IN SUPREME COURT OF FLORIDA

FRED LORENZO BROOKS,

Appellant,

v. Case No. 92,011

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT,
IN AND FOR DUVAL COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF CONTENTS

(Continued)

TABLE OF CITATIONS

TABLE OF CITATIONS

(Continued)

TABLE OF CITATIONS

(Continued)

TABLE OF CITATIONS

(Continued)

TABLE OF CITATIONS

(Continued)

TABLE OF CITATIONS

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STATEMENT OF THE CASE

On October 17, 1996, the Duval County Grand Jury indicted appellant, FRED LORENZO BROOKS, for first-degree murder in the death of Darryl Jenkins on August 28, 1996; aggravated battery in the shooting of Michael Johnson on August 28, 1996; armed robbery; armed trafficking in cocaine; conspiracy to traffic in cocaine; and possession of a firearm by a convicted felon. I 13-16.[1] The state dropped all but the murder and aggravated battery charges before trial.

On February 10, 1997, the trial court granted the state's motion to consolidate Brooks' trial with the trial of his codefendant, Foster Brown. II 205-206.

[1] References to the twenty-two volume record on appeal are designated by volume number in roman numerals and the page number. References to the two-volume supplemental record are designated by "SR," followed by the volume number in roman numerals and the page number.

On February 23, 1997, the defense filed a motion for psychiatric exam, which was granted, II 207-208. On February 24, 1997, defense counsel filed a motion to withdraw. II 210-219.

On April 17, 1997, Brooks waived a competency hearing, and the trial court adjudicated him competent. II 231, III 611-613.

On April 21, 1997, after an in camera hearing, the trial court denied defense counsel's motion to withdraw. II 219, SR 1-13.

On May 5-8, 1997, Brooks and Brown were tried jointly before Judge Brad Stetson for first-degree murder and aggravated battery. Motions for judgment of acquittal at the close of the state's case and at the close of all the evidence were denied. X 948-952, XI 1096. The jury found both defendants guilty as charged. II 278-279, XII 1269-1270.

On May 19, 1997, the trial judge denied Brooks' motion to bifurcate the penalty phase. XIV 1315. A joint penalty phase trial was held May 19-20, 1997. Following deliberations, the jury returned an advisory verdict recommending life for Brown and, by 7 to 5 vote, death for Brooks. II 324, XV 1599-1600.

A Spencer hearing was held September 26, 1997. The trial judge denied Brooks' motion for a new trial and heard additional evidence and argument as to the sentence. XIX 1646.

On October 21, 1997, the trial court imposed the death sentence on Brooks, finding two aggravators (prior violent felony and robbery/trafficking/pecuniary gain) and one mitigating circumstance (family background). II 366-380, XXII 1720.

STATEMENT OF FACTS

Guilt Phase

The shooting occurred during a drug deal. The victims, Darryl Jenkins and Michael Johnson, were selling crack to the defendants, Fred Brooks and Foster Brown. Johnson, never charged with any crime, VII 444, was the state's key witness at trial. Codefendants Jackie Thompson and Tyrone Simmons also testified for the state as part of a plea bargain.

Jackie Thompson, 24, had three prior felony convictions. IX 748. Jackie had been charged in this case with conspiracy to traffic in cocaine and second-degree murder. She pled guilty to conspiracy to traffic in exchange for her truthful testimony, and the murder charge was dropped. As part of the plea agreement, she was to get 0-10 years in prison. IX 748-750.

The night of the shooting, Jackie was selling drugs on the street when Brooks and Brown drove up in a red Camry. It was about 10:15 p.m. Jackie had known Brooks for several years, and Brown for a few months. IX 752-753, 772. They asked Jackie

where they could find some “juggler” action, which is street slang for big rocks of crack cocaine. Brooks showed her five one hundred dollar bills. Jackie agreed to go with them to Darryl Jenkins' house. Jenkins was also known as "BBQ." She had to go with them because they had never dealt with her source, Michael Johnson, and he would not have "served" them without her. IX 771-772. In return, they agreed to give her four jugglers, which was worth about $80.00. IX 754-755. Tyrone Simmons, a friend of Jackie's, who was hanging out on the street corner with her, drove the car. Simmons drove because Brooks did not want Brown driving him. IX 775. Brown sat in front with Simmons; Jackie and Brooks sat in back. On the way over, Brooks and Brown told Jackie they wanted 50 rocks, or $500 worth. Jackie said she would buy a dime rock first to show them a sample. IX 756-757.

Simmons parked on the street in front of BBQ's house. Michael Johnson's car was backed into the driveway. IX 757. She did not recall seeing Lashan Mahone or another car there. IX 801-802. Jackie was heading towards the house when Michael Johnson called her over. Jackie bought a dime rock from Johnson, then told him she had “two dogs” -- which is street slang for friends -- who wanted to spend $500. She walked back to show the rock to Brooks and Brown, who were standing outside the Camry.

Brown thought the cocaine was decent, but Brooks said it was too flat, so he only wanted 30. IX 758-759.

Jackie got back in the back seat of the Camry. She and Tyrone started listening to the radio. The next thing she remembered was somebody calling out a name, yelling out, or screaming something. It came from the driveway behind her. Then she heard gunfire behind her. She looked out the rear window and saw Brooks shooting a gun over the top of Johnson's car. She ducked down. Then she heard 10 or 15 more shots. After the gunfire ended, Brooks and Brown ran back to the car. Brown jumped in first, into the front seat. He had a dark-colored gun in his hand. Brooks jumped on top of Brown. Brooks had a big silver automatic gun in his hand. Brooks and Brown were telling Tyrone, "Pull off. Pull off." IX 760-766.

Tyrone drove to 14th Street, where Jackie and Tyrone stayed. She and Tyrone got out. The next morning, Brooks came over and told Jackie "That man BBQ dead and you didn't see nothing." Jackie saw Foster Brown a few days later, and he told her, "Tell them we from Georgia." IX 767-768.

On cross-examination, Jackie said she never saw a gun on the way to BBQ's and there was no talk of a robbery. IX 775-776.

Before meeting up with Brooks and Brown that night, Jackie had already been to BBQ's to buy dope for herself. The first time she had gone, she bought the dope from "Mall" or "Shack." IX 799-800.

When she bought the dime rock from Johnson, he got it from a plastic bag he had in his hand. Jackie did not know how many rocks were in the bag. IX 804-805. All she knew was she heard Johnson said, "I got 24 pieces," and she saw Foster gave him $300. That was all she saw. She never saw a second bag of cocaine. BBQ and J.R. were asking her for a cigarette, so she got back in the car. IX 808, 813. As she was walked off to get in the car, she heard Johnson say, “What, man? You want your money back? You ain’t satisfied?” IX 813-814. All of this took place between the Camry and Michael Johnson's car. She remembered saying it took place at the Camry in her deposition but it really was in between the two cars. IX 805-806, 814. She was in her car only three to five seconds when she heard the gunfire. IX 823-824. During the shooting, she saw somebody run from the driver's side of Johnson's car. She said in deposition it was Michael Johnson but now she could not be sure. IX 814-815.

Jackie said "cornbread" was a less pure form of cocaine that was lighter than pure cocaine. Sometimes a seller pinches off some of a rock and smokes it himself and then sells the rest as a full piece. IX 826.

Tyrone Simmons testified he had previously been convicted of six felonies. He was in jail awaiting sentencing in this case on charges of conspiracy to traffic in cocaine and accessory after the fact. He originally was charged with second-degree murder and trafficking in cocaine; those charges were dropped. As part of the plea agreement, he was to get 0-10 years prison in exchange for his truthful testimony. IX 857-X 864.

Simmons had known Fred Brooks for seven or eight years. He had known Foster Brown for several months prior to the shooting. He had known Jackie Thompson for four or five years and Darryl Jenkins for eight or nine years. He did not know Michael Johnson. X 864-866.

Simmons said he was standing on the corner of 23rd and Myrtle when Brooks and Brown drove up in a red Camry and talked to Jackie. Jackie called him over and asked him to ride with them. Simmons went along because he wanted to get high and Jackie said she would look out for him, meaning get him high. X 897. He drove because he had a driver’s license. When they got

to BBQ's, Brooks and Brown told Jackie they wanted 50 rocks. X 867-868.

Simmons parked on the side of the driveway. He heard Jackie say, “There go Michael J.” She went over to that person and said, “Give me a dime.” X 870, 916. Jackie walked back to the Camry and showed the rock to Brooks and Brown, who had gotten out of the car. She hollered, “They want 50 rocks.” The man said he “ain’t have but 24,” that he "got to get the other 26" and walked towards the driveway. X 870-871, 917. Jackie got back in the car. Brooks and Brown walked towards the driveway to get the rest of the rocks. Simmons was not really paying attention to them. He and Jackie were in the car listening to the radio. Then Simmons heard a loud voice and gunshots coming from the rear of the car. Simmons looked in the rearview mirror and saw Brooks shooting a gun. Simmons looked to see what he was shooting at. He saw somebody running towards the house, through the gate. X 871-872. Simmons ducked down in the car. He heard more shots. When the gunfire ended, Brown ran and jumped into the front seat of the car. Brooks jumped in the front seat behind him. Brooks had a chrome-plated 9 millimeter gun. They were hollering, “Crank up and drive.” Simmons drove to his house at 14th Street, and he and Jackie got out of the car. X 873-876.

Simmons had smoked dope and used crack that day. He had been using crack for so long, though, it had no effect on him. He did it just to get high. He denied being high when the shooting took place and denied he was testifying based on information he got from the prosecutor or from Jackie, through his mother and brother, before he was arrested. X 891-892, 895.

Simmons never saw any guns before Brooks and Brown got out of the car. No one talked about committing a robbery. X 902.

Michael Johnson said he and Darryl Jenkins were close friends. Darryl used crack. Darryl sold crack. Johnson sold cocaine at Darryl's house. VII 372-374. Johnson sold drugs to support his seven kids but was not a user himself.[2] VII 441-442. Johnson knew Fred Brooks and Foster Brown but was not friends with them. He had known Jackie Thompson for five or six years. Jackie was a regular customer at Darryl's. Johnson sold her cocaine regularly. VII 374-276.

The night of the shooting, Johnson agreed to meet Lashan Mahone at BBQ's house to go to the club, Jazzco. Johnson backed his 1973 Chevrolet Impala into BBQ's driveway, opened his door,

[2] Johnson later added that his children's mothers were a "big help" to him. "You know, I just do what I can, you know, for them. I'm there for them, you know, when they need me." VII 467.

and sat listening to CD's. VII 376-77, 381-382. Three or four minutes later, Lashan pulled up next to him. She got out and came to his car. They began to talk and listen to music. Darryl Jenkins and Jessie Bracelet were sitting in lawn chairs in the driveway area, right in front of Lashan's car. Five minutes after Lashan pulled up, a red Camry pulled up and parked on the street, about 15 to 25 feet away. VII 382-384. Jackie Thompson got out of the Camry and started walking toward BBQ's house. Johnson called her over, and she asked to buy a ten-dollar rock. She said she had two guys in the car who wanted to buy 50 rocks. Johnson told Jackie he would "serve" them. After Jackie purchased the rock of crack cocaine, she walked back to the red Camry. The two men got out and talked to Jackie. Johnson did not recognize them at the time. VII 385-387.

Johnson then went to BBQ and got a sandwich baggie with cocaine in it. VII 387. Johnson did not know exactly how many rocks were in the bag. The rocks were "about a gram in size and identical in shape." VII 388. He had sold drugs "off and on" for two years. When asked whether he "observe[d] the contents of the bag carefully enough to determine if there were at least 50 in there?," the defense objected, arguing the state had not laid a predicate.

During voir dire outside the jury's presence, Johnson said he "knew" it was enough to serve 50 because he "saw" at least 50 in there, and he had seen a quantity of more than 50 rocks more than five times before. VII 396. He also said the drugs were not his, he had not "laid hands on them before," and he had not weighed them. He could not say whether the rocks were "cornbread," a lighter form of crack cocaine, because he had not examined them. But, "I know what they weighed" because "I know what a juggler weighs; a gram apiece." VII 402-403.

