IN THE SUPREME COURT OF FLORIDA

LAMAR BROOKS,

Appellant,

CASE NO. SC02-538

v.

STATE OF FLORIDA,

Appellee.

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/

ANSWER BRIEF OF APPELLEE

CHARLIE CRIST
ATTORNEY GENERAL

CHARMAINE M. MILLSAPS
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 0989134

OFFICE OF THE ATTORNEY GENERAL
THE CAPITOL
TALLAHASSEE, FL 32399-1050
(850) 414-3300
COUNSEL FOR RESPONDENT

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PRELIMINARY STATEMENT

Appellant, LAMAR BROOKS, the defendant in the trial court, will be referred to as appellant or by his proper name. Appellee, the State of Florida, will be referred to as the State. Pursuant to Rule 9.210(b), Fla. R. App. P. (1997), this brief will refer to a volume according to its respective designation within the Index to the Record on Appeal. A citation to a volume will be followed by any appropriate page number within the volume. The symbol "IB" will refer to appellant's initial brief and will be followed by any appropriate page number. All double underlined emphasis is supplied.

STATEMENT OF THE CASE AND FACTS

This is an appeal following a retrial. *Brooks v. State*, 787 So.2d 765 (Fla. 2001)(remanding for new trial).

Lamar Brooks was indicted for two counts of first degree murder with a knife for the April 24, 1996 murder of Rachael Carlson and her three month old infant daughter Alexis Stuart (R. I 1). The State filed a notice of intent to seek the death penalty on August 13, 1996 (I 7)

On January 11, 2002, the retrial started. Rachael Carlson died of bleeding from multiple stab wounds. (T. 34 1205). She was stabbed approximately 66 times. (1208). The fatal wounds were to her neck. (T. 34 1202). She had defensive wounds to her hands. (T. 34 1203,1209). She was also strangled. (T. 34 1205). Three month old Alexis Stuart was stabbed four times. (34 1211). Three wounds were to her pubic area. (T. 34 1213). The fatal wound was to her heart. (T. 34 1212,1214)

Insurance agent Manthey testified that he was an insurance representative for Met Life. (T. 35 1497). He testified that Davis took out a $100,000 policy on Alexis. (T. 35 1499,1501). Davis was the primary beneficiary. (T. 35 1501). He identified exhibit 22 as a life insurance application. (T. 35 1497). He also identified exhibit 23 as a life insurance policy. (T. 35 1499).

Melissa Thomas, who had met Davis earlier that month, testified that both Davis and Brooks came to her house in Crestview on Wednesday, April 24 at 9:00. (35 1520, 1524, 1525). Her house was near Booker Street where Carlson's car was found.

(T. 35, 1508-1509; 34 1261). They used the telephone. (T. 35 1527). FDLE Agent Haley testified that he interviewed Melissa Thomas shortly after the murders on Monday, April 29, 1996. (38 2148-2149,2150). Agent Haley testified that he took a tape recorded statement from Melissa Thomas. (38 2156-2157).

Rochelle Jones, who worked at the Eglin Air Force Base hospital with Davis, testified that she drove to Crestview on the night of the murder at Davis' request. (T. 35 1543,1566-1567). She picked up Davis and Brooks from the Credit Union in Crestview. (T. 35 1567,1570). Davis called her from Melissa Thomas' house at exactly 9:22 pm according to the telephone company records. (T. 35 1565). She was stopped for speeding. (T. 35 1572). Trooper Tiller testified that he stopped her for speeding and that he issued a ticket for driving with a suspended license to Rochelle Jones. (T. 35 1583,1585). The citation was issued at 10:20 pm. (T. 1586). There were two males in the front seat and children in the back. (T. 35 1584). Because her license was suspended, the officer allowed Davis to drive. Davis had a cast on his leg. (T. 35 1585). Glenese Rushing, who banks at the Eglin Federal Credit Union, went to the credit union on the night of the murder to get some money from the ATM machine. (T. 35 1471,1472). She saw two men across the street get in a car. (T. 35 1476). The bank records established that her withdraw occurred at exactly 9:53 pm (T. 35 1483).

Mark Gilliam, who had been in the Army with Brooks, testified at trial for the State. (36 1614,1616). He and Brooks met in

Atlanta for Freaknic on Saturday, April 20, 1996. (36 1618-1620). On Sunday, April 21, they picked up Brook's cousin, Davis, and drove to Eglin Air Force Base. (36 1620). Gilliam was close friends with Brooks, not Davis. (36 1638). Davis said that he had offered Lamar (Brooks) for ten thousand dollars to kill her. (36 1634). Davis and Brooks offered him 500.00 dollars to drive the car to Crestview where Brooks was to jump out and shoot her. (36 1634-1635,1636). The plan was that Davis would drive with the victim while Gilliam and Brooks would follow them in Gilliam's car. (36 1638). Davis had a pump shotgun at his house which he showed Gilliam. (36 1640). Brooks loaded the shotgun. (36 1641). Davis gave Brooks a pair of Latex gloves so no fingerprints would be left. (36 1641-1642). Walker offered Davis $10,000 dollars to kill the victim. (36 1644). The officer explained to Gilliam that he had investigated because it was unusual for someone to stop behind a police car. (36 1663). Gilliam told the officer that the gear shifter light went out, when, in fact, the light was already out. (36 1663-1664). The officer gave Gilliam a warning about stopping behind police cars. (36 1665-1666). This encounter scared Gilliam out of following the plan to murder the victim, so he stopped following the victim's car and returned to Davis' house. (36 1666-1667). Brooks characterized Gilliam as a chicken, a wuss, and a punk to Davis when he returned to the house. (36 1669,1671). Gilliam then told them that he was leaving on Tuesday but he did not. (36 1670). They talked about trying again on Tuesday afternoon but Gilliam was scared to do

so despite both Brooks and Davis coaxing him to do so. (36 1673-1674). Brooks's coaxing had more effect because he was friends with Brooks, not Davis. They attempted again on Tuesday with Brooks and Gilliam in Gilliam's car following the victim's car. (T. 36 1675). Davis had called the victim to meet him at the shoppette on the base. (T. 36 1676). They both started driving toward Crestview but Gilliam lost Carlson's car while following her in his car. (T. 36 1677). Brooks again had the shotgun. (T. 36 1681). The plan again was for Brooks to shoot Carlson. (T. 36 1681-1682). Davis, but not Brooks, attempted to talk Gilliam into attempting a third time. (T. 36 1683). Gilliam refused to try again and this time he returned to Fort Benning. (T. 36 1683). Walker, who worked at the Eglin Air Force base hospital, was going to do some paperwork to establish an accident so Gilliam would not be AWOL at Fort Benning on Tuesday morning and could participate in the murder. (36 1446-1447). The State introduced this paperwork as exhibit 20. (T. 36 1686).

Two special agents with the Air Force Office of Special Investigations interviewed Brooks. (T. 34 1278,1285). Brooks denied being in Crestview the night of the murder. (T. 34 1290). Brooks claimed that both he and Davis were at Walker Davis' house walking the dog, putting together a waterbed and watching a movie that night. (T. 34 1290,1292). He claimed he went to sleep between 10:30 and midnight. (T. 34 1290).

Officer Whatmough of the Crestview Police testified that he took Davis, who had a cast on his leg, to the hospital and when they removed the cast, paper fell out. (35 1595-1598). The

notes were introduced as Exhibit 36A & 36B (35 1599). The notes contain several statements including "Mark would have cracked up", "Events home to ~~bank~~ - Home to walk Heavy[1] and then to home and a question: what time is the flight and the name? And answer: US AIR 5:45, $244 Sgt. Samm.

An FDLE blood stain pattern expert, Jan Johnson, examined the crime scene at 1:45. (T. 37 1923, 1927). She videotaped and photographed the scene. (T. 37 1929-1948). She testified that no one was in the front passenger seat when Rachael was attacked. (37 1982,1985). She testified that Rachael's attacker was in the backseat behind the driver. (37 1982).

The State rested. (39 2236). Defense counsel proffered the testimony of Investigator Worley regarding his investigative report and other possible leads regarding Jerold Gundy and a stolen pick up truck. (39 2237). The State renewed its offer of life in exchange for a guilty plea and noted the offer was still open. (39 2257). Brooks rejected the offer. (39 2258). Defense counsel moved for a judgment of acquittal arguing reasonable doubt due to the lack of physical evidence. (39 2265-2267). The prosecutor responded that based on Gilliam's testimony the State had direct evidence of the conspiracy. (39 2269). The trial court denied the motion for judgment of acquittal. (39 2273). After the charge conference, the defendant waived the right to testify during guilt phase. During closing argument, defense counsel mainly argued reasonable doubt. (39 2350; 40 2521).

[1] Heavy is the dog's name.

The trial court instructed the jury including the lesser included offense of second degree murder, third degree murder and manslaughter. (R. 27 5116; T. 40 2559-2575). The jury deliberated from 11:15 until 5:33. (T. 40 2575, T 41 2604). During deliberations, the jury asked a question regarding the application of the law of principals. (40 2591-2600). The trial court informed the jury to reread the jury instructions. (40 2600). The jury convicted Brooks of both counts of first degree murder on January 23, 2002. (R. 27 5129; T 41 2605).

The State provided a list of aggravating circumstances on January 25, 2002. (27 5130). The State listed five aggravators for the murder of Rachael Carlson: (1) prior violent felony for the contemporaneous murder of her daughter; (2) felony murder; (3) pecuniary gain; (4) HAC; and (5) CCP. The State listed five agggravators for the murder of Alexis Stuart: (1) prior violent felony for the contemporaneous murder of her mother; (2) felony murder; (3) pecuniary gain (4) CCP (5) victim less than 12 years of age. The State filed a memorandum in support of a death sentence. (R. 27 5161).[2] The State argued for five aggravators for the murder of Rachael Carlson and five agggravators for the murder of Alexis Stuart. The State argued that there were no statutory mitigators (R. 5168-5172). The State argued the non-statutory mitigation should be given little weight. (R. 5172-5177). The State argued that while the co-defendant was sentenced to life should be given some weight,

[2] The State filed an addendum to the memo in support of death relying on Goodman's testimony at the Spencer hearing to establish that Brooks was the actual stabber. (R. 27 5180)

Brooks admitted that he was the actual killer to Goodman and inflicted the 75 wounds to Carlson. (R. 5175-5176).[3] Defense counsel did not file a memorandum in support of life in accordance with the defendant's wishes. (R. 27 5210-5211; T 41 2741).

On January 30, 2002, the penalty phase was conducted. (T. 41 2612). The defendant waived the right to present mitigation at the penalty phase. (T. 41 2613). The trial court conducted a waiver colloquy. (R. 27 5196-5206). Pursuant to *Koon*,[4] defense counsel placed in the record the evidence of mitigation that he would have presented: no significant criminal history; accomplice in a capital felony committed by another; age; family background including that he is the only living son; military record; regular attendee at church; great potential for rehabilitation; co-perpetrator Walker Davis received a life sentence; jail conduct; life in prison; courtroom behavior and good character. (T. 41 2614-2615; R. 27 5193-5196). The State presented five witnesses including Linda Chaloupka, who was Rachael Carlson's supervisor at Eglin Hospital, who testified regarding an award she had recommended Rachael receive; Bridgette Brahms, a nurse at Eglin who worked with Rachael, testified that she was a great worker who was proud of her baby; Rochelle Bunner's prior testimony was read to the jury, who was also a nurse at Eglin hospital, she testified that Rachael was

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[3] The co-perperator, Walker Davis, was sentenced to life. *Davis v. State*, 728 So.2d 341 (Fla. 1st DCA 1999)(affirming conviction for two counts of first degree murder).

[4] *Koon v. Dugger*, 619 So.2d 246 (Fla.1993).

an excellent scrub tech who was very precise and serious about her work, Cynthia Houchin's prior testimony was also read to the jury, she testified that Rachael was an excellent scrub tech; who volunteered for the Special Olympics; Clarissa Stuart, Rachael's mother and the grandmother of Alexis, testified that Rachael was a good student, who had named the baby Stuart in honor of her stepfather and that the murders caused her to suffer from depression and anxiety. (T. 41 2657-2692). The prosecutor argued for death because these were planned murders committed for money. (41 2699-2717). Defense counsel waived closing. (41 2717). The trial court instructed the jury on prior violent felony, murder committed during aggravated child abuse, pecuniary gain, CCP and victim less than 12 years of age as well as mitigation. (41 2722-2728). The jury recommended death by a vote of 9 to 3 for the murder of Rachael Carlson and 11 to 1 for the murder of Alexis Stuart the January 30, 2002. (T 41 2732; R. 27 5152).

On February 14, 2002, the trial court conducted a *Spencer* hearing.[5] (T. 41 2739; R. 27 5209). The defendant also waived his right to present mitigation to the trial court during the *Spencer* hearing. (R. 27 5212-5219). A PSI was conducted and presented to the trial court (T 41 2745; R. 25 5214; R. 27 5185-5192). The defendant declined to comment upon or rebut any evidence contained in the PSI. (T 41 2745; R. 27 5214). The defendant also declined to attempt to rebut the State's aggravation. (T 41 2743; R. 27 5215). Brooks also waived the

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

right to testify at the *Spencer* hearing. (T 41 2743,2748-2749). The prosecutor explained to the defendant that his failure could result in the waiver of an appellate claim of error regarding those aggravators. (T 41 2746; R. 25 5215). The trial court explained that if the defendant waived good jail conduct, he would not find that mitigator. (T. 41 2747-2748). The State noted that it was going to present the testimony of two corrections officers for the defendant's threats to these officers to rebut the mitigation of good behavior in prison but, based on the defendant's waiver of mitigation, the prosecutor decided not to present this rebutting evidence. (T 41 2751; R. 27 5220). The State presented the prior testimony of several witnesses, including Jason Hatcher, Linda Chaloupka, Ame Boehmer, Elisabeth Lauer, Alicia Williams, Sgt. Lyens, the victim Carlson's e-mail message on the day of the crime to Davis. (T 41 2752-2753; R. 27 5221-5223; R. 27 5179). The State also presented the live testimony of Terrance Goodman. (T 41 2754; R. 27 5223). The State introduced his prior testimony into evidence as well. (T. 41 2755; R. 27 5224). Goodman and Brooks were incarcerated together in jail following the murder. (R. 27 5224). Brooks told him that he offed this broad. (R. 27 5225,5226). Brooks told him that he was in the back seat. (R. 27 5227). Brooks told him that while anybody could pull a trigger, it takes more heart to stab someone because you can feel the hitting of the bone and the tearing of the tissue. (R. 27 5227-5228). Brooks had instructed his counsel not to cross-examine Goodman. (R. 27 5230). The prosecutor argued in support

of aggravation. (R. 27 5230-5232). The prosecutor also argued against the mitigation including that the co-defendant received life because Brooks was the actual killer. (R. 27 5231-5235; 5233). The prosecutor agreed that the trial court should consider all mitigation from the various sources including the PSI, the prior penalty phase and the *Koon* presentation. (R. 27 5236-5237).

The trial court pronounced the sentence on February 25, 2002. (R. 27 5248-5264; T 41 2773). Defense counsel argued his motion for new trial. (41 2774-2781). The trial court denied the motion. (T. 41 2783). Brooks once again waived the right to present mitigation. (T 41 2783-2784). The trial court noted that he considered the evidence presented at the first penalty phase, the prior defense sentencing memorandum, the *Koon* presentation and had reviewed the PSI. (T. 41 2787-2788, 2798). The trial court found five aggravators in the death of Rachael Carlson: (1) the prior violent felony based on the contemporaneous murder of Alexis Stuart; (2) CCP because the "evidence demonstrates that Rachael Carlson's murder was the culmination of the deliberate, cold-blooded plan of the defendant to do away with Rachael Carlson and her infant daughter for profit"; (3) pecuniary gain based on being paid $10,000 from the $100,000 life insurance policy; (4) felony murder aggravator based on aggravated child abuse of Alexis Stuart and (5) HAC based on the medical testimony that she was choked, beaten, stabbed over sixty-five times and the defensive wounds on her hands. (T 41 2788-2793; R. 27 5254). The trial

court noted that Brooks was in fact the person who stabbed Rachael Carlson based on the testimony of Terrance Goodman. (T. 41 2793-2794). The trial court also noted that, based on the testimony of the bloodstain pattern expert, it was the backseat passenger who stabbed Rachael. (T. 41 2794). The trial court found four aggravators in the death of Alexis Stuart: (1) the prior violent felony based on the contemporaneous murder of Rachael Carlson; (2) pecuniary gain based on being paid $10,000 from "contract-style execution"; (3) felony murder based on aggravated child abuse of Alexis Stuart[6] and (4) CCP based on the "deliberate, cold-blooded plan of the defendant to kill this innocent child for profit". (T 41 2795-2797; R. 27 5254). The trial court found two statutory mitigators: (1) no significant prior history which was given little weight and (2) the age of the defendant, who was 23 years old at the time of the murders, but because the defendant was "a mature young adult" with military experience the trial court gave this mitigator little weight. (T. 41 2799). The trial court considered but rejected the defendant was an accomplice in the capital felony committed by another person statutory mitigator because Brooks was the actual stabber. (T. 41 2799-2800). The trial court then considered thirteen non-statutory mitigators. The trial court considered the life sentence imposed on the co-defendant but noted that Brooks was the actual stabber and therefore, "Lamar

[6] The trial court also considered the victim less than 12 years of age aggravator because Alexis was three months old but felt that this would constitute improper doubling if considered in connection with the felony murder aggravator based on the aggravated child abuse. (T. 41 2796).

