No. _____

OCTOBER TERM 2017

IN THE SUPREME COURT OF THE UNITED STATES

MARK TWILEGAR,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE FLORIDA SUPREME COURT

APPENDIX
TO PETITION FOR WRIT OF CERTIORARI

APPENDIX A

Filing # 64573474 E-Filed 11/27/2017 08:52:29 AM

Supreme Court of Florida

No. SC17-839

MARK A. TWILEGAR,
Appellant,

vs.

STATE OF FLORIDA,
Appellee.

[November 2, 2017]

PER CURIAM.

Mark A. Twilegar, a prisoner under sentence of death, appeals the circuit court's order denying his successive motion for postconviction relief filed under Florida Rule of Criminal Procedure 3.851 seeking relief from his death sentence pursuant to Hurst v. Florida, 136 S. Ct. 616 (2016), and Hurst v. State, 202 So. 3d 40 (Fla. 2016), cert. denied, 137 S. Ct. 2161 (2017). We have jurisdiction. See art. V, § 3(b)(1), Fla. Const.

As the circuit court correctly recognized, the Hurst decisions do not apply to defendants like Twilegar who waived a penalty phase jury. See Mullens v. State, 197 So. 3d 16, 38-40 (Fla. 2016), cert. denied, 137 S. Ct. 672 (2017); see also

Brant v. State, 197 So. 3d 1051, 1079 (Fla. 2016). Although Twilegar urges this Court to revisit, in light of the Hurst decisions, its prior holding in Twilegar's direct appeal that his waiver was knowing, intelligent, and voluntary, see Twilegar v. State, 42 So. 3d 177, 204 (Fla. 2010), cert. denied, 562 U.S. 1225 (2011), that argument is without merit. See Mullens, 197 So. 3d at 39-40 (explaining that a defendant "cannot subvert the right to jury factfinding by waiving that right and then suggesting that a subsequent development in the law has fundamentally undermined his sentence"). Accordingly, we affirm the circuit court's denial.

It is so ordered.

LABARGA, C.J., and PARIENTE, LEWIS, QUINCE, CANADY, POLSTON, and LAWSON, JJ., concur.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

An Appeal from the Circuit Court in and for Lee County,
Ramiro Mañalich, Judge - Case No. 362003CF002151000ACH

Neal Dupree, Capital Collateral Regional Counsel, Suzanne Myers Keffer, Chief Assistant, and Scott Gavin, Staff Attorney, Capital Collateral Regional Counsel, Southern Region, Fort Lauderdale, Florida,

for Appellant

Pamela Jo Bondi, Attorney General, Tallahassee, Florida, and Timothy A. Freeland, Senior Assistant Attorney General, Tampa, Florida,

for Appellee

APPENDIX B

The IN THE CIRCUIT COURT FOR THE TWENTIETH JUDICIAL CIRCUIT IN AND FOR LEE COUNTY, FLORIDA

STATE OF FLORIDA,
Plaintiff,

vs. **CASE NO: 03-CF-2151**

MARK A. TWILEGAR,
Defendant.
_____/

FINAL ORDER DENYING SUCCESSIVE MOTION FOR POSTCONVICTION RELIEF

THIS CAUSE comes before the Court on Defendant's "Successive Motion To Vacate Judgments Of Conviction And Sentence With Special Request For Leave To Amend," filed on January 11, 2017, pursuant to Fla. R. Crim. P. 3.851. The State filed a response on February 9, 2017. A case management conference was held on February 15, 2017. Being otherwise fully advised, the Court finds as follows:

1. The facts of this case are outlined in the initial Florida Supreme Court opinion on direct appeal, Twilegar v. State, 42 So.3d 177 (Fla. 2010).

> On April 3, 2003, Mark Twilegar was charged with first-degree murder, either by premeditated design or in the course of a robbery, for the shooting death of David Thomas in Fort Myers on August 7, 2002. The evidence presented at trial showed that Twilegar came to Fort Myers from Missouri in the spring of 2002 and lived for a couple of weeks with his niece, Jennifer Morrison, who rented a residence from the victim, David Thomas, and his wife, Mary Ann Lehman. Twilegar's mother arrived a few weeks later and also moved in with Morrison. After several weeks, Twilegar moved out and eventually pitched a three-room tent in an undeveloped area adjacent to the backyard of a house at 412 Miramar Road, which was occupied by Britany and Shane McArthur. Twilegar did not own a car and did not have a regular job. In lieu of paying rent, he worked as a handyman on the premises. His possessions included a couch, a TV, some clothes and a twelve-gauge shotgun, which he kept in the tent. The McArthurs moved out of the house in June 2002, and Britany's younger brother, Spencer, moved into the house in September. Prior to moving in, Spencer stopped by the house on a regular basis to perform renovations, as described below.
>
> On occasion, Twilegar worked as a handyman for the victim, David Thomas, and on August 2, 2002, the two drove in Thomas's pickup truck to Montgomery, Alabama, where

Twilegar had agreed to install a deck on a house Thomas owned there. Thomas told his wife that he would be gone six to eight weeks. On the morning of August 6, 2002, Thomas withdrew $25,000 in cash from a bank in Montgomery, ostensibly to purchase a house at an auction, and then later that same morning he rented a Dodge Neon, arranging to return the car in Montgomery on August 9, 2002. Thomas called his girlfriend, Valerie Bisnett Fabina, in Fort Myers and told her that he and Twilegar would be returning to Fort Myers that night. Thomas's neighbor last saw Thomas and Twilegar at the Montgomery house at approximately 3 p.m. that afternoon. Thomas and Twilegar then returned to Fort Myers, where Thomas met with Fabina at approximately 11 p.m. and obtained a motel room key card from her. At the meeting, Fabina observed Twilegar sitting in the passenger seat of the Neon.

The next evening, August 7, 2002, Thomas visited Fabina at her job at 7 or 7:30 p.m. and returned the motel key card. When he opened his wallet to remove the key card, Fabina noticed that he had an unusually large amount of cash. Thomas told her that he and Twilegar were going to go look at a truck to buy for Twilegar to use on the job in Alabama, and that he would meet her later that night at the motel. Fabina never saw or heard from him again. Thomas spoke with his wife, Mary Ann Lehman, by phone a little after 9 p.m. that evening, and they made arrangements to speak again in the morning. She never saw or heard from him again. Later that night, Twilegar, alone, arrived at Jennifer Morrison's house, where Twilegar's mother was staying. Morrison then drove Twilegar to 7-Eleven where he purchased cell-phones and supplies. She also drove him to Wal-Mart where he made additional purchases. When they arrived back at the house, Morrison went to bed. When she woke the next morning, Twilegar and his mother and their possessions were gone. Morrison would never see Twilegar in Fort Myers again.

After Britany and Shane moved out of the Miramar house in June but before Spencer moved into the house in September, Spencer arrived at the house one day at 4 p.m. to perform renovations and he saw Twilegar digging in the backyard on the far side of his tent. Spencer watched him briefly, unobserved, then returned to the front of the house. A few minutes later, Twilegar approached him and explained that a man would be stopping by to deliver a couple pounds of "weed" and that the man would not stop if he saw Spencer there. Twilegar asked him to leave the premises and told him that if he did he would give him either $100 or an ounce of weed. Spencer left, and when he returned the next day, he found a $100 bill in the prearranged spot. He also found Twilegar's tent disassembled and smoldering in the backyard incinerator. Most of Twilegar's possessions were gone, including the shotgun. Spencer would never see Twilegar in Fort Myers again. On September 26, 2002, after Thomas's disappearance was publicized, Spencer went to the spot where Twilegar had been digging and found that the area was covered by Twilegar's couch. He moved the couch aside and found an area of freshly dug dirt, covered with palm fronds. Beneath the palm fronds was a piece of plywood, and beneath that a couple of cinder blocks and a car ramp. After digging several feet, he detected a strong odor. Police were called and they discovered Thomas's body.

Thomas died from a single shotgun blast to his upper right back, delivered at close range. The 7 1/2 birdshot, from a twelve-gauge shell, had travelled through his body at a

downward trajectory. He had died within minutes of being shot. Soft fine sand, similar to that which covered the exterior of his body, was found deep within his throat, in his larynx, indicating that he had still been breathing, though not necessarily conscious, when buried. He was still wearing the same clothes he had been wearing when Fabina last saw him on August 7, 2002, but his wallet was missing. His body was badly decomposed, and the time of death was uncertain. A spent twelve-gauge shell was found in the incinerator, along with a broken D-shaped garden tool handle. Twilegar's shotgun was never found. Several live twelve-gauge shells were found discarded in the area, along with a shovel with a broken handle. Thomas's rental car key fob was found approximately 100 feet from the body. The rental car was found earlier, on August 13, 2002, burned in a remote area of Lee County. Twilegar was apprehended September 20, 2002, in Greenville, Tennessee, where he had been staying at a campground since August 21, 2002. Among the property seized at the campground were numerous retail receipts totaling thousands of dollars for camping supplies and other items purchased after Twilegar left Fort Myers. The merchandise was all purchased with cash. While awaiting trial, Twilegar made several incriminating phone calls, which were recorded.

Twilegar's trial began January 16, 2007, and he testified in the guilt phase. He stated that the "weed" incident had in fact occurred but that it had happened before he left for Alabama with Thomas, not after he returned. He said that he had often dug holes near his tent for latrine purposes. He also testified that he had returned from Alabama not with Thomas on August 6, 2002, but alone on August 5, 2002, in a car Thomas had given him as partial payment for the deck work he was doing, and that he had later sold the car to an itinerant in Palm Beach. He testified that during the early morning hours of August 8, 2002, after shopping at 7-Eleven and Wal-Mart, he had driven his mother's car, which was already packed with their possessions, back to his tent to get his shaving kit and that someone had pointed a shotgun at him in the dark and that he had deflected the shot, injuring his hand. He kicked the assailant and ran away.

After closing arguments, the jury deliberated for little more than an hour and on January 26, 2007, returned a verdict finding Twilegar guilty of first-degree premeditated murder. Twilegar waived a penalty phase jury and waived both the investigation and the presentation of mitigation. The penalty phase proceeding was held before the judge on February 16, 2007, and the defense stood mute. The *Spencer* [FN1] hearing was held February 19, 2007. On August 14, 2007, the court sentenced Twilegar to death, based on two aggravating circumstances, [FN2] no statutory mitigating circumstances, and four nonstatutory mitigating circumstances. [FN3]

Twilegar v. State, 42 So.3d 177, 185-188 (Fla. 2010) (footnotes omitted).

2. A jury convicted Defendant of first-degree murder by a unanimous vote of all twelve jurors. Defendant waived a penalty phase jury. The trial court found two aggravating factors,

concluded that the mitigating factors did not outweigh the aggravating factors, and sentenced Defendant to death. The Florida Supreme Court affirmed Defendant's convictions and sentences on direct appeal. Id. The United States Supreme Court denied Defendant certiorari relief on February 22, 2011. Twilegar v. Florida, 131 S. Ct. 1476 (2011).

3. Defendant filed a "Motion To Vacate Judgment Of Convictions And Sentences With Special Leave To Amend." on February 7, 2012. He filed an "Amended Motion To Vacate Judgments Of Conviction And Sentence With Special Leave To Amend" on October 1, 2012, and "Second Amended Motion To Vacate Judgments of Conviction And Sentence With Special Request For Leave To Amend," filed December 26, 2012, which amended claims in the original motion. On October 26, 2012, a case management conference was held. The evidentiary hearing was held on July 15-16, 2013. The trial court denied the postconviction motion by order rendered September 27, 2013. The Florida Supreme Court affirmed the denial. Twilegar v. State, 175 So. 3d 242 (Fla. 2015).

4. In this current successive motion, Defendant raised three claims that he is entitled to relief under Hurst v. Florida, 136 S. Ct. 616 (2016) and Hurst v. State, 202 So.3d 40 (Fla. 2016). A case management conference was held on February 14, 2017. Having determined that the claims raised are purely legal arguments which do not require an evidentiary hearing, the Court makes the following findings as to Defendant's claims.

5. **As to Claim I,** Defendant argued his death sentence violated the Sixth Amendment because a jury did not make all findings of fact necessary to impose a death sentence. Defendant argued that the Florida Supreme Court held in Hurst v. State that a death sentence could be imposed only if a jury unanimously and expressly found aggravating factors proven beyond a reasonable

doubt, the aggravating factors outweighed the mitigating factors, and unanimously rendered a verdict for a death sentence. Defendant argued that fundamental fairness required application to his case, because he raised Ring claims in three separate motions, and only after denial of these motions did he waive his right to a penalty phase jury. Defendant argued this waiver is not valid, and he would not have made the waiver had he known that he had a right to a unanimous jury making the findings necessary to impose a death sentence. Defendant argued that since there were no jury findings, it is impossible to state that any error was harmless. He further argued that one of the aggravating factors found by the trial judge was specifically rejected by the jury during the guilt phase.

6. The State conceded that Defendant's case was final after Ring v. Arizona, 536 U.S. 584 (2002), and that Hurst applied retroactively to Defendant's case. Mosley v. State, ___ So.3d ___, 2016 WL 7406506 (Fla. 2016). However, the State argued that Defendant is not entitled to relief under Hurst because he waived his right to a penalty phase jury, *citing* Mullens v. State, 197 So.3d 16 (Fla. 2016); Knight v. State, ___ So.3d ___, 2016 WL 7242640 (Fla. 2016); Robertson v. State, ___ So.3d ___, 2016 WL 7043020 (Fla. 2016); Wright v. State, ___ So.3d ___, 2016 WL 6901449 (Fla. 2016); Davis v. State, ___ So.3d ___, 2016 WL 6649949 (Fla. 2016); Brant v. State, 197 So.3d 1051 (Fla. 2016). Mullens held that a defendant who waived his right to a penalty phase jury is not entitled to relief pursuant to Hurst. Mullens, 197 So.3d at 40 ("Mullens cannot subvert the right to jury factfinding by waiving that right and then suggesting that a subsequent development in the law has fundamentally undermined his sentence"). In Davis, the Florida Supreme Court held that a defendant was not entitled to relief under Hurst, even where the defendant preserved Ring claims prior to waiving the right to a penalty phase jury. Davis, 2016 WL 6649949 at *31. The Florida

Supreme Court has held that an argument that a defendant waived his right to an advisory jury, not the jury required under Hurst, was undermined by an explanation that the waiver was trial strategy. Wright, 2016 WL 6901449 at *18-19.

