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IN THE SUPREME COURT OF FLORIDA

ELIJAH BROOKINS,

Appellant,

v. Case No. SC14 - 418

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE SECOND JUDICIAL CIRCUIT,
IN AND FOR GADSDEN COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

This brief will refer to Appellant as such, or by proper name, e.g., "Brookins." Appellee, the State of Florida, was the prosecution below; the brief will refer to Appellee as such, the prosecution, or the state. References to the victim in this case will be by proper name "Mr. Sexton" or "Sexton."

The record on appeal is in 22 volumes that are numbered consecutively and conform to the requirements of Fla. R. App. P. 9.200. The record will be referenced by the letter "V" followed by an appropriate volume and page number "(V#: ##)."

There is one volume marked "Imposition of Sentence." It will be referenced by the word "Sent." followed by an appropriate page number "(Sent.: ##)."

Finally, Brookins' initial brief will be referenced by "IB" followed by the appropriate page number "(IB: ##)."

STATEMENT OF THE CASE AND FACTS

This is a direct appeal in a capital case. Appellant, Elijah Brookins, was indicted by the Grand Jury of Gadsden County, Florida, for the murder of Eric Sexton. (V1: 2 – 3). The only charge filed was (Count 1) first-degree murder of Eric Sexton. (V1: 2 – 3). Following a trial, the jury found Brookins guilty of the first-degree murder of Eric Sexton with both premeditation and felony murder proven beyond a reasonable doubt. (V1: 139; V20: 436). After the penalty phase, the jury returned an advisory sentence of death by a vote of ten to two. (V1: 140; V21: 547). On January 23, 2013, the trial court announced its findings from the penalty phase and imposed a sentence of death on Brookins for the murder of Eric Sexton. (V2: 192 – 225).

Appellant filed his initial brief on October 7, 2014. This Answer follows.

Facts – Guilt / Innocence Phase

Elijah Brookins and Eric Sexton were both inmates with the Florida Department of Corrections. Brookins was serving a life sentence for first-degree murder, and Sexton was serving a sentence of 40 years for second-degree murder. Brookins and Sexton were briefly housed in the same dorm of the Jefferson Correctional Institution. (V19: 301). The day of the murder, Brookins and Sexton were scheduled to be transferred, by bus, to the Northwest Florida Reception Center from the Jefferson Correctional Institution.

The transfer buses for the Department of Corrections are divided into three sections. (V17: 43; V18: 125). The first section is a small area for the DOC security team consisting of two persons, one driver and one additional security guard. (V3: 266; V17: 43 – 44; V18: 125). The second section is a closed off cage for the "close management" inmates. (V17: 43 – 44). The cage consists of one row of seats on each side of the bus. (V3: 265, 267 – 8; V17: 43 – 44). The cage is divided from the rest of the bus by an expanded metal gate in the front and back which is supported by plexiglass. (V3: 265, 267 – 8; V17: 102). Once the bus begins its trip, the close management section cannot be opened until the bus arrives at its destination. (V17: 100). The third section is at the back of the bus for open population inmates. (V17: 44). Inmates in the third section enter and exit the bus from the rear door and do not have assigned seats. (V3: 263; V17: 44, 50).

Before inmates board the bus they are processed at the facility they are departing from, which includes a strip search and careful examination of all personal property an inmate takes with them. (V17: 49; V18: 301). Inmates are required to wear leg-restraints, but do not wear handcuffs. (V17: 49). An inmate is also required to wear the DOC issued blue pants, blue over-shirt, shoes, and is permitted to wear a white undershirt. (V17: 49 – 50). Each inmate is given a bag lunch for the trip, and a keg of water is available for those inmates in the back section of the bus. (V17: 81; V18: 138, 172 – 73).

During a transport the security officer is required to conduct a security check every 30 minutes. (V17: 51). A security check consists of standing up and looking through the gates of the close management section to make sure all the inmates are awake and nothing is happening. (V17: 50 – 51, 88). A written log is kept of the times each security check is performed and by whom. (V17: 57 – 58). Once the bus is in route to its destination it cannot stop under any circumstances. (V17: 99). A guard may not go into the open population section, even for a homicide. (V17: 99).

In the early morning of September 20, 2011, Brookins and Sexton boarded a DOC transfer bus bound for the Northwest Florida Reception Center. (V19: 298 – 300). Prior to their departure, Sgt. Raymond Hill performed an initial security check by walking in the back portion of the bus and talking with the group of inmates. (V17: 80). Everyone in the open population section was awake and did not appear to have any issues prior to their departure. (V17: 80). Sgt. Hill filled the water keg for the inmates, closed the back door, and took his position as the driver for the trip to the Northwest Florida Reception Center. (V17: 77 – 78, 81 – 84). The trip from the Jefferson Correction Institution to the Northwest Florida Reception Center was approximately two hours and sixteen minutes. (V17: 65).

Sexton was seated in the front of the third section on the driver's side, directly across from Brookins who was seated on the passenger side. (V18: 128). Shortly

after the bus got onto Interstate-10, Brookins attacked Sexton without provocation. (V18: 129). Three eye witnesses saw Brookins jump on top of Sexton, pull out a knife and begin stabbing Sexton. (V18: 129 – 30, 149, 165, 191 – 93). All of the other inmates rushed to the rear of the bus when the attack began. (V18: 131, 184). Brookins was stabbing Sexton in the face, head, and torso. (V18: 185, 196). Witnesses described a frenzied, prolonged attack, where it appeared that Brookins was trying to stab Sexton's eyes out. (V18: 196). Sexton was screaming for his life. (V18, 133, 158, 165, 168). Brookins suddenly stopped the attack, because the knife he was using bent. (V18: 157, 165, 168). Brookins calmly used his teeth and the side of the bus to straighten the knife out and then resumed stabbing Sexton. (V18: 157, 165, 168). Throughout the attack, witnesses described Brookins as mumbling or talking to Sexton, but no one could make out exactly what was said. (V18: 132 – 33, 171). At some point, someone from the back of the bus yelled "that's enough," but Brookins ignored them and continued to stab Sexton. (V18: 133 – 34).

Brookins did not stop until Sexton was dead. (V18: 134). He then enlisted the help of an unknown inmate in moving and positioning Sexton's body. (V18: 135). Brookins placed Sexton halfway between the aisle and the seat where he was killed. (V18: 135, 196). Brookins then pulled Sexton's pants all the way to the ground, calmly put on a pair of latex gloves and inserted his hand into Sexton's

anus. (V18: 136, 154, 197). Brookins was heard saying "where is it at, boy? Where it at? Where the package?" (V18: 197). He then took the knife and stabbed Sexton in the anus. (V18: 197). It appeared Brookins was looking for something, because he next dumped out all of Sexton's personal property and went through it tearing up the photographs. (V18: 137, 171).

Once he was finished, Brookins started to clean up and dispose of the evidence. The knife and an elastic holder used to conceal the knife were thrown out a window of the bus. (V18: 138, 170). Brookins used the water cooler to wash the blood off of his hands and to attempt to clean up the back of the bus. (V18: 140, 173, 198). Brookins found Sexton's bag lunch, sat down propped his feet up on Sexton's body and ate both his lunch and Sexton's lunch. (V18: 138, 172). Just before the bus arrived at the Northwest Florida Reception Center, Brookins made it a point to urinate on Sexton's body. (V18: 139, 175). Throughout the attack neither of the DOC security guards noticed anything unusual happening in the back of the bus. (V17: 52, 68, 84).

When the bus arrived, Ofc. Tanya Bell was at the loading area to process the incoming inmates. (V17: 107). Inmates always depart the bus from the rear, but this time was different because all of the inmates fell out the backdoor like dominos. (V17: 114). It was unusual for the inmates to rush Ofc. Bell in that manner. (V17: 108).

Brookins was the last person off of the bus and Ofc. Bell immediately noticed him. (V17: 108 – 09). He was not wearing his required blue over-shirt, and blood was visible on his white t-shirt. (V17: 54, 108 – 09). None of the other inmates had blood anywhere on their clothes or person. (V19: 325 – 26; V20: 364). Ofc. Bell and Sgt. Wester went into the bus and discovered Sexton's body partially leaned up against the seat and partially on the floor. (V17: 55).

Sgt. Mayo asked Brookins what happened, and Brookins' responded "I don't know Sarge, I fell asleep and when I woke up he was in my lap." (V20: 361). Sgt. Hill then took Brookins to a holding cell and waited there with him. (V17: 86). A subsequent search of Interstate 10 conducted by Florida Highway Patrol and the Department of Corrections found a homemade knife and an elastic waistband believed to be part of this crime. (V18: 211, 5[illegible]).

Mr. Sexton's cause of death was determined to be blood loss as a result of multiple stab wounds. (V19: 275). The autopsy revealed Sexton was stabbed more than 25 times in the head, face, torso, arms and anus. (V19: 268). There were two stab wounds to the lower right abdomen. (V19: 263). Neither of these wounds penetrated any major organs but one of them did pass through the abdomen and finish in the soft-tissue of Sexton's back. (V19: 263). Another stab wound to the lower left portion of Sexton's torso did not hit any major organs, but did penetrate into the abdominal cavity. (V19: 263). Sexton had one superficial

wound to his lower left neck. (V19: 264).

There was one major wound to the upper portion of the left side of Sexton's neck. (V19: 264). This wound traveled at a downward trajectory into the chest cavity and severed the jugular vein on the left side. (V19: 264). This wound produced a significant amount of blood loss. Sexton had superficial stab wounds to the upper portion of both his left and right arms. (V19: 265 – 66).

There were multiple injuries to Sexton's face. (V19: 264). One stab wound near the left eyebrow penetrated "into the soft tissue just below the orbital prominence." (V19: 266). The wound traveled from front-to-back, perforated the skull and entered into the left temporal lobe of Sexton's brain. (V19: 266). Another stab wound to Sexton's right eye near the lower eyelid did not result in an orbital fracture. (V19: 270).

There were three additional stab wounds to the right side of Sexton's face, and one to the left side just below the ear. (V19: 266). The stab wound which did the most damage was on the right side of the neck and penetrated the soft tissue and musculature of the neck. (V19: 267 – 68). This wound cut the jugular vein and resulted in major blood loss. (V19: 268). Another stab wound on the right side of the neck cut the vertebral artery on the right side. (V19: 270). Multiple injuries to Sexton's hands included small lacerations between the fingers and were classified as defensive wounds. (V19: 272). Finally, the medical examiner determined the

stab wound to Sexton's anus was inflicted postmortem. (V19: 276). In addition, the medical examiner determined the homemade knife, which was recovered on the side of Interstate-10 could have made all of the stab wounds and lacerations. (V19: 273).