Brooks is more culpable than Walker Davis" and hence, the trial court gave this little weight. (T. 42 2801-2802). The trial court found, in addition, the following non-statutory mitigation: (2) the defendant had a very loving relationship with his family, attended church and choir, who played little league which was given little weight; (3) the defendant is the only living son following the tragic death of his brother which the trial court gave some weight; (4) military record; however, because the defendant's second term included numerous disciplinary reports the trial court gave it little weight; (5) good character as established by family and friends which the trial court accorded little weight; (6) being the father of a six year old which the trial court gave some weight; (7) life without parole which the trial court gave little weight; (8) courtroom behavior which the trial court accorded some weight; (9) regular church attendance which the trial court gave little weight and (10) employment history which the trial court accorded little weight. (T. 42 2802-2808). The trial court rejected the following three non-statutory mitigators: (1) the good jail conduct mitigator due to the defendant's desire to waive it; (2) the great potential for rehabilitation due to lack of evidence and (3) maintaining his innocence because residual doubt is not a mitigator. (R. 42 2805-2806, 2807,2808). The trial court found the aggravators "far outweigh" mitigators. (R. 42 2809). The trial court then imposed death for the murder of Rachael Carlson and death for the murder of Alexis Stuart. (R.

42 2810). The trial court sentenced the defendant to consecutive death sentences. (R. 27 5241-5246).

SUMMARY OF ARGUMENT

ISSUE I -

Appellant asserts the trial court abused its discretion by admitting a life insurance policy and the testimony that such a policy was purchased by the co-perpetrator. The policy was relevant to establish Davis' source of money to pay Brooks for this murder-for-hire. Moreover, the policy was relevant to establish the motive for the murder. Thus, the trial court properly admitted the life insurance policy.

ISSUE II -

Appellant asserts that the trial court improperly allowed the State to introduce an appointment record of the child support agency because there was no evidence that either Davis or Brooks knew of the call. First, this issue is not preserved. Brooks did not object on knowledge grounds in the trial court. Furthermore, regardless of their knowledge, this evidence is relevant to establish the additional motive. Killing the child ended any issue regarding child support. To establish Brooks' motive to help his cousin with his problems, the State must establish what the cousin's problem was. This testimony showed why Davis would hire Brooks to kill the mother and child and therefore, the trial court properly admitted the evidence.

ISSUE III -

Appellant contends, because the conspiracy ended when the murder occurred, the notes taking from Davis' cast after the murder may not be introduced against Brooks without violating the Confrontation Clause. The State respectfully disagrees.

The notes are not hearsay because they were not offered to prove the truth of the matter asserted. The State introduced the notes to prove the exact opposite. The notes contained lies about their whereabouts on the night of the murder. The notes connected the co-perpetrators in a scheme to lie about events on the night of the murder. Moreover, the notes were physical evidence of the earlier conspiracy. Thus, the trial court properly admitted the notes.

ISSUE IV -

Appellant asserts the trial court abused its discretion by allowing the prosecutor to impeach his own witness when she testified she did not remember her prior statements. The State respectfully disagrees. A prosecutor may impeach his own witness provided that is not the sole reason for calling the witness to testify. This witness was not called for the sole purpose of impeaching her. Thus, the trial court properly allowed the impeachment.

ISSUE V -

Appellant contends that the trial court abused its discretion by allowing Gilliam to testify as to an uncharged attempted murder on the victim. The State respectfully disagrees. First, this issue is not preserved. This partial admissibility claim was never presented to the trial court. Furthermore, this evidence, including the threat to the officers' lives was inextricably intertwined with the crime charged, relevant to establish Brook's intent, and to establish the conspiracy. Thus, the trial court properly admitted this evidence.

ISSUE VI -

Brooks contends that the trial court abused its discretion by overruling the objections to the prosecutor's closing argument. The State respectfully disagrees. The prosecutor's arguments were proper arguments. Furthermore, the error, if any, was harmless. None of these comments warrant a new trial. Thus, the trial court properly overruled the objections.

ISSUE VII -

Appellant argues that the trial court erred in failing to give the jury instruction as required by the co-conspiracy hearsay statute prior to the admission of the conspiracy testimony. The State respectfully disagrees. No such jury instruction was required. The instruction is only required where multiple witnesses are necessary, not, as here, where one witness lays the entire foundation. Furthermore, the error, if any, is harmless because Brooks is not actually challenging the sufficiency of the evidence of the conspiracy. Thus, the trial court properly refused to give the jury instruction.

ISSUE VIII -

Brooks contends that the trial court should have granted a mistrial when the prosecutor referred to the previous trial. The State respectfully disagrees. One of the prosecutor references was to trial preparation, not the previous trial itself. Furthermore, the jury was not informed of the result of the prior trial. This jury was never told that a prior jury had convicted Brooks. Moreover, these two references were unintentional and inadvertent. The error, if any, was harmless.

Thus, the trial court properly denied the motion for mistrial.

ISSUE IX -

Brooks argues that the trial court erred in denying his motion for change of venue. The State respectfully disagrees. First, this issue is not preserved. Defense counsel did not provide the trial court with the newspaper articles until the State rested. Moreover, Brooks did not use all of his peremptory challenges. He had one remaining. Thus, the trial court properly denied the motion for change of venue.

ISSUE X -

Brooks argues that, because the co-perpetrator, Walker Davis, received a life sentence, his death sentence is disproportionate. The State respectfully disagrees. Brooks, who was the actual stabber, is more culpable than Davis. Thus, the death sentence is proportionate.

ISSUE XI -

Appellant asserts that the merger doctrine prohibits aggravated child abuse from being the underlying felony for felony murder. The State respectfully disagrees. This argument is contrary to the explicit language of the felony murder statute that lists aggravated child abuse as an enumerated felony. There can be no argument that the legislature did not intend the crime of aggravated child abuse to serve as an underlying felony for a felony murder when it specifically amended the felony murder statute to so provide. Thus,

aggravated child abuse may properly serve as the underlying felony for a felony murder conviction.

ISSUE XII -

Appellant contends that Florida's death penalty statute violates *Ring v. Arizona*, 122 S.Ct. 2428 (2002). He mainly asserts that *Ring* requires unanimity, written findings by the jury and that the jury's decision be the final decision. The State respectfully disagrees. First, only the issue of unanimity is preserved. A non-unanimous jury recommendation of death without written findings complies with *Ring*. *Ring* does not require either written findings by the jury or an unanimous recommendation of death. Thus, the trial court properly denied the motion for unanimity.

ISSUE XIII -

Appellant asserts that trial court erred in finding the pecuniary gain aggravator and the CCP aggravator. The State respectfully disagrees. Competent, substantial evidence supports the trial court's findings of these aggravators. Furthermore, any error was harmless. As the trial court specifically noted, any one of the aggravators is sufficient to outweigh the insignificant mitigation. One of the remaining aggravators, not attacked on appeal, is the prior violent felony aggravator for the murder of her mother. Thus, the trial court properly found both the pecuniary gain aggravator and the CCP aggravator.

ISSUE XIV -

Appellant asserts that the trial court erred by giving great weight to the jury's recommendation of death when he chose not to present any mitigation. The State respectfully disagrees. The trial court did not give great weight to the jury's recommendation of death. While the trial court referred to the jury's recommendation at the beginning of the sentencing hearing and in the introductory paragraph of its sentencing order, it did not refer to the jury's recommendation at all in its reasoning for imposing death. Thus, the trial court properly independently arrived at its own conclusion and properly considered all possible sources of mitigation.

ARGUMENT

ISSUE I

DID THE TRIAL COURT ABUSE ITS DISCRETION BY ADMITTING THE LIFE INSURANCE POLICY? (Restated)

Appellant asserts that the trial court abused its discretion by admitting a life insurance policy and the testimony that such a policy was purchased by the co-perpetrator. The policy was relevant to establish Davis' source of money to pay Brooks for this murder-for-hire. Moreover, the policy was relevant to establish the motive for the murder. Thus, the trial court properly admitted the life insurance policy.

The trial court's ruling

During jury selection, the existence of a life insurance policy was discussed with numerous jurors. Prior to opening statements, the defense counsel made several motions. (T. 32 974). During a discussion of the motions, the prosecutor raised the issue of the appropriateness of his opening statements to the trial court. (T. 32 984-986). The prosecutor, referring to the joint lies Brooks and Davis told regarding their whereabouts on the night of the murder, argued the relevance of this evidence. (T. 32 991-995). Defense counsel objected to any reference to the life insurance policy during opening. (T 33 1015). The prosecutor noted that the *Brooks I* opinion did not hold that the policy itself was inadmissible only the hearsay convictions regarding it. (T 33 1016). The prosecutor also noted that the policy was clearly covered by the business records exception. Defense counsel argued that because the policy was purchased it was not covered by the co-conspirator

exception relying upon *Sandoval v. State*, 689 So.2d 1258 (Fla. 3d DCA 1997). (T 33 1018). The prosecutor explained that he had to establish Davis' motive to establish the motive for the murder. (T 33 1020). The trial court noted that the source of the money to pay Brooks was relevant inside or outside the conspiracy. (T 33 1022). The trial court ruled the policy admissible, not as motive of Brooks, but as the source of the money to pay Brooks. (T 33 1025-1026,1043).

At trial, before the insurance agent testified, defense counsel objected to the introduction of the life insurance policy because there was no evidence that Brooks personally knew of the insurance. (XXXV 1494). The prosecutor noted that Davis, who had promised Brooks thousands of dollars for the murder, had limited financial resources and that therefore, the life insurance was relevant to establish the source of the pay off. (XXXV 1495). The insurance agent Manthey testified that he was an insurance representative for Met Life. (XXV 1497). He identified exhibit 22 as a life insurance application over objection. (XXXV 1497). He also identified exhibit 23 as a life insurance policy over objection. (XXXV 1499). Defense counsel's objection was overruled. (XXXV 1500).

Preservation

This issue is preserved. Defense counsel objected pre-trial and renewed the objection when the testimony was admitted.

The standard of review

The admissibility of evidence is within the sound discretion of the trial court, and the trial court's ruling will not be reversed unless there has been a clear abuse of that discretion.[7]

Merits

In *Brooks I*, this Court explained that evidence of a defendant's desire or intent can be relevant when used to establish motive for a murder. However, the *Brooks* Court found the statements were not made by Brooks, but by Davis, and they provided a motive directly for Davis, not Brooks and the State had improperly sought to use them to impute Davis's motive to Brooks. *Brooks*, 787 So.2d at n.4. The *Brooks* Court also observed through the admission of numerous hearsay statements, the State sought to impute Davis's actions, statements, motive and intent to Brooks. *Brooks*, 787 So.2d at 779. However, contrary to appellant's claim, the *Brooks* Court never addressed the admissibility of the life insurance policy itself. Rather, the opinion was limited to hearsay statements.

In *Strickland v. State*, 165 So. 289 (Fla. 1936), this Court held that, in a separate trial of defendant, who was charged with having killed the victim at direction of third person, the third person's motive was admissible. This Court reasoned that the motive which actuated McCall was material because that motive would show, or tend to show, a reason why he would be

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[7] *Ray v. State*, 755 So. 2d 604, 610 (Fla. 2000); *Zack v. State*, 753 So. 2d 9, 25 (Fla. 2000); *Cole v. State*, 701 So. 2d 845 (Fla. 1997); *Jent v. State*, 408 So. 2d 1024, 1039 (Fla. 1981); *Cf. General Elec. Co. v. Joiner*, 522 U.S. 136, 118 S.Ct. 512, 517, 139 L.Ed.2d 508 (1997) (stating that all evidentiary rulings are reviewed for "abuse of discretion").

willing to pay Strickland to commit the murder. *Id citing Rufer v. State*, 25 Ohio St. 464 (stating that where two or more persons acted in concert in the commission of murder, the state may show, upon the separate trial of one, the motives which actuated the others).

In *State v. Escobar*, 570 So.2d 1343 (Fla. 3d DCA 1990), the Third District held that co-defendant's motive was admissible to establish defendant's motive. Evidence that outstanding warrants existed against defendant at the time he and codefendant were involved in shooting of police officer was admissible against both defendant and codefendant to establish motive for murder. The Third District reasoned, in addition to defendant's desire to avoid arrest on warrants, codefendant was defendant's brother, who clearly could have been motivated to shoot officer to keep defendant out of jail.

In *Ellis v. State*, 778 So.2d 114 (Miss. 2000), the Mississippi Supreme Court held that a life insurance check payable to codefendant for life of victim was admissible to show motive. Ellis argued that there was never any link or connection between the life insurance proceeds and the alleged conspiracy and that there was no evidence that Ellis received any of the proceeds. Ellis argued that this evidence was irrelevant or if it was relevant, its relevancy was outweighed by its prejudice. *Ellis*, 778 So.2d at 120. The *Ellis* Court held otherwise.

Here, the trial court properly ruled that the policy was admissible to establish the source of funds. The policy was relevant to establish Davis' source of money to pay Brooks for

this murder-for-hire. In any murder-for-hire case, the source of the money that one perpetrator intends to use to pay the other perpetrator is admissible, regardless of whether the policy is purchased before the agreement to commit murder forms. Davis offered Brooks $10,000.00 for these murders. The only possible source for this money for Davis, who had limited financial means, was the life insurance policy.

Moreover, the policy was relevant to establish the motive for the murder. One of the main motives for these murders was to obtain the life insurance proceeds. The co-perpetrator's actions of purchasing the policy and then agreeing to pay Brooks with the proceeds resulted in that motive becoming both of their motives. Knowledge on the part of the defendant that such a policy has been purchased is simply not required. Even a defendant who does not know where the money to pay him will come from, still is a pecuniary motive for the murder when he agrees to a murder-for-hire scheme and the State is entitled to show the likely source of such funds regardless of the defendant's knowledge. While such knowledge would increase the State's case, it is not required. Nor is the concept that the co-perpetrator intends to pay the defendant out of the proceeds "pure speculation" by the jury; rather, it is a reasonable inference. The State introduced evidence of Davis' otherwise limited financial resources. The jury would rationally decide that the insurance money was the source and may reasonably conclude that Davis informed Brooks of this.

The confrontation clause objection is baseless. Defense counsel had every opportunity to cross-examine the insurance agent and did so. (T. 35 1502). Moreover, no statement of Davis' in relation to the purchase of the policy was introduced against Brooks; rather, Davis' actions in purchasing the policy were. Brooks' confrontation rights were fully satisfied.

The limits of the co-conspirator hearsay exception argument is also baseless. The policy was not admitted under this exception; rather, it was admitted under the business records exception. That it was purchased before the conspiracy formed has no bearing on its admissibility as a business record. The co-conspirator exception concerns statements, not actions. No statement of Davis was introduced against Brooks; rather, Davis' actions in purchasing the policy were.

Appellant actually seems to be more focused on the prosecutor's arguments regarding the policy more than its pure admissibility. Once admissible evidence is admitted, the prosecutor may make argument and make reasonable inferences about that evidence.

Harmless Error

The error, if any, was harmless. Even without any motive testimony, the jury would still have convicted Brooks based on the evidence that he was in the area with the co-perpetrator and lied about his whereabouts; the papers in the cast which established that both Brooks and Davis were coordinating their lies and the testimony of Gilliam.

ISSUE II

DID THE TRIAL COURT ABUSE ITS DISCRETION IN ADMITTING TESTIMONY RELATING THE VICTIM'S STATEMENT TO A CHILD SUPPORT WORKER? (Restated)

Appellant asserts that the trial court improperly allowed the State to introduce an appointment record of the child support agency because there was no evidence that either Davis or Brooks knew of the call. First, this issue is not preserved. Brooks did not object on knowledge grounds in the trial court. Furthermore, regardless of their knowledge, this evidence is relevant to establish the additional motive. Killing the child ended any issue regarding child support. To establish Brooks' motive to help his cousin with his problems, the State must establish what the cousin's problem was. This testimony showed why Davis would hire Brooks to kill the mother and child and therefore, the trial court properly admitted the evidence.

