IN THE SUPREME COURT OF FLORIDA

WILLIAM TAYLOR,

Appellant,

vs. CASE NO. SC04-2243

STATE OF FLORIDA,

Appellee.
_____/

APPEAL FROM THE CIRCUIT COURT
OF THE THIRTEENTH JUDICIAL CIRCUIT
IN AND FOR HILLSBOROUGH COUNTY,
STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

The instant appeal arises from a sentence of death imposed upon the Appellant, William Taylor. Mr. Taylor will be referred to as Taylor in the Initial Brief. The State of Florida, the prosecuting authority, will be referred to as the State. The record on appeal consists of 30 volumes. Volumes 1-8 contain the documents supplied by the Clerk and will be referenced in the Initial Brief with the volume number followed by "R" and the appropriate page number. Volumes 9-30 contain the transcripts of the lower proceedings and will be referenced in Initial Brief by the volume number followed by "T" and the appropriate page number.

STATEMENT OF THE CASE

On June 12, 2001, the Grand Jury for the Thirteenth Judicial Circuit, in and for Hillsborough County, Florida, returned an indictment against the Appellant, William Taylor, for the first-degree murder of Sandra Kushmer between May 25 and May 26, 2001, contrary to §782.04(1) and §775.087(2), Florida Statutes (2001). (V1,R23) Taylor was also charged with one count of Attempted First-Degree Murder, a first-degree felony contrary to §782.04 and

§777.04, Florida Statutes (2001); Robbery with a Deadly Weapon, a first-degree felony punishable by life contrary to §812.13(1) and (2)(A), Florida Statutes (2001); Robbery with a Firearm, a first-degree felony punishable by life contrary to §812.13(1) and (2)(A) and §775.087(2), Florida Statutes (2001); Armed Burglary of a Dwelling, a first-degree felony punishable by life contrary to §810.02(1) and (2)(B) and §775.087(2), Florida Statutes, (2001) and Felon in Possession of a Firearm, a degree felony contrary to §790.23(1), Florida Statutes (2001). (V1,R23-27) The State's Notice to Seek the Death Penalty was filed on March 22, 2002. (V1,R37;V9,T5-8)

Numerous defense motions attacking constitutionality of the death penalty were filed. On August 28, 2002, defense counsel filed a motion asserting the Florida death penalty sentencing scheme was unconstitutional under Ring. (V2,R59-236;V3,R237-353) On September 2, 2003, additional defensive motions were filed seeking to declare the death sentencing scheme unconstitutional under Ring (V3,R356-377;V4,R483-504); that the death penalty is unconstitutional(V4,R449-450); for lack of adequate appellate review(V3,R378-400;460-482);unconstitutional for permitting a bare majority of jurors to be sufficient for a

death recommendation(V4,R414-416;451-453); unconstitutional due to inadequate or misleading jury instructions regarding mitigation (V4,R401-413;V4,R510-522); to declare the HAC and CCP jury instructions unconstitutional (V4,R417-432); and to declare Florida R. Crim. P. 3.202 unconstitutional. (V4,R572-586)

Defense counsel objected to the State's use of a 1976 conviction for First Degree Assault as a predicate for the Prior Violent Felony Aggravator due to the remoteness of the conviction. (V10,T261-278) The State countered that the offense was applicable due to the length of incarceration that Mr. Taylor had received for that offense, intervening criminal activity, and his continuous incarceration. (V10,T275-277) The trial court initially took the motion under advisement. (V10,T279) The issue was revisited on March 5, 2004, wherein the objection was renewed and exclusion of the Delaware victim was sought. (V10,T338-344) The motion to strike was denied. (V10,T344)

Numerous challenges were made the standard jury instructions. (V5,R638-697)

Defense counsel sought individual voir dire of the jurors and for voir dire after the verdict. (V4,R548-556) Three motions in limine sought to exclude the challenge of

certain jurors for cause, to prohibit cross-examination of the defendant in penalty phase about the details of the crime, and to strike portions of the standard jury instructions. (V4,R557-561;564-566;569-571)

Pretrial rulings were also sought to prohibit or limit the presentation of victim impact evidence to the jury or to permit such evidence to be heard only by the trial judge. (V5,R590-612;618-627;632-635) Defense counsel sought to have any victim impact evidence presented by video tape only and to require a pre-presentation proffer of such evidence. (V5,R630-631;636-637)

Defense counsel also sought protection from the discovery provisions of Fla. R. Crim. P. 3.202, Florida Statutes, (2001). (V5,R759-780)

A severance of Count 6, Felon in Possession of a Firearm was sought. (V5,R712-714)

The trial court's order on penalty phase motions is located at V6,R940-943.

The State filed numerous motions in limine, which sought to exclude reference to a second perpetrator (V6,R901); other criminal activity not committed by the defendant (V6,R902); any argument of "diminished capacity" (V6,R903); any argument of residual doubt (V6,R904); any

argument of actual execution methods, actual or as depicted in print media (V6,R905;907);any argument about religious belief and the death penalty (V6,R906) and any comparison to other death cases. (V6,R908) Following a hearing on February 27, 2004, the trial court granted the motion as to reference to residual doubt (V10,T289); methods and descriptions of executions (V10,T293); religious beliefs in the penalty phase argument (V10, T296,299); comparisons between other death cases (V10,T304); and diminished capacity (V10,T311). The trial court denied the State's motion requesting to restrict argument of a second perpetrator (V0,T307).

A Motion to Suppress Evidence Seized in an Unlawful Search was filed on January 22, 2004. (V5,R715-721) The motion alleged that the evidence was illegally seized without a warrant and without adequate consent to search from Taylor. (V5,R717)

Taylor filed a motion in limine asserting the marital privilege as codified under §90.504, Florida Statutes, (2001). (V6,R917-920) Taylor sought to prevent the State from introducing evidence contained in letters Taylor wrote to his wife during his incarceration. (V6,R918-920) The court granted the motion with the state's

concession that the letters were within the marital privilege exemption under the evidence code.(V7,R982-984;V10,T331-322;336) Later redactions requested by the defense were approved by the court.(V7,R1161-1165;V10,T415-438)

Mr. Taylor was tried by a jury, with the Honorable Barbara Fleischer, Circuit Judge, presiding from March 15, 2004 through March 26, 2004. (V6,R968) A mistrial was declared. (V6,R968) A retrial was held from June 2, 2004 through June 9, 2004. The jury returned a verdict of guilty as charged on the first five counts of the Indictment on June 9, 2004. (V8,R1212-1213;V25,T2477-2478)

The penalty phase was held on June 11, 2004. (V8,R1245) A stipulation was entered into by the defense and State as to the prior record of Mr. Taylor. (V8,R1258-1259) The jury returned an advisory recommendation of death by a vote of 12/0 on June 14, 2004. (V8,R1285)

A written motion for renewed judgment of acquittal and for a new trial was filed on June 16, 2004. (V8,R1274-1280)

The Sentencing memorandum for the State was submitted on July 16, 2004. (V8,R1281-1289) The State relied upon three aggravating circumstances in support of a death sentence: Prior Violent Felony Conviction; Murder Committed

for Pecuniary Gain; and that Taylor was on Felony Probation at the time of the offense. (V8,R1286-1288) The State further urged the court to accept the recommendation of the jury.

The defendant's sentencing memorandum was submitted on July 16, 2004. (V8,R1291-1312) The defense urged the trial court to override the jury recommendation. (V8,R12991-1294) With regard to the aggravating factors, the defense argued the prior convictions had occurred 27 years previous when Taylor was an adolescent. (V8,R1295) Defense counsel conceded that Taylor committed the offenses to obtain property, but argued that he went to the house with no intent to harm. (V8,R1296) The offense that Taylor was on probation for at the time of the murder was a non-violent offense. (V8,R1296)

In mitigation the defense urged to court to consider numerous mitigating circumstances. The defense argued that two statutory mitigating circumstances had been proven- (1) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance and (2) the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially

impaired. (V8,R1297-1302) The defense presented the following non-statutory mitigating circumstances: Mr. Taylor has neurological impairment in the frontal lobe and temporal lobes of his brain, which affect his brain's function and his behavior; Mr. Taylor suffered psychological trauma due to abuse and neglect as a child; Mr. Taylor suffered psychological trauma due to deprivation in parental nurturing; lack of positive role models; no parental emotional support to assist in his development; neurological impairment; learning disabilities, attention deficit problems, and social interaction problems; obtainment of GED in prison; attempts to address and recover from drug addiction; good and dependable worker; cooperation with law enforcement; history of substance abuse dating to childhood; under the influence of alcohol at the time of the incident; demonstrated appropriate courtroom behavior; proportionality. (V8,R1302-1313).

A Spencer hearing was held on August 16, 2004. (V8,R1314)

The trial court imposed sentence on September 29, 2004. The trial court found three aggravating factors: that Mr. Taylor was previously convicted of a violent felony (great weight); that the murder was committed for

pecuniary gain (great weight); and that Mr. Taylor was on felony probation at the time of the offense (great weight). (V8,R1314-1317)

The trial court addressed the two proposed statutory mitigating circumstances. The trial court stated that "The Court has not seen or heard any credible objective evidence that the Defendant has brain damage due to trauma or any other source." (V8,R1320) The court acknowledged both an antisocial personality disorder and a borderline personality disorder. (V8,R1320) The court found that Mr. Taylor was not under the influence of extreme mental or emotional disturbance (rejecting the statutory mitigator), but did find that Mr. Taylor was under the influence of some mental or emotional disturbance. (V8,R1321) The court assigned this mitigating circumstance some weight. (V8,R1321)

The trial court also rejected the statutory mitigating circumstance that the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law as substantially impaired. (V8,R1321-1322)

The trial court found the following non-statutory mitigating circumstances and assigned them the following

weight:

1. Neurological frontal lobe impairment affecting brain function and behavior: previously found and previously given some weight. (V8,R1322)
2. Psychological trauma due to abuse and neglectful treatment in childhood: some weight. (V8,R1322)
3. Psychological trauma due to deprivation in parental nurturing: some weight.
4. No positive role models in formative years: rejected.
5. No emotional or parental support to assist with personality development: modest weight.
6. Neurological impairments affected ability to control impulses: some weight to mental disorders.
7. Documented learning disabilities, attention deficit disorders, and problems with social interaction: some weight.
8. Obtaining of GED: minimum weight.
9. Attempts to address and recover from drug dependency: modest weight.

10. Good dependable worker and employee: minimum weight.

11. Cooperation with law enforcement: minimum weight.

12. Early abuse of alcohol and drugs: some weight.

The trial court also considered separately four other mitigating circumstances;

1. Under the influence of alcohol at the time of the offense: little weight.

2. Demonstrating appropriate courtroom behavior: little weight.

3. Society can be protected by life in prison: not an appropriate consideration for sentencing.

4. The totality of the circumstances does not set this murder apart from the norm of other murders: rejected, as the court found this murder was among the most aggravated and least mitigated.

The trial court imposed a sentence of death on Count1, first-degree murder. (V8,R1325;1334) The trial court also sentenced Mr. Taylor to life in prison on Count 2,

Attempted First-Degree Murder; life in prison on Count 3, Robbery with a Deadly Weapon; life in prison with a 20 year minimum/mandatory on Count 4, Robbery with a Firearm; and life in prison with a 10 year minimum/mandatory on Count 5, Armed Burglary of a Dwelling. (V8,R1325;1336-45) Each of these sentences was to run consecutive to each other and consecutive to the sentence on Count 1. (V8,R1325)

A timely Notice of Appeal was filed on October 7, 2004. (V8,R1349)

STATEMENT OF THE FACTS

Mrs. Renate Sikes is the mother of Sandra Kushmer and Bill Maddox. (V16,T1158) In 2001 she was living in Riverview. (V16,T1158) On May 25, 2001, her husband, Barry Sikes was hospitalized. (V16,T1161) Due to the severity of his illness, Ms. Kushmer was living with her and Bill Maddox had come from California to visit. (V16,T1161-1163) Mr. Maddox rented a car, but was planning to stay with Mrs. Sikes. (V16,T1164)

On May 25, Mrs. Sikes, Mr. Maddox, and Ms. Kushmer went to the Columbia restaurant for lunch. (V16,T1164) Mr. Maddox purchased some cigars. (V16,T1165) The three returned to the hospital, taking both cars. (V16,T1166) Later in the evening Mr. Maddox and Ms. Kushmer left

together, taking the rental car. (V16, T1166)

Ms. Sikes phoned her home from the hospital around 10:30 p.m.. (V16,T1166) She spoke with Ms. Kushmer. (V16, T1166) Ms. Sikes noticed that Ms. Kushmer was laughing and carrying on. (V16,T1166) When asked, Ms. Kushmer said that "Ken" was also at the house with her and her brother. (V16,T1166) Ms. Kushmer said that she knew "Ken" from school. (V16,T1190) Mrs. Sikes did not like people being at her house and asked that "Ken" leave.(V16,T1167;1189)

Mrs. Sikes called about a half hour later and no one answered the phone. (V16,T1167) Mrs. Sikes continued to call all night long, trying to reach her children to let them know that she as going to stay at the hospital because her husband had taken a turn for the worse. (V16,T1167) She continued to call into the next morning. (V16,T1168)

Mrs. Sikes decided to risk leaving the hospital around 3:00 p.m. the next day to go to the house. (V16,T1168) She arrived at the house around 3:30 p.m. on May 26. (V16,T1169) Mrs. Sikes parked her car in the driveway and headed to the side entrance. (V16,T1170) The rental car was not in the driveway. (V16,T1171) Mrs. Sikes discovered a pocketbook and her daughter's shoes laying on the ground. (V16,T1171-1172) She picked up her daughter's medication

from the ground. (V16,T1172) Mrs. Sikes then saw blood on the outside wall of the side of the house. (V16,T1172)

