IN THE SUPREME COURT OF FLORIDA

LAMAR BROOKS,

Appellant,

CASE NO. 94,308

v.

STATE OF FLORIDA,

Appellee.
_____/

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

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

Shortly before midnight on April 24, 1996, Rachel Carlson and her three-month-old daughter, Alexis Stuart, were found in her running car in Crestview, Florida; they had been stabbed to death. (XII 911-13; 977-79). Carlson was a member of the United States Air Force, and, early on April 25, Karen Garcia of the Air Force Office of Special Investigations (OSI) went to the home of a fellow airman, Walker Davis, Jr. (XIII 1103-05). She found Lamar Brooks asleep on the living room couch. (XIII 1105). Davis told her that he last saw Carlson at the hospital where they both worked on the afternoon of April 24. (XIII 1107). He said that on the evening of April 24 he put a waterbed together and walked his dog and that he and Brooks were at the house all night. (XIII 1108-10). Garcia interviewed Brooks later that morning. (XIII 1112). Brooks told her that he had not been in Crestview on the 24th and had spent the previous evening putting a waterbed together and walking Davis' dog. (XIII 1116). Wayne Achtzen, another OSI agent, testified that he picked up Davis at the hospital around 9:00 a.m. on April 25 and picked up Brooks shortly afterwards. (XIII 1147-48).

Mike Hollinshead, a state attorney's investigator, testified that he interviewed Brooks on April 26. (XIII 1019). Brooks denied knowing the victim and said that he saw her at Davis' on Monday, April 22. (XIII 1021). Brooks said that he and Davis went to Crestview that evening with two other men, that they stayed home and watched movies the next evening (Tuesday, April 23), and that

they set up the waterbed, watched movies, and walked the dog the evening of Wednesday, April 24. (XIII 1024-27).

Several of Carlson's friends and co-workers testified that, on April 24, 1996, Carlson told them that she, Davis, and the baby were going to Crestview that night to visit his aunt and cousins, that she needed money from him, and that she had paternity papers for him to sign. (XIV 1363-66; 1380; 1389; 1393; XV 1413). Insurance agent Steven Manthey testified that he sold a $100,000 life insurance policy on the baby to Davis, with Davis as the beneficiary, and that Davis said he was the baby's father. (XV 1438-41). David Johnston testified that, in March or April 1996, Davis visited his car dealership and talked about buying a $32,000 Pathfinder because he was coming into some money. (XVII 1873, 1878).

Kea Bess testified that, on the evening of April 24, she saw Davis and another man walking down Booker Street in Crestview "real fast like he wanted to run but couldn't because he had a cast on." (XVII 1843-44). Melissa Thomas testified that Brooks and Davis came to her house in Crestview between 9:00 and 9:30 p.m. on Wednesday, April 24. (XV 1535-36). Rochelle Jones, a friend and co-worker of Davis', testified that she received a call from Davis at 9:22 p.m. on the 24th and that he wanted her to pick him up in Crestview. (XVI 1773-74). After picking up Davis and Brooks, she was stopped for speeding. (XVI 1783). William Tiller, a state trooper, testified that he stopped Jones for speeding at 10:20

p.m., April 24; Davis, another black male, and some children were in the car with Jones. (XVI 1749-52).

Jones also testified that Davis called her between 7:30 and 8:00 a.m. on April 25 and told her twice that "you ain't seen me." (XVI 1786). When Davis came to her house with some OSI agents that afternoon, he asked if she "was cool." (XVI 1788-89). On Monday, April 29, OSI agents told Jones they knew about the April 24 phone call, and she told them what had happened and revealed more information at the State Attorney's Office on May 2. (XVII 1805).

Mark Gilliam, a friend of Brooks', testified that he met Brooks and Davis in Atlanta for Freaknik and drove back to Eglin with them on Sunday, April 21, 1996. (XVI 1624-29). Monday evening Davis said he should choke the victim and that she was pestering him for money. (XVI 1638-39). Brooks said she should be shot, and Gilliam said she should be stabbed. (XVI 1639-40). The following evening Davis said the victim should be killed in Crestview and that he wanted Gilliam to drive (XVI 1646). Gilliam was to receive $500 for driving and Brooks was to get $4,000 to $8,000 for participating in the killing. (XVI 1647-48). Law enforcement officers came to see him at Ft. Benning on May 14, 1996. (XVI 1662-63).

Terrance Goodman, a cellmate of Brooks' at the Okaloosa County Jail, testified that Brooks talked some about his case, i.e., that he, Davis, and Gilliam discussed various ways to kill the victims (XVIII 2095) and that there was no physical evidence against him

(XVIII 2097, 2103). Brooks admitted his involvement in the murders several times. (XVIII 2103). Among other things, Brooks said that it took heart to stab someone (XVIII 2102), that he "offed the broad" and "copped" the bodies (XVIII 2099), and that he rode in the backseat of the victim's car to Crestview. (XVIII 2100).

Joan Wood, the medical examiner for the Sixth Judicial Circuit, testified that she performed second autopsies of the victims shortly before the bodies were buried. (XIV 1266). The baby had been stabbed and cut several times with the cause of death being a stab wound that injured the heart and the other wounds having been inflicted after death. (XIV 1275-76). Carlson suffered seventy-five stab wounds to her neck, chest, abdomen, back, left side, left forearm and wrist, and hands. (XIV 1282, 1279). The eighteen wounds to her hands and wrist were defensive wounds. (XIV 1282-83). The cause of Carlson's death was multiple stab wounds from which she bled to death, and the manner of death was homicide. (XIV 1287). Wood also found evidence that Carlson had been hit in the face and choked, injuries not apparent at the first autopsy because it was done less than twenty-four house after death. (XIV 1281, 1290, 1293, 1316). All of the wounds were inflicted prior to death (XIV 1298) and were consistent with a right-handed person stabbing Carlson from behind (XIV 1319, 1330), with the defensive wounds "clearly" occurring while she was conscious. (XIV 1351).

The jury convicted Brooks of two counts of first-degree murder as charged (I 189-90; XXIII 3006) and, after the penalty hearing, recommended that he be sentenced to death for each count by a vote of ten to two. (II 209-10; XXV 3236). The court found that four aggravators had been established for both murders (prior conviction of violent felony; felony murder/aggravated child abuse; pecuniary gain; and cold, calculated, and premeditated) and a fifth individually for each, i.e., heinous, atrocious, or cruel for Carlson and victim under twelve years of age for the baby. (III 412-17). After weighing the two statutory mitigators (no prior history and age) and eight nonstatutory mitigators (III 414-17) against the aggravators, the trial court imposed two death sentences. (III 418; XXVI 3247 et seq.).[1]

[1] At his trial in 1997 Walker Davis was convicted of two counts of first-degree murder. His jury, however, recommended sentences of life imprisonment, which the trial court imposed. His convictions and sentences were affirmed on appeal. Davis v. State, 728 So.2d 341 (Fla. 1st DCA 1999).

SUMMARY OF ARGUMENT

Point 1: The trial court properly allowed the state to introduce hearsay statements made by the victim and by Brooks' co-defendant.

Point 2: The state established the existence of a conspiracy, and the court properly allowed the introduction of a co-conspirator's hearsay statements.

Point 3: Introduction of a co-conspirator's hearsay statements did not violate Brooks' confrontation rights.

Point 4: The court properly denied Brooks' motions for new trial.

Point 5: The court did not err in allowing Gilliam and Goodman to testify.

Point 6: The court did not err in denying Brooks' motion for judgment of acquittal based on the prosecutor's closing argument.

Point 7: The court did not err in determining juror qualifications.

Point 8: The court did not err in allowing the state to introduce autopsy photographs of the victims.

Point 9: The court did not err in refusing to strike the venire on Brooks' claim of excessive pretrial publicity.

Point 10: The court did not err in allowing the state to introduce a co-defendant's hearsay statements.

Point 11: The evidence is sufficient to support Brooks' convictions, and the court did not err in denying his motion for judgment of acquittal.

Point 12: The court did not err regarding the aggravators.

Point 13: The court properly considered the mitigating evidence.

Point 14: The trial court properly allowed the state to introduce victim impact evidence.

Point 15: Brooks' death sentences are both constitutional and proportionate.

ARGUMENT

POINT 1

WHETHER THE TRIAL COURT PROPERLY ALLOWED THE STATE TO INTRODUCE HEARSAY EVIDENCE.

Brooks argues that the trial court erred in allowing the state to introduce hearsay statements by Carlson about her plans for the day she was killed and by Walker Davis, Brooks' co-defendant. There is no merit to this claim.

Carlson's Statements

Just before the state opened its case, the court and counsel discussed the state's introducing Carlson's statements to her friends and co-workers. (XII 903-4, 908-10). Thereafter, Lisa Lauer testified that, on April 24, Carlson told her that she and Davis were going to Crestview that evening to visit his aunt. (XIV 1393). Ame Boehmer stated that, on the 24th, Carlson said she and Davis were driving to Crestview that evening to visit his family and that she was going to try to get some money from him. (XIV 1389). Linda Chaloupka stated that Carlson told her that she had paternity papers for Davis to sign and that she would see him the evening of the 24th. (XIV 1380). Alicia Williams testified that, on the 24th, Carlson said she was going to Crestview with Davis and the baby to meet his aunt and cousins. (XV 1413). Jason Hatcher said that Carlson told him the same thing on April 24th and that she needed gas money from Davis and wanted him to sign the paternity papers. (XIV 1363, 1366). Michael Lynes testified that,

on April 29, he retrieved an e-mail message that Davis deleted from his computer at work at 7:03 a.m., April 25, 1996. (XV 1460-61, 1465-66). The message, titled "visiting" and dated "24 April 96 14:24:25" [2:24 p.m.], read as follows: "We can go there again tonight, but I need gas money. Also, let's try to go a little earlier. I'm about to fall over I'm so tired from the last two nights. Also, if you can, I need some money for diapers. She's almost out and I'm flat broke. Call me." (XV 1162-63). Billie Madero, a child support enforcement worker, testified that she took an appointment from Carlson regarding support for the baby and that Carlson identified Davis as the father of her child. (XV 1447-50). Defense counsel objected to these witnesses' testimony on the basis of hearsay, except for Madero's. (E.g., XIV 1363, 1379, 1389, 1393; XV 1413, 1460).

Brooks now argues that, because "there was no claim of self defense, no allegation of suicide nor was there any hint that Mr. Brooks claimed that the deaths were accidental" (initial brief at 37), Carlson's state of mind was not at issue, and the testimony should have been excluded. The standard Brooks states is derived from United States v. Brown, 490 F.2d 758 (D.C. Cir. 1973), which sets out exceptions to the general rule that a victim's hearsay statement about being afraid of the defendant is inadmissible. State v. Bradford, 658 So.2d 572 (Fla. 5th DCA 1995); Kennedy v. State, 385 So.2d 1020 (Fla. 5th DCA 1980); see also Peterka v. State, 640 So.2d 59 (Fla. 1994), cert. denied, 513 U.S. 1129

(1995). In the instant case, however, none of the hearsay statements indicate that Carlson was afraid of Brooks. Instead, the state introduced the statements to show Carlson's state of mind and intent on the day she and her baby were murdered. As such, her statements were admissible under subsection 90.803(3), Florida Statutes.

