of the stop" and "the investigative methods must be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time." Royer; Reynolds v. State, 592 So. 2d 1082 (Fla. 1992). Accordingly, a Terry stop may properly include force or threat of force only where justified by the circumstances. Handcuffing may be used only where it is "reasonably necessary to protect the officers' safety or to thwart a suspect's attempt to flee." Reynolds, 592 So. 2d at 1084. Likewise, placing a detainee in a car is proper only when dictated by special circumstances, such as officer safety or inclement weather. United States v. Manbeck, 744 F.2d 360 (4th Cir. 1984), cert. denied, 469 U.S. 1217 (1985); Goss; State v. Wilkins, 692 A.2d 1233 (Conn. 1997). When the officers' conduct is more intrusive than necessary for an investigative stop, a de facto arrrest occurs. United States v. Miller, 974 F.2d 953, 957 (8th Cir. 1992); United States v. Rose, 731 F.2d 1337, 1342 (8th Cir.), cert. denied, 469 U.S. 931 (1984); Goss.

In accord with these principles, Florida courts consistently have held that handcuffing and placing a suspect in a patrol

car constitutes a de facto arrest. Goss; Melendez v. State, 743 So. 2d 1145 (Fla. 4th DCA 1999); State v. Rivas-Marmol; Poey v. State, 562 So. 2d 449 (Fla. 3d DCA 1990); London v. State; State v. Coron, 411 So. 2d 237 (Fla. 3d DCA 1982).

In the present case, the patdown and handcuffing inside the trailer was unlawful because the officers did not have probable cause to believe Taylor was armed or dangerous. The money found under the cushion provided no basis for a reasonable belief that Taylor had removed a weapon from under the cushion. Lindsay testified he "clearly" saw Taylor take something from his back pocket and place it under the cushion. There was nothing else to support a reasonable belief that Taylor was armed or was dangerous. Taylor had offered no resistance and had complied with Lindsay's directive to walk towards the kitchen. The trial court's justification for the handcuffing--that it "was temporary and less intrusive than other avenues available to the officers"--does not satisfy Reynolds, which permits handcuffs only where there some basis in the record that handcuffs were necessary for officer safety.

However, even if the frisk and initial handcuffing were justified, there was no justification for removing Taylor from his home in handcuffs and placing him in the back of the patrol car. These actions were more intrusive than necessary and thus constituted a de facto arrest. The trial court's conclusion that this was merely a lawful investigative stop is not supported by any case law. The trial court's reliance on

Reynolds is misplaced. Reynolds did not involve the removal of a suspect from his own home but the detention of a person during the lawful stop of an automobile whose occupants were suspected crack dealers. This Court found the initial handcuffing proper where several officers testified they "regularly experienced very intense violent resistance" when apprehending persons in crack cocaine cases. The Court held the continued use of handcuffs after the pat-down revealed no weapons was illegal, however. Reynolds thus provides no support for Taylor's removal from his home and placement in the patrol car after the patdown revealed he had no weapons.

"It is the state's burden to demonstrate that the seizure it seeks to justify on the basis of a reasonable suspicion was sufficiently limited in scope and duration to satisfy the conditions of an investigative seizure." Florida v. Royer, 460 U.S. at 500. The state did not satisfy this burden. Taylor's removal from his home in handcuffs and placement in the back of the patrol car plainly exceeded the parameters of a lawful investigatory stop, resulting in a de facto arrest.

The state did not argue the officers had probable cause to arrest Taylor at that point. In fact, Detective Lester candidly admitted he did not have probable cause to arrest when Taylor was taken from his home. Nor did the trial court find probable cause. Caselaw supports this conclusion. The probable cause required for a warrantless arrest is much the same as a magistrate's assessment of probable cause for a search or arrest warrant to issue. London, 540 So. 2d 211,

citing Whitely v. Warden, 401 U.S. 560 (1971). Moreover, "a probable cause determination will not arise where the conduct is at least equally consistent with non-criminal activity." Angaran v. State, 681 So. 2d 745 (Fla. 2d DCA 1996). Thus, an attempt to conceal an outwardly innocuous object, along with other factors, does not necessarily rise to the level of probable cause. See, e.g., Millets v. State, 660 So. 2d 789 (Fla. 4th DCA 1995), review denied, 667 So. 2d 775 (Fla. 1996).

In the present case, the officers knew Shannon was missing under suspicious circumstances after reportedly last seen with Taylor, but they did not know if a crime had been committed or if Taylor committed it. The money found under the chair cushion was not contraband, such as drugs, an illegal firearm, or identifiable stolen property. It was just money, and was not distinguishable in any way from any other money. It was not recognized as money that Shannon had been carrying and could not be connected to her or the bank deposit she was planning to make twenty-four hours earlier. No impartial magistrate could have issued a valid arrest warrant for Taylor based on these facts. Taylor's forced removal from his home was a de facto arrest without probable cause.

4. The Evidence Seized From Taylor's Home and Car Was the Fruits of the Unlawful Arrest and Unlawful Search.

Once an illegality is established under the Fourth Amendment, such as an illegal search or arrest, the illegality presumptively taints and renders involuntary any consent to search. Norman, 379 So. 2d 643. The consent will be held voluntary only if there is clear and convincing proof the consent was not a product of the illegal police action. Id.; Bailey, 319 So. 2d at 28-29. As this Court observed in Bailey:

> There may be a few rare instances in which a valid consent could be made after an illegal arrest, provided that circumstances were so strong, clear and convincing as to remove any doubt of a truly voluntary waiver. However, ordinarily consent given after an illegal arrest will not lose its unconstitutional taint.

319 So. 2d at 27-28.

Informing a suspect of his right to refuse consent is not dispositive but is merely a factor to be considered, along with the temporal proximity of the illegal arrest and consent, the presence of intervening circumstances, and the purpose and flagrancy of the official misconduct. Brown v. Illinois; Reynolds; United States v. Cherry, 794 F.2d 201 (5th Cir. 1986), cert. denied, 479 U.S. 1056 (1987); Reyes v. State, 741 S.W.2d 414 (Tex. Cr. App. 1987).

Here, the consent was given immediately after Taylor was removed from his home and placed in the back of the patrol vehicle. Though the handcuffs had been removed, Taylor remained under illegal police custody, cf. Peterson v. State, 503 So. 2d 1336 (Fla. 1st DCA 1987)(defendant's consent voluntary where given after officers let him out of police car

and returned license), and his consent was the direct product of the illegal detention.

No intervening circumstances attenuated the taint of the illegal detention. There is no evidence police advised Taylor of his right to refuse consent to a search. Immediately upon removing Taylor from his home and placing him in the patrol car, Noble told Taylor they "needed" to search his car and trailer. He then had Taylor sign the written consent forms. Although the written consent forms advised of the right to refuse consent, Noble could not remember whether he read the consent forms to Taylor. The written advice therefore was insufficent to purge the taint of the prior illegality. See Gonzalez v. State, 578 So. 2d 729, 736 (Fla. 3d DCA 1991)(taint of prior illegality not purged by consent where right to refuse consent contained in written consent form but no showing written advice ever read to or by defendant prior to signing form).

