

SUPREME COURT OF FLORIDA

LAMAR BROOKS,

Appellant,

vs.

CASE NO.: 94,308

STATE OF FLORIDA,

Appellee.

_____ /

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

AMENDED
INITIAL BRIEF OF APPELLANT

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SUPREME COURT OF FLORIDA

LAMAR BROOKS,

Appellant,

vs.

CASE NO.: 94,308

STATE OF FLORIDA,

Appellee.

_____ /

INITIAL BRIEF OF APPELLANT

PRELIMINARY STATEMENT

The Record on Appeal consists of seven volumes of record and twenty-six volumes of transcript. References to the record shall be made as “R”; and references to the transcript shall be made as “T”.

STATEMENT OF THE CASE

A grand jury indicted Appellant, Lamar Z. Brooks and Walker Davis, Jr. with identical charges in a single two-count indictment filed May 23, 1996 in Okaloosa County. Count I charged first degree murder of Rachel Carlson as Premeditated or Felony Murder With a Weapon. Count II charged first degree murder of Alexis Stuart as Premeditated or Felony Murder With a Weapon. (R1-3). At trial, Appellant was represented by Barry Beronet, Esquire.

The Honorable Jere Tolton, First Judicial Circuit, Escambia County, presided over proceedings for both defendant's, although trying each separately. Brooks was found guilty by a jury on April 10, 1998 of Counts I and II, (R 189-190; T 3006). A penalty phase convened before the same jury on April 16, 1998. On April 19, 1998, the jury returned a death recommendation as to Counts I and II by a vote of 10-2. (T 3236). On September 29, 1998, the Court sentenced Lamar Z. Brooks to death. (R 585-592). A timely notice of appeal was filed on October 28, 1998. (R 572). On November 16, 1998 this Court relinquished jurisdiction for 30 days in order to conduct hearing(s) on motion(s) for new trial. (R 992-993). Undersigned counsel became recognized as Attorney of Record by this Court on February 8, 1999.

STATEMENT OF THE FACTS

A. Guilt Phase.

Some facts are clear and undisputed. On or about April 24, 1996, Rachel Carlson and her child, Alexis Stuart, were found dead in a car in Crestview, Florida. Additionally, Walker Davis, Jr., in a separate trial, was convicted of the first degree murders of Rachel Carlson and Alexis Stuart. Walker Davis, Jr. was sentenced to life imprisonment. (R 589). The majority of facts are unclear in this record. With that caveat, the record reveals the following facts.

Irving Westbrook was the first witness to testify. He found the two victims dead in a running vehicle located on Booker Street located in Crestview, Florida. (T 911-913). He went across the street to call 911 but was not given permission to use the phone. (T 924-925). As a result, he went to a friend's mother's house on School Avenue, a couple of blocks from the scene. (T 925). Charles Tucker accompanied Mr. Westbrook and Mr. Westbrook phoned 911. (T 926). After phoning, Mr. Westbrook and Mr. Tucker walked back to the scene and told an officer there that Mr. Westbrook was the individual who had called 911. (T 927). Mr. Westbrook did not know what time this occurred. (T 927). Mr. Westbrook and Mr. Tucker were transported to the Crestview Police Department and filled out written statements. (T 928-929).

Ben Morgan was a Crestview police officer. He was the first law enforcement officer on the scene, arriving at 11:46 p.m. (T 977-979). Deputy Haffner, of the Okaloosa County Sheriff's Office, arrived on scene at the same time as Ben Morgan. (T 1074). Paula Freeman, Rachel Carlson's supervisor at Eglin Air Force Base, arrived on scene and identified the bodies. (T 1073-1074; 1097).

Jan Johnson was a senior lab analyst and blood stain pattern interpreter employed by the Florida Department of Law Enforcement. (T 1180-1181). Analyst

Johnson performed blood stain pattern analysis of the area surrounding Rachel Carlson's car as well as the car itself. (T 1196). Johnson collected all of the contents of the car and examined the entire interior and exterior of the car. (T 1196). Additionally, fingerprints were developed on the car and collected. (T 1197). Although this was conducted, there were no latent fingerprints preserved for comparison because none were suitable for comparison. (T 1203). Johnson told of theories of why no prints were suitable for comparison. (T 1203-1207). Trace material was collected from the fingernails of Rachel Carlson. (T 1221). A dark colored fiber was collected from a stab wound of Alexis Stuart. (T 1222). Johnson also examined Rochelle Jones' vehicle. (T 1240). Rochelle Jones picked up, in her vehicle, Davis and Brooks on the night of the homicides. (T 1799-1780). Jones' vehicle was transported to the Pensacola Operational Center for this examination. (T 1242). Analyst Johnson, after spending a couple of days searching the Jones vehicle for evidence, found no trace evidence of blood. (T 1242). The examination included using Luminol and phenolphthalein which may detect blood after cleaning. (T 1243). Analyst Johnson took casts of footprints found at the crime scene because a search dog alerted to some prints down a dirt path. (T 1246-1247). Johnson performed visual and chemical testing on Mr. Brooks' pants. All tests were negative for blood. The pants were provided by Investigator Worley of the Crestview Police Department. (T 1248). Johnson observed blood spatter on the driver's windshield. (T 2211). Johnson believes that the first injuries to Rachel Carlson resulted in the windshield blood spatter. (T 2220). Johnson opined that Carlson was strapped in her seatbelt, seated in an upright position, when forceful injury occurred to her. (T 2214). Johnson, based on the low positioning of arterial spurting blood found on the passenger door panel, felt that Carlson then fell onto

the front passenger seat after the initial forceful injury. (T 2214-2215). Johnson said someone may have been seated in the front passenger seat when the windshield blood spatter occurred. On the other hand, she said, someone could have been standing in the right front door when this occurred. Lastly, she felt someone could have been in the back seat when this spatter occurred. Analyst Johnson does not know which scenario is correct. (T 2223). Further, she cannot conclude that two people were sitting in the car at the same time that these blood spatter patterns occurred. (T 2223). Johnson cannot eliminate the scenario that one person in the front seat, killed Rachel Carlson, exited the vehicle, entered the back seat, and killed Alexis Stuart. (T 2224). Johnson detected no blood on the exterior of the vehicle or pavement around the vehicle. (T 2221).

Kenneth Fleming was a patrol sergeant with the Crestview Police Department. (T 2548). On April 24, 1996, Fleming directed officers to preserve the crime scene. (T 2548-2549). Officer Jenkins of the Game and Fish Control, brought a K-9 dog with him to the crime scene. (T 2549). The K-9 was a black lab. (T 2549-2550). Lt. Worley directed Jenkins to search the area around Carlson's vehicle. (T 2550). Worley directed Fleming's attention to footprints/tracks at the scene of the homicides. (T 2550-2551). Worley asked Jenkins to have the K-9 track the prints and asked Fleming to stay with Jenkins. (T 2552). The dog was put on the track. (T 2552). The dog tracked west of the intersection where the vehicle was situated. He then proceeded southwest across an open field and upon reaching Martin Luther King Boulevard, turned west down Martin Luther King Boulevard. (T 2553). Upon reaching Lloyd Street, the dog turned northwest and south on Lloyd Street. (T 2553). He went back onto Martin Luther King Boulevard heading west. At the end of Martin Luther King Boulevard, the dog went west at

the intersection of Garden and Grimes. The dog went west again and ended up at a residence located at 201 Grimes Street. (T 2553). No evidence exists that places Mr. Brooks on Grimes Street.

Dr. Joan Wood was the Chief Medical Examiner for the Sixth Judicial Circuit of Florida. (T 1263). She performed autopsies of the two victims in Portland, Oregon. Prior to her performing the autopsies, the two victims had been the subject of autopsies by Dr. Jody Nielson, associate medical examiner for Okaloosa County. (T 1267; 1271). Dr. Wood began the two autopsies at the Sunset Hills Funeral Home in Oregon on April 29, 1996. (T 1267; 1271). Dr. Wood stated that the autopsy of Alexis Stuart was difficult because the body had previously been autopsied. As a result, Dr. Wood had to unstitch wounds that were sutured closed with very heavy thread, like a butcher's twine. (T1271-1272). On the day Dr. Wood began her work, the family of the victim was to view the bodies at 2:00 p.m. As a result, Dr. Wood did not have enough time to complete everything. (T 1271). Dr. Wood could not examine part of the breastbone nor the front left rib because it was previously removed. The only internal organ present was the heart. (T 1273-1274). On May 1, 1996, Dr. Wood continued her examination. (T1274). Prior to May 1, Dr. Wood could not interfere with the head, as the viewing was to occur. Dr. Wood had to clean off make-up, applied by the funeral home, in order to continue. After examining the face, Dr. Wood concluded her autopsy of the child. (T 1275). She concluded that Alexis Stuart died of a stab wound to the chest, injuring the heart. (T 1275-1276). Dr. Wood said that some wounds on Alexis Stuart were inflicted post-mortem. (T 1333). Further, she concluded that Alexis Stuart died within minutes after being stabbed in the heart and that she would have been rendered unconscious in less time than that. (T 1325).

After the funeral, Dr. Wood examined Rachel Carlson. Previously, Rachel Carlson had been sutured and embalmed. (T 1278- 1279). Dr. Wood could not learn anything about the stab wounds due to the changes that occurred as a result of the suturing. (T 1279). Dr. Wood did examine some knife wounds. Dr. Wood, because of the first autopsy and the embalming process, could not evaluate her right carotid artery. (T 1285). Rachel Carlson died of injury to the blood vessels of the right and left neck, although she did receive stab wounds with injury to the liver and lung. (T 1287). Dr. Wood concluded that Rachel Carlson was also choked. (T 1296). Dr. Wood concluded that Rachel Carlson had defensive stab wounds to her hands, was choked and was killed by stab wounds. She concluded that Rachel Carlson may have been unconscious at the time of the fatal stabbing because she did not die from strangulation nor can Dr. Wood state the order in which the events occurred. (T 1335-1337).

Steve Manthey was a Met Life insurance salesman. On February 20, 1996, Walker Davis, Jr. applied for life insurance. (T 1438). Manthey sold Walker Davis, Jr. a \$100,000.00 life insurance policy, which named Alexis Stuart as the insured and Walker Davis, Jr. as the primary beneficiary. (T 1436-1442).

Wayne Samms was a good friend of Walker Davis, Jr.'s. (T 2240). Approximately one month prior to the homicides, Walker Davis, Jr. and Mr. Samms had a conversation in Samms' vehicle. (T 2258). Samms was separated from his wife at the time of the conversation with Davis. (T 2258-2259). Samms told Davis that if Davis would have just paid Carlson \$150.00 per month, she would have left Davis alone. (T 2259). Samms stated that Davis said that "she and the baby was done." (T 2259). Davis continued to tell Samms that Carlson was "bugging" and "that her and the little dip were done." (T 2260). Samms told Davis

that if he killed the baby or her that it would come back to him. (T 2260). Samms again suggested paying her to which Davis replied that he wasn't going to give her anything. (T 2261).

Billie Madero was a senior clerk for the Department of Health and Rehabilitative Services/Department of Revenue. (T 1450). A HRS document listed Rachel Carlson as the custodial parent of Alexis Stuart and Walker Davis, Jr. as the father of Alexis. (T 1450). Madero said that Carlson contacted the agency for a child support enforcement appointment.

David Johnston was a car salesman for Preston Hood Imports. In the first part of April of 1996, Johnston spoke with Walker Davis, Jr. about buying a Nissan Pathfinder. (T 1872-1873; 1878). The automobile Davis was interested in cost approximately \$32,000.00. (T 1873). Johnston said that Davis said that he would pay cash for the vehicle. (T 1875). Davis told Johnston that he was "coming into some money." (T 1877).

Anthony Sievers was a friend and co-worker of Walker Davis, Jr. (T 1880). Walker Davis, Jr., while riding with Mr. Sievers, stated that he was contemplating getting a car(s) and that there would be no payments. (T 1888).

Jason Hatcher was a surgical technician who worked with Rachel Carlson at Eglin Air Force Base. (T 1357-1359). He said that Ms. Carlson told him about her plans for April 24, 1996. (T 1362-1363). He said that Ms. Carlson said that she and Walker Davis, Jr. were going to go to Crestview again to look for an aunt and two cousins. (T 1363-1364). Further, Ms. Carlson said that the baby was going to accompany Ms. Carlson and Walker Davis, Jr. (T 1366). Ms. Carlson, according to Mr. Hatcher, said that she wanted gas money from Walker Davis, Jr. and that he

was going to have to sign paternity papers for child support indicating that Walker Davis, Jr. was the father of the child. (T 1366).

Linda Chaloupka was a hospital co-worker of Rachel Carlson's. (T 1377-1378). She said that Ms. Carlson told her about her plans for April 24, 1996. (T 1379-1380). Ms. Carlson told her that she had some sort of paternity papers for her infant daughters father to sign and that he agreed to do that and that Ms. Carlson was going to see him that evening. (T 1380).

Ame Boehmer was a surgical technician employed by the Air Force and stationed at Eglin. (T 1385). Ms. Boehmer said that Ms. Carlson said that she was going to drive to Crestview and to visit her boyfriends family. (T 1389). Further, Ms. Carlson said that Walker Davis, Jr. owed her money and that Ms. Carlson was trying to get money from him. (T 1389).

Lisa Lauer was an operating room technician and co-worker of Rachel Carlson. She said that Ms. Carlson said that, on April 24, 1996, she was going to pick up her baby and Walker and go to Crestview to visit Davis' aunt. (T 1390-1394).

Alicia Williams was a surgical technician employed by the Air Force and stationed at Eglin. (T 1408). She said that Ms. Carlson said that she was going to take the baby to Crestview to meet her fathers aunt and cousins. (T 1412-1413). Ms. Williams said that Ms. Carlson said that Ms. Carlson, the baby and Walker Davis, Jr. were going to make the trip. (T 1413).

Antonio Orr was a friend and co-worker of Walker Davis, Jr. On Monday afternoon, April 22, 1996, he appeared at Davis' residence. Orr heard Walker Davis, Jr. and Rachel Carlson speaking in an agitated manner. (T 1478-1483).

Mark Gilliam was an Army buddy of Lamar Brooks. (T 1620). As a result of an agreement between he and the Office of the State Attorney, he testified. (T 1702). Mark Gilliam traveled to Walker Davis, Jr.'s residence from Atlanta on Sunday, April 21, 1996. (T 1629). On that same evening, Gilliam, Davis, Lamar Brooks and Wayne Samms, traveling in two vehicles, drove to Crestview. (T 1630). In Crestview, they went to a bar, purchased beer and hung out in a parking lot. (T 1631-1632). The four listened to music, talked and reminisced. (T 1633). Mark Gilliam and Lamar Brooks returned to Walker Davis, Jr.'s residence Sunday night. (T 1634-1635). On Monday, April 22, 1996, at Walker Davis, Jr.'s residence, Davis complained about a woman who pestered him for money for a stereo. He said that he "should choke that broad." (T 1638-1639; 1641). After Davis said he should choke that broad, Brooks said you should shoot her and Gilliam said, "Nah, that would be too messy, you should stab her." Gilliam and Brooks were joking and did not take this seriously. (T 1639). The woman was never identified by name, race or relationship to Davis. (T 1639-1640). On Tuesday night, April 23, 1996, Gilliam, Davis and Brooks drank liquor and watched movies, including "Let's Do It Again" a comedy starring Bill Cosby and Sidney Poitier. (T 1644; 1692). Davis stated that she should be killed in Crestview and that Gilliam would drive. (T 1646). Also, Gilliam was to receive \$500.00 for driving. (T 1647). Lamar Brooks agreed that Gilliam should receive \$500.00. (T 1647). Brooks was supposed to receive \$4-8 thousand for his help. (T 1647-1648). Gilliam did not take it seriously and thought it was a long, played out joke. (T 1654). Lamar Brooks and Mark Gilliam were laughing during Walker Davis, Jr.'s complaining about the woman who was pestering him. (T 1692-1693). Due to the tone and manner of the conversation, Gilliam did not take it seriously. At trial,

Gilliam said that Lamar Brooks tried on latex gloves during this time frame. (T 1650). On the same night, Tuesday, Gilliam told Davis he was leaving for Georgia. Lamar Brooks did not attempt to talk Gilliam out of leaving. (T 1659-1660). The atmosphere surrounding the nights of April 22 and 23, 1996 between Gilliam, Davis and Brooks was comfortable, joking, laughing, listening to music, reminiscing and watching movies. (T 1697). Mark Gilliam never expected to receive \$500.00. (T 1698). On April 22 and April 23, Lamar Brooks never agreed to kill anybody. (T 1698). James Worley of the Crestview Police Department, among others, questioned Mark Gilliam on May 14, 1996. (T 1662; 1688). Law enforcement personnel told Gilliam that they believed Gilliam was involved in a conspiracy to commit murder. In response to law enforcement questioning about Gilliam driving a car, Gilliam lied. (T 1689-1690). Gilliam lied, not because he was involved in any murder, but because he was scared. (T 1690). Gilliam was questioned for six hours, without food, before he admitted the joking conversations he had had with Davis and Lamar Brooks. (T 1668; 1690). Gilliam emphasized to law enforcement that he thought it was all a joke. (T 1692). Further, Gilliam said they were all drinking. (T 1692). On May 15, 1996, Gilliam recanted portions of his statement to law enforcement. He recanted because he gave untrue answers thinking law enforcement “wanted to hear those answers.” (T 1701). Gilliam was concerned that he was going to be charged. (T 1701). Mark Gilliam received a guarantee of not being prosecuted in any form arising out of the homicides. Further, if arrested, the State of Florida would dismiss any charges against Gilliam involving the homicides. (T 1702-1703).

Howard Bettis was a special agent with the Florida Department of Law Enforcement. (T 2318). On April 26, 1996, Mr. Bettis and Mr. Hollinhead

conducted an interview with Lamar Brooks. (T 2319-2320). Brooks said that he thought Davis was happily married. (T 2321). After being shown a photo of Ms. Carlson, Brooks said that he recognized her as one who came to Davis' residence on April 22, 1996 looking for Davis. (T 2322). Brooks told Bettis and Hollinhead that Mark Gilliam had left Ft. Walton Beach on the Tuesday prior to the Wednesday murders. (T 2324). Brooks said that Davis worked on Monday and after work, he and Davis and a friend of Davis' went to Crestview. (T 2325). Brooks said that they tried to, unsuccessfully, purchase marijuana that Monday evening. (T 2325). Brooks said that on Tuesday, April 23, 1996, he and Davis watched movies. (T 2326). On Wednesday, April 24, 1996, Brooks said that in the late afternoon, he helped Davis and a co-worker set up a waterbed at Davis' residence. (T 2327). Brooks said later in the evening, after dark, he and Davis walked Davis' dog and Davis made a phone call from a pay phone. (T 2327). Brooks said that the Monday meeting was the only time he came in contact with Rachel Carlson. (T 2329). Brooks said that he learned about the homicides at around 9:30-10:30 on Thursday, April 25, 1996. (T 2329). In Bettis' report, Brooks stated that after being taken to the Air Force Office of Special Investigations, he asked Davis why they were involved. Davis told Brooks that he was implicated and one of the victims was Davis' child. (T 2334). Brooks stated that he had no relatives in Crestview and believed that Davis did not have relatives in Crestview. (T 2331).

