IN THE SUPREME COURT OF FLORIDA

MARK A. TWILEGAR,

Appellant,

v.

STATE OF FLORIDA,

Appellee.
_____/

CASE NO. SC07-1622
L.T. No. 03-CF-002151
DEATH PENALTY CASE

ON APPEAL FROM THE CIRCUIT COURT
OF THE TWENTIETH JUDICIAL CIRCUIT,
IN AND FOR LEE COUNTY, FLORIDA

ANSWER BRIEF OF THE APPELLEE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Federal Cases

Other Authorities

STATEMENT OF THE CASE AND FACTS

Defendant was charged by indictment on April 3, 2003 with the first-degree murder of David Thomas. (R. 1/12-13) A jury trial began on January 17, 2007. (T. 3/454) On January 25, 2007 Defendant was found guilty of the murder. (T. 12/2222) A penalty phase proceeding was conducted February 16, 2007 without the presence of a jury as Defendant had waived his right to a penalty phase jury. (R. 16/1231-81; T. 1/30-43) Following a Spencer[1] hearing, conducted February 19, 2007, the Honorable James R. Thompson sentenced Defendant to death on August 14, 2007. (R. 17/1297-1329, 20/1874, 21/1878-91)

In his sentencing order, Judge Thompson found the following aggravating factors: 1) the capital felony was committed for pecuniary gain, given great weight; and 2) the capital felony was a homicide and was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification, given very great weight. (R. 21/1880-86, 1890) After considering statutory and non-statutory mitigation, the following mitigation was found to apply: 1) Defendant had a disadvantaged and dysfunctional family background and childhood, given little weight; 2) Defendant had very limited formal education (seventh grade), given little weight; 3) Defendant abused drugs when he was a teenager, given very little weight;

[1] Spencer v. State, 615 So. 2d 688 (Fla. 1993).

and 4) the alternative punishment to death is life imprisonment without parole, given significant weight. (R. 21/1886-90)

Dave Thomas was an attorney who owned and managed rental properties in Fort Myers. (T. 4/583)[2] Thomas lived with his wife of almost twenty years, Mary Ann. (T. 4/580-82) They owned thirteen rental properties in Fort Myers. (T. 4/633) They also owned a home in a historic neighborhood in Montgomery, Alabama they intended to live in when they retired. (T. 4/584-85) Thomas was known to be neat, always wore pressed shirts and was never known to wear the same clothes two days in a row. (T. 4/590-91) He usually carried a Cross pen in his shirt pocket. (T. 4/590) Thomas was known to carry a Zippo lighter and wore glasses on a string around his neck. (T. 4/589) The Zippo lighter would be recovered from his body at his autopsy. (T. 4/506, 514, 609) Thomas' glasses and pen would not be recovered.

Defendant, who used the alias "Vinnie", worked as a handyman for Thomas. (T. 4/591-92, 6/1021, 7/1339-40, 11/2034)[3] Mary Ann first met Defendant in the Spring of 2002 when he came

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[2] Citations to the records and transcripts will be designated as follows: the record on direct appeal will be cited throughout this Brief as "R" with the appropriate volume and page numbers (R. V#/page#); the transcripts on direct appeal will be cited as "T" with the appropriate volume and page numbers. (T. V#/page#) Appellant will be referred to as Defendant. The prosecution and Appellee will be referred to as the State.

[3] Defendant was identified in court as "Vinnie." (T. 4/610, 5/957, 959, 6/1050-51, 1094)

to their home to install a door. (T. 4/591) Mary Ann testified that Defendant did odd jobs for Thomas and did maintenance work on her husband's rental properties. (T. 4/583-84, 591-92) Thomas had met Defendant at the apartments Thomas owned. (T. 4/591) The two were not friends but maintained a working relationship. (T. 4/592)

Thomas was last seen by his wife on August 2, 2002. (T. 4/593) She met him off the interstate on his way to Montgomery, Alabama. (T. 4/593-94) Defendant was traveling with Thomas to Alabama and Mary Ann saw Defendant sitting in the passenger seat of Thomas' red pick-up truck. (T. 4/586-87, 593-97, 11/1987-88) She expected Thomas to be gone six to eight weeks as he was building a deck at their Montgomery home and wanted to begin practicing law in Alabama. (T. 4/594) Defendant went with Thomas to help build the deck. (T. 5/945, 11/1986) Defendant told people he was going to work in Alabama. (T. 5/945-946, 6/1010-11, 1022-23) On July 10th he told one person he was going there to work on Thomas' home, and he was flying there the following day. (T. 5/945-946)

The morning of August 6th Thomas entered his Montgomery bank and withdrew $25,000. (T. 4/606-07, 671-74, 678-80)[4] Shortly thereafter Thomas rented a Dodge Neon from Thrifty Car Rental.

[4] Thomas' wife would later tell law enforcement that the withdrawal amount was not unusual. (T. 10/1842-43)

(T. 4/721-23, 725, 728) Thomas acknowledged that the vehicle had to be returned to the Montgomery airport on August 9th. (R. 13/833; T. 4/724, 728) Thomas was known to rent vehicles to drive back and forth between Fort Myers and Montgomery. (T. 4/587) On August 13 the rental car was found burned in a remote area of Lee County. (T. 5/861, 863) The fire had totally consumed the car, the paint had burned off and the interior was completely destroyed. (T. 5/876, 886-87) The State Fire Marshall's Office determined that the fire was intentionally set. (T. 5/895)

On August 6th Defendant and Thomas has been seen together at Thomas' Montgomery home. (T. 4/662-64, 11/2036) Defendant and Thomas then left Montgomery, returning to Fort Myers that evening. Thomas was involved in an extramarital affair with Valerie Bisnett. (T. 4/737-44) Thomas' wife was aware that Thomas was having affairs. (T. 4/777-78) Bisnett thought Thomas was a retired attorney who lived in Alabama and stayed at the local Motel 6 when in Fort Myers. (T. 4/741) Thomas called Bisnett telling her he would be in late on August 6th and he was coming to Fort Myers in a rental car with Defendant. (T. 5/799-800) Thomas went to visit Bisnett, and she saw Defendant sitting in the passenger's seat of the rental car. (T. 4/751-52) It was approximately 11:00 p.m. and dark; however, light was shining into the vehicle allowing Bisnett to see Defendant. (T. 4/751,

5/787-88) Bisnett recognized Defendant, having been introduced to Defendant in June or July. (T. 4/742-47) Bisnett identified Defendant in a photo lineup on September 20, 2002. (R. 13/829, 834; T. 5/808-10)

Thomas was last seen alive the following day, August 7th, while visiting Bisnett at work between 7:00 p.m. – 7:30 p.m. (T. 4/753-54, 5/796-97) All Thomas' cellphone activity ceased after 8:00 p.m. that evening and Thomas' wife, Mary Ann, last spoke to him about 9:00 p.m. (R. 13/1104; T. 4/598, 643, 10/1955) Mary Ann testified there was nothing unusual about his voice and nothing that gave her any cause for concern. (T. 4/598) She expected to speak to him the following morning, but this would be the last time they spoke. (T. 4/598-99) She became concerned the next evening after being unable to reach him by phone. (T. 4/600-601) She contacted their neighbors in Alabama who told her Thomas' truck was at the home and he had been there with another man. (T. 4/601)

At Thomas' last meeting with Bisnett on August 7th, he told her that he was going to look at a truck with Defendant and he would meet her later that evening at the Motel 6. (T. 4/753-54) Thomas wanted to buy a truck for hauling, and Defendant was to drive it. (T. 5/798) When Thomas gave Bisnett the key to the motel room, Bisnett noticed an unusually large sum of money in Thomas' wallet. (T. 4/754) Thomas told Bisnett the money was for

the truck he was going to buy with Defendant. (T. 4/753-54, 779-80, 5/798) Bisnett went to the motel to meet Thomas, found his bag inside the room, but he never arrived. (T. 4/755-56) Bisnett attempted to call Thomas that evening and the next day, and the day after, but there was no answer, and her calls were left unreturned. (T. 4/756-58) On August 10th, Bisnett reported Thomas missing. (T. 4/759) Thomas' wallet would not be recovered.

Thomas' wife Mary Ann, becoming more concerned as she was unable to reach Thomas, contacted the police in Alabama on August 10th or 11th and filed a missing persons report. (T. 4/601-02, 634) To her surprise, a missing persons report was also filed in Florida. (T. 4/601-02) The missing persons report in Florida was filed by Bisnett, who identified herself as Thomas' girlfriend. (T. 4/603) On August 16th, Mary Ann traveled to their Montgomery home. (T. 4/604-05, 637-38) Thomas' truck was still there and building supplies for the deck were left at the home. (T. 4/605-06) She entered the home, disarmed the security system and searched the home for Thomas, to no avail. (T. 4/606) Mary Ann closed the Alliant bank account, and changed the locks on their home. (T. 4/606-07) She felt something terribly wrong had happened to Thomas and became concerned for her own safety. (T. 4/603-04) She listened to messages that were still on the answering machine in Alabama but nothing she heard caused her to be concerned. (T. 4/638-39)

Defendant arrived in Fort Myers in 2002 on a bus. (T. 7/1334-36) He lived in a tent at the Seminole campground but was asked to leave. (T. 6/994, 11/1973-74) Defendant was not known to have a job, but instead did handyman work for trade. (T. 7/1339-40) Shane McArthur and his wife Britany rented a home at 412 Miramar from Britany's parents Sandra and William Hartman. (T. 5/934-35, 964, 6/979) Defendant needed a place to stay and Shane needed work done on the home, so Defendant moved his tent to the backyard of 412 Miramar and did odd jobs in lieu of paying rent. (T. 5/940, 935-36) Defendant was not known to have much property. (T. 5/941) State witnesses testified he had a couch, radio, television, VCR, some clothes and blankets. (T. 5/941, 7/1338) Defendant testified the couch and radio were "donated" to him and that he also possessed tables, a DVD player and Snap-on ten drawer tool box with tools. (T. 11/1978, 2034) His niece, Jennifer Morrison, believed Defendant's tent was purchased by his mother. (T. 7/1337) Defendant's mother supplied him with basic necessities, such as food and drink. (T. 5/944)

In June 2002, Britany and Shane moved out of the Miramar residence. (T. 5/938-39) Defendant continued to live in the tent behind the home. (T. 5/939) Spencer Hartman, Britany's brother, began remodeling the Miramar home as he was preparing to move in. (T. 6/1017, 1024) In September 2002 Spencer moved into the Miramar home. (T. 6/1023) Prior to moving in, Spencer went to

the property to paint. It was about 4:00 in the afternoon and there was a light rain. (T. 6/1024) It had been raining all day. (T. 6/1024) In the backyard Spencer found Defendant digging a hole. (T. 6/1023-29) Spencer saw Defendant standing beside his tent, bent over, and Spencer could hear the sound of "a shovel breaking earth". (T. 6/1025) Spencer testified that Defendant was hunched over and then would stand up, and that he was moving about. (T. 6/1026-28) He said he was familiar with the actions of digging a hole, and there was no question in his mind based on Defendant's actions and the sound he heard that he saw Defendant digging a hole. (T. 6/1028-29) Spencer demonstrated the digging he observed for the jury. (T. 6/1029) Defendant was standing behind his tent in a location that was not visible from the roadway. (T. 6/1026-27) As Spencer watched Defendant digging, Defendant did not see him. (T. 6/1030) Spencer went back to the front of the house to finish painting. (T. 6/1030) Defendant then came to the front of the house, saw Spencer was there and offered him $100 or an ounce of weed to leave telling him he was expecting a delivery of weed and that the person would not stop if anyone else was there. (T. 6/1030-31) Spencer said he would rather have the weed and left. (T. 6/1031, 1037) Spencer said Defendant was wet from being out in the rain and that his shoes were dirty. (T. 6/1058) This was the last time he saw Defendant. (T. 6/1023-24) The following day Spencer returned

to the house to finish painting. (T. 6/1032) Defendant was gone and Spencer found his tent smoldering in the backyard incinerator. (R. 13/847; T. 6/1031-33, 1043) Spencer grabbed a nearby hose and put it out. (T. 6/1032) The tent was intact the previous day. (T. 6/1032) Defendant was known to take care of his tent, wash it and move it around the yard. (T. 5/953) There was $100 where Defendant said he would leave it. (T. 6/1037)

On September 26, 2002 Spencer returned to the property to move furniture into the home. (T. 6/1034, 1099) He was with his friend T.J. and they began discussing Defendant as the news was reporting that Defendant and Thomas were missing. (T. 6/1034-35) Spencer took his friend to the hole in the backyard he saw Defendant digging. (T. 6/1035) There they found Defendant's couch sitting atop freshly dug dirt. (T. 6/1035, 1090, 1096) They flipped over the couch to reveal palm fronds spread over the ground. (R. 13/855, 877; T. 6/1035, 1045-46, 1090, 7/1183) Below the palm fronds was a piece of plywood covering a couple of cinder blocks and a car ramp. (R. 13/853, 858; T. 6/1035-36, 1089-1090, 7/1183) Spencer testified it was like someone was trying to cover up the hole that was dug. (T. 6/1044) After these items were moved, Spencer got a shovel and began digging. (T. 6/1036, 1090-1091) He dug four to five feet and stopped to call the sheriff after he hit what was described as the smell of "death". (R. 13/854-55; T. 6/1036-37) This location where

Spencer saw Defendant digging was where Thomas' body was found buried. (T. 6/1059, 1065, 10/1865) Spencer had not seen any other people come to the Miramar property nor did he see any other person digging in the backyard. (T. 6/1064) Spencer did not see Defendant digging any other time. (T. 6/1065)

Lee County Sheriff's Office crime scene technicians responded and established a six-foot-by-eight-foot excavation site around the hole Spencer began digging. (R. 13/868; T. 6/1099-1100, 1172) The site area was just behind the home. (R. 13/852; T. 6/1137) There was a wooded area in the backyard; however, the hole was in a cleared area beyond a tree line. (R. 13/864-66; T. 6/1100-01, 1174-75) One foot at a time was excavated until Thomas was found lying in a semi-fetal position four feet underground. (R. 13/869-70, 873-76; T. 6/1105-06, 1117, 1170, 1173) Thomas' foot was found propped up, the dirt removal causing it to fall sideways onto his body. (R. 13/871; T. 6/1113, 1135-36, 1140-41) Thomas was wearing the same clothes and jewelry when Bisnett last saw him on August 7th. (T. 3/465-68, 506-517, 4/760-62, 5/796-98, 6/1118, 1173) Bisnett identified Thomas' shirt and jewelry that was collected during autopsy. (T. 4/760-62, 5/796-98) His cellphone was still attached to his belt. (T. 6/1118)

Medical Examiner Dr. Rebecca Hamilton testified Thomas' body was found in a severe state of decomposition. (T. 3/460) He

had been dead for some time. (T. 3/460) His time of death could not be determined. (T. 3/468-69) He had very little intact hair that was left. (T. 3/460) Skin and soft tissues were decomposed thus body characteristics were not obviously evident upon visual examination. (T. 3/460) His hands had decomposed to the point where skin and soft tissues were almost gone off his fingers and hands, leaving portions of bone protruding. (T. 3/467) Evidence of trauma was apparent during the external examination. (T. 3/460) A single shotgun wound was apparent in Thomas' right upper back. (T. 3/470, 472, 484)[5] The medical examiner and Florida Department of Law Enforcement criminal analyst, Yolando Soto, a firearms identification specialist both testified the shotgun was fired at close range. (T. 3/477-79, 7/1326) The shotgun pellets pierced his aorta, and his left lung. (T. 3/488) The shotgun pellets tore through his left diaphragm and caused his stomach to enter his chest and rupture. (T. 3/479-80, 488) Gastric contents were dumped into his chest. (T. 3/488) The medical examiner reported Thomas' death was caused by the shotgun wound. (T. 3/492) Defendant owned a 12-gauge shotgun that was seen in his tent. (5/941-43, 6/1020-21, 11/2034) He had a box of ammunition he kept nearby. (T. 6/1021) His shotgun did not have any serial numbers on it. (T. 6/1020) Wet sand was

[5] Thomas' hyoid bone was fractured prior to death and the medical examiner opined that blunt manual trauma could have caused the fracture. (T. 3/486-87)

found deep into Thomas' larynx and trachea. (T. 3/489) The sand was consistent with sand found on top of Thomas' body. (T. 3/465, 490) The medical examiner testified the location of the sand indicated that Thomas was buried alive and the sand entered the larynx as he was still breathing. (T. 3/490-91) Thomas would have died within minutes of being shot. (T. 3/500) When Thomas was discovered his identity was unknown and he was later identified through dental records and DNA taken from his son. (T. 3/494, 526, 543-44, 573-75, 10/1813-15)

