

IN THE SUPREME COURT OF FLORIDA

LAMAR Z. BROOKS,

Appellant,

v.

CASE NO. **SC02-538**

STATE OF FLORIDA,

Appellee.
_____ /

ON APPEAL FROM THE CIRCUIT COURT
OF THE **FIRST** JUDICIAL CIRCUIT,
IN AND FOR **OKALOOSA** COUNTY, FLORIDA

REPLY BRIEF OF APPELLANT

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SECOND JUDICIAL CIRCUIT

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REPLY BRIEF OF APPELLANT

PRELIMINARY STATEMENT

References to the State's Answer Brief shall be as "Appellee's Brief" followed by the appropriate page numbers. All other references shall be as set forth initially.

ARGUMENT

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 SECTION 90.803(18)(e), FLORIDA STATUTES, AND THE SIXTH AMENDMENT'S CONFRONTATION CLAUSE

On page 21 of its brief, the State says: "Contrary to appellant's claim, the Brooks [v. State, 787 So. 2d 765 (Fla. 2001)] Court never addressed the admissibility of the life insurance policy itself. Rather, the opinion was limited to hearsay statements." Well, yes, this Court did address the admissibility of not only Steve Mantheny's (the insurance agent's) statements but also the insurance policy Davis signed. "At trial, Brooks objected not only to Mantheny's testimony but also to the introduction of the actual life insurance policy" Id., at 772. This Court found that what Mantheny said and the insurance policy were statements made outside the time frame of the conspiracy, and hence inadmissible. "There is simply no record evidence even suggesting that at the time most of the above statements were made any conspiracy existed." Id. at 772-73.

The State cites three cases on pages 21 and 22 of its brief to support its argument that it could present evidence of Davis' motive to prove Brooks'.

Strickland v. State, 165 So. 289 (Fla. 1936); State v. Escobar, 570 So. 2d 1343 (Fla. 3d DCA 1990); Ellis v. State, 778 so. 2d 114 (Miss. 2000). Brooks has no argument with the contention in the Florida cases that the State can show one conspirator's motive to establish another's. The problem arises in how the State can do that, and that is the issue presented here. Sure the State could introduce evidence of Davis' motive but only with what was said or done during the course of the conspiracy. That is what this Court held in Brooks I, and none of the Florida cases cited refute that holding.

In Ellis, the Mississippi Supreme Court held that a \$10,000 check a co-defendant received for the death of the person Ellis murdered was "admissible to show motive" of the co-conspirator. It was simply further circumstantial evidence that a conspiracy existed. While that case may express Mississippi law, this Court rejected it in Brooks I. Section 90.803(13)(e) simply limits the admissibility of Davis' statements of his motive to those made "during the course of the conspiracy and in furtherance of it." Id. at 773.

On page 23, the State says, "Moreover, the policy was relevant to establish the motive for the murder." Ok, but whose motive? The State on appeal is making the same mistake it made in Brooks' first and second trials. It wants to impute Davis' motive to kill Rachel Carlson onto Brooks, and it cannot do that using

evidence of that desire outside the conspiracy time frame. Moreover, what evidence of the motive that exists within the conspiracy specifically refutes the State's need for the insurance evidence. Mark Gilliam pointedly denied that Brooks and Davis ever talked about the insurance policy (36 R 173-1704). No problem, the State argues because even if Brooks was ignorant of the insurance policy, the State claims we can infer that in light of Davis' "limited financial resources" Brooks was aware of the policy. We can then, contrary to Gilliam's testimony, further infer that "the jury would rationally decide that the insurance money was the source and may reasonably conclude that Davis informed Brooks of this." (Appellee's Brief at p. 23) In short to reach the State's conclusion we must stack one inference on top of other inferences, which is clearly impermissible. Kennedy v. State, 781 So. 2d 421, 423 (Fla. 4th Dist.,2001); Graham v. State, 748 So. 2d 1071, 1072 (Fla. 4th DCA 1999)("An impermissible pyramiding of inferences occurs where at least two inferences in regard to the existence of a criminal act must be drawn from the evidence and then stacked to prove the crime charged; in that scenario, it is said that the evidence lacks the conclusive nature to support a conviction.")

On the same page the State minimizes Brooks' confrontation argument by noting that "Defense counsel had every opportunity to cross-examine the insurance

agent and did so. (T 35 1502). That misses the point. The constitutional problem arose not because Mantheyny took the stand, but because Davis did not.