Mrs. Sikes walked into the house and found Ms. Kushmer laying on the floor in a puddle of blood. (V16,T1172) Mrs. Sikes picked up her daughter's head and realized that she was dead. (V16,T1172) She then began to look for her son. (V16,T1172)

Mrs. Sikes found Mr. Maddox in his childhood bedroom. (V16,T1173) She yelled at him that Ms. Kushmer was dead. (V16,T1173) Mr. Maddox sat up and told her to "be quiet". (V16,T1173) Mrs. Sikes saw that Mr. Maddox's face was all black and blue and that his pillow was black with blood. (V16,T1173) Mr. Maddox did not appear to know what was going on. (V16,T1173) Mrs. Sikes called 911. (V16,T1173)

Mr. Maddox was taken to Tampa General Hospital. (V16,T1175)

Mrs. Sikes has noticed personality and demeanor changes in Mr. Maddox since the incident. (V16,T1175) He suffered depression. (V16,T1175)

During May 2001 Mrs. Sikes kept her costume jewelry in a jewelry box on the dresser in her bedroom. (V16,T1178) She discovered all the jewelry and little boxes all over the counter and her bed. (V16,T1178) Cameras kept in the

closet where Mr. Maddox was found were missing. (V16,T1181-1182) She later identified her cameras in the possession of Detective Flair. (V16,T1182)

Mrs. Sikes found several items in her kitchen that would not normally be there. (V16,T1183) Orange juice was in the refrigerator and Heineken beer bottles were in the freezer. (V16,T1183) There was broken glass in the trash can and the kitchen rug had been hung outside. (V16,T1183) Bread and other items were left on the counter. (V16,T1183)

Officer Anthony Shephard responded to the Riverview home. (V16,T1212) Shepard observed something on the outside of the house and several items strewn along the side of the house. (V16,T1215-1220) As he entered the house Shephard believed he saw blood spatters in that area. (V16,T1220) Inside he discovered Ms. Kushmer laying in blood. (V16,T1221) Shephard discovered Mr. Maddox in the bedroom. (V16,T1223) Mr. Maddox was speaking incoherently and appeared to be in shock. (V16,T1223) In canvassing the remainder of the house, Shephard found what appeared to be blood on a suitcase and toilet. (V16,T1225)

Cynthia Byrnes worked at Harry’s Bar in Riverview in May 2001. (V16,T1258) She knew Mr. Taylor as a regular

customer in the bar. (V16,T1259) She also knew Sandra Kushmer as a customer who had come in several times. (V16,T1259)

On the night of Friday, May 25th, Ms. Kushmer and her brother came into the bar about 9:30 p.m.. (V16,T1259) Mr. Taylor, whom she knew as Ken, arrived at the bar after them. (V16,T1259) Ms. Byrnes saw Ms. Kushmer talking to Mr. Taylor. (V16,T1259) Mr. Maddox was drinking expensive drinks and paying for them in cash, with twenties. (V16,T1260) Mr. Maddox was leaving good tips. (V16,T1260) He and Ms. Kushmer had quite a bit to drink. (V16,T1260) Ms. Byrnes had previously testified that a man named "Wayne" with a crazy eye was also at the bar. (V16,R1280)

When they started to leave, Ms. Kushmer and Mr. Maddox got into an argument about leaving. He wanted to go and she wanted to stay. (V16,T1261) Mr. Maddox asked Ms. Byrnes to call him a cab. (V16,T1260) Ms. Byrnes called a cab. (V16,T1261)

Ms. Byrnes then saw Mr. Maddox, Ms. Kushmer, and Mr. Taylor leave the bar together. (V16,T1261) About fifteen minutes later the cab driver arrived, asking where his fare was. (V16,T1262)

Tommy Riley knew Mr. Taylor, having met him through an

acquaintance at a bar. (V16,T1232) In 2001 he was living with Lisa Lewis. (V16,T1233) On May 25th, Ms. Lewis had asked him if Mr. Taylor could spend the night at their home and Riley had agreed. (V16,T1233) Riley spoke with Mr. Taylor that evening and Mr. Taylor confirmed that he would be coming over and asked that the door be left open. (V16,T1233) The door was not left unlocked at Lisa Lewis's request. (V16,T1234)

Riley did not see Mr. Taylor until the morning of May 26th. (V16,T1234) Mr. Taylor was at the door around 9:00 a.m. and asked if he could do some laundry. (V16,T1234) Mr. Taylor washed some clothes, including a pair of tennis shoes. (V16,T1234) The shoes were left to dry on the fence outside. (V16,T1235) A detective later came and got the shoes. (V16,T1242)

Later in the day Mr. Taylor said he was low on money and asked if Riley would cash a check for him. (V16,T1235) Mr. Taylor gave Riley a beige check for several hundred dollars from Wells Fargo Bank drawn on the account of William Maddox and made out to Mr. Taylor. (V16,T1235) Mr. Taylor said he was given the check for work he had done at the shipyard.(V16,T1236) Mr. Riley said they couldn't cash an out-of-state check on Saturday. (V16,T1236) Mr. Taylor

then offered to cash another check and give Riley $40 that he owed him. (V16,T1236) Riley refused. (V16,T1236)

Mr. Taylor had a white pick-up truck that morning. (V16,T1237) It had a Tennessee tag in the rear window. (V16,T1237) Mr. Taylor kept going out to the truck, saying he was listening to the radio. (V16,T1237) He seemed nervous. (V16,T1246)

Sometime in the afternoon another person came over and was talking with Mr. Taylor. (V16,T1251) The two left in the other person's vehicle. (V16,T1251) Riley did not know the person, who appeared to be Hispanic. (V16,T1253)

Riley went to work that evening at the Oasis bar, doing part-time bar tending. (V16,T1239) Mr. Taylor came into the bar with the same Hispanic person from the afternoon and several other people. (V16,T1253) Mr. Taylor was buying drinks, paying with twenties. (V16,T1240) Mr. Taylor then said that they were going to Ybor City and several left the bar. (V16,T1240) Mr. Taylor came back to Riley's house later that night. (V16,T1253)

The next morning, May 27th, Riley received a phone call from a friend named Troy from Harry's Bar. (V16,T1240) Mr. Taylor was sleeping in a back bedroom. (V16,T1240) Riley woke Mr. Taylor up and told him that police detectives were

at Harry's Bar. (V16,T1241) Riley told Mr. Taylor that he didn't know what he had done, but that he needed to leave. (V16,T1241) Mr. Taylor quickly got up. (V16,T1241) Mr. Taylor asked Riley if he should go north or south and Riley told him north because if he went south he would run out of real estate. (V16,T1241) Mr. Taylor left in the white pick-up. (V16,T1241)

Detective Dorothy Flair, with the Hillsborough Sheriff's Office, was assigned this case. She arrived on the scene, spoke with Mrs. Sikes, and arranged for crime scene technicians to process the home. (V17,T1294) While she was still at the scene the car rented by Mr. Maddox was located at Harry's Bar. (V17,T1295) After interviewing several persons, Mr. Taylor was developed as a suspect. (V17,T1323)

Over a defense objection, Det. Flair testified that she learned that credit cards belonging to Mr. Maddox were being used. (V17,T1326) Based upon information she received from American Express and Equifax, she contacted authorities in Memphis, Tennessee. (V17,T1327) During this time period Mr. Maddox remained a patient at Tampa General Hospital. (V17,T1329)

Marshal Scott Sanders was working for the United

States Marshal Service in Memphis, Tennessee. (V20,T1769) He came into contact with Mr. Taylor around 11:00-11:30 p.m. outside his motel room. (V20,T1769) Mr. Taylor was taken into custody without any resistance. (V20,T1770;1776) Marshal Sanders asked Mr. Taylor for permission to search his motel room. (V20,T1770) Marshal Sanders had Mr. Taylor execute a consent to search form that he had obtained from the local sheriff's office. (V20,T1770-1773) Three receipts and several credit cards with the names of Barry Sikes and Sandra Kushmer were found in the motel room. (V20,T1774)

Detective Flair was notified on May 30th that Mr. Taylor had been taken into custody in Memphis. (V17,T1333) The next morning Det. Flair went to Memphis. (V17,T1333) Det. Flair viewed various items, including credit cards, a checkbook belonging to Mr. Maddox, receipts from K-Mart, and receipts from the Choices Bar and Grill in Memphis that had been removed from the Memphis motel room registered to Mr. Taylor. (V17,T1337-1338) Mr. Maddox's credit card had been used to make the purchases at Choices Bar and Grill and for the motel room registered to Mr. Taylor from May 29, 2001 through May 30, 2001. (V17,T1343;1346;1348)

Detective Flair interviewed Mr. Taylor in the federal

building in Tennessee. (V17,T1349) Mr. Taylor appeared awake, alert, and coherent. (V17,T1349) Det. Flair asked Mr. Taylor about his medical condition and he indicated to her that he was receiving anti-seizure medication. (V18,T1504) After being advised of the purpose of the interview, Mr. Taylor gave consent for the search of his truck. (V17,T1350) A consent to search form was filled out. (V17,T1350-1352)

An interview was then conducted with Mr. Taylor. (V17,T1352) Mr. Taylor was provided with a form outlining his Miranda rights and that form was reviewed with him. (V17,T1353-1354) Mr. Taylor signed the form and agreed to speak to Det. Flair. (V17,T1354) Det. Flair did not record the statement at Mr. Taylor's request, but did take notes. (V17,T1355) Mr. Taylor signed the notes. (V17,T1356)

The notes reflect that Mr. Taylor said that he talked to Ms. Kushmer around 4:00 p.m. on Friday afternoon from a pay phone near Harry's Bar. (V17,T1357) Ms. Kushmer told him that she and her brother would be at Harry's Bar later that night. (V17,T1357)

Mr. Taylor went to Harry's around 6:00 p.m.. (V17,T1357) While at the bar he came into contact with a man whose name he didn't know that claimed to know Ms.

Kushmer. (V17,T1358) This man stated that Ms. Kushmer was coming to the bar later and that he wanted to rob her house. (V17,T1358) Mr. Taylor knew that the man had been doing burglaries. (V17,T1358) Mr. Taylor said that if Ms. Kushmer showed up he would come to the bar a little after that, dance with her, and then take her and her brother home. (V17,T1358) The other man talked about coming over, tying up Ms. Kushmer and her brother, then taking electronics and any other items. (V17,T1359) Mr. Taylor said that he would take Ms. Kushmer to "Tammy's" and that he would leave the door of the house open. (V17,T1359)

Mr. Taylor left Harry's, went to the Oasis, and made arrangements to stay the night with Lisa Lewis. (V17,T1359) Mr. Taylor returned to Harry's, where he found Ms. Kushmer and her brother. (V17,T1359) Ms. Kushmer was dancing with the unknown man. (V17,T1359) Mr. Taylor stated that Mr. Maddox was ready to leave, but too drunk to drive. (V17,T1359) Ms. Kushmer didn't want to leave, but Mr. Maddox convinced her to go. (V17,T1360) Mr. Maddox went to his rental car, retrieved his wallet, then he and Ms. Kushmer got into Mr. Taylor's truck. (V17,T1360)

Mr. Taylor drove them back to the house. (V17,T1360) The three of them went inside, had a few sandwiches and

some beer, and Mr. Maddox dropped a beer bottle and broke it. (V17,T1360) Mr. Taylor then took Ms. Kushmer to Tammy's bar. (V17,T1360) Mr. Maddox said that he was going to go to bed. (V17,T1360)

Mr. Taylor and Ms. Kushmer returned to the house around 12:30 a.m.. (V17,T1360) The unnamed man from the bar was in the driveway of the house when they arrived. (V17,T1360) Ms. Kushmer asked why he was there and the man said he wanted to talk to her. (V17,T1361) Ms. Kushmer invited them in and as she turned to enter the house, the unnamed man struck Ms. Kushmer in the back of the head with a long black bar. (V17,T1361)

Ms. Kushmer fell to the driveway, dropping her purse. (V17,T1361) The contents of the purse spilled out and Mr. Taylor picked up some credit cards that fell out. (V17,T1361)

The unnamed man stayed outside with Ms. Kushmer while Mr. Taylor went into the house. (V17,T1361) Mr. Taylor saw Mr. Maddox lying in a pool of blood in the middle of the floor by his suitcase. (V17,T1361) The unnamed man then came inside and began to go through the dresser drawers in another bedroom. (V17,T1361) The unnamed man went through a jewelry box. (V17,T1362)

The unnamed man then said he heard a noise and ran outside. (V17,T1362) He came back in and said that Ms. Kushmer was leaning up against the house. (V17,T1362) Mr. Taylor asked what the man as going to do and the unnamed man replied “Hit her”. (V17,T1362) The unnamed man then picked up a shotgun that was leaning against the wall by the bar and went outside, saying that he was going to hit Ms. Kushmer. (V17,T1362)

Mr. Taylor then heard a big bang. (V17,T1362) Mr. Taylor ran to the back and asked what had happened. (V17,T1362) The unnamed man replied that he had shot Ms. Kushmer. (V17,T1362) Mr. Taylor asked the man if he was crazy and the man said he was. (V17,T1362) Mr. Taylor picked up Ms. Kushmer and laid her in the house. (V17,T1363) Mr. Taylor said he left the other man at the house and he went to Tom Riley’s house. (V17,T1363)

Mr. Taylor claimed to have been at the Sikes house several times before. (V17,T1363) He had never been there when Ms. Kushmer’s mother was home. (V17,T1363)

