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IN THE SUPREME COURT OF FLORIDA

ELIJAH BROOKINS,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No: SC14-418

L.T. No. 12-478-CFA

ON DIRECT APPEAL FROM A JUDGMENT OF GUILTY OF FIRST-DEGREE MURDER AND SENTENCE OF DEATH RENDERED BY THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT, IN AND FOR GADSDEN COUNTY, FLORIDA, HON. JONATHAN OSTROM, CIRCUIT JUDGE, PRESIDING

INITIAL BRIEF OF APPELLANT

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Preliminary Statement

This is a direct appeal from a judgment of conviction and sentence of death rendered January 23, 2014 by the Circuit Court of the Second Judicial Circuit in and for Gadsden County, Florida, in a capital felony case. The Hon. Jonathan Sjostrom, Circuit Judge, presided over the guilt and penalty phases of the trial and imposed a death sentence.

Elijah Brookins was the defendant in the circuit court and is the appellant in this Court. He will be referred to herein as "Mr. Brookins" or "appellant." The State of Florida was the plaintiff below, is the appellee here, and will be referred to as "the State."

The record on appeal consists of 23 volumes. References to the record on appeal will include the letter "R" and the volume number, followed by a slash (/), and then the page number(s).

Statement of the Case and Facts

Nature of the Case:

This is a direct appeal from a final judgment of conviction and sentence of death in a capital felony case from the Second Judicial Circuit, Gadsden County, Florida. Mr. Brookins was afforded the opportunity to select venue, and chose Gadsden County.

Jurisdiction:

This Court has jurisdiction pursuant to Art. V § 3(b), Fla. Const. and § 921.141(4), Fla. Stat. (2012).

Course of the Proceedings:

On June 27, 2012, Mr. Brookins was indicted by a Gadsden County grand jury for the first-degree murder of Eric Sexton on September 20, 2011. The incident occurred during a prison transport across several counties. Mr. Brookins was afforded the opportunity to choose venue and elected to be tried in Gadsden County (R1/1).

Mr. Brookins entered a plea of not guilty (R1/17). Undersigned counsel, Baya Harrison, III, Esq., was appointed to represent Mr. Brookins on October 8, 2012 (R1/21). Chuck Collins was appointed as second chair counsel on October 18, 2012 (R1/27).

The case proceeded to trial with the selection of a 12-person jury commencing on December 9, 2013 (R17/1)[1]. The guilt phase of the trial commenced on December 10 and was completed on December 11, 2013 (R15/1, R20/1). The State presented its case-in-chief and rested, after which Mr. Brookins' motion for judgment of acquittal was denied (R19/282-3). Mr. Brookins testified on his own behalf as the lone defense witness (R19/297). The State then called two rebuttal witnesses (R20/360, 364).

The court instructed the jury on the applicable law, and then the attorneys presented closing arguments (R20/368, 385, 408, 426). The court gave final instructions to the jury on the rules for deliberation (R20/430). The jury returned a verdict of guilty as charged for first-degree murder, and made a finding that murder was established by proof of both premeditation and felony murder (R20/436).

The penalty phase of the trial was held on December 12, 2013 (R21/447). The State presented one victim impact witness (R21/475). The defense called three witnesses (R21/478, 489, 497). The jury returned an advisory sentence of death by a vote of 10-2 (R21/547).

[1] The jury selection portion of the record is out of order. Jury selection begins in volume 17 and ends in volume 16. The evidentiary portion of the guilt phase begins in volume 15 and resumes in volume 18.

The circuit court conducted a *Spencer* hearing on January 7, 2014 (R22/1). On January 23, 2014, the circuit court imposed the death penalty on Mr. Brookins (R23/5).

Disposition in the Lower Tribunal:

The circuit court entered judgment for first-degree murder and sentenced Mr. Brookins to death (R2/227-233).

Statement of the Facts:

The State's first witness was Sergeant Gordon Wester from the Department of Corrections (R15/40). He was working at the Northwest Florida Reception Center on September 20, 2011 (R15/40-41). He drove a prison transport bus to Jefferson Correctional Institution, along with Sergeant Raymond Hill (R15/42). When they arrived, another bus full of inmates was waiting for them to drive back to the reception center (R15/43).

Sergeant Hill went into the bus and did a security check and headcount before they left (R15/48-49). They did not strip search the inmates on the bus, as that would have been done before they were loaded (R15/49). All of the inmates had blue prison uniforms and leg restraints (R15/49). Mr. Brookins and the victim were both on the bus. Sergeant Hill was the driver for the trip back, with Sergeant Wester responsible for the security checks (R15/50). Wester's task was to stand up

and look through the window and metal cages into the back of the bus to make a headcount/security check to the best of his ability every 30 minutes (R15/51).

Sergeant Wester noted the security checks on a log (R15/51). That particular bus was extremely loud, and he was not able to hear what was going on in the back. He also did not see anything out of the ordinary during the security checks (R15/51-2). They did not make any stops along the way. They left Jefferson around 10:00 central time and arrived back at the reception center between 12:00 and 12:30 (R15/52).

Upon arrival, they opened up the back of the bus and allowed the inmates to get out. He and Sergeant Hill were removing leg irons while Sergeant Bell [sic] had a list of inmates to process them in (R15/53). Mr. Brookins did not have his blue uniform shirt on, and had what appeared to be a bloodstain on his T-shirt (R15/54). Sergeant Bell was talking to Mr. Brookins. Sergeant Wester went into the bus, discovered Mr. Sexton, and called for medical to come down (R15/54). Mr. Sexton was about two or three rows back from the front of the bus on the driver's side. He was leaned up against the seat and partially sitting on the floor (R15/54-55). Sergeant Wester identified Mr. Brookins in the courtroom (15/55).

On cross-examination, Sergeant Wester said that it was customary for the inmates to be strip-searched prior to getting on the transport bus (R15/56). He did three or four security checks during the return trip (R15/65). He did not recall

seeing any inmates standing up at the back of the bus during his checks (R15/66). On redirect, he said that Mr. Sexton was unresponsive when they arrived at the reception center (R15/71).

Sergeant Raymond Hill was the State's second witness (R15/76). He was working with Sergeant Wester on September 20. The inmates were already on the bus when they arrived at Jefferson Correctional Institution. He did a check of the interior of the bus, and all of the inmates were present and accounted for (R15/78-79). He did not do any searches of the inmates on the bus because that should have been done before they got on (R15/81). The bus was very loud and he had to scream at Sergeant Wester just to speak with him (R15/84).

When they arrived back at the reception center, Sergeant Hill was assisting with processing the inmates off the bus. Sergeant Wester and Officer Bell were also assisting. He observed Mr. Brookins talking to Officer Bell. He did not have his blue uniform shirt on and had bloodstains on his white T-shirt and blue pants (R15/85-86). Sergeant Hill placed Mr. Brookins in restraints, put him in a holding cell and stayed with him at that time (R15/86).

On cross-examination, Sergeant Hill said that he did not get up and look into the back of the bus during the return trip because he was the driver (R15/92).

Officer Tanya Bell was working in transport and receiving at Northwest Florida Reception Center on September 20, 2011 (R15/106). Late in the morning

or early in the afternoon, a transport bus arrived carrying Mr. Brookins, Eric Sexton, Tyrone Jackson, Juan Hernandez, Theodus Hunt and others (R15/107-8). When Mr. Brookins came out of the back door, he was all bloody. He was also wearing a white T-shirt and no blue uniform shirt (R15/108).

Officer Bell handed Mr. Brookins off to another officer and went onto the bus with Sergeant Wester (R15/109). Inmate Sexton was on the floor near the fourth row of seats on the driver's side (R15/112). He had injuries all over him. Officer Bell went back to the sallyport window to call medical and get some help (R15/112). Mr. Brookins' clothing was seized as evidence (R15/112). She then identified Mr. Brookins in the courtroom (R12/113).

The State's next witness was inmate Tyrone Jackson (R18/122). He has been convicted of a felony several times. He has not been promised anything in exchange for his testimony or coerced into testifying (R18/123-4). He did file a motion for credit for time served, and asked the prosecutor in this case to take a look at the motion (R18/124).

Mr. Jackson was on the transport bus on September 20, 2011. After stopping at Jefferson C.I., they switched drivers and continued on to the reception center (R18/124-5). He was sitting in the third row on the right side (R18/125). Each inmate on the bus had a bag with their property in it (R18/126).

Mr. Jackson spoke with Mr. Brookins, who was sitting in the second row directly in front of him (R18/126-7). They spoke about people they knew in Pensacola (R18/127). Mr. Brookins was calm and gave no indication that anything was going to happen (R18/128). Mr. Sexton was sitting in the second row on the left side. Once they got on the interstate, Mr. Jackson stopped talking to look out the window (R18/128-9).

A few minutes after that, Mr. Brookins ran over and jumped on top of Mr. Sexton (R18/129). It appeared to be a fight, but then he saw a knife come out and blood squirting all over the place (R18/129). He saw Mr. Sexton defending himself and trying to push Mr. Brookins away (R18/130). Mr. Brookins had the knife. It was a long piece of metal with a sharp edge, nine to ten inches long (R18/130). He stabbed Mr. Sexton with the knife. Most of the other inmates then moved to the back of the bus (R18/131). State's Exhibit 5 appeared to be the knife he saw that day (R18/131-2).