In addition to the three eye witnesses, DNA linked Brookins to the murder as well. Sexton's DNA was found on Brookins' bloody white t-shirt with statistical certainty of 1 in 2.1 quadrillion Caucasians. (V18: 227 – 29). Brookins' pants also tested positive for the presence of blood. (V18: 230). A mixed DNA profile was found on Brookins' pants, and assuming Brookins to be a part of the mixture, a partial DNA profile matched Sexton within a statistical certainty of 1 in 140 trillion Caucasians. (V18: 230). The elastic waistband found on Interstate-10 which was used to conceal the knife also tested positive for the presence of blood. (V18: 231). A partial DNA profile matched Sexton as the major contributor within a statistical certainty of 1 in 5.1 trillion Caucasians. (V18: 232). The minor contributor of the mixture on the waistband matched Brookins within a statistical certainty of 1 in 130 African Americans. (V18: 232).

Finally, two different DNA swabs were taken from the homemade knife found on Interstate-10. (V18: 233). The first was a swab of the tip, which tested positive for the presence of blood. (V18: 233). The DNA on "[t]he pointed end matched Mr. Sexton." (V18: 233). The second swab was of the handle, and was

specifically swabbed for touch DNA trying to avoid any blood stained areas of the handle. (V18: 233 – 34, 238). The handle yielded a mixed DNA profile with Sexton as the major contributor and Brookins as the minor contributor. (V18: 233). The minor DNA profile matched Brookins within a statistical certainty of 1 in 790 African Americans. (V18: 234).

Brookins testified in his own defense. (V19: 298 – 339). He claimed that Sexton got into an argument with a group of inmates and that one of them suddenly started stabbing Sexton. (V19: 304 – 07). Initially Brookins could not identify who was stabbing Sexton, but later blamed the murder on Theodus Hunt during cross-examination. (V19: 304 – 05, 318 – 19). Hunt, an inmate on the bus, was one of the eye-witnesses who testified for the State. (V18: 187 – 205).

Brookins claimed Sexton's blood got on his shirt when Sexton was trying to flee his attacker and coincidentally ended up in his seat. (V19: 305 – 06). Brookins said he touched the knife when Sexton was already dead in an attempt to help the murderer move Sexton's body. (V19: 306). Brookins stated that he only pulled the knife out of Sexton's body. (V19: 306). Brookins admitted to using the water keg to wash the blood off of his hands, and acknowledged that no other inmates on the bus had any blood on them, including Thoedus Hunt. (V19: 307, 325 – 26). Brookins stated that when he got off the bus, he told Ofc. Bell "the dude went crazy in there," but never identified a specific person. (V19: 308).

Finally, Brookins' explained to the jury the reason he had not previously told his version of events to anyone was because he did not want to be labeled a snitch in prison. (V19: 309).

The jury found Brookins guilty of first-degree murder and determined the State had proven both premeditation and felony murder beyond a reasonable doubt. (V1: 139; V20: 436).

Penalty Phase

The State presented evidence of Brookins prior conviction for first-degree murder. (V21: 475). Theresa Mercer, Mr. Sexton's sister, was called as the State's only witness for the purpose of victim impact testimony. (V21: 475 – 77).

Brookins called three witnesses to establish mitigation. Shonda Brookins, is Brookins' older sister and Mary Ann Poole is his aunt. Both witnesses testified that Brookins' was "slow" as a child and had learning disabilities, but nothing was ever formally diagnosed. (V21: 483). Brookins' father was never involved in his life and always made excuses for not visiting. (V21: 480, 490). Brookins' mother could neither read nor write and was unable to work due to a disability. (V21: 480). As a result, Brookins and his siblings grew up on food stamps and their mother's disability check. (V21: 480). Brookins was always nice and caring to his family. (V21: 481, 494). When Brookins was a teenager, he became involved in a gang and eventually went to prison when he was 16 years old. (V21: 484, 493).

Elysha McPherson also testified on Brookins' behalf. Ms. McPherson is Brookins' youngest sister. Ms. McPherson told the jury that Brookins was a normal big brother who always looked out for her. (V21: 498). As a young child Ms. McPherson was bullied because of her weight, but Brookins would stick up for her and help her build self-esteem. (V21: 499 – 500). Unfortunately Brookins went to prison when she was eight years old. (V21: 498).

The trial court instructed the jury on five aggravators: (1) under sentence of imprisonment at the time of the murder; (2) prior violent felony; (3) the murder was committed while engaged in a robbery; (4) heinous, atrocious, and cruel; and (5) cold, calculated, and premeditated. (V21: 508 – 510). Brookins did not request instructions on any of the statutory mitigators and thus the trial court gave only the catch all mitigation instruction. After hearing the aggravation, victim impact statements, and mitigation, the jury recommended a death sentence by a vote of ten to two. (V1: 140; V21: 547).

During the *Spencer*[1] hearing, the State read victim impact letters from Sexton's mother and sister. (V21: 475 – 77). The defense presented Brookins' mother, sister and aunt. (V22: 7 – 9).

Sentencing and Trial Court Findings.

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[1] *Spencer v. State*, 615 So. 2d 688 (Fla. 1993).

Brookins was sentenced to death on January 23, 2014. (Sent. 1). The trial court found beyond a reasonable doubt, five aggravating circumstances to exist:

(1) the capital felony was committed by a person under a sentence of imprisonment (great weight);

(2) Brookins was previously convicted of another capital felony (great weight)

(3) the capital felony was committed while Brookins was engaged in a robbery (less than great weight);

(4) the capital felony was especially heinous, atrocious, and cruel (very great weight);

(5) the capital felony was committed in a cold, calculated, and premeditated manner (substantial weight). (V2: 217 – 221).

The trial court did not find any statutory mitigating circumstances,[2] but did find and assign weight to eight non-statutory mitigating circumstances:

(1) Brookins prior criminal history consisted of a single offense committed when he was 15 years old (moderate weight applied only against the aggravator of Brookins prior violent felony);

(2) Brookins has been imprisoned for most of his adolescence and his entire adult life (very little weight);

[2] (V2: 221, 224). The defense conceded that the evidence did not support the application of any statutory mitigating circumstances. (V2: 221).

(3) Brookins was abandoned by his father and raised by a mentally disabled mother (little weight)

(4) Brookins family was impoverished (little weight);

(5) Brookins childhood was spent in a crime-ridden public housing project (little weight);

(6) Brookins is loved by his family (very little weight);

(7) Brookins was a loving, supportive son and brother (very little weight);

(8) Brookins was a slow learner and dropped out of school very young (little weight). (V2: 221 – 2[illegible]).

After weighing the aggravation and mitigation, the trial court determined there were insufficient mitigating circumstances to outweigh the aggravating circumstances, and sentenced Brookins' to death. (V2: 225). The trial court concluded Brookins' prior violent felony alone "would substantially outweigh the minimal mitigation proven in this case, even mitigated by Mr. Brookins's [sic] youth at the time of the first murder. . . ." (V2: 217). In addition, the trial court stated the HAC aggravator "by itself is far more substantial than the minimal mitigation supported by the evidence." (V2: 219). This appeal follows.

SUMMARY OF ARGUMENT

I. The evidence of Brookins' collateral crime went to a material fact at issue and could have been introduced in the state's case-in-chief. The evidence of Brookins' collateral crime was admissible to prove preparation, plan and knowledge of how to carry and conceal a weapon in jail during a strip search. The collateral crime followed the same factual pattern as the charged offense, and was therefore relevant as evidence.

Brookins also opened the door to this line of questioning during his direct examination. By going through the detailed process of what occurs during an inmate transfer and strip search, Brookins was telling the jury, that he could not have been the person to murder Eric Sexton, because he had neither the opportunity nor the means to conceal and carry the homemade knife. As such, the state's line of cross-examination regarding Brookins' personal knowledge for concealing knifes in jail was relevant and proper on cross-examination.

II. Brookins' testimony on direct-examination opened the door to legitimate cross-examination and closing argument concerning his pre-arrest and pre-*Miranda* statements. Brookins' self-proclaimed statement to Ofc. Bell that "the dude went crazy in there" was made prior to an arrest or the giving of any *Miranda* warnings and therefore is not entitled to protections of the Fifth Amendment.

Brookins' also opened the door to this line of questioning through his

testimony. It was Brookins' own explanation as to why he did not previously name Theodus Hunt as a suspect which permitted the state to fully develop this testimony on cross-examination.

III. This Court has found CCP in the advance procurement of a weapon, lack of resistance or provocation, and the appearance of a killing carried out as a matter of course. Brookins' actions in procuring a weapon, concealing the weapon within his pants, launching an unprovoked attack, repeatedly straightening the knife, and bringing gloves for the purpose of a robbery provide competent substantial evidence of CCP.

IV. The weight given to a mitigating circumstance lies within the discretion of the trial court. The trial court applied weight to each of the eight non-statutory mitigating factors proposed by Appellant and even considered the statutory aggravating circumstances. Each of the eight mitigating factors related to Brookins' impoverished and deprived childhood. The trial court reduced the weight given to the mitigating circumstances due to Brookins' maturity as a grown man who had not lived in his childhood home since he initially went to prison at age 15. Because the trial court acted with sounds discretion in considering each piece of mitigation, and assigning weight with a finding of fact, this claim should be denied.

V. No error is present within the guilt phase of Brookins' trial and therefore a

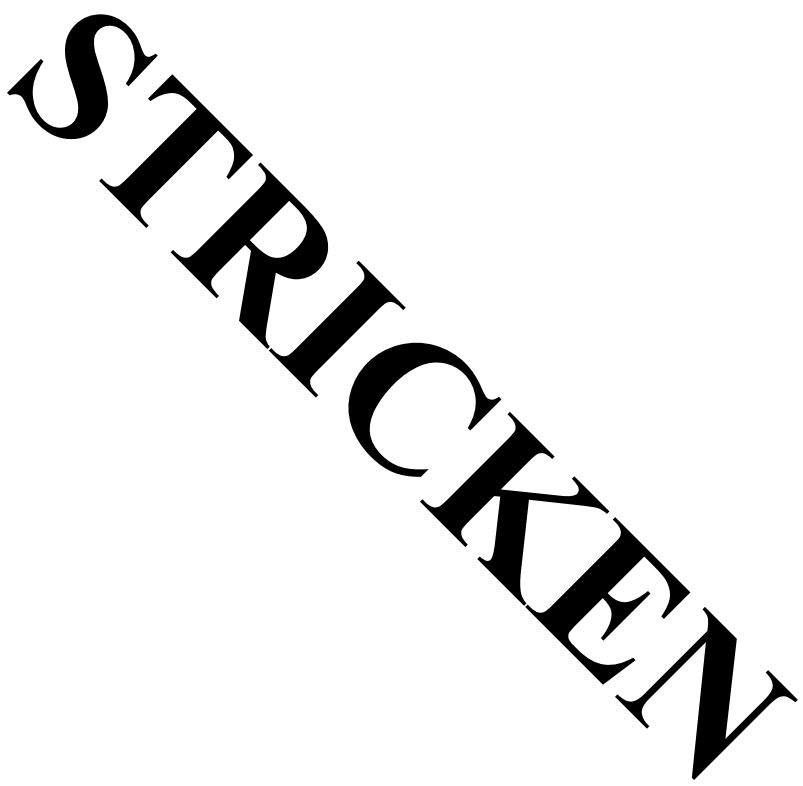
claim of cumulative error is without merit. The complained of errors also do not meet this Court's three part test for cumulative error as outlined in *Penalver*.

