IN THE SUPREME COURT OF FLORIDA

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

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

REPLY BRIEF OF APPELLANT

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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ISSUE I

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

The standard of review of the sufficiency of circumstantial evidence to support a conviction does not give the State the benefit of a theory of guilt upon which no proof has been adduced, nor does it allow the State to indulge in conjecture to supply missing information. See Mahnn v. State, 714 So. 2d 391, 396-97 (Fla. 1998)(State did not produce facts to support its theory of armed robbery in contradiction of defendant's assertion the robbery was an afterthought). Appellee's Answer Brief is riddled with unfounded assumptions and conclusions. In order to arrive at its theory of guilt, Appellee impermissibly piles the assumptions on one another to prove its circumstantial evidence case.

Before addressing the facts, Appellee writes, "The finding of premeditated murder on the jury verdict form does not operate as an acquittal on the felony murder and, therefore, this Court should consider the evidence of robbery, which served as the basis for the felony murder charge, in its review of the entire record to confirm that the verdict is supported by the record." (Brief of Appellee, page 30.) Appellee then cites Fla. R. App. P. 9.142(a)(6), Floyd v. State, 913 So. 2d 564, 572 n.2 (Fla. 2005), and Ferguson v. State, 417 So. 2d 639, 642 (Fla. 1982). Those citations concern this Court's duty in death penalty cases to

conduct an independent review the sufficiency of the evidence underlying a conviction. The rule operates in favor of an appellant. The rule and cases do not support Appellee's argument that the Court can consider evidence supporting a theory of guilty upon which the accused was acquitted.

It is clear from case law that a jury has the ability to find a defendant guilty of both premeditated murder and felony murder through the use of special verdicts. See, e.g., Davis v. State, 33 Fla. L. Weekly S994, 2008 WL 5245549 (Fla. December 18, 2008)(trial court used special verdict forms and the jury found Davis guilty of each count of first-degree murder under both theories); Carter v. State, 980 So. 2d 473, 479 (Fla. 2008)("By special verdict form, the jury unanimously found Carter guilty of both premeditated and felony murder for each of the three killings."); Howell v. State, 877 So. 2d 697, 700 (Fla. 2004)("In a special verdict, the jury also found that Howell committed both premeditated and felony murder."). In this case, the jury did not find both; it found only premeditated murder.

Any ambiguity in the verdict must be resolved in favor of Appellant. "The rule of law in all criminal cases is that any ambiguity in statutes, rules, verdicts, judgments, sentences, and any other matter is resolved in favor of the accused." Fortner v. State, 830 So. 2d 174, 175 (Fla. 2d DCA 2002); Williams v. State, 528 So. 2d 453, 454 (Fla. 5th DCA 1988).

In Brown v. State, 959 So. 2d 218 (Fla. 2007), the defendant was charged with first-degree felony murder along with armed

robbery, the underlying felony. The jury convicted Brown of first-degree murder and of petit theft, probably because of the omission of attempted robbery as a lesser-included offense. This resulted in an ambiguity in the verdict form, such that it was difficult to determine whether or not the verdict for felony murder was inconsistent with the jury's verdict of petit theft. This Court decided the verdicts were truly inconsistent in favor of the defendant, writing, "The State, not the defendant, must bear the burden of this omission." Id. at 221. This Court also held that Brown's assent to the instruction that the jury consider each count separately did not waive his right to object. Brown at 222-223. For the same reasons as in Brown, it is the State that must bear the burden of any confusion regarding the verdict form in this case.

Although Appellant's initial brief thoroughly explains why the State's evidence is insufficient, it is important to point out specific errors in the Answer Brief.

Appellee argues that Appellant could not have driven back to Florida in a Monte Carlo given to him by Thomas because Thomas did not have a Monte Carlo in Alabama. (Brief of Appellee, page 31.) Appellee then cites to Thomas' wife's testimony as support at 4:T585. However, Thomas' wife never said Thomas did not have a Monte Carlo. Thomas' wife stated that she found other cars in Alabama including a 1966 Mustang, a 1958 Corvette, a 1984 Porsche, a Ford Ranger, and the 2002 Dodge Thomas drove. [4:T586, 628-629] Her testimony seems to indicate that those were the cars that were

remaining after Thomas' death. [5:T628-629] Obviously, the Monte Carlo would not have been in Alabama for Lehmann to find.

Lehmann admitted that Thomas collected cars as a hobby. [4:T586] She also admitted that Thomas bought real estate and made substantial transactions without her knowledge. [4:T621, 624-625, 631] She admitted he did not tell her about his dealings unless she asked. [4:T621] Therefore, Lehmann would not have known whether or not Thomas had a Monte Carlo in Alabama.

