

IN THE SUPREME COURT OF FLORIDA

LAMAR BROOKS,

Appellant,

v.

Case No. **SC02-538**

STATE OF FLORIDA,

Appellee.

_____ /

INITIAL BRIEF OF APPELLANT

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PUBLIC DEFENDER

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PRELIMINARY STATEMENT

Appellant, Lamar Z. Brooks, was the defendant below and will be referred to in this brief as either "defendant," "appellant," or by his proper name. The State was the prosecution below and will be referred to as "the State."

References to the 42 volume record on appeal will be as ([vol. no.] R [page no.]).

STATEMENT OF THE CASE

This is the second time this case has come before this Court. By way of an Indictment filed in the Circuit Court for Okaloosa County on May 23, 1996, the State charged Walker Davis, Jr. and Lamar Brooks with two counts of first-degree murder (1 R 1-2).¹ Brooks was tried, found guilty, and sentenced to death. On appeal, this Court reversed the trial court's judgment and sentence and remanded for a new trial. Brooks v. State, 787 So. 2d 765 (Fla. 2001). Davis was tried separately, found guilty as charged, and sentenced to life in prison for each murder. Davis v. State, 728 So. 2d 341 (Fla. 1st DCA 1999).

At the retrial, Brooks filed the following motions that have relevance to this appeal:

1. Objection to Standard Instructions on "Premeditated Murder" and Motion for corrected instruction on first-degree murder from premeditated design (25 R 4777). Denied (25 R 4880).
2. Motion in Limine in regard to pictures (25 R 4811). Denied (23 R 1121-22).
3. Motion to Preclude first-degree felony murder (25 R 4842).

¹ The indictment alleged a premeditated intent and also that the murders were committed during the course of an aggravated child abuse of one of the victims.

4. Motion for findings of fact by the jury (25 R 4845).
5. Motion for interrogatory guilt phase verdict (25 R 4856).
6. Motion for special verdict as to theory of guilty (25 R 4852). Denied (39 R 2317).
7. Motion to change venue (25 R 4897).

Brooks proceeded to trial before Judge Jere Tolton, and after the State and defense had presented their cases, the court instructed on the law, and closing arguments made, the jury found the defendant guilty as charged on both counts (27 R 5129).

He proceeded to the penalty phase portion of the trial, but he refused to present any evidence to mitigate a death sentence (41 R 2613). The court questioned him about that decision (27 R 5196-5219). Defense counsel, following the dictates of Koon v. State, 619 So. 2d 246 (Fla.1993), presented a list of statutory and nonstatutory mitigation he believed applied to Brooks' case (27 R 5194).

The State relied on the evidence it had presented in the guilt phase of the trial, and on the testimony of several victim impact witnesses. Brooks' lawyer never cross-examined them, nor did he object to the prosecutor's closing argument, and he presented no summation. Accordingly, the jury returned two death recommendations by a vote of 9-3 and 11-1 (27 R 5152).

The court asked for sentencing memorandum from the State and Brooks. The State submitted one detailing the aggravation it believed the court should find and why it should minimize the mitigation that might apply (27 R 5161-5178). Brooks' lawyer filed no similar document.

The trial judge, after conducting the hearing mandated by Spencer v. State, 615 So. 2d 688 (Fla. 1993), followed those verdicts and sentenced the defendant to death.

Justifying that punishment, it found in aggravation:

1. As to Rachel Carson:
 - a. Prior conviction for another capital felony, i.e., the contemporaneous murder of Alexis Stuart.
 - b. The murder was committed in a cold, calculated, and premeditated manner.
 - c. The murder was committed for pecuniary gain.
 - d. The murder was committed during the course of an aggravated child abuse.
 - e. The murder was especially heinous, atrocious, or cruel.
2. As to Alexis Stuart:
 - a. Prior conviction for another capital felony, i.e. the contemporaneous murder of Rachel Carson
 - b. The murder was committed for pecuniary gain.
 - c. The murder was committed during the course of an aggravated child abuse, and the victim was less than 12 years old. (Considered as one aggravator)
 - d. The murder was cold, calculated, and premeditated.

(27 R 5250-55)

In mitigation, the court found, as to both murders,

1. Statutory mitigators:
 - a. Brooks had no significant criminal history. Little weight.
 - b. At the time of the murder, Brooks was 23 years old. Little weight.
 - c. The defendant was an accomplice in the capital felony committed by another person, and his participation was relatively minor. Little weight.
2. Nonstatutory mitigators:

- a. Strong family background, participation in community affairs, church, choir, school, and little league, for which he received awards. Little weight.
- b. Brooks's brother died while the defendant was in jail. some weight.
- c. Honorable military service. Little weight.
- d. Brooks has a good character, and has loving relationships with others. Little weight.
- e. Brooks is the father of a 6-year-old child.
- f. The defendant has had good jail conduct. Not considered because Brooks waived it.
- g. Life without parole. Little weight.
- h. Courtroom behavior and demeanor. Some weight.
- i. Church attendance and Christian training. Little weight.
- j. Great potential for rehabilitation. Not proven.
- k. Brooks worked after leaving the army. Little weight.
- l. Brooks maintains his innocence.

(27 R 5259-62)

This appeal follows.

STATEMENT OF THE FACTS

Responding to a 911 call about 10:30 or 11:00 p.m. on Wednesday April 24, 1996, officers with the Crestview Police Department approached a parked car that had its engine running and lights on (34 R 1387, 1395). It had stopped at the end of a dead end street in a ghetto area of Crestview, which had some night clubs and homes nearby, and was about two blocks from the police station (34 R 1135, 1258). People regularly walked the area (33 R 1171).

When the police officers looked inside the car they saw the woman driver slumped over onto the passenger side. They also saw an infant in the rear passenger side of the car

in a child's seat (34 R 1263-64,). Thinking the woman had merely passed out, the officers quickly discovered that 23-year-old Rachel Carson was dead, as was Alexis Stuart, her three-month-old daughter (35 R 1426). Carson had been strangled and stabbed 66-70 times, the fatal wounds being to her neck (33 R 1193-94, 34 R 1202, 1205). Alexis also had several stab wounds, and died from a single stab wound to her heart (34 R 1212-14).

The car had been parked for about two hours. About 10 p.m., Walker Davis (who was limping because he had a cast on his foot (35 R 1436)) and another man, were seen walking quickly along the street the car was parked on (33 R 1143-44, 1149, 1153, 35 R 1512, 1513). Other than that lead, the police initially had little to go on, but within a day they began questioning Walker Davis, Jr. about what he knew about Ms. Carlson (34 R 1279-80). They were both in the Air Force and worked at the hospital on Eglin Air Force Base (34 R 1281). The police also questioned Lamar Brooks, Davis' cousin, who had come to visit him and had been in Crestview since Sunday (34 R 1288, 1293). When asked what he had been doing for the past several days, he told the police that he had gone to town twice, once looking for marijuana (34 R 1290). About 7 p.m. on the night of the murder, he had helped his relative put together a water bed, walked Davis' dog, watched a movie, and then gone to bed (34 R 1290, 1366).² On the other hand, a Melissa Thomas said that Davis and Brooks were at her house near the murder scene about 9 p.m. on the

² It took about two hours to set up the waterbed and fill it with water (34 R 1367).

night of the murder and had stayed there for 20 minutes (35 R 1525, 1531). During that time, Brooks used her bathroom and telephone. She saw no blood on him, his clothes, or anywhere he had been (35 R 1534). A short while later, the two men apparently went to a nearby credit union where a work acquaintance of Davis' picked them up and drove them back to Davis' house (35 R 1567-73).³

Davis, who was married and had two children at the time,⁴ never mentioned that he knew Carlson (34 R 1292, 1357). Carlson, on the other hand, not only knew Davis, but claimed that Alexis was his child (35 R 1410), which was untrue (38 R 2049). Davis also denied the infant was his (35 R 1458). Nevertheless, as early as December 1995, he had inquired about buying an insurance policy for Alexis, and in February 1996, he purchased one worth \$100,000 with him as the primary beneficiary and Rachel Carlson as the contingent beneficiary (35 R 1500-1501).

Brooks, when questioned, told the police that an Army buddy, whom he identified only as Mark, had come with him and Davis from a weekend trip to Atlanta (35 R 1455). With some other information provided by the defendant, the police eventually identified Mark as Mark Gilliam, a soldier stationed at Ft. Benning, Georgia (36 R 1698).

³ Davis had also used the telephone while at Thomas's home (35 R 1527),

⁴ His wife and children were out of town (34 R 1354).

Gilliam provided some of the most incriminating testimony against Brooks, but it was also some of the most heavily impeached-by the prosecutor as well as the defense. At the retrial, he said he had met his old friend in Atlanta on the weekend of April 21-22, 1996. After partying there, he, Brooks, Davis, and others came to Crestview on Sunday evening and stayed in Davis' apartment (36 R 1621-22).

Early the next morning a woman banged on Davis' door, and she was angry (36 R 1625). Gilliam was too drunk to get up, but Davis later told him that "this girl kept pestering him about a stereo he owed money for," and that upset him (36 R 1629). He said she should be choked, but Brooks said, "nah you should just shoot her," and Gilliam added "nah, shooting would be too messy. You should just stab her." (36 R 1631) For Gilliam they were only joking (36 R 1632), but later on Monday evening, Davis and Brooks approached him, and each offered him \$500 if he would drive a car so they could kill the girl. Davis told him that he would pay Brooks ten thousand dollars to kill her (36 R 1634), would provide the shotgun Brooks would use, and would also get some latex gloves so no fingerprints would be left (36 R 1640-42). Davis promised Gilliam that he would provide falsified medical records to explain his absence from work (36 R 1647).

Accordingly, Walker Davis got Rachel Carlson to come to his house on Monday evening (36 R 1651). He got in her car, and Gilliam and Brooks followed in the former's vehicle (36 R 1656). She sped away. In fact, she was speeding, and soon a police car had pulled her over and given her a ticket (37 R 1817-19). Gilliam drove past but circled back

and stopped behind the two cars (36 R 1657). Another police car pulled behind Gilliam. Brooks, according to Gilliam, said he was going to “have to shoot them,” but Gilliam told Brooks to put the shotgun away (36 R 1659). He did, and the officer asked why Gilliam had pulled behind Carlson and the other police car. He said that the light from his gear shifter had gone out (36 R 1663). The officer gave him a warning ticket and let them go (36 R 1665, 37 R 1831, 1844). Scared, Gilliam returned to Davis’ apartment, and when Davis showed up Gilliam said he was leaving the next day (36 R 1670). He did not.

Instead, he went to bed and woke up the next afternoon, and just hung around (36 R 1672). According to Gilliam, Davis had a dentist appointment in the morning, but when he returned, he and Brooks said they should “try it again.” (36 R 1673) Although he did not want to, Gilliam eventually gave in (36 R 1675).

But, they failed again. This time Gilliam simply lost Carlson’s car, and went to the place they had agreed they would commit the homicide and waited (36 R 1679-80). Davis never showed up, and after a while Brooks and Gilliam returned to Davis’s house (36 R 1681). When Davis came home some time later, Gilliam said “I’m out of here. I’m leaving tomorrow.” (36 R 1682) And he did, but not before getting the promised, falsified papers saying that he had been in an accident (36 R 1684).⁵

⁵ That document proved unsatisfactory, and Gilliam was eventually punished for being absent without leave (36 R 1692).

When the police eventually questioned him about the double homicide, he initially told them nothing, but when threatened with criminal charges, he loosened up a bit (36 R 1701). But only a bit, and at the retrial he admitted that he had “left out some parts” when he had testified at Brooks’s first trial (36 R 1701, 1722) Specifically, he omitted that he had “helped attempt their murder two nights in a row,” and said, instead that they had “just hung out.” (36 R 1701) As a result, the State charged him with four counts of perjury for the testimony he had given in 1997 and 1998 (36 R 1722). Indeed, as the prosecutor brought out, “the truth is that in one way or the other, every statement you gave before November 18, 1998, contained a lie.”⁶ He had “always lied about this case.” (36 R 1778, 1799)⁷

Also, after the murder, and after the police had arrested Davis, they took him to a hospital to have his leg cast removed. When it was cut off, two pieces of paper fell out, which the police seized, and which the prosecution introduced at trial (37 R 1898-99).⁸

SUMMARY OF THE ARGUMENTS

ISSUE I. In Brooks I, this Court found the trial court had reversibly error when it allowed Steve Manthey, an insurance agent, and other witnesses to testify about what Walker Davis had said and done that showed his intention to kill Rachel Carlson and Alexis

⁶ Brooks also impeached his testimony at the retrial with his deposition given three months before the retrial (36 R 1777).

⁷ The original trial began on March 23, 1998 and ended on April 10, 1998.

⁸ State Exhibits 36A and 36B (35 R 1599) (Appendix A).

Stuart. In the retrial, the court let the prosecutor call Manthey but for the limited purpose of establishing a source for the money he had promised to pay Brooks. Despite that limited relevance, the State immediately used the evidence of the insurance policy to establish Davis' motive and intent, and by doing so, Brooks's criminal intent. Yet, this Court in Brooks I had specifically said that the State could not use the statements Davis made outside the conspiracy to show the defendant's criminal mind. In the retrial it did so, and because it did, this Court must reverse for another yet another trial.

ISSUE II. The court, over defense objection, allowed a worker at the Department of Revenue to testify that someone claiming to be Rachel Carlson called her inquiring about getting child support from Walker Davis. That evidence had no relevance to Brooks. It also had no relevance to Davis because the State never showed that Davis knew about the inquiry. It also had no pertinence to this case because the State never established that the worker recognized the voice as belonging to Rachel Carlson.

ISSUE III. Sometime after his arrest, Walker Davis had his leg cast removed. When cut off, two pieces of paper fell out, the police seized them, and eventually the State offered them against Brooks. They had no relevance to Brooks' case because the State never proved when they were written, who wrote them, or if Brooks knew of them. For all the State showed, they could have been written by anyone, months before the murders, or minutes before the cast was removed.

ISSUE IV. At trial, the State called Melissa Thomas who said that sometime during the evening of April 24, 1996, Walker Davis and Brooks came to her house. When the prosecutor asked her if Davis had changed his clothes at her house, she said she could not remember. Unsatisfied with that response, it later called a police investigator who said that she had told him that Brooks had changed from wearing running pants to shorts. Brooks objected because Thomas' "I don't remember" response did not directly conflict with what she had told the investigator. Compounding this error, the State then used its impeaching evidence for substantive purposes, i.e., that Brooks had changed his clothes at Thomas' house, during its closing argument.

ISSUE V. The court admitted, over defense objection, the testimony of Mark Gilliam that during the first failed effort to kill Carlson, a police officer had stopped her for speeding. Gilliam and Brooks, riding in his car, pulled behind Carlson's car, and within a short time another police officer stopped. Brooks, according to Gilliam said he was going to shoot this officer because he could not go back to jail. The court should have excluded that evidence because it had no relevance to proving Brooks's state of mind to kill Carlson and Stuart. Indeed, it showed only his bad character as one who would kill anyone who could send him to jail. Additionally, because the state had little need of this evidence to establish Brooks' intent or consciousness of guilt, the prejudicial impact of this evidence substantially outweighed its marginal relevance.

ISSUE VI. The State’s closing argument was riddled with improper comments: (1) It claimed that Brooks’ failure to mention he knew nothing about any insurance policy could be used against him. That improperly shifted the State’s burden of proof onto the defendant. (2) It argued that whatever Davis had done could be imputed Brooks. That was incorrect, as this Court had said in Brooks I. (3) It created “strawman” defenses and then argued why the jury should ignore them. Such argument may have led the jury to believe Brooks had some burden of proving his innocence. (4) It also used the word “alibi,” even though Brooks never claimed an alibi defense. Again, the State’s use of that word may have led the jury to have expected Brooks to have produced an alibi, and then to use his silence when he did not against him.

ISSUE VII. Mark Gilliam testified about the planning of the murders, and his testimony of what Brooks and Davis said was admissible under the co-conspirator rationale that excepts statements made by conspirators during and in furtherance of some conspiracy, as permitted by Section 90.803(18)(e), Florida Statutes (1997). That section also requires the court, at defense request, to instruct the jury that before they can consider the hearsay, it must find the conspiracy established by independent evidence. Brooks requested the instruction, but the court refused to give it, accepting the State’s argument that the hearsay itself could prove the conspiracy. That was wrong, as this Court has held.

ISSUE VIII. Twice the State mentioned or referred to Brooks’ first trial. That it did

so was wrong, and the trial court erred in refusing the defendant's motions for mistrial. For a jury to know that another jury had previously heard the evidence and found Brooks guilty beyond a reasonable doubt is, as this Court has said, devastating and reason enough for a new trial.

ISSUE IX Before trial, and before the jury was sworn, Brooks asked the court to move his trial. As evident by the numerous cause challenges granted, and the extensive hearing into juror misconduct conducted during the voir dire, the venire simply could not produce 12 people who could fairly try the defendant. The totality of the circumstances, including the shocking facts of this case, the persistent memory of the community about it, and the State's inherently weak evidence of Brooks' guilt, compel the conclusion that the court should have moved the trial to another locale outside of Okaloosa County.

ISSUE X The trial court found that Brooks deserved a death sentence even though Walker Davis, a co-defendant, had received life because the former was the actual killer. There is no competent substantial evidence Brooks rather than Davis murdered Rachel Carlson and Alexis Stuart. Even if so, Davis' culpability, as demonstrated by his long term planning for the murder, his instigation of the plot to murder, and his insistence that the conspirators complete what they had started, showed that he had at least an equal culpability with Brooks for these killings. The defendant's death sentence, therefore is disproportionate because Davis received a life sentence.