VI. No error is present within the penalty phase of Brookins' trial and therefore a claim of cumulative error is without merit. The complained of errors also do not meet this Court's three part test for cumulative error as outlined in *Penalver*.

VII. The evidence was sufficient to support Brookins' conviction for first-degree murder. Three eye-witnesses testified to seeing Brookins repeatedly stab Eric Sexton without provocation. In addition, DNA evidence linked Brookins to the crime, with Sexton's blood and DNA present on Brookins' shirt. Furthermore, Brookins was the only inmate on the bus with Sexton's blood on his clothing. Based on a review of the evidence in the light most favorable to the state, a rational trier of fact could find the existence of the elements of first-degree murder beyond a reasonable doubt.

VIII. The murder of Eric Sexton is among the most aggravated and least mitigated of first-degree murders. The aggravators of CCP, HAC, and prior violent felony are the most serious and weightiest within the capital sentencing scheme. In addition, the trial court applied the aggravators of under sentence of imprisonment, and murder in the course of a robbery. Brookins' presented minimal mitigation which did little to outweigh the substantial aggravation. The evidence shows the murder of Eric Sexton was a senseless, unprovoked and carried

out in a matter of course. This case resembles *England v. State*, but here there is significantly more aggravation and considerably less mitigation. Furthermore, this Court has repeatedly upheld a death sentence when the appellant has murdered someone while serving a life sentence for murder.



ARGUMENT

I: THE TRIAL COURT DID NOT ERR IN ADMITTING EVIDENCE OF BROOKINS' COLLATERAL CRIME, BECAUSE THE EVIDENCE WENT TO A MATERIAL FACT AT ISSUE AND BROOKINS OPENED THE DOOR DURING HIS DIRECT EXAMINATION.[3]

Brookins contends the trial court erred in the admission of his collateral crime as impeachment because he did not open the door to any prior wrongs during his direct examination. Within this claim, Brookins asserts that the state conceded during a pre-trial hearing that the evidence of Brookins' collateral crime was not admissible in its case-in-chief; however, Brookins misreads the record because no such concession was made.

The evidence of Brookins' collateral crime went to a material fact at issue and could have been introduced in the state's case-in-chief. Nevertheless, the state chose to use the collateral crime as impeachment evidence. Here, it was only after Brookins' direct testimony which inferred he had neither the knowledge nor

[3] The longstanding principle of the "Tipsy Coachman" doctrine permits an appellate court to affirm a trial court's decision even if the trial court reached the correct result, but for the wrong reasons. *Robertson v. State*, 829 So. 2d 901, 906 (Fla. 2002). "The key to the application of this doctrine of appellate efficiency is that there must have been support for the alternative theory or principle of law in the record before the trial court." *Id*. at 906 – 07. *See Muhammad v. State*, 782 So. 2d 343, 359 (Fla. 2001) (stating "the trial court's ruling on an evidentiary matter will be affirmed even if the trial court ruled for the wrong reasons, as long as the evidence or alternative theory supports the ruling.").

opportunity to carry and conceal a weapon during a prison strip search that the state admitted evidence of Brookins' collateral crime.

a. Standard of Review

The admissibility of collateral crime evidence is reviewed on an abuse of discretion standard. *Wright v. State*, 19 So. 3d 277, 291 (Fla. 2009). "[D]iscretion is abused only where no reasonable [judge] would take the view adopted by the trial court." *Buzia v. State*, 926 So. 2d 1203, 1216 (Fla. 2006) (quoting *Huff v. State*, 569 So. 2d 1247, 1249 (Fla. 1990)).

b. The Collateral Crime Evidence Went To a Material Fact at Issue and Was Therefore Admissible in the State's Case-in-Chief.

Brookins' contends the State conceded the collateral crime evidence was inadmissible in its case-in-chief; however, the record does not support Brookins' assertion. (IB: 37). At a pre-trial hearing, the prosecution informed the court that they "did not intend to introduce [the collateral crime] in [its] case in chief." (V13: 20). The prosecution's stated intentions do not constitute a concession that Brookins' collateral crime was inadmissible, merely that the defense should be on notice to the use of the collateral crime as impeachment.

In order to be admissible, evidence must first be relevant. "Relevant evidence is evidence tending to prove or disprove a material fact." § 90.401, Fla. Stat. (2014). "All relevant evidence is admissible, except as provided by law." § 90.402, Fla. Stat. (2014). "Relevant evidence is inadmissible if its probative value

is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence." § 90.403, Fla. Stat. (2014). "Evidence of other crimes, wrongs and acts is admissible if it is relevant because it is probative of a material issue other than the bad character or propensity of an individual." 1 Fla. Prac. Evd. § 404.9 (2014). "Therefore, collateral-crime evidence, such as bad acts not included in the charged offenses, is admissible when relevant to prove a *material* fact in issue, but is inadmissible when the evidence is relevant *solely* to prove bad character or propensity." *Wright*, 19 So. 3d at 291 – 92 (citing § 90.404(2)(a), Fla. Stat. (2000) (emphasis in original).

Trial courts as well as attorneys often confuse the admission of collateral crime evidence with "similar fact evidence." Use of a defendant's collateral crime need not involve similar facts, if the evidence goes to a material fact at issue.[4] *See McWatters v. State*, 36 So. 3d 613, 628 – 29 (Fla. 2010); *Kopsho v. State*, 84 So. 3d 204, 213 (Fla. 2012).

In this case, Brookins concealed a homemade knife within his clothing as he

[4] "Of course, where collateral crime evidence is offered as probative of identity, this Court also has required a showing of substantial factual similarity among the crimes." *McWatters*, 36 So. 3d at 628 (citing *State v. Savino*, 567 So. 2d 892, 894 (Fla. 1990) ("When the purported relevancy of past crimes is to identify the perpetrator of the crime being tried, we have required a close similarity of facts, a unique or 'fingerprint' type of information, for the evidence to be relevant.")).

was being transported to another facility within the Department of Corrections. Brookins then used his homemade knife to murder Eric Sexton on the transport bus. Accordingly, one of the material facts at issue was how Brookins was able to carry and conceal the homemade knife, knowing he would be strip searched.

The evidence of Brookins' collateral crime was admissible to prove preparation, plan and knowledge of how to carry and conceal a weapon in jail during a strip search. (V3: 312). Brookins' admission to the collateral crime detailed how he was able to carry and conceal a knife during a strip search at the Gadsden Co Jail. (V3: 312). In his statement Brookins admitted he:

> . . . carried a homemade shank from A-2 to the visiting area upon . . . hearing Officer Ash inform Officer Crump that they wanted to strip search them by two's, I then reach inside my paints [sic] to remove a tring [sic] handle from the homemade shank, and just left the shank inside my pants as I Elijah Brookins and inmate Demetric Smith was told to go back to A2 cell block, as I begin to walk down A-2 Hall I notice that Officer Buckhalt was doing search and I slip the shank down my right leg as my right leg was in motion moving forward the shank came out and hit Demetic Smith . . . the Officer heard the metal object hit the floor as the Officer investigated the metal hitting the floor he ID it as a homemade shank . . . I informed the Officer it was mine.

(V3: 312). This statement gives the trier of fact a clear understanding of exactly how Brookins was able to carry and conceal the homemade knife during the strip search. It details Brookins' knowledge of how to conceal a knife during a strip search, and does not focus on Brookins' bad character because it does not depict an unprovoked act of violence. Therefore, the statement was relevant as probative of

a material fact and not outweighed by the danger of unfair prejudice.

Brookins' collateral crime is also sufficiently similar to qualify as probative evidence of identity. As this Court has explained, "in cases where the purported relevancy of the collateral crime evidence is the identity of the defendant, we have required 'identifiable points of similarity' between the collateral act and the charged crime that 'have some special character or [are] so unusual as to point to the defendant." *Drousseau v. State*, 55 So. 3d 543, 552 (Fla. 2010) (quoting *Drake v. State*, 400 So. 2d 1217, 1219 (Fla. 1981). The theory of proving identity via collateral crimes is based on both the similarity and the "unusual nature of the factual situations being compared." *Drousseau*, 55 So. 3d at 552 (quoting *Drake*, 400 So. 2d at 1219). This "Court considers both similarities and dissimilarities between the collateral crimes and the charged offense when reviewing whether a 'sufficiently unique pattern of criminal activity [justifies] admission." *Drousseau*, 55 So. 3d at 552 (quoting *Peterson v. State*, 2 So. 3d 146, 153 (Fla. 2009) (alternations in original).

Here, the charged offense required Brookins to obtain a homemade knife in prison, which was a criminal offense by itself. Brookins also had to manufacture a handle from string and an elastic waistband in order to conceal the knife within his pants. Finally, Brookins needed a working knowledge of the procedure for a strip search so he could hide his weapon during the search.

The collateral crime followed the same factual pattern as the charged offense. Brookins managed to obtain a knife inside the Gasden Co. Jail, which was a criminal offense. (V3: 312). Brookins made a string holster or handle in order to conceal the knife within his pants. (V3: 312). Brookins' statement shows knowledge of the procedure for a strip search in the jail, and was only discovered when the knife fell out through the bottom of his pants. (V3: 312). While Brookins' asserted that another inmate was responsible for the murder of Mr. Sexton, evidence of his collateral crime for carrying and concealing a knife within a jail, corroborates each of the three eye-witnesses who saw Brookins remove the knife from his pants before he started to stab Mr. Sexton.