Appellee also claims Appellant was lying about being paid for work on the deck because the "deck was never built." (Appellee's brief, page 31.) Appellant went all the way to Alabama with Thomas. He helped him get the supplies, and he cut boards. Certainly, he was entitled to be paid for his time and effort. Also, there is no evidence Thomas did not pay him in advance for the work other than the deck that Thomas asked Appellant to do. Appellant did not say what repairs he needed to make to the Monte Carlo to get it running; therefore, there is no evidence he could not have repaired the car.

Appellee assumes that Spencer Hartman heard Appellant digging the hole in which Thomas' body was found, and Appellee takes liberties with the facts, proclaiming categorically, "Spencer Hartman witnessed Defendant dig Thomas' grave." (Brief of Appellee, page 32.) An inference cannot be based on pure speculation. See Dallas v. State, 995 So. 2d 1062, 1065 (Fla. 5th DCA 2008)(inference that defendant transported money to promote illegal activity was based on pure speculation).

Appellant's Initial Brief sets out in detail on page 32 why this conclusion has not been proven. Appellant pointed out that Spencer did not see Appellant digging any hole. In fact, he did not see digging, he just heard what he thought was a shovel digging into dirt. [6:1025, 1055] He heard shovel noises for only a second or so. [6:1025, 1028-29] Spencer could not give a date when he heard Appellant using a shovel, other than to say it was between June and September. There was no evidence it was raining on the night Thomas is alleged to have disappeared, although Spencer said it was raining when he heard the digging noise. Appellee claims that Appellant stated he stayed in the tent after he saw Spencer that night; however, a closer reading shows that Appellant only agreed he still "lived" there at that time, not that he slept there after he saw Spencer. [11:T1982] Britany McArthur testified that Appellant would come and go and there were times when he would not be at the tent for days. [6:999] On the night Thomas disappeared, Appellant stated unambiguously he went back to his tent but he never saw the tent that night. [11:T1998-99, 2003]

If Appellant were digging the very large hole found by the crime scene technicians, he would have to have taken down the tent before he started to dig. Also, State witnesses testified that whoever dug the hole had to excavate tree and palmetto roots. [6:T1134-35, 1140, 1170; 7:T1232-33, 1235] Spencer did not see Appellant excavate the roots. Also, on the day he found the tent burned, Spencer did not see evidence suggesting that roots had

been excavated. There was absolutely no evidence that the ground was disturbed or that there was loose dirt around or root debris.

Furthermore, although Thomas was wearing the same clothing as he was on the day he disappeared, the medical examiner could not say Thomas died on the night he disappeared. If Thomas died somewhere other than the property or some time after he disappeared, the hole could have been dug any time after the tent was burned without Spencer's knowledge because Spencer did not return to the area between the time he last saw Appellant and the time he found the body. [6:T1035]

Appellee also argues that Spencer did not see anyone else digging. However, Spencer was not living on the property until September. The photographs of the property show how secluded and overgrown the property was, and highlight the fact that there was little clear ground Thomas' killer could have used to bury him.

Appellee makes the categorical statement, "Defendant laid in wait for Thomas' arrival at Miramar. Defendant, his shotgun in hand, placed Thomas beneath him and shot him in the right upper back." (Brief of Appellee, page, 33.) These claims are unacceptable because they are mere conjecture. No one knows what happened that night. No one witnessed the shooting. The State did not even present any cell phone evidence that Appellant and Thomas talked during the day. No one saw Appellant at the Miramar property that night. There was no evidence anyone in the neighborhood heard a shotgun blast. There was no blood found at the scene. Although the evidence could be consistent with Thomas'

death at the scene, it was not inconsistent with the fact that he may have been killed elsewhere and his body placed in the grave. (See Appellant's Initial Brief pages 52-54.) Furthermore, even if Thomas were killed at the Miramar property, it does not prove Appellant killed Thomas because the property was unoccupied and overgrown and many people trespassed there. [6:T983, 989; R13:851-52, 864, 866, 895-99]

In a footnote, on page 35, Appellee asserts that somehow the State proved that the money Appellant spent was Thomas' money because, "At some point, obviously, Thomas' $20 bills were exchanged for $100 bills." Appellee assumes that because Mr. Twilegar was spending new $100 bills, that he took thousands of dollars in $20 bills from Thomas and took them to a bank to change them to $100 bills. There is absolutely no evidence that Mr. Twilegar had Thomas' $20 bills or that he went to a bank to change them into $100 bills. The inference that Appellant's $100 bills were bills obtained in exchange for Thomas' $20 bills is based upon pure speculation. An appellate court cannot indulge in inferences based on pure speculation. See Lifka v. State, 530 So. 2d 371, 371 (Fla. 1st DCA 1988)(State's assertion that defendant could have committed a lewd assault not proven because inferences of threat to victims was "pure speculation").