The purpose and flagrancy of the official misconduct in this case also weighs heavily against finding the taint of the illegal conduct sufficiently attenuated to render the consent free and voluntary. From the moment Taylor stepped into his living room clad only in a towel, the police asserted control over him and his property. The entire atmosphere was coercive, as discussed supra. The officers had followed Taylor around in his own home, restricting his freedom of movement and activity. Four armed officers had come and gone from the tiny trailer at will. The officers never asked

Taylor if he would voluntarily agree to speak with Detective Lester; they told him Lester needed to speak with him. The officers had already given Taylor the impression they could do whatever they wanted to do. In addition, Taylor had been coerced into consenting to the search of the chair, without any advice of rights. Finally, the arrest was made with no apparent justification other than to obtain a confession. See Brown v. Illinois, 422 U.S. at 605 (confession was poisoned fruit where obtained just two hours after arrest without any intervening event of significance and where arrest obviously illegal and undertaken "in the hope that something might turn up").

This case is similar to Gonzalez. There, three police officers clad in raid jackets knocked on the defendant's door at 9 p.m. Two other similarly clad officers stood on both sides of the house. The defendant's wife answered the door, and one of the officers said they were conducting a narcotics investigation and "would like to speak with her." The officers were armed but no weapons were visible. Mrs. Gonzalez opened the door and invited them in the house.[9] Upon entering, the police conducted a brief sweep of the house for security purposes. The police then told Mrs. Gonzalez a suspicious man had just come from her house, that he was

[9]Though the court did not resolve the issue, it noted a reasonable person under the circumstances well might have interpreted this statement as an order rather than a request to let the police enter, in which case Mrs. Gonzalez' "invitation" to enter the house was an acquiescence to authority, not a voluntary consent. 578 So. 2d at 733.

lying, and asked if they could search the house to make sure nothing was going on. Mrs. Gonzalez gave verbal consent, then signed a written consent form. The police then conducted a thorough search of the defendant's house, finding cocaine. The defendant was arrested based on the seizure of the cocaine. He later gave consent to search a floor safe in his house, which also yielded evidence admitted at his trial.

The court concluded the illegal protective sweep of the house tainted and rendered involuntary Mrs. Gonzalez's consent to search the house because "the police had already demonstrated to Mrs. Gonzalez, when they initially 'swept' through her house, that they had an absolute right to search the premises and that her 'consent' to any further search was a mere formality which she could not refuse." 578 So. 2d at 733. The court held the taint of the prior illegality was not dissipated by the printed advices of rights on the written consent forms because "Mrs. Gonzalez had already been coerced into verbally consenting to a search of her house, without any such advice of rights, before the police read the written consent forms for her signature." Id. at 734 n.14.

Here, too, there is nothing in the record that would serve to dissipate the taint of the illegal arrest and search so as to render Taylor's consent voluntary. Here, as in Gonzalez, Taylor had already been coerced into giving his verbal consent before he signed the consent forms to formalize that consent. Furthermore, here, there was no clear and convincing evidence Taylor was read the written consent form or that he read it

himself. Accordingly, the warrantless search of his home and car were unlawful, and the fruits of those searches must be suppressed.

5. Taylor's Statements Were the Fruits of the Illegal Arrest.

Officer Noble testified that while Taylor was signing the consent to search forms in the back seat of the patrol car, he told Noble there was more money in his car. Taylor was then transported to the police station, where after two to three hours, he gave additional statements to Detective Lester. All of these statements were a direct product of the illegal arrest, and no intervening circumstances dissipated the taint of the illegality. Accordingly, Taylor's statements were the poisoned fruit of his illegal arrest and should have been suppressed.

Taylor's statements to Officer Noble in the police car were the product of both the illegal arrest and the imminent unlawful search. See Howell v. State, 725 So. 2d 429 (Fla. 2d DCA 1999). In Howell, police lawfully stopped Howell for speeding, then directed Howell and his two passengers to exit the car. The officers began conducting pat-down searches for officer safety, patting down the passengers first. As one of the officers approached Howell, Howell told the officer he had a gun. On appeal, the court held the officers lacked authority to conduct the pat-down search. The state asserted the seizure of the gun was justified nonetheless because it

was voluntarily disclosed by Howell. The court rejected this argument:

> Howell asserts that his incriminating statement was a product of the imminent, unlawful pat-down search and was, therefore, made in acquiescence to police authority. We agree with Howell. As we have indicated, the record shows that Howell stated he had a gun only after he observed the officers complete a pat-down search of the passengers and as Deputy Salnato was approaching him to conduct a pat-down search. We conclude that Howell's admission was the product of the imminent pat-down search and not the result of an independent act of free will.

Id. at 431.

Here, too, Taylor's admission that there was more money in the car was the product of the imminent search of his car for which police had no authority.

Taylor's statements made at the police station likewise were the fruit of his unlawful arrest. It is now firmly established that a confession obtained through custodial interrogation after an illegal arrest should be excluded unless intervening events break the causal connection between the illegal arrest and the confession so that the confession is "'sufficiently an act of free will to purge the primary taint.'" Brown v. Illinois, 422 U.S. at 602 (quoting Wong Sun, 371 U.S. at 486); see also Taylor v. Alabama, 432 U.S. 687 (1982); Dunaway v. New York; State v. Rivas-Marmol; State v. Delgado-Armenta, 429 So. 2d 328 (Fla. 2d DCA 1983). The rule applies whether or not the defendant's removal to the police station is technically characterized as an arrest. Dunaway, 442 U.S. at 212-213 (mere fact petitioner was not told he was under arrest, was not "booked," and would not have

had an arrest record if interrogation had proved fruitless, do not make petitioner's seizure even roughly analogous to the narrowly defined intrusions involved in Terry). Involuntary transportation to the police station merely for "investigation" also is forbidden by the Fourth Amendment, absent probable cause. See Hayes v. Florida, 470 U.S. 811 (1985)(seizure and transportation of defendant to police station where he was fingerprinted and briefly questioned violated Fourth Amendment, and fingerprints were inadmissible fruits of illegal detention).

Accordingly, under Dunaway and its progeny, the stationhouse interrogation of Taylor without probable cause was a violation of his Fourth Amendment rights. The trial court's conclusion that this was a valid "temporary" detention was error. In this case, as in Dunaway and Taylor, the police effected an investigatory arrest without probable cause and involuntarily transported Taylor to the station for interrogation "in the hope that something would turn up." See Taylor, 457 U.S. at 693.

The trial court erred, too, in concluding Taylor voluntarily agreed to go to the police station. Officer Noble testified, "I explained to him, Mr. Taylor, that Detective Lester wanted to speak with him at the sheriff's office. Again, he made no comment; "he just kind of shrugged his shoulders." III 423. The facts do not show actual consent, much less voluntary consent. Taylor's statements to Officer Noble at the police car and to Detective Lester at the police station were the product of his

illegal de facto arrest. No intervening event attenuated the taint to make those statements admissible. Accordingly, the statements should have been suppressed.

6. Taylor's Arrest Was the Poisonous Fruit of His Unlawfully-Obtained Confession, and the Clothing Seized Was the Poisonous Fruit of His Illegal Arrest.

Taylor was formally arrested for the burglary of Yelton's truck after he confessed to that burglary while being illegally held for interrogation at the police station. Taylor's arrest therefore was illegal. His clothing, including the boxer shorts later subjected to DNA analysis and introduced at trial, were the product of his illegal arrest and inadmissible. Wong Sun.

Point 2

THE TRIAL COURT ERRED IN PERMITTING JOE DUNN, ARTHUR MISHOE, ALEX METCALF, AND CYNTHIA SCHMERMUND TO TESTIFY TO HEARSAY STATEMENTS MADE BY THE VICTIM ABOUT GIVING TAYLOR A RIDE TO GREEN COVE SPRINGS.