Crime scene technicians returned after the excavation to search the area surrounding the excavation site. (T. 6/1119) A shotgun recoil pad and a Bic lighter was found. (T. 6/1120-21) Fourteen live shotgun shells were located in a wooded area fifty to sixty feet north of the excavation site. (R. 13/896, 905-10; T. 7/1274, 1277-78, 1286, 1297) The shells were for use with a 12-gauge shotgun and appeared to have been dumped in the brush. (T. 7/1298, 1305) A knit rifle or shotgun case with four live shotgun shells, and a shotgun shell holder was also collected. (R. 13/911-13; T. 7/1274-75, 1282-83, 1291-92) A tent pole frame and tent poles were observed in nearby palmettos. (R. 13/901-04; T. 7/1279-81) Thomas' rental car key tag was located approximately one-hundred feet from where his body was found. (T. 5/855-56, 7/1120-21) A shovel with a broken handle was

recovered west of the excavation site. (R. 13/895, 899-900; T. 7/1274, 1281-82, 1285)

Lee County crime scene manager Harry Balke also returned and searched the surrounding area. (T. 7/1189) Balke searched the backyard incinerator. (R. 13/881; T. 1194) Inside he found portions of a charred tent, tent poles, scissors, charred fingernail clippers, a charred metal-case ball point pen, a pack of Newport cigarettes and charred metal-rimmed eyeglasses. (R. 13/882-86, 889; T. 7/1195-97, 1210, 1216, 1227, 1230) He also uncovered a charred broken garden tool handle. (R. 13/888; 7/1194, 1197-99, 1208) A single fired shotgun shell was found burnt in the backyard incinerator. (T. 7/1202, 1209-10) Sitting atop a dog shed in the backyard were several items, including a large knife, a charred marijuana cigarette and a pack of Newport cigarettes. (T. 7/1219-22, 1227) Thomas smoked Newports and Defendant at times also smoked Newports. (T. 10/1859)

FDLE firearm specialist Soto compared the shotgun wadding from Thomas' body to the shells at the scene and found that they were consistent in style and appearance. (T. 7/1310, 1316-21) She also determined the fired shell from the incinerator was similar to the shells collected around the excavation site. (T. 7/1320-21) According to Soto, the wadding from Thomas, the fired shell found in the incinerator and the shells recovered from the

scene all appeared to be of the Winchester type. (T. 7/1209-10, 1319-21)

Defendant testified at trial. Defendant admitted that he had been previously convicted of four felonies or crimes of dishonesty. (T. 11/1983) He said he was a drug dealer who likes to be paid in $100 bills because they are easier to carry. (T. 11/1978-79, 1981, 2041) He refused to say who sold him marijuana but said he had dozens of buyers a day. (T. 11/2042-44, 2055) Regarding Spencer, Defendant testified he remembered the incident recalling it took place prior to him going to Alabama. (T. 11/1981) Further, Defendant testified he lived in his tent after the incident. (T. 11/1982) He indicated that he would dig a hole when he needed to go to the bathroom. (T. 11/1983) Defendant recalled that he arrived in Alabama with Thomas in the early morning hours of August 3rd. (T. 11/1988) He said he cut lumber for the deck the afternoon and evening of August 4th. (T. 11/1990) Defendant testified he drove from Montgomery to Florida the morning of August 5th in a 1979 Monte Carlo that was not running until he repaired it. (T. 11/1988-89, 1993) He also testified that he was not an internal engine kind of guy but could make outside repairs. (T. 11/1986) He said he took a basic tool set with him to Alabama. (T. 11/1986) The car had expired Mississippi tags. (T. 11/2047) Defendant testified the car was given to him as partial payment for the deck job at Thomas'

home. (T. 11/1988-89, 1993) Defendant indicated the deck could not be built until after Christmas so he decided to leave but did not tell Thomas. (T. 11/1991-94) Defendant testified he had fronted some marijuana and wanted to get paid money owed to him in Fort Myers. (T. 11/1992-93) Defendant testified he sold the car to a Mexican by the name of Chico Serano he knew that bought that type of car but could produce no paperwork from the sale. (T. 11/1994, 2046) He said Serano looked like every other Mexican on Palm Beach. (T. 11/2046) Thomas' wife testified that in 2002 Thomas had only one vehicle in Alabama, a 1984 BMW that was in the repair shop. (T. 4/585)

When Defendant returned from Fort Myers he went to his niece, Jennifer Morrison's, home. (T. 7/1341-42) He showed up "more towards the evening" and said he had been in Alabama working. (T. 7/1341-42) Defendant's mother was in from out of town and was staying with Morrison. (T. 7/1337) Defendant needed a ride, and Morrison took him to Wal-Mart and 7-Eleven. (T. 7/1342-43) Defendant testified he was at Wal-Mart on August 7th. (T. 11/1995) Defendant testified that he went to Wal-Mart to purchase travel supplies. (T. 11/1996) At 7-Eleven Defendant purchased three cellular telephones. (T. 11/1996) The 7-Eleven receipt indicated that it was a cash purchase for $688.97 made on August 8th at 12:39 a.m. (R. 16/1883; T. 8/1498-99, 1501) Defendant and Morrison returned to her home around 3:00 a.m. (T.

11/1997) Morrison went to sleep and awoke the following morning to discover that Defendant and his mother had left in the middle of the night without telling Morrison. (T. 7/1342-44) Morrison never saw Defendant again.

During the early morning hours of August 8th Defendant testified he drove his mother's car to 412 Miramar. (T. 11/1998) Defendant said he was going back to his tent because his things were packed in the car and he needed a shave kit. (T. 11/1997) He indicated he did not park in the driveway at Miramar but at nearby Sonny's parking lot because of his outstanding warrant from Missouri on a failing to appear on a drug possession charge. (T. 11/1984, 1998, 2047) He said he took a circuitous route there because he was a fugitive and because as a drug dealer people are always trying to steal from you. (T. 11/1998) He said every single time he went there he would take a different route. (T. 11/2047) Defendant indicated on his way to his tent, he smelled Brut cologne. (T. 11/1999, 2038) He said this reminded him of his brother-in-law who wore the fragrance. (T. 11/1999) Out of the darkness, Defendant said a barrel of a gun was pointed at this head. (T. 11/1999) He testified he deflected the gun while it fired, singing his head and burning his hands. (T. 11/1999-2000, 2048) He said he kicked the person and ran away. (T. 2000, 2048) He said he could not identify who was behind the barrel because it was dark but he was close

enough to touch the barrel. (T. 11/2000, 2048) Even though the injuries were serious and Defendant had an alias he was using, Defendant testified he did not seek medical care because he was a fugitive. (T. 11/2001, 2048-49) Defendant described the injuries as infected and inflamed, and as "chewed up meat". (T. 11/2048-49, 2053) No person who came in contact with Defendant mentioned these injuries. (T. 11/2050) At trial, Defendant said he still had scars and, as requested by his attorney and the State, showed the jurors. (T. 11/2000, 2050)

Defendant testified he lived in a tent solely to avoid the warrant from Missouri. (T. 11/1986-87) Defendant did not have a car and his mother was known to give him rides. (T. 5/945, 6/999, 1022, 10/1864) He testified he did not like to drive and did not have a valid driver's license. (T. 11/1985) He said his mother was "pitching a bitch fit" for him to take her to Tennessee, and they left Fort Myers together after the Miramar injury. (T. 11/1995, 2002-03) He said his mother did not drive at night and did not like to drive, he indicated she was old and had bad eyes. (T. 11/1985) Defendant's trip to Tennessee with his mother was evidenced by a trail of receipts for cash purchases totaling over $4000.00. (R. 13/926-947; T. 8/1501-08, 9/1583-88, 1593-94, 1603-07, 1625) Defendant testified he had about $2500.00 with him and his mother also had some money. (T. 11/2004) He said the trip was a "blur". (T. 11/2007) Defendant

went to a secluded campsite in the Tennessee forest. (T. 8/1373, 1420-21) Camp host Betsy Marie Reeves recalled Defendant arriving August 21st. (T. 8/1375-77) His mother brought him to the campsite and would visit him every day, driving a maroon car. (T. 8/1380-81, 1383-84) Betsy found it was unusual that Defendant never let her in his campsite. (T. 8/1379) She described his campsite as having a large tent which he kept closed all the time, and a large "cover" over the picnic table enclosed with camouflage. (T. 8/1380) Defendant said he set up tenting so people could not stand there and look at his stuff. (T. 11/2009) Reeves heard a police scanner coming from Defendant's campsite. (T. 8/1380)

At Defendant's campsite he had a tent, an insect tent over the adjacent picnic table, two or three police scanners, a refrigerator, a generator, portable power units and other items he was not known to have. (T. 8/1380, 1413-14, 1417, 1451) In Fort Myers Defendant lived in a single tent and did not have these items he now possessed. (T. 5/941, 6/1022) On August 25th Deputy Wesley Holt was called to the campground because campers had voiced concerns about Defendant's pit bull dog. (T. 8/1411-12) Defendant had placed "Beware of Dog" signs at his campsite. (T. 8/1412, 1439) Defendant gave Holt a name and date of birth that checked out when Holt ran it through the National Crime Information Center. (T. 8/1414) Holt then asked for photo I.D.

in case the dog got loose, and Defendant appeared to make a phone call asking someone to bring his identification. (T. 8/1414-16) Defendant told Holt he would have the identification in about thirty minutes. (T. 8/1415) Holt said that would be fine and left returning approximately thirty minutes later. (T. 8/1415-16) In the meantime, Defendant's mother came to Defendant's campsite and left with Defendant's dog. (T. 8/1383-84) When Holt returned Defendant and his dog were both gone. (T. 8/1417-18) Later a car, not seen previously by the camp hosts[6] came in empty, went to Defendant's campsite, and left speeding off loaded down with items. (T. 8/1385-90, 1405-08) The vehicle was registered to a Nicole Miller, 20860 State Route 34, in Telford, Tennessee. (T. 8/1514) Defendant would later he arrested after a traffic stop at this location. (T. 9/1639-41, 11/2013) The location was the residence of Chris Miller, Defendant's future stepson. (T. 9/1639) Defendant, while awaiting trial, would marry Miller's mother, Debbie. (R. 4/189)

That evening when the campsite hosts and Holt went back to Defendant's campsite it appeared to be ravaged like someone had hastily loaded things up. (T. 8/1419) His refrigerator and generator were gone. (T. 8/1390) Everything was strewn about, a scanner was dropped on the steps and his tent was left open. (T.

[6] Betsy hosted the campsite with her husband Arthur (T. 8/1403-04)

8/1390) It was raining heavily and Holt took the items left behind for safekeeping. (T. 8/1390-91, 1419) Defendant testified he returned while it was raining, his campsite was trashed and he was robbed. (T. 11/2010) Defendant was gone and never returned. (T. 11/2040) He said he did not return because the police had come and the camp hosts were nosing around. (T. 11/2011) The property he abandoned sat unclaimed. (T. 8/1391, 1419-20) Among the items entered into evidence were Defendant's: thirteen by ten insect tent, three-room cabin tent, small folding table and two chairs, oversize chair, extremely large tarp, cot, stainless steel coffee pot, four stainless steel cups, battery-powered air pump, extension cords, Coleman power transformer, and Uniden scanner. (T. 8/1421-51) Holt collected a briefcase found under the picnic table. (T. 8/1490) Inside the briefcase Holt found, among other items: prepaid phone cards, a pair of glasses, a road atlas, a wallet with fourteen dollars and receipts for various items. (T. 8/1491-97) The receipts were for cash purchases and totaled over $4000.00. (R. 13/926-947, 16/1883)

The disappearance of Thomas and Defendant began as a missing persons case. (T. 10/1803) As the investigation progressed, there appeared to be some type of foul play involved and the case was assigned to Homicide Detective Ryan Bell. (T. 10/1803) Bell's focus was to locate both men, missing persons

posters were posted, photos were circulated and the missing persons information was sent through the National Crime Information Computer to alert all law enforcement who may come into contact with either man. (T. 10/1804-05, 1817) Defendant's niece told Bell that Defendant went missing at the same time Thomas was last seen. (T. 10/1805-06)

Eventually Bell received information that Defendant was in Tennessee. (T. 10/1806-07) On or about September 17, 2002 Bell sent photos of Thomas and Defendant to the Tennessee Washington County Sheriff's Office. (T. 9/1637-38) Bell asked Deputy Todd Hull if he could watch Debbie Miller's residence to see if he could see who was coming and going. (T. 9/1638) On September 20th a vehicle with two people left the residence and was stopped. (T. 9/1638-39) Hull responded to the traffic stop and found Chris Miller in the back of a patrol cruiser and a man sitting beside the cruiser. (T. 9/1639-40) Hull used the photo Bell sent and identified the man sitting beside the cruiser as Defendant. (T. 9/1640) Hull observed that Defendant's appearance was different than the photo Bell sent. (T. 9/1641-42) The hair style, length of hair and facial hair were all different. (T. 9/1642) Defendant was taken into custody on a charge unrelated to Thomas' murder. (T. 11/2013) A wallet containing cash, a cellular telephone and an address book was taken from Defendant. (T. 9/1643-44) A methamphetamine lab was found in the trunk. (T.

11/2012) Defendant said he made money in Tennessee by selling methamphetamines that he made from an internet recipe. (T. 11/2012-13)

Defendant was housed at the Washington County Tennessee Detention Center. While in custody, Defendant made over two-hundred phone calls between September 27, 2002 and February 10, 2003. (T. 9/1649-50) Five calls were played for the jury. During the period of the phone calls Defendant was aware that he was a suspect in Thomas' disappearance but Thomas' body had not been found. (T. 11/2022) Prior to each call Defendant was informed that the call was "subject to monitoring and recording". (T. 9/1722, 1734, 1748, 1763, 10/1777) In a call with his mother Defendant was told that Spencer was "running his mouth". (T. 9/1724) Defendant responded by asking "How?" and his mother answered, "Well, they found Dave." (T. 9/1724) Defendant warned that they had to watch what was said on the phone. (T. 9/1725) Defendant's time on that phone call ran out and he called his mother right back. (T. 9/1733-34) Defendant then asked "What kind of things is Spencer saying?" (T. 9/1745) His mother informed him Spencer is saying "Um, you did it. And, you know he seen ya do this and do that. And heard you say this and that and -- so I don't know." (T. 9/1745) Defendant inquired if Spencer was saying this to the "cops" and his mother answered "yeah", Spencer is saying it to the "detectives". (T. 9/1745-46)

Defendant responded, “I’ll be damn. Well, they’ll probably be filing their damn charges here in a bit then.” (T. 9/1746) Defendant testified he believed his mother was talking about Dave Twomey, Morrison’s boyfriend, though no other witness indicated Twomey was missing. (T. 11/1974, 2015-16) Defendant said a Jamaican guy was looking for Twomey. (T. 11/2016) Further he said he thought Spencer was talking to the detectives about his marijuana dealing. (T. 11/2017) Prior to his statement about the “damn charges”, Defendant indicated on the phone he had already been charged with the “meth lab” in Tennessee. (T. 9/1730) Defendant also indicated that he believed that “they can’t get me for a drug deal in the past.” (T. 11/2021) Defendant testified he did not know about the money Thomas withdrew, he did not know about the car Thomas rented, and he did not know about the truck Thomas was going to purchase. (T. 11/1991) He denied burning his tent, denied killing Thomas, and denied burying him in the backyard. (T. 11/2025-26)

After just an over an hour of deliberation the jury found Defendant guilty of first-degree premeditated murder. (R. 14/1607-08; T. 12/2207, 2220) All twelve found that the killing was premeditated. (T. 12/2222) The verdict form required the jury to indicate how many of them found that the killing was premeditated. (R. 14/1106-07) Despite Defendant’s indication in his brief that this form was given at the trial court’s

"insistence", Defendant requested the use of the special verdict form. (Initial Brief of Appellant at p. 24; T. 11/2074) The State objected arguing that the use of a general verdict form was approved by this Court and the special form was confusing. (T. 11/2072-77) The court agreed with Defendant and the special form was submitted to the jury. (T. 11/2077)

Prior to trial Defendant filed a Motion to Suppress the evidence collected at his campsite in Tennessee. (R. 7/323-24) A hearing was held wherein the campsite hosts and Deputy Holt testified for the State. (R. 10/459-531) Defendant testified in his behalf. (R. 10/532-35) The trial court entered an order denying Defendant's motion finding Defendant abandoned his property and that the property was taken based on exigent circumstances. (R. 10/633) Prior to jury selection, Defendant waived the right to the jury's sentencing recommendation, instead opting for the trial court to determine his fate alone. (T. 1/30-43) Defendant also waived the right to present mitigating evidence, forbade his attorneys from investigating mitigation, and threatened firing them had they presented mitigation. (R. 6/273-76, 8/371, 10/623, 16/1249-50, 1277) The court held a hearing on Defendant's waiver of mitigation and after finding Defendant competent, accepted the waiver. (R. 8/366-91) Defendant's counsel ensured the trial court he had no doubt that Defendant was competent. (R. 10/600) An order

reflecting the acceptance of the waiver was entered. (R. 8/408-13) The trial court revisited this issue prior to voir dire, and after trial. (T. 1/40-43) Each time Defendant maintained his waiver. After the jury's verdict, the trial court offered Defendant the option of withdrawing his waiver of mitigation. (R. 15/1117) Defendant declined. (R. 15/1119) At the start of the sentencing hearing, the court inquired again of Defendant, Defendant maintained his waiver stating he wanted counsel to "stand silent". (R. 16/1248) At the start of the Spencer hearing the trial court again questioned Defendant regarding mitigation, his position remained the same, he wanted counsel to stand silent. (R. 17/1299, 1307-08, 1322) Prior to the trial court announcing sentence, Defendant was offered to continue the case to present mitigation but declined. (R. 20/1865-67)

Defendant now appeals challenging the sufficiency of the evidence and asserting various enumerations of error.