7. The record reflects that Defendant filed a "Motion For Special Verdict Forms," "Motion To Require Unanimous Jury In The Penalty Phase," and "Motion To Bar Imposition Of Death Sentence Florida's Capital Sentencing Procedure Is Unconstitutional Under Ring v. Arizona," on September 13, 2006, which raised Ring claims. The motions are attached as Court Exhibit A. Defendant filed an affidavit supporting his demand that counsel cease mitigation on September 12, 2006, citing his right to privacy and his religious beliefs. The affidavit is attached as Court Exhibit B. On September 22, 2006, the trial court heard a "notice" that Defendant had informed trial counsel to stop mitigation, and reserved ruling. The transcript of that hearing reflects that Defendant refused to cooperate with the mitigation specialists, refused to be evaluated by experts, and refused to permit counsel to contact friends and family, telling the trial court there were things in his background he did not want brought up (September 25, 2006 Transcript pp. 3-27). Relevant portions of the transcript are attached as Court Exhibit C. The demand to cease mitigation was granted by order filed September 29, 2006. The order is attached as Court Exhibit D. The motions containing Ring claims were set to be heard on December 18, 2006, at which time they were withdrawn at the specific request of Defendant, with the knowledge that the death penalty law could change. Copies of the notice of hearing, court minutes, and relevant portions of the hearing transcript are attached as Court Exhibit E. Defendant filed a "Motion To Waive Jury In Penalty Phase" on January 11, 2007. The motion is attached as Court Exhibit F. This motion was heard and granted on January 16, 2007, and during the hearing trial counsel stated it was his idea and his

recommendation to do so, with which Defendant agreed (January 16, 2007 Trial Transcript pp. 42-44). Relevant portions of the trial transcript are attached as Court Exhibit G. During the penalty phase, the trial court again addressed these issues, and Defendant indicated that he did not want a jury, and wanted trial counsel to "stand silent the entire hearing" (February 16, 2007 Trial Transcript pp. 18-20). Relevant portions of the penalty phase transcript are attached as Court Exhibit H. It appears from the record that Defendant's decision to waive mitigation was based on his own desire to avoid airing personal matters, and his wish if found guilty to be sentenced to death and quickly executed, and was not related in any way to the pretrial motions raising Ring claims. It appears from the record that the motion to waive a penalty phase jury was trial strategy on the part of trial counsel in light of Defendant's refusal to permit presentation of mitigation evidence, and Defendant expressly agreed to that trial strategy. Since the pretrial motions raising Ring claims were withdrawn, Defendant's claim that he waived a penalty phase jury only because those motions were denied is refuted by the record that the trial court did not hear those motions at his request and did not deny them.

8. The January 29, 2007 verdict form indicated that the jurors unanimously found that the killing of the victim was premeditated. The verdict form is attached as Court Exhibit I. The line for alternatively finding that the killing occurred during the commission of a robbery was left blank. The blank line does not mean that the jury "specifically rejected" the aggravating factor that the murder was committed for pecuniary gain as Defendant argued, only that the jury found the murder was premeditated, and not felony murder.

9. Under the case law cited above, and the record, Defendant is not entitled to relief under Hurst because he knowingly and voluntarily waived both presentation of mitigation and his right to

a penalty phase jury. Defendant's waiver is not rendered invalid by the change in the law, since Defendant was specifically warned during the December 18, 2006 hearing that the law was unsettled and could change. See Court Exhibit E, December 18, 2006 Transcript p. 10. Therefore, **Claim I is DENIED.**

10. **As to Claim II**, Defendant argued that in light of Hurst v. State, his death sentence violated the Eighth Amendment. Defendant argued that his sentence was cruel and unusual punishment because a jury did not unanimously find he should be sentenced to death. Defendant argued that the "Eighth Amendment requires findings by a unanimous jury as to what he is eligible for, and deserves, regardless of his wishes." He argued that the unconstitutional sentencing scheme "pervaded" his decision making with respect to his decision to waive a penalty phase jury. The Court finds that the record refutes that argument, and that Defendant's waiver was intelligently and voluntarily made, despite numerous colloquies and warnings by the trial court. Under the case law cited above, and the record, Defendant is not entitled to relief under Hurst because he knowingly and voluntarily waived his right to a penalty phase jury. Therefore, **Claim II is DENIED.**

11. **As to Claim III**, Defendant argued that Defendant argued that Hurst v. State and Perry v. State, 41 Fla. L. Weekly S449 (Fla. 2016), are new law that would apply at resentencing, and require the Court to revisit previously raised postconviction claims. Defendant argued that his previously presented postconviction claims must be re-visited and re-evaluated in light of the new Florida law which would govern at resentencing. Defendant cited to Hildwin v. State, 141 So.3d 1178 (Fla. 2014) and Swafford v. State, 125 So.3d 760 (Fla. 2013) in arguing that the standard for newly discovered evidence – whether a different outcome was probable – should be applied by the Court to reconsider all his prior postconviction claims in light of the requirement that the jury must

now make all findings unanimously. Defendant believed that the prejudice analysis would be different now, and that the prior postconviction claims would be granted because there was a reasonable probability that on resentencing, at least one juror would again vote for a life sentence. The cases relied on by Defendant apply to claims of newly discovered evidence, not to claims of new law. Defendant cited to no legal authority which would authorize, much less require, this Court to reconsider previously denied postconviction claims. Defendant has not claimed the existence of any newly discovered evidence. Under the case law cited above, and the record, Defendant is not entitled to relief under Hurst because he knowingly and voluntarily waived his right to a penalty phase jury, and Defendant is not entitled to relief as a matter of law. Therefore, **Claim III is DENIED.**

12. The following are attached hereto, or incorporated by reference: (1) relevant portions of the trial transcript; (2) relevant portions of the record; and (3) relevant portions of the transcript of the case management conference.

Therefore, it is

ORDERED AND ADJUDGED that Defendant's "Successive Motion To Vacate Judgments Of Conviction And Sentence With Special Request For Leave To Amend" is DENIED. Defendant may file a notice of appeal within thirty days of the date this order is rendered.

DONE AND ORDERED in Chambers at Fort Myers, Lee County, Florida, this 31st day of March, 2017.

Ramiro Mañalich
Circuit Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above order has been furnished to: **Suzanne Keffer**, keffers@ccsr.state.fl.us, Capital Collateral Regional Counsel, Southern Region, One East Broward Blvd., Suite 444, Fort Lauderdale, FL 33301; **Scott Gavin**, gavins@ccsr.state.fl.us, Capital Collateral Regional Counsel, Southern Region, One East Broward Blvd., Suite 444, Fort Lauderdale, FL 33301; **Timothy A. Freeland**, timothy.freeland@myfloridalegal.com, capapp@myfloridalegal.com, Office of the Attorney General, 3507 East Frontage Road, Suite 200, Tampa, FL 33607-7013; **Brenda M. Wade**, servicesao-lee@sao.cjis20.org, Office of the State Attorney, P.O. Box 399, Fort Myers, FL 33902-0399; and **Administrative Office of the Courts** (XIV), 1700 Monroe Street, Fort Myers, FL 33901; this 31 day of March, 2017.

LINDA DOGGETT
Clerk of Court

By: _____
Deputy Clerk

APPENDIX C

APPENDIX C (1)

KeyCite Yellow Flag - Negative Treatment
Declined to Extend by Dunn v. State, Fla.App. 1 Dist., November 17, 2016

42 So.3d 177
Supreme Court of Florida.

Mark A. TWILEGAR, Appellant,
v.
STATE of Florida, Appellee.

No. SC07–1622.
|
Jan. 7, 2010.
|
Rehearing Denied Aug. 9, 2010.

Synopsis
Background: Defendant was convicted, after a jury trial in the Circuit Court, Lee County, James R. Thompson, J., of first-degree premeditated murder, and was sentenced to death. Defendant appealed.

Holdings: The Supreme Court held that:

[1] circumstantial evidence established defendant's identity as perpetrator;

[2] evidence established premeditation;

[3] evidence of defendant's flight from state after murder, and of his subsequent flight from out-of-state campground, was admissible to show consciousness of guilt;

[4] error was harmless as to admission, without proper foundation for admission under business records exception to hearsay rule, of receipts for some of defendant's cash purchases after murder;

[5] evidence established that the murder was committed for pecuniary gain; and

[6] evidence established that the murder was committed in a cold, calculated, and premeditated manner.

Affirmed.

West Headnotes (65)

[1] **Criminal Law** ⇐ Construction in favor of government, state, or prosecution
Criminal Law ⇐ Reasonable doubt

The standard of review for the sufficiency of the evidence, where the evidence of guilt is direct, in whole or in part, is whether a rational trier of fact, upon reviewing the evidence in the light most favorable to the State, could find that the elements of the crime have been established beyond a reasonable doubt.

5 Cases that cite this headnote

[2] **Criminal Law** ⇦ Circumstantial evidence

Under the standard of review for the sufficiency of the evidence where the evidence of guilt is wholly circumstantial, not only must the evidence be sufficient to establish each element of the offense, but the evidence also must be inconsistent with any reasonable hypothesis of innocence proposed by the defendant.

11 Cases that cite this headnote

[3] **Criminal Law** ⇦ Circumstantial evidence

Criminal Law ⇦ Circumstantial evidence

Under the standard of review for the sufficiency of the evidence where the evidence of guilt is wholly circumstantial, which standard requires the evidence to be sufficient to establish each element of the offense and also requires the evidence to be inconsistent with any reasonable hypothesis of innocence proposed by the defendant, the issue of inconsistency is a jury question, and the verdict will be sustained if supported by competent, substantial evidence.

10 Cases that cite this headnote

[4] **Criminal Law** ⇦ Weight and conclusiveness in general

"Direct evidence" is that to which the witness testifies of his own knowledge as to the facts at issue.

Cases that cite this headnote

[5] **Criminal Law** ⇦ Circumstantial Evidence

"Circumstantial evidence" is proof of certain facts and circumstances from which the trier of fact may infer that the ultimate facts in dispute existed or did not exist.

1 Cases that cite this headnote

[6] **Criminal Law** ⇦ Circumstantial Evidence

When circumstantial evidence is relied upon to support a conviction, the conclusion as to the ultimate facts must be one which in the common experiences of men may reasonably be made on the basis of the known facts and circumstances.

Cases that cite this headnote

[7] **Criminal Law** ⇦ Circumstantial evidence

Conviction for first-degree premeditated murder was based on circumstantial evidence, for purposes of determining the standard of review for sufficiency of the evidence, where the record showed that no one witnessed the murder, no physical evidence linked defendant directly to the murder, defendant did not confess to the murder, and defendant made no directly incriminating statements concerning the murder.

Cases that cite this headnote

[8] **Homicide** ⇦ Miscellaneous particular circumstances

Circumstantial evidence established defendant's identity as perpetrator, in prosecution for first-degree premeditated murder; defendant was seen digging a hole near his tent in undeveloped area on what was probably the last day victim was seen alive and the day following defendant's and victim's return from car trip to neighboring state, when victim was last seen alive he told his girlfriend he was going to meet with defendant, at that point victim had in his possession an unusually large amount of cash, victim's body was later found buried in same spot where defendant had been digging, victim was shot in close proximity to grave site because he died within minutes of being shot and he was still alive when buried and had inhaled soil that was consistent with grave site soil, crime scene evidence supported conclusion that burial hole had been dug before the shooting, victim was shot with 12-gauge shotgun and defendant was known to possess such a weapon and to keep it in his tent, defendant's shotgun disappeared after the murder and was never found, and defendant fled the state immediately after victim's disappearance and was involved in series of uncharacteristic and extensive retail purchases that totaled thousands of dollars in cash.

1 Cases that cite this headnote

[9] **Homicide** ⇦ Miscellaneous particular circumstances

With respect to sufficiency of the evidence identifying the perpetrator, circumstantial evidence was inconsistent with defendant's hypotheses of innocence, in prosecution for first-degree premeditated murder; while defendant asserted that victim's wife or his girlfriend was responsible for the killing, that a drug dealer or other assailant happened upon victim and killed him, or that victim was kidnapped and killed by an unknown assailant, those hypotheses, reasonable or not, were inconsistent with single evidentiary fact that victim was killed and buried at same spot outside defendant's tent where defendant had been seen digging a hole earlier on what was probably the last day victim was seen alive.

Cases that cite this headnote

[10] **Homicide** ⇦ Deliberation and premeditation

In a prosecution for first-degree murder, premeditation is a factual issue for the jury.

2 Cases that cite this headnote

[11] **Criminal Law** ⇦ Particular issues or elements

If evidence of premeditation, as element of first-degree murder, is direct, whether in whole or in part, a jury's finding of premeditation will be sustained if supported by competent, substantial evidence in the record.

3 Cases that cite this headnote

[12] **Criminal Law** ⇦ Particular issues or elements

Under the standard of review for the sufficiency of the evidence where the evidence of premeditation, as element of first-degree murder, is wholly circumstantial, not only must the evidence be sufficient to support the finding of premeditation, but the evidence, when viewed in the light most favorable to the State, must also be inconsistent with any other reasonable inference.

7 Cases that cite this headnote

[13] **Criminal Law** ⇦ Particular issues or elements

Criminal Law ⇦ Particular issues or elements

Under the standard of review for the sufficiency of the evidence where the evidence of premeditation, as element of first-degree murder, is wholly circumstantial, which standard requires the evidence to be sufficient to support the finding of premeditation and also requires the evidence, when viewed in the light most favorable to the State, to be inconsistent with any other reasonable inference, the issue of inconsistency is a jury question, and the verdict will be sustained if supported by competent, substantial evidence.

5 Cases that cite this headnote

[14] **Homicide** ⇦ Degrees of murder compared and contrasted

In the absence of an underlying statutorily enumerated felony, premeditation is the key element that separates first-degree murder from second-degree murder.

Cases that cite this headnote

[15] **Homicide** ⇦ Deliberation and premeditation

More than a mere intent to kill, "premeditation," as element of first-degree murder, is a fully-formed conscious purpose to kill.

Cases that cite this headnote

[16] **Homicide** ⇦ Sufficiency of deliberation;time required

With respect to premeditation, as element of first-degree premeditated murder, the purpose to kill may be formed a moment before the act but must 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.

1 Cases that cite this headnote

[17] **Homicide** ⇦ Deliberation and premeditation

Homicide ⇦ Deliberation and premeditation

Premeditation, as element of first-degree premeditated murder, is a factual issue to be determined by the jury, and like other factual matters, may be established by circumstantial evidence.

2 Cases that cite this headnote

[18] **Homicide** ⇦ Deliberation and premeditation

Evidence from which premeditation, as element of first-degree premeditated murder, 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.

1 Cases that cite this headnote

[19] **Homicide** ⇐ Sufficiency of deliberation;time required

No definite length of time for premeditation, as element of first-degree premeditated murder, to exist has been set, and indeed could not be set.

Cases that cite this headnote

[20] **Homicide** ⇐ Deliberation and premeditation

Homicide ⇐ Deliberation and premeditation

Where premeditation, as element of first-degree premeditated murder, is sought to be proved by circumstantial evidence, the evidence must be inconsistent with every other reasonable inference, and this question of inconsistency is for the jury to determine.

1 Cases that cite this headnote

[21] **Homicide** ⇐ Deliberation and premeditation

Evidence established premeditation, in prosecution for first-degree premeditated murder; defendant was seen digging a hole near his tent in undeveloped area on what was probably the last day victim was seen alive, when victim was last seen alive he told his girlfriend he was going to meet with defendant, at that point victim had in his possession an unusually large amount of cash, victim's body was later found buried in same spot where defendant had been digging, victim was shot in upper back at close range with 12-gauge shotgun at downward angle, victim was shot in close proximity to grave site, crime scene evidence supported conclusion that burial hole had been dug before the shooting, and immediately after victim's disappearance defendant was involved in series of uncharacteristic and extensive retail purchases that totaled thousands of dollars in cash.