Mr. Brookins kept stabbing Mr. Sexton nonstop. Mr. Brookins was mumbling something, but Mr. Jackson couldn't make it out (R18/132). Mr. Sexton was screaming for officers to help him (R18/133). This went on for a long time (R18/133). No one intervened to stop the attack (R18/133). Someone said, "That's enough," but Mr. Brookins continued stabbing Mr. Sexton (R18/134). When Mr. Brookins finally stopped, Mr. Sexton was dead (R18/134).

A second inmate started interacting with Mr. Brookins. He had been in front of Mr. Brookins on the passenger side (R18/135). He helped move Mr. Sexton's body around to position it. He was black, but the witness did not know his name (R18/135). Mr. Brookins threw the knife out of the window when they were in the vicinity of the Grand Ridge, Cottondale exit (R18/135).

Mr. Brookins took off Mr. Sexton's clothes and pulled his pants down as far as the shackles would allow. Mr. Brookins put on a pair of gloves from his bag and put his hand in Mr. Sexton's rectum like he was searching for something. This lasted only a few seconds (R18/136). Mr. Brookins then went through Mr. Sexton's property, tearing up his personal family pictures and papers, and dumping out his hygiene items (R18/137). Mr. Jackson also saw Mr. Brookins throw a piece of elastic band out the window (R18/138).

Mr. Brookins then sat down and ate both his own lunch and Mr. Sexton's, with his feet propped up on Mr. Sexton's body. He also urinated on Mr. Sexton's body (R18/138-9). Everyone else stayed in the back of the bus for the remainder of the trip (R18/139). Mr. Brookins used the water cooler to wash his hands off, with the other inmate assisting him (R18/140). Mr. Jackson gave a statement and identified Mr. Brookins from a photo lineup. He also identified him in court (R18/140-141).

On cross examination, Mr. Jackson said that he asked the prosecutor about his jail credit motion when he came to visit Mr. Jackson a couple of weeks before trial (R18/142). The bus was in Leon County approaching Tallahassee when the stabbing began (R18/148). When Mr. Sexton pushed Mr. Brookins away, that's when the witness saw the knife for the first time. He did not see Mr. Brookins pull the knife from a concealed area (R18/149). He could not say how the knife got onto the bus (R18/149-150). The stabbing went on for a long time until Mr. Brookins threw the knife out in the Grand Ridge area (R18/150). The stabbing ended in Gadsden County before the bus crossed the bridge into Jackson County, lasting 20 to 30 minutes (R18/150-151).

On redirect, Mr. Jackson said that he saw Mr. Brookins use his mouth to bend the blade of the knife straight so that he could stab Mr. Sexton with it again (R18/157).

Juan Hernandez testified that he was also an inmate on the transport bus on September 20, 2011, and has several prior felony convictions (R18/159). He was seated in the first row on the driver's side (R18/161). Mr. Sexton was seated right behind him. During the first leg of the trip, Mr. Brookins was sitting right next to Mr. Hernandez (R18/161-2). Mr. Brookins had his bag with all of his property in it and seemed kind of nervous. Mr. Hernandez was talking to someone in the CM

cage in front of him. Every time Mr. Hernandez moved, Mr. Brookins shifted as if to protect his property (R18/162).

When they got to Jefferson C. I., Mr. Brookins moved to another seat in the second row on the right side (R18/163). The witness had conversation with Mr. Sexton behind him (R18/163). After they left Jefferson C. I., Mr. Hernandez was standing up and talking and heard a noise behind him. He saw Mr. Brookins on top of Mr. Sexton, and Mr. Sexton had a stab wound in his face (R18/164-5). He saw the knife and how big it was, and he got scared and jumped to another row of seats. He heard Mr. Brookins tell Mr. Sexton that he couldn't get away from him (R18/165).

Mr. Hernandez saw Mr. Brookins bend the knife back into shape and begin stabbing Mr. Sexton again. Mr. Hernandez moved to the back of the bus. He identified State's Exhibit 5 as the knife (R18/166). Mr. Sexton was screaming and trying to hold Mr. Brookins and the knife, but he was getting stabbed everywhere (R18/166-7). Mr. Brookins was on his knees on top of Mr. Sexton. He used his teeth and the wall to straighten the blade of the knife on more than one occasion (R18/167-8). The stabbing went on for ten minutes until Mr. Sexton was dead. The officers did not hear his calls for help (R18/168). No one intervened (R18/169).

Afterward, Mr. Brookins put the knife in his pocket, and later threw it out the window (R18/170). He then pulled Mr. Sexton's pants down and did something

between his legs with a bottle of lotion. Mr. Brookins put gloves on after the killing (R18/170). He picked up Mr. Sexton's body and threw it over a seat, and then tore up all of Mr. Sexton's pictures while talking to him (R18/171). Mr. Brookins was talking the entire time he was killing Mr. Sexton (R18/171). He sprayed Mr. Sexton's property around and made a big mess (R18/171). He heard Mr. Brookins call Mr. Sexton a piece of shit who needed to die. He called him that a lot (R18/172).

Mr. Brookins then ate his lunch sitting next to Mr. Sexton's body. Afterward, he used the water hog to clean up. Another inmate helped him. He was a black male, but Mr. Hernandez did not know his name (R18/172-3). He saw Mr. Brookins urinate on Mr. Sexton's body (R18/173). Mr. Brookins also threw an elastic band and holster out the window, along with the gloves (R18/174). He identified Mr. Brookins in the courtroom (R18/174).

Mr. Hernandez gave a statement to the prison inspector. He also picked Mr. Brookins out of a photo lineup as the person who did the stabbing (R18/175). He had not been promised anything or threatened with anything to get him to testify (R18/176).

On cross-examination, Mr. Hernandez admitted that he was in a holding cell with Tyrone Jackson and talked to him while they waited to testify (R18/177). He admitted that inmates do sometimes have their property stolen by other inmates on

transport buses, and this could be why Mr. Brookins was nervous (R18/179). He had his back turned when the fight first broke out (R18/180). He had no idea how the knife got on the bus until Mr. Brookins revealed how he did it with the elastic holster (R18/180). Mr. Brookins stabbed Mr. Sexton out of nowhere; he heard no prior altercation or loud talking (R18/181). Everyone went to the back of the bus except Mr. Brookins, Mr. Sexton and Mr. Kalifa (R18/183). They traveled the rest of the way standing up in the back of the bus (R18/184).

Theodus Hunt testified next. He was also an inmate on the transport bus on the day of the incident. He has been convicted of a felony one time (R18/188). The stabbing occurred right after they got on Interstate 10. He did not know the inmates, but recognized Mr. Brookins in the courtroom (R18/189). Mr. Hunt was sitting behind the person who got stabbed (R18/189). Mr. Brookins was on the right side (R18/190).

Mr. Sexton sold a cigarette for food to a man sitting behind Mr. Hunt (R18/190). Mr. Brookins was watching this happen and told Mr. Sexton he didn't have to sell him the cigarette and that he told him about that (R18/191). The argument escalated into a shoving match, with Mr. Brookins standing up and pushing Mr. Sexton, and Mr. Sexton pushing back. Mr. Brookins pushed again, and again Mr. Sexton pushed back. Then Mr. Brookins braced his feet on the seat, ripped his pants open, and pulled out a knife (R18/191).

Mr. Hunt clarified that both men pushed each other at least twice (R18/192), and that Mr. Sexton stood up at one point to push Mr. Brookins (R18/193). This happened twice before the knife came out (R18/193). Mr. Hunt identified State's Exhibit 4 as the waistband that Mr. Brookins had the knife in (R18/193-4). He identified State's Exhibit 5 as the knife (R18/195). The blade was initially curved, and Mr. Brookins had to straighten it out before stabbing Mr. Sexton with it several times (R18/195).

Mr. Hunt then went to the back of the bus, as did the other inmates. Mr. Sexton was screaming in a loud voice. From his vantage point, the only place he saw Mr. Brookins stab Mr. Sexton was in the eyes (R18/196). After Mr. Sexton was dead, Mr. Brookins moved his body and began looking for something (R18/196-7). He put the knife in Mr. Sexton's [illegible], and then his hand, asking "Where is it at, boy? Where it at? Where the package?" (R18/197).

Mr. Brookins continued stabbing Mr. Sexton after he stopped screaming. Then he ate Mr. Sexton's lunch. Mr. Brookins had blood on his hand. He threw his extra pants, the gloves, the knife, and the elastic band out the window. He used the water keg to wash up (R18/197-8). Another black inmate helped him with the water (R18/198-9). He gave a statement to the prison inspector and picked Mr. Brookins out of a photo lineup (R18/199). He also saw Mr. Brookins going through Mr. Sexton's property and commenting on his pictures (R18/200).

On cross-examination, Mr. Hunt stated that Muhammad Kalifa was on the transport bus (R18/202). He said the guards could not see through the window to do security checks (R18/203). Once the stabbing began, the inmates stood in the back of the bus for about an hour and a half (R18/204). When they arrived at the reception center and the back door opened, everyone fell out of the bus like dominoes (R18/205).

On redirect, Mr. Hunt stated that he has not received any promises or threats to get him to testify, and had no expectation of preferential treatment (R18/205).

Cory Harrison testified that he was working as a Florida Highway Patrol trooper on September 20, 2011 (R18/211). He searched an area of Interstate 10 for the objects that were thrown from the prison transport bus (R18/211). Along the shoulder in Jackson County, he recovered a white piece of elastic band with blue stitching, which he turned over to the prison inspector. He identified State's Exhibit 4 as the item, which was then admitted into evidence (R18/213).

Chadwick Carr testified that he was working as a correctional officer for the Florida Department of Corrections on September 20, 2011 (R18/215). He also searched an area of Interstate 10 for possible items of evidence. He found a metal object that he turned over to the prison inspector. He identified State's Exhibit 5 as the item he found, which was then entered into evidence (R18/216-7).