Mr. Taylor stated that the next day he did laundry at Riley’s house. (V17,T1364) He tried to get Riley to cash a check from Mr. Maddox’s account for him, but that Riley refused. (V17,T1364)

Later that night Mr. Taylor went with some others to the Oasis bar and to Ybor City. (V17,T1364) He used Mr. Maddox's credit cards to pay for a meal. (V17,T1364)

On Sunday morning Riley told him that the police were looking for him. (V17,T1365) Mr. Taylor left, heading north. (V17,T1365) Mr. Taylor used some of Mr. Maddox's credit cards for the next few days. (V17,T1365) He arrived in Memphis on Monday. (V17,T1365-1366)

Mr. Taylor provided a description of the unknown man who had killed Ms. Kushmer. (V17,T1366) Mr. Taylor stated he was white, 45-50 years old with short, straight black hair that was streaked with gray. (V17,T1366) The man had a mustache and goatee. He was about 5'10" and weighed about 175 lbs.. (V17,T1366) Mr. Taylor stated he knew the man lived at a motel between the bar and gas station and that he was a construction worker. (V17,T1366) Mr. Taylor knew the man from Harry's Bar. (V17,T1366) He believed the man knew Ms. Kushmer because he arrived at the house without directions from Mr. Taylor. (V17,T1366-1467)

The next day Det. Flair searched Mr. Taylor's truck with Marshal Rufus Flag. (V17,T1372;V20,T1781) She found both Florida and Tennessee tags. (V17,T1373) A black bag and gloves were taken from the cab. (V17,T1374) The bag

contained cameras and camera accessories. (V17,T1374) The cameras were later identified by Mrs. Sikes as belonging to her. (V17,T1376) Receipts from K-Mart and pawn ticket from a Memphis pawn shop were also found. (V17,T1403)

Det. Flair also met with Pamela Williams, who worked at Choices Bar and Grill. (V17,T1377;V20,T1760-1761) Ms. Williams testified that Mr. Taylor came into the bar while she was working. (v20,T1761) He bought her several beers. (V20,T1761) The mad said that his name was William Maddox. (V20,T1763) Ms. Williams gave her a napkin with writing on it and identified Mr. Taylor as the person who gave her the napkin. (V17,T1378;V20,T1763)

Det. Flair, with Rufus Flag present, then reinterviewed Mr. Taylor on May 31st. (V17,T1379;V20,T1782) Mr. Taylor was advised of Miranda and agreed to talk. (V17,T1379) Det. Flair told Mr. Taylor that she did not believe everything that he had said the previous day. (V17,T1380) Mr. Taylor said the interview was over, but then said he wanted to continue. (V17,T1380) At one point Mr. Taylor said “I shot her.”. (V17,T1380) Mr. Taylor then agreed to have the interview recorded. (V17,T1380) The recorded interview was played to the jury: (V18,T1409)

Mr. Taylor said that he didn’t want to take the fall

by himself. (V18,T1407) In his second statement Mr. Taylor told Det. Flair that while the house was being burglarized, he went outside. (V18,T1413) Mr. Taylor had the gun when he entered the house. (V18,T1418) He had gotten the gun in Memphis the week before. (V18,T1535) Mr. Taylor told Det. Flair that he had gone outside, saw some movement, but it was dark, so he fired the shotgun. (V18,T1413) He shone a flashlight around outside and discovered that he had shot Ms. Kushmer. (V18,T1414) He picked her body up, put her inside the house, put the gun in truck and left. (V18,T1414) Mr. Taylor said the gun was at the buy and sell shop on US41. (V18,T1415)

Mr. Taylor admitted to taking two cameras from the house. (V18,T1414)

Mr. Taylor threw away his clothes and his tennis shoes were recovered by the police. (V18,T1416)

Mr. Taylor maintained that a second person was with him, but that he didn't know his name. (V18,T1417)

Officer Ronald Cashwell went to pawn shop located on Highway 41. (V16,T1194) He impounded a shotgun and a pawn ticket. (V16,T1194) The gun was placed in evidence and the pawn ticket was give to Sam McMullen, a fingerprint examiner. (V16,T1202) According to Mr. Benjamin Linsky, the

former owner of the pawn shop, a fingerprint is taken and placed on a pawn receipt. (V21,T1840) Mr. Taylor's thumb print and name appeared on the pawn receipt for May 26, 2001. (V21,T1843-1846;1860-1865) Sam McMullen, a latent print examiner from FDLE, confirmed that the thumb print on the pawn receipt belonged to Mr. Taylor. (V21,T1869)

The shotgun was examined for fingerprints. (V21,T1953) None were found. (V21,T1953-1954)

Chuck Sackman processed several beer bottles found in the house for latent fingerprints.(V21,T1934) He processed three bottles and lifted seven prints. (V21,T1936;1938) Wesley Zachary, a latent examiner with FDLE compared the known prints of Mr. Taylor to the latents from the beer bottles. (V21,T1941-1944) He indentified one print as belonging to Mr. Taylor. (V21,T1944)

Officer Sackman went to Harry's Bar and recovered the car that Mr. Maddox had rented. (V21,T1936)

On June 27th Det. Flair spoke with Mr. Taylor again. (V18,T1424) She had received a message from the jail that Mr. Taylor wanted to see her. (V18,T1425) Det. Flair went to the jail and Mr. Taylor gave her a letter. (V18,T1426) In the letter Mr. Taylor named "Jose Arano" as being the person who was at the house with him. (V18,T1427) Mr.

Taylor maintained that his wife, Lorena Taylor was also present. (V18,T1432) According to the letter, Mr. Taylor had told Jose and Lorena that Mr. Madddox was carrying a lot of money. (V18,T1428) He gave them directions to the house and said that he would be back there with Ms. Kushmer about 1:00 a.m.. (V18,T1428) Mr. Taylor claimed that as Ms. Kushmer walked up the drive Lorena came out of a hiding place and hit Ms. Kushmer with a crowbar, calling her names. (V18,T1428) While Lorena watched outside, Mr. Taylor went to his truck and retrieved a shotgun. (V18,T1428) Jose had gone into the house and beaten Mr. Maddox with the crowbar. (V18,T1428) Lorena called inside that she had heard a noise, so Mr. Taylor went outside with the gun. (V18,T1429) As he went out, someone turned the corner and he fired the gun. (V18,T1429) He saw that he had shot Ms. Kushmer, so he put her in the house. (V18,T1429) Mr. Taylor then went back into the house, took a few items, then left with Lorena. (V18,T1429) Jose left separately. (V18,T1429)

Several miles away Lorena disposed of her blood spattered clothes. (V18,T1429) Jose wiped off the crowbar and put it in the trunk of Lorena’s car. (V18,T1429) Jose gave Mr. Taylor the money he had gotten from Mr. Maddox.

(V18,T1429) Mr. Taylor gave Lorena some money and watches and told her to go back to Miami. (V18,T1429)

Mr. Taylor went to Harry's and moved Mr. Maddox's rental car. (V18,T1430) He found Mr. Maddox's wallet in the car and kept it. (V18,T1430) Later in the day he got together with Jose. (V18,T1430) They ate and went to Ybor City, with Mr. Taylor using Mr. Maddox's credit cards. (V18,T1430) That was the last time Mr. Maddox saw Jose. (V18,T1431)

Mr. Taylor wrote that Jose Arano worked at the Tampa Ship Building and Repair Company at the Tampa Port Authority. (V18,T1431)

A second taped interview was made after Det. Flair read the letter. (V18,T1434) Mr. Taylor substantially repeated the information contained in the letter. (V18,T1436-1441)

Mr. Leroy Parker is a blood spatter/crime scene reconstructionist with FDLE. (V19,T1571-1575) Mr. Parker explained the method by which he determines the point of origin of blood stains and the analysis of the corresponding blood spatter to determine the velocity of the impact of the splatter. (V19,T1576-1578) Mr. Parker

also explained how transfer stains and cast-off stains can be used to determine the velocity of blood. (V19,T1579-1582;1585-86)

Blood spatter is created when there is an impact on blood that has collected- an object striking a surface where blood is located. (V19,T1587) Cast-off stains occur when blood is clinging to an object that is moving changes direction. (V19,T1586) The number of cast-off stains can be used to determine the number of blows. (V19,T1587)

High velocity blood spatter is usually associated with gun shot wounds. (V19,T1589) Gunshots at close range create a type of blood stain called “blowback”. (V19,T1590) A contact wound is characterized by a star-shaped wound that is larger than usual and back splatter hitting the shooter as a result of the close contact. (V19,T1590) High velocity blood spatter was found to the left of the stains on the outside wall. (V19,T1600) The blood was headed downward. (v19,T1603) Other splatters were headed upward, with a point of convergence about 24-36 inches above the ground. (V19,T1604) This meant that the victim was about 24-36 inches above the ground at the time of the shooting. (V19,T1604) This height would be consistent with a person kneeling or sitting. (V19,T1605) High velocity stains were

also found on the pants and foot of Ms. Kushmer. (V19,T1606) These stains would not be found if the victim was standing at the time of the shooting. (V19,T1607) It is possible to have a contact shooting where the barrel of the gun is against the skin and have no blood inside the barrel of the gun. (V19,T1661)

In this case the blood stains on the outside wall of the house are smear stains caused by contact with some movement. (V19,T1598) They were most likely made by Ms. Kushmer's hair. (V19,T1599)

A small pooling of blood outside indicated that Ms. Kushmer remained there for a short time after being shot. (V19,T1609) A trail of blood leading away from the pooling confirmed that Ms. Kushmer was carried after being shot. (V19,T1611) The blood trail continued over the threshold of the house. (V19,T1611-1615)

Mr. Parker testified about the blood patterns present in the bedroom. (V19,T1626) The person bleeding was in contact with the pillow, causing contact and transfer stains. (V19,T1636) Impact splatter was found on the wall, headboard, and ceiling. (V19,T1627;1630) The blood stains indicated medium velocity- consistent with a beating as opposed to a gun shot. (V19,T1629) The floor area around

the closet had pooled blood, contact blood and dropped blood. (V19,T1632) These stains were consistent with someone remaining in the area for a period of time. (V19,T1633)

Blood was also found in the adjacent bathroom. (V19,T1636) Transfer blood was found on the toilet and light switch. (v19,T1637) Blood was also found on khaki shorts and a bath mat. (V19,T1639)

Mr. Franklin Chandler is a fraud investigator with MBNA Bank. (V19,T1662) He reviewed the several credit accounts of Mr. Maddox. (V19,T1664) Mr. Chandler found that two transactions were made in Tampa on May 26th. (V19,T1665) A transaction was made in Valdosta, Georgia on May 28th. (V19,T1665) Several transactions were made at the Choices Bar and Grill in Memphis on May 28th through May 30th. (V19,T1666) The account was in the name of Bill Maddox. (V19,T1670)

Todd Evans, a senior special agent in fraud investigations with American Express reviewed credit transactions on Mr. Maddox's account for May 2001. (V19,T1670) Several purchases were made in Ybor City on May 25th. (V19,T1670) Beginning on May 26th, several transactions were made in Tampa. (V19,T1671) On May 28th

transactions were recorded in Tennessee for gas. (V19,T1672) Additional transactions were made in Tennessee at K-Mart on May 29th. (V19,T1673) Hotel charges were made on May 30th. (V19,T1673) The account was in the name of Billy Maddox, Jr.. (V19,T1674)

William Maddox testified that he lives in Visalia, California. (V23,T2098) He came to Tampa in May 2001 to visit his ill stepfather, mother, and sister. (V23,T2098) On Friday he, his sister, and mother ate lunch at the Columbia restaurant in Ybor City and he purchased some cigars as gifts. (V23,T2099)

After visiting his mother and stepfather at the hospital, he and Ms. Kushmer left the hospital in his rental car. (V23,T2100) They stopped at Tammy's Lounge and had two beers. (V23,T2100) They then went to another bar. (V23,T2101)

Mr. Maddox remembered being in the second bar and drinking Crown Royal. (V23,T2102) He paid with cash. (V23,T2102) At one point in time Mr. Maddox remembered going outside to smoke a cigar. (V23,T2103) He was a little concerned about the circumstances, so he locked his wallet in his rental car. (V23,R2103) He and his sister disagreed about leaving, but eventually she agreed to

leave. (V23,T2102) Mr. Maddox went to his rental car, retrieved his wallet, and left with someone that he could not remember. (V23,T2102)

The next thing that Mr. Maddox remembered was awakening in the hospital. (V23,T2104) He remained in the hospital 4-41/2 weeks. (V23,T2104)

The injuries he suffered have dramatically affected Mr. Maddox's life. (V23,T2104) He is unable to work, do math, or spell. (V23,T2104-2108) He has visible scarring. (V23,T2108)

Mr. Maddox examined numerous receipts from Choices Bar and Grill and stated he had not made those purchases. (V23,T2104) He did not give anyone permission to use his credit cards or checkbook. (V23,T2109)

Dr. Scott Gallagher treated Mr. Maddox upon his arrival at Tampa General on May 26th. (V23,T2113-2122) Mr. Maddox had severe head wounds and head lacerations. (V23,T2123;2126) A CAT scan and X-rays revealed significant skull fractures of the frontal bone, left side of the head, the temporal and parietal bone, cheek bone, orbital walls, and intercranial bleeding. (V23,T2125-2126) One of the skull fractures was depressed causing a bone to compress into the cranium about four millimeters.