That subsection reads as follows:

> (3) Then-existing Mental, Emotional, or Physical Condition –
>
> (a) A statement of the declarant's then-existing state of mind, emotion, or physical sensation, including a statement of intent, plan, motive, design, mental feeling, pain, or bodily health, when such evidence is offered to:
>
> 1. Prove the declarant's state of mind, emotion, or physical sensation at that time or at any other time when such state is an issue in the action.
>
> 2. Prove or explain acts of subsequent conduct of the declarant.

Brooks claimed he was innocent, in spite of testimony that put him in Crestview with his co-conspirator the evening of April 24, 1996. The victim's intention to travel to Crestview with the co-conspirator on the evening of April 24, 1996 thus became at issue in the case. Carlson's hearsay statements regarding her state of mind and intent fit within the 90.803(3) hearsay exception and were admissible. Bowen v. Keen, 17 So.2d 706, 711 (Fla. 1944) ("The rule is quite generally recognized that the statements of a deceased person as to the purpose and destination of a trip or

journey he is about to make are admissible"); Morris v. State, 456 So.2d 471, 484 (Fla. 3d DCA 1984) ("evidence of mental state, as for example a plan or design, where offered to show that the person who has the state of mind later carried it out by suitable action, is an exception to the rule which forbids evidence of out-of-court assertions to prove the facts asserted in them); Ehrhardt, Florida Evidence, §803.3b (1999 ed.). The trial court properly admitted Carlson's statements, and this claim should be denied.

Davis' Statements

Brooks also claims that the trial court erred in allowing the state to introduce, through the following witnesses, statements made by Walker Davis. Wayne Samms testified that, about a month before the murders, Davis complained that Carlson was asking him for money and "that her and the little dip were done," meaning he meant to kill them. (XIX 2256). David Johnston, a car dealer, testified that, in March or April 1996, Davis talked with him about purchasing a $32,000 vehicle and said that he would be coming into some money soon. (XVII 1873, 1877). A friend of Davis', Anthony Sievers, stated that Davis told him he would be getting a car soon and that there would not be any payments on it. (XVII 1888). Insurance agent Steve Manthey testified that, on February 20, 1996, Davis paid the premium on a $100,000 life insurance policy on Carlson's baby, that Davis identified himself as the child's father, and that Davis was the beneficiary of the policy. (XV

1439-41). According to Rochelle Jones, a day or two before the murders Davis told her that he was going to get money from a guy and that he would have "to smoke the dip" with the baby because she would tie him to the guy, which Jones interpreted as meaning the baby would be killed. (XVII 1808-09). Contrary to Brooks' claim, these statements were admissible as a co-conspirator's statements against interest.

As set out in point 2, infra, the state demonstrated that Brooks and Davis were co-conspirators in a plan to murder the victims. Foster v. State, 679 So.2d 747 (Fla. 1996), cert. denied, 117 S.Ct. 1259 (1997); Larzelere v. State, 676 So.2d 394 (Fla.), cert. denied, 519 U.S. 1043 (1996). When a conspiracy is shown to exist, every act and declaration of each member of the conspiracy is the act and declaration of all. Honchell v. State, 257 So.2d 889 (Fla. 1971). Davis' statements evidenced his state of mind and intent which, because of the existence of the conspiracy, is the same as Brooks' intent. The trial court correctly allowed the state to introduce this evidence, and this claim should be denied.[2]

[2] Brooks' reliance on Sandoval v. State, 689 So.2d 1258 (Fla. 3d DCA 1997), and Kelly v. State, 543 So.2d 286 (Fla. 1st DCA 1989), is misplaced because those cases are factually distinguishable from this case. In Sandoval the district court found error in allowing Sandoval's self-serving testimony about her co-defendant's hearsay statements that allegedly showed Sandoval's state of mind and explained her actions. In Kelly the district court found the trial court erred in allowing into evidence the victim's hearsay statements about his extramarital affairs.

POINT 2

WHETHER THE TRIAL COURT PROPERLY FOUND THAT A CONSPIRACY EXISTED AND PROPERLY ALLOWED THE STATE TO INTRODUCE CO-CONSPIRATOR HEARSAY STATEMENTS.

Brooks argues that the trial court erred in finding that a conspiracy existed and, consequently, should not have allowed the state to introduce Davis' statements to Mark Gilliam and Rochelle Jones. There is no merit to this claim.

A co-conspirator's hearsay statements are exceptions to the general rule that hearsay is not admissible.

> [T]he following are not inadmissible as evidence, even though the declarant is available as a witness:
>
> . . . .
>
> (18) ADMISSIONS. –- A statement that is offered against a party and is:
>
> . . . .
>
> (e) A statement by a person who was a coconspirator of the party during the course, and in furtherance, of the conspiracy. Upon request of counsel, the court shall instruct the jury that the conspiracy itself and each member's participation in it must be established by independent evidence, either before the introduction of any evidence or before evidence is admitted under this paragraph.

§90.803(e), Fla. Stat. (1997). For such statement to be admissible, the state must establish by a preponderance of the evidence that a conspiracy existed. E.g., Foster v. State, 679 So.2d 747 (Fla. 1996), cert. denied, 117 S.Ct. 1259 (1997); Romani

v. State, 542 So.2d 984 (Fla. 1989); Tresvant v. State, 396 So.2d 733 (Fla. 3d DCA 1981). The state must show:

> 1) that a conspiracy existed; 2) that the declarant/coconspirator and the defendant against whom the statements are offered were members of the conspiracy; and 3) that the statements were made during the course and in furtherance of the conspiracy.

State v. Edwards, 536 So.2d 288, 292 (Fla. 1st DCA 1988), citing Briklod v. State, 365 So.2d 1023 (Fla. 1978); Honchell v. State, 257 So.2d 889 (Fla. 1971). Contrary to Brooks claim, the state proved the existence of a conspiracy.

At the beginning of the trial, the court and the parties discussed the co-conspirator hearsay rule. (XII 897-907). More discussion occurred on the second day of trial. (XIII 1059 et seq.). Another major discussion took place the following day, including a voir dire examination of Gilliam prior to his testimony. (XV 1561 et seq.). Defense counsel argued that no conspiracy had been established (XV 1561), and the prosecutor went through the evidence showing its existence. (XV 1572). After hearing argument and the examination of Gilliam, the trial court held that a conspiracy had been demonstrated by the preponderance of the evidence. (XV 1598). The record supports this conclusion.

The direct testimony of Gilliam about his statements and Brooks' on Monday, April 22, are evidence that a conspiracy existed. Brooks' denial that he was in Crestview on April 24 was contradicted by testimony from Melissa Thomas and Rochelle Jones

that he and Davis were, in fact, in Crestview that evening. The victim's statements that she was going to Crestview the evening of the 24th with the baby and Davis and the fact that the victims were found dead in Crestview also support the establishment of a conspiracy. The trial court did not err in holding that a conspiracy had been established.

Also contrary to Brooks' claim, his confrontation rights were not violated by allowing Gilliam to testify about Davis' statements. This Court recently addressed a similar claim in Nelson v. State, 24 Fla.L.Weekly S250 (Fla. Sept. 30, 1999), and held that silence in the face of a co-conspirator's statements amounted to an admission by acquiesce. Id. at S252. The Court stated: "Because there was an admission by Nelson, there can be no confrontation clause violation." Id. By his silence in the instant case, Brooks acquiesed in Davis' statements, and they became his admissions.

Early in the morning of April 25, 1996, Davis called Jones and told her "you ain't seen me." Later in the day, he asked if she were "cool." Although Davis made these statements after the murders, at the time he made them, he was actively trying to conceal his part in the murders, as was Brooks. Therefore, the conspiracy had not yet ended, and Davis' statements were admissible under the co-conspirator's hearsay rule.

There is no merit to this issue, and any relief based on it should be denied.

POINT 3

WHETHER THE TRIAL COURT PROPERLY ALLOWED THE ADMISSION OF OTHER STATEMENTS BY DAVIS.

Brooks argues that the trial court erred in allowing the state to introduce other hearsay statements that Davis made to Jerome Worley of The Crestview Police Department on April 29, 1996. There is no merit to this claim.

Worley and Dennis Haley, an agent of the Florida Department of Law Enforcement, interviewed Davis on April 26 and again on April 29.[3] During the first interview, Davis admitted that he had no relatives in Crestview. (XX 2437). At the second interview Worley and Haley confronted Davis with additional information, and Davis admitted he was in Crestview the evening of April 24. (XX 2488-89). Worley arrested Davis after this admission (XX 2489), and Davis then implicated Brooks.

When the state announced its intention to introduce Worley's testimony, the court and parties discussed the issue. (XIX 2291 et seq.). The judge directed the parties to research the issue further and stated that he would hear further argument when the court reconvened after the weekend. (XIX 2303). Further discussion then occurred. (XIX 2303-12). When court reconvened on April 6, 1998, the court heard extensive argument from the parties. (XIX 2341 et seq.). The prosecutor wanted to introduce six items

[3] The trial court deemed Haley's testimony about these interviews to be cumulative and refused to allow the jury to hear it. (XX 2414).

of information through Worley's testimony, but the court found only three reliable enough to be introduced. (XIX 2370-71). Thereafter, Worley was allowed to testify that Davis said he was in Crestview on April 24 and that Davis said that he and Brooks rode to Crestview with the victims in Carlson's car, arriving about 9:00 p.m. (XX 2489).

Davis consistently denied any involvement in these murders. Not until confronted with additional information on April 29 did he make any admissions about being with the victims. He was then arrested and, after that, tried to shift the blame for the murders to Brooks.[4] Davis' statements just prior to his arrest should be construed as being part of the conspiracy and his arrest as defining the end of the conspiracy. Even if not so construed, their admission was harmless. Thomas, Bess, and Jones all placed the defendants in Crestview around 9:00 to 9:30 p.m. on April 24, and Brooks told Goodman that he killed the victims and rode in the backseat of the car.

There is no merit to this claim, and it should be denied.

POINT 4

WHETHER THE TRIAL COURT PROPERLY DENIED THE MOTIONS FOR NEW TRIAL.

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[4] The jury never heard about Davis' implication of Brooks.

Brooks argues that the trial court erred in denying his motions for new trial that alleged that key state witnesses had recanted their trial testimony. There is no merit to this claim.

At trial Mark Gilliam testified to conversations at Davis' home on April 22 and 23, 1996, at which he, Davis, and Brooks were present, during which the plan to kill the victims was discussed. (XVI 1638-54). Also at trial Terrance Goodman testified that, while in jail together, Brooks told him, among other things, that he "copped" the bodies and "offed" the broad (XVIII 2099) and that he rode in the backseat of the victim's car. (XVIII 2100).

