IN THE SUPREME COURT OF FLORIDA

FRED LORENZO BROOKS,
Appellant,

vs.

STATE OF FLORIDA,
Appellee.

Case No. 92,011

CAPITAL CASE

APPELLANT'S PRO SE SUPPLEMENTAL BRIEF

Submitted by:

Fred Lorenzo Brooks #068676
Appellant pro se
Florida State Prison
P.O. Box 181
Starke, FL. 32091

TABLE OF CONTENTS

TABLE OF CONTENTS
-continued-

TABLE OF CONTENTS
-continued-

TABLE OF CITATIONS

TABLE OF CITATIONS
-continued-

ADDITIONAL AUTHORITIES

PRELIMINARY STATEMENT

The appellant, **Fred L. Brooks**, is a layman at Law; this **pro se** supplemental brief has been prepared without benefit of any trial transcripts or record on appeal, and with virtually no access to a law library, relying totally upon Brooks' memory of the trial and upon the initial brief filed by his appointed counsel. Accordingly, this **pro se** supplemental brief in no way constitutes a waiver or a statement by Brooks that no other viable, colorable appellate issues exist.

STATEMENT OF THE CASE

Appellant relies upon, adopts and incorporates hereinto the Statement of the Case set forth by his appointed counsel in her initial brief filed on Brooks' behalf. Additionally, by order dated July 16th, 1998, this Court granted Brooks leave to File this instant **pro se** supplemental brief, due on or before August 21st, 1998.

STATEMENT OF THE FACTS

Appellant relies upon, adopts and incorporates hereinto the Statement of the Facts set forth by his appointed counsel in her initial brief filed on Brooks' behalf. Brooks has supplemented those facts, in minor respects, within the body of some of the claims/issues presented herein.

ISSUES PRESENTED

I

THE EVIDENCE IS INSUFFICIENT TO SUPPORT A CONVICTION FOR FIRST DEGREE MURDER UNDER EITHER A FELONY MURDER THEORY OR A THEORY OF PREMEDITATION

II

THE APPELLANT'S FIRST DEGREE MURDER CONVICTION CANNOT STAND WHERE HIS JURY WAS INSTRUCTED ON TWO OR MORE INDEPENDENT GROUNDS FOR MURDER IN THE FIRST DEGREE AND AT LEAST ONE OF THOSE GROUNDS WAS LEGALLY INSUFFICIENT

III

THE TRIAL COURT ERRED IN FAILING TO MAKE SUFFICIENT INQUIRY INTO THE EFFECTIVENESS OF COURT-APPOINTED COUNSEL AFTER COUNSEL MOVED TO WITHDRAW AND THE DEFENDANT MOVED TO DISCHARGE COUNSEL

IV

THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION FOR A CONTINUANCE SO THAT THE DEFENDANT COULD HIRE COUNSEL OF CHOICE, THEREBY DEPRIVING THE DEFENDANT OF HIS CONSTITUTIONAL RIGHT TO COUNSEL OF CHOICE

V

THE TRIAL COURT ERRED IN GRANTING THE STATE'S MOTION FOR JOINDER OF CO-DEFENDANTS AND IN DENYING THE DEFENDANT'S MOTION FOR SEVERANCE

VI

THE TRIAL COURT ERRED IN PERMITTING A NON-EXPERT, LAY WITNESS TESTIFY AS TO THE WEIGHT, QUALITY AND GENUINENESS OF THE ALLEGED ROCK COCAINE WHERE SUCH TESTIMONY WAS THE ONLY EVIDENCE OF AN ESSENTIAL ELEMENT OF FIRST DEGREE FELONY MURDER

VII

THE TRIAL COURT ERRED IN ADMITTING EVIDENCE OF OTHER, COLLATERAL CRIMES

SUMMARY OF THE ARGUMENTS

In his first argument Brooks submits that the evidence presented by the state was wholly insufficient, as a matter of law, to sustain the conviction for first-degree murder. There was absolutely no evidence of premeditation (a theory even the state did not push), nor was there sufficient evidence of either of the two alleged underlying felonies (robbery and/or trafficking in cocaine) to support a felony murder conviction (Brooks was not convicted of any underlying felony).

In his second claim the appellant argues his conviction for first-degree murder cannot stand where his jury was instructed on two or more independent grounds for murder and at least one of those grounds was legally insufficient.

Third, Brooks argues that the court erred in failing to make a sufficient inquiry into the effectiveness of court-appointed trial counsel after counsel moved to withdraw and Brooks moved to withdraw counsel.

In the fourth issue Brooks submits that the trial court erred when it denied Brooks' motion for a continuance so that the appellant could hire his own attorney. The court's action deprived Brooks of his constitutional right to counsel of choice.

Fifth, Brooks argues that the trial court erred in granting the state's motion for joinder of co-defendants and in denying the defendants'

motion for severance. Because the co-defendants had antagonistic defenses the trial court's actions deprived Brooks of a fundamentally fair trial.

Sixth, the appellant contends that the trial court erred in permitting a non-expert, lay witness testify as to the existence of a crucial, essential element of the crime charged (first-degree felony murder based upon trafficking in cocaine). Because this witnesses's testimony was the **only** evidence as to the existence of this essential element (i.e., the existence of cocaine and its alleged weight of 28 grams or more) this error was not harmless.

Finally, in his seventh claim Brooks submits that the trial court erred in admitting evidence of other, collateral crimes.