Michael Hollinhead was an investigator with the State Attorneys Office for the 1st Judicial Circuit. (T 1014). Hollinhead interviewed Lamar Brooks about his activities prior to the homicides. (T 1020). Brooks told Hollinhead that he came to the Crestview area from Atlanta on Sunday and that he stayed on Eglin Air Force

Base with his cousin, Walker Davis, Jr. (T 1020). Brooks told Hollinhead that he did not know Rachel Carlson but that he saw her Monday evening. Brooks did not know nor did he discuss Rachel Carlson's pregnancy with Walker Davis, Jr. (T 1022-1023). Hollinhead then told Brooks that Carlson's infant was also murdered and that the murders occurred in Crestview. (T 1023). Hollinhead stated that Brooks told him that he and Davis traveled to Crestview on Monday night to purchase some marijuana, to no avail. (T 1024-1025). Hollinhead said that Brooks told him that on Tuesday night, he stayed at Davis' house and watched movies. (T 1025). Brooks told Hollinhead that while in Florida he had no transportation. (T 1026). Brooks then told Hollinhead that, prior to coming to Florida, they were in Atlanta where they met an Army buddy named Mark. Brooks provided a description of Mark's vehicle. (T1026). On the day of the homicides, Wednesday, April 24, 1996, Brooks told Hollinhead that he had helped set up a waterbed at Davis' house. Further, he told Hollinhead that two females stopped by the house looking for sunglasses and that he watched a movie and walked Davis' dog after dark. Brooks denied being in Crestview on the night of the homicides. (T 1027). Brooks stated that he knew nothing about Rachel Carlson's death. (T 1029). On the date of Hollinhead's interview with Brooks, April 26, 1996, Brooks was not a suspect nor was there any incriminating information against him. (T 1044; 1053). Mr. Brooks provided Hollinhead with his date of birth, social security number, address in Pennsylvania and the telephone number at his address. (T 1044).

Paul Keown sold a water bed to Walker Davis, Jr. and helped Davis set it up at Davis' residence on the evening of the homicides. While at Davis' residence, Mr. Keown was introduced to Lamar Brooks. (T 1416-1419).

Robert Hursey was an expert in forensic hair examination and is employed by the Florida Department of Law Enforcement. (T 2569-2570). From Carlson's vehicle, Hursey received vacuum sweepings from the front passenger seat, front passenger floor, front driver's seat, front driver's side floor, rear seat driver's side, rear floor driver's side and rear passenger side floor. (T 2571). Hursey compared the sweepings to known hair samples of Lamar Brooks. (T 2571). Hursey did not find any hairs that were microscopically consistent with Lamar Brooks. (T 2571). In the front passenger and drivers seat two items were found. (T 2572). The items were hairs present that were characteristic of Negroid body hairs. (T 2572). None matched Lamar Brooks. (T 2572). Hursey packaged the items separately and noted that roots were present so DNA analysis could be performed. (T 2572-2573). Hursey also received debris recovered from the child's seat, the transport sheet of Rachel Carlson and clothing from both victims. After comparison, none matched Lamar Brooks. (T 2573). Hursey also received items collected from Lamar Brooks' sweat pants. (T 2574). On the pants, Hursey found no hairs that were consistent with Rachel Carlson. (T 2575). Hursey received vacuum sweepings from a couch and found no hairs consistent with Rachel Carlson. (T 2575). Hursey received sweepings from Lamar Brooks' visor, tee-shirt, a pair of boots, socks, sweat pants, clothing, a sweat shirt and a glove. No hairs consistent with Rachel Carlson were found. (T 2576).

Melissa Thomas lives in Crestview, Florida. Walker Davis, Jr. and Lamar Brooks arrived at Melissa Thomas' house, in Crestview, on the night of the homicides between 9:00 and 9:30 p.m. (T 1536). Lamar Brooks sat on a couch, smoked a cigarette and used the bathroom in Melissa Thomas' residence. (T 1536). Melissa Thomas lived at 194 Washington Street. (T 1533). Brooks placed the

cigarette butt in an ashtray in her home. (T 1538-1539; 1553). Brooks also used the telephone. (T 1554). Lamar Brooks wore black jogging pants and some type of shirt or jacket. (T 1541-1542). Also, Mr. Brooks had a backpack. While sitting on Ms. Thomas' couch, Ms. Thomas could see him pretty well as the room was lit. (T 1553-1554). Ms. Thomas saw no blood on Mr. Brooks nor observed any indications that he had been in a struggle or fight. (T 1554). Mr. Brooks appeared calm and relaxed. (T 1554). Law enforcement administered tests to Ms. Thomas' house to look for trace amounts of blood. (T 1556). Law enforcement confiscated a telephone and an ashtray.

Charles Richards is a senior crime scene analyst employed by the Florida Department of Law Enforcement. (T 1932). He is an expert in crime scene analysis. (T 1934). Mr. Richards documented and collected evidence at the residence of Melissa Thomas. (T 1934). Mr. Richards conducted a visual examination and took photographs at the residence. (T 1934). He photographed and collected a green ashtray and cigarette butt contained therein. He collected a white Northern Telecom telephone. He used a vacuum cleaner with a filter on it on the couch to collect any trace evidence such as hairs and fibers. (T 1935). He collected a dish rag in the front yard for processing. He took a cutting from the couch itself to be used in microanalysis. (T 1935). Richards processed the toilet and sink for latent prints. (T 1935). He lifted a print from the toilet and placed it on a white card for lab submission. (T 1935). He spent one and one half hours at Thomas' residence. (T 1977). Later that evening, Richards returned to the residence and sprayed Luminol in an effort to find traces of blood. (T 1938). In the evening, Richards spent 45 minutes to one hour at the Thomas' residence. (T 1938). Mr. Richards found no trace of blood. (T 1938).

Thomas Hardin was a friend of Walker Davis, Jr. He used his military identification to purchase a plane ticket for Lamar Brooks. Hardin purchased the ticket in order for Lamar Brooks to receive a discounted fare. (T 1737; 1743-1744). Additionally, Hardin drove Davis and Brooks to pick up money that was wired to Brooks. The money was for the plane ticket. (T 1742).

Michael Lynes was an information systems technician for Eglin Hospital. (T 1452-1453). Mr. Lynes retrieved e-mail messages that originated from an account assigned to Rachel Carlson and were sent to an account assigned to Walker Davis, Jr. (T 1460; State Exhibit 34). An e-mail message retrieved on April 29, 1996, from an account assigned to Rachel Carlson stated “We can go up there again tonight, but I need gas money. Also, let’s try to go a little earlier. I’m about to fall over I’m so tired from the past two nights. Also, if you can, I need some money for diapers. She’s almost out, and I am flat broke. Call me.” (T 1460; 1463, 1464).

Rochelle Jones is a co-worker and friend of Walker Davis, Jr. (T 1765). Davis phoned Jones at 9:22 p.m. on the night of the homicides. On the phone, Davis asked Jones to pick him up in Crestview. (T 1774). Jones picked up Davis and Brooks in Crestview. (T 1799-1780). It was not unusual for Jones to provide transportation to Davis. (T 1774). Jones had a conversation with Davis on the Monday or Tuesday before the Wednesday homicides. (T 1809). This occurred at the hospital in a computer class. (T 1807). Davis told Jones about a guy owing him money and he was going to get the money and that he would have to “smoke the dip with the baby” because she would be able to tie him to that guy. (T 1808-1809). “Smoke the dip” means kill the baby. (T 1809). On Thursday, April 25, 1999, a day after the homicides, Davis phoned Jones. (T 1786). On the phone, Davis told Jones “You ain’t seen me.” (T 1786). The phone call lasted seconds. (T 1786).

Lamar Brooks phoned Jones and asked her to pick him up. (T 1790-1791). Brooks further stated that they were trying to say that Davis and Brooks killed this girl. He went on to say to Jones that he wanted to call home and said that they needed to get Walker Davis, Jr. an attorney. (T 1792). Lamar Brooks only mentioned the murder of a lady and made no mention of a murder to a baby. (T 1793). In the afternoon of April 25, 1996, Davis came to Jones' residence. (T 1787). OSI agents accompanied Davis to Jones' residence. (T 1788). At the front door, Davis asked her if "she was cool?" (T 1789). In the evening of Thursday, April 25, 1996, Rochelle Jones received another call from Davis. Davis asked if she was "still cool?" On Saturday, April 27, 1996, Davis arrived at Jones' residence. (T 1796-1797). Davis told Jones that he and Lamar Brooks went to Crestview to rob this guy and they shot at him and they took his money and that the guy probably killed Rachel because she had set him up. (T 1798-1799). Further, Davis told Jones that he had the money on him when OSI was questioning him and wanted to give the money to Jones but OSI agents accompanied him to Jones' house. (T 1799). Davis told Jones that he had \$4,000.00 on him. (T 1799). Jones was not offered any money to "keep cool." (T 1800). Lamar Brooks never told Jones to conceal the fact that they were together. (T 1823).

William Tiller was a trooper with the Florida Highway Patrol. He issued a Driving While License Suspended Citation to Rochelle Jones at 10:20 p.m. on the night of the homicides. (T 1751). Walker Davis, Jr. and another black male were seated next to Ms. Jones and children were located in the back seat at the time of the stop. (T 1750). Trooper Tiller asked if any passenger had a valid license. Davis answered in the affirmative. (T 1750). Trooper Tiller had both Davis and the

other black male exit the vehicle. (T 1753). Trooper Tiller noticed nothing unusual about the people, their clothing or their actions. (T 1754).

Curtis Gilliland was an orthopedic technician employed by Eglin Hospital. He removed a cast from Walker Davis, Jr. on May 2, 1996. (T 1716-1717). As Gilliland removed the cast, two pieces of paper fell out. He collected the pieces of paper and put them back in the cast. (T1718).

Steve Whatmough was a police officer with the Crestview Police Department. He collected the two pieces of paper that fell from Walker Davis, Jr.'s cast. One of the pieces of paper had the words "USAir, 5:45, \$244, Sgt. Samms." (T 1728). The other piece of paper had writing with the words "Mark would have cracked" and "Events, home to walk Heavy, and then to home."

Carl Burian was an employee of the Florida Department of Law Enforcement and was an expert in latent fingerprint examination comparison. (T 1890-1891). Mr. Burian matched a fingerprint of Walker Davis, Jr. to State Exhibit 36A. (T 1895). State Exhibit 36A is a note that fell from Walker Davis, Jr.'s cast that contained the writing "Mark would have cracked", "Events, home to walk Heavy, and then to home." (T 1729). 36B is a note that fell from Walker Davis, Jr.'s cast that contains the writing "USAir, 5:45, \$244, Sgt. Samms." (T 1728). Mr. Burian did not find Lamar Brooks' fingerprints on State Exhibit 36A or 36B. (T 1903). Mr. Burian examined five latent lift cards taken from Rachel Carlson's red/maroon Nissan. (T 1896). None of the prints were of value for comparison. Mr. Burian did find latent prints of value on objects found within Rachel Carlson's vehicle. (T 1899). Mr. Burian compared the latent prints of value with Lamar Brooks' fingerprints and did not make an identification. (T 1899).

Karen Smith is a forensic document examiner employed by the Florida Department of Law Enforcement. (T 1916). Ms. Smith examined the two notes that fell from Walker Davis, Jr.'s cast, State Exhibits 36A and 36B. (T 1923). She examined a known handwriting exemplar form and twenty known handwriting exemplars of Lamar Brooks. (T 1923). She compared State Exhibits 36A and 36B with Lamar Brooks' samples and could not form an opinion as to whether to include or exclude Mr. Brooks as the author. (T 1927-1928). Additionally, she could not form an opinion whether or not one or two different people authored the notes. (T 1928).

Terrance Goodman is a six time convicted felon. (T 2117-2118). Terrance Goodman was indicted for First Degree Murder with a Firearm, Shooting into a Building and felony causing bodily injury. (T 2073). After fleeing the jurisdiction in an attempt to hide and after providing the police with a false name, Goodman was arrested for murder on March 7, 1997 in DeSoto County, Florida. (T 2074; 2122). Goodman was housed in the Okaloosa County Jail from April 12, 1997 until February 26, 1998. (T 2075). Goodman knew that he was facing either life or death for the first degree murder charge. (T 2127). Goodman entered into an agreement for testimony with the State of Florida. (T 2072). Goodman's agreement included that the State of Florida, in an exchange for testimony, would reduce the First Degree Murder with a Firearm charge to a 3rd degree murder with a firearm. (T 2073). Further, the State of Florida agreed to a 15 year prison sentence to be followed by three years probation. (T 2073). The State of Florida recommended a downward departure on the guidelines. (T 2132). Goodman's attorney discussed the guidelines with him. (T 2133). The guidelines, Goodman explained, include amassing an amount of points when a person gets convicted and the guidelines only

let the judge give them a certain amount of time. (T 2132). Further, Goodman acknowledges, that not only did the State agree to reduce the charges against Goodman, but to agree to go below the guidelines. (T 2133). Goodman and the State of Florida agreed that Goodman would not be housed in the same prison as Lamar Brooks or Brandon Dawson. (T 2134). If Goodman did not have an agreed to sentence with the State which recommended a downward departure and if Goodman pled straight up to the reduced charges, he would have scored between 230 and 386 months in prison. The recommended sentence with the reduced charges was 307 months in prison. (T 2136). 307 months equals 25.58 years. In exchange for the reduction in charge and agreed upon 15 year sentence, Goodman was required to testify, not only against Lamar Brooks, but also against Brandon Dawson, Goodman's co-defendant. (T 2129). Lt. Worley and Investigator Hollinhead visited Goodman in the county jail on February 26, 1998. (T 2105). The two told Goodman that they received information informing them that Goodman might know something about the Brooks case. (T 2105). In response, Goodman stated "Well, I might know a little something." (T 2105). Goodman felt that the two officers did not have the "power" that the prosecutor had, so Goodman said "I gotta talk to Mr. Elmore (prosecutor) before I say anything else." (T 2107). Approximately two weeks later, the prosecutor, Hollinhead and Goodman's counsel arrived at the jail to speak with Goodman. (T 2107-2108). The prosecutor took a statement from Goodman on March 12, 1998. (T 2108). Goodman and the State of Florida reached their agreement on the evening of March 25, 1998, three days into the jury selection of Mr. Brooks' trial. (T 2109). Goodman pled on March 26, 1998. (T 2139). While Goodman was Brooks' cellmate, he acknowledged that Lamar Brooks had a stack of legal papers. (T 2148). Goodman

observed four or five different envelopes that Brooks kept his legal papers in. (T 2149). Goodman knows that the legal papers have all the information about the State's case contained in them. (T 2149). Goodman is knowledgeable about the criminal system and "had to work the angles before taking the deal." (T 2153). Goodman says that he was in the Okaloosa County Jail for 45 days before he spoke to Lamar Brooks. (T 2075). Goodman says that Brooks told him that he and some other guy came to Florida from Georgia and went to his cousin's house and was hanging out. (T 2093). Brooks said he was only in Florida for four days, was questioned by the police and traveled back to Philadelphia. (T 2093). Brooks said to Goodman that he was arrested a week later. (T 2093). Goodman stated that Brooks told him about what Brooks' defense was going to be at trial. (T 2094). On the other hand, referring to Brooks' case, Goodman says, "I don't know nothing about it or how no murder occurred or nothing like that." (T 2151). Goodman further says, "I don't know nothing about what happened that night." (T 2150). Goodman says that Brooks did not just open up and tell him everything about his case. (T 2150). Goodman says, "We never discussed the actual crime, how it happened and all that, never discussed that." (T 2150). Goodman says that Brooks was concerned about his inability to account for the time between 9:00 and 9:22 p.m. on the night of the murders. (T 2094). Goodman said that Brooks told him that Walker, Brooks and Gilliam suggested different ways of killing the two victims. (T 2095). Brooks also told Goodman that the police made Gilliam say some things. (T 2095). Goodman said that Brooks said that there was no physical evidence in his case. (T 2097). Brooks told Goodman that the stains found on Brooks' pants upon his arrest was spilled alcohol, called Mad Dog. (T 2097). Goodman said that Brooks would talk to him late at night, when other inmates were

asleep. (T 2097). Goodman described Brooks as saying he said “he copped these bodies” or “the night I offed this broad,” something like that. (T 2099). When Goodman was reviewing the ME report in his own case, Goodman made the comment about the shooting in his case. (T 2102). Brooks responded that it took no brains or heart to pull the trigger and that it takes heart to stab somebody. (T 2102). Goodman says that Brooks said that you can feel everything when you stab someone, bones and tissue. (T 2102). Brooks told Goodman that “his case was the perfect murder, no physical evidence, no eyewitnesses, no DNA, no nothing. That’s what I call the perfect murder.” (T 2103). At no time did Brooks go into how he did it. Goodman says Brooks’ main focus of the conversation was how he was going to get out of it. (T 2104).

Nolan Haynes was a corrections officer employed by the Okaloosa County Department of Corrections. (T 2748). The Okaloosa County Jail used inmate request forms to communicate with inmates on a daily basis. (T 2749). The request form was designed so that the inmate has an avenue of addressing a problem or question with the staff of the county jail. (T 2749-2750). Lamar Brooks provided Haynes with an inmate request form on November 3, 1996. (T 2750). Brooks sought to be moved to cell one to avoid putting his case in jeopardy. (T 2756). As a result of Officer Haynes observations, he concluded that Lamar Brooks was concerned about his case and his papers. (T 2760-2761).

John Morrow was an inmate at the Okaloosa County Jail. (T 2678). Mr. Morrow was housed in a cell with Lamar Brooks for approximately eight months. (T 2679). Terrance Goodman and Christopher Kerr were also housed with Morrow and Brooks. (T 2680). Subsequently, inmates were moved to a new section of the jail. Brooks and Goodman were housed together and Morrow had a

cell to himself. (T 2680). In the pod area of the jail, there were five cells, three upstairs and two downstairs. (T2680-2681). Goodman and Brooks were housed upstairs and Morrow was downstairs. (T 2681). Lamar Brooks never spoke to Morrow about his case. (T 2684). Terrance Goodman left maximum security around February 26, 1998. (T 2684). About one week prior to Goodman's departure, Morrow was on his way upstairs to play Uno. Morrow observed Goodman placing Lamar Brooks' paperwork back under the mattress where Brooks had it stashed. (T 2687). Morrow had previously seen Lamar Brooks pull out his paper work when his attorney would visit. (T 2698). Morrow never told Lamar Brooks that he had observed Terrance Goodman having Brooks' legal papers. (T 2702). Morrow questioned Goodman about Goodmans' actions. (T 2687). On one occasion, Goodman was walking to the shower, located right next to Morrow's cell and was whistling, carrying on and singing. (T 2687). Morrow asked Goodman why he was so happy and asked jokingly, if he was going home. (T 2688). Goodman responded by saying "If he could get these crackers to believe what he had to say, then yes, he might be going home." (T 2687-2688). Goodman always referred to the police and State as crackers. (T 2706). Morrow asked Goodman what he meant and Goodman said that he was "going to turn evidence against Lamar." (T 2688). Morrow responded by saying "That's fucked up and you know Dred does not speak in talking about his case." (T 2688). Dred is the name the guards gave to Lamar Brooks. (T 2692). On March 18, Morrow read a newspaper article that mentioned Terrance Goodman. (T 2688-2689). As a result, Morrow wrote a letter to attorney Beronet. (T 2689). No one asked Morrow to come forward with his testimony. (T 2689). Morrow observed Terrance Goodman usually hanging out with his co-defendant, Brandon Dawson. (T 2717;

2129). Morrow did not believe that he would be helping himself by testifying in Lamar Brooks' case. (T 2726).

