IN THE SUPREME COURT OF FLORIDA

MARK TWILEGAR,	:	
Appellant,	:	
vs.	:	Case No. SC07-1622
STATE OF FLORIDA,	:	
Appellee.	:	
	:	

APPEAL FROM THE CIRCUIT COURT
IN AND FOR LEE COUNTY
STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE AND FACTS

On April 3, 2003, the Grand Jury for the Twentieth Judicial Circuit for Lee County, Florida, filed an indictment charging Appellant, MARK A. TWILEGAR, with the first-degree murder of David H. Thomas by use of a firearm, either by premeditated design or in the course of a robbery. [1:R12-13] He was not charged with robbery. On September 25, 2006, the court conducted a colloquy and found Appellant was competent to make a knowing and intelligent waiver of the right to present evidence in mitigation, [R8:375-392] and the court also accepted Appellant's waiver of all penalty phase investigation. Id. Appellant filed a motion to waive penalty phase jury on January 11, 2007, [R11:757] and before jury selection, the court accepted the waiver. [1:T30-43] Appellant was tried by a jury before the Honorable James R. Thompson on January 16-19 and 23-26, 2007. The facts are as follows:

David Thomas (the victim) owned rental properties in Fort Myers and the Appellant's niece, Jennifer Morrison, and her boyfriend, David Twomey, rented a residence from Thomas. [4:T583; 7:T1339] Twomey was Thomas' property manager, and Morrison collected rents for the two-year period before Thomas' death. [7:T1350-51]

Mark Twilegar (Appellant) came to Florida from Missouri in February or March of 2002, and he lived with Morrison and Twomey for a couple of weeks before he moved to a campground. [7:T1335, 1339] A couple of weeks after the Appellant arrived, his mother, Hazel Twilegar, arrived at Morrison's apartment with a car and

two dogs. [7:T1337-38] Morrison had always known Appellant by the name Vinnie. [5:T966] Mrs. Twilegar stayed with Morrison after the Appellant left. [7:T1338-39]

Twomey introduced Appellant to Shane McArthur, [5:T935; 6:T996] and McArthur got permission from his in-laws, Sandra and William Hartman, for Appellant to live in a tent in a field next to the backyard of the house (412 Miramar) in which he lived with the Hartmans' daughter. [7:T1337] The Hartmans also knew the Appellant as Vinnie. In lieu of rent, Appellant did work on the house, including restoring a burned bedroom, and mowing the lawn. [5:T936, 940; 6:T979-80, 994, 995-96, 1052-53] The property bordered undeveloped land and could be accessed from the area behind it without using the road. [6:T983, 989] The property was also used as a racetrack for ATVs and motorcycles. [6:T989]

Appellant lived in a three-room collapsible tent with a zipper door. [5:T936, 941] There were no toilet facilities in the yard, and Appellant did not use the bathroom in the house. [6:T988, 1006-1007, 1055-56] He used the outside hose for water, and he used electricity from the house. [6:T1007, 1019] He did not have a car, but he had a couch, a television, a VCR, and some clothes. [5:T941, 945; 6:T1019-1020, 1022] Appellant also had a shotgun that hung in a net inside the tent. [5:T942] He had a pit bull dog that he would take with him. [6:T1000] Appellant's mother would visit him almost every day and bring him food and cigarettes. [5:T944] Dave Twomey would also come over and visit and see if Appellant needed anything. [5:T944] The McArthurs moved out of the house in June of 2002, but Appellant remained on

the property. [5:T939; 6T979] Spencer Hartman, the Hartmans' son (who was 26 at the time of trial), moved into the property in September of 2002. [6:T1017] Between the time the McArthurs left and Spencer Hartman moved in, Spencer would go to the property to work on it. [6:T985]

Mr. Thomas was married to Mary Ann Lehman, and the two of them still owned a house in a historic district in Montgomery, Alabama, where they lived before they were married in 1987. [4:T580, 582] The house needed a roof and other renovations, and Thomas wanted to install a deck even though he would need a special permit. [4:T594] Thomas had closed his law practice in Florida, but he was making plans to resume his practice in Alabama. [4:T594]

Morrison and Twomey introduced Appellant to Thomas some time in the Spring of 2002, and Appellant began doing handiwork for him. [7:T1339] He installed a door for Thomas' wife and built a deck around his hot tub. [4:T591, 592] Thomas asked Appellant to go with him to Alabama to install the deck. [4:T594] He and Appellant left in Thomas' pickup truck on August 2, 2002, and they arrived in Montgomery the next day. [4:T593] Thomas told Lehmann he would be in Alabama for six to eight weeks. [4:T594]

At 10:13 on the morning of August 6, 2002, Thomas arrived at the Alliant Bank in Montgomery and withdrew $25,000, insisting that he wanted the money in $20 bills. [4:T677] The bank gave him the money in three separate bank bags, and Thomas told the teller he was going to an auction to buy a house. [4:T677] The teller called Thomas on his cell phone some time before 10:00 the next

morning (August 7, 2002) to obtain information, and Thomas was driving at the time of the call. [4:T681, 685]

At 10:30 on the same morning he withdrew the money, Thomas rented a red Dodge Neon from Thrifty Car Rental at the Montgomery Airport. [4:T721-722, 725, 728] The car was supposed to be returned in Montgomery on the morning of August 9, 2002, but it was never returned. [4:T724, 728] Bea Crawford, Thomas' next-door neighbor in Montgomery, saw Thomas and "Vinnie" after 3:00 on the afternoon of August 6, 2002. [4:T666] It takes from 10 to 14 hours to drive from Ft. Myers to Alabama. [4:T595]

Lehmann did not know that Thomas was having an affair with a woman named Valerie Bisnett Fabina (Fabina) who worked at a Dollar Store and lived in Cape Coral. [4:T738, 739] Fabina was separated from her husband, and she had three children. In the summer of 2002, she was living with friends because she had financial problems, and her children were living with her husband. [5:T813] Thomas told Fabina that he lived in Alabama, and that he came to Ft. Myers to oversee his rental properties. [5:T791] Fabina did not suspect that Thomas was married because he did not seem to hide his activities. [5:T791] She saw Lehmann's name on some checks and Thomas told her Lehmann was only a business partner. [4:T772-773] Thomas stayed at a Motel 6 when he came into town, and Fabina stayed with him approximately 10 times between May and August. [4:T742] Thomas took Fabina to his residence in Alabama for a weekend in June and once in July. [4:T742, 748] Fabina had also gone to Thomas' rental properties with him, and on one occasion, she was introduced to a man named

Vinnie to whom Thomas was talking about a roofing job. [4:T744-745]

Thomas called Fabina on the morning of August 6, 2002, and told her he would be arriving later that evening. [4:T748] She told him she would get him a room at the motel. [4:T748-49] She rented the room, and according to Fabina, Thomas came to her friends' house and picked up the key card from her around 11:00 p.m. [4:T749, 751] She waited in the house for Thomas with the front door open to the lanai. [5:T806, 812-13] When Thomas arrived, he was driving a small red rental car, and he parked at the end of the driveway behind a very large pickup truck. [4:T751] Although Fabina had only seen Appellant one time, Fabina claimed she could see from 20 to 30 feet away that Vinnie was with him. [4:T751, 787]

The next day (August 7), Thomas came to see Fabina at the Dollar Tree a couple of times, and around 7:00 or 7:30 that evening when he gave her the motel key. [4:T753, 788, 790] When he opened his wallet, Fabina noticed he had more money than he usually carried. [4:T754] However, Fabina did not know how much was in his wallet, and she did not describe the denominations of the money. [4:T754] According to Fabina, Thomas said he and Vinnie were going to go look at a truck and that he would see her later at the motel. [4:T753-754] Fabina did not see Vinnie that day, nor did she see the rental car. [5:T789-91] Thomas said he rented the car to save mileage on his truck, and he said the money in his wallet was to buy a truck to take back to Alabama for Vinnie to use. [4:T779-80; 5:T798] He did not say anything about a property

auction. [5:T794]

When Fabina went to the motel, Thomas was not there so she waited and spent the night. [4:T755, 756] Fabina called Thomas' cell phone, but got no answer. [4:T756] She left a message that was not returned, and Thomas never arrived. [4:T756] The next morning, she took Thomas' bag, and left another message saying that she had his things. [4:T757-58] Since Thomas' behavior was not normal, Fabina assumed he was ending the relationship, but she was also concerned that something might have happened. [4:T758] On Saturday, August 10, 2002, she went to the Sheriff's Office and reported Thomas missing. [4:T759]

On August 15, 2002, Fabina rented a house and resumed living with her husband. [4:T770] At that time, she paid $380 in rent for August and $735 for a deposit. [4:T770] Fabina gave Thomas' bag to the Sheriff's Office on August 20, 2002. [4:T772] It contained toiletries, underwear and socks, two cell phones, and two or three checkbooks, some with Lehmann's name on them. [4:T772-773; 11:T1971] According to Fabina, the bag did not contain money. [4:T774]

Lehmann spoke to Thomas by phone a little after 9:00 p.m. on August 7, 2002. [4:T598] They argued during the call, and she was angry that he left her to oversee repairs for the rental property. [4:T600] They made arrangements to speak again the next morning, but Thomas did not call or answer his phone. [4:T599] Lehmann became concerned on Thursday and called her neighbors in Alabama, and she called the police on the weekend of August 10-11, 2002, and left a message. [4:T601, 634] She called the police on Monday,

and they told her Valerie Bisnett (Fabina) filed a report in Florida and that Bisnett was listed as Thomas' live-in girlfriend. [4:T602, 603]

Jennifer Morrison remembered that Appellant arrived at her house "some time more toward evening" on August 7, 2002. [7:T1341] They went to the 7-Eleven in North Ft. Myers and Appellant purchased cell phones around 12:39 in the morning. [7T:1342, 1348] They then went to Wal-Mart and went back to Morrison's house. Morrison had no idea what time she fell asleep, but when she woke up the next morning, Appellant, his mother and his mother's two dogs were gone. They did not tell Morrison they were leaving. [7:T1343]

Lehmann asked the bank to close Thomas' bank account in Montgomery on August 14, 2002, and discovered that Thomas had withdrawn $25,000 in cash. [4:T607, 636, 638] The account had $111,510.90 in it. [4:T632] On August 16, Lehmann found building materials at the house along with the pick-up truck. [4:T604, 605-606, 637] Some of the boards had already been cut for the deck supports. [4:T606] She changed the locks on the house. [4:T607]

Lehmann stated that Thomas did not make any money from the cars he collected. [4:T630] In February of 2002, Thomas deposited over $86,000; however, Lehmann did not know where the money came from. [4:T630-31] She was not aware that he deposited $26,000 in January, and she did not know that he transferred $20,000 by wire that same month. [4:T631] She knew he deposited $100,000 in May because he wanted to buy an apartment complex in Alabama, but he did not purchase it. [4:T632] Thomas had a life insurance policy

worth $100,000 and she had a trust fund with $400,000 to $600,000 in it that would have gone to Thomas if anything had happened to her. [4:T633] When Thomas died, they jointly owned 13 properties. [4:T633] She sold 11 of the properties. They were not rentable because they were in disrepair, and they had substantial liens. [4:T633, 641] The properties were not making much money. [4:T644]

According to Fabina, Lehmann came to the Dollar Tree looking for the duffel bag, and she was not happy that Fabina gave it to the Sheriff. [4:T775-76] Lehmann asked her if she looked in it, and Fabina thought Lehmann really wanted something in the bag. [4:T776] According to Fabina, Lehmann was aware that Thomas had other girlfriends. [4:T777]

On August 13, 2002, the police discovered Thomas' rental car in a remote area of Lehigh Acres. [5:T861, 863, 873] It had been totally burned, and the Fire Marshall opined that the fire was set intentionally by use of a "wick" or trail of accelerant, and the car had burned itself out. [5:T882, 893, 895] The embers were cold, indicating that it was burned more than 24 hours before it was found. [5:T884] The debris was still in powder form and not packed down as it would have if it had rained or if it had been extinguished. [5:T882, 909-910] The driver's seat was partially folded backward to give a taller person more room to drive. [5:T877] Later, bullet casings from a handgun were also recovered from the car. [5:T896, 915] There was a handgun under the passenger seat that was burned beyond recognition and could not be traced. [5:T896-897, 899] A ring and a key ring with nine keys on it also found in the car. [5:T914, 915] One bullet casing and a

cigarette butt were found nearby. [5:T920-21]

Spencer Hartman did not recall the last time he saw Appellant; however, he did remember that sometime after his sister and her husband moved out, but before he moved in, he saw Appellant in the back yard around 4:00 in the afternoon. [6:T1023-24] It was raining, and there were no vehicles there. [6:T1024, 1025] Spencer saw Appellant standing behind his tent and he heard the sound of a shovel breaking the earth. [6:T1025] Spencer stood there for only a few seconds, and he did not say anything to Appellant. [6:T1028-29] He did not see Appellant digging -- he just saw body movements that led him to assume he was digging. [6:1055] The tent took up almost all of the clearing in the brush, and the place where Appellant was standing was the only place not occupied by the tent. [6:T1055]

A few minutes later, Appellant walked to the front of the house and they spoke for a few minutes in the carport. [6:T1030] Appellant said that he had a guy coming to deliver a couple of pounds of “weed” and the man would not stop if someone was there. [6:T1031] He told Spencer that if he left, he would leave him an ounce of weed or $100. [6:T1031] Spencer told Appellant he would rather have the ounce of weed, and he left and went down the street to his mother’s house. [6:T1031, 1037] He did not see anyone else on the property, and did not hear any gunshots that night. [6:T1060] The next morning when Spencer returned, he discovered Appellant’s tent smoldering in the barbeque. [6:T1032] There was a can of lantern kerosene sitting on the back of the dog pen, and there was a hundred dollar bill on the shed where

Appellant said he would leave it. [6:T1033, 1037, 1042]

A few days or a week later, Dave Twomey came by and said Appellant had some of his stuff and he wanted to see if he left it. [6:T1061] Spencer left, so he did not know how long Twomey stayed, or what he did there, or whether he found anything. [6:T1061-62] Five or six weeks later, Spencer was moving some furniture into the house with T.J. Vaughn. [6:T1034, 1088-1091] They started talking about Appellant because they heard Appellant and another man were missing. [6:T1034-35] Spencer took Vaughn back to the area where Appellant was digging, and they found the couch from the tent on top of plywood covered with palm fronds. [6:T1035] Underneath were a couple of cinder blocks and a car ramp. [6:T1035] Vaughn left and Spencer got a shovel and dug. [6:T1037, 1091] There was a strong smell, like a dead animal, so he told his mother to call the police. [6:T1037]

Although Spencer went to the property every day after work, he had not seen Appellant for a few weeks or a few months prior to that day. [6:T1063-64] He admitted he smoked marijuana, and that he lied to the police by omitting the fact that he asked Appellant to leave marijuana. [6:T1058] Vaughn admitted he smoked marijuana with Appellant a few times, and for that reason, he thought there might have been marijuana buried there. [6:T1097]

On September 26-27, 2002, Thomas' body was discovered about three feet down. [6:T1116-1117, 1119, 1156] Technicians excavated the area around the body and found it permeated with palmetto and tree roots that were difficult to cut through. [6:T1134, 1140]

They had to chop through them with a saw or trimmer and hedge clippers. [6:T1134; 7:T1233] Whoever dug the hole cleared the roots in order to bury Thomas. [6:T1134, 1140] The body was lying on its left side. [6:T1141] There was a cell phone on the belt and a ring on the finger. [6:T1173]

A search of the property revealed a shotgun recoil pad and a key chain from Thrift Car Rental in the wooded area northwest of the excavation site. [6:T1120-1121] There was no blood evidence. [6:T1130; 7:T1229-30] There was a lot of trash including tent material and poles in the barbeque. [7:T1190] There was a charred pair of scissors, a light bulb that had not been burned, charred metal-framed eyeglasses, and a D-shaped handle from a garden tool in the barbecue, along with a spent 12-gauge shotgun shell. [7:T1196-1198, 1209, 1262] A pager was found on the shed shelter along with a burned marijuana cigarette; however, the cigarette was not tested for DNA. [7:T1219, 1222, 1226, 1227]

Dr. Rebecca Hamilton performed an autopsy on the severely decomposed body of David Thomas on September 27, 2002. Thomas had been shot only once in the upper back with 7 ½ birdshot from a shotgun. [3:T456, 460, 484; 7:T3189] Hamilton opined that the shotgun was between one and four feet away when it was fired. The pellets traveled in a downward direction. [3:T480] Thomas was wearing a plaid shirt identified by Fabina as the shirt he was wearing on August 7, 2002. [4:T771]

Because the medical examiner found wet sand in Thomas' larynx and trachea, she opined that Thomas breathed in the sand when he was still alive. [3:T489, 490-91] However, Hamilton could not tell

if Thomas was conscious at the time, and Hamilton concluded Thomas would have died within minutes of being shot because the pellets pierced Thomas' aorta and lung. [3:T480, 491, 500] Hamilton did not take a sample of the sand for comparison, and for that reason, there was no way to tell if the sand was from the site where the body was found. [3:T496] Hamilton agreed that Thomas could have inhaled the sand if he had been face down on any uneven sandy surface, and that the inhalation of sand did not necessarily come from being buried. [3:T497-98, 501] Hamilton refused to give an opinion as to how long the body had been buried. [3:T491, 495]

