

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, :

Petitioner, :

v. :

CASE NO. SC10-1791

ROBERT N. STURDIVANT, :

Respondent. :

_____ /

RESPONDENT'S ANSWER BRIEF ON MERIT

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II STATEMENT OF THE CASE AND FACTS

This is not a direct appeal. This case comes to the Court on a certified question from the First District Court of Appeal. The pertinent facts are as follows.

Robert Sturdivant was indicted for the first degree felony murder and aggravated child abuse of Isaiah Howard on November 9, 2008. Count I of the indictment alleged that Sturdivant

did unlawfully, while engaged in the perpetration of, or in the attempt to perpetrate Aggravated Child Abuse, kill and murder Isaiah Howard, a human being, **by slapping Isaiah Howard into a wall causing him to die**, in violation of Section 782.04(1)(a), Florida Statutes, ...

Count II alleged that Sturdivant

did unlawfully commit aggravated child abuse upon Isaiah Howard, a child under the age of 18 years, by willfully torturing and/or maliciously punishing Isaiah Howard, or by knowingly or willfully committing child abuse upon Isaiah Howard and in doing so caused great bodily harm, permanent disability, or permanent disfigurement, to-wit: Robert Nathan Sturdivant did **slap Isaiah Howard into a wall which caused him to die**, in violation of Section 827.03(2), Florida Statutes, . . .

(RI, 11).

The state subsequently filed an information charging Sturdivant with second degree murder (RI, 39), and moved to consolidate the indictment and information for trial (RI, 37-38). The prosecutor advised the court that she filed the information alleging second degree murder, in light of Brooks v. State, 918 So.2d 181, 198 (Fla. 2005), in the event the aggravated child abuse

merged with the felony murder (RII, 153-155). The trial court granted the motion to consolidate (RII, 158).

At trial, the state presented medical evidence that Isaiah Howard died of blunt head trauma (RVI, 243). There was a pattern of a hand slap on a fresh bruise above and behind the left ear, as well as fresh bruises on the right wrist and hand (RVI, 235-237). The injuries were all consistent with the child being slapped into a wall (RVI, 239).

The state also presented Sturdivant's statement to law enforcement and a tape recorded reenactment of the offense. In the statement, Sturdivant said Isaiah was standing on the table when he came out of the bathroom, and he struck the child on the back of the head with his hand. He hit Isaiah so hard that it stung his hand, and Isaiah flew off the table and hit the concrete wall (RV, 173-175). Sturdivant said he didn't think he hit Isaiah that hard and was sorry for what he did; he said he was just trying to knock Isaiah off the table when he slapped the child in the back of the head, but Isaiah's head hit the wall. Isaiah cried. Sturdivant picked him up and was holding him and thought everything was okay until Isaiah started making funny noises and acted like he was having a hard time breathing and his eyes rolled in the back of his head. That's when Sturdivant called Isaiah's mother and the police.

Sturdivant denied beating Isaiah that night ["I swear to you there

was not no beating”] and said he only hit Isaiah one time: “Slapped him in the back of the head and he went into the wall. But I guess I hit him too hard because it stung my fingers” (RV, 177-184). The video and audio tape of the reenactment was played for the jury (RV, 186-189). According to the medical examiner, Sturdivant’s reenactment was consistent with the findings in the autopsy (RVI, 247).

After the state rested (RVI, 248), defense counsel moved for a judgment of acquittal, orally and in writing, on the charges of first degree felony murder and aggravated child abuse on the ground that because the Indictment alleged that Sturdivant committed the murder and child abuse by slapping the child into a wall causing him to die, the aggravated child abuse merged with the homicide to create one offense, citing Brooks v. State, 918 So.2d 181 (Fla. 2005), Mills v. State, 476 So.2d 172 (Fla. 1985), and Dorsey v. State, 942 So.2d 983 (Fla. 5th DCA 2006) (RI, 67-69; RVI, 248-252). The state argued that Sturdivant willfully tortured the child by failing to seek medical attention right away (RVI, 253-254). Defense counsel noted that Sturdivant was not charged with child abuse by failing to seek medical attention; he was only charged with child abuse by slapping Isaiah (RVI, 254, 256-257).

The trial court initially granted the motion for judgment of acquittal as to the charge of felony murder (RVI, 260). The state, however, argued that Sturdivant was charged alternatively with

maliciously punishing or willfully torturing the child, in addition to aggravated battery by causing great bodily harm, presumably to distinguish this case from Brooks and Mills (RVI, 262-264). Defense counsel pointed out that they were all forms of aggravated battery and it did not matter if the battery was to punish or torture the child (RVI, 265-266). The trial court then reversed its ruling on the motion for judgment of acquittal as to the alternative forms of aggravated child abuse, stating that "in the component of torture and malicious punishment there is probably not a merger," and agreed not to instruct the jury on aggravated battery or knowingly or willfully committing child abuse and causing great bodily harm, permanent disability or permanent disfigurement (RVI, 265, 274-275).