The trial court's ruling

At trial, prior to the child support worker's testimony, defense counsel objected arguing that this evidence was being presented to establish Davis' motive, not Brook's and therefore was contrary to *Brooks I.* (34 1398). The prosecutor explained that one of the victims, Rachel Carlson, mother of the other victim, had put in a claim for child support naming Davis as the father. (34 1399). The child support claim was a business record. The trial court ruled that the child support claim was admissible, reasoning that one of the areas of proof is why Davis would hire Brooks to kill the mother and child. (35 1403). Brooks also asserted a confrontation violation because he could

not cross-examine Rachael. The child support worker, Madero, testified that she received a phone call from Rachael Carlson wanting to make an appointment and she, as standard procedure, made a record of this call. (35 1408). Counsel again objected stating that the witness could only say that a person claiming to be Rachael Carlson made a call. (35 1409). The trial court ruled that definitiveness of the identity of the caller was a subject of cross examination, not a basis of exclusion. The witness testified that the appointment record identified Walker Davis as the absent parent. (35 1410). The business record established the address, phone number, social security number, date of birth, sex and race of the caller. (35 1410). The agency tries to collect child support from the absent parent. (35 1411)

Preservation

This issue is partially preserved. While defense counsel objected, the basis of his objection was imputing motive, a confrontation clause violation and a lack of reliability argument. He did not assert a lack of knowledge argument. The objection asserted as error on appeal must be on the same basis as that made in the trial court.[8] Brooks may not switch the basis of his objections on appeal. Thus, the lack of knowledge is not

[8]*Archer v. State*, 613 So.2d 446, 448 (Fla.1993)(stating the issue "must be presented to the lower court and the specific legal argument or ground to be argued on appeal must be part of that presentation if it is to be considered preserved"); *Steinhorst v. State*, 412 So.2d 332, 338 (Fla.1982)("[I]n order for an argument to be cognizable on appeal, it must be the specific contention asserted as legal ground for the objection, exception, or motion below.").

preserved. However, the lack of reliability argument is preserved.

Standard of Review

The admissibility of evidence is within the sound discretion of the trial court, and the trial court's ruling will not be reversed unless there has been a clear abuse of that discretion.[9]

Merits

The definition of relevant evidence statute, § 90.401, Florida Statutes, provides:

> Relevant evidence is evidence tending to prove or disprove a material fact.

All relevant evidence is generally admissible unless the law provides otherwise. § 90.402, Florida Statutes

Part of the motive of these murders was to solve the problem of child support payments. Killing the child ended any issue regarding child support. Brooks was Davis' cousin. To establish Brooks' motive to help his cousin with his problems, the State must establish what the cousin's problem was.

Regardless of whether Davis knew of the conversation, this testimony is still relevant. First, it is a reasonable inference that the mother had discussed child support payments with Davis. Why pay the $25.00 fee required by the agency and the trouble of a lawsuit, if the father is willingly paying

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[9] *Ray v. State*, 755 So. 2d 604, 610 (Fla. 2000); *Zack v. State*, 753 So. 2d 9, 25 (Fla. 2000); *Cole v. State*, 701 So. 2d 845 (Fla. 1997); *Jent v. State*, 408 So. 2d 1024, 1039 (Fla. 1981); *Cf. General Elec. Co. v. Joiner*, 522 U.S. 136, 118 S.Ct. 512, 517, 139 L.Ed.2d 508 (1997) (stating that all evidentiary rulings are reviewed for "abuse of discretion").

child support. So, knowledge by Davis can be inferred. Even if he did not know of the particular call, he knew that child support was a problem for him. That child support agencies exist and that they collect child support from the father is common knowledge. Nor does Brooks need to know of the particular call. Regardless of what Brook's knew, this evidence is relevant to establish the additional motive.

As to the lack of reliability argument, the business record established the address, phone number, social security number, date of birth, sex and race of the caller. (35 1410). Social security numbers are not commonly known. The caller knowing this unique number tends to establish the definitiveness of the identity of the caller. Moreover, as the trial court ruled, this is a proper area of cross-examination or argument but is not a basis for exclusion. Harmless Error

The error, if any, was harmless. While this testimony established an additional motive, there was already a substantial motive established, *i.e.* the life insurance. Furthermore, motive is not an element of murder.

ISSUE III

DID THE TRIAL COURT ABUSE ITS DISCRETION BY ADMITTING EVIDENCE OF NOTES FOUND IN DAVIS' CAST? (Restated)

Appellant contends, because the conspiracy ended when the murder occurred, the notes taken from Davis' cast after the murder may not be introduced against Brooks without violating the Confrontation Clause. The State respectfully disagrees. The notes are not hearsay because they were not offered to prove the truth of the matter asserted. The State introduced the notes to prove the exact opposite. The notes contained lies about their whereabouts on the night of the murder. The notes connected the co-perpetrators in a scheme to lie about events on the night of the murder. Moreover, the notes were physical evidence of the earlier conspiracy. Thus, the trial court properly admitted the notes.

The trial court's ruling

Prior to opening statements, the motion to suppress the two pieces of paper from Davis' cast were discussed. (33 1031). Defense counsel asserted that because the notes were written after the murder, at which point the conspiracy ended according to *Brooks I* (35 1031-1032). During the trial, the trial court considered the admissibility of the notes. (35 1587). Defense counsel acknowledged that if the notes could be clearly identified as written by Brooks they would be admissible (presumably as a written statement against interest). His objection was because it was not established which person wrote which notes, any statement of Davis' would violate the

confrontation clause. (35 1588). The prosecutor asserted that the notes were not hearsay because they were not offered to prove the truth of the matters asserted in them. (35 1590). According to the prosecutor, the relevancy of the notes was that they connect the co-perpetrators in a scheme to lie about events on the night of the murder. (35 1590). The prosecutor explained that it established a consciousness of guilt by showing a need to lie about their whereabout. (35 1590). The notes showed they were telling the same lie. (35 1591) The trial court ruled that the notes showed a connection situation and also showed that a conspiracy existed earlier. (35 1592). The notes established a communication between them and an association. (35 1593). The trial court explained that the jury could infer that Brooks wrote the notes and they show his consciousness of guilt by inconsistent statements about walking the dog and from his flight. (35 1593). Defense counsel renewed his objection to this testimony before the testimony. (35 1594). Officer Whatmough of the Crestview Police testified that he took Davis, who had a cast on his leg, to the hospital and when they removed the cast, paper fell out. (35 1595-1598). The notes were introduced as Exhibit 36A & 36B (35 1599). The notes contain several statements including "Mark would have cracked up", "Events home to ~~bank~~ - Home to walk Heavy[10] and then to home and a question: what time is the flight and the name? And answer: US AIR 5:45, $244 Sgt. Samm.

Preservation

[10] Heavy is the dog's name.

This issue is preserved.

The standard of review

The admissibility of evidence is within the sound discretion of the trial court, and the trial court's ruling will not be reversed unless there has been a clear abuse of that discretion.[11]

Merits

First, the notes are clearly jointly authored. They contain a question and an answer to that question. The question asked is: what time is the flight? And the answer given is: US AIR 5:45, $244. People do not write questions to themselves. Moreover, according to the prosecutor, the notes contain two different handwriting. (35 1590).

The lies contained in the notes were the lies that Brooks told. This fact alone connects him to the notes regardless of authorship. The part of the notes regarding the alibi, beginning with events, are not hearsay because they were not offered for the "truth" of the matter asserted. Far from it - the State's position was that they were a pack of lies. *State v. Dreggors*, 813 So.2d 170, 172 (Fla. 5th DCA 2002)(explaining that prior testimony was not necessarily hearsay because it would not be offered to prove the truth of the matters but to the contrary, the State seeks to prove the falsity of her

[11] *Ray v. State*, 755 So. 2d 604, 610 (Fla. 2000); *Zack v. State*, 753 So. 2d 9, 25 (Fla. 2000); *Cole v. State*, 701 So. 2d 845 (Fla. 1997); *Jent v. State*, 408 So. 2d 1024, 1039 (Fla. 1981); *Cf. General Elec. Co. v. Joiner*, 522 U.S. 136, 118 S.Ct. 512, 517, 139 L.Ed.2d 508 (1997) (stating that all evidentiary rulings are reviewed for "abuse of discretion").

testimony); *Martinez v. McCaughtry*, 951 F.2d 130, 133 (7th Cir 1991)(explaining that threats such as "Don't make me do this to you," "you're a dead man," "you're going to die," are not hearsay because they are not assertions and are not offered to prove the truth of the matter asserted). Because the State was not offering these statements for their truth but rather to establish a pattern of lies, they are not hearsay.

The question and answer regarding the flight involved a non-hearsay use of the notes to show Brooks left the area and they were discussing his leaving. The flight showed consciousness of guilt. As the trial court noted, these notes were physical evidence of the earlier conspiracy. The notes referred to Mark Gilliam who was the third member of the conspiracy. The notes confirm Gilliam's testimony about the earlier conspiracy,

Even if some of the notes are viewed as hearsay, such as "Mark would have cracked up", they are admissible. They have an extra indicia of reliability because they are written, physical evidence. Moreover, the notes were found inside Davis' cast. The fundamental principle behind prohibiting hearsay is that it is unreliable. When physical evidence proves the statements were made, *i.e.*, writings and the source of those statements, the rule against hearsay should not be applied. *Dallas County v. Commercial Union Assurance Co.*, 286 F.2d 388 (5th Cir.1961)(holding courts have the discretion to admit evidence that violates the rule against hearsay even if the evidence does not meet one of the exceptions). The classic four dangers or risks of hearsay, *i.e.,* insincerity, distorted perception,

erroneous memory, and ambiguity of utterance, are not present with a written document. There is no question that this is reliable evidence. This additional "indicia of reliability" satisfy constitutional concerns. *Lilly*, 527 U.S. at 136, 119 S.Ct. 1887 (noting that the residual 'trustworthiness' test credits the axiom that a rigid application of the Clause's standard for admissibility might in an exceptional case exclude a statement of an unavailable witness that is incontestably probative, competent, and reliable, yet nonetheless outside of any firmly-rooted hearsay exception.").

Furthermore, the conspiracy should not be viewed as ending with the murder.[12] The co-conspirator statement exception is

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[12] The State does not agree that a conspiracy to murder ends when the victim dies as this Court stated in *Brooks I*. This holding should be reconsidered in light of the United States Supreme Court's new decision in *United States v. Recio*, No. 01-1184 (January 21, 2003), which held that conspiracy law does not contain an 'automatic termination' rule. The *Recio* Court explained that the substantive crime and the conspiracy are separate evils.

While some federal courts seem to say that conspiracy ordinarily ends with arrest, others, including the Eleventh Circuit, have found that conspiracies can, and often do, continue after arrest. *United States v. Pineda-Ortuno*, 952 F.2d 98, 106 (5th Cir. 1992); *United States v. Bascope-Zurita*, 68 F.3d 1057, 1061 (8th Cir.1995)(conspiracy continues after one co-conspirator is arrested if other co-conspirators' illegal activities continue thereafter) ;*United States v. Ammar*, 714 F.2d 238, 253 (3d Cir. 1983)(noting the arrest of a conspirator does not necessarily terminate his or her involvement in the conspiracy); *United States v. Hudson*, 970 F.2d 948, 959 (1st Cir. 1992)(observing that the arrest hardly brought an end to appellant's on-going conspiracy); *United States v. Jones*, 913 F.2d 1552, 1563 (11th Cir.1990)

Courts should not pick an arbitrary event that is outside of the conspiracy, like the murder or the arrest, to say the conspiracy ended at that point. Instead, they should, and seem to be more and more be deciding, on a case by case basis, when

firmly rooted, and therefore, does not violate the Confrontation Clause. *Bourjaily v. United States*, 483 U.S. 171, 182-183, 107 S.Ct. 2775, 97 L.Ed.2d 144 (1987)(explaining that because the co-conspirator statement exception to the hearsay rule is "firmly rooted," proper admission of a co-conspirator statement does not offend the Sixth Amendment).

Harmless Error

The error, if any, was harmless. While the notes established an agreement to lie, that there was a conspiracy to murder, that these cousins were in Crestview and that these cousins lied

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the particular conspiracy actually ended. *United States v. Davis*, 226 F.3d 346, 353 (5th Cir. 2000)(noting where there is evidence that conspirators managed to continue conducting the business of the conspiracy after arrest, the mere fact of arrest does not prevent the government from relying on that evidence). The note passing by these two co-perpetrators clearly shows that the conspiracy continued during this period.

In *People v. Hardy*, 825 P.2d 781 (Cal. 1992), the California Supreme Court held statements made by defendants' coconspirators while in pretrial detention were properly admitted under coconspirator exception to hearsay rule, as statements made "in furtherance of objective" of conspiracy. Hardy was convicted of first-degree murder and of conspiracy to commit murder to collect life insurance proceeds. The statements involved an effort to coordinate their alibis. The conspiracy did not, as defendants argue, end with the death of the insured. *Hardy*, 825 P.2d at 812. Hardy argued that the statements made only to conceal the co-conspirators' involvement in the conspiracy was not in furtherance of the conspiracy which the court rejected. Hardy, 825 P.2d at 813. The Court explained that the conspiracy to commit murder to collect life insurance proceeds continued after arrest including throughout the trial in this particular case because it was only at the end of the trial that the money would not be paid.

about their whereabouts on the night of the murders was known to the jury.

ISSUE IV

DID THE TRIAL COURT ABUSE ITS DISCRETION BY ALLOWING THE PROSECUTOR TO IMPEACH HIS OWN WITNESS? (Restated)

Appellant asserts the trial court abused its discretion by allowing the prosecutor to impeach his own witness when she testified she did not remember her prior statements. The State respectfully disagrees. A prosecutor may impeach his own witness provided that is not the sole reason for calling the witness to testify. This witness was not called for the sole purpose of impeaching her. Thus, the trial court properly allowed the impeachment.

The trial court's ruling

Melissa Thomas, who had met Davis earlier that month, testified at trial for the State. (35 1520). She lived in Crestview. (35 1520). During her testimony, she acknowledged having trouble remembering all of this. (35 1526). The prosecutor had to refresh her memory about other matters. (35 1526). She testified that both Davis and Brooks came to her house in Crestview on Wednesday April 24 at 9:00. (35 1524, 1525). They were both wearing black pants. (35 1527). Brooks asked to use the bathroom. (1525). The prosecutor asked her if Brooks looked differently after using the bathroom. (1532). She did not remember telling Agent Haley that Brooks come out of the bathroom wearing shorts when he had been wearing pants. (1533). Later, the prosecutor called FDLE Agent Haley to testify. (38 2148). Agent Haley testified that he interviewed Melissa Thomas shortly after the murders on Monday, April 29,

1996. (38 2149,2150). Defense counsel objected on the basis of hearsay. (38 2153). The prosecutor explained that he wanted Agent Haley to testify that she told him that Brooks had changed into shorts in the bathroom which constituted impeachment of his own witness. (38 2154). Defense counsel objected, arguing that this was not proper impeachment, because the witness' testimony that she could not remember was not materially different from her prior statement. Defense counsel's position was that the witness would have had to directly deny the changing of clothes for there to be materially different statements. (38 2154). The trial court noted that this was "very innocuous" (38 2155). The trial court ruled that it was proper impeachment because it was contradictory to a degree. (38 2156). Agent Haley testified that he took a tape recorded statement from Melissa Thomas in which she stated that when Brooks arrived at her house he was wearing black jogging pants but came out of the bathroom wearing shorts. (38 2156-2157).

Preservation

This issue is preserved. Defense counsel objected at trial on the exact same grounds being raised on appeal.

The standard of review

The admissibility of evidence is within the sound discretion of the trial court, and the trial court's ruling will not be reversed unless there has been a clear abuse of that discretion.[13]

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[13] ***Ray v. State***, 755 So. 2d 604, 610 (Fla. 2000); ***Zack v. State***, 753 So. 2d 9, 25 (Fla. 2000); ***Cole v. State***, 701 So. 2d 845 (Fla. 1997); ***Jent v. State***, 408 So. 2d 1024, 1039 (Fla.

Merits

The who may impeach statute, § 90.608(1), Florida Statutes (2002), permits any party, including the party calling the witness, to attack the credibility of a witness by introducing statements of the witness which are inconsistent with the witness's present testimony.

In *Morton v. State*, 689 So.2d 259, 264 (Fla.1997), this Court held that when a witness gives both favorable and unfavorable testimony, the party calling the witness should usually be permitted to impeach the witness with a prior inconsistent statement. The *Morton* Court after canvassing the law noted that the problem was not so much the individual instances of impeachment as it is the effect of so much impeachment of so many witnesses. The *Morton* Court found the improper impeachment to be harmless.[14] Professor Ehrhardt notes that there is a disagreement about whether lack of memory is a prior inconsistent statement but notes that most of the federal court

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1981); *Cf. General Elec. Co. v. Joiner*, 522 U.S. 136, 118 S.Ct. 512, 517, 139 L.Ed.2d 508 (1997) (stating that all evidentiary rulings are reviewed for “abuse of discretion”).