On the next page it says the policy was admitted under the business records exception. Well, so what? It still has to be relevant, and unless Davis bought the policy during the course of the conspiracy it never should have been admitted. That is, the business records exception does not trump the confrontation problem. Only the co-conspirator exception, Section 90.803(18)(e) does that, and for it to apply to the statement, the hearsay must be uttered during the course of the conspiracy. Here neither Mantheyny's testimony nor the policy were, so they were inadmissible against Brooks.

The State, on the same page, says "Appellant actually seems to be more focused on the prosecutor's arguments regarding the policy more than its pure admissibility. Once admissible evidence is admitted, the prosecutor may make argument and make reasonable inferences about that evidence." Not so. It can only make arguments within the limits set by the court when it admitted the hearsay. In this case, the court found the evidence admissible only "to show where that source would come from for the money." (33 R 1043). Yet, the State quickly exploited that opening and immediately used the insurance evidence to prove Davis' motive and Brooks' intent. That was impermissible, as this Court clearly

held in Brooks I. As this Court also concluded, the errors made on this issue forced it to order a new trial. This Court can only reach the same result this time as well.

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.

The State, on page 26 of its brief, asserts that this issue is only “partially preserved” because “[Brooks] did not assert a lack of knowledge argument.” That is, Brooks never claimed Ms. Madero did not know the voice on the telephone was Rachel Carlson’s. This is what defense counsel said: “I’m just realizing that this is a phone call only. I would object that she cannot—the State cannot prove that it was Rachel Carlson that was on the phone that made this call. All she knows is somebody who said she was Rachel Carlson made a phone call and gave her information.” (35 R 1409). In other words, Ms. Madero did not know that the person whom she talked to was Rachel Carlson. This issue is preserved.

As to the merits, the State has precious few facts to deal with and ignores those it cannot refute. It does this by creating a problem of child support payments. (Appellee’s Brief at p. 27) There is, however, absolutely no evidence Davis, much less Brooks, ever considered this a “problem.” There is no proof from which the State can make a “reasonable inference that the mother had discussed child support payments with Davis.” Indeed, it points the other way. That is, Davis denied the child was his (35 R 1458), which DNA results confirmed (38 R 2049). Child support was no problem, and there is absolutely no evidence or reasonable inference from which anyone except the State can conclude that Davis “knew that child support was a problem for him.” Instead, we have only speculative hunches.

This argument, of course, presumes that Davis’ motive had relevance to Brooks’ motive, which is the same problem the State had in Brooks I, and which dominated the defendant’s second trial and appeal. See Issue I.

The State, on page 28 of its brief, then claims that the information the caller gave established her as Rachel Carlson. It never bothered, however, to show that the Social Security Number, the address, the phone number, date of birth, and race of the caller were those of Rachel Carlson. Social Security numbers may not be

commonly known, as the State claims, but there is no evidence that Ms. Madero got Ms. Carlson's number from the caller.

In short, the State failed to lay the required predicate to justify admitting Ms. Madero's testimony, and that failure is something for the court to rule on, not the jury to consider.

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

The State's argument on this issue focuses on problems Brooks never raised, and indeed, conceded. "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)(See Initial Brief at page 30.) It dwells excessively on the statements found on the notes as not being hearsay, and if so, admissible anyway. Besides making some absolutely outrageous statements,¹ its argument ignores Brooks' claims. First, the State never

¹ For example, on page 32 of its brief, the State says: "When physical evidence proves the statements were made, i.e. writings and the source of those

showed, or made any effort to show, who wrote the notes and when. We assume Davis wrote at least part of them because they were found in his cast, but there is no evidence to support that assumption. Nevertheless, assuming Davis wrote at least some of the comments, who wrote the others? Brooks? Gilliam? Others? Maybe, but the point is we do not know. As significant, we have no idea when any of them were written.

The State at trial claimed the notes were written by different people, and the State, on appeal, willingly accepts that claim. “Moreover, according to the prosecutor, the notes contain two different handwriting.” (Appellee’s brief at p. 31). But as pointed out in the Initial Brief at pages 29-30, that is the State’s claim, and no evidence supports it.