ISSUE XI. The State charged Brooks with committing two first-degree felony murders, the underlying felony being aggravated child abuse. Problems arise from the fact that the aggravated child abuse -- the stabbings -- also became the murder. That is, the stabbing was both the aggravated child abuse and cause of the homicide. The little used merger doctrine, however, should have prevented that result. If not, then other decisions by this Court that reduced the first-degree murder convictions for children to second-degree murder were wrongly decided. Also, any death of a child that might be a manslaughter or third-degree murder would automatically become a first-degree murder.

If so, the death of a child by aggravated child abuse will automatically become a first-degree murder and will also automatically have at least one aggravating factor: the murder was committed during the course of an aggravated child abuse. Allowing that result, however, does nothing to “genuinely narrow” the class of persons subject to execution, a key requirement Florida’s death penalty scheme must satisfy to remain constitutionally valid.

ISSUE XII. The court refused Brooks’ request that the jury return specific verdicts as to whether Brooks was guilty under a felony murder theory, and what specific aggravating factors it found justified imposition of a death sentence. The United States Supreme Court’s ruling in Ring v. Arizona, ___ U.S. ___ (2002), and rulings from this Court require such findings because without them the inherent ambiguity surrounding a

death recommendation, particularly what aggravators the jury found, renders their required verdict suspect, and any subsequently imposed death sentence, invalid.

ISSUE XIII. The trial court found, among other aggravators, that the murder of Alexis Stuart was committed for pecuniary gain and in a cold, calculated, and premeditated manner. No evidence supports those findings; to the contrary, Mark Gilliam, the only witness who could have substantiated them, specifically refuted them. He said that Davis and Brooks never talked about Stuart or the need to kill her, or the \$100,000 insurance policy Davis had on her. Simply put, there is no evidence to support those aggravators as they applied to Stuart.

ISSUE XIV. Brooks waived his right to present mitigating evidence to the jury, and he told his lawyer to stand mute when the State argued that he should die. The jury, predictably, recommended the judge impose a death sentence. The court, giving great weight to that verdict, did so. That was error because although Brooks may have waived his right to present a case for life, he never waived his right to a valid jury recommendation. To be so, they must have heard and considered all the available mitigation, which, in this case, included evidence that Walker Davis, Jr. had received a life sentence. That it knew nothing of this and other mitigation destroyed the legitimacy of their death recommendation and the court's subsequent death sentence.

ISSUE I

THE COURT ERRED IN ADMITTING THE TESTIMONY OF STEVE MANTHENY, A LIFE INSURANCE SALESMAN, THAT HE HAD SOLD A LIFE INSURANCE POLICY TO WALKER DAVIS THAT NAMED ALEXIS STUART AS THE INSURED AND HIMSELF AS THE PRIMARY BENEFICIARY, IN VIOLATION OF 90.803(18)(e), FLORIDA STATUTES, AND THE SIXTH AMENDMENT'S CONFRONTATION CLAUSE.

“It’s deja vu over again.”

At Brooks’ second trial, the court committed the same error as it did in the defendant’s first one: It allowed evidence outside the conspiracy of Davis’ intent or motive to kill Rachel Carlson and Alexis Stuart to show Brooks’ motive to kill. In the first trial he did so by presenting hearsay testimony of Steve Manthey, an insurance agent; Wayne Samms, and Anthony Sievers, friends of Davis; and David Johnson, a car dealer.

This Court unanimously found that the trial court had improperly admitted all of the hearsay testimony, including that of Manthey’s because it had failed to comply with Section 90.803(18)(3), Florida Statutes (1997).

The State contends that these statements should be admitted even though they were made by Davis because of the close and inseparable connection between Brooks and Davis during Brooks’s visit and stay in Florida. However, by this argument the State is ignoring the limitations of the co-conspirator hearsay exception of section 90.803(18)(e), which requires (1) that these statements be made during and in furtherance of a conspiracy, and (2) that independent evidence establish the conspiracy before the statements are allowed. . . . As noted, at the time the above statements were made, there was no evidence of

⁹ Yogi Bera. <http://expage.com/page/yogiquotes>

a conspiracy or that one would occur; therefore, those statements are devoid of the requisite trustworthiness contained in the co-conspirator exception. The statements are clearly hearsay not covered by any other recognized exception to the hearsay rule.

Brooks v. State, 787 So. 2d 765, 773 (Fla. 2001)(Brooks I).

We find now that in the second trial nothing changed except that the State had less evidence to prove its case. As in the first trial, the prosecutor's "particularly troublesome" approach still sought "to impute Davis' actions, statements, motive and intent to Brooks." Brooks I at 779, the only difference being that it had only Steve Manthey's testimony about the insurance policy to establish Davis' and hence Brooks' motive. As in the first trial, Brooks' "trial was really a retrial of Davis, rather than a trial limited to evidence about Brooks." Brooks I at 770.

Specifically, at the retrial, Manthey testified that on February 20, 1996, almost two months before the murder, Davis applied for a life insurance policy naming the baby, Alexis Stuart, as the insured and himself as the primary beneficiary. Before trial, Brooks alerted the court to the confrontation problems inherent in letting the State prove his intent by showing Davis'. "He's trying to kind of, I guess, transfer Mr. Davis's consciousness of guilt to Mr. Brooks and that's a problem. I can't ask Mr. Davis about his statement, there's a confrontation problem." (32 R 995). The State, fixated on Davis as the "ringleader of the conspiracy" (32 R 999), never saw the constitutional issue. With the faith of the true believer, it asserted in Brooks I and in the retrial that "Walker Davis's consciousness of

guilt is absolutely relevant.” (32 R 998) This meant that it could specifically introduce Steve Manthey’s evidence to show the co-defendant’s motives and intent that in turn proved Brooks’ criminal intent.

The trial court, lacking the zeal of the prosecutor, and having read Brooks I, severely limited the use of that evidence.

On the insurance policy, I'm not going to let it in on the basis of motive of Lamar Brooks, because I think it could be motive of Walker Davis but not that of Lamar Brooks. It could come in, it seems to me, and could be relevant if a conspiracy is established and if there is testimony within that conspiracy that Mr. Brooks was paid money by Mr. Davis. At that point in time it could come in to who the source of that.. . . I think it's perfectly relevant to show where that source would come from for that money.

(33 R 1043)

The prosecutor, having won the admission of Manthey’s testimony, then ignored the court’s limitation, and immediately used the insurance evidence to prove Davis’ motive and Brooks’ intent. In his opening statement he focused on the the insurance policy as the reason for the murders, and not simply as a source of money. After telling the jury about Rachel Carlson’s inquiry to the “child support division” about getting Davis to provide financial assistance to raise Alexis, he discussed a stronger and “more sinister” reason or motive Davis had.

He didn’t want to pay child support for the next eighteen years for Alexis Stuart. You’ll find that. he didn’t want to have to deal with Rachel Carlson for the next eighteen years. You’ll find that.

There’s more motive and it’s more sinister and I’ll tell you about it. Walker Davis, Jr, who had a wife and children and a baby, Walker Davis, Jr,

went to an insurance agent named Steve Manthey and he purchased an insurance policy on Alexis Stuart. ... He purchased an insurance policy for \$100,000 on Alexis Stuart, the dip – the baby he was going to kill and the mother he was going to kill. \$100,000.

That is the more sinister motive in this case. . . That unsolved murder would have made Walker Davis, Jr, a very wealthy man to some people's eyes, because he was the primary beneficiary of that policy. Not the mother, Rachel Carlson, but Walker Davis, Jr. You'll see that application an policy for insurance

(33 R 1078-79)

Accordingly, the State called Steve Manthey who spoke only about Walker Davis' December 1995 inquiry about insuring Stuart and his February 1996 purchase of the \$100,000 policy. He also provided the predicate for the introduction of the policy he issued to Davis (35 R 1496-1502). Admitting this evidence was error and reversible error at that, even under the abuse of discretion standard of review. Brooks I at 773.

In Brooks I, this Court held that the State had to prove Brooks', not Davis' intent to kill Carlson and Stuart. If it wanted to do this using statements admissible under the co-conspirator exception to the hearsay rule, it had to abide by the limits imposed by that rule of evidence, the right to cross-examination, and the Sixth Amendment's confrontation clause. That fundamental right gives the defendant the right to confront his accusers, which often means he or she must be able to cross-examine them. Garcia v. State, 816 So. 2d 554, 561 (Fla. 2002)(The right of cross-examination is implicit in the constitutional right of confrontation). The only relevant exception comes from the co-conspirator exception to the hearsay rule, as codified in Section 90.803(13)(e), Florida Statutes (1997).

The provision of s. 90.802 to the contrary notwithstanding, the following are not inadmissible as evidence, even though the declarant is available as a witness:

* * *

(18) Admissions.--A statement that is offered against a party and is:

* * *

(e) A statement by a person who was a coconspirator of the party during the course, and in furtherance, of the conspiracy. Upon request of counsel, the court shall instruct the jury that the conspiracy itself and each member's participation in it must be established by independent evidence, either before the introduction of any evidence or before evidence is admitted under this paragraph.

Here, the prosecutor never accepted the “during the course, and in furtherance of” limitation to admitting statements of Davis about an insurance policy bought months before any conspiracy existed. Contrary to the State’s notions, the Sixth Amendment confrontation clause limited his use of hearsay excluded by the co-conspirator exception to the hearsay rule. His dogged determination to prove Davis’ intent finds no assistance in section 90.803(18)(e). He simply ignored its limits and used it as a blanket authority to introduce every bit of evidence relevant to Davis, but as this Court held, only those statements he had made “during and in furtherance of [the] conspiracy” were admissible. Brooks I at 773. Hence, Davis’s statements to Manthey and the policy he bought had no relevance because they were made or purchased months before the conspiracy began.¹⁰

¹⁰ In Brooks I, this Court said the conspiracy began “shortly before the murders.” Brooks I at 773. At the retrial, the evidence again showed that the earliest the three men could have colluded was Monday evening, about 6 or 7 o’clock (36 R 1633-34).

Obviously, the prosecutor resented the limits this Section 90.803(18)(e), the Constitution, and this Court had put on him in Brooks I. It considered what that opinion said ill reasoned, confusing and a barrier to be ignored in his effort to convict, unfairly, as it turns out, Brooks (32 R 988, 993, 35 R 1558, 1560). Walker Davis was the “ringleader of the conspiracy” and “there’s no doubt that from the very beginning to the very end Walker Davis’s consciousness of guilt was more important than Lamar Brooks’s.” (32 R 999) However strongly it believed it could establish Brooks’s guilt by showing Davis’s motive, this Court clearly had rejected that approach to proving its case against the defendant. “However, . . . the statements here were not made by Brooks, but by Davis, and they provided a motive directly for Davis, not Brooks. Notwithstanding, the State improperly sought to use them to impute Davis’s motive to Brooks.” Brooks I at 773, fn. 4.

Besides the constitutional problems this evidence had, defense counsel also objected before trial because “I don’t think there’s going to be any evidence presented to show that Mr. Brooks had knowledge of that policy.” (35 R 1494) If so, the jury could only have speculated about how Davis was going to pay Brooks, which besides being impermissible, would now become irrelevant and a collateral issue.

That objection proved prophetic, because during the prosecution’s examination of Mark Gilliam, the only witness who could have refuted the defense objection, specifically said no mention was made of Alexis or the insurance policy when Davis, Brooks, and he

planned the murders.

Q. What about the baby? Did you ever tell them [the police] that there was a plan to kill the baby?

A. No, because I never knew about the baby?

* * *

Q. Now, had either Walker Davis, Jr. or Lamar Brooks, in all these discussions about shooting the lady, said anything about killing the baby?

A. No.

Q. Had either one of them said anything to you about there being a \$100,000.00 insurance policy on the life of the baby that would pay Walker Davis, Jr. if she died?

A. No, he didn't, he never mentioned that.

(36 R 1703-1704)

The prosecutor must have been surprised when Gilliam testified that no mention was ever made about any insurance policy and further admitted they never discussed killing Stuart. That testimony only undercut the State's basis for prosecuting Brooks: that Davis wanted to kill Carlson and Stuart for the insurance money. If no one ever mentioned killing Stuart, much less the insurance policy, then Steve Manthey's testimony had no relevance to show Brooks's guilt, and we can only speculate that at some point the two men ever discussed how Davis was to pay his cousin.

Yet, Gilliam's admissions proved no deterrence to this prosecutor. In his closing argument, as in his opening statement, the insurance policy provided the key motive Walker Davis had for committing these murders. Over objection, the State repeatedly argued Davis's intent and motive:

This was a planned, premeditated, thought-out execution to help Walker Davis,

Jr. avoid the responsibilities of a child that he signed an insurance and bought an insurance policy claiming that he was the father of.

(39 R 2378-79)

That life insurance policy bought by Walker Davis, Jr. in the amount of one hundred thousand dollars for an infant that he told Lamar Brooks was not even his, for an infant he did not want, an infant he couldn't afford to have in his life because he was already married, he already had two children, he already had a third child. his wife had just given birth. That's the evidence of premeditation.

(39 R 2380)

Let's talk about motivation to commit these crimes. . . . What was Walker Davis, Jr.'s motivation. . . Rachel Carlson was constantly coming over to his house crying and upset. He was going to have to deal with that for seventeen years and nine months if he didn't do something about it, and admitted paternity of that child on the insurance application, and that's really the true evidence of motive, isn't it? He bought a hundred thousand dollar insurance policy on a baby that he told this defendant was not even his."

(39 R 2380-81)

Steve Manthey, insurance agent. He was here for one reason and one reason only, so you could see that Walker Davis, Jr. applied for this life insurance, a hundred thousand dollars on a baby he was telling his cousin wasn't even his and to show that he bought that life insurance.. . . Mr. Szachacz [defense counsel] said oh, but Manthey said that Mr. Davis saw him in December about that, as if that means something, ladies and gentlemen. What do you think Rachel Carlson looked like in December? Hmm? All that shows is that Walker Davis was already thinking about it in December, thinking about getting that hundred thousand from a baby he didn't want and claimed to his cousin wasn't even his.

(40 R 2439-40)¹¹(emphasis supplied.)

Even in the truncated penalty phase portion of the trial, the prosecution used the insurance policy to establish Brooks's cold, calculated, and premeditated intent.

What you heard is there's evidence that Walker Davis, Jr. purchased that insurance policy quite a distance before April of '96. That was in February that he purchased the insurance policy. You also heard that he first met with the insurance agent in December, back when Rachel was very pregnant, eight months pregnant, because she had the baby in January. So the evidence in this case is absolutely clear that at least for days this murder was planned, if not longer, if not longer, but at least for days Lamar Brooks sat around with his cousin, Walker Davis, Jr., and his Army buddy, Mark Gilliam, and they planned how to kill Rachel Carlson and her baby.

The prosecutor considered Brooks I as only limiting the number of objectionable witnesses it could put on the stand to establish Walker Davis' motive. At the defendant's retrial, it never abandoned the fundamental problem of the first trial: using evidence of Davis' motive that was outside the conspiracy to prove Brooks' intent. The only difference between the first and second proceedings was that in the latter it relied solely on Manthey to establish in this trial what several witnesses in the first trial had done. The error remains, and the harm is just as obvious. This Court will have to reverse Brooks' judgments and sentences yet again.

¹¹ In a bizarre twist of logic, and an obvious shifting of the burden of proof, the State tried to rebut Gilliam's testimony that the insurance policy had never been discussed. "Maybe it will be suggested that Lamar Brooks, there's no evidence that he knew about the insurance. Well, he sure didn't tell the police he did. He sure didn't when he was interviewed." (40 R 2500). The court overruled Brooks's objection to this argument (40 R 2501).

ISSUE II

THE COURT ERRED IN ALLOWING A WORKER WITH THE CHILD SUPPORT DIVISION OF THE DEPARTMENT OF REVENUE TO TESTIFY THAT SHE HAD RECEIVED A TELEPHONE CALL FROM A PERSON WHO CALLED HERSELF RACHEL CARLSON AND WHO WANTED CHILD SUPPORT FROM WALKER DAVIS, JR., WHICH TESTIMONY HAD NO RELEVANCE TO BROOKS AND WAS ADMITTED IN VIOLATION OF BROOKS'S SIXTH AMENDMENT RIGHT TO CONFRONTATION.

Sometime, presumably in the early part of 1996, Billie Small Madero, a worker at the Child Support Division of the Department of Revenue, got a telephone call from someone who identified herself as Rachel Carlson. She wanted to make an appointment to set up child support payments, and she claimed that Walker Davis was the father of her child (35 R 1410). Ms. Madero made a record of the conversation, but nothing more happened. At trial, the State, over defense objection,¹² introduced her testimony. Denying that it wanted to prove Rachel Carlson's state of mind (35 R 1402), it said the paper had relevance to establish Walker Davis' motive (35 R 1402-1403). "It is one of the areas of proof that shows why Walker Davis hired Lamar Brooks to kill Rachel Carlson." (35 R 1403) If so, the trial court abused the discretion given it in matters of this sort by allowing Ms. Madero to testify.

1. **No evidence Davis knew of Carlson's intent.**

¹² Brooks objected on grounds of relevancy, confrontation, and the inability of Ms. Madero to say that the person who called her was actually Rachel Carlson (34 R 1400, 35 R 1403, 1409).

Several reasons exist for excluding the evidence, but the first is that there is no evidence Davis ever knew that Carlson intended to seek child support from him. Only the prosecutor provided a link (33 R 1078, 34 1398-99, 39 R 2380), but argument is not evidence, and without the latter to provide some connection, we can only speculate that Brooks' co-defendant ever knew of the inquiry. Moreover, as noted in Brooks I at p. 771, Rachel Carlson's intent had no relevance to show Brooks's guilt. It still has no pertinence.