Shortly after being convicted, Brooks filed a motion for new trial, raising twenty-four grounds, on April 15, 1998. (I 191). On June 26, 1998 Brooks filed an amended motion for new trial, alleging that he had newly discovered evidence that Goodman lied during his trial testimony. (II 272-75). He also moved to continue his sentencing until the court heard the new trial motions. (II 276). The parties stipulated to continuing the sentencing, and the court set a hearing on the motions for August 21, 1998. (II 278).

The newly discovered evidence was contained in a letter, ostensibly from Goodman to his co-defendant Brandon Dawson. (II 274). The parties introduced numerous witnesses at the August 21 hearing. (VI 1015 et seq.). Goodman testified and denied writing the letter relied on in the amended motion. (VI 1119). After

hearing argument from the parties, the court denied both the original and amended motions for new trial. (VI 1151-52).

On October 12, 1998 Brooks filed a second amended motion for new trial alleging that a letter received from Gilliam prompted defense counsel to take a sworn statement from Gilliam in which he recanted his trial testimony. (III 565-68). Ten days later Brooks filed yet another motion for new trial claiming that counsel had received a letter from Goodman recanting his testimony at trial. (III 569-71). The trial court held a hearing on the October motions for new trial on October 28, 1998. (IV 593 et seq.).

At that hearing Gilliam recanted his trial testimony. (IV 611-21). After Gilliam testified, the prosecutor asked that he be detained so that a warrant could be prepared for his arrest for perjury. (IV 708). The court granted that request, appointed a public defender for Gilliam, and continued the hearing until November. (IV 710).

On November 16, 1998 the court heard numerous witnesses and the parties on the third amended motion for new trial. (VII 1237 et seq.). During that hearing, Goodman testified that he wrote the letter to defense counsel because Brooks' father told him that the state attorney's office was being investigated for getting people to lie about Brooks. (VII 1244-45). Then he stated that he lied in the letter, recanted the letter, and said that he told the truth in his trial testimony. (VII 1246-49).

At the end of the hearing the prosecutor told the court that Gilliam might be recalled. (VII 1337). The court set November 19, 1998 for any further proceedings. (VII 1338). On that date Gilliam appeared before the court, recanted his October recantation, and went back to his trial testimony. (V 938-44). Gilliam apologized to the court for lying in October and stated that he decided to change his testimony again after his mother told him to tell the truth. (V 955-56). On cross-examination by defense counsel he reiterated that he decided to change his October testimony after talking with his mother. (V 970).

The parties filed memoranda supporting their positions. (V 871, 879, 891). The court issued a written order denying the second and third amended motions for new trial on December 15, 1998. (V 907). In doing so the court found that Gilliam's October recantation "was unreliable" (V 907) and that "Goodman's recantation by letter and his notarized statement . . . were not truthful and are unreliable." (V 908).

Granting or denying a motion for new trial is within the trial court's discretion, and its ruling will not be disturbed on appeal unless an abuse of discretion is shown. Jones v. State, 709 So.2d 512 (Fla. 1998); Bell v. State, 90 So.2d 704 (Fla. 1956); Henderson v. State, 135 Fla. 548, 185 So. 625 (1938). Brooks has failed to demonstrate that the trial court abused its discretion in denying his motions for new trial.

In reaching its decision the court relied on Brown v. State, 381 So.2d 690 (Fla. 1980). In Brown this Court considered a trial court's denial of a new trial where a witness recanted his trial testimony in an affidavit, but reaffirmed the testimony and recanted the affidavit at a hearing on the matter. In affirming the denial this Court stated that "a witness's post trial recantation of testimony, followed by a clear recantation of the post trial statements, is not sufficient to overturn a jury verdict and sentence." Id. at 693; Jent v. State, 408 So.2d 1024 (Fla. 1981) (same). The same holds true for this case.

As this Court has long held, recanted "testimony is exceedingly unreliable, and it is the duty of the court to deny a new trial where it is not satisfied that such testimony is true. Especially is this true where the recantation involves a confession of perjury." Henderson, 135 Fla. at 561, 185 So. at 630; Armstrong v. State, 642 So.2d 730 (Fla. 1994), cert. denied, 514 U.S. 1085 (1995); Bell. The trial court relied on this statement of law and was "not satisfied that either witnesses' recantation of their trial testimony was truthful." (V 910). Instead, the court found that "both witnesses gave credible explanations as to why their recantations were false." (V 910).

The record supports the trial court's ruling and "this Court, as an appellate body, has no authority to substitute its view of the facts for that of the trial judge when competent substantial evidence exists to support the trial judge's conclusion." Jones,

709 So.2d at 514-15, quoting Spaziano v. State, 692 So.2d 174, 175, 177 (Fla. 1997). The denial of the motions for new trial, therefore, should be affirmed.

POINT 5

WHETHER THE TRIAL COURT PROPERLY ALLOWED MARK GILLIAM AND TERRANCE GOODMAN TO TESTIFY.

Brooks argues that under the federal bribery statute, 18 U.S.C. §201(c)(2), the trial court erred in allowing Mark Gilliam and Terrance Goodman to testify because the state made deals with them in exchange for their testimony. There is no merit to this claim.

Although he mentions United States v. Singleton, 165 F.3d 1297 (10th Cir. 1999), Brooks ignores the holding of that case. In Singleton the Tenth Circuit en banc reversed a panel decision and held that an assistant United States attorney does not violate the federal bribery statute by presenting bargained-for testimony. No court has ruled otherwise.

Witnesses may testify so long as any bargain with the state is disclosed, the defendant is permitted to cross-examine the witness about the agreement, and the jury is instructed to weigh the testimony with caution. United States v. Dailey, 759 F.2d 192 (1st Cir. 1985); United States v. Guillame, 13 F.Supp. 1331 (S.D. Fla. 1998). Whether a witness is credible and the weight to be given the testimony are for the jury to decide. Brown v. State, 721

So.2d 274 (Fla. 1998), cert. denied, 119 S.Ct. 1582 (1999). Moreover, a trial judge's ruling on the admissibility of evidence will not be disturbed unless an abuse of discretion is demonstrated. Alston v. State, 723 So.2d 148 (Fla. 1998).

During direct examination, the prosecutor went through the state's agreement with both Gilliam (XVI 1678 et seq.) and Goodman (XVIII 2071 et seq.), and defense counsel cross-examined them closely. (XVI 1688-1705; XVIII 2117-54). Their bargains with the state were explored fully, and the court instructed the jury to consider the testimony with care. (XXII 2992-93). Brooks has shown no abuse of discretion in the admission of their testimony. This claim, therefore, should be denied.

POINT 6

WHETHER THE TRIAL COURT PROPERLY DENIED THE MOTION FOR MISTRIAL BASED ON THE PROSECUTOR'S CLOSING ARGUMENT.

In this point Brooks claims that the trial court erred in denying his motion for mistrial based on what he claims was a comment on his right to remain silent. There is no merit to this issue.

Mark Gilliam testified that he and Brooks met while both were stationed at Ft. Hood, Texas, that Brooks later visited him in Philadelphia, that he joined Brooks in Atlanta the weekend prior to these murders, and that he drove back to Eglin with Brooks. (XVI 1618-29). Glen Barberree of the Okaloosa County Sheriff's Office testified that he interviewed Davis on April 26, 1998 and that he did not give "Mark's" last name or location. (XIX 2313-16). Howard Bettis of FDLE participated in interviewing Brooks on April 26, 1998 and testified that Brooks did not disclose Gilliam's last name or location. (XIX 2319, 2324-25). Gilliam was not identified as having information about these murders and located until the following month. (XIX 2316; XX 2438). During his guilt-phase closing argument, the prosecutor stated: "Glen Barberree participated in the interviews of Walker Davis, Jr. He also went and found Mark Gilliam. That's the main reason we called him because he's the man who had to find Mark Gilliam, May 14th, two weeks after the arrest of the defendants in this case because the defendants would not give his whereabouts." (XXII 2855). Defense

counsel objected that the last sentence was a comment on silence. (XXII 2856). The prosecutor responded that it was a fair comment on the evidence, and the trial court overruled the objection. (XXII 2855).

It is well settled "that courts must prohibit all evidence or argument that is fairly susceptible of being interpreted by the jury as a comment on the right of silence." State v. Smith, 573 So.2d 306, 317 (Fla. 1990). However, wide latitude is permitted in argument to the jury. Moore v. State, 701 So.2d 545 (Fla. 1997), cert. denied, 118 S.Ct. 1536 (1998). Counsel may advance all legitimate arguments and draw logical conclusions from the evidence. Bonifay v. State, 680 So.2d 413 (Fla. 1996); Breedlove v. State, 413 So.2d 1 (Fla.), cert. denied, 459 U.S. 882 (1983). The prosecution can explain unsatisfactory responses to questions, Perez v. State, 648 So.2d 715 (Fla. 1995), and highlight inconsistencies in the evidence and testimony. Kramer v. State, 619 So.2d 274 (Fla. 1993).

The prosecutor's argument was only fair comment on the evidence. Brooks has shown no abuse of discretion in the trial court's ruling on his objection, and the court's overruling of the objection should be affirmed. Moore. Even if this Court were to find error on this point, any such error would be harmless because this single sentence in a seventy-page closing argument could not have affected the jury's verdict. Heath v. State, 648 So.2d 660 (Fla. 1994), cert. denied, 515 U.S. 1162 (1995).

POINT 7

WHETHER THE COURT PROPERLY DETERMINED JUROR QUALIFICATIONS.

Brooks claims that the trial court should have granted his challenges for cause to two prospective jurors and that it should not have granted one of the state's challenges for cause. There is no merit to this issue.

"The test for determining juror competency is whether the juror can lay aside any bias or prejudice and render his verdict solely on the evidence presented and the instructions on the law given . . . by the court." Lusk v. State, 446 So.2d 1038, 1041 (Fla.), cert. denied, 469 U.S. 873 (1984); Bryant v. State, 656 So.2d 426 (Fla. 1995); Vining v. State, 637 So.2d 921 (Fla.), cert. denied, 513 U.S. 1022 (1994). A prospective juror must be excused for cause if "any reasonable doubt exists as to whether a juror possesses the state of mind necessary to render an impartial recommendation as to punishment." Hill v. State, 477 So.2d 553, 556 (Fla. 1985); Bryant, 656 So.2d at 428. A challenged juror's competency is "a mixed question of law and fact, the resolution of which is within the trial court's discretion." Hall v. State, 614 So.2d 473, 476 (Fla.), cert. denied, 510 U.S. 834 (1993); Parker v. State, 641 So.2d 369 (Fla. 1994), cert. denied, 513 U.S. 1131 (1995); Vining. A "trial court's determination of juror competency will not be overturned absent manifest error." Fernandez v. State, 730 So.2d 277, 281 (Fla. 1999).

Brooks argues that the court erred in denying his challenges for cause to prospective jurors Claussen and Johnson. When the standards set out above are applied, however, no manifest error has be demonstrated.