1 Cases that cite this headnote

[22] **Homicide** ⇐ Deliberation and premeditation

With respect to sufficiency of the evidence, circumstantial evidence was inconsistent with defendant's hypotheses of lack of premeditation, in prosecution for first-degree premeditated murder; any inference that the killing may have been accidental or impulsive was belied by the evidentiary facts that victim was shot in upper back at close range with 12-gauge shotgun at downward angle, victim was killed and buried at same spot outside defendant's tent where defendant had been seen digging a hole earlier on what was probably the last day victim was seen alive, and crime scene evidence supported conclusion that burial hole was dug before the shooting.

Cases that cite this headnote

[23] **Criminal Law** ⇐ Reception of evidence

As with all trial court rulings, a suppression ruling comes to the reviewing court clad in a presumption of correctness as to all fact-based issues, and the proper standard of review depends on the nature of the ruling in each case.

Cases that cite this headnote

[24] **Criminal Law** ⇐ Reception and Admissibility of Evidence

If the trial court's ruling consists of a pure question of fact, the ruling must be sustained if supported by competent substantial evidence.

1 Cases that cite this headnote

[25] **Criminal Law** ⇦ Review De Novo

Criminal Law ⇦ Questions of Fact and Findings

If the trial court's ruling consists of a mixed question of law and fact addressing certain constitutional issues, such as probable cause, reasonable suspicion, the "in custody" requirement under *Miranda*, or ineffective assistance of counsel, the ultimate ruling must be subjected to de novo review but the trial court's factual findings must be sustained if supported by competent substantial evidence. U.S.C.A. Const.Amends. 4, 5, 6.

4 Cases that cite this headnote

[26] **Criminal Law** ⇦ Sentencing

If the trial court's ruling consists of a mixed question of law and fact regarding a departure sentence or the presence of an aggravating circumstance at sentencing, the ruling must be sustained if the trial court applied the right rule of law and its ruling is supported by competent substantial evidence.

1 Cases that cite this headnote

[27] **Criminal Law** ⇦ Review De Novo

If the trial court's ruling consists of a pure question of law, the ruling is subject to de novo review.

Cases that cite this headnote

[28] **Searches and Seizures** ⇦ Emergencies and Exigent Circumstances;Opportunity to Obtain Warrant

Under the exigent circumstances exception to the search warrant requirement, 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. U.S.C.A. Const.Amend. 4.

1 Cases that cite this headnote

[29] **Searches and Seizures** ⇦ Emergencies and Exigent Circumstances;Opportunity to Obtain Warrant

The exigent circumstances exception to the search warrant requirement must be strictly circumscribed by the exigencies which justify its initiation, and thus, an officer must cease a search once it is determined that no emergency exists. U.S.C.A. Const.Amend. 4.

1 Cases that cite this headnote

[30] **Searches and Seizures** ⇦ Inventory or booking search

Searches and Seizures ⇦ Inventory and impoundment;time and place of search

An inventory search is a Fourth Amendment search and seizure, but is unique in that its purpose is the protection of property and persons rather than to investigate criminal activity. U.S.C.A. Const.Amend. 4.

Cases that cite this headnote

[31] **Searches and Seizures** ⇦ Inventory or booking search

Searches and Seizures ⇐ Inventory and impoundment;time and place of search

Contraband or evidence seized in a valid inventory search is admissible because the procedure is a recognized exception to the search warrant requirement. U.S.C.A. Const.Amend. 4.

Cases that cite this headnote

[32] **Searches and Seizures** ⇐ Inventory or booking search

Searches and Seizures ⇐ Inventory and impoundment;time and place of search

The probable cause standard and the search warrant requirement are not relevant to an inventory search analysis, and the test is solely one of reasonableness. U.S.C.A. Const.Amend. 4.

Cases that cite this headnote

[33] **Searches and Seizures** ⇐ Inventory or booking search

Searches and Seizures ⇐ Inventory and impoundment;time and place of search

The reasonableness of a purported inventory search is dependent upon it being a true good-faith inventory search and not a subterfuge for a criminal, investigatory search, and if the search is not, in fact, an inventory search, then it must be justified on some other basis. U.S.C.A. Const.Amend. 4.

Cases that cite this headnote

[34] **Searches and Seizures** ⇐ What Constitutes Search or Seizure

A Fourth Amendment "search" occurs when the government violates a subjective expectation of privacy that society recognizes as reasonable. U.S.C.A. Const.Amend. 4.

1 Cases that cite this headnote

[35] **Searches and Seizures** ⇐ Abandoned, surrendered, or disclaimed items

The test for abandonment, for purposes of search and seizure law, is whether a defendant voluntarily discarded, left behind, or otherwise relinquished his interest in the property in question so that he could no longer retain a reasonable expectation of privacy with regard to it at the time of the search. U.S.C.A. Const.Amend. 4.

3 Cases that cite this headnote

[36] **Searches and Seizures** ⇐ Abandoned, surrendered, or disclaimed items

No search occurs when police retrieve property voluntarily abandoned by a suspect in an area where the suspect has no reasonable expectation of privacy. U.S.C.A. Const.Amend. 4.

2 Cases that cite this headnote

[37] **Searches and Seizures** ⇐ Emergencies and Exigent Circumstances;Opportunity to Obtain Warrant

Officer's entry to camp site lot that defendant had used was justified under exigent circumstances exception to the search warrant requirement; when campground hosts and officer came upon the lot after dark, it appeared to have been burglarized and ransacked or vandalized. U.S.C.A. Const.Amend. 4.

Cases that cite this headnote

[38] **Searches and Seizures** ⇦ Inventory or booking search

Inventory search of personal property at camp site lot defendant had used was reasonable; campground hosts and officer believed the lot had been burglarized and ransacked or vandalized, officer suggested that perhaps the prudent thing to do was to remove the remaining items for safekeeping purposes because otherwise the person who burglarized the lot might return and take the remaining items, and the officer inventoried the remaining items for identification purposes, not for criminal, investigatory purposes. U.S.C.A. Const.Amend. 4.

Cases that cite this headnote

[39] **Searches and Seizures** ⇦ Abandoned, surrendered, or disclaimed items

Defendant, who had no intention of retrieving property he left at camp site lot, due to an outstanding warrant for his arrest, abandoned the property, and thus, there was no illegal seizure of the property, to the extent that the police ultimately retained possession of the property, i.e., campground hosts and officer believed the lot had been burglarized and ransacked or vandalized, officer suggested that perhaps the prudent thing to do was to remove the remaining items for safekeeping purposes because otherwise the person who burglarized the lot might return and take the remaining items, and since hosts had no room at their residence for the property, the officer took the property to the police station. U.S.C.A. Const.Amend. 4.

Cases that cite this headnote

[40] **Criminal Law** ⇦ Reception and Admissibility of Evidence

As a general rule, a trial court's ruling concerning the admissibility of evidence will be sustained on review absent an abuse of discretion.

1 Cases that cite this headnote

[41] **Criminal Law** ⇦ Necessity and scope of proof

A trial court's discretion regarding admissibility of evidence is not boundless, and it may be constrained by legal precepts such as the rules of evidence.

Cases that cite this headnote

[42] **Criminal Law** ⇦ Evidence calculated to create prejudice against or sympathy for accused

In applying the balancing test under which relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence, the trial court necessarily exercises its discretion, and indeed, the same item of evidence may be admissible in one case and not in another, depending upon the relation of that item to the other evidence. West's F.S.A. § 90.403.

1 Cases that cite this headnote

[43] **Homicide** ⇦ Victim

Probative value of evidence that murder victim previously had been arrested for conspiracy to kill his wife was substantially outweighed by the danger of prejudicing or confusing the jury, at guilt phase of capital murder trial. West's F.S.A. § 90.403.

Cases that cite this headnote

[44] **Homicide** ⇐ Victim

Probative value of evidence that murder victim previously had used drugs and had accepted sexual favors in lieu of back rent was substantially outweighed by the danger of prejudicing or confusing the jury, at guilt phase of capital murder trial. West's F.S.A. § 90.403.

Cases that cite this headnote

[45] **Homicide** ⇐ Victim

Probative value of evidence that murder victim and business associate had been seen about five years before the murder waving guns at each other, and that victim had said to witness at a convenience store, sometime before the murder, "If anybody asks, you haven't seen me," was substantially outweighed by the danger of prejudicing or confusing the jury, at guilt phase of capital murder trial. West's F.S.A. § 90.403.

Cases that cite this headnote

[46] **Criminal Law** ⇐ Evidence calculated to create prejudice against or sympathy for accused

Probative value of records from murder victim's and his prior girlfriend's bank account was substantially outweighed by the danger of prejudicing or confusing the jury, at guilt phase of capital murder trial. West's F.S.A. § 90.403.

Cases that cite this headnote

[47] **Criminal Law** ⇐ Flight or refusal to flee

Criminal Law ⇐ Resisting or avoiding arrest

Evidence of flight, concealment, or resistance to lawful arrest after the fact of a crime is admissible as being relevant to consciousness of guilt which may be inferred from such circumstances.

3 Cases that cite this headnote

[48] **Criminal Law** ⇐ Flight or refusal to flee

Criminal Law ⇐ Resisting or avoiding arrest

For evidence of flight, concealment, or resistance to lawful arrest after the fact of a crime to be admissible as being relevant to consciousness of guilt, there must be evidence which indicates a nexus between the flight, concealment, or resistance to lawful arrest and the crimes for which the defendant is being tried in that specific case.

3 Cases that cite this headnote

[49] **Criminal Law** ⇐ Flight or refusal to flee

Evidence of defendant's flight from state after murder, and of his subsequent flight from out-of-state campground, was admissible to show consciousness of guilt, at guilt phase of capital murder trial; defendant was seen digging a hole near his tent in undeveloped area on what was probably the last day victim was seen alive and the day following defendant's and victim's return from car trip to neighboring state, when victim was last

seen alive he told his girlfriend he was going to meet with defendant, at that point victim had in his possession an unusually large amount of cash, victim's body was later found buried in same spot where defendant had been digging, victim was shot in close proximity to grave site, victim was shot with 12-gauge shotgun and defendant was known to possess such a weapon, and defendant fled the state immediately after victim's disappearance and was involved in series of uncharacteristic and extensive retail purchases that totaled thousands of dollars in cash.

2 Cases that cite this headnote

[50] **Criminal Law** ⇦ Use of documentary evidence

Admission of tapes of defendant's jailhouse telephone calls did not violate the Confrontation Clause, at guilt phase of capital murder trial; defendant was a knowing and active participant in the recorded conversations, and he had ample opportunity to refute or contradict any of the statements that were adverse to his interests, but instead, he acquiesced in the statements. U.S.C.A. Const.Amend. 6.

2 Cases that cite this headnote

[51] **Criminal Law** ⇦ Use of documentary evidence

Tapes of defendant's jailhouse telephone calls were admissible under hearsay exception for adoptive admissions, at guilt phase of capital murder trial. West's F.S.A. § 90.803(18)(b).

Cases that cite this headnote

[52] **Criminal Law** ⇦ Sound recordings

Probative value of tapes of defendant's jailhouse telephone calls was not substantially outweighed by danger of unfair prejudice, at guilt phase of capital murder trial, even if admission of tapes could compel defendant to disclose his alleged drug dealing in order to explain certain statements in the tapes. West's F.S.A. § 90.403.

Cases that cite this headnote

[53] **Criminal Law** ⇦ Business records;books of entry

In order to lay a foundation for the admission of a document under the business records exception to the hearsay rule, it is necessary to call a witness who can show that each of the foundational requirements is present, but it is not necessary to call the person who actually prepared the document; the records custodian or any qualified witness who has the necessary knowledge to testify as to how the record was made can lay the necessary foundation. West's F.S.A. § 90.803(6)(a).

6 Cases that cite this headnote

[54] **Criminal Law** ⇦ Documentary and demonstrative evidence

Error was harmless as to admission, without proper foundation for admission under business records exception to hearsay rule, of receipts for a convenience store purchase, for the cash purchase of three cell phones and supplies, and for the cash purchase of a generator, offered to show defendant's use of victim's cash and the course of defendant's flight after the murder; defendant's niece testified that she drove defendant to the convenience store, and copious evidence was admitted of other cash purchases for which proper foundation was made. West's F.S.A. § 90.803(6)(a).

1 Cases that cite this headnote

[55] **Sentencing and Punishment** ⇐ Questions of fact

With respect to aggravating circumstances at the penalty phase of a capital murder trial, it is not the Supreme Court's job to reweigh the evidence to determine whether the State proved each aggravating circumstance beyond a reasonable doubt, for that is the trial court's job; rather, the Supreme Court's task on appeal is to review the record to determine whether the trial court applied the right rule of law for each aggravating circumstance, and, if so, whether competent substantial evidence supports its finding. West's F.S.A. § 921.141(5).

Cases that cite this headnote

[56] **Sentencing and Punishment** ⇐ Personal or pecuniary gain

In order to establish that the capital felony was committed for pecuniary gain, as aggravating circumstance at penalty phase of capital murder trial, 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. West's F.S.A. § 921.141(5)(f).

Cases that cite this headnote

[57] **Sentencing and Punishment** ⇐ Personal or pecuniary gain

Evidence established that the murder was committed for pecuniary gain, at penalty phase of capital murder trial; victim, while out of state with defendant, withdrew $25,000 in cash from a bank the day before he was last seen alive by girlfriend, girlfriend noticed that he had an unusually large amount of cash in his wallet, when victim's body was found at site at which defendant had dug a hole the victim's wallet was missing, defendant left a $100 bill as payment for a neighbor who temporarily left the area in which hole was dug, and on the night victim was last seen alive and during the following days, defendant was involved in a series of uncharacteristic and extensive retail purchases that totaled thousands of dollars, all of which were paid in cash. West's F.S.A. § 921.141(5)(f).

Cases that cite this headnote

[58] **Sentencing and Punishment** ⇐ Planning, premeditation, and calculation

To establish that the murder was committed in a cold, calculated, and premeditated manner (CCP), at penalty phase of capital murder trial, the jury must determine that the killing was the product of cool and calm reflection and not an act prompted by emotional frenzy, panic, or a fit of rage (cold), that the defendant had a careful plan or prearranged design to commit murder before the fatal incident (calculated), that the defendant exhibited heightened premeditation (premeditated), and that the defendant had no pretense of moral or legal justification. West's F.S.A. § 921.141(5)(i).

Cases that cite this headnote

[59] **Sentencing and Punishment** ⇐ Planning, premeditation, and calculation

Evidence established that the murder was committed in a cold, calculated, and premeditated manner (CCP), at penalty phase of capital murder trial; defendant was seen digging a hole near his tent on what was probably the last day victim was seen alive, when victim was last seen he told his girlfriend he was going to meet with defendant and he had in his possession an unusually large amount of cash, victim's body was later found buried in same spot where defendant had been digging, victim had been shot in upper back at close range with 12-gauge shotgun at a downward angle, victim was shot in close proximity to grave site, crime scene evidence supported

conclusion that burial hole had been dug before the shooting, and immediately after the disappearance of victim and in the following days, defendant was involved in a series of uncharacteristic and extensive retail purchases that totaled thousands of dollars, all of which were paid in cash. West's F.S.A. § 921.141(5)(i).