Jack Remus is a forensic serologist employed by the Florida Department of Law Enforcement. (T 1940-1941). He is an expert in forensic serology and forensic DNA examination. (T 1941). Mr. Remus compared the DNA extracted from the saliva found on the cigarette butt with Lamar Brooks' DNA. He concluded that there is a one in 34,000 chance that the DNA on the cigarette butt is not Lamar Brooks'. (T 1958). Mr. Remus was provided with some 18 samples taken from Rachel Carlson's vehicle. (T 1948). Mr. Remus compared the samples with Lamar Brooks' DNA. (T 1950; 1955). None of the questioned blood samples/exhibits taken from Rachel Carlson's vehicle included Lamar Brooks' blood. (T 1955). Further, Mr. Remus examined a Newport cigarette butt found adjacent to the driver's side of Rachel Carlson's vehicle. (T 1190; 1966). Mr. Remus developed a DNA profile from the Newport cigarette and compared it to Lamar Brooks' DNA. Remus excluded Lamar Brooks as the source of DNA. Remus examined for blood, a visor, a tee-shirt, a pair of boots, two pairs of socks, a pair of jogging pants, a wallet and all its contents, a Motorola flip phone and a backpack all belonging to Lamar Brooks. (T 2623-2626). All tested negative for blood. Further, Remus tested a phone battery, another cellular phone, a contact lens case, a Brut deodorant stick, a toothbrush, a Bic pen, a Listerine gel tube, a Motorola plug, a cassette case, receipts, a plane ticket, numerous pairs of boxer shorts and another tee-shirt for blood. All the above items were found in Brooks' backpack. All tested negative for blood. (T 2626-2628).

Karen Garcia was a special agent employed by the Air Force Office of Special Investigations. (OSI). Agent Garcia testified to questions put to and

answers given by Walker Davis, Jr. (T 1107). Garcia asked Davis when was the last time he saw Rachel Carlson? Davis told Garcia that he last saw Carlson at 4:15 in the afternoon when Rachel was getting ready to leave work. (T 1107). Davis told Garcia that he last saw Carlson at the hospital on base.

(T 1107). Garcia said that Davis said he put a waterbed together on Wednesday, April 24, 1996. (T 1108). Further, Garcia said that Davis said that on Wednesday night, April 24, 1996, the night of the homicides, he went out and walked his dog and that he was with his cousin, Lamar Brooks the entire evening. (T 1110). On Thursday morning, April, 25, 1996, Garcia picked up Brooks at Davis' apartment unannounced. (T 1131-1132). Garcia noted no cuts, abrasions, marks, blood or stains on Brooks or his clothing. (T 1132). Garcia interviewed Lamar Brooks. (T 1112). After the interview on Thursday, April 25, 1996, Brooks was not a logical suspect. (T 1127).

Larry Ashley was an investigator with the Okaloosa County Sheriffs Office. Mr. Ashley, along with other law enforcement personnel, questioned Walker Davis, Jr. at the Crestview Police Department on Friday, April 26, 1996. (T 2179). Walker Davis, Jr. told Ashley and the others that he had sex with Rachel Carlson on two occasions in April and May of 1995. (T 2180-2181). Davis further stated that he told his wife about Rachel and that she knew about baby Alexis. (T 2181). After Ashley tried to get a time line on him for the week before the homicides, Davis told him he was in Georgia with his cousin Lamar and friend Marcus. (T 2181). Davis told law enforcement that he rode to Eglin from Atlanta with Lamar and Marcus. (T 2181). Davis told them that Lamar and Marcus stayed at Walker Davis, Jr.'s house. (T 2181). Walker Davis, Jr. told law enforcement that the last time he saw Rachel Carlson was at approximately 4:15 at work. (T 2181-2182). Ashley stated

that Davis stated that Carlson stated that she wanted to come over to his house to pick him up so they could go to the daycare center and see Alexis. (T 2182). Further, Ashley stated that Davis stated that Carlson asked Davis for \$50.00. (T 2182). Upon questioning, Davis told Ashley that he would give Carlson about \$50.00 every two weeks to help with the baby. (T 2182). Further, Davis stated that he didn't know if the baby was his but that he intended, after his income tax check came in, to have a blood test completed in order to determine paternity. (T 2182). Ashley stated that Davis stated that Davis owed Carlson money for a stereo. (T 2182). Davis told Ashley that Lamar and Paul Keown helped set up a waterbed at Davis' house at approximately 5:15 and lasted until 6:00 p.m. on Wednesday, the night of the homicides. (T 2184). Davis told Ashley that between 6:00 and 9:00 p.m. on Wednesday, he and Lamar walked his dog and did some night training with the dog. (T 2184). Davis said between 6:00 and 9:00 p.m., on Wednesday, April 24, 1996, that he phoned a girl in Philadelphia and phoned Rachel Carlson, but left no message. (T 2185). Davis stated to law enforcement that he and Lamar returned at approximately 9:00 and that Lamar started cooking, burned what he was cooking and went to bed. (T 2185). Ashley stated that Davis stated he was with Lamar Brooks from 6:00 until 9:15 p.m. on the night of the homicides. (T 2186).

Glen Barberree was an investigator with the Crestview Police Department. On Friday, April 26, 1996, two days after the homicides, Barberree participated in an interview of Walker Davis, Jr. (T 2313). Barberree said that Davis said that Davis was not in Crestview on the night of the murders. (T 2314-2315). Barberree further stated that Davis stated that Lamar Brooks burned a meal and he and Brooks walked around and went to bed around 11:00. (T 2315).

Dennis Haley is an agent with the Florida Department of Law Enforcement. (T 2407). He participated in conducting interviews with Walker Davis, Jr. on two occasions, April 26 and April 29. (T 2415). The April 26, 1996 interview lasted about one hour and the April 29, 1996 interview lasted approximately two and one half hours and lasted into the early morning hours of April 30, 1996. (T 2415). After the interview of Walker Davis, Jr. concluded on April 30, 1996, Walker Davis, Jr. was arrested for the murders of Rachel Carlson and Alexis Stuart. Also, as a result of Walker Davis, Jr.'s April 29-30, 1996 interview, law enforcement met with the State Attorney and drew up an arrest warrant for Lamar Brooks for murder. (T 2419). After obtaining the warrant, Haley immediately booked a flight to Philadelphia and arrived there on the afternoon of April 30, 1996. (T 2419-2420). Haley, Bettis and an investigator from the Crestview Police Department, went to Philadelphia to arrest Lamar Brooks. (T2420). Brooks was arrested in front of his parents house in Philadelphia. (T 2420). Haley assisted in drafting search warrants for Brooks' vehicle, his parents house and his backpack. (T 2421; 2423).

Jerome Worley was an investigator with the Crestview Police Department. (T 2428). Worley interviewed Walker Davis, Jr. on April 26, 1996 at the Crestview Police Department. (T 2436). Worley stated that Davis stated that he did not have any relatives in Crestview. (T 2437). A tape recording was made of the April 26, 1996 interview. (T 2451). On a portion of the tape recording, Davis said that he was not in Crestview, Florida on Wednesday, April 24, 1996. (T 2451). Further, Davis stated that he was not in the vehicle at the time of the deaths and that he had no knowledge about the homicides. (T 2451).

Worley interviewed Mark Gilliam in Georgia on May 14, 1996. (T 2438). Worley told Gilliam that he was investigating a double homicide. (T 2439). Worley

drew a map of Crestview for Gilliam to reference. (T 2441-2442). Gilliam told Worley that he was not familiar with Crestview. (T 2495). Worley labeled specific points on the map, including bars, steps and Melissa Thomas' residence. (T 2442). Worley showed Gilliam photos of the two victims in the vehicle. (T 2494). Worley asked Gilliam to mark locations on the map where he was going to pick up Walker Davis. (T 2442). Gilliam was made aware that Walker Davis, Jr. and Mr. Brooks were questioned on the 25th and 26th concerning the murders. (T 2485). Worley stated that subsequently, Davis and Brooks were asked concerning the participation or knowledge of each in the murders. (T 2485-2486). Further, Worley said that Davis and Brooks were asked about their whereabouts on Wednesday, April 24, 1996 and as to the whereabouts of the other. (T 2486). Worley said that on April 29, 1996, Davis initially maintained the same story he had told previously about his whereabouts on Wednesday, April 24, 1996. (T 2487). On April 29, 1996, Worley told Davis that law enforcement had interviewed Nikki Henry and Rochelle Jones and had collected phone records from Melissa Thomas' home. (T 2488). After Davis maintained his original story, Worley confronted Davis about what the interviewed witnesses had said and confronted him with other documented evidence concerning his whereabouts, when he was actually in Crestview. (T 2488-2489). After Worley's confrontation, Davis changed his story. (T 2489). Davis admitted to Worley that he was in Crestview, that he rode in Rachel Carlson's car and that they arrived in Crestview around 9:00 p.m. (T 2489). After the two and one half hour interview that included, *inter alia*, those statements, Davis was arrested. After Davis implicated Lamar Brooks, a warrant was prepared to arrest Lamar Brooks. (T 2489).

B. Penalty Phase.

Linda Chaloupka met Rachel Carlson in November of 1994 (T 3031). She was a co-worker of Rachel Carlson's. (T 1377). She provided a description of Rachel Carlson's job as an OR technician. (T 3032). Ms. Chaloupka said that Rachel Carlson was a quality worker and in fact, she had submitted Ms. Carlson as Surgical Technician of the Quarter. Ms. Carlson was selected as such in January 1995. (T 3032-3034). Linda Chaloupka said that Rachel Carlson had an outstanding reputation. (T 3034). Dr. Sweet, a plastic surgeon at their hospital, would request Ms. Carlson as she was his favorite. (T 3035). Ms. Chaloupka described Rachel Carlsons' goals of becoming a doctor. (T 3035) She felt that Ms. Carlson had a good career ahead of her. (T 3036). She described Ms. Carlson as pleasant, happy with a good attitude. (T 3036). Rachel Carlson spoke to Ms. Chaloupka about dealing with having an illegitimate child. (T 3038).

Ms. Chaloupka said she knew Alexis Stuart. (T 3037). She described her as bright. (T 3037). She described the relationship between Rachel Carlson and Alexis Stuart as close. (T 3037).

Paula Freeman was a co-worker of Rachel Carlson from 1991-1996. (T 3039-3040). She described Rachel Carlson as picky and as a perfectionist at work. (T 3041). She observed Rachel Carlson as always kidding and making others smile or laugh. (T 3042). She knew Alexis Stuart. (T 3043). She described Rachel Carlson as protective of Alexis Stuart. (T 3043). She said that Ms. Carlson was not ashamed that Alexis Stuart was illegitimate. (T 3043). Rachel Carlson volunteered at work for the March of Dimes; cancer fund run; school physicals and

beach cleanup. (T 3044-3045). She was devastated by the homicides. (T 3045). She described Rachel Carlson as like a daughter to her. (T 3045).

Cynthia Hutchins knew Rachel Carlson from work for three to four years. (T 3049). She described Rachel Carlson as an excellent technician. (T 3049). Dr. Sweet would request Rachel Carlson and he was arrogant, meticulous and hard to work for. (T 3049). Ms. Carlson was friendly and she volunteered for Special Olympics and a new emergency response team. (T 3050). The volunteer emergency response team got organized but Rachel Carlson couldn't participate because the first activation was the death of Rachel Carlson. (T 3050).

Michael Stuart is Rachel Carlson's step-father. He has known her since she was three. (T 3052). He married Ms. Carlson's mother, Clarissa Stuart in 1977. (T 3053). He participated in raising Rachel and they had a close relationship. (T 3053). He described Rachel as having a happy childhood and she was a good student. (T 3053). He described her desires to be a doctor. (T 3055). As she got older, Rachel would call home to her mother and step-father about once a month. (T 3056). She had one older sister and two step brothers. (T 3056). One step brother is deceased. (T 3056). He said that her sister and step-brother were very interested in the proceedings but could not make the trip. (T 3056-3057). He said that the death hit her sister and step-brother hard and that her sister was in counseling as a result. She is having an extremely hard time dealing with the deaths. (T 3057). The deaths hit her step-father hard. (T 3058). He never met Alexis.

Clarissa Stuart was the mother of Rachel Carlson. (T 3059). She said that when Rachel was young that she used to like to cuddle and snuggle with her mother. She was happy and was a good baby, she never cried much. She was a good student, self-sufficient, played flute and learned to cross-stitch. (T 3060).

Rachel sewed items for her mother and family. (T 3061). Clarissa Stuart picked up items of Rachel's after her death. The items included an Air Force Achievement Award posthumously awarded. (T 3061). She also received letters of commendation for volunteer work. She saw Alexis Stuart in late January 1996. (T 3063). She believed Rachel was going to be a good mother, as she always changed diapers in a timely fashion. (T 3064). Photographs depicting the two victims were introduced as well as photos of Rachel Carlson home on leave for Christmas in 1991. (T 3064-3065). A finish-the-sentence questionnaire completed by Rachel Carlson in 1992 was admitted. (T 3066-3070). The deaths affected Ms. Stuart very badly. She was under a doctor's care, had an extended disability, was terminated from a job, was on Prozac, had trouble getting out of bed and her life will never be the same. (T 3070).

Nolan Haynes was a corrections officer at the Okaloosa County jail. He observed nothing negative about Lamar Brooks while he was incarcerated there. (T 3086). He described Lamar as cooperative, very respectful and not a disciplinary problem. (T 3086).

Douglas Compton was also a corrections officer at the Okaloosa County jail. He described Lamar as well adjusted to maximum security life from civilian life. (T 3090). All the time Lamar was incarcerated, he observed no problems and in fact, had a calming effect on the other inmates because of his demeanor. (T 3091). Numerous letters were read into the record in lieu of live testimony. (T 3091).

Via letter, Dorothy Brooks testified. (T 3092). She is the mother of Lamar Brooks. She described Lamar as a regular church goer, a church choir member, usher and as a member of the junior trustee board. (T 3092). Lamar played little league and graduated from Chester high school in Pennsylvania. He is warm,

friendly, compassionate, loves children and has a two year old daughter in Texas. (T 3092).

Via letter, Robert Brooks, Sr. testified. (T 3093). He reiterated the church-related upbringing and Lamar's service in Desert Storm. (T 3094).

Via letter, Diane Outland testified. (T 3095). She has known Lamar since he was very young. She described Lamar as a good child.

Via letter, George Danner testified. (T 3096). He is a family friend of the Brooks'. He has known Lamar since he was two years old. He reiterated the church-going family atmosphere that Lamar was raised. (T 3096).

Via letter, Heather Womack testified. (T 3097). She is Lamar's girlfriend and had known him for two years at the time of her writing the court. (T 3097). She described Lamar as never being violent and was lovable.

Via letter, Horace Davis testified. (T 3099). He is a District Justice in Pennsylvania. He described the church-going family of the Brooks' and described Lamar as having fine character.

Via letter, Donna Davis testified. (T 3100). She is a cousin to Lamar and describes her relationship to him as like a brother. (T 3100).

Via letter, Joyce Davis testified. She is Lamar's aunt and said that Lamar received a NAACP award as an outstanding youth in Chester, Pennsylvania. (T 3101). She said that Lamar was never disrespectful and was a positive influence on the youth of the community.

Via letter, Albrew Dennis testified. (T 3102). He spent 22 years in the Air Force and was a teacher. He has known Lamar since he was in grade school. He described Lamar as being a good student, obedient and very polite. (T 3120).

Lamar Brooks testified on his own behalf. (T 3104). He was 25 years old at the time of the homicides. (T 3104). Photographs of Lamar and his family were introduced. One photo depicts Lamar and Robert Brooks, Jr., his only brother and now deceased. (#3106). He has no prior felony convictions. (T 3124). Lamar had plans after the military to start his own record company. (T 3118). He spent 2 years in the Army and served in Desert Storm for six months. (T 3120-3121). After his first two years in the Army, he received an Honorable Discharge. (T 3121). After he re-enlisted, he left the Army under a general discharge under honorable conditions. (T 3123). Lamar received an Army Commendation Medal; National Defense Medal; Army Service Ribbon; Marksmanship badge; Southwest Asia Service Medal with three bronze stars and the Kuwait Liberation Medal. (T 3123).

SUMMARY OF ARGUMENT

POINT ONE: The trial court erred by permitting improper hearsay. The trial court permitted improper victim hearsay and defendant hearsay under the guise of the state of mind exception to the hearsay rule. These admissions were an attempt to prove the subsequent conduct and motive of the defendant. Additionally, they were highly prejudicial and not relevant to any issue at trial.

POINT TWO: The trial court erred by permitting inadmissible hearsay statements where no independent evidence of a conspiracy existed; statements were not made during nor in furtherance of any conspiracy. No conspiracy existed as the record is void of any independent non-hearsay evidence establishing same. The trial court allowed numerous statements via this exception. Even if a conspiracy

existed, the admitted statements were not uttered during or in furtherance of, the conspiracy.

POINT THREE: The trial court erred by violating the Confrontation Clause and Due Process Clauses by permitting non-testifying co-defendant statements that inculpated the Appellant under the guise of statements against penal interest. This is not a firmly rooted hearsay exception nor are there any particularized guarantees of trustworthiness.

POINT FOUR: The trial court erred by denying Appellant's Motion(s) for New Trial after newly discovered evidence was discovered. Numerous recantations and statements were obtained, under oath, by two witnesses who testified only as a result of promises and pressures. Absent these two witnesses, the State held no evidence of guilt against the Appellant.

POINT FIVE: The trial court erred in permitting the testimony of witnesses Gilliam and Goodman. 18 U.S.C. Section 201(c)(2) describes the federal bribery statute. The purpose of criminalizing such behavior is to, *inter alia*, keep all testimony free of all influence. The State engaged in behavior which clearly violated this criminal statute. As such, exclusion is appropriate for the government's failure to observe its own laws.

POINT SIX: The trial court erred in denying Appellant's Motion for Mistrial after the State impermissibly commented on the Appellant's right to remain silent.

POINT SEVEN: The trial court erred in determining juror qualifications and due process was thwarted via impermissible prosecutorial comment. Numerous jurors were impermissibly struck and numerous jurors were allowed to remain after their opinions were made clear. Further, the trial court abused its

discretion in permitting the highly prejudicial comment by the State, regarding cutting up live animals.

POINT EIGHT: The trial court erred in permitting the admission of photographs of a second autopsy. The court permitted photographs of the two murder victims that were taken after previous autopsies had been performed. They did not accurately depict the victims. Further, photographs from the first autopsy were available to the State.

POINT NINE: The trial court erred in denying the Appellant's Motion to Strike Venire/Change Venue. The trial court did not make the requisite findings in order to determine the nature and effect of pre-trial publicity.

POINT TEN: The trial court erred by permitting statements made by non-testifying co-defendant to law enforcement. The trial court permitted these statements to law enforcement under the guise of the co-conspirator exception and statement against interest exception. These statements were untrue and offered to show the bad character and intent of the co-defendant. They were impermissibly allowed to show the future intent of the Appellant.

POINT ELEVEN: The trial court erred in denying the Appellant's Motion for Judgment of Acquittal. The case was circumstantial against the Appellant. The State failed to present evidence from which the jury could exclude every reasonable hypothesis except that of guilt.

POINT TWELVE: The trial court erred with respect to aggravators. These include instructing the jurors on cold, calculated and premeditated; heinous, atrocious or cruel; committed during the course of a felony; victim under twelve; previously convicted of a capital felony; pecuniary gain as well as improper doubling. The trial court also erred in finding that the above existed beyond and to

the exclusion of every reasonable doubt. The weighing process was distorted by errors.

