In the Supreme Court of Florida

STATE OF FLORIDA,

Appellant,

v. CASE NO. SC10-1791

ROBERT N. STURDIVANT,

Appellee.

_____/

ON APPEAL FROM THE
FIRST DISTRICT COURT OF APPEAL

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

Appellee, ROBERT N. STURDIVANT, the defendant in the trial court, will be referred to as appellant or by his proper name. Appellant, 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. All double underlined emphasis is supplied.

STATEMENT OF THE CASE AND FACTS

This is a direct appeal from a criminal conviction for the murder of a two-year-old child by the mother's live-in boyfriend. The First District reversed the first-degree felony murder conviction based on this Court's decision in *Brooks v. State*, 918 So.2d 181 (Fla. 2005). The First District held that the merger doctrine precluded the use of aggravated child abuse as the underlying felony for the felony murder charge where only a single act of abuse led to the child's death but certified the following question:

> 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)?

Sturdivant v. State, - So.3d -, 2010 WL 3464410, 35 Fla. L. Weekly D1993 (Fla. 1st DCA September 7, 2010).

A grand jury indicted Robert Nathan Sturdivant on two counts: I) first degree felony murder "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, and II) aggravated child abuse "by willfully torturing and/or maliciously punishing" by slapping "Isaiah Howard into a wall which caused him to die, in violation of section 827.03(2), Florida Statutes," (R. I 11 - indictment).

The prosecutor, concerned about the *Brooks* merger issue, also filed an information charging second-degree murder based on the same allegations as in the indictment. (R. I 39 - information). The

information charged that on November 9, 2007, Robert Nathan Sturdivant "did unlawfully kill Isaiah Howard, a human being, by slapping Isaiah Howard into a wall." (R. I 39 - information). The prosecutor also filed a motion to consolidate the first-degree charge with the second-degree murder charges relying on 3.151(c). (R. I 37-38 - motion to consolidate). At the motion hearing held on October 24, 2008, the prosecutor explain that she filed a motion to consolidate "out of an abundance of caution" based on *Brooks*. (T. Vol. II 153). The prosecutor noted that Brooks was a Florida Supreme Court case "that stands for the proposition that if one single act is the basis for the felony murder, then . . . it's not felony murder." She filed the second-degree murder charge in the alternative. The prosecutor noted that defense counsel would argue in a judgment of acquittal that the case is analogous to *Brooks* because "we only have one slap." (T. Vol. II 155).

Defense counsel explained that his argument was based on the old doctrine of merger under which you could not be convicted on both the underlying felony and felony murder because they merged. (T. Vol. II 155). Defense counsel noted that obviously just about every murder is also an aggravated battery and that the only difference between aggravated battery and aggravated child abuse is the age of the victim. (T. Vol. II 156). Defense counsel noted that the Florida Supreme Court in *Brooks* adopted *Mills*, and determined that "you have to have more than one injury for it to constitute child abuse." (T. Vol. II 156). "There has to be more than one blow, stab, shot whatever." (T. Vol. II 156). Defense counsel stated that he would

be making a motion for judgment of acquittal based on the merger doctrine. (T. Vol. II 156). The trial court expressed concern about jury confusion. (T. Vol. II 157). The trial court noted that he could not sentence the defendant on both first-degree and second-degree murder. (T. Vol. II 158). The prosecutor and defense counsel agreed with the trial court's observation. (T. Vol. II 158). The trial court granted the motion to consolidate. (T. Vol. II 158).

Defense counsel filed a written motion for judgment of acquittal, which he renewed orally at the close of the State's case. (T. Vol. VI 248- 277). After extensive discussion regarding the merger issue, the trial court denied the motion. (T. Vol. VI 248- 277; 274).

The jury convicted Sturdivant of first-degree felony murder; second-degree murder; and aggravated child abuse as charged. (R. Vol. I 72-73; T. Vol. VI 357-358). The trial court sentenced the defendant to life without parole on the first-degree murder count and to 30 years' imprisonment on the aggravated child abuse count. (R. 83-89 - judgment & sentence). The judgment noted that the defendant was not sentenced on the second-degree count. (R. 89).

SUMMARY OF ARGUMENT

Sturdivant asserts that the merger doctrine prohibits aggravated child abuse from being the underlying felony for first-degree felony murder. This Court should redefine the merger doctrine away from single versus multiple acts to draw the line between prototypical child abuse murders and those that are not prototypical based on the legislative history of the amendment to the felony murder statute. Use of aggravated child abuse as the underlying felony for felony murder should be limited to prototypical child abuse murders which are those murders where a care-giver punishes a child to death. The relationship, the motive and the type of harm should be the dividing line for the merger doctrine, not single or multiple acts. If a stranger shoots or stabs a child, that is not a prototypical child abuse murder and should not be charged as aggravated child abuse or felony murder. Limiting the scope of aggravated child abuse serving as the underlying felony for first-degree felony murder in this manner comports with the legislative intent, as derived from the legislative history, which is the basis for the merger doctrine. The use of aggravated child abuse as the underlying felony should also be limited § 827.03(2)(b) which requires that the defendant willfully tortures, maliciously punishes, or willfully and unlawfully cages a child. It should exclude § 827.03(2)(a), which only requires aggravated battery on a child and § 827.03(2)(c).

This was a prototypical child abuse murder. The live-in boyfriend, who was babysitting the child, slapped the child for being on the table and stepping on his marijuana. Thus, aggravated child

abuse may properly serve as the underlying felony for a first-degree felony murder conviction in this case.

ARGUMENT

ISSUE I

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

Sturdivant asserts that the merger doctrine prohibits aggravated child abuse from being the underlying felony for felony murder. This Court should redefine the merger doctrine away from single versus multiple acts to draw the line between prototypical child abuse murders and those that are not prototypical based on the legislative history of the amendment to the felony murder statute. Use of aggravated child abuse as the underlying felony for felony murder should be limited to prototypical child abuse murders which are those murders where a care-giver punishes a child to death. The relationship, the motive and the type of harm should be the dividing line for the merger doctrine, not single or multiple acts. If a stranger shoots a child, that is not a prototypical child abuse murder and should not be charged as aggravated child abuse or felony murder. Limiting the scope of aggravated child abuse serving as the underlying felony for first-degree felony murder in this manner comports with the legislative intent, as derived from the legislative history, which is the basis for the merger doctrine. This was a prototypical child abuse murder. The live-in boyfriend, who was babysitting the child, slapped the child for stepping on his marijuana. Thus, aggravated child abuse may properly serve as the underlying felony for a first-degree felony murder conviction in this case.

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*. *Larimore v. State*, 2 So.3d 101, 106 (Fla. 2008)(noting that judicial interpretation of a statute is a purely legal matter and therefore subject to *de novo* review).

The trial court's ruling

After the State rested, defense counsel, Assistant Public Defender Walter Smith, presented to the court a written motion for judgment of acquittal. (T. Vol. VI 248). The written motion for judgment of acquittal argued that the aggravated battery on the child merged "with the homicide to create one offense" relying on *Mills v. State*, 476 So.2d 172, 177 (Fla. 1985), and *Brooks v. State*, 918 So.2d 181 (Fla. 2005). (R Vol. I 67-69). The written motion for judgment of acquittal stated that to be convicted of first-degree felony murder based on aggravated child abuse, the evidence had to establish "multiple acts at the hands of the defendant" citing *Dorsey v. State*, 942 So.2d 983 (Fla. 5th DCA 2006). (R Vol. I 68). The written motion for judgment of acquittal concluded that "the greatest offense for which the defendant could be convicted is second-degree murder. (R Vol. I 68).