According to the camp hosts, Mr. and Mrs. Reeves, on August 21 or 22, 2002, the Appellant arrived at the Horse Creek Campground in the Cherokee National Forest in Greeneville, Tennessee, in a maroon Buick with his mother and two dogs. [8:T1376, 1400] Appellant paid for the use of a primitive camp-site for two weeks. [8:T1373, 1403] Appellant had a large tent and a cover over the picnic table, and he kept the door closed at all times. [8:T1380] The maroon car would come and go. [8:T1380]

On August 25, 2002, someone complained to Mrs. Reeves about Appellant's pit bull dog. [8:T1381] She asked Deputy Sheriff Wesley Holt of the Greene County, Tennessee, Sheriff's Office to speak to Appellant. [8:T1382, 1412] Holt told Appellant to keep the dog on a leash. [8:T1414] He also asked Appellant for a name and date of birth, and the information checked out when he ran it through NCIC. [8:T1414] Holt asked for photo identification in case the dog got loose. [8:T1415] Appellant made a phone call and asked the person he called to bring his identification, and then

told Holt he would have it in 30 minutes. [8:T1415] Holt left and returned about 30 minutes later, but the man was gone. [8:T1417] Holt walked around to the other side of the tent and saw two or three police scanners, a generator, a refrigerator and some portable power units, but the dog was gone. [7:1417-18]

According to Reeves, the lady with the maroon car came 30 minutes after Holt left, and Reeves thought the lady had one dog when she came in and that she left with two dogs. [8:T1383-84] Later that evening, a small car with a Tennessee tag came in and went to Appellant's campsite. [8:T1385, 1400] When Mr. and Mrs. Reeves arrived to investigate, the car sped off quickly and drove into a ditch. [8:T1387, 1406-07] The car was full of items. [8:T1388, 1406] A young skinny man jumped out of the car and met them in the road. [8:T1388-89] They offered to call for help, but the car left. [8:T1389]

Holt arrived at 10:14. [8:T1419] He found that the refrigerator and generator were gone. [8:T1390] A scanner had been dropped on the steps. Everything was strewn about and the tent was open. [8:T1390, 1408] It began to rain heavily. Mrs. Reeves gathered Appellant's things and Holt took them to the Sheriff's Office. [8:T1391] No one ever contacted him about the items. [7:T1420] The car leaving the campsite was registered to Nicole Miller in Telford, Tennessee. [8:T1514]

Holt seized numerous items, including a briefcase containing various receipts and a wallet. [8:T1425, 1490, 1490] Holt agreed that having scanners was not illegal and that scanners can pick up aircraft, EMS and fire frequencies, and it was not unusual for

people to enjoy listening to them. [8:T1511] Appellant's scanners were not set for local codes, meaning that he was not monitoring local law enforcement. [8:T1512]

Appellant was arrested on September 20, 2002, after deputies stopped Chris Miller's car in order to investigate a missing persons report from Florida. [9:T1637-39] Appellant and his dog were in the car, and the officers took a wallet with cash, a cell phone and an address book from Appellant. [9:T1640, 1644] The deputies searched Debbie Miller's trailer, but they did not find any money at the residence. [9:T1646] Hazel Twilegar was living in Miller's trailer. [9:T1642]

An investigation revealed that sometime in August, Appellant and his mother bought a 1982 Nissan 280Z and a 1985 Jeep Cherokee for $1150 from Anthony Miller in Greenville, Tennessee. [8:T1532, 1535, 1536, 1537] Appellant had $800 in cash, and his mother went to get the rest of the money. [8:T1538] Appellant paid in eleven $100 bills, two 20's and a 10. [8:T1542]

On August 22, 2002, Appellant's mother called the NAPA Auto Parts store in Greenville, Tennessee, and asked about the price for a new engine for a Jeep Cherokee. [8:T1549] Appellant's mother came into the store and paid $1279 in advance. [8:T1549-50] She agreed to bring in the old engine to avoid a fee of $300 that she said she did not have. [8:T1551] The engine arrived on August 26, 2002, and Appellant and two teenage boys came to pick it up. [8:T1554, 1555, 1557] He did not have the old engine, so he paid the $300 charge in cash. [8:T1555] Later, Appellant returned the old engine and the water pump, and got a refund of $368.67.

[8:T1558] Receipts for these transactions were found in the briefcase seized by Holt.[1] [8:T1546, 1547] On September 6, 2002, Appellant gave Todd Miller, a mechanic at the Phillips 66 service station, a $100 bill to help him start the Jeep. [8:T1565, 1567-68]

While he was incarcerated at the Washington County, Tennessee, Detention Center, Appellant made phone calls to his mother and to Debbie Miller, a woman he would later marry. Over defense objection, certain phone calls made from September 27, 2002, to October 1, 1002, were played to the jury. [9:T1722-91] On the tapes, Appellant and his mother discuss whether Debbie Miller's son, Christopher Miller, had been arrested, and they discuss the fact Chris gave the officers permission to search the car. [9:T1724, 1742] Appellant tells her the police report said an Officer Miller gave permission to search, and that would be a good point at trial. [9:T1742] Appellant tells his mother that Chris should keep his mouth shut and that if he did, "this will all go away." [9:T1724] Appellant's mother tells Appellant Spencer was talking and that "they" had found "Dave." [9:T1724] Appellant answered, "Okay." [9:T1725]

Appellant and his mother discuss the fact the police would not return Appellant's wallet. [9:T1727] Appellant says that Jennifer "dropped a dime" on him, and his mother says it was Kirk, a man from where he was working on the Jeep. [9:1729-30] Appellant says he is wanted in Florida and Missouri and that he has been

[1] All of the receipts found at the campsite and during Appellant's arrest totaled around $6,000, including the receipts that have faded and could not be copied. [R13:926-947]

charged in Tennessee for the meth lab. [9:T1730] Appellant says he wants to fight extradition to Florida and Appellant's mother comments that they only want him for questioning. [9:T1731] Appellant's mother says the police are harassing her about a lot of money, and they were asking her where he got money. [9:T1733] She says she told the police he was selling dope. [9:T1734] They talk about Chris and the dog, and Appellant says he would try to do everything he could to keep Chris out of it, but he would have to watch out for himself. [9:T1741-42]

Appellant's mother tells him Spencer is saying he is a psycho and he did it. [9:T1745] Appellant comments, "I'll be damn. Well, they'll probably be filing their damn charges here in a bit then." [9:T1746] In response to his mother saying, "they say he's really running his mouth," Appellant replies only "Okay, well, the world goes round." [10:T1746] They joke about the fact that the police think she has money, and he asks his mother to get his wallet back and buy him an inexpensive television that they can return when he is transferred. [10:T1750, 1770] He says he will be in jail for a year for the meth lab, and that he has a plan for Florida, but he could not say it over the phone. [10:T1761]

Appellant tells Debbie Miller that he is going to tell "them" that he's been there for at least eight weeks. [10:T1773] Miller says he came on August 8th, and Appellant makes a noise. [10:T1773] Miller asks if "that is thinking," and Appellant says "no it's not." [10:T1773] Appellant tells Debbie Miller the newspapers said he was a murder suspect, but he was told it was a missing persons case. [9:T1776] He thought "they" were trying to see what he would

say. [9:T1776-77] Appellant asks Miller if there was anything she would not do for him, and when she says no, he tells her "you better get your fancy dress on." [10:T1788]

Fort Myers Detective Ryan Bell admitted that the Sheriff's Office did not get Fabina's phone records, nor did they get records from the house in Alabama. [10:T1826] They did not ask if there was an answering machine at the house in Alabama, and they took Lehmann's word that there was nothing of interest on that machine. [10:T1827] Bell did not go to Alabama to investigate, even though he went to Tennessee twice. [10:T1828] Bell did not know that Thomas had withdrawn the money in $20 bills, [10:T1829], and what little he knew about Thomas' financial matters was supplied by Lehmann and Twomey. [10:T1831] The last time Thomas used his credit card was on August 7, 2002, in an Eckerds in Ft. Myers. [10:T1833]

They did not get any records from the Suncoast Credit Union. [10:T1839] There were three check registers in the bag. [10:T1840] Bell asked Lehmann about the $86,869.43 deposit in February, and Lehmann said it was not unusual with all the rental properties and the old cars Thomas collected. [10:T1842] Lehmann also told Bell that it was not unusual for Thomas to take large amounts of money out of the bank. [10:T1850] Bell did not check into the specifics of the transaction. [10:T1843]

Fabina and Lehmann told Bell that the phone they used to contact Thomas was missing. [10:T1836] Bell knew there were two other cell phones in Thomas' duffel bag; however, Bell did not care about Thomas' activities before his disappearance, because

they did not “want to go backwards.” [10:T1834-36, 1837] Law enforcement did not check those phone records. [10:T1835]

Although there were keys found in the burned car, neither Lehmann nor Fabina recognized them as belonging to Thomas, and law enforcement did not know to whom they belonged. [10:T1846] Bell did not investigate Fabina’s finances, but he knew she had fallen on hard times and that she was living with friends. [10:T1852] Bell did not know whether she had lost a house to foreclosure [10:T1852], but he knew Fabina was still married. [10:T1852] They found a ring with a white stone in the burned car, but they did not know who owned it. [10:T1859] Bell never checked any of the titles of the cars to see when they were bought or from whom. [10:T1861] Bell knew Lehmann had a concealed weapons permit, but he did not check to see if Fabina or her husband owned a shotgun. [10:T1870-71]

Mark Twilegar (Appellant) testified that he always got paid in cash and he preferred $100 bills because they were easier to hide in his pockets. [11:T1973, 1978-79] While he lived on Miramar, he had no real expenses except for food. [11:T1975] There was a warrant for his arrest from Missouri for failure to appear for a charge of possession of a controlled substance. [11:T1984] He was living in a tent solely to avoid being arrested on the warrant. [11:T1987] The field where the tent was located was overgrown with palmetto and pine. There was a racetrack in the field, and people used the field as a shortcut. [11:T1980] There were no bathroom facilities, so he would dig a hole in the brush, and break the bottom out of a bucket and use it, and cover

the hole. [11:T1983] If he had an emergency, or it was raining, he would do that closer to his tent. [11:T1983]

Appellant admitted he was a marijuana dealer. [11:T1981] Sometime after the McArthurs moved out, but before he went to Alabama, a supplier came over to sell him a 2.2 pounds of marijuana. [11:T1981-82] The house was vacant, so the supplier would park in the carport and go to the tent where they would make the deal. [11:T1982] The supplier would not stop if Spencer was around. [11:T1982] Appellant told Spencer that if he left, he would give him $100 or a bag of pot. [11:T1982] Spencer wanted the bag of pot, but the marijuana was packaged as a brick and he needed scales to weigh it, so he left $100 instead. [11:T1982]

When Appellant went to Alabama with Thomas it took 13 hours to get there. [11:T1986-87] Thomas promised that he had permits for the deck, but he couldn’t get them, so Thomas suggested they do some electrical work or put a concrete floor in the basement. [11:T1988] Thomas had lumber delivered to the house and Appellant cut the band boards for the deck on the evening of August 4th. [11:T1989-90] Thomas would leave the house at 6:00 or 7:00 in the morning and return with lunch and then not show up until 10:00 to 12:00 at night. [11:T1990] Thomas did not tell him where he was going, but he did mention he was going to the courthouse to get some public defender cases. [11:T1990-91] Appellant did not know Thomas took money out of the bank, and he did not know Thomas rented a car. [11:T1991] Thomas did not tell him he was going to any auction or that he was buying a vehicle. [11:T1991] Appellant did not come back to Ft. Myers in the rental car. [11:T1991]

Appellant decided to return on August 5, 2002. [11:T1992] Thomas came to the house between 8:30 and 9:00 a.m. and told him they couldn't do the deck until after Christmas. [11:T1992] Thomas said Appellant could stay and do some work at the house, but he wanted to return to Ft. Myers because he had fronted some marijuana and he needed to collect the money. [11:T1992] Thomas wanted Appellant to fix his cars and sell them, and Thomas wanted 20 percent. [11:T1989] Appellant repaired a 1979 Monte Carlo, and Thomas gave him the title. [11:T1989, 1993] When he got back, he sold the car for $750 to a Mexican named Chico Serano on Palm Beach. [11:T1994] Appellant then went to collect money. He went to Morris Beach, his tent, and to Jennifer's. [11:T1994]

Appellant explained that his 65-year-old mother lived with Jennifer Morrison, her granddaughter. [1984] His mother wanted to leave because Morrison and her boyfriend partied all night. She didn't like living there, and she wanted to see her friend Debbie in Tennessee for an indefinite stay. [11:1984] His mother needed him to drive her to Tennessee because she could not drive at night and she didn't like to drive. [11:T1985]

On the night of August 7, 2002, his mother was upset because she wanted to leave, so he and Jennifer went to Wal-Mart to buy supplies. [11:T1995] They bought dog toys and food and he bought a cell phone for himself, one for his mother and one for Jennifer. [11:T1996] They got back around 3:00 in the morning. [1997] Jennifer took some pills and went to sleep. [11:T1997] They had already packed his mother's car, so he went back to the tent for a shaving kit. [11:T1997] He drove his mother's car, parked

behind the Sonny's on Alta Vista and walked down the dirt road to Miramar. [11:T1998] He then cut through the field that led to his tent. [11:T1998] Appellant explained that it was his habit to take this route because he was a fugitive and drug dealer, and people were always trying to steal from him. [11:T1998]

He was half way to the tent when he smelled Brut aftershave. [11:T1999] He thought it was a police officer, so he tried to leave quietly, but when he turned around, a shotgun was pointed at his forehead. [11:T1999] He deflected it and it went off, burning his hair and tearing up his hand. [11:T1999-2000] Appellant kicked the person, but he did not see who it was because it was dark. [11:T2000] He left and never went back to the tent, so he could not see whether or not the tent was still there. [11:T2003]

Appellant explained that he didn't go to the hospital because he was a fugitive and he knew gunshots had to be reported. [11:T2001] He still had serious scars from it, which he displayed to the jury. [11:T2000] Appellant went back to Jennifer's house and got his mother to hurry so they could leave. [11:T2001] He cleaned the wounds, put triple antibiotic ointment on them and wrapped them in gauze, and put a glove over it. [11:T2001-2002] It was 4:00 or 5:00 in the morning. [11:T2002]

Appellant had the money he collected for work on the deck and $750 for the car. [11:T2004] He had about $2500 in cash, and his mother also had some money. [11:T2004] On the way, they had to make some car repairs. [11:T2005, 2006] They bought some items at Wal-Mart and broke some bills to buy gas and other things.