The defense argued the state had not laid a sufficient predicate for Johnson to testify as to the amount, quality, or weight of the cocaine in question:

> MR. NICHOLS: I don't think they've laid the predicate. . . he admits on the stand that this quantity could just as well have been a kind of practice [sic] known as cornbread, which is a much lighter form, that he never made the comparison. . . . He's offering an opinion and by his own testimony is telling us it could have been something substantially lighter than what he's saying it is.
>
> MR. KURITZ: The only testimony from any statements of the defendant was there was a request for 30, which puts us in a very precarious position when it's supposed to be one gram apiece and we're now two grams apart and the witness is unable to tell us whether it was cornbread or cocaine because he had not--basic rock cocaine which he testified clearly that cornbread would be much lighter and that he testified he did not examine the

> cocaine, nor did he ever weigh the cocaine, nor did he ever count the cocaine, so clearly there has been an insufficient predicate laid for them to say that clearly we have met that burden or clearly he can enumerate a number. They've fallen short of that predicate.

VII 408-409.

The trial judge overruled the objections, "especially since the felony murder rule includes an attempt." VII 413.

The jury returned, and Johnson was permitted to testify there were at least 50 rocks in the bag and that he had observed a quantity of 50 rocks before more than five times. VII 418-419. He also testified he "knew" the rocks were a gram apiece because "in my experience in dealing with crack cocaine, I know a juggler is consisted of one gram." VII 420. Johnson gave his opinion that it was "real crack cocaine" in the baggie. VII 421.

After he got the baggie from BBQ, Johnson went to the passenger side of his car, to the trunk area. The men approached him, and he recognized them as Foster Brown and Fred Brooks. VII 422. Johnson asked, "Are you the ones that want to get the 50 rocks?," and Foster Brown said, "I'll tell you what, just give me 30." Johnson was in the middle, with Foster Brown on his left, and Brooks on his right, closest to the back seat of the car. VII 423. Foster Brown had several hundred dollar bills in his hand. VII 425. Johnson untied the baggie, reached in, and

started to count the rocks out. Fred Brooks was reaching in his pocket. Johnson thought he was getting some money out "to buy him some, too," but he came out with a long chrome gun. Johnson just dropped the baggie on the trunk, and ran. He did not give them a chance to say anything because he thought he was being robbed. VII 475-476, 480. That's when he heard BBQ say, “Hey, man, what’s up? He got a gun or something?” VII 426. Johnson saw Brooks turn the gun towards BBQ and fire one time. Johnson turned and ran through the gate. As he ran past Foster Brown, Brown stepped back, like he was going for something in his pocket. VII 427. Johnson heard heard 10 or 12 more gunshots as he ran through the yard. VII 429. It sounded like two guns because one sounded louder than the other. VIII 534, 537. A bullet hit him in the back, came through his chest and hit him in the arm. He ran around to the back door of the house, and someone helped him inside. Afterwards, Lashan took him to the hospital. VII 429. He never saw the baggie of cocaine again. VII 436.

Johnson agreed it was pretty dark out there, and he could not pinpoint where anyone was at the time of the shooting other than Brooks and Brown. He did not know what the gunman may have seen that may have startled him. VII 479-480.

Johnson denied counting out 24 rocks and denied getting any money from anyone, except what Jackie gave him. VII 482-483. Jackie gave him ten dollars and he gave her a little rock out of a little bag--"a small piece of plastic"--containing "three or our little rocks, dime rocks." VII 483-484. When asked how much the "little pieces" weighed, Johnson said he did not know what they weighed after he cut them but they were a gram before he cut them because "I know how much a juggler weighs." VII 486.

He admitted he had never handled those drugs before that night. He admitted they were not even his drugs. He did not know who cooked them. When asked how he could say what they weighed without having weighed them, he said he was no expert but "I know what I'm looking at when I look at it," VII 487, and "in my experience in selling jugglers and dealing with crack cocaine I know if you're selling a juggler, it's one gram." VII 490. Holding up a Starbright mint candy, defense counsel asked Johnson what it would weigh if it were crack cocaine. Johnson said he had seen rocks similar in size to the candy. Those rocks weighed "about one and a half grams, two grams. It depends on what scale you're on." VII 489. Johnson said he had known users to pinch off a piece of a rock for their personal use and try to sell the remainder as a full gram. VII 491. In his experience, the term

“cornbread” was used for drugs that were not good or to describe the color of the drugs. VII 492. "Cornbread" could weigh less than true cocaine, depending on "who or where it's coming from." He did not know where BBQ got the rocks in the bag. VIII 498. He knew the rocks were real because "I never sold bad dope from BBQ's house and I knew BBQ never sold bad dope from his house." VIII 506, VII 446.

When asked why he sold the rocks that night, instead of Jenkins, the following colloquy ensued:

> M. JOHNSON: See, I was going to make sure the people I was selling to, you know, was going to get a fair deal with the rocks because I know what "BBQ" had a tendency to do, you know, "BBQ," like you just said, "BBQ" was a user and so he might try to, you know, you know, at night he might try to, you know, given them the smallest rocks out of the bag. See, I'm not like that. You know, I'm fair, you know, I know it's wrong, but I'm fair. You know what I'm saying. If you come to buy something from me, I'm going to make sure it's good. I'm going to make sure the dope good and I'm going to make sure you get what you pay for.
>
> Q . . . you were going to do it because you wanted to make sure that whoever was coming up to purchase drugs in that house was going to get a fair shake?
>
> A And I could have made me some extra money also.
>
> . . .

Q Isn't it true what you were trying to do, you were trying to give them -- the conversation allegedly was 50 rock, right?

A Right.

Q But you were going to try to give them 25 rocks for the same amount of money, isn't that right?

A No, that is wrong.

. . .

Q . . . Why don't you explain to the jury how that is that you'll make extra money that way?

. . .

A . . . the way I could have did that, if they were coming to buy ten dollar jugglars, then I could have gave them 25 and said they was 20 dollar jugglars and two hundred and 50 dollars, but when they said they wanted -- you know, when they said they wanted 50 rocks, I just have to see the people, you know, because like if I see them, I pretty much know what they coming to buy, so if they would have said I want 50 20's, I would have told "BBQ," "Well, `BBQ', they want 50 dimes." So that means I would have got 50 rocks out of the bag, but would have only

sold them 25, but they would have gave me five hundred dollars. Got me?

VIII 500-502.

At this point, defense counsel read back to Mr. Johnson his deposition testimony, as follows:

> Q Do you recall the question: Now, why did you say that? Why did you say let me do it instead of him, talking to "BBQ"? And your response being: Because late at night, you know, when somebody ask for 50 rocks, you can give them 25 rocks?
>
> A Yeah.
>
> Q And that way, you know, you getting the profit. Like if you give them the whole 50 rocks you're not really making any money, so I could have given them 25 rocks and they gave me five hundred dollars. I just give "BBQ" two hundred and 50 dollars and I keep two hundred and 50 dollars, right?

VIII 502-503.

When asked how much a gram of rock cocaine sells for on the street, Johnson said "a dime. Ten dollars." But it "just depends on who's buying it." VIII 510. A gram of what he was selling that night sold for ten dollars. VIII 512. Johnson remembered saying in his deposition that a gram was about 25 dollars. He said that because it could be worth 25 dollars, depending on who he was selling it to:

> Like if I was selling it to you or you wanted to buy it. It will be 25 dollars. . . If I was selling to one of my friends, it will be ten dollars. If I didn't have no money in my pocket and needed quick money, fast money, it might be 35 dollars. So it's just the person who I sell it to is the reason, you know, the prices change.

VIII 512-513.

Lashan Mahone testified she had been convicted two times of a felony and four times of shoplifting. She was an ex-addict and stole to support her drug habit. VIII 546. Darryl Jenkins was an addict, too. He let people sell drugs out of his house in order to get drugs. VIII 548. He also sold drugs sometimes. VIII 597. Lashan knew Brooks but not Brown. VIII 548.

Lashan went to BBQ's that night to meet Michael Johnson to go to Jazzco. When she arrived, Johnson was sitting in his car. "J.R." and Darryl were sitting in lawn chairs in front of the house. She parked her car and went over to Johnson’s car and they started talking. VIII 548-550. In a few minutes, the red Camry pulled up. Jackie got out and came over and asked could she purchase a ten-dollar rock of crack cocaine. Johnson got out and Lashan sat in the car and Johnson walked towards the back of the car. Lashan began listening to CDs, not paying much attention to what was going on outside. She saw Jackie head back towards the Camry and saw two men coming up from the Camry. The men met Johnson at the back of the car on the passenger side. Johnson was in the middle, with a guy on each side. Lashan was sitting in the car in the driver’s seat. She glanced back for a second and saw Johnson with a bag of crack. It looked like he was pouring it out on the car but she was not paying any

attention. VIII 551-552. A couple of seconds later, she heard BBQ scream and then heard a shot. She turned around and saw Johnson running through the fence. One of the men was standing with a gun in his hand. It looked to be the man that was on Johnson's right. He was shooting at Johnson. She laid down in the seat and heard more shots from the rear of the car. The guy with the gun backed up along the side of the car and stopped for about 10-15 seconds right next to the window, close enough to touch. VIII 553-554, 562. Then he took off towards the Camry. She heard the Camry drive off and got out. A woman, Kathy, came out of the house and told her not to panic and to take Johnson to the hospital. Johnson was coming out, and she took him to the hospital. VIII 555-556. She had not seen any drugs on the trunk area of the car when she got out. VIII 558.

She did not recognize the gunman that night. She had been shown photographs by the police three times. She recognized Brooks' picture in the photographs the first two times but could not say he was the gunman. The third set of photos included side profiles. At that time, she recognized Brooks' profile as looking like the gunman. She still could not say with certainty, however, that the gunman was Brooks. VIII 562-565. It was very dark. VIII 569.

Jessie Bracelet, also known as "J.R.," had known Jenkins for 10 years and lived around the corner from him. VIII 599. BBQ was an addict. Drug dealing and drug use took place at his house all the time. VIII 630-631. Michael Johnson was a dealer. VIII 640. BBQ also was a dealer sometimes. VIII 649. Bracelet had been using crack for 3-5 years but denied being an addict. He denied using crack the night BBQ was shot; he denied using crack the day of his trial testimony. VIII 630-631. He did not know Fred Brooks or Foster Brown. VIII 599.

Bracelet was sitting with Jenkins in Jenkins' front yard the night of the shooting. He saw Michael Johnson pull up and back into the driveway. He saw Lashan Mahone pull up next to Johnson and walk over to his car. The red Camry pulled up. Jackie Thompson got out and walked to the rear of Johnson's car and bought a dime rock from him. She went back to the Camry and talked to someone inside the car. VIII 600-602. She came back to Johnson's car, and they discussed a quantity of rocks the individuals wanted to buy. Johnson told her to get the men, and she went back to the Camry and got inside, and the two men got out. The two men stood on each side of Johnson at the rear passenger side of Johnson's car. They were talking, and Johnson was counting a bag of rocks on his trunk. VIII 603-604. That

was when Bracelet got up to leave. He had taken two or three steps when he heard Jenkins say, "He’s got a gun." Bracelet glanced around and saw the man on Johnson's right extend his arm and fire at Jenkins. The gunman was about 15 feet from Bracelet; Bracelet was a couple of feet from Jenkins. Bracelet ran, and the man fired a couple of shots at him as he ran around the corner. He heard 10 to 15 more shots. It sounded like two guns because some shots were louder. Bracelet identified Brooks as the gunman. VIII 605-607.

After the shots stopped, Bracelet returned. He found Jenkins lying in the across-the-street neighbor's driveway. VIII 608-610. When the police arrived, Bracelet lied and said just come around the corner and found Jenkins in the driveway. He lied because he feared reprisals. After the gunmen were arrested, he told police the story he told today. VIII 624-626.

On cross-examination, Bracelet said he saw Jenkins with a bag of cocaine an hour or two before the shooting. VIII 649. He did not see Jenkins give Johnson a bag "because I had left several times." VIII 651. He never heard the two men say anything. VIII 652. He did not remember telling Detective Booker twice that he heard Jackie say her friends wanted 5 to 10 more rocks. VIII 643.

On recall the next day, Bracelet said Jenkins was sitting in the chair when Bracelet got up to leave. When he heard Darryl say, "He’s got a gun," he looked back over at Jenkins, who had stood up. He did not see a weapon. Jenkins slumped down and ran down the street. Bracelet did not see a gun or weapon with anyone besides Brooks. He denied having a gun or weapon himself. IX 844-847. He could not hear the conversation between Johnson and the two men. Earlier, though, when the two men were still in the car, but after Jackie had bought the rock and gone to talk to the men the first time, he heard Jackie tell Michael Johnson the two men only wanted 5 to 10 more rocks. After that, the men got out of the Camry and came up to do the transaction. IX 854-855.