(V23,T2129) A significant amount of force was necessary to cause these fractures. (V23,T2132-2136) There were repeated blows. (V23,T2136) Dr. Gallagher opined that this was the most significant or severe assault to the head of a patient that he had seen where the patient had survived. (V23,T2146) The injuries were life-threatening. (V23,T2147)

The skin lacerations were fagged and not in a straight line, which would eliminate a knife as having made them. (V23,T2132) They were consistent with having been made by a bat rather than a crowbar. (V23,T2132)

Memory loss would be consistent with this type of head injury. (V23,T2151) Personality changes would also be common. (V23,T2152) There is a 50% chance of severe permanent injury or disability. (V23,T2152)

Dr. Lee Miller performed an autopsy on Ms. Kushmer. (V19,T1679-1699) He discovered scraped bruise on the left knee and knuckles of the hand consistent with the victim falling to her knees. (V19,T1687-1689;V20,T1732-1736) There was a blunt trauma wound to the back of the head consistent with being hit with a club. (V20,T1725) Dr. Miller determined the cause of death to be from a gunshot wound to the mouth area. (V19,T1690) The jaw was shattered

and there was injury to the chin, bridge of the nose, the left eye, and to the side of the face. (V19,T1689-1692) Some of the facial injuries were caused by a fall forward after being shot. (V19,T1693) Dr. Miller believed that the gunshot wound was from close range due to the semi-circular configuration of the wound, a discolored mark consistent with the barrel being placed on the skin, and the radiating tears inside the oral cavity caused by the gas expansion from the shot. (V19,T1694-1695;V20,T1719-1720) Wadding from the shotgun was also found inside the wound, further substantiating a close or hard contact wound. (V19,T1697)

Dr. Miller did not believe that the victim was shot as she came around a corner due to his opinion that the muzzle of the gun was pressed against her at the time of the firing. (V20,T1721)

Justin Greenwell is a firearms examiner with FDLE. (V23,T2072) He obtained the firearm from this case as well as a small tray containing pellets and wadding. (V23,T2075) The gun was in good working order and functioned appropriately. (V23,T2077) The shotgun is designed to expel a projectile under the force of an explosion. (V23,T2077) The trigger pull was within normal range of 63/4ths to 7 pounds. (V23,T2082) The shotgun shells used

by this firearm use a combination wad, which contains the powder, a spacer, and the shot cup to hold the pellets. (V23,T2084) After the gun is fired, the shot cup peels back when the shell hits the air or an object like a body or wall. (V23,T2087;2094) This allows the lead pellets to travel forward. (V23,T2087) The plastic wadding of the shot cup then falls to the side. (V23,T2088)

DNA was obtained from Mr. Maddox by swabbing his cheek in 2003. (V20,T1792-1805) A sample of Ms. Kushmer's blood was retained and sent to FDLE. (V20,T1812) A blood sample was taken from Mr. Taylor and submitted to FDLE. (V20,T1820-1824) The shotgun and Mr. Taylor's tennis shoes were sent to FDLE. (V20,T1825) Brian Higgins, a forensic biologist with FDLE processed the blood and DNA samples from Mr. Taylor, Mr. Maddox, and Ms. Kushmer. (V21,T1885-1889) He obtained some blood samples from the shotgun from the butt end of the rifle. (V21,T1889-1902) He examined the barrel of the rifle, but found no blood. (V21,T1889-1890) Mr. Higgins also took some limited swabbings of blood from the tennis shoes. (V21,T1904-1907)

Susan Ulery, a DNA analyst with FDLE, performed DNA testing on the samples she obtained from Mr. Higgins. (V21,T1968-1972) The swabbings from the shotgun showed

partial human profiles. (V21,T1972-1981) Two areas were matches when compared with the DNA profile of Mr. Maddox. (V21,T1978-1980) The statistical probability was 1 in 4,800 for one sample and 1 in 62 million for a second sample. (V21,T2002-2003) The swab from the tennis shoe was not sufficient to develop a profile from. (V21,T1982)

PENALTY PHASE

The following testimony was presented by the State:

VICTIM IMPACT

A letter was read from Bill Maddox, Jr. (V26,T2633) In it he expressed love for his sister and the difficulty of her death. (V26,T2633) He stated his mother's pain cannot be described and that his sister's only child has not accepted her death. (V26,T2633)

A second letter from Ms. Kushmer's father was also read. (V26,T2633) He expressed his sadness at not being able to have Ms. Kushmer call him and express her love to him. (V26,T2633) At the time of her death Ms. Kushmer had a son and two grandchildren that will not know her. (V26,T2634) He remembered Ms. Kushmer as being a thoughtful, caring person with a heart of gold. (V26,T2634) Her death has taken a toll on the entire family. (V26,T2634-35)

Mrs. Sikes, Ms. Kushmer's mother, testified that Ms. Kushmer was a loved and caring daughter. (V26,T2635) She described Ms. Kushmer as a hard working single parent who was very caring and helpful. (V26,T2635) Ms. Kushmer's son has had a very hard time dealing with this. (V26,T2636)

STATE PENALTY PHASE EVIDENCE

It was stipulated that Mr. Taylor has also been known as Mark Levy and was convicted of burglary in 1977 in Elko County, Nevada. (V26,T2640)

Lily Stewart testified that in 1976 she was employed as a hostess at a casino in Elko county, Nevada. (V26,T2641) During this time period she came to know an individual by the name of Mark Levy, who worked as a dishwasher. (V26,T1641) Ms. Stewart befriended Mr. Levy and during conversations with him told him that she was saving money for a trip to California. (V26,T2643) She told Mr. Levy that the money was hidden in her room at the hotel attached to the casino. (V26,T2644)

Ms. Stewart went to her room to change her shoes one day. (V26,T2645) She unlocked her door and entered her room. (V26,T2645)

Ms. Stewart noticed that a brown paper bag that she used to contain dirty clothes was moving. (V26,T2646) She

turned to shut the door and as she did, Mr. Levy hit her in the head causing her to fall or fly about three feet over to the bed. (V26,T2646) Ms. Stewart was dazed. (V26,T2647) Her face remained bruised for about a week. (V26,T2650)

Mr. Levy ran out of the room and Ms. Stewart did not ever see him again. (V26,T2647-48) The money that Ms. Stewart had hidden was not take, but $30.00 left on the nightstand was missing. (V26,T2648)

A video taped deposition of Margaret Kolluck was played to the jury. (V26,T2653) In August of 1976 Ms. Kolluck was living in Delaware. (V26,T2655) She knew Mr. Taylor because his parents lived across the street from her home. (V26,T2655) Ms. Kolluck worked as a security major in a state mental hospital. (V26,T2656)

On the evening of August 25, 1976, MS. Kolluck was at home preparing to go to work. (V26,T2656) She was sitting at a the dining room table drinking a Pepsi when she felt like an explosion went off in her head. (V26,T2657) She jumped up and felt pain in her left side by her lung. (V26,T2658) She didn’t know what had happened, but she went to a telephone and called her daughter. (V26,T2659) She was unable to speak. (V26,T2659)

Mw. Kolluck then went and to lie down because she was

in so much pain. (V26,T2659) Ms. Kolluck then got up and walked across the street to a neighbor's house. (V26,T2659) The neighbor's called her daughter and an ambulance. (V26,T2660)

Ms. Kolluck was taken to the hospital. (V26,T2660) It was determined that Ms. Kolluck had been shot twice, once in the head. (V26,T2664-2667) It took her six months to recuperate. (V26,T2663)

Ms. Kolluck later learned that the shots were fired through her window. (V26,T2667)

Mr. Taylor was later arrested and went to trial on charges stemming from this incident. (V26,T2669) Ms. Kolluck testified at the trial. (V26,T2669) Mr. Taylor was convicted. (V26,T2670)

It was further stipulated that at the time of the instant offenses Mr. Taylor was on federal felony probation. (V26,T2670)

The state presented no additional evidence.

DEFENSE PENALTY PHASE EVIDENCE

The following evidence was presented through videotape:

Idamae Newlin is a resident of Wilmington, Delaware. (v2674) Her husband Robert is deceased. (V26,T2674) Mr.

Taylor is Mrs. Newlin's nephew. (V26,T2674) Mr. Taylor's parents were Roberta Taylor and Albert Taylor. (V26,T2675) Albert and Roberta Taylor were married only briefly and separated at the time of Mr. Taylor's birth. (V26,T2676) Albert Taylor is deceased. (V26,T2676) Roberta Taylor died in 1991 from cancer. (V26,T2677)

Roberta Taylor married William Parott when Mr. Taylor was quite small. (V26,T2677) A second child, Don Allen Parott, was born of the marriage. (v26,T2677) Don Parott was killed in a car accident ten years ago. (V26,T2678)

Mrs. Newlin believed that Mr. Taylor and his mother had a good relationship. (V26,T2678) Mr. Taylor seemed attached to his mother. (V26,T2678)

William Parott, Mr. Taylor's stepfather, was nasty and mean. (V26,T2679) Mr. Parott never liked Mr. Taylor. (V26,T2679) Mr. Parott always put Mr. Taylor down and told him that he was no good. (V26,T2679) When Mr. Taylor wanted to play sports as a child Mr. Parott wouldn't let him. It was clear that Mr. Parott had no time for Mr. Taylor. (V26,T2679)

The relationship between Parott and Mr. Taylor was bad. (V26,T2679) Parott was mentally and physically abusive to Mr. Taylor. (V26,T2679) When Mr. Taylor was

young, he did nothing in response to the abuse because he was afraid of Parott. (V26,T2680) When he was older Mr. Taylor fought back. (V26,T2680)

Roberta Parott told Mrs. Newlin of one time that Mr. Taylor fought with Parrot and a neighbor had to come and separate them. (V26,T2680)

Both Roberta and Parott drank. (V26,T2681) Parrot drank all the time and drank heavy. (V26,T2681) Drinking made Parrot meaner. (V26,T2681)

The relationship between the Parott's was violent. (V26,T2684) Roberta was afraid of Parott because he beat her. (V26,T2684) Mrs. Newlin saw marks on her sister from the beatings and knew that she was hospitalized at least once as a result of her injuries. IV26,T2684) At one point they divorced. (V26,T2685)

Mrs. Newlin had Mr. Taylor over to her house while he was growing up. (V26,T2685) She had him pretty much every weekend when he was a child because he would call her and ask her to come and get him. (V26,T2686) Roberta worked on the weekends. (V26,T2698) Mrs. Newlin loved Mr. Taylor very much and her husband adored him. (V26,T2698) She tried to be a good role model for him while he was at their house. (V26,T2698) They took him places when they could.

(V26,T2699)

Mrs. Newlin was concerned about Mr. Taylor's welfare. (V26,T2686) She saw welts on his back that Mr. Taylor said came from being beaten with a belt by Parott. (V26,T2686) Mrs. Newlin confronted the Parott's about this and told them that she would call the police if she found marks on Mr. Taylor again. (V26,T2686)

Parott often punished Mr. Taylor and Don Parott. (V26,T2687) Mrs. Newlin recalled that one time he made both boys stay in the wooden cabin of a boat when it was very hot. (V26,T2687) They had not been fed, so Mrs. Newlin fed them. (V26,T2688) Parott wanted to be at the boat on the weekends, so the children were not allowed to play sports. (V26,T2689)

Mrs. Newlin became aware of problems Mr. Taylor was having when Roberta told her that he was getting in trouble. (V26,T2692) Mrs. Newlin knew that he was seen by two different psychiatrists. (V26,T2692)

Mrs. Newlin saw Mr. Taylor for the last time in May 2001, when he came to her house. (V26,T2692) Mr. Taylor said he had come to visit his mother's grave and to put a picture on it. (V26,T2692) Mr. Taylor had not gone to her funeral and was quite affected by her death. (V26,T2694)

He took her death very hard. (V26,T2694) Mr. Taylor was also affected deeply by the death of Don Parott. (V26,T2694)

Mrs. Newlin had visited Mr. Taylor in prison several times. (V26,T2695) She had gone with Roberta to visit him. (V26,T2695) Parott never visited him. (V26,T2695)

Josephine Quattrociocchi lives in Delaware. (V26,T2721) She is 73 years old and retired. (V26,T2721) She had worked as a legal secretary in a private firm and for the Delaware Attorney General. (V26,T2721) She came into contact with Mr. Taylor while he was an inmate at the Smyrna Prison in the 1980's. (V26,T2722) She had gone to the prison to visit someone else and was introduced to Mr. Taylor. (V26,T2722) She got to know Mr. Taylor, who called her Aunt Jo. (V26,T2723) She tried to help Mr. Taylor with the prison board. (V26,T2724) She did not know why Mr. Taylor was in prison, but she thought he deserved another chance. (V26,T2727) She treated him like a member of her family. (V26,T2727)

After Mr. Taylor was released from prison in Delaware he kept in contact with Mrs. Quattrociocchi by telephone and by writing, even after he returned to prison. (V26,T2724) She last saw Mr. Taylor in 2001 when he came

to her house and visited her in Delaware. (V26,T2726) Mrs. Quattrociocchi also became acquainted with Mr. Taylor's wife, Lorena. (V26,T2725)

Robert Railey, II, lives in Ketchikan, Alaska. (V27,T2757) He lived in Tampa from 1999 through 2003. (V27,T2758) He met Mr. Taylor when Mr. Taylor worked at the Tampa Bay Ship Building and Repair Company in Tampa. (V27,T2759) Mr. Railey was the paint foreman and Mr. Taylor worked for him. (V27,T2760) Mr. Railey was directly responsible for Mr. Taylor. (V27,T2760) Mr. Railey also developed a friendship with Mr. Taylor. (V27,T2760)

Mr. Railey described Mr. Taylor as an excellent worker who required little maintenance. (V27,T2761) He had a good initiative and a good work ethic. (V27,T2761)