[11:T2006] The trip took 30 to 35 hours with the stops. [11:T2007] They got to Tennessee on August 9 or 10th. [11:T2007] He called to find primitive camping sites and bought supplies. [11:T2008] He explained that after he was shot, he didn't want to return to Florida. [11:T2008]

He chose the most secure campsite he could away from the road and set up screen tents. [11:T2009] He came back and saw his campsite was trashed. [11:T2010] He didn't want to tell the police he was robbed. [11:T2011] He had a police scanner that he brought from Florida. [11:T2011] Some of the items in the briefcase were his. [11:T2040]

On the day he was arrested, Appellant was with Christopher Miller in Miller's girlfriend's car. [11:T2012, 2015] He had a methamphetamine laboratory in the trunk, because they were making methamphetamine in Tennessee. [11:T2012-13] The police arrested him on a fugitive warrant and then later charged him with the meth lab. [11:T2012-13]

The marijuana he bought weighed 2.2 pounds and he would package it in quarter pounds. [11:T2042] He would sell an 8-ball of methamphetamine (3 ½ grams) for $225, and an ounce of marijuana for $50. [11:T2043, 2044] He would have three buyers a day for methamphetamine and dozens for marijuana. [11:T2044]

At the time he was arrested, he did not know his tent in Florida was burned. [11:T2014] He told the women to tell Chris Miller to keep his mouth shut about the meth lab because he told Debbie Miller he would take care of her son, and he did not want Chris involved. [11:T2015] When his mother said they found Dave,

Appellant thought she was referring to Dave Twomey because he also left under suspicious circumstances. [11:T2016] Appellant called Florida trying to find out who shot his hand, and he was told that Twomey was not there anymore and that a Jamaican guy was looking for him. [11:T2016] He thought his mother was telling him that Spencer was talking about his selling marijuana, but he didn't care what Spencer said. [11:T2017]

Appellant explained that when he referred to "the plans", he meant that if Chris would stop talking about the meth lab, he would take care of it and do a year or so of federal time. [11:T2017] He thought Jennifer told the police where to find his mother. [11:T2018] When she said, "He traded you off," Appellant thought it meant Kirk Hartley, a man he knew in Tennessee, traded him to get a lighter sentence on something. [11:T2018]

When he told his mother they wanted him in Florida and Missouri and they charged him with the meth lab in Tennessee, he was trying to tell his mother he would stop fighting extradition in exchange for charges being dropped. [11:T2019] He had no idea he was going to be charged with murder. [11:T2019] His plan worked because they dropped the methamphetamine charge in Tennessee. [11:T2019] He found out during the period of the phone calls that he was a suspect in the disappearance of Dave Thomas. [11:T2022]

Appellant did not burn his tent and he did not kill Dave Thomas. [11:T2025] He did own a shotgun that he bought at the flea market. [11:T2026-27] He did not hide it, and he had not seen it since he left Ft. Myers. [11:T2027] When he moved to Ft. Myers he told everyone his name was Vinnie. [11:T2035]

The Appellant made motions for judgment of acquittal of the charge of first-degree murder under both theories, premeditation and felony murder, which were denied. [10:T1892-93, 1904; 11:T2107-2110] At the court's insistence, the jury was given a special verdict. [R14:1106-1107] Once the jury found first-degree murder, the jury was asked how many of the jurors found the killing was premeditated and how many found the killing was committed during the course of a robbery or attempt to commit a robbery. [12:T2200; R14:1106] All twelve jurors found the killing was premeditated and none found the killing to be during the course of a robbery or attempted robbery. [R14:1106; 12:T2222]

The State did not present any additional testimony at the penalty phase on February 16, 2007. [R:161233-1280] The court held a Spencer hearing on February 19, 2007, [17:R1299-1328] during which the court conducted a colloquy regarding Appellant's request that his attorneys not present mitigation. Id. Appellant stated he wanted his attorneys to remain silent and not to argue that the State had failed to prove the aggravators. [17:R1301] The State presented mitigation in the form of a psychiatric examination from Missouri in 1982 and a PSI from 1983. [17:R1308-09] Appellant submitted Mr. Thomas' last will and testament and the probable cause and booking sheet for Thomas' arrest for conspiracy to commit murder of Mary Anne Lehmann. [17:R1327]

The court denied the motion for new trial and amended motion for new trial by written order on August 6, 2007. [R20:1845-1859] The court imposed the death penalty on August 14, 2007. [R20:1863-1874; R21:1878-1891] Appellant filed a notice of appeal

on August 21, 2007. [21R:1926]

SUMMARY OF THE ARGUMENT

I. The circumstantial evidence was insufficient to prove Appellant killed David Thomas because the evidence did not contradict his assertion of innocence. No one witnessed the shooting, and there was no physical evidence linking Appellant to Thomas' death. There was no confession, and there were no overtly incriminating statements made by, or adopted by, the Appellant in the telephone conversations with his mother or Debbie Miller. The evidence of robbery also proved to be purely circumstantial. The State failed to prove the money Appellant spent came from Thomas. Since the court erred in denying the motion for judgment of acquittal, the Appellant should be discharged.

II. The evidence is insufficient to prove premeditation because no one witnessed the events that led to Thomas' death. There was no evidence of animosity between Appellant and Thomas, and the fact that Thomas was shot once in the back is insufficient to prove premeditation because that evidence is equally as consistent with a homicide committed in the spur of the moment. Because the special verdict provided to the jury allowed the jurors to make a finding of both premeditation and felony murder, and because all of the jurors found premeditation and none found felony murder, this Court cannot uphold the conviction for first-degree murder based on robbery. To do so would be to substitute this Court's decision for a jury verdict. Therefore, since the

evidence is insufficient to prove premeditation, this Court must reduce Appellant's conviction to manslaughter.

III. The court erred in denying Appellant's motion to suppress the camping gear and receipts from the campsite in Tennessee because the State failed to shoulder its burden of showing Appellant abandoned the property. Contrary to the court's order, there is no evidence Appellant removed the items from the constitutionally protected campsite or that he had an agent remove them for him. Additionally, the seizure cannot be upheld under an "exigent circumstances" exception to the warrant requirement. Exigent circumstances may justify entering a constitutionally protested area under emergency circumstances, but it cannot justify seizing items that are not contraband or that are not obviously incriminating. Furthermore, it made no sense that the deputy disassembled Appellant's tent in the rain to protect his property from the rain when the deputy could have simply placed the items back into the tent or covered them with a tarp.

IV. The court denied Appellant his right to present a defense when the court excluded evidence that Thomas was arrested for conspiring with a girlfriend to kill his wife, and that Thomas had symptoms of drug use. Inasmuch as Thomas was still having affairs, and because Thomas withdrew $25,000 in $20 bills for some unknown reason, this evidence would have tended to establish reasonable doubt. If the court had allowed testimony regarding Thomas' drug use, Appellant could have compelled the presence of a former girlfriend who would have testified she had seen Thomas with ounces of cocaine and that he asked her to sell drugs for him. The

court also erred in excluding Thomas' bank statements which proved Thomas' withdrawing large sums of money was unusual, contrary to his wife's testimony. The court also erred in failing to grant a continuance to obtain the testimony of Dave Twomey because Twomey saw Thomas in a rental car and Thomas made statements indicating he did not want anyone to know he was in Fort Myers.

V. The court erred in allowing the State to present evidence Appellant left Ft. Myers and went to Tennessee and lived in a campground in order to argue flight as circumstantial evidence of consciousness of guilt. Appellant habitually lived in tents because of an outstanding warrant for unrelated charges. At the time Appellant left, there was no investigation and no publicity, and Appellant was not a suspect. Appellant's behavior at the campground is more consistent with the fact that he was selling methamphetamine in Tennessee than it was with evading the authorities for a murder which had not yet been discovered. In order to counter the insinuation of flight, Appellant had to reveal the outstanding warrant and the drug dealing. Therefore, the prejudice outweighed any probative value.

VI. The court erred in allowing the State to play the audiotaped telephone conversations between Appellant and his mother and between Appellant and Debbie Miller because there are no adoptive admissions on the tapes. Furthermore, if the tapes are edited to delete references to Appellant's arrest for methamphetamine and for references to the Missouri warrant, the tapes are misleading. Without the highly prejudicial evidence, the jurors would have been misled into believing Appellant was worried that

other people were talking to the police about the instant charges instead of his other charges.

VII. The court erred in admitting the cash register receipts because the State failed to prove an exception to the hearsay rule. Because the State sought to admit the receipts to prove the Appellant bought the items listed, at the places and on the dates printed on the receipts, the receipts were hearsay. The State attempted to lay a foundation under the business records exception for the receipts from Wal-Mart; however, the Wal-Mart employees were not records custodians and they did not testify as required that Wal-Mart kept the receipts in the ordinary course of business and that it was the regular practice for Wal-Mart to make such records. The State also failed to lay a foundation for receipts from other store, because no records custodian testified.

VIII. For the same reasons set forth in Issues I and II, the evidence was insufficient to prove either that the murder was committed in a cold, calculated and premeditated manner or that the murder was committed for pecuniary gain.

IX. Appellant must be granted a new penalty phase because the court had no authority to allow Appellant, who was represented by counsel, to waive all investigation into all possible mitigation. Also, the court abused its discretion in finding Appellant’s waiver of presentation of mitigation evidence to be knowing and voluntary when counsel had no idea what mitigation evidence existed.

ARGUMENT

ISSUE I

WHETHER THIS COURT MUST VACATE APPELLANT'S CONVICTION BECAUSE THE CIRCUMSTANTIAL EVIDENCE WAS INSUFFICIENT TO PROVE APPELLANT KILLED THOMAS.

After the State rested, the Appellant moved for a judgment of acquittal of the charge of first-degree murder, arguing that the State did not show Appellant robbed Thomas, and that the State failed to prove Appellant shot Thomas. [10:T1892-93] The court denied the motion. [10:T1904] The motion was again denied after Appellant presented his case. [11:T2107-2110]

Appellant's hypothesis of innocence was simply he did not commit the murder. See Terranova v. State, 764 So.2d 612, 615 (Fla. 2d DCA 1999). The evidence was legally insufficient because the evidence did not exclude that hypothesis. The evidence as to the identity of the perpetrator was purely circumstantial. No one witnessed the shooting, and there was no physical evidence linking Appellant to Thomas' death. There was no confession, and there were no overtly incriminating statements made by, or adopted by, the Appellant in the telephone conversations with his mother or Debbie Miller. The evidence of robbery also proved to be purely circumstantial.

The law is well-settled that "[a] prima facie case of circumstantial evidence must lead to a 'reasonable and moral certainty that the accused and no one else committed the offense charged.'" Brown v. State, 672 So.2d 648, 650 (Fla. 4th DCA 1996), citing Davis v. State, 90 So.2d 629 (Fla. 1956). Where the evidence

creates only a strong suspicion of guilt or simply a probability of guilt, the evidence is insufficient to sustain a conviction. Brown, citing Cox v. State, 555 So.2d 352 (Fla. 1989). "It has long been held in Florida that 'where the only proof of guilt is circumstantial, no matter how strongly the evidence may suggest guilt, a conviction cannot be sustained unless the evidence is inconsistent with any reasonable hypothesis of innocence.'" Fowler v. State, 492 So.2d 1344, 1346 (Fla. 1st DCA 1986), approved State v. Law, 559 So.2d 187 (Fla. 1989), citing McArthur v. State, 351 So.2d 972, at 976, n. 12 (Fla. 1977).

In reviewing a motion for judgment of acquittal, a *de novo* standard of review applies, Pagan v. State, 830 So.2d 792, 803 (Fla. 2002); however, a special standard of review of the sufficiency of the evidence applies where a conviction is wholly based on circumstantial evidence. Smolka v. State, 662 So.2d 1255, 1267 (Fla. 5th DCA 1995); Law at 188; Jaramillo v. State, 417 So.2d 257 (Fla. 1982). Florida law requires that when the state relies on circumstantial evidence to convict the accused, the state must prove the circumstantial evidence is consistent with the defendant's guilt and inconsistent with any reasonable hypothesis of innocence. Smolka at 1267 [emphasis added]; Reichmann v. State, 581 So.2d 133, 141 (Fla. 1991). "In applying the standard, *the version of events related by the defense must be believed if the circumstances do not show that version to be false.*" Fowler at 1346, citing McArthur at 976.

The State failed to prove Thomas was killed at the Miramar property. (See Issue II). However, even if he were killed on the

property, there is no evidence to prove Appellant killed Thomas. The body was found in the field adjacent to the Hartmans' back-yard. [R13:916] First, Appellant did not own the property and he did not have exclusive access to it. The field was overgrown and not fenced in any way, and there was no evidence the land was posted or that there was any attempt to keep trespassers out. All of the Hartmans had access to the property, and other people used the property as a racetrack and as a shortcut through the neigh-borhood. [R13:851-52, 864, 866, 895-99; 6:T989] Much of the land in the area was undeveloped and the back yard could be accessed from the field behind Miramar. [5:T972; 6:T983, 989; 7:T1236] During the time in question, the house was vacant and Spencer and the Hartmans were not aware what went on there. One crime scene technician testified it was dark behind the property. [7:T1237] See Burkell v. State, 2007 WL 3006535, 32 Fla. L. Weekly D2485 (Fla. 4th DCA 2007), in which evidence that sliding glass door and door to the bedroom were unlocked was significant in court's conclusion that the evidence was insufficient to prove the defen-dant was the perpetrator.

Also, a few days after Spencer found the tent burned, Dave Twomey came to the property and told Spencer that he wanted to go onto the property to see if Appellant had left items belonging to Twomey. Spencer was leaving at the time and he had no idea how long Twomey was on the property or what he did there. [6:T1061-62] Spencer did not go to the area where the tent was between the time he found the tent in the barbecue and the time he found the body. Anything could have happened in that interval.

Additionally, there is no evidence Appellant dug the hole in which the body was found. Although Spencer heard the sound of a shovel being used, he could not give any time frame for the event other than it occurred sometime after his sister's family moved out of the Miramar house in June and before he moved into the house in September. Spencer admitted that he heard digging noises for only a second or so because he left. He did not see Appellant digging a large hole or excavating roots. Crime scene technicians stated that whoever dug the hole had to cut roots from trees and palmettos and that it took considerable effort and the use of various tools to chop through the roots. [6:T1134-35, 1140, 1170; 7:T1232-33, 1235] Spencer admitted that the tent took up most of the clearing, and for that reason, if Appellant were going to dig in that area, the place where Spencer saw him was the only place in which to dig. Therefore, if Appellant were digging a hole big enough for a body and excavating roots, he would have taken down the tent first.

The evidence was undisputed that Appellant did not use the bathroom at the house. Spencer said it was raining, and Appellant explained that when it was raining, he would dig a hole and go to the bathroom near the tent. Spencer stated that when he returned the next morning to find the tent in the barbecue, he found a $100 bill in the shed, but Spencer did not say that he noticed anything about the couch being over the area where he saw Appellant digging. The record is inconclusive regarding when the tent burned. It could have been burned at any time before Appellant left for Alabama because there is no evidence regarding where Appellant

slept immediately before he left for Alabama. Appellant did not see the tent when he returned.

Appellant testified that he was shot with a shotgun when he attempted to return to his property after 3:00 in the morning on August 8th, and he never got close enough to see the tent. Appellant's testimony was supported by healed injuries to his hands that would be consistent with being shot with birdshot. Appellant also testified that he was a drug dealer and that he usually entered his property from the undeveloped land behind it because people were always trying to rob him. Appellant may have happened on the scene to be shot by the same person who killed Thomas with the same weapon. Although Appellant owned a shotgun, there is no evidence that his shotgun was used in the murder, or that Appellant used the shotgun that killed Thomas. The weapon was never recovered. More importantly, Appellant's shotgun was not secured. He left it in his tent when he went to Alabama, and the tent was closed only with a zipper, and anyone could have taken it out and used it.

The evidence is equally as consistent with Thomas' being killed by someone looking to rob Appellant of drugs or money and finding Thomas, or with some other person using Appellant's unsecured shotgun to kill Thomas and the vacant land to bury him. The evidence is also consistent with someone using the field to conduct business with Thomas before they shot him.[2] The State did

[2] Appellant wanted to introduce testimony that Thomas had unexplained sources of income, that he had symptoms of cocaine usage, and that Twomey saw Thomas at a gas station with a rental car and Thomas told Twomey "You didn't see me. If anybody asks, you didn't see me," indicating that he was scared of someone other

not explain why Thomas would need to withdraw $25,000 in $20 bills or why he withdrew the cash and then immediately returned to Florida, and the State did not attempt to explain why Thomas had at least two extra cell phones in his overnight bag. See In re forfeiture of Seven Thousand 00/100 Dollars, 942 So.2d 1039, 1041 (Fla. 2d DCA 2006)(possession of thousand dollar packages of $20 bills and five cell phones was consistent with way drug dealers carried money and consistent with a drug operation).

Fabina was the last person to see Thomas alive. No one saw Appellant with Thomas on August 7, 2002. On the day the State claims Thomas died, Fabina had lunch with him and she saw him at 7:00 or 7:30 that evening. Fabina did not see Appellant that day, nor did she see the rental car. [4:T753-754] Fabina was the only person who knew that Thomas had money in his wallet. [4:T754]

Fabina claimed she saw Appellant with Thomas in the rental car at 11:00 on the night of August 6, 2002, the day before Thomas went missing. [4:T751] However, the State presented testimony from Thomas' neighbor in Montgomery, Bea Crawford, who saw Appellant at Thomas' house after 3:00 in the afternoon on Tuesday, August 6, 2002. [4:T661-62] In closing argument, the prosecution relied on that testimony to prove that the Appellant was with Thomas on August 6th at 3:00 in the afternoon. [11:T2118] Lehmann testified that it took 10 to 14 hours to drive from Alabama to Fort Myers. [4:T595] If Thomas left Alabama after 3:00 p.m., he could not have seen Fabina eight hours later at 11:00. Although Fabina seemed

(..continued)
than Appellant. [11:T2099-2100] Appellant also wanted to present evidence from Patricia Sweeney that Thomas at one time possessed ounces of cocaine and Thomas asked her at one time to sell

sure she saw Appellant, Fabina admitted that before August 6th, she had seen Appellant only once, and she admitted the rental car was at the end of the driveway 20 to 30 feet away, and of course, the evidence showed it was dark. [4:T747, 787, 799-801]

The State's theory presumes that Thomas was killed on the evening of August 7th because he was wearing the same clothing; however, the duffel bag in the motel room contained only underwear and socks and toiletries. [11:T1970-71] It did not contain a change of clothing. Also, there is nothing to rule out the possibility that Thomas was kidnapped and killed after Appellant left Ft. Myers because there was no way to determine when he died.

The State presented evidence to indicate Appellant left Ft. Myers on the morning of August 8, 2002. The night before Appellant and his mother left Ft. Myers, they were with Jennifer Morrison. The prosecutor asked Morrison what time of day Appellant arrived at her house, asking: "The morning? Afternoon? Evening?" [7:T1341] Morrison answered that Appellant arrived "more towards the evening." [7:T1341]

Whoever killed Thomas had to have killed him some time after 9:00 p.m. because Fabina saw Thomas from 7:00 to 7:30 and Lehmann (Thomas' wife) testified unequivocally that she spoke to him around 9:00.[3] [4:T598] Appellant would have needed time to kill Thomas; bury him and cover the area with the plywood, vegetation and the couch; disassemble and burn the tent; drive the rental car all the way out to a remote area of Lehigh Acres; burn the car and

(..continued)
cocaine for him. [11:T2098]

[3] The telephone records show the last call on Thomas' phone was at 7:59 that evening; however, Lehmann's testimony does not rule

somehow get to Morrison's home on Poinciana Court some time "more towards the evening." [7:T1334] "More toward the evening" means some time between afternoon and evening but closer to the evening hours. If the State had thought the truth was something other than that, the prosecutor would have clarified Morrison's answer. Furthermore, there was no testimony that Appellant was dirty or sweaty when he arrived, that he smelled of accelerant used to burn the car, or that he had just showered. The record also showed Appellant arrived at Morrison's alone. [7:T1342] Appellant would have needed an accomplice to drive him back from Lehigh Acres; however, the State's theory does not include an accomplice, nor does it explain this discrepancy.