On page 35 of the brief, Appellee writes, "Defendant did not have money . . ." The only evidence presented was that Appellant lived frugally. There was no evidence he did not have money. There was evidence Appellant's mother brought him cigarettes and food

because he did not have a car, but there is no evidence that he did not pay for those items, or that he did not reimburse his mother for gas for her car. Appellee's argument also assumes that Appellant's mother did not supply any of the cash for the camping equipment when there is no evidence that the cash did not belong to Appellant's mother, and Appellant testified that his mother had cash for the trip. Also, there was evidence that Mr. Twilegar worked doing odd jobs and construction. Therefore, it is equally as likely that Mr. Twilegar was not spending his money, either because he was saving it, or because he did not want to look like he was living above his means and thereby draw attention to the fact he was dealing drugs.

Appellee writes, "Defendant claimed his money was from drug dealing but no other witness testified that Defendant was a drug dealer . . . It is unbelievable that none of the State witnesses, nine in number, who came in contact with Defendant knew of his drug dealings with the dozens of buyers he claimed to have had a day for marijuana." (Brief of Appellee, pages 35-36.) This is not accurate. Spencer Hartman specifically testified that Appellant told him he had a man coming over to deliver a couple of pounds of "weed." [6:T1031] A couple of pounds are not for personal use. There is no indication Hartman seemed to think that was unusual. Hartman stated that when Appellant asked him if he wanted $100 or an ounce of marijuana, he asked Appellant for the drugs. [6:T1031, 1037] This would indicate Spencer knew Appellant sold drugs. Also, T.J. Vaughn testified that he smoked marijuana with Appellant in

the past and he thought there might be marijuana buried on the property. [6:T1097]

Other State witnesses would have had no reason to testifiy that Appellant sold drugs. First, the State agreed before trial not to introduce any evidence of drug dealing, or charges for possession of methamphetamine. [R11:719-722; 1:T9-10] Such evidence would be collateral crime evidence not relevant to the issue of the murder. Therefore, there was no mention of it until Appellant insisted that the audiotapes be played in their entirety. When Appellant insisted that evidence of drug dealing not be excluded from the audiotapes, the prosecution complained that they would have put on testimony of drug dealing; however, the tapes came late in the State's case, and the prosecution witnesses had already left. [9:T1668-73] On the tapes, Appellant's mother alludes to Appellant's selling dope [9:T1734], and Appellant mentions the meth lab and criminal charges regarding the meth lab. [9:T1730; 10:T1761] Appellant testified he was stopped in Tennessee with a methamphetamine lab in the truck of the car in which he was riding. [11:T2012]

On page 33, Appellee states that Appellant was found with two wallets containing cash. This improperly suggests that one of the wallets belonged to Thomas. However, neither of the wallets was shown to belong to Thomas. The statement also suggests that the wallets were found at the same time. This is incorrect. One of the wallets was found at the campsite on August 25th. [8:T1496] It contained only $14. Id. The other wallet was found on Appellant's

person when he was arrested on September 20th. [9:1643-44] Inasmuch as neither wallet was identified as Thomas' wallet, it is equally as likely that Mr. Twilegar replaced the wallet that was seized from the campsite with the one found on his person at arrest. On page 36 of its brief, Appellee assumes that Appellant pretended to make a phone call asking a family member to bring his identification when there is no evidence that the phone call was a pretense.

Appellee states, "While Morrison did not provide a time Defendant arrived, it is clear from the evidence he arrived in the late evening." (Brief of Appellee, page 34.) Appellee does not cite places in the record that support its conclusion. Morrison testified that Appellant arrived "more toward evening," she did not say he arrived late in the evening. (See Initial Brief, page 35-26.) Furthermore, there is no evidence Appellant was dirty or sweaty or that he smelled of the accelerant used to burn the car.

On page 37, Appellee writes that Appellant "knew during the time of the calls that Thomas' body had not been found." However, the body was found in the late evening and early morning hours of September 26-27 [6:T1116-17], and the phone calls that were played to the jury began on September 27, 2002. [9:T1722-91] The testimony to which Appellee refers actually reads:

> Q: What did you find out during these – the period of these phone calls, from the 27th to the 1st?
>
> MR. TWILEGAR: Uh, that I was a suspect in the disappearance of Dave Thomas. And it was actually said once in court that I was a suspect in a murder, and they hadn't even found the body yet. But the judge cleared that up.