Finally, this Court also conducts a balancing test to ensure the admissibility of collateral crime evidence is not substantially outweighed by the danger of unfair prejudice. *Drousseau*, 55 So. 3d at 554 (citing §90.403, Fla. Stat. (1999)). Recognizing that most evidence introduced by the state has a prejudicial effect, "[t]he real question is whether that prejudice is so unfair that it should be deemed unlawful." *Id*. In this case, the probative value of the collateral crime evidence outweighed the prejudicial efficient because it showed a unique knowledge of prison procedures and the ability to carry and conceal a dangerous weapon inside a jail or prison.

The collateral crime evidence showed Brookins had the requisite knowledge to

actively hide a knife in jail, but did not portray Brookins as a violent inmate prone to dangerous outbursts. Accordingly, Brookins' collateral crime was admissible in the State's case-in-chief, because it went to a material fact at issue, was sufficiently similar for use as proof of identity, and its probative value was not outweighed by the danger of unfair prejudice.

c. Brookins Opened the Door to Evidence of His Collateral Crime and Therefore the State's Cross-Examination was Proper.

During his direct examination testimony, Brookins gave a detailed account of the strip search each inmate encounters before boarding the transport bus:

> The process, they wake you up around about 4:00 in the morning, 4:00 or 3:30, around that time. You get all your property and you go to the chose hall where you eat your chow, breakfast. Then they take you to the property room.
>
> After you get in the property room, they do a certain amount of people like at one time. Like they may take like 15 inmates and four officers, four or five officers, and they have us line up in front of them. They make us dump all our property out. They go through it, shake it down. They push our property in front of us. They make us step back. They strip search us. They get each piece of clothes, they go through pants, hold them up. They go through them. Shirts, boxers, drawers, everything. Socks, everything.
>
> After they do it, you get back dressed. They don't move. They watch you pack your property. Then they escort you out. The next group comes in with the other officers outside. They come in. Then other inmates go until everybody's been strip searched.

(V19: 300 – 01). Based on this testimony, the jury could infer that Brookins did not know how to conceal the homemade knife in his clothing during the strip

search. By going through the detailed process of what occurs during an inmate transfer and strip search, Brookins was telling the jury, he could not have been the person to murder Eric Sexton, because he had neither the opportunity nor the means to conceal and carry the homemade knife.

On cross-examination, over defense objection, the State introduced evidence of Brookins' collateral crime for possessing a homemade knife in the Gadsden County jail. (V3: 312). During this incident Brookins gave a sworn statement which detailed not just his possession of the knife, but also how he concealed the knife in his pants, made a string handle, and how he concealed the knife during a strip search.[5] (V3: 312).

As recognized by the United States Supreme Court in *Davis v. Alaska*, 415 U.S. 308, 316 (1974):

> Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested. Subject always to the broad discretion of a trial judge to preclude repetitive and unduly harassing interrogation, the cross-examiner is not only permitted to delve into the witness' story to test the witness' perceptions and memory, but the cross-examiner has traditionally been allowed to impeach, i.e., discredit, the witness.

"The parameters of a full and fair cross-examination should always encompass

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[5] Brookins' denied this during cross-examination, ultimately telling the jury, that he had previously admitted to possession of the knife in the Gadsden Co. Jail, but that his statement was a lie. (V19: 332 – 33).

subjects opened on direct examination." *Jones v. State*, 440 So. 2d 570, 576 (Fla. 1983) (citing *Coxwell v. State*, 361 So. 2d 148, 152 (Fla. 1978); *Coco v. State*, 62 So. 2d 892 (Fla. 1953)). However, "cross-examination is not confined to the identical details testified to in chief, but extends to its entire subject matter, and to all matters that may modify, supplement, contradict, rebut or make clearer the facts testified to in chief . . . ." *McDuffie v. State*, 970 So. 2d 312, 325 (Fla. 2007) (quoting *Boyd v. State*, 910 So. 2d 167, 185 (Fla. 2005)).

Here, the State's cross-examination sheds light on an important question. Namely that Brookins knew precisely how to possess, conceal, and carry a knife during a DOC transfer and strip search. Brookins' direct testimony inferred he did not know how to conceal and carry a knife in prison, but his sworn statement to possession of the knife in the Gadsden County jail details that exact knowledge. Following the cross-examination, the jury had a more complete picture of Brookins' knowledge of the strip search procedures and how to conceal and carry weapons during a search.

The trial court did not err in admitting evidence of Brookins' collateral crime, because it was relevant evidence which went to a material fact at issue, first broached by the defendant. In determining the proper scope of cross examination, the trial court is vested with broad discretion. *Harmon v. State*, 527 So. 2d 182, 185 (Fla. 1988) (quoting *Johnston v. State*, 497 So. 2d 863, 869 (Fla. 1986)).

In this case, the defense raised the subject of what happens during a prisoner transfer and strip search. Brookins' testimony implied there was neither the means nor the opportunity for him to conceal and carry a knife onto the transport bus because of the strip search. Nevertheless, the State's cross-examination using Brookins' collateral crime for possession of a knife in the jail, showed Brookins knew exactly how to conceal and carry a knife in prison. (V3: 312). As such, the trial court exercised appropriate discretion in admitting evidence of Brookins collateral crime because it made clearer the facts to which Brookins' testified.

d. Any Error in The Admission of Brookins' Collateral Crime was Harmless and Did Not Affect the Jury's Verdict.

Should this Court determine the evidence of Brookins' collateral crime was error, it is subject to a review of harmless error. *Robertson*, 829 So. 2d at 913; *see Kopsho*, 84 So. 3d at 223 (Pariente, J. concurring in result) (citing *State v. DiGuilio*, 491 So. 2d 1129, 1139 (Fla. 1986). But this Court begins its analysis under the presumption that the admission of erroneous collateral crimes evidence is harmful. *Castro v. State*, 547 So. 2d 111, 115 (Fla. 1989) (quoting *Straight v. State*, 397 So. 2d 903, 908 (Fla. 1981). The burden rests with the state to prove there is no reasonable possibility that the error contributed to the conviction. *Diguilio*, 491 So. 2d at 1138 – 39.

In this case, three eye-witnesses gave corroborating testimony which established Brookins' attacked Mr. Sexton without provocation and repeatedly

stabbed him. (V18: 129 – 30, 149, 165, 191 – 93). The attack continued long after Mr. Sexton was dead. (V18: 134). As the inmates departed the transport bus, Brookins was the only person to have Eric Sexton's blood on his clothing. (V19: 325 – 26; V20: 364). Brookins was also the only person not wearing his DOC issued coveralls; because the eye-witnesses saw Brookins throw these items out the windows of the bus. (V18: 138, 170). DNA linked Brookins' to the murder, and none of the physical evidence or eye-witness testimony suggested anyone other than Brookins was responsible for Mr. Sexton's murder. (V18: 227 – 234). Because of the unique circumstances of this case involving both eye-witnesses to the actual murder and DNA evidence linking Brookins to the murder, there is no reasonable possibility the erroneous admission of Brookins' collateral crime affected the jury's verdict, and this claim should be denied.

II. THE TRIAL COURT DID NOT ERR IN OVERRULING THE DEFENSE OBJECTIONS CONCERNING COMMENTS ON SILENCE BECAUSE THE PROSECUTION'S QUESTIONS WERE FAIR COMMENTS ON BROOKINS' TESTIMONY CONCERNING HIS PRE-ARREST PRE-*MIRANDA*[6] STATEMENTS.

Brookins asserts the trial court erred when it permitted questioning on cross-examination and comments during closing argument, concerning his post-arrest post-*Miranda* silence concerning the failure to identify Eric Sexton's murderer prior to his testimony. (IB 48). However, the state questioned Brookins regarding his pre-arrest pre-*Miranda* statements made moments after departing the DOC transportation bus. As such, the prosecution's questioning of Brookins on cross-examination and comments during closing argument were proper and did not violate Appellant's Fifth Amendment rights.

a. Standard of Review.

"A trial court's ruling on a pure question of law is subject to de novo review." *Demps v. State*, 761 So. 2d 302, 306 (Fla. 2000). This Court is to afford a strong presumption of correctness to the trial court's determinations of historical fact, but conducts an independent review of the application of law to those facts. *Connor v. State*, 803 So. 2d 598, 607 – 08 (Fla. 2001).

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[6] *Miranda v. Arizona*, 384 U.S. 436 (1966).

When examining comments on silence, the test in Florida is "whether the comment is 'fairly susceptible' to an interpretation which would bring it within the prohibition against comments on silence." *State v. Thornton*, 491 So. 2d 1143, 1144 (Fla. 1985) (citing *State v. Kinchen*, 490 So. 2d 21 (1985).

b. Brookins' Testimony on Direct-Examination Opened the Door to Legitimate Cross-Examination and Closing Argument that Explained His Pre-Arrest, Pre-*Miranda* Statements.

On direct-examination, Brookins' testified to previously unknown and undisclosed statements he made to Ofc. Bell upon getting off the transport bus at the Northwest Florida Reception Center. (V19: 308). Brookins also stated he did not previously identified Theodus Hunt – Mr. Sexton's attacker, because he did not want to be identified as working with the police. (V19: 308 – 09). Brookins' testimony was as follows:

> **(Defense Counsel) Q.** What happened when you got to Northwest Florida Reception Center?
>
> **(Brookins) A.** Everybody got off the bus. I said, I'm going to be last. Everybody got off the bus. When I got off the bus, the lady was like, what happened to you? I said, dude went crazy in there. She say, who? I said, a dude in there, just like that there.
>
> Then the other officers came. They took me and put me in another room.
>
> **Q.** Is there a reason why you didn't say who specifically did it?
>
> **A.** I didn't want to be labeled as the police.

Q. That's not a good thing in prison, right?

A. Right.

(V19: 308 – 09). Brookins' self-proclaimed statement to Ofc. Bell that the "dude went crazy in there" was made prior to his arrest and prior to the issuing of any *Miranda* warnings. (V1: 11 – 12; V19: 308 – 09). Brookins' statements were therefore not entitled to the protections of the Fifth Amendment as well as the protections of *Miranda*. In addition, until his testimony in court, this self-proclaimed statement was the first time anyone had heard Brookins accuse someone else of the murder.

When a witness testifies to contradictory facts, an opposing party may pursue a line of questioning on those facts. *See Robertson*, 829 So. 2d at 911 (citing § 90.404(1)(c) Fla. Stat. (2014) (character of witness) and § 90.608(5) Fla. Stat. (2014) (contradiction on relevant facts). Understanding that Ofc. Bell had previously testified and did not indicate Brookins made a statement implicating someone in Sexton's murder, the State sought further explanation during cross-examination.

(The State) Q. You did see who had the knife?

(Brookins) A. Yes, sir.