Suzanne Livingston testified as an FDLE crime lab analyst (R18/218). The State qualified her as an expert in DNA analysis (R18/220). She obtained full DNA profiles on Mr. Brookins and Mr. Sexton (R18/222-225). A swab from Mr. Brookins' left hand contained blood that included Mr. Sexton as a possible contributor only, but not conclusively (R18/225-6).

A white shirt worn by Mr. Brookins had blood that matched Mr. Sexton (R18/227-8). Pants worn by Mr. Brookins contained blood with a mixed DNA profile. One partial profile matched Mr. Sexton (R18/227-230). State's Exhibit 4 was a waistband containing blood with a mixed DNA profile. The major profile matched Mr. Sexton; a minor profile matched Mr. Brookins (R18/231-2). Muhammad Kalifa was excluded as a possible contributor to the mixed profile on the waistband (R18/232). State's Exhibit 5 was the knife with blood on it (R18/232-3). Blood on the pointed end matched Mr. Sexton's. A swab on the handle contained a mixed profile. The major contributor was Mr. Sexton, and Mr. Brookins was a minor contributor (R18/233). The profile on the handle produced a statistical analysis of one in 790 African American males (R18/234).

The State's next witness was Michael Hunter, the district medical examiner (R19/256). He was qualified as an expert in forensic pathology (R19/258). He conducted an autopsy on Eric Sexton on September 21, 2011 (R19/259-60).

Mr. Sexton had a stab wound to his anal area (R19/262), two stab wounds to his right abdomen and one on the left (R19/263), one superficial wound to his left neck and one that severed the jugular vein (R19/264), a superficial wound to his left arm (R19/265), two cuts to his left forearm (R19/266), and multiple injuries to his face (R19/266). A stab wound near the left eyebrow perforated the base of the skull and entered the temporal lobe of the brain (R19/266). Mr. Sexton had three stab wounds to the right side of the neck, including one that penetrated the jugular vein on that side and one that penetrated the vertebral artery (R19/267). There were also stab wounds to the nose, cheek, right ear and right eye, and one in the back rib area that entered the kidney (R19/269-270). There were also blunt injuries and abrasions, and defensive cuts to the hands (R19/271-272).

In all, Mr. Sexton had 26 stab wounds. State's Exhibit 5 (the knife) was consistent with the wounds and could have caused them. The cause of death was blood loss from the various stab wounds, and the manner of death was homicide (R19/273).

On cross-examination, Dr. Hunter stated that the lack of vital reaction and bleeding indicates that the anal injury occurred much later and likely post-mortem. He didn't know when Mr. Sexton died relative to the timing of the wounds (R19/275-6).

The State rested and Mr. Brookins moved for a judgment of acquittal, which was denied (R19/282-3). The court inquired of Mr. Brookins whether he wanted to testify, and Mr. Brookins stated that he would testify (R19/285-8).

Mr. Brookins testified that he was 34 years old and was an inmate in the Department of Corrections. He was at Columbia Correctional Institution on September 20, 2011 (R19/298). Guards woke him up early in the morning and told him that he was being transferred. He didn't know where he was going or who else might also be transferring that day (R19/298-299).

Mr. Brookins testified that he had very little time to pack his property. He was strip searched in the property room in preparation for transport, and every article of clothing checked (R19/300-301). He had been in the same dormitory with Mr. Sexton for about 30 days, but then left for confinement due to a disciplinary charge (R19/301). He had no prior confrontations with Mr. Sexton or problems with him (R19/302).

Mr. Brookins was sitting near the front of the bus. There were no problems on the trip to Jefferson C.I. He wasn't talking to anybody. Property theft was a problem on transport buses, but it had never happened to him (R19/302). When they got to Jefferson C.I., some inmates were called off the bus and then a guard did a head count of who was left (R19/303). Mr. Brookins could not recall where the other inmates were sitting as they left Jefferson C.I. (R19/303-4).

Mr. Sexton got into an argument with somebody, but Mr. Brookins wasn't paying attention to it. That's when the stabbing happened (R19/304). The stabbing started in the aisle, with Mr. Sexton trying to get away from the man and ending up in Mr. Brookins' seat (R19/305). When it was over, the attacker left the knife in Mr. Sexton, who was asking for help. Mr. Brookins testified that he pulled the knife out and helped Mr. Sexton onto the seat. Mr. Sexton's blood was all over him. He left the knife on the seat as well and never touched it again (R19/306).

Mr. Sexton tried to get up and move forward to get the officers' attention, but the person who did the stabbing grabbed him, got the knife, and grabbed him by the pants to keep him from crawling forward (R19/306-7). When Mr. Sexton's pants came down, the man hit him in the anus (R19/307). There were two people arguing with Mr. Sexton, but only one did all the stabbing (R19/307).

Mr. Brookins used the water keg to try to wash some of the blood off his hands (R19/307). He knows Muhammad Kalifa, but he was not involved in the incident (R19/308). The rest of the trip was quiet, except that the black inmate who testified, Theodus Hunt, was telling everyone to plead the Fifth and not talk (R19/308).

When they got to the reception center, everyone got off the bus. Mr. Brookins got off last. The lady officer asked him what happened, and he told her that a dude went crazy in there (R19/308). He didn't say who it was because he

didn't want to be labeled as the police (R19/309). Mr. Brookins had been convicted of one prior felony (R19/309).

On cross examination, Mr. Brookins said that he did not personally know Tyrone Jackson, Juan Hernandez, and Theodus Hunt, the three inmates who testified against him. However, he remembered seeing Mr. Hunt (R19/310). Mr. Brookins denied having State's Exhibit 5 on the bus or bringing it onto the bus in an elastic holster in his pants. He denied stabbing Mr. Sexton (R19/311-12). He did not remember whether Mr. Sexton was screaming or not because he was trying not to get hit himself (R19/312). The fight started in the aisle two to three seats away from him (R19/312). Someone else did the stabbing (R19/312).

Mr. Brookins denied taking Mr. Sexton's property or throwing it around the bus to look for something. He said that all the inmates on the bus went through his property (R19/313). He only moved Mr. Sexton's body to get it off of him. He got trapped in his seat when Mr. Sexton fell into him (R19/313-14). The knife was sticking in Mr. Sexton, so he put Mr. Sexton in the seat and helped pull the knife out (R19/314). He could not remember how long this all took (R19/314).

There were several people involved in the argument with Mr. Sexton, but only one did the stabbing (R19/315). He doesn't know what they were arguing about because he wasn't paying attention to it (R19/316). He doesn't remember where Mr. Sexton was sitting prior to the argument (R19/316-17). He didn't know

where the knife came from (R19/318). The first time he saw it was when Mr. Sexton was trying to block and defend himself (R19/319).

Mr. Brookins stated that Theodus Hunt is the person who had the knife. He did not tell the correctional officers that Mr. Hunt was the one who did it (R19/319). He hasn't told this to anybody prior to trial (R19/319-20). Defense counsel then objected on the ground that the prosecutor was eliciting testimony in violation of Mr. Brookins' right to remain silent (R19/320). The court overruled the objection (R19/321). The prosecutor then repeated the question, and Mr. Brookins admitted that the first time he's told anyone about the incident he just described was that day in the courtroom (R19/323).

During the sidebar discussion about the right to remain silent, the State also announced its intention to cross-examine Mr. Brookins about a handwritten statement he made regarding an incident involving another shank[2] (R19/321). The prosecutor argued that it was relevant to impeach Mr. Brookins' testimony that

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[2] The State filed a pretrial notice of intent to introduce collateral crime evidence regarding an incident at the Gadsden County Jail while Mr. Brookins was awaiting trial in this case (R1/71-72). In that incident, Mr. Brookins admitted to possessing a shank that he had concealed on a string inside his clothing. When the guards announced a strip search, Mr. Brookins dropped the shank onto the floor near another inmate. When guards attempted to charge that inmate with possessing the shank, Mr. Brookins told the guards the knife was his (R1/73). Defense counsel moved to exclude this evidence as irrelevant and not sufficiently similar to the instant murder to be admissible under Williams Rule (R1/89). At a hearing on the motion, the State conceded that the evidence was inadmissible under Williams rule but reserved the right to use it for impeachment if Mr. Brookins testified and denied knowing how to conceal a knife in his clothing (R13/20).

someone else stabbed Mr. Sexton and he only touched the knife to remove it from Mr. Sexton's body (R19/3221). The court asked if the State wanted to cross-examine Mr. Brookins about how the strip search was conducted and how the officers check the inmates' clothes to avoid concealment of objects, to which the State replied in the affirmative (R19/321-22). The court then ruled that a foundation had not yet been laid for the collateral crime evidence because the State had not established whether Mr. Brookins had the knowledge and ability to conceal things (R19/322).

The prosecutor then resumed his cross-examination of Mr. Brookins. Mr. Brookins admitted that blood was on his pants and shirt, and that none of the other inmates on the bus got blood on them (R19/327). He was the only one who got blood on him because Mr. Sexton fell in his lap (R19/326). He did not remember telling Officer Mayo at the reception center that all he knew was that he woke up to find Mr. Sexton in his lap (R19/328). Mr. Brookins reiterated that all he said when he got off the bus was that a dude went crazy in there (R19/329).

The prosecutor then cross-examined Mr. Brookins about the strip search in order to open the door to the collateral crime evidence:

> Q: So, I want to go back to the strip search a little bit. You said that it was very thorough?
>
> A: Yes, sir.