SUMMARY OF THE ARGUMENT

Issue I: Defendant's motion for judgment of acquittal was properly denied as there is substantial competent evidence to support the verdict and judgment. The State presented evidence from which the jury could exclude every reasonable hypothesis save the guilt of Defendant. The jury's resolution of the evidence should not be disturbed.

Issue II: Defendant's claim that there was insufficient evidence to prove premeditation is not preserved for review as Defendant failed to argue this ground during his motions for judgment of acquittal. Notwithstanding this bar, there was substantial, competent evidence that Thomas was the victim of a premeditated murder. Defendant's prearranged plan was certain, and the jury's verdict should not be disturbed.

Issue III: The motion to suppress was properly denied as Defendant abandoned the property after it was properly removed from the campsite and was not the product of a search and seizure.

Issue IV: The trial court did not abuse its discretion in precluding the admission of the irrelevant, prejudicial and incredible hearsay testimony concerning alleged drug use and sexual acts of the victim unrelated to the facts of this case.

Issue V: The trial court did not err in admitting evidence concerning Defendant's actions after the murder as they were inextricably intertwined evidence and also relevant evidence of flight as consciousness of guilt.

Issue VI: Phone calls made by Defendant from the Tennessee jail to Defendant's mother and girlfriend were properly admitted as statements against interest and adoptive admissions.

Issue VII: Defendant's challenge to admission of evidence concerning the numerous receipts found at his Tennessee campsite

should also be denied as the evidence was properly admitted and, error, if any was harmless where evidence contained in the receipts was cumulative to other evidence that Defendant suddenly had substantial cash and expensive possessions.

Issue VIII: Defendant next asserts that the trial court erred in finding CCP, pecuniary gain and that in the absence of these aggravators the death sentence is not proportionate. The trial court's sentencing order should be upheld as it properly found both aggravating circumstances. Further, the death sentence is proportionate.

Issue IX: The trial court properly accepted Defendant's waiver of a penalty phase jury and the presentation of mitigation to same. Further, while the court conducted a Koon hearing which revealed Defendant limited counsel's investigation into mitigation, some investigation was done and Defendant was allowed to present the evidence he mitigation that he wanted the court to consider.

ARGUMENT

ISSUE I

SUFFICIENT EVIDENCE EXISTED TO PROVE DEFENDANT KILLED THOMAS

Defendant claims that the trial court erred in denying his motion for a judgment of acquittal and that the evidence was insufficient to support his conviction. Defendant appears to assert that the State's evidence was flawed and inadequate because it was circumstantial. Defendant, admitted four-time convicted felon and drug dealer, urges this Court to adopt his version of events. The trial court properly denied Defendant's motions for judgment of acquittal and sufficient evidence existed for the jury to find Defendant murdered Thomas.

As this Court noted in Crain v. State, 894 So. 2d 59, 71 (Fla. 2004). (citations omitted):

> A judgment of conviction comes to this Court with a presumption of correctness and a defendant's claim of insufficiency of the evidence cannot prevail where there is substantial competent evidence to support the verdict and judgment. The fact that the evidence is contradictory does not warrant a judgment of acquittal since the weight of the evidence and the witnesses' credibility are questions solely for the jury. It is not this Court's function to retry a case or reweigh conflicting evidence submitted to the trier of fact.

This Court further stated in Tibbs v. State, 397 So. 2d 1120, 1123 (Fla. 1981):

> An appellate court should not retry a case or reweigh conflicting evidence submitted to a jury or other trier of fact. Rather, the concern on appeal must be

> whether, after all conflicts in the evidence and all reasonable inferences therefrom have been resolved in favor of the verdict on appeal, there is substantial, competent evidence to support the verdict and judgment. Legal sufficiency alone, as opposed to evidentiary weight, is the appropriate concern of an appellate tribunal.

Evidence is insufficient "in a circumstantial evidence case if the state fails to present evidence from which the jury can exclude every reasonable hypothesis except that of guilt." Orme v. State, 677 So. 2d 258, 262 (Fla. 1996). "The question of whether the evidence fails to exclude all reasonable hypotheses of innocence is for the jury to determine, and where there is substantial, competent evidence to support the jury verdict," reversal is not required. Darling v. State, 808 So. 2d 145, 155 (Fla. 2002)(*quoting* State v. Law, 559 So. 2d 187, 188 (Fla. 1989) To meet this burden, the State is not required to "rebut conclusively, every possible variation of events", but only has to present evidence that is inconsistent with Defendant's reasonable hypothesis. Darling, 808 So. 2d at 156 (*quotin*g Law, 559 So. 2d at 189)[7] The circumstantial evidence rule does not require a jury to believe a Defendant's version of events where the State had produced conflicting testimony. Spencer v. State, 645 So. 2d 377, 381 (1994). Moreover, the State is entitled to a view of any conflicting evidence in the light most favorable

[7] When reviewing a trial court's ruling on a motion for judgment of acquittal, this Court applies a de novo standard of review. Pagan v. State, 830 So. 2d 792, 803 (Fla. 2002).

to the jury's verdict. Cochran v. State, 547 So. 2d 928, 930 (Fla. 1989).

In this case, Defendant's hypothesis of innocence was that he did not murder Thomas. As will be demonstrated, the evidence presented was to the contrary. Defendant's self-serving and bizarre testimony was contradicted by the State's witnesses and should be disregarded as unreasonable.

Defendant's invitation to this Court to not consider robbery evidence because the jury found Defendant guilty under a premeditated murder theory instead of a robbery theory should be rejected. The finding of premeditated murder on the jury verdict form does not operate as an acquittal on the felony murder and, therefore, this Court should consider the evidence of robbery, which served as the basis for the felony murder charge, in its review of the entire record to confirm that the verdict is supported by competent substantial evidence. Fla. R. App. P. 9.142(a)(6); Floyd v. State, 913 So. 2d 564, 572 n. 2 (Fla. 2005); Ferguson v. State, 417 So. 2d 639, 642 (Fla. 1982).

Defendant went to Alabama with Thomas on August 2nd. (T. 4/586-87, 593-97, 11/1987-88) He was in Alabama with Thomas when Thomas withdrew $25,000. (T. 4/662-64, 671-74, 678-80, 11/2036) Thomas rented a car in Alabama on August 6th, intending to return it by August 9th. (R. 13/833; T. 721-25, 728) On August 6th Valerie Bisnett saw Thomas and Defendant in the rental car. (T.

4/751-52) Defendant's suggestion that Bisnett did not see Defendant is belied by the evidence. Bisnett had met Defendant, a light illuminated the passenger compartment so she could see him and she was able shortly thereafter to identify Defendant again in a photo line-up. (R. 13/829, 834; T. 4/742-47, 751, 5/787-88, 5/808-10) Moreover, Thomas told Bisnett that he was coming back to Fort Myers with Defendant. (T. 5/799-800)

Defendant's story that he left Alabama on August 5th was a feigned and failed attempt to separate himself from Thomas. In addition to Bisnett's testimony that she saw them Defendant and Thomas together in Ft. Myers on August 6, 2002, Defendant's lies were exposed by his own testimony. He claimed he repaired an inoperable Monte Carlo, but he admitted that he did not have the knowledge of engines and all he had with him was a basic tool set. (T. 11/1986) He claimed Thomas gave him the car as payment for the deck job, but the deck was never built. (T. 11/1988-89, 1991-94) Furthermore, Defendant testified he took great steps to avoid law enforcement. (T. 11/1984, 1986-88, 2047) It is not plausible that he would drive from Alabama to Florida without a valid license in a car with expired tags. (T. 11/1985, 2047) Lastly, the only car Thomas had in Alabama was a BMW not a Monte Carlo. (T. 4/585)

After Thomas took possession of the money, Defendant devised a plan to murder him and flee with Thomas' money.

Thomas was last seen alive by Bisnett on August 7th between 7:00 p.m. – 7:30 p.m. (T. 4/753-54, 5/796-97) Thomas had a large sum of money in his wallet and he told Bisnett he was going with Defendant to buy a truck. (T. 4/753-54, 779-80, 5/796-98) Thomas planned to meet Bisnett later that evening, but he would never arrive. (T. 4/755-56) Prior to Thomas' arrival at the Miramar residence to get Defendant, Defendant would dig the grave where Thomas' body was found. (T. 6/1059, 1065, 10/1865) Thomas would be found wearing the same clothes and jewelry Bisnett last saw him in. (T. 3/465-68, 506-17, 4/760-62, 5/796-98, 6/1118, 1173)

Spencer Hartman witnessed Defendant dig Thomas' grave. (T. 6/1023-29) When Defendant realized Spencer was at the property, he bribed him to leave so he would be left alone with Thomas. (T. 6/1030-31) Spencer saw no other person dig at the Miramar property and did not see Defendant dig any other time. (T. 6/1064-65) Spencer took law enforcement to the exact spot he saw Defendant digging. (13/854-55, 868; T. 6/1036-37, 1099-1100, 1172) Defendant's testimony, to the contrary was not credible. He claimed he remembered this encounter with Spencer, testifying it took place *prior* to his trip to Alabama. (T. 11/1981) Spencer found Defendant's tent burned the day *after* he saw Defendant digging. (R. 13/847; T. 6/1031-33, 1043) As such, there could have been no way Defendant stayed in the tent after he saw Spencer as he claimed. (T. 11/1982) Further, there could have

been no way he went back to his tent after being in Alabama as he claimed. (T. 11/1994)

Defendant laid in wait for Thomas' arrival at Miramar. Defendant, his shotgun in hand, placed Thomas beneath him and shot him in the right upper back. (T. 3/470, 472, 494, 5/941-43, 6/1020-21, 11/2034)[8] The pellets' entry were consistent with this as they entered Thomas' body right to left and then downward. (T. 3/479-80, 488)[9] Thomas would then be placed in the grave. Defendant next began covering the murder. He used a car ramp, cinder blocks, plywood, palm fronds and finally his couch to cover Thomas' grave. (R. 13/853, 855, 858, 877; T. 6/1035, 1045-46, 1089-90, 1096, 7/1183) Had it not been for Spencer leading the Sheriff's Department to the exact spot he saw Defendant dig, Defendant's crime may have not been discovered. (T. 6/1036-37, 1059, 1065, 10/1865)

Defendant used the incinerator to burn his tent. (R. 13/847; T. 6/1031-33, 1043, 7/1195-96, 1216-17) He used it to try to destroy the fired shell. (T. 7/1202, 1209-10) He used it to try to destroy Thomas' glasses and Cross pen. (R. 13/884, 889; T. 7/1195-97) Lastly, he used it to destroy shovel handle

[8] Defendant faults Detective Bell for not knowing if others owned shotguns. Initial Brief of Appellant at p. 44. However, as Bell explained there is no way to determine who owns shotguns as there is no registration requirement. (T. 10/1869-70)

[9] Defendant is only 5'6" and Thomas was 5'10". (R. 17/1331(PSI), 21/1902)

area which could have revealed his fingerprints. (R. 13/888; T. 7/1194, 1197-99, 1208) Defendant hastily left shotgun shells around the grave site and threw Thomas' rental car key tag away from the grave. (R. 13/896, 905-13; T. 5/855-56, 7/1120-21, 1274-75, 1277-78, 1282-83, 1286, 1291-92, 1297-98, 1305) All the shells recovered were consistent in style and appearance with the wadding found in Thomas' back. (T. 7/1209-10, 1310, 1316-21) Thomas' wallet and money would not be recovered. However, Defendant would be found with two wallets both containing cash. (T. 8/1496, 9/1643-44)

Defendant went to Jennifer Morrison's after he murdered Thomas, took his money and buried him alive. (T. 3/490-91, 7/1341-42) He told Morrison he had been in Alabama working. (T. 7/1341-42) While Morrison did not provide a time Defendant arrived, it is clear from the evidence he arrived in the late evening. He needed a ride and Morrison would take Defendant only to Wal-Mart and 7-11, the 7-11 receipt indicating they were there after 12:30 a.m. (R. 16/1883, T. 7/1342-43, 8/1498-99, 1501, 11/1995-96) August 8th would be the last day Defendant would be seen in Fort Myers, he would flee with his mother in the middle of the night without telling anyone where he was going. (T. 7/1342-44)

He would take Thomas' money and begin spending it in Fort Myers buying everything from cellphones to camping equipment and

ringing up receipts in excess of $4,000.00. (R. 13/926-947, 16/1883)[10] Of note, within 4 hours of Thomas last being seen Defendant paid almost $700.00 for cellular telephones at 7-11. (R. 16/1883, T. 7/1342-43, 8/1498-99, 1501, 11/1995-96) Prior to Thomas' death, Defendant lived a meager existence. He possessed few items, his mother bought the tent he lived in and provided him with basic necessities. (T. 5/944, 7/1337-38, 11/1978, 2034) Defendant did not have money, did not have a car and had to get rides places. (T. 5/945, 6/999, 1022) Defendant would do odd jobs in lieu of paying rent at Miramar. (T. 5/940) He later would be found in Tennessee with new items purchased with the fruits of his crime. Of note, he had a generator, portable power units and police scanners he never possessed in Fort Myers. (T. 5/941, 6/1022, 8/1380, 1413-14, 1417, 1251) Defendant claimed his money was from drug dealing but no other witness testified that Defendant was a drug dealer. (T. 11/1978-79, 1981, 2041) Instead, he was known to be a handyman. (T. 4/591-92, 6/1021, 7/1339-40) It is unbelievable that that none of the State witnesses, nine in number, who came in contact with

[10] Defendant argues that the State failed to prove that the money spent was Thomas' as Thomas bank withdrawal was in $20 bills and Defendant was spending $100 bills. Initial Brief of Appellant at p. 41. While interesting, the argument is easily refuted. First, it assumes the truth of Defendant's grandiose testimony that he was a prolific drug dealer who was paid in $100 bills and it ignores the evidence that Defendant was spending crisp new $100 bills. (T. 9/1583, 1585) At some point, obviously, Thomas' $20 bills were exchanged for $100 bills.