In response to questions by the court and state about her ability to be fair and impartial Ms. Claussen responded that she thought she could be. (VII 158-59). When defense counsel questioned her about presuming Brooks to be innocent, she stated that she would want proof of his innocence. (VII 162). On further inquiry, however, she stated: "I guess he shouldn't have to prove his innocence." (VIII 162). After argument by both sides, the court denied Brooks' challenge for cause to Claussen. (VIII 164).

Defense counsel moved to strike Mr. Johnson for cause "because he couldn't think of any case of first degree murder where the death penalty wouldn't be appropriate." (XI 657). When the court questioned that, defense counsel responded that the prosecutor asked if Johnson could envision any case where he could vote for death and that he had just reversed that question. (XI 657). With further explanation of the process Johnson stated that he could follow the process, that he would not automatically vote for the death penalty, and that he would follow the law. (XI 663, 669). Defense counsel again challenged Johnson for cause, which the court denied. (XI 670-71).

Counsel used a peremptory challenge to remove Johnson from the jury panel. (XI 799). The following day, defense counsel asked

for an unspecified number of additional peremptory challenges. (XII 835). In doing so he mentioned that he used a peremptory challenge on Johnson because his challenge for cause had been denied. (XII 836). He did not, however, identify a juror that he would remove if he had an additional peremptory challenge. The trial court denied counsel's request. (XII 837).

Because he did not identify a specific juror that he would excuse if he had additional peremptory challenges, Brooks has not preserved this claim for appeal. Farina v. State, 680 So.2d 392 (Fla. 1996); Pietri v. State, 644 So.2d 1347 (Fla. 1994), cert. denied, 515 U.S. 1147 (1995); Dillbeck v. State, 643 So.2d 1027 (Fla. 1994), cert. denied, 514 U.S. 1022 (1995). Moreover, he has demonstrated no error in the court's refusal to excuse Claussen and Johnson for cause. As with most prospective jurors, those called in Brooks' case had little or no knowledge of the law of criminal or capital cases. See Castro v. State, 644 So.2d 987, 990 (Fla. 1994). When it was explained to them, however, the challenged prospective jurors stated that they could follow the law and instructions. Cf. Johnson v. State, 660 So.2d 637, 644 (Fla. 1995) (juror's statement that she thought and hoped she would follow the court's instruction rehabilitated her), cert. denied, 517 U.S. 1159 (1996); Bryant, 656 So.2d at 428 (challenged jurors stated that they would follow the instructions or that they would weigh the aggravators and mitigators); Castro, 644 So.2d at 990 (trial court's explanation of capital sentencing proceeding rehabilitated

prospective jurors); Parker, 641 So.2d at 373 (questioning by state and court established that challenged jurors met proper standards); Reaves v. State, 639 So.2d 1, 2 (Fla.) (challenged jurors were properly rehabilitated by questioning of the judge and prosecutor), cert. denied, 513 U.S. 990 (1994).

Brooks also argues that the court erred in granting the state's challenge for cause to Ms. Grimm. Grimm stated that she did not believe in the death penalty, that she did not know if she could be fair, and that there was no circumstance under which she could vote for death. (X 585-92). The prosecutor challenged her for cause, and defense counsel objected because he thought that people who opposed the death penalty should be allowed to serve on capital juries. (X 594). The court granted the state's cause challenge. (X 595).

Contrary to counsel's opinion, however, individuals "who cannot and will not conscientiously obey the law with respect to one of the issues in a capital case" can be removed for cause. Lockhart v. McCree, 476 U.S. 162, 176 (1986); San Martin v. State, 717 So.2d 462 (Fla. 1998). Grimm was emphatic in her inability to follow the law and the court's instructions, and the court properly excused her for cause. Cf. San Martin v. State, 705 So.2d 1337, 1343 (Fla. 1997) (jurors excused for cause expressed their personal opposition to the death penalty).

As this Court has held: "There is hardly any area of the law in which the trial judge is given more discretion than in ruling on

challenges of jurors for cause." Cook v. State, 542 So.2d 964, 969 (Fla. 1989). This is so because "the trial court is in the best position to observe the attitude and demeanor of the juror and to gauge the quality of the juror's responses." Johnson, 660 So.2d at 644. The record contains competent support for the denial of Brooks' challenges to Claussen and Johnson and for the granting of the state's challenge to Grimm. Brooks has demonstrated no abuse of discretion and this issue should be denied.

Brooks also claims that the court should have granted a mistrial when, during voir dire, the prosecutor asked the prospective jurors if any of them had ever cut an animal with a knife. Granting or denying a motion for mistrial is within the trial court's discretion, however, and a court's ruling will not be reversed absent an abuse of discretion. Terry v. State, 668 So.2d 954 (Fla. 1996). Brooks has demonstrated no abuse of discretion, and this subclaim should be denied. Moreover, given the facts of this brutal stabbing of a woman and her infant daughter and Brooks' statement that it takes heart to stab someone, if any error occurred, it was harmless.

POINT 8

WHETHER THE TRIAL COURT PROPERLY ADMITTED AUTOPSY PHOTOGRAPHS OF THE VICTIMS.

Brooks argues that the trial court erred in admitting autopsy photographs of the victims during the medical examiner's testimony. There is no merit to this claim.

This Court has addressed the admissibility of photographs many times and in Henderson v. State, 463 So.2d 196, 200 (Fla. 1986), stated: "Persons accused of crimes can generally expect that any relevant evidence against them will be presented in court. The test of admissibility is relevance. Those whose work products are murdered human beings should expect to be confronted by photographs of their accomplishments." Photographs are admissible if they assist a medical examiner in explaining the nature and manner in which wounds were inflicted. Bush v. State, 461 So.2d 936 (Fla. 1984), cert. denied, 475 U.S. 1031 (1986). They are also admissible when they "show the manner of death, the location of wounds, and the identity of the victim." Larkins v. State, 655 So.2d 95, 98 (Fla. 1995). The fact that photographs are gruesome does not mean that they are inadmissible. Preston v. State, 607 So.2d 404 (Fla. 1992), cert. denied, 507 U.S. 999 (1993); Thompson v. State, 565 So.2d 1311 (Fla. 1990); Foster v. State, 369 So.2d 928 (Fla.), cert. denied, 444 U.S. 885 (1979).

Joan Wood, the medical examiner for the Sixth Judicial Circuit, testified that in late April 1996 the Florida Department of Law Enforcement asked her to go to Portland, Oregon, to perform a second autopsy on each victim. (XIV 1263, 1265). She used the photographs from those autopsies to illustrate her testimony as to

the cause of death for each victim (XIV 1275, 1287), that Carlson had seventy-five stab wounds, eighteen of which were defensive (XIV 1282-83), and to show injuries to Carlson that were not apparent at the first autopsy because it was done less than twenty-four hours after her murder. (XIV 1281, 1293, 1316). Not only were the photographs relevant, they were also necessary to the medical examiner's testimony.

The admission of photographs is within the trial court's discretion, Wilson v. State, 436 So.2d 908 (Fla. 1983), and a trial court's ruling will not be disturbed absent a clear abuse of discretion. Pangburn v. State, 661 So.2d 1182 (Fla. 1995); Wilson. Brooks has shown no abuse of discretion in the trial court's allowing the introduction of these photographs. There is no merit to this issue, therefore, and it should be denied.

POINT 9

WHETHER THE TRIAL COURT PROPERLY REFUSED TO STRIKE THE VENIRE.

Brooks argues that the trial court erred in refusing to grant his motion to strike the venire because of the pretrial publicity about this case. There is no merit to this claim.

Jury selection began on March 23, 1998. (VIII 16). Ten of the first fourteen prospective jurors called had some knowledge of the case, and the trial court decided to conduct individual voir dire regarding pretrial publicity. (VIII 28). The following day, defense counsel orally moved for a change of venue, claiming that Brooks could not receive a fair trial because of pretrial publicity and the prospective jurors' knowledge of the case. (IX 285-86). The prosecutor responded that the prospective jurors not removed for cause stated that they would be fair and impartial and that a change of venue was not necessary. (IX 288-89). The court denied the motion for change of venue without prejudice so that Brooks could raise the issue again. (IX 289). Later, counsel asked to change the motion for change of venue to a motion to strike the venire because the former motion has to be filed before trial and accompanied by affidavits. (IX 368). The court denied the motion to strike. (IX 368).

On March 25, 1998 counsel filed a written motion to strike the venire based on pretrial publicity. (I 157). The court took the motion under advisement, but, later, denied it. (X 529). Brooks

renewed the motion to strike near the end of voir dire on the following day, and the court denied it. (XI 798). When Brooks again raised that motion just prior to the start of trial on March 27, 1998, the court again denied it. (XII 837).

The test for determining if a fair trial cannot be had because of pretrial publicity is whether the community's knowledge is so great and has generated so much prejudice, bias, and preconceived notions that the prospective jurors cannot put such matters out of their minds. Murphy v. Florida, 421 US 794 (1975); McCaskill v. State, 344 So.2d 1276 (Fla. 1977). Rulings on motions regarding the effect of pretrial publicity are within the trial court's discretion, and a defendant must demonstrate inherent prejudice. Manning v. State, 378 So.2d 274 (Fla. 1980); Cole v. State, 701 So.2d 845 (Fla. 1997), cert. denied, 118 S.Ct. 1370 (1998). Brooks did not carry this burden.

Most of the prospective jurors called in this case had some knowledge of it. The trial court, however, liberally granted Brooks' challenges for cause to those persons who had formed opinions as to his guilt or who indicated that they could not give him a fair trial. (E.g., Orr, VIII 40-42; Pankhurst, VIII 45-50; Burton, VIII 79-81; Agro, VIII 84-86; Irarraza, VIII 102-06; Byron, VIII 126-28; Larry, IX 240; Wyatt, XI 610-13; Robinson, XI 620-24; Bugbee, XI 633-34). As this Court stated: "The mere fact that jurors were exposed to pretrial publicity is not enough to raise the presumption of unfairness." Castro v. State, 644 So.2d 987,

990 (Fla. 1994); Farina v. State, 680 So.2d 392, 399 (Fla. 1996); Bundy v. State, 471 So.2d 9 (Fla. 1985), cert. denied, 479 U.S. 894 (1986). As the prosecutor pointed out, all of the jurors who sat on Brooks' case assured the court that any prior knowledge of the case would not affect their impartiality. See Irvin v. Dowd, 366 U.S. 717 (1961). Brooks has demonstrated no abuse of discretion in the trial court's denial of his motions based on pretrial publicity, and this claim should be denied. Cole; Rolling v. State, 695 So.2d 278 (Fla.), cert. denied, 119 S.Ct. 448 (1997); Henyard v. State, 689 So.2d 239 (Fla. 1996), cert. denied, 522 U.S. 546 (1997).

POINT 10

WHETHER THE TRIAL COURT PROPERLY ALLOWED THE STATE TO INTRODUCE DAVIS' HEARSAY STATEMENT.

Brooks argues that the trial court erred in allowing the state to introduce a statement Davis made to Glen Barberree of the Okaloosa Sheriff's Office during an interview on April 26. There is no merit to this claim.