[14] In *Shere v. State*, 579 So.2d 86, 93 (Fla. 1991), this Court ruled that it was improper to call a witness as a court witness and then to impeach that witness with her prior statements after she merely said she did not remember what happened, especially when those statements had not been shown to be materially inconsistent citing Smith, 573 So.2d at 312-13. However, at the time of *Shere*, the Evidence Code did not permit a party to impeach their own witness. *Shere*, 579 So.2d at 91 & n.10. The witness had to be adverse for a party to impeach them and “a mere lapse of memory is insufficient to render a witness adverse." The change in the statute made this part of *Shere* no longer good law.

permit such impeachment. CHARLES W. EHRHARDT, FLORIDA EVIDENCE, § 608.4 n.5 (2002 ed.).

In *Laur v. State*, 781 So.2d 452 454 (Fla. 4th DCA Dist. 2001), the Fourth District held that impeachment was proper where victim was not called for the primary purpose of introducing her prior statement to the officer. The Court explained that there was a legitimate forensic purpose in calling the witness because she gave other testimony that supported the State's case. She acknowledged that she and Laur had been loudly arguing, that she had been drinking, that she was crying and shaking, and that she may have had scrapes on her knees.

Here, the State was using this witness to establish that Brooks was in Crestview at the time and place of these murders, not that he changed clothes. The witness could not remember the details because, as she explained, this occurred six years ago. (35 1526). The interview with Agent Haley occurred five days after the incident at her house that she was testifying regarding. (38 2149,2150). It is quite understandable that she could remember five days later but not six years later. Under such circumstances, such impeachment should be allowed.

Appellant's reliance on *James v. State*, 765 So.2d 763, 766 (Fla. 1st DCA 2000) and *Calhoun v. State*, 502 So.2d 1364, 1365 (Fla. 2d DCA 1987), is misplaced. *James* is incorrectly decided. In *James*, the First District held that a witness's trial testimony that "he had no recollection" was not truly inconsistent with his previous statement that "he saw [the defendant] murder the victim". Such statements are inconsistent.

Many other district courts disagree with the reasoning in *James*. *Bateson v. State*, 761 So.2d 1165, 1170 (Fla. 4th DCA 2000)(applying *Morton* and finding no error in allowing impeachment where witness gave testimony supportive of the state's case in addition to prior statement used to impeach her).

Alternatively, the taped statements this witness gave Agent Haley can be viewed as a past recollection recorded. *United States v. Riley*, 657 F.2d 1377, 1386 (8th Cir. 1981)(concluding that a taped statement of the victim of the crime, who testified at trial but could not recall details, given to law enforcement officers satisfied the requirements of Fed.R.Evid. 803(5) as recorded recollections).[15] Such statement may be used as substantive evidence.

Harmless error

The error, if any, is harmless. As the trial court noted this is "very innocuous" evidence. The pants were not recovered. Any evidence relating to changing into short is minor and did not contribute to the convictions.

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[15] The hearsay exception statute, § 90.803(5), provides:

Recorded recollection.--A memorandum or record concerning a matter about which a witness once had knowledge, but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made by the witness when the matter was fresh in the witness's memory and to reflect that knowledge correctly. A party may read into evidence a memorandum or record when it is admitted, but no such memorandum or record is admissible as an exhibit unless offered by an adverse party.

ISSUE V

DID THE TRIAL COURT ABUSE ITS DISCRETION BY ADMITTING THE TESTIMONY OF THE CO-CONSPIRATOR THAT THE DEFENDANT SAID HE WAS GOING TO HAVE TO SHOOT THE OFFICER? (Restated)

Appellant contends that the trial court abused its discretion by allowing Gilliam to testify as to an uncharged attempted murder on the victim. The State respectfully disagrees. First, this issue is not preserved. This partial admissibility claim was never presented to the trial court. Furthermore, this evidence, including the threat to the officers' lives was inextricably intertwined with the crime charged, relevant to establish Brook's intent, and to establish the conspiracy. Thus, the trial court properly admitted this evidence.

The trial court's ruling

Mark Gilliam, who had been in the Army with Brooks, testified at trial for the State. (36 1614,1616). Defense counsel objected to testimony regarding the attempted murder on Monday arguing the prejudicial effect outweighed the probative value. (36 1648). The prosecutor argued that this evidence was in furtherance of the conspiracy. The trial court agreed and overruled the objection. (36 1649). Gilliam then testified that Davis got the victim to come to Davis' house in her car. (36 1651-1652). Gilliam drove Davis to the hospital to use the phone to call her. (36 1654). Davis and the victim got in her car and drove to Crestview with Gilliam following in his car with Brooks. (36 1655-1656). Brooks had the shotgun. (36 1656). She was driving fast and a cop car with his lights on pulled her over. Gilliam kept driving but then made a U-turn, stopping

behind her. (36 1657-1658). Another cop came and pulled behind Gilliam. (36 1658). Brooks, who had the shotgun in the front, said he couldn't go back and he was going to have to shoot the cops. (36 1658-1659). Gilliam told him to put the shotgun away. (36 1659). Brooks put the shotgun underneath the back seat covers. Defense counsel again objected which the trial court noted. (36 1659). The prosecutor then explained to the trial court that Brooks' statement that he can't go back to jail showed consciousness of guilt that he was involved in a criminal enterprise at the time. (36 1660). Defense counsel again objected and moved for a mistrial. (36 1660). The trial court denied the motion for mistrial.

Preservation

This issue is not preserved. While defense counsel objected to any evidence regarding the earlier attempted murder, appellate counsel is now arguing that the attempted murder of the victim was admissible, just not Brooks' threat on the officer's life. This partial admissibility claim was never presented to the trial court. The argument in the trial court was that the entire episode was not admissible. *Archer v. State*, 613 So.2d 446, 448 (Fla.1993)(stating the specific legal argument or ground to be argued on appeal must be part of the presentation to the trial court if it is to be considered preserved).

The standard of review

The admissibility of evidence is within the sound discretion of the trial court, and the trial court's ruling will not be

reversed unless there has been a clear abuse of that discretion.[16]

Merits

The exclusion on grounds of prejudice or confusion statute, § 90.403, provides:

> 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. This section shall not be construed to mean that evidence of the existence of available third-party benefits is inadmissible.

First, this evidence was relevant. It described an attempt to murder the victim that succeeded a couple of days later. The attempted murder occurred on Monday, April 22, 1996; whereas, the charged murder occurred on Wednesday. (36 1650) Moreover, this testimony establishes Brooks' individual intent to murder the victims.

Furthermore, the attempted murder was inseparable from the charged murder. As this Court has explained, evidence of uncharged crimes which are inseparable from the crime charged, or evidence which is inextricably intertwined with the crime charged, is not *Williams* rule evidence. It is admissible under section 90.402 Florida Statutes because 'it is a relevant and inseparable part of the act which is in issue ... [I]t is necessary to admit the evidence to adequately describe the

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[16] *Ray v. State*, 755 So. 2d 604, 610 (Fla. 2000); *Zack v. State*, 753 So. 2d 9, 25 (Fla. 2000); *Cole v. State*, 701 So. 2d 845 (Fla. 1997); *Jent v. State*, 408 So. 2d 1024, 1039 (Fla. 1981); *Cf. General Elec. Co. v. Joiner*, 522 U.S. 136, 118 S.Ct. 512, 517, 139 L.Ed.2d 508 (1997) (stating that all evidentiary rulings are reviewed for "abuse of discretion").

deed.' " *Coolen v. State*, 696 So.2d 738, 742-43 (Fla.1997) (quoting *Griffin v. State*, 639 So.2d 966, 968 (Fla.1994)). See also CHARLES W. EHRHARDT, FLORIDA EVIDENCE, § 404.17 (2000 Edition).[17] Additionally, this conduct, as well as the statement and threat, occurred during the conspiracy. Gilliam's testimony established that the conspiracy had already began and this conduct, as well as the threats, was in furtherance of that conspiracy. Moreover, the statement and threat to the officers showed Brook's consciousness of guilt that he was involved in a criminal enterprise at the time.

In *Wyatt v. State*, 641 So.2d 335, 358 (Fla. 1994), this Court held that a threat to shoot an officer was admissible as evidence of flight. The arresting officer testified that Wyatt told him he was glad he did not have a gun when he got stopped, otherwise he would have shot the officer. Wyatt argued that this was inadmissible character evidence. *Id citing Straight v. State*, 397 So.2d 903, 908 (Fla. 1981)(explaining that when a suspected person in any manner attempts to escape or evade a threatened prosecution by flight, concealment, resistance to lawful arrest, or other indications after the fact of a desire to evade prosecution, such fact is admissible, being relevant to the consciousness of guilt which may be inferred from such circumstance). Here, as in *Wyatt* and *Straight* this threat to shoot an officer was admissible because it was relevant to the consciousness of guilt.

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[17] The State may indeed assert this alternative ground not considered by the lower court. *Dade County School Board v. Radio Station WQBA*, 731 So.2d 638, 644 (Fla.1999).

The probative value of the attempted murder outweighed any prejudice. This evidence was not used merely to show Brooks' bad character because he threatened the officer's lives. It was part and parcel of a conspiracy to murder that was completed two days later.

Appellant's reliance on ***Williamson v. State***, 681 So.2d 688, 695-696 (Fla. 1996), is misplaced. The ***Williamson*** Court held that evidence of a murder of a child that occurred years earlier was admissible. The ***Williamson*** Court reasoned that the testimony was integral to the State's theory of why its key witness acted as he did and explained that had the trial judge precluded either witness's testimony, the jury would have been left with a materially incomplete account of the criminal episode. Likewise, here, the jury would have been left with a materially incomplete account of the criminal episode. Here, by contrast, the intended victim of the attempted murder was, in fact, murdered by these conspirators two days later.

Harmless error

The error, if any, was harmless. For collateral crime evidence to be truly prejudicial, the uncharged crime must be more serious than the charged crime. Here, the uncharged crime was not even attempted murder of the officers; rather, it was a threat or an attempted assault of the officers. In contrast, the charged crime was two counts of actual murder.

ISSUE VI

DID THE TRIAL COURT ABUSE ITS DISCRETION BY OVERRULING THE OBJECTIONS TO THE PROSECUTOR'S CLOSING ARGUMENT ? (Restated)

Brooks contends that the trial court abused its discretion by overruling the objections to the prosecutor's closing argument. The State respectfully disagrees. The prosecutor's arguments were proper arguments. Furthermore, the error, if any, was harmless. None of these comments warrant a new trial. Thus, the trial court properly overruled the objections.

The trial court's ruling

The prosecutor argued that "maybe it will be suggested that Lamar Brooks, there is not evidence that he knew about the insurance. Well, he sure didn't tell the police he did. He sure didn't when he was interviewed" (T. 40 2500). Defense counsel objected arguing that Brooks had no duty to tell the police and that such an argument was improper burden shifting. (T. 40 2501). The trial court overruled the objection. (T. 40 2501).

The prosecutor also discussed the principal theory. Every time you see his name in the instructions, every time you see his name under the law principals that doesn't just mean Lamar Z. Brooks. That means Lamar Z. Brooks or his principal because he is responsible for all the acts of Walker Davis." (T. 39 2385-2386). Defense counsel objected arguing that the evidence tends to prove the motive of Davis, not Brooks. (T. 39 2387-2388). The trial court overruled the objection and denied the motion for mistrial. (T. 39 2388).

The prosecutor discussed Rochelle Jones' testimony . (T. 40 2434-2435). The prosecutor noted that Walker Davis may well have been worried about Jones telling others that she had picked up both Davis and Brooks in Crestview on the night of the murder. (T. 39 2435). Defense counsel objected arguing that this argument was inferring a statement made by Davis who did not testify at trial. (T. 39 2436). The trial court overruled the objection and denied the motion for mistrial (T. 39 2436). The prosecutor then pointed out to the jury that after the call, Jones lied to the OSI Agent who interviewed her about Davis' whereabouts. (T. 39 2436). He also pointed out that her later version was corroborated by the speeding ticket.

The standard of review

The standard of review is abuse of discretion. *Franqui v. State*, 804 So.2d 1185,1195 (Fla. 2001)(noting that the control of comments made to the jury is within the trial court's discretion, and an appellate court will not interfere unless an abuse of discretion is shown citing *Occhicone v. State*, 570 So.2d 902, 904 (Fla.1990)). Both the prosecutor and defense counsel are granted wide latitude in closing argument. *Ford v. State*, 802 So.2d 1121, 1129 (Fla. 2001).

Merits

For the prosecutor's comments to merit a new trial, the comments must either deprive the defendant of a fair and impartial trial, materially contribute to the conviction, be so harmful or fundamentally tainted as to require a new trial, or be so inflammatory that they might have influenced the jury to

reach a more severe verdict than that it would have otherwise. *Spencer v. State*, 645 So.2d 377, 383 (Fla.1994).

Here, the prosecutor never argued that Brooks should have presented a defense. Rather, the prosecutor was rebutting any possible suggestion that Brooks did not know about the insurance policy. Moreover, this claim is rather disingenuous given that appellate counsel asserts this exact claim as error on appeal. Obviously, such a suggestion is being made by Brooks.[18]

The prosecutor's closing being sandwiched between defense counsel's two opportunities to argue to the jury accounts for the prosecutor rebutting all possible defenses. There is nothing improper about a prosecutor pointing out that the defendant has no defense or that the defendant presented nothing to rebut the State's case. IB at 51. *Lawrence v. State*, 831 So.2d 121, 135 (Fla. 2002)(rejecting claim that prosecutor's repeated use of the word "uncontroverted" during closing argument was a comment on his failure to testify and shifted the burden of proof).

Brooks next complains that the prosecutor in closing argued that Brooks was responsible for Davis' actions under the law of principals in violation of *Brooks I*. Appellate counsel is confusing limits in the admission of hearsay statements with the actions of principals. The prosecutor may properly argue the later regardless of the limits of the co-conspirator hearsay exception. The law of principals concerns actions, not hearsay

[18] If, as appellate counsel asserts, this argument defies logic, then defense counsel could have easily pointed this out to the jury in his final closing. IB at n.17

statement. The prosecutor's closing argument properly drew this distinction and therefore, was perfectly proper. (40 2435-2436). Thus, the trial court properly overruled these objections.

Harmless error

The error, if any, is harmless. *Conahan v. State*, No. SC00-170 (Fla. January 16, 2003)(finding prosecutor's comment in opening to be error but harmless). None of these arguments vitiate the entire trial. *Woodel v. State*, 804 So.2d 316, 323 (Fla. 2001)(citing *Duest v. State*, 462 So.2d 446, 448 (Fla.1985)).

ISSUE VII

DID THE TRIAL COURT ERR BY REFUSING TO GIVE AN INDEPENDENT CONSPIRACY JURY INSTRUCTION? (Restated)

Appellant argues that the trial court erred in failing to give the jury instruction as required by the co-conspiracy hearsay statute prior to the admission of the conspiracy testimony. The State respectfully disagrees. No such jury instruction was required. The instruction is only required where multiple witnesses are necessary, not, as here, where one witness lays the entire foundation. Furthermore, the error, if any, is harmless because Brooks is not actually challenging the sufficiency of the evidence of the conspiracy. Thus, the trial court properly refused to give the jury instruction.

The trial court's ruling

During Gilliam's testimony establishing the conspiracy, defense counsel requested a jury instruction on co-conspirators prior to the admission of this testimony. (36 1629-1630). The prosecutor argued that the only time the instruction is necessary is when the State attempts to introduce statements before independent proof of the conspiracy is established and because this witness was the independent proof, no jury instruction was necessary. (36 1630). The trial court ruled that it was not going to give the jury instruction at this time. (36 1630).

Preservation

This issue is preserved.

The standard of review

The standard of review is abuse of discretion. *James v. State*, 695 So. 2d 1229, 1236 (Fla. 1997)(noting that a trial court has wide discretion in instructing the jury).

Merits

The hearsay exceptions statute governing co-conspiracy, § 90.803(18)(e), Florida Statutes (2002), provides:

Admissions.--A statement that is offered against a party and is:

> A statement by a person who was a coconspirator of the party during the course, and in furtherance, of the conspiracy. Upon request of counsel, the court shall instruct the jury that the conspiracy itself and each member's participation in it must be established by independent evidence, either before the introduction of any evidence or before evidence is admitted under this paragraph.

Professor Ehrhardt's treatise on evidence contains a detailed discussion of when the jury instruction for co-conspiracy should be given. He explains that currently in federal courts the old *Apollo* jury instruction[19] has been replaced by *James* hearings[20]. Federal courts prohibit the giving of any such jury instructions because the determination of admissibility is to be made by the judge, not the jury. CHARLES W. EHRHARDT, FLORIDA EVIDENCE, § 803.18f (2002 ed.). However, he states, due to the explicit language of the statute, Florida still follows *Apollo*.[21]

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[19] *United States v. Apollo*, 476 F.2d 156 (5th Cir.1973).