Defendant knew of his drug dealings with the dozens of buyers he claimed to have had a day for marijuana. (T. 11/2042-44) Furthermore, his mother would not have had to provide him with food, drink and cigarettes if he had money as he claimed. (T. 5/944)

When Defendant fled Fort Myers, he would change his appearance and hide at a secluded campsite in the Tennessee forest. (T. 8/1373, 1420-21, 9/1641-42) There Defendant would come in contact with law enforcement. (T. 8/1411-12) When asked for identification he gave a false name and date of birth. (T. 8/1414) As Defendant had an active warrant for his arrest, giving false information was the only way he could have evaded arrest. The false information would check out through NCIC. (T. 8/1414) He then would pretend to make a phone call asking for his ID, telling Deputy Holt he would produce it. (T. 8/1414-16) Afterwards, Defendant had his mother and future step-son come and take his dog and some of his belongings from the site. (R. 4/189; T. 8/1383-90, 1405-08, 1514, 9/1639) He would flee again and leave many items abandoned. (T. 8/1391, 1419-20 Defendant would never return to the campsite. (T. 11/2040) He would claim robbery at trial. (T. 11/2010)

Defendant's testimony regarding being shot at Miramar was an incredible tale and a feigned and failed attempt to place another at Miramar with a shotgun. He claimed he could touch

the barrel but at the same time says he could not see who was at the other end. (T. 11/2000, 2048) He gave no indication why someone would want to kill him, only testifying he was concerned about being robbed because he was a drug dealer. (T. 11/1998) No person who came in contact with him ever mentioned the serious wounds he described. (T. 11/2050) Moreover, the jury observed Defendant's hands and clearly found this story to be a tall tale. (T. 11/2000, 2050)

Defendant attempts to cast doubt on his own guilt, by suggesting Bisnett or Thomas' wife were involved in Thomas' death. Appellant's Initial Brief at p. 44-45. However both women, concerned for Thomas' fate, reported Thomas missing. (T. 4/601-02, 634, 759) Defendant was the only person that was not trying to find him. Defendant was the last person with Thomas and was the only person that did not participate in trying to find him.

During Defendant's jail calls, he acknowledges he is about to be charged with Thomas' murder. He knew during the time of the calls Thomas he was a suspect in Thomas' murder. (T. 11/2022) He knew during the time of the calls that Thomas' body had not been found. (T. 11/2022) When his mother informs him that Thomas was found and that Spencer was talking to the detectives, Defendant acknowledges he will be charged. (T. 9/1724, 1745-46) Also during the calls, Defendant would blame

Morrison, who talked to Detective Bell, for revealing his whereabouts. He lamented she "dropped a dime on me" as she provided Bell with the information that Defendant was hiding out in Tennessee. (T. 9/1728-29, 10/1805-07)

First, as the State's evidence created an inconsistency with Defendant's theory of innocence (he had nothing to do with Thomas' murder), the denial of the motions for judgment of acquittal was proper and the case was properly submitted to the jury for resolution. Reynolds v. State, 934 So. 2d 1128, 1146 (Fla. 2006); Woods v. State, 733 So. 2d 980, 985 (Fla. 1999). Second, where Defendant's testimony that he was not with Thomas was contradicted by Bisnett, denial was proper. See Norton v. State, 709 So. 2d 87, 91 (Fla. 1997)(witness testimony he saw Defendant with victim at time Defendant claimed to be elsewhere sufficient to avoid judgment of acquittal) Furthermore, the motions were properly denied here where the evidence supported a conviction of first-degree murder. Woods v. State, 733 So. 2d 980, 985 (Fla. 1999)

The jury had the right to reject Defendant's version of events. As Defendant denied all involvement in Thomas' murder, his credibility was a critical aspect of the case. Defendant is an admitted four-time convicted felon, who was using a number of aliases to avoid law enforcement. The jury was specifically charged that in considering whether evidence was reliable they

should consider if the witness had been convicted of a crime *and* whether the witness' testimony agrees with other testimony and evidence in the case. (T. 12/2196)[11] Here, Defendant's testimony was contradicted by Bisnett's, by Thomas' wife's, by Spencer Hartman's testimony and by the evidence found at Miramar and in Tennessee. Defendant's credibility was critical to the jury's deliberations. Here, the jury was entitled to disbelieve Defendant's testimony and conclude his explanation of the events was false and unsatisfactory. See Darling, supra; Spencer, supra; Coleman v. State, 466 So. 2d 395, 397 (Fla. 2d DCA 1985)(jury entitled to reject Defendant's testimony where Defendant's credibility was impeached by his admission he had been convicted of three prior felonies)

Defendant argues that he was acquitted of felony murder. Appellant's Initial Brief at p. 40. Defendant is mistaken. The verdict is silent as to a finding of felony murder. (R. 14/1106) The jury did not indicate that zero of their number found felony murder, and they were not charged they could find both premeditated murder and felony murder. Instead, they were repeatedly charged their verdict must be unanimous and that only one verdict may be returned as to the crime charged. (T. 12/2199-2203) Further, they were charged the verdict should be

[11] The jury was charged they should apply the same rules to the consideration of Defendant's testimony that they apply to other witnesses. (T. 12/2197)

for the highest offense proved and the verdict form suggests that a premeditated killing is the "highest offense". (R. 14/1106; T. 12/2199)

The jury found the State's witnesses and evidence to be credible and Defendant's testimony to be implausible. This conviction should be presumed correct as there is substantial competent evidence to support the verdict and judgment.[12] The State presented evidence from which the jury could exclude every reasonable hypothesis save the guilt of Defendant. The jury's resolution of the evidence should not be disturbed.

ISSUE II

SUFFICIENT EVIDENCE EXISTED TO PROVE PREMEDITATION

Defendant's claim that there was insufficient evidence to prove premeditation is not preserved for review as Defendant failed to argue this ground during his motions for judgment of acquittal. (T. 10/1892-1901, 11/2107-09) Stephens v. State, 787 So. 2d 747, 753-54 (Fla. 2001); Robinson v. State, 975 So. 2d 787, 588 (Fla. 1st DCA 2008). Notwithstanding this bar, the

[12] The cases cited, *one withdrawn*, by Defendant represent unique factual situations which shed no light on the facts and circumstances of this case. Appellant's Initial Brief at pp. 46-50. See Burkell v. State, 2008 Fla. App. LEXIS 15128 (Fla Dist. Ct. App. 4th Dist., Oct. 1, 2008)(prior opinion withdrawn and conviction affirmed); Smolka v. State, 662 So. 2d 1255 (Fla. 5th DCA 1995)(wife's body found in car, and husband's conviction based on suspicion reversed); Fowler v. State, 662 So. 2d 1255 (Fla. 5th DCA 1995)(theory of accidental shooting not refuted)

State's evidence was more than sufficient to establish premeditation.

Premeditation may be shown by evidence such as "the nature of the weapon used, the presence or absence of adequate provocation, previous difficulties between the parties, the manner in which the homicide was committed, and the nature and manner of the wounds inflicted." Green v. State, 715 So. 2d 940, 943 (Fla. 1998)(*quoting* Holton v. State, 573 So. 2d 284, 289. (Fla. 1990)) Whether a premeditated design to kill was formed prior to the killing is a question of fact for the jury. Asay v. State, 580 So. 2d 610, 612 (Fla.), *cert. denied*, 112 S. Ct. 265 (1991). Where the element of premeditation is sought to be established by circumstantial evidence, the evidence relied upon by the State must be inconsistent with every other reasonable inference and where competent, substantial evidence exists, the verdict will not be reversed on appeal. Cochran, 547 So. 2d at 930. In this case, the evidence of premeditation is clear. The evidence of premeditation is overwhelming.

As illustrated in Issue I, Defendant dug Thomas' grave and bribed Spencer, the only possible witness, to leave Miramar. It was a grave four-feet deep, and big enough for Thomas to fit lying on his side in a semi-fetal position. (R. 13/869-70, 873-76; T. 6/1105-06, 1117, 1170, 1173) It is obvious that due to the size of Thomas' grave it was prepared in advance. Spencer

saw Defendant digging in the afternoon and Thomas would last be heard from the evening of August 7th, the date he planned to go buy a truck with Defendant. (R. 13/1104; T. 4/598, 643, 753-54, 10/1955) Spencer, who would later lead law enforcement to the exact spot Defendant was digging and where Thomas' body would be recovered, plainly witnessed Defendant's digging Thomas' grave. (R. 13/854-55, 868; T. 6/1036-37, 1099-1100, 1172) Further, Thomas would be found wearing the same clothes Bisnett last saw him in on August 7th in the early evening hours and Thomas was never known to wear the same clothes two days in a row. (T. 3/465-68, 4/590-91, 760-62, 753-54, 5/796-98, 6/1118, 1173) See Buzia v. State, 926 So 2d 1203, 1214-15 (Fla. 2006)(heightened premeditation found where advanced procurement of weapon); see also Swafford v. State, 533 So. 2d 270, 277 (Fla. 1988)(heightened premeditation can be indicated "by circumstances showing such facts as advance procurement of a weapon, lack of resistance or provocation, and the appearance of a killing carried out as a matter of course.") The fatal shot would be fired at close range. (T. 3/477-79, 7/1326) See Griffin v. State, 474 So. 2d 777, 780 (Fla. 1985)(premeditation found where wound was inflicted at close range and thus unlikely to be unintentional) It is highly improbable and unrealistic to believe that some other person would bury Thomas in the same location Defendant was seen digging.

Moreover, it is evident the grave was dug in advance because Thomas was still alive when he was put in the grave. The sand found deep in Thomas' larynx and trachea was found to be consistent with Thomas being buried alive and struggling to breathe. (T. 3/489, 490-91, 501) See Way v. State, 496 So. 2d 126 (Fla. 1986)(heightened premeditation found where victim burned alive and struggled to her death). Moreover, the fact the sand he breathed in was consistent with the sand found covering his dead body further supports the evidence that he was buried alive at Miramar. (T. 3/465, 490) Lastly, the fact Thomas' foot would was found propped up evidences the fact he was alive and attempting to move in his final minutes. (R. 13/871; T. 3/500, 6/1113, 1135-36, 1140-41)

Moreover, Defendant's unsupported contention that this Court should not consider the robbery facts should be rejected. Further, even though evidence of motive may become probative where premeditation is sought to be proved by circumstantial evidence, motive is not an element of the crime. Norton, 709 So. 2d at 93. As illustrated in Issue I, Defendant's motive was robbery and he devised a plan to murder Thomas and he fled Fort Myers with his money. Nevertheless, even if the State had not been able to establish robbery as a motive, the evidence that Thomas was still alive when he was put in the grave, clearly established premeditation without more.

If this Court finds that the State failed to establish Thomas' murder was premeditated, Defendant may still be retried for felony murder. As argued in Issue I, the trial court properly denied Defendant's motions for judgment of acquittal and the jury's verdict was silent as to felony murder. As such, retrial for felony murder would be proper. Defendant's conviction need not be reduced.

There was substantial, competent evidence that Thomas was the victim of a premeditated murder.[13] Defendant's prearranged plan was certain, and the jury's verdict should not be disturbed.

ISSUE III

THE TRIAL COURT PROPERLY DENIED DEFENDANT'S MOTION TO SUPPRESS

Prior to trial, Defendant filed a motion to suppress evidence obtained from his campsite in Tennessee, which included camping gear and receipts. (T. 7/323-24) A hearing was held on the motion wherein the campsite hosts and Deputy Wesley Holt testified for the State. (T. 10/459-531) Defendant testified on his behalf. (T. 10/532-35) Based on this testimony, the lower court made the following factual findings:

> 1. On August 21, 2002 the defendant rented a campsite, lot 8, for 2 weeks at Horse Creek Campground

[13] Defendant's reliance on Bigham v. State, 2008 Fla. LEXIS 1232 (Fla. 2008) and Norton are misplaced. In Bigham there was no preconceived plan to murder and in Norton there was no motive or preparation in advance of the killing.

in the Cherokee National Forest in Tennessee. Rentals are made on the honor system by the renter putting his rental payment in an envelope with information including name and length of stay in a drop box at the entrance to the park. The defendant properly registered and rented campsite, lot #8, for two weeks. He established a campsite with two tents and various equipment. He testified he chose this site because of those available it was the largest and offered the most privacy. The rental period had not expired at the time of the incident in issue.

2. The park was attended, in season, by a husband and wife living in a camper at the park entrance. They served as campsite host and watched to see that people pay on the honor system, that the rules were followed, that the camp was generally maintained in a clean condition and generally checked on things. Their duties also included keeping track of the license tag numbers of the campers.

3. The camp hosts received a complaint from a lady at the campsite adjacent to defendant's that the defendant's dog had come at her as if to attack and that it had frightened her. The lady camp host said the dog was a large white dog like a Bull Dog and that she was also afraid of the dog.

4. She reported the complaint to a deputy sheriff with the Sheriff's office of Green County Tennessee, Deputy Holt, whose duties included patrolling of the Cherokee National Forest including the Horse Creek Campground and who had come by the campground in the usual course of those duties.

5. The deputy indicated he would talk to the defendant about the incident. He went to the defendant's campsite and spoke with him. In the process he observed the site to have a tent around a picnic table with camouflage netting over it, a second tent and, out of the ordinary, two beware of dog signs. He asked for identification because as he testified if the dogs bit someone they would need to know the owner. The defendant had no identification but indicated he could get some and made a call. The deputy was dispatched elsewhere before seeing any identification. He later returned to the site but no

one was present and the dogs were gone. He did not enter the tents but did observe the campsite and some of the equipment.

6. On August 25, 2002 the camp host observed a strange vehicle enter the campground. They. went to see where it had gone and observed it at the lot 8 site. The vehicle took off suddenly when they approached and now appeared to be packed with stuff. The vehicle traveled at a speed and in a manner indicating it was attempting to avoid them. It ultimately ran off the road and the camp host spoke to the driver and offered to call someone to pull the vehicle out; however, before a call was made the driver got the vehicle out and left.

6. The Camp Host called the Sheriff's Office about 9:45 pm and Deputy Holt arrived about 10:14 pm. He and the camp host went to defendant's campsite, Lot 8. The campsite was in disarray and appeared to have been burglarized or vandalized. It had been raining and at this time the rain was heavy. They could not locate the defendant. The deputy suggested they should take the tent down and the rest of the stuff and hold it for the defendant. The camp site host had no place at the camp ground to store the property and it was taken by the deputy to be stored for safe keeping with the deputy advising the camp site host that if the defendant came back to tell him where his property was. No one came back to ask about the items. [*incorrectly numbered in original*]

7. The defendant testified he had not abandoned the site that he customarily left the site to go by foot to a second campsite he had in another camping area in the Cherokee National Forest but outside of the Horse Creek Campground. He further testified that when he returned by foot that evening it was raining heavily, he saw the camp host vehicle driving away and assumed he was making the normal rounds, his stuff was gone and he believed he had been robbed. He did not contact the camp host or law enforcement because he was on the run and avoiding law enforcement.

(R. 10/632-33)

After making the foregoing factual findings, the lower

court denied the motion, concluding, in part:

> The seizure (the court is not certain the word search correctly applies in these circumstances) of the defendant's property will be sustained both on the State's contention that the property was abandoned and also on the State's contention that the property was taken based on exigent circumstances requiring its protection

(R. 10/633)

Now on appeal, Defendant contends that these findings were erroneous. He argues that the State failed to carry its burden of showing that Defendant had abandoned the property and that the seizure cannot be upheld under an "exigent circumstances" exception to the warrant requirement because exigent circumstances cannot justify seizing items that are not contraband or that are not obviously incriminating. Finally, he disputes the deputy's claim that he removed the items from the campsite to protect them when he could have simply placed the items back into the tent or covered them with a tarp.

A trial judge's ruling on a motion to suppress is clothed with a presumption of correctness, with regard to determinations of historical fact. However, appellate courts must independently review mixed questions of law and fact. See Connor v. State, 803 So. 2d 598, 608 (Fla. 2001)(A determination of whether the application of the law to the historical facts establishes an adequate basis for the trial court's ruling is subject to de novo review.) See also Blake v. State, 972 So. 2d

839, 842-843 (Fla. 2007); Nelson v. State, 850 So. 2d 514, 521 (Fla. 2003). As the following will show, the trial court properly denied the motion to suppress and the denial should be affirmed by this Court.