Barberree testified that, during the interview, Davis denied being in Crestview the evening of April 24. (XIX 2313). When Davis made this statement, Brooks was also denying being in Crestview on the 24th. (E.g., XIII 1027). At that time the conspiracy was still in existence, and Davis' denial of being in Crestview was in furtherance of the conspiracy. The denial by both

Brooks and Davis showed their complicity in concocting a story to keep their conspiracy to murder the victims from being discovered.

No error has been demonstrated in this claim, and it should be denied.

POINT 11

WHETHER THE TRIAL COURT PROPERLY DENIED BROOKS' MOTIONS FOR JUDGMENT OF ACQUITTAL.

Brooks argues that the trial court erred in denying his motions for judgment of acquittal and that his convictions should not be affirmed. There is no merit to this claim.

The state filed a two-count indictment against Brooks. The first count charged the first-degree murder of Rachel Carlson, either premeditated or during the commission of an aggravated child abuse. (I 1). The second count charged that Brooks committed the first-degree murder of Alexis Stuart, either premeditated or during the commission of aggravated child abuse. (I 2). The trial court denied Brooks' motions for judgment of acquittal. (XX 2510; XXI 2781). The jury convicted Brooks of both counts as charged. (I 189-90; XXIII 3006).

When a defendant moves for a judgment of acquittal, he or she "admits not only the facts stated in the evidence adduced, but also admits every conclusion favorable to the adverse party that a jury might fairly and reasonably infer from the evidence." Lynch v. State, 293 So.2d 44, 45 (Fla. 1974). This Court has repeatedly

affirmed the rule that "courts should not grant a motion for judgment of acquittal unless the evidence is such that no view which the jury may lawfully take of it favorable to the opposite party can be sustained under the law." Id.; Gordon v. State, 704 So.2d 107 (Fla. 1997); Gudinas v. State, 693 So.2d 953 (Fla.), cert. denied, 118 S.Ct. 345 (1997); Barwick v. State, 660 So.2d 685 (Fla. 1995), cert. denied, 516 U.S. 1097 (1996); DeAngelo v. State, 616 So.2d 440 (Fla. 1993); Taylor v. State, 583 So.2d 323 (Fla. 1991). A trial court should "review the evidence to determine the presence or absence of competent evidence from which the jury could infer guilt to the exclusion of all other inferences." State v. Law, 559 So.2d 187, 189 (Fla. 1989) (emphasis in original); Benedith v. State, 717 So.2d 472 (Fla. 1998); Orme v. State, 677 So.2d 258 (Fla. 1996), cert. denied, 519 U.S. 1079 (1997); Barwick; Atwater v. State, 626 So.2d 1325 (Fla. 1993), cert. denied, 511 U.S. 1046 (1994). The trial court's review of the evidence must be "in the light most favorable to the state," Law, 559 So.2d at 189, Benedith, and the state need not "conclusively rebut every possible variation of events which can be inferred from the evidence but [needs] only to introduce competent evidence which is inconsistent with the defendant's theory of events." Atwater, 626 So.2d at 1328; Benedith; Barwick; Law. If the state does this, the case should be presented to the jury: "Where there is room for a difference of opinion between reasonable men as to the proof or facts from which an ultimate fact is sought to be established, or

where there is room for such differences as to the inference which might be drawn from concealed facts, the Court should submit the case to the jury." Lynch, 293 So.2d at 45; Orme; Barwick. Then, as this Court has recognized, "the weight of the evidence and the witnesses' credibility are questions solely for the jury." Donaldson v. State, 722 So.2d 177, 181 (Fla. 1998).

A longstanding rule of appellate review is that judgments of conviction come to reviewing courts with a presumption of correctness and that any conflicts in the evidence must be resolved in favor of the judgment or verdict. Terry v. State, 668 So.2d 954 (Fla. 1996); Holton v. State, 573 So.2d 283 (Fla. 1990), cert. denied, 500 U.S. 960 (1991); Williams v. State, 437 So.2d 133 (Fla. 1983), cert. denied, 466 U.S. 909 (1984); Tibbs v. State, 397 So.2d 1120 (Fla. 1981), aff'd, 457 U.S. 31 (1982); Spinkellink v. State, 313 So.2d 666 (Fla. 1975), cert. denied, 428 U.S. 911 (1976); Taylor v. State, 139 Fla. 542, 190 So. 691 (1939). "It is not this Court's function to retry a case or reweigh conflicting evidence submitted to the trier of fact." Donaldson, 722 So.2d at 181; Tibbs. In other words, an appellate court "has no authority at law to substitute its conclusions for that of a jury in passing upon conflicts or disputes in the evidence." Taylor, 139 Fla. at 547, 190 So. At 693. A district court of appeal, in applying this rule, commented that "it is axiomatic that appellate judges, who review only the cold record, are not in a position to fully determine the credibility of witnesses and are not at liberty to simply reweigh

the evidence that was presented to the" factfinder. State v. Reutter, 644 So.2d 564, 565 (Fla. 2d DCA 1994); Tibbs. Therefore, because the state prevailed in the trial court, factual conflicts in this case should be resolved in the state's favor, i.e., in the light most favorable to supporting the judgment and sentence. Orme.

Applying the rules set out above, it is obvious that the trial court did not err in denying Brooks' motions for judgment of acquittal, that the evidence supports Brooks' convictions, and that this Court should affirm those convictions.

Contrary to his claim that he never stated he was in Carlson's car and never confessed, Brooks told Goodman that he rode to Crestview in the backseat of her car and that he "offed the broad" and "copped the bodies." (XVIII 2099-2100). The medical examiner testified that the wounds appeared to be consistent with someone in the backseat stabbing the victims. (XIV 1319, 1330). Gilliam stated that Brooks was to receive several thousand dollars for killing the victims. (XVI 1647).

This evidence supports the jury's verdicts finding Brooks guilty of two counts of first-degree murder. The trial court did not err in denying the motions for judgment of acquittal, and Brooks' convictions of first-degree murder should be affirmed.

POINT 12

WHETHER THE TRIAL COURT PROPERLY CONSIDERED THE AGGRAVATORS.

The trial court found four aggravators applicable to both murders (prior violent felony; cold, calculated, and premeditated (CCP); pecuniary gain; and committed during a felony). (III 411-413). A fifth aggravator was also found for each, i.e., heinous, atrocious, or cruel (HAC) as to Carlson (III 413) and victim under twelve years of age as to the baby. (III 414). Brooks argues that the court erred in finding all of the aggravators. There is no merit to this claim.

Standard of Review

As this Court has recognized, its function is not "to reweigh the evidence to determine whether the State proved each aggravating circumstance beyond a reasonable doubt – that is the trial court's job." Willacy v. State, 696 So.2d 693, 695 (Fla.), cert. denied, 118 S.Ct. 419 (1997). Instead, this Court's "task on appeal is to review the record to determine whether the trial court applied the right rule of law for each aggravating circumstance and, if so, whether competent substantial evidence supports its findings." Id. Thus, when there is a legal basis for finding an aggravator, this Court will not substitute its judgment for that of the trial court. Occhicone v. State, 570 So.2d 902 (Fla. 1990), cert. denied, 500 U.S. 938 (1991).

Pecuniary Gain

The trial court made the following findings regarding this aggravator:

> 3. The capital felony was committed for pecuniary gain.
>
> The evidence proved that Lamar Brooks's co-defendant, Walker Davis, Jr., purchased a life insurance policy on Alexis Stuart in the amount of $100,000.00. Walker Davis, Jr. would collect the proceeds from the policy as the primary beneficiary. He promised Lamar Brooks and Mark Gilliam substantial sums of money for their assistance in the murders of Rachel Carlson and Alexis Stuart. The court is satisfied that the purpose of Walker Davis, Jr.'s purchase of the life insurance policy on Alexis Stuart was to attempt to collect the proceeds as the primary beneficiary after her and her mother's "unfortunate murder" in a high-crime area of Crestview. The court is equally satisfied that Lamar Z. Brooks's reasons to commit these murders was to receive the money promised from the insurance proceeds.
>
> As to each victim, the State has proven this aggravating factor beyond a reasonable doubt.

(III 412-13). Contrary to Brooks' contention the record supports the court's conclusion that "Brooks's reason to commit these murders was to receive the money promised from the insurance proceeds."

To prove pecuniary gain, "the State must prove beyond a reasonable doubt that the murder was motivated, at least in part, by a desire to obtain money, property, or other financial gain." Finney v. State, 660 So.2d 674, 680 (1995), cert. denied, 516 U.S. 1096 (1996). To this end, the state established that Brooks was to

receive four to eight thousand dollars for killing the victims (XVI 1647) and that he did, indeed, kill them. (XVIII 2099-2100). The pecuniary gain aggravator is present in virtually all contract killings. E.g., McDonald v. State, 24 Fla.L.Weekly S347 (Fla. July 1, 1999); Gordon v. State, 704 So.2d 107 (Fla. 1998); Bonifay v. State, 680 So.2d 413 (Fla. 1996); Mordenti v. State, 630 So.2d 1080 (Fla.), cert. denied, 512 U.S. 1227 (1994); Echols v. State, 484 So.2d 568 (Fla. 1985), cert. denied, 479 U.S. 871 (1986). These murders for hire are no different from the just listed cases.

The record supports finding the pecuniary gain aggravator applicable to both murders. Brooks has shown no error on this claim, and the trial court's findings should be affirmed.

Cold, Calculated, and Premeditated (CCP)

The trial court made the following findings as to CCP:

> 2. The capital felony was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.
>
> The evidence demonstrates that Rachel Carlson and Alexis Stuart's murders were the culmination of the deliberate, cold-blooded plan of the Defendant to do away with Rachel Carlson and her three month old daughter, Alexis Stuart, for profit. The following sequence of events demonstrate the cold-blooded nature of the Defendant's murder of Rachel Carlson and Alexis Stuart:
>
> a) The Defendant organized and orchestrated the murders with his cousin, Walker Davis, Jr., and friend, Mark Gilliam, on April 22 and 23, 1996. The time, place, and method of the murders were discussed, as

> well as, payment for Lamar Z. Brooks and Mark Gilliam. Gloves were tried on by Brooks and Davis in Gilliam's presence. A getaway plan in which Gilliam was to meet Brooks and Davis and drive them out of Crestview was discussed and agreed upon.
>
> b) The murders were committed in cold, calculated, premeditated fashion as planned on April 24, 1996. Gloves were worn by the murderers as demonstrated by the lack of physical evidence, i.e., hand prints without ridge detail. The murder weapon or weapons, as well as any bloody clothing, were taken from the scene and disposed of, never to be found.
>
> c) The body of Alexis Stuart was mutilated after death in an obvious attempt to make it appear that she was slashed to death in the same brutal manner as Rachel Carlson.
>
> d) The totality of the matters raised in Paragraphs a - c above satisfies this court that Rachel Carlson and Alexis Stuart were marked for death on the night of April 24, 1996. The Defendant and his co-defendant, Walker Davis, Jr., planned the murders of Rachel Carlson and Alexis Stuart in a cold, calculated, and premeditated manner.
>
> As to each victim, the State has proven this aggravating factor beyond a reasonable doubt.