[11:T2022]

The Appellee repeatedly asserts that the State's evidence contradicts Appellant's hypothesis of innocence without giving any factual support except the fact that Valerie Bisnett Fabina stated that she saw Appellant with Thomas the day before he disappeared. (Brief of Appellee, page 38.) At one point in the brief, Appellee even states without explanation, "Defendant was the last person with Thomas . . ." (Brief of Appellee, page 37.)

First, it is of note that Valerie Fabina could not identify Appellant at trial. [5:T801] Although there was evidence Thomas may have told Fabina he was going to go buy a truck with Appellant, that evidence is far from convincing. First, the evidence is hearsay as far as it applies to future actions of Appellant.[1] Bailey v. State, 419 So. 2d 721 (Fla. 1st DCA 1982)(90.803(3) hearsay evidence of intent or future plan may be used to prove subsequent acts of declarant, but cannot be used to prove acts of defendant); Ibar v. State, 938 So. 2d 451 (Fla. 2006)(hearsay regarding future acts cannot be used to prove intent of party other than declarant).

Regardless of the reliability of the statement, Fabina's testimony establishes, at most, that Appellant was with Thomas the day before Thomas disappeared. She did not see Appellant at all on the day in question. [5:T789-91]

Appellee cites Norton v. State, 709 So. 2d 87 (Fla. 1997), in

[1] There was no objection to the hearsay.

support of its position. However, in Norton, a witness saw the victim get out of Norton's car at 10:30 or 11:00 on the night the victim died to buy drugs. The witness then saw the victim reenter the defendant's car. The medical examiner placed the time of death between 7:00 p.m. and 1:30 a.m. This would place the witness's observations squarely within the time of death.

In Terranova v. State, 764 So. 2d 612 (Fla. 2d DCA 1999), the defendant's alibi for a portion of the evening of the murders was impeached; nevertheless, the court still held that the circumstantial evidence was insufficient to prove murder. Likewise, in this case, a discrepancy regarding Appellant's whereabouts the day before the murder does not negate his hypothesis of innocence.

What we do know is that Dave Thomas was lying to his wife about his whereabouts. Thomas did not tell his wife he withdrew $25,000. He was lying to Valerie Fabina. He told her he lived in Alabama. He misled her about his marital status. He lied to Appellant about getting a permit for the deck. We know that Fabina was the last person to see Thomas alive. We also know that Thomas' actions made no sense in that Thomas would not have driven Appellant all the way back to Florida to buy a truck to take back to Alabama. We don't know why he would have needed $25,000 in cash in small bills.

The State's version of events cannot be based on pure speculation. See Tillman v. State, 842 So. 2d 922, 926 (Fla. 2d DCA 2003)(State failed to present competent evidence to impeach or

contradict Tillman's explanation of what happened). If the State is unable to articulate a theory of the evidence that contradicts the defendant's explanation and excludes his hypothesis of innocence, the evidence is legally insufficient to support the conviction for murder. See Fowler v. State, 492 So. 2d 1344, 1346 (Fla. 1st DCA 1986). See also, Ballard v. State, 923 So. 2d 475, 485 (Fla. 2006), in which the State asserted that its evidence proved Ballard drove the victim's car to an empty lot because Ballard had lived in that neighborhood before and because he lived approximately a mile from where the car was found. This Court rejected the State's conclusion as "pure speculation" unsupported by actual evidence.

"Circumstantial evidence is insufficient to create a jury question when it is susceptible of two equally reasonable inferences, so that it is a matter of conjecture as to which inference is accurate." Alan & Alan, Inc. v. Gulfstream Car Wash, Inc., 385 So. 2d 121, 122 n.1 (Fla. 3d DCA 1980). When circumstantial evidence is equally supportive of both a theory of guilt and a theory of innocence, the conviction must be reversed. See Light v. State, 841 So. 2d 623 (Fla. 2d DCA 2003) (circumstantial evidence of defendant's state of mind was equally supportive of a theory that defendant was simply guilty of a serious momentary misjudgment of amount of force permissible in a mosh pit or guilty of an impulsive reaction to being hit as it was with depraved mind).

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 v. State, 672 So. 2d 648, 650 (Fla. 4th DCA 1996), 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). See also, Ballard, 923 So. 2d at 482(quoting Davis v. State, 90 So. 2d 629, 631-32 (Fla. 1956))("Evidence that furnishes nothing stronger than a suspicion, even though it would tend to justify the suspicion that defendant committed the crime, it is not sufficient to sustain conviction.").