As to the confrontation claim, the State says nothing, or tries to deflect that issue by couching it as nothing more than a hearsay argument. Well, hearsay is part of the problem, but that constitutional protection has more concerns than simply making the hearsay rule part of the nation’s fundamental law. California v. Green, 399 U.S. 149 (1970).

statements, the rule against hearsay should not be applied.” The mind boggles at the possibilities. Trials by affidavit. Press clippings prove issues. Defendants who enter written pleas of not guilty are instantly freed.

The State, in a long footnote on pages 33 and 34 of its brief wants this Court to reconsider its holding in Brooks I, that the conspiracy in this case ended with the murder. Appellate counsel for Brooks frankly is torn how to respond to this issue. His first thought was to file a motion to strike the footnote. He has rejected that approach in favor of a short rant.

The State, while obviously upset with the ruling at the trial failed to preserve the issue for this Court to again review. It never filed a cross-appeal in this case, which is the way its displeasure should have been brought to the Court's attention. Doing so through a footnote is not the way to raise issues. This is, after all, Brooks' appeal, not the States', and if it has problems with rulings made by the trial court the legislature and this Court have provided it with the authority and means to present its complaints to this Court. It has ignored that way of raising issues, so Brooks will not respond to the merits of the State's footnote argument/issue because it is not properly before this Court.

As to the harm of erroneously admitting the notes, the State says that while they established the agreement to lie and the conspiracy, the jury already knew about them anyway. Yet, how did they know this? From Mark Gilliam, the admitted perjurer. As the State asked, "Why should you believe Mark Gilliam? . . . [T]he note from the cast." (40 R 2511-12). If the notes were as important as the

State claims it is, simply because it is a writing, (Appellee's brief at page 32) then the notes were of supreme significance. Under the State's rationale, admitting them for the jury to consider simply had to be harmful error.

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 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

The State, on page 38 of its brief claims that it "was using this witness to establish that Brooks was in Crestview at the time and place of these murders, not that he changed clothes." Not so. Brooks raises this issue specifically because the State told the court it wanted Melissa Thomas to testify that Brooks "changed into shorts."

I've put on a witness who's testified, Melissa Thomas, she's testified they were at here house, but she also testified, contrary to her statement to Mr. Haley, that Lamar Z. Brooks did not change into shorts 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)

The State, on page 38 of its brief, says that Brooks' reliance on James v. State, 765 So. 2d 763 (Fla. 1st DCA 2000), is misplaced. It is, it claims, because the First DCA opinion was "wrongly decided." It provides no reasons why the First DCA erred. Instead it merely asserts "Many other district courts disagree with the reasoning in James. Well, actually, no other court does. Certainly the Fourth District Court of Appeal did not in Bateson v. State, 761 So. 2d 1165, 1170 (Fla. 4th DCA 2000), because it made no mention of James. Indeed, that court probably follows the James reasoning, because in Laur v. State, 781 So. 2d 452 (Fla. 4th DCA 2001), it cited James in support of the position that a party cannot impeach a witness whose lack of memory was not "truly inconsistent" with her trial testimony.

Moreover, the State's claim that Professor Ehrhardt notes that most federal courts "permit such impeachment" also needs closer examination. They do so when there is a "feigned lack of memory," "evasive answers," or a "manifest reluctance to testify." Charles W. Ehrhardt, Florida Evidence, Section 608.4 footnote 5 (2002 ed.). In fact if we look at the federal cases, we find that judiciary has a distinct queasiness about letting prosecutors use what they claim as prior

inconsistent statements to impeach witnesses. As this Court noted in Morton v. State, 689 So. 2d 259, 263 (Fla. 1997):

In addressing the potential for abuse, the federal courts have consistently limited the government in criminal cases from using a prior inconsistent statement under the guise of impeachment where the primary purpose is to place before the jury substantive evidence which is otherwise inadmissible.

This case justifies that fear because that is precisely what the prosecutor did. When Ms. Thomas said she could not remember if Brooks came out of her bathroom wearing shorts, the State called Agent Haley to say that yes, she had told him that he had changed into them. Then in closing argument it used that “impeachment” as substantive evidence. “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) Thus, even the federal courts would have balked at what the State did in this case.