(III 412). The record supports these findings.

As Brooks states, CCP is applicable to execution-type murders and contract killings. Thus, CCP is found to exist in virtually all contract killings. E.g., McDonald; Gordon; Bonifay; Archer v. State, 673 So.2d 17 (Fla.), cert. denied, 519 U.S. 876 (1996); Mordenti; Echols. The state proved that these were murders for

hire, and the trial court did not err in finding CCP applicable to both.

Brooks claims that CCP should not have been found because the murders were the result of intense emotion. Davis' motivation may have been partly emotional. Brooks, on the other hand, was motivated solely by greed. Moreover, these were not "domestic" murders, especially since Brooks, the actual killer, had no relationship with the victims. See Reese v. State, 694 So.2d 678 (Fla. 1997).

The CCP aggravator should be affirmed for each murder.

Heinous, Atrocious, or Cruel (HAC)

The trial court made the following findings in deciding that Carlson's murder was HAC:

> 5. The capital felony was especially heinous, atrocious, or cruel.
>
> This court is satisfied that this aggravating factor has been proven beyond a reasonable doubt as to the murder of Rachel Carlson. The medical examiner testified that Rachel Carlson was choked, stabbed, and beaten to death in her car while still strapped in her seat belt in the driver's seat. Rachel Carlson was aware that she was being murdered, which is demonstrated by the defensive wounds found on her hands indicating that she tried to ward off the attack on her and her child.
>
> The medical examiner testified that Rachel Carlson was choked, beaten and then stabbed over seventy-five times with a short-blade knife. Her hands were cut numerous times with the knife as she grabbed for it, and were stabbed through and through as she tried to protect herself. One can only

> imagine the fear and anxiety experienced by Rachel Carlson as she was strapped in her seat belt while undergoing this brutal attack as she desperately fought to save the lives of herself and her infant child. That would be heinous, atrocious or cruel. Her panic and fear before her merciful death is unfathomable.
>
> This court also finds that the evidence demonstrates beyond a reasonable doubt that Lamar Z. Brooks is in fact the person who stabbed Rachel Carlson to death. Terrance Goodman, Brooks's cell mate at the Okaloosa County Jail, testified that the defendant admitted to and even bragged about the murders. Brooks remarked to Goodman that it took "heart" to stab someone and further remarked "When I killed the broad" and "When I copped those bodies." Never did Brooks state to Goodman that "we" killed them or "he" (Walker Davis, Jr.) killed them. Terrance Goodman also testified that Lamar Brooks told him that he was seated in the backseat of Rachel Carlson's car on the night of the murders. The backseat passenger is who the forensic examination of the car and bodies proves is the person who carried out the knife attack. The testimony of the medical examiner and the bloodstain pattern expert conclusively demonstrated that the backseat passenger's hands were awash with blood and that he was in the position to carry out all of the stab wounds to both victims.
>
> As to the victim, Rachel Carlson, this aggravating factor has been proven beyond a reasonable doubt.

(III 413). The record supports these findings. The medical examiner testified that Carlson sustained seventy-five stab wounds, eighteen of which were defensive (XIV 1282-83) and that all of Carlson's injuries occurred while she was alive (XIV 1298).

This Court has found HAC applicable to virtually all stabbing deaths. E.g., Bates v. State, 24 Fla.L.Weekly S471 (Fla. Oct. 7, 1999); Brown v. State, 721 So.2d 274 (Fla. 1998), cert. denied, 119 S.Ct. 1582 (1999); Mahn v. State, 714 So.2d 391 (Fla. 1998); Allen v. State, 662 So.2d 323 (Fla. 1995), cert. denied, 517 U.S. 1107 (1996); Barwick v. State, 660 So.2d 685 (Fla. 1995), cert. denied, 516 U.S. 1097 (1996); Finney v. State, 660 So.2d 674 (Fla. 1995), cert. denied, 516 U.S. 1096 (1996); Whitton v. State, 649 So.2d 861 (Fla. 1994), cert. denied, 516 U.S. 832 (1995); Pittman v. State, 646 So.2d 167 (Fla. 1994), cert. denied, 514 U.S. 1119 (1995); Garcia v. State, 644 So.2d 59 (Fla. 1994), cert. denied, 514 U.S. 1085 (1995); Derrick v. State, 641 So.2d 378 (Fla. 1994), cert. denied, 513 U.S. 1130 (1995); Atwater v. State, 626 So.2d 1325 (Fla. 1993), cert. denied, 511 U.S. 1046 (1994). The trial court did not err in finding HAC applicable to Carlson's murder, and that finding should be affirmed.

Brooks claims that there is no indication that he intended to cause Carlson unnecessary and prolonged suffering. AS this Court has recognized, however: "Unlike the [CCP] aggravator, which pertains specifically to the state of mind, intent and motivation of the defendant, the HAC aggravator focuses on the means and manner in which death is inflicted and the immediate circumstances surrounding the death." Brown, 721 So.2d at 277; Stano v. State, 460 So.2d 890, 893 (Fla. 1984), cert. denied, 471 U.S. 1111 (1985). A defendant's mental state might be a mitigating factor that can be

weighed against the HAC aggravator. Orme v. State, 677 So.2d 258 (Fla. 1996), cert. denied, 519 U.S. 1079 (1996). Brooks, however presented nothing in the nature of mental mitigation.

There is no merit to Brooks' complaints about the HAC aggravator, and this claim should be denied.

Felony Murder

The trial court found the felony murder aggravator applicable to each murder:

> 4. The murders of each victim was committed while Lamar Z. Brooks was engaged, or was an accomplice, in the commission of, or flight after committing, a felony, to wit: aggravated child abuse of Alexis Stuart. Section 921.141(5)(d).
>
> As to the victim, Alexis Stuart, the State has proven beyond and to the exclusion of every reasonable doubt that the defendant was engaged in, or was an accomplice, in the commission of aggravated child abuse. Likewise, as to the victim, Rachel Carlson, the State has proven beyond and to the exclusion of every reasonable doubt that the defendant murdered Rachel during the commission of the aggravated child abuse murder of Alexis Stuart and, in fact, to facilitate the commission of and escape from the murder of Alexis.

(III 413). Brooks cites Clark v. State, 609 So.2d 513 (Fla. 1992); Jones v. State, 580 So.2d 143 (Fla. 1991); and Parker v. State, 458 So.2d 750 (Fla. 1984), to support his claim that the trial court erred in finding the felony murder aggravator applicable. In Clark, Jones, and Parker this Court found taking property from the

victim after death not to constitute robbery. These cases are factually distinguishable from the instant case. Aggravated child abuse and first-degree murder can be based on the same core acts. Donaldson v. State, 722 So.2d 177 (Fla. 1998); see Dingle v. State, 699 So.2d 834 (Fla. 3d DCA 1997); Green v. State, 680 So.2d 1067 (Fla. 3d DCA 1996). Thus, the trial court did not err in finding the felony murder aggravator.

Even if this Court decides that the trial court erred in finding that this aggravator had been established, no relief is warranted. As stated by this Court previously: "If there is no likelihood of a different sentence, the trial court's reliance on an invalid aggravator must be deemed harmless." Rogers v. state, 511 So.2d 526, 535 (Fla. 1987), cert. denied, 484 U.S. 1020 (1988). Striking the felony murder aggravator would leave four aggravators applicable to each murder to be weighed against scant mitigation. Given the presence of four strong aggravators and the lack of significant mitigators, there is no reasonable likelihood that Brooks would have received a sentence of life imprisonment if this aggravator had not been considered. See Zack v. State, 25 Fla.L.Weekly S19 (Fla. Jan. 6, 1999); Geralds v. State, 674 So.2d 96 (Fla.), cert. denied, 519 U.S. 819 (1996); Barwick; Fennie v. State, 648 So.2d 95 (Fla. 1994), cert. denied, 513 U.S. 1169 (1995); Pietri v. State, 644 So.2d 1347 (Fla. 1994), cert. denied, 515 U.S. 1147 (1995); Green v. State, 641 So.2d 391 (Fla. 1994), cert. denied, 513 U.S. 1159 (1995); Wyatt v. State, 641 So.2d 355

(Fla. 1994), cert. denied, 514 U.S. 1023 (1995); Peterka v. State, 640 So.2d 59 (Fla. 1994), cert. denied, 513 U.S. 1129 (1995).

There is also no merit to Brooks' automatic aggravator claim. This Court has uniformly and consistently rejected such claims because:

> Eligibility for this aggravating circumstance is not automatic: The list of enumerated felonies in the provision defining felony murder is larger than the list of enumerated felonies in the provision defining the aggravating circumstances of commission during the course of an enumerated felony. A person can commit felony murder via trafficking, carjacking, aggravated stalking, or unlawful distribution, and yet be ineligible for this particular aggravating circumstance. This scheme thus narrows the class of death-eligible defendants. See Zant v. Stephens, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983). See generally White v. State, 403 So.2d 331 (Fla. 1981).

Blanco v. State, 706 So.2d 7, 11 (Fla. 1997), cert. denied, 119 S.Ct. 96 (1998). Brooks has presented no reason for overruling what was said in Blanco.

Prior Conviction

As to the prior conviction of violent felony aggravator, the trial court found:

> 1. The Defendant was previously convicted of another capital felony.
>
> As to the crime against Rachel Carlson, the Defendant also was previously convicted of a capital felony, the murder of Alexis Stuart.
>
> As to the crime against Alexis Stuart, the Defendant also was previously convicted of

> a capital felony, the murder of Rachel Carlson.
>
> Accordingly, as to each crime for which the Defendant is to be sentenced, he has been previously convicted of one capital felony. This aggravating factor was proven beyond a reasonable doubt and was accorded great weight in determining the appropriate sentence in this case.

(III 411-12). As Brooks acknowledges, contemporaneous convictions qualify for this aggravator. Knight v. State, 721 So.2d 287 (Fla. 1998), cert. denied, 120 S.Ct. 459 (1999); Cole; Wike v. State, 698 So.2d 817 (Fla. 1997), cert. denied, 118 S.Ct. 714 (1998). The court's finding this aggravator applicable to each murder should be affirmed.

Victim Under Twelve Years of Age

The trial court found the under twelve years of age aggravator applicable to the baby's murder:

> 6. The victim, Alexis Stuart, was a person less than twelve (12) years of age.
>
> As to the victim, Alexis Stuart, the State has proven beyond and to the exclusion of every reasonable doubt that she was three months old.

(III 417).

Brooks claims that this aggravator, based on the victim's status, is unconstitutional. This issue is procedurally barred because he did not raise it at trial. Larzelere v. State, 676 So.2d 394 (Fla.), cert. denied, 519 U.S. 1043 (1996); Jackson v.

State, 648 So.2d 85 (Fla. 1996). Even if not procedurally barred, however, it has no merit.