2. If Davis knew of Carlson's intent, no evidence shows Brooks also knew it.

If we assume Davis knew Carlson's preliminary plan to get child support there is no proof he ever told Brooks of that. Of course, the State theorized that in order to show Brooks's intent it had to establish Walker Davis's motive to murder, but as this Court held in Brooks I, it could only use his statements if made during the conspiracy, which formed "shortly before the murders." Moreover, and more significant, they provided a motive for Davis, not Brooks, and the "State improperly sought to use them to impute Davis's motive to Brooks." Id. Footnote 4.

3. No evidence shows Carlson made the telephone call.

Ms. Madero said the caller identified herself as Rachel Carlson, but she never said she was familiar with the victim, or could independently identify the voice she heard as being that of Ms. Carlson. That failing, which Brooks' identified at trial (35 R 1409), should have forced the court to exclude the Department of Revenue worker's hearsay.

To lay the proper predicate for admitting Madero's testimony, the State had to show that its witness had at some time heard Ms. Carlson's voice, and could identify the caller as Rachel Carlson. In Manuel v. State, 524 So. 2d 735 (Fla. 1st DCA 1988), the trial court erroneously admitted evidence that "Clarence" had made some intimidating telephone calls to a State witness. Other than the fact that "Clarence" was the Manuel's first name, nothing connected the caller with the defendant. "This evidence creates little more than a bare suspicion that appellant was the caller, and falls far short of the standard of proof required."

Similarly, other than the caller identifying herself as Rachel Carlson, no other circumstances linked the two voices. Of course, she gave a social security number, a date of birth, and an address (35 R 1410), but the State presented no evidence they were true. For all we know, a friend, relative, co-worker, or bum on the street could have invented the requested information when she made the call to the Department of Revenue. As in Manuel, the State simply failed to lay an adequate foundation or predicate to justify admitting Ms. Madero's testimony. See, Mack v. Widrowicz, 556 So. 2d 1221, 1222-23 (Fla. 4th DCA 1990).

In Brooks I, this Court's cumulative analysis of the errors led to the inevitable conclusion that it had to reverse the defendant's convictions and remand for a new trial. In this case the prosecution has used the same approach to convict Brooks that it used in Brooks I. As in the first trial, "the State's admitted theory at trial was to show that Davis and Brooks were inseparable in the days leading up to the murders.... Thereafter, through

the admission of numerous hearsay statements, the State sought to impute Davis's actions, statements, motive and intent to Brooks.... As such, the admission of this evidence constituted reversible error." Id at 779.

Ms. Madero's testimony, adds weight to the cumulative error side of the scale.

During the State's closing argument it said, of her testimony:

That's relevant to prove that Rachel Carlson believed he was the father, that Rachel Carlson wanted his money, that Rachel Carlson was involving him with her and her child. Well Lamar Brooks may not have known that, he didn't take that phone call, but Walker Davis's motive is what made this happened.

(40 R 2421-22)

When the State continued to prosecute Brooks for what Davis intended, it inevitably ran the risk of succeeding. As such, while it may have proven its case against Davis, it should have not used Brooks' trial to do that. This Court can only conclude that it has to reverse the defendant's judgments and sentences and remand for a new trial.

ISSUE III

THE COURT ERRED IN ADMITTING NOTES THE POLICE SEIZED FROM WALKER DAVIS, AFTER THEY WERE FOUND WHEN HIS LEG CAST WAS REMOVED, A VIOLATION OF THE DEFENDANT'S SIXTH AMENDMENT RIGHT TO CONFRONTATION AND FOURTEENTH AMENDMENT RIGHT TO A FAIR TRIAL.

Walker Davis, sometime before April 1996, had broken his leg playing football, and by the latter part of the month, it was still in a cast (35 R 1436, 1504, 1521). On May 2, 1996, after his arrest, the cast was taken off, and when it was two small pieces of paper that

had been stuffed down it were discovered, apparently by Davis, because his fingerprints were found on at least one of them (37 R 1898, 38 R 2020). The police seized the papers and at trial, over repeated defense objections that the papers were irrelevant because they violated Brooks' right to confront Davis, and they were written outside the conspiracy time frame, the court admitted them (33 R 1031, 35 R 1590-94 39 R 2274). It did so with considerable reluctance:

I can't figure out who wrote it, . . . but it does show, . . . a connection and the connection to me would be of some relevance to form the conspiracy, I know it's after the fact, but that there was a conspiracy that existed earlier.

* * *

The association connection is important, and I think that that is relevant to show that there was a prior conspiracy that was formed, and obviously I think, too, it was not during the conspiracy that this note was written, whoever wrote it, but at the same time, it was information between the two of them. I think there was a communication between the two of them because of the nature of the note that shows an association, not for the truth of the matter asserted, but shows an association that the jury could conclude helped form a conspiracy.

* * *

If the jury can find that Mr. Brooks wrote this, then they can infer consciousness of guilt because of the inconsistent statement about walking the dog and also the flight because he says I'm leaving.

(35 R 1592-93) The notes have several problems, which the court itself acknowledged, but abused the discretion given it in matters of this sort when it admitted the pieces of paper as evidence against Brooks.¹³

¹³ On one of the papers are the words, "Mark would have cracked up." "Events home to walk Heavy and then- to home." On the other are the words, "What time is the first flight and the name." "USAir 5:45-24.00 Sgt Samms."

1. **If Mr. Brooks wrote this.** The first problem, of course, is whether Brooks wrote the notes or parts of them. The State claimed they had two different styles of writing, but that is the State's claim, and no evidence supports it.¹⁴ It never established that Davis scribbled anything on the papers, that Brooks did, or that anyone else wrote anything. It showed only that the papers were taken from Davis' cast and one of them had his fingerprints were on it. It never presented any evidence to show when the notes were written, who wrote them, or when they were placed in the cast.

Indeed, as even the court acknowledged, "I can't figure out who wrote it." (35 R 1592) If not, then what pertinence does it have to Brooks' trial? If we have no idea who wrote the notes, then how can they possibly "connect these two co-conspirators" or show "their consciousness of guilt." (35 R 1590) They cannot, and the court simply erred by letting the jury speculate who wrote the note.

2. **Brooks could not confront Davis.** The State, denying that the note was hearsay, claimed it was offered "to connect these two co-conspirators to murder, and they're offered to prove they were telling the same lie." (35 R 1591) To that Brooks' counsel correctly noted "It doesn't matter whether it was hearsay or not. It's Walker Davis' statement that would be inadmissible against a co-defendant in a trial when we can't cross-examine Walker Davis." (35 R 1591)

¹⁴ Indeed, if one examines the notes the writing looks more similar than different. See State's Exhibit 36A and 36B. (Appendix A)

Thus, we have the same problem the State created in Brooks I and repeated in the retrial: It has introduced statements allegedly by Walker Davis that Brooks cannot challenge. Because Davis was unavailable for examination, Brooks could not confront him. That is, in constitutional terms, the trial court denied Brooks' right to confront Davis when it admitted the notes, whether it was hearsay or not.

But, so what, says the State. The court's error, if it was that, was harmless. Not so, says Brooks. What other evidence shows a conspiracy between him and Davis? Mark Gilliam? Maybe, but he was so heavily impeached that any reasonable juror would have wanted other, less perjured evidence the two defendants planned and carried out a murder. And in its closing argument it used the notes repeatedly to do just that (40 R 2437, 2458, 2472, 2511-12).

And, ladies and gentlemen, what Mr. Szachacz didn't say was that this is his client's lie. "Home to walk Heavy, and then to home." Is that what Lamar Brooks told Karen Garcia? Is that what Lamar Brooks told Mike Bettis and Michael Hollinhead? You know it is. I think that connects Lamar Brooks to that note. What you can also tell from both notes, what also connects him, is there's a question on here, "What time is the first flight and the name?" And then an answer, "US Air, 5:45, \$244, Sgt. Samms." It also says, "Mark would have cracked up. Events. Home to bank." Home to bank's scratched out. Why do you think? Why do you think it's scratched out? Do you think they left Rochelle Jones out of the story because they knew she knew they were in Crestview? This is he and Walker Davis talking, and it's easy to tell that that's what it is. It's in Walker Davis's cast, but it's Lamar Brooks's lie. It's in Walker Davis's cast, but it's Lamar Brooks asking when am I going to get out of here to Philadelphia? "What time is the first flight and the name?" "US Air, 5:45, \$244." \$244, the same amount of money that Thomas Hardin went with them and got, and he got three dollars out of that because it turns out they were able to get an earlier flight. He left at 11:00 for \$241. Oh, there's a

connection all right, between these notes and this case. I'll tell you more about it in a little bit.

(40 R 2437)

Well, all you got to do is read it and look at it and know it was handled and it was passed back and forth between two persons, that it has Lamar Brooks's lie on it, and that it has Lamar Brooks's plans to get out of town on it.

(40 R 2458)

Why should you believe Mark Gilliam? First, he was here. He was here in Okaloosa County. It isn't just he that says so. Rochelle Jones says so, Wayne Samms says so, even Lamar Brooks says so, told Garcia and Bettis and Hollinhead. Next, the note from the cast. The police had this on May 2nd, several days before they ever talked to Mark Gilliam, and there it is, "Mark would have cracked up." Now, I don't think that Walker Davis and Lamar Brooks were saying oh, Mark would have cracked up, ha ha ha, he'd have laughed. What they're saying here, and you know it is, is that they were predicting exactly what would have happened if Mark had been still at Eglin Air Force Base. He would have gave it up, he would have cracked, which he did in fifteen minutes on May 14th.

(40 R 2511-12)

The State's circumstantial evidence case, and the credibility of its star witness, Mark Gilliam, significantly improved with the introduction and use of the notes. The court's error in admitting them, therefore, became reversible. State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986).

ISSUE IV

THE COURT ERRED IN ALLOWING THE STATE TO "IMPEACH" THE TESTIMONY OF MELISSA THOMAS BY ALLOWING A POLICE OFFICER TO TESTIFY THAT SHE HAD TOLD HIM THAT ON THE NIGHT OF THE MURDERS, BROOKS CAME TO HER HOUSE

WEARING BLACK PANTS BUT LEFT WEARING SHORTS, A VIOLATION OF SECTION 90.608(1)(a), FLORIDA STATUTES (1997), AND THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Melissa Thomas testified for the State that on the night of the murders, Davis and Brooks came to her house about 9 o'clock (40 R 1525). Both men wore black nylon pants, but she could not recall what type of shirts they had on (40 R 1527-28). The State, apparently unsatisfied with that description asked her, "Do you remember telling Agent Haley that Lamar Brooks came out of the bathroom in shorts?" She said, "I don't remember." (40 R 1533)

Later, the State called Agent Haley, and before he could say what Ms. Thomas had told him, Brooks objected (40 R 2153). The State then explained why it had called him. "I've put on a witness who's testified, Melissa Thomas, she's testified they were at her house, but she also testified, contrary to her statement to Mr. Haley, that Lamar Z. Brooks did not change into short or that she can't remember that he changed into shorts. I'm building up to impeachment of that witness and I can impeach my own witness as to whether Brooks changed into shorts in the restroom." (40 R 2154)

Defense counsel objected, "That's not impeachment. That's not materially different. She said I don't know. She didn't deny it. That's not proper impeachment. She said I don't know." (40 R 2154) The court overruled Brooks' objection, and Haley then said that he had taken a tape recorded statement from her, during which she said "When Lamar

Brooks arrived at her house he was wearing black jogging pants and a dark colored shirt, and when he went into the bathroom and came out he was wearing shorts and he was carrying backpack.” (40 R 2157)

The trial court erred in letting Haley testify about what Thomas had told him, and in doing so it abused the discretion given it in matters of this sort. It erred simply because, as defense counsel correctly noted, Haley’s testimony was not materially different from what Thomas had said. That is, saying that she could not remember telling Haley that Brooks had come out of the bathroom wearing shorts is not inconsistent with her statement to him that he had come out of it wearing shorts. Calhoun v. State, 502 So. 2d 1364 (Fla. 2nd DCA 1987).

Section 90.608(1)(a), Florida Statutes (1997), allows

(1) Any party, including the party calling the witness, [to] attack the credibility of a witness by:

(a) introducing statements of the witness which are inconsistent with the witness’s present testimony.

A statement is inconsistent with another if it directly contradicts the earlier one or if there are material differences between the two. Guidnas v. State, 693 So. 2d 953, 963 (Fla. 1997).

Here, Haley’s testimony never directly contradicted what Thomas had said at trial, so if the State could use it, what he said had to materially differ from what she said. The question becomes whether her trial testimony “I don’t remember” materially differs from Haley saying she told him Brooks left her bathroom wearing shorts.

In Calhoun, cited above, a police officer testified that she could not remember ever saying she was an aggressive female. Defense counsel then sought to impeach her testimony with that of another witness who had heard her say exactly that. The Second DCA affirmed the trial court's ruling excluding that evidence because "in this case Deputy Manger made no statement inconsistent with her alleged prior statement. She merely could not recall making the statement." Id. at 1365.

In James v. State, 765 So. 2d 763 (Fla. 1st DCA 2000), the State charged James with first-degree murder, and during its case in chief it called one Chad Jones who admitted he suffered alcohol induced blackouts and that he neither saw the defendant shoot the victim nor recalled telling a Roosevelt Brown, that he saw the shooting. The prosecution then called Brown who said Jones had told him he had seen James shoot the victim.

In reversing James' subsequent conviction for second-degree murder, the court found that the State had improperly impeached Jones' trial testimony because his professed lack of memory was "not truly inconsistent" with what he had told Brown. "The fact that a witness once stated that something was true is not logically inconsistent with a subsequent loss of memory." Id. at 766, quoting, State v. Staley, 995 P.2d 1217, 1220, 165 Or. App. 395 (2000).

Here, as in James, Thomas simply said she had no recall of what she had told Haley. That in no way is inconsistent with or materially different from Haley's testimony that she had told him Brooks had left her bathroom wearing shorts. The court simply erred in

letting the State impeach what Thomas had said.

Making matters worse, the State then repeatedly used that impeachment as substantive evidence in its closing argument:

The evidence is reliable, it fits with all the other evidence that comes before her [Thomas] and that comes after her. Now, again, Mr. Szachacz [defense counsel] says well, she said they had a backpack. That's right, she told Dennis Haley, "Lamar Brooks went in that bathroom with a backpack and he came out in shorts. He was in long dark pants before he went in and he came out in shorts."

(40 R 2434, see also 40 R 2429, 2463-64)

Thus, not only did it improperly impeach Thomas, it used the impeaching evidence to prove Brooks had changed clothes shortly after the murder. Yet, the State could not do that. McNeil v. State, 433 So. 2d 1294, 1295 (Fla. 1st DCA 1983); See, Rockerman v. State, 773 So. 2d 602 (Fla. 1st DCA 2000); United States v. Webster, 734 F. 2d 1191, 1192 (7th Cir 1984).

The State improperly impeached Melissa Thomas, and then used Investigator Haley's testimony to prove its case against Brooks. That was not only error, it was reversible error, and this Court should reverse the trial court's judgments and sentences and remand for a new trial.

ISSUE V

THE COURT ERRED IN ALLOWING MARK GILLIAM TO SAY THAT WHEN A POLICE OFFICER STOPPED THE CAR HE AND BROOKS WERE RIDING IN, THE DEFENDANT TOLD HIM "HE'S GOING TO HAVE TO SHOOT THE COP," AND THAT "HE CAN'T GO BACK TO

JAIL,” VIOLATIONS OF HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL.

At Brooks’ trial, Mark Gilliam testified about the failed murder attempt on Monday, April 22, 1996. He said that Walker Davis had gotten Rachel Carlson to come to his house and pick him up (36 R 1651). As she sped away, Gilliam and Brooks followed in the former’s car (36 R 1656). Brooks, according to Gilliam, had a shotgun that he claimed the defendant planned to use to kill Carlson (36 R 1656).

Shortly, a police car “flew past me with his lights on and pulled her over.” (36 R 1656). Gilliam drove past, but circled back and parked behind Carlson and the police (36 R 1658). As they sat there another police car pulled behind Gilliam. He started getting nervous, and Brooks still had the shotgun in the front seat of the car. As the officer approached them, Brooks said, “he can’t go back. He’s going to have to shoot them.” (36 R 1659) Gilliam told the defendant to “put that away,” and he apparently did, hiding the gun behind Gilliam’s seat (36 R 1659).

Anticipating Gilliam’s objectionable testimony, Brooks’ lawyer had earlier asked the court to prohibit the State from eliciting those responses from this witness (36 R 1648). The court overruled his objection because the anticipated testimony was in furtherance of the conspiracy (36 R 1648-49). After Gilliam’s testimony about Brooks not wanting to go back to jail and having to shoot the police officer, Brooks renewed his complaint and moved for a mistrial after the State added the further justification for the testimony that it

showed a consciousness of guilt (36 R 1660). The court again denied that motion. The State resumed its examination of Gilliam, specifically getting him to testify again that Brooks had said “he can’t go back to jail.” (36 R 1662)

The court erred in allowing both statements, and in doing so it abused the discretion given it in admitting evidence.

If the evidence of the threat and unwillingness to return to jail has relevance to the State’s case against Brooks it does so only under Section 90.402, Florida Statutes (1997). Section 90.404(2)(a), Florida Statutes (1997), the codification of the so-called Williams Rule,¹⁵ provides no basis for admissibility because the facts of the threat have no similarities with that of the murders of Carlson and Stuart to show the defendant’s motive or intent, or, as the State said, a consciousness of guilt. Brooks, according to Gilliam, threatened to shoot a police officer acting in the course of his duties. The murders, on the other hand, involved a mother and her daughter who were stabbed with at least one knife. Carlson may also have been strangled. The defendant provided the only similarity between the two events, and that is an insufficient reason for admitting what Brooks allegedly had said.