POINT THIRTEEN: The trial court erred when it failed to find valid mitigation established by the evidence. The trial court erred in its findings by misconstruing the facts and misapprehending the law. The findings were not logically supported nor were they supported by competent substantial evidence and thus, the rejection of same was not expressly stated in the sentencing order.

POINT FOURTEEN: The trial court erred in permitting victim impact evidence. This evidence was permitted for the sole purpose of inflaming the jurors passions for the victims and against the Appellant.

POINT FIFTEEN: Death is unconstitutional and disproportionate. The trial court made errors in its sentencing order and as such, did not properly weigh the aggravators and mitigators. Since the trial court made errors in its findings, a proportionality review would result in a different sentence. Death as punishment, is unconstitutional.

ARGUMENT

POINT ONE

THE TRIAL COURT ERRED BY PERMITTING IMPROPER HEARSAY EVIDENCE OVER APPELLANTS' OBJECTIONS

Hearsay statements of victim

Lisa Lauer was an operating room technician and co-worker of Rachel Carlson. She testified that on the day of the homicides, April 24, 1996, Ms.

Carlson told her that she was going to pick up her baby and Walker and go to Crestview to visit Walker Davis, Jr.'s aunt. (T 1390-1394). Over objection, this testimony was allowed as a state of mind hearsay exception. (T 1396).

Ame Boehmer was a surgical technician employed by the Air Force and stationed at Eglin. (T 1385). She testified that Ms. Carlson said that she was going to drive to Crestview to visit her boyfriends family. (T 1389). Further, Ms. Carlson said that Walker Davis, Jr. owed her money and that Ms. Carlson was trying to get money from him. (T 1389). Over objection, this testimony was allowed. (T 1389).

Linda Chaloupka was a hospital co-worker of Rachel Carlson's. (T 1377-1378). She said that Ms. Carlson told her about her plans for April 24, 1996. (T 1379-1380). Ms. Carlson told her that she had some sort of paternity papers for her infant daughters father to sign and that he agreed to do that and that Ms. Carlson was going to see him that evening. (T 1380). Over objection, this testimony was allowed. (T 1379).

Alicia Williams was a surgical technician employed by the Air Force and stationed at Eglin. (T 1408). She said that Ms. Carlson said that she was going to take the baby to Crestview to meet her fathers aunt and cousins. (T 1412-1413). Ms. Williams said that Ms. Carlson said that Ms. Carlson, the baby and Walker Davis, Jr. were going to make the trip. (T 1413). Over objection, this testimony was allowed. (T 1412).

Jason Hatcher was a surgical technician who worked with Rachel Carlson at Eglin Air Force Base. (T 1357-1359). He said that Ms. Carlson told him about her plans for April 24, 1996. (T 1362-1363). He said that Ms. Carlson said that she and Walker Davis, Jr. were going to go to Crestview again to look for an aunt and two cousins. (T 1363-1364). Further, Ms. Carlson said that the baby was going to

accompany Ms. Carlson and Walker Davis, Jr. (T 1366). Ms. Carlson, according to Mr. Hatcher, said that she wanted gas money from Walker Davis, Jr. and that he was going to have to sign paternity papers for child support indicating that Walker Davis, Jr. was the father of the child. (T 1366). Again, over objection, this testimony was allowed. (T 1363).

Michael Lynes was an information systems technician for Eglin Hospital. (T 1452-1453). Mr. Lynes retrieved e-mail messages that originated from an account assigned to Rachel Carlson and were sent to an account assigned to Walker Davis, Jr. (T 1460). An e-mail message retrieved on April 29, 1996, from an account assigned to Rachel Carlson states “We can go up there again tonight, but I need gas money. Also, let’s try to go a little earlier. I’m about to fall over I’m so tired from the past two nights. Also, if you can, I need some money for diapers. She’s almost out, and I am flat broke. Call me.” (T 1460; 1463, 1464). Over objection, this testimony and document was allowed. (T 1460).

Billie Madero was a senior clerk for the Department of Health and Rehabilitative Services/Department of Revenue. (T 1450). A HRS document listed Rachel Carlson as the custodial parent of Alexis Stuart and Walker Davis, Jr. as the father of Alexis. (T 1450). Madero said that Carlson contacted the agency for a child support enforcement appointment. Over objection, this testimony was allowed. (T 1450).

The testimony of Lauer, Boehmer, Chaloupka, Williams, Hatcher and Lynes were admitted pursuant to Section 90.803(3), Florida Statutes (1997). The statute states:

(3) Then-existing mental, emotional, or physical condition.--

- (a) A statement of the declarant's then-existing state of mind, emotion, or physical sensation, including a statement of intent, plan, motive, design, mental feeling, pain, or bodily health, when such evidence is offered to:
 - 1. Prove the declarant's state of mind, emotion, or physical sensation at that time or at any other time when such state is an issue in the action.
 - 2. Prove or explain acts of subsequent conduct of the declarant.
- (b) However, this subsection does not make admissible:
 - 1. An after-the-fact statement of memory or belief to prove the fact remembered or believed, unless such statement relates to the execution, revocation, identification, or terms of the declarant's will.
 - 2. A statement made under circumstances that indicate its lack of trustworthiness.

In a murder case, ordinarily only the state of mind of the defendant is material. Downs v. State, 574 So.2d 1095 (Fla. 1991). A murder victim's statements are material and admissible under the state-of-mind exception only when (1). there is a claim of self-defense; (2). the defendant claims the victim committed suicide and (3). the defendant claims the death was accidental. Kingery v. State, 523 So.2d 1199, 1202 (Fla. 1st DCA 1988);

Mr. Brooks told law enforcement that he was with Walker Davis the entire time he was in Florida. As a result, from opening to closing, the prosecution considered Lamar Brooks and Walker Davis, Jr. as one. (T 1888). The prosecution; however, had no physical evidence linking Mr. Brooks to the crimes. Further, the State did not have any admissions of guilt to law enforcement, contradictions of statements nor any real evidence of motive from Lamar Brooks.

On the other hand, the State had fingerprint evidence against Walker Davis, Jr., confessions to law enforcement by Walker Davis, Jr., admissions by Walker Davis, Jr., contradictions by Walker Davis, Jr., evidence found on Walker Davis, Jr.'s person and a conviction of Walker Davis, Jr. for the killing of Rachel Carlson and Alexis Stuart. Also, they possessed a tremendous amount of witness testimony exposing the motive for Walker Davis, Jr. to commit these homicides. After all, it was Walker Davis, Jr. who spoke of killing his lover and baby, who purchased a life insurance policy on Alexis naming himself as the primary beneficiary, who shopped for expensive automobiles to pay cash with, who bragged that he would be coming into money, who complained of owing Rachel money, and who felt the pressures from his own wife and new baby that he had these infidelities with Rachel, resulting in detrimental consequences in the eyes of Walker Davis, Jr. Witnesses Lauer, Boehmer, Chaloupka, Williams, Hatcher and Lynes offered statements of Rachel Carlson to prove the future acts of *Walker Davis, Jr.* and offered them to prove the motive of *Walker Davis, Jr.* Since the State believed and prosecuted Davis and Brooks as one, all that inculpated Davis, necessarily inculpated Brooks. The State offered this victim hearsay because Walker Davis, Jr. initially denied being in Crestview on the night of the homicides, denied that he rode in the car with Rachel Carlson to Crestview on the night of the homicides and because he said he last saw Ms. Carlson at 4:15 p.m. at work. The admission, by the Court, of Rachel Carlson's statements to all of these witnesses was clearly violative of Section 90.803(3). A statement of intent is allowed to prove a subsequent act of the declarant not a defendant. Bailey v. State, 419 So.2d 721 (Fla. 1st DCA 1982); Jones v. State, 440 So.2d 570 (Fla. 1983); Hodges v. State, 595 So.2d 929 (Fla. 1992); Hunt v. State, 429 So.2d 811 (Fla. 2nd DCA 1983);

Correll v. State, 523 So.2d 562 (Fla.), cert. denied, 488 U.S. 871, 109 S.Ct. 183, 102 L.Ed.2d 152 (1988). The State did not offer these statements to prove the acts of Ms. Carlson. There was no claim of self defense, no allegation of suicide nor was there any hint that Mr. Brooks claimed that the deaths were accidental.

The admission of Madero's testimony was admitted to show that Davis was the purported father of Alexis Stuart and that since Carlson had contacted HRS to institute child support enforcement, that Davis had a motive to eliminate that "problem" in his life. Over an objection of relevancy, it was admitted. The relevancy issue is not negated by Section 90.803(3). see Charles W. Ehrhardt, Florida Evidence p. 682 (1999 Edition). Ms. Carlsons' acts, as described in the hearsay statements, were not relevant to any issue in the trial of Lamar Brooks.

The State, via all of the above hearsay testimony, attempted to prove the subsequent acts of Davis and that Davis had lied. Pursuant to the State's theory, they also proved the subsequent acts of Brooks and that Brooks lied. As the State pounded home in their closing, "...that's the theme you're going to hear over and over again... because they are one." (T 2852). "...[the State's case] also proves the guilt of Walker Davis, Jr., because that's how this case had to be prosecuted. You couldn't just separate them, because they were one..." (T 2890). The permitted hearsay above would not be admissible in a trial of Walker Davis, Jr., save the trial of Lamar Brooks.

Hearsay statements of Walker Davis, Jr.

The misapplication of 90.803(3) continued. The Court permitted the hearsay testimony of Wayne Samms. Over objection, the court allowed this testimony as a state of mind hearsay exception. (T 2231-2235; 2238; 2258). Wayne Samms was a good friend of Walker Davis, Jr.'s. (T 2240). Approximately one month prior to

the homicides, Walker Davis, Jr. and Mr. Samms had a conversation in Samms' vehicle. (T 2258). Samms was separated from his wife at the time of the conversation with Davis. (T 2258-2259). Samms told Davis that if Davis would have just paid Carlson \$150.00 per month, she would have left Davis alone. (T 2259). Samms stated that Davis said that "she and the baby was done." (T 2259). Davis continued to tell Samms that Carlson was "bugging" and "that her and the little dip were done." (T 2260). Samms told Davis that if he killed the baby or her that it would come back to him. (T 2260). Samms again suggested paying her to which Davis replied that he wasn't going to give her anything. (T 2261). This highly prejudicial evidence of Walker Davis, Jr.'s statements are inadmissible under Section 90.803(3) to show Lamar Brooks' intent. Sandoval v. State, 689 So.2d 1258 (Fla. 3d DCA 1997); Kelley v. State, 543 So.2d 286 (Fla. 1st DCA 1989). Further, they are inadmissible pursuant to Sections 90.401 and 90.403. The Court continued to admit prejudicial hearsay.

Over objection, the Court permitted the hearsay testimony of David Johnston as another state of mind exception. (T 1876-1877). David Johnston was a car salesman for Preston Hood Imports. In the first part of April of 1996, Johnston spoke with Walker Davis, Jr. about buying a Nissan Pathfinder. (T 1872-1873; 1878). The automobile Davis was interested in cost approximately \$32,000.00. (T 1873). Johnston said that Davis said that he would pay cash for the vehicle. (T 1875). Additionally, Davis told Johnston that he was "coming into some money." (T 1877). The hearsay statements of Walker Davis Jr. are inadmissible under Section 90.803(3) to show Lamar Brooks intent. Sandoval; Kelley. Further, they are inadmissible pursuant to Sections 90.401 and 90.403.

Over objection, the Court admitted the hearsay statements of Walker Davis, Jr. provided by Anthony Sievers. (T 1882-1883). Anthony Sievers was a friend and co-worker of Walker Davis, Jr. (T 1880). Walker Davis, Jr., while riding with Mr. Sievers, stated that Davis was contemplating getting a car(s) and that there would be no payments. (T 1888). The hearsay statements of Walker Davis Jr. are inadmissible under Section 90.803(3) to show Lamar Brooks intent. Sandoval; Kelley. Further, they are inadmissible pursuant to Sections 90.401 and 90.403.

Over objection, the Court admitted the hearsay statements of Walker Davis, Jr. through Steve Manthey. (T 1441). Steve Manthey was a Met Life insurance salesman. On February 20, 1996, Walker Davis, Jr. applied for life insurance. (T 1438). Manthey sold Walker Davis, Jr. a \$100,000.00 life insurance policy, which named Alexis Stuart as the insured and Walker Davis, Jr. as the primary beneficiary. (T 1436-1442). Clearly, the only purpose the State offered this testimony was to establish the motive for the killings. According to the State, if Davis had motive, then Brooks had motive. The statements; however, are inadmissible to show Lamar Brooks' motive/intent. Sandoval; Kelley. Further, they are inadmissible pursuant to Sections 90.401 and 90.403.

Additionally, the Court permitted highly prejudicial hearsay statements of Walker Davis, Jr. through Rochelle Jones. (T 1807). Jones had a conversation with Davis on Monday or Tuesday before the Wednesday homicides. (T 1809). This conversation between Davis and Jones occurred at Eglin hospital in a computer class. (T 1807). Davis told Jones about a guy owing him money and he was going to get the money and that he would have to "smoke the dip with the baby" because she would be able to tie him to that guy. (T 1808-1809). "Smoke the dip" means kill the baby. (T 1809). Again, the State attempted to prove Mr. Brooks intent/plan

through the hearsay statements of Walker Davis, Jr. This is impermissible. Sandoval; Kelley. Further, the statements are inadmissible pursuant to Sections 90.401 and 90.403.

Hearsay testimony was elicited from Lauer, Boehmer, Chaloupka, Hatcher, Lynes, Madero, Samms, Johnston, Sievers, Manthey and Rochelle Jones. It was error for the trial court to permit the exhaustive hearsay statements of Rachel Carlson and Walker Davis, Jr. Since Brooks merely said that he was always with Davis, the State, admittedly, placed tremendous emphasis on Davis' motives, actions, statements and lies in an effort to inculcate Brooks. The prosecutor, in his opening statement, called Davis and Brooks "Siamese twins." (T 871). As a result, the introduction and emphasis of the hearsay is highly prejudicial to Lamar Brooks. This inadmissible evidence was a material feature of the prosecutions argument and theory of the case. As a result, these admissions require reversal. State v. Lee, 531 So.2d 133 (Fla. 1988); Hopkins v. State, 632 So.2d 1372 (Fla.1994); Arney v. State, 652 So.2d 437 (Fla. 1st DCA 1995); Kelley at 288. Further, the admissions cannot be said to be harmless, as it provided the motive and means for the murders. In view of the lack of physical evidence against Lamar Brooks, the admission of this powerful hearsay cannot be harmless. A close reading of the States opening and closing arguments lead to the inescapable conclusion that the prosecutor was asking the jury to find Brooks guilty because he was associated with Walker Davis, Jr. All of the inculpatory statements made by Davis, the prosecution argues, inculcate Brooks since "...Lamar Brooks and Walker Davis are one." (T 2907). The inability to cross examine this hearsay testimony only exacerbated the harm caused, as well as violates Article 1, Sections 9 and 16 of the Florida Constitution and the Fifth, Sixth and Fourteenth Amendments to the United

States Constitution. Lee v. Illinois, 476 U.S. 530, 90 L.Ed.2d 514, 106 S.Ct. 2056 (1986); Williamson v. United States, 512 U.S. 594, 129 L.Ed.2d 476, 114 S.Ct. 2431 (1994); Pointer v. Texas, 380 U.S. 400, 13 L.Ed.2d 923, 85 S.Ct. 1065 (1965); Maryland v. Craig, 497 U.S. 836, 111 L.Ed.2d 666, 110 S.Ct. 3157 (1990); California v. Green, 399 U.S. 149, 26 L.Ed.2d 489, 90 S.Ct. 1930 (1970); Ohio v. Roberts, 448 U.S. 56, 65 L.Ed.2d 597, 100 S. Ct. 2531 (1980); White v. Illinois, 502 U.S. 346, 116 L.Ed.2d. 848, 112 S. Ct. 736 (1992); Brown v. State, 471 So.2d 6 (Fla. 1985).

POINT TWO

THE TRIAL COURT ERRED IN PERMITTING CO-CONSPIRATORS' HEARSAY STATEMENTS WHERE NO INDEPENDENT EVIDENCE OF A CONSPIRACY EXISTED; STATEMENTS WERE NOT MADE DURING NOR IN FURTHERANCE OF ANY CONSPIRACY

Since 1937, this Court has required that independent non-hearsay testimony establish the out-of-court declarant's participation in the conspiracy prior to the admission of co-conspirator statements. Brown v. State, 175 So. 515 (Fla. 1937). This precedent was codified into Section 90.803(18)(e) Florida Statutes. It states in pertinent part:

Hearsay exceptions; availability of declarant immaterial

The provision of Section 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 must be established by independent evidence, either before the introduction of any evidence or before evidence is admitted under this paragraph.

The rationale for this rule is that “a person who has authorized another to speak or to act to some joint end will be held responsible for what is later said or done by his agent, whether in his presence or not.” United States v. Trowery, 542 F.2d 623, 626 (3d Cir.1976), cert. denied, 429 U.S. 1104, 97 S.Ct. 1132, 51 L.Ed.2d 555 (1977). In order for hearsay statements made by one member of a conspiracy to be admissible against another member of the conspiracy, the offering party must show: (1) that both the person making the statement and the person against whom it was offered are members of a conspiracy; (2) that the statement was made during the course of the conspiracy; and (3) that the statement was made in furtherance of the conspiracy. Nelson v. State, 490 So.2d 32 (Fla. 1986); L.S. v. State, 591 So.2d 1105 (Fla. 4th DCA 1992); Hudson v. State, 276 So.2d 89 (Fla. 4th DCA 1973); Isom v. State, 619 So2d.369 (Fla. 3rd DCA 1993). Preliminarily, it is incumbent upon the trial court to determine if, the offering party, has established the three prerequisites pursuant to the section. Additionally, the trial court cannot simply find that the offering party has introduced some evidence of each of the predicate facts, but is required to make a factual determination under Section 90.105 Florida Statutes (1997) that the predicate has been proved by a preponderance of the evidence. Romani v. State, 542 So2d. 984 (Fla. 1989); see

Charles W. Ehrhardt, Florida Evidence p. 752 (1999 Edition). In order to determine whether an adequate foundation has been laid, the court must consider evidence other than the co-conspirator admission itself. Foster v. State, 679 So.2d 747 (Fla. 1996); Briklod v. State, 365 So.2d 1023 (Fla. 1978); State v. Duarte, 681 So.2d 1187 (Fla. 2nd DCA 1996); Christie v. State, 652 So.2d 932 (Fla. 4th DCA 1995).

In response to Appellants question to the court--“What evidence is there of a conspiracy?” The court simply stated that “I think there is a preponderance of the evidence of a conspiracy.” (T 1598). Contrary to the requirements of law, the Court made no findings of fact in reaching such a conclusion. It is not apparent who was a participant in any conspiracy or when it began and when it terminated. Additionally, the court considered the actual statements themselves in concluding that a conspiracy existed. The court stated--“But, at the same time, *taking the particular statements that were made*, as well as the other circumstances that I’ve heard, I feel like there is a preponderance of the evidence to constitute an independent--by independent facts to constitute a conspiracy. For that reason, the Court’s going to allow the testimony of Mr. Gilliam...” (T 1599). (Emphasis added). This was error. Romani; Foster; Briklod; Duarte; Christie. Without specific findings of fact from the court, as required, it is impossible to speculate on the effect that the statements themselves had in finding that a conspiracy existed. Maryland v. Craig, 497 U.S. 836, 111 L.Ed.2d 666, 110 S.Ct. 3157 (1990). Although the United States Supreme Court interpreted the Federal Rules of Evidence to permit the court to consider the hearsay statement sought to be admitted in determining whether a foundation has been laid, this Court has found

otherwise. Bourjaily v. United States, 483 U.S. 171, 107 S.Ct. 2775, 97 L.Ed.2d 144 (1987); Romani at 986.