The rental car Mr. Thomas was driving on August 7th was found burned on August 13th, suggesting that there was evidence of the murder in or on the car. The State's theory included Appellant's burning the car, and the prosecutor excluded the possibility that gang members may have stolen the car and burned it. [12:T2127] The Fire Marshall opined that the car was burned more than 24 hours before it was found because the embers were not warm; however, since the remnants were not compacted, the Fire Marshall did not believe the car had been sitting in the rain. [5:T903, 909] Therefore, since it was August, the car was probably not burned six days before it was found. Since Appellant left on the morning of August 8th, someone else must have parked the car in Lehigh Acres and burned it.

Also, although a key ring with nine keys was found in the

(..continued)
out the possibility Thomas called from another phone.

burned rental car, the keys did not belong to Thomas and no effort was made to identify the owner of the keys. The Fire Marshall testified that the driver's seat in the rental car was leaning back as if to accommodate a taller driver. Appellant is only five-foot-four or five-foot-five. [5:T944]

The fact Appellant left Ft. Myers does not demonstrate consciousness of guilt. The court erred in admitting evidence of his leaving Florida because there is nothing to show he was a suspect or that he knew Thomas was missing. (Issue IV) Appellant explained that when he returned to Florida, his mother demanded that he take her to Tennessee because she did not like living with Morrison and her boyfriend because of their unorthodox hours and because of their "partying." The fact Appellant lived in a tent in the forest is not indicative of guilt because Appellant lived in tents in Florida where he was evading an outstanding warrant for a drug charge in Missouri. Appellant lived a secretive and paranoid existence because he was a drug dealer who habitually carried cash in his pockets. Therefore, the fact Appellant either left the campsite in Tennessee or that he failed to claim his property does not indicate consciousness of guilt for anything other than the warrant and drug dealing.

The phone conversations from the jail do not indicate a consciousness of guilt. It is clear from the unredacted text that most of the comments the State found suspicious concerned Appellant's belief that if Chris Miller did not talk to the police about the meth lab or drug sales, the charges in Tennessee relating to the meth lab would "go away." Miller lived in Tennessee,

and there is no evidence linking him to Thomas. The conversations do not contain any confessions, and the women did not make any accusatory statements. Appellant's mother refers to the fact that other people were saying things, but the fact that other people are saying things does not mean that those things are true. There were no accusations in the calls for Appellant to deny, and even if there were, they would be third-party accusations and there would be no reason to deny third-party accusations to your own mother and your fiancée.

The conversations are cryptic and for that reason, they are not overtly incriminating. The State failed to prove that the conversations were inconsistent with Appellant's claim that they did not prove consciousness of guilt. The factfinder would have to assume, first, that the circumstantial evidence was consistent with the State's theory that the phone calls demonstrated consciousness of guilt, and inconsistent with any other inference, before using that inference to infer that Appellant killed Thomas. "Circumstantial evidence is not sufficient when it requires the pyramiding of assumption upon assumption in order to arrive at the conclusion necessary for a conviction." Chaudoin v. State, 362 So.2d 398, 402 (Fla. 2d DCA 1978); Gustine v. State, 86 Fla. 24, 97 So. 207 (1923).

In determining whether or not the State proved Appellant killed Thomas, this Court should not consider any of the evidence the State presented regarding the alleged robbery. The indictment charged both premeditated murder and felony murder in the alternative, with robbery as the underlying felony. Appellant was not

charged with robbery. The jury was given a special verdict form that allowed for a finding of first-degree murder, second-degree murder, manslaughter or not guilty in the alternative. [R14:1106-1107] Once the jury found first-degree murder, the jury was asked how many of the jurors found the killing was premeditated and how many found the killing was committed during the course of a robbery or attempt to commit a robbery. [12:T2200; R14:1106] Although the jury was instructed to check only one degree of murder, the jury was not instructed that it had to find either premeditation or felony murder. There was nothing to indicate that the jurors' decision regarding premeditation or felony murder had to be unanimous, and the judge and the prosecutor agreed that a juror could find both premeditation and felony murder. [11:T2060, 2062]

All twelve jurors found the killing was premeditated and none found the killing to be during the course of a robbery or attempted robbery. [R14:1106; 12:T2222] There is a well-established presumption that juries follow trial court instructions. See Sutton v. State, 718 So.2d 215, 216 (Fla. 1st DCA 1998). The jurors decided Appellant did not rob Thomas, and thereby acquitted him of felony murder. Compare Kaplan v. State, 681 So.2d 1166 (Fla. 5th DCA 1996), in which the trial court instructed the jury it could return a verdict on either one of the two attempted murder theories (premeditation or felony murder) but not both. In Kaplan, retrial for attempted premeditated murder was not prohibited because the court prohibited the jury from finding guilt on both theories. In this case, neither the verdict form nor the

court's instructions prohibited a finding on both theories; therefore, the Appellant was acquitted of the offense of felony murder.

In Bigham v. State, 33 Fla. L. Weekly S527, 2008 WL 2678052 (Fla. July 10, 2008), the trial court granted the motion for judgment of acquittal of kidnapping, sexual battery and felony murder. For that reason, in deciding that the evidence failed to prove premeditation, this Court did not consider evidence suggesting kidnapping or sexual battery. Likewise, because the verdict in this case excluded felony murder, this Court should not consider any evidence introduced to prove robbery.

However, even if this Court disagrees, the evidence did not support a motive of robbery. There is no evidence that Appellant had any interest in robbing Thomas or any need to do so. There was no testimony Appellant told anyone he planned to rob anyone. The trial judge admitted that the evidence of robbery was not strong. [11:T2076]

Appellant testified that he did not know Thomas withdrew money from the bank and that he did not know Thomas had any money on him. There is no evidence that Thomas told Appellant anything about his finances or his whereabouts. Thomas left Appellant alone at the house in Alabama and he did not tell Appellant where he was going or what he was doing. The bank teller testified Thomas was alone and there is no evidence Appellant went to the bank with Thomas.

Even though Appellant had various store receipts in his possession, the State proved only that he spent $238.15 because the

State produced only one cashier who remembered a man paying for the items at Wal-Mart. Appellant's mother paid for his tent in Florida, and we do not know if the Appellant's mother or Debbie Miller provided money for any of the items found at the campsite. In other words, the receipts are only circumstantial evidence Appellant had the money represented by the receipts. We do not know if Appellant's mother or Debbie Miller contributed money for the cars because Appellant's mother went to get the rest of the money and Appellant's mother paid for the engine. [8:T1549]

The State also presented inconclusive circumstantial evidence to prove Thomas had a substantial amount of money. The bank teller in Montgomery testified that Thomas asked for the money in $20 bills so that he could use it for an auction. Thomas told Fabina he was going to buy a truck. The State did not show Thomas did not spend the money at an auction or for a truck and there is no evidence Thomas still had any of the money from the bank with him. The fact that Fabina saw Thomas with cash is meaningless because Fabina had no idea how much cash Thomas had, and she did not describe the denominations of the money.

Even if the State proved Thomas had money, and even if the State proved Appellant spent money in his possession, the State did not prove the money Appellant spent belonged to Thomas. The record shows Appellant spent $100 bills, and there is no evidence that Appellant went to a bank on the way up to Tennessee and changed the bills from $20 bills to $100 bills. Appellant testified he always got paid in cash and he preferred $100 bills. There is no evidence Appellant had credit cards or a bank account. He

testified he kept the money on his person. In Morse v. State, 604 So.2d 496 (Fla. 1st DCA 1993), the morning after a burglary, law enforcement found shoeprints matching Morse's shoes, leading from the site of the crime to Morse's motel room. A few minutes after Morse was interviewed by deputies, he ran from them and threw down a jar of coins. Because the State did not show the coins were related to the burglary, the appellate court found the evidence to be insufficient, even though the evidence was suspicious. Id. at 504.

The State theorized Appellant was without funds; however, the evidence showed Appellant installed a door and a hot tub deck in Thomas' Ft. Myers house. [4:T592] He also did maintenance work for the rental properties Thomas owned, and Fabina testified she heard Thomas talking to Appellant about repairing the roof on a property. [4:T747] The roof repairs would have been between May and August because Fabina started dating Thomas in May. [4:T739] Appellant also did roofing work for Marine's Best during that period, and McArthur testified Appellant did construction work. The evidence is undisputed that Appellant had no rent or utility payments. He had no car payments or gas expenses because he did not have a car.

There is undisputed evidence Appellant made money selling marijuana in Florida. At one point before he left for Alabama he had 2.2 pounds of marijuana (approximately 35 ounces), and he sold it for $50 an ounce. He was selling methamphetamine in Tennessee, and when he was arrested, he had a meth lab in the trunk of the car. The methamphetamine sold for $225 for 3½

ounces. He had 3 buyers a day for meth and dozens for marijuana. [11:T2044] If he had only 10 meth sales from the time he arrived in Tennessee and the time he was arrested, he would have made $2,250. Also, Appellant started the trip with over $2,500 in cash and his mother brought cash with her. The State alleged Appellant and his mother only spent somewhere between $5,000 and $6,000. No other money was found, although the police searched for it in Tennessee. Also, the phone conversations indicate the money dried up once Appellant was arrested and no longer able to sell meth.

This Court cannot disregard Appellant's testimony. A jury can choose to disbelieve the defense only regarding facts on which the state has presented contrary testimony. See Fowler, 492 So.2d at 1347, citing Buenoano v. State, 478 So.2d 387, 390 (Fla. 1st DCA 1985). The rule is well settled that unimpeached or undisputed testimony by a competent witness cannot be disregarded by the fact-finder unless it is inherently improbable on its face. Flowers v. State, 106 Fla. 686, 143 So. 612 (1932); Brannen v. State, 94 Fla. 656, 114 So. 429 (1927); Holton v. State, 87 Fla. 65, 99 So. 244 (1924); Harris v. State, 104 So.2d 739 (Fla. 2d DCA 1958). "It is well settled in Florida that a defendant's otherwise reasonable, unrebutted, and unimpeached testimony in a criminal case must be accepted by a trier of fact and -- if such testimony is entirely exonerating, the trial court is obligated to enter a judgment of acquittal for the defendant on the crime charged." Dudley v. State, 511 So.2d 1052, 1057 (Fla. 3d DCA 1987). The legal effect of competent evidence which is not impeached, discredited, or controverted is a question of law. Holton; Brannen. In

other words, the trial court and jury could not disregard Appellant's testimony, and this Court, still must accept the testimony as true. See Evans v. State, 643 So.2d 1204, 1206 (Fla. 1st DCA 1994).

The evidence in this case is far less cut and dried than the prosecution's theory. We know, for example, that Valerie (Bisnett) Fabina was the last person to see Thomas alive. Fabina was still married while she was dating Thomas; however, law enforcement did not investigate Fabina or her husband. Detective Bell testified that Fabina had fallen on hard times financially and for that reason, she was living with friends; however, soon after Thomas disappeared, she paid $1115 for rental of a house. The Sheriff's Office knew nothing about this transaction. [10:T1852-53] Fabina and her husband began living together again on August 15, 2002, about a week after Thomas went missing. Bell did not know if either Fabina or her husband owned a shotgun. [10:T1869-70] Fabina waited until August 22, 2002, to give Thomas' duffle bag to the Sheriff, and we know that Lehmann was very concerned about something in the duffle bag.

The State's evidence also showed that Thomas' rental properties were in disrepair, and for that reason, they were not making much money. Lehmann and other witnesses testified that Thomas bought and sold old cars; however, according to Lehmann, none of the cars were functional. Although Thomas may have been licensed to practice law, he was not doing so in 2002. Nevertheless, Thomas deposited large sums of money in the bank in Alabama, including a deposit for $86,000 in February of 2002.

Thomas told the bank teller that he was going to use the cash for a property auction, and he told Fabina he was going to buy a truck. He lied to Lehmann about his extra-marital affairs; he lied to Fabina about his marital status and he told her he lived in Alabama. He lied to Lehmann, telling her he would be in Alabama for eight weeks or so. He lied to Appellant, telling him he had gone through the process to obtain a special permit to put a deck on a historic home. [11:T1988] Thomas also had at least two more cell phones. However, none of those phone records were obtained by law enforcement. [10:T1826]

Lehmann changed the locks on the house in Alabama on August 15, 2002, and she closed the Alliant bank account there at the same time. She was afraid Thomas had been kidnapped or killed. Lehmann did not turn over the answering machine from the Montgomery residence, and she decided whether or not the messages on it were relevant. There was also evidence that someone forwarded the calls made to the cell phone found on Thomas' body around August 22, 2002. Other than contacting the company, the only way to do that was by using the phone, and there is no evidence Lehman called the company. Lehmann also had a concealed weapons permit.[4]

What is more puzzling, however, is Thomas' behavior. He did not have to sneak away to Alabama to see Fabina because Fabina lived in Florida, and they did not hide their relationship. Nevertheless, according to the State, Thomas took Appellant to Alabama to construct a deck for which he needed a special permit,

[4] The court excluded proffered testimony that Thomas had been arrested in 1998 for conspiracy to kill Lehmann, and that his co-conspirator was his girlfriend (Issue IV).

knowing that he did not have the permit and that it would take time to obtain one. Thomas stayed in Alabama for only a few days and then rented a car to drive all the way back to Fort Myers with Appellant to buy a truck to take all the way back to Alabama. Thomas could have easily bought a truck in Alabama; he did not have to drive back to Florida. Also, he certainly did not have to withdraw $25,000 in small bills to buy a truck, he could have written a check on the Alliant account. Since the lumber was already at the house and because Thomas did not have a permit for the deck, Appellant would not have needed a truck at that time.

Given all of the above, this Court must reverse because suspicion alone is not sufficient to sustain a conviction. In Fowler, the defendant shot and killed a man who had given him a ride. He claimed he accidentally shot the man while struggling with him to prevent the man from shooting him, and claimed the victim was in the process of forcing him into a homosexual act. He also claimed he found the victim's wallet on the floorboard of the victim's truck after the shooting. The state theorized the motive for the killing was robbery of the truck and wallet because both were found in Fowler's possession. State witnesses testified the victim was not inclined to homosexual acts and that the victim habitually kept his wallet in his back pocket. The state theorized Fowler shot the victim while the victim was on his hands and knees-- a fact contradicted by its own forensics evidence. In reversing, the court found the circumstantial evidence insufficient and found that evidence of collateral matters regarding Fowler's actions after the murder did not contradict the Appel-

lant's theory of defense. In Fowler, the court stated in coming to this conclusion:

> Initially, we must consider whether, in order to be legally sufficient, the circumstantial evidence relied on by the state must lead ***only*** to an inference or conclusion that contradicts defendant's hypothesis of innocence, or whether it may be susceptible of two or more inferences, one being consistent with defendant's story and others being inconsistent with such story. We conclude that a circumstantial evidence case should not be submitted to the jury unless the record contains competent, substantial evidence which is susceptible of only one inference and this inference is clearly inconsistent with the defendant's hypothesis of innocence. Evidence that leaves room for two or more inferences of fact, at least one of which is consistent with the defendant's hypothesis of innocence, is not legally sufficient to make a case for the jury.

Id. at 1347-48.

In Burkell, 32 Fla. L. Weekly D2485, “the Frenchman” who was lodging with the defendant and his family was bludgeoned to death in his bedroom. The defendant, described by the court as the “father,” found the body about 18 hours after the murder. His footprints were found in blood on the floor of the victim’s bedroom. Specks of blood from both the victim and the defendant were found on a bathmat and sink in the bathroom. The defendant cashed a $10,000 check drawn on the victim’s account the day before the death. The defendant was also a beneficiary in the man’s will, and his estate was almost $300,000. The sliding glass doors leading out of the bedroom and the bedroom door were not locked. There were latent fingerprints at the scene which could not be matched to anyone in the household. The father was convicted of first-degree murder and the appellate court vacated the conviction for the entry of a judgment of acquittal for insufficient evidence. The court found the evidence to be purely circums-

tantial because the DNA evidence along with the footprint proved nothing more than the father's presence in the room after the murder and that the father left his blood specks in his own bathroom, stating "Alone, neither tends to show that it was the father alone who bludgeoned the man to death." Burkell.

Smolka, 662 So.2d 1255, demonstrates how suspicion is insufficient. In Smolka, Smolka's wife was found in a field shot to death. Smolka had a partnership interest in a hotel in Ocala which was faltering. Before the murder Smolka's wife accompanied Smolka on a business trip from Virginia to Ocala at his insistence, ostensibly to sign papers and to vote out a partner at a board meeting. On the night she was killed, Smolka insisted that his wife go to Phar-Mor to pick up supplies that another employee had previously made plans to get. When she didn't return, Smolka called the police.