Mr. Railey knew that Mr. Taylor had been in trouble with the law, but didn't know what for. (V27,T2762) Since his arrest on these charges Mr. Railey has had some contact with Mr. Taylor by letter and telephone. (V27,T2763)

The following witnesses presented live testimony:

Gary Cross was employed as a drug counselor at Glades Correctional Institution in the early 1990's. (V27,T2751) He came into contact with Mr. Taylor while he was an inmate in that institution. (V27,T2752) Mr. Taylor became

involved in the drug program that Mr. Cross was running. (v27,T2752)

Mr. Taylor did very well in the program and became a facilitator. (V27,T2753) As a facilitator he helped other inmates. (V27,T2753) Mr. Taylor worked with the program until he was transferred to another institution. (V27,T2753)

Dr. Harry Krop is a licensed psychologist with an emphasis on neuropsychology. (V27,T2774) Neuropsychology is a specialization which involves the assessment of a person by using psychological tests to asses whether a person has deficits in cognition or other aspects involving the brain. (V27,T2775) Ninety to ninety-five per cent of his current practice is devoted to forensic psychology. (V27,2779)

Dr. Krop was retained to do an evaluation on Mr. Taylor. (V27,T2781) Dr. Krop reviewed information about the current offenses, as well as extensive records of Mr. Taylor.(V27,T2781) Dr. Krop noted that a number of neuropsychological tests had already been conducted, so Dr. Krop performed only four additional neuropsychological tests that he believed were particularly relevant to Mr. Taylor. (V27,T2783-84) The results of those tests led him

to do some additional testing. (V27,T2784)

Neuropsychological tests assess different brain functions, such as memory, intellectual ability, perceptual ability, etc.. (V27,T2785) A battery of tests to asses full brain function had been done by Dr. Sesta. (V27,T2785) Based on those tests results, Dr. Krop felt further testing to asses frontal lobe functioning was necessary. (V27,T2786)

The frontal lobe of the brain matures and develops last in a person, sometimes not fully until the teen years. (V27,T2786) It is the part of the brain that is in control or influences executive functions- the individual's ability to do complex activities. (V27,T2786) The frontal lobe involves problem-solving, judgment, the ability to control behavior, to control impulses, and to allow a person to stop behaving in a certain way after he starts, and the ability to change behaviors or shift in actions or thought process after they have begun. (V27,T2787;2789) The level of impairment is measured by degrees of impairment. (V27,T2791)

Brain damage is a loose term referring to something in the brain that is not working the way it is supposed to. (V27,T2792) Brain damage can be caused by many things,

including structural damage from injury, genetic or developmental damage, and damage from the destruction of brain tissue stemming from substance abuse. (V27,T2793) The destruction of brain cells causes cognitive deficit, which is impairment in the way a person thinks. (V27,T2794)

Dr. Krop diagnosis Mr. Taylor with a Cognitive Disorder NOS under the Diagnostic and Statistical Manual, which meant he had significant impairment based upon a battery of psychological tests, primarily in the frontal lobe region of the brain. (V27,T2796;2817) The cognitive disorder can help explain certain behaviors of Mr. Taylor over the years. (V27,T2797)

As part of his examination, Dr. Krop obtained an extensive psychosocial history from Mr. Taylor, which included interviews with Mr. Taylor, information provided to other mental health counselors, and medical records. (V27,T2797) This data indicated significant family dysfunction, with emotional deprivation in his childhood, physical abuse by the stepfather, domestic violence in the home, and the lack of a positive male role model in the home. (V27,T2798) These deficits affect the personality development of children and have a significant impact on how a person develops. (V27,T2799) This is especially true

during the formative years of age 3 to age 8, when a person is most impressionable. (V27,T2800)

Emotional security is extremely important to appropriate personality development. (V27,T2800) Mr. Taylor began having documented behavior problems around age 9 when he learned that his stepfather was not his biological father. (V27,T2800) This was very traumatic for him. (V27,T2801) School records substantiated increased acting out, fighting, lowered grades, difficulty with authority figures, and difficulty in peer relationships. (V27,T2801) Mr. Taylor was placed on Ritalin, now prescribed for ADHD, after attention and concentration problems were reported. (V27,T2802) Mr. Taylor was referred by the school for “mental hygiene”- an antiquated term for psychological counseling. (V27,T2803)

Dr. Krop administered a full IQ scale assessment. (V27,T2803) Mr. Taylor tested at a 74 IQ, in the borderline range of intellectual ability, or the 4th percentile of the overall population. (V27,T2803) This result was significantly lower than IQ testing done in 1971 (IQ of 85 on children’s test); 1972 (IQ of 94); 1994 (IQ of 89).(V27,T2805-06) The differences between 1971 and 1972

most likely indicated a recollection of the test. (V27,T2805) An IQ of 89 is in the low average range. (V27,T2806)

Several factors could attribute for the scoring differences between the present test results and that of the 1994 test. (V27,T2806) Dr. Krop believed that the lower IQ was likely the result of Mr. Taylor's continued drinking and long-term drug and alcohol abuse.(V27,T2807) This could account for a 10 point drop in score. (V27,T2707)

Dr. Krop looked for malingering and found no evidence of any intent to look worse, which indicated the current test was valid. (V27,T2806) The current test had very consistent scores in all thirteen subsets, again suggesting optimal effort on the test. (V27,T2807) It would take someone of considerable sophistication to "fake" the tests and achieve a similar score on all 13 subparts. (V27,T2809) Mr. Taylor would often get genuinely frustrated with the tests, at some tests he would make sarcastic comments, but he always persisted in trying. (V27,T2810)

Dr. Krop also determined that Mr. Taylor suffered from two personality disorders: Antisocial Personality Disorder

and Borderline Personality Disorder. (V27,T2816) Persons with frontal lobe deficits and these personality disorders often find themselves in trouble with the law. (V27,T2825)

His emotional age is significantly less than his chronological age of 45. (V27,T2818) He is quite immature, more like a teenage boy. (V27,T2819) Mr. Taylor responds reactively, with little thought to negative consequences, and in many times, what most would consider inappropriate and self-destructive. (V27,T2820;2822) His attention seeking behavior- such as suicide attempts to get into treatment programs- are examples of this. (V27,T2820)

The combination of alcohol and drugs would increase the impairment of Mr. Taylor. (V27,T2818) It would cause impulsivity to be higher. (V27,T2825)

Dr. Krop believed that Mr. Taylor had a seizure disorder that was consistent with older medical records. (V27,T2822) Mr. Taylor was prescribed Dilantin while in prison for seizures. (V27,T2822) Mr. Taylor is no longer in Dilantin, but is taking Tegretol for seizures. (V27,T2823) Seizure disorders can be unpredictable. (V27,T2835)

Dr. Krop acknowledged that in 1991 a Dr. Greer had an EEG performed on Mr. Taylor that came back normal.

(V27,T2836-39) Dr. Greer did not find a need for anticonvulsant medication. (V27,T2838)

Mr. Taylor is currently prescribed Depicote, Tegretol, Sinequon, Benadryl, and Prozac. (V27,T2823) These are pretty major psychotropic medications. (V27,T2823) The early onset of Mr. Taylor's problems (age 9 in school and age 11 for the legal system) led Dr. Krop to believe that there was an early likelihood of both brain damage and environmental contributors. (V27,T2826) Many of the features of the personality disorder correlate with the frontal lobe brain damage. (v27,T2855)

A person with this psychological profile can only effect positive change with appropriate intervention or changes in circumstance. (V27,T2927) This did not occur for Mr. Taylor. (V27,T2827) Removing him from the home as a child created a vicious cycle of absconding coupled with alcohol and drug abuse by age 12. (V27,T2827)

Dr. Krop believed that at the time of homicide Mr. Taylor suffered from a chronic emotional disturbance or emotional disorder- chronic organic brain damage, frontal lobe syndrome. (V27,T2829) Alcohol consumed on the night of the homicide aggravated or exacerbated the existing psychiatric disorder. (V27,T2829) Although Dr. Krop felt

that Mr. Taylor could distinguish right from wrong, his judgment was compromised to the extent that his ability to conform his conduct to the requirements of the law was impaired. (V27,T2829)

Dr. David McCraney, a neurologist, specializes in forensic neurology and traumatic brain injury rehabilitation. (V28,T2896) He evaluated Mr. Taylor in 200. (V28,T2898) Dr. McCraney also conferred with Dr. Harry Krop and Dr. Joseph Sesta regarding neuropshchological testing that they conducted. (V28,T2899)

There are three steps in neurological evaluations: health history, neurological evaluation, and a review of any diagnostic tests that have been done. (V28,T2899)

According to Dr. McCraney the brain is not only responsible for motor skills and emotion, it is also responsible for behavior. (V28,T2903) The front portion of the brain, or frontal lobe, has three important functions: concentration, freedom from distraction, and the formulation of intention- the decision to act. (V28,T2906) The formulation of intent is twofold: forming the intent to do an act and forming the intent to <u>not</u> do an act, or impulsivity. (V28,T2906;2911)

Dr. McCraney reviewed the childhood record of Mr.

Taylor. (V28,T2907) He determined the presence of organicity- that something physical was going on with the brain of Mr. Taylor since childhood. (V28,T2907;2909) Mr. Taylor's records contained evidence of low grades, inattentive to the point of having a learning disability, difficulty with peer relationships, getting along with others, and being a loner, and poor performance on neuropsychological tests. (V28,T2908) Mr. Taylor had a number of interactions with the mental health system as a child. (V28,T2910)

Dr. McCraney obtained a history from Mr. Taylor during an interview in 2002. (V28,T2913) This included a detailed family history, history of drug and medical problems, history of head injuries and possible epilepsy. (V28,T2913) A physical examination was then done to determine how the brain was functioning. (V28,T2913) This is primarily a series of memory tests, tests to determine the ability to formulate intent, and a neurological examination to determine the condition of the neurosystem. (V28,T2914)

Dr. McCraney concluded that Mr. Taylor has a deficiency in the smooth pursuits, indicating a dysfunction in the brain or the result of medication. (V28,T2915) Mr. Taylor had abnormal tone tests indicating facilitory

paratonia consistent with traumatic brain injury in a person his age. (V28,T2917) Facilitory paratonia is linked to frontal lobe impairment. (V28,T2917) Mr. Taylor also had abnormal results on the "Go/No-Go" test for impulse control. (V28,T2918) Based upon these test results, Dr. McCraney determined that Mr. Taylor has brain dysfunction consistent with frontal lobe damage. (V28,T2920)

Dr. McCraney reviewed the results of the neuropsychological testing done by Drs. Krop and Sesta. (V28,T2923) Dr. Sesta's finding of mild to moderate brain impairment and rather marked frontal lobe impairment was consistent with Dr. McCraney's findings. (V28,T2923) The objective testing performed by Dr. Krop also confirmed his findings of frontal lobe impairment and difficulties with formulation of intent. (V28,T2924)

In Dr. McCraney's opinion, a person suffering the brain dysfunction found in Mr. Taylor combined with a chaotic and abusive environment during childhood would create bad outcomes. (V28,T2930) Consistency is the key to overcoming brain dysfunction to the degree necessary to improving behavior. (V28,T2931) Success depends on three factors: proper medication management if needed, training, and social skills acquisition. (V28,T2932) Nothing in Mr.

Taylor's records indicated that he had received any consistent appropriate treatment as a child. (V28,T2933) A brief period of treatment in middle school had shown marked improvement for Mr. Taylor while he was in treatment. (V28,T2934)

Mr. Taylor also reported a significant head injury at age 17. (V28,T2934) This resulted in a significant disability in epilepsy- most likely complex partial seizure disorder. (V29,T2935) The history of seizures was consistent with the medical history. (V28,T2935) Mr. Taylor's use of Dilantin (an anti-seizure medication) supported this diagnosis. (V28,T2936)

The state presented the testimony of Dr. Donald Taylor, forensic psychiatry. (V28,T2964) Dr. Taylor interviewed Mr. Taylor, reviewed his statements and the police reports in this case. (V28,T2968) He reviewed the tests results obtained by Drs. Sesta and Krop, as well as medical, educational, and prison records of Mr. Taylor. (V28,T2969-2970)

Dr. Taylor reached a psychiatric diagnosis of Mr. Taylor. (V28,T2970) He made three Axis 1 diagnosis: substance abuse disorder, nicotine dependence, and adjustment mood disorder. (V28,T2971) Dr. Taylor made two

Axis II diagnosis- which are characterized as permanent and present since at least the teenage years. (V28,T2972) He diagnosed Mr. Taylor with Antisocial Personality Disorder, which is descriptive of an individual who has a life-long history of law violations and Borderline Personality Disorder, characterized by unstable and intense interpersonal relationships, self-destructive behavior, and difficulty in controlling anger. (V28,T2972)

Dr. Taylor was aware of Mr. Taylor's contacts with the juvenile justice system. (V28,T2982) Those contacts corroborated his diagnosis of Anti-Social Personality Disorder. (V28,T2982-2986) A person's childhood affects the formation of Anti-Social Personality Disorder. (V28,T2986) A failure in child-rearing such as emotional neglect, physical or sexual abuse generally leads to this disorder. (v28,T2987) Dr. Taylor believed that Mr. Taylor had suffered psychological trauma due to abuse and neglectful treatment in his formative years. (V29,T3045) Mr. Taylor had a very chaotic childhood in the home environment. (V29,T3049) Mr. Taylor's emotional maturity was more that of a teenager rather than an adult. (V29,T3048)

Dr. Taylor did not believe that Mr. Taylor suffered

from epilepsy based upon his review of the medical records. (V29,T3015) He did believe that Mr. Taylor had suffered a fall and head injury in his teen years in Tennessee, with brief period of seizures following that incident. (V29,T3005-3015)