I

THE EVIDENCE IS INSUFFICIENT TO SUPPORT A CONVICTION FOR FIRST DEGREE MURDER UNDER EITHER A FELONY MURDER THEORY OR A THEORY OF PREMEDITATION

ARGUMENT [1]

Throughout the course of Brooks' trial the state made it clear that the state's primary theory of liability was felony murder (based upon either a robbery or trafficking as the underlying predicate felony). In closing arguments the state made no real effort to argue premeditation. Brooks moved for a directed verdict of acquittal as to both theories, (premeditation and felony murder), which the court denied. The jury returned a general verdict of guilty of first-degree murder. It is Brooks' assertion, however, that the evidence was legally insufficient as a matter of law to sustain a verdict of guilty as to **either** theory and his conviction for first-degree murder must be reversed. Brooks will address each theory in turn:

I. **The Evidence Did Not Establish First-Degree Felony Murder:** As already set forth the state argued the existence of two (2) separate underlying predicate felonies

---

1. This issue was in fact briefed by Brooks' appellate counsel (**see**: Issue I, pages 35-49, of appellant's initial brief). However, Brooks wishes to provide additional arguments and supporting case law not found in the initial brief.

as a basis for first-degree felony murder, to wit: Robbery (or its attempt), and/or trafficking in cocaine (or its attempt). The record demonstrates, however, that neither one of these underlying felonies was proven beyond and to the exclusion of every reasonable doubt:[2]

A) **The Evidence Did Not Establish Trafficking In Cocaine:** As already set forth by Brooks' appointed appellate counsel in her initial brief, in order to prove the crime of trafficking in cocaine (or attempted trafficking) the state must establish, among other things, the following two (2) essential elements: 1) that the substance was in fact cocaine or a mixture containing cocaine; and, 2) that the cocaine weighed 28 grams or more. See: § 893.135 (1) (b) (1), Fla. Stat. (1995); Florida Standard Jury Instructions in Criminal Cases; **Wiesenberg v. State**, 455 So.2d 633 (5th DCA 1984).

Brooks submits that the state failed to **prove** either of these essential elements beyond and to the exclusion of every reasonable doubt. First, the state failed to prove that the alleged substance (which was never recovered, or seen or examined by the police or any law enforcement personnel) was in fact cocaine. Second, the state failed to prove that the amount of cocaine (if it was in fact cocaine) was 28 grams or more, **or** that the amount Brooks attempted to purchase

---

2. It is noteworthy that Brooks was originally charged with both robbery and trafficking, but the state **dropped** these two charges just before trial. This demonstrates the State's own lack of faith in their ability to **prove** these charges. The state did **not** want to submit these to a jury and risk acquittal. Instead, the state preferred a general verdict so it would be up to an appellate court to sort it all out and determine liability.

(30 "rocks") was intended by Brooks to be 28 or more grams. Because these essential elements were not proven the underlying felony of trafficking (or attempted trafficking) must fail.

The evidence presented by the state unequivocally established that Brooks and Brown were attempting to purchase 30 "rocks," **not** 30 grams. The state's own evidence (through the testimony of drug users and drug dealers) demonstrated that the street drug trade is not precise or governed by quality control. In particular a "rock" is not a uniform, consistent weight but instead is irregular and varying in size, shape and weight. The buying and selling is subjective, with a buyer typically eye balling the product to see if it meets his or her expectations. Rocks can be, and are, "pinched" or "made light." No weighing scales were used or expected, in the transaction at bar and it is clear that these deals are consumated, or rejected, based upon how the "rocks" **look**, not how much they weigh. In fact, Brooks and Brown decided to get only 30 rocks after inspecting the sample rock Jackie Thompson had purchased and concluding it was "too flat." It was 30 of these "too flat" (i.e., less than ideal size) rocks which were attempted to be purchased by Brooks and Brown. This demonstrates an intent by Brooks and Brown to buy **less** than one gram rocks, even if one accepts that rocks weigh one gram each (a fact Brooks does **not** concede).

The **sole** evidence going towards the weight of the drugs came from state witness/drug dealer Michael Johnson's testimony. Johnson testified at one point that "a juggler" (slang for a rock) "consists of one gram." This testimony is contradicted and

tempered by other portions of his testimony, however. For example, while Johnson kept insisting that a juggler weighs a gram, he had also stated that there are #10 jugglers and #20 jugglers:

> 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 that they was 20 dollar jugglars....

See: VIII 500-502. Most critically, these were not Johnson's drugs. By his own admission he did not buy the rocks, did not weigh the rocks and did not inspect them. Rather, he "jumped into" the transaction, and was handed a plastic bag of rocks, **in the dark**, which he in turn **began** to count out when the transaction was aborted. In summary:

*) The drugs were not Johnson's and he did not even **Know** that it was cocaine.[3]

*) Jugglers could be in either a #10 size or a larger #20.00 size.

*) Johnson did not count the rocks and did not know how many rocks were in the bag.

---

3 Johnson claimed to "know" that the drugs were "good" (as to quality and weight) because BBQ (from whom Johnson got the drugs) "never sold bad dope from his house." VIII 506; VII 446. This, of course, was improper, inadmissible opinion testimony and inadmissible hearsay. This was not an ultimate fact, but was rank speculation and opinion.

*) Brooks and Brown were attempting to purchase thirty (30) of the inferior, "too flat" rocks.

*) The rocks Brooks and Brown were attempting to buy were the smaller, ten dollar rocks, not the larger twenty dollar rocks.[4]

*) Johnson did not weigh the rocks and did not **Know** how much they weighed.

*) The whole transaction took place in the dark. Johnson never saw all of the rocks, in their entirety, since he was just beginning to count them out when he dropped the bag and ran away.

In short, the state totally failed to **carry its burden** of proving that Brooks bought, or attempted to buy, 28 grams or more of cocaine. The entire crux of this charge boils down to whether there **actually was** a transaction for 28 or more grams of cocaine (if the crime was trafficking), or, whether it was Brooks' **intention** to purchase 28 or more grams of cocaine and he was "doing an act toward the

4. **See:** IX 756-757, where state witness Jackie Thompson testified that Brooks and Brown told her that they wanted 50 rocks, or $500 worth. That works out to $10.00 per rock. If the larger, $20 rocks/jugglers are a gram each, it follows that the $10 rocks are one half (½) grams. Accordingly, the 30 ten dollar rocks which Brooks and Brown attempted to purchase amounted to, at most, fifteen (15) grams.

commission of such offense, but failed" in completing the offense (if the crime was **attempted** trafficking).