Cases that cite this headnote

[60] **Sentencing and Punishment** ⇦ Proportionality

Because death is a unique punishment, it is necessary in each case to engage in a thoughtful, deliberate proportionality review to consider the totality of circumstances in a case, and to compare it with other capital cases.

Cases that cite this headnote

[61] **Sentencing and Punishment** ⇦ Determinations based on multiple factors

Proportionality review of a death sentence not a comparison between the number of aggravating and mitigating circumstances.

Cases that cite this headnote

[62] **Sentencing and Punishment** ⇦ Planning, premeditation, and calculation

Sentencing and Punishment ⇦ Childhood or familial background

On proportionality review, death sentence was warranted; aggravating circumstances were that the murder was committed for pecuniary gain and that the murder was committed in a cold, calculated, and premeditated manner (CCP), while nonstatutory mitigating circumstances found by trial court were that defendant had a disadvantaged and dysfunctional family background and childhood, that defendant had received a limited formal education in that he had completed only the seventh grade, and that defendant had abused drugs as a teenager. West's F.S.A. § 921.141(5)(f, i).

Cases that cite this headnote

[63] **Criminal Law** ⇦ Review De Novo

Criminal Law ⇦ Sentencing

The Supreme Court reviews a trial court's decision with respect to the defendant's waiver of the right to present mitigation evidence at the penalty phase of a capital murder trial as a mixed question of law and fact, upholding the trial court's factual findings if supported by competent, substantial evidence, and reviewing the trial court's ultimate decision de novo.

4 Cases that cite this headnote

[64] **Sentencing and Punishment** ⇦ Reception of evidence

When a defendant, against his counsel's advice, refuses to permit the presentation of mitigating evidence in the penalty phase of the capital murder trial, 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, and the court should then require the defendant to confirm on the record that his counsel has discussed these matters with him, and despite counsel's recommendation, he wishes to waive presentation of penalty phase evidence.

Cases that cite this headnote

[65] **Jury** ⇐ Form and sufficiency

Sentencing and Punishment ⇐ Reception of evidence

Capital murder defendant's waiver of penalty phase jury, waiver of investigation into mitigation evidence for penalty phase, and waiver of presentation of mitigation evidence at penalty phase, was knowing, intelligent, and voluntary; defendant wanted to preserve his privacy, he told the court he accepted that his actions would bar him from raising the issue on appeal, trial counsel told the court that defendant was intelligent and self-educated and that there was no question in his mind that he was competent, and defendant told the court he had no history of mental illness, that his mental faculties were not impaired, and that he had never been under the care of a mental health professional.

Cases that cite this headnote

Attorneys and Law Firms

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Opinion

PER CURIAM.

This case is before the Court on appeal from a judgment of conviction of first-degree murder and a sentence of death. We have jurisdiction. *See* art. V, § 3(b)(1), Fla. Const. We affirm.

I. BACKGROUND

On April 3, 2003, Mark Twilegar was charged with first-degree murder, either by premeditated design or in the course of a robbery, for the shooting death of David Thomas in Fort Myers on August 7, 2002. The evidence presented at trial showed that Twilegar came to Fort Myers from Missouri in the spring of 2002 and lived for a couple of weeks with his niece, Jennifer Morrison, who rented a residence from the victim, David Thomas, and his wife, Mary Ann Lehman. Twilegar's mother arrived a few weeks later and also moved in with Morrison. After several weeks, Twilegar moved out and eventually pitched a three- ***186** room tent in an undeveloped area adjacent to the backyard of a house at 412 Miramar Road, which was occupied by Britany and Shane McArthur. Twilegar did not own a car and did not have a regular job. In lieu of paying rent, he worked as a handyman on the premises. His possessions included a couch, a TV, some clothes and a twelve-gauge shotgun, which he kept in the tent. The McArthurs moved out of the house in June 2002, and Britany's younger brother, Spencer, moved into the house in September. Prior to moving in, Spencer stopped by the house on a regular basis to perform renovations, as discussed below.

On occasion, Twilegar worked as a handyman for the victim, David Thomas, and on August 2, 2002, the two drove in Thomas's pickup truck to Montgomery, Alabama, where Twilegar had agreed to install a deck on a house Thomas owned there. Thomas told his wife that he would be gone six to eight weeks. On the morning of August 6, 2002, Thomas

withdrew $25,000 in cash from a bank in Montgomery, ostensibly to purchase a house at an auction, and then later that same morning he rented a Dodge Neon, arranging to return the car in Montgomery on August 9, 2002. Thomas called his girlfriend, Valerie Bisnett Fabina, in Fort Myers and told her that he and Twilegar would be returning to Fort Myers that night. Thomas's neighbor last saw Thomas and Twilegar at the Montgomery house at approximately 3 p.m. that afternoon. Thomas and Twilegar then returned to Fort Myers, where Thomas met with Fabina at approximately 11 p.m. and obtained a motel room key card from her. At the meeting, Fabina observed Twilegar sitting in the passenger seat of the Neon.

The next evening, August 7, 2002, Thomas visited Fabina at her job at 7 or 7:30 p.m. and returned the motel key card. When he opened his wallet to remove the key card, Fabina noticed that he had an unusually large amount of cash. Thomas told her that he and Twilegar were going to go look at a truck to buy for Twilegar to use on the job in Alabama, and that he would meet her later that night at the motel. Fabina never saw or heard from him again. Thomas spoke with his wife, Mary Ann Lehman, by phone a little after 9 p.m. that evening, and they made arrangements to speak again in the morning. She never saw or heard from him again. Later that night, Twilegar, alone, arrived at Jennifer Morrison's house, where Twilegar's mother was staying. Morrison then drove Twilegar to 7–Eleven where he purchased cell-phones and supplies. She also drove him to Wal–Mart where he made additional purchases. When they arrived back at the house, Morrison went to bed. When she woke the next morning, Twilegar and his mother and their possessions were gone. Morrison would never see Twilegar in Fort Myers again.

After Britany and Shane moved out of the Miramar house in June but before Spencer moved into the house in September, Spencer arrived at the house one day at 4 p.m. to perform renovations and he saw Twilegar digging in the backyard on the far side of his tent. Spencer watched him briefly, unobserved, then returned to the front of the house. A few minutes later, Twilegar approached him and explained that a man would be stopping by to deliver a couple of pounds of "weed" and that the man would not stop if he saw Spencer there. Twilegar asked him to leave the premises and told him that if he did he would give him either $100 or an ounce of weed. Spencer left, and when he returned the next day, he found a $100 bill in the prearranged spot. He also found Twilegar's tent disassembled and smoldering in the backyard incinerator. Most of Twilegar's possessions were gone, including the shotgun. Spencer would never see ***187** Twilegar in Fort Myers again. On September 26, 2002, after Thomas's disappearance was publicized, Spencer went to the spot where Twilegar had been digging and found that the area was covered by Twilegar's couch. He moved the couch aside and found an area of freshly dug dirt, covered with palm fronds. Beneath the palm fronds was a piece of plywood, and beneath that a couple of cinder blocks and a car ramp. After digging several feet, he detected a strong odor. Police were called and they discovered Thomas's body.

Thomas died from a single shotgun blast to his upper right back, delivered at close range. The 7 1/2 birdshot, from a twelve-gauge shell, had travelled through his body at a downward trajectory. He had died within minutes of being shot. Soft fine sand, similar to that which covered the exterior of his body, was found deep inside his throat, in his larynx, indicating that he had still been breathing, though not necessarily conscious, when buried. He was still wearing the same clothes he had been wearing when Fabina last saw him on August 7, 2002, but his wallet was missing. His body was badly decomposed, and the time of death was uncertain. A spent twelve-gauge shell was found in the incinerator, along with a broken D-shaped garden tool handle. Twilegar's shotgun was never found. Several live twelve-gauge shells were found discarded in the area, along with a shovel with a broken handle. Thomas's rental car key fob was found approximately 100 feet from the body. The rental car was found earlier, on August 13, 2002, burned in a remote area of Lee County. Twilegar was apprehended September 20, 2002, in Greenville, Tennessee, where he had been staying at a campground since August 21, 2002. Among the property seized at the campground were numerous retail receipts totaling thousands of dollars for camping supplies and other items purchased after Twilegar had left Fort Myers. The merchandise was all purchased with cash. While awaiting trial, Twilegar made several incriminating phone calls, which were recorded.

Twilegar's trial began January 16, 2007, and he testified in the guilt phase. He stated that the "weed" incident had in fact occurred but that it had happened before he left for Alabama with Thomas, not after he returned. He said that he had

often dug holes near his tent for latrine purposes. He also testified that he had returned from Alabama not with Thomas on August 6, 2002, but alone on August 5, 2002, in a car Thomas had given him as partial payment for the deck work he was doing, and that he had later sold the car to an itinerant in Palm Beach. He testified that during the early morning hours of August 8, 2002, after shopping at 7–Eleven and Wal–Mart, he had driven his mother's car, which was already packed with their possessions, back to his tent to get his shaving kit and that someone had pointed a shotgun at him in the dark and that he had deflected the shot, injuring his hand. He kicked the assailant and ran away.

After closing arguments, the jury deliberated for little more than an hour and on January 26, 2007, returned a verdict finding Twilegar guilty of first-degree premeditated murder. Twilegar waived a penalty phase jury and waived both the investigation and the presentation of mitigation. The penalty phase proceeding was held before the judge on February 16, 2007, and the State presented argument in aggravation, while the defense stood mute. The *Spencer*[1] hearing was held February ***188** 19, 2007. On August 14, 2007, the court sentenced Twilegar to death, based on two aggravating circumstances,[2] no statutory mitigating circumstances, and four nonstatutory mitigating circumstances.[3] This appeal follows, wherein Twilegar raises nine issues.[4]

1 *Spencer v. State,* 615 So.2d 688, 690–91 (Fla.1993) ("[T]he trial judge should hold a hearing to: a) give the defendant, his counsel, and the State, an opportunity to be heard; b) afford, if appropriate, both the State and the defendant an opportunity to present additional evidence; c) allow both sides to comment on or rebut information in any presentence or medical report; and d) afford the defendant an opportunity to be heard in person.").

2 The court found that the following aggravating circumstances had been established, with the following weights: (1) the capital felony was committed for pecuniary gain (great weight); and (2) the capital felony was committed in a cold, calculated and premeditated manner (CCP) (great weight).

3 The court found that the following nonstatutory mitigating circumstances had been established, with the following weights: (1) the defendant had a disadvantaged and dysfunctional family background and childhood (little weight); (2) the defendant had received a limited formal education in that he had completed only the seventh grade (little weight); (3) the defendant had abused drugs as a teenager (very little weight); and (4) the alternative punishment to death is life in prison without parole (significant weight).

4 Twilegar raises the following issues in his present appeal: (1) whether the trial court erred in concluding that the evidence is sufficient to prove that Twilegar committed the crime; (2) whether the trial court erred in concluding that the evidence is sufficient to support premeditation; (3) whether the trial court erred in denying Twilegar's motion to suppress the evidence seized at the Tennessee campground; (4) whether the trial court erred in excluding evidence concerning the victim; (5) whether the trial court erred in admitting evidence of flight; (6) whether the trial court erred in admitting Twilegar's jailhouse phone calls; (7) whether the trial court erred in admitting Twilegar's receipts for retail purchases; (8) whether the trial court erred in finding pecuniary gain and CCP as aggravators and whether Twilegar's death sentence is proportionate; and (9) whether the trial court erred in allowing Twilegar to waive a penalty phase jury and to waive both the investigation and presentation of mitigation.

II. ISSUES ON APPEAL

A. *Sufficiency of the Evidence Showing That Twilegar Was the Killer*

[1] [2] [3] Twilegar contends that the trial court erred in concluding that the evidence is sufficient to show that he killed Thomas. We disagree. When sufficiency of the evidence is in issue, several standards of review are applicable. The following standard applies where the evidence of guilt is direct, whether in whole or in part: if a rational trier of fact, upon reviewing the evidence in the light most favorable to the State, could find that the elements of the crime have been established beyond a reasonable doubt, then the evidence is sufficient to sustain the conviction. *Pagan v. State,* 830 So.2d 792, 803 (Fla.2002). Where the evidence of guilt is wholly circumstantial, on the other hand, the following standard

applies: not only must the evidence be sufficient to establish each element of the offense, but the evidence also must be inconsistent with any reasonable hypothesis of innocence proposed by the defendant. *Id.* The issue of inconsistency is a jury question and the verdict will be sustained if supported by competent, substantial evidence. *State v. Law,* 559 So.2d 187, 188 (Fla.1989).

[4] **[5]** **[6]** **[7]** The Court in *Davis v. State,* 90 So.2d 629 (Fla.1956), addressed the issue of direct versus circumstantial evidence:

> In arriving at the conclusion which we hereafter announce, we are aware of the fact that circumstantial evidence is many times relied upon to support convictions for crimes. Direct evidence is that to which the witness testifies of his own knowledge as to the facts at issue. *Circumstantial evidence is proof of certain* ***189** *facts and circumstances from which the trier of fact may infer that the ultimate facts in dispute existed or did not exist.* The conclusion as to the ultimate facts must be one which in the common experiences of men may reasonably be made on the basis of the known facts and circumstances.

Davis, 90 So.2d at 631 (emphasis added). In the present case, the evidence of guilt is circumstantial. [5]

5 The record shows that no one witnessed the murder, no physical evidence links Twilegar directly to the murder, Twilegar did not confess to the murder, and Twilegar made no directly incriminating statements concerning the murder.

[8] Applying the above law to the present case, we conclude that Twilegar has failed to show that the trial court erred in concluding that the evidence is sufficient to prove that he committed the crime. First, viewing the evidence of guilt in the light most favorable to the State, a rational trier of fact could find that the elements of the crime have been established beyond a reasonable doubt. The evidence of guilt includes the following: (1) Twilegar returned from Alabama with Thomas on August 6, 2002, and was seen in his company late that night; (2) Twilegar was seen digging a hole near his tent at approximately 4 p.m. on what was probably August 7, 2002, the last day Thomas was seen alive; (3) Twilegar did not know that he had been seen digging the hole; (4) at the time he was digging the hole, Twilegar asked the only person in the area, Spencer, to leave the premises; (5) when Thomas was last seen later that night, he told his girlfriend he was going to go meet with Twilegar; (6) at that point, Thomas had in his possession an unusually large amount of cash; (7) Thomas's body was later found buried in the same spot where Twilegar had been digging; (8) Thomas had been shot in close proximity to the grave site because he died within minutes of being shot and he was still alive when buried and had inhaled soil that was consistent with the grave site soil; (9) crime scene evidence supports the conclusion that the burial hole had been dug prior to the shooting because the investigator testified that the soil was extraordinarily difficult to excavate due to palmetto and other tree roots and yet the hole had been dug three or four feet deep and Thomas had died within minutes of being shot and was still alive when buried; (10) Thomas was shot in the upper back at close range with a twelve-gauge shotgun, at a downward angle, and Twilegar was known to possess such a weapon and to keep it in his tent; (11) Twilegar's shotgun disappeared after the murder and has never been found; (12) immediately after the disappearance of Thomas, Twilegar fled the Fort Myers area and eventually settled at a secluded campsite in Tennessee; (13) in fleeing the area, Twilegar was involved in a series of uncharacteristic and extensive retail purchases that totaled thousands of dollars, all of which were paid in cash; and (14) after he was taken into custody, Twilegar made a number of incriminating phone calls that appear to implicate him in the murder.