For these reasons, and for the reasons in Appellant's Initial Brief, the conviction must be vacated.

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.

Appellee's argument on this point also relies on conclusions not supported by the record. In order to find premeditation, Appellee presumes that the State proved that Appellant murdered Thomas in the manner laid out in its theory of prosecution. Without these presumptions, the Appellee cannot show that the first-degree murder conviction is supported by the evidence. Appellant's Initial Brief dissects the evidence of premeditation piece by piece, and for that reason, Appellant relies on that argument in reply to the State's argument on that issue.

Finally, even if the Appellant did not raise the issue on appeal, this Court would have to make an independent determination whether or not the evidence supported a conviction for first-degree murder under the theory of premeditation. See Everett v. State, 893 So. 2d 1278, 1287 (Fla. 2004)(under its independent duty to review the evidence in death penalty cases, this Court reviewed the sufficiency of the evidence of both premeditation and felony murder even though issue was not raised on appeal).

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.

Appellee argues in its brief that this Court can find Appellant legally abandoned his property after the officer seized it, and that a post-seizure abandonment somehow justifies the seizure. However, Appellee cites no law in support of its position. At the motion for new trial, the judge clarified that, legally, the abandonment had to occur before the seizure. [17R:1359-60] The judge also stated that his finding of abandonment pertained to the time period before the seizure. Id. Therefore, the trial judge rejected Appellee's argument.

Appellant's Initial Brief goes into great detail regarding why the Court cannot presume that Appellant arranged for someone to take the items from the campsite. Appellant will not restate that argument here except to point out that if Appellant were going to abandon the campsite, he would not have left a briefcase with personal papers and a wallet with cash inside it. He could have easily carried those away himself.

In a footnote Appellee takes a fact out of the trial transcript to insinuate that Appellant knew the driver of the car seen hauling away his property. (Brief of Appellee, page 50.) At trial, at page 1514 of Volume 8, the deputy testified that the car Mrs. Reeves saw was registered to Nicole Miller at 20860 State

Route 34 in Telford, Tennessee. That testimony was not presented at the suppression hearing. Furthermore, the State never presented testimony at the suppression hearing (or at trial) that this Nicole Miller was in cahoots with Appellant. Furthermore, no witness identified the man who took the items, although Mrs. Reeves got a good look at the man and could have identified him.

A seizure cannot be justified if the State has to use conjecture to support its position. In Rhoden v. State, 941 So. 2d 5 (Fla. 2d DCA 2006), Rhoden was walking down the street at a brisk pace talking on a cell phone. He kept looking back at an unmarked police vehicle and ran just before the officers got out of the car and identified themselves. In Rhoden, the appellate court concluded that the stop was not justified stating, "The State offered nothing but speculation to support its assertion that Rhoden knew the unmarked Ford Explorer was a law enforcement vehicle." Id. at 9. Similarly, in this case, The State offers nothing but speculation as to the issue of abandonment.

Appellant's Initial Brief goes into great detail in explaining why the items should have been suppressed. Appellant relies on those arguments in reply; however, Appellant would reiterate that the State failed to show that the deputy need to disassemble a tent (Appellant's constitutionally protected residence) that was still standing. The deputy should not have taken items out of the tent in the rain, contrary to the State's assertion that the deputy was preserving the items. Also, inasmuch as there was no evidence regarding what was removed from inside

the tent, the State failed to prove that the seizure of any particular item was justified.

Appellee claims that if this Court decides the evidence should have been suppressed, the error in admitting the evidence was harmless. Appellee writes: “The receipts were only introduced to establish that Defendant had substantial cash and/or assets that he did not have prior to the murder.” (Brief of Appellee, page 55.) The State used the receipts to prove robbery as the underlying felony for felony murder. If the State could not have introduced the receipts, there would have been no need for Appellant to testify about the fact that the cash he spent came from various sources including his mother and his drug dealing. Even if Deputy Holt had testified that he saw the camp equipment, there would have been no evidence as to who purchased the items or when they were purchased, or as to how much they cost. Also, there would have been no evidence regarding the automobiles Appellant purchased in Tennessee, because those receipts led law enforcement to the seller.

Based on all arguments made by Appellant, this Court should reverse the order denying the motion to suppress and remand the case for a new trial.

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.

Appellee argues that any error in excluding the evidence was harmless in that the evidence "did not undermine any of the evidence presented that established that Defendant was responsible for the instant homicide." (Brief of Appellee, page 63.)