The court below thoroughly addressed the law and the facts and explained:

> **Abandonment.** At the time of the taking of defendant's property from lot 8 his rental period had been paid for and had not expired. The defendant had a reasonable expectation of privacy in the tents, see United States v. Gooch, 6 F.3d 673 (9th Cir. 1993), unless he had abandoned the site. It is clear he abandoned the site before the end of the period that had been paid for. He abandoned it either before the officer and the camp host took the property or shortly thereafter when he claims to have discovered it missing and left without inquiring of the camp host or reclaiming the property. The critical factual determination is when the abandonment took place. Some of the things the court has considered are as follows:
>
> The defendant had earlier come to the attention of law enforcement and he was a fugitive from justice. Considering his circumstances it appears unlikely he would be staying to present his identification to law enforcement, as he believed he was expected to do. The most valuable items had been removed from the campsite either by theft or by his arrangement. The idea of a theft as he had testified is a little too convenient. Why would a thief appear at a time when a camper would be expected to be in residence, pick just this site in the dark and conveniently take the property just when the defendant needed to leave the site because he had come to the attention of law enforcement? Also the manner of the removal appears to have been the only practical way he could recover his property without risking again coming to attention of law enforcement. His testimony that he returned to the campsite at night by foot through the woods in a heavy rain is also questionable. Having considered the matter, the court is of the opinion that the most creditable

> evidence supports a finding that he abandoned the site with the removal of the bulk of his property by an associate acting at his direction and therefore, at the time the deputy and camp host took the remaining property for safe keeping he had abandoned the site and the remaining property.
>
> The test for abandonment in search and seizure law is whether a defendant voluntarily relinquished his interest in the property in question so that he could no longer retain a reasonable expectation of privacy with regard to it at the time of the search, State v. Lampley 817 So.2d 989 Fla.App.4 Dist., 2002. The court finds the state has meet its burden of proving such an abandonment and that such abandonment occurred before the deputy and the camp host secured the remaining property.
>
> **Exigent Circumstances:** Police may enter defendant's property without a warrant if an objectively reasonable basis exists for the officer to believe that there is an immediate need for police assistance for the protection of life or substantial property interests." Seibert v. State, 923 So.2d 460,468 (Fla.2006). In the instant circumstances the officer accompanied by the park host had an objectively reasonable basis to believe the defendant's property was endangered and in the heavy rain acted reasonably to protect and preserve the remaining property from the elements and possible theft.
>
> ORDERED AND ADJUDGED as follows:
>
> 1. The defendant's Motion To Suppress Unlawful Search is denied.

(T. 10/633-34)(emphasis added)

Curiously, Defendant contends that because the State did not present any direct evidence Defendant, or someone acting on his behalf, took the property or that Defendant intended to leave and not return, there was no evidence of abandonment and

the officer had no reason to take the property.[14] Defendant's argument misses the point. The officer testified that he only removed the items in order to secure them for the Defendant. The officer was not conducting a search but rather was fulfilling his function as a community caretaker. As this Court explained in Seibert:

> A warrantless search of a home is per se unreasonable and thus unconstitutional under the Fourth Amendment. Coolidge v. New Hampshire, 403 U.S. 443, 454-55, 91 S. Ct. 2022, 29 L. Ed. 2d 564 (1971). However, several exceptions to this rule have developed. One exception is the presence of an emergency situation which requires the police to assist or render aid. See Mincey v. Arizona, 437 U.S. 385, 392, 98 S. Ct. 2408, 57 L. Ed. 2d 290 (1978) ("[T]he Fourth Amendment does not bar police officers from making warrantless entries and searches when they reasonably believe that a person within is in need of immediate aid."). Under this exception, police may enter a residence without a warrant if an objectively reasonable basis exists for the officer to believe that there is an immediate need for police assistance for the protection of life or substantial property interests. Rolling v. State, 695 So. 2d 278, 293-94 (Fla. 1997). It is immaterial whether an actual emergency existed in the residence; only the reasonableness of the officer's belief at the time of entry is considered on review. State v. Boyd, 615 So. 2d 786, 789 (Fla. 2d DCA 1993). However, this search must be "strictly circumscribed by the exigencies which justify its initiation." Mincey, 437 U.S. at 393 (quoting Terry v. Ohio, 392 U.S. 1, 26, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968)). Thus, an officer must cease a search once it is determined that no emergency exists. Rolling, 695 So. 2d at 293.

Seibert v. State, 923 So. 2d 460, 468 (Fla. 2006)(emphasis

[14] Notably, the car that removed Defendant's possessions was registered to Nicole Miller, 20860 State Route 34, in Telford, Tennessee. (T. 8/1514)

added).

Deputy Holt testified that when he saw that the campsite had been vandalized or burglarized "or something," he determined that the best thing to do was take the property into custody for "safekeeping" to preclude someone from coming back and taking the rest of the stuff in case it was a burglary. He told Mr. and Mrs. Reaves that if the owner came back to get it, he was more than welcome to come to the sheriff's department and get it. (T. 10/514, 524-25) A couple of days later, when no one showed up to get the property, they tried to figure out what was going on. He did an inventory which was two pages long, he looked through the briefcase for identification to return the property to the owner but could not find any, so he spoke with forest service law enforcement and they said to hold onto it for a while to see if anybody claimed it. He also totaled up receipts in an effort to figure out what had happened. (T. 10/515, 524-26) Defendant's own testimony established that by the time Deputy Holt inventoried the items, Defendant had abandoned the property. Defendant testified that when he came back and saw that his items were gone, he did not contact the camp hosts or the police to recover his property, even though he said he saw Mr. Reaves making his nightly rounds of the area when he returned. Defendant testified that he did not contact them because he was a wanted fugitive and "on the run." (T.

10/543-44) Thus, there is no question, that at the very least he abandoned it when he returned even if the court believed his contention that he had no reason to leave because he had identification in the name of Brian Wagner so there was no reason for the officer to suspect him. (Initial Brief of Appellant at p. 65)[15] Thus, contrary to Defendant's attempt to circumvent evidence that he abandoned the property by arguing that the police and the camp hosts should have left the property where it was after discovering that it had been ransacked and, therefore, it would have been there for him to recover when he returned, the officer's efforts to secure the property are consistent with his responsibilities to protect Defendant's property interest until it became evident that he had abandoned same. Rolling v. State, 695 So. 2d 278, 293-94 (Fla. 1997).

Defendant's suggestion that the trial court cannot make a finding that the evidence was abandoned unless there is direct evidence of intent, is without basis. Clearly, the trial court can rely upon circumstantial evidence in support of his ultimate legal conclusion. "It has long been established that circumstantial evidence is competent to establish the elements of a crime, including intent." State v. Castillo, 877 So. 2d

[15] This argument defies logic. If he was not concerned about the officer being suspicious beforehand, then there would be no reason for the officer to suspect him after he had secured the items for him.

690, 693-694 (Fla. 2004), *citing*, Moorman v. State, 157 Fla. 267, 25 So. 2d 563, 564 (Fla. 1946)("It is too well settled to require citation of authorities that any material fact may be proved by circumstantial evidence, as well as by direct evidence."); and, State v. Waters, 436 So. 2d 66, 71 (Fla. 1983)("The element of intent, being a state of mind, often can only be proved by circumstantial evidence.") See also Webb v. Blancett, 473 So. 2d 1376, 1378 (Fla. 5th DCA 1985)(finding that evidence of parental abandonment can be established by circumstantial evidence.)

Moreover, this Court has repeatedly held that when reviewing a trial court's ruling on a motion to suppress, the appellate "court must interpret the evidence and reasonable inferences and deductions derived therefrom in a manner most favorable to sustaining the trial court's ruling." Schoenwetter v. State, 931 So. 2d 857, 866 (Fla. 2006), *citing* Rolling v. State, 695 So. 2d 278, 291 (Fla. 1997) and McNamara v. State, 357 So. 2d 410, 412 (Fla. 1978)). The trial court made "reasonable inferences and deductions" in reaching the conclusion that Defendant had left the area to avoid further confrontation with law enforcement when he admitted that he did not attempt to retrieve the property because he was a fugitive and that the sudden removal of his most valuable property right after his encounter with the officer who said he would return to

examine his identification was just a "little too convenient." This conclusion is supported by competent substantial evidence.

Further, the lower court applied the correct legal standard to the facts in reaching the conclusion that Defendant had abandoned the property. As the lower court recognized, the test for abandonment is "whether a defendant voluntarily discarded, left behind, or otherwise relinquished his interest in the property in question so that he could no longer retain a reasonable expectation of privacy with regard to it at the time of the search." State v. Lampley, 817 So. 2d 989, 991 (Fla. 4th DCA 2002)(quoting 14A Fla.Jur.2d Abandoned Property § 633 (2001)). See also Branch v. State, 952 So. 2d 470 (Fla. 2006)(Denying claim of ineffective assistance of counsel where trial court found that the circumstances that existed at the time supported both the legality of the seizure and search of the vehicle and that defendant had abandoned the car.) Since Defendant wholly failed to avail himself of the opportunity to retrieve the property once he discovered it was missing the trial court properly found that he "relinquished his interest in the property in question so that he could no longer retain a reasonable expectation of privacy with regard to it at the time of the search." State v. Lampley, 817 So. 2d 989, 991 (Fla. 4th DCA 2002)

The motion to suppress was properly denied. Even if this

Court should find otherwise, admission of this evidence was harmless. The receipts were only introduced to establish that Defendant had substantial cash and/or assets that he did not have prior to the murder. First, his testimony did not refute that he made the purchases or that he paid cash. In fact, he specifically affirmed that he had paid cash and explained that he had cash from his drug dealing. (T. 11/1978-81, 1995-97) Similarly, Deputy Holt and the campsite hosts were also able to testify that Defendant had the same expensive items reflected in the receipts, including a cellphone, screen tents and a generator which would add to the evidence Defendant robbed and murdered David Thomas. (T. 8/1380, 1390, 1413-17, 1451)

ISSUE IV

THE TRIAL COURT PROPERLY PRECLUDED EVIDENCE CONCERNING THE VICTIM

Defendant next argues that the trial court erred in precluding the defense from presenting hearsay testimony concerning the character and other bad acts of the victim.[16] The admissibility of evidence is within the sound discretion of the trial court, and the trial court's ruling will not be reversed

[16] On January 12, 2007, the court held a hearing on the State's motion in limine to preclude reference to the victim's arrest, allegations of fraud and drug use or dealing. The motion was granted as to his arrest and allegations of fraud with the understanding that it could be revisited if it later became relevant and that a proffer would be made. (R. 11/693-702, 718) The court reserved ruling on whether the victim's statement about going to Ft. Myers was admissible. (R. 11/711, 718)

unless there has been a clear abuse of that discretion. Ray v. State, 755 So. 2d 604, 610 (Fla. 2000); Zack v. State, 753 So. 2d 9, 25 (Fla. 2000); Cole v. State, 701 So. 2d 845 (Fla. 1997); Jent v. State, 408 So. 2d 1024, 1039 (Fla. 1981); General Elec. Co. v. Joiner, 522 U.S. 136, 118 S. Ct. 512, 517, 139 L.Ed.2d 508 (1997)(stating that all evidentiary rulings are reviewed for "abuse of discretion"). Evidence of a victim's character is generally inadmissible. Hayes v. State, 581 So. 2d 121, 126 (Fla. 1991). While character evidence of the victim is admissible under section 90.404(1)(b) when a claim of self-defense is made, see Dupree v. State, 615 So. 2d 713 (Fla. 1st DCA 1993), Defendant was not seeking to establish self defense but, rather, to establish his theory of defense "that someone else committed the murder, and that Thomas was killed either because he had conspired to kill [his wife] Lehmann or that his activities involved the highly dangerous activity of drug dealing." (Appellant's Initial Brief at 75) Under these circumstances inquiry into collateral matters, wholly unrelated to the instant case are properly excluded. Breedlove v. State, 580 So. 2d 605, 609 (Fla. 1991). See also Mendoza v. State, 964 So. 2d 121, 130 (Fla. 2007)(finding that evidence that the deceased victim was a bolitero was improperly excluded). As the following will show, the trial court did not abuse its discretion in precluding the admission of the irrelevant,

prejudicial hearsay testimony.

First, Defendant complains that the trial court erred in precluding questions of the victim's wife, Mary Ann Lehman, concerning the victim's arrest for conspiracy to kill her in 1998. During the proffer of Lehman's testimony, she explained that she learned he was having an affair with Patricia Sweeney from police because he was arrested for conspiracy to kill her. She testified in the proffer that the police told her they had audio and video tapes but they would not show them to her. They also told her the plot was to poison her wine but the charges were dropped shortly after the arrest because they had insufficient evidence. (T. 4/647-651) In the proffer she explained on cross that she stayed with Thomas and that she did not believe he was going to kill her because he was never violent toward her, verbally or physically. (T. 4/653) First, Lehman's testimony was based strictly on hearsay. Hearsay evidence of arrest is not admissible. White v. State, 301 So. 2d 464, 465 (1st DCA 1974). As the evidence was not admissible, the trial court did not abuse its discretion in excluding it. Moreover, the defense made no attempt to connect the victim's unrelated arrest that happened four years before the instant crime to the instant crime. As it was not relevant in time nor place to the instant crime, it was properly excluded. Breedlove v. State, 580 So. 2d 605, 609 (Fla. 1991)(inquiry into

collateral matters, wholly unrelated to the instant case are properly excluded); Delaware v. Van Arsdall, 475 U.S. 673, 679 (1986)(trial court has wide latitude to limit cross-examination based on concerns about prejudice, confusion of the issues or interrogation that is only marginally relevant.) As the court in Slocum v. State, 757 So. 2d 1246 (Fla. 4th DCA 2000), explained:

> To open the door to evidence about an unrelated case was to create a trial within a trial; there was a risk that the trial would be needlessly lengthened and that the additional evidence would obscure the discovery of the truth. See § 90.612(1), Fla. Stat. (1999). To have stepped into the quicksand of the other homicide case would have sunk this trial into litigation over the myriad details of a completely unrelated homicide. Even relevant evidence is inadmissible if "its probative value is substantially outweighed by the danger of . . . confusion of issues [or] misleading the jury. . . ." § 90.403, Fla. Stat. (1999). We find no abuse of discretion in the trial court's refusal to permit cross-examination concerning the unrelated homicide case.

Slocum v. State, 757 So. 2d 1246 (Fla. 4th DCA 2000).

Defendant further complains that the court also prohibited him from presenting proffered testimony from Jennifer Morrison suggesting Thomas was using drugs or that he accepted sexual favors in lieu of rent. (Appellant’s Initial Brief at p. 75) Actually, the record shows that on January 23, 2007, Jennifer Morrison, the Defendant’s niece, testified for the State that she and her fiancé, David Twomey, introduced the Defendant to the victim David Thomas. David Thomas was her landlord and he

hired her uncle, Mark Twilegar, as a handyman. (T. 7/1339-40) She testified on cross that she sometimes worked for David Thomas collecting rents. When she was asked if Thomas sniffled a lot, the State objected, pointing out that in her deposition the witness indicated that she never saw him use drugs. Defense counsel responded that they were just trying to have her testify that Thomas sniffled, was skinny, never ate, that he was hyper and he smoked a lot of cigarettes and let the jury draw its own conclusion. The court sustained the objection and agreed that Defendant could proffer the testimony. The court also sustained objections to questions concerning Thomas having sexual relations with tenants and speculation regarding Mary Ann Lehman's bruises. (T. 7/1351-52, 1355-56) Defendant then proffered Morrison's testimony. She testified in the proffer that Thomas sniffled, was skinny, never ate and chain smoked and that based on these observations she and David Twomey believed Thomas was on cocaine. (T. 7/1358) She testified that she witnessed him having sexual relations with one of the tenants of his apartments in lieu of back rents. (T. 7/1359-60, 1364) On cross she admitted she never saw him ingest any type of narcotics and that although she had heard of other sexual encounters she only witnessed it the one time two months before he left to go to Alabama. (T. 7/1362-64) After the proffer, defense counsel argued that the evidence of sex and drug use was

relevant because it would show that other people had a reason to harm the victim. (T. 7/1365) The trial court sustained the objection to the testimony as neither relevant nor probative. (T. 7/1368) Days later, after the defense put on its case in chief, defense counsel informed the court that they had planned to call two witnesses, Patricia Sweeney and David Twomey. Based on statements she made to the defense investigator, Patricia Sweeney was called to testify as to the conspiracy case against the victim, that she saw him use cocaine and that she had seen him and a business associate waving guns at each other in 1998, but she refused to come. (T. 11/2098) David Twomey, Jennifer Morrison's fiance, showed up to testify but was under the influence and had trouble focusing on anything they asked him. Counsel alleged that Twomey was called to testify that "sometime" prior to Thomas' disappearance, Twomey had seen him at a Hess Mart and Thomas told him, "If anybody asks you haven't seen me." (T. 11/2099) Judge Thompson explained that while he could have someone arrested for failing to appear, since he had already ruled the evidence was inadmissible, there seemed to be no need to delay the trial and issue a writ. (T. 11/2100) As with the evidence concerning Thomas' prior arrest, the trial court correctly concluded that the testimony was not relevant. Relevant evidence is defined by § 90.401, Fla. Stat. as "evidence tending to prove or disprove a material fact." See

Mendoza v. State, 964 So. 2d 121, 130 (Fla. 2007)(excluding evidence that victim engaged in illegal gambling). Where, as here, the evidence is nothing more than an attempt to confuse the issue of Defendant's guilt by suggesting through hearsay and innuendo that there may be others who would do the victim harm because he was "skinny and hyper," had been seen having a sexual encounter with a tenant once and on one occasion did not want it known that he was at a Hess Mart, it is not relevant to the ultimate issue of Defendant's guilt.