[20] *United States v. James*, 590 F.2d 575 (5th Cir.1979)(overruling *Apollo*)

[21] It is not clear that an *Apollo* instruction is still required in Florida. Several district courts have held that an *Apollo* instruction is still required. *Boyd v. State*, 389 So.2d 642, 646 (Fla. 2nd DCA 1980)(stating that the Apollo rule "lives on in Florida" because of the express language of Section

90.803(18)(e) which is not included in the federal counterpart); *State v. Edwards*, 536 So.2d 288 292(Fla. 1st DCA 1988)(holding that an *Apollo* instruction is still required in Florida citing *Boyd*); *State v. Morales*, 460 So.2d 410,413 (Fla. 2d DCA 1984)(holding, in Florida after the trial court makes a threshold decision to admit hearsay evidence in this type of case, the cautionary *Apollo* instruction shall be given); *Romani v. State*, 528 So.2d 15,20, n.11 (Fla. 3d DCA 1988)(stating that the *Apollo* instruction lives on in Florida by virtue of its inclusion in Florida Evidence Code but noting that other jurisdictions have discontinued the instruction, viewing it as potentially confusing and inconsistent with the role of the judge); *See also Romani v. State*, 542 So.2d 984, 986 (Fla. 1989)(observing that the Florida Code provides for a jury instruction that each member's participation in the conspiracy must be proved by independent evidence). However, in *Saavedra v. State*, 421 So.2d 725, 727 (Fla. 4th DCA 1982), the Fourth District, relying upon *James*, pointed out that "the jury plays no role in the decision whether to admit a co-conspirator's declaration." If the jury has no such role, no such jury instruction is necessary. As Judge Learned Hand observed, in *United States v. Dennis*, 183 F.2d 201 (2d Cir. 1950),

> In strict logic these instructions in effect altogether withdrew the declarations from the jury, and it was idle to put them in at all. The law is indeed not wholly clear as to who must decide whether such a declaration may be used; but we think that the better doctrine is that the judge is always to decide, as concededly he generally must, any issues of fact on which the competence of evidence depends, and that, if he decides it to be competent, he is to leave it to the jury to use like any other evidence, without instructing them to consider it as proof only after they too have decided a preliminary issue which alone makes it competent. Indeed, it is a practical impossibility for laymen, and for that matter for most judges, to keep their minds in the isolated compartments that this requires.

Moreover, reading this instruction is contrary to the evidence code provision governing admissibility of evidence. § 90.105, Fla Stat (2002). The Court, not the jury, is to decide preliminary issue of admissibility. Once Florida courts determine that the judge must decide this issue, an *Apollo* instruction was no longer required. Only if the determination

Even if an *Apollo* instruction is required under Florida law, it is only necessary in cases where multiple witnesses are necessary to lay the foundation. As Professor Ehrhardt's explains, an order of proof problem occurs when multiple witnesses are necessary. CHARLES W. EHRHARDT, FLORIDA EVIDENCE, § 803.18f, pg 822 (2002 ed.). Contrary to appellate counsel's argument, this is an order of proof problem and when, as in this case, one witness establishes the entire foundation, no jury instruction is necessary. Thus, the trial court properly refused to give an *Apollo* instruction.

Harmless error

The error, if any, in failing to give the *Apollo* instruction was harmless because Brooks does not claim that there was actually insufficient evidence of the conspiracy. *Boyd v. State*, 389 So.2d 642 (Fla. 2nd DCA 1980)(finding no error in the trial judge's refusal to give an *Apollo* instruction because the defendant was the only defendant in this case and he does not claim that there was insufficient independent evidence of a conspiracy and explaining that under either circumstance, no prejudice results from the failure to give an *Apollo* instruction because such an instruction in such a case is meaningless and useless citing *United States v. Buschman*, 527 F.2d 1082 (7th Cir. 1976) and *United States v. Moore*, 505 F.2d 620 (5th Cir. 1974)).[22]

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is for the jury to make is such an instruction necessary.

[22] This Court concluded that sufficient independent evidence to establish a conspiracy between Gilliam, Davis and Brooks beginning on the Monday evening after their return from

Atlanta in *Brooks I*. *Brooks v. State*, 787 So.2d 765, 778 (Fla. 2001)(finding based on statements plus latex gloves and a "buck knife" on the speaker of the stereo, not the shotgun and the earlier attempted murder).

ISSUE VIII

DID THE TRIAL COURT ABUSE ITS DISCRETION IN DENYING THE MOTION FOR MISTRIAL WHERE THE PROSECUTOR MENTIONED TRIAL PREPARATION AND PRIOR TESTIMONY? (Restated)

Brooks contends that the trial court should have granted a mistrial when the prosecutor referred to the previous trial. The State respectfully disagrees. One of the prosecutor references was to trial preparation, not the previous trial itself. Furthermore, the jury was not informed of the result of the prior trial. This jury was never told that a prior jury had convicted Brooks. Moreover, these two references were unintentional and inadvertent. The error, if any, was harmless. Thus, the trial court properly denied the motion for mistrial.

The trial court's ruling

Mark Gilliam testified as to two attempted murders on the victim, one on Monday and one on Tuesday, prior to the actual murder on Wednesday. He admitted that he had not previously disclosed this information during the investigations or during his previous testimony (36 1712-1713). He admitted that in his previous testimony he testified that it was all a joke when, in fact, it was not. (36 1714). He testified that on October 6, 1998 he gave a deposition at the direction of Brooks in which he changed his testimony to that it was all a joke, he never saw the latex gloves, he was not the driver. (36 1716-1719,1721). On October 28, 1998 he testified in Florida, recanting and admitting that he had perjured himself. (36 1721-1722). He testified that there was no plan to murder and that neither he

nor Brooks were offered money. The prosecutor charged Gilliam with four counts of perjury in a capital case. (36 1723). Gilliam then gave a sworn statement to the prosecutor revealing the two attempted murders on Monday and Tuesday. (36 1725). After counsel objected to the prosecutor's question, the prosecutor attempted to rephrase the question and said in trial prep - I'm sorry in 1998. (36 1727). Defense counsel objected because this informed that jury that there was a previous trial and moved for a mistrial. (36 1727). The prosecutor noted that he did not say that a trial happened. The trial court observed that based on the numerous references to previous testimony and trial, any mention of the prior trial was harmless but directed the prosecutor not to say it again. (36 1727). After, the prosecutor assured the trial court that he would not, the trial court denied the motion for mistrial (36 1727).

Defense counsel in his cross referred to Judge Tolton presiding, his being under oath, to being subpoenaed and to committing perjury. (36 1749, 1751,1757, 1756,1769,1771,1776). During the prosecutor's redirect, the prosecutor clarifying one of the earlier questions, Mr. Funk asked you about your testimony in April of '98 - and I may have said March of '98 because that is when the trial began. (36 1783). Defense counsel again objected and moved for a mistrial claiming the comment violated the motion in limine.[23] The trial court denied

[23] Defense counsel filed a motion in limine which, among other things, sought to preclude any reference to the prior guilty verdict by the previous jury on January 8, 2002 just prior to trial. (R. 26 4991).

the motion because of the numerous references to previous testimony hearings, courtrooms and so forth, and mention of a trial was harmless. (36 1783). The trial court directed the prosecutor not to use the word again. Defense counsel argued that harmless error analysis is limited to appellate courts, not trial courts. The trial court noted his disagreement with this observation and his ruling. (36 1784). Defense renewed the motion for mistrial on this basis at the close of the State's case. (39 2268). The prosecutor admitted that he misspoke when he used the phrase trial prep but explained that the two references were inadvertent. (39 2270). The prosecutor characterized them as "slip-ups" (39 2275). The trial court noted that the jury probably concluded that there had been prior proceedings but not an earlier trial. (39 2276)

Preservation

This issue is preserved. Defense counsel objected and moved for a mistrial based on the comments.

The standard of review

The admissibility of evidence is within the sound discretion of the trial court, and the trial court's ruling will not be reversed unless there has been a clear abuse of that discretion. *Ray v. State*, 755 So. 2d 604, 610 (Fla. 2000); *Zack v. State*, 753 So. 2d 9, 25 (Fla. 2000); *Cole v. State*, 701 So. 2d 845 (Fla. 1997); *Jent v. State*, 408 So. 2d 1024, 1039 (Fla. 1981); *General Elec. Co. v. Joiner*, 522 U.S. 136, 118 S.Ct. 512, 517, 139 L.Ed.2d 508 (1997) (stating that all evidentiary rulings are reviewed for "abuse of discretion").

Merits

In *Jackson v. State*, 545 So.2d 260 (Fla.1989), the Florida Supreme Court held that references to prior guilty verdicts are improper. The prosecutor asked the defendant if when you were in prison, you weren't awaiting trial; you hadn't been granted a new trial yet, had you and then asked you had been convicted when you were in prison, right and your status was convicted, wasn't it? This Court noted that while the fact that there has been a prior trial was not admissible evidence, many times such references are inadvertently presented to the jury through various means during the course of a second trial. However, the *Jackson* Court noted that the presentation of evidence of a prior trial was not inadvertent but intentional. The *Jackson* Court found that error to be harmful because testimony that on a previous occasion another jury listened to the same testimony and believed beyond a reasonable doubt the defendant was guilty of the crime can be devastating.

There is no error in merely referring to a prior trial. Unlike *Jackson*, the prosecutor did not inform the jury that a prior jury had convicted Brooks. Rather, at most the jury knew that there had been a prior trial, not the result of that prior trial. The jury may well have thought that the prior trial ended in a mistrial or a hung jury. Any prejudice that results from references to prior proceedings, results not from the fact of the prior proceedings but from informing the jury that the previous jury convicted the defendant. Furthermore, it is clear from the broken nature of the prosecutor’s questions that his

comments were unintentional and inadvertent, just as the prosecutor explained to the trial court.

Harmless error

The error, if any, was harmless. Given the numerous references to prior testimony throughout this trial by numerous witnesses, including Melissa Thomas, the jury would have been aware that there were prior proceedings in this case. The jury was never informed of the results of those prior proceedings and therefore, the error is harmless.

ISSUE IX

DID THE TRIAL COURT ABUSE ITS DISCRETION BY DENYING THE MOTION FOR CHANGE OF VENUE ? (Restated)

Brooks argues that the trial court erred in denying his motion for change of venue. The State respectfully disagrees. First, this issue is not preserved. Defense counsel did not provide the trial court with the newspaper articles until the State rested. Moreover, Brooks did not use all of his peremptory challenges. He had one remaining. Thus, the trial court properly denied the motion for change of venue.

The trial court's ruling

During jury selection, one of the prospective jurors, Pakutinski, informed the judge that some members of the courtroom on the fourth and fifth row were discussing the fact that this was a retrial. (31 768-777). He was excused. (31 777,780). The trial court then interviewed the other prospective jurors about the discussion. (31 782 - 32 900). These prospective jurors were excused for cause. (32 921). Another juror who actually sat on the jury, Miss Duvall, revealed that she overheard a conversation where someone expressed the opinion that Brooks was innocent. (32 907-908). Defense counsel used nine peremptory challenges. (32 932, 934). The jury including alternates was Judith Dagostino, Pamela Thompson, Marilyn Brown, Lloyd Bowman, Marlene Suarez, Terrance Anson, April Evans, Sandra McIntyre, Roger Zemba, Donald

Kennedy, Rita Forbes, Gail Duvall, Davis Vaughan, Patricia Wooley. (32 975).[24]

Defense counsel requested that the trial court address the change of venue issue. (32 921). One of the prospective jurors Juror Broxson, informed the judge that he thought he heard a female voice express her opinion that the defendant was guilty but he could not identify the person who made the statement. (32 858, 862-864). He could not even be sure that the voice was female. (32 866-868). Defense counsel, based on this information and reports of other conversations among prospective jurors, and that Crestview is a small town where people talk, it was a waste of time to attempt to sit a jury. (32 921-923). Defense counsel stated that there is poison out there and the proper remedy was to move the trial to another community. (32 923). He noted that the newspaper articles referred to the fact that this was a retrial. The prosecutor responded that the venire was not tainted and that it was possible to get a fair jury. (32 924-925). Defense counsel moved to change venue and secondly to strike the venire. (32 925). There were approximately 130 prospective jurors. (T. 41 2780) The trial court denied the motion. (32 926). Defense counsel renewed his motion for change of venue which the trial court again denied. (32 976). Defense counsel made several newspaper articles part of the record. (T. 39 2328-2329). The articles contained mainly

[24] The final jury was Miss Dagostino, Miss Thompson, Miss Brown, Mr. Bowman, Miss Suarez, Mr. Anson, Miss McIntyre, Mr. Zemba, Mr. Kennedy, Miss Forbes, Miss Duvall, Mr. Vaughn. (41 2605-2606)

factual information about the current trial but noted that the prior conviction had be overturned on appeal by the Florida Supreme Court. (R. 26 5089-5110).

Preservation

This issue is not preserved. While defense counsel made a motion for change of venue, he did not provide the trial court with the newspaper articles until the State rested. Obviously, this is too late for the trial court to properly consider these facts.

The standard of review

The standard of review is abuse of discretion. *Cole v. State*, 701 So.2d 845, 854 (Fla.1997)(noting that a motion for change of venue is addressed to the trial court's discretion and will not be overturned on appeal absent a palpable abuse of discretion citing *Davis v. State*, 461 So.2d 67, 69 (Fla.1984)).

Merits

The test to determine whether a change of venue is necessary because of pretrial publicity is whether the general state of mind of the inhabitants of a community is so infected by knowledge of the incident and the accompanying prejudice, bias, preconceived opinions that jurors could not possibly put these matters out of their minds and try the case solely on the evidence presented in the courtroom. *Rolling v. State*, 695 So.2d 278, 284 (Fla.1997) (quoting *McCaskill v. State*, 344 So.2d 1276, 1278 (Fla.1977)). The *Rolling* Court identified main five factors to consider: (1) the length of time that has passed from the crime to the trial and when, within this time, the

publicity occurred; (2) whether the publicity consisted of straight, factual news stories or inflammatory stories; (3) whether the news stories consisted of the police or prosecutor's version of the offense to the exclusion of the defendant's version; (4) the size of the community in question; and (5) whether the defendant exhausted all of his peremptory challenges. ***Rolling***, 695 So.2d at 285 citing ***Hoy v. State***, 353 So.2d 826 (Fla.1977).

Here, all five factors demonstrate the trial court properly denied the motion. This crime occurred in 1996 and this retrial occurred six years later in 2002. Neither defense counsel nor appellate counsel identify anything inflammatory in the newspaper articles. Many of the articles were published during the trial, not before it. Articles that were published during the trial, after jury selection was complete, cannot support an earlier motion for change of venue. These articles did not exist at the time of jury selection and therefore, could not possibly have had any affect on the jury selection process. Assuming that the jury followed the trial court's instructions regarding avoiding the media, none of the jurors read these articles. (39 2260). Furthermore, while Crestview is a small community, as the trial court noted in response to defense counsel's argument that Crestview is a small town where people talk, the venire was from the surrounding areas as well. Moreover, as Brooks acknowledges, he did not exhaust his peremptory challenges. He used nine. He had one remaining.

Thus, the trial court properly denied the motion for change of venue.

Harmless error

To the extent that Brooks is actually claiming that his jury was actually biased, such a claim is not subject to harmless error analysis. *United States v. Carpa*, 271 F.3d 962, 967 (11th Cir. 2001)(observing that if a court determines there was actual bias, the juror's inclusion in the petit jury is never harmless error citing *McDonough*, 464 U.S. at 556, 104 S.Ct. 845).

ISSUE X

WHETHER THE DEATH SENTENCE IS PROPORTIONATE? (Restated)

Brooks argues that, because the co-perpetrator, Walker Davis, received a life sentence, his death sentence is disproportionate. The State respectfully disagrees. Brooks, who was the actual stabber, is more culpable than Davis. Thus, the death sentence is proportionate.

The trial court's ruling

The trial court considered the fact that the co-perpetrator, Walker Davis, received a life sentence in his sentencing order. The trial court found this as a non-statutory mitigator. However, as the trial court explained, because Brooks was the actual stabber he was more culpable than Davis. (R. 5258)

The standard of review

A trial court's determination concerning the relative culpability of the co-perpetrators is a finding of fact and will be sustained on review if supported by competent substantial evidence.

Marquard v. State, 2002 WL 31600017, *3 (Fla. Nov 21, 2002)(citing *Puccio v. State*, 701 So.2d 858, 860 (Fla.1997).

Merits

As this Court in *Shere v. Moore*, 830 So.2d 56, 60 (Fla. 2002) explained, in cases where more than one defendant was involved in the commission of the crime, this Court performs an additional analysis of relative culpability. Underlying our relative culpability analysis is the principle that equally culpable co-defendants should be treated alike in capital

sentencing and receive equal punishment. If the defendant, however, is the more culpable participant in the crime, disparate treatment of the codefendant is justified. *Sexton v. State*, 775 So.2d 923, 935 (Fla. 2000).