Defense counsel argued to the trial court the "old common law notion that the underlying felony merged with the homicide and created one offense." (T. Vol. VI 248). Defense counsel asserted that while the merger doctrine had been statutorily denigrated over the years, it was still alive and well with respect to the crime of aggravated

battery. (T. Vol. VI 249). Defense counsel, citing *Mills v. State*, 476 So.2d 172 (Fla. 1985), stated that you cannot premise a first-degree felony murder on an aggravated battery. (T. Vol. VI 249). Defense counsel, relying on *Brooks v. State*, 918 So.2d 181 (Fla. 2005), stated there is no difference between aggravated battery and aggravated child abuse "save the age of the victim." (T. Vol. VI 249). Defense counsel stated that in *Brooks*, in the case of a child, when there is only one injury, "one insult" committed upon the child that offense still merges. (T. Vol. VI 249). Defense counsel maintained that even if there was more than one injury, it would still merge and "you would eliminate the aggravated child abuse and you would just be looking at murder - first, second and manslaughter." Defense counsel noted that the doctor pretty much testified that the one blow to the back of the head could have killed the child, which was consistent with Mr. Sturdivant's version. (T. Vol. VI 250). Defense counsel stated that a single blow causing perhaps the fatal injury. (T. Vol. VI 250). Defense counsel argued that the case "firmly falls within the pronouncements of the *Brooks* case" meaning it was either premeditated, or done with ill will, hatred, spite or evil intent or it was manslaughter. (T. Vol. VI 250).

The trial court inquired whether *Brooks* involved both premeditated and felony first-degree murder theories. (T. Vol. VI 250-251). Defense counsel stated, because felony murder went away, they were left with second-degree murder and manslaughter. (T. Vol. VI 251). Defense counsel stated that you cannot have felony murder if you do not have a felony. (T. Vol. VI 252). Defense counsel stated that they

were one in the same and it is one act that caused the death. (T. Vol. VI 252). Defense counsel stated that in Florida, we still adhere to the old common law merger rule and the one acts becomes the single homicidal act. (T. Vol. VI 252). Defense counsel stated that "*Brooks* controls" because they were "dealing with a single injury that leads to the death of a child." (T. Vol. VI 252).

The prosecutor responded that the key words in *Brooks* were "one single act." (T. Vol. VI 253). The prosecutor felt that there was more than one single act because of the burn to the foot and the ongoing continuing abuse of the child. (T. Vol. VI 253). The prosecutor noted that the defendant refused to seek medical care for the child right away which could have saved the child's life which was "ongoing torture." (T. Vol. VI 253). The prosecutor noted that torture could include acts of omission as well as commission. (T. Vol. VI 253). The prosecutor noted that the testimony from Dr. Snider was that the child felt pain for 15 to 20 minutes after the incident. (T. Vol. VI 254).

The trial court asked defense counsel to distinguish *Dorsey v. State*, 942 So.2d 983 (Fla. 5th DCA 2006), which involved areas of hemorrhage in the brain and retinas. (T. Vol. VI 254). The trial court noted that the Fifth District relied on the injury of a torn frenulum which was not causally related to the child's death in that case but was evidence that "the child had been roughly handled for more than a single moment in time." (T. Vol. VI 255). Defense counsel distinguished *Dorsey* by being an ongoing event of shaking whereas; here, it was undisputed that there was a single act. (T. Vol. VI 255). Defense counsel stated that the case was "squarely on point with

Brooks." (T. Vol. VI 256). Defense counsel noted that the indictment charged a single act of slapping Isaiah Howard into a wall and that there was no allegations of lack of medical care. (T. Vol. VI 256). Defense counsel also noted that the information charging second-degree murder also only alleged the single act of slapping into the wall. (T. Vol. VI 257).

The trial court agreed that the State charged only one act of child abuse. (T. Vol. VI 257-258). The trial court asked the prosecutor to distinguish *Brooks.* (T. Vol. VI 258-259). The prosecutor reiterated that torture was charged and includes acts of omission. (T. Vol. VI 259). The trial court then observed that it sounded like the motion for judgment of acquittal should be granted. (T. Vol. VI 260). The trial court then granted the motion as to the felony murder count. (T. Vol. VI 260).

Defense counsel then asked about the child abuse count. (T. Vol. VI 260). Defense counsel stated that if a single act cannot be felony murder, a single act cannot be aggravated child abuse either. (T. Vol. VI 260). The prosecutor objected but noted that there was no caselaw on point. (T. Vol. VI 260). The prosecutor noted regardless of the merger doctrine the defendant committed aggravated child abuse. (T. Vol. VI 261). The trial court inquired whether the aggravated child abuse charge survived in *Brooks*. (T. Vol. VI 261).[1] Defense counsel stated in this case it is not aggravated child abuse it is homicide. (T. Vol. VI 261-262). It all merges into the homicide according to

[1] There was no separate count of aggravated child abuse in *Brooks*.

defense counsel. (T. Vol. VI 262). The trial court noted that *Mills* barred a conviction for aggravated battery where a single act of aggravated battery also caused the homicide. (T. Vol. VI 262).

Another prosecutor noted that there were alternative ways to commit aggravated child abuse including malicious punishment and torture. (T. Vol. VI 263). The prosecutor explained that there are other "breeds" of aggravated child abuse rather than just battery on a child. (T. Vol. VI 263-264). The trial court noted that there are two separate jury instructions for aggravated child abuse; one of which is for willfully torture or maliciously punish or willfully and unlawfully cage and then a second instruction for the aggravated battery type of child abuse. (T. Vol. VI 264). The trial court noted that *Mills* and defense counsel's arguments applied to the second type. (T. Vol. VI 264). The trial court then noted that the information was the willfully tortured/maliciously punished type, not the battery type. (T. Vol. VI 265). Defense counsel argued that it did not matter what the motive was. (T. Vol. VI 265). Defense counsel thought that it did not matter whether the defendant was mad at the child or wanted to punish the child, it was all one act regardless of motive and it merged into the homicide. (T. Vol. VI 265-266). Defense counsel believed that the standard jury instruction was incorrect under *Reed v. State*, 837 So.2d 366 (Fla. 2002), because malicious requires "spite, ill will, hatred or evil intent" which is the same mental state required for second-degree murder. (T. Vol. VI 266). Defense counsel noted that torture was not defined, while it

was under the old statute, it is not under the current version. (T. Vol. VI 266).

The trial court inquired whether the statute, § 827.032, had been amended since *Brooks* and the prosecutor stated that the statute was amended in June of 2003 but he did not know what the amendment was. (T. Vol. VI 267). The trial court's staff attorney noted that the 2003 amendment was to the definition of malicious. (T. Vol. VI 267). The trial court reasoned that, at least regarding the torture and malicious punish forms of aggravated child abuse, there was "probably not a merger" (T. Vol. VI 268).

Defense counsel noted that the Florida Supreme Court's decision in *Reed* had changed the definition of malicious. (T. Vol. VI 268). The trial court noted the date of the *Reed* decision was in 2002 before the 2003 amendment to the statute. (T. Vol. VI 269). The trial court noted that the Legislature watches the Florida Supreme Court's decision and addresses them promptly. (T. Vol. VI 269). The trial court observed that it sounded like *Reed* and *Brooks* were addressed by the Legislature and the Legislature had modified the aggravated child abuse statute to permit a person to commit aggravated child abuse in a multitude of ways one of which was by torturing and another of which was by maliciously punishing. (T. Vol. VI 269). Defense counsel noted that both methods had always been in the statute - that both torture and malicious punishment were in the old statute. (T. Vol. VI 269-270).

Defense counsel asserted that changing the definition of malicious in the statutory amendment did not change the old common law of merger.

(T. Vol. VI 270). The trial court noted that the merger argument was based on aggravated battery only. (T. Vol. VI 270). All of the merger cases deal with aggravated battery where there was a stabbing. (T. Vol. VI 270). Defense counsel noted that stabbing an infant was child abuse also. (T. Vol. VI 270). The prosecutor noted that it was only one of the "breeds" of child abuse. (T. Vol. VI 270). The trial court noted that it was one of many. (T. Vol. VI 270). The trial court noted that maliciously punishing a child does not require great bodily harm. (T. Vol. VI 270). Defense counsel asserted that that would be third-degree murder. (T. Vol. VI 270). Defense counsel stated that you cannot just change the labels and change the underlying act to something else. (T. Vol. VI 271-272). The trial court noted the difference between simple child abuse and aggravated child abuse. (T. Vol. VI 272).