In order for a conspiracy to have existed, for co-conspiracy purposes, it is not a requirement that the offering party prove all of the substantive elements of the crime of conspiracy. Boyd v. State, 389 So.2d 642, 647 (Fla. 2d DCA 1980).

Although this is true, what must be proved is that there was an express or implied agreement to accomplish, by concerted action, some criminal or unlawful act or to accomplish by criminal or unlawful means a legal goal. United States v. Gil, 604 F.2d 546 (7th Cir. 1979); see Charles W. Ehrhardt, Florida Evidence p. 751 (1999 Edition). After numerous objections, the Court allowed Mark Gilliam to testify via the exception. (T 898-903; 1561-1563; 1565; 1614; 1638). All of the following was permitted via the co-conspirator exception to hearsay:

1. Walker Davis, Jr. said that he should choke that broad. (T 1638).
2. Walker Davis, Jr. said that this woman was pestering him for money for a stereo. (T 1639).
3. Walker Davis, Jr. said that she should be killed in the ghetto in Crestview. (T 1646).
4. Walker Davis said that Mark Gilliam should take Walker Davis, Jr. to Crestview, as the driver, so he could kill her. (T 1646).
5. Walker Davis, Jr. said Mark Gilliam would be paid \$500.00 for driving. (T 1647).
6. Walker Davis, Jr. said he wanted Lamar Brooks to help. (T 1648).
7. Walker Davis, Jr. said that the town of Crestview was slow. (T 1686).
8. Mark Gilliam said that he should stab her. (T 1639).

Time and time again, Mark Gilliam testified that he felt that the evenings of April 22 and April 23, 1996 were all a part of a “long, played out joke.” (T 1654; 1690; 1692). Gilliam stated that he and Brooks were laughing during Walker Davis, Jr.’s complaining about this woman who was pestering him. (T 1692-1693). At first, Davis said that “he should choke that broad” to which Brooks said that “he should shoot her” and Gilliam chimed in with his suggestion of stabbing. These statements were made in jest. (T 1639). Gilliam said this “just to ease Davis up because Davis was so tense.” (T 1653). The atmosphere on April 22 and April 23, according to Gilliam, included jokes, laughter, and was comfortable. (T 1697). Further, Gilliam testified that they were drinking liquor and watching comedy movies. (T (1644; 1692). Gilliam testified that he never expected to actually receive \$500.00 as a result of this banter. (T 1698). Further, Gilliam testified that Lamar Brooks never actually agreed to kill anybody. (T 1698). On Monday night, no one asked Gilliam to help, in any way, to kill anybody. (T 1641). Additionally, Mark Gilliam, in the presence of Lamar Brooks, never said that he was going to drive and pick them up. (T 1702). Given the surrounding circumstances of these conversations, there was no “meeting of the minds” between any of the people present. No independent evidence exists in the record to establish the requisite agreement. Since there was no agreement to accomplish the murders of Rachel Carlson or Alexis Stuart, no conspiracy existed. The court did not make any of the requisite factual findings required by the exception because the record is void of any independent evidence of the existence of a conspiracy.

The requirement that the co-conspirator’s statement be made “during the course of the conspiracy” means that the statement must be made while the conspiracy is in existence and before it is terminated. Calvert v. State, 730 So.2d

316 (Fla. 5th DCA 1999)(Conspiracy ended after murder, statements made after murder inadmissible); Burnside v. State, 656 So.2d 241, 245 (Fla. 5th DCA 1995)(Error to admit statements of co-conspirator after murders occurred); Usher v. State, 642 So.2d 29, 31 (Fla. 2nd DCA 1994); Moore v. State, 503 So.2d 923, 924 (Fla. 5th DCA 1987). Assuming, *arguendo*, that a conspiracy existed, the object of that conspiracy was murder. The object of the conspiracy was accomplished on Wednesday, April 24, 1996, thereby terminating the conspiracy. The court admitted statements of Walker Davis, Jr. under the co-conspirator exception to the hearsay rule via Rochelle Jones. Over objection, the court allowed statements made by Davis to Jones *after* the homicides occurred. (T 1763; 1786). The court permitted Jones to testify that Davis said to her “You ain’t seen me.” This statement was said after the murders. (T 1786). Further, the jury heard Jones testify that Davis asked Jones if “She was cool?” and later if she was “Still cool?” These statements were said after the murders. (T 1789; 1796). On Saturday, April 27, 1996, Davis arrived at Jones’ residence. (T 1796-1797). That day, Davis told Jones that “He and Lamar Brooks went to Crestview to rob this guy and they shot at him and they took his money and that the guy probably killed Rachel because she had set him up.” (T 1798-1799). Although this statement was not made during the conspiracy nor was it made in furtherance of any conspiracy, it was permitted. Additionally, the admission of this highly prejudicial statement of uncharged crimes violates Sections 90.401 and 90.403 as its prejudicial effect far outweighs any probative value.

Any statement admitted pursuant to this exception must also be made in furtherance of the conspiracy. Isom. In order for a statement to be made in “furtherance” of the conspiracy, the statement must be made to advance the object

of the conspiracy. United States v. Miller, 664 F.2d 94, 98 (5th Cir. 1981), cert. denied, 459 U.S. 854, 103 S.Ct. 121, L.Ed.2d 106 (1982); United States v. McGuire, 608 F.2d 1028, 1032-1033 (5th Cir. 1979), cert. denied, 446 U.S. 910, 100 S.Ct. 1838, 64 L.Ed.2d 262 (1980); United States v. Patton, 594 F.2d 444 (5th Cir. 1979); Weinstein, Evidence Section 801(d)(2)(E)[01]; see Charles W. Ehrhardt, Florida Evidence, p. 750 (1999 Edition). None of the Davis statements, admitted through Jones, were made to advance the goal of murder. As a result, it was error to admit the statements.

Based on the above authority, it was error to permit the hearsay testimony listed above. Given the lack of evidence inculcating Lamar Brooks to these homicides, the State piled hearsay upon hearsay in effort to secure another conviction for these crimes. Consequently, since the prosecution focused its arguments on the Davis/Brooks linkage, these errors cannot said to be harmless. Since no conspiracy existed, Appellant's rights to confrontation and due process were thwarted. Appellant objected to same. (T 2173-2176). The Appellants' rights pursuant to Article 1, Sections 9 and 16, Florida Constitution and the Fifth, Sixth and Fourteenth Amendments to the United States Constitution were subverted. Lee v. Illinois, 476 U.S. 530, 90 L.Ed.2d 514, 106 S.Ct. 2056 (1986); Williamson v. United States, 512 U.S. 594, 129 L.Ed.2d 476, 114 S.Ct. 2431 (1994); Pointer v. Texas, 380 U.S. 400, 13 L.Ed.2d 923, 85 S.Ct. 1065 (1965); Maryland v. Craig, 497 U.S. 836, 111 L.Ed.2d 666, 110 S.Ct. 3157 (1990); California v. Green, 399 U.S. 149, 26 L.Ed.2d 489, 90 S.Ct. 1930 (1970); Ohio v. Roberts, 448 U.S. 56, 65 L.Ed.2d 597, 100 S. Ct. 2531 (1980); White v. Illinois, 502 U.S. U.S. 346, 116 L.Ed.2d. 848, 112 S. Ct. 736 (1992); Brown v. State, 471 So.2d 6 (Fla. 1985).

POINT THREE

THE TRIAL COURT ERRED BY VIOLATING APPELLANTS RIGHTS TO CONFRONT WITNESSES AND DUE PROCESS BY PERMITTING NONTESTIFYING CO-DEFENDANTS STATEMENTS THAT INCULPATED APPELLANT

In all criminal prosecutions, the accused has a right, guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, “to be confronted with the witnesses against him.” U.S. Constitution, Amendment 6; Pointer. This right to confrontation is applicable to the states via the Fourteenth Amendment, see Idaho v. Wright, 497 U.S. 805, 813, 111 L.Ed.2d 638, 110 S. Ct. 3139 (1990). This Court has called the right of confrontation “...a cornerstone of Western society for a number of centuries.” Harrell v. State, 709 So.2d 1364, 1367 (Fla. 1998)(citing Coy v. Iowa, 487 U.S. 1012, 1015-16 (1988)). “The central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact.” Maryland v. Craig 497 U.S. at 845, 111 L.Ed.2d 666, 110 S.Ct. 3157 (1990). When the government seeks to offer a declarant’s out-of-court statements against the accused, and the declarant is unavailable, as in this case, courts must decide whether the Clause permits the government to deny the accused his usual right to force the declarant “to submit to cross-examination, the ‘greatest legal engine ever invented for the discovery of the

truth.”” California v. Green at 158; Lilly v. Virginia, 119 S.Ct. 1887, 527 U.S.--, 144 L.Ed.2d 117 (1999). The United States Supreme Court explained:

The primary object of the [Confrontation Clause] was to prevent depositions or *ex parte* affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross examination of the witness in which the accused has opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.

Mattox v. United States, 156 U.S. 237, 242-43, 39 L.Ed. 409, 15 S.Ct. 337 (1895).

In White v. Illinois, 502 U.S. 346, 116 L.Ed.2d. 848, 112 S. Ct. 736 (1992), the Supreme Court rejected the suggestion that the Confrontation Clause should be narrowly construed to apply to practices comparable to the use of affidavit practice mentioned in Mattox. In White, the Court reiterated and adhered to the framework established in Ohio v. Roberts. The framework says that the “veracity of hearsay statements is sufficiently dependable to allow the untested admission of such statements when (1) “the evidence falls within a firmly rooted hearsay exception” or (2) it contains “particularized guarantees of trustworthiness” such that adversarial testing would be expected to add little, if anything, to the statements reliability.” Id., at 66, 65 L.Ed.2d. 597, 100 S. Ct. 2531. As the Supreme Court stated:

We have allowed the admission of statements falling within a firmly rooted hearsay exception since the Court’s recognition in Mattox v. United States, 156 U.S. 237, 39 L.Ed. 409, 15 S. Ct. 337 (1895), that the Framers of the Sixth Amendment “obviously intended

to ... respec[t]” certain unquestionable rules of evidence in drafting the Confrontation Clause. *Id.*, at 243, 39 L.Ed. 409, 15 S.Ct. 337. Justice Brown, writing for the Court in that case, did not question the wisdom of excluding deposition testimony, *ex parte* affidavits and their equivalents. But he reasoned that an unduly strict and “technical” reading of the Clause would have the effect of excluding other hearsay evidence, such as dying declarations, whose admissibility neither the Framers nor anyone else 100 years later “would have [had] the hardihood... to question.” *Ibid.*

Lilly v. Virginia, 119 S.Ct. 1887, 527 U.S.--, 144 L.Ed.2d 117, 127 (1999).

The Supreme Court describes exceptions that are deeply rooted if, in light of “long-standing judicial and legislative experience,” Idaho v. Wright, 497 U.S. 805, 817, 111 L.Ed.2d. 638, 110 S.Ct. 3139 (1990), it “rest[s] [on] such [a] solid foundatio[n] that admission of virtually any evidence within [it] comports with the ‘substance of the constitutional protection.’” Roberts, 448 U.S., at 66, 65 L.Ed.2d 597, 100 S. Ct. 2531 (quoting Mattox, 156 U.S., at 244, 39 L.Ed. 409, 15 S.Ct. 337 (1895)). Further, the Supreme Court stated “Established practice, in short, must confirm that statements falling within a category of hearsay inherently “carr[y] special guarantees of credibility” essentially equivalent to, or greater than, those produced by the Constitution’s preference for cross-examined trial testimony.” White v. Illinois, 502 U.S., at 356, 116 L.Ed.2d. 848, 112 S. Ct. 736 (1992).

In this case, the State sought to introduce, as a statement against penal interest, the statements/confession given by Walker Davis, Jr. to Agents Haley and Worley on April 29 and 30, 1996. (T 2291; Defense Exhibits 5-9). First, the United States Supreme Court states that “[a] simple categorization of a statement as “‘declaration against penal interest’... defines too large a class for meaningful Confrontation Clause analysis.” Lee v. Illinois, 476 U.S., at 544, n. 5, 90 L.Ed.2d

514, 106 S.Ct. 2056 (1986). “In criminal trials, statements against penal interest are offered into evidence in three principal situations: (1) as voluntary admissions against the declarant; (2) as exculpatory evidence offered by a defendant who claims that the declarant committed, or was involved in, the offense; and (3) as evidence offered by the prosecution to establish the guilt of an alleged accomplice of the declarant.” Lilly v. Virginia, 119 S.Ct. 1887, 527 U.S.--, 144 L.Ed.2d 117, 127 (1999). Clearly, the prosecution, was offering Walker Davis, Jr.s’ statements in an effort to establish the guilt of Lamar Brooks as an accomplice. As a result, these statements fall within the third category of statements against penal interest as they were so numbered in Lilly. The Court, states that “The practice of admitting statements in this category under an exception to the hearsay rule... is, unlike the first category or even the second, of quite recent vintage. This category also typically includes statements that, when offered in the absence of the declarant, function similarly to those used in the ancient *ex parte* affidavit system.” Lilly v. Virginia, 119 S.Ct. 1887, 527 U.S.--, 144 L.Ed.2d 117, 131.

The trial court erred when it permitted, over objection, the following statements of Walker Davis, Jr. as statements against his penal interest (T 2370; 2489):

1. That Walker Davis, Jr. changed his statement to admit that he was in Crestview, Florida on Wednesday evening, April 24, 1996.
2. That Walker Davis, Jr. changed his statement to admit that he arrived in Crestview, Florida on Wednesday evening, April 24, 1996 at approximately 9:00 p.m.
3. That Walker Davis, Jr. changed his statement to admit that he arrived in Crestview, Florida at approximately 9:00 p.m. on Wednesday

evening, April 24, 1996 by riding in the same vehicle with the victim, Rachel Carlson.

The trial court's admission of these statements is confounding, given the trial courts' analysis of the circumstances surrounding the statements. The trial court says, "...I can't find in any way that this was an inculpatory statement, because from the very get-go... the police... came in there and they said..." "Brooks had rolled over on you." (T 2300). Further, the trial court notes that "...I think the tenor of that whole interview or confession... was him [Davis] trying to say, I haven't done anything wrong, let me tell you what happened, and even changed that later, so I don't know about the reliability of this at all." (T 2301-2302). The trial court goes on-- "But the problem I have is the whole confession, the whole idea, from the very get-go the tenor of that, he was trying to shift the blame from himself to Lamar Brooks." (T 2305). Even though the trial court made these observations, he admitted portions of the Davis statement. The United States Supreme Court stated:

Most important, this third category of hearsay encompasses statements that are inherently unreliable. Typical of the groundswell of scholarly and judicial criticism that culminated in the Chambers decision, Wigmore's treatise still expressly distinguishes accomplices' confessions that inculcate themselves and the accused as beyond a proper understanding of the against-penal-interest exception because an accomplice often has a considerable interest in "confessing and betraying his cocriminals." 5 Wigmore, Evidence Section 1477, at 358, n. 1. Consistent with this scholarship and the assumption that underlies the analysis in our Bruton line of cases, we have over the years "spoken with one voice in declaring presumptively unreliable accomplices' confessions that incriminate defendants." Lee, 476 U.S., at 541, 90 L.Ed.2d 514, 106 S.Ct. 2056; Bruton v. United States, 391 U.S. 123, 20 L.Ed.2d. 476, 88 S.Ct. 1620 (1968).

Lilly v. Virginia, 119 S.Ct. 1887, 527 U.S.--, 144 L.Ed.2d 117, 131 (1999).

Further, the State admitted, “The interview of Walker Davis, Jr., contained a great deal of attempt to shift blame. There’s absolutely no doubt about it, that he was attempting to shift blame to his cousin, Lamar Brooks, for the majority of guilt of killing those persons...” (T 2345). In Douglas v. Alabama, 380 U.S. 415, 419, 13 L.Ed.2d. 934, 85 S.Ct. 1074 (1965), the Supreme Court held that the admission of a nontestifying accomplice’s confession, which shifted responsibility and implicated the defendant as the triggerman, “plainly denied [the defendant] the right of cross-examination secured by the Confrontation Clause.” In this case, the trial court found the inherent problems of reliability in Davis’ statements yet admitted it anyway, knowing that Davis was unavailable and therefore would not be subject to cross examination by Appellant. In Lee v. Illinois, 476 U.S., at 541, 90 L.Ed.2d 514, 106 S.Ct. 2056 (1986), the Supreme Court reaffirmed Douglas and explained that its holding “was premised on the basic understanding that when one person accuses another of a crime under circumstances in which the declarant stands to gain by inculcating another, the accusation is presumptively suspect and must be subjected to the scrutiny of cross-examination.” Further,

“th[e] truthfinding function of the Confrontation Clause is uniquely threatened when an accomplice’s confession is sought to be introduced against a criminal defendant without the benefit of cross-examination... ‘Due to his strong motivation to implicate the defendant and to exonerate himself, a codefendant’s statements about what the defendant said or did are less credible than ordinary hearsay evidence.’” Ibid. (quoting Bruton, 391 U.S., at 141, 20 L.Ed.2d. 476, 88 S. Ct. 1620 (White, J., dissenting)).

There is no question that the United States Supreme Court has consistently held that an accomplices’ statements that shift or spread the blame to a criminal

defendant as falling outside the realm of those “hearsay exception[s] [that are] so trustworthy that adversarial testing can be expected to add little to [the statements’] reliability.” White, 502 U.S., at 357, 116 L.Ed.2d. 848, 112 S. Ct. 736.

The State went to great lengths to convince the trial court that Davis’ statements were reliable by pointing out other corroborating evidence in the trial. This argument, is misplaced. In Wright, 497 U.S., at 822, 111 L.Ed.2d. 638, 110 S.Ct. 3139 the Court concluded that the admission of hearsay statements violated the Confrontation Clause even though the statements were admissible under an exception to the hearsay rule recognized by Idaho, and even though they were corroborated by other evidence. The Court added that it refused to allow the State to “bootstrap on” the trustworthiness of other evidence. “To be admissible under the Confrontation Clause... hearsay evidence used to convict a defendant must possess indicia of reliability by virtue of its inherent trustworthiness, not by reference to other evidence at trial.” Ibid.

There remains little doubt, “The decisive fact, which we make explicit today, is that accomplices’ confessions that inculcate a criminal defendant are not within a firmly rooted exception to the hearsay rule as that concept has been defined in our Confrontation Clause jurisprudence.” Lilly v. Virginia, 119 S.Ct. 1887, 527 U.S.--, 144 L.Ed.2d 117, 133 (1999).

The April 29/30, 1996 interview of Walker Davis, Jr. lasted approximately two and one half hours. (T 2415). Worley said that on April 29, 1996, Davis initially maintained the same story he had told previously about his whereabouts on Wednesday, April 24, 1996. (T 2487). On April 29, 1996, Worley told Davis, *inter alia*, that law enforcement had interviewed Nikki Henry and Rochelle Jones and had collected phone records from Melissa Thomas’ home. (T 2488). After Davis

maintained his original story, Worley confronted Davis about what the interviewed witnesses had said and confronted him with other documented evidence concerning his whereabouts, when he was actually in Crestview. (T 2488-2489). Only after Worley's confrontation, did Davis change his story. (T 2489). Immediately thereafter, the State elicited the statements against penal interest of Davis.