Dr. Taylor did not believe that Mr. Taylor had frontal or temporal lobe impairment that would be caused by brain damage. (V29,T3028) Dr. Taylor believed that Mr. Taylor had spent a good deal of his life not utilizing the higher levels of his frontal lobe and this would be connected to the personality disorders. (V29,T3028;3040) Dr. Taylor did not believe that Mr. Taylor suffered from any mental disease or defect that substantially impaired his capacity to appreciate the criminality of his conduct. (V29,T3030) Dr. Taylor believed that Mr. Taylor could conform his conduct to the requirements of the law and that he had the capacity to appreciate the criminality of his actions. (V29,T3032)

Dr. Taylor admitted that he is not a neurologist and is not trained to conduct, score, or interpret the results of any individual test instruments. (V29,T3038)

The following testimony was presented at a Spencer hearing on August 16, 2004: (V30,T3159)

Dr. Harry Krop testified that Mr. Taylor reported to him that on the evening of the homicide he had consumed five beers and four 2 oz. shooters of tequila at Harry's. (V30,T3161) He also drank an unknown amount of beer while eating sandwiches. (V30,T3161) He then smoked two or three marijuana joints, then returned to a bar and drank a few more beers. (V30,T3161)

The neuropsychological testing that Dr. Krop performed on Mr. Taylor was strongly indicative of frontal lobe impairment-namely executive functions, impulse control, and inhibition. (V30,T3162) Seizure activity is based on electrical abnormalities in the brain at a particular time. (V30,T3162) Seizures do not always reflect brain damage. (V30,T3162) Seizures and the deficits obtained in the neuropsychological testing that Dr. Krop obtained from Mr. Taylor were not mutually exclusive. (V30,T3163) The deficits that Dr. Krop observed in Mr. Taylor are most likely developmental as opposed to trauma induced. (V30,T3163)

Dr. Krop diagnosed Mr. Taylor with both Anti-Social Personality Disorder and Borderline Personality Disorder. (V30,T3165) The borderline features were very severe and

individuals with these traits are usually very disturbed individuals who have considerable difficulty getting along in society. (V30,T3165)

Dr. Krop did not believe that Mr. Taylor had ever received the type of consistent, nurturing, and supportive environment in order to modify negative behaviors. (V30,T3167) In fact, his childhood environment was exactly the opposite. (V30,T3167) Dr. Krop's opinion of the stepfather's treatment of Mr. Taylor was consistent with that given by Mr. Taylor based upon his review of a videotape of the stepfather. (V30,T3170) Dr. Krop believed that he was mentally and physically abusive to Mr. Taylor. (V30,T3170) Dr. Krop opined that Mr. Taylor was not capable of making more positive choices in his life given his background and the strikes against him. (V30,T3169)

It was Dr. Krop's opinion that Mr. Taylor's judgment and reasoning were significantly impacted at the time of the homicide due to his mental disorders, neurological deficits, and consumption of alcohol. (V30,T3171)

SUMMARY OF THE ARGUMENT

ISSUE I: The trial court erred in denying the motion to suppress evidence where such evidence was seized without a warrant and absent any exigent circumstances. The consent

to search provided by the Appellant was involuntary, as the Appellant was not clearly advised of the area to which consent applied.

ISSUE II: A sentence of death is disproportionate in this case. Although three aggravating circumstances were found by the trial court, the most serious aggravators are absent. Substantial and meaningful mitigation demonstrates that is not the least mitigated of cases.

ISSUE III: Florida's capital sentencing process is unconstitutional because a judge rather than jury determines the sentence.

ISSUE IV: The existence of the prior violent felony aggravator does not circumvent the necessity of a jury finding as to each aggravating factor in capital proceedings in order to satisfy constitutional requirements.

ISSUE V: The standard penalty phase jury instructions are unconstitutional because they fail to give appropriate guidance to the jury's determination regarding mitigation.

ISSUE VI: The denigration of the capital jury's role in the penalty phase is unconstitutional.

ARGUMENT

ISSUE I

THE TRIAL COURT ERRED IN DENYING THE MOTION TO SUPPRESS THE EVIDENCE SEIZED AS THE RESULT OF AN UNLAWFUL SEARCH.

Prior to trial, a motion to suppress evidence was filed in the lower court. (V5,R715-721) The motion sought the suppression of numerous items, including the driver's license, check book, and credit cards of Mr. Maddox and Ms. Kushmer and any other property obtained as a result of a search of the Stuckey's Motel room registered to Mr. Taylor in Memphis, Tennessee. (V5,R715-716) The motion alleged that the evidence was seized without a warrant and as the result of an illegal search.

A hearing was held on the motion on February 13, 2004, before the Honorable Anthony K. Black, circuit judge. (V10). The following summarizes the testimony presented at the hearing:

Mr. Taylor testified that he was arrested outside of the Stuckey's Motel about 11:30 p.m. on May 29, 2001. (V10,T95) Mr. Taylor was a registered guest at the motel. (V10,T95) The room was rented through 11:00 a.m. on May 30th. (V10,T96)

Mr. Taylor described the circumstances surrounding his arrest: Mr. Taylor was outside of his room smoking a cigarette when two SWAT team members came up the sidewalk and one came from around his truck. (V10,T96) They placed Mr. Taylor on the ground, handcuffed him, and had him remain on the ground while they entered his room and searched it for other people. (V10,T96) After finishing in the room, the officers took Mr. Taylor, still in handcuffs, to the other end of the parking lot. (V10,T97)

Mr. Taylor had no one else staying in the room with him. (V10,T97) He had no weapons on his person or in the room at the time of his arrest. (V10,T97) Mr. Taylor offered no resistance to his arrest. (V10,T98)

Later in the evening Mr. Taylor spoke with United States Deputy Marshal Scott Sanders. (V10,T98) Marshal Sanders told Mr. Taylor that they needed to search his truck- Mr. Taylor assumed so they could take it. (V10,T99) Marshal Sanders told him that the truck was to be impounded and towed away. (V10,T100) Marshal Sanders asked Mr. Taylor if he had any weapons in the truck. (V10,T100) Mr. Taylor told Marshal Sanders that he could search the truck and there was a knife in the truck, but no other weapons. (V10,T99) Mr. Taylor signed a form which he believed was

necessary in order to move his truck and permit it to be searched, but it was blank at the time. (V10,T99) His intent was to allow the truck to be searched. (V10,T101)

Mr. Taylor was shown a form with his signature on it. (V10,T99) Mr. Taylor stated that it was the form he had signed and that it had been blank at the top when he signed it. (V10,T99) It had no handwriting on it at the time he signed it. (V10,T99) The handwritten portions of the note which read that the consent to search being granted was for "Room 123, Stuckey's Motel, 1770 Witten Road, Memphis, Tennessee" did not appear on the paper when Mr. Taylor signed the form. (V10,T105)

Mr. Taylor is familiar with consent to search forms. (V10,T108) He had seen approximately four in the past. (V10,T108) He had never contested a search before. (V10,T108)

Marshal Sanders also asked Mr. Taylor if they could search the motel room and if he had any weapons in the room. (V10,T100) Mr. Taylor said that there were no weapons in the room. (V10,T101)

Mr. Taylor identified a second consent to search form that listed his truck. (V10,T110) Mr. Taylor stated that he signed that form the following day when it was brought

to him by Det. Flair. (V10,T110)

Deputy Marshal Scott Sanders testified that his agency was looking for Mr. Taylor in May 2001. (V10,T114) He had been contacted by Florida authorities, who had advised him of two outstanding arrest warrants for Mr. Taylor for probation violations. (V10,T115) Marshal Sanders also had information about some credit cards that Mr. Taylor might be using. (V10,T115) Marshal Sanders also knew that Mr. Taylor was a suspect in a Tampa homicide. (V10,T117)

A vehicle connected to the credit card use was seen by a deputy conducting a surveillance sweep outside the Stuckey's Motel. (V10,T116) Additional assistance was called for and Mr. Taylor was arrested while standing outside his motel room. (V10,T116)

Marshal Sanders met with Mr. Taylor moments after his arrest. (V10,T116) Mr. Taylor was handcuffed and sitting in a patrol car. (V10,T117) Knowing that an investigation in Tampa for a homicide was underway, Marshal Sanders thought it would be helpful to get consent from Mr. Taylor to search his motel room. (V10,T118;128) Marshal Sanders looked for the consent to search form that he uses, but couldn't find one. (V10,T118) He then obtained a Shelby County Sheriff's Department consent to search form from one

of the assisting deputies. (V10,T118)

Marshal Sanders discussed the form with Mr. Taylor. (V10,T118) Marshal Sanders testified that he filled out the form and then read it and explained it to Mr. Taylor. (V10,T118) Marshal Sanders testified that he filled out the portion identifying that the motel room was the subject of the search before going over the form line by line with Mr. Taylor. (V10,T120-121) When Mr. Taylor finished reading the form, he signed it. (V10,T121) A search of the room was then conducted. (V10,T123)

Marshal Sanders denied telling Mr. Taylor that the consent to search form applied to the truck. (V10,T122) Marshal Sanders knew that the truck would be impounded and held for processing as a part of the investigation. (V10,T128) Marshal Sanders thought that some information had come in from Tampa that indicated that the truck belonged to one of the victims. (V10,T129) Mr. Taylor would have been told that the truck would be towed because his was in jail. (V10,T130) Mr. Taylor would also have been asked if there were any weapons in the truck. (V10,T130)

No weapons were found on Mr. Taylor or in the motel room. (V10,T131)

Defense counsel argued that the consent to search signed by Mr. Taylor was invalid because the form had not clearly identified the area to be searched at the time Mr. Taylor signed it. (V10,T134-135) It was also argued that there were no exigent circumstances to justify a warrantless search. (V10,T135) The trial court denied the motion, finding that the consent was freely and voluntarily given. (V10,T137)

The State called Deputy Sanders as a witness during the trial. Prior to Deputy Sander's testimony, trial counsel renewed his objection to the admission of evidence seized from the motel room under the grounds asserted in the motion to suppress. (V20,T1767-1768) The trial court overruled the objection and permitted the state to introduce the evidence found in the motel room. This included credit card receipts, credit cards, and other property belonging to Mr. Maddox and Ms. Kushmer. (V20,T1767-1775)

The trial court's ruling on a Motion to Suppress is clothed with a presumption of correctness and not subject to reversal absent an abuse of discretion. San Martin v. State, 717 So. 2d 462 (Fla. 1998). Appellate review is plenary- the review of the law as applied to the facts is

conducted under a *de novo* standard by the appellate court, while the factual decisions by the trial court are reviewed with deference to the trial court commiserate with the superior vantage point afforded to the trial court. Nelson v. State, 850 So. 2d 514, 521 (Fla. 2003).

The Fourth Amendment to the United States Constitution and Article I, §9 of the Florida Constitution provide protection for citizens against "unreasonable searches and seizures". A warrantless search is presumptively unreasonable unless it falls within a few established and well delineated exceptions. The five basic exceptions to a warrantless search are (1) consent, (2) incident to a lawful arrest, (3) with probable cause and with exigent circumstance, (4) in hot pursuit, and (5) stop and frisk. The State has the burden to establish that the search falls within one of these recognized exceptions. Coolidge v. New Hampshire, 403 U.S. 443 (1971). Evidence seized in violation of constitutional principals is subject to exclusion. Wong-Sun v. U.S., 371 U.S 471 (1963).

In this instance, the defense challenged the constitutionality of the consent given. The other factors are inapplicable and not supported by the evidence adduced at the hearing.

Voluntary consent to search can validate a search performed without a warrant. In such instances, the state must demonstrate that the consent was valid and that it was freely and voluntarily given by examining the totality of the circumstances at the time the consent was obtained. United States v. Mendenhall, 446 U.S. 544 (1980); Reynolds v. State, 592 So. 2d 1082, 1086 (Fla. 1992); Smith v. State, 753 So. 2d 713, 715(Fla. 2nd DCA 2000). The state must prove by a preponderance of the evidence that consent was voluntarily given in instances where the search is not preceded by police misconduct. Faulkner v. State, 834 So. 2d 400 (Fla. 2nd DCA 2003).

Trial counsel conceded that the basis for suppression in this case did not, as most issues arising from consent do, on coercive police tactics, but rather on the omission of critical information given to Mr. Taylor. (V10,T133) The factors that bear on the question of whether or not consent was voluntarily given turn on whether or not Marshal Sanders clearly communicated to Mr. Taylor that the search was for the motel room as opposed to the truck and at what point in time the identifying writing was placed on the consent to search- before or after Mr. Taylor signed the form.

The testimony of Mr. Taylor was reasonable in this case and corroborated by that of Marshal Sanders. Mr. Taylor testified that he believed that the consent to search was for the motel room because (1) he had already seen the police enter and search the motel room [Marshal Sanders corroborated Mr. Taylor's observation and testified that officers had entered and looked around the very small motel room prior to the consent to search being signed]; (2) that he was told that his truck need to be entered since it would be impounded and held for investigative purposes [Marshal Sanders confirmed that the truck was impounded and towed]; and (3) that he was asked questions about the presence of any weapons in the truck [Marshal Sanders confirmed that he asked this question].

The testimony of Mr. Taylor and Marshal Sanders as to whether or not the consent to search had been fully filled out at the time he signed it was in conflict. According to Marshal Sanders, he looked for his usual form, couldn't find one, so used an unfamiliar form from the local sheriff. He filled out the form then read it to Mr. Taylor. Mr. Taylor then signed it.

Mr. Taylor testified that the discussion about the truck was held and he was then told to sign a form. Mr.

Taylor testified that the form was blank and he believed that the form was related to the issues surrounding the truck. He read the form, but not carefully or for a very long.