The trial court offered to take the matter under advisement. (T. Vol. VI 273). The trial court noted that the cases pre-dated the amendment. (T. Vol. VI 270).[2] The trial court stated that you might have merger based on aggravated battery of a child but you do not have merger based on a separate crime with torture or malicious punishment. (T. Vol. VI 273). Defense counsel asked what was the evidence of malicious punishment other than hitting the child on the back of the head? (T. Vol. VI 273). The trial court responded that that was a question for the jury, not him. (T. Vol. VI 273). Defense counsel

[2] *Reed* predates the 2003 amendment, *Brooks* does not. Reed was decided in 2002 but Brooks was decided in 2005. *Reed v. State*, 837 So.2d 366 (Fla. 2002) *Brooks v. State*, 918 So.2d 181, 197-199 (Fla. 2005)

asked where was the evidence that the defendant ever punished the child? (T. Vol. VI 273). The trial court noted the evidence that the defendant hit the child because he was up on the table and the child had violated his instructions not to climb on the table which sounded like punishment to the judge. (T. Vol. VI 274). The trial court noted that, based on the 2003 amendment, the motion to dismiss the felony murder charge must fail because "there is not a merger as a consequence of the state charging willful torture and malicious punishment." (T. Vol. VI 274).

Defense counsel then, based on the ruling denying the motion to dismiss, requested an instruction of third-degree murder with simple child abuse as the underlying felony. (T. Vol. VI 274). The trial court then asked whether he should instruct on type (a), which is the "committed aggravated battery" form of aggravated child abuse, because under *Brooks* that form of aggravated child abuse would merge. (T. Vol. VI 274). The prosecutor agreed that that form would merge and therefore, the jury should not be instructed on that form. (T. Vol. VI 274). The trial court then inquired about type (e)? (T. Vol. VI 274). The trial court noted that (d), which is the caging form of aggravated child abuse, did not apply because there was no evidence of caging. (T. Vol. VI 275). The prosecutor agreed to take out forms (a) and (e) from the jury instructions. (T. Vol. VI 275).

The trial court noted that none of the cases discussed the willful torture and malicious punishment forms of aggravated child abuse. (T. Vol. VI 275). The trial court determined that whether there was willful torture or malicious punishment was a jury question. (T. Vol.

VI 276). The trial court granted the motion to dismiss regarding forms (a); (d); and (e) of aggravated child abuse. (T. Vol. VI 276).

Defense counsel renewed his request for third-degree felony murder with simple child abuse as the underlying felony to be given as a lesser. (T. Vol. VI 276). The prosecutor agreed. (T. Vol. VI 276). The trial court agreed to give third-degree murder as a lesser. (T. Vol. VI 276).[3]

Defense counsel disagreed with the ruling but understood it. (T. Vol. VI 276). Defense counsel stated that that was why he wanted to try this case in May "before they got wind of all this stuff." (T. Vol. VI 276-277). The trial resumed. (T. Vol. VI 277).

Preservation

This issue is preserved. Defense counsel objected to the use of aggravated child abuse as the underlying felony for first-degree murder on the basis of this Court's decision in *Brooks* and properly obtained a ruling from the trial court. *Jones v. State*, 998 So.2d 573, 581 (Fla. 2008)(noting that "to be preserved, the issue or legal argument must be raised and ruled on by the trial court" citing § 924.051(1)(b), Fla. Stat. (2006) and Philip J. Padovano, Florida Appellate Practice, § 8.1, at 148 (2007 ed.) (stating: "the aggrieved party must obtain an adverse ruling in the lower tribunal to preserve an issue for review.... Without a ruling or decision, there is nothing to review.")).

[3] Defense counsel provided a written special jury instruction on third-degree felony murder. (R. Vol. I 70-71)

Merits

The felony murder statute, § 782.04(1)(a)2, Florida Statutes (2007), 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,
i. Aggravated abuse of an elderly person or disabled adult,
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

* * * * *

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

The aggravated child abuse statute, § 827.03(2), Florida Statutes (2007), 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 or permanent disfigurement to the child.

The merger doctrine

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 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. 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 murder meant that all homicides automatically became 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 states. As the First District explained, without the merger doctrine, all felonious assaults that resulted in death would be bootstrapped up to first-degree murder regardless of whether the requisite mens rea existed. *Lewis v. State*, 34 So.3d 183, 184-185 (Fla. 1st DCA 2010)(citing Douglas Van Zanten, *Felony Murder, the Merger Limitation, and Legislative Intent in State v. Heemstra: Deciphering the Proper Role of the Iowa Supreme Court in Interpreting Iowa's Felony-Murder Statute*, 93 Iowa L. Rev. 1565, 1574 (2008)). Such an interpretation would render those states' second degree and manslaughter statutes meaningless. *Cotton v. Commonwealth*, 546 S.E.2d 241, 243 (Va. App. Ct. 2001)(noting merger doctrine developed

as a limitation on the felony murder statute necessary to maintain the distinction between murder and manslaughter). 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.

The merger doctrine is merely an application of the normal rules of statutory construction. The doctrine is not a matter of constitutional law. *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); *Rhode v. Olk-Long*, 84 F.3d 284, 289 (8th Cir. 1996)(rejecting the defendant's due process challenge to her conviction of felony murder based upon child endangerment because the merger doctrine "lacks a constitutional basis."). 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. As the Arizona 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 enumerated 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). After *Robles*, the Florida Legislature specifically amended Florida's felony murder statute to include aggravated child abuse. Laws 1984, c. 84-16, § 1.[4]

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[4] 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. *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 a 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, 302-303 (Miss. 1987)(rejecting a merger challenge, in a 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).

Brooks and the merger doctrine in Florida

In *Brooks v. State*, 918 So.2d 181, 197-199 (Fla. 2005), the Florida Supreme Court, in a capital case, held that the merger doctrine applied to first-degree felony murder when aggravated child abuse was the underlying felony and a single act as both the abuse and the murder. Brooks was convicted of two counts of first-degree murder for the murder of a mother and her infant daughter and sentenced to death. Brooks' cousin took out a $100,000.00 life insurance policy on his putative, illegitimate, infant daughter a couple of months before he and Brooks stabbed the three-month-old infant to death to collect the insurance money. *Brooks*, 918 So.2d at 188. The jury was instructed on both premeditated and felony murder with the underlying felony being aggravated child abuse. Brooks was not charged with a separate count of aggravated child abuse.

In appeal, Brooks argued that because the single act of stabbing the infant formed the basis of both the aggravated child abuse and the first-degree felony murder charge, the court should have found that the aggravated child abuse allegation "merged" with the more serious homicide charge. *Brooks*, 918 So.2d at 197. Brooks asserted that the State should have been totally precluded from invoking the felony murder doctrine and should have been limited to proving first-degree murder only on the theory of premeditation for both murders. *Brooks*, 918 So.2d at 197-198. Relying upon their prior decision in *Mills v. State*, 476 So.2d 172, 177 (Fla. 1985), the Florida Supreme Court stated that "[w]e do not believe that the legislature intended dual convictions for both homicide and the lethal act that

caused the homicide without causing additional injury to another person or property." The *Brooks* Court reasoned that *"Mills* clearly bars a conviction of aggravated battery where a single act of aggravated battery also causes a homicide." The *Brooks* Court observed that aggravated child abuse is an aggravated battery with the only difference being that the victim is a child. The Florida Supreme Court approved *Mapps v. State*, 520 So.2d 92 (Fla. 4th DCA 1988), in which the defendant was convicted of felony murder with the underlying felony being aggravated child abuse but noted that, in *Mapps*, "there were separate acts of striking, shaking, or throwing which led to the killing of the child."[5] But in *Brooks* there was a "single act of stabbing which caused a single injury." *Brooks*, 918 So.2d at 198. The Florida Supreme Court explained that in a case where a single act caused both an aggravated battery and a homicide, aggravated battery cannot then serve as the underlying felony. *Brooks*, 918 So.2d at 198-199. The Court concluded that the *Mills* rule

[5] 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."

prevents a conviction of aggravated battery. Justice Lewis dissented and believed that aggravated child abuse was available for consideration even though Brooks inflicted only one lethal stabbing blow on the infant's body. *Brooks*, 918 So.2d at 217-220 (Lewis, J., dissenting).