At trial and over defense objection, the trial court permitted four witnesses to testify to statements made by the victim before leaving Buddy Boy's with Taylor the day she was killed. Joseph Dunn testified he heard Shannon say, "Don't tell Jeff. I'm just giving him a ride to Green Cove Springs." Arthur Mishoe testified he heard Shannon tell his uncle, Alex Metcalf, not to tell her husband, that she was giving a guy a ride to Green Cove to get his car. Metcalf testified Shannon told him not to say anything to Jeff, that she was giving Taylor a ride to Green Cove to rent a car. Cynthia Schmermund testified Shannon was taking Taylor to Green Cove to pick up a

rental car. The trial court admitted the out-of-court statements under the state of mind exception discussed in Peede v. State, 474 So. 2d 808 (Fla. 1985), cert. denied, 477 U.S. 909 (1986). The trial court's ruling was error because unlike the situation in Peede, the victim's state of mind when she left Buddy Boy's was not at issue here, nor do the statements evince the specific state of mind the state sought to prove.

Out-of-court statements generally are inadmissible to prove the truth of the facts asserted in them, unless the statements fall within an exception to the hearsay rule. See ss. 90.801(1)(c), .802, .803, Fla. Stat. (1997). The state of mind exception permits admission of hearsay statements that prove the declarant's state of mind "at that time or at any other time when such state is an issue in the action." s. 90.803(3)(a)(1). This Court recently outlined the contours of the state-of-mind exception in Woods v. State, 733 So. 2d 980, 987-88 (Fla. 1999)(citations omitted):

> Under the state of mind exception, the out-of-court statements by the declarant may not be used to prove the state of mind or motive of the defendant. As Woods correctly points out, under section 90.803(3)(a)(1), a homicide victim's state of mind prior to the fatal event generally is neither at issue nor probative or any material issue raised in the murder prosecution. The only exceptions to this rule are where the victim's state of mind goes to a material element of the crime, see Peede, or where the evidence rebuts a defense raised by the defendant.

In the present case, the state argued the victim's statements about giving Taylor a ride were admissible "to

prove [the victim's] state of mind as to why she was with [Taylor]," XII 1059, relying on Peede.

In Peede, the evidence showed Peede flew to Miami to get his estranged wife Darla to go to North Carolina with him to act as a decoy to lure his former wife and her boyfriend to a motel where he could kill them. He called Darla's residence several times and spoke to Tanya, her daughter, because Darla was not home. Peede finally spoke to Darla. According to Peede's confession, Darla picked him up at the airport, they headed north, and he stabbed Darla to death just outside Orlando. At Peede's trial for first-degree murder, Tanya was allowed to testify that Darla told her she was going to pick Peede up at the airport, she was scared she might be in danger, and Tanya should call the police if she was not back by midnight. This Court held the statements were properly admitted to show Darla's state of mind, which was relevant to the kidnapping charge which was the basis for the state's felony murder theory:

> Under section 787.01(1)(a), Florida Statutes (1983), it was necessary for the state to prove that the victim had been forcibly abducted against her will, which was not admitted by the defendant. The victim's statements to her daughter just prior to her disappearance all serve to demonstrate that the declarant's state of mind at that time was not to voluntarily accompany the defendant outside of Miami or to North Carolina.

474 So. 2d at 816.

Peede does not apply here for two reasons. First, here, there was no dispute as to whether Shannon voluntarily went into the woods with her killer. The defense did not dispute

that at some point after the victim made the deposit at the First Union Bank in Green Cove, she was attacked and taken to the woods. Taylor's defense was not that she voluntarily accompanied him into the woods but that someone else committed the crime. The victim's state of mind with regard to whether she voluntarily accompanied her killer therefore was not at issue. Second, in Peede, the hearsay statements that Darla feared Peede and to call the police if she was not home by midnight clearly demonstrated an intent not to accompany Peede out of the city. Here, Shannon's statement that she was giving Taylor a ride to Green Cove to pick up his rental car did not evince a specific intent not to take him somewhere else to get his car. The hearsay statement thus shed no light at all on whether Shannon was forcibly abducted against her will. Her alleged intent to give Taylor a ride to Green Cove was irrelevant to the felony-murder charge.

The state's real purpose in seeking to admit the hearsay statements was to show what Taylor asked Shannon to do, i.e., to show Taylor's state of mind. It is well settled, however, that the victim's statements cannot be used to prove the state of mind or motive of the defendant. Woods, 733 So. 2d at 987; Hodges v. State, 595 So. 2d 929, 931-32 (Fla.), vacated on other grounds, 506 U.S. 803 (1992); Downs v. State, 574 So. 2d 1095 (Fla. 1991); Correll v. State, 523 So. 2d 562 (Fla.), cert. denied, 488 U.S. 871 (1988); Charles W. Ehrhardt, Florida Evidence s 803.3(a), at 649 (2000 ed.). The statements in the present case are classic hearsay offered to

prove the truth of the matter asserted. In other words, the state sought to prove through hearsay that Taylor, in fact, asked for a ride to Green Cove Springs. Because the statements are hearsay, however, Taylor had no opportunity to cross-examine the person who made the statement to test that person's perception, memory, sincerity, and accuracy of the event. The facts contained in the statement could not be tested and are unreliable. Taylor may actually have asked Shannon if she was going to Green Cove, and when she responded "yes," asked for a ride to his rental car. From this exchange, Shannon may have assumed Taylor's car was in Green Cove. Because the statement could not be tested through cross-examination, the jury could have misused the statements as proof of the truth of what Taylor asked Shannon to do.

The present case is analogous to Selver v. State, 568 So. 2d 1331 (Fla. 4th DCA 1990), not Peede. In Selver, the state's case against appellant was that the victim, Gibbs, was executed as a result of a drug deal gone sour. The defense attacked the credibility of the witnesses who allegedly saw the defendant with Gibbs and called two witnesses who established an alibi for him at the time of the shooting. At trial, several witnesses were permitted to testify to statements made by Gibbs at various times before his kidnapping and murder. His wife testified that two weeks before his death, he said "he had some money that belonged to some people and he got ripped off." His brother testified that two weeks before the murder, he said he was in a deal

that went sour, he wanted to leave the country, and if he did not leave he would get shot. Another brother, Goldman, testified Gibbs told him two days before he died the defendant had given him some money to buy cocaine, the police had taken his car and he didn't know what happened to the money, and if he didn't have the money soon, the defendant would do something to him. The trial court allowed these statements under Peede.

The district court disagreed, however, reasoning:

> In Peede, the state of mind of the victim on the evening the statements were uttered was an issue, and the statement directly addressed the victim's intent not to voluntarily be with the defendant past a certain time period or physical location. However, the statements in the present case indicate only a generalized fear of someone, later identified in the statement to Goldman as appellant, at times well in advance of the actual kidnapping. They do not evince the specific intent which is in issue, namely the intent not to voluntarily accompany the appellant on the date of the murder. Statements of a murder victim that express general fear of the defendant or a concern the defendant may intend to kill the victim are generally inadmissible hearsay.

Id. at 1333-34 (emphasis added).

Shannon's statement showing her intent to give Taylor a ride to Green Cove to pick up his car is not relevant to whether she voluntarily gave him a ride to his trailer to pick up his car or to whether she was forcibly abducted after she made the deposit at the First Union Bank. The main relevance of the statements was to prove Taylor's state of mind, which is improper. Admitting the hearsay statements deprived Taylor of his right to cross-examine the witness against him, in violation of the confrontation clauses of the United States

Constitution and the Florida Constitution. Because there was no other testimony on this point, the error cannot be deemed harmless under the standard of State v. DeGuilio, 491 So. 2d 1129 (Fla. 1986).