The circumstantial evidence against Smolka was extensive and included the fact that he appeared to know that the van in which his wife was killed had blood on the middle seat-- something he had not been told, and something he could not have observed from his vantage point. Smolka was in severe financial trouble and needed $28,000 a month for debts and living expenses. He had purchased additional life insurance on his wife just ten days before she was murdered. Smolka's relationship with his wife had deteriorated, and witnesses had heard him make threatening remarks about her. The partnership in the motel had been placed in an irrevocable trust and the wife's presence was not needed in Ocala,

even though he insisted she come. She also did not have any authority to vote on the board of directors.

On the night of the murder, a patron of the hotel noticed the couple dressed up as if they were going out, indicating they would have showered before dressing. After Smolka's wife disappeared, he was seen in the hotel with wet hair. Witnesses testified it was uncharacteristic for him to be in public with wet hair. According to surveillance cameras, the victim left the store just after 7:30. An employee testified he looked for Smolka between 7:30 and 8:30 that evening, but could not find him. At 8:15 or 8:20, Smolka called a friend whom the couple planned to meet and told him his wife had not returned from the errand. Smolka went to meet that friend at a club by himself around 9:20. A witness said he was acting unusually gregarious, making sure people knew he was there.

Smolka made a phone call to an employee at 10:00 that evening to ask her to pick up his wife at 7:45 the next morning and take her to the Gainesville airport even though she was still missing. People saw Smolka walking around the hotel between 3 and 4 in the morning. The night auditor called Smolka who denied being outside. At 4:00 in the morning, the auditor again called Smolka's room and got no answer. The next morning, employees who were scheduled to take Smolka's wife to the airport discovered she was missing. When they got to the airport, airport security told the employees the ticket had not been used. When the employees left the airport, Smolka flagged them down and asked them to wait while he returned his rental car and to drive him back to Ocala. Smolka did not ask the Budget Rental Car company if someone had returned his wife's

van, nor did he mention the fact she was missing, although he did question an overcharge on his car. On the way back to Ocala the employees told Smolka they had inquired as to whether his wife's ticket had been used. Smolka said he knew the ticket had not been used because he had been there earlier and checked. However, such inquiries had to be made through airport security, and security did not remember seeing him in the airport.

Even though the evidence strongly suggested Smolka's guilt, the appellate court reversed the conviction, writing: “There is no doubt that the State’s case against Smolka creates a strong suspicion that he murdered his wife. The number of suspicious circumstances is especially troubling. But suspicions cannot be the basis of a criminal conviction.” Id., 662 So.2d at 1267. The court found that even the fact of Smolka's apparent guilty knowledge about where the bloodstains were found in the rented van was not enough to contradict Smolka's reasonable hypothesis that he did not commit the murder. Id. at 1267.

In Davis, 90 So. 2d 629 (Fla. 1956), this Court said:

> Evidence which furnishes nothing stronger than a suspicion, even though it would tend to justify the suspicion that the defendant committed the crime, it is not sufficient to sustain conviction. It is the actual exclusion of the hypothesis of innocence which clothes circumstantial evidence with the force of proof sufficient to convict. Circumstantial evidence which leaves uncertain several hypotheses, any one of which may be sound and some of which may be entirely consistent with innocence, is not adequate to sustain a verdict of guilt. Even though the circumstantial evidence is sufficient to suggest a probability of guilt, it is not thereby adequate to support a conviction if it is likewise consistent with a reasonable hypothesis of innocence.

Id. at 631. In this case, because the evidence is equally as probative of innocence as it is of guilt, the conviction must be

reversed and the Appellant discharged.

ISSUE II

WHETHER THE EVIDENCE FAILS TO PROVE FIRST-DEGREE MURDER BECAUSE THERE IS INSUFFICIENT EVIDENCE TO PROVE PREMEDITATION, AND BECAUSE THE JURY SPECIFICALLY RULED OUT FELONY MURDER; AND WHETHER THE CONVICTION SHOULD BE REDUCED TO MANSLAUGHTER.

Even if the evidence were sufficient to prove Appellant killed Thomas, the evidence was insufficient to prove Thomas was killed with premeditated intent because no one witnessed the events that led to Thomas' death, and the fact that Thomas was shot once in the back was insufficient to prove premeditation.

In his motion for judgment of acquittal, the Appellant specifically argued that the evidence was insufficient to prove Appellant committed robbery; however, counsel neglected to argue the issue of insufficiency of the evidence to prove premeditated intent. The jury agreed that the evidence was insufficient to prove robbery because the jury indicated through a special finding that all of the jurors found premeditation as opposed to felony murder. The jury's special verdict acts as an acquittal of the offense of felony murder because the jurors were allowed to find both premeditation and felony murder. (See Issue I)

This Court may still review the sufficiency of the evidence to prove premeditated intent because even in the absence of a specific argument below, this Court is obligated to review the record in each death penalty case on direct appeal to determine whether the evidence is sufficient to support the conviction for

first-degree murder. See Fla. R. App. P. 9.142(a)(6); Rogers v. State, 948 So. 2d 655, 673-74 (Fla. 2006).

If the State fails to present evidence regarding how a death occurs, the State fails to prove premeditated intent. See Terry v. State, 668 So.2d 954, 964 (Fla. 1996)(although evidence showed victim was killed in the course of a robbery, premeditated intent could not be proven absent evidence showing how the shooting occurred); Norton v. State, 709 So.2d 87 (Fla. 1997); Coolen v. State, 696 So.2d 738 (Fla. 1997). "Where the State's proof fails to exclude a reasonable hypothesis that the homicide occurred other then by premeditated design a verdict of first-degree murder cannot be sustained." Bigham, 33 Fla. L. Weekly S527, citing Green v. State, 715 So.2d 940, 944 (Fla. 1998).

Even if one were to presume Appellant killed Thomas, the evidence showed Thomas was shot once in the back with a shotgun loaded with birdshot used for small game, as opposed to buckshot, even thought there were unspent buckshot shells found on the property. If someone planned the murder, he or she would not have chosen birdshot. There were no witnesses to the shooting, and there was no evidence that there had been any difficulties between the Appellant and Thomas. There was no evidence of a struggle.

The prosecution insisted that Mr. Thomas was lured to the Miramar property and that he was killed there even though there is no evidence that supports that theory to the exclusion of a theory that he was transported to the Miramar property after he was killed. There was no blood evidence at the Miramar property. [6:T1130] There was no testimony that anyone in the neighborhood

heard a shotgun that night. No one testified that they saw Thomas' rental car on Miramar that night, and no one saw Thomas at the property that night.

There is no evidence Thomas was still alive when the hole was dug. The fact there was sand in Thomas' airways did not prove he was killed in the hole or buried while still breathing. Because Thomas was shot in the back, he would have fallen forward. The coroner stated that Thomas could have inhaled the sand if he fell on any uneven sandy surface. [3:T497-498, 501] Because the State failed to test the sand collected, the medical examiner could not say the sand was from the place where Thomas was buried. [3:T496] Also, the body was found lying on its left side. The body was not facedown. Hamilton testified Thomas would have died within minutes. It would have taken too much time for someone to cover the body with dirt; therefore, it is highly unlikely that Thomas lived long enough to breathe in dirt from the gravesite.

The State argued in closing argument that the fact that Thomas' right foot was higher than the left foot when the body was excavated proved that Thomas was killed on the property and buried while still moving. However, the State failed to present any expert testimony to support its theory, and the prosecutor avoided asking Dr. Hamilton and the crime scene technicians whether that fact supported its theory. The State never proved that the right foot could not have become elevated during burial or when the body started to settle or decompose. Also, the coroner opined that Thomas would have become unconscious and died within minutes of being shot. [3:T500]. Therefore, it is not

possible that Thomas was still moving after his right foot was buried because the body was lying on its left side; the right foot was lying on top of the left foot and it would have taken too long to cover both legs with dirt. See Burkell(inference that murderer made the footprint failed because State did not present expert testimony that defendant's bloody footprint "could have been made only when the murder was committed" as opposed to when the defendant discovered the body).

There was no evidence that Appellant dug the hole in which the body was found, and there was no evidence indicating when the hole was dug. (See extensive discussion in Issue I) Spencer heard only seconds of the sound of a shovel in the rain some time between June and September while the tent was still standing. Appellant explained that Spencer must have seen him preparing to go to the bathroom.

In Randall v. State, 760 So.2d 892, 901 (Fla. 2000), this Court defined premeditation:

> More than a mere intent to kill; it is a fully formed conscious purpose to kill. This purpose to kill may be formed a moment before the act but must also exist for a sufficient length of time to permit reflection as to the nature of the act to be committed and the probable result of that act.

Id., quoting Wilson v. State, 493 So.2d 1019, 1021 (Fla. 1986). Evidence of premeditation must be sufficient to show that the accused was conscious of the act that was about to be committed and the probable result of the act. Tillman v. State, 842 So.2d 922, 925 (Fla. 2d DCA 2003).

A premeditated design to effect the death of a human being is more than simply an intent to commit homicide, and more than an

intention to kill must be proved to sustain a first-degree murder conviction. Tien Wang v. State, 426 So.2d 1004, 1006 (Fla. 3d DCA), review denied, 434 So.2d 889 (Fla. 1983). Evidence from which premeditation may be inferred includes such matters 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. Holton v. State, 573 So.2d 284, 289 (Fla. 1990); Norton v. State, 709 So.2d 87, 92 (Fla. 1998).

Although premeditation may be proven by circumstantial evidence (Norton), when the intent of an accused is sought to be established by the actions of the accused, the circumstantial evidence rule applies. Tien Wang, 426 So.2d at 1006. In order to prove the fact of premeditation by circumstantial evidence, "the evidence must be inconsistent with any reasonable hypothesis of innocence." See Holton v. State, 573 So.2d 284 (Fla. 1990); Tillman v. State, 842 So.2d 922 (Fla. 2d DCA 2003); Wilson, 493 So.2d at 1022; McArthur v. State, 351 So.2d 972 (Fla. 1977). "Where the State's proof fails to exclude a reasonable hypothesis the homicide occurred other than by premeditated design, a verdict of first-degree murder cannot be sustained." Randall; Norton; Kirkland v. State, 684 So.2d 732, 734 (Fla. 1996); Coolen v. State, 696 So.2d 738, 741 (Fla. 1997).

In Norton, this Court reduced Norton's conviction from first-degree premeditated murder to manslaughter because "the total absence of evidence as to the circumstances specifically surrounding the shooting" militated against a finding of premeditation.

Id. at 92. Norton's victim was found in an open field with a gunshot wound to the back of her head. There was an imprint of the tire tread from Norton's car on the back of the victim's leg. There were no signs of a struggle, nor were there any defensive wounds. The victim and Norton were seen together the night before the body was discovered, and Norton lived a little over a mile from where the body was found. The victim's blood was found on the passenger side window of Norton's car, and a shell casing from bullet of the same caliber as that which killed the victim was found on the back seat. Norton also attempted to flee from officers who were watching his residence.

In Norton, the fact that the victim was shot once in the back of her head was insufficient to establish premeditation because the gunshot wound was also consistent with a homicide committed in the spur of the moment. Norton at 93. In this case, the fact that Thomas was shot in the back does not mandate a finding of premeditation. In Norton, the fact that there were no witnesses to the shooting or to the events preceding the shooting was persuasive, as was the lack of evidence of a continued attack. In this case, there were no witnesses, and there is no evidence of a continuing attack. Also, in this case, as in Norton, there was no evidence of animosity or difficulties between Appellant and Thomas, and witnesses who saw them together in the days before August 7, 2002, did not see any arguing or any other kind of strife. There is no evidence Appellant had any intention or plan to kill Thomas. See also, Kirkland v. State, 684 So.2d 732 (Fla. 1996).

In Bigham, this Court reduced a conviction from first to

second-degree murder. The victim was found strangled. Even though the evidence, which included drag marks in the pine needles leading to the scene, was more consistent with a theory that Bigham assaulted the victim on the road and dragged her into the woods, strangled her and then had sex with her, this Court reduced the conviction because the evidence was not inconsistent with a strangulation during or immediately after consensual sex without a premeditated intent to kill.

In this case, neither the fact the body may have buried by the perpetrator, nor the fact that Appellant may have left the jurisdiction after the shooting, proves premeditation, because that evidence is equally consistent with efforts to avoid prosecution for any unlawful killing. See Norton, 709 So. 2d 87 (evidence that defendant may have taken steps to conceal evidence of the crime did not established that he committed the murder with a preconceived plan or design); Smith v. State, 568 So.2d 965 (Fla. 1st DCA 1990)(evidence of conflicting stories as to defendant's wife's whereabouts and efforts to cover up the crime did not prove premeditation).

This court should not consider evidence of felony murder in its determination of whether or not the evidence proved first-degree murder. As argued in Issue I, the jury specifically found that the murder was premeditated. Because the jurors could have chosen both theories, their verdict acts as an acquittal of felony murder. Therefore, as in Bigham, this Court cannot consider a theory of guilt for which Appellant has been acquitted.

Even if this Court were to somehow reason that the special

verdict does not preclude first-degree felony murder, this Court cannot uphold the verdict based on a felony murder theory not found by the jury. "Neither this Court nor the trial court can alter the original jury's findings with regard to the guilt issues." Lebron v. State, 894 So.2d 849, 852 (Fla. 2005)(court could not alter specific and inconsistent special jury verdicts). To hypothesize a guilty verdict that was never in fact rendered – no matter how inescapable the findings to support that verdict might be – would violate the jury-trial guarantee. See Sullivan v. Louisiana, 508 U.S. 275, 279 (1993).

Even if this Court were to believe that Appellant could be retried for felony murder, for the same reasons argued in Issue I, the State failed to prove that Appellant robbed Thomas, and therefore, the State failed to prove felony murder. Retrial would be barred because the trial judge erred in denying the motion for judgment of acquittal of felony murder based on robbery (Issue I). Since no evidence of a depraved mind killing was presented, Appellant's conviction must be reduced to manslaughter. Norton.

ISSUE III

WHETHER THE TRIAL COURT ERRED IN DENYING THE APPELLANT'S MOTION TO SUPPRESS THE PROPERTY SEIZED FROM THE CAMPSITE IN TENNESSEE WHEN THE STATE FAILED TO PROVE HE ABANDONED THE PROPERTY, AND BECAUSE THE WARRANT EXCEPTION OF "EXIGENT CIRCUMSTANCES" CANNOT JUSTIFY SEIZING THE TENT AND ITS CONTENTS AND THE PROPERTY REMAINING AT THE CAMPSITE.

The court correctly found Appellant had an expectation of privacy in his tents at the campsite in Tennessee, United States v. Gooch, 6 F. 3d 673 (9th Cir. 1993); however, the court's legal

conclusion that Appellant abandoned the property is not supported by competent substantial evidence. The State did not present any evidence Appellant or someone acting on his behalf took the property, and there is no evidence Appellant intended to leave.

During the November 17, 2006, hearing on Appellant's motion to suppress [R7:323-324; R10:456-574] the State proved Marie and Gus Reeves were live-in camp hosts at the Horse Creek Park campground in the Cherokee National Forest in Greenville, Tennessee. [R10:T460-61] Appellant arrived at the campground on August 21, 2002, secured a 14-day permit for a campsite, and chose Lot. 8, which had a walking path behind it. [R10:480-81] He arrived in a maroon car and erected one tent to sleep in and another screened tent over the picnic table. [R10:482] Appellant said his name was Brian Wagner. [R10:463]

Four days later, on August 25, 2002, a woman complained the dog in Lot 8 was menacing. [R10:462-63, 483] Reeves reported the complaint to Deputy Wesley Holt and Holt spoke to Appellant. [R10:463-64] Holt asked for photo identification in case the dog got loose and bit someone. [R10:506] Appellant said he did not have any with him, but he did provide the name of Brian Wagner and a birth date. [10R:507] Appellant said a family member could bring his identification and Appellant made a cell phone call. [R10:508] At that point, Holt was called away for a car accident, and he told Appellant he would return to look at the identification. [10R:508] Holt returned later and Appellant and the dog were not there. [10R:509] He walked around the site without entering the tent and saw a generator, a refrigerator, and three police scan-

ners inside the tent. [R10:510] Holt told the Reeves to let him know if the Appellant returned. [R10:464, 512]

According to Mrs. Reeves, the maroon car came back with a woman and large dog inside. [R10:465-66] Reeves did not see it stop at Lot 8, but when the car left a few minutes later, Reeves saw two large dogs. [R10:465-66, 467, 477] Later that day, Reeves saw an unfamiliar car enter the campground. [R10:468-70, 512] There was only one person in the car. [R10:468] When the car did not come out right away, they went looking for it. [R10:470] The car was in front of Lot 8, and when they approached, the car took off suddenly. [R10:470, 497] It was packed so that the Mr. and Mrs. Reeves could not see through from the back window to the front. [R10:471, 498] The car careened into a ditch, the man got out, and Mrs. Reeves wrote down the tag number. [10R:473, 498] They told the man they would call a tow truck and left; however, the car drove away before they could make the call. [R10:474-75] Mrs. Reeves called the Sheriff and Deputy Holt arrived a few minutes later. [R10:476]

Holt was called back to the campground at 9:58 that evening and he arrived at 10:14. [R10:518] Mr. and Mrs. Reeves and Holt went to the campsite and found that it had been ransacked. [R10:476, 499 513] There were things on the road and the steps to the campsite, the bedding was out of the tent, and the refrigerator and generator were gone. [R10:499, 512, 513, 517] It was raining heavily. [R10:477, 513, 514]

Mrs. Reeves remembered that Holt suggested that they “should take the rest of the stuff down and hold it for Mr. Wagner.”