A rehearing was filed. On rehearing, Justice Pariente concluded that the United States Supreme Court decision in *Yates v. United States*, 354 U.S. 298, 77 S.Ct. 1064, 1 L.Ed.2d 1356 (1957), and the Florida Supreme Court's decision in *Fitzpatrick v. State*, 859 So.2d 486 (Fla. 2003), required a reversal because the general verdict of guilt precluded the Court from determining whether the jury relied upon the valid premeditated murder theory or the legally invalid felony murder theory. *Brooks*, 918 So.2d at 220-221 (Pariente, C. J., dissenting). Justice Lewis filed a separate dissenting opinion also concluding that *Yates* and *Fitzpatrick* mandated reversal of the conviction. *Brooks*, 918 So.2d at 221-224 (Lewis, J., dissenting). Justice Lewis seems to view *Yates* as a constitutional decision.

District courts application of *Brooks*

In *Dorsey v. State*, 942 So.2d 983 (Fla. 5th DCA 2006), the Fifth District affirmed convictions for first-degree felony murder and aggravated child abuse. Dorsey babysat a four-month-old child for approximately eight hours. *Dorsey*, 942 So.2d at 985. When the child's mother left the victim in his care, the child was healthy. When the mother returned, the child was gasping for breath and her

eyes were rolling in her head. The treating intensive care physician testified that the severe retinal hemorrhaging, cerebral swelling, diffuse axonal injury and intracranial bleeding led "to the inescapable conclusion" that the child was a victim of shaken baby syndrome. *Dorsey*, 942 So.2d at 985. The medical examiner also concluded the cause of death was subdural hemorrhaging or hematoma due to shaken baby syndrome. Dorsey was charged with, and convicted by a jury of, first-degree felony murder with the underlying felony being aggravated child abuse. *Dorsey*, 942 So.2d at 984.

On appeal, Dorsey asserted that the aggravated child abuse merged into the felony murder relying on *Brooks*. *Dorsey*, 942 So.2d at 984. Dorsey contended that the state was precluded from relying aggravated child abuse as the underlying felony because the act constituting the underlying felony of aggravated child abuse was the identical act which caused the child's death. The Fifth District discussed the Florida Supreme Court case of *Brooks* noting that Brooks killed an infant child by a single act of stabbing. The Fifth District explained that *Brooks* is limited to single blow child abuse murder cases. It is only in such cases that the aggravated child abuse merges into the felony murder. The *Dorsey* court noted that the Florida Supreme Court in *Brook*s "acknowledged that generally aggravated child abuse can be a separate charge and also serve as the underlying felony in a felony-murder charge." *Dorsey*, 942 So.2d at 985 citing *Brooks*, 918 So.2d at 198. The Fifth District concluded that "it appears the *Brooks* holding is limited to those unique cases in which there is a single instantaneous act by the defendant which

constitutes both the aggravated child abuse and the act causing the child's death."

The Court concluded the facts supported a finding that the aggravated child abuse was not a single instantaneous act. The evidence supported a conclusion that the child had been roughly handled for more than a single moment in time. *Dorsey*, 942 So.2d at 985-986. Indeed, the Court questioned "whether shaking a child to death could ever be considered a single instantaneous act." The Court concluded that the facts of the case were "readily distinguishable from *Brooks*" and affirmed. *Dorsey*, 942 So.2d at 986.

In *Lewis v. State*, 34 So.3d 183 (Fla. 1st DCA 2010), the First District Court held that the merger doctrine did not apply. Lewis was convicted of first-degree felony murder based on aggravated child abuse in the drowning death of her seven-year-old daughter. On appeal, she argued that the merger doctrine precludes the use of aggravated child abuse as the underlying felony in a felony murder charge if only a single act of abuse led to the child's death citing *Brooks v. State*, 918 So.2d 181 (Fla. 2005).

The First District first explained the merger doctrine and its rationale. "The rationale behind the merger doctrine is to ensure that varying degrees of murder, manslaughter, and other homicides remain distinct categories." *Lewis*, 34 So.3d at 184 citing Douglas Van Zanten, *Felony Murder, the Merger Limitation, and Legislative Intent in State v. Heemstra: Deciphering the Proper Role of the Iowa Supreme Court in Interpreting Iowa's Felony-Murder Statute*, 93 Iowa L. Rev. 1565, 1574 (2008). The First District then discussed the

Florida Supreme Court's decision in *Brooks* and stated: "[i]nexplicably, however, the Court ultimately affirmed Brooks' convictions." The *Lewis* Court averred that the Florida Supreme Court's statements in *Brooks* that aggravated child abuse cannot serve as the underlying felony in a felony murder charge if only a single act led to the child's death was not a holding in the case; rather, they were dicta.[6] The First District Court also observed that the

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[6] The First District's statement in *Lewis* that the Florida Supreme Court's discussion of the merger doctrine in *Brooks* was dicta is not accurate. It was not dicta; it was an alternative holding. What the Florida Supreme Court in *Brooks* determined was that there was error but that the error was harmless. When a Court concludes that there was error but that the error was harmless, a Court is actually making two holdings. Neither the merits discussion nor the harmless error analysis are dicta; they are both holdings, albeit alternative holdings. *Cummings v. State*, 341 A.2d 294, 309 (Md. App. Ct. 1975)(noting its holding that the error was harmless is not "passing dictum" rather it is an "alternative holding" which was a considered and deliberate judgment by the Court after a thorough review of all of the evidence); See also *Bravo v. United States*, 532 F.3d 1154, 1162 (11th Cir. 2008)(explaining that alternative holdings are not dicta; rather, they are binding precedent citing *Massachusetts v. United States*, 333 U.S. 611, 623, 68 S.Ct. 747, 92 L.Ed. 968 (1948)); *Carachuri-Rosendo v. Holder*, 570 F.3d 263, 266 (5th Cir. 2009)(same). As the United States Supreme Court has explained, "where a decision rests on two or more grounds, none can be relegated to the category of obiter dictum." *Woods v. Interstate Realty Co.*, 337 U.S. 535, 537, 69 S.Ct. 1235, 1237, 93 L.Ed. 1524 (1949); see also *MacDonald, Sommer & Frates v. County of Yolo,* 477 U.S. 340, 346 n. 4, 106 S.Ct. 2561, 91 L.Ed.2d 285 (1986)(explaining where a court gives two reasons for its decision "it is appropriate to treat them as alternative bases of decision [rather than dicta]." In Florida, alternative holdings are binding. *Parsons v. Fed. Realty Corp.*, 105 Fla. 105, 143 So. 912, 920 (1932); *Paterson v. Brafman*, 530 So.2d 499, 501 n. 4 (Fla. 3rd DCA 1988)(observing that the fact that the holding was an alternative holding does not detract from its binding authority citing *Clemons v. Flagler Hospital, Inc.*, 385 So.2d 1134, 1136 n. 3 (Fla. 5th DCA 1980)).

Granted the *Brooks* decision may seem "inexplicably" from just reading the opinion, but undersigned counsel has the advantage of having been counsel of record in *Brooks*. The State's main argument

in its response to the motion for rehearing in *Brooks* was that the error in the felony murder theory was harmless - a position that the United States Supreme Court later agreed with in *Hedgpeth v. Pulido*, - U.S. -, 129 S.Ct. 530, 530-31, 172 L.Ed.2d 388 (2008). Even before *Pulido*, courts were finding *Yates* errors to be harmless. The Ninth Circuit had found a *Yates* error to be harmless years before *Pulido* in *Shackleford v. Hubbard*, 234 F.3d 1072 (9th Cir. 2000). The State cited and discussed *Shackleford v. Hubbard* at length in its response to the motion for the rehearing in *Brooks*.