The State offers the novel argument that what Haley said was admissible under the “past recollection recorded” exception to the hearsay rule.² It made no

² It is novel in that this is the first mention of it in this case. The prosecutor below never relied on it to justify what it did. As such the State is precluded from raising that issue on appeal. See, Cannady v. State, 620 So. 2d 165 (Fla. 1993); State v. DuPree, 656 So. 2d 430 (Fla. 1995)(The procedural default rules apply to the State with equal force as they do to the defendant.)

such argument below for the very good reason that that exception does not apply. Specifically, the foundation or predicate for admitting that evidence was never established. Indeed, Agent Healy testified about his recollection of what Ms. Thomas said. Ms. Thomas never said she gave a statement to him, and it accurately reflected what had happened. See, Ehrhardt, Section 803.5 (2002 ed.)

Finally, the State is probably right that this error by itself was harmless. But when we add it to the growing pile of mistakes made in this case, the conclusion becomes increasingly clear that Brooks deserves 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.

The State, on page 41 of its brief, says this issue is unpreserved apparently because Brooks’ objection regarding Mark Gilliam’s testimony of the two alleged attempts to kill Rachel Carlson was too broad. That is, he never complained about the State eliciting evidence that Brooks wanted to kill the police officer because he did not want to go back to jail. Brooks made his initial objection to Gilliam’s

testimony immediately before Gilliam gave his inadmissible testimony (36 R 1648-49). That was overruled, and the prosecutor continued his examination of the witness. When it questioned him about the police stop and Brooks' alleged intent to shoot the officer, defense counsel specifically objected to that line of questioning, not once, but twice (36 R 1659-60). Brooks apprised the court of the problem, it recognized it, so he has done everything the law requires him to do to preserve this issue for appeal. Castor v. State, 365 So. 2d 702 (Fla. 1978).

The State says on page 44 of its brief that Brooks' threat to kill the police officer was "part and parcel of a conspiracy to murder that was completed two days later." First, there was no general conspiracy to murder. The agreement was to kill Rachel Carlson. Second, at no time did anyone say they would have to kill anyone else, and certainly not an unknown police officer who happened to have stopped them.

The State repeatedly says that had the court excluded the evidence of the threat to kill the policeman, "the jury would have been left with a materially incomplete account of the criminal episode." (Appellee's brief at pp. 42, 44).³ How? The State would still have had Gilliam's testimony of the two attempts and the plotting, the evidence of the murder scene, and all the other proof that linked

³ It apparently did not have this testimony at the first trial.

Brooks to the murder. The challenged evidence tended to prove no fact of consequence other than Brooks' bad character.

Finally, its harmless error argument certainly blazes new law. "For collateral crime evidence to be truly prejudicial, the uncharged crime must be more serious than the charged crime." (Appellee's brief at p. 44) That is not, never has been, and until now has never been suggested as being, the test for harmless error. This Court's opinion in State v. DiGuilio 491 So. 2d 1129 (Fla. 1986), provides the standard: "The question is whether there is a reasonable possibility that the error affected verdict." Id. at 1139. Here the evidence, which is particularly corrosive of the presumption of innocence and presumptively prejudicial, became a damning, fatal comment on Brooks' character. The State has done absolutely nothing to carry its burden to establish its harmless error beyond a reasonable doubt. Indeed, it cannot. This Court should, therefore, reverse the trial court's judgment and sentence 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' FOURTEENTH AMENDMENT RIGHT TO A FAIR TRIAL

The State's short argument defending what it did in its closing argument claims it had the right to "rebut[] all possible defenses." (Appellee's brief at p. 47). Perhaps if it had had the initial closing argument, it could have had more latitude in what to present since it did not know what Brooks intended to argue. Morrison v. State, 818 So. 2d 432, 445-46 (Fla. 2002). But when this prosecutor stood before this jury, he knew exactly what Brooks' defenses were because he had just heard them. He could rebut or reply to those. He could not, as he did here, raise "all possible defenses" the defendant might have presented and then explain why they had no merit. It not only shifted the burden onto Brooks to justify why he had never argued those claims, it confused the jury and diverted them from the issues legitimately before it.

The State, on page 47 of its brief, defends the prosecutor's argument that Brooks was responsible for Davis' actions under the law of principals. If, by that, the State meant all the actions surrounding the murder then it would have a stronger argument. Instead, it wanted to infer Brooks' guilty knowledge of the murder from

what Davis said the morning after the murder. If guilty, though, as a principal, it is because he aided and abetted the murder, not its coverup. If he helped in the latter he would have been guilty as an accessory after the fact, not as a principal.