Thus, only Section 90.402 justifies, if it can be, the threat evidence. It simply provides that “All relevant evidence is admissible, except as provided by law.” Significantly for this case, the “except as provided by law” includes Section 90.403, Florida Statutes

¹⁵ Williams v. State, 110 So. 2d 654 (Fla. 1959)(Similar fact evidence admissible even though it points to commission of another crime.)

(1997), which limits otherwise relevant evidence if “Its probative value is substantially outweighed by the danger of unfair prejudice, ...” Also, if the evidence only exhibits the defendant’s bad character, it is inadmissible. Hence, because of the extraordinarily corrosive strength of bad acts evidence, this Court has adopted a “strict standard of relevancy.” Heuring v. State, 513 So. 2d 122, 124 (Fla. 1987).

In this case, Gilliam’s testimony of the uncharged crimes or bad acts -- i.e. the threat and the unwillingness to return to jail -- were admissible if they were inseparable from the charged crime and were necessary to adequately to describe it. Griffin v. State, 639 So. 2d 966, 968 (Fla. 1994); Coolen v. State, 696 So. 2d 738, 742-43 (Fla. 1997). Obviously, what Brooks told Gilliam two days before the murders and during a traffic stop could easily have been excluded without any reduction of the State’s ability to tell its story. The threat simply did nothing to “explain[] or throw[] light upon the crime being prosecuted.” Tumulty v. State, 489 So. 2d 150, 153 (Fla. 4th DCA 1986). Indeed, the State at trial never asserted the intertwining of the threats and the murders, so it cannot on appeal claim that as a reason for admitting this evidence. C.f., Cannady v. State, 620 So. 2d 165 (Fla. 1993); State v. Dupree, 656 So. 2d 430 (Fla. 1995).

Moreover, the cases in which evidence of prior threats has been admitted have significant distinctions from the facts of this case. For example, in Dennis v. State, 817 So. 2d 741, 761-62 (Fla. 2002), evidence that Dennis had stalked, threatened, and assaulted Timwanika Lumpkins, one of the people he murdered had relevance because the two had

had a five-year romance and a child. Id. at 745. The couple had, however, had fights, with the defendant having slapped her on occasion. The bad acts, including the threatening, tended to show his motive in killing his former lover because, as creatures of habit, we often do what we have done before. Obviously, we have no similar situation in this case because Brooks had never seen the officer before. See also Conover v. State, 692 So. 2d 312, 313 (Fla. 5th DCA 1997)(Conover threatened to kill former girlfriend just days before he killed her.)

The threat could also have relevancy if it put the “entire case in perspective.” Bradley v. State, 787 So. 2d 732, 742 (Fla. 2001). In Bradley, the defendant and a couple of his employees tried to retrieve a diamond ring Jack Jones, the husband of Linda Jones, had given to his teenage girlfriend. Mrs. Jones had convinced Bradley to bully the girl and beat up Mr. Jones. A week after he had accosted the girl, Bradley beat and murdered the husband. The earlier incident against the teenager had relevance this Court held because it “provides the necessary coherence to the State’s theory that Bradley had become the enforcer of Mrs. Jones’ angry wishes, which ultimately included murdering her husband for his participation an extramarital affair.”

In this case, the State could have set the entire context of the Carlson and Stuart murder without any reference to Brooks’ alleged threat to kill the policeman and desire to avoid returning to jail. It could have presented the evidence of the failed attempts without any reference to Brooks’ threat. Nothing would have been lost with it excluded. In truth,

what the defendant said had relevance only to show his bad character, an impermissible justification for admitting bad act evidence. Straight v. State, 397 So. 2d 903, 908 (Fla. 1981); Holland v. State, 636 So. 2d 1289, 1293 (Fla. 1994).

In Escobar v. State, 699 So. 2d 988, 998 (Fla. 1997), the defendant killed a police officer as he tried to stop the defendant for driving without any lights. At trial, the State presented evidence of a Ramon Arguello, an acquaintance of Escobar's who said that the defendant had once pointed a gun at his chest and threatened to kill him. The trial court should have excluded that evidence, this Court held, "because the evidence is relevant solely to prove bad character."

In this case, the State claimed the threat and fear of returning to jail had relevance to show Brooks' consciousness of guilt, but if so, its pertinence to that issue was so weak that its damning, prejudicial value substantially outweighed the limited significance it may have had. Section 90.403, Florida Statutes (1997). Williamson v. State, 681 So. 2d 688, 696 (Fla. 1996)(Claim that prejudicial value of evidence outweighed its relevance rejected because it was "integral to the State's theory of why its key witness acted as he did both during and after the criminal episode.") In State v. McClain, 525 So. 2d 420 (Fla. 1988), this Court articulated the test to determine if the prejudicial significance of the offered evidence outweighs its probative value:

In excluding certain relevant evidence, Section 90.403 recognizes Florida law. Certainly, most evidence that is admitted will be prejudicial to the party against whom it is offered. [Section 90.403](#) does not bar this evidence; it is directed at

evidence which inflames the jury or appeals improperly to the jury's emotions. Only when that unfair prejudice substantially outweighs the probative value of the evidence is the evidence excluded. In weighing the probative value against the unfair prejudice, it is proper for the court to consider the need for the evidence; the tendency of the evidence to suggest an improper basis to the jury for resolving the matter, e.g., an emotional basis; the chain of inference necessary to establish the material fact; and the effectiveness of a limiting instruction.¹ C. Ehrhardt, Florida Evidence § 403.1 at 100-03 (2d Ed. 1984) (footnotes omitted).

In this case, the State simply had no need for this evidence, which had only a minimal relevance at best. David v. Brown, 774 So. 2d 775 (Fla. 4th DCA, 2000). Surely Gilliam's other testimony, assuming this convicted perjurer told the truth, of their plotting would have more strongly shown Brooks' intent kill Carlson and Stuart than his threat to shoot a police officer who had absolutely nothing to do with those homicides. On the other hand, assuming what Brooks said had some significance in proving the defendant's state of mind, its greater significance came from the picture it painted of a man bent on killing anyone that might send him back to jail. See, Williams v. State, 539 So. 2d 563 (Fla. 4th DCA 1989)(Trial court should have excluded, as unduly prejudicial, portion of the defendant's confession in which he had said he had been arrested before and was on probation.) And it was a picture the State clearly drew for the jury during its closing argument.

What did Mark Gilliam say Lamar Brooks did, though? He had that shotgun, and as those deputies approached, he told Gilliam, "I ought to shoot them, I'm not going back." And Gilliam said, "No, don't do that, man, hide that gun", and he hid it and they didn't find it. They didn't know even to look for it. He gave them a story. "My light went out here on my car. I'm trying to fix it."

(40 R 2452-53) Thus, its prejudicial impact, when coupled with its scant relevance shows only the defendant's bad character, and should have convinced the court that it had to exercise its discretion and keep this part of Gilliam's version of what happened away from the jury. That it ruled otherwise means this Court must now reverse the trial court's judgments and sentences and remand for a new trial.

ISSUE VI

THE COURT ERRED IN DENYING SEVERAL DEFENSE OBJECTIONS TO THE CLOSING ARGUMENT OF THE STATE, A VIOLATION OF BROOKS'S FOURTEENTH AMENDMENT RIGHT TO A FAIR TRIAL.

Brooks never testified, and according to Rule 3.250, Fla. R. Crim. P., this meant he had the concluding closing argument. Or, said another way, the State had only one opportunity to present its reasons why the jury should have found him guilty, and that was "sandwiched" between the defendant's initial and final closing arguments. That bit of procedural minutiae becomes important in this case because the prosecutor had only one opportunity to convince the jury of Brooks' guilt and rebut the defenses raised in the defendant's initial opening. Unfortunately, his zeal to convict Brooks led him to do far more than the facts of this case, Brooks' defenses, or the law allowed.

1. A brief primer on the law controlling closing arguments.

Fundamentally, closing argument provides the parties an opportunity to summarize the evidence and explain how the facts and relevant law interact. See Ruiz v. State, 743 So. 2d 1 (Fla.1999); Hill v. State, 515 So. 2d 176, 178 (Fla.1987). This means that courts and

particularly reviewing courts grant the defense and prosecution wide latitude in what they argue. Alleged error is viewed in light of the entire record and argument. See, Cochran v. State, 711 So. 2d 1159 (Fla. 4th DCA 1998). Accordingly, this Court has measured those comments under an abuse of discretion standard of review appellate. Moore v. State, 701 So. 2d 545 (Fla.1997); Bertolotti v. State, 476 So. 2d 130 (Fla.1985)

This level of appellate review, though, is deceptive. This Court has placed significant restrictions on what can be argued, so that if, say, the prosecutor violates these limits, it has erred, and the trial court will have abused its discretion if it overrules a defense objection to what the State has argued. It becomes reversible error if it is harmful. State v. DiGuilio, 491 So. 2d 1129, 1139 (Fla. 1986) Although a party can exceed the bounds of legitimate argument in many ways, in this case, the fundamental restriction the prosecutor violated occurred when it ignored its fundamental duty to prove Brooks' guilt beyond all reasonable doubts. Gore v. State, 719 So. 2d 1197, 1200-1201 (Fla. 1998). This meant first, that the State could not shift that burden to the defense and "invite the jury to convict the defendant for some reason other than that the State has proved its case beyond a reasonable doubt." Id. Second, it could not comment on Brooks' failure to present evidence "because such could erroneously lead the jury to believe that the defendant has the burden of proving her innocence." Jackson v. State, 575 So. 2d 181, 188 (Fla. 1991). Even "oblique" suggestions that the State's argument that the defendant had failed to prove he was "anywhere else" amounted to error, and in Jackson v. State, 707 So. 2d 412, 415

(Fla. 5th DCA 1998), reversible error. Thus, comments that do nothing more than “invite” or “lead the jury” to believe the defendant has some burden, or which only obliquely do so are errors, which the trial court should have prohibited.

2. **The specific problems objected to by Brooks.** Here, the State made several errors, several times. First, it argued Brooks should have presented a defense. Second, it noted repeatedly that he had not. Third, it ignored the limits imposed by the law as articulated by this Court in Brooks I. Fourth, it argued against an alibi defense when Brooks had never raised one. He, of course, acknowledges that the State can certainly strike hard blows, but in this case it also inflicted many, many foul ones that inexorably forces the conclusion that Brooks must be given a new trial. See, Berger v. United States, 295 U.S. 78 (1935).

A. **Brooks never told the police about any insurance policy.** Permeating the State’s closing argument was the claim that Brooks should have presented certain, specific defenses, and because he had not, he was, therefore, guilty..

MR. ELMORE: Maybe it will be suggested that Lamar Brooks, there's no evidence that he knew about the insurance. Well, he sure didn't tell the police he did. He sure didn't when he was interviewed --

MR. FUNK: Judge, Mr. Brooks doesn't have a duty to tell the police a darn thing. Now what he's wanting is that only Mr. Brooks can answer that, why he didn't tell the police or do the police work for them. It's an improper burden shift, it's improper argument, and I move for a mistrial.

THE COURT: Let me hear from you on this. This is the third time we’ve heard this argument. Go ahead and tell me why - -

MR. ELMORE: Judge, even if he had maintained his silence, it would have been pre-arrest, pre-Miranda silence.

I can comment on that all day long under the law, but I'm not commenting on it. What I'm commenting on is what he did tell the police when he did not invoke his right to remain silent. He spoke with them twice and he didn't mention the insurance.

THE COURT: Anything else?

MR. FUNK: No further argument.

THE COURT: Same objection and motion.

(40 R 2500-2501)

In short, the prosecutor argued that Brooks should have vigorously defended himself when the police questioned him. That he remained silent amounted to evidence of his guilt. That was wrong.

In Jackson v. State, 575 So. 2d 181 (Fla.1991), this Court held that "the state cannot comment on a defendant's failure to produce evidence to refute an element of the crime, because doing so could erroneously lead the jury to believe that the defendant carried the burden of introducing evidence." Id. at 188.

Following Jackson, the Second DCA in Sackett v. State, 764 So. 2d 719, 723 (Fla. 2d DCA 2000), found that the State had improperly argued that the defendant's failure to tell the investigating police officers that "LaPoint was drunk and making up allegations" showed his guilt. This argument improperly shifted its burden to prove the defendant's guilt and was "the equivalent of arguing to the jury that Sackett should have proclaimed his innocence to the officers."

Similarly, the Fifth DCA found error in the prosecutor's closing argument that Bradshaw had failed to "tell you where he was.' This comment was improper because it

suggests that Bradshaw, who did not present an alibi defense, had the burden of proving his innocence.” Bradshaw v. State, 744 So. 2d 1095, 1097 (Fla. 5th DCA 1999)¹⁶

Significantly, because the prosecutor’s closing in this case was “sandwiched” between Brooks’ two closings, it knew what defenses he had raised, so it had no basis to make its “he sure didn’t tell the police comment.” This is in contrast to the situation in Morrison v. State, 818 So. 2d 432, 445-46 (Fla. 2002) in which the prosecution’s objected comment came in his initial closing argument -- before Morrison had presented his comments.

Given the context of the prosecutor's remarks, i.e., during the prosecutor's closing argument and prior to defense counsel presenting his closing argument, the prosecutor was merely referring to the fact that defense counsel had not yet presented his argument. It was not a comment on the evidence presented by the defense, nor did it impermissibly shift the burden of proof to the defendant.”

See, also, Morgan v. State, 700 So. 2d 29, 30 (Fla. 2d DCA 1997) (If no alibi defense is asserted, the court errs in allowing any comment on a defendant's failure to call an alibi witnesses.)

Here, the State argued Brooks’ guilt because he had failed to tell the police he knew nothing about any insurance policy.¹⁷ Such an argument led or invited the jury to

¹⁶ The error was harmless, though.

¹⁷ The State’s argument defies logic. If Brooks knew nothing about the policy how could he be expected to tell the police about something of which he was ignorant. With equal consistency, the State could have argued Brooks never told the police about Rachel Carlson’s child support inquiry or that Alexis Stuart

believe the defendant had some obligation to protest his innocence and when he said nothing that silence became an admission of guilt. That was wrong.

B. Brooks is responsible for the acts of Davis.

In Brooks I, this Court specifically rejected the State’s position that Brooks was liable for whatever Davis had done or intended to do that was outside of the conspiracy. “[T]he trial court should not have allowed Davis’s statements to be used against Brooks to establish motive, absent any evidence of a conspiracy at the time the statements were made.” Id. at 773. The State, at Brooks’ second trial, as noted in Issue I, simply failed to recognize that limit. Indeed, it used the same approach in the second trial as it had done in the first one, and it made the same errors in both. This is evident in its closing argument when it said:

Let's back up. There are two theories of first-degree murder. ... Number two, the deaths occurred as a consequence of and while Lamar Z. Brooks was engaged in the commission of aggravated child abuse. Remember this. Every time you see his name in the instructions, every time you see his name under the law of principals, that doesn't just mean Lamar Z. Brooks. That means Lamar Z. Brooks, or his principal, because he is responsible for all the acts of Walker Davis, Jr.

MR. FUNK: Judge, I would object. May we approach? He's not responsible for any acts of principal of Walker Davis, Jr. . . .

MR. ELMORE: Judge he is absolutely responsible for all of the acts of his principal, Walker Davis, Jr. That is the theory of his case. that's the law you're going to instruct them. That's my argument.

THE COURT: Here's what you're going to do. . . . You've already mentioned it several times, but - -

was not Davis’s child.

MR. ELMORE: And I'm going to mention it several more.

* * *

MR. FUNK: Judge, this closing argument, if this case get reviewed, this closing argument by Mr. Elmore corroborates my concern about the admission of the Walker Davis evidence that tends to incriminate Walker Davis, that tends to prove the motive of Walker Davis and not Lamar Brooks, and it's improper. This closing argument is highlighting what I believe to be objectionable evidence in the first place. As a result, I need to move for a mistrial based on the argument.

THE COURT: Okay. Objection noted and motion denied.

(39 R 2385-88)(Emphasis supplied.)

Now, the next morning after [Rochelle Jones'] gone and picked them up in Crestview, Walker Davis calls her in the early A.M, early Thursday, April 25th. What do you think had just happened before he called her? Do you think Karen Garcia had paid him a visit? Do you think he was worried about Rochelle Jones telling where he'd been that night after Karen Garcia came to see him?

MR. FUNK: What Mr. Elmore just did is infer a statement attributed to Walker Davis, who didn't testify in this case, that will implicate Lamar Brooks. I object and move for a mistrial.¹⁸

THE COURT: Objection overruled, motion denied.

* * *

MR. ELMORE: . . .As I was saying, Walker Davis called her that morning early, early. Later that day she was interviewed by Air Force OSI Agent Neil Clough, and she lied. She lied. The first time she was asked, "Know anything about Walker Davis's whereabouts last night?" She said, "No, I don't, I don't know."

(40 R 2435-36)

The State is correct only if Davis acted within the confines of the conspiracy. But,

¹⁸ At defense counsel's insistence, the trial court had prevented the State from asking Rochelle Jones and Thomas Hardin, a friend of Davis, about the substance of what Davis had talked with Jones about the day after the murder (35 R 1579-80, 37 R 1891-92).

in Brooks I, and as corroborated in this case, the conspiracy began sometime Monday and ended with murder of Carlson and Stuart on Wednesday evening. Brooks, therefore, had no liability for what Davis did to coverup the murder, nor can Davis' inquiry into and eventual purchase of an insurance policy be considered this defendant's actions.