The trial court instructed the jury on first degree felony murder and the lesser included crimes of second degree murder, third degree murder, and manslaughter (RVI, 314-320). In instructing the jury on the lesser crime of manslaughter, the court said:

The next lesser included crime is the crime of manslaughter. Before you can find the defendant guilty of manslaughter the state must prove the following two elements beyond a reasonable doubt. First, Isaiah Howard is dead. Secondly, Robert Nathan Sturdivant intentionally caused the death of Isaiah Howard or the death of Isaiah Howard was caused by the culpable negligence of Robert Nathan Sturdivant. However, the defendant cannot be guilty of manslaughter if the killing was either justifiable or excusable homicide, as I've previously explained those terms to you.

I'll now define culpable negligence for you. Each of us has a duty to act reasonably towards others. In order for negligence to be culpable it must be gross and flagrant. Culpable negligence is a course of conduct showing reckless disregard of human life or of the safety of persons exposed to its dangerous effects or such an entire want of care as to raise a presumption of a conscious indifference to consequences or which shows wantonness or recklessness or a grossly careless disregard for the safety and welfare of the public or such an indifference to the rights of others as equivalent, as is equivalent to an intentional violation of such rights. The negligent act or omission must have been committed with an utter disregard for the safety of others. Culpable negligence is consciously doing an act or following a course of conduct that the defendant must have known or reasonably should have known was likely to cause death or great bodily injury.

In order to convict of manslaughter by intentional act it is not necessary for the state to prove that Robert Nathan Sturdivant had a premeditated intent to cause death.

(RVI, 319-320).

The jury found Sturdivant guilty as charged of first degree felony murder, second degree murder, and aggravated child abuse (RI, 72-73; RVI, 357).

The trial court sentenced Sturdivant to concurrent terms of life in prison on Count I of the indictment and 30 years in prison on Count II, with 388 days jail credit on both counts. The court did not sentence appellant on the second degree murder charge (RI, 82-89; RIV, 227-228).

On direct appeal to the First District, Sturdivant argued that he could not be convicted of both first degree felony murder and

aggravated child abuse, where both were predicated on the single act of slapping the child in the back of the head. The District Court, relying on Brooks v. State, agreed and reversed Sturdivant's convictions for first degree murder and aggravated child abuse and remanded with instructions that the trial court adjudicate him guilty of second degree murder and sentence him for that offense. After analyzing the various opinions in Brooks, the District Court concluded that the majority in Brooks held that it was error (1) to convict Brooks of felony murder based on the predicate felony of aggravated child abuse and (2) for the trial court to rely on aggravated child abuse as an aggravating factor for sentencing purposes. The Court, however, questioned the holding in Brooks based on the plain and unambiguous language of the felony murder statute. The Court said:

As we have already noted, the merger doctrine is a creature of the common law. As such, it must yield to an inconsistent statute adopted by the legislature. See, e.g., *State v. Egan*, 287 So.2d 1, 6 (Fla. 1973); §2.01 Fla. Stat. (2007). To the extent pertinent, the felony murder statute reads: 'The unlawful killing of a human being ... [w]hen committed by a person engaged in the perpetration of, or in the attempt to perpetrate, any ... [a]ggravated child abuse ... is murder in the first degree and constitutes a capital felony ...' §782.04(1)(a)2.h., Fla. Stat. (2007)(emphasis added). We see nothing unclear or ambiguous about this statutory language. It clearly states that 'any' aggravated child abuse will support a conviction for felony murder. As Justice Lewis said in *Brooks*, '[t]he plain text of the statute ... affords no indication that the Legislature intended to exclude application of the felony murder doctrine in those instances of aggravated battery on a

child that involve a solitary stab wound, or any other single act of violence'; rather, '[t]he plain statutory language reflects a policy decision to protect the children of this state by subjecting those whose acts of child abuse produce death to the highest possible penalty.' 918 So.2d at 219 (footnote omitted).

Sturdivant v. State, __ So.3d __, 35 Fla.L.Weekkly D1993 (Fla. 1st DCA Sept. 7, 2010). Hence, the District Court certified that following question to this Court as one of great public importance:

DOES BROOKS v. STATE, 918 So.2d 181 (Fla. 2005), PRECLUDE A CONVICTION FOR FELONY MURDER BASED ON THE PREDICATE OFFENSE OF AGGRAVATED CHILD ABUSE WHEN THE ABUSE CONSISTS OF A SINGLE ACT, NOTWITHSTANDING THE LANGUAGE OF SECTION 782.04(1)(a),2.h., FLORIDA STATUTES (2007)?