The State's argument in the rehearing was that Brooks was a premeditated murder case, not a felony murder case. Brooks' cousin took a out a $100,000.00 life insurance policy on his putative, illegitimate, infant daughter a couple of months before he and Brooks stabbed the four-month-old infant to death to collect the insurance money. The *Brooks* case was a conspiracy to commit premeditated murder between Brooks and his cousin. They planned the murders and even practiced it. *Brooks* was, as are all insurance murder cases, necessarily a premeditated murder. Brooks' jury never reached the felony murder theory; they convicted Brooks of premeditated murder. So, any error in the felony murder theory was harmless. This was the State's position in the rehearing.

Justice Scalia has been taking shots at *Yates v. United States*, 354 U.S. 298, 77 S.Ct. 1064, 1 L.Ed.2d 1356 (1957) since *Griffin v. United States*, 502 U.S. 46, 49, 112 S.Ct. 466, 116 L.Ed.2d 371 (1992). In *Griffin*, Justice Scalia, discussing *Yates,* says: "Our analysis made no mention of the Due Process Clause but consisted in its entirety of the following:

> "In these circumstances we think the proper rule to be applied is that which requires a verdict to be set aside in cases where the verdict is supportable on one ground, but not on another, and it is impossible to tell which ground the jury selected. *Stromberg v. California*, 283 U.S. 359, 367-368; *Williams v. North Carolina*, 317 U.S. 287, 291-292; *Cramer v. United States*, 325 U.S. 1, 36, n. 45."

Griffin, 502 U.S. at 52, 112 S.Ct. at 470. Justice Scalia then observes of the *Yates* opinion: "None of the three authorities cited for that expansive proposition in fact establishes it." He then discusses each of the three cases cited by the *Yates* Court, suggesting that the trilogy maybe limited to convictions which possibly rested on an unconstitutional ground and that none of them "sanction as broad a departure as the dictum in *Yates* expresses." *Griffin*, 502 U.S. at 52-56, 112 S.Ct. at 470-472. Justice Scalia found *Yates* to be "an unexplained extension, explicitly invoking neither the Due Process Clause (which is an unlikely basis) nor our supervisory powers over the procedures employed in a federal prosecution." Given Justice Scalia's contempt for *Yates* as expressed in *Griffin*, as well as at various oral arguments over the years, it was merely a matter of time

"plain, unambiguous language of the statute demonstrates that the legislature intended that a defendant who kills a child during the perpetration of the crime of aggravated child abuse may be charged and convicted of both aggravated child abuse and felony murder, regardless of the number of acts of abuse which caused the child's death." *Lewis*, 34 So.3d at 186-187. But the First District noted that even if the statements in *Brooks* were not dicta, they would affirm.

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before the United States Supreme Court overruled *Yates* because it makes no sense. And they recently did so in *Pulido*. Indeed, the three "dissenters" in *Pulido* did not disagree about *Yates* rather they concluded that the error was not harmless under *Brecht v. Abrahamson*, 507 U.S. 619, 623, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993), which is the harmless error test in federal habeas cases. In other words, the dissenters applied a harmless error analysis to the issue. So, really *Pulido* was unanimous on the issue of overruling *Yates*. Normally, harmless error is employed when there is no doubt that error occurred but, in a *Yates* situation, there may have been no error at all. It makes no sense to apply harmless error in the former but not the later. *Pulido* was a per curium opinion but it is unlikely that Justice Scalia wrote it because its tone is not scathing enough.

The statement in *Griffin* about *Yates* not resting on the Due Process Clause makes clear, as the State of Florida has been asserting for years, that *Yates* is not a constitutional mandated rule. *Griffin*, 502 U.S. at 55-56, 112 S.Ct. at 472. Rather, States are constitutionally free to follow the old common law rule and affirm such convictions if they are convinced the error in the alternative theory of prosecution was harmless. *Clark v. Crosby*, 335 F.3d 1303 (11th Cir. 2003)(noting, in a habeas case, that it was unlikely that the result in *Yates* was constitutionally compelled). The State made this argument in its response to the motion for rehearing citing the Eleventh Circuit's decision in *Clark*. And the State argued the error was harmless in its response to the motion for rehearing citing, and discussing at some length, the Ninth Circuit's decision in *Shackleford v. Hubbard*, 234 F.3d 1072 (9th Cir. 2000), finding that an erroneous felony murder theory was harmless error.

The Florida Supreme Court in *Brooks* engaged in a *Pulido* harmless error analysis. So, the reason the Florida Supreme Court affirmed in *Brooks* is because they found the error to be harmless because the facts of the crime clearly established that the crime was actually and solely a premeditated life insurance murder.

The *Lewis* panel reasoned that, based on the child's injuries and the manner of her death, it was "clear that more than a single act of abuse led to her death." The Court explained that holding a "child beneath the surface of a swimming pool long enough to produce unconsciousness and then death cannot be considered a single act." The First District questioned whether drowning a child could ever be considered a single act *Lewis*, 34 So.3d at 187 citing *Dorsey v. State*, 942 So.2d 983 (Fla. 5th DCA 2006)(questioning whether shaking a child could ever be considered a single act). The First District in *Lewis* certified the following question as a matter of great public importance:

> WHETHER BROOKS V. STATE, 918 So.2d 181 (Fla.2005), HOLDS THAT AGGRAVATED CHILD ABUSE CANNOT SERVE AS THE UNDERLYING FELONY IN A FELONY MURDER CHARGE IF ONLY A SINGLE ACT OF ABUSE LED TO THE CHILD'S DEATH?

Lewis is currently pending in this Court on a petition for belated appeal which the State did not object to this Court granting. See *Lewis v. State*, SC10-1134.

In *Sturdivant v. State*, - So.3d - (Fla. 1st DCA September 7, 2010), the instant case, the First District reversed a first-degree murder conviction where aggravated child abuse was the underlying felony. The First District reversed based on the merger doctrine and *Brooks,* finding that there may well have been a single act that led to the child's death. The First District noted that the grand jury indicted Sturdivant for first-degree felony murder and aggravated child abuse. As to the felony-murder charge, the indictment alleged that he killed the child victim while committing aggravated child abuse by slapping

the child victim into a wall. The allegation was the same for the aggravated child abuse charge.

Disagreeing with the earlier panel in *Lewis*, the panel in *Sturdivant*, concluded that this Court's discussion of the merger doctrine in *Brooks* was necessary to the court's decision and, therefore, was not dicta. After a detailed analysis of the various opinions in *Brooks*, including the concurring opinions, the *Sturdivant* panel concluded that this Court affirmed the conviction for first-degree murder in *Brooks* because it found the merger error to be harmless. The panel in *Sturdivant* concluded "that a majority of the court determined these errors were harmless" in *Brooks*. While acknowledging they were "unable to find any direct statement that the majority also concluded that allowing the charges to go to the jury on alternative theories of either premeditated first-degree murder or felony murder was harmless," the *Sturdivant* panel observed that such a conclusion seemed "inescapable in light of the opinions of Chief Justice Pariente and Justice Lewis dissenting from denial of rehearing." The *Sturdivant* panel then held that "[b]ecause it is clear that the child victim died as the result of a single blow," they reversed appellant's conviction for first-degree felony murder. The *Sturdivant* panel noted they were "in complete agreement with the *Lewis* panel that Justice Lewis' position in *Brooks* was the better-reasoned one" and their belief "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."

The *Sturdivant* panel, like the *Lewis* panel, certified a question of great public importance to the Florida Supreme Court, albeit a slightly different version:

> 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)?