Moreover, Davis' alleged conversation with Rochelle Jones on Thursday April 25, occurred after the murder and beyond the scope of the conspiracy. It was, therefore, inadmissible hearsay against Brooks, and denied him his right to confront Davis. The State simply had no basis in law to argue Brooks "is absolutely responsible for all of the acts of his principal, Walker Davis, Jr." (Emphasis supplied.)

C. Other theories of the defense.

For several pages of the trial transcript the State raised possible defense theories and then argued why the jury should reject them, a classic "strawman" argument appellate courts have repeatedly denounced.

Let's see. What other theories of defense might there be? How about the waterbed set up time?

(40 R 2482)

Maybe it's a defense theory that because Melissa Thomas and Nikki Henry and Trooper Tiller and Rochelle Jones didn't see a bunch of blood all over Walker Davis and Lamar Brooks, that, you know, that that means Lamar Brooks is not guilty. . .

Maybe a defense theory will be that this is still all a joke. . .

(40 R 2484)

Maybe it's a theory that Jan Johnson stated some hearsay that the dog alerted on the footprints.

(40 R 2485)

MR. FUNK: Judge, I need to object and approach. ...
Judge, Mr. Elmore is continuing to attempt to shift the burden to the defense, what's the defense theory's going to be, that you didn't hear anybody giving this evidence, or that evidence. It's an improper burden shifting, I object, and I move for a mistrial.

THE COURT: Objection overruled, motion denied

(40 R 2485-86) And the prosecutor kept on with his “maybe its his defense” argument for several more pages (40 R 2487-94, 99-2501). Such an approach was error. Williams v. State, 619 So. 2d 1044 (Fla. 4th DCA 1993); Morgan v. State 700 So. 2d 29, 30 -31 (Fla. 2nd DCA, 1997)(The prosecutor's creation of a "straw man" alibi was clear error); Lane v. State, 459 So. 2d 1145 (Fla. 3d DCA 1984) ("Because the whole issue of alibi was raised by the state, we find the prosecutor's 'straw man' argument ... may have led the jury to believe that appellant had the burden of proving his innocence."). In this case, the State had already heard what claims Brooks had made in his defense before it made its “other defenses” argument, so it knew specifically what it had to address in its closing . Thus, its strawman or possible defense arguments had no justification.

Had the State raised its burden shifting strawman argument once, or maybe twice, the State, on appeal, could claim its lapse amounted only to harmless error. But when page after page after page it argued that maybe this or this or this was Brooks’ defense, the jury got the message: Brooks had no defense, and had presented nothing by way of evidence

or argument to rebut the State's case against him. This repeated strawman attack, particularly when the State knew, because Brooks had the initial closing argument, what his defense was, was error, and prejudicial, reversible error at that.

D. Brooks's "alibi."

As part of its closing argument, the State used a time line of events. Brooks objected to specific parts of it.

Among other things, it says "Tells the Heavy alibi again," etc., etc. We would strongly object to the use and phrase "alibi." Mr. Brooks has not offered an alibi defense in this case. We haven't filed any alibi notice as required by the rules, and what Mr. Elmore is doing, in a sense, is he's setting up an alibi that he knows he's going to be able to knock down via Jack Remus's testimony that, in fact, Lamar Brooks was in Crestview. It's not an alibi. Alibi has got a legal meaning, it's got a legal context. This is not an alibi defense. Mr. Elmore wants to make it that. . . .

THE COURT: Well, don't worry about it. We've already been over that three times. You've objected twice already. . . .I've talked about that being a generic term as far as I'm concerned and not a legal term, the way it's been used, but I note the objection, I think, for the third time. . .

(39 R 2398-99)

Alibi, as defined by Instruction 3.04(a), Standard Jury Instructions (Crim), defines alibi as focusing on "whether defendant was present when the crime allegedly was committed." Webster's Third New International Dictionary says that an alibi is "the plea of having been at the time of the commission or an act elsewhere than at the place of commission." So, whether the State used the word in its "generic" or legal sense missed the point of Brooks' objection: the State, not he, raised the issue that he was somewhere

else other than where he claimed on the night of the murder. Thus, as with the other comments the State has fabricated a defense (and an alibi defense is one that only Brooks could raise, Rule 3.200, Fla. R. Crim. P.) so it could rebut it. As with the other comments, that was error.

Because the whole issue of alibi was raised by the state, we find that the prosecutor's "straw man" argument and actual use of the word "alibi" may have led the jury to believe that appellant had the burden of proving his innocence, . . . , and was, therefore, prejudicial error.

Lane v. State, 459 So. 2d 1145, 1146 (Fla. 3rd DCA 1984) (citations omitted.)

Similarly, in Brown v. State, 524 So. 2d 730, 731 (Fla. 4th DCA 1988), the prosecutor improperly created an alibi defense for the defendant and then commented on his failure to support it with evidence. That amounted to error because "but for the prosecutor's creation of the impression that alibi witnesses existed ... there would not have been even a hint as to the existence of a possible alibi defense." See, also, Bradshaw v. State, 744 So. 2d 1095, 1097 (Fla. 5th DCA 1999)

In this case, Brooks never raised, argued, or even hinted that he intended to raise an alibi defense. The trial court, therefore, should have stopped the State when it argued the issue -- generic or otherwise -- so it could then knock it down.

Of course, the State could agree with Brooks on these arguments, and mournfully regret the prosecutor's excesses, but still argue that its violations of well settled law amounted, at most, to harmless error. Indeed, the appellate court, in some of the cases

Brooks cited above, found just that. E.g., Bradshaw v. State, 744 So. 2d 1095 (Fla. 5th DCA 1999). Others have measured the error under the standards set out in State v. DiGuilio, 491 So. 2d 1129, 1139 (Fla. 1986), and found the State's excesses reversible error.

In this case, the sheer number of improper comments should cry out "reversible error." Other reasons exist. This was and is a very emotional case. Of course, all murders arouse intense feelings, but this one, involving the brutal, senseless murder of a mother and her three month old daughter for the basest of all reasons, greed, sets it well apart from the norm of capital felonies. So, the jury needed little encouragement to find someone guilty, and, suggesting Brooks' guilt for reasons beyond those the law permits could reasonably tipped their deliberations unfairly towards guilt.

It may have done so also because the State had a surprisingly weak circumstantial evidence case. Mark Gilliam, of course, provided the most damning evidence against the defendant, but he had committed perjury at least three times in this case, so the jury could very well have viewed his testimony with a large dose of skepticism, particularly when the prosecutor claimed, in closing argument, that he was just as guilty of murder as Brooks and Walker (39 R 2390-91). Moreover, he knew nothing about the events of Wednesday, ostensibly because he had returned to Ft. Benning the previous day (36 R 1687). Likewise, no one else saw him with or even near Rachel Carlson or her car on the day of the murder. The prosecutor could only present the testimony of a witness with a proven tendency to be

dishonest (33 R 1128-29) who said he saw two men, one of whom was limping, walking away from the car (33 R 1144). It also had Melissa Thomas say that Davis and Brooks showed up at her house, about a half mile from the murder scene, late Wednesday evening. But nothing unusual happened, and she noticed nothing out of the ordinary about them. Significantly, she saw no blood on them (35 R 1534).

If its witnesses could provide no solid evidence that Brooks had murdered Carlson and Stuart, neither could its physical evidence. The State never found Brooks' fingerprints, DNA, blood, or other evidence he had been in Carlson's car. It never produced the murder weapon. Indeed, even the insurance policy, which provided the only motive for Davis to have wanted to commit these homicides was never mentioned during the conspiracy, nor was the need to kill Stuart (36 R 1703-1704).

Thus, it becomes obvious why the State's closing argument strayed so far from the paths of acceptable comment. It had a weak case, it knew it, and if the evidence lacked substance perhaps a strong, though improper, argument would overcome its deficiencies. That strategy worked to produce a guilty verdict at trial, and on appeal it will work to produce another trial for Brooks. This Court should reverse the trial court's judgment and sentence and remand for a new trial.

ISSUE VII

THE COURT ERRED IN REFUSING TO GIVE THE INSTRUCTION
REQUIRED BY SECTION 90.803(18)(e), FLORIDA STATUTES (1997),
THAT THE CONSPIRACY ITSELF AND EACH MEMBER'S

PARTICIPATION IN IT MUST BE ESTABLISHED BY INDEPENDENT EVIDENCE, A VIOLATION OF BROOKS'S FOURTEENTH AMENDMENT RIGHTS.

Mark Gilliam was the State's key witness. Without his testimony, the State's circumstantial evidence case would have collapsed. He provided the crucial evidence of the conversations between Davis, Brooks, and himself that established Brooks' participation in the plan to kill Rachel Carlson and Alexis Stuart. Davis' motive and intent provided the focal point for the State's prosecution against Brooks, but after Brooks I, the only evidence it could introduce to establish that was what Davis had said during the course of the conspiracy. Hence, the State had to show a conspiracy existed between the three men.

Section 90.803(18)(e), Florida Statutes (1996), provided the legal foundation for the State's approach. It allows the jury to hear a statement that is offered against a party and is "A statement by a person who was a coconspirator of the party during the course, and in furtherance, of the conspiracy." Significantly, because of the nebulous nature of conspiracies, such as when they start and end and what is their scope, the evidence code requires the trial court tell the jury they must first determine a conspiracy exists before they can consider a coconspirator's hearsay.

Upon request of counsel, the court shall instruct the jury that the conspiracy itself and each member's participation in it must be established by independent evidence. . . ."¹⁹

¹⁹ The rest of the sentence requires the court instruct the jury "before the introduction of any evidence or before the evidence is admitted under this

In this case, after the State had called Mark Gilliam but immediately before he began to testify about the conversations he had with Davis and Brooks, defense counsel raised the instruction issue:

MR. FUNK: Mr. Elmore's going to introduce some co-conspirator testimony of Walker Davis, and I don't recall how the Court felt about reading an instruction regarding this . . .

(36 R 1629)

The State said that the instruction was unnecessary in this case because "the only time that instruction is necessary is when the state tries to introduce statements made in furtherance before the independent proof of the conspiracy. [Gilliam's] testimony is the independent evidence of the conspiracy, and therefore the instruction is unnecessary." (36 R 1629-30). Brooks then asked the court to "read it," but the court refused. "Okay, I'm not going to give the instruction at this time." (36 R 1630). In fact, it never gave the one required by Section 90.803(18)(e), and that was error. Because it made an error in the applicable law, this Court should review this claim *de novo*.

First, the State simply was wrong to claim that the court could avoid the necessity of giving the limiting instruction because Gilliam's testimony was independent evidence of the conspiracy. Section 90.803(18)(e) requires the instruction, not to minimize some order of proof problem, as the State seemed to believe, but to insure the jury considered only

paragraph."

credible evidence. Romani v. State, 542 So. 2d 984 (Fla. 1989)(“Our present rule of disallowing the statement itself in determining its admissibility helps assure that a defendant is convicted only on credible evidence. Hence, we adhere to the established rule.”). In short, the State needed more than Gilliam’s testimony that a conspiracy existed to prove that a conspiracy existed.

Second, a plain reading of Section 90.803(18)(e) clearly required the court to give the instruction “upon request of counsel.” “The court shall instruct the jury.” Shall means shall, and to say it somehow now means “may” would gut the plain and simple meaning of the statute. C.f., Tascano v. State, 393 So. 2d 540, 540-41 (Fla. 1980) (Rule that a court, upon request, shall instruct the jury on the possible maximum and minimum sentences means just that. “To interpret [Rule 3.390(a), Fla. R. Crim. P.] otherwise would mean that the amendment was meaningless and accomplished nothing.”)

Third, this Court has rejected the State’s approach of using the hearsay to establish the conspiracy. Romani, cited above.

Finally, the inherent non-credibility of Mark Gilliam strongly undercuts any argument against the need for the instruction. Gilliam had severe credibility problems. He lied repeatedly about what had happened, and admitted that he had told the police “whatever they wanted to hear,” (36 R 1747) and that “the truth is that in one way or the other every statement you gave before November 18, 1998, contained a lie.” (36 R 1778). Hence, had the court told the jury about the necessity of independent evidence to establish

the conspiracy before they could consider what Gilliam would testify about, they may very well have discounted his “independent evidence” that supposedly did that. Indeed, this is the very sort of case the framers of Section 90.803(18)(e) had in mind. Without the limiting instruction, we can only assume the jury considered Gilliam’s testimony of what Davis said without ever having determined if the required conspiracy existed. That would have been wrong. This Court should reverse the trial court’s judgments and sentences and remand for a new trial.

ISSUE VIII

THE TRIAL COURT ERRED IN DENYING BROOKS’ MOTIONS FOR MISTRIAL BECAUSE THE STATE REPEATEDLY MENTIONED THAT BROOKS HAD BEEN TRIED BEFORE, A DENIAL OF THE DEFENDANT’S FOURTEENTH AMENDMENT RIGHT TO A FAIR TRIAL.

Twice, during its examination of Mark Gilliam, the State mentioned that Brooks had been previously tried.

MR. ELMORE: Mr. Gilliam, in trial prep -- I'm sorry. In 1998 --

MR. FUNK: I need to move for a mistrial. Mr. Elmore just put in 1998 in trial prep. I don't know if the court reporter got the word prep or not. Now this jury thinks there was a previous trial. He's mentioned previous counsel, and I need to move for a mistrial.

MR. ELMORE: I didn't say a trial happened.

THE COURT: You know with previous testimony and trial, I think it's very harmless at this point in time, although please don't say it again. . . .Motion denied at this point.

(36 R 1727)

MR. ELMORE Now, Mr. Funk asked you about whether your

testimony in April of '98 -- and I may have said March of '98 because the trial begin -- . . .

MR. FUNK: I need to move for a mistrial, Judge, based on Mr. Elmore's comment, violation of the motion in limine and the thing I was most concerned with. We've all been concerned with. I move for a mistrial.

MR. SZACHACZ: This is the second time.

THE COURT: The court is going to have the same ruling as it did yesterday. The number of times that we've mentioned previous testimony, hearings, courtrooms, and so forth, I do not feel like the mention of a trial at this point in time is anything but harmless. I'm going to obviously ask Mr. Elmore not to use that word again.

(36 R 1783)

Evidence that another jury listened to the evidence and found the defendant guilty beyond a reasonable doubt has a devastating effect on the jury when it considers his guilt. Jackson v. State, 545 So. 2d 260, 263 (Fla. 1989). Thus, as the trial court correctly realized, the mention of the earlier trials, even though inadvertent, Id., was still error. Not only was the State wrong for mentioning the earlier proceeding, it was of such seriousness, that, contrary to the court's ruling, it requires a new trial, and the trial court simply abused the discretion given it. References to "previous testimony, hearings, courtrooms, and so forth" does not minimize the error into harmlessness; it accents the seriousness of the problem, which went beyond these two objected to comments. Mendoza v. State, 700 So. 2d 670 (Fla. 1998).

The prejudicial effect upon a jury of testimony that a defendant has been previously convicted of the crime for which he is now on trial is so damaging that it cannot be said beyond a reasonable doubt that a jury would return a verdict of guilty absent the testimony.

Jackson.

Of course, the State may very well argue the State's errors amounted to only harmless error, but it would be wrong. This is, first of all, an unusual case in that we have horrible murders of particularly sympathetic victims, occurring in Crestview, a small community. People remembered them, even six years later, and Brooks alerted the court early on that it should move the trial because of that lingering memory and prejudice against him (25 R 4897). This latent prejudice against him repeatedly surfaced during voir dire, and the court almost as often granted his challenges for cause, most of the time without objection from the State (28 R 46, 68-69, 71, 73-74, 78, 80, 82-83, 84, 90, 104, 110, 113, 115, 154, 161, 164 167, 180, 196, 206, 209, 224, 263, 270, 284, 295, 297, 298, 307, 309-10, 315-16, 328-29, 336, 343, 344, 348, 352, 365, 385-86)

The pervasiveness of the community knowledge of Brooks' first trial came to the court's attention when one member of the venire, Mr. Pakutinski, came forward after hearing several prospective members of the jury talk about Brooks' previous trial.

MR. PAKUTINSKI: Yeah, that lady, Miss King, had said that they had heard that you[Brooks] had been sentenced to life imprisonment and that it was a retrial type situation. . . . And then the guy in front of me, McBride, turned around and he says that you had gotten life imprisonment and that because it was a federal grand jury you were going . . .through this again . . . I was just so surprised because I've been sitting here this whole time expecting this was going to be the first, original trial

* * *

[M]y main concern was the guy sitting in front of me in all honesty he said, don't tell anybody I said it, but he's the one that came up with the

federal charge, this was the second time around. . . .I was very upset. If this was true, that this was - - it either tainted us or it put a thought in my mind, oh, where do I go from here?

So I went back I said I guess you're right, you know. I guess everyone seemed [to] know this was a retrial.

* * *

It was like reluctant acceptance where I went oh, I basically stated to them that I have a hard time with this because I've been here this whold trial trying to stay neutral and impartial.

(28 R 770-73)

The court tried to clean up the problem by excusing several members of the venire, but if everyone knew about the retrial, and at least one of them tried to keep that knowledge a secret, then the prosecutor's comments about it could only have brought to their mind that which the law and common sense said should better have been left unsaid. Because these particularly terrible murders happened in a small community and the venire's memory long, the court's error in overlooking the prosecutor's repeated gaffes was not only error it became reversible error. Green v. State, 688 So. 2d 301 (Fla. 1996)(New trial required in a different venue because the State had charged Green, with the murder of a woman in a small town.) This Court should reverse the trial court's judgments and sentences and remand for a new trial.