In order to prove an essential element of the crime of trafficking in cocaine, especially where the evidence is entirely circumstantial, the weight of the cocaine cannot be based upon guesswork or speculation. **See, Williams v. State**, 592 So.2d 737 (1st DCA 1992). In **Williams, supra**, the defendant was convicted of conspiracy to traffick in cocaine, even though the amount of cocaine delivered was only 17 grams. A central issue was the terminology employed by the parties and the fact that no specific weight (such as grams, or "an ounce") was used. The Court, in reversing, made some relevant observations:

> To support a conviction of trafficking in cocaine, or conspiracy to traffick in cocaine, the state must prove that the amount of cocaine involved was 28 grams or more.... A special standard of review of sufficiency of the evidence applies when a conviction is based wholly on circumstantial evidence [citations omitted]. "Where the only proof of guilt is circumstantial, no matter how strongly the evidence may suggest guilt, a conviction cannot be sustained unless the evidence is inconsistent with any reasonable hypothesis of innocence," **State v. Law** 559 So.2d [187 (Fla.1989)] at 188, citing **McArthur v. State**, 351 So.2d 972 (Fla. 1977). That is, the court must determine as a threshold matter whether the state produced competent, substantial evidence to contradict the

> defendant's story.... The evidence in this case as to the specific amount contemplated by the parties' agreement is not as specific as the evidence on this point in **Kocol**.... no specific amounts **were** discussed on the two occasions when appellant was present, nor did appellant agree to furnish a specific amount of cocaine. Instead, appellant agreed to participate in "a big deal."

Williams, **supra**, at 738-39.[5] **Williams** stands for the proposition that slang, such as "a big deal", or "rocks", or "jugglers" is insufficient, standing alone, to **prove** the amount of cocaine involved.

In **Ross v. State**, 528 So.2d 1237 (3rd DCA 1988), the Court was faced with a situation where the defendant had been caught in possession of 92 separate packets of white powder, and was charged with Trafficking in cocaine. However, the police lab technician only actually tested two (2) of the packets. The 2 packets tested positive for cocaine, but together they weighed less than 28 grams. The total weight of the entire 92 packets was over 28 grams. The technician had

---

5. In **Williams** the defendant (unlike here) was charged with conspiracy and the state only had to demonstrate his **intent**, not the actual amount of cocaine delivered. In contrast, to prove attempt against Brooks the state must prove that the actual transaction was for 28 or more grams, but that the transaction was not executed. Mere intent alone is insufficient to establish attempt (which is why Williams was charged with conspiracy). Nevertheless, the **Williams** Court reversed.

testified that his "visual inspection" of the 92 packets showed that the white powder in the 90 untested packets, and the white powder in the 2 tested packets, "looked alike." The **Ross** Court reversed on the Trafficking conviction, finding that the State had failed to carry its **burden of proof** on this essential element:

> The State however, has the burden of proof on this issue, **see Purifoy v. State**, 359 So.2d 446 (Fla. 1978).... we do not think that this burden is satisfied by a simple visual examination of separately wrapped packets containing white powder weighing twenty-eight (28) grams or more.... **It is essential** in order to sustain a cocaine trafficking conviction that each packet of white powder **be chemically tested**, by random sample, to contain cocaine, and that **the total weight of the material in the tested packets equal or exceed twenty-eight (28) grams; a visual examination of untested packets of this weight is insufficient to convict** because the white powder contained therein may be milk sugar or any one of a vast variety of other white powdery chemical compounds not containing cocaine.

Ross, supra, at 1239 [emphasis added]. If the evidence was legally insufficient in **Williams, supra**, and **Ross, supra**, then it is certainly insufficient in the case at bar. In fact, as far as this writer can determine, never in the history of this state has any court sustained a conviction for **Trafficking** where **no drugs** were ever recovered, tested and/or

weighed. The dispute is especially egregious here where the state is asking this Court to keep a man on death row based upon such a dearth of evidence.

B) The Evidence Did Not Establish Robbery:

The state presented no evidence of a robbery by Brooks and Brown, or of any intent to commit a robbery. In fact, according to the state's own witnesses Brooks and Brown had paid for the drugs already, so that even if they left with the drugs (a fact not conceded here) they were merely taking what they paid for. Moreover, it is just as likely that it was Brooks and Brown who were being robbed, or ripped off.

The state's case for a robbery or attempted robbery was totally circumstantial and calls for rank speculation. The case, according to the state, was "proven" by the existence of a gun and the missing cocaine. However, this scenario requires the fact finder to assume, guess or speculate that Brooks and Brown took the cocaine. There is no evidence that this occurred. As Brooks' attorney has pointed out in her initial brief, this was a drug transaction occurring in the dark, on the victim's home turf, with multiple persons present. For reasons unknown a gun was produced, accusations were traded, and then shots were fired. The evidence, such as it is, supports a variety of reasonable scenarios. As likely and reasonable as any other scenario is one where Michael Johnson shortchanged Brooks and Brown (who had already paid their money up front) and the gun was produced in response to the actions of the victims. This was no robbery, but a drug deal gone bad. Brooks and Brown were just as likely the victims of a robbery/rip off, not the perpetrators.

The standard of review in a circumstantial evidence

case is well established and oft stated:

> In a case such as this one involving circumstantial evidence, a conviction cannot be sustained - no matter how strongly the evidence suggests guilt - unless the evidence is inconsistent with any reasonable hypothesis of innocence. **McArthur v. State**, 351 So. 2d 972, 976 (Fla. 1977). A defendant's motion for judgment of acquittal should be granted in a circumstantial-evidence case "if the state fails to present evidence from which the jury can exclude every reasonable hypothesis except that of guilt." **State v. Law**, 559 So. 2d 187, 188 (Fla. 1989).

Mungin v. State, 689 So2d 1026, 1029 (Fla. 1995). As far as the robbery "charge" at bar here, this case is a text-book example of when a circumstantial evidence case fails to meet the standard and burden of proof. The state has "failed to present evidence from which the jury [could] exclude every reasonable hypothesis except that of guilt," and has thus failed to carry its burden of proof. The evidence here simply does not establish a robbery or attempted robbery, as a matter of law.

II. The Evidence Did Not Establish Premeditation:
Again, the state's case against Brooks as to first-degree premeditated murder was wholly circumstantial. There was no plan to kill, no intent. The context of this homicide was a drug transaction gone bad. Whatever happened, it was spontaneous and spur of

the moment. As with the robbery charge, the State's case for premeditation calls for speculation and guesswork, and totally fails to exclude several reasonable hypotheses of innocence.

> Premeditation is the essential element that distinguishes first-degree murder from second-degree murder. **Coolen v. State**, 696 So.2d 738, 741 (Fla. 1997). Premeditation is defined as:
>
> "more than a mere intent to kill; it is a fully formed conscious purpose to kill. This purpose to kill may be formed a moment before the act but must also exist for a sufficient length of time to permit reflection as to the nature of the act to be committed and the probable result of that act."
>
> **Id.** (quoting **Wilson v. State**, 493 So.2d 1019, 1021 (Fla. 1986)). "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." **Holton v. State**, 573 So.2d 284, 289 (Fla. 1990) (quoting **Larry v. State**, 104 So.2d 352, 354 (Fla. 1958). Where the State's proof fails to exclude a reasonable hypothesis that the homicide occurred other than by premeditated design, a verdict of first-degree murder cannot be sustained.