David Twomey would have testified that he saw Thomas in a rental car and that Thomas told him, "You didn't see me. If anybody asks, you didn't see me." [11:T2099] That evidence would have shown that Thomas was afraid someone would know he was in Florida. It would explain why he was not driving his truck, and it would also explain why he needed large amounts of cash. If he were hiding, he would not want to leave a "paper trail" by using credit cards.

Evidence of Thomas' bank account would have undermined Lehmann's testimony that it was usual for Thomas to withdraw large sums of money. Most jurors have bank accounts, and bank statements would not have confused the jury. The jurors would simply look at the statements for large deposits, withdrawals, or transfers. The evidence would have also shown that whatever was happening with

Thomas was not usual, and suggested that whatever it was had nothing to do with Appellant. Evidence that Thomas was involved with drugs would have explained the large cash withdrawal and, with the addition of Twomey's testimony, would have suggested that Thomas' hiding had something to do with narcotics transactions.

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 CAMPGROUND WHEN THAT EVIDENCE DEMONSTRATES A DESIRE TO AVOID ARREST FOR AN OUTSTANDING WARRANT AND A DESIRE TO HIDE HIS DRUG DEALING FROM LAW ENFORCEMENT.

Appellee argues that even though the trial judge ruled immediately before trial that the prosecution could make any comment it thought appropriate concerning flight, that Appellant waived the argument by failing to make a "contemporaneous objection" to evidence and argument concerning flight. (Brief of Appellee, page 65-66.) However, section 90.104(1)(b), Florida Statutes now reads:

> If the court has made a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal.

Therefore, counsel did not need to object to comments in closing argument.

In closing argument, the prosecutor clearly argued that Appellant was guilty because he fled. The prosecutor told the jury:

> **We know that immediately after all contact with the victim was lost, that the defendant left town with a trail of purchases from Fort Myers, all the way up to Tennessee.** They start from 8/8, 8/9. 8/10, all the way up to 9/4. . . .
>
> **We know the when he left town, and didn't tell anybody he was going, he went to a secluded campsite in a forest in Tennessee**. Mrs. Reeves, the campsite host, saw him check in. She saw his tent set up. She heard a

> police scanner. She saw that there were two tents.
>
> We also know that when he was approached by law enforcement and asked for I.D., he got on the phone and called somebody, said “Hey, I need my I.D. Can you bring it?”

[11:T2124] The prosecutor then goes on to say that Mrs. Reeves saw what she thought was Appellant’s mother come in and leave with two dogs, and saw a man take Appellant’s things. [11:2125] In rebuttal argument, the prosecutor argued flight:

> [Valerie Bisnett], too, called the police to get law enforcement to get involved. She didn’t shoot – neither one of those people shot and killed Dave Thomas. What do you do when you shoot and kill somebody? Do you call the police and say, “Hey, I want to report him missing?” No. Nope. **You get in a car and you drive as far away as you possibly can and go live in the woods.**

[12:T2171] The prosecutor ended the argument with a reference to flight, saying: “He dug a hole. He laid in wait. He shot him in the back. He took his money. **He buried him, and he fled to the woods of Tennessee.**” [12:T2183]

Because evidence and argument suggesting flight as consciousness of guilt should have been excluded, the Appellant should be granted 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 PLAY IN THEIR ENTIRETY, WHICH RESULTED IN THE REVELATION OF HIGHLY PREJUDICIAL EVIDENCE OF OTHER OFFENSES.

Appellant's argument is not that introducing the redacted portions of the tapes was error. Appellant is arguing that playing any of the tapes was error. Appellant is arguing that there were no adoptive admissions in the tapes in that neither of the women made any statements that were accusatory. Therefore, the non-accusatory statements and Appellant's responses to them were not relevant. Appellant is arguing that even if this Court believed the tapes were relevant, the relevancy was outweighed by unfair prejudice. If other-crime evidence was redacted from the tapes, horribly unfair inferences would be presented to the jury. If the tapes were not redacted, highly prejudicial information about drug dealing and warrants for other offenses from other states was presented to the jury.

The State wanted to play the redacted tape because, if the references to warrants, drug dealing, and the methamphetamine charges were deleted, the jury would be misled into thinking Mr. Twilegar was talking about the murder. In order to avoid unfair inferences, Appellant had to ask that highly prejudicial material be presented. Appellant's counsel argued:

> MS. BEARD: We discussed that with our client. The redacted portions that the State have do talk about the meth labs, but there are mentions of Cris talking, and he should be quiet. And the redacted portions are discussing that he should specifically keep quiet about the meth labs. We think that it would mislead the jury not to have the whole thing in.
>
> Your Honor, obviously we object to it coming in. We've made our objections. It is likely that our client would have to take the stand to explain this. He's giving up his – because this is coming in, and it needs to come in in full amount, otherwise the jury only gets a portion of what is going on. . . .