Jenkins died of the gunshot wound shortly after the police arrived and while rescue personnel were working on him. IX 713. The bullet went through his heart and lung, then exited. The bullet was not fired at close range, and the wound would not have caused instantaneous death. Jenkins had ingested cocaine within a few hours of death. The bullet was not recovered. IX 709-711. Ten 9 millimeter shell casings were found around the blue Chevy Impala. IX 715, 717. No guns or weapons were found. IX 718.

Penalty Phase

The state presented five witnesses.

Detective Robinson said Fred Brooks was involved in the armed robbery of a grocer and customer at the Caceas Grocery in Jacksonville on January 17, 1979. Brooks and another person carried a sawed-off shotgun and handgun and robbed the two men of money and jewelry. According to Detective Robinson, Brooks had the sawed-off shotgun. Brooks was 15 years old. He was prosecuted as an adult and pled guilty. He received a four-year prison sentence as a youthful offender and two years community control. XIV 1351-1355.

Detective Goff testified about the robbery and kidnapping of Carlton Kellum on September 20, 1983. Kellum was new to Jacksonville and was riding around looking for a nightclub. Shortly after midnight, he asked some people on a street corner for directions to the nightclub. The individuals agreed to show him if he would give them a ride. On the way to the nightclub, one of the suspects threatened Kellum with a pistol. Brooks tied Kellum up with Kellum's belt. They took him to a wooded area, tied him to a tree, took his money and jewelry, and stole his car. He got loose a short time later and called the police. The officer was writing the report when he spotted the vehicle. A chase lead to the arrest of the suspects. Brooks was found

guilty by a jury of armed robbery and kidnapping and sentenced to 17 years in prison. XIV 1358-1360.

Lt. Warren testified about the murder of Zachary Doctor, for which Foster Brown was convicted. Zachary Doctor, Melvin Mitchell and Foster Brown were at the 747 Club in November of 1978. Doctor asked Melvin for a ride home. Melvin was driving, Zachary Doctor was in the front passenger's seat, and Foster Brown was in back behind Doctor. As they were driving, they discussed a robbery Doctor and Brown had been involved in. Doctor told Brown that he was going to turn state's evidence against him. It got quiet for a few seconds after Doctor made this comment, then Brown shot Doctor in the head. Mitchell helped Brown dispose of the body in the woods. They dragged the body into the woods. Mitchell had turned around and started back to the car when he heard two more shots. When Brown got back, he told Mitchell shot Doctor two more times in the chest. The gun and bullets were thrown into the Trout River. Brown pled guilty to second-degree murder and received 22 years in Florida State Prison. XIV 1362-1365.

Sgt. Pruitt testified about the murder of Jimmy Lee Bostick on September 28, 1988. Bostick was twenty years old. He was riding a bicycle near his home when Foster Brown tried to rob him

and shot him twice. Bostick ran home and dropped dead in his carport. Brown pled guilty to second-degree murder and was sentenced to 14 years in Florida State Prison. XIV 1367-1368.

The state's final witness was Meltonia Jenkins May, Darryl Jenkins' aunt. Ms. May read a prepared statement. She told the jurors Darryl was murdered three days before his 29th birthday. He had suffered some years before that. He was two years old when his mother died. He was seven years old when his father died. After his father died, Ms. May brought him from Michigan to live with her family in Jacksonville. He was adopted by her parents. During his teenage years, he watched his adopted mother slowly die from a debilitating lung disease. She died while he was in high school. In 1990, his 27-year-old sister, Tammy, developed multiple sclerosis. She had been bedridden for the past three years, and Darryl had been caring for her, daily changing her diapers, cleaning her, and putting her to bed. The night he was murdered, Darryl had just left her father’s house after bathing and putting Tammy to bed. The family had to hire a paid sitter after Darryl’s murder, which did not compare to the love and care Darryl provided. Darryl had a heart and cared for people. His friends came to his wake and told Ms. May about countless deeds Darryl had done for them. He had helped many

people during times of need. Ms. May told the jurors she loved Darryl very much and missed him. He was no saint, but, "had more heart and compassion than most people I've encountered in my life." XIV 1374-1377.

Following Ms. May's testimony, the court instructed the jurors that her testimony was not an aggravating circumstance in the case and they were not to consider it as aggravation in any way. XIV 1381.

Fred Brooks put on his witnesses next.

Jerome Bird had known Fred Brooks since 1971. Brooks was his wife's nephew. Mr. Bird had been a deacon in church for about 10 years. He told the jurors there was an another side of Fred. He had not known Fred like he had been portrayed at the trial. Fred had a humanitarian side. He was a very caring person. Mr. Bird would not be afraid to leave his only daughter with Fred. He believed Fred would protect and care for her. During all that was going on, Fred's mother was dying of cancer. Mr. Bird had never known Fred to actually hurt anybody. Mr. Bird believed Fred could make amends even if he stayed in prison the rest of his life. Even if he stayed in prison the rest of his life, he could make an impact there. Mr. Bird asked the jurors to give Fred that opportunity. XIV 1381-1386.

Mr. Bird said he tried to be a positive role model for Fred but felt he could have done better. He realized now he should have done better. He should have been more forceful. He visited Fred in prison but was not as forceful and did not know then what he knew now. Back then, he was a new Christian and was young in the faith. He did not have that much to give. XIV 1393-1394.

Carolyn Bird, 39, was Fred's aunt, his mother's sister. She had known Fred all his life. Fred’s father died right after he was born. Mrs. Bird testified that during the armed robbery and kidnapping of the tourist, Fred was the one who decided to tie the man up instead of kill him. Someone wanted to kill the victim after they robbed him and took his car, but Fred persuaded the others to tie him up instead of taking his life. XIV 1399. Mrs. Bird said she loved Fred and always had loved him. She was sorry about what had happened to Mr. Jenkins. Fred had never shown her any violence. His mother died from terminal cancer. Fred was there, he saw her suffering. She died on June 28th and was buried July 5th. His mother was all he had to call his own. He showed care and concern for his mother’s death. XIV 1405. Mrs. Bird's father, 84, was around Fred a good bit while he was growing up but not as a “father figure.” He did not raise Fred. The only time they saw Fred was when he came to their house. As

far as she knew, her sister, Fred’s mother, was a loving mother. Until he was 15, Fred had a family around. He was in prison for most of his teenage life after 15. XIV 1408-1411.

Tommy Hall was married to Fred's sister, Shirley Hall. Tommy met Fred 13 years ago while Fred was in prison. He and his wife had three children, were Christians, and went to church on Sunday. Every Sunday they had dinner at Shirley’s mom's house. Fred lived there too. They would have fellowship, look at football and basketball games. His kids loved their Uncle Fred and they looked forward to it. He played with them and he took a lot of time with them. Fred loved them and they all loved him. Mr. Hall knew about the offenses Fred had done but as far as his own personal interaction with Fred, he never saw any tendency to violence or disrespect of other people’s lives and property. When asked whether he had talked to Fred about turning his life around while he was in prison, Mr. Hall said he had asked himself, "did I do enough?" The answer was no. XIV 1412-1419.

Shirley Hall, Fred’s sister, said the side of Fred she knew was a caring, loving side. She understood what had happened and understood the consequences of it, but he was her brother and she loved him and she did not feel he should have to lose his life. She had never seen Fred violent or even angry. She tried her

best to help Fred and give him guidance. She visited him in prison all the time. XIV 1420-1427.

Foster Brown presented his witnesses next.

Patrick Walker, 30, was Foster Brown’s brother. Patrick had worked for Anheuser Busch as an engineer for 10 years. He did not spend a lot of time with Foster when he was a child because of the 14-year age difference. He was unaware Foster previously had been convicted of two murders. When Foster was released in 1996 and moved in with his mother, Patrick was excited because he had spent so little time with his brother. After Foster got out of prison, they spent quite a bit of time together. Patrick took him on job interview after job interview and tried to call in some personal resources to get him a job. It was very difficult because of Foster's age and also because of his prior record. Despite that, Foster continued to go with him to apply for jobs. XIV 1437-1439.

One day, Patrick was on his way to pick Foster up to go on another job interview when a black car flew past him. Patrick pulled in the driveway and learned his brother had been shot in a drive-by shooting. After Foster got out of the hospital, he told Patrick he had to be careful and was looking around him all the

time. Patrick became concerned about his safety and moved out of his mother’s house. The landlord said Foster had to leave and their mother was nervous. The people apparently were still looking for Foster because he saw them whenever he left the house. He was followed a number of times. Foster was very concerned about the safety of his family. XIV 1440-1442.

Patrick did not know anything about Foster’s criminal record. He only knew how he was with his family and his friends. Patrick knew him to be a good person. Patrick's two kids loved their Uncle Foster. He babysat for them and Patrick did not leave his kids with just anyone. Foster was raised mostly by his grandmother, while Patrick was raised more by his mother. His grandmother was a loving, caring person. She did her best. Patrick was discouraged after they put in all the applications. He felt he was the only hope Foster had because the places they went were not going to give him a job. The only choice he had was to tell them he had been working someplace for the last ten years and hope and pray they did not check it out. The minute they mentioned where he had been for the last ten years--whether it was Jiffy Mart or McDonald's--they said, "thanks very much, we’ll give you call." XIV 1443-1455.

Elaine Baker said she had been Foster Brown’s friend, lover, and partner since March 1996. She had three kids, a daughter, 26, with two kids of her own, a daughter, 12, and a son, 14. Foster had been a very positive influence on her kids, especially her son. Foster had always given him advice "because he’s been there" and he tried to help lead him away from what he had been through himself. Foster was looking for a job, going to church. He was trying to get his life together. XIV 1460-1469.

Lanny Tippens was Foster Brown’s brother. They were pretty much raised together. His grandmother, Melissa Brown, raised them. She was a religious person. They went to church every Sunday. She gave them the best she could. She was loving. The male figure in the house was his grandfather, James Brown. He was working most of the time. Tippens said a lot of his brother’s problems came from the streets. He got caught up in the street environment and never could really get out. After he had spent so much time in prison, it distorted his judgment as far as right and wrong. But his brother was one of the sweetest, most loving guys you could have for a brother. That was the brother he had been raised with and spent most of his life with. XIV 1471-1477.

SUMMARY OF ARGUMENT

I. The evidence was insufficient to prove first-degree murder. The evidence showed the shooting was not premeditated but was committed on the spur of the moment and without any opportunity for reflection. The evidence did not establish felony murder because the state did not prove the requisite predicate felony. The state failed to prove trafficking in cocaine because the evidence was insufficient to prove the cocaine the defendants sought to purchase weighed 28 or more grams. The state failed to prove robbery because the evidence was consistent with the reasonable hypothesis that Brooks pulled his gun because the drug seller was trying to cheat him, and then fired reflexively in response to the victim's sudden outcry.

II. The trial court erred in allowing Michael Johnson to testify the cocaine rocks he was selling weighed a gram a piece. He was not qualified to testify based on personal knowledge because the cocaine was not his, he had not seen or laid hands on it until moments before the transaction, and he had no personal knowledge of its nature or weight. He was not qualified to testify as an expert because the state made no showing that he was an expert in determining the weight of a rock of cocaine by looking at it.

III. The trial court erred in instructing the jury and finding robbery/pecuniary gain as an aggravating circumstance. The state failed to prove the homicide was committed during a robbery or for pecuniary gain because the evidence supported the reasonable possibility that Brooks pulled his gun because he thought Johnson was trying to cheat him.

IV. The trial court erred in failing to find the victim's participation in drug trafficking as a mitigating circumstance. Restriction of the "victim participant" mitigator to situations such a dueling assumes the legislature created a mitigator for a situation that is virtually nonexistent. It is more likely the Legislature intended this mitigator to apply in situations such as here, where the victim was an equal and willing participant in the dangerous criminal conduct from which the homicide arose.

V. Death is disproportionate and disparate compared to other single-aggravator cases and where an equally culpable codefendant received life despite two prior murder convictions.

VI. Prosecutorial misconduct during the penalty phase closing argument rendered Brooks' sentencing proceeding fundamentally unfair.

ARGUMENT

Issue I

THE CIRCUMSTANTIAL EVIDENCE PRESENTED WAS INSUFFICIENT TO SUPPORT FIRST-DEGREE MURDER.