Coolen, 696 So.2d at 741; Kirkland v. State, 684 So.2d 732, 734 (Fla. 1996); Terry v. State, 668 So.2d 954, 964 (Fla. 1996).

Green v. State, ___ So.2d ___ (Fla. 5/21/98), at ____. In the case at bar there is no **evidence** of premeditation; the state's case relies upon speculation. Critically, the state's evidence "fails to exclude a reasonable hypothesis that the homicide occurred other than by premeditated design." A very reasonable, and likely, hypothesis is that Brooks was being robbed or ripped off (or at least thought that he was) and pulled his gun out in self defense and/or to get his money back. It was dark and Brooks was surrounded by drug dealers whom he did not know. Someone shouted at Brooks, the word "gun" was used. Under these circumstances it is **reasonable** to believe that Brooks was acting in self defense or fear, and his only **intent** was to retrieve his $300 and/or leave the premises safely. Even the state's own theory, that the victim was shot because he yelled a warning, demonstrates a spontaneous act, not a premeditated design to kill. In truth, the state paid only lip service to the issue of premeditation and made it clear throughout the trial that the state's case was based upon felony murder [6].

6. Further militating against the concept of premeditation is the fact that the victim was **not** the drug dealer Michael Johnson, who was at arm's length and who had the drugs, but instead was the shouting, shadowy figure emerging from the darkness.

A comparison between the facts of this case and those found in other, recent cases decided by this Court where this Court held that the evidence was insufficient to sustain a finding of premeditation demonstrates that the evidence of premeditation in all of those cases was stronger than the evidence in this case. **See, e.g., Green v. State, supra** (evidence insufficient to establish premeditation, but sufficient to support second-degree murder); **Norton v. State**, 23 FLW S12 (Fla. 12/24/97) (evidence insufficient to establish premeditation, but sufficient to sustain conviction for manslaughter); **Mungin v. State, supra**; **Kirkland v. State**, 684 So. 2d 732 (Fla. 1996); **Cummings v. State**, ____ So. 2d ____ (Fla. 6/11/98) (evidence sufficient to prove second-degree murder, but not premeditation); **Kormondy v. State**, 22 FLW S635 (Fla. 10/9/97) (evidence failed to prove premeditation, although sufficient to establish first-degree felony murder); **see also: Hoefert v. State**, 617 So. 2d 1046 (Fla. 1993) (premeditation not found despite evidence that the strangled victim was found partially nude and the defendant had a history of strangling women while raping them).

Brooks submits that the evidence in this case supports, at most, a conviction for manslaughter, or third-degree murder. **Norton v. State, supra**. However, Brooks contends that this case should be remanded for a new trial so that a jury, the finder of facts, may properly and fairly determine the degree of liability, if any.

II

THE APPELLANT'S FIRST DEGREE MURDER CONVICTION CANNOT STAND WHERE HIS JURY WAS INSTRUCTED ON TWO OR MORE INDEPENDENT GROUNDS FOR MURDER IN THE FIRST DEGREE AND AT LEAST ONE OF THOSE GROUNDS WAS LEGALLY INSUFFICIENT

ARGUMENT

As already set forth in Issue I, **supra**, Brooks submits that the evidence against him was legally insufficient, as a matter of law, to sustain a conviction for first degree murder, either under a theory of premeditation or under a theory of felony murder. In the case at bar the jury returned a general verdict of guilty as to first degree murder; the jury did not indicate whether its finding was predicated upon premeditation or felony murder.

In **Stromberg v. California**, 283 U.S. 359, 51 S.Ct. 532 (1931), the Supreme Court held that a general verdict must be set aside if the jury was instructed that it could rely on any of two or more independent grounds, and one of those grounds is insufficient. This is because the verdict may have rested exclusively on the insufficient ground. This principle of law was reiterated in **Tafero v. Wainwright**, 796 F.2d 1314, 1319 (11th Cir. 1986), where the Court observed that:

> It is settled law that "a general verdict must be set aside if the jury was instructed that it could rely on any of

two or more independent grounds, and one of those grounds is insufficient, because the verdict may have rested exclusively on the insufficient ground." **Zant v. Stephens**, 462 U.S. 862, 881, 103 S.Ct. 2733, 2745, 77 L.Ed.2d 235, 252 (1983); **Hitchcock v. Wainwright**, 745 F.2d 1332, 1340 (11th Cir. 1984).

This Court has itself adopted and acknowledged this principle of law. **See, e.g., McKennon v. State**, 403 So.2d 389 (Fla. 1981) (The trial court erred in instructing the jury on felony murder and robbery where there was no evidence to establish that a robbery had occurred); **Mungin v. State**, 689 So.2d 1026, 1029 (Fla. 1995) (Where evidence did not support premeditation the lower court erred in instructing jury on both premeditated and felony murder).

Unlike the situation in **McKennon** and **Mungin**, where this Court held that the error was harmless because there **was** sufficient evidence to sustain a finding of first degree murder under the alternate theory of liability (premeditation in **McKennon**, felony murder in **Mungin**), the error in this case was not harmless where there was insufficient evidence to sustain a finding of first degree murder under **either** theory of liability. The error in this case was a violation of due process of law and deprived Brooks of a fundamentally fair trial, in violation of the Fifth and Fourteenth Amendments to the U.S. Constitution, and Article I, sections 9 and 16. Under the circumstances of this case the appropriate remedy is to reverse Brooks' conviction and remand for a new trial.

III

THE TRIAL COURT ERRED IN FAILING TO MAKE SUFFICIENT INQUIRY INTO THE EFFECTIVENESS OF COURT-APPOINTED COUNSEL AFTER COUNSEL MOVED TO WITHDRAW AND THE DEFENDANT MOVED TO DISCHARGE COUNSEL

ARGUMENT

In order to protect a criminal defendant's Sixth Amendment right to the **effective** assistance of counsel the courts of this state have established procedures which must be followed whenever a defendant requests to discharge his court-appointed counsel prior to trial. See, e.g., Nelson v. State, 274 So.2d 256, 257 (4th DCA 1973); Chiles v State, 454 So.2d 726, 727 (5th DCA 1984); Brooks v. State, 555 So.2d 929 (3rd DCA 1990); Perkins v. State, 585 So.2d 390 (1st DCA 1991).