Notably, even in cases was there is credible evidence of drug use by a testifying witness, this Court in Edwards v. State, 548 So. 2d 656 (Fla. 1989), held that evidence of drug use by the witness for purposes of impeachment would be excluded unless: (a) it could be shown that the witness had been using drugs at or about the time of the incident that was the subject of the testimony of the witness; (b) it could be shown that the witness was using drugs at or about the time of the testimony itself; or (c) it was expressly shown by other relevant evidence that the prior drug use affected the witnesses ability to observe, remember, and recount. The evidence here was not sought for this purpose but, rather, went merely to the victim's character. Again, evidence of a victim's character is generally inadmissible. Hayes v. State, 581 So. 2d 121, 126 (Fla. 1991). See also, State v. Hamner, 942 So. 2d 433, 436 (Fla. 4th DCA.

2006)(Affirming trial court's ruling precluding defense from questioning the victim about her use of pain medication unless defense could show that it was relevant to the night of the incident.)

Defendant next argues that the court also erred in precluding him from introducing bank records from Thomas' and Lehmann's Alliant bank account in Montgomery from October, 2001, to July, 2002 to show that it was unusual for anyone to withdraw large amounts of cash, and therefore, "something else may have been happening at the time Thomas was killed" and to show "that witnesses may not have been candid about Thomas' business practices." (Appellant's Initial Brief at p. 74; T. 10/l957-59; 23/1986-99) The trial court did not abuse its discretion in sustaining the objection based on a finding that the evidence was not relevant and that any probative value, of which he concluded there was none, would be outweighed by the possibility of confusion. (T. 10/l962) Discretion is abused only when the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable person would take the view adopted by the trial court. See Trease v. State, 768 So. 2d 1050, 1053 n. 2 (Fla. 2000). The exclusion of this evidence was entirely reasonable.

Finally, even if it was error to preclude Defendant from exploring these collateral matters, it would be harmless in

light of the fact that it went solely to the victim's character and did not undermine any of the evidence presented which established that Defendant was responsible for the instant homicide.

ISSUE V

EVIDENCE OF FLIGHT WAS PROPERLY ADMITTED

Defendant next contends that the trial court erred in denying a motion in limine to preclude the admission of evidence of Defendant's leaving Ft. Myers and, subsequently, the Tennessee campground, as evidence of flight. "To be admissible, evidence of flight after a crime has been committed must be relevant to consciousness of guilt that can be inferred from the circumstances of the case." Penalver v. State, 926 So. 2d 1118, 1133 (Fla. 2006), *citing* Escobar v. State, 699 So. 2d 988, 995 (Fla. 1997). "The interpretation of an act of flight 'should be made with a sensitivity to the facts of the particular case.' Id. at 1133" (*quoting*, Escobar at 996, quoting Bundy v. State, 471 So. 2d 9, 21 (Fla. 1985)). The admissibility of evidence is within the sound discretion of the trial court, and the trial court's ruling will not be reversed unless there has been a clear abuse of that discretion. Ray v. State, 755 So. 2d 604, 610 (Fla. 2000); Zack v. State, 753 So. 2d 9, 25 (Fla. 2000); Cole v. State, 701 So. 2d 845 (Fla. 1997); Jent v. State, 408 So. 2d 1024, 1039 (Fla. 1981); General Elec. Co. v. Joiner, 522

U.S. 136, 118 S. Ct. 512, 517, 139 L.Ed.2d 508 (1997)(stating that all evidentiary rulings are reviewed for "abuse of discretion"). As the following will show, the evidence was properly admitted and, therefore, no abuse of discretion has been shown.

First, Defendant's claim overlooks the fact that the evidence concerning his trip from Florida to Tennessee and his sudden departure from the Tennessee campground after his encounter with Deputy Holt, was not admitted to establish flight but, rather, was inextricably intertwined with the commission of this crime. It is well settled that evidence of uncharged crimes which are inseparable from the crime charged, or evidence which is inextricably intertwined with the crime charged is admissible under section 90.402 because "it is a relevant and inseparable part of the act which is in issue." Sliney v. State, 944 So. 2d 270, 287 (Fla. 2006)(rejecting claim that it was error to admit evidence defendant sold guns stolen from the pawn shop); Gorham v. State, 454 So. 2d 556, 558 (Fla. 1984)(evidence defendant used victim's credit cards and identification of items purchased with those cards was admissible.) See also Walker v. State, 896 So. 2d 712, 719 (Fla. 2005)(possession of recently stolen property involves the fruits of the theft or burglary and is inextricably intertwined with the crime itself.) The State established through receipts found

at the Tennessee campsite that Defendant had purchased several large ticket items on the trip from Florida to Tennessee despite his prior lack of funds or possessions. Thus, the evidence of his actions at the Tennessee campsite and subsequent arrest was inextricably intertwined with the admission of the evidence from the campsite. Similarly, the admission of evidence concerning the date he left town was relevant to establish that he was in town on the last day the victim was seen alive and, therefore, he had opportunity to commit the crime.

Moreover, while Defendant filed a motion in limine that was denied by the court stating that he would permit "them to make any comment they believe appropriate from that evidence" and "would not exclude the argument that the movement constituted flight." (T. 1/12-13) Defendant points to no place in the record, and undersigned counsel can find none, where he objected to the actual admission of any evidence or argument as being impermissible evidence or argument of flight being evidence of consciousness of guilt. The only thing the motion in limine sought was to exclude "any admission of evidence of flight to show consciousness of guilt" as irrelevant because there was no evidence that defendant knew David Thomas was missing and because there was evidence that he was avoiding capture on a warrant from Missouri." (R. 11/680) Since he did not point to any specific facts which he felt should not have been presented

either in the motion or during trial this claim is not preserved.

In fact, in the instant brief, the only thing he points to as referencing flight is the State's closing argument, which again was not the subject of a contemporaneous objection. Moreover, the context of the closing argument focused on evidence of when the defendant left town, not as consciousness of guilt but, rather, to establish that Defendant was in Ft. Myers on August 7th, the last day that Dave Thomas was seen alive and that Defendant did not leave town until August 8th. (T. 11/2122-23)

Finally, even if this evidence was introduced as evidence of flight, it was admissible as such. As previously noted, evidence of flight, concealment, or resistance to lawful arrest after the fact of a crime is admissible to show the consciousness of guilt which may be inferred from such circumstances where there is a nexus between the flight and the crime for which the defendant is being tried in that case. Escobar v. State, 699 So. 2d 988, 995 (Fla. 1997). Defendant contends that because Thomas was not reported as a missing person and Defendant was not suspected of anything related to this case at the time he left,[17] the evidence of his being in

[17] Not surprisingly since Defendant left town within hours of the homicide.

Tennessee and of his failure to claim his property after the burglary of the items from his campground was explained by his desire to evade arrest on the warrant and by his desire to avoid law enforcement because he was selling drugs.

In the instant case, the facts showed that Defendant left immediately after murdering and burying David Thomas and took measures to evade the police after departing. Under similar circumstances this Court has upheld the admission of flight evidence even where there was evidence that the defendant was sought on other matters. Randall v. State, 760 So. 2d 892, 900 (Fla. 2000)(rejecting claim that State failed to prove that he fled from police to avoid prosecution for the Florida murders as opposed to fleeing to avoid prosecution on charges concerning a Massachusetts probation violation); Freeman v. State, 547 So. 2d 125 (Fla. 1989), in which this Court concluded that it could be reasonably inferred that Freeman fled to avoid penalties for two separate crimes. Shellito v. State, 701 So. 2d 837, 840 (Fla. 1997)(even though defendant committed several robberies between the murder and his arrest, evidence that defendant resisted arrest the day after the murder was admissible as consciousness of guilt of the murder); Duest v. Dugger, 555 So. 2d 849, 852 (Fla. 1990)(even though defendant escaped after being arrested for misdemeanor traffic warrants, evidence of escape could be used as consciousness of guilt of the murder); Bundy v. State,

471 So. 2d 9, 20 (Fla. 1985)(evidence of defendants attempt to flee officers six days after the murder was admissible as consciousness of guilt even though defendant was wanted for several murders in other states). Further, even though Thomas had not been reported missing when Defendant left town, he knew that he had been seen digging at the burial site and it is only logical for him to assume it would only be a matter of time before Thomas' family, girlfriend or business associates would report him missing. Thomas v. State, 748 So. 2d 970, 982-983 (Fla. 1999)("Although Thomas may not have known how close police were to identifying the killer, the case had received publicity and he knew or should have known that Elvord, the other victim in this case, could probably identify him. We hold that the facts in this case present a strong nexus between Thomas's flight and the murder of Skinner.")

Finally, error, if any, is harmless. Brooks v. State, 918 So. 2d 181, 202 (Fla. 2005) and Jackson v. State, 575 So. 2d 181, 189 (Fla. 1991)(finding admission of evidence of flight was harmless, where none of the errors committed were fundamental, none went to the heart of the State's case, and the jury would have still heard extensive and substantial evidence in support of defendant's guilt.) This claim should be denied as procedurally barred, meritless and harmless.

ISSUE VI

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ALLOWING DEFENDANT'S JAILHOUSE PHONE CALLS TO BE ADMITTED

Next Defendant complains that the trial court erred in admitting taped phone calls between him and his mother and Debbie Miller. He contends they did not constitute adoptive admissions and were unduly prejudicial. Again, a "trial judge's ruling on the admissibility of evidence will not be disturbed absent an abuse of discretion." Dessaure v. State, 891 So. 2d 455, 466 (Fla. 2004). It is the State's contention that the trial court did not abuse its discretion in admitting the tape recordings.

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

In the defense motion in limine, Defendant argued that the recordings should either be excluded or that all of them should be played in order to put the conversations in context. The

court noted there were over 300 calls, so it would be necessary to be more specific and withheld ruling. (T. 1/22-28) During the trial, while the State was attempting to lay a foundation for the admission of the calls through the testimony of Investigator Todd Hull from the Tennessee Attorney General's Office, the defense objected and a sidebar conference was held on the issue. (T. 9/1646-47) The State noted that it had given the defense a CD with 239 phone calls on it made between September 27, 2002 and February 10, 2003. (T. 9/1650) The State agreed that certain portions needed to be redacted and had prepared a redacted version. (T. 9/1651) A recess was granted and both parties went through the transcript to determine what the defense wanted redacted. (T. 9/1663-64) Subsequently, the defense requested that everything not said by the Defendant be redacted and the court denied that motion. (T. 9/1666) Without that, the defense then requested that the only thing to be redacted is the statement, "and I was using the name Miller." (T. 9/1666) They did not want the statements about the meth lab to be excluded because they felt it would be misleading to the jury not to have the whole thing in. (T. 9/1668) The State objected and asked the court to go with their redacted version because it would help the State's case without hurting the Defendant as far as his prior record. The court concluded that it was a tactical decision and he would not exclude it if the Defendant wanted it

introduced without waiving his objection to Crawford, the operating system and the authentication. (T. 9/1673-75) A redacted transcript was given to the jury and marked as Court's Exhibit 1. (T. 9/1682-83, 1688)

Now on appeal, Defendant contends that "any statements that pertain to the Missouri warrant or the meth charges are not relevant to this case at all and should have been excluded." (Appellant's Initial Brief at p. 84) It is undisputed that the only reason these portions were put into evidence was because they were requested by defense counsel to put the rest of the conversations into "context." It is the State's position that any contention that this additional evidence was error falls under the invited error doctrine. "Under the invited-error doctrine, a party may not make or invite error at trial and then take advantage of the error on appeal." Goodwin v. State, 751 So. 2d 537, 544 (Fla. 1999) *citing*, Norton v. State, 709 So. 2d 87, 94 (Fla. 1997); Terry v. State, 668 So. 2d 954, 962 (Fla. 1996); Czubak v. State, 570 So. 2d 925, 928 (Fla. 1990); Pope v. State, 441 So. 2d 1073, 1076 (Fla. 1983). Having made the decision to have all of the tape recordings put into evidence over the objection of the State, Defendant cannot now obtain reversal based on that decision. See also Chandler v. State, 702 So. 2d 186, 197 (Fla. 1997)(finding trial court did not err in letting defendant live with consequences of his choices.)

Moreover, there is no support for Defendant's contention that the relevant content of phone calls that he placed from jail was improperly admitted. In general where jailed defendants are fully warned in advance that telephone conversation are being monitored and taped by jail authorities, they are admissible as statement against interests. See Black v. State, 920 So. 2d 668, 670 (Fla. Dist. Ct. App. 5th Dist. 2006)("As Mr. Black knew or should have known that the communication was being overheard, we find no fault in the trial court's ruling that the conversation was not confidential.")

In this Court's decision in Globe v. State, 877 So. 2d 663, 672-673 (Fla. 2004), citing to Crawford v. Washington, 541 U.S. 36 (2004), this Court held that "admissions by acquiescence or silence do not implicate the Confrontation Clause." Id. at 672. Based on Globe, the court in Hernandez v. State, 979 So. 2d 1013, 1016-1017 (Fla. 3d DCA. 2008) held that the trial court could properly admit into evidence any statements by the codefendant during a taped phone conversation that qualified as adoptive admissions by Defendant. See § 90.803(18)(b), Fla. Stat. (reciting hearsay exception for "statement that is offered against a party and is: . . . [a] statements of which the party has manifested an adoption or belief in its truth"). Id. at 1016-1017.

While Defendant disputes that his responses were

affirmations by silence, this contention is not supported by review of the relevant portions of the tape in context. During Defendant's jail calls, he acknowledges that during the time of the calls he was a suspect in Thomas' murder and that he knew that Thomas' body had not been found. (T. 11/2022) When his mother informs him that Thomas was found and that Spencer was talking to the detectives, Defendant acknowledges he will be charged. (T. 9/1724, 1745-46) Also during the calls, Defendant blames Morrison, who talked to Detective Bell, for revealing his whereabouts. He lamented she "dropped a dime on me" as she provided Bell with the information that Defendant was hiding out in Tennessee. (T. 9/1728-29, 10/1805-07)

Moreover, consistent with the State's attempt to narrow the admission of the evidence, the only references to the phone calls were made during closing as follows:

> On the jail calls, Debbie Miller was heard, if you go back and listen to that, you can recall -- you can clearly hear that after she said she knew when he left, which was August 8th, after she says that you can hear the defendant stop, he starts whistling, making some funny kind of noise. She questions it and then, "Oh", and he changes the subject. He knew that he left town on August 8th, and he knew that the victim was killed on August 7th, and he didn't want anyone to know that he was in Fort Myers when the victim was killed. There's no other plausible reason why the defendant would care when he left Fort Myers or whether he was in town on August 8th. (T. 11/2123-24)

Then on rebuttal, the State noted:

> There were some jail calls that were played, and

> in it we heard the defendant say, “So if Chris will shut his F’ing mouth and quit talking. Because he’s talking.” Now, when Mr. Twilegar got up here and testified, he indicated, “Well, I'm just trying to help him because, you know, I’m wanting to help him out.”
>
> Chris wasn't arrested. He wasn’t arrested. There is no indication that he was ever arrested. The only testimony that came out was that he was questioned, and that the reason that they questioned Chris was because they were trying to ascertain the identity of the people and find out their whereabouts.
>
> So his response is, “Oh, yes.” “Is he?” “Oh, yes, he is. He’s talking. And if he will shut up, this will all go away.” And then his mother says, “Well, you know, Spencer -- you know who I’m talking about?” He says, “Yeah.” “Well, he’s running his mouth, too.” “How?” She then says, “Well, they found Dave.” His response was, “Wow, is Dave missing? Where is he?” “Well, they found Dave.” His response is, “Okay.” And then she says, “And Spencer is really running his mouth.” He says, “Right.” “So I don’t know --” Mark’s response, “You got to watch what you say on this phone.” (T. 11/ 2178-79)

Specifically, with regard to the central issue of the date Defendant left, rather than deny the correctness of the date which might inspire Debbie Miller to make further inculpatory statements, Defendant’s attempt to signal her to stop talking indicates his knowledge of the truth of the statement. Further, as to the evidence he contends was truly harmful, the State did not rely upon any statements made during the calls about the meth labs or Defendant’s Missouri warrant.