Q: No possible way that you could have secreted a shank, such as the one we have here, Exhibit Number 5, in your clothing?

A: Yes, sir.

Q: Isn't it true that you do know how to secrete a shank in your clothing?

A: No, sir.

Q: Isn't it true that you've had a shank in your clothing before?

A: No, sir.

(R19/329). The State then moved to introduce Mr. Brookins' handwritten statement about the collateral crime incident. Defense counsel vehemently objected, arguing that Mr. Brookins had not opened the door to this evidence on direct examination by falsely claiming a lack of knowledge about shanks, and that the State was creating the problem itself on cross-examination (R19/329-330).

The court overruled the objection and allowed the State to introduce the statement (R19/331). The State then elicited Mr. Brookins' admission that he wrote the statement and that he admitted possession of the shank on the second occasion. Mr. Brookins also admitted that he lied in the sworn statement in order to protect the other inmate from being charged with possessing the shank (R19/333-34).

The State then presented its rebuttal case, calling two correctional officers. Sergeant Donnie Mayo testified that he was working transport and receiving at the Northwest Florida Reception Center on September 20, 2011 (R20/360). He

responded to a call for help when a bus arrived. He asked Mr. Brookins what happened, and Mr. Brookins stated that he fell asleep, and when he woke up a guy was lying in his lap (R20/361). Mr. Brookins did not say anything about a fight between other inmates (R2/361).

Tanya Bell was recalled and testified that there was no blood visible on Theodus Hunt or any other inmate other than Mr. Brookins when they got off the bus (R20/364-65). On cross-examination, she admitted hearing Mr. Brookins say that a "dude went psycho" on the bus (R20/366). He never made a statement about anyone sleeping (R20/366).

The jury found Mr. Brookins guilty as charged of first-degree murder by both premeditation and felony murder (R20/436).

The penalty phase was conducted on December 12, 2014 (R21/1). The State introduced a certified copy of Mr. Brookins' prior conviction and called one victim impact witness, Teresa Maher (R21/475). The State then rested (R21/477).

The defense then presented its penalty phase case, calling Shonda Brookins (R21/478). Mr. Brookins' birthdate is March 20, 1979 (R21/479). He is her younger brother. Their father abandoned them and was not a part of the family (R21/480). Their mother could not read or write or work outside the home. Because of her disability, they were forced to rely on government aid to survive (R21/480-81). They always had to live in low income housing projects and suffer

financial hardships (R21/481). Mr. Brookins used to defend Elysha, their younger sister, from bullying and taunting (R21/482).

The project where they lived was called Truman Arms. There was rampant crime and drug abuse there. They saw fighting, people using drugs, and a few murders (R21/483). Mr. Brookins dropped out of school in the 9th or 10th grade. He had been in the slow learners' classes (R21/483). He was arrested just after his 16th birthday for a serious crime, went to state prison, and has been there ever since (R21/485). They tried to maintain a relationship, but couldn't afford the travel to visit him for the first ten years (R21/486).

The defense's next witness was Mary Poole, Mr. Brookins' aunt (R21/488-90). She also stated that Mr. Brookins' father was absent and not a part of his life (R21/490). His mother was disabled and life was hard. Mr. Brookins did not do well in school because he was very slow (R21/491). They did go to church (R21/493). Around age 14 or 15, he dropped out of school and fell in with the wrong crowd (R21/493). He was 15 or 16 when he went to prison (R21/493).

After a recess, defense counsel moved to exclude the CCP[3] aggravator on the ground that there was no evidence of heightened premeditation. Counsel argued that Mr. Brookins had no axe to grind with Mr. Sexton, wasn't targeting

[3] See § 921.141(5)(i), Fla. Stat. (2012) (The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification).

him until they got on the bus, and had no way of knowing that Mr. Sexton was even going to be on the bus (R21/495). The State argued that bringing the shank onto the bus was sufficient evidence that the killing was cold, calculated and premeditated (R21/496). The court denied the motion to strike the CCP aggravator (R21/496).

The defense's last witness was Elysha McPherson (R21/497). She is Mr. Brookins' youngest sister (R21/498). Mr. Brookins was a very loving brother to her (R21/498). She was eight years old when he went to prison (R21/498). They lived in a rough neighborhood. There were fights and people breaking into houses. Mr. Brookins tried to keep her from that (R21/499). He was a good son to their mother, who had health problems (R21/500). She wants to stay in contact with her brother so her children can know him (R21/50[illegible]).

The defense then rested. Following argument and instruction, the jury rendered an advisory sentence of death by a vote of 10-2 (R21/547).

The circuit court conducted a Spencer hearing on January 7, 2014 (R22/1). The prosecutor read letters from Mr. Sexton's surviving family members (R22/4-7). The defense presented the testimony of Mr. Brookins' mother, his sister, and his aunt (R22/7-9). Defense counsel presented a written memorandum opposing the death penalty, and the court took the matter under advisement (R22/10-12).

The circuit court conducted the imposition of sentence on January 23, 2014 (R23/1). The court found that the State proved five statutory aggravating circumstances beyond a reasonable doubt. The defense proved no statutory mitigating circumstances and eight non-statutory mitigating circumstances (R23/4). The court found that the aggravating circumstances outweighed the evidence in mitigation, and following the jury's 10-2 recommendation, sentenced Mr. Brookins to death (R23/4-5).

The circuit court's written sentencing order found the following five aggravating circumstances proven beyond a reasonable doubt:

> (1) The capital felony was committed by a person previously convicted of a felony and under sentence of imprisonment or placed on community control or on felony probation.

(R2/217). The court gave this aggravating factor great weight (R2/217).

> (2) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

(R2/217). The court gave this aggravating factor great weight (R2/2/17).

> (3) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery.

(R2/217). The court gave this aggravating factor substantial weight (R2/218).

(4) The capital felony was especially heinous, atrocious, or cruel.

(R2/218). The court gave this factor very great weight and noted that this factor alone outweighs the mitigation evidence (R2/219).

(5) The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

(R2/219). The court gave this factor, hereinafter referred to as "CCP," substantial weight (R2/221).

The court then found the following eight non-statutory mitigating factors:

1. Mr. Brookins' prior criminal history consisted of a single offense committed at age 15 years;

2. Mr. Brookins was imprisoned for his entire adult life and most of his adolescence;

3. Mr. Brookins was abandoned by his father and raised by his mentally disabled mother;

4. Mr. Brookins' family was impoverished;

5. Mr. Brookins' childhood was spent in a crime-ridden public housing project;

6. Mr. Brookins is loved by his family;

7. Mr. Brookins was a loving, suppportive son and brother;

8. Mr. Brookins was a slow learner and dropped out of school very young.

(R2/221-224). The court found the first mitigating circumstance regarding Mr. Brookins' age at the time of his prior violent felony to be of moderate weight as against the prior violent felony aggravator only (R2/221). The court found this circumstance was not mitigating as to the other aggravating circumstances because Mr. Brookins "was no longer a child or adolescent when he killed Mr. Sexton." (R2/221).

The court gave mitigating circumstance #2 very little weight and circumstances 3, 4, 5, and 8 little weight because Mr. Brookins "was a middle-aged adult when he murdered Mr. Sexton" and the mitigating circumstances were too "remote in time." (R2/222-223). The court gave mitigators 6 and 7 very little weight (R2/223).

This appeal follows.

Summary of the Argument

The circuit court erred in allowing the State to impeach Mr. Brookins with collateral crime evidence. Mr. Brookins' testimony that he was strip searched before getting on the prison transport bus did not open the door to evidence that he possessed a knife concealed in his clothing on another occasion. Two prison guards had already testified that all of the inmates were strip searched, and Mr. Brookins' testimony was cumulative to that. Mr. Brookins did not give any misleading testimony or make any specific factual assertion that he was unfamiliar with how to conceal a knife or smuggle it past security. It is undisputed that a knife was smuggled onto the bus by someone, and Mr. Brookins' only testimony on direct examination was that someone else committed the stabbing. This testimony did not put Mr. Brookins' character in issue so as to allow impeachment with collateral crime evidence.

The circuit court also erred in allowing the State to cross-examine Mr. Brookins about his post-arrest, post-Miranda silence. After Mr. Brookins admitted that he did not tell his version of events to correctional officers when he first got off the prison bus, the prosecutor continued the line of questioning and brought out the fact that Mr. Brookins never told anyone of his testimony until he took the stand at trial. This included the entire 17-month time between Mr. Brookins' arrest and invocation of his right to remain silent and the trial, a time period during which

Mr. Brookins had the absolute right to remain silent and not have his silence used against him as proof of guilt or to attack his credibility by suggesting that his trial testimony was a fabrication.

The CCP aggravating circumstance is not supported by the evidence and should not have been submitted to the jury. One of the State's own witnesses testified that the stabbing resulted from an argument and shoving match between Mr. Brookins and the victim about a cigarette. Mr. Brookins and the victim pushed each other several times before Mr. Brookins pulled out a knife and stabbed the victim to death. Witnesses also described Mr. Brookins exhibiting rage during and after the killing, calling the victim a piece of shit who deserved to die, urinating on the body, and tearing up his family pictures and other property. Mr. Brookins also didn't put gloves on until after the stabbing, leaving blood on his hands that was later used as evidence. This evidence is inconsistent with the calm reflection, heightened premeditation and careful planning that are necessary elements of the CCP aggravator.