III SUMMARY OF THE ARGUMENT

The certified question asks whether Brooks v. State prohibits a conviction of felony murder based on aggravated child abuse consisting of a single violent act. The question should be answered in the affirmative.

The mere inclusion of aggravated child abuse as an underlying felony in Section 782.04(1)(a)2, Florida Statutes, did not abrogate the merger doctrine under the common law. The merger doctrine limits aggravating circumstances used to justify a death sentence, even though such aggravating factors are specifically enumerated in section 921.141(5), Florida Statutes. The decision in Brooks encompasses both the aggravating factor of murder in the course of a felony and felony murder based on a single lethal act. In amending the felony murder statute to include aggravated child

abuse, the legislature did not explicitly abrogate the merger rule recognized in Brooks. The merger rule in Brooks is logical and a bright-line rule; it does not apply to all types of aggravated child abuse, only those consisting of a single violent act resulting in death.

This Court should approve the ruling of the district court and affirm that a single act of assaultive conduct merges into the resulting homicide, thus precluding a felony murder conviction.

The district court vacated respondent's convictions for felony murder and aggravated child abuse and remanded with instructions that the trial court adjudicate him guilty of second degree murder and sentence him for that offense. However, respondent is entitled to a new trial on second degree murder because the trial court gave an erroneous instruction on manslaughter by act. The instruction given included the element of intent to kill. This was the same instruction that this Court condemned in State v. Montgomery, infra. But for the erroneous instruction, the jury could have found respondent guilty of manslaughter, a lesser offense of second degree murder. Respondent is, therefore, entitled to a new trial.

IV ARGUMENT

ISSUE I:

ADDITION OF AGGRAVATED CHILD ABUSE TO THE OFFENSES UNDERLYING FIRST-DEGREE FELONY MURDER DID NOT ABROGATE THE COMMON-LAW MERGER OF A SINGLE ACT OF ASSAULTIVE CONDUCT INTO THE RESULTING HOMICIDE, CONSISTENT WITH BROOKS V. STATE, 918 SO. 2D 181 (FLA. 2005).

Standard of review: This issue requires solely legal determinations, including statutory construction. Review is de novo. See Clines v. State, 912 So. 2d 550, 555 (Fla.2005).

Discussion: The certified question asks, in substance, whether Brooks v. State, 918 So. 2d 181 (Fla. 2005), prohibits a conviction of felony murder based on aggravated child abuse consisting of a single violent act. The question should be answered in the affirmative. As reflected in Brooks, the mere inclusion of aggravated child abuse as an underlying felony for first-degree felony murder did not abrogate the merger doctrine under the common law, whereby a single act of assaultive conduct merges into the resulting homicide, precluding a felony murder conviction.

Sturdivant was charged in a two count indictment with first degree murder and aggravated child abuse. In Count I, the state alleged that Sturdivant killed Isaiah Howard “while engaged in the perpetration of, or in the attempt to perpetrate Aggravated Child Abuse, . . ., by slapping Isaiah Howard into a wall causing him to die.” (RI, 11). Count II alleged aggravated child abuse

by willfully torturing and/or maliciously punishing Isaiah Howard, or by knowingly or willfully committing child abuse upon Isaiah Howard and in doing so caused great bodily harm, permanent disability or permanent disfigurement, to-wit: Robert Nathan Sturdivant did slap Isaiah Howard into a wall which caused him to die, . . .

(RII, 11). The indictment and evidence at trial predicated both counts on the single act of slapping the child into a wall.

In the pages that follow, respondent will explore the common law of merger in criminal cases, discuss the ongoing vitality of merger in Florida's capital sentencing scheme, and explain why Florida's felony murder statute left the merger rule intact as it applies to a single act of battery resulting in a homicide. Respondent will also address the decision in Brooks and the First District's opinions in this case and Lewis v. State, 34 So. 3d 183 (Fla. 1st DCA 2010), and respond to the State's argument that only assaultive child abuse by strangers, as opposed to caregivers, merges into felony murder.

A. Merger and Assaultive Felony Murder

Under the common law, some crimes merged into one another, precluding multiple convictions. Applied to felony murder, merger bars reliance on a felony "which is an integral part of the homicide," and which the evidence shows to be an offense "included in fact within the homicide," to make the crime felony murder. People v. Ireland, 450 P.3d 580, 590 (Cal. 1969). In State v.

Jones, 896 P.2d 1077 (Kan. 1995), the court disallowed use of aggravated battery to form the basis for a charge of first-degree murder. Some states apply the merger doctrine to crimes inherent in the murder, without regard to the single act theory. See People v. Morgan, 758 N.E.2d 813 (Ill. 2001)(predicate felony underlying a charge of felony murder must have an independent felonious purpose); State v. Moore, 213 P.3d 150 (Ariz. 2009)(assault may not serve as a predicate for felony murder). In State v. Godsey, 60 S.W.3d 759, 774-778 (Tenn. 2001), the Tennessee Supreme Court noted:

Conceived in the nineteenth century, the merger doctrine was developed . . . as a shorthand explanation for the conclusion that the felony-murder rule should not be applied in circumstances where the only underlying (or 'predicate') felony committed by the defendant was assault. The name of the doctrine derived from the characterization of the assault as an offense that 'merged' with the resulting homicide.