In *Bradley v. State*, 787 So.2d 732, 746 (Fla. 2001), this Court held that the death sentence was proportionate although the wife received a life sentence. The victim had a $500,000 life insurance policy. His wife conspired with Bradley and the McWhite brothers to kill her husband. Bradley, as part of a staged burglary, with the wife present, beat the victim to death. Bradley was sentenced to death. The wife was sentenced to life imprisonment. The McWhite brothers, as part of a plea bargain, received ten-year sentences. The *Bradley* Court explained that while the victim's wife originated the idea of killing her husband and solicited defendant to carry out the murder, the victim's wife had mental mitigation based on her discovery of victim's affair, while defendant seemed strictly to be motivated by expected monetary payoff. The Court noted that Bradley, with the help of the McWhite brothers and not the wife, actually carried out this brutal beating of the victim. The Court concluded that the death sentence was warranted.

In *Ventura v. State*, 560 So.2d 217 (Fla. 1990), this Court affirmed the death sentence for the actual killer in a contract murder even though the party instigating the murder and another principal received a lesser or no sentence at all. McDonald hired Ventura to kill the victim so that Jerry Wright, the victim's former employer, could receive the benefits of the key

man life insurance policy which he had taken out on the victim. Wright had borrowed some money from McDonald and had asked him to find someone to kill the victim and split the proceeds of the policy with him as repayment of the debt. McDonald intended to split his half of the money with Ventura. Wright received a life sentence and McDonald was discharged due to a speedy trial violation. See also *Ventura v. State*, 794 So.2d 553, 571 (Fla. 2001)(rejecting a newly discovered evidence of life sentence because Ventura was the triggerman and therefore, Ventura and Wright are not equally culpable codefendants). See also *Evans v. State*, 808 So.2d 92, 109 (Fla. 2001)(affirming death sentence, in a murder-for-hire case, where the wife had her husband killed for life insurance proceeds, where one of the four coconspirators was never charged, one of whom entered a plea to second degree murder and wife received a life sentence because while the wife had the greatest motive, Evans was both the shooter and planner of the actual details of the murder); *Downs v. State*, 572 So.2d 895, 898 (Fla. 1990)(affirming death penalty in a contract murder for life insurance proceeds where conspiracy was formed by Ron Garelick, who hired Downs and Johnson to kill victim and Downs asserted that Johnson was actual triggerman).

Furthermore, relative culpability analysis cannot be premised solely on the facts of the murder. Surely, if two defendants are equally culpable, but one has higher aggravation and less mitigation, death would be an appropriate sentence for one, but

not the other. Here, Davis' prior criminal history is not known.

Davis, who was over six feet, had a cast on his leg at the time of the murders. A FDLE blood stain pattern expert, Jan Johnson, testified that Rachael's attacker was in the backseat behind the driver. (37 1982). Dr. Berkland testified that the person who stabbed Rachael was not seated in the front passenger seat; rather, the stabber was seated in the rear on the driver's side. (T. 38 2108). While Rachael was choked, the choking did not kill her; rather, the stab wounds to her neck killed her. (T. 38 2110). Thus, even if Davis choked Rachael, he is not equally culpable because Brooks stabbed her. Thus, the death penalty is proportionate.[25]

[25] This Court also reviews the sufficiency of the evidence to support the conviction regardless of whether it is raised as an issue on appeal by appellant. *Mora v. State*, 2002 WL 87463, *7 (Fla. 2002)(noting the Court's independent duty to ensure the sufficiency of the evidence regardless of whether the issue is raised). Here, the evidence is sufficient. Brooks was placed near the scene of the murder at the time of the murder by numerous witnesses. He lied about his whereabout on the night of the murder and corroborated with Davis to establish an alibi as evidenced by the notes found in Davis' cast. One of the other conspirators testified that there was a conspiracy to murder this mother and child for the insurance proceeds.

ISSUE XI

WHETHER A FELONY MURDER CONVICTION BASED ON AGGRAVATED CHILD ABUSE IS PROHIBITED BY THE MERGER DOCTRINE? (Restated)

Appellant asserts that the merger doctrine prohibits aggravated child abuse from being the underlying felony for felony murder. The State respectfully disagrees. This argument is contrary to the explicit language of the felony murder statute that lists aggravated child abuse as an enumerated felony. There can be no argument that the legislature did not intend the crime of aggravated child abuse to serve as an underlying felony for a felony murder when it specifically amended the felony murder statute to so provide. Thus, aggravated child abuse may properly serve as the underlying felony for a felony murder conviction.

The trial court's ruling

The trial court instructed the jury on felony murder with the underlying felony being aggravated child abuse of Alexis. (40 2562-2563; R. 27 5117-5118). The jury's verdict was a general verdict, not a special verdict. (27 5129). The trial court found as an aggravator in the murder of Rachael Carlson, the felony murder aggravator based on aggravated child abuse of Alexis Stuart. (T 41 2788-2793; R. 27 5254). The trial court found as an aggravator in the murder of Alexis Stuart, the felony murder based on aggravated child abuse of Alexis Stuart. (T 41 2795-2797; R. 27 5254).

Preservation

This issue is not preserved. Defense counsel did not raise a merger challenge to the felony murder theory during the charge conference. (39 2277-2279). Nor did he object to the finding of the aggravator based on the merger doctrine.

The standard of review

Whether the merger doctrine applies to the first degree felony murder statute is a question of statutory interpretation which is purely a legal question reviewed *de novo*. *Racetrac Petroleum, Inc. v. Delco Oil, Inc.*, 721 So.2d 376, 377 (Fla. 5th DCA 1998)(noting that judicial interpretation of Florida statutes is a purely legal matter and therefore subject to *de novo* review).

Merits

The felony murder statute, § 782.04(1)(a)2, Florida Statutes (1997), provides:

(1)(a) The unlawful killing of a human being:

* * * * *

2. When committed by a person engaged in the perpetration of, or in the attempt to perpetrate, any:

a. Trafficking offense prohibited by Sec. 893.135(1),
b. Arson,
c. Sexual battery,
d. Robbery,
e. Burglary,
f. Kidnapping,
g. Escape,
h. Aggravated child abuse,[26]

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[26] The aggravated child abuse statute, § 827.03(2), Florida Statutes (1997), provides in part:

"Aggravated child abuse" occurs when a person:

(a) Commits aggravated battery on a child;
(b) Willfully tortures, maliciously punishes, or willfully and unlawfully cages a child; or
(c) Knowingly or willingly abuses a child and in so doing causes great bodily harm, permanent disability

i. aggravated abuse of an elderly person or disabled adult,[27]
j. Aircraft piracy,
k. Unlawful throwing, placing, or discharging of a destructive device or bomb,
l. Carjacking,
m. Home-invasion robbery,
n. Aggravated stalking, or

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is murder in the first degree and constitutes a capital felony, punishable as provided in Sec. 775.082.

THE MERGER DOCTRINE[28]

Some states, retaining the old common law definition of felony murder, allow any felony to serve as the underlying felony for felony murder. See *Richardson v. State*, 823 S.W.2d 710, 714 (Tex. App. 1992)(noting that Texas authorizes any felony, except the designated manslaughters, to be the underlying felony in applying the felony murder rule). In the states where any felony could serve as the basis for felony murder, allowing assault or battery to serve as the underlying felony for felony

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or permanent disfigurement to the child.

The aggravated child abuse charges in this case to were limited to (a) or (c). (XII 2373)

[27] This subsection dealing with aggravated abuse of the elderly is subject to the same type of attack because the definition of aggravated abuse of an elderly person is the same as aggravated child abuse. § 825.102 (2), Fla. Stat. (1997).

[28] Brooks also seems to be raising a double jeopardy attack on is first degree murder conviction. Here, however, there can be no valid double jeopardy issue because he was not convicted of both the underlying felony of aggravated child abuse and felony murder based on the crime of aggravated child abuse; he was only convicted of felony murder. While dual convictions for both the underlying felony and felony murder would have been proper, no such dual convictions occurred.

murder meant that all homicides automatically became felony murder.[29]

Actually, the merger doctrine is merely an application of the normal rules of statutory construction. *State v. Godsey*, 60 S.W.3d 759, 773-774 (Tenn. 2001)(explaining that the merger doctrine is not a principle of constitutional law; rather, it is a rule of statutory construction which preserves the Legislature's gradation of homicide offenses). The rules of statutory construction, such as the *in para materia* rule, require courts to construe statutes to give effect to all statutes and not to construe one statute in a manner that renders another statute meaningless. In those states that do not limit the felony murder rule to particular enumerated felonies, any felony may serve as the basis for the felony murder. If the felony murder statute was interpreted to allow a battery or assault to serve as the underlying felony, nearly all killings would become first degree felony murder in those

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[29] New York, which was one of these states at the time, adopted the merger doctrine to limit the application of the felony murder rule. In *People v. Moran*, 158 N.E. 35 (N.Y. 1927), the court held that the assault on a police officer was not independent of the homicide but was the homicide itself. However, once New York's felony murder statute was limited to certain enumerated felonies, New York's courts have refused to extend the merger doctrine because the doctrine was developed to remedy a fundamental defect in the old felony-murder statute. *People v. Miller*, 297 N.E.2d 85 (N.Y. 1973);BARRY BENDETOWIES, FELONY MURDER AND CHILD ABUSE: A PROPOSAL FOR THE NEW YORK LEGISLATURE, 18 FORDHAM URB. L.J. 383 (1991)(noting that the 1967 Penal Law limited the application of the felony murder rule in New York to nine serious and violent felonies and advocating that the New York legislature amend the felony murder statute to include child abuse to the list of enumerated felonies).

states. Such an interpretation would render those states' second degree and manslaughter statutes meaningless. *Cotton v. Commonwealth*, 546 S.E.2d 241, 243 (Va. App. 2001)(noting merger doctrine developed as a limitation on the felony murder statute necessary to maintain the distinction between murder and manslaughter). Therefore, courts, in those states without enumerated felonies in their felony murder statutes, have interpreted their statutes to exclude battery or assault as a possible underlying felony.

Other state courts, whose felony murder statutes are limited to certain enumerated felonies but whose legislature have also amended to their respective felony murder statutes to include aggravated child abuse as an underlying felony, have rejected similar challenges. These courts have reasoned that their legislatures intended this result.[30] Moreover, as the Arizona

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[30] *State v. Godsey*, 60 S.W.3d 759, 774 (Tenn. 2001)(rejecting, in a capital case where the first degree felony murder conviction was based on aggravated child abuse, a due process argument because due process does not require that the underlying felony be based upon acts separate from those causing death and explaining the General Assembly has expressed an unmistakable intent to have aggravated child abuse as a qualifying offense); *Cotton v. Commonwealth*, 546 S.E.2d 241, 243 (Va. App. 2001)(holding that felony child abuse could be predicate offense for felony murder and rejecting merger doctrine where defendant contended a single act cannot form the basis for both the murder and the predicate felony); *State v. Lopez*, 847 P.2d 1078, 1089 (Ariz. 1992)(rejecting a merger challenge to child abuse as a underlying felony for felony murder and noting that Arizona has enumerated felonies and observing that even in those states that follow the merger doctrine recognize that if the legislature explicitly states that a particular felony is a predicate felony for felony-murder, no merger occurs); *Faraga v. State*, 514 So.2d 295, 302-03 (Miss.1987)(rejecting a merger challenge, in a

Supreme Court observed, there is no constitutional prohibition on the legislature choosing to designate aggravated child abuse as an enumerated felony. *State v. Lopez*, 847 P.2d 1078, 1089 (Ariz. 1992).

Florida did not have this problem because its felony murder statute was limited to certain enumerated felonies and did not include battery or assault as one of the underlying felonies. *Robles v. State*, 188 So.2d 789 (Fla.1966)(rejecting the argument that an underlying felony must always be independent of the killing to serve as the underlying felony for a felony murder conviction and explaining that the Florida felony murder statute was limited to certain specific felonies, and therefore, the problem motivating the adoption of the merger doctrine in other states did not exist in Florida). Florida has no doctrine requiring the aggravated child abuse be a distinct, separate, and independent offense from the felony murder offense. After *Robles*, the Florida Legislature specifically amended Florida's felony murder statute to include aggravated child abuse. Laws 1984, c. 84-16, § 1. While aggravated child abuse can indeed be

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capital murder case where child abuse was the underlying felony and the defendant threw a child to the pavement three times which resulted in skull fractures, because the "intent of the Legislature was that serious child abusers would be guilty of capital murder if the child died" where Mississippi has enumerated felonies); *Stevens v. State*, 806 So.2d 1031, 1043-1044 (Miss 2001)(rejecting a merger claim where a defendant killed his ex-wife, her new husband and two boys with a shotgun where one of the boys was killed by a single shotgun blast to the head because it was the intent of the Mississippi Legislature that the intentional act of murdering a child by any manner or form constitutes child abuse and, therefore, constitutes capital murder).

a type of battery, it is a unique type of battery limited to children. The Legislature was well aware that often there is one fatal blow to the child during the abuse and that killing a child would become first degree murder if it amended the felony murder statute to include aggravated child abuse. This was a policy choice that the legislature made in an effort to protect children and punish child killers more severely. Moreover, adding one unique type of battery to the felony murder statute does not render any of the other homicide statutes meaningless. The Florida Legislature clearly intended this one type of battery to serve as an underlying felony for felony murder.

In *Mapps v. State*, 520 So. 2d 92 (Fla. 4th DCA 1988), the Fourth District held that felony murder does not merge with the underlying felony of aggravated child abuse. Mapps threw, shook, or struck a ten-month old child resulting in a skull fracture. Mapps was convicted of first-degree felony murder based on the underlying felony of aggravated child abuse and the conviction was founded entirely on a felony murder theory. Mapps contended that he could not be convicted of felony murder for a death occurring in the course of aggravated child abuse because the act of abuse was not separate and independent of the killing, *i.e.*, it "merged" into the homicide. Noting that aggravated child abuse had been added to the list of specific underlying felonies that support a charge of first degree felony murder, the *Mapps* Court reasoned that: “[i]t is obvious that our legislature did not intend that the felonies specified in the felony-murder statute merge with the homicide to prevent

conviction of the more serious charge of first-degree murder."

This Court has twice rejected versions of this same argument. *Lukehart v. State*, 776 So.2d 906 (Fla. 2000); *Donaldson v. State*, 722 So.2d 177 (Fla. 1998). As the *Donaldson* Court noted, legislative intent is the polestar that guides statutory construction and as the *Lukehart* Court noted, in aggravated child abuse cases there is ordinarily overt physical violence which is directed towards a child and that by specifically including the category of aggravated child abuse within the felony murder statute, the legislature clearly contemplated that both charges can be brought where violence directed at the child results in the child's death. When the legislature amended the felony murder statute to include aggravated child abuse, they were aware of that often a single fatal blow would be the basis of the felony murder charge and, in an effort to protect child whose deaths had previously been undercharged as third degree felony murder, the legislature made a policy decision to allow aggravated child abuse to serve as the underlying felony for felony murder.

Appellant argues, based on *Beck v. Alabama*, 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980), that the jury will not be instructed on any lesser included offenses and therefore, will be faced with an all or nothing option. The jury was instructed on the lesser included offenses of second degree murder, third degree felony murder and manslaughter. (R. 27 5119-5120). Moreover, the United States Supreme Court has held that states,

in capital cases, are not constitutionally required to instruct juries on offenses that are not lesser-included offenses under state law even if this results in no option other than a capital offense. *Hopkins v. Reeves*, 524 U.S. 88, 118 S.Ct. 1895, 141 L.Ed.2d 76 (1998).

Furthermore, the merger doctrine prohibits aggravated child abuse from serving as the underlying felony for a felony murder conviction where the aggravated child abuse is based on the "single" act of stabbing. This is not a single gunshot case. There was no single act - there were multiple acts of stabbing.

Appellant's reliance on *State v. Jones*, 896 P.2d 1077 (Kan. 1995), is seriously misplaced. The Kansas Supreme Court held that the merger doctrine applied to this situation but noted that "if additional protection for children was desired, the Kansas Legislature might well consider legislation which would make the death of a child occurring during the commission of the crime of abuse of a child, or aggravated battery against a child, first-or second-degree felony murder." *State v. Lucas*, 759 P.2d 90,99 (Kan. 1988). The Kansas legislature then did just that and amended the first-degree murder statute to make a killing committed in perpetration of abuse of a child first-degree felony murder. K.S.A. 21-3436(a)(7); *State v. Smallwood*, 955 P.2d 1209, 1226-1228 (Kan. 1998)(holding that a defendant may be convicted of first degree murder with child abuse as the underlying felony regardless of the merger doctrine because the legislature intended that anyone who causes the

death of a child while committing the act of abuse of a child to be guilty of the crime of first-degree felony murder). The Kansas legislature overruled *Lucas*. Just as the Kansas legislature amended its felony murder statute to include child abuse as a qualifying felony, Florida's legislature also amended our felony murder statute to include child abuse as a qualifying felony.