. . . . . **Point 3** . . . . . .

THE TRIAL COURT ERRED IN ADMITTING INTO EVIDENCE TAYLOR'S CREDIT APPLICATION, WHICH INCLUDED STATEMENTS BY TAYLOR THAT WERE LIES.

At trial, the trial court overruled Taylor's objection to admitting into evidence the credit application Taylor submitted to Garber Ford Mercury the day of the murder. XIII 1338. The trial court's ruling on this issue was error because the information in the credit application was not relevant to any issue in this case. The credit application included statements by Taylor that were lies, such as that he was currently employed when he had not been working for several weeks. Such evidence of "other wrongs" is inadmissible unless relevant to prove a material issue other than the bad character or propensity of the individual. s. 90.404(2)(a), Fla. Stat. (1997). The credit application had no relevance here and should not have been admitted. Evidence that suggests a defendant has committed other crimes or bad acts can have a "powerful effect" on the results at trial. Bozeman v. State, 698 So. 2d 629, 631 (Fla. 4th DCA 1997). Such evidence is presumed to be prejudicial. Id. Here, where the jury had to decide who was telling the truth--McJunkin or Taylor--the improper admission of evidence showing Taylor had lied cannot be deemed harmless.

Point 4

THE TRIAL COURT ERRED IN ALLOWING THE PROSECUTOR TO REHABILITATE DEPUTY NOBLE BY ADMITTING A PRIOR CONSISTENT STATEMENT WHERE THE PRIOR STATEMENT WAS MADE A YEAR AFTER ANY MOTIVE TO FABRICATE AROSE.

On direct examination, Deputy Noble testified that while Mr. Taylor was seated in the back seat of Noble's patrol vehicle on December 30, 1997, Noble asked Taylor where he got the money under the chair, and Taylor said, "I've had it." Noble further testified that after Taylor signed written consent forms for his trailer and car, he told Noble there was more money in the car and it was underneath the passenger seat." XIV 1507. On cross-examination, the defense brought out that Noble did not include anywhere in his six-page report, which was written that same day and which detailed his contacts with Taylor, the statement about more money in the car. XIV 1517-1518. Over defense objection, the prosecutor was allowed to bring out on redirect that Noble testified Taylor made the statement about the money in the car at a motion hearing on January 19, 1999. XIV 1521-1523.

The trial court erred in permitting the state to bolster Noble's testimony with the prior consistent statement. It is well-established that a witness's prior consistent statements generally are inadmissible to corroborate the witness's testimony. Jackson v. State, 498 So. 2d 906 (Fla. 1986); Van Gallon v. State, 50 So. 2d 882 (Fla. 1951); McElveen v. State, 451 So. 2d 746 (Fla. 1st DCA 1982). An exception to the rule allows such statements to be used "to rebut an express or implied charge against [the declarant] of improper influence,

motive, or recent fabrication." s. 90.801(2)(b), Fla. Stat. (1997). The exception is applicable, however, only where the prior consistent statement was made "'prior to the existence of a fact said to indicate bias, interest, corruption, or other motive to testify.'" Jackson, 498 So. 2d at 910 (quoting McElveen, 451 So. 2d at 748).

In the present case, defense counsel impeached Noble's trial testimony by showing Noble had not written anywhere in his report of December 30, 1998, that Taylor said there was more money in the car. The implication of this impeachment was that Noble fabricated the statement after he wrote his report. His motive to fabricate could have arisen at any time after he wrote the report, therefore. The prior consistent statement was given a full year after the report was written, however, and after any motive to fabricate may have arisen. The prior consistent statement could not logically rebut any allegation of recent fabrication and therefore was inadmissible.

The trial court erred in allowing the prior consistent statement to bolster Deputy Noble's testimony. The statement about the money in the car was prejudicial because the prosecutor emphasized in closing argument that because the money found in the car added to the money found in the trailer and the money Taylor spent that day was more than the $5,000 Taylor said he got from Chip Yelton, Taylor's statement about the money in the car was evidence of his guilt:

> "Now, if he didn't make that statement which the Defense is claiming, they're saying he didn't make that statement, and you know why? Think about it. Do the math when you go back in that room. Because

> they know if they admit to this $2,000, that's more money than Chip Yelton had and the math won't add up. He can't admit to this $2000 because it's more money than Chip Yelton had and it nails him, ladies and gentlemen. So they have to dispute what Deputy Noble said or it's proof of his guilt. Do the math and you'll see. Without the 2000, it's just under that $5000 mark. With the 2000, it puts it at $6,347. Are you tired of hearing that figure? You can't be tired of it because it is proof beyond a reasonable doubt that this defendant robbed Shannon Holzer that night."

XVI 1945-1946.

The prior consistent statement should not have been admitted into evidence and improperly bolstered Noble's credibility. Because this case turned on the credibility of witnesses, and because the state emphasized the testimony about the money in the car during closing argument, the error cannot be deemed harmless. See, e.g., Bass v. State, 547 So. 2d 680 (Fla. 1st DCA), review denied, 553 So. 2d 1166 (Fla. 1989).

Point 5

> THE TRIAL COURT ERRED IN ADMITTING INTO EVIDENCE A PAIR OF UNDERWEAR FOUND IN THE BAG CONTAINING THE CLOTHING TAKEN FROM TAYLOR WHEN HE WAS ARRESTED, WHERE THE STATE PRESENTED NO EVIDENCE TAYLOR WAS WEARING UNDERWEAR OR THAT UNDERWEAR WAS PLACED IN THE BAG, WHERE THE BAG WAS LEFT UNATTENDED IN A CABINET FOR TWO WEEKS, AND WHERE THE BAG WAS NOT IN THE SAME CONDITION IT WAS IN WHEN ORIGINALLY PLACED IN THE CABINET.

At trial, Taylor moved to exclude from evidence a pair of boxer shorts the state claimed Taylor was wearing when he was booked into the St. John's County Jail. The bag containing Taylor's clothing had been left unattended for two weeks, and

when it was retrieved by the FDLE, an identifying note the booking officer had attached to it was gone and a staple had been pulled out of one side. There was no evidence Taylor was wearing underwear or that underwear was ever placed in the bag. The defense contended that under these circumstances, a proper chain of custody was required. The trial court denied the motion and admitted the underwear. XV 1653-1663.

The admissibility of demonstrative evidence seized during arrest depends on a showing that the proferred evidence is, in fact, the seized object and that its condition is materially unchanged. United States v. Zink, 612 F.2d 511 (10th Cir. 1980). This can be accomplished either by presenting witnesses who can visually identify such evidence or by showing a "chain of custody," which indirectly establishes the identity and integrity of the evidence by tracing its continuous whereabouts. Id. Although a break in the chain of custody alone is not a basis for excluding physical evidence, where there is an indication of probable tampering during the time for which the evidence is unaccounted, the evidence must be excluded. See Taplis v. State, 703 So. 2d 453 (Fla. 1997); Nieves v. State, 739 So. 2d 125 (Fla. 5th DCA 1999); Cridland v. State, 693 So. 2d 720 (Fla. 3d DCA 1997); Dodd v. State, 537 So. 2d 626 (Fla. 3d DCA 1988); Beck v. State, 405 So. 2d 1365 (Fla. 4th DCA 1981); Westfall v. State, 365 So. 2d 171 (Fla. 1st DCA 1978).