[Emphasis in original]. Recently, the California Supreme Court reaffirmed that assaultive felonies merge into second-degree felony murder, which applies to unenumerated felonies and is akin to third-degree felony murder in Florida. See People v. Sarun Chun, 203 P.3d 425, 443 (Cal. 2009). The seminal decision on merger and felony murder is People v. Moran, 246 N.Y. 100 (1927). There the New York Court of Appeals ruled felony murder inapplicable unless the supporting felony is independent from the homicide. The court explained:

Homicide is murder in the first degree when perpetrated with a deliberate and premeditated design to kill, or, without such design, while engaged in the commission of a felony. To make the quality of the intent indifferent, it is not enough to show that the homicide was felonious, or that there was a felonious assault which culminated in homicide. Such a holding would mean that every homicide, not justifiable or excusable, would occur in the commission of a felony, with the result that intent to kill and deliberation and premeditation would never be essential. The felony that eliminates the quality of the intent must be one that is independent of the homicide and of the assault merged therein, as, e. g., robbery or larceny or burglary or rape.

246 N.Y. at 102 (emphasis supplied, internal case references omitted).

In 1966, the Florida Supreme Court declined to apply the merger rule to a felony murder statute that omitted from the list of supporting felonies "assault in any of its forms." Robles v. State, 188 So. 2d 789, 792 (Fla. 1966). The court in Robles upheld, against a merger claim, a conviction of felony murder based on burglary.

Legislation enacted in 1984 added aggravated child abuse to the list of felonies enumerated in section 782.04(1)(a)2, Florida Statutes. Ch. 84-16, § 1, Laws of Fla. Then, as now, aggravated child abuse could occur through aggravated battery, malicious punishment, willful torture, or unlawfully caging a child. § 827.03(2), Fla. Stat. (2010). Under a 1996 revision, knowing and

willful abuse of a child which results in great bodily harm also constitutes aggravated child abuse. Ch. 96-322, § 8, Laws of Fla.

These alternatives encompass both assaultive and non-assaultive behavior. See, e.g., Nicholson v. State, 600 So. 2d 1101, 1104 (1992) (holding that “willful torture” under section 837.03 “includes willful acts of omission and neglect that cause unnecessary or unjustifiable pain and suffering to a child”); Blow v. State, 993 So. 2d 540, 541 (Fla. 2d DCA 2007) (limiting “unlawful caging” provision to confinement of child in wire or bar boxlike structure or small restrictive enclosure, receded from on other grounds, M.N. v. State, 16 So. 3d 280 (Fla. 2d DCA 2009)).

In Florida, the merger doctrine limits aggravating circumstances used to justify a death sentence. Although section 921.141(5), Florida Statutes, enumerates fifteen individual aggravating circumstances, this Court has repeatedly merged aggravators which rest on the same evidence. See, e.g., Eaglin v. State, 19 So. 3d 935, 941 (Fla. 2009) (reflecting trial court’s merger of aggravators for law enforcement victim performing legal duties and murder during escape from custody); Hutchinson v. State, 882 So. 2d 943, 953 (Fla. 2004) (trial court properly merged aggravated child abuse aggravator with the “victim under twelve” aggravator because both aggravators relied upon the victim’s status as a child), abrogated on other grounds by Deparvine v. State, 995

So. 2d 351 (Fla. 2008); Gonzalez v. State, 786 So. 2d 559 (Fla. 2001)(ruling that trial court properly merged aggravating factors that felony was committed both in course of a robbery and for pecuniary gain, as well as aggravators for murder committed to avoid arrest and to disrupt enforcement of laws, and law enforcement victim); Burns v. State, 699 So. 2d 646, 648 n.3 (Fla. 1997) (noting trial judge merged three aggravators which were all based on victim's status as law enforcement officer).

B. Brooks v. State

In respondent's view, Brooks is the product of an implicit recognition by at least some members of this Court that merger applies equally to aggravating factors and assaultive felony murder. In Brooks, the Court ruled that the aggravating factor for murder in the course of a felony could not rest on aggravated child abuse via a single, lethal blow:

[H]ad Brooks been charged with aggravated child abuse, he could not have been convicted of that crime. That is because aggravated child abuse is an aggravated battery, the only difference being that the victim is a child. See 827.03(2), Fla. Stat. (2002) (" 'Aggravated child abuse' occurs when a person: (a) commits aggravated battery on a child...."). In light of the fact that Brooks delivered a single stabbing blow that resulted in Alexis Stuart's death, the act constituting the aggravated child abuse merged into the infant's homicide.