Q. All right. Who had the knife?

A. I told you already, sir.

Q. Well, I must have missed it. Would you please tell me again?

A. The dude Theodus.

Q. What dude?

A. That testified up here today.

Q. Which one of them?

A. The black one. The black one.

Q. Theodus Hunt, the older fellow, he's the one that did this?

A. Yes, sir.

Q. Did you tell the officers at the correctional facility that Mr. Hunt's the one that did that?

A. No, sir.

Q. Who have you told that to?

A. Nobody.

Q. You haven't told anybody until today, have you? Is that right?

A. Yes, sir.

(Sidebar, whereby the defense objected to the state's questions. The objection was overruled).

Q. The first time you've told anyone about this incident that you've described is here today in the courtroom, correct?

A. Yes, sir.

(V19: 318 – 321, 323). Through this line of questioning, the State was both impeaching Brookins' claim that he made a statement to Ofc. Bell, and explaining

Brookins' reasoning for not identifying Theodus Hunt prior to his testimony.

Brookins' effectively opened the door to this line of questioning through his own testimony regarding the statement made to Ofc. Bell and the reasons he kept the information to himself until trial. "[T]he concept of 'opening the door' allows the admission of otherwise inadmissible testimony to 'qualify, explain, or limit' testimony or evidence previously admitted." *Hudson v. State*, 992 So. 2d 96, 110 (Fla. 2008) (quoting *Lawrence v. State*, 846 So. 2d 440, 452 (Fla. 2003) (quoting *Rodriguez v. State*, 753 So. 2d 29, 42 (Fla. 2000)). This concept is "'based on considerations of fairness and the truth-seeking function of a trial' and without the fuller explanation, the testimony that opened the door 'would have been incomplete and misleading.'" *Hudson*, 992 So. 2d at 110 (quoting *Lawrence*, 846 So. 2d at 452).

Additional evidence of the State's intent in pursuing this line of question is found in the presentation of Ofc. Bell as a rebuttal witness. On rebuttal, Ofc. Bell confirmed Brookins' previously unheard statement he made. (V20: 366). The cross-examination of Brookins was therefore permissible because Brookins' opened the door through his own testimony and the State is afforded the opportunity to further explain the admitted evidence.

In *Dennis v. State*, 817 So. 2d 741, 753 (Fla. 2002), the defendant was convicted and sentenced to death for the double murder of a University of Miami

football player and his girlfriend. *Id*. The defense's cross-examination of the lead detective, focused on the "omissions in the investigation conducted by the police." *Id*. at 751. "Specifically, the defense focused on the failure of the police to pursue the person" they argued was the prime suspect. *Id*. at 751. On redirect the state responded by asking the lead detective "about the evidence the police had in their possession supporting there [sic] decision to arrest Dennis." *Id*. 751 – 52. Over the defense objection the lead detective was permitted to testify to statements gathered from multiple witnesses that showed the defendant's jealously, constant spying, and planning of the murders. *Dennis*, 817 So. 2d at 752. On appeal, Dennis claimed the trial court erred in admitting the evidence because it consisted of hearsay. *Id*. at 751. This Court disagreed and stated "the defense's cross-examination of [the lead detective] opened the door to the State's line of questioning aimed at rebutting the defense's implication that the officers' investigation was less than thorough. . . ." *Id*. at 752. In this case, it was the defendant's own testimony that opened the door to Brookins' previously unknown statements accusing another person of the murder. The State was well within the procedural rules regarding cross-examination in questioning and confirming Brookins' statements.

The closing arguments by the prosecutor were also permissible because Brookins' opened the door to during his direct testimony. It was Brookins' who

first offered the explanation as to why he did not identify Theodus Hunt until trial. (V19: 309). Brookins' also explained on direct that he would not have told anyone because he did not want to be connected to the police while he was in prison. (V19: 309). The State in its closing argument simply restated what Brookins' had already told the jury, that Brookins' had not told anyone about Theodus Hunt until his testimony during trial. (V20: 401). As such, the comments by the prosecution did not infringe on Brookins' Fifth Amendment Right to remain silent, because they were fair comments on the evidence which were first approached by Brookins during his direct examination.

c. Any Error in the Admission of the Prosecution's Comments Concerning Brookins' Pre-Arrest, Pre-*Miranda* Silence was Harmless.

Should this Court determine the complained of statements did infringe on Brookins' right to remain silent, the error is likely to be deemed harmless. In a harmless error analysis the "question is whether there is a reasonable possibility that the error affected the verdict." *Diguilio*, 491 So. 2d at 1138 – 39. As the beneficiary of the error, the burden rests with the state to prove there is no reasonable possibility that the error contributed to the conviction. *Id.* If the permissible evidence was clearly conclusive of the defendant's guilt, then the error was harmless. *Id.*; *see Fundora v. State*, 634 So. 2d 255, 256 (Fla. 3d DCA 1994); *Smith v. State*, 681 So. 2d 894, 895 – 96 (Fla. 4th DCA 1996).

Here, the evidence of Brookins' guilt was clearly conclusive. Three eye-witnesses to the murder gave corroborating testimony. (V18: 129 – 30, 149, 165, 191 – 93). Regardless of their status as inmates, each eye-witness testified to seeing Brookins launch an unprovoked attack on Eric Sexton, and repeatedly stab Sexton in the face, head and chest stopping only to straighten the knife he was using. (V18: 129 – 30, 149, 165, 191 – 93). When the inmates departed the transport bus, Brookins was the only person to have Eric Sexton's blood on his clothing. (V19: 325 – 3[illegible], V20: 364). Brookins was also the only person not wearing his DOC issued coveralls. (V17: 54, 108 – 09).

DNA also linked Brookins to the murder. DNA was found on Brookins' bloody white t-shirt with statistical certainty of 1 in 2.1 quadrillion Caucasians. (V18: 227 – 29). Brookins pants tested positive for the presence of blood. (V18: 230). A mixed DNA profile was found on Brookins' pants, and assuming Brookins to be a part of the mixture, a partial DNA profile matched Sexton within a statistical certainty of 1 in 140 trillion Caucasians. (V18: 230). The elastic waistband used to conceal the knife, and found on Interstate-10 also tested positive for the presence of blood. (V18: 231). A partial DNA profile matched Sexton as the major contributor within a statistical certainty of 1 in 5.1 trillion Caucasians. The minor contributor of the mixture on the waistband matched Brookins within a statistical certainty of 1 in 130 African Americans. (V18: 232).

Finally, two different DNA swabs were taken from the homemade knife found on Interstate-10. (V18: 233). The first was a swab of the tip, which tested positive for the presence of blood. (V18: 233). The DNA on "[t]he pointed end matched Mr. Sexton." (V18: 233). The second swab was of the handle, and was specifically swabbed for touch DNA, trying to avoid the blood stained areas of the handle. (V18: 233 – 34, 238). The handle yielded a mixed DNA profile with Sexton as the major contributor and Brookins as the minor contributor. (V18: 233). The minor DNA profile matched Brookins within a statistical certainty of 1 in 790 African Americans. (V18: 234).

None of the evidence presented at trial suggested that anyone other than Brookins was responsible for the murder of Eric Sexton. Brookins' claim that Theodus Hunt was responsible for Sexton's murder was uncorroborated by any eyewitness testimony or physical evidence. Brookins even admitted that he was the only person covered in blood getting off the bus at the Northwest Florida Reception Center. (V20: 325 – 26). Because the evidence of Brookins' guilt was clearly conclusive, there is no reasonable possibility that an error in the complained of statements affected the verdict.

III. THE TRIAL COURT APPLIED THE CORRECT RULE OF LAW SUPPORTED BY COMPETENT SUBSTANTIAL EVIDENCE IN FINDING THE AGGRAVATOR OF COLD, CALCULATED, AND PREMEDITATED.

Brookins asserts the trial court erred by instructing and finding the aggravator of cold, calculated, and premeditated proven beyond a reasonable doubt. (IB: 54). While Brookins contends the murder of Sexton was the product of a frenzied rage, the evidence shows Brookins' careful plan to murder and rob Sexton. (IB: 55). A trial court is required to give all instructions to the jury regarding aggravating or mitigating circumstances when credible and competent evidence has been presented. Brookins' actions in procuring a weapon, concealing the weapon within his pants, launching an unprovoked attacked on Sexton pausing throughout the attack, and bringing gloves for purposes of the robbery provide competent substantial evidence for CCP.

a. Standard of Review.

A challenge to a specific jury instruction is reviewed on an abuse of discretion standard. *Carpenter v. State*, 785 So. 2d 1182, 1200 (Fla. 2001). "[D]iscretion is abused only where no reasonable [judge] would take the view adopted by the trial court." *Buzia*, 926 So. 2d at 1216 (quoting *Huff*, 569 So. 2d at 1249). "A trial court has wide discretion in instructing the jury, and the court's decision regarding the charge to the jury is reviewed with a presumption of correctness on appeal."

Patrick v. State, 104 So. 3d 1046, 1058 (Fla. 2012) (citing *Carpenter*, 785 So. 2d at 1199 – 1200).

"A trial court's ruling on an aggravating circumstance is a mixed question of law and fact and will be sustained on review as long as the court applied the right rule of law and its ruling is supported by competent substantial evidence in the record." *Ford v. State*, 802 So. 2d 1121, 1133 (Fla. 2001). "The weight to be given aggravating factors is within the discretion of the trial court and is subject to the abuse of discretion standard." *Buzia*, 926 So. 2d at 1216 (citing *Sexton v. State*, 775 So. 2d 923, 934 (Fla. 2000)).

b. The Jury Instruction of Cold, Calculated, and Premeditated Aggravator

When evaluating the proposed jury instructions, a trial court is required to instruct the jury on all aggravating and mitigating factors when credible and competent evidence has been presented to the jury. *Welch v. State*, 992 So. 2d 206, 215 (Fla. 2008) (citing *Stewart v. State*, 558 So. 2d 416, 420 (Fla. 1990)). Although an aggravating factor must be proven beyond a reasonable doubt for purposes of sentencing, a jury instruction on an aggravator "need only be supported by credible and competent evidence." *Welch*, 992 So. 2d at 215 (citing *Hunter v. State*, 660 So. 2d 244, 252 (Fla. 1995)). In order for the CCP aggravator to apply the defendant must have formed a careful plan to commit the murder, must have had the opportunity for cool reflection and heightened premeditation

and there must be no moral or legal justification for the murder. *See Victorino v. State*, 23 So. 3d 87, 105 – 06 (Fla. 2009).

In this case, while the precise motive for the murder is unclear, what is proven is Brookins' took the time to procure not only a homemade weapon but also latex gloves in order to carry out the murder and robbery. He concealed the homemade knife in his pants by fashioning an elastic holster in order to hide the knife during the strip search. Brookins then carried out the unprovoked attack without any moral or legal justification.