The court adopted the State's argument that Mr. Taylor was familiar with consent to search forms, that he later learned that items were taken from the motel room, and that the next day he signed a consent to search form for the truck- all of which proved that the form was not blank. These factors do not, as the court found, demonstrate that the first consent to search form was adequate. Mr. Taylor's testified that he had seen a consent to search on maybe four prior occasions and that he had never previously challenged a search. The second consent form presented on the following day came from Detective Flair and clearly stated that the truck was to be searched. This evidence supports Mr. Taylor's position rather than contradicting it. It is a reasonable assumption that Mr. Taylor believed that Det. Flair needed separate consent to search the truck as she was from a different police agency- this fact is not determinative of whether or not the prior form was filled in. Mr. Taylor's lack of "objection" to the second search form or to voicing any objection to the police the

next day after learning from Det. Flair that his motel room had been searched has no legal relevance to the question at hand. Any objection Mr. Taylor might have made about the search to the police after the fact would be meaningless. Mr. Taylor did object in the legally accepted method challenging the results of the search through the motion filed by counsel. There is no requirement for a defendant in custody to lodge a post-search objection to law enforcement. The damage was already done.

The state failed to meet the burden by establishing by a preponderance of the evidence that the consent to search was freely and voluntarily given. The evidence seized as a result of the search was significant in sustaining the convictions for robbery and burglary, as well as establishing the pecuniary gain aggravating factor. The denial of the motion was therefore, not harmless.

ISSUE II

THE SENTENCE OF DEATH IS DISPROPORTIONATE IN THIS CASE AS THIS IS NOT THE MOST AGGRAVATED AND LEAST MITIGATED OF MURDERS

This Court has consistently held that due to the uniqueness and finality of death, the propriety of all death sentences must be addressed through proportionality

review. Urbin v. State, 714 So.2d 411, 416-417 (Fla. 1998). In conducting this review this Court considers the totality of the circumstances in the case before it is compared to other cases in which the death penalty has been imposed in order to insure uniformity in the application of the death penalty. Urbin, Id.

In performing this analysis, this Court has declined to engage in the reweighing of the mitigating factors against the aggravating factors, instead delegating this decision to the trial court. Bates v. State, 750 So. 2d 6, 14-15 (Fla. 1999). Still, this Court has continued to determine that the death penalty is reserved for only the most aggravated and least mitigated of first-degree murders. That standard is not met in this case, requiring reversal of the death sentence.

The trial court in this case found three aggravating circumstances: prior violent felony conviction, on felony probation, and that the murder was committed for pecuniary gain and assigned each factor great weight. (V8,R1315-1316)

While three aggravators were found, proportionality review is not simply a totaling of aggravating circumstance as compared to the mitigating circumstances. It is important to consider what aggravating factors are not

present as well, compared with other cases. It is not uncommon for capital cases to come before this court with many more than three aggravators. Notably absent in this case are what have been deemed the most serious aggravators- heinous, atrocious, and cruel (HAC) and cold, calculated, and premeditated (CCP). See, Larkins v. State, 539 So. 2d 90, 95 (Fla. 1999). The absence of these aggravators precludes this case from falling into the category of most aggravated of murders. Even if this Court were to concluded that this case did fall into the most aggravated category, the sentence of death would still be disproportionate due to the mitigation established.

Substantial mitigation is present in this case. The trial court was asked to consider two statutory mental health mitigators. In reviewing the first, that the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance, the trial court rejected “extreme” and determined that the testimony of Dr. Krop and Dr. McCraney had established the existence of “some” mental or emotional disturbance and accorded this mitigation “some weight”. (V8,R1317-1321) The trial court rejected the second mental health mitigator. (V8,R1321-1322)

The trial court gave the following non-statutory mitigating circumstances some weight: (1) psychological trauma due to abuse and neglectful treatment in his formative years which has affected his social and psychological development; (2) psychological trauma due to deprivation in parental nurturing and such deprivation affected his social and psychological development; (3)documented history from early childhood which indicates learning disabilities, attention deficit problems, and problems with social interaction; and (4) a history of substance abuse dating back to his preteen years which has affected his behavior and social functioning.

The trial court gave the following mitigating circumstances modest, little, minimum, or slight weight: (1) the stepfather provided no emotional or parental support to help him with his personality development; (2) Mr. Taylor obtained his GED in prison; (3) Mr. Taylor made attempts to address and recover from his drug dependence and failed; (4) Mr. Taylor has been a good and dependable worker and employee; (5) Mr. Taylor agreed to be interviewed and cooperated with the police; (6) Mr. Taylor was under the influence of alcohol at the time of the offense; and (7) Mr. Taylor has exhibited appropriate

courtroom behavior. (V8,R1323-1324)

The trial court found that certain other requested mitigation had been found and previously given some weight in the court's review of the statutory mental health mitigator of "under the influence of some mental or emotional disturbance". In this category the trial court included that (1) Mr. Taylor's neurological impairments affect his ability to control his impulses (V8,R1323) and (2) Mr. Taylor has neurological impairment in the frontal lobe and temporal lobes of his brain which affect his brain's function and consequently, his behavior- although the court was not reasonably convinced of the existence of neurological damage. (V8,R1322)

As shown, mitigation in this case was extensive. There was no doubt as to the abusive and deficient childhood environment, the presence of significant mental health disorders, the lack of appropriate mental health treatment for Mr. Taylor as a child, and very early substance abuse. This is simply not a case where the evidence of mitigation was sparse or weak. Thus, not only is this not the most aggravated of capital felonies, neither is the least mitigated.

The sentence of death is disproportionate in this case

and is subject to reversal.

ISSUE III

FLORIDA'S CAPTIAL SENTENCING PROCESS IS UNCONSITITUTIONAL BECAUSE A JUDGE RATHER THAN JURY DETERMINES SENTENCE

During the course of the lower court proceedings defense counsel attacked the constitutionality of Florida's capital sentencing statutes under the holding of the United States Supreme Court in Ring v. Arizona, 122 S.Ct. 2428 (2002).(V4,R414-416;451-453;483-504;V10,T238-240;243-247;249-255) Defense counsel further requested that special jury instructions be given to the jury consistent with the arguments presented in the pre-trial motions and in light of the trial court's denial of those motions. (V8,R1179-1211)

The United States Supreme Court in Ring struck the death penalty statute in Arizona because it permitted a death sentence to be imposed by a judge who made the factual determination that an aggravating factor existed, overruling its prior decision in Walton v. Arizona, 497 U.S. 639 (1990). The Supreme Court held that Arizona's enumerated aggravating factors operated as the "functional equivalent of an element of a greater offense" under Apprendi v. New Jersey, 530 U.S. 466 (2000). Absent the

presence of aggravating factors, a defendant in Arizona would not be exposed to the death penalty. Subsequent decisions from the United States Supreme Court in noncaptial cases have adhered to the principle that sentencing aggravators require a specific jury determination as opposed to one performed solely by the court. Blakely v. Washington, 124 S.Ct. 2531 (2004).

Similar to Arizona, under Florida law, a "hybrid" state, the aggravating circumstances are matters of substantive law which actually "define those capital felonies which the legislature finds deserving of the death penalty." Vaught v. State, 410 So. 2d 146, 149 (Fla. 1982), see also, State v. Dixon, 283 so. 2d 1, 9 (Fla. 1973). Under Florida's Statute, the jury submits a penalty recommendation, but makes no specific findings as to aggravating (or mitigating) factor, nor is jury unanimity required as to any or all of the aggravating factors. It is the judge who makes the findings of the statutory aggravating circumstances, and it is the judge who is required to independently weigh the aggravating factors which he has found against the mitigating factors which he has found, and thereupon determine whether to sentence the defendant to death or life imprisonment. See, King v.

State, 623 So. 2d 486,489 (Fla. 1993). While the jury recommendation is to be given great weight, this Court has said "We are not persuaded that the weight to be given the jury's advisory recommendation is so heavy as to make it the de facto sentence… Notwithstanding the jury recommendation, whether it be for life imprisonment or death, the judge is required to make an independent determination, based on the aggravating and mitigating factors." Grossman v. State, 525 So.2d 833, 840 (Fla. 1988)(emphasis supplied).

Since, just as in Arizona, it is the Florida trial judge who makes the crucial findings of fact necessary to impose a death sentence, it follows inexorably that Ring applies to the State of Florida.

While recognizing that this position has not been ruled upon favorably by this Court in Bottoson v. Moore, 833 So. 2d 693 (Fla.), cert. denied, 123 S. Ct. 657 (2002) and subsequent cases, Mr. Taylor asserts that the Florida capital sentencing statute suffers from the same flaws that led to Ring.

Although Florida is a "hybrid" state in which a jury renders a nonunanimous advisory recommendation, this distinction is legally irrelevant. As noted in Walton v.

Arizona, supra., 497 U.S. at 648, "A Florida trial court no more has the assistance of a jury's findings of fact with respect to sentencing issues than does a trial judge in Arizona." The standard jury instructions read to the jury at the beginning and end of the penalty phase specifically advise the jury that the "final decision as to what punishment shall be imposed rests solely with the judge of this Court." and that the jury renders only an "advisory sentence." As was cogently stated in by Justice Anstead in his dissent in Conde v. State, So.2d (Fla. 2003):

> It would be a cruel joke, indeed if the important aggravators actually relied on by the trial court were not subject to Ring's holding that acts used to impose a death sentence cannot be determined by the trial court alone. The Ring opinion, however, focused on substance, not form, it its analysis and holding, issuing a strong message that facts used to aggravate any sentence, and especially a death sentence, must be found by a jury.

The decisions of this Court rejecting Ring seemed to have held that until the United States Supreme Court explicitly says that Ring applies, it cannot apply. This viewpoint is expressed in Justice Wells' concurring opinion in Bottoson v. Moore, supra., at696 that:

> I also do not agree… that Florida aggravating factors are the funct-ional equivalent of elements of a

> greater offense. Reaching that conclusion would overrule United States Supreme Court precedent. See, Hildwin v. Florida, 490 U.S. 638 (1989).("[T]he existence of an aggravating factor here is not an element of the offense but instead is 'a sentencing factor that comes into play only after the defendant has been found guilty." (quoting McMillan v. Pennsylvania, 477 U.S. 79, 93 (1986))).

The overruling of Walton is an implicit overruling of Hildwin. In Brice v. State, 815 A. 2d 314, 317 (Del. Supr. 2003), the Supreme Court of Delaware—a state whose "hybrid" capital sentencing scheme was substantially patterned on Florida's characterized Ring as an effort to resolve the conflict between Walton and Apprendi:

> In Walton, the court stressed that the Constitution "'does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury.'" Walton, 497 U.S. at 648 [citation omitted](quoting Hildwin v. Florida, 490 U.S. 638 [citation omitted]. The Court reasoned that the Sixth Amendment does not require a State to "denominate aggravating 'elements' of the offense or permit only a jury to determine the existence of such cir-cumstances." Walton, 497 U.S. at 649. Ten years later, however, the Court announced a markedly different rule en Apprendi, holding that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted

> to a jury and proved beyond a reason able doubt. Apprendi, 530 U.S. at 490. The Court did not, however, expressly overrule Walton in its Apprendi decision [footnote omitted]. Ring resolved this inconsistency by "overrul[ing] Walton to the extent that it allows a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty." Id. At 2443.

The most basic holding in Walton, which was overruled by Ring, derived directly from Hildwin. Moreover, Walton itself recognized that its conclusion –since overruled– applied equally to both "judge only" and "hybrid" systems:

> The distinctions Walton attempts to draw between the Florida and Arizona statutory schemes are not persuasive. It is true that in Florida the jury recommends a sentence, but it does not make specific factual findings with re-gard to the existence of mitigating or aggravating circumstances and its recom-mendation is not binding on the trial judge. A Florida trial court no more has the assistance of a jury's findings of fact with respect to sentencing issues than does a trial judge in Arizona.

Walton v. Arizona, supra., 497 U.S. at 648 (emphasis supplied).

If Hildwin and Walton applied to both Arizona and Florida when they were both thought to be good law, then

the overruling of Walton in Ring logically must amount to an overruling of Hildwin as well.

Without conceding his position that Ring has rendered Florida's death penalty sentencing process unconstitutional as a whole, alternatively argues that this Court should adopt the reasoning expressed in the dissenting opinions of Justice Pariente and Justice Anstead in Butler v. State, 842 So. 2d 817 (2003), that a unanimous recommendation of death by the jury is necessary to meet the constitutional safeguards expressed in Ring. The reasoning of the dissent in Butler that "the right to a jury trial in Florida would be senselessly diminished if the jury is required to return a unanimous verdict on every fact necessary to render a defendant eligible for the death penalty with the exception of the final and irrevocable sanction of death" should be adopted by this Court. Butler, at 824. The lack of a unanimous jury recommendation violates the Sixth and Fourteenth Amendments to the United States Constitution.

Under Florida law, a defendant cannot be sentenced to death unless the judge- not jury- makes the ultimate findings of fact as to the aggravators and mitigators. The necessity of this requirement has been recognized by members of this Court in Butler, supra. 842 So. 2d at 838-

839. The use of verdict forms by trial judges which have required the jury to record their determination as to each aggravating factor and mitigating circumstance have been lauded by jurists of this Court. Huggins v. State, 899 So. 2d 743 (Fla. 2004)(Pariente, J., dissenting). In this case counsel specifically requested that the jury be required to identify the numerical vote on the aggravating and mitigating circumstances in order to determine unanimity as to their findings on each element of death penalty eligibility and to ensure that the sentence recommendation was unanimous. The judge should not be permitted to find any statutory aggravating circumstance proved unless the judge knew that the jury first found that statutory aggravating circumstance had been proved. Absent a verdict form that accurately tracks the jury's determination as to each aggravating factor and mitigating circumstance, it is impossible to comply with the Ring requirements. Because the death sentence in Florida is based upon fact finding by the judge, as opposed to the jury, the death penalty sentencing structure is unconstitutional.