. It makes no difference that Brooks was not charged or convicted of aggravated child abuse because that crime, under these

facts, merges with the homicide itself. In the instant matter, the action underlying the aggravated child abuse factor constituted the fatal stab wound that killed Alexis Stuart. Because there is no separate offense of aggravated child abuse, that crime cannot logically serve as the underlying felony in a felony murder charge.

Id. at 198-99. This Court invalidated the aggravator for murder in the course of a felony but found the error harmless and affirmed Brooks' two death sentences. Id. at 199.

Brooks asserted on rehearing that merger also invalidated his first-degree murder convictions based on general verdicts that could have rested either on felony murder rendered invalid via merger or on premeditated killings. The Court denied rehearing, but three Justices concluded that the original majority's merger analysis required reversal of the first-degree murder convictions.

Id. at 220-21 (Pariente, C.J., dissenting from denial of rehearing, with Anstead, J., concurring); id. at 221-24 (Lewis, J., dissenting).

C. First District Split

Because this Court affirmed the first-degree murder convictions, two First District panels have split on whether Brooks' merger analysis requires reversal of a first-degree felony murder conviction based on a single act constituting aggravated child

abuse. The panel in Lewis deemed the merger discussion in Brooks “ultimately immaterial to the outcome of the case,” making it dicta. 34 So. 3d at 185. In this case, Sturdivant, a different panel concluded that a majority in Brooks must have concluded that “allowing the charges to go to the jury on alternative theories of either premeditated first-degree murder or felony murder was harmless.” 35 Fla. L. Weekly at D1994. Noting that the Lewis panel also found that more than a single act led to the child’s death in that case, the panel in Sturdivant concluded that Lewis’ discussion of Brooks was dicta. Id. Nine of the First District’s fifteen judges voted to deny an en banc hearing. Sturdivant v. State, 35 Fla. L. Weekly D1997 (Fla. 1st DCA Sept. 7, 2010).

D. Reconciling Brooks to the Common Law

Brooks remains viable and precludes the felony murder conviction in this case. First, as the First District concluded in Sturdivant, Brooks’ merger analysis encompasses both the aggravating factor of murder in the course of a felony and a felony murder conviction resting on a single act of violence. Although a finding that the error was harmless as to the convictions is not explicit in Brooks, the First District’s conclusion in this case that merger error affected only a single aggravator and not the validity of the underlying convictions is a more reasonable exegesis from Brooks than a determination that merger applied only

to the aggravator. Second, stare decisis favors adherence to Brooks because it remains a workable application of a solid tenet of criminal jurisprudence.

1. Discerning Brooks' Holding

The Brooks majority spoke unambiguously in stating that “in light of the fact that Brooks delivered a single stabbing blow that resulted in Alexis Stuart's death, the act constituting the aggravated child abuse merged into the infant's homicide.” 918 So. 2d at 198. How then could the Court have affirmed the first-degree murder convictions resting on a general verdict after the jury was instructed on the legally valid theory of premeditation as well as felony murder via the merged offense of aggravated child abuse? As Justice Lewis explained in his dissent in Brooks, the uncertainty caused by a general guilty verdict from a jury instructed on both premeditated murder and felony murder resting on an invalid underlying felony compels reversal of the conviction and remand for a new trial. Id. at 222 (Lewis, J., dissenting); see also Sturdivant, 34 Fla. L. Weekly at D1996 (Rowe, J., dissenting). In contrast, when a jury is instructed on two legally valid theories, one of which rests on insufficient evidence, the jury can be trusted to discern the difference, and the resulting general guilty verdict is upheld. 918 So. 2d at 223 (Lewis, J., dissenting). The First District panel in Lewis found the disparity between analysis

and result in Brooks “inexplicabl[e],” 34 So. 3d at 186, but the Sturdivant panel deemed the conclusion that this Court found the error harmless as to the convictions “inescapable.” 35 Fla. L. Weekly at D1995.

The latter conclusion is more reasonable. The jury in Brooks heard ample evidence of premeditation, including testimony on a life insurance policy taken out on one of the victims and testimony by a coconspirator of a plan to kill the victims. 918 So. 2d at 188-89. Aggravators upheld by this Court included that the killing was cold, calculated, and premeditated, and that it was for pecuniary gain. Id. at 206-07. This Court may have concluded beyond a reasonable doubt in Brooks that the jury based its verdicts on a finding of premeditation and not the more arcane theory of aggravated child based on malicious punishment and willful torture.

2. Stare Decisis

Whatever the Court’s rationale for declining to reverse the convictions in Brooks, its invalidation of the aggravator for murder in the course of a felony and accompanying rationale are entitled to the deference traditionally given precedent in the American legal system. The precise principle at issue is stare decisis, which is “the obligation of a court to abide by its own precedent.” N. Fla. Women’s Health & Counseling Services, Inc. v.