Based on the undisputed evidence presented to the jury, the trial court did not err in giving the CCP instruction because credible and competent evidence showed the murder of Eric Sexton was CCP.

c. The Trial Court Found the CCP Aggravator and Assigned Weight

The trial court determined the state proved the CCP aggravator beyond a reasonable doubt and assigned the aggravator "substantial weight." (V2: 219 – 221). In order to find CCP as an aggravating factor the trial court must determine:

> (1) the killing must have been the product of cool and calm reflection and not an act prompted by an emotional frenzy, panic, or a fit of rage (cold); and (2) the defendant must have had a careful plan or prearranged design to commit murder before the fatal incident (calculated); and (3) the defendant must have exhibited heightened premeditation (premeditated); and (4) there must have been no pretense of moral or legal justification.

Victorino, 23 So. 3d at 105 – 06 (citing *Lynch v. State*, 841 So. 2d 362, 371 (Fla.

2003)).

This Court determines whether CCP is present based on the totality of the circumstances. *Ballard v. State*, 66 So. 3d 912, 919 (Fla. 2011) (citing *Hudson*, 992 So. 2d at 96). "'The CCP aggravator pertains specifically to the state of mind, intent, and motivation of the defendant.'" *Ballard*, 66 So. 3d at 919 (quoting *Wright*, 19 So. 3d at 298). "CCP can also be established by evidence of 'advance procurement of a weapon, lack of resistance or provocation, and the appearance of a killing carried out as a matter of course.'" *Eaglin v. State*, 19 So. 3d 935, 948 (Fla. 2009) (quoting *Davis v. State*, 859 So. 2d 465, 479 (Fla. 2003). "'[D]eliberate ruthlessness' is necessary to raise . . . premeditation above that generally required for premeditated first-degree murder.'" *Buzia*, 926 So. 2d at 1214 (quoting *Fennie v. State*, 648 So. 2d 95, 95 (Fla. 1994)).

In this case, Brookins procured a weapon and gloves in advance of his crime, attacked without provocation, and murdered Eric Sutton as a matter of course. (V2: 220). At the time he committed the murder, Brookins was serving a life sentence in the Florida Department of Corrections. (V2: 217). Under no circumstances are inmates permitted to possess weapons, which means Brookins either made or purchased his homemade knife prior to the murder. Brookins knew he would be strip searched, so he manufactured an elastic holster in order to carefully hide his knife from the DOC officers. (V2: 220). Brookins then

concealed the knife in his pants, and brought a pair of latex gloves, which he would use to search for something inside Mr. Sexton's body. (V2: 217, 220).

Three eye-witnesses to the murder described a situation where without provocation, Brookins jumped on top of Eric Sexton and suddenly began stabbing him. (V18: 129 – 30, 149, 165, 191 – 93). At most, Brookins cites to the testimony of Theodus Hunt, who said that Brookins may have asked Eric Sexton for a cigarette, and was refused. (V18: 190 – 91). But, under no circumstances does this supposed rejection of a cigarette rise to a level of provocation which would give Brookins a moral or legal justification for the murder. *See Rivers v. State*, 78 So. 343, 345 (Fla. 1918) (stating "[t]here must be an adequate or sufficient provocation to excite the anger or arouse the sudden impulse to kill in order to exclude premeditation and a previously formed design. A man is not permitted to act upon any provocation which he may think sufficient to excuse him from murder in the first degree in taking human life, merely because it is sufficient to excite his anger and impulse to kill and thereby reduce his crime to manslaughter."); *Forehand v. State*, 171 So. 241 (1936) (holding that a "dominating passion" operates to exclude premeditation and reduces a first-degree homicide to a lesser degree of murder or manslaughter).[7] Finally, each of the eye-

[7] *In re Standard Jury Instructions In Criminal Cases--Report No. 2013-02*, 137 So.

witnesses describes the murder of Eric Sexton as being carried out in a matter of course. (V18: 129 – 30, 149, 165, 191 – 93). Throughout the attack, Brookins would need to stop and straighten out his knife because it had bent during the attack. (V18: 157, 165, 168). Moreover, Brookins refused the request to stop the attack after it was apparent to the other inmates that Sexton was dead. (V18: 133 – 34).

The trial court looked directly at Brookins' advance procurement of a weapon, careful plan to conceal his weapon, and the unprovoked nature of the attack in finding CCP. (V2: 220). The murder of Eric Sexton was the product of Brookins' careful advanced planning and did not happen in a fit of rage or passion as has been claimed. But, due to the circumstantial nature of the evidence the trial court determined the CCP aggravator was less weighty than each of the other proven

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3d 995, 996 (Fla. 2014) (stating "In the instructions on first- and second-degree murder (instructions 7.2 and 7.4) and attempted first- and second-degree murder (instructions 6.2 and 6.4), language is added to instruct the jury on the common law defense of "heat of passion upon a sudden provocation" when it is applicable. Under Florida law, this defense can be asserted in certain circumstances, but presently there are no standard instructions addressing it. The instructions provide that if the jury finds the defense of "heat of passion upon sudden provocation" proven, it should acquit the defendant of the crime charged. Also, since the "heat of passion" defense, if proven, negates the element of premeditation in the case of first-degree murder and negates the element of depraved mind in the case of second-degree murder, when the court finds there is evidence to support the defense, the jury is instructed that the State has the burden of disproving the "heat of passion" defense beyond a reasonable doubt.").

aggravators, and assigned CCP only "substantial weight." (V2: 221). Therefore, because the trial court applied the correct rule of law supported by competent substantial evidence, this Court should affirm the trial court's finding of CCP.

d. Any Error in the Application of CCP was Harmless.

"When this Court strikes an aggravating factor on appeal, 'the harmless error test is applied to determine whether there is no reasonable possibility that the error affected the sentence.'" *Cole v. State*, 36 So. 3d 597, 609 (Fla. 2010) (quoting *Williams v. State*, 967 So. 2d 735, 765 (Fla. 2007)). In the present case, the trial court found four additional aggravating circumstances: (1) HAC; (2) prior violent felony for first-degree murder; (3) under sentence of imprisonment; and (4) murder committed during the course of the robbery. (V2: 217 – 221). The aggravators of HAC and prior capital felony are two of the weightiest in the capital sentencing scheme. *Gregory v. State*, 118 So. 3d 770, 786 (Fla. 2013) (citing *Silvia v. State*, 60 So. 3d 959, 974 (Fla. 2011)). The trial court took careful consideration of the HAC and prior capital felony aggravators, noting that either of these aggravators on their own would have been enough to outweigh the minimal mitigation presented by Brookins. (V2: 217 – 19). Therefore, any error in applying the CCP aggravator is harmless because no reasonable possibility exists that the error affected the sentence.

IV. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN APPLYING WEIGHT TO THE MITIGATING CIRCUMSTANCES.

Brookins contends the trial court erred in assigning weight to the mitigating circumstances because it improperly used Brookins' age as a basis for reducing the weight given. (IB: 59). Because the trial court did find that each of the proposed non-statutory mitigating factors was proven, Brookins only challenges the amount of weight given to those mitigating factors. In making this claim, Bookins asserts that because he was incarcerated since the age of 15, and therefore denied access to a family, that his status as a 19 year old adult capable of mature decisions cannot be used as a factor in reducing the weight given to mitigating circumstances. (IB: 59). This argument lacks merit and this case is distinguishable from those Brookins' uses to support his claim.

a. Standard of Review

"The weight given to each mitigating factor is a matter which rests within the discretion of the trial court." *Robinson v. State*, 761 So. 2d 269, 276 (Fla. 1999) (citing *Campbell v. State*, 571 So. 2d 415, 420 (Fla. 1990). "[D]iscretion is abused only where no reasonable [judge] would take the view adopted by the trial court." *Buzia*, 926 So. 2d at 1216 (quoting *Huff*, 569 So. 2d at 1249).

b. The Trial Court's Findings as to Mitigation

The trial court found and applied weight to each of the eight non-statutory

mitigating circumstances proposed by Brookins' and provided a factual basis for each of its rulings. (V2: 221 – 24). The trial outlined the following established mitigating factors:

1. **"Mr. Brookins's [sic] Prior Criminal History Consisted of a Single Offense Committed at Age 15 Years."** (V2: 221). Because Brookins' was 15 when he committed the murder that sent him to prison for life, his age at the time of that offense was substantially mitigating. (V2: 221). "[Brookins'] youth at the time of the Pensacola murder mitigates the statutory aggravating circumstances of a prior violent offense." (V2: 221). But, Brookins' was an adult when he murdered Mr. Sexton, and had substantial time to contemplate the consequences of murder. (V2: 221). As such, "Mr. Brookins's [sic] youth at the time he committed the Pensacola murder and the time between that offense and the murder of Mr. Sexton is of **moderate weight as against the prior violent felony aggravating circumstances only."** (V2: 221).
2. **"Mr. Brookins was Imprisoned for His Entire Adult Life and Most of His Adolescence."** (V2: 222). "This mitigating circumstances was proved. However, it is of **very little weight** because Mr. Brookins was a middle-aged adult when he murdered Mr. Sexton." (V2: 222).
3. **"Mr. Brookins was abandoned by his Father and Raised by His**

Mentally Disabled Mother." (V2: 222). The defense proved Brookins had a difficult upbringing, with little to no paternal guidance. (V2: 222). "However, Mr. Brookins was a middle aged adult when he murdered Mr. Sexton. As his sister exemplified, a difficult upbringing does not necessitate crime, much less murder." (V2: 222). Therefore this circumstance is of **little weight**. (V2: 222).

4. **"Mr. Brookins's [sic] Family was Impoverished."** (V2: 222). "Mr. Brookins's [sic] family subsisted entirely on public assistance, public housing, welfare, food stamps and disability payment." (V2: 222). "However, those disadvantages are remote in time from the offense. Mr. Brookins was a fully grown, middle –aged adult when he killed Mr. Sexton." (V2: 222). Therefore this circumstance was given **little weight**. (V2: 222).
5. **"Mr. Brookins's [sic] Childhood was Spent in a Crime-ridden Public Housing Project."** (V2: 223). The defense proved that Brookins' childhood was spent in public housing project that was subjected to pervasive criminality and gang influence. (V2: 223). "There is little doubt that such disadvantages contribute to criminality. However, those disadvantages are remote in time from the offense." (V2: 223). Because Mr. Brookins was a fully grown, middle aged man at the time he murdered Mr. Sexton, this circumstance is given **little weight**. (V2: 223).