The legislature added this aggravator to subsection 921.141(5), Florida Statutes, to read as follows: "(1) the victim of the capital felony was a person less than 12 years of age." Ch. 95-159, §1, Laws of Fla., effective October 1, 1995. Other status aggravators include (5)(j) (law enforcement officers), (5)(k) (public officials), and (5)(m) (elderly persons). See Pietri. This classification of being less than twelve years old "genuinely narrow[s] the class of persons eligible for the death penalty," Zant v. Stephens, 462 U.S. 862, 877 (1983), because not all homicide victims are less than twelve years old. Thus, this aggravator will apply only to those people who murder children that are less than twelve, a narrow subset of all homicides. Moreover, this aggravator "reasonably justif[ies] the imposition of a more severe sentence compared to others found guilty of murder." Id. The statutory class, persons under twelve years of age, bears a reasonable relationship to a legitimate state interest, i.e., the protection of people who are less able to protect themselves than are the general population. This aggravator is no broader or more inclusive than the other groups of people that the legislature, in its discretion, has decided need or deserve special protection. E.g., §921.141(5)(j), (k), (m).

There is also no merit to Brooks' claim that this aggravator is improperly doubled with the felony murder aggravator for the

baby's murder. As this Court stated in Banks v. State, 700 So.2d 363, 367 (Fla 1997), cert. denied, 118 S.Ct. 1314 (1998), "there is no reason why the facts in a given case may not support multiple aggravating factors so long as they are separate and distinct aggravators and not merely restatements of each other."

Section 827.03, Florida Statutes (1995), defines and prohibits aggravated child abuse, while a "child" is defined as any person under the age of 18 years. §827.01(1), Fla. Stat. (1995). On the other hand, the aggravator at issue here reads: "The victim of the capital felony was a person less than 12 years of age." §921.141(5)(1), Fla. Stat. (1995). Although age is central to both aggravated child abuse and the (5)(1) aggravator, each requires proof of a different age. Because they contain different elements, there is no merit to Brooks' claim that the felony murder/aggravated child abuse and victim under 12 years of age aggravators were improperly given double consideration. Similarly, there is no merit to Brooks' claim that the felony murder and CCP aggravators were improperly doubled. Again, each aggravator addresses different concerns. See, e.g., Foster v. State, 679 So.2d 747 (Fla. 1996) (pecuniary gain and felony murder aggravators), cert. denied, 520 U.S. 1122 (1997); Bonifay v. State, 626 So.2d 1310 (Fla. 1993) (pecuniary gain and CCP); Fotopoulos v. State, 608 So.2d 784 (Fla. 1992) (same), cert. denied, 508 U.S.924 (1993).

Brooks has demonstrated no reversible error regarding the trial court's finding five aggravators applicable to each murder, and his death sentence should be affirmed.

POINT 13

WHETHER THE TRIAL COURT PROPERLY EVALUATED THE MITIGATING EVIDENCE.

Brooks argues that, if it had evaluated the mitigating evidence properly, the trial court would have found that the statutory mitigators of his being merely an accomplice, his lack of a significant criminal history, and his age had been established. There is no merit to this claim.

In Rogers v. State, 511 So.2d 526 (Fla. 1987), cert. denied, 484 U.S. 1020 (1988), this Court set out the manner in which trial courts should address proposed mitigating evidence. Pursuant to Rogers a trial court must "consider whether the facts alleged in mitigation are supported by the evidence[,] . . . must determine whether the established facts are of a kind capable of mitigating the defendant's punishment[, and] . . . must determine whether they are of sufficient weight to counterbalance the aggravating factors." Id. at 534. Whether the greater weight of the evidence establishes a proposed mitigator "is a question of fact." Campbell v. State, 571 So.2d 415, 419 n.5 (Fla. 1990); Lucas v. State, 613 So.2d 408 (Fla. 1992), cert. denied, 510 U.S. 845 (1993). A trial court has broad discretion in determining whether mitigators apply,

and the decision on whether the facts establish a particular mitigator will not be reversed because this Court or an appellant reaches a contrary conclusion absent a palpable abuse of discretion. Banks v. State, 700 So.2d 363 (Fla. 1997), cert. denied, 118 S.Ct. 1314 (1998); James v. State, 695 So.2d 1229 (Fla.), cert. denied, 118 S.Ct. 569 (1997); Foster v. State, 679 So.2d 747 (Fla. 1996), cert. denied, 117 S.Ct. 1259 (1997); Pietri v. State, 644 So.2d 1347 (Fla. 1994), cert. denied, 515 U.S. 147 (1995); Wyatt v. State, 641 So.2d 355 (Fla. 1994), cert. denied, 514 U.S. 1023 (1995); Arbelaez v. State, 626 So.2d 169 (Fla. 1993), cert. denied, 511 U.S. 1115 (1994); Preston v. State, 607 So.2d 604 (Fla. 1992), cert. denied, 507 U.S. 999 (1993); Sireci v. State, 587 So.2d 450 (Fla. 1991), cert. denied, 503 U.S. 946 (1992). A trial court's finding that the facts do not establish a mitigator "will be presumed correct and upheld on review if supported by 'sufficient competent evidence in the record.'" Campbell, 571 So.2d at 419 n.5 (quoting Brown v. Wainwright, 392 So.2d 1327, 1331 (Fla. 1991)); Banks; Spencer v. State, 691 So.2d 1062 (Fla. 1996), cert. denied, 118 S.Ct. 213 (1997); Consalvo v. State, 697 So.2d 805 (Fla. 1996), cert. denied, 118 S.Ct. 1681 (1998); Duncan v. State, 619 So.2d 279 (Fla.), cert. denied, 510 U.S. 969 (1993); Johnson v. State, 608 So.2d 4 (Fla. 1992), cert. denied, 508 U.S. 919 (1993); Ponticelli v. State, 593 So.2d 483 (Fla. 1991), aff'd on remand, 618 So.2d 154 (Fla.), cert. denied, 510 U.S. 935 (1993). Resolving conflicts in the evidence is the trial court's duty, and

its decision is final if supported by competent substantial evidence. Parker v. State, 641 So.2d 369 (Fla. 1994), cert. denied, 513 U.S. 1131 (1995); Johnson; Sireci; Gunsby v. State, 574 So.2d 1085 (Fla.), cert. denied, 502 U.S. 843 (1991). As this Court has long held, "the weight to be given a mitigator is left to the trial judge's discretion." Mann v. State, 603 So.2d 1141, 1144 (Fla. 1992); Robinson v. State, 24 Fla. Law Weekly S393 (Fla. August 19, 1999); Hill v. State, 727 So.2d 198 (Fla. 1998); Alston v. State, 723 So.2d 148 (Fla. 1998); Spencer; Kilgore v. State, 688 So.2d 895 (Fla. 1996), cert. denied, 118 S.Ct. 103 (1997); Bonifay v. State, 680 So.2d 413 (Fla. 1996); Windom v. State, 656 So.2d 432 (Fla.), cert. denied, 516 U.S. 1012 (1995); Campbell; Swafford v. State, 533 So.2d 270 (Fla. 1988), cert. denied, 489 U.S. 1100 (1989).

The trial court made the following findings regarding the mitigating evidence:

> **B. MITIGATING FACTORS**
>
> STATUTORY MITIGATING FACTORS
>
> 1. The Defendant has no prior significant criminal history.
>
> The State presented evidence during the penalty phase that the Defendant has been previously convicted of: 1) Driving Under the Influence (Texas 1992), and 2) Disorderly Conduct (Texas 1994). The State argues that these two convictions coupled with the non-judicial punishment he received by the U.S. Army for his participation in stolen telephone services, the admitted drug use by the defendant, and the State's contention that the

Defendant perjured himself during testimony in the penalty phase should be considered by this Court as prior criminal history that is significant.

This Defendant has never been convicted of a felony. While this court does not consider the Defendant's prior behavior to be "law abiding", it does not consider the prior criminal history of the Defendant to be significant. Therefore, the Court recognizes the existence of this mitigating factor.

This mitigating factor was given very little weight.

2. The age of the Defendant at the time of the offense.

The Defendant was twenty-three (23) years of age at the time of the offense, a mature young adult with lifetime experience, including military combat overseas.

This mitigating factor was given very little weight.

3. The Defendant was an accomplice in the capital felony committed by another person, and his participation was relatively minor.

The Defendant stated to his cell mate, Terrance Goodman, that he road [sic] in the backseat of Rachel Carlson's car the night of the murders and that he was the one who "killed the broad" and "copped the bodies." Lamar Brooks never stated that Walker Davis, Jr., his co-defendant, murdered the victims. He further bragged to Terrance Goodman that it took "heart" to stab someone. The medical examiner and the Bloodstain pattern expert both testified that the backseat passenger was the one in position to carry out all the stab wounds to both victims. Based on the totality of the guilt phase testimony, the Court concludes that Lamar Brooks was the backseat passenger in Rachel Carlson's car and was, in

fact, the one who committed the murders of both Rachel Carlson and Alexis Stuart.

For the reasons stated above the court rejects the existence of this statutory mitigating circumstance.

NON-STATUTORY MITIGATING CIRCUMSTANCES

The Court asked the Defendant to prepare a memorandum suggesting all non-statutory mitigation he believed had been presented to either the jury or the Court at the separate sentencing hearing. A memorandum was prepared. Each suggestion of non-statutory mitigation circumstances presented in either the memorandum or during the sentencing hearing will be addressed using the terminology of the Defendant.

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

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

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

Walker Davis, Jr. in the murders of Rachel Carlson and Alexis Stuart.

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

2. The defendant has a strong family background and personal relationship of love and mutual respect with family members as well as participation in community affairs, church, choir, little league, and is the recipient of awards.

This Court does find that this Defendant had a very loving relationship with his family, participated in community affairs, attended church and choir, played little league, and was the recipient of awards as a youth. This defendant was afforded every opportunity to become a respectable citizen. His extended family includes member of the military, a judge, a state trooper, police officers, and other gainful occupations. The defense read several letters to this Court from these family members expressing love and affection for Lamar Z. Brooks. The defendant voluntarily elected to reject the values that had been taught to him by his loving family. He cannot point to a deprived childhood to explain his actions.

While the Court is convinced that this mitigating circumstance does exist, in light of the fact that the Defendant rejected the opportunities open to him by the virtue of the relationship he had with his family, it is given very little weight.

3. The Defendant is the only living son in his family due to the tragic death of his brother during the Defendant’s incarceration.

This mitigating circumstance is given some weight.

4. The Defendant served honorably in the military during his first tour and received an honorable discharge.

A good military record can be a valid mitigating factor. The defendant served one full term and a portion of another in the U.S. Army and was given a General Discharge Under Honorable Conditions. While his first term was not marred by unsatisfactory conduct and included a tour in Desert Storm, the defendant's second term was unsatisfactory, which is evidenced by the numerous infractions of law and discipline noted in his U.S. Army records. The discipline reports include incidences of direct disobedience and disrespect to commanding officers, failure to appear at duty post, drunkenness on duty, and theft.

If a General Discharge Under Honorable Conditions, standing alone, is considered mitigating, in light of the unsatisfactory conduct of the defendant's second term, it is entitled to little weight.

5. Family members, friends, relatives, and community members have attested to his good character and warm and loving relationships with family and friends.