Constitutional violations of due process and jury trial rights further exist in the failure of Florida law to require that the aggravating circumstances be charged in

the Indictment. Defense counsel filed a Motion to Dismiss the Indictment in this case due to the failure of the Indictment to charge the aggravating circumstances the state intended to rely upon in seeking a death sentence. (V4,R523-52)

Under Ring a capital defendant is entitled to the same due process and jury trial rights that "apply to the determination of any fact on which the legislature conditions an increase in their maximum punishment." Ring, supra., 122 S.Ct. at 2432. As in Arizona, Florida's "enumerated aggravating factors operate as the 'functional equivalent of an element of a greater offense.'" Ring, at 2443. Aggravating factors define those crimes to which the death penalty is applicable in the absence of mitigating circumstances. State v. Dixon, 283 So. 2d 1,9(Fla. 1973). Since the aggravating factors are an essential element necessary element in the imposition of an aggravated sentence, due process requires that they be charged in the Indictment. State v. Rodriguez, 575 so. 2d 1262, 1264 (Fla. 1991).

While recognizing that this Court has previously rejected the position of Mr. Taylor in this Issue, it is respectfully urged that this Court reconsider it's previous

holdings and required that Florida's capital sentencing scheme comply with the requirements of the Constitution.

ISSUE IV

THE EXISTENCE OF THE PRIOR VIOLENT FELONY AGGRAVATING FACTOR SHOULD NOT BAR THE APPLICATION OF RING TO DEATH SENTENCES.

This Court's alternative basis for rejecting Ring challenges to numerous cases was the fact that one of the aggravating factors was the defendant's prior violent felony conviction. This Court has concluded in majority opinions that the constitutional requirements of both Ring and Apprendi are satisfied when one of the aggravating circumstances is a prior conviction of one or more violent felonies (whether the crimes were committed previously, contemporaneously, or subsequently to the charged offense). See, Doorbal v. State, 837 So. 2d 940, 963 (Fla. 2003) cert. denied, 539 U.S. 962 (2003); Lugo v. State, 845 So. 2d 74, 119n.79 (Fla. 2003); Duest v. State, 855 so. 2d 33, 49 (Fla. 2003). In this case Mr. Taylor also had prior violent felony convictions.

The concept that recidivism findings might be exempt from otherwise applicable constitutional principles regarding the right to trial by jury or the standard of

proof "represents at best an exceptional departure from … historic practice." Apprendi v. New Jersey, supra., 530 U.S. at 487. The recidivism exception was recognized in the context of noncaptial sentencing by a 5-4 vote of the United States Supreme Court in Almendarez-Torres v. United States, 523 U.S. 224, 118 S.Ct. 1219, 140 L.Ed 2d 350 (1998). In his dissenting opinion, Justice Scalia, joined by Justices Stevens, Souter, and Ginsburg asserted "there is no rational basis for making recidivism an exception." 523 U.S. at 258 (emphasis in opinion). In Apprendi v. New Jersey, supra, the majority consisted of the four dissenting Justices from Almendarez-Torres, with thte addition of Justice Thomas (who had been in almendarez-Torres majority). The opinion of the Court in Apprendi states:

> Even though it is arguable that Almendarez-Torres was incorrectly decided [footnote omitted], and that a logical application of our reasoning today should apply if the recidivist issue were contested, Apprendi does not contest the decision's validity and we need not revisit it for purposes of our decision today…

530 U.S. at 489-90.

The Apprendi Court further remarked that "given its unique facts, [Almendarez-Torres] surely does not warrant

rejection of the otherwise uniform course of decision during the entire history of our jurisprudence." 530 U.S. at 490 (emphasis supplied). In his concurring opinion in Apprendi, Justice Scalia wrote:

> This authority establishes that a "crime" includes every fact that is by law a basis for imposing or increasing punishment (in contrast with a fact that mitigates punishment). Thus, if the legislature defines some core crime and then provides for increasing the punishment of that crime upon a finding of some sort of aggravating fact--- of whatever sort, including the fact of a prior conviction—the core crime and the aggravating factors together constitute an aggravated crime, just as much as grand larceny is an aggravated form of petit larceny. The aggravating fact is an element of the aggravated crime. Similarly, if the legislature has provided for setting the punishment of a crime based on some fact—such as a fine that is proportional to the value of the stolen goods—that fact is also an element. No multifactor parsing of statutes, of the sort that we have attempted since McMillan, is necessary. one need only look to the kind, degree, or range of punishment to which the prosecution is by law entitled for a given set of facts. Each fact necessary for that entitlement is an element.

530 U.S. at 501 (emphasis supplied).

In addition, it is noteworthy that the majority in Almendarez-Torres adopted the recidivism exception at least partially based on its assumption that a contrary ruling

would be difficult to reconcile with the now-overruled precedent of Walton and implicitly overruled precedent of Hildwin. See, 523 U.S. at 247. It appear highly doubtful whether the Almendarez-Torres exception for "the fact of a prior conviction" is still good law.

Even if this exception still survives in noncaptial contexts, it plainly, by its own rationale cannot apply to capital sentencing and it especially cannot apply to Florida's "prior violent felony" aggravator which involves much more—and puts before the jury much more—than the simple "fact of the conviction".

As previously mentioned, the Apprendi Court took note of the "unique facts" of Almendarez-Torres. Because Almendarez-Torres had admitted his three earlier convictions for aggravated felonies, all of which had been entered pursuant to proceedings with their own substantial procedural safeguards, "no question concerning the right to a jury trial or the standard of proof that would apply to a contested issue of fact was before the Court. Apprendi, 530 U.S. at 488 (emphasis supplied).

Unlike the noncaptial sentencing enhancement provision if Almendarez-Torres, which authorized a longer sentence for a deported alien who returns to the United States

without permission, when the initial deportation "was subsequent to a conviction for the commission of an aggravated felony", Florida's prior violent felony aggravator focuses at least as much, if not more, upon the nature and details of the prior, contemporaneous, or subsequent criminal episodes as much as it does on the mere "fact of the conviction". Even more importantly, one of the main reasons given in Justice Breyer's majority opinion in Almendarez-Torres for allowing a recidivism exception in noncapital sentencing was the importance of keeping the fact of the prior conviction or convictions and the details of the prior crimes from prejudicing the jury.

In this case, and in Florida death penalty proceedings, both the fact of the prior convictions and the details of the prior crimes are routinely introduced to the jury through documentary evidence, physical evidence, and often by testimony, including testimony from the victim. In the case at bar, the State presented video testimony of one prior victim from Delaware and the live testimony of a second victim from Nevada. Each was asked to describe the prior offense in vivid detail, provide information about the injuries they sustained, and the resulting proceedings following the offense. Even if the defense offers to

stipulate to the existence of the prior conviction, the state "is entitled to decline the offer and present evidence concerning the prior felonies." Cox v. State, 819 So. 2d 705, 715 (Fla. 2002).

When Cox argued before this Court that the presentation of this evidence was unduly prejudicial contrary to the holding of Old Chief v. United States, 519 U.S. 172, 117 S.Ct. 644, 136 L.Ed 2d 574 (1997), this Court rejected that assertion. This Court determined that such evidence would assist the jury in evaluating the character of the accused and the circumstances of the crime so that the jury could make an informed recommendation as to the appropriate sentence. This Court rejected the holding of Old Chief in the capital sentencing proceeding where "the point at issue' is much more than just the defendant's 'legal status'". Cox, 819 So. 2d at 716.

For the same reason that Old Chief is not analogous to Florida's capital sentencing procedure, neither is the Almendarez-Torres exception. The issue in a capital sentencing proceeding is much more than the defendant's legal status or the bare facts of his prior record. If the jury is allowed to hear the details of the defendant's prior conviction, there is no rationale basis for carving

out an exception to Ring's holding that the findings of the aggravating factors necessary for the imposition of the death penalty just be made by a jury. Thus, the existence of a prior violent felony conviction does not relieve the need for a jury finding under Ring as to each aggravating factor in order to meet constitutional safeguards.

ISSUE V

THE PENALTY PHASE JURY INSTRUCTIONS UNCONSITUTIONALLY SHIFT THE BURDEN OF PROOF TO THE DEFENDANT TO ESTALBISH MITIGATING FACTORS AND TO SHOW THAT THE MITIGATING FACTORS OUTWEIGH THE AGGRAVATING CIRCUMSTANCES

The Florida Death Penalty sentencing scheme is constitutionally infirm. Defense counsel objected to the use of the standard jury instructions and asked the court to declare §921.141, Florida Statutes (2000) unconstitutional. (V4,T454-459;510-522;V10,T240-242) The sentence of death is this case is predicated upon unconstitutional jury instructions which shift the burden of proof to the Defendant to establish mitigating circumstances and then show that they outweigh the aggravating factors. Under Florida law a capital sentencing jury must be told that:

> …the State must establish the existence of one or more aggravating circumstances before the death

> penalty could be imposed…
> [S]uch a sentence could be given if the State showed the aggravating circumstances out-weighed the mitigating circumstances.

State v. Dixon, 283 So. 2d 1 (Fla. 1973); Mullaney v. Wilbur, 421 U.S. 684 (1975). This straight forward standard was never applied to the sentencing phase of Mr. Taylor's trial over the objections of defense counsel. (V4,R401-413) The jury instructions in this case were inaccurate and provided misleading information as to whether a death recommendation or life sentence recommendation should be returned.

The jury instructions as given shifted to Mr. Taylor the burden of proving whether he should live or die by instructing the jury that is was their duty to render an opinion on life or death by deciding "whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist." In Hamblen v. Dugger, 546 So. 2d 1039 (Fla. 1989), a capital post-conviction action, this Court addressed the question of whether the standard jury instructions shifted the burden to the defendant as to the question whether he should live or die. The Hamblen opinion reflects that this issue should be addressed on a case by case basis.

The jury instructions in this case required that the jury impose death unless mitigation was not only produced by Mr. Taylor, but also unless Mr. Taylor proved that the mitigation outweighed and overcame the aggravation. The trial court then employed the same standard in sentencing Mr. Taylor to death. This standard obviously shifted the burden to Mr. Taylor to establish that life was the appropriate sentence and limited consideration of the mitigating evidence to only those factors proven sufficient to outweigh the aggravation. The standard jury instruction given to this jury violated Florida law. This jury was precluded from "fully considering" and "giving full effect to" mitigating evidence. Penty v. Lynaugh, 109 S.Ct. 2934, 2952 (1989). This burden shifting resulted in an unconstitutional restriction upon the jury's consideration of any relevant circumstance that it could use to decline the imposition of the death penalty. McKoy v. North Carolina, 110 S. Ct. 1227, 1239 (1990)[Kennedy, J. concurring]. Mr. Taylor was forced to prove to the jury that he should live. This violated the Eighth Amendment under Mullaney. The effect of these jury instructions is that the jury will conclude that it need not consider mitigating factors unless they are sufficient to outweigh

the aggravating factors and from evaluating the totality of the circumstances as required under Dixon.

Section 921.141 further fails to provide a standard of proof for mitigating evidence. The jury instruction committee has promulgated a instruction that the jury is to consider mitigation only after being reasonably convinced of its existence. Decisions from this Court have referred to the standard as "reasonably convinced". Campbell v. State, 571 So. 2d 415, 419 (Fla. 1990). The "reasonably convinced" standard is contrary to the constitutional requirement that all mitigating evidence be considered.

Continued use of the standard jury instructions runs afoul of constitutional principals embodied in the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, §9,16, and 17 of the Florida Constitution.

ISSUE VI

THE PENALTY PHASE JURY INSTRUCTIONS IMPROPERLY MINIMIZE AND DENIGRATE THE ROLE OF THE JURY IN VIOLATION OF CALDWELL V. MISSISSIPPI.

Defense counsel objected to the use of the standard jury instructions as being in violation of Caldwell v. Mississippi, 472 U.S. 320 (1985) and submitted proposed

jury instructions. (V4,R569-571;V10,T182-183) Caldwell prohibits the giving of any jury instruction which denigrates the role of the jury in the sentencing process in violation of the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution. The penalty phase jury instructions in Florida violate not only Caldwell, but also Article I, Sections 6, 16, and 17 of the Florida Constitution. The decision of this Court in Thomas v. State, 838 So. 2d 535 (Fla. 2003), and others rejecting this claim should be reversed.

By repeatedly advising the jury that their verdict is only advisory and a recommendation and being told that the decision as to sentence rests solely with the court, the jury is not adequately and correctly informed as to their role in the Florida sentencing process. The jury instructions suggest that the decision of deciding the appropriateness of a death sentence rests with the court and not them. These instructions minimize the jury's sense of responsibility for determining the appropriateness of a death sentence.

CONCLUSION

In light of the foregoing arguments, citations of law, and other authority, the Appellant, William Taylor,

respectfully requests that this Court reverse his convictions for a new trial, or alternatively, reverse the sentence of death and direct that a sentence of life in prison be imposed.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that a true copy of the forego-Ing Initial Brief was generated in Courier New, 12 point font, pursuant to Fla. R. App. 9.210.

ANDREA M. NORGARD
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by United States Mail to the Office of the Attorney General, Assistant Attorney General Carol Dittmar, Concourse Center 4, 3507 E. Frontage Rd., Suite 200, Tampa, FL 33607, this ____day of April, 2005.

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