In the instant case Brooks orally moved in open court to discharge his court-appointed counsel, Richard Nichols. Tellingly, Nichols himself filed a motion to withdraw, citing a complete breakdown of trust and communication between himself and Brooks. Nichols went so far as to inform the court that his relationship with Brooks had deteriorated so much that he feared that there would be physical violence between them.

In response to Brooks' motion to discharge Nichols the Court conducted an in-camera hearing in his chambers. During this hearing (approximately three (3) weeks prior to the trial) Brooks informed the trial judge that Nichols was not investigating the case nor preparing a defense. Brooks stated that Nichols was

refusing to interview his alibi witnesses. Nichols told the judge that it was a misunderstanding and that he, Nichols, had been under the mistaken notion that Brooks wanted him "to commit perjury" at trial. Nichols claimed that he, Nichols, now "understood" that this was not the case. Brooks insisted that he wanted to discharge Nichols because Nichols had only come to see him "once or twice" and Nichols was doing nothing to prepare a defense. Brooks informed the Court that he had no faith in Nichols and did not trust him, and that there was a total breakdown in communication between them.[7]

The trial court denied Brooks' motion to discharge attorney Nichols, stating that in the court's opinion hostility or the threat of violence did not constitute a "conflict" sufficient enough to require granting the motions. Brooks submits that the trial court erred and that both his motion to discharge Nichols, as well as Nichols' motion to withdraw should have been granted.

In **Smith v. Lockhart**, 923 F.2d 1314 (8th Cir. 1991), at 1320, the Court discussed the criteria for finding that a conflict exists sufficient to warrant discharge of counsel:

> A criminal defendant who is dissatisfied with appointed counsel must show good cause to warrant substitution of

---

7. Brooks urges this Court to consider and review attorney Nichols' written motion to withdraw, which sets forth numerous grounds relating to the conflicts between him and Brooks, as well as the oral reasons given by Brooks himself at the hearing. For all of these reasons both Nichols' and Brooks' motions should have been granted.

> counsel, such as a conflict of interest, an irreconcilable conflict, or a complete breakdown in communication between the attorney and the defendant. [citations omitted]. Once good cause is shown, the trial judge must appoint different counsel.

Brooks maintains that he did in fact demonstrate "good cause" inasmuch as the record makes clear that there existed "an irreconcilable conflict or a complete breakdown in communication between the attorney and the defendant." **Smith, supra.**

> We believe Smith showed sufficient cause for substitution of counsel when he cited both a conflict of interest between him and his appointed attorney and explained that they were unable to communicate with each other. Once good cause was shown, the trial judge violated Smith's sixth amendment rights by failing to appoint different counsel to represent him...

Smith, supra, at 1321. Brooks maintains that the record demonstrates that he had "good cause" to discharge Nichols and that the trial court erred in refusing to do so.

Moreover, as a threshold matter, Brooks asserts that the in-camera, in chambers hearing which the trial court did conduct was **insufficient** to meet the standard set forth in **Nelson, Chiles, Brooks** and **Perkins, supra.** The scope of the inquiry made by

the trial court failed to adequately inquire (from both Brooks **and** Nichols) as to the grounds asserted as the dissatisfaction. Additionally, the trial court failed to properly advise Brooks of his alternative right to represent himself pursuant to **Faretta v. California**, 422 U.S. 806, 95 S.Ct. 2525 (1975). In this respect this case is similar to **Perkins v. State**, **supra**, where the Court, at 391-92, held that:

> When a defendant lets it be known that he wishes to discharge his court-appointed counsel, the trial court should inquire of the defendant as to his reason for requesting discharge. If incompetency of counsel is given as a reason, the trial court should then make further inquiry to determine whether there is reasonable cause to support the allegation. If reasonable cause appears, the court should appoint substitute counsel; if no reasonable cause appears the court should then advise the defendant that if he insists on discharging his original counsel, the State may not be required to appoint a substitute.

In **Perkins**, **supra**, the Court held that although the trial court had made an inquiry, "The trial court below did not go far enough in satisfying the inquiry standard." **Id**, at 392. The appellate court held that the lower court had failed to inquire of the defendant's counsel, **and** had failed to adequately advise the defendant of his right to represent himself:

> Even if the trial court had conducted an adequate inquiry before finding counsel

> to be competent, the trial court was still obligated to advise appellant that his attorney could be discharged but the state would not be required to appoint substitute counsel and that appellant had the right to defend himself.

Perkins, supra, at 392. Brooks likewise submits that the inquiry made by the lower court was insufficient to satisfy the inquiry standard, particularly in failing to adequately advise Brooks of his option of representing himself rather than proceeding to trial with an attorney Brooks did not want.

In conclusion Brooks' claim is two-fold: first, he asserts that the lower court's inquiry was insufficient to satisfy the inquiry standard. Perkins, supra; Chiles, supra; Brooks, supra; Nelson, supra. Second, even if the court did make sufficient inquiry, the court erred in its ultimate conclusion that Brooks had failed to demonstrate good cause to discharge counsel. Because good cause was shown the court should have granted the motion(s) and discharged counsel. Accordingly, this cause should be reversed and remanded for a new trial. Smith v. Lockhart, supra.

IV

THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION FOR A CONTINUANCE SO THAT THE DEFENDANT COULD HIRE COUNSEL OF CHOICE, THEREBY DEPRIVING THE DEFENDANT OF HIS CONSTITUTIONAL RIGHT TO COUNSEL OF CHOICE

ARGUMENT

As a general principle of law a criminal defendant is entitled to the retained counsel of his choice, pursuant to the Sixth Amendment of the U.S. Constitution. See, e.g., U.S. v. Lillie, 989 F.2d 1054 (9th Cir. 1993), at 1055-56:

> A criminal defendant is entitled to the retained counsel of his choice (though not to the appointed counsel of his choice). U.S. Const. amend. VI; Wheat v. United States, 486 U.S. 153, 159, 108 S.Ct. 1692, 1697, 100 L.Ed.2d 140 (1988). This isn't an absolute right; it may be abridged to serve some compelling purpose. But the defendant can't be denied his choice of retained counsel just because the request comes late, or the court thinks current counsel is doing an adequate job.