State, 866 So. 2d 612, 637 (Fla. 2003). “The presumption in favor of stare decisis is strong.” Id. In determining whether the presumption is overcome, a court must answer three questions:

(1) Has the prior decision proved unworkable due to reliance on an impractical legal 'fiction'? (2) Can the rule of law announced in the decision be reversed without serious injustice to those who have relied on it and without serious disruption in the stability of the law? And (3) have the factual premises underlying the decision changed so drastically as to leave the decision's central holding utterly without legal justification?

Id.; Strand v. Escambia Cnty., 992 So. 2d 150, 159 (Fla. 2008).

The first and third of these questions look to the foundations of the decision under review. The second looks to the effect of its undoing.

On the first question, the merger doctrine on which Brooks relies is a rule formed and honed by the common law. It is neither a legal fiction nor, as was demonstrated as recently as 2009 by the California Supreme Court in Sarun Chun, impractical. Brooks itself demonstrates that its merger analysis is a logical extension of this Court's decision in Mills v. State, 476 So. 2d 172 (Fla. 1985), to felony murder resting on a single, lethal act. In the narrow circumstances in which it applies, Brooks' holding compels the state to prove first-degree murder by premeditation. If the state cannot meet this burden, it may still obtain a conviction of second-degree murder, which under the Criminal Punishment Code may still yield a

life sentence. In this sense, Brooks is thoroughly “workable.” The first question warrants a “No” answer.

The third question must also be answered in the negative because the factual premises underlying the decision remain unchanged. As the Brooks majority recognized, when a single violent act results in the death of a child, “there is no separate offense of aggravated child abuse, [so] that crime cannot logically serve as the underlying felony in a felony murder charge.” 918 So. 2d at 199; accord Mills, 477 So. 2d at 178 (ruling that aggravated battery and homicide resulting from single shotgun blast “merged into one criminal act”). The factual premises underlying this narrow holding are static.

Because the answers to the first and third questions show that Brooks rests on firm footing, this Court need not address the effect of its being overruled. Lewis and this case raise the question of whether Brooks applies to murder convictions and not merely aggravators. Resolution of the uncertainty in favor of a unitary rule gives no cause to consider the injustice and disruption that would be caused by its reversal. If this question is reached, the Court should note that “the Mills rule” girding Brooks, 918 So. 2d at 199, has been in place twenty-five years.

E. Durability of the Common Law

As explained above, Brooks is consistent with the common law of merger. In both Sturdivant and Lewis, the First District panels opined that inclusion of aggravated child abuse among the felonies that may support a first-degree felony murder conviction abrogated this common law rule:

[T]he merger doctrine is a creature of the common law. As such, it must yield to an inconsistent statute adopted by the legislature. See, e.g., State v. Egan, 287 So.2d 1, 6 (Fla.1973); § 2.01, Fla. Stat. (2007). To the extent pertinent, the felony-murder statute reads: "The unlawful killing of a human being ... [w]hen committed by a person engaged in the perpetration of, or in the attempt to perpetrate, any ... [a]ggravated child abuse ... is murder in the first degree and constitutes a capital felony" § 782.04(1)(a)2.h., Fla. Stat. (2007) (emphasis added). We see nothing unclear or ambiguous about this statutory language. It clearly states that "any" aggravated child abuse will support a conviction for felony murder. As Justice Lewis said in Brooks, "[t]he plain text of the statute ... affords no indication that the Legislature intended to exclude application of the felony murder doctrine in those instances of aggravated battery on a child that involve a solitary stab wound, a lone blow to the head, one gunshot wound, or any other single act of violence"; rather, "[t]he plain statutory language reflects a policy decision to protect the children of this state by subjecting those whose acts of child abuse produce death to the highest possible penalty." 918 So.2d at 219 (footnote omitted). The Lewis panel agreed

Accordingly, while we conclude that we are constrained by Brooks to reverse appellant's convictions, we believe that a proper deference to the legislature's adoption of section 782.04(1)(a)2.h. requires the

conclusion that aggravated child abuse will support a felony-murder conviction, even if the abuse consisted of a single act.

Sturdivant, 35 Fla. L. Weekly at D1995.

Sturdivant and the opinions on which it relies in this passage give inadequate consideration to the high hurdle faced by statutes purportedly in derogation of the common law. Legislation should be interpreted to displace a common-law rule already in place no further than is clearly necessary. Carlile v. Game & Fresh Water Fish Comm'n, 354 So. 2d 362, 364 (Fla. 1977). “The presumption is that no change in the common law is intended unless the statute is explicit in this regard.” Id. Further, a statute that is both penal and in derogation of the common law must be construed most favorably to the accused. Perry v. State, 968 So. 2d 70, 75 (Fla. 4th DCA 2007). Applying these rules of construction in Perry, the Fourth District in Perry ruled that a statute prohibiting the use of force to resist an arrest did not cover force used during post-arrest intake procedures. Id. at 76.