Probable tampering is indicated by an unexplained change in the condition of the evidence or its packaging. Taplis; Dodd.

In Dodd, where the evidence at issue was cocaine, the facts were as follows:

> The officer who seized the cocaine testified at trial he placed the bags of cocaine into a container. When weighed on a postal scale, the container and its contents registered a combined weight of 317.5 grams. The same officer transported the container to the FDLE office in Miami, where a contraband scale registered a combined weight of 249.5 grams. According to his testimony, the officer then put the bags inside a single plastic bag, heat-sealed the bag, and marked the date and his initials on the outside of the bag. The officer used a secure evidence locker to store the contraband until such time as he removed the bag and turned it over to a special agent who was to hand deliver it to the crime lab in Orlando. A chemist from the crime lab testified a heat-sealed plastic bag was delivered to the lab by the special agent. According to the chemist, the bag showed no markings whatsoever. The contraband, minus its packaging, registered a net weight of 220 grams on the lab scale. The state did not call the special agent to testify, nor was he listed as a potential witness in the state's pretrial catalog. In the course of three redirects, the officer who first seized and secured the contraband managed to explain some, but not all, of the discrepancies in weight and packaging.

537 So. 2d at 627.

On these facts, the Third District held it was error to admit the cocaine into evidence:

> [T]he conflicting descriptions of the bag and the gross discrepancies in the recorded weights and packaging details indicate probable tampering. It is plain that the contraband received by the crime lab was not in the same condition as was testified to by the officer who seized the contraband. On this record we cannot tell whether the cocaine Dodd sold and the cocaine introduced at trial are one and the same. Thus, it was error for the trial court to admit the cocaine into evidence without first receiving testimony from the special agent that would explain the changes in the condition of the evidence between the time of seizure and the time of trial. Lacking the testimony of the special agent, the state could not establish a sufficient chain of

> custody for the cocaine to be admitted in evidence against Dodd.

Id. at 628; accord Cridland (cocaine inadmissible where state did not produce testimony from two critical links in chain of custody and evidence was "conflicting" as to quantity of cocaine seized).

In State v. Taplis, 684 So. 2d 214 (Fla. 5th DCA 1996), review dismissed with opinion, 703 So. 2d 453 (Fla. 1997), on the other hand, the Fifth District concluded the evidence was admissible even in the absence of a proper chain of custody. At issue in Taplis were samples of debris from a burned automobile. Taplis was driving the car when it started burning. A Fire Service member put out the fire and the car was left on the street for three days. It was then towed to a secure lot and later towed to another secure lot. Samples of fire debris were then taken and sent to a lab for analysis. As a result of the tests, Taplis was charged with burning to defraud an insurer. Taplis argued the evidence had not been properly preserved and may have been the product of tampering. The court rejected this argument, reasoning that although the vehicle was left unattended for three days and the public had access to the lots during business hours, there was no indication of tampering. Furthermore, the Fire Service officer who put the fire out, two deputy sheriffs, employees of the secure lots, and the fire investigator all testified that no material changes occurred to the vehicle prior to obtaining the samples. 684 So. 2d at 216.

In the present case, the booking officer, Cardwell, placed the clothing Taylor was wearing into a bag. Cardwell did not remember whether Taylor was wearing underwear. The form he filled out did not have a listing for underwear, and he did not write anything by the notation "other." Cardwell stapled the bag shut and put it in a locked cabinet under the booking desk, with a note stapled to it identifying the bag as evidence to be picked up by Detective Lester. Cardwell was not at the booking desk when the bag was retrieved by Alan Miller on January 13. Miller did not know who gave him the bag. Miller did not open the bag or look inside. He added a piece of brown tape to the top to keep the top down, placed his lab number, the date, his initials, and a description and item number on it, and locked it up in his evidence locker. Miller turned the bag into evidence on January 23. The person who opened the bag at the FDLE lab did not testify, so there was no testimony as to which item of clothing was on top when the bag was first opened.

In the present case, as in Dodd and Taplis, there was a break in the chain of custody because the bag of clothing was left unattended for two weeks. Furthermore, as in Dodd, there was an indication of tampering because the bag received by Miller was not in the same condition as was testified to by Cardwell: The attached note was missing and a staple had been pulled out of one side, as if someone opened the bag. As in Dodd, there was no explanation for these changes. In

addition, Miller may have obscured further evidence of tampering when he put tape on the top of the bag.

Most importantly, however, unlike the situation in Taplis, no one could testify whether the contents of the bag were in the same condition when retrieved that they were in when the bag was placed under the counter. No one could even testify the bag contained the same items of clothing Cardwell had placed in the bag. No one saw Taylor put on underwear.[10] No one saw underwear go into the bag. Under these circumstances, where the state had to rely on the integrity of bag for the existence of the boxers, and the bag was not in the same condition it was in when placed under the desk, a proper chain of custody was required. Because the state failed to establish a proper chain of custody, the trial court erred in admitting the underwear into evidence.

This error cannot be deemed harmless. Blood similar to that of the victim was found on the underwear. This was the only physical evidence linking John Taylor to the murder. A new trial is required.

Point 6

THE HUSBAND/WIFE PRIVILEGE WAS VIOLATED WHEN THE TRIAL COURT REQUIRED TAYLOR'S WIFE TO TESTIFY TAYLOR TOLD HER MICHAEL MCJUNKIN NEEDED MONEY FOR A BUS TICKET TO ARKANSAS.

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[10]Deputy Strickland testified at the suppression hearing that when he watched Taylor dress at his trailer just before he was transported to the police station, he did not see Taylor put on underwear. III 439.

On direct examination during the defense case, Taylor's wife, Mary Ann Taylor, testified regarding her contact with her husband and Michael McJunkin the day before, the day of, and the day after the murder. At the conclusion of her testimony, Mrs. Taylor testified she helped Michael McJunkin buy a bus ticket to Arkansas on January 1, 1998. XVI 1850. On cross-examination, the following colloquy ensued:

> Q And you had to help him with the money to pay for that, correct?
>
> A Yes. I just assumed that he had no money.
>
> Q How much did you help him with?
>
> A I don't know. Probably a hundred dollars.
>
> Q He had some money on him, didn't he?
>
> A Yes.
>
> Q So did he tell you he needed help?
>
> A Michael didn't talk very much. I had just assumed that he needed help.
>
> Q But you knew he had some money; how did you know that?
>
> A Oh, gee. You know somethiing? I don't know. He had -- maybe I did ask him, because it seems to me he had about $70 on him.
>
> Q Okay.
>
> A Or maybe John told me. Because I had seen John on New Year's Eve and maybe John did tell me that he had -- you know, that he's got to have about 60 are [sic] $70. And I thought well, then, he's going to have to have money for food, so I gave him a hundred dollars. I think the ticket was like $130. That would give him enough.
>
> Q Now when you say you talked to John, who's John?
>
> A My husband.
>
> . . .

> Q So you talked to Mr. Taylor after he had been arrested in St. Johns County?
>
> A Yes.
>
> Q And he told you that Michael needed money to get back to Arkansas?
>
> A Yes.

XVI 1854-1855.

Defense counsel objected on the ground the testimony violated the husband-wife privilege.[11] The prosecutor argued the door was opened: "What he asked her was, did you help him buy the ticket? She said yes. I'm entitled to ask why." XVI 1856-1857. The trial judge overruled the objection and required Mrs. Taylor to testify she spoke to her husband while he was in jail and that was when he told her Michael needed money to get to Arkansas. XVI 1858-1859.