More fundamental, though, the State's argument ignores the simple fact that the State wanted Davis' statements attributed to Brooks because he was an aider and abettor. In short it wants to get around or avoid the limits of the co-conspirator exception to the hearsay rule by the sleight of hand of claiming that what the co-defendant said is now an action that somehow can be attributed to Brooks. But, if the conspiracy to murder ended with the homicide, so did any aiding and abetting to commit the murder Brooks may have done.

The State continues its magic act with its harmless error claim. Enchanting two or three case citations to some unchallenged law, and a bland claim that "None of these arguments vitiate the entire trial," it wants this Court to believe that it has carried its burden to show the harmlessness of the repeated improper arguments. But it will need more than the skill of a Harry Potter to pull off its illusion, particularly when it ignored several pointed complaints Brooks made in his Initial Brief and his harmless error argument that the State's overreaching fatally damaged the fairness of his trial.

This Court should reverse the trial court's judgments and sentences 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' FOURTEENTH AMENDMENT RIGHTS.

Professor Ehrhardt is a wonderful person, a great academic, and a widely respected author. He is, however much the State would like to believe otherwise, not the law. Nor is he a member of this Court. Nor was he a member of the legislature that enacted Section 90.803(18)(3), Florida Statutes (1996). Likewise, as much as the federal courts like to expound ad nauseam on the minutiae of the law, they do not make Florida law. The state legislature does, and this Court interprets what they have said. And when they have said "the court shall instruct the jury that the conspiracy itself and each member's participation in it must be established by independent evidence. . . ." this Court's job is easy. Shall means shall. Of course, it can add some judicial explanation for the rule as it did in Romani v. State, 542 So. 2d 984 (Fla. 1989), but fundamentally this issue in this case is easy. We do not

need the State's, Professor Ehrhardt's, or the defendant's explanations. Once the legislature said the court shall read the instruction upon the request of counsel, the court had no discretion put to do so.

ISSUE VIII

THE TRIAL COURT ERRED IN DENYING BROOKS' MOTION 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.

The State's primary arguments are 1. The errors were inadvertent, not intentional. 2. Because there were so many references to Brooks' first trial throughout this trial, the errors were harmless (Appellee's Brief at pp 56-57)

Whether the State deliberately or not created the problem this Court must now resolve is irrelevant. In Jackson v. State, 545 So. 2d 260, 263 (Fla. 1989), this Court correctly focused on the real issue: prejudice to the defendant's constitutionally guaranteed right to a fair trial.

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.

Maybe so, the State responds, but here the jury knew that while Brooks had had an earlier trial, they did not know why he now was being retried. “The jury may well have thought that the prior trial ended in a mistrial or a hung jury.” They may also have thought he had been found guilty, the problem this Court in Jackson identified as fatally damaging the constitutionally guaranteed presumption of innocence. Wishful thinking and “hoping for the best” should not replace the unfortunate reality that we have no idea what the jurors actually thought. In such instances, the threat to wrongfully convicting Brooks is too great to let our hopes outweigh our concerns for a fair trial.

Yet, the State says we should do that when it claims the prosecutor’s gaffes were only two references to Brooks’ prior trial when compared to the “numerous reference to prior testimony throughout this trial by numerous witness, including Melissa Thomas, the jury would have been aware that there were prior proceedings in this case.” (Appellee’s Brief at p. 56) No one, however, could reasonably equate the police questioning witnesses such as Thomas, as a “prior proceeding” that somehow became the same as a trial.

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

The State claims Brooks failed to preserve this issue for appeal because “Defense counsel did not provide the trial court with the newspaper articles until the State rested.” (Appellee’s Brief at p. 58) No court has ever said that doing such is a prerequisite to preserving a venue claim for appellate review. Indeed, in Green v. State, 688 So. 2d 301 (Fla. 1996), this Court granted the defendant a new venue on retrial based solely on the responses of the prospective jurors during voir dire. In this case, Brooks asked the court to move the trial in a timely manner, and after it became evident to him that the chosen jury simply could not give him the fair trial the law and the constitutions of this State and the nation guarantee (32 R 976). He has preserved this issue for this Court’s review.