[R10:477] Mrs. Reeves stated that the items that were outside the tent were already soaked, and there was no reason the campsite had to be moved other than their fear that the thief would return. [R10:487] The Reeves helped Holt take down the tents in the rain. [R10:487] Holt stated that he decided to seize the property and put it in custody even though he did not know if the Appellant had been assaulted or kidnapped. [R10:514, 524] Reeves stated there was no place at the campground to store the items. [R10:487] Holt told the Reeveses that if Mr. Wagner came back, they were to tell him where the items were; however, he did not return. [R10:478]

A day and a half later, Holt did an inventory. [R10:515] He opened the briefcase to see if he could get some identification or a contact number to find Mr. Wagner. [515] Holt admitted he did not know if anyone ever returned to the campsite. [R10:526] The inventory showed Holt seized the tent in addition to the property. [R10:516] He also seized a wallet with identification and $14.00. [R10:516] He admitted that the Appellant did not break any laws, but that he was suspicious. [R10:521, 526] Holt also admitted he had time to get a warrant. [R10:526]

Appellant testified that on August 21, 2002, he paid $192 for the site for 14 days. [R10:532, 536] He had two tents, one to sleep in and an insect tent to lounge in, and he placed burlap camouflage around the insect tent so that people could not see inside. [R10:533] He considered the campsite his private property and he thought he had the right to keep people out of his tents. [R10:533, 535] He purchased those tents because he wanted to keep items out of view and he chose that campsite because it had

borders around it and it was not right next to anyone else. [R10:534] Appellant explained that his mother drove the maroon car. [R10:537] Deborah Miller and her son, Christopher Miller, also visited the campsite along with Christopher's friends. [R10:538] He left the campsite every day but he came back. [R10:538]

On August 25, 2002, he returned to the campsite for lunch and then went to the Appalachian Trail with a backpack and a scanner. [R10:539-540] He was at his tents when Holt arrived the first time. [R10:540] Appellant thought he had identification in the tent, but he didn't. [R10:546] He called Debbie Miller and told her to bring identification in the name of Brian Wagner. [R10:546-47] When Holt left, Appellant went to another campsite of his on the Appalachian Trail. [R10:540-541] He was not there when his mother arrived, and his dog was with him that day, and not at the campground. [R10:541-42]

When he came back, it was raining. [R10:542-43] He saw the Reeves making their rounds, but he did not see the theft. When he returned his campsite was already down, his things were already gone and Deputy Holt had already left. [R10:543-44] There was only a little bit of debris left. Everything of value was gone. [R10:544] He did not contact Mrs. Reeves or the police because there was a warrant out for him from Missouri. [R10:544] He later heard that Christopher Miller may have taken the property, but he did not know that for a fact. [R10:545]

The court denied the motion, finding that even though the Appellant had an expectation of privacy, he abandoned the property

before the deputy took the property.[5] [10R:633-634]

The court's ruling on abandonment is erroneous because the State did not present any evidence that the man who took the property from the campsite was working with the Appellant or at his behest. The finding is based on innuendo not supported by the record, and in the order denying the motion, the court adds "two plus two" and comes up with five:

> 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 should 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 credible 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.

[R10:634]

This finding is clearly erroneous, because there is no evidence the thief was an associate of Appellant. A trial court's factual findings are entitled to deference, but reversal is

[5] At the hearing on the motion for new trial the court stated that in denying the motion, the court ruled Appellant could not legally abandon the property after it was seized by law enforcement; however, the court found he abandoned the property before it was seized. [17R:T1359-60]

appropriate if the findings are not supported by competent substantial evidence. See State v. Johns, 920 So. 2d 1156 (Fla. 2d DCA 2006)(trial court's findings in favor of defendant not supported by evidence because record did not show that traffic stop had ended before search took place); Herrera-Fernandez v. State, 33 Fla. L. Weekly D1604, 2008 WL 2468878 (Fla. 4th DCA June 18, 2008)(reversal required because finding that defendant consented to officers' entry into his home not supported by the record). An appellate court reviews the trial court's determination of historical facts under the competent substantial evidence standard of review. State v. Roman, 983 So.2d 731, 734-35 (Fla. 3d DCA 2008). Since the court's factual findings and legal conclusions are not supported by the evidence, this court must disregard the trial court's determination that the property was abandoned.

The court could not disregard Appellant's testimony in favor of unsupported speculation. Appellant testified that he was away from the campsite when his property was taken, and he did not see the theft. There is no evidence Appellant arranged for that man to remove the items from the campsite. The State did not prove Appellant knew the man. Furthermore, the Appellant testified that whoever took his property did not have permission to do so and that he had every intention of returning to the tent; however, it was gone by the time he returned. Deputy Holt had already taken whatever the thief had not.

He also testified that he did have identification in the name of Brian Wagner and that he had called his girlfriend to bring it to him. At that point in time, there was no reason for the deputy

to suspect Appellant of anything. Appellant testified that the deputy was cordial, and for that reason, he was not concerned. Holt only wanted identification because he had a pit bull and because the officer was afraid the dog might injure someone. Deputy Holt testified that he heard Appellant make the call.

Contrary to the State's position at the hearing, there was no evidence Appellant was in the car with the man who burglarized the campsite because Mr. and Mrs. Reeves saw only one man. The fact that there could possibly have been someone else in the car is not proof. Furthermore, it is equally as probable that the man chose the Appellant's campsite in the dark simply because he was not there and because thieves usually do not steal in broad daylight or when the occupant is on the premises. Also, thieves usually take valuable items and leave junk behind. Therefore, the fact that only valuable items were taken is consistent with a theft. Additionally, Appellant or someone acting for him would have taken the briefcase with the wallet because that item would have been valuable to Appellant and he would have known where to find it.

The court cannot base its ruling on speculation unproven by any facts. The fact that he could have arranged for someone to take the items is not evidence. See Davis v. State, 604 So. 2d 794, 798 (Fla. 1992)(fact that the victim knew defendant and "could have" identified him was insufficient to prove aggravator of murder to avoid arrest).

The trial court could not disregard Appellant's testimony because the State failed to present any evidence to contradict that testimony. The rule is well settled that unimpeached or

undisputed testimony by a competent witness cannot be disregarded by the fact-finder unless it is inherently improbable on its face. Flowers v. State, 106 Fla. 686, 143 So. 612 (1932); Brannen v. State, 94 Fla. 656, 114 So. 429 (1927); Holton v. State, 87 Fla. 65, 99 So. 244 (1924); Harris v. State, 104 So.2d 739 (Fla. 2d DCA 1958). The legal effect of competent evidence which is not impeached, discredited, or controverted is a question of law. Holton; Brannen. Since the Appellant's testimony was not inherently improbable and because it was not impeached or contradicted, the trial judge had no authority to disregard it and to assume that the man who took the property was the Appellant's accomplice.

Even if the court's ruling could be based on speculation that Appellant sent someone to get his property, Appellant's taking some of his own property from the campsite would not constitute an abandonment of the items remaining at the site — especially the tents, which were still standing, and the items inside them. Those items would still be in a constitutionally protected area and not in an area to which the public had access. Also, the deputy took the remaining property shortly after Mr. and Mrs. Reeves' observation of the man driving away with the property. Holt could not conclude that Appellant would not come back for the rest of the property. In fact, one of the reasons he took the property was because he thought the man would come back. Also, if the thief who took the property were an agent of the Appellant's, the State would have had to prove that the Appellant gave the man permission to leave the items behind in order to find that Appellant voluntarily abandoned an expectation of privacy regarding the property.

For that reason, the court erred in concluding that the Appellant "voluntarily relinquished his interest in the property in question" at the time the property was seized by Deputy Holt.

The burden is on the state to establish abandonment by clear and convincing evidence. Kelly v. State, 536 So.2d 1113 (Fla. 1st DCA 1988). In State v. Lampley, 817 So.2d 989 (Fla. 4th DCA 2002), cited in the court order, the defendant placed a bag containing contraband up under the wheel well of a truck before he walked away and went into a convenience store. The appellate court held that Lampley had no reasonable expectation of privacy in the wheel well of the truck in the store's parking lot (a public place in which he had no expectation of privacy) and that Lampley abandoned the bag by leaving it there. First, in Lampley, the defendant himself abandoned the bag. There was no question of whether Lampley authorized someone else to abandon the bag. Also, contrary to the facts in Lampley, in this case Appellant did have an expectation of privacy in his tents.

Even if Appellant did leave items behind, those items in the tents certainly were not in a public place. The items in the tent were in a constitutionally protected area, and the items found outside the tent were still in the rented campsite area. Nevertheless, except for testimony about bedding being outside the tent, the State absolutely failed to present testimony regarding which items were found outside the tent and which items were still inside of the tent when Holt took it upon himself to take the tent. For that reason, this Court cannot assume that any item introduced at trial or mentioned in trial testimony was found

outside the tent. In the absence of proof to the contrary, it must be assumed that anything else seized was inside the tent.

In Peterka v. State, 890 So.2d 219 (Fla. 2004), this Court held that appellate counsel was not ineffective for failing to raise denial of a motion to suppress the evidence found in a duplex he had shared with the victim. This Court found the trial court properly denied the motion. This Court stated, without reciting the underlying facts, that Peterka did not have a reasonable expectation of privacy in the premises on the afternoon of July 14 because he had abandoned the premises. The facts as recited in the direct appeal, Peterka v. State, 640 So.2d 59 (Fla. 1994), reveal only that Peterka was arrested and on July 14th he asked a friend to remove some of his belongings from the duplex and save them. Aside from the dearth of factual information in the case, Peterka is not instructive because the evidence is clear that Peterka specifically asked Thompson to remove his items from the duplex. The opinion in the direct appeal does not deal with the second search of the duplex, and for that reason, we do not know if Peterka manifested an intention to move from the duplex. In this case, removing some of the items cannot be deemed an intention to abandon the tent and remaining items because there is no evidence Appellant intended to abandon his tents at the campsite.

The court correctly decided that the Appellant had an expectation of privacy with regard to his campsite. However, the court also decided that the officer had “exigent circumstances” to take the Appellant’s property because he 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 for the elements and possible theft." [R10:634]

Searches conducted without a warrant are *per se* unreasonable unless conducted within the framework of a few specifically established and well delineated exceptions to the warrant requirement. See Gnann v. State, 662 So.2d 406, 408 (Fla. 2d DCA 1995), citing Katz v. United States, 389 U.S. 347 (1967). The State has the burden of showing that a warrantless search comes within one of the recognized exceptions. Gnann, citing Coolidge v. New Hampshire, 403 U.S. 443 (1971). One of the recognized exceptions to the requirement for a warrant to enter and search a home is exigent circumstances. See Barth v. State, 955 So.2d 1115, 1117 (Fla. 2d DCA 2006); Seibert v. State, 923 So.2d 460, 468 (Fla. 2006); Riggs v. State, 918 So.2d. 274, 278 (Fla. 2005).

Once the defendant establishes that the search was conducted without a warrant, the burden shifts to the State to produce "clear and convincing evidence" that the warrantless search was legal. Palmer v. State, 753 So.2d 679 (Fla. 2d DCA 2000)(judge erroneously shifted the burden of proof to the defendant by not requiring state to present evidence), citing State v. Lyons, 293 So.2d 391, 393 (Fla. 2d DCA 1974). The State has the burden to establish the exigent circumstances exception to the warrant requirement. Murphy v. State, 898 So.2d 1031, 1033 (Fla. 5th DCA 2002).

The trial court erred in concluding the exigent circumstances exception allowed the taking of Appellant's property. The exigent

circumstances exception is utilized to justify an entry into a constitutionally protected place. See Siebert at 468("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.")

Although exigent circumstances may justify entry, law enforcement needs separate justification for the seizure of property. In Davis v. State, 834 So.2d 322 (Fla. 5th DCA 2003), the police entered a residence based on the exigency of an apparent burglary. Once inside, they saw narcotics in plain view. They also observed jewelry, envelopes with Value Pawn labels or stickers, firearms, and zippered bank bags. At the time of the entry, the officers did not know there had been a robbery of the pawn shop. The items raised the suspicions of the officers and an officer testified he took the items for "safekeeping" because he did not want to leave valuable items and firearms in an unsecured residence. The appellate court held the warrantless seizure was illegal because the "incriminating nature" of the items seized was not apparent and because the exigency had ended once it was determined that no burglar or person in need of aid was inside.

In Davis, the court explained that the doctrine of exigent circumstances allows law enforcement to enter a home if they have "a compelling need for official action and no time to secure a warrant." Davis at 327, quoting Michigan v. Tyler, 436 U.S. 499, 509 (1978). The court also explains that "if the police enter a home under exigent circumstances and, prior to making a determina-

tion that the exigency no longer exists, find contraband in plain view, they may lawfully seize the illegal items." Id. The court also reiterates:

> The plain view doctrine generally provides the police authority to seize illegal contraband after entry is made under exigent circumstances. Under the plain view doctrine, an item may be seized without a warrant if 1) the police are legitimately in a place where the item may be viewed; 2) the incriminating character of the item is immediately apparent; and 3) the police have a lawful right of access to the item. Rimmer v. State, 825 So. 2d 304, 313 (Fla.), cert denied, 537 U.S. 1034 [](2002). In order to satisfy the second requirement, the police must have probable cause to associate the item with criminal activity.

Id. at 327.

Although there may have been exigent circumstances which would justify looking into the tent to see if the Appellant was injured or if the burglar was still at the campsite, there would be no exigent circumstances to justify taking any items still inside the tent or from the campsite. None of the items seized were contraband or even suspicious at that point. At that time, the deputy had no way of knowing Appellant would become a person of interest in any investigation. Also, any exigency had dissipated once the deputy determined the burglar had left and determined there was no one needing assistance at the campsite.

The court erred in concluding: "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." The officer had no authority, and no logical reason, to disassemble the tents and confiscate Appellant's property. It was

doubtful that the burglar would have returned after the Reeves saw him. Appellant specifically argued that if the deputy was concerned for the items lying outside the tents, he should have placed them back inside the tent or covered them with the tarp. [R10:T575] The State failed to show why taking items out of a tent in the heavy rain would have been necessary to protect them from the rain.

The court's reliance on Seibert v. State, 923 So.2d 460 (Fla. 2006), is misplaced. In Seibert, the officers responded to a 911 call that Seibert may have been suicidal. Seibert opened the door and spoke to the officers, but they were not convinced that he was all right. When he opened the door a second time, the officers forced their way inside. While in the apartment, the officers looked around to ensure that Seibert was alone and saw a severed foot in the bathroom. No such facts occurred here.

In Rolling, this Court concluded that the possibility that there was a weapon in Rolling's tent due to the fact that the police saw evidence linking Rolling to an armed bank robbery the day before created the exigency of police safety and justified the search of a tote bag and seizure of gun box. However, in this case there was no issue regarding the safety of police that would justify seizing Appellant's property.

The court's error requires reversal because at trial the State relied heavily on the receipts found at the campsite along with evidence of the camping gear to argue Appellant obtained the money for these items from Thomas. In closing, the prosecutor argued the receipts found at the campground showed Appellant spent

large amounts of cash. [11:T2122-23, 2124, 2132; 12:T2183] The prosecutor also argued that the camping gear found at the campsite matched the receipts and they were brand new. [11:T2124, 2125, 2132]

ISSUE IV

WHETHER THE COURT DENIED APPELLANT HIS CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE BY EXCLUDING EVIDENCE THOMAS HAD BEEN ARRESTED FOR CONSPIRACY TO KILL HIS WIFE, THAT HE HAD SYMPTOMS OF DRUG USE, AND THAT AT ONE POINT HE ASKED A GIRLFRIEND TO SELL COCAINE; AND WHETHER THE COURT ERRED BY EXCLUDING THOMAS' BANK STATEMENTS, WHICH SHOWED TRENDS CONTRARY TO TESTIMONY; AND WHETHER THE COURT DENIED APPELLANT HIS SIXTH AMENDMENT RIGHT TO COMPULSORY PROCESS IN REFUSING TO CONSIDER GRANTING A CONTINUANCE TO ALLOW APPELLANT TO CALL A WITNESS WHO WOULD HAVE TESTIFIED THOMAS MADE STATEMENTS INDICATING HE WAS AFRAID OF SOMEONE OTHER THAN APPELLANT.