[9] And second, competent, substantial evidence supports the conclusion that this evidence is inconsistent with any reasonable hypothesis of innocence proposed by Twilegar. Twilegar asserts various hypotheses of innocence: that Thomas's wife was responsible for the killing, that Thomas's girlfriend was responsible for the killing, that a drug dealer or other assailant happened upon Thomas on the Miramar Road property and killed him, or that Thomas was kidnapped and killed by an unknown assailant. Yet, all these hypotheses, reasonable or not, are inconsistent with a single evidentiary fact: Thomas was ***190** killed and buried at the same spot outside Twilegar's tent where Twilegar had been seen digging a hole earlier on what was probably August 7, 2002, the last day Thomas was seen alive. There is no reasonable way

to reconcile this evidentiary fact with any of Twilegar's various hypotheses of innocence. Further, the totality of the evidentiary facts noted above is inconsistent with each of Twilegar's hypotheses of innocence. Accordingly, Twilegar has failed to show that the trial court erred with respect to this claim.

B. *Sufficiency of the Evidence Showing Premeditation*

[10] [11] [12] [13] Twilegar contends that the trial court erred in concluding that the evidence is sufficient to support premeditation. We disagree. Premeditation is a factual issue for the jury, *Asay v. State,* 580 So.2d 610, 612 (Fla.1991), and several standards of review are applicable. The following standard applies where the evidence of premeditation is direct, whether in whole or in part: as with other factual findings, a jury's finding of premeditation will be sustained if supported by competent, substantial evidence in the record. *See, e.g., Wheeler v. State,* 4 So.3d 599, 605 (Fla.), *cert. denied,* 558 U.S. 866, 130 S.Ct. 178, 175 L.Ed.2d 112 (2009). Where the evidence of premeditation is wholly circumstantial, on the other hand, the following standard applies: not only must the evidence be sufficient to support the finding of premeditation, but the evidence, when viewed in the light most favorable to the State, must also be inconsistent with any other reasonable inference. *Cochran v. State,* 547 So.2d 928, 930 (Fla.1989). The issue of inconsistency is a jury question and the verdict will be sustained if supported by competent, substantial evidence. *Id.* In the present case, the evidence of premeditation is circumstantial, and the latter standard of review applies.

[14] [15] [16] [17] [18] [19] [20] In the absence of an underlying statutorily enumerated felony, premeditation is the key element that separates first-degree murder from second-degree murder. *Randall v. State,* 760 So.2d 892, 901 (Fla.2000). More than a mere intent to kill, premeditation is a fully-formed conscious purpose to kill. *Wilson v. State,* 493 So.2d 1019, 1021 (Fla.1986). "This purpose to kill may be formed a moment before the act but must 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.* Premeditation is a factual issue to be determined by the jury and, like other factual matters, may be established by circumstantial evidence. *Id.*

> 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. It must exist for such time before the homicide as will enable the accused to be conscious of the nature of the deed he is about to commit and the probable result to flow from it in so far as the life of his victim is concerned. No definite length of time for it to exist has been set and indeed could not be.

Larry v. State, 104 So.2d 352, 354 (Fla.1958). Where premeditation is sought to be proved by circumstantial evidence, the evidence must be inconsistent with every other reasonable inference. *Cochran v. State,* 547 So.2d 928, 930 (Fla.1989). This question of inconsistency is for the jury to determine. *Id.*

[21] Applying the above law to the present case, we conclude that Twilegar has failed to show that the trial court ***191** erred in determining that the evidence is sufficient to support premeditation. First, competent, substantial evidence supports the finding of premeditation: (1) Twilegar was seen digging a hole near his tent at approximately 4 p.m. on what was probably August 7, 2002, the last day Thomas was seen alive; (2) when Thomas was last seen later that night, he told his girlfriend he was going to go meet with Twilegar, and he had in his possession an unusually large amount of cash; (3) Thomas's body was later found buried in the same spot where Twilegar had been digging; (4) Thomas had been shot in the upper back at close range with a twelve-gauge shotgun, at a downward angle; (5) Thomas had been shot in close proximity to the grave site; (6) crime scene evidence supports the conclusion that the burial hole had been dug prior to the shooting; and (7) immediately after the disappearance of Thomas, Twilegar was involved in a series of uncharacteristic and extensive retail purchases that totaled thousands of dollars, all of which were paid in cash.

[22] And second, viewing the evidence in the light most favorable to the State, competent, substantial evidence supports the conclusion that the evidence is inconsistent with any reasonable inference other than premeditation. Any inference that the killing may have been accidental or impulsive is belied by three evidentiary facts: (1) Thomas was shot in the upper back at close range with a twelve-gauge shotgun, at a downward angle; (2) Thomas was killed and buried at the same spot outside Twilegar's tent where Twilegar had been seen digging a hole earlier on what was probably August 7, 2002, the last day Thomas was seen alive; and (3) crime scene evidence supports the conclusion that the burial hole was dug prior to the shooting. There is no reasonable way to reconcile these evidentiary facts with any reasonable inference of an accidental or impulsive killing. Further, the totality of the evidentiary facts noted above is inconsistent with any such inference. Accordingly, Twilegar has failed to show that the trial court erred with respect to this claim.

C. *Motion to Suppress*

[23] **[24]** **[25]** **[26]** **[27]** Twilegar contends that the trial court erred in denying his motion to suppress the evidence seized at the Tennessee campground. We disagree. This Court has explained that suppression issues are varied in nature and generally fall into three categories:

> Suppression issues are extraordinarily rich in diversity and run the gamut from (1) pure questions of fact, to (2) mixed questions of law and fact, to (3) pure questions of law. Reviewing courts must exercise care when examining such issues, for while the issues themselves may be posed in broad legal terms (e.g., whether a suspect was "in custody," whether conduct by police constituted "interrogation"), the actual ruling is often discrete and factual (e.g., whether police did in fact tell a suspect he was free to go, whether police did in fact ask a suspect if he committed the crime). Appellate courts cannot use their review powers in such cases as a mechanism for reevaluating conflicting testimony and exerting covert control over the factual findings. As with all trial court rulings, a suppression ruling comes to the reviewing court clad in a presumption of correctness as to all fact-based issues, and the proper standard of review depends on the nature of the ruling in each case.

State v. Glatzmayer, 789 So.2d 297, 301 (Fla.2001)(footnotes omitted). The standard of review for each category is as follows:

> ***192** The following standards of review apply to trial court rulings in general: If the ruling consists of a pure question of fact, the ruling must be sustained if supported by competent substantial evidence. *See, e.g.,* Philip J. Padovano, *Florida Appellate Practice* § 9.6 (2nd ed.1997). If the ruling consists of a mixed question of law and fact addressing certain constitutional issues (e.g., probable cause, reasonable suspicion, the "in custody" requirement under *Miranda,* ineffectiveness of counsel), the ultimate ruling must be subjected to de novo review but the court's factual findings must be sustained if supported by competent substantial evidence. *See, e.g., Stephens v. State,* 748 So.2d 1028 (Fla.1999). If the ruling consists of a mixed question of law and fact addressing other issues (e.g., the dependency of a child, the propriety of a departure sentence, the presence of an aggravating circumstance), the ruling must be sustained if the trial court applied the right rule of law and its ruling is supported by competent substantial evidence. *See, e.g., In re M.F.,* 770 So.2d 1189, 1192 (Fla.2000); *Banks v. State,* 732 So.2d 1065, 1067 (Fla.1999); *Willacy v. State,* 696 So.2d 693, 695 (Fla.1997). If the ruling consists of a pure question of law, the ruling is subject to de novo review. *See, e.g.,* Philip J. Padovano, *Florida Appellate Practice* § 9.4 (2nd ed.1997).

Glatzmayer, 789 So.2d at 301 n. 7. As discussed below, the suppression ruling in the present case is a mixed question of law and fact of the first type noted above, and while the trial court's ultimate ruling must be subjected to de novo review, the court's factual findings must be sustained if supported by competent, substantial evidence in the record.

[28] **[29]** Fourth Amendment law governing the principle of exigent circumstances provides as follows:

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

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

[30] **[31]** **[32]** **[33]** Fourth Amendment law governing inventory searches by police provides as follows:

> An inventory search is a Fourth Amendment search and seizure, ***193** *Elson v. State,* 337 So.2d 959 (Fla.1976), but is unique in that its purposes are for the protection of property and persons rather than to investigate criminal activity. *Miller v. State,* 403 So.2d 1307 (Fla.1981). Contraband or evidence seized in a valid inventory search is admissible because the procedure is a recognized exception to the warrant requirement. *Caplan v. State,* 531 So.2d 88 (Fla.1988). The nature of this exception, however, is determined by the nature of the intrusion.
>
> In *South Dakota v. Opperman,* 428 U.S. 364, 96 S.Ct. 3092, 49 L.Ed.2d 1000 (1976), the United States Supreme Court discussed the protective, noncriminal basis of this particular intrusion and pointed out that the probable cause standard and the warrant requirement are not relevant to an inventory search analysis. *The test is solely one of "reasonableness." The reasonableness of a purported inventory search is dependent upon it being a true good-faith inventory search and not a subterfuge for a criminal, investigatory search.* If the search is not, in fact, an inventory search, then it must be justified on some other basis.

Rolling v. State, 695 So.2d 278, 294 (Fla.1997) (emphasis added).

[34] **[35]** **[36]** And Fourth Amendment law governing the abandonment of property provides as follows:

> "[A] Fourth Amendment search occurs when the government violates a subjective expectation of privacy that society recognizes as reasonable." *Kyllo v. United States,* 533 U.S. 27, 33, 121 S.Ct. 2038, 150 L.Ed.2d 94 (2001). The Supreme Court has "applied this principle to hold that a Fourth Amendment search does *not* occur ... unless 'the individual manifested a subjective expectation of privacy in the object of the challenged search,' and 'society [is] willing to recognize that expectation as reasonable.' " *Id.* (quoting *California v. Ciraolo,* 476 U.S. 207, 211, 106 S.Ct. 1809, 90 L.Ed.2d 210 (1986))....
>
> In contrast to property law, which defines the often subtle nuances of ownership, courts treat the concept of "abandonment" differently in the context of search and seizure law. "*The test for abandonment is whether a defendant voluntarily discarded, left behind, or otherwise relinquished his interest in the property in question so that he could no longer retain a reasonable expectation of privacy with regard to it at the time of the search.*" 14A Fla. Jur. 2D *Abandoned Property* § 633 (2001); *see Maxwell v. State,* 443 So.2d 967, 969 (Fla.1983); *Riley v. State,* 266 So.2d 173 (Fla. 4th DCA

1972). "No search occurs when police retrieve property voluntarily abandoned by a suspect in an area where the latter has no reasonable expectation of privacy." *State v. Milligan,* 411 So.2d 946, 947 (Fla. 4th DCA 1982).

State v. Lampley, 817 So.2d 989, 990–91 (Fla. 4th DCA 2002) (emphasis added).

[37] **[38]** **[39]** Applying the above law to the present case, we conclude that Twilegar has failed to show that the trial court erred in denying his motion to suppress. Mr. and Mrs. Reaves, who were the campground hosts, and Deputy Holt all testified that when they came upon the Lot 8 campsite after dark on August 25, 2002, the campsite appeared to have been burglarized and ransacked or vandalized. The most expensive pieces of property—the refrigerator and generator —were gone, along with various other items, while many other items lay strewn about in the pouring rain. Deputy Holt suggested that perhaps the prudent thing to do was to remove the remaining items for safekeeping purposes; otherwise, the person who burglarized the campsite might return and ***194** take the remaining items. Because Mr. and Mrs. Reaves had no room at their residence for the property, Deputy Holt took the property to the police station. Deputy Holt told Mr. and Mrs. Reaves that when the resident returned they should tell him what had happened and let him know where he could pick up his property. A day and a half later, when the resident failed to retrieve his property, Deputy Holt conducted an inventory review of the items, hoping to find information that would lead to the owner so he could return the property. When he was unable to identify the owner and when the resident failed to recover the property, the police ultimately retained possession of it.

Under these circumstances, there was no Fourth Amendment violation in the initial seizure of the property, *see Seibert v. State,* 923 So.2d 460, 468 (Fla.2006) ("[P]olice 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 ... substantial property interests."), or in the inventory search, *see Rolling v. State,* 695 So.2d 278, 294 (Fla.1997) ("The reasonableness of a purported inventory search is dependent upon it being a true good-faith inventory search and not a subterfuge for a criminal, investigatory search."), for Deputy Holt removed the property for safekeeping purposes and he inventoried it for identification purposes, not for criminal, investigatory purposes. Further, to the extent police ultimately retained possession of the property, there was no illegal seizure because at that point Twilegar had abandoned the property, *see State v. Lampley,* 817 So.2d 989, 991 (Fla. 4th DCA 2002) ("The test for abandonment is whether a defendant voluntarily discarded, left behind, or otherwise relinquished his interest in the property in question so that he could no longer retain a reasonable expectation of privacy with regard to it at the time of the search."), for by his own admission Twilegar had no intention of retrieving the property due to an outstanding warrant for his arrest in Missouri. Accordingly, Twilegar has failed to show that the trial court erred with respect to this claim.

D. *Evidence Concerning the Victim*

[40] **[41]** Twilegar contends that the trial court erred in excluding certain evidence concerning the victim. We disagree. As a general rule, a trial court's ruling concerning the admissibility of evidence will be sustained on review absent an abuse of discretion. *Alston v. State,* 723 So.2d 148, 156 (Fla.1998). Yet a court's discretion is not boundless, and it may be constrained by legal precepts such as the rules of evidence, *Johnston v. State,* 863 So.2d 271, 278 (Fla.2003), and the principle of stare decisis. *McDuffie v. State,* 970 So.2d 312, 326 (Fla.2007).

[42] Section 90.401, Florida Statutes (2007), defines relevant evidence thusly: "Relevant evidence is evidence tending to prove or disprove a material fact." And section 90.402 provides that "[a]ll relevant evidence is admissible, except as provided by law." § 90.402, Fla. Stat. (2007). Section 90.403 sets forth the following exclusion:

> 90.403. Exclusion on grounds of prejudice or confusion.—*Relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues,*

> *misleading the jury, or needless presentation of cumulative evidence.* This section shall not be construed to mean that evidence of the existence of available third-party benefits is inadmissible.

***195** § 90.403, Fla. Stat. (2007) (emphasis added). The standard for applying this exclusion is as follows:

> This statute compels the trial court to weigh the danger of unfair prejudice against the probative value. In applying the balancing test, the trial court necessarily exercises its discretion. Indeed, the same item of evidence may be admissible in one case and not in another, depending upon the relation of that item to the other evidence.

State v. McClain, 525 So.2d 420, 422 (Fla.1988).