Indeed, Brooks made no mention of any pretrial publicity in the argument in his Initial Brief. Instead, he focused on the actual, demonstrated prejudice he had suffered. For analytical purposes a motion for a change of venue has merit if the defendant can show at least one of two types of prejudice: presumed or actual. Rolling v. State, 695 So. 2d 278 (Fla. 1997). In the former case, pretrial publicity so saturates the venue of the defendant’s trial that it presumptively taints the ability of the

citizens of the community to render a fair and impartial verdict Rideau v. Louisiana, 373 U.S. 723 (1963). That is very rare. Much more common is actual prejudice. In that situation, pretrial publicity may be the mundane usual type that surrounds a murder. There is a flare of it at the time of the murder and then it dies down. Two years or so later, there is a brief mention or two in the local section of the paper that the defendant is going to trial, but that is about all. Esty v. State, 694 So. 2d 1074 (Fla. 1994).

The actual prejudice surfaces in voir dire, and in this case, in some extrajudicial proceedings that accompanied the jury selection. When responses to questions posed by the State and defense show a persistent, extensive prejudice against the defendant, the court, as this Court has held, should liberally grant a defendant's motion to change the venue of the trial. Manning v. State, 378 So. 2d 274 (Fla. 1979). Pretrial publicity and newspaper articles may have some relevance to measuring actual prejudice, but juror responses dominate the analysis. Green, cited above.

Thus, the State simply missed the point of Brooks' argument and focused on an issue it surely found easier to respond to than the one the defendant had posed.

ISSUE X

A DEATH SENTENCE IS PROPORTIONATELY UNWARRANTED IN THIS CASE

The State says, on page 64 of its brief, “Furthermore relative culpability analysis cannot be premised solely on the facts of the murder. Surely, if two defendants are equally culpable, but one has higher aggravation and less mitigation, death would be an appropriate sentence for one, but not the other. Here Davis’ prior criminal history is not known.” While Brooks is unclear what the State means, it is clear that the case for aggravation applies as equally to Davis as to Brooks. Even the heinous, atrocious, or cruel aggravator applies to Davis. Ormelus v. State, 584 So. 2d 563 (Fla. 1993); Archer v. State, 613 So. 2d 446, 448 (Fla. 1993). While we may not know Davis’ prior criminal history, we do know Brooks’ because the court found the statutory mitigator that Brooks had no significant criminal history (27 R 5259).⁴ Thus, Brooks had at least the same mitigation as his co-defendant. Except for the trial court’s finding that Brooks, and only he, committed both murders, the defendants stand on equal culpability footing.

⁴ If Brooks had no significant prior criminal history, Mark Gilliam’s claim that the defendant said he had to kill the police officer so he would not have to go to jail was probably a lie, and a blatant example of the State’s key witness’ acknowledged willingness to lie in this case. See ISSUE V.

Brooks presented abundant other reasons in his Initial Brief of why this Court must reduce his sentence to life in prison. As to those, the State says nothing. He will, therefore, rest on what he said there.

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.

On page 72 of its brief, the State says, “This Court has twice rejected versions of this same argument. Lukehart v. State, 776 So. 2d 906 (Fla. 2000); Donaldson v. State, 722 So. 2d 177 (Fla. 1998).” No it has not. In those case, this court rejected the defendants’ double jeopardy contention that dual convictions of first-degree murder and aggravated child abuse based on the same act violated his double jeopardy rights. Neither opinion ever mentioned any merger argument. See, Initial Brief at pp. 79-80.

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

Brooks wants to expand on the argument that the jury that recommends death must do so unanimously. As contended here, this claim naturally follows from the United States Supreme Court's decision in Ring v. Arizona, 122 S. Ct. 2428 (2002).

If we were using the analysis applied in determining if we execute the mentally retarded, we would ask if our "evolving standards of decency" require juries considering whether to recommend life or death to unanimously do so. Atkins v. Virginia, 536 U.S. 304 (2002). As such, the answer would clearly be that the Eighth Amendment to the United States Constitution mandates such a verdict because Florida is among the very few states that allows men or women to be sent to their death with a less than a unanimous jury verdict.

This Court's approach to the jury unanimity issue has, however, followed another path. Relying on precedent from the United States Supreme Court and its own pre- Furman v. Georgia 408 U.S. 238 (1972), death penalty case it has held that jury unanimity in capital sentencing has no of due process limitations. Alvord v.