The question here is whether the 1984 addition of aggravated child abuse to the felony-murder law was a clear, explicit abrogation of the merger rule recognized in Brooks, sufficient to negate a construction of this penal law favorably to those accused of a single-act assaultive homicide of a child. As noted above, aggravated child abuse encompasses aggravated battery, felony

battery, willful torture, malicious punishment, and unlawful caging. The crime may be committed either as in Brooks and this case, through a single, lethal blow, or as in Nicholson, through willful omissions and deprivations which result in death.

If felony murder via aggravated child abuse encompasses assaultive behavior committed with no purpose other than to harm the victim, it is one of only two offenses listed in section 782.04(1)(a)2 for which this is true.¹ In adding aggravated child abuse to the felonies in the statute, the Legislature may have wished to bring nonassaultive misconduct within the ambit of first-degree murder while leaving the common-law merger rule intact as to assaultive homicides. This leaves the killing of a child through a single violent act punishable either as first-degree murder when committed with premeditation or second-degree murder when committed with reckless indifference demonstrating a depraved mind. A construction both in accord with the common law and most favorably to the accused would leave the merger rule intact as to single-act, assaultive child homicides. In the absence of explicit statutory language demonstrating lawmakers' intent that assaultive behavior without intent to kill be equated with premeditated intent to kill, this Court should continue to respect the common law rule requiring that an act constituting felony murder by aggravated child abuse be "independent of the homicide and of the assault merged therein." Moran, 246 N.Y. at 102.

¹ The second is aggravated abuse of an elderly person or disabled adult under subdivision (1)(a)(2)(i), added in 1996. See Ch. 996-322, § 18, Laws of Fla. The underlying felony, codified at section 825.102(2), Florida Statutes, tracks the aggravated

F. The State's Argument

Petitioner divines that in adding aggravated child abuse to the felony murder law, the Legislature intended to make only abuse by a caregiver which results in death a first degree murder. The State asks this Court to distinguish between crimes committed in a domestic setting from those committed by strangers. This is an artificial distinction.

Very few crimes are specifically defined by the relationship between the victim and the perpetrator. See, e.g., § 794.011(8), Fla. Stat. (sexual battery by one in a position of familial or custodial authority). Crimes are typically defined by the nature of the act, not the status of the offender. Some acts are criminal merely because of the offender's status, e.g., § 790.23, Fla. Stat., (possession of a firearm by a convicted felon), or by the location of the offense, e.g., § 790.115 (possession of a firearm on school property). Other crimes are enhanced by the status of the victim, e.g., § 784.08, Fla. Stat. (battery on a person 65 years of age or older). However, these "status" crimes are specifically defined by statute. Crimes are defined--and punished--by their statutory elements. The merger doctrine focuses on the statutory elements, i.e., battery and murder. Mills. In contrast, petitioner's merger proposal focuses on nonstatutory factors and creates a distinction

child abuse provisions in section 827.03.

found nowhere in the language of sections 782.04(1)(a)(2) and 827.03(2). Caregivers are statutorily distinguished from noncaregivers only in section 827.03(3), which concerns child neglect. This Court should not engraft a caregiver element into the law of felony murder via aggravated child abuse.

G. Conclusion

Respondent agrees with petitioner that this Court should not abandon the merger doctrine. The application of the merger doctrine in Mills and Brooks, where two offenses merge when a single act constitutes both the homicide and underlying felony, without causing additional injury, is logical and a bright-line rule. It is neither under- nor over-inclusive, as petitioner urges. It is limited to those narrow instances of aggravated child abuse under Section 827.03(2)(a) or (c), Fla. Stat., which exclusively involve a battery that results in death. It does not apply to types of aggravated child abuse that do not involve a battery or to cases which involve multiple instances of abuse. See Lim v. State, 35 Fla. L. Weekly D2526 (Fla. 1st DCA Nov. 17, 2010); Rosa v. State, 35 Fla. L. Weekly D1361 (Fla. 2d DCA June 18, 2010); Dorsey v. State, 942 So.2d 983 (Fla. 5th DCA 2006).

Consequently, the First District correctly ruled that the trial court committed reversible error in instructing the jury it could find that Sturdivant's single blow, which caused the child's

death, constituted first-degree felony murder under any of the statutory alternatives for aggravated child abuse. This Court should approve that decision and answer the certified question in the affirmative.

ISSUE II:

THE TRIAL COURT FUNDAMENTALLY ERRED IN GIVING
AN ILLEGAL INSTRUCTION ON MANSLAUGHTER BY ACT.