The state prosecuted Brooks on theories of both premeditated and felony murder, with robbery and/or trafficking in cocaine as the predicate felonies for felony murder. Appellant moved for judgment of acquittal as to both theories, which the trial court denied. The jury returned a general verdict of first-degree murder. The state's evidence was insufficient, however, to prove either premeditated or felony murder, and established, at most, second-degree murder. Brook's first-degree murder conviction must be reversed.

The Evidence Did Not Establish Premeditation

Premeditation, as an element of first-degree murder,

> is a fully-formed conscious purpose to kill, which exists in the mind of the perpetrator for a sufficient length of time to permit of reflection, and in pursuance of which an act of killing ensues.

Jackson v. State, 575 So. 2d 181, 186 (Fla. 1991)(quoting Sireci v. State, 399 So. 2d 964, 967 (Fla. 1981), cert. denied, 456 U.S. 984, 102 S.Ct. 2257, 72 L.Ed.2d 862 (1982)). Evidence from which premeditation may be inferred includes "such matters as the nature of the weapon used, the presence or absence of adequate

provocation, previous difficulties between the parties, the manner in which the homicide was committed and the nature and manner of the wounds inflicted." Id.

Under this Court's decisions in Jackson and Mungin v. State, 667 So. 2d 751 (Fla. 1995), the record in the present case is insufficient to support premeditation. In Jackson, the defendant was convicted of shooting a convenience store clerk in the chest at a distance of at least three feet. Although there were no witnesses to the shooting, an inmate testified he heard Jackson tell his mother "we had to do it because he had bucked the jack," meaning resisted the robbery. 575 So. 2d at 185. In finding the evidence insufficient to support premeditation, the Court reasoned:

> In Sireci, premeditation was proved with evidence that the defendant clubbed the victim over the head with a wrench, then stabbed and cut the victim fifty-five times in the chest, head, back, and extremities, and finally slit his throat. In Griffin, premeditation was supported by evidence that Griffin used a "particularly lethal gun"; the bullets were of a special type designed to have "a high penetrating ability"; there was no sudden provocation by the victim; and Griffin fired two shots into his victim at close range. Those facts are completely distinguishable from the instant case where there is no evidence to indicate an anticipated killing, and where all of the evidence is equally and reasonably consistent with the theory that [the victim] resisted

> the robbery, inducing the gunman to fire a single shot reflexively, not from close range, with an unidentified type of weapon and bullet. There is no evidence of a fully-formed conscious purpose to kill.

Id. at 186.

The Court reached the same conclusion on similar facts in Mungin, which also involved the shooting of a convenience store clerk. As in Jackson, there were no witnesses to the actual shooting. In finding the evidence insufficient to support premeditation, the Court reasoned:

> The state presented evidence that supports premeditation: The victim was shot once in the head at close range; the only injury was the gunshot wound; Mungin procured the murder weapon in advance and had used it before; and the gun required a six-pound pull to fire. But the evidence is also consistent with a killing that occurred on the spur of the moment. There are no statements indicating that Mungin intended to kill the victim, no witnesses to the events preceding the shooting, and no continuing attack that would have suggested premeditation.

667 So. 2d at 754.

The evidence against premeditation is even stronger in the present case than in Jackson or Mungin. As in those cases, there was no evidence here of any intent to kill prior to the actual shooting. Here, however, the testimony of witnesses to the events preceding the shooting and to the shooting itself negated

a premeditated killing. Michael Johnson, Jackie Thompson, and Tyrone Simmons testified Brown told Johnson he only wanted 30 rocks. Jackie Thompson and Tyrone Simmons testified they heard Johnson say he had only 24 rocks. Thompson also said she saw Brown give Johnson $300, and heard Johnson say, "What man? You want your money back? You ain't satisfied?" It was just seconds later, while Johnson, Brooks, and Brown were standing over the trunk of the car with Johnson holding the baggie of cocaine, that Brooks took out his gun, and Jenkins, seated fifteen feet away, yelled or said something about a gun, and Brooks turned and fired at Jenkins, hitting him in the chest. Although other shots were fired towards Johnson and Jesse Bracelet, who were fleeing, there was no continuing attack on Jenkins, who walked across the street, where he collapsed in a neighbor's driveway.

Thus, whereas in Jackson and Mungin, the Court found the evidence insufficient to establish premeditation because the shooting may have "occurred on the spur of the moment," here, eyewitness testimony directly supports that the guman fired the single shot reflexively, not at close range, and in response to the victim's sudden outcry. There was no evidence of a fully-formed conscious purpose to kill. The trial judge erred in

denying Brooks' motion for judgment of acquittal as to premeditation.

The Evidence Did Not Establish Trafficking

The evidence was legally insufficient to establish felony murder based upon trafficking in cocaine[3] because the state failed to prove appellant was attempting to purchase or possess 28 or more grams of cocaine.

The offense of trafficking in cocaine is defined as follows:

> [a]ny person who knowingly sells, purchases, manufactures, delivers, or brings into this state, or who is knowingly in actual or constructive possession of, 28 grams or more of cocaine, . . . but less than 150 kilograms of cocaine or any such mixture, commits a felony of the first degree, which felony shall be known as "trafficking in cocaine."

s 893.135(1)(b)(1), Fla. Stat. (1995). To sustain a felony murder conviction based on trafficking in cocaine, then, the state must prove beyond any reasonable doubt the defendant purchased, or attempted to purchase,[4] 28 or more grams of cocaine. The requisite weight may be proved in two ways: One,

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[3] See s. 782.04(2)(a), (d), Fla. Stat. (1995)

[4] Attempted trafficking is proscribed by section 777.04(1), Florida Statutes (1995), which states, in pertinent part: "A person who attempts to commit an offense prohibited by law and in such attempt does any act toward the commission of such offense, but fails in the perpetration or is intercepted or prevented in the execution thereof, commits the offense of criminal attempt.

the state could present evidence of intent to purchase or possess 28 or more grams, cf. Spera v. State, 656 So. 2d 550 (Fla. 2d DCA 1995)(conspiracy to traffic requires agreement as to requisite amount); or, two, the state could present evidence proving the cocaine in question actually weighed 28 or more grams. See Williams v. State, 592 So. 2d 737 (Fla. 1st DCA 1992)(to support trafficking conviction, state must prove amount was 28 grams or more).

The state failed to present such proof in the present case. First, the evidence did not prove Brooks and Brown intended to purchase 28 grams or more of cocaine. Brown said he wanted 30 rocks, not 30 grams. It cannot be assumed Brooks thought the rocks he was purchasing were a gram apiece. In fact, the evidence suggests otherwise. The defendants decided to get only 30 rocks after inspecting the rock Jackie Thompson had purchased, which, according to Brown, was "too flat." And, according to Michael Johnson, the piece Jackie purchased and showed the defendants was a "little piece," a dime rock. Johnson could not say how much the "little pieces" weighed but said they were a gram before he cut them. Based on this testimony, then, the evidence is consistent with an intent on the part of the defendants to buy 30 rocks weighing less than a gram apiece.

This evidence is insufficient to establish the statutory threshold of 28 grams.

Assuming, on the other hand, there was a second bag of cocaine containing bigger pieces, per Michael Johnson's testimony, the state also failed to prove beyond a reasonable doubt 30 of those rocks weighed 28 or more grams. The only testimony concerning the weight of those rocks was the testimony of Michael Johnson, who was permitted to testify the rocks weighed a gram apiece, even though he had no personal knowledge of their weight.[5] The only foundation for Johnson's opinion as to their weight was that in his experience as a drug dealer, "a juggler consists of one gram," and "I'm not an expert but I know what I'm looking at."

Johnson's testimony was insufficient to establish the proscribed weight. The rocks did not belong to Johnson; the rocks belonged to Darryl Jenkins. Johnson had no personal knowledge of their weight. Johnson had not dealt with those rocks before and had not laid hands on them until he started to count them. In fact, Johnson testified he "untied" the baggie just seconds before the shooting began.

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[5] Appellant argues in Issue II, infra, that the trial court erred in admitting Johnson's testimony as to the weight of the cocaine.

There was no showing Johnson was an expert in determining the weight of a piece of crack by visual inspection. Furthermore, the testimony of several witnesses, including Johnson, established that some crack weighs less than other crack, depending on its purity. The purity of the cocaine, and whether it was even real or not, also was outside the scope of Johnson's knowledge. Johnson's opinion, therefore, was nothing more than an approximation. Because the approximation barely exceeded the amount necessary to establish the crime, the state failed to prove the crime beyond any reasonable doubt. At most, the state showed the cocaine Brooks and Brown were attempting to purchase "may" have weighed 28 or more grams. That Brooks "may" have committed the crime of trafficking is insufficient to sustain his a conviction for felony murder.

The district court's opinion in Sims v. State, 402 So. 2d 459 (Fla. 4th DCA 1981), is directly on point. In Sims, the issue was whether the state carried its burden of showing the defendants possessed more than 100 pounds of unlawful cannibis,

as opposed to nonprohibited stalks, stems, or seeds.[6] Judge Schwartz's reasoning bears quoting in full:

> At the trial, the only testimony concerning the nature and quantity of the material in question was that of a chemist, Jay Pintacuda. He stated that he secured samples of the substance simply by taking a handful from each of four bales of the material, which had a total gross weight of 170 pounds. He acknowledged that although marijuana on the bottom of such a receptacle would likely contain a larger portion of seeds, he could not and did not actually reach to the bottom in taking the samples. Pintacuda then took one gram from each bale, separated the prohibited material from the chaff and stems, and without using a scale and without a showing that he was expert in arriving at such a determination, made a visual estimate that 70% of the sample was cannabis, and 30% lawful material. This was the sole basis upon which he stated that he "fe[lt] confident we have over . . . a hundred pounds of controlled marijuana." Most significantly, however, he admitted that
>
> > I cannot say beyond a reasonable scientific certainty . . . I feel confident of my conclusions, but that is only my opinion.
>
> It seems obvious that this testimony was insufficient as a matter of law to establish, as the prosecution was obliged to do, that more than 100 pounds of prohibited material was involved. <u>There was plainly no direct</u>

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[6] <u>See</u> <u>Purifoy v. State</u>, 359 So. 2d 446 (Fla. 1978)(where portion of substance introduced by state as contraband is claimed by defendant to be nonprohibited matter, state has burden of proving weight of contraband alone exceeds statutory threshold).

> evidence of this fact--no one weighed the actual cannibis and found that more than 100 pounds registered on the scale. The state was forced to rely entirely on the essentially circumstantial evidence of the chemist's estimate of the comparative weights of his sample. For two separate reasons, this extrapolation did not, as required when such evidence is relied upon, exclude a reasonable hypothesis that, in fact, there was less than 100 pounds of marijuana on the plane.
>
> First, Pintacuda's estimate was no more than a bare conclusion of what "appeared" to be the relative proportions of quantities of separate materials neither of which was actually weighed. Since he was not qualified as an expert in making such estimates, this opinion of that percentage was, pardon the pun, entitled to little, if any, weight itself. It was surely not impossible that his "rough estimate" was off by no more than 12% making the percentage of cannabis only 58% of the sample and the unlawful portion of the whole 170 pounds therefore less than 100. Just as important, since it may well have contained a significantly smaller percentage of seeds, the sample itself was not shown to be a fair representation of the entire quantity. . . . In sum, as shown by his candid refusal to state his opinion beyond a reasonable scientific certainty, it was just the chemist's guess that over 100 pounds of prohibited substance were present in the bales he tested. But a guess, even a good or an informed one, cannot be the basis of a criminal conviction.

Id. at 460-61 (citations omitted)(emphasis added).

Here, too, it was just the drug dealer Michael Johnson's "guess" that the rocks in the baggie weighed a gram a piece.

Johnson had not weighed them. They just looked the size and shape of jugglers, which in street parlance apparently means a piece of crack equivalent to one gram. In Sims, the chemist at least based his guess on a logical process, involving large enough amounts of material to make such an approximation. All Johnson did was eyeball the crack. Indeed, one gram is such a small quantity--one ounce equals approximately 28 grams, Spera, 656 So. 2d at 552--it is difficult to conceive of anyone being able to determine by visual inspection the precise weight of a piece of rock in the one-gram range. Moreover, the illegal drug trade obviously is not a standardized industry. There is no quality control, so to speak, and certainly no evidence presented below establishing that every rock every seller calls a "juggler" actually weighs precisely one gram. Johnson was not qualified as an expert in determining the weight of crack by visual inspection. And, surely it is possible some of the rocks weighed less than a gram, rendering Johnson's "estimate" off by a few grams and thereby making the attempted purchase less than 28 grams.