ISSUE IX

THE COURT ERRED IN DENYING BROOKS MOTION TO CHANGE THE VENUE OF HIS TRIAL, A VIOLATION OF HIS SIXTH AMENDMENT RIGHT TO A FAIR AND IMPARTIAL JURY.

After the jury had been selected but before the court swore them, Brooks made three

disturbing requests of the court: (1) That it change the venue of the trial,²⁰ (2) That it strike the entire venire, and (3) that it strike the portion of the venire that was “downstairs.” (32 R 926). The court denied each motion (32 R 926). That was error and an abuse of the discretion given it in matters of this type. Gaskin v. State, 591 So. 2d 917 (Fla.1991).

The law in this area is deceptively simple to state. Applying it is much harder. The Sixth Amendment to the United States Constitution guarantees every person charged with a crime a fair trial, free of prejudice. Estelle v. Williams, 425 U.S. 501, 505 (1976). As applied to this case, this means, “Where the evidence presented reflects prejudice, bias, and preconceived opinions, the trial court is bound to grant the motion” to change venue. Manning v. State, 378 So. 2d 274, 276 (Fla. 1979). The trial court did not, and that was error.

At the outset, Brooks acknowledges he did not exhaust his peremptory challenges (32 R 934). Trotter v. State, 576 So. 2d 691 (Fla. 1990). Nor, obviously, did he request any more, nor did he ever say who he would have used them on, and for what reason. Joiner v. State, 618 So. 2d 174, 176 (Fla. 1993) So, is he out of luck on this issue? No, absolutely not. The problems the venire presented transcended those of individual jurors and isolated prejudices. The knowledge of Brooks’ prior trial and the facts of the case permeated that body so that whatever jury he would have gotten would have not been the

²⁰ He had also filed a pretrial motion to change the trial’s venue (25 R 4897).

neutral and unbiased one guaranteed by the Sixth Amendment to the United States Constitution.

The law that has evolved on venue issues has generally encouraged the trial court to deny pretrial motions for a change of venue, but without prejudice. The parties should try to seat a jury and if the question of changing the venue arises during voir dire it “must [be] liberally resolved in favor of the defendant. . .” Singer v. State, 109 So. 2d 7, 14 (Fla. 1959). Granting a change of venue in a questionable case eliminates a possible error and retrial. More important, it insures the defendant received a fair trial by an impartial jury. Id.

How, though, does the court know when a panel is so tainted that a fair jury cannot be found? Juror responses cannot be conclusive on the matter, Irvin v. Dowd, 366 U.S. 717 (1961), because some jurors can be led to say whatever one side or the other may want. Or, as the Third District Court of Appeal said, relying on Irvin v. Dowd, "In this case it is true that the prospective juror ultimately gave affirmative answers lending credence to her ability to render a dispassionate, neutral, and unbiased verdict. On the other hand, that may have been the result of the psychological impact requiring such a declaration." Leon v. State, 396 So. 2d 203, 205 (Fla. 3rd DCA 1981).

Obviously, a broader, totality of the circumstances, test should guide the trial court in evaluating whether the defendant’s Sixth Amendment right to a fair and impartial jury can be had in a particular venue. Coleman v. Kemp, 778 F. 2d 1487, 1538 (11th Cir. 1985); see, Murphy v. Florida, 421 U.S. 794, 799 (1975). Accordingly, this case shows some of

the factors that should go into the mix:

1. The court grants many defense cause challenges because of pretrial publicity or familiarity with the case, a large number of which the State has no objection to. The Court is not particularly liberal in granting cause challenges if the State objects. Rolling v. State, 695 So. 2d 278 (Fla. 1997). That happened here (28 R 46, 68-69, 71, 73-74, 78, 80, 82-83, 84, 90, 104, 110, 113, 115, 154, 161, 164 167, 180, 196, 206, 209, 224, 263, 270, 284, 295, 297, 298, 307, 309-10, 315-16, 328-29, 336, 343, 344, 348, 352, 365, 385-86).

2. The court has to stop the voir dire and conduct an extensive hearing to prevent and eliminate contamination created when prospective jurors talk among themselves about the case. In this case, as shown in the previous issue, several members of the venire knew about Brooks' prior trial, and the court had to stop voir dire eliminate the damage created by what they were saying among themselves. (31 R 768-842) Eventually it excused several members of the panel because of what they had said or heard (32 R 809, 825, 827,834,841).²¹

3. Defense counsel renews his pretrial motion for a change of venue during voir dire, and vigorously argues it. After the State and Brooks had picked the jury, but immediately before the court swore them to service, Brooks renewed his motions to change venue, strike

²¹ It should trouble the court that only Mr. Pakutinski came forward to reveal the widespread talking about Brooks' prior trial. None of the several people he mentioned did so, choosing instead to "Keep it to [themselves.]" (32 R 834)

the venire, and strike a portion of it (32 R 976). Before they picked the alternate jurors, he emphasized the problems he had with this panel, making a lengthy argument about the infections that suffused this venire. “Mr. Broxson has told us now on two occasions that he heard a female voice proclaim their opinion about Mr. Brooks’ guilt that the death penalty would be appropriate . . . and we don’t have the ability to ferret out who it is. . .” (32 R 922) Though he had not exhausted his peremptory challenges, yet, as evident by his renewed efforts to change the venue, he remained unsatisfied with the jury.

4. The trial is set in a small, stable community. Obviously true here and uniquely prejudicial in this case. “It seems we had another woman tell us how she’s walking to, I think, Desi’s, the restaurant, going for lunch, how people are talking to her in the community about, you know, ‘Are your sitting on the jury about the guy that killed this woman and her baby?’” (32 R 922) Another man “came in and was talking about Mr. Brooks’ guilt. . . . [T]his is a small town where people talk.” (32 R 923)

5. The facts of the case lend themselves to notoriety and easily inflame emotions. As mentioned in the previous issue, Brooks a black man and a stranger to Crestview, was accused of plotting to and eventually killing a white woman and her infant daughter for the basest of all motives, greed. In Manning v. State, 378 So. 2d 274 (Fla. 1979), this Court held that Manning's trial should have been moved from the small county in which the crimes occurred and the trial was held. There the state charged Manning, a black from outside Wakulla County, with killing two popular white police officers. All the prospective jurors

knew about the case and would have been hard pressed to resist the community hostility against the defendant. In this case, the selected jurors had similar knowledge and would have faced similar pressures.

6. Prospective jurors give arguably deceptive answers to questions. Prospective Juror McBride apparently wanted to hide his knowledge of Brooks' prior trial from the court (32 R 832)²², and the defendant's lawyer simply "didn't believe a word [Miss Rohling] said. He sought to have her struck for cause, but the State objected, and the court denied his request, forcing him to use a peremptory challenge on her (32 R 935-36).

7. The State has a weak case that hinges on the testimony of a single, highly impeached witness. Manning v. State, 378 So. 2d 274 (Fla. 1980); Green v. State, 688 So. 2d 301 (Fla. 1996). The State's case stands or falls on the testimony of Mark Gilliam. Yet, Brooks not only severely impeached it, the State itself had so much doubt about the truth of his stories that it charged and convicted him of four counts of perjury for the lies he had given in this case.

In this case, near the end of the voir dire, the picture had become so clear to Brooks that he made the extraordinary motions to strike the entire venire and to change the venue

²² Indeed, when pressed by defense counsel, Mr. McBride admitted "It was discussed that it shouldn't be made known." When asked why he had ignored the court's instructions not to talk about the case, he had no excuse (32 R 833). At that point the State had no questions, and the court summarily dismissed him. "It's best that you not serve." (32 R 834)

of the trial. Expecting him to have exhausted his peremptory challenges to preserve a jury selection issue would have been meaningless. The problem Brooks faced went beyond individual jurors. It was systemic. That is, more than simply single jurors were biased against him. As the voir dire, the numerous unchallenged cause challenges, and the problem with knowledgeable venire clearly show, the Crestview community could not have given Brooks a fair trial. They knew too much about the facts of the case and the fact of his first trial. That their recollection should persist six years after the homicides was surprising, but not really. Crestview is a small community where people talk a lot and know one another. Moreover, Brooks, a black person from outside the community (and indeed, outside of Florida), stood accused of killing a white mother and her infant daughter. Those facts would have been hard to forget in Miami, much less in this panhandle community.

Indeed, Brooks' clearly identified the wide scope of the problem and the futility of individual peremptory challenges.

There's poison out there and I don't know how we're going to care it out, and the remedy is to fore on, strike these folks in our fifty-one that we have here, and— well, I have a feeling that if we bring those people down from upstairs and bring in some other folks we're going to have the same problem and that will be a grander waste of time. The best remedy would be to move to a community that's never hear of Mr. Brooks and we don't have any of these issues regarding retrial.

(32 R 923)

Brooks' counsel clearly identified the problem, the inability to pick a fair and impartial jury, and presented the only viable remedy. Under the unique facts of this case, Green,

cited above, the trial court should have done as this Court suggested, Singer, cited above, and have liberally granted his request to move the trial to another locale. Its error in refusing to do so means that this Court must now order another trial. Under the authority of Section 924.38, Florida Statutes (2001), Brooks asks this honorable Court to order he be tried in a venue other than Okaloosa County.

ISSUE X

A DEATH SENTENCE IS PROPORTIONATELY UNWARRANTED IN THIS CASE.

Walker Davis, Jr. received life sentences for committing the first-degree murders of Rachel Carlson and Alexis Stuart. He instigated, planned, and helped carry out those homicides. The State charged him with the same crimes in the same indictment as Brooks, and he faced the same possibility of a death sentence as the defendant. But he was sentenced to life in prison while the court imposed a capital sentence on his cousin (27 R 5258). That utterly more severe punishment for Brooks makes absolutely no sense. During the trial the prosecutor repeatedly hammered that Walker Davis was the driving force behind the murders of Rachel Carlson and Alexis Stuart (32 R 999). He had the motive. He had the evil intent. He wanted the insurance money, and he would kill to get it.

There's more motive and it's more sinister and I'll tell you about it. Walker Davis, Jr, who had a wife and children and a baby, Walker Davis, Jr, went to an insurance agent named Steve Manthey and he purchased an insurance policy on Alexis Stuart. ... He purchased an insurance policy for \$100,000 on Alexis Stuart, the dip – the baby he was going to kill and the mother he was going to kill. \$100,000.

That is the more sinister motive in this case. . . That unsolved murder would have made Walker Davis, Jr, a very wealthy man to some people's eyes, because he was the primary beneficiary of that policy. Not the mother, Rachel Carlson, but Walker Davis, Jr. You'll see that application an policy for insurance

(33 R 1078-79)

For the State, at the sentencing hearing to claim that Walker Davis is now somehow less culpable than Brooks simply defies the facts and what it asserted at the guilt phase of the trial. Under this Court's unique obligation to insure that persons facing a capital sentence receive punishment similar to that of their equally culpable co-defendants, this Court has no choice but to reduce the death sentence of Lamar Brooks to life in prison without the possibility of parole.

This Court conducts two types of proportionality review in capital cases. First, it compares the sentences defendants received in other factually similar cases. It does so because uniformity of sentencing, particularly where they face a death sentence, has significant Eighth Amendment implications. As a corollary, proportionality review also means that in a particular case, defendants who share equal culpability in committing a murder, should receive the same punishment. "When a codefendant is equally as culpable or more culpable than the defendant, the disparate treatment of the codefendant may render the defendant's punishment disproportionate." Sexton v. State, 775 So. 2d 923, 935

(Fla.2000); White v. State, 817 So. 2d 799, 809-810 (Fla. 2002).²³

In this case, the trial court found Brooks more culpable than Walker Davis, his co-defendant.

1. The co-defendant, Walker Davis, Jr, was sentenced to life imprisonment. The defense submits that the fact that the co-defendant, Walker Davis, Jr, was sentenced to life imprisonment and did not receive the death penalty should be considered a non-statutory mitigating factor.

In analyzing the life sentence imposed on Walker Davis, Jr, it is important to acknowledge that although Walker Davis, Jr, participated in the planning and to some extent in the murder of the two victims, the evidence showed that Davis was the front seat passenger of the vehicle and did not deliver the fatal blows to either of the victims. Lamar Brooks stated to Terrance Goodman that on the night of the murders he was the backseat passenger of Rachel Carlson's car. This admission coupled with the testimony of the medical examiner and the bloodstain pattern expert establishes that Lamar Brooks was the occupant of the car who carried out the plan to murder both of the victims.

This Court is satisfied from the totality of the evidence that Lamar Brooks not only participated in the planning of the murders of the two victims, but actually carried out the plan by fatally stabbing each of the victims. Therefore, Lamar Brooks is more culpable than Walker Davis, Jr, in the murders of Rachel Carlson and Alexis Stuart.

The Court gives this non-statutory mitigating circumstance little weight.

(27 R 5258)

In short, Brooks deserves a death sentence because he actually killed Carlson and her child. Davis, the court concluded, had no equal or greater role in their deaths. Two

²³ The standard of review is one of competent, substantial evidence. "A trial court's determination concerning the relative culpability of the co-perpetrators in a first-degree murder case is a finding of fact and will be sustained on review if supported by competent substantial evidence." Puccio v. State, 701 So. 2d 858, 860 (Fla.1997).

problems arise from that conclusion. First, the evidence hardly supports the court's conclusion that Brooks committed the murders. That is, the State presented no competent, substantial evidence that only Brooks killed Rachel Carlson and her daughter. Second, Davis had at least an equal culpability to Brooks, a fact the trial court completely missed in its proportionality analysis.

1. Who killed Rachel Carlson and Alexis Stuart?

At trial, the State proved that Rachel Carlson was stabbed to death and at least one of her killers was behind her when he killed her (37 R 1923-1993). That is, he was in the back seat of the car (37 R 1982). Yet, it proved more than that. It also showed that someone had strangled her, and that person could have been in the front or back seat, or two people could have done so (38 R 2111). As possible, the person in the passenger seat could have choked her before any stabbing began. As the prosecutor said in his direct examination of one of the pathologists:

MR. ELMORE: And a front seat passenger could have begun the attack by strangling and beating Rachel Carlson before the stabbing began, and exited the vehicle before the arterial spurting went on the doorway, correct?"

DR. BERKLAND: That's certainly possible.

MR. ELMORE: And if that front seat attacker was a different person than the rear seat attacker, then we'd have at least two, correct?

DR. BERKLAND: That's correct.

(38 R 2139) Indeed, another examiner agreed that he could not exclude the possibility that more than one knife was used (34 R 1208). And that was as close as the State could come

in the guilt phase of the trial to say who had stabbed either victim. It never put a knife in Brooks' hand, nor Davis' for that matter. It proved the defendant's guilt simply because he was a co-conspirator or aider and abettor. It never established who actually stabbed the victims.

Instead, the prosecution waited until the Spencer hearing to arguably do that. The only testimony that tended to prove Brooks killed Carlson came from the jail house informant, Terrance Goodman, and it was loaded with ambiguity.²⁴

Q All right. Did he ever make any statement to you that indicated that he had killed Rachel Carlson?

A In so many words, yes, but, you know, like he never came directly straight out and told me he did it. But, you know, we're talking, you know, a person assume, you know, he gave me that impression, yes.

Q What words did he say that gave you that impression?

A One night we was talking. I can't really remember what it was about, but I know he used the statement -- I think he was referring to some weed or something he was smoking. He used the statement like the night I offered this broad I was high, or I wasn't high. I can't really remember what statement he was talking about, what exactly he was talking about at the time.

²⁴ Several studies have questioned the reliability of jail informant's testimony, and at least has recommended against their use. See, e.g. , Texas Defender Service Report-A State of Denial: Texas Justice and the Death Penalty, <http://www.texasdefender.org/study/study.html>; Report of the Kaufman Commission on Proceedings involving Guy Paul Morin, <http://www.attorneygeneral.jus.gov.on.ca/html/MORIN/morin.htm>; The Inquiry Regarding Thomas Sophonow, <http://www.gov.mb.ca/sophonow>. In addition to this general ambiguity, Goodman's credibility has serious problems because, as this Court noted in its opinion in Brooks's first appeal, "the State agreed to reduce a first-degree murder charge against him to a third-degree murder without a firearm and agreed to recommend a downward depart from the sentencing guidelines." Brooks v. State, 787 So. 2d 765, 769 (Fla. 2001).

But that's the statement that was made. You know what I'm saying, I took it as it.

Q When he offed the broad?

A Exactly.

* * *

Q During those times when he would be discussing the case, his case for the murder of Rachel Carlson and her infant child, what other type statements would he make that indicated he was responsible for the death of Rachel Carlson?

A Well, to me the two statements that stand out clearly in my head is like the night we'd be talking and he'd say, well, the night I caught these cases or the night I caught these bodies or the night I offed the broad. Those are the only that really stand out in my head. You know, if I sit down and think, think, think about every detail, every conversation, you know, something else might come up. Right now that's the only things that stand out in my head, you know.

(41 R 2756-2759)

Goodman never said Brooks admitted killing Carlson. He could only testify that the defendant gave him the “impression” he had killed someone. His responses remained fuzzy on that point because he had a fuzzy memory of his conversations with Brooks. His recollection became its sharpest only when Brooks said he had “caught the cases,” whatever that means.

Moreover, if what Goodman said about the murder of Carlson was confused and confusing, his silence about any confession from Brooks about who killed Alexis is equally troubling. Thus, the evidence that Brooks killed Carlson and Alexis has so much uncertainty that it is also insubstantial. Terry v. State, 668 So. 2d 954, 965 (Fla. 1996) (Death sentence vacated where “the circumstances surround the actual shooting are

unclear...”)