THE MERGER DOCTRINE & AGGRAVATORS

The doctrine that limits aggravating circumstances is the rule against improper doubling, not double jeopardy or the merger doctrine. *Provence v. State*, 337 So.2d 783, 786 (Fla. 1976)(explaining that improper doubling occurs when both aggravators rely on the same essential feature or aspect of the crime). This Court has previously rejected this exact claim. *Lukehart v. State*, 776 So.2d 906,923 (Fla. 2000)(rejecting a claim that merger doctrine applies to aggravators in a child abuse capital case and noting that rationale of *Mills* v. State, 476 So.2d 172, 177 (Fla.1985), is not applicable to this issue, relying on *Blanco v. State*, 706 So.2d 7 (Fla.1997)).

Harmless Error

The error, if any, in finding the felony murder aggravator was harmless. Regarding the finding in relation to Rachael, if the felony murder aggavator is stricken, four aggravators including prior violent felony, CCP, pecuniary gain and HAC remain. Regarding the finding in relation to Alexis, the trial court also considered the victim less than 12 years of age aggravator because Alexis was three months old but felt that this would

constitute improper doubling if considered in connection with the felony murder aggravator based on the aggravated child abuse. (T. 41 2796). If the felony murder aggavator is stricken, the victim less than 12 years of age would replace it and there would still be four aggravators in the case of Alexis.

ISSUE XII

DOES FLORIDA'S DEATH PENALTY STATUTE VIOLATE *RING V. ARIZONA*, 122 S.Ct. 2428 (2002) ? (Restated)

Appellant contends that Florida's death penalty statute violates *Ring v. Arizona*, 122 S.Ct. 2428 (2002). He mainly asserts that *Ring* requires unanimity, written findings by the jury and that the jury's decision be the final decision. The State respectfully disagrees. First, only the issue of unanimity is preserved. A non-unanimous jury recommendation of death without written findings complies with *Ring*. *Ring* does not require either written findings by the jury or a unanimous recommendation of death. Thus, the trial court properly denied the motion for unanimity.

The trial court's ruling

Defense counsel filed a motion to declare the death penalty statute unconstitutional because it does not require a unanimous recommendation based mainly on due process grounds but it did reference the Sixth Amendment and *Johnson v. Louisiana*, 406 U.S. 356, 92 S.Ct. 1620, 32 L.Ed.2d 152 (1972). (25 4839). Defense counsel also filed a motion for findings of fact by the jury supporting that aggravating and mitigating circumstances. (25 4845). However, the motion referred to the need to "aid appellate review", not the Sixth Amendment right to a jury trial. The trial court held a hearing on the motions on October 17, 2001. (R. 27 5280). Defense counsel relied on the motions presenting no additional argument. (R. 27 5304,5306). The prosecutor argued against written findings of aggravators

relying on Florida Supreme Court precedent. (R. 27 5307). The trial court reserved ruling at the hearing on the unanimity motion but denied the motion for written findings. (R. 27 5304; 5307). The trial court later denied the motion to declare the statute unconstitutional due to lack of unanimity in writing. (25 4886). During the jury instruction conference, defense counsel noted that he filed a pretrial motion requesting a special verdict in the theory of guilt. (R. 25 4856; T. 39 2328).

Preservation

Only the issue of unanimity is preserved. The written findings of aggravation issue is not preserved. The motion for written findings in the penalty phase by the jury did not cite the Sixth Amendment, the right to a jury trial or caselaw based on the Sixth Amendment. Thus, that issue is not preserved.

The standard of review

Whether the defendant's right to a jury trial has been violated is reviewed *de novo*. *United States v. Harris*, 244 F.3d 828, 829 (11th Cir. 2001)(holding that the applicability of *Apprendi* is a pure question of law reviewed *de novo*); *United States v. Arellano-Rivera,* 244 F.3d 1119, 1127 (9th Cir.2001)(concluding that whether the district court violated the constitutional rule expressed in *Apprendi* is a question of law reviewed *de novo*). Hence, the standard of review is *de novo*.

Merits

In *Ring*, the United States Supreme Court, concluded that capital defendants are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment. The *Ring* Court rejected Arizona's argument that the statutory maximum for murder was death. The *Ring* Court explained:

> Arizona first restates the *Apprendi* majority's ruling that, because Arizona law specifies death or life imprisonment as the only sentencing options for the first-degree murder of which Ring was convicted, he was sentenced within the range of punishment authorized by the jury verdict. This argument overlooks *Apprendi*'s instruction that the relevant inquiry is one of effect, not form. 530 U.S., at 494, 120 S.Ct. 2348. In effect, the required finding of an aggravated circumstance exposed Ring to a greater punishment than that authorized by the guilty verdict. Ibid. The Arizona first-degree murder statute authorizes a maximum penalty of death only in a formal sense, id., at 541, 120 S.Ct. 2348 (O'CONNOR, J., dissenting), for it explicitly cross-references the statutory provision requiring the finding of an aggravating circumstance before imposition of the death penalty. If Arizona prevailed on its opening argument, *Apprendi* would be reduced to a "meaningless and formalistic" rule of statutory drafting.

Ring, 122 S.Ct at 2430. The *Ring* Court overruled *Walton v. Arizona*, 497 U.S. 639 (1990), because it was irreconcilable with *Apprendi v. New Jersey,* 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). The Court reasoned that because aggravating factors operate as the functional equivalent of an element, the Sixth Amendment requires that they be found by a jury rather than a judge. The *Ring* Court held that the right to trial by jury guaranteed by the Sixth Amendment encompasses the

factfinding necessary to put a defendant to death. *Ring*, at 2443.[31]

RING'S APPLICATION TO FLORIDA AND ALABAMA

In *Mills v. Moore*, 786 So.2d 532, 536-537 (Fla.2001), which was decided prior to *Ring*, the Florida Supreme Court held that *Apprendi* did not apply to capital cases. Mills argued that the statutory maximum was life, not death. Mills asserted that only after further proceedings was death a possible sentence and that unless and until the judge holds a separate hearing, life was the only possible sentence. The *Mills* Court held that, according to the plain language of the statutes, the statutory

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[31] The *Ring* Court noted in a footnote that Arizona was one of only five states that committed both capital sentencing factfinding and the ultimate sentencing decision entirely to judges. The other four states are Colorado, Idaho, Montana and Nebraska. See Colo.Rev.Stat. § 16-11-103 (2001) (three-judge panel); Idaho Code § 19-2515 (Supp.2001); Mont.Code Ann. § 46-18-301 (1997); Neb.Rev.Stat. § 29-2520 (1995). The court noted that Florida was one of four states that have "hybrid systems, in which the jury renders an advisory verdict but the judge makes the ultimate sentencing determinations." The other three states are Alabama, Delaware and Indiana. See Ala.Code §§ 13A-5-46, 13A-5-47 (1994); Del.Code Ann., Tit. 11, § 4209 (1995); Ind.Code Ann. § 35-50-2-9 (Supp.2001) *Ring*, 122 S.Ct. 2428, 2442, n.5.

Idaho, which has a statute like Arizona's, has addressed *Ring*. In *State v. Fetterly*, 2002 WL 1791425 (Idaho August 6, 2002), the Idaho Supreme Court stated that *Ring* "appears to invalidate the death penalty scheme in Idaho." Fetterly was a summary denial of a petition for post-conviction relief in a capital case. The crime occurred in 1983. The Court vacated the death sentence and remanded for resentencing. The opinion contains virtually no reasoning and did not address retroactivity. The Idaho death penalty scheme involves no jury input. The Idaho scheme is like Arizona's, but unlike Florida's.

maximum was “clearly death.” *Mills*, 786 So.2d at 538. Both § 775.082 and § 921.141 clearly refer to a "capital felony." A "capital felony" is by definition a felony that may be punishable by death. The *Mills* Court reasoned that because *Apprendi* did not overrule *Walton*, the basic scheme in Florida is not overruled either. *Mills*, 786 So.2d at 537.

In *Bottoson v. Moore*, 27 Fla. L. Weekly S891 (Fla. Oct. 24, 2002), the Florida Supreme Court reexamined Florida’s death penalty statute in light of *Ring*. All seven Justices concurred but four concurred in result only. Justice Harding concurred. Justices Wells and Quince, concurred specially and each filed separate, lengthy opinions. Chief Justice Anstead, and Justices Shaw, Pariente, and Lewis, concurred in result only and each filed separate, lengthy opinions as well. The *Bottoson* Court reasoned that *Ring* had not directly declared Florida’s death penalty statute unconstitutional, nor directly overruled either *Hildwin v. Florida*, 490 U.S. 638 (1989) or *Spaziano v. Florida*, 468 U.S. 447 (1984). Therefore, the Florida Supreme Court decided to leave the prerogative of overruling its own decisions to the United States Supreme Court. Justice Wells, Quince and Harding all concurred in this reasoning, as did Justice Pariente, making a majority of four of the seven justices. This and only this is the holding in *Bottoson*.

In *Waldrop v. State*, 2002 WL 31630710 (Ala. Nov. 22, 2002), the Alabama Supreme Court affirmed an override against a *Ring* challenge. Waldrop was convicted of three counts of capital murder: two counts of murder committed during a robbery and one

count of murder where two or more persons were murdered. The jury, by a vote of 10-2, recommended life imprisonment but the trial court overrode the jury's recommendation and sentenced Waldrop to death. On appeal, Waldrop claimed that under *Ring* and *Apprendi*, any factual determination required for imposition of the death penalty must be made by the jury, not by the trial court. Waldrop argued that, under Alabama law a defendant cannot be sentenced to death unless there is a determination: (1) that at least one statutory aggravating circumstance exists and (2) that the aggravating circumstances outweigh the mitigating circumstances. Waldrop asserted that both determinations had to be made by the jury. While the Alabama Supreme Court agreed that under Alabama law at least one statutory aggravating circumstance must exist for a defendant convicted of a capital offense to be sentenced to death, they noted that many capital offenses include conduct that clearly corresponds to certain aggravating circumstances. *Id.* citing Ala.Code 1975, § 13A-5-45(f)("Unless at least one aggravating circumstance as defined in Section 13A-5-49 exists, the sentence shall be life imprisonment without parole.") and *Johnson v. State,* 823 So.2d 1, 52 (Ala.Crim.App.2001). Moreover, Alabama statutes provide that any aggravating circumstance which the verdict establishes was proven beyond a reasonable doubt at trial shall be considered as proven beyond a reasonable doubt for purposes of the sentencing hearing. *Id*. citing Ala.Code 1975, § 13A-5-45(e). The *Waldrop* Court also noted that the United States Supreme Court upheld a similar procedure in *Lowenfield v. Phelps,* 484

U.S. 231, 244-45 (1988)(observing “[w]e see no reason why this narrowing function may not be performed by jury findings at either the sentencing phase of the trial or the guilt phase."). Because the jury convicted Waldrop of two counts of murder during a robbery, the statutory aggravating circumstance of committing a capital offense while engaged in the commission of a robbery was proven beyond a reasonable doubt. The findings reflected in the jury's verdict alone exposed Waldrop to the maximum penalty of death. Thus, in Waldrop's case, the jury, and not the trial judge, determined the existence of the aggravating circumstance necessary for imposition of the death penalty which is all *Ring* and *Apprendi* require. Waldrop also claimed that *Ring* and *Apprendi* require that the jury, and not the trial court, determine whether the aggravating circumstances outweigh the mitigating circumstances. the Alabama Supreme Court rejected this claim reasoning that the weighing process is not a factual determination and is not susceptible to any quantum of proof; rather, the weighing process is a moral or legal judgment that takes into account a theoretically limitless set of facts. *Id.* citing *Ford v. Strickland,* 696 F.2d 804, 818 (11th Cir.1983)(observing that while the existence of an aggravating or mitigating circumstance is a fact susceptible to proof under a reasonable doubt or preponderance standard ... the relative weight is not). Consequently, *Ring* and *Apprendi* do not require that a jury weigh the aggravating circumstances and the mitigating circumstances. *See also Wrinkles v. State*, 776 N.E.2d 905, 907-08 (Ind. 2002)(holding that the Court need not

decide whether some aspects of Indiana's death penalty scheme are affected by *Ring,* because *Ring* is not implicated under any plausible view because one of the aggravators, *i.e.,* the multiple murder aggravator, was necessarily found by the jury when they found the defendant guilty of the three murders in the guilt phase).[32]

FLORIDA'S DEATH PENALTY STATUTE COMPLIES WITH RING

Even assuming that the Florida Supreme Court recedes from *Mills* in a future case, Florida's death penalty statute does not violate *Ring*. The holding in *Ring* does not extend to all facts or to the ultimate decision. Even in the wake of *Ring*, a jury only has to make a finding of one aggravator and then the judge may make the remaining findings. *Ring* is limited to the finding of an aggravator, not any additional aggravators, nor mitigation, nor any weighing. *Ring*, 122 S.Ct. 2445 (Scalia, J., concurring)(explaining that the fact finding necessary for the jury to make in a capital case is limited to "an aggravating factor" and does not extend to mitigation or to the ultimate life-or-death decision which may continue to be made by the judge). This is because it is the finding of one aggravator that increases the penalty to death. *Ring*, 122 S.Ct. 2445 (Kennedy, J., concurring)(noting that it is the finding of "an aggravating circumstance" that exposes the defendant to a

[32] There are four "hybrid" states, as the *Ring* Court characterized them: Alabama, Florida, Delaware and Indiana. Delaware courts have not addressed their statutes in light of *Ring* but Alabama, Florida, and Indiana courts have each upheld death penalty cases under various rationales in the wake of *Ring*.

greater punishment than that authorized by the jury's verdict). Constitutionally, all the jury must find is one narrower, *i.e.*, one aggravator, at either the guilt or penalty phase. *Tuilaepa v. California*, 512 U.S. 967, 972 (1994)(observing "[t]o render a defendant eligible for the death penalty in a homicide case, we have indicated that the trier of fact must convict the defendant of murder and find one 'aggravating circumstance' (or its equivalent) at either the guilt or penalty phase."). *Ring* only requires that the jury make a finding of ONE aggravating circumstance, not all aggravators nor any mitigators nor any weighing. So, once a jury has found a single aggravator, the constitution is satisfied and the judge may do the rest. No further involvement on the part of the jury is required by *Ring*. The trial judge may make additional findings in aggravation or mitigation, perform any weighing and may be the ultimate decision maker.

The United States Supreme Court has expressly explained that Florida's scheme does not violate the Sixth Amendment if there is a jury recommendation of death in light of their new Sixth Amendment jurisprudence. The United States Supreme Court in *Jones v. United States*, 526 U.S. 227, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999), a case that was a precursor to *Apprendi* and *Ring*, explained that if there is a jury recommendation of death, the Sixth Amendment right to a jury trial is not violated. It was a statement in *Jones* that become the holding in *Apprendi*.[33]

[33] The statement in *Jones* was "under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction)

Jones reflects the Court's new Sixth Amendment jurisprudence. The *Jones* Court explained that in ***Hildwin***, a jury made a sentencing recommendation of death, thus necessarily engaging in the factfinding required for imposition of a higher sentence, that is, the determination that at least one aggravating factor had been proved. *Jones*, 526 U.S. at 251, 119 S.Ct. at 1228. The United States Supreme Court has reaffirmed ***Hildwin*** in light of the reasoning of ***Ring***. It is only ***Spaziano v. Florida***, 468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984) which was an override case, that is in doubt in the wake of ***Ring***, not ***Hildwin***, where the jury recommended death, as the United States Supreme Court in *Jones* explained.

It is also clear that this is the United States Supreme Court's position from the lifting of the stay in ***Bottoson*** and ***King***. The United States Supreme Court entered a stay in both cases pending resolution of ***Ring***. Once ***Ring*** was decided, they lifted the stay. While normally the denial of certiorari means nothing, in the unique circumstances of granting a stay to decide a related case and then lifting the stay in the same week after that related case was decided, it means that the United States Supreme Court's view is that a jury recommendation of

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that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt. Jones at 243 n. 6, 119 S.Ct. 1215. This statement, minus the language about the indictment, became the holding in *Apprendi*. Deleting the indictment language was not an oversight. The *Apprendi* Court knowingly deleted the indictment phrase because *Apprendi* was a state prosecution and states do not have to charge by indictment. ***Hurtado v. California***, 110 U.S. 516, 538, 4 S.Ct. 111, 28 L.Ed. 232 (1884).

death does not violate *Ring*. Any other view of the United States Supreme Court's actions requires a belief that the United States Supreme Court does not know what it is doing.

In Florida, a defendant is provided two chances at life. The first chance is with a jury. If the jury recommends death, the defendant then gets a second chance at the *Spencer* hearing to convince the judge to impose life. Providing a second bite at the life apple does not violate the right to a jury trial. It is only if the jury recommends life based on a finding of no aggravation, not merely based on the jury's weighing, and the judge imposes death, that a possible violation of the Sixth Amendment right to a jury trial occurs.