Further, error, if any, was not only invited but, also, was harmless beyond a reasonable doubt. State v. DiGuilio, 491 So. 2d 1129, 1135 (Fla. 1986).

ISSUE VII

DEFENDANT'S RECEIPTS WERE PROPERLY ADMITTED

As previously noted, in Issue III, evidence obtained from Defendant's campsite in Tennessee included camping gear and receipts. (T. 7/323-24) In addition to contending that the receipts should have been suppressed as the product of an illegal search and seizure, Defendant contends that the contents of the receipts are hearsay and should not have been admitted.

During Deputy Holt's testimony, the items from the campsite were introduced into evidence over a defense objection as to hearsay and lack of authenticating foundation. (T. 8/1457-1459) The court overruled the objection, agreeing that since the receipts were the Defendant's and kept by the him, they could be admitted without testimony from a records custodian. (T. 8/1463-64) Subsequently, when the State began to introduce into evidence, State's Exhibits 163-186, the briefcase and its contents, including an atlas, the receipts, and warranty registration cards, etc. the defense objected claiming a Crawford violation.[18] (T. 8/1482, 1492-95) Defendant complained that although the State had listed the custodian of records for

[18] Defendant does not present his Crawford claim in the instant brief. Nevertheless, the State notes Crawford applies only to testimonial statements and the Crawford Court specifically identified business records as an example of "statements that by their nature were not testimonial[,]" and, thus, not subject to Confrontation Clause scrutiny. Crawford, 541 U.S. at 56.

Wal-Mart and for NAPA as witnesses, they had no one to cross-exam because the court had found them to be the Defendant's business records. The court clarified that he did not know if this was a correct interpretation because he did not know if a person has business records. (T. 8/1484) The court concluded that by virtue of them being in the Defendant's possession it was sufficient to introduce them at that time. (T. 8/1485)

Subsequently, the State presented the testimony of Jennette Scott and Buddy Kolb, from Wal-Mart to authenticate the Wal-Mart receipts. Ms. Scott testified that she worked as a cashier at the Wal-Mart in Johnson City, Tennessee. (T. 9/1579-80) Ms. Scott was a Wal-Mart cashier on one of the receipts from her store. She identified the receipt as having her cashier number and her store number. (T. 9/1582) The receipt was for $300 and included the purchase of a screen house, a stove and camping equipment. (T. 9/1583) She remembered the man who bought the items as wearing Army pants, with a tan, sunglasses, middle-aged and built. She remembered asking him if he was going camping, to which he responded, "that's where I am living." She recalled that he had three crisp new $100 bills. (T. 9/1584-85) She identified State's Exhibits 185, 180 and 174 as being from the Wal-Mart store where she worked based on the store number, the phone number and the manager's name contained on the receipt. Each of the receipts reflected that cash had been paid for the

items. (T. 9/1586-88)

Buddy Kolb testified that he was a store manager at a Wal-Mart in Greenville, Tennessee. He had been a manager for Wal-Mart for twenty-three years and was familiar with the Wal-Mart receipting process. (T. 9/1595) He was shown State's Exhibits 171, 172, 175, 176, 178, 179, 183 and 184 which had previously been moved into evidence. (T. 9/1597) He identified each of the receipts as being from his store in Greenville, Tennessee. (T. 9/1598-1604) He was also able to identify State's Exhibits 169, 166, 167 and 168 as being generated by Wal-Mart based on the format, the information, the bar code and the receipt paper. (T. 9/1605)

Similarly, Frank Qualls from NAPA in Greenville, Tennessee, testified that the NAPA invoice found and admitted as State's Exhibit 192, was an invoice from his store and it was a record that he kept in the regular course of business. (T. 9/1546-47) He also described the transaction as occurring on August 22, 2002 for repairs on a 1985 Jeep Cherokee. (T. 8/1546) He testified that a lady called for a price on an engine and then she later came into the store and wanted to pay him in cash the $1279 for a rebuilt engine up front. Additionally he told her there would be a core charge of $300 if they did not bring the core in. (T. 8/1549-52) She also ordered a distributor which she paid for and had a man pick up when it came in on the 26th of

August. At that time, the man paid for the core and a water pump in cash. (T. 8/1555-56) On September 4, 2002, the man returned with the engine core. He was middle-aged and driving the Jeep Cherokee and had a white pit-bull with him. (T. 8/1557-59)

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

First, while Defendant did object to the admission of the exhibits through the testimony of Deputy Holt, no objection was tendered after the State presented the Wal-Mart or NAPA records custodians to complain that it was an insufficient authentication of the records. As such, Defendant cannot now obtain relief based on that aspect of the claim.

Further, even if the claim was not procedurally barred, a review of the relevant testimony shows that the Wal-Mart and NAPA receipts were properly authenticated as required by Section 90.803(6), Florida Statutes. As the court in Forester v.

Jewell, 610 So. 2d 1369, 1373 (Fla. 1st DCA. 1992), explained:

> The business records exception to the hearsay rule, Section 90.803(6), Florida Statutes (1987), authorizes admission of certain written material made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity and if it was the regular practice of that business activity to make such memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the sources of information or other circumstances show lack of trustworthiness.
>
> In order to lay a foundation for the admission of a business record, it is necessary to call a witness who can show that each of the foundational requirements set out in the statute is present. 1 Charles W. Ehrhardt, *Florida Evidence* § 803.6, at 585 (2d ed. 1991) (hereinafter "Ehrhardt"). It is not necessary to call the person who actually prepared the document. The records custodian or any qualified witness who has the necessary knowledge to testify as to how the record was made can lay the necessary foundation. *Id.*
>
> Forester v. Jewell, 610 So. 2d at 1373.

Moreover, "'in order to prove a fact of evidence of usual business practices, it must first be established that the witness is either in charge of the activity constituting the usual business practice *or is well enough acquainted with the activity to give the testimony.*' Alexander v. Allstate Insurance Company, 388 So. 2d 592, 593 (Fla. 5th DCA 1980). The trial judge has 'broad discretion in determining if the evidence adduced laid the proper foundation for reception under section 92.36(2), Florida Statutes, F.S.A. [Business Records Exception].' The Mastan Co., Inc. v. American Custom Homes, Inc., 214 So. 2d 103,

111 (Fla. 2d DCA 1968);" Specialty Linings, Inc. v. B.F. Goodrich Co., 532 So. 2d 1121, 1121-1122 (Fla. Dist. Ct. App. 2d Dist. 1988)(emphasis added).

In the instant case, the State properly authenticated the Wal-Mart and NAPA receipts by producing the employees who testified as to the normal course of business concerning the receipts, their formats and the information contained therein that authenticated them.

Further, while Defendant contends that he cannot cross-exam anyone concerning the content of the receipts, the only real claim he has is that the State argued they were evidence that he purchased those items with cash even though the store receipts did not contain Defendant's name or other identification. This is not a question of admissibility but goes to weight of the evidence. To be admissible the documents do not need to identify him as the purchaser but, rather, it only qualifies as circumstantial evidence that, when considered with all of the other evidence, establishes Defendant's guilt of the instant crime. In this case, the State presented not only the receipts but also the testimony of both Ms. Scott and Frank Qualls who were able to give identifying information which tied Defendant to those receipts, thus, rendering any deficiency harmless. It would also be harmless because Deputy Holt and the campsite hosts were also able to testify that Defendant had the same

expensive items reflected in the receipts, including a cellphone, screen tents and a generator which would add to the evidence Defendant robbed and murdered David Thomas. (T. 8/1380, 1390, 1413-17, 1451)

Defendant also contends that the failure to produce a witness from 7-Eleven to authenticate the receipt was harmful. He contends that without the 7-Eleven receipt, the State probably would not have evidence to show when Defendant left Morrison's residence. To the contrary as the prosecutor's closing shows, Jennifer Morrison testified at length concerning her trip to the 7-Eleven to purchase cellphones with Defendant and the fact, that after they returned home and she went to sleep, he and her grandmother had moved out. (T. 7/1341-43) Moreover, there was no dispute that Defendant had cellphones as Deputy Holt testified he had one when he met him at the campsite and Defendant admitted he had purchased same. Further, Defendant never contended that he was not in Ft. Myers on the day of the murder. Thus, even if it was necessary to have records custodians verify that the 7-Eleven receipt was actually a 7-Eleven receipt, error, if any, was harmless.

Moreover, while Defendant complains that he was prejudiced by the admission of this evidence because he had to testify to explain the receipts, his testimony did not refute that he made the purchases or that he paid cash. In fact, he specifically

affirmed that he had paid cash and explained that he had cash from his drug dealing. (T. 11/1978-81, 1995-97) Thus, the evidence merely precluded Defendant from presenting false testimony which he has no constitutional right to do. Arriving at the truth is a fundamental goal of our legal system. Oregon v. Hass, 420 U.S. 714, 721-722 (U.S. 1975)(shield provided by Miranda cannot be perverted into a license to use perjury) "When defendants testify, they must testify truthfully or suffer the consequences." United States v. Havens, 446 U.S. 620, 626 (U.S. 1980). "This is true even though a defendant is compelled to testify against his will. Bryson v. United States, 396 U.S. 64, 72 (1969); United States v. Knox, 396 U.S. 77 (1969)." Id. at 626. Thus, since there is no dispute as to the validity of the receipts, any error in admission and authentication of same would be harmless.

Defendant also complains about the order of proof in the instant case. He contends that the receipts should not have been introduced through Deputy Holt's testimony. At that point in the proceedings the receipts were admissible as evidence recovered from the Tennessee campsite and were not being offered for the truth of the matter asserted. See Breedlove v. State, 413 So. 2d 1, 6 (Fla. 1982)("Merely because a statement is not admissible for one purpose does not mean it is inadmissible for another purpose."); Dias v. State, 812 So. 2d 487, 495 (Fla. 4th

DCA 2002)("A statement inadmissible as hearsay can still be admissible for another reason, such as for impeachment purposes."). Later, after the receipts were identified by the Wal-Mart personnel, the content became relevant to establish what items were purchased and that they were paid for with cash. Moreover, even if the items should not have been admitted until the Wal-Mart employees could authenticate them, error, if any is harmless. Cf. State v. Hodges, 169 So. 2d 361 (Fla. 3rd DCA 1964)(trial court authorized to regulate the order of the introduction of evidence and its discretion in such matters will only be interfered with by an appellate court where clearly abused or the rights of the accused clearly have been injuriously affected.); Honchell v. State, 257 So. 2d 889, 890 (Fla. 1971)(the trial judge in his discretion may permit the order of proofs to be reversed, conditional on the prosecutor subsequently furnishing adequate proof of the conspiracy itself.)

This claim should be denied as barred, meritless and harmless.

ISSUE VIII

THE FINDING OF CCP AND PECUNAIRY GAIN WERE PROPER; DEFENDANT'S DEATH SENTENCE WAS PROPORTIONATE

Defendant asserts that the trial court erred in finding CCP, pecuniary gain and that in the absence of these aggravators the death sentence is not proportionate. The trial court's sentencing order should be upheld as it properly found both aggravating circumstances. Further, the death sentence is proportionate.

This Court's review of a trial court's finding regarding an aggravator is limited to whether the trial court applies the correct law and whether its finding is supported by competent, substantial evidence. Willacy v. State, 696 So. 2d 693, 695 (Fla. 1997); see also Cave v. State, 727 So. 2d 227, 230 (Fla. 1998). In finding CCP, the trial court stated:

> **4. The capital felony was a homicide and was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. Florida Statute 921.141(5)(i).**
>
> The Court finds this aggravating circumstance has been proven beyond a reasonable doubt and further finds it should be given very great weight.
>
> Evidence, the reasonable inferences from it and facts that are material to this aggravating circumstance are as follows:
>
> (1) Mark Twilegar became aware David Thomas had a large sum of money in his possession. He devised a plan get that money. The plan included the murder of David Thomas

(2) The Defendant dug a hole for David Thomas' body before David Thomas's expected arrival at Mark Twilegar's living location, he forced him to stand or kneel in or next to the grave, killed him with a single shotgun blast to the back, and then began his burial while he was dying. All of the forgoing was in furtherance of a careful plan and prearranged design to kill David Thomas and obtain his money.

A murder is cold, calculated, and premeditated, for use as death penalty aggravator, when the evidence shows that the killing was the product of cool and calm reflection and not an act prompted by emotional frenzy, panic, or a fit of rage; "cold," meaning that the Defendant had a careful plan or prearranged design to commit murder before the fatal incident; "calculated," meaning that the Defendant exhibited heightened premeditation; "premeditated," meaning that the Defendant had no pretense of moral or legal justification. See Diaz v. State, 860 So. 2d 960 (Fla. 2003). The facts of this case establish this aggravating circumstance beyond a reasonable doubt.

(R. 21/1885-86)

As seen from the foregoing, the trial court properly set forth the test that this Court established in Jackson v. State, 648 So. 2d 85, 89 (Fla. 1994)(killing product of cool and calm reflection and not an act prompted by emotional frenzy, panic, or a fit of rage (cold) and Defendant had a careful plan or prearranged design to commit murder before the fatal incident (calculated), and Defendant exhibited heightened premeditation (premeditated) and Defendant had no pretense of moral or legal justification). As such, the trial court applied the correct law. Moreover, its factual findings are supported by the evidence. In addition to those facts argued in issues I and II,

the State would highlight the following facts. Defendant was with Thomas in Alabama when Thomas withdrew $25,000. (T. 4/662-64, 671-25, 728) Defendant returned to Fort Myers with Thomas and the money. (R. 13/829; T. 4/742-47, 751-52, 5/787-88, 799-800, 808-10) The day after returning, Thomas was seen with a large amount of money and Thomas was to take Defendant with him to spend the money. (T. 4/753-54, 779-80, 5/796-98) Prior to Thomas' arrival at Miramar to get Defendant, Defendant would dig Thomas' grave. (R. 13/844-55, 868; T. 6/1023-29, 1036-37, 1099-1100, 1172) Spencer Hartman witnessed Defendant dig in the afternoon and the evidence was that Thomas was with Defendant in the evening. (T. 5/796-97, 6/1024, 7/753-54) Defendant killed Thomas with a single shotgun blast fired at close range. (T. 3/477-79, 492, 7/1326) Defendant then buried Thomas alive, with Thomas struggling for his final breaths. (T. 3/489, 490-91, 501) The sand inhaled matched the sand found atop Thomas' body. (T. 3/465, 490).

This evidence supports the trial court's finding regarding CCP. Since the trial court applied the correct law and its findings are supported by the evidence, its determination that CCP applied in this matter should be affirmed. Willacy, 696 So. at 695; see also Cave, 727 So. 2d at 230; Wike v. State, 698 So. 2d 817, 823 (Fla. 1997)(determination of whether CCP is present is properly based on a consideration of the totality of the

circumstances).

Defendant also asserts that the trial court erred in finding the pecuniary gain aggravator was established in this case based on his unsupported contention that the jury acquitted Defendant of the robbery. However, for the reasons previously stated and presented herein, the trial court properly found the aggravator and that finding should be affirmed. See Allen v. State, 662 So. 2d 323, 330 (Fla. 1995) (pecuniary gain upheld where Defendant acquitted of robbery).

In finding pecuniary gain, the trial court stated:

> **2. The capital felony was committed for pecuniary gain. Florida Statute 921.14 1(5)(f).**
>
> The Court finds this aggravator has been proven beyond a reasonable doubt and further finds it should be given great weight.
>
> Evidence, the reasonable inferences from it and facts that are material to this aggravating circumstance are as follows:
>
> (1) Mark Twilegar and David Thomas traveled together to Montgomery, Alabama in David Thomas' vehicle. Mark Twilegar was to work as a handy man by constructing a deck on the home of David Thomas.
>
> (2) On August 6, 2002, David Thomas withdrew $25,000.00 in cash in $20 dominations from his and his wife's joint bank account in Montgomery Alabama. Mark Twilegar was with him in Alabama but there is no evidence he was physically with him at the time of this withdrawal.
>
> (3) On August 6, 2002, David Thomas and Mark Twilegar returned by car from Alabama. David Thomas's girlfriend had rented a motel room for him at Motel 6 in North Fort Myers. He came by to pickup the motel key for the room at Motel 6 she had rented for him. On

August 7, 2002, David Thomas' girlfriend spoke with him at about 7:00-7:30 PM at the Dollar Store in North Fort Myers. She testified he let her know he and Vinnie (Mark Twilegar) were going to look at a truck. She noticed an amount of money in his wallet that appeared to be more than he usually carried. She further testified David Thomas usually paid cash and that she had never seen him use a credit card.