Furthermore, although witnesses said that Mr. Brookins procured a weapon in advance and concealed it in his clothing, this was not necessarily done out of a plan to kill the victim. Mr. Brookins was being transferred and had to carry all of his property with him, including any weapon that he wanted to keep by concealing it from the guards. He was awakened early in the morning with news that he was

transferring, and did not know where he was going or who else was being transferred. As a result, there was little opportunity to engage in calm reflection and advance planning prior to getting on the transport bus.

The circuit court also erred in its weighting of six non-statutory mitigating circumstances. The court found these factors proven, but gave them little or very little weight based on a finding that they were remote in time. These circumstances were based on Mr. Brookins' neglected and deprived childhood, and included the fact that his father abandoned him, he was raised by a mentally disabled mother, lived in poverty, lived in a high-crime housing project, dropped out of school, and was incarcerated at age 15.

These factors persisted throughout Mr. Brookins' life until the time he was incarcerated as a juvenile with a life sentence. There was no intervening period with a healthy or stable environment to offset the damaging effect of these influences on his life. This Court's precedents hold that an abusive or deprived childhood is absolutely a mitigating circumstance, and the mere passage of time without more does not negate these circumstances as too remote. The circuit court's failure to give these factors substantial mitigating weight constitutes an abuse of discretion that requires reversal.

Argument

I. WHETHER THE CIRCUIT COURT ERRED IN ADMITTING COLLATERAL CRIME EVIDENCE FOR IMPEACHMENT

The circuit court erred in allowing the State to introduce evidence of an uncharged collateral crime committed by Mr. Brookins while awaiting trial in this case. The admissibility of evidence is reviewed on appeal for abuse of discretion, but the trial court's discretion is limited by the rules of evidence. *Michael v. State,* 884 So. 2d 83 (Fla. 3rd DCA 2004). If erroneously admitted, collateral crime evidence is presumed to be harmful. *Castro v. State,* 547 So. 2d 111 (Fla. 1989).

Prior to trial, the State filed a "Notice of Intent to Introduce Evidence of Other Crimes, Wrongs, or Acts." (R1/72). The notice set forth an incident at the Gadsden County Jail on July 18, 2013, during which Mr. Brookins admitted to possessing a metal shank that he had concealed in a string inside his pants. Mr. Brookins executed a written statement admitting his wrongdoing in that incident (R1/73). The notice tracked the language of § 90.404(2), but did not specifically enumerate the basis for admitting the evidence or its purpose. The notice did not allege that the incident was similar in any way to the instant offense.

Mr. Brookins filed a defense motion in limine to exclude this evidence (R1/89). At a hearing on the motion, the State conceded that it could not introduce the collateral crime during its case-in-chief, but argued that it might be able to use it for impeachment if Mr. Brookins testified at trial (R13/20).

At trial, Mr. Brookins took the stand in his own defense. He testified that the victim got into an argument with other inmates on the bus, and that is when the stabbing happened (R19/304). The victim tried to get away from the other inmate who was stabbing him and fell into Mr. Brookins' lap (R19/305). The inmate left the shank in the victim, so Mr. Brookins pulled it out and put it on the seat (R19/306). Mr. Brookins said that was the only time he touched the shank (R19/306). That was the only testimony Mr. Brookins gave on direct examination about the shank.

On cross-examination, the State asked Mr. Brookins if he brought the shank onto the bus in an elastic holster in his pants, which Mr. Brookins denied. He denied stabbing the victim (R19/311). He said that the inmate witness who testified, Theodus Hunt, was the person he saw with the knife on the bus (R19/319).

During a sidebar conference, the State announced its intention to cross-examine Mr. Brookins about the collateral crime. The prosecutor said this was relevant impeachment because Mr. Brookins denied stabbing the victim (R19/321). The court then suggested that the collateral crime would be admissible to impeach Mr. Brookins' testimony about the strip search and how guards check all the clothing to avoid concealment of objects (R19/321-22). The court said that the State had not laid a foundation yet by questioning Mr. Brookins about whether he

had knowledge or experience with concealing things or the ability to do so (R19/322). Defense counsel agreed that the door had not been opened for the collateral crime incident to be admissible (R19/322).

The prosecutor then continued his cross-examination of Mr. Brookins, during which the following exchange occurred:

> Q: So, I want to go back to the strip search a little bit. You said that it was very thorough?
>
> A: Yes, sir.
>
> Q: They went through every square inch of your clothing?
>
> A: Yes, sir.
>
> Q: No possible way that you could have secreted a shank, such as the one we have here, Exhibit Number 5, in your clothing?
>
> A: Yes, sir.
>
> Q: Isn't it true that you do know how to secrete a shank in your clothing?
>
> A: No, sir.
>
> Q: Isn't it true that you've had a shank in your clothing before?
>
> A: No, sir.

(R19/329). The parties then argued the admissibility of the collateral crime evidence again at sidebar. Defense counsel strongly objected on the ground that

Mr. Brookins did not bring up on direct examination anything about being unfamiliar with shanks or avoiding shanks, and the prosecutor was creating the problem by raising the issue on cross-examination solely for the purpose of impeaching Mr. Brookins (R19/330-331).

The judge ruled that Mr. Brookins' direct examination testimony that he was strip searched before getting on the bus supported an inference that it was impossible to get the shank on the bus, and opened the door to inquiry about his knowledge and ability to conceal things from correctional officers. The court then overruled the objection and allowed the State to introduce the collateral crime evidence (R19/331). Mr. Brookins was then confronted with his written statement about the collateral crime and acknowledged that he admitted possessing the shank on that occasion (R19/332-333). The prosecutor argued the collateral crime evidence in closing (R20/400).

The circuit court erred in ruling that Mr. Brookins' direct examination testimony opened the door to this irrelevant collateral crime evidence. Mr. Brookins did not testify that it was impossible to conceal an object in his clothing or that the strip search would have discovered such an object had he attempted to conceal it. He also did not testify that he knew nothing about shanks or how to conceal them. Mr. Brookins did not even say on direct that he brought no weapon onto the bus. He merely testified that Theodus Hunt stabbed the victim with a

shank, and the only time Mr. Brookins touched it was to pull it out of the victim.

Mr. Brookins' testimony about the strip search was given during the preliminary portion of his testimony to explain the course of events leading up to him being on the transport bus. There was no discussion about shanks during this portion of his testimony, nor was it offered to establish an impossibility defense or an inference that it was impossible to conceal a shank and smuggle it onto the bus. Clearly, someone managed to conceal the shank and bring it onto the bus.

Furthermore, the prosecutor elicited from two DOC guards who testified that all of the inmates were strip searched before getting on the bus. Mr. Brookins' testimony to the same effect was merely cumulative to testimony elicited by the State of its own witnesses.

Three inmate witnesses testified that Mr. Brookins stabbed the victim with a knife. One, Theodus Hunt, testified that Mr. Brookins pulled the knife from an elastic holster in his pants. Mr. Brookins' knowledge or ability to conceal a knife in his clothing was not an issue in the case until the prosecutor made it an issue. Mr. Brookins did not testify about his knowledge or ability to conceal a knife in his clothing until forced to do so by the prosecutor on cross-examination.

To open the door on direct examination to a line of questioning on cross-examination, the defense must first offer misleading testimony or make a specific factual assertion which the State has the right to correct so that the jury will not be

misled. *Robertson v. State,* 829 So. 2d 901, 913 (Fla. 2002). *Robertson* is on point and is the controlling law on this issue.

In *Robertson,* the defendant was charged with murder for shooting the victim with a .40 caliber pistol. The defendant took the stand and testified that the gun went off accidentally while he was cleaning it. *Id* at 904. On cross-examination, the State asked the defendant if he was familiar with large assault rifles like the AK-47 and asked if he had threatened people with assault rifles before. *Id.* The defendant admitted that he owned an AK-47 but denied threatening anyone with it. *Id*. Over objection, the State was then allowed to call the defendant's ex-wife to impeach the defendant's cross-examination testimony. *Id* at 905. She testified about an incident in which Robertson threatened her with an AK-47 and pointed it at her. *Id*. The State then argued the collateral bad act in closing as proof of Robertson's guilt and dishonesty. *Id*.

On appeal, the Third District initially reversed the conviction, holding that the introduction of the collateral crime was improper impeachment. *Id*. On rehearing, the court reviewed the case en banc and affirmed the conviction on the ground that the collateral crime was admissible as Williams Rule evidence. *Id* at 905-906. A plurality opinion ruled that the collateral crime was admissible both as Williams Rule evidence and as impeachment. *Id* at 906. Four judges dissented, holding the view that the evidence was inadmissible under either theory. *Id*.

On conflict review, this Court quashed the en banc decision of the Third District and remanded for a new trial. First, the Court held that the evidence could not be admitted as Williams Rule because the parties had not litigated the matter in the trial court and the judge had not made the required findings to comply with statutory requirements. Therefore, affirming on a Williams Rule theory was an improper application of the Tipsy Coachman Rule. *Id* at 908-909.

The Court then addressed the issue of whether the evidence was properly admitted for impeachment. The Court recognized that even if a collateral crime is not admissible under § 90.404(2), "a testifying defendant may nonetheless open the door to the prior crime evidence by (1) offering a trait of the defendant's good character, *see* § 90.404(1)(a) (character of accused), or (2) inaccurately testifying to material facts, *see* § 90.404(1)(c) (character of witness), § 90.608(5) (contradiction on relevant facts)." *Id* at 911.