2. **Davis’ and Brooks’ equal culpability.**

If we assume Brooks actually killed at least Carlson, was his culpability greater than that of Davis’? The trial court found that Brooks being the actual killer was the only distinction that made him more culpable than Davis. That, of course, is an important factor in determining if one defendant is more blameworthy than another. Johnson v. State, 696 So. 2d 317, 326 (Fla. 1997)(Johnson led the attack on the victim, recruited the co-defendants, got the murder weapon, and arranged transportation.). Yet, other factors or considerations this Court has used in other cases show that Davis was as culpable, if not more so, than Brooks.

First, Brooks and Davis have an equal culpability in some respects. Both offered Gilliam \$500 to act as the get away driver (36 R 1643, 1767). Brooks had no history of violence, and presumably neither did Davis. See, Heath v. State, 648 So. 2d 662, 665-666 (Fla. 1994)(Among other factors, Heath had a prior murder conviction to distinguish his culpability from that of his brother/co-defendant.); Scott v. Dugger, 604 So. 2d 465, 468 (Fla. 1992)(Similar criminal records, IQS, age, and culpability)

In most other aspects, however, Davis, not Brooks, exhibited a greater blameworthiness. Only Davis, for example, had the motives and most to gain from killing Carlson and Alexis. He, not Brooks, had insured Alexis for \$100,000 (35 R 1500-1501). Larzelere v. State, 676 So. 2d 394, 407 (Fla. 1996)(wife plans husband’s death to get two

million dollar insurance proceeds and one million dollars in assets.). While he promised to pay the defendant \$10,000 (35 R 1500-1501) for killing Carlson, he obviously would have kept the remainder, which was almost ten times what he had promised to pay Brooks. Davis had obviously thought longer and more seriously about the murders than Brooks.

Beyond being the only one with a motive to kill, Davis first raised the idea of murder and was intimately involved in carrying it out. More than simply providing a reason to murder and being inextricably involved in the planning, he provided the crucial link with its execution. Ferrell v. State, 686 So. 2d 1324, 1331 (Fla. 1998) (Ferrell is integrally involved in the planning and carrying out of the murder and lures the victim to his death.) Indeed, except for Davis, Carlson had no reason to have associated with Brooks, and without Davis, she would not have been lured to her death. Three times Davis, and only he, got her to come to his apartment, so he could get in her car and drive away. He was the focal point, the lynch pin, the keystone for these murders.

Thus, Davis not only was the prime instigator for the murders, he was the one who had laid the foundation for Carlson's and Alexis' deaths long before Brooks entered the picture (35 R 1500-1501). Hazen v. State, 700 So. 2d 1207, 1214 (Fla. 1997)(Co-defendant who got life was prime instigator of murder and was, "therefore, more culpable."). He initiated the murder plot, he was its mastermind, and he kept it going after the repeated aborted attempts (36 R 1673).

Brooks may have been the one who killed but Davis had at least an equal culpability

with him, and more reasonably he deserved greater blame than the defendant. Yet this co-defendant received a life sentence. Cardona v. State, 641 So. 2d 361, 365 (Fla. 1994); Scott v. Dugger, 604 So. 2d 465, 468 (Fla. 1992)(“[L]ittle to separate the joint conduct of the co-defendants which culminated in the death of the decedent.”) Clearly, he could have received a death sentence, but he did not. And however much Brooks may deserve to die, this Court must reduce his death sentences to life imprisonment because when the trial judge imposed a life sentence on Davis it limited the punishment it could impose on Brooks. His culpability was no greater than Davis’ and for that reason, he could not be sentenced to death. In short, but for Davis, Carlson and Alexis would be alive today, and Brooks would a free man. A death sentence for this defendant is proportionately unwarranted.

This Court must reverse the trial court’s sentences of death and remand for them to impose concurrent or consecutive sentences of life in prison.

ISSUE XI

THE COURT ERRED IN FINDING THAT BROOKS COMMITTED THE MURDER OF THE ALEXIS STUART AND RACHEL CARLSON DURING THE COURSE OF AN AGGRAVATED CHILD ABUSE AND THEN USING THAT FACT TO JUSTIFY IMPOSING A DEATH SENTENCE, A VIOLATION OF HIS SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS.

This issue focuses on the problem that arises when the single act giving rise to a charge of aggravated child also is the act that results in the child’s death. Specifically, the State alleged that Brooks committed felony murders on Rachel Carlson and Alexis Stuart

the underlying felony in each homicide being aggravated child abuse. More specifically, Brooks killed the child by stabbing her with a knife. That act -- the stabbing -- not only formed the basis for the aggravated child abuse allegation, it also justified the first-degree murder charge. As argued here, the trial court should have found, under the peculiar facts of this case, that the aggravated child abuse allegation “merged” with the more serious homicide charge. Thus, the State could have proved Brooks’s guilt of first-degree murder only under a theory of premeditation, and in the penalty phase portion of the trial, the court could not have found, as it did (27 R 5254-55), that Brooks committed the murder during the course of an aggravated child abuse. Section 921.141(5)(d), Florida Statutes (2000 Supp.).

A. Some background on felony-murder and narrowing of the issue in this case.

The felony-murder doctrine, while of longstanding validity, nevertheless is a poor cousin to the preferred method of proving the defendant’s intent to commit a first-degree murder: premeditation. “[T]he crime of felony murder is based upon a legal fiction which implies malice aforethought from the actor’s intent to commit the underlying felony” Amlotte v. State, 456 So. 2d 448, 450 (Fla. 1984)(Overton, dissenting.) Indeed, this Court in Gray v. State, 652 So. 2d 552, 554 (Fla. 1995), narrowed its reach by declaring that no

crime of attempted felony murder existed in Florida.²⁵ More specifically, other states and other scholars have united to condemn allowing aggravated battery (of which aggravated child abuse is merely a species) to form the basis for a charge of first-degree felony murder. People v. Ireland, 70 Cal. 2d 522, 75 Cal. Rptr. 188, 450 P. 2d 580 (1969); State v. Jones, 896 P. 2d 1077 (Kan. 1995).

This Court has not followed that logic, relying instead on the legislature to define which felonies elevate a homicide into a first-degree murder. Accordingly, that body provided a small list of particularly dangerous crimes, such as arson, sexual battery, kidnaping, and robbery to define first-degree felony murder. Significantly, aggravated battery, which, by virtue of the violence implicit in its nature, logically should have been among those offenses defining this species of murder, was excluded as one of the underlying felonies, probably for the equally logical reason that the homicide “swallowed” the aggravated battery. LaFave and Scott, 2 Substantive Criminal Law 229.

B. Felony murder and aggravated child abuse.

This changed in 1984 when the legislature added aggravated child abuse, as defined in Section 827.03, Florida Statutes (1998 Supp.)²⁶ (but not aggravated battery) to the list of

²⁵ The legislature, however, overruled the logic of Gray and declared that attempted felony murder was a crime. Section 782.051, Florida Statutes (2000 Supp.).

²⁶ (2) "Aggravated child abuse" occurs when a person:
(a) Commits aggravated battery on a child;
(b) Willfully tortures, maliciously punishes, or willfully and unlawfully cages a

felonies justifying a first-degree felony-murder conviction. Double jeopardy and other legal problems arose from that amendment to Florida's felony-murder statute.

In resolving that constitutional issue, the United States Supreme Court has said that courts should look to the legislature for guidance. Whalen v. United States, 445 U.S. 684 (1980); Albernaz v. United States, 450 U.S. 333, 340 (1981). Accordingly, when faced with a double jeopardy question this Court has focused on Section 775.021(4), Florida Statutes (1998 Supp.), as an aid to discern the legislative intent regarding the felony-murder statute. Boler v. State, 678 So. 2d 319 (Fla. 1996).

Accordingly, in Lukehart v. State, 776 So. 2d 906, 922-23 (Fla 2000), this Court rejected Lukehart's argument that "double jeopardy principles prohibit the dual convictions of felony murder and aggravated child abuse.... Section 775.021(4), Florida Statutes (1995), which provides the test for determining double jeopardy violations, does not prohibit a defendant from being separately convicted and sentenced for felony murder and the qualifying felony."²⁷ Lukehart, however, said nothing about the other fundamental problem inherent in cases such as Brooks' where the underlying felony

child; or

(c) Knowingly or willfully abuses a child and in so doing causes great bodily harm, permanent disability, or permanent disfigurement to the child.

²⁷ While Brooks believes Lukehart had a good, powerful argument, he acknowledges this Court's ruling in the latter's case, at least as to the double jeopardy contention. By doing this, however, he seeks to preserve the issue for future review.

“merges” with the homicide.

C. The felony-murder merger doctrine.

Unlike the double jeopardy analysis, which looks only to the distinctiveness of the statutory elements of crimes, Blockburger v. United States, 284 U.S. 299 (1932), the merger doctrine examines the facts of the criminal episode. Thus, for example, if Jones and Smith get into a fight, and Jones hits Smith with a pipe who later dies, the State cannot use the aggravated battery of Smith as the underlying felony to justify a first-degree felony murder conviction.²⁸ The facts of the aggravated battery merge with those of the homicide.

The merger doctrine—that crimes that are involved in every homicide “merge” with the homicide -- apparently arose in New York because of its overly broad felony murder law. In that state a homicide committed during “any felony” became a felony murder.

Since the phrase “any felony” is broad enough to include even the aggravated assault that is usually involved in any homicide, the result would be that substantially every homicide would constitute first-degree murder.

It was to avoid this result that the New York court adopted the doctrine that the supporting felony had to be independent of the homicide.

* * *

It is obvious that the problem that motivated the New York court to adopt the above rule cannot exist under a statute like Florida’s, which limits the felony-murder rule to homicides committed in the perpetration of specified felonies, not including assault in any of its forms.

²⁸ Of course, aggravated battery is not one of the enumerated felonies the State can use to prove first-degree felony-murder. Section 782.04(1)(a)(2), Florida Statutes (1998 Supp.).

Robles v. State, 188 So. 2d 789, 792 (Fla. 1966).

Thus, a careful reading of Robles reveals that this Court would have given New York's merger doctrine much more serious consideration if Florida's list of felonies included an "assault in any of its forms." Indeed, without referring to Robles, the Fifth District Court of Appeals considered and resolved this problem in the context of an attempted felony murder where robbery was the underlying felony.

We hold, until the supreme court decides otherwise, that an essential element of the underlying qualifying felony cannot also serve as the overt act necessary to prove attempted murder.

Grinage v. State, 641 So. 2d 1362, 1365-66 (Fla. 5th DCA 1994); approved on other grounds, State v. Grinage, 656 So. 2d 457 (Fla. 1995).

Almost 20 years later after this Court decided Robles, the legislature amended Section 782.04(1)(a)(2) to include a special form of assault -- aggravated child abuse -- to the growing list of felonies that qualified a homicide as a first-degree murder. Now, any homicide of a child becomes a first-degree murder because each one will always involve an aggravated child abuse. That is, as in this case, the death of the child is the aggravated child abuse, and the aggravated child abuse makes it a first-degree murder. "All [aggravated child abuses] resulting in death could serve as the underlying felony for felony murder." Mapps v. State, 520 So. 2d 92, 93 (Fla. 4th DCA 1988).

If so, but this Court concludes that the merger doctrine has no relevance to homicide

cases involving aggravated child abuse, it will also have to conclude that it had improperly found defendants in other cases were guilty of lesser degree murders than the first-degree murders they were convicted of committing. Knowles v. State, 632 So. 2d 62 (Fla. 1993); Fisher v. State, 715 So. 2d 950 (Fla. 1998). In Knowles, this Court reduced one of Randy Knowles' two convictions for first-degree murder to second-degree murder. One evening in September 1991, Knowles walked to the trailer next to the one he and his father had lived in and shot a ten-year-old girl who had arrived for a birthday party, and who was a stranger to him. He then shot his father who was sitting in his truck outside his home. Since the killing of the girl, as here, involved an aggravated child abuse -- the shooting -- this Court should have affirmed the conviction for first-degree murder. Instead, relying on well established precedent, Purkhiser v. State, 210 So. 2d 448 (Fla. 1968), it found insufficient evidence to support that conviction and reduced it to second-degree murder.

In Fisher, the defendant and three other men fired at least 35 bullets into a house where a person stayed who had gotten into a fight with Fisher earlier in the evening. One of the bullets struck and killed a five-year-old boy who was sleeping on a couch with his mother. This Court reduced Fisher's subsequent conviction for first-degree murder to second-degree murder because "the proof is clearly sufficient for a conviction of second-degree murder." Fisher, at 952. The shooting of the child was also clearly aggravated child abuse, so this Court should have affirmed the first-degree murder conviction.

Killings that would otherwise be manslaughters would similarly become first-degree

murders. A drunk driver who ran off the road and killed a child would be guilty of first-degree murder rather than manslaughter. Duckett v. State, 686 So. 2d 662 (Fla. 2nd DCA 1996). Indeed, all vehicular homicides in which a child was killed would automatically become first-degree murders. So would all child neglect cases that traditionally are third-degree murders. Hermanson v. State, 570 So. 2d 322 (Fla. 2d DCA 1990)(Third-degree murder convictions affirmed for parents who had refused medical treatment for their child who had died of juvenile diabetes.); McDaniel v. State, 566 So. 2d 941 (Fla. 3d DCA 1990)(Third-degree murder conviction affirmed for father who had starved his son to death.); Maldonado v. State, 697 So. 2d 1284 (Fla. 5th DCA 1997)(Attempted second-degree murder where Maldonado punched a four-year-old girl in the stomach, causing internal injuries); Small v. State, 667 So. 2d 299 (Fla. 1st DCA 1995)(Upward sentencing departure for second-degree murder of child unwarranted); Robinson v. State, 589 So. 2d 1372 (Fla. 4th DCA 1992)(same)

From a slightly different perspective, other good reasons exist to limit the reach of aggravated child abuse felony murder. If every homicide of a child involves an aggravated child abuse then jurors will have only two choices when faced with deciding the fate of a defendant charged with first-degree felony murder: guilty of first-degree murder or not guilty. There will be no lesser offenses. But those extreme choices, particularly when the defendant has obviously done something wrong but certainly nothing so terrible that he should be executed, place jurors in an unenviable position.

While we have never held that a defendant is entitled to a lesser included offense instruction as a matter of due process, the nearly universal acceptance of the rule in both state and federal courts establishes the value to the defendant of this procedural safeguard. That safeguard would seem to be especially important in a case such as this. For when the evidence unquestionably establishes that the defendant is guilty of a serious, violent offense-but leaves some doubt with respect to an element that would justify conviction of a capital offense-the failure to give the jury the “third option” of convicting on a lesser included offense would seem inevitably to enhance the risk of an unwarranted conviction.

Such a risk cannot be tolerated in a case in which the defendant’s life is at stake.

Beck v. Alabama, 447 U.S. 625, 637 (1980).

To minimize the risk that the jury will unfairly convict defendants such as Brooks of first-degree felony murder, this Court should apply the merger doctrine to prevent the overreaching of felony murder in this special instance.²⁹

D. Aggravated child abuse and death sentencing.

If not, then Brooks’ death sentence has serious constitutional problems. That is, not only is he guilty of committing a first-degree felony murder, he will automatically have two aggravating factors (though treated as one, Lukehart, at 925.) that presumptively mean that death is the correct sentence State v. Dixon, 283 So. 2d 1 (Fla. 1973).

Death penalty statutes that have survived constitutional attacks have done so when

²⁹ The State also charged Brooks with the first-degree premeditated and felony murder of Rachel Carlson with the aggravated child abuse of Alexis being the felony. If this Court agrees that the aggravated child abuse and murder merge for the Alexis Stuart murder then it must also reverse the conviction for first-degree murder for Carlson.

they have “genuinely narrowed” the class of first-degree murderers so that only those truly deserving a death sentence receive it. Zant v. Stephens, 462 U.S. 862 (1983).

In Lukehart, this Court relied on Blanco v. State, 706 So. 2d 7 (Fla. 1997) to reject the defendant’s claim that every murder of a child automatically had, as an aggravator, that it was committed during the course of aggravated child abuse. Yet, the underlying felony in Blanco was armed burglary, which was independent of the murder, whereas the acts giving rise to the aggravated child abuse allegation are in this case the same ones that give rise to the murder charge. Hence, every child abuse that ends in a homicide will convert it into a first-degree felony murder with at least one aggravator, the committed during the course of an aggravated child abuse aggravator, automatically applicable. Florida’s death penalty scheme does not narrow the class of child abusers eligible for a death sentence, which is the critical type of narrowing required when the acts giving rise to the aggravated child abuse are the same ones justifying the murder. That is, to genuinely narrow the class of convicted murderers eligible for a death sentence, when they have also committed an aggravated child abuse, this Court must conclude that the acts giving rise to the child abuse cannot be the same ones that resulted in the youth’s death.

Thus, not only would the defendants in the cases cited above have been convicted of first-degree murder, they would have automatically been sentenced to death, assuming he or she was still in shock from learning the likelihood of receiving such punishment and had offered nothing in mitigation. This Court should find such harsh results unlawful or

unconstitutional. It should reverse Brooks' convictions for first-degree murder and sentences of death.

ISSUE XII

THE TRIAL COURT ERRED IN REFUSING TO REQUIRE THE JURY TO INDICATE IF THEY FOUND BROOKS GUILTY OF FELONY MURDER AND WHICH AGGRAVATING FACTORS THEY FOUND AND BY WHAT VOTE, A VIOLATION OF HIS SIXTH AMENDMENT RIGHT TO A TRIAL BY JURY AND THE EIGHTH AMENDMENT RIGHT AGAINST CRUEL AND UNUSUAL PUNISHMENTS.