See also: U.S. v. Mullen, 32 F.3d 891, 895 (4th Cir. 1994) ("A defendant's right to have a lawyer of his or her own choosing is an **essential** element of the Sixth Amendment right to assistance of counsel."). In the instant case Brooks moved the trial court to allow

him to hire counsel of his own choice, due to Brooks' dissatisfaction with his appointed counsel, Richard Nichols.[8] Prior to moving the court to discharge Nichols and allow him to hire his own attorney, Brooks had made at least two (2) prior attempts to hire private counsel; on both occasions Brooks had actually retained private counsel by paying them a retainer, but in both instances the attorneys had to return the retainer and decline to represent Brooks because both attorneys came to realize that, in prior proceedings, they had once represented Brooks' co-defendant, Foster Brown. This is a matter of record.

Finally, Brooks moved the court to allow him to hire private counsel, and announced that he, and his family had found an attorney willing to take the case. Brooks' family stood up in open court and confirmed this. However, Brooks told the court that this attorney had informed him that in order to represent Brooks he (the attorney) would need a continuance. This was approximately one week before the trial began. The trial court denied the motion for a continuance, despite the fact that defense attorney Nichols himself joined in on the motion and urged the court to permit Brooks to hire substitute counsel. The trial court summarily denied Brooks' motion to hire substitute counsel, stating that it would not permit a continuance. In U.S. v. Mullen, supra, the Court reversed a

---

8. Please see Issue III, supra, of this supplemental brief, wherein Brooks has detailed his dissatisfaction with attorney Richard Nichols.

conviction under similar circumstances, holding that it was error to refuse the defendant's request to hire substitute counsel. The Court initially noted that

> When a defendant raises a seemingly substantial complaint about counsel, the judge has an obligation to inquire thoroughly into the factual basis of defendant's dissatisfaction.

Mullen, supra, at 896. In Mullen a threshhold issue was whether the defendant's request was timely. The request "would have necessitated a continuance." Nevertheless, the appellate court found the request (made 27 days before trial) to be timely.[9] Here, the lower court failed to adequately inquire into the factual basis of Brooks' dissatisfaction with appointed counsel, even though counsel himself wanted to withdraw and wanted Brooks to hire substitute counsel. This was error. Mullen, supra. See also, Smith v. Lockhart, 923 F.2d 1314 (8th Cir. 1991), at 1320-21:

> A criminal defendant who is dissatisfied with appointed counsel must show good cause to warrant substitution of counsel, such as a conflict of interest, an irreconcilable conflict, or a complete breakdown in communication between

---

9. Although, in the case at bar, this issue of allowing substitute counsel and the issue of a continuance are intrinsically linked, the claim being presented here, unequivocally, is the constitutional issue of whether Brooks was denied his right to substitute counsel, **not** merely whether the lower court abused its discretion in not granting a continuance.

> the attorney and the defendant.... Once good cause is shown, the trial judge must appoint different counsel.... Courts have long recognized that the Sixth Amendment right to representation of counsel contains a correlative right to representation that is unimpaired by conflicts of interest or divided loyalties.... In general, a conflict exists when an attorney is placed in a situation conducive to divided loyalties.... We believe Smith showed sufficient cause for substitution of counsel when he cited both a conflict of interest between him and his appointed attorney and explained that they were unable to communicate with each other. Once good cause was shown, the trial judge violated Smith's sixth amendment rights by failing to appoint different counsel to assist him at the omnibus hearing, which was a critical stage of the proceeding.

Like the defendant in **Smith**, Brooks informed the trial court that there had been a total breakdown of communication and trust between himself and attorney Nichols. Even Nichols himself joined in and moved to withdraw. Notwithstanding this the trial court failed to "inquire thoroughly into the factual basis of defendant's dissatisfaction," **Mullen**, **supra**, at 896 (quoting **Smith**, **supra**, at 1320). Accord, **U.S. v. D'Amore**, 56 F.3d 1202 (9th Cir. 1995) (Trial court made inadequate inquiry before denying defendant's motion to substitute counsel. Evidence showed substantial

breakdown of communications between defendant and counsel; denial of motion was not warranted on grounds of untimeliness). In **D'Amore**, the defendant did not move for substitution of counsel until the day before the probation revocation hearing. Nevertheless, the Court held that the request was not untimely. The **D'Amore** Court, at 1204-05, reiterated that:

> The district court's denial of the motion to substitute counsel is reviewed for abuse of discretion [citation omitted]. That discretion must be exercised, however, within the limitations of the Sixth Amendment, which grants criminal defendants a qualified constitutional right to hire counsel of their choice.... Before the district court can engage in a measured exercise of discretion, it must conduct an inquiry adequate to create a sufficient basis for reaching an informed decision.

In the case at bar the lower court failed to sufficiently inquire, and erred in refusing to permit Brooks to hire substitute counsel of choice. Accordingly, this case should be reversed and remanded for a new trial.

V

THE TRIAL COURT ERRED IN GRANTING THE STATE'S MOTION FOR JOINDER OF CO-DEFENDANTS AND IN DENYING THE DEFENDANT'S MOTION FOR SEVERANCE

ARGUMENT

The State successfully moved for joinder/consolidation of the trials of the two co-defendants, Fred Brooks and Foster Brown. At a subsequent court proceeding both co-defendants moved for a severance, which the trial court denied. Under the facts of this case, where the two co-defendants had and pursued mutually antagonistic defenses, Brooks submits that he was deprived of a fundamentally fair trial where he had to defend himself not only from the state, but also from his co-defendant's counsel.[10]

In U.S. v. Serpoosh, 919 F.2d 835 (2nd Cir. 1990), the Court of Appeals held that the trial court had erred in denying the defendants' motions to sever their trials based upon mutually antagonistic defenses. In Serpoosh, two defendants were charged with narcotics trafficking; at trial both defendants, through their respective attorneys, attacked each other, calling each other a liar who had concocted a story to escape blame. In

---

10. This argument extends to and encompasses the penalty phase also, where Brooks again had to defend himself from his co-defendant's counsel's efforts to paint Brooks as the triggerman and ring leader. This joint penalty phase deprived Brooks of a fair and individualized sentencing proceeding.

reversing for a new, separate trial(s), the Court observed:

> We believe that the prejudice caused by the joint trial is evident. Both defendants gave detailed and mutually exclusive explanations of their conduct on the day of the arrest. The damage done was greatly enhanced by the sparring between counsel for the two defendants in which each characterized the other defendant as a liar who concocted his story to escape blame. There was, therefore, the "substantial prejudice" needed to reverse the denial of a severance motion.