The State may only impeach a defendant with a collateral crime under this rule if the defendant first opens the door to such impeachment by putting his character in issue. *Id* at 912. "[T]he State cannot open the door itself by asking impermissible questions on cross-examination." *Id*. Quoting an earlier case, the Court stated:

> [T]he prosecution in a criminal case cannot call witnesses to impeach the character of the defendant, unless the defendant puts it in issue. *Nor can the prosecution accomplish the same forbidden end by indirection*

> *through pursuing a method of questioning defendant and his witness on cross examination that is principally designed, by means of innuendo and suggestions of general criminality on accused's part, to lead the jury to believe that the accused should be found guilty of the particular crime charged,* because of his being suspected or accused of other offenses, or because of his connections or association with other accused persons under indictment for different crimes not constituting part of the charge on trial.

Id at 912 (quoting *Ivey v. State,* 115 Fla. 245, 155 So. 657, 658 (1934) (emphasis in original). The Court reasoned that the State violated these principles because Robertson never put his character in issue and subject to rebuttal through evidence of a prior crime. *Id*.

In this case, the State suggested general criminality on Mr. Brookins' part by asking him if he knew how to hide a knife in his clothing and whether he had ever done it before. The State then impeached Mr. Brookins' answers to those questions with his written statement about the subsequent shank incident at the jail. This Court specifically held in *Robertson* that "[t]he State cannot ask a series of impermissible questions concerning prior acts of misconduct on cross-examination, and then claim that the defendant opened the door by answering the impermissible questions." *Id* at 913.

To open the door, "the defense must first offer misleading testimony or make a specific factual assertion which the state has the right to correct so that the jury will not be misled." *Id* (emphasis added). Mr. Brookins gave no misleading

testimony on direct examination. He merely stated that guards strip searched him and went through his clothing in the property room before putting him on the bus. Two state witnesses had already testified that the inmates were strip searched.

Mr. Brookins made no specific factual assertion on direct examination that it was impossible to conceal a knife from the guards or smuggle it onto the bus, or that he lacked the knowledge or ability to do so. In the absence of such an assertion, a vague inference that a strip search might make it harder to get a knife past security is insufficient to open the door to inflammatory and highly prejudicial collateral crime evidence.

This Court stated the importance of this limitation on cross-examination in *Robertson*:

> It is critical for the courts to enforce this restriction on impeachment because the failure to do so would allow the State to circumvent the procedural requirement of section 90.404(2)(b)(1), which requires pretrial notice to the defendant when the State intends to introduce evidence of prior crimes. Because the State could not introduce the evidence of Robertson's alleged prior threat to his ex-wife as *Williams* rule evidence, the State cannot rely on the law of impeachment to introduce the same evidence through the back door by asking an impermissible question regarding an alleged prior crime.

Id at 913.

The evil targeted by the rule announced in *Robertson* is precisely what the State did in the instant case. The State knew that the collateral crime was not

strikingly similar to the capital murder, nor was it relevant to prove any material fact put in issue in the case. Therefore, the State abandoned its Williams Rule notice at the motion hearing and sought to get the evidence in through the back door as impeachment. And, when Mr. Brookins failed to make the necessary misleading factual assertions on direct examination, the prosecutor pulled them out of him on cross-examination. This is clearly forbidden by the holding and rationale in *Robertson.* The evidence was inadmissible and the circuit court erred in allowing the State to introduce it over defense objection.

The error is harmful in this case for four reasons. First, "the erroneous admission of irrelevant collateral crimes evidence 'is presumed harmful error because of the danger that a jury will take the bad character or propensity to crime thus demonstrated as evidence of guilt of the crime charged.'" *Id* at 913-914 (quoting *Castro,* 547 So. 2d at 115). Second, evidence that Mr. Brookins possessed a prison shank concealed in his clothing on another occasion not only showed Mr. Brookins' ability to conceal such a weapon, but also bolstered Mr. Hunt's testimony that Mr. Brookins pulled the knife from an elastic holster hidden in his clothing to murder the victim. Third, as was the case in *Robertson*, the prosecutor highlighted the collateral crime evidence during closing argument, insisting that Mr. Brookins' denials were proof that his oath to tell the truth doesn't mean very much (R20/401).

Finally, the only direct evidence of guilt is the testimony of three convicted felons with an interest in the outcome of the case[4], one of whom Mr. Brookins testified was the murderer. The only independent witnesses who could have credibly identified the murderer were the two DOC guards in the front of the bus, and they did not see or hear anything. The presence of the victim's blood on Mr. Brookins and his DNA on the knife were consistent with guilt, but also consistent with Mr. Brookins' testimony that the victim fell into his lap after being stabbed by Mr. Hunt, and that Mr. Brookins pulled the shank out of the victim and put it on the seat. The State did not call a crime scene expert to testify that the blood on Mr. Brookins established him as the killer or that the absence of blood on Mr. Hunt ruled him out as the killer.

Accordingly, the improper use of the collateral crime evidence against Mr. Brookins was harmful error that went directly to the question of guilt or innocence. This deprived Mr. Brookins of due process and a fair trial.

[4] The trial court instructed the jury that a prison inmate who provides substantial assistance to the State in resolving a criminal case may ask the state attorney to petition the court to reduce or suspend the inmate's prison sentence (R20/379).

II. WHETHER THE CIRCUIT COURT ERRED IN OVERRULING DEFENSE OBJECTION TO COMMENT ON APPELLANT'S RIGHT TO REMAIN SILENT

The circuit court erred in allowing the State, over defense objection, to cross-examine Mr. Brookins about his post-arrest and post-Miranda[5] silence and argue it to the jury in closing. The standard of review 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 (Fla. 1986).

Mr. Brookins took the stand in his own defense and testified that Theodus Hunt, one of the three inmates who testified at trial and implicated him in the murder, was the person he recognized from the bus as the person who actually stabbed the victim to death (R19/319). On cross-examination, Mr. Brookins admitted that he did not tell the officers at the correctional facility when he got off the transport bus that Mr. Hunt was the person who committed the crime (R19/319). However, the prosecutor did not stop there, but continued the cross-examination as follows:

> 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.

[5] *Miranda v. Arizona,* 384 U.S. 436, 86 S. Ct. 1602 (1966).

(R19/319-320). Defense counsel then objected and requested a sidebar, arguing that the last question was an improper comment on Mr. Brookins' right to remain silent (R19/320). The court overruled the objection (R19/321), and the State then repeated the question and again elicited Mr. Brookins' admission that he never told anyone his version of events prior to testifying at trial (R19/323).

It is a violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution to use a defendant's post-Miranda silence to impeach his trial testimony. *State v. Hoggins,* 718 So. 2d 761, 765 (Fla. 1998); *Doyle v. Ohio,* 426 U.S. 610, 96 S. Ct. 2240 (1976). Once a defendant's silence has been induced by the implicit assurances contained within the Miranda warnings, it cannot be used against him for any purpose. *Hoggins,* 718 So. 2d at 765. It is also a violation of Art. I § 9 of the Florida Constitution to introduce evidence of a defendant's post-arrest silence either as proof of guilt or for impeachment, irrespective of Miranda warnings. *Hoggins,* 718 So. 2d at 769-70.

Both constitutional rules were violated in this case. The prosecutor's first question about Mr. Brookins' failure to tell the correctional officers what happened immediately after disembarking from the bus concerned his pre-arrest, pre-Miranda silence. However, the two follow-up questions concerning Mr. Brookins' failure to ever relate his version of events at any time prior to trial was an improper comment on Mr. Brookins' protected constitutional rights.

This incident occurred on September 20, 2011. Mr. Brookins was arrested for the offense on July 5, 2012 (R1/11-12), and invoked his Fifth Amendment right to remain silent in writing on July 6, 2012 (R11/13). He gave his trial testimony on December 11, 2013. As a result, the prosecutor's sweeping questions about the pretrial period encompassed the 17 months between Mr. Brookins' arrest and invocation of his Miranda rights and the trial in this case, a time period during which Mr. Brookins had an absolute right to remain silent and not have that silence used against him at trial as proof of guilt or to suggest that his trial testimony was a fabrication. The questions are therefore fairly susceptible of being interpreted as a comment on Mr. Brookins' silence during this time period.

The specific question of whether a defendant's trial testimony is the first time he has ever publicly stated his version of events has been held to be an improper comment on post-arrest silence. *Chamblin v. State*, 994 So. 2d 1165 (Fla. 1st DCA 2008). In *Chamblin,* the defendant was involved in a fatal vehicle crash on August 12, 2005, and was arrested in November of that year. *Id* at 1166-67. He went to trial in August of 2006, but the trial ended in a hung jury. *Id* at 1167. At the second trial, the prosecutor elicited on cross-examination of the defendant that his testimony during the first trial was the first time he had ever publicly stated his version of events, which is that the passenger caused the crash by grabbing the steering wheel. *Id*. The trial court overruled defense counsel's objection. *Id.* The

court also allowed the State to argue the defendant's failure to give his version of events sooner in closing, again over defense objection. *Id* at 1168.

On appeal, the First District reversed, holding that the questions and argument were fairly susceptible of being construed by the jury as a comment on the defendant's exercise of his right to remain silent after being arrested and receiving Miranda warnings, in violation of *Hoggins*. *Id*. The court rejected the State's attempt to focus on the statements made by the defendant to witnesses at the scene of the accident prior to his arrest, reasoning that at least one of the questions was directed to the defendant's post-Miranda silence. *Id*. The court further reasoned that by securing the defendant's admission that his trial testimony was the first time he ever publicly mentioned his story, this necessarily covered the entire period between the accident and the first trial, which included an extended period after the defendant received his Miranda warnings. *Id* at 1168-69.