Indeed, the evidence, including Michael Johnson's own testimony, supports the hypothesis that the rocks weighed less than a gram apiece. Johnson, and other witnesses, testified that

"cornbread" is a less pure and lighter form of crack cocaine. Johnson, and other witnesses, said sellers sometimes pinch off a piece and sell the remainder as a full piece, or full gram. Furthermore, as to the specific rocks Johnson was selling, Johnson said he jumped in to make the sale because he was afraid Darryl Jenkins would try to give the buyers the "smallest rocks." Thus, Johnson's own testimony supported the reasonable hypothesis that the rocks he was trying to sell were not of uniform size and weight and weighed less than a gram apiece.

If the state is going to rely upon circumstantial evidence to convict a defendant, the circumstances relied upon must lead only to the conclusion that the defendant is guilty of the crime charged. D.R.C. v. State, 670 So. 2d 1183 (Fla. 5th DCA 1996). The evidence in the present case failed to meet this standard.

The Evidence Did Not Establish Robbery

Robbery is defined by statute as

> the taking of money or other property which may be the subject of larceny from the person or custody of another, with the intent to either permanently or temporarily deprive the person or the owner of the money or other property, when in the course of the taking there is the use of force, violence, assault, or putting in fear.

s. 812.13, Fla. Stat. (1995). To prove attempted robbery, the state must prove intent to commit the crime and an overt act towards its completion. See s. 777.04(1), Fla. Stat. (1995).

In the present case, the evidence of robbery was circumstantial. According to the state, the gun and the missing cocaine proved a robbery, or attempted robbery. These circumstances were insufficient to prove robbery, however, because they also were consistent with innocence.

The "missing" cocaine proved little, as there was no evidence Brooks or Brown took it. Johnson said he dropped the cocaine on the trunk of his car when the shooting started and never saw it again. Lashan Mahone said when she got out of the car after the gunfire, she did not see the baggie anywhere. But, no one saw what happened to the baggie during the melee, or afterwards. There were other people in the house during and after the shooting. Someone else could have taken the drugs after Lashan took Johnson to the hospital.

There was no evidence of a plan to rob. Jackie Thompson and Tyrone Simmons both testified there was no talk of robbery on the way to BBQ's house. Nothing was said before or during the incident to suggest a robbery was taking place. In fact, it was undisputed that Brown and Brooks had several hundred dollars to

buy the drugs, and one witness, Jackie Thompson, said she saw Brown give Johnson $300 and heard Johnson respond, "What man? You want your money back? You ain't satisfied?"

Nor does the gun prove a robbery was attempted. The evidence supports, and certainly does not exclude, the reasonable possibility that Brooks took out his gun to "persuade" Michael Johnson to give him the rest of the crack he had paid for. Several witnesses heard Johnson say he had only 24 rocks in the bag. Jesse Bracelet said he heard Jackie Thompson tell Michael Johnson they only wanted 5 to 10 more rocks. Jackie Thompson saw Foster Brown give Johnson $300. Johnson admitted he jumped in to make the sale so he could make some money for himself by giving Brooks and Brown half the drugs for the same amount of money. The only evidence of a plan, then, was Michael Johnson's plan: to execute a drug rip-off. The state's evidence, therefore, did not exclude the reasonable hypothesis that Brooks pulled out his gun, not to rob, but to get what he had paid for. In addition, given the paranoia and potential danger that attend drug transactions, the number of people in the house and yard, and a possible rip-off by Johnson, Brooks may have gotten his gun out for protection. Finally, there is no evidence as to what Brooks

heard, or thought was happening, when he heard Jenkins shout. All we know is that he reacted by firing his weapon.

The evidence showed only a suspicion of robbery, but "[e]vidence which furnishes nothing stronger than a suspicion, even though it would tend to justify the suspicion that the defendant committed the crime, is not sufficient to sustain conviction." Davis v. State, 90 So. 2d 629, 631 (Fla. 1956). The state did not prove beyond a reasonable doubt a robbery was intended, attempted, or committed.

In sum, the state failed to prove first-degree premeditated or felony murder. Appellant's conviction must be reversed.

ISSUE II

THE TRIAL COURT ERRED IN ALLOWING MICHAEL JOHNSON TO TESTIFY THE ROCKS OF COCAINE HE WAS SELLING WEIGHED A GRAM APIECE WHEN THE COCAINE WAS NOT HIS, HE HAD NO PERSONAL KNOWLEDGE OF ITS QUALITY OR WEIGHT, AND THE PRECISE WEIGHT OF THE ROCKS WAS CRITICAL TO THE STATE'S PROOF.

Over strenuous objection, the trial judge permitted Michael Johnson, the drug dealer, to repeatedly assert he "knew" the rocks of cocaine he was selling Brooks and Brown weighed a gram apiece. The trial judge allowed this testimony even though the rocks were not Johnson's, he had not laid hands on them until moments before the attempted sale, he had no personal knowledge

of their quality or weight, and he himself acknowledged that users sometimes pinch off pieces and try to sell the remainder as full grams. Johnson's testimony as to the weight of the cocaine was indmissible under the basic rules of evidence and highly prejudicial to appellant. This error requires a new trial.

First, the trial court erred in allowing Johnson to testify as an expert because Johnson was not qualified as an expert in determining the weight of crack rocks by visual inspection. Johnson gave no testimony demonstrating he could determine the weight of a piece of crack by looking at it or touching it. An expert's testimony may not be speculation and must be based on reliable scientific principles. Ehrhardt, Florida Evidence s. 702.3, p. 539 (1998 Edition). Johnson's "expert" opinion was pure speculation for which no foundation was laid.

Nor was Johnson's testimony admissible as a lay opinion. Section 90.701, Florida Statutes (1995), permits a lay witness to testify using opinions and inferences when the witness cannot communicate accurately and fully what he or she perceived, or when the opinion is not one that requires expert testimony. Ehrhardt, s. 701.1, p. 516-17. Although lay witnesses generally are permitted to testify or give opinion testimony on matters such as distance, time, size, and weight, id. at 518, "when exact

speed and distance are critical, they are not a proper subject for opinion testimony by non-expert witnesses." Id. at 525.

Here, the exact weight of the cocaine was critical since the state had the burden of showing the defendants were attempting to purchase 28 or more grams. The only evidence of the defendants' intent was Foster Brown's statement that he wanted 30 rocks. The precise weight of the individual rocks thus was critical to proving the offense of trafficking, which in turn was critical to proving felony murder. Accordingly, the weight of the cocaine was not a proper subject for opinion testimony by a non-expert.

The holding in State v. Gilbert, 507 So. 2d 637 (Fla. 5th DCA 1987), does not require a different conclusion. In Gilbert, the court held it was error not to permit an experienced narcotics officer to testify as to the weight of a bag of cocaine he had seen the defendant remove from his back, tear open, and throw into a pond. The court noted "the proffered testimony would be sufficient to show the corpus delicti of trafficking in 400 grams or more of cocaine, so as to make the defendant's voluntary statement that he was carrying approximately one pound of cocaine admissible." In Gilbert, therefore, the officer's testimony was not being admitted to prove an essential element of the crime, as here, but to establish the corpus delicti so the

defendant's confession--which proved the crime--could be admitted.

The improper admission of Michael Johnson's testimony that the cocaine rocks in question weighed a gram apiece requires reversal for a new trial. The weight of the cocaine was critical to proving trafficking in cocaine, which was submitted to the jury as one of the predicate felonies for felony murder. The admission of Johnson'e testimony, therefore, was highly prejudicial and cannot be deemed harmless.

Issue III

THE TRIAL COURT ERRED IN FINDING TRAFFICKING/ ROBBERY/PECUNIARY GAIN AS AN AGGRAVATING CIRCUMSTANCE.

Aggravating circumstances must be proved beyond a reasonable doubt. State v. Dixon, 283 So. 2d 1, 9 (Fla. 1973), cert. denied, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 91974). Such proof cannot be supplied by inference from the circumstances unless the evidence is inconsistent with any reasonable hypothesis other than the existence of the aggravating circumstance. Geralds v. State, 601 So. 2d 1157, 1163-64 (Fl. 1982), cert. denied, 117 S.Ct. 239, 136 L.Ed.2d 161 (1996); Simmons v. State, 419 So. 2d 316, 318 (Fla. 1982).

In finding the merged aggravating circumstance of trafficking/robbery/pecuniary gain, the trial judge stated:

> The facts of the case show that the defendants planned to traffic in cocaine. They solicited Jackie Thompson and Tyrone Simmons to take them to buy $500 worth of crack cocaine, eventually leading them to the murder victim's home. Both defendants carried concealed handguns. As soon as the cocaine was produced, the defendant pulled his handgun to rob the seller, Michael Johnson. When Darryl Jenkins attempted to warn Johnson, the defendant shot and killed Jenkins, who stood fifteen feet away. (See state's exhibit 11, showing the bullet hole to victim's heart). It was absolutley [sic] proven beyond any reasonable doubt that Fred Brooks shot and killed Darryl Jenkins.

> Foster Brown did not shoot or kill Darryl Jenkins. Both defendants fired at the fleeing Johnson, who was wounded with a bullet in the back. Each defendant fired numerous shots in the direction of the victims and witnesses, then fled. The cocaine was not found at the scene.
>
> The capital felony was committed, therefore, while the defendant was engaged in the commission of, or the attempt to commit robbery and trafficking in cocaine. This aggravating circumstance was proven beyond a reasonable doubt, and was accorded great weight in determining the appropriate sentence in this case.

II 370-372.

The evidence does not support the trial court's conclusion that "the defendant pulled his handgun to rob" because although the evidence is consistent with this possibility, the evidence also is consistent with other possibilities.

As discussed in Issue I, supra, there was no direct evidence Brooks pulled his gun to rob Johnson. There also was no evidence of a plan to rob, and no words spoken indicating a robbery was afoot before or during the entire episode. There was evidence, however, that this drug deal was going awry. Jackie said Brown already had paid Johnson $300 for 30 rocks. A number of witnesses heard Johnson say he had only 24 rocks. Jackie heard Michael Johnson say, "What, man? You want your money back? You ain't satisfied?" And, Michael Johnson admitted he jumped in to

make the sale to make some money for himself and admitted, in effect, that he was going to do this by shorting both Jenkins and the buyers. The evidence thus supports the reasonable possibility that Brooks pulled out his gun because he thought he was getting cheated. See Issue I, supra. The state failed to prove beyond a reasonable doubt the homicide was committed during a robbery or for pecuniary gain.

Accordingly, it was error for the trial judge to instruct the jury on robbery and pecuniary gain as aggravating circumstances and to consider these aggravating circumstance as a reason for imposing the death sentence.

It also was error for the trial court to consider trafficking in cocaine as an aggravator, as trafficking is not one of the predicate felonies for the felony murder aggravating circumstance. s. 921.141(5)(d), Fla. Stat. (1995).[7]

Absent the robbery/pecuniary gain aggravating circumstance, there was only one valid aggravator, prior violent felony, to be weighed against the mitigating evidence. Under such circumstances, and especially given the close vote for death (7 to 5), the error may well have affected the jury's recommendation

[7] The jury was not instructed on trafficking in cocaine as an aggravating circumstance.

of death, and a new penalty phase proceeding is required. See Hill v. State, 549 So. 2d 179, 183 (Fla. 1989)("cannot tell with certainty result of weighing process would be same" where striking of invalid aggravator left 2 aggravating factors and 1 mitigating factor).

Issue IV

THE TRIAL COURT ERRED IN FAILING TO FIND AS A MITIGATING FACTOR THE VICTIM'S PARTICIPATION IN THE FELONY FROM WHICH THE HOMICIDE AROSE.