Serpoosh, supra, at 838. In the case at bar there was similar sparring between the defendants' attorneys. Counsel for co-defendant Foster Brown repeatedly **vouched** for the credibility of the state's witnesses whenever one of them testified to any fact which implicated Brooks and/or exonerated Brown, thus forcing Brooks to defend against the state and co-defendant's counsel. In the case at bar, because "the jury, in order to believe the core of testimony offered on behalf of [one] defendant, [had to] necessarily disbelieve the testimony offered on behalf of his codefendant," fundamental fairness required a severance. **See**: **U.S. v. Potamitis**, 739 F.2d 784, 790 (2nd Cir. 1984). Accordingly, this Court should reverse and remand for a new trial (or alternatively a new penalty phase which comports with the Eighth Amendment's requirement of a fair and individualized capital sentencing proceeding).

VI

THE TRIAL COURT ERRED IN PERMITTING A NON-EXPERT, LAY WITNESS TESTIFY AS TO THE WEIGHT, QUALITY AND GENUINENESS OF THE ALLEGED ROCK COCAINE WHERE SUCH TESTIMONY WAS THE ONLY EVIDENCE OF AN ESSENTIAL ELEMENT OF FIRST DEGREE FELONY MURDER

ARGUMENT [11]

The only "evidence" adduced at trial going towards the existence of any cocaine, as well as towards the quantity and/or weight of this alleged cocaine, came from the testimony of a lay witness, self described crack cocaine user and dealer Michael Johnson. Over strenuous defense objection the trial court allowed drug dealer Johnson to testify that he "knew" the bag of alleged rock cocaine was genuine cocaine (as opposed to something else), and that he "knew" that each rock weighed a gram apiece.

The crucial nature of Johnson's testimony is demonstrated by the fact that this testimony is the only "evidence" which the state presented to establish

---

11. This issue was briefed by Brooks' appellate counsel (see: Issue II, pages 49-52, of appellant's initial brief). However, Brooks wishes to provide additional arguments and supporting case law not found in the initial brief.

the crime of first degree felony murder based upon trafficking being the underlying felony. **See**: Section 782.04 (1) (a) 2. a, Florida Statutes, defining trafficking, or attempted trafficking, as one of the underlying, predicate felonies to establish the capital crime of first degree felony murder. In fact, the state argued this theory of liability throughout the trial.

It is axiomatic that the state bears the burden of proving, **by competent, admissible evidence**, each and every element of the crime charged, beyond and to the exclusion of every reasonable doubt. Here, the state was required to prove two (2) things in order to establish trafficking, or attempted trafficking: 1) that the contraband in question was in fact cocaine; and, 2) that the amount of cocaine weighed 28 or more grams. In fact, the state failed to prove either one of these elements [**See**: Issue I, **supra** of this brief].

The gravaman of this claim is that lay witness Michael Johnson's testimony as to these crucial facts was not admissible under the law, and the admission of such deprived Brooks of a fundamentally fair trial and denied him due process of law, contrary to the Fifth and Fourteenth Amendments to the U.S. Constitution, and Article I, sections 9 and 16, Florida Constitution.

It bears repeating that **no** drugs or cocaine was recovered by the police, and thus no scientific testing was ever conducted to determine whether in fact there ever was any cocaine at all, or, if so, what the weight of the cocaine was. The only evidence came from the testimony of Michael Johnson. State witness Johnson admitted that the cocaine was not his, that he had not tested it nor had he weighed it. Johnson had not even laid hands on

this bag of "rocks" until moments before the attempted sale when, in the dark, the bag was handed to him. Even Johnson conceded that dealers sometimes pinched off pieces of rocks and try to sell the remainder as full grams.[12]

Under the circumstances of this case the trial court erred in allowing this evidence to reach the jury. Johnson's testimony as to the weight, and the genuineness, of the alleged cocaine, was clearly inadmissible under the rules of evidence; because this inadmissible testimony severely prejudiced Brooks he is entitled to a new trial.

It was error for the trial court to allow Johnson to testify as an expert because Johnson was not qualified as an expert in determining the weight of crack rocks by visual inspection, or in determining the genuineness of cocaine. Indeed, even Johnson himself testified that "I'm not an expert..."

Proof of contraband does not require, necessarily, elaborate scientific tests. However, the evidence authenticating the contraband must be reliable and based upon the testimony of a witness with training and experience. Weaver v. State, 543 So.2d 443 (3rd DCA 1989).

---

12. By his own admission, Johnson had jumped in to make the sale that night because he knew that BBQ (the individual from whom Johnson got the bag of rocks) sometimes sold smaller, underweight rocks, keeping the pinched difference for his own, personal use. This testimony supports the contention that the baggie could have contained underweight rocks, less than a gram apiece.

In **Weaver, supra**, the Court was faced with a situation where the only evidence to sustain a charge of possession of heroin was the testimony of two (2) undercover police officers. Although one officer tested the white substance in the field, he could not testify that the field test was reliable. The **Weaver** Court held:

> No chemist or other qualified technician testified that the substance was heroin... The evidence was insufficient to establish that the substance involved was heroin... In this case it was not established that the officers could independently, by training or experience, identify the substance with sufficient reliability to support a finding that the defendant was guilty of a probation violation.

Weaver, supra, at 443-44. In this case drug dealer Johnson was no expert witness. Even an expert's testimony may not be based upon speculation, but rather must be founded on reliable scientific principles. **See**: Ehrhardt, **Florida Evidence**, Section 702.3, page 539 (1998 Edition) ("An expert's opinion may not be speculation and must be based on reliable scientific principles. If the expert opinion is not based on reliable scientific principles, the opinion will not be admitted."). **See also**: **Ramirez v. State**, 542 So.2d 352, 355 (Fla. 1989) (Testimony concerning the identification of a knife mark in human cartilage was inadmissible when the prosecution failed to establish the scientific reliability of the evidence. The evidence of reliability was the expert technician's statements that the technique was reliable and an article the technician had written concerning the technique). The burden is on the proponent of the evidence to prove

the general acceptance of both the underlying scientific principle and the testing procedures used to apply that principle to the facts of the case at hand. Murray v. State, 692 So.2d 157 (Fla. 1997), at 161 and 163. In Murray, supra, this Court reversed for a new trial where the State had "completely failed to carry its burden as the proponent of the DNA evidence," at 163. Because state witness Johnson was not a qualified expert witness the admission of his testimony was reversible error. Murray, supra. Ramirez v. State, 651 So.2d 1164 (Fla. 1995).