Immediately after Davis' statements were permitted, the State asked Worley, "Now, after he made-- after he completed that interview [April 29/30] with Walker Davis, Jr., what was done with him?" Answer: "He was placed under arrest." The very next question was, "And what action was taken concerning Lamar Z. Brooks?" Answer: "A warrant was prepared for his arrest." (T 2489). The attempt to infer that Davis implicated Brooks in the remainder of the two and one half hour interview was obvious and intentional. It is the very reason for the question regarding what action was taken regarding Lamar Z. Brooks. This is apparent by a close reading of the State's opening and closing arguments. In its opening, the State promised the jury that Davis made numerous statements including those made to law enforcement on April 29, 1996. The State tells the jury that, on April 29, 1996, Davis made numerous admissions to law enforcement. Davis admitted, says the State, that he actually was in Crestview, on April 24, 1996, the night of the homicides, that he came to Crestview in Rachel Carlson's car with Rachel and Alexis Stuart and that they arrived in Crestview around 9:00 p.m. Further, the State tells the jury that Davis admitted that as soon as they got to Crestview, just shortly after they arrived, Rachel Carlson ended up dead, and Davis admitted that he was in the car as Rachel Carlson died. (T 859). In closing, the State drove their point home by stating, "You know, you didn't hear everything Walker Davis said to

those police in the two-hour interview he gave.” (T 2961). This error is clearly violative of the due process rights afforded the Appellant.

The history of the Confrontation Clause is quite clear. Simply put, the Court erred in permitting this highly prejudicial, unreliable hearsay testimony of a non-testifying co-defendant and erred in not granting a mistrial after the prosecutors’ comments in closing. The State’s objective, admittedly, was to inculcate Lamar Brooks through Walker Davis, Jr’s statements. Because the State did not possess any physical evidence against Mr. Brooks, it continued to add inadmissible hearsay to their pile. As the trial court stated, “... this case has been tried in evidentiary exceptions, is what it amounts to.” (T 2309). All of this inadmissible hearsay points a finger to Walker Davis, Jr. It is impossible to point a finger at one “Siamese twin” without necessarily including the other. Therein lies the danger. In fact, the Court noted, “What Mr. Elmore’s [prosecutor] done, I’m afraid, is that in order to associate Lamar Brooks-- I mean prosecute Lamar Brooks, he’s had to try Walker Davis again.” (T 2233). The admission of these statements was an effort to show that Walker Davis, Jr. planned, orchestrated, committed, confessed and implicated Lamar Brooks to these murders, and therefore, Lamar Brooks is also guilty. Additionally, the intentional act of the State in closing, to-wit: raising the spectre of Davis “telling all” about the homicides and Brooks’ involvement, on April 29/30 was misconduct that violates due process. The Appellants’ rights pursuant to Article 1, Sections 9 and 16, Florida Constitution and the Fifth, Sixth and Fourteenth Amendments to the United States Constitution were subverted. Noting all the authority above, this was error requiring reversal, as it cannot said to be harmless.

POINT FOUR

THE TRIAL COURT ERRED BY DENYING APPELLANT'S MOTION(S) FOR NEW TRIAL WHERE APPELLANT PRESENTED NEWLY DISCOVERED EVIDENCE OF APPELLANT'S INNOCENCE

The trial court conducted evidentiary hearings on the Appellants Motion(s) for New Trial on October 28, 1998, November 16, 1998, and on November 19, 1998. As a result of trial counsel receiving new evidence, the original Motion for Trial was amended. Trial counsel attached a letter and an envelope from Mark Gilliam. (R 598; Defendant's Exhibit #1-2nd Amend. New Trial). As a result of the letter, a sworn statement was taken from Mark Gilliam. This was entered into evidence at hearing. (Defendant's Exhibit #2-2nd Amend. New Trial).

At the hearing on October 28, 1998, Mark Gilliam testified consistently with the contents of the letter and sworn statement. The October 28, 1998 testimony was contrary to his trial testimony of April 1, 1998, during the trial of the defendant. Additionally, Mark Gilliam admitted that he testified untruthfully at the previous trial of Walker Davis, Jr. (R 602-603). At hearing, and prior to Gilliam testifying, the State made it abundantly clear that his testimony may result in perjury charges, punishable up to 15 years in prison and a \$15,000.00 fine. (R 602). Further, the prosecutor warned, that Gilliam may breach his agreement with the State Attorneys Office, which had precluded them from prosecuting him for conspiracy to commit first degree murder. (R 605). Upon the State asking Mr. Gilliam if he understood the consequences, Gilliam replied, "Yes, the truth will come out." (R 600). Gilliam testified that when he spoke to law enforcement for the first time, he felt that he was in a corner, had nowhere to go, was hungry and felt like they could hold him there

as long as they wanted to so he told them “what they wanted to hear.” (R 610-613). Gilliam testified that there was no plan to kill a woman, that Brooks never tried on any latex gloves, nor was there any plan that he was to be a driver. (R 610-614). Further, Gilliam testified that there was no plan between Lamar Brooks and Walker Davis, Jr. to commit a murder and that his statement to OSI was false. (R 614). Gilliam did affirm his trial testimony about the joking nature of conversation about a killing. (R 615). Gilliam said there was never an offer for him to receive \$500.00 to drive a getaway car. (R 616). He never heard Davis offer money to Lamar Brooks to participate in any homicide. (R 616). Gilliam testified that law enforcement drew the map that was used at trial and that law enforcement showed Gilliam a little tiny spot on the map for Gilliam to place the X’s he made. (R 617).

Gilliam was arrested in New York in March, 1998 because the prosecution, according to Mr. Gilliam, did not believe that he was going to show up for the Brooks trial. (R 621). After being released in New York, Gilliam appeared at the Brooks trial. (R 622). Gilliam said that during a break and after cross-examination in the Brooks trial, that Prosecutor Elmore, outside the courtroom, told Gilliam that he needed to stick to the story [testimony from the Davis trial] and that Elmore had his hand in Gilliam’s face as he spoke. (R 623-624). At the October 28, 1998 hearing, under a thorough cross examination and another warning about perjury in a capital case, Gilliam maintained his recantation as the truth. (R 629).

Immediately after Gilliam recanted his trial testimony, the State requested that Gilliam be detained while they drew up an arrest warrant for perjury. (R 708).

The hearing was continued to November 16, 1998. At that time, the Appellant called Terrance Goodman. (R 1237). Terrance Goodman testified at the trial of Lamar Brooks. (R 1241). Goodman wrote attorney Beroset a letter dated

October 18, 1998. (R 1242-1243; Defendant's Exhibit #1-3rd Amend. New Trial). Also, Goodman acknowledged writing a notarized document in the presence of a corrections officer named Toley and trial counsel. (R 1244; Defendant's Exhibit #2-3rd Amend. New Trial). In those two documents, Goodman states that Lamar Brooks never admitted being involved in the murders and that prosecutor Elmore and Investigator Worley provided the information for Goodman's trial testimony. Goodman indicated that he was willing to testify on behalf of Lamar Brooks concerning this matter.

After the receipt of Goodman's recantation letters and before the November 16, 1998 hearing, Prosecutor Elmore sent Goodman's counsel, Jay Gontarek, a letter indicating his concern about Goodman's apparent recantation. Elmore wrote that if Goodman would reaffirm his trial testimony, that *Goodman would have the choice* whether to withdraw his plea and sentence that he was serving and go to trial, or maintain the agreement. (Defendant's Exhibit #3- 3rd Amend. New Trial).

On November 16, 1998, and after conferring with Gontarek, Goodman said what he had written in the letter and notarized statement was not true, but wrote it in an effort to have his own case dismissed. (R 1255). Goodman stated that he feared perjury charges. (R 1249-1250). Goodman reaffirmed his trial testimony.

On November 19, 1998, the Motion for New Trial hearing continued. (R 911). Appellant introduced a four count Information against Mark Gilliam charging him with perjury. (Defendant's Exhibit #4- 3rd Amend. New Trial). The State introduced a recorded statement taken from Mark Gilliam on the day preceding the hearing date, on November 18, 1999. (State's Exhibit #4- 3rd Amend. New Trial). The State provided Gilliam with use immunity. He was free from being prosecuted for the homicides as well as free from additional perjury charges only if he changed

his testimony again on November 19, 1998. (R 945). Also, Gilliam was advised that he would not be prosecuted for conspiracy to commit murder, only if he reaffirmed his trial testimony. Gilliam knew that he was facing up to 90 years for the perjury alone. (R 958). Further, Gilliam was held in custody on a \$200,000.00 bond since his arrest on October 28, 1998. (R 1340; 933).

Gilliam, under immunity, provided new details about two prior attempts on the life of a white female by Walker Davis, Jr. and Lamar Brooks wherein Mark Gilliam participated as a driver.

The only evidence of Lamar Brooks' involvement in these killings comes in the form of Mark Gilliam and Terrance Goodman. Mark Gilliam was granted immunity from prosecution and Terrance Goodman received a reduction in charge and sentence in exchange for their testimony. Their testimony should be subject to close scrutiny. In Robinson v. State, 707 So.2d 688 (Fla. 1998), this Court reiterated the proper standard by which a trial court must evaluate newly discovered evidence and recanted testimony. This court said:

“First, to qualify as newly discovered evidence, ‘the asserted facts must have been unknown by the trial court, by the party, or by counsel at the time of the trial, and it must appear that the defendant or his counsel could not have known them by the use of diligence.’ Blanco v. State, 702 So.2d 1250, 1252 (Fla. 1997) (quoting Jones v. State, 591 So.2d 911, 916 (Fla. 1991)). If the proffered evidence meets the first prong, to merit a new trial the evidence must substantially undermine confidence in the outcome of the prior proceedings or the ‘newly discovered evidence must be of such a nature that it would probably produce an acquittal on retrial.’ Blanco v. State, 702 So.2d at 1252 Jones v. State, 591 So.2d at 915).”

The Appellant has met the first prong, without question. This Court set the standard for prevailing on newly discovered evidence in State v. Spaziano, 692 So.2d 172 (Fla. 1997):

1. The evidence has been discovered since the former trial;
2. The evidence could not have been discovered earlier through the exercise of due diligence;
3. The evidence is material;
4. The evidence goes to the merits of the case and not merely impeachment of the character of the witness;
5. The evidence must not be merely cumulative;
6. The evidence must be such that it would probably produce a different result on retrial.

Again, the discovery requirements are clearly met. The materiality requirement is self-evident as Mark Gilliam testified that he was not aware of any plans by Lamar Brooks to become engaged in a conspiracy to commit murder. Goodman subsequently advised that he did not talk about the alleged murder while incarcerated with Lamar Brooks. It goes to the merits as this new material directly contradicts their original trial testimony. It is by definition, not cumulative. This new material will result in an acquittal on re-trial, as this Court suggested in Robinson at 691.

Mark Gilliam has given statements and testimony against Lamar Brooks on many occasions. Each time, he was under duress, pressure and coercion from the State of Florida. Initially, in Georgia, he denied any involvement. This denial continued for hours. After the spectre of prosecution for conspiracy to commit murder was raised, he changed his story and entered into an agreement with the

State. At that point, he qualified his statement saying he did not agree to be any driver. This was the version he gave at the trial of Lamar Brooks. Subsequently, he recanted his testimony by letter, by sworn testimony on October 6, 1998, in Chester, Pennsylvania and before the trial court on October 28, 1998. As a result, the State of Florida arrested him, detained him and charged him with four counts of perjury. Only after being advised that nothing he said on November 18, 1998 would be used against him and being advised that the State would grant him immunity for his reaffirmation, Mark Gilliam gave yet another version of events surrounding the homicides. Obviously, he has lied under oath under the pressures of self-preservation. The trial court found his November 19, 1998 testimony to be truthful and credible. (R 908). This was an abuse of discretion. Gilliam's testimony of November 19, 1998 is contrary to material testimony that he gave in the trial. Gilliam testified at trial that they stayed at Davis' residence on Monday and Tuesday, April 22 and 23, 1996. This directly and materially contradicts his testimony of November 19, 1998. If Appellant knew that Mark Gilliam was going to testify at trial as he did on November 19, 1998, Appellant would have confronted him with his motive for seeking immunity from prosecution. After the November 19, 1998 testimony, his motives are substantially different because he now admits that he conspired to commit attempted first degree murder and participated in two attempts of first degree murder. Mr. Gilliam will have to answer to that on re-trial. As it stands now, Appellant was not afforded an opportunity to confront and expose Mark Gilliam's fraudulent testimony concerning his actions on April 22 and 23, 1996. Further, his testimony is materially inconsistent with the trial testimony of Walker Davis, Jr. Gilliam's testimony is materially inconsistent with the two statements he gave in Georgia. Last, his testimony is materially inconsistent with

the testimony he gave, under oath, in the Lamar Brooks trial. The transgressions themselves, coupled with the reasons and motivations behind these “admissions” is new, meritorious, non-cumulative, substantially undermines the verdict and sentence in this case and likely will result in an acquittal on re-trial.

Terrance Goodman’s recantations and subsequent recantation of the recantations show his “shrewd” knowledge of the criminal justice system. He admittedly, is trying to help himself. It is no surprise that Goodman testified for the State at Mr. Brooks’ trial. He will do whatever it takes to save his hide and he found a willing partner in the State of Florida. A close reading of his trial testimony as well as testimony at the November 16, 1998 hearing will show just how Mr. Goodman became a six time convicted felon. He did, however, to Mr. Brooks’ detriment, have learned advice from counsel, in the time between his recantation and the November 16, 1998 hearing, or he too, would have been prosecuted for perjury. The documents, however, remain, and he will have to answer that new, material, meritorious, non-cumulative evidence which undermined the outcome of Mr. Brooks’ trial and sentence.

The trial court abused its discretion in not granting Appellant a new trial. The Appellants’ rights pursuant to Article 1, Sections 9 and 16, Florida Constitution and the Fifth, Sixth and Fourteenth Amendments to the United States Constitution were subverted. Noting all the authority above, this was error requiring reversal, as it cannot said to be harmless.

POINT FIVE

THE TRIAL COURT ERRED IN PERMITTING THE TESTIMONY OF WITNESSES GILLIAM AND GOODMAN

First, Appellant is aware of the decision of U.S. v. Singleton, 165 F.3d 1297 (10th Cir. 1999) which holds contrary to the point made in this section. That being noted, the import of the testimony of state witnesses Gilliam and Goodman in Lamar Brooks' trial, cannot be understated. The sole evidence against Mr. Brooks was the negotiated-for testimony of Gilliam and Goodman.

Section 201(c)(2) of Title 18 of the United States Code prohibits giving, offering, or promising anything of value to a witness for or because of his testimony. This section makes this conduct a 15 year felony. This section, 201, is to be broadly construed to further its legislative purpose of deterring corruption. United States v. Hernandez, 731 F.2d 1147, 1149 (5th Cir. 1984); United States v. Evans, 572 F.2d 455, 480 (5th Cir.), cert. denied, 439 U.S. 870, 99 S.Ct. 200, 58 L.Ed.2d 182 (1978).

The statute requires a gift, offer, or promise, either direct or indirect, to a person. There is no doubt that Goodman received his reduction in charges and recommendation of a downward departure from the State in exchange for his testimony in the Lamar Brooks and Brandon Dawson murder trials. (T 2072; 2129). Mark Gilliam received a promise not to be prosecuted for any charges stemming from the homicides. (T 1702-1703) At the November 19, 1998 hearing on the Motion for New Trial, he received additional promises stating that he would not be further charged with perjury and that he would continue to be free from murder conspiracy prosecution if he reaffirmed his trial testimony. (R 945). These concessions made by the State, in exchange for testimony, clearly have value, the second requirement of 18 U.S.C. Section 201(c)(2). The third requirement requires

that the thing of value must be made “for” or “because of” the persons testimony. This requirement is clearly met.

The federal bribery statute, 18 U.S.C. Section 201(c)(2), was enacted to keep testimony free of all influence so that truthfulness is protected. United States. Biaggi, 853 F.2d. 89, 101 (2d Cir. 1988), cert. denied, 489 U.S. 1052, 109 S.Ct. 1312, 103 L.Ed.2d 581 (1989); Evans, 572 F.2d at 480. The promise of intangible benefits imports as great a threat to a witness’s truthfulness as a cash payment. United States v. Cervantes-Pacheco, 826 F.2d. 310, 315 (5th Cir. 1987)(“It is difficult to imagine a greater motivation to lie than the inducement of a reduced sentence...”), cert. denied, 484 U.S. 1026, 108 S.Ct. 749, 98 L.Ed.2d. 762 (1988).

The conduct of police, investigators, and law enforcement agents is regularly evaluated against the standard of what is legitimate and reasonably necessary to enforce the law. United States v. Mosley, 965 F.2d. 906, 908-915 (10th Cir. 1992); United States v. Warren, 747 F.2d. 1339, 1341-1344 & nn. 4-10 (10th Cir. 1984); United States v. Ascenio, 873 F.2d 639-641 (2d Cir. 1989). Consequently, Assistant State Attorneys should not be granted justification to violate generally applicable laws. United States v. Ryans, 903 F.2d 731, 739; 740 (10th Cir.)(holding disciplinary rules applies to prosecutors), cert. denied, 498 U.S. 855, 111 S.Ct. 152, 112 L.Ed.2d. 118 (1990). Since the testimony of Mark Gilliam and Terrance Goodman was obtained solely as a result of their promises and acceptance of those promises from the prosecutor, their testimony should have been excluded. “[T]he principle reason behind the adoption of the exclusionary rule was the Government’s ‘failure to observe its own laws.’” United States v. Russell, 411 U.S. 423, 430, 93 S.Ct. 1637, 36 L.Ed.2d. 366 (1973)(quoting Mapp v. Ohio, 367 U.S. 643, 659, 81 S.Ct. 1684, 6 L.Ed.2d. 1081 (1961)). Further, the exclusionary rule has been

implemented to deter unlawful conduct. United States v. Blue, 384 U.S. 251, 255, 86 S.Ct. 1416, 16 L.Ed.2d. 510 (1966). This Court should adopt suppression of this type of evidence, in this case, as the Court can fashion a rule whose primary purpose is to deter official misconduct. United States v. Peltier, 422 U.S. 531, 542, 95 S.Ct. 2313, 45 L.Ed.2d. 374 (1975); United States v. Calandra, 414 U.S. 338, 347-348, 94 S.Ct. 613, 38 L.Ed.2d 561 (1974). The Appellants' rights pursuant to Article 1, Sections 9 and 16, Florida Constitution and the Fifth, Sixth and Fourteenth Amendments to the United States Constitution were subverted. Noting all the authority above, this was error requiring reversal, as it cannot said to be harmless.

POINT SIX

THE TRIAL COURT ERRED BY DENYING APPELLANT'S MOTION FOR MISTRIAL AFTER IMPERMISSIBLE COMMENT ON APPELLANT'S RIGHT TO REMAIN SILENT

It is axiomatic that "Courts must prohibit all evidence or argument that is fairly susceptible of being interpreted by the jury as a comment on the right of silence." State v. Smith, 573 So.2d 306, 317 (Fla. 1990). "Any comment on, or which is fairly susceptible of being interpreted as referring to, a defendant's failure to testify is error and is strongly discouraged." State v. Marshall, 476 So.2d 150, 153 (Fla. 1985).