Appellant requested the jury be instructed it could consider as a statutory mitigating circumstance the victim's participation in the defendant's conduct.[8] The trial judge agreed to give the instruction to the jury but concluded in his sentencing order this mitigating circumstance did not exist. In rejecting this mitigator, the trial court wrote:

> The victim, Darryl Jenkins was in no way a participant in the murder, the armed robbery or the aggravated battery. In fact, he was a victim.
>
> The evidence does indicate that Darryl Jenkins was a participant in the trafficking in cocaine. However, Darryl Jenkins was not the person with whom the defendants were dealing at the time of the cocaine transaction. That person was Michael Johnson. Darryl Jenkins was unarmed and standing fifteen feet away when the defendant shot him in the heart, killing him. The defendant's attention was only diverted to Darryl Jenkins when Jenkins yelled out a warning upon seeing the defendant draw his gun. It was for sounding this alarm that Darryl Jenkins was killed.
>
> Veiwing [sic] the evidence in the light most favorable to the defendant, the victim was, at most engaged in some unlawful and dangerous transaction that merely provided

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[8] See s. 921.141(6)(c), Fla. Stat. (1995)("The victim was a participant in the defendant's conduct or consented to the act.")

> the killer a better opportunity to commit murder, which the victim did not intend. In Wuornos v. State, 676 So. 2d 972 (Fla. 1996), the Florida Supreme Court upheld the lower court's decision not to find this statutory mitigating factor, under similar circumstances. The Court noted that this factor applies when the victim is a participant in a transaction that, in and of itself, would be likely to cause death, for example dueling.
>
> Accordingly, the mitigating circumstance that Darryl Jenkins was involved in the defendant's conduct or consented to the act does not exist.

II 372-373.

In Wuornos v. State, 676 So. 2d 972 (Fla.), cert. denied, 117 S.Ct. 491, 136 L.Ed.2d 384 (1996), the defendant argued the "victim participant" mitigator applied because the victim, by seeking the services of a prostitute, Wuornos, "assumed the risk" of suffering bodily harm, thereby contributing to the acts leading to his death. The Court rejected this argument, stating:

> It would be absurd to construe this language as applying whenever victims have engaged in some unlawful or even dangerous transaction that merely provided the killer a better opportunity to commit murder, which the victim did not intend. What the language plainly means is that the victim has knowingly and voluntarily participated with the killer in some transaction that in and of itself would be likely to result in the victim's death, viewed from the perspective of a reasonable person. An example would be two persons participating in a duel, with one being killed as a result.

Id. at 975.

Restricting the "victim participant" mitigating circumstance to situations such as "dueling" restricts the mitigator right out of existence. Dueling is virtually nonexistent in our society, and the laws prohibiting dueling were repealed in 1972,[9] the same year the legislature enacted the new death penalty statute. It seems highly unlikely the legislature had dueling in mind when it enacted "victim participation" as a separate statutory mitigating circumstance in Florida's new death penalty statute. Moreover, this interpretation violates the general rule of statutory interpretation that the legislature does not intend to enact purposeless and therefore useless legislation. See Unruh v. State, 669 So. 2d 242 (Fla. 1996); City of North Miami v. Miami Herald Publishing Co., 468 So. 2d 218 (Fla. 1985).

It is more likely the Legislature intended this mitigator to apply in situations such as the present case, where the victim was an equal participant in the dangerous and illegal conduct from which the homicide arose. Here, the victim, Darryl Jenkins supplied the cocaine Michael Johnson attempted to sell. The drug

[9] See Laws of Florida, c. 72-254, s. 1, repealing ss. 783.01 to 783.03, Fla. Stat., relating to dueling, with comment noting the crime of dueling which involves mutual combat is covered under the assault and battery chapter.

transaction took place at Jenkins' house, a house where Jenkins and others regularly--every day--sold crack. Jenkins would have made the sale himself if Johnson had not jumped in to get a share of the profits. Jenkins was present during the transaction. He was no innocent bystander but rather was a principle to trafficking in cocaine, a felony the Legislature has deemed sufficiently dangerous to establish felony murder if a death occurs during its commission.

The present situation also is factually distinguishable from Wuornos in that the victim in Wuornos was not engaged in any felony or inherently dangerous conduct. Wuornos was convicted of murdering a man who, according to Wuornos, picked her up for an act of prostitution. Though illegal, participating in an act of prostitution is not a felony, nor is it an inherently dangerous act. More importantly, however, as this Court recognized in its opinion, prostitution was simply the means Wuornos used to find her victims. Not only was the murder in Wuornos premeditated, this Court approved the trial court's finding that it was cold, calculated, and premeditated. Here, in contrast, the killing was not premeditated but was committed on the spur of the moment when the drug deal appeared to be going awry. The trial court should

have found "victim participation" as a mitigating circumstance. This error requires resentencing.

Issue V

APPELLANT'S DEATH SENTENCE IS A DISPROPORTIONATE AND DISPARATE PENALTY WHERE THERE WAS ONLY ONE VALID AGGRAVATOR AND AN EQUALLY CULPABLE CODEFENDANT RECEIVED A LIFE SENTENCE DESPITE A SIGNIFICANTLY MORE EGREGIOUS PRIOR RECORD THAT INCLUDED TWO PRIOR MURDERS.

This was a spur-of-the-moment, reflexive shooting, involving a single aggravating circumstance. Brooks' codefendant, whose intent and participation were equal to that of Brooks, received a life sentence, despite a record that included two prior murder convictions. Under the doctrine of proportionality, the ultimate penalty is not warranted.

In making the determination of proportionality, this Court is guided by several considerations. The foremost of these is the test laid out in State v. Dixon, 283 So. 2d 1, 7 (Fla. 1973), cert. denied, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974), that the death penalty is reserved for "only the most aggravated, [and] the most indefensible of crimes." Accord Terry v. State, 668 So. 2d 954 (Fla. 1996); Kramer v. State, 619 So. 2d 274 (Fla. 1995).

Accordingly, this Court consistently and repeatedly has reversed the death penalty in cases involving only a single aggravating circumstance. See Williams v. State, 707 So.2d 683

(Fla. 1998); Jones v. State, 705 So. 2d 1364 (Fla. 1998); Sinclair v. State, 657 So. 2d 1138 (Fla. 1995); Beseraba v. State, 656 So. 2d 441 (Fla. 1995); Chaky v. State, 651 So. 2d 1169 (Fla. 1995); Thompson v. State, 647 So. 2d 824 (Fla. 1994); White v. State, 616 So. 2d 21 (Fla. 1993); Clark v. State, 609 So. 2d 513 (Fla. 1992); Klokoc v. State, 589 So. 2d 219 (Fla. 1991); McKinney v. State, 579 So. 2d 80 (Fla. 1991); Jackson v. State, 575 So. 2d 181 (Fla. 1991); Penn v. State, 574 So. 2d 1079 (Fla. 1991); Smalley v. State, 546 So. 2d 720 (Fla. 1989); Songer v. State, 544 So. 2d 1010 (Fla. 1989); Lloyd v. State, 524 So. 2d 396 (Fla. 1988); Nibert v. State, 508 So. 2d 1 (1987); Ross v. State, 474 So. 2d 1170 (Fla. 1985); Caruthers v. State, 465 So. 2d 496 (Fla. 1985); Randolph v. State, 463 So. 2d 186 (Fla. 1984); Rembert v. State, 445 So. 2d 337 (Fla. 1984); Blair v. State, 406 So. 2d 1103 (Fla. 1981); Menendez v. State, 368 So. 2d 1278 (Fla. 1979).

The Court has affirmed the death penalty despite mitigation in one-aggravator cases only "where the lone aggravator was especially weighty." Ferrell v. State, 680 So. 2d 390 (Fla. 1996), cert. denied, 117 S.Ct. 1262, 137 L.Ed.2d 341 (1997). Where the sole aggravator is the prior violent felony aggravator, "especially weighty" means a prior murder or similar prior

violent attack. See e.g., Ferrell (prior second-degree murder bearing many earmarks of present crime); Lindsey v. State, 636 So. 2d 1327 (Fla.)(contemporaneous first-degree murder and prior second-degree murder), cert. denied, 513 U.S. 972, 115 S.Ct. 444, 130 L.Ed.2d 354 (1994); Duncan v. State, 619 So. 2d 279 (Fla.)(prior second-degree murder), cert. denied, 510 U.S. 969, 114 S.Ct. 453, 126 L.Ed.2d 385 (1993); Lemon v. State, 456 So. 2d 885 (Fla. 1984)(death affirmed for stabbing/strangulation of girlfriend where prior conviction was for assault with intent to commit first-degree murder for stabbing female victim), cert. denied, 469 U.S. 1230, 105 S.Ct. 1233, 84 L.Ed.2d 370 (1985); King v. State, 436 So. 2d 50 (Fla. 1983)(prior conviction for axe-slaying of common-law wife), cert. denied, 466 U.S. 909, 104 S.Ct. 1690, 80 L.Ed.2d 163 (1984); Harvard v. State, 414 So. 2d 1032 (Fla. 1982)(death sentence affirmed for shooting second ex-wife where prior conviction for aggravated assault arose from shooting attack on first ex-wife and her sister), cert. denied, 459 U.S. 1128, 103 S.Ct. 764, 74 L.Ed.2d 979 (1983).

Brooks' prior record, though serious, does not involve a prior murder or similar prior violent attack. In 1979, when Brooks was fifteen years old, Brooks and another individual robbed a grocer and his customer of their cash and jewelry at

gunpoint.[10] There was no evidence either victim was physically harmed. In 1983, Brooks was convicted in the armed robbery and kidnapping of a tourist. The facts underlying that offense were that the victim stopped and asked some individuals on the street, including Brooks, for directions to a local bar. The victim then picked up the four men. After they got in the car, they threatened the victim with a gun and tied him up. They drove him to a wooded area, where they robbed him and left him tied to a tree. The victim untied himself and called the police, who shortly afterwards apprehended the suspects in the victim's car. Although one of the perpetrators wanted to kill the victim, Brooks persuaded the others to just tie him up instead. In 1987, Brooks was convicted of aggravated assault while incarcerated. The facts underlying that offense were that Brooks and another man were seen chasing another inmate with a knife.

This is balanced against the statutory mitigating factors of family background, which the trial court found, and the victim's participation in the offense, which the trial court should have found. See Issue IV, supra. Brooks' father died soon after he was born, and his mother's sister's family helped his mother

[10] Although Detective Robinson testified during the penalty phase that Brooks carried a sawed-off shotgun, the PSI, at page 4, says the codefendant, Michael Jones, drew a sawed-off shotgun.

raise him. His aunt, uncle, and sister testified Brooks was a loving son, brother, and nephew. This Court has recognized this as a valid mitigating factor. See, e.g., Perry v. State, 522 So. 2d 817, 822 (Fla. 1988)(that defendant was "kind" and "good to his family" was mitigating); Rogers v. State, 511 So. 2d 535 (Fla. 19887)(contributions to family are evidence of positive character traits to be weighed in mitigation), cert. denied, 484 U.S. 1020, 108 S.Ct. 733, 98 L.Ed.2d 681 (1988). The totality of the circumstances in this case do not place this murder among "the most aggravated and least mitigated" for which the death penalty is reserved.

This Court's decision in Wilson v. State, 493 So. 2d 1019 (Fla. 1986), also supports a life sentence. In Wilson, this Court reduced the death sentence to life imprisonment despite two statutory aggravating circumstances (HAC and prior violent felony), no mitigating circumstances, and a death recommendation from the jury. The Court reduced the sentence to life imprisonment, relying on the fact "that the killing, although premeditated, was most likely upon reflection of a short duration." Id. at 1023. The Court took this action even though the offense included a first-degree murder, a second-degree

murder, and an attempted first-degree murder,[11] and the defendant "had a history of violent criminal behavior." Id. at 1024 (Ehrlich, J., concurring in part and dissenting in part).

The present case is less aggravated and more mitigated than Wilson. Both have the prior violent felony aggravator, though Wilson involves stronger facts for that aggravator. And, unlike Wilson, the homicide in the present case was not premeditated but was committed reflexively in response to the victim's sudden outcry, which appellant may have interpreted as a threat.

This Court's decision in Kramer v. State, 619 So. 2d 274 (Fla. 1993), also supports a life sentence. The Court reduced Kramer's death sentence to life where there were two aggravators (prior violent felony and HAC) and no statutory mitigators even though Kramer had previously killed a man for which he was convicted of attempted murder before the man died. Like the present case, the victim in Kramer was a participant in the conduct that resulted in his death, i.e. a spontaneous fight that

[11] In Wilson, while visiting his father, the defendant got mad when his stepmother told him to stay out of the refrigerator and started hitting her with a hammer. When his father intervened, the defendant started beating him with a hammer, too. While doing so, he stabbed to death his five-year-old cousin with a pair of scissors. The defendant then shot his father in the forehead, killing him, then emptied his pistol into the closet where his stepmother was hiding. 493 So. 2d at 1019.

occurred for no apparent reason. See also Voorhees v. State, 699 So. 2d 602 (Fla. 1997)(reducing death sentence to life where victim beaten, hog-tied, and had his throat slit; aggravators of robbery and HAC upheld; and mitigation included alcoholism, mental stress, loss of emotional control, and potential for productivity in prison); Sager v. State, 699 So. 2d 619 (Fla. 1997)(same).