The trial court erred in requiring Mrs. Taylor to testify to what Taylor told her in private. The communication was privileged, and the privilege was not waived by Mrs. Taylor's testimony that she helped Michael McJunkin buy a bus ticket. The improper testimony was not cumulative of any other testimony and was damaging to Mr. Taylor's defense. It cannot be deemed harmless.

The husband-wife privilege is codified in section 90.504, Florida Statutes (1997), which provides in pertinent part:

> (1) A spouse has a privilege during and after the marital relationship to refuse to disclose, and to prevent another from disclosing, communications

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[11]Taylor previously had filed a motion in limine asserting the husband-wife privilege. IV 588.

> which were intended to be made in confidence between the spouses while they were husband and wife. (2) The privilege may be claimed by either spouse . . .

The privilege refers only to communications, not to facts or acts. See Bolin v. State, 650 So. 2d 21, 23 (Fla. 1995)(spouse could testify to what she observed but could not testify about husband's statements to her concerning murders because those statements constituted privileged communications); Kerlin v. State, 352 So. 2d 45 (Fla. 1977)(privilege does not preclude from evidence independent facts gained by spouse's own observation and knowledge). Either spouse who is testifying may assert the privilege, or the spouse who is a party to an action may assert it in order to prevent the other spouse from testifying to privileged matters. s. 90.504(1); Brown v. May, 76 So. 2d 652 (Fla. 1954); Cox v. State, 192 So. 2d 11 (Fla. 3d DCA 1966).

The privilege may be waived only by voluntary disclosure:

> A person who has a privilege against the disclosure of a confidential matter or communication waives the privilege if the person, or the person's predecessor while holder of the privilege, voluntarily discloses or makes the communication when he or she does not have a reaonable expectation of privacy, or consents to disclosure of any significant part of the matter or communication.

s. 90.507, Fla. Stat. (1997).

Taking the stand to testify does not result in waiver; waiver occurs only when the substance of a privileged communication is revealed. Brookings v. State, 495 So. 2d 135, 139 (Fla. 1986)(Client did not waive privilege by testifying at trial. "It is the communication ... that is

privileged, not the facts"). Unless the client discloses the contents of the communication, there is no waiver. Id.

Here, Taylor's wife did not testify on direct about any conversations with her husband. Her testimony about the bus ticket therefore did not "open the door" to any privileged matters. The trial court's ruling was erroneous. It's unclear whether the prosecutor was aware he was eliciting privileged information when he asked Mrs. Taylor how she knew Michael needed money. As soon as the improper testimony was elicited, however, defense counsel objected, noting he previously had asserted the marital privilege in a pretrial motion in limine. The trial court erred in allowing the state to require Mrs. Taylor to testify again about the statement and when it was made.

The testimony was prejudicial because it tended to support the state's theory that McJunkin had no money because Taylor, not McJunkin, robbed and killed Shannon. Accordingly, this Court cannot conclude beyond a reasonable doubt that the improper testimony did not play a role in the jury's determination of guilt. Harmless error cannot be found. A new trial is required.

Point 7

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY ON AND IN FINDING THE "UNDER SENTENCE OF IMPRISONMENT" AGGRAVATING CIRCUMSTANCE" BASED UPON A 1991 ARKANSAS PRISON SENTENCE FOR WHICH TAYLOR WAS NEVER INCARCERATED DUE TO AN ADMINSTRATIVE GOOF.

The trial court instructed the jury it could weigh as an aggravating circumstance that Taylor "owed" the state of

Arkansas a twenty-year prison sentence for a 1991 burglary which he never served and for which he was never imprisoned due to one or more administrative "goofs" on the part of state officials. The trial court also found this as an aggravating circumstance. This aggravator has never been held to apply to an offense for which the defendant was neither incarcerated nor placed under any type of restraint or supervision. Because Taylor never began the burglary sentence through no fault of his own, and there is no evidence he even knew he owed Arkansas any prison time, the under sentence of imprisonment aggravator should not apply to him. The trial court erred in instructing the jury on and in finding this aggravating factor.

George Brewer, the classification administrator for the Arkansas Department of Corrections (DOC), testified on September 4, 1991, Taylor received a 20-year sentence on a burglary charge in Pulaski County, Arkansas, at which time Taylor was on parole. The commitment papers normally would be forwarded to DOC at that time, and the 20-year sentence combined with the other sentences he was serving. The papers were not forwarded to DOC until May 1993, however. In the meantime, Taylor posted an appeal bond, which was revoked July 2, 1992. Taylor also violated parole and was returned to prison. He was released from parole again in February 1993. When the Pulaski County commitment papers were finally received by the DOC on May 24, 1993, the Arkansas Department of Corrections notified the parole authorities, who located

Mr. Taylor in the Arizona Department of Corrections. The DOC would have filed a detainer at that point. Brewer agreed the sentence was never served because somebody in Arkansas goofed up the paperwork and through no fault of Mr. Taylor's. If Taylor had entered the DOC in September of 1991, he would have been required to serve fifteen years of the 20-year sentence. The good-time policies in place would have made him eligible for parole in seven and a half years. XVII 2159-2169.

Marguerite Maxwell, a parole officer for the Arizona Department of Corrections, testified a printout of inmate records at the Arizona DOC showed "detainer 12/3/93" from Pulaski County, Arkansas, "Agreement 12/20/93" and "canceled 4/26/94." Maxwell said this indicated a warrant had issued out of Pulaski County, which was later canceled. XVII 2155-2156.

This Court has construed the term "under sentence of imprisonment"[12] to include parolees, Straight v. State, 397 So. 2d 903 (Fla.), cert. denied, 454 U.S. 1022 (1981), mandatory conditional releasees, Haliburton v. State, 561 So. 2d 248, 252 (Fla. 1990), and control releasees. Davis v. State, 698 So. 2d 1182, 1193 (Fla. 1997), cert. denied, 522 So. 2d 1127 (1998). And, although this Court originally held that neither probation, Peek v. State, 395 So. 2d 492 (Fla. 1980), cert. denied, 451 U.S. 964 (1981), nor community control qualified for this aggravator, see Trotter v. State, 576 So. 2d 691, 694

[12] See s. 921.141(5)(a), Fla. Stat. (1997).

(Fla. 1990), the Legislature has amended the statute to expressly include both community control, Ch. 91-271, p. 1, at 2562, Laws of Fla., and felony probation. Ch. 96-290, p. 5, 96-302, p. 1, Laws of Fla. The "under sentence of imprisonment" aggravator thus has been expanded to include any form of custody or restraint, whether imposed by the Department of Corrections or by the court.

The "under sentence of imprisonment" aggravator has never been applied, however, to a situation like the present one, where the defendant was never incarcerated nor placed under any type of restriction or supervision. Nor would application of the aggravator under such circumstances serve its purpose. The original purpose of the "under sentence of imprisonment" aggravator, as explained by the framers of the Model Penal Code, from which Florida patterned its death penalty statute, was to discourage violence by incarcerated persons:

> Paragraph (a) recognizes the need for a special deterrent to homicide by convicts under sentence of imprisonment. Especially where the prisoner has no immediate prospect of release in any event, the threat of further imprisonment as the penalty for murder may well seem inconsequential.

s. 210.6, Model Penal Code. The rationale of deterrence logically can be extended to parolees and others who, though not incarcerated, remain under some form of supervision because the fact of the "restraint" demonstrates the person poses a greater threat of criminal activity than ordinary citizens. The added measure of deterrence presented through capital punishment thus is appropriately applicable to these classes of felons. In addition, killing while imprisoned or

under some form of restraint demonstrates a rejection of authority, making the crime more offensive and its perpetrator more culpable.