Chamblin is directly on point. The prosecutor, not satisfied with Mr. Brookins' admission that he failed to identify Mr. Hunt as the killer to correctional officers at the scene, went further and elicited on cross-examination that Mr. Brookins did not do so at any time prior to giving his direct testimony at trial. As was the case in *Chamblin,* "[t]his line of inquiry necessarily covered" the entire period between the incident and trial, including an extended period after Mr. Brookins was arrested and invoked his Fifth Amendment right to silence. These

questions were fairly susceptible of being interpreted by the jury as a comment on Mr. Brookins' silence during this protected period.

The prosecutor also argued Mr. Brookins' post-Miranda silence in closing:

> The first time he ever told anybody this story about Theodus Hunt chasing Eric Sexton down the aisle of that bus is here in this courtroom, and he admitted that.

(R20/401). The prosecutor also commented on Mr. Brookins' right not to testify and argued that the jury should not give his testimony any additional credibility based on this right. This type is improper. *See Varona v. State,* 674 So. 2d 823 (Fla. 4th DCA 1996) (holding that prosecutor cannot comment on defendant's right not to testify, even if it is a well-intentioned reminder to the jury that they cannot use this fact against the defendant).

The error is harmful. Comments on a defendant's right to silence are not harmless unless the evidence against the defendant is clearly conclusive. *Smith v. State,* 681 So. 2d 894 (Fla. 4th DCA 1996). Mr. Brookins' testimony, if true, provided an hypothesis of innocence that was consistent with the blood and DNA evidence. The State relied on the testimony of three inmate witnesses to contradict Mr. Brookins' version of events and prove guilt. These witnesses had prior felony convictions and an interest in how the case should be decided, either to obtain a sentence reduction or, in the case of Mr. Hunt, to avoid prosecution for the murder.

The improper comments on Mr. Brookins' protected silence directly undercut his credibility as a witness, suggesting to the jury that his trial testimony was a fabrication because he failed to come forward and make a statement after being arrested. This shifted the credibility balance in favor of the State's inmate witnesses. Because the physical evidence is not conclusive and the State's witnesses had their own credibility issues, the error is not harmless and a new trial is required.

III. WHETHER THE CIRCUIT COURT ERRED IN FINDING AS AN AGGRAVATING CIRCUMSTANCE THAT THE MURDER WAS COLD, CALCULATED AND PREMEDITATED

The circuit court erred in finding the cold, calculated and premeditated aggravating circumstance and assigning it substantial weight. The court also committed an Eighth Amendment violation under *Sochor v. Florida*[6] by submitting this invalid aggravating circumstance to the jury over defense objection. The standard of review this Court applies to a claim regarding the sufficiency of the evidence to support an aggravating circumstance in a death penalty case is for competent, substantial evidence. *Guardado v. State,* 965 So. 2d 108, 115 (Fla. 2007). Defense counsel preserved this issue for appeal with a motion to strike the CCP aggravator based on insufficient evidence (21/495-6).

It is an aggravating circumstance supporting imposition of the death penalty if "[t]he capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification." § 921.141(5)(i), Fla. Stat. (2012) (hereinafter "CCP"). There are four elements to the CCP aggravator, all of which must be present: (1) there must be evidence of cool and calm reflection, not a frenzy, panic or fit of rage; (2) there must be evidence of a careful plan or prearranged design; (3) there must be heightened premeditation; and (4) there can be no pretense of moral or legal justification. *Brown v. State,* 126

[6] 504 U.S. 527, 112 S. Ct. 2114 (1992)

So. 3d 211, 217 (Fla. 2013). The CCP aggravator can be indicated by circumstances such as advance procurement of a weapon, lack of resistance or provocation, and the appearance of a killing carried out as a matter of course. *Id*.

The evidence in this case does not support the CCP aggravator. Witnesses testified that Mr. Brookins repeatedly called the victim a piece of shit who deserved to die during the stabbing, urinated on the victim, and tore up his family pictures and other property (R18/137-139, 171-173, 200). This obvious malice toward the victim is more indicative of a frenzy or rage than the cool and calm reflection required for the first element of CCP.

Although Mr. Brookins used latex gloves after the stabbing while attempting to clean up, he neglected to put them on beforehand. As a result, Mr. Brookins left incriminating DNA evidence on the shank, the plastic holster, and on his hand. This is not consistent with a carefully arranged plan to kill the victim, especially since Mr. Brookins would have known that he had no way of fleeing the crime scene or reliably disposing of evidence after the murder. Thus, a careful plan would have included donning gloves before the stabbing to minimize any DNA or fingerprint evidence being left behind to identify him. Because Mr. Brookins failed to take such precautions, the second element of CCP is also lacking.

Although the State presented evidence that appellant had procured a weapon and concealed it in his clothing prior to boarding the transport bus, this does not

necessarily mean that Mr. Brookins did so out of a premeditated intent to kill the victim. Mr. Brookins testified that he was roused early in the morning and told that he was being transferred, that he had little time to pack, and that he did not know who else from his institution would also be transferring or who else would be on the bus (R19/299-300). Thus, there was minimal opportunity for calm reflection or careful planning.

Furthermore, because Mr. Brookins was being permanently transferred from one institution to another, he would have been required to carry all of his property with him. This reality was corroborated by the testimony of state witnesses, who said that all the inmates on the bus were carrying their property (R18/126, 137, 162). If Mr. Brookins owned a homemade knife for self-defense, which would not be unexpected for someone in the prison system, he would have to take it with him on the bus or lose it. He would also have to conceal the weapon in order to avoid detection by the guards. Thus, the possession and concealment of a weapon during transport is not probative of heightened premeditation on the facts of this case[7]. When the evidence supports multiple hypotheses, one of which is that the defendant was not preplanning a murder, the evidence is insufficient to prove the CCP aggravator. *See Hall v. State,* 107 So. 3d 262, 278 (Fla. 2012) (finding

[7] Juan Hernandez testified that Mr. Brookins seemed very nervous on the bus and fearful that Mr. Hernandez was going to steal his property during the time they were sitting next to each other (R18/162). This supports an inference that Mr. Brookins elected to carry a weapon for self-defense out of fear of being robbed.

evidence insufficient where inmate may not have been lying in wait with intent to kill, but merely hiding from officer while he looked for concealed drugs).

There was also evidence of provocation. Theodus Hunt testified that Mr. Brookins observed the victim sell a cigarette to another inmate in exchange for food (R18/190). Mr. Brookins apparently became upset over this and told the victim he should not have sold the cigarette. The argument then escalated into a shoving match with both Mr. Brookins and the victim standing up and pushing each other several times (R18/190-193). It was at that moment that Mr. Brookins took out the shank and began stabbing the victim (R18/193).

The CCP aggravator involves a much higher degree of premeditation than that required to prove first-degree murder. *Brown v. State,* 2014 WL 1923644 (Fla. 2014). The presence of a sudden provocation indicates a lack of heightened premeditation prior to the altercation breaking out, as well as a pretense of moral justification for the killing. In addition, the State must prove beyond a reasonable doubt that the defendant planned or prearranged to commit murder before the crime began. *Zommer v. State,* 31 So. 3d 733 (Fla. 2010). Mr. Hunt's testimony suggests that the stabbing was a spontaneous reaction to the physical altercation with the victim. A spontaneous killing does not support the CCP aggravator. *See Smith v. State,* 28 So. 3d 838 (Fla. 2009) (finding evidence insufficient in part because killing was spontaneous).

Under the totality of the circumstances, the evidence is wholly insufficient to support application of the CCP aggravator. There is insufficient proof of any of the four elements of CCP, and the circuit court erred in finding this aggravating circumstance and assigning it weight, as well as submitting this aggravator to the jury and instructing them on it. This aggravating circumstance should be stricken and a new penalty phase conducted.

IV. WHETHER THE CIRCUIT COURT ABUSED ITS DISCRETION IN ASSIGNING MINIMAL WEIGHT TO SEVERAL MITIGATING FACTORS BASED ON APPELLANT'S AGE AND A FINDING THAT HIS BACKGROUND WAS REMOTE IN TIME TO CAPITAL MURDER

The circuit court erred in assigning little or very little weight to five of Mr. Brookins' mitigating circumstances based on a finding that they were all remote in time to the capital murder. The weight assigned to a mitigating circumstance is reviewed on appeal for abuse of discretion. *Morton v. State,* 789 So. 2d 324, 331-2 (Fla. 2001).

During the penalty phase, the defense conceded that the evidence supported no statutory mitigating circumstances, but asserted 8 separate non-statutory mitigating factors based on Mr. Brookins' background in the catch-all provision in § 921.141(6)(h), which includes:

> (h) The existence of any other factors in the defendant's background that would mitigate against imposition of the death penalty.

§ 921.141(6)(h), Fla. Stat. (2012). The non-statutory mitigating circumstances were as follows:

> 1. Mr. Brookins' prior criminal history consisted of a single offense committed at age 15 years;
>
> 2. Mr. Brookins was imprisoned for his entire adult life and most of his adolescence;
>
> 3. Mr. Brookins was abandoned by his father and raised by his mentally disabled mother;

4. Mr. Brookins' family was impoverished;

5. Mr. Brookins' childhood was spent in a crime-ridden public housing project;

6. Mr. Brookins is loved by his family;

7. Mr. Brookins was a loving, supportive son and brother;

8. Mr. Brookins was a slow learner and dropped out of school very young.

(R2/221-3). This was the entirety of the mitigation case presented by Mr. Brookins during the penalty phase.