Finally, the death sentence is disproportionate when compared to the life sentence imposed on Brooks' codefendant, Foster Brown, also found guilty of first-degree murder and aggravated battery.

"[D]eath is not a proper penalty when a coperpetrator of equal or greater culpability has received less than death." Scott v. State, 657 So. 2d 1129, 1132 (Fla. 1995)(Kogan, J., concurring). As explained in Slater v. State, 316 So. 2d 539, 542 (Fla. 1975), the requirement that equally culpable codefendants be treated equally is constitutionally mandated:

> We pride ourselves in a system of justice that requires equality before the law. Defendants should not be treated differently upon the same or similar facts. When the facts are the same, the law should be the same. The imposition of the death sentence [on only one of two equally culpable codefendants] clearly is not equal justice under the law. . . . We recognized the validity of the Florida death penalty

> statute, as expressed in State v. Dixon, 283 So. 2d 1 (Fla. 1973), but it is our opinion that the imposition of the death penalty under the facts of this case would be an unconstitutional application under Furman v. Georgia, 408 U.S. 238 (1972).

In determining the relative culpability between two co-perpetrators, this Court has looked at the level of participation of each in the planning and carrying out of the crime, Hazen v. State, 700 So. 2d 1207 (Fla. 1997); Scott v. Dugger, 604 So. 2d 465 (Fla. 1992); and at who was the dominating force behind the murder, Larzelere v. State, 676 So. 2d 394 (Fla.), cert. denied, 117 S.Ct. 615, 136 L.Ed.2d 539 (1996); Witt v. State, 342 So. 2d 497, 500 (Fla.), cert. denied, 434 U.S. 935, 98 S.Ct. 422, 54 L.Ed.2d 294 (1977). This Court has also considered the quality of aggravating and mitigating circumstances applicable to each defendant. See Demps v. State, 395 So. 2d 501, 506 (Fla. 1981)(upholding Demps' death sentence even though two codefendants received life where Demps "had the loathsome distinction of having previously been convicted of the first-degree murder of two persons and the attemped murder of another), cert. denied, 454 U.S. 933, 102 S.Ct. 430, 70 L.Ed.2d 239 (1981).

Here, Foster Brown's participation and involvement in the offense was identical to Brooks'. As discussed in Issue I, supra, there was no evidence either defendant planned or

attempted a robbery. Both defendants planned and participated in the drug transaction to an equal degree. The crime was a joint effort. They also responded to Jenkins' outcry in like fashion, by fired their guns and fleeing. Each of them, at separate times, went back to Jackie Thompson's house a few days later and told her to deny knowledge of their participation in the crime. Both were found guilty of first-degree murder in Jenkins' death and of aggravated battery in the shooting of Michael Johnson. Their intent, therefore, was the same, and "there is little to separate out the joint conduct of the co-defendants which culminated in the death of the decedent." See Messer v. State, 330 So. 2d 137, 142 (Fla. 1976), cert. denied, 456 U.S. 984, 102 S.Ct. 2259, 72 L.Ed.2d 863 (1982).

It is true the state presented evidence that Brooks fired the bullet that killed Jenkins. And, the prosecutor conceded in his closing argument that "most likely" it was a bullet fired by Brooks that Jenkins. XV 1525. The state nevertheless maintained that "Brown was an equal participant," II 230, and that both defendants were "equally culpable." II 232. The state was correct. There is no rule in Florida that a triggerman is necessarily more culpable than a codefendant who did not pull the trigger. See Scott v. Dugger, 604 So. 2d at 470; Burch v. State,

522 So. 2d 810, 812-13 (Fla. 1988); Bush v. State, 682 So. 2d 85, 87 (Fla.), cert. denied, 117 S.Ct. 355, 136 L.Ed.2d 246 (1996). Indeed, such a conclusion makes no sense in cases where, as here, the evidence shows both defendants shared the same purpose and intent, both fired their weapons, and it was just chance that one bullet resulted in death. The critical fact is that Brooks and Brown were equally culpable in motivation and participation.

Turning to the third consideration, the quality of mitigating factors does not cut in either defendant's favor. Both defendants presented evidence of the love and respect they gave to received from their families. The quality of aggravating factors, however, weighs heavily in Brooks' favor. The aggravating factor of prior violent felony was proved as to both defendants. Brooks and Brown did not have equivalent criminal histories, however, and this aggravator shows Brown was more culpable than Brooks. Although Brooks had prior convictions for robbery, kidnapping, and aggravated assault, no actual physical violence occurred during these criminal episodes. Brown, on the other hand, had two prior murder convictions, and based on the evidence presented here, both murders were intentional and premeditated.

Imposition of the death penalty on Brooks is not "equality before the law." See Slater. Brooks' death sentence is disproportionate and disparate and must be reversed. Any other result would violate due process and subject Brooks to cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments of the United States Constitution and Article I, sections 9 and 17, of the Florida Constitution.

Point VI

THE PROSECUTOR'S PENALTY-PHASE ARGUMENT WAS FILLED WITH IMPROPER AND INFLAMMATORY REMARKS, WHICH TAINTED THE JURY'S RECOMMENDATION AND RENDERED THE SENTENCING PROCEEDING FUNDAMENTALLY UNFAIR.[12]

The prosecutor's penalty-phase closing argument was filled with numerous instances of misconduct this Court consistently and repeatedly has labeled improper and unethical. Some of the comments and argument are verbatim examples of misconduct the Court recently condemned in Urbin v. State, 23 Fla. L. Weekly S257 (Fla. May 7, 1998).[13]

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[12] Appellant makes this argument under the fifth, sixth, eighth, and fourteenth amendments of the United States Constitution, and Article 1, sections 9, 16, and 17, of the Florida Constitution.

[13] The prosecutor in the present case was also the prosecutor in Urbin. Some of the arguments are the same arguments made in Urbin, with only the names of the victims and the defendants changed.

Some of the prosecutor's comments were objected to, some were not. When objections were made, some were sustained, some were not. Counsel's failure to object to each improper argument does not preclude this Court's review. See Garron v. State, 528 So. 2d 353 (Fla. 1988); Wilson v. State, 294 So. 2d 327, 328-29 (1974); Rosso v. State, 505 So. 2d 611 (Fla. 3d DCA 1987); Cochran v. State, 23 Fla. L. Weekly D739 (Fla. 4th DCA March 18, 1998); DeFreitas v. State, 701 So. 2d 593 (Fla. 4th DCA 1997); Meade v. State, 431 So. 2d 1031 (Fla. 4th DCA), review denied, 441 So. 2d 633 (Fla. 1983).

Viewed cumulatively, in light of the entire record in the case, including the close vote for death, the misconduct warrants a new trial. See Ryan v. State, 457 So. 2d 1084, 1091 (Fla. 4th DCA 1984)("In a close case, such as the one at hand, where the jury is walking a thin line between a verdict of guilt and innocence, the prosecutor cannot be allowed to push the jury to the side of guilt with improper comments such as these").

Inflaming the Passions and Prejudices of the Jury

Appeals to passion and prejudice and inflammatory matters are impermissible. This Court repeatedly has cautioned against prosecutors injecting "elements of emotion and fear into the jury's deliberations." Urbin, 23 Fla. L. Weekly at S55-60

(quoting King v. State, 623 So. 2d 486 (Fla. 1993)); Garron, 528 So. 2d at 359; Bertolotti v. State, 476 So. 2d 130, 133 (Fla. 1985). The federal courts have done likewise. E.g., Hance v. Zant, 696 F.2d 940, 951 (11th Cir.)("With a man's life at stake, a prosecutor should not play on the passions of the jury."), cert. denied, 463 U.S. 1210, 103 S.Ct. 3544, 77 L.Ed.2d 1393 (1983).

The ABA Standards for Criminal Justice 3-5.8 (1980) also describe limits on a prosecutor's argument to the jury, stating in pertinent part: "The prosecutor should not use arguments calculated to inflame the passions and prejudices of the jury." Meade v. State, 431 So. 2d 1031 (Fla. 4th DCA 1983).

The prosecutor in the present case violated these standards with the following argument, which had no other purpose but to inflame the jury and incite sympathy for the victim and his kin:

> Darryl Jenkins is dead. On August 28, 1996, he was a living, breathing, young man in the prime of his life. He was 28 years old. He had a father, he had a sister, he had an aunt, he had friends. He had people that cared for him.
>
> I'm not trying to convince you that Darryl Jenkins was some great leader of men, but he was a human being. He did nothing, nothing to deserve to be shot like a rabid dog on the driveway in front of his own home.
>
> On August 28th, both of those defendants, both of those defendants right there, executed 28-year-old Darryl Jenkins.

They shot him through the heart at a distance of about 15 feet. Darryl Jenkins was unarmed; he was totally defenseless. All Darryl Jenkins did to deserve death, in the minds of those two defendants, was to yell out a warning: "he's got a gun." That's what it took for those defendants to execute him.

. . . . When he ruined their element of surprise, they shot him through the heart.

They weren't going to discuss the matter. They weren't going to say, calm down, hold it, we just want the dope, and leave. They didn't do that. No discussion. Distance of 15 feet, a bullet right through his heart. He was executed right there. And then he fled.

Darryl, shot through the heart, ran across the street to Laquita Ward's, in a desparate attempt for shelter, for cover. That barrage of bullets were still coming his way. It was a futile attempt to run for safety. He had been shot through the heart. He was dying.

Blood, he was losing blood rapidly, he was dying quickly. He ran to Laquita Ward's house in a desparate attempt for cover, shelter. He ran to the hood of that car. And you cn see, when he reached up for that car, collapsed, a stream of blood running down the back of that car. In his desparate attempt, all he said was, "they got a gun."

He had been mortally wounded, fled over here, fell down to this cold cement, life flowed out of him.

His friend, Jesse Bracelet, came over to assist him, providing some comfort, but it was too late. His blood flowed onto that cold concrete. The life flowed out of him, flowed out of him, and he died there within minutes of being shot through the heart by both those defendants, died there on that cold slab of cement of Laquita Ward's driveway.

We'll never know what kind of man Darryl Jenkins would have become, was going to become. Would he have been able to turn his life around like Lashan Mahone? Would he have been able to get away from drugs, away from drug addiction? We don't know. We will never know. The defendants took care of that when they shot him through the heart in front of his own home.

Darryl Jenkins can no longer experience the love and comfort of his family, the companionship and support of his friends. He can no longer experience the joys of life. It was his God-given right to live and experience life in its fullest, but the defendants ended that by robbing and executing him.

The question I want to ask you is, why did they do it? . . . They executed him because he gave a warning. And in the minds of the defendants, when Darryl yelled out, "He's got a gun," that was a capital crime. That was a capital crime to them in their plan and they executed him. That deserved the death penalty, in their minds, in their system of justice. They didn't care that Darryl Jenkins was only 28 years old; they didn't care that he was just starting out in life. They didn't care that his mother died when he was two. They didn't care that his father died when he was seven. They didn't care that he had a sister who had multiple sclerosis that he used to care for on a daily basis, that he had helped clean her up and put her to bed the night that he was murdered by these defendants. They didn't care. They didn't care that he had a family; they didn't care that he had friends that cared for him and loved him. They didn't care.

They ambushed him and they robbed him and they made sure he didn't live to tell about it. They didn't care about Darryl.

XV 1511-1516 (emphasis added). The prosecutor also told the jurors the defendants were persons of "true deep-seated, violent character"; "people of longstanding violence"; "they commit violent, brutal crimes of violence"; "it's a character of violence"; "both of these defendants are men of longstanding violence, deep-seated violence, vicious violence, brutal violence, hard violence. . . those defendants are violent to the core, violent in every atom of their body." XV 1531, 1535, 1536, 1538, 1539.

The trial judge responded to the first defense objection to the repetitive nature of the comments by admonishing the prosecutor, "[d]on't repeat previous arguments, but you may proceed." XV 1538. The prosecutor continued along in the same vein, however, provoking a second objection. That objection was overruled. XV 1538.