[43] Applying the above law to the present case, we conclude that Twilegar has failed to show that the trial court erred in its evidentiary rulings concerning the victim. First, with respect to the testimony of Thomas's wife, Mary Ann Lehman, concerning Thomas's prior arrest for conspiracy to kill her, Lehman testified in proffer that she had learned from police that Thomas was having an affair with Patricia Sweeney, that Thomas had been arrested for conspiracy to kill Lehman, that police possessed audio and video tapes that they could not reveal to her, and that the charges against Thomas had been dropped due to insufficient evidence. Based on this record, the court did not err in excluding this evidence, *see Slocum v. State,* 757 So.2d 1246, 1251 (Fla. 4th DCA 2000) ("To open the door to evidence about an unrelated case was to create a trial within a trial; there was a risk that the trial would be needlessly lengthened and that the additional evidence would obscure the discovery of the truth."), for the court reasonably may have concluded that the probative value of the evidence was substantially outweighed by the danger of prejudicing or confusing the jury. *See* § 90.403, Fla. Stat. (2007).

[44] Second, with respect to the proffered testimony of Twilegar's niece, Jennifer Morrison, concerning Thomas's alleged drug use and acceptance of sexual favors in lieu of back rent, the court excluded this testimony, concluding that the evidence was not sufficiently relevant or probative. Based on this record, the court did not err in this respect, *see Hayes v. State,* 581 So.2d 121, 126 (Fla.1991) ("Although such evidence [of drug use] may be relevant in some circumstances, it was not relevant to any material issue on the facts of this case."), for the court reasonably may have concluded that the probative value of the evidence was substantially outweighed by the danger of prejudicing or confusing the jury. *See* § 90.403, Fla. Stat. (2007).

[45] **[46]** Third, with respect to the testimony of both Thomas's prior girlfriend, Patricia Sweeney, concerning the conspiracy case against Thomas and his alleged drug use and the fact that she had seen him and a business associate waving guns at each other in 1998, and the testimony of David Twomey that he had seen Thomas at a convenience store sometime prior to the murder and Thomas had told him, "If anybody asks, you haven't seen me," the court excluded this evidence, concluding that the evidence was not sufficiently relevant or probative. Based on this record, the court did not err in this respect, for the court reasonably may have concluded that the probative value of the evidence was substantially outweighed by the danger of prejudicing or distracting or confusing the jury. *See* § 90.403, Fla. Stat. (2007). And fourth, with respect to the bank records from Thomas and Lehman's Alliant Bank account in Montgomery from October 2001 to July 2002, the trial court ruled as follows: "I believe any minimal probative value, which at this juncture I find none, would be certainly—the exhibits would be more confusing than they would be probative of anything." Based on this record, the court did not err in this respect, ***196** for the court reasonably may have concluded that the probative value of the evidence was substantially outweighed by the danger of confusing the jury. *See* § 90.403, Fla. Stat. (2007). Accordingly, Twilegar has failed to show that the trial court erred with respect to this claim.

E. *Evidence of Flight*

[47] **[48]** Twilegar contends that the trial court erred in admitting evidence of Twilegar's flight from Fort Myers and from the Tennessee campground following the murder. We disagree. The Court has addressed the admissibility of evidence of flight to prove consciousness of guilt:

> We agree, as an abstract rule of law, that evidence of flight, concealment, or resistance to lawful arrest after the fact of a crime is admissible as "being relevant to consciousness of guilt which may be inferred from such circumstances." *Straight v. State,* 397 So.2d at 903, 908 (Fla.1981). However, in applying this principle to a particular case, *there must be evidence which indicates a nexus between the flight, concealment, or resistance to lawful arrest and the crime(s) for which the defendant is being tried in that specific case.* This is necessary in the application of this rule of law since the evidence creates an inference of a consciousness of guilt of the crime for which the defendant is being tried in that case. *See Merritt v. State,* 523 So.2d 573, 574 (Fla.1988). *The ultimate admissibility issue is the relevance to the charged crime.*

Escobar v. State, 699 So.2d 988, 995 (Fla.1997) (emphasis added). The Court earlier had noted the following caveat:

> [T]he cases in which flight evidence has been held inadmissible have contained particular facts which tend to detract from the probative value of such evidence. For instance, the probative value of flight evidence is weakened: 1) if the suspect was unaware at the time of the flight that he was the subject of a criminal investigation for the particular crime charged; 2) where there were not clear indications that the defendant had in fact fled; or, 3) where there was a significant time delay from the commission of the crime to the time of flight. The interpretation to be gleaned from an act of flight should be made with a sensitivity to the facts of the particular case.

Bundy v. State, 471 So.2d 9, 21 (Fla.1985) (citations omitted).

[49] Applying the above law to the present case, we conclude that Twilegar has failed to show that the trial court erred in admitting evidence of Twilegar's flight from Fort Myers and from the Tennessee campground following the murder. The key question here is whether there is a sufficient nexus between the murder, on the one hand, and Twilegar's flight, on the other, to allow jurors to fairly infer consciousness of guilt. The following evidentiary facts support admission of this evidence: (1) Twilegar returned with Thomas from Alabama on August 6, 2002, and was seen in his company late that night; (2) when Thomas was last seen, during the evening of August 7, 2002, he said he was going to go meet with Twilegar, and Thomas had in his possession an unusually large amount of cash; (3) Thomas was murdered and buried just outside Twilegar's tent at the Miramar Road location; (4) Thomas was killed with a twelve-gauge shotgun, and Twilegar was known to possess such a weapon and to keep it in his tent; and (5) immediately after the disappearance of Thomas, Twilegar fled the Fort Myers area and was involved in a series of uncharacteristic and extensive retail purchases that totaled thousands of dollars, all of which were paid in cash.

***197** Based on this record, the court did not err in admitting the evidence of flight, for the court reasonably may have concluded that the probative value of the evidence was not substantially outweighed by the danger of prejudicing or misleading the jury. *See* § 90.403, Fla. Stat. (2007). Further, Twilegar's allegation that he was fleeing because of a Missouri warrant or because of his drug dealing or because of his involvement in a meth lab in Tennessee is a nonissue, for even if he were fleeing for all those reasons, he reasonably could have been fleeing because of the murder as well. *See Randall v. State,* 760 So.2d 892, 900 (Fla.2000) ("Here, we find a sufficient evidentiary nexus in the record to have permitted the jury to reasonably infer that appellant's flight on June 27, 1996, was related to Randall's consciousness of guilt as to the Evans and Pugh murders as well as to the Massachusetts probation violation."). Accordingly, Twilegar has failed to show that the trial court erred with respect to this claim.

F. *Jailhouse Phone Calls*

Twilegar contends that the trial court erred in admitting tapes of Twilegar's jailhouse phone calls. We disagree. The Confrontation Clause provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to ... be confronted with the witnesses against him." U.S. Const. amend. VI. This Court in *Globe v. State,* 877 So.2d 663 (Fla.2004), addressed a Confrontation Clause issue and held that the clause was not implicated where Globe and his codefendant, Busby, speaking together to a law enforcement officer, gave a joint taped statement in which they admitted killing a fellow inmate and where the tape was played at trial. The Court reasoned thusly:

> We have previously recognized that admissions by acquiescence or silence do not implicate the Confrontation Clause. *See Nelson v. State,* 748 So.2d 237 (Fla.1999); *see also United States v. Kehoe,* 310 F.3d 579, 590–91 (8th Cir.2002) (holding that the Confrontation Clause did not guarantee the defendant the right to cross-examine a speaker whose statements were imputed to the defendant as adoptive admissions of a party opponent), cert. denied, 538 U.S. 1048, 123 S.Ct. 2112, 155 L.Ed.2d 1089 (2003).
>
> In *Nelson,* we held that because the codefendant's statements were admitted as admissions by silence, there could be no Confrontation Clause violation. We presented several factors that should be present to show that an acquiescence to the codefendant's statements did in fact occur. These factors include the following:
>
> 1. The statement must have been heard by the party claimed to have acquiesced.
>
> 2. The statement must have been understood by [the defendant].
>
> 3. The subject matter of the statement is within the knowledge of the [defendant].
>
> 4. There were no physical or emotional impediments to the person responding.
>
> 5. The personal make-up of the speaker or his relationship to the party or event are not such as to make it unreasonable to expect a denial.
>
> 6. The statement itself must be such as would, if untrue, call for a denial under the circumstances.
>
> *See Nelson,* 748 So.2d at 242 (quoting *Privett v. State,* 417 So.2d 805, 806 (Fla. 5th DCA 1982)). *The essential inquiry thus becomes whether a reasonable person would have denied the statements under the circumstances.*

Globe, 877 So.2d at 672–73 (emphasis added).

***198** The Court in *Globe* concluded as follows, based on the adoptive admissions exclusion to the hearsay rule:

> In this case, Globe was present during Busby's statement and had a chance to contradict what Busby said. A review of the transcript in this case makes it clear that Busby's statements were adopted by Globe. Instead of contradicting Busby's statements, Globe verbally affirmed what Busby said and added significant details to Busby's statement. The statements were properly admitted as adoptive admissions pursuant to section 90.803(18)(b). As we previously noted, statements admitted as adoptive admissions do not implicate the Confrontation Clause.

Globe, 877 So.2d at 673. An adoptive admission is defined as follows: "A statement of which the party has manifested an adoption or belief in its truth." § 90.803(18)(b), Fla. Stat. (2007).

[50] **[51]** **[52]** Applying the above law to the present case, we conclude that Twilegar has failed to show that the trial court erred in admitting the tapes of his jailhouse phone calls. First, to the extent Twilegar claims that use of the tapes constituted a Confrontation Clause violation, the Court's ruling in *Globe* is dispositive. As was the case in *Globe,* Twilegar was a knowing and active participant in the recorded conversations and he too, as did Globe, had ample opportunity to refute or contradict any of the statements that were adverse to his interests; instead, he acquiesced in the statements. To claim now that he is entitled to cross-examine the other participants in the conversations is disingenuous in light of

the fact that he had previously acquiesced in their statements. As in *Globe,* the statements were properly admitted as adoptive admissions under section 90.803(18)(b), Florida Statutes (2007). As to whether the trial court erred in admitting the tapes in light of fact that use of the tapes could compel Twilegar to disclose his alleged drug dealing in order to explain certain statements in the tapes, the court did not err in this respect, for the court reasonably may have concluded that the probative value of the evidence was not substantially outweighed by the danger of prejudicing the jury. *See* § 90.403, Fla. Stat. (2007). Accordingly, Twilegar has failed to show that the trial court erred with respect to this claim.

H. *Receipts for Retail Purchases*

[53] Twilegar contends that the trial court erred in admitting the receipts for retail purchases found at the Tennessee campsite. The business record exception to the hearsay rule provides as follows in relevant part:

> (6) RECORDS OF REGULARLY CONDUCTED BUSINESS ACTIVITY.—
>
> (a) A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinion, or diagnosis, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity and if it was the regular practice of that business activity to make such memorandum, report, record, or data compilation, all *as shown by the testimony of the custodian or other qualified witness,* or as shown by a certification or declaration that complies with paragraph (c) and s. 90.902(11), unless the sources of information or other circumstances show lack of trustworthiness. The term "business" as used in this paragraph includes a business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

***199** § 90.803(6)(a), Fla. Stat. (2007) (emphasis added). To lay a proper foundation for use of business records, certain steps must be taken:

> In order to lay a foundation for the admission of a business record, it is necessary to call a witness who can show that each of the foundational requirements set out in the statute is present. It is not necessary to call the person who actually prepared the document. The records custodian or any qualified witness who has the necessary knowledge to testify as to how the record was made can lay the necessary foundation.

Forester v. Norman Roger, Jewell & Brooks Int'l, Inc., 610 So.2d 1369, 1373 (Fla. 1st DCA 1992) (citation omitted).

Applying the above law to the present case, we conclude that the trial court erred in initially admitting the retail receipts through the testimony of Deputy Holt without first requiring the State to establish a sufficient foundation, but the error was cured as to most of the receipts and was harmless as to the others, as explained below. Deputy Holt testified that after he removed property from the campsite at Lot 8, he found a number of retail receipts in an unlocked briefcase. He then read to the jury numerous receipts, reciting the name of each business and the date of each receipt and sometimes the amount and whether the purchase was made in cash. He explained that the dates ranged from August 3, 2002, to August 22, 2002, and that the locations began in Florida and ended in Tennessee. He testified that, using the receipts, he had mapped out the dates on a calendar in an effort to identify the owner of the property. Later at trial, two Wal–Mart employees and a NAPA employee testified in detail concerning the contents of the numerous receipts from their businesses: they testified as to the dates of the purchases, the amounts of the purchases, the items purchased, whether the purchases were in cash, and the amounts tendered.

[54] On this record, the trial court erred in admitting the receipts through the testimony of Deputy Holt, for the receipts were admitted for the truth of the matters asserted (the dates of the purchases, the amounts, the locations, and whether the purchases were made in cash) and Deputy Holt was not qualified to, and did not attempt to, attest to the fact that

the receipts were records of regularly conducted business activity for the respective businesses. However, the error was cured as to the Wal–Mart and NAPA receipts when employees of those businesses subsequently testified concerning the business practices of their companies in this respect, for each of those witnesses possessed sufficient knowledge to attest to such matters. As for the remaining receipts, only two are significant: one from 7–Eleven dated August 8, 2002, at 12:39 a.m., in the amount of $688.97, for three cell phones and other supplies, for which cash was paid; and one from Sam's Club dated August 14, 2002, in the amount of $435.56, for a generator, for which cash was paid. However, in light of Jennifer Morrison's testimony concerning the events of late night August 7, 2002, and early morning August 8, 2002, with respect to Twilegar's purchases at 7–Eleven, and in light of the copious other evidence of retail purchases that was properly admitted, the admission of these receipts was harmless. *See State v. DiGuilio,* 491 So.2d 1129, 1139 (Fla.1986) ("The question is whether there is a reasonable possibility that the error affected the verdict."). Accordingly, although Twilegar has shown that the trial court erred with respect to this claim, the error was cured in part and is harmless in part.

***200** H. *Pecuniary Gain, CCP, and Proportionality*

[55] With respect to this claim, Twilegar contends that the trial court erred in finding pecuniary gain and CCP as aggravating circumstances, and he contends that his death sentence is disproportionate. We disagree. With respect to the standard of review for aggravating circumstances, the Court has held that it is not this Court's job to reweigh the evidence to determine whether the State proved each aggravating circumstance beyond a reasonable doubt, for that is the trial court's job. *Willacy v. State,* 696 So.2d 693, 695 (Fla.1997). "Rather, our task on appeal is to review the record to determine whether the trial court applied the right rule of law for each aggravating circumstance and, if so, whether competent substantial evidence supports its finding." *Id.*

[56] **[57]** **[58]** **[59]** First, with respect to the pecuniary gain aggravating circumstance, the Court has held that "[i]n order to establish this 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). In the present case, the trial court applied the proper rule of law for this aggravating circumstance,[6] and the court's finding that this aggravator was established is supported by competent, substantial evidence.[7] Second, with respect to the CCP aggravating circumstance, the Court has held as follows:

6 The court stated in its sentencing order that "[t]he capital felony was committed for pecuniary gain. Florida Statutes 921.141(5)(f)." *See* § 921.141(5)(f), Fla. Stat. (2007). The court then listed extensive evidentiary findings supporting this aggravator.