6. **"Mr. Brookins is Loved by His Family."** (V2: 223). The defense proved Brookins is loved by his family, but "the love of family is virtually inconsequential in comparison to the aggravating circumstances." (V2: 223). This circumstance is therefore given **very little weight**. (V2: 223).
7. **"Mr. Brookins was a Loving, Supportive Son, and Brother."** (V2: 223). Brookins was shown to be a loving and supportive son and brother to his family, but "the love of family is virtually inconsequential in comparison to the aggravating circumstances." (V2: 223). This circumstance is therefore given **very little weight**. (V2: 223).
8. **"Mr. Brookins was a Slow Learner and Dropped Out of School Very Young."** (V2: 223). Brookins was shown to be a slow learner who was poorly served by the Pensacola school system. (V2: 223). "These disadvantages certainly tend to contribute to criminality. However, those disadvantages are remote in time from the offense and are virtually inconsequential in comparison to the aggravating circumstances." (V2: 223). Because Brookins was a middle aged adult when he murdered Mr. Sexton, this circumstance is given **little weight**. (V2: 223).

The trial court also took care to examine the statutory mitigators not addressed by Brookins to ensure that every possible piece of mitigation was applied, but ultimately determined none of the statutory mitigators were applicable. (V2: 224).

c. The Trial Court Used Appropriate Discretion in Assigning Weight to the Mitigators.

Brookins' concedes that mitigation which is remote in time to the murder is a valid basis for assigning less weight to the mitigating circumstances, but claims the two time periods must be separated by a positive influence or loving family in order for a trial court to be justified in reducing the weight given. (IB: 61 – 62). Because Brookins was incarcerated and denied access to his family, he asserts the trial court improperly reduced the weight given to his mitigation. (IB: 61 – 62).

Brookins likens his case to *Nibert v. State*, 574 So. 2d 1059 (Fla. 1990). In *Nibert*, the defendant presented a substantial amount of mitigation evidence which established he was physically and psychologically abused for more than 10 years. *Nibert*, 574 So. 2d at 1062. The trial court rejected this evidence as mitigation because the defendant had not lived with his abuser for almost nine years. *Id*. This Court reversed, and held no competent and substantial evidence supported the trial court's refusal to consider the mitigation. *Id*.

In this case, the trial court did not refuse to consider any of the mitigation, and in fact, considered more potential mitigation that what was proposed. (V2: 221 – 224). Brookins' case is different from *Nibert*, because the trial court in *Nibert* refused to consider mitigation evidence believing it was remote in time. Here, the trial court found the mitigation, but reduced the weight given because Brookins was now a fully grown man.

Brookins also looks to *Morton v. State*, 789 So. 2d 324, 331 – 32 (Fla. 2001), and *Douglas v. State*, 878 So. 2d 1246 (Fla. 2004), to support the position that in order for a trial court to reduce the weight given to a mitigating circumstance an intervening positive influence must be present in the defendant's background prior to the murder. This argument is refuted by Brookins' lack of criminal activity following his incarceration and the example set by his sisters.

First, by his own logic, because he suffered a deprived childhood and was then denied access to a loving family, Brookins would continue to be a disciplinary problem and commit crimes while he was incarcerated. But, as the trial court's sentencing order states, the murder of Eric Sexton was the first offense committed by Brookins since his incarceration. (V2: 221). This shows the trial court's reasoning and analysis. Since his incarceration, Brookins matured as an adult who is capable of making mature rational decisions. Thus, the weight given to the mitigation was reduced. Second, Brookins was raised in the same deprived and impoverished home as each of his sisters who testified during the penalty phase. Neither of Brookins' sisters were shown to have criminal records. Therefore the criminal actions and decisions were the product of Brookins' conscious choices, and not directly attributable to his deprived childhood. The trial court's order reflected this reasoning, noting that "a difficult upbringing does not necessitate crime, much less murder." (V2: 222). The trial court's reasoning was based on

Brookins' maturity over the 17 years he was incarcerated. Since he went to prison, Brookins was able to make rational decision that did not involve criminal activity.

The trial court's reasoning therefore consisted of sound discretion. No mitigation was rejected, but the weight given was reduced based on Brookins' maturity. Brookins' sisters were concrete examples the trial court looked to in determining the proper weight and noted that a deprived childhood does not automatically result in a life of crime or murder. (V2: 222). For 17 years Brookins had not committed another crime until, as a 32 year-old man, he decided to carefully plan and murder Eric Sexton. In this case, because any reasonable judge would take the view adopted by the trial court, there is no abuse of discretion of the weight given to the mitigation.

d. Any Error in the Weight Given to Mitigation was Harmless

Should this Court find the trial court did err in assigning weight to the mitigating circumstances, that error is likely to be harmless. The harmless error test places the burden on the State to show there is no reasonable possibility the error contributed to the jury recommendation. *DiGuilio*, 491 So. 2d at 1135 (citing *Chapman v. California*, 386 U.S. 18, 24 (1967)). Application of the harmless error test requires a complete review of the record examining both the permissible and impermissible findings to determine if the impermissible ruling of the trial court affected the sentence.

Here, the State proved five aggravators beyond a reasonable doubt: (1) HAC; (2) prior violent felony for first-degree murder; (3) under sentence of imprisonment; (4) murder committed during the course of the robbery; and (5) CCP. (V2: 217 – 22 1). The aggravators of HAC, prior capital felony, and CCP are the weightiest in the capital sentencing scheme. *Gregory*, 118 So. 3d at 786 (citing *Silvia*, 60 So. 3d at 974).

The defense case for mitigation was weak, and focused on Brookins' relationship with his family. Even though no statutory mitigators were proposed, the trial court considered and rejected each of the statutory circumstances. (V2: 224). The trial court took careful consideration of the HAC and prior capital felony aggravators, noting that either of these aggravators on their own would have been enough to outweigh the minimal mitigation presented by Brookins. (V2: 217 – 19). Therefore, it is unlikely any additional weight given to the minimal mitigation presented by Brookins would have affected the trial court's reasoning and Brookins' sentence of death.

V. NO ERROR WAS PRESENT DURING THE GUILT PHASE OF BROOKINS' TRIAL, AND THEREFORE A CLAIM OF CUMULATIVE ERROR IS WITHOUT MERIT.

Brookins asserts the cumulative effect of the alleged errors presented in Issue I and Issue II denied him a fair and impartial trial. (IB: 65). This claim is without merit because the alleged of errors have been shown to be non-existent.

a. Review of Cumulative Error.[8]

When this Court finds multiple harmless errors within a trial it considers "whether 'the cumulative effect of [the] errors was such as to deny to defendant the fair and impartial trial that is the inalienable right of all litigants in this state and this nation.'" *Penalver v. State*, 926 So. 2d 1118, 1137 (Fla. 2006) (quoting *Brooks v. State*, 918 So. 2d 181, 202 (Fla. 2005)). In determining the cumulative effect of the errors within a trial, this Court considers "whether: (1) the errors were fundamental, (2) the errors went to the heart of the State's case, and (3) the jury

[8] It is worth noting that the United States Supreme Court has never addressed the issue of cumulative error. *Derden v. McNeel*, 978 F.2d 1453, 1456 (5th Cir. 1992)(en banc)(noting the Supreme Court has not directly spoken regarding cumulative error). The problem with cumulative error analysis is that it is an open admission that none of the individual errors warrants reversal, but somehow together the errors do merit reversal. The whole is greater than the sum of the parts according to the doctrine of cumulative error. *Derden*, 978 F.2d at 1456 (noting "[t]hat the constitutionally of a state criminal trial can be compromised by a series of events none of which individually violated a defendant's constitutional rights seems a difficult theoretical proposition).

would still have heard substantial evidence in support of the defendant's guilt." *Penalver*, 926 So. 2d at 1137. If "the individual claims of error alleged are either procedurally barred or without merit, the claims of cumulative error also necessarily fails." *Israel v. State*, 985 So. 2d 510, 520 (Fla. 2008) (quoting *Parker v. State*, 904 So. 2d 370, 380 (2005).

b. No Error is Present During the Guilt Phase of Brookins' Trial.

The complained of errors during the guilt phase of Brookins' trial are presented in Issue I – Admission of Evidence of Brookins' Collateral Crime and Issue II – Alleged Comments on Brookins' Right to Remain Silent. First, the admission of Brookins' collateral crime went to a material issue in the case and was therefore proper on cross-examination. Brookins' gave the impression to the jury that he had neither the knowhow nor opportunity to carry and conceal a knife onto the DOC transport bus. The State then introduced evidence of a collateral crime, that showed Brookins' knew exactly how to carry and conceal a knife during a strip search in jail. The complained of error is therefore meritless.

Second, the questions by the State during cross-examination of Brookins were directed at Brookins' pre-arrest and pre-*miranda* statements and therefore did not infringe on Brookins' Fifth Amendment rights. Moreover, the complained of comments during the State's closing argument, were also proper because they re-affirmed Brookins' direct examination testimony. Namely that his testimony was

the first-time he had told his version of events to anyone. (V20: 401).

Finally, the complained of errors do not satisfy this Court's three part test for cumulative error as outlined in *Penalver*. Ample evidence was presented that established Brookins' guilt in the murder of Eric Sexton. The foundation of the State's case came from the multiple eye-witnesses to the murder and the physical evidence which connected Brookins to the murder. The complained of evidence and statements were collateral matters that did not address the heart of the State's case. Finally, neither of the alleged errors were fundamental. Accordingly, Brookins' claim of cumulative error is without merit, and should be denied.

VI. NO ERROR OCCURRED DURING THE PENALTY PHASE OF BROOKINS' TRIAL AND THEREFORE A CLAIM OF CUMULATIVE ERROR IS WITHOUT MERIT.

Brookins asserts the cumulative effect of the alleged errors presented in Issue III and Issue IV denied him a fair sentencing. (IB: 67). This claim is without merit because the alleged of errors have been shown to be non-existent.

a. Review of Cumulative Error.

When this Court finds multiple harmless errors within a trial it considers "whether 'the cumulative effect of [the] errors was such as to deny to defendant the fair and impartial trial that is the inalienable right of all litigants in this state and this nation.'" *Penalver*, 926 So. 2d at 1137 (quoting *Brooks*, 918 So. 2d at 202). In determining the cumulative effect of the errors within a trial, this Court considers "whether: (1) the errors were fundamental, (2) the errors went to the heart of the State's case, and (3) the jury would still have heard substantial evidence in support of the defendant's guilt." *Penalver*, 926 So. 2d at 1137. If "the individual claims of error alleged are either procedurally barred or without merit, the claims of cumulative error also necessarily fails." *Israel*, 985 So. 2d at 520 (quoting *Parker*, 904 So. 2d at 380).

b. No Error is Present in the Penalty Phase of Brookins' Trial.