This Court condemned remarkably similar rhetoric and argument in Urbin. There, the Court noted the argument was "full of `emotion and fear' and efforts to dehumanize and demonize the defendant." 23 Fla. L. Weekly at S261 n.9. Here, too, the use of words and phrases such as "executed," "shot like a rabid dog," "ambush," "deep-seated violence," "vicious violence, brutal

violence, hard violence" was manipulative and obviously calculated to induce an emotional response.

In addition, the prosecutor's emotional portrayal of the victim's agony during his last moments also constituted a not-so-subtle "Golden Rule" argument, "a type of emotional appeal [this Court has] long held impermissible." Urbin; Garron. This part of the argument also violated the Court's admonition in Payne v. Tennessee, 501 U.S. 808, 836, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991)(Souter, J., concurring), against victim impact evidence and argument that is "so inflammatory as to risk a verdict impermissibly based on passion, not deliberation."

The prosecutor also improperly argued:

> I'm going to ask you not show mercy or pity to these defendants. What mercy or pity did they show Darryl Jenkins that night? But if you are tempted to show the defendants mercy or pity, I'm going to ask you to show them the same mercy, the same pity that they showed Darryl Jenkins on August 28,, 1996, and that is none.

XV 1556. This line of argument is "blatantly impermissible." Urbin, 23 Fla. L. Weekly at S261; Richardson v. State, 604 So. 2d 1107, 1109 (Fla. 1992); Rhodes v. State, 547 So. 2d 1201, 1205 (Fla. 1989).

Arguing Prosecutorial Expertise

The prosecutor may not undermine the jury's discretion in determining the proper punishment by implying he, or another authority, has already made the careful decision required. Pait, 112 So. 2d at 384; Brooks v. Kemp, 762 F.2d 1383, 1410 (11th Cir. 1985)(en banc), reversed on other grounds, 478 U.S. 1016, 106 S.Ct. 3325, 92 L.Ed.2d 732 (1986); Tucker v. Kemp, 762 F.2d at 1484. The following comments violated this proscription:

> The law sets out a weighing test, a death penalty weighing test that's -- and you are to use, as jurors in this case, in making your recommendation. That test is the law of this state and you all are duty-bound to follow that test.
>
> Now, I would submit now that the State does not seek the death penalty in all first-degree murders because it's not always proper, not always appropriate. If you've got a 16-year-old first-time offender --

XV 1517. The defense objected, but the objection was overruled. The prosecutor continued:

> This [weighing] test is laid out by the law, and if a first-degree murder doesn't meet that test, it's not appropriate to seek it.
>
> I would submit to you, if you've got a 16-year-old first-time offender that hooks up with a 30-year-old ex-convict with a lengthy record and they plan to commit a robbery, and the 16-year-old's plan is to stay out in the getaway car while the 30-year-old ex-con goes in the store to commit a robbery, and if the 30-year-old goes there and robs and rapes and murders and then comes out, and the 16-year-old would be

> guilty of first-degree murder because he participated in the robbery. But I would submit to you that it wouldn't be proper, wouldn't be -- it wouldn't be just, it wouldn't meet the law of Florida to impose the death penalty against the 16-year-old.
>
> Where, under the facts of the case in the law of Florida, that death penalty weighing test is met, it is proper to seek a death penalty. . . .

XV 1518.

This argument improperly implied to the jury that this particular case was suited for death penalty, or the State of Florida would not be seeking it, and that in his own personal review of the case, the prosecutor had found the aggravators outweighed the mitigators. This argument was improper. It also was improper for the prosecutor to give his personal opinion as to the kind of first-degree murder case that would not warrant capital punishment. See Berger v. United States, 295 U.S. 78, 85-88, 55 S.Ct. 629, 79 L.Ed.2d 1314 (1935)(prosecutor is forbidden from expressing his personal opinion about any aspect of the case).

Misleading Jury as to the Law

The prosecutor made several arguments that were incorrect statements of the law. The prosecutor misstated the law when he told the jury,

> And if sufficient aggravating factors are proved beyond a reasonable doubt, you must recommend a death sentence, unless those aggravating circumstances are outweighed, outweighed by the mitigating circumstances.

XV 1520 (emphasis supplied). This remark repeatedly has been held improper. Urbin, 23 Fla. L. Weekly at S261 n.12; Henyard v. State, 689 So. 2d 239, 250 (Fla. 1996)("jury is neither compelled nor required to recommend death where aggravating factors outweigh mitigating factors"), cert. denied, 118 S.Ct. 130, 139 L.Ed.2d 80 (1997); Garron, 528 So. 2d at 359 & n.7 (misstatement of law to argue "that when the aggravating factors outnumber the mitigating factors, then death is an appropriate penalty").

Brooks objected to the misleading comment, but the trial court's "curative" instruction did little to remedy the error:

> MR. NICHOLS: Your Honor -- excuse me, Mr. Bateh.
>
> They must not recommend. That's an improper statement of the law. They are justified in doing it, but there's nothing that says they must vote for death under any circumstances and that's an improper statement.
>
> MR. BATEH: Your Honor, I would disagree with counsel. The Court is going to read that instruction, but that's exactly what that test says.
>
> THE COURT: The law says, ladies and gentlemen -- I will be reading it to you.

> It says, should you find sufficient aggravating circumstances do exist, it will then be your duty to determine whether mitigating circumstances exist that outweigh aggravating circumstances. That is the law, and both counsel will be allowed to argue what they believe that means, but -- reasonably, that is -- but you will follow the law that I give you both in word and in writing.

XV 1520-1521.

The prosecutor also misled the jury by arguing the merged aggravators of robbery/pecuniary gain--based on the same aspect of the offense, robbery--were more weighty than a single aggravating factor:

> Two of those aggravators merge, number two and three, felony murder, robbery and financial gain, merge under the law because they're involving the same aspects of the crime. But I submit to you that, because they merge, that makes them even more powerful, even more weighty, even more demanding.

XV 1544. Merged aggravators must be considered as only one aggravator in favor of death. See Provence v. State, 337 So. 2d 783, 786 (Fla. 1976)(where several aggravating circumstances refer to same aspect of defendant's crime, those aggravators constitute only one factor in the weighing process), cert. denied, 431 U.S. 969, 97 S.Ct. 2929, 53 L.Ed.2d 1065 (1977). Accordingly, the weight to be given merged factors must be based

on something other than the mere fact they are merged. It was improper for the prosecutor to tell the jury that "because they merge," the robbery/pecuniary gain aggravators were "even more powerful, even more weighty, even more demanding."

The prosecutor improperly suggested the jurors would be shirking their duty if they voted for life:

> I'm concerned about the temptation some of you may have, and that is that you may want to take the easy way out and not weigh out all the aggravating circumstances, not analyze the law or the facts, take the easy way out and just quickly vote for life.

XV 1555. The prosecutor continued:

> I submit to you, don't do that; follow the law, do your duty. . . .

XV 1555. Telling the jury it has a duty to decide one way or the other is patently improper, and this Court recently condemned a similar argument in Urbin, 23 Fla. L. Weekly at S260. See also United States v. Young, 470 U.S. 1, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985)(error to exhort jury to "do its job"; that kind of pressure has no place in administration of criminal justice); United States v. Mandelbaum, 803 F.2d 42, 44 (1st Cir. 1986)("There should be no suggestion that jury has a duty to decide one way or the other; such an appeal is designed to stir passion and can only distract a jury from its actual duty:

impartiality"); Redish v. State, 525 So. 2d 928 (Fla. 1st DCA 1988)(reversible error for prosecutor to argue jury would be "in violation of your oath as jurors" if they "succumbed to the defense argument").

Finally, the prosecutor denigated the mitigating evidence throughout his argument and repeatedly labeled the mitigation as "excuses" by the defendants to evade responsibility. XV 1549, 1550, 1551, 1553. The defense objection to this argument was overruled. XV 1553. These comments were improper. See Urbin, 23 Fla. L. Weekly at S261 n.14.

Improper Reference to Biblical Law

The prosecutor even made one comment that elicited a sua sponte reprimand and curative instruction from the trial judge:

> PROSECUTOR: . . . At this time, after that second conviction, had [Brown] learned that you have to abide by the law, thou shalt not kill?
>
> THE COURT: Mr. Bateh, don't refer to the Biblical law; it's the civil law that these defendants are on trial for.
>
> MR. BATEH: I didn't use the word "Biblical."
>
> THE COURT: You said, "Thou shalt not kill." There are forms of homicide. We're not here to discuss the Biblical description.
>
> The jury is to disregard that comment and the previous comment. Base it on the law.

XV 1534. The trial judge later correctly cited Ferrell v. State, 686 So. 2d 1324 (Fla. 1996), cert. denied, 117 S.Ct. 1262, 137 L.Ed.2d 341 (1997), as the basis for its ruling; see also Meade.

Personal Attack on Defense Counsel

The prosecutor made the following argument:

> [A]bout a week and a half ago, those two criminal defense lawyers got up here and they told you that the evidence would show you that the defendants were not guilty of murder and aggravated battery, and they looked you straight in the eye when they told you that. And I would submit to you that the evidence that came out during the trial proved to you beyond a reasonable doubt that the defendants were guilty of first-degree murder and aggravated battery.
>
> The evidence produced at trial disproved what those two criminal defense lawyers argued to you.

XV 1544-1545. Defense counsel objected:

> MR. NICHOLS: Objection Your Honor. First of all, it's a misstatement. Secondly, I said that the proof -- the witnesses were unworthy of their belief. I have never one time said it was going to prove they were not guilty of something. And that's a mistatement; it's improper
>
> . . .
>
> . . . a personal attack on me before this jury is not proper.

XV 1545. The trial court overruled the objection, stating, "It's not a personal attack. Each side is able to tell the jury what the other side said in opening statements and whether they were proven or not." XV 1546. The trial court erred in overruling the defense objection. The prosecutor's reference to the defense attorneys was a personal attack on the lawyers and their credibility. The import of his message was clear, that "criminal defense lawyers" are not worthy of belief.

Prejudice

In the present case, the prosecutorial misconduct did not consist of one or two isolated remarks. The improper and inflammatory comments occurred throughout the prosecutor's closing argument. Although Brooks did not object to all of the improper comments, the cumulative impact of the improprieties requires reversal. See Whitton v. State, 649 So. 2d 861 (Fla. 1994)(even though no objection made to first two improper comments, reviewing court must consider all three comments in its harmless error analysis because harmless error test requires examination of entire record), cert. denied, 516 U.S. 832, 116 S.Ct. 106, 133 L.Ed.2d 59 (1995). Given the close vote for death, 7 to 5, it cannot be said beyond a reasonable doubt that the improper argument did not influence the jury to reach a more severe verdict than it would have otherwise. The prosecutor's

comments deprived Brooks of a fair trial and fundamentally tainted the jury's recommendation. Brooks is entitled to a new penalty phase proceeding before a new jury.

CONCLUSION

Appellant respectfully requests this Honorable Court to reverse and remand for the following relief: Issue I, reverse appellant's conviction with directions the conviction be reduced to second-degree murder; Issue II, reverse and remand for a new trial; Issues III and VI, vacate the death sentence and remand for a new penalty phase proceeding before a newly empaneled jury; Issue IV, vacate the death sentence and remand for resentencing by the judge; Issue V, vacate the death sentence and remand for imposition of a life sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY a copy of the foregoing has been furnished to Richard Martell, Assistant Attorney General, by delivery to The Capitol, Plaza Level, Tallahassee, Florida and a copy has been mailed to appellant on this ____ day of May, 1998.

_____
Nada M. Carey

IN THE SUPREME COURT OF FLORIDA

FRED LORENZO BROOKS,

Appellant,

v. Case No. 92,011

STATE OF FLORIDA,

Appellee.
_____/

APPENDIX

IN SUPREME COURT OF FLORIDA

FRED LORENZO BROOKS,

Appellant,

v. Case No. 92,011

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT,
IN AND FOR DUVAL COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF CONTENTS

(Continued)

TABLE OF CITATIONS

TABLE OF CITATIONS

(Continued)

TABLE OF CITATIONS

(Continued)

TABLE OF CITATIONS

(Continued)

TABLE OF CITATIONS

(Continued)

TABLE OF CITATIONS

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TABLE OF CITATIONS

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