In closing arguments, the State said, "Glen Barberree participated in the interviews of Walker Davis, Jr. He also went and found Mark Gilliam. That's the main reason we called him because he's the man who had to find Mark Gilliam, May 14th, two weeks after the arrest of the defendants in this case, because the

defendants would not give Gilliam's last name and would not give his whereabouts." (T 2855-2856). In this case, the only two people who could have testified at trial regarding Gilliam's last name and whereabouts were Davis and Brooks. Once again, the prosecution links Davis and Brooks as one. Brooks could not call Davis to explain this even if he so desired. The State attempted to call Davis as a witness, but he invoked his privilege. (T 2381). This leaves only Mr. Brooks. Mr. Brooks did not testify. The prosecutors comment referred directly to Mr. Brooks' failure to assist law enforcement. As a result, this comment was fairly susceptible to interpretation by the jury as a comment on defendant's failure to testify. This Court has also adopted "a very liberal rule" for determining what constitutes a comment on a defendant's right to remain silent. Jackson v. State, 522 So.2d 802 (Fla. 1988). Comments on a defendant's failure to testify can be of "almost unlimited variety," and any remark which is "fairly susceptible" of being interpreted as a comment on silence creates a "high-risk" of error. Dean v. State, 690 So.2d 720 (Fla. 4th DCA 1997); Spry v. State, 664 So.2d 41 (Fla. 4th DCA 1995)(citing State v. DiGuilio, 491 So.2d 1129, 1135 (Fla. 1986)).

The Appellants' rights pursuant to Article 1, Sections 9 and 16, Florida Constitution and the Fifth, Sixth and Fourteenth Amendments to the United States Constitution were subverted. Noting all the authority above, this was error requiring reversal, as it cannot said to be harmless.

POINT SEVEN

**THE COURT ERRED IN DETERMINING JUROR QUALIFICATIONS;
DUE PROCESS GUARANTEES WERE VIOLATED BY PROSECUTORIAL
COMMENT**

Juror qualifications

The test for determining juror competency is “whether the juror can lay aside any bias or prejudice and render his verdict solely upon the evidence presented and the instructions on the law given him by the court. Farina v. State, 679 So.2d 1151 (Fla. 1996); Lusk v. State, 446 So.2d 1038 (Fla. 1984). If there is basis for a reasonable doubt whether a juror has a state of mind that will enable him to render an impartial verdict based solely on the evidence and the law, that juror should be excused for cause. Singer v. State, 109 So.2d 7 (Fla. 1959); Bryant v. State, 656 So. 2d 426 (Fla. 1995).

A juror is not impartial when one side must overcome a preconceived opinion in order to prevail. If a juror has formed an opinion that the defendant is guilty before the evidence, she must be excused for cause. Singer at 7. When a juror has formed an opinion of guilt, there is a danger the juror will expect the defendant to explain his innocence. While it is possible that a juror expressing an opinion of the defendant’s guilt could be rehabilitated, it is not sufficient merely for the juror to state that he could hear the case with an open mind. Hamilton v. State, 547 So.2d 630 (Fla. 1989). In this case, prospective juror Clausens’ opinions fit within the holding of Hamilton. (T 162; 671; 796). Additionally, as this Court stated in Singer, the “statement of a juror that he can readily render a verdict according to the evidence, notwithstanding an opinion entertained, will not alone render him competent if it otherwise appears that his formed opinion is of such a fixed and settled nature as not readily to yield to the evidence.” Id. at 22. Juror Clausen stated that she didn’t know if Brooks was innocent and that she would want some proof that he was innocent. (T 162). After further explanation of the presumption of innocence, Ms. Clausen couched her answers with the words “I

think I could.” (T 163-164). The Appellants cause motion was denied and Ms. Clausen sat as a juror in the cause. (T 164; 3237). Further, Appellant exhausted all of his peremptory challenges and requested additional peremptory challenges . (T 836). This request was denied. (T 836).

Before Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968), prosecutors could challenge for cause prospective jurors who were simply opposed to the death penalty or had conscientious scruples against its imposition. In Witherspoon, the defendant’s death sentence was reversed, the court finding that a jury from which all those opposed to the death penalty were excluded, was neutral but “uncommonly willing to condemn a man to die.” This holding was clarified in Adams v. Texas, 448 U.S. 38, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980) and Wainwright v. Witt, 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985). The Witt case sets the standard.

Under Witt, a prospective juror in a capital case may be excused for cause if his views on the death penalty “would prevent or substantially impair the performance of his duties as a juror.” The opposite is also true. Jurors who are such strong proponents of the death penalty that they believe it should be mandatory in certain cases should be excused. Bryant v. State, 601 So.2d 529 (Fla. 1992); Floyd v. State, 569 So.2d 1225 (Fla. 1990)(juror thought death penalty warranted in all cases of premeditated murder); Hill v. State, 477 So.2d 553 (Fla. 1985)(juror said he believed the death penalty was the proper penalty in cases of premeditated murder and felony murder and that he was “inclined towards the death penalty” in the defendants case). Interestingly, the juror in question in Hill was named Johnson. Other similarities are apparent throughout the entire

exchanges with counsel. In this case, the appellant moved the court to excuse, for cause, prospective juror Johnson. (T 671; 796). A portion of the exchanges:

Mr. Beroset: In other words, you couldn't say at this time that-- you can't think of any cases of first degree pre-meditated murder where the death penalty wouldn't be appropriate.

Mr. Johnson: From the knowledge that I know right now, I would say no...(T 657).

Mr. Beroset: I just got the impression and maybe I'm wrong, Mr. Johnson, that if you find someone guilty of first degree murder, premeditated murder that you're more inclined to give them the death penalty?

Mr. Johnson: Well, the chance-- but I think that it would weigh a little bit heavier on the death penalty side of it. (T 668).

In response to Appellant's motion for cause, the State argues that Mr. Johnson is entitled to be inclined for death. (T 670). As in Hill, Mr. Johnson should have been dismissed for cause. It was error not to. Appellant moved to strike Johnson for cause and Appellant was forced to use a peremptory challenge to remove him. (T 835-836). The Court denied the request for additional peremptory challenges. (T 837). As a result, the Appellant exhausted all peremptory challenges resulting in Ms. Clausen sitting as a juror.

The State moved the court to strike prospective juror Grimm for cause. (T 594). It is not apparent from the record what the basis was for the cause challenge. (T 594-595). It appears, however, that the State so moved because of Ms. Grimm's discussion of the death penalty. In Randolph v. State, 562 So.2d 331

(Fla. 1990), this Court held, “We agree that prospective jurors who believe the death penalty is unjust may serve as jurors and cannot be excluded for cause of that belief.” If this belief prevents them from upholding their sworn duty, they may be properly excused for cause. The record does not show that Ms. Grimm’s belief would cause her to discharge her sworn duty. Her exclusion, over Appellant’s objection was error.

The Witherspoon-Witt standard is rooted in the constitutional right to an impartial jury which goes to the integrity of the legal system. Gray v. Mississippi, 481 U.S. 648, 107 S.Ct. 2045, 95 L.Ed.2d. 622 (1987). The trial court erroneously determined juror qualification in this death penalty case. Consequently, this error is not subject to the harmless error analysis. Even if the Court disagrees with the proper standard of review, it was not harmless.

Improper prosecutorial comment

The trial court has discretion to control the scope of questioning jurors in a capital case. Farina. The trial court abused that discretion when it allowed, over objection, the improper question put to the jurors by the State. (T 386). After asking if anyone else had been a victim of a violent crime, the State asked if any juror had ever used a knife to cut an animal, living or dead. The State then gave his personal opinion that it “doesn’t sound very appetizing, does it, dead chicken?” (T 386). He adds, “How many who have actually cut a living animal?” (T 386) Given the fact that this case involved two homicides committed with a knife on two living humans, this question was highly improper. After objection, the trial court seemingly felt that the objection was well taken. (T 387). The trial court finally says, “I’m having trouble with... I’m really having some difficulty, but go ahead

and let's get it over with. Just go ahead and ask and let's get on to the next thing.” (T 387). The Appellant immediately moved for a mistrial. This should have been granted. This ruling suggests that if one can ask a highly prejudicial question to prospective jurors in a hurried fashion, that this would eliminate its prejudice. This violates the Appellants rights to due process of law.

POINT EIGHT

THE TRIAL COURT ERRED IN PERMITTING THE ADMISSION OF PHOTOGRAPHS TAKEN DURING A SECOND AUTOPSY

The test for the admissibility of photographic evidence of a murder victim is relevancy, not necessity. Pope v. State, 679 So.2d 710 (Fla. 1996); Nixon v. State, 572 So.2d 1336 (Fla. 1991).

Over objection, the trial court permitted photographs of the two murder victims. (T 1303). These photographs, Exhibits 12A-E; 14A-D, were taken at the second autopsy. (T 1303). Dr. Wood, the doctor who performed the interrupted second autopsy(s) at the funeral home in Oregon, testified at length about how she was inhibited because the body(s) had previously been autopsied. As a result, Dr. Wood had to unstitch wounds that were sutured closed with very heavy thread, like a butcher's twine. (T1271-1272). Prior to the second autopsy, Rachel Carlson had been sutured and embalmed. (T 1278- 1279). Dr. Wood could not learn anything about the stab wounds due to the changes that occurred as a result of the suturing. (T 1279). Dr. Wood, because of the first autopsy and the embalming process, could not evaluate her right carotid artery. (T 1285). Dr. Wood could not examine part of the breastbone nor the front left rib because it was previously removed.

The only internal organ present was the heart. (T 1273-1274). The probative value of the photos taken from the second autopsy are substantially outweighed by the prejudice. In response to the Appellant's objection, the State admits that the photos depict the facial injury to the child *after the funeral*. (T 1303). Dr. Wood had to clean off make-up, applied by the funeral home, in order to complete the second autopsy. (T 1275). Dr. Wood had examined the photographs taken from the initial autopsy. (T 1275). Since photos from the first autopsy were available, the admission of the above were also cumulative. State v. Smith, 573 So.2d 306 (Fla. 1990). Further, the trial court should not have admitted the more gruesome, second autopsy photos since less graphic and more reliable photos were available to illustrate the same point. Marshall v. State, 604 So.2d 799 (Fla. 1992). These photographs were admitted merely to inflame the jury and their prejudicial effect substantially outweighs any probative value, thus denying Appellant's due process guarantees. The Appellants' rights pursuant to Article 1, Sections 9 and 16, Florida Constitution and the Fifth, Sixth and Fourteenth Amendments to the United States Constitution were subverted. Noting all the authority above, this was error requiring reversal, as it cannot said to be harmless.

POINT NINE

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO STRIKE VENIRE/CHANGE VENUE

A prospective juror is not subject to disqualification simply because he or she may have some knowledge of the case. The issue is whether the juror's knowledge of the case will result in prejudice to the defendant. Davis v. State, 461

So.2d. 67 (Fla. 1984). The juror should be asked if he can put aside anything he may have learned about the case, serve with an open mind, and reach a verdict based only on the law and the evidence presented at trial. The trial court did not ensure that this three prong standard was applied to all of the jurors in this case, which garnered much attention. As jury selection proceeded, at one point, only thirty jurors remained and twenty five of them had knowledge about the case. (T 287). There was publicity about Davis' previously held trial and one prospective juror commented about a confession Brooks had made to Goodman.

In McCaskill v. State, 344 So.2d 1276 (Fla. 1977), this Court set the test for determining whether a change of venue is required because of prejudice in the proper county:

The test for determining a change of venue is whether the general state of mind of the inhabitants of a community is so infected by knowledge of the incident and accompanying prejudice, bias, and preconceived opinions that jurors could not possibly put these matters out of their minds and try the case solely on the evidence presented in the courtroom.

Id. at 1278 (quoting Kelley v. State, 212 So.2d 27, 28 (Fla. 2d DCA 1968))). In so doing, the trial court is required to consider certain factors in evaluating the nature and effect of the pre-trial publicity. The record is void of these required findings. The trial court should have considered:

1. the length of time that has passed from the crime to the trial and when, within this time, the publicity occurred. Oats v. State, 446 So.2d 90, 93 (Fla.1984);
2. whether the publicity consisted of straight, factual news stories or inflammatory stories. Provenzano v. State, 497 So.2d 1177, 1182 (Fla. 1986);

3. whether the news stories consisted of the police or prosecutor's version of to the exclusion of the defendant's version. Manning v. State, 378 So.2d 274, 275 (Fla. 1979);
4. the size of the community in question. Copeland v. State, 457 So.2d 1012, 1017 (Fla. 1984); and
5. whether the defendant exhausted all of his peremptory challenges. Hoy v. State, 353 So.2d 826 (Fla. 1977), cert. denied, 439 U.S. 920, 99 S.Ct. 293, 58 L.Ed.2d. 265 (1978).

The trial court should, after considering the factors above, consider the difficulty encountered in actually selecting a jury. Murphy v. Florida, 421 U.S. 794, 95 S.Ct. 2031, 44 L.Ed.2d 589 (1975). The trial court did not make the required analyses. As a result, it is impossible to speculate on the extent and nature of the publicity and its effect on the actual selection of the jury.

When the prejudice creates an atmosphere whereby a defendant cannot receive a fair trial, a change of venue is proper. Since the motion(s) for a change of venue/strike the venire were denied, Mr. Brooks' rights, under the Florida and United States Constitutions to a fair trial were left unprotected. This error requires reversal of the Appellant's verdict and/or sentence.

POINT TEN

THE TRIAL COURT ERRED IN PERMITTING THE ADMISSION OF STATEMENTS TO LAW ENFORCEMENT BY CO-DEFENDANT UNDER THE HEARSAY RULE

Appellant has previously explained the underpinnings of the co-conspiracy exception to the hearsay rule as well as the state of mind exception. See Points One and Two of brief. The trial court permitted Investigator Barberree to testify about

Walker Davis, Jr.'s statements made to him on April 26, 1998. Over objection, this was permitted pursuant to the co-conspiracy exception. (T 2314). Barberree reiterated Davis' statements that he was not in Crestview on the night of the homicides and that he and Lamar Brooks were at Davis' living quarters and went to bed around 11:00 p.m. (T 2315). These statements were admitted to show that Davis lied to law enforcement. Admission under the co-conspiracy exception was misplaced. No exception to the hearsay rule applies to these statements. The intent of the State, of course, was to associate the lies to law enforcement of Davis to Brooks. Davis later recanted, not Brooks. As a result, the hearsay statements of Walker Davis Jr. are inadmissible under Section 90.803(18)(e) as well as 90.803(3) to show Lamar Brooks intent. Sandoval; Kelley. The cumulative admission of these same statements was made via witnesses Garcia, Ashley, Haley and Worley. This too was error.

The Appellants' rights pursuant to Article 1, Sections 9 and 16, Florida Constitution and the Fifth, Sixth and Fourteenth Amendments to the United States Constitution were subverted. Noting all the authority above, this was error requiring reversal, as it cannot said to be harmless.

POINT ELEVEN

THE COURT ERRED IN DENYING THE APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL

The trial court erred in its handling of Brooks' motion for acquittal as to first-degree premeditated murder. The State's own evidence failed to discount the reasonable hypothesis that the homicides were committed by one person, Walker

Davis, Jr. The expert testimony could not exclude that one knife may have been used and that one person had the ability to carry out these murders. There was no evidence that the Mr. Brooks knew either victim. No testimony nor evidence placed Mr. Brooks in the vehicle at the time of the homicides. Mr. Brooks has maintained his innocence from day one. He stated to Rochelle Jones that they needed to get Walker Davis, Jr. an attorney. He asked Walker Davis, Jr. why were they being questioned by OSI. Brooks answered all of law enforcements questions. Walker Davis, Jr.'s fingerprint was found on a piece of evidence. Lamar Brooks never suggested to Rochelle Jones that she should "be cool." Lamar Brooks never knew about a life insurance policy. Lamar Brooks never shopped for expensive cars. Lamar Brooks never complained about his infidelities and never said that "she and the little dip are done." Lamar Brooks never stated that he was in the car when Rachel Carlson died. Lamar Brooks never confessed to these homicides. Given the lack of physical evidence against Lamar Brooks and given the evidence against Walker Davis, Jr., not only did the State fail to exclude the hypothesis that Walker Davis, Jr. acted alone, but it is the more likely scenario. When the State relies upon circumstantial evidence to support a conviction for premeditated first-degree murder, a motion to acquit as to such murder must be granted unless the State can "present evidence from which the jury can exclude every reasonable hypothesis except that of guilt." Kirkland v. State, 684 So.2d 732, 735 (Fla. 1996)(quoting State v. Law, 559 So.2d 187, 188 (Fla. 1989)). Further, if "the State's proof fails to exclude a reasonable hypothesis that the homicide occurred other than by premeditated design, a verdict of first degree murder cannot be sustained." Hoefert v. State, 617 So.2d 1046, 1048 (Fla. 1993). Given the

authority noted above, this Court should enter a judgment of acquittal on the murder counts.

POINT TWELVE

THE TRIAL COURT ERRED IN ERRONEOUSLY INSTRUCTING, FINDING AND DOUBLING AGGRAVATING FACTORS, VIOLATING FLORIDA LAW AND BROOKS' STATE AND FEDERAL CONSTITUTIONAL RIGHTS

Many of the trial court's specific findings of aggravating circumstances are based on legal and factual errors. These errors, individually and cumulatively, distorted the weighing process and violated Brooks' state and federal constitutional rights to due process, equal protection, a fair trial and protection against cruel and/or unusual punishment. Article I, Sections, 2, 9, 16, and 17 Florida Constitution the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

Pecuniary gain

There must be proof beyond a reasonable doubt that the killings were committed for financial gain. This aggravating circumstance applies "only where the murder is an integral step in obtaining some sought-after specific gain." Hardwick v. State, 521 So.2d 1071, 1076 (Fla.) cert. denied, 488 U.S. 871, 109 S.Ct. 185, 102 L.Ed.2d 154 (1988). There must be specific factual findings by the trial court to support this aggravating circumstance. Peterka v. State, 640 So.2d 59 (Fla. 1994). In its Sentencing Order, the trial court found that Walker Davis, Jr. promised Lamar Brooks and Mark Gilliam substantial sums of money for their assistance in the murders. (R 586). The record is void of these facts. At best and

if believed, Mark Gilliam said that they joked about some money. After Gilliam testified to this joking about money, he recanted all testimony that a conspiracy existed. Only after he was incarcerated for telling the truth, did he give, yet another version of events. In any event, there was no testimony, in this trial, that Walker Davis, Jr. promised Lamar Brooks anything. There must exist proof beyond and to the exclusion of every reasonable doubt that the individual against whom the circumstance is applied actually personally had formed the “primary motive” of killing for personal enrichment as a necessary component of facilitating the crime. Scull v. State, 533 So.2d 1137, 1142 (Fla. 1989), cert. denied, 4909 U.S. 1037, 109 S.Ct. 1937, 104 L.Ed.2d. 408 (1989). This factor cannot be imputed vicariously, like the heinous, atrocious or cruel aggravator cannot, from the actual killer to a defendant unless the State proves beyond a reasonable doubt that the defendant shared that motive. Archer v. State, 613 So.2d 446, 448 (Fla. 1993); Omelus v. State, 854 So.2d 563, 566 (Fla. 1991). There was no testimony that Brooks knew of the Davis insurance policy. There was no testimony showing how Appellant was to come into possession of any money as a result of the murders. Since any financial advantage Brooks could have expected, if any, at most was indirect and uncertain, one cannot conclude that this aggravator existed beyond and to the conclusion of every reasonable doubt. Proof of this aggravator cannot be “supplied by inference from circumstances unless the evidence is inconsistent with any reasonable hypothesis other than the existence of the aggravating circumstance.” Simmons v. State, 419 So.2d 316 (Fla. 1982).