By the time this Court considers Brooks' case, it will probably have decided most of the issues arising from the United States Supreme Court's decision in Ring v. Arizona, ___ U.S. ___, 122 S. Ct. 2428 (2002). Appellate counsel will, therefore, keep this argument mercifully short.³⁰

In Ring and the companion case, Harris v. United States, No. 00-10666 (U.S. June 24, 2002), the nation's high court found that the Sixth Amendment's guarantee of a jury trial in criminal cases meant that the jury, not the judge determined the limits of the punishment that could be imposed. In the noncapital context, the trial judge, who has traditionally been the exclusive sentencer could impose whatever sentence it deemed appropriate as long as it stayed within the bounds set by the jury's verdict. Harris.

In the capital context, because of the severe finality of a death sentence, the Eighth Amendment's proscriptions required the jury to have a voice in what sentence the defendant

³⁰ Which is lawyer talk for less than 20 pages

could face. Most states give the jury the exclusive right to impose a death sentence. Those will withstand a Sixth Amendment Ring scrutiny. The judge only sentencing scheme used in Ring has not. Florida, as the U.S. Supreme Court recognized in footnote 6 of Ring, has a hybrid scheme. That is, “Florida has essentially split the weighing process in two.” Espinosa v. Florida, 505 U.S. 1079 (1992). The jury makes a recommendation that the judge, the actual sentencer, must give great weight. Indeed, only if no reasonable person could agree with that verdict can the court override it. Tedder v. State, 322 So. 2d 908 (Fla. 1975). Thus, the question arises of whether Florida’s unusual sentencing scheme complies with the Sixth Amendment’s declaration that the jury has to have a determining role in the maximum punishment the court can impose.

In this case, Brooks asked the court to require several findings from the jury that would have enhanced the reliability of the jury’s death recommendation. Notably, he wanted to jury to return specific findings as to

1. Whether it found Brooks guilty of first-degree murder because the homicides were committed during the course of a felony (25 R 4845 39 R 2317, 2328).³¹
2. What aggravating factors it found and by what vote (25 R 4856).

The court denied those requests (See 39 R 2328), but Ring requires more than a simple jury recommendation of life or death. What Brooks requested was at least the

³¹ He also asked that the State be precluded from prosecuting under a felony murder theory because it had not alleged it in the indictment (25 R 4842-44).

minimum needed to satisfy the demands of that case.

That is, both the Ring court and this Court have declared that the aggravating factors “define those crime ... to which the death penalty is applicable in the absence of mitigating circumstances.” State v. Dixon, 283 So. 2d 1, 9 (Fla. 1973). They differ from guilt phase elements in that the jury need not find each element proven beyond a reasonable doubt in order to return a death recommendation. Indeed, this Court has declared that it need find only one aggravator to justify a death sentence. Id. Moreover, while each aggravating factor must be proven beyond a reasonable doubt, Id., only a bare majority of the jurors need to recommend death.

Thus, let us consider the problems that arise in this case where the jury found, by a vote of 9-3 that Brooks deserved to die for the murder of Rachel Carlson. As to that homicide, the court found five aggravating factors, one of them being that the defendant committed the murder during the course of an aggravated child abuse, the same crime it used to prove he had committed the homicide during the course of a felony murder (27 R 5250-55). Without the requested specific findings requested by Brooks, the jury could have voted for the aggravators as follows:

Aggravator #1 - 4 jurors
Aggravator # 2- 2 jurors
Aggravator # 3 - 3 jurors
Aggravator # 4 - 5 jurors
Aggravator # 5 - 1 juror

Significantly, although nine of the jurors recommended death, no majority would have

agreed that any specific aggravating factor justified a death sentence. Some may have thought aggravators #1 and #3 were enough, another group, aggravators # 2 and #4 permitted death. Maybe only one juror believed only aggravator #5 was sufficient to allow a capital sentence. The point is, that without any specific findings by the jury we simply have no idea if a majority agreed that the same aggravating factors outweighed the mitigation and justified death. For all the jury's recommendation shows, the jury may have been badly splintered about what aggravators applied, but at least 9 of them agreed that whatever ones they were they warranted a death sentence. If so, Brooks was denied his Sixth Amendment right to a jury determination that he deserved to die. If the jury's vote is to have legitimacy, at least seven of the jurors must agree that the same aggravators outweighed whatever mitigation was present. Brooks' requests would have met that constitutional requirement, and the court erred in denying them. This Court should reverse the trial court's judgments and sentences and remand for a new trial.

ISSUE XIII

THE COURT ERRED IN FINDING THAT BROOKS COMMITTED THE MURDER OF ALEXIS STUART FOR PECUNIARY GAIN AND IN A COLD, CALCULATED AND PREMEDITATED MANNER, A VIOLATION OF HIS EIGHTH AMENDMENT RIGHTS.

In finding death an appropriate punishment for the death of Alexis Stuart, the court found Brooks committed the murder for pecuniary gain, and in a cold, calculated, and premeditated manner without any pretense of legal or moral justification. That was error

because the State presented no evidence to support a finding either aggravator applied to the child.

1. No evidence exists that Brooks killed for money.

As to the pecuniary aggravator applying to Brooks, the court found:

2. The capital felony was committed for pecuniary gain.

The only motivating reason for Brooks to murder Alexis Stuart was to be able to collect the \$10,000 promised by Walker Davis, Jr. for the murder. The contract-style execution by which the Defendant carried out this murder proves beyond a reasonable doubt that Alexis Stuart's murder was committed for pecuniary gain.

(27 R 5254)

If "the only motivating reason for Brooks to murder Alexis Stuart" was the \$10,000, the State should have presented evidence to support that finding. It did not. To the contrary, Mark Gilliam, the only State witness who could have testified about the details of the conspiracy, specifically said no insurance money was ever discussed, and more damning, Alexis Stuart and the necessity to kill her was never mentioned.

Q. What about the baby? Did you ever tell them [the police] that there was a plan to kill the baby?

A. No, because I never knew about the baby?

* * *

Q. Now, had either Walker Davis, Jr. or Lamar Brooks, in all these discussions about shooting the lady, said anything about killing the baby?

A. No.

Q. Had either one of them said anything to you about there being a \$100,000.00 insurance policy on the life of the baby that would pay Walker Davis, Jr. if she died?

A. No, he didn't, he never mentioned that.

(36 R 1703-1704)

2. **No evidence exists that Brooks killed Alexis Stuart in a cold, calculated, and premeditated manner.**

Davis may have promised Brooks \$10,000, but there is no evidence he killed Stuart as part of the plan to murder Carlson. Likewise, that Brooks had participated in two failed attempts to kill Carlson does not mean he also failed twice to kill Stuart (27 R 5255). Indeed, when questioned, Mark Gilliam again undercut the Court's finding .

MR. ELMORE: Now, had either Walker Davis, Jr. or Lamar Brooks, in all these discussions about shooting the lady, said anything about killing the baby?

MR. GILLIAM: No.

MR. ELMORE: Had either one of them said anything to you about there being a \$100,000.00 insurance policy on the life of the baby that would pay Walker Davis, Jr. if she died?

MR. GILLIAM No, he didn't, he never mentioned that.

(36 R 1704)

With no record support for its conclusion, the trial court simply erred, as it did with the pecuniary gain aggravator, in concluding, as to the murder of Alexis Stuart, that Brooks killed her in a cold, calculated, and premeditated manner.

ISSUE XIV

THE COURT ERRED IN GIVING THE JURY'S DEATH RECOMMENDATION GREAT WEIGHT BECAUSE, IN LIGHT OF THE EXTENSIVE MITIGATION PRESENTED AFTER IT HAD RECEIVED THAT RECOMMENDATION, IT DESERVED LITTLE OR NO CONSIDERATION, A VIOLATION OF THE PROCEDURE SET FORTH IN SECTION 921.141, FLORIDA STATUTES, AND THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The guilt phase portion of Brooks' trial ended on January 23, 2002, when the jury returned its guilty verdicts (41 R 2605). The penalty phase began a week later, but before it started, counsel for Brooks told the court that his client wanted to waive presenting any evidence or argument in support of a life sentence (41 R 2613). Relying on this Court's opinion in Koon v. Dugger, 619 So. 2d 246 (Fla.1993), and Chandler v State, 702 So. 2d 186 (Fla.1997), counsel told the court what mitigation he had found (27 R 5193-96). Specifically, he said he would have told the jury about the life sentence Walker Davis had received. "Certainly we would put on as mitigation that Walker Davis received a life sentence and arguing that disparate treatment of an equally culpable co-defendant that he ought to receive life since Walker Davis did." (41 R 2614). Counsel also told the court he had planned to present several jury instructions, but "that as a result of Mr. Brooks' decision I'm not going to propose to you." (41 R 2617)³² In addition, Brooks told his lawyer to present no argument to the jury or judge in support of a life sentence (40 R 2619). In particular this meant he would say nothing regarding any statutory or nonstatutory mitigators and stand silent when the State argued for his execution (41 R 2622).

The court and the State then extensively questioned the defendant about his decision, trying to determine if it was knowingly and voluntarily made (41 R 2642-51). Although the court never explicitly found that Brooks had freely, voluntarily and knowingly made the

³² He nonetheless told the court of the several instructions he would have offered (41 R 2628-33, 2638-2642)

decision to waive the presentment to the jury of mitigation evidence in this case that is the only conclusion one can draw from the dialogue he had with the defendant.

Moreover, at the Spencer hearing, defense counsel presented no memorandum or additional evidence in favor of a life sentence (41 R 2625).³³ The State, on the other hand, vigorously argued its case in aggravation, which included presenting the testimony of Terrance Goodman that ostensibly identified Brooks as the one who stabbed Carlson (41 R 2756-59). It also argued against most of the proposed mitigation Brooks' counsel had suggested (41 R 2762-67).

When we look at the sentencing proceedings, the inescapable conclusion emerges that the trial court fundamentally erred in finding Brooks deserved to die. Specifically, in applying two procedures this Court has fashioned to remedy specific capital sentencing problems, it created a situation in which the jury's recommendation of death deserved far less than the great weight this Court has said such verdicts deserve. Then, without any valid guidance from this voice of the community, the court sentenced Brooks to death. In doing this, the trial judge violated Florida's death penalty statute, Section 921.141, Florida Statutes, and the proscriptions developed under the Eighth Amendment to the United States Constitution. As such, its error amounts to a misapplication of a rule of law, and it is subject to a de novo review by this Court.

³³ Counsel did, nonetheless, argue against admitting victim impact evidence (41 R 2626-27)

This novel argument arises directly and by implication from opinions of this Court and the United States Supreme Court. First, the overarching consideration in this area of the law focuses on the reliability or justness of imposing a capital sentence on a defendant found guilty of committing a first-degree murder. See, e.g., Simmons v. South Carolina, 512 U.S. 154, 172 (1994)(Souter, concurring.) To enhance the confidence of a finding of death, this Court has created an additional procedure the trial court must follow after it has received the jury's recommendation but before it actually imposes sentence. Spencer v. State, 615 So. 2d 688, 690-91 (Fla. 1993). In Grossman v. State, 525 So. 2d 833 (Fla. 1988), this Court required the trial court to prepare a written order before it orally pronounced punishment. In Spencer, the prosecution and the trial court had an ex parte discussion regarding how to comply with that case. The trial court had also drafted a sentencing order before the final hearing in which counsel would present arguments about why his client should be spared a death sentence. It thus appeared that the trial court had made up its mind about what punishment to impose without regard to any last arguments the defendant might make. "[W]e did not perceive that our decision [in Grossman] would be used in such a way that the trial judge would formulate his decision prior to giving the defendant an opportunity to be heard." Spencer, at 690. Hence, to give the defendant the utmost due process, in this case the right to be heard, the Court created the Spencer hearing.

Second, unlike most states that have capital punishment, in Florida we have split

capital sentencing between the jury and judge. Espinosa v. Florida, 505 U.S. 1079 (1992). The former, after hearing the relevant evidence and law, recommends whether the defendant should live or die. The latter, giving that vote "great weight," then imposes the appropriate sentence. Tedder v. State, 322 So. 2d 908 (Fla. 1975). There is, therefore, an interdependence between the judge and jury. In Espinosa, the United States Supreme Court recognized that symbiotic existence by holding that the jury, as a co-sentencer, had to have correct statements of the law in order for its recommendation to receive great weight. Without that the jury's recommendation was suspect, and the judges sentence unconstitutional.

Third, this Court has created a procedure to use whenever defendants like Brooks have decided they would rather die than spend the rest of their lives in prison. Koon v. Dugger, 619 So. 2d 246 (Fla. 1993).

Fourth, when a sentencing jury makes a recommendation without considering or being given the mitigation the sentencing judge considered, the latter can give its verdict no weight. Muhammad v. State, 782 So. 2d 343 (Fla. 2001). If defendants have not waived their right to a jury recommendation, they have the accompanying right to the community's input into whether they should live or die. This, by implication, means the jury must have more than accurate statements of the law. Espinosa. They must also have heard the relevant mitigating evidence.

This case, at least to this point, thus becomes indistinguishable from Muhammed.

Because Brooks refused to present any evidence or argument in mitigation, his jury, like the one in Muhammed, never fulfilled its statutory sentencing role of rendering a valid verdict. Id. The trial court, therefore, should have ignored its recommendation when it determined if Brooks should live or die. But it could not, and when it announced that it would give their verdict great weight (41 R 2763), it did not. Because Brooks never waived his right to have the voice of the community fairly pass on whether he should live or die, the court could not ignore what they recommended. Yet, according to Muhammed, it had to do so. To resolve this problem, this Court can only conclude that the trial court erred in keeping the mitigation from the jury, and that distorted their recommendation.

So, what should the court have done? In Muhammed, this Court said "[W]e have now concluded that the better policy will be to require the preparation of a PSI in every case where the defendant is not challenging the imposition of the death penalty and refuse to present mitigation evidence." If the PSI raises the possibility that significant mitigation exists that requires further proof, the court can call witnesses to establish it, or appoint special counsel to present the case for mitigation. Id. The Muhammed proceeding, however, fails to adequately protect or realize the defendant's right to have the jury, one of the co-sentencers, recommend whether he should live or die. Specifically, even though Brooks waived his right to present mitigation, he never gave up his right to have a jury recommendation (5 R 27).

Of course, as this Court recognized in Muhammed, that verdict would have little

weight because no mitigation had been offered. Yet, in this case, there obviously was evidence of ameliorating value, the most significant being, of course, Walker Davis' life sentence. The absolutely critical point is that the jurors should have, and under the facts of this case, they could have had known of the mitigation trial counsel proffered at the Koon hearing. The trial court erred, therefore, in considering the mitigating evidence as part of the Spencer hearing. It should have required counsel to present his evidence before the jury as well. Had he done so, the its recommendation would have had greater legitimacy.

Moreover, the jury, when presented with the mitigation, may have found the mitigators the court rejected or gave little weight to, and have given the case for life more weight than that for death. After all, Davis' life sentence is extraordinarily powerful mitigation because it hardly seems fair to let the instigator and driving force behind these murders get life while executing a man who, until four days before the murders, had never known of Carlson or Stuart. Hence, the jurors may have recommended the court impose a life sentence out of a belief that equal guilt requires equal punishment. Had it done so, the trial court's independent analysis would have been far different than the evaluation it made. Instead of following the jury's death recommendation it would have had to have examined the record to discover if no reasonable person would have voted for life. That is a very difficult level of proof to satisfy, and as this Court's recent history has shown, it has become a burden almost impossible to carry on appeal. Indeed, in light of Ring v. Arizona, No. 01-488 2002 WL 1357257 (U.S. June 24, 2002), and Harris v. United States, No. 00-10666 (U.S. June

24, 2002), if the jury has authorized a maximum punishment of only life in prison, the court could have only imposed that punishment.

Thus, the court improperly used the Spencer hearing to consider the case for mitigation. That proceeding was never intended to be the major vehicle for a defendant to present a case for life. The court here should have required Brooks' lawyer or special counsel to have presented the case for mitigation to the jury for them to have considered, as Section 921.141 plainly requires. That it denied the jury the information it considered was error.

Instead of splitting the sentencing decision between the judge and jury, as Section 921.141 contemplates, this Court has recognized, Tedder, and the United States Supreme Court has acknowledged, Espinosa, the trial court assumed sole responsibility for determining that Brooks should die. That law, however, allows the judge sentencing in a capital case only if the defendant has waived his right to a jury recommendation. Brooks never did that. The court, therefore, had no right to impose a death sentence without considering their vote and giving it great weight. But, to give it such respect required that body to have had the mitigation available to the trial court.

This Court should, therefore, reverse the trial court's sentence of death and remand for a new sentencing hearing before a jury.

CONCLUSION

Based on the arguments presented here, the Appellant, Lamar Brooks, respectfully

asks this honorable Court to (1) Reverse the trial court's judgments and sentences and remand for a new trial, (2) Reverse the sentences of death and remand for a new sentencing hearing, or (3) Reverse the sentences of death and remand for imposition of a life sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to **CURTIS FRENCH**, Assistant Attorney General, The Capital, Tallahassee, FL 32399-1050, and to appellant, **LAMAR BROOKS**, #, #A-124538, Florida State Prison - Main Unit, 7819 NW 288th Street, Raiford, FL 32026, on this date, May 29, 2003.

CERTIFICATE OF FONT SIZE

I HEREBY CERTIFY that, pursuant to Fla. R. App. P. 9.210(a)(2), the foregoing brief was typed in Times New Roman 14 point.

DAVID A. DAVIS

IN THE SUPREME COURT OF FLORIDA

LAMAR BROOKS,

Appellant,

v.

Case No. **SC02-538**

STATE OF FLORIDA,

Appellee.

_____ /

APPENDIX TO INITIAL BRIEF OF APPELLANT

APPENDIX

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A Copy of papers from Walter Davis' cast