[9:T1667-68]

The prosecution must have realized that it would benefit from the editing of the tape, otherwise, the State would not have objected so strenuously to the introduction of redacted material that would help the State by showing Appellant was involved in drug dealing. The State and the court discussed Appellant's insistence on playing the entire tape:

> MS. STEWART (Prosecutor): Your Honor, it's -- it's our duty as prosecutors to give the defendant a fair trial.
>
> THE COURT: All right, so you want me to let you represent the defendant in this matter?
>
> MS. STEWART: Your Honor, we believe that the part that we have indicated that should be redacted is fair. It has the defendant giving statements that we believe will help our case, without hurting the defendant as far as his prior record. It does not put him in a position of having to take the stand with what we have redacted. We do not believe it's –
>
> THE COURT: . . . Hold on. You put me in this position; all right? You put me in a position to say, "I want to introduce part of a telephone conversation in which the defendant is involved." The defendant wants to introduce the balance of it, and I should exclude that? I don't think I can do that.

[9:T1672-73]

It is clear from the State's case that Spencer Hartman knew Appellant sold drugs, and he could implicate Appellant in drug dealing or trafficking by talking to police. Also, on the tapes Appellant talks about the search of the car in Tennessee. [9:T1723] Clearly, this has nothing to do with Thomas or his disappearance, but it has everything to do with drug dealing. Appellant alludes to the fact that Chris was involved in the manufacture of meth when he says he told Chris "you are committing the wrong also." [9:T1741] Appellant stresses that Chris Miller should not talk to law enforcement. Clearly, Chris Miller had nothing to do with anything in Florida. However, Miller would have known that Appellant was making and selling methamphetamine. Also, Appellant acknowledges that he was willing to go to prison for the meth; therefore, it is obvious he did not want Chris Miller to get into trouble for meth dealing or get involved as a witness against him. Without references to the meth offense, the jury would be left with the impression that Miller knew something about this case. That inference would have been unfair, and Appellant had to insist on revealing the drug dealing.

Appellant should not have been placed in the position of revealing such damaging evidence when the relevancy of the phone calls was marginal. Therefore, Appellant should be retried without the use of this evidence.

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 trial judge allowed the State to admit all of the receipts found at the campsite through Deputy Holt, ruling that the State did not need to bring in any records custodian for authentication. [8:T1457-59, 1460, 1463; R13:926-947] Appellant's argument on appeal concerns the lack of authentication altogether, because other than the NAPA receipts, there was no proper foundation presented.

Appellee argues that even though the court ruled that no foundation at all was necessary, that for some reason, Appellant had to object to the State's faulty attempt at some kind of authentication after the receipts had been admitted into evidence and read to the jury. (Brief of Appellee, page 78.) Since the court made a "definitive" ruling right before the receipts were admitted into evidence and read to the jury, Appellant did not have to renew his objection to lack of authenticating foundation. See Section 90.104(1)(b), Florida Statutes.

Appellant's argument specifically excludes the NAPA receipts (Appellant's Initial Brief, pages 89-90); however, Appellee's argument in large part concerns the NAPA receipts. Appellee has no argument regarding the propriety of the introduction of the 7-Eleven receipts, other than to say that admission of the evidence was harmless because Morrison testified they went to 7-Eleven.

(Brief of Appellee, page 81.) However, Morrison did not know how much was spent at 7-Eleven, but the receipt contained an amount of $688.97. Clearly the State used these receipts to show the amount of purchases. Appellee has no argument whatsoever for the receipts from the Flying J Travel Center, from Sam’s Club, from the Pilot Travel Center, or from Winn-Dixie.

ISSUE VIII

WHETHER THE TRIAL COURT ERRED IN FINDING THAT THE HOMICIDE WAS COMMITTED IN A COLD, CALCULATED AND PREMEDIATED MANNER WHEN THE EVIDENCE FAILED TO DEMONSTRATE HOW THE OFFENSE OCCURRED; AND WHTHER THE JURY'S FINDING PRECLUDES A FINDING OF THE PECUNIARY GAIN AGGRAVATOR.

In reply to Appellee's argument on this issue, Appellant relies on his argument in the Initial Brief, along with his reply to Issues I and II in this Reply Brief, because those issues concern sufficiency of the evidence to prove both premeditated murder and robbery (pecuniary gain).