The existence of living relationships is a mitigating factor. The defendant has an extended family who have attested through letters to this Court of the warm and loving relationships he has established with both family and friends. However, contrary to the warm and loving relationship he had established with family and friends, Lamar Brooks, along with his co-defendant and cousin, Walker Davis, Jr., planned the murders of a mother and her infant child. If Lamar Brooks had the capacity to establish warm and loving relationships, then he rejected these values in order to commit murder for money.

Accordingly, the Court gives this mitigating circumstance little weight.

6. The defendant's good jail conduct indicates that he could live in prison without problems.

This Court recognizes that good jail conduct can be a mitigating circumstance. Testimony was presented to this Court that the Defendant has been a good prisoner while being incarcerated and pending trial at the Okaloosa County Jail and has had a calming affect on other inmates.

This mitigating circumstance is given some weight.

7. Life without parole is sufficient to punish the Defendant.

The Defendant is a young man and would be incarcerated for a longer period of time than someone who was older might have to serve.

This mitigating circumstance is given some weight.

8. The Defendant conducted himself very appropriately through all proceedings and through the trial.

The Defendant was not a problem for either the court, his lawyer, or the bailiffs during his trial. He never committed any outbursts during any proceedings in this Court and has conducted himself appropriately.

The fact that he created no problems for any one during his trial is mitigating and will be given some weight.

9. The Defendant has maintained his innocence.

Lingering or residual doubt in not a mitigating factor in the State of Florida, King v. State, 514 So.2d 354 (Fla. 1987). Lest anyone misconstrue this last statement to think this Court has such a doubt, let me make it clear that I do not. The jury had no reasonable doubt about Defendant's guilt. This Court has no doubt of Defendant's guilt. Lamar Z. Brooks has been tried, convicted, and is soon to be sentenced for his acts.

> The fact that the Defendant still protests his innocence is irrelevant to this procedure. It is neither aggravating nor mitigating.

(III 414-17). The record supports these findings.

Brooks argues that the court erred in relying on Goodman's testimony to find that the statutory mitigator of being an accomplice had not been established. As the trial court found, however, Goodman testified that Brooks said that he "copped the bodies" and "offed the broad" (XVIII 2099) and that Brooks said he was in the backseat. (XVIII 2100). Thus, the record supports the court's conclusion that the evidence did not support Brooks' claim that he was merely an accomplice in these murders, and the court properly found this mitigator did not exist.

Brooks also complains about the court's findings regarding the no significant criminal history and age mitigators. The court found that both mitigators had been established, but gave them very little weight. Therefore, Brooks' complaint is, essentially that the court did not give enough weight to these mitigators. As stated earlier, the weight to be given is within the trial court's discretion. Brooks has shown no abuse of discretion in the weight given these mitigators. E.g.. Burns v. State, 699 So.2d 646, 650 (Fla. 1997) (weight given the no significant criminal history mitigator can be reduced based on prior criminal activities), cert. denied, 118 S.Ct. 1063 (1998); Echols v. State, 484 So.2d 568, 575 (Fla. 1985) ("if [age] is to be accorded any significant weight, it

must be linked with some other characteristic of the defendant or the crime such as immaturity or senility").

Brooks' complaint that the court improperly found the non-statutory mitigators to be relatively insignificant is also, essentially, a complaint about the weight given to them. The court considered and found established all of the non-statutory mitigators that Brooks proposed in his sentencing memorandum, except for the profession of innocence. (II 230-31). As was its prerogative, the court gave these mitigators from "very little" to "little" to "some" weight. Brooks has shown no abuse of discretion in the weight assigned by the trial court. Shellito v. State, 701 So.2d 837 (Fla. 1997), cert. denied, 118 S.Ct. 1537 (1998); Banks; Mungin v. State, 689 So.2d 1026 (Fla. 1995); Williamson v. State, 681 So.2d 688 (Fla. 1996).

Even if this Court were to find that the trial court erred in considering the mitigating evidence, any error would be harmless in light of the aggravators in this case. See Lawrence v. State, 691 So.2d 1068 (Fla.), cert. denied, 118 S.Ct. 205 (1997). Brooks has failed to demonstrate any error, however, let alone reversible error, and the trial court's findings on the mitigating evidence should be affirmed.

POINT 14

WHETHER VICTIM IMPACT EVIDENCE WAS PROPERLY ADMITTED.

Brooks claims that the trial court erred in allowing Rachel Carlson's parents to testify about her and the effect her death had on her family. There is no merit to this claim.

Defense counsel filed a pretrial motion asking that any victim impact evidence be presented to the court alone. (I 131). The court denied that motion. (II 249). At the beginning of the penalty phase defense counsel objected to the introduction of any victim impact evidence (XXIV 3020), and the prosecutor explained what victim impact evidence he planned to introduce. (XXIV 3023). Thereafter, Michael and Clarissa Stuart, Carlson's stepfather and mother, testified about their daughter. (XXIV 3052-70).

In discussing the admissibility of victim impact evidence, this Court stated:

> Clearly, the boundaries of relevance under the statute include evidence concerning the impact to family members. Family members are unique to each other by reason of the relationship and the role each has in the family. A loss to the family is a loss to both the community of the family and to the larger community outside the family.

Bonifay v. State, 680 So.2d 413, 419-20 (Fla. 1996). The testimony that Brooks complains about was only that which this Court has found permissible. Cole v. State, 701 So.2d 845 (Fla. 1997), cert. denied, 118 S.Ct. 1370 (1998); Moore v. State, 701 So.2d 545 (Fla. 1997), cert. denied, 118 S.Ct. 1536 (1998); Burns v. State, 699 So.2d 646 (Fla. 1997), cert. denied, 118 S.Ct. 1063 (1998);

Bonifay. There is no merit to Brooks' claim that this testimony violated his constitutional rights. Burns.

The trial court did not err in allowing Carlson's parents to testify and this claim should be denied.

POINT 15

WHETHER BROOKS' DEATH SENTENCES ARE PROPORTIONATE.

Brooks argues that his death sentences are disproportionate in view of Davis' life sentence; that Emmund v. Florida, 458 U.S. 782 (1982), prohibits a death sentence for one who does not kill, attempt to kill, or intend that a killing take place; and that the death penalty is unconstitutional because it is arbitrary, based on a dissenting opinion in Callins v. Collins, 510 U.S. 1141 (1994), and because of inordinate delays inherent in the system. These claims are procedurally barred and/or without merit.

The constitutional complaints are procedurally barred because they were not raised in the trial court. Cf. Richardson v. State, 706 So.2d 1349 (Fla. 1998) (complaints about the constitutionality of the death penalty statute must be raised at trial to be cognizable on appeal); Hunter v. State, 660 So.2d 244 (Fla. 1995), cert. denied, 516 U.S. 1128 (1996). Moreover, a dissenting opinion is not precedent that this Court must follow, and Brooks has presented no reason for this Court to follow the dissent in Callins voluntarily. Contrary to Brooks' contention, the fact that long

delays may occur between imposition of a death sentence and execution of that sentence does not render the death penalty unconstitutional. This Court rejected this exact issue in Knight v. State, 721 So.2d 287 (Fla. 1998), cert. denied, 120 S.Ct. 459 (1999), addressing the issue as follows:

> Knight claims that to execute him after he has already endured more than two decades on death row is unconstitutionally cruel and unusual punishment. He also argues that Florida has forfeited its right to execute Knight under binding norms of international law. Although Knight makes an interesting argument, we find it lacks merit. As the State points out, no federal or state courts have accepted Knight's argument that a prolonged stay on death row constitutes cruel and unusual punishment, especially where both parties bear responsibility for the long delay. *See, e.g., White v. Johnson,* 79 F.3d 432 (5th Cir. 1996); *State v. Smith*, 280 Mont. 158, 931 P.2d 1272 (Mont. 1996). We also note that the Arizona Supreme Court recently rejected this precise claim. *See State v. Schackart*, 190 Ariz. 238, 947 P.2d 315, 336 (Ariz.1997) (finding "no evidence that Arizona has set up a scheme prolonging incarceration in order to torture inmates prior to their execution"), *cert. denied*, — U.S. —, 119 S.Ct. 149, — L.Ed.2d — (1998). . . . We similarly reject Knight's claim under international law.

Id. at 300; Elledge v. State, 706 So.2d 1340, 1342 n4, 1347 n10 (Fla. 1997) (finding no merit to Elledge's claim that death should not be a possible sentence based on unconstitutional delay), cert. denied, 119 S.Ct. 366 (1998).

As shown throughout this brief, the record contains competent substantial evidence that Brooks killed the victims by stabbing them to death. Enmund, therefore, is not applicable to this case.

As set out in point 13, supra, the trial court found Davis' life sentence to be a mitigator, but worth little weight due to the differences between his and Brooks' culpability in these murders. (III 415). There is no merit to Brooks' claim that he should not be punished more severely than Davis. The facts of this case show that Brooks was the dominant actor, the actual killer, in these murders and, therefore, more culpable than Davis. This Court has consistently held that a death sentence is proper, in spite of a co-defendant's life sentence, on such facts. E.g., Brown v. State, 721 So.2d 274 (Fla. 1998), cert. denied, 119 S.Ct. 1582 (1999); Cole v. State, 701 So.2d 845 (Fla. 1997), cert. denied, 118 S.Ct. 1370 (1998); Downs v. State, 572 So.2d 895 (Fla. 1990), cert. denied, 502 U.S. 829 (1991).

Not only is Brooks' sentence proportionate with Davis', it is also proportionate to cases where death sentences have been affirmed. This Court has upheld death sentences in numerous multiple-murder cases with similar, or fewer, aggravators and similar, or much more, mitigation than present in this case. E.g., James v. State, 695 So.2d 1229 (Fla.), cert. denied, 118 S.Ct. 569 (1997); Windom v. State, 656 So.2d 432 (Fla.), cert. denied, 516 U.S. 1012 (1995); Jones v. State, 652 So.2d 346 (Fla.), cert. denied, 516 U.S. 875 (1995); Pittman v. State, 646 So.2d 167 (Fla.

1994), cert. denied, 514 U.S. 1119 (1995); Stein v. State, 632 So.2d 1361 (Fla.), cert. denied, 513 U.S. 834 (1994); Asay v. State, 580 So.2d 610 (Fla.), cert. denied, 502 U.S. 895 (1991); Chandler v. State, 534 So.2d 701 (Fla. 1988), cert. denied, 490 U.S. 1075 (1989); Correll v. State, 523 So.2d 562 (Fla.), cert. denied, 458 So.2d 871 (1988).

When set beside truly comparable cases, it is obvious that these murders are among the most aggravated and least mitigated. Brooks' death sentences are proportionate and should be affirmed.

CONCLUSION

For the foregoing reasons the State of Florida asks this Court to affirm Brooks' convictions of first-degree murder and sentences of death.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief has been furnished by U.S. Mail to Kepler B. Funk, One Harbor Place, 1901 South Harbor City Blvd., Suite 600, Melbourne, Florida 32901, this 18th day of January 2000.

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