The trial court also found this aggravator applicable to the murder of Rachel Carlson. This conflicts with the reason given by the trial court for the murder of Alexis Stuart. Walker Davis, Jr. was the primary beneficiary of the life insurance

policy. No one stood to make a pecuniary gain for the murder of Rachel Carlson. This finding by the trial court was not proved, nor was it attempted to be proved. Clearly, even if it is believed that Lamar Brooks committed/assisted in the murder of Rachel Carlson, it was not proved that the primary motive for her killing was pecuniary in nature. This was error.

Since the instruction did not provide for the above requirements, it was error to give it. Additionally, it was error for the trial court to find it proved since there was no evidence that Brooks formed any intent to kill, let alone to kill for a pecuniary gain beyond and to the exclusion of every reasonable doubt.

Cold, calculated, and premeditated

This aggravator applies to “murders more cold-blooded, more ruthless, and more plotting than the ordinarily reprehensible crime of premeditated first-degree murder.” Porter v. State, 564 So.2d 1060, 1064 (Fla. 1990), cert. denied, 498 U.S. 1110, 111 S.Ct. 1024, 112 L.Ed.2d. 1106 (1991), and where the killing includes “calm and cool reflection.” Richardson v. State, 604 So.2d 1107, 1109 (Fla. 1992). “Heightened premeditation” distinguishes this aggravating circumstance from the premeditated element of first degree murder. Id.; Rogers v. State, 511 So.2d 526, 533 (Fla. 1987), cert. denied, 484 U.S. 1020, 108 S.Ct. 733, 98 L.Ed.2d 681 (1988). “Calculation constitutes a careful plan or prearranged design.” Rogers at 533. Cold, calculated and premeditated encompasses something more than premeditated first degree murder. Jackson v. State, 648 So.2d 85 (Fla. 1984).

The evidence in this case was circumstantial. Consequently, to satisfy the burden of proof, the circumstantial evidence must be inconsistent with any

reasonable hypothesis which might negate the aggravating factor. Eutzy v. State, 458 So.2d 755, 758 (Fla. 1984), cert. denied, 471 U.S. 1045, 105 S.Ct. 2062, 85 L.Ed.2d 336 (1985). This aggravating factor is reserved primarily for execution or contract murders or witness elimination killings. Bates v. State, 465 So.2d 490 (Fla. 1985).

The facts in this case lead to the inescapable conclusion that the deaths of the two victims occurred as a result of intense emotion. These murders resulted from Walker Davis, Jr.'s marital and extramarital difficulties. Quite frankly, he had an affair with a woman while he was married and having a child on the way. His affair resulted in, in his mind, fathering a child. He simply could not stand her "bugging" and her requests for child support in addition to the pressures of keeping this from his wife with whom he was trying to reconcile. These were domestic killings. As a result, this aggravator should not apply. Santos v. State, 591 So.2d 160 (Fla. 1991); Douglas v. State, 575 So.2d 165 (Fla. 1991); Maulden v. State, 617 So.2d 298 (Fla. 1993); Richardson. There must be proof beyond a reasonable doubt that "the killing[s] were the product of cool and calm reflection and not an act prompted by emotional frenzy, panic, or a fit of rage." Jackson at 89. The frenzied stabbings of Rachel Carlson do not demonstrate cold and calculated premeditation necessary to aggravate Brooks' sentence with this factor. The trial courts' basis for this aggravator are inadequate and not supported by the record. The trial court concludes that the body of Alexis Stuart was stabbed post-mortem "in an obvious attempt to make it appear that she was slashed to death in the same brutal manner as Rachel Carlson." (R 586). There was no testimony that provided the reason for the post-mortem wounds. One can only speculate on why these were inflicted. This is exactly what the trial court did. Certainly, there are

numerous hypotheses that can explain these wounds. In addition, the trial court found that a getaway plan was discussed and agreed upon with Gilliam. To the contrary, Gilliam left for Georgia before the homicides and Brooks' did nothing to stop him. This suggests that there was in fact no agreement, as Gilliam swore to before being arrested, held in jail and charged with perjury.

Since the instruction did not provide for the above requirements, it was error to give it. Additionally, it was error for the trial court to find it proved since there was no evidence that Brooks killed anybody, let alone in a cold, calculated and premeditated manner beyond and to the exclusion of every reasonable doubt.

Heinous, atrocious or cruel

This Court has held that this aggravator applies "only in torturous murders-- those that evince extreme and outrageous depravity as exemplified either by the desire to inflict a high degree of pain or utter indifference to or enjoyment of the suffering of another." Cheshire v. State, 568 So.2d 908, 912 (Fla. 1990).

Additionally, the crime must be both conscienceless or pitiless and unnecessarily tortuous to the victim. Hartley v. State, 686 So.2d 1316 (Fla. 1996); Richardson. This aggravator cannot be applied vicariously. Omelus, Archer.

There is no evidence in the record that Brooks intended to cause Carlson unnecessary and prolonged suffering. Again, the trial court's findings are not supported by the record. In the Sentencing Order, the trial court states that "The testimony of the medical examiner and the bloodstain pattern expert conclusively demonstrated... that he [Brooks] was in the position to carry out all of the stab wounds to both victims." (R 587). This is simply untrue. Analyst Johnson provided two other scenarios that contradict the trial court's "conclusive" findings.

Analyst Johnson does not know which of the three scenarios occurred when Carlson was first stabbed. (T 2223). Further, analyst Johnson cannot conclude that two people committed these murders. She testified that one person, sitting in the front seat could have stabbed Rachel Carlson, exited the front seat and entered the back seat to kill Alexis Stuart. (T 2224). In fact, Analyst Johnson finally says, “The only thing I can say is that forceful injury did occur when she was in an upright position behind the steering wheel.” (T 2224). The trial court found that she was choked, stabbed and beaten to death. (R 587). The medical examiner concluded that Rachel Carlson died of stab wound(s). There was no evidence that the choking and/or beating contributed to her death. The medical examiner could not form an opinion as to the sequence of events. In fact, the medical examiner, Dr. Wood, testified that Rachel Carlson may have been unconscious at the time of the fatal stabbing. (T 1335-1337). Anything that occurs after a victim is rendered unconscious, including that which would qualify as heinous, atrocious or cruel can not be used in support of this circumstance. Jones v. State, 569 So.2d 1234 (Fla. 1990); Jackson v. State, 451 So.2d 458 (Fla. 1984); Herzog v. State, 439 So.2d 1372 (Fla. 1983). As a result, this has not been proven beyond and to the exclusion of every reasonable doubt, save “conclusively” that Brooks not only committed the stabbings but did so via this aggravator.

The trial court found that “Terrance Goodman also testified that Lamar Brooks told him that he was seated in the backseat of Rachel Carlson’s car on the night of the murders.” (R 587). On the contrary, Terrance Goodman said “We never discussed the actual crime, how it happened and all that, never discussed that.” (T 2150). He said, “I don’t know nothing about what happened that night.” (T 2150). Further, Goodman testified, “I don’t know nothing about it or how no

murder occurred or nothing like that.” (T 2151). He added that Brooks didn’t just open up and tell him everything about his case. A close reading of Goodman’s trial testimony is required. On two separate occasions Goodman provided the premise for his conversation with Brooks. He said, Brooks told me what his *defense* was going to be at trial not what in fact happened. (T 2094). He said of their conversation, Brooks’ main focus was how he was going to get out of it. (T 2104). The allowance of the jury to consider this aggravator was error as it did not exist in the case against Mr. Brooks. Bonifay v. State, 626 So.2d 1310 (Fla. 1993).

Since the instruction did not provide for the above requirements, it was error to give it. Further, the instruction given was vague and therefore unconstitutional. Shell v. Mississippi, 498 U.S. 1 (1990); Proffitt v. Florida, 428 U.S. 527 (1992); Sochor v. Florida, 504 U.S. 527 (1992). Additionally, it was error for the trial court to find it proved since there was no evidence that Brooks killed anybody, let alone in a heinous, atrocious or cruel manner beyond and to the exclusion of every reasonable doubt.

Murders committed while engaged in a felony

The trial court found that as to the victim, Alexis Stuart, the State proved beyond and to the exclusion of every reasonable doubt that the Lamar Brooks engaged in the commission of aggravated child abuse. Further, the trial court found that the State proved that Lamar Brooks murdered Rachel during the commission of the aggravated child abuse murder of Alexis Stuart and, in fact, to facilitate the commission of and escape from the murder of Alexis. (R 587). Regarding the

murder of Rachel Carlson, the trial court erred by considering a witness elimination type aggravator that was inapplicable and not requested by the State.

The trial court misapplied this aggravator in this case. This Court found that felonies committed incidental to killings and those that are not the primary motive for the killings will not be found beyond a reasonable doubt for this aggravator. Clark v. State, 609 So.2d 513 (Fla. 1992); Parker v. State, 458 So.2d 750 (Fla. 1984); Jones v. State, 580 So.2d 143 (Fla. 1991). There is no evidence that satisfies the burden of proof required that Lamar Brooks' primary motive of the killing was the aggravated child abuse. Further, it cannot be said beyond and to the exclusion of every reasonable doubt that the murder of Rachel Carlson occurred during any aggravated child abuse. A reasonable hypothesis exists that this did not occur. The evidence simply does not prove this as the trial court erroneously found.

The felony murder aggravator automatically subjected Brooks to the death penalty and failed to narrow the class of death-eligible defendants in violation of due process, equal protection and the cruel and/or unusual punishment clauses of the Florida and United States Constitutions. Appellant states that he is aware of Johnson v. State, 660 So.2d 637 (Fla. 1995), but requests that this Court reconsider its holding in that case.

This aggravator was erroneously given in this case as it was also the basis of a felony murder theory. As a result, this does not allow for the narrowing of persons eligible for the death penalty. Tennessee v. Middlebrooks, 840 S.W. 2d 317 (Tenn. 1992). Additionally, it was error for the trial court to find it proved since there was no evidence that Brooks killed anybody, let alone during the

commission of an aggravated child abuse beyond and to the exclusion of every reasonable doubt.

Defendant was previously convicted of another capital felony

The trial court found that each of the victims crimes contain the aggravator of Lamar Brooks previously being convicted of a capital felony of each victim. (R 585). While Appellant is aware of holdings to the contrary, he urges this Court to once again evaluate those cases. Our United States Supreme Court has recently emphasized the primacy of statutory plain language. Salinas v. United States, -- U.S.--, 118 S.Ct. 469, 473-474, 139, L.Ed.2d. 352. There, the court emphatically refused to rewrite Congress' enactment or judicially add elements to a crime. Here, the plain meaning of "previously" cannot equate with "contemporaneously." Simply put, if the legislature wanted to make contemporaneous multiple homicides an aggravator, they would have so drafted.

Since the instruction did not provide for the above requirements, it was error to give it. It was error for the trial court to find it proved and give it great weight since there was no evidence that Brooks killed anybody, let alone having previously been convicted of another capital felony beyond and to the exclusion of every reasonable doubt.

The victim was less than twelve

Alexis Stuart was less than twelve. This aggravator is unconstitutional as it establishes victim status as a factor for imposing the death penalty. Further, the

arbitrary age of twelve violates both Florida and federal constitutional guarantees of the Appellant. This instruction should not have been given since there was no evidence that Brooks killed anyone, let alone someone under twelve years of age.

Since it is not clear under which theory the jury found Lamar Brooks guilty, the trial court improperly doubled the aggravators of committed during the course of an aggravated child abuse and that the victim was less than twelve. This violates the principles enunciated in Provence v. State, 337 So.2d 783 (Fla. 1976), cert. denied, 431 U.S. 969, 97 S.Ct. 2929, 53 L.Ed.2d. 1065 (1977). Also, given the trial court's findings regarding witness elimination type aggravation, the court improperly doubled during the course of an aggravated child abuse with cold, calculated and premeditated. This too was error. The weighing process was skewed as a result of this improper doubling. The Court should not have instructed as to all these factors and the judge did not caution jurors not to double. They should not have been weighed twice by the jury or the judge.

These errors, individually and cumulatively, distorted the weighing process and violated Brooks' state and federal constitutional rights to due process, equal protection, a fair trial and protection against cruel and/or unusual punishment. Article I, Sections, 2, 9, 16, and 17 Florida Constitution the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

POINT THIRTEEN

THE TRIAL COURT ERRED WHEN IT FAILED TO FIND VALID
MITIGATION ESTABLISHED BY THE EVIDENCE, THEREBY DISTORTING
THE WEIGHING PROCESS IN VIOLATION OF BROOKS' STATE AND
FEDERAL CONSTITUTIONAL RIGHTS

Many of the trial court's specific findings of mitigating circumstances are based on legal and factual errors. These errors, individually and cumulatively, distorted the weighing process and violated Brooks' state and federal constitutional rights to due process, equal protection, a fair trial and protection against cruel and/or unusual punishment. Article I, Sections, 2, 9, 16, and 17 Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

In the Sentencing Order, the trial court found that Brooks told Goodman that he rode in the backseat of Rachel Carlson's car the night of the murders and that he was the one who "killed the broad" and "copped the bodies." He further found that Brooks in fact rode in the back seat and that Brooks is the only person who stabbed anybody. As a result of the courts' findings, the court rejected the statutory mitigator that Lamar Brooks was an accomplice in the capital felony committed by another person, and that his participation was minor. The evidence simply does not support the trial court's version of events. The reasons for rejecting it must be expressly stated in the sentencing order; must be supported by competent substantial evidence in the record; must not misconstrue undisputed facts; must not misapprehend the law; and must logically support the judge's conclusion. Nibert v. State, 574 So.2d 1059, 1062 (Fla. 1990); Campbell v. State, 571 So.2d 415 (Fla. 1990). The judge abused his discretion by using invalid and unsupported reasons to reject this mitigator as well as the findings under Appellant's no prior significant criminal history and the defendant's age. Further,

the Court found that Lamar Brooks has relatively insignificant mitigators in his life. This too was improperly found. The trial court's sentencing of death compared to the trial court's sentencing of the co-defendant to life will be discussed under separate heading.

POINT FOURTEEN

THE TRIAL COURT ERRED IN PERMITTING IMPROPER VICTIM IMPACT EVIDENCE

Prior to Payne v. Tennessee, 501 U.S. 808 (1991), the United States Supreme Court had held that the Eighth Amendment, per se, prohibited victim impact statements from being admitted in a capital sentencing procedure. Booth v. Maryland, 482 U.S. 496 (1987). South Carolina v. Gathers, 490 U.S. 805 (1989) extended Booth to prohibit prosecutorial comment on the victim's personal characteristics. Payne overruled these cases if state law permitted this type of evidence and argument. Although this is true, Payne does not affect Booth's additional holding that the Eighth Amendment bars admissions or opinions of the victim's family about the crime, the defendant and the appropriate penalty for the defendant. Appellant is aware of Branch v. State, 685 So.2d 1250 (Fla. 1996) and similar cases. Although these cases exist, they do not prevent the trial court from weighing the probative value versus the prejudice. The probative value of the victim impact evidence in this case is nil. As a result, the prejudice substantially outweighs any probative value this testimony may have. It is uncontroverted that Rachel Carlson had fine attributes, both as a person and as a worker. These facts are not probative of any sentencing issue before the jury or the court. The admission of testimony from the victim's mother and father stating, *inter alia*, that

Rachel was a happy and good baby, called home once a month, sewed items for her mother, that her death caused her sister to receive counseling, that Rachel received an award posthumously, that her mother was under the care of a doctor, was terminated from her job and living on Prozac and that Rachel was going to be a good mother because she changed diapers in a timely fashion serves no value except to evoke emotion for the victims and against the defendant. The attempt to stoke the fires of emotion reached its zenith when the prosecutor introduced the finish-the-sentence questionnaire, apparently completed by Rachel Carlson in 1992. (T 3066-3070). These admissions violate Appellant's rights to confront evidence against him, due process, a fair trial and cruel and/or unusual punishment. Article I, Sections, 2, 9, 16, and 17 Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

POINT FIFTEEN

THE DEATH SENTENCE IS UNCONSTITUTIONAL; THE DEATH SENTENCE IS DISPROPORTIONATE AFTER TRIAL COURT'S ERRORS REGARDING AGGRAVATING AND MITIGATING CIRCUMSTANCES

The trial court's sentencing order focused on the fact that he believed Lamar Brooks was the person who actually committed the killings. The record reflects otherwise and thus, that finding was error. Tillman v. State, 591 So.2d 167 (Fla. 1991) and other cases, mandate proportionality review. Assuming that Brooks was the one who stabbed the victims, that conclusion is greatly diminished by the failure to prove premeditated killings. As argued throughout this brief, the evidence suggests that Walker Davis, Jr. committed these killings. The evidence also

suggests that Walker Davis, Jr. had motive, opportunity and confessed to these crimes. Under these circumstances, it would be disparate treatment to sentence Davis to life and Brooks to death. Campbell.

Enmund v. Florida, 458 U.S. 782 (1982) stands for the proposition that the Eighth Amendment does not permit the imposition of the death penalty on a defendant who aids and abets a felony in the course of which a murder is committed by others but who himself does not kill, attempt to kill, or intend that a killing take place, or that lethal force be employed. Like this case, this Court has suggested that in a felony murder committed by two co-defendants where there are no eye witnesses, the evidence is circumstantial, and the killer is not clearly identified, the Enmund culpability requirement cannot be met. Jackson v. State, 575 So.2d 181 (Fla. 1991).

The death penalty violates both federal and state constitutions on its face and as applied because of systemic problems that make it unworkable and because the punishment in this case is disproportional after taking all of the sentencing errors into account. Additionally, the death penalty is unconstitutional, particularly when considering the irreconcilable paradox noted in Callins v. Collins, 114 S.Ct. 1127, 127 L.Ed.2d 435 (1994)(Blackmun, J., dissenting from denial of certiorari)(conflict between constitutional commands requiring jury discretion to consider all mitigation, and against arbitrariness), and the inordinate delays inherent in the system, see, e.g. Lackey v. Texas, 115 S.Ct. 1421, 131 L.Ed.2d. 304 (1995).

As a result, the Appellants rights via Article I, Sections, 2, 9, 16, and 17 Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution were subverted.

CONCLUSION

Based upon the foregoing cases, authorities, policies, and arguments, Appellant respectfully requests this Honorable Court reverse the convictions, vacate the sentences and enter judgments of acquittal. In the event this Court does not enter judgments of acquittal, it should vacate the judgments and death sentences and remand for a new trial before a different judge. In the event this Court does not remand for a new trial, it should vacate the death sentences and remand for a new penalty phase conducted before a different judge and a new jury panel. If this court affirms the convictions and does not grant a new penalty phase, it should vacate the death sentences and remand with instructions to impose life sentences.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Hand/Courier/U.S. Mail/Facsimile/Overnight delivery to the Office of the State Attorney located at P.O. Box 517, Crestview, Florida 32536 and by Hand/Courier/U.S. Mail/Facsimile /Overnight delivery to Richard Martell, Esquire located at the Office of the Attorney General, Department of Legal Affairs PL 01, The Capitol, Tallahassee, Florida 32399-1050, and by U.S. Mail delivery to Lamar Brooks, DC #124538, located at Florida State Prison, P.O. Box 747, Starke, Florida 32091, this the _____ day of _____, 1999.

Respectfully submitted,

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CERTIFICATE

The undersigned states that this brief was typed in 14 point font using Times New Roman style.

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