7 According to the record, on the morning of August 6, 2002, Thomas withdrew $25,000 in cash from a bank in Montgomery; the next evening, the night that Thomas was last seen alive, Thomas visited Fabina at her job at 7 or 7:30 p.m., and she noticed that he had an unusually large amount of cash in his wallet; when Thomas's body was found, his wallet was missing; as payment for Spencer leaving the Miramar Road property on the day he had seen Twilegar digging the hole by the tent, Twilegar left a $100 bill, which Spencer found the next day at the prearranged spot; and on the night when Thomas was last seen alive and during the following days, Twilegar was involved in a series of uncharacteristic and extensive retail purchases that totaled thousands of dollars, all of which were paid in cash.

> Thus, in order to find the CCP aggravating factor under our case law, the jury must determine that the killing was the product of cool and calm reflection and not an act prompted by emotional frenzy, panic, or a fit of rage (cold); *and* that the defendant had a careful plan or prearranged design to commit murder before the fatal incident (calculated); *and* that the defendant exhibited heightened premeditation (premeditated); *and* that the defendant had no pretense of moral or legal justification.
>
> *Jackson v. State,* 648 So.2d 85, 89 (Fla.1994) (citations omitted). In the present case, the court applied the proper rule of law for this aggravating circumstance,[8] and ***201** the court's finding that this aggravator was established is supported by competent, substantial evidence.[9]

8 In its sentencing order, the court cited this Court's decision in *Diaz v. State,* 860 So.2d 960 (Fla.2003), noting as follows:

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

See § 941. 141(5)(i), Fla. Stat. (2007):

9 According to the record, Twilegar was seen digging a hole near his tent at approximately 4 p.m. on what was probably August 7, 2002, the last day Thomas was seen alive; when Thomas was last seen later that night, he told his girlfriend he was going to go meet with Twilegar, and he had in his possession an unusually large amount of cash; Thomas's body was later found buried in the same spot where Twilegar had been digging; Thomas had been shot in the upper back at close range with a twelve-gauge shotgun, at a downward angle; Thomas had been shot in close proximity to the grave site; crime scene evidence supports the conclusion that the burial hole had been dug prior to the shooting; and immediately after the disappearance of Thomas and in the following days, Twilegar was involved in a series of uncharacteristic and extensive retail purchases that totaled thousands of dollars, all of which were paid in cash.

[60] [61] [62] And third, with respect to proportionality review, the Court has explained its role as follows:

> Because death is a unique punishment, it is necessary in each case to engage in a thoughtful, deliberate proportionality review to consider the totality of circumstances in a case, and to compare it with other capital cases. It is not a comparison between the number of aggravating and mitigating circumstances.

Porter v. State, 564 So.2d 1060, 1064 (Fla.1990) (citation omitted). In the present case, a review of the totality of the circumstances in this case shows that this case is comparable to other such cases where a sentence of death was imposed. [10] Accordingly, we conclude that Twilegar has failed to show that the trial court erred with respect to this claim.

10 *See, e.g., Diaz v. State,* 860 So.2d 960 (Fla.2003) (aggravators: CCP and prior violent felony; mitigation: both mental mitigators, age, lack of significant criminal history, remorse, and history of family violence); *Hauser v. State,* 701 So.2d 329 (Fla.1997) (aggravators: HAC, CCP and pecuniary gain; mitigation: no significant history of prior criminal activity, good attitude and conduct in jail, cooperated fully with police, was under the influence of drugs or alcohol and emotional or mental health problems since he was fourteen years old); *Shellito v. State,* 701 So.2d 837 (Fla.1997) (aggravators: prior violent felony and pecuniary gain/commission during a robbery; mitigation: alcohol abuse, mildly abusive childhood, difficulty reading and learning disability); *Melton v. State,* 638 So.2d 927 (Fla.1994) (aggravators: pecuniary gain and prior violent felony; mitigation: difficult family background and good conduct while awaiting trial); *Hayes v. State,* 581 So.2d 121 (Fla.1991) (aggravators: CCP and committed during course of a robbery; mitigation: age, low intelligence, developmentally disabled and product of a deprived environment).

I. *Waiver of a Penalty Phase Jury, of Investigation Into Mitigation, and of Presentation of Mitigation*

[63] [64] The Court reviews a trial court's decision with respect to the waiver of mitigation as a mixed question of law and fact, upholding the court's factual findings if supported by competent, substantial evidence, and reviewing the court's ultimate decision de novo. *See, e.g., Mora v. State,* 814 So.2d 322 (Fla.2002); *Chandler v. State,* 702 So.2d 186 (Fla.1997). The Court in *Koon v. Dugger,* 619 So.2d 246 (Fla.1993), addressed the issue of waiver of mitigation and set forth the following guidelines:

> Although we find that no error occurred here, we are concerned with the problems inherent in a trial record that does not adequately reflect a defendant's waiver of his right to present any mitigating evidence. Accordingly, we establish the following prospective rule to be ***202** applied in such a situation. 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. The court should then require the defendant to confirm on the record that his counsel has discussed these matters with him, and despite counsel's recommendation, he wishes to waive presentation of penalty phase evidence.

Koon, 619 So.2d at 250. The Court subsequently explained the *Koon* rationale thusly:

> Obviously, our primary reason for requiring this procedure was to ensure that a defendant understood the importance of presenting mitigating testimony, discussed these issues with counsel, and confirmed in open court that he or she wished to waive presentation of mitigating evidence. Only then could the trial court, and this Court, be assured that the defendant knowingly, intelligently, and voluntarily waived this substantial and important right to show the jury why the death penalty should not be imposed in his or her particular case.

Chandler v. State, 702 So.2d 186, 199 (Fla.1997).

[65] Applying the above law to the present case, we conclude that Twilegar has failed to show that the trial court erred with respect to this claim. Prior to trial, defense counsel notified the court of Twilegar's desire to waive a penalty phase jury, to waive investigation into mitigation, and to waive the presentation of mitigation, and the court held hearings and conducted extensive inquiries into these matters. In support of his waivers, Twilegar executed an affidavit wherein he stated that he was invoking his constitutional right "to prevent my attorney(s) from presenting mitigating evidence to a penalty phase jury in my defense," and giving the following reasons:

> (3) I have certain INALIENABLE RIGHTS TO PRIVACY, which I believe would be invaded if counsel were allowed to proceed.
>
> (4) 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.
>
> (5) I HAVE DISCUSSED IN DEPTH these issues with assigned counsel and I am aware of the potential ramifications of not having the benefit of counsel, expert(s) and witnesses testify on my behalf.
>
> (6) Further, I understand that any issues I forbid to come forth, are issues that I may be FOREVER BARRED from raising during appeals.

At the subsequent hearing, the following exchange took place between the court and defense counsel:

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

When the trial court asked Twilegar what he was requesting, he responded:

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

***203** Defense counsel had enlisted both a mitigation specialist, who had discussed mitigation with Twilegar, and a psychiatrist, who had attempted to meet with Twilegar but Twilegar had refused to cooperate. Trial counsel informed the

court that Twilegar's background may lead to "good mitigation" but he could not complete his investigation, and counsel noted a "possible good deed done by Mr. Twilegar that we weren't able to further investigate." Twilegar also refused to cooperate with trial counsel's attempt to gather mitigation from family and friends. Counsel stated that hypothetically if he were to present mitigation, he would call as witnesses "[p]ossibly his sister, his wife, his mother," and counsel told the court that he had provided Twilegar with updated mitigation materials, and that he, his co-counsel and the mitigation specialist had all discussed the waiver issue with Twilegar but he had remained adamant.

Twilegar stated that trial counsel had met with him dozens of times to discuss the mitigation issue and that counsel had recommended every time that mitigation be presented but Twilegar had insisted on waiving both the investigation into mitigation and the presentation of mitigation, stating: "I forbid them to investigate. There is just certin things I don't want brought up for any circumstance, therefore, if they can't investigate, they can't present." He added: "I don't want my background drug through the dirt any more than it has been." And: "It's my life. It's private and I'm keeping it that way. It's been that way all my life and I'm going to keep it private." He told the court: "I also, when it come right down to it, if I'm convicted and I would rather do the death penalty and just get it over with then.... Let's just get it over with. I know when I wake up in the next life I'm not going to be in jail."

Counsel told the court: "If we do proceed with the investigation, Mr. Twilegar will fire us, and I think that would be of greater harm to him than for us to [respect his wishes concerning mitigation]." When questioned by the trial court and the State numerous times if he understood that prohibiting investigation could limit the mitigation presented if he later chose to present a case, Twilegar replied that he understood. Twilegar further stated that he accepted that his actions barred him from raising the issue on appeal. Trial counsel stated that Twilegar was intelligent and self-educated, that counsel had met with him frequently and that there was no question in his mind that he was competent. Twilegar stated that he had no history of mental illness, that his mental faculties were not impaired and that he had never been under the care of a mental health professional. The trial court found that he was competent and accepted his waivers.

The court revisited the issue throughout the trial and gave Twilegar repeated opportunities to reconsider. At the *Spencer* hearing, pursuant to the court's direction, the State presented in mitigation a Missouri presentence investigation report and a Missouri psychiatric report concerning Twilegar, and Twilegar himself presented Thomas's last will and testament and a booking report and probable cause affidavit concerning Thomas's arrest for conspiracy to murder his wife. The mitigation offered by the State indicated that Twilegar had no mental illness and that his most recent IQ score was 102. At the hearing on Twilegar's motion for a new trial, defense counsel submitted, and the court accepted, the written arguments that counsel had prepared for the penalty phase and also the written arguments that counsel had prepared for the *Spencer* hearing. The court also considered the presentence investigation report that had been prepared ***204** for this case. Prior to the court's pronouncing sentence, Twilegar read a prepared statement wherein he proclaimed his innocence and again sought to cast suspicion on Thomas's wife. Based on the foregoing, we conclude that Twilegar's waiver of a penalty phase jury, waiver of investigation into mitigation and waiver of the presentation of mitigation were knowing, intelligent and voluntary, and that the trial court did not err in granting these waivers. Accordingly, Twilegar has failed to show that the trial court erred with respect to this claim.

III. CONCLUSION

With the single exception noted above, we conclude that Twilegar has failed to show that the trial court erred with respect to the above claims. As for the claim concerning the admission of receipts for retail purchases, we conclude that the trial court erred in initially admitting the receipts without first requiring the State to establish a sufficient foundation, but that the court's error was cured by later testimony or was harmless, as explained above. We conclude that the conviction for premeditated first-degree murder is supported by the evidence, and that the sentence of death is proportionate. We affirm Twilegar's conviction and sentence.

It is so ordered.

QUINCE, C.J., and PARIENTE, LEWIS, CANADY, POLSTON, LABARGA, and PERRY, JJ., concur.

All Citations

42 So.3d 177, 35 Fla. L. Weekly S13

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APPENDIX C (2)

2015 WL 2458011

Supreme Court of Florida.

Mark A. TWILEGAR, Appellant,

v.

STATE of Florida, Appellee.

No. SC13–2169. | May 28, 2015.

Synopsis

Background: Defendant, whose conviction for murder in the first degree and sentence of death was affirmed on direct appeal, 42 So.3d 177, sought postconviction relief. The Circuit Court, Lee County, Mark Alan Steinbeck, J., denied defendant's motion. Defendant appealed.

[Holding:] The Supreme Court held that trial counsel was not ineffective in failing to call expert that defense retained.

Affirmed.

Attorneys and Law Firms

Neal Andre Dupree, Capital Collateral Regional Counsel–South, Suzanne Myers Keffer, Chief Assistant, Capital Collateral Regional Counsel–South, and Scott Gavin, Staff Attorney, Capital Collateral Regional Counsel–South, Fort Lauderdale, FL, for Appellant.

Pamela Jo Bondi, Attorney General, Tallahassee, FL; Katherine Maria Diamandis, Assistant Attorney General and Timothy Arthur Freeland, Assistant Attorney General, Tampa, FL, for Appellee.

Opinion

PER CURIAM.

***1** This case is before the Court on appeal from an order denying a motion to vacate a judgment of conviction of first-degree murder and a sentence of death under Florida Rule of Criminal Procedure 3.851. We have jurisdiction. *See* art. V, § 3(b)(1), Fla. Const. For the following reasons, we affirm.

STATEMENT OF THE CASE AND FACTS

The facts were summarized by this Court in *Twilegar v. State,* 42 So.3d 177 (Fla.2010), as follows:

> On April 3, 2003, Mark Twilegar was charged with first-degree murder, either by premeditated design or in the course of a robbery, for the shooting death of David Thomas in Fort Myers on August 7, 2002. The evidence presented at trial showed that Twilegar came to Fort Myers from Missouri in the spring of 2002 and lived for a couple of weeks with his niece, Jennifer Morrison, who rented a residence from the victim, David Thomas, and his wife, Mary Ann Lehman. Twilegar's mother arrived a few weeks later and also moved in with Morrison. After several weeks, Twilegar moved out and eventually pitched a three-room tent in an undeveloped area adjacent to the backyard of a house at 412 Miramar Road, which was occupied by Britany and Shane McArthur. Twilegar did not own a car and did not have a regular job. In lieu of paying rent, he worked as a handyman on the premises. His possessions included a couch, a TV, some clothes and a twelve-gauge shotgun, which he kept in the tent. The McArthurs moved out of the house in June 2002, and Britany's younger brother, Spencer, moved into the house in September. Prior to moving in, Spencer stopped by the house on a regular basis to perform renovations, as discussed below.
>
> On occasion, Twilegar worked as a handyman for the victim, David Thomas, and on August 2, 2002, the two drove in Thomas's pickup truck to Montgomery, Alabama, where Twilegar had agreed to install a deck on a house Thomas owned there. Thomas told his wife that he would be gone six to eight weeks. On the morning of August 6, 2002, Thomas withdrew $25,000 in cash from a bank in Montgomery, ostensibly to purchase a house at an auction, and then later that same morning he rented a Dodge Neon, arranging to return the car in Montgomery on August 9, 2002. Thomas called his girlfriend, Valerie Bisnett Fabina, in Fort Myers and told her that he and Twilegar would be returning to Fort Myers that night. Thomas's neighbor last saw Thomas and Twilegar at the Montgomery house at approximately 3 p.m. that afternoon. Thomas and Twilegar then returned to Fort Myers, where Thomas met with Fabina at approximately 11 p.m. and obtained a motel

room key card from her. At the meeting, Fabina observed Twilegar sitting in the passenger seat of the Neon.

The next evening, August 7, 2002, Thomas visited Fabina at her job at 7 or 7:30 p.m. and returned the motel key card. When he opened his wallet to remove the key card, Fabina noticed that he had an unusually large amount of cash. Thomas told her that he and Twilegar were going to go look at a truck to buy for Twilegar to use on the job in Alabama, and that he would meet her later that night at the motel. Fabina never saw or heard from him again. Thomas spoke with his wife, Mary Ann Lehman, by phone a little after 9 p.m. that evening, and they made arrangements to speak again in the morning. She never saw or heard from him again. Later that night, Twilegar, alone, arrived at Jennifer Morrison's house, where Twilegar's mother was staying. Morrison then drove Twilegar to 7–Eleven where he purchased cell-phones and supplies. She also drove him to [Walmart] where he made additional purchases. When they arrived back at the house, Morrison went to bed. When she woke the next morning, Twilegar and his mother and their possessions were gone. Morrison would never see Twilegar in Fort Myers again.