In *Rosa v. State*, - So.3d -, 2010 WL 2430985, 35 Fla. L. Weekly D1361 (Fla. 2d DCA June 18, 2010), the Second District recently affirmed a felony murder conviction based on aggravated child abuse. Rosa was convicted of first-degree felony murder with aggravated child abuse being the underlying felony for the strangulation death of a 13-year-old child. The Court described the victim's "multiple injuries in various parts of his body" which, in addition to neck injuries from the strangulation, included abrasions on his right wrist, hip, thigh and shin, left arm, left hand and his back as well as galeal hemorrhages on the top of his head. Rosa was charged with both premeditated murder and felony murder but the jury convicted him only of felony murder. On appeal, Rosa contended that the merger doctrine precluded the use of aggravated child abuse as the underlying felony for a felony murder charge if a single act of abuse led to the child's death relying on *Brooks*. The Second District distinguished *Brooks*, concluding that there were multiple injuries to the child, not a single act. The Second District noted that, even without the evidence of multiple injuries, they would not necessarily conclude that strangulation constituted a single act of aggravated child abuse. The Second District found the case to be analogous to the

First District's case of *Lewis*, in which the First District had explained that it did not consider the act of drowning a child to be a single act of abuse. The Second District agreed that the case did not involve a single act either.

While the Second District disagreed with the First District in *Lewis* regarding whether the Florida Supreme Court's discussions in *Brooks* of the merger doctrine was dicta, the Second District agreed with the First District that the Florida Supreme Court's application of the merger doctrine "appears to conflict" with the plain language of the felony murder statute, section 782.04. The Second District observed that *Brooks* makes no reference to the statute and it was "unclear how the decision in that case can be reconciled with the statute." The Second District then certified that same question that the First District had certified in *Lewis*:

> Whether *Brooks v. State*, 918 So.2d 181 (Fla. 2005), holds that aggravated child abuse cannot serve as the underlying felony in a felony murder charge if only a single act of abuse led to the child's death.

In *Lim v. State*, - So.3d -, 2010 WL 4628986 (Fla. 1st DCA November 17, 2010), the First District affirmed a first-degree felony murder conviction where aggravated child abuse was the underlying felony. The First District noted that the felony murder statute "specifically provides that aggravated child abuse can serve as the underlying felony in a felony murder charge" regardless of the number of acts of abuse that led to the child's death. Alternatively, the First District also affirmed because there were multiple injuries to the child.

The District Courts have disagreed regarding the correct interpretation of this Court's decision in *Brooks*. *Sturdivant v. State*, - So.3d - (Fla. 1st DCA September 7, 2010)(stating the that "the opinions in *Brooks* (including two on rehearing, there are five), are not models of clarity."). Indeed, there is intradistrict conflict in the First District regarding whether this Court applied the harmless error doctrine in the *Brooks* decision. Compare *Lewis v. State*, 34 So.3d 183 (Fla. 1st DCA 2010)(concluding that this Court's discussion of merger in *Brooks* was dicta because this Court did not reversed the conviction for first-degree murder) with *Sturdivant v. State*, - So.3d - (Fla. 1st DCA September 7, 2010)(concluding that a majority of this Court determined that the merger error in *Brooks* was harmless) and *Sturdivant v. State*, - So.3d - (Fla. 1st DCA September 7, 2010)(Lowe, J., dissenting)(finding that "the relevant language in *Brooks* was merely dicta and that a single act of aggravated child abuse may, under the plain language of the murder statute, serve as a predicate crime for felony murder."). This Court should explain its prior decision in *Brooks.*

Legislative history of the amendment to the felony statute

Because the merger doctrine is actually a doctrine of statutory construction to determine legislative intent, the legislature history of this statute should be examined. Moreover, when the legislative intent is unclear from the text of the statute, it is proper to consult the legislative history. *Koile v. State*, 934 So.2d 1226, 1231 (Fla. 2006)(stating that "if the statutory intent is

unclear from the plain language of the statute, then we apply rules of statutory construction and explore legislative history to determine legislative intent."); *Kasischke v. State*, 991 So.2d 803, 807 (Fla. 2008)(finding the criminal statute at issue to be ambiguous and looking to the legislative history).

The Florida Legislature amended the first-degree felony murder statute to include aggravated child abuse based on an actual case. Laws 1984, c. 84-16, § 1. As is often the case, the Florida Legislature amended the felony murder statute based on an actual case - the child abuse murder of five-year-old Ursula Sunshine Assaid by her mother's boyfriend, Donald Glenn McDougall. As the Bill Analysis states: "[t]his bill is based upon a particular case encountered by an assistant state attorney in Sanford where a child died as a result of beatings and withholding of food and water." See HB 135 Bill Analysis of Committee on Criminal Justice dated December 27, 1983 at 2. The Analysis noted that the jury had "found the defendant guilty of second degree murder" and that "under existing law, the jury was unable to convict the defendant of capital murder." The Bill Analysis noted that "the practical effect of the bill" was "to change the highest possible penalty for aggravated child abuse, resulting in the death of the child, from 15-year felony to a capital felony." See HB 135 Bill Analysis of Committee on Criminal Justice dated December 27, 1983 at 2.

On Monday, January 9, 1984, the subcommittee on the criminal code of the House Criminal Justice Committee held a hearing on the bill at which two persons spoke: (1) the prosecutor, Assistant State

Attorney Donald L. Marblestone from Seminole County and (2) Melanie Arrington of Orlando of the Ursula Sunshine Memorial Fund. A tape of their testimony is available from the State archives.

The prosecutor, ASA Marblestone, gave a summary of a case that he had recently prosecuted in his testimony before the subcommittee. *McDougall v. State*, 464 So.2d 575 (Fla. 5th DCA 1985). A young man and woman were living together and as "so often happens in abuse cases, the live-in boyfriend began methodically abusing the young woman's five year old girl." The last week of the child's life, the boyfriend kept her up 24 hours a day. The child was forced to remain standing at nighttime. He would set the alarm clock to verify that the child was still standing. There were constant beatings. He would force the victim to eat soap sandwiches. He deprived the child of water as punishment for wetting her pants. On Friday, she started going into a state where she could not walk or talk. The medical examiner opined that the child's behavior was a sign either of cerebral hematoma or internal injuries. The death could also have been a result of the combination of the injuries with withholding liquids and feeding the child soap. After the child died, the mother and boyfriend put the child in a canvas sailing bag and placed the body into a body of water. The body was not found for several weeks and was so badly decomposed when discovered that no definitive cause of death could be established by the medical examiner.

The jury, after eight hours of deliberations, returned a verdict of second-degree murder. The jury felt there was not enough evidence of premeditation to convict the defendant of first-degree murder.

The prosecutor stated that the amendment was needed for such cases "because of the extreme difficulty in proving premeditation." The prosecutor thought that if aggravated child abuse was included in the felony murder rule that it would act as a deterrent to this type of conduct. It would encourage child abusers to get medical attention for their victims before the victim died because it would be better to be convicted of child abuse than first-degree murder if the child died.

The prosecutor also believed that this was the proper punishment. The prosecutor noted that the defendant was convicted only of second-degree murder and, under the sentencing guidelines, the crime resulted in a recommended sentence of 12 to 17 years' imprisonment. The prosecutor explained that the defendant could be released in ten or eleven years.

The prosecutor noted under the current law to get a first-degree murder conviction, he had to prove premeditation. The prosecutor believed that the felony murder rule exists because the crime is so heinous, in and of, itself. The prosecutor pointed out that they were not talking about regular child abuse; rather, they were talking about aggravated child abuse "which is maliciously caging, torturing, or punishing a child."

The prosecutor noted that most people are unfamiliar with the quantity and gravity of the child abuse in this state and county. The prosecutor noted that the second most frequent comment he heard about the case after how could the mother of the child stand by and watch, was how could a 6'2", 180 pound young man beat, torture, and kill,

a five-year-old child? What on earth could have been his motive? The prosecutor noted that the victims of child abuse need protection and that is why you have the felony murder rule. Who needs protection more than a five-year-old child, the prosecutor inquired? Children often cannot report the abuse and are petrified to report it, the prosecutor observed.

The prosecutor noted that other states had amended their felony murder statutes to include aggravated child abuse and gave Mississippi as an example.[7] The prosecutor, in response to a representative's question about whether anyone noticed the abuse of the girl, explaining that often with young children there are no signs of abuse, gave an example of another child abuse murder that he had prosecuted where a boyfriend punched a crying toddler for crying "once in the stomach" and the child hemorrhaged to death eight hours later from a lacerated liver.