Standard of Review: In instructing the jury on the lesser crime of manslaughter, the court told the jury that the state must prove two things: that Isaiah Howard is dead, and Robert Sturdivant intentionally caused the death of Isaiah Howard or the death of Isaiah Howard was caused by the culpable negligence of Robert Sturdivant. The instruction given was erroneous as a matter of law because it imposed an intent to kill element, whereas the crime of manslaughter by act requires only an intentional unlawful act, rather than an intent to kill. State v. Montgomery, 39 So.3d 252 (Fla. 2010). Pursuant to Montgomery, any instruction that includes intent to kill as an element of manslaughter by act is fundamental error. Id., at 258. The standard of review is de novo.

Hankerson v. State, 831 So.2d 235 (Fla. 1st DCA 2002).²

² This issue is being raised for the first time in this brief. Respondent did not raise the Montgomery issue on direct

appeal because he was convicted as charged of first degree felony murder, in addition to second degree murder. The issue became apparent only after the District Court vacated the first degree murder conviction and remanded for imposition of a judgment and sentence for second degree murder. Since this Court has jurisdiction on the basis of the certified question, it has jurisdiction to review this issue as well. Feller v. State, 637 So.2d 911 (Fla. 1994); Savoie v. State, 422 So.2d 308 (Fla.1982).

Discussion: The instruction given below contained the identical flaw as that in Montgomery and must likewise be deemed fundamental error. In Montgomery, this Court held that the erroneous jury instruction was fundamental error because the jury, if it found no intent to kill, was directed to return a verdict for the greater offense of second degree murder, an offense not requiring proof of intent to kill. In the present case the jury, although it could have returned a verdict for manslaughter if properly instructed, was similarly “coerced” to return a verdict for a greater offense not requiring proof of intent to kill, such as second degree murder or felony murder. The Montgomery error thus forced the jury to choose an offense other than manslaughter by act.

In Salonko v. State, 42 So.3d 801 (Fla. 1st DCA 2010), *discretionary review pending*, SC10-842, the First District held that while an instruction that includes intent to kill as an element of manslaughter by act is fundamental error, a narrow exception exists when the trial court gives the erroneous instruction on manslaughter by act in combination with an instruction on manslaughter by culpable negligence. See also, Daniels v. State, 46 So.3d 630 (Fla. 3d DCA 2010); Joyner v. State, 41 So.3d 306 (Fla. 1st DCA 2010); Nieves v. State, 22 So.3d 691 (Fla. 2d DCA 2009). Here, as in Salonko, the trial court instructed the jury that manslaughter by act required an intent to kill and also instructed the jury on manslaughter by culpable

negligence. The latter instruction, however, did not cure the Montgomery error.

The premise of the Salonko court's ruling is that when the jury returns a verdict of the lesser offense of second degree murder, the jury has decided that the defendant did not intend to kill the victim. The fallacy of the narrow exception in Salonko as applied here is that the jury may have found that Sturdivant committed an intentional act of child abuse, not merely a negligent act, and hence was guilty of felony murder, but the jury nonetheless did not believe Sturdivant had an intent to kill. The erroneous voluntary manslaughter instruction directs jurors who find an intentional act but reject both culpable negligence and intent to killing away from a manslaughter verdict. Under these circumstances, the instruction on manslaughter by culpable negligence is no safe harbor from the Montgomery error.

If the jury had been properly instructed that manslaughter by act did not require proof of intent to kill, the jury may have found appellant guilty only of manslaughter by act, rather than second degree murder. The error in the manslaughter instruction was, as in Montgomery, fundamental.

The District Court reversed respondent's convictions for first degree murder and aggravated child abuse and remanded with instructions that the trial court adjudicate him guilty of second degree murder and sentence him for that offense. Although the

convictions were properly vacated, the remand for imposition of judgment for the "lesser" offense of second murder would violate State v. Montgomery. The proper remedy is a remand for a new trial with corrected instructions on the elements of manslaughter by act.

V CONCLUSION

Based upon the foregoing argument, reasoning and citation of authority, respondent requests in Issue I that this Court confirm its holding in Brooks and approve the decision of the First District. In Issue II, respondent urges this Court to vacate his convictions and remand the cause for a new trial on second degree murder.

CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a copy of the foregoing has been furnished by electronic mail to Trisha Meggs Pate, Office of the Attorney General, the Capitol, at criminalappealsintake@myfloridalegal.com, as agreed by the parties, and by U.S. Mail to Appellant, Mr. Robert Sturdivant, DOC# Q22232, Century Correctional Institution, 400 Tedder Road, Century, FL 32535, on this 6th day of January, 2011.

CERTIFICATE OF FONT AND TYPE SIZE

I hereby certify that this brief was typed using Courier New, 12 point.

Respectfully submitted,

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