Pursuant to the court’s ruling granting the State’s motion in limine, Appellant proffered testimony during trial to establish Thomas and his girlfriend, Patricia Sweeney, were arrested in 1998 for conspiracy to murder Thomas’ wife, Mary Ann Lehmann. [4:T647-653] Thomas planned to poison Lehmann, and although the charges were dropped, the FDLE apparently had audio or videotaped evidence, and Lehmann got a restraining order against Sweeney. [4:T649-50] The court also prohibited Appellant from presenting proffered testimony suggesting Thomas was using drugs or that he accepted sexual favors in lieu of rent. During trial, Jennifer Morrison, a woman who worked for Thomas collecting rents, testified Thomas sniffled a lot. Appellant then proffered Morrison’s testimony that she and David Twomey believed Thomas was on cocaine because he was skinny, hyper and smoked one cigarette

after another. [7:T1358] Morrison knew Thomas had sexual relations with women who fell behind in their rents because about two months before Thomas left for Alabama, she walked in on a tenant, Janet Riddle, giving Thomas oral sex for back rent, and after that, the rent was forgiven. [7:T1359-60, 1364]

During trial Appellant also attempted to introduce bank records from Thomas' and Lehmann's Alliant bank account in Montgomery from October, 2001, to July, 2002. [10:T1957-58; R23:T1986-1999] The records showed, contrary to Lehmann's testimony, that it was unusual for anyone to withdraw large amounts of cash, and for that reason, something else may have been happening at the time Thomas was killed. Counsel wanted to show that witnesses may not have been candid about Thomas' business practices. [10:T1958-59] Counsel argued Lehmann claimed there were large wire transfers, but the statements showed only one. [10:1959] The court sustained the objection, ruling that the probative value of the statements would be outweighed by the possibility they would be confusing. [10:T1962]

Because the court prohibited presentation of any evidence of the conspiracy to murder Lehmann and of Thomas' drug use, counsel knew he could not present the testimony of Patricia Sweeney who refused to appear. For that reason, counsel did not attempt to compel Sweeney's attendance. Counsel explained that Thomas was having an affair with Sweeney in 1998 and proffered she would have testified about the conspiracy case and that she had seen Thomas with ounces of cocaine and Thomas had asked her to sell cocaine for him. [11:T2098] Sweeney also witnessed Thomas and a business

associate waiving guns at each other and threatening to kill each other in 1998. Id.

The court also refused to consider a continuance or compelled process for counsel to obtain testimony from David Twomey. (Twomey managed Thomas' rental property.) Counsel explained that Twomey had appeared the day before, but he was under the influence of something and could not focus. [11:T2098-99] Counsel proffered that in deposition Twomey said the last time he saw Thomas, he was in a rental car at a gas station and he told Twomey, "You didn't see me. If anybody asks, you didn't see me." [11:T2099] The court ruled that based on the proffer, there was no need to delay the trial or to issue a writ of attachment. [11:T2100]

The court erred in excluding this evidence because Appellant's theory of defense was that someone else committed the murder, and that Thomas was killed either because he had conspired to kill Lehmann or that his activities involved the highly dangerous activity of drug dealing. Twomey would have testified that Thomas was afraid of someone other than Appellant. The fact Thomas was carrying $25,000 in $20 bills and that he had multiple cell phones at the time of his death supports that theory. Lehmann's testimony establishes the fact that Thomas' income could not be explained by his known business activity. Thomas was having an affair, and there was testimony that shortly after Thomas went missing, Morrison saw Lehmann with a black eye and bruises on her arm. [7:T1355] Evidence showed that there were unexplained keys in the rental car, and the rental car may have been driven by someone considerably taller than Appellant. All of the excluded

testimony would have been relevant to reasonable doubt.

Few rights are more fundamental than that of an accused to present witnesses in his own defense. Chambers v. Mississippi, 420 U.S. 284, 302 (1973). Where evidence tends in any way, even indirectly, to establish a reasonable doubt of defendant's guilt, it is error to deny its admission. Rivera v. State, 561 So.2d 536, 539 (Fla. 1990); Vannier v. State, 714 So.2d 470 (Fla. 4th DCA 1998). The relevancy standard is different in the context of proffered defense evidence. See Neiner v. State, 875 So.2d 699, 700 (Fla. 4th DCA 2004). "If there is any possibility of a tendency of evidence to create a reasonable doubt, the rules of evidence are usually construed to allow for its admissibility." Vannier, citing Rivera and Story v. State, 589 So.2d 939 (Fla. 2d DCA 1991).

In Vannier, the defendant sought to introduce letters written by his wife to show she might have committed suicide. The appellate court found the letters were equivocal, but held that since the letters were arguably exonerating, the trial judge's discretion was reduced, and it was up to the jury to decide which inference was correct. The court also held the error mandated reversal. In Wagner v. State, 921 So.2d 38, 30 (Fla. 4th DCA 2006), the defendant was convicted of second-degree murder for the death of an accomplice in a robbery gone bad. He wanted to present expert testimony about "suicide by cop," and he wanted to elicit testimony from a State witness regarding a video that suggested the accomplice was suicidal at the time and that his decision to shoot at police was an independent act. The appellate

court held it was error to exclude this evidence, stating:

> A defendant has a constitutional right to present a defense. See generally Casseus v. State, 902 So.2d 294 (Fla. 4th DCA 2005). The trial court must protect that right when considering whether to exclude evidence. Id. at 296. Although some evidentiary rulings are reviewed under the relevancy standard, other considerations must also be taken into account. See Neiner [875 So.2d at 700]. What is relevant to show a reasonable doubt may differ from what is relevant to show the commission of the crime itself. Id.(citing Vannier {714 So. 2d 472]. "Where evidence tends in any way, even indirectly, to establish a reasonable doubt of defendant's guilt, it is error to deny its admission." Id. (quoting Rivera [561 So.2d 539]).

The court should have allowed the proffered testimony and should have allowed a continuance for Appellant to obtain Twomey's cooperation. See Ostolaza v. State, 943 So.2d 1001 (Fla. 2d DCA 2006)(court erred in failing to grant continuance and in failing to issue writ of bodily attachment for a reluctant witness who would testify defendant thought he had permission to enter residence). Because the State's case consisted of evidence which could "cut both ways," any exclusion of this type of evidence was harmful. See Vannier.

ISSUE V

> WHETHER THE TRIAL COURT ERRED IN ALLOWING THE STATE TO INTRODUCE EVIDENCE OF APPELLANT'S LEAVING FORT MYERS TO ARGUE CONSCIOUSNESS OF GUILT AND ERRED IN ALLOWING THE STATE TO INFER CONSCIOUSNESS OF GUILT FROM THE FACT HE EITHER LEFT THE TENNESSEE CAMPGROUND OR FAILED TO CLAIM HIS PROPERTY FROM THE CAMGROUND WHEN THAT EVIDENCE DEMONSTRATES A DESIRE TO AVOID ARREST FOR AN OUTSTANDING WARRANT AND A DESIRE TO HIDE HIS DRUG DEALING FROM LAW ENFORCEMENT.

Immediately before trial the court denied Appellant's motion in limine to prohibit the State from presenting any evidence of

flight to show consciousness of guilt. [R11:680; 1:T12-13] Although the standard of review of a court's ruling on flight evidence is abuse of discretion, Thomas v. State, 748 So.2d 970, 982 (Fla. 1999), the court abused its discretion in allowing this evidence and the arguments related to flight. Evidence of flight is relevant to infer consciousness of guilt where there is a sufficient nexus between flight and the crime with which a defendant is charged, see Escobar v. State, 699 So.2d 988 (Fla. 1997); however, in this case the evidence of a nexus is insufficient to allow such an inference.

In this case, there were no clear indications Appellant was fleeing when he left Florida. Appellant testified his mother wanted to go to Tennessee because she was unhappy living with her granddaughter who "partied" and stayed up all night. At the time Appellant left Fort Myers, Thomas was not reported as a missing person, there was no investigation, and Appellant was not suspected of anything related to this case.

There was no evidence Appellant was hiding in the Tennessee campground because of these charges. Appellant was living in Fort Myers under an assumed name avoiding an outstanding Missouri warrant. He lived in tents and he lived in an overgrown field. He sold drugs and he had a police scanner. Before Thomas' body was found on September 26, 2002, the investigation concerned a missing person. When he was at the campground in late August, Appellant had no reason to think that law enforcement was interested in him regarding Thomas' murder. While he was in Tennessee Appellant was making methamphetamine and selling it in the national forest.

Therefore, the evidence of his being in 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. Furthermore, Appellant was arrested on the Missouri warrant before Thomas' body was found.

A determination as to whether there is a nexus between the defendant's behavior and the crime for which he is being tried should be made with a sensitivity to the facts of the particular case. See Bundy v. State, 471 So.2d 9, 21 (Fla. 1985). In Escobar, 699 So.2d 988, 996 (Fla. 1997), this Court held Escobar's flight from officers in California lacked a sufficient evidentiary nexus to infer consciousness of guilt partly because there were outstanding warrants against him in California, concluding: "It could reasonably be inferred that the California warrants alone were the cause of appellant's attempt to flee the California police." Id. at 996. In this case, Appellant's avoidance of authorities in Tennessee was caused by an outstanding warrant in Missouri along with his drug dealing.

In Escobar, this Court noted United States v. Borders, 693 F.2d 1318 (11 Cir. 1982), lists facts that would tend to detract from the probative value of flight evidence. Those facts include the suspect's being unaware that he was the subject of a criminal investigation and the lack of a clear indication that the defendant had in fact fled. See Escobar at 995. In this case, there is absolutely no evidence Appellant thought he was the subject of an investigation or that he knew an investigation had even been

initiated. Compare Bundy v. State, 471 So.2d 9 (Fla. 1985), in which Bundy's flight from officers six days after the murder was admissible because there had been substantial publicity regarding the victim's disappearance.

In Conde v. State, 860 So.2d 930, 949 (Fla. 2003), the trial court allowed the State to present evidence that Conde attempted to hide when he was arrested in his grandmother's house six months after the murder for which he was being tried, and allowed the State to argue that behavior showed consciousness of guilt. Conde argued that that any consciousness of guilt suggested by his attempt to hide was just as easily associated with the fact that Conde had kidnapped and/or assaulted a woman within the week. This Court agreed there was an insufficient nexus between the conduct and the charged crime. The Court also found it important that there was no evidence Conde "even was aware that he was the subject of a murder investigation."

Also, the evidence did not prove Appellant fled when he left Florida and took up residence in a campground because his behavior was consistent with his lifestyle. When evidence is equally as indicative of a finding that flight did not occur, the evidence is not admissible. See United States v. Myers, 550 F.2d 1036, 1049-50 (5th Cir. 1977). Myers was cited in Bundy, and the facts in that case reveal that two months after a robbery in Florida, agents attempted to apprehend the defendants while they were on a motor-cycle. Because it was not clear the defendants were attempting to get away from police when they got off the motorcycle and moved away on foot, the court held the flight evidence was inadmissible

as “conjecture and speculation.” Likewise in this case, the evidence of flight is speculative. See also, Person v. State, 950 So.2d 1270 (Fla. 2d DCA 2007) (defendant’s flight out back door could be explained by fact SWAT team used distraction device when it entered the residence).

The trial court also erred because in order to rebut the evidence, Appellant had to reveal there was an outstanding warrant from Missouri and that he was dealing drugs. Therefore, the danger of unfair prejudice outweighed the probative value of the evidence. In Meritt v. State, 523 So.2d 573 (Fla. 1988), this Court stated: “Merritt was between a rock and a hard place once the court erroneously admitted the evidence. To rebut the state's improper implication that he escaped to evade prosecution for the Davis murder, defense counsel introduced testimony that he escaped while being returned to Florida on unrelated charges.” Id. at 573.

Because Appellant had to reveal the warrant and drug dealing, the error was not harmless. See Merritt. Also, in closing argument, the prosecutor argued Appellant was guilty because he left town in the middle of the night on August 8th because he knew Thomas was killed on August 7th, and that he went to a secluded campsite in the forest to hide. [11:T2123-24] The prosecutor argued Appellant had police scanners and when he was approached by law enforcement, he left and never came back. [11:T2124] The prosecutor repeated the argument that Appellant left in the middle of the night and that he fled when approached by law enforcement. [11:T2132, 2182-83] In rebuttal argument, the

prosecutor again argued that because Appellant got in a car, drove as far as he could and lived in the woods, it meant he and not Bisnett (Fabina) killed Thomas. [12:T2171] Therefore, this Court should reverse for a new trial.

ISSUE VI

WHETHER THE TRIAL COURT ERRED IN ALLOWING THE STATE TO INTRODUCE AUDIOTAPES OF PHONE CALLS BETWEEN THE APPELLANT AND HIS MOTHER AND BETWEEN THE APPELLANT AND DEBBIE MILLER BECAUSE THE TAPES WOULD HAVE BEEN MISLEADING IF REDACTED AND BECAUSE THE TAPES DID NOT CONTAIN ADOPTIVE ADMISSIONS WHEN PLAYED IN THEIR ENTIRETY, WHICH RESULTED IN THE REVELATION OF THE HIGHLY PREJUDICIAL EVIDENCE OF OTHER OFFENSES.

Appellant objected to the introduction of audiotaped telephone calls he made from a Tennessee jail to his mother and to Debbie Miller while he was being held for the Missouri warrant and for possession of the meth lab. [R:11756; 1:T14-26; 9:T1648-88] Counsel argued the conversations were not admissible as adoptive admissions because the conversations did not contain "any kind of statement that's adopting something." [9:T1655] Counsel argued the conversations were ambiguous, and supplied only a "circumstantial inference," and that if the parties to the conversations testified, the conversations would be shown to be innocuous with regard to the charged offense.[6] [9:T1658-59] Counsel also argued that the defense would have to present Appellant's testimony and/or present the testimony of his mother and Debbie Miller, who had become his wife since the calls were

[6] Counsel also argued the tapes violated Appellant's right to confront witnesses under Crawford v. Washington, 541 U.S. 36 (2004).

made, and that they would have to testify about the meth lab and the warrant from Missouri. [9:T1658-59, 1668, 1670] Appellant argued that an improper inference should not be presented to the jury [9:T1659], and requested, over the State's objection [9:T1668-73] that the tapes be played in their entirety (minus one comment regarding an alias given to police) in order to place the conversations in the proper context. [9:T1667-68] Although section 90.803(18)(b) allows for the introduction of "[a] statement of which the party has manifested an adoption or belief in its truth," the women made no statements that are accusatory in nature or that implicate the Appellant in any wrongdoing relevant to this case, and furthermore, Appellant does not manifest an adoption of any of accusatory statements. Therefore, despite the fact that admissions by acquiescence or silence do not implicate the confrontation clause, Globe v. State, 877 So. 2d 663 673 (Fla. 2004), the content of these tapes cannot be admitted as "adoptive admissions."

"The hearsay statement can only be admitted when it can be shown that in the context in which the statement was made it was so accusatory in nature that the defendant's silence may be inferred to have been assent to its truth." Privett v. State, 417 So. 2d 805, 806 (Fla. 5th DCA 1982)(overt discussions of crime and defendant's role in it in defendant's presence). "To determine whether the person's silence does constitute an admission, the circumstances and the nature of the statement must be considered to see if it would be expected that the person would protest if the statement were untrue." Id.

On the tape, Mrs. Twilegar tells the Appellant they found Dave, and the Appellant replied, “Okay”. [9:T1724] She tells him that Spencer is “really running his mouth,” and the Appellant replies, “Right.” [9:T1725] Clearly, these statements are not adoptive admissions because no accusation is made and there is nothing to deny. Nothing said by Spencer is revealed, and even if it were, it would be hearsay within hearsay. Moreover, there would be no reason for Appellant to deny hearsay statements made by Spencer, especially when it can be assumed that his mother knows his position on the matter. Later in the conversations, Mrs. Twilegar says Spencer is saying things “like you’re a psycho” and “you did it” and “he seen ya do this and do that” and “heard you say thing and that.” First, those statements do not implicate Appellant in anything, and second, they do not require a denial.

In Sparkman v. State, 902 So. 2d 253 (Fla. 4th DCA 2005), the court admitted a videotaped statement given by the defendant to law enforcement. The tape included the detective’s “recitation of facts and his beliefs and theories of the case.” Sparkman either did not respond to the statements or he simply said “uh huh.” The appellate court ruled that the detective’s statements were inadmissible hearsay because they were “clearly not adoptive admissions by Sparkman.” Likewise, in this case, a response of “okay” or something similar does not constitute an adoptive admission.

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. In the first conversation between Appellant and his mother, Appellant asks his mother if Chris has been arrested.

[9:T1723] Appellant explains that Chris gave law enforcement permission to search the car. [9:T1723] Appellant says, “So, if Chris will shut his fucking mouth and quit talking. Cuz he’s talking.” [9:T1724} Appellant says that if Chris would shut up, “this will go away.” [9:T1724] Because the Appellant is talking about the search of the car and the meth lab found in the trunk of the car, clearly this is not an admission as to the murder and, therefore, it was not relevant. Later Appellant tells Mrs. Twile-gar to tell Chris that “if he don’t shut his fucking mouth,” and tells her he told Chris “you are committing the wrong also.” [9:T1741] Inasmuch as Chris was in the car with the meth lab, the clear implication is that Chris is guilty of the meth charges. Appellant says he doesn’t want Chris charged with the crime and he then refers to the fact the officers were confused about which Miller gave permission to search the car. [9:T1742] Nevertheless, the State wanted to excise material showing the context of the comments so that the jury would hear what sounded like Appellant directing his mother to tell Chris not to talk about this offense.