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[7] The current version of Mississippi's "Murder" and "capital murder" defined statute, § 97-3-19(2)(c), provides:

(2) The killing of a human being without the authority of law by any means or in any manner shall be capital murder in the following cases:

* * *

> (f) When done with or without any design to effect death, by any person engaged in the commission of the crime of felonious abuse and/or battery of a child in violation of subsection (2) of Section 97-5-39, or in any attempt to commit such felony;

The Mississippi Supreme Court rejected a merger challenge to its statute. *Faraga v. State*, 514 So.2d 295, 302-303 (Miss. 1987)(rejecting a merger challenge, in a 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).

Melanie Arrington was a private citizen of Orlando who established the Ursula Sunshine Memorial Fund in October of 1983 after hearing about the crime. Her group of 150 supporters "wholeheartedly" supported House Bill 135.

On February 6, 1984, the prosecutor, Assistant State Attorney Donald L. Marblestone, spoke again to the entire House Criminal Justice Committee. The bill then passed the Committee with eleven votes.

The Florida Legislature amended the felony murder statute to include aggravated child abuse in an effort to protect children whose deaths had previously been undercharged as second or third degree felony murder. The Legislature believed that such murders were resulting in underconvictions, as in the case of Ursula Sunshine Assid, where the conviction that resulted was for second-degree murder, not first-degree murder. The Legislature made a policy decision to allow aggravated child abuse to serve as the underlying felony for a first-degree felony murder to solve this problem. This was a policy choice that the legislature made in an effort to protect children and punish child killers more severely.

Merger doctrine versus double jeopardy

This Court's merger test announced in *Brooks*, employing a single act versus multiple acts as the drawing line, seems to be confusing the merger doctrine with double jeopardy. Single act versus multiple acts is a double jeopardy construct. But the merger doctrine is a rule of statutory constitution with no constitutional implications;

whereas, double jeopardy is a constitutional principle. It is not a violation of double jeopardy to convict a defendant of both felony murder and the underlying felony as this Court has repeatedly held. *State v. Enmund*, 476 So.2d 165, 168 (Fla. 1985)(holding "that a defendant can be convicted of and sentenced for both felony murder and the underlying felony."); *Boler v. State*, 678 So.2d 319, 322 (Fla. 1996)(concluding again that a defendant may be "separately convicted and sentenced for felony murder and the qualifying felony."); *Jordan v. State*, 694 So.2d 708, 713 (Fla. 1997)(rejecting a double jeopardy challenge to convictions for both felony murder and the underlying felony, concluding "that there is no constitutional infirmity in convicting a defendant of both felony murder and the qualifying felony.").

The *Brooks* Court relied on *Mills v. State*, 476 So.2d 172 (Fla. 1985). *Mills*, however, did not prevent a conviction for murder, only aggravated battery and murder. The *Mills* Court affirmed the murder conviction. *Mills*, 476 So.2d at 175. It was the aggravated battery conviction that the *Mills* Court vacated, reasoning:

> Even so, we do not believe it proper to convict a person for aggravated battery and simultaneously for homicide as a result of one shot gun blast. In this limited context the felonious conduct merged into one criminal act. We do not believe that the legislature intended dual convictions for both homicide and the lethal act that caused the homicide without causing additional injury to another person or property. Hence we vacate the sentence and conviction for aggravated battery.

Mills, 476 So.2d at 177. This was based on legislative intent, not double jeopardy. Indeed, earlier, in the same paragraph, the *Mills* Court rejected any double jeopardy argument regarding the aggravated

battery conviction. The *Mills* Court, after enumerating the elements of both felony murder and aggravated battery, rejected the double jeopardy argument, stating it was "possible to commit each of these crimes without committing the other, and each contains elements which the other does not." *Mills*, 476 So.2d at 177.

There is no connection between the merger doctrine and single/multiple act rationale. Double jeopardy does not apply and the merger limitation should not be based on it. The relationship, the motive and the type of harm should be the dividing line for the merger doctrine, not single or multiple acts. This Court should formulate a test for the merger doctrine based on legislative intent.

Redefining the merger doctrine

This Court should redefine the limits of the merger doctrine. This Court should redefine the merger doctrine away from the single versus multiple acts to between prototypical child abuse murders and those murders of children that are not prototypical child abuse murders, based on the legislative history of the amendment to the felony murder statute. The prosecutor used a single punch case as a type of crime the amendment was designed to cover. From the prosecutor's testimony, the legislature was aware that single acts of abuse leading to death of the child would be covered by this amendment. So, the *Brooks* single act merger limitation is contrary to the legislative history of this amendment.

Because the merger doctrine is a doctrine of statutory construction, the legislative intent should control. The Florida Legislature meant to punish prototypical child abuse murders as first-degree felony murders. In prototypical child abuse murders, a caregiver, such as a parent, a step-parent, the mother's boyfriend or a babysitter, "punishes" a child to death. Based on the legislative history of the amendment, first-degree felony murder should be limited to this type of situation. If a person who is not a care giver kills a child for some other reason than punishment, then aggravated child abuse should not be permitted to serve as the underlying felony.

The State is not advocating that this Court recede from the merger doctrine, only that this Court should redefine the merger limitations in a manner that correctly reflects the legislative intent. The concern this Court identified when it created the merger doctrine in *Brooks*, was, that in absence of a merger limit on the first-degree felony theory, all murders of a child automatically became first-degree murders, thereby negating all other types of murders involving children, such as second-degree or manslaughter, which the legislature presumably did not intend. Florida Courts should retain the merger limit on using aggravated child abuse as an underlying felony for first-degree felony murder to address those concerns. But to give full force to the legislative intent, the merger limitation should involve prototypical child abuse murders. Prototypical child abuse murders are those in which a care-giver kills a child, by means

other than shooting or stabbing, out of anger or frustration in an effort to punish the child.

The current single act definition of merger is both over-inclusive and under-inclusive. It includes murders other than prototypical child abuse murders that the legislature did not intend to be included as first-degree felony murders and it excludes prototypical child abuse murders, when a single act caused the murder, which the legislature did intend to be first-degree felony murder. For example, the babysitter, often the live-in boyfriend of the mother, as was the case in the murder that prompted the Legislative amendment in 1984, harms a child as a form of punishment "to teach the child a lesson" in a manner that causes death. But if the care-giver harms the child by a single act, then under *Brooks*, the perpetrator may not be charged with first-degree felony murder. Often a care-giver, in frustration over the child's crying or anger over the child's soiling his diaper, picks up the child by the arm or the leg and hits the child against a wall using the child's extremity as a lever and the child dies of head injuries as a result of the single act of child abuse. Indeed, in the case of Ursula Sunshine Assaid the actual cause of death may have been a single blow to the five-year-old little girl's head. But this is the type of crime that the Legislature intended to be first-degree felony murder. So, the *Brooks* merger limitation, as currently formulated, is under-inclusive in such a case.

The *Brooks* merger limitation, as currently formulated, is also over-inclusive in some cases. It could include cases where a stranger or acquaintance kills a child by stabbing or strangulating

the child provided there are multiple injuries to the child establishing multiple acts. Yet, those are the types of cases that this Court's concern about all murders of children automatically becoming first-degree murder is justified. There is no support in the Legislative history to establish that the Legislature intended its amendment to the first-degree felony statute to cover such crimes. Yet, under the *Brooks* multiple act test, a prosecutor can charge such cases as first-degree felony murder because there are multiple acts.

Nor would redefining the merger limitation in this manner involve this Court receding from the actual holding in *Brooks*. Under the prototypical child abuse test advocated by the State, the defendant in *Brooks* should not have been charged with first-degree felony murder. Brooks was not a care-giver. He was a stranger to the child. Moreover, he stabbed the infant. Stabbing is not a form of malicious punishment. Brooks did not stab the child out of anger or in frustration in an effort to punish the child; he stabbed the child to obtain the life insurance that his cousin had purchased on the infant. A life insurance murder of a child is not the type of crime that the Legislature intended to cover with this amendment to the first-degree felony murder statute. The State should have been required to prove first-degree murder by premeditation in a case such as *Brooks*.