(4) There was no evidence of any problems or animus between David Thomas and Mark Twilegar or evidence of any motive for the killing other than for Mark Twilegar to get David Thomas's money.

(5) Mark Twilegar killed David Thomas and disposed of his body as elsewhere described previously.

(6) There was either no money or an insignificant amount of money, found on David Thomas's body when it was recovered.

(7) Mark Twilegar left Fort Myers immediately after killing David Thomas on August 7, 2002 and began spending substantial sums of cash totaling approximately $4,613.43 on camping equipment, generators, radios and other items. See receipts found in his personal effects, State's Exhibit's 163-186. The Court specifically notes State's Exhibit 163, 7-11 receipt of 8/8/02, 12:39 am for $688.97, State's Exhibit 171, Wal-Mart receipt of 8/10/02 for $417.31 for miscellaneous items, State's Exhibit 173, Wal-Mart receipt of 8/11/02 for $238.15 for camping equipment, State's Exhibit 174, Wal-Mart receipt of 8/11/02 for $388.18 for camping equipment, and State's Exhibit 181, Sam's Club receipt of 8/14/02 for $435.56 for a generator.

(8) Mark Twilegar had very limited means prior to August 7, 2002. Indeed, his niece testified that his mother had purchased the tent for Twilegar that he had been living in prior to August 7, 2002.

(R. 21/1882-83)(emphasis supplied)

Pecuniary gain is established when the State proves a pecuniary motive for the murder. Hildwin v. State, 727 So. 2d

193, 195 (Fla. 1998); Allen, 662 So. 2d at 330. As seen from above, the trial court correctly applied the law regarding pecuniary gain. Moreover, its findings are supported by competent, substantial evidence as illustrated by the trial court's order and the facts discussed in Issue I.

Defendant insists that pecuniary gain was not established as he explained the source of his new found wealth. Appellant's Initial Brief at p. 93. As noted in Issue I, Defendant was not credible. As such, the trial court was not required to accept Defendant's self-serving statements. Walker v. State, 957 So. 2d 560, 582 (Fla. 2007). Accordingly, both aggravators should be upheld.

Defendant further argues that if either of the aggravators is found to be invalid then his sentence is not proportionate. Appellant's Initial Brief at p. 93. Defendant is mistaken. Each aggravator is supported by competent, substantial evidence and the sentence of death is proportionate.

"Proportionality review compares the sentence of death with other cases in which a sentence of death was approved or disapproved." Palmes v. Wainwright, 460 So. 2d 362, 362 (Fla. 1984). The Court must "consider the totality of circumstances in a case, and compare it with other capital cases. It is not a comparison between the number of aggravating and mitigating circumstances." Porter v. State, 564 So. 2d 1060, 1064 (Fla.

1990), *cert. denied*, 498 U.S. 1110 (1991).

Here, the trial court found two statutory aggravators regarding the murder: (1) the capital felony was committed for pecuniary gain and (2) CCP (R. 16/1882-83, 1885-86). This Court has recognized that CCP is one of the weightiest aggravators available. Larkins v. State, 739 So. 2d 90, 95 (Fla. 1999)(CCP aggravator is one of the "most serious aggravators set out in the statutory sentencing scheme"); see also Maxwell v. State, 603 So. 2d 490, 490 (Fla. 1992)(noting that factor of CCP is of the "most serious of order"). Defendant waived the presentation of mitigation and the only mitigation found was that the Defendant had a disadvantaged and dysfunctional family background and childhood, Defendant had very limited formal education and Defendant abused drugs as a teenager (R. 16/1886-88).

The facts in the instant case are similar those in Marquard v. State, 641 So. 2d 54 (Fla. 1994) where the Defendant lured the victim into the woods and robbed her. This Court found no error in finding CCP and pecuniary gain and upholding the sentence of death. Further, this Court has affirmed other death sentences in cases with comparable aggravation and mitigation. Diaz v. State, 860 So. 2d 960 (Fla. 2003)(aggravators: CCP and prior violent felony; mitigation: both mental mitigators, age, lack of significant criminal history, remorse, and history of

family violence); Hauser v. State, 701 So. 2d 329 (Fla. 1997)(aggravators: HAC, CCP and pecuniary gain; mitigation: no significant history of prior criminal activity, good attitude and conduct in jail, cooperated fully with police, was under the influence of drugs or alcohol and emotional or mental health problems since he was fourteen years old); Shellito v. State, 701 So. 2d 387 (Fla. 1997)(aggravators: prior violent felony and pecuniary gain/commission during a robbery; mitigation: alcohol abuse, mildly abusive childhood, difficulty reading and learning disability); Cummings-el v. State, 684 So. 2d 729 (Fla. 1996)(aggravators: prior violent felony, during the course of a burglary, HAC and CCP; mitigation: none); Melton v. State, 638 So. 2d 927 (Fla. 1994)(aggravators: pecuniary gain and prior violent felony; mitigation: difficult family background and good conduct while awaiting trial); Hayes v. State, 581 So. 2d 121 (Fla. 1991)(aggravators: CCP and committed during course or a robbery; mitigation: age, low intelligence, developmentally disabled and product of a deprived environment); Puiatti v. State, 495 So. 2d 128 (Fla. 1986)(aggravators: avoid arrest, pecuniary gain and CCP; mitigation: none). As such, Defendant's sentence is proportionate and should be affirmed.

ISSUE IX

THE TRIAL COURT PROPERLY ALLOWED DEFENDANT TO WAIVE MITIGATION

Defendant waived the right to present mitigating evidence, and forbade investigation. (R. 6/273-76, 8/371, 10/623, 16/1249-50, 1277) The trial court revisited this issue many times and each time Defendant maintained his waiver. (R. 15/1117, 1119, 16/1248, 17/1299, 1307-08, 1322, 20/1865-67; T. 1/40-43)

In support of his waiver of mitigation Defendant executed an affidavit stating his right to privacy would be violated if counsel was allowed to proceed. (T. 6/273) Further, he stated that mitigation would be "in direct violation of my PROSCRIBED RELIGIOUS EDICTS." (T. 6/273-74) The affidavit was executed September 12, 2006. (T. 6/275) At a subsequent hearing, the trial court was provided with the affidavit. (R. 8/339) Quizzically, trial counsel then relied on the *same* cases to support waiver, appellate counsel now relies upon to defeat waiver. (R. 8/339-41) Appellant's Initial Brief at pp. 95-96. Defendant had every case he now cites and his trial counsel ensured the trial court that he had "thoroughly discussed" the mitigation issue with Defendant. (R. 8/344) When Defendant motioned the court to waive mitigation, the court continued the matter to ensure it understood the waiver issue and the matter was addressed appropriately. (T. R/341-42, 368) The following exchange would later take place:

> THE COURT: Two things, I believe, and correct me if I am wrong, we needed to address. One was Mr. Twilegar's desire to waiver presentation of mitigating evidence?
>
> MR. MCLOUGHLIN: And investigation.

(R. 8/368) When the trial court asked Defendant what he was requesting, Defendant responded:

> THE DEFENDANT: I'm requesting that my counsel do no investigation for mitigation. Do not prepare for it in any way except just to cover themselves. Whatever is statutory that they have to do because I plan on no mitigation at all.

(R. 8/369)

This is not a case where counsel "latched onto" a defendant's request to not present mitigation as an excuse to not investigate. Power v. State, 886 So. 2d 952, 961-962 (Fla. 2004)(affirming where counsel was perfectly poised to proceed with a thorough presentation of mitigating evidence including defendant's background, if allowed him to do so.)

Counsel had already obtained a mitigation specialist who discussed mitigation with Defendant, and a psychiatrist who attempted to meet with Defendant but Defendant refused to cooperate. (R. 8/370-71) Trial counsel informed the court that the Defendant's background may lead to "good mitigation" but he could not complete his investigation, and a "possible good deed" was discovered but counsel was unable to further investigate. (R. 8/371-72) Defendant also refused to cooperate with trial

counsel's attempt to gather mitigation from family and friends. (R. 8/371-72) Counsel informed the court the witnesses he would call would be Defendant's sister, wife and mother. (R. 8/372) Trial counsel ensured the court that he sent Defendant material on mitigation, that he, his co-counsel and the mitigation specialist all discussed waiver with Defendant and the outcome has always been the same. (R. 8/372-73)[19] Defendant decided against a mitigation case. (R. 8/380) Defendant insisted he wished to waive mitigation and investigation, maintaining, "[t]here is just certain things I don't want brought up for any circumstance". (R. 8/378-79) Defendant did not want his background "drug through the dirt". (R. 8/381) "It's my life. It's private and I'm keeping it that way. It's been that way all my life and I'm going to keep it private", Defendant stated. (R. 8/381-82) He would refuse to cooperate with the court ordered pre-sentence investigation. (R. 17/1334, 1337-38) Trial counsel made the record clear that Defendant was intelligent and self-educated. (R. 8/383-85) Counsel ensured the trial court he met with Defendant frequently and there was no question in his mind that Defendant was competent. (R. 10/600) Defendant told the court if convicted he would "rather do the death penalty" than spend the rest of his life in prison. (R. 8/385-86)

[19] Trial counsel met with Defendant dozens of times to discuss mitigation and each time counsel recommended that mitigation should be presented. (R. 8/378)

Defendant wanted to risk a death sentence recommendation over having his background revealed. (R. 8/385-86, 10/597) Trial counsel made clear for the record that he and co-counsel were aware of ABA ethical rules and United States Supreme Court precedent regarding mitigation investigation. (R. 8/389) Counsel argued that if he proceeded with investigation Defendant would "fire us" and he thought that would be of greater harm to Defendant than for him to ignore Defendant's wishes and investigate. (R. 8/389) When questioned by the trial court and the State numerous times if he understood that prohibiting investigation could limit mitigation presented if he later chose to present a case, Defendant replied he understood. (R. 8/373-74, 380, 387-88) Defendant further stated he accepted that his actions barred raising the issue on appeal. (R. 8/388) Defendant swore that he had no history of mental illness. (R. 8/376-77) Defendant's mental faculties were not impaired and he had never been under the care of a mental health professional. (R. 8/377-78)[20] He was taking one prescription for pain caused by diabetes. (R. 8/382, 390) While Defendant did state he was "thumped" on the head in 1992, he suffered from no impairment. (R. 8/382-83) The trial court found Defendant was competent and accepted his waiver. (R. 8/391) An order reflecting same was

[20] Mitigation offered by the State indicated that Defendant had no mental illness and that most recently his IQ was assessed to be 102. (R. 17/1308-10, 21/1912, 1921)

entered. (R. 8/408-13) While the trial court's order allowed Defendant to waive mitigation and further investigation regarding his character and life, Defendant was allowed to present the "mitigation" he wished to the trial court which focused on the character of the victim. (R. 8/408-13) Defendant now criticizes the trial court for its order he urged for below. In Grim v. State, 841 So. 2d 455, 462 (Fla. 2003), this Court reiterated that "all competent defendants have a right to control their own destinies", stating:

> Grim asserts that the trial court should have required special counsel to present mitigating evidence to the penalty phase jury notwithstanding the defendant's vocal objection. In Hamblen v. State, 527 So. 2d 800 (Fla. 1988), we determined that a defendant cannot be forced to present mitigating evidence during the penalty phase of the trial. We reasoned that "all competent defendants have a right to control their own destinies" within the ambit of the rights, responsibilities, and procedures set forth in the constitution and statutes. Id. at 804. We therefore continue to hold that a trial court should not be required to appoint special counsel for purposes of presenting mitigating evidence to a penalty phase jury if the defendant has knowingly and voluntarily waived the presentation of such evidence. See: Nixon v. Singletary, 758 So. 2d 618, 625 (Fla.)("The defendant, not the attorney, is the captain of the ship."), cert. denied, 531 U.S. 980 (2000); Koon v. Dugger, 619 So. 2d 246 (Fla. 1993); Farr v. State, 621 So. 2d 1368 (Fla. 1993).

Grim v. State, 841 So. 2d 455, 462 (Fla. 2003).

Having wrestled control of his destiny, Defendant cannot now complain on appeal error was committed where (1) the trial court did not abuse its discretion in accepting Defendant's

waiver, (2) Defendant did present the mitigation he wished to present and (3) any if error exists, it was created by trial counsel and Defendant and cannot form the basis for relief.

Defendant argues there was no compliance with Koon v. Dugger, 619 So. 2d 246 (Fla. 1993). The requirements of Koon were satisfied. Counsel informed the court of Defendant's decision, informed the court of what mitigation he could possibly present, informed the court which witnesses he would call and the court confirmed on the record trial counsel discussed the issue with Defendant and confirmed Defendant's waiver many times. Trial counsel was aware of mitigation and provided same to the court; more intensive investigation though was precluded by Defendant. As noted by this Court in Chandler v. State, 702 So. 2d 186, 200 (Fla. 1997), the Koon inquiry is not a hyper technical colloquy. A trial court does not err in accepting a waiver where record is clear it is knowing and voluntarily executed and where counsel discussed issue with Defendant and informed court of possible mitigation. Id. at 200; See also Spann v. State, 857 So. 2d 845, 854 (Fla. 2003); Henry v. State, 613 So. 2d 429, 433 (Fla. 1992)(no error arising from knowing and voluntary waiver.) As demonstrated above, Defendant knowingly, voluntarily and intelligently waived the presentation of mitigating evidence. As trial counsel, in the instant case, informed the court of possible mitigation and the court ensured

that Defendant did not blindly waive his rights, there is no error. Chandler.

Despite Defendant's efforts to stymie the court process, the trial court found that Defendant had a disadvantaged and dysfunctional family background and childhood, that Defendant had very limited formal education and that Defendant abused drugs when he was a teenager. (R. 21/1886-90) Additionally, the court considered the alternative punishment to death is life imprisonment without parole. (R. 21/1890) There is no error. See Overton v. State, 801 So. 2d 877, 902-05 (Fla. 2001)(no error where Defendant refused to cooperate and trial court considered mitigation available in record).[21]

Even though as discussed above, Koon was complied with, this case is distinguishable from Koon as Defendant ultimately presented mitigation evidence and testified at sentencing. See Boyd v. State, 910 So. 2d 167, 189 (Fla. 2005). At the Spencer hearing Defendant offered into evidence the Thomas last will and testament and the booking sheet from Thomas' arrest for conspiracy to murder his wife. (R. 17/1327; 21/1902-09)

[21] Notably, this Court has found trial counsel is not ineffective where Defendant does not wish to present mitigation and objects to its presentation. Power v. State, 886 So. 2d 952, 961-62 (Fla. 2004); Cummings-El v. State, 863 So. 2d 246, 266 (Fla. 2003); see also Grim v. State, 841 So. 2d 455, 462 (Fla. 2003)(special counsel not required to present mitigating evidence where Defendant objects).

Additionally, trial counsel had prepared a Spencer memorandum but Defendant refused to allow its presentation, however, the memo along with trial counsel's penalty phase arguments were later offered and accepted into evidence. (R. 17/1307, 17/1391-96, 1400-10) These documents argued Defendant's case against the aggravators. Three days prior, Defendant ensured the trial court again he had discussed mitigation many times with his attorneys, was aware of ABA guidelines and still wanted counsel to stand silent. (R. 16/1248-49) At the final sentencing hearing, the trial court gave Defendant the opportunity again to discuss mitigation with counsel, and offered Defendant a continuance for mitigation but Defendant declined. (R. 20/1865-66) Defendant testified before the court before it announced sentence, the court informing that if anything Defendant said altered the court's sentencing decision, the matter would be continued. (R. 20/1867-68) Defendant expressed sorrow for Thomas' death, criticized the investigation into Thomas' death and maintained his innocence. (R. 20/1869-71) Defendant presented his mitigation and made it clear over and over he did not want counsel to present a mitigation case. There is no error. Boyd.

Lastly, Defendant may not invite error and take advantage of the error on appeal. San Martin v. State, 705 So. 2d 1337, 1347 (Fla. 1997); Czubak v. State, 570 So. 2d 925, 928 (Fla.

1990). Here, Defendant created the exact situation he complains of on appeal. A new penalty phase should not be ordered.

CONCLUSION

In conclusion, Appellee respectfully requests that this Honorable Court AFFIRM Defendant's conviction and sentence.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Cynthia J. Dodge, Assistant Public Defender, P.O. Box 9000-Drawer PD, Bartow, Florida 33831-9000, this 10th day of November, 2008.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

Respectfully submitted,

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