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.

In its Answer brief, Appellee inaccurately reframes the issue. The primary issue is whether or not the court erred in allowing Appellant to waive investigation into possible mitigation. Since an investigation is a prerequisite to a knowing, voluntary, and intelligent waiver of presentation of mitigation evidence, then there cannot be a valid waiver of presentation of mitigation without an investigation. See State v. Larzelere, 979 So. 2d 195 (Fla. 2008).

Appellee takes Appellant's statement in his affidavit in support his demand to forego mitigation out of context. The statement Appellee quotes actually reads: "I believe any mitigating arguments on my behalf by counsel, would be an ADMISSION OF GUILT AND OR LIABILITY which would be in direct violation of my PROSCRIBED RELIGIOUS EDICTS." (R6:273-274) The plain meaning of that sentence is that admitting guilt (perhaps to save one's life) would violate Mr. Twilegar's religious convictions.

Although there is no law directly on point regarding a waiver of all investigation into mitigating evidence, Appellee criticizes Appellant's use of "black letter law" concerning waiver of mitigation both in support of its position at trial and in support of its position on appeal. (Brief of Appellee, page 92.) These

cases include Koon v. Drugger, 619 So. 246 (Fla. 1993), Chandler v. State, 702 So. 2d 186 (Fla. 1997), and Mora v. State, 814 So. 2d 322 (Fla. 2002), which deal with the procedures to be utilized in determining whether or not a waiver of presentation of mitigation is valid. Trial counsel did not cite State v. Lewis, 838 So. 2d 1102 (Fla. 2002), which emphasized the importance of investigation and preparation as a prerequisite to a waiver of presentation of mitigation.

At the waiver hearing, Mr. Twilegar stated that counsel could do some investigation "just to cover themselves." (R8:369) In this case, counsel did not "cover themselves." Instead, counsel, who was not properly certified to do death penalty litigation[2], threw up his hands and abdicated his responsibility. In spite of Mr. Twilegar's failure to cooperate, counsel could have obtained mitigation information with the use of a little imagination.

Counsel could not have "thoroughly discussed" waiver of mitigation when counsel had no idea what type of mitigation evidence existed. Any conversation regarding the waiver would have been in the abstract. Contrary to Appellee's assertion in its brief, counsel could not have informed the court of what mitigation evidence he could have presented simply because he did not look for any. Appellee points out that the State found

[2] With Mr. Twilegar's consent, the court allowed Mr. McLoughlin to represent Appellant without being certified. (R6:268-271, 272; R8:333-339) Counsel had tried only one death penalty case with penalty phase. (R6:270-271; R8:337) The State objected on the grounds that there were no exceptional circumstances. (R8:335-336)

mitigation evidence and presented it in the Spencer hearing. (R17:1308-10) In discussing the waiver, counsel did not even produce this evidence, although the State represented that some of its mitigation was actually provided to the State by Appellant's previous public defender. [R17:R1308-1309; R21:1912-15, 1916-21]

The fact that Mr. Twilegar wanted to keep his private life private does not support an argument in favor of waiver of investigation. Anything counsel found would have been kept confidential, and would not have been presented without Appellant's consent. The fact that Mr. McLaughlin was concerned that Mr. Twilegar would "fire" him is irrelevant. Counsel was an assistant public defender, he was not hired by Mr. Twilegar. As such, Mr. Twilegar could not "fire" Mr. McLaughlin without asserting his right to proceed pro-se. It is not the concern of the Public Defender whether or not a client would proceed pro-se if counsel insisted on doing his job.

Appellee argues that Mr. Twilegar presented mitigation in the form of evidence of Thomas' last will and testament and the booking sheet for his arrest for conspiracy to murder his wife. (Brief of Appellee, page 98.) That type of evidence was relevant only to guilt and not to whether or not the death penalty was appropriate. Therefore, it is not mitigation evidence. Lingering or residual doubt of guilt is not a valid nonstatutory mitigating circumstance. Druest v. State, 855 So. 2d 33, 40-41 (Fla. 2003); Darling v. State, 808 So. 2d 145, 162 (Fla. 2002). Appellant did not testify at the hearing (R17:1328), nor did he present any

evidence in mitigation.

Because the waiver was invalid, Appellant is entitled to a new penalty phase.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Katherine Maria Diamandis and/or Candance M. Sabella, Concourse Center #4, 3507 E. Frontage Rd. - Suite 200, Tampa, FL 33607, (813) 287-7900, on this _____ day of March, 2009.

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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