State, 322 So. 2d 533 (Fla.1975); Johnson v. Louisiana, 406 U.S. 356 (1972). “We do not find that unanimity is necessary when the jury considers this issue.” Alvord, at p. 536. This Court has reaffirmed that position recently. Evans v. State, 800 So. 2d 182, 197 (Fla. 2001); Sexton v. State, 775 So. 2d 923, 937 (Fla. 2000); Bottoson v. Moore, 27 Fla. L. Weekly S 891 (Fla. Oct. 24, 2002)(Shaw, concurring).

Johnson, however, was a non capital case, and that is a significant distinction. In death sentencing, the United States Supreme Court has found that states must ensure not only that defendants receive due process, but a heightened due process. See, Eddings v. Oklahoma 455 U.S. 104 (1982); Skipper v. South Carolina, 476 U.S. 1 (1986). For example, capital defendants have a due-process right to a state-provided psychiatrist to help prepare his defense. Ake v. Oklahoma, 470 U.S. 68 (1985). The sentencer cannot consider information unavailable to the defendant. Gardner v. Florida, 407 U.S. 349 (1977). This Court has also said capital sentencing orders, unlike their non capital counterparts, must be unmistakably clear. Mann v State, 420 So. 2d 578, 581 (Fla. 1982); that sentencers can only consider specific legislatively created aggravators, State v. Dixon, 283 So. 2d 1 (Fla. 1972); and only relevancy limits mitigation. Lockett v. Ohio, 438 U.S. 586 (1978).

Thus, with the jury being a key, core part of Florida’s split sentencing scheme, Espinosa v. Florida, 505 U.S. 1079 (1992), an equally vital component is their

recommendation. The utter finality of that punishment and the heightened due process required before it can be imposed demands no less than the community's united, unanimous decision that a defendant deserves to die.

Brook death sentence is invalid for, among other reasons, the jury in his case failed to unanimously recommend he die.

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.

As it has done repeatedly throughout its brief, the State has again supplied speculation when it could provide no evidence to support its argument. In Brooks' Initial Brief, the defendant presented evidence that Brooks never knew that the murder of Rachel Carlson also included killing her child. The State's Answer Brief has no facts to refute that. Instead, it insists "Brooks had to know that the child was included in the murder plan once he saw her in the car and was well aware of her presence while he was killing the mother." (Appellee's Brief at p. 94) That is sheer, unadulterated, blatant speculation.

It would be nice if the defendant could hit a home run on every issue. He could hear the roar of the crowd, the congratulations of his team, and take a slow victory lap around the bases. More realistically, just getting on base may help the overall team strategy. So here, this issue should add to the growing, overwhelming doubt this Court must have that Brooks not only did not receive a fair guilt phase trial, but the penalty hearing also has significant errors. When considered together these mistakes have created enough harm that the defendant should get at least a new sentencing hearing.

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 heart of the State's argument on this issue can be found on page 97 of its brief. "Here, unlike Muhammad [v. State, 782 So. 2d 343 (Fla. 2001)] the trial court did not give any weight to the jury's recommendation." If not, then the United States Supreme Court's opinion in Ring v. Arizona, 122 S. Ct. 2428 (2002), mandates

reversal of the death sentence. In that case, the nation's high court found fatal, constitutional error in the trial court sentencing the defendant to death after it had dismissed the jury that had found Ring guilty of murder. There, as here, the sentencing court had no valid input from the voice of the community of the appropriate sentence. That, the Supreme Court held, denied Ring his Sixth Amendment right to a jury trial.

Similarly here, if the trial court gave no weight to the jury's recommendation, that also denied Brooks the right to their legitimate voice on what punishment he should receive. Moreover, if the trial court ignored what they recommended it also ignored this Court's pronouncement in Tedder v. State, 322 So. 2d 908 (Fla. 1975)(Jury to give great weight to the jury's recommendation.)

Hence, this Court should reverse Brooks' death sentence and remand for a new sentencing hearing.

CONCLUSION

Based on the arguments and citations of authority as set forth, appellant 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 trial; 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 was furnished by U.S. Mail to **CHARMAINE MILLSAPS**, Assistant Attorney General, The Capital, Tallahassee, FL 32399-1050; and to appellant, **LAMAR Z. BROOKS**, #124538, Florida State Prison, 7819 NW 288th Street, Raiford, FL 32026, on this date, March 25, 2003.

CERTIFICATE OF FONT SIZE

I HEREBY CERTIFY that pursuant to Rule 9.201(a)(2), Fla. R. App. P., this brief was typed in Times New Roman 14 point.

DAVID A. DAVIS
Assistant Public Defender