The merger limitation on using aggravated child abuse as the underlying felony for first-degree felony murder should be whether the murder was a prototypical child abuse murder. Such a test comports with legislative intent, while this Court's current merger

limitation of single act versus multiple acts does not. Prototypical child abuse murders are those in which a care-giver kills a child, by means other than shooting or stabbing, out of anger or frustration in an effort to punish the child. Those are exactly the types of murders that the Florida Legislature intended to be charged as first-degree felony murders as established by the legislative history. In contrast, this Court should explain that if a stranger or mere acquaintance, stabs or shoots a child, aggravated child abuse may not be used as the underlying felony for first-degree felony murder because the Legislature did not intend for the amendment to be used for those types of murders. Rather, the Legislature intended those types of murders to be charged in the normal manner.

This was a prototypical child abuse murder. The mother's live-in boyfriend, who was babysitting the child, slapped the child for being on the table and stepping on his marijuana as a form of punishment. It did not involved stabbing or shooting or strangulation. Thus, aggravated child abuse may properly serve as the underlying felony for a first-degree felony murder conviction in this case.

Limiting use of aggravated child abuse to subsection (b)

Not only should the State be limited in using aggravated child abuse as the underlying felony for first-degree felony murder to cases factually involving prototypically child abuse murders, but the State should also be limited, based on the statutory language, to cases of aggravated child abuse charged under § 827.03(2)(b).

The current version of the aggravated child abuse statute, § 827.03(2), Florida Statutes (2007), 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 or permanent disfigurement to the child.

The merger problem arises from subsection (a) which refers to "commits aggravated battery on a child." It is this subsection that gives rise to the concern that all murders of children automatically become first-degree felony murder that this Court recognized in *Brooks*. The State should be precluded from invoking § 827.03(2)(a).

Nor should the State may able to invoke § 827.03(2)(c). At the time of the amendment to the first-degree felony murder statute in 1984, the aggravated child abuse statute, § 827.03, Florida Statues (1983), provided:

> (1) Commits aggravated battery on a child;
> (2) Willfully tortures a child
> (3) Maliciously punishes a child; or
> (4) Willfully and unlawfully cages a child

The current subsection (c) which refers to "abuses a child and in so doing causes great bodily harm, permanent disability or permanent disfigurement to the child" did not exist at the time of the amendment in 1984. Additionally, death is not great bodily harm, permanent disability or permanent disfigurement; it is death. The State should also be precluded from invoking § 827.03(2)(c) as well.

This Court should limit first-degree felony murder prosecutions to cases involving 827.03(2)(b), which refers to willfully tortures,

maliciously punishes, or willfully and unlawfully cages a child. It was this subsection that the prosecutor referred to in his testimony to the subcommittee hearings distinguishing aggravated child abuse form simple child abuse. Cases where the child is stabbed or shot are not § 827.03(2)(b) cases because stabbing or shooting is not punishing, torturing or caging a child. Killing of a child, by methods such as stabbing and shooting, should not be viewed as prototypical child abuse murders. These are normal killings that just happen to involve a child and such killing should have to be proven in the normal manner. The State should only be allowed to invoke § 827.03(2)(b) as a basis for aggravated child abuse as the underlying felony for first-degree felony murder.

Harmless Error

The United States Supreme Court has recently clarified that a general verdict based on multiple theories of guilt, one of which is invalid, is not a structural error. Rather, such errors are subject to harmless error analysis. *Hedgpeth v. Pulido*, - U.S. -, 129 S.Ct. 530, 530-31, 172 L.Ed.2d 388 (2008), *overrruling Yates v. United States*, 354 U.S. 298, 312, 77 S.Ct. 1064, 1 L.Ed.2d 1356 (1957); *Skilling v. United States*, - U.S. -, 130 S.Ct. 2896, 2934, - L.Ed.2d - (2010)(noting that "errors of the *Yates* variety are subject to harmless-error analysis" and remanding the case for the Fifth Circuit to conduct a harmless error analysis). At common law, general jury verdicts were valid as long as such a verdict "was legally supportable on one of the submitted grounds - even though that gave no assurance

that a valid ground, rather than an invalid one, was actually the basis for the jury's action." *Griffin v. United States*, 502 U.S. 46, 49, 112 S.Ct. 466, 116 L.Ed.2d 371 (1992).

The Florida Supreme Court has a series of cases following the now overruled case of *Yates*. These cases held "that a general jury verdict cannot stand where one of the theories of prosecution is legally inadequate." *Fitzpatrick v. State*, 859 So.2d 486, 490 (Fla. 2003).[8] However, in light of the United States Supreme Court's ruling in *Pulido*, these cases are no longer good law. Indeed, in the case of *Brooks*, the Florida Supreme Court affirmed the conviction for first-degree murder even though they held it may have rested on a legally invalid theory of felony murder. *Brooks v. State*, 918 So.2d 181 (Fla. 2005)(Lewis, J., dissenting)(asserting that *Yates* required the Court to reverse the convictions); see also n.6 infra (explaining the arguments presented on rehearing in *Brooks*).

[8] *Fitzpatrick v. State*, 859 So.2d 486, 490 (Fla. 2003)(reversing a general verdict that could have rested on an invalid legal basis); *Mackerley v. State*, 777 So.2d 969 (Fla. 2001)(holding that it is reversible error to sustain a conviction based on a general jury verdict for first-degree murder on dual theories of premeditation and felony murder where the felony underlying the felony murder charge is based on a legally unsupportable theory even when there is evidence to support premeditation); *Valentine v. State*, 688 So.2d 313 (Fla. 1996) (holding that a conviction for attempted first-degree murder must be reversed where the jury was instructed on dual theories of attempted first-degree premeditated murder and attempted first-degree felony murder when this Court later determined that attempted first-degree felony murder does not exist in Florida); but see *Brooks v. State*, 918 So.2d 181 (Fla. 2005)(affirming a first-degree murder conviction despite holding the felony murder theory based on aggravated child abuse was invalid).

Sturdivant was only charged with felony murder, so the logic of *Yates* does not really apply to this case. If a jury convicts the defendant of felony murder solely, which this jury did, and aggravated child abuse may not serve as the underlying felony pursuant to the merger doctrine, then there necessarily was error. The State is not asserting that the error was harmless in this case, it is merely explaining the result in *Brooks* and making this Court aware of a change in the law regarding legally invalid general verdicts.

Remedy

The remedy here is not a new trial. Rather, the proper remedy, if this Court finds the conviction for first-degree felony murder to be prohibited by the merger doctrine, is to order the trial court to enter a judgment of conviction for second-degree murder. Here, the first jury also found Sturdivant guilty of second-degree murder in count II, as well as first-degree felony murder. (R. Vol. I 72; T. Vol. VI 357-358). This verdict cured any merger issue and no retrial is necessary. The judgment noted that the defendant was not sentenced on the second-degree count. (R. 89).

This is the reason the First District remanded with directions that the trial court adjudicate appellant guilty of second-degree murder and sentence him for that offense. *Sturdivant*, - So.3d at -, 2010 WL 3464410 at *6. This is the correct remedy. No retrial is required.

CONCLUSION

The State respectfully requests that this Honorable Court affirm appellant's conviction for first-degree felony murder.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing INITIAL BRIEF has been furnished by U.S. Mail to Paula S. Saunders, Assistant Public Defender, Leon County Courthouse, Suite 401, 301 South Monroe Street, Tallahassee, FL 32301 and via email at paula.saunders@flpd2.com this 13th day of December, 2010.

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CERTIFICATE OF FONT COMPLIANCE

I certify that this brief, which has been typed using Courier New 12 point, complies with the font requirement of rule 9.210(a)(2), Fla. R. App. Pro.

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