Here, however, Taylor was never incarcerated for the 1991 burglary and was under no form of supervision or restraint for that crime when the instant murder was committed. He was released from custody in Arkansas through no fault of his own, and there is no indication he was aware he owed Arkansas any time. An aggravator cannot serve as a deterrent when the defendant himself has no knowledge of the fact that makes the aggravator applicable. Nor can a defendant be deemed more culpable for committing a murder while under a sentence of imprisonment when he was not actually imprisoned and may not even have known he was supposed to be imprisoned.

This Court's decision in Stone v. State, 378 So. 2d 765 (Fla. 1979), cert. denied, 449 U.S. 986 (1980), is distinguishable. In Stone, the murder took place on August 22, 1974. On August 31, 1974, Stone was arrested in Missouri based upon a detainer Florida had lodged against him after the state had won an appeal relating to an earlier criminal conviction for sodomy.[13] Stone challenged the "under sentence of imprisonment" aggravator, arguing he was not under sentence of imprisonment at the time of the homicide because he had been released by a federal court order. In upholding the aggravator, this Court said:

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[13]The United State Supreme Court reversed the lower court rulings on November 5, 1973.

> The sole purpose of the federal proceedings in habeas corpus was to determine the legality of the restraint on liberty. As long as the proceedings in federal court were pending, defendant was under sentence of imprisonment, and would remain so until the federal proceedings were concluded favorably to defendant. The final determination was that defendant be returned to custody.

Id. at 772. In Stone, therefore, the defendant's discharge was but a temporary reprieve from custody, pending a final determination in the federal court system. Stone was imprisoned for the crime and knew he could be returned to prison to serve the remainder of his sentence if the lower federal court decisions were not upheld.

Here, in contrast, Taylor never began serving his sentence and there is nothing in the record to indicate he was aware he had an outstanding sentence when the Arkansas authorities released him in 1993. The present situation is not equivalent to the situation in Stone or any other factual situation which has been held to satisfy this aggravator. Because penal statutes must be strictly construed in favor of the one against whom a penalty is to be imposed, Trotter, 576 So. 2d 691, the under sentence of imprisonment aggravating circumstance should not be construed to encompass the unique facts here.

Accordingly, it was error for the trial court to instruct the jury on and to find the "under sentence of imprisonment" aggravator. Because this error may have affected the jury's recommendation of death, this case must be remanded to a jury for resentencing.

Point 8

THE TRIAL COURT ERRED IN FINDING THE EVIDENCE FAILED TO PROVE THE MITIGATING FACTORS THAT (1) AS A CHILD AND AN ADULT, TAYLOR HAS BEEN KNOWN TO BE A THIEF BUT HAS NOT BEEN KNOWN AS A VIOLENT PERSON, AND AN ACT OF VIOLENCE IS OUT OF CHARACTER FOR HIM; (2) TAYLOR MAKES FRIENDS EASILY, ENJOYS PEOPLE WHO ENJOY HIM, AND HAS DONE GOOD DEEDS FOR FRIENDS AND EVEN PERFECT STRANGERS; (3) TAYLOR ENJOYS FAMILY RELATIONSHIPS AND ACTIVITIES; (4) TAYLOR APPEARS TO PERFORM WELL WHEN HE HAS STRUCTURE IN HIS LIFE; (5) TAYLOR HAS BEEN AND CAN CONTINUE TO BE A POSITIVE INFLUENCE IN THE LIVES OF FAMILY MEMBERS.

The Eighth and Fourteenth Amendments of the United States Constitution prohibit the sentencer from refusing to consider any relevant mitigating evidence. Eddings v. Oklahoma, 455 U.S. 104 (1982). The sentencer must consider and give effect to mitigating evidence relevant to the defendant's background and character precisely because the punishment should be directly related to the personal culpability of the defendant. Penry v. Lynaugh, 492 U.S. 302, 327-28 (1989).

To insure the proper consideration of mitigating circumstances, this Court has ruled that the trial court must expressly evaluate each mitigating circumstance to determine whether it is supported by the evidence. Campbell v. State, 571 So. 2d 415, 419 (Fla. 1990). A mitigator is supported by the evidence "if it is mitigating in nature and reasonably established by the greater weight of the evidence." Ferrell v. State, 653 So. 2d 367 (Fla. 1995). The trial court must find that a mitigating circumstance has been proved if it is supported by a reasonable quantum of competent, uncontroverted evidence. Nibert v. State, 574 So. 2d 1059 (Fla. 1990). The trial court must then decide whether the established mitigating factors are of sufficient weight to counter-balance

the aggravating factors. Campbell, 571 So. 2d at 419. The result of the weighing process must be detailed in the written order and supported by sufficient competent evidence in the record. Ferrell.

In the present case, the defense presented twenty-two witnesses who gave testimony regarding John Taylor's background and character. Based on their testimony, the defense proposed eight nonstatutory mitigating circumstances. The trial court found three of the proposed mitigating circumstances had been proved and considered these in sentencing Taylor: (1) John Taylor was raised in a dysfunctional family and suffered neglect and abuse during his first eleven years; (2) By the time anyone encouraged John Taylor to be interested in school, it was too late, and he dropped out in junior high; (3) John Taylor has shown he can be a skilled, reliable, and a diligent worker inside and outside of prison. The trial judge rejected as unproved, however, the remaining five proposed mitigating circumstances: (1) as a child and an adult, Taylor has been known to be a thief but has not been known as a violent person, and an act of violence is out of character for him; (2) Taylor makes friends easily, enjoys people who enjoy him, and has done good deeds for friends and even perfect strangers; (3) Taylor enjoys family relationships and activities; (4) Taylor appears to perform well when he has structure in his life; (5) Taylor has been and can continue to be a positive influence in the lives of family members.

The trial court provided no explanation for why it found these five mitigators unproved. There was ample evidence to support each of them, and no evidence presented to rebut them. Indeed, in his order, the trial judge discussed in some detail the evidence presented in support of each of these mitigators, did not cite any evidence that refuted their existence, then rejected them as unproved, without explanation. For example, as to the mitigator that Taylor enjoys family relationships and activities, the court said:

> The members of **John Taylor, II's** immediate family testified they still have a relationship with him, even if he goes to prison for the rest of his life. His sister, Barbara Henery, testified that she wants him involved in her life and the life of her children. **John Taylor, II's** niece, Jackie Sharp, testified that she wants him to be involved in the life or her child. Anita Gray testified that **John Taylor, II**, became involved with her during the time that she was pregnant and after the baby was born. He attended and planned a baby shower for her, was present during labor in the hospital and visited her in the hospital after the birth of the baby. After the baby was born he helped take care of the baby, got up mornings with the baby while Anita slept late and helped care for the baby when Anita went out with friends. Justin Gray who is the step-son of the defendant, **John Taylor, II**, testified the defendant was a good role model and helped him improve his life. That **John Taylor, II**, was like a father to him and taught him more in a matter of one month than his natural father had taught him in many years. The defendant, **John Taylor, II**, had helped him learn the construction trade, helped him rebuild a car, and at all times had a very good attitude about it. He testified that he wanted to remain a part of **John Taylor, II's** life while **John Taylor, II**, serves time in prison. **This non-mitigating factor has not been proven and thus will not be considered by this Court.**

VI 990. The trial court similarly rejected four other mitigating factors as unproved. See **Appendix B**.