Any comments that Jennifer “dropped a dime” on Appellant probably refer to the Missouri warrant because Appellant was arrested on the warrant. When Mrs. Twilegar corrects Appellant and says it was Kirk, and that Kirk was “running his mouth,” she explains that Kirk was where he was working on the Jeep. Kirk must have been in Tennessee and Appellant was making meth in Tennessee, Kirk was not a witness at trial and there is no reason to believe Kirk knew anything related to this charge.

Even if the evidence was relevant, relevant evidence is

inadmissible where the probative value is substantially outweighed by the danger of unfair prejudice. See Brooks v. State, 918 So.2d 181, 188 (Fla. 2005); §90.403, Fla. Stat. (2002). A defendant should not have to choose between allowing a misleading conversation to go to the jury and revealing horribly prejudicial facts, including the fact that he is a drug dealer. See Meritt, 523 So.2d 573 (rebutting the State's improper implication that he escaped to evade prosecution for murder required introduction of evidence of escape on unrelated charges).

In Hill v. State, 768 So. 2d 518 (Fla. 2d DCA 2000), the court erred in allowing the State to introduce a letter the defendant wrote to the judge and to cross-examine her about it. In the letter the defendant discussed her problems with addiction and mental illness and admitted she had made bad choices that led to her "captivity." The defendant also admitted to all of her "wrongdoing" and wrote about her numerous arrests and convictions. Defense counsel argued the letter did not contain any admissions to the crime for which the defendant was being tried, but that the letter contained references to her past criminal record. The appellate court agreed the letter was of "questionable relevance," and held that the danger of unfair prejudice outweighed its probative value. For the same reasons, admitting the tapes in this case was error which requires reversal for a new trial.

ISSUE VII

WHETHER THE TRIAL COURT ERRED IN ADMITTING THE CASH REGISTER RECEIPTS WHEN THE STATE FAILED TO LAY A FOUNDATION FOR THE "BUSINESS RECORDS" EXCEPTION TO THE

HEARSAY RULE.

The receipts found in the briefcase should have been suppressed (Issue III); however, the court also erred in admitting the receipts without a proper foundation. The receipts were hearsay because they were admitted for the truth of the matters asserted therein, i.e., that the items in the receipts were indeed purchased on the dates indicated by the receipts, for the amounts shown on the receipts, and at the locations indicated on the receipts, and that those items were purchased with cash. Even though the store receipts did not contain Appellant's name or other identification, the State also introduced the receipts as evidence that Appellant spent relatively large amounts of cash.

Over defense objection as to hearsay and lack of authenticating foundation, the receipts were introduced during Deputy Holt's testimony. [8:T1457-1459; R13:926-947] The prosecutor argued the State was not introducing them for the truth of the matter and the State was not attempting to prove the value of the item, only that Appellant kept the receipts. [8:T1460] The court overruled the objection, agreeing the receipts were business records made in the normal course of business; however, the court reasoned that since the receipts were kept by the Appellant, and since they were his records, they could be admitted without testimony from a records custodian. [8:T1463-64] The State then introduced 24 receipts, and Holt read the dates, store names and amounts on each receipt. [8:T1495, 1498-99, 1501-1505] Holt also testified he used the receipts to determine where Appellant was on certain dates. [8:T1505-1508]

Later in its case, the State presented Jennette Scott, a Wal-Mart cashier. [9:T1582-1591] She was the cashier on only one of the receipts from her store and she remembered the man who bought the items; however, she was not a custodian of records for Wal-Mart. The State also presented the testimony of Buddy Kolb, a store manager at a Wal-Mart in Greenville, Tennessee. Although he was familiar with Wal-Mart receipts, he was not the custodian of the records. Also, although he testified as to the receipts generated at his store, Kolb testified regarding receipts from other stores.

A receipt introduced as evidence of payment for a good or service constitutes hearsay. Untied States v. Jefferson, 925 F.2d 1242, 1252 (10th Cir. 1991). A store receipt admitted to prove the time of purchases is hearsay. See Wright v. State, 958 So. 2d 594, 595 (Fla. 4th DCA 2007). Hearsay can be admissible under numerous exceptions, one of which is the business records exception. Quinn v. State, 662 So.2d 947, 953 (Fla. 5th DCA 1995). However, the absence of testimony from a records custodian or other qualified person identifying the records and stating they were kept in the ordinary course of business renders the evidence inadmissible as hearsay. See Quick v. State, 450 So.2d 880 (4th DCA 1984); Butler v. State, 970 So.2d 919 (Fla. 1st DCA 2007)(estimate for repairs not admissible in restitution hearing because State failed to call witness to lay foundation for business records).

In Brooks v. State, 918 So.2d 181, 193 (Fla. 2005), this Court stated:

> To be admissible as a business record, it must be shown that the record was (1) made at or near the time of the

> event recorded; (2) by or from information transmitted by a person with knowledge; (3) kept in the course of a regularly conducted business activity; and (4) that it was the regular practice of that business to make such a record. See Quinn[662 So.2d at 953]; §90.803(6)(a), Fla. Stat. (2002). To the extent the individual making the record does not have personal knowledge of the information contained therein, the second prong of the predicate requires the information to have been supplied by an individual who does have personal knowledge of the information and who was acting in the course of a regularly conducted business activity. See Quinn, 662 So.2d at 953; Van Zant v. State, 372 So.2d 502, 503(Fla. 1st DCA 1979).

This Court reviews a trial court's decision to admit evidence under an abuse of discretion standard; however, that discretion is limited by the rules of evidence. Hudson v. State, 2008 WL 2612083, 33 Fla. L. Weekly S465 (Fla. July 3, 2008).

Although the State presented testimony from Wal-Mart employees who identified the receipts as Wal-Mart receipts, that testimony took place well after the court allowed the State to introduce them. Also, neither employee was a custodian of the records and neither had personal knowledge of the receipts other than the one for which Scott was the cashier. Also, neither testified that the records were kept in the course of business or that it was the regular practice of Wal-Mart to make the records. See United States v. Markopoulos, 848 F.2d 1036 (10th Cir. 1988)(records custodian did not testify until *after* the trial court had already admitted the items into evidence, and even then did not testify that the records were "kept in the course of a regularly conducted business activity" or that it was "the regular practice of that business activity" to make those records).

Other than a NAPA Auto Parts employee, the State never

attempted to present anyone to lay a foundation for receipts from the other stores. The State never produced "business records" testimony for State's Exhibit 163 from 7-Eleven in the amount of $688.97, and for Exhibit 164 and for 165 (in the amount of $154.73) from the Flying J Travel Center because no one from 7-Eleven or the Flying J was called to testify.[7] [R13:923-25] The State also introduced a receipt from the Pilot Travel Center in the amount of $32.07 (R13:930), a receipt from a Winn-Dixie in the amount of $21.94 (R13:937), and two receipts from Sam's Club in the amounts of $435.56 and $16.33 (R13:941, 943) without having any witness to authenticate them. [R13:930, 937, 941, 942]

The error was harmful because the State used the receipts as proof Appellant robbed Thomas and as evidence he fled Florida for Tennessee during a specific time period. [11:T2122-23, 2124] Without the 7-Eleven receipt, the State probably would not have evidence to show when Appellant left Morrison's residence. [11:T2122-23] Also, counsel informed the court that his advice to Appellant to testify was based largely on the court's rulings admitting the receipts. [10:T1932] Therefore, the Appellant must be retried.

ISSUE VIII

WHETHER THE TRIAL COURT ERRED IN FINDING THAT THE HOMICIDE WAS COMMITTED IN A COLD, CALCULATED AND

[7] Exhibits 163, 164 and 165 were not included in the record because they were not readable at the time the record was prepared; however, because of references in the record, it is clear that the 7-Eleven receipt (or a copy thereof) was in evidence and able to be read. [8:T1486-88, 1498, 1500] The prosecutor specifically referred to the 7-Eleven receipt in closing argument. [11:T2128]

PREMEDITATED MANNER WHEN THE EVIDENCE FAILED TO DEMONSTRATE HOW THE OFFENSE OCCURRED; AND WHETHER THE JURY'S VERDICT PRECLUDES A FINDING OF THE PECUNIARY GAIN AGGRAVATOR.

As argued in Issue I above, no member of the jury found that the homicide was committed during a robbery or during an attempt to commit a robbery. For that reason, the court should be estopped from finding pecuniary gain as an aggravator.

At the penalty phase, the State relied on the evidence presented at trial and did not put on any additional evidence. Because Appellant's counsel stood mute, the State argued inferences not supported by the facts. As a result, the court found Appellant "learned that David Thomas had a substantial sum of cash on his person," and that he "devised a plan to take David Thomas' money, kill him and conceal his body." [R21:1880] The court also found that Appellant dug a hole before Thomas arrived and that Thomas did come to Appellant's tent where Thomas was shot while he was either standing in or kneeling beside the hole. Id. The court found that Appellant took Thomas' money either shortly before or immediately after Thomas was killed.

For the same reasons extensively argued in Issues I and II, the State failed to present evidence to rebut Appellant's hypothesis that he did not rob Thomas and that the murder was not premeditated. Briefly, there is absolutely no evidence the hole was dug before Thomas was killed because no one saw Appellant digging a hole of that size before Thomas died. No one witnessed the murder, and for that reason, there is no evidence proving where Thomas died or the circumstances of the death. Although the

evidence shows the shotgun blast that killed Thomas traveled downward from his upper back, the evidence certainly does not prove Thomas was on his knees by the hole or in the hole when he died. There is no evidence Thomas died on the property because there is no evidence that the sand found in Thomas' windpipe came from the sand in the hole because the State never had them compared.

The court admitted at the end of trial that the evidence of robbery was weaker evidence, and the jury declined to find felony murder. Appellant explained the source of the money he spent in August and September of 2002, admitting he sold marijuana and manufactured methamphetamine. The money was in $100 bills, and there is no evidence Appellant went to a bank and changed Thomas' $20 bills. Appellant spent nowhere near $25,000 and no additional money was ever discovered.

In order to establish pecuniary gain as an aggravating factor, the State must prove beyond a reasonable doubt that the murder was motivated, at least in part, by a desire to obtain money, property, or other financial gain. Finney v. State, 660 So.2d 674, 680 (Fla. 1995). The standard is not that pecuniary gain was possibly the motive, or that it was more probable than not that it was the motive. Also, in light of the jury verdict dismissing felony murder altogether, the trial court erred in finding the murder was motivated by a desire to rob Thomas. See McCray v. State, 416 So.2d 804 (Fla. 1992).

In Brooks v. State, 918 So. 2d at 181, this Court stated:

> The standard of review for whether an aggravating factor exists is whether it is supported by competent,

> substantial evidence. See Almeida v. State, 748 So.2d 922, 932 (Fla. 1999). Aggravating factors require proof beyond a reasonable doubt, "not mere speculation derived from equivocal evidence or testimony." Hardwick v. State, 521 So.2d 1071, 1075 (Fla. 1988). An aggravating factor may be supported entirely by circumstantial evidence, but "the circumstantial evidence must be inconsistent with any reasonable hypothesis which might negate the aggravating factor." [citations omitted]

It is mere speculation that the murder was planned and accomplished in the manner set forth by the court. Therefore, the court erred in finding the murder was cold, calculated and premeditated.

In Geralds v. State, 601 So.2d 1157 (Fla. 1992), the defendant killed a woman in her home during a robbery. Although the evidence was consistent with a finding Geralds made careful plans which included questioning the woman's son concerning when his father would return and concerning when the son would not be home, and included his bringing a change of clothing, the evidence was also consistent with lack of a specific plan. For that reason, the evidence failed to prove the aggravator of heightened premeditation.

Finally, if this Court finds either of the aggravators invalid, then the sentence is disproportionate and must be reduced to life imprisonment. However, since neither aggravator is valid, the Court must order that Appellant's death sentence be vacated for a life sentence.

ISSUE IX

> WHETHER THE COURT ERRED IN ALLOWING APPELLANT TO WAIVE AN INVESTIGATION INTO POSSIBLE MITIGATION EVIDENCE FOR THE PENALTY PHASE AND TO WAIVE PRESENTATION OF MITIGATION WITHOUT AN INVESTIGATION.

The guilt phase trial took place on January 16-26, 2007; however, on September 25, 2006, the court conducted a colloquy and found Appellant was competent to make a knowing and intelligent waiver of the right to present evidence of mitigation. What is unusual is that the court also found Appellant competent to waive all investigation to prepare for mitigation.[8] [R8:375-392]

At the hearing, counsel told the court only that they had hired a mitigation specialist and that she had discussed the purpose of a penalty phase investigation with the Appellant, but the Appellant told the specialist he did not want an investigation. [R8:370] Counsel stated that the defense hired a doctor, but Appellant refused to meet with him. [R8:371] The court then asked counsel, "At this juncture then is the investigation or the discovery so far to your knowledge disclose mitigating evidence that you think should be presented should the case reach the penalty phase stage?" [R8:371] Counsel then stated:

> To the best of my knowledge there are certain items from Mr. Twilegar's background that could lead to, I believe, good mitigation presentation, but we were not allowed to further investigate it. At the time Mr. Twilegar forbade us to further have any contact with his family and friends. So I only have a very peripheral or shallow view of it. I was unable to gather enough information to present it to the experts . . .

Id. Pursuant to the court's questioning, counsel revealed that the evidence would be something in the nature of the Appellant's childhood and "a possible good deed done by Mr. Twilegar that we weren't able to further investigate." [R8:371, 372] The court

[8] The court also filed a written order granting the Appellant's request to forego mitigation investigation. [R8:408-413]

asked counsel, “If you were to call the witnesses at the level of your information at this, what witnesses would be called?” Counsel responded, “Possibly his sister, his wife, his mother, and at this juncture that’s all I know.” [R8:372} The court asked if there was any psychiatric testimony that would qualify as mitigation and counsel responded, “No way of knowing, Your Honor.” [R8:372] During the colloquy that followed, the Appellant revealed he had a sixth-grade education, that he was on antidepressants for diabetic neuropathy and that he had his “head split open” and that he had had a concussion with a cracked skull. [R8:375, 382, 383] The court revisited the waiver immediately before jury selection, but no investigation had been done in the interim. [1:T39-41]

In Koon v. Drugger, 619 So.2d 246, 250 (Fla. 1993), this Court established a procedure when the defendant wishes to waive presentation of mitigation evidence, holding in part:

> When a defendant, against his counsel's advice, refuses to permit the presentation of mitigating evidence in the penalty phase, counsel must inform the court on the record of the defendant's decision. Counsel must indicate whether, based on his investigation, he reasonably believes there to be mitigating evidence that could be presented and what that evidence would be.

Id. (emphasis added). In State v. Lewis, 838 So.2d 1102, 1113 (Fla. 2002), this Court affirmed the trial court’s order finding Lewis’ waiver of mitigation was not knowing and voluntary because of counsel’s failure to adequately investigate possible mitigation, noting:

> . . . [T]he obligation to investigate and prepare for the penalty portion of a capital case cannot be overstated-this is an integral part of a capital case. Al-

> though a defendant may waive mitigation, he cannot do so blindly; counsel must first investigate all avenues and advise the defendant so that the defendant reasonably understands what is being waived and its ramifications and hence is able to make an informed, intelligent decision.

In Chandler v. State, 702 So.2d 186 (Fla. 1997), this Court found no error in the court's accepting the waiver of mitigation after extensive investigation, finding, "that defense counsel complied with his duties under Koon by investigating Chandler's background, having witnesses ready and available to testify, and adequately outlining the favorable character evidence that Chandler's witnesses would have presented." In this case, there was no compliance with Koon because there was no investigation.

There is no procedure and no provision in Florida law that would allow a defendant represented by counsel to waive investigation. Although it may be possible for a defendant represented by counsel to prohibit investigation into a very limited portion of mitigation for a specific reason, see Mora v. State, 814 So.2d 322 (Fla. 2002), Appellant could not prohibit all investigation. Inasmuch as investigation is a prerequisite to a waiver of presentation, the court could not allow Appellant to waive presentation of mitigation without investigation. Therefore, Appellant's sentence must be vacated for a new penalty phase.[9]

[9] Since the issue of whether a waiver of investigation is possible presents a purely legal question, review would be *de novo*; however, review of the propriety of accepting the waiver would be governed by an abuse of discretion standard. See Boyd v. State, 910 So.2d 167, 169 (Fla. 2005).

CONCLUSION

In light of the foregoing arguments and authorities, the Appellant respectfully requests that this Honorable Court vacate his sentence and conviction and order that he be discharged. In the alternative, the Appellant requests that this Court reduce his conviction to manslaughter, or grant him a new trial.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Bill McCollum, Concourse Center #4, 3507 E. Frontage Rd. - Suite 200, Tampa, FL 33607, (813) 287-7900, on this _____ day of August, 2008.

CERTIFICATION OF FONT SIZE

I hereby certify that this document was generated by computer using Microsoft Word with Courier New 12-point font in compliance with Fla. R. App. P. 9.210 (a)(2).

Respectfully submitted,

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