*2 After Britany and Shane moved out of the Miramar house in June but before Spencer moved into the house in September, Spencer arrived at the house one day at 4 p.m. to perform renovations and he saw Twilegar digging in the backyard on the far side of his tent. Spencer watched him briefly, unobserved, then returned to the front of the house. A few minutes later, Twilegar approached him and explained that a man would be stopping by to deliver a couple of pounds of "weed" and that the man would not stop if he saw Spencer there. Twilegar asked him to leave the premises and told him that if he did he would give him either $100 or an ounce of weed. Spencer left, and when he returned the next day, he found a $100 bill in the prearranged spot. He also found Twilegar's tent disassembled and smoldering in the backyard incinerator. Most of Twilegar's possessions were gone, including the shotgun. Spencer would never see Twilegar in Fort Myers again. On September 26, 2002, after Thomas's disappearance was publicized, Spencer went to the spot where Twilegar had been digging and found that the area was covered by Twilegar's couch. He moved the couch aside and found an area of freshly dug dirt, covered with palm fronds. Beneath the palm fronds was a piece of plywood, and beneath that a couple of cinder blocks and a car ramp. After digging several feet, he detected a strong odor. Police were called and they discovered Thomas's body.

Thomas died from a single shotgun blast to his upper right back, delivered at close range. The 7 1/2 birdshot, from a twelve-gauge shell, had travelled through his body at a downward trajectory. He had died within minutes of being shot. Soft fine sand, similar to that which covered the exterior of his body, was found deep inside his throat, in his larynx, indicating that he had still been breathing, though not necessarily conscious, when buried. He was still wearing the same clothes he had been wearing when Fabina last saw him on August 7, 2002, but his wallet was missing. His body was badly decomposed, and the time of death was uncertain. A spent twelve-gauge shell was found in the incinerator, along with a broken D-shaped garden tool handle. Twilegar's shotgun was never found. Several live twelve-gauge shells were found discarded in the area, along with a shovel with a broken handle. Thomas's rental car key fob was found approximately 100 feet from the body. The rental car was found earlier, on August 13, 2002, burned in a remote area of Lee County. Twilegar was apprehended September 20, 2002, in Greenville, Tennessee, where he had been staying at a campground since August 21, 2002. Among the property seized at the campground were numerous retail receipts totaling thousands of dollars for camping supplies and other items purchased after Twilegar had left Fort Myers. The merchandise was all purchased with cash. While awaiting trial, Twilegar made several incriminating phone calls, which were recorded.

*3 Twilegar's trial began January 16, 2007, and he testified in the guilt phase. He stated that the "weed" incident had in fact occurred but that it had happened before he left for Alabama with Thomas, not after he returned. He said that he had often dug holes near his tent for latrine purposes. He also testified that he had returned from Alabama not with Thomas on August 6, 2002, but alone on August 5, 2002, in a car Thomas had given him as partial payment for the deck work he was doing, and that he had later sold the car to an itinerant in Palm Beach. He testified that during the early morning hours of August 8, 2002, after shopping at 7–Eleven and [Walmart], he had driven his mother's car, which was already packed with their possessions, back to his tent to get his shaving kit and that someone had pointed a shotgun at him in the dark and that he had deflected the shot, injuring his hand. He kicked the assailant and ran away.

> After closing arguments, the jury deliberated for little more than an hour and on January 26, 2007, returned a verdict finding Twilegar guilty of first-degree premeditated murder. Twilegar waived a penalty phase jury and waived both the investigation and the presentation of mitigation. The penalty phase proceeding was held before the judge on February 16, 2007, and the State presented argument in aggravation, while the defense stood mute. The *Spencer* [*v. State,* 615 So.2d 688, 690–91 (Fla.1993),] hearing was held February 19, 2007. On August 14, 2007, the court sentenced Twilegar to death, based on two aggravating circumstances, no statutory mitigating circumstances, and four nonstatutory mitigating circumstances.

Twilegar, 42 So.3d at 185–88 (footnotes omitted). On appeal to this Court, Twilegar raised nine issues. [1] *Id.* at 188. We concluded that, with one exception, "Twilegar has failed to show that the trial court erred with respect to [his] claims." *Id.* at 204. We further found that while the trial court erred in initially admitting receipts for retail purchases without first requiring the State to establish a sufficient foundation, the error was harmless. *Id.* Accordingly, we affirmed Twilegar's conviction and sentence of death. *Id.*

Twilegar filed his initial Motion to Vacate Judgment of Conviction and Sentences with Special Request for Leave to Amend pursuant to Florida Rule of Criminal Procedure 3.851 on February 7, 2012, which he amended on September 27, 2012. The circuit court held a case management conference on October 26, 2012, and issued an order setting an evidentiary hearing on one claim and summarily denying the remaining claims. Thereafter, the circuit court held an evidentiary hearing on July 15–16, 2013. At the conclusion of the hearing, the circuit court issued an order denying Twilegar's postconviction motion.

Twilegar now appeals, raising four issues: (1) ineffective assistance of trial counsel during the guilt phase, (2) public records access, (3) juror misconduct, and (4) ineffective assistance of trial counsel during jury selection.

ANALYSIS

***4 [1]** First, regarding the circuit court's summary denial of Twilegar's third and fourth claims on appeal, we review de novo. *See Davis v. State,* 142 So.3d 867, 875 (Fla.), *cert. denied,* —— U.S. ——, 135 S.Ct. 15, 189 L.Ed.2d 867 (2014). The summary denial of a postconviction claim will be upheld if the motion is legally insufficient or its allegations are conclusively refuted by the record. *Id.* After a review of the pleadings and record, we find that the circuit court properly summarily denied these claims. Accordingly, we limit our discussion to Twilegar's claims of ineffective assistance of counsel during the guilt phase and his access to public records.

Ineffective Assistance of Counsel

[2] [3] [4] [5] [6] [7] [8] [9] [10] The sole issue for which the circuit court granted an evidentiary hearing was Twilegar's allegation of three instances of ineffective assistance of trial counsel. In accordance with *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), we employ the following standard of review:

> First, the claimant must identify particular acts or omissions of the lawyer that are shown to be outside the broad range of reasonably competent performance under prevailing professional standards. Second, the clear, substantial deficiency shown must further be demonstrated to have so affected the fairness and reliability of the proceeding that confidence in the outcome is undermined.

Long v. State, 118 So.3d 798, 805 (Fla.2013) (quoting *Bolin v. State,* 41 So.3d 151, 155 (Fla.2010)). Additionally:

> There is a strong presumption that trial counsel's performance was not deficient. *See Strickland,* 466 U.S. at 690, 104 S.Ct. 2052. "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id.* at 689, 104 S.Ct. 2052. The defendant carries the burden to "overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.' " *Id.* (quoting *Michel v. Louisiana,* 350 U.S. 91, 101, 76 S.Ct. 158, 100 L.Ed. 83 (1955)). "Judicial scrutiny of counsel's performance must be highly deferential." *Id.* "[S]trategic decisions do not constitute ineffective assistance of counsel if alternative courses

have been considered and rejected and counsel's decision was reasonable under the norms of professional conduct." *Occhicone v. State,* 768 So.2d 1037, 1048 (Fla.2000). Furthermore, where this Court previously has rejected a substantive claim on the merits, counsel cannot be deemed ineffective for failing to make a meritless argument. *Melendez v. State,* 612 So.2d 1366, 1369 (Fla.1992).

In demonstrating prejudice, the defendant must show a reasonable probability that "but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland,* 466 U.S. at 694, 104 S.Ct. 2052.

*5 *Long,* 118 So.3d at 805–06 (parallel citations omitted).

> Because both prongs of the *Strickland* test present mixed questions of law and fact, this Court employs a mixed standard of review, deferring to the circuit court's factual findings that are supported by competent, substantial evidence, but reviewing the circuit court's legal conclusions de novo.

Shellito v. State, 121 So.3d 445, 451 (Fla.2013) (citing *Mungin v. State,* 79 So.3d 726, 737 (Fla.2011); *Sochor v. State,* 883 So.2d 766, 771–72 (Fla.2004)).

First, Twilegar alleges trial counsel was ineffective for failing to adequately challenge the State's forensic evidence by bringing in experts for the defense or more thoroughly cross-examining the medical examiner. At the evidentiary hearing, Twilegar presented testimony from experts who opined that the medical examiner's autopsy was deficient. Twilegar argues that trial counsel should have presented evidence of this type during his trial either through cross-examination or by calling expert witnesses on behalf of the defense. The circuit court found that counsel's performance was not deficient. Additionally, the circuit court found that Twilegar did not establish prejudice. Competent, substantial evidence supports the circuit court's determination.

At trial, the medical examiner, Dr. Rebecca Anne Hamilton, testified regarding her findings during her autopsy of the victim's body. Twilegar's trial counsel cross-examined her on the issues of the uncertainty of the time of death and the origin of the sand she discovered in the victim's laryngeal cavity. Accordingly, to the extent that Twilegar argued that counsel was ineffective for failing to cross-examine the medical examiner, his assertion is refuted by the record and was properly denied by the circuit court.

Twilegar additionally alleges that trial counsel was ineffective for failing to present an expert to refute the medical examiner's testimony. Relating to this claim, the circuit court found that trial counsel retained Dr. Spitz but did not call him to testify. McLoughlin testified at the evidentiary hearing that because the case against Twilegar was purely circumstantial, the defense strategy was to challenge everything. Specifically, McLoughlin sought to develop an alternate theory of the crime that drug dealers were responsible for Thomas's murder. McLoughlin testified that he provided Dr. Spitz with the same information provided to Dr. Haddix at postconviction but that Dr. Spitz did not provide any information that would have been helpful to the case and was therefore not called to testify. McLoughlin explained that the possibility of multiple gunshots and injuries were not consistent with the defense theory of the case, and may have been damaging if the jury thought that Thomas had been beaten and mutilated. Therefore, Twilegar has not demonstrated that counsel's trial strategy was unreasonable.

[11] Secondly, Twilegar alleges that trial counsel was ineffective for failing to call David Twomey to testify regarding his alleged sighting of the victim after the established date of his disappearance. The circuit court properly denied this claim. First, this Court has already considered a version of this claim and rejected it on direct appeal. Specifically, this Court considered whether the trial court properly excluded the testimony of Twomey that he had seen Thomas at a convenience store sometime prior to this murder and that Thomas had told Twomey to deny seeing him. This Court determined that the trial court did not err in finding that the evidence was not sufficiently relevant or probative.[2] Next, McLoughlin testified that he had concerns regarding Twomey's credibility because of his prior inconsistent statements and that he was under the influence when he arrived to testify. This was a reasonable strategic decision. *See Bolin v. State,* 41 So.3d 151, 159–60 (Fla.2010) (counsel is not ineffective for failing to present a witness with questionable credibility); *Evans v. State,* 995 So.2d 933, 940–43 (Fla.2008) (trial counsel's tactical decision not to present witnesses with questionable credibility does not constitute ineffective assistance); *Lamarca v. State,* 931 So.2d 838, 848–49 (Fla.2006) (finding it a reasonable trial strategy for counsel not to call people who were not credible and would not have made good defense witnesses); *Marquard*

v. State, 850 So.2d 417, 427 (Fla.2002) (denying ineffective assistance claim for failing to call witness when counsel believed the witness would not exonerate the defendant).

Public Records

*6 [12] Additionally, Twilegar alleges that section 119.19, Florida Statutes, and Florida Rule of Criminal Procedure 3.852 are facially unconstitutional and unconstitutional as applied to him because they prevent his access to public records to which he is otherwise entitled.[3] Specifically, Twilegar alleges that the statute and rule are so stringent that they prevent any similarly situated inmate from ever being able to access constitutionally obtainable public records. The circuit court denied Twilegar's public records claim, stating that it failed as a matter of law. The circuit court properly denied Twilegar's additional public records requests[4] and properly found meritless his claim regarding the constitutionality of the denial.

[13] We have consistently held that a defendant bears the burden of demonstrating that the records sought relate to a colorable claim. *See Chavez v. State,* 132 So.3d 826, 829 (Fla.2014); *Mann v. State,* 112 So.3d 1158, 1163 (Fla.2013); *Valle v. State,* 70 So.3d 530, 549 (Fla.2011). Further, "the production of public records is not intended to be a 'procedure authorizing a fishing expedition for records unrelated to a colorable claim for postconviction relief.' " *Dennis v. State,* 109 So.3d 680, 699 (Fla.2012) (quoting *Diaz v. State,* 945 So.2d 1136, 1150 (Fla.2006)). "Accordingly, where a defendant cannot demonstrate that he or she is entitled to relief on a claim or that records are relevant or may reasonably lead to the discovery of admissible evidence, the trial court may properly deny a public records request." *Mann,* 112 So.3d at 1163.

Twilegar has failed to establish that he was denied access to records at all, much less that he was denied access to records that related to a colorable claim. Twilegar's allegation that the language of the rule as it applies to him fails to allege anything more than speculation that he could have been denied access to records since he was required to articulate a claim to which the records related. Because this Court has stated that a public records request is not intended to be a "fishing expedition" and because the purpose of the rule and statute is not to grant access to unrelated or protected documents, Twilegar's claim fails. Accordingly, the circuit court properly denied his request.

CONCLUSION

For the foregoing reasons, we affirm the circuit court's denial of Twilegar's motion for postconviction relief.

It is so ordered.

LABARGA, C.J., and PARIENTE, LEWIS, QUINCE, CANADY, POLSTON, and PERRY, JJ., concur.

All Citations

--- So.3d ----, 2015 WL 2458011, 40 Fla. L. Weekly S299

Footnotes

1 The issues Twilegar raised on direct appeal were: (1) sufficiency of the evidence to prove that Twilegar committed the crime, (2) sufficiency of the evidence to prove premeditation, (3) whether the trial court erred in denying Twilegar's motion to suppress, (4) whether the trial court erred in excluding evidence, (5) whether the trial court erred in admitting evidence of flight, (6) whether the trial court erred in admitting Twilegar's jailhouse phone calls, (7) whether the trial court erred in admitting Twilegar's receipts for retail purchases, (8) whether the trial court erred in finding pecuniary gain and CCP as aggravators and proportionality, and (9) whether the trial court erred in allowing Twilegar to waive a penalty phase jury and waive mitigation. *Twilegar,* 42 So.3d at 188 n. 4.

2 We therefore find without merit Twilegar's allegation that trial counsel was deficient for failing to follow up on a motion in limine on which the trial court deferred ruling.

3 Twilegar's conviction and sentence of death were affirmed prior to July 1, 2013, and are therefore not governed by section 27.7081, Florida Statutes. *See Abdool v. Bondi,* 141 So.3d 529, 551 (Fla.2014) (quoting ch. 2013–216, § 8, Laws of Fla.).

4 This issue concerns Twilegar's request for additional records, filed on April 21, 2011. The agencies complied with Twilegar's initial request.

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