The circuit court found all 8 mitigating factors proven by the evidence, but assigned them very little mitigating weight. As to the first circumstance, that Mr. Brookins had only one prior conviction committed at age 15, the court found this mitigating only as to the prior violent felony aggravator and assigned it moderate weight (R2/221). The court found Mr. Brookins' youth at the time of the prior conviction was not mitigating as to the under sentence, robbery, HAC and CCP aggravators (R2/221-2). The court reasoned that Mr. Brookins was an adult when he committed the capital murder, and had "substantial time to contemplate the consequences of murder and was no longer a child or adolescent when he killed Mr. Sexton." (R2/221).

The circuit court then assigned very little weight to circumstance 2, and little weight to circumstances 3, 4, 5 and 8. The court cited the fact that Mr. Brookins

was a middle-aged adult[8] when he killed the victim and his background experiences were remote in time as justification for the weight given. The court also gave very little weight to circumstances 6 and 7 because Mr. Brookins has had little contact with his family while incarcerated. (R2/222-3).

Thus, the single fact that Mr. Brookins was a "middle-aged adult" at the time of the capital murder was the basis for applying circumstance #1 only to the prior violent felony aggravator, and for assigning little or very little weight to five other non-statutory mitigating factors. For the reasons that follow, this was an abuse of discretion.

A circuit court's finding that a defendant's mitigating background is remote in time is a valid basis for assigning less mitigating weight, provided there is an intervening break between the abusive or deprived childhood and the capital felony that afforded opportunities for a stable and loving environment. For example, in *Morton,* the defendant was abused by his father until age eight, but then his mother divorced the abusive father and remarried, providing the defendant with a loving and stable father figure. *Morton,* 789 So. 2d at 332. The trial court found that the abusive portion of Morton's childhood was not mitigating because there was no showing that those experiences diminished Morton's ability to know right from wrong. *Id*. On appeal, this Court found no abuse of discretion. *Id.*

[8] Mr. Brookins was 32 years old at the time of the capital murder. His birth date is March 20, 1979. The murder was committed on September 20, 2011.

Similarly, this Court found no abuse of discretion in *Douglas v. State,* 878 So. 2d 1246 (Fla. 2004). In that case, the defendant's father was abusive and left the home when he was 9 or 10, and the defense cited this as a mitigating factor. *Id* at 1260. However, the defendant's stepfather was loving and not abusive and provided a close-knit family environment. *Id*. As a result, the court gave little weight to the abusive childhood suffered at the hands of the birth father because it was remote in time when compared to the stable environment provided by the stepfather. *Id.* This Court affirmed the trial court's order, finding no abuse of discretion because of the intervening positive influences. *Id.*

In the instant case, however, there was no intervening positive influence or stable family environment for Mr. Brookins between his deprived and abusive childhood and subsequent incarceration. The mitigation adduced at the penalty phase showed that Mr. Brookins was abandoned by his father and raised by a mentally disabled mother in poverty in a high-crime area, leading to Mr. Brookins dropping out of school and being incarcerated at the age of 15. He then committed the instant capital murder during that period of incarceration.

Unlike the defendants in *Morton* and *Douglas,* there was no stable and loving environment later in childhood or early adulthood to ameliorate the negative effect of Mr. Brookins' childhood on his development. Whereas the defendants in those cases had an abusive parent removed from the home and replaced by a loving

surrogate, Mr. Brookins had no father and a mentally disabled mother as his guardians and role models throughout all of his formative years.

The circuit court relied solely on the passage of time to justify giving virtually no mitigating weight to Mr. Brookins' background circumstances. This Court previously rejected that type of analysis in *Nibert v. State,* 574 So. 2d 1059 (Fla. 1990). In *Nibert,* the defendant presented evidence that he was physically and psychologically abused in his youth for many years. *Id* at 1062. The trial court found this evidence to be possible mitigation, but dismissed it because the defendant was 27 years old at the time of the capital murder and had not lived in the abusive home since age 18. *Id*. Thus, the court found the mitigating circumstances too remote in time due to the defendant's age.

This Court rejected that reasoning, stating:

> The fact that a defendant had suffered through more than a decade of psychological and physical abuse during the defendant's formative childhood and adolescent years is in no way diminished by the fact that the abuse finally came to an end. To accept that analysis would mean that a defendant's history as a victim of child abuse would never be accepted as a mitigating circumstance, despite well-settled law to the contrary. Nibert reasonably proved this nonstatutory mitigating circumstance, and there is no competent, substantial evidence to support the trial court's refusal to consider it. *See e.g., Brown v. State,* 526 So. 2d 903, 908 (Fla.) (defendant's disadvantaged childhood, abusive parents, and lack of education and training, constitute valid mitigation and must be considered), *cert. denied,* 488 U.S. 944, 109 S. Ct. 371, 102 L. Ed. 2d 361 (1988).

Id.

In the instant case, the circuit court found Mr. Brookins' non-statutory mitigating circumstances proven, but gave them little or very little weight based solely on the passage of time, contrary to this Court's precedents. This was an abuse of discretion that deprived Mr. Brookins of substantial mitigation and a fair penalty phase proceeding. This requires a new penalty phase proceeding.

V. WHETHER CUMULATIVE PREJUDICIAL EFFECT OF EVIDENTIARY ERRORS UNDERMINED APPELLANT'S CREDIBILITY AND DEPRIVED HIM OF A FAIR TRIAL

The cumulative effect of the evidentiary errors described above in Issues I and II was highly prejudicial to Mr. Brookins and deprived him of a fair trial and due process of law. A claim of cumulative error may be raised to show that the combined effect of several errors that may be individually harmless deprived the defendant of a fair trial. *Penalver v. State,* 926 So. 2d 1118, 1137 (Fla. 2006). In assessing the cumulative effect of errors, the 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. *Id*.

The erroneous introduction of collateral crime evidence against Mr. Brookins, as set forth above in Issue I, undermined his character and credibility. The State used this evidence to suggest Mr. Brookins' propensity to carry a knife concealed in his prison uniform, and also to call Mr. Brookins a liar who does not take seriously his oath to tell the truth. This bolstered the credibility of the State witnesses who said that Mr. Brookins stabbed Mr. Sexton with a concealed knife, and undermined Mr. Brookins' testimony that Theodus Hunt was the killer. The improper evidence went to the heart of the State's case by shifting the credibility balance in the State's favor on the ultimate question of factual guilt or innocence.

Similarly, the improper use of Mr. Brookins' post-arrest, post-Miranda silence as impeachment undermined the credibility of his trial testimony by suggesting that it was a recent fabrication. As a matter of state and federal law, Mr. Brookins' silence during the 17 months between his arrest and invocation of rights and the trial in this case was constitutionally protected. The error was harmful because it directly undercut Mr. Brookins' credibility as a witness, depriving him of his opportunity to have the jury fairly weigh his testimony.

Thus, both errors had the effect of weakening the credibility of Mr. Brookins' testimony and bolstering the State's theory of the case. Even if one error standing alone would not be harmful enough to require reversal, the combined prejudicial effect of these two evidentiary errors resulted in the denial of a fair trial and requires a new trial.

VI. WHETHER CUMULATIVE EFFECT OF PENALTY PHASE ERRORS REQUIRES NEW SENTENCING PROCEEDING

The combined effect of the circuit court's errors during the penalty phase, as set forth above in Issues III and IV, requires resentencing. A claim of cumulative error is cognizable on appeal to consider the effect of multiple errors that might be deemed harmless when considered in isolation. *Penalver,* supra.

In this case, the CCP aggravator is not supported by the evidence. However, there are four other aggravating circumstances present: prior violent felony, under sentence, robbery, and HAC. Therefore, the Court may find the invalidity of the CCP aggravator, standing alone, to be harmless error. However, the error is not harmless when considered in conjunction with the circuit court's improper weighting of Mr. Brookins' mitigating factors as described in Issue IV.

A trial court's application of an invalid aggravating circumstance is harmless error and does not require resentencing if there are other valid aggravating circumstances and no mitigating circumstances. *Aldridge v. Wainwright,* 433 So. 2d 988, 989 (Fla. 1983). However, if there are mitigating circumstances present, then remand for resentencing is required if an aggravating circumstance is found to be invalid on appeal. *Id*; *Elledge v. State,* 346 So. 2d 998 (Fla. 1977).

By improperly finding Mr. Brookins' mitigating factors to be remote in time, the court gave very little or little weight to five separate non-statutory mitigating circumstances. But for this error, Mr. Brookins would have had "substantial

mitigation" to balance against the State's aggravating factors. As stated above, the presence of substantial mitigation requires resentencing if one of the aggravating circumstances is stricken on appeal.

As a result, the cumulative effect of the two errors requires remand for resentencing because there is both an invalid aggravating factor and the presence of mitigating factors. Under *Elledge,* this requires resentencing.

Conclusion

Based on the foregoing, the appellant requests that the judgment of the circuit court be REVERSED, and this cause remanded for a new trial and/or new penalty phase proceeding.

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Certificate of Service

I HEREBY CERTIFY that I have furnished a true and correct copy of the foregoing initial brief by electronic service to the Office of the Attorney General, PL-01, The Capitol, Tallahassee, Florida 32399, and by U.S. mail to Elijah Brookins, DC# P01395, Florida State Prison, 7819 NW 228th St., Raiford, Florida 32026, on this 7th day of October, 2014.

s/ *Baya Harrison*
Baya Harrison, III, Esq.

Certificate of Compliance

I CERTIFY that the foregoing document was prepared in Times New Roman 14-point font, per Fla. R. App. 9.210.

s/ *Baya Harrison*
Baya Harrison, III, Esq.