Here, the judge did not override the jury's recommendation. The jury recommended death 11 to 1 and 9 to 3. Brooks cannot raise a valid *Ring* claim. Only a capital defendant in a jury override case can legitimately raise a *Ring* challenge to Florida's death penalty scheme. Brooks had a jury at sentencing. A jury was present during the penalty phase; heard the evidence of aggravators and mitigators; was instructed on aggravating circumstances and the requirement that they be proven beyond a reasonable doubt. Brook's jury had to find at least one aggravating circumstance prior to recommending death. There can be no possible violation of the Sixth Amendment in his particular case. Cf. *Burch v. Louisiana*, 441 U.S. 130, 132, n.4, 99 S.Ct. 1623, 1624, n.4, 60 L.Ed.2d 96 (1979)(holding that one of the defendants who was convicted by a unanimous six-person jury lacked standing to raise a non-unanimous challenge to his

conviction). In Florida, a jury recommends a sentence after hearing evidence during penalty phase.

A combination of jury plus judge sentencing does not violate *Ring*. Imagine, for example, a state that wanted to combine the virtues of a jury, such as being the voice of the community, with the virtues of a judge, such as his vast legal experience, so they created a rule that no one could be convicted in the state without both the jury and the judge agreeing that the defendant was guilty. In this hypothetical state, first a jury would render an advisory verdict of guilty and then the judge would make written findings which would facilitate appellate review of the conviction. If a defendant claimed that this scheme violated the Sixth Amendment, an appellate court would correctly observe that this scheme provides increased protection to a defendant and such a scheme is a boon to criminal defendants. This is the Sixth Amendment with a cherry on top. Florida's death penalty scheme is very analogous to this hypothetical state. Jury plus judge does not violate the Sixth Amendment.[34]

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[34] Petitioner in *Bottoson* asked if Respondent Moore was "seriously" arguing that this Court would affirm a conviction based on a judge's findings of premeditation after a jury rendered an advisory verdict of guilty. This is exactly the State's position. Moreover, in recognition of the added protection of requiring the judge to agree, the hypothetical state decided that the jury verdict did not have to be unanimous as it is constitutionally entitled to do. The State is, indeed, seriously arguing that such a scheme would be constitutional. Hyperbole by Bottoson's appellate counsel does not change the fact that capital defendants have a jury at penalty phase in Florida, unlike Arizona. Motions for judgment of acquittal and for a new trial function somewhat similarly to the hypothetical state. Neither are thought to violate the Sixth Amendment right

FINDING OF ADDITIONAL AGGRAVATORS

Justice Pariente expressed concern that *Ring* may have affected the precedent allowing a trial court to consider aggravators that the jury did not consider.[35] *Ring* did not. *Ring* is limited to the finding of one aggravator. *Ring*, 122 S.Ct. 2445 (Kennedy, J., concurring)(noting that it is the finding of "an aggravating circumstance" that exposes the defendant to a greater punishment than that authorized by the jury's verdict). Once a jury finds a single aggravator, a judge may do the rest including finding additional aggravators. Additional aggravators do not act as the functional equivalent of elements; they do not increase the penalty to death. The penalty is already death based on the finding of one aggravator. None of the existing precedent allowing a judge to consider aggravators not present to, or found by, the jury is affected by *Ring*.

FINDING OF AN AGGRAVATOR IN THE GUILT PHASE

Often a jury makes the required finding of an aggravator in the guilt phase. Juries can find the felony murder aggravator in the guilt phase either by convicting a defendant of a enumerated felony in count II or by special verdict form of

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to a jury trial.

[35] *Davis v. State*,703 So.2d 1055,1061 (Fla. 1997)(hold that it was not error for a judge to consider and find an aggravator that was not presented to or found by the jury citing *Hoffman v. State*, 474 So.2d 1178 (Fla.1985)(holding that the trial court's finding of HAC was not error even though jury was not instructed on it); *Fitzpatrick v. State*, 437 So.2d 1072, 1078 (Fla.1983)(holding finding of prior violent felony aggravator was proper even though jury was not instructed on it); *Engle v. State*, 438 So.2d 803, 813 (Fla.1983).

felony murder. The jury can also find the aggravator that the defendant has been previously convicted of a another capital felony by finding the defendant guilty of a contemporaneous murder.

Aggravators may be found by the jury prior to the penalty phase. *Ring* only requires that the jury rather than the judge find the aggravator. *Ring* does not require jury findings regarding aggravators to be made in any particular phase. Constitutionally, if a jury returns these types of verdicts, the judge may decline to hold a penalty phase and directly proceeded to the *Spencer* hearing. Thus, the jury may make the finding of an aggravator by its verdict in the guilt phase.

Here, the jury convicted Brooks of the contemporaneous murder. The prior violent felony aggravator was found by the jury in the guilt phase. Additionally, this finding was unanimous. Thus, Brook's jury made the finding of an aggravator prior to the penalty phase.

SPECIFIC WRITTEN FINDINGS

No written findings are necessary. The holding in *Ring* was because aggravators operate as elements, they must be found by a jury. However, no element is require to be accompanied by specific written findings. For example, when a defendant is charged with robbery, the jury is not asked to make specific written findings regarding each element. The jury form does not require that the jury check that there was a "taking" and then check of "money or goods" and then check "from a person or in

his presence" and then check "by force". A general verdict of guilt is sufficient.

Moreover, *Apprendi* itself did not require such written findings. While *Apprendi* required the jury to be instructed on biased purpose, it did not require written findings of biased purpose. Neither *Ring* nor *Apprendi* have anything to say regarding written findings from a jury.

Florida law does not require written findings from the jury in either the guilt or penalty phase. *Cox v. State*, 2002 WL 1027308 (Fla. 2002)(rejecting claim that pursuant to *Apprendi* the jury constitutionally must make specific written findings); *Fotopoulos v. State*, 608 So.2d 784, 794 n.7 (Fla. 1992)(finding claim that the lack of a special verdict from the jury on aggravating and mitigating circumstances violates the Eighth Amendment lacking in merit); *Steverson v. State*, 787 So.2d 165, 167 (Fla. 2d DCA 2001)(noting that a general verdict of guilt of first-degree murder arising from an alternative theory of premeditation or felony murder is valid citing *Kearse v. State*, 662 So.2d 677, 682 (Fla.1995) and *O'Callaghan v. State*, 429 So.2d 691, 695 (Fla.1983).

Florida's death penalty statute

Justice Pariente also expressed concern that an entire provision of the death penalty statute may have to be stricken and expressed concern regarding the affect on the remainder of the statute. The sentence of death or life imprisonment for capital felonies statute, § 921.141(3), Florida Statutes (2001), provides:

> Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts.

Florida's death penalty statute does not actually have an override provision. A ***Ring*** challenge in Florida, given the wording of Florida's statute and Florida's requirement of jury involvement in the penalty phase, is an as-applied challenge, not a facial challenge. As applied to the vast majority of capital defendants, ***i.e.,*** those with a death recommendation from the jury, the statute is unquestionably constitutional. It is only in the very rare case of a jury override that a ***Ring*** challenge is possible. ***Ring*** is an as-applied challenge and therefore, no part of the statute must be stricken.

UNANIMITY

Unanimity is not required. The United States Supreme Court first applied the Sixth Amendment right to a jury trial to the States in *Duncan v. Louisiana*, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968). However, the United States Supreme Court has declined to constitutionalize a "jury" to mean twelve persons or unanimous verdicts. In *Williams v. Florida*, 399 U.S. 78, 103, 90 S.Ct. 1893, 26 L.Ed.2d 446 (1970), the Court held that a six member jury in a felony case did not violate the Sixth Amendment right to a jury trial. The *Williams* Court referred to the twelve person requirement as a "historical accident" that was "unrelated to the great purposes which gave rise to the jury in the first place." *Williams*, 399 U.S. at 89-90, 90 S.Ct. at 1900. Two years later, in *Apodaca v. Oregon*,

406 U.S. 404, 92 S.Ct. 1628, 32 L.Ed.2d 184 (1972), and *Johnson v. Louisiana*, 406 U.S. 356, 92 S.Ct. 1620, 32 L.Ed.2d 152 (1972), the United States Supreme Court held that conviction by less than unanimous verdicts did not violate the right to a jury trial. However, in *Burch v. Louisiana*, 441 U.S. 130, 99 S.Ct. 1623, 60 L.Ed.2d 96 (1979), the United Supreme Court, while agreeing with the Louisiana Supreme Court that the question was a "close" one, required unanimity in a jury of six. Hence, the only constitutional requirement of unanimity is that a jury of six must be unanimous. Here, nine of the twelve jurors agreed that death was the appropriate sentence. Nor does Florida's constitution require unanimity. *Flanning v. State*, 597 So.2d 864 (Fla. 3d DCA 1992)(noting that the Florida Constitution has never been interpreted to require a unanimous verdict).

Additionally, in those states that require an unanimous jury decision, the jury's decision is the final decision. Florida, by contrast, has two decision makers. Florida, while only requiring a simple majority vote by the jury, also requires the judge to agree with the jury's recommendation. We have two separate actors that must agree on death. If the jury recommends life, the judge, under *Tedder*,[36] must give great deference to the jury's life recommendation. However, if the jury recommends death, the judge is completely free to ignore that death recommendation and impose life instead. The requirement of unanimity is a procedural device to insure reliability and certainty, but the judge, as a second decision

[36] *Tedder v. State*, 322 So.2d 908 (Fla. 1975).

maker, fulfills this exact same function in Florida. To be sentenced to death in Florida, seven laymen and a judge with vast criminal experience must agree. Simple majority vote is quite reasonable when there is a second actor involved that must independently agree with the first actor and perfectly constitutional. Hence, unanimity is not required.

Justice Shaw argues in *Bottoson* that a unanimous finding of aggravators is required under Florida constitutional law. He cites a rule of criminal procedure, a standard jury instruction, the common law including its codification and the right to jury trial provision of the Florida constitution. None of these, but the last, can possibly support the proposition that there is a constitutional right. Neither rules of procedure, nor jury instruction nor the common law can give rise to constitutional rights, only the constitution itself can do that. The state constitutional provision only refers to a right to a jury trial. It does not mention unanimity. The legislature may supercede the common law and did so when it passed the death penalty statute which only requires a simple majority vote. The statute governing the common law of England, § 775.01, Florida Statute, provides:

> The common law of England in relation to crimes, except so far as the same relates to the modes and degrees of punishment, shall be of full force in this state <u>where there is no existing provision by statute on the subject</u>.

The reception statute itself explains that the common law controls only where there is no statutory provision to the contrary. *DeGeorge v. State*, 358 So.2d 217 (Fla. 4th DCA 1978)(explaining the where a statute, expressly or by

implication, supersedes common law becomes controlling law). Hence, unanimity is not constitutionally required. Thus, the death penalty statute does not violate *Ring*.

ISSUE XIII

DID THE TRIAL COURT ERR IN FINDING THE MURDER OF ALEXIS STUART TO BE FOR PECUNIARY GAIN AND CCP? (Restated)

Appellant asserts that trial court erred in finding the pecuniary gain aggravator and the CCP aggravator. The State respectfully disagrees. Competent, substantial evidence supports the trial court's findings of these aggravators. Furthermore, any error was harmless. As the trial court specifically noted, any one of the aggravators is sufficient to outweigh the insignificant mitigation. One of the remaining aggravators, not attacked on appeal, is the prior violent felony aggravator for the murder of her mother. Thus, the trial court properly found both the pecuniary gain aggravator and the CCP aggravator.

The trial court's ruling

The trial court found four aggravators in the death of Alexis Stuart: (1) the prior violent felony based on the contemporaneous murder of Rachael Carlson; (2) pecuniary gain based on being paid $10,000 from "contract-style execution"; (3) felony murder based on aggravated child abuse of Alexis Stuart and (4) CCP based on the "deliberate, cold-blooded plan of the defendant to kill this innocent child for profit". (T 41 2795-2797; R. 27 5254).

Preservation

This issue is waived. Defense counsel, at the direction of Brooks, did not argue against either of these aggravators, in any sentencing memorandum, or at the penalty phase, or at the

Spencer hearing. Brooks has waived the right to challenge the sufficiency of the evidence supporting these two aggravators on appeal by having waived his attack in the trial court.

The standard of review

The standard of review for whether a aggravator exists is competent, substantial evidence.[37]

Merits

As to the pecuniary gain aggravator, the testimony established that Davis offered Brooks $10,000 for these murders. While the State did not present direct evidence that Davis told Brooks about the life insurance, the State did present the earwitness testimony that Davis offered Brooks $10,000 for the murder of Rachael Carlson. (T. 36 1644). As to the CCP, it was the child's life that was insured, not the mother's. While Gilliam may not have know that killing Alexis Stuart was part of the plan, Brooks did. Brooks had to know that the child was included in the murder plan once he saw her in the car and was well aware of her presence while he was killing her mother.

Harmless Error

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[37] ***Smithers v. State***, 826 So.2d 916, 928 (Fla. 2002)(noting a trial court's ruling on an aggravating circumstance 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); ***Almeida v. State***, 748 So.2d 922, 932 (Fla.1999)(explaining that a trial court's ruling on an aggravating circumstance 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 and that competent substantial evidence is tantamount to legally sufficient evidence, and we assess the record evidence for its sufficiency only, not its weight).

As the trial court noted in its sentencing order, “every one of the aggravating factors in this case, standing alone, would be sufficient to outweigh the relatively insignificant mitigating circumstances” . . . (R. 5263). Even if both these aggravators are stricken, two aggravators remain. Both the prior violent felony for the murder of her mother and the felony murder aggravators remain. The prior violent felony aggravator here involves not just any violent felony; rather, it is a murder conviction and therefore, deserved great weight.

ISSUE XIV

DID THE TRIAL COURT ERR IN GIVING GREAT WEIGHT TO THE JURY'S RECOMMENDATION OF DEATH ?

Appellant asserts that the trial court erred by giving great weight to the jury's recommendation of death when he chose not to present any mitigation. The State respectfully disagrees. The trial court did not give great weight to the jury's recommendation of death. While the trial court referred to the jury's recommendation at the beginning of the sentencing hearing and in the introductory paragraph of its sentencing order, it did not refer to the jury's recommendation at all in its reasoning for imposing death. Thus, the trial court properly independently arrived at its own conclusion and properly considered all possible sources of mitigation.

The trial court's ruling

The trial court's sentencing order does not contain the statement that he gave great weight to the jury's recommendation of death. (R 5363; T. 42 2809). While the trial court referred to the jury's recommendation at the beginning of the sentencing hearing and in the introductory paragraph of its sentencing order, it did not refer to the jury's recommendation in its conclusion. (T. 41 2786;R. 5248).

Preservation

This issue is waived. Brooks chose to not present any mitigating evidence. Defendant may not inject error into the case, then claim that action as error on appeal. Basically, Brooks chose to warp the penalty phase process by not rebutting

the aggravators and failing to present any mitigation. He may not now complain the process was not balanced.

The standard of review

The standard of review is not clear. It is probably *de novo* because a *Muhammad* error claim seems to be a pure matter of law.

Merits

In *Muhammad v. State*, 782 So.2d 343 (Fla.), cert. denied, - U.S. -, 122 S.Ct. 87, 151 L.Ed.2d 49 (2001), and cert. denied, - U.S. -, 122 S.Ct. 323, 151 L.Ed.2d 241 (2001), this Court held a trial court should not give weight to a jury's recommendation of death when the defendant fails to present any evidence in mitigation at the penalty phase. Muhammad did not present any mitigating evidence. The jury returned a recommendation of death. The trial court imposed a death sentence indicating in its sentencing order that "this Court must give great weight to the jury's sentencing recommendation." *Muhammad*, 782 So.2d at 362. This Court, reversed for a new penalty phase, concluding that the trial court erred when it gave great weight to the jury's recommendation in light of Muhammad's refusal to present mitigating evidence.

Here, unlike *Muhammad*, the trial court did not give any weight to the jury's recommendation. Here, the trial court considered the PSI as required by *Muhammad*. Here, unlike *Muhammad*, there had been a prior penalty phase at which mitigation was presented and the trial court considered that mitigation in its current sentencing decision.

Harmless Error

Any error was harmless. Regardless of the jury's view of this case, it is clear from the language of the trial court's sentencing order that he considered this a death penalty case and would have independently imposed death.

CONCLUSION

The State respectfully requests that this Honorable Court affirm appellant's convictions and death sentences.

Respectfully submitted,

CHARLIE CRIST
ATTORNEY GENERAL

_____
CHARMAINE M. MILLSAPS
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 0989134
OFFICE OF THE ATTORNEY GENERAL
THE CAPITOL
TALLAHASSEE, FL 32399-1050
(850) 414-3300
COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing ANSWER BRIEF has been furnished by U.S. Mail to David Davis, Assistant Public Defender, Leon County Courthouse Suite 400, 301 South Monroe Street Tallahassee FL 32301 22nd day of January, 2003.

_____
Charmaine M. Millsaps
Attorney for the State of Florida

CERTIFICATE OF FONT AND TYPE SIZE

Counsel certifies that this brief was typed using Courier New 12.

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