The trial court's rejection of five of the nonstatutory mitigating circumstances as unproved is not supported by the record, or even by the trial court's own order. This error requires reversal for resentencing. Campbell.

Point 9

THE DEATH SENTENCE IS DISPROPORTIONATE WHERE THERE WERE ONLY TWO RELATIVELY WEAK AGGRAVATING CIRCUMSTANCES AND COPIOUS MITIGATING CIRCUMSTANCES, INCLUDING A SEVERELY DYSFUNCTIONAL UPBRINGING MARKED BY DAILY ABUSE AND A COMPLETE LACK OF PARENTAL CARE OR SUPERVISION.

As this Court repeatedly has said, death is a unique punishment, which must be limited to the most aggravated and least mitigated of first-degree murders. See Larkins v. State, 739 So. 2d 90 (Fla. 1999). In deciding whether the death penalty is the appropriate penalty, this Court must consider the totality of the circumstances in comparison to other cases. The death penalty is not warranted unless the crime falls within the category of both the most aggravated and the least mitigated of murders. Almeida v. State, 748 So. 2d 922 (Fla. 1999), cert. denied, 528 U.S. 1181 (2000).

In the present case, only two aggravators apply, the felony murder aggravator and prior violent felony, neither of which is very strong. Neither of the most serious aggravators is present. See Larkins v. State, 739 So. 2d at 95 (heinous, atrocious, and cruel, and cold, calculated, and premeditated are two of the most serious aggravators, and while their absence is not controlling, it is not without some relevance to the proportionality analysis). The underlying felony aggravator is the weakest aggravating circumstance of all, as it is inherent in every felony murder

prosecution. This Court has implicitly recognized this by consistently reducing to life cases where the underlying felony was the only aggravating factor. Sinclair v. State, 657 So. 2d 1138 (Fla. 1995); Thompson v. State, 647 So. 2d 824 (Fla. 1994); Proffit v. State, 510 So. 2d 896 (Fla. 1987); Caruthers v. State, 465 So. 2d 496 (Fla. 1985); Menendez v. State, 419 So. 2d 312 (Fla. 1982). The court has found death inappropriate where felony murder was the only aggravator even where there was no mitigation. Rembert v. State, 445 So. 2d 337 (Fla. 1984).

Nor is the prior violent felony aggravator strong when the facts are considered. The aggravator is based on a conviction of aggravated robbery in Arkansas in 1981. The offense took place eighteen years ago, and Taylor has not been involved in a crime of violence between that offense and the present crime. See Larkins (appropriate to consider time since prior violent felony committed--20 years--in determining whether life or death appropriate). In addition, the victim of the prior robbery was not touched or hurt. The only words spoken to her were, "Robin, step away from the car." Though shots were fired, the shots were probably fired into the air because the victim did not see them or hear them hit anything. Taylor's confession solved the crime. He pled guilty and served his sentence. All of Taylor's other crimes have been non-violent property offenses, committed against businesses at times when no people were present. His other crimes have intentionally avoided contact with people. Apart from the

1981 robbery, Taylor has been known by his friends and family as a nonviolent, easygoing person. These two relatively weak aggravators are balanced against significant mitigation, including severe abuse and neglect during his first eleven years. John Taylor had no adult guidance or supervision for most of his childhood. He lived under the domination of an "extremely violent" older brother, who treated John as a "slave" and physically and verbally abused him "every day of his life." The problems in John's family included extreme poverty, extreme lack of adult supervision, lack of bonding, alcoholism, abandonment, sexual abuse, physical abuse, and marriage between family members. The defense expert characterized the family as "severely dysfunctional," noting that "[a] lot of things just simply didn't happen, or happened primitively."

Nonetheless, Taylor has positive attributes, which are relevant to the question of whether the death penalty is appropriate for him. He has a family who love him and view him as a positive influence in their lives. He has helped family members and done good deeds for others, even complete strangers. Taylor also has shown he can be an exceptionally skilled, reliable, and diligent worker inside and outside of prison. His employers in Arizona, Jim and Carolyn Vavra, described Taylor as a "great person," "one of the best foremen I've ever had," and "all around great guy," "very kind," and "very easy to get along with." Taylor's supervisor at Arizona State Prison, Jose Perez, said Taylor was reliable, talented, trustworthy, and a good role model for other prisoners. John

Taylor has redeeming qualities, and apparently does well in a structured environment.

This Court has reversed the death sentence in other cases involving a similar balance of aggravation and mitigation. In Larkins, there were two aggravators and no statutory mitigation but some nonstatutory mitigation. The aggravators were prior violent felony, based upon a prior manslaughter and assault with intent to kill, which had occurred twenty years prior to the murder, and robbery/pecuniary gain. As here, neither heinous, atrocious, or cruel nor cold, calculated, and premeditated were found as aggravators. Similarly, in Johnson v. State, 720 So. 2d 232 (Fla. 1998), two aggravators, prior violent felony and the burglary/pecuniary gain, were balanced against the defendant's age of twenty-two and nonstatutory mitigation that included a troubled childhood, previous employment, and that Johnson was respectful to his parents and neighbors. Other comparable cases include Robertson v. State, 699 So. 2d 1343 (Fla. 1997)(felony murder and HAC balanced against age (19), drug and alcohol use, abusive childhood, low intelligence, and history of mental illness), cert. denied, 522 U.S. 1136 (1998), Terry v. State, 668 So. 2d 954 (Fla. 1996)(two aggravators, prior violent felony and felony murder, balanced against emotional deprivation in adolescence, poverty, good family man), and Wilson v. State, 493 So. 2d 1019 (Fla. 1986)(two aggravators, prior violent felony and pecuniary gain, balanced against nonstatutory mitigation).

The present case is not the most aggravated and least mitigated of capital murders. Accordingly, this Court should reduce Taylor's sentence to life imprisonment.

CONCLUSION

Appellant respectfully requests this Honorable Court to reverse and remand this case for the following relief: Points 1, 2,3,4,5, and 6, reverse appellant's robbery and murder convictions for a new trial; Point 7, vacate appellant's death sentence and remand for a new penalty phase proceeding before a new jury; Point 8, vacate appellant's death sentence and remand for resentencing; Point 9, vacate appellant's death sentence and remand for imposition of a life sentence.

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Respectfully submitted,

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NANCY A. DANIELS

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PUBLIC DEFENDER

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SECOND JUDICIAL CIRCUIT

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Curtis M. French, Assistant Attorney General, by hand delivery to The Capitol, PLO1, Tallahassee, FL 32399-1050, on this date, April _____, 2001.

CERTIFICATE OF FONT SIZE

I HEREBY CERTIFY that, pursuant to Florida Rule of Appellate Procedure 9.210, this brief was typed in Courier New 12 point.

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Nada M. Carey

IN THE SUPREME COURT OF FLORIDA

JOHN CALVIN TAYLOR, II,

Appellant,

v. . . . . .
. . . . . .
. . . . . Case No. 96,959

STATE OF FLORIDA,

Appellee.
_____/

INDEX OF APPENDICES TO AMENDED INITIAL BRIEF OF APPELLANT

<u>APPENDIX</u> . . . . . <u>DOCUMENT</u>