The complained of errors during the penalty phase of Brookins' trial are presented in Issue III – Application of CCP Aggravator and Issue IV – Weight

Applied to the Mitigating Circumstances. First, competent and substantial evidence existed to support the application of CCP. Brookins procured a weapon and gloves in advance of his crime, attacked without provocation, and murdered Eric Sexton as a matter of course. (V2: 220; V18: 129 – 30, 149, 165, 191 – 93). Brookins knew he would be strip searched, so he manufactured an elastic holster in order to carefully hide his knife in his pants. (V2: 220). Three eye-witnesses to the murder described a situation where without provocation, Brookins jumped on top of Eric Sexton and suddenly began stabbing him. (V18: 129 – 30, 149, 165, 191 – 93). Each of the eye-witnesses describe the murder of Eric Sexton as being carried out in a matter of course. (V18: 129 – 30, 149, 165, 191 – 93). Throughout the attack, Brookins would stop and straighten out his knife because it had bent during the attack. (V18: 157, 185, 196). The trial court looked directly at Brookins' advance procurement of a weapon, careful plan to conceal his weapon, and the unprovoked nature of the attack in finding CCP. (V2: 220). Because the CCP aggravator was supported by competent substantial evidence, no error is present.

Second, the trial court exercised appropriate discretion in assigning weight to the mitigating circumstances presented by the defense. The trial court found and applied weight to each of the eight non-statutory mitigating circumstances proposed by Brookins' and provided a factual basis for each of its rulings. (V2:

221 – 24). The trial court's reasoning looked at Brookins' siblings and Brookins' maturity over the 17 years he was incarcerated. Since he went to prison, Brookins was able to make rational decision that did not involve criminal activity. The trial court did not reject any proposed mitigation, but reduced the weight based on Brookins' maturity. For 17 years Brookins had not committed another crime, until he decided to carefully plan and murder Eric Sexton. Accordingly, no reasonable judge would disagree with the trial court's determination of weight given to the mitigation and therefore no error is present.

Even assuming error was present, the complained of errors do not satisfy this Court's three part test for cumulative error as outlined in *Penalver*. The aggravating circumstances proven by the State were substantial, and the presented mitigation was minimal. The heart of the State's case for aggravation lay in the HAC and prior violent felony aggravators, either of which would have been enough to outweigh the minimal mitigation presented by Brookins. (V2: 217 – 19). Finally, neither of the complained of error were fundamental. Brookins' claim of cumulative error during the penalty phase is therefore without merit, and should be denied.

VII. THE EVIDENCE WAS SUFFICIENT TO SUPPORT BROOKINS' CONVICTION FOR FIRST-DEGREE MURDER.

Although not raised on direct appeal, "this Court has an obligation to review the sufficiency of the evidence in every case in which a sentence of death has been imposed." *Gregory*, 118 So. 3d at 785 (citing *Jones v. State*, 963 So. 2d 180, 184 (Fla. 2007). Here, the evidence was sufficient to support a conviction for first-degree murder.

a. Standard of Review

This Court applies a de novo standard of review when examining the sufficiency of the evidence to sustain a conviction for first-degree murder. *See Jones v. State*, 790 So. 2d 1194, 1197-98 (Fla. 1st DCA 2001); *see also Fisher v. State*, 715 So. 2d 950 (Fla. 1998). "In determining the sufficiency of the evidence, the question is whether, after viewing the evidence in the light most favorable to the State, a rational trier of fact could have found the existence of the elements of the crime beyond a reasonable doubt." *Gregory*, 118 So. 3d at 785 (quoting *Simmons v. State*, 934 So. 2d 1100, 1111 (Fla. 2006)); *Bradley v. State*, 787 So. 2d 732, 738 (Fla. 2001).

b. The Murder of Eric Sexton.

To prove the crime of first-degree murder of Eric Sexton, the State must prove: (1) Eric Sexton is dead; (2) the death was caused by the criminal act of Brookins;

and (3) there was a premeditated killing of Eric Sexton. *See* Fla. Std. Jury Instr. (Crim.) 7.2. Within his initial brief, Brookins' challenged the elements of causation and premeditation. Based on the eye-witness testimony and the physical evidence from the blood and DNA, a rational of trier of fact could find the murder of Eric Sexton was caused by Brookins.

"Premeditation is a fully formed conscious purpose to kill that may be formed in a moment and need only exist for such time as will allow the accused to be conscious of the nature of the act he is about to commit and the probable results of that act." *Asay v. State*, 580 So. 2d 610, 612 (Fla. 1991). Evidence of premeditation may be found in the nature of the weapon used, the lack of provocation, and the nature and manner of the wounds inflicted. *Twilegar v. State*, 42 So. 3d 177, 190 (Fla. 2010) (quoting *Larry v. State*, 104 So. 2d 352, 354 (Fla. 1958)).

In this case, three eye-witnesses to the murder described a situation where without provocation, Brookins jumped on top of Eric Sexton, took out a knife from his pants and suddenly began stabbing him. (V18: 129 – 30, 149, 165, 191 – 93); *see Hampton v. State*, 103 So. 3d 98 (Fla. 2012) (finding the deliberate use of a knife with multiple stab wounds as evidence of premeditation). Each of the eye-witnesses described a prolonged attacked where Brookins stabbed Sexton in the head, face, chest and neck. (V18: 129 – 30, 149, 165, 191 – 93). One witness

testified that it seemed as if Brookins was trying to stab Sexton's eyes out. (V18: 196). Throughout the attack, Brookins' knife would bend, so he would stop and straighten out the knife before resuming his attack. (V18: 157, 165, 168). When the attack was over Eric Sexton's blood was present on Brookins' clothes. (V17: 54, 108). In-fact, only Brookins' had any of Mr. Sexton's blood on him. (V19: 325 – 26; V20: 364).

Based on a review of the evidence in the light most favorable to the state, a rational trier of fact could find the elements of first-degree murder beyond a reasonable doubt. Therefore, this Court should conclude the evidence was sufficient to sustain a conviction for the first-degree murder of Eric Sexton.

VIII. THE MURDER OF ERIC SEXTON IS AMONG THE MOST AGGRAVATED AND LEAST MITIGATED OF FIRST-DEGREE MURDERS.

Although not raised on appeal, this Court has an obligation to review the proportionality of every death sentence. In this case, the murder of Eric Sexton is among the most aggravated and least mitigated of first-degree murders.

a. Standard of Review and Test for Proportionality.

"A trial court's ruling on a pure question of law is subject to de novo review." *Demps*, 761 So. 2d at 30[illegible]. In determining whether death is a proportionate penalty in a given case, this Court conducts "a comprehensive analysis in order to determine whether the crime falls within the category of both the most aggravated and least mitigated of murders, thereby assuring uniformity in the application of the sentence." *Bright v. State*, 90 So. 3d 24[illegible] 2[illegible] (Fla. 2012) (quoting *Williams v. State*, 37 So. 3d 187, 205 (Fla. 2005)). A direct appeal determination of death-penalty proportionality is not a matter of simply counting the aggravating and mitigating facts. As this Court explained in *Woodel v. State*, 985 So. 2d 524, 532 (Fla. 2008):

> In weighing the aggravating circumstances against the mitigating factors, the court understands that the weighing process is not simply an arithmetic exercise. The court's role is to consider the quality of the factors to be weighed, not the quantity of those factors. Accordingly, the court considers the nature and quality of the aggravators and mitigators that it has found to exist.

In reviewing the trial court's determination of the factual foundation for its death-penalty decision, [this] Court generally defers to the trial court, that is, whether a factual finding is supported by "competent, substantial evidence." *See, e.g.*, *Allred v. State*, 55 So. 3d 1267, 1277 – 78, 1281 (Fla. 2010).

b. Brookins' Sentence is Proportional.

A proper proportionality review of Brookins' case considers the totality of the circumstances compared to similar cases. *See Woodel*, 985 So. 2d at 532. The evidence in this case shows that Brookins stabbed Sexton to death with no justification.

The trial court found five aggravating and assigned weight accordingly:

- Brookins was previously convicted of a capital felony (Great Weight). (V2: 217);
- Brookins was under a sentence of imprisonment at the time of the murder (Great Weight). (V2: 217);
- Brookins was engaged in a robbery at the time of the murder (Less Than Great Weight). (V2: 217 – 18);
- HAC (Very Great Weight). (V2: 218 – 19); and
- CCP. (Substantial Weight). (V2: 219 – 221).

The jury recommended a death sentence by a vote of ten to two. (V1: 140; V21: 547). The trial court did not find any statutory mitigators, but did assign

weight to eight non-statutory mitigators. (V2: 221 – 224).

Based on the underlying facts, aggravators and mitigating circumstances, this case is comparable to *England v. State*, 940 So. 2d 389 (Fla. 2006). In *England*, the defendant was convicted of first-degree murder for brutally beating the victim to death. *Id*. at 393. The trial court found the aggravators of HAC, felony probation, prior violent felony, and crime committed during the course of a robbery. *Id.* at 113. The court in *England* did not find any statutory mitigators, but did find strong non-statutory mitigating circumstances and afforded them great weight collectively. *Id.* at 402. This Court found England's sentence proportionate when compared to cases involving with similar aggravators and mitigators. *E.g.*, *Johnson v. State*, 84[illegible] So. 2d 349, 361 (Fla. 2002) (finding death sentence proportional where four aggravators were found, including prior violent felony conviction and murder committed during commission of a sexual battery and kidnapping); *Singleton v. State*, 783 So. 2d 970 (Fla. 2001); *Mansfield v. State*, 758 So. 2d 636 (Fla. 2000) (upholding death sentence where two aggravators HAC and that murder was committed during the commission of a sexual battery outweighed five non-statutory mitigators).

Here, Brookins' case has more aggravation and substantially less mitigation than *England*. In addition, this Court has previously upheld a death sentence for a prison inmate serving life for first-degree murder, who then murders another

individual in prison. *See Gill v. State*, 14 So. 3d 946 (Fla. 2009); *Kilgore v. State*, 688 So. 2d 895, 896 – 97 (Fla. 1996). Therefore, the murder of Eric Sexton is among the most aggravated and least mitigated of first-degree murders and Brookins' sentence of death is proportional.

CONCLUSION

For the aforementioned reasons, the State respectfully requests this Honorable Court affirm Appellant's conviction and sentence.

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CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to Baya Harrison, bayalaw@aol.com – Counsel for Appellant by E-MAIL on December 16th, 2014.

CERTIFICATE OF COMPLIANCE

I certify that this brief was computer generated using Times New Roman 14 point font.

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