Neither was state witness Johnson's testimony admissible as lay opinion. Under Section 90.701, Florida Statutes (1995), a lay witness may testify using opinions and inferences when the witness cannot communicate accurately and fully what he perceived, and when the opinion is not one which requires expert testimony. See: Ehrhardt, Florida Evidence, section 701.1, pages 516-17 (1998 Edition). While lay witnesses are generally 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. Accord, Weaver, supra. In the case at bar the exact weight of the alleged crack cocaine was critical to the case, as was the issue of whether or not it was even genuine cocaine. Under the Facts of this case in order to carry its burden of proof the state was required to present expert testimony. Section 90.701 (2), Florida Statutes, prohibits a lay witness from testifying as to an opinion where that opinion concerns a matter of specialized knowledge which requires an expert witness to draw the conclusion. See, e.g., D.R.C. v. State, 670

So.2d 1183 (5th DCA 1996) (A police officer, who was not qualified as an expert, could not express a lay opinion that a juvenile was a seller, rather than a user, of rock cocaine).

Under Section 90.701, F.S. a lay witness may testify in terms of opinion and inference only when two (2) prerequisites are met: 1) when the witness cannot otherwise communicate accurately and fully what he perceived; and, 2) when the opinion is not one that requires expert testimony. Because the evidence as to the weight and genuineness of the cocaine was required to come in via expert testimony, Johnson's testimony was not admissible as lay opinion testimony. Accord, **Adamson v. State**, 569 So.2d 495 (3rd DCA 1990) (No abuse of discretion for trial court to prohibit officer from answering questions regarding effect of cocaine, where the officer was not qualified as an expert).

Moreover, under Florida law an offering party must first demonstrate that the lay witness have an adequate foundation for that opinion. **See, e.g.**, Fino v. Nodine, 646 So.2d 746, 749 (4th DCA 1994) (Error to permit lay witness to express opinion without a predicate being laid). In the case at bar no such predicate was laid.

In conclusion, Johnson's testimony was not admissible, either as expert testimony or as lay witness testimony. Neither was a proper predicate laid by the state prior to Johnson's testimony. Because this evidence was absolutely crucial to establish an essential element of the crime charged, it cannot be considered harmless error. Accordingly, Brooks is entitled to a new trial.

VII

THE TRIAL COURT ERRED IN ADMITTING EVIDENCE OF OTHER, COLLATERAL CRIMES

ARGUMENT

At trial, and over the two codefendants' counsel's objections, state witness Tony Carr was permitted to testify that he rented his Toyota automobile to the two defendants for "a few hours" and that it was never returned, and was actually found abandoned a week later. This constitutes auto theft, an uncharged and irrelevant crime. The admission of evidence of this collateral crime/bad act served only to prejudice the appellant in the eyes of the jury. This evidence was not admissible under section 90.404, Florida Statutes, inasmuch as there is no similarity between auto theft and the crimes for which Brooks was being tried. **See**: §90.404 (2)(a), F.S. The only other conceivable provision of the evidence code which the trial judge may have relied upon is §90.402, F.S. However, the evidence of this auto theft was in no way **relevant** to proving the crimes charged, and under §90.402, relevancy is the sole determinant. **Accord**, **Jorgenson v. State**, ___ So.2d ___ (Fla. 6/11/98) (Section 90.404 (2)(a), controls where collateral crimes are alleged to be similar; otherwise, section 90.402 governs).

Evidence of this unrelated auto theft was neither relevant, as required by §90.402, F.S., nor did its probative value outweigh its prejudicial effect, as required by §90.403, F.S. Rather, the erroneous admission of this evidence served only to deprive

Brooks of a fair and impartial trial, contrary to the Fifth and Fourteenth Amendments to the U.S. Constitution and Article I, sections 9 and 16, Florida Constitution.

The admission of improper collateral offense evidence is presumed harmful. **Straight v. State**, 397 So.2d 903, 908 (Fla. 1980). Generally,

> The admission of improper collateral crime evidence is presumed harmful error because of the danger that a jury will take the bad character or propensity to crime thus demonstrated as evidence of guilt of the crime charged.

Peek v. State, 488 So.2d 52, 56 (Fla. 1986). **See also: Steverson v. State**, 695 So.2d 688 (Fla. 1997) (Reversible error to admit evidence of collateral crime which served only to prejudice the defendant); **Henry v. State**, 574 So. 2d 73 (Fla. 1991) (same). Based upon the foregoing, Brooks submits that he is entitled to a new trial on all counts.

CONCLUSION

WHEREFORE, based upon the foregoing facts and arguments, as well as upon the initial brief filed by Brooks' appointed counsel, and the record in this case, this appellant submits that he is entitled to a new trial on all counts; alternatively, Brooks is entitled to a reduction of his conviction of first degree murder to a lesser included offense. Moreover, Brooks' death sentence cannot stand and must be vacated under controlling case law.

Respectfully submitted,

/s/ Fred L. Brooks #068676
Fred Lorenzo Brooks #068676
Appellant pro se
Florida State Prison
P.O. Box 181
Starke, FL. 32091

FLB/WVP

CERTIFICATE OF SERVICE

I, Fred Lorenzo Brooks, do hereby certify that a true and correct copy of the foregoing pro se supplemental brief has been furnished to: Mr. Richard Martell and Katherine V. Blanco, Assistant Attorney Generals, The Capitol Bldg., Plaza Level, Tallahassee, FL., 32399-1050; and Ms. Nada M. Carey, Asst. Public Defender, Leon County Courthouse, Suite 401, 301 S. Monroe Street, Tallahassee, FL., 32301, on this 7th day of AUGUST, 1998, by U.S. Mail.

/s/ Fred L. Brooks #068676
